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

Case 868: MAL 34 (2) (b) (ii)
Germany: Bayerisches Oberstes Landesgericht
4Z Sch 23/02
20 March 2003
Original in German
Published in: http://www.dis-arb.de (DIS – Online Database on Arbitration Law)

Abstract prepared by Stefan Kröll, National Correspondent

[**Keywords**: *award – setting aside; public policy*]

The dispute arose out of the claimant's sale of its shares in a limited partnership. The sale contracts contained a guarantee for the limited partnership's tax liabilities. The tax authorities demanded additional tax payments, about which dispute between the parties arose. The claims for damages were, beside others, based on the alleged immoral behaviour of the defendant, forcing the claimant to sell its shares in the partnership at a price below their value. The tribunal largely rejected the claims and ordered the claimant to indemnify the defendant for the additional tax claims.

The claimant applied to have the award set aside. It argued that the award was contrary to public policy pursuant to § 1059 (2) (no. 2 (b)) of the German civil procedure law (ZPO) [corresponding to article 34 (2) (b) (ii) MAL], because it allegedly upheld the immoral sales transactions and thereby violated the principles underlying §§ 138, 826 of the German civil law, pursuant to which immoral transactions are void and cannot be enforced. The claimant requested that the court should review the case and that in this respect it was not bound by the tribunal's fact-finding and legal conclusion.

The court rejected the claim. It held that an arbitral award could only be set aside for infringement of public policy, if it was contrary to basic legal values, but not merely for the factual incorrectness of the award. The court noted that the procedures for setting aside an award were not meant to scrutinize the award's content. The court observed that the tribunal had considered the sale contracts not void after an extensive evaluation of the evidence; thus a revision of the merits of the arbitral award was not permissible. Finally, the court held that possible reductions of the tax claims, another argument of the claimant, would not affect the validity of the award and could therefore not be raised in the proceeding for setting aside the arbitral award.

Case 869: MAL 7 (1); 36 (1) (a) (i)
Germany: Bayerisches Oberstes Landesgericht
4Z Sch 35/02
13 May 2003
Original in German
Published in German: MDR 2003, 1132; http://www.dis-arb.de (DIS – Online Database on Arbitration Law)

Abstract prepared by Marc-Oliver Heidkamp

[**Keywords**: *arbitral awards; arbitral tribunal; arbitration agreement; arbitration clause; award; award – recognition and enforcement courts; enforcement; recognition – of award; validity*]

The claimant, a member of the Bavarian association of dog sports, had been dismissed by the association's presiding committee from several of his posts within the association. The association's dispute settlement body issued a decision ordering to reinstate the claimant to those posts. The claimant applied to the state court to have the award declared enforceable.

The court rejected the application, as it could not be determined that the award was an arbitral award pursuant to §§ 1025 ff. of the German procedural law (ZPO). Such a determination would require that the parties agreed to have their disputes decided by an arbitral tribunal excluding the competence of state courts [corresponding to article 7 (1) MAL]. Whether the association dispute settlement body was to be considered an arbitral tribunal or a mere internal dispute settlement body was to be primarily determined pursuant to the association's rules. The arbitration clause in the rules provided that the decisions of the tribunal were final and unavoidable within the association. That wording, however, did not clearly exclude the possibility of avoidance of the award before the state courts. The court required that the exclusion of the state courts' competence to scrutinize the award was explicitly made. The will of the parties to submit themselves to an arbitral tribunal, renouncing the competence of the state courts, had to be unambiguously stated. The submission had to be determined with even greater care when the arbitration clause was applicable to non-merchants and was incorporated into the rules of an association, which one party had to accept when becoming a member.

The court held that the dispute settlement clause in question was too ambiguous as to the exclusion of state court jurisdiction and thus denied declaration of enforceability [article 36 (1) (a) (i) MAL].

Case 870: MAL 3; 34 (2) (a) (ii)
Germany: Oberlandesgericht Dresden
11 Sch 0019/05
15 March 2006
Original in German
Published in: German Arbitration Journal (SchiedsVZ) 2006, p. 166
DIS – Online Database on Arbitration Law – http://www.dis-arb.de

Abstract prepared by Stefan Kröll, National Correspondent

[**Keywords**: *place of business; habitual residence; receipt; validity; due process; notice*]

The claimant applied for enforcement of an arbitral award. In response, the defendant requested the arbitral award to be set aside because of a violation of its right to due process under German civil procedure law (ZPO) [corresponding to article 34 (2) (a) (ii) MAL], as it had not been given proper notice of the arbitral proceedings and had not been able to defend itself. The defendant alleged that it had learned about the pending arbitration proceedings through the application for a declaration of enforceability. As a matter of fact, the arbitral tribunal had not tried to find out the address of the habitual residence of the general manager of the defendant but had merely sent the request of arbitration and other communications both to the defendant's last-known business address and the last-known address of its general manager. The claimant emphasised that the arbitral award had been sent to the same address as the application for a declaration of enforceability.

The court declared the arbitral award enforceable. It held that service to the last known address was sufficient as the arbitral tribunal was not obliged to investigate the address of the defendant. Further, in accordance to § 1028 (1) ZPO, the parties could be served validly at their last-known mailing address. [Unlike article 3 MAL, § 1028 (1) ZPO does not provide for "making a reasonable inquiry" concerning the current address. In addition, the court noted that that determination was in accordance with the arbitral agreement of the parties.]

Case 871: MAL 8 (1)
Germany: Oberlandesgericht Karlsruhe
1 U 232/06
4 April 2007
Original in German
Published in German: http://www.dis-arb.de (DIS – Online Database on Arbitration Law)
English case note: International Arbitration Law Review 2008

Abstract prepared by Stefan Kröll, National Correspondent

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

The dispute arose out of the separation agreement of a partnership between two lawyers. The dispute resolution clause contained in the separation agreement provided that all disputes were to be settled by the dispute resolution body of the bar association of Karlsruhe. In case that bar association did not have its own arbitration

rules, §§ 1025 ff. of the German civil procedural law (ZPO) should apply. Mediation should be tried first in all cases.

Soon after the conclusion of the separation agreement, the parties discovered that the bar association of Karlsruhe did not have a dispute resolution body and tried in vain to agree on an amendment to that provision. When a dispute with respect to the separation agreement arose, the claimant started court proceedings.

Despite objections of the defendant, the court of first instance assumed jurisdiction. It held that the arbitration clause was inoperable, since there was no arbitral tribunal at the chosen bar association of Karlsruhe and it could not be deduced from the agreement whether the parties wanted arbitration before a different bar association or whether they still wanted arbitration at all.

Upon appeal of the defendant, the Higher Regional Court overturned the decision and denied its jurisdiction pursuant to § 1032 ZPO [corresponding to article 8 (1) MAL]. By way of supplementary interpretation (*ergänzender Vertragsauslegung*) it stated that the parties had validly agreed on arbitration before the bar association of Frankfurt, which was geographically the closest bar association with its own dispute resolution body. The court held that it was clear from the agreement that the parties intended to submit their disputes to arbitration. The stipulation that in all cases mediation should be tried first, but in particular the reference to §§ 1025 ff. ZPO, concerning the rules on arbitration, made clear that the parties wanted their dispute to be referred to arbitration and not to state court. Furthermore, the choice of the local bar association (Karlsruhe) made clear that the parties intended to have their disputes decided by the dispute resolution body of the nearest bar association. As the Karlsruhe bar association did not have a dispute resolution body, the arbitration agreement of the parties contained a gap which had to be closed by supplementary interpretation (*ergänzende Vertragsauslegung*), which the agreement itself also foresaw. The court agreed that if the parties had foreseen the lack of an arbitral tribunal at the local bar association, they would have opted for arbitration under the rules of the bar association of Frankfurt, which was the nearest bar association with its own dispute resolution body. The court furthermore held that the defendant could rely in good faith on the arbitration clause. Both parties had recognized the gap in the arbitration clause and had tried to conclude a new arbitration agreement. In addition, the defendant had contested the jurisdiction of the state courts since the beginning of the proceedings.

II. CASES RELATING TO THE NEW YORK CONVENTION (NYC)

Case 872: NYC V (1) (a); V (1) (c); V (1) (e); V (2) (b); VI; CISG 3 (2); 71; 81 (2)
Germany: Oberlandesgericht Köln
9 Sch 13/99
15 February 2000
Original in German
Published in: DIS-Online Database on Arbitration Law – http://www.dis-arb.de.

Abstract prepared by Dr. Stefan Kröll, National Correspondent

[**Keywords**: *formal requirements; award – recognition and enforcement; public policy*]

The original dispute arose out of an exclusive distribution and know-how agreement by which the Spanish claimant had agreed to distribute the products of the German defendant in Spain. After the parties found out that – contrary to their assumption – the defendant was not the sole owner of the trademark rights for Spain, the claimant terminated the agreement. The defendant initiated arbitration proceedings for payment of a receivable in London according to the arbitration clause included in the distribution and know-how agreement and the claimant counter-claimed for lost expenses and lost profits. The arbitral tribunal rendered an award in favour of the claimant and the claimant applied to have it recognized and declared enforceable in Germany.

The court granted the application. It found that the formal requirements for enforcement of an arbitral award were fulfilled according to article IV NYC with the submission of certified copies of the arbitral award and the arbitration agreement accompanied with translations thereof.

The court held that there were no reasons for refusing or limiting enforcement of the arbitral award. The court noted that the arbitral award was effective, as long as it was not set aside by a court of the country in which or under the law of which the award had been made according to § 1061 (3) [corresponding to article V (1) (e) NYC] and that article VI NYC did not lead to a different decision. The court further noted that there was no violation of public policy according to article V (2) (b) NYC. According to the court, public policy meant the public policy of Germany, which included international public policy. Therefore, public policy would be violated only if the decision of the foreign arbitral tribunal had been the result of a procedure that violated the fundamental principles of German procedural law. The alleged wrong application of Spanish commercial law, even if it had happened, would not amount to such violation. Furthermore, a mere violation of substantive or procedural law applicable to the proceeding before the arbitral tribunal was not considered sufficient for a violation of public policy. The court concluded that there was no reason to deny enforcement on the basis of article V (1) (a) NYC.

The court rejected the defendant's argument that the decision of the arbitral tribunal exceeded the scope of the arbitration agreement pursuant to article V (1) (c) NYC, as the defendant allegedly had a right of retention or right to refuse performance according to articles 81 (2), and 71 CISG. The court held that such defences against the enforcement of an award could generally be raised in the proceedings for recognition and enforcement but only under the condition that the fact only arose

after the award was rendered (§ 767 para. 2 ZPO). Since that was not the case the defendant could not rely on the defence. Moreover, the CISG was not applicable pursuant to article 3 (2) CISG, as the contract between the parties was a distribution and know-how agreement.

Case 873: NYC II; III; IV; V (1) (a); V (2) (b); VII
Germany: Oberlandesgericht Rostock
1 Sch 3/2000
22 November 2001
Original in German
Published in: IPRax 2002, 401; DIS – Online Database on Arbitration Law – http://www.dis-arb.de
Commented on in German: Kröll, IPRax 2002, 384

Abstract prepared by Stefan Kröll, National Correspondent

[**Keywords**: *form of arbitration agreement; formal requirements; award – recognition and enforcement; public policy*]

The claimant, a company located in the Isle of Guernsey, and the defendant, having its place of business in Germany, initiated negotiations for the sale of metal products in autumn 1997. In November 1997, the claimant sent a fax to the defendant "confirming" the "transaction", which contained a clause providing for "*arbitration by the LME under English law*". The defendant, however, claimed that it had never received the fax nor entered into a binding contract and refused to accept the goods or pay the price. In the arbitration proceedings, the defendant's challenge of the tribunal's jurisdiction was rejected and the defendant was ordered to make the payment for purchasing the goods. The tribunal held that even if the defendant had never received the fax – but its receipt was considered to be at least possible – a valid arbitration agreement existed between the parties. This decision was based on subsequent written communications that allegedly referred to the conclusion of a contract. The award was declared enforceable in England and the claimant applied to have it declared enforceable in Germany.

The German court rejected the application for several reasons. First, it considered that the formal requirements where not met since the claimant had never submitted a certified copy of the arbitration agreement as requested by article IV NYC. The court held that article IV NYC prevailed over a more lenient provision in German civil procedure law (§1064 (1) ZPO) for domestic awards, which was in principle also applicable to foreign awards "unless otherwise provided in treaties". The court held that, irrespective of article VII NYC, which in its view did not cover form requirements, article IV NYC constituted such an overriding provision in a treaty.

Furthermore, the court noted that though foreign arbitral awards should generally not be denied recognition, articles II and V NYC provided grounds for such refusal. The court stated the obligation to recognize a "written agreement" pursuant to article II NYC, which was either an arbitral clause in a contract or an arbitration agreement, signed by the parties or contained in an exchange of letters or telegrams. The court held that there was no valid arbitration agreement pursuant to article II NYC, as the claimant had neither proven that a sales contract containing an arbitration agreement was received by the defendant nor shown that an arbitral

agreement signed by both parties existed. Therefore the German party could rely on article V (1) (a) New York Convention. The court also noted that the subsequent correspondence, on which the arbitral tribunal relied, did not contain any explicit reference to the arbitration agreement fulfilling the requirements of article II NYC. The court further held that the enforcement of the award would violate German public policy pursuant to article V (2) (b) NYC, since there was no valid arbitration agreement.

According to the court, contrary to the allegation of the claimant, the defendant was not precluded from raising the lack of a valid arbitration agreement, though it had not challenged the award for lack of jurisdiction under section 67 Arbitration Act 1996 in the English courts. Doubting whether the rules of preclusion were at all applicable under the NYC, the court considered that the case fell within the exception to preclusion recognized by German jurisprudence, as the arbitral tribunal had assumed its jurisdiction in an arbitrary manner, and without any reference to the parties' agreement.

Case 874: NYC II (1); II (2); III; V; VII
Germany: Bayerisches Oberstes Landesgericht
4Z Sch 16/02
12 December 2002
Published in: [2003] Neue Juristische Wochenschrift – Rechtsprechungsreport 719
http://www.dis-arb.de (DIS – Online Database on Arbitration Law)

Abstract prepared by Stefan Kröll, National Correspondent

[**Keywords**: *arbitral awards; arbitration agreement; arbitration clause; award – recognition and enforcement; form of arbitration agreement; formal requirements; signatures; telecommunications; validity; writing*]

The dispute arose out of three sales contracts between a Yugoslav seller and a German buyer. The details of each contract were agreed upon by the parties via telephone and then inserted by the seller in a document template. The template had the buyer's letterhead, was signed by both parties and photocopied in multiple copies to be used for the various sales contracts. The photocopied template with the details of the specific contract was then faxed to the buyer who neither confirmed the agreement in a written form nor rejected it. Upon refusal by the buyer to pay for the allegedly defective goods, the seller initiated arbitration proceedings before the Chamber of Commerce in Beograd and obtained an award in its favour.

In the proceedings to have the award declared enforceable in Germany, the buyer, which had not participated in the arbitration, argued the lack of an arbitration agreement. It submitted that it had never agreed orally or in writing to arbitration. The seller argued that it had informed the buyer orally during the contract negotiations that dispute resolution by arbitration was part of its conditions.

The court rejected the application to declare the arbitral award enforceable in Germany pursuant to articles III and V NYC, as it found that the requirement of "an [arbitration] agreement in writing" was not fulfilled, according to article II (1), and II (2) NYC. The contract documents had not been signed by the parties, but produced by technical means. Thus, the requirement of article II (2), first alternative, NYC had not been met. Furthermore, the alleged transmission of the

final document via fax by the seller, even if real, could not be considered as "an exchange of letters or telegrams" pursuant to article II (2), second alternative, NYC. The court emphasized that only a mutual exchange of documents could fulfil that requirement, whereas neither the unilateral transmission of contractual documents nor the unilateral written confirmation of an oral agreement, even in an ongoing business relationship, complied with article II (2) NYC. The mere acceptance of an offer for a sale contract including the agreement to arbitrate, whether oral or implicit, was not sufficient to constitute a valid arbitration agreement. The court found that the requirement of a mutually signed arbitration agreement could not be abrogated by relying on German procedural law or on the European Convention on International Commercial Arbitration (Geneva, 1961), in accordance with the "more favourable provision" rule of article VII NYC. Article I (2) (a) of the European Convention allowed oral agreements to arbitrate, but only if accepted and provided for by the national laws of both parties. This was not the case with respect to German civil procedural law: § 1031 (1) of the German civil procedure law (ZPO) was consistent with article II (2) NYC and its requirements were not met.

Although the court acknowledged that formal defects of an arbitration agreement may be cured, it found that this required an explicit submission to arbitration before the tribunal. Alternatively, both sides had to declare their intention to have the dispute settled by arbitration in documents exchanged during the composition of the tribunal. If a party, however, did not submit any statement at all, it could not be precluded from invoking the defence of a lack of arbitration agreement.

Case 875: NYC II; V (1) (d); V (2) (b)
Germany: Bayerisches Oberstes Landesgericht
4Z Sch 5/04
23 September 2004
Original in German
Published in: http://www.dis-arb.de (DIS – Online Database on Arbitration Law)
English Translation: Yearbook Commercial Arbitration 2005, 568

Abstract prepared by Stefan Kröll, National Correspondent

[**Keywords**: *arbitral awards; arbitration agreement; award – recognition and enforcement; enforcement; form of arbitration agreement; public policy; procedure; award – recognition and enforcement*]

The dispute arose out of the termination of a service agreement between a German automobile manufacturer and a Syrian company. The parties agreed to settle the dispute concerning the validity of the termination and resulting damages by arbitration in Syria. In October 2001, an arbitral award was rendered in favour of the Syrian company who applied to have the award declared enforceable in Germany. The defendant raised several defences against the application, relying, beside others, on an alleged lack of authority of its lawyer to conclude the arbitration agreement, the delay in rendering the award and a violation of due process, as well as of public policy for the non-application of the chosen law and principles.

The court rejected the defences and declared the award enforceable in Germany. The court held that the defendant could not claim lack of arbitration agreement,

as it had participated in the arbitration without any reservation. Although article II NYC – unlike § 1031 (6) of the German civil procedure law (ZPO) – did not explicitly provide for a possibility to cure non-compliance form requirements, the principle of good faith underlying the NYC justified such a conclusion. The court further held that non-compliance with the time limit for rendering an award was not a ground for refusing recognition and enforcement of the award. The defendant was precluded from raising such a defence as it had not made any such objection during the arbitration proceedings despite the possibility to do so. Moreover, an award might only be set aside for formal irregularities when the latter were substantial. In the present case, there was no indication that the arbitral tribunal would have come to a different conclusion, had it rendered the award within the time limit.

The court also denied any violation of public policy by the alleged failure to consider German law or the alleged uncertainty as to the application of general legal principles, trade usages and the non-consideration of a contractually agreed exclusion of liability (article V (2) (b) NYC). The court noted that proceedings for recognition and enforcement of foreign arbitral awards did not present the basis for a review on the merits of the award by state courts. A violation of public policy could only be assumed if a decision violated a norm, which governed the fundamental rules of political and economic life or if it was in unbearable conflict with the German notion of justice. By contrast, merely erroneous decisions of arbitral tribunals had to be accepted in the same way as erroneous non-appealable decisions of state courts.

Case 876: MAL 16 (3); NYC V (2) (b); VII
Germany: Federal Court of Justice
III ZB 50/05
23 February 2006
Original in German
Published in: SchiedsVZ 2006, 161; http://www.dis-arb.de (DIS – Online Database on Arbitration Law)
Published in English: International Arbitration Law Review 2006, XXX

Abstract prepared by Stefan Kröll, National Correspondent

[**Keywords**: *award – recognition and enforcement; jurisdiction; procedure; public policy*]

The underlying dispute arose out of a contract for the sale of wood and led to arbitration proceedings for outstanding payment and damages under the Rules of the Belarusian Chamber of Industry and Commerce in Minsk. The buyer did not participate in the arbitration proceedings after having declared that it contested the existence of an arbitration agreement and that it would refuse receipt of any further communication by the arbitral tribunal in the matter. The arbitral tribunal issued a final award, in which it confirmed its jurisdiction and ordered payment. The Higher Regional Court in Karlsruhe denied recognition of the award due to a violation of public policy pursuant to article V (2) (b) NYC: the arbitral tribunal had not established its jurisdiction in a preliminary ruling as required by article 22 of the Belarusian Arbitration Law, which would have enabled the buyer to request a final

determination by the president of the arbitration court, thus guaranteeing a due process.

Upon a complaint on the merits, the Federal Court of Justice (BGH) held that the recognition and enforcement of the award was governed by the German-Soviet Treaty on General Issues of Trade and Maritime Transport of 1958, which applied in relation to Belarus. It constituted a more favourable provision in the sense of article VII NYC as it recognized the lack of finality, violation of public policy and the lack of an arbitration agreement as possible defences against recognition, but not a violation of the applicable procedural rules.

With regard to public policy, the court held that the relevant standard was German international public policy, which was not infringed by the tribunal's conduct not to render a preliminary decision on jurisdiction. The BGH held that neither the requirement of a preliminary ruling as such nor the existence of a second arbitral instance – provided by the Belarusian law in connection with the mandatory preliminary ruling – were part of German public policy. Similarly to article 16 (3) (i) MAL, the German civil procedural law (ZPO) itself does not provide for a second arbitral instance in relation to the tribunal's decision on jurisdiction and leaves the decision of whether or not to determine jurisdiction in the end to the tribunal's discretion. As long as it was ensured that the tribunal's decision on its jurisdiction could be reviewed by state courts, international public policy was not infringed. In the case at hand, the party had the option to initiate proceedings for setting aside the final award.

The BGH referred the case back to the Higher Regional Court which – in light of the assumed violation of public policy – had not made any findings on the existence of an arbitration agreement.