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Uniform interpretation of UNCITRAL texts: sample digest of case law on the UNCITRAL Model Law on International Commercial Arbitration (1985)

Addendum

1. The digest of case law on article 34 is as follows:

This Digest was prepared using the full text of the decisions cited in the CLOUT abstracts and other citations listed in the footnotes. The abstracts are intended to serve only as summaries of the underlying decisions and may not reflect all the points made in this Digest. Readers are advised to consult the full text of the listed court and arbitral decisions rather than relying solely on the CLOUT abstracts.

Article 34. Application for setting aside as exclusive recourse against arbitral award

(1) Recourse to a court against an arbitral award may be made only by an application for setting aside in accordance with paragraphs (2) and (3) of this article.

(2) An arbitral award may be set aside by the court specified in article 6 only if:

(a) The party making the application furnishes proof that:

(i) A party to the arbitration agreement referred to in article 7 was under some incapacity; or the said agreement is not valid under the law to which the parties have subjected it or, failing any indication thereon, under the law of this State; or

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(ii) The party making the application was not given proper notice of the appointment of an arbitrator or of the arbitral proceedings or was otherwise unable to present his case; or

(iii) The award deals with a dispute not contemplated by or not falling within the terms of the submission to arbitration, or contains decisions on matters beyond the scope of the submission to arbitration, provided that, if the decisions on matters submitted to arbitration can be separated from those not so submitted, only that part of the award which contains decisions on matters not submitted to arbitration may be set aside; or

(iv) The composition of the arbitral tribunal or the arbitral procedure was not in accordance with the agreement of the parties, unless such agreement was in conflict with a provision of this Law from which the parties cannot derogate, or, failing such agreement, was not in accordance with this Law; or

(b) The court finds that:

(i) The subject-matter of the dispute is not capable of settlement by arbitration under the law of this State; or

(ii) The award is in conflict with the public policy of this State.

(3) 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 or, if a request had been made under article 33, from the date on which that request had been disposed of by the arbitral tribunal.

(4) The court, when asked to set aside an award, may, where appropriate and so requested by a party, suspend the setting aside proceedings for a period of time determined by it in order to give the arbitral tribunal an opportunity to resume the arbitral proceedings or to take such other action as in the arbitral tribunal's opinion will eliminate the grounds for setting aside.

Exclusive recourse against arbitral award—paragraph (1)

Introduction

1. Paragraph (1) of article 34 provides that recourse to a court against an arbitral award may only be made pursuant to the provisions of paragraphs (2) and (3) of article 34. Thus, the Model Law only sets out one type of recourse against arbitral awards, to the exclusion of any other means of recourse regulated in another procedural law of the State in question.[1]

2. The term "recourse" has not been subject to interpretation in any reported decision. However, according to the *Explanatory note by the UNCITRAL secretariat on the Model Law on International Commercial Arbitration* (the Explanatory note on the Model Law), the term "recourse" was selected to mean actively "attacking" the award, which should be distinguished from seeking court

[1] Explanatory note by the UNCITRAL secretariat on the Model Law on International Commercial Arbitration, para. 41.

control by way of defence in enforcement proceedings (article 36 of the Model Law). Furthermore, according to the Explanatory note on the Model Law, "recourse" refers to resort to a court, i.e. an organ of the judicial system of a State; a party is not precluded from resorting to an arbitral tribunal of second instance if such a possibility has been agreed upon by the parties (as is common in certain commodity trades).

Jurisdiction to hear an application under article 34

3. Pursuant to article 1 (2) of the Model Law, a court has jurisdiction to hear an application for the setting aside of an arbitral award under article 34 of the Model Law, only if the place of arbitration[2] is within the national jurisdiction of such court.[3] Where the parties have agreed that the place of arbitration shall be within a certain State, only the courts of that State will have jurisdiction to hear an application under article 34 even if all hearings of the arbitral tribunal are held in another State.[4] However, if the place of arbitration is neither agreed upon by the parties nor determined by the arbitral tribunal, the courts at the effective place of arbitration, i.e. the place where all relevant actions in the arbitration have taken place, or, if this cannot be determined, the place of the last oral hearing, have been considered to have jurisdiction under article 34.[5]

Arbitral award

4. A court does not have jurisdiction under article 34 to set aside a decision of an arbitral tribunal or of any other dispute resolution body that does not constitute an arbitral award within the meaning of the Model Law.[6] In one case, it has been found that a decision of an arbitral tribunal constitutes an arbitral award if it entails a decision on the merits of the case,[7] while in another case, it was stated that a decision of an arbitral tribunal can be considered as an arbitral award if it meets the formal requirements of article 31 of the Model Law.[8] However, in a number of other decisions, assertions that the award does not meet the requirements of article 31 have not been considered sufficient to render article 34 inapplicable, but rather to constitute possible grounds for setting aside the arbitral award under paragraph (2).[9]

5. It has been found that decisions of arbitral tribunals declining jurisdiction can be subject to applications for setting aside under article 34, at least if the

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[2] For the territorial scope of the Model Law and the meaning of the concept "place of arbitration" see articles 1 (2) and 20.

[3] CLOUT case No. 374, Germany, 23 March 2000; Court of Appeal, Singapore, *[2002 1 SLR 393] PT Garuda Indonesia v Birgen Air*, 6 March 2002. (The application to set aside was dismissed by the court since the place of arbitration, according to the arbitration agreement, was not within the national jurisdiction of such court.)

[4] Court of Appeal, Singapore, *[2002 1 SLR 393] PT Garuda Indonesia v. Birgen Air*, 6 March 2002.

[5] CLOUT case No. 374, Germany, 23 March 2000.

[6] CLOUT case No. 441, Germany, 20 July 2000; Oberlandesgericht Frankfurt a.M., Germany, 23 Sch 01/98, 12 May 1999.

[7] CLOUT case No. 455, Germany, 4 September 1998.

[8] CLOUT case No. 441, Germany, 20 July 2000.

[9] CLOUT case No. 12, Canada, 7 April 1988; Hanseatisches Oberlandesgericht Hamburg, Germany, 11 Sch 01/01, 8 June 2001 (alleged failure to state the reasons on which the arbitral award is based).

decision is in the form of an arbitral award.[10] However, such an application should be determined under the grounds listed in paragraph (2) and it has been found that none of the individual grounds in paragraph (2) allows a court to set aside an award due to the fact that the arbitral tribunal erred in finding that it did not have jurisdiction.[11]

Applications under article 34 by third parties

6. A third party intervener in the arbitration has been allowed to bring an action for the setting aside of the arbitral award where the parties and the arbitral tribunal have, at least tacitly, consented to the intervention and where the intervener has a legal interest in the outcome of the arbitral proceedings.[12]

Award on jurisdiction

7. As to the relationship between article 34 and court review of the arbitral tribunal's decision on jurisdiction under article 16 (3) of the Model Law, one decision has provided that if such a decision of the arbitral tribunal has taken the form of an award on jurisdiction, such an award would have to be subject to a separate application for setting aside of the award under article 34 even if the court hearing the application under article 16 (3) would find that the tribunal did not have jurisdiction.[13]

The grounds for setting aside—paragraph (2)

Introduction

8. Paragraph (2) sets out the various grounds on which an award may be set aside.

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[10] Bundesgerichtshof, Germany, III ZB 44/01, 6 June 2002; Hanseatisches Oberlandesgericht Hamburg, Germany, 11 Sch 02/00, 30 August 2002.

[11] Bundesgerichtshof, Germany, III ZB 44/01, 6 June 2002.

[12] Oberlandesgericht Stuttgart, Germany, 1 Sch 08/02, 16 July 2002. (The intervener was allowed to bring the claim since the parties to the arbitration had accepted its intervention in the arbitration and since the outcome of the arbitration directly or indirectly affected the legal position of the intervener.)

[13] Court of Appeal, Bermuda, *Christian Mutual Insurance Company, Central United Life Insurance Company, Connecticut Reassurance Corporation v. Ace Bermuda Insurance Ltd.*, 6 December 2002. (In Bermuda applications under article 16 (3) are determined exclusively at the trial court level while application under article 34 are submitted directly to the Court of Appeal. In order to avoid the inconvenience of having the same issue determined by different courts, the Court of Appeal decided to hear both applications.)

General issues

No review of the merits of an arbitral award

9. A great number of cases have found that the Model Law does not contemplate review of the merits of an arbitral award.[14] This has been found to apply to issues of law[15] as well as to issues of fact.[16]

Standard of review

10. It has been stated that the appropriate standard of review of arbitral awards under article 34 is one that seeks to preserve the autonomy of the arbitral procedure and to minimize judicial intervention.[17]

Construction and application

11. Courts construing article 34 have stated that the list of grounds for setting aside an award in paragraph (2) is exhaustive[18] and should be construed narrowly,[19] and that courts should not extend the grounds listed in paragraph (2) by analogy.[20]

Burden of proof

12. It has been found that, under paragraph (2), the applicant has the burden of proving a ground on the basis of which the award should be set aside.[21]

Ex officio application

13. Some decisions have found that the grounds in paragraph (2) (b) are to be considered ex officio by the courts[22] and that they could be raised even if the time

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[14] CLOUT case No. 10, Canada, 16 April 1987 (full text of the decision); CLOUT case No. 148, Russian Federation, 10 February 1995; CLOUT case No. 375, Germany, 15 December 1999; CLOUT case No. 391, Canada, 22 September 1999; High Court, Singapore, *[2001] 1 SLR 624, Tan Poh Leng Stanely v. Tang Boon Jek Jeffrey,* 30 November 2000 (the High Court stated that the hallmark of the Model Law is that it does not provide for appeals on the merits of an arbitral decision); Hanseatisches Oberlandesgericht Hamburg, Germany, 11 Sch 01/01, 8 June 2001 (alleged non-application of the applicable law); Oberlandesgericht Karlsruhe, 10 Sch 04/01, 14 September 2001 (relationship between public policy and constitutional rights); Oberlandesgericht Stuttgart, Germany, 1 Sch 08/02, 16 July 2002 (no reassessment of testimonies given during the arbitration).

[15] CLOUT case No. 10, Canada, 16 April 1987 (full text of the decision).

[16] CLOUT case No. 10, Canada, 16 April 1987 (full text of the decision); CLOUT case No. 457, Germany, 14 May 1999.

[17] CLOUT case No. 16, Canada, 24 October 1990.

[18] CLOUT case No. 10, Canada, 16 April 1987 (full text of the decision); CLOUT case No. 12, Canada, 7 April 1988 (full text of the decision).

[19] CLOUT case No. 391, Canada, 22 September 1999.

[20] Hanseatisches Oberlandesgericht Hamburg, Germany, 11 Sch 02/00, 30 August 2002. (The court refused to apply article 34 (2) (a) (i) by way of analogy where it was claimed that the arbitral tribunal had erred in finding that the arbitration agreement was invalid.)

[21] CLOUT case No. 391, Canada, 22 September 1999.

[22] CLOUT case No. 407, Germany, 2 November 2000 (full text of the decision); Bayerisches Oberstes Landesgericht, Germany, 4 Z sch 48/99, 10 February 2000; Oberlandesgericht Frankfurt a.M., Germany, 26 Sch 01/03, 10 July 2003.

limit of paragraph (3) has expired (see below, comments under paragraph (4) of article 34, section on "remission").[23]

Judicial discretion

14. In respect of both paragraph (2) (a) and (2) (b), one decision has provided that even if one of the grounds for setting aside is fulfilled, it is still within the discretion of the court to decide whether the award should be upheld or set aside.[24]

Exclusion of certain rights

15. It has been determined that the parties may agree to exclude any rights they may otherwise have to apply to set aside an award under article 34 as long as their agreement does not conflict with any mandatory provision of the Model Law, or confer powers on the arbitral tribunal contrary to public policy.[25]

Incapacity, invalid arbitration agreement—paragraph (2) (a) (i)

Introduction

16. Paragraph (2) (a) (i) provides that an arbitral award may be set aside if a party to the arbitration agreement was under some incapacity; or the said agreement is not valid under the law to which the parties have subjected it or, failing any indication thereon, under the law of the place of arbitration.

The arbitration agreement is invalid

17. While, in principle, an award declining jurisdiction may be set aside (see above, comments under paragraph (1) of article 34, section on "arbitral awards"), it has been stated that paragraph (2) (a) (i) does not allow a court to set aside such an award on the ground that the arbitral tribunal erred in finding that the arbitration agreement was invalid.[26]

Guarantor

18. It has been found that an arbitration agreement contained in a contract is not automatically binding in relation to a guarantor to the extent the guarantor is not a party to the said agreement and its obligations are independent from the principal agreement.[27]

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23 CLOUT case No. 407, Germany, 2 November 2000 (full text of the decision).

24 British Colombia Supreme Court, Canada, *The United Mexican States v. Metalclad Corporation*, 2 May 2001. (The court argued that the seriousness of the defect in the arbitral procedure should be considered when the court is deciding whether to exercise its discretion to set aside an award under article 34. The court found that like article 36 (1), article 34 (2) is permissive in nature because it states that an arbitral award may be set aide if one of the conditions contained in sub-paragraphs (a) and (b) is met.)

25 Ontario Court of Justice, Canada, *Noble China Inc. v. Lei Kat Cheong*, 13 November 1998. (The application under article 34 was dismissed, since the arbitration agreement excluded recourse under article 34.)

26 Hanseatisches Oberlandesgericht Hamburg, Germany, 11 Sch 02/00, 30 August 2002.

27 Hanseatisches Oberlandesgericht Hamburg, Germany, 6 Sch 04/01, 8 November 2001.

Third party

19. It should be noted that, in some decisions, courts have considered claims that someone was not a party to the arbitration agreement under paragraph (2) (a) (i)[28] and in other cases under paragraph (2) (a) (iii).[29]

Waiver

20. Decisions have provided that if a party does not raise objections to the existence of an arbitration agreement at the latest in the submission of the statement of defence (article 16 (2) of the Model Law), such party is precluded from raising this objection in an application under article 34.[30] However, where the respondent failed to submit a statement of defence due to the arbitral tribunal's failure to request the respondent to submit such a statement of defence, it was found that this did not preclude the party from raising objections under article 34.[31]

21. Courts have had different opinions as to whether the failure of a party to apply for court review of the arbitral tribunal's decision on jurisdiction under article 16 (3) would imply a waiver of such party's objection to jurisdiction. One court has found that a court application under article 16 (3) is optional and that a party is not prevented from submitting an application for the setting aside of the award on the basis of lack of jurisdiction simply because the party did not make use of the possibility of an application under article 16 (3),[32] while another court took the opposite view.[33]

Due process (« garantie d´une procédure régulière »)—paragraph (2) (a) (ii)

Introduction

22. Paragraph (2) (a) (ii) provides that an arbitral award may be set aside if the party making the application was not given proper notice of the appointment of an arbitrator or of the arbitral proceedings or was otherwise unable to present his case.

The party was unable to present its case

Standard of review

23. To justify the setting aside of an arbitral award for a violation of due process (article 18 of the Model Law), it has been found that the conduct of the arbitral tribunal must be sufficiently serious to offend most basic notions of morality and

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[28] Hanseatisches Oberlandesgericht Hamburg, Germany, 6 Sch 04/01, 8 November 2001 (see paragraph 18, above).

[29] CLOUT case No. 12, Canada, 7 April 1988. (The award was found not to be binding up on a person who had signed the arbitration agreement in his professional capacity on behalf of a company and not in his private capacity. The court determined that the tribunal therefore had gone beyond the scope of the submission to arbitration in that the award affects a third party who was not a party to the arbitration agreement.)

[30] CLOUT case No. 148, Russian Federation, 10 February 1995; Oberlandesgericht Stuttgart, Germany, 1 Sch 16/01 (1), 20 December 2001.

[31] Hanseatisches Oberlandesgericht Hamburg, Germany, 6 Sch 04/01, 8 November 2001.

[32] High Court, Singapore, *[2001] 1 SLR 624, Tan Poh Leng Stanely v. Tang Boon Jek Jeffrey*, 30 November 2000.

[33] Oberlandesgericht Oldenburg, Germany, 9 SchH 09/02, 15 November 2002.

justice.[34] For example, this would be the case if an arbitral tribunal deliberately concealed documents from a party, or if it obtained its own evidence on which it relied, but failed to disclose the evidence to one of or both of the parties.[35] The allegation that a party was not able to present its case cannot be accepted if the violation had no effect on the content of the award.[36]

Take note of and consider the arguments of the parties

24. Decisions have provided that due process requires the arbitral tribunal to take note of and consider the arguments of the parties, but that the arbitral tribunal is not required to rule expressly on each and every argument advanced by the parties, since it should be presumed that the arbitral tribunal has fulfilled this obligation, unless the specific circumstances of the case evidence the contrary.[37]

Reasonable time to respond

25. A court has found that due process normally requires the arbitral tribunal to give the parties reasonable time to respond to a submission by the other party.[38] However, a court determined that due process was not violated by giving a party only a short time-limit to respond to an application for the issuance of an award on agreed terms, if the terms of the settlement are not in dispute and the opposing party has had sufficient time to consult with its lawyers before agreeing to the settlement.[39]

Request to take evidence

26. Where the arbitral tribunal has considered a party's request to take additional evidence or to rehear certain witnesses but found that it would not be necessary in the circumstances of the case, such decision has not been found to be a violation of due process.[40] Furthermore, it has been stated that the arbitral tribunal is not required to give reasons for such a decision.[41]

Waiver

27. A party that refuses to participate in the arbitration has been considered to have deliberately forfeited the opportunity to be heard.[42]

Scope of mandate—paragraph 2 (a) (iii)

Introduction

28. Paragraph (2) (a) (iii) provides that an arbitral award may be set aside if the award deals with a dispute not contemplated by or not falling within the terms of

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34 CLOUT case No. 391, Canada, 22 September 1999.
35 Ibid.
36 Hanseatisches Oberlandesgericht Hamburg, Germany, 11 Sch 01/01, 8 June 2001.
37 CLOUT case No. 375, Germany, 15 December 1999; Oberlandesgericht Frankfurt a.M., Germany, 26 Sch 01/03, 10 July 2003.
38 Oberlandesgericht Dresden, Germany, 11 Sch 02/00, 25 October 2000.
39 Ibid.
40 Oberlandesgericht Frankfurt a.M., Germany, 26 Sch 01/03, 10 July 2003.
41 CLOUT case No. 375, Germany, 15 December 1999.
42 CLOUT case No. 391, Canada, 22 September 1999.

the submission to arbitration, or contains decisions on matters beyond the scope of the submission to arbitration. However, if the decisions on matters submitted to arbitration can be separated from those not so submitted, only that part of the award which contains decisions on matters not submitted to arbitration may be set aside.

The award deals with or contains decisions on a matter outside the terms of the submission to arbitration

29. One court has found that there is a strong assumption that the arbitral tribunal acted within its mandate.[43] This court stated that in determining the "terms of the submission" and "scope of the submission" in paragraph (2) (a) (iii), it is necessary to have recourse, inter alia, to the arbitration agreement and other relevant contractual provisions, the notice of request for arbitration, and the pleadings exchanged between the parties.[44]

Reference to non-existing arbitration institution

30. Where the arbitration clause provides for arbitration under the auspices of a certain arbitration institution, which no longer exists, another institution that has replaced the abolished institution has been considered to have jurisdiction to hear the dispute.[45]

Arbitration pursuant to treaty

31. Where the arbitration agreement is contained in a treaty and provides that alleged breaches of only certain provisions of such treaty should be settled by arbitration, the arbitral tribunal has been found to be dealing with an issue not falling within the terms of the submission to arbitration, if the arbitral tribunal in fact based its award on other provisions of the treaty.[46]

The arbitral tribunal has no power to revise or recall the final award

32. Decisions have provided that if the arbitral tribunal after issuing the final award reopens the case by issuing another award, the effect of which is to recall or revise the earlier award, the latter award shall be set aside since the mandate of the

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43 CLOUT case No. 16, Canada, 24 October 1990 (full text of the decision).

44 Ibid.

45 CLOUT case No. 148, Russian Federation, 10 February 1995.

46 British Colombia Supreme Court, Canada, *The United Mexican States v. Metalclad Corporation*, 2 May 2001. (In arbitrations under the North American Free Trade Agreement (NAFTA) between a private investor and a member State, the arbitral tribunal has jurisdiction only as regards violations of any of the obligations contained in section A of chapter 11 of NAFTA and of two articles contained in chapter 15.)

arbitral tribunal is terminated upon issuing the final award.[47] The only independent powers the arbitral tribunal has after issuing the final award are those under article 33 of the Model Law, and article 33 does not empower the arbitral tribunal to recall or reverse a final award.[48]

Award on jurisdiction

33. While, in principle, an award declining jurisdiction may be set aside, it has been stated that paragraph (2) (a) (iii) does not allow a court to set aside such an award on the ground that the arbitral tribunal erred in finding that it did not have jurisdiction.[49] (See above, comments under paragraph (1) of article 34, section on "arbitral awards" and comments under paragraph (2) (a) (i) of article 34, section on "the arbitration agreement is invalid".)

The court should only set aside decisions that are outside the scope of the mandate

34. It has been stated by a court that where the conclusion of the arbitral tribunal is based on two or several independent grounds, the award should be set aside in its entirety only if all these grounds involved decisions beyond the scope of the submission to arbitration.[50]

Composition of the arbitral tribunal, procedural errors—paragraph 2 (a) (iv)

Introduction

35. Paragraph (2) (a) (iv) provides that an arbitral award may be set aside if the composition of the arbitral tribunal or the arbitral procedure was not in accordance with the agreement of the parties, unless such agreement was in conflict with a provision of the Model Law from which the parties cannot derogate, or, failing such agreement, was not in accordance with the Model Law.

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47 Oberlandesgericht Stuttgart, Germany, 1 Sch 13/01, 20 December 2001 (an arbitral award which revised an earlier final award was set aside); High Court, Singapore, *[2001] 1 SLR 624, Tan Poh Leng Stanely v. Tang Boon Jek Jeffrey*, 30 November 2000 (an arbitral award which revised an earlier final award was set aside). The decision of the High Court was reversed on appeal, see Court of Appeal, Singapore, [2001] 3 SLR 237, *Tang Boon Jek Jeffrey v. Tan Poh Leng Stanely*, 22 June 2001. However, the appeal turned on the definition of when there is a final award and did not refute the principal ruling that the tribunal is not empowered to recall or revise a final award. To clarify the situation where there is not yet a final award, the Singapore International Arbitration Act 1995, which incorporates the Model Law in Singapore, provides that the arbitral tribunal may make more than one award at different points in time during the arbitration proceedings on different aspects of the matters to be determined, that any such award is final and binding and that the arbitral tribunal shall not vary, amend, correct, review, add to or revoke any such award (sections 19A and 19B of the Singapore International Arbitration Act).

48 High Court, Singapore, *[2001] 1 SLR 624, Tan Poh Leng Stanely v. Tang Boon Jek Jeffrey*, 30 November 2000.

49 Bundesgerichtshof, Germany, III ZB 44/01, 6 June 2002.

50 British Colombia Supreme Court, *The United Mexican States v. Metalclad Corporation*, 2 May 2001. (The arbitral award was not set aside in its entirety since the arbitral tribunal had found three breaches of the NAFTA-treaty and only two of these breaches were considered to be outside the scope of the mandate of the arbitral tribunal.)

The arbitral tribunal was not composed according to the agreement of the parties

36. In a case where the applicable arbitration rules authorized the arbitral tribunal to rule on the challenge of arbitrators and to appoint substitute arbitrators, the arbitral award was set aside because the arbitral tribunal had refused to accept an arbitrator that was not part of a certain list of arbitrators, although it was not mandatory under the applicable arbitration rules that the parties appoint arbitrators from such list.[51]

Conflict with mandatory provisions of the Model Law

37. An award issued by two arbitrators appointed by only one of the parties was not set aside since the arbitration agreement entitled a party to appoint an arbitrator on behalf of the other party, if that other party failed to appoint its arbitrator within the time provided for in the arbitration agreement. The court concluded that such agreement between the parties was not contrary to mandatory provisions of the Model Law.[52] A provision in the arbitration agreement or the applicable arbitration rules, which provides that, in case the defendant does not appoint its arbitrator within the prescribed time, such arbitrator shall be appointed by a certain arbitration institution (appointing authority), has not been found to be contrary to mandatory provisions of the Model Law.[53]

38. An arbitral award issued by an appeal board rejecting an appeal against an earlier arbitral award due to late payment of fees was not set aside since such rejection was in accordance with the arbitration rules agreed to between the parties, and the arbitration rules did not conflict with mandatory provisions of the Model Law.[54]

The arbitral procedure was not in accordance with the Model Law

Standard of review

39. As to claims that the arbitral procedure was not in accordance with the Model Law, some decisions seem to require that arbitral awards should be set aside only in case of procedural errors of a certain degree of seriousness, for instance violations of important procedural rules[55] or violations of mandatory provisions.[56] Arbitral awards have been set aside due to procedural errors in violation of the Model Law where the claimant did not submit a statement of claim (article 23 of the Model Law).[57] In another case, a court concluded that when a party (in this case the claimant) requested that a hearing be held, the arbitral tribunal is obliged to hold such hearings at an appropriate stage of the proceedings (article 24 (1) of

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[51] CLOUT case No. 436, Germany, 24 February 1999 (full text of the decision).

[52] CLOUT case No. 440, Germany, 22 December 1999.

[53] Oberlandesgericht Köln, Germany, 9 Sch 23/00, 16 October 2000.

[54] CLOUT case No. 455, Germany, 4 September 1998.

[55] CLOUT case No. 436, Germany, 24 February 1999 (full text of the decision) (the arbitral tribunal did not adhere to the procedure agreed to between the parties); CLOUT case No. 455, Germany, 4 September 1998 (full text of the decision) (the court found that there normally would be a violation of important procedural rules if the arbitral tribunal did not adhere to the procedure agreed to between the parties).

[56] Bayerisches Oberstes Landesgericht, Germany, 4 Z Sch 02/99, 29 September 1999.

[57] Ibid.

the Model Law); however, the defendant lost its right to rely on this non-compliance with the request because it did not state its objection without undue delay and was therefore deemed to have waived its right to object. The court added that the principle of oral proceedings in arbitration has a different meaning than in court proceedings in that hearings in arbitral proceedings are to be held if so requested by a party but only to the extent the parties have not agreed otherwise.[58] In another case, the fact that the award was only signed by two arbitrators has not been considered to constitute a ground for setting aside the award, even though the reason for the omitted signature was not stated in the award as prescribed by article 31, because the reason for the omitted signature was formally given to the court in the setting aside proceedings by the president of the arbitral tribunal.[59]

Failure to apply the law applicable to the substance of the dispute

40. Decisions have provided that arbitral awards should be set aside if the arbitral tribunal applies a law to the substance of the dispute different than the one agreed to by the parties (article 28 (1) of the Model Law). However, it has been stressed that the court can review only whether the arbitral tribunal based its decision on the law chosen by the parties and not whether it applied or interpreted it correctly.[60]

Failure to give reasons

41. In evaluating the sufficiency of the reasons expressed, one must take into account not only what has been expressly stated but also what is implicit, and the fact that the arbitral award does not expressly disclose any legal reasoning does not make the reasoning insufficient where the arbitrators are commercial persons.[61]

Waiver

42. One decision has considered that if a party fails to make use of the possibility to challenge an arbitrator in court under article 13 (3) of the Model Law, such party is precluded from later raising the issue in an application to set aside the arbitral award. However, no preclusion will arise where the arbitral tribunal failed to decide on the challenge.[62]

Public policy—paragraph 2 (b) (ii)

43. Paragraph (2) (b) (ii) provides that the arbitral award may be set aside if the court finds that the award is in conflict with the public policy of the State that has jurisdiction to hear the application under article 34.

44. All reported decisions that have applied the concept of public policy in paragraph (2) (b) (ii) have confirmed the narrow scope of the provision and that it should be applied only in instances of most serious procedural or substantive

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[58] Oberlandesgericht Naumburg, Germany, 10 Sch 08/01, 21 February 2002.

[59] CLOUT case No. 12, Canada, 7 April 1988.

[60] CLOUT case No. 375, Germany, 15 December 1999 (full text of the decision); Hanseatisches Oberlandesgericht Hamburg, Germany, 11 Sch 01/01, 8 June 2001.

[61] CLOUT case No. 10, Canada, 16 April 1987.

[62] Oberlandesgericht Stuttgart, Germany, 1 Sch 08/02, 16 July 2002.

injustice. It has been found that the provision should be given a restrictive interpretation[63] and should be applied only in exceptional cases.[64]

Standard of review

45. In defining the appropriate standard of review under paragraph (2) (b) (ii), courts have found that the public policy defence should be applied only if: (1) some fundamental principle of the law or morality or justice is violated,[65] (2) the award fundamentally offends the most basic and explicit principles of justice and fairness or shows intolerable ignorance or corruption on part of the arbitral tribunal,[66] or (3) the award is in conflict with a principle that bears upon the very foundations of public and economic life.[67] For example, the public policy defence would be applicable in case of corruption, bribery, fraud and serious procedural irregularities.[68]

Procedural public policy

46. Public policy has been found to include both substantive and procedural aspects.[69] Procedural laws have been considered part of public policy only when they set forth the basic principles upon which the procedural system is based[70] or express fundamental procedural principles.[71] Decisions have found that a violation of a party's right to be heard could constitute a violation of procedural public policy, but only if there is a causal link between such violation of the right to be heard and the content of the award.[72] There is, for instance, no violation of the right to be heard if the arbitral tribunal considered the claim or defence, but found it immaterial.[73] Where the legal argument of a party has been the subject of oral

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63 CLOUT case No, 323, Zimbabwe, 21 October and 21 December 1999; Oberlandesgericht Karlsruhe, Germany, 10 Sch 04/01, 14 September 2001. (Relationship between public policy and constitutional rights.)

64 CLOUT case No. 10, Canada, 16 April 1987; Oberlandesgericht Stuttgart, Germany, 1 Sch 08/02, 16 July 2002. (The court determined that public policy should only be applied in exceptional cases and that public policy does not constitute an appeal on the merits of the arbitral award.)

65 CLOUT case No, 323, Zimbabwe, 21 October and 21 December 1999.

66 CLOUT case No. 391, Canada, 22 September 1999.

67 Oberlandesgericht Karlsruhe, Germany, 10 Sch 04/01, 14 September 2001 (relationship between public policy and constitutional rights); Hanseatisches Oberlandesgericht Hamburg, Germany, 11 Sch 02/00, 30 August 2002 (no violation of public policy where the arbitral tribunal allegedly had erred in finding that the arbitration agreement was invalid and therefore declined jurisdiction).

68 CLOUT case No. 391, Canada, 22 September 1999 (full text of the decision); CLOUT case No. 323, Zimbabwe, 21 October and 21 December 1999.

69 CLOUT case No. 391, Canada, 22 September 1999.

70 CLOUT case No. 10, Canada, 16 April 1987 (full text of the decision). (Sufficiency of the reasons on which the arbitral award was based.) A different view is represented in CLOUT case No. 146, Russian Federation, 10 November 1994 in which the Court considered that a procedural infringement in the arbitral proceedings had no relevance to the notion of public policy.

71 CLOUT case No. 457, Germany, 14 May 1999.

72 CLOUT case No. 375, Germany, 15 December 1999 (full text of the decision); CLOUT case No. 457, Germany, 14 May 1999 (full text of the decision); Hanseatisches Oberlandesgericht Hamburg, Germany, 11 Sch 01/01, 8 June 2001.

73 Hanseatisches Oberlandesgericht Hamburg, Germany, 11 Sch 01/01, 8 June 2001.

hearing, and the arbitral tribunal addressed the argument in its decision, the party's right to be heard has not been considered violated,[74] nor has public policy been found to require that the arbitral award expressly deals with each and every argument put forward by the parties.[75]

Substantive public policy

47. As to substantive public policy, decisions have provided that the public policy review does not permit a review of the merits of the case[76] and that the award should not be set aside in order to correct a possible breach of equity or a wrong decision, except where the decision is incompatible with a fundamental sense of justice.[77] However, public policy has been found to be violated if the arbitral award has been obtained by fraudulent means.[78] Public policy has also been found to be violated if the arbitral award would allow a party to take advantage of a position that he has deliberately engineered.[79] However, where a party allegedly has tried to deceive the arbitral tribunal by a fraudulent claim of expenses, no violation of public policy has been found where such deception was not relied upon by the arbitral tribunal.[80] Public policy was not found to be violated where the award ordered the defendant in the arbitral proceedings to pay an amount in a currency other than the currency of the place of arbitration.[81]

Time limit—paragraph (3)

48. Paragraph (3) provides that 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 or, if a request had been made under article 33, from the date on which that request had been disposed of by the arbitral tribunal.

49. It has been found that courts are not empowered to extend the time limit provided in paragraph (3)[82] and an application by a party seeking to set aside an award must be submitted within the said time limit.[83]

50. Contrary to the wording of paragraph (3), one court decided that an application for the setting aside of an award based on the grounds in paragraph (2) (b) can be

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74 Hanseatisches Oberlandesgericht Hamburg, 6 Sch 07/01, 17 January 2002.

75 Hanseatisches Oberlandesgericht Hamburg, Germany, 11 Sch 01/01, 8 June 2001.

76 CLOUT case No, 323, Zimbabwe, 21 October and 21 December 1999 (full text of the decision) (factual error on behalf of the arbitral tribunal); Oberlandesgericht Stuttgart, Germany, 1 Sch 08/02, 16 July 2002 (the court determined that public policy should only be applied in exceptional cases and that public policy does not constitute an appeal on the merits of the arbitral award).

77 Oberlandesgericht Karlsruhe, Germany, 10 Sch 04/01, 14 September 2001. (Relationship between public policy and constitutional rights.)

78 CLOUT case No. 407, Germany, 2 November 2000.

79 CLOUT case No, 323, Zimbabwe, 21 October and 21 December 1999 (full text of the decision).

80 British Columbia Supreme Court, Canada, *The United Mexican States v. Metalclad Corporation*, 2 May 2001.

81 CLOUT case No. 149, Russian Federation, 18 September 1995.

82 High Court, Singapore, *[2003] 3 SLR 546, ABC Co. v. XYZ Ltd.*, 8 May 2003.

83 Ibid.

made also after the three-month time limit has elapsed, since these grounds are to be considered ex officio by the courts.[84]

Remission—paragraph (4)

51. Paragraph (4) provides that the court, when asked to set aside an award, may, where appropriate and so requested by a party, suspend the setting aside proceedings for a period of time determined by it in order to give the arbitral tribunal an opportunity to resume the arbitral proceedings or to take such other action as, in the arbitral tribunal's opinion, will eliminate the grounds for setting aside.

52. Where the arbitral tribunal has issued a final award, a court did not find appropriate to remit the case to the arbitral tribunal for the purpose of enabling the arbitral tribunal to recall or revise its decision on the merits of the case or to take fresh evidence on the merits of the case.[85]

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[84] CLOUT case No. 407, Germany, 2 November 2000 (full text of the decision).

[85] CLOUT case No. 391, Canada, 22 September 1999 (full text of the decision); High Court, Singapore, *[2001] 1 SLR 624, Tan Poh Leng Stanely v. Tang Boon Jek Jeffrey*, 30 November 2000.