United Nations A/CN.9/563

General Assembly

Distr.: General
24 May 2004*

Original: English

United Nations Commission on International Trade Law
Thirty-seventh session
New York, 14 June-25 June 2004

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

Note by the Secretariat

1. In 1966, when the General Assembly established the United Nations Commission on International Trade Law and gave it the mandate to promote the progressive harmonization and unification of the law of international trade, it also stated that the Commission was to do so, inter alia, by promoting ways and means of ensuring a uniform interpretation and application of international conventions and uniform laws in the field of the law of international trade and by collecting and disseminating information on national legislation and modern legal developments, including case law, in the field of international trade.[1]

2. At its twenty-first session, in 1988, the Commission considered the need and means for collecting and disseminating court decisions and arbitral awards relating to legal texts emanating from its work, noting that information on the application and interpretation of international texts would help to further the desired uniformity in application and would be of general informational use to judges, arbitrators, lawyers and parties to business transactions.[2] In deciding to establish the case law reporting system, the Commission also considered the desirability of establishing an editorial board, which, amongst other things, could undertake a comparative analysis of the collected decisions and report to the Commission on the state of application of the legal texts. Those reports could evidence the existence of uniformity or divergence in the interpretation of individual provisions of the legal

* The late submission of the document is a reflection of the current shortage of staffing resources in the Secretariat.

[1] General Assembly resolution 2205 (XXI), sect. II, paras. 8 (d) and (e); *UNCITRAL Yearbook, vol. I, 1968-1970*, part one, II, E.

[2] *Official Records of the General Assembly, Forty-third Session, Supplement No. 17* (A/43/17); *UNCITRAL Yearbook, vol. XIX, 1988*, part one, para. 99.

V.04-54164 (E) 070604 080604

texts, as well as gaps in the texts that might come to light in actual court practice. The Commission decided not to establish the board at that time, but to reconsider the proposal in the light of experience gathered in the collection of decisions and the dissemination of information under the CLOUT system.[3]

3. At its thirty-fourth session, the Commission considered a document prepared by the Secretariat proposing the preparation of a digest of case law on the United Nations Convention on Contracts for the International Sale of Goods (Vienna, 1980), which contained sample chapters of a proposed digest.[4] After discussion, the Commission requested the Secretariat to prepare a digest of case law, summarizing the similarities and differences in interpretation by different jurisdictions, while avoiding criticism of domestic case law.[5] At its thirty-fifth session, the Commission requested the Secretariat to prepare a similar digest of case law on the UNCITRAL Model Law on International Commercial Arbitration (1985).[6]

4. The present document contains a digest of case law on articles 3 and 14 of the Model Law on International Commercial Arbitration. Document A/CN.9/563/Add.1 contains such a digest on article 34 of the Model Law. These documents are intended to offer to the Commission an example of how court and arbitral decisions might be presented with a view to fostering uniform interpretation. The Commission may wish to consider whether the Secretariat, in consultation with national correspondents and experts from the different regions, should prepare a complete digest of cases reported on the various articles of the Model Law. If so, the Commission may wish to consider whether the approach taken in preparing the sample digest, including the style of presentation and the level of detail, is appropriate.

5. The digest of case law on articles 3 and 14 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 3. Receipt of written communications

(1) Unless otherwise agreed by the parties:

(a) Any written communication is deemed to have been received if it is delivered to the addressee personally or if it is delivered at his place of business, habitual residence or mailing address; if none of these can be found after making a reasonable inquiry, a written communication is deemed to have been received if it is sent to the addressee's last-known place of business, habitual residence or mailing address by registered

---

[3] *UNCITRAL Yearbook, vol. XIX, 1988,* part one, paras. 107-109.

[4] A/CN.9/498.

[5] *Official Records of the General Assembly, Fifty-sixth Session, Supplement No. 17* (A/56/17), paras. 391 and 395.

[6] Ibid., *Fifty-eighth Session, Supplement No. 17* (A/58/17), para. 243.

letter or any other means which provides a record of the attempt to deliver it;

(b) The communication is deemed to have been received on the day it is so delivered.

(2) The provisions of this article do not apply to communications in court proceedings.

Receipt of written communications—paragraph (1) (a)

1. Paragraph (1) (a) of article 3 lists a variety of instances in which a written communication is deemed to have been received by a party, unless the parties have agreed otherwise.

2. It has been found that paragraph (1) is applicable to written communications by a party to the other party,[7] such as the notice of request for arbitration,[8] as well as to written communications by the arbitral tribunal to the parties, including the delivery of the arbitral award to the parties under article 31 (4).[9]

Actual receipt of written communications

3. A written communication is deemed to have been received by the addressee if it is either delivered to the addressee personally, or if it is delivered at his place of business, habitual residence or mailing address. It has been found that a written communication has been received where the communication was sent by courier to the respondent's place of business and signed for upon receipt by a representative of the respondent corporation.[10]

Deemed receipt of written communications

4. If none of the addressee's place of business, habitual residence or mailing address can be found after making a reasonable inquiry, a written communication is deemed to have been received if it is sent to the addressee's last-known place of business, habitual residence or mailing address by registered letter or any other means which provides a record of the attempt to deliver it. The requirements of this provision have been found to be met where the written communication was sent to all of the respondent's known addresses, and inquiry, in the form of searches in available registers, had been made to determine that party's current address.[11] In an enforcement decision, the Court found that the respondent had not been duly notified of the arbitral proceedings, where the arbitral tribunal had not required any

---

[7] CLOUT case No. 384, Canada, 26 April 1991.

[8] CLOUT case No. 20, Hong Kong, 29 October 1991 (full text of the decision). (According to article 21 of the Model Law the arbitral proceedings commence on the date on which a request for arbitration is received by the respondent.)

[9] CLOUT case No. 29, Canada, 30 January 1992 (full text of the decision). (The court found that the arbitral award was received by the parties, since it was delivered in accordance with paragraph (1) (a) of article 3.)

[10] CLOUT case No. 29, Canada, 30 January 1992 (full text of the decision). See also Analytical commentary on draft text of a model law on international commercial arbitration: report of the Secretary-General (A/CN9/264), p. 111, which states that the instances of receipt referred to above in paragraph 3 deals with instances of actual (i.e. non-fictional) receipt.

[11] CLOUT case No. 384, Canada, 26 April 1991.

evidence that the respondent had received the notice of request for arbitration and no inquiries had been made to find the respondent's current address.[12]

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 14. Failure or impossibility to act

(1) If an arbitrator becomes de jure or de facto unable to perform his functions or for other reasons fails to act without undue delay, his mandate terminates if he withdraws from his office or if the parties agree on the termination. Otherwise, if a controversy remains concerning any of these grounds, any party may request the court or other authority specified in article 6 to decide on the termination of the mandate, which decision shall be subject to no appeal.

(2) If, under this article or article 13 (2), an arbitrator withdraws from his office or a party agrees to the termination of the mandate of an arbitrator, this does not imply acceptance of the validity of any ground referred to in this article or article 12 (2).

Failure or impossibility to act—paragraph (1)

Introduction

1. Paragraph (1) of article 14 sets out the conditions on which an arbitrator's mandate terminates due to de jure or de facto inability to perform his functions or if, due to other reasons, he fails to act without undue delay. In case the arbitrator does not withdraw from his office or the parties do not agree on the termination of his mandate, any party may request the court or other authority specified in article 6 to decide on the termination of the mandate. Such decision shall not be subject to appeal.

De jure or de facto inability to perform functions as arbitrator

2. In a case where a judge had been wrongly granted a special administrative permission to serve as arbitrator, which was required under the administrative regulations applicable to judges in the jurisdiction in question, the court found that this would not make the judge de jure unable to perform his functions as arbitrator.[13] Similarly, in a decision under article 34 of the Model Law, it has been found that any doubts as to whether a judge has validly obtained such an administrative permission to serve as arbitrator cannot work to the detriment of the parties.[14]

---

[12] CLOUT case No. 402, Germany, 16 March 2000 (full text of the decision). (The court refused to enforce the arbitral award, since, in the view of the court, the respondent was not duly notified of the arbitral proceedings, which was considered to constitute a violation of public policy.)

[13] Oberlandesgericht Hamm, 17 SchH 07/03, 18 September 2003. (The court did not terminate the mandate of the arbitrator since paragraph (1) of article 14 was found to be inapplicable.)

[14] Oberlandesgericht Stuttgart, 1 Sch 08/02, 16 July 2002. (The court found that, regardless of whether the permission to act as arbitrator had been validly granted to the judge, the arbitral tribunal was properly constituted (art. 34 (2) (a) (iv) of the Model Law).)

Agreement between the parties

3. A court found paragraph (1) to be applicable where the entire arbitral tribunal was considered to have lost its mandate due to the exercise by one of the parties of a right in the arbitration agreement which gave the parties an option to require the appointment of a new arbitral tribunal, if the original tribunal failed to issue its award within a specific time limit. The court found that such a mechanism in the arbitration agreement for the appointment of a new arbitral tribunal, if exercised, constituted an agreement between the parties on the termination of the mandate of the arbitrators in the meaning of paragraph (1).[15] On appeal, it was found that, where the parties have agreed on the termination of the mandate of the arbitral tribunal, and where the arbitral tribunal refuses to terminate its mandate (article 32 (2) (b) and 32 (3) of the Model Law), a party may request a court to terminate the mandate of the arbitral tribunal under paragraph (1) of article 14. This recourse under article 14 was found to be separate from any recourse a party might have under article 34, if the arbitral tribunal would proceed by issuing the arbitral award.[16]

---

[15] Alberta Court of Queen's Bench Judicial District of Calgary, *Petro-Canada et al. v. Alberta Gas Ethylene Co. Ltd. et al.*, July 12, 1991. The decision of the trial court was upheld in relevant parts, see Alberta Court of Appeal, *Petro-Canada et al. v. Alberta Gas Ethylene Co. Ltd. et al.*, January 28, 1992.

[16] Alberta Court of Appeal, *Petro-Canada et al. v. Alberta Gas Ethylene Co. Ltd. et al.*, January 28, 1992.