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(CLOUT)

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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.3). CLOUT documents are available on the UNCITRAL website at: https://uncitral.un.org/en/case_law.

Each CLOUT issue includes a table of contents on the first page that lists the full citation of 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 a decision in its original language is included in the heading to each case, along with the Internet addresses, where available, of translations in official United Nations language(s) (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 Law on International Commercial Arbitration include keyword references which are consistent with those contained in the Thesaurus on the Model Law, 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 on 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, by individual contributors, or 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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Cases relating to the UNCITRAL Model Law on International Commercial Arbitration (MAL)

Case 2163: MAL 16; 34
Hong Kong SAR, China: The Court of Final Appeal
[2023] HKCFA 16
C v. D
30 June 2023
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Abstract prepared by Yat Hin (Adrian) LAI, National Correspondent

[**Keywords:** *arbitral proceedings; arbitration agreement; arbitration clause; award – setting aside; courts; formal requirements; kompetenz-kompetenz; judicial intervention; jurisdiction*]

The parties entered into a contract in relation to the operation of a jointly owned broadcasting satellite. A contractual dispute arose as to whether the Appellant was in material default of the agreement. The contract, governed by Hong Kong law, stipulated certain pre-arbitration procedures, including an attempt to resolve the dispute through good faith negotiations. A key issue before the Court of Final Appeal was whether the Court could review the decision by the arbitral decision on the fulfilment of the pre-arbitration conditions.

The arguments before the Court of Final Appeal was that the tribunal should have rejected the claim which was prematurely referred to arbitration, given that the pre-arbitration condition had yet to be fulfilled. Furthermore, since the challenge was jurisdictional in nature, therefore the Appellant could rely on Article 34(2)(a)(iii) of the Model Law to set aside the arbitral award. The Court of Final Appeal unanimously dismissed the appeal on the basis that, upon the proper construction of the arbitration agreement, both the main contractual dispute and the dispute as to the fulfilment of the pre-arbitration conditions fell within the parties' contemplation and intended submission to arbitration.

A majority of the judges in the Court of Final Appeal found that the Distinction should be adopted in aid of the construction and application of the Arbitration Ordinance (Cap.609). The Distinction was as a useful tool when deciding whether a particular objection warrants judicial interference. It is based on the premise that arbitrations are consensual. A jurisdictional challenge is an objection that the relevant party has not agreed to the tribunal exercising authority to conduct the arbitration in the circumstances specified. The objection is to the tribunal and not just to the claim. Admissibility, however, refers to objections which allege that a claim is defective and cannot be proceeded with. In addition, the Court emphasized the principle of party autonomy, stating that parties can, in principle, agree through clear language that certain matters, which would typically be considered matters of admissibility under the Distinction are actually matters of jurisdiction, hence reviewable by the supervisory court. This agreement would fundamentally affect their consent to arbitrate, thereby limiting the tribunal's jurisdiction accordingly.

The minority view was that the Distinction was an unnecessary distraction and an excessive task. Since the adoption of the Model Law in 1985 there had been many decisions of courts in various Model Law jurisdictions where MAL Article 34(2)(a)(iii) had been applied without any attention to such a Distinction. The question is not whether an issue is one of "admissibility" and therefore not a subject of curial challenge to "jurisdiction" but whether the applicant can invoke at least one of the grounds under which MAL Article 34 permits recourse to a court to set aside an arbitral award. If none of those grounds applies, then recourse to a court is not

permitted. This is not because of classification of the issue as one of "admissibility", but because Article 34 the Model Law mandates that result.

This case has authoritatively decided that in line with many other pro-arbitration jurisdictions, a distinction is to be drawn between admissibility and jurisdiction, and the Hong Kong Court does not interfere with the tribunal's decisions on issues related to the admissibility of a claim.

Case 2164: MAL 34(2); 34(4)
India: High Court of Delhi
O.M.P. (COMM) 95/2023, O.M.P. (COMM) 106/2023
National Highways Authority of India v. Trichy Thanjavur Expressway Ltd
21 August 2023
Original in English
Published: 2023 SCC OnLine Del 5183

Available at: https://indiankanoon.org/doc/11563168/

Abstract prepared by: Gourab Banerji, Promod Nair, Manisha Singh, George Pothan Poothicote, Arjun Krishnan, Sriharsha Peechara, Ajay Thomas, National Correspondents

[**Keywords:** *arbitral awards; arbitral proceedings; arbitral tribunal; award – setting aside; courts; procedure; severability*]

The core issues before the High Court of Delhi (the Court) were (i) whether courts have the power to partially set aside arbitral awards under Section 34 of the Arbitration Act (corresponding to MAL Article 34, except the proviso appended to Section 34(2)(a)(iv)); (ii) whether such partial setting aside could be considered modification of the award; (iii) whether the concept of partial setting aside is limited to challenges based on the grounds enumerated in clause (iv) of Section 34(2)(a) or if it could also apply to other grounds enumerated in that Section; and finally, on the scope and intent of Section 34(4), which empowers the court to adjourn proceedings on the request of one of the parties to allow the arbitral tribunal to resume proceedings and take such further action to eliminate the grounds for setting aside the arbitral award.

The Court clarified that the Supreme Court of India's decision in *NHAI v. M. Hakeem* [(2021) 9 SCC 1], which had held that a court does not have the authority to modify an award could not be construed as a blanket prohibition on the partial setting aside of an award. The Court found that this prohibition does not extend to partial setting aside. Applying the principle of severability, and relying on the Supreme Court case of *JG Engineers v. Union of India* [(2011) 5 SCC 758] as well as reports of the UNCITRAL Working Group on International Contract Practices, the Court held that it has the power to partially annul or set aside an award, provided that the part proposed for annulment is independent and not interlinked with any other part of the award, such that it can be validly incised without affecting the other components of the award. The Court further held that the placement of the proviso to Section 34(2)(a)(iv) does not restrict its applicability only to it and therefore it could be validly imported and applied to subsections (i)–(iii) and (v) of Section 34(2)(a) and Section 34(2)(b) of the Arbitration Act.

The Court recognized that the scope and intent of Section 34(4) had been previously examined in various Supreme Court decisions. Referring to the MAL *travaux préparatoires*, it clarified that Section 34(4) could be used to remand parties back to the arbitral tribunal only while the arbitral award is still valid, and not after annulment. Furthermore, it was further held that Section 34(4), being remedial in nature, operates independently of Section 34(2), which outlines grounds for setting aside awards. Consequently, the criteria under Section 34(2) cannot be applied to Section 34(4). Therefore, if an award is found to be affected by any of the irregularities specified in Section 34(2) (a) or (b), invoking Section 34(4) to rectify it would exceed the permissible scope of remedial correction. The Court emphasized

that Section 34(4) is intended for remedial measures similar to those in Section 33 (corresponding to MAL Article 33), and its application does not permit the Court to comprehensively review past findings and conclusions of the tribunal or alter the award.

Case 2165: MAL 34(2)
Singapore: Court of Appeal
Case No. Civil Appeal No. 27 of 2023
DBL v. DBM
21 May 2024
Original in English
Published: [2024] SGCA 19
Available at: https://www.elitigation.sg/gd/s/2024_SGCA_19

[**Keywords:** *arbitral awards; arbitral proceedings; arbitral tribunal; arbitration agreement; arbitration clause; award – setting aside; courts; due process; public policy*]

This case primarily addresses the circumstances under which a court could set aside the arbitral award under section 24(b) of the International Arbitration Act 1994 (corresponding to MAL Article 34(2)). DBM (the buyer) and DBL (the seller) entered into a sales contract of prime steel slabs. The contract stated that either party could terminate the agreement in the event of any breach of its conditions. The contract also specified that it would be governed by English law and provided for arbitration in Singapore under the arbitration rules of the Singapore Chamber of Maritime Arbitration. Additionally, a provision in the contract stated that the prime steel slabs were to be loaded at any port from the Kingdom of Saudi Arabia.

Suspecting that the goods were shipped from the Islamic Republic of Iran, the buyer requested an indemnity bond, by which the seller confirmed the Saudi origin of the goods. The bond further provided a provision for terminating the contract with a full refund and compensation for all costs and losses incurred by the buyer if the relevant parties, including the parties' bank were not satisfied with the documentation relating to the goods. Subsequently, the buyer terminated the contract and sought refund of the purchase price. Disputes arose regarding the outstanding amount owed by the seller to the buyer, leading the buyer to initiate arbitral proceedings. Based on evidence suggesting that the goods were likely to have been loaded from the Islamic Republic of Iran, the arbitral tribunal ruled in favour of the buyer.

The seller then applied to set aside the award granted by the tribunal pursuant to section 24(b) of the International Arbitration Act 1994 (corresponding to MAL Article 34(2), but with additions) for the breach of natural justice on the basis that (i) the tribunal allowed demonstrative exhibits that was contrary to the agreed hearing protocol, and further, the seller was not afforded a reasonable and fair opportunity to respond to the evidence adduced; and (ii) the tribunal failed to consider two defences which the seller had raised. The first instance court held that there had been no breach of natural justice which prejudiced the seller and dismissed the application for setting aside.

On appeal, the Appellate Court upheld the decision made by the first instance court. First, on the issue of the demonstrative exhibit used by the buyer's counsel (i.e. Searoutes Demonstration), the Appellate Court rejected this ground of appeal as the seller did not raise any objections in relation to the use of the Searoutes Demonstration during the arbitral hearings. It held that the seller could not reserve its position until after the award had been made, so that the seller's belated objection to the Searoutes Demonstration in its setting aside application was deemed inexcusable and opportunistic.

The second and third grounds of appeal was on whether natural justice was breached as the tribunal allegedly failed to consider the defences of time limitation and the unenforceable indemnity bond. The Appellate Court stated that while natural justice requires the parties to be heard, it does not require a tribunal to address all submissions

made, but only the essential issues, with the tribunal being given fair latitude to determine what is essential. The Appellate Court found that the tribunal did not err in relation to the time limitation defence just because it made a limited response to the issue. Although the tribunal failed to consider the enforceability of the indemnity bond, the Appellate Court observed that this oversight did not have a meaningful impact on the outcome of the arbitral proceedings. The provision requiring the goods to be shipped from Saudi Arabia would have established the seller's breach irrespective of the indemnity bond. As the seller suffered no actual or real prejudice from the breach of natural justice, the Appellate Court found no basis for setting aside the award.

Cases relating to the United Nations Convention on the Recognition and Enforcement of Foreign Arbitral Awards – The "New York Convention" (NYC)

Case 2166: NYC V(1)(b)

Belarus: Judicial Collegium for Economic Cases of the Supreme Court (Supreme Court)
Case No. 154EIch/2280
LLC M. v. JSC K.
16 February 2023
Original in Russian
Available at: https://ilex-private.ilex.by/

Abstract prepared by Aleksei Korochkin, National Correspondent

The Supreme Court considered the cassation appeal against the ruling of the Economic Court of the Grodno region (Economic Court) of 19 December 2022, in which the Economic Court refused to satisfy the application of the appellant to recognize and enforce the award of the International Commercial Arbitration Court at the Ukrainian Chamber of Commerce and Industry of 19.04.2022 in case No. 251/2021 to recover from the respondent 115,246.52 euros.

The Economic Court dismissed the appellant's application on the basis of Article V(1)(b) of the NYC, stating that the party against whom the award was invoked, was unable to submit its explanations to the Court.

The respondent requested to refuse the application of the appellant due to the inability to send its representative to the arbitration court to present its case. Assessing the objections of the respondent, the Supreme Court pointed out that the impossibility to participate in the arbitration proceedings and give oral explanations constitutes an infringement of the procedural rights of the party. The introduction of the military situation in Ukraine (letter of the Chamber of Commerce and Industry of Ukraine dated 28 February 2022 No. 2024/02.0-7.1) indicates the presence of extraordinary, irreversible and objective circumstances for economic entities. These circumstances hindered the realization of the legal rights and interests of the respondent and the principle of proper judicial protection was not ensured.

Case 2167: NYC V(1)(b)
Ukraine: Supreme Court of Ukraine
Case No. 1423/15646/2012
SEA EMERALD S.A. v. State Enterprise "Shipbuilding yard named after 61 Kommunars"
5 October 2017
Original in Ukrainian
Available at: https://reyestr.court.gov.ua/

Abstract prepared by Sergei Voitovich[1] and Anastasiia Shymon

In August 2012, the claimant requested the Ukrainian courts to enforce the arbitral award issued by a sole arbitrator in London (hereinafter, the "Award") on recovery of interest in favour of the claimant in the amount of 35,725,689.93 USD and accrued interest on the tribunal's expenses.

The key issue in dispute was whether the respondent was given a proper notice of date and place of the arbitration proceeding, and accordingly whether the dispute was resolved by a competent forum. The respondent was informed of the date and place of arbitration via electronic mail, a method not specified in the parties' contract.

The request for enforcement of the Award went through several hearings: once in the first instance Court, twice in the Appellate and three times in the cassation courts. These Courts made various decisions with respect to enforcement sought by the claimant.

The first instance Court satisfied the request of the claimant as to recognition and enforcement of the Award. The Court found that the claimant provided evidence of proper notice to the respondent regarding time and place of arbitration proceeding, in particular the affidavit of the sole arbitrator and the correspondence attached to it.

The Appellate Court overruled the decision of the first instance Court, and refused the enforcement of the Award, stating that the parties' contract had not stipulated the use of electronic documents and there were no email addresses in the parties' contract. Also, there was no evidence of any subsequent agreements between the parties on the use of electronic documents or subsequent exchange of electronic addresses. Therefore, the Appellate Court found no evidence of proper agreement of the parties as to electronic notification procedure in the arbitration proceeding.

However, the High Specialized Court of Ukraine for Civil and Criminal Cases (hereinafter, the "High Specialized Court") accepted the claimant's cassation appeal stating that the case files contained proper and admissible evidence indicating the notification of the respondent regarding the arbitration proceeding. The High Specialized Court noted that the exchange of correspondence and notifications by email had been a usual practice of the London arbitration, thus there was a valid and admissible proof of the claimant notifying the respondent of the arbitration proceeding.

Subsequently, the respondent appealed to the Supreme Court of Ukraine (hereinafter, the "SCU") in order to review the decision of the High Specialized Court. The SCU remitted the case to the High Specialized Court for a new consideration.

In its second decision in January 2016, the High Specialized Court referred the case to the Appellate Court for a new consideration. Upon rehearing the case, the Appellate Court, refused the enforcement of the Award stating that parties had not agreed to the use of electronic documents in the contract, thus rendering this method of notification inappropriate. The claimant appealed to the High Specialized Court once more, seeking to set aside the decision of the Appellate Court and to uphold decision of the first instance Court. However, the High Specialized Court dismissed the appeal, agreeing with the finding of the Court of Appeal that the method of notification could

[1] At the time the UNCITRAL secretariat received the abstract, Sergei Voitovich was Ukraine's CLOUT National Correspondent.

not be considered appropriate as it was not agreed upon by the parties in the contract and therefore could not be taken as proof of proper notification.

In 2017 the claimant appealed to the SCU with a request for review of the judgment of the High Specialized Court. However, the SCU refused the claimant's requests, and ultimately, the enforcement of the Award was not allowed.

Case 2168: NYC V(1)(e)
United States of America: United States Court of Appeals, Tenth Circuit
Case Nos. 21-1196, 21-1324, *Compañía de Inversiones Mercantiles S.A. v. Grupo Cementos de Chihuahua S.A.B. de C.V.*
20 January 2023
Original in English
Available at: https://law.justia.com/cases/federal/appellate-courts/ca10/21-1324/21-1324-2023-01-10.html

Abstract prepared by S.I. Strong, National Correspondent

Petitioner, a company incorporated under the laws of the Plurinational State of Bolivia, sought enforcement of an arbitral award against respondents, a group of Mexican companies. The award was issued by an arbitral panel seated in the Plurinational State of Bolivia. Respondents challenged the award in the Bolivian courts in 2016 but was unsuccessful. An order was subsequently issued from the US District Court for the District of Colorado, confirming the Bolivian arbitral award.

In 2020, respondents convinced the Bolivian Constitutional Court to invalidate the decision from 2016, subsequently the arbitral award was annulled. The US District Court denied a motion to vacate its earlier confirmation order and ordered respondents to turn over assets located in Mexico to satisfy the award. Both rulings of the US District Court were appealed to the US Court of Appeals. At issue was whether the award could be confirmed given that Article V(1)(e) of the NYC indicates that recognition and enforcement of an award may be refused in cases where the award has been set aside by a competent authority of the country in which that award was made.

After reviewing previous court of appeals cases and considering their applicability to the facts at issue here, the Court of Appeals decided that a court that is asked to vacate an order confirming an arbitral award that has subsequently been annulled needs to balance the interests of the international comity under the New York Convention against public policy considerations. In particular, the court needs to consider "whether the annulment is repugnant to US public policy" and "whether giving effect to the annulment would undermine US public policy."

In this case, the Court of Appeals held the court below acted within its permissible discretion when it denied respondents' motion to vacate the earlier confirmation order. According to the Court of Appeals, the court below was justified in doing so because United States interests in "(1) protecting the finality of judgments, (2) upholding parties' contractual expectations, and (3) the policy in favour of arbitral dispute resolution" outweighed interests of international comity under the New York Convention.

The Court of Appeal therefore affirmed (1) the lower court's decision to enforce the Bolivian arbitral award and (2) the order requiring respondents to turn over assets located in Mexico to satisfy the award.