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Contents

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Introduction

This compilation of abstracts forms part of the system for collecting and disseminating information on court decisions and arbitral awards relating to Conventions and Model *Laws that emanate from the work of the United Nations Commission on International Trade Law (UNCITRAL). 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, 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.

Cases relating to the Model Law on International Commercial Arbitration (MAL)

Case 1847: MAL 4; 6; 9; 14; 17; 17J; MML 13
Australia: Supreme Court of New South Wales, Court of Appeal
Case No. 2018/160051
Ku-ring-gai Council v. Ichor Constructions Pty Ltd
5 February 2019
Published: (2019) 364 ALR 728; [2019] NSWCA 2
Available at: www.austlii.edu.au

[**Keywords:** *arbitrators – challenge of; arbitrators – mandate; courts; estoppel; injunctions; interim measures; jurisdiction; knowledge; waiver*]

This case deals primarily with the question of whether a court decision under article 14 MAL can be subject to appeal. The ability of an arbitrator to resume arbitration proceedings when they have acted as a mediator for the same dispute is also considered.

Ku-ring-gai Council (the applicant) and Ichor Constructions Pty Ltd (the respondent) entered into a construction contract under which various disputes arose that were referred to arbitration. On the final day of the arbitration proceedings, the arbitrator offered to provide a settlement proposal for both parties to consider. The parties each consented to hearing such a proposal and having the arbitrator act as a mediator for such purposes, but both rejected the settlement proposal. The arbitration proceedings were reconvened, and the final decision was provided. A few days following the conclusion of proceedings, the respondent indicated to the applicant that they had not consented to the arbitrator continuing proceedings after he had "acted as a mediator" by suggesting a settlement proposal, and that the final arbitral decision was thus invalid. The applicant sought a declaration of the Supreme Court of New South Wales that the arbitrator's mandate had not been terminated, alongside an injunction precluding the respondent from asserting that it had. The Court refused such remedy and dismissed the application on the grounds that the arbitrator had in fact acted as a mediator in contravention of section 27D of the Commercial Arbitration Act 2010 (NSW) ("the Act"), which closely resembles article 13 of the UNCITRAL Model Law on International Commercial Mediation and International Settlement Agreements Resulting from Mediation ("MML"). Moreover, the Court found that to overcome this obstacle to continuing the arbitration, the parties had to give written consent (which is not required by article 13 MML), and this had not been given, nor had the respondent waived its right to this section as permissible under section 4 of the Act (cf. article 4 MAL).

The applicant then sought leave to appeal the decision of the NSW Supreme Court to the NSW Court of Appeal (the application for leave hearing is the case cited here). The primary issue at hand in the hearing for the application for leave to appeal was whether the decision of the court could in fact be appealed vis-à-vis section 14 of the Act, which resembles article 14 MAL. The Act provides that a "decision of the Court under subsection (2) that is within the limits of the authority of the Court is final", whereas article 14 MAL indicates that "any party may request the court …to decide on the termination of the mandate, which decision shall be subject to no appeal". The court found that the phrase "within the limits of the authority of the Court", included in the Act but not present in the MAL, was evidence that the Act intended to permit the possibility of review of a decision for jurisdictional error, to the exclusion of other reasons for appeal. Moreover, turning to the UNCITRAL travaux préparatoires as evidence, the Court determined that the words "subject to no appeal" were intentionally drafted instead of the term "final" in order to clarify the kind of ambiguity precisely before the court in the present matter, and thus in accordance with a desire to maintain uniformity of the domestic and international interpretation of the Model Law (as applied in Australia). The Court ruled that the term "final" should be interpreted analogously with the phrase "subject to no appeal" except for where there is a jurisdictional error. The application for appeal was accordingly dismissed on the

grounds that the initial decision could not be subject to appeal except for jurisdictional error.

The Court also addressed the residual issues of the case in obiter, finding that even if an appeal could be granted, it would not have been. The Court expounded that the arbitrator was in fact "acting as a mediator" per section 27D of the Act (see article 13 MML), that the required written consent was not given when the arbitrator resumed his role (a requirement which is not found in the MML), that no waiver had occurred per section 4 of the Act (see article 4 MAL) as the respondent did not actually know of their right to object (it was not sufficient that they "ought to have known"), and finally that estoppel could not have operated.

Case 1848: MAL 8(1)
Australia: High Court of Australia
Case No. S143/2018; S144/2018
Rinehart v. Hancock Prospecting Pty Ltd
Rinehart v. Rinehart
8 May 2019
Published: [2019] HCA 13
Available at: www.austlii.edu.au

[**Keywords:** *judicial assistance; validity; stay of court proceedings; third parties*]

This case deals with stay applications under article 8(1) MAL (i.e. applications for a stay of court proceedings in favour of arbitration).

Respondent Gina Rinehart entered into a number of settlement deeds with the appellants concerning various family trusts, which contained arbitration clauses providing for any dispute "under" the deeds to be referred to arbitration. Among other issues, the appellants claimed that the settlement deeds were not valid (the "validity claims") and sought for the claims to be dealt with by the courts. The respondent argued that any dispute "under" the deeds, including the validity claims, should be referred to arbitration pursuant to section 8(1) of the Commercial Arbitration Act 2010 (NSW) (the "Act"), which is modelled after article 8(1) MAL.

The first instance court (Federal Court of Australia) found that the validity claims were not subject to the arbitration clauses on the basis of a perceived limitation on the scope of the arbitration clauses resulting from the words "under this deed". On appeal, however, the Full Court of the Federal Court disagreed and stayed the court proceedings in favour of arbitration. Having considered the approaches to stay applications in different jurisdictions, including the approach of the House of Lords of the United Kingdom in Fiona Trust & Holding Corporation v Privalov, the Full Court held that the words "under this deed" should be given a liberal, not narrow, interpretation, unless the context requires otherwise.

The High Court unanimously dismissed the appeal and agreed with the conclusion reached by the Full Court. The High Court did not consider it necessary to review the approach in the Fiona Trust case, as it found that the scope of the arbitration clause could be determined applying orthodox principles of contract interpretation, i.e. "by reference to the language used by the parties, the surrounding circumstances and the purposes and objects to be secured by the contract". As the context and purpose of the settlement deeds was to minimize publicity surrounding the substantive dispute and to avoid the disclosure of confidential information, in the view of the High Court, it was "inconceivable" that the parties had intended a dispute as to the validity of the deeds to be heard in public court proceedings rather than by confidential arbitration. Thus, it found that the validity claims were covered by the arbitration clauses and were to be referred to arbitration.

Although the High Court did not consider the standard of review for stay applications, it was noted that the Act is "part of an integrated statutory framework for international and domestic arbitration which implements the MAL", and "adopts principles such as that which recognizes an arbitration agreement as distinct and limits attacks upon its

validity (the separability principle) and the related principle by which an arbitral tribunal is competent to rule on its jurisdiction (kompetenz-kompetenz)".

The High Court further considered a cross-appeal initiated by three of the respondents ("third party respondents"), who were assignees of the mining tenements under the settlement deeds. The third party respondents also applied for a stay of proceedings, on the basis that they were claiming "through or under" parties to one of the settlement deeds, and were therefore "parties" to the arbitration agreement contained therein by virtue of the extended definition of "party" contained in section 2(1) of the Act, a deeming provision that predates the adoption of the MAL and its enactment in Australia. The first instance court and the Full Court both rejected the stay application. The majority of the High Court, however, found that the third parties respondents were parties within the meaning of the Act, finding that "there is no good reason why this claim should not be determined as between the claimant and the assignee in the same way as it will be determined between the claimant and the assignor" and noting their concerns about multiple proceedings being conducted in arbitration and court.

Case 1849: MAL 34(3)
Australia: Federal Court of Australia
Case No. NSD 2003 of 2019
Sharma v. Military Ceramics Corporation
20 February 2020
Published: [2020] FCA 216
Available at: www.judgments.fedcourt.gov.au

[**Keywords**: *award – setting aside; procedure; time limit*]

This case deals with the time limit for filing an application for setting aside an arbitral award under article 34(3) MAL.

A dispute arose between the applicant (an Indian citizen) and the respondent (a company incorporated in the British Virgin Islands) in relation to a joint venture agreement. Pursuant to the arbitration agreement contained therein, the dispute was submitted to arbitration in Sydney in accordance with the rules of the Australian Centre for International Commercial Arbitration ("ACICA"). On 4 April 2018, the sole arbitrator appointed by ACICA issued a final award in favour of the respondent. In August 2018, the respondent commenced proceedings in the High Court of Delhi to enforce the final award in India.

On 29 November 2019, the applicant commenced proceedings before the Federal Court of Australia (the "Court") to set aside the final award. The respondent argued that the proceedings were time-barred because of the three-month time limit provided for in article 34(3) MAL (as incorporated into the International Arbitration Act 1974).

The Court found that the applicant had received the award three times, first from ACICA on 6 April 2018. As the applicant had received the award some 20 months before commencing proceedings, the Court dismissed the application to set aside the award.

In doing so, the Court offered some obiter remarks about its power to extend the time limit in article 34(3) MAL. Citing case law from other common law jurisdictions, and supporting observations that "the whole scheme of the MAL is to restrict court review of arbitration awards both with respect to grounds and time" and that its efficacy requires "the swift and efficient judicial enforcement and recognition of contracts and awards", the Court concluded that it was unlikely that the MAL conferred any power to extend the time limit.

Case 1850:[1] **MAL 36**
Denmark: Eastern High Court of Appeal (Østre Landsret)
Case No. B-424-17, 21st Dept.
A A/S v. Teoplyy Dom LRS
27 June 2018
Original in Danish
Published in Danish: Ugeskrift for Retsvæsen 2018 p. 3405 et seq.

Abstract prepared by Joseph Lookofsky, National Correspondent

[**Keywords**: *arbitration agreement; interpretation; enforcement of foreign award*]

In this case, which involved a Russian claimant/buyer (B) and a Danish respondent/seller (S), B sought recognition and enforcement in Denmark of an arbitral award rendered in B's favour by the International Commercial Arbitration Court at the Chamber of Commerce of the Russian Federation (ICAC).

In 2011, the parties concluded a contract for B's purchase of a production line manufactured by S and guaranteed to produce a minimum of 1,200 kg cellulose products per hour. During the negotiations, which were conducted solely in English, S initially proposed that disputes in relation to the contract be settled in a Danish court. B replied by submitting a draft contract, in both Russian and English language version, which provided for dispute settlement by arbitration in Russia as follows:

> "All disputes and differences, which may arise out of, or in connection with the present Contract, will be settled as far as possible by means of negotiations between the Parties. If the Parties do not come to an agreement, the matter will be settled by the International Commercial Arbitration Court at the Chamber of Commerce and Industry of Russian Federation in accordance with its procedure."

Following further negotiations on this point, B added a (third) sentence to the English (but not the Russian) language version of the arbitration clause:

> "The Parties have agreed that the matter will be settled by the Arbitration Court at the Chamber of Commerce of the country of the respondent."

Following delivery of the goods in 2013, B claimed the line could not meet contract-guaranteed levels, and after failed attempts to cure the problem, B cancelled the contract, demanding that S refund the purchase price in exchange for B's return of the goods.

When S refused that demand, B asked (inter alia) the Danish Chamber of Commerce (Dansk Erhverv) to provide information regarding the "Arbitration Court at the Chamber of Commerce". Replying that it did "not have its own Court of Arbitration", the Chamber referred B to the Danish Institute of Arbitration (Voldgiftsinstituttet).

Later in 2013 B commenced arbitration proceedings in Russia at the ICAC. After receiving an English language translation to B's statement of claim from the ICAC, S wrote to B, maintaining that the dispute be settled in accordance with the law of arbitration applicable in the seller's country. S did not, however, participate in the Russian proceedings, which in 2014 resulted in an award of approximately 4.5 million DKK in favour of B.

B then brought an action in a Danish Sherriff's Court (Fogedret) to enforce the ICAC award. Referring to §§ 38-39 of the Danish Arbitration Act (corresponding to articles 35 and 36 MAL), the Court held in favour of B, emphasizing that S had not met its burden of establishing circumstances set forth in § 39(1)(1)(a-e) of the Act (corresponding to article 36(1)(a)(i-v) MAL). Later, the Eastern High Court of Appeal (Østre Landsret) refused to consider an appeal by S of the Sheriff's Court's decision, this by virtue of certain formal issues in relation to the process for lodging the appeal, but in 2017, the Danish Supreme Court (Højesteret) reversed that ruling and remanded

[1] This case has been reported as CLOUT Case 1828 with respect to its aspects relating to the contract for international sale of goods.

the case to the High Court for reconsideration on the merits, holding that the case had been appealed correctly to the High Court.

Upon such reconsideration, the Eastern High Court held in favour of S. The main grounds set forth in support of this decision to refuse enforcement of the ICAC award are as follows:

1. The parties agree that their contract contains an arbitration agreement. The dispute, which concerns the jurisdiction of the ICAC, arose because the arbitration clause in the Russian and English language versions of the contract is not the same;

2. The parties further agree that their agreement is subject to the United Nations Convention on Contracts for the International Sale of Goods (CISG), and pursuant to article 8 CISG, the arbitration clause must be interpreted, to the extent possible, in accordance with the parties' mutual intent;

3. Since neither party understood the other's native language, the contractual negotiations were conducted in English. For this reason, the English version of the contract should be afforded special weight;

4. Regarding the negotiations, the parties intended to reach a compromise on the issue of jurisdiction, to the effect that an arbitral proceeding should be instituted in the domicile of the respondent. Thus, a case brought by S against B would be instituted in Russia, whereas a case by B against S would be instituted in Denmark. The third sentence of the arbitration clause in the English language version, which S during the negotiations had underlined, set in brackets, and labelled "OK", reflects this compromise, and, as S argued, the failure by B to delete the preceding sentence regarding ICAC arbitration for all disputes must be regarded as a mistake by B;

5. In 2010, i.e. prior to conclusion of the parties' sales contract in 2011, the Danish Chamber of Commerce ceased to administer arbitration cases and transferred all of its arbitration activities to the Danish Institute of Arbitration. Against this background, the arbitration clause in the contract must be interpreted to mean that B should have commenced its action at the Danish Institute of Arbitration. In this connection, B was held to have received sufficient information to institute such a proceeding;

6. By commencing a proceeding against S at the ICAC, B acted in contravention of the parties' arbitration agreement. For this reason, the ICAC was not competent to decide the dispute in question, and the ICAC award not enforceable in Denmark, cf. sec. 39(1)(d), as well as 39(1)(c), of the Danish Arbitration Act, corresponding to art. 36(1)(a)(iv) and 36(1)(a)(iii) MAL.

Case 1851: MAL 16(3); 34(2)(a)(iii)
Singapore: Court of Appeal
Civil Appeal Case No. 240 of 2017
Rakna Arakshaka Lanka Ltd v. Avant Garde Maritime Services (Pte) Ltd
9 May 2019
Published: [2019] SGCA 33
Available at: www.supremecourt.gov.sg

[**Keywords:** *estoppel; jurisdiction; procedure; arbitrators – mandate*]

The appellant and the respondent were Sri Lankan companies which agreed to form a public-private partnership to carry out certain projects. The parties entered into a series of agreements, which were subsequently incorporated into a master agreement dated 27 January 2014. That master agreement provided for the governing law to be the laws of Sri Lanka and for disputes to be settled by arbitration in Singapore in

accordance with the rules of the Singapore International Arbitration Centre ("SIAC"). The UNCITRAL Model Law on International Commercial Arbitration ("MAL"), except chapter 8, has the force of law in Singapore pursuant to section 3(1) of the International Arbitration Act (Chapter 143A) ("IAA").

The respondent commenced arbitration proceedings against the appellant and the SIAC confirmed the constitution of the arbitral tribunal ("Tribunal") on 30 September 2015. On 20 October 2015, the parties entered a memorandum of understanding ("MOU") in which they agreed to withdraw the arbitration. The appellant wrote to the SIAC requesting the Tribunal to discontinue the proceedings because of the MOU. The respondent subsequently sent a letter to the Tribunal stating that it was not in a position to withdraw the arbitration. The appellant did not respond.

On 19 December 2015, the Tribunal issued an interim order ("Order") holding that the arbitration ought to proceed. The appellant took no action except enquiring of SIAC about the progress of the arbitration. Above all, the appellant did not utilize the appeal procedure provided by article 16(3) MAL and section 10(3) IAA. The Tribunal issued the final award on 24 November 2016 ("Award").

The appellant applied to the High Court of Singapore to set aside the award, then appealed to the Court of Appeal ("Court") the decision of the High Court to dismiss the application. On the jurisdictional challenge pursuant to article 34(2)(a)(iii) MAL, the appellant submitted to the Court, among others, that it was not precluded from applying to set aside the Award and that the mandate of the Tribunal ended with the MOU.

The Court of Appeal found that the Order was a preliminary ruling on jurisdiction for the purposes of article 16(3) MAL and noted that the position on the preclusive effect of article 16(3) MAL was unsettled and had been left by the drafters to the individual national courts to decide in accordance with their own jurisprudence. The Court mentioned that the reason for the adoption of article 16(3) MAL was to effect a compromise between the policy consideration of avoiding wastage of resources, the wastage that results from the setting aside of an arbitral award for lack of jurisdiction after the entire arbitration has been completed, and the policy consideration of preventing parties from trying to delay arbitral proceedings by bringing challenges before the court.

The Court further reasoned that the law did not compel a respondent against whom arbitration proceedings have been started to take part in those proceedings and to defend its position, and in the absence of a clear duty on the respondent to participate in the arbitration proceedings, the Court found it difficult to conclude that a non-participating respondent should be bound by the award no matter the validity of its reasons for believing that the arbitration was wrongly undertaken. It concluded that article 16(3) MAL should not be construed so as to preclude a respondent who chooses not to participate in an arbitration because it has a valid objection to the jurisdiction of the tribunal from raising that objection as a ground to set aside an eventual award.

Turning to the substance of the application to set aside, the Court found that the MOU resolved the dispute between the parties and concluded that on and from the date of the MOU the mandate given to the Tribunal to decide the dispute between the parties had ended. Accordingly, the Court held that any decision on a dispute which an arbitral tribunal makes after the parties have agreed to withdraw the submission had to be by definition outside the scope of the submission within the meaning of the second limb in article 34(2)(a)(iii) MAL.

The Court allowed the appeal and set aside the Award because the Tribunal had no jurisdiction to conduct the arbitration proceedings after the conclusion of the MOU.

Case 1852: MAL 4; 20(1); 36(1)(a)(iv)
Singapore: Court of Appeal
Civil Appeal Case No. 113 of 2018; Civil Appeal Case No. 114 of 2018
ST Group Co Ltd and others v. Sanum Investments Limited
Sanum Investments Limited v. ST Vegas Enterprise Ltd
18 November 2019
Published: [2019] SGCA 65
Available at: www.supremecourt.gov.sg
[**Keywords:** *place of arbitration; arbitration agreement; arbitration clause; award – recognition and enforcement; enforcement*]

This case deals primarily with enforcement of an arbitral award made in a seat not chosen by the parties.

Sanum Investments Limited ("Sanum") is a company incorporated in Macao that carries on business in the gaming industry. Sanum entered into a contract ("Master Agreement") with ST Group Co, Ltd ("ST Group"), ST Vegas Co Ltd ("ST Vegas"), and Mr. Sithat. The Master Agreement contained an obligation to hand over a slot club in Laos to Sanum. It also contained a multi-tiered dispute resolution clause providing first for disputes to be submitted to the "Resolution of Economic Dispute Organization" (REDO), a Lao dispute resolution centre, or the courts of Laos and then, if one of the parties was unsatisfied with the results of that procedure, for the parties to "mediate and, if necessary, arbitrate such dispute using an internationally recognized mediation/arbitration company in Macau, SAR PRC".

Sanum then entered into a contract ("Participation Agreement") with ST Vegas Enterprise Ltd ("STV Enterprise"). The Participation Agreement also contained a multi-tiered dispute resolution clause, which similarly provided first for disputes to be submitted to the REDO or the courts of Laos but then, if one of the parties was unsatisfied with the results of the decision or judgment of that procedure, for the parties to "mediate and, if necessary, arbitrate such dispute using an internationally recognized mediation/arbitration at the Singapore International Arbitration Centre (SIAC), Singapore and the rules of SIAC shall be applied". Three additional agreements relating to the slot club were concluded, but none contained a dispute resolution clause.

A dispute arose between Sanum and ST Group, ST Vegas, STV Enterprise, and Mr. Sithat (the "Lao Parties") after delays in handing over the slot club. Following arbitration proceedings before the REDO and unsuccessful attempts to mediate, Sanum commenced arbitration proceedings against the Lao Parties in Singapore under the rules of the SIAC. The Lao Parties objected to the arbitration and did not participate in it. The arbitral tribunal found that the Master Agreement, the Participation Agreement, and the three sub-agreements had to be read together in order to determine the parties' intentions with respect to the slot club, and awarded Sanum damages for breach of contract. Sanum obtained leave to enforce the award in Singapore. The High Court's decision to affirm the leave was appealed to the Court of Appeal.

The Court of Appeal agreed with the High Court that the dispute only involved a breach of the Master Agreement, and accordingly that ST Group, ST Vegas and Mr. Sithat (but not STV Enterprise) were parties thereto and thus bound by the dispute resolution clause contained therein. The Court further agreed that Macao – not Singapore – was the rightful seat of arbitration under the dispute resolution clause contained in the Master Agreement.

The Court of Appeal explained that the Lao Parties did not waive their objection to the wrongful seating and composition of the arbitral tribunal since they had not participated in the arbitration proceedings (article 4 MAL, as enacted in Singapore under the International Arbitration Act (Cap. 143A)).

In its judgment, the Court of Appeal stressed the importance of the choice of the seat of arbitration as it determines the law applicable to the arbitration. The Court added

that the fact that both Macao and Singapore had enacted the MAL did not lessen the significance of the choice of seat given differences in how the MAL has been enacted in each jurisdiction. Stating that "party autonomy is of central importance to the legitimacy and binding nature of an arbitral award", the Court of Appeal concluded that, "once an arbitration is wrongly seated, in the absence of waiver of the wrong seat, any award that ensues should not be recognized and enforced by other jurisdictions because such award had not been obtained in accordance with the parties' arbitration agreement".

Case 1853: MAL 18; 34(2)(a)(ii)
Singapore: Court of Appeal
Civil Appeal Case No. 94 of 2018
China Machine New Energy Corporation v. Jaguar Energy Guatemala LLC and AEI Guatemala Jaguar Ltd
28 February 2020
Published: [2020] SGCA 12
Available at: www.supremecourt.gov.sg

[**Keywords:** *award – setting aside; due process; equal treatment*]

This case deals with the legal standard for setting aside an award for violation of the right to be heard.

In 2008, China Machine New Energy Corporation, contractor, and Jaguar Energy Guatemala, owner of the plant, entered into an engineering, procurement and construction contract for the construction of a power generation plant in Guatemala. The contract provided for disputes to be referred to arbitration in Singapore. In November 2013, the owner of the plant terminated the contract for breach by the contractor.

On 28 January 2014, the owner of the plant commenced arbitral proceedings against the contractor to recover the aggregate cost of completing the plant. On 25 November 2015, the tribunal rendered its award, in which it unanimously found that the contract had been validly terminated and substantially allowed the owner's claims on the cost of completing the construction.

On 25 February 2016, the contractor commenced proceedings in the High Court of Singapore to set aside the award. Among other things, it argued that the award had been obtained in breach of article 34(2)(a)(ii) MAL, as enacted in Singapore under the International Arbitration Act (Cap. 143A), and section 24(b) of the International Arbitration Act (Chapter 143A), since it had been deprived of a full opportunity of responding to the owner's claim regarding the cost of completing the plant. Specifically, the contractor argued that: (i) the restrictions placed on the disclosure of sensitive documents, albeit lifted in the end, severely hindered its ability to assess the cost of completing the plant; (ii) being forced to leave the construction site, it had lost access to documents relating to the work completed before the termination of the contract and necessary to assess the cost of completing the plant; and (iii) both the arbitral tribunal's failure to put an earlier stop to the respondents' rolling production of documents evidencing the cost of completion and the disorganized and haphazard manner in which they were produced resulted in the appellant not having sufficient time to prepare its response. On 26 April 2018, the High Court dismissed the application.

On appeal, the Court of Appeal observed that the right to be heard was a fundamental rule of natural justice enshrined in article 18 MAL and referred to each party's right to present its case and respond to the case against it. It added that the right to a "full opportunity" of presenting one's case was impliedly limited by considerations of reasonableness and fairness. It explained that what constituted a "full opportunity" was a contextual inquiry to be undertaken within the specific context of the particular facts and circumstances of each case. It also explained that the proper approach for the court to take was to ask itself if what the arbitral tribunal did (or decided not to

do) fell within the range of what a reasonable and fair-minded tribunal in those circumstances might have done. This meant that: (i) the tribunal's decisions could only be assessed by reference to what was brought to the attention of the tribunal at the material time; and (ii) the court would accord a margin of deference to the tribunal in matters of procedure and would not intervene simply because it might have done things differently.

The Court of Appeal dismissed the appeal accordingly.

Case 1854: MAL 1(5); 8
South Africa: Supreme Court of Appeal of South Africa
Case No. 768/2018
Atakas Ticaret VE Nakliyat AS v Glencore International AG
30 May 2019
Published: [2019] ZASCA 77
Available at: www.saflii.org

[**Keywords:** *procedure; judicial assistance*]

This case deals with the issue whether article 1(5) MAL affects the discretion of a South African court to join a party to litigation commenced by another party under the Admiralty Jurisdiction Regulation Act, Act No. 105 of 1983 ("AJRA") despite the evidence of an arbitration agreement between the parties covering the dispute.

The appellant purchased a consignment of coal from the respondent and chartered a vessel to carry the consignment from a port in South Africa to Turkey. Due to an explosion in the vessel shortly after the loading had been completed, the voyage had to be abandoned and the coal unloaded. The appellant commenced an admiralty action in the first-instance court for damages against the operator of the coal terminal, Richards Bay Coal Terminal ("RBCT"). In its defence, RBCT asserted, among other things, that the appellant's claim lay against the respondent, as the seller, for breach of the sale contract. For this reason, the appellant applied to the first-instance court to join the respondent in the action in accordance with the AJRA.

The respondent opposed the joinder application by arguing that the sale contract contained an arbitration agreement and, based on article 8 MAL (incorporated into the International Arbitration Act of South Africa, Act No. 15 of 2017 ("IAA")), the first-instance court was required to stay the court proceedings and refer the matter to arbitration unless it found the sale contract to be null and void, inoperative or incapable of being performed. This argument was accepted by the first-instance court.

On appeal, the Court considered the interaction between the AJRA and the IAA. It observed that the AJRA was "a special Act which governs all admiralty matters" that come before the courts of South Africa, and that it contained its own provisions on referring matters to arbitration and on staying proceedings to enable a dispute to be referred to arbitration. It then observed that applying the provisions of the IAA – notably article 8 MAL – to the jurisdiction of the courts under the AJRA would "put a red line through those provisions of the AJRA", which would be contrary to the rule of statutory interpretation under South African law according to which a court must read statutes together and that a later statute (i.e., the IAA) must not be construed so as to repeal the provisions of an earlier statute (i.e., the AJRA).

Against this background, the Court considered article 1(5) MAL and observed that the phrase "any other law" in that provision "plainly encompasses the AJRA". Accordingly, it found that the IAA "left untouched" the discretion of the courts under the AJRA to join the respondent in the application. The Court then proceeded to decide, in the circumstances, to exercise the discretion and ordered the joinder of the respondent.

Case 1855: MAL 3; 34 (2)(a)(ii)
Ukraine: Supreme Court
Case No. 761/17236/17
Altum Air Inc. v. Windrose Aviation Company (Altum Air Inc. v. Roza Vetrov Aviation Company LLC)
9 October 2019
Original in Ukrainian
Published in Ukrainian in the Unified State Register of Court Decisions
Available at: www.reyestr.court.gov.ua

Abstract prepared by Gennady Tsirat, National Correspondent

[**Keywords:** *place of business; writings-receipt*]

The American company Altum Air Inc. and the Ukrainian airline Roza Vetrov signed a contract for the supply of spare parts. According to the arbitration clause contained in the contract, disputes between the parties were to be submitted to the International Commercial Arbitration Court (ICAC) at the Chamber of Commerce and Industry of Ukraine and Ukrainian law would apply.

When arbitration proceedings were brought against Roza Vetrov, the airline company did not participate in those proceedings, even though it had been notified of the proceedings in accordance with the ICAC Rules (as revised in 2007) and the International Commercial Arbitration Act of Ukraine.

Altum Air Inc., having obtained a ruling in its favour from ICAC, filed an application for the recognition and enforcement of the ICAC award with the Podilskii District Court of Kyiv (the court of first instance closest to the respondent's location) (case No. 758/4900/17). Roza Vetrov in turn submitted an appeal against the ICAC award to the Shevchenkivskii District Court of Kyiv (the district court closest to the seat of the arbitration) (case No. 761/17236/17). Although the Podilskii District Court of Kyiv did not suspend the proceedings while the application to set aside the ICAC award was being considered, its consideration of the application for recognition and enforcement of the award was repeatedly postponed pending a final decision with regard to the setting aside of the award.

In its application for the setting aside of the ICAC award, Roza Vetrov claimed that it had not been duly notified of the appointment of the arbitrator or of the arbitration proceedings, since all of the ICAC notices, except for the final notice containing the award itself, had been received by persons not granted special power of attorney by the airline. On that basis, Roza Vetrov claimed that the company did not know and could not have known about the ICAC arbitration proceedings brought against it.

The Shevchenkivskii District Court of Kyiv upheld the appeal of Roza Vetrov and set aside the ICAC award.

Altum Air Inc. filed an appeal against that decision with the Kyiv Court of Appeal. The Court of Appeal, in its decision of 3 April 2019, overturned the ruling of the Shevchenkivskii District Court of Kyiv and upheld the ICAC decision on the grounds that "local acts of Roza Vetrov Aviation Company LLC in respect of the persons authorized to receive correspondence cannot be determinative in resolving the question of whether the person was properly notified of the arbitration proceedings. As to what constitutes proper notification, the ICAC Rules and the International Commercial Arbitration Act of Ukraine do not require an international commercial arbitration tribunal or any party to a dispute to submit any evidence that a written notice has been served on a party in accordance with that party's internal procedures, since any attempt to follow such procedures would inevitably make it impossible to serve any written notice of arbitration proceedings on a party that did not wish to participate in those proceedings. Thus, regardless of which employee of Roza Vetrov Aviation Company LLC took delivery of the letter, the fact that the letter was delivered to the address of the declarant's commercial enterprise constitutes proper notification of the party and the person concerned should be considered as having been notified of the arbitration proceedings."

Roza Vetrov filed an appeal against the decision of the Kyiv Court of Appeal with the Supreme Court.

The Supreme Court, in its decision of 9 October 2019, upheld the cassation appeal of Roza Vetrov and overturned the decision of the Kyiv Court of Appeal of 3 April 2019, thus upholding the decision of the Shevchenkivskii District Court of Kyiv to set aside the ICAC award.

The Supreme Court ruled that: (1) when sending correspondence, the arbitral tribunal must take into account not only the legal address but also the address of the actual location of the company; dispatch to an address other than the address where the company's headquarters is located, even if that address is a leased office, and not to an address listed in the State register does not constitute proper notification to such company; and that (2) a company may be considered to have been properly notified only if the notification is received by a person authorized by the company's internal documents (granted power of attorney). Delivery only to the commercial address of the enterprise without delivery of the correspondence by hand to an authorized person of such company does not constitute proper notification to the company.

Case 1856: MAL 6, 34(2)
United Kingdom: Privy Council
Case No. Appeals 0084 and 0089 of 2018
Peepul Capital Fund II LLC and another v. VSoft Holdings LLC
19 December 2019
Available at: www.bailii.org

[**Keywords:** *public policy*]

This case deals with a request to set aside an arbitration award under section 39(2) of the International Arbitration Act 2008 of Mauritius (MIAA), which is based on article 34(2) MAL.

VSoft Holdings LLC (VSoft) and Peepul Capital Fund II LLC (Peepul) are companies incorporated in Mauritius. Millenium Strategic Group Limited (Millenium) is incorporated in the British Virgin Islands. In late 2006, Peepul and Millenium invested $8 million in VSoft in exchange for an equity shareholding. The relationship between VSoft and Peepul was governed by an "Investment Agreement", which provided Peepul with an option to request an exit for a minimum return on its investment. Peepul requested the exit. Although not party to the Investment Agreement, Millenium also requested an exit on the same terms. The parties eventually agreed to a "Shareholders Agreement", which provided for the surrender by Peepul and Millenium of their shares in VSoft for US$17 million, payable by VSoft in three tranches. Peepul and Millenium surrendered their shares, but VSoft failed to make payment.

Among other things, Peepul and Millenium claimed payment from VSoft under the Shareholders Agreement. The parties agreed to resolve the dispute by arbitration in Mauritius under an ad hoc arbitration agreement.

On 8 January 2015, the single arbitrator rendered an award in favour of Peepul, in which it found that counsel for VSoft had conceded that the claim under the Shareholders Agreement was not in dispute but only the determination of its quantification.

VSoft applied to the Supreme Court of Mauritius to set aside the award under section 39(2) MIAA. It argued that: (1) the arbitrator had determined the dispute against VSoft without ruling upon the substantial matters in issue, in breach of the rules of natural justice within the purview of section 39(2)(b)(iv) MIAA; (2) VSoft was unable to present its case, within the meaning of section 39(2)(a)(ii) MIAA, due to an intervention by the arbitrator during closing submissions; and (3) the award conflicted with the public policy of Mauritius, within the meaning of section 39(2)(b)(ii) MIAA (which corresponds to article 34(2)(b)(ii) MAL). The Supreme Court rejected the

application. The decision of the Supreme Court was appealed to the Judicial Committee of the Privy Council under section 42 MIAA.

The Board of the Privy Council (Board) rejected the arguments of the appellant. In particular, it found that there was no substance in the argument that the award conflicted with the public policy of Mauritius due to the risk of a double recovery in the form of a continued enjoyment of shareholder benefits despite full payment by VSoft. In that regard, the Board acknowledged that Peepul and Millenium had surrendered their shares and found that the administrative steps needed to cancel them was a matter within VSoft's control.

The Board noted in a postscript that the right of appeal to the Privy Council under the MIAA conferred "a wider avenue of appeal than almost any comparable jurisdiction with a law of arbitration based on the UNCITRAL Model Law", and indicated that this might run counter to the exigencies of speed in dispute settlement.

Case 1857: MAL 9
United States: Supreme Court of Louisiana
Case No. 2018-CQ-1728
Stemcor USA Incorporated. v. Cia. Siderurgica do Pará Cosipar
8 May 2019
Published: 2018-1728 (La. 05/08/19) 2019 La. LEXIS 1350, 2019 WL 2041826, 283 So.3d 1014 (La. 2019)
Available at: http://www.lasc.org

Abstract prepared by John Rooney and Danielle Tubert

[**Keywords**: *arbitration agreement; courts; interim measures; procedure*]

This case deals primarily with whether under the law of Louisiana a party may obtain a writ of attachment in aid of arbitration under a statute that permits such relief for actions for money judgements.

Two companies, Daewoo International Corp. and Thyssenkrupp Mannex GmbH ("TKM") entered into unrelated contracts with America Metals Trading L.L.P. for the purchase of pig iron. The Daewoo contract had an arbitration clause. The TKM contract did not. America Metals Trading L.L.P. collected the sales price in both cases but did not deliver the goods to either buyer. Daewoo initiated an action in federal court to compel arbitration and sought a writ of attachment over the seller's pig iron located in Louisiana. TKM filed suit in a Louisiana state court, and then intervened in the Daewoo suit in federal court and also sought a writ of attachment. As a result, pig iron stowed on a vessel in Louisiana owned by the seller was the subject of two separate writs of attachment.

The federal district court granted the TKM writ and dismissed the Daewoo writ. The dismissal of the Daewoo writ was based on the conclusion of the court that the motion to compel arbitration was not an action for a money judgment as required by Article 3542 of the Louisiana Code of Civil Procedure (CCP), which is Louisiana pre-judgment attachment statute, and therefore could not be a basis for pre-judgment attachment of the seller's property. Moreover, the lower court, indicating that Louisiana had not adopted the MAL, could not find any legislative support in Louisiana for pre-award attachment in aid of arbitration. Pursuant to the TKM writ, the seller's pig iron subject to the writ was sold and the proceeds deposited into the registry of the court.

On appeal, the United States Court for the Fifth Circuit initially vacated the district court's order. It first found that the motion to compel arbitration was not an action for a money judgment but affirmed under other grounds. On rehearing, the appellate court affirmed the decision of the lower court, agreeing once again that the motion to compel was not an action for a money judgment. The Court of Appeals certified the question to the Louisiana Supreme Court.

The Supreme Court of Louisiana held that attachment in aid of arbitration is permitted if the underlying arbitration claim is pursuing money damages and the arbitral party has satisfied the statutory requirements necessary to obtain writ of attachment. Based on Louisiana principles of statutory interpretation, the Court found that a motion to compel arbitration fit within the meaning of the words "in any action for a money judgment" contained in article 3542 CCP. The Court also found that the term "action" included an arbitration.

The Court indicated that its interpretation of article 3542 CCP was "all the more reasonable" when considered in conjunction with Louisiana Revised Statutes 9:4249, which reproduces verbatim article 9 MAL.[2] Noting that Louisiana Revised Statutes 9:4249 did not establish specific interim remedies, the Court found that it reflected Louisiana's policy that then-existing interim measures under Louisiana law were equally applicable in arbitration and that attachment was one such interim measure. The Court explained that the enactment of Louisiana Revised Statutes 9:4249 without indicating any particular provisional measures would be illogical unless the intention of the legislature was to apply existing provisional remedies to arbitration actions. The Court also reproduced paragraph 22 of the MAL Explanatory Note, which refers to pre-award attachment as an interim measure compatible with an arbitration agreement.

Noting that Louisiana Revised Statutes 9:4249 (enacting article 9 MAL) "is consistent with Louisiana's policy of fostering a legal climate conducive to international arbitration", the court concluded that to "exclude a creditor from seeing the protection of Article 3542 simply because its contract with the debtor mandated arbitration of this dispute would undermine our state's policy favouring arbitration agreements".

[2] La. R.S. 9:4249, enacted as part of Louisiana's "International Commercial Arbitration Act:," La. R.S. 9:4241 *et seq*,. The Court also noted that the lower federal court was incorrect in stating that Louisiana had not enacted the MAL.