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CASE LAW ON UNCITRAL TEXTS (CLOUT)

Contents

INTRODUCTION

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V.01-84723 (E)

I. CASES RELATING TO THE UNITED NATIONS SALES CONVENTION (CISG)

Case 376: CISG 61; 62; 78
Germany: Landgericht Bielefeld; 12 O 120/95
2 August 1996
Original in German
Unpublished

A German seller, the plaintiff, and an Italian buyer, the defendant, held long-standing business relations in respect of the delivery of living pigs. The seller negotiated with the buyer who was accompanied by another Italian cattle-dealer, X. The parties agreed on the delivery of pigs and X paid cash and by cheque. When the cheques had been dishonoured the seller sued the buyer for the outstanding purchase price and the costs of the dishonoured cheques. The buyer argued that X had been the one to be bound by this agreement.

The claim was successful. The Court found that the seller had proved the buyer's willingness to be bound during the negotiation and that accordingly it had to pay the outstanding purchase price (article 62 CISG). Moreover, the buyer had to bear the costs for the dishonoured cheques under article 61 CISG.

The Court granted interest pursuant to article 78 CISG and established the rate of interest under German law.

Case 377: CISG 31(a); 33; 36; 39; 40; 50; 53; 57(1)(a); 57(1)(b); 58; 66; 74; 78
Germany: Landgericht Flensburg; 2 O 291/98
24 March 1999
Original in German
Unpublished

A German seller, the plaintiff, delivered meat products to a French buyer, the defendant. When the buyer failed to pay the purchase price the seller sued. After the proceedings had started, the buyer paid part of the purchase price. It objected to the court's jurisdiction and declared that the meat had been undetectably perished when it arrived and therefore had been returned by its customers. As to the delayed payment, the buyer argued that its cheque had been returned dishonoured. The seller reduced its demand and claimed damages for inadmissible delay instead.

The Court found to have jurisdiction according to article 5(1) of the Brussels Convention on Jurisdiction and Enforcement of Judgements in Civil and Commercial Matters. Thereunder jurisdiction is dependant upon the place of performance. The Court determined the place for payment under article 57(1)(a) CISG at the seller's place of business in Germany. It refused to consider the place where the handing over of the goods took place under article 57(1)(b) CISG because payment had not to be made against the handing over of the goods or of documents in the case at hand.

The Court allowed the claim under article 53 CISG because the outstanding purchase price was due under article 58 CISG. The buyer was not entitled to reduce the purchase price under article 50 CISG for non-conformity of the goods. As the parties did not agree otherwise, the seller had to hand over the goods to the first carrier (article 31(a) CISG). The seller handed over the goods accordingly and therefore the risk passed to the buyer pursuant to article 36 and article 66 CISG. The Court left open whether the goods had been defective at this moment or not. As the buyer accepted the goods without objecting to its quality, it had to prove that the goods did not conform to the contract when the risk passed; however, the buyer failed to do so. The Court also left open the issue of whether the buyer lost his right to rely on a lack of conformity because of its failure to give notice within reasonable time (article 39 and 40 CISG).

The Court granted interest pursuant to article 78 CISG and established the rate of interest under German law.

As to the lateness of payment, the Court held that the buyer was entitled to claim damages under article 74 CISG. The Court was of the opinion that CISG does not govern the period of time for payment. Thus, the Court established it according to the rules of private international law under German law according to which the payment had been delayed in an inadmissible way.

Case 378: CISG 7(1), 6, 39(1), 7(2)
Italy: Tribunale di Vigevano (Judge A. Rizzieri)
Date: 12 July 2000
Rheinland Versicherungen v. S.r.l. Atlarex and Allianz Subalpina s.p.a.
Original in Italian
Published in Italian: Giurisprudenza italiana 2000, 280-290.
Commented on by Ferrari, Giurisprudenza italiana 2000, 281-285; Ferrari, Revue de droit des affaires internationales 2001, 224-230.

An Italian seller delivered vulcanized rubber to a German buyer for the production of shoe soles. The soles produced by the buyer were sold on to an Austrian manufacturer who produced a certain number of shoes and commercialized them in Russia. Upon receiving complaints from its Russian customer, the Austrian manufacturer turned to the buyer who commenced legal action against the seller alleging lack of conformity of the raw material.

In its judgement, the Court relied for each issue on a number of decisions on the CISG already rendered by foreign courts and arbitral tribunals. Though precedents in international case law cannot be considered legally binding, in the Court's opinion they have to be taken into account by judges and arbitrators in order to promote uniformity in the interpretation and application of CISG (Art. 7(1) CISG).

According to the Court, while the parties are free to exclude application of CISG either expressly or impliedly (Art. 6 CISG), the mere reference to domestic law in the parties' pleadings is not in itself sufficient to exclude CISG. To this effect parties must first of all be aware that CISG would be applicable and moreover intend to exclude it.

As to the buyer's claim to damages for lack of conformity, the Court observed – referring to several international decisions on the same issue – that the "reasonable time" for notice under Art. 39(1) CISG depends on the circumstances of each case and on the nature of the goods. It starts running as from the time when the buyer is required to examine the goods under Art. 38(1), which as a rule is upon delivery or shortly thereafter and only exceptionally may be later, for instance when the defect is discoverable only by processing the goods.

In the case at hand, the Court held that a notice given four months after delivery was not timely. Indeed, even supposing that the defects could not have been discovered at delivery, the buyer should have discovered them at the latest when processing the goods and given notice immediately thereafter, while it waited until it received complaints by its own customer. A different conclusion could be drawn only if it were proved that the alleged defects were not discoverable during processing. The burden of bringing evidence thereof falls however on the buyer, who in the case at hand failed to bring such evidence.

Nor had the buyer sufficiently specified the nature of the lack of conformity according to Art. 39(1) CISG. A mere statement that the goods "caused problems" or "present defects" does not enable the seller to determine its conduct regarding the alleged lack of conformity.

Finally, the Court examined the question of the burden of proving the lack of conformity of the goods. The Court rejected the opinion that the burden of proof is a question excluded from CISG and governed by the applicable domestic law (Art. 4, first sentence, CISG). On the contrary, it held that the burden of proof is a matter governed but not expressly settled by CISG, and which therefore has to be settled in conformity with the general principles underlying CISG (Art. 7(2) CISG). In the Court's view, it is a general principle underlying the CISG that the claimant should bring evidence in favor of its cause of action. Such principle may be derived *inter alia* from Art. 79(1) CISG which expressly states that the non performing party must prove the circumstances exempting it from liability for its failure to perform, thereby implicitly confirming that it is up to the other party

to prove the fact of the failure to perform as such. Therefore, it is up to the buyer to prove the existence of a lack of conformity and the damage ensuing from it.

Case 379: CISG 57
Italy: Corte di Cassazione, sez.un.
Date:14 December1999
Imperial Bathroom Company v. Sanitari Pozzi s.p.a.
Original in Italian
Published in Italian: Giustizia civile, 2000, 2333-2334.
Commented on by: Ferrari, Giustizia civile, 2000, 2334-2342.

A company having its place of business in Italy and a company having its place of business in Great Britain entered into an agreement providing for the sale and the distribution of goods. The Italian company sued the British company claiming termination of the agreement due to the latter's failure to fulfill its obligations thereunder (i.e., to buy and distribute the goods on the British market and to pay the price), as well as damages.

The Supreme Court retained jurisdiction of the Italian Courts pursuant to article 5(1) of the Brussels Convention and to article 4 of the Rome Convention: the first states that jurisdiction belongs to the country where the obligation was or has to be fulfilled, the second leads to the application of Italian law, Italy being the place in which the characteristic obligations of the agreement had to be fulfilled.

However, the Supreme Court also supported its view by way of mentioning article 57(1)(a) of the CISG, according to which the price must be paid at the seller's place of business and highlighted that this article sets forth a general rule the application of which can only be avoided on the basis of a provision, either legal or contractual, providing for a place of payment other than the seller's place of business. Accordingly, the decision relied on the assumption that the CISG is applicable not only to sales, but also to distribution agreements, provided that these can be construed as accessory clauses to a sale agreement.

Case 380: CISG 7, 78, 79
Italy: Tribunale di Pavia (Judge Frangipani)
Date: 29-12-1999
Parties: Unknown
Published in Italian:Corriere Giuridico, 2000, 932-933.
Commented on by Ferrari, Corriere Giuridico 2000, 933-939; Ferrari, Revue de droit des affaires internationales 2001, 224-230; Graffi, European Legal Forum 2001, 240-244.

An agreement for supply of fashion fabric was entered into between a company having its place of business in Italy and a company having its place of business in Greece, prior to ratification of the CISG by Greece. The Italian supplier sued the Greek company for the payment of the price, as well as of interests and damages.

In awarding payment to the plaintiff, the Court retained the applicability of the CISG pursuant to article 1(1)(b), since the Italian rules of conflict of laws led to the application of Italian law and Italy was a Contracting State at the time when the agreement was entered into. It also held that uniform substantive law prevails over the conflict of laws rules due to its speciality.

The Court held that the rate of interest is not settled by the Convention itself, since article 78 merely states that failure to pay the price or any other sum due entitles the other party "to interest on it". Therefore, the issue has to be settled in conformity with the national law applicable by virtue of the rules of private international law.

The Court also highlighted that, under article 78, title to interests does not prejudice the right to claim damages and that it is the party claiming damages who has to prove them, according to the principle underlying article 79.

Finally, the Court recognized that foreign decisions, though not binding, should be taken into account by the judge in construing and applying the Convention; this according to article 7 (1), which expressly provides that "regard has to be taken" to the international character of the convention and the need to promote uniformity in its application.

II. CASES RELATING TO THE UNCITRAL MODEL ARBITRATION LAW (MAL)

Case 381: MAL 8
Canada: Federal Court of Canada, Appeal division (Linden, Sexton and Malone, JJA))
May 24, 2000
Fibreco Pulp Inc. v. Star Shipping A/S
Original in English
Published in English: [2000] 257 N.R. 291, F.C.J. No. 889 (F.C.A.), affirming [1998] F.C.J. No. 297 (1998), 156 F.T.R. 127 (Fed. T.D.), affirming (1998), 145 F.T.R. 125 (Fed. T.D.)

This was an application to stay proceedings. The case involves the shipment of 2 loads of wood pulp from British Columbia to Finland via Rotterdam. Two ships, owned by different owners, carried the wood pulp from B.C. to Rotterdam. Two other ships owned by two other owners carried the wood pulp from Rotterdam to Finland. When the ships were unloaded in Rotterdam, the wood pulp was found to be damaged. Altogether there were 5 plaintiffs and 10 defendants (including the ships themselves) named in the action. The parties and the ships have close connections with various jurisdictions including British Columbia, Sweden, Finland, Norway, Liberia, Bermuda, U.S.A., Panama, Japan and Denmark. As is readily apparent, the facts are complex. They are clearly set out in the reasons of the Prothonotary reported at (1998) 145 F.T.R. 125.

The defendants entered conditional appearances to bring motions to stay proceedings along with other procedural claims.

The application was allowed. The contract of affreightment contained an arbitration clause which was binding on two of the main parties. The contract of affreightment also bore the signature of Fibreco, the Canadian pulp producer and plaintiff, which indicated its awareness of the arbitration clause if not necessarily its legal submission to it. The decision to stay the Canadian proceedings until the arbitration took place between the parties involved therein was considered to be the most efficient means of litigating the issues between the various parties. As a result, the court used its discretion to stay proceedings and did not refer all of the parties to arbitration.

Case 382: MAL 8(1), 16
Federal Court of Canada, Trial Division (Hargrave P.)
January 9, 1998.
Methanex New Zealand Ltd. v. Fontaine Navigation S.A., Tokyo Marine Co. Ltd, The Owners and all Others Interested in the Ship Kinugawa (The)
Original in English
Published in English: [1998] 2 F.C. 583, 142 F.T.R. 81 (Fed. T.D.)

These were two separate motions to stay an action for damage to a cargo of methanol carried from British Columbia to Japan in the Panamanian tanker Kinugawa. The defendant, Tokyo Marine Co. Ltd., sought to arbitrate in London, as provided in the contract of affreightment (COA), dated February 24, 1994. The defendant, Fontaine Navigation S.A., sought to litigate in Japan, as provided in the bill of lading. While the COA provided for issuance of bills of lading in the form annexed to the contract, no bill of lading was ever annexed. An unsigned Tokyo Marine Co. Ltd. bill of lading, dated August 7, 1995, was subsequently issued. The bill of lading required that any disputes be subject to the jurisdiction of the Tokyo District Court and that if there was a conflict with the charter party (COA), the jurisdiction clauses in the bill of lading would prevail.

The Court refused to send the parties to the COA to arbitration in London. The Court's interpretation of art. 8 was that the existence of a dispute was required in order to refer the parties to arbitration and that a court was entitled to consider this prerequisite in applying art. 8.

In this case, the plaintiff argued that the defendant Tokyo Marine had no defense to the contamination claim. The Court accepted this and concluded that a party cannot give notice of arbitration unless there is a disputed claim, and a court will not order a stay of an action in favour of arbitration if there is no genuine dispute. While the Court noted that the arbitral tribunal was entitled to determine its own jurisdiction under art. 16, a court was also entitled to make this determination in applying
art. 8.

The Court also held that Tokyo Marine was estopped from invoking the arbitration clause because of a letter of undertaking it had signed in favour of the plaintiff agreeing to litigation in Canada. Similarly to parties to a jurisdictional clause, parties to a contractual arbitration clause may recast their dispute resolution mechanism to supersede arbitration with litigation.

Litigation in the Tokyo District Court was not an option for Tokyo Marine Co. Ltd., because there was no evidence that it was a demise charterer of the Kinugawa, which is a requirement to qualify as a carrier under the bill of lading and thereby fall within the Tokyo District Court jurisdiction clause in the bill of lading.

London arbitration was not an option for Fontaine Navigation S.A. because, although the COA was in the guise of a charter party and was incorporated into the bill of lading, the Tokyo jurisdiction clause in the bill of lading clearly overrode the arbitration provision in the COA. Having signed the letter of undertaking, however, the defendant was also precluded from invoking the forum selection clause.

The motions were denied.

Case 383: MAL 1(2), 5, 8, 16
Canada: Ontario District Court (Mandel D.C.J.)
October 27, 1989
Deco Automotive Inc. v. G.P.A. Gesellschaft Fur Pressenautomation MbH
Original in English
Published in English: (1989) O.J. No. 1805
Comments: Branson (2000) 1 Arb. Int'l 37-38; Patterson (1993) 10 J. Int'l Arb. 29-43.

The plaintiff (Deco) purchased an automated transfer system produced by the defendant (GPA), a German corporation. The system was delivered in the Fall of 1986. Differences between the parties were not resolved and on May 9, 1988 GPA issued a claim at the I.C.C. Court of Arbitration for DM 452,230.745 for the balance owing in respect of the transfer systems.

The parties had originally agreed to this arbitration but Deco subsequently claimed that the agreement had involved fraud by GPA and thereafter challenged the jurisdiction of the I.C.C. and commenced proceedings in Ontario against GPA. GPA responded with a motion to stay the action in Ontario. The motion was argued on two bases : first that the parties had agreed to arbitrate any differences in their original contract and that there was an arbitration at that time pending before the I.C.C.; and secondly, that Ontario was not the convenient forum to try the dispute.

The judge concluded that the subject matter of the action commenced by Deco which included damages for misrepresentation (fraudulent or otherwise), breach of contract, inherently defective equipment and negligent performance of contract were not covered by an arbitration clause. Despite the fact that the I.C.C. arbitrator was already seized of the jurisdictional issue, the Court refused to wait for its decision, holding that art. 16 of the MAL did not apply. This conclusion was based on the territorial limitation in art. 1(2) and the fact that art. 5 and art. 16 are not listed as exceptions to this territorial limitation. Since the I.C.C. arbitration was taking place in London, England, the Ontario court concluded that the question of the stay was to be decided solely in accordance with the common law and not according to principles expressed in the MAL. Since the

Court concluded that there was no agreement to arbitrate included in the agreement between the parties, he refused to order a stay of proceedings despite the existence of the arbitral proceedings at the I.C.C.

Case 384**:** MAL 3
Canada: Ontario Court of Justice - General Division (Gray J.)
April 26, 1991
Skorimpex Foreign Trade Co. v. Lelovic Co.
Original in English
Published in English: [1991] O.J. No. 641

Skorimpex, a Polish state trading company and Lelovic Co., a Canadian importer based in Ontario, have been dealing with each other since 1957. Lelovic Co. purchased men's and women's footwear manufactured in Poland.

Following a dispute between the parties, an arbitration was undertaken and an award rendered in Skorimpex's favour. Lelovic objected to the enforcement of the award in Ontario on the ground that it had not received notice of the arbitration procedure. Skorimpex replied that it had taken all reasonable steps to notify Lelovic, in accordance with art. 3 of the Model Law.

The Arbitrators held that notices had been sent to Lelovic Co. at three addresses and that Skorimpex had made a reasonable inquiry as to Lelovic's address and had used all known addresses. As a result, the arbitration proceeded in the absence of the defendant.

The court agreed that the requirements of art. 3 of the Model Law had been met on the issue and agreed with the finding of the arbitral tribunal that the claimant used all addresses known.

Case 385: MAL 35, 36
Canada: Ontario Court of Justice - General Division (Somers J.)
December 19, 1994.
Murmansk Trawl Fleet v. Bimman Realty Inc.
Original in English
Published in English: [1994] O.J. No. 3018

Murmansk Trawl Fleet and Bimman Realty entered into an agreement for the processing of fish skins into a leather product. The case does not specify the origins of the parties but their contracts refers to the Russian and English texts of their agreement thereby indicating the international nature of their relationship. A dispute arose between the parties and an arbitral award was rendered in New York against Bimman.

Murmansk sought enforcement in Ontario but Bimman objected, citing art. 36 of the MAL. Bimman claimed that the award was not binding in New York as it had not been confirmed by a New York court in accordance with state or federal law.

The Court rejected this argument given that confirmation under New York law related only to enforcement in New York. Enforcement in Ontario was governed by the MAL and not New York state law. An order for the enforcement of the New York arbitral award was made.

Case 386: MAL 8, 9, 17
Canada: Ontario Court of Justice (Sedgwick J.)
June 8, 1995.
ATM Compute GmbH v. DY 4 Systems, Inc.
Original in English
Published in English: [1995] O.J. No. 1678

The German applicant was the exclusive distributor in Germany of electronic printed circuits manufactured by the respondent, apparently an Ontario company. Following an alleged repudiation by the applicant, the respondent terminated the agreement. This agreement provided for arbitration before the Arbitration Court of the International Chamber of Commerce Zurich/Switzerland. Intending to bring the matter to arbitration, the distributor asked the Ontario court to refer the parties to arbitration pursuant to Article 8 of the Model Law and to grant interim measures of protection pursuant to Article 9.

The application was dismissed. While the Court held that the arbitration clause in the parties' agreement was one to which the Model Law would apply, there was no action pending in Ontario. There was also no evidence that the applicant served notice on the respondent of its wish to arbitrate the disputed matters but only of its intention to do so. The application under art. 8 was therefore premature. On the issue of interim measures, the Court noted that these could be ordered by the arbitral tribunal, in accordance with art. 17 and that these would be enforceable in Ontario under art. 9.

Case 387: MAL 8
Canada: Ontario Court of Justice (Jarvis J.)
February 20, 1996.
Duferco International Investment Holding (Guernsey) Ltd. v. Pan Financial Insurance Co.
Original in English
Published in English: (1996), 7 W.D.C.P. (2d) 135, [1996] O.J. No. 549

Duferco brought an action for damages arising from the seizure of oil drilling equipment by Iranian authorities. This equipment was covered under a policy of insurance issued by the insurers. The policy contained exclusions which might apply to the losses in question. The policy provided that disputes shall be submitted to arbitration at the London Court of International Arbitration and that any questions of the contract shall be governed by the laws of England.

Duferco relied on an interpretation of the arbitration clause that would permit it to sue in Ontario "in the event of the failure of the underwriter herein to pay any amount". Duferco argued that the payment not having been made under the policy that an action in Ontario is appropriate. Duferco submitted that the contract was ambiguous on this point and ought to be interpreted in its favour.

The Court rejected this argument, citing the general policy of Ontario law to foster arbitration and the contract itself. It found that the meaning that Duferco sought to give to the arbitration clause was incompatible with the clear intent of this policy and was inconsistent with the context within which it appeared. It therefore refused to invoke the rule of contra preferentem and referred the parties to arbitration.

Case 388: MAL 8
Canada: Ontario Court of Justice (Kiteley J.)
March 31, 1998.
Temiskaming Hospital v. Integrated Medical Networks, Inc.
Original in English
Published in English: (1998) 59 O.T.C. 48, 46 B.L.R. (2d) 101, O.J. No. 1309

Temiskaming is a public hospital which operates in New Liskeard, Ontario. Integrated Medical Networks, Inc. (“Integrated”) is a company incorporated pursuant to the laws of the State of Delaware. Its place

of business is in Texas. IMN is a limited liability company organized pursuant to the laws of the State of Texas and carrying on business in Texas.

IMN guaranteed the obligations of Integrated pursuant to three contracts. In November, 1995, Integrated and Temiskaming entered into three contracts which provided that Integrated would supply computer hardware and software services to Temiskaming. The contracts included two sections, one entitled “Remedies” and the other “Dispute Resolution”. The former detailed specific default events which would entitle one party to begin court proceedings against the other. The latter referred all disputes to arbitration in Texas in accordance with the rules of the American Arbitration Association.

In August, 1997, the plaintiff instituted proceedings in Ontario, claiming damages for breach of contract and misrepresentation and a declaration that the plaintiff was entitled to treat itself as discharged from its contracts with Integrated. The defendant responded with a motion to stay in accordance with art. 8 of the MAL.

The Court dismissed the motion. While the Court recognized the policy favouring arbitration in Ontario, it held that the primary issue was to determine whether the dispute in question was subject to arbitration according to the terms of the contract. The Court held that the contract was not ambiguous in allowing court proceedings for specifically listed default events while retaining arbitration for all other disputes. In this case, the Court found that the claims fell within the specified events of default and that the arbitration clause did not apply. Since art. 8 MAL required that there be a dispute subject to arbitration, the Court was obliged to make that determination prior to any reference to arbitration.

Case 389: MAL 8
Canada: Ontario Court of Appeal (Finlayson, Austin and Borins JJ.A.)
July 8, 1999.
Canadian National Railway Company, Grand Trunk Western Railroad Incorporated, St. Clair Tunnel Company and St. Clair Tunnel Construction Company. v. Lovat Tunnel Equipment Inc.
Original in English
Published in English: (1999) 174 D.L.R. (4th) 385, 122 O.A.C. 171, 37 C.P.C. (4th) 13, O.J. No. 2498

The defendant, Lovat Tunnel Equipment, is a corporation engaged in the design, construction and supply of tunnel equipment, with its head office in Etobicoke, Ontario. The plaintiff, CNR, is a company incorporated pursuant to the laws of Canada and carries on business in the Province of Ontario as a railway. GTW is a company incorporated pursuant to the laws of the State of Delaware. The two other plaintiffs are wholly owned subsidiaries of CNR, incorporated pursuant to the laws of the State of Michigan. By contract, CNR and GTW entered into an agreement with Lovat for the purchase of a soft ground earth pressure balance tunnel boring machine (the "TBM"). The TBM was used in the construction of a railway tunnel under the St. Clair river in Ontario. The contract provided that “The parties may refer any dispute under this Agreement to arbitration, in accordance with Arbitration Act of Ontario [sic]”.

In 1997, the plaintiffs commenced an action in Ontario seeking damages for alleged improper design, construction and manufacture of the TBM, breach of express and implied terms of the contract, and negligence in relation to the design, construction and manufacture of the TBM. Following this, Lovat requested that the dispute be referred to arbitration in accordance with the contract and asked if the plaintiffs would agree to that process or if it would be necessary to bring a motion to stay the action. The plaintiff indicated that a motion would be required as it preferred to proceed before the court.

The motion judge refused to order a stay but the Court of Appeal reversed this decision and referred the parties to arbitration. On the question of whether this was a domestic or international arbitration, the Court held that it did not matter since the applicable rule, art. 8, was the same regardless of the nature of the arbitration. On the facts, the Court held that since the plaintiffs had initiated proceedings in the courts, the defendants were presented with a choice between electing binding arbitration or acquiescing in the plaintiffs’ decision to resort to the courts. The correct interpretation of the clause was that "parties" meant "either party".

Thus either party could refer a dispute to binding arbitration and arbitration then became mandatory. Failing such an election by one of the parties, the matters in dispute could be resolved in the courts. A stay was ordered.

Case 390: MAL 1(1)
Canada: Ontario Court (Rutherford J.)
February 1, 1996
Re Carter et al. and McLaughlin et al.
Original in English
Published in English: (1996), 27 O.R. (3d) 792 , O.J. No. 328

In 1993, the defendants, McLaughlin, moved to Ontario and sold their home in Minnesota to the applicants, Carter. The transaction was undertaken through a real estate listing agreement which included a provision to arbitrate any claim about the physical condition of the property. A claim arose and an arbitral award was subsequently made granting the Carters $9,049.50 for the cost of replacing the septic system servicing the property. The McLaughlins refused to pay and the Carters brought an application to enforce the award in Ontario.

The only issue was whether the arbitration agreement and the award were "commercial" within the meaning of the Model Law. Section 13 of Ontario's implementing legislation provided that, for the purpose of interpreting the Model Law, recourse may be had to, among other things, the Analytical Commentary contained in the Report of the Secretary General to the eighteenth session of the UNCITRAL. The Court considered this Commentary in arriving at the conclusion that the arbitration agreement between the parties and the resulting award were commercial within the meaning of the Model Law. While the sale of the home was unconnected to the regular business activity of either party, it was done in a business-like way, with the assistance of professional realtors and within a legal framework appropriate for a transaction involving a large sum of money. It had the earmarks of what goes on in trade and commerce except that the parties were not "commercial persons" or merchants in respect of the transaction. The Analytical Commentary indicated that the Commissioners drafting the Model Law anticipated that the word "commercial" would be given a broad interpretation so as to embrace matters arising from all relationships of a commercial nature and that the broad interpretation for the term "commercial" would mean inclusion of commercial relationships, irrespective of whether the parties are "commercial parties" or "merchants" under any given national law. The application for enforcement was granted.

Case 391: MAL 7, 18, 25, 27, 34
Canada: Superior Court of Justice (Lax J.)
September 22, 1999
Re Corporacion Transnacional de Inversiones, S.A. de C.V. et al. and STET International, S.p.A. et al.
Original in English
Published in English: 45 O.R. (3d) 183, affirmed (2000) 49 O.R. (3d) 414, O.J. No. 3408 (C.A., Catzman, Abella & Rosenberg JJ.A.), leave to appeal to the Supreme Court of Canada sought: [2000] S.C.C.A. No. 581.

The respondents, together referred to as "STET", are an Italian company and its Netherlands subsidiary. They commenced the arbitration against the four corporate applicants (collectively referred to as "COTISA") who are Mexican companies that are owned and/or controlled by the personal applicant, Javier Garza Caldern ("Garza"). STET had entered into a share subscription agreement with COTISA to purchase an indirect interest in the Cuban national telephone company. In June 1999, pursuant to the arbitration clause in the subscription agreement, STET sought rescission of the subscription agreement. A three-person I.C.C. arbitral tribunal was constituted and arbitration proceedings were held in Ottawa. The arbitral tribunal concluded that it had jurisdiction in respect of all the parties and issues presented to it and went on to find that the applicants were all jointly and severally liable to compensate STET for losses of approximately US$305-million incurred as a result of breaches of the subscription agreement. Before the Ontario court, the applicants sought to have the award set aside while the respondents asked for its enforcement.

The applicants challenged the arbitral award on several grounds provided for in articles 34(2)(a)(ii) and (b)(ii) of the Model Law: namely that the tribunal was without jurisdiction over three of the parties, that they had been denied equality of treatment and opportunity to present their case contrary to Article 18 of the Model Law; and that the award was in conflict with public policy in Ontario, which is a ground for setting aside an award.

The Court held that under Article 34 of the Model Law, the applicant had the onus of proving that the award should be set aside. If the applicants fails to do so, then Articles 35 and 36 require the court to recognize and enforce the award. The court also noted that the grounds for refusing to enforce an award are to be construed narrowly and that the public policy ground for resisting enforcement should apply only where enforcement would violate basic notions of morality and justice of which corruption, bribery or fraud are examples. The Court also held that the "due process" protection of art. 34(2)(a)(ii) included both procedural and substantive fairness, which made it overlap with the public policy defense in 34(2)(b)(ii).

After considering the facts of the case, the Court found that the applicants failed to establish grounds to set aside the award. In particular, there was no unfairness in the Arbitral Tribunal's handling of the applicants' request that STET disclose certain purchase agreements involving the shares in the Cuban telephone company. In the circumstances, there was a fair balancing of the considerations of both sides. The applicants' arguments that the Arbitral Tribunal's decision about rescission was wrong on the facts and the law was no more than the presentation of evidence and arguments that COTISA could have presented. The Court noted that a party that refuses to participate in an arbitration is deemed to have forfeited the opportunity to be heard (art. 25 MAL). The purpose of Article 18, in the Court's view, is to protect a party from egregious and injudicious conduct by a tribunal. It is not intended to protect a party from its own failures or strategic choices. Further, that the award might be legally or factually wrong was not, in the Court's view, grounds for setting it aside. On the issue of compelling testimony, the Court held that the arbitral tribunal had no power, under art. 27 of the MAL, to compel witnesses to testify. Failure of the applicant to seek judicial assistance cannot be imputed to the tribunal. Finally, the Court found that the tribunal had jurisdiction over all of the applicants because Article 7 of the Model Law and the Mexican law both contemplate that parties may enter into a valid arbitration agreement by entering into a contract that incorporates by reference another document that provides for arbitration.

Case 392: MAL 5, 16(3)
Canada: Cour supérieure du Québec (la juge Pierrette Sévigny)
15 February 2000.
Compagnie nationale Air France v. Libyan Arab Airlines
Original in French
Published in French: [2000] R.J.Q. 717, J.Q. No. 410

In 1995 Lybian Arab Airlines (LAA) gave notice of arbitration to Air France (AF), claiming failure of the latter to fulfill a number of obligations arising from a commercial agreement the parties had entered into in 1972 and pursuant to which the arbitration proceeding would be governed by the UNCITRAL Arbitration Rules. AF claimed that the embargo declared by the United Nations Security Council upon Lybia, as implemented by a number of national rulings both in Canada and in Europe, would deprive the arbitral tribunal of the power to decide and resolve upon the dispute. The plea raised by AF was rejected by the arbitral tribunal; the decision of the latter was challenged by AF before the Supreme Court of Quebec.

In rejecting the plea raised by AF, the Supreme Court of Quebec highlighted that its power to intervene and review the decision taken by the arbitral tribunal was excluded pursuant to article 5 of the MAL. The Supreme Court also clarified that the power of a party to appeal a decision taken by the arbitral tribunal on a preliminary question before a court pursuant to article 16 (3) MAL was excluded by the UNCITRAL Arbitration Rules the parties had agreed upon. The Supreme Court retained that the decision of the arbitral tribunal dealt exclusively on the one hand with the possible effects of the embargo measures on the jurisdiction of the arbitral tribunal, if any; on the other hand, with the issue as to whether LAA's claims fell within the scope of the arbitral jurisdiction. Accordingly, the Supreme Court held that both issues fell entirely within the scope of the powers of the arbitral tribunal. Finally, the Supreme Court clarified that both the appointment of the arbitral tribunal and

the decisions taken by the latter could be reviewed by a court exclusively within the context of a recourse for recognition or avoidance of a final award.

Case 393: MAL 9
Canada: Federal Court of Canada (Pinard J.)
December 23, 1999
Frontier International Shipping Corp. v. Tavros (The)
Original in English
Published in English**:** [2000] 2 F.C. 445, (1999) 179 F.T.R. 306, F.C.J. No. 1921, varying [2000] 2 F.C. 427

The plaintiff, Frontier, successfully sought a stay of proceedings against the defendant Tavros to pursue arbitration in New York. In that application, the defendant had sought, as interim protection, security for its claim in the New York arbitration or security for costs of the action in Federal Court. In granting the stay, however, the lower Court made an order for costs against Frontier, against which Frontier appealed.

On appeal, the Court agreed that the judge at first instance had erred in awarding costs as interim protection allowed under art. 9 of the MAL. It held that interim protection is "interim" in that it is something done pending final determination of the issues on the merits. It is protection, not payment. Here, the costs awarded were to be collected now, without any determination whatsoever on the merits. There was no opportunity to alter this award. There was nothing "interim" about the award, and it was not "protective" in nature - it was payment. The appeal was thus allowed and the order for costs overturned.

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