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CASE LAW ON UNCITRAL TEXTS (CLOUT)

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). Information about the features of that system and about its use is provided in the User Guide (A/CN.9/SER.C/GUIDE/1/REV.1). CLOUT documents are available on the UNCITRAL website (http://www.uncitral.org).

Issues 37 and 38 of CLOUT introduced several new features. First, the table of contents on the first page lists the full citations to each case contained in this set of abstracts, along with the individual articles of each text which are interpreted by the court or arbitral tribunal. Second, the Internet address (URL) of the full text of the decisions in their original language are included, along with Internet addresses of translations in official United Nations language(s), where available in the heading to each case (please note that references to websites other than official United Nations websites do not constitute an endorsement by the United Nations or by UNCITRAL of that website; furthermore, websites change frequently; all Internet addresses contained in this document are functional as of the date of submission of this document). Third, abstracts on cases interpreting the UNCITRAL Model Arbitration Law now include keyword references which are consistent with those contained in the Thesaurus on the UNCITRAL Model Law on International Commercial Arbitration, prepared by the UNCITRAL Secretariat in consultation with National Correspondents, and in the forthcoming UNCITRAL Digest on the UNCITRAL Model Law on International Commercial Arbitration. Finally, comprehensive indices are included at the end, to facilitate research by CLOUT citation, jurisdiction, article number, and (in the case of the Model Arbitration Law) keyword.

Abstracts have been prepared by National Correspondents designated by their Governments, or by individual contributors. 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 UNCITRAL Model Arbitration Law (MAL)

Case 581: MAL 8 (1)
Canada: Alberta Court of Appeal (Fraser, Conrad JJ. A., Picard J.)
Bird Construction Co. v. Tri-City Interiors Ltd.
2 May 1994
Original in English and French
Unreported

[**keywords**: *arbitration clause; court*]

The claimant (main contractor) appealed against the decision of a lower court, which had referred various disputes between the claimant and the respondent (sub-contractor) to arbitration. The claimant argued that the submission of the disputes to arbitration was optional under the sub-contracting agreement, and that the disputes related to non-arbitrable matters. As well, the claimant argued that the submission of the disputes to arbitration was not made within the prescribed time limits set forth in the main contract and incorporated by reference into the sub-contracting agreement. It finally asserted that the respondent had waived its right to arbitration by commencing a Builder's Lien action.

The Court dismissed the appeal. In its view, the sub-contracting agreement provided for arbitration upon the request of either party. The use of the word "may" in the arbitration clause was to be interpreted to mean that either party had an option to proceed with arbitration, and not that the submission of disputes to arbitration was optional. Claims related to contractual losses and were thus arbitrable matters. The fact that the sub-contracting agreement was concluded "subject to the terms and conditions of" the main contract did not imply that the sub-contracting agreement incorporated *mutatis mutandis* the procedure of the main contract concerning the time limits for submission of disputes to arbitration. The Court exercised its inherent jurisdiction to stay the Builder's Lien action, until completion of the arbitral procedure, considering that a multiplicity of proceedings was not desirable.

Case 582: MAL 7 (1); 35 (1)
Canada: British Columbia, Supreme Court (Callaghan J.)
First City Development. Ltd. v. Cytrynbaum and others
22 April 1989
Original in English and French
Published in 36 BC L R (2d) 395

[**keywords**: *award*; *arbitration agreement*; *arbitrator*; *court*]

Parties agreed to submit their disputes to arbitration and an agreed statement of facts and issues in dispute (which amounted to an arbitration agreement in the sense of article 7 (1) MAL) was filed with the arbitral tribunal. The main dispute related to the terms of repayment of a mortgage debt. The arbitral award provided that a certain amount of money was due and payable under the mortgage and determined the period during which interests were recoverable.

The claimant sought from the Court an order of foreclosure. The respondent objected that the claimant was barred, because the matter had already been settled by the arbitral award.

The Supreme Court found that the arbitral award was binding and enforceable, according to s. 29 of the Commercial Arbitration Act and article 35 (1) MAL. However, the Court concluded that the claimant's application was admissible and granted the order on the basis that not all the parties involved in the foreclosure proceedings were parties to the arbitration agreement and that the arbitral award did not deal with all the issues raised in the foreclosure proceedings.

Case 583: MAL 7 (1); 16 (1)
Canada: Quebec Court of Appeal (Vallerand, Rothaman and Mailhot JJ.A.)
Clavel v. Productions Musicales Donald K Donald Inc.
18 May 1994
Original in English and French
Published in English: 114 D.L.R. (4th) 441

[**keywords**: *arbitration agreement*; *arbitration clause; arbitrators*; *competence*; *judgement*]

The plaintiff, Guns N'Roses, abruptly concluded a concert promising to ensure partial reimbursement of the ticket price. A class action was instituted by ticket-holders against the production company, Production Musicals Donald K. Donald Inc. (the respondent) in order to obtain reimbursement of part of the ticket price. In turn, the plaintiff brought an incidental warranty action in appeal against the respondent. The main issue in appeal was whether a valid arbitration clause contained in the contract between the plaintiff and the respondent deprived the court of jurisdiction to hear and decide the incidental warranty action.

The Court observed that, according to article 943.1 C.C.P. (and article 16 MAL), the arbitrators would be solely competent to decide whether the arbitration clause covered the dispute. The Court considered the applicability of the arbitration clause in the context of the warranty proceedings and concluded that a Court would normally not have jurisdiction to decide such a dispute, because of the arbitration clause entered into between the parties. However, applying *AGS Industries Inc. v. Corporation Superseal* [1983] 1 SCR 781, the Court stated that article 71 C.C.P provides that incidental action in warranty must be taken before the Court where the main action is pending. Since the sole cause of the claim was the plaintiff's misconduct during the performance, the Court concluded that it would be manifestly unfair to compel the respondent to face alone a refund claim before the Supreme Court. For this reason, the Court concluded that it had jurisdiction to hear the warranty claim and consequently dismissed the appeal.

Case 584: MAL 16 (1); 16 (3); 34 (2) (a) (i); 34 (2) (a) (iii); 36 (1) (a) (i); 36 (1) (a) (iii)
Canada: Alberta Queens Bench (Marshall J.)
Dunhill Personnel System Inc. v. Dunhill Temps Edmonton Ltd.
30 September 1993
Original in English and French
Published in English: 13 Alta L.R.(2d) 240

[**keywords**: *arbitral tribunal; arbitration clause; award—enforcement of; award—recognition of; court; jurisdiction*]

The claimant applied to the Court for recognition and enforcement of an arbitral award on the basis of article 35 (1) MAL. The respondent argued that, on the basis of articles 16 (1), 34 (2) (a) (i) and 36 (1) (a) (i) MAL, the arbitral tribunal was not competent to hear the disputes, because the agreements containing the arbitration clause were terminated following a breach of such agreements by the claimant. The respondent also argued before the enforcement court that the arbitral tribunal lacked jurisdiction for the reason that the arbitral award dealt with damages in tort as well as in contract. It relied on articles 34 (2) (a) (iii) and 36 (1) (a) (iii) MAL and stated that these matters did not fall within the terms of submission to arbitration and were beyond the scope of arbitration.

The enforcement court found that the lack of competence of the arbitral tribunal could not be invoked at the time of the recognition of the arbitral award. The Court pointed to article 7 (1), s. 2, of the International Commercial Arbitration Act, S.A. 1986—pursuant to 7 (1) MAL—and found that the disputes felt within the description "differences arising out of commercial legal relationship, whether contractual or not". The Court held the wording to be sufficiently broad to include tort claims, thus concluding for the power of the arbitral tribunal to award damages in tort.

As to the question whether the exchange rate to be applied to the computation of damages should be the one prevailing at the date of the arbitral award or at the time of application for enforcement, the Court ruled that the latter would prevail, even through there would be additional financial benefits to the claimant. The enforcement was granted on the basis of article 35 (1) MAL.

Case 585: MAL 7 (1); 8 (1); 16 (1)
Canada: British Columbia Court of Appeal (Lambert, Wood and Hollinrake JJ.A.)
Dynamic Endeavours Inc. v. 247518 BC Ltd.
16 July 1993
Original in English and French
Published in English: [1993] B.C.J. No 1622 (B.C.A.A.)

[**keywords**: *arbitration clause*; *arbitrator*; *court*; *interim measures*]

The claimant and the respondent were parties to a joint venture agreement. The claimant served a notice of default under the joint venture agreement on the ground that the respondent was in breach of the agreement. The claimant also filed an application for an order requesting that funds of the joint venture be frozen at a Canadian Bank. Such an order was granted but subsequently, following a motion of the respondent, set aside. The respondent requested discovery of documents and notice to produce, while seeking a stay of the action pursuant to section 15 (1) of the Commercial Arbitration Act (which reproduces article 8 MAL). The stay was granted, but the claimant appealed against it.

The claimant argued that the respondent had taken a step in the proceedings when it served a request for discovery of documents in the action. A request for discovery could be considered as a statement on the substance of the dispute (article 8(1) MAL). The Court ruled that the request for discovery of documents and notice to produce was made for the purpose of protecting the rights of the respondent in the face of the *ex parte* order obtained by the claimant, freezing the funds in the bank, and that it was not incompatible with an arbitration agreement

for a party to request from the court, before or during arbitral proceedings, an interim measure of protection and for the Court to grant that measure (article 9 MAL).

As the plaintiff argued that the dispute fell outside the scope of the arbitration clause (article 7 (1) MAL), the Court stated that it was not clear whether the dispute fell within the arbitration clause, and this was an issue to be decided by the arbitral tribunal, (article 16 (1) MAL). The appeal against the stay was thus dismissed (article 8(1) MAL).

Case 586: MAL 2; 8 (1)
Canada: Alberta Court of Appeal (Kerans, Hetherington, and Irving JJ. A.)
Kaverit Steel and Crane Ltd. v. Kone Corp.
16 January 1992
Original in English and French
Published in English: 87 D.L.R. (4th) 129

[**keywords**: *arbitrability; arbitration agreement; court*]

On the basis of article 8 (1) MAL, the claimant sought a stay in favour of arbitration with regard to the action brought by the respondent before the Queen's Bench of Alberta. The lower court rejected the application.

The Court noted that certain parties involved in litigation were not parties to the arbitration agreement. While the claimant and the respondent had signed the arbitration agreement, a company (the sole shareholder of the respondent), the individual shareholders of that company, and the wholly owned subsidiaries of the claimant had not. The Court thus found that it had no authority to order these other parties to submit their claims to arbitration. The Court held nevertheless that claims of non-parties that derived from the main claims ought to be stayed pending the outcome of the arbitration.

As to the objection raised by the respondent that some of the issues were non-arbitrable, including an allegation of conspiracy to harm all the plaintiffs, the Court observed that the New York Convention and the International Commercial Arbitration Act covered both contractual and non-contractual commercial relationships, and that liability in tort was an arbitrable matter, provided that the relationship that created that liability was of a "commercial" nature. The Court held that the claim by the respondent for conspiracy to harm by unlawful acts, to the extent the unlawful acts constituted breach of contract was arbitrable and had to be referred to arbitration.

Finally, the Court of Appeal rejected the lower court's argument that a referral to arbitration of only some of the causes of action brought before it could be "inconvenient", as there would be two suits at the same time, with the risk of contradictory findings. The Court of Appeal held that the arbitration agreement could not, for that sole reason, be qualified as "inoperative" as per article II, para. 3 of the New York Convention.

The Court of Appeal directed that all issues between the claimant and the respondent be referred to arbitration.

Case 587: MAL 34 (2) (a) (iii); 35 (1); 36 (1) (a) (iii)
Canada: Federal Court of Appeal (Heald, Mahoney and Stone JJ. A)
Compania Maritima Villa Nova S.A. v. Northern Sales Co.
20 November 1991
Original in English and French
Published in English: [1992] 1 F.C. 550

[**keywords**: *award—foreign*]

The respondent (hereinafter "the appellant") appealed against an order of the Trial Division declaring a foreign arbitral award enforceable. The appellant relied upon articles 34 (2) (a) (iii) and 36 (1) (a) (iii) MAL, alleging that the dispute did not fall within the terms of submission to arbitration.

The dispute related to the question whether the appellant was liable to pay demurrage, by virtue of provisions contained in a charter party. The appellant argued that its statements had not been not adequately taken into account by the arbitrators in the settlement of the dispute, which was referred to them. The Court of Appeal confirmed that that argument did not constitute a ground for refusing recognition and enforcement of the arbitral award.

The Court of Appeal affirmed that the arbitrators decided the existence and extent of the appellant's liability under the charter party for demurrage, which was referred to them by the parties. It was in fact for the arbitrators to decide what effect, if any, the respondent's failure to settle demurrage should have on the respondent's liability.

Case 588: MAL 17; 31 (6)
Canada: British Columbia industrial relations council (Nitikman, Vice-Chair)
Fast Car Co. Inc. and others v. I.A.T.S.E. Locals 669 & 891
23 July 1991
Original in English and French
Published in English: 14 C.L.R.B.R. (2d) 44

[**keywords**: *interim award; interim measures; jurisdiction*]

Trade unions, applied for an interim order that an employer provided security for damages. Also, another application was made for an order restraining the employer from employing individuals in violation of a collective agreement. The employer submitted that the council was not competent to grant that order, because it amounted to a request for execution before judgment. The employer submitted that the council could not have greater power than the courts. The employer asserted also that there was no document purporting to be a collective agreement signed by itself and the trade unions.

The council found that it had jurisdiction to decide whether to grant that order. In the council's view, Industrial Relations councils are expert bodies in labour matters. As such, they stand in a better position than courts to determine the balance of convenience necessary in granting an order. The council relied not only upon the Industrial Relations Act, which determined the powers of the council, but also on articles 17 and 31 MAL. The council found that its power to order interim measures were wider than those set out in article 17 MAL.

The council also confirmed that, at any time, it could issue an interim award, according to article 31 MAL. However, based on the facts submitted, it rejected the applications.

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