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CASE LAW ON UNCITRAL TEXTS (CLOUT)

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Introduction

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

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I. Cases relating to the UNCITRAL Model Arbitration Law (MAL)

Case 598: MAL 7 (1); 8 (1)

Hong Kong: High Court of Hong Kong, Court of First Instance (Le Pichon J)
 An Feng International Trading Ltd. v. Honour Link International Development Ltd.
 11 February 1999
 Original in English
 Unreported
 Abstract prepared by Ben Beaumont

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

The plaintiff and the defendant entered into a contract for the sale of deformed steel bars. The contract contained an arbitration clause and a buy-back option, which was exercised by the plaintiff in respect of only part of the delivery. The contract was subsequently amended by two additional agreements (the “October Transaction” and the “Guarantee”), whereby the parties agreed on revised conditions for the purchase by the plaintiff of the remaining part of the goods to be delivered.

The dispute concerned the amount due under the Guarantee and the defendant started two court actions, one for breach of the terms of the Guarantee and the other in respect of amounts alleged to be due and owing by the plaintiff under the original contract and the October Transaction. The plaintiff applied for a stay of both actions on the basis that the dispute should be referred to arbitration pursuant to article 8 (1) MAL.

The court found that there was no substantial evidence of a dispute between the parties. In its view, the period of time between the day when the payment was due by the plaintiff, and the day when it was claimed by the defendant was unusually long and the reasons for the dispute were unclear.

One question to be decided by the court was whether the arbitration provision contained in the original contract applied to the October Transaction and to the Guarantee. The court found that nothing in either the October Transaction or the Guarantee indicated that the parties intended to incorporate the arbitration provision in such documents (article 7 (1) MAL).

The court concluded that there was no basis to restrain the defendant from presenting a winding-up petition and refused to order a stay in favour of arbitration, pursuant to article 8 (1) MAL.

Case 599: MAL 34 (2) (a) (ii); 34 (2) (b) (ii); 36 (1); 36 (1) (a) (ii); 36 (1) (b) (ii)

Hong Kong: High Court of Hong Kong, Court of Final Appeal (Li CJ, Litton, Ching, Bokhary PPJ, Sir Anthony Mason)
 Hebei Import & Export Corp. v. Polytek Engineering Co. Ltd.
 9 February 1999
 Published in English
 [1999] 2 HKC 205
 Abstract prepared by Ben Beaumont

[**keywords:** *arbitral tribunal; award – enforcement of; public policy; jurisdiction*]

An arbitral tribunal, constituted within the CIETAC, agreed, at the request and at the expense of the respondent, to appoint experts to examine the equipment manufactured for the appellant, to confirm its quality and production capacity and to propose a “reasonable modification plan”. The inspection took place but, as no notice of the inspection was given to the respondent, it did not attend the inspection. The president of the arbitral tribunal attended the inspection made by the experts. The experts’ report found that the equipment could not be modified so as to achieve the production capacity stipulated by the contract. The award relied on the experts’ report and concluded in favour of the appellant.

The appellant obtained an order *ex parte* granting leave to enforce the award and a judgement granting enforcement. The respondent appealed. The Court of Appeal found that the respondent did not have an opportunity to present its case and, on the basis of articles 34 (2) (a) (ii) and 36 (1) (a) (ii) MAL, set aside the grant of leave and the judgement. It held that there were private communications from the appellant’s technicians to the president of the arbitral tribunal, evidenced by the experts’ report and that the respondent was denied a proper opportunity to present its case. That constituted a departure from natural justice and apparent bias on the part of the tribunal. According to s. 44 (3) of the Arbitration Ordinance (corresponding to article 36 (1) (b) (ii) MAL), it would be contrary to the public policy of Hong Kong to enforce the award. The decision was appealed.

The Court of Appeal of Hong Kong observed that the provision of article V of the New York Convention, notably article V (2) (b) relating to public policy (reproduced in article 36 (1) (b) (ii) MAL), must be given a narrow construction. The court stated that the expression “contrary to the public policy of that country” in article V (2) (b) of the New York Convention is generally interpreted as to mean “contrary to the fundamental conceptions of morality and justice” of the State of enforcement.

With respect to the argument that the respondent was unable to present its case, the court observed that the respondent was given a copy of the experts’ report and an opportunity to deal with it. At no stage did the respondent indicate that it wished to contest any part of the report, to call any other people or experts as witnesses, to question the experts or to present a case that the equipment was capable of appropriate modification. It did not either apply for a re-inspection. As to the argument arising from the communications between the experts and the president of the arbitral tribunal, the court found that once the respondent received the report and a letter from the arbitral tribunal, it was in a position to challenge the president of the arbitral tribunal, but it failed to do so.

The appeal was rejected.

Case 600: MAL 7 (1); 8 (1); 9

Hong Kong: High Court of Hong Kong, Court of First Instance (Stone J),
Dongnama Shipping Co. Ltd. v. The Owners and/or demise Charterers of the Ship or
Vessel “Halla Liberty” v. Donghwa Leasing Co. Ltd.

24 July 1998

Original in English

Unreported

Abstract prepared by Ben Beaumont

[keywords: *arbitral tribunal; award – enforcement of; public policy; jurisdiction*]

The plaintiff obtained the arrest of the vessel “Halla Liberty” as an interim measure of protection to secure the payment of a certain amount owed by the defendants. The defendants, on the basis of article 8 (1) MAL, applied for a stay of the judicial proceedings, which was granted.

The defendants submitted that the stay should stop all proceedings, save those which were required to permit interim protection, according to article 9 MAL. The plaintiff argued that the court should retain a wider jurisdiction to determine priorities among creditors and that such matter fell outside the arbitration agreement (article 7 (1) MAL).

The court concluded that any issue as to priorities among creditors should be decided after the arbitral award is rendered. Applying article 8 (1) MAL, the court confirmed the stay of judicial proceedings.

Case 601: MAL 1 (3) (a); 5; 9

Hong Kong: High Court of Hong Kong Special Administrative Region, Court of First Instance (Findley J)

China Ocean Shipping Co., Owners of the M/V Fu Ning Hai v. Whistler International Ltd., Charters of the M/V Fu Ning Hai

24 May 1999

(Original in English)

Unreported

Abstract prepared by Ben Beaumont

[keywords: *arbitral tribunal; jurisdiction; arbitration proceedings; court*]

The plaintiff filed an application for a stay of arbitration proceedings, due to the unreasonable behaviour of the defendant, which refused to disclose its place of business, thus avoiding posting security for arbitration costs. The case concerned the court’s jurisdiction to order both security and the disclosure of information on the defendant’s identity.

In the court proceedings, the defendant also deliberately did not disclose its place of business, restricting the possibility of investigating if the defendant was a mere shell company without assets.

In the absence of an agreed comprehensive set of procedural rules governing the arbitration proceedings, the court decided that Hong Kong procedural rules on matters such as liability to provide security for costs would apply. The court observed that there was nothing in the MAL that governed the matter of refusal by a party to make disclosures about its identity and, therefore, the restriction in article 5 MAL did not apply in this case. Nor was the court satisfied that an order requiring a party to supply such details was an “interim measure of protection”, in the meaning of article 9 MAL. In the court’s view, there was no express provision in the law that dealt with the issue and, to prevent an abuse of process, the matter must be decided on the basis of the inherent jurisdiction of the court.

The court granted the defendant time to provide the security and, meanwhile, ordered a stay of the arbitration proceedings.

Case 602: MAL 8 (1)

Hong Kong: High Court of the Hong Kong Special Administrative Region,
Court of First Instance (Yeung J)
Sun Fook Kong (Civil) Ltd. v. Wellead Construction and Engineering Co. Ltd. &
Others
13 December 1999
Original in English
Unreported
Abstract prepared by Ben Beaumont

[**keywords:** *arbitration proceedings*]

The plaintiff applied for summary judgement against the first defendant as the debtor and the second defendant as the guarantor. The plaintiff argued that two loans were granted to the first defendant and that the second defendant agreed to be the guarantor for the first defendant in respect of the said loans. The loans were evidenced by two agreements. The plaintiff contended that the defendants had failed and/or refused to repay the said loans upon demand and therefore filed the application.

The first defendant asserted to be a sub-contractor of the plaintiff and to have submitted applications for interim payment in respect of certain transactions. Pending the outcome of the arbitration proceedings, the first defendant alleged that the plaintiff owed it a certain amount under the sub-contract in question, being thus entitled to a set-off against the plaintiff's claim.

The court stayed the proceedings brought before it, on the basis of article 8 (1) MAL, pending the outcome of the arbitration proceedings. Until and unless the plaintiff could establish that there was no sum due to the first defendant under the sub-contract, the plaintiff did not have a valid claim against the first defendant in respect of the loans. The second defendant's liability to pay as a guarantor could arise only if the liability of the first defendant as a debtor was established, a matter which could not be resolved until the conclusion of the arbitration proceedings.

The application for summary judgement was thus considered premature and consequently dismissed.

Case 603: MAL 7 (1); 8 (1)

Hong Kong: High Court of the Hong Kong Special Administrative Region,
Court of First Instance (Findlay J)
China Liaoning Ltd. v. New Century (Holdings) Development Co. Ltd.
7 September 1999
Original in English
Unreported
Abstract prepared by Ben Beaumont

[**keywords:** *arbitration agreement*]

This case involved a dispute related to a contract for the sale of air conditioning equipment to the defendant. The sales contract included an arbitration agreement. The defendant paid only part of the price agreed upon. By another

written undertaking, the plaintiff agreed to extend the date for payment of the remaining price and the defendant agreed to pay interest but it failed to fulfil this undertaking. The plaintiff sought summary judgement. The defendant invoked article 8 (1) MAL and applied for a stay of proceedings. The plaintiff objected that the new agreement was a separate agreement from the original contract, not falling as such within the scope of the arbitration agreement.

The court observed that there was no evidence of the parties' intention to incorporate the arbitration agreement into the new agreement (article 7 (1) MAL). The court considered that the new agreement was not dependent on the sales contract for its enforceability.

The court concluded that the plaintiff's cause of action was not an "action brought in a matter which is subject to an arbitration agreement" in the meaning of article 8 MAL. It dismissed the defendant's application for a stay and issued the summary judgement in favour of the plaintiff.

Case 604: MAL 8 (1)

Hong Kong: High Court of Hong Kong, Court of First Instance (Stone J)
Glencore International A.G. v Bright China International Ltd & Others
24 April 1998
Original in English
Unreported
Abstract prepared by Ben Beaumont

[**keywords:** *arbitration proceedings; arbitrators*]

The plaintiff entered into a contract (hereinafter "the April contract") with the first defendant and into another contract with the second defendant (hereinafter "the July contract") for the sale of aluminium ingots. The first defendant failed to make payment of the balance of one shipment under the April contract. A vessel discharged its cargo of ingots in Hong Kong.

The courts in United Kingdom and in Hong Kong issued a Mareva injunction, restraining the disposition of the bundles of ingots discharged from the vessel. The Hong Kong court discharged the Mareva injunction and ordered the sale of the ingots and payment of the proceeds into court. In the meantime, the plaintiff commenced arbitration proceedings in London against the second defendant, wherein it claimed damages for breach by the second defendant of the July contract, and subsequently, before the Hong Kong court, invoked article 8 MAL, seeking a stay of the defendant's counterclaim in favour of the arbitration proceedings.

The court found that article 8 (1) MAL was in principle applicable. The sole outstanding issue in this case was whether the plaintiff was barred from making the application because it failed to apply for a stay "not later than when submitting his first statement on the substance of the dispute". The court stated that, having duly considered all the circumstances, and after reviewing all the arguments submitted, it was unable to conclude that the pleading in this case did in fact amount to a "first statement on the substance of the dispute". Subsequently, it granted the stay of judicial proceedings.

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Hong Kong

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Case 600: MAL 7 (1); 8 (1); 9—*Hong Kong: High Court of Hong Kong, Court of First Instance (Stone J), Dongnama Shipping Co. Ltd. v. The Owners and/or demise Charterers of the Ship or Vessel “Halla Liberty” v. Donghwa Leasing Co. Ltd. (24 July 1998)*

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Case 598: *Hong Kong: High Court of Hong Kong, Court of First Instance (Le Pichon J), An Feng International Trading Ltd. v. Honour Link International Development Ltd.* (11 February 1999)

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MAL 36 (1) (b) (ii)

Case 599: *Hong Kong: High Court of Hong Kong, Court of Final Appeal (Li CJ, Litton, Ching, Bokhary PPJ, Sir Anthony Mason), Hebei Import & Export Corp. v. Polytek Engineering Co. Ltd. (9 February 1999)*

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