



General Assembly

Distr.: General
10 April 2006

Original: English

United Nations Commission on International Trade Law

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.

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**CASES RELATING TO THE UNCITRAL MODEL ARBITRATION LAW
(MAL)**

Case 618: MAL 7 (1); 8 (1); 19 (2)

Canada: Quebec, Court of Appeal (Jacques, Malouf & Mailhot J.J.A.)
Jacob Silverberg, Howard Silverman, v. C. Clarke Hooper PLC, and others
6 February 1990
Original in English and French
Unreported

[**Keywords:** *arbitration clause; arbitrator; court; public order*]

The appellants sought an order suspending the delay mechanism contained in an arbitration clause together with an order preventing the arbitrator from rendering any *ex parte* decision, until a competent court had ruled upon the validity of the arbitration clause.

The appellants argued, on the basis of articles 7 (1) and 8 MAL, that the arbitration clause was invalid and violated the *audi alteram partem* rule, as it only provided for written submissions and did not permit cross-examination of witnesses. In addition, it was said that the arbitration clause did not encompass the subject matter of the dispute.

The court of appeal confirmed the decision of the lower court, which held that the arbitration clause was not invalid, nor contrary to public policy. In the court's view, according to article 19 (2) MAL, and insofar as the principle audi alteram partem was concerned, the arbitrator was "master of his own procedure" and could take whatever steps he deemed appropriate to ascertain the facts.

The court concluded that the allegations contained in the motion and the arguments of the appellants had not convinced it that it was in the interest of justice to grant the requested order.

Case 619: MAL 8 (1)

Canada: Ontario, Supreme Court (Campbell J.)
Boart Sweden Ab and others v. NYA Strommes AB and others
21 December 1988
Original in English and French
Published in 41 DLR 295

[**Keywords:** *arbitration agreement; arbitration agreement - nullity of; arbitration clause; public policy*]

The applicants, on the basis of article 8 (1) MAL, sought a stay in favour of arbitration of various claims brought in a single action. The respondents argued that some of the issues were outside the scope of the arbitration clause and that some parties involved in the action were not parties to the arbitration agreement. In the respondents' view, deferring only some of the issues to arbitration would result in a multiplicity of proceedings and possibly contradictory decisions. The respondents alleged the nullity of the arbitration agreement, based on the applicants' waiver of their rights to rely upon the arbitration agreement and on public policy.

In the court's view, the applicant's proposal for a stay of action for a brief period of time reduced the prospect of any practical inconvenience resulting from multiplicity of proceedings. As to the other matters referred to court, even if on a strict interpretation, not covered by the arbitration agreement, they were so inextricably connected with the matters, which the parties agreed to arbitrate, that it would be mischievous to continue court proceedings, pending arbitration.

The court therefore referred the parties to arbitration according to article 8 (1) MAL and stayed all the remaining portions of the action.

Case 620: MAL 7 (1); 11 (4)(a)

Canada: British Columbia, Supreme Court (Meredith J.)
Roanan Corporation v. Star One Resources Inc. and others
22 December 1988
Original in English and French
Published in 43 B. L. R. 61

[**Keywords:** *arbitrator*]

The petitioner applied for an order that both parties appointed a single arbitrator, on the basis of article 11 (4)(a) MAL. The respondents alleged that there were no disputes to be referred to arbitration.

The court observed that both parties had misconceived at least some provisions of their original agreements. The petitioner was therefore entitled to refer the parties to arbitration.

The order was therefore granted.

Case 621: MAL 8 (1)

Canada: British Columbia, Supreme Court (Boyd L.J.S.C.)
Robert Wall and others v. Scott's Hospitality (B.C.) Inc. and Anor
6 March 1990
Original in English and French
Unreported

[**Keywords:** *international arbitration*]

The first defendant applied for an order that a portion of the plaintiff's claim be stayed pending the completion of an on-going arbitration between the parties.

The Supreme Court noted that the pleadings in the action before it had already been closed. There had been discoveries and one or more interlocutory applications had been heard. The court pointed to section 1 of article 15 of the Commercial Arbitration Act, R.S.B.C., 1979 (corresponding to article 8 (1) MAL), according to which a party is given the authority to apply for a stay of proceedings, but the application must be brought within certain time limits, that is "before or after entering an appearance and before delivery of a pleadings or taking another step in the proceedings".

The application was thus dismissed.

Although this case arose from a domestic arbitration case, the same principles would apply for international arbitration.

Case 622: MAL 14 (1); 15

Canada: British Columbia, Court of Appeal (Seaton, Macfarlane & Esson AJJ.)

PZ Resort System Inc. v. Ian Macdonald Library Services Ltd.

11 June 1987

Original in English and French

Published in 39 D. L. R. (4th) 626

[**Keywords:** *arbitrator; award - setting aside*]

The appellant applied to the court in order to prevent appointment of an arbitrator in replacement of the initially appointed arbitrator, who had rendered an award which had been set aside. The lower court had found that the initially-appointed arbitrator was “incapable of acting” and had permitted the respondent to seek the appointment of a new arbitrator, on the basis of articles 14 (1) and 15 MAL.

The court of appeal addressed the issue of the consequences of setting aside an award. It drew a main distinction between a “general” agreement to arbitrate and a “specific” agreement to refer to arbitration a dispute already in existence. In the first case, the agreement subsists after an award is set aside and the parties may select new arbitrators and proceed as though there had not been a previous proceeding. In the second case, the decision on setting aside the award puts the parties in the position in which they were immediately before they entered into that specific agreement.

The court concluded that when the award was set aside, the parties were put in the position they were in at the time the dispute arose and were released from the original arbitration agreement. The parties could, if they so agree, either enter into a new agreement to arbitrate, or submit their dispute to State court.

The appeal was allowed.

Case 623: MAL 7 (1); 8 (1)

Canada: Manitoba, Queens Bench (Krindle J.)

Injector Wrap Corp. Ltd. v. Agrico Canada Limited

24 April 1990

Original in English and French

Unreported

[**Keywords:** *arbitration clause; arbitral tribunal; court; jurisdiction*]

A lease contract, entered into between the plaintiff and the defendant, contained an arbitration clause. A dispute arose and the plaintiff served a notice of arbitration to the defendant. The defendant declared its availability to arbitrate, referring to the provisions of the Arbitration Act of Ontario. The parties’ lawyers attempted to meet and resolve the issue, but after a period of time, the plaintiff brought an action before the Manitoba’s court.

The defendant applied for a stay of the court proceedings in favour of arbitration (article 8 (1) MAL), and the court concluded that, due to the very broad wording of the arbitration clause (article 7 (1) MAL), there was no doubt as to the jurisdiction of the arbitral tribunal to hear the dispute.

The application for a stay was granted.

Case 624: MAL 8 (1) Huband

Canada: Manitoba, Court of Appeal (Huband, Twaddle, Helper JJ. A.)
 Injector Wrap Corp. Ltd. v. Agrico Canada Ltd.
 12 June 1990
 Original in English and French
 Published in [1990] Man D 250

[**Keywords:** *arbitration clause(s); court*]

The appellant appealed against the order of the lower court to stay court proceedings (article 8 (1) MAL), granted on the basis that the contract contained arbitration clauses requiring the parties to submit their dispute to arbitration.

The court of considered that the first judge erred in granting the stay without the benefit of an adequate delineation of the issue in dispute. The appeal was allowed and the order staying the action set aside.

Case 625: MAL 33 (1)(a); 33 (3); 35 (1); 36 (1)(a)(v)

Canada: Federal Court, Trial Division
 Relais Nordik Inc. v. Secunda Marine Services Limited and Anor
 12 April 1990
 Original in English and French
 Unreported

[**Keywords:** *additional award; arbitral tribunal; awards; award - correction of; interim award; court*]

The plaintiff applied to the Federal Court to register both an interim and a final award under the provision of article 35 (1) MAL. However, within the 30-day period provided for by article 33 (1)(a) MAL, the first defendant had requested the arbitral tribunal to correct in the award an error in computation. The court observed that the arbitral tribunal had not yet made its decision, nor issued an additional award in the meaning of article 33 (3) MAL.

In spite of the fact that there was no disagreement between the parties as to the correction to be made to the award and that the latter related to a minimal amount, the court found that the award had not yet become binding on the parties in the meaning of article 36 (1)(a)(v) MAL, since the arbitral tribunal had not made its determination on the request for correction and was still seized of the matter.

The application was thus refused.

Case 626: MAL 16 (1); 17

Canada: British Columbia, Supreme Court (G. ow J.)
 Quintette Coal Ltd. v. Nippon Steel Corp.
 6 July 1988
 Original in English and French
 Unreported

[**Keywords:** *arbitral tribunal; arbitration proceedings; arbitrator; award; court; interim measures; jurisdiction*]

The petitioner asked the Supreme Court to set aside a decision issued by an arbitral tribunal. It alleged that the arbitral tribunal had exceeded its jurisdiction in declaring

that the parties had, by agreement, conferred to it the power to issue interim measures and in declaring that it had jurisdiction to determine the question of whether it had such power (articles 16 (1) and 17 MAL).

In the arbitration proceedings, the arbitral tribunal found that the parties agreed to be bound by the International Commercial Arbitration Act (the Act). The arbitral tribunal also observed that the parties had agreed that procedural matters would be determined by the arbitral tribunal as they arose. In the alternative, it was also the view of the arbitral tribunal that it was bound by the Act.

Before the Supreme Court, the petitioner argued that sections 16, 17 and 31 (6) of the Act, partially reproducing articles 16 and 17 MAL, were unconstitutional, to the extent they violated section 96 of the Constitution Act.

The court observed that section 96 had never been construed as forbidding two or more citizens from appointing another as their “private judge” to resolve their dispute and conferring upon him decision making powers. The arbitral tribunal in question was not a provincial statutory body and there was no violation of section 96 of the Constitution Act.

The court then observed that an arbitral tribunal, if its jurisdiction was challenged or questioned, was competent to decide on its own jurisdiction (article 16 (1) MAL) for the purpose of satisfying itself as a preliminary matter whether it ought to go on with the arbitration or not. The court also found that an arbitrator could issue an order.

The petitioner’s applications were denied.

Case 627: MAL 2(a); 7; 12; 31 (2)

Canada: Supreme Court (Betz Lamer, Wilson, Ledain and L’Heureux-Dube JJ.)

Sport Maska Inc. v. Jack Ritter and others

24 March 1988

Original in English and French

Unreported

[**Keywords:** *arbitrators; award; court*]

A receiver of an insolvent company, CCM Inc., accepted an offer from R.A.D. Inc. to buy a large part of CCM’s assets. The agreement in question contained a clause, according to which the auditors of CCM Inc. (hereinafter ‘the respondents’) were required to deliver a valuation on the inventory described in another clause of the agreement. The valuation had to be final and binding.

The court of appeal found the auditors to be arbitrators and therefore immune from liability for prosecution for negligence. The appellants appealed against that decision.

The Supreme Court found that the wording of the agreement and the exchange of correspondence between the parties related to the valuation function, contained “obscurities which ma[d]e it difficult to qualify appellants’ function in legal terms”. It analyzed the concept of arbitration, submission to arbitration and undertaking to arbitrate under several legislations (article 7 MAL).

It ruled out the interpretation of the agreement in question as a submission to arbitration, since there was no present or potential dispute either at the time the

agreement was concluded between the parties or when respondents performed their mandate. As to the parties' intent, none of the documents containing the agreement used the words "arbitrators" or "arbitration" or referred to any other expression suggesting arbitration.

In the court's view, the intent that clearly emerged from the agreement and the other documents giving effect to it was that the parties agreed to obtain an expert opinion from an accountant and did not intend to submit the matter to arbitration. That analysis was based on the language used, on the process contemplated by the parties under the rules applicable to arbitration, on the fact that they deliberately deleted the paragraph providing for a possible arbitration, that respondents had a professional connection with one of the parties, CCM, as they acted as its auditors (article 12 MAL) and that the respondents' letter containing the evaluation did not contain reasons, as normally requested for an arbitral award (article 31 (2) MAL).

For these reasons, the Supreme Court allowed the appeal, reversed the judgement of the court of appeal and restored the decision of the Superior Court.

Case 628: MAL 11 (2); 11 (3); 34 (2)(a)(iv); 36 (1)(a)(iv)

Canada: Alberta, Queens Bench (Cormack J.)

Donald Fleming, Florence Fleming and Donna Moran v. Space Homes Ltd.

15 January 1985

Original in English and French

Unreported

[**Keywords:** *arbitral tribunal; arbitration clause; arbitrator; award - setting aside*]

The applicants applied to set aside an award made by a single arbitrator. The applicants argued that there was not a proper appointment of the arbitrator. The arbitration clause required that there must be three arbitrators, one appointed by each side and the third appointed by those two already appointed (as provided for by article 11 (2) MAL). Before the third appointment could be made, the arbitrator appointed by the applicants died. The respondent's lawyer failed to obtain from the applicants a reply to his request for them to nominate a successor and applied to the court for an order, compelling the applicants to appoint an arbitrator. After a period of time, a person claimed to have taken over the law practice of the deceased and to have been appointed as arbitrator for all the applicants. A third arbitrator, selected by the parties-appointed arbitrators, rendered the award.

The question raised before the court was whether the award had been "improperly procured"—in the meaning of section 11 of the Arbitration Act, R.S.A. 1980—because of a composition of the arbitral tribunal not in accordance with the agreement of the parties (articles 34 (2)(a)(iv) and 36 (1)(a)(iv) MAL). The court noted that the two appointed arbitrators did appoint a third arbitrator. However, they requested the latter to determine the dispute. Being unable to agree on various issues, the two arbitrators had delegated their authority to the third arbitrator. The court observed that only the parties could have varied the arbitration agreement, but not the arbitrators themselves, without explicit authority. One of the applicant argued that he had never given its own arbitrator the authority to refer the issues in dispute to the third arbitrator as sole arbitrator for a final and binding decision.

The court therefore concluded that the first two arbitrators did not comply with the appointment requirements set out in the arbitration clause and set aside the award.

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Case 628: MAL 11 (2); 11 (3); 34 (2) (a) (iv); 36 (1) (a) (iv) - *Canada: Alberta, Queens Bench (Cormack J.), Donald Fleming, Florence Fleming and Donna Moran v. Space Homes Ltd. (15 January 1985)*

II. *Cases by text and article***UNCITRAL Model Arbitration Law (MAL)****MAL 2(a)**

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MAL 8 (1)

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MAL 31 (2)

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MAL 33 (1)(a)

Case 625: - *Canada: Federal Court, Trial Division, Relais Nordik Inc. v. Secunda Marine Services Limited and Anor (12 April 1990)*

MAL 33 (3)

Case 625: - *Canada: Federal Court, Trial Division, Relais Nordik Inc. v. Secunda Marine Services Limited and Anor (12 April 1990)*

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Case 625: - *Canada: Federal Court, Trial Division, Relais Nordik Inc. v. Secunda Marine Services Limited and Anor (12 April 1990)*

MAL 36 (1)(a)(v)

Case 625: - *Canada: Federal Court, Trial Division, Relais Nordik Inc. v. Secunda Marine Services Limited and Anor (12 April 1990)*

MAL 34 (2)(a)(iv)

Case 628: - *Canada: Alberta, Queens Bench (Cormack J.), Donald Fleming, Florence Fleming and Donna Moran v. Space Homes Ltd. (15 January 1985)*

MAL 36 (1)(a)(iv)

Case 628: - *Canada: Alberta, Queens Bench (Cormack J.), Donald Fleming, Florence Fleming and Donna Moran v. Space Homes Ltd. (15 January 1985)*

III. *Cases by keyword***UNCITRAL Model Arbitration Law (MAL)**

arbitral tribunal

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Case 626: MAL 16 (1); 17 - Canada: *British Columbia, Supreme Court (G. ow J.), Quintette Coal Ltd. v. Nippon Steel Corp.* (6 July 1988)

Case 627: MAL 2(a); 7; 12; 31 (2) - Canada: *Supreme Court (Beetz Lamer, Wilson, Ledain and L'Heureux-Dube JJ.), Sport Maska Inc. v. Jack Ritter and others* (24 March 1988)

award - additional

Case 625: MAL 33 (1)(a); 33 (3); 35 (1); 36 (1)(a)(v) - Canada: *Federal Court, Trial Division, Relais Nordik Inc. v. Secunda Marine Services Limited and Anor* (12 April 1990)

award - correction of

Case 625: MAL 33 (1)(a); 33 (3); 35 (1); 36 (1)(a)(v) - Canada: *Federal Court, Trial Division, Relais Nordik Inc. v. Secunda Marine Services Limited and Anor* (12 April 1990)

award - setting aside

Case 622: MAL 14 (1); 15; - *Canada: British Columbia, Court of Appeal (Seaton, Macfarlane & Esson A.J.J.), PZ Resort System Inc. v. Ian Macdonald Library Services Ltd. (11 June 1987)*

Case 628: MAL 11 (2); 11 (3); 34 (2) (a) (iv); 36 (1) (a) (iv) - *Canada: Alberta, Queens Bench (Cormack J.), Donald Fleming, Florence Fleming and Donna Moran v. Space Homes Ltd. (15 January 1985)*

court(s)

Case 618: MAL 7 (1); 8 (1); 19 (2) - *Canada: Quebec, Court of Appeal (Jacques, Malouf & Mailhot J.J.A.), Jacob Silverberg, Howard Silverman, v. C. Clarke Hooper PLC, and others (6 February 1990)*

Case 623: MAL 7 (1); 8 (1) - *Canada: Manitoba, Queens Bench (Krindle J.), Injector Wrap Corp. Ltd. v. Agrico Canada Limited (24 April 1990)*

Case 624: MAL 8 (1) - *Canada: Manitoba, Court of Appeal (Huband, Twaddle, Helper J.J. A.), Injector Wrap Corp. Ltd. v. Agrico Canada Ltd. (12 June 1990)*

Case 625: MAL 33 (1)(a); 33 (3); 35 (1); 36 (1)(a)(v) - *Canada: Federal Court, Trial Division, Relais Nordik Inc. v. Secunda Marine Services Limited and Anor (12 April 1990)*

Case 626: MAL 16 (1); 17 - *Canada: British Columbia, Supreme Court (G. ow J.), Quintette Coal Ltd. v. Nippon Steel Corp. (6 July 1988)*

Case 627: MAL 2(a); 7; 12; 31 (2) - *Canada: Supreme Court (Beetz Lamer, Wilson, Ledain and L'Heureux-Dube J.J.), Sport Maska Inc. v. Jack Ritter and others (24 March 1988)*

interim award

Case 625: MAL 33 (1) (a); 33 (3); 35 (1); 36 (1) (a) (v) - *Canada: Federal Court, Trial Division, Relais Nordik Inc. v. Secunda Marine Services Limited and Anor (12 April 1990)*

interim measures

Case 626: MAL 16 (1); 17 - *Canada: British Columbia, Supreme Court (G. ow J.), Quintette Coal Ltd. v. Nippon Steel Corp. (6 July 1988)*

international arbitration

Case 621: MAL 8 (1) - *Canada: British Columbia, Supreme Court (Boyd L.J.S.C.), Robert Wall and others v. Scott's Hospitality (B.C.) Inc. and Anor (6 March 1990)*

jurisdiction

Case 623: MAL 7 (1); 8 (1) - *Canada: Manitoba, Queens Bench (Krindle J.), Injector Wrap Corp. Ltd. v. Agrico Canada Limited (24 April 1990)*

Case 626: MAL 16 (1); 17 - *Canada: British Columbia, Supreme Court (G. ow J.), Quintette Coal Ltd. v. Nippon Steel Corp. (6 July 1988)*

public order

Case 618: MAL 7 (1); 8 (1); 19 (2) - *Canada: Quebec, Court of Appeal (Jacques, Malouf & Mailhot J.J.A.), Jacob Silverberg, Howard Silverman, v. C. Clarke Hooper PLC, and others (6 February 1990)*

public policy

Case 619: MAL 8 (1) - *Canada: Ontario, Supreme Court (Campbell J.), Boart Sweden AB and others v. NYA Strommes AB and others (21 December 1988)*
