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Contents

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INTRODUCTION

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Cases relating to the UNCITRAL Model Arbitration Law (MAL)

Case 738: MAL 8 (1)
Hong Kong: Supreme Court of Hong Kong, Court of Appeal
[1995] 2 HKC 777
Chung Kiu Development Ltd & Anor v Sung Foo Kee Ltd & Anor
4 July 1995
Judgment in English

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

In this case the court discusses the approach to follow when one party seeks summary judgment while the other seeks a stay of court proceedings in favour of arbitration.

The plaintiff commenced a court action for the payment of 8.4 million USD under a contract which included an arbitration clause. The court granted a summary judgment for 6.2 million USD in favour of the plaintiff, but stayed the action for the rest of the balance. The defendant appealed and contended that the whole action should have been stayed according to MAL 8 (1) whereas the respondent argued that the whole amount claimed should have been granted to it.

The Court noted that the proper approach in a case where one party seeks summary judgment and the other party a stay in favour of arbitration should be the following: if a plaintiff to an action which the defendant has applied to stay can show that there is no defence to the claim, the court may refuse the stay and give final judgment to the plaintiff. However, care should be taken in situations where the defendant disputes the claim on grounds which the plaintiff is very likely to overcome and situations where the defendant is not really raising a dispute at all. Only where it is obvious that the party seeking a stay has no sound grounds for disputing the claim, should that party be deprived of its contractual right to refer the dispute to arbitration.

In this case, the Court found that the appellant had grounds for disputing the claim and allowed the appeal for a stay in favour of arbitration according to MAL 8 (1).

Case 739: MAL 8 (1)
Hong Kong: Supreme Court of Hong Kong, High Court
[1995] HCA 2202, HCA 6266
Koppen Yan Zimmermann (International) Limited v Mission Hill Holdings Limited
9 December 1995
Judgment in English
Abstract prepared by Ben Beaumont

[**Keywords**: *arbitration agreement; courts*]

The plaintiff commenced court proceedings based on several unpaid cheques. The defendant applied for the stay of proceedings in favour of arbitration under MAL 8 (1). The defendant based its argument on an arbitration clause in a management agreement not concluded between the parties but parties associated with each party.

The Court stated that even if it is arguable that the drawer and payee of the cheques gave and received them as agents of the parties to the management agreement, the contracts represented by the cheques are separate and distinct from the management agreement. The Court also upheld the view that an action before the court must be "in" the same "matter" that is the subject of the arbitration agreement and not merely "related to" or "involved" in it.

The court found that the contracts out of which the cheques arose were distinct from the management contracts. There were no arbitration clauses in those contracts. The cheques were drawn in Hong Kong on a Hong Kong bank and delivered in Hong Kong, the relevant contracts were governed by the law of Hong Kong

The court, holding that MAL 8(1) could not be applied to this case, thus dismissed the application to refer the disputes to arbitration under MAL 8 (1).

Case 740: MAL [7], 36
Singapore: High Court
[2006] 3 SLR 174, [2006] SGHC 78
Aloe Vera of America Inc. v Asianic Food (S) Pte Ltd. & Chiew Chee Boon
10 May 2006
Published in English:
Abstract prepared by Lawrence Boo (National Correspondent)

[**Keywords**: *arbitration agreement; arbitration clause; claims; contracts; defences; documents; awards; arbitral proceedings; arbitral tribunal; enforcement*]

This case deals with the role of the court when requested to refuse the enforcement of a foreign arbitration award.

The plaintiff obtained an arbitration award at a tribunal of the International Center for Dispute Resolution of the American Arbitration Association in Arizona, against the defendants. During the arbitration proceedings, the second defendant challenged the tribunal's jurisdiction. It argued that it was not a party to the arbitration agreement as the dispute arose out of a contract between the plaintiff and the first defendant, and that it had merely signed a contract as the manager of that defendant. Following a preliminary ruling by the tribunal upholding its jurisdiction, both defendants withdrew from further proceedings.

In the award, the arbitrator found that the second defendant was the alter ego of the first defendant and hence was a party to the contract and the arbitration agreement. The second defendant applied to set aside the order granting leave to enforce the award on the grounds that the plaintiff had failed to establish that there was an arbitration agreement between the parties or alternatively, that the second defendant was able to satisfy one or more grounds set out in section 31 (2) of the International Arbitration Act (IAA) based on MAL 36.

The Court rejected this challenge and ordered enforcement of the award. It ruled that the examination by the court of documents in an application to enforce an arbitral award was a formal requirement and did not require a judicial investigation by the court of whether the findings of the arbitral tribunal were correct. As the second defendant could not satisfy any of the grounds set out in MAL 36, the award was given enforcement.

Case 741: MAL 9
Singapore: Court of Appeal
CA 24/2006, [2006] SGCA 42
Swift-Fortune Ltd v Magnifica Marine SA
01 December 2006
Published in English
Abstract prepared by Lawrence Boo (National Correspondent)

[**Keywords**: *arbitration agreement; courts; injunctions; interim measures; judicial assistance; judicial intervention; procedure*]

This case deals with the statutory power of the court to grant interim order or relief, including Mareva interlocutory relief, to assist international arbitrations according to MAL 9.

The appellant and the respondent had entered into a vessel-sales-agreement, which provided an agreement for arbitrations to take place in London. The appellant filed an appeal to a decision of the High Court in which the court had ruled that it had no power to grant a Mareva injunction pending arbitration proceedings between the parties in London. The High Court noted that section 12 (7) of the International Arbitration Act (IAA) conferred powers on the court to grant Mareva interlocutory relief to assist only "Singapore" international arbitrations but not "foreign" arbitrations, i.e. arbitrations which do not stipulate Singapore as the seat of arbitration.

In considering the meanings of section 12 (7) of the IAA, the High Court noted that the purpose of MAL 9 was to declare the compatibility between arbitrating the substantive dispute and seeking assistance from the courts for interim protective measures, and thus had no bearing on the meaning and effect of a domestic law providing for interim measures, such as section 12 (7) of IAA. Therefore, the meaning and effect of 12 (7) had to be determined by reference to its own language and structure as well as any other relevant extrinsic matters.

After carefully reviewing the legislative background of section 12 (7) and arguments set forward by the parties, the Court of Appeal concluded that section 12 (7) had been intended to apply to Singapore international arbitrations and not to foreign arbitrations. In essence, courts had not been endowed with the power to grant interim measures, including Mareva interlocutory relief, to assist "foreign" arbitrations. The Court of Appeal also found that section 12 (7) did not, in itself, provide an independent source of statutory power for the court to grant interim measures. Such power would need to be derived from section 4 (10) of the Civil Law Act, which however does not confer any power on the courts to grant a Mareva injunction against the assets of a defendant in Singapore unless the plaintiff has an accrued cause of action against the defendant, justifiable in a Singapore court. For the above reasons, the appeal was dismissed.

Case 742: MAL 16 (1), 16 (3), 34 (2)(a)(iii), 34 (2)(b)(ii)
Singapore: Court of Appeal
PT Asuransi Jasa Indonesia (Persero) v Dexia Bank SA
[2006] SGCA 41
01 December 2006
Published in English
Abstract prepared by Lawrence Boo (National Correspondent)
http://www.ipsofactoj.com/appeal/2006/Part4/app2006(4)-007.htm

[**Keywords**: *arbitral tribunal; estoppel; judicial jurisdiction; arbitral proceedings; award - setting aside; public policy*]

This case deals with the circumstances under which an arbitral award may be set aside by the court and whether a negative decision by an arbitral tribunal on its jurisdiction of the case referred to it constitutes an "award" under MAL 34.

In this case, two awards were rendered in two separate arbitral proceedings between the appellant and the respondent. As the High Court dismissed the application to set aside the award rendered by the second arbitral tribunal, the appellant, an Indonesia state-owned entity, submitted an appeal.

One of the grounds that the appellant relied on to set aside the award was MAL 34 (2)(a)(iii) arguing that the second arbitral tribunal, as a subsequent arbitral tribunal, was not entitled to make findings on the same issues inconsistent with those made by the first arbitral tribunal as they were not within the scope of the submission to arbitration. The Court noted that the findings of the second arbitral tribunal were indeed erroneous and inconsistent with those of the first tribunal. However, the Court stated that an arbitral tribunal had the power to rule on its own jurisdiction under MAL 16 (1), and by implication, to rule on the underlying issues of fact or law that are relevant to determining whether it had jurisdiction. It also noted that MAL 16 (3) provided for an appeal to the court if the arbitral tribunal ruled that it had jurisdiction, but not when it ruled that it did not have such jurisdiction. The Court thus concluded that any negative finding on jurisdiction by the arbitral tribunal may not be set aside under MAL 34 (2)(a)(iii) even if there were certain findings which were erroneous or inconsistent with those of the previous arbitral tribunal.

Another ground relied on for setting aside the award was MAL 34 (2)(b)(ii). The appellant argued that the second award was in conflict with the public policy of Singapore because the second tribunal's findings contradicted that of the first arbitral tribunal and thereby contravened the finality principle in the Singapore International Arbitration Act (the Act). Errors of fact or law made in an arbitral decision are final and binding on the parties and may not be appealed against or set aside by a court except under MAL 34. Therefore, Article 34 (2)(b)(ii) should not be construed to enlarge the scope of intervention to set aside errors of law or fact. Such errors should only be set aside if they are outside the scope of the submission to arbitration. The Court also noted that the scope of public policy under MAL should be construed narrowly.

The Court further considered whether a negative decision by an arbitral tribunal on its jurisdiction of the case referred to it under an arbitration agreement constitutes an "award" for the purposes of MAL 34 such that it may be set aside. The Court first noted that a negative ruling on its jurisdiction by an arbitral tribunal should not

be regarded as an "award" as it does not deal with the substance of the dispute. The Court also noted that although no definition of an "award" is provided in MAL, preliminary rulings on jurisdictions by arbitral tribunals were dealt separately under MAL 16. According to MAL 16 (3), parties may request the court to decide on this matter only in cases where an arbitral tribunal rules that it has jurisdiction. Hence, MAL 16 (3) precludes any recourse to courts following a negative ruling by the tribunal on its jurisdiction.

The appeal was dismissed as there was no award to be set aside under MAL 34.

Case 743: MAL 18
Singapore: Court of Appeal
CA 100/2006
Soh Beng Tee & Co Pte Ltd. v Fairmount Development Pte Ltd
9 May 2007
Published in English
Abstract prepared by Lawrence Boo (National Correspondent)

[**Keywords**: *arbitral tribunal; due process; equal treatment*]

This case deals with the equal treatment of parties and the right of parties to be heard in arbitral proceedings.

Having failed in the arbitration proceeding, the respondent filed an application in the High Court to set aside the award on the grounds that the arbitrator had dealt with an issue outside the scope of the arbitration and that it had been deprived of its right to be heard on a critical issue. The High Court set aside the entire award based on the fact that there had been a breach of the rules of natural justice in the making of the award. The tribunal had ruled that time was set at large for the completion of the project, i.e. the construction of a number of condominiums, which, according to the respondent, had never been argued by the parties. Dissatisfied, the appellant filed an appeal.

In the appeal, the Court analyzed the requirements imposed on the arbitrators by the rules of natural justices, in particular, the parties' right to be heard under MAL 18. In this regard, the Court stated that courts should seek to support the arbitration process in order to preserve party autonomy and to ensure procedural fairness. Furthermore, the Court stated that the concept of such procedural fairness included the right to be heard and mandated equality of treatment under MAL 18. However, arid, technical or procedural objections that do not prejudice any party should not be tolerated in the context of fairness. Only when the alleged breach of natural justice has surpassed the boundaries of legitimate expectation and propriety, resulting in actual prejudice to a party, can or should a remedy be made.

In conclusion, the Court concluded that the parties in this case were fully aware of the issue of time extension as it was pleaded and argued (although not emphasized) during the arbitration hearing. The arbitrator was entitled to extract an alternative position from the submissions of the parties to rule that time was set at large.

Accordingly, the Court held that the arbitrator had not breached the rules of natural justice for the award to be set aside.

Case 744: MAL 34 (2)(b)(ii), 34 (3)
New Zealand: High Court
CIV 2002 485 210, CIV 2003 485 876
Downer-Hill Joint Venture v the Government of Fiji
24 August 2004
Original in English

[**Keywords**: *arbitral proceedings; arbitral tribunal; award - setting aside; public policy; recognition - of award*]

This case deals with three major issues: (i) the circumstances in which an application to set aside an arbitral award is time-barred; (ii) the requirements for striking out an application to set aside an award in conflict with public policy,; and (iii) whether the arbitral award should be entered as a judgment of the court, if the application to set aside the award is struck out.

The applicant applied to the court to set aside an arbitral award made on 5 September, 2002 according to Article 34 of the First Schedule of the Arbitration Act, New Zealand, which is based on MAL 34.

The applicant submitted its first application on 12 December 2002 and filed amended applications on 6 March and 9 June 2003. The Court noted that MAL 34 (3), which provided a limitation period of three months, was intended to restrict the court review of arbitral awards both with respect to grounds and time. The applicant argued that, as long as an application to set aside the award was made within the three month-period, the applicant was entitled to make amendments. The Court found that amended applications challenged entirely new parts of the award and were substantially different from the first application. Accordingly, the Court decided not to consider admissible the paragraphs in the amended applications that introduced new causes of action.

The applicant contended for a wide interpretation of the words “public policy” and argued that the findings of the arbitral tribunal, which were not supported by any evidence, and the award itself, which contained serious and fundamental errors, were in conflict with the public policy of New Zealand under MAL 34 (b)(ii). After carefully examining the relevant cases, the Court noted that the “public policy” requirement in MAL 34 (b)(ii) imposed a high threshold. It found that the applicant’s causes of action were so clearly unfounded that they could not possibly succeed. It also found that there was evidentiary basis for the arbitral tribunal’s findings and thus dismissed the application of the applicant.

Subsequently, the respondent sought an order for the award to be entered as a judgment of this Court. The Court declined the request, as according to it, this requires a separate application and hearing.

Cases relating to the United Nations Convention on the Carriage of Goods by Sea (Hamburg Rules)

Case 745: Hamburg Rules 5 (2)
Republic of Korea: Seoul District Court
2002GADAN121261
Song Dong Geun v Geumchun Maritime Shipping
28 August 2002
Judgment in Korean

This case deals with the meaning of "delay in delivery."

The plaintiff (shipper) and the defendant (carrier) entered into a contract for the carriage of fabric merchandise by sea . Upon loading the merchandise, the defendant issued to the plaintiff a bill of lading which also contained the terms of the contract. As the delivery of the fabric merchandise was delayed, the importers of the goods raised claims against the plaintiff. The plaintiff thus sought action in court arguing that the defendant should be responsible for the damages incurred.

The Court noted that Article 788 (1) of the Commercial Code did not present a clear standard for determining whether there was a "delay in delivery." The Court stated that Hamburg Rules 5 (2) provided an internationally reasonable standard and stated that "delay in delivery" should be referred to as situations where goods were not delivered within the time expressly agreed upon or within the time which would be reasonable. Accordingly, the Court found that the plaintiff in this case had not shown that there was a delay in delivery.