UNITED NATIONS

GENERAL ASSEMBLY

Distr.
GENERAL

A/CN.9/SER.C/ABSTRACTS/2
4 November 1993

ORIGINAL: ENGLISH

UNITED NATIONS COMMISSION
ON INTERNATIONAL TRADE LAW

CASE LAW ON UNCITRAL TEXTS
(CLOUT)

Contents

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 have emanated 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).

The abstracts have been prepared by National Correspondents designated by their Governments. 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.

V.93-89970

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

Case 21: CISG 1(1)(a); 7(2); 9 (2)
Argentina: Juzgado Nacional de Primera Instancia en lo Commercial No. 7. Secretaría No. 14.
20 May 1991; judgement not final
"Elastar Sacifia S/ Concurso preventivo S/ Incidente de Impugnación por Bettcher Industries Inc."
Original in Spanish
Unpublished

A contract for the international sale of goods between a seller of the state of Ohio, United States of America, and an Argentine buyer was considered to be governed by CISG because both States had acceded to CISG, the sales contract had been concluded after CISG had entered into force (article 1(1)(a) CISG) and, according to the commercial invoice, the seller had its place of business in the state of Ohio. Questions not settled in the Convention are subject to the law of the seller, since in principle the sale is governed by the law of the domicile of the seller who is responsible for the performance characteristic of the contract, in accordance with the rules of international private law (article 7(2) CISG).

The seller has a right to interest on the price because this was expressly agreed and notwithstanding the fact that CISG contains no express provision recognizing payment of interest. It was considered that payment of interest was a widely known usage in international trade (article 9(2) CISG).

Case 22: CISG 100
Argentina: Cámara Nacional de Apelaciones en lo Comercial, Sala C (From the advice of the State Attorney assigned to the Court).
15 March 1991; judgement not final
"Qûilmes Combustibles S.A. v. Vigan S.A. S/ Ordinario"
Original in Spanish
Unpublished

In an action for late performance of a sales contract, which contained a jurisdiction clause, it was considered that CISG was not applicable. The contract had been concluded on a date preceding the entry into force of CISG (article 100 CISG).

Case 23: CISG 8(3); 18(1); 19(1)-(3)
United States: U.S. District Court for the Southern District of New York, 91 Civ. 3253 (CLB)
14 April 1992; appeal dismissed 19 January 1993
Filanto, S.p.A. v. Chilewich International Corp.
Published in English: 789 Federal Supplement 1229 (1992); 984 Federal Reports, 2d 58 (1993)
Commented on by Brand & Flechtner, 12 The Journal of Law & Commerce, 239 (1993)

A New York enterprise agreed to sell shoes to a Russian enterprise pursuant to a master agreement that required disputes to be arbitrated in Moscow. To fulfill the agreement, the New York enterprise entered into multiple contracts with an Italian manufacturer. Pursuant to one purported contract the Italian manufacturer supplied shoes but the New York buyer made only

partial payment. The Italian manufacturer sued in a New York court to recover the price. Alleging that the contract incorporated the Russian master agreement by reference, the New York buyer sought a stay of proceedings to permit arbitration.

The court construes article II(1) of the Convention on the Recognition and Enforcement of Foreign Arbitral Awards to determine whether the parties had agreed in writing to arbitrate. Concluding this is a federal law question, the court refers to contract principles embodied in CISG. It holds that the New York buyer's offer, which incorporated the Russian master agreement by reference, had been accepted by the Italian manufacturer's failure to respond promptly. Although under article 18(1) CISG silence is not usually acceptance, the court finds that under article 8(3) CISG the course of dealing between the parties created a duty on the part of the manufacturer to object promptly and that its delay in objecting constituted acceptance of the New York enterprise's offer.

Case 24: CISG 8(3)
United States: U.S. Court of Appeals for the Fifth Circuit
15 June 1993
Beijing Metals & Minerals Import/Export Corporation v. American Business Center, Inc., et. al.
Published in English: 993 Federal Reports 2d 1178 (1993); reproduced in 1993 U.S. App. Lexis 14211

A Chinese manufacturer and a U.S. importer agreed to develop the North American market for the manufacturer's weight lifting equipment. Following a dispute, the parties concluded a modified payment agreement in writing. When the Chinese manufacturer sought to enforce the payment agreement, the U.S. importer raised defences under alleged contemporaneous oral agreements with respect to the manufacturer's supply obligations. The lower court excluded the testimony about oral agreements under the state's "parol evidence" rule.

The appellate court declines to resolve the dispute about whether CISG or state law applies to the parties' contract because it concludes that to do so would be unnecessary to its decision. Nevertheless, the court states expressly that the parol evidence rule "applies regardless" of whether CISG applies or not.

Case 25: CISG 1(b); 57(a)
France: Cour d' Appel de Grenoble, Chambre des Urgences
16 June 1993
Original in French
Unpublished

In the context of commercial relations providing for phased delivery of goods, a Spanish businessman bought construction materials from a French company. He thus received delivery, from January to June 1991, of certain materials at the principal place of business of the French company. Alleging that the materials were defective the buyer refused to pay their price and

was sued before the French interim relief court, which found that it did not have substantive and territorial jurisdiction.

Based on the provisions of article 5/1 of the EC Convention on Jurisdiction and Enforcement of Judgements in Civil and Commercial Matters of 27 September 1968, the appellate court found in favour of the competence of the French court, since it was the court of the place of performance of the obligation of the buyer to pay.

The appellate court held that the contractual relationship of the parties constituted an international sale of goods and applied CISG as the relevant French law, in accordance with the French private international law. Applying article 57(1)(a) CISG the court determined that the price of the goods should have been paid at the place of business of the seller.

Case 26: CISG 1(1)(a); 53; 57(1); 78
International Chamber of Commerce, International Court of Arbitration
Arbitral award issued in 1992 in case no. 7153
Excerpts published in French: Journal de Droit International, 4, 1992, 1006
Commented on by Hascher in Journal de Droit International, 4, 1992, 1007

(Abstract prepared by Picard S. of the ICC International Court of Arbitration)

In the absence of an agreement of the parties on the law applicable, the arbitral tribunal found that CISG is applicable to the contract for the provision and installation of materials destined for the construction of a hotel.

CISG entered into force in Yugoslavia and Austria, the countries of the buyer and the seller respectively, before the conclusion of the contract. In addition, the contract falls within the scope of application of CISG, since it is clear from the text of the contract that the provision of services is secondary to the sale.

Consequently, if CISG applies, the buyer in default is obliged to pay the price and the interest for delay in payment. As CISG does not indicate the applicable interest rate, the arbitral tribunal applied the national law applicable in accordance with the rules of private international law, that is the law of the place of payment. Since the contract does not specify the place of payment, the tribunal applied article 57(1) CISG and designated the place of delivery of the goods as the place of payment.

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

Case 27: MAL 16(1)
Argentina: Cámara Nacional de Apelaciones en lo Commercial - Sala
26 September 1988; judgement not final
"Enrique C. Wellbers S.A.I.C. A. G. v. Extraktionstechnik Gesellschaft für Anlagenbau
M.B.M.: S/ Ordinario"
Excerpts published in Spanish: La Ley, 1989-E-302, Buenos Aires

In accordance with an arbitration clause contained in a contract of sale FOB port of Hamburg, one of the parties to the contract brought an action before the courts of Argentina for the constitution of the arbitral tribunal. The respondent raised a plea that the arbitral tribunal did not have jurisdiction. It was argued that the courts in Hamburg, the place of performance of the contract, had international jurisdiction over the subject-matter of the contract, and, since the arbitration clause was accessory to the contract of which it forms part, the arbitration clause should follow the fate of the contract.

The court of first instance rejected the plea of lack of jurisdiction. The court of appeals affirmed that the arbitration clause was autonomous, and therefore its validity did not depend on the validity of the contract, on the applicable law or on the court with international jurisdiction to resolve any dispute. The principle of the autonomy of such a clause is internationally accepted and, as such, incorporated in MAL (Article 16(1)). Although MAL has not been adopted in Argentina, it reflects generally accepted principles in the matter and can be taken into account to make up for the absence of a specific national norm.

Case 28: MAL 1(2); 8
Canada: Saskatchewan Court of Queen's Bench (MacPherson C.J.Q.B.)
19 March 1993
BWV Investments Ltd. v. Saskferco Products Inc., UHDE-GmbH, et al.
Original in English
Unpublished

The parties entered into a series of contractual relationships concerning the construction of a fertilizer plant for Saskferco. The subcontract between UHDE and BWV for the construction contained an arbitration clause requiring that the arbitration take place in Zurich and the interpretation, application and performance of the sub-contract be governed by Swiss law. BWV sued the defendants in court for monies owing on the contract. UHDE applied to have the proceedings stayed in order that the case might be resolved by arbitration. In issue was the application of MAL to this dispute.

The court, stating that despite the provision in article 1(2) that only articles 8, 9, 35 and 36 of MAL apply to arbitration agreements where the place of arbitration is outside the state, found that it could refer to the definitions in MAL by virtue of s. 2(2) of the International Commercial Arbitration Act, Statutes of Saskatchewan 1988-89, c.I-10.2, which enacts MAL. This section provides that all terms used in the Act will have the same meaning as in MAL. The court found that the agreement in question was an international commercial arbitration agreement within the meaning of the Act. The court found that the agreement was void as it

conflicted with the Builders' Lien Act, Statutes of Saskatchewan 1984-85-86, c. B-7.1. The agreement would have rendered inapplicable the rights of several lien holders who would not be involved in an arbitration. The court declared the arbitration agreement void and did not grant a stay of proceedings.

Case 29: MAL 2;35;36
Canada: Ontario Court, General Division (While J.)
30 January 1992
Kanto Yakin Kogyo Kabushiki-Kaisha v. Can-Eng Manufacturing Ltd.
Published in English: 7 Ontario Reports (3d), 779
Commented on by Tetley in [1993] Lloyd's Maritime and Commercial Law Quarterly, 238

Concluding an agreement prior to the existence of legislation implementing MAL will not mean that MAL will not apply to arbitrations taking place pursuant to the agreement.

The parties concluded an agreement which contained an arbitration clause and provided that arbitration would take place in Tokyo. Arbitration of an issue arising out of the agreement was held and an award was made. Kanto Yakin sought to enforce the award in Ontario. The court found that, despite the fact that the agreement was concluded prior to the coming into force of the International Commercial Arbitration Act, Revised Statutes of Ontario, 1990, c. 1.9, which enacts MAL, the agreement was still an arbitration agreement governed by the Act and was enforceable as such.

Case 30: MAL 35;36
Canada: Ontario Court, General Division (Feldman J.)
13 February 1992; appeal pending in the Ontario Court of Appeal
Robert E. Schreter v. Gasmac Inc.
Published in English: 7 Ontario Reports (3d), 608
Commented on by Tetley in [1993] Lloyd's Maritime and Commercial Law Quarterly, 238

For the purposes of MAL, an arbitral award does not merge in a judgment which confirms it. The court should not re-open the merits of an arbitral award where there has been no misconduct, simply on the grounds of ensuring conformity with public policy.

The agreement between the parties provided that the law of the state of Georgia, United States of America, would govern and that disputes arising out of the agreement would be determined by binding arbitration to take place in Atlanta. An arbitral award in favour of Schreter was subsequently confirmed by the Georgia court. Gasmac challenged the enforcement of the award in Ontario on a number of procedural grounds, all of which were rejected by the court. Gasmac claimed that the award had merged in the Georgia court judgment and could therefore only be enforced in Ontario as a foreign judgement. Gasmac also claimed that the acceleration of royalty payments for breach of contract was contrary to the public policy of Ontario.

The court found that article 35 MAL as enacted by the International Commercial Arbitration Act, Revised Statutes of Ontario, 1990, c. 1.9 made recognition and enforcement of

arbitral awards mandatory. The court found no indication in article 35 or 36 that awards should be considered to merge in judgments which confirm them. The court indicated that to make such a finding would "create a gaping hole in the scope of the Act." The court determined that the facts did not warrant re-opening the arbitral award on public policy grounds pursuant to article 36(1)(b)(ii) MAL. The court enforced the arbitral award.

Case 31: MAL 8
Canada: British Columbia Court of Appeal (Hinkson, Southin and Cumming JJ.A.)
10 March 1992
Gulf Canada Resources Ltd. v. Arochem International Ltd.
Published in English: 66 British Columbia Law Reports (2d), 113
Commented on by Tetley in [1993] Lloyd's Maritime and Commercial Law Quarterly, 238

While the court must grant a stay of court proceedings pursuant to article 8 MAL where its terms are satisfied, the court retains some residual jurisdiction to exercise on an application for a stay.

A contract existed between the parties for the delivery of 375,000 barrels of crude oil. The contract contained an arbitration clause. The defendant refused delivery and the plaintiff sued for damages. The trial court granted the defendant's request for a stay of court proceedings pending arbitration pursuant to s. 8 of the International Commercial Arbitration Act, Statutes of British Columbia 1986, c. 14, which enacts MAL. The plaintiff appealed.

The court determined that, while s. 8 requires that the court grant a stay unless the arbitration agreement is null and void, inoperative or incapable of being performed, the court still has some residual jurisdiction to exercise. The court may exercise this jurisdiction and refuse to grant a stay should it conclude that one of the parties named in the proceeding is not a party to the arbitration agreement, the alleged dispute does not come within the terms of the arbitration agreement or if the application is out of time. The court upheld the trial court's decision to grant the stay of proceedings.

Case 32: MAL 7; 8
Canada: Ontario Court, General Division (Zelinski J.)
30 April 1992
Mind Star Toys Inc. v. Samsung Co. Ltd.
Published in English: 9 Ontario Reports (3d), 374

Agreements containing both an arbitration clause and a right to sue will still be subject to article 8 MAL, depending on the particular agreement.

Mind Star was a licensee of a product which it sub-licensed to Samsung. The sub-licensing agreement contained an arbitration clause and also a clause providing Mind Star with the right to sue should Samsung fail to perform any of its obligations. Mind Star claimed that Samsung had fundamentally breached the agreement and that Mind Star was entitled to claim damages. The parties agreed that the arbitration clause in the agreement qualified as an

arbitration agreement pursuant to article 7 MAL as enacted by the International Commercial Arbitration Act, Revised Statutes of Ontario, 1990, c.1.9.

The court concluded that the right to sue did not qualify the duty to arbitrate. Even disputes concerning the clause creating the right to sue were subject to arbitration. The court found this "consistent with the requirement that the arbitrator will, in the first instance, determine its own jurisdiction, and the scope of its authority." The arbitration clause was operative and as such article 8 MAL required that the parties be referred to arbitration.

Case 33: MAL 8
Canada: Federal Court of Appeal (Marceau, Desjardins and Décary JJ.A.)
29 May 1992
Ruhrkohle Handel Inter GMBH and National Steel Corp. et al. v. Fednav Ltd. and Federal Pacific (Liberia) Ltd. and Federal Calumet (The)
Published in English and French: 3 Federal Court Reports 1992, 98
Commented on by Tetley in [1993] Lloyd's Maritime and Commercial Law Quarterly, 238

In order for the court to grant a stay of proceedings pursuant to article 8 MAL, the party requesting the stay must satisfy the court that the request was made in a timely fashion and that the request was made to the court, not just to the other party.

The parties entered into a charter-party which contained an arbitration clause. The charter-party was subsequently breached. The appellants asked the respondents for an extension of time to "commence suit and/or arbitration". The respondents granted an extension of time to commence arbitration only. The appellants filed a statement of claim for damages which made no mention of arbitration. The respondents filed a statement of defence and counterclaim, and requested a stay of proceedings. Both the Senior Prothonotary and the Trial Division refused the appellants' request that the action be stayed. The appellants appealed.

The court found that while article 8 MAL which is enacted by the Commercial Arbitration Act, Revised Statutes of Canada 1985, c.C-34.6 requires the court to grant a stay of proceedings and refer the matter to arbitration, such an order is not made as of right. Certain conditions must first be met. The party seeking such an order must demonstrate that a request for arbitration was made in a timely fashion (not later than when submitting their first statement on the substance of the dispute). The court noted that the request for arbitration required in article 8 MAL is a request to the court, not just to the other party. No such request was made to the court here and, therefore, no stay was granted.

Case 34: MAL 8
Canada: Federal Court of Canada, Trial Division (Joyal J.)
30 September 1992 and 9 October 1992 (identical decisions)
Miramichi Pulp and Paper Inc. v. Canadian Pacific Bulk Ship Services Ltd.
Original in English and French
Unpublished

While the Federal Court possesses some permissive jurisdiction over the granting of

stays of proceedings, strong reasons are required to overcome the assumption that contracts must be respected and, therefore, article 8 MAL must operate.

The parties entered into a charter-party agreement whereby any dispute would be referred to arbitration in London. A dispute arose and court proceedings were commenced. A stay of these proceedings was granted by the Senior Prothonotary. This decision was appealed.

The court noted the mandatory nature of article 8 MAL (enacted by the Commercial Arbitration Act, Revised Statutes of Canada 1985, c.C-34.6) which requires the court to grant a stay of proceedings and refer matters to arbitration where certain conditions are met. The court also noted the permissive jurisdiction in s. 50 of the Federal Court Act, Revised Statutes of Canada 1985, c.F-7 which allows the Federal Court to grant stays of proceedings in the interest of justice. The court found that the interest of justice generally dictated that contractual agreements be upheld. In order to overcome this assumption, strong reasons are required. The court found that no such strong reasons existed in this case and upheld the decision of the Senior Prothonotary granting the stay.

Case 35: MAL 8
Canada: Ontario Court, General Division (Day J.)
1 October 1992
Canada Packers Inc. et al. v. Terra Nova Tankers Inc. et al.
Published in English: 11 Ontario Reports (3d), 382

The fact that a claim on which a party seeks arbitration is grounded in tort does not preclude the application of MAL.

The parties entered into a charter-party agreement which contained an arbitration clause. The respondent sued the applicant in both contract and tort. At issue was whether the court should grant a stay of proceedings pursuant to article 8 MAL. The respondent claimed that MAL did not apply to tortious actions and that the absence of the word "commercial" characterizing the term arbitration in the International Commercial Arbitration Act, Revised Statutes of Ontario, 1990, c. 1.9. indicated that MAL would not apply to the situation.

The court found that the fact that a claim is grounded in tort does not preclude arbitration. The court also determined that even though the word "commercial" does not appear in the implementing legislation, it does appear in the schedule to the legislation and as such MAL will apply to commercial arbitrations in Ontario. The court granted the stay of proceedings.

Case 36: MAL 8
Canada: Federal Court of Canada, Trial Division (Walsh J.)
19 January 1993
Nanisivik Mines Ltd. and Zinc Corporation of America v. F.C.R.S. Shipping Ltd., Canarctic Shipping Co. Ltd. et al.
Original in English and French
Unpublished

The mandatory nature of article 8 MAL does not remove the permissive jurisdiction of the Federal Court to grant stays of proceedings pursuant to s. 50 of the Federal Court Act.

Nanisivik and Canarctic entered into a charter-party which required that all disputes of law and fact arising under it be referred to arbitration. The ship sank. The plaintiffs sued in contract and tort. Canarctic argued that the court was required to grant a stay of proceedings and refer the matter to arbitration pursuant to article 8 MAL which is enacted by the Commercial Arbitration Act, Revised Statutes of Canada 1985, c. C-34.6. Nanisivik argued that a stay should not be granted against those parties to the litigation who were not parties to the charter-party.

The court relied on its discretion pursuant to s. 50(1) of the Federal Court Act, Revised Statutes of Canada 1985, c.F-7 rather than on article 8 MAL and granted a stay of proceedings only against Canarctic. In so doing, the court relied on previous Federal Court decisions which determined that article 8 MAL as invoked by an agreement to arbitrate does not affect or impinge on the permissive jurisdiction of the Federal Court (see A/CN.9/SER.C/ABSTRACTS/1, cases 8 and 15).

Case 37: MAL 36(1)(b)(ii)
Canada: Ontario Court, General Division (Eberle J.)
12 March 1993
Arcata Graphics Buffalo Ltd. v. Movie (Magazine) Corp.
Original in English
Unpublished

In order to refuse to enforce an award as contrary to public policy (article 36(1)(b)(ii) MAL) the award must be contrary to the morality of the community of the enforcing State.

The arbitral award in question included interest at the rate of 1.5% per month with no annual interest rate. This violated s. 4 of Canada's Interest Act which imposes limits on interest rates not expressed annually. The respondent argued that to give force to this provision would be contrary to public policy and thus contrary to article 36(1)(b)(ii) MAL enacted by the International Commercial Arbitration Act, Revised Statutes of Ontario, 1990, c.1.9.

The court adopted the principle that to refuse to enforce an award pursuant to article 36(1)(b)(ii) MAL the award must be contrary to the essential morality of the state in question. The court upheld the award.

Case 38: MAL 8
Hong Kong: High Court (Kaplan J.)
2 March 1991
China State Construction Engineering Corporation, Guangdong Branch v. Madiford Limited
Published in English: 1992, Hong Kong Law Digest, C4

(Abstract prepared by Kaplan J.)

The plaintiff agreed to supply to the defendant the services of a number of Chinese construction workers to carry out certain works in Libya. The defendant admitted that the amount claimed by the plaintiff was correct but contended that it was not obliged to pay it in full on the basis of a settlement agreement it had reached with the plaintiff.

The plaintiff had obtained a judgement by default and, in accordance with s. 6A of the Arbitration Ordinance (with his summons the plaintiff invoked article 8 MAL), the defendant applied for a stay of the proceedings, on the ground that the agreement between the plaintiff and the defendant contained an arbitration clause. The arbitration clause provided that "In case of any incompleteness of the contract, both parties shall reach settlement ... If settlement cannot be reached ... the matter may be submitted for arbitration ..." (emphasis added).

The court set aside the judgement by default obtained by the plaintiff as it was satisfied that the defendant had "a reasonable prospect of success".

The court found that MAL was not applicable as the arbitration agreement was entered into before 6 April 1990, namely the commencement date of the Arbitration (Amendment) (No. 2) Ordinance 1989, by which MAL was made part of the Hong Kong law of arbitration.

The court, applying article 6A of the Arbitration Ordinance, granted the stay of proceedings as it found that there was a valid arbitration agreement. The word "incompleteness" in the arbitration clause was held to be wide enough to cover a failure to perform the contract. The words "may be submitted" in effect meant "shall", as once one party had elected to proceed to arbitration for the resolution of a dispute the other party was obliged to honour the agreement to arbitrate.

Case 39: MAL 1(3) (b) (ii), 9
Hong Kong: High Court of Hong Kong (Kaplan J.)
Katran Shipping Co. Ltd. v. Kenven Transportation Ltd.
Published in English: 1992, Hong Kong Law Digest, G9

(Abstract prepared by Kaplan J.)

The defendant, a Hong Kong company, sought to have set aside a Mareva injunction that the court had granted the plaintiff, also a Hong Kong company. The issue before the court was whether it had jurisdiction to grant such an interim measure of protection, in view of the fact that a charter-party agreement entered by the plaintiff and the defendant contained an arbitration clause which provided that "any dispute will be settled before Hong Kong Arbitrators and under British Maritime law ...".

The court, relying on article 1(3)(b)(ii) MAL and its decision on Fung Sang Trading v. Kai Sun Sea Products and Food Co. Ltd. [see A/CN.9/SER.C/ABSTRACTS/1, case 20], found that MAL covered this dispute, since a substantial part of the obligations provided in the charter-party was to be performed outside Hong Kong.

The court held that the interim measure of protection referred to in article 9 MAL was wide enough to cover a Mareva injunction. "The protection afforded by a Mareva injunction" was held to be "the reduction in the risk of the amount of the claim, or part of it, being dissipated or otherwise put out of the plaintiff's reach before the resolution of the dispute".

The court concluded that it had jurisdiction to grant a Mareva injunction in support of a domestic arbitration carried out in Hong Kong, both under article 9 MAL and s. 14(6) of the Arbitration Ordinance which were identical in regard to domestic arbitration.

Case 40: MAL 7; 11(4)
Hong Kong: High Court of Hong Kong (Kaplan J.)
30 July 1992
Pacific International Lines (PTE) Ltd. & Another v. Tsinlien Metals and Minerals Co. Ltd.
Published in English: 1992, Hong Kong Law Digest, G5; excerpts of judgement in The Arbitration and Dispute Resolution Law Journal, Part 4, December 1992, 240

(Abstract prepared by Kaplan J.)

The plaintiff, owner and manager of a vessel which was chartered to the defendant, sought payment of damages for breach of the charter-party with the defendant. When the defendant failed to pay, the plaintiff appointed an arbitrator pursuant to an arbitration clause contained in the charter-party. The defendant failed to appoint a second arbitrator and the plaintiff applied in accordance with article 11(4) MAL for the court to appoint a second arbitrator.

Although the charter-party was not signed by both parties, the court found that there was a charter-party between the plaintiff and the defendant, since there was no doubt from the facts and the pre-voyage communications that the defendant had chartered the vessel of the plaintiff and had paid also certain sums to the plaintiff in accordance with that charter-party. The court concluded that article 7 MAL requiring a written agreement to arbitrate had been complied with and gave the defendant seven days to appoint a second arbitrator, otherwise the court was to appoint him.

Case 41: MAL 8(1)
Hong Kong: High Court of Hong Kong (Barnett J.)
24 September 1992
Guangdong Agriculture Company Limited v. Conagra International (Far East) Limited
Published in English: (1993) 1, Hong Kong Law Reports and 1992, Hong Kong Law Digest, H11. Excerpts of judgement published in The Arbitration and Dispute Resolution Law Journal, Part 2, June 1993, 100

(Abstract prepared by Kaplan J.)

The plaintiff sought a summary judgement for damages for short delivery of a shipment of urea. The defendant applied for a stay of the action pending arbitration on the grounds that the agreement with the plaintiff contained an arbitration clause providing that "... In case no settlement can be reached, the case under dispute can then be submitted to the chartered loss adjuster for arbitration ... The arbitration shall take place in Hong Kong and shall take place in accordance with the rules of Hong Kong ...".

The court found that there was a binding arbitration agreement, since all article 8 MAL required was that the parties plainly agreed to settle any dispute by arbitration.

The court also found that this case involved a real dispute that could be referred to arbitration as required by s. 6A(1) of the Arbitration Ordinance, but not by article 8 MAL. The words " ... or that there is not in fact any dispute between the parties with regard to the matter agreed to be referred ...", omitted from article 8(1) MAL but contained in section 6A(1) of the Arbitration Ordinance, made it clear that under the Arbitration Ordinance only where it was readily and immediately demonstrable that a claim has not been admitted by the party against whom it is made, the matter should be referred to arbitration. The court granted a stay of proceedings.

Case 42: MAL 9
Hong Kong: High Court of Hong Kong (Barnett, J.)
2 March 1992
Interbulk (Hong Kong) Ltd. v. Safe Rich Industries Ltd.
Published in English: (1992) 2 Hong Kong Law Reports, 185 and 1992 Hong Kong Law Digest, C7

(Abstract prepared by the Secretariat)

The plaintiff, shipowner, obtained an injunction against the defendant, charterer. The charter-party contained a clause providing for arbitration in England under English law. The defendant sought to have the injunction set aside.

The court held that, pursuant to s. 14(6) of the Arbitration Ordinance, Hong Kong courts had no jurisdiction to grant interim relief, in cases where there was a valid arbitration agreement providing for arbitration elsewhere than in Hong Kong.

The court noted that under article 9 MAL the courts of Hong Kong were empowered to

grant an "interim measure of protection" to a party to an arbitration to which MAL applied. The court recognized that it was "... at least open to argument" that a court of a state that had adopted MAL might be more ready to assist a party to an international arbitration agreement, notwithstanding the fact that the arbitration had its seat elsewhere.

Case 43: MAL 7(2) MAL
Hong Kong: High Court of Hong Kong (Mayo J.)
8 September 1992
Hissan Trading Co. Ltd. v. Orkin Shipping Corporation
Published in English: 1992, Hong Kong Law Digest, H8

(Abstract prepared by Kaplan J.)

The plaintiff, sub-charterer, filed an action against the defendant, ship-owner, for loss of cargo occasioned by the vessel's sinking. The claim was made under a bill of lading subject to Japanese law, which incorporated the arbitration clause of a charter-party to which neither the plaintiff nor the defendant were parties. The bill of lading itself contained an exclusive jurisdiction clause in favour of the Tokyo District Court. At the commencement of the action the plaintiff obtained an injunction against the defendant with regard to the proceeds of the insurance policy on the vessel.

The defendant applied for a stay of court proceedings on the ground of the arbitration clause, alternatively on the basis of the exclusive jurisdiction clause, contained in the bill of lading. The defendant also sought to have the injunction set aside.

The court found that, since the bill of lading was not signed by both parties, there was no written agreement to arbitrate contained in a document signed by both parties, as required by article 7(2) MAL. The correspondence between the parties was held to be insufficient as article 7(2) MAL precluded the adoption of memoranda being relied upon, which were issued after the conclusion of the agreement to arbitrate [see, however, A/CN.9/SER.C/ABSTRACTS/2, case 44]. In addition, the court could not apply the relevant arbitration clause, even if it were a written agreement in the meaning of article 7(2) MAL, since it was not clear whether the parties had agreed to resolve their disputes through arbitration or through court proceedings before the Tokyo District Court. In order to apply the arbitration clause the court would have to manipulate the language of the agreement of the parties in a substantial and, thus, impermissible way. The court dismissed the application for a stay of proceedings.

The court dismissed also the defendant's application to have the injunction set aside. The court held that there was sufficient evidence that the main asset of the defendants, the proceeds of the insurance policy on the vessel, might be dissipated, as the defendant was a one-ship-owning Panamanian company which was unlikely to continue trading after the vessel had sunk.

Case 44: MAL 7(2); 8
Hong Kong: High Court of Hong Kong (Kaplan J.)
17 February 1993
William Company v. Chu Kong Agency Co. Ltd. and Guangzhou Ocean Shipping Company
Published in English: 1993, Hong Kong Law Digest, B7

(Abstract prepared by the Secretariat)

The plaintiff filed a suit against the defendants requesting damages for loss and damage to its cargo carried under a bill of lading issued by the first defendant in Hong Kong. The bill of lading, which was subject to the Hague-Visby Rules, contained an arbitration clause providing for arbitration in China under Chinese law and an exclusive jurisdiction clause in favour of Chinese courts.

The defendants sought a stay of proceedings in favour of arbitration in China, alternatively a stay on the grounds of the Chinese exclusive jurisdiction clause and/or on the grounds of forum non conveniens.

The court found that the arbitration clause constituted a valid written agreement to arbitrate. Declining to follow a previous High Court decision to the contrary, namely Hissan Trading Co Ltd. v. Orkin Shipping Corporation [see A/CN.9/SER.C/ABSTRACTS/2, case 43], the court held that, although the bill of lading was not signed by both parties and the arbitration clause contained therein could not be said to be a written agreement to arbitrate in the sense of article 7(2) MAL, material addressed by one party to the other after the conclusion of the agreement to arbitrate could provide a record of the agreement to arbitrate. In this case it was shown conclusively through the presentation of such material that the parties had agreed on arbitration in China.

As the bill of lading contained both an arbitration and an exclusive jurisdiction clause, the court addressed the question whether the arbitration clause was void. It was held that the claimant had a choice, either to seek arbitration or litigation in China. As the plaintiff opted for a method of dispute resolution not foreseen in the bill of lading, namely litigation in Hong Kong, it was open to the defendants to exercise that choice. By applying for a stay of proceedings pursuant to article 8 MAL, the defendants opted for arbitration in China. The court granted the stay of proceedings.

III. ADDITIONAL INFORMATION ON ABSTRACTS PUBLISHED IN A/CN.9/SER.C/ABSTRACTS/1

Cases 1, 3, 4 and 5

Commented on by Karollus in Recht der Wirtschaft 1991/11, 319.

Case 4

Excerpts of the judgement published in Uniform Law Review II, 1989, 853.

Case 10

The correct reference to the publication of the judgement is "Requeils de Jurisprudence du Québec 1987, 1346". Commented on by Tetley in [1993] Lloyd's Maritime and Commercial Law Quarterly, 238.

Case 12

Appeal pending before the Federal Court of Appeal.

Case 16

The correct reference to the publication of the judgement is "Published in English: 1 Western Weekly Reports, 1991, 219".

Cases 9, 14, 15, 16

Commented on by Tetley in [1993] Lloyd's Maritime and Commercial Law Quarterly, 238.

Cases 9, 16 and 17

Commented on by Paterson in Williamette Law Review, Vol. 27, 573.

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