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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).

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V.94-25797

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

Case 53: CISG 14(1)
Hungary: Supreme Court Gf.I. 31.349/1992/9
25 September 1992
United Technologies International Inc. Pratt and Whitney Commercial Engine Business v. Magyar Légi Közlekedési Vállalat (Malév Hungarian Airlines)
Original in Hungarian
Unpublished
Summary published in Italian: Diritto del commercio internazionale July-September 1993, 651
Commented on by Magnus in Zeitschrift für Europäisches Privatrecht (ZEuP) 1993, 79

The plaintiff, an American manufacturer of aircraft engines, further to extensive negotiations with the defendant, a Hungarian manufacturer of Tupolev aircraft, made two alternative offers of different types of aircraft engines without quoting an exact price. The defendant chose a type of engine from the ones offered and placed an order. At issue was whether a valid contract was concluded. The court of first instance held that a valid contract had been concluded on the ground that the offer indicated the goods and made provision for determining the quantity and the price.

The Supreme Court found that the offer and the acceptance were vague and, as such, ineffective since they failed to explicitly or implicitly fix or make provision for determining the price of the engines ordered (art. 14(1) CISG). The Supreme Court considered that the acceptance was a mere expression of the intention of the defendant to conclude a contract for the purchase of the engines chosen and, as such, the acceptance could not operate as a counter-offer. The Supreme Court therefore overturned the decision of the court of first instance and held that there was no valid contract concluded.

Case 54: CISG 1(1)(a);1(1)(b); 4; 79
Italy: Tribunale Civile di Monza
14 January 1993
Nuova Fucinati S.p.A. v. Fondmetal International A.B.
Published in Italian: Giurisprudenza Italiana 1994, I, 146 and Il Foro Italiano 1994, I, 916
Commented on by Bonell in Giurisprudenza Italiana 1994, I, 145 and Di Paola in Il Foro Italiano 1994, I, 917

The plaintiff, an Italian seller who failed to deliver the goods to the defendant, a Swedish buyer, claimed avoidance of the sales contract on the ground of hardship ("eccessiva onerosità sopravvenuta") since the price of the goods had increased after conclusion of the contract and before delivery by almost 30%.

The court held that CISG was not applicable since at the time of the conclusion of the contract CISG was in force in Italy but not in Sweden (article 1(1)(a) CISG). The court also excluded the application of the Convention on the ground that the parties had chosen Italian law as

the law governing their contract holding that article 1(1)(b) CISG operates only in the absence of a choice of law by the parties. In the court's opinion, even if CISG applied, the seller could not rely on hardship as a ground for avoidance, since CISG did not contemplate such a remedy in article 79 or elsewhere. A domestic court could not integrate into CISG provisions of domestic law recognizing a right of avoidance of the contract in case of hardship since hardship is not a matter expressly excluded in article 4 CISG from the scope of the Convention.

Case 55: CISG 1(1)(b); 78
Switzerland, Canton of Ticino: Pretore della giurisdizione di Locarno Campagna
15 December 1991
Excerpts published in German: Schweizerische Zeitschrift für internationales und europäisches Recht (SZIER) 1993, 665

The plaintiff, a French seller, claimed the payment of the price of goods, which the defendant, a Swiss buyer, had failed to pay, plus interest at the rate of 6% from July 1990, the time of conclusion of the contract. The defendant acknowledged the debt in the course of the proceedings but argued that interest was payable only from August 1991, the time the defendant was notified of the plaintiff's refusal to accept a returned sample as payment.

Although the plaintiff invoked Swiss law, the court, applying article 118 of the Swiss Federal Act of Private International Law and article 3 of the Hague Convention on the Law Applicable to International Sales Contracts on Movables of 15 June 1955, held that CISG was applicable as the applicable French law. The court granted the plaintiff interest on the sum owed from the time of the conclusion of the contract since article 78 CISG did not refer to any formal or informal notice of default. In order to determine the interest rate, the court applied French law, since CISG does not provide for a specific interest rate, and granted interest at the rate of 6%, as requested by the plaintiff, on the ground that it was lower than the statutory interest rate under French law.

Case 56: 1(1)(b); 36(1); 38; 39; 50
Switzerland, Canton of Ticino: Pretore della giurisdizione di Locarno Campagna
27 April 1992
Excerpts published in German: Schweizerische Zeitschrift für internationales und europäisches Recht (SZIER) 1993, 665

The plaintiff, an Italian wholesaler of furniture, claimed the purchase price, which the defendant, a Swiss retailer, refused to pay alleging lack of conformity of the goods.

The court, applying Swiss private international law, found that CISG was applicable as the law of Italy. It was held that as the defendant had resold some of the defective furniture without notifying the plaintiff in time about the resale, the defendant had lost its right to rely on non-conformity of the goods (art. 38 and 39 CISG). With regard to other goods, the defendant was granted a reduction of price, since it had promptly notified the plaintiff about the defects and the plaintiff had refused to remedy the defects (art. 50 CISG). The court rejected an offer made by

the plaintiff during the proceedings to pay the repair cost, holding that article 50 CISG was not intended to provide for restitution of the repair cost but a reduction of the purchase price in the same proportion as the value that the goods actually delivered had at the time of delivery bore to the value that conforming goods would have had at that time.

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

Case 57: MAL 8
Hong Kong: High Court of Hong Kong (Kaplan J.)
5 May 1993
Lucky-Goldstar International (H.K.) Limited v. Ng Moo Kee Engineering Limited
Excerpts published in [1993] 2 Hong Kong Law Reports (HKLR), 73

(Abstract prepared by the Secretariat)

The plaintiff, a Hong Kong company and subsidiary of a Korean company, sold sets of elevators to the defendant, a Hong Kong company. The contract contained an arbitration clause which provided for arbitration in a "3rd country, under the rule of the 3rd country and in accordance with the rules of procedure of the International Commercial Arbitration Association". The plaintiff sued for damages in the Hong Kong courts and the defendant sought a stay of the proceedings pursuant to article 8 MAL.

The plaintiff argued that the arbitration agreement should be considered null since it referred by mistake to an unspecified third country, or inoperative since it referred to a non-existent organization and to non-existent rules.

The court found that the arbitration clause sufficiently indicated the parties' intention to arbitrate. It held that the reference to an unspecified third country, to a non-existent organization and to non-existent rules did not render the arbitration agreement inoperative or incapable of being performed since arbitration could be held in any country other than the countries where the parties had their places of business and under the law of the place of arbitration, which could be chosen by the plaintiff. The court granted the stay of proceedings sought by the defendant and ordered the plaintiff to pay the costs of the proceedings.

Case 58: MAL 1(3)(b)(ii)
Hong Kong: High Court of Hong Kong (Kaplan J.)
22 June and 12 July 1993; appeal pending
Ananda Non-Ferrous Metals Ltd. v. China Resources Metal and Minerals Co. Ltd.
Excerpts published in [1993] 2 Hong Kong Law Reports (HKLR), 348

(Abstract prepared by the Secretariat)

The plaintiff, a Hong Kong company, agreed to sell to the defendant, also a Hong Kong company, 40 metric tonnes of cadmium c.i.f. Rotterdam. Upon arrival in Rotterdam, the goods were inspected and the defendant contended that they did not comply with the description contained in the contract. The issue was submitted to arbitration and the arbitral tribunal, in an interim award, found in favour of the defendant. The plaintiff sought leave from the court to appeal against that interim award. The defendant argued that an international arbitration was involved, to which MAL applied, and that under MAL there was no right to appeal. It was agreed that the court should first deal with the issue whether it had jurisdiction depending on whether a domestic or international arbitration was involved. The plaintiff argued that the arbitration was domestic since both parties were Hong Kong companies and that, even if it were international, the defendant was estopped from raising that defence or had waived such a defence since the circumstances and the conduct of the parties indicated that a domestic arbitration was involved.

The court, applying article 1(3)(b)(ii) MAL and citing its ruling on Fung Sang Trading Limited etc. (case 20), held that an international arbitration was involved since a substantial part of the obligations of the commercial relationship was to be performed outside Hong Kong. It was found that the documents submitted by the plaintiff and the circumstances did not indicate that the parties had agreed to opt into the domestic regime. It was also found that the defendant was not estopped from raising the defence that an international arbitration was involved since there was no representation by the defendant on which the plaintiff might have acted to its detriment; nor did the defendant waive such defence since the fact that the arbitration was international was never an issue in the arbitration proceedings and the defendant could not have waived a right of which it was not aware. The court dismissed the application.

Case 59: MAL 11(4)(a)
Hong Kong: High Court of Hong Kong (Leonard J.)
28 September 1993
China Ocean Shipping Company v. Mitrans Maritime Panama S.A.
Original in English
Unpublished

(Abstract prepared by the Secretariat)

The defendant failed to appoint an arbitrator and the plaintiff sought the appointment of an arbitrator by the court on behalf of the defendant pursuant to article 11(4)(a) MAL. One day before the hearing the defendant indicated its willingness to consent to the appointment of an

arbitrator by the court, provided that each party would bear its share of the costs of the proceedings. The plaintiff, who had some difficulty in getting the matter before the court because of problems concerning service of documents, rejected the defendant's offer and asked the court to appoint an arbitrator and order that the defendant pay the costs of the proceedings.

The court found that the defendant had failed to honour its obligation under the arbitration agreement and appoint an arbitrator and that the defendant's conduct was such that it was proper that the plaintiff should be placed in a position in which it would have been if the defendant had honoured its obligation. The court ordered the defendant to pay the costs of the plaintiff occasioned by the application for the appointment of an arbitrator by the court on behalf of the defendant.

Case 60
Hong Kong: High Court of Hong Kong (Kaplan J.)
6 October 1993
Safond Shipping Sdn. Bhd. v. East Asia Sawmill Corp.
Original in English
Unpublished

(Abstract prepared by the Secretariat)

The plaintiff had a claim for demurrage against the defendant on the basis of a charterparty containing an arbitration clause which provided for arbitration in Hong Kong under English law and that each party would nominate one arbitrator. The plaintiff informed the defendant about the appointment of an arbitrator and invited the defendant to appoint its arbitrator. The defendant did not respond. The plaintiff then sought the appointment of an arbitrator by the court on behalf of the defendant pursuant to article 11 MAL. The court granted the plaintiff leave to serve out of the jurisdiction of the court and process was served, but the defendant again did not respond.

The court found that the defendant's conduct, which reflected what was becoming a standard pattern in claims before Hong Kong courts arising usually out of charterparties or contracts for the international sale of goods, involved cost and delay and as such was contrary to the spirit of arbitration which seeks to resolve a dispute quickly and economically. It was held that such conduct constituted a flagrant breach of the contractual obligation to arbitrate and an unacceptable defiance of the court proceedings, which caused delay and expense. The court appointed an arbitrator and ordered the defendant to pay the plaintiff's costs on an indemnity basis.

Case 61: MAL 8
Hong Kong: High Court of Hong Kong (Kaplan J.)
21 January 1994
Zhan Jiang E & T Dev Area Service Head Co. v. An Hau Company Limited
Original in English
Unpublished

(Abstract prepared by the Secretariat)

The plaintiff sued for damages on the ground that the defendant failed to deliver a shipment of wire rods. The defendant requested a stay of the proceedings pursuant to article 8 MAL.

The plaintiff argued that there was no dispute to be referred to arbitration since the defendant in a letter addressed to the plaintiff had admitted liability and offered to compensate the plaintiff. The defendant denied that this letter could be construed as a sufficient admission of liability to justify refusing the stay and argued that it was unable to deliver the wire rods because it could not accept a condition set unilaterally by the plaintiff after the conclusion of the contract that the defendant submit a performance bond.

The court found that the letter referred to by the plaintiff did not constitute an unequivocal admission of liability but was merely a commercial offer to settle. Even if the letter were accepted as an admission of liability, it could clearly not be construed as an admission of the quantum of the claim. The court held that there was a dispute in the sense of article 8 MAL and granted the stay of the proceedings sought by the defendant.

Case 62: MAL 7(2); 11
Hong Kong: High Court of Hong Kong (Kaplan J.)
2 February 1994
Oonc Lines Limited v. Sino-American Trade Advancement Co. Ltd.
Original in English
Unpublished

(Abstract prepared by the Secretariat)

The plaintiff requested the court to appoint an arbitrator on behalf of the defendant pursuant to article 11 MAL. The defendant objected on the ground that article 7(2) MAL was not complied with since the defendant never signed the charterparty which contained in a rider the arbitration agreement invoked by the plaintiff.

The court found that, although the charterparty was not signed by either party, a number of communications exchanged between the parties provided a sufficient record in writing of their agreement to arbitrate. The court appointed an arbitrator on behalf of the defendant.

Case 63: MAL 8
Hong Kong: High Court of Hong Kong (Kaplan J.)
31 March 1994
Joong and Shipping Co. Limited v. Choi Chong-sick (alias Choi Chong-sik) and Chu Ghin Ho trading as Chang Ho Company
Original in English
Unpublished

(Abstract prepared by the Secretariat)

The plaintiff sought summary judgement against the defendant for a claim for freight and demurrage, which the defendant had admitted in correspondence with the plaintiff. The defendant requested a stay of proceedings and requested that the matter be submitted to arbitration pursuant to article 8 MAL.

The court, citing its decisions in Guangdong Agriculture Co. Ltd etc. (case 41) and on Zhan Jiang & T. Dev Area Service Head Co. etc. (case 61), found that article 8 MAL was predicated upon the existence of a dispute and that in the present case there was no dispute that could be referred to arbitration since the defendant had admitted the plaintiff's claim unequivocally both as to liability and quantum. The court dismissed the application for a stay and granted the plaintiff a summary judgement for the sum claimed.

Case 64: MAL 7
Hong Kong: High Court of Hong Kong (Kaplan J.)
13 May 1994
H. Small Limited v. Goldroyce Garment Limited
Original in English
Unpublished

(Abstract prepared by the Secretariat)

The plaintiff, who had previous dealings with the defendant, sent to the defendant a purchase order, which, in its general conditions, contained an arbitration clause. The goods were delivered and a dispute arose as to their quality. The defendant made an offer for compensation. The plaintiff rejected it and sought the appointment of an arbitrator by the court on behalf of the defendant pursuant to s. 12 of the Hong Kong Arbitration Ordinance, on the ground that the defendant failed to appoint an arbitrator.

The plaintiff was not able to produce a copy of the purchase order signed by the defendant but stated that a former employee of the defendant told them that the defendant had signed the purchase order and had kept the signed copy. The plaintiff argued that the evidence met the threshold of article 7 MAL requiring an arbitration agreement in writing. The plaintiff further argued that it was clearly beyond doubt that a contract existed between the parties and that the contract contained an arbitration clause.

The court, citing its ruling on Pacific International Lines etc. (case 40), found that the evidence produced by the plaintiff was hearsay, which, in the absence of a testimony from the former employee of the defendant, could not be held to meet the threshold of article 7 MAL. As to the second argument of the plaintiff, the court held that the arbitration agreement was separable from the contract of the parties and its existence could not be assumed on the basis of the conduct of the parties, but had to be either in a writing signed by the parties or in another document which provides a record of the agreement. The court decided in favour of the defendant and dismissed the plaintiff's application.

Case 65: MAL 8(1)
Canada: British Columbia Supreme Court (Mackoff J.)
28 November 1988
ODC Exhibit Systems Ltd. v. Lee, Expand International et al.
Published in English: 41 Business Law Reports, 286

The plaintiff, a British Columbia company, claimed damages from the defendants, including a former general manager of the plaintiff and Expand International, a Swedish company which was the exclusive agent of the plaintiff in Canada, on the ground that they had conspired, deceived and defrauded the plaintiff with a view to terminating the exclusive agency agreement between the plaintiff and Expand International and giving it to the former general manager of the plaintiff. The defendant argued that the court did not have jurisdiction since a breach of contract committed in Sweden was involved and, alternatively, requested a stay of proceedings under s. 8 of the International Commercial Arbitration Act (ICAA, art. 8 MAL) on the basis of an agreement, reached with the plaintiff after the dispute arose, containing an arbitration clause, which provided that "... any dispute arising out of this agreement shall be settled by arbitration ...".

The court found that the plaintiff's action was founded on tort committed in Canada and thus established its jurisdiction. It was found that conspiracy, deceit and fraud were not matters arising out of "this agreement". It was also found that these torts could not have been agreed or even contemplated by the parties as matters that could be settled by arbitration since they were committed before the conclusion of the arbitration agreement. It was thus held that the basic condition precedent for the granting of a stay of proceedings under s. 8, namely that the court action must relate to a matter agreed to be arbitrated, was not met. The court dismissed the defendant's application for a stay of the proceedings.

Case 66: MAL 8
Canada: Superior Court of Quebec (Moisan J.)
14 March 1989
Jean Charbonneau v. Les Industries A.C. Davie Inc. et. al.
Published in French: Recueil de Jurisprudence du Québec 1989, 1255

The plaintiff sued for damages caused by the delay in the delivery of a fishing boat, which one of the defendants was to construct and the other, the Minister of Agriculture, to partly finance. The defendants sought a stay of proceedings pursuant to s. 8 of the International Arbitration

Arbitration Act (art. 8 MAL) on the ground that the construction contract contained an arbitration clause.

The court found that under the arbitration agreement the Minister of Agriculture was to arbitrate any dispute arising between the parties. It was held that the arbitration clause was inoperative on the ground that the Minister of Agriculture could not act as an impartial arbitrator being a party to the contract. The court dismissed the defendant's application for a stay of the proceedings.

Case 67: MAL 36(1)(a)(ii)
Canada: Saskatchewan Court of Appeal (Vancise, Wakeling and Gerwing JJ.A.)
17 September 1991
AAMCO Transmissions Inc. v. Kunz
Published in English: 97 Saskatchewan Reports, 5

The appellant terminated a franchise agreement with the respondent citing as reasons, inter alia, the respondent's failure to file business reports and to pay fees with the result that its indebtedness to the appellant had continued to increase at a rapid rate. The matter was submitted to arbitration in the U.S. pursuant to an arbitration clause, which however, contained a proviso excluding from arbitration matters arising from "... termination by AAMCO which is based in whole or in part upon the fraudulent acts of Franchisees or Franchisee's failure to deal honestly and fairly with any customer or Franchisees's failure to accurately report his gross receipts to AAMCO ...". The arbitral tribunal found in favour of the appellant, who subsequently sought to have the award recognized and declared enforceable by the courts in Canada.

The court of first instance refused to recognize the arbitral award. On appeal, at issue was whether the award dealt with a matter "not contemplated by or not falling within the terms of the submission to arbitration", or whether it contained "decisions on matters beyond the scope of the submission to arbitration" (article 36(1)(a)(ii) MAL). The appellant argued that the proviso mentioned above should be interpreted narrowly so as to cover only fraudulent or quasi-fraudulent actions and not termination for failure of the franchisee to file reports. The respondent argued that the dispute dealt with a matter which clearly was not contemplated by the parties or did not fall within the arbitration agreement.

The appellate court found that the failure of the respondent to file business reports was explicitly mentioned in the arbitration clause as a non-arbitrable matter and dismissed the appeal upholding the decision of the court of first instance.

Case 68: MAL 9; 27
Canada: Federal Court of Canada, Trial Division (Denault J.)
3 December 1993
Delphi Petroleum Inc. v. Derin Shipping and Training Ltd.
Original in English and French
Unpublished

The plaintiff, a charterer, had a dispute with the defendant, a shipowner, involving freight and demurrage costs. Pursuant to an arbitration clause contained in the charterparty the matter was submitted to a single arbitrator in New York who issued a final award.

The plaintiff, who was not satisfied with the award as far as the claim for demurrage costs was concerned, applied to the court for an interim order in order to secure the evidence of a witness with regard to that claim and a number of additional claims for unjust enrichment and misrepresentation.

The court referred to the travaux préparatoires of MAL (A/CN.9/264, article 9, paras. 1 and 4) pursuant to sections 4(2)(b), 5 and 6 of the International Commercial Arbitration Act and found that it had jurisdiction to grant an interim order pursuant to article 9 MAL. The court noted that it had a mandate to render assistance in matters of evidence in arbitration but it should avoid taking measures conducive to dilatory tactics of the parties (A/CN.9/264, article 27, paras. 5-6).

The court dismissed the plaintiff's application on the ground that it did not meet the test of rule 466.3(3)(a) of the Federal Rules of Procedure that the witness whose testimony is sought "may have information on an issue in the action" since the issue of demurrage had been decided upon by the arbitrator and the court was not satisfied that the evidence before it demonstrated that the witness had any information on the other issues raised in the application.

Case 69: MAL 8(1)
Canada: Ontario Court of Justice, General Division (Blair J.)
24 January 1994
Onex Corp. v. Ball Corp.
Original in English
Unpublished

A dispute arose between the plaintiff and the defendant as to whether the plaintiff had the right under their joint venture agreement to acquire the defendant's share in the joint venture. The parties agreed that the matter should be submitted to arbitration pursuant to an arbitration clause contained in their agreement. However, the plaintiff sought from the court to rectify a provision of the agreement or, alternatively, to declare that provision void on the ground that it contained a drafting mistake and did not actually reflect the parties' agreement. The defendant sought a stay of proceedings and submission of the whole dispute to arbitration.

The court found that the issue whether the arbitral tribunal had the power to rectify the parties' written agreement was a matter of interpretation of the arbitration agreement. It was held that, while the expression arising "under" or "in relation to the construction" of the agreement

contained in the arbitration clause was not as broad as the expression "all disputes arising in connection with", which was held by courts to be sufficient to cover the equitable remedy of rectification, it was broad enough to cover rectification of the agreement. The court, citing its decision on Gulf Canada etc. (case 31) noted that in doubt the arbitration clause should be interpreted in a manner that would be conducive to arbitration. The court granted a stay of the proceedings and referred the matter to arbitration.

Case 70: MAL 8
Canada: Federal Court of Appeal (Mahoney, MacGuigan and Linden, JJ.A.)
10 February 1994
Nanisivik Mines Ltd. and Zinc Corporation of America v. Canarctic Shipping Co. Ltd.
Original in English and French
Unpublished

The case involved an appeal against the decision of the court of first instance (case 36). There were three issues involved: first, whether the first instance court had discretion as to referring the claim against Canarctic to arbitration and whether it erred in exercising that discretion; second, if the court had no discretion to refer the matter to arbitration, whether it had discretion as to staying the proceedings and whether it erred in the exercise of its discretion; and third, whether, in any event, the court erred in referring the claim of Zinc Corp. to arbitration and, if so, in staying the proceedings in the action by it.

As to the first issue, which was before the Court of Appeal for the first time, the Court of Appeal upheld the decision of the court of first instance that if the conditions of article 8 MAL are met, namely if an arbitration agreement is in writing, is not null and void or inoperative or incapable of performance, the court, if asked by a party, has no discretion but is obliged to refer the matter to arbitration ("shall" in article 8 MAL clearly means "must", not "may").

As to the second issue, the Court of Appeal noted that there were two approaches followed by courts with regard to a stay of proceedings after a mandatory reference has been made. In some cases, it was held that the reference to arbitration is mandatory pursuant to article 8 MAL but that, with regard to the stay of the proceedings, the courts have a residual "permissive" jurisdiction under section 50 of the Federal Court Act to grant a discretionary stay unless there are "strong reasons" not to (case 15). In other cases, it was held that reference of a matter to arbitration pursuant to article 8 MAL left the courts no discretion but to stay the proceedings (case 9). The Court of Appeal found that the same policy considerations existing in favour of a mandatory legislative requirement that a dispute subject to an arbitration agreement be referred to arbitration seem to be conclusively in favour of the staying of litigation of the same issues until the issuance of an arbitral award. Thus the Court of Appeal, overturning the decision of the court of first instance, held that once a reference to arbitration had been made, there was no residual discretion in the court to refuse to stay the proceedings between the parties to arbitration even though there may be particular issues between them that are not subject to arbitration.

As to the third issue, the Court of Appeal found that Zinc Corp. was a party to the bill of lading but not to the charterparty out of which the present dispute arose. It was held that the arbitration clause of the charterparty, incorporated in the bill of lading by general reference to the

terms and conditions of the charterparty, did not bind the parties to the bill of lading. It was noted that that result could only be achieved by an arbitration clause in a charterparty which expressly provided that it applied to disputes arising in connection with bills of lading that incorporated generally the terms of the charterparty without specific reference to the arbitration clause, or by way of a provision in the bill of lading incorporating the terms and conditions of the charterparty including, by specific reference, its arbitration clause. The Court of Appeal overturned the decision of the court of first instance with regard to the reference of the claim of Zinc Corp. to arbitration on the ground that Zinc. Corp. was not bound by the arbitration clause contained in the charterparty, but upheld that decision with regard to the stay of proceedings holding that under section 50(1)(b) of the Federal Court Act the court had discretion to stay the litigation of the claim of Zinc Corp. against Canarctic pending arbitration of Nanisivik's claim.

Case 71: MAL 9
Canada: British Columbia Supreme Court (Bouck J.)
25 February 1994
Trade Fortune Inc. v. Amagalmated Mill Supplies Ltd.
Original in English
Unpublished

The plaintiff, a Greek shipowner, claimed payment of demurrage costs on the ground that the defendant, a Canadian charterer, was responsible for a delay in unloading a cargo in Korea. The plaintiff sought and obtained an interim court order designed to secure funds for payment of the claim upon issue of a final decision. The defendant paid into court the full amount of the claim, but sought that the matter be referred to arbitration in London pursuant to an arbitration clause contained in the charterparty, litigation be stayed and the interim order be set aside. The plaintiff agreed to the reference to arbitration and stay of proceedings but objected to the setting aside of the interim court order.

There were two main issues; first, whether interim measures of protection that could be taken by courts (article 9 MAL) included the interim order granted in the present case or whether such an order could be granted only by the arbitral tribunal dealing with the substance of the dispute (article 17 MAL); and second, whether staying the procedures had the effect of setting aside the interim order. On the first issue, the court, referring to the travaux préparatoires of MAL, held that interim court orders designed to protect the applicant from the risk of being unable to enforce a final arbitral award were not incompatible with arbitration (article 9 MAL). The application of the defendant to set aside the interim court order was thus dismissed. On the second issue, the court found that staying the proceedings would not set aside the interim order since the original claim of the plaintiff would not merge into the arbitration award and the plaintiff was thus not prevented from pursuing its claim until it was paid in full. The court ordered a stay of proceedings and dismissed the application of the defendant to set aside the interim court order.

Case 72: MAL 8(1)
Canada: Federal Court of Canada, Trial Division (Strayer J.)
22 March 1994
Continental Resources Inc. v. East Asiatic Co. (Canada) et al.
Original in English and French
Unpublished

A dispute arose out of a charterparty for loss of cargo, and the plaintiff sued the defendants in court. The defendants requested that the matter be referred to arbitration since the charterparty contained an arbitration clause and sought a stay of the proceedings pursuant to article 8 (1) MAL. The plaintiff argued that the arbitration clause did not preclude the continuance of litigation since the plaintiff had a claim, based on a bill of lading, against the ship and the shipowners, who were not bound by the arbitration clause contained in the charterparty since they were not parties to the charterparty. The defendant argued that the bill of lading incorporated the terms and conditions of the charterparty, including the arbitration clause, by general reference.

The court held that it was bound to submit the matter to arbitration since the dispute was within the scope of the arbitration agreement and the defendant had not filed its first statement of defence on the substance of the dispute (article 8(1) MAL). The court exercising its discretion under section 50 of the Federal Court Act granted a stay of the proceedings. It was noted that the criteria followed by the court in exercising its discretion included the likelihood of injustice to the defendant if the action proceeded and the unlikelihood of injustice to the plaintiff if it did not. It was also noted that, even if the plaintiff had a claim in tort not covered by the arbitration agreement, the court could still exercise its discretion and grant a stay of proceedings pending arbitration, and the plaintiff could seek the stay to be lifted if after arbitration it still had a claim.

Case 73: MAL 8(1)
Canada: Ontario Court of Appeal (Morden, Blair and Austin JJ.A.)
25 April 1994
Automatic Systems Inc. v. Bracknell Corp. (Canal Contractors) and Chrysler Canada Ltd.
Original in English
Unpublished

Automatic, a Missouri company, entered into a contract with Chrysler to supply and install a conveyor system at the Chrysler plant in Ontario. Automatic subcontracted part of the work to Bracknell, an Ontario company. The subcontract contained an arbitration clause providing for arbitration in Missouri under Missouri law. Bracknell, which had a lien claim under the Ontario Construction Lien Act against Automatic, sought and obtained a lien certificate and had it registered against the title to Chrysler's land in Ontario. Automatic sued Bracknell for damages and sought a stay of the proceedings and submission of the matter to arbitration. Bracknell declined to arbitrate and Automatic applied to the court for an order referring the matter to arbitration and staying the proceedings.

The court of first instance found that an agreement for international arbitration of a dispute involving an Ontario lien claim was unenforceable since the Ontario Construction Lien Act made provision only for domestic arbitration and dismissed the application of Automatic.

The appellate court found that, having regard to international comity and the strong commitment of the Ontario legislature in support of international arbitration demonstrated through the adoption of MAL, only very clear language in a statute could preclude international arbitration. The appellate court overturned the decision of the court of the first instance on the ground that the Ontario Construction Lien Act by providing only for domestic arbitration did not clearly and expressly preclude international arbitration. The court, without commenting in detail, drew a distinction between the present case and BWV Investments Ltd etc. (case 28; appeal pending) in several respects, including that in the present case the lien had been lifted since Automatic had deposited with the court a letter of credit in the amount of the lien claim and that there were no other lien claimants.

Case 74: MAL 8(1)
Canada: Ontario Court of Appeal (Morden, Blair and Austin JJ.A.)
25 April 1994
Automatic Systems Inc. v. E.S. Fox Ltd. and Chrysler Canada Ltd.
Original in English
Unpublished

Fox was another subcontractor of Automatic (case 73). Unlike the previous case, in the present case the parties disagreed as to whether there was an agreement to arbitrate and the court of first instance did not find it necessary to decide that matter, in view of its decision that at any rate an agreement for international arbitration of an Ontario lien would be unenforceable in Ontario.

The appellate court overturned the decision of the court of first instance and remitted the matter to that court with the question whether there was an agreement to arbitrate between Automatic and Fox and the question of the appropriate relief.

III. ADDITIONAL INFORMATION ON ABSTRACTS PUBLISHED IN A/CN.9/SER.C/ABSTRACTS/1, 2 and 3

Case 28

Appeal pending.

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