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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 is provided in the User Guide (A/CN.9/SER.C/GUIDE/1).

Unless otherwise indicated, 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.95-60492

CASES RELATING TO THE UNITED NATIONS SALES CONVENTION (CISG)

Case 102: CISG 75(1); 79(1); 100(2)
International Chamber of Commerce, International Court of Arbitration
Arbitral award issued in 1989, case no. 6281
Extracts published in French: Journal de Droit International, 1114; and in English: Yearbook of Commercial Arbitration, XV, 1990, 83 and Collection of ICC Arbitral Awards, Vol. II, 394

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

The parties, of Egyptian and Yugoslav nationality, concluded a contract for the FOB sale of a certain quantity of steel. In conformity with the contract, the buyer announced that it wished to exercise its right to buy an additional quantity of steel at the price and on the conditions stipulated in the contract. The dispute arose from the seller's refusal to deliver the additional quantity of steel at the contract price, since the market price had gone up, as a result of which the buyer was forced to obtain the goods from another source at a higher price.

The tribunal found that, pursuant to article 100(2) CISG, the Convention was not applicable, since the contract was concluded before the Convention entered into force in the countries involved (including France, the place of arbitration), even though those countries were parties to the Convention at the time of issuance of the arbitral award. Applying the private international law rules of the countries concerned and article 3.1 of the Hague Convention of 15 June 1955 on the law applicable to international sales of goods, to which France is a party, the tribunal concluded that the applicable law was the law of Yugoslavia, as the law of the place where the seller had its principal place of business and where the contract was performed.

The tribunal compared the Yugoslav law with article 74.1 of the Uniform Law on the International Sale of Goods (ULIS) and with article 79(1) CISG and found that by refusing to deliver the additional goods at the contract price the seller had committed a breach of contract. The tribunal held that the seller could be relieved of the obligation to deliver the goods at the contract price only if the contract contained a price adjustment clause, or in case of frustration of the contract, which was not the case here, since the increase in the market price was, in fact, neither sudden nor substantial nor unforeseeable.

In order to determine the amount of compensation due to the buyer, the tribunal compared Yugoslav domestic law with articles 75 CISG and 85 ULIS and held that the buyer was entitled to the difference between the contract price and the price actually paid in order to obtain the goods from another source.

Case 103: CISG 1(1)(b); 35; 36; 78; 84
International Chamber of Commerce, International Court of Arbitration
Arbitral award issued in 1993, case no. 6653
Extracts published in French: Journal de Droit International, 1993, 1041

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

The parties concluded a contract for the sale of goods. The buyer contested the conformity of the goods to the contract specifications.

The arbitral tribunal applied the CISG on the grounds that: the parties had chosen French law as applicable law and the Convention was in force in France at the time the contract was concluded; the contract concerned international trade interests because its performance assumed a movement of goods and payments across frontiers; and the goods concerned fell within the scope of application of the CISG. The tribunal also noted that the buyer was located in Syria, which was a party to the Convention at the time the contract was concluded and that the seller was located in Germany which became a party to the Convention after the time of the conclusion of the contract.

The tribunal considered the question of which party had the burden of establishing the lack of conformity, a question that was not addressed in the CISG, and found that, pursuant to article 1315 of the French Civil Code and general principles of international trade, the party invoking a lack of conformity should have to prove it.

The tribunal found that some of the goods did not conform to the contract and ordered reimbursement of the buyer for the sums paid for these goods. As the seller was regarded as having been very cooperative at the time the difficulties arose, the tribunal left to the seller the choice of either removing the non-conforming goods at its own expense or abandoning them on site.

The tribunal awarded the buyer interest, although it was found that article 84 CISG was somewhat ambiguous as to whether interest was payable if it had not been requested, in view of the fact that article 1153-1 of the French Civil Code prescribed it in any case. As CISG does not specify how the applicable interest rate is to be determined, the tribunal applied the rate commonly applied to Eurodollar settlements between operators in international trade, i.e., the one-year London Inter-Bank Offered Rate (LIBOR).

Case 104: CISG 1(1)(b); 7(2); 54; 61 (1)(a); 61(2); 62; 63(1); 64(2); 69; 77; 78; 79; 85 to 88
International Chamber of Commerce, International Court of Arbitration
Arbitral award published in 1993, case No. 7197
Extracts published in French Journal de Droit International, 1993, 1028

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

The dispute concerned the failure of the Bulgarian buyer to pay the Austrian seller within the time period agreed in the sales contract.

The arbitral tribunal found that, while the parties did not specify any applicable law, the application of Austrian and Bulgarian rules of private international law led to the application of Austrian law. In view of the fact that CISG had been incorporated into the Austrian legal system, the tribunal decided to apply CISG, in accordance with article 1(1)(b) of the Convention. The tribunal also noted that, as the applicable rules of private international law led to the application of the law of Austria, where the seller had its place of business, it was immaterial that Bulgaria, where the buyer had its place of business, was not a party to the Convention at the time the contract was concluded.

The tribunal found that the buyer committed a breach of contract in that it failed to open the irrevocable and divisible letter of credit provided for in the contract, despite the additional period of time allowed by the seller (articles 54, 62 and 63(1) CISG). The tribunal also found that the seller was entitled to demand performance (article 64 CISG), without loosing its right to request compensation since no force majeure was involved (articles 61(1)(a), 61(2) and 79 CISG). The tribunal, applying Austrian law pursuant to article 7(2) CISG, held that the exercise of the seller's right to demand compensation was not contrary to the penalty clause contained in the contract.

The tribunal awarded the seller interest on the amount due (article 78 CISG). As the Convention does not specify the interest rate, the tribunal determined the interest rate in accordance with the substantive law applicable to the relationship between creditors and debtors (article 7(2)). The tribunal held that the interest rate to be awarded may be higher than the legal rate since the entitlement to interest under article 78 CISG was independent of any claim for damages under article 74 CISG. In the case in question, the tribunal found that the seller operated on the basis of credit for which it had to pay interest at the rate of 12% and applied that rate since the seller would have to obtain credit in order to replace the funds missing due to the non-payment by the buyer.

Case 105: CISG 3(1) and (2)
Austria: Supreme Court; 8 Ob 509/93
27 October 1994
Published in German: Zeitschrift für Rechtsvergleichung 1995, 159

An Austrian company ordered brushes and brooms in the former Yugoslavia. Under the contract, the Austrian company had to provide the Yugoslav company with materials for the production of the goods ordered.

The court found that the Convention was not applicable because the party ordering the goods supplied a substantial part of the materials necessary for the production of the goods (article 3(1) CISG) and the obligation of the party furnishing the goods consisted mainly in the supply of labour and services (article 3(2) CISG).

Case 106: CISG 1(1)(a); 14; 8(2) and (3); 55; 57(1)
Austria: Supreme Court; 2 Ob 547/93
10 November 1994
Published in German: Zeitschrift für Rechtsvergleichung 1995, 79

The Austrian buyer ordered in Germany a large quantity of chincilla pelts of middle or better quality at a price between 35 and 65 German Marks per piece. The German seller delivered 249 pelts.

The Austrian buyer, without opening the packaged goods, sold them further to an Italian pelt dealer at the same price. The Italian dealer returned 13 pelts arguing that they were of inferior quality to that agreed. The Austrian buyer sent to the German seller an inventory list setting out the rejected pelts and refused to pay their price arguing that it had sold the pelts further on behalf of the German seller as its agent.

The first instance court ordered the Austrian buyer to pay the price of the rejected pelts, since the pelts were as specified in the contract. Having found that pelts of middle quality were sold in the market at a price up to 60 German Marks, the court considered that a price of 50 German Marks per pelt was a reasonable one.

The Court of Appeal confirmed that decision. It found that CISG was applicable since the parties had their places of business in States parties to the Convention and the subject matter of the dispute fell within the scope of application of the Convention. The Court of Appeal further found that a valid contract had been concluded on the basis of the order, which was sufficiently definite both as to the quantity and the quality of the goods.

The Court of Appeal further found that the agreement as to the price range (35 to 65 German Marks) did not preclude the valid conclusion of a contract since under article 55 of the Convention, if the price is not explicit or implicit in the contract, the parties are considered to have agreed on the usual market price. The Court of Appeal noted that the price of 50 German Marks per pelt, which had been established by the court of first instance based on the market price, had not been questioned by the parties. As to the currency of payment, the court found that payment was due in German Marks, since payment should be made at the place of business of the German seller (article 57 CISG).

The Supreme Court confirmed the decision of the Court of Appeal. It found that the Convention was applicable since an international sales contract in the sense of article 1(1)(a) CISG was involved. It also found that the order was sufficiently definite to constitute an offer under article 14 CISG, since it could be perceived as such by a reasonable person in the same circumstances as the seller (article 8(2) and (3) CISG). In determining that the order was sufficiently definite, the Supreme Court took into consideration the behaviour of the Austrian buyer who accepted the delivered goods and sold them further without questioning their price, quality or quantity. In particular, the price was found to be sufficiently definite, so as to make the application of article 55 CISG unnecessary. As to the place of payment, the Supreme Court found that it was the place of business of the seller since the goods were sent by post and no third party had been appointed to receive payment in Austria on behalf of the German seller.

Case 107: CISG 35; 49
Austria: Court of Appeal Innsbruck; 4 R 161/94
1 July 1994
Unpublished

The plaintiff, a Danish exporter of flowers, sold several shipments of garden flowers to the Austrian defendant, who refused to pay the price for some of them arguing that the seller had breached a guarantee or committed a fundamental breach of the contract since the flowers did not bloom through the entire summer.

The court of first instance dismissed the buyer's arguments on the ground that it had failed to prove that the seller had guaranteed that the flowers would bloom through the entire summer, or that the seller had committed a fundamental breach of contract because the flowers were not conforming with contract specifications (articles 36 and 49(1)(a) CISG). The court further held that, even if the buyer had been able to establish lack of conformity of the goods, it would have lost its right to avoid the contract, since it had failed to give the seller notice within a reasonable period of time after discovery of the defect (article 39(1) CISG; which, the court found, was similar to article 377 of the Austrian Commercial Code). The court held that two months after delivery of the goods was a reasonable period of time within which the buyer should have, and in fact had, discovered the lack of conformity of the goods.

The Court of Appeal confirmed the decision of the court of first instance on the ground that the buyer had failed to establish that the seller had breached a guarantee or committed a fundamental breach of contract in supplying flowers non-conforming with contract specifications (articles 25, 35 and 49(1)(a) CISG).

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

Case 108: MAL 1(3)(b)(ii); 8(1)
Hong Kong: High Court of Hong Kong (Leonard J.)
4 May 1995
D. Heung & Associates, Architects & Engineers v. Pacific Enterprises (Holdings) Company Limited
Original in English
Unpublished

(Abstract prepared by N. Kaplan, Q.C.)

The plaintiff, a Hong Kong company, appointed by the defendant, also a Hong Kong company, as the architect for the entire design of a project in Dongshan Island, China, sued claiming agreed professional fees due by the defendant. The defendant sought a stay of the court proceedings under article 8 MAL and submission of the dispute to arbitration, since their agreement contained an arbitration clause.

The issue was whether, despite the fact that both parties were Hong Kong companies and that the contract was to be partly performed in Hong Kong, an "international arbitration agreement" in the meaning of article 1(3)(b)(ii) was involved. The court found that the subject matter of the dispute was most closely connected to the project in Dongshan, China, and that a substantial part of the defendant's duties related to the entire design and supervision of that project.

The court, noting that article 8(1) MAL was mandatory in its nature, stayed the proceedings, since no party had suggested that the arbitration agreement was null and void or inoperative or incapable of being performed, and in view of the fact that the plaintiff's claim was disputed by the defendant.

Case 109: MAL 11(3)(a); 11(5)
Hong Kong: Court of Appeal (Litton, V.P., Liu, J.A. and Keith, J.)
7 July 1995
Private Company "Triple V" Inc. v. Star (Universal) Co. Ltd. and Sky Jade Enterprises Group Ltd.
Original in English
Unpublished

(Abstract prepared by the Secretariat)

This case involves an appeal against the decision on Case 101, in which the court had appointed a sole arbitrator pursuant to article 11(3)(a) MAL.

Private Company argued that the Court of Appeal did not have jurisdiction to hear the appeal since the decision of the first instance court dealt with a matter falling within the scope of article 11(3) and, accordingly, was not subject to an appeal (11(5) MAL). The Court of Appeal dismissed that argument holding that article 11(3) applied to cases where the failure to agree on the appointment of an arbitrator was due to the parties failing to agree on a procedure for the appointment of an arbitrator and not on whether there should be an arbitration at all or on whether the arbitration should involve a particular party, as in the present case.

Star argued that the court of first instance had erred since there was no contract between Private Company and Star to arbitrate, in view of the fact that their first contract had been rescinded and their second contract was invalid. The Court of Appeal held that the court of first instance could not examine these arguments in detail without interfering with the jurisdiction of the arbitrator and was correct in forming a prima facie view as to whether there was an agreement to arbitrate, namely that there was no "overwhelming" evidence "that an agreement to arbitrate has been abrogated".

Sky argued that there was no evidence whatsoever that it was a party to the contract between Private Company and Star. The Court of Appeal noted that the first instance court had found that Star had signed the contract both for itself and as agent of Sky; and that there was some evidence that Sky was to be the party to "render performance" under the contract, although the evidence as to agency was found to be extremely weak. On this issue too, the Court of Appeal confirmed the decision of the first instance court holding that it was not for the court to examine the substance of the dispute but for the arbitrator.

Case 110: MAL 11(3)(b)
Singapore: Chairman, Singapore International Arbitration Centre (SIAC) (Tan Boon Teik, SC)
4 October 1995; SIAC arb. no. 21 of 1995
Original in English
Unpublished

Disputes arose between the parties to a contract to build and operate a chain of hotels in Indonesia, which contained an arbitration clause. The claimant's notice of arbitration named as respondents a party which had signed the contract and four other parties which had not signed it but had participated in negotiations with the claimant regarding the terms of the contract. The claimant

applied to SIAC for appointment of an arbitrator under article 11(3)(b) MAL.

The claimant argued that all five respondents named in the notice of arbitration were parties to the contract in that they were all companies within the same group and were inextricably involved in the venture as "affiliates", negotiations regarding the terms of the contract having been undertaken involving all of them. The claimant further argued that all the respondents had to do at that stage was to present an arguable case.

The court held that the issue of joinder of parties was well within the jurisdiction and competence of the arbitrator under article 16 MAL; and that, while all that the claimant had to do was to present an arguable case that all five companies were parties to the contract, the claimant failed to do so. An appointment was made only for an arbitration between the claimant and the respondent who had signed the contract.

Case 111: MAL 1(1); 8(1)
Canada: Alberta Court of Queen's Bench (Murray J.)
12 August 1994
Borowski v. Heinrich Fiedler Perforiertechnik GmbH
Published in English: (1994) 158 Alberta Reports, 213; and [1994] 10 Western Weekly Reports, 623

The plaintiff, an employee of the defendant, sued for damages in lieu of notice of termination of the employment contract and for loss of wages and benefits. The defendant sought a stay of proceedings and submission of the dispute to arbitration, since the employment contract contained an arbitration clause.

The court found that, with regard to the claim for past wages and benefits, there was no dispute to be referred to arbitration, since the defendant had admitted that it owed the plaintiff for past wages and benefits. With regard to damages in lieu of notice of termination, the court found that that was a dispute covered by the arbitration clause, stayed the court proceedings and referred the matter to arbitration.

On the question whether the International Commercial Arbitration Act (I.C.A.A.), which enacted MAL, could apply to a dispute arising from an employment contract, the court held that such a contract created a master and servant relationship and not a commercial relationship of the type falling under the I.C.A.A. (section 4(2) I.C.A.A., which is equivalent to article 1(1) MAL).

Case 112: MAL 8(1)
Canada: Alberta Court of Queen's Bench and Alberta Court of Appeal
13 July 1994 and 4 October 1994
Kvaerner Enviropower Inc. v. Tanar Industries Ltd.
Published in English: 157 Alberta Reports, 363; and [1994] 9 Western Weekly Reports, 228

Kvaerner, a contractor, applied for a stay of the court proceedings initiated by Tanar, a subcontractor, and for submission of the dispute between them and a third party, which had to pay performance bonds issued in favour of Tanar, to arbitration.

The court stayed the proceedings and referred the dispute between Kvaerner and Tanar to arbitration. While the court considered that the performance bonds in favour of Tanar did not constitute an agreement between the third party and Kvarner to arbitrate their differences, it stayed the court proceedings as between Kvaerner and the third party pending arbitration of the dispute between Kvaerner and Tanar. The Court of Appeal confirmed the decision of the court of first instance.

Case 113: MAL 8(1)
Canada: Ontario Court of Justice - General Division (Borins, J.)
10 November 1994
T1T2 Limited Partnership v. Canada
Original in English
Unpublished

The defendant sought a stay of the court proceedings initiated by the plaintiffs and submission of the dispute to arbitration, based on an arbitration clause contained in their contract. The arbitration clause provided that differences between the parties should be resolved through arbitration, with the exception of differences "involving a question of law".

The court found that resolving the plaintiff's claims would involve addressing "questions of law", including the application of legal principles to a set of facts, and rejected the application for a stay of proceedings.

Case 114: MAL 8(1) and 16(1)
Canada: British Columbia Supreme Court (Lysyk J.)
18 November 1994
Globe Union Industrial Corp. v. G.A.P. Marketing Corp.
Published in English: [1995] 2 Western Weekly Reports, 696

Globe was a Taiwanese manufacturer who entered into a distribution agreement with G.A.P. granting it a licence to distribute Globe's products in Canada and Mexico. G.A.P. initiated arbitration proceedings under an arbitration clause in the agreement and Globe then commenced the present court proceedings, which G.A.P. sought to stay under s. 8 of the International Commercial Arbitration Act, Statutes of British Columbia, 1986, chapter 14, which enacts MAL.

The court found that, even if the distribution agreement had been terminated between the parties and was assumed to be null and void, it did not mean that the arbitration clause it contained was unenforceable (articles 8(1) and 16(1) MAL). The court also found that the court proceedings were in respect of a matter agreed by the parties to be submitted to arbitration and the fact that G.A.P. responded to Globe's application to enjoin G.A.P. from proceeding with the arbitration did not constitute the taking of a step in the court proceedings so as to justify refusal of a stay.

Case 115: MAL 8(1)
Canada: Alberta Court of Queen's Bench (Master Funduk)
23 November 1994
Crystal Rose Home Ltd. v. Alberta New Home Warranty Program
Original in English
Unpublished

Crystal, a construction company, was a member of the Warranty Programme, a company designed to provide warranty protection to buyers of new homes. The Warranty Programme terminated Crystal's membership. Crystal initiated court proceedings claiming that it was not in default on its obligation to any home buyers and had not received notice of any such default that would entitle the Warranty Programme to exercise its rights. The contract between the parties provided for arbitration of any dispute "with respect to any matter in relation to this agreement".

The court found that the arbitration clause was not limited in scope to matters expressly addressed in the contract or to matters that were addressed by specific terms of the contract. The court distinguished Borowski v. Heinrich Fiedler (Case 111) as a case where specific words qualified the scope of the arbitration clause. A stay was ordered under the Arbitration Act, Statutes of Alberta, 1991, chapter A-43.1. The court concluded that the arbitration clause was not limited to claims for breach of contract but would extend, for example, to a claim in tort for which the existence of the contract was a relevant fact.

The court thought that whether the statute implementing MAL or an arbitration law dealing only with domestic disputes applied was not relevant to the interpretation of the scope of the arbitration clause. Unless the clause was invalid under either law, it was for the parties between them to decide what was arbitrable.

Case 116: MAL 8(1)
Canada: Saskatchewan Court of Appeal
25 November 1994
BWV Investments Ltd. v. Saskferco Products Inc. et.al. and UHDE GmbH
Published in English [1995] 2 Western Weekly Reports, 1

This case involved an appeal against the decision on Case 28, in which the court of first instance had refused to grant a stay of court proceedings declaring the arbitration agreement between BWV, Saskferco, UHDE and others void under both article 8(1) MAL and s. 99(1) of the Builder's Lien Act (B.L.A.). BWV, a subcontractor in a Saskatchevan construction project with head offices in Canada, had filed a builder's lien against the project and sued Saskferco, UHDE, contractors with head offices in Germany, and others under B.L.A..

The issue before the Court of Appeal was whether the arbitration agreement, which was contained in the subcontract between BWV, Saskferco and UHDE, conflicted with B.L.A. and was thus void. The Court of Appeal found that a builders' lien action was not the only method available to determine the amount of money owed in relation to contracts where liens have arisen and that there was no inconsistency between an arbitration agreement and the builders' lien legislation. The Court of Appeal reversed the decision of the court of first instance, stayed the court proceedings and referred the matter to arbitration.

The Court of Appeal considered the question whether to stay the proceedings with regard to sub-subcontractors of BWV who had also filed builder's liens against the project. It was found that, as there was no evidence that the sub-subcontracts incorporated the arbitration agreement, the sub-subcontractors were "third parties" with regard to the dispute between BWV, Saskferco and UHDE. Referring to the United States practice in domestic construction matters to stay third-party actions pending arbitration, the Court of Appeal ordered that the actions by sub-subcontractors be stayed pending the above arbitration, to avoid the problem of multiple concurrent proceedings. A member of the Court of Appeal disagreed with the scope for residual judicial discretion in staying applications set out in Gulf Canada Resources Ltd. v. Arochem International Ltd. (Case 31).

Case 117: MAL 35
Canada: Ontario Court of Justice, General Division (Somers J.)
19 December 1994
Murmansk Trawl Fleet v. Bimman Realty Inc.
Original in English
Unpublished

The plaintiff sought to enforce in Ontario a final arbitral award issued in New York with regard to a dispute arising from its contract with the defendant. The application was made after the right to appeal the award in New York State had expired but the defendant argued that the award should not be enforced in Ontario, since no steps had been taken to have it confirmed (made binding) under New York law.

The court held that it was not necessary that the foreign award be confirmed in order to be enforceable in Ontario. The court, referring to the decision on Case 30, based this conclusion on a public policy favouring the avoidance of delays that were ensuing from court proceedings and providing for a more efficient dispute resolution where the parties have chosen arbitration.

Case 118: MAL 8(1); 23(1)
Canada: Ontario Court of Justice, General Division (Borins J.)
21 December 1994
Bab Systems, Inc. v. McLurg
Original in English
Unpublished

The plaintiff, one of the parties to a franchise agreement, applied to the court seeking judicial relief. Within hours of the court granting certain provisional relief in respect of the application, and adjourning for further particulars, the plaintiff advised the defendant of its intention to submit the dispute to arbitration pursuant to an arbitration clause in their agreement. This oral advice was followed by written confirmation a day later indicating that the plaintiff sought to amend its notice of application, that had been served on the defendant, by discontinuing all relief sought except for certain provisional relief, which was specifically excluded from the scope of the arbitration clause. The plaintiff then sought a court order referring the dispute to arbitration and a stay of the court proceedings, except the claim for provisional relief.

Having concluded that, except for the provisional relief, the relief sought in the application was within the arbitration clause, the court considered, whether the plaintiff had waived arbitration by having brought its dispute before the court. Even assuming a right of unilateral waiver, which was unlikely as the arbitration clause bound all parties to the contract, the court concluded that the waiver had been effectively retracted by reasonable notice of the intention to arbitrate.

The defendant argued that the court should not stay the judicial proceedings under the Ontario equivalent of article 8(1) MAL because the application for stay had been made after the plaintiff had submitted its "first statement on the substance of the dispute" by filing an application with the court. The court held that the word "statement" in article 8(1) MAL meant the first statement in the arbitral process, as distinct from the litigation process. Expressly disagreeing with the interpretation of article 8(1) MAL by the Federal Court of Appeal in Ruhrkohle Handel Inter GmbH v Fednau Ltd. (see Case 33), the court concluded that, since the plaintiff had not submitted its first statement in the arbitral proceedings, within the meaning of articles 23(1) and 8(1) MAL, its request for submission to arbitration was timely. An order was issued referring the parties to arbitration pursuant to their agreement.

Case 119: MAL 8
Canada: Ontario Court of Justice, General Division (Haley J.)
23 December 1994
ABN Amro Bank Canada v. Krupp Mak Maschinenbau GmbH
Published in English; (1994) 21 Ontario Reports (3d) 511; excerpts published in International Arbitration Report, May 1995, 11

ABN made a loan to Diesel Inc. (Diesel), a party to a technology licensing agreement with Krupp, which under the terms of the loan was to be assigned to ABN as collateral. Diesel signed a general assignment of its assets to ABN but, although an assignment agreement to which Krupp would be party was prepared, it was never signed. After the loan was made, ABN alleged that the principal owner of Diesel and Krupp had conspired to deceive it and sued Krupp for conspiracy and fraud. In its statement of defence and counterclaim, Krupp, based on an arbitration clause contained in the licensing agreement, sought to stay the proceedings and to have the matter referred to arbitration in Switzerland.

The court held that ABN was not bound to arbitrate because it was not a party to the arbitration clause contained in the licensing agreement between Krupp and Diesel and the assignment of Diesel's assets to ABN did not make it a party to that agreement. It was held that, under article 8 MAL, a party to an arbitration agreement did not include a person claiming through or under a party, as ABN was doing in the present case.

The court further held that Krupp's request for a stay was either no request at all in the meaning of article 8 MAL or an untimely request, since it was filed with Krupp's first statement on the substance of the dispute which implied acceptance of the jurisdiction of the court. The correct procedure pursuant to article 8 MAL was for Krupp to apply for a stay of court proceedings, after receiving the statement of claim but before submitting a statement of defence.

III. ADDITIONAL INFORMATION

A. On abstracts published

Case 1

Commented on by Diederichsen: [1995] Journal of Law and Commerce, 177.

Cases 1-5, 7, 46, 48 50, 51 and 79

Summarized in English: [1995] Journal of Law and Commerce, 201.

Case 24

Commented on by Flechtner: [1995] Journal of Law and Commerce, 153.

Cases 25 and 26

Commented on by Callaghan: [1995] Journal of Law and Commerce, 183.

Case 25

Commented on by Witz: Recht der Internationalen Wirtschaft (RIW) 1995, 310.

Case 93

Excerpts published in German: Recht der Internationalen Wirtschaft (RIW) 1995, 590.
Commented on by Schlectriem in Recht der Internationalen Wirtschaft (RIW), 592.

B. Cases on which no abstracts will be prepared [1]

1. CISG

a. Australia: Court of Appeal, New South Wales, 12.3.1992. Renard v. Minister, New South Wales

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[1] These are cases which, in the view of the responsible National Correspondents, are not relevant to the interpretation or application of an UNCITRAL text. They are listed, however, with a reference to the journal in which they appear, so that CLOUT-users may have a chance to read them, if they so wish.

Law Reports 1992, 234.

b. Mexico: 4.5.1993, Compromex (M/66/92), Diario Oficial 27.5.1993, 17

c. Switzerland: Handelsgericht Zürich, 9.4.1991, Schweizerische Zeitschrift für internationales und Schweizerisches Recht (SZIER) 1993, 644; Tribunal cantonal Vaud, 29.4.1992, 29.4.1992, 14.3.1993, Schweizerische Zeitschrift für internationales und Schweizerisches Recht (SZIER) 1993, 664.

d. U.S.A.: U.S. Court of International Trade, 24.10.1989, Orbisphere v. U.S., 726 F. Supp. 1344; U.S. District Court S.D.N.Y., 6.4. 1994, Braun v. Alitalia, 1994 U.S. Dist. LEXIS 4114.

e. Iran-U.S. Claims Tribunal, 28.7.1989, Watkins-Johnson v. Iran, Yearbook Commercial Arbitration, XV, 1990, 220.

C. Cases to be reported on [2]

1. CISG

a. Argentina:Tribunal Buenos Aires, 23.10.1991, Aguila Refractarios S.A., unpublished; Camara Nacional en lo Commercial, 14.10.1993 (45.626), Inta v. MCS, El Derecho 32 (1994), 3.

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c. China: People's Court, China Law and Practice, 28.12.1993, 18

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