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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 emanate from the work of the United Nations Commission on International Trade Law (UNCITRAL). Information about the features of that system and about its use is provided in the User Guide (A/CN.9/SER.C/GUIDE/1). CLOUT documents are available on the website of the UNCITRAL secretariat on the Internet (http://www.un.or.at/uncitral).

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.

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

Case 172: CISG 36
Hungary: Metropolitan Court (No. 12.G.75.715/1996/20)
1 July 1997
Original in Hungarian
Unpublished

The plaintiff, a German company, sold to the defendants, two Hungarian companies, used timber machinery. One of the defendants opened a letter of credit in favour of the plaintiff for the payment of part of the price, the balance to be paid in installments. However, the issuer did not pay upon demand and presentation of the necessary documents on the ground that the documentation was defective and when the defect was cured the letter of credit had expired.

The plaintiff asserted a claim against both defendants. One of the defendants contested the claim on three grounds: error, lack of conformity of the goods to the contract terms and disproportionate value of the obligations between the opposing parties.

On the one hand, the court decided on the questions of error and disproportionate value of the obligations on the basis of the Hungarian Civil Code since those issues are not covered in the CISG. On the other hand, the court decided the question of lack of conformity pursuant to article 36 CISG.

The court held that only one of the defendants was liable for payment for the used timber machinery.

Case 173: CISG 19(3)
Hungary: Metropolitan Court (No. 12.G.76.237/1996/14)
17 June 1997
Original in Hungarian
Unpublished

The Canadian plaintiff concluded a distribution contract with the Hungarian defendant. The contract was to expire on 31 December 1991. After the contract's expiry, the parties discussed and corresponded about extending the distribution contract into 1992. However, the defendant failed to deliver any goods in 1992. The plaintiff demanded damages based on either breach of contract or, alternatively, on the doctrine declaring that a promise may also be enforced if the making of the promise reasonably induced another person to change position in reliance on the promise ("promissory estoppel").

The court, pursuant to article 19(3) CISG, found that there was no clear agreement between the parties and therefore no distribution contract for 1992 and rejected the claim for damages based on a breach of contract theory. Moreover, the court adjudicated the claim for damages based on the promissory estoppel theory in conformity with the Hungarian Civil Code and rejected the claim.

Case 174: CISG 1(a)(b)
Hungary: Arbitration Court attached to the Hungarian Chamber of Commerce and Industry
Arbitral award in case No. Vb/96038 of 8 May 1997
Original in Hungarian

Unpublished

The Hungarian claimant and the Italian respondent agreed that Hungarian law would govern their contract. The contract contained the elements of both a sales and an agency agreement. At the time of concluding the contract, the CISG was already applicable in both Italy and Hungary. Therefore, one of the parties argued that the CISG would be applicable to their contract even without any choice of law clause and that by "Hungarian law" their contract was referring to the Hungarian Civil Code.

The arbitral court applied the CISG to the elements of sale (article 1(a)) and the Hungarian Civil Code to the agency elements (article 1(b)).

Case 175: CISG 9(2); 35
Austria: Court of Appeal Graz; 6 R 194/95
9 November 1995
Original in German
Unpublished

The plaintiff, an Italian seller, sold marble slabs labelled "Giallo Veneziano" to the Austrian defendant. The defendant alleged that the marble slabs delivered did not conform to the contract and refused to pay the purchase price (article 35 CISG).

In remanding the case to the court of first instance, the Court of Appeal held that article 9(2) CISG, save a limited number of exceptions, could not be interpreted as barring the application of national or local usage in interpreting a contract even though no mention of such usage was made in the contract itself. Accordingly, a seller who has been engaging in business in a country for many years and has repeatedly concluded contracts of the type involved in the particular trade concerned is obliged to take national usage into consideration.

Case 176: CISG 8(1); 9(1); 41; 54
Austria: Supreme Court; 10 Ob 518/95
2 February 1995
Original in German
Published in German: Zeitschrift für Rechtsvergleichung (ZfRV) [1996] 248

The plaintiff, a German buyer, and the defendant, an Austrian seller, entered into an agreement for the FOB delivery of a certain quantity of propane gas. The parties exchanged communications by facsimile and telephone on the terms of their agreement, including the method of payment (letter of credit). The buyer, however, did not obtain a letter of credit since an essential element was missing, i.e. the seller failed to name the port of origin. In addition, the seller made the delivery of the gas subject to the condition that it was not to be resold in the Benelux countries.

The parties had initially intended to enter into a "basic agreement", which would contain the general conditions of the seller and would constitute the trade usages that would govern the transactions between the parties, but could not reach an agreement. The draft of the "basic agreement" stated that all orders should be in writing. However, the seller could not prove that the "basic agreement" nor the general conditions had been made known to the buyer.

The court found that the parties could be bound by any trade practices or usage established between themselves (article 9(1) CISG). In such instances, article 9(1) CISG must be interpreted in the light of article 8(1) CISG to the effect that a party must have known of the intent of the other party.

As regards the letter of credit, the court found that under article 54 CISG the buyer would be under an obligation to obtain a letter of credit. However, the court held that the buyer did not violate such an obligation since the seller failed to provide the necessary details and the buyer was under no obligation to obtain a "blank" letter of credit.

With respect to the conditional delivery of the propane gas, the court held that, if delivery of the goods is made, after the formation of the contract, subject to a limitation of export destinations, such a limitation must be regarded as a violation of the duty of the seller under article 41 CISG.

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

Case 177: MAL 7 , 10
India: Supreme Court of India
18 November 1996
MMTC v. Sterlite Industries (India) Ltd.
Published in English: Judgments Today [1996] 10 S.C. 390

(Abstract prepared by the Secretariat)

The case concerned an arbitration clause contained in a contract entered into by the parties. The clause provided for the appointment of one arbitrator by each party and an umpire to be jointly appointed by those arbitrators.

The appellant sought to rely on the arbitration clause after a dispute arose between the parties. After the respondent claimed that the arbitration clause could not be resorted to, and, therefore, refused to name an arbitrator, the appellant brought an action in the High Court . The High Court rejected the respondent's contention that the arbitration clause was invalid in light of section 10 of the new 1996 Arbitration and Conciliation Act (adapted from article 10 MAL). The aforementioned provision in the Act states that parties are free to determine the number of arbitrators, provided that such number shall not be an even number. Special leave was given to appeal to the Supreme Court.

The Supreme Court held that the relevant provision to determine the validity of an arbitration agreement is section 7 of the 1996 Act (adapted from article 7 MAL), which contains the writing requirement. As there is no reference to the number of arbitrators within this provision, the Supreme Court concluded that the validity of an arbitration clause does not depend on the number of arbitrators specified therein. The arbitration clause was therefore held to be valid.

Case 178: MAL 8(1)
Canada: British Columbia Supreme Court (Huddart J.)
31 January 1996
Siderurgica Mendes Junior S.A. v. "Icepearl"(The)
Original in English
Unpublished

Siderurgica (SMJ) shipped a cargo of steel wire on the "Icepearl", which was time-chartered by Norsul International S.A. and owned by Icepearl Shipping Co. The bills of lading were endorsed to Mitsui & Co. (Canada) Ltd., a charterer of part of the vessel. The goods arrived in Vancouver damaged by salt water. SMJ and Mitsui sued Norsul on the bill of lading, claiming damages in contract or tort, or for breach of duty as bailee. Norsul applied for a stay of proceedings and referral to arbitration in New York pursuant to Article 8 of the Commercial Arbitration Act, Revised Statutes of Canada, 1985 (2nd Supplement), Chapter 17, which enacts Article 8(1) MAL. An arbitration clause was contained in the charter-party signed by Mitsui and Norsul. The bills of lading included a clause purporting to supersede all previous agreements.

The court applied a line of Canadian and English cases to the effect that an endorsement like that used in the bills of lading did not incorporate the arbitration clause contained in the charter- party. An obligation to arbitrate had to be found in a separate agreement between SMJ or Mitsui and Norsul. As SMJ was not a party to any other agreement with Norsul, no stay could be granted on that ground with respect to that plaintiff.

However, the court then found that, despite the fact that Mitsui sued on the bills of lading, and not the charter-party, the agreement to arbitrate in the charter-party was binding. In addition, the court found that Mitsui and Norsul had agreed that any dispute between them would be referred to arbitration in New York and thus the arbitration clause was enforceable separately from any other provisions of the charter-party. The supersession clause in the bills of lading did not, therefore, prevent Norsul and Mitsui from being bound by the arbitration clause in the charter-party between them.

The court also found that Norsul had not waived its right under the arbitration agreement since it did not submit its application later than the submission of its first statement on the substance of the dispute. The action, by both SMJ and Mitsui, was stayed pending the arbitration between Norsul and Mitsui.

Case 179: MAL 8(1)
Canada: British Columbia Court of Appeal (Macfarlane, Cumming and Prowse, JJ.A.)
4 July 1995
The City of Prince George v. A.L. Sims & Sons Ltd.
Original in English
Published in English: [1995] 9 Western Weekly Reports, 503

The defendant (appellant), Sims, entered into a construction contract containing an arbitration clause with the plaintiff (respondent), the City of Prince George. Plaintiff (respondent) nominated McElhanney Engineering Services Ltd. (McElhanney) as a consultant under the contract. However, there was no arbitration clause in the contract between them. Plaintiff (respondent) commenced an action against defendant (appellant) and McElhanney. Defendant (appellant) applied for an order under Section 15 of the Commercial Arbitration Act, Revised Statutes of British Columbia, 1985 (2nd Supplement), Chapter 17, which enacts Article 8 MAL, for a stay of the action.

The first instance court found that the arbitration clause was inoperative or incapable of being performed because the action raised broader issues against the co-defendant, McElhanney, which were interrelated with the arbitrable issues between the plaintiff and the defendant. The first instance court also said that it would exercise a residual discretion to refuse the stay where there was a risk of multiple proceedings and inconsistent results.

On appeal, the Court of Appeal found that there was a dispute between the parties that involved matters which had been agreed to be submitted to arbitration. The Court of Appeal found that Canadian and English case law was clear that, as a general principle, whenever there are multiple parties and multiple issues, of which some are interrelated and similar, defendants are not barred from invoking an arbitration clause binding them. Amongst the cases referred to by the Court of Appeal was BMW Investments Ltd. v. Saskferco Products Inc. (CLOUT case no. 116 in A/CN.9/SER.C/ABSTRACTS/8).

The Court of Appeal then considered the question of residual discretion to refuse a stay of proceedings in the light of the earlier British Columbia Court of Appeal decision in Gulf Canada Resources Ltd. v. Arochem International Ltd. (CLOUT case no. 31 in A/CN.9/SER.C/ABSTRACTS/2). The Court of Appeal considered that there was, on this issue, no difference in substance between the British Columbia Commercial Arbitration Act and the British Columbia International Commercial Arbitration Act, Statutes of British Columbia, 1986, Chapter 14. The Court of Appeal found that the first instance court had misinterpreted the language of the Court of Appeal in the Gulf Canada decision. The Court of Appeal held that a court had a residual discretion to refuse a stay of proceedings only when a party clearly established that it was not privy to an arbitration agreement. If it is arguable that a party is indeed a party to such an agreement, a stay should be granted and the issue can be resolved in the arbitration.

Case 180: MAL 8
Canada: British Columbia Supreme Court (Saunders J. in Chambers)
9 May 1995
Traff et al. v. Evancic et al.
Original in English
Unpublished

The plaintiffs commenced an action against the defendants for fraud and breach of trust in relation to an investment scheme. Two Bahamian corporations were also served in the action and sought an order staying the proceedings against them under the International Commercial Arbitration Act, Statutes of British Columbia, 1986, Chapter 14 (which enacts article 8 MAL).

While the proceedings related to allegations of fraud, the plaintiffs also sought an accounting under various agreements relating to the investment scheme. These agreements contained an arbitration clause.

Despite there being different issues, the court granted the stay requested since one of the issues was in respect of a matter agreed to be arbitrated. The court relied on the Gulf Canada Resources Ltd. v. Arochem International Ltd. decision (CLOUT Case no. 31 in A/CN.9/SER.C/ABSTRACTS/2).

Case 181: MAL 8
Canada: British Columbia Supreme Court (Oppal J. in Chambers)

24 March 1995
Queensland Sugar Corp. v. "Hanjin Jedda" (The)
Original in English
Published in English: [1995] 6 British Columbia Law Reports (3rd) 289

The defendants shipped to the plaintiffs a cargo of raw sugar from Australia to Canada. The latter alleged the cargo was damaged at sea. A charter-party referred all disputes between the parties to arbitration. Two months after the plaintiffs commenced the action, the defendants filed a statement of defence which did not refer to arbitration. After the case was set for trial, the defendants requested the plaintiffs' consent to commence arbitration pursuant to Article 8 of the Commercial Arbitration Act, Revised Statutes of Canada, 1985 (2nd Supplement) Chapter 17, which enacts article 8 MAL.

The court held that the defendants impliedly agreed that the court try the dispute by participating in the litigation process from its commencement.

The court relied on the Gulf Canada Resources Ltd. v. Arochem International Ltd. (CLOUT Case no. 31 in A/CN.9/SER.C/ABSTRACTS/2) decision and its interpretation of Article 8 MAL to the effect that a stay of proceedings should not be granted if it was applied for out of time; and that it would prejudice the plaintiffs to refer the matter to arbitration when the litigation process was well under way.

Case 182: MAL 5; 16; 34
Canada: Superior Court of Quebec (Tellier J.)
9 September 1994
International Civil Aviation Organization (ICAO) v. Tripal Systems Pty. Ltd.
Original in French
Published in French: Recueil de jurisprudence du Québec [1994] 2560

In February 1990, ICAO entered into a contract with Tripal for the conception, construction and installation of an airport in Hanoi, Vietnam. The contract included an arbitration clause as well as a clause that preserved any immunity that might accrue to ICAO. Following the commencement of arbitral proceedings to resolve a dispute between the parties, ICAO raised its immunity to contest the arbitral tribunal's competence. Considering that the issue was one of mixed fact and law, the arbitral tribunal, in order to rule on the objection, decided to hear all evidence. ICAO then asked the Superior Court of Quebec to declare that it enjoyed an absolute immunity from judicial process of any kind. Tripal responded with its own motion for dismissal on the grounds that only the arbitral tribunal was competent at that stage of the proceedings.

The Superior Court granted the motion for dismissal of the declaratory motion, having decided that the arbitral tribunal alone was competent to decide the immunity issue. To this end, the Superior Court examined the conditions regulating judiciary intervention in the arbitral process (articles 16 and 34 MAL) and concluded that these were not met. The Superior Court refused to intervene on the basis of article 5 MAL. However, it noted that once the arbitral tribunal had declared itself competent, the Superior Court would be competent to review this decision in accordance with article 16(3) MAL, should a party so request.

Case 183: MAL 8(1)
Canada: Ontario Court of Appeal (Morden A.C.J.O., Blair and Austin JJ. A.)
25 April 1994

Automatic Systems Inc. v. Bracknell Corp.
Original in English
Published in English: [1994] 18 Ontario Reports (3rd) 257

Automatic Systems, Inc., a Missouri corporation, contracted with Bracknell Corp., an Ontario corporation, for the supply and installation of a conveyor system at a Chrysler plant in Ontario. The contract contained an agreement to arbitrate all disputes arising under it in Missouri in accordance with the law of that State. When Bracknell claimed a statutory construction lien against Automatic, the latter applied for an order staying the action and referring the parties to arbitration. The application for an order staying the action was denied and Automatic appealed.

The Court of Appeal held that the construction lien legislation should not have been narrowly construed by the court seized of the stay application, rather the court should have enquired whether that legislation prohibited arbitration. The lien statute did not prohibit arbitration but actually contemplated it. The International Commercial Arbitration Act, Revised Statutes of Ontario, 1990, Chapter I.9, which enacts article 8(1) MAL, was applied since the case fell within its scope and nothing in the lien statute precluded a claim from being arbitrated under the Act.

The Court of Appeal made extensive reference to the commitment of the province of Ontario to the policy of international commercial arbitration through enactment of MAL and granted a stay of the proceedings.

The Court of Appeal referred in critical terms to the trial judgement in BWV Investments Ltd. v. Saskferco Products Inc. et.al. and UHDE GmbH (CLOUT case no. 116 in A/CN.9/SER.C/ABSTRACTS/8), which was reversed on appeal in a manner consistent with the result in the present case.

Case 184: MAL 8(1)
Canada: Federal Court of Canada (Trial Division) (Strayer J.)
22 March 1994
Continental Resources Inc. v. The East Asiatic Company (Canada) Inc.
Original in English
Unpublished

The court was satisfied that there was an arbitration agreement within the meaning of Article 8 of the Commercial Arbitration Act, Revised Statutes of Canada, 1985, 2nd Supplement, Chapter 17, which enacts Article 8(1) MAL, and that, therefore, the matter before it must be referred to arbitration in New York as provided in the charter-party between the litigants. As no statement of defence had been filed by the defendants, they had not submitted any statement on the substance of the dispute to the court so as to justify the refusal of a stay of proceedings.

The court held that there was insufficient evidence that a new agreement had been reached between the parties for arbitration in Vancouver. The court also held that if there was any claim against the defendant vessel, which claim was not precluded by the agreement to arbitrate, it could be stayed pending the conclusion of the arbitration in New York. The court found insufficient evidence to warrant granting such a stay. However, as Article 8 MAL does not address the issue of the terms on which the action before the court should be disposed of, the court used its discretion to grant the stay on condition that the defendants did not rely on prescription or on delay as a defence in the arbitration.

Case 185: MAL 34(4); 36(b)(ii)
Canada: Quebec Court of Appeal (Vallerand, Brossard and Dussault, JJ. A.)
15 June 1990
Transport de cargaison (Cargo Carriers) v. Industrial Bulk Carriers
Original in French
Published in French: Revue de droit judiciaire [1990] 418

Cargo Carriers, whose cargo ship travels between Niger and Spain, contracts with Industrial Bulk for port services. A dispute arose concerning sums incurred and paid by Industrial for services rendered while Cargo's ship was moored in Bilbao. Cargo opposed the enforcement of the arbitral award rendered in Industrial's favour for two reasons.

First, the award was said to order payment by Cargo of a sum greater than that expended by Industrial. The court rejected this argument on the grounds that it was equivalent to an application for the setting aside of the award and that this was within the exclusive jurisdiction of the arbitral tribunal under article 34 MAL.

Second, Cargo argued that the award provided for reimbursement of a bribe paid by Industrial to the port authority in Bilbao and that it would be contrary to Canadian public policy for Quebec courts to enforce such an award. The court rejected this argument, accepting the arbitrator's interpretation of the nature of the payment in question. The court further stated that the payment was in the nature of a ransom as opposed to a bribe because Industrial had no other choice but to pay the escalating demurrage charges to enable the ship to leave the port. The court distinguished between a bribe, which it defined as intrinsically immoral for both the offeror and the receiver, and a ransom, which involves immorality only on the part of the blackmailer. An arbitral award imposing the reimbursement of a sum paid as ransom does not violate Canadian public policy and therefore Cargo could not resist recognition and execution of the award on the basis of article 36(b)(ii) MAL.

A motion for leave to appeal to the Supreme Court of Canada was denied.

Case 186: MAL 8
Canada: Superior Court of Quebec (Ryan J.)
18 May 1990
A. Bianchi S.R.L. v. Bilumen Lighting Ltd.
Original in French
Published in French: Recueil de jurisprudence du Québec [1990] 1681

In a series of contracts concluded during 1986, Bianchi granted Bilumen the exclusive right to assemble, sell and distribute its products in Canada and the United States. Shortly thereafter, and despite the arbitration clause contained in the contract, Bianchi began judicial proceedings before the Superior Court, claiming damages for breach of contract. The proceedings followed their course, including joint motions for particulars, a demand for a guarantee in respect of the costs of the proceedings and discovery. In March 1990, Bilumen filed a motion for dismissal of the action, pointing to the arbitration clause. Bianchi contested this motion, arguing that Bilumen had tacitly renounced arbitration in view of the various steps undertaken in relation to the judicial proceedings.

Given the general policy favouring arbitration, and particularly article 8 MAL, the Superior Court concluded that the delay in invoking the arbitration clause and the steps undertaken in the judicial proceedings did not amount to renunciation of the arbitral procedure. The Superior Court further stated that the mandatory nature of the provision and the absence of judicial discretion required that the parties be referred to arbitration.

III. ADDITIONAL INFORMATION

Corrigendum

Case 119

The entry "...excerpts published in International Arbitration Report, May 1995, 11" in the Arabic, Chinese, English, French, Russian and Spanish texts of document A/CN.9/SER.C/ABSTRACTS/8 *should read* "...excerpts published in Mealey's International Arbitration Report, May 1995, 11".

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