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CASE LAW ON UNCITRAL TEXTS (CLOUT)

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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). The purpose is to facilitate the uniform interpretation of these legal texts by reference to international norms, which are consistent with the international character of the texts, as opposed to strictly domestic legal concepts and tradition. More complete information about the features of the system and its use is provided in the User Guide (A/CN.9/SER.C/GUIDE/1/REV.1). CLOUT documents are available on the UNCITRAL website: (www.uncitral.org/clout/showSearchDocument.do).

Each CLOUT issue includes a table of contents on the first page that lists the full citations to each case contained in this set of abstracts, along with the individual articles of each text which are interpreted or referred to by the Court or arbitral tribunal. The Internet address (URL) of the full text of the decisions in their original language is included, along with Internet addresses of translations in official United Nations language(s), where available, in the heading to each case (please note that references to websites other than official United Nations websites do not constitute an endorsement of that website by the United Nations or by UNCITRAL; furthermore, websites change frequently; all Internet addresses contained in this document are functional as of the date of submission of this document). Abstracts on cases interpreting the UNCITRAL Model Arbitration Law include keyword references which are consistent with those contained in the Thesaurus on the UNCITRAL Model Law on International Commercial Arbitration, prepared by the UNCITRAL Secretariat in consultation with National Correspondents. Abstracts on cases interpreting the UNCITRAL Model Law on Cross-Border Insolvency also include keyword references. The abstracts are searchable on the database available through the UNCITRAL website by reference to all key identifying features, i.e. country, legislative text, CLOUT case number, CLOUT issue number, decision date or a combination of any of these.

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Cases relating to the United Nations Convention on the Use of Electronic Communications in International Contracts (ECC)

Case 1195: ECC 10(2)

Canada: Cour d'appel du Québec

2012 QCCA 1030 (CanLII)

Services financiers Paccar ltée c. Kingsway, compagnie d'assurances générales

31 May 2012

Available at <http://canlii.ca/t/frm9m>

This case deals with the presumption of receipt of an electronic communication sent to a designated electronic address.

A company concludes a contract for the lease of a truck. One condition of the lease contract is that the lessee will get insurance coverage against theft of the truck. The lessee concludes, with the assistance of a broker, an insurance contract for that purpose. The insurance contract contains a clause requesting the lessee to install on the truck an anti-theft and vehicle-tracking system within fifteen days from the conclusion of the contract. If the system is not installed, the insurance coverage will be suspended until evidence of the installation of the system is offered.

The insurance contract indicating the request to install the system and the penalty for failing to do so is transmitted by telefax from the insurance broker to the lessee and the lessor. Subsequently, other communications referring to the obligation of installing the system and to the penalty for not doing so are exchanged between the parties.

The lessee fails to install the anti-theft and vehicle-tracking system. After a few months, the truck is stolen. However, the insurance refuses to reimburse the value of the truck to the lessor due to the lessee's failure to install the system.

During the hearings, the lessee claims not having received copy of a letter transmitted by telefax from the insurance company to the insurance broker and to the lessor. However, the lessee is not in a position to provide the telefax transmission log for the relevant machine and period of time. On the other hand, the insurance company provides witness evidence that the sender's telefax machine had confirmed the successful dispatch of the letter to the lessor and copy of the telefax log indicating date and time of the transmission.

The Court refers to article 31 of the *Loi concernant le cadre juridique des technologies de l'information of Québec*, providing that "A technology-based document is presumed received or delivered where it becomes accessible at the address indicated by the recipient as the address where the recipient accepts the receipt of documents from the sender, or at the address that the recipient publicly represents as the address where the recipient accepts the receipt of documents, provided the address is active at the time of sending".¹ The Court explains that the witness evidence indicating that the document had not been received is not sufficient to rebut the presumption of receipt of the telefax set forth in that article.

¹ This provision is similar in substance to article 10(2) of the United Nations Convention on the Use of Electronic Communications in International Contracts, dealing with the time of receipt of an electronic communication at a designated electronic address.

**Cases relating to the UNCITRAL Model Law on Electronic Commerce (MLEC)
and the United Nations Convention on the Use of Electronic Communications
in International Contracts (ECC)**

Case 1196: MLEC 8; 9; 11; ECC 9

People's Republic of China: Second Intermediate People's Court of Shanghai,

Case No. 1949, 2011

21 October 2011

Original in Chinese

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ODU2MTUmdGFoPaOoMjAxMaOpu6a2/tbQw/HSuyjD8SnW1dfWtdoxOTQ5usUmd3o9z

Searchable in Chinese: www.hshfy.sh.cn:8081/flws/index.jsp?wz=

This case involves a dispute regarding a real estate purchase arrangement between a buyer, a long-term resident of the United States and a Chinese agent. The buyer had purchased numerous real properties in Shanghai and commissioned a local agent to assist in management of those properties, including purchase and maintenance of the property, making necessary payments as well as the management of relevant funds and bank accounts. The dispute arose when the agent transferred the funds, which were transferred by the buyer to the agent's general account in February 2009, into his personal equity trading account. The buyer requested that the funds be returned.

The parties communicated by e-mail, which were submitted as evidence. The agent denied the content of the e-mail and argued that he was not the owner of the three e-mail accounts referred to in the case. He further argued that the e-mails did not reflect the actual circumstances and the instability and alterability of the e-mails made it inadmissible in court.

Both the Trial Court and the Appeal Court rejected the agent's claim. It was held that an e-mail was an allowable form of offer and acceptance in the Chinese contract law. The e-mails sent by the buyer were from a public mail server and they were notarized. The agent did not provide any evidence to prove that the actual circumstances were not consistent with the content of those e-mails, nor did he request an investigation on accuracy of these emails. Moreover, the content of the e-mails submitted by the buyer matched with the bank account transaction records and witness' inquiry records. While one of the e-mails sent by the agent was from a third party's e-mail account, it still included the agent's signature. The buyer's request of returning the funding in question was upheld.

Cases relating to the UNCITRAL Model Law on Electronic Commerce (MLEC)**Case 1197: MLEC [5]; 6(1); [7]**

Canada: Court of Appeal of New Brunswick

2012 NBCA 40

Druet v. Girouard

26 April 2012

Decision published in English and French. Available at

www.gnb.ca/cour/03COA1/Decisions/2012/April/20120426DruetvGirouard.pdf

(last retrieved on 5 October 2012)

This case discussed whether e-mail messages and the method for identifying their authors may meet the requirements of “written form” and “signature” set forth in the law of New Brunswick² for the sale of land.

Two private parties exchanged seven e-mails relating to the sale and purchase of a residential condominium unit in two days. The name of the seller was indicated at the end of its e-mails in different forms, including “seller’s phone”, though without including the reference that this constituted the signature of the document. On the other hand, the buyer never wrote its name in its e-mails. The seller decided to withdraw from the transaction. Considering the seller bound by the agreement, the buyer commenced an action seeking specific performance or damages for breach of contract.

In the first instance of the case, the motion judge ruled that the electronic exchanges resulted in a binding contract. The judge indicated that the e-mails contained the essential terms of the agreement and the electronic communications complied with the requirements (written form and signed by the party to be bound) set forth for sale of land in the Statute of Frauds of New Brunswick (R.S.N.B. 1973, c. S-14). In the motion judge’s opinion, the e-mails were admissible for the proof of what was stated on them and “*there was no issue as to the identity of the senders, whether the emails were actually sent, or any allegation of the emails having been altered*”. The seller appealed the ruling.

The Court of Appeal concurred that the e-mails satisfied the written form requirement set forth for the sale of land. The Court moved on to determine whether the data messages had legal validity under the Statute of Frauds.³ After applying the “joinder” principle, the Court of Appeal concluded that the e-mails constituted a sufficient memorandum within the meaning of the Statute of Frauds, though they did not contain any specific reference to each other. Although the condominium unit object of the sale had not been identified other than with a number, the reference to the tenant and the fact that the unit was owned by the seller were considered to be sufficient for purposes of the Statute of Frauds. In addition, the Court of Appeal

² New Brunswick, a province of Canada, has enacted the Electronic Transactions Act (SNB 2001, c. E-5.5) (ETA), which is influenced by the UNCITRAL Model Law on Electronic Commerce (MLEC) and its underlying principles. In particular, section 7 of the ETA corresponds to article 6(1) of the MLEC. However, the ETA departs from the MLEC with respect to the requirements for electronic signatures, since section 10(2) ETA requires, inter alia, that: “... the person signing the document (i) provides his or her name, and (ii) indicates clearly that the name is being provided as his or her signature to the document”.

³ See also Guide to Enactment of the UNCITRAL Model Law on Electronic Commerce, para. 61.

agreed that, when read collectively, the e-mails outlined the essential terms of the underlying consensus (the “3 P’s”: price, parties and property), and other terms unique to the transaction (the assumption of the existing mortgage and the undertaking to pay an amount towards the vendor’s legal fees).

However, the Court of Appeal concluded that the exchange of e-mails qualified as preliminary negotiations but not as a binding contract, in light of the circumstances of the agreement reached between the parties that a more formal document for the sale of the condominium would be prepared and executed.

Case 1198: MLEC 7

United Kingdom: Court of Appeals of England and Wales, Civil Division

Golden Ocean Group Limited v. Salgaocar Mining Industries PVT Ltd. and another [2012] EWCA Civ 265

9 March 2012

Original in English

Published in: www.bailii.org/ew/cases/EWCA/Civ/2012/265.html

Section 4 of the Statute of Frauds 1677 imposes a requirement that a guarantee must be in writing and signed by a person in order to be enforceable. In this case, the Court of Appeals considered the application of that section in the situation where the guarantee was contained in a sequence of e-mails between the parties.⁴

The case concerned a charter-party with a guarantee which was negotiated and concluded by e-mail exchange. While the specific terms of a charter-party including the guarantee were negotiated in a sequence of e-mails between the parties, the concluding e-mail no longer made an express reference to the guarantee. When proceedings were brought under the guarantee, it was argued that the sequence of e-mails did not amount to the required signed, written agreement. It was submitted that the Statute of Frauds required a contractual instrument which the parties had agreed or intended was to contain the whole of their contract of guarantee.

The Court of Appeals found that the exchange of a number of electronic messages could lead to the conclusion of an agreement in writing for the purposes of the Statute of Frauds, without the need for all operative terms to be contained within a single or limited number of documents. There was no limit on the number of documents in which the required writing is to be found, and indeed the conclusion of commercial contracts (particularly charter-parties) by an exchange of e-mails was common.

The Court of Appeals also found that the signature requirement was satisfied. In this case, the final e-mail contained the name “Guy” (being from Guy H [...], the appellant’s broker) and the appellant argued that this was merely a salutation. The Court considered that brokers may communicate with one another in a familiar manner but that does not detract from the seriousness of the business they are conducting. Furthermore, it was found that whilst the e-mail in itself was not the contract of guarantee, the signature contained in it authenticated the contract

⁴ This case illustrates the application of the principle of functional equivalence between handwritten and electronic signatures, which is one of the underlying principles of UNCITRAL texts on electronic commerce. It also inspires relevant English legislation, which does not necessarily represent an enactment of UNCITRAL texts.

contained in both that e-mail and the other documents in the sequence. The Court had no doubt that this was sufficient to meet the underlying requirement of the Statute of Frauds, namely to authenticate the contents of the guarantee.

Case 1199: MLEC 7

United Kingdom: High Court of England and Wales, Queen's Bench Division, Commercial Court

WS Tankship II BV v. The Kwangju Bank Ltd. and another [2011] EWHC 3103

25 November 2011

Original in English

Published in: www.bailii.org/ew/cases/EWHC/Comm/2011/3103.html

The case involved a dispute between the buyers of a ship and Korean banks giving a refund guarantee. The High Court considered whether the guarantee complied with the Statute of Frauds, which requires guarantees to be signed to be enforceable.⁵ While it was not necessary for the purposes of the Court's decision, the Court considered the validity of a letter of guarantee sent by SWIFT message (SWIFT being a secure international messaging service used by financial institutions).

The guarantee in dispute was issued in the form of a letter of guarantee and sent by SWIFT message to the buyers' bank. The name of the seller's bank did not appear anywhere in the text of the guarantee and thus the bank argued that the guarantee was not signed.

The Court considered that it would be a surprising result for a guarantee not to be binding in such circumstances, saying that, as a matter of common sense, authentication by sending a SWIFT message was equivalent to authentication by signing and so within the spirit, if not the letter, of the Statute of Frauds. The Court noted that the name of the seller's bank appeared in the header, which was automatically inserted into the SWIFT message. The bank argued that this could not be considered a signature because this was not a text which was typed in, but was merely an output message header. However, the Court concluded that by sending the message, the respondent had caused its name to be inserted into the SWIFT message. It further stated that this constituted a sufficient signature for the purposes of the Statute of Frauds, that this would be the case whether or not the automatically generated by the system, and whether or not stated in whole, or abbreviated. The method of transmission also provided sufficient authentication to enable the SWIFT message recipient to know that the message was from the seller's bank.

This decision therefore provides that letters of guarantee issued by SWIFT will be considered to be properly "signed" for the purposes of the Statute of Frauds, even though they have no signature in the traditional sense, and that accordingly they can be relied upon by the parties to a transaction.

⁵ This case illustrates the application of the principle of functional equivalence between handwritten and electronic signatures, which is one of the underlying principles of UNCITRAL texts on electronic commerce. It also inspires relevant English legislation, which does not necessarily represent an enactment of UNCITRAL texts.

Case 1200: MLEC 5; 6; 11

United States of America: New York State Supreme Court, Appellate Division, First Department, 2010 NY Slip Op 07079 [80 A.D.3d 1]

5 October 2010

Original in English

Published in English: www.nyCourts.gov/reporter/3dseries/2010/2010_07079.htm

This case involves a dispute arising from a contract to purchase real property transmitted by using e-mail.

The buyer made an offer to the real estate agent, acting on behalf of the seller, for the purchase of real property. However, the property was eventually sold to a third party. The buyer brought legal action against the seller for breach of contract, since, as the buyer argued in Court, the real estate agent had granted the buyer a right of first refusal in an e-mail reply to the buyer's offer. The seller sought to dismiss the case by arguing, among other things, that the alleged right of first refusal was not enforceable under the applicable Statute of Frauds requiring the contract to be memorialized in a signed writing, because it was only an e-mail communication.

The Court of First Instance noted that an e-mail would generally be considered a "signed writing" if the name of the party to be charged appeared at the end of the e-mail. With respect to the applicability of the Statute of Frauds to contracts concerning real estate transactions, the Court of first instance recognized that although the recent amendments to the statute created a new category of financial transactions which may be signed by electronic means, nothing prohibited the parties in a real estate transaction from granting a right of first refusal via e-mail. Therefore, the Court concluded that the right of first refusal granted in an e-mail sufficiently bound the parties concerned. Accordingly, the motion to dismiss was denied and the seller appealed.

The Appellate Court reaffirmed the decision by the Court of First Instance that an e-mail would satisfy the Statute of Frauds so long as its contents and subscription met all requirements of the governing statute. With regard to the applicability of the Statute of Frauds to real estate contracts, the Court noted that the 1994 amendment to the general Statute of Frauds was to clarify that certain qualified financial contracts are legally binding from the moment agreement is reached through electronic means of communication. The Court concluded that it was too late to accept that an electronic communication cannot satisfy the statute of fraud for contracts outside the scope of that amendment because e-mail is no longer a novelty but omnipresent in both personal affairs and business, including real property transaction. Reference was made to section 7 of the Uniform Electronic Transactions Act (UETA) (though not yet enacted by New York) which provides that a contract may not be denied legal effect or enforceability solely because an electronic record was used in its formation and that if a law requires a record to be in writing, an electronic record satisfies the law.

As to whether the record of an electronic communication satisfied the Statute of Frauds under New York state law, reference was made to the 2002 amendments to the Electronic Signatures and Records Act (ESRA), whereby the definition of the term "electronic signature" was amended to conform to the definition provided in the Electronic Signatures in Global and National Commerce Act (E-SIGN, inspired

by the UETA and the MLEC), which was enacted by the Congress in 2000. By referring to the legislative intent in amending ESRA, the Court held that New York's lawmakers appeared to have chosen to incorporate the substantive terms of E-SIGN into New York state law. Thus, the Court concluded that the E-SIGN's requirement that an electronically memorialized and subscribed contract be given the same legal effect as a contract memorialized and subscribed on paper was part of New York law. In addition, the Court complemented that even in the absence of E-SIGN and the legislative intent in amending ESRA, given the vast growth in the number of people and entities regularly using e-mail, the Court would conclude that the terms "writing" and "subscribed" should now be construed to include, respectively, records of electronic communications and electronic signatures, notwithstanding the limited scope of the 1994 amendment to the general Statute of Frauds.

Although an e-mail might satisfy the Statute of Frauds, the Appellate Court granted the motion to dismiss based on the fact there was never a meeting of the minds between the parties on the terms of the proposed right of first refusal.

Case 1201: MLEC 9; 12

People's Republic of China: First Intermediate People's Court of Beijing, Case No. 12610, 2009

12 November 2009

Original in Chinese

Published in: www.110.com/panli/panli_259486.html (un-official)

The dispute involves a car rental contract. On 20 June 2005, the plaintiff entered into a rental contract with the respondent whereby the respondent rented equipment from the plaintiff to produce automobile parts. The rental fee was to be paid on a quarterly basis based on the number of parts produced.

At the end of June 2006, the respondent discontinued the rental payment. The rental agreement was eventually terminated on 30 April 2007. The plaintiff continued to request that the respondent pay this outstanding amount, using telephone and e-mail. The case was brought to the People's Court of Daxing District whereby the plaintiff requested the payment of the outstanding balance from July 2006 to April 2007. The Trial Court upheld the plaintiff's claims and ordered the respondent to pay the outstanding amount.

The case was appealed. The respondent questioned the authenticity of the e-mail evidence submitted by the plaintiff. The respondent argued that because the e-mails were sent from the plaintiff's company server, the plaintiff had the capacity to alter the content of those e-mails. The respondent argued that only e-mails from a creditable third party server can be accepted as evidence whereas an e-mail was from a company's server could not be accepted as evidence because the company had capacity to alter the content.

The Intermediate Court rejected this claim and held that the e-mails sent from one's own company server could constitute effective evidence.

**Cases relating to the United Nations Convention on Contracts for the
International Sale of Goods (CISG)**

Case 1202: CISG 1; 8(2); 8(3); 14

The Netherlands: Rechtbank Utrecht

Number: 253099/HA ZA 08-1624

21 January 2009

German company v. Quote Foodproducts BV

Available in Dutch: NJF 2009, 148

Abstract prepared by Jan Smits,⁶ National Correspondent, with the assistance of Esther van Schagen

The question that arises in this case is whether the standard terms and conditions of the seller are applicable to the contract.

Several deliveries of sesame seeds took place between the Dutch seller (the defendant) and the German buyer (the claimant). When a dispute arose between the parties, the seller argued that its terms and conditions would apply to the agreement and objected to the Dutch Court jurisdiction over the case. The buyer held the opposite. The Court, provisionally assuming the existence of an agreement, and referring to the decision of the Dutch Supreme Court of 28 January 2005, NJ 2006, 517, found that the CISG was applicable, as the case concerned the sale of movables between parties having their place of business in contracting States of the Convention.

The Court found that the terms and conditions can only be applicable if the seller has stipulated their applicability in its offer and the offer has been accepted by the buyer. The inclusion of standard terms and conditions should be recognizable for the buyer, in accordance with article 8(2) and (3) CISG. In the absence of any existing practice between the parties, the mere reference to the general terms and conditions is not sufficient to incorporate them in the contract. This reasoning applies to the case at hand, since the parties never conducted business with one another before. Supporting the arguments of the buyer, the Court also noted that there is a difference “between national and international agreements concerning the way in which the applicability of general terms of business is accepted”. In the opinion of the Court, the seller did not sufficiently motivate that the application of standard terms and conditions is customary in international trade, although it is customary of German suppliers.

Finally, the Court found that the seller should have given the buyer the opportunity to become apprised of its standard terms and conditions, for example by providing the buyer with their text. With this regard, the Court also referred to German case law (mentioning Bundesgerichtshof 31 October 2001, VIII ZR 60/01) on the applicability of standard terms and conditions, which stresses that those are applicable if their text is provided to the buyer before the conclusion of the contract.

For this reason the Court rejected the seller’s claim of lack of jurisdiction.

⁶ Prof. J. Smits was CLOUT national correspondent for the Netherlands until 24th June 2012.

Case 1203: CISG 1(a); 6; 11; 35; 38; 39; 40; 44

The Netherlands: Rechtbank Breda

Number: 197586 KG ZA 08-659

16 January 2009

Greek company v. Ed Fruit & Vegetables BV

Available in Dutch: LJN BH1776

Abstract prepared by Jan Smits,⁷ National Correspondent, with the assistance of Esther van Schagen

The Greek claimant (i.e. seller) sold watermelons to the Dutch defendant (i.e. buyer) over the period of June, July and August 2008, which the defendant did not fully pay for. The claimant sued for the outstanding payment. Although the defendant recognized it owed a certain amount to the claimant, it still refused to pay the sum, claiming that the watermelons were defective and that it had complained (though not in writing) to the claimant. The defendant, thus, held the claimant liable for the costs of transportation of non-conforming goods and requested that the seller be sentenced to compensate them.

The Court stated that the CISG was applicable, since the parties had their place of business in States parties to the Convention, and their contract concerned the sale of movables not excluded from the scope of the CISG. Pursuant to article 11 CISG, the fact that the contract was not in writing did not hinder the applicability of the Convention. Although the defendant submitted that the CISG should not apply, the Court held that it did not state that the parties had (tacitly) agreed to exclude its application, nor there was any evidence of this.

The Court noted that the carriage of the contracted goods was to be organized by the defendant, which meant that this latter had to carry the risk of their transport to the place of destination. In accordance with articles 35 and 36 CISG, the seller was thus liable for the quality of the watermelons before the transport took place.

Since the risk passed to the defendant before transport, pursuant to article 38 CISG the defendant was obliged to examine the goods before they were shipped, which the defendant failed to do. Accordingly, the reasonable time to give notice of non-conformity (as per article 39 CISG) started from the moment when this inspection should have been conducted. The Court clearly stated that the circumstances of the case did not allow for the inspection to be postponed. According to article 38(2) CISG, the inspection can be postponed until after the delivery at the place of destination only in those cases when the contract of sale involves the transport of the goods. Furthermore, “the duration of the notice period in article 39 CISG depends on the ... nature of the delivered goods”. The Court thus agreed with the seller that the circumstances of the case demanded a very short notice period “... whereby [the buyer] should have complained either immediately, or at least a few days following delivery of the watermelons”.

The Court further noted that the defendant did not sustain that the claimant knew or could not have been unaware of the non-conformity of the watermelons (article 40 CISG). Neither the defendant claimed to have a reasonable excuse for failing to give notice, which would have given it the right to reduce the price or claim damages pursuant to article 44 CISG. For these reasons, the Court concluded that the

⁷ Ibid.

defendant had forfeited its right to claim goods non-conformity and it sentenced the defendant to pay the full price agreed in the contract, as well as interest and extra-judicial costs as stipulated in article 74 CISG.
