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Contents

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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: (http:// http://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 UNCITRAL Model Arbitration Law (MAL)

Case 811: MAL 35; 36 (1)(a)(i); 36 (1)(a)(v); 36 (1)(b)(ii)
Hong Kong: Supreme Court of Hong Kong, High Court
Zhejiang Province Garment Import and Export Company v. Siemssen & Co (Hong Kong)
2 June 1992
Judgment in English
Abstract prepared by Ben Beaumont

[**Keywords**: *arbitral awards; courts; enforcement; award-recognition and enforcement; award-setting aside; public policy*]

In July 1991, an arbitration award was rendered by the China International Economic and Trade Arbitration Commission (CIETAC) in favour of the plaintiff, which sought then enforcement of the award in Hong Kong. In February 1992, the court in Hong Kong ordered ex parte the enforcement of the award, MAL 35. In March, though, the defendant applied to set aside that order, MAL 36. Its argument was based on the following grounds: (i) the plaintiff was not a party to the arbitration agreement, MAL 36 (1)(a)(i); (ii) the award was not binding on the parties because an alleged condition had not been satisfied, MAL 36 (1)(a)(v); and (iii) it would be contrary to public policy to enforce the award as to reimbursement of Chinese import duties, MAL 36 (1)(b)(ii).

With regard to the first argument, the court concluded that a slight change in the name of the plaintiff did not cause the arbitration agreement to be null and that the defendant was, in fact, a party to that arbitration agreement. With regard to the second argument, the court concluded that the obligation set out in the arbitral award, i.e. the plaintiff should return the goods and the defendant should refund a certain sum in compensation, did not constitute a condition precedent for the arbitration award to become binding on the parties. In this regard, it was recalled that the word “final” in the Geneva Convention had been substituted with “binding” in the New York Convention to make enforcement less cumbersome. With regard to the third argument, it was noted that the court’s order was not an attempt to recover tax against a foreign national but rather an order that the defendant should pay damages in the amount of the customs tax which could no longer be recovered due to the defendant’s breach of contract. Thus, the order was not contrary to the public policy of Hong Kong.

Therefore, the court denied the defendant’s application to refuse enforcement of the arbitral award.

Case 812: MAL 35 (1); 36 (1)(a)(ii); 36 (1)(b)(ii)
Hong Kong: Supreme Court of Hong Kong, High Court
[1993] 1 HKLR 173
Qinghuangdao Tongda Enterprises Development Co. and others v. Million Basic Co. Ltd.
5 January 1993
Judgment in English
Abstract prepared by Ben Beaumont

[**Keywords**: *arbitral awards; courts; enforcement; award-recognition and enforcement; award-setting aside; public policy*]

The plaintiff received an ex parte order giving leave to enforce an arbitration award by the China International Economic & Trade Arbitration Commission (CIETAC), MAL 35 (1). The defendant applied to set aside the order arguing that it had not been given an opportunity to present its case, MAL 36 (1)(a)(ii) and that it would be contrary to the public policy of Hong Kong to enforce this award, MAL 36 (1)(b)(ii).

In the arbitration proceedings, a hearing took place at which all parties were present. The defendant filed a submission subsequent to the hearing followed by two more replies to the plaintiff's further submission. The arbitration proceeding was formally closed on 2 August 1991. However, on 12 August 1991, the defendant obtained a written confirmation from the plaintiff's technical adviser which contradicted the evidence previously submitted by the plaintiff. The defendant alleged that, in a meeting between its lawyer and the presiding arbitrator following this finding, it was instructed to prepare and file a detailed submission to the tribunal. The defendant delivered the submission on 26 August, the very same day on which the arbitral tribunal rendered the award dismissing the defendant's claims.

The court took note of the fact that the defendant was present at the hearing, made oral representations and submitted three written submissions. Thus, the defendant had an opportunity to present its case, and it was only after the proceedings had been formally declared closed that an attempt was made to submit new evidence. Thus, the court denied the defendant's application, pursuant to MAL 36 (1)(a)(ii).

The court also noted that the public policy ground for refusal of enforcement must be construed narrowly and be applied only where enforcement would violate the state's most basic notions of morality and justice. The defendant argued that it would be contrary to the public policy of Hong Kong to enforce an award based on a forged contract. However, this argument had already been made in the arbitration proceedings and had been rejected by the arbitral tribunal. The court concluded that such an argument was no more than an attempt to conduct a review of the merits of the case and did not constitute a basis for refusing enforcement of the award because it was considered contrary to the public policy of Hong Kong, MAL 36 (1)(b)(ii).

For these reasons, the court dismissed the application.

Case 813: MAL 7 (1); 8 (1)
Hong Kong: Supreme Court of Hong Kong, High Court
[1994] 1 HKC 545
Tianjin Medicine & Health Products Import & Export Corp. v. Ja Moeller (Hong Kong) Ltd.
27 January 1994
Judgment in English
Abstract prepared by Ben Beaumont

[**Keywords**: *arbitration agreement; arbitration clause; claims; contracts; defences*]

The plaintiff agreed to sell various chemical products to the defendant by various contracts. After a year, the plaintiff initiated a proceeding in court claiming the sum due for the purchase. The defendant sought a stay of the proceedings on the grounds that the contracts contained an arbitration clause, MAL 8 (1).

The plaintiff argued that the arbitration clause had the permissive word 'may' which made it a non-binding agreement to arbitrate. The court stated that when the defendant opted for arbitration by issuing the application to stay, arbitration became mandatory for

both parties. Further, the court noted that the arbitration clause was inserted in the plaintiff's own standard terms and conditions of the contract which is the clearest indication of an intention by both parties to submit disputes to arbitration, MAL 7 (1).

The court found that the defendant had denied allegation, which indicated that there was clearly a dispute between the parties and that there had been no admission by the defendant as to its liability in this case. The fact that the sum claimed was unpaid was sufficient evidence of a dispute to go to arbitration, MAL 8 (1).

The court granted the application of the stay of the proceedings in favour of arbitration, MAL 8 (1).

Case 814: MAL 7 (1); 8 (1)
Hong Kong: Supreme Court of Hong Kong; High Court
13 July 1995
Sky Fond Investment Limited & ANOR v. Sun Shine International Enterprises (Holdings) Limited & ANOR
(Original in English)
Unreported
Abstract prepared by Ben Beaumont

[**Keywords**: *arbitration agreement, arbitration clause, validity*]

The plaintiff obtained a judgment against the defendants in default of filing a defence. The defendants subsequently made an application to stay those proceedings and to have them referred to arbitration, MAL 8 (1).

The court found that the default judgment was in order. The defendants argued that the key to their defence was that the first defendant was not a party to the contract upon which the default judgment relied. The court considered that argument not credible on the basis of the evidence before it.

As to the application for a stay of the proceedings, MAL 8 (1), the court found that there was a valid arbitration clause between the first defendant and the plaintiff, MAL 7 (1). In order for the clause to be implemented a dispute should take place in which case a stay would be mandatory.

The court noted that first defendant had not challenged its liability under the contract. Therefore, the court stated that there was no dispute.

Case 815: MAL 9; 35
Philippines: Supreme Court, Special Second Division
Transfield Philippines Inc. v. Luzon Hydro Corporation
19 May 2006
Published in English G.R. No. 146717
http://www.supremecourt.gov.ph/jurisprudence/2006/may2006/G.R.%20No.%20146717.htm

[**Keywords**: *arbitration agreement; courts; injunctions; interim measures; judicial assistance; judicial intervention; procedure; protective orders; sequestration*]

The respondent claimed that the petitioner was guilty of forum-shopping when it filed three separate cases: (a) an arbitration proceedings before the ICC International Court of Arbitration, for a request of arbitration (November 2000); (b) a complaint for injunction

(November 2000) and c) a civil action before the Regional Trial Court (RTC) for confirmation, recognition and enforcement of the third partial award granted by the ICC Court (March 2004).

The Supreme Court dismissed the charges of forum-shopping. The Court found that there the cause of action or the identity of parties was different in the three cases, hence forum-shopping did not exist. The Court noted that the arbitration case was an arbitral proceeding commenced pursuant to a turnkey contract between the petitioner and the respondent. The injunction case was filed to restrain the respondent from calling on the securities while the arbitration proceedings were pending. The 2004 civil law case sought the issuance of a writ of execution to enforce the third partial award by the ICC Court.

The Supreme Court recognized that the right of the petitioner to apply for provisional relief measure to the regular courts during an arbitral proceeding was allowed by the rules of the ICC. Thus, parties to an international commercial arbitration could request the court interim/conservatory measures and judicial assistance in the Philippines, even if the seat of arbitration was elsewhere. The court also noted that international commercial arbitrations shall be governed by the UNCITRAL Model Law on International Commercial Arbitration (MAL) and it recognized the enforceability of foreign arbitral awards in the Philippines by referring to the Alternative Dispute Resolution Act of 2004.

The Supreme Court held that the petitioner's suit for recognition and enforcement of the third partial award was admissible both under the New York Convention and the Alternative Dispute Resolution Act of 2004. Its application for enforcement however was considered to be premature, since the partial award granted by the ICC Court referred any payment to "a future award".

Case 816: MAL 16 (1)
Philippines: Supreme Court, Special Second Division
Gonzalez v. Climax Mining Ltd.
22 January 2007
Judgment in English
Published in English G.R. No. 161957 and 167994
http://www.supremecourt.gov.ph/jurisprudence/2007/jan2007/161957.htm

[**Keywords**: *arbitral tribunal; arbitration agreement; arbitration clause; competence; contracts; courts; severability*]

The petitioner, a Filipino citizen filed a complaint before the panel of Arbitrators of the Department of Environment and Natural Resources (DENR) in order to declare the nullity or termination of an Addendum Contract it had stipulated with the respondent, an Australian company, on grounds of fraud and violation of the Philippine Constitution. On appeal the Supreme Court held that the DENR Panel of Arbitrators had no jurisdiction over the complaint. It also held that since the arbitration clause was included in the Addendum which was being discussed and the issue of validity of that agreement was judicial in nature, the jurisdiction over the dispute rested with the courts. The respondent filed a motion for partial reconsideration of the decision where it opposed that the case should not be brought to arbitration under the Arbitration Law. The respondent cited American jurisprudence and the UNCITRAL Model Law on International Commercial Arbitration, (MAL) and argued that the arbitration clause in

the Addendum Contract should be treated as an agreement independent of the other terms of the contract and that a claimed rescission of the contract does not imply avoiding the duty to arbitrate.

While the motion for reconsideration was pending, the respondent also filed a petition for arbitration before the Regional Trail Court (RTC) to compel the petitioner to submit the case to arbitration pursuant to the arbitration clause in the Addendum Contract. The petitioner alleged that the Addendum Contract containing the arbitration clause was null and void in view of the respondent's acts of fraud, and that it violated the Constitution. Thus, the arbitration clause was also null and void. The RTC, however, granted the petition and ordered the parties to proceed with arbitration. The petitioner challenged the said order before the Supreme Court.

The Supreme Court dismissed the petitioner's request for certiorari. The court ruled that the doctrine of separability or severability enunciates that an arbitration agreement is independent of the main contract. It further held that the doctrine denotes that the invalidity of the main contract does not affect the validity of the arbitration agreement. Hence, irrespective of the fact that the main contract is invalid, the arbitration clause still remains valid and enforceable. The Supreme Court expressly pointed out that the separability of the arbitration clause was confirmed in MAL 16 (1) and Article 21 (2) of the UNCITRAL Arbitration Rules.

Case 817: MAL 34; 35; 36
Philippines: Supreme Court, Special Second Division
KOREA TECHNOLOGIES CO. LTD, Petitioner, v. HON. ALBERTO A. LERMA et al.
7 January 2008
Published in English G.R. No. 143581

[**Keywords**: *arbitration clause; ordre public, award-recognition and enforcement, jurisdiction*]

A Korean corporation, the petitioner, entered into a contract with a Philippine corporation, the respondent, whereby the petitioner would set up an LPG Cylinder Manufacturing Plant in the Philippines. The contract contained a clause referring all disputes to arbitration in Korea in accordance with the arbitration rules of the Korea Commercial Arbitration Board (KCAB). It also stipulated that the award rendered by the arbitration tribunal should be final and binding.

The respondent paid part of the contract price after the machineries, equipment and facilities for the manufacture of the cylinders were shipped, delivered and installed in the plant. The plant, however, could not operate due to the financial difficulties of the respondent which affected the supply of materials. The respondent refused to pay for the balance and cancelled the contract on the ground that the petitioner had altered the quantity and lowered the quality of the machineries and equipment it delivered. The respondent informed the petitioner of its plan to dismantle and transfer the machineries and equipment since the plant never became operational.

The petitioner initiated arbitration before the KCAB and also commenced a civil case before the Regional Trial Court (RTC) for violation of arbitration clause of contract since the respondent unilaterally rescinded the contract without resorting to arbitration. The respondent argued that the arbitration clause was null and void for being against public policy.

The Supreme Court referred the parties back to arbitration but allowed the respondent to dismantle and transfer the equipment and machineries. The Court held that the arbitration clause was not contrary to public policy and sanctioned by art. 2044 of the civil code.

The Court noted that the Philippines had incorporated the UNCITRAL Model Law on International Commercial Arbitration (MAL) in R.A. 9285 (Alternative Dispute Resolution Act of 2004). The Court interpreted the provisions of RA 9285, as follows:

1. Under section 24, the RTC does not have jurisdiction over disputes that are subject of arbitration pursuant to an arbitration clause and mandate referral to arbitration;
2. While the parties stipulate in their arbitration clause that the foreign arbitral awards are final and binding, they are not immediately enforceable unless recognized by a competent court, in the case the RTC, pursuant to articles MAL 35 and MAL 36.
3. Foreign arbitral award is subject to judicial review by the RTC, which can set aside, reject or vacate it under sec. 42 in relation to sec. 45 of RA 9285 on grounds provided under article MAL 34 (2).
4. RCT decision on foreign arbitral awards is appealable.

Therefore, the Court ruled that an arbitration clause, which stipulates that the arbitral award is final and binding, does not oust courts of jurisdiction since international arbitral award is still judicially reviewable under certain conditions provided for by MAL.

Cases relating to the UNCITRAL Model Law on Electronic Commerce (1996)

Case 818: MLEC 4
Philippines: Supreme Court, Special Third Division
MCC Industrial Sales Corp. v. Ssangyong Corporation
17 October 2007
Published in English G.R. No. 170633
http://www.supremecourt.gov.ph/jurisprudence/2007/october2007/170633.htm

A Korean corporation, the seller, and a Philippine corporation, the buyer, concluded a contract for the purchase of hot rolled stainless steel by means of pro forma invoices that were sent by fax. The invoices required that payment would be made through an irrevocable letter of credit ("L/C") and delivery of goods was to be made after the L/C had been opened. Upon failure of the buyer to open a L/C despite repeated requests, the seller filed a civil action for damages due to breach of contract before the Regional Trial Court (RTC). After the seller completed the presentation of its case, the buyer filed a demurrer alleging that the seller had failed to present the original copies of the pro forma invoices.

The RTC held that the pro forma invoices were admissible. The Court of Appeal affirmed the ruling of the Trial Court and declared that the photocopies of the facsimile invoices were admissible and were to be considered original documents under R.A. No. 8792 (the Electronic Commerce Act, 2000).

The Supreme Court reversed the ruling of the Court of Appeal. The court moved from consideration of the Electronic Commerce Act (2000), according to which an "electronic data message" or an "electronic document" can be considered the functional equivalent of a written document for evidentiary purposes. First, the Court noted that the term "international origin" under sec. 37 RA No. 8792 referred to the UNCITRAL Model Law on Electronic Commerce (MLEC) and the definition of "data message" provided under the Model Law. The Court further noted that the Philippine Congress had replaced the term "data message" (as found in MLEC) with "electronic data message" and deleted from the definition the phrase "but not limited to, electronic data interchange (EDI), electronic mail, telegram, telex or telecopy". Given this deliberation of the congress, the court argued that for national lawmakers the term "electronic data message" would not apply to "telexes or faxes, except computer-generated faxes, unlike" MLEC.

Accordingly, the court concluded that the terms "electronic data message" and "electronic document" in the definition provided under the Electronic Commerce Act 2000 could not apply to a fax transmission, which could not be considered as electronic evidence. Obviously, this reasoning was applicable with even greater reason to the photocopies of such a fax transmission.

Nevertheless, although the pro forma invoices were not electronic evidence, the Court found that the seller had proven with great evidence the existence of a contract of sale and ordered the buyer to pay nominal damages.