United Nations A/CN.9/SER.C/ABSTRACTS/102

General Assembly

Distr.: General
20 October 2010

Original: English

United Nations Commission on International Trade Law

CASE LAW ON UNCITRAL TEXTS (CLOUT)

Contents

V.10-57374 (E) 221010 251010

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 web-site 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.

The abstracts are prepared by National Correspondents designated by their Governments, or by individual contributors; exceptionally they might be prepared by the UNCITRAL Secretariat itself. 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.

Cases relating to the United Nations Convention on the Recognition and Enforcement of Foreign Arbitral Awards (NYC) and to the UNCITRAL Model Arbitration Law (MAL)

Case 1009: NYC I, III, V, XI; MAL 5, 34, 35, 36
Canada: Supreme Court of Canada
No. 32738
Yugraneft Corp. v. Rexx Management Corp.
20 May 2010
Original in English and in French: 2010 SCC 19 (English) and 2010 CSC 19 (French)
Published in English: [2010] S.C.J. No. 19
Published in French: [2010] A.C.S. no 19; J.E. 2010-926; EYB 2010-174202; 2010EXP-1696
Available on the Internet:
www.canlii.org/en/ca/scc/doc/2010/2010scc19/2010scc19.html (English) and
www.canlii.org/fr/ca/csc/doc/2010/2010csc19/2010csc19.html (French)

Abstract prepared by Frédéric Bachand, National Correspondent

[**keywords:** *recognition and enforcement of foreign award*, *time limitation*, *non-discrimination rule*, *federal States*]

In response to an application by the claimant, a Russian company, seeking the recognition and enforcement of an award rendered in Russia, the defendant, a Canadian company, successfully argued that the application was time-barred under Alberta's statute of limitations. In its decision, the court confirmed that Art. III NYC ought to be interpreted as permitting the application of local limitation periods to recognition and enforcement applications. The court also discussed how the non-discrimination rule found in Art. III NYC ought to be applied in a federal State. In this respect, it rejected an argument contending that as some Canadian provinces apply a ten-year limitation period to the recognition and enforcement of arbitral awards, Alberta was prevented by Art. III NYC from applying a shorter limitation period. Referring to Art. XI NYC, the court found that for the purposes of Art. III NYC, the law applicable in the relevant enforcing jurisdiction within the contracting State was to be considered, rather than the most favourable law in any jurisdictions of the federal State. Furthermore, the court — while addressing an argument derived from the MAL, emphasizing the importance of legal certainty and asserting that the availability of judicial intervention in aid of international arbitration should normally not depend on procedural rules set out elsewhere then in the local statute implementing the MAL — found that as Alberta's statute of limitations was intended to constitute a comprehensive and exhaustive set of provisions in that matter, it could apply to the case even though none of its provisions expressly mention recognition and enforcement proceedings. Lastly, while the court concluded that NYC-based applications were subject to the default two-year limitation period found in Alberta's statute, it also held that a discoverability rule applied. Acknowledging that parties to an international arbitration often have assets in a number of different States and that creditors cannot be presumed to know the location of all of their debtor's assets, the court held that the limitation period should only start running once the creditor, exercising reasonable diligence, had become aware that the debtor possessed assets in the jurisdiction where recognition and enforcement were sought.

Case 1010: NYC III, V; MAL 35, 36
Canada: Ontario Superior Court of Justice
No. CV-09-381678
Min Mar Group Inc. v. Belmont Properties LLC
26 March 2010
Original in English: 2010 ONSC 1814
Published in English: [2010] O.J. No. 1352
Available on the Internet:
www.canlii.org/en/on/onsc/doc/2010/2010onsc1814/2010onsc1814.html

Abstract prepared by Frédéric Bachand, National Correspondent

[**keywords:** *recognition and enforcement of foreign award*, *request to vary terms of foreign award*, *res judicata*]

After an application seeking the recognition and enforcement of a foreign award was granted by the court, the claimant sought a stay of the award's enforcement as well as an order varying some of the award's terms. The applications were dismissed, the court holding that it did not have the power to alter or interfere with the terms of the award. The court also relied on the doctrine of res judicata, as the arbitral tribunal had already heard and dismissed similar applications.

Case 1011: NYC II(1), II(3); MAL 7(2), 8(1) 16(1)
Canada: British Columbia Supreme Court
No. S088532
H & H Marine Engine Service Ltd. v. Volvo Penta of the Americas Inc.
9 October 2009
Original in English: 2009 BCSC 1389
Published in English: [2009] B.C.J. No. 2010
Available on the Internet:
www.canlii.org/en/bc/bcsc/doc/2009/2009bcsc1389/2009bcsc1389.html

Abstract prepared by Frédéric Bachand, National Correspondent

[**keywords:** *referral of court action to arbitration*, *competence-competence*, *existence of arbitration agreement*]

The claimant, a Canadian company, resisted the defendants' application to refer the action to arbitration by denying that an arbitration agreement had been concluded between the parties. The defendants took the position that the issue of the arbitration agreement's existence had to be submitted to the arbitral tribunal in the first place. The arbitration agreement they relied upon, which was contained in general terms and conditions, provided for arbitration in Sweden in accordance with the rules of the Arbitration Institute of the Stockholm Chamber of Commerce. The court acknowledged a Supreme Court of Canada precedent confirming that the principle of competence-competence entails that arbitral tribunals should generally rule on challenges to their jurisdiction first, unless the challenge raises a question of law or a mixed question of fact and law requiring only a superficial consideration of the evidence. However, in this case the court refused to refer the jurisdictional issue to the arbitral tribunal on the grounds that the governing legal framework was the rules of the Arbitration Institute of the Stockholm Chamber of Commerce and that no evidence had been adduced as to whether these rules incorporate the competence-competence principle. The court further held that in any event, it was clear after a prima facie consideration of the documentary evidence submitted that no arbitration

agreement had been concluded by the parties. The application to refer the action to arbitration was thus dismissed.

Case 1012: NYC V(2)(b); MAL 36(1)(b)(ii)
Canada: Ontario Superior Court of Justice
Nos. CV-09-374167 and CV-09-380451
Abener Energia, S.A. v. Sunopta Inc.
15 June 2009
Original in English
Published in English: [2009] O.J. No. 2487; 61 B.L.R. (4th) 313; 2009 CarswellOnt 3449
Available on the Internet:
www.canlii.org/en/on/onsc/doc/2009/2009canlii30678/2009canlii30678.html

Abstract prepared by Frédéric Bachand, National Correspondent

[**keywords:** *stay of application seeking recognition and enforcement of foreign award*, *equitable set-off*, *public policy*]

The claimant, a Spanish company, sought the recognition and enforcement of a foreign award rendered against the defendant, a Canadian company. Invoking the doctrine of equitable set-off, the defendant sought a stay of the proceedings on the ground that it would be unfair to recognize and enforce the award before the conclusion of arbitral proceedings it had commenced against a company in the same group of companies as the claimant. The court found that the circumstances of the case did not justify applying the doctrine of equitable set-off. Furthermore, the court held that even if that doctrine's operating requirements had been met, recognition and enforcement of the award would not have been contrary to public policy because that would not have entailed a violation of Ontario's most basic notions of morality and justice. The stay application was dismissed and an order recognizing and enforcing the award was entered.

Case 1013: NYC III, IV; MAL 35
Canada: Saskatchewan Court of Queen's Bench
No. Q.B.G. No. 135 of 2009
West Plains Co. v. Northwest Organic Community Mills
5 May 2009
Original in English: 2009 SKQB 162
Published in English: [2009] S.J. No. 266
Available on the Internet:
www.canlii.org/en/sk/skqb/doc/2009/2009skqb162/2009skqb162.html

Abstract prepared by Frédéric Bachand, National Correspondent

[**keywords:** *recognition and enforcement of foreign award*]

The claimant, an American company, entered into a purchase contract with the defendant, a Canadian company. The contract contained an arbitration clause requiring the parties to resolve disputes in the United States of America. After a dispute arose, the arbitral tribunal rendered a default award against the defendant, which the claimant subsequently sought to have recognized and enforced in a Saskatchewan court. The court found that West Plains had met all of the procedural requirements for the recognition and enforcement of the award, and that the

defendant, by not participating in the proceedings, had not put forward any grounds for refusing enforcement. Therefore, the court recognized and enforced the award.

Case 1014: MAL 5, 18, 19, 34(2)(a)(ii), 34(2)(a)(iii), 34(2)(b)(ii)
Canada: Ontario Superior Court of Justice
No. 07-CV-340139-PD2
Bayview Irrigation District #11 v. United Mexican States
5 May 2008
Original in English
Published in English: [2008] O.J. No. 1858
Available on the Internet:
www.canlii.org/en/on/onsc/doc/2008/2008canlii22120/2008canlii22120.html

Abstract prepared by Frédéric Bachand, National Correspondent

[**keywords:** *annulment of jurisdictional decision*, *negative jurisdictional ruling by arbitral tribunal*, *standard of review of arbitral awards*, *public policy*]

The claimants commenced arbitration under Chapter 11 of the North American Free Trade Agreement ["NAFTA"] in connection with certain water rights. In a preliminary phase of the proceedings, the arbitral tribunal ruled that it did not have jurisdiction because the claimants' water rights were not investments owned by them within the meaning of the relevant NAFTA provisions. The claimants applied for an order setting aside the tribunal's jurisdictional decision on the grounds that the tribunal had erred in (i) allowing the defendant to take issue with factual assertions contained in the claimants' submission, (ii) finding that the claimants did not own their water rights and (iii) determining facts without a complete evidentiary record. In dismissing the application, the court noted that the standard of review of international arbitral awards is high. The court further noted that such awards are not invalid merely because the tribunal wrongly decided a point of fact or law, and for that reason it refused to review the merits of the tribunal's jurisdictional holding. The court further held that the award did not violate public policy, as the tribunal's conduct had not been marked by corruption, bribery or fraud, or otherwise been contrary to essential morality. Finally, the court concluded that the claimants had been provided a full opportunity to present their case, and had been given the opportunity to address the tribunal's practice of not presuming the facts alleged to be true.

Case 1015: NY II(3); MAL 8(1)
Canada: Ontario Superior Court of Justice
No. 05-CV-303286PD3
Sport Hawk USA Inc. v. New York Islanders Hockey Club
5 May 2008
Original in English
Published in English: [2008] O.J. No. 1732; 167 A.C.W.S. (3d) 253
Available on the Internet:
www.canlii.org/en/on/onsc/doc/2008/2008canlii20338/2008canlii20338.html

Abstract prepared by Frédéric Bachand, National Correspondent

[**keywords:** *referral of court action to arbitration*, *existence of a dispute*, *mandatory nature of the court's obligation to refer action to arbitration*]

The parties entered into a contract pursuant to which the claimant provided air charter services to the defendant. The claimant sued in Ontario, claiming that the defendant had failed to pay for services provided, and sent a copy of the statement of claim to the defendant. The defendant challenged the validity of the service and sought the referral of the action to arbitration on the basis of a dispute resolution clause inserted in the parties' contract. The claimant resisted that application, arguing that because the defendant had not explained its failure to pay for the services rendered, there was no "dispute" within the meaning of the parties' arbitration agreement. The court referred the action to arbitration, holding that a dispute obviously existed between the parties, that such dispute clearly fell within the scope of the parties' arbitration agreement, and that pursuant to the MAL, courts are obliged to refer actions to arbitration when the relevant conditions are met.

Case 1016: MAL 5, 8(1), 16(1)
Canada: Court of Appeal of Quebec
No. 200-09-006066-077 (200-17-007706-062)
Dens Tech-Dens, k.g. v. Netdent-Technologies, Inc.
26 June 2008
Original in French: 2008 QCCA 1245
Published in French: [2008] J.Q. no 5934; J.E. 2008-1386; 169 A.C.W.S. (3d) 927; EYB 2008-135221
Available on the Internet:
www.canlii.org/fr/qc/qcca/doc/2008/2008qcca1245/2008qcca1245.html

Abstract prepared by Frédéric Bachand, National Correspondent

[**keywords:** *court application seeking to strike notice of arbitration*, *subject-matter arbitrability*, *competence-competence*]

The claimant, a German company, sought the annulment of a notice of arbitration sent by the defendant, a Canadian company. The claimant contended that the defendant, which was represented in the arbitration by its president, breached mandatory Quebec rules requiring that companies be represented by lawyers in legal proceedings, and that the dispute had for this reason become inarbitrable. The court dismissed the application on the basis of a general principle according to which jurisdictional issues ought to be resolved by arbitral tribunals in the first place. While acknowledging that under Art. 8(1) MAL courts may — under some circumstances — rule immediately on the effectiveness of arbitration agreements, the court found that provision to be applicable only where a defendant seeks the referral of a court action to arbitration. In this case no action was pending in court, as the claim had initially been brought to arbitration. The application was thus deemed to be inadmissible.