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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: (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 Convention on the Recognition and Enforcement of Foreign Arbitral Awards (NYC) and to the UNCITRAL Model Arbitration Law (MAL)

Case 1042: NYC II(3); MAL 8(1), 16(1)
Canada: Court of Appeal of Quebec
No. 500-09-017986-076 (500-05-076503-042)
Bombardier Transportation v. SMC Pneumatics (UK) Ltd.
4 May 2009
Original in French: 2009 QCCA 861
Published in French: [2009] J.Q. no 4218; J.E. 2009-901; EYB 2009-158343
Available on the Internet:
www.canlii.org/fr/qc/qcca/doc/2009/2009qcca861/2009qcca861.html

Abstract prepared by Frédéric Bachand, National Correspondent

[keywords: referral of court action to arbitration, scope of arbitration agreement, competence-competence, waiver of arbitration agreement]

The claimant objected to the defendant's application seeking the referral of the action to arbitration on two grounds. First, it contended that part of its claim did not fall within the arbitration clause contained in the parties' contract, as it had not arisen out of that main contact, but rather out of an agreement settling a dispute that had arisen out of that main contract. Second, and in relation to the remainder of its claim, the claimant contended that the defendant had waived the benefit of the arbitration clause by admitting — during these court proceedings — the claimant's entitlement to some of the sums claimed. The court dismissed both objections. On the first point, the court relied on Supreme Court of Canada precedent while concluding that the issue of the applicability of the arbitration clause had to be determined by the arbitral tribunal in the first place. On the second point, the court found that the defendant's admission of the claimant's entitlement to some of the sums claimed could not be construed as a waiver of the arbitration clause.

Case 1043: NYC II(3); MAL 8(1), 16(1)
Canada: Ontario Superior Court of Justice and Ontario Court of Appeal
Nos. 07-CV-339295-0000 and C49415
Popack v. Lipszyc
2 September 2008 and 30 April 2009
Original in English: 2009 ONCA 365 (Court of Appeal decision)
Published in English: [2008] O.J. No. 3380; 169 A.C.W.S. (3d) 9 (Superior Court of Justice decision); [2009] O.J. No. 1786 (Court of Appeal decision)
Available on the Internet:
www.canlii.org/en/on/onsc/doc/2008/2008canlii43593/2008canlii43593.html (Superior Court of Justice decision) and
www.canlii.org/en/on/onca/doc/2009/2009onca365/2009onca365.html (Court of Appeal decision)

Abstract prepared by Frédéric Bachand, National Correspondent

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

The claimant resisted the defendant's application seeking the referral of the action to arbitration by arguing, first, that the dispute fell within neither of the arbitration agreements concluded by the parties and, second, that the institution chosen by the parties, a Jewish Beth Din located in the United States of America, had refused to resolve the dispute. On the first issue, the first instance court, while acknowledging that the determination of the scope of an arbitration agreement should normally be left to the arbitral tribunal in the first place, nevertheless found that the dispute fell within the ambit of the parties' undertaking to arbitrate. On the second issue, the court held that in presence of conflicting evidence regarding the Beth Din's willingness to hear the case, it could not find the arbitration agreement to be incapable of performance. The appellate court confirmed this decision and instructed the Beth Din to proceed with the arbitration on a fixed timetable or clearly indicate its refusal to deal with the matter.

Case 1044: MAL 5, 8(1), 16(1), 34(2)(a)(i), 34(2)(b)(i), 34(2)(b)(ii), 36(1)(b)(i), 36(1)(b)(ii)
Canada: Ontario Court of Appeal
No. C48730
Jean Estate v. Wires Jolley LLP
29 April 2009
Original in English: 2009 ONCA 339
Published in English: [2009] O.J. No. 1734; 96 O.R. (3d) 171; 310 D.L.R. (4th) 95; 68 C.P.C. (6th) 1; 47 E.T.R. (3d) 20; 2009 CarswellOnt 2250
Available on the Internet:
www.canlii.org/en/on/onca/doc/2009/2009onca339/2009onca339.html

Abstract prepared by Frédéric Bachand, National Correspondent

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

The defendant law firm represented the claimant, the executor and sole beneficiary of his mother's estate. An agreement concluded between the parties specified that the defendant would be entitled to a success fee constituting 10% of the claimant's inheritance; it also provided for arbitration in Canada. A dispute subsequently arose as to the base amount of inheritance applicable to the determination of the success fee and arbitration was commenced by the defendant. The claimant replied by seeking a court order striking the notice of arbitration on the ground that under Ontario law, courts had exclusive jurisdiction to resolve disputes concerning contingency fee agreements. The first issue that arose was whether a court could rule on the arbitrability of the dispute pursuant to an application seeking an order striking the notice of arbitration. Two of the three judges who heard the case answered that question in the affirmative. In their opinion, Supreme Court of Canada precedent relating to the impact of the principle of competence-competence on applications based on Art. 8(1) MAL was applicable to this case. Therefore, while arbitral tribunals should normally rule first on objections to their jurisdiction, some exceptions allowed courts to address them immediately, including where the objection only raised a question of law, which — in their opinion — was the case here. The third judge disagreed and held that it would be inappropriate for the court to rule immediately on the arbitrability of the dispute, notably because the claimant had not submitted any evidence tending to show that his application was not merely

a delaying tactic. Turning to the second issue that arose, the majority judges concluded that disputes relating to contingency fee agreements are arbitrable under Ontario law, but added that any arbitration must be conducted in accordance with mandatory Ontario rules governing such agreements.

Case 1045: NYC V(2)(b); MAL 36(1)(b)(ii)
Canada: Ontario Superior Court of Justice
Nos. CV-08-792300 CL and CV-09-80244-00CL
Banglar Progoti Ltd. v. Ranka Enterprises Inc.
8 April 2009
Original in English
Published in English: [2009] O.J. No. 1470
Available on the Internet:
www.canlii.org/en/on/onsc/doc/2009/2009canlii16292/2009canlii16292.html

Abstract prepared by Frédéric Bachand, National Correspondent

[keywords: recognition and enforcement of award, public policy]

The claimant, a Bangladeshi company, sought recognition and enforcement of three arbitral awards resolving disputes arising out of a joint venture agreement. The defendants, Ontario companies, resisted the application and sought the annulment of the awards on the ground that they were in conflict with Ontario public policy forbidding champerty and maintenance. The defendants relied on the payment of significant legal fees made by the son-in-law of the claimant's chairman to the claimant's legal counsel. After discussing the torts of champerty and maintenance, the court concluded that neither had occurred in this case because there was no evidence of an improper motive, a necessary element of both torts. Because no champerty or maintenance existed, there were no grounds for the court to set aside or refuse recognition and enforcement of the awards. The claimant's application was thus granted.

Case 1046: NYC II(3); MAL 8(1)
Canada: Court of Appeal of Quebec
Nos. 500-09-018971-085 and 500-09-018976-084 (500-17-035307-076)
PS Here, L.L.C. v. Fortalis Anstalt
19 March 2009
Original in French: 2009 QCCA 538
Published in French: [2009] J.Q. no 2175; J.E. 2009-634; EYB 2009-156191
Available on the Internet:
www.canlii.org/fr/qc/qcca/doc/2009/2009qcca538/2009qcca538.html

Abstract prepared by Frédéric Bachand, National Correspondent

[keywords: referral of court action to arbitration, existence of arbitration agreement, assignment of arbitration agreement]

At issue was whether the assignee of a claim is bound by the arbitration clause contained in the contract out of which the claim arose. The claimant, a lender which — further to the borrower's default — acquired by assignment assets and claims belonging to the latter, sued the defendant, an American company, on the basis of a contract originally concluded with the borrower. The defendant sought the referral of the action to arbitration on the basis of a dispute resolution clause inserted in that

contract. The claimant objected, arguing that it was not bound by that clause. The court disagreed and pointed out that as a general rule, the assignee of a claim is bound by the arbitration clause contained in the contract out of which the claim arose.

Case 1047: NYC II(3); MAL 8(1), 16(1)
Canada: Ontario Court of Appeal
No. C49360
Dancap Productions Inc. v. Key Brand Entertainment Inc.
13 February 2009
Original in English: 2009 ONCA 135
Published in English: [2009] O.J. No. 572; 246 O.A.C. 226; 55 B.L.R. (4th) 1; 68 C.P.C. (6th) 34; 2009 CarswellOnt 710
Available on the Internet:
www.canlii.org/en/on/onca/doc/2009/2009onca135/2009onca135.html

Abstract prepared by Frédéric Bachand, National Correspondent

[keywords: referral of court action to arbitration, competence-competence, scope of arbitration agreement, chain of contracts]

The parties entered into two related agreements, each governing different aspects of their business relationship. One agreement contained an arbitration clause and one did not. A dispute arose and the claimants sued in Ontario, alleging a violation of the agreement that did not contain an arbitration clause. The defendants sought the referral of the action to arbitration, contending that the dispute rather related to the second agreement and fell within the arbitration clause contained therein. The court referred the action to arbitration after having held that pursuant to Supreme Court of Canada precedent, parties should be referred to arbitration when it is arguable that the action falls within the arbitration agreement invoked by the defendant.

Case 1048: MAL 1(1), 8(1), 16(1)
Canada: Ontario Court of Appeal
No. C48699
Patel v. Kanbay International Inc.
23 December 2008
Original in English: 2008 ONCA 867
Available on the Internet:
www.canlii.org/en/on/onca/doc/2008/2008onca867/2008onca867.html
Published in English: [2008] O.J. No. 5256; 93 O.R. (3d) 588; 244 O.A.C. 61; 70 C.C.E.L. (3d) 205; 2008 CarswellOnt 7811

Abstract prepared by Frédéric Bachand, National Correspondent

[keywords: scope of application of the MAL, commerciality requirement, employment dispute, referral of court action to arbitration, competence-competence, scope of arbitration agreement]

The claimant, an Ontario resident, sued the defendants, a group of companies with operations in Canada, alleging negligent misrepresentation and wrongful termination of his position of president of two of the defendant companies. The defendants sought the referral of the action to arbitration, relying on a dispute resolution clause inserted in a shareholders' agreement signed by the claimant. The

court found that the claims were not sufficiently commercial to engage the MAL and that they did not fall within the scope of the arbitration clause at issue. On that last point, the court acknowledged that jurisdictional issues should normally be left to the arbitral tribunal in the first place, but it nevertheless held — as it had done in previous cases — that where the dispute clearly does not fall within the arbitration agreement at issue, the court should immediately rule accordingly.

Case 1049: MAL 18, 19, 28, 32, 34(2)(a)(ii), 34(2)(a)(iii), 34(2)(a)(iv), 34(2)(b)(ii)
Canada: Superior Court of Quebec
Nos. 500-05-017680-966 and 500-05-015828-963
Louis Dreyfus S.A.S. v. Holding Tusculum B.V
8 December 2008
Original in English: 2008 QCCS 5903 and 2008 QCCS 5904
Published in English: [2008] Q.J. No. 12906; J.E. 2009-372; EYB 2008-151689 ; [2008] Q.J. No. 15012; 2008 QCCS 5904; J.E. 2009-451; EYB 2008-151687
Available on the Internet:
www.canlii.org/en/qc/qccs/doc/2008/2008qccs5903/2008qccs5903.html and
www.canlii.org/en/qc/qccs/doc/2008/2008qccs5904/2008qccs5904.html

Abstract prepared by Frédéric Bachand, National Correspondent

[keywords: annulment of award, *audi alteram partem*, amiable composition, public policy, failure to comply with applicable rules of procedure, *functus officio, res judicata*]

The parties entered into an agreement containing an ICC arbitration clause and pursuant to which each became shareholders of a German company. The agreement also contained a clause allowing either party to request that the claimant buy out the defendant's shares of the company in the event of an impasse between the parties. After a dispute arose, the defendant requested arbitration, seeking a declaration that an impasse existed and that the claimant had breached the agreement. The claimant filed a counterclaim alleging breach, repudiation and violation of fiduciary duties by the defendant. An arbitral tribunal issued an award dismissing both parties' claims on the ground that the purpose of the agreement had been frustrated and that the relationship between the parties had terminated. The tribunal also ordered the claimant to buy out the defendant's shares. The claimant applied for partial annulment of the award to both the court and the tribunal, arguing that the tribunal had fashioned a remedy not sought by either party and failed to give the parties an opportunity to be heard. The German company subsequently became bankrupt, and the tribunal, in a second award, concluded that the company's bankruptcy had effectively terminated the parties' relationship and made the tribunal's previous order regarding the claimant's buyout of the defendant's shares inoperative. The defendant then sought the annulment of the tribunal's second award on the ground that by issuing another award despite being *functus officio*, the tribunal had acted beyond the scope of its mandate, failed to observe the applicable rules of procedure and produced an award that was contrary to public policy. In its decision annulling the first award, the court concluded that the tribunal had gone beyond the scope of its mandate by creating a valuation and buyout remedy based on its own perception of what was fair and equitable in the circumstances. The court further concluded that the award contravened public policy in that the tribunal had not given the parties notice that it would consider the doctrine of frustration nor provided them

with an opportunity to be heard on that issue. The court also noted that by this action, the tribunal had failed to comply with the procedural rules applicable to the arbitration. Although that decision rendered the application seeking the annulment of the second award moot, the court nevertheless expressed the view that the defendant's arguments were ill-founded. Notably, the court held that the public policy exception to the finality of arbitral awards ought to be construed narrowly, as relating to the forum's most basic and explicit principles of justice and fairness, and that the principle of *res judicata* did not form part of international public policy.