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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.

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Cases Relating to the UNCITRAL Model Law on International Commercial Arbitration (MAL)

Case 1246: MAL 28; 35; 36
Australia: Federal Court of Australia [2013] HCA 13
TCL Air Conditioner (Zhongshan) Co. Ltd. v. The Judges of the Federal Court of Australia
13 March 2013
Original in English
Available at: www.hcourt.gov.au/cases/case_s178-2012
Abstract prepared by Albert Monichino, National Correspondent

[**Keywords**: *arbitral awards, enforcement, procedure, choice of law*]

The High Court of Australia rejected a constitutional challenge to Australia's adoption in the International Arbitration Act 1974 (the "1974 Act")[1] of the enforcement provisions contained in Chapter VIII (articles 35 and 36) of the UNCITRAL Model Law on International Commercial Arbitration

In 2010, an arbitral tribunal awarded an Australian company A$3.4 million (US$3.5 million) plus costs in relation to a contract with a Chinese air conditioner company, which specified that disputes would be resolved by arbitration, with Melbourne as the seat. In 2012, the Australian company successfully enforced the award as to damages and costs in the Federal Court of Australia. The Chinese company brought a proceeding in the Australian High Court to restrain the judges of the Federal Court from enforcing the award.[2]

The Chinese company alleged that the enforcement of the award was unconstitutional on two grounds. First, it said that articles 35 and 36 MAL effectively confer the judicial power of the Commonwealth on arbitral tribunals, as opposed to a court specified in the Australian Constitution, by limiting the grounds for recognition and enforcement of awards. Second, the Chinese company argued that the Federal Court's discretion to resist enforcement of an international arbitration award was so limited under articles 35 and 36 MAL that it constituted an impermissible interference with the judicial power of the Commonwealth.

The challenge stated that an Australian court is mandated to enforce an international arbitration award made in Australia even if, on its face, the award contains a manifest error of law, and that to oblige an Australian court to enforce an award in those circumstances was to require the court to act in a fashion that is repugnant to the judicial process.

The High Court unanimously dismissed the challenge. The court noted that the international origins of the MAL require it to be interpreted without any assumption that it embodies common law concepts, such as the common law rule that an arbitral

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[1] The Model Law is given the force of law by section 16 of the International Arbitration Act.

[2] Foreign awards made in New York Convention countries may be enforced in Australia under sections 8 to 9 of the International Arbitration Act, which implements articles IV and V of the Convention. On the other hand, foreign awards made in non-convention countries, and also international awards made in Australia, have to be enforced under Chapter VIII (articles 35 and 36) MAL.

award could be set aside for error of law on the face of the award. Like the New York Convention, the MAL operates on the basis that an arbitral award satisfies the parties' accord to refer their disputes to determination by arbitration, which results in a binding award that will be enforced subject only to very limited exceptions.

The High Court held that article 28 MAL, contrary to what argued by the Chinese company, does not require an arbitral tribunal to decide a dispute in a manner that a competent court of law would determine to be correct. Such article allows the parties to choose the rules of law according to which the substance of the dispute is to be determined, it has nothing to do with the correct or incorrect application of those rules. Furthermore, no implied term "of an arbitration agreement requires an arbitral award to be correct in law".

The court also rejected the argument that the making of an arbitral award pursuant to the Model Law amounted to an exercise of the judicial power of the Commonwealth. The court held that the essential distinction between judicial power and arbitral authority is that arbitral authority is based on the voluntary agreement of the parties, whereas judicial power is conferred and exercised by law and coercively, and operates independently of the consent of the parties. Moreover, the court noted that unlike a judgement, an arbitrator's award is not binding prior to recognition and enforcement by a court. The court thus rejected the contention that the making of the arbitral award pursuant to the Model Law amounted to an exercise of the judicial power of the Commonwealth. On the contrary, the exercise of judicial power in the present case arose upon the court entertaining an application for enforcement under articles 35 and 36 of the Model Law.

As to the second ground of challenge, the court held that the inability of the Federal Court as a competent court under articles 35 and 36 MAL to refuse enforcement of an arbitral award on the ground of error of law did nothing to undermine the institutional integrity of the Federal Court. This was because enforcement of the arbitral award was the enforcement of an award made pursuant to the parties' agreement to submit their dispute to arbitration, not enforcement of any disputed rights submitted to arbitration.

Case 1247: MAL 19; 27
Canada: Court of Appeal of Alberta [2006] ABCA 18
Jardine Lloyd Thompson Canada Inc. v. SJO Catlin
18 January 2006
Original in English
Available at: www.canlii.org/en/ab/abca/doc/2006/2006abca18/2006abca18.html

[**Keywords**: *arbitral tribunal, judicial assistance, evidence, documents, procedure*]

The issues in this case were two-fold: (i) whether a court could assist an arbitration tribunal in obtaining discovery evidence from third parties before the arbitration hearing; and (ii) whether the arbitration tribunal had jurisdiction to require the production of a confidential agreement between a party to the dispute and a third party.

The claimants initiated arbitration proceedings under an insurance policy, containing an arbitration clause: the insurers refused to cover the losses arising out

of a construction project. The arbitration tribunal decided that: (i) a confidential agreement entered into by the claimants and their brokers (i.e. a third party to the arbitration proceedings) be produced to the tribunal for inspection; (ii) that employees (including former employees) of the brokers be examined for discovery and (iii) that the respondents (i.e. the insurers) may seek assistance of the Court of Queen's Bench of Alberta to obtain the examinations for discovery.

The court, noting that the jurisdiction of the arbitration tribunal "is limited and must derive from a legitimate term in the agreement to arbitrate or the statute", considered that the International Commercial Arbitration Act[3] (the "Act") did not authorize the examination of third parties for discovery. With respect to the production of the document subject to a confidentiality agreement, the judge held that the arbitration tribunal was permitted by article 19 MAL to determine its own procedure, therefore the tribunal could order the production of the document despite the claimants' obligation to the brokers not to do so without the brokers consent.

On appeal, the Court of Appeal upheld the reasoning of the arbitration tribunal that the arbitration agreement allowed the examination of third parties for discovery consistent with the Alberta Rules (the venue of the arbitration was in Alberta). The court made reference to article 19 MAL which requires the arbitration to be conducted in accordance with the agreement of the parties, or, where there is no agreement, in such a manner as it sees fit. Moreover, the court stated that the arbitration tribunal had considerable latitude in the adoption of procedural rules in accordance with the Analytical Commentary (i.e., an interpretative tool to apply the Model Law),[4] which includes the power to specifically adopt "rules of evidence appropriate to the proceedings". Further, the Commentary expressly speaks of the entitlement of an arbitration tribunal to order pre-hearing discovery in relation to article 19 MAL. Although the parties cannot by their own agreement be entitled to take evidence from a third person, the Model Law empowers an arbitration tribunal to seek the assistance of the court to take evidence in a manner consistent with the laws of the place of the arbitration. Article 27 of the Model Law can reasonably be interpreted to permit the request for assistance in taking evidence to include evidence by way of discovery. The court will then examine the reasons for the request and must be satisfied that the request is reasonable and in accordance with the practices of the court. In this case, the Court of Appeal concluded that the arbitration tribunal was composed of experienced and knowledgeable counsels who have determined that such discovery evidence is necessary for purposes of the arbitration proceedings and in accordance with the discovery practices in Alberta.

As regards production of a confidential agreement with a third party, the Court of Appeal upheld the conclusion of the lower judge and reaffirmed that the arbitration tribunal had jurisdiction to decide whether the production of such an agreement, when the document is relevant for the case, should be allowed or not.

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[3] The International Commercial Arbitration Act R.S.O. 1990 incorporates the UNCITRAL Model Law on International Commercial Arbitration in Canada.

[4] See section 12 of the International Commercial Arbitration Act R.S.O. 1990 (footnote 1), which refers to the International Commercial Arbitration Analytical Commentary on Draft Test of a Model Law on International Commercial Arbitration as one of the aids for its interpretation.

Case 1248: MAL 25(c); 27; 34(2)(a)(ii); 34(2)(b)(ii)
Canada: Court of Appeal for Ontario 136 OAC 113
Corporacion Transnacional de Inversiones S.A. de C.V. and others v. STET International SpA and others
15 September 2000
Original in English
Available at:
www.canlii.org/en/on/onca/doc/2000/2000canlii16840/2000canlii16840.html

[**Keywords**: *arbitral proceedings, evidence, settings aside*]

The case concerns a dispute over the enforcement of an arbitral award in Ontario. In the first instance,[5] the applicants primarily challenged the award on grounds under article 34(2) (a) (ii) and (b) (ii) MAL. In particular they argued they had been denied equality of treatment to present their case and that the award was in conflict with the public policy of Ontario. The applicants moreover claimed they had been prevented from presenting some evidence because the arbitration tribunal had not compelled relevant witnesses to give testimony.

The court at first instance rejected these arguments, applying a "test of morality" derived from *Boardwalk Regency Corp. v. Maalouf*: an award can be set aside as against public policy, when it fundamentally offends "the most basic and explicit principles of justice and fairness in Ontario", in other words it must be established that the award is "contrary to the essential morality of Ontario".

On appeal, the appellants objected to such a "test of morality" as being inapplicable to the case at hand. The Court of Appeal held that it was not necessary to decide whether the "test of morality" was applicable; rather, the court held that it was clear enough that the procedure followed by the arbitration tribunal did not offend Ontario's "principles of justice and fairness in a fundamental way". As to the argument that the appellants had been deprived of an adequate opportunity to present their case, the Court of Appeal noted that the first time the applicants alleged that "the principles of fundamental justice" had not been met during the arbitral hearing, was before the court of first instance.

Furthermore, the court held that the appellants would have been able to make their case, if they had not voluntarily withdrawn from arbitration. As per article 25(c) of the Model Law, when a party is absent without a valid excuse the arbitrator(s) shall proceed with the arbitration as if the parties were present. Since the appellants forfeited the chance to present their case, the notion of fundamental justice was not at all offended.

Finally, as to the absence of the relevant witnesses, the Court of Appeal upheld the conclusion of the first instance judge: the arbitration tribunal had no power to compel such testimony nor to issue letters rogatory, pursuant to article 27 of the Model Law. There was furthermore no evidence that the appellants had made an attempt to obtain adjournment of the arbitration hearing to attempt to obtain the relevant witness evidence although the arbitration tribunal had proposed several alternatives to obtain such evidence in one form or another.

For these reasons the Court of Appeal dismissed the appeal.

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[5] See CLOUT case 391.

Case 1249: MAL [1(3)]; 8
Hong Kong: High Court of Hong Kong, Court of First Instance
Aggressive Construction Co. Ltd. v. Data Form Engineering Ltd.
4 August 2009
Original in English
Unreported
Abstract prepared by Gary Soo

[**Keywords**: *arbitration agreement, courts, procedure*]

A dispute arose between the plaintiff, contractor, and the defendant, sub-contractor, in relation to the termination of two sub-contracts. Following the termination, the plaintiff initiated court action to recover the outstanding wages paid over to the defendant's workers as required under section 43C of the Employment Ordinance. The two sub-contracts contained arbitration clauses. The defendant raised in its defence a counterclaim for damages arising from the breaches of the sub-contracts. The plaintiff applied for a stay of the counterclaim for arbitration, in accordance with article 8 MAL. In response, the defendant submitted, inter alia, that the arbitration agreement was waived by the plaintiff when initiating the court action. The plaintiff stated that its claim, being one based on the Employment Ordinance, was outside the scope of the arbitration agreement.

The wording of the arbitration agreement provided that the determination in writing by the plaintiff on any dispute in relation to the sub-contractors was to be final "*…in terms of contract and in law with binding effect in law and in terms of contract*", unless the defendant requested arbitration within 28 days of the determination.

Since the plaintiff's claim was only pursued under section 43F of the Employment Ordinance, rather than any term of the sub-contracts, the court decided that the plaintiff's claim in the court action was irrelevant to the question whether the arbitration agreement had been waived by the plaintiff. Also, as the plaintiff had never submitted any 'first statement on the substance of the dispute' in relation to the counterclaim with the meaning of article 8 MAL, the court had no discretion not to order a stay of the counterclaim.

Case 1250: MAL 7(2); 8; 16
Hong Kong: District Court
Fai Tak Engineering Co. Ltd. v. Sui Chong Construction & Engineering Co. Ltd.
16, 22 June 2009
Original in English
Unreported
Abstract prepared by Gary Soo

[**Keywords**: *arbitration agreement, courts, procedure, signatures, arbitral tribunal, kompetenz-kompetenz*]

The plaintiff had not countersigned, as requested, a letter of intent incorporating by reference a standard form of contract commonly in use in Hong Kong containing an arbitration clause. Nevertheless, the plaintiff did commence work and offered to make some amendments to the letter. The defendant did not reply to the amendments, but work proceeded on the defendant's site.

The plaintiff then submitted a dispute to court, claiming that its counter-offer had never been accepted by the defendant. The defendant disagreed.

The court observed that the parties had proceeded with the work and the amendments proposed had no direct relationship with the arbitration clause. Referring to article 7(2) MAL and applying *Astel-Peiniger JV v. Argos Engineering & Heavy Industries Co. Ltd.* [1994] 3 HKC 328 (Case 78), the court noted that reference to an arbitration clause was not limited to a document signed by the parties to the arbitration, but also could include an unsigned standard form of contract.

The court was satisfied that the conduct of the parties objectively demonstrated a good prima facie or plainly arguable case that an arbitration clause existed between the parties, as per the legal principles in *Pacific Crown Engineering Ltd. v. Hyundai Engineering & Construction Co. Ltd*. [2003] 3 HKC 659 and *Tommy CP Sze & Co. v. Li & Fung (Trading) Ltd.* [2003] 1 HKC 418. Therefore, it would be left to the arbitral tribunal to decide jurisdiction pursuant to article 16 MAL, if needed. The court also held that, on whether there was any dispute under article 8 MAL, a dispute existed where there was any claim which the other party refused to admit or did not pay whether or not there was any answer to the claim in fact or in law.

Case 1251: MAL 8(1)
Hong Kong: High Court of Hong Kong, Court of First Instance
China Medical Ltd. v. Autoscale Resources Ltd.
15 May 2009
Original in English
Unreported
Abstract prepared by Gary Soo

[**Keywords**: *arbitration agreement, procedure*]

The plaintiff and the defendant were parties to a guarantee, arising from a subscription agreement. A judgement in default had been entered against the defendant. There was an arbitration clause in the subscription agreement, but not the guarantee. The defendant applied to set aside the default judgement, saying that liability under the guarantee should only be determined after the outcome of the arbitral proceedings and that the court action should be stayed pursuant to section 6 of the Arbitration Ordinance which applied article 8 MAL.

The court referred to the principles in *Linfield Limited v. Taoho Design Architects Limited* [2002] 2 HKC 204, which highlighted that, where a plaintiff instituted court proceedings as of right, it was not to be deprived of carrying on those proceedings unless very good reasons exist to the contrary. In this case, the court noted that the guarantee itself contained no arbitration clause and that, on these facts, that article 8(1) MAL was not engaged and refused to set aside the default judgement.

Case 1252: MAL [16(3)]; 18; 19; 34(2)(a)(ii); 34(2)(a)(iii); 34(2)(a)(iv)
Hong Kong: High Court of Hong Kong, Court of First Instance
Brunswick Bowling & Billiards Corp. v. ShangHai ZhongLu Industrial Co. Ltd. & Anor
13-15 January, 10 February 2009
Original in English
Unreported
Abstract prepared by Gary Soo

[**Keywords**: *arbitral tribunal, equal treatment, arbitral proceedings, setting aside*]

The claimant and respondents had undergone a 34-day international arbitration in Hong Kong in 2005 covering various commercial disputes. An award was rendered in 2007 in relation to the claimant's claim. The respondents' counterclaim was found to be not within the jurisdiction of the tribunal. The respondents applied to set aside the award, under articles 34(2) (a)(ii), 34(2)(a)(iii) and 34(2)(a)(iv) MAL, in relation to different heads of claims.

In relation to a challenge under article 34(2)(a)(ii) MAL, the respondent argued that the tribunal had construed the agreement based on PRC law requirements, even though there was no contention before the tribunal of any requirement under the PRC law and the parties had not been invited to address the tribunal on these. While the court was not satisfied, on the facts, that the award dealt with a dispute not within or beyond the submission to arbitration, or the arbitration was not in accordance with the agreement of the parties, the court held that, in such circumstances, the tribunal should have canvassed with the parties the particular provision in the PRC law on the topic and gave them an opportunity to respond before making a decision on the same. It found that the failure of the tribunal in this regard furnished the respondents a valid ground of complaint under article 34(2)(a)(ii) MAL. Adopting the approach in *Apex Tech Investment Ltd. v. Chuang's Development (China) Limited* [1996] 2 HKC 293; [1996] 2 HKLR 155, the court held that it had a residual discretion if satisfied that the arbitral tribunal would not have reached a different conclusion but for the matter complained. In exercising the discretion not to set aside the award, the court found that the failure to afford the respondents an opportunity to present their case on the tribunal's undisclosed knowledge of PRC contractual requirements was a matter that had no real impact on the result and, as such, was satisfied that, even without such infraction, the tribunal would have reached the same conclusion.

Also, the court did not find a breach of article 34(2)(a)(ii) or 34(2)(a)(iv) MAL, where the arbitral tribunal awarded damages based on loss and revenue and set off, instead of loss of profit as advocated by the claimant. In doing so, the court distinguished this in that there was no dependence on any findings of primary fact.

On the counterclaim, the court found that as the tribunal decided that it had no jurisdiction, the respondents were at liberty to initiate the claim again, by way of arbitration or otherwise.

The court also considered a challenge based on the allocation of time during proceedings. The parties had agreed to conduct the arbitration with a "chess-clock" arrangement. During closing, the tribunal added 3 days to the hearing, most of the time of which was allocated to the claimant.

The court held that the procedure to be adopted regarding allocation of time had to satisfy both articles 18 and 19 MAL. Thus, in a situation where the tribunal discerned a potential problem with the opportunity to a party presenting his case fairly as a result of a procedure agreed by the parties, it was obliged to raise it with the parties instead of following blindly what had been agreed; if, after hearing submissions from the parties, the tribunal was of the view that the procedure agreed by the parties would result in a breach of article 18 MAL, the tribunal should take steps to conduct the arbitration in such a manner that could redress the problem instead of being constrained by an unworkable agreement of the parties.

Case 1253: MAL 8
Hong Kong: District Court
The Incorporated Owners of Go Wah Mansion v. Hong Kong Hardware Supplier Ltd.
24 July 2008
Original in English
Unreported
Abstract prepared by Gary Soo

[**Keywords**: *courts, procedure*]

The plaintiff applied to court for summary judgement. The defendant applied for a stay of all further proceedings for arbitration under the arbitration clause in the deed of mutual covenant of the mansion in relation to a building management dispute.

In order to determine whether a dispute existed that could be referred to arbitration, the court referred to *Gatwick Engineers Ltd. v. Pilecon Engineering Ltd.* (2002) HCA558/2002, Ma J, 28 August 2002; that case laid down the principles that, in the absence of admissions as to both liability and quantum, a mere denial of liability or of the quantum claimed, even in circumstances where no defence existed, would be sufficient to found a dispute.

The court hence granted a stay of proceedings pursuant to the arbitration agreement between both parties, section 6 of the Arbitration Ordinance and article 8 MAL.