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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). Information about the features of that system and about 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://www.uncitral.org>).

Issues 37 and 38 of CLOUT introduced several new features. First, the table of contents on the first page lists the full citations to each case contained in this set of abstracts, along with the individual articles of each text which are interpreted by the court or arbitral tribunal. Second, the Internet address (URL) of the full text of the decisions in their original language are 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 by the United Nations or by UNCITRAL of that website; furthermore, websites change frequently; all Internet addresses contained in this document are functional as of the date of submission of this document). Third, abstracts on cases interpreting the UNCITRAL Model Arbitration Law now 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, and in the forthcoming UNCITRAL Digest on the UNCITRAL Model Law on International Commercial Arbitration. Finally, comprehensive indices are included at the end to facilitate research by CLOUT citation, jurisdiction, article number, and (in the case of the Model Arbitration Law) keyword.

Abstracts have been prepared by National Correspondents designated by their Governments, or by individual contributors. 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.

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**CASES RELATING TO THE UNCITRAL MODEL ARBITRATION LAW  
(MAL)**

**Case 517: MAL 34(2)(b)(ii); 35(1); 36(1)(b)(ii)**

Hong Kong: High Court of Hong Kong Special Administrative Region, Court of First Instance (Burrell J)

Sam Ming City Forestry Economic Co. & Others v. Liu Yuk Lin & Others

6 July 2000

Original in English

Unreported

Abstract prepared by Ben Beaumont

**[keywords:** *arbitral awards; arbitral proceedings; award; award - recognition and enforcement; award - setting aside; courts; enforcement; ordre public; procedure; public policy*]

A foreign award was made in favour of the second plaintiff.

Although the second plaintiff was not a party to the joint venture agreement and thus not party to the arbitration, it was common ground that, in the special circumstances that existed before the arbitral tribunal, the arbitral tribunal had jurisdiction to make such an award. The second plaintiff was placed in liquidation outside the jurisdiction of Hong Kong. The first plaintiff sought leave to enforce the award as a judgment in favour of the second plaintiff, in accordance with article 35(1) of the Model Law. Leave was granted. The first defendant raised various procedural submissions as to why the leave granted should be set aside. The court held that these submissions did not have merit.

The first defendant argued that the award should not be enforced on the basis of a violation of public policy of Hong Kong in accordance with articles 34(2)(b)(ii) and 36(1)(b)(ii) of the Model Law. Allegations of fraud were made. These allegations were not made during the arbitration. The court found such allegations were merely tactical and did not accept them. The court rejected the application of the first defendant to set aside the leave to enforce the award as a judgment which had been granted initially.

**Case 518: MAL 7(1); 8(1)**

Hong Kong: High Court of Hong Kong Special Administrative Region, Court of First Instance (Burrell J)

Ever Rise Engineering Limited v. Dah Chong Hong

17 November 2000

Original in English

Unreported.

Abstract prepared by Ben Beaumont

**[keywords:** *arbitration agreement; arbitration clause; clause compromissoire; compromis; judicial assistance; procedure*]

The defendant applied for a stay of proceedings based on article 8(1) of the Model Law. The plaintiff argued that there was no dispute. The court found that, while there was evidence of admissions, there were still matters in dispute.

The plaintiff then argued there was a settlement agreement, which overrode the contract. That agreement did not contain an arbitration clause in accordance with article 7(1) of the Model Law. The court was unable to find that the settlement agreement constituted a different and separate contract. Therefore, that agreement did not override the original contract terms.

Finally, the plaintiff submitted that the arbitration clause in the contract did not apply to the proceedings.

The court found the scope of the disputes referable to arbitration very narrow. The court held that the matters under review by the arbitral tribunal did not fall within the arbitration clause and the application for a stay of the proceedings was refused based on article 8(1) of the Model Law.

**Case 519: MAL 34(2)(a)(ii); 34(2)(a)(iv); 35(1); 36(1)(a)(ii); 36(1)(a)(iv)**

Hong Kong: High Court of Hong Kong Special Administrative Region, Court of First Instance (Burrell J)

Wuzhou Port Foreign Trade Development Corp. v. New Chemic Ltd.

8 December 2000

Published in English: [2001] 3 HKC 395

Abstract prepared by Ben Beaumont

**[keywords:** *arbitral awards; arbitral proceedings; arbitral tribunal; award; award - recognition and enforcement; award - setting aside; courts; due process; enforcement; procedure*]

The plaintiff had been granted leave to enforce a foreign award as a judgment, in accordance with article 35(1) of the Model Law. The defendant applied to the court to have the award set aside.

The defendant argued that, for procedural reasons, the award should not be enforced. The court found that various amendments of the applicable arbitration law permitted enforcement of the award.

The defendant submitted that the award should be set aside on the ground that the arbitral procedure was not in accordance with the agreement of the parties, based on articles 34(2)(b)(iv) and 36(1)(a)(iv) of the Model Law. The defendant argued that the arbitral tribunal should have applied its former rules, not the amended ones.

The court decided to exercise its discretion, based on article 36(1) of the Model Law, in favour of the plaintiff. The defendant had not raised the issue before the arbitral tribunal, which was therefore unable to make a ruling upon the issue.

The defendant argued that it had been unable to properly present its case, based on articles 34(2)(a)(ii) and 36(1)(a)(ii) of the Model Law. The court refused the applications of the defendant to set aside the judgment enforcing the award.

**Case 520: MAL 34(2)(b)(ii); 35(1); 36(1)(b)(ii)**

Hong Kong: High Court of Hong Kong Special Administrative Region, Court of First Instance (Burrell J)

Shanghai City Foundation Works Corp. v. Sun Link Ltd. (Original in English)

2 February 2001

Published in English: [2001] 3 HKC 521

Abstract prepared by Ben Beaumont

**[keywords:** *arbitral awards; arbitral proceedings; arbitration agreement; award; award - recognition and enforcement; award - setting aside; enforcement; ordre public; procedure; public policy*]

The plaintiff obtained leave to enforce a foreign award as a judgment, in accordance with article 35(1) of the Model Law. The defendant applied to set aside the grant of leave, in accordance with articles 34(2)(b)(ii) and 36(1)(b)(ii) of the Model Law on the ground that there was an overriding oral agreement between the parties, which would result in the award being unenforceable.

The defendant submitted that there was an oral agreement on the fact that, whatever the result of the arbitration proceedings, the outstanding amount awarded, if any, would only be payable upon certain conditions, which would not be known to the arbitral tribunal. The defendant submitted that the court must hear oral evidence in order to determine the existence of the oral agreement. The court refused to hear evidence, as the agreement was never put into written form; no mention was made of the alleged agreement in the arbitration.

The court then considered the implications of a challenge on grounds of violation of public policy, stating that awards should only be set aside on this ground where there was a violation of the most basic principles of morality and justice.

The court noted that a factor to be taken into account was the failure of the plaintiff to raise the issue of public policy before the courts in the jurisdiction where the award was made.

The court refused the application of the defendant to set aside the judgment enforcing award, based on articles 35(1), 34(2)(b)(ii) and 36(1)(b)(ii) of the Model Law.

**Case 521: MAL 8(1)**

Hong Kong: High Court of Hong Kong Special Administrative Region, Court of First Instance (Burrell J)

F & D Building Services Engineering Co Ltd. v. Chevalier (E & M Contracting) Ltd.

23 February 2001

Published in English: [2001] 3 HKC 403

Abstract prepared by Ben Beaumont

**[keywords:** *arbitration agreement; courts; judicial assistance; procedure*]

The plaintiff commenced proceedings based upon claims relating to three construction contracts. Each contract had an arbitration clause. The defendant applied for a stay of proceedings in favour of arbitration in accordance with article 8(1) of the Model Law. The plaintiff argued that there was no dispute.

As to the first contract, the plaintiff submitted that the sum outstanding was settled by agreement. A sum in settlement of the monies outstanding on the second contract was about to be paid. As to the third contract, the plaintiff, although with less supporting evidence, submitted there was no longer any dispute.

The defendant argued that there was not an unequivocal admission both as to liability and quantum, and that the meaning of “assessed amounts” in the course of contract settlement negotiations was also in dispute. The court agreed.

The defendant argued that there was no requirement in article 8(1) of the Model Law for the applicant to formulate the terms of the dispute. The court, supporting that condition, noted that it was for the court to decide upon the evidence before it at the application stage whether or not there was a dispute. Even where some elements of the claim were indisputably due, it would be wrong in principle to refuse a stay of part and refer the balance to arbitration.

The application of the defendant for a mandatory stay of the proceedings was granted, based on article 8(1) of the Model Law.

**Case 522: MAL 8(1)**

Hong Kong: High Court of Hong Kong Special Administrative Region, Court of First Instance (Burrell J)

Paladin Agricultural Ltd. & Others v. Excelsior Hotel (Hong Kong) Ltd.

6 March 2001

Published in English: [2001] 2 HKC 215

Abstract prepared by Ben Beaumont

[**keywords:** *arbitration agreement; courts; judicial assistance; procedure*]

The first plaintiff entered into a tenancy agreement. The first plaintiff was required to provide a guarantee of its obligations from its parent company. The premises were used as a restaurant in the name of the second plaintiff. This occupancy was a violation of the term of the tenancy being that the premises should not be subject or assigned to anyone else. The restaurant closed. The defendant commenced proceedings against the parent company of the first plaintiff under the guarantee. Thereafter, the first and second plaintiffs commenced proceedings against the defendant. The defendant applied to stay the action commenced by the first plaintiff, based on article 8(1) of the Model Law, and to stay the action of the second plaintiff pending resolution of the arbitration between the first plaintiff and the defendant.

The first plaintiff argued that the defendant had rescinded the arbitration clause by agreement in correspondence between the solicitors of the parties. The correspondence from the defendant requested that the first plaintiff chose between litigation and arbitration. The solicitors for the first plaintiff replied that there was no objection to the matters being referred to the jurisdiction of the court.

The court ruled that the response as to no objection was not an agreement to waive the right to opt for determination by arbitration, there was no prima facie agreement to rescind the arbitration agreement. The issue as to jurisdiction was therefore for the arbitral tribunal to decide, in accordance with article 16(1) of the Model Law.

The first plaintiff argued that the defendant had submitted a first statement on the substance of the dispute and could not take the advantage of the stay provision, as per article 8(1) of the Model Law. The court ruled that the action on the guarantee

was not subject to arbitration. However, the actions of the first and second plaintiffs arose out of the agreement containing the arbitration clause. The defendant had added the first plaintiff in the action under the guarantee. This act, the court held, was not a positive election to abandon arbitration. The court granted the application of the defendant to stay the proceedings of the first and second plaintiffs in favour of arbitration until the completion of the arbitration.

**Case 523: MAL 16(1); 16(3)**

Hong Kong: High Court of Hong Kong Special Administrative Region, Court of First Instance (Burrell J)

Weltime Hong Kong Ltd. & Others v. Ken Forward Engineering Ltd.

6 March 2001

Published in English: [2001] 1 HKC 458

Abstract prepared by Ben Beaumont

**[keywords:** *arbitral tribunal; competence; courts; jurisdiction; kompetenz-kompetenz; procedure*]

There were four issues for determination. The key issue was the plaintiff's summons applicable to the exercise of jurisdiction by the arbitrators, based on article 16(3) of the Model Law. The plaintiff sought a declaration that the arbitrators did not have jurisdiction to proceed with the arbitration currently before them.

The plaintiff also sought leave to appeal the decision of the court as to the status of the arbitrators' decisions as to their jurisdiction, based on article 16(1) of the Model Law.

The plaintiff submitted that the decision as to jurisdiction was an award. As an award, it is not a ruling on a preliminary question and not subject to appeal. The court ruled that any award on jurisdiction, whether called "award" or "interim award", is a preliminary ruling, preceding an award on the merits.

The court ruled that there was no right of appeal for the plaintiff.

**Case 524: MAL 7(1); 8(1)**

Hong Kong: High Court of Hong Kong Special Administrative Region, Court of First Instance (Burrell J)

Leung Kwok Tim v. Building Federal (Hong Kong) Ltd.

17 March 2001

Published in English: [2001] 3 HKC 527

Abstract prepared by Ben Beaumont

**[keywords:** *arbitration agreement; courts; defences; documents; formal requirements; judicial assistance; procedure*]

The plaintiff issued a writ claiming monies arising from invoices submitted to the defendant. The defendant applied for a stay of those proceedings in favour of arbitration, based on article 8(1) of the Model Law.

The court noted that the existence of the arbitration agreement was not in dispute.

The plaintiff argued that there was no dispute to be referred to arbitration. When the invoices were issued, they were not disputed, the defendant merely sought time to



pay. That evidence was simply oral. There was not any supporting documentary evidence from the defendant.

The court noted that the onus of proving the existence of disputes lies upon the defendant. A representative of the defendant disputed both quantum and liability. The court found that there was prima facie evidence of disputes. The court granted the application of the defendant that the proceedings be stayed in favour of arbitration, in accordance with article 8(1) of the Model Law.

**Case 525: MAL 8(1); 16(1)**

Hong Kong: High Court of Hong Kong Special Administrative Region, Court of First Instance (Burrell J)

Daily Win Engineering Limited v. The Incorporated Owners of Greenwood Terrace  
7 June 2001

Original in English

Unreported.

Abstract prepared by Ben Beaumont

[**keywords:** *arbitration agreement; contracts; courts; judicial assistance; jurisdiction; procedure*]

The defendant applied for a stay of proceedings in favour of arbitration, based on article 8(1) of the Model Law.

The plaintiff argued that despite the agreement to arbitrate disputes, the parties had subsequently agreed not to arbitrate but to proceed by way of litigation.

The plaintiff relied upon a purported oral agreement and subsequent correspondence. The first letter from those representing the defendant offered a choice between arbitration and litigation. The plaintiff's solicitors responded that the dispute be dealt with in court.

The defence submitted that their correspondence taken together did not constitute an agreement. In the alternative, if the issue was not clear, then the arbitrator should decide the issue using the power as to jurisdiction in accordance with article 16(1) of the Model Law.

The court found that there was a dispute as to the content of the agreement whether to litigate or arbitrate and held that the correspondence did not constitute valid offer and acceptance. Thus, there was no binding agreement not to arbitrate. Therefore, the court granted the application of the defendant to stay all proceedings in favour of arbitration, in accordance with article 8(1) of the Model Law.

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