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CASE LAW ON UNCITRAL TEXTS (CLOUT)

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* Reissued electronically for technical reasons.



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 671: MAL 7; 8 (1)

Hong Kong: Supreme Court of Hong Kong, High Court (Downey District J.)
Landale Development Limited v. Zhen Heng Development Limited
12 January 1990
Original in English
Unreported
Abstract prepared by Ben Beaumont

[**keywords:** *arbitration agreement; arbitration clause; court(s)*]

The parties entered into a contract of sale contained in a document headed “Sales confirmation”. An arbitration clause was included in the reverse side of this document. On the face of the document there was a clause stating that the contract was expressly made subject to the terms and conditions set forth “on the face and back hereof”. However, the defendant only faxed the face of the document to the plaintiff. The plaintiff signed the faxed copy and sent it back to the defendant.

When a dispute arose, the plaintiff started judicial proceedings, but the defendant requested a stay of proceedings on the basis of article 8 (1) MAL. The plaintiff objected that the arbitration clause was not incorporated into the contract.

The court stated that the faxed copy sent to the plaintiff expressly referred to the reverse of the document and that the plaintiff signed the faxed copy, without asking for clarification of the other “terms and conditions”. Such conduct was tantamount to signing a contract without reading its terms. Accordingly, the parties were deemed to have agreed to all terms and conditions of the contract, including the referral of all the disputes to arbitration (article 7 MAL).

Thus the court upheld the defendant’s application for a stay.

Case 672: MAL 8 (1)

Hong Kong: Supreme Court of Hong Kong, High Court (Bokhary J.)
Aboitiz Jebesen Bulk Transport Corp. v. Kit Shipping Agency Ltd.
16 March 1990
Original in English
Published in [1990] 1 HKC 390
Abstract prepared by Ben Beaumont

[**keywords:** *arbitration agreement; arbitration clause(s); arbitrator(s); court(s)*]

The plaintiff applied for a continuation of a Mareva injunction, granted ex parte, claiming amounts due under a charter party.

The defendant sought a stay of the proceedings in favour of the arbitration on the basis of article 8 (1) MAL, even though it denied that it was a party to the charter party. The vessel having been chartered by a third party, the defendant took and operated it on a “consignment” basis. Furthermore, the defendant had understood from the third party that the amount due was lower than the figure actually put forward by the plaintiff.

The court found that, according to the law of Hong Kong, the question as to whether a party was bound by an arbitration agreement was a question to be decided by the court, not by the arbitrators. As the defendant disputed that it was a party to the contract, which contained the arbitration clause, it could not rely upon the arbitration clause and seek a stay of the proceedings. The application for a stay was thus refused.

Concerning the Mareva injunction, the court considered that the conditions for granting such an injunction were not fulfilled, and dismissed the application for the continuation of the injunction as well.

Case 673: MAL 1 (3); 7 (1); 8 (1)

Hong Kong: Supreme Court of Hong Kong, High Court (Cons VP, Kempster, Clough JJA.)

Trans-medica Pharma-Handelsgesellschaft MbH v. Huang Su Hua and others

22 June 1990

Original in English

Published in [1990] 1 HKC 215

Abstract prepared by Ben Beaumont

[keywords: *arbitration agreement; arbitration clause; courts*]

The plaintiff appealed against the grant of a stay of proceedings in favour of arbitration issued on the basis of article 8 (1) MAL. The arbitration was international, in the meaning of article 1 (3) MAL, since the plaintiff was a company incorporated in Germany.

The question to be decided by the court of appeal was whether the parties had entered into a valid arbitration agreement, pursuant to article 7 (1) MAL. The contract had been concluded first orally and then by telex. The negotiations between the parties made no mention of arbitration, except for a defendant's document which referred to their standard terms and conditions, including arbitration according to the laws of Hong Kong.

The court of appeal found that the evidence was insufficient to warrant findings that the defendant's standard terms and conditions were incorporated into the contract. Thus there was no arbitration agreement upon which to found an application for stay.

The stay of the proceedings was therefore rejected.

Case 674: MAL 7; 35 (1); 36 (1) (a) (i); 36 (1) (a) (iii)

Hong Kong: Supreme Court of Hong Kong, High Court (Kaplan J.)

Tiong Huat Rubber Factory (SDN) BHN v. Wah Chang International (China) Co. Ltd. & ANOR

28 November 1990

Original in English

Published in [1990] 2 HKC 450

Abstract prepared by Ben Beaumont

[keywords: *arbitration agreement; arbitration clause; awards; courts; (arbitral) tribunal*]

The plaintiffs sought to enforce in Hong Kong arbitration awards made in Malaysia against the two defendants, on the basis of article 35 (1) MAL (Malaysia acceded to the New York Convention for the Enforcement of Arbitral Awards 1958). The defendants relied upon articles 36 (1) (a) (i) and 36 (1) (a) (iii) MAL as grounds to resist enforcement of the awards.

The arbitration proceedings concerned the defendants' failure to open the letters of credit required by the contracts.

In court, the defendants argued that a binding arbitration agreement, pursuant to article 7 MAL, was lacking, since the arbitration clause was contained in standard form contracts for the sale of rubber, while the contracts signed by the parties were for the sale of latex. The defendants further argued that, if the court found that the arbitration clause nevertheless would apply, it was meant to cover disputes as to quality or condition of goods and not claims for non-payment.

The High Court considered that with no doubt both parties fully appreciated that, if disputes arose between them, such disputes would be dealt with by arbitration. The Court also noted that the arbitration clause not only encompassed disputes as to the quality or condition of rubber, but expressly referred to "other dispute arising under these contract regulations". The court observed that each arbitration clause must be construed in the context of the contract as a whole. Since the words "arising under" had been given a very wide meaning in a number of cases, and since payment was a crucial element in all contracts for the sale of goods, the court concluded that the arbitration clause was wide enough to cover the dispute between the parties.

On the basis of article 35 MAL, the court gave leave to enforce the arbitration awards.

Case 675: MAL 7 (1); 34 (2) (a) (iii); 35 (1); 36 (1) (a) (iii)

Hong Kong: Supreme Court of Hong Kong, High Court (Cons VP, Kempster, Clough JJA.)

Tiong Huat Rubber Factory (SDN) BHN v. Wah Chang International (China) Co. Ltd. & ANOR

18 January 1991

Original in English

Published in [1991] 1 HKC 28

Abstract prepared by Ben Beaumont

[**keywords:** *arbitration clause; arbitration proceedings; arbitrators; awards; court(s); jurisdiction*]

The defendants sought to set aside the order of the High Court, giving leave to enforce arbitration awards made in Malaysia, on the basis of article 35 (1) MAL. The dispute was about the alleged failure of the defendants to establish letters of credit in favour of the plaintiffs. The arbitration clause expressly read: "all disputes as to quality or condition of rubber or other dispute arising under these contract regulations shall be settled by arbitration". The High Court had considered this wording broad enough to include the dispute between the parties.

On the contrary, the court of appeal found that the arbitration clause did not encompass the issue of the failure to open letters of credit, according to article 7 (1) MAL. In the court's view, the words "these contract regulations" were

to be understood just to refer to those in the introductory paragraph of such regulations. Thus the wording “these contract regulations” covered provisions such as excess freight, savings in freight, export duty and proof of date of shipment. The court concluded that the arbitrators rendered their awards on matters beyond the terms of submission (articles 34 (2) (a) (iii) and 36 (1) (a) (iii) MAL) and the awards should not be enforced.

The appeal was allowed and the order of the High Court giving leave to enforce the awards set aside.

Case 676: MAL 1 (3); 4; 8 (1); 9; 16 (1)

Hong Kong: Supreme Court of Hong Kong, High Court (Jones J.)

Attorney-General v. Vianini Lavori Spa

11 February 1991

Original in English

Published in [1991] 1 HKC 423

Abstract prepared by Ben Beaumont

[**keywords:** *arbitrator; court(s); jurisdiction*]

The plaintiff applied to court for security of costs, on the basis of article 9 MAL. The defendants applied for a stay of the proceedings, on the basis of article 8 (1) MAL. The defendant was an Italian company with a head office in Rome and a registered place of business in Hong Kong too. The parties had agreed to refer any future disputes to arbitration. The court found that the arbitration was international, in the meaning of article 1 (3) MAL.

The defendant argued that under the applicable rules, i.e. the “1985 Works Branch Model Arbitration Rules” (hereinafter the Rules), the court had no jurisdiction to make any order for security. As a matter of fact, the Rules required any application for security of costs to be made to the arbitrator. No such application had been made in this case.

The plaintiff insisted that the court had jurisdiction since the defendant had waived its right to object to the non-compliance to the Rules. According to these, in fact, the defendant should submit a written objection to the non-compliance of the plaintiff within 28 days after it knew, or ought to have known, it. If there were no such objection, the defendant would be deemed to have waived the right to object. Though the defendant had not submitted any objection in the present case, the court found that it had no jurisdiction to decide over the waiver issue. The appropriate tribunal was the arbitrator (article 16 (1) MAL).

The court found that it had jurisdiction to make the order sought by the plaintiff, but that it would be clearly unjust to do so by reason of the express wording of the Rules referred to by the parties, which required such an application to be made to the arbitrator.

The application was therefore refused (pursuant to article 9 MAL).

Case 677: MAL 7 (1); 7 (2); 34 (2) (a) (i); 34 (2) (a) (ii); 34 (2) (a) (iv); 35 (1); 36 (1) (a) (i); 36 (1) (a) (ii); 36 (1) (a) (iv)

Hong Kong: Supreme Court of Hong Kong, High Court (Barnes J.)
Guangdong New Technology Import & Export Corp. Jiangmen Branch v.
Chiu Shing trading as B. C. Property & Trading Company
23 August 1991
Original in English
Published in [1991] 2 HKC 459
Abstract prepared by Ben Beaumont

[**keywords:** *arbitration agreement; arbitral proceedings; arbitral tribunal; award; award – recognition and enforcement; court*]

The plaintiff sought leave to enforce an award, on the basis of article 35 (1) MAL. The defendant relied upon the failure of the plaintiff to give proper notice of the arbitral proceedings (article 36 (1) (a) (ii) MAL); it also argued that the arbitral tribunal which made the award was not the tribunal referred to in the arbitration clause (articles 34 (2) (a) (iv) and 36 (1) (a) (iv) MAL); and that there was no arbitration agreement between the parties (articles 7 (2), 34 (2) (a) (i) and 36 (1) (a) (i) MAL).

The court found that the requirements of articles 34 (2) (a) (ii) and 36 (1) (a) (ii) MAL, i.e. the failure to give proper notice of the proceedings, were not met, since the defendant, even though it did not appear before the arbitral tribunal, had nevertheless submitted a defence, which showed that it was aware of the proceedings.

The composition of the tribunal was held to be in accordance with the agreement of the parties.

Finally, the court noted that, although there was no arbitration agreement contained in the document signed by the parties, the arbitral tribunal had found that the agreement had been confirmed by the parties by reference to other documents. The court thus stated that the arbitration agreement was valid (articles 7 (1) and 7 (2) MAL).

On the basis of article 35 (1) MAL, the court decided in favour of the plaintiff and granted leave for the award to be enforced.

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Case 672: MAL 8 (1) - *Hong Kong: Supreme Court of Hong Kong, High Court (Bokhary J.), Aboitiz Jebsen Bulk Transport Corp. v. Kit Shipping Agency Ltd. (16 March 1990)*

Case 673: MAL 1 (3); 7 (1); 8 (1) - *Hong Kong: Supreme Court of Hong Kong, High Court (Cons VP, Kempster, Clough JJA.), Trans-medica Pharma-Handelsgesellschaft MbH v. Huang Su Hua and others (22 June 1990)*

Case 674: MAL 7; 35 (1); 36 (1) (a) (i); 36 (1) (a) (iii) - *Hong Kong: Supreme Court of Hong Kong, High Court (Kaplan J.), Tiong Huat Rubber Factory (SDN) BHN v. Wah Chang International (China) Co. Ltd. & ANOR (28 November 1990)*

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Case 676: *Hong Kong: Supreme Court of Hong Kong, High Court (Jones J.), Attorney-General v. Vianini Lavori Spa (11 February 1991)*

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Case 677: MAL 7 (1); 7 (2); 34 (2) (a) (i); 34 (2) (a) (ii); 34 (2) (a) (iv); 35 (1); 36 (1) (a) (i); 36 (1) (a) (ii); 36 (1) (a) (iv) - Hong Kong: Supreme Court of Hong Kong, High Court (Barnes J.), Guangdong New Technology Import & Export Corp., Jiangmen Branch v. Chiu Shing trading as B. C. Property & Trading Company (23 August 1991)

award – recognition and enforcement

Case 677: MAL 7 (1); 7 (2); 34 (2) (a) (i); 34 (2) (a) (ii); 34 (2) (a) (iv); 35 (1); 36 (1) (a) (i); 36 (1) (a) (ii); 36 (1) (a) (iv) - Hong Kong: Supreme Court of Hong Kong, High Court (Barnes J.), Guangdong New Technology Import & Export Corp., Jiangmen Branch v. Chiu Shing trading as B. C. Property & Trading Company (23 August 1991)

court(s)

Case 671: MAL 7; 8 (1) - Hong Kong: Supreme Court of Hong Kong, High Court (Downey District J.), Landale Development Limited v. Zhen Heng Development Limited (12 January 1990)

Case 672: MAL 8 (1) - Hong Kong: Supreme Court of Hong Kong, High Court (Bokhary J.), Aboitiz Jebsen Bulk Transport Corp. v. Kit Shipping Agency Ltd. (16 March 1990)

Case 673: MAL 1 (3); 7 (1); 8 (1) - Hong Kong: Supreme Court of Hong Kong, High Court (Cons VP, Kempster, Clough JJA.), Trans-medica Pharma-Handelsgesellschaft MbH v. Huang Su Hua and others (22 June 1990)

Case 674: MAL 7; 35 (1); 36 (1) (a) (i); 36 (1) (a) (iii) - Hong Kong: Supreme Court of Hong Kong, High Court (Kaplan J.), Tiong Huat Rubber Factory (SDN) BHN v. Wah Chang International (China) Co. Ltd. & ANOR (28 November 1990)

Case 675: MAL 7 (1); 34 (2) (a) (iii); 35 (1); 36 (1) (a) (iii) - Hong Kong: Supreme Court of Hong Kong, High Court (Cons VP, Kempster, Clough JJA.), Tiong Huat Rubber Factory (SDN) BHN v. Wah Chang International (China) Co. Ltd. & ANOR (18 January 1991)

Case 676: MAL 1 (3); 4; 8 (1); 9; 16 (1) - Hong Kong: Supreme Court of Hong Kong, High Court (Jones J.), Attorney-General v. Vianini Lavori Spa (11 February 1991)

Case 677: MAL 7 (1); 7 (2); 34 (2) (a) (i); 34 (2) (a) (ii); 34 (2) (a) (iv); 35 (1); 36 (1) (a) (i); 36 (1) (a) (ii); 36 (1) (a) (iv) - Hong Kong: Supreme Court of Hong Kong, High Court (Barnes J.), Guangdong New Technology Import & Export Corp., Jiangmen Branch v. Chiu Shing trading as B. C. Property & Trading Company (23 August 1991)

jurisdiction

Case 675: MAL 7 (1); 34 (2) (a) (iii); 35 (1); 36 (1) (a) (iii) - Hong Kong: Supreme Court of Hong Kong, High Court (Cons VP, Kempster, Clough JJA.),

Tiong Huat Rubber Factory (SDN) BHN v. Wah Chang International (China) Co. Ltd. & ANOR (18 January 1991)

Case 676: MAL 1 (3); 4; 8 (1); 9; 16 (1) - *Hong Kong: Supreme Court of Hong Kong, High Court (Jones J.), Attorney-General v. Vianini Lavori Spa (11 February 1991)*
