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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). 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 703: MAL 1 (3)(b)(i), 8 (1)
Hong Kong: Supreme Court of Hong Kong, High Court
HCA009014/1995
Orbitel Mobile Communication Limited v Novatel Communication (Far East) Limited
16 February 1996
Judgement in English
http://legalref.judiciary.gov.hk/lrs/common/search/search_result_detail_frame.jsp?DIS=31817&QS=%28%24orbitel%29&TP=JU

[**keywords**: *arbitration agreement; courts; procedure; validity*]

This case deals with the circumstances that would restrict a party's right to refer to arbitration.

The plaintiff sought a summary judgement against the defendant for the balance of the price of goods delivered and other service charges. Although the defendant did not dispute the balance amount, it contended that (i) it was entitled to set off against the plaintiff's claims for damages incurred by the defendant and (ii) the dispute should be referred to arbitration in London under MAL 8 (1) as the agreement between the parties contained an arbitration clause. Thus, the defendant sought an order to stay the proceedings.

The Court found that the arbitration agreement was international in nature as arbitration was to take place in London, MAL 1 (3)(b)(i). The key issue related to the circumstances in which the court should refer the case to arbitration under MAL 8 (1). The Court noted that any dispute between parties who have agreed on arbitration should have the dispute resolved by arbitration, according to MAL 8 (1), unless an unequivocal admission has been made both as to liability and quantum. The plaintiff argued that the defendant had made such admissions. The Court, first, noted that the 'alleged' admissions were merely casual remarks that enquiries would be made to payment claims. Moreover, there was no indication that the defendant had been aware of the plaintiff's non-compliance with the pricing formula when it had made those remarks.

Therefore, the Court concluded that there had not been a clear and unequivocal admission as to liability and quantum to bar the defendant from referring the dispute to arbitration in accordance with MAL 8 (1). Accordingly, the plaintiff's summons for summary judgement was dismissed and the dispute was referred to arbitration in London.

Case 704: MAL 35 (1), 36 (1), 36 (1)(a)(ii)
Hong Kong: Supreme Court of Hong Kong, Court of Appeal
CACV231/1995, [1996] 2 HKLRD 155
Apex Tech Investment Limited v Chuang's Development (China) Limited
15 March 1996
Judgement in English
http://legalref.judiciary.gov.hk/lrs/common/search/search_result_detail_frame.jsp?DIS=10844&QS=%28%7B%24Apex+Tech%7D+%25parties%29&TP=JU
Abstract prepared by Ben Beaumont

[**keywords**: *arbitral awards; courts; procedure, recognition – of award; arbitral proceedings; arbitral tribunal; award-recognition and enforcement; enforcement; notice*]

This case deals with grounds for refusing enforcement of foreign arbitration awards.

Pursuant to MAL 35 (1), the respondent applied for the enforcement of an arbitration award rendered in China. In the lower court, the appellant contended that the enforcement should be refused according to MAL 36 (1)(a)(ii), as the appellant had not been able to present its case fully during the arbitration. At its proceedings, the arbitral tribunal had made its own inquiries. The appellant argued that it ought to have been notified of the results of such inquiries. Moreover, it should have been provided with the opportunity to make further submissions and adduce further evidence. The lower court found that there was procedural irregularity at the arbitral tribunal as referred to in MAL 36 (1)(a)(ii). Despite these findings, the lower court exercised its discretion not to refuse enforcement under MAL 36 (1) as the result of the arbitration would not have been different even if the opportunity to be heard had been granted to the appellant.

The appellant appealed on the basis that the enforcement of the award should have been refused pursuant to MAL 36 (1)(a)(ii). The issue of appeal was limited to whether the lower court was wrong when it decided that an opportunity to be heard further did not have any effect on the tribunal's award. The Court did not agree that it was a foregone conclusion that the final result would have been the same. Had the appellant been allowed to make further submissions, the outcome of the award could have been affected. Consequently, the appeal was allowed and the enforcement of the award was refused pursuant to 36 (1) MAL.

Case 705: MAL 7 (1), 7 (2), 8 (1)
Hong Kong: Supreme Court of Hong Kong, Court of Appeal
CACV000236/1995, [1996] 282 HKCU 1
Jin Hai An Construction & Engineering Ltd v Golden Rock Beach Inc, Ng Chun Wah as Wai Wah Co
21 March 1996
Judgement in English
http://legalref.judiciary.gov.hk/lrs/common/search/search_result_detail_frame.jsp?DIS=10924&QS=%28%7B%24Jin+Hai+An%7D+%25parties%29&TP=JU
Abstract prepared by Ben Beaumont

[**keywords**: *arbitration agreement; arbitration clause; formal requirements; incorporation by reference*]

This case deals with whether a party who is introduced as a guarantor to an agreement may request a stay of court proceedings based on an arbitration clause which covers disputes between the original parties of the agreement.

The plaintiff, a company incorporated in Hong Kong, sought a summary judgement against the second defendant, an individual resident in Hong Kong. The second defendant counter-argued seeking a stay of action pursuant to MAL 8 (1). The lower court refused the stay of action and gave summary judgement against the second defendant. The second defendant appealed.

It was common ground that there was an international arbitration agreement according to MAL 7 (1), (2). However, the Court found that the agreement that the second defendant relied upon for the stay of proceedings was an agreement entered into by the plaintiff and the first defendant. The second defendant was part of the agreement as a guarantor. As the arbitration clause in the agreement expressly covered disputes between the plaintiff and the first defendant and as there had been no reference to the second defendant, the Court found that there was no basis for granting the stay of court proceedings to the second defendant. The application for a stay was dismissed.

Case 706: MAL 1 (3)(b)(i); 1 (3)(b)(ii); 8 (1); 11 (3)(a); 21
Hong Kong: Supreme Court of Hong Kong, High Court
[1996] 2 HKC 407
Fustar Chemicals Ltd v Sinochem Liaoning Hong Kong Ltd
5 June 1996
Judgement in English
Abstract prepared by Ben Beaumont

[**keywords**: *arbitrability, internationality, jurisdiction, arbitration agreement, courts, procedural default, validity, arbitrators – appointment of; commencement, request for arbitration, receipt*]

This case deals with whether a letter by a party indicating its willingness to defend in an arbitration proceeding may be considered as a repudiation of the arbitration agreement and thus make the agreement "inoperative" under MAL 8 (1). The case also deals with the commencement of an arbitral proceedings under MAL 21.

The defendant in this case applied for a stay of proceedings in favour of arbitration pursuant to MAL 8 (1). The Court, first, found that there was an international arbitration agreement between the parties under MAL 1 (3)(b)(i) and (ii) as the contract was to be performed by shipping the goods from China to South Africa and provided that arbitration was to take place in Hong Kong.

The plaintiff argued that the arbitration agreement was "inoperative" under MAL 8 (1) because the agreement had been repudiated by the defendant in its correspondence with the plaintiff. In one of the letters, the defendant had suggested that the plaintiff should refrain from arbitration and that it would bring counterclaims in case of an arbitration proceeding. In response, the plaintiff stated that if the defendant does not submit to arbitration within five days, it would commence legal proceedings. The defendant did not reply. The Court noted that the defendant had no obligation to respond to the letter sent by the plaintiff and had stated that it would defend itself in an arbitration proceeding. Thus, the plaintiff had failed to establish that the defendant had repudiated the arbitration agreement.

The plaintiff also stated that the opening letter to the defendant constituted a request for arbitration as required under MAL 21. The Court noted that MAL 21 was drafted to define the point in time when the limitation period for bringing a legal action is considered to have been interrupted by the commencement of arbitral proceedings. The Court found that arbitration would have commenced if and when the plaintiff requested the defendant to appoint an arbitrator. If there had been such a request by the plaintiff, the time for appointing an arbitrator under MAL 11 (3)(a) would have expired and the plaintiff would be able to ask the Court to appoint an arbitrator on behalf of the defendant.

As the plaintiff had not made such a request in this case, the Court ordered the stay of proceedings and referred the parties to arbitration according to 8 (1) MAL.

Case 707: MAL 1 (3), 8 (1)
Hong Kong: Supreme Court of Hong Kong , High Court
HCCW000281/1995
In the Matter of Mech-Power Hong Kong – China Limited
4 June 1996
Judgement in English
http://legalref.judiciary.gov.hk/lrs/common/search/search_result_detail_frame.jsp?DIS=27795&QS=%28%24mech%5C-%5Cpower%29&TP=JU (English language text)
Abstract prepared by Ben Beaumont

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

This case deals with whether winding up a company is “a matter which is subject to arbitration” under MAL 8 (1) and whether a petition to wind up a company is to be intended as “an action” in the meaning of MAL 8 (1).

The petitioner entered into a joint venture agreement to establish a new company. Later on, it submitted a petition to wind up the company based on just and equitable grounds. After filing an affirmation which concerned the merits of the petition, one of the parties to the joint venture submitted an application to stay the petition proceedings pursuant to MAL 8 (1) on the basis that there was an arbitration clause in the joint venture agreement.

The Court found that MAL 8 (1) was relevant because this was an international arbitration under MAL 1 (3). With respect to whether the petition to winding up a company was “an action in a matter which is the subject of an arbitration agreement” under MAL 8 (1), the Court stated that (i) the decision to wind up a company resided solely in the court hearing the petition and thus is not an action within the meaning of MAL 8 (1) and (ii) the operation of a company including winding it up through a court proceeding was not a matter subject to an arbitration agreement. With respect to whether filing of an affirmation could be considered as a submission of a “first statement on the substance of the dispute” under MAL 8 (1), the Court stated that it was to be considered a first statement because it clearly goes into the merits of the petition.

Therefore, the Court refused the application to stay the petition proceedings.

Case 708: MAL 34, 36 (1), 36 (2)
Hong Kong: Supreme Court of Hong Kong, High Court
[1996] 3 HKC 725
Hebei Import & Export Corp v Polytek Engineering Co Ltd
1 November 1996
Judgement in English
Abstract prepared by Ben Beaumont

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

This case deals with the circumstances under which a court may adjourn its decision on the recognition or enforcement of an award and when the court may order one of the parties to provide appropriate security under MAL 36 (2).

Before this case, the defendant had issued a summons to set aside the Court's order for the enforcement of an arbitral award under MAL 36 (1). In this case, the defendant seeks to adjourn the hearing of the previous summons according to MAL 36 (2), because an application to set aside the award had been submitted to a court of the country in which the award was made as stated in MAL 36 (1)(a)(v). The plaintiff objected stating that the defendant is bound to fail before the Beijing Court (where the application to set aside the award had been submitted).

The Court noted that the general purpose of MAL 36 (2) is to expedite the enforcement of foreign arbitral awards. It also noted that the application for adjournment was a matter of court's discretion as the term "may" is used in MAL 36 (2). The Court held that, in this case, the defendant had the burden of showing that a bona fide application has been made in the Beijing Court and that there were some reasonably arguable grounds for the Beijing Court to set aside the award according to MAL 34. The Court also noted that that defendant need not show that it was likely to succeed.

In this case, the Court found that an application had been made by the defendant in the Beijing Court and that there was prima facie evidence that the defendant had some prospect of success in that court. Thus, the Court, in its discretion, decided to adjourn the hearing of the summons pending the outcome of the application currently before the Beijing Court.

The plaintiff then asked the court to exercise its power under MAL 36 (2) to order the defendant to provide security pending the result of the Beijing Court hearing. The Court dismissed the application based on the fact that the defendant was a substantially local company with ample assets and that there was no reason to suppose that any risk existed for the plaintiff to be protected by an order of security.

Case 709: MAL 7 (1), 8 (1), 16 (1), 16 (3)
Hong Kong: Supreme Court of Hong Kong, High Court
[1996] 2 HKC 639
Nanhai West Shipping Co v Hong Kong United Dockyards Ltd
11 December 1996
Judgement in English
Abstract prepared by Ben Beaumont

[**keywords**: *arbitration agreement; arbitration clause; jurisdiction; courts; defences; incorporation by reference; arbitral tribunal; procedure; judicial intervention*]

This case deals with a situation where parties disagree on whether an arbitration agreement between them existed.

The plaintiff had sought for the court to determine whether there was an arbitration agreement between the parties for the purposes of MAL 7 (1) and if it existed, to appoint an arbitrator. The defendant, arguing that an arbitration agreement was incorporated by reference, sought a stay of proceedings and an order that the parties be referred to arbitration pursuant to MAL 8 (1).

The Court stated that the party arguing for the existence of an arbitration agreement should make out a prima facie case for the existence and apply for a stay of court proceedings under MAL 8 (1). If and when the case is referred to arbitration, the arbitral tribunal should decide whether it has jurisdiction over that particular dispute pursuant to MAL 16 (1). Such decision may also be challenged under MAL 16 (3).

In this case, the Court found that there was sufficient evidence that an arbitration agreement existed between the parties. Thus it granted the stay of the proceedings and referred the parties to arbitration pursuant to MAL 8 (1). However, the Court struck out the application for the appointment of an arbitrator as the application did not specify any particular dispute and was, therefore, an abuse of process.

Case 710: MAL 8 (1)
Hong Kong: Supreme Court of Hong Kong, High Court
HCCL000201/1996, 3 HKC 597
Louis Dreyfus Trading Ltd v Bonarich International (Group) Ltd
24 March 1997
Judgement in English
http://legalref.judiciary.gov.hk/lrs/common/search/search_result_detail_frame.jsp?DIS=24165&QS=%28%24Dreyfus%29&TP=JU
Abstract prepared by Ben Beaumont

[**keywords**: *arbitration agreement; courts; procedure; validity; waiver*]

This case deals with the circumstances for a stay of summary judgement proceedings and with the meaning of a “first statement on the substance of the dispute” under MAL 8 (1).

The defendant, a Hong Kong company, requested the court to order a mandatory stay of the summary judgement proceedings pursuant to MAL 8 (1), in which the plaintiff, a sugar trading company in London, sought a judgement against the defendant. The parties had previously entered a string of contracts all of which contained an arbitration clause.

The Court stated that the intention of the MAL 8 (1) was for courts to stay out of arbitration agreements unless there was nothing at all to arbitrate. If parties had made unequivocal admissions as to liability and quantum, there would be nothing at all to arbitrate. In other words, such admissions would deprive a party its right to stay court proceedings under MAL 8 (1). In this case, the parties had prepared, among other matters, a schedule of payments to be made by the defendant to the plaintiff in order to resolve the dispute. The document was not signed by the defendant but there was a stamp thereon made on behalf of the parent company of the defendant. The defendant argued that the document was not valid as it was not signed. The Court found that the defendant had not made an unequivocal admission in respect of the relevant contracts and thus, denied the summary judgement sought by the plaintiff.

The plaintiff further argued that the defendant could not rely upon MAL 8 (1) because it had made a first statement on the substance of the dispute. In an affirmation, the defendant had stated "(T)he defendant denies liability to the plaintiff and will dispute the plaintiff's claim on the ground that the contracts in question do not bind the defendant." The Court concluded that a single paragraph in an affirmation did not amount, in the circumstances, to a first statement.

Therefore, the court dismissed the summary judgement and granted the application for a stay according to MAL 8 (1).

Case 711: MAL 7 (1), 8 (1)
Hong Kong Special Administrative Region of China: High Court of Hong Kong, Court of Appeal
CACV000112/2001, 3 HKC 580
China Merchant Heavy Industry Co. Ltd. v JGC Corp
4 July 2001
Judgement in English
http://legalref.judiciary.gov.hk/lrs/common/search/search_result_detail_frame.jsp?DIS=8153&QS=%28%24jgc%29&TP=JU (English language text)
Abstract prepared by Ben Beaumont

[**keywords**: *arbitration agreement; arbitration clause; claims; courts; form of arbitration agreement*]

This case deals with whether failure to exercise the right to refer a dispute to arbitration renders the agreement conferring that right 'inoperative' under 8 (1) MAL.

The plaintiff engaged in a contract with the defendant for providing pipe works for a new terminal. After the completion of the work, the plaintiff issued proceedings for the outstanding amount of the contract. The defendant sought a stay of the proceedings based on clause 12 of the contract.

Clause 12 of the contract provided that: (1) with respect to any dispute between the parties which cannot be settled by mutual agreement, the defendant shall state its decision in writing and give notice to the plaintiff; (2) such decision by the defendant would be binding upon both parties until the completion of works, pending the outcome of any arbitration proceedings; and (3) the dispute shall be referred to arbitration if the plaintiff request so in writing to the defendant within 15 days after the date of the decision by the defendant.

Pointing out that this was not the usual bilateral arbitration clause under which both parties have the right to refer the dispute to arbitration, the Court of First Instance found that the only way in which the plaintiff could contest the defendant's decision was through arbitration. However, the plaintiff could no longer refer the dispute to arbitration because it had failed to contest the defendant's decision within the required time period. Accordingly, the stay of proceedings was granted and the plaintiff appealed.

On appeal, the Court found that even if a clause in an agreement gives only one of the parties the right to refer a dispute to arbitration, it constitutes an arbitration agreement within the meaning of MAL 7 (1) and 8 (1). With respect to the plaintiff's argument that the agreement in clause 12 had become 'inoperative' under MAL 8 (1) because the plaintiff had chosen not to refer the dispute to arbitration, the Court held that such an interpretation unduly stretches the meaning of MAL 8 (1). The mere fact that a party chose not to exercise the right to refer a dispute to arbitration does not make an agreement conferring such a right 'inoperative' within the meaning of MAL 8 (1). Concluding that clause 12 was not inoperative, the Court refused to grant the appeal and ordered the stay of proceedings.

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