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CASE LAW ON UNCITRAL TEXTS (CLOUT)

Abstracts of cases

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 have emanated 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).

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V.93-85596

I. Cases relating to the United Nations Sales Convention (CISG)

Case 1: CISG 1(1)(b); 35, 36, 78
Germany: Oberlandesgericht Frankfurt a.M.; 5 U 261/90
13 June 1991
Published in German: Recht der Internationalen Wirtschaft 1991, 591
Reproduced in German with brief summary in English and French: Uniform Law Review, 1991, I, 372

A sales contract between a French seller and a German buyer, concluded after the Convention's entry into force in France, was held to be governed by the Convention, since the parties had not chosen another law. It did not constitute an implied consent that the seller at first instance, in response to the buyer's statement that German law was applicable, had merely raised the question whether German or French law applied. Nor could the lack of an unequivocal response be treated as an admission since the applicable law is not a fact.

The buyer, who had alleged non-conformity of the goods without specifying in which respect, had to pay the purchase price with interest. As regards the rate of interest, the court referred to the widely prevailing view that the law of the country of the seller (the creditor) applied, but mentioned the opposite view according to which the debtor's law should apply. The court did not take a final stand on that controversy since in the case at hand the statutory rates of interest in both laws were identical (5%).

Case 2: CISG 1(1)(b); 3(1); 49(1)(a); 25
Germany: Oberlandesgericht Frankfurt a.M.; 5 U 164/90
17 September 1991
Published in German: Recht der Internationalen Wirtschaft 1991, 950
Reproduced in German with brief summary in English and French: Uniform Law Review, 1991, I, 382

An Italian manufacturer had agreed to produce 130 pairs of shoes according to specifications given by a German buyer, to be used as a basis for further orders. At a trade fair, the manufacturer displayed some shoes produced according to these specifications and bearing a trade mark of which the buyer was the licensee. When the manufacturer refused to remove those shoes, the buyer advised the manufacturer by telex one day after the fair that the buyer discontinued the relationship and would not pay for the 130 sample shoes which were no longer of any value to the buyer.

The court applied CISG as the relevant Italian law pursuant to German private international law and considered the above agreement as a contract of sale according to article 3(1)CISG. It held that the buyer had timely and effectively declared the contract avoided; the manufacturer's breach of the ancillary duty of preserving exclusivity constituted a fundamental breach of the contract under article 25 CISG

since it endangered the purpose of the contract to such a degree that, as was foreseeable to the manufacturer, the buyer had no more interest in the contract.

Case 3: CISG 1(1)(b); 39
Germany: Landgericht München I; 17 HKO 3726/89
3 July 1989
Published in German: Praxis des Internationalen Privat- und Verfahrensrechts (IPRax) 1990, 316
Commented on by Reinhart, IPRax 1990, 289

A German fashion retailer and an Italian clothing manufacturer concluded in 1988 a contract for the sale of various fashion goods. The buyer refused payment, alleging to have notified the seller within eight days after delivery (and twelve days after a second delivery) of "poor workmanship and improper fitting" of the goods.

Following German private international law, the court applied CISG as the law of Italy in force at the time of the conclusion of the contract. The court held that the buyer has lost the right to rely on non-conformity of the goods since the notifications, even if sent as alleged, did not specify precisely the defect in the goods.

Case 4: CISG 1(1)(b); 38; 39; 49;(1)(a); 74
Germany: Landgericht Stuttgart; 3 kfH O 97/89
31 August 1989
Published in German: Praxis des Internationalen Privat- und Verfahrensrechts (IPRax) 1990, 317
Commented on by Reinhart, IPRax 1990, 289

A German shoe retailer ordered from an Italian seller 48 pairs of shoes of the same model and colour as delivered under an earlier order. Based on customer complaints concerning shoes of the earlier delivery, the buyer requested one week after its new order cancellation of that order. The seller shipped the second lot and the buyer examined only few samples without detecting any defect. 16 days later, the buyer notified the seller of customer complaints about imperfect sewing and measurements and loss of colour of the shoes. The seller demanded payment of the full sales price, including interest at bank loan rates.

Following German private international law, the court applied CISG as the relevant Italian law. Leaving open whether articles 38 and 39 of CISG applied or, by virtue of article 7(2) CISG, the time-period for giving notice under German domestic law became subsidiarily relevant, the court held that the buyer did not give notice within the required time. Having been forewarned by the complaints concerning the first delivery, the buyer should have examined carefully all shoes of the second contingent, in which case the buyer would have discovered the patent defects of the kind alleged later.

As regards the payment of interest, the court applied Italian law as the law of the creditor's country and since the purchase price was payable in Italian currency.

Case 5: CISG 1(1)(b); 8; 23; 29; 53; 58; 78
Germany: Landgericht Hamburg; 5 O 543/88
26 September 1990
Published in German: Praxis des Internationalen Privat- und Verfahrensrechts (IPRax) 1991, 400
Reproduced in German: Europäische Zeitschrift für Wirtschaftsrecht (EuZQW) 1991, 188
Commented on by Reinhart, IPRax 1991, 376

An Italian clothing manufacturer demanded payment of the purchase price plus interest from a German who, according to his account, had intended to order the textiles on behalf of a company X with limited liability but, according to the seller, had acted under a trade name referring to a non-existent company Y. After delivery of the goods, the German had given the seller a bill of exchange drawn on and accepted by company Y.

The court, following German international private law, applied CISG as the relevant Italian law for the formation of the contract and for the rights and obligations of the parties to the sales contract. It determined according to article 8 that the seller could not know that the German intended to bind company Y. Since, according to German law as the law applicable to the formation of a company in Germany, company X had not been validly established as a legal person, the German himself was the buyer. While, under Italian law, the giving of the bill of exchange did not free him from the payment obligation, it constituted a modification of the contract according to article 29(1) CISG to the effect that the due date for paying the purchase price was postponed until the maturity date of the bill of exchange. From that date on, interest was awarded under article 78 CISG at the statutory Italian rate plus additional interest as damages under article 74 CISG assessed on the basis of the Italian discount rate.

Case 6: CISG 1(1)(b); 25; 49; 78
Germany: Landgericht Frankfurt a.M.; 3/11 O 3/91
16 September 1991
Published in German: Recht der Internationalen Wirtschaft 1991, 952
Reproduced in German with brief summary in English and French: Uniform Law Review, 1991, I, 376

A German retailer ordered in September 1989 from an Italian manufacturer through a commercial agent 120 pairs of shoes "Esclusiva su B". After delivery in March 1990 and having resold 20 pairs, the buyer learned that identical shoes supplied by the Italian manufacturer were offered for sale by a competing retailer at a considerably lower price. Since attempts to enjoin the competing retailer failed, the buyer returned the unsold 100 pairs and cancelled the "order of March 1990" promising payment for the 20 pairs upon receipt of the credit.

The court, applying CISG as the relevant Italian law, held that a valid contract had been concluded at the latest at the time of delivery and that this contract had not been avoided under article 49 CISG. The cancellation of the "order of March 1990" was not an express declaration of avoidance of the order of September 1990 since it referred to another

order. Even if a declaration of avoidance could be made impliedly (a point on which authors disagree), the buyer did not reject the entire contract as evidenced by the promise to pay for 20 pairs. Even assuming such rejection, the buyer was not entitled to avoid the contract for lack of a fundamental breach of the exclusive contract according to article 25 CISG. The manufacturer had no knowledge about the branches of its business partners, and any knowledge of the commercial agent could be imputed to the manufacturer only if the agent had acted as a closing agent.

The court refused reimbursement of fees incurred by the manufacturer in engaging an Italian collection agency since such engagement constitutes an appropriate measure of pursuit of right only if the collection agency can take steps superior to those that the creditor could take. No interest beyond the statutory rate was awarded and a set-off claim by the buyer based on loss of profit was rejected, both for lack of substantiation.

Case 7: CISG 1(1)(b); 47; 49; 74; 78
Germany: Amtsgericht Oldenburg in Holstein; 5 C 73/89
24 April 1990
Published in German: Praxis des Internationalen Privat- und Verfahrensrechts (IPRax) 1991, 336
Commented on by Enderlein, IPRax 1991, 313

A German fashion retailer and an Italian clothing manufacturer concluded a contract for the sale of fashion goods, with the specification "autumn goods, to be delivered July, August, September +-". When a first delivery was attempted on 26 September, the buyer refused to accept the goods and returned the invoice on 2 October claiming expiry of the delivery period. The parties argued about the meaning of the above specification, relying on different additional factors allegedly known to both parties.

The court applied CISG as the law of the seller's country but took also into account German domestic law for filling gaps on questions of performance. The court awarded the seller the full sales price, including interest at the statutory rate in Italy plus additional interest as damages. The seller's claim was held to be justified since delivery was tendered during the agreed delivery period. Even if, as alleged by the buyer, during each of the three months one third of the goods had to be delivered, the buyer did not effectively avoid the contract by refusing acceptance of the goods without having fixed an additional period in the previous cases of non-delivery.

Case 8: CISG 99(3),(6); 100
Italy: Corte Suprema Di Cassazione; No. 5739
3 March 1988
Kretschmer GmbH & Co. KG V. Muratori Enzo
Original in Italian
Excerpts of judgement in: Rivista di diritto internazionale privato e processuale 1990, 155, reproduced in: Uniform Law Review II 1989, 857

An Italian exporter had concluded a contract for the sale of a cargo of fruit with a German importer. The court, noting that Italy's ratification of CISG according to article 99(6) had taken effect only after its denunciation of the 1964 Hague Convention relating to a Uniform Law on the International Sale of Goods, i.e. as from 1 January 1988, held that CISG did not apply in the case at hand since the contract had been concluded before that date.

II. Cases relating to the UNCITRAL Model Arbitration Law (MAL)

Case 9: MAL 8
Canada: Federal Court of Canada, Trial Division (Denault, J.)
2 November 1987
Coopers and Lybrand Limited (Trustee) for BC Navigation S.A. (Bankrupt)
v. Canpotex Shipping Services Limited
Published in English: 16 Federal Trial Reporter, 79

Where a valid arbitration agreement exists and a party requests a transfer of the dispute to the arbitration tribunal at the first opportunity, article 8 MAL obliges the court to refer the matter to arbitration.

The charter-party agreement executed by the parties contained an arbitration clause. After Coopers and Lybrand commenced an action against the Canpotex in court, Canpotex filed a conditional appearance objecting to the jurisdiction of the court and sought a stay of proceedings in order to allow the objection to be made. Canpotex also sought an order pursuant to section 50(1)(b) of the Federal Court Act seeking a stay of proceedings.

The court granted Canpotex's motion. Pursuant to article 8 of the Model Law, which is enacted by the Commercial Arbitration Act, R.S.C.1985, c.C-34.6, the court was obliged to refer the matter to arbitration. A valid arbitration agreement existed and Canpotex had requested a transfer of the dispute to the arbitration tribunal at the first opportunity. In the alternative, the court would have granted a stay pursuant to section 50 of the Federal Court Act.

Case 10: MAL 31(2); 34
Canada: Superior Court of Quebec (Gonthier J.)
16 April 1987
Navigation Sonamar Inc. V. Algoma Steamships Limited and others
Published in French: Rapports Judiciaires de Québec 1987, 1346

The court ruled that arbitrators cannot be criticized for expressing themselves as commercial men and not as lawyers. Where the agreement between the parties does not specify the form of the award, that form is governed by article 31(2).

In accordance with the arbitration clause contained in a charter-party agreement concluded on 9 January 1981, the parties submitted to arbitration a dispute concerning their respective liability with regard to certain damages that resulted from the grounding, on 26 April 1984, of the vessel that was the subject of the charter-party. The applicant (Navigation Sonomar), based on alleged lack of coherent and comprehensible reasons, submitted an application to set aside the award rendered on 29 October 1986.

The Superior Court dismissed the application. The court ruled that the reasons were adequate, taking into account not only what was expressly stated but also what was implicit in the award. Arbitrators cannot be criticized for expressing themselves as commercial men and not as lawyers.

Case 11: MAL 8; 9
Canada: Federal Court of Canada, Trial Division (Pinard, J.)
19 February 1988
Relais Nordik v. Secunda Marine Services Limited
Published in English and French: 24 Federal Trial Reporter, 256

A mandatory interim injunction requiring compliance with the terms of a charter party is not an interim measure within the scope of article 9 MAL.

Relais Nordik applied pursuant to article 9 of the Model Law which is enacted by the Commercial Arbitration Act , Revised Statutes of Canada, 1985, c.C-34.6 for a mandatory interim injunction to force Secunda Marine to comply with the terms of a charter-party signed by both parties.

The Court dismissed the application for an injunction on the grounds that the applicant had not made out a strong prima facie case for an injunction. As well, damages would compensate any loss suffered by the applicant. Moreover, the court held that the remedy sought was not an interim measure within article 9 MAL. The applicant was seen as attempting to have the court rather than the arbitrators resolve the substance of the dispute, notwithstanding the respondent's objection pursuant to article 8 MAL.

Case 12: MAL 31; 34
Canada: Federal Court of Canada, Trial Division (Denault J.)
7 April 1988
D. Frampton & Co. Ltd. v. Sylvio Thibeault and Navigation Harvey & Frères Inc.
Original in English and French

With respect to an application to set aside an arbitral award, the powers of the court are limited to examining the award on the basis of the restrictive provisions of article 34 of the Model Law, as those provisions are reproduced in the Commercial Arbitration Code, S.R.C. 1985, c.C-34.6. The court cannot draw authority from article 34(4) MAL to refer the matter back to the arbitral tribunal and request that it consider the question of the applicable rate of interest where that question was not originally considered by the arbitrators.

Thibeault and Navigation Harvey requested the court to set aside an arbitral award where only two out of the three arbitrators had submitted their opinion. Where a defendant signed the charter-party which contained the arbitration clause, that defendant is personally involved in the charter-party since he signed it in his personal capacity. However, the court allowed the application of another defendant who had signed the charter-party while acting as president of his company. According to the court, the defendant is bound by the charter-party in his official capacity but not in his personal capacity. The decision of the arbitrator to involve that defendant personally was beyond the scope of the submission to arbitration in that it affected a third party who was not a party to the arbitration.

The application of Navigation Harvey to set aside the arbitral award was dismissed even though only two arbitrators rendered the award. Article 31 MAL provides that "the signatures of the majority of all members of the arbitral tribunal shall suffice, provided that the reason for any omitted signature is stated". That reason was formally given to the court by the president of the tribunal. The application for homologation of the arbitral award was allowed.

Case 13: MAL 1(2); 5; 16
Canada: Ontario District Court, York Judicial District (Mandel, J.)
27 October 1989
Deco Automotive Inc. v. G.P.A. Gesellschaft für Pressenautomation mbH
Original in English

Where an arbitration occurs outside of Canada, pursuant to article 1(2), articles 5 and 16 will not apply.

GPA (a German corporation) entered into a contract with Mareda (a U.S.A. company) to design, manufacture, deliver and put into operation a transfer system. This contract contained references to general conditions (ECE 188), which contained a clause referring disputes to arbitration. The arbitration terms provided for reference of any dispute to the International Chamber of Commerce for resolution through the application of the arbitration conditions of the Economic Commission for Europe (ECE). Mareda assigned the contract to Deco, a Canadian

company. Deco refused to pay following disputes with GPA and sued in court for damages. GPA moved to have the action stayed.

The court dismissed the motion finding that the reference to arbitration in the ECE rules did not cover the areas in dispute between the parties. Furthermore, the court ruled that where the arbitration is in Canada, then the matter may proceed as set out in Article 16, but where it is not (as in the present case) then article 16 does not apply by virtue of article 1(2). Also based on article 1(2), article 5 of the Model Law restricting judicial intervention does not apply because the place of arbitration is not in Canada.

Case 14: MAL 8
Canada: Federal Court of Canada, Appeal Division (Marceau, Hugessen and Desjardins, JJ.A.)
2 June 1989
Iberfreight S.A. et al. v. Ocean Star Container Line AG and J.W. Lunstedt KG
Published in English: 104 National Reporter, 164

Both applications were dismissed by the motions judge, but were upheld in part by the Federal Court of Appeal. Article 8 of the Model Law, which is enacted by the Commercial Arbitration Act, Revised Statutes of Canada 1985, c.C-34.6, does not require the dismissal of a motion for service ex juris nor require the court to decline jurisdiction whenever the contract documents contain an arbitration agreement. Therefore, the application by the defendants concerning service ex juris was dismissed.

The court stayed the action against Ocean Star and dismissed the appeal of Lunstedt concerning the arbitration clause. With regard to Ocean Star, the Court stayed the action and referred the matter to arbitration in accordance with the terms of the bill of lading. The application by Lunstedt was dismissed due to a lack of evidence.

Case 15: MAL 8
Canada: Federal Court of Canada, Trial Division (Joyal, J.)
17 January 1989
Navionics Inc. v. Flota Maritima Mexicana S.A. et al.
Published in English: 26 Federal Trial Reporter, 148

Article 8 is to be given a fairly strict interpretation and its imperative provision is an exceptional departure from the inherent jurisdiction of the Court to grant stays of proceedings. However, in this case, the court refused to decide if article 8 had been complied with and granted the stay based on its inherent jurisdiction.

A dispute arose between the parties concerning their obligations with respect to a standard-form charter party they had signed. Flota Maritima moved to stay the proceedings brought by Navionics, relying on article 8 of the Model Law as enacted by the Commercial Arbitration Act,

Revised Statutes of Canada, 1985, c.C-34.6. The motion was adjourned and before it could be heard, Navionics filed its own motion seeking default judgment against the defendant. The defendant was subsequently granted two extensions in order to allow it to obtain an affidavit. After Flota Maritima was refused any further extension, it filed a statement of defence in order to avoid being held in default.

The court granted the stay of proceedings sought by Flota Maritima. The court relied on section 50(1)(b) of the Federal Court Act, Revised Statutes of Canada, 1985, c F-7, in granting the stay pursuant to its inherent jurisdiction. Article 8 is to be given quite a strict interpretation.

Case 16: MAL 1; 5; 23(1); 34, especially 34(2)(a)(iii)
Canada: British Columbia Court of Appeal (Hutcheon, Proudfoot and Giggs, JJ.A.)
24 October 1990
Quintette Coal Limited v. Nippon Steel Corp. et al.
Published in English and French: Canada Supreme Court Reports 1990 volume 2

The appropriate standard of review of arbitral awards is one which preserves the autonomy of the forum chosen by the parties and minimizes judicial intervention.

Quintette, a Canadian company, agreed to supply coal to the respondent, a Japanese company. Their agreement provided that any contract disputes would be submitted to binding arbitration under British Columbia Law. Accordingly, a dispute concerning the interpretation of a contract clause outlining a pricing mechanism was referred to arbitration and an award rendered. Quintette, relying on sections 5 and 34 of the Model Law as enacted by the International Commercial Arbitration Act, Statutes of British Columbia, 1986, c. 14 sought to set aside the award on the grounds that the arbitrators had exceeded their jurisdiction by dealing with a matter not contemplated by or falling within the scope of the submission to arbitration.

The Court of Appeal upheld the lower court's affirmation of the award. The Court noted the world-wide trend toward restricting the scope of judicial intervention into commercial arbitration. The award could be justified under the terms of the contract so the Court was prevented from intervening under article 34(2)(a)(iv) of the British Columbia Act (which is the same as article 34(2)(a)(iii) of the Model Law).

(The Supreme Court of Canada denied leave to appeal from the British Columbia Court of Appeal judgment on 13 December 1990.)

Case 17: MAL 8
Canada: British Columbia Court of Appeal (Carrothers, Southin and Wood, JJ.A.)
26 February 1990
Stancroft Trust Limited, Berry and Klausner v. Can-Asia Capital Company, Limited, Mandarin Capital Corporation and Asiamerica Capital Limited
Published in English: 3 Western Weekly Reports 1990, 665

Under article 8(1) MAL, the fact that one defendant is entitled to an order staying the proceedings does not entitle other defendants to the benefit of the stay.

Mandarin and Asiamerica are British Columbia corporations. Can-Asia is a Hong Kong corporation. Stancroft is a United Kingdom company, Berry resides in London, England, and Klausner resides in Switzerland. The parties had concluded a number of agreements and security instruments. One instrument contained an arbitration clause requiring the resolution of disputes by the London Court of International Arbitration and according to British Columbia law. The plaintiffs sued the defendants for breach of contract. Can-Asia sought a stay of proceedings, citing the court's inherent jurisdiction and the Model Law as enacted by the International Commercial Arbitration Act, Statutes of British Columbia, 1986, c.14. The other defendants filed statements of defence after their applications to stay the proceedings.

On appeal, the British Columbia Court of Appeal ruled that Can-Asia was entitled to stay under section 8(1) of the Act, but the other defendants were not as they had filed statements of defence. The court upheld section 8(2) of the Act as representing no denial of access to the courts as those who were bound by the section had given up access voluntarily by agreeing to arbitration. As well, laws of a similar nature have existed for almost 300 years.

(Leave of appeal was denied by the Supreme Court of Canada.)

Case 18: MAL 5; 8; 16
Canada: Ontario Court of Justice - General Division (Henry J.)
1 March 1991
Rio Algom Limited v. Sammi Steel Co.
Original in English

The interaction of articles 8 and 16 restricts the court's role in arbitrations to determining whether the arbitration clause is null and void. Any determination of the arbitrator's jurisdiction is made by the arbitrator pursuant to article 16.

The parties agreed that Sammi would purchase Rio's steel manufacturing business in Ontario, Quebec and New York State. The agreement provided that the parties each prepare a Closing Date Balance Sheet as soon as possible after closing. Arbitration was provided for if the parties could not resolve any dispute arising out of the Closing Date Balance Sheets. Such a dispute did arise. Sammi followed the required procedure and submitted the matter to an arbitrator. Rio

commenced an action in court challenging the jurisdiction of the arbitrator and seeking an order staying the arbitration proceedings. The Chambers judge granted the order finding that the arbitrator's jurisdiction is a threshold issue of contract construction to be decided by the court. Leave to appeal the Chambers judge's order was sought.

The court granted leave to appeal. It found that the Chambers judge's decision had been erroneously based on principles of the domestic arbitration act rather than those found in the Model Law as enacted by the International Commercial Arbitration Act, Statutes of Ontario, 1988, c.30. In particular the court cited article 16 which provides the arbitral tribunal with the power to rule on its own jurisdiction. The court further noted article 8 which restricts court involvement to a determination of whether the arbitration agreement is null and void.

Case 19: MAL 8
Canada: British Columbia Supreme Court (Chambers) (Harvey J.)
22 November 1991
Krutov v. Vancouver Hockey Club Limited
Original in English

The mere presence of procedural irregularities in the implementation of the arbitration process, under either the agreement itself or the collective bargaining agreement, will not prevent the dispute from proceeding to arbitration.

Krutov, a hockey player residing in Moscow and the Club, a British Columbia corporation, had a contract for playing services of three years' duration. The Club refused to pay Krutov for the second and third seasons and Krutov in turn refused to play. The Club sent the dispute to arbitration pursuant to the agreement. The Club argued that the dispute was automatically subject to arbitration and that article 8 of the Model Law as enacted by the International Commercial Arbitration Act, Statutes of British Columbia, 1986, c.14 contains no discretion for the court to deflect a consensual arbitration. Krutov argued that the contract was null and void and thus there was no arbitration agreement. Krutov also argued that procedural irregularities existed making referral to arbitration impossible.

The Court found that the agreement was not null and void within the meaning of section 8 of the Act. The procedural irregularities referred to by Krutov concerned time limits and notice requirements. The Court concluded that such irregularities in themselves would not prevent the parties from proceeding to arbitration.

(In making this finding, the court placed particular emphasis on the decision reported as Case 9.)

Case 20: MAL 1(3)(b)(ii); 3; 8; 10; 11; 16
Hong Kong: High Court of Hong Kong (Kaplan J.)
29 October 1991
Fung Sang Trading Limited v. Kai Sun Sea Products and Food Company Limited
Original in English
Excerpts of judgement in Doyles dispute resolution practice: Asia, Pacific in 1 volume. North Ryde, N.S.W.: CCH International, c1990-Tab 80-036, p.80, 661-80 and in: Yearbook Commercial Arbitration, (Deventer, Netherlands, Kluwer) vol. XVII, 1992, p. 289-303.
Commented on in: Doyles ADR update 5: 4-5, 28 February 1992, and by Pryles, World Arbitration and Mediation Report 2:12:329 (December 1991).

(Abstract prepared by the Secretariat)

The plaintiff, a Hong Kong company, asked the court to appoint a second arbitrator, relying on a contract with another Hong Kong company that contained an arbitration clause. The contract was for the sale of soybean extraction meal FOB Dalian; Dalian, which is in China, was stated to be the place of delivery. The defendant, asserting that there was no valid contract since the person who had signed had no authority to bind it, contended that an arbitrator had no jurisdiction to rule on whether or not a contract had been concluded. Even if an arbitration agreement existed, the arbitration would be domestic and thus have to be conducted by a sole arbitrator.

The court determined the arbitration to be international pursuant to article 1(3)(b)(ii) of the Model Law as enacted by the Hong Kong Arbitration (Amendment) (No.2) Ordinance, 1989. It regarded delivery (which was to take place outside Hong Kong) as "a substantial part of the obligations of the commercial relationship", without ignoring that payment and nomination of the vessel (which were to take place in Hong Kong) were also important obligations in a contract of sale.

The court refused to deal with the question of whether a valid contract had been concluded since, according to article 16 MAL, it was first for the arbitral tribunal to decide on its jurisdiction. Recognizing the autonomy or separability of the arbitration clause except in the case of ab initio illegality of the contract (with references to English law), the court stated that the decision of the arbitral tribunal was neither final nor exclusive but subject to immediate review under article 16(3) MAL.

In making the appointment under article 11(5) MAL, the court deemed it important that when "appointing on behalf of the defaulting appointing party, it should go out of its way to ensure that no sense of grievance is felt, however unreasonable that attitude might appear to others".