



**United Nations Commission
on International Trade Law**
**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). 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 website 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 Arbitration Law (MAL)**Case 1261: MAL 35; 36(1)(a)(ii)**

Canada: Supreme Court of Nova Scotia

Hfx No. 389841

Rusk Renovations Inc. v. Dunsworth

14 June 2013

Original in English

Published in English: [2013] N.S.J. No. 303

Available on the Internet: <http://canlii.ca/t/fz767>

Abstract prepared by Frédéric Bachand, National Correspondent

[**keywords:** *arbitral award, recognition and enforcement, due process, proper notice*]

The applicant was involved in arbitral proceedings after a dispute arose out of a contract it entered into with “ES Inc.”(ES Inc. hereinafter). The arbitral tribunal issued an award not only against ES Inc., but also against the respondents, the owners of ES Inc., who were found by the tribunal to have acted in a fraudulent manner. The applicant sought recognition and enforcement of the award in Nova Scotia. The respondents objected primarily on the ground that they had not been given proper notice of the arbitral proceedings, but also on the basis that they were not proper parties to the arbitration agreement. The court refused to recognize and enforce the award, finding that the respondents could not be joined to the arbitral proceedings without their consent, as they were not proper parties to the arbitration agreement. In the alternative, the court found that recognition and enforcement should nonetheless be refused since the respondents had not been informed of the fraud claim against them, and had thus not been given proper notice within the terms of Article 36(1)(a)(ii) of the Model Law.

1262: MAL 34(2)(a)(ii)

Canada: Superior Court of Quebec

200-17-015721-111

Endoceutics Inc. c. Philippon

16 April 2013

Original in French

Published in French: J.E. 2013-913

Available on the Internet: <http://canlii.ca/t/fx7pz>

Abstract prepared by Frédéric Bachand, National Correspondent

[**keywords:** *award-setting aside, award-recognition and enforcement, arbitrators-mandate, due process*]

In the context of proceedings seeking the annulment of an arbitral award, two of the applicants alleged that the arbitrator had exceeded his jurisdiction in interpreting the contract originally in force between the parties, while a third applicant claimed that it was not a proper party to the arbitration agreement and that it had been unable to present its case before the arbitral tribunal. The court dismissed the application on all grounds and recognized and enforced the arbitral award in its entirety. First, the court reiterated the importance of arbitral autonomy and ruled that the arbitrator’s jurisdiction to interpret the agreement was to be construed broadly. Second, the

court considered that the third applicant, despite being a non-signatory to the agreement, was the *alter ego* of one of the signatories and was thus a proper party to the arbitral proceedings. The court further ruled that the third applicant had not discharged its burden of showing it had been denied an opportunity to present its case.

Case 1263: MAL 8(1), 16(1)

Canada: New Brunswick Court of Queen's Bench

S/C/101/12

Harrison v. UBS Holding Canada Ltd.

26 March 2013

Original in English

Published in English: 2013 CarswellNB 162

Abstract prepared by Frédéric Bachand, National Correspondent

[**keywords:** *arbitration agreement, validity, jurisdiction, kompetenz-kompetenz, judicial intervention*]

The applicant sought a stay of the action commenced by the respondents and the referral of the dispute to arbitration in Ontario on the basis of a dispute resolution clause contained in the agreement in force between them. The respondents' action was based on provincial business corporations legislation and alleged illegal conduct interfering with their investments in the company. The court dismissed the application and declined to refer the parties to arbitration on the ground that the arbitration clause was inoperative within the terms of Article 8(1) of the Model Law, as it found that the dispute was not one "arising out of or relating to the ... Agreement". The action was therefore properly before the court. The court also found that the arbitral tribunal's competence-competence power (under Article 16(1) of the Model Law) did not prevent it from ruling on its own jurisdiction, nor did it prevent it from ruling on the scope of the clause as doing so did not engage the arbitral tribunal's special expertise.

Case 1264: MAL 8(1); 16(1)

Canada: Saskatchewan Court of Queen's Bench

Q.B.G. 1566 of 2011

Zwack v. Pocha

11 September 2012

Original in English

Published in English: [2012] S.J. No. 587

Available on the Internet: <http://canlii.ca/t/fssrk>

Abstract prepared by Frédéric Bachand, National Correspondent

[**keywords:** *judicial assistance, jurisdiction, arbitration agreement, kompetenz-kompetenz, validity*]

The respondent commenced against the applicant an action in negligence related to their sales agreement. The applicant sought a stay of that action on the basis of an arbitration clause inserted in the agreement. The court first noted that it could rule on the arbitral tribunal's jurisdiction without violating the competence-competence principle, since the application raised a question of law involving undisputed facts. After a clear and systematic application of Article 8 of the Model Law, the court

granted the applicant's request for a stay of proceedings. The court relied on the principle according to which parties enjoy virtually unfettered autonomy in identifying which disputes should be resolved by arbitration, and decided that the arbitration clause applied to the respondent's negligence claim. Further, the court noted that provisions found in provincial consumer protection legislation did not render the clause void or incapable of being performed, as the negligence claim was not an effort to privately enforce the legislation's consumer protection standards. It was also categorically affirmed that a court that is presented with a claim that fulfils the conditions outlined in Article 8 of the Model Law has no discretion and must stay the proceedings and order the parties to proceed to arbitration.

Case 1265: MAL 35; 36

Canada: Ontario Superior Court of Justice

CV-11-9419-00CL

Sistem Mühendislik İnşaat Sanayi Ve Ticaret Anonim Sirketi v. Kyrgyz Republic

25 July 2012

Original in English

Published in English: [2012] O.J. No. 3581

Available on the Internet: <http://canlii.ca/t/fs5lk>

Abstract prepared by Frédéric Bachand, National Correspondent

[**keywords:** *recognition and enforcement of an arbitration award, validity, procedure, due process*]

The applicant and the respondent were involved in an ICSID arbitration in which the applicant sought compensation for the loss of its investment after its agents were forcefully evicted from the hotel it owned and operated in the Kyrgyz capital. The arbitral tribunal found in favour of the applicant, who later initiated recognition and enforcement proceedings in Ontario. The award was recognized and enforced, and the applicant subsequently took steps to execute it by seizing shares of a Canadian company which were allegedly owned by a Kyrgyz company wholly-owned by the respondent. After a dispute arose with respect to the ownership of these shares — which were alleged by the applicant to be beneficially owned by the respondent —, the Kyrgyz company brought two motions. The first sought the setting aside of the judgement recognizing and enforcing the award, on the basis that Ontario courts lacked jurisdiction over the respondent. The court dismissed that motion on the ground that the Kyrgyz company lacked standing to challenge that judgement, since it was a party neither to the arbitral proceedings nor to the recognition and enforcement proceedings. While the addition of the Kyrgyz company as a respondent in the ownership dispute granted it a limited status as party to defend itself in the determination of its rights, it did not entitle it to challenge the judgement recognizing and enforcing the award. Notably, the court emphasized and approved as sound the policy according to which arguments about the validity of a judgement advanced by a stranger to that judgement should not be considered by a court, because such consideration could prejudice the rights of actual parties to the judgement. The court also dismissed the Kyrgyz company's second motion, which sought a stay of the execution proceedings on *forum non conveniens* grounds. The court refrained from deciding whether the doctrine of *forum non conveniens* applied to proceedings relating to the recognition and enforcement of an international arbitral award, as it found that the Kyrgyz company had, in any event, failed to

show that Kyrgyz courts were a clearly more appropriate forum to resolve the dispute regarding the ownership of the Canadian company's shares.

Case 1266: MAL 4; 35; 36(1)(a)(iii)

Canada: Ontario Superior Court of Justice

11-29505

Telestat Canada v. Juch-Tech, Inc.

3 May 2012

Original in English

Published in English: [2012] O.J. No. 2061

Available on the Internet: <http://canlii.ca/t/fr848>

Abstract prepared by Frédéric Bachand, National Correspondent

[**keywords:** *recognition and enforcement of award, arbitrators-mandate, arbitration agreement, contracts, waiver, knowledge*]

The applicant, a Canadian communications satellite operator, sought recognition and enforcement of an award issued in New York against the respondent, a communications services provider. The respondent objected on the ground that the arbitral tribunal had exceeded its jurisdiction by awarding costs despite that the relevant arbitration agreement provided that each party was to bear its own costs. In response, the applicant contended that the respondent had, by its submission to the arbitral proceedings, waived its right to object to an alleged overextension of jurisdiction, pursuant to Article 4 of the Model Law. While acknowledging the strong presumption in favour of recognition and enforcement of awards under the Model Law, the court, in a strict application of Article 36(1)(a)(iii) refused to recognize and enforce the costs portion of the award. It found that, on the facts of this case, the respondent had not waived the clause providing that each party was to bear its own costs. The court emphasized that for a waiver of the right to object to be considered as such under the Model Law, the waiving party must have unequivocally and consciously abandoned rights of which it had full knowledge.

Case 1267: MAL 8(1)

Canada: Federal Court of Appeal

A-378-11

Canada Moon Shipping Co. Ltd. and Fednav International Ltd. v. Companhia Siderurgica Paulista — Cosipa and T.Co. Metals LLC

26 March 2012

Original in English

Published in English: [2012] F.C.J. No. 1416, leave to appeal to the Supreme Court of Canada denied on 16 May 2013 (No. 35158)

Available on the Internet: <http://canlii.ca/t/ftqpd>

Abstract prepared by Frédéric Bachand, National Correspondent

[**keywords:** *judicial assistance, arbitration agreement, validity, jurisdiction*]

FI and CM appealed from a decision granting a stay of proceedings in favour of arbitration. CSP, the applicant, had invoked an arbitration clause contained in a charter-party agreement with FI. It had also sought to refer to arbitration CM's action alleging a violation of a letter of indemnity incorporated as an amendment to the charter-party. The Federal Court of Appeal allowed the appeal in part: it upheld

the order staying FI's action, but struck the order staying CM's action. The court found that by omitting any reference to arbitration in the letter of indemnity, the parties had not extended the arbitration clause to CM. Referring to the doctrine of privity of contract, the court thus concluded that CM could not be bound by the arbitration agreement.

Case 1268: MAL 17; 34(2)(a)(iii)

Canada: Court of Appeal of Quebec

500-09-021110-101

Nearctic Nickel Mines Inc. c. Canadian Royalties Inc.

29 February 2012

Original in English

Published in English: J.E. 2012-570

Available on the Internet: <http://canlii.ca/t/fqcwz>

Abstract prepared by Frédéric Bachand, National Correspondent

[**keywords:** *award-setting aside, recognition and enforcement of award, arbitrators-mandate, injunctions, jurisdiction, interim measures, arbitration agreement, substantive law*]

The parties were involved in arbitration proceedings in Quebec after a dispute arose in connection with a mining contract. The arbitrator ordered specific performance of the contract, and the Superior Court subsequently recognized and enforced the award. The respondent appealed from this decision and sought annulment of the award, arguing first that the arbitrator had no jurisdiction to issue an order an injunction under Quebec law, and second that the arbitrator had exceeded his jurisdiction by interpreting the contract as generously as he did. The court dismissed the appeal on both grounds. After an extensive review of the nature and origin of injunctive relief, and while emphasizing the relevance of foreign sources such as Article 17 of the Model Law, the court ultimately refrained from deciding whether arbitral tribunals sitting in Quebec could validly issue injunctive orders. It did find, however, that the remedy granted in this case was not an injunction, but rather an order of specific performance similar to an action in transfer of title. On the second ground, the court ruled that the arbitrator had not exceeded its jurisdiction in interpreting the contract, and emphasized that a reviewing court should never review the merits of an arbitral award.