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Contents

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Introduction

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Cases relating to the UNCITRAL Model Arbitration Law (MAL)

Case 1285: MAL 7(2); 16(1); 35
Canada: Federal Court
T-165-10
Orient Overseas Container Line Ltd. v. Sogelco International
13 December 2011
Original in English
Published in English: [2011] F.C.J. No. 1774
Available on the Internet: http://canlii.ca/t/fpdxg
Abstract prepared by Frédéric Bachand, National Correspondent

[**Keywords**: *award – recognition and enforcement, arbitration agreement, formal requirements, writing, substantive law, kompetenz-kompetenz*]

The respondent appealed from a decision recognizing and enforcing an arbitral award made in New York and resolving a dispute over unpaid freight fees. The respondent objected on the ground that there had never been any written agreement to arbitrate. It also challenged the award on its merits, without specifically invoking any of the grounds for refusing recognition and enforcement set out in Article 36 of the Model Law. The court upheld the decision to recognize and enforce the award, finding that the parties had in fact been bound by a written arbitration clause set out in a page of their agreement that the respondent had simply failed to read. The court noted, in *obiter dictum*, that the arbitrator's determination that there existed an arbitration agreement was entitled to deference. On the second ground of appeal, the court noted that the respondent was essentially requesting that it engage in merits review. The court refused to do so, emphasizing the principle according to which a reviewing court should avoid interfering with an arbitrator's findings on the merits of the case.

Case 1286: MAL 35; 36(1)(b)(ii)
Canada: Ontario Superior Court of Justice
11-CV-435836
ACTIV Financial Systems, Inc. v. Orbixa Management Services, Inc.
8 December 2011
Original in English
Published in English: [2011] O.J. No. 5988
Available on the Internet: http://canlii.ca/t/fpgq1
Abstract prepared by Frédéric Bachand, National Correspondent

[**Keywords**: *award – recognition and enforcement, applicable law, public policy, procedure*]

The applicant sought recognition and enforcement of a New York arbitration award resolving a dispute relating to the interpretation of a liquidated damages clause in a licensing agreement. The respondent objected on the ground that the applicant had erred in basing its application on common law rules on recognition and enforcement of awards rather than the Model Law. Alternatively, the respondent asserted that the recognition and enforcement of the award would be contrary to Ontario public policy. After agreeing to treat the application as though it had been made under the

Model Law, the court recognized and enforced the award. In so doing, the court rejected the respondent's public policy argument by emphasizing that the award had been recognized and enforced in New York, and that New York's public policy was essentially the same as Ontario's. The court finally noted that, assuming that the application could not be treated as if made under the Model Law, it would have been rejected as Articles 35 and 36 of the Law are the exclusive means of recognizing and enforcing a foreign arbitral award.

Case 1287: MAL 11(3); 11(4)
Canada: Ontario Superior Court of Justice
CV-11-9285-00CL
Hallcon v. Railcrew
23 September 2011
Original in English
Published in English: [2011] O.J. No. 4700
Available on the Internet: http://canlii.ca/t/fnjkw
Abstract prepared by Frédéric Bachand, National Correspondent

[**Keywords**: *arbitrators – appointment of, appointment procedures, judicial assistance*]

The parties were involved in a dispute which was properly the subject of arbitration under the Model Law. Unable to agree on the appointment of an arbitrator, the applicant requested — pursuant to Article 11(4) — that the court appoint a three-member arbitral tribunal. The respondent objected and submitted that Article 11(3) should apply instead. Noting that the parties' agreement was inherently unclear as to which appointment procedure should prevail, the court held that Article 11(3) applied. According to the court, the application of Article 11(4) required the existence of an agreement as to an alternative appointment procedure, but no such procedure had been agreed to in this case. The court also acknowledged the importance of the Analytical Commentary for guidance on the interpretation of the Model Law, but it did not find it useful on the facts of this case.

Case 1288: MAL 8; 16(1)
Canada: British Columbia Supreme Court
No. S107233
New World Expedition Yachts, LLC v. F.C. Yachts Ltd.
25 January 2011
Original in English
Published in English: [2011] B.C.J. No. 91
Available on the Internet: http://canlii.ca/t/2fflh
Abstract prepared by Frédéric Bachand, National Correspondent

[**Keywords**: *arbitration clause, validity, procedure,* res judicata, *judicial intervention, contracts, severability*]

The parties had previously been involved in several arbitrations pursuant to various contractual disputes. In these proceedings, the applicant moved to strike the respondent's fraud action for abuse of process. The applicant argued that the arbitration clause applied to the questions raised in the respondent's fraud claim,

that they had in fact previously been arbitrated and that the principle of *res judicata* prevented the respondent from relitigating them. The court granted the application and struck the respondent's fraud action, emphasizing that the applicant's *res judicata* plea, made in lieu of an application under Article 8 of the Model Law, succeeded here because every element of the action had already been advanced in previous arbitration proceedings. The court also reaffirmed the principle of separability enshrined at Article 16(1) of the Model Law while rejecting the respondent's argument that a finding of fraud with respect to the underlying contract also rendered the arbitration clause invalid.

Case 1289: MAL 8(1); 16(1)
Canada: Supreme Court of Canada
No. 31067
Dell Computer Corp. v. Union des consommateurs
13 July 2007
Original in French and English
Published in French and English: [2007] 2 R.C.S. 801, [2007] 2 S.C.R. 801
Available on the Internet: http://canlii.ca/t/1s2f3
Abstract prepared by Frédéric Bachand, National Correspondent

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

The applicant appealed from decisions by lower courts dismissing its request for a stay of class action proceedings. The respondent objected to the referral on the ground that the arbitration clause relied upon by the applicant was null and void. In allowing the appeal, the court clarified the extent to which a court seized of a referral application may review the validity, operativeness and applicability of an arbitration clause, in light of the general principle of competence-competence. The court established that where the objection to the referral only raises questions of law, those questions ought to be resolved immediately, and in a final manner, by the court. Where the objection raises disputed questions of fact, the court should normally refer the action to arbitration to allow the arbitral tribunal to make the first ruling on the objection. Where the objection raises mixed questions of fact and law, the action should normally be referred to arbitration, unless the questions only require superficial consideration of the evidence submitted. In this case, the court found that the objection raised mixed questions of fact and law that involved more than a superficial consideration of the evidence, and that the action should thus have been referred to arbitration.

Cases relating to the Convention on the Recognition and Enforcement of Foreign Arbitral Awards — The "New York" Convention (NYC) and to the UNCITRAL Model Arbitration Law (MAL)

Case 1290: NYC V(1)(c); MAL 34(2)(a)(iii)

Canada: Ontario Court of Appeal
C52737
Mexico v. Cargill, Incorporated
4 October 2011
Original in English
Published in English: [2011] O.J. No. 4320, leave to appeal to the Supreme Court of Canada denied on 20 May 2012 (No. 34559)
Available on the Internet: http://canlii.ca/t/fn9qh
Abstract prepared by Frédéric Bachand, National Correspondent

[**Keywords**: *award – setting aside, arbitrators – mandate, substantive law*]

Mexico appealed from an Ontario court decision dismissing an application seeking the annulment of an arbitral award. The arbitration proceedings involved a damage claim brought under NAFTA Chapter 11 by the respondent who sought compensation for losses allegedly sustained in connection with an investment in the Mexican sugar industry. The arbitral tribunal awarded damages for two categories of losses. Before the court, Mexico argued that damages relating to the second category could not be awarded under NAFTA Chapter 11, and that the tribunal had thus exceeded its jurisdiction. In a thorough judgement dismissing the appeal, the court first held that, even though "Canadian reviewing courts have consistently stated that courts should accord international arbitration tribunals a high degree of deference and that they should interfere only sparingly or in extraordinary cases", jurisdictional determinations made by arbitrators ought to be reviewed on a correctness standard. Applying that standard, the court further determined that Mexico's jurisdictional challenge was unfounded and that the arbitral tribunal was entitled to award damages of the second category.

Case 1291: NYC II(3); MAL 8(1); 16

Canada: Ontario Court of Appeal
C52576
Ontario v. Imperial Tobacco Canada Limited
20 July 2011
Original in English
Published in English: [2011] O.J. No. 3392
Available on the Internet: http://canlii.ca/t/fmfvl
Abstract prepared by Frédéric Bachand, National Correspondent

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

The respondent appealed from a decision to stay its declaratory action in favour of arbitration. It did so on the basis that it was not a proper party to the arbitration agreement invoked by the applicant and that the dispute fell outside the scope of that agreement. The respondent also argued that, despite the Supreme Court of

Canada's decision in *Dell Computer v. Union des consommateurs* 2007 CSC 34, the court was entitled to deal immediately with the jurisdictional issues. The appellate court partially disagreed with the respondent. While the court held that some of the jurisdictional objections ought to be first addressed by the arbitral tribunal, it found that one particular objection — asserting that one aspect of the declaratory action was not subject to the arbitration agreement — ought to be addressed immediately. Doing so, the court found that the objection was well founded and that that part of the action ought not to have been stayed.

Case 1292: NYC IV; V(2)(b); MAL 35; 36(1)(b)(ii)
Canada: Saskatchewan Court of Queen's Bench
Q.B.G. No. 482 of 2010
Subway Franchise Systems of Canada Ltd. v. Cora Laich
24 June 2011
Original in English
Published in English: [2011] S.J. No. 534
Available on the Internet: http://canlii.ca/t/fn19s
Abstract prepared by Frédéric Bachand, National Correspondent

[**Keywords**: *award – recognition and enforcement, public policy substantive law*]

The applicant sought recognition and enforcement of an arbitral award issued in Connecticut providing for the termination of the parties' franchise agreement. The arbitral award granted the applicant damages for future losses it would sustain as a result of the termination of the agreement. The respondent successfully objected on the ground that the recognition and enforcement would be contrary to public policy. Although emphasizing the need to construe the grounds listed at Article 36 narrowly, the court found on the evidence that the applicant had not suffered any loss since it had continued to work with and support the respondent in a profitable partnership, as if their agreement had still been in force. The court considered that such an award of damages would amount to double recovery for the applicant, which would be contrary to public policy and to the law of Saskatchewan.