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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). 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: (http://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 web-site 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 Law on International Commercial Arbitration (MAL)

Case 1649: MAL 34(2); 34(2)(a)(ii); 34(2)(a)(iii); 34(2)(b)(ii)

Canada: Superior Court of Justice of Ontario (First instance)
2016 ONSC 7171
Consolidated v. Ambatovy
28 November 2016
Original in English
Available at: http://canlii.ca/t/gvzwq

Abstract prepared by Frédéric Bachand, National Correspondent and Giacomo Marchisio

[**Keywords:** *arbitrators; arbitral proceedings; arbitral awards; award-setting aside; public policy*]

The case deals with an application to set aside an award. The applicant argued that the arbitrators had wrongfully retained jurisdiction, denied the right to present its case, and made findings that were contrary to Ontario's public policy. The arbitration, which originated from disputes over the construction of a pipeline in Madagascar, took place in Toronto and was subject to Ontario law. Furthermore, the proceedings were conducted under the 1998 ICC Rules.

The first ground raised by the applicant concerned the jurisdiction of the tribunal. In particular, a counterclaim raised by the respondent in the arbitration allegedly failed to meet the pre-arbitration steps mandated by the arbitration agreement. The argument failed since there was no reasonable prospect that the award would have been different had this irregularity been avoided.

The applicant further argued that the tribunal's decision to retain jurisdiction over the counterclaim had been in breach of its right to be heard. The court rejected the argument, since the evidence showed that the tribunal had reviewed all of the applicant's arguments during the arbitration.

As for the applicant's third ground, concerning an alleged breach of public policy, the court ruled that the arbitral tribunal had neither "fundamentally offend[ed] the most basic and explicit principles of justice and fairness in Ontario" nor displayed "intolerable ignorance or corruption."

Finally, the court noted that even if it were to assess the existence of a relevant violation under Article 34(2) MAL, it could nonetheless uphold the award in the exercise of its discretion. In this respect, the court ruled that four factors should be taken into account, namely: "(1) the nature of the ground upon which the award might be set aside [...]; (2) the seriousness of the breach; (3) the potential impact of that breach on the result; and (4) the potential prejudice flowing from the need to redo the arbitration if the award was set aside."

Case 1650: MAL 35(2); 36(1)(a)(ii)

Canada: Superior Court of Justice of Ontario (First instance)
2016 ONSC 7221
Entes v. Kyrgyz Republic
16 November 2016
Original in English
Available at: http://canlii.ca/t/gvqbc

Abstract prepared by Frédéric Bachand, National Correspondent, and Giacomo Marchisio

[**Keywords:** *award-recognition and enforcement; procedure; public policy*]

The case deals with an application for recognition and enforcement of an arbitral award relating to a construction dispute. The Republic of Kyrgyz resisted

enforcement by alleging that the recognition of the award would be contrary to the public policy of Ontario. Specifically, the Republic of Kyrgyz alleged that one of its counsels in the arbitration had provided expert evidence on Kyrgyz law in the enforcement of a different award against the Republic, and that the party seeking recognition and enforcement in the present case would have indirectly attempted to use such expert evidence. This would show, according to the State, that its counsel had been in a conflict of interest during the arbitration which she had failed to disclose. In rejecting the argument, the court held that the public policy defence must be narrowly construed; its violation "must fundamentally offend the most basic and explicit principles of justice and fairness in Ontario or evidence intolerable ignorance or corruption on the part of the Arbitral Tribunal."

Case 1651: MAL 34(2); 34(2)(a)(iv)
Canada: Court of Appeal of Ontario
2016 ONCA 135
Popack v. Lipszyc
18 February 2016
Original in English
Available at: http://canlii.ca/t/gncng

Abstract prepared by Frédéric Bachand, National Correspondent, and Giacomo Marchisio

[**Keywords:** *award; award-setting aside; arbitral proceedings; arbitrators*]

The appellant and the respondent agreed to submit their dispute concerning certain properties in Ontario to a New York Rabbinical tribunal. In an addendum to their arbitration agreement, it was specified that the parties had the right to appear before the tribunal at scheduled hearings, and that the arbitrators themselves should give notice of such hearings. The *casus belli* concerns an *ex parte* meeting that the arbitrators had with a Rabbi who had previously acted as arbitrator in another dispute involving the same parties. Accepting that the arbitrators had an *ex parte* meeting with the Rabbi without notice to the appellant, the lower court refused to set aside the award, holding that while the tribunal had committed a procedural irregularity, it was not a serious one.

The Court of Appeal dismissed the appeal on the ground that the lower court had correctly applied the relevant standard, namely, whether the procedural error had an impact on the "reliability" of the result (i.e. the award), or to the fairness, or the appearance of the fairness of the arbitral process.

Case 1652: MAL 34(2)(a)(iv)
Canada: Superior Court of Justice of Ontario (First instance)
2016 ONSC 604
Jacob Securities Inc v. Typhoon Capital BV
26 January 2016
Original in English
Available at: http://canlii.ca/t/gn39c

Abstract prepared by Frédéric Bachand, National Correspondent, and Giacomo Marchisio

[**Keywords:** *arbitrators-appointment; due process; award-setting aside*]

The applicant is a Canadian investment bank and the respondent is a Dutch company operating in the renewable energy sector. The bank's role was to find potential partners for an offshore wind power project. The key issue revolved around an alleged lack of independence of the arbitrator appointed to hear their case. The seat of the arbitration was Toronto. After the arbitration, the applicant became aware that the arbitrator's former law firm had assisted a company which had provided equity project financing in the above wind project. In response,

evidence was provided showing that the arbitrator had retired in 2012, that former lawyers were not able to search conflicts at the firm, and that the arbitrator had not been personally associated with any work related to his former firm's involvement in the wind project.

The court first identified the applicable test to deal with allegations of bias: "the apprehension of bias must be a reasonable one, held by reasonable and right minded persons, applying themselves to the question and obtaining thereon the required information." Furthermore, there is a strong presumption of impartiality, so that the burden to rebut the presumption falls on the party making the allegation. After considering the 2014 IBA Guidelines on Conflicts of Interest in International Arbitration, as well as the relevant case law, the court concluded that the services provided by the arbitrator's old firm had no bearing on the award. At the same time, the duty to investigate any potential conflicts of interests to satisfy disclosure obligations do not extend to arbitrators' former law firms.

Case 1653: MAL 35(2), 36(1)(a)(ii), 36(1)(b)(ii)
Canada: Superior Court of Justice of Ontario (First instance)
2015 ONSC 999
Depo Traffic v. Vikeda International
18 February 2015
Original in English
Available at: http://canlii.ca/t/ggd2g

Abstract prepared by Frédéric Bachand, National Correspondent, and Giacomo Marchisio

[**Keywords:** *award-recognition and enforcement; due process; public policy*]

The applicant, a Chinese company, sought the recognition and enforcement of an award rendered against a Canadian company further to an arbitration before the Shanghai International Arbitration Commission. The respondent objected on the ground that it had been denied the ability to present its case when the arbitral tribunal failed to consider its double recovery defence. The court noted that while the tribunal had not made any factual findings on the double recovery defence, it had addressed the respondent's submission in its decision from a general legal perspective. The fact that the award did not contain detailed reasons on this issue was not a bar to its recognition and enforcement.

The respondent relied on the same circumstances while invoking Article 36(1)(*b*)(ii) MAL. The court rejected the argument after stating that the public policy defence is an exceptional one, and that it must be construed narrowly in light of the overriding purpose of the applicable legal framework to encourage recognition and enforcement of international arbitral awards and to unify the applicable standards. The arbitral proceedings did not offend any principles of justice and fairness in a fundamental way, nor did they evidence any misconduct on the part of the tribunal.

Case 1654: MAL 8(1); 9; 17
Canada: Supreme Court of British Columbia (First instance)
2014 BCSC 2130
African Mixing Technologies Ltd v. Canamix Processing Systems Ltd
14 November 2014
Original in English

Available at: http://canlii.ca/t/gf9n5

Abstract prepared by Frédéric Bachand, National Correspondent, and Giacomo Marchisio

[**Keywords:** *interim measures; courts; injunctions; jurisdiction*]

The case deals with an application for an interlocutory injunction and restraining orders against a Canadian company. The applicant is a company incorporated in South Africa. The contract between the two companies contained an arbitration clause providing for ICC arbitration and stipulating that the seat would be Johannesburg, South Africa. The applicable law chosen by the parties was South African law. Despite the existence of the arbitration clause, the applicant sought an injunction before the Supreme Court of British Columbia. During the proceedings, it contended that Canadian courts had jurisdiction to grant interim relief pending the final resolution of the dispute between the parties. The respondent objected to the court's jurisdiction and requested both a stay of proceedings and a referral to arbitration.

The court noted that state courts have "an inherent jurisdiction over interlocutory matters even where there is a comprehensive statutory or contractual scheme for resolving the dispute where no adequate alternate remedy exists within that scheme." There are a number of factors that the court must take into account when determining whether to exercise its jurisdiction to grant interim relief, namely: "(1) whether the interlocutory relief claimed would pre-empt a final decision of an arbitrator; (2) whether the relief claimed treads on the jurisdiction of the arbitrator to grant interim protective measures; (3) whether the arbitration procedure provides for the interlocutory relief claimed; (4) whether the remedy sought is to preserve the status quo pending arbitration and not to give the plaintiffs the remedy they ultimately seek."

In light of the above, the court dismissed the application for the interlocutory injunction and granted the stay requested by the respondent. The court emphasized that there was no evidence indicating that the ICC tribunal could not issue a binding interim measure, which could subsequently be enforced in Canada against the respondent.

Case 1655: MAL 8(1); 16(1); 16(3)
Canada: Court of Appeal of New Brunswick
2014 NBCA 26
UBS Holding Canada Ltd v. Harrison et al.
24 April 2014
Original in English
Available at: http://canlii.ca/t/g6mh3

Abstract prepared by Frédéric Bachand, National Correspondent, and Giacomo Marchisio

[**Keywords:** *procedure; courts; kompetenz-kompetenz*]

The appeal concerns an action filed by the respondents on the basis of allegedly oppressive and unfairly prejudicial conduct by certain companies owned by the appellant. The respondents are former shareholders and employees of those companies. While the contract between the parties contained an arbitration clause, the court below had dismissed the request for a stay of proceedings filed by the appellant, holding that the jurisdictional objection — which concerned the scope of the arbitration clause — ought to be decided as a preliminary matter by the court itself.

Applying Articles 8(1) and 16(1) MAL, the Court of Appeal found, in accordance with the Supreme Court of Canada's ruling in *Dell v Union des consommateurs*, that "arbitrators should be allowed to first rule on their own jurisdiction and the scope of that jurisdiction, subject, of course, to challenge by judicial review." This conclusion is dictated by the competence-competence principle enshrined in the above provisions of the Model Law. In considering the threshold test mandated by the competence-competence principle, the court held that stays of proceedings in actions falling under the scope of an arbitration agreement should be granted upon

finding that the interested party has established "a *prima facie* case that an arbitration clause exists and that it applies to the circumstances."

Case 1656: MAL 4; 13(2); 35(2); 36(1)(a)(iv)
Canada: Supreme Court of British Columbia (First instance)
2014 BCSC 370
Assam Company India Ltd v. Canoro Resources Ltd
7 March 2014
Original in English
Available at: http://canlii.ca/t/g637l

Abstract prepared by Frédéric Bachand, National Correspondent, and Giacomo Marchisio

[**Keywords:** *award-recognition and enforcement; procedure; waiver*]

The applicant, an Indian company, sought recognition and enforcement of an award against a Canadian company. The original dispute between the parties arose from a joint operating agreement concerning the exploitation of a potential oilfield. The agreement contained an ad hoc arbitration clause, mandating binding arbitration in New Delhi in accordance with the Indian Arbitration and Conciliation Act (1996).

The main argument raised by the respondent concerned the allegedly invalid appointment of the presiding arbitrator. The clause at issue provided that where the two arbitrators appointed by each party failed to agree on the appointment of the third arbitrator, then the applicant could proceed by nominating the third arbitrator in their stead. According to the respondent, the clause would not have been correctly applied in that the applicant failed to consult with the party-appointed arbitrators before selecting the third arbitrator. The court dismissed the argument raised by the respondent, noting that remedies against the irregular composition of the tribunal were available under the law of the seat, and that the proceedings initiated by the respondent in India had subsequently been abandoned. The court also noted that the objection to the composition of the tribunal had been considered and unanimously dismissed by the arbitrators themselves. Likewise, no evidence was offered to challenge the probity of the two arbitrators appointed by the applicant. In conclusion, the court found that the respondent had waived its right to object to the composition of the tribunal by abandoning the legal proceedings instituted to this effect before the courts of the seat.

Case 1657: MAL 16(3); 35(2); 36(1)(a)(iv); 36(1)(b)(ii)
Canada: Supreme Court of British Columbia (First instance)
2013 BCSC 1804
CE International Resources Holdings LLC v. Yeah Soon Sit
1 October 2013
Original in English
Available at: http://canlii.ca/t/g0s23

Abstract prepared by Frédéric Bachand, National Correspondent, and Giacomo Marchisio

[**Keywords:** *award-recognition and enforcement; procedure; arbitration agreement; jurisdiction; public policy*]

The applicant, a US company, sought an order seeking the recognition and enforcement of a final award against an individual. The award, which was rendered in New York, concerned claims for breach of contract and fraud. After deeming that the conditions set out in Article 35(2) MAL had been satisfied, the court turned to the respondent's objections to the effect that he was not a party to the arbitration agreement and that the arbitral proceedings had been unfair.

On the first objection, the court held that the arbitrator's decision on this matter was final and, as such, could not be reviewed *de novo*. While the respondent had not

signed the contracts in his personal capacity, the arbitral tribunal had added him as a party to the arbitration after having found that that the company in question was merely his alter ego. The court further held that the conclusion reached by the arbitral tribunal was consistent with the applicable law, as well as with Article 15(1) of the Dispute Resolution Procedures of the American Arbitration Association, which states that the arbitrator has the power to rule on his own jurisdiction. The court added that the respondent should have challenged the tribunal's decision before the competent court at the seat of arbitration.

As for the second objection relating to procedural unfairness, which the respondent considered to amount to a breach of public policy, the court also found it to be meritless. The fact that the arbitrator decided to set a hearing on a date on which one of the respondent's counsels and expert witness was not available was not a breach of public policy, because the arbitrator had concluded that the presence of the expert witness was not necessary and that the other respondent's lawyers could be present at the hearing.