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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). 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 website of the UNCITRAL Secretariat on the Internet (<http://www.uncitral.org>).

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I. CASES RELATING TO THE UNITED NATIONS SALES CONVENTION (CISG)

Case 291: CISG 14; 18(3); 19(1); 19(3)

Germany: Oberlandesgericht Frankfurt am Main; 5 U 209/94

23 May 1995

Original in German

Published in German: [1995] Die Deutsche Rechtsprechung auf dem Gebiete des Internationalen

Privatrechts 269; <http://www.jura.uni-freiburg.de/ipr1/cisg/urteile/text/185.html>

Abstract in Italian: [1997] Diritto del Commercio Internazionale 738

An Italian manufacturer of shoes, plaintiff, sued a German buyer, defendant, for the outstanding purchase price. The buyer sought set-off with damages arising from non-performance by the seller. It argued, inter alia, that it had ordered 3.240 pairs of shoes instead of the delivered 2.700 pairs.

The court allowed the claim. It held that the buyer failed to prove that a contract for delivery of 3.240 pairs of shoes had been concluded. The buyer alleged that an order of that quantity constituted an offer according to article 14 CISG. Due to a lack of express acceptance of such offer by the seller, no contract for the delivery of such quantity was entered into. The court found that the delivery of 2.700 pairs amounted to an acceptance by performance according to article 18(3) CISG. The court held that the delivery of a different quantity of goods materially altered the terms of the offer under article 19(3) CISG. Accordingly, the seller's delivery had to be interpreted as a rejection of the offer by the buyer and constituted a counter-offer under article 19(1) CISG. Therefore, the court held that a contract was concluded only with regard to the quantity delivered by the seller.

The court further held that, even if the buyer had complained about the missing quantity, the seller would not have had the obligation to effect a further delivery, as at no time it had accepted any delivery of a higher quantity of shoes.

Case 292: CISG38(1); 38(3); 39(1)

Germany: Oberlandesgericht Saarbrücken; 1 U 69/92

13 January 1993

Original in German

Published in German: <http://www.jura.uni-freiburg.de/ipr1/cisg/urteile/text/83.html>

A French seller, plaintiff, sold doors to a German buyer, defendant. The buyer refused to pay the purchase price, claiming lack of conformity of the goods. The seller sued the buyer for the outstanding purchase price.

The court allowed the claim. It held that the buyer had to pay the purchase price, because - apart from the fact that it had failed to sufficiently specify the lack of conformity (article 39(1) CISG) - it had failed to examine the goods as provided in article 38(1) CISG and had not given notice of the lack of conformity within a reasonable time. Accordingly, it lost its right to rely on lack of conformity under article 39(1) CISG.

The buyer was not exempted under article 38(3) CISG from its obligation to examine the doors

applicable only if the buyer had either acted as a pure intermediary or if the goods had been directly delivered to the ultimate consumer. The exemption could not be applicable, however, if it was unforeseeable, whether and when the delivered goods, which in the meantime had been stored in the buyer's warehouse, would be resold. As this was the case, immediate examination after delivery would still have been necessary.

The court held that despite the fact that the doors had been wrapped in piles on pallets and that the wrapping had to be opened to allow for examination, such immediate examination was neither impossible nor unreasonable. The buyer could have unwrapped sample doors, which would at least have revealed defects depending on manufacturing, since the doors had been produced in series. Furthermore, the court held that, in general, parties could derogate from the provisions contained in articles 38, 39 CISG by trade usage. Nevertheless, such a trade usage was found to be non-existent in this case. Accordingly, notice of lack of conformity given by the buyer more than two and a half months after the date of the last shipment of doors was held to be too late.

Case 293: CISG 8; 26; 45(1)(a); 49(1)(a); 73(1); 73(2); 81(2); 84(1)

Germany: Schiedsgericht der Hamburger freundschaftlichen Arbitrage (Arbitral Award)

29 December 1998

Original in German

Published in German: [1999] Neue Juristische Wochenschrift-Rechtsprechungsreport 780; [1999] Recht der Internationalen Wirtschaft 394

A German buyer, plaintiff, sued a Czech seller, defendant, for restitution of a payment made in advance for a second (out of fifteen) delivery of cheese, which had been cancelled by the seller.

The arbitral tribunal (the "tribunal") held that it had jurisdiction in the case in accordance with the arbitration clause agreed upon by the parties. In the absence of an express choice of law, the tribunal ruled that, by choosing a German place of arbitration, the parties implicitly agreed upon German law to govern the contract, and thus the CISG was applicable.

The tribunal found that the buyer was entitled to restitution of the advance payment under article 81(2) clause 1 CISG.

In view of the fact that the parties had agreed that the buyer should collect the cheese in 15 deliveries, the contract was construed to be a contract for delivery of goods by instalments under article 73 CISG.

The tribunal held that the buyer had the right to declare the contract avoided under articles 45(1)(a) and 49(1)(a) CISG. Referring to article 8 CISG, the tribunal found that an agreement on advance payment does not allow suspension of the subsequent delivery of the goods concerned on grounds such as settlement of other claims. When refusing delivery on such grounds, the seller was considered to be in fundamental breach of contract, irrespective of the existence of any other claim. Accordingly, the tribunal held that the buyer was entitled to declare the contract avoided, even without fixing an additional period of time for delivery. Although a fundamental breach of contract by one party in respect of an instalment gives the other party the right to declare the contract avoided with respect to that instalment only (article 73(1) CISG), the tribunal found that the buyer was entitled to

The tribunal further held that the buyer's letter stating that no further business would be done with the seller had met the conditions of a declaration of avoidance under article 26 CISG.

Finally, the tribunal awarded interest from the date on which the advance payment was made according to article 84(1) CISG. The interest rate was determined under German law as applicable under the private international law provisions.

Case 294: CISG 26, 74, 75

Germany: Oberlandesgericht Bamberg; 3 U 83/98

13 January 1999

Original in German

Published in German: [1999] Oberlandesgerichts-Rechtsprechungsreport Bamberg 149

A Portuguese seller, plaintiff, claimed against a German buyer, defendant, for the outstanding purchase price. The buyer sought set-off with damages arising from, inter alia, late and incomplete delivery, which resulted in additional costs for substitute purchases and for processing a part of the goods in Germany instead of Turkey.

In connection with the incomplete delivery, the court held that the buyer was not entitled to set-off with a claim for recovery of the additional costs incurred for purchases in replacement of the undelivered goods under article 75 CISG, as it failed to declare the contract avoided. Any substitute purchase cannot replace a notice of declaration of avoidance of the contract under article 26 CISG, since the CISG does not provide for a termination of the contract by operation of law.

As to another delivery, the court held that the seller's telephone call stating that it could only deliver a portion of the agreed amount was sufficient to replace a notice of declaration of avoidance. The seller thereby sincerely and finally refused performance, which allowed the buyer to purchase goods in replacement without any prior declaration of avoidance of the contract.

Furthermore, the court held that the buyer was not allowed to claim for additional costs arising out of processing the goods in Germany. As the burden of proof was placed on the buyer, it had to show that such damages either could have been foreseen or ought to have been foreseen by the seller at the time of the conclusion of the contract under article 74 CISG. The court stated that, generally, damages caused by the surrounding circumstances of one party could only be covered, if those circumstances were known by the other party at the time of the conclusion of the contract. Since the buyer failed to prove such knowledge or foreseeability at the time of the conclusion of the contract, it was not entitled to such damages.

Case 295: CISG 1(1)(a); 7(2); 31(a); 78

Germany: Oberlandesgericht Hamm; 11 U 41/97

5 November 1997

Original in German

Published in German: <http://www.jura.uni-freiburg.de/ipr1/cisg/urteile/text/381.html>

An Italian seller, plaintiff, made a series of deliveries of in-line skates to a German buyer, defendant under a contract of sale. The seller sued the buyer for the total outstanding purchase price. The buyer sought set-off with damages arising from deliveries unconnected to the seller's claim.

The appellate court, with which an appeal was lodged by the buyer, found the CISG to be applicable to the sales contracts according to article 1(1)(a) CISG, despite an underlying distribution agreement between the parties. It held that each of the sales contracts had to be treated independently from the distribution agreement and that the plaintiff's claim for payment was justified under article 53 CISG.

It furthermore held that the buyer's claim for set-off was not admissible due to a lack of jurisdiction. As both the domicile of the seller and the place of performance were held to be in Italy, the court ruled that German courts were not competent to deal with the set-off claim.

As to the sales contracts, in view of the fact that the seller had handed over the goods to the first carrier in Italy, this country was determined to be the place of performance according to article 31 (a) CISG.

Since the buyer had not objected to the seller's claim for payment, such claim was allowed. Additionally, the seller was entitled to interest according to article 78 CISG, the rate of which had to be determined by Italian domestic law as applicable under private international law provisions.

Case 296: CISG 61; 74

Germany: Amtsgericht Berlin-Tiergarten; 2 C 22/97

13 March 1997

Original in German

Published in German: [1999] Praxis des internationalen Schieds- und Verfahrensrechts 172

Commented on in German: A.F. Peter, [1999] Praxis des internationalen Schieds- und Verfahrensrechts 159

A Dutch plaintiff sued a German defendant, inter alia, for reimbursement of debt collection costs. The plaintiff had engaged the services of a Dutch debt collection agency in order to collect payment from the defendant.

The court held that debt collection costs are not covered under article 74 CISG. Although the court admitted that a foreign creditor cannot necessarily be obliged to engage a German lawyer for debt collection from a German party to a contract, the court dismissed the claim, as it found that the plaintiff failed to follow the most economical way. The court noted that the plaintiff could have brought an action before a Netherlands court, the jurisdiction of which would have been granted, according to existing conventions. Furthermore, the court noted that under article 26 of the European Communities

resulting Dutch decision would have also been enforceable in Germany, and thus, the costs for a Dutch debt collection agency as well as for a German lawyer could have been saved.

In contrast to the decision for debt collection costs, the court held that damages under article 74 CISG include court and lawyers fees.

Case 297: CISG 58; 59

Germany: Oberlandesgericht Muenchen; 7 U 3506/97

21 January 1998

Original in German

Unpublished

An Italian seller, plaintiff, sued a German buyer, defendant, for the unpaid purchase price for delivery of thermal insulation material. The buyer refused to pay the price arguing that the seller had granted a non-interest-bearing credit on goods for an indefinite time.

The court held that a non-interest-bearing credit on goods as mentioned above had to be regarded as an agreement modifying the provisions of article 58 CISG. According to article 58 CISG, the buyer shall pay the price when the seller places either the goods or the documents controlling their disposition at the buyer's disposal. In the court's view, the credit on goods had to be regarded as an indefinite extension of the time for payment granted by the seller, which the seller was not allowed to terminate unilaterally.

Nevertheless, the court allowed the claim. It held that the parties had jointly terminated the extension agreement. Therefore, payment was due in accordance with article 59 CISG.

Case 298: CISG 57

European Union: European Court of Justice; C-288/92

29 June 1994

Custom Made Commercial Ltd. v. Stawa Metallbau GmbH

Published in all the official languages of the European Communities: [1994] Reports of Cases Before the Court of Justice and the Court of First Instance

Published in French: [1994] Revue critique de droit international privé 692; [1995] Revue trimestrielle

de droit européen 83

Published in German: [1994] European Court Reports I-2913-2960; [1994] Recht der Internationalen Wirtschaft 676; 876; [1995] Neue Juristische Wochenschrift 183; [1995] Juristenzeitung 244; [1995] Praxis des internationalen Privat- und Verfahrensrechts 692

Commented on in English: Vlas, [1994] Netherlands International Law Review 342; [1995]

Karollus, Cornell Review of the CISG 175; Curran, [1995] Journal of Law and Commerce 195

Commented on in French: Witz, Les premières applications jurisprudentielles du droit uniforme de la vente internationale, 80; Gaudemet-Tallon, [1994] Revue critique de droit international privé 698;

Tichadou, [1995] Revue trimestrielle de droit européen 87; Huet, [1995] Journal du Droit International 461; Tagaras, [1995] Cahiers de Droit Européen 222

Commented on in German: Geimer, [1995] Juristenzeitung 245; Jayme, [1995] Praxis des internationalen Privat- und Verfahrensrechts 13; Jayme/Kohler, [1994] Praxis des internationalen Privat- und Verfahrensrechts 410; Karollus, [1994] Recht der Wirtschaft (Austria) 387; Koch, [1996] Recht der Internationalen Wirtschaft 379; Kohler, [1995] Zeitschrift für Europäisches

Privatrecht 497;

Rainer, [1995] Wirtschaftsrechtliche Beratung 438; Schack, [1995] Zeitschrift für Europäisches Privatrecht 659; Schlechtriem, Entscheidungen zum Wirtschaftsrecht Art. 5 EuGVÜ 1/95, 55;

Volken, [1995] Schweizerische Zeitschrift für Internationales und Europäisches Recht 295

Commented on in Spanish: Borrás Rodríguez, [1995] Revista Jurídica de Catalunya 276

(Abstract prepared by the Secretariat)

The judgement was issued in response to a question brought before the European Court of Justice by the German Bundesgerichtshof according to art. 177 of the European Economic Community Treaty.

With regard to the interpretation of the European Communities Convention on Jurisdiction and the Enforcement of Judgements in Civil and Commercial Matters, the Bundesgerichtshof asked whether the place of performance under its article 5(1) must be determined on the basis of substantive law provisions governing the obligation at issue, according to the rules of conflict of the jurisdiction in which the action was brought, even if those rules indicate that a unified substantive law, such as the 1964 Hague Convention relating to the Uniform Law on the International Sale of Goods, must apply to the contract.

The European Court of Justice affirmed the question and identified the place of performance of the obligation to pay as being the seller's place of business.

Although the decision itself dealt with the Hague Uniform Law on the International Sale of Goods, the same rationale applies to CISG. According to the reasoning of this decision, article 57

Case 299: CISG 1(1)(a)

International Chamber of Commerce, International Court of Arbitration; 7399

Interim Arbitral Award issued in 1993

Original in English

Published in English: [1995] The ICC International Court of Arbitration Bulletin, Vol. 6, No. 2, 68

Published in French: [1995] Bulletin de la Cour Internationale d'Arbitrage de la Chambre de Commerce Internationale Vol. 6, No.2, 67

Abstract published in French: [1995] Bulletin de la Cour Internationale d'Arbitrage de la Chambre de Commerce Internationale Vol. 6, No.2, 67

Commented on in English by Petrochilos [1999] Revue Hellenique de Droit International, 86

Commented on in French by Hascher [1993] Journal du Droit International 1040

(Abstract prepared by the Secretariat)

A Swiss buyer, plaintiff, sued a US seller, defendant, for damages due to an alleged breach of a contract for the sale of shoes. No shoes had been delivered by the seller. The issue before the arbitral tribunal was to determine the applicability of the CISG.

The arbitral tribunal held that as the CISG had entered into force both in Switzerland and the United States (the State of California) at the time of the transaction between the parties, and as the requirements contained in article 1(1)(a) CISG had been fulfilled, the CISG was applicable for deciding the (i) issue of the formation of the contract; (ii) alleged breach of contract; and (iii) extent of any damages if such breach of contract had occurred.

Case 300: CISG 1(1)(b); 6; 7(2); 35(1); 35(2)(a); 35(2)(b); 39(2); 45; 74; 78

International Chamber of Commerce, International Court of Arbitration; 7565

Arbitral Award issued in 1994

Original in English

Published in English: [1995] The ICC International Court of Arbitration Bulletin, Vol. 6, No. 2, 64

Published in French: [1995] Bulletin de la Cour Internationale d'Arbitrage de la Chambre de Commerce Internationale Vol. 6, No.2, 63

Abstract published in English: [1996] UNILEX

Abstract published in French: [1995] Bulletin de la Cour Internationale d'Arbitrage de la Chambre de Commerce Internationale Vol. 6, No.2, 63

Abstract published in Italian: [1996] Diritto del Commercio Internazionale, No. 108, 635

Commented on in English by Ferrari [1998] International Legal Forum No. 4, 138; Koneru [1997]

Minnesota Journal of Global Trade, No. 6, 123; Thiele [1998] The Vindobona Journal of International

Commercial Law and Arbitration No. 2, 3; Schwenger [1998] Schlechtriem, Commentary on the UN Convention on the International Sale of Goods, 318; Petrochilos [1999] Arbitration Conflict of Laws Rules and the CISG, 61

(Abstract prepared by the Secretariat)

A Dutch seller, defendant, sold four cargoes of coke breeze to a US buyer, plaintiff. The buyer

The arbitral tribunal held that the parties had expressly made the contract subject to “the laws of Switzerland”, which according to the arbitral tribunal included the CISG as of the date of its incorporation into Swiss law. As such, the contract was held to be governed by the CISG pursuant to article 1(1)(b) CISG.

The arbitral tribunal allowed the buyer’s claim. It held that it was undisputed that the buyer provided the seller with rapid notice of lack of conformity of the goods (article 39(2) CISG). The arbitral tribunal further held that, under article 6 CISG, the parties could depart from its provisions, which meant that, in the matter of lack of conformity, they were entitled to either shorten or extend the periods, as set out in the last clause of article 39(2).

The arbitral tribunal determined that the seller’s contention that the thirty-day time limitation contained in the contract’s arbitral clause, “reflected the parties intention to depart from the provisions of ... article 39(2)” was not justifiable, as article 39(2) dealt with notice of lack of conformity and the time limit contained therein was not to be understood as a statute of limitation. The arbitration clause, noted the arbitral tribunal, strictly regarded the time in which any claim, whether or not concerning a dispute for lack of conformity, could be filed as a claim in arbitration. In addition, the arbitral tribunal noted that the arbitration clause had no relationship with the “contractual period of guarantee” contained in article 39(2) CISG.

Referring to the seller’s obligations under articles 35(1) CISG, 35(2)(a) CISG and 35(2)(b) CISG as well as the buyer’s remedies under articles 45 CISG and 74 CISG, the arbitral tribunal held that the buyer had proved that the seller had delivered to it a product which could not be considered to be coke breeze, and that therefore the seller had to indemnify the buyer for all the losses including loss of profit.

In respect of interest rates, the arbitral tribunal stated that neither article 74 CISG nor article 78 CISG contained a ruling regarding interest rates. Therefore, it referred to the general principles on which the CISG was grounded (article 7(2) CISG) and held that such general principles did not settle the matter, and, taking into account that the parties had referred to the laws of Switzerland, the interest rate had to be determined under Swiss law. The arbitral tribunal further held that the interest had to be computed from the first day of the relevant year, on the assumption that the cargoes would normally have been resold to the buyer’s customers by the end of the previous year.

Case 301: CISG 1(1); 7(2); 25; 53; 54; 63(1); 64(1)(b); 74; 75; 77; 78; 84; 100

International Chamber of Commerce; International Court of Arbitration; 7585

Arbitral Award issued in 1992

Original in English

Published in English: [1995] The ICC International Court of Arbitration Bulletin, Vol. 6, No. 2, 60

Published in French: [1995] Bulletin de la Cour Internationale d'Arbitrage de la Chambre de Commerce Internationale Vol. 6, No.2, 59

Abstract published in English: [1995] UNILEX

Abstract published in French: [1995] Bulletin de la Cour Internationale d'Arbitrage de la Chambre de Commerce Internationale Vol. 6, No.2, 59; [1995] Journal du Droit International, No. 4, 1015

Abstract published in Italian: [1996] Diritto del Commercio Internazionale, No.93, 622

Commented on in English by Ferrari [1998] International Legal Forum No. 4, 138; Koneru [1997]

Minnesota Journal of Global Trade, No. 6, 105; Koch [1998] Pace Review of Convention on

Contracts for International Sale of Goods, 251; Lookofsky [1996] Understanding the CISG in

Scandinavia, 67, 124; Thiele [1998] The Vindobona Journal of International Commercial Law and

Arbitration No. 2, 3; Petrochilos [1999] Arbitration Conflict of Laws Rules and the CISG

Commented on in Finnish by Huber/Sundstroem [1997] Defensor Legis, 758

Commented on in French by Y.D [1995] Journal du Droit International, 1020

Commented on in Italian by Giardina [1998] Revista dell'arbitrato, 191

Commented on in Spanish by Perales [1996] Cuadernos Jurídicos 3, No. 43, 5

(Abstract prepared by the Secretariat)

An Italian seller of machinery for a production line of foamed boards, plaintiff, sued the Finnish buyer, defendant, for damages and interest as the buyer had failed to make the third down payment to it and to notify the relevant letters of credit on the required date.

The contract contained a clause providing that the CISG was applicable to it. The arbitral tribunal held that according to articles 1(1) CISG and 100 CISG, the CISG was applicable in its entirety (Finland had made a reservation upon ratification, declaring that it would not be bound by Part II of the CISG) with a statutory nature, because the conflict of laws rules expressed in the 1955 Hague Convention on the Law Applicable to Contracts for the International Sale of Goods (Italy and Finland ratified this Convention) led to the application of Italian law, which, after ratification of the CISG, incorporated the provisions thereof. Therefore, the express choice of the CISG in the contract had not deprived the CISG of its statutory character.

The arbitral tribunal approved the seller's declaration of avoidance of the contract in accordance with article 64(1)(b). It held that the buyer, by failing to notify the letters of credit on the date required, had not complied with the requirements of articles 53 CISG and 54 CISG regarding the buyer's obligation to pay the price. Reading article 25 CISG, which defines a fundamental breach, in connection with articles 53 CISG and 54 CISG, the arbitral tribunal stated that the mere fact that a buyer had some delay in payment was not always in itself a fundamental breach. In this case, the seller waited several months before declaring the contractual relations terminated, in spite of the fact that it was clear that the buyer did not have the financial resources. The arbitral tribunal regarded the period between the buyer's default and the declaration of avoidance by the seller as an "additional period" fixed by the seller under articles 63(1) CISG and 64(1)(b) CISG.

On the basis of articles 78 CISG and 84 CISG, the arbitral tribunal determined that the seller was entitled to claim interest on any sum that was in arrears. Stating that the CISG had not solved the question of the rate of interest, the arbitral tribunal further determined that as the financial aspects of the sale were linked with the German Mark, the applicable rate of interest was the German one.

The arbitral tribunal found that the damages claimed by the seller, namely, on the one hand damages for preservation of the undelivered machinery and costs and expenses (legal costs, arbitration), and on the other hand, damages for loss of profit, should be considered as foreseeable according to article 74 CISG, as such damages were usual in situations of avoidance of a contract for breach of one party. Citing article 77 CISG, the arbitral tribunal awarded the total amount claimed by the seller for the first category of damages. The damages for loss of profit were held to be covered by article 74 CISG. The arbitral tribunal held that, according to article 75 CISG, the seller, who had resold the machinery, was entitled to recover the difference between the contract price and the price of the substitute transaction.

Referring to the first clause of article 7(2), the arbitral tribunal granted the seller, in addition to damages, the “compensation fee” contained in the contract’s penalty clause.

Case 302: CISG 3(1); 6; 7(2); 39(2); 49(1)(a); 51(1); 51(2); 74; 78; 84; 84(1)
International Chamber of Commerce; International Court of Arbitration; 7660
Arbitral Award issued in 1994

Original in English

Published in English: [1995] The ICC International Court of Arbitration Bulletin, Vol. 6, No. 2, 69

Published in French: [1995] Bulletin de la Cour Internationale d’Arbitrage de la Chambre de Commerce Internationale Vol. 6, No.2, 68

Abstract published in English: [1994] UNILEX

Abstract published in French: [1995] Bulletin de la Cour Internationale d’Arbitrage de la Chambre de Commerce Internationale Vol. 6, No.2, 68

Abstract published in Italian: [1995] Diritto del Commercio Internazionale, No.54, 234

Commented on in English by Van Alstine [1998] University of Pennsylvania Law Review, No.146, 767; Ferrari [1998] International Legal Forum, No. 4, 138; Honnold [1999] Uniform Law for International Sales, 345; Lookofsky [1995] Understanding the CISG in the USA, 16, 71; Lookofsky [1996] CISG-Scandinavia, 21, 87; Bernstein and Lookofsky [1997] CISG-Europe, 8,18, 90; Bonell/Liguori [1996] Uniform Law Review, 147; Petrochilos [1999] Arbitration Conflict of Laws Rules and the CISG

Commented on in German by Schlechtriem [1996] Internationales UN-Kaufrecht,18, 106

Commented on in Italian by Liguori [1996] Foro Italiano, 145

Commented on in Spanish by Perales [1996] Cuadernos Jurídicos 3, No. 43, 5

(Abstract prepared by the Secretariat)

A Czech buyer, plaintiff, and an Italian seller, defendant, concluded a contract for the production, delivery and installation of a complete automatic assembly line for batteries, which was to be delivered to a Czech company X. The buyer sued the defendant requesting partial avoidance of the contract, payment of damages arising out of undelivered spare parts and indemnification of a pending third-party claim.

The arbitral tribunal held that there was no dispute between the parties that their choice of law, Austrian law, included the application of the CISG. Citing article 3(1) CISG, the arbitral tribunal determined that the contract fell within the scope of the CISG.

The arbitral tribunal allowed the buyer's claim regarding undelivered spare parts and granted the buyer interest in the amount due under articles 78 and 84 CISG from the maturity of the first promissory notes according to article 84(1) CISG. The arbitral tribunal stated that, as the CISG was silent on the amount of interest (articles 78 CISG and 84 CISG), and, on the basis of article 7(2) CISG, Austrian law had to be applied in order to determine this issue. Given that the contract price, though valued in Lira, was due in DM at an exchange rate agreed by the parties, the arbitral tribunal held that any refund, including interest, should also be due in DM at the same rate.

The arbitral tribunal disallowed the buyer's claim for avoidance of part of the contract. The arbitral tribunal noted that article 51(1) CISG provided for a partial avoidance of the contract as declared by the buyer, and that under article 51(2) CISG such partial avoidance was the rule rather than the exception in cases of partial non-performance amounting to a non-fundamental breach of the contract (article 49(1)(a) CISG). In view thereof, the arbitral tribunal determined that a partial avoidance under article 51(1) CISG was permissible where the defective piece of machinery formed an independent part of the contracted goods as it was in the case at issue. However, the arbitral tribunal further determined that the buyer's partial avoidance was barred by the 18-month time limit contained in the contract. It further noted that according to article 6 CISG the parties by agreeing on an 18-month warranty period had also reduced the two-year time limit provided for in article 39(2) CISG to a one and half year time limit. The arbitral tribunal noted that the CISG was silent as to "prescription periods", and therefore Austrian law had to govern such issue.

The arbitral tribunal rejected the buyer's claim for indemnification of a pending claim filed by company X in the Prague court against it, as the buyer had not suffered any damage yet as required by article 74 CISG.

Case 303: CISG 8; 39(1); 44; 50; 77; 78

International Chamber of Commerce, International Court of Arbitration; 7331

Arbitral award issued in 1994

Original in English

Published in English: [1995] The ICC International Court of Arbitration Bulletin Vol.6, No. 2, 73

Published in French: [1995] Journal du Droit International 1001

Abstract published in English: [1996] UNILEX

Abstract published in French: [1995] Bulletin de la Cour Internationale d'Arbitrage de la Chambre de Commerce Internationale Vol. 6, No.2, 73

Abstract published in Italian: [1996] Diritto del Commercio Internazionale, No. 111, 637

Commented on in English by Ferrari [1998] International Legal Forum No. 4, 138; Honnold [1999] Uniform Law for International Sales, 285; Koneru [1997] Minnesota Journal of Global Trade, No. 6, 123; Goderre in [1997] University of Cincinnati Law Review 277

Commented on in French by Hascher in [1995] Journal du Droit International 1996; Muir Watt in [1996] Revue de Droit des Affaires Internationales 401

Commented on in Spanish by Perales in [1996] Cuadernos Jurídicos 3, No.43, 5

(Abstract prepared by the Secretariat)

A Yugoslav seller, plaintiff, sold cow hides (supplied by a Russian entity ("RE") as a payment to the seller for the reconstruction of a factory in Russia) to an Italian buyer, defendant. The buyer did not report to the seller defects discovered upon inspection, but instead requested a price reduction based on the depressed market for hides. The seller refused to reduce the price and the buyer withheld payment. The seller, the buyer and the RE met in Moscow and signed a protocol (the "Protocol") establishing the total amount of the buyer's outstanding debt and providing the buyer with a 30-day postponement of payment of the debt, during which time RE was to inspect the hides in Italy. When RE failed to inspect the hides, the buyer informed the seller that it no longer had any debt to it. Subsequently, the buyer sold the hides without specifying the amount obtained.

As the contract contained no choice of law provision, the arbitral tribunal held the CISG to be applicable to the contract according to article 13 (3) of the ICC Rules.

The arbitral tribunal found that the Protocol had not released the buyer of its obligations under its contract with the seller. Against the background of the CISG's silence on the issue of novation, the arbitral tribunal did not consider solely one national law, but it applied the common core requirements as a general legal standard derived from the three relevant national laws (Italy, France and former Yugoslavia). On the basis of article 8 CISG, the arbitral tribunal concluded that under the terms of the Protocol, the seller had not intended to release the buyer from its obligations and that the buyer had no reasonable basis upon which to assume that this had been the seller's intent.

The arbitral tribunal held that due to the buyer's failure to give notice to the seller of the lack of conformity of the goods according to article 39 (1) CISG, the buyer was not entitled to rely on lack of conformity. Furthermore, given the buyer's lack of a reasonable excuse for its failure to give the required notice, a price reduction according to articles 44, 50 CISG was not justifiable. The arbitral tribunal pointed out that, even if the buyer had timely given notice, it would have been in breach of its obligation to mitigate damages under article 77 CISG. In this respect the arbitral tribunal noted that the buyer had sold the hides without providing evidence that such hides were sold at a loss due to their

The arbitral tribunal also held that the seller was entitled to receive interest on the principal amount awarded according to article 78 CISG from the time of the filing of the request for arbitration. The interest was to be determined according to the law of the country in which the damage resulting from the delayed payment was suffered: in this case, the seller's country.

Case 304: CISG 1(1)(a); 25; 35(1); 35(2); 49(1)(a); 51(2); 74; 75; 86; 87; 88(1)

International Chamber of Commerce, International Court of Arbitration; 7531

Arbitral Award issued in 1994

Original in English

Published in English: [1995] The ICC International Court of Arbitration Bulletin Vol. 6, No 2, 67

Published in French: [1995] Bulletin de la Cour Internationale d'Arbitrage de la Chambre de Commerce Internationale Vol.6, No. 2, 66

Abstract published in English: [1996] UNILEX

Abstract published in French: [1995] Bulletin de la Cour Internationale d'Arbitrage de la Chambre de Commerce Internationale, 66

Abstract published in Italian: [1996] Diritto del Commercio Internazionale, No. 109, 636

Commented on in English by Koneru [1997] Minnesota Journal of Global International Trade, No. 6, 105

Commented on in Spanish by Perales in [1996] Cuadernos Jurídicos 3, No. 43, 5

(Abstract prepared by the Secretariat)

A Chinese seller, defendant, sold scaffold fittings to an Austrian buyer, plaintiff. The buyer claimed lack of conformity of the goods and declared the contract avoided. Subsequently, the buyer sold the goods and sued the seller for damages, as such goods had been sold only partially and at a lower price.

The arbitral tribunal determined the CISG to be applicable to the contract in accordance with article 1(1)(a) CISG).

The arbitral tribunal allowed the buyer's claim. It held that the seller had not delivered the goods in accordance with article 35(1), (2) CISG and that the lack of conformity of an important part of the delivered goods amounted to a breach of contract by the seller which, under article 25 CISG, was fundamental since the buyer had been deprived of substantially what it was entitled to expect under the contract. In view thereof, the arbitral tribunal found that the buyer was entitled to rely on articles 49(1)(a) CISG and 51(2) CISG for declaring the contract avoided, and that the seller was not entitled to supply substitute items after the delivery date specified in the contract without consent of the buyer.

Citing articles 86 CISG, 87 CISG and 88(1) CISG, the arbitral tribunal allowed as damages costs, expenses and losses related to the buyer's reasonable expenses for preservation of the goods. In addition, under articles 74 CISG and 75 CISG, the arbitral tribunal allowed all damages (except one, the travel costs of the buyer's customer) claimed by the buyer. The buyer's claim of cost of credit was held to be an element of the damages due according to article 74 CISG.

The arbitral tribunal further held that as the CISG was silent on the question of the maturity date of damage claims and taking into account that this element of the claim was undisputed, the buyer was

II. ADDITIONAL INFORMATION

Addenda/Corrigendum

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(Arabic, Chinese, English, French, Russian, Spanish)

Case 270

Commented on in French: Witz [1999] Recueil Dalloz, No. 40, 356

Case 271

Published in German: 141 Entscheidungen des Bundesgerichtshofes in Zivilsachen, 129

Case 273

The word “buyer”, which appears in the first line of the second paragraph *should read* “seller”

Case 290

Commented on in French: Witz [1999] Recueil Dalloz, No. 40, 356

Addendum

Document A/CN.9/SER.C/ABSTRACTS/24
(Arabic, Chinese, English, French, Russian, Spanish)

Case 246

Commented on in French: Rosch, [1999] Recueil Dalloz, No. 41, 363

Addendum

Document A/CN.9/SER.C/ABSTRACTS/23
(Arabic, Chinese, English, French, Russian, Spanish)

Case 243

Commented on in French: Witz, [1999] Recueil Dalloz, No. 41, 363

Addendum

Document A/CN.9/SER.C/ABSTRACTS/22
(Arabic, Chinese, English, French, Russian, Spanish)

Case 238

Commented on in French: Niessen, [1999] Recueil Dalloz, No. 40, 359

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(Arabic, Chinese, English, French, Russian, Spanish)

Case 237

Commented on in French: Limbach, [1999] Recueil Dalloz, No. 41, 365

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(Arabic, Chinese, English, French, Russian, Spanish)

Case 232

Commented on in French: Witz, [1999] Recueil Dalloz, No. 40, 356

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(Arabic, Chinese, English, French, Russian, Spanish)

Case 222

Commented on in French: Papandréou-Deterville, [1999] Recueil Dalloz, No. 41, 367

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Document A/CN.9/SER.C/ABSTRACTS/17
(Arabic, Chinese, English, French, Russian, Spanish)

Case 210

Commented on in French: Rosch, [1999] Recueil Dalloz, No. 40, 361

Document A/CN.9/SER.C/ABSTRACTS/1
(Arabic, Chinese, English, French, Russian, Spanish)

Case 9

Abstract published in English: [1995] Model Arbitration Law Quarterly Reports, Vol. 1, issue 1, 95

Text of the court decision published in English: [1995] Model Arbitration Law Quarterly Reports, Vol. 1, issue 1, 98

Case 10

Abstract published in English: [1995] Model Arbitration Law Quarterly Reports, Vol. 1, issue 1, 1

Text of the court decision published in English: [1995] Model Arbitration Law Quarterly Reports, Vol. 1, issue 1, 6

Text of the court decision published in French: [1995] Model Arbitration Law Quarterly Reports, Vol. 1, issue 1, 24

Case 11

Abstract published in English: [1995] Model Arbitration Law Quarterly Reports, Vol. 1, issue 1, 65

Text of the court decision published in English: [1995] Model Arbitration Law Quarterly Reports, Vol. 1, issue 1, 68

Text of the court decision published in French: [1995] Model Arbitration Law Quarterly Reports, Vol. 1, issue 1, 75

Case 12

Abstract published in English: [1995] Model Arbitration Law Quarterly Reports, Vol. 1, issue 1, 43

Text of the court decision published in English: [1995] Model Arbitration Law Quarterly Reports, Vol. 1, issue 1, 47

Text of the court decision published in French: [1995] Model Arbitration Law Quarterly Reports, Vol. 1, issue 1, 56

Case 13

Abstract published in English: [1995] Model Arbitration Law Quarterly Reports, Vol. 1, issue 1, 121

Text of the court decision published in English: [1995] Model Arbitration Law Quarterly Reports, Vol. 1, issue 1, 126

Abstract published in English: [1995] Model Arbitration Law Quarterly Reports, Vol. 1, issue 1, 115

Text of the court decision published in English: [1995] Model Arbitration Law Quarterly Reports, Vol. 1, issue 1, 118

Case 15

Abstract published in English: [1995] Model Arbitration Law Quarterly Reports, Vol. 1, issue 1, 101

Text of the court decision published in English: [1995] Model Arbitration Law Quarterly Reports, Vol. 1, issue 1, 106

Case 16

Abstract published in English: [1995] Model Arbitration Law Quarterly Reports, Vol. 1, issue 2, 11

Text of the court decision published in English: [1995] Model Arbitration Law Quarterly Reports, Vol. 1, issue 1, 16

Case 17

Abstract published in English: [1995] Model Arbitration Law Quarterly Reports, Vol. 1, issue 2, 1

Text of the court decision published in English: [1995] Model Arbitration Law Quarterly Reports, Vol. 1, issue 2, 4

Case 18

Abstract published in English: [1995] Model Arbitration Law Quarterly Reports, Vol. 1, issue 2, 29

Text of the court decision published in English: [1995] Model Arbitration Law Quarterly Reports, Vol. 1, issue 2, 33

Case 19

Abstract published in English: [1995] Model Arbitration Law Quarterly Reports, Vol. 1, issue 2, 79

Text of the court decision published in English: [1995] Model Arbitration Law Quarterly Reports, Vol. 1, issue 2, 82

Case 20

Abstract published in English: [1995] Model Arbitration Law Quarterly Reports, Vol. 1, issue 2, 55

Text of the court decision published in English: [1995] Model Arbitration Law Quarterly Reports, Vol. 1, issue 2, 59

Document A/CN.9/SER.C/ABSTRACTS/2
(Arabic, Chinese, English, French, Russian, Spanish)

Case 28

Abstract published in English: [1996] Model Arbitration Law Quarterly Reports, Vol. 2, issue 1, 9

Text of the court decision published in English: [1996] Model Arbitration Law Quarterly Reports, Vol. 2, issue 1, 13

Case 29

Abstract published in English: [1995] Model Arbitration Law Quarterly Reports, Vol. 1, issue 3, 1

Text of the court decision published in English: [1995] Model Arbitration Law Quarterly Reports, Vol. 1, issue 3, 5

Case 30

Abstract published in English: [1995] Model Arbitration Law Quarterly Reports, Vol. 1, issue 3, 27

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Case 31

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Text of the court decision published in English: [1995] Model Arbitration Law Quarterly Reports, Vol. 1, issue 3, 75

Case 32

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Case 33

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Text of the court decision published in English: [1995] Model Arbitration Law Quarterly Reports, Vol. 1, issue 3, 103

Case 34

Abstract published in English: [1995] Model Arbitration Law Quarterly Reports, Vol. 1, issue 4, 55

Text of the court decision published in English: [1995] Model Arbitration Law Quarterly Reports, Vol. 1, issue 4, 58

Case 35

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Text of the court decision published in English: [1995] Model Arbitration Law Quarterly Reports, Vol. 1, issue 4, 74

Case 36

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Case 37

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Case 38

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Case 39

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Case 40

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Case 41

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Text of the court decision published in English: [1995] Model Arbitration Law Quarterly Reports, Vol. 1, issue 4, 39

Case 42

Abstract published in English: [1995] Model Arbitration Law Quarterly Reports, Vol. 1, issue 3, 49

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Case 43

Abstract published in English: [1995] Model Arbitration Law Quarterly Reports, Vol. 1, issue 4, 13

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Case 44

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Document A/CN.9/SER.C/ABSTRACTS/4
(Arabic, Chinese, English, French, Russian, Spanish)

Case 57

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Case 58

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Text of the court decision published in English: [1996] Model Arbitration Law Quarterly Reports, Vol. 2, issue 1, 43

Case 60

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Case 61

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Case 62

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Text of the court decision published in English: [1996] Model Arbitration Law Quarterly Reports, Vol. 2, issue 2, 4

Case 63

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Case 64

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Case 65

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Case 67

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Case 70

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Case 71

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Case 72

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Case 75

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Case 76

Abstract published in English: [1996] Model Arbitration Law Quarterly Reports, Vol. 2, issue 3, 1

Text of the court decision published in English: [1996] Model Arbitration Law Quarterly Reports, Vol. 2, issue 3, 3

Case 77

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Case 78

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Case 111

Abstract published in English: [1996] Model Arbitration Law Quarterly Reports, Vol. 2, issue 4, 65

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Case 112

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