



General Assembly

GENERAL
DEB.
A/CN.9/SER.C/ABSTRACTS/28

3 March 2000
ORIGINAL: ENGLISH

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). 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 305: CISG 27

Austria: Supreme Court; 1Ob 273/97x

30 June 1998

Original in German

Published in Zeitschrift für Rechtsvergleichung (ZfRVgl) 1998, 249

An Austrian buyer, defendant, ordered ananas from the seller, plaintiff. When the buyer discovered that a portion of the goods was spoiled, it claimed lack of conformity and paid the purchase price partially. The buyer alleged to have immediately notified the seller by fax of the lack of conformity of the goods. However, such fax had been transmitted only the following day. The court had to decide whether the notice of lack of conformity of the goods had been sent by the buyer within the 12 hours period provided by § 17 (2) c COFREUROP, the application of which had been agreed by the parties.

The court remanded the case to the court of first instance, instructing it to make a clear fact finding on the circumstances that had prevented the buyer to effect a timely transmission of the notice of lack of conformity. The court held that although the buyer did not bear the risk of a delay or error in the transmission of the notice as provided by article 27 CISG, the burden of proof that such notice had been timely given, lied with it.

Case 306: CISG 1; 8(1)

Austria: Supreme Court; 2 Ob 163/97b

11 March 1999

Original in German

Published in Zeitschrift für Rechtsvergleichung (ZfRVgl) 1999, 152

A German buyer, plaintiff, ordered frames for mountain bikes from an Austrian seller, defendant. The buyer alleged lack of conformity and claimed the restitution of an advance payment made by it to the seller.

The court determined that the CISG was applicable in accordance with article 1 CISG and remanded the case to the court of appeal, which had applied Austrian domestic law. Referring to various articles of the CISG and focussing on article 8(1) CISG (intent of party making statements or engaging in conduct), the court instructed the court of appeal to make the necessary findings of the facts with respect to the offer and the order of the goods, and to decide the case accordingly.

Case 307: CISG 63(1); 64(1)(b)

Austria: Supreme Court; 6 Ob 187/97m

11 September 1997

Original in German

Published in German [1997] Zeitschrift für Rechtsvergleichung, 245

A German seller, plaintiff, sold carpets to an Austrian buyer, defendant. Upon the buyer's failure to pay the price, the seller declared the contract avoided, and, based on its reserved title on the carpets, claimed the restitution thereof.

The court found that the seller failed to fix an additional period of time for performance by the buyer, before it effectively declared the contract avoided as provided by articles 63(1) and 64(1)(b) CISG. However, the contract was avoided, due to the buyer's implicit agreement to the avoidance of the contract.

Case 308: CISG 1(1)(a); 4; 8; 11; 15(1); 18(1); 25; 26; 29(1); 61; 63; 64

Australia: Federal Court of Australia SG 3076 of 1993 FED No. 275/95

28 April 1995

Roder Zelt- und Hallenkonstruktionen GmbH v. Rosedown Park Pty. Ltd. and Reginald R. Eustace

Original in English

Published in English: http://www.austlii.edu.au/au/cases/cth/federal_ct/unrep7616.html;

<http://www.scaleplus.law.gov.au>

Abstract published in English: [1996] UNILEX;

<http://www.cisg.law.pace.edu/cisg/wais/db/cases2/950428a2.html>

Commented on in English by Ziegel [1999] Review of the Convention on Contracts for the International Sale of Goods, 53

A German seller of large scale tents and marquees, plaintiff, sold tents to an Australian buyer, defendant. Under the contract, the buyer had to pay for the tents by instalments. However, as the buyer was in acute financial difficulty, it fell in arrears with its payments to the seller. Subsequently, it was placed under administration in accordance with the Australian Corporations Law. The seller sued the buyer and the administrator, claiming that it had retained ownership of the tents by virtue of a retention of title clause in the contract with the buyer, and seeking an order for the tents to be returned to it and for damages to be paid.

The court held the CISG to be applicable, as both Germany and Australia had ratified the CISG (1(1)(a) CISG).

The court ruled that the question whether the contract contained a retention of title clause was a question of fact to be determined on the basis of articles 8, 11, 15(1), 18(1) and 29(1) CISG, and that the validity of the retention of title clause had to be determined in accordance with the appropriate domestic law, as the CISG was not concerned with property rights (article 4 CISG). The court further ruled that the contract contained an effective retention of title clause in the seller's favour, which was a valid clause pursuant to the appropriate domestic law.

The court found that the seller was entitled to avoid the contract under articles 61 and 64 CISG due to the appointment of the administrator by the buyer, which constituted a fundamental breach of the contract within the meaning of article 25 CISG. The placement of the buyer in administration resulted in such detriment to the seller as to substantially deprive it of what it was entitled to expect under the contract. In addition, the court found that the administrator, who was by virtue of that position constituted as agent of the buyer, had been asked by the seller to return the tents to it, but the administrator had refused to do so, denying that there was any retention of title agreement in the contract. This also amounted to a fundamental breach of the contract.

The court noted that prior to the administrator's appointment, the buyer was in breach of the contract in that interest payments were overdue. However, the seller had neither demanded payment nor fixed an additional period of time for performance of its obligations by the buyer pursuant to article 63 CISG. Therefore, the court concluded that this breach of contract by the buyer did not constitute a fundamental breach that would justify avoidance of the contract.

The court held that the seller, by filing a statement of claim with it, had satisfied the condition for an effective avoidance of the contract required by article 26 CISG, namely to give notice of avoidance to the other party.

The court determined that the contract included a valid retention of title clause, whereby title to the goods did not pass to the buyer until the purchase price had been paid in full and that the seller was entitled to immediate re-possession of the tents as from the time when the buyer's creditors approved a Deed of Company Arrangement for the restructuring of the buyer's business and the payment of its debts.

Case 309: CISG 1(1)(b); 11; 18(1); 57

Denmark : Østre Landsret

23 April 1998

Elinette Konfektion Trading ApS v. Elodie S.A.

Original in Danish

Published in Danish: [1998] ØLK Ugeskrift for Retsvæsen (UfR), 1092

Commented on in Danish by Hertz and Lookofsky in [1999] B Ugeskrift for Retsvæsen (UfR), 6;

Commented on in English by Lookofsky in [1999] 18 Journal of Law & Commerce, 289

Commented on in French by Midtgaard Fogt [1999] Recueil Dalloz No. 40, 360

A Danish seller, plaintiff, alleged that a French buyer, defendant, had ordered women's clothing from it. The seller sued the buyer for the outstanding purchase price. Denying the existence of an order or a contract with the seller, the buyer contested the jurisdiction of the court.

The first instance court dismissed the case for lack of jurisdiction, and the seller appealed.

Referring to article 57 CISG, the court of appeal noted that it would normally have jurisdiction according to article 5(1) of the European Communities Convention on Jurisdiction and Enforcement of Judgements in Civil and Commercial Matters, which provides that jurisdiction is dependant upon the place of performance of the obligation in question. However, referring to the European Court of Justice's decision in *Effer* (Case 31/18, 4 March 1982), the court held that it would deal with the case

only if there was evidence of the existence of the “constituent elements” of a contract - i.e an offer and an acceptance.

The court held Part II of the CISG to be applicable in accordance with article 1(1)(b) CISG. It held that although Denmark had made a reservation upon ratification, declaring that it would not be bound by Part II of the CISG, the conflict of laws rules expressed in article 3(2) of the 1955 Hague Convention on the Law Applicable to Contracts for the International Sale of Goods led to the application of French law, which after the ratification of the CISG, incorporated the provisions thereof in its entirety.

Referring to article 11 CISG and based on the second clause of article 18(1) CISG, which provides that “silence or inactivity does not in itself amount to acceptance”, the court found that as the parties had no prior business dealings, the buyer’s silence could not be interpreted as an implied acceptance of the offer allegedly made by the seller. Therefore, it determined that it had no jurisdiction to decide the case under the European Communities Convention on Jurisdiction and Enforcement of Judgements in Civil and Commercial Matters, since a key element of the contract (the acceptance) was thus missing.

Case 310: CISG Art. 1(1)(b); 8(1),(2); 29; 35; 38; 39; 45; 49(1)(a); 53

Germany: Oberlandesgericht Düsseldorf; 17 U 136/93

12 March 1993

Original in German

Published in German: <http://www.jura.uni-freiburg.de/ipr1/cisg/urteile/text/182.htm>

Abstract in Italian: [1997] Diritto del Commercio Internazionale, 723

Abstract in English: [1998] Pace Review of the Convention on Contracts for the International Sale of Goods, 119

An Italian seller, plaintiff, delivered clothes to a German buyer, defendant. The buyer claimed lack of conformity of the goods 25 days after the delivery date. The seller recovered the goods for examination and granted a pro forma credit note to the buyer. After examination, the seller denied the lack of conformity and sued the buyer for the purchase price.

The court held that the rules of private international law of Germany led to the application of Italian law. Since the CISG was in force in Italy as of 1 January 1988, even though Germany was not a Contracting State at that time, the CISG was held to be applicable (article 1(1)(b)).

The court upheld the ruling of the first instance court. It held that the seller's claim was justified under article 53 CISG. The contract was not terminated by agreement of the parties as provided by article 29 CISG. Under the circumstances of the case (article 8 (1), (2) CISG), when granting the credit note, the seller had no intention to accept the buyer’s proposed termination. The note was issued pro forma, and there was no reason for the buyer to interpret this as the outcome of the examination of the goods by the seller.

The court found that the buyer was not allowed to declare the avoidance of the contract under articles 49 (1)(a) CISG, 35 CISG, and 45 CISG. It further found that even if there was a lack of conformity of the goods, the buyer had failed to give notice within a reasonable time, as 25 days could

The court held that although the seller recovered the goods for examination, it had not renounced its right to rely on article 39 CISG. In this respect, the court noted that under Section 377 of the German Commercial Code, the seller, by negotiating a settlement with the buyer, does not lose its right to rely on the buyer's failure to give notice of lack of conformity within the required deadline. Only when there are clear circumstances, such as the seller's unconditional acceptance of the restitution of the goods by the buyer, the seller's decision not to rely on such failure, can be assumed. The court held that these considerations should be taken into account when applying the CISG in comparable cases, as a settlement between the parties should remain a possibility in national or in international trade, even in case of the buyer's failure to give a timely notice of lack of conformity.

Case 311: CISG 31; 45; 71; 74

Germany: Oberlandesgericht Köln; 27 U 58/96

8 January 1997

Original in German

Published in German: <http://www.jura.uni-freiburg.de/ipr1/cisg/urteile/text/217.htm>

A Dutch seller, plaintiff, delivered tannery machines "ex works on lorry" to a German buyer, defendant. The seller recovered the tannery machines in order to adjust parts of the equipment, with the promise to return them within an agreed period of time. As the seller did not return the machines within such period of time, the buyer contracted a third party for treating its leather goods. When asked to pay the purchase price, the buyer counterclaimed compensation for its expenses. The seller claimed the right of retention of the machines.

The appellate court held that the first instance court had jurisdiction under article 5(1) of the European Communities Convention on Jurisdiction and Enforcement of Judgements in Civil and Commercial Matters, according to which, jurisdiction is determined at the place where the obligation which is the basis of the claim was, or should have been, performed. The court further held that while the parties stipulated "ex works on lorry" in the contract, they had in fact agreed that the buyer's place of business in Germany would be the place of performance, as the seller delivered the machines at the buyer's business address (article 31 CISG).

The court partially allowed the counterclaim under article 45 CISG and article 74 CISG. It held that the seller was obliged to return the machines in accordance with its agreement with the buyer, as the seller had no right of retention, neither under the seller's general business conditions nor under article 71 CISG. The seller had engaged himself unconditionally to return the tannery machines after adjustment, which meant that the parties had excluded the right of retention. The court held that article 45 CISG applied to any failure of performance by the seller, including lack of performance of secondary obligations. The court ruled that article 74 CISG included also the buyer's reasonable expenses to mitigate the loss, as it was forced to contract a third party due to the seller's failure to return the machines within the agreed period of time.

II. ADDITIONAL INFORMATION

Addendum

Document A/CN.9/SER.C/ABSTRACTS/26
(Arabic, Chinese, English, French, Russian, Spanish)

Case 274

Published in German: [1999] Praxis des Internationalen Privat- und Verfahrensrechts, 456

Commented on in German: Gebauer, [1999] Praxis des Internationalen Privat- und Verfahrensrechts,
432

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