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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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CASES RELATING TO THE UNITED NATIONS SALES CONVENTION (CISG)

Case 409: CISG 3(1); 27, 39(1); 53; 74; 78

Germany: Landgericht Kassel; 110 4158/95

15 February 1996

Original in German

Published in German in [1996] Neue Juristische Wochenschrift Rechtsprechungs-Report 1146

Commented on in German by Gaus in [1996] Wirtschaftsrechtliche Beratung, 208

A German buyer, the defendant, ordered marble coverings through X, a self-employed merchant and broker. X forwarded the order to an Italian seller, the plaintiff, who handed the undamaged coverings over to the first carrier. After reception the buyer found some of the coverings to be defective and informed X about a lack of conformity. X omitted to forward the notice to the seller. The buyer refused to pay the full purchase price and alleged that it was authorized to undertake a deduction of cash discount for payment within 30 days. The seller sued the buyer for the outstanding purchase price.

The Court allowed the claim under article 53 CISG, applying CISG as being part of the applicable German law. The court held that the contract in the case at hand related to the supply of goods to be manufactured or produced and consequently had to be considered sale pursuant to article 3(1) CISG.

As to the deduction of cash discount the court found that this matter concerned the determination of the purchase price. Therefore the seller had to rebut the buyer's allegation but failed to do so. Consequently the buyer's deduction of cash discount was admissible.

The Court stated that the buyer had to prove the seller's reception of the notice about the lack of conformity (article 39(1) CISG). X acted as a self-employed broker and not as a commercial agent of the seller. Therefore he was no appropriate addressee for the notice. Also giving notice to a self-employed broker was not appropriate in the circumstances by virtue to article 27 CISG. For giving notice by means appropriate in the circumstances the buyer had to assure itself about the reliability of X. Thus, the buyer had to indicate to X his function as a messenger and the importance of the notice and had to control the performance of the commission. When failing to do so the buyer took over the risk of non-compliance with the commission.

The Court granted interest under article 78 CISG. It held that under article 74 CISG the buyer was liable for all damages resulting out of the delay of payment including the costs of a bank credit. In the case at hand the seller failed to prove the existence of such costs.

Case 410: CISG 1(1); 1(2); 2; 3(2); 7(2); 53; 55; 57(1)(a); 57(1)(b); 58; 59; 62; 74; 77; 78; 79

Germany: Landgericht Alsfeld; 31 C 534/94

12 May 1995

Original in German

Published in German in [1996] Neue Juristische Wochenschrift Rechtsprechungs-Report, 120; [1995]

Die Deutsche Rechtsprechung auf dem Gebiete des internationalen Privatrechts, 38

A German buyer, the defendant, ordered through X, a self-employed sales agent, flagstones from an Italian seller, the plaintiff. The seller sent an invoice. X handed the stones over to the buyer and reduced the purchase price mentioned in the invoice. The buyer wrote out a cheque for X as recipient. Subsequently the cheque was cashed but the seller never received the purchase price. After sending a reminder through its Italian advocate the seller sued the buyer for the purchase price and for the expenses of the reminder. The buyer argued that it had paid the purchase price as reduced by X.

The Court held the CISG to be applicable by virtue of article 1(1) CISG because the parties had their places of business in different Contracting States and the exclusions of the articles 1(2) and 2 CISG did not apply.

The Court held the claim to be justified under article 53 CISG. It found that CISG did not rule the

question of agency. Pursuant to Article 7(2) CISG the issue of agency was governed by German law applicable under the rules of international private law of the forum. According to German law, X had no representative authority for the seller. Consequently its reduction of the purchase price was ineffective.

The Court held that the buyer had not fulfilled its obligation to pay the purchase price. Neither did the buyer pay the purchase price to the seller at the seller's place of business (article 57(1)(a) CISG) nor did it pay the purchase price to the seller at the place where the handing over of the stones took place (article 57(1)(a) CISG). However, as the seller never received the purchase price, handing over the cheque to X did not amount to payment. If the buyer commissioned X to transmit the purchase price to the seller, it had to bear the risk of this transmission (article 79 CISG). Also X was no authorized collecting agent of the seller. As the buyer wrote out a cheque for X as recipient, it had to bear the risk for X cashing the cheque without handing over the purchase price to the seller (article 79 CISG).

Concerning the costs for the reminder the Court dismissed the claim. It held that the seller had the possibility to entrust a German [advocate] with sending the reminder. When entrusting an Italian lawyer the seller failed to take measures to mitigate the loss by virtue to article 77 CISG.

The Court granted interest under article 78 CISG from the due date of the purchase price (articles 58 and 59 CISG). The court determined the rate of interest under Italian law applicable under the rules of German international private law (article 7 CISG). The court refused to grant a higher rate of interest under the articles 62 and 74 CISG because the seller failed to prove the recourse to bank credit.

Case 411: CISG 39; 53; 78

Germany: Landgericht Bochum; 13 0 142/95

24 January 1996

Original in German

Published in German in [1996] Forum International, 92

Commented on in English by Sölla, [1996] Forum International, 93

Commented on in German by Sölla, [1996] Forum International, 94

An Italian wholesale distributor for food, the plaintiff, delivered truffle to a German buyer, the defendant. After examination the buyer gave notice to X, an employee of the seller, that the truffle were too soft. X declared that it was not authorised to receive complaints but that it will forward the notice. The buyer also returned the final account by fax mentioning that it objected to the quality of the goods. Later, maggots appeared in the truffle. The buyer held the first notice to be sufficient. The seller sued the buyer for the purchase price.

The Court allowed the claim under article 53 CISG. It found that the buyer's notice had not met the requirements of article 39 CISG. As regards to specification of the nature of the lack giving notice that the truffle were soft was held as being too general. Moreover the buyer failed to address its notice to the appropriate person. X was employed as sales-person and as such not authorised to receive complaints. Therefore X acted as messenger to forward the notice to the seller. The buyer failed to prove that X forwarded the notice as promised.

As to the appearance of maggots, the Court found that the buyer had to give further notice because the lack was not covered by the first notice.

The Court granted interest under article 78 CISG.

Case 412: CISG [1(1)]

United States: U.S. [Federal] District Court for the Central District of California; No. EDCV 01-130-RT (SGL)
1 May 2001

China National Metal Products Import/Export Company v. Apex Digital, Inc.

Published in English: 2001 WL 487720

A Chinese seller, plaintiff, agreed to sell digital versatile disk (DVD) players to an U.S. buyer,

defendant. Many of the players were returned to the buyer by its customers because of defects. Under threat of litigation from its customers, the buyer withheld payment for the last shipments received. The parties submitted their dispute to arbitration in China. The seller filed a motion with a U.S. court seeking an order recognizing its right to attach property in support of the arbitral proceeding. In its pleadings, the seller assumed that California state law applied to the sales contract.

Applying California state sales law, the court concluded that the seller had a *Aprobable validity*® of success on the merits of its claim and therefore issued an order recognizing the seller's right to attach buyer's property in support of the arbitral proceeding. In response to the buyer's argument that the CISG applied and that the seller had not shown probable success under the CISG, the Court noted that the argument was made only after the buyer had argued the case as if it was governed by California law. The Court also said that it was bound to apply California state law unless a party offered evidence of foreign law, such as Chinese law or the CISG, or demonstrated how the foreign law would apply. The Court did not note that, under the federal constitution, the CISG, as a treaty duly ratified by the United States, is *Asupreme law*® that binds California courts.

Case 413: CISG 1(1)(a), 7(2), 8(3), 9(1), 11, 19

United States: U.S. [Federal] District Court for the Southern District of New York; No. 96 Civ. 8052(HB)(THK)
6 April 1998

Calzaturificio Claudia S.n.c. v. Olivieri Footwear Ltd.

Published in English: 1998 WL 164824, 1998 U.S. Dist. LEXIS 4586,

<http://cisgw3.law.pace.edu/cases/980406u1.html>

An Italian manufacturer of shoes, plaintiff, alleged that a buyer located in the United States, defendant, had agreed to purchase shoes but had failed to pay the price for four lots duly delivered *ex works*. The plaintiff brought a court action for the price of these shoes and moved for summary judgment. The buyer responded that plaintiff was not entitled to summary judgment because there were material facts in dispute. The buyer denied that there was a contractual relationship, that it had agreed to delivery "*ex works*," and that it had received the goods at issue. It also counterclaimed for damages on the ground that any goods it had received were either delivered late or nonconforming.

The issue before the Court was what evidence it could consider when acting on a motion for summary judgment.

Recognizing that the CISG differs from domestic U.S. law rules on the need for a writing and the evidentiary weight to be given written terms, the Court stated that it could consider evidence of statements made during negotiations, article 8(3) CISG, and that the parties are bound by any usage to which they agreed and any practices between themselves which they have established, article 9(1) CISG. The Court concluded that material facts were in dispute as to all matters denied by the defendant and the court therefore did not grant summary judgment for the plaintiff.

Case 414: CISG 8(3), 11

United States: U.S. [Federal] District Court for the Southern District of New York; No. 98 CIV. 7728(NRB)
8 August 2000

Fercus, S.r.l. v. Palazzo

Published in English: 2000 WL 1118925; 2000 U.S. Dist. LEXIS 11086;

<http://cisgw3.law.pace.edu/cases/000808u1.html>

An Italian manufacturer of shoes, plaintiff, concluded an exclusive distribution agreement with a U.S. corporation (*Afirst U.S. corporation*®) for distribution of the plaintiff's shoes in the United States and Canada. The plaintiff also concluded an oral agreement with a second U.S. corporation (*Asecond U.S. corporation*®) affiliated to the first corporation under which agreement the affiliate would purchase shoes and resell them to retailers in the United States.

The first U.S. corporation negotiated a contract of sale with a U.S. retailer, defendant. The plaintiff manufactured the shoes, delivered them to the second U.S. corporation, and sent an invoice directly to the defendant. The only written sales contract, however, was entered into after delivery to the second U.S. corporation and showed the parties as the second U.S. corporation and defendant. (The second U.S. corporation subsequently assigned the contract to the first U.S. corporation.) The plaintiff sent instructions to the first U.S. corporation on how payment was to be made. Contrary to the instructions it had received from the plaintiff, the first U.S. corporation directed the defendant to make payment to the first corporation's financier, which had purchased its receivables. The defendant paid this financier and the plaintiff received no payment for the shoes. The plaintiff sued the defendant for the price of the shoes and the defendant moved for summary judgment.

The issue before the court was whether the defendant was entitled to summary judgment.

The Court held that the plaintiff and the defendant had not entered into a contract of sale. The Court noted that the CISG did not require a written contract and that evidence of the parties' negotiations, if any, could be considered. If the first U.S. corporation acted as an agent within its authority, then it was authorized to direct how payment was to be made and to enter into the agreement amending the terms of the plaintiff's invoice. If, on the other hand, the first U.S. corporation was not acting within its authority then the only contract was between the second U.S. corporation and the defendant. The Court therefore granted the defendant summary judgment.

Case 415: CISG [18(3)]

United States: U.S. [Federal] District Court for the Southern District of New York; No. 95 Civ. 10506(DLC); reversed, U.S. [Federal] Court of Appeals for the Second Circuit; No. 97-9436

6 August 1997; reversed, 29 July 1999

Kahn Lucas Lancaster, Inc. v. Lark International Ltd.

Published in English: 1997 WL 458785; 1997 U.S. Dist. LEXIS 11916;

<http://cisgw3.law.pace.edu/cases/970811u1.html>; reversed, 186 Federal Reporter 3d series 210, 1999 U.S. App. LEXIS 17877

A U.S. corporation engaged in the children's clothing business, plaintiff, sent two purchase orders to a Hong Kong corporation, defendant, that acted as agent in Asia for U.S. buyers. The purchase orders were for finished fleece clothing to be acquired from manufacturers in the Philippines. The purchase orders indicated that the defendant was the seller and none of the manufacturers' names appeared on the orders, but the word "agent" also appeared next to the defendant's name. Payment was to be made by letters of credit naming the defendant as beneficiary. The purchase orders included clauses submitting disputes between the parties to arbitration and designating New York law as the applicable law.

The defendant assisted plaintiff in dealing with manufacturers, inspected the clothing before shipment, and arranged shipping to the United States. The plaintiff alleged, however, that some of the delivered goods were nonconforming and many were delivered late or not delivered at all. The plaintiff brought a court action seeking an order to compel arbitration of its claim.

The issue before the Court was whether the parties had entered into an enforceable arbitration agreement.

The defendant argued that it had not agreed to arbitrate because it was acting merely as agent for the plaintiff in contracts of sale between the plaintiff and the manufacturers. The district court found, however, that the defendant acted as seller. The court held that the purchase orders were offers that the defendant accepted by performing in accordance with the orders. The court cited contract formation provisions of U.S. domestic law but indicated in a footnote that the result would be the same under the CISG if it were applicable. The District Court ordered the parties to arbitrate.

On appeal, the Court of Appeal reversed on the ground that article II (2) of the United Nations Convention on the Recognition and Enforcement of Foreign Arbitral Awards required that defendant sign the agreement to arbitrate and the defendant had not done so.

Case 416: CISG [4]

United States: Minnesota State District Court for the County of Hennepin; CT 98-013101; affirmed, Minnesota Court of Appeals; C7-99-770

9 March 1999; affirmed, 14 December 1999

KSTP-FM, LLC v. Specialized Communications, Inc. and Adtronics Signs, Ltd.

Published in English: <http://cisgw3.law.pace.edu/cases/990309u1.html>

A U.S. buyer, plaintiff, bought music board systems and electronic displays from a U.S. seller, first defendant. To fulfill this sales contract the U.S. seller bought some of the items from a Canadian supplier, second defendant. The supplier sent these items directly to the plaintiff. The items did not work satisfactorily and the supplier attempted unsuccessfully to fix the items it supplied. The plaintiff brought a court action for breach of contract against both the first and second defendants. The plaintiff's claim against the Canadian supplier was for breach of an express or implied representation made by the supplier to the buyer's seller.

The District Court ordered the plaintiff to submit its claim against the first defendant to arbitration in accordance with an arbitration agreement in the sales contract. As for the plaintiff's claim against the second defendant, the District Court held that the CISG governed the relationship between the plaintiff and the second defendant but dismissed the claim because the CISG does not contain provisions with respect to the rights of parties that are not in contractual privity.

On appeal, the State Court of Appeals affirmed dismissal of the plaintiff's action against the second defendant on the ground that the state courts did not have personal jurisdiction over the second defendant. The Appellate court did not address the reasoning of the District Court.

Case 417: CISG 8, 14(1), 19, 25, 28, 46, 72

United States: U.S. [Federal] District Court for the Northern District of Illinois; No. 99 C 5153

7 December 1999

Magellan International Corp. v. Salzgitter Handel GmbH

Published in English: 76 Federal Supplement, 2d series 919; 1999 U.S. Dist. LEXIS 18855; 40 UCC Reporting Service (Callaghan), 2d series 321; <http://cisgw3.law.pace.edu/cases/991207u1.html>

An Illinois distributor of steel products, plaintiff, negotiated with a steel trader with headquarters in Germany and a sales office in Illinois, defendant, to purchase steel to be manufactured in the Ukraine to the plaintiff's specifications. When purportedly accepting plaintiff's offer, the defendant appended general conditions to its order confirmations that differed from plaintiff's conditions with respect to vessel loading conditions, dispute resolution and choice of law. The parties continued to negotiate until plaintiff, under pressure from the defendant, agreed to the contract and arranged to have a letter of credit issued naming the defendant as beneficiary. Each party subsequently sought amendments but they were unable to agree on any change. Defendant therefore stated that unless the letter of credit was amended it would "no longer feel obligated" to perform and would "sell the material elsewhere." Plaintiff thereupon canceled the letter of credit and defendant sought to sell the steel to other buyers.

The plaintiff brought this legal action (1) to recover damages for the defendant's alleged anticipatory repudiation of the contract, and (2) to obtain a court order directing the defendant to deliver the steel to the plaintiff. The defendant moved to dismiss the complaint for failure to state legally sufficient claims.

The issue before the Court was whether the buyer's pleadings stated legally sufficient claims so that the case should proceed to trial.

The Court found that the complaint sufficiently stated facts from which it could be found at trial that there was a contract, that plaintiff was prepared to perform, that there had been anticipatory repudiation by the defendant, and that the plaintiff had been damaged by the repudiation. The Court also found that the complaint stated sufficient facts to justify an order of specific performance under article 46(1) CISG and domestic law, which the Court found to be relevant by virtue of article 28 CISG. The Court therefore refused to dismiss the action but it noted that plaintiff would still have to prove the facts at trial.

Case 418: CISG 7, 25, 35, 49

United States: U.S. [Federal] District Court for the Eastern District of Louisiana; Civil Action No. 99-0380
Section AK@ (1)

17 May 1999

Medical Marketing International, Inc. v. Internazionale Medico Scientifica, S.r.l.

Published in English: 1999 WL 311945; 1999 U.S. Dist. LEXIS 7380;

<http://cisgw3.law.pace.edu/cases/990517u1.html>

An Italian manufacturer of radiology materials, defendant, granted to a Louisiana marketing corporation, plaintiff, exclusive marketing rights in the United States for certain mammography units. A dispute arose as to which party bore the burden of complying with U.S. governmental safety standards. The dispute was submitted to arbitration and the arbitrators awarded damages to the plaintiff because the defendant had delivered units that failed to comply with U.S. safety standards.

The plaintiff sought judicial confirmation of the award under the Federal Arbitration Act rather than under the United Nations Convention on the Recognition and Enforcement of Foreign Arbitral Awards. The defendant challenged the award on the grounds that the arbitrators had exceeded their authority by their manifest disregard of international sales law.⁶ Specifically, the defendant argued that the arbitrators misapplied the CISG and had refused to follow a German Supreme Court case interpreting the CISG (CLOUT Case 123).

The issue before the Court was whether to confirm an arbitral award that allegedly misapplied the CISG.

The Court noted that the arbitrators had carefully considered the German case and had concluded that the situation before them fit within an exception recognized by the German Supreme Court. The Court therefore held that the arbitrators had not exceeded their authority and confirmed the arbitral award.

Case 419: CISG 8, 11, 35, 36, [92]

United States: U.S. [Federal] District Court for the Northern District of Illinois; No. 97 C 5668

27 October 1998

Mitchell Aircraft Spares, Inc. v. European Aircraft Service AB

Published in English: 23 Federal Supplement, 2d series 915; 1998 U.S. Dist. LEXIS 17030;

<http://cisgw3.law.pace.edu/cases/981027u1.html>

A U.S. broker in the market for surplus commercial aircraft parts, plaintiff, purchased three integrated drive generators from a Swedish dealer in aircraft parts, defendant. There was a dispute between the parties as to whether the seller had represented that the units were part number 729640. The two parties disputed the substance of the communications between them during negotiations. The buyer brought a legal action to recover damages for breach of the alleged representation. Each party moved for summary judgment.

The issue before the Court was whether either the seller or the buyer was entitled to summary judgment in an action brought by the buyer to recover damages for breach of a sales contract.

Although the Court confirmed its earlier order that the CISG applied generally to the contract between the parties, the Court modified its order to apply Illinois state law to contract formation issues because Sweden had declared that it was not a party to Part II of the CISG. Relying, nevertheless, on article 8(3) CISG, the Court considered evidence of statements made during negotiations when determining whether there was a material dispute as to the terms of the contract.

The Court concluded that there were unresolved issues of material fact that precluded it from granting either of the motions for summary judgment.

Case 420: CISG [1(1)], [14(1)]

United States: U.S. [Federal] District Court for the Eastern District of Pennsylvania; Civil Action No. 99-6384
29 August 2000

Viva Vino Import Corporation v. Farnese Vini S.r.l.

Published in English: 2000 WL 1224903; 2000 U.S. Dist. LEXIS 12347

A U.S. corporation, plaintiff, and an Italian company, defendant, entered into three agreements: an exclusive distributorship agreement under which plaintiff was to distribute defendant's wines in the United States; a sales commission agreement; and an agreement by which the defendant granted the plaintiff a 25% interest in the business. There was a falling out between the parties before they performed these contracts and plaintiff sued defendant for breach of contract, promissory estoppel, unjust enrichment, and tortious interference with business relations. The defendant counterclaimed for breach of contract.

The issue before the Court was what law governed the issues set out in plaintiff's complaint.

The Court held that the CISG did not apply to the distributorship agreement because that agreement did not provide for the sale of a specified quantity of goods at a stated price. The Court also noted that the CISG does not govern the non-contractual claims.

* * *