United Nations A/CN.9/SER.C/ABSTRACTS/37

General Assembly

Distr.: General
27 May 2003

Original: English

UNITED NATIONS COMMISSION ON INTERNATIONAL TRADE LAW

CASE LAW ON UNCITRAL TEXTS (CLOUT)

Contents

V.03-84628 (E)

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 UNCITRAL website (http://www.uncitral.org).

Issues 37 and 38 of CLOUT introduce several new features. First, the table of contents on the first page lists the full citations to each case contained in this set of abstracts, along with the individual articles of each text which are interpreted by the court or arbitral tribunal. Second, the Internet address (URL) of the full text of the decisions in their original language are 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 by the United Nations or by UNCITRAL of that website; furthermore, websites change frequently; all Internet addresses contained in this document are functional as of the date of submission of this document). Third, abstracts on cases interpreting the UNCITRAL Model Arbitration Law now 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, and in the forthcoming UNCITRAL Digest on the UNCITRAL Model Law on International Commercial Arbitration. Finally, comprehensive indices are included at the end, to facilitate research by CLOUT citation, jurisdiction, article number, and (in the case of the Model Arbitration Law) keyword.

Abstracts have been prepared by National Correspondents designated by their Governments, or by individual contributors. It should be noted that neither the National Correspondents nor anyone else directly or indirectly involved in the operation of the system assumes any responsibility for any error or omission or other deficiency.

———————

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

Case 421: CISG 57
Austria: Oberster Gerichtshof, 7 Ob 336/97f
10 March 1998
Original in German
Unpublished
http://www.cisg.at/7_33697f.htm (German language text)
Abstract prepared by Martin Adensamer, National Correspondent

The plaintiff (seller) has its place of business in Switzerland, the defendant in Austria. In their contract the parties designated Amsterdam as place of payment but later they agreed to terminate the contract. The buyer asserted a claim for reimbursement of payments made in advance.

The main issue before the Supreme Court was jurisdiction. The trial court applied article 57 CISG to determine the place of performance of the obligation (restitution of advance payments) for purposes of asserting jurisdiction under Art. 5(1) of the Lugano Convention. The Supreme Court reversed, concluding that article 57 CISG applies to the purchase price only, and that the relevant place for other payments, such as the return of advance payments is a matter of domestic law.

Case 422: CISG 7(2), 29, 81, 82, 83, 84
Austria: Oberster Gerichtshof, 1 Ob 74/99k
29 June 1999
Original in German
Published in German: *Zeitschrift für Rechtsvergleichung* (ZfRV) 2000, 33
http://www.jura.uni-freiburg.de/ipr1/cisg/urteile/text/483.htm (German language text)
http://cisgw3.law.pace.edu/cases/990629a3.html (English translation)
Abstract prepared by Martin Adensamer, National Correspondent

In the course of an ongoing business relationship, a German seller, the plaintiff, delivered wall panels which had been prepared by drilling and shaping to a construction site for the Austrian buyer. In October 1992, unprepared panels were delivered. It was agreed that these panels should be returned, consequently the defendant contracted with a carrier for return shipment. The day after the plaintiff acknowledged receipt without reservation it was found that the panels were severely damaged. The plaintiff sought compensation.

The Supreme Court stated that under the CISG the delivery of goods different from those ordered is to be seen as delivery of non-conforming goods regardless of the extent of the non-conformity. The Court noted that there is no requirement as to the form of termination of the contract and therefore pursuant to article 29 CISG the parties agreed on termination of the contract. The Court stated that under article 7(2) CISG, in the absence of a contractual provision on the effect of termination of the contract, the gap is to be filled by applying article 81 CISG *et seq*. As of the time of the avoidance, the parties are released from their mutual obligations. Nevertheless they are bound to return what they have received under the contract (article 81 CISG). The Court observed that articles 81 through 84 CISG on the allocation of the risk in the context of avoidance of the contract supersedes where applicable the general risk allocation rules of articles 66 to 70.

The Court noted that there is no provision in the CISG regarding the place where the goods have to be returned, and the provision in the contract regarding the place of delivery must apply to the return as well. The defendant's obligation was only to care for the return of the goods. Under article 82 CISG, the risk for any deterioration of the goods also lies with the seller unless it is caused by an act or omission of the buyer. The Court stated that the reason for allocating the risk of loss to the seller arising from the return of defective goods under article 82 CISG is justified because the risk of such loss arose due to the asserted failure of the seller to deliver conforming goods. The Court concluded that the seller's claim to compensation for damage to the returned goods failed because the seller did not prove that such damage was due to the acts or omissions of the buyer.

Case 423: CISG 38, 39(1)
Austria: Oberster Gerichtshof, 10 Ob 223/99x
27 August 1999
Original in German
Published in German: *Zeitschrift für Rechtsvergleichung* (ZfRV) 2000, 31; *Recht der Wirtschaft* (RdW) 2000/10.
http://www.cisg.at/1_22399x.htm (German language text)
http://cisgw3.law.pace.edu/cases/990827a3.html (English translation)
Abstract prepared by Sonja Niederberger

The Italian plaintiff (seller) sold to the Austrian defendant (buyer) hiking shoes which were resold and directly delivered to a Scandinavian enterprise. About three weeks after the last partial delivery, the buyer informed the seller of defects which had not been detectable upon initial inspection. The seller refused to take back the shoes and demanded payment of the price. The buyer asserted that due to the failure of the seller to deliver goods in conformity with the contract it had suffered loss of profit and asserted its right to set-off its damages.

The court of first instance dismissed the claim. The Court of Appeal set aside the judgement and remanded the case to the court of first instance. The Supreme Court confirmed the decision of the court of appeal. It found that according to article 38(1) CISG the buyer must examine the goods within a short period. This time frame varies according to the circumstances, e.g. the size of the firm of the buyer, the kind of goods and their complexity. Each partial delivery has to be examined separately. The Court stated that normally, in the absence of special circumstances the buyer should notify the seller of any lack of conformity pursuant to article 39(1) CISG within about 14 days from delivery.

Under the facts, the Supreme Court found no reason to extend this time-limit, particularly given that the shoes were seasonal goods and the seller's need to sell them during the season must be considered. Thus the notice was delayed and the buyer lost the right to rely on the lack of conformity, unless the defects could not be discovered by an examination pursuant to normal business practice. The Court found that in the absence of any applicable business practice the goods must be examined thoroughly and in a professional manner. The Court noted that in any case the burden of proof regarding notification of non-conformity in due form and time lies with the buyer.

As the findings of the court of first instance were not sufficient to assess whether the mere visual inspection of the delivered shoes was in line with the relevant business practices and whether the notification was in time or not, the case was remanded to the court of first instance.

Case 424: CISG 19(1), 75
Austria: Oberster Gerichtshof, 6 Ob 311/99z
9 March 2000
Original in German
Published in German: *Zeitschrift für Rechtsvergleichung* (ZfRV) 2000, 152
http://www.cisg.at/6_31199z.htm (German language text)
http://cisgw3.law.pace.edu/cases/000309a3.html (English translation)
Abstract prepared by Martin Adensamer, National Correspondent

The Austrian buyer ordered goods from the German seller. The buyer paid 28 Austrian shillings (ATS) per kg according to a general agreement while the seller sought 40 ATS per kg. The seller claims the unpaid balance of the price.

Because the seller had not accepted the buyer's order at 28 ATS but offered the goods for 40 ATS which the buyer subsequently accepted, the Supreme Court found that the contract was concluded on the basis of 40 ATS. The reply of the seller at the higher price was a counter-offer under article 19(1) CISG because it materially altered the terms of the buyer's order.

The Supreme Court rejected the buyer's argument that the contract had to be adapted to the conditions of the general agreement on the ground that the seller had acted in bad faith, knowing that the buyer urgently needed the material. The Court found that the buyer possibly could claim damages for the breach of the general agreement but had no right to an adaption of the actual contract. The Court also found that, as the buyer never declared the contract avoided, the buyer could not claim possible damages on the basis of article 75 CISG but should take into account that the contract remained valid. Since the buyer did not claim damages, it was irrelevant whether the seller knew of the buyer's urgent need of the goods.

Case 425: CISG 4(a), 9, 39(1)
Austria: Oberster Gerichtshof 10 Ob 344/99g
21 March 2000
Original in German
Published in German: *Zeitschrift für Rechtsvergleichung* (ZfRV) 2000, 185; *ecolex* 2000/306; *Internationales Handelsrecht* (IHR) 2001, 40.
http://www.cisg.at/10_34499g.htm (German language text)
Abstract prepared by Sonja Niederberger

The German plaintiff (seller) sold wood to the Austrian defendant (buyer). The seller contended that the "Tegernseer Gebräuche" (regional trade usages) were applicable to the sales contract.

The court of first instance found that the "Tegernseer Gebräuche" are terms of contract commonly used for sales contracts on wood between German and Austrian parties and were thus applicable according to article 9(2) CISG.

Both the Court of Appeal and the Supreme Court confirmed this decision. The Supreme Court found that article 9 CISG is a provision on the applicability of a usage but not on its validity. While article 9(2) assumes that the parties wish to be bound by usages of international trade, under article 9(1) the usages the parties have agreed upon expressly or impliedly need not be international usages. In the sense of article 9(2) a usage is widely known and regularly observed when it is recognized by the majority of persons doing business in the same field. To be applicable such usages must be known or at least should have been known by the parties having their place of business in the area of the usages. The Supreme Court affirmed the findings of the court of first instance, noting

that since the plaintiff in its acceptance of the order expressly stated the applicability of the "Tegernseer Gebräuche" and had delivered wood to the defendant before, the defendant must have known these usages.

The Supreme Court further stated that pursuant to article 39(1) CISG the goods are presumed to be accepted if the buyer does not give notice of a lack of conformity within a reasonable period of time, specifying the nature of the lack of conformity; this rule does not only apply in cases where the goods are deficient but also where the seller delivers goods other than those ordered by the buyer.

Case 426: CISG 35; 45
Austria: Oberster Gerichtshof, 2 Ob 100/00w
13 April 2000
Original in German
Published in German: *Recht der Wirtschaft* (RdW) 2000/506; *Zeitschrift für Rechtsvergleichung* (ZfRV) 2000/84; *Österreichische Richterzeitung Entscheidungsübersicht* (RZ-EÜ) 2000/24, *IPrax* 2001, 149
http://www.cisg.at/2_10000w.htm (German language text)
http://cisgw3.law.pace.edu/cases/000413a3.html (English translation)
Abstract prepared by Christian Mosser

The German plaintiff (seller) sold four used machines to the Austrian defendant (buyer), who had long-standing business connections with the seller. In past dealings, machines delivered to the buyer had not carried the European Community "CE" mark, indicating that the product conformed to applicable European Community directives. This time, the buyer refused to pay the rest of the purchase price on the ground that the four machines, of which one presumably had been imported from the Czech Republic or Slovakia, lacked this certification.

The court of first instance found that all four machines should have been certified. Pursuant to EC Directive 89/392 in conjunction with the German law on machinery, the CE-marking was compulsory not only for machines imported from outside the European Economic Area (EEA), but also for machines which had been significantly changed (based on the court's finding, the handling systems had been removed from the machines concerned). The buyer had been assured of being able to sell the machines on the market within the EEA. The court found that since this condition had not been fulfilled by the seller and the buyer gave notice regarding the lack of conformity with the contract without delay, the buyer was entitled to retain the price.

In remanding the case to the court of first instance, the Court of Appeal stated that the court of first instance should consider the legal issues arising under the CISG, and the security and certification standards on the basis of Austrian law, and make the relevant findings.

The Supreme Court affirmed the decision of the Court of Appeal regarding the application of the CISG. The Court noted, that under article 35 CISG, the seller must deliver goods which are of the quantity, quality and description required by the contract and which are contained or packaged in the manner required by the contract. Where the contract does not specify these conditions the standards of article 35(2) CISG become relevant. Whether the goods are fit for the purposes for which the goods of the same description would ordinarily be used is to be decided on the basis of the standards in the country of the seller; the goods need not meet the security, certification and production standards of the importing country. Consequently, the seller was not obliged to follow these legal standards, even though the seller was aware of the place of delivery. It was up to the buyer to consider these requirements and to incorporate them into the contract on the ground of article 35(1) or 35(2)(b) CISG. The Court stated that requirements which apply in the Contracting State of the buyer were to be taken into consideration only if they also exist in the Contracting State of the seller, or have been agreed upon by the parties or made known to the seller according to article 35(2)(b) CISG. Therefore, the Supreme Court directed the court

of first instance to determine which security provisions and standards had to be applied and whether the machines complied with such provisions.

Case 427: CISG 63(1); 64(1)(b); 74; 75; 76
Austria: Oberster Gerichtshof, 1 Ob 292/99v
28 April 2000
Original in German
Published in German: *Recht der Wirtschaft* (RdW) 2000, 643; *Zeitschrift für Rechtsvergleichung* (ZfRV) 2000, 80; *Österreichische Juristenzeitung* (ÖJZ) 2000, 167 (EvBl)
http://www.cisg.at/1_29299v.htm (German language text)
http://cisgw3.law.pace.edu/cases/000428a3.html (English translation)
Abstract prepared by Christian Mosser

The German plaintiff (seller) sold jewelry to two Austrian defendants (buyers) based on several orders which explicitly contained a clause whereby the purchase price should be paid in advance. After three reminders the seller in a letter eventually fixed an additional period of time for payment by the buyer, stating that after the expiration of that period he would refuse to accept any payment and consequently claim damages or declare the contract avoided. The buyers refused to pay the price in advance asserting that the parties had agreed on payment after delivery. The seller suffered loss of profit and claimed damages for breach of contract.

The court ordered the buyers to pay damages pursuant to Section 326 of the German Civil Code. The Court of Appeal affirmed that decision but held that the CISG was applicable since the parties had not excluded its application. The clause in the seller's general terms and conditions of business, making German law exclusively applicable, was not found to have excluded the CISG, because that clause did not refer to German domestic law only. Even though the plaintiff based his conditional declaration of avoidance on Section 326 of the German Civil Code (BGB), it was valid under articles 63 and 64 CISG as well. The declaration of avoidance was held to be timely even though it was only raised during the course of the proceedings.

The Supreme Court affirmed the decision of the Court of Appeal and highlighted that, while a declaration under article 64 CISG on the avoidance of the contract is not subject to any form requirements or time limits, it should leave no doubts as to the avoidance of the contract. Insofar as the wording of the seller's letter on the avoidance of the contract may have left doubt about the status of the contract, the subsequent lawsuit was found to have replaced the declaration of avoidance. Under article 74 CISG, damages for breach of contract by one party consist of a sum equal to the loss, including loss of profit, suffered by the other party as a consequence of the breach. Such damages are limited to the loss which the party in breach had foreseen or should have foreseen at the time when the contract was concluded. In this case the buyers could foresee the loss of profit suffered by the seller.

To calculate the damages, the seller could choose between article 75 (substitute transaction) and article 76 CISG (current price). But neither article 75 nor article 76 prevent the seller from claiming damages under article 74 even if the contract is avoided. The Court stated that, if the party to the contract claiming damages regularly concludes similar transactions, the current price calculation under article 76 CISG is excluded only if this party fixes one of these transactions as the benchmark of current price.

Case 428: CISG 4(a)
Austria: Oberster Gerichtshof, 8 Ob 22/00v
7 September 2000
Original in German
Published in German: *Zeitschrift für Rechtsvergleichung* (ZfRV) 2001, 70
http://www.cisg.at/8_2200v.htm (German language text)
Abstract prepared by Martin Adensamer, National Correspondent

The German plaintiff (seller) delivered "labrador dark" gravestones to the Austrian defendant (buyer). Two weeks after delivery, the buyer discovered a defect in the material (white lines). One of the stones was sent to Germany for examination. Some of the other stones finally were used for the construction of a tomb. According to the conditions for delivery which had been accepted by the defendant, the buyer had no right to retain the price even if the goods were non-conforming. The buyer finally declared the contract avoided.

The Supreme Court found that the right to retain the price was validly excluded under the conditions of delivery which have been accepted by the buyer and that, therefore, it was not relevant whether the buyer could validly declare the contract avoided.

The Court also found that the validity of agreements that amend the rights of the buyer according to article 4(a) CISG is to be seen in the light of the applicable national law and is not subject to the Convention. Only provisions of national law which are contrary to the basic policy of the Convention are to be disregarded. The rule of German law allowing businesspeople to agree on an exclusion of the right to retain the price does not undermine the basic policy of the Convention. The right, however, to declare the avoidance of the contract as a last resort of the buyer normally must be granted. If this right is restricted, the contracting party at least must have the right to damages.

The Court stated that the question of whether the contract can be avoided arises only when the buyer has paid the price and the seller fails to cure the non-conformity or deliver substitute goods.

Case 429: CISG 6; 8; 14; 18
Germany: Oberlandesgericht Frankfurt a. M.; 9 U 13/00
30 August 2000
Original in German
Published in German: *Recht der Internationalen Wirtschaft* (RIW) 2001, 383
http://www.cisg.law.pace.edu/cisg/text/000830g1german.html (German language text)
http://cisgw3.law.pace.edu/cases/000830g1.html (English translation)
Abstract prepared by Rudolf Hennecke

The decision deals with the prerequisites of contract formation as well as the exclusion of CISG by means of a choice-of-law clause.

The defendant, a German textile wholesaler, ordered five containers of textile yarn from an Indian manufacturer. The Indian manufacturer asked its Swiss subsidiary, the plaintiff in these proceedings, to issue an invoice for the goods. The plaintiff sent the invoice to the defendant, pointing out that it had been requested to do so by its Indian parent company, and demanded that a promissory note be issued by the defendant to secure payment of the contract price. The defendant issued a promissory note in favour of the Indian parent company. The plaintiff requested the issuing of a new, extended promissory note, which should, inter alia, be made out in its, plaintiff's, favour. Even though the defendant failed to comply, the goods were delivered. The plaintiff subsequently claimed the contract price for the goods from the defendant.

The Court first ruled that the applicability of CISG had not been excluded by a choice-of-law clause in the plaintiff's invoice, which stipulated that all transactions were "subject to Swiss law". Since the CISG was part of Swiss law, such a clause could not lead to its exclusion. In order to exclude the application of CISG, a more specific reference to the domestic Swiss code would have been necessary.

The Court then dismissed the claim on the ground that the plaintiff lacked a right of action, since there was no contract between the plaintiff and the defendant. First, the invoice sent by the plaintiff could not be construed as an offer under article 14 CISG, even though it had been intended as such by the plaintiff. According to article 8 CISG, a statement by a party is not to be construed according to the party's subjective intent. Rather, it is to be construed according to its objective meaning, i.e. the understanding of a reasonable receiver. Since the plaintiff had pointed out to the defendant that the invoice had been issued on request by its Indian parent company, the defendant was rightfully under the impression that the Indian parent company, and not the plaintiff, was its contractual partner.

Even if one was to construe the invoice by the plaintiff as an offer, there was still no acceptance by the defendant. Applying the objective standard of article 8 CISG, the issuing of the promissory note could not be understood by the plaintiff as an acceptance, since the note was made out in favour of the Indian company, and did not reveal any intent on the defendant's part to contract with the plaintiff.

Case 430: CISG 3(1); 3(2); 31
Germany: Oberlandesgericht München; 23 U 4446/99
3 December 1999
Original in German
Published in German: *Recht der Internationalen Wirtschaft* (RIW) 2000/712
http://www.jura.uni-freiburg.de/ipr1/cisg/urteile/text/585.htm (German language text)
http://cisgw3.law.pace.edu/cases/991203g1.html (English translation)
Abstract prepared by Rudolf Hennecke

The decision concerns both paragraphs of article 3 CISG, i.e. the sale of goods to be manufactured as well as the supply of additional services by the seller. The buyer, a German manufacturer of windows, had ordered from the Italian seller a window manufacturing unit. It was agreed that some parts for the unit should be provided by the buyer. Moreover, the unit was to be modified according to the buyer's specifications and to be delivered to the buyer's place of business, where it was to be assembled by the seller's technicians.

When the seller declared that it would not be able to deliver the manufacturing unit by the agreed time, the buyer fixed an additional period of time for delivery and, after that time had passed, declared the contract avoided.

The seller filed suit in Italian court for damages arising out of the avoidance of the contract. The buyer filed suit in Germany for lost profit and the cost of a substitute transaction. The seller contested the jurisdiction of the German court, asserting that the suit should be brought in Italy, the place of performance, pursuant to article 5(1) of the Brussels Convention.

The Oberlandesgericht München (Higher Regional Court of Munich) found that the German court of first instance had jurisdiction. As an initial matter, the Court stated that the CISG was applicable pursuant to article 1(1)(a) CISG since the two parties had the places of business in Contracting States. The Court then applied article 31 CISG, finding that the place of performance of the delivery of the manufacturing unit was the buyer's place of business in Germany, since according to the contract the unit was to be assembled there by the

defendant's technicians. A clause in the contract stating the net price "at the seller's place of business" was considered immaterial in this respect, since it only clarified that the transport costs had to be borne by the buyer.

The Court observed that the contract was a contract for the sale of goods pursuant to article 3(1) CISG, since the parts for the unit to be provided by the buyer were not substantial in value or function. Finally, the Court concluded that the application of the CISG was not excluded by article 3(2) CISG. The mere fact that the machine was to be assembled by the seller's technicians at the buyer's place of business did not constitute a preponderant part of the seller's obligations. The value of the labour of the installation only amounted to a small part of the total value of the contract, and the main interest of the buyer was still the machine itself and not its installation.

The Oberlandesgericht München (Higher Regional Court of Munich) remanded to the court of first instance for a decision on the merits (pending a prior decision on jurisdiction by the court in Italy pursuant to the Brussels Convention).

Case 431: CISG 38(1), 39(1)
Germany: Oberlandesgericht Oldenburg; 12 U 40/00
5 December 2000
Original in German
Published in German: *Recht der Internationalen Wirtschaft* 2001/381
http://www.unilex.info/case.cfm?pid=1&do=case&id=500&step=FullText (German language text)
Abstract prepared by Rudolf Hennecke and Kokularajah Paheenthararajah

This decision deals with the examination period under article 38(1) CISG, as well as the standard of reasonable time for giving notice of a lack of conformity under article 39 CISG.

The buyer (defendant) ordered a machine from the seller (plaintiff). Fifty-eight days after delivery, the buyer gave notice to the seller about a deficiency of the machine. Finally, the buyer declared the contract avoided. The seller sued for payment of the full contract price.

The court of first instance ruled in favour of the seller. On appeal, the Higher Regional Court upheld the decision, ruling that the buyer had failed to give notice of the deficiency within reasonable time under article 39(1) CISG and had accordingly lost its right to rely on the lack of conformity. The Court stated that the notification period under article 39(1) CISG begins at the end of the short period of examination of goods according to article 38(1) CISG.

The Court noted that the circumstances of the individual case must be taken into account in determining the length of the examination period. The main purpose of the examination and notification duties is to enable the seller to remedy a lack of conformity of the goods. Therefore, the method of examination must be of such nature as to disclose recognizable defects. The buyer of complicated machinery is thus expected to conduct a test run in order to confirm that the machine functions properly. In the view of the Court, a period of two weeks was sufficient to conduct the test run. The Court also pointed out that the period starts to run upon delivery, irrespective of the point of time when the machine is intended to be used in actual business. In the case at hand, the buyer had failed to examine the machine within two weeks after delivery.

According to article 39(1) CISG, notice has to be given within a reasonable time after the lack of conformity had been discovered or ought to have been discovered. The Court observed that, although the standard of reasonable time for giving notice is subject to dispute, in the case at hand it was unnecessary to decide upon this question, since the buyer had given notice only approximately six weeks after the end of the examination period,

i.e. eight weeks after delivery. This was considered by the Court to be too late under any standard commonly applied pursuant to article 39 CISG.

Case 432: CISG 39(1); 47(1); 49(1)(a); 49(2)(b)(ii); 50; 51; 53; 58(3); 71(3); 78
Germany: Landgericht Stendal; 22 S 234/99
12 October 2000
Original in German
Published in German: *Internationales Handelsrecht* (*IHR*), 1-2001 (Feb. 2001), at. p. 30
http://cisgw3.law.pace.edu/cisg/text/001012g1german.html (German language text)
http://cisgw3.law.pace.edu/cases/001012g1.html (English translation)
Abstract prepared by Rudolf Hennecke and Peter Prusseit

The decision concerns the notice requirement under article 39 CISG as well as the prerequisites of avoidance under article 49 CISG.

The dispute arose from a contract between an Italian seller (plaintiff) and a German buyer (defendant) for the purchase of granite stone. After a first delivery turned out to be faulty, the seller offered a free delivery of substitute goods. After this second delivery, however, the buyer still did not pay the full contract price. When the seller sued, the buyer claimed that the second delivery had been faulty as well and alleged that after it had made a complaint in this respect, the seller had agreed upon a reduction of the price. Later on, however, the buyer declared an avoidance of the sales contract or alternatively at least a reduction of the purchase price. The seller argued that a complaint in respect of the asserted defects of the substitute delivery had never been made. The seller also denied any agreement on a reduction of price.

The court found in favour of the seller. It held there was no agreement on a reduction of price because the buyer was unable to prove that such an agreement had been reached. A reduction of the price pursuant to articles 50 and 51(1) CISG was not granted because of the inability of the buyer to prove that it had given notice of the asserted defects according to article 39(1) CISG.

Concerning the alleged avoidance of the contract by the buyer under articles 49(1)(a), 49(2)(b)(ii) CISG, the court did not rule out that there might have been a fundamental breach of contract. However, it observed that the buyer had failed to set an additional period of time for performance according to article 47(1) CISG. Therefore, the court concluded that avoidance of the contract was impossible.

Moreover, the court decided that the buyer could not rely on a right to suspend performance according to article 71 CISG, because pursuant to paragraph 3, the buyer was required to give immediate notice to the seller. The mere non-performance by the buyer could not fulfil the requirement of notice of suspension.

Furthermore, with regard to the interest claimed under article 78 CISG, the court stated that the date on which interest becomes due depends on article 58 CISG. According to article 58(3), if no date for the payment of the purchase price is fixed, interest becomes due after the buyer has had the opportunity to examine the goods. Because of the lack of an express provision in the CISG concerning the interest rate, the court determined the interest rate according to the seller's law, the applicable national law of Italy.

Case 433: CISG 1(1)(a), 6, 10
United States: U.S. [Federal] District Court for the Northern District of California; No. C 01-20230 JW
30 July 2001
Asante Technologies, Inc. v. PMC-Sierra, Inc.
Published in English: 164 *Federal Supplement, Second Series* 1142; 2001 *U.S. Dist. LEXIS* 16000
http://cisgw3.law.pace.edu/cases/010727u1.html
Abstract prepared by Peter Winship, National Correspondent

The plaintiff (buyer), a producer of network switchers located in the United States (California), concluded "Prototype Product Limited Warranty Agreements" with the defendant (seller), a U.S. corporation with places of business in Canada (British Columbia) and the United States (Oregon). The agreements set out technical specifications for component parts the buyer wished to acquire from the seller. When ordering the components, the buyer, at the seller's direction, submitted most but not all purchase orders to an independent distributor located in California.

The delivered components allegedly did not conform with the agreed specifications. The buyer brought suit in a California state court on claims based in tort and contract. The complaint did not refer to the CISG. The seller removed the case to a federal district court and the buyer asked the federal court to remand the case to the state court. The issue before the federal district court was whether it had jurisdiction. The court held that it had jurisdiction because the contract dispute was governed by the CISG and therefore the complaint raised a federal question.

The court held that the contract claims in the plaintiff's complaint were governed by the CISG. It found that the parties had their places of business in two different States and these States were Contracting States. In particular, the court concluded that the seller's relevant place of business was in Canada. The seller had its corporate headquarters, inside sales and marketing office, public relations department, and principal warehouse in British Columbia, and the seller carried out most of its design and engineering functions there. In its dealing with the buyer, the seller sent documents with technical specifications from Canada and the parties executed the "Prototype Product Limited Warranty Agreements" in Canada. The court found that this Canadian place of business was closest to the contract and its performance. It did so notwithstanding the buyer's extensive contacts with the engineers at the U.S. place of business when developing and engineering the components purchased.

Although the buyer sent its purchase orders to the independent distributor in California, the court stated that the "warranty agreements" were entered into directly with the seller. The court held that the independent distributor was not an agent of the seller. The court did not consider whether the "warranty agreements" were contracts of sale.

The court further held that the choice of law clauses in the parties' forms did not have clear language excluding application of the CISG. The buyer's clause stated that the contract was governed by the law of California, while the seller's clause stated that British Columbia was the "proper" law governing the agreement. The court noted that under the Supremacy Clause of the federal constitution the CISG would bind California and that British Columbia legislation made the CISG applicable in that province.

Finally, in response to the buyer's argument that its complaint did not establish that the case arose under federal law, the court held that the CISG, as a treaty to which the United States was a party, preempted state law by virtue of the Supremacy Clause of the federal constitution and that the facts pleaded in the complaint showed that the CISG governed.

Case 434: CISG 74, 78
United States: U.S. [Federal] District Court for the Northern District of Illinois; No. 99 C 4040
19 July 2001; 28 August 2001
Zapata Hermanos Sucesores, S.A. v. Hearthside Baking Co., Inc.
Published in English:
(#1) 2001 *WL* 877538, 2001 *U.S. Dist. LEXIS* 11698, http://cisgw3.law.pace.edu/cases/010719u1.html;
(#2) 2001 *WL* 1000927, 2001 *U.S. Dist. LEXIS* 15191, http://cisgw3.law.pace.edu/cases/010828u1.html
Abstract prepared by Peter Winship, National Correspondent

The plaintiff, a Mexican enterprise, sold biscuit tins to the defendant, a U.S. corporation. After their long-term relationship ended, the plaintiff sued the defendant to recover payment for tins delivered and not paid for. After a jury verdict for the plaintiff, the trial court entered judgement for the plaintiff. In its several opinions in the case, the trial court applied the CISG to two issues: the award of interest to the plaintiff and the recovery by the plaintiff of its litigation expenses.

The plaintiff argued that express provisions in its invoices called for the payment of interest and proposed a calculation of the amount of interest owed. The defendant denied that it was liable for interest because the parties' course of conduct demonstrated that the defendant was never in arrears. It did not present to the jury a proposed calculation of interest. The jury resolved the dispute in favour of the plaintiff. The defendant then objected to the amount of interest awarded and asked the court to take judicial notice of the Illinois statutory rate and the U.S. treasury bill rate. In a first opinion (#1), the court turned down the defendant's request. Purporting to apply article 78 CISG, the court stated that the amount of interest should reflect a reasonable commercial rate as between merchants. It reduced the jury award of interest to reflect the amount of principal shown to be owed to the plaintiff.

In a second opinion (#2), the court awarded litigation expenses, including attorneys' fees, as part of the damages recoverable by plaintiff. Although the "American rule" normally requires each litigant to bear its own legal expenses, the court stated that the rule did not apply when there was a law that provided otherwise. The court held that article 74 CISG was such a law. Under that article, the plaintiff is entitled to recover a sum equal to its loss, including losses suffered as a consequence of the defendant's breach. The defendant could foresee that there might be litigation and legal expenses if it failed to pay sums admittedly due. The result, the court stressed, is consistent with the almost universal rule that a successful party may recover its legal expenses and, therefore, promoted the CISG policies of promoting uniformity and certainty.

Index to this issue

CISG 4(a)

Case 425:—*Austria: Oberster Gerichtshof, 10 Ob 344/99g (21 March 2000)*
Case 428:—*Austria: Oberster Gerichtshof, 8 Ob 22/00v (7 September 2000)*

CISG 6

Case 427:—*Austria: Oberster Gerichtshof, 1 Ob 292/99v (28 April 2000)*
Case 429:—*Germany: Oberlandesgericht Frankfurt a. M.; 9 U 13/00 (30 August 2000)*
Case 433:—*United States: U.S. [Federal] District Court for the Northern District of California; Asante Technologies, Inc. v. PMC-Sierra, Inc., No. C 01-20230 JW (30 July 2001)*

CISG 8

Case 429:—*Germany: Oberlandesgericht Frankfurt a. M.; 9 U 13/00 (30 August 2000)*

CISG 9

Case 425:—*Austria: Oberster Gerichtshof, 10 Ob 344/99g (21 March 2000)*

CISG 10

Case 433:—*United States: U.S. [Federal] District Court for the Northern District of California; Asante Technologies, Inc. v. PMC-Sierra, Inc., No. C 01-20230 JW (30 July 2001)*

CISG 14

Case 429:—*Germany: Oberlandesgericht Frankfurt a. M.; 9 U 13/00 (30 August 2000)*

CISG 18

Case 429:—*Germany: Oberlandesgericht Frankfurt a. M.; 9 U 13/00 (30 August 2000)*

CISG 19(1)

Case 424:—*Austria: Oberster Gerichtshof, 6 Ob 311/99z (9 March 2000)*

CISG 29

Case 422:—*Austria: Oberster Gerichtshof, 1 Ob 74/99k (29 June 1999)*

CISG 31

Case 430:—*Germany: Oberlandesgericht München; 23 U 4446/99 (3 December 1999)*

CISG 35

Case 426:—*Austria: Oberster Gerichtshof, 2 Ob 100/00w (13 April 2000)*

CISG 38

Case 423:—*Austria: Oberster Gerichtshof, 10 Ob 223/99x (27 August 1999)*

CISG 38(1)

Case 431:—*Germany: Oberlandesgericht Oldenburg; 12 U 40/00 (5 December 2000)*

CISG 39(1)

Case 423:—*Austria: Oberster Gerichtshof, 10 Ob 223/99x (27 August 1999)*
Case 425:—*Austria: Oberster Gerichtshof, 10 Ob 344/99g (21 March 2000)*
Case 431:—*Germany: Oberlandesgericht Oldenburg; 12 U 40/00 (5 December 2000)*
Case 432:—*Germany: Landgericht (12 October 2000)*

CISG 45
Case 426:—*Austria: Oberster Gerichtshof, 2 Ob 100/00w (13 April 2000)*
CISG 47(1)
Case 432:—*Germany: Landgericht (12 October 2000)*

CISG 49(1)(a)
Case 432:—*Germany: Landgericht (12 October 2000)*

CISG 49(2)(b)(ii)
Case 432:—*Germany: Landgericht (12 October 2000)*

CISG 50
Case 432:—*Germany: Landgericht (12 October 2000)*

CISG 51
Case 432:—*Germany: Landgericht (12 October 2000)*

CISG 53
Case 432:—*Germany: Landgericht (12 October 2000)*

CISG 57
Case 421:—*Austria: Oberster Gerichtshof, 7 Ob 336/97f (10 March 1998)*

CISG 58(3)
Case 432:—*Germany: Landgericht (12 October 2000)*

CISG 63(1)
Case 427:—*Austria: Oberster Gerichtshof, 1 Ob 292/99v (28 April 2000)*

CISG 64(1)(b)
Case 427:—*Austria: Oberster Gerichtshof, 1 Ob 292/99v (28 April 2000)*

CISG 71(3)
Case 432:—*Germany: Landgericht (12 October 2000)*

CISG 74
Case 427:—*Austria: Oberster Gerichtshof, 1 Ob 292/99v (28 April 2000)*
Case 434:—*United States: U.S. [Federal] District Court for the Northern District of Illinois; Zapata Hermanos Sucesores, S.A. v. Hearthside Baking Co., Inc., No. 99 C 4040 (19 July 2001; 28 August 2001)*

CISG 75
Case 424:—*Austria: Oberster Gerichtshof, 6 Ob 311/99z (9 March 2000)*
Case 427:—*Austria: Oberster Gerichtshof, 1 Ob 292/99v (28 April 2000)*

CISG 76
Case 427:—*Austria: Oberster Gerichtshof, 1 Ob 292/99v (28 April 2000)*

CISG 78

Case 432:—*Germany: Landgericht (12 October 2000)*
Case 434:—*United States: U.S. [Federal] District Court for the Northern District of Illinois; Zapata Hermanos Sucesores, S.A. v. Hearthside Baking Co., Inc., No. 99 C 4040 (19 July 2001; 28 August 2001)*

CISG 81

Case 422:—*Austria: Oberster Gerichtshof, 1 Ob 74/99k (29 June 1999)*

CISG 82

Case 422:—*Austria: Oberster Gerichtshof, 1 Ob 74/99k (29 June 1999)*

CISG 83

Case 422:—*Austria: Oberster Gerichtshof, 1 Ob 74/99k (29 June 1999)*

CISG 84

Case 422:—*Austria: Oberster Gerichtshof, 1 Ob 74/99k (29 June 1999)*