United Nations A/CN.9/SER.C/ABSTRACTS/39

General Assembly

Distr.: General
2 July 2003

Original: English

United Nations Commission on International Trade Law

CASE LAW ON UNCITRAL TEXTS
(CLOUT)

Contents

V.03-85643 (E) 250803 260803

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 web site (http://www.uncitral.org).

Issues 37 and 38 of CLOUT introduced 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 web sites other than official United Nations web sites do not constitute an endorsement by the United Nations or by UNCITRAL of that web site; furthermore, web sites 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 445: CISG 1(3); 2(a); 7(1); 14; 18
Germany: Bundesgerichtshof; VIII ZR 60/01
31 October 2001
Original in German
Published in German: [2001] BGHZ No. 149, 113
http://www.cisg.law.pace.edu/cisg/text/011031g1german.html (German language text)
http://cisgw3.law.pace.edu/cases/011031g1.html (English translation)
Abstract prepared by Rudolf Hennecke

This decision by the Federal Supreme Court of Germany deals primarily with the incorporation by reference of standard terms into sales contracts under articles 8 and 14 CISG.

The defendant (seller), a German company, sold to the plaintiff (buyer), a Spanish corporation, a used gear-cutting machine for the price of DM 370,000. The written confirmation of the order by the seller contained a reference to its standard conditions of sale, which were not attached to the confirmation. These standard conditions of sale contained an exemption clause, which excluded any liability for defects of used equipment.

After delivery, the machine could only be rendered operational with the assistance of outside experts. In its claim against the seller, the buyer sought reimbursement for the costs involved.

In an appeal on questions of law, the main question before the Federal Supreme Court concerned the requirements for the incorporation by reference of standard conditions into international sales agreements. The court first observed that the CISG did not provide any specific rules on the incorporation of standard terms by reference. Thus, the general rules on contract formation, articles 14 and 18 CISG, were applicable. Whether the standard terms had become part of the offer had to be determined in accordance with article 8. The court stated that the recipient of an offer must be given a reasonable chance of considering the standard conditions, if these conditions are to become part of the offer. This requires that the recipient is made aware of the offeror's intention to include the standard terms. Moreover, it also requires that the offeree is sent the standard conditions or otherwise given the opportunity to read them.

The court noted that, due to the differences between the many legal systems and traditions worldwide, standard terms used in one particular country often differ considerably from those used in another. Therefore, knowledge of such terms is vital to the offeree. For a party wishing to rely on these terms it does not constitute any difficulty to attach them to the offer. If the recipient, on the other hand, had to inquire about the standard terms, this would often lead to delay in the formation of the contract, which would be unnecessary and unwelcome to both parties. The court thus concluded that it would contravene good faith in international trade, as embodied in article 7(1) CISG, as well as the parties' duty to cooperate, to request the offeree to inquire about standard conditions and to hold the offeree liable in case

such an inquiry was not made. Therefore, standard conditions could only become part of the offer if they were attached to it or otherwise placed at the disposal of the offeree.

The court observed that this general result was also necessary with regard to the protection of consumers, which was not an issue in this case. Concerning the applicability of the CISG, the court noted that article 1(3) CISG does not distinguish between merchants and other parties, and that only if the seller is aware at the time of contract formation that the buyer is a consumer is the application of the Convention excluded under article 2(a) CISG, consequently, if the seller is not aware of dealing with a consumer, the CISG applies. In such cases, the necessary consumer protection laws also require that the standard conditions are sent with the offer.

Case 446: CISG 3; 39
Germany: Saarländisches Oberlandesgericht; 1 U 324/99
14 February 2001
Original in German
Published in German: [2001] OLGR Saarbrücken 2001, 239
http://www.cisg.law.pace.edu/cisg/text/010214g1german.html (German language text)
http://cisgw3.law.pace.edu/cases/010214g1.html (English translation)
Abstract prepared by Rudolf Hennecke

The decision by the Higher Regional Court of Saarbrücken deals with the application of the Convention to goods to be manufactured pursuant to article 3 and to the reasonable period of time for giving notice of a lack of conformity pursuant to article 39 CISG.

The seller, an Italian manufacturer of windows and doors, made several deliveries to the buyer, a German retailer. The seller sued the buyer for the balance due. The court of first instance, the District Court of Saarbrücken, found for the seller.

On appeal, the Higher Regional Court of Saarbrücken affirmed. The court noted that the contracts, which were for goods to be manufactured, would be subject to the CISG pursuant to article 3. The court stated that the buyer lost the right to rely on the non-conformity of the goods because they had been delivered in early 1995 and the buyer had only given notice of non-conformity in January 1998, beyond the two year cut-off point specified in article 39(2) CISG. In any case, citing Staudinger/Magnus, the court noted that notice of non-conformity had not been given within a reasonable period of time under article 39(1), which it stated was generally considered to be between two weeks and a month after discovery of the defects.

Case 447: CISG [1(1)(a)]; 4(b); [8(2)]; 9(2); 67(1)
United States: U.S. [Federal] District Court for the Southern District of New York, No. 00 CIV. 9344(SHS)
St. Paul Guardian Insurance Co. & Travelers Insurance Co. v. Neuromed Medical Systems & Support, GmbH
26 March 2002
Published in English: 2002 WL 465312, 2002 U.S. Dist. LEXIS 5096
http://cisgw3.law.pace.edu/cases/020326u1.html (English language text)
Abstract prepared by Peter Winship, National Correspondent

A German company, defendant, sold a mobile magnetic resonance imaging system to a United States company. The delivery term provided "CIF New York Seaport, the buyer will arrange and pay for customs clearance as well as transport to Calmut City [the ultimate destination in the United States]." Preceding the payment term was a handwritten note stating that "acceptance subject to inspection" followed by the initials of a representative of the buyer. The seller and buyer agreed that the equipment was in good working order when loaded at the port of shipment but was damaged when it arrived at its ultimate destination. Two United States insurance companies reimbursed the buyer and brought suit against the defendant as subrogees to the buyer's claim.

The court granted the defendant's motion to dismiss the suit for failure to state a cause of action.

The parties' contract designated German law as the applicable law. The court applied the CISG as the relevant German law. The parties had their places of business in two different Contracting States and had not agreed to exclude application of the CISG. The court noted that on similar facts German courts apply the Convention as applicable German law.

The court concluded that the risk of loss passed to the buyer upon delivery to the port of shipment by virtue of the CIF delivery term. The court found that the International Chamber of Commerce's 1990 CIF incoterm governed by virtue of article 9(2) CISG. The court also noted that German courts apply the incoterm as a commercial practice with the force of law.

The court rejected plaintiffs' argument that the risk of loss could not have passed because the seller had retained title to the equipment. Citing articles 4(b) and 67(1) CISG, the court stated that the Convention distinguished between the risk of loss, which it deals with in chapter IV of part III, and the transfer of title, which is beyond the scope of the Convention.

The court also rejected arguments based on the typed and handwritten terms of the contract. A clause allocating the responsibility for customs clearance deals with a matter not addressed by the CIF incoterm. A clause providing for a final payment after the equipment arrives at its destination is not inconsistent with the passing of the risk of loss. Moreover, a reasonable recipient would understand the handwritten term to mean that receipt of the equipment was not to be construed as an admission that the equipment was free of defects and performed according to contract specifications.

II. Cases relating to the UNCITRAL Model Arbitration Law (MAL)

Case 448: MAL 7(1); 16(1); 16(3); 34(2)(a)(iii); 35(1); 36(1); 36(1)(a)(iii)
Hong Kong: High Court of Hong Kong Special Administrative Region, Court of Appeal (Leong C. J., Wong J. A., Pang J.)
27 June 2001
Sam Ming City Forestry Economic Co. & Anor v. Lam Pun Hung Trading as Henry Company & Anor
(Original in English)
Unreported
Abstract prepared by Ben Beaumont

[**keywords**: *arbitration agreement; arbitration clause; award; award—recognition and enforcement; award—setting aside; clause compromissoire; compromis; courts; enforcement; estoppel; jurisdiction; procedure; waiver*]

The main appeal brought by the defendants centred upon the refusal of the Court of First Instance to set aside the order granting leave to enforce the arbitration award as a judgement (MAL 35(1)).

The defendants relied upon a different ground to support the appeal from that at the Court of First Instance. It was that the award dealt with a difference not contemplated by or falling within the terms of the submission to arbitration … (MAL 34(2)(a)(iii); 36(1)(a)(iii)). The facts were that the parties to the arbitration agreement were the first plaintiff and the first defendant. The greatest proportion of the award was granted to the second plaintiff, now in liquidation, who was not a party to the arbitration agreement. Before the Court of First Instance the parties agreed that the arbitral tribunal had jurisdiction to make the award to the second plaintiff. The defendants now argued that there was no such jurisdiction (MAL 34(2)(a)(iii); 36(1)(a)(iii)). The defendants also argued that in any event the Court of Appeal should exercise its discretion not to enforce the award (MAL 36(1)). The plaintiff argued that the defendants were basically asking that there should be a reappraisal of the merits of the jurisdictional issue heard by the arbitral tribunal.

The Court of Appeal stated that the defendants could not raise the issue of lack of jurisdiction. Further, the court found that the dispute as to whether monies had been wrongfully taken by the defendants from the second plaintiff was plainly within the scope of the arbitration agreement (MAL 7(1)). The court also found that by arguing the matter before the tribunal the parties had submitted to the jurisdiction of the tribunal and were estopped from raising the jurisdictional point subsequently (MAL 16(1), 16(3)).

The appeal of the defendant against the order of the Court of First Instance was refused.

Case 449: MAL 7(1); 8(1)
Hong Kong: High Court of Hong Kong Special Administrative Region, Court of Appeal (Keith J. A., Cheung J.)
4 July 2001
China Merchant Heavy Industry Co. Ltd. v. JGC Corp.
(Original in English)
[2001] 3 HKC 580
Abstract prepared by Ben Beaumont

[**keywords**: *arbitration agreement; arbitration clause; clause compromissoire; compromis; courts; defences; judicial assistance; procedural default; procedure; validity*]

The plaintiff contracted with the defendant to provide piping works. After the completion of the works the plaintiff alleged that monies were due to it and issued proceedings. The defendants sought a stay of those proceedings in favour of arbitration, which was granted (MAL 8(1)). The plaintiff appealed against the grant of the stay.

The court held that clause 12 of the contract, the dispute resolution clause, could only be triggered if "any dispute or difference of any kind" between the parties could not be settled by mutual agreement. Once clause 12 had been triggered the defendant was required to state its decision regarding the substance of the dispute and to inform the plaintiff of that decision, after which the plaintiff, if it disagreed with the decision, had 15 days in which to notify the defendant that it wished to refer the dispute to arbitration. The defendant's decision on the substance would, however, remain binding between the parties until the completion of the contract.

It was common ground that clause 12 had been triggered. A decision concerning the substance of the dispute had been made by the defendant. It was common ground that the plaintiff had not notified the defendant of its disagreement with the decision within the required time period. The defendant submitted that the only method of dispute resolution was through arbitration and that that right had been lost by the plaintiff's failure to object the prescribed time limits. The plaintiff appealed that finding.

The plaintiff argued that it did not have to refer the dispute to arbitration and since it chose litigation, and the plaintiff alone having the decision-making power, then the arbitration could not take place and was inoperative (MAL 8(1)). The court stated that it would unduly stretch the wording of MAL 8(1) to deem such an agreement inoperative for the reason that the party with the right to elect to settle its dispute through arbitration chose not to exercise that right. Therefore the clause was not inoperative.

The court also found that a clause, such as clause 12, which gave to only one party the right to opt for arbitration was an agreement to arbitrate within the meaning of MAL 7(1), 8(1).

The Court of Appeal refused to grant the appeal and ordered the stay of proceedings (MAL 8(1)).

Case 450: MAL 1(3)(a); 5; 9
Hong Kong: In the High Court of Hong Kong Special Administrative Region, Court of First Instance (Findley J.)
China Ocean Shipping Co., Owners of the M/V Fu Ning Hai v. Whistler International Ltd., Charters of the M/V Fu Ning Hai
24 May 1999
(Original in English)
Unreported
Abstract prepared by Ben Beaumont

[**keywords**: *courts; injunctions; interim measures; internationality; judicial assistance; judicial intervention; jurisdiction; place of business; procedure; protective orders; territorial application*]

The defendant applied for security for costs in an ongoing arbitration (MAL 9). An application had been made to the arbitral tribunal, which had been refused on the possible basis of lack of jurisdiction. The dispute was international in nature (MAL 1(3)(a)).

The plaintiff agreed that the court had jurisdiction to make such an order. However, the plaintiff submitted that where both parties were non-resident and the venue, Hong Kong, was chosen by mutual consent then security should not be ordered.

The court examined the arbitral process in order to determine whether, when the dispute resolution clause was prepared, the parties might have considered that the making of an order for security was inconsistent with that process. The court found that where there was a comprehensible set of rules, such as the ICC rules together with a limited connection with the seat of arbitration, then it would not often be correct to order security.

However, in the present case there were no such inhibitions. The court found that the arbitral process envisaged by the parties permitted the ordering of security for costs. The parties did not expressly agree to a set of procedural rules and there was more than a limited connection with Hong Kong (the plaintiff had a reasonably close connection with Hong Kong). As the defendant had refused to reveal details of its address, in the view of the court, this fact alone supported the plaintiff's justifiable concern as to the willingness of the defendant to meet any award made.

The defendant argued that the plaintiff had exercised unreasonable delay in making the application. The court did not agree.

An order for security for costs was made against the defendant (MAL 9).

The defendant gave an undertaking to reveal its details to the plaintiff. In spite of that undertaking, the defendant argued that the court had no jurisdiction to make an order requiring a party to reveal its detailed information. The defendant argued that article 5 MAL restricted that jurisdiction of the court.

The court considered whether article 9 MAL provided a jurisdictional basis for an order requiring details of a party to be given. However, it concluded that article 9 was limited to interim orders of protection.

The court decided that it had an inherent jurisdiction to prevent an abuse of process occurring in tribunals over which it had jurisdiction. The court stated that a

party could not participate anonymously, or pseudonymously, or partially so in such proceedings. The importance of such information as to whereabouts was clear when considering whether the party was based in a country not a party to the New York Convention.

Thus, the court would have made the order to give details had it been necessary.

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Case 446: - *Germany: Saarländisches Oberlandesgericht; 1 U 324/99* (*14 February 2001*)

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Case 447: - *United States: U.S.* [*Federal*] *District Court for the Southern District of New York, No. 00 CIV. 9344(SHS), St. Paul Guardian Insurance Co. & Travelers Insurance Co. v. Neuromed Medical Systems & Support, GmbH* (*26 March 2002*)

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Case 445: - *Germany: Bundesgerichtshof; VIII ZR 60/01* (*31 October 2001*)

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Case 445: - *Germany: Bundesgerichtshof; VIII ZR 60/01* (*31 October 2001*)

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CISG 18

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CISG 39

Case 446: - *Germany: Saarländisches Oberlandesgericht; 1 U 324/99* (*14 February 2001*)

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