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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 UNCITRAL website (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.

Cases relating to the United Nations Sales Convention

Case 461: CISG 35(2); 45; 74
Russian Federation: Tribunal of International Commercial Arbitration at the Russian Federation Chamber of Commerce and Industry
Arbitral award in case No. 166/1995
12 March 1996
Original in Russian
Published in Russian: *Arbitrazhnaya praktika za 1996-1997 god*, ed. M. G. Rozenberg (Moscow, Statut), 1998, p. 43
http://cisgw3.law.pace.edu/cases/960312r1.html (English translation)
Abstract prepared by Alexander Komarov, National Correspondent

Under an agreement concluded in October 1993, a Russian company, the seller, delivered goods on CFR terms to a buyer in Ecuador, but after a few days defects were found, preventing the goods from being used for their proper purpose. The seller offered to exchange the defective goods with conforming goods, but the buyer did not accept the offer and sued, demanding reimbursement of the value of the defective goods and compensation for losses sustained. The seller refused, stating that the manufacturer would not accept the return of any of the goods to Russia and recommended that the goods should be disposed of as the buyer saw fit.

The tribunal determined that the agreement had set no conditions regarding the quality of the goods. The seller was, therefore, obligated to supply the buyer with goods of normal quality appropriate for their practical application to specific conditions of use. From the facts of the case, it was clear that defects had occurred in the course of manufacture preventing the goods from being used for their proper purpose. The tribunal thus concluded, on the basis of article 35(2) CISG, that the goods did not conform with the contract. Under article 45 CISG, the buyer has the right to choose its legal remedy in case of breach of contract by the seller, so it was entitled to refuse the seller's offer to exchange the defective goods and claim compensation for its loss. The tribunal considered that the seller's business experience could have enabled it not only to foresee the actual loss to the buyer but also the possibility of avoiding such loss. The losses borne as a result of the breach of contract were therefore subject to compensation, in accordance with article 74 CISG. The tribunal rejected the seller's assertion that it could not pay damages to the buyer until the successful conclusion of the case that it intended to bring against the manufacturer, since the sales contract as concluded established rights and obligations only between the buyer and the seller.

On the basis of the above, the tribunal found in favour of the buyer.

Case 462: CISG 49
Russian Federation: Tribunal of International Commercial Arbitration at the Russian Federation Chamber of Commerce and Industry
Arbitral award in case No. 3/1996
13 May 1997
Original in Russian
Published in Russian: *Arbitrazhnaya praktika za 1996-1997 god*, ed. M. G. Rozenberg (Moscow, Statut), 1998, p. 198
http://cisgw3.law.pace.edu/cases/970513r1.html (English translation)
Abstract prepared by Alexander Komarov, National Correspondent

Under a contract concluded in December 1984 between a Russian company, the buyer, and a Canadian firm, the seller, the buyer made a prepayment to the seller of 60 per cent of the value of the goods to be supplied in February 1995. The seller made a partial delivery, substantially after the contracted delivery date, and the value of the goods delivered was less than the prepayment made by the buyer. The buyer sought restitution amounting to the difference between the sum paid by it and the value of the goods delivered and also sought the payment of liquidated damages, as provided for in the contract. The seller expressed willingness to deliver the balance of the goods. The buyer rejected the seller's offer on the grounds that it no longer needed the undelivered goods.

The tribunal found that the buyer's refusal to accept delivery of the goods that had not been delivered in time was in accordance with article 49 CISG. Consequently, the buyer was entitled to seek the return of part of the prepayment. Given that the seller's failure to perform its obligation to deliver on time caused the buyer economic loss, the tribunal ruled that the seller must pay also compensation in the amount provided for under the contract in cases of late delivery.

Case 463: CISG 39; 78
Russian Federation: Tribunal of International Commercial Arbitration at the Russian Federation Chamber of Commerce and Industry
Arbitral award in case No. 256/1996
4 June 1997
Original in Russian
Published in Russian: *Arbitrazhnaya praktika za 1996-1997 god*, ed. M. G. Rozenberg (Moscow, Statut), 1998, p. 207
Abstract prepared by Alexander Komarov, National Correspondent

The case was brought by a Russian company, the seller, against a Norwegian firm, the buyer, in connection with the failure of the buyer to pay for part of the goods supplied under a contract concluded by the parties in January 1995. The seller sought payment from the buyer of the unpaid balance due and interest for the use of its facilities. The buyer sought to justify the partial payment on the grounds that the first of the two deliveries was incomplete. The buyer, therefore, deducted a corresponding amount from the payment due for the second delivery. The seller asserted that the buyer did not have the right to withhold payment under the contract on the grounds of its late claim.

On the basis of the evidence, the tribunal noted that the buyer had asserted its claim after the 30-day time limit established under the contract and the claim had

not been duly confirmed. The tribunal, therefore, concluded that the buyer had not asserted its claim in the proper manner and, in accordance with article 39 CISG, had forfeited the right to claim that the goods supplied did not conform with the contract. The tribunal determined that the balance due could be recovered from the buyer, and pursuant to article 78 CISG, the seller was entitled to interest on the sum in arrears. On the basis of the above, the tribunal found for the seller on all points.

Case 464: CISG 53; 62; 79

Russian Federation: Tribunal of International Commercial Arbitration at the Russian Federation Chamber of Commerce and Industry
Arbitral award in case No. 255/1994
11 June 1997
Original in Russian
Published in Russian: *Arbitrazhnaya praktika za 1996-1997 god*, ed. M. G. Rozenberg (Moscow, Statut), 1998, p. 212
http://cisgw3.law.pace.edu/cases/970611r1.html (English translation)
Abstract prepared by Alexander Komarov, National Correspondent

A Russian organization, the seller, brought an action against a German firm, the buyer, claiming payment for goods supplied. The buyer disputed the claim.

The tribunal determined that the evidence supplied by the seller confirmed that the goods had been delivered. The buyer's claim that it had paid import tax could not serve as lawful grounds for the deduction of this expenditure from the value of the goods, since the contracts were concluded on c.i.f. terms and made no provision for transferring such costs to the seller. The buyer's claim that, owing to the lack of demand for the goods delivered, it had asked for deliveries to be discontinued did not constitute grounds for underpayment for the goods supplied. Under articles 53 and 60 CISG, the buyer's obligations included taking delivery of the goods. Lack of demand for the goods could not, under article 79 CISG, serve as grounds for releasing it from this obligation.

On the basis of the above, the tribunal found for the seller and ordered the buyer to pay the price for the unpaid goods.

Case 465: CISG 53

Russian Federation: Tribunal of International Commercial Arbitration at the Russian Federation Chamber of Commerce and Industry
Arbitral award in case No. 128/1996
15 December 1997
Original in Russian
Published in Russian: *Arbitrazhnaya praktika za 1996-1997 god*, ed. M. G. Rozenberg (Moscow, Statut), 1998, p. 260
Abstract prepared by Alexander Komarov, National Correspondent

A Russian company, the seller, sued an English firm, the buyer, for full payment for goods delivered according to the contract and default interest for overdue payment. The buyer countered that the goods received had not met the required quality standards. The buyer asserted that it was, therefore, entitled to withhold ten per cent of the balance due in view of the quality of the goods.

In considering the case, the tribunal noted that the buyer had failed to complain about the quality of the goods within the time limit set out in the contract. It thus lost the right to claim that the quality was unsatisfactory and, in accordance with article 53 CISG, it was obliged to pay the seller the outstanding amount. The tribunal also ruled that the buyer must pay default interest for the overdue payment.

Case 466: CISG 78

Russian Federation: Tribunal of International Commercial Arbitration at the Russian Federation Chamber of Commerce and Industry
Arbitral award in case No. 152/1996
12 January 1998
Original in Russian
Published in Russian: *Arbitrazhnaya praktika za 1998 god*, ed. M. G. Rozenberg (Moscow, Statut), 1999, p. 18
Abstract prepared by Alexander Komarov, National Correspondent

Under a contract concluded by the parties in November 1994, the buyer, a Russian company, transferred to the seller, a German firm, a sum in roubles to an account specified by the seller at a Russian bank as prepayment for goods to be delivered. The seller did not deliver the goods, on the grounds that it had not received the money transferred to its account by the buyer owing to the bankruptcy of the bank which held the account and the consequent freezing of the account. In the seller's view, these circumstances amounted to force majeure, releasing it from liability for non-performance of its obligations under the contract.

The buyer provided proof that it had prepaid the value of the goods in full, submitting a copy of the authorization for payment. The seller acknowledged the transfer of the sum and did not dispute the fact that it had not fulfilled its obligation of delivery to the buyer of the goods which had been paid for. The tribunal did not accept the buyer's claim that the bank's bankruptcy was an instance of force majeure releasing it from liability for non-performance of the contract, since those circumstances had no direct bearing on the non-delivery of the goods. Since the buyer had performed its obligations, as provided for under the agreement, the tribunal allowed the buyer's claim, plus awarded interest in accordance with article 78 CISG.

Case 467: CISG 45; 74

Russian Federation: Tribunal of International Commercial Arbitration at the Russian Federation Chamber of Commerce and Industry
Arbitral award in case No. 407/1996
11 September 1998
Original in Russian
Published in Russian: *Arbitrazhnaya praktika za 1998 god*, ed. M. G. Rozenberg (Moscow, Statut), 1999, p. 157
http://cisgw3.law.pace.edu/cases/980911r1.html (English translation)
Abstract prepared by Alexander Komarov, National Correspondent

A Hungarian company, the seller, sued a Russian company, the buyer, which had received goods under barter contracts but had not delivered in exchange the goods agreed under the contract. The buyer asserted that these contracts were invalid, since they were subject to compulsory State registration in Russia and the export from Russia of the goods covered by the contracts was permitted only to a special category of exporters, to which the buyer did not belong. The buyer also stated that the non-performance of its obligations was a consequence of the failure of the seller to pay the rail tariff, without which the goods could not be delivered. The seller disagreed and characterized its claim as a claim for compensation for losses incurred in connection with the buyer's non-performance of its obligations under the contract.

The tribunal ruled that the failure to obtain an export permit or to register as a special exporter did not constitute grounds for invalidating the contracts and should not have detrimental consequences for the seller, since the performance of the relevant actions was entirely the buyer's responsibility. The tribunal dismissed the buyer's argument regarding the seller's failure to pay the rail tariff, since the buyer had not proved that it had informed the seller in a timely and appropriate fashion of the requirement to pay such a tariff.

At the same time, the tribunal took into consideration that, in a letter of 27 October 1995, the seller had arranged to transfer part of the goods to a third party with which the seller had direct contractual relations, so that the seller retained the right to claim the property from the party that was holding it.

Taking into account the above and the provisions of articles 45 and 74 CISG, the tribunal concluded that the seller was entitled to damages in connection with the buyer's breach of its contractual obligations.

Case 468: CISG 25; 64
Russian Federation: Tribunal of International Commercial Arbitration at the Russian Federation Chamber of Commerce and Industry
Arbitral award in case No. 53/1998
5 October 1998
Original in Russian
Published in Russian: *Arbitrazhnaya praktika za 1998 god*, ed. M. G. Rozenberg (Moscow, Statut), 1999, p. 173
http://cisgw3.law.pace.edu/cases/981005r1.html (English translation)
Abstract prepared by Alexander Komarov, National Correspondent

A Russian company, the seller, sued a Mexican firm, the buyer, for payment for goods supplied for sale on commission under a contract concluded by the parties in November 1990 and annexes to the contract in 1991 and 1993. Under the contract, in the event that the goods remained unsold for a period of two years, they passed into the buyer's ownership. The contract also provided for a schedule for payment by instalments. The buyer did not perform its payment obligations.

The tribunal determined that, under the contract, the seller had transferred the goods to the buyer for sale on commission, as the documentation confirmed. Two years after the delivery date, the buyer became the owner of the goods received and was obliged to pay their value to the seller. Under articles 25 and 64 CISG, the seller

was entitled to suspend performance of its obligations and/or declare the contract avoided. That being the case, the tribunal agreed with the seller that the contract of 15 November 1990 should be avoided on the grounds of the material breach by the buyer of its obligations and that the seller should be awarded the full value of the goods acquired by the buyer.

Case 469: CISG 53; 62; 79
Russian Federation: Tribunal of International Commercial Arbitration at the Russian Federation Chamber of Commerce and Industry
Arbitral award in case No. 269/1997
6 October 1998
Original in Russian
Published in Russian: *Arbitrazhnaya praktika za 1998 god*, ed. M. G. Rozenberg (Moscow, Statut), 1999, p. 176
Abstract prepared by Alexander Komarov, National Correspondent

A Chinese company, the seller, sued a Russian organization, the buyer, in connection with the buyer's non-performance of its obligations under a barter contract. The parties had concluded a supplementary agreement concerning payment by the buyer for the goods delivered by the seller instead of returned deliveries, the establishment of a time limit for extinguishment of the debt, and the payment of interest in the event of non-performance of obligations in respect of debt extinguishment. In response to the suit, the buyer requested to be released from its liabilities, since its inability to perform was due to an obstacle beyond its control and was the fault of a third party: the bank which held the buyer's financial assets went bankrupt.

On the basis of the evidence, the tribunal determined that the seller had delivered goods to the buyer but the buyer had not fulfilled the corresponding obligation to deliver goods to the seller. The parties, therefore, decided to settle the contract in monetary form, rather than through barter. The buyer also failed to perform its obligations to pay for the delivered goods. The tribunal considered unfounded the buyer's claim that it should be released from liability for non-performance of the contract, on the basis of article 79 CISG since a bank's bankruptcy is not among the grounds for release from liability indicated in the article.

In view of the above, the tribunal applied articles 53 and 62 CISG, according to which the buyer is bound to pay the seller the price for the goods received. The seller's claim for payment of interest, which was based on the conditions of the supplementary agreement concluded by the parties, was also upheld.

Case 470: CISG 26; 49; 78
Russian Federation: Tribunal of International Commercial Arbitration at the Russian Federation Chamber of Commerce and Industry
Arbitral award in case No. 196/1997
22 October 1998
Original in Russian
Published in Russian: *Arbitrazhnaya praktika za 1998 god*, ed. M. G. Rozenberg (Moscow, Statut), 1999, p. 193
http://cisgw3.law.pace.edu/cases/981022r1.html (English translation)
Abstract prepared by Alexander Komarov, National Correspondent

A Cypriot firm, the seller, sued a Russian company, the buyer, for the outstanding balance due on goods delivered under a contract concluded in April 1996. The contract provided for delivery by instalments in May-June 1996. The buyer did not pay for the goods, which were delivered in July. The buyer stated that it was justified in declaring the contract avoided at the end of the agreed period, having offered to pay the seller for the goods at current prices. The buyer considered the delivery of the goods in July 1996 to fall outside the scope of the contract. The seller claimed payment for the goods delivered in July 1996 at the contract price plus interest.

The seller and the buyer agreed on the application of the law of the Russian Federation, which is a party to the CISG. Article 6 CISG allows the parties to a contract of sale to exclude the application of the Convention, but such agreement between the parties must be expressed clearly and specifically. In the present case, in the tribunal's view, the parties, in agreeing to be bound by Russian law and thus submitting themselves exclusively to the operations of a national legislation, did not intend to exclude the application of the CISG. On the contrary, in making their cases to the tribunal, both parties cited the provisions of the CISG. Consequently, the tribunal concluded that article 1(b) CISG was applicable inasmuch as, in accordance with private international law, (which allows the parties to an agreement to choose the applicable law, in the present case the law of the Russian Federation, as a Contracting State), it was applicable on the strength of the corresponding agreement between the parties.

As for national civil law, and particularly the Russian Federation Civil Code, it was applicable only to the extent to which the case currently before the tribunal was not regulated under the CISG (see art. 7(2)).

The tribunal determined that the buyer's communication addressed to the seller on 1 July 1996 could not be characterized as declaring the agreement avoided, since it did not contain a direct and unambiguous expression of the buyer's will. It was clear from the parties' business correspondence that the buyer considered shipments made after the expiry of the agreed time limit to be deliveries under the contract. The buyer's contention that the price of the goods delivered by the plaintiff should be reviewed was not accepted. Since the buyer did not declare the agreement avoided within a reasonable time after the delivery had been made, as provided for under article 49 CISG, the tribunal found that the goods delivered in July 1996 should be paid for in full at the price stipulated by the contract. Furthermore, the tribunal awarded interest on the damages to be paid by the buyer pursuant to article 78 CISG, the amount of such interest to be determined in accordance with Russian law. On the basis of the above, the tribunal ruled in favour of the seller.

Case 471: CISG 82; 86
Russian Federation: Tribunal of International Commercial Arbitration at the Russian Federation Chamber of Commerce and Industry
Arbitral award in case No. 164/1996
17 November 1998
Original in Russian
Published in Russian: *Arbitrazhnaya praktika za 1998 god*, ed. M. G. Rozenberg (Moscow, Statut), 1999, p. 225
Abstract prepared by Alexander Komarov, National Correspondent

A Russian company, the buyer, sued a Slovenian firm, the seller, for delivery of equipment of inadequate quality. Before the expiration of the guarantee period established by the contract, the buyer found defects, which were rectified by the seller's specialists. However, the equipment failed again and the buyer demanded that the seller replace the equipment. The seller refused to do so. Consequently, the buyer demanded repayment of the purchase price of the equipment, together with the costs incurred by the buyer in returning parts of the equipment to the seller.

The tribunal noted that when the defects in the operation of the equipment were discovered, the parties signed an annex to the contract, under which the seller undertook to exchange the defective parts at its own cost. At the same time, the parties agreed that if the equipment broke down again within six months after its repair, the buyer would return the defective equipment to the seller and the seller would install new equipment, in good working order, and pay the costs of returning the defective equipment. However, the buyer did not fulfil its obligation under the agreement and article 86 CISG to preserve the equipment, since the equipment had been written off and disposed of. Under articles 46 and 82 CISG, therefore, the buyer had forfeited its right to demand the delivery by the respondent of equipment in good working order and was found to have resorted to a legal remedy incompatible with its right to demand performance by the seller of its obligations.

The tribunal rejected the buyer's claim for the return of the purchase price of the equipment. The buyer's claim for the recovery from the seller of customs duties for the delivery of defective equipment parts to the seller was upheld.

Case 472: CISG 74
Russian Federation: Tribunal of International Commercial Arbitration at the Russian Federation Chamber of Commerce and Industry
Arbitral award in case No. 227/1996
22 March 1999
Original in Russian
Published in Russian: *Praktika mezhdunarodnogo kommercheskogo arbitrazhnogo suda pri TPP RF za 1999-2000 gody*, ed. M. G. Rozenberg (Moscow, Statut), 2002, p. 54
http://cisgw3.law.pace.edu/cases/990322r1.html (English translation)
Abstract prepared by Alexander Komarov, National Correspondent

The buyer, an Iranian firm, sued the seller, a Russian company, for the latter's breach of its obligations under contracts concluded in April and May 1995 and under an agreement on cooperation in building and assembling a factory in Iran. The buyer's claims included compensation for losses incurred by the partial non-delivery of the goods and termination of the cooperation, and for the costs incurred in registering the contracts, obtaining licences and arranging publicity. The seller asserted that the buyer's breach of the payment procedure gave sufficient grounds for it to terminate the deliveries and declare the contracts avoided. The seller also denied that agreement had been reached on a further delivery of goods or that a contract had been concluded on cooperation in building and assembling the factory.

The tribunal found that advance payments to the seller were made on 12 March and 8 November 1995 in accordance with the contract of 6 May 1995, after which the seller delivered part of the goods under this contract proportionally to the sum of the advance. Under the contract, the final payment was to be made within 45 days from the date of delivery of the goods to Iran. The last shipment took place on 20 December 1995 and the seller's letter on the termination of cooperation was sent to the plaintiff on 1 February 1996, within the 45-day limit. The tribunal, therefore, concluded that the seller had no grounds for a unilateral avoidance of the contracts. In view of the above, the tribunal concluded that the buyer was entitled to claim compensation for damages, including loss of profit, in accordance with article 74 CISG. Bearing in mind, however, that the buyer had not paid in full for the goods delivered and had not submitted sufficient evidence to support the scale of its claims, the tribunal reduced the buyer's damages to 60 per cent of the claimed amount. The buyer's claims for compensation from the seller for the losses incurred by the termination of cooperation in building the factory were not upheld, since the agreement on which the buyer based its claim did not rise to the level of an enforceable contract.

The tribunal granted in part the buyer's claims for restitution from the seller of advertising costs and expenses incurred in travelling and conducting negotiations over the contracts. It, therefore, ordered the seller to pay the buyer a sum amounting to 50 per cent of that claimed by the buyer. The buyer's claim for the recovery from the seller of the costs of registering the contracts and obtaining import licences was granted in full, since evidence as to the amounts involved had been submitted by the buyer.

Case 473: CISG 8; 72; 81

Russian Federation: Tribunal of International Commercial Arbitration at the Russian Federation Chamber of Commerce and Industry
Arbitral award in case No. 238/1998
7 June 1999
Original in Russian
Published in Russian: *Praktika mezhdunarodnogo kommercheskogo arbitrazhnogo suda pri TPP RF za 1999-2000 gody*, ed. M. G. Rozenberg (Moscow, Statut), 2002, p. 104
http://cisgw3.law.pace.edu/cases/990607r1.html (English translation)
Abstract prepared by Alexander Komarov, National Correspondent

An action was brought by a Russian company, the buyer, against an Indian firm, the seller, for the tribunal to recognize as well-founded the buyer's avoidance of a contract of sale of goods, following the seller's refusal to fulfil an exclusive condition that the whole shipment should be carried as a single consignment on a vessel specially insured only for that shipment at a time specified by the contract. The buyer also claimed compensation for losses incurred in connection with the avoidance of the contract. The seller submitted a counterclaim for compensation for losses incurred as a result of the avoidance of the contract by the buyer. The seller argued that the buyer's interpretation of the contract conditions concerning exclusive use of the insured vessel was incorrect.

The tribunal noted that, under article 8 CISG, the conduct of a party is to be interpreted according to its intent, where the other party knew or could not have been unaware what that intent was. It was clear from the provisions of the contract and from the business correspondence between the parties that the seller was aware of the buyer's intention to ensure the best possible quality for the food product to be supplied and to exclude the use of the vessel for the transport of any cargo except its own goods. The tribunal, therefore, concluded that the seller had been under an obligation to charter a whole vessel exclusively for the transport of the buyer's cargo. The tribunal found that, since the seller had not fulfilled the buyer's requirements concerning the vessel, the buyer had been entitled to deny the seller permission to use a vessel that did not correspond to the provisions of the contract. The tribunal further concluded that given the seller's unfounded interpretation of the provision concerning the "exclusiveness" of the vessel and its refusal to fulfil the reasonable requirements of the buyer, the plaintiff had sufficient grounds for considering the respondent's conduct to be a fundamental breach of contract (art. 72 CISG). Since the contract had been lawfully avoided by the buyer, the tribunal concluded that there was no legal basis for granting the counterclaim, which it dismissed outright. With regard to the buyer's claim for compensation for damages caused by the seller's breach of contract, the tribunal found that, although restitution was possible under article 81 CISG, the buyer's claim for compensation for the cost of credit should be dismissed, since there was insufficient evidence to support the claim. The buyer's claim for damages for lost profit (characterized as the amount that might have been earned as the result of investing in bank deposit accounts the foreign exchange tied up in the letter of credit) was granted, in accordance with article 74 CISG.

Case 474: CISG 46; 74; 77

Russian Federation: Tribunal of International Commercial Arbitration at the Russian Federation Chamber of Commerce and Industry
Arbitral award in case No. 54/1999
24 January 2000
Original in Russian
Published in Russian: *Praktika mezhdunarodnogo kommercheskogo arbitrazhnogo suda pri TPP RF za 1999-2000 gody*, ed. M. G. Rozenberg (Moscow, Statut), 2002, p. 181
http://cisgw3.law.pace.edu/cases/000124r1.html (English translation)
Abstract prepared by Alexander Komarov, National Correspondent

The action was brought by an American firm, the buyer, against a Russian company, the seller, in connection with a contract concluded by the parties in January 1998. The contract involved the delivery of two consignments on an FCA (free carrier) basis, in accordance with Incoterms under the contract. The seller was obliged to check the quality of the goods before dispatch and submit confirmatory documents with the cargo to the buyer. According to the statement by the seller, the check on the first consignment was conducted, for technical reasons, in the country of destination. The check revealed material deviations from the contract requirements, as a result of which the first consignment reached the end user substantially reduced in value. On the first consignment, the buyer sought a price reduction equal to the sum that remained unpaid by the end users. On the second consignment, the buyer sought damages for lost profit, on the grounds that the delivery of inferior goods under the first consignment had damaged its reputation on the market, with a consequent substantial slowdown in sales. The seller asserted that, firstly, the buyer had not proven that the goods were defective, and, second, that the buyer's claim had been lodged after the deadline established by the contract.

The tribunal found that the buyer's inspection of the first consignment had used methods not provided for by the contract. With regard to the breach by the buyer of the agreed claim period, the tribunal ruled that the buyer, by sending the seller a letter with an inquiry about replacing the defective goods, had acted in conformity with the provisions of article 46 CISG. The tribunal did not, however, agree with the buyer's contention that the seller had wrongfully failed to indicate in the documentation accompanying the shipment the existence of defects, since it was impossible to draw such a conclusion from the nature and extent of the defects and the evaluation made by each side. The tribunal found that the inspection of the goods in the loading port had been economically and technically inadequate. The postponement of the quality check until its arrival in the port of destination was, therefore, considered reasonable by the tribunal.

With regard to the amount of the payment that should be made by the seller to the buyer, the court concluded that it was impossible to establish precisely from the documents submitted by the buyer whether all the defective goods checked had defects characterized as such under the terms of the contract. In addition, the tribunal concluded that claims relating to the consignment could be considered only in relation to the goods that were actually checked, since the method of checking by sampling was not in accordance with the provisions of the contract (despite the fact that such a method of checking is generally recognized in world trade). Furthermore, the tribunal noted that the buyer could not base its claim on articles 75 and 76 CISG, which applied to situations where a contract was avoided, whereas the buyer had exercised its right under article 50 CISG to claim a price reduction. The buyer could not, therefore, also claim compensation for loss and it had made no claim for including customs costs in the calculation of the price reduction. Moreover, the buyer had not proved that it could use the goods only for the purposes indicated by it (sale to specified users). The tribunal applied article 77 CISG, since the buyer had taken no action to mitigate the loss arising out of the breach of contract. With regard to the first consignment of goods, the tribunal determined that the price reduction should be fixed at 50 per cent of the difference between the price of the disputed goods under the contract and the price agreed between the buyer and the end consumers. With regard to the second consignment of goods, the tribunal determined that the buyer had not proven the damage caused to its reputation by the

goods in question. The tribunal noted that seller's breach of contract could not have resulted in serious harm to the reputation of the goods or difficulties in selling the second consignment.

On the basis of the above and of article 74 CISG, the tribunal concluded that the buyer's claims with regard to the second consignment of goods should be dismissed. With regard to the first consignment, the tribunal ordered the seller to pay the buyer 50 per cent of the difference between the price of the goods under the contract and the price agreed between the respondent and the end users.

Case 475: CISG 77
Russian Federation: Tribunal of International Commercial Arbitration at the Russian Federation Chamber of Commerce and Industry
Arbitral award in case No. 71/1999
2 February 2000
Original in Russian
Published in Russian: *Yurist*, No. 19, p. 8 (May 2001)
http://cisgw3.law.pace.edu/cases/000202r1.html (English translation)
Abstract prepared by Alexander Komarov, National Correspondent

The seller, a Russian company, sued the buyer, an Italian firm, in connection with the balance due for goods supplied under a contract concluded between the parties on 18 November 1997 and additional expenses incurred by the seller. Under the contract, the delivery was to have been under f.o.b. stowed conditions at a named port of destination, payment for the goods being made by a letter of credit opened by the buyer. The buyer justified its partial payment for the goods on the grounds that it had paid the demurrage for the vessel's prolonged stay in the loading port, which should have been borne by the seller. The seller disagreed, claiming that the buyer had been very late in supplying the vessel, which had caused loading difficulties. Three quarters of the consignment had been loaded, while the rest had remained onshore and been sold to third parties, which had caused additional expenses for the seller.

The tribunal determined that, under the contract, payment for goods supplied was effected by a letter of credit and that the goods had been transferred to the buyer. The tribunal noted that a letter of credit did not entitle a payer/buyer to withhold part of the payment for goods supplied in order to meet its counterclaims against the seller, and that the withholding of payment was unlawful. The tribunal, therefore, upheld the claim of the seller concerning the unjustified withholding of payment. Given that the f.o.b. stowed condition had not been formulated fully or clearly enough in the contract, the tribunal decided to apportion losses caused by the incomplete loading in equal parts between the two parties, citing article 77 CISG.

Case 476: CISG 74; 76; 77
Russian Federation: Tribunal of International Commercial Arbitration at the Russian Federation Chamber of Commerce and Industry
Arbitral award in case No. 406/1998
6 June 2000
Original in Russian
Published in Russian: *Yurist*, No. 20, p. 8 (May 2001)
http://cisgw3.law.pace.edu/cases/000606r1.html (English translation)
Abstract prepared by Alexander Komarov, National Correspondent

An English firm, the buyer, sued a Russian company, the seller, in connection with the non-performance of a contract concluded by the parties on 25 April 1994 for the delivery during the course of the year beginning July 1995 of goods to a named port of destination on c.i.f. terms. In December 1995, the seller declared that it would not perform the contract owing to a rise in taxes, which, in its view, constituted force majeure. The buyer characterized the seller's letter of 29 December 1995 as acknowledgement of the seller's liability for non-performance of the contract and a request to be informed of the damages claimed by the buyer. The buyer claimed damages representing approximately 50 per cent of the value of the goods under the contract concluded between the buyer and the seller. The buyer also sought the payment of interest in an amount to be determined by the tribunal.

The tribunal noted that it was clear from the faxes from the seller to the buyer that the seller acknowledged its liability for non-performance of the contract and expressed its intention of compensating the buyer for its losses. No evidence regarding circumstances of force majeure was submitted by the seller. The tribunal, therefore, found the claim of force majeure unfounded. The buyer based its claim for losses incurred on a contract concluded by it with a third party, under which the price of the goods to be supplied was substantially higher than in the contract concluded between the buyer and the seller. The tribunal noted that, in accordance with article 74 CISG, the buyer was entitled to seek compensation for its loss of profit. The tribunal noted, however, that the buyer had not taken the necessary measures to mitigate its loss, as required by article 77 CISG, had not declared the contract avoided or concluded a substitute transaction, nor had it applied the provisions of article 76 CISG in making out its claim. Moreover, the seller had not been informed of the conditions agreed between the buyer and the third party. In view of the situation that had developed, the tribunal concluded that the seller had been under no obligation to foresee that the buyer's loss of profit would amount to approximately 50 per cent of the disputed contract price.

The tribunal ruled, on the basis of Incoterms, that the loss of profit should be fixed at the amount of 10 per cent. The buyer's claim for the payment of interest by the seller was dismissed, since the buyer had not submitted the interest rates obtaining in the place where the creditor was located or indicated a specific period for which interest should be charged.

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