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Contents

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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 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.

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CASES RELATING TO THE UNITED NATIONS CONVENTION ON CONTRACTS FOR THE INTERNATIONAL SALE OF GOODS (CISG)

Case 721: CISG 7 (1), 35, 39 (1), 45 (1), 50, 53, 58 (1), 60 (b), 61 (1)(b), 74
Germany: Oberlandesgericht Karlsruhe
7 U 101/04
08 February 2006
Original in German
Published in: [2007] Internationales Handelsrecht (IHR), 106;
http://cisgw3.law.pace.edu/cases/060208g1.html (English translation);
Abstract prepared by Ulrich Magnus, National Correspondent, and Jan Losing

The decision of the Higher Regional Court of Karlsruhe affirms the buyer's burden of proof for lack of conformity and the requirements of notice under article 39 CISG.

The claimant, a Hungarian company, entered into two contracts of sale FOB Budapest Sepal dated 10 and 16 October 2001 with the defendant, a dealer from Germany, for the delivery of Hungarian wheat. The defendant's carrier took the first delivery on 19 October and the second on 25 October. In a letter dated 14 November 2001 the defendant gave notice of lack of conformity, arguing that the wheat had been contaminated with excessive lead content and vomitoxin. The defendant also argued that the falling number of the wheat was only 210 sec or 215 sec although a falling number of 230 sec was agreed in the contract. The defendant relied on the right of price reduction under article 50 CISG and claimed damages under articles 45 (1)(b), 74 CISG which it set off against the claim for the purchase price. The claimant denied the non-conformity of the wheat delivered by him and sued the defendant for payment of the purchase price and damages due to delay in taking the first delivery.

The Higher Regional Court dismissed the defendant's appeal against the judgement of the Regional Court Mannheim, which had granted the claimant the full purchase price plus interest and compensation for storage costs.

With reference to a consolidated line of decisions, the Higher Regional Court held that the buyer has to prove the lack of conformity if he takes the goods without complaining about defects. In the court's opinion the defendant failed to prove the contamination with lead as well as with vomitoxin. Concerning the differing falling number the court stated that the buyer had lost the right to rely on the lack of conformity because it had failed to give notice in compliance with article 39 CISG. The notice under article 39 CISG must show the intention to object and identify the lack of conformity exactly. These requirements are not met if the non-conformity is only mentioned incidentally among other such notices and if it is stated that this specific non-conformity is no longer of importance. Therefore the court denied the defendant's right to reduce the price under article 50 CISG and to claim damages under article 45 (1)(b), 74. On the contrary, it granted the claimant the purchase price plus interest and storage charges, with the rate of interest following from the respective provisions of the Hungarian law applicable according to the parties' agreement.

Case 722: CISG 3, 4, 18, 19 (3)
Germany: Oberlandesgericht Frankfurt a. M.
26 Sch 28/05
26 June 2006
Original in German
Published in:
http://www.cisg-online.ch/cisg/urteile/1385.htm (original);
http://cisgw3.law.pace.edu/cases/060626g1.html (English translation)
Abstract prepared by Ulrich Magnus, National Correspondent, and Jan Losing

Following an application for enforceability of an arbitral award, the Higher Regional Court of Frankfurt had to decide whether an arbitration clause becomes a legally effective part of the contract, if the arbitration clause means an additional term to the offer by the replying party.

The applicant, a Dutch company, and the opponent, a customer from Germany, entered into a contract for the production and delivery of printed matters for the packaging of CDs. The opponent sent two written orders by fax to the applicant containing the specific notice that only its own general terms and conditions were applicable. The applicant confirmed the placing of orders by fax, with the reply pointing out that the provisions of the Graphics Industry of the Netherlands, containing an arbitration clause in its article 21, were part of the contracts. Since the respondent did not pay the invoice after the applicant's performance, the applicant instituted arbitration proceedings, with the court of arbitration ordering the respondent to pay the remunerations pursuant to the contracts plus interest and costs.

The Higher Regional Court dismissed the application for enforceability denying the recognition of the arbitral award.

The court found that according to article II (2) of the United Nations Convention on the Recognition and Enforcement of Foreign Arbitral Awards of New York, 10 June 1958 (New York Convention), which is to apply under § 1061 (1) German Code on Civil Procedure (ZPO) to foreign arbitral awards, the arbitration clause had not become a legally effective part of the contract, since article II (2) New York Convention requires a written agreement of the parties. Therefore the one-sided sending of order confirmations did not establish an arbitration agreement. The court also discussed whether, notwithstanding article II (2) New York Convention, an arbitration agreement had been reached by the one-sided reference to the standard provisions of the Graphics Industry of the Netherlands pursuant to § 1031 ZPO. Under § 1031 (1) and (3) ZPO an arbitration agreement may be reached by reference to general terms and conditions in case of business transactions. The court argued, that the specific emphasis to the exclusive validity of general terms and conditions excludes different or additional terms of the other party, and that the resulting discrepancy between the terms of the parties however does not frustrate the validity of the contract itself provided that the contract has been performed amicably. Furthermore, holding that according to article 3 (1) CISG the case is subject to CISG, the court stated that the validity of the arbitration clause cannot be derived from article 19 (2) CISG. An arbitration clause, as provision concerning the settlement of disputes, is always considered to alter the offer materially under article 19 (3) CISG, thus the silence of the respondent can not be considered as acceptance of the applicant's general terms and conditions.

Case 723: CISG 27, 35, 38, 39, 45 (1)(b), 53, 58 (1),74, 77, 78
Germany: Oberlandesgericht Koblenz
6 U 113/06
19 October 2006
Original in German
Published in: [2007] Internationales Handelsrecht (IHR),
http://www.cisg-online.ch/cisg/urteile/1407.htm (original);
http://cisgw3.law.pace.edu/cases/061019g2.html (English translation)
Abstract prepared by Ulrich Magnus, National Correspondent, and Jan Losing

The decision of the Higher Regional Court of Koblenz determines among other things that the whole delivery may be rejected as non-conforming, if all random samples reveal non-conformities of the goods.

The claimant, a Hungarian company producing, processing and distributing textiles, sued the purchaser, a German intermediary, for payment of the purchase price of several shipments of T-shirts, which the defendant had undisputedly received. The buyer set off the purchase price against several alleged claims for damages due to non-conformity and delay of the deliveries. The claimant had sent the T-shirts directly to the defendant's customer. Random samples taken by the defendant's customer showed that the T-shirts had not been packaged in the manner required by the contract, that they partly had flaws in the weave and that they were dirty. Additionally, some T-shirts had long sleeves although they had been ordered with short-sleeves. Being faced by its customer with the alternatives of accepting a reduction in price or taking back the T-shirts altogether, the defendant accepted a price reduction. The defendant claimed that it had given notice of non-conformity to the claimant via fax, while the claimant alleged that it had never received such a fax.

In the first instance at the Regional Court, the claimant was granted the full amount of its claim for payment of the purchase price plus interest. On appeal, the Higher Regional Court partly reversed the judgement, accepting the defendant's set-off with its damages claim for delivery of non-conforming goods and awarding the claimant the remaining purchase price after set-off against the defendant's damages.

The appellate court stated that delivery is deemed non-conforming as a whole, if all random samples of the goods turn out to be non-conforming. It further held that the notice period of, by and large, one month was met and it allowed the defendant's set-off without any redress to the applicable national law on the requirements of set-off. The court also held that the defendant met its obligation under article 77 CISG to take reasonable measures to mitigate the loss resulting from breach of contract by accepting a reduction of the purchase price instead of accepting the goods back in all. Referring to article 27 CISG the court considered the claimant's objection that it had never received the notice of non-conformity to be irrelevant. With regard to the claimant's demand for interest on the remaining purchase price the court stated that the rate of default interest is to be determined by the national law applicable according to the conflict of laws rules of the forum state, since article 78 CISG omits to state the rate of interest.

Case 724: CISG 35 (2)(d), 36, 39, 45, 49 (2)(b), 50, 66, 67, 69
Germany: Oberlandesgericht Koblenz
2 U 923/06
14 December 2006
Original in German
Published in: [2007] Internationales Handelsrecht (IHR), 36;
http://www.cisg-online.ch/cisg/urteile/1408.htm (original);
http://cisgw3.law.pace.edu/cases/061214g1.html (English translation)
Abstract prepared by Ulrich Magnus, National Correspondent, and Jan Losing

The decision of the Higher Regional Court of Koblenz on the claimant's appeal shows the independence of the remedies of avoidance of the contract (article 49 (1)(a) CISG) and price reduction (article 50 CISG).

The claimant, an Italian manufacturer of wine bottles, sued the buyer, a customer from Germany, for payment of the purchase price of several shipments of bottles, after the defendant had declared that it would not pay. The defendant argued that due to defective packaging by the claimant the bottles had been either broken or had lost their sterility and therefore became unsuitable for further use. The contract obliged the claimant only to deliver "ex factory" while it was up to the defendant to take delivery.

On first instance, the Regional Court partly rejected the claim, on the ground that the buyer had declared the contract avoided pursuant to article 49 (1)(a) CISG and declared its unwillingness to pay. The Higher Regional Court dismissed the claimant's appeal against the judgement of the Regional Court.

The Higher Regional Court held that the claimant had failed to perform its obligation, pursuant to article 35 (2)(d) CISG, to provide packaging for the bottles in a manner adequate for transport by truck. Therefore the court regarded the seller to be liable for the damage to the bottles under articles 36 (2) and 66 CISG, although the risk of loss or damage passed to the buyer, when the bottles were taken over by the buyer's carrier. However, contrary to the Regional Court's reasoning in first instance, the Higher Regional Court stated that the requirement of article 49 (2)(b) CISG to declare the contract avoided within a reasonable time does not allow to consider the buyer's refusal of payment to be an implied declaration of avoidance. The court considered the buyer's refusal to be a declaration of reduction of the purchase price to zero. Explicitly the court pointed out that the buyer may reduce the price according to article 50 CISG even if it had lost its right to avoid the contract for instance as a result of missing the deadline pursuant to article 49 (2)(b) CISG. According to the court the right to reduce the price may also be used as an objection against a claim for the payment of the purchase price. As for the interpretation of article 50 CISG itself the court stated that the wording "at the time of delivery" means the time the goods are available to the buyer after having arrived at their destination.

The failure of the claimant to provide adequate packaging for the bottles to preserve them and to ensure their arriving in a marketable condition was deemed as a fundamental breach of contract by the court under article 25 CISG.

Concerning the notice of defects as per article 39 CISG the court clarified that the requirement of "specifying the nature of the lack of conformity" is satisfied if the

buyer describes the divergence from quality by description of the symptoms, while a specification of the causes is not required.

Case 725: CISG 57
Italy: Corte di Cassazione, Sezioni Unite; n. 6/1999
Mantovani & Serrazzi S.p.a – Eurosab S.a.r.l.
1 February 1999
Original in Italian
Full text available in ItalGiureWeb (database)

Keywords: Jurisdiction – Place of payment – Seller's place of business

Abstract prepared by Maria Chiara Malaguti, National Correspondent, and Giacomo Viva.

The plaintiff, an Italian company, sued the French buyer demanding payment of the purchase price, plus interest, for goods sold and delivered to the defendant. Since the defendant alleged lack of jurisdiction of the Italian judge, the seller, according to the Italian rules on jurisdiction, asked the Italian Supreme Court to state the Italian jurisdiction on the case. The sole relevant obligation at stake was that relating to the payment of the purchase price, which was due via wire transfer at the plaintiff's bank account in Italy. The buyer counterclaimed that the parties had submitted the contract to French law, according to which, the place where a money obligation must be performed is the place where the debtor has his domicile, i.e. in this case, France.

In assessing the question of jurisdiction, the Supreme Court first applied article 5 (1) of the 1968 Brussels Convention on Jurisdiction and the Enforcement of Foreign Judgements in Civil an Commercial Matters, pursuant to which a person domiciled in a Contracting State (i.e. the buyer) may be sued in the Court for the place of performance of the obligation in question (i.e. the place where the payment of the price was to be made). It then turned to the issue of place of performance: this must be determined pursuant to the substantive law applicable to the case according to domestic private international law. With regard to the obligation of payment of the purchase price, the Italian legislation refers to the 1980 Rome Convention on the Law applicable to Contractual Obligations. Article 4 of the Rome Convention establishes that when the law applicable to the contract has not been chosen by the parties, the contract shall be governed by the law of the country to which it is most closely connected; it shall be presumed that the contract is most closely connected with the country where the party that has to perform the obligation that is characteristic of the contract, has – at the time of conclusion of the contract – his habitual residence. In this case Italy was the seller's principal place of business and, therefore, Italian substantive law had to be applied.

According to the Court, this was also the conclusion to be reached according to other international conventions to which Italy is a party, including the Vienna Convention on Contracts for the Sale of Goods: pursuant to article 57 CISG, lacking any agreement to the contrary, the buyer must pay the price at seller's place of business. As a consequence, the Supreme Court concluded that also according to CISG Italian Courts had jurisdiction on the case.

Case 726: CISG 57 (1)
Italy: Corte di Cassazione, Sezioni Unite, Judgement No. 11088/98
05 November 1998
AMC di Ariotti e Giacomini s.n.c. v. V.B. Handelsgeselischaft MBH
Original in Italian
Full text and excerpt available in CED ItalGiure and JurisData database
Italian excerpt published in *Rivista di diritto internazionale* 1999, p. 222; *Giustizia civile, Massimario* 1998, p. 2266; *Giurisprudenza italiana* 1999, p. 1809.
Abstract prepared by Maria Chiara Malaguti, National Correspondent, and Laura Sempi.

The seller, an Italian corporation with its place of business in Italy, agreed to sell women stockings to the buyer, an Austrian company, whose place of business was in Austria. Since the buyer had failed to pay the whole price, the seller brought an action for payment of the price before the Italian judge, alleging the breach of the supply contract for partial performance. The defendant claimed that the Italian judge did not have the authority to decide the issue in controversy, as its place of business was in Austria.

The issue before the Supreme Court was therefore whether the Italian court had the power to adjudicate the case.

The Supreme Court held that the relevant rule was to be found in article 57 CISG, a Convention that both states had ratified at the time of the litigation.

On the basis of article 57 (1) CISG, if the buyer is not bound to pay the price at any other particular place, it must pay it to the seller at the seller's place of business or, if the payment is to be made against the handing over of the goods or of documents, at the place where the handing over takes place.

The Court stated that since the parties had not determined different rules in their contract, the general principle provided for by the aforesaid article 57 applies. According to this, the payment for the supplied commodities was to be performed by the buyer at the seller's place of business, therefore Italy was designed as "forum destinatae solutionis".

The Court ruled that the Italian judge had jurisdiction over the case in light of both article 57 CISG and article 4, n. 2, Italian Civil Procedure Code, which states that the foreigner can be sued before an Italian judge if the action implies obligations to be fulfilled in the territory of Italy.

Case 727: CISG 1 (a), 10 (a), 45 (2), 47 (2), 73, 78
Italy: Arbitral Tribunal - Chamber of National and International Arbitration of Milan
28 September 2001
Original in English
Abstract prepared by Maria Chiara Malaguti, National Correspondent, and Valentina Renna.

In 1999 a seller – a Cyprus company having its principal place of business in Russia – and a buyer, an Italian company, entered into an agreement concerning steel goods.

The parties agreed on many specifications of the contract – in order to detail sorts of production, prices, delivery and payments – but when they begun performance, a

dispute arose on the quality standards of some delivered goods. Once settled the matter, with a reduction of the price of the goods already delivered, the parties decided to go on with further deliveries.

Nonetheless, divergences arose between them on alleged misconduct in the performance of their mutual obligations, mostly regarding the payment of the reduced price and the further deliveries of goods at the terms and conditions agreed upon.

The contract contained an arbitration clause referring to the Rules of the Chamber of National and International Arbitration of Milan. Thus, the seller initiated an arbitration proceedings.

The contract was silent on the rules applicable to the merits of the case. The seller identified it with Russian law whereas, according to the buyer, the Italian law should apply.

The Arbitral Tribunal, going beyond parties' assumptions on the point, concludes that the CISG is the body of law applicable to the arbitration, under the following reasoning.

The CISG is the special regulation for international sales of the national legal system of the two States more directly involved in the case (both of which have ratified the CISG).

The Arbitral Tribunal upheld the seller's position considering Russian law as the national law applicable – Russia indeed had a closer connection with the contract as the goods were to be produced in Russia, according to Russian standards and delivered on Russian ships, being all these circumstances perfectly known by the parties – whereas the CISG applied to the dispute as *lex specialis* within the domestic general law of sales. Moreover, in the Arbitral Tribunal's opinion, CISG must automatically apply also by virtue of articles 1(a) and 10(a), as the law applicable to a sale contract between parties belonging to different contracting states.

The Arbitral Tribunal considered the framework contract plus various specifications as a contract for delivery of goods by instalments, pursuant to article 73 CISG.

The Arbitral Tribunal found that the buyer's failure to complete payment of the goods already delivered was without well founded reasons, consequently the seller was entitled to recover the corresponding amount. The fact that the seller made its agreement to further deliveries subject to cooperation of the buyer on some requests did not constitute either a violation of the duty of good faith or a fundamental breach of the contract. Thus, the buyer could not refuse to make the payment assuming a fundamental breach on the seller's side.

In the Arbitral Tribunal's opinion the principle *inadimplenti non est adimplendum* did not apply to the case at hand. First, CISG does not include that exception among the remedies to be used. Secondly, the buyer did not validly terminate the contract (article 73 CISG) in its entirety or with respect to the third shipment.

Besides, wherever permitted, the exception could be used to withhold the performance until the other party has performed its obligation in respect of the same instalment.

The Arbitral Tribunal ruled that the seller was entitled also to interest on the payment pursuant to article 78 CISG. The interest rate was to be calculated in conformity with Russian law.

As for the incomplete shipment of goods complained by the buyer, the seller's refusal was groundless and the buyer was so entitled to compensation of damages for delayed performance (articles 45.2 and 47.2 CISG) as it bought other goods in replacement (paying a different price).

Case 728: CISG 3 (2)
Italy: Corte di Cassazione, Sezioni Unite
Jazbinsek GmbH v. Piberplast S.p.a.
6 June 2002 n. 8224
Original in Italian
Full text and excerpts available in Iurisdata (database)
Italian excerpt published in Giustizia civile, Massimario, 2000, p. 979.
Abstract prepared by Maria Chiara Malaguti, National Correspondent, and Rocco Palma.

The case concerned a contract between an Italian buyer and a German seller for the sale of industrial machinery to be installed by the latter in Italy and intended to speed up the production of plastic cans for food products. Since, upon installation, the machinery resulted to be different from the design agreed in the terms of contract and seriously defective, the buyer sued the seller before the district Court of Milan and obtained in first instance avoidance of contract and restoration of down payment, besides interests and damages. The seller appealed against the decision objecting that the Italian judge had no jurisdiction to hear the case; however the Court of Appeal confirmed its jurisdiction on the ground that: (1) by virtue of article 5.1 of the 1968 Brussels Convention, a defendant with domicile in a contracting State may be sued in another contracting States where the obligation is to be performed; (2) according to article 31(a) CISG – which was deemed applicable to the case by virtue of article 3.2 Brussels Convention –, the place of performance of the obligation was to be intended as the place of delivery of the goods, i.e. Italy. The seller decided to refer the issue to the Italian Supreme Court.

In deciding the case, the Court, relying both on its previous case-law (Cass. Civ. Sez. Un. n. 58, 10 March 2000) and that of the European Court of Justice (case C-440/97, 28 Sept. 1999), argued that, in order to correctly solve the issue of the competing jurisdictions, the place of performance was to be determined in accordance with the law regulating the obligation under the rules of conflict to be applied by the deciding judge. However, the Court found that: (1) the CISG was not applicable to the case as the contractual clauses to install the machinery at buyer's factory and to train his workers made clear that the contract was not an international sale of goods in the meaning of article 3 CISG; (2) in accordance with article 4.1 of the 1980 Rome Convention, the law regulating the obligation was to be deemed that of the country with which the contract presented the stricter connection (in this case, according to the Court, this was Italy). In the Court's opinion, since the contractual obligations were not exhausted by the mere handing over of the good to the career, but implied the assemblage of the machinery at the buyer's factory and the training of his employees, according to the Italian law, the place of performance was to be

considered Italy and, as a consequence, the Italian judge had jurisdiction to hear the case.

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