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CASE LAW ON UNCITRAL TEXTS (CLOUT)

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INTRODUCTION

This compilation of abstracts forms part of the system for collecting and disseminating information on court decisions and arbitral awards relating to Conventions and Model Laws that emanate from the work of the United Nations Commission on International Trade Law (UNCITRAL). Information about the features of that system and about its use is provided in the User Guide (A/CN.9/SER.C/GUIDE/1/Rev.1). CLOUT documents are available on the 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 729: CISG 36 (2), 45

Spain: Audiencia Provincial de Barcelona (Sección 1ª)

No. 619/2001

Eugenio v. BARBERAN, S.A.

21 March 2003

Published in Spanish: <http://www.uc3m.es/cisg/sespan52.htm>

Abstract prepared by Pilar Perales Viscasillas, National Correspondent

An Austrian buyer and a Spanish seller entered into a contract about a moulding machine, including sale and installation at the place of destination. The contract stipulated that the last payment rate should be due 30 days after the machine's installation. After the time elapsed, the buyer withheld the last payment rate, claiming that the machine was defective. In addition, the buyer claimed compensation for expenses and damages to its professional image due to the malfunctioning of the machine. The seller sued the buyer for the outstanding contract price and won. The buyer appealed the decision.

First, the court determined that there was a mixed contract, including elements of a sales contract and of a contract for services. The court decided that the installation was part of the sale price and that the sale of the machine was the essential part of the contract. The court noted that article 36 CISG holds the seller liable for any lack of conformity of the goods which occurs after the time the risk passes to the buyer and which is due to a breach of any of the seller's obligations. The court observed that the buyer had forwarded its claims only to prevent the payment of the rest of the purchase price pursuant to article 36 (2) and article 45 CISG, because it had failed to prove that the machine was not properly functioning. Additionally, the court held that the machine conformed to the contract expectations. As evidence the court took, beside others, the expert testimony that the buyer had earlier requested the seller to demonstrate the machine to some of its collaborators. Consequently, the court rejected the buyer's appeal.

Case 730: CISG 26, 74, 75

Spain: Audiencia Provincial de Valencia (Sección 8ª)

Guillem Export, S.L. v. Frischaff Produktions GMBH

31 March 2005

Published in Spanish: <http://www.uc3m.es/cisg/sespan48.htm>

Abstract prepared by Pilar Perales Viscasillas, National Correspondent

A German buyer entered into a sales contract for the purchase of oranges with a Spanish seller. The delivery was agreed to take place between the beginning of January and July 2002. When January passed without the delivery, the buyer entered into two substitute purchases with other sellers at a higher price. The last delivery of these substitute purchases took place at the end of September 2002. The buyer notified the seller of its avoidance of the contract and its substitute purchases only four days prior to the last substitute purchase in September 2002.

The buyer claimed the price difference as damages between the original contract price and the substitute purchases according to article 75 CISG. The first instance court granted the damages, but based on article 74 CISG due to the late notification of the seller. The seller

appealed the decision claiming that due to the late communication, there should be no recovery at all, either under article 74 or article 75 CISG.

The court followed the seller's reasoning and noted that a substitute purchase necessitated prior notification of avoidance according to article 26 CISG. The court held that article 74 CISG referred to other damages for breach of contract, in particular compensation of the injured party. Further, that the determination of damages under article 74 CISG was a different procedure than under article 75 CISG and that the buyer had not made a claim fulfilling these requirements. Consequently, the court reversed the first judgment and thus rejected the buyer's claim.

Case 731: CISG 26

Spain: Audiencia Provincial de Cordoba

No. 328/2005

Doña Julia v. D. Javier

26 July 2005

Published in Spanish: <http://www.uc3m.es/cisg/sespan43.htm>

Abstract prepared by Pilar Perales Viscasillas, National Correspondent

The buyer and the seller entered into a sales contract about real estate. The payment was to take place by instalments. After the date of the last instalment elapsed without payment, the seller avoided the contract by a notary declaration. The seller tried to get a court order evicting the buyer from the property. The buyer argued that the avoidance of the contract had not been judicially recognized.

The court held that the contract had been rightfully avoided. The court noted that a contract could be avoided after default by the other party judicially and extra judicially. In its reasoning, the court interpreted the national law making references to article 26 CISG and the European Contract Principles.

Case 732: CISG [1 (1)(a)], 25, 30, 35 (1), 35 (2), 45, 60, 74, 81

Spain: Audiencia Provincial de Palencia

No. 227/2005 (Sala de lo Civil, Sección 1ª)

Simancas Ediciones, S.A. v. Miracle Press Inc.

26 September 2005

Published in Spanish: <http://www.uc3m.es/cisg/sespan46.htm>

Abstract prepared by Pilar Perales Viscasillas, National Correspondent

A U.S. seller and a Spanish buyer entered into a contract for the purchase and installation of a printing machine. When the machine did not work properly upon its installation, the seller refused to repair the machine under the existing electric generator, but required the buyer to first put the machine to an electronic connection with a different electric voltage. In July, the cause for the machine defect had not been found yet. The buyer, nevertheless, bought a substitute machine from a Dutch company, as its production phase had started in March, as usual. The machine did not work either with the new electric connection. The buyer sought avoidance of the contract concluded with the U.S. seller and asked for damages, including the costs for the bank transfers to pay the contract price, the costs for the import of the machine, for the new electronic connection, diverse costs for material required by the technicians of the seller in the period of the failed installation of the machine,

the costs for the technicians' stay in Spain, the costs of other companies that the buyer had to hire to help fulfil its printing obligations to its clients and the price for the substitute machine less the amount which the buyer received for its resale.

The court of the first instance recognized the avoidance of the contract and granted the buyer all damages sought except for the substitute purchase. Its reasoning was that the purchase had taken place prematurely. Both parties appealed the decision. The buyer claimed that it was entitled to all damages including the costs for the substitute purchase, whereas the defendant claimed that it had fulfilled its obligations under the contract and that the defect of the machine was due to the inadequate place of installation provided by the buyer.

The court of appeals reversed the first decision in so far as it granted the buyer all damages sought. It noted that the first instance had rightfully deemed the CISG as applicable law, as the U.S. and Spain were both contracting States to the CISG [article 1 (1)(a) CISG]. The court then examined whether the seller had fundamentally breached its obligation under the contract by delivering a defective machine pursuant to articles 25, 30 and 35 (1), (2) CISG. The court rejected the allegation of the seller that the machine did not work as it had been installed in an inadequate place. This allegation, according to the court, was not proven. Further, the court found that there was no failure of the buyer under its obligations to take delivery, pursuant to article 60 CISG. Thus, the court noted that the first instance had rightfully declared the contract avoided, which obligated the parties to concurrently make restitution of what they had received from the other party under the contract according to article 81 CISG. The court further noted that the buyer was entitled to damages pursuant to article 45, 74 CISG. The damages should also include the purchase price for the substitute machine less its resale price, because the default of the seller's machine caused the substitute purchase. Though the reason for the machine failure had not been found in July, the court held that the machine did not properly function either at that time or later. As the buyer was already late in fulfilling its printing obligations, the court deemed the substitute purchase reasonable, timely and adequate.

Case 733: CISG [1]

Spain: Tribunal Supremo

No. 165/2006 (Sala de lo Civil, Sección 1ª)

Compañía Mercantil NER-TOR, S.A. v. AUTOLUX F. STRUB

24 February 2006

Published in Spanish: <http://www.uc3m.es/uc3m/dpto/PR/dppr03/cisg/sespan49.htm>

Abstract prepared by Pilar Perales Viscasillas, National Correspondent

A Swiss seller and a Spanish buyer entered into a contract for the purchase of car accessories. The seller was repeatedly late in the delivery, sent products that did not conform in quantity or size to those agreed in the contract or the products did not function properly. Thus, the buyer took legal action, seeking avoidance of the contract and damages.

The case went through three levels of jurisdiction and only in the last level the seller claimed that the contract should be governed by the CISG. The court noted that this was a new legal argument, which the seller had not stated before. The court further observed that, in previous instances, the seller had presented arguments only based

on Spanish law. Consequently, the court held that the seller had tacitly consented to Spanish law as the applicable law and deemed the CISG not applicable [article 1 CISG].

Case 734: CISG 25, 26, 39 (1), 49 (1)(a), 49 (2)(b)(i)

Spain: Audiencia Provincial de Castellón (Sección 3ª)

No. 138/2006

MOTORTRACCION CASTELLON, S.L. v. D. Evaristo

21 March 2006

Published in Spanish: <http://www.uc3m.es/cisg/sespan53.htm>

Abstract prepared by Pilar Perales Viscasillas, National Correspondent

The seller, a German company, sold devices to a Spanish company to reduce the consumption of gasoline in cars. The purchase price was due in January 2001. The gadgets did not reduce the gasoline consumption and the buyer orally informed the seller of this problem. The seller visited the buyer's premises in June 2001 to verify the lack of conformity. In March of the following year the buyer formally notified the seller the non-conformity, and avoided the contract.

The seller sued the buyer claiming the outstanding contract price, which the buyer denied paying due to the goods' lack of conformity. The court noted that the lack of conformity of the goods was due to a hidden default, according to article 39 (1) CISG. However, the court held that the time of the written notification by the buyer to the seller was not within a reasonable time according to article 39 (1) CISG and thus upheld the seller's claim. The buyer appealed the decision.

The appellate court noted that the lack of conformity of the goods constituted a fundamental breach according to article 25 CISG. The court observed that the buyer had orally informed the seller about the goods' non-conformity and its intention of returning them before the written notification took place, which even resulted in the seller's visit to the buyer. Thus, the court held that the buyer had notified the seller of its intention to avoid the contract according to article 26 CISG and article 49 (1)(a) CISG. In addition, the court decided that these communications took place within a reasonable time according to article 49 (2)(b)(i) CISG. The buyer's appeal was, thus, upheld.

Case 735: CISG 25

Spain: Tribunal Supremo

No. 364/2006 (Sala de lo Civil, Sección 1)

Banco Urquijo, S.A. v. Hispania Agropecuaria, S.L.

05 April 2006

Published in Spanish: <http://www.uc3m.es/uc3m/dpto/PR/dppr03/cisg/sespan54.htm>

Abstract prepared by Pilar Perales Viscasillas, National Correspondent

A Spanish creditor gave credit to a Spanish debtor, fixing the payment dates by instalment. When the last payment date elapsed, the debtor had only paid back part of the credit. Further, the debtor communicated to the creditor that it could not further pay its dues. The creditor avoided the contract for reason of default by the debtor.

The court examined whether the non-payment of the debtor's dues represented a fundamental breach of its obligation under the credit contract. The court observed that the

failure of performance needed to constitute a fundamental breach, which had to take place intentionally. The court further noted that this definition had been progressively specified in the jurisprudence, i.e. the breach needed to frustrate the contract, leading to the failure of the legitimate expectations of the other contracting party. Additionally, the court observed that this refined interpretation adjusted to the principles of modern international instruments, referring to the definition of a fundamental breach under article 25 CISG and the European Contract Principles. The court concluded that, accordingly, the debtor had fundamentally breached its obligation by not paying its dues at the last payment date.

Case 736: CISG 25, 49

Spain: Tribunal Supremo

No. 1062/2006 (Sala de lo Civil, Sección 1ª)

D. Tomás y Dª Almudena v. Don Casimiro y Doña María Milagros

31 October 2006

Published in Spanish: <http://www.uc3m.es/uc3m/dpto/PR/dppr03/cisg/sespan56.htm>

Abstract prepared by Pilar Perales Viscasillas, National Correspondent

A Spanish buyer and a Spanish seller entered into a contract for the purchase of a real property. At the time of the contract, the seller was aware of the rights of a third party to the same real property pursuant to a verbal contract. The third party filed its claim after the buyer and the seller had signed the contract. When the buyer found out about the third party's claim, it withdrew from the contract and claimed its money back for breach of performance of the seller.

The claim was upheld and the seller appealed, until the case came before the Supreme Court. The court discussed the concept of a fundamental breach of one party, which would give the right of avoidance to the other. The court noted that a fundamental breach needed to take place intentionally and that this definition had been progressively specified in its jurisprudence, i.e. the breach needed to be a substantial violation of the contract leading to the failure of the legitimate expectations of the other contracting party. The court also observed that this evolution adjusted to the requirements of a fundamental breach contained in article 25 CISG, giving the right of avoidance pursuant to article 49 CISG, and also to the European Principles of Contract law. The court further noted that the dispositions of an international convention which formed part of its legal regime and that were also embodied into national law (commercial law) should help in the application of national law by interpreting it in accordance with the current social and legal development of the country. Consequently, the court held that the seller committed a fundamental breach by selling real property that was encumbered with the claim of a third party and it rejected the seller's appeal.

Case 737: CISG 25

Spain: Sentencia de la Audiencia Provincial Islas Baleares

No. 479/2006 (Sección 5ª)

Doña Rosa v. Carpintería Merak

09 November 2006

Published in Spanish: <http://www.uc3m.es/uc3m/dpto/PR/dppr03/cisg/sespan57.htm>

Abstract prepared by Pilar Perales Viscasillas, National Correspondent

The Spanish claimant and the Spanish defendant entered into a carpeting contract, under which the claimant was to craft and install works in the house of the defendant. The defendant did not pay the agreed contract price, claiming that the work was faulty. Therefore, the claimant took legal action to recover the money.

The court noted that the breach of contract by one party must be fundamental in order to give the other party the right of avoidance. According to the court, a fundamental breach needed to be intentional and to be a substantial violation of contract leading to the failure of the legitimate expectations of the other contracting party. The court also observed that this interpretation trend in jurisprudence adjusted to the principles of modern international instruments, referring to the definition of a fundamental breach in article 25 CISG and in the European Contract Principles. The court decided that the claimant's work had only some very minor defects and that the claimant, thus, had fulfilled its obligation under the contract. In contrast, it held that the defendant had fundamentally breached its obligation by not paying the agreed contract price.

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Case 737: *Spain: Sentencia de la Audiencia Provincial Islas Baleares, (Sección 5ª) Doña Rosa v. Carpintería Merak (09 November 2006)*

II. Cases by text and article

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Case 734: *Spain: Audiencia Provincial de Castellón (Sección 3ª) MOTORTRACCION CASTELLON, S.L. v. D. Evaristo (21 March 2006)*

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