United Nations A/CN.9/SER.C/ABSTRACTS/74

General Assembly

Distr.: General
18 April 2008

Original: English

[Start1]

United Nations Commission on International Trade Law

CASE LAW ON UNCITRAL TEXTS (CLOUT)

Contents

V.08-53094 (E) 300408 020508

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). The purpose is to facilitate the uniform interpretation of these legal texts by reference to international norms, which are consistent with the international character of the texts, as opposed to strictly domestic legal concepts and tradition. More complete information about the features of the system and 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/clout/showSearchDocument.do).

Each CLOUT issue includes a table of contents on the first page that lists the full citations to each case contained in this set of abstracts, along with the individual articles of each text which are interpreted or referred to by the court or arbitral tribunal. The Internet address (URL) of the full text of the decisions in their original language is 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 of that website by the United Nations or by UNCITRAL; furthermore, websites change frequently; all Internet addresses contained in this document are functional as of the date of submission of this document). Abstracts on cases interpreting the UNCITRAL Model Arbitration Law 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. Abstracts on cases interpreting the UNCITRAL Model Law on Cross-Border Insolvency also include keyword references. The abstracts are searchable on the database available through the UNCITRAL website by reference to all key identifying features, i.e. country, legislative text, CLOUT case number, CLOUT issue number, decision date or a combination of any of these.

The abstracts are prepared by National Correspondents designated by their Governments, or by individual contributors; exceptionally they might be prepared by the UNCITRAL Secretariat itself. 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 Convention on Contracts for the International Sale of Goods (CISG)

Case 770: CISG 4, 11, 35, 36, 38, 39, 40, 49, 73, 74, 75, 77, 78, 80, 96
People's Republic of China: China International Economic & Trade Arbitration Commission [CIETAC]
30 March 1999
Published in Chinese: Zhong Guo Guo Ji Jing Ji Mao Yi Zhong Cai Wei Yuan Hui Cai Jue Shu Hui Bian [Compilation of CIETAC Arbitration Awards] (May 2004) 1999 vol., pp. 1703-1738
English translation: http://cisgw3.law.pace.edu/cases/990330c2.html
Abstract prepared by Damon Schwartz

The case deals with the conformity of goods, notice periods and article 40 "safety valve", avoidance for fundamental breach and the calculation of damages.

An American buyer entered into multiple contracts with a Chinese seller for the purchase and transportation of forging carbon steel flanges ("flanges"). Each contract contained different terms: on quantity, specification, price, and time of delivery. However, other terms such as quality, examination, claims, and arbitration were the same. Furthermore, the seller was to provide the so-called Mill Test Reports ("MTRs") describing the chemical and heat data of the flanges. The buyer had the option to inspect the goods prior to shipment and the right of examination was an inseparable part of the agreement. In the early stages of the contractual relationship, some minor quality issues were resolved by the parties without reference to the contractual periods for claims.

After a few years, some quality deficiencies were discovered in the goods by one of the buyer's third-party customers. Therefore, the customer returned all Chinese flanges to the buyer and claimed compensation. The buyer requested compensation from the seller, but the negotiations were unsuccessful as the seller denied liability on the contractual grounds that claims could only be placed within 90 days of the arrival of the goods.

Eventually, the buyer agreed on compensation with the seller and mitigated the losses by selling flanges at lower prices. Further, the buyer notified the seller it would not accept any undelivered flanges called for under the contract.

When the case was heard by the arbitral tribunal, both parties agreed that the CISG was applicable pursuant to the laws of the People's Republic of China and since the parties' countries were signatories to the CISG. Experts were appointed to determine the existence of deficiencies in the goods and the authenticity of the testing data.

The buyer claimed for damages under CISG article 74 pursuant to breach of CISG articles 36 (1), 36 (2), and 40. It argued that since it had the right to inspect goods prior to or after shipment, failure to inspect goods prior to shipment did not waive any rights to inspect the goods after shipment. Further, it claimed that the MTRs should be considered as a quality warranty. As some of the flanges were found to be inconsistent with the MTRs, the buyer claimed an extended period to submit indemnity claims. Its argument that the MTRs should be considered a quality warranty was partially accepted by the tribunal.

The seller based its arguments on CISG articles 38 (1), 39 (1), and 39 (2). It submitted that the buyer had failed to perform inspections which would have discovered many of the possible defects. The seller also claimed that the buyer had waived the right to claim for quality defects as it had not inspected the goods prior to shipment nor raised the claim within three months after the goods' arrival at the destination port. The seller maintained that the flanges were not defective, as evidenced by the buyer's own testing, and that the buyer's self-testing procedures were incorrect and therefore inaccurate. In addition, the seller requested that the buyer should pay for the remaining undelivered flanges determined in the contracts and compensate the seller for losses due to storage, reprocessing, and lost profit.

The experts' report concluded that some of the flanges tested were defective under the standards specified in the contracts. The experts also found that the buyer's independent and self-testing methods were not completely consistent with acceptable testing procedures and could not be used to determine defect rates.

The tribunal decided that the failure to inspect the goods prior to shipment did not waive the right to all later inspections, as the contract provisions stated that the buyer's right to examination was inseparable from the agreement. The tribunal found that CISG article 36 (1) was in accordance with the contract provisions, stating that the seller was liable for any lack of conformity which existed at the time when the risk passes to the buyer, even though the lack of conformity became apparent only later on. The tribunal considered the seller liable under CISG article 36 (2), in that the defective flanges were a breach of a guarantee that the goods would remain fit for their ordinary purpose. However, the guarantee period was not indefinite and would not extend past the two-year period set forth in CISG article 39 (2).

As to the defective and non-conforming goods, the tribunal found that the seller should not be held liable for the non-latent defects after the three-month period stipulated in the contracts, as these defects could have been discovered by simple examination of the goods. The buyer should therefore share some of the liability for the losses due to its failure to perform inspections of the flanges [CISG article 38 (1)]. However, the seller was found to be liable for latent defects beyond the three-month period up to two years, as these defects could only be discovered with destructive tests or through actual use. Although the tribunal concluded that some of the deficiencies in this case were defects of which the seller "could not have been unaware", the tribunal held that CISG article 40 is secondary to CISG article 39 (2). The tribunal ruled that the language of CISG article 39 (2) bars an indemnity claim beyond the two-year period recited therein.

The tribunal stated that the seller would be liable for latent defects where the buyer had raised a claim within two years after the acceptance of the flanges. Non-latent defect claims were dismissed as the buyer should have performed inspections and notified the seller within the three-month period of the contracts. The tribunal also found that the buyer's claim for lost profits on the undelivered flanges was unsupported by evidence of serious defects. The buyer's claims for losses were granted by the tribunal as an acceptable method of mitigating damages. The tribunal determined that the seller should bear no liability for the buyer's settlement of its dispute with its third-party customer.

Case 771: CISG 9, 50, 74, 78
People's Republic of China: China International Economic & Trade Arbitration Commission [CIETAC]
21 May 1999
Published in Chinese: Zhong Guo Guo Ji Jing Ji Mao Yi Zhong Cai Wei Yuan Hui Cai Jue Shu Hui Bian [Compilation of CIETAC Arbitration Awards] (May 2004) 1999 vol., pp. 1980-1988
English translation: http://cisgw3.law.pace.edu/cases/990521c1.html
Abstract prepared by Jean Ho

The case deals with the conformity of the goods, the claim for a reduction in price on the basis of non-conformity and general rules for measuring damages.

A Korean seller and a Chinese buyer entered into a contract for the sale and purchase of excavators. The payment terms included the price for the goods and interest. Upon receipt of the goods, the buyer made a partial payment to the seller and subsequently resold the excavators. After numerous failed attempts to get the buyer to make the outstanding payment and suffering severe economic loss, the seller filed for arbitration proceedings against the buyer.

The buyer argued that the excavators delivered by the seller were not those contracted for, but were related to previous arrangements, since the Bill of Lading showed that they had been shipped in September 1994. As the seller had changed the content of the contract, the buyer was merely helping the seller to deal with the excavators. In addition, the width of two excavators did not conform to the contract and other excavators had various quality defects. According to the experts hired by the buyer, because of these defects the buyer was entitled to claim a reduction in price (CISG article 50).

The seller argued that a delivery date different from the date stipulated in the contract or prior to the date of conclusion of the contract did not prevent the goods delivered from being the goods contracted for (CISG article 9). The buyer was therefore not entitled to claim a reduction in price for non-conformity after it had inspected and accepted the goods. Any claim for the reduction in price should have been made before the acceptance of the goods. The buyer was also not entitled to claim damages for defective goods since it had not produced a Certificate of Inspection from the relevant Commodity Inspection Bureau.

The arbitral tribunal decided to allow a reduction of 10 per cent of the contract price. The buyer was to pay the seller the unpaid contract price, and interest on the paid price, as well as interest on the paid and the unpaid price (CISG article 78). The tribunal found indeed that it was not essential that the excavators were delivered prior to the date of the conclusion of the contract, the issue being whether the goods delivered were those under the contract. The tribunal stated that the seller had fulfilled its duty to appropriate the excavators from the goods delivered as the buyer had accepted the Bill of Lading submitted by the seller and had taken delivery of the excavators. By accepting delivery of and reselling the excavators, the buyer had lost the right to claim that the excavators were not the ones contracted for. The tribunal agreed with the buyer that it was entitled to claim damages for the two excavators that did not comply with contractual specifications (CISG article 74). The buyer was also entitled to claim damages for quality defects raised within the warranty period despite the absence of a Certificate of Inspection. The tribunal

considered that since the seller did not contest the buyer's claims of the goods being defective, this led the buyer to think that it was unnecessary to produce a Certificate of Inspection in order to prove its claims.

Case 772: CISG 1 (1), 6, 57 (1)(a)
Germany: Bundesgerichtshof
III ZR 237/02
30 April 2003
Original in German
Published in: [2003] BGH-Report, 897; [2003] Internationales Handelsrecht (IHR), 170; [2003] Monatsschrift für Deutsches Recht (MDR), 1007; [2003] Wertpapier-Mitteilungen (MW), 2157; [2003] NJW-Rechtsprechungsreport Zivilrecht (NJW-RR), 1582; BGH Rechtsprechung (BGHR), EGÜbk Art 5 Nr 1 Erfüllungsort XX;
http://www.cisg-online.ch/cisg/urteile/790.htm (original);
http://cisgw3.law.pace.edu/cases/030430g1.html (English translation);
http://www.unilex.info
Abstract prepared by Prof. Ulrich Magnus, National Correspondent and Jan Lüsing

In this case, the Federal Court of Justice had to decide whether German courts had international jurisdiction according to article 5 No. 1 EuGVÜ. Article 5 No. 1 EuGVÜ defines the international jurisdiction according to the place of performance: the question raised was thus whether the dispute was governed by CISG and therefore if the place of performance was to be determined by article 57 (1)(a) CISG.

The plaintiff, a German grower of cucumbers, entered into an agreement with a Dutch cooperative for utilising its cucumbers. The contract between the parties was part of the standard selling procedure, whereas it was the function of the cooperative to sort the cucumbers by quality classes and to bring the goods to market by way of auctions, advance sale and sale.

The German cucumber grower filed an action in Germany against the cooperative for payment of the outstanding "purchase price" as well as damages for having allegedly sorted the cucumbers in the wrong way, and reimbursement for lawyer fees incurred before filing the action. The Regional Court largely granted the plaintiff's claim. The Higher Regional Court reversed the verdict for lack of the international jurisdiction of German courts. The plaintiff applied for legal aid to appeal to the Federal Court of Justice, claiming that the Higher Regional Court failed to consider the fact that the parties had agreed on predetermined prices for the forthcoming cucumber harvest.

The Federal Court of Justice upheld the lower court's decision. Denying the applicability of CISG, it found that the agreement the parties had entered into is not to classify as contract of sale, but as a contract of agency, which is outside the sphere of application of CISG. The agreement on predetermined fix prices does not necessarily mean that this agreement equals to a sales contract. Therefore the Federal Court held that the place of performance was not to be defined by article 57 (1)(a) CISG but by the Dutch law, pursuant to the rules of German conflict of law provisions. As a result, the international jurisdiction of German courts was not established under article 5 No. 1 EuGVÜ.

Case 773: CISG 4, 36, 38, 39 (1), 40, 44
Germany: Bundesgerichtshof
VIII ZR 321/03
30 June 2004
Original in German
Published in: [2004] BGH Report, 1645; [2004] Internationales Handelsrecht (IHR), 201; [2004] Recht der internationalen Wirtschaft (RIW), 788; [2004] Neue Juristische Wochenschrift (NJW), 3181; [2004] Monatsschrift für Deutsches Recht (MDR), 1305; [2004] The European Legal Forum (EuLF), 385;
http://www.cisg-online.ch/cisg/urteile/847.htm (original);
http://cisgw3.law.pace.edu/cases/040630g1.html (English translation);
http://www.unilex.info
Abstract prepared by Prof. Ulrich Magnus, National Correspondent and Jan Lüsing

The decision deals with the conditions that would allow shifting the burden of proof under article 40 CISG.

The plaintiff, a company located in Spain, sold the defendant paprika powder and oil. The defendant set it off against an alleged claim for damages as a result of non-conformity of the goods previously delivered.

The previous delivery consisted of sweet paprika, which were not to be irradiated according to the parties' agreement. The buyer inspected the goods merely with respect to the degree of purity but not for radiation exposure, as such an examination is costly and time-consuming. Only after an article in a test magazine had given an indication for radiation exposure the defendant initiated tests of four samples of the delivered goods proving radiation exposure. Following the test reports, the defendant complained by letter about the radiation exposure of the goods delivered. Subsequently it demanded damages. The plaintiff disputed the radiation exposure of the goods.

The Regional Court granted the seller the full purchase price and the Higher Regional Court rejected the buyer's appeal. The buyer appealed to the Federal Court of Justice.

The Federal Court found, in accordance with the judgment of the Higher Regional Court, that the buyer lost his right to rely on a lack of conformity of the goods under article 39 (1) CISG as it had failed to give notice of the non-conformity within reasonable time. The Federal Court stated that the period of notice had started as of the receipt of the test report, because a prior routine testing of the paprika powder for radiation exposure was unreasonable for the buyer in view of the expenditure related to such a measure. It held that the period of more than two months between the buyer's knowledge of the first test report and its notice of complaint however could not be deemed to be within a reasonable time as per article 39 (1) CISG.

In the Higher Regional Court's judgment it was assumed that the buyer did not present a reasonable excuse for its failure to give timely notice (article 44 CISG) and had not provided evidence that the seller knew or could not have been unaware of facts concerning the irradiation of the paprika powder (article 40 CISG). The Federal Court, however, did not agree with the lower Court as far as article 40 CISG is concerned. While in principle the buyer has to prove the factual requirements of article 40 CISG because this article is the exception to article 39 CISG, the Federal Court stated that the Higher Regional Court had not sufficiently considered the

question of which of the parties can provide evidence of the factual requirements more easily (proof proximity). The Court stated that if the production of evidence means unreasonable difficulties of proof for the buyer, the burden of proof can shift to the seller, claiming that this principle is accepted within the scope of the CISG and is taken into account by article 40 CISG. The article not only refers to the seller's actual knowledge of the facts on which the breach of contract is based, but also covers its negligent ignorance. Furthermore, gross negligence is to be assumed, if the goods widely deviate from what is required by the contract and the non-conformity results from a fact within the seller's domain.

In the present case, however, the Federal Court did not affirm that gross negligence was to be assumed, due to the difficulty to detect radiation exposure, but found that it resulted from the principle of "proof proximity". While the buyer should prove that the goods delivered by the seller were irradiated, the seller should demonstrate that it did not act with gross negligence. If the buyer's allegations were correct, it should further be proved either that the irradiation took place at the seller's facilities or at the facilities of the seller's supplier. In this case it would be for the seller to explain that it did not act with gross negligence since the breach of contract occurred in its domain.

The Federal Court of Justice reversed the judgment of the Higher Regional Court and remanded the matter for a new hearing and judgment to the Higher Regional Court.

Case 774: CISG 7 (1), 35 (2)(a), 36 (1), 50, 67 (1)
Germany: Bundesgerichtshof
VIII ZR 67/04
2 March 2005
Original in German
Published in: [2005] BGH-Report, 1026; [2005] Internationales Handelsrecht (IHR), 158; [2005] Recht der internationalen Wirtschaft (RIW), 547; [2005] Juristenzeitung (JZ), 844; [2005] Der Betrieb (DB), 1959; [2005] Monatsschrift für Deutsches Recht (MDR), 972; [2005] Wertpapier-Mitteilungen (WM), 1806; [2005] NJW Rechtsprechungsreport Zivilrecht (NJW-RR), 1218; [2005] The European Legal Forum (EuLF), I-148 and II-127;
http://www.cisg-online.ch/cisg/urteile/999.htm (original);
http://cisgw3.law.pace.edu/cases/050302g1.html (English translation);
www.unilex.info
Abstract prepared by Prof. Ulrich Magnus, National Correspondent and Jan Lüsing

The case deals with the conformity of goods and the reduction of price.

A German buyer entered into contract with a Belgian seller for the purchase of pork. It was agreed that the meat should be delivered directly to the buyer's customer, who would forward the goods to the ultimate buyer in Bosnia-Herzegovina. The goods were delivered in three instalments, for which of them the seller drew up invoices payable on 25 June 1999 at the latest. The last instalment arrived in Bosnia Herzegovina on 4 June 1999.

The suspicion of Belgian pork being contaminated with dioxin started to arise in Belgium and Germany as of June 1999. On 11 June an ordinance was enacted in

Germany which declared Belgian pork as not marketable unless a health clearance certificate proving the meat to be free of dioxin was presented. On 28 July 1999 a similar ordinance was enacted in Belgium including provisions regarding meat that had already been exported abroad. The defendant rendered only a partial payment towards the total amount. The remaining purchase price was assigned to the plaintiff [i.e. the seller's assignee] by the Belgian meat wholesaler.

The plaintiff filed an action demanding payment of the remaining purchase price. The buyer stated that the delivered pork had been withheld and finally disposed of by customs after Bosnia-Herzegovina had prohibited the resale and the buyer had not been able to present a health clearance certificate, which it had repeatedly requested from the Belgian meat wholesaler.

After the Regional Court had dismissed the plaintiff's claim for payment of the remaining purchase price, the Higher Regional Court rejected the plaintiff's appeal as well. Eventually, the plaintiff appealed to the Federal Court of Justice.

The Federal Court of Justice reversed the judgment of the Higher Regional Court and amended the Regional Court's verdict. It held that the Higher Regional Court had reached its decision incorrectly by referring to precedents of the national jurisdiction only. The Federal Court expressed that, under article 7 (1), it is necessary to interpret the provisions of the CISG autonomously i.e. with reference to its international character and without recourse to principles developed for national laws.

As to the substance, the Federal Court held that the defendant was entitled to reduce the price because of non-conformity of the delivered goods pursuant to articles 35, 36, 50 CISG as far as the delivered pork had been affected by the precautionary measures of the ordinance enacted in Belgium. In the Federal Court's opinion this applied to the two initial deliveries, whereas the last delivery did not originate from animals slaughtered within the time period the Belgium ordinance referred to.

The Federal Court stated that in international wholesale and intermediate trade the resaleability (tradability) of the goods is one aspect of being fit for the purpose of ordinary use in terms of article 35 (2)(a) CISG and that in the case of foodstuff intended for human consumption, the resaleability includes that the goods are at least not harmful to health. Insofar as this is governed by provisions of public law, the law of the seller's state is applicable on principle.

Furthermore, the Federal Court held that in the sector of international wholesale and intermediate trade, the mere suspicion that the goods may be harmful to health represents a lack of conformity of the goods and therefore a breach of contract at any rate, if the suspicion has resulted in measures of public-law precluding the tradability of the goods.

Pursuant to article 36 (1) CISG, the Federal Court stated that the lack of conformity is already given at the time when the risk passes to the buyer, even if the non-conformity became apparent only after the risk has passed, i.e. in cases of hidden defects. The characteristics of the goods causing the loss of resaleability were inherent to the pork when the risk passed, as it was certain beyond doubt at that time that the pork originated from animals suspected to be contaminated with dioxin.

Arguing that there had not been any other way of utilizing the meat, the Federal Court granted the defendant the right to reduce the purchase price to zero for the first two deliveries.

Case 775: CISG 25, 38, 39 (1), 40, 44, 45 (1)(b), 74
Germany: Landgericht Frankfurt am Main
2-26 O 264/04
11 April 2005
Original in German
Published in: [2005] Internationales Handelsrecht (IHR) 2005, 161
http://www.cisg-online.ch/cisg/urteile/1014.htm (original);
http://cisgw3.law.pace.edu/cases/050411g1.html (English translation)
Abstract prepared by Prof. Ulrich Magnus, National Correspondent and Jan Lüsing

The case deals with issues of fundamental breach of contract, examination of goods and lack of conformity.

The buyer, a company based in Kampala/Uganda, entered into a contract with a German seller for purchasing second-hand shoes of first quality level and second-hand shoes of second quality level. The parties agreed upon C&F FOB Mombasa, Kenya. The goods were shipped by the seller to Mombasa. The original bill of lading was handed over by the seller, after the last instalment of the purchase price had been paid. After the buyer had redispatched the shoes to Kampala/Uganda and examined them, it sent a notice of non-conformity of the goods to the seller. Moreover, the Uganda National Bureau of Standards refused to grant the import license because of the bad and unhygienic condition of the shoes. The buyer gave notice of non-conformity for the second time and fixed an additional period of time for performance. Eventually, it declared the contract avoided by letter.

The buyer brought an action to the German Regional Court of Frankfurt am Main against the seller for reimbursement of the purchase price as well as of the costs incurred, such as customs and handling fees and freight charges. The plaintiff argued that the shoes delivered did not conform to the quality levels the contract provided for. Regarding the timeliness of the notice of non-conformity, it states that the seller knew about the redispatch from Mombasa to Kampala and that there was no reasonable opportunity for examination in Mombasa, since an examination would have caused additional customs duties in consequence of damaging the customs seal. In defence, the seller relied on article 39 CISG arguing that the plaintiff had failed to give notice of non-conformity of the goods in time. He also denied all knowledge of the redispatch by the buyer.

Despite affirming a fundamental breach of contract, the court rejected the plaintiff's claim, holding that the plaintiff was not entitled to any payment under articles 45 (1)(b), 74 CISG and article 81 (2) CISG, nor under any other provisions.

The court found that the notice of lack of conformity had not been given within a reasonable time, so that the plaintiff had lost its right to rely on the non-conformity of the goods under article 39 (1) CISG. Examining the goods more than three weeks after the receipt of the bill of lading, the plaintiff did not meet the condition of article 38 (1) as the non-conformity of the shoes could have been detected without any effort by merely taking a random sample.

In addition, the Court denied the plaintiff's reference to article 38 (3) CISG. Concerning the seller's knowledge of the possibility of a redispatch of the goods at the time of the conclusion of the contract, as required by article 38 (3), the court stated that the fact that the buyer was based in Kampala/Uganda alone was not sufficient to impose notice of the possibility of a redispatch. As for the missing opportunity for examination, the court held that the additional payment of customs duty in Kenya cannot be regarded as rendering the opportunity for examination unreasonable in the sense of article 38 (3) CISG since it was the purchaser's affair to take into account the number and the amount of the customs duties.

Denying the plaintiff's right to reduce the purchase price under article 44 CISG, the court argued that the plaintiff had not presented a reasonable excuse for the failure of a timely notice of non-conformity according to article 44 CISG. The court did not address the issue of whether this case qualified under article 40 CISG.

Case 776: CISG 38 (1), (2), 39 (1)
Mexico: Juzgado Primero Civil de Primera Instancia de Lerma de Villada
254/2004
Barcel S.A. de C.V. v. Steve Kliff
3 October 2006

The case deals with the goods' lack of conformity.

A Mexican company, dealing with salty snacks (the buyer), concluded an oral agreement with a California based seller to purchase foil trading cards.

Upon delivery of the goods, the buyer noticed their toxic and malodorous state, which made them totally unfit for the intended use in food packaging. Eventually, the buyer sued the seller for breach of contract due to lack of conformity of the goods.

The court found that the buyer had failed to notify the lack of conformity of the goods to the seller in a reasonable time. In particular, the court made reference to articles 38 and 39 CISG, relating to the reasonable time for the examination of the goods and to the time period for giving notice of lack of conformity. In discussing those articles, the court referred to article 383 of the Mexican Commercial Code, which establishes a five-day term for the buyer to inform the seller of apparent lack of conformity and a thirty-day term to inform of non-apparent lack of conformity, and concluded that the CISG and the domestic provisions were analogous. The court dismissed the lawsuit accordingly.

Case 777: CISG 1, 4, 8 (1), 8 (2), 8 (3), 9 (1), 9 (2)
United States: U.S. [Federal] Court of Appeals for the Eleventh Circuit
05-13005
Treibacher Industrie, A.G. v. Allegheny Technologies, Inc.
12 September 2006
Published in English: 464 F.3d 1235 (11th Cir. 2006); 2006 U.S. App. LEXIS 23252
http://www.call.uscourts.gov/opinions/ops/200513005.pdf (English language text)
Abstract prepared by John H. Rooney, Jr.

An Austrian supplier and a United States buyer located in Alabama entered into a series of contracts for the purchase of a chemical compound for "consignment". Each contract specified the amount of compound that would be delivered to the buyer. For all contracts preceding the contracts in dispute, the buyer had purchased the entire compound delivered by the supplier, and on one occasion had desisted from an attempt to return unused compound. The buyer, during the terms of the two contracts in dispute, notified the supplier that it would not be taking additional delivery of compound and would not be paying for compound that had been delivered but not used. Unknown to the supplier, the buyer had found a less expensive source for compound. The supplier found an alternate buyer for the compound, but at a lower cost. It then filed suit to recover the amount the buyer should have paid if it had taken delivery of all of the powder indicated in the contracts.

The supplier and the buyer disagreed as to the meaning of the delivery term "consignment". According to the buyer's expert, in the metals industry "consignment" meant that no sale occurred until the compound was actually used by the buyer. The supplier provided evidence of course of dealing between the parties to establish that "consignment" meant that the buyer had the obligation to pay for all of the compound delivered, but that the buyer would not be billed until the compound was actually used by it.

Applying the CISG, the lower judge found that "evidence of the parties' interpretation of the term in their course of dealings trumped evidence of the term's customary usage in the industry," and found that the buyer was obligated to purchase all compound delivered pursuant to the contract and was condemned to pay the price.

The buyer appealed, arguing that under the CISG a term in a contract should be interpreted according to its customary usage "unless the parties have expressly agreed to another usage." The buyer also argued that the parties in their course of dealing did not require the buyer "to use and pay for all of the [compound] specified in each contract." Finally, it argued that the lower court incorrectly found that the supplier had properly mitigated its damages.

The appellate court affirmed the judgment of the lower court in all respects.

First, the appellate court confirmed the applicability of the CISG, since the United States and Austria were contracting States of the Convention (articles 1 and CISG). The appellate court framed the issue of breach of contract as governed by article 9 of the CISG, as informed by article 8.

The appellate court noted that article 8, which governs the interpretation of the parties' statements and conduct, dealt separately with the situation in which the

actual intent of a party is known to the other party and when the actual intent is not known. The court concluded that when actual intent is not known, article 8 imposes a reasonable person standard. Article 8 (3) identifies the sources for determining a party's actual intent, "including the negotiations, any practices which the parties have established between themselves, usages and any subsequent conduct of the parties."

The buyer argued that article 9 requires the express agreement of the parties for usage between the parties to prime customary usage in the industry. Specifically, it argued that article 9 (2) required that the parties expressly agree not to be bound by customary usage. In support, it cited the portion of article 9 (1) that obligates the parties to "any usage to which they have agreed and by any practices which they have established between themselves." The buyer also argued that when this definition is applied to article 9 (2), the contract terms should "be interpreted according to customary usage" unless the parties agree to the contrary.

The appellate court found that the buyer's interpretation would render article 8 (3) and the latter portion of article 9 (1) nullities.

The latter part of article 9 (1) would be rendered void because the parties would no longer be governed by "any practices which they have established between themselves." In rejecting the buyer's interpretation of article 9 (2), the appellate court stated that the parties' usage of a term in their course of dealings controls that term's meaning in the face of a conflicting customary usage of the term".

The appellate court noted that it was not disputed that the parties had entered into a series of contracts for supply of the chemical compounds between 1993 and 2000. All contracts were for specific quantities of compound, and were for "consignment", compound was segregated by the buyer, who provided monthly "usage reports" to the supplier. The usage reports were used to invoice the buyer for compound as it was used. All compound delivered to the buyer had been used and paid for by it for all contracts entered into prior to the two contracts in dispute.

The appellate court also noted that the buyer had in the past acted as if it was obligated to purchase all compound delivered in accordance with the contracts.

The appellate court finally found that the supplier did take reasonable steps to mitigate its damages, as required under article 77 of the CISG, as it had found a buyer for part of the compound within 17 days of the buyer's notice. The court found that the article 77 placed the burden on the buyer to prove the supplier's failure to mitigate, but that the buyer had presented no evidence showing a failure to mitigate.

The appellate court decided that the district court properly determined that, under the CISG, the meaning the parties ascribe to a contractual term in their course of dealings establishes the meaning of that term in the face of a conflicting customary usage of the term. The district court was not clearly erroneous in finding that the supplier and the buyer understood their contracts to require the buyer to purchase the entire compound specified in each contract and that the supplier took reasonable measures to mitigate its losses after the buyer's breach.