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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). 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 819: CISG 14-24
Germany: Landgericht Trier
7 HK.O 134/03
8 January 2004
Original in German
Published in: [May/June 2004] Internationales Handelsrecht 117-118; see also http://www.cisg-online.ch/cisg/urteile/910.pdf
English translation: http://cisgw3.law.pace.edu/cases/040108g1.html
Abstract prepared by Jan C. Engelmann

The buyer, which had its statutory seat in the Grand Duchy of Luxemburg, contracted on several occasions with the German seller for the purchase of window parts. The seller mentioned its general terms and conditions on the reverse side of the invoices following conclusion of each contract. The general terms and conditions included a forum choice clause stating that the domicile of the seller, i.e., Germany, was considered the place of jurisdiction. Later on, the seller sued the buyer for payment of the goods in Germany. The buyer opposed the claim on the ground that German courts had no jurisdiction.

The court found that the seller's claim was inadmissible due to lack of jurisdiction. The court noted that the issue of agreement on general terms and conditions was governed by the law underlying the contract. Since Germany and Luxemburg were both contracting states of the CISG, the CISG was to be considered the applicable law. The court pointed out that according to articles 14-24 CISG, simply referring to existing standard terms and conditions doesn't imply their binding incorporation into the contract. Furthermore, printing the standard terms on the backside of the invoices was not enough to incorporate them into the contract since at that point in time the contractual agreement was already concluded (articles 14-24, CISG). Consequently, the court held that the choice-of-forum agreement was not valid.

Case 820: CISG 35; 36; 67 (1)[1]
Germany: Oberlandesgericht Frankfurt am Main
3 U 84/03
29 January 2004
Original in German
Published in: [2004] Internationales Handelsrecht 113; [2004] OLGR Frankfurt 199
http://www.justiz.hessen.de/migration/rechtsp.nsf/3C766911A9D830E8C1256E520035EB94/$file/03U08403.pdf
Abstract prepared by Ulrich Magnus, National Correspondent, and Klaus Bitterich

The German defendant bought frozen pork from a Belgian company. The frozen meat arrived in Germany in several deliveries, the latest on 4 June 1999. About the same time, it was made public that Belgian pork could be contaminated by dioxin.

[1] For the Bundesgerichtshof decision on this case, VII ZR 67/04, 2 March 2005, please see case 774 CLOUT 74.

Therefore, in that same month of June, a German regulation entered into force, declaring Belgian pork not marketable, unless the seller presented a certificate proving the pork to be free of dioxin. Shortly afterwards, the Belgian government took similar measures and declared pork meat not marketable if the animals were slaughtered on or before 23 July 1999. The defendant refused to pay for the goods, claiming that the pork had been seized by the German customs authorities, as the defendant could not present the required certificate. The claimant, on behalf of the seller, brought an action for payment primarily arguing that the defendant had taken over the goods before the suspicion of the contamination arose.

The court dismissed the claim. It ruled that a suspicion of a health-threatening condition of the goods had to be regarded as a lack of conformity, even if the suspicion arose after the passing of risk, pursuant to articles 36 and 67 (1) CISG, as long as the facts on which the suspicion was based were existent before that time. In that case, according to the court, it did not matter if those facts were known or unknown at the time of the passing of risk. As the precautionary measures taken by the Belgian government were concerned with products coming from animals slaughtered on or before 23 July 1999, the pork sold to the defendant fell within the scope of application of those measures. There was evident suspicion that the pork might be contaminated because of facts pre-existing the passing of risk, thus the court concluded that the pork did not conform to the contract.

The court left the question undecided whether the pork was in fact contaminated. As the suspicion on the harmful conditions of the goods was already a lack of conformity, the burden of proof shifted to the claimant contrary to the general rule of burden of proof pursuant to article 36 CISG. Though the court admitted that generally the seller was not liable for conformity of the goods with public regulations in the country of destination, the court found that the case was an exception to the general rule. The reasons for that exception were that the specific government measures were based on events in the country of origin of the goods and, in particular, on the specific type of goods.

Case 821: CISG 1 (1) (a); 49 (1) (a); 49 (1) (b); 53 (1); 71; 74
Germany: Oberlandesgericht Karlsruhe
17 U 136/03
20 July 2004
Original in German
Published in German: [2004] Internationales Handelsrecht 246
Abstract prepared by Klaus Bitterich

A French shoe manufacturer, the seller, sued a German shoe vendor, the buyer, for payment of the delivery of shoes pursuant to an invoice of April 1997. The defendant pleaded that the claim was statute-barred and raised a counter-claim for damages, which would set-off the seller's claim. The defendant alleged that the claimant had not performed in accordance with another agreement made with a trade representative of the claimant. In a letter dating May 1997, the defendant had given notice to the claimant of its intent to suspend its obligation to pay the price of the April invoice if the claimant failed to perform according to the second delivery agreement. The defendant had also declared its refusal to take delivery if the claimant did not commit to perform by a given date in June 1997.

The court of first instance dismissed the claim on procedural grounds of German law. The appellate court reversed the judgment due to procedural errors and allowed the claim in a provisional judgment.

The appellate court found that the CISG was applicable pursuant to article 1 (1) (a), irrespective of the fact that the (second) contract had been concluded through a German trade representative of the claimant, as the parties had their places of business in different contracting states. The court held that the claimant was entitled to the purchase price pursuant to article 53 (1) CISG, since the goods had been delivered according to the contract concluded by the parties. The court further stated that the defendant was not entitled to suspend performance of its obligation to pay the price under article 71 (1) CISG. That provision would require, first, that the defendant had ground for the counter-claim and, second, that the claims at issue resulted from mutual obligations. However, no decision as to the fulfilment of those requirements was needed, because the right of the defendant to suspend performance was already expired. According to the court, the purpose of such a right was to put pressure on the other party to fulfil its obligations. That purpose could no longer be accomplished, as the time-period fixed by the defendant in the letter of May 1997 had elapsed and consequently the defendant's refusal to take delivery became effective.

The court held that the limitation of actions, a topic which was not governed by the CISG, was subject to French law, as the applicable law pursuant to the conflict of law rules of Germany, and had not expired.

With regard to the counter-claim, the appellate court held that the CISG did not address the question whether a claim raised for the breach of a contract other than the contract at issue could be used for set-off. Under the applicable French law, the defendant was entitled to exercise the right of set-off. As the factual circumstances presented by the defendant supported its claim for damages under articles 74, 49 (1) (a) and 49 (1) (b) CISG, the appellate court remanded the case to the court of first instance to take evidence of the foundation of the counter-claim and the amount of the damages.

Case 822: CISG 41; 43; 44
Germany: Bundesgerichtshof
VIII ZR 268/04
11 January 2006
Original in German
Published in: [2006] Internationales Handelsrecht (IHR) 82; [2006] Juristenzeitung (JZ) 271; [2006] Juristenzeitung (JZ) 977; [2006] Neue Juristische Wochenschrift (NJW) 1343; [2006] Recht der internationalen Wirtschaft (RIW) 462; [2006] Zeitschrift für Rechtsvergleichung (ZfRV) 154
http://www.cisg-online.ch/cisg/urteile/1200.htm (original)
http://cisgw3.law.pace.edu/cases/060111g1.html (English translation)
Abstract prepared by Prof. Ulrich Magnus, National Correspondent, and Jan Lüsing

The claimant, a car dealer based in the Netherlands, bought a used car from the defendant, a German car dealer in April 1999. In August 1999, the police seized the car from the claimant on the suspicion that the car had been stolen prior to the

contract of sale. The insurance company of the original owner demanded the turnover of the car from the claimant in a letter dated May 2000.

Meanwhile, in October 1999, the claimant requested refund of the purchase price from the defendant stating that the contract was invalid because the car had been stolen. After the seller rejected the request, the buyer filed an action for refund of the purchase price and for damages relating to expenses allegedly incurred in connection with the pick-up of the car from the seller.

Although the claimant was successful in the first instance, on appeal its claims were dismissed. The Federal Court of Justice upheld the appeal decision. It held that the buyer had no right to remedies under article 45 CISG if it had lost its right to rely on article 41 CISG by failing to give notice of legal defects within a reasonable time according to article 43 (1) CISG. The court pointed out that the length of the "reasonable time" under article 43 (1) CISG was to be determined by the circumstances of each individual case. Therefore, a rigid interpretation of the concept was to be excluded. However, the buyer had to be granted a certain period of time within which it could get an approximate picture of the legal situation, also depending on the type of legal defect. On the basis of those standards, the court confirmed the view of the court of appeals that the notification to the seller in the letter of October 1999, more than two months after the seizure of the car, was beyond the reasonable time as intended in article 43 (1) CISG.

Furthermore, the Federal Court of Justice held that the buyer could not derive any rights from the insurance company's demand for handover of the car, because it had failed to notify the claim to the seller within a reasonable time after receiving that letter. The court noted that the notification of the claim of a third party had to contain the relevant information on the claiming person and the steps taken by it, as the notification was supposed to allow the seller to contact the third party and to reject the claim against the buyer. The claimant had sent the seller a letter after the seizure of the car by the police in October 1999, but only to inform the seller of the seizure based on the police suspicion of a stolen car. It seemed that no other letter had been sent to the seller after the buyer had received the letter of the insurance company in May 2000.

Finally, the Federal Court stated that the requirements of the exception to article 43 CISG contained in article 44 CISG were not fulfilled, as the buyer lacked a reasonable excuse for its failure to give the required notice within a "reasonable time".

Case 823: CISG 38; 43; 74; 78
Germany: Oberlandesgericht Köln
16 U 17/05
13 February 2006
Original in German
Published in: [2006] Internationales Handelsrecht (IHR) 145
http://www.cisg-online.ch/cisg/urteile/1219.htm (original)
http://cisgw3.law.pace.edu/cases/060213g1.html (English translation)
Abstract prepared by Prof. Ulrich Magnus, National Correspondent, and Jan Lüsing

The claimant purchased from the defendant, an Italian textile supplier, woollen cloth for trousers, sport jackets and skirts. While processing the cloth, creases cropped up,

which could not be fixed. The claimant complained about this defect in a letter to the defendant. It then tried to sell the processed cloth to its customers in vain, as they refused acceptance of the goods due to lack of conformity because of the creases. The claimant refused to pay for the defective goods and, also, for a delivery of conforming goods. It then sued the seller for damages resulting from the lack of conformity and from the failed resale. The defendant denied the alleged lack of conformity, raised the defence of time limitation and filed a counterclaim demanding the payment of the purchase price plus interest for a previous conforming delivery.

The court granted the claimant's claim. Upon the defendant's appeal, the appellate court reversed the lower court's decision, rejected the claimant's claim and granted the defendant's counterclaim.

The appellate court noted that the contract between the parties was governed by the CISG in principle, but pointed out that the CISG did not contain provisions on the limitation period and the right to set-off. Therefore, the limitation period was governed by the applicable national law according to the rules of private international law of the forum state. Italian law was thus applicable pursuant to the German rules of conflict of laws (EGBGB), subsidiary to the CISG. The court held that the buyer had complied with the requirements of articles 38 and 43 CISG and, therefore, was entitled to damages under article 74 CISG. However, the court found that the claimant's claim fell under the statute of limitations pursuant to Italian law. With regard to the defendant's counterclaim, the court held that the defendant was entitled to claim the full price for the conforming delivery. The court rejected the claimant's argument that relied on set-off for the time barred claim for the non-conforming delivery since the applicable Italian law (as the CISG did not regulate the matter of set-off) did not permit set-off.

Therefore, the court held that the claimant was not entitled to damages. On the contrary, the defendant was entitled to payment of the purchase price plus interest for the conforming delivery with the claim to interest based on article 78 CISG on its merits and the rate of interest based on Italian law.

Case 824: CISG 6; 19
Germany: Oberlandesgericht Köln
16 W 25/06
24 May 2006
Original in German
Published in: [2006] Internationales Handelsrecht (IHR), 147
http://www.cisg-online.ch/cisg/urteile/1232.htm (original)
http://cisgw3.law.pace.edu/cases/060524g1.html (English translation)
Abstract prepared by Prof. Ulrich Magnus, National Correspondent, and Jan Lüsing

The German applicant purchased a bus from the respondent which was headquartered in the Netherlands. The applicant's order of November 2004 included the general terms and conditions printed in German on the reverse of the form. The respondent sent a confirmation of that order shortly afterwards, referring to its own general terms and conditions written in Dutch. The general terms and conditions of both parties contained a choice of forum clause for disputes arising from the contract, which stipulated that the forum was at the place of the seller's

headquarters. In March 2006, the applicant filed a motion for independent proceedings at the German court of Cologne to obtain an expert's opinion on the question whether the delivered bus could be equipped with a different seat, which the applicant alleged the parties had agreed upon in the contract. The buyer considered that the court of Cologne was the proper forum, since the seller's branch through which the transaction had been concluded was in Cologne. The seller objected this fact and argued that its headquarters was in the Netherlands and that the one in Cologne was just an independent commercial agency.

The court dismissed the applicant's motion, and the appellate court affirmed the lower court's ruling, arguing that the German court had no international jurisdiction.

The appellate court stated that the requirement of mutual written form for agreements on the choice of forum under article 23 (1) of the EU Regulation No. 44/2001 on Jurisdiction and Recognition and Enforcement of Judgments in Civil and Commercial Matters ("Brussels I Regulation") could be met also by using general terms and conditions. The court found that the CISG was applicable since Germany and the Netherlands were contracting states and the parties had not excluded the application of the Convention. Then, the court pointed out that in case of conflicting general terms and conditions at least the non-conflicting parts of the general terms and conditions were considered to be agreed upon, while for the rest the "last-shot doctrine" applied, meaning that the general terms and conditions of the party sending its terms last prevailed. Therefore, the court considered valid the choice of forum agreement, since both standard terms were similar on this point. For the very same reason, in this particular case even the application of the "last-shot doctrine" would have led to a similar result.

Case 825: CISG 39; 45 (1) (b); 50; 74
Germany: Oberlandesgericht Köln
16 U 57/05
14 August 2006
Original in German
Published in: [2007] Internationales Handelsrecht (IHR) 68
Abstract prepared by Prof. Ulrich Magnus, National Correspondent, and Jan Lüsing

The Spanish claimant, an exporter of agricultural products, and the German defendant, an agricultural dealer, entered into a contract for the sale and delivery of potatoes to Germany. According to the agreement, the claimant sent the potatoes in five consignments. All consignments contained potatoes, which were not conforming to the contract in different degrees, i.e. damages, misshapenness and rottenness. After each delivery, after the quality control of the goods, the defendant informed the claimant by phone of the lack of conformity of the goods. As a result of the nonconformity, the parties agreed that the defendant should try to resell the potatoes at the best possible price. According to those agreements, the defendant reduced the purchase price of the deliveries respectively by 12 per cent up to zero in the case of one delivery, which was entirely unsaleable, and set it off against additional expenses relating to the nonconforming potatoes and for the freight costs. Later on, however, the claimant filed an action for payment of the full purchase price denying the lack of conformity of the goods.

The court granted the claim. Upon the defendant's appeal, the appellate court reversed the lower court's judgment and dismissed the seller's claim.

The appellate court stated that in the case of perishable goods a lack of conformity had to be notified within 24 hours according to article 39 (1) CISG. The court also held that if the parties had agreed on the resale of the goods at the best possible price the buyer might reduce the purchase price in proportion to the amount of the loss incurred by the resale, pursuant to article 50 CISG. Moreover, following the agreement with the buyer, the seller had lost its right to demand the purchase price if the goods delivered turned out to be entirely unsaleable. Finally, since the defendant had the right to reduce the purchase price, the court also found that it was entitled to set-off the purchase price against claims for damages under article 45 (1) (b) and 74 CISG.

Case 826: CISG 14; 25; 61 (1); 63 (1); 64 (1) (b); 74
Germany: Oberlandesgericht München
23 U 2421/05
19 October 2006
Original in German
Published in: [2007] Internationales Handelsrecht (IHR) 30
Abstract prepared by Prof. Ulrich Magnus, National Correspondent, and Jan Lüsing

The claimant, a car importer based in Singapore, was in business contacts with the defendant, a car exporter from Germany. Between July 2002 and October 2003 the claimant made several collective orders of several cars. The defendant confirmed each order separately. The general terms and conditions of the defendant contained a choice of law clause according to which German law was applicable, to the exclusion of the Uniform Law in the International Sale of Goods (ULIS) and the Uniform Law on the Formation of Contract for the International Sale of Goods (ULF). According to the parties' agreement, the buyer was obliged to pay a deposit while the remaining purchase price should become payable only when the seller would give notice that the shipment was ready and specified the chassis number of the particular car. Though the buyer made several payments, it nevertheless came in arrears with the payment of the due purchase price of several cars.

In April 2003, the seller notified the buyer that additional cars of the second order were ready and fixed an additional period of time for the due payment. However, that notification concerned only part of the purchase price due at that time. Though the buyer had made additional payments, only the purchase price of the cars of the first order had been paid completely by October 2003. In October 2003, the seller finally declared all contracts avoided and demanded damages for loss of profit. The buyer filed an action at the regional court demanding restitution of the payments made. In response, the seller counter-claimed that it was entitled to set-off the buyer's claim to repayment against its claim for damages. The court dismissed the claimant's claim as being entirely off-set.

The appellate court reversed the lower court's judgment and granted the buyer's claim partially. The appellate court stated that the CISG was applicable to the case as the exclusion of the ULIS and the ULF by the seller's general terms and conditions did not mean an exclusion of the CISG. The court noted that in particular

in international trade, it was required the explicit decision of the users of the terms and conditions to exclude the CISG.

The appellate court viewed the buyer as entitled to restitution of its payments pursuant to article 81 (2) CISG. However, the court held that that entitlement was partially off-set by the defendant's counterclaim. The defendant was entitled to declare one of the purchase contracts partially avoided with regard to some cars pursuant to article 64 (1) (b) CISG and to demand damages for loss of profit under articles 61 (1) (b), and 74 CISG. For those cars, the defendant had fixed an additional period of time for payment pursuant to article 63 CISG. The court noted that, in principle, the seller could fix an additional period of time for payment in the same notice by which the purchase price became due, if the additional period was sufficiently long for the buyer to fulfil its obligation. Moreover, the court noted that a period of six months between the fixing of the additional period of time and the declaration of contract avoidance did not forfeit the right to declare the contract avoided.

However, the court held that the partial non-payment to the seller could not be regarded as a fundamental breach of contract under article 25 CISG in respect to all contracts concluded between the parties, as they had not concluded a frame agreement, but rather several separate contracts for the sale of individual cars. Therefore, the buyer's non-payment of a particular contract(s) did not entitle the seller to avoid the other contracts.

With regard to the other orders, the court denied the set-off, for different reasons. In one case, the buyer had fully paid the purchase price, in another the price had not become due, as the seller had not notified the buyer, so that no breach of obligation by the buyer (article 61 (1) CISG) occurred and no entitlement to avoidance of the contract was given (article 64 CISG). For another order, the court held that no contract had been concluded, because the confirmation was not sufficiently definite pursuant to article 14 CISG.