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CASE LAW ON UNCITRAL TEXTS (CLOUT)

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 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).

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 the 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.

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

Case 877: CISG 4(a); 8; 35; [49(1)]
Switzerland: Federal Court, 4C.296/2000
22 December 2000
Original in German
Published in German: CISG-online.ch. No. 628
English translation: http://cisgw3.law.pace.edu/cases/001222s1.html
Abstract in German: Swiss Review of International and European Law (SRIEL), 1/2002, pp. 140 ff.
Abstract in English:
www.unilex.info/case.cfm?pid=1&do=case&id=729&step=Abstract
http://www.globalsaleslaw.com/content/api/cisg/urteile/628.pdf

Abstract prepared by Thomas M. Mayer

The subject of the dispute related to the sale of a used textile machine by a seller having its headquarters in Switzerland to a buyer having its place of business in Germany for resale to Iran. The buyer discovered defects in the goods sold and demanded the refitting of the machine, setting a time limit. The time limit having expired without result, the buyer thereupon repudiated the contract. The seller then terminated the contract, retaining the down payment by way of a penalty, as stipulated in the contract. The buyer brought an action before the cantonal commercial court, claiming reimbursement of that amount. The court dismissed the claim.

The Federal Court had first to consider whether a possible fundamental mistake arising at the time of conclusion of the contract, as alleged by the plaintiff, had been remedied by decisive action (i.e., requesting performance of the contract and subsequently damages for delayed performance). Pursuant to Swiss law, the court found in the affirmative. It considered that the CISG was not applicable to the matter (which was concerned with the validity of the contract), citing article 4(a).

The court then examined article 35 of the Convention. It considered that that article did not contain any specific rule on promised qualities. However, the seller was required to guarantee all the qualities, as stipulated in the contract, which the buyer was entitled to expect in the goods sold. Pursuant to article 8 CISG, the court concluded that, in the present case, the plaintiff had professional knowledge in the matter and was aware that the offer related, not to a new machine, but to a used machine which had been built some 14 years earlier and consequently did not incorporate the latest technical developments. It therefore lay with the plaintiff to make enquiries as to the machine's functioning and fittings. The lower court had therefore correctly acknowledged the defendant's right to accept that the plaintiff had entered into the contract with full knowledge of the machine's technical capacity and fittings. In line with the lower court ruling, it had to be accepted that the sold machine had been supplied in conformity with the contractual requirements within the meaning of article 35(1) CISG. The claimant had therefore wrongly invoked the defect warranty. In view of that fact, the defendant was, in accordance with the provisions of the contract, entitled to terminate the contract. The dismissal of the claim had therefore been correct.

Case 878: CISG [7(2)]; 39(1); [74]
Switzerland: Commercial Court of the Canton of Berne, 8831 FEMA
30 October 2001
Original in German
Published in German: CISG-online.ch. No. 956
Abstract in German: Swiss Review of International and European Law (SRIEL), 1/2002, pp. 142 ff.
Abstract in English: http://cisgw3.law.pace.edu/cases/011030s1.html
http://www.globalsaleslaw.com/content/api/cisg/urteile/956.pdf

Abstract prepared by Thomas M. Mayer

The German plaintiff purchased construction machinery from a defendant having its place of business in Switzerland. It sought damages in respect of defects in the goods sold and late delivery. The defendant pleaded the statute of limitations.

The court considered the question of statutory limitation in depth. Its fundamental position was that it must in principle be assessed on the basis of either the applicable national law or, as in the case under consideration, Swiss civil law. However, the application of a national limitation period should not, in its opinion, lead to a reduction in the period specified in article 39(1) CISG to the detriment of the buyer. The one-year limitation period stipulated in Swiss law for warranty proceedings in respect of defects in goods was thus computed, not from the handing over of the goods, as was normally the case, but only from timely notice of the defect, within the meaning of article 39 CISG.

The parties had accordingly concluded an agreement whereby the defendant had to take back the goods sold, refund the instalment payments made by the plaintiff and compensate the latter for expenditure incurred by it in consequence of the delay and the defects in the goods sold. The plaintiff argued that, under that agreement, any obligations arising from the contract of sale had been superseded by new obligations, which were no longer subject to the statutory provisions of the contract of sale but led to the application of the standard ten-year limitation period. The court examined the question in the light of Swiss civil law and concluded that no novation had taken place in the defendant's obligation to compensate. It therefore ruled that, at the time when the action at law was brought, the claim forming the subject of that action was already statute-barred, notwithstanding several earlier interruptions of the limitation period.

The ruling of the Berne Commercial Court was upheld by the Federal Court. However, the Federal Court examined only the aforementioned determinations made, pursuant to Swiss law, by the lower court in regard to the agreement. The lower court's reasoning relating to the CISG was not challenged by the appellant.

Case 879: CISG [7(2)]; 39; 39(1)
Switzerland: Commercial Court of the Canton of Berne, No. 8805 FEMA
17 January 2002
Original in German
Published in German: CISG-online.ch. No. 725
English translation: http://cisgw3.law.pace.edu/cases/020117s1.html
Abstract in German: Recht, Zeitschrift für juristische Ausbildung und Praxis, p. 48
http://www.globalsaleslaw.com/content/api/cisg/urteile/725.htm

Abstract prepared by Thomas M. Mayer

The Swiss defendant supplied grapefruit seed extract to the plaintiff, whose headquarters were in Germany, promising that the product was free from preservatives. The promise proved untrue and the plaintiff was sued in a Berlin court by its main customer, whose claim was successful. The plaintiff in turn sued the defendant for damages.

The court considered at length the question of giving notice of defects within the meaning of article 39(1) CISG. It established that the plaintiff had sent timely notification to the defendant of the contents of an expert report according to which the goods contained a specific preserving agent.

The court then examined the plea of limitation advanced by the defendant. Reaffirming an earlier ruling, it observed that, in principle, statutory limitation was assessed on the basis of the applicable national law. However, a national limitation period should not shorten the period specified in article 39(1) CISG. Consequently, the one-year limitation period stipulated in Swiss law for warranty proceedings in respect of defects in goods was computed, not from the moment of delivery to the buyer, as was customary, but only from timely notice of the defects, in accordance with article 39 CISG.

Case 880: CISG [7(2); 49(1)(a)]; 73(1); [74]; 78
Switzerland: Cantonal Court of the Canton of Vaud, 100/2002
11 April 2002
Original in French
Published in French: CISG-online.ch. No. 899
http://www.globalsaleslaw.com/content/api/cisg/urteile/899.htm

Abstract prepared by Thomas M. Mayer

Following the previous year's satisfactory experience, the defendant, a Swiss clothing company, placed new orders for garments with the plaintiff, a French manufacturer. There were three orders in all. On receipt of the deliveries, the defendant made a number of complaints and at a certain point stopped one of its cheques, stating that the business relationship was terminated. Some days later it returned the goods, with the exception of the articles already sold, to the plaintiff. The plaintiff took back part of the goods for sale to other customers. It continued to demand payment of the price of the remainder of the orders and finally initiated legal proceedings to obtain payment. As part of its claim it also sought damages for loss of profit on the resold goods and for its additional efforts. In a counterclaim the defendant also sought damages.

The court observed that the mistakes in delivery and invoicing errors experienced by the defendant were sufficiently important to destroy a recently established but positive business relationship, but that such mistakes in delivery were common among suppliers and that an experienced customer should develop the means to protect itself against setbacks of that kind. The court thus concluded, pursuant to article 73(1) CISG, that the defendant was not entitled to rescind the contract and that consequently it still owed the sale price.

On the basis of article 78 CISG, the court awarded the plaintiff interest on arrears. The amount of such interest was to be determined in line with the law applicable in accordance with Swiss private international law.

Case 881: CISG 3(2)
Switzerland: Handelsgericht des Kantons Zürich (Commercial Court of the Canton of Zurich), HG000120/U/zs
9 July 2002
Original in German
Published in German: CISG-online.ch. No. 726
English translation: http://cisgw3.law.pace.edu/cases/020709s1.html
Abstract in German: Swiss Review of International and European Law (SRIEL), 1/2003, p. 102
http://www.globalsaleslaw.com/content/api/cisg/urteile/726.htm

Abstract prepared by Thomas M. Mayer

The German defendant ordered a refuse-separation plant from the plaintiff, domiciled in Switzerland. The contract covered the design, delivery, assembly and commissioning of the plant.

In the present case the court ruled that, in accordance with article 3(2) CISG, the subject-matter of the dispute did not fall within the material scope of application of the Vienna Convention.

Giving grounds for its ruling, it stated that the assembly, adaptation and training work and similar operations stipulated in the contract constituted an essential part of the agreed performance. In the court's view, it therefore had to be accepted, in accordance with legal opinion, that the CISG did not apply to turnkey contracts, which constituted a mesh of reciprocal obligations of participation and assistance rather than a relationship involving the exchange of goods against money.

Case 882: CISG [7(2); 25]; 35; [45(1); 48(1)]; 49(1); [53]; 58; [74]; 78
Switzerland: Handelsgericht des Kantons Aargau (Commercial Court of the Canton of Aargau), OR.2001.00029
5 November 2002
Original in German
Published in German: CISG-online.ch. No. 715
English translation: http://cisgw3.law.pace.edu/cases/021105s1.html
Abstract in German: Swiss Review of International and European Law (SRIEL), 1/2003, p. 103; Internationales Handelsrecht (IHR), 4/2003, p. 160
http://www.globalsaleslaw.com/content/api/cisg/urteile/715.htm

Abstract prepared by Thomas M. Mayer

The defendant, an association incorporated in Germany, which held the marketing rights concerning a German motor racing event, ordered three inflatable triumphal arches bearing a specified advertising slogan from the plaintiff, a company having its headquarters in the canton of Aargau, Switzerland.

On the first day of the races one of the three arches collapsed. The race management thus insisted that all the arches be taken down. On the same day the defendant gave notice of the defects to the plaintiff, which responded two days later. Some two weeks later the defendant declared the contract avoided.

In the present case, the court before which the matter was brought was competent in accordance with the rules laid down in the Brussels-Lugano Convention. It awarded the plaintiff the full agreed sale price, together with interest on arrears as from the due date of payment. The defendant had correctly invoked lack of conformity within the meaning of article 35 CISG, since the arches did not meet the agreed purpose, namely their use as an advertising medium near to and above the motor racing tracks. However, the court concluded that the defendant was nevertheless not entitled to terminate the contract since, for that purpose, article 49(1) CISG required a fundamental breach of contract. No such fundamental breach was, however, established since it would have been possible to remedy the defect, which would have permitted the use of the arches at subsequent races.

Although the defendant had submitted set-off claims for damages, it had not detailed them and reserved the right to assert them in subsequent proceedings. In accordance with article 78 CISG, the sale price due yielded interest on arrears as from the date established on the basis of article 58 CISG. The rate of interest was to be determined in accordance with national law.

Case 883: CISG 33(c); 47(1); 49(1)(b); 71(1); [74]
Switzerland: Kantonsgericht von Appenzell Ausserrhoden (Cantonal Court of Appenzell Ausserrhoden), 433/02
10 March 2003
Original in German
Published in German: CISG-online.ch. No. 852
English translation: http://cisgw3.law.pace.edu/cases/030310s1.html
Abstract in German: Internationales Handelsrecht (IHR), 6/2004, pp. 254 ff
http://www.globalsaleslaw.com/content/api/cisg/urteile/852.pdf

Abstract prepared by Thomas M. Mayer

In January 2002, the German plaintiff and the defendant, based in Switzerland, concluded a contract of sale concerning a machine being used by a third company until the beginning of March 2002. The agreed sale price was 15,000 euros, payable 14 days before the delivery of the machine. The precise date for taking possession of the machine was to be communicated to the buyer in the course of the following days. Notwithstanding several requests from the plaintiff, the defendant never communicated a date for taking possession. Following the expiry of a final additional period of time fixed by it, the plaintiff brought an action for damages before the competent court, claiming the payment of approximately 7,000 euros as compensation for the loss that it had suffered by reason of the resale of the machine to a Turkish customer.

The court held that, in accordance with article 71(1) CISG, the plaintiff was entitled to suspend the performance of its obligation to pay the sale price. Citing article 33(c) CISG, it further held that the defendant should have fixed a date for delivery of the machine no later than the beginning of April 2002. In accordance with article 49(1)(b) CISG, the plaintiff, having unsuccessfully fixed an additional period of time for performance within the meaning of article 47(1) CISG, was thus entitled to terminate the contract on 29 April and could claim compensation for its loss. However, the court considered that the loss asserted had not been sufficiently demonstrated. For that reason it finally rejected the claim.

Case 884: CISG [7(2); 26]; 38(1); 39(1) [45]; 49(1)(a); 50
Switzerland: Obergericht des Kantons Luzern (Higher Court of the Canton of Lucerne), 11 01 73
12 May 2003
Original in German
Published in German: CISG-online.ch. No. 849
Abstract in German: Revue de la société des juristes bernois (RJB), 2004, pp. 704 ff
http:://www.lu.ch/download/gerichte/entscheide/11_01_73.pdf

Abstract prepared by Thomas M. Mayer

The German plaintiff sued the defendant, based in Switzerland, for payment of the sale price of a textile washing machine. The defendant refused to pay, stating that it had terminated the contract of sale on the ground of defects in the goods sold.

The court ruled on the requirements to be fulfilled for a declaration of avoidance of a contract within the meaning of article 49(1)(a) CISG. It concluded that, in the case under consideration, those requirements had not been met.

The court also ruled on the computation of periods of time within the meaning of articles 38(1) and 39(1) CISG. In the case under consideration it applied periods of one week and one month respectively and found that those two periods had been complied with.

The court laid the burden of proof of the defects on the defendant. The Swiss Federal Court, which was subsequently to hear the case, upheld that finding but on the basis of a different reasoning (ATF 130 III 258). On examination, only one defect was established. However, in the view of the court, that defect had not given rise to any loss of value of the goods sold. The defendant’s subsidiary claim for a price reduction (article 50 CISG) was therefore dismissed. The plaintiff's suit for payment of the sale price was entirely successful.

Case 885: CISG 1(1)(a); [7(2); 35]; 39(1)
Switzerland: Federal Court, 4C.198/2003
13 November 2003
Original in German
Published in German: Recueil officiel des Arrêts du Tribunal fédéral, ATF 130 III 258 (www.bger.ch/fr/index/juridiction/jurisdiction-inherit-template/jurisdiction-recht/jurisdiction-recht-leitentscheide1954.htm); cisg-online.ch, No. 840
French translation: La Semaine judiciaire 1/2004, pp. 505 ff
English translation: http://cisgw3.law.pace.edu/cases/031113s1.html
Abstract in German: Pratique juridique actuelle (PIA), 12/2004, pp. 1472 ff; Swiss Review of International and European Law (SRIEL), 1/2005, pp. 116 ff;

Internationales Handelsrecht (IHR), 5/2004, pp. 215 ff; Revue Suisse de Jurisprudence (RSJ), 12/2005, pp. 291 ff; Revue de la Société des juristes bernois (RJB), 8/2008, pp. 638 ff.
http://www.globalsaleslaw.com/content/api/cisg/urteile/840.pdf

Abstract prepared by Etienne Henry

The dispute arose from a transaction involving the sale of a used laundry machine by B & Co., whose headquarters were in Switzerland, to A. GmbH, which had its headquarters in Germany. The machine was delivered in July 1996. By letters sent in August and September 1996 the buyer gave notice of various defects, which the seller failed to remedy. When the seller sued for payment of the sale price of the equipment, the buyer refused to pay, maintaining that it had been released from its contractual obligations as a result of the avoidance of the contract due to the defects in the goods sold.

The Federal Court, affirming the applicability of the CISG to the dispute by virtue of its article 1(1)(a), considered that a notice of defects was sufficient within the meaning of article 39(1) CISG if it stated exactly the nature of the lack of conformity within a reasonable time after discovery. Article 39(1) did not require a more precise description. That argument had become all the more cogent with the advent of electronic communications since that enabled the seller to put questions to the buyer if it required more precise information on the nature of the defect. In particular, it was not necessary for the buyer to describe the causes of the functioning problems of a machine since a description of the symptoms would suffice.

The court also ruled on the question of apportionment of the burden of proof. That question fell within the matters governed by the CISG. However, the CISG did not contain any express rule concerning onus of proof. That gap had to be filled by the application of the general principles underlying the Convention. Among those principles it was recognized that each party had to prove the factual prerequisites of a legal provision that was favourable to it. A party claiming an exception was in principle required to prove that the prerequisites for its application had been met. According to another general principle, facts relating to a sphere clearly better known to one party than to the other party had to be proven by the party exercising control over that sphere.

According to the principle that a party must prove that the prerequisites for the application of a legal provision favourable to it had been met, a seller seeking payment of the sale price had to prove that delivery was in conformity with the contract and a buyer making contrary claims (for example, avoidance of the contract or reduction of the price), alleging a breach of contract, had to prove the existence of such breach. Thus, in line with that principle, it lay with both parties to prove that the contract had or had not been complied with. Since it was not a question here of applying an exception to the rule, the allocation of the burden of proof regarding conformity of the goods with the contract had to be determined from the standpoint of the proximity of the evidence. Pursuant to that principle, it had to be considered whether the goods had entered the buyer's sphere of control. Thus a buyer who had already accepted goods without making any claim had to prove a breach of contract if it wished to derive rights therefrom.