United Nations A/CN.9/SER.C/ABSTRACTS/96

General Assembly

Distr.: General
22 June 2010
English
Original: Russian/English

United Nations Commission on International Trade Law

CASE LAW ON UNCITRAL TEXTS (CLOUT)

Contents

V.10-54626 (E) 300610 010710

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 956: CISG 6, 46 (3), 47, 48 (1), 50; MLEC 15
Australia: Federal Court of Australia
Olivaylle Pty Ltd v Flottweg GMBH & Co KGAA
20 May 2009
Original in English
http://www.austlii.edu.au/au/cases/cth/federal_ct/2009/522.html

The plaintiff, an Australian company, and the defendant, a German company, concluded a contract for the sale of an olive oil production line. After extensive negotiations about the terms of the contract and exchange of several preparatory documents, the defendant incorporated the plaintiff's ultimate comments into a final sales contract which the defendant's German export manager e-mailed to its Australian representative in New South Wales, Australia, on 8 February 2005. The latter forwarded this electronic message to the plaintiff with place of business in Victoria, Australia, on 10 February 2005. The final contract contained a clause providing "Australian law applicable under exclusion of UNCITRAL law."

In the contract, the seller undertook that the production line would meet certain benchmark operating speeds and yields, warranting to make repairs, supply replacements, or make good any services not carried out correctly within a reasonable time period; failing which, the buyer had the right to hire a technician to carry out repairs and recover costs from the seller. Moreover, the contract gave the plaintiff the right to claim a reduction in the purchase price or withdraw from the contract, but only after expiry of a "reasonable period of grace," which the buyer was obligated to specify in the event of the seller's default on its obligations.

The plaintiff claimed that it experienced several problems with the production line during the first harvesting season. In February 2006, it notified the seller that it would withdraw from the contract, unless the seller would remedy the alleged defects by the end of June 2006. The seller disagreed, claiming that the failure to meet the contract benchmarks resulted from the buyer's misuse of the machinery, but conceding that a gearbox needed to be replaced. The buyer refused to allow the seller to carry out the repair and sued.

Regarding contractual formation, the court interpreted the buyer's comments on the proposed contract it received from the seller in late 2004 as a counteroffer and held that the seller's February 2005 electronic communication, by incorporating the buyer's comments, constituted an acceptance. In line with Article 15 of the UNCITRAL *Model Law on Electronic Commerce* (which Australia had enacted in section 14 of its Electronic Transactions Act of 1999 and which the state of Victoria had enacted in section 13 of its Electronic Transactions Act of 2000), the court held that the place where the electronic acceptance was received should be deemed the place of contract formation. As to the time of formation, the court noted that, strictly, and in accordance with Article 15 of the MLEC, the contract was completed when the electronic acceptance reached the buyer, i.e. when it entered the buyer's information system on 10 February 2005. However, since both parties stipulated in pleadings that the contract was formed on 8 February 2005 and since the issue was not material to the dispute, the court agreed to act on the basis of that admission.

Furthermore, the court held that, by inserting the opt-out clause in the sale contract, the parties excluded the application of the CISG pursuant to its Article 6. Establishing that "UNCITRAL Law" in the contract referred to the CISG and that the Convention was part of Australian law, the court reasoned from the parties' intention as evidenced in their writing that they sought their contractual disputes to be resolved solely under Australian local law.

Proceeding to the buyer's claim that it had the right to withdraw from the contract, given the seller's failure to repair alleged defects within the time period indicated, the court noted that the concept of "grace periods" potentially giving buyers the right to withdraw or reduce the purchase price originated from the civil rather than the common law. Therefore, the court looked to Section III of Chapter II of the CISG ("Remedies for breach of contract by the seller"), in particular Articles 46 (3), 47, 48 (1), and 50, for guidance on how such terms were to be interpreted. In referencing the CISG, the court again pointed to the parties' intention to incorporate civil law terms in their contract. Relying on Article 48 (1) CISG, the court held that in February 2006 the buyer was not entitled to specify a grace period ending in June of that year, because the reasonable time period for seller's repairs had not expired at that time. According to the court, the reasonable time period for repairing defects that had materialized during the 2005 harvesting season expired at the end of June 2006; only at that point would the buyer have had the right to specify a grace period and threaten withdrawal. Finding the buyer's denial to allow the seller to repair the gearboxes unreasonable, the court affirmed the seller's claim to the final instalment due under the contract.

Case 957: [CISG 1; 6]
Australia: Supreme Court of Wales
Italian Imported Foods Pty Ltd v Pucci s.r.l.
13 October 2006
Original in English
Abstract prepared by Bruno Zeller, National Correspondent

The case was an appeal from the Magistrate Court in relation to the failure to supply goods of merchantable quality. The appeal was based on an attempted change of position to that taken at trial.

The Italian defendant had agreed to supply goods, preserved vegetables, to the Australian plaintiff. This latter refused to pay the price arguing that some of the goods had been defective. The defendant brought action to the Magistrate Court to recover the price of the goods. The case was discussed and decided based on the domestic Sale of Goods Act 1923 and not on the CISG.

The buyer appealed the decision of the lower court and argued that the claim should be decided pursuant to the CISG. The judge of the Supreme Court, however, stated that the buyer was trying "to run a new defence" in appeal, i.e. to raise an issue that it had not raised in the Magistrate Court. The judge noted that "if the point had been raised [by the buyer] in the Court below, the defendant might have conducted its case differently". Furthermore, the judge considered that granting the requested amendment to include the CISG, "…in any event, it would be futile…"

Therefore, although recognizing that the Sale of Goods Act, 1923 and the Sale of Goods (Vienna Convention) Act, 1986, are not the same and that they entail different consequences, the judge refused to apply the CISG and decided the case based on local sales law. The appeal was dismissed.

Case 958: [CISG 1; 9; 35; 39; 44; 50]
Australia: Federal Court of Australia [2008] FCA 1591 (Finn J)
Hannaford (trading as Torrens Valley Orchards) v Australian Farmlink Pty Ltd
24 October 2008
Original in English
Abstract prepared by Lisa Spagnolo

An Australian grower, TVO, sold cherries through F, an Australian exporter of fruit, to buyers in Hong Kong and Singapore. The latter buyers were not party to the proceedings. Due to defects, the exporter claimed to be entitled to pass on price reductions made by the overseas buyers to TVO. TVO brought action against the exporter, arguing that this latter was not entitled to set any automatic reduction of price. The exporter objected that its right to reduce the price was due to a "course of dealing" previously established with TVO.

Justice Finn determined that the relationship between TVO and the exporter was one of sale, not of agency. This meant the CISG did not apply to the dispute. Had the opposite conclusion been reached, then the contracts of sale would have been between TVO and the overseas buyers. The CISG would have applied to the Singapore contracts, as Singapore is a CISG Contracting State under Art. 1 (1)(a). However, the Hong Kong contracts might not have been governed by the CISG. Certainly, the CISG would not be applicable through Art. 1 (1)(a); as Finn J observed China has not yet taken the necessary steps to make Hong Kong a Contracting State.

Although the Convention did not apply, Finn J made various references to its provisions, including Art. 39, Art. 50, and Art. 9, and also cited relevant CISG authority. In particular, the Justice mentioned the need for buyers to notify lack of conformity in a timely fashion pursuant to Art. 35, 39 and 44; the right to unilaterally effect a price reduction (Art. 50), and the influence of usages on contractual terms (Art. 9). While admitting that reference to practices and usages could have imply a different decision on some of the requests of the respondent, Finn J stated that "the [Court's] conclusions were based on the evidence" and that "no reliance was placed [by the parties] upon practices and usages".

Case 959: CISG 30; 33; 81 (2)
Republic of Belarus: Economic Court of Grodno Region
23 July 2008
Original in Russian
Abstract prepared by Viktor S. Kamenkov, National Correspondent

The plaintiff, a Belarusian company, contracted to buy broilers from the defendant, a Polish company. The contract provided for a prepayment of 30 per cent of the purchase price and a penalty charge amounting to 0.15 per cent of the received amount per day of late delivery. The parties stipulated in their agreement that all disputes arising under the contract be governed by the CISG. The plaintiff sued the defendant at the plaintiff's place of business, claiming that, despite timely prepayment, the defendant had failed to deliver the goods and seeking restitution of the prepayment and payment of the penalty charges, as stipulated in the contract, and damages. The defendant made no appearance in court.

The court held that the CISG applied by parties' choice and, pursuant to Articles 30 and 33 of the Convention, found the seller in breaching of its obligation to deliver the goods at the time specified in the contract. Furthermore, referring to

Article 81 (2) of the Convention, the court held that the buyer had duly performed its obligation of advance payment, while the seller had not returned the payment received. Therefore, the court upheld the buyer's claim for restitution of the amount prepaid and for the penalty as specified under the contract. However, the court rejected the plaintiff's claim for damages, since according to the Code of Economic Procedure the plaintiff had not submitted enough evidence on this point.

Case 960: CISG 1 (1)(a); [53, 54, 55, 56, 57, 58, 59]
Republic of Belarus: Economic Court of Grodno Region
29 April 2008
Original in Russian
Abstract prepared by Viktor S. Kamenkov, National Correspondent

The plaintiff, a Belarusian Consumer Association, contracted to sell potatoes and beet roots to the defendant, a Russian company. The contract required the buyer to pay for the goods within 5 calendar days of shipment. Failing such payment, the buyer was obligated to pay 0.15 per cent of the purchase price per day late after the payment became due. Moreover, the parties stipulated that the buyer was obligated to provide the seller with the documents certifying the buyer's VAT payment to the Russian Federation authorities for the purchased goods and that, failing delivery of such documents within 60 days of receipt of the goods, the buyer was to pay the seller a penalty amounting to 18 per cent of the purchase price. The parties chose Belarusian law to govern the disputes arising from the contract.

The plaintiff claimed that the defendant had failed to pay for the goods and sought judgment for the purchase price, penalty charges for late payment and for the failure to issue certification of the buyer's VAT payment. The defendant made no appearance in court.

The court held that since, under Belarusian law, international treaties ratified by the Republic of Belarus become part of the Belarusian civil legislation, the CISG should apply to the dispute, because the parties' places of business were in different Contracting States (Article (1)(a)). The court also noted that the buyer was obligated to pay for the delivered goods within the period specified in the contract and that it had failed to perform accordingly. Therefore, the seller was entitled to receive the purchase price. However, the court rejected the plaintiff's claim of penalties for late payment, because the contract only provided for penalties for late discharge of the prepayment obligation, not for late payment of the purchase price. In its submission the plaintiff had referred only to the contract provisions on the late payment of the purchase price and not on those relating to the prepayment. For this reason the plaintiff was not entitled to any damage for failure of payment by the seller. The court, however, granted the plaintiff the damages on the VAT payment to the Russian authorities stating that the buyer had failed to prove that it had made this payment within the period stated in the contract.

Case 961: CISG [1 (1)(a)]; 7; 53
Republic of Belarus: Economic Court of the City of Minsk
10 April 2008
Original in Russian
Abstract prepared by Viktor S. Kamenkov, National Correspondent

The plaintiff, a Belarusian company, contracted to sell mineral water and soft drinks to the defendant, a Russian company. The contract stipulated for payment of the purchase price within 14 days following the shipment of the goods and it also contained a penalty clause, according to which the buyer was to pay the seller a penalty amounting to 0.15 per cent of the price to be paid per day late. If the buyer defaulted on the payment for more than 90 days after the date of shipment, the penalty was to amount to 2.00 per cent per day late (for the entire period). Since, according to the seller, the buyer had failed to perform its obligation, the seller brought action against it asking for the purchase price and damages. The defendant made no appearance in court.

Pursuant to the agreement between the Republic of Belarus and the Russian Federation on settling disputes relating to business activities (Kiev, 20 March 1992), the rights and obligations of the parties to business transactions are governed by the law of the place where the transaction was concluded. Hence, the court stated that Belarusian law would apply. Furthermore, since both parties had their place of business in CISG Contracting States (Article (1)(a)) the Court held that the Convention would apply. The court referred to Article 7 CISG and stated that issues not directly governed by the Convention should be subject to settlement pursuant to the general principles of the CISG and, in their absence, to the rules applicable according to private international law.

Pursuant to Article 53 CISG, the court found that the defendant had not fulfilled its obligation to pay the price and upheld the seller's claim. The court however recalculated the damages due and based on the Belarusian Civil Code, which authorizes judges to reduce penalties, the judges limited the penalty due, finding the amount required by the contract to be excessive.

Case 962: CISG [1 (1)(a);] 53; 59
Republic of Belarus: Economic Court of the City of Minsk
4 February 2008
Original in Russian
Abstract prepared by Viktor S. Kamenkov, National Correspondent

The plaintiff, a Lithuanian company, contracted to sell wheat to the defendant, a Belarusian company. The contract stipulated that any dispute should be litigated in the Republic of Belarus, but did not account for the applicable law to the transaction. The contract established that the payment of the goods should take place within 30 days of delivery and it included a penalty for late payment, amounting to 0.1 per cent of the purchase price per day late. The plaintiff delivered the goods, but, as acknowledged by the defendant, the payment was delayed. The plaintiff thus filed a suit at the defendant's place of business, claiming the payment of the penalty.

The court held that pursuant to the Agreement between the Republics of Belarus and Lithuania (signed in Vilnius on 20 October 1992) the rights and obligations of the parties to business transactions are governed by the law of the place of transaction. Since the contract at hand had been signed in Minsk, Republic of Belarus,

Belarusian law applied to the dispute. The court further held that, pursuant to Articles 53 and 59 CISG, the defendant was obliged to pay the price within the time specified in the contract, which had not happened. The plaintiff was thus entitled to the penalty for late payment. However, the court did not enforce the penalty clause in full: considering the relation between the consequences of the breach of obligation and the amount of penalty and referring to the provisions of the Belarusian Civil Code that authorize the judges to reduce penalties, the court decided to reduce the penalty due.

Case 963: CISG 1 (1)(a); 53; 61; 62
Republic of Belarus: Economic Court of Grodno Region
21 January 2008
Original in Russian
Abstract prepared by Viktor S. Kamenkov, National Correspondent

The plaintiff, a Belarusian company, contracted to sell peat fuel bricks to a Lithuanian company, the defendant. The contract stipulated that any dispute between the parties should be settled according to the substantive law of the Republic of Belarus. Upon delivery of the goods, the defendant failed to pay the price due, claiming damages to the goods. The plaintiff brought action in its home state court.

The court held that since the parties' places of business were in CISG Contracting States, the dispute should be resolved under the Convention, pursuant to Article 1 (1)(a). Referring to Articles 53, 61, and 62 CISG, the court stated that the defendant was obliged to pay the plaintiff the amount due under the contract, rejecting the defendant's objections as it was not sufficiently substantiated under Belarusian procedural law.

CASE RELATING TO THE UNCITRAL MODEL LAW ON ELECTRONIC COMMERCE (MLEC)

Case 964: MLEC 2(a), 3, 4, 5, 9, 15
South Africa: Labour Court of South Africa (Durban)
Case no. D204/07
Jafta v Ezemvelo KZN Wildlife
1 July 2008
Published in English: [2008] ZALC 84; [2008] 10 BLLR 954 (LC); (2009) 30 ILJ 131 (LC)
1 July 2008
Original in English
Available at: http://www.saflii.org/za/cases/ZALC/2008/84.html
Cites CLOUT case no. 661.

This case deals with the conclusion of a labour contract in connection with the use of electronic communications (email and SMS).

Further to a successful selection process, the respondent, E KZN W, sent by e-mail an employment offer to the applicant, SGJ, who tentatively accepted. The respondent sent a second e-mail, prompting a final decision, to which the applicant replied by accepting the offer without conditions. Although the applicant's information system indicated that the acceptance e-mail had been successfully sent, it never reached the respondent's system. Later, one of the respondent's employees

sent a final reminder of the pending offer by Short Message System (SMS), to which the applicant replied promptly confirming his acceptance.

The Court considered the conclusion of the labour contract by e-mail and SMS in the context of the Electronic Communications Transaction Act of South Africa, act No. 25 of 2002 ("ECT Act") which is based, in the relevant parts, on the UNCITRAL Model Law on Electronic Commerce 1996 ("MLEC"). In particular, the Court noted the necessity to interpret the ECT Act in light of its uniform origin and of the inherent transnational nature of the law of electronic communications; it therefore made reference to the MLEC, to other enactments of the MLEC as well as to relevant case law from foreign jurisdictions.

Moreover, the Court noted that certain principles of the law of electronic communications are widely accepted worldwide and enacted in South African law. Such principles include: non-discrimination of electronic communications (section 11 ECT Act; article 5 MLEC); due evidential weight of data messages (section 15 ECT Act; article 9 MLEC); and freedom of the parties to vary statutory provisions by agreement (section 21 ECT ACT; article 4 MLEC).

With respect to the formation of the contract, the Court noted that there was no evidence that the e-mail reply by the applicant containing unconditional acceptance of the offer had entered the information system under the control of the intended recipient, and that therefore the contract could not be considered concluded at that moment (see section 23(b) ECT Act, inspired by article 15 (2)(a)(i) MLEC, but adding the requirement that the message should be capable of being retrieved and processed by the addressee).

The Court then stated that a message sent by SMS meets the notion of electronic communication set in the ETC Act, with particular regard to the definitions of "electronic communication" and "data message" (drafted after art. 2(a) MLEC) contained therein, and that therefore the acceptance expressed by SMS constitutes a valid method of communicating the acceptance of an offer (section 22 ECT Act; see also Article 11 MLEC).