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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 (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.

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**Cases relating to the United Nations Convention on Contracts for the
International Sale of Goods (CISG)**

Case 983: CISG 25; 53; 74; 78

China: China International Economic and Trade Arbitration Commission (CIETAC)

CISG/2005/02

10 May 2005

Original in Chinese

English translation: <<http://cisgw3.law.pace.edu/cases/050510c1.html>>

Abstract prepared by Fan YANG

This case deals primarily with the payment of the purchase price, fundamental breach and interest.

The seller entered into fourteen contracts with the buyer for the sale of hats. The seller sold the products to the buyer through a third party who was responsible for payment of freight, customs duties and for relating tasks. At first, payment was made to the third party who transferred it to the seller, but later the buyer defaulted on its payment obligation several times despite numerous demands by the seller. The parties concluded an additional contract but when the buyer failed to pay again, this contract was cancelled and the seller contracted directly with the buyer's customer who paid directly to the seller. The seller commenced arbitration to recover the outstanding payment from the buyer. The buyer did not submit any arguments or evidence.

The seller's first claim was for the overdue payment, a part of which should have been paid to the third party for shipping costs and commission. The arbitral tribunal found that the seller delivered the goods and performed its contractual obligations under the contracts of sale, and that the buyer took delivery of the goods without making timely payment of the contract price as required by article 53 CISG. Given the fact that the contract was entered into by the seller and the buyer, the tribunal honoured the full amount of the seller's overdue payment claim regardless of the fact that part of the payment should be paid to the third party. The tribunal ruled that the buyer's failure to pay the price for the goods constituted a fundamental breach of the contract under article 25 CISG. Further, in accordance with article 74 and article 78 CISG, the tribunal held that the seller was entitled to the outstanding payments.

The seller's second claim was for interest on the outstanding purchase price. The calculation was based on the dollar amount of each contract involved, at the rate claimed by the seller. Without elaboration, the tribunal ruled that this calculation was consistent with the CISG.

Case 984: CISG 1(1)(a); 8; 9; 25; 35; 74

China: China International Economic and Trade Arbitration Commission (CIETAC)

CISG/2002/08

4 November 2002

Original in Chinese

English translation: <<http://cisgw3.law.pace.edu/cases/021104c1.html>>

Abstract prepared by Georges Sawadogo

This case deals primarily with conformity of the goods, intent of the parties, trade practices and calculation of damages.

The parties entered into a contract for the sale of “A-quality” beech logs, without any flaws in quality.

When the first instalment was delivered to the buyer in Shanghai, the local inspection bureau issued a certificate that it did not find any defects in the goods. Yet, a second inspection certificate from the final destination contained that part of the goods had serious defects. The buyer immediately informed the seller of the defects. Most of the goods did not conform to the contract in the second instalment either. At that time, the market price of the goods dropped dramatically forcing the buyer to sell the goods at a reduced price in order to reduce its losses. When the negotiations between the parties broke down, the buyer commenced arbitration arguing non-conformity of the goods which the seller denied.

The arbitral tribunal applied the CISG under article 1(1)(a) CISG.

The tribunal first interpreted the contractual terms defining quality of the goods. The tribunal held that the term describing quality requirements in the contract is equivalent in meaning to the term used in the timber industry, therefore, the parties had implicitly made applicable to their contract that industrial term under article 9(2) CISG.

Regarding the interpretation of other contractual terms concerning quality, the tribunal interpreted the respective terms according to their general meaning, and compared them to the specific quality requirements under the contract. The tribunal ultimately held that goods with “scars”, “gaps” or “holes” do not conform to the contractual requirement to deliver “A-quality” goods.

The arbitral tribunal allowed the buyer to use the second inspection certificate as a basis for its damages claim. The tribunal ruled that the buyer was only the importer and not the end-user of the goods and that Shanghai was only the connecting port of the goods, not their final destination. For these reasons, under article 38(2) CISG, requiring the buyer to have the goods examined in the port of Shanghai would have been impracticable, and a waste of time and money. Therefore, the second certificate of inspection was valid and the buyer was entitled to rely on it.

The tribunal ruled that, in the absence of any relevant contractual provisions and certificates, the buyer could not include in the calculation of the damages the market situation at the time of the inspection. In calculating the damages under article 74 CISG, the tribunal considered the price of conforming beech logs recorded by the Shanghai customs authorities while doing customs clearance. The tribunal allowed the buyer to recover only the price of those goods which had many kinds of quality defects and had to be sold at a reduced price. The tribunal held that the

losses resulting from the market price drop cannot be enforced as damages under article 74 CISG because the price drop was not foreseeable by the seller.

Case 985: CISG [4]; 25; 35; [36; 38; 74]

China: China International Economic and Trade Arbitration Commission (CIETAC)

CISG/2002/19

15 July 2002

Original in Chinese

English translation: <<http://cisgw3.law.pace.edu/cases/020715c1.html>>

Abstract prepared by Ashley Sproat

This case deals primarily with conformity of goods and notice of defects within the warranty period as stipulated in the sales contract within the context of the CISG. The Second Claimant entered into a joint venture contract with the Third Respondent. On that same day, the Second Claimant entered into an equipment sales contract with the Third Respondent (i.e. the seller) on behalf of the joint venture (i.e. the First Claimant, the buyer) yet to be established. Disputes arose during performance of the contract and the buyer commenced arbitration for alleged non-conformity of the goods, and sought avoidance of the contract, as well as damages based on the investment in accessory facilities and costs of raw materials, training, wages, etc. The buyers further requested payment of a penalty amounting to 20 per cent of the total contract price.

The contract did not specify the governing law. The arbitral tribunal stated that because the places of business of the parties are in Contracting States of the CISG (China and the United States) the CISG shall apply, however, the subject qualification and civil status of the Respondents should be governed by the law of the United States.

After analyzing an inspection report provided by the sellers, the tribunal found that some defects in the equipment did exist; however, they did not constitute a fundamental breach of the contract under article 25 CISG. The tribunal found that the contract entitled the buyers to conduct inspections twice after receipt of the equipment but the buyers had waived this right when they ordered inspection after the warranty period expired. The tribunal noted that the warranty period should begin on the date the adjustment (the time between installation and trial production) finishes and the length is one year, however, the parties did not stipulate in the contract how that date should be determined. The tribunal held that the inspection certificate presented by the buyers to prove that the goods were defective was not a valid basis for the buyers to file a claim for damages or to request return of the goods.

The tribunal rejected the buyers' claim to avoid the contract on two grounds. Although defects were present with the equipment under article 35 CISG, the buyers failed to prove that the defects constituted a fundamental breach of contract under article 25 CISG. Also, the buyers did not complete valid inspection of the goods within the warranty period. Therefore, the buyers were not entitled to avoid the contract.

With regard to the delay in delivery, there were various stipulations in the contract on liability. The sellers did not contest that delivery was late but, in lack of proper evidence, the tribunal rejected the sellers' argument that delivery was late because

the buyer had failed to issue the letter of credit on time. Based on the contractual provisions on liability for late delivery, the tribunal concluded that the sellers must pay a fine to the buyers for their breach. The buyers' claim for attorneys' fees was rejected and the arbitration fees were split.

Case 986: CISG 25; [26]; 53; 54; 59; 61; 63(1); 64; 74; 75; [77; 78]

China: China International Economic and Trade Arbitration Commission (CIETAC)

CISG/2002/03

4 February 2002

Original in Chinese

English translation: <<http://cisgw3.law.pace.edu/cases/020204c1.html>>

Abstract prepared by Lachmi Singh

This case deals primarily with breach of contract by failing to open a letter of credit (L/C) within the additional time fixed and the seller's right to avoid the contract in case of fundamental breach.

The parties entered into a contract for the sale of styrene monomer under a CFR term (cost and freight). Under the contract, payment was to be made by irrevocable L/C which would be negotiated within 90 days of the issuance of the bill of lading. Shipment of the goods was to take place in February 2001, and the L/C had to be issued before 18 February 2001. The contract provided that the seller may extend the L/C issuing period or claim damages if the buyer failed to issue the L/C. The buyer refused to issue the L/C stating that the market conditions had changed. Subsequently, the seller agreed to postpone the shipment, and extended the L/C issuance date, but the buyer continued to assert price issues and other issues. Since the goods were susceptible to deterioration if stored in high temperatures over a prolonged period of time, the seller sought to mitigate the loss by reselling them to another buyer, then commenced arbitration. Alleging fundamental breach by the buyer, the seller sought damages for economic loss and interest.

The buyer argued that it had not refused to issue the L/C but merely asked for a postponement which cannot be a fundamental breach because the buyer did not deprive the seller of what it was entitled to expect under the contract. The buyer argued that it was unaware that the seller had resold the goods to another buyer and, believing that the contract could be performed, the buyer had already resold the goods to its own customer. The buyer counterclaimed for damages for breach of the contract with the third-party customer and for the expenses incurred in performing the third-party contract.

The arbitral tribunal found that the buyer had breached the contract by failing to open the L/C within the stipulated time in accordance with the contract. The tribunal substantiated the buyer's duty to pay the price under the CFR term (INCOTERMS 2001), and cited articles 53, 54 and 59 CISG on the buyer's obligation to pay the price and comply with payment formalities. The tribunal also referred to articles 25, 63(1) and 64 CISG on fundamental breach of contract and seller's right to avoid the contract.

Ultimately, the tribunal found that the buyer had continued to refuse to perform its obligations even after an additional period of time was set by the seller and, accordingly, the seller was entitled to avoid the contract. Under articles 61, 74 and

75 CISG, the tribunal ordered the buyer to compensate the seller for its loss and pay interest on the damages owed.

Case 987: CISG [1]; 25; [38(1)]; 60; [63; 64; 72(1)];74; 75;77; [78]

China: China International Economic and Trade Arbitration Commission (CIETAC)

CISG/2001/02

22 March 2001

Original in Chinese

English translation: <<http://cisgw3.law.pace.edu/cases/010322c1.html>>

Abstract prepared by Lachmi Singh

This case deals primarily with the buyer's obligations under an FOB contract (free on board) and the buyer's right to reject non-conforming goods.

The parties entered into a contract for the sale of mung beans subject to an FOB term. Under the contract, payment was to be made by irrevocable letter of credit (L/C) and the goods were to be inspected by an inspection bureau in the seller's country.

Subsequently, the parties mutually agreed to modify the contract price and they specified the loading date. The seller delivered the goods to the port of loading and faxed the buyer that the goods were ready for loading. At the port, the goods were inspected and certified by the inspection bureau. The date of loading expired without the buyer nominating a ship or responding to the seller's request for the goods to be loaded.

A week later, the buyer sent a letter to the seller informing them that the buyer was going to ask SGS to inspect the goods as they noticed some of the goods were "discoloured". The seller responded that this was unacceptable as it was not stipulated in the contract, and continued to request that the buyer select a ship to transport the goods. The buyer responded that SGS had found that the goods were not in conformity with the contract, therefore, the buyer would not send a ship. The goods were being held at the port for storage and to mitigate its losses, the seller resold them to a new buyer after the L/C issued by the buyer had expired. The seller claimed damages for the price difference and loss on the goods, re-fumigating charges, plant inspection fees, storage charges and loss of bank loan interest.

The arbitral tribunal found that even though the parties failed to stipulate the applicable law, the CISG applies because both parties had their place of business in Contracting States.

The tribunal found that inspection of the goods by SGS was not a contractual stipulation and the seller had fulfilled its obligations by providing the inspection certificate issued by an inspection bureau in the seller's country, which certified that the goods were in conformity with the contract. Furthermore, under the contract containing an FOB shipping term, it was the buyer's obligation to hire a ship so that the goods could be loaded at the stipulated port on the date specified. The tribunal held that the buyer failed to honour its obligation under article 60 CISG to enable the seller to make delivery even after additional time was granted by the seller.

Therefore, the tribunal found that the buyer's refusal to send a ship made the seller's performance impossible, and this constituted fundamental breach of the contract under article 25 CISG. The tribunal ordered the buyer to pay the difference between

the contract price and the resale price, the re-fumigation fee, storage fees, and attorneys' fees.

Case 988: CISG 2(d); 6; [8; 25; 35; 38; 39]; 46

China: China International Economic and Trade Arbitration Commission (CIETAC)
CISG/2000/17

2000 [case not dated]

Original in Chinese

English translation: <<http://cisgw3.law.pace.edu/cases/000000c1.html>>

Abstract prepared by Boris Pupko

This case deals primarily with fundamental breach of contract and limitation of liability under the CISG.

The parties entered into a contract for the sale of souvenir coins in several instalments. The seller delivered a sample. The contract contained a clause limiting the seller's liability to a certain sum, and requiring the buyer to file any claim in writing within forty days after the goods arrived. The seller delivered the coins. Later the buyer's customers complained that the coins were not as described in the certificates and they doubted of their authenticity. The buyer requested the arbitral tribunal to order the seller to take back the unsold goods, i.e. approximately one-quarter of the total volume, to refund the price already paid and to compensate for the buyer's other losses.

The CISG was applied because the contract between the parties so stipulated. Despite the provision in article 2(d) CISG, the arbitral tribunal applied the CISG to the sale of coins although such items may be qualified as currency.

The tribunal held that the coins conformed to the samples. The tribunal held that the goods had to conform to the description and the certificates as well, even though the contract did not include a relating provision. Therefore, the seller breached the contract but the breach was not fundamental because the buyer was able to sell three-quarters of the goods, therefore, the seller did not substantially deprive the buyer of what it was entitled to expect under the contract. In lack of a fundamental breach, the buyer was not entitled to return the goods under article 46 CISG.

The tribunal held that the limitation of liability clause was a voluntary stipulation of the parties that did not violate the applicable law and was reasonable and valid. The sales contract stipulated a time for inspection and filing claims, which superseded the provisions of the CISG. Because the parties agreed that the goods would be delivered in instalments, the tribunal ruled that the times for reasonable inspection and filing claims should be calculated separately for each instalment, and held that the buyer was entitled to file claims regarding the last three instalments only.

In lack of a fundamental breach by the seller, the tribunal rejected the buyer's claim for refunding the price and returning the goods to the seller. Instead, in accordance with the limitation of liability clause in the contract, the tribunal ordered the seller to pay damages.

Case 989: CISG 38(1); 39; 73(1);[80]; 81(1)

China: China International Economic and Trade Arbitration Commission (CIETAC)
CISG/1999/19

5 April 1999

Original in Chinese

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., p. 1766-1776

English translation: <<http://cisgw3.law.pace.edu/cases/990405c1.html>>

Abstract prepared by Xiaotong Yuan

This case deals primarily with timely examination of the goods and the notice of lack of conformity.

The parties entered into a contract for the sale of air conditioner equipment and materials. The contract provided that the price of the goods must be paid in three instalments: a deposit after contract conclusion, the second instalment after confirming conformity of the goods, and the remainder after the test run was completed. Under the contract the buyer had to examine the goods upon receiving them and issue a written receipt to the seller within three days after the goods were transported to the construction site. The buyer delayed the payment of the deposit and the price, arguing that the seller delayed the delivery of part of the goods and the goods had quality defects. The seller commenced arbitration to recover the payment. The buyer provided examination certificates indicating quality defects in different instalments and requested the arbitral tribunal to find that it was entitled to return the goods under article 73(1) CISG. The buyer further claimed compensation under article 81(1) CISG.

The tribunal noted that since the buyer failed to pay the deposit and the seller failed to perform test runs and train the buyer's personnel, both parties failed to perform their obligations under the contract, and they should bear the responsibility on their own.

The arbitral tribunal held that all the examination certificates provided by the buyer were issued by an inspection authority after the seller filed for arbitration. Under the contract, the buyer had to examine the goods once they arrived at the construction site and issue a written receipt to the seller. The goods were delivered over the course of one year, but the buyer did not provide any written evidence to the seller indicating any quality problems. The tribunal held that the examination certificates were not issued within a reasonable time under the contract and article 38(1) CISG. Consequently, the tribunal held that under article 39 CISG, the buyer lost the right to rely on a lack of conformity of the goods because it did not give notice to the seller specifying the nature of the lack of conformity within a reasonable time after it had discovered it. Therefore, the tribunal denied the buyer's counterclaim for compensation for the loss caused by the quality problems, and the buyer's request to return the goods.

Regarding the instalment payable upon confirming conformity of the goods, the arbitral tribunal held that such confirmation should have taken place once the buyer opened the packages, examined the goods upon delivery to the construction site and issued a written receipt, as required by the contract. Since the buyer failed to raise an objection against the quality within that time limit, the tribunal held that the

buyer was obliged to pay within three days after the goods arrived at the construction site.

The arbitral tribunal further held that the seller did not provide testing, training and maintenance services as required by the contract, which had caused damages to the buyer. Therefore, the tribunal denied the seller's claim for interest on the delinquent payment.

Case 990: CISG 4; 25; 29(1); 47; 49; 51(2); 72(1); [81]

China: China International Economic and Trade Arbitration Commission (CIETAC)

CISG/1997/36

19 December 1997

Original in Chinese

English translation: <<http://cisgw3.law.pace.edu/cases/971219c1.html>>

Abstract prepared by Aaron Bogatin

This case deals primarily with modification of the contract and anticipatory breach.

The parties concluded a contract for the sale of steel manufactured by a third party. The parties agreed upon a delivery period, and payment by irrevocable letter of credit (L/C) issued by a certain date. During the delivery period the seller indicated that it was unable to deliver the goods on time and asked for postponement of the delivery date and extension of the expiry date of the L/C. The buyer did not accept modification of the delivery date and shortly thereafter the seller instructed the third-party manufacturer to stop production.

The seller first argued that the limitation period had run out on the claim. It further argued that the contract in dispute was in fact a modification of a former contract that was breached by the buyer, and the new contract was entered into to protect the buyer's reputation. Under this new contract, the delivery date was within a very short period of time which the seller sought to extend. The buyer's representative stated that, for convenience, the contract would keep the same wording and the delivery date could be extended if necessary. The seller argued that the buyer first orally agreed to extend the delivery date, then sent a letter that the contract was to be terminated. Therefore, the seller argued, that it did not commit an anticipatory breach of the contract under article 72(1) CISG because there was no indication that it would, in the future, fundamentally breach the contract under article 25 CISG since the delivery date was effectively modified under article 29(1) CISG. According to the seller, under article 51(2) CISG, the buyer may not declare the contract avoided in its entirety because delivery of almost half of the goods ordered does not amount to fundamental breach by the seller. Therefore, the buyer has not suffered any loss because the contract was terminated by agreement between the parties.

The buyer objected that if the goods had been loaded at the new extended date, they would have reached China at the earliest by the end of the year. In China, business around the Chinese New Year is out of season and, therefore, the price for steel would be unpredictable. Consequently, the buyer claimed that the seller's breach was fundamental.

The arbitral tribunal held that the CISG is silent on the limitation period, and under Chinese law the limitation period had not yet run out. The tribunal found that the buyer had no legal basis to claim compensation. Under the contract it was agreed

that, if needed, the L/C could be extended, and therefore the buyer, if wanting to avoid the contract under article 49 CISG, would first have had to grant an additional time for delivery in accordance with article 47 CISG. Instead, the buyer refused to extend the L/C or to postpone the delivery deadline, which violated the contractual terms and the CISG. The tribunal held that the buyer's request to avoid the contract prior to performance was in fact a request to terminate the contract. This termination request was accepted by the seller in accordance with article 29(1) CISG. Therefore, the contract was terminated legally by agreement of the parties and neither party was entitled to compensation.

Case relating to the UNCITRAL Model Law on Electronic Commerce (MLEC)

Case 991: MLEC 15(2)(a)(i)

Aristocrat Technologies, Inc. v. IGT [2008] APO 33

15 December 2008

Published in English: [2008]

Decision of a Delegate of the Commissioner of Patents

www.austlii.edu.au/cgi-bin/sinodisp/au/cases/cth/APO/2008/33.html

This case deals with the service of a document, namely, Statement of Grounds and Particular ("SGP") on opposition of a patent application and, in particular, the time of receipt of that service document in electronic means.

The applicant filed a patent application under the Patent Cooperation Treaty and claimed priority. In this regard, the opponent filed a Notice of Opposition on 17 April 2008. Under regulation 5.4 of Federal Court Rules, the opponent had 3 months to serve a copy of their SGP and therefore, the deadline for serving the SGP was 17 July 2008. The facts show that the opponent had made numerous attempts to serve their SGP electronically — via e-mail and facsimile — at the applicant's address for service. The relevant communication at issue is an e-mail received by the server of the applicant's attorney at 23:59:59 on 17 July 2008, one second to the deadline.

The Delegate of the Commissioner of Patents considered the receipt of the service document and, in particular, whether an electronic address for service had been designated, in the context of the Electronic Transactions Act 1999 (ETA) which is based, in the relevant parts, on the UNCITRAL Model Law on Electronic Commerce 1996 ("MLEC"). Under these rules, where the parties designate a specific information system to exchange electronic communications, the time of receipt of the electronic communication is when it enters the addressee's information system (see section 14(3) of ETA Act inspired by article 15(2)(a)(i) of MLEC). If the parties had designated the address for receipt of service documents, the e-mail received at 23:59:59 on 17 July 2008 would have been received within the time and hence, effective. On the other hand, when the parties do not designate a specific information system, the time of receipt is when the e-mail communication came to the attention of the addressee (see section 14(4) of ETA Act departing from article 15(2)(a)(ii) of MLEC stating that the time of receipt of e-mail communication is at the time when the data message is retrieved by the addressee). In this case, the e-mail received at 23:59:59 on 17 July 2008 arrived after regular business hours and no prior notice of the imminent service of the SGP had been given. Therefore, the service was not completed until the following morning when the e-mail was brought to the applicant's attention.

The Delegate noted that the applicant did not specifically request that the service documents be sent to a particular information system and therefore, there was no expressed designation of an electronic address. Further, the Delegate indicated that mentioning an electronic address in the letter head does not suffice as a designated address for service. Hence, the Delegate concluded that the opponent's e-mail communication containing SGP received at the applicant's server one second before the deadline had not been properly received by the applicant and that the service was not effected.
