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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). 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.

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Cases relating to the United Nations Sales Conventions (CISG)

Case 1017: CISG 3 (1); 6; 7 (1); 11; 29 (1); 57 (1)
Belgium: Hof van Beroep Gent
NV AR v NV I
15 May 2002
Original in Dutch
Published in English: http://cisgw3.law.pace.edu/cases/020515b1.html

Abstract prepared by Andrey A. Panov

The Belgian seller and the French buyer entered into negotiations regarding the production and supply of pagers. The parties executed a letter of intent, which expressly stipulated that the final agreement was still to be reached after subsequent negotiations. The document however, specified the anticipated order of 30,000 pagers to be made by the buyer, the time frame for delivery, and the price to be paid for each unit. Moreover, it stipulated that the mutual relationships of the parties both before and after execution of the final agreement was to be governed by French law. The parties did not execute the final contract by the date specified; however they went on negotiating specific terms of it. After some time, the feasibility of the project became doubtful due to disappointing levels of pager sales in France over the Christmas period. At their meeting the parties discussed the possible options for an amicable solution, which were described in the minutes of the meeting drafted by the buyer and sent to the seller. The seller responded two months later, declaring the buyer to be in default because of the cancellation of the order. The buyer then claimed that such an order had never been made. The seller issued a law suit claiming payment of the price and seeking an order that the buyer must pick up the 30,000 pagers.

The Belgian Court of First Instance found itself lacking international competence to hear the dispute, for the main obligation was to be performed in France.

The seller appealed. Allowing the seller's appeal, the Court found that French law referred to in the letter of intent, contrary to the buyer's allegation, also included the CISG, ratified by France. The contracts for the supply of goods to be manufactured or produced were considered contracts of sale according to Article 3 (1) CISG. The primary obligation of the buyer was to pay for the goods. The letter of intent specified the place of performance of the obligation to deliver, but was silent as to the place of performance of the obligation to pay. In this case, according to Article 57 (1) CISG, the payment was to be made at the place of business of the seller (i.e. in Belgium). Hence, the Belgian courts were internationally competent to hear the dispute pursuant to Article 5 (1) of the Brussels Convention.

The Court noted that the formation of sales contracts is dealt with in Part II of the CISG, requiring an offer and acceptance to be found, but also noted that the parties can reach an agreement gradually as a result of negotiations (with no clearly distinguishable offer and acceptance) on the basis of the principle of party autonomy set forth in Article 6 CISG. In their letter of intent the parties stipulated a number of important elements of the anticipated contract. The letter of intent was regarded as an agreement on principle, which prevented the parties from stepping back on the points on which agreement had already been reached. The formal agreement had never been executed; however, the parties kept negotiating and there

was an agreement between them on certain points. Hence, the buyer's argument that the order had never been made was not followed.

When the feasibility of the whole project became doubtful and the parties had negotiated possible solutions, the options had included calling off the order. The seller did not react within a reasonable time after receiving the minutes of the relevant meeting and did not question their contents. According to Articles 29 (1) and 11 CISG an agreement can be modified or terminated by mere agreement of the parties, which may be proved by any means, including the parties' own behaviour. The needs of international trade obliged the parties to protest within a reasonable time after receiving a communication they could not agree with, for in trade, a positive meaning is attached to silence when receiving all kinds of documentation. The order had been annulled by the agreement of the parties and the seller's claim that the buyer must still buy the 30,000 pagers was unfounded and irreconcilable with the rule of good faith, which must be observed in application and interpretation of CISG (Article 7 (1) CISG). Therefore, the Court dismissed the seller's claim.

Case 1018: CISG 1 (1)(b); 39 (1); 46; 49; 50; 51; 74; 78
Belgium: Hof van Beroep Antwerp
I.S. Trading v Vadotex
4 November 1998
Original in Dutch
Published in English: http://cisgw3.law.pace.edu/cases/981104b1.html

Abstract prepared by Rebecca Emory and Andrea Vincze

A Belgian buyer, the defendant, ordered goods from a Dutch seller, the plaintiff. The buyer noted deficiencies of the goods, only vaguely describing the defects and stating that it was forced to give considerable price reduction to its own buyers. The Court of Appeals held that the CISG was applicable to the case under Article 1 (1)(b).

The seller claimed that it never received the letter of complaint; however, the Court regarded it as proven that the buyer sent the letter and the seller did receive it within a reasonable time as required by Article 39 (1) CISG. The Court also found that despite the complaint being sent later than the standard deadline in the general conditions, it was timely under Article 39 CISG because application of the CISG was not excluded in the standard conditions.

The Court found that the buyer may not claim damages under Article 74 CISG because the underlying defects were not proved sufficiently.

The buyer did not claim delivery of substitute goods (Article 46 CISG), nor avoidance or partial avoidance of the contract (Articles 49 and 51 CISG) and therefore, was only entitled to reduction of the price. The Court held the seller properly reduced its price pursuant to Article 50 CISG. The Court ordered the buyer to pay the seller damages and interest under Article 78 CISG, in accordance with the relating provisions of the general conditions.

Case 1019: CISG 31 (1)
Montenegro: Appellate Court of Montenegro
Ca. No. Mal. 184/04
Hartman LLC v. Grlic Plus LLC
20 February 2007 (1st instance Commercial Court in Podgorica 20 October 2006)
Original in Montenegrin
Published in English: http://cisgw3.law.pace.edu/cases/070220mo.html

Abstract prepared by Aneta Spaic

This case deals primarily with the seller's obligation to deliver the goods to the buyer by handing them over to the first carrier and with the buyer's obligation to pay the purchase price.

A Croatian company, the seller, entered into a contract with a Montenegrin company, the buyer, for the sale of cardboard boxes for eggs. As the buyer failed to pay the price of the goods, the seller brought action in court claiming the payment of the price of the goods and accrued interest. The evidence and documents submitted confirmed that the parties were in a regular business relationship, and that the seller delivered the goods by handing them over to a carrier, pursuant to the order of the buyer. The buyer, however, alleged that it was not clear to which delivery the sum was related since it had already made payments in advance. As a matter of fact, all obligations relating to the goods delivered were settled and the goods referred to in this particular case were never delivered. The buyer also alleged that, had the goods at hand been delivered, it would have objected to them and contacted the seller for cross-checking the status of accounting and closing of mutual obligations. In its submissions the buyer stressed that the dispatch did not point out who took the goods on behalf of the buyer. The seller disputed the buyer's allegations since the transport of goods was performed by a clearly identified carrier and also pointed out that the buyer signed for the shipment on the day the goods were delivered, and that the account that followed was sealed by the custom house in Koprivnica.

The Commercial Court of Montenegro noted all of the allegations of the buyer. The Court, however, found that those facts did not influence the decision in any manner. The seller presented to the Court evidence of the dispatch of the goods from which it was determined that the buyer signed for the shipment when it received the goods. In addition, the confirmation of the performed forwarding services and the international consignment note showed that the goods were delivered. This is in accordance with Article 31 (a) CISG which states that if the seller is not obliged to deliver the goods at any particular place, its obligation to deliver consists, if the contract involves carriage of goods, in handing over the goods to the first carrier for transmission to the buyer. According to the Convention this amounts to a delivery made to the buyer. Therefore the Court ruled in favour of the seller.

The Montenegrin buyer brought an appeal against this decision. The Court of Appeals, however, rejected it noting that the Commercial Court had correctly applied Article 31 (a) CISG. According to the evidence, the buyer ordered the goods and they were delivered. No evidence that a different delivery of the goods had been arranged or that the debt had been settled through advance payment was provided by the buyer.

Case 1020: CISG 1 (1)(b); 7 (1); 62; 78
Serbia: Foreign Trade Court of Arbitration attached to the Serbian Chamber of Commerce
28 January 2009
Original in Serbian
Published in English: http://cisgw3.law.pace.edu/cases/090128sb.html

The parties, a Serbian seller and an Albanian buyer, signed a "Sales and distribution agreement", set to expire on 31 December 2007. However, the arbitration clause was not time barred and provided that it [the clause] "shall survive termination or expiration of (the Contract)". The arbitration clause further provided that the parties may resort to arbitration if the dispute could not be amicably settled within 30 days. Since the buyer failed to perform its payment obligation within 45 days of the delivery of the goods, the seller initiated arbitration proceedings.

The seller stated in its submissions that it had "repeatedly demanded the buyer to fulfil its payment obligation" and that such attempts were met with "vague promises" or even "absence of any reaction". The sole Arbitrator found that the requirement of pursuit of amicable settlement had been observed by the seller.

The contract contained a choice of law clause, providing that the Contract "*shall be governed and construed in accordance with applicable regulations and laws of the Republic of Serbia*". Since Serbia has ratified the CISG, the arbitrator found that the CISG should be applied. This finding was in accordance with foreign judicial and arbitral practice, which should be taken into consideration for the purpose of achieving uniform application of the CISG, pursuant to Article 7 (1) CISG. Although Albania was not a party to the CISG [at the time of the contract], the Convention was applicable by virtue of Article 1 (1)(b) as the party autonomy pointed to a law of the Contracting State — Serbia. The arbitrator also noted that although the CISG does not cover distribution agreements, the Convention is applicable to individual transactions concluded under the overall agreement, as in the case at hand. As a matter of fact, the seller based its claim on single transactions and not the contract as a whole.

The Arbitrator noted that the contract was concluded for a definite period, and expired on 31 December 2007. Not being able to terminate the contract, as the seller requested, the Arbitrator observed and declared that it had expired on 31 December 2007. However, the individual sales transaction, concluded according to the contract had remained in force and had not been avoided. Hence, the seller's request for payment of the contract price was justified by the terms under which the sales transaction was concluded and Article 62 CISG. Furthermore, pursuant to Article 78 CISG, the seller was entitled to interest on the purchase price the buyer failed to pay. The seller had requested to apply a "domicile" interest rate for the sum requested in euro. Since the CISG does not determine the interest rate to be applied, the arbitrator stated that the rate had to be determined in accordance with the principles of the Convention (Article 7 CISG), in particular that of full compensation. The arbitrator further noted that compensation "should not put the creditor in a better position than he would be had the contract been performed". Therefore, the arbitrator decided that Serbian law was not applicable as it would result in overcompensation of the seller. On the contrary, it was more appropriate to apply an interest rate "regularly used for savings, such as short-term deposits in the first class banks at the place of payment (Serbia) for the currency of payment".

Case 1021: CISG 8; 64 (1)(b); 81 (1)
Serbia: Foreign Trade Court of Arbitration attached to the Serbian Chamber of Commerce
T-4/05
15 July 2008
Original in Serbian
Published in English: http://cisgw3.law.pace.edu/cases/080715sb.html

The plaintiff, a Swiss company, contracted to lease equipment for packaging of milk to the defendant, a Serbian company. Under the terms of the contract, the buyer had to pay half of the price 15 days before the delivery, the remaining sum being payable in quarterly instalments within five years upon invoices issued by the seller. In addition, the buyer was requested to order prescribed quantities of packaging from the seller for five years. In case the buyer failed to perform this obligation, the contract provided for payment of liquidated damages. The contract did not prescribe the conditions of purchase of the packaging, but only the quantity to be purchased and the amount of liquidated damages to be paid in case smaller quantities were to be ordered. Furthermore, the contract provided that "*the equipment is to remain the property of the seller until the expiration of the agreed period, or until the fulfillment of the conditions of purchase of the packaging and its timely payment*".

The buyer failed to perform its contractual duties on several occasions, even though the seller warned him to do so: it did not make the payments it was supposed to and it ordered less packaging than it was obliged to under the contract. The parties attempted to reach a mutually acceptable solution, but the buyer failed to perform timely payment. Therefore the seller commenced arbitration proceedings requesting termination of the contract, return of the leased equipment and payment of costs and liquidated damages. The buyer alleged that the contract had been modified and that a form of settlement had been reached. However, neither in its submissions to the arbitrator nor at the hearings, did the buyer ever put forward any counterclaims against the seller.

Since the parties had not chosen the law applicable to the contract, the arbitrator determined that Serbian law — thus the CISG, pursuant to Article 1 (1) — was applicable to the case. Given the language of the contract (Serbian), the place of performance of substantial part of the obligations (Serbia) and the fact that the Serbian subsidiary of the seller had a relevant role in the performance of the contract, the Serbian law was mostly connected to the contract. However, the contract was to be considered an "international transaction" (as per Article 1 CISG). Since the seller had more than one place of business, the one most closely connected to the contract and its performance (Article 10 CISG) was the headquarters in Switzerland (it conducted the negotiations, signed the contract, delivered the machine and received the payment). Incidentally, the arbitrator noted that although the Serbian law on the ratification of the CISG uses the term "seat" instead of "place of business", for the purpose of the uniform interpretation of the Convention, the Serbian translation should be interpreted in accordance with the terminology used in the official languages of the Convention.

The CISG was applicable even if the parties had named their contract "Leasing Contract" and the seller in its submissions referred to the contract as a lease. The agreement was to be considered a sale of goods, with the price being paid in instalments and a provision of retention of property over the delivered goods by the

seller until complete performance of the contractual obligations. Payment in advance of one-half of the price and the fact that the buyer would become the owner of the equipment upon payment of the last instalment (rather than being in the position to purchase the object of the contract after payment of the last instalment) corroborated this interpretation. The interpretation was also consistent with foreign judicial practice, which was to be taken into consideration for the uniform application of the Convention, on the basis of Article 7 (1) CISG.[1] Since the Convention does not deal with the effect of the contract on the property of the goods sold (Article 4 CISG), the question of the retention of property over the delivered goods by the seller was to be decided according to Serbian law.

Based on evidence, the arbitrator noted that the parties had negotiated on the performance of the contract even after their submissions to the arbitrator. Through its "Statement of Claim", the seller had given the buyer an additional period of time for performance of its contractual obligations. As a result, the seller could have avoided the contract only upon the expiration of this additional period of time under Article 64 (1)(b) of the Convention. This additional period of time, of about four months, was reasonable as per the meaning of Article 63 CISG. However, the seller failed to declare avoidance: its behaviour, pursuant to Article 8 CISG, indicated that it wanted the contract to remain in force. The provisional measure obtained by the seller from the Commercial Court in Kraljevo, ordering the restitution of the equipment, was a way to put pressure on the buyer. This equipment was eventually handed over to the seller and the contract was at that point avoided in accordance with Article 64 (1)(b) CISG. Therefore, the arbitrator could not decide on the avoidance of the contract, as requested by the seller, but only acknowledge the moment of avoidance.

Pursuant to Article 81 (1) CISG, restitution in case of avoidance can be ordered only in respect of those performances for which it is claimed. While the seller requested restitution of the machine returned, the buyer failed to request the restitution of what it had paid for the machine until the moment of avoidance. Therefore the buyer was ordered to deliver the machine with all accessories.

The seller's request for payment of the lease-price for usage of the equipment from the moment of delivery to the moment of commencement of arbitration was unfounded. The arbitrator considered the request as a request for compensation of damages (Article 74 CISG) or as a request for restitution based on unjust enrichment. The seller failed to prove the occurrence of damage due to the buyer's breach of contract, or the profits acquired by the buyer by usage of the equipment. The seller also failed to submit evidence to determine the amount of the machine's depreciation, as well as evidence on lost profits, because the machine was in the possession of the buyer, and on the amount of benefit that the buyer had obtained keeping possession of the machine until the moment of avoidance of the contract.

As to the request of liquidated damages for failure of the buyer to purchase packaging, the arbitrator noted that pursuant to the principle of party autonomy (Article 6 CISG) the parties can freely stipulate the amount of compensation to be paid in case of non-performance or untimely performance of the contractual

[1] The arbitrator quoted the case of the Australian Federal Court for South Western Australia *Roder Zelt- und Hallenkonstruktionen GmbH v Rosedown Park Pty and Reginald Eustace* ((1995) 57 FCR 216, 240 (FCA)).

obligation. The arbitrator thus granted the seller's claim, although not in the amount requested by the seller. Pursuant to Article 78 CISG, the seller's request of "domiciliary interest" was also granted.

Case 1022: CISG 35 (1); 36 (1); 45 (1)(b); 74; 78
Serbia: Expanded Tribunal of the Foreign Trade Court of Arbitration attached to the Serbian Chamber of Commerce
23 January 2008, T-9/07
Original in Serbian
Available at: http://cisgw3.law.pace.edu/cisg/text/080123serbian.pdf
Published in English: http://cisgw3.law.pace.edu/cases/080123sb.html
Commented on in Serbian: Vladimir Pavic, Milena Djordjevic, Primena Becke konvencije u arbitraznoj praksi Spoljnotrgovinske arbitraze pri Privrednoj komori Srbije, Pravo i privreda br. 5-8/2008, cited at pp. 572, 581, 586, 592, 601 and 606.

Abstract prepared by Andrea Vincze

The dispute arose out of a contract for the sale of white crystal sugar. The Italian buyer commenced arbitration before a Serbian court of arbitration against the Serbian seller to recover the customs the buyer had to pay in Italy as a result of withdrawal by the Serbian authorities of the certificates of origin required by the contract and ensuring exemption from the payment of customs. The seller challenged the jurisdiction due to incorrect denomination of the court of arbitration, contested its liability for any damages suffered by the buyer as a result of the withdrawal, and disputed the amount of damages requested arguing that the buyer had already requested compensation for the same losses in another proceeding.

Applying Articles 28 and 30 of the Serbian Arbitration Act (identical to Article 16 (1) and (3) of the UNCITRAL Model Law on International Arbitration) and Article V, paragraph 3, of the European Convention on International Arbitration of 1961, the arbitral tribunal ruled that it had jurisdiction despite the incorrect denomination; and rejected the seller's argument regarding identity of claims.

On the merits, the tribunal made its decision under a multiplicity of legal sources, i.e. the CISG, the UNCITRAL Model Law on International Credit Transfers, and several sources of *lex mercatoria*. Therefore, UNCITRAL texts represent only a part of the legal basis and the reasoning. [Only UNCITRAL texts are referred to in this abstract.]

The arbitral tribunal ruled, that under Article 35 (1) CISG, the provision regarding specific origin of the goods and the duty to provide the certification of origin was an express contractual term. Therefore, the seller was aware at the time of contract conclusion that a failure to provide the required certification of origin may have financial effects on the buyer, i.e. that buyer would lose the exemption from paying customs and relating charges in Italy.

The arbitral tribunal applied Article 36 (1) and 45 (1)(b) CISG and found that the seller was liable for non-conformity existing at the time of passing of the risk to the buyer because the seller had been aware of the express contractual term on the requirement to provide a certificate of origin as early as the conclusion of the contract, even though the non-conformity became apparent only at a later time.

Based on the above findings and under Article 74 CISG, the arbitral tribunal found that the seller could have foreseen at the time of the contract conclusion that the buyer may suffer damages if the specific certificate of origin is not available to the buyer, and ordered the seller to pay damages to the extent proved by the buyer.

Under Article 78 CISG, the arbitral tribunal ordered the seller to pay interest. In lack of a relating Serbian law, the interest rate was determined by applying *lex mercatoria* and Article 2 (1)(m) of the UNCITRAL Model Law on International Credit Transfers. The tribunal found that the applicable interest rate was the EURIBOR rate, being the short-term lending rate calculated on the basis of the currency involved.

Case 1023: CISG 1 (1)(b); 53
Ukraine: Chamber of Commerce and Trade Arbitration proceeding
23 September 2004
Original in Russian
Published in English: http://cisgw3.law.pace.edu/cases/040923u5.html

Abstract prepared by: Luiz Gustavo Meira Moser

The International Commercial Arbitral Tribunal at the Ukrainian Chamber of Commerce and Trade dealt with the action brought by the Claimant (the seller), a Ukrainian company, against the Respondent (the buyer), an Israeli company, for the recovery of US$ 44,208.65. This included US$ 43,669.95, constituting the cost of the goods, plus US$ 538.70, constituting reimbursement of the expenses incurred by the payment of a penalty for breach of currency payment receipt laws.

The seller undertook to sell and the buyer undertook to buy an assortment of foodstuffs, the price and quantity of which were specified in the contract.

The buyer accepted the delivered goods; however, the buyer only partially paid for the cost of the goods. Since the buyer had not paid off its debt voluntarily, the seller addressed the Tribunal with an action against the buyer claiming recovery of US$ 44,208.65.

Section 11.3 of the contract called for the substantive law of the seller's State, i.e. the law of Ukraine, to be applicable to the contract. In accordance with Article 1 (1)(b) CISG, the Convention was applicable to the contract since Ukraine was a Contracting State.

In this regard, Article 53 CISG required payment of the purchase price and that the buyer accepts delivery of the goods as required by the contract and the Convention. In settling the dispute, the Tribunal decided that the Israeli buyer was obliged to pay to the Ukrainian seller US$ 43,699.95 (the cost of the delivered goods) and US$ 2,620.20 (reimbursement of the expenses on payment of the arbitration fee). The Tribunal decided the buyer was not obliged to repay the seller's penalty as such recovery was not provided for in the contract and the seller could have prevented the penalty being incurred by initiating arbitral proceedings within the prescribed time.

Case 1024: CISG 77
Ukraine: Chamber of Commerce and Trade Arbitration proceeding
9 July 1999
Original in Russian
Published in English: http://cisgw3.law.pace.edu/cases/990709u5.html

Abstract prepared by: Andrey A. Panov

In 1998 a Ukrainian seller and a Russian buyer concluded a contract for the sale of metal production goods. The goods were delivered to the buyer in two instalments on 15 and 20 May 1998. The buyer received the goods, but did not pay for them. After some negotiations the buyer partially fulfilled the agreed schedule for extinguishment of the debt; however, the most part of the price still remained unpaid. Finally, the seller on 1 February 1999 demanded the buyer to repay the debt, consisting of the price payable under the contract, interest on it and damages (which amounted to a fine, charged by the Bureau of the Budget of Ukraine, for non-repayment of the currency proceeds to the State). This demand was not fulfilled and in March 1999 the seller commenced arbitration proceedings.

The Tribunal granted the recovery of the contract price (under the Civil Code of the USSR) and the interest on it. As for the damages, the Tribunal found Article 77 of the CISG applicable. The Tribunal's view was that, if the seller had not delayed issuing the proceedings until the expiration of 90 days from the date of the customs clearance of the goods, the fine would not have been levied and the seller would not have incurred this loss. Hence, as the seller's failure to issue the proceedings at an early stage amounted to failure to mitigate the loss according to Article 77 CISG, the Tribunal dismissed the claim for damages.