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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 Sales of Goods (CISG)**

Case 1033: CISG 14; 15; 16; 74; 75; 77

Spain: Murcia Provincial High Court

Previously heard by Murcia Court of First Instance No. 5, 23 December 2009

15 July 2010

Complete text: www.uc3m.es/cisg/sespan85.htm, Arazadi/Westlaw (440)

Abstract prepared by María del Pilar Perales Viscasillas, National Correspondent

The parties to a contract on the international sale of a crane were in dispute over the conclusion of the contract. The Court of First Instance deemed the contract to have been concluded, on the grounds that the Spanish seller had offered a deal on the goods and a price that had been accepted by the German buyer. The appellant (the seller) considered that the contract had been subject to the condition that payment for the goods would take place before any other buyer was accepted and that, if that condition had not been fulfilled, there was no contract. However, the Provincial High Court upheld the judgement of the Court of First Instance, in view of the provisions of articles 14 to 16 of CISG, since it was clear from the electronic mails exchanged by the parties that the seller had given the buyer first refusal to carry out the transaction, so long as it was carried out before a specified date. This the buyer had done, when it paid the agreed amount by bank transfer. That transaction had, however, been refused by the seller's bank. The seller had thus made a firm and binding offer that it had failed to honour for unjustified reasons, since it had not sought to extend the deadline granted for paying the cost of the transaction but had gone on to sell the goods to a third party. There had thus been an offer and an acceptance, which meant that the sale contract had been concluded and its failure was due to the seller.

The Court considered whether article 74 of CISG applied, since the breach of contract by the seller had caused damage to the buyer in the form of loss of profit. In endorsement of the lower court's judgement, damages were set at the difference between the amount of the resale and the price of the crane acquired by the buyer, in addition to the buyer's costs. Lastly, the Court considered that there had been no breach of the provisions of articles 74, 75 and 77 of CISG, since the seller had not established that the damages claimed exceeded the loss that the party in breach had foreseen or ought to have foreseen, it had not established that the possibility of a replacement purchase was possible and it had not established that the buyer had not taken reasonable measures, given the circumstances, to reduce the damage. The exercise of discretion provided for in article 1.103 of the Civil Code was not appropriate in the present case.

Case 1034: CISG 8

Spain: Cáceres Provincial High Court

Previously heard by Trujillo Court of First Instance No. 2, 26 April 2010

14 July 2010

Complete text: www.uc3m.es/cisg/sespan84.htm, Aranzadi/Westlaw (2008/189082)

Abstract prepared by María del Pilar Perales Viscasillas, National Correspondent

The Court considered article 8 of CISG with a view to interpreting the intention of the parties with regard to the amount and the price fixed in a sales contract. On the basis of the article, the Court ruled that, in view of the communications exchanged by the parties, it could not be concluded that the seller “did not know or was unaware of the buyer’s intent, given that the latter had expressed the unequivocal intention of buying only 30 bales at a price of €20.57 per bale and not at a price per metre”. The Court thus found, in application of article 8 of CISG, that the knowledge of the buyer’s intent should prevail.

Case 1035: CISG 35

Spain: Barcelona Provincial High Court

Reporting judge: Agustín Ferrer Barriandos

Previously heard by Sabadell Court of First Instance No. 6, 31 July 2008

27 January 2010

Complete text: www.uc3m.es/cisg/sespan83.htm, Aranzadi/Westlaw (114416)

Abstract prepared by María del Pilar Perales Viscasillas, National Correspondent

The case concerned the defects in a machine sold by one Spanish company to another. The Court considered it in the light of the principle of *aliud pro alio*, which it ruled arose from case law and constituted a remedy for the resolution of situations of extreme injustice that might occasionally be created by modern contracts and to which no reasonable solution could be found in the civil cases that had passed through the Spanish legal system down the years. The Court thus deemed that it should apply benchmarks for fairness that would avoid the need to endorse the absolute authority of the *aliud pro alio* principle. A good benchmark, it held, could be found in the references to conformity with ordinary use or a particular purpose, as set out in article 35 of CISG, which constituted the current law of Spain in such sale contracts and whose benchmarks — which were accepted throughout the world, since they were contained in a Uniform Law produced by the United Nations — also applied basically to consumer sales under Act No. 23/2003 on guarantees in the sale of consumer goods, particularly as none of these legal texts contained rules directly applicable in the case before the court.

Case 1036: CISG 7; 35.1; 35.2; 38; 39; 40; 46; 47; 48; 77; 86; 87; 88

Spain: Zaragoza Provincial High Court

Previously heard by Zaragoza Court of First Instance No. 19, 30 June 2008

31 March 2009

Complete text: www.uc3m.es/cisg/sespan79.htm, Aranzadi/Westlaw (2009/221573)

Abstract prepared by María del Pilar Perales Viscasillas, National Correspondent

The Spanish buyer and the Belgian seller had agreed on the purchase of both fresh and frozen shoulders of pork. The seller sued for payment, but the buyer alleged a breach by the seller in respect of the quality of the goods supplied. The dispute

concerned the object and purpose of the contract. The seller maintained that only a specified original weight had been stipulated. The buyer considered that the goods should meet certain conditions of weight and fat content so that they could be marketed as serrano ham, although these requirements had not been specified in the contract. The Court considered the seller's obligations under article 35.1 and 35.2 of CISG. It held that, since the contract related to a commercial sale, the goods must be fit for the buyer's purposes, that is, for resale. It investigated the question of whether the seller knew the end use of the goods and came to the conclusion that the seller had had no opportunity to find out the end use until after the problems with the goods had emerged, because it was not liable for any requirements other than those set out in the order.

As for the non-conformity with regard to the inadequate weight and fat content of the pork, the Court held, in view of article 35.1 of CISG and the expert tests carried out, that, after they had been received by the buyer, the goods had gone through the drying and curing process for several months and it was only later that a certain proportion had been considered unmarketable.

The seller therefore invoked articles 38 and 39 of CISG, arguing that the buyer had examined the merchandise and had not reported the lack of conformity within as short a period as was practicable or specified the nature of the defect. The buyer argued that the seller was not entitled, under article 40, to invoke articles 38 and 39, because the seller already knew or could not have been unaware of the facts or the lack of conformity.

The Court ruled that the goods had been delivered, received and, by going through the curing and maturing process, became part of the buyer's production process. It considered the application of article 77 of CISG, which obliged a party to take such measures as were reasonable in the circumstances to mitigate the loss, including loss of profit. If the buyer intended to exercise its rights under CISG, it had seemingly not taken reasonable steps to that end (art. 86), since it had neither rejected the goods nor deposited them in a warehouse of a third person (art. 87) if, as it claimed, it did not have means to preserve the goods, nor had it sold them (art. 88). All the goods had been received and payment had been made by November.

The Court also held that the buyer had not fully complied with articles 38 and 39 of CISG. The whole conduct of the seller showed that the goods had been accepted. This interpretation was based on the buyer's behaviour in accordance with the principle of good faith established in article 7 of CISG, which required complaints to be made quickly, circumstances permitting, so that the seller could take action in response and be given the opportunity of examining the goods or replacing them (CISG, arts. 46 and 48). In reaching its judgement, the Court cited in its support CLOUT Case 337, Germany, Landgericht Saabrücken, 26 March 1996.

Case 1037: CISG 25; 30; 31; 34; 35; 37; 38; 39; 48; 50

Spain: Barcelona Provincial High Court

Previously heard by the Barcelona Court of First Instance No. 35, 29 January 2008

24 March 2009

Complete text: www.uc3m.es/cisg/sespan78.htm, Aranzadi/Westlaw (2009/384407)

Abstract prepared by María del Pilar Perales Viscasillas, National Correspondent

The Spanish buyer and the Pakistani seller, which had concluded a contract for the sale and purchase of 1,920 boxes of frozen cuttlefish having a net weight of 12.920 kg were in dispute over the quality of part of the merchandise: part of the product (5.589 kg) had been declared unfit and destroyed by order of the health authorities, while the rest had been inferior in quality to that contracted for and the quantity was also smaller, at 12.740 kg.

This was a cost and risk sale (or cost and freight, or with a cost-and-freight clause), with a bill of lading effected through a bank credit; the parties did not question the application of CISG. Quality and accuracy of description were also covered by Pakistani health certificates, which had not been contested by the port health authority of the port of destination, Barcelona, where health checks had been carried out on the goods.

The Court held, on the basis of articles 25, 30, 31, 34, 35, 37, 38, 39, 48 and 50 of CISG, that the seller had complied with all its obligations under the sale contract: it had delivered the goods, with customs documentation — an export permit — and health certificates, as well as a quality certificate (in line with the regulations and practices of the port of embarkation), it had arranged transport and it had carried the goods on board the vessel in the port of embarkation in a symbolic transfer of title. It had thus delivered the goods, handed over documents relating to them and transferred the property in the goods (CISG, arts. 30, 31 and 34) and ensured that the goods were of the quantity, quality and description required by the contract and packaged in the manner required (CISG, art. 35).

The seller had not provided sufficient evidence of the non-conformity of the goods prior to the risk transfer. That was without prejudice to any action that the seller might take against the carrier.

Case 1038: CISG 1.1 (a); 39; 53; 59; 78

Spain: Valencia Provincial High Court

Previously heard by Onteniente Court of First Instance No. 3, 30 January 2007

8 April 2008

Complete text: www.uc3m.es/cisg/sespan74.htm, Aranzadi/Westlaw (2008/189082)

Abstract prepared by María del Pilar Perales Viscasillas, National Correspondent

The Spanish buyer and the Italian seller concluded a sale and purchase contract for a single-screw extruder. On the basis of the Spanish principle *aliud pro alio*, the buyer claimed that there were defects in the screw and a lack of capacity, or power, in the extruder's motor.

The Court deemed CISG to be applicable on the basis of article 1.1 (a), namely that the parties were based in States party to the Convention. It held that the delivery entailed the obligation to pay the price, in accordance with articles 53 and 59 of CISG. The buyer's response was to adduce the defects mentioned above. In

application of the Spanish principle of *aliud pro alio*, the Court ruled that it was for the buyer to prove the significance of the defects. In fact, the seller had attempted to find a solution to the problem by ordering a new screw to be made at a workshop, although there had subsequently been shown also to be a lack of capacity or power in the extruder's motor. Despite this, the buyer had not notified the seller of the existence of the defects within a reasonable time (CISG, art. 39), even though the seller had put in a series of requests for payment; the buyer had not avoided the contract, either. In particular, the Court considered the periods of time that had elapsed between the replacement of the screw in June 2004, the request for payment on 2 March 2005 and the submission of the claim on 14 February 2006. It concluded that the buyer had not complied with the reasonable time stipulated in article 39 of CISG.

The Court held that, although article 78 of CISG did not establish a *dies a quo* for arrears to be paid, article 7.2 provided that questions that were not expressly settled in the Convention were to be settled in conformity with the general principles on which it was based or, in the absence of such principles, in conformity with the law applicable by virtue of the rules of private international law. In these circumstances, the applicable provision was article 63, paragraph 1, of the Commercial Code, under which late payment in fulfilment of a commercial obligation would, in contracts that specified a day for payment, begin to attract interest the day following the expiry date, as provided for in Act No. 3/2004 of 29 December, which incorporated Directive 2000/35/EC on combating late payment in commercial transactions.

Case 1039: CISG 7; 8; 8.1; 8.3; 25; 26; 39; 46; 49.1 (a)

Spain: Navarra Provincial High Court, Section 3

Previously heard by Tudela Court of First Instance and Investigation No. 3, 29 March 2005, <http://turan.uc3m.es/uc3m/dpto/PR/dppr03/cisg/espan45.htm>
27 December 2007

Complete text: www.uc3m.es/cisg/espan62.htm

Abstract prepared by María del Pilar Perales Viscasillas, National Correspondent

The case, which had previously been heard by the Court of First Instance and Investigation,¹ turned on the defective functioning of a machine that the German seller had manufactured and sold to the Spanish buyer.

The appeal concerned not only the judgement of the Court of First Instance but also various orders imposed on the parties in relation to other issues. First, the Spanish court's jurisdiction had been questioned, on the grounds that the general conditions of the German company referred to the German courts. The Court had ruled that the German company could not be taken to have tacitly agreed to come under Spanish jurisdiction by contesting the claim, since at the same time it was challenging the jurisdiction of the Spanish courts. Article 16 of Council Regulation (EC) No. 44/2001 on jurisdiction and the recognition and enforcement of judgements in civil and commercial matters was also not applicable, since the case involved companies and not a private customer. The Court had also held, on the basis of article 23 of Council Regulation (EC) No. 44/2001, that the general conditions of the German company with regard to the jurisdiction of the German courts were not

¹ See Case 1041, p. 9.

applicable. It had thus held that, while the validity of the general conditions was not affected by the fact that they were written, in German, in small print at the back of the document, that validity was called into question by the fact that the contract did not contain an explicit reference to a clause attributing jurisdiction at the end of the general conditions. Furthermore, the Court had considered that the clause attributing jurisdiction to the German courts was not valid under the principle of good faith set out in article 7 of CISG, since that principle implied that a contract should have the content that the parties might with reasonable confidence hope it would have. The principle of good faith would be breached if a clause in the general conditions recognizing a particular jurisdiction, to which the Spanish party had not given its consent, was considered valid.

The Provincial High Court rejected practically all the claims by the seller regarding the judgement of the Court of First Instance.

The seller claimed that the Court of First Instance had applied national provisions and case law rather than CISG. The Provincial High Court, hearing the appeal, ruled that, although the Court of First Instance had used Spanish case law with regard to the avoidance of the contract under article 1124 of the Civil Code, it had, nonetheless, referred to CISG, particularly articles 39, 46 and 49.1 (a). The Court also rejected the seller's claim that article 26 of CISG should be interpreted to mean that it was an absolute requirement for the buyer to submit a legal claim for extrajudicial avoidance, particularly since the seller was aware of it through its own court order. The Court further held that, since the issuance and notification of the claim, there had been constant complaints by the buyer to the seller about the malfunctioning of the machine. It therefore held that avoidance had taken place within a reasonable period of time.

The Court also considered the seller's claim that the buyer had acted in contradiction with its previous conduct in avoiding the contract of sale and purchase. The Court applied article 8 of CISG, which it considered a provision for the interpretation not only of the statements and conduct of the parties but also of the contract itself; moreover, article 8.3, in referring to the subsequent conduct of the parties, enshrined the well-known prohibition of *venire contra factum proprium*, thus recognizing that the subsequent conduct of the parties should be taken into consideration when assessing the intention of each party.

The seller also claimed that the judgement of the Court of First Instance had not resolved the issue, since it considered that there had been a basic breach of contract under the terms of article 25 of CISG. The Provincial High Court considered that, although the judgement appealed against also cited Spanish case law in relation to article 1124 of the Civil Code (Discharge by breach), such case law was along the same lines as article 25 of CISG, which provided that the buyer might declare the contract avoided where the breach was serious and fundamental, without needing to adduce the failure to perform secondary or complementary actions that, not being of vital importance, had not prevented the creditor from obtaining the financial result that had prompted it to conclude the contract.

Lastly, as regards the interpretation of the contract where it concerned the specific features that the machine in question was required to have, the Court held that the aim of article 8.1 of CISG in introducing the rule or subjective criterion of interpretation was to discern the real intent of a contracting party — without going

so far as a psychological investigation — so that, if the terms of the contract were clear, there was an obligation to abide by the literal meaning, without either party being able to claim that its unstated wishes should prevail.

Case 1040: CISG [14.1; 15.1; 18.1; 23; 24; 25; 30;] 39.1; [78]

Spain: Cuenca Provincial High Court

Reporting judge: Mariano Muñoz Hernández

Previously heard by Cuenca Court of First Instance No. 3, 24 September 2004

31 January 2005

Summary: www.uc3m.es/cisg/respan47.htm

Complete text: www.uc3m.es/cisg/sespan47.htm

Abstract prepared by María del Pilar Perales Viscasillas, National Correspondent

The case concerned the sale of live calves. The seller had delivered calves that were not of the agreed breeds and, moreover, were in extremely poor health, showing symptoms of dehydration and malnutrition, as a result of which 25 died. The seller had claimed payment of the price plus interest for late payment. The Provincial High Court, hearing the appeal, considered that there had not been a fundamental but only a partial breach. It also endorsed the interpretation of the Court of First Instance with regard to the time limit referred to article 39.1 of CISG, which it considered reasonable and fixed at 20 to 25 days. As for the question of determining the interest for late payment, the Court held that it had been determined as a result of the judgement, in application of the principle *in illiquidis non fit mora*.

Case 1041: CISG 39; 46; 47.1; 49; 49.1 (a)

Spain: Tudela Court of First Instance and Investigation No. 3

29 March 2005

Complete text: <http://turan.uc3m.es/uc3m/dpto/PR/dppr03/cisg/espan45.htm>

Abstract prepared by María del Pilar Perales Viscasillas, National Correspondent

The business of the Spanish buyer was the manufacture and marketing of tiles and bricks. In 1999, it had considered the possibility of introducing brick-grinding technology into its manufacturing process, for which purpose it had contacted the German seller's exclusive representative in Spain. Prior to the conclusion of the sale contract in July 2000, the seller sent the buyer publicity material on its machines, with particular reference to their productive performance. The buyer, meanwhile, visited the seller's installations and supplied it with a number of samples of the bricks that it manufactured.

Following the co-instruction and delivery of the machine by the seller, the buyer had complained about the machine's poor performance. The seller had denied that there were defects and ascribed the buyer's problems to excess cracking in the bricks that it used. It had also demanded payment of the price of the contract.

The seller's understanding was that, under article 46 of CISG, the contract could not be unilaterally avoided, because the parties had established new deadlines (CISG, art. 47.1). The Court rejected this argument, on the grounds that both the complaint about the defects of the machine and the claim for payment had been submitted within the periods of time set out in CISG (arts. 39 and 49).

With regard to the goods' lack of conformity, the Court applied the provisions of the Civil Code and Spanish case law regarding the principle *aliud pro alio*; that is, it held that there had occurred a fundamental breach of the sales contract, in view of the unfitness of the machine in question for the purpose for which it was sold and the buyer's consequent dissatisfaction, which gave it the right to avoid the contract. In that connection, the Court considered that the possible avoidance of the contract was provided for in similar terms in article 49.1 (a) of CISG. Lastly, the Court considered the seriousness of the defects in the light of the expert report that had shown that bricks passing through the machine exhibited a breakage level of between 75 per cent and 84 per cent, depending on the speed applied.
