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CASE LAW ON UNCITRAL TEXTS
(CLOUT)

Contents

INTRODUCTION

This compilation of abstracts forms part of the system for collecting and disseminating information on court decisions and arbitral awards relating to Conventions and Model Laws that emanate from the work of the United Nations Commission on International Trade Law (UNCITRAL). Information about the features of that system and about its use is provided in the User Guide (A/CN.9/SER.C/GUIDE/1). CLOUT documents are available on the website of the UNCITRAL secretariat on the Internet (http://www.un.or.at/uncitral).

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I. CASES RELATING TO THE UNITED NATIONS SALES CONVENTION (CISG)

Case 187: CISG 14(1); 61(3); 63
United States: Federal District Court, Southern District of New York
23 July 1997
Helen Kaminski Pty. Ltd. v. Marketing Australian Products, Inc. doing business as Fiona Waterstreet Hats
Published in English in U.S. Dist. LEXIS 10630 [1997] and WL 414137 [1997]

An Australian manufacturer of fashion accessories entered into a "Distribution Agreement" with a U.S. distributor. The Agreement specified the terms on which the parties would do business, including methods of payment, delivery and warranties as to quality (article 14(1) CISG). The distributor agreed to purchase accessories totalling a specified amount during the year following the conclusion of the Agreement. Soon after entering into the Agreement, the parties amended it to transfer the manufacturer's accessories that were already in the United States to the distributor.

The distributor subsequently ordered additional accessories and the manufacturer sent notice that the accessories were ready for shipment. The distributor failed, however, to open a letter of credit before shipment as provided in the Distribution Agreement. The manufacturer thereupon sent notices to the distributor demanding that the distributor cure its default within a specified time (article 63 CISG). Before the time to cure expired, the distributor filed for bankruptcy in the United States. The bankruptcy court granted the distributor additional time to cure and ruled that the manufacturer was stayed from suing in an Australian court.

On appeal to the Federal District Court, the manufacturer argued that the CISG superseded the U.S. Bankruptcy Code and that consequently the bankruptcy court was not authorized to grant the distributor a "period of grace"(article 61(3) CISG). The Federal District Court affirmed the bankruptcy court's order, holding that the Distribution Agreement did not fall within the ambit of the CISG because the Agreement did not cover the subsequently-ordered accessories. Although the Agreement had been amended to cover some specified goods, the amended Agreement did not refer specifically to the accessories in dispute.

Case 188: CISG 99(2); 100(2)
Spain: Tribunal Supremo
3 March 1997
Original in Spanish
Published in Spanish in La Ley 9 [7 April 1997]

Prior to 1990, a Spanish company, the seller, concluded with a USA company, the buyer, successive FOB contracts for the sale of lemons.

As a consequence of the breach by the buyer of its duty to pay the purchase price agreed upon, the seller made a series of joint claims for the unpaid amounts against the buyer and the sea carrier, which had been charged with the transportation of the goods.

The court noted that the CISG did not become part of Spanish law until after the dispute arose between the parties. Accordingly and in view of the interpretation of articles 99(2) and 100 (2) CISG, the court held that the CISG was not applicable to the dispute, which arose from a contract for the sale of goods concluded prior to the entry into force of the CISG in Spain.

Case 189: CISG 8(2); 14(1); 19(2)(3)
Austria: Oberster Gerichtshof; 2 Ob 58/97m
20 March 1997
Original in German
Published in German in Juristische Blätter 592[1997] and in Österreichische Juristenzeitung 829[1997]

The plaintiff, a company, with its place of business in Russia, ordered from the defendant, a company with its place of business in Austria, 10,000 tons +/- 10% of monoammoniumphosphate (MAP) with the specification "P 205 52%+/- 1%, min 51%". However, the seller accepted instead to deliver 10,000 tons +/- 5% MAP with the specification "P 205 52%+/- 5%, min 51%".

The court of first instance held that the negotiations between the parties had not led to a valid contract. The court of appeal vacated that decision and remanded the case to the court of first instance.

The defendant appealed against the decision of the court of appeal to the supreme court, which held that the findings of fact of the court of first instance were incomplete. The specification by the seller appeared to be contradictory since "52% +/- 5%" described a range from 47% to 57%, whilst that range was restricted in the seller's offer to a minimum of 51%. Therefore, the supreme court stated that the court of first instance should have clarified whether, in the light of article 8(2) CISG, for a "reasonable person of the same kind as the other party ... in the same circumstances" the reply to the offer could be regarded as sufficiently definite pursuant to article14(1) CISG. If the offer could be regarded as sufficiently definite, the court of first instance should have decided whether the reply altered the terms of the offer materially. The supreme court also held that the alterations listed in article 19(3) CISG are not to be considered as altering the terms of the offer "materially" in the sense of article 19(2) CISG if, in the light of usages, the negotiations and the very circumstances of the case, they are not deemed essential. In particular, it was held that alterations merely in favour of the other party do not require an express acceptance.

Accordingly, the supreme court, in remanding the case to the court of first instance, stated that the court should make the relevant findings and then decide whether the alterations were to be considered material and if the alteration with regard to the quantity was merely in favour of the buyer.

Case 190: CISG 2(a)
Austria: Oberster Gerichtshof; 10 Ob 1506/94
11 February 1997
Original in German
Unpublished

The defendant, an Austrian seller of imported Italian cars, sold a Lamborghini Countach to the plaintiff, a Swiss buyer. The seller, however, could not deliver the car to the buyer.

The court held that since the car was purchased for personal use, in accordance with its article 2(a), the CISG was not applicable to the case. Nevertheless, the court stated that the CISG could have been applied to the case if the fact that the seller "neither knew nor ought to have known that the goods were bought for any such use" had been proved by the seller.

Case 191: CISG 66; 67
Argentina: Cámara Nacional de Apelaciones en lo Comercial, Sala C

31 October 1995
Bedial, S.A., v. Paul Müggenburg and Co. GmbH
Original in Spanish
Published in Spanish in El Derecho 4 [21 October 1996]
Commented on in Spanish by Iud in El Derecho 1 [21 October 1996]
Commented on in French by Rosch in Recueil Dalloz, 27e Cahier, Sommaires commentés 225 [1997]

An Argentinean buyer and a German seller concluded a contract, containing a C & F clause, for the sale of dried mushrooms to be shipped to the buyer. In the course of their transport to Buenos Aires, the goods deteriorated. The buyer sued the seller claiming lack of conformity of the goods.

In accordance with article 67 CISG, the court held that the risk passed to the buyer when the goods were handed over to the first carrier for transmission to the buyer in keeping with the contract of sale. In addition, the court held that the C & F clause obliged the seller to hand over the goods to the carrier and to pay the freight. However, a C & F clause does not affect the passing of the risk. Further, it should be noted that the buyer, pursuant to the C & F clause in the contract of sale, had taken out an insurance policy for transportation risks.

In accordance with article 66, the court held that the buyer, after the passing of the risk, was not discharged from its obligation to pay the purchase price, even in the event of loss or damage to the goods, unless the loss or damage was due to an act or omission of the seller. In this case, the damage to the goods occurred after the passing of the risk to the buyer, who did not adduce that it was owing to an act or omission of the seller. Accordingly, the court dismissed the action.

Case 192: CISG 3(2); 38; 39
Switzerland: Obergericht des Kantons Luzern; 11 95 123/357
8 January 1997
Original in German
Unpublished
Abstract published in German in Schweizerische Zeitschrift für Internationales und Europäisches Recht 132 [1997]

The Italian seller of medical supplies sold a quantity of items to his exclusive distributor, the Swiss buyer, who resold the goods to a Swiss hospital. The hospital refused acceptance of the consignment on the ground of lack of conformity. Therefore, the buyer refused to pay the purchase price. The seller sued the buyer and the court of first instance ordered the latter to pay the purchase price.

On appeal, the court upheld that decision. With respect to the issue of the CISG's applicability, the court held that the CISG was applicable and had not been excluded by the parties since a valid choice of law could only be made by the parties if they consciously wanted their relation to be governed by a specific law. In addition, the court held that the CISG would not apply if other elements than those related to the contract of sale were preponderant (article 3(2) CISG). However, the court noted that a single sale of goods pursuant to, for example, an exclusive distribution or franchise contract would be governed by the CISG.

As regards examination of the goods by the buyer for the purpose of determining their conformity with the contract, the court found a period of ten days after delivery to be appropriate (article 38 CISG). As to the notice requirement for lack of conformity, the court held that a "rough average" of one month was also appropriate (article 39 CISG). After a review of international case law, the court

stated that there were serious gaps in the construction of the terms “examination of the goods” and “notice of lack of conformity”, with the extremely restrictive German case law, on the one hand, and the more liberal American and Dutch case law, on the other. The court observed that the gap between these two positions had to be narrowed.

The court held that the buyer had lost its rights on account of having notified the seller about the lack of conformity of the goods more than three months after their delivery.

Case 193: CISG 18(1)(2)(3); 74; 78
Switzerland: Handelsgericht des Kantons Zürich; HG 940513
10 July 1996
Original in German
Unpublished
Abstract published in German in Schweizerische Zeitschrift für Internationales und Europäisches Recht 129 [1997]

A dispute arose concerning the purchase price for a consignment of printed chips between the plaintiff, a German seller of plastic parts, and a Swiss buyer, one of three defendants. Although the initial purchase price had been agreed upon, the seller, realizing that production would be more costly, notified the buyer that the purchase price would be increased. The buyer ignored the notification and denied any agreement modifying the initial purchase price. The seller sued the buyer requesting payment of the increased purchase price.

The court held that an agreement between the parties had been reached for the initial purchase price. The seller’s notification to the buyer of the increase in the purchase price was, in the court’s view, an offer to modify the original contract to which the buyer had not expressed any explicit consent. Mere silence or inactivity does not amount to acceptance (article 18(1)(2) CISG), unless other conduct of the offeree exists indicating consent or the offeree performs an act (articles 18(1) and 18(3) CISG). As the buyer had not expressed an implicit consent, the court found, therefore, that the modification of the purchase price had not been accepted and that the initial purchase price agreed upon was still valid.

As regards interest, the court determined the interest rate under the law designated by the relevant choice-of-law rule (articles 74 and 78 CISG). Accordingly, the court applied the German law at the seller’s place of business (Section 352(1) of the Handelsgesetzbuch). Inasmuch as the seller had to obtain a loan owing to the buyer’s refusal to pay the purchase price, the seller was awarded the higher interest rate of 9 percent, which had to paid on the loan.

Case 194: CISG 57(1); 58(1)(2)
Switzerland: Bundesgericht
18 January 1996
Original in German
Published in German in Arrêts du Tribunal fédéral (ATF) 122 III 43
Commented on in French by Witz in Recueil Dalloz, 27e Cahier, Sommaires commentés 224 [1997]
Abstract published in German in Schweizerische Zeitschrift für Internationales und Europäisches Recht 53 [1996] and in Aktuelle Juristische Praxis (AJP) 1050 [1996]

The federal court had to decide in this case if the Zürich Court of Commerce had jurisdiction to adjudicate a lawsuit between a Swiss seller of a waste gas cleaning installation and an Italian buyer.

The plaintiff began the lawsuit in Zürich based on article 5(1) of the Lugano Convention on Jurisdiction and Enforcement of Judgements in Civil and Commercial Matters, according to which, in matters relating to a contract, a person may be sued in the courts of the place of performance of the obligation concerned. The Zürich Court of Commerce affirmed its jurisdiction.

On appeal, the federal court found that the purchase price as the obligation in controversy was governed by the CISG. The purchase price had to be paid at the seller's place of business (article 57(1)(a) CISG). If, however, payment was to be made against the delivery of the goods or of documents, the seller must be paid at the place where the delivery occurs (article 57(1)(b) CISG). In the present case, the federal court had to determine whether article 57(1)(b) CISG was applicable.

The federal court construed the words of article 57(1)(b) CISG "if the payment is to be made against the handing over of the goods" in the light of article 58(1)(2) CISG, pursuant to which the seller may make such payment a condition for delivering the goods or documents.

The federal court held that the present case did not fall within the ambit of article 57(1)(b) CISG. Thus, payment had to be made at the seller's place of business at Zürich. Consequently, the Zürich Court of Commerce had jurisdiction under article 5(1) of the Lugano Convention.

Case 195: CISG 74; 78
Switzerland: Handelsgericht des Kantons Zürich; HG 930476
21 September 1995
Original in German
Unpublished
Abstract published in German in Schweizerische Zeitschrift für Internationales und Europäisches Recht 53 [1996]

The Austrian producer of air conditioning and heating equipment sued the Swiss buyer for the purchase price and damages, including interest.

The court ruled in favour of the plaintiff. With respect to damages, the court explained that the plaintiff could ask for higher damages than those under the applicable law by proving that it was paying a higher rate of interest (article 74 CISG).

As regards interest, the court found that article 78 CISG was applicable. However, as article 78 CISG does not address the question of the applicable rate of interest, the court applied Austrian law in determining the rate of interest.

Case 196: CISG 3(2); 39; 49(1); 49(2)(b)(i); 74
Switzerland: Handelsgericht des Kantons Zürich; HG 920670
26 April 1995
Original in German
Unpublished
Abstract published in German in Schweizerische Zeitschrift für Internationales und Europäisches Recht 51 [1996]

The Swiss plaintiff sold a "floating centre", a container filled with salt water for weightless floating, to the German defendant for an agreed upon price. The buyer alleged that the container leaked and as a result its house was damaged by water. Therefore, the buyer declared the contract avoided (article 49 (1)CISG) and refused to pay the outstanding balance. When the seller sued the buyer for the outstanding balance, the buyer filed a cross-claim seeking damages.

The court found that an agreement existed between the parties for a sale of goods with the attendant obligation to install the container. The court also found that the CISG was applicable since the services to be provided, i.e., the installation of the container, were not preponderant (article 3(2) CISG).

The court ruled in favour of the plaintiff. It was held that the buyer had lost its right to declare the contract avoided under article 49 CISG since the buyer had failed to notify the seller about the lack of conformity of the goods in a timely fashion (articles 39 and 49(2)(b)(i) CISG).

The court also mentioned that the seller's failure to perform its obligation was probably not a fundamental breach as the damage concerned was easily repairable. However, since the buyer had lost its right under article 49(2)(b)(i) CISG, the court did not address this question fully.

As regards damages, the court found that the buyer had lost its rights for failure to claim damages for the leak within a reasonable time. Compensation for damages caused by the transport of the container was denied by the court because the buyer failed to prove them sufficiently (article 74 CISG).

Case 197: CISG 7(2); 58; 59; 78: 100
Switzerland: Tribunal cantonal du Valais
20 December 1994
Original in French
Published in French in 29 Revue valaisanne de jurisprudence (RVJ) 164 [1995]

The plaintiff, an Italian seller of natural and artificial stones, sued the defendant, a Swiss buyer, for the purchase price. The defendant neither contested delivery of the goods nor claimed lack of conformity of the goods.

The court found the CISG applicable (article 100 CISG). The court held that the defendant had to pay the purchase price on the date fixed or determined by the contract (article 59 CISG). In this connection, the court stated that article 58 CISG presupposed that payment was to be effected when the seller placed the goods at the buyer's disposal.

As regards the interest requested by the plaintiff (article 78 CISG), the court held that the interest rate was to be determined pursuant to the law applicable under the choice-of-law rules of the forum (article 7(2) CISG). In accordance with Italian law, the plaintiff was awarded interest in the amount requested.

Case 198: CISG 1(1)(b); 100
Switzerland: Tribunal cantonal du Valais
21 October 1994
Original in French
Published in French in 28 Revue valaisanne de jurisprudence (RVJ) 312 [1994]
Commented on in French by Vouilloz in 28 Revue valaisanne de jurisprudence (RVJ) 337 [1994]

The defendants, two Swiss sellers of computer software, attached the Swiss bank accounts of the plaintiff, a French buyer, and asked for specific performance of the sale of software contract, which had been declared avoided by the plaintiff.

The court ruled under Swiss law in favour of the defendants. The court, deciding on the issue of jurisdiction, held that the CISG was not applicable in Switzerland. The CISG had entered into force in Switzerland on 1 March 1991 and the contract for the sale of the software was concluded on 21 September 1990. Pursuant to its article 100, the CISG applies only when the proposal for concluding the contract is made on or after the date when the CISG enters into force in the Contracting States. In addition, the CISG was neither applicable under article 1(1)(b) CISG, since the relevant Swiss choice-of-law rule designated Swiss law at the place of the seller as the applicable law.

Case 199: CISG 1(1)(a); 2; 6
Switzerland: Tribunal cantonal du Valais
29 June 1994
Original in French
Published in French in 28 Revue valaisanne de jurisprudence (RVJ) 125 [1994]

The plaintiff, an Italian seller of furniture, sued the defendant, a Swiss buyer, for the purchase price. The issue to be determined by the court was whether it had jurisdiction and whether the CISG was applicable.

The court affirmed the applicability of the CISG finding that the parties had their places of business in different Contracting States (article 1(1)(a) CISG). The court further held that the CISG was applicable autonomously and not as the domestic law of the State designated by the forum's choice-of-law rules. Consequently, the court determined that it had jurisdiction.

Case 200: CISG 87; 88
Switzerland: Tribunal cantonal de Vaud; 01 93 1308
17 May 1994
Original in French
Unpublished
Abstract published in German in Schweizerische Zeitschrift für Internationales und Europäisches Recht 278 [1995]

The Swiss plaintiff, buyer, concluded a contract with the German defendant, seller, for the purchase of a machine. The buyer paid two installments of the purchase price, but refused to pay the balance. Therefore, the seller did not deliver the base of the machine, a part without which the machine was worthless to the buyer. The seller threatened to sell the machine part to someone else if the buyer did not pay the balance.

Consequently, the buyer made an application to the court seeking a preliminary injunction prohibiting the seller from selling the machine part. In a counter-claim, the seller applied to the court for either permission to sell immediately the machine part based on article 88 CISG or, alternatively, for permission to store it at the buyer's expense pursuant to article 87 CISG.

The court stated that, when deciding on interim measures, it had to limit itself to a cursory examination of the merits of the case. Therefore, the question of determining whether the claims were justified or not was not decided on the basis of the CISG but rather in accordance with the Swiss lex fori. The court did not touch upon whether the CISG was applicable to the merits of the case. The court granted the buyer's application for a preliminary injunction and also permitted the seller to store the machine part, albeit at his own expense.

Case 201: CISG 1(1)(b); 3
Switzerland: Richteramt Laufen des Kantons Berne
7 May 1993
Original in German
Unpublished
Abstract published in German in Schweizerische Zeitschrift für Internationales und Europäisches Recht 277 [1995]; in Italian in 70 Diritto Commerciale Internationale 451 [1995];
in English in UNILEX, D.93-15 [1995/II]

The Finnish plaintiff, a producer of automatic storage systems, concluded, with a Swiss defendant, a metal-works company, a number of agreements, such as a non-disclosure agreement, a licence agreement and various contracts, for the supply of goods to be manufactured on or after 1988. In 1992, the plaintiff sued the defendant for the outstanding balance of the purchase price on several of those agreements.

The court found that the parties had entered into contracts for the supply of goods to be manufactured and thus they were to be considered sales under article 3(1) CISG since, although the plaintiff had to furnish a number of different services, these obligations were not preponderant (article 3(2) CISG). Therefore, the court held that the Convention was applicable pursuant to article 1(1)(b) CISG. However, the court stated that, according to Swiss procedural law, it did not have subject-matter jurisdiction and, therefore, dismissed the claim.

II. ADDITIONAL INFORMATION

Corrigenda

Case 176

The date entry in the case caption *should read* "6 February 1996" instead of "2 February 1995" in the Arabic, Chinese, English, French, Russian and Spanish texts of document A/CN.9/SER.C/ABSTRACTS/13.

Case 141

The reference to "article 27" in the last paragraph *should read* "article 25" in the Arabic, Chinese, English, French, Russian and Spanish texts of document A/CN.9/SER.C/ABSTRACTS/10.

Abstracts published in A/CN.9/SER.C/ABSTRACTS/8, 9, 11 and 12

Cases 159 and 160

Commented on by Morán Bovio in [1997] Lloyd's Maritime and Commercial Law Quarterly 351

Cases 123, 138 and 171

Commented on by Witz, Spiegel and Papandréou-Deterville, respectively, in [1997] Recueil Dalloz, 27e Sommaires commentés 217

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