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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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CASES RELATING TO THE UNITED NATIONS SALES CONVENTION (CISG)

Case 211: CISG 78
Switzerland: Tribunal Cantonal Vaud, 163/96/BA and 164/96/BA
11 March 1996
Original in French
Unpublished
Abstract published in German in 1 Schweizerische Zeitschrift für Internationales und Europäisches Recht 82 [1998]

A Swiss defendant (buyer) purchased aluminum from companies in Hungary and Austria. The buyer did not deny delivery and conformity of the goods, but asserted fees for consulting services in a counterclaim. The case related to the CISG only insofar as the court had to determine the interest rate (article 78 CISG). Notwithstanding the prevailing case law, the court applied the law at the debtor's (i.e. buyer's) place of business because only the buyer's obligation was in dispute and the parties did not rely on Hungarian or Austrian law, which would have been applicable pursuant to the Swiss rules of private international law.

Case 212: CISG 100 (2)
Switzerland: Tribunal Cantonal Vaud, 189/96/GN
14 March 1996
Original in French
Unpublished
Abstract published in German in 1 Schweizerische Zeitschrift für Internationales und Europäisches Recht 83 [1998]

An Austrian seller had delivered machines to a Swiss buyer before 30 September 1987. As the CISG entered into force after that date for both Austria and Switzerland, the court held that the CISG was not applicable (article 100 (2) CISG).

Case 213: CISG 2 (a)
Switzerland: Kantonsgericht Nidwalden, 48/95 Z
5 June 1996
Original in German
Unpublished
Abstract published in German in 1 Schweizerische Zeitschrift für Internationales und Europäisches Recht 82 [1998]

A German plaintiff (buyer) purchased from a Swiss defendant (seller) a used car for personal use. Accordingly, the court found that the CISG was not applicable (article 2 (a) CISG).

Case 214: CISG 45 (1) (b); 49 (1) (b); 73 (1) (2); 74; 81 (2); 84 (1)
Switzerland: Handelsgericht des Kantons Zürich, HG950347
5 February 1997
Original in German
Unpublished
Abstract published in German in 1 Schweizerische Zeitschrift für Internationales und Europäisches Recht 75 [1998]

A German plaintiff (buyer) had entered into a contract with a French defendant (seller) for the delivery to Romania of 2 to 4 million liters of sunflower oil per month at a specified price. Although the buyer had paid a timely instalment for the first delivery, the seller did not ship the goods to Romania. The buyer declared the contract avoided and sued the seller for restitution of the first instalment and for damages.

The court held that the buyer had a right to declare the contract avoided as the seller did not deliver the goods and this failure to perform its obligation gave reason to believe that a fundamental breach of contract was to be expected for further instalments (article 49 (1) (b), 73 (1) and (2) CISG). Therefore, the seller had to refund the price (article 81 (2) CISG) of the first instalment. As the buyer had proved that it had the opportunity to resell the first delivery at a higher price per liter, the seller furthermore had to pay damages for profits the buyer could not realize as a consequence of the breach of contract (article 45 (1) (b), 74 CISG).

The court also found that the buyer was not entitled to damages for losses it suffered because of the fluctuating rate of the currency the price had to be paid in. Although it was recognized that currency losses can be damages under article 45 (1) (b) and 74 CISG, the claim for damages in this case was not granted by the court because, pursuant to a general principle (of Swiss tort law), damages for future losses can only be awarded when the amount at least can be estimated. However, the rate of interest the seller had to pay (article 84 (1) CISG) was determined on the basis of the prevailing rate of interest at the seller's place of business.

Case 215: CISG 8 (3); 55
Switzerland: Bezirksgericht St. Gallen, 3PZ97/18
3 July 1997
Original in German
Unpublished
Abstract published in German in 1 Schweizerische Zeitschrift für Internationales und Europäisches Recht 84 [1998]

A Dutch seller (plaintiff) and a Swiss buyer (defendant) entered into an agreement for goods to be manufactured by the buyer with the raw material delivered by the seller. After the buyer had used 10 percent of the raw material, the cooperation between the buyer and the seller was terminated and the remaining goods returned to the seller. The seller sued the buyer for the purchase price of the whole shipment.

The court held that the buyer had to pay the price for all the material delivered and not only for the 10 percent used. The court relied, in the first place, on the buyer's subsequent conduct (article 8 (3) CISG). The buyer had asked the seller to send the invoice without any reservations although it already knew that the whole material would not be used. The purchase price had not been fixed by the parties and was determined by the court in application of article 55 CISG. The interest rate was fixed based on the law applicable pursuant to the forum's rules of private international law, which led to Dutch law. However, the court mentioned the possibility of determining the rate of interest in application of the law at the debtor's place of business, pointing out that it was the debtor who could profit from the fact that the purchase price had not been paid.

Case 216: CISG 58 (1)
Switzerland: Kantonsgericht St. Gallen, 3 ZK 96-145
12 August 1997
Original in German
Unpublished
Abstract published in German in 1 Schweizerische Zeitschrift für Internationales und Europäisches Recht 80 [1998]

A German seller of clothing sued a Swiss buyer for the purchase price. The buyer claimed that the seller didn't deliver documents necessary to clear the goods through customs and that it therefore had to return the clothing.

The court held that the buyer must pay the purchase price when the seller places either the goods or documents controlling their disposition at the buyer's disposal (article 58 (1) CISG). In general, documents representing the goods are to be procured by the party exporting the goods. This is not necessarily the seller in every case. The procurement of customs documents is incumbent upon the seller, only if so agreed between seller and buyer, which was not the case.

Case 217: CISG 14 (1); 25; 49 (1) (a)
Switzerland: Handelsgericht des Kantons Aargau, OR.96.00013
26 September 1997
Original in German
Unpublished
Abstract published in German in 1 Schweizerische Zeitschrift für Internationales und Europäisches Recht 78 [1998]

A German plaintiff (seller) had produced sets of cutlery ordered by a Swiss defendant (buyer). The buyer refused to accept the delivery and claimed that no contract had been validly concluded or that it was entitled to declare the contract avoided because of a violation of exclusive rights granted by the seller. The seller declared the contract avoided and sued the buyer for damages.

The court held that a contract had been validly concluded although not all relevant points had been addressed by the parties, such as the purchase price. The buyer had ordered specific sets of cutlery and had informed the seller about the time of delivery. This offer was sufficiently definite (article 14 (1) CISG). The court furthermore found that the buyer had no right to declare the contract avoided (article 49 (1) (a) CISG) even though the violation of an agreement granting exclusive rights might be a fundamental breach of contract. However, the buyer did not give sufficient proof under Swiss law that an agreement granting exclusive rights had been entered into. The court awarded

a global amount of ten percent of the purchase price as damages, including the losses that occurred when the cutlery had to be resold. The court noted that every seller must expect expenses of that amount. However, a minority of the court found that there was no sufficient proof for these damages. The interest rate was determined based on the German law at the seller's place of business (§ 352 Handelsgesetzbuch), applicable pursuant to the forum's rules of private international law.

Case 218: CISG 53
Switzerland: Kantonsgericht Zug, A3 1997 39
16 October 1997
Original in German
Unpublished
Abstract published in German in 1 Schweizerische Zeitschrift für Internationales und Europäisches Recht 83 [1998]

A German seller of watches and measuring instruments sued a Swiss buyer for the payment of the purchase price for hygrometers. The buyer claimed to have returned part of the goods to the seller and claimed damages for the violation of an exclusive agreement in a counterclaim.

The court held that the buyer was under an obligation to pay the purchase price (article 53 CISG) and did not grant the counterclaim because the buyer did not furnish sufficient proof either for the exclusive agreement or of having returned the goods. The interest rate was determined based on the law applicable pursuant to the forum's rules of private international law, which led to German law (§ 352 Handelsgesetzbuch).

Case 219: CISG 33 (a); 35 (3); 36; 39; 78
Switzerland: Tribunal Cantonal Valais, CI 97 167
28 October 1997
Original in French
Unpublished
Abstract published in German in 1 Schweizerische Zeitschrift für Internationales und Europäisches Recht 77 [1998]

An Italian plaintiff sold a bulldozer to a Swiss defendant, who did not pay two remaining instalments because of an alleged late delivery and a lack of conformity. The court granted the plaintiff's claim for payment of the two instalments.

The court found the delivery, made within not more than two weeks after the seller had received the first instalment by handing over the machine to the carrier, to be in time as no date had been fixed by the parties (article 33 (a) CISG). In addition, the court found the buyer's claim of non conformity not to be legitimate. The buyer had tested the bulldozer and the court deduced from article 36 CISG and the principle of good faith, the presumption that a person who buys goods in spite of obvious defects intended to accept the seller's offer. Furthermore, the buyer had not given notice of the alleged lack of conformity (article 39 CISG). The interest rate was determined in application of the forum's rules of private international law, which led to Italian law (article 1024 Codice Civile).

Case 220: CISG 6; 39 (1)
Switzerland: Kantonsgericht Nidwalden, 15/96 Z
12 November/3 December 1997

Original in German
Unpublished
Abstract published in German in 1 Schweizerische Zeitschrift für Internationales und Europäisches Recht 81 [1998]

An Italian plaintiff delivered furniture to a Swiss defendant, who resold the goods in East Asia. The buyer refused to pay the purchase price, alleging non conformity of the goods. The court granted the plaintiff's claim for payment of the purchase price.

The court first had to determine the applicable law because both parties had argued before the court based on Swiss law although the seller's general contract terms included a provision with a choice of Italian law. The court found that the parties had implicitly chosen Swiss law without excluding the application of the CISG (article 6 CISG). The court furthermore held that the buyer had lost its right to rely on the lack of conformity because, by using expressions like "wrong parts" or "full of breakages" the buyer did not specify the nature of the lack of conformity (article 39 (1) CISG).

The interest rate was determined on the basis of Italian law. The court also determined the period for which the buyer had to pay interest based on Swiss law, which provides that a debt only becomes due and interest starts to accrue after a reminder by the seller (article 102 (1) Swiss Code of Obligation).

Case 221: CISG 9 (2); 57 (1)
Switzerland: Zivilgericht des Kantons Basel-Stadt, P4 1996/00448
3 December 1997
Original in German
Unpublished

The court of first instance had to decide whether it had jurisdiction to adjudicate a lawsuit between a Swiss plaintiff (seller) and an Italian company (defendant-buyer), which had purchased 5,000 tons of Bulgarian white urea. The Italian buyer did not pay the purchase price, and the Swiss seller commenced the lawsuit in Basel based on article 5 (1) of the Lugano Convention on Jurisdiction and Enforcement of Judgments in Civil and Commercial Matters, pursuant to which a person may be sued in the courts of the place of performance of the obligation concerned.

The court found that the purchase price of the obligation in controversy was governed by the CISG. According to article 57 (1) CISG, the purchase price must be paid at the place the parties agreed upon; if no agreement was made, at the seller's place of business or, if the payment is to be made against the handing over of the goods or of documents, at the place where the handing over takes place. In the present case, the parties had agreed upon payment within 30 days after delivery of a bill of lading and several other documents. As the case dealt with a purchase on credit, the rule on the handing over did not apply.

The court dismissed the plaintiff's allegation that a usage existed and was known to the parties (article 9 (2) CISG), pursuant to which bank transfers have to be made to the seller's account in the import trade. Therefore, the court concluded that the place of performance was in Binningen (Canton of Basel-Landschaft), and that the courts of Basel-Stadt had no jurisdiction to adjucate the matter and dismissed the lawsuit.

Case 222: CISG 8(1); 8(3)
United States: U.S. Court of Appeals for the Eleventh Circuit
29 June 1998
MCC-Marble Ceramic Center, Inc. v. Ceramica Nuova D'Agostino, S.p.A.
Published in English: 1998 U.S. App. LEXIS 14782, 1998 WL 343335

The issue before the court was whether the parol evidence rule of domestic law applies to the interpretation of a contract governed by CISG. The rule excludes evidence of an oral agreement which contradicts or varies the terms of a subsequent or contemporaneous written contract.

A U.S. retailer, the buyer, agreed orally with the seller, an Italian manufacturer of ceramic tiles, on the basic terms for the purchase of tiles. The parties then recorded these terms in the seller's standard, pre-printed order form and the president of the buyer's company signed the form on behalf of the company. The form was printed in the Italian language and contained terms on both the front and back. Immediately below the signature line on the front of the form was language, in Italian, stating that the buyer was aware of the terms on the back of the form and agreed to them. Four months later the parties entered into a requirements contract and pursuant to that contract the buyer ordered tiles on numerous occasions using the seller's order form.

The buyer brought a breach of contract action in the U.S. District Court for the Southern District of Florida against the seller for failure to deliver the tiles ordered. In defense, the seller relied on a standard term on its order form which authorized it to suspend deliveries if the buyer failed to pay and the seller brought a counterclaim for nonpayment. To buyer's response that the tiles were nonconforming, the seller stated that the buyer had not given written notice of defects within ten days of receipt as required by a term on the order form. The buyer presented affidavits from its president and two employees of the seller stating that the parties did not intend to be bound by the standard terms on the order form. The court excluded this evidence on the basis of the domestic parol evidence rule, gave effect to the standard terms and granted summary judgment to the seller.

The U.S. Court of Appeals for the Eleventh Circuit reversed the district court's grant of summary judgment. The court held that article 8(3) CISG precludes the application of the parol evidence rule. The court expressly rejected a statement to the contrary in Beijing Metals & Minerals Import/Export Corp. v. American Business Center [CLOUT case no. 24]. The court also rejected the seller's argument that the parol evidence rule was a procedural rule outside the scope of CISG. Consequently, the appellate court found that the affidavits of the subjective intent of both parties raised sufficient factual question as to the terms of the parties' contract under article 8(1) CISG that summary judgment was inappropriate.

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