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CASE LAW ON UNCITRAL TEXTS (CLOUT)

Contents

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Introduction

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Each CLOUT issue includes a table of contents on the first page that lists the full citations to each case contained in this set of abstracts, along with the individual articles of each text which are interpreted or referred to by the court or arbitral tribunal. The Internet address (URL) of the full text of the decisions in their original language is included, along with Internet addresses of translations in official United Nations language(s), where available, in the heading to each case (please note that references to websites other than official United Nations websites do not constitute an endorsement of that website by the United Nations or by UNCITRAL; furthermore, websites change frequently; all Internet addresses contained in this document are functional as of the date of submission of this document). Abstracts on cases interpreting the UNCITRAL Model Arbitration Law include keyword references which are consistent with those contained in the Thesaurus on the UNCITRAL Model Law on International Commercial Arbitration, prepared by the UNCITRAL Secretariat in consultation with National Correspondents. Abstracts on cases interpreting the UNCITRAL Model Law on Cross-Border Insolvency also include keyword references. The abstracts are searchable on the database available through the UNCITRAL website by reference to all key identifying features, i.e., country, legislative text, CLOUT case number, CLOUT issue number, decision date or a combination of any of these.

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

Case 1125: CISG [8 (3); 9 (2)]; 39; 50
Spain: Asturias Provincial High Court (Section 7)
29 September 2010
Complete text: www.uc3m.es/cisg/sespan88.htm
WestlawEs (2010/385754)

Abstract prepared by María del Pilar Perales Viscasillas, National Correspondent

A contract was concluded between an Argentine seller and a Spanish buyer for the sale of five containers of anchovies in brine to be delivered in two shipments. The Argentine party demanded payment of the price stipulated in the contract, specifically payment of the second invoice, which was outstanding, but the Spanish party refused to pay, since it considered the goods to be defective. The appeal court rejected all claims by the appellant (the seller).

The court of first instance considered that the goods supplied did not meet the conditions agreed in the contract, that the buyer had given notice of that lack of conformity within the time period established in the United Nations Convention on Contracts for the International Sale of Goods (CISG) and that goods other than those agreed upon had been delivered (*aliud pro alio*). Specifically, the court considered that the anchovies supplied by the seller were not of the type, size and quality required, since they were smaller than had been agreed, as a result of which a significant proportion were unfit for their intended use. The court's judgement was based on the goods inspection certificate produced by the average agent, the expert opinion issued by an animal specialist, the documentary evidence certifying delivery, which proved that the buyer had complained on a number of occasions about the small size of the anchovy supplied, and the seller's own offer to withdraw the goods.

The seller lodged an appeal against the court's judgement. The appeal judges examined in detail the terms of the sales contract, which contained very detailed provisions with regard to the type and size of the anchovy to be delivered by the seller. Although the court did not explicitly cite article 8 (3) or 9 (2) of CISG, it argued that "there is no legally established criterion for determining different types on the basis of the number of fish per kilogram and the price for each type, as a result of which market practice must be referred to; [that] each trader, on the basis of the number of fish in each haul (number of anchovies caught and their size), establishes the number of fish per kilogram according to type and the price for each type; [that] while those figures are not always the same, being established separately by each trader, they are nonetheless very similar — there may be a difference of only ± $0.10 in price or ± 1 or 2 fish per type." However, it concluded on the basis of its examination that the different types of South American anchovy and their respective prices in the case under consideration were consistent with the documentation in the case file.

The court noted that the seller had demanded full payment for the goods ten years after the contract had been concluded and therefore could not expect the buyer to have retained the goods. However, having assessed the evidence available, namely the certificate issued by the inspection agency and the expert evidence, the court

concluded that the goods had not been in conformity with the contract, given that the buyer had had to set the bulk of them aside for conversion into fish flour for use in animal feed.

The seller's claim was based on article 336 of the Commercial Code, according to which a buyer has four days to report any defects in wrapped or packaged goods received. The court considered, however, that that provision was not applicable, firstly because the case was one of *aliud pro alio* (the delivery of something different from that which was agreed upon), and secondly because CISG was applicable law in Spain and Argentina. The court considered in the light of articles 39 and 50 that the buyer had complied with the provisions of article 39 since it had lodged its complaint within approximately four months of receipt of the goods, a period of time that could be considered more than reasonable in view of the quantity and nature of the goods in question, once it had determined that the serious defect relating to the size of the anchovy was present in the bulk of the goods, and had given notice, within two years, of its refusal to pay the rest of the second invoice, the sum of which was now being claimed. The court therefore considered that the complaint was in accordance with article 39 of CISG, since the case involved a large quantity of perishable goods in brine, a sizeable proportion of which would have been at risk of being beyond salvaging if all the containers had been opened at once. The court therefore considered it logical that the defendant had taken approximately four months from the time of receipt of the goods to lodge its complaint.

Case 1126: CISG 2 (d); 75
Spain: Supreme Court (Civil Division, Section 1)
Previously heard by the Madrid Court of First Instance No. 5, 12 July 2004, and the Madrid Provincial High Court, 5 May 2006
3 September 2010
Complete text: www.uc3m.es/cisg/sespan87.htm
WestlawES (2010/6950)

Abstract prepared by María del Pilar Perales Viscasillas, National Correspondent

The parties were in dispute over certain breaches of a share purchase contract. The main issue concerned the determination of the extent of compensation awarded for breach of contractual obligations. The appellant claimed, inter alia, that the lower courts had failed to apply article 75 of CISG and to follow certain legal precedents, including the judgement of the Supreme Court of 14 May 2003 (RJ 2003, 4749), basing that claim on the grounds that replacement purchases were equivalent to lost profit.

In relation to those two issues, the Supreme Court considered that, according to case law, the purchase of replacement goods "consists of allowing the buyer, following breach of contract by the seller, and provided that it acts in good faith, to acquire similar goods (of the same quality and amount) from an alternative source and, if applicable, to claim from the seller the difference between the contract price and the price in the substitute transaction." The Court concluded that article 75 of CISG could not be applied since article 2 (d) stated that the Convention did not apply to sales of shares.

Moreover, in relation to the second issue, the Court considered that replacement purchases as provided for in article 75 of CISG could not be regarded as equivalent to lost profit, as had been clearly highlighted in the judgement of 14 May 2003, which, with reference to the purchase of a number of batches of must, stated that "[...] there is a clear confusion, in the judgement under appeal, between replacement purchases and lost profit", because "if the buyer, in order to avoid the consequences of breach of contract, acquires batches of must for a higher price than the contract price, the cost of those batches will constitute *damnum emergens* ("arising damage", or actual loss) paid out of the buyer's assets; this bears no relation to lost profit, which relates to the amount expected to be made upon resale of what was acquired." The Supreme Court also considered that the judgements that the appellant claimed had been violated were not applicable to the case, since they related to very different cases; the case under examination concerned the sale of shares for a lower price than was initially offered, whereas the appellant was seeking to apply the rules governing replacement purchases, which applied to such goods as crops and wine but not to shares.

Case 1127: CISG 25; 38; 39; 39 (1)
Spain: Navarra Provincial High Court
Previously heard by the Pamplona Court of First Instance No. 7, 19 December 2007
30 July 2010
Complete text: www.uc3m.es/cisg/sespan86.htm
WestlawES (2011/139178)

Abstract prepared by María del Pilar Perales Viscasillas, National Correspondent

The parties to a sales contract — a British seller and a Spanish buyer — were in dispute over the conformity of the goods with the terms of the contract. The contract concerned the sale of billets or steel rods used by the buyer to manufacture axle spindles through a forging and heat treatment process. Axle spindles are welded to the frames that form an integral part of the axle to which the wheels of industrial vehicles, lorries and buses are attached and are therefore important safety components. The seller was aware of their importance and of the fact that quality control of such components was very stringent.

The seller claimed that the buyer had not complied with the provisions of article 39 of CISG, since the buyer had given notice of the lack of conformity of the goods two months and seven days after they had been delivered. The court, however, considered that the buyer had in fact complied with the provisions of article 39 (1) of CISG since the testimonies and expert opinions obtained proved that, while the billets had faults in the form of lamination marks which were easily noticeable, the faults were not caused by those marks but by superficial cracks that were hidden by the lamination marks and could not easily be seen. The court therefore considered that, on the basis of the special circumstances of the case, the more than two months taken to report the fault could not be considered unreasonable, given that the billets supplied needed to be used in the manufacturing process before the cause and nature of the fault could be determined. Furthermore, the court considered that the concept of "reasonable time" must be understood in relation to the time at which the lack of conformity was or ought to have been discovered and in relation to the need to specify the nature of the lack of conformity. The amount of time taken to report the

lack of conformity must therefore be considered reasonable, particularly given the difficulty in identifying the cause of the fault and the need to carry out various tests.

In relation to the concept of fundamental breach of contract, the court considered in detail the object of the sales contract and the use for which the purchased goods had been intended. In that light, and following analysis of the expert evidence available, it considered that the billets supplied clearly had faults that rendered them unfit for their intended use, especially given that faults were not acceptable in the automotive sector and that it had been proved that the lack of conformity stemmed from the raw materials supplied.

Consequently, the court concluded that, since the goods had been unfit for their purpose, namely use in the manufacture of axle spindles for vehicles, it was clear, in view of the nature of the fault and the sector for which the goods were intended, that the breach had been committed by the seller and that that breach had deprived the buyer of what it was entitled to expect under the contract, namely non-defective steel rods suitable for producing automotive axle spindles, there being no grounds for exemption insofar as the seller could have foreseen such an outcome once the activity of the buyer was known to it. In that respect, the court based its decision on the Supreme Court judgement of 17 January 2008 (http://turan.uc3m.es/uc3m/dpto/PR/dppr03/cisg/espan67.htm) (CLOUT case No. 802) which stated that "fundamental breach corresponds to the rule […] of fundamental breach of contract […] and from it is derived a system of contractual liability based on a criterion of objective imputation, attenuated, however, by exceptions — corresponding to the hypotheses of fortuitous events and force majeure under domestic law — and by a parameter of reasonableness (article 25 in fine)"; accordingly, the Navarra Provincial High Court considered that it did not appear in the case in question that any such lack of predictability of the outcome would create a situation that could be regarded as a fortuitous event or one of force majeure. Consequently, the claim by the seller that the faults were not of such significance as to warrant termination of the contract also lacked foundation.

Case 1128: CISG 33 (b); 34; 39 (1); 40; 44
Spain: Supreme Court
Previously heard by Valencia Provincial High Court, 7 June 2003
(available at http://turan.uc3m.es/uc3m/dpto/PR/dppr03/cisg/espan39.htm,
(CLOUT case No. 549))
9 December 2008
Complete text: www.uc3m.es/cisg/sespan76.htm, Aranzadi/Westlaw (2009/15)

Abstract prepared by María del Pilar Perales Viscasillas, National Correspondent

The buyer (of the United States of America) lodged an appeal before the Supreme Court against the judgement of the Valencia Provincial High Court of 7 June 2003 (CLOUT case No. 549), which had found in favour of the Spanish seller. The parties were in dispute over which of them had committed breach of contract. The buyer considered that the defect in the colour intensity of the concentrated red must purchased under the contract had occurred when the must was made, while the Spanish seller attributed the defect to the period of time that passed before the must was collected and the use of inadequate transportation, both of which were attributable to the actions of the buyer, which had delayed in taking delivery of the

goods once they had been made available and had not transported them in an appropriate container to prevent colour deterioration.

Firstly, the Court considered the application of article 33 (b) of CISG, understanding that, once the goods had been made available, the buyer could choose when to collect them. According to the Court, the buyer, which was aware that must took seven to ten days to produce and that concentrated red must lost the intensity of its colour over time, had delayed in collecting the must and had not used adequate transportation (refrigerated drums instead of flexitanks), which had contributed to the colour deterioration. The Court also considered that the parties had agreed an "ex factory" clause, as a result of which risk was transferred from the time when the goods were made available by the seller to the buyer, and their being made available did not constitute actual handover. If the goods were in perfect condition at the time when they were made available and the defect (loss of colour intensity) occurred as a result of the buyer's delay in collecting them and use of inadequate transportation, the seller could in no way be considered to have been in breach of contract.

In relation to article 34 of CISG, the buyer claimed that the seller had deliberately breached the contract by not including information on the colour of the goods in the quality certificate. The Court rejected that claim on the grounds that that omission was irrelevant to the case and that the must had met the requisite colour condition when it was made available to the buyer; the buyer could therefore have checked the must upon receipt rather than postponing doing so until its arrival at the buyer's premises, being aware of the terms of the contract and the specific characteristics of the goods, namely that the colour of the must changed over time and deteriorated as the result of the use of inadequate containers for transportation.

The buyer also claimed that article 39 (1) of CISG had been incorrectly applied by the appeal court in relation to articles 40 and 44. The Court rejected that claim also, on the grounds that it was not relevant to the proceedings as the burden of proof that the colour of the goods was defective at their point of origin was on the buyer, which could (and ought to) have checked the goods on collection rather than at their destination, given that the buyer was perfectly aware of, or at least could not be unaware of, the effect of time and transportation on the colour of the must.

Case 1129: CISG 35; 39; [78]
Spain: San Cristobal de La Laguna Court of First Instance
(Santa Cruz of Tenerife) No. 5
23 October 2007
Complete text: www.uc3m.es/cisg/sespan73.htm, Aranzadi/Westlaw (2009/176901)

Abstract prepared by María del Pilar Perales Viscasillas, National Correspondent

The German seller reared and sold beef cattle. The Spanish buyer had ordered 68 head of cattle, 17 of which had to be slaughtered because they were not fit for consumption. The court considered that it was possible to prove neither that there had been a breach of contract nor that such a breach was attributable to the seller: the cattle had been in good condition when they left Germany, accompanied by the relevant health certificates, and were not examined by an expert, nor was any indication of their being in a poor condition given in the transportation documents. Consequently, it was not possible to determine whether the cattle that became ill did so during the journey or upon arrival.

With regard to the giving of notice under article 39 of CISG, the court considered that it could not accept as a formal complaint the fact that such notice had been given via an intermediary in the sales contract, since no written claim or notice had subsequently been received by the seller through the channels normally used in such cases, which would have exempted the buyer from its main obligation, namely to pay the price stipulated in the contract.

With regard to the payment of interest, the court applied Law No. 3/2004 of 29 December 2004, which incorporates Directive 2000/35/EC of the European Parliament and of the Council of 29 June 2000 and establishes measures to combat late payment in commercial transactions. The legal interest rate for late payment, established in accordance with the provisions of the above-mentioned Law, would be applied over the six months following the date when the rate was set.

In relation to the initial calculation of the period within which notice of lack of conformity should have been given, the court, for reasons of fairness, decided that that period should be of two years from the time at which the buyer could first have lodged its complaint, as provided for in article 39* of CISG.

Case 1130: CISG 1
Spain: Supreme Court
Previously heard by Lérida Court of First Instance, 15 January 1999 and
Lérida Provincial High Court, 16 June 1999
8 June 2006
Complete text: www.uc3m.es/cisg/sespan71.htm, Aranzadi/Westlaw (2006/3355)

Abstract prepared by María del Pilar Perales Viscasillas, National Correspondent

A contract had been concluded between a Spanish seller and a Spanish buyer for the sale of 19,806.20 kilograms of frozen pork shoulder. The parties were in dispute over the lack of conformity of the goods, namely the poor sanitary conditions in which they were delivered. The buyer claimed that the contract was an international contract, subject to CISG and the provisions of article 39 thereof. The Court considered, however, that the contract had been concluded between two Spanish parties through application of article 1 of CISG, as the buyer was registered in writing through a notary in Barcelona and was domiciled there. As a result, national law was applicable, namely the Commercial Code, regardless of the fact that the final recipient of the goods was a business registered in Germany, on account of the nature of the relationship between that company and the buyer, which was distinct from the contractual relations between the litigants.

* Translator's note: Article 35 in the original text; this is presumably an error.

Case relating to the Convention on the Limitation Period in the International Sale of Goods, unamended text (Limitation Convention, unamended text)

Case 1131: Limitation Convention (unamended text) 3

Vrhovni sud Srbije u Beogradu
Prev. 112/2003
28 May 2003
Original rendered in Serbian

Parts of the judgement were published in Sudska praksa trgovinskih sudova — Časopis za privredno pravo, No. 4/2003 — p. 136, and in the electronic database Paragraf Lex.

Abstract prepared by Maja Stanivuković

This case deals primarily with the scope of application of the Limitation Convention.[1]

The seller, a company having its place of business in Berlin, Germany (acting as legal successor of a State-owned company formerly located in East Berlin, German Democratic Republic) and the buyer, a joint-stock company having its place of business in Novi Sad, Serbia, entered into a sales contract on 12 December 1989 for the sale of 25,000 watches for the purchase price of 212,500 United States dollars. The seller delivered the goods, but the buyer paid the price only partially by means of barter.

On 11 July 1994, the seller commenced an action for payment of the unpaid portion of the price in the amount of $52,820.50 that had been due on 21 November 1990. The action was commenced before the Foreign Trade Court of Arbitration attached to the Yugoslav Chamber of Commerce in Belgrade. The claim was rejected by the Foreign Trade Court of Arbitration on 3 December 1996 owing to lack of jurisdiction.

On 19 December 1996, the claimant filed a claim before the Commercial Court of Novi Sad, for collection of the debt. The Commercial Court in Novi Sad rendered a judgment in favour of the claimant on 19 October 2000 that was appealed by the respondent. The Higher Commercial Court in Belgrade reversed the decision of the lower court on 11 December 2002. The claimant then filed an extraordinary appeal before the Supreme Court of Serbia on grounds of misapplication of substantive law.

The Supreme Court found that the extraordinary appeal was without grounds. The Supreme Court noted that the Assembly of the former Socialist Federal Republic of Yugoslavia (SFRY) had adopted the Act on Ratification of the Convention on the Limitation Period in the International Sale of Goods on 11 July 1978. The Act was published in Official Journal No. 5 of the former Socialist Federal Republic of Yugoslavia, dated 13 July 1978. Article 16 of the Constitution of the former Socialist Federal Republic of Yugoslavia provided that international treaties that were ratified and published in accordance with the Constitution, as well as generally accepted rules of international law, became an integral part of the internal legal

[1] Serbia is a party to the unamended text of the Limitation Convention (adopted in 1974), art. 3 of which does not provide for the application of the Convention by virtue of rules of private international law (art. 3 (1) (b) of the amended Limitation Convention).

order. Therefore, upon ratification, the Convention became an integral part of the Yugoslav law, and subsequently of the legal order of the State Union of Serbia and Montenegro. The Supreme Court stated that the Convention should be applied as *lex specialis* and it should have precedence over domestic law.

The Supreme Court mentioned that, according to article 8 of the Convention, the limitation period in the field of international sale of goods was four years, longer than the limitation period of three years provided in article 374 of the Serbian Code of Obligations.

However, the Supreme Court added, the limitation period prescribed in article 8 of the Convention was not to be applied when the claim belonged to a company whose place of business was located in a State that was not a party to the Convention. The Supreme Court indicated that that principle was specified in the text of the preamble to the Convention, in its article 3[2] and in the other provisions relating to its sphere of application.

Moreover, in the view of the Supreme Court the application of the Convention to a claim of a company that had a place of business in a State that was not a party to the Convention would not be logical, since it would run against the principle of reciprocity. In other words, the party with place of business in a State party to the Convention could not use the more favourable limitation period of four years against the company that had its place of business in the State that was not a party to the Convention while the Convention would apply in a reverse situation.

Finally, the Supreme Court noted that the claimant's claim was due on 21 November 1990 and that it was referred to the Foreign Trade Court of Arbitration on 11 July 1994. Accordingly, the Supreme Court concluded that the claim had been referred to arbitration at the time when it was already outside the statute of limitations pursuant to article 374 of the Serbian Code of Obligations.

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[2] The Copy of the Court's judgment refers to art. 31, not art. 3, possibly owing to a typographical error.