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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 1132: CISG 35; 35(3); 74; 77
Australia: Federal Court of Australia
Castel Electronics Pty Ltd v Toshiba Singapore Pte Ltd, FCAFC 55
20 April 2011
Original in English: www.business.vu.edu.au/cisg/cases.asp#1

This case involved an Australian distributor and a wholly owned subsidiary of a large corporation incorporated in Singapore. The parties entered into an agreement of distributorship of the manufacturer's electronic products. As a result of the updated way of digital television broadcasting in Australia, however, the set-top boxes, a kind of high-tech equipment designed by the manufacturer to convert digital signals onto analogue television receivers, caused problems. After the release of the goods for sale in the Australian market, the distributor received numerous complaints about their performance and functionality. Although the defective products had been reworked, the distributor continued to encounter serious technical problems. The parties thus agreed to terminate the distributorship agreement and entered into a termination agreement to resolve a number of outstanding issues. The agreement, however, preserved the right of the parties to take further action as might be available to them. Eventually the distributor initiated proceedings against the supplier.

Referring to CISG and Australian laws, the distributor alleged that the supplier had breached the terms of the sales contract and claimed damages for the costs it incurred because of the breach (i.e. "expectation damages") as well as damages for lost opportunity by not becoming a distributor of another electronic manufacturer (i.e. "reliance damages").

The supplier denied both types of damages as well as the applicability of the CISG. In the case the Convention would apply, however, the supplier invoked the application of article 74 CISG in relation to the "expectation damages". Therefore, the damages could not exceed the loss which the supplier foresaw or ought to have foreseen at the time of the conclusion of the contract in light of the facts and matters which it then knew or ought to have known as a possible consequence of the breach of contract. Further, the supplier made a cross-claim for overpayment and other costs incurred due to the buyer's obligations.

The judge confirmed the application of the CISG, because Australia and Singapore were Contracting States and applied article 35 of the Convention with reference to the supplier's breach of contract. The judge did not upheld the distributor's request of "reliance damages", because had nothing to do with the supplier's performance of the contracts.

Although the judge awarded the distributor the damages related to the supplier breach of contract, the amount awarded was reduced. The judge rejected the assertion that the distributor's administrative costs should be taken into account in calculating the distributor's profit if the products had not been defective. The judge held that there was not enough evidence to found the assumption that the supplier's breach of contract caused extra expenses.

Both parties appealed to the Federal Court of Australia. The court dealt with the CISG articles argued by the supplier in its cross appeal. As to article 35(3) CISG, the supplier had objected that at the time of the conclusion of each contract the distributor knew, or could have not been unaware, of a lack of conformity of the products. The court considered that the supplier failed to establish that the defects which gave rise to the lack of conformity of the goods were known to the distributor at the time each batch of goods was ordered. Therefore, this aspect of the respondent's cross appeal was rejected.

The court also rejected the respondent's argument concerning the failed application of article 74 CISG in the First Instance. The Court noted that, contrary to the seller's argument, when "Article 74 speaks of consequences which 'ought to have been foreseen' it refers 'to consequences which [are], objectively speaking, foreseeable by the breaching party'" and not to circumstances that can only be proved by evidence from the manufacturer's employees. According to the judge of first instance, it "was foreseeable at the time of the formation of each of the relevant sales contracts that recurrent failures, recalls and delays in supplying replacements of the 'epidemic' products would have had a repercussive effect in reducing [the distributor's] margins of profit". The Court considered evident that the judge of first instance used the word "foreseeable" to refer to what "ought to be foreseen" and upheld his decision on this matter.

The supplier's argument for the application of article 77 CISG, which the judge of first instance had not considered, was also rejected by the Court. The Court noted that such article "[affords] the party in breach 'a claim' for a reduction in the damages…" but "absent a successful claim by the party in breach… the other party will be entitled to recover 'the damages'". "… Since the manufacturer did not … prove its claim for a reduction of the damages payable by it", article 77 could not be applied.

Case 1133: CISG 35, 39[1]
Australia: Federal Court of Australia
Cortem SpA v Controlmatic Pty Ltd [2010] FCA 852
13 August 2010
Original in English

The parties, of Italian and Australian nationality, concluded contracts for the distribution and sale of explosion-proof junction boxes. The Australian distributor would also assist the Italian manufacturer in obtaining the required certification for the products to be sold in Australia.

After several years, the manufacturer (i.e. the claimant) terminated the distributorship and sued the distributor (2nd respondent) and an Australian company (1st respondent) for injunctions, damages and declarations because, unbeknown to the claimant, the 2nd respondent had commenced to manufacture its own junction boxes in cooperation with such a company and to supply them to customers in Australia bearing the claimant's logo.

By cross-claim the 2nd respondent (hereinafter the respondent) claimed payments, in the nature of remuneration and compensation, for expenses incurred, and for the

[1] Abstract prepared following information from B. Zeller, national correspondent.

time spent in securing the safety certification of the claimant's products with the relevant Australian regulatory authority, because the products in question did not comply with Australian requirements. The respondent claimed that much work was done to secure such certification, and that expenses were outlaid, so that it was entitled to compensation on the ground that, otherwise, the claimant would be unjustly enriched. The respondent also claimed that the products were defective, not merchantable and unfit for "their intended purpose".

The claimant objected that the Federal Court of Australia had no jurisdiction on the matter and that, as agreed in the contracts, the court of Gorizia (Italy) had jurisdiction over any question of law or fact arising thereunder. The Federal Court distinguished between the distribution contract the parties agreed on and the following sales contracts for the Australian market. The first agreement solely established and regulated the relationship of manufacturer and distributor and "was not a contract under which any particular goods were bought and sold. Each such contract was constituted by the orders presumptively placed by [the respondent], and accepted by [the claimant], from time to time". Contrary to the distribution contract, the parties agreed that the "international purchase orders" would be referred to arbitration under the UNCITRAL Arbitration Rules. Since the claimant had not filed for arbitration, the Federal Court had jurisdiction over the case and would apply the CISG, as both parties had their place of business in States parties to the Convention.

The Court granted the Italian manufacturer damages for the lost profit due to the distributor's breaching of its obligations under the agency agreement.

As to the respondent cross-claims, the Court dismissed the request for compensation for the time spent in obtaining the certification to the products, as the respondent failed to prove how much time it had actually spent on this and the relevant expenses.

With regard to the applicability of article 35(2)(a) CISG, the Federal Court stated the respondent only established that the products did not pass the tests administered by the Australian authority. This mere fact was not the same thing as proving they were not fit for the purpose referred to in the said article. The products were in the same condition as the claimant would have supplied to any other wholesaler everywhere in the world, "the problem being that, in Australia, the products encountered a regime of testing to which they might not previously have been subjected".

As to article 35(2)(b), the Court noted that for some of the products, the respondent's purpose was not their submission for certification, but their resale in the Australian market. As a matter of fact, the relevant contract was concluded after the products had received the required certification. That purpose, if not expressly "made known" to the claimant, was at least implicit. Furthermore, despite the respondent's claim that the products were not fit, the respondent disposed of them. Therefore, it could not be said that the respondent had suffered loss or damage within the meaning of article 35(2)(b). The Court well noted the claimant's argument that the respondent had never made a complaint about the goods' defects until the commencement of the proceeding.

With this regard, the Court looked into the applicability of article 39 CISG and considered that the respondent's claim for some of the products should be

dismissed, since it had not given notice of the non-conformity of the goods within a reasonable time after the alleged discovery of the defects (article 39(1) CISG). This was also applicable, by virtue of article 39(2) CISG, to those products delivered over two years before the proceeding. However, the Court upheld the respondent's claim for another part of the products, as it found they were lacking conformity as per article 35(2)(b) and the respondent had given notice in conformity with the purpose of article 39 CISG.

Case 1134: CISG 35
Australia: Supreme Court of Victoria
Delphic Wholesalers (Aust) Pty Ltd v Agrilex Co Limited [2010] VSC 328
6 August 2010
Original in English: www.austlii.edu.au/au/cases/vic/VSC/2010/328.html

Abstract prepared by B. Zeller, national correspondent

An Australian buyer entered into a contract with a Bulgarian seller for the purchase of cheese. After the initial shipments, the buyer complained that the goods were not of the quality or description that the seller had agreed to supply, it thus withheld payments for the last shipments. The seller sued the buyer, which objected that the seller was in breach of contract for lack of conformity of the goods and that the buyer was thus entitled to set off the seller's request with its claim for damages. The buyer, referring to the CISG argued that the cheese [should] "be fit for the purpose expressly or impliedly made known to [the seller] and that the cheese possesses the qualities of sample cheese provided" (article 35 CISG). The judge of first instance dismissed the buyer's allegations.

On appeal, the Supreme Court made the decision mainly on the facts themselves. The judge found there was no source of proof of any matter relevant to the question of the quality of the cheese and its being the cause of the reduction in sales. Besides, after the buyer had received the complaints from its customers, it had remained silent on the quality or source of the cheese for a long time and continued to accept the cheese from the seller and make payments. Considering all these circumstances, the judge concluded that there was not a genuine offsetting claim and the appeal was dismissed.

Case 1135: CISG [1]; [6]
Australia: Supreme Court of Western Australia
Attorney-general of Botswana -v- Aussie Diamond Products Pty Ltd [No. 3] [2010] WASC 141
23 June 2010
Original in English

A buyer from Botswana and a seller from Australia signed a contract for commissioning and installing a drill rig. The buyer claimed that "the consideration under the contract wholly failed, because the seller failed to commission the drill rig" and requested therefore the return of the sum paid.

Further, the buyer pleaded that Botswana law was the proper law of the contract. The seller contended that the law of Western Australia was the proper law, and that the Act (Sale of Goods Act 1895 [WA]) applied either for that reason, or because the

buyer did not displace the presumption that the law of Botswana is the same as the law of the forum.

The court discussed the applicable law and came to the conclusion that Western Australian law was the governing law. The court was aware that the CISG forms part of the law of Australia and was applicable in this case. However the court noted that "Neither party in this case has suggested that there are provisions of the Convention which require consideration, or that the provisions of the Convention would operate inconsistently with the application of the Act in the circumstances of this case, and the general law of Western Australia. Having regard to the way the case was run it is unnecessary to refer to the Convention further …".

Applying domestic law, the Court defined the particular nature and terms of the contract in between a contract for the sales of goods and a contract for work to be done and noted that the issue was the sale of the rig and not the construction which was a minor part of the agreement.

Case 1136: CISG 8
Australia: Supreme Court of New South Wales
Franklins Pty Ltd v Metcash Trading Ltd [2009] NSWCA 407
16 December 2009
Original in English

Abstract prepared by B. Zeller, national correspondent

Two parties from Australia entered into a written contract for the supply of products for supermarkets. At the time the agreement was entered, the buyer was a newcomer in the Australian retail grocery industry and the seller an established supplier. Nevertheless, the buyer wished to establish and control its own relations with manufacturers and negotiate its own pricing terms. A dispute arose between the parties over the price the seller was charging for the products. The dispute centred around the definition of "Wholesale Price" in the Supply Agreement. The buyer alleged that all that was required was the deduction of certain specified allowances and discounts. Further, the seller brought a cross-claim seeking rectification of the contract, and also alleging that the seller was stopped from asserting the construction it contended for.

The judge found in favour of the buyer on the construction of the agreement, holding that it required the deduction of all allowances and discounts whatsoever; but held that the contract should be rectified to deduct only published allowances and discounts.

In debating the interpretive approach in relation to later conduct and the construction of written contracts, the Court referred to the UNIDROIT principles of International Commercial Contracts (3rd Ed.), Articles 4.1-4.3, and article 8 CISG. The Court however was of the opinion that "to a significant degree the approach to the construction and interpretation of contracts in the UNIDROIT Principles and the CISG reflects civil law principles".

Case 1137: CISG 7; 8; 9 [relevant but court considered domestic Australian law]
Australia: Supreme Court of South Australia
Vetreria Etrusca Srl v Kingston Estate Wines Pty Ltd [2008] SADC 102
14 March 2008
Original in English: www.austlii.edu.au/au/cases/sa/SASC/2008/75.html

Abstract prepared by J. Waincymer, national correspondent

This is a dispute between an Italian bottle manufacturer (the appellant) and an Australian winemaker (the defendant). The parties entered into an agreement for supply of wine bottles, which, later on, the buyer alleged not complying with the standard required by the contract. The seller claimed the price and damages for breach in an Italian court. The Australian company commenced the proceeding to claim damages for breach of contract in Australia. Later on the Italian manufacturer sought an interlocutory order to stay the Australian proceedings on the basis of a clause in the supply agreement which gave the court in Florence, Italy, the exclusive jurisdiction over the dispute.

In the first instance, the district court judge noted that neither party disputed that the proper law of the contract was the United Nations Convention on Contracts for the International Sale of Goods. However, the seller argued that 'Australian' law should be used to construe the choice of forum clause. The judge concluded that the dispute was not arising from the interpretation, execution or application of the sales agreement, "[r]ather it is an allegation by the plaintiff that the defendant has breached the Sales Agreement it has with the plaintiff". "… The interpretation of the contract was not alleged to be in dispute, and there was no allegation that either party had not properly executed it. There is no dispute as to whether or not the contract applies as between the two parties". Finally, the judge declined exercise of the discretion to stay proceedings due to the location of witnesses, experts and physical evidence. The application for a stay was dismissed.

Upon appeal, the Supreme Court of South Australia, like the judge of first instance, did not refer to the interpretive provisions of the CISG in construing the choice of forum clause: it upheld the decision of the lower court and dismissed the appeal.

Case 1138: CISG 35; 38; 39; 50; 46; 78; Limitation Convention 3; 8
Serbia: Foreign Trade Court of Arbitration, Attached to the Serbian Chamber of Commerce in Belgrade, proceedings No. T-13/05
5 January 2007
Original in Serbian

An American buyer and a Serbian seller signed contracts for the purchase of frozen fruits. The buyer paid for the entire contracted quantity of goods to the seller in advance. The seller moreover failed to deliver a certain amount of the contracted goods. Moreover, there were several tons of the delivered fruits that were not in conformity with the contract. The buyer initiated arbitration proceeding.

Since the parties failed to choose the applicable substantive law the sole arbitrator decided that the CISG would apply as both the United States of America and Serbia are members of the Convention.

The buyer's request for compensation of the purchase price of the goods which were not delivered was granted. Pursuant to articles 35 and 50 CISG, the seller was thus

ordered to pay the buyer the proportionate amount of the contracted price because of its failed delivery. Applying article 78 CISG the sole arbitrator awarded interest on this amount. The interest was due as of 8th August 2005, i.e. the day of the submission of the claim, until final payment. The claim that the interest was due for a longer period, starting before the commencement of the proceeding, was denied, because the buyer had granted the seller an additional deadline for delivering the missing amount. Only when the buyer initiated the proceeding the seller knew of its decision to terminate the agreement on the additional delivery and only from the moment, i.e. 8th August 2005, the seller was in default. Since Article 78 does not set the interest rate, the arbitrator referred to the legislation in effect in the Republic of Serbia, as the Serbian law was the applicable substantial law pursuant to the Law on Conflict of Laws with Regulations of Other Countries.[2]

The buyer's claim for compensation for the alleged poor quality of the goods was rejected. For the sole arbitrator it was not possible to determine with certainty whether the deliveries that lacked conformity caused the buyer to incur any damages whatsoever, irrespective of their amount. The buyer failed to prove the fundamental breach of contract and failed to rely on a lack of conformity within a reasonable time according to Articles 38, 39 and 46 CISG.

The buyer's claim for damages due re-sorting and repackaging of a certain amount of non-conforming goods was partly granted. The sole arbitrator refused it for the amount that exceeded the actual damage suffered by the buyer.

The sole arbitrator rejected the seller's objection that the buyer was precluded from raising any claims, since the limitation period had expired, as unfounded. The seller referred with its objection to the Serbian Law on Contracts and Torts and the Convention on the Limitation Convention. The sole arbitrator stated that the Serbian Law on Contracts and Torts was not applicable at the case at hand. Since at the time of the conclusion of the contracts (which dealt with international sale of goods) the parties had their respective place of business in two Contracting States of the Limitation Convention, the Convention applied (Article 3). According to Article 8 Limitation Convention, the limitation period shall be four years. Pursuant to the contracts, the seller was obliged to deliver the goods between 15th September 2001 and 1st October 2001 and between 15th August 2001 and 1st September 2001. Since the buyer commenced arbitration proceedings on 8th August 2005 the limitation period was not up. The seller's argument was thus rejected.

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[2] ("Official Gazette of the Socialist Federal Republic of Yugoslavia" number 43/82 and 72/82), ("Official Gazette of the Socialist Federal Republic of Yugoslavia" number 46/96) and ("Official Gazette of the Republic of Serbia" number 46/06).

Case relating to the United Nations Convention on Independent Guarantees and Stand-by Letters of Credit (UNLOC)

Case 1139: UNLOC 14(2)
Tunisia: Appeal Court of Tunis City, 4th Chamber, Appeal No. 84922
30 December 2009
Matutrading Company, Ltd. v. North Africa International Bank
Original in Arabic

Abstract prepared by J. Baccar

The principal entered into a facilitation agreement with the guarantor to secure the exportation of merchandise purchased from the supplier on behalf of the buyer. At the principal's request, the guarantor issued a first demand guarantee in favour of the buyer. In return, the buyer had a Bank in Bamako issue the first commercial letter of credit in a back-to-back series of letter of credits (LCs) in favour of the principal. Article 6 of the facilitation agreement required that the first of the back-to-back LCs be received by the guarantor, then the guarantor was to issue a second LC in favour of the supplier. It was stipulated that the first LC must be received at the counter of the guarantor before the second LC could be issued to the supplier.

However, the first LC was sent to and received at a Bank in Tunis rather than by the guarantor. The guarantor then refused to issue a second LC in favour of the supplier and the supplier refused to deliver the merchandise to the principal. Therefore, the principal was not able to import the merchandise from the supplier or export it to the buyer. The buyer then drew on the demand guarantee. The collapse of the operation was due to the guarantor's failure to receive the first LC at its counter.

The principal was thus menaced by the payment of the first demand guarantee and the utilization of a land mortgage issued by the Company L (mortgagee) to secure implementation of the principal's obligations. In fact, the guarantor gave the principal notice to repay the amount of the demand guarantee or risk the use of the mortgage.

Both the principal and the mortgagee together took the matter before the Court of First Hearing in Tunis, claiming the dissolution of the facilitation agreement between the principal and the guarantor because this latter breached its obligations, as well as the termination of the guarantee agreement and consequently of the mortgage. The principal and the guarantor referred to the Tunisian Code of Obligations and Contracts, particularly Article 247. No reference to the United Nations Convention on Independent Guarantees and Stand-by Letters of Credit, as applicable law, was made.

The Court of First Hearing of Tunis[3] simply applied Tunisian law and made no reference to the United Nations Convention. It declared that the guarantor had committed no violation of its obligations and had implemented the contract by issuing the demand guarantee without any mistake from his part. The Court concluded by rejecting the principal and mortgagee's claims.

Both the principal and mortgagee appealed this decision.

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[3] Case number 21386/23, April 19 2008.

The appeal judges expressly declared that in the Tunisian Legal System the UNLOC should be applied with priority over internal law, notably the Code of Obligations and Contracts promulgated in 1906.[4] The UNLOC is to be considered the first source of law when there is a question of independent guarantees and standby letters of credit. This position is legally justified by Article 32-2 of the Tunisian Constitution, which stipulates: "Treaties ratified by the President of the Republic and approved by the House of Deputies have an authority higher than that of laws".

Tunisian judges must thus exclude the application, on one hand, of national general law, in reference to the Code of Obligations and Contracts; on the other hand, they must exclude the application of national specific law, that is the Code of International private law[5] applicable on international relationships (as defined by article 2 of this Code), especially its article 62 (dealing with the law applicable on voluntary obligations) specifying the application of the "Law of autonomy" that means the rules chosen by the parties. In this regard, the judge in this case must also exclude the application of the URDG ICC Publication No. 458 chosen by the parties as governing rules.

The judges applied Article 14-2 UNLOC to determine the responsibility of the guarantor. The Article excludes the guarantor's responsibility except in case of a major mistake or the guarantor's good faith. The judges interpreted Article 14-2 to indicate that the behaviour of the guarantor was not a major mistake or bad faith. They concluded that the guarantor was not responsible.

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[4] Text promulgated on December 15, 1906 and reorganized by Law No. 87 on August 15, 2005.

[5] Text promulgated by Law No. 97 on November 27, 1998.