United Nations A/CN.9/SER.C/ABSTRACTS/107

General Assembly

Distr.: General
19 April 2011

Original: English

United Nations Commission on International Trade Law

CASE LAW ON UNCITRAL TEXTS (CLOUT)

Contents

V.11-82524 (E) 210411 220411

Introduction

This compilation of abstracts forms part of the system for collecting and disseminating information on Court decisions and arbitral awards relating to Conventions and Model Laws that emanate from the work of the United Nations Commission on International Trade Law (UNCITRAL). The purpose is to facilitate the uniform interpretation of these legal texts by reference to international norms, which are consistent with the international character of the texts, as opposed to strictly domestic legal concepts and tradition. More complete information about the features of the system and its use is provided in the User Guide (A/CN.9/SER.C/GUIDE/1/REV.1). CLOUT documents are available on the UNCITRAL website: (www.uncitral.org/clout/showSearchDocument.do).

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

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Cases relating to the Convention on the Limitation Period in the International Sale of Goods (Limitation Convention)

Case 1050: Limitation Convention 8, 21, 23
Montenegro: Court of Appeal of Montenegro
Case No. Mal. 341/10
Enker and Zeničko-dobojski kanton v. Zeljezara Niksic Lld
8 October 2010 (upholds Commercial Court of Podgorica, 14 April 2008)
Original in Montenegrin

Abstract prepared by Aneta Spaic, National Correspondent

This case deals with the limitation of an action arising from breach of a contract for international sale of goods.

Enker Inc., a spark plug and industrial ceramics factory with place of business in Tešanj, Bosnia and Herzegovina, and Zeničko-dobojski kanton, a territorial entity with place of business in Zenica, Bosnia and Herzegovina, (the plaintiffs), and Montenegrin company Zeljezara Niksic Lld (the defendant) entered into a contract for the sale of goods. The goods were delivered, but the price was paid only partially: according to invoice no. 225/92 of 12 March 1992, the defendant owed the plaintiff the amount of 2477.00 dinars (equivalent to 17.75 USD).

On 10 August 2007, the successor of the original plaintiff (due to privatization) brought suit before the Commercial Court of Podgorica requesting payment of the outstanding sum of 17.75 USD plus an additional USD 1.69 to account for a difference in the exchange rate. The plaintiff also requested statutory penalty interest as calculated from the date of maturity. The buyer, however, refused to pay, arguing that the claim had lapsed due to the plaintiff's failure to file within the required statute of limitations.

The Commercial Court of Podgorica rejected the plaintiff's claim.

The Court applied article 8 of the Law on Resolution of Conflict of the Law with Regulations of Other Countries ("Official Gazette of SFRJ", Nos. 43/82 and 72/82 and "Official Gazette of SRJ", No. 46/96),[1] and found applicable the Convention on the Limitation Period in the International Sale of Goods (the "Limitation Convention"), adopted on 13th June 1974 in New York City (and ratified and published in the "Official Gazette of the Socialist Federal Republic of Yugoslavia – International Treaties", No. 5 of 13 July 1978), to which Bosnia and Herzegovina as well as Montenegro are a party.

According to the provisions of article 8 of the Limitation Convention, the right to request the fulfilment of an obligation expires four years from the date on which the claim accrued. Article 21 of the same Convention, however, stipulates that where, as a result of circumstances beyond the control of the creditor and which he could neither avoid nor overcome, the creditor has been prevented from causing the limitation period to cease to run, the limitation period shall be extended so as not to expire before the expiration of one year from the date on which the relevant

[1] Article 8 of the Law on Resolution of Conflict of the Law with Regulations of Other Countries states: "The law applicable to the content of a legal transaction or legal action shall govern the rules of prescription".

circumstance ceased to exist. In addition, article 23 of the Limitation Convention stipulates that a limitation period shall in any event expire not later than ten years from the date on which it commenced to run.

The Court established that the plaintiff filed the suit against the defendant for payment of the outstanding portion of the price of the goods on 10 August 2007 and that the war in Bosnia and Herzegovina started on 6 April 1992 and officially ended on 21 November 1995, which, for the purposes of article 21 of the Limitation Convention, should be considered the date when the unavoidable extenuating circumstances ceased to exist. On that basis, the Court concluded that the limitation period for the claim brought before it had expired in November 2000, that is four years after November 1996, being one year after the termination of the war and therefore the time limit as set by article 21 of the Limitation Convention. Thus, the Court concluded that the plaintiff could not claim the payment of the outstanding balance of the price agreed in the contract for sale of goods.

The buyer appealed the decision of the Commercial Court of Podgorica in the Court of Appeal of Montenegro. The Court of Appeal rejected the appeal finding the decision of the Commercial Court to be in conformity with the law.

Case 1051: Limitation Convention 3(a), 8, 20(1); MLEC: 5
Ukraine: High Commercial Court of Ukraine
LLC Horizont Marketing-Finance-Logistika v. LLC Terkyrii-2
(case # 2009/17/140-3571 (9/56-1492))
17 December 2009
Original in Ukrainian
www.reyestr.court.gov.ua/Review/7570965 (Ukrainian language text)

Abstract prepared by Yuliya Chernykh

A seller with place of business in the Czech Republic concluded on 6 October 2003 a contract for sale of paint on FCA terms with a buyer with place of business in Ukraine. The goods were delivered in December 2003 and the buyer made a partial advance payment in the amount of EUR 1507.50. The remaining amount, EUR 7720.00, was due within 45 days (1 February 2004) of the invoice date (18 December 2003) and was never paid.

In April 2008, the company LLC Horizont Marketing-Finance-Logistika (to whom the seller had assigned the outstanding credit in 2007) lodged a claim against the buyer in front of the Commercial Court of Ternopil Region. The buyer contested the claim on various grounds including the expiration of the period of limitation of four years under the Limitation Convention.

The court of first instance ruled in favour of the seller having found that the period of limitation had not expired under the Limitation Convention. The court referred to article 20(1) of the Limitation Convention, which states that a new limitation period of four years shall commence to run from the date when a debtor acknowledges in writing his obligation to the creditor so long as the acknowledgement is made before the expiration of the initial limitation period (here, 1 February 2008). In the court's opinion, such acknowledgement took place on 4 March 2005 when the buyer confirmed the debt in an e-mail to the creditor.

With respect to the electronic form of the acknowledgment of the debt, the court referred to article 8 of the Law on Electronic Document and Electronic Documents Circulation of Ukraine (Law No.851-IV of 22.05.2003), mandating that the legal validity of an electronic record can not be denied solely because of its electronic form.

Reviewing this decision, the Lviv Court of Appeal affirmed that the period of limitation had not expired. Similarly, the High Commercial Court of Ukraine on 17 December 2010 unanimously upheld the decision of both instances.

Case 1052: Limitation Convention 3, 12(2); CISG: 78
Cuba: Sala de lo Económico del Tribunal Supremo Popular
Decision n. 3 of 30 April 2009 (revisión)
Nelson Servizi S.r.l. v. Empresa RC Comercial
30 April 2009 (reversing decision n. 18 of 10 April 2008, dictada en casación por la Sala de lo Económico del Tribunal Supremo Popular, which was in turn upholding decision n. 111 of 10 June 2007 of the Sala de lo Económico del Tribunal Provincial Popular de Ciudad de La Habana)

This case deals primarily with the application of the Limitation Convention in conjunction with the application of the CISG.

Nelson Servizi S.r.l., a company having its place of business in Italy (the seller), entered into a contract for the sale of a plastic moulding machine with Empresa RC Comercial, a company having its place of business in Cuba (the buyer). The machine was delivered to the buyer, accepted by the buyer and subsequently resold to a final client. The contract was concluded in January 2004 and provided for payment of the machine in instalments. The buyer made payments through at least December 2006 but then failed to complete payment. The seller sued in March 2007 for the remainder of the contract price. The courts in the first and second instance declared the request of the seller time-barred on the basis of the one-year prescription term set in article 116(d) of the Civil Code of Cuba.

On appeal for revision, the Court noted that the contract fell under the scope of application of the CISG since both Cuba and Italy are States Parties to that Convention and the parties had not opted out of its provisions. It then indicated that the obligation of the buyer to pay the price was undisputed under article 53 of the CISG and the facts of the case. The Court further noted that Cuba is a party to the Limitation Convention, whose purpose is to provide for a uniform set of rules on time-barring of actions relating to non-performance or partial performance of contracts for the international sale of goods. The Court also indicated that, under the system of legal sources established in article 20 of the Civil Code of Cuba, as well as in light of its nature as *lex specialis*, the provisions of an international treaty prevail over those contained in national legislation. The Court determined that, since the parties had not opted out of its application, the Limitation Convention should apply to the case. It further decided that the action of the seller was not time-barred under the Limitation Convention since it was initiated before the lapse of the four-year limitation period set in article 8 of that Convention.

In particular, the Court noted that, under article 12(2) of the Limitation Convention, the limitation period in respect of a claim arising out of a breach of contract for the

delivery of or payment for goods by instalments shall, in relation to each separate instalment, commence on the date when the particular breach occurs.

Thus, the Court ordered the buyer to pay the outstanding sum to the seller. It did not, however, recognize the seller's entitlement to interest under Acuerdo No. 144 de 2000 del Comité de la Política Monetaria del Banco Central de Cuba as that regulation does not apply to sale of goods involving foreign entities.

Case 1053: Limitation Convention 8, 10(1)
Montenegro: Court of Appeal of Montenegro
Ca. No. Mal. 418/07
Mi-Rad International Inc. v. Top Art Lld
22 January 2009 (upholds Commercial Court of Podgorica, 29 December 2007)
Original in Montenegrin

Abstract prepared by Aneta Spaic, National Correspondent

The case primarily deals with two issues: first, the defendant's contractual obligations to pay the purchase price stated in the invoice to which he voiced no objections; and second, the four-year statute of limitations within which a foreign plaintiff must file claims arising from breach of contract for the international delivery of goods.

Mi-Rad International Inc., a Canadian company (seller and plaintiff), and Top Art Lld (buyer and defendant), a Montenegrin company entered into a contract for the delivery of goods in 2001. The defendant received an invoice for the sum of $21,019.08 relating to the goods purchased, to which he made no objections with respect to price or quantity of the goods delivered. However, the defendant paid $10,413.62 through authorized banks and $8,095.32 to an authorized employee of the plaintiff, leaving an outstanding balance of $2,510.14.

On 29 September 2005, the seller commenced suit against the buyer demanding $4,462.04 plus interest. This amount reflected the total of the unpaid balance amount of $2,510.14 combined with a claim for compensation for alleged damages in the amount of $1,951.90. The seller indicated that the damages arose from the defendant's breach of contract and that the amount of the debt was not disputed among the parties as evidenced by e-mail correspondence between them. The buyer, however, refused to pay the sum requested, replying that the price of delivered goods was not agreed upon between the parties, and even if it was, the plaintiff's claim had lapsed for failure to file within the required statute of limitations.

The Commercial Court of Podgorica rejected the defence of the buyer that the parties had not agreed on the price of the goods because the defendant did not provide any evidence of his claims despite having the burden of proof pursuant to article 219, paragraph 3 of the Law on Civil Procedure of Montenegro ("Official Gazette of the Republic of Montenegro", no. 22/04 – "ZPP"). Rather, the Court found that the goods had been delivered and that the defendant had paid most of their price (for a total of $18,508.94); moreover, it found that the buyer had not provided any evidence of complaints to the plaintiff regarding type, quantity or price of goods.

Regarding the defendant's second objection, the Court found that: "As the plaintiff is a foreign legal person, when evaluating claims, the Convention on the Limitation Period in the International Sale of Goods, adopted on 13th June 1974 in New York City (and ratified and published in the "Official Gazette of the Socialist Federal Republic of Yugoslavia – International Treaties", No. 5 of 13 July 1978), must be applied. According to the provisions of Article 8 of the Convention, this right expires in four years, while according to the provisions of article 10, paragraph 1 of the Convention, the right to a claim arising from breach of contract begins to run from the date when the breach of contract occurs. Since the goods were ordered on 2 November 2001 (as indicated on the relevant invoice) and the action in this legal matter was submitted to the court on 29 September 2005, the statute of limitations of four years for the filing of claims arising from the international buying and selling of goods (based on the quoted provisions of article 8 of the Convention) has not elapsed."

The Court, however, found that the claim was receivable only with respect to the debt arising from breach of the contract for sale of goods, so that the defendant is obliged to pay the plaintiff, on the basis of a debt, the amount of $2,510.14, plus corresponding interest starting from 29 September 2005 (the day of filing of the case), within eight days of the final verdict. The Court rejected the plaintiff's claim regarding compensation for damages in the amount of $1,951.90 plus corresponding interest because the plaintiff had failed to provide evidence of the damages sustained and of their amount, although he had the burden of proof under article 219, paragraph 2 ZPP.

The buyer appealed the decision of the Commercial Court of Podgorica in the Court of Appeal of Montenegro. The Court of Appeal rejected the appeal finding the decision of the Commercial Court to be in conformity with the law.

Case 1054: Limitation Convention 8, 19[2]
Hungary: Fővárosi Itélőtábla (Metropolitan Judicial Board, Budapest)
Decision no. 14.Gf.40.225/2008/3
9 October 2008 (confirming decision no. 4.G.20.305/2007/20 of 8 April 2008 by the Heves County Court which rejected the plaintiff's claim for damages)

Abstract prepared by Andrea Vincze

This case deals primarily with the application of the Limitation Convention.

The plaintiff/buyer ordered mushrooms from the defendant/seller. The goods turned out to be defective, and, during subsequent consultations, the defendant/seller agreed to deliver replacement goods. The replacement goods were also defective. On 24 May 2002, the defendant/seller offered a certain quantity as a gift but refused to grant the plaintiff/buyer any extension of time on the payment. On 11 July 2006, the plaintiff/buyer sued the defendant/seller for damages due to non-conforming deliveries.

The plaintiff/buyer appealed the first-instance decision holding that the plaintiff/buyer's claim was time barred under Article 8 of the Limitation

[2] See Case 1055.

Convention. The court of first instance found that the plaintiff/buyer failed to prove that during the 4 years prior to filing the lawsuit (between 11 July 2002 and 11 July 2006) it performed a procedural act (written payment demand, agreement or composition, or acknowledgement of debt) that would have recommenced the limitation period (Article 19 of the Limitation Convention in conjunction with Article 327 of the Civil Code of Hungary).

On appeal, the plaintiff/buyer argued that the court of first instance erred in finding that the plaintiff/buyer did not state any procedural act that could have recommenced the limitation period. The plaintiff/buyer referred to the original statement of claim, in which it had stated that, prior to filing the lawsuit, the plaintiff/buyer's attorney visited the defendant/seller's offices in November 2004, rejected the defendant/seller's offer for a settlement and informed the defendant/seller that it would uphold its original claim for damages. The latter consultation was not contested by the defendant/seller during the trial, therefore, the plaintiff/buyer argued that it did perform a procedural act with the effect of recommencing the limitation period between 11 July 2002 and 11 July 2006 (i.e. within 4 years prior to filing the lawsuit). The defendant/seller contested the latter argument.

The court of second instance rejected the appeal. The court of second instance did not question the decision of the court of first instance to apply the Limitation Convention. It examined only the question of whether the Convention's 4-year limitation period had been suspended and recommenced under the relevant Hungarian legal provisions applicable by virtue of Article 19 of the Limitation Convention.

The court held that the limitation period recommences only in case of a written notice for performance of a claim, judicial enforcement of a claim, amendment of a claim by agreement, acknowledgment of a debt by the obligor (as expressly listed in Article 327 (1) of the Civil Code of Hungary), or notification of the debtor about assignment of the claim (as expressly listed in Article 329 (2) of the Civil Code of Hungary). However, settlement negotiations and discussions at a party's place of business are not listed as such procedural acts. Settlement negotiations and discussions at a party's place of business merely interrupt [and do not recommence] the limitation period, and they extend the limitation period by only the duration of such settlement negotiations or discussions (Article 326 (2) of the Civil Code on interruption of the limitation period). The court of second instance held that even if the limitation period was extended by the duration of settlement negotiations referred to by the plaintiff/buyer, the claim was time-barred because more than 4 years had passed between 24 May 2002 (when the plaintiff/buyer threatened the defendant/seller with a lawsuit if the latter did not provide replacement goods for all deliveries), and 11 July 2006 (the date of filing the lawsuit).

Case 1055: Limitation Convention 3(1)(b), 8, 19
Hungary: Heves County Court
Decision no. 4.G.20.305/2007/20
8 April 2008

Abstract prepared by Andrea Vincze

This case deals primarily with the application of the Limitation Convention.

The plaintiff/buyer ordered mushrooms from the defendant/seller. The goods turned out to be defective, and, during subsequent consultations, the defendant/seller agreed to deliver replacement goods. The replacement goods were also defective. On 24 May 2002, the defendant/seller offered a certain quantity as a gift but refused to grant the plaintiff/buyer any extension of time on the payment. On 11 July 2006, the plaintiff/buyer sued the defendant/seller for damages due to non-conforming deliveries.

Before the court of first instance, the defendant/seller argued that the claim was time barred under the Limitation Convention.

Initially, the plaintiff/buyer contested applicability of the Limitation Convention because the parties had agreed upon the application of the Hungarian Civil Code. Subsequently the plaintiff/buyer argued that the parties had not agreed upon the applicable law, and therefore, the law of the seller, incorporated in Hungary, i.e. Hungarian law applied (Article 24 of Law Decree no. 13 of 1979 on Private International Law). Eventually, however,, the plaintiff/buyer conceded that the Limitation Convention did apply to the case but argued that it must be applied in conjunction with Article 327 of the Civil Code. Article 327 states that "a period of limitation shall be suspended by a written notice for performance of a claim, the judicial enforcement of a claim, the amendment of a claim by agreement (inclusive of composition), and the acknowledgment of a debt by the obligor". The plaintiff/buyer argued that the claim was neither time-barred under the latter provision nor under Article 19 of the Limitation Convention, which states that "where the creditor performs, in the State in which the debtor has his place of business and before the expiration of the limitation period, any act, other than the acts described in articles 13, 14, 15 and 16, which under the law of that State has the effect of recommencing a limitation period, a new limitation period of four years shall commence on the date prescribed by that law".

The defendant/seller insisted that the claim was time-barred under Article 8 of the Limitation Convention, and, that due to a judicial precedent (No. 41 of the Economic Chamber of the Supreme Court), the claim was time-barred even if the Hungarian Civil Code was applicable.

The court rejected the plaintiff's claim.

Since both parties acknowledged its applicability, the court applied the Limitation Convention The court further held that the Limitation Convention was in any case directly applicable, thus governing the matter of limitation and excluding application of the Hungarian conflict of laws provisions (Article 2 of Law Decree no. 13 of 1979 on Private International Law).

Under Article 8 of the Limitation Convention, the limitation period applicable in the instant case was 4 years. The plaintiff/buyer referred to Article 19 of the Limitation

Convention allowing for application of Article 327 of the Hungarian Civil Code. In accordance with the latter provisions, the plaintiff/buyer had the burden to prove that during the 4 years prior to filing the lawsuit (between 11 July 2002 and 11 July 2006) it performed a procedural act (written payment demand, agreement or composition, or acknowledgement of debt) that would have recommenced the limitation period. The plaintiff/buyer did not refer to any such procedural act, therefore, the court held that the plaintiff/buyer's claim was time-barred.

Case 1056: Limitation Convention 8; CISG 39(2), 53, 78[3]
Hungary: Hajdú-Bihar County Court (Debrecen)
Decision no. 5.G.40.127/2007/31 (on remand from Debreceni Itélőtábla (Judicial Board of Debrecen), decision no. Gf. III. 30.0009/2007/5).
26 April 2007

Abstract prepared by Andrea Vincze

This case deals primarily with the application of the Limitation Convention in conjunction with the CISG.

On 30 October 2003, a defendant/buyer concluded a contract for the sale of sanitary products with a plaintiff/seller based in Italy. On 2 December 2003, the defendant/buyer requested replacement goods, stating that it had found problems with absorbency. The plaintiff/seller asked the defendant/buyer to return the goods along with an examination report. When the defendant/buyer failed to do so by 15 December 2003, the plaintiff/seller informed the defendant/buyer that it considered that the defendant/buyer had accepted the goods.

On 22 March 2004 and on 20 April 2005, the defendant/buyer obtained examination certificates confirming microbiological contamination of the goods but did not notify the plaintiff/seller of its findings until 1 June 2006, more than two years after original delivery of the goods. In addition, instead of returning the goods, the defendant/buyer kept them in storage and, on 13 June 2005, disposed of them at a communal landfill while the lawsuit was pending. The defendant/buyer later claimed to have found a remaining unopened carton of the disputed goods. By that time, however, the plaintiff/seller had sold the machinery that had manufactured the allegedly defective goods to a third party (Company X) which continued to manufacture goods identical to those involved in the dispute, making it unclear where the unopened carton had originated.

The plaintiff/seller contested that the goods were defective and brought suit in the Hajdú-Bihar County Court ("County Court"), requesting that the defendant/buyer pay the purchase price plus interest. The defendant/buyer acknowledged that it had failed to pay the purchase price, but it requested a reduction of the price because of defects and submitted a warranty claim. Subsequently, the defendant/buyer modified its claim, alleging that 70 per cent of the goods were defective and upholding its request for a price reduction. Later, the defendant/buyer alleged that the entire delivery was defective. The defendant/buyer did not provide a reasonable explanation as to why it had modified its argument regarding quantity of the

[3] It is to be noted that when this abstract was prepared, the initial County Court judgment was not available.

defective goods, or why it had not had the goods examined immediately when the defects were discovered.

In an initial trial, the County Court accepted the plaintiff/seller's claim and ordered the defendant/buyer to pay the purchase price plus interest. The case was appealed to the Judicial Board of Debrecen ("Judicial Board"), where the Judicial Board considered whether the defendant/buyer's warranty claim was time-barred under Article 39(1) CISG, and whether the defendant/buyer's claim regarding defects of the goods due to their microbiological contamination was time-barred under Article 39(2) CISG. Before the Judicial Board, the defendant/buyer argued that the four-year period found in Article 8 of the Limitation Convention should apply. The plaintiff/seller responded that Italy was not a State party to the Limitation Convention and, thus, the Convention was inapplicable. Instead, the plaintiff/seller argued for the application of Article 39 CISG. The Judicial Board agreed with the plaintiff/seller and held that this situation was governed by the CISG provisions related to notice of defective goods.

In its decision, the Judicial Board referred to Article 27 CISG pursuant to which if any notice, request or other communication is given or made by a party in accordance with Part III of the CISG and by means appropriate in the circumstances, a delay or error in the transmission of the communication or its failure to arrive does not deprive that party of the right to rely on the communication. It was undisputed that the defendant/buyer communicated absorbency problems to the plaintiff/seller as early as 2 December 2003, and the Judicial Board held that this communication was valid under Article 27 CISG and, as a result, the defendant/buyer did not lose the right to refer to quality defects of the goods, despite its failure to transmit the examination reports and return the goods. The Judicial Board also found that the County Court had ignored an expert opinion stating that an examination of the remaining unopened carton could bring an independent result. Therefore, the Judicial Board annulled the County Court's judgment and ordered a new trial. The Judicial Board instructed the County Court on remand to order an examination of the unopened carton, and to decide accordingly on the plaintiff/seller's claim and the defendant/buyer's counterclaim to set off the damages caused by the quality defects (Decision No. Gf. III. 30.0009/2007/5).

During the second trial in the County Court, the defendant/buyer maintained its warranty claims and continued to argue that its claim regarding defect of the goods was not time-barred because it had been filed within the 4-year limitation period found in Article 8 of the Limitation Convention. It supported its claims regarding the defect of the goods with the evidence from the unopened carton. The plaintiff/seller, on the other hand, argued that the unopened carton did not come from the disputed delivery. It also reiterated its argument that the Limitation Convention was not applicable because Italy was not a State party to the treaty.

The County Court rejected the plaintiff/seller's argument concerning Italy's status under the Limitation Convention since the parties had agreed upon Hungarian law as the applicable law. Thus, the County Court applied the CISG and the Limitation Convention as part of Hungarian law, but it did not use the four-year Limitation Convention period because of the Judicial Board's prior holding on the subject. As instructed, the County Court examined the evidence and held that the defendant/buyer could not prove that the goods presented by the defendant/buyer

came from the disputed delivery. Furthermore, it found that the defendant/buyer lost the right to rely on lack of conformity of the goods because it had sent the notice of lack of conformity out of the two-year deadline set forth in CISG Article 39(2). Consequently, the County Court rejected the defendant/buyer's warranty claim and ordered the defendant/buyer to pay the purchase price (CISG Article 53) and interest (CISG Article 78).

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

Case 1057: CISG 1(1)(a); 6; 38; 39; 49; 74; 81; 82; 84
Austria: Supreme Court
8 Ob 125/08b
2 April 2009
Original in German
Published in German in JBL 2009/647

Abstract prepared by Petra Peer, National Correspondent

In August 2002, a German buyer ordered a boiler plus several applications (in particular a pellet heating system) from an Austrian seller. The buyer entered the contract as one of its customers needed a heating system for two new buildings. The sellers' standard terms of purchase, accepted by the buyer, contained (amongst others) provisions on notification of lack of conformity (within one week after delivery), damages, contractual warranty and jurisdiction. According to the provisions all claims were subject "exclusively to Austrian law, except the rules on the conflict of laws, and the CISG"

The boiler did not work properly from the very beginning, and the buyer's customer informed the buyer. However, this latter failed to give notice to the seller. The seller was informed, by the buyer's customer, only in mid-February 2003. Despite several efforts to remedy the defects, the boiler still did not work properly. The seller thus offered to take the boiler back and reimburse the buyer's customer, while deducting a certain amount. The buyer's customer disagreed with the deduction and (in March 2003) sent a letter to the buyer declaring the contract avoided. The buyer sold its customer a new heating system.

In August 2005 the buyer brought action against the seller claiming avoidance of the contract and repayment of the purchase price as well as compensation for the installation of a new heating system. It also requested the court to declare the seller's liability for the dismantling of the boiler and the respective equipment. The Court of First Instance dismissed the claim. Pursuant to Austrian law, the court declared that the buyer had failed to give timely notice of the lack of conformity.

The Court of Appeal partially reversed the decision of the lower court. Applying the CISG, (article 1(1)(a)), the Court noted that the buyer had failed to comply with articles 38 and 39 of the Convention. However, the Court stated that the seller's attempts to repair the system several times, following the notice of the buyer's customer, could be considered as a waiver of the timely notice of non-conformity. Those attempts could not be considered the result of a mere warranty. Therefore, the seller had committed a fundamental breach of contract and the contract could be

avoided pursuant to article 49 CISG, as actually done by the buyer. However, the buyer had failed to properly store the goods (Article 81 CISG), as it was obliged to return them in the same conditions they had been received (article 82 CISG). It also had to account for the benefits derived from the goods (Article 84 CISG). For these reasons, the seller was entitled to damages (Article 74 ff. CISG).

The Supreme Court considered the question of applicability of the CISG, pursuant to article 6 of the Convention. The Court noted the seller's argument that there was a typing error in the standard terms of contract. As a matter of fact, there should have been no comma between the words "and" and "CISG" in the choice of law clause. According to the Court, in matters of exclusion of the Convention, it is decisive whether the parties have relied on the non-uniform law of a State. Mere reference to the national law of a Contracting State does not constitute an exclusion of the CISG. In the absence of clauses stating the contrary — in particular a reference to the substantive law — the application of Austrian law includes the Convention. In the case considered, however, it could be assumed that the exclusion of application of both private international law and CISG was intended. This could be inferred from the fact that both parties had referred to § 377 commercial code (HGB) and thus to substantive Austrian law. The Court noted that the question of the application of the CISG was irrelevant, as the Court of Appeal had decided that that the notice of lack of conformity was belated both pursuant to the CISG and the Austrian Commercial Code.

Case 1058: CISG 39(2), 40
Austria: Supreme Court
9 Ob 75/07 f
19 December 2007
Original in German
Published: ÖJZ 2008,367

Abstract prepared by Martin Adensamer, National Correspondent

In the context of a long lasting business relationship, the defendant (an Austrian seller) delivered multilayer glass to the Swiss subsidiaries of the buyer (a German company), which would further process it to insulating glass. When defects emerged during the production of the insulating glass (so called wormholes), the buyer failed to give notice within two years after delivery. Eventually the buyer/plaintiff, to which the subsidiaries had assigned their claims, brought action against the seller claiming damages, since the subsidiaries had to remove and replace the defective glass panes on behalf of the final buyers.

The Court of First Instance, applying the CISG, rejected the claim stating that the damages were the result of the working processes applied by the subsidiaries. Furthermore, it noted that the subsidiaries had failed to give timely notice of the defects, and for that reason damages could not be claimed.

The Court of Appeal held that according to article 39 (2) CISG a buyer loses its right to rely on the lack of conformity if it does not give proper notice to the seller, at the latest within two years from the date when the goods were actually handed over to the buyer. However, a further appeal on this point was admissible as the Supreme Court had not yet decided whether the time-limit of article 39(2) was

applicable to claims for damages based on contractual relationships and hidden defects.

The Supreme Court found that the buyer had failed to prove that the seller knew or could have not been unaware of the circumstances leading to the defects of the glass. Article 40 CISG was thus not applicable and the seller was entitled to rely on Article 39 CISG. The Supreme Court, making reference to the leading doctrine, held that a buyer cannot rely on lack of conformity of the goods if it does not give notice within two years, even when the defects become evident after two years. The question is deliberately settled in the Convention in this way and cannot be solved by recourse to domestic law. Incidentally, the Court noted that the parties can agree to extend or shorten the two-year period of article 39 CISG or to exclude its application.

The Court dismissed the buyer's appeal.

Case 1059: CISG 6
Austria: Supreme Court
2 Ob 95/06v
4 July 2007
Original in German
Published in German in IHR 6/2007, 237-240

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A German buyer and an Austrian seller entered into a contract for the sale of a brand new automobile with certain supplementary equipment. As known by the seller, the buyer needed the automobile primarily for professional use. The seller's standard terms of contract, accepted by the buyer, contained provisions on contractual warranty. According to them the seller granted any buyer acting as a consumer, pursuant to the Consumer Protection Act, a warranty under the relevant statutory provisions, whereas in respect to businessmen the warranty provisions of the Austrian Commercial Code would apply. Due to repeated major defects, failed repairs and the seller's refusal to replace the automobile, the buyer brought action against the seller claiming the purchase price and damages.

The Supreme Court held that the CISG did not apply to the case, at least with regard to warranty provisions. This decision reversed the Court of Appeal's statement on the applicability of the Convention. The Supreme Court considered that, although the parties had not expressly opted out of the Convention, the reference to a particular law such as the Austrian Consumer Protection Act and the Austrian Commercial Code was to be regarded as an implied exclusion of the CISG.