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Contents

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Introduction

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

Case 1077: [CISG 1; 9; 19]
France: Court of Cassation, Commercial Division
22 March 2011
Appeal No. 10-16.993
Société Galperti Tech and another v. Company RKS
Original in French
Published online in *Bulletin numérique des arrêts publiés des chambres civiles* www.courdecassation.fr/publications_cour_26/arrets_publies_2986/chambre_commerciale_financiere_economique_3172/2011_3709/mars_3791/309_22_19545.html
- Légifrance
www.legifrance.gouv.fr/affichJuriJudi.do?oldAction=rechJuriJudi&idTexte=JURITEXT000023765852&fastReqId=227039018&fastPos=1
- CISG-France www.cisg-france.org/
- Tijdschrift@ipr.be, No. 1/2011, pp. 62-65 (www.dipr.be/tijdschrift/tijdschrift38.pdf)

The company RKS, based in France, concluded a contract with the company Officine Nicola Galperti e Figlio SpA to supply raw materials and a subcontract with the company Galperti Tech, both based in Italy.

Owing to a number of defects, RKS issued a writ against Galperti Tech before the Auxerre Commercial Court for termination of contract, payment of indemnity and warranty against demands that might be made by Officine Nicola Galperti.

The two Italian companies, however, argued that the Commercial Court did not have jurisdiction to hear the case, on the grounds that the sellers were not required to deliver the goods, given the use of the International Commercial term (Incoterm) “ex works” on the delivery order. Under Council Regulation (EC) No. 44/2001 of 22 December 2000 on jurisdiction and the recognition and enforcement of judgements in civil and commercial matters (hereinafter Brussels 1 Regulation), article 5, paragraph 1 (b), therefore, the competent courts should be those in the place where the Italian companies were based, given that the goods had to be collected rather than delivered, and not those of the headquarters of the French company. The Italian companies therefore argued that the Auxerre Commercial Court did not have jurisdiction to try the case.

The court of appeal had held that the Auxerre Commercial Court had jurisdiction to hear the case, on the grounds that the vendor had a duty of delivery distinct from that of making the goods available. The fact that the delivery order contained a reference not only to “ex works” but also to “delivery address” meant that the parties had intended to override the duty of delivery whereby the vendor was required simply to place the goods at the disposal of the buyer. The court of appeal had therefore concluded, on the basis of the reference to a delivery order, that the vendors had a duty of delivery in France.

Galperti Tech and Officine Nicola Galperti e Figlio applied for judicial review. The Court of Cassation made no reference either to the United Nations Convention on Contracts for the International Sale of Goods or to the Incoterm “ex works” and merely noted that, according to the appeal judgement, the place of delivery of the goods under article 5, paragraph 1 (b), of the Brussels 1 Regulation was clear from a

special provision of the sales contract between the parties, which specified the place of delivery as Avallon. It thus followed that the Auxerre Commercial Court was competent under article 5, paragraph 1 (b), of the Regulation. The Court of Cassation rejected the application against the judgement of the Paris Court of Appeal, which had rightly acknowledged the competence of the Auxerre Commercial Court.

Case 1078: CISG [1]
France: Court of Cassation, Commercial Division
11 May 2010
Appeal No. 08-21266
Ultimate Solution Company v. Union International Oil and Gaz Material Pictures
Original in French
Published in French: Légifrance: www.legifrance.gouv.fr; CISG-France Database: www.cisg-france.org; CISG-online Database: CISG-online.ch, No. 2184
German translation: *Internationales Handelsrecht (IHR)* 2011, 107
Commentary: Marie Tilche, *Bulletin des Transports et de la Logistique* 2010, 338; Isabelle Bon-Garcin, *Semaine Juridique*, édition Entreprise (JCP E) 2010, 1772; Claude Witz/Martin Hlawon, *Internationales Handelsrecht (IHR)* 2011, p. 94, 102

Summary by Claude Witz, National Correspondent and Martin Hlawon

A Jordanian company U sold 60 armoured vehicles to a Swiss company T, with the first five vehicles due to be delivered at Baghdad Airport on 31 December 2004. Delivery at the time agreed was made a condition of the validity of a rental contract relating to 75 other vehicles. Company U applied to a manufacturer of armoured vehicles, the French company UI, to buy its first five vehicles. It was that contract that was the subject of the present case. On conclusion of the contract, the seller, UI, drew up a pro forma invoice with the words “Total C&F [cost and freight] Baghdad Airport”, stating an overall price, made up of an “ex works” price and air transport costs. Company U added to this pro forma invoice the words “We accept your pro forma ex works excluding shipment”. Subsequently, company UI ordered an aircraft and requested payment. Having been paid, it transported the five vehicles from its Austrian workshops by land as far as Budapest Airport, where they were to be loaded on to an aircraft headed for Baghdad. Owing to a technical fault, the transporter was unable to make the flight. The deadline for the duty of delivery by company U to company T was imminent, so company UI sought the services of another transporter, which undertook to take the vehicles by road to Istanbul, where they were to be loaded on to an aircraft to Baghdad via Amman. The vehicles never arrived in Baghdad, for reasons unknown.

Company U issued a writ against company UI seeking judgement against it for avoidance of the sale, reimbursement of the costs and damages, invoking CISG. Stating that “the parties did not use the Incoterm cost and freight simply to determine who was responsible for transport costs and organizational costs ... and that in consequence of the failure to ship the goods the transfer of risks to the purchaser could not have taken place”, the Lyon Appeals Court had upheld the ruling of the Saint-Etienne Commercial Court, which had declared the sale avoided and had ordered company UI to reimburse the costs. It had also awarded company U part of the sum that it claimed in damages.

The Court of Cassation rejected the appeal of company UI, on the grounds that "the loading on to an aircraft, which constituted the main form of transport, did not take place" and that therefore "the Appeal Court was correct in holding that the failure to load the goods meant that the transfer of risks to the purchaser could not have taken place". The Court of Cassation thus ruled without reference to either CISG or Incoterms.

Case 1079: CISG [1; 2;] 74
France: Court of Cassation, First Civil Division
1 December 2010
Appeal No. 09-13303
Mr. Peter X and Ms. Julie Y, wife of Mr. X, v. Fountaine Pajot S.A.
Original in French
Published in French: www.legifrance.gouv.fr; CISG-France: www.cisg-france.org; Cour de cassation: www.courdecassation.fr
Commentary: François-Xavier Licari, *Recueil Dalloz (D.)* 2011, p. 423; Jennifer Juvénal, *Semaine juridique*, édition générale (JCP G) 2011, 140; Bertrand Fages, *Revue trimestrielle de droit civil (RTD civ.)*, 2011, p. 122; Hélène Gaudemet-Tallon, *Revue critique de droit international privé (Rev. Crit. DIP)*, 2011, p. 93; Mustapha Mekki, *La Gazette du Palais (Gaz. Pal.)*, 4 and 5 May 2011, p. 21

Summary by Claude Witz, National Correspondent and Corinne Chatelain

A husband and wife, Mr. X and Ms. Y, of United States nationality, had ordered a catamaran for their personal use in July 1999 from the French company Fountaine Pajot. The boat had been built in La Rochelle but been damaged in a storm several months before delivery. The company Fountaine Pajot had undertaken repairs but concealed this fact from the buyers. Mr. X and Ms. Y had noted defects soon after delivery and sued the seller before the Superior Court of California.

Mr. X and Ms. Y sought the enforcement in France of a decision handed down by the Californian court on 26 February 2003 ordering Fountaine Pajot to pay them US$ 1,391,650 damages in compensation, $1,460,000 in punitive damages and $402,084 for legal fees.

The Poitiers Appeal Court, in its judgement of 26 February 2009, had confirmed the ruling of the Rochefort Court of Major Jurisdiction, which had rejected the request for enforcement of the Californian decision. The Poitiers Appeal Court had held that the Californian decision ran counter to international public policy, since the amount of punitive damages was manifestly disproportionate to the price of the goods and the sum of compensatory damages for loss suffered. The Appeal Court had invoked both article 74 of CISG, according to which damages should consist of a sum equal to the loss, including loss of profit, and French domestic law, under which the purpose of third-party liability is to restore as closely as possible the equilibrium upset by the loss and to put the victim back in the position that he or she would have been in if the injurious act had not occurred, as well as honouring the general principle of prohibiting unjustified enrichment.

In the appeal, the principal drew attention to the fact that the Poitiers Appeal Court had breached CISG, in that the Convention did not apply to the sale of boats or the sale of goods purchased for personal or family use.

The Court of Cassation did not address this part of the argument and thus declined to rectify the error committed by the Poitiers Appeal Court concerning the applicability of CISG. The Court ruled in a general way on the extent to which foreign sentences of punitive damages conformed with public policy. In the view of the Court of Cassation, "in principle, a sentence of punitive damages may not, in itself, be contrary to public policy, but it becomes so when the sum awarded is disproportionate to the harm suffered or to the obligor's breach of its contractual obligations". The Court of Cassation rejected the appeal, on the grounds that the Poitiers Appeal Court had been right in concluding "that the amount of damages was manifestly disproportionate to the harm suffered and the breach of contractual obligations and that therefore the ruling by the foreign court could not be recognized in France".

Case 1080: CISG 25; 35; 46 (2)
Poland: Supreme Court
V CSK 456/06
Spoldzielnia Pracy "A" v. GmbH & Co. KG
11 May 2007

Abstract prepared by Rohan Batra and Nimrat Kaur

A Polish seller and a German buyer entered into a contract for the sale of leather for the manufacturing of military shoes for the German Army. The leather was delivered directly to the third party manufacturer in Germany, but the German buyer did not inspect the goods after they were delivered to the manufacturer. Subsequently, the German Federal Bureau for Technical Defense and Supply found that the goods did not conform to the relevant specifications and the buyer notified the seller about the non-conformity. Meanwhile, the German Army returned all manufactured shoe pairs. An additional period of three days was given to deliver substitute goods but the seller refused. The buyer sent a declaration for the avoidance of the contract and the seller sued the buyer for the payment of the purchase price.

The Polish Supreme Court stated that there should not be any distinction between failure to perform and other breaches of the contract. Hence, delivery of non-conforming goods is a breach of contract as per Article 35 CISG. However, it was noted that this non-conformity does not permit a demand for delivery of substitute goods as per Article 46 (2) of the CISG unless there is a fundamental breach of contract under Article 25 CISG.

The Court held, referring to the principle of good faith, the CISG Advisory Council Opinion No. 5, and a ruling of the Austrian Supreme Court, that as a general rule a buyer may withhold payment as a result of non-conformity from Articles 71, 81 (2), 85 and 86 (2) CISG. Further referring to the good faith principle, the Court held that the buyer is not allowed to first request delivery and then purchase substitute good without avoiding the contract. Overall, the Court stated that the buyer, who demanded substitute delivery under Article 46, also had the right to withhold the payment of the price until such time as the seller performed its obligations in conformity with the contract.

Case 1081: CISG 1 (1)(a); 7 (2); 100 (2); Limitation Convention, 1980 (amended text) 3.1 (a); 3.1 (b)
Poland: Supreme Court
III CK 80/02
"O.O." AG in M. v. Leszek W. & Zbigniew W.
19 December 2003

Abstract prepared by Rohan Batra and Nimrat Kaur

The defendants (Polish buyers) and the Italian seller concluded a contract for purchasing door components to produce harmonica-type doors. The seller delivered the goods to the buyers and issued four invoices. Thereafter, the seller assigned the debt of the defendants in the amount of 93,841,007 liras to the plaintiff, a Swiss company. The assignment contract stated that the contract was governed by "Swiss property law". By a letter addressed to the plaintiff, the defendants acknowledged the debt to the extent of 95,270.08 zlotych (the currency of the debt had been changed in the meantime) and disputed the rest. Yet, the defendants only deposited 9,600 zlotych with the plaintiff and made no further payments.

The plaintiff brought a suit against the defendants for the payment of 85,670.08 zlotych with statutory interest. In reply, the defendants claimed that the plaintiff was not entitled to the payment of the debt since the limitation period had expired and they were entitled to set off the claim. The Circuit Court did not agree that the limitation period had expired. Referring to article 13 of the Convention, the Court stated that the "period ceases to run when the creditor performs any act which under the law of the court where the proceedings are instituted, is recognized as commencing judicial proceedings against the debtor, and according to Article 20 of the Convention, when the debtor acknowledges the obligation in writing". In the case at hand, the plaintiff had filed the complaint before the limitation period set forth in Article 8 Limitation Convention had passed.

The defendant's appeal was rejected by the Appellate Court substantially upholding the decision of the Circuit Court.

The Polish Supreme Court made the following determinations. First, the Court held that the CISG was applicable to the sales contract as the requirements of Articles 1 (1)(a) and 100 (2) CISG were met. Secondly, with respect to the assignment of debt, the Court noted that even though the CISG was applicable to the sales contract, it did not regulate the assignment of debt. Therefore, the applicable law must be determined in accordance with Article 7 (2) CISG, i.e. in conformity with Polish Private International Law. According to Polish Private International Law, Italian law was applicable. The Court further explained that the clause designating Swiss law insofar it indicated Swiss civil substantive law and not Swiss property law should be respected in relation to the assignment contract as a prerequisite to the assignment of a debt governed by Italian law. Hence, the validity of the assignment contract should be decided according to Swiss law and issues of interest shall be decided based on the law applicable to the obligation. Thirdly, the court observed that the Limitation Convention was not applicable in accordance with Articles 3.1 (a) or 3.1 (b) since Italy was not a party to the Convention.

Case 1082: CISG 53; 77
Ukraine: Tribunal of International Commercial Arbitration at the Ukraine Chamber of Commerce and Trade
27 October 2004
Published: http://cisgw3.law.pace.edu/cases/041027u5.html

Abstract prepared by Guillermo Coronado

The claimant, a Ukrainian factory, agreed to sell lavatory paper to the first respondent, a Hungarian business firm. Payment was to be made by a different entity, the second respondent, a different Hungarian firm. The claimant delivered the goods to the Hungarian business firm which received them but did not pay. At issue was the payment of the price, and damages connected with a fine levied by Ukrainian taxation authorities relating to late return of currency from abroad.

The Arbitral Tribunal held that the sales contract was governed by Ukrainian law, and that the claimant was entitled to receive the purchase price from the payer (Article 53 CISG). However, in relation to the damages claim, Article 77 CISG applied and imposed upon the claimant the obligation to mitigate its losses. Under Ukrainian law, this would have occurred if the claimant had submitted its claim within 90 days from the delivery of the goods, under which circumstances the fine would cease to exist. This did not occur, and further, the claimant had not proven the payment of the fine. In these circumstances, the claim for damages was rejected.

Case 1083: CISG 1 (1)(b); 25; 29 (2); 45
Ukraine: Tribunal of International Commercial Arbitration at the Ukraine Chamber of Commerce and Trade
25 November 2002
Published: http://cisgw3.law.pace.edu/cases/021125u5.html

Abstract prepared by Luiz Gustavo Meira Moser

In October 2001, an English company (the seller) and an American firm (the buyer) concluded a contract according to which the seller undertook to deliver goods on the conditions CIF (Cost Insurance, Freight, Incoterms 2000) and the buyer undertook to accept and pay for the goods pursuant to additional agreements which set forth the quantity, cost for the unit and sum of the contract. These additional agreements were integral parts of the contract, though they were not signed by the parties.

The International Commercial Arbitral Tribunal at the Ukrainian Chamber of Commerce and Trade dealt with the action brought by the buyer for the recovery of the monetary loss and avoidance of the contract.

Section 9 of the contract provided that in settling disputes submitted to the Tribunal, the arbitrators shall be guided by the provisions of the contract and by Ukrainian substantive law. By virtue of Article 1 (1)(b) CISG the Convention was applicable.

The contract conditions required written alterations and additions to the contract in the form of a single document signed by both parties, and permitted signature of documents received via fax. This was held not to contradict Article 29 (2) CISG since it provides that a contract in writing, which contains a provision requiring any modification or termination by agreement to be in writing, may not be otherwise modified or terminated by agreement.

The Tribunal found that, among others, the seller's statements on the parties' agreement on the total amount of the contract and on the reduction of the sum of the contract were not confirmed by the facts of the case. Further, the Tribunal found that the seller had breached its obligations given that it had not drawn an invoice for payment for the goods and had unilaterally altered the conditions of the contract. In accordance with Articles 25 and 45 CISG, the Tribunal upheld the buyer's claim for avoidance of the contract and recovery of losses from the seller. The Tribunal also ordered the seller to reimburse the buyer the arbitration expenses.

Case 1084: CISG 80
Ukraine: Tribunal of International Commercial Arbitration at the Ukraine Chamber of Commerce and Trade
21 June 2002
Published: http://cisgw3.law.pace.edu/cases/020621u5.html

Abstract prepared by Arpan Kumar Gupta

The seller agreed to deliver to the buyer equipment of the price of 2,500,000 Russian rubles. The buyer was required to pay a 50 per cent prepayment within two months from the moment of signing of the contract; 25 per cent within five days from the day of manufacturing of the equipment; and 25 per cent within five days from the signing of the certificate of acceptance. The buyer paid 1,000,000 Russian rubles as a prepayment and the seller shipped equipment worth 1,350,000 Russian rubles to the buyer. The goods were found to be defective and this was reported to the seller by the buyer. The goods were subsequently partially repaired. The buyer did not pay any further amounts.

The seller claimed a penalty for the buyer's delay in payment. The Arbitration Tribunal refused the claim under Article 80 CISG. The Tribunal applied the CISG as it had been ratified by both parties' States. According to Article 80 CISG "a party may not rely on a failure of the other party to perform, to the extent that such failure was caused by the first party's act or omission". The Tribunal found the shortage and malfunctions in the shipped goods were evidence of such omissions of the seller and thus no penalty for delay of the buyer's payment was awarded.

Case 1085: CISG 53; 67 (1); 71; 78; 79
Court of Arbitration of the International Chamber of Commerce
Arbitration Case No. 8790
2000
Available in English: http://cisgw3.law.pace.edu/cases/008790i1.html

Abstract prepared by Lorraine Isabelle de Germiny

The parties concluded a contract for the purchase of a processed food product. The buyer was to supply the seller with various equipment and materials and the seller was to deliver the buyer 440 tons of the product in periodic shipments. The price was agreed upon for the first four months of the contract and was to be agreed upon for the rest of the year. A dispute arose when the seller was unable to continue deliveries, due to drought and a diminution in the supply of needed raw materials. The buyer failed to pay and also argued that the products delivered were of poor quality.

Two versions of the contract were signed: one in Russian and one in both Russian and English. The Russian version contained an ICC arbitration clause, whereas the bilingual version did not. The buyer contested the Arbitration Tribunal's jurisdiction, arguing first that there was no original contract on which the arbitration could be based and second that the arbitration clause was to be interpreted as meaning that the parties intended to submit their disputes to common tribunals, and only if this were not possible, then to ICC arbitration.

Although the parties were only able to supply copies of these contracts, the sole arbitrator found them to be true copies of the originals; there was no evidence that the copy of the Russian version was a forgery. The arbitrator found that the bilingual version was merely a summarized version of the Russian language contract, as it contained only certain provisions relating to the economic aspects of the agreement and not certain legal provisions, such as the arbitration and force majeure clauses. The arbitrator concluded that the bilingual version did not deprive the arbitration clause contained in the Russian text of its validity.

Next, the arbitrator examined the disputed language of the arbitration clause: "If the parties fail to reach a settlement, any dispute or controversy *without recourse to common courts* shall be settled by the International Court of Arbitration of the International Chamber of Commerce in accordance with the Rules of Procedure thereof, awards of which shall be final and binding upon both parties". The arbitrator held that, contrary to the buyer's submissions, the Russian text excluded the competence of the common courts. It was noted that the heading above the arbitration clause was "Arbitration", and thus to read the clause as would the buyer would undermine the parties' intentions. In sum, the Tribunal held that the parties had validly agreed to arbitration under the ICC Rules of Arbitration.

As to the substance of the dispute, the arbitrator applying the CISG and Incoterms, held that the seller was validly entitled to suspend deliveries, due to force majeure. In support of this opinion, it was noted that the seller had provided the buyer with a certificate from its local Chamber of Commerce stating that climatic conditions beyond the seller's control prevented it from fulfilling its obligations under the contract. The contractual force majeure clause specifically provided that evidence of force majeure would be brought through such certificates. The buyer was therefore not justified in its non-payment of the purchase price of the 90 tons which were delivered.

As to the buyer's claims relating to the quality of the goods, because it provided no evidence from an independent inspection of the goods indicating their poor quality and because it did not seem to have inspected the goods before delivery as recommended by the trade practice, the buyer was not justified in failing to meet its obligations under Article 53 CISG. In light of an earlier agreement between the parties, the arbitrator held that the seller was entitled to receive payment of the purchase price for 90 tons, less half of the repacking costs claimed by the buyer. Under Article 78 CISG, the seller was also entitled to receive delay interest.

Case 1086: CISG 3; 8; 9; 38; 39 (1); 40 [45; 46; 47; 48; 49; 50; 51; 52; 75; 76; 77]
Court of Arbitration of the International Chamber of Commerce
Arbitration Case No. 9083
August 1999
Published in English: ICC International Court of Arbitration Bulletin, Vol. 11/No. 2 (Fall 2000) 78-82; also available at <http://cisgw3.law.pace.edu/cases/999083i1.html; www.cisg-online.ch/cisg/urteile/706.htm>

Abstract prepared by Jean-Pierre Michaelle

The claimant (the seller) entered into contract with the respondent (the buyer) to print and supply books to be resold to supermarkets and cut-price bookshops. The seller delivered the books in four instalments. About thirty-three days after the fourth instalment the buyer informed the seller that it would not pay, alleging discrepancies between the quantities delivered and those agreed upon and delay in the delivery of the books and the restitution of the films used for printing. The buyer argued that it was contractually entitled to compensation from the seller, which should be used to offset against the seller's claim. The seller brought suit before the Arbitral Tribunal sitting in Vienna, which determined that Austrian law was to be applied in accordance with the printing contract.

The Tribunal held the CISG applicable to the dispute as the parties had chosen Austrian law to govern the contract and the CISG is part of Austria's legal system. The printing contract was considered a sales contract as it related to goods to be produced and delivered by the seller (Article 3).

On the substance of the dispute, the tribunal noted that pursuant to Article 38 CISG, the buyer has a duty to examine the goods, or cause them to be examined within as short a time as practicable under the circumstances. Pursuant to Article 39 CISG, the buyer also has a duty to provide notice to the seller specifying the nature of the lack of conformity within a reasonable time after he has discovered or ought to have discovered the defect. Under the circumstance, the tribunal held that the buyer did not comply with either Articles 38 or 39 CISG nor did it offer any evidence to establish a reasonable excuse pursuant to Article 44. Thus the buyer was not able to avail himself of the remedies of article 45 CISG. The tribunal commented on the Supreme Court of Austria's decision that fourteen days is a reasonable time for an overall inspection and complaint when there are no special circumstances in support of a reduction or extension. In this case, the buyer did not notify the seller of the discrepancies in quantity until 3 July 1995, more than a month after the last instalment, 31 May 1995. No special circumstances or reasonable excuses were alleged by the buyer.

The Tribunal also considered whether the buyer could benefit from article 40 CISG, which prevents the seller from relying on Articles 38 and 39 where the lack of conformity relates to facts of which the seller knew or could not have been unaware and did not disclose to the buyer. Here, for the two deliveries of March 1995 and 17 April 1995, the seller disclosed the shortages in its accompanying invoices; thus, Article 40 was inapplicable.

The Tribunal also considered whether the shipment of 27 April 1995, in which the seller made up for the deficiencies in the two prior shipments by sending more than the contracted quantity would allow the buyer to avail itself of Article 40. The issue

presented was whether delivery shortages in the small proportions as here, which are made up for in later deliveries within the overall delivery period, may be deemed not to be in conformity with the contract. The Tribunal denied the non-conformity of such a temporary shortage because the contract did not contain provisions for quantity discrepancies. If the buyer wanted a literal application of the contract then it should have informed the seller of its objection upon the first insufficient or excessive delivery. Since no such complaints were made, the seller was reasonable in assuming that it had complied with the contract and the buyer has no claims for deficiency or delay. The tribunal also stated that trading practices must be taken into consideration when interpreting the contract. The tribunal noted that up to 5 per cent of discrepancies are to be tolerated by the contractual partners especially when the difference is made up within the overall delivery time by subsequent deliveries.