United Nations A/CN.9/SER.C/ABSTRACTS/118

General Assembly

Distr.: General
22 May 2012

Original: English

United Nations Commission on International Trade Law

CASE LAW ON UNCITRAL TEXTS
(CLOUT)

Contents

V.12-53712 (E) 220512 230512

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.

The abstracts are prepared by National Correspondents designated by their Governments, or by individual contributors; exceptionally they might be prepared by the UNCITRAL Secretariat itself. It should be noted that neither the National Correspondents nor anyone else directly or indirectly involved in the operation of the system assumes any responsibility for any error or omission or other deficiency.

———————

Printed in Austria

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

Case 1148: CISG 19(3); 26; 47; 48; [75]; 80
Slovenia: Vrhovno sodišče (Supreme Court)
III Ips 90/2008
Višje sodišče v Ljubljani (High Court of Ljubljana): VSL sodba I Cpg 1100/2005
13 September 2011
Original in Slovenian
Published in Slovenian:
www.sodisce.si/znanje/sodna_praksa/vrhovno_sodisce_rs/2010040815258125/

The parties (both with places of business in CISG contracting states) entered into a contract for sale of water and oil pumps. Regarding the payment, they agreed that the buyer (plaintiff) was to open irrevocable letters of credit (L/Cs) to ensure payment for the pumps. After the buyer opened the L/Cs, the seller protested stating that they had not been filled out correctly. The seller then refused to deliver the goods unless they were paid for in advance. The buyer asked the seller to provide the text of the conditions for the L/Cs, which the seller failed to do. The buyer then purchased equivalent goods elsewhere and brought a claim against the seller for payment of the difference between the substitute transaction price and the contract price.

The court of first instance ruled for the buyer applying the CISG and awarding the damages sought. The seller appealed, claiming that the contract had not been avoided and that the awarded damages were inappropriate.

The appellate court dealt first with the question of whether the contract had been amended in a way that required the buyer to pay the price for the goods in advance. It examined the formation of the contract and stated that, under article 19(3) CISG, additional or different terms relating to the payment are considered to materially alter the terms of the offer. Consequently, it ruled that in situations where the contract has already been concluded such amended payment terms would fundamentally change the contract conditions and that consent of the parties is, therefore, required for such amendments to be valid. Because the buyer did not agree to the changes to the terms of payment and insisted on the seller's performance according to the (original) contract, the court found that the contract had not been validly amended. According to the court, the seller was relying on a mode of payment that had not been agreed upon in the contract.

The court further found that, even if the letters of credit were to be considered as not in conformity with the contract, the seller cannot rely on this fact. Namely, under article 80 CISG, a party may not rely on a failure of the other party to perform when the failure was caused by the first party's act or omission. The seller should have, if it felt that the letters of credit did not conform to the contract, sent the buyer the relevant information required to open new letters of credit. Therefore, the court found that the seller was unable to rely on the buyer's failure to properly fulfil its obligations regarding the letters of credit because the seller had caused that failure.

Regarding the seller's claim that the contract had not been avoided, the court found that, when the seller does not perform his obligations in the additional period of

time allowed for under article 47 or when the seller remedies the failure to perform his obligations after the date of delivery under article 48, the buyer retains a right to claim damages regardless of whether the contract has been avoided. Here, because the buyer had fixed an additional period of time for delivery of the goods and because the seller had failed to perform its obligation, the court ruled that the buyer was entitled to recovery of damages that it had suffered due to the seller's breach of contract.

Based on all these circumstances, the appellate court confirmed the decision of the court of first instance. Thereupon, the seller filed a request for revision of the decision claiming incorrect application of law.

The Supreme Court granted the request and found that the appellate court had indeed misapplied the CISG. It stated that a claim for recovery of the difference between the contract price and the price in the substitute transaction can only be recovered when the contract has been avoided and that, under article 26 CISG, an avoidance is effective only if made by notice to the other party. Because it was not evident whether a notice had actually been given by one of the parties, the Supreme Court overturned the decisions of the appellate court and the court of first instance and remanded the case for retrial.

Case 1149: CISG 1(1)(a); 6
Slovenia: Višje sodišče v Celju (Celje High Court)
VSC sklep Cpg 33/2011
8 June 2011
Original in Slovenian
Published in Slovenian:
www.sodisce.si/znanje/sodna_praksa/visja_sodisca/2010040815262021/

On 20 June 2007, a Polish producer of paper bags entered into a long-term sales relationship with a Slovenian buyer concerning sales of specially produced paper bags. In the contract the parties agreed that the law governing the contract would be "the civil code and corresponding community regulations".

In January 2008, the buyer transferred its rights and obligations from the contract of sale to another buyer on which the new buyer and the seller subsequently agreed. After a month had passed, the seller invoiced the new buyer for the goods, costs of matrix preparation and costs of the transport of the goods. The buyer refused to pay the invoices, claiming not to be in a contract of sale relationship with the seller and that the original buyer had ordered the goods.

The court of first instance applied the CISG on the basis of article 1(1)(a), stating that both of the parties' places of business were in contracting States. It ruled in favour of the seller finding that the "new" buyer must pay the price for the goods. The defendant appealed.

The appellate court first dealt with the matter of personal subrogation and found that the rights and obligations were validly transferred from the original buyer to the new buyer under Slovenian law. Although the appellant had not appealed against the part of the decision regarding applicable law, the appellate court dealt with the question on its own initiative. It found that, because the contract of sale stipulated

that the "civil code and corresponding community regulations" should govern the contract, the court of first instance should have taken the will of the parties into consideration. Therefore, it should have determined whether the parties' intention was to exclude application of the CISG under article 6 CISG. The appellate Court stated that, because the court of first instance failed to clarify this question, it was not clear which civil code the parties had in mind.

Thus, the appellate court overturned the decision of the court of first instance and remanded the case for retrial indicating that, in reconsideration of the case, the court of first instance should fully and comprehensively clarify the question of applicable law.

Case 1150: CISG 75
Slovenia: Višje sodišče v Mariboru (Maribor High Court)
VSM sklep I Cpg 243/2010
21 October 2010
Original in Slovenian
Published in Slovenian:
www.sodisce.si/znanje/sodna_praksa/visja_sodisca/2010040815251596

In 1995, a seller from Austria sold printing machines to a buyer in Slovenia under multiple contracts of sale. The buyer paid only a part of the purchase price and, after they were delivered, started using the machines.

Because of the buyer's failure to pay the complete purchase price, the seller declared the contract avoided and, on 2 February 1998, claimed restitution of the machines in a different case before the court of the first instance. Thereupon, the buyer filed a counter-claim for restitution of the already paid part of the purchase price to which the seller lodged an objection stating that the amount of the already paid purchase price was at least as high as the damages it had suffered from value diminution of the machines resulting from the buyer's usage.

The court decided on the case in 2000 and confirmed the existence of all three claims and offset the buyer's claim for restitution of the already paid part of the purchase price with the seller's claim for damages resulting from value diminution.

In 2001, after having regained the machines, which were still located at the buyer's premises, the seller sold them to another Slovenian buyer for the price of 180,000.00 Deutsche Marks. Subsequently, it brought another action against the initial buyer claiming payment of the rest of the damages resulting from value diminution due to the buyer's use of the machines in the amount of 125,977.21 EUR. This was the difference in euros between the contractually agreed price for the goods and the price obtained in the substitute transaction. It also claimed statutory interest on this debt.

The court of first instance awarded the seller a part of the claimed damages in the amount of 96.992,48 EUR. It ordered the seller to reimburse the buyer for the costs of litigation. Both of the parties appealed.

On appeal, the buyer asserted that the court of first instance had failed to correctly determine whether the seller had fulfilled the conditions stipulated by

article 75 CISG as well as whether the price in the substitute transaction actually represented the market value of the goods.

The appellate court applied the CISG.

Regarding the seller's claim for the difference between the contract price and the price obtained in the substitute transaction, the court first sought to determine whether the conditions from article 75 CISG had been fulfilled, i.e. whether the seller, after having avoided the contract, had sold the goods within a reasonable time and in a reasonable manner. The buyer asserted that the seller had not resold the goods in a reasonable manner because it had obtained a price below the market value. The seller, on the other hand, maintained that, being a foreign company unfamiliar with the circumstances on the Slovenian market, it had considered the resale price to be favourable. In fact, it had arrived at that price after negotiating for a 30 per cent increase on the initial offer by the new buyer.

The appellate court ruled that the reasonableness of the manner of the substitute sale of goods cannot be ascertained merely by determining the market price of the goods. It held that there is a common position in jurisprudence and scholarly writings which requires an examination as to whether the seller has acted with due diligence to be determined through consideration of the seller's subjective properties (e.g. foreign/domestic entity, knowledge of the market, business connections) as well as the objective properties of the goods (e.g. whether the goods are intended for specialized industries with limited markets or for general consumption).

As the court of first instance failed to clarify whether the seller had resold the goods at a reasonable manner in accordance with article 75 CISG, the appellate court reversed the decision and ordered a retrial.

Case 1151: CISG 1(1)(a); 16(1)
Slovenia: Višje sodišče v Ljubljani (Ljubljana High Court)
VSL sodba in sklep I Cpg 951/2006
9 April 2008
Original in Slovenian
Published in Slovenian:
www.sodisce.si/znanje/sodna_praksa/visja_sodisca/43709
Abstract prepared by Peter Rižnik

A Slovenian buyer sent an order for goods to an Austrian seller, who confirmed its acceptance of the offer on 8 October 1999. On 14 October 1999, the buyer sent a revocation of the offer to the seller, who immediately notified the buyer that a revocation was no longer possible because the goods had already been handed over to the carrier on 12 October. The buyer refused to pay the contract price claiming that it had revoked the offer before having been notified that the goods had been taken over by the freight forwarder.

The seller brought an action for payment of the price before the court of first instance. The court ruled that the buyer's revocation statement had no legal consequences because the seller had already performed its obligations under the contract in their entirety.

The buyer appealed.

The appellate court applied the CISG under article 1(1)(a) as the parties had their places of business in contracting States.

The appellate court pointed the parties' attention to the provision of article 16(1) CISG under which an offer may be revoked if the revocation reaches the offeree before it has dispatched an acceptance. The court found that because the seller had received the revocation statement on 14 October 1999 which was after it had dispatched its acceptance of the buyer's offer on 8 October 1999 and even after it had, by delivering the goods, fulfilled its obligations under the contract of sale in their entirety, the buyer's statement of revocation had no legal effect.

The appellate court therefore dismissed the buyer's appeal against the judgement of the court of first instance and upheld the decision in its entirety.

Case 1152: CISG 18(2); 18(3)
Slovenia: Višje sodišče v Kopru (Koper High Court)
VSK sodba I Cpg 125/2006
9 February 2007
Original in Slovenian
Published in Slovenian:
www.sodisce.si/znanje/sodna_praksa/visja_sodisca/40501

A Slovenian buyer and a foreign seller were involved in a long-term contractual relationship for the sale of fish and other seafood. On 23 March 2004, the buyer placed an order for a new shipment, but the seller did not deliver the goods.

After the seller brought a claim against the buyer for payment of an unrelated debt at the court of first instance, the buyer filed a counter-claim where it claimed that the seller had breached the contract by not delivering the goods and claimed damages, including lost profit. The seller responded that the buyer's document of 23 March 2004 did not constitute an offer and was merely to be regarded as a price query. This position was confirmed by the court of first instance.

The appellate court determined that the CISG applied to the dispute. It directed the parties' attention to article 18(3) under which, by virtue of the offer or as a result of practices which the parties have established between themselves or of usage, the offeree may indicate assent by performing an act, such as one relating to the dispatch of the goods or payment of the price, without notice to the offeror. The acceptance is effective at the moment the act is performed, provided that the act is performed within the period of time laid down in article 18(2). Based on this provision, the court found that, even if the document of 23 March 2004 could be considered as an offer, the contract was not validly concluded because of the fact that the seller had not reacted and had not delivered the goods — i.e., no assent was given by the seller to conclude the contract.

The appellate court, therefore, rejected the appeal and upheld the decision of the court of first instance.

Case 1153: CISG 1(1)(a); 7(2); 25; 40; 49(1)(a); 78; 81(2); 88
Slovenia: Višje sodišče v Ljubljani (Ljubljana High Court)
VSL sodba I Cpg 1305/2003
14 December 2005
Original in Slovenian
Published in Slovenian:
www.sodisce.si/znanje/sodna_praksa/visja_sodisca/36787/

A German buyer (plaintiff) and a Slovenian seller (defendant) were in a long-term contractual relationship for the sale of doors and door frames, which were being produced by the seller for the buyer and then sold upon individual orders by the buyer. The buyer was paying the price for the individual shipments in advance.

The dispute arose after the buyer paid 18.000,00 Deutsche Marks in advance on 4 June 2001. On 8 June 2001, the seller issued a pro-forma invoice from which an offer for the sale of 119 doors and 123 door frames was evident, although at a higher price. The seller thereupon delivered a consignment of 22 doors and 174 door frames, although the buyer had made it known that it always needed approximately the same number of doors and door frames so that it could deliver kits consisting of a door and a door frame to its buyer.

The court of first instance stated that the seller was aware that it was supposed to deliver approximately the same number of doors and door frames in order for the buyer to make kits. It added that the seller knew of the buyer's contractual relation with the end buyer under which it was under an obligation to deliver kits consisting of a door and a doorframe. It rejected the seller's assertion that the buyer failed to specify the goods to which the advance payment referred and, therefore, the seller had chosen the goods itself from a consignment, previously prepared for the buyer. The court ruled that, considering that the goods had indeed been specified in the pro-forma invoice and that the seller knew that the buyer needed the same number of doors and door frames, the seller had failed to comply with its contractual obligation to deliver goods in conformity with the contract.

The court of appeal applied the CISG under article 1(1)(a), because both of the parties had their places of business in contracting States. It ruled that the seller had indeed breached the contract by delivering 22 doors and 174 door frames. In the court's opinion, this constituted a fundamental breach under article 25 CISG as the buyer had been deprived of what it was entitled to expect under the contract, namely that it was unable to assemble kits for resale. The buyer was therefore entitled to declare the contract avoided under article 49(1)(a). Because the seller knew about the facts relating to the lack of conformity of the goods, the court further ruled that under article 40, the seller was not entitled to rely on the buyer's delay in giving notice thereof.

The court stated that, although the court of first instance ruled on the consequences of the breach applying the Slovenian Obligation code, it contains the same provisions as CISG in article 81(2), namely that a party who has performed the contract may claim restitution from the other party of whatever the first party has supplied or paid under the contract. Therefore, it upheld the decision of the court of first instance ordering the seller to make restitution of the received part of the price for the goods. After having avoided the contract, the buyer also attempted to return the delivered goods to the seller, who refused to take them. Therefore, the buyer

sold them according to article 88 to minimize the storage costs. The court found that the buyer had done so in an appropriate manner and that it had received an appropriate price. It further ruled that the seller is liable to the buyer for reimbursement of the costs it had suffered by storing the goods.

The court additionally found that, under article 78 CISG, the buyer is entitled to interest on the sum in arrears. After consulting article 7(2) CISG and applying the conflict-of-law rules of the forum, it found that Slovenian law is applicable to determining the interest rate.

The appellate court therefore rejected the appeal and confirmed the decision of the court of first instance.

Case 1154: Limitation Convention, 1980 (amended text) 8; [10(1)]; 24; CISG 78
Slovenia: Višje sodišče v Ljubljani (Ljubljana High Court)
VSL sodba I Cpg 972/2010
13 October 2010
Original in Slovenian
Published in Slovenian:
www.sodisce.si/znanje/sodna_praksa/visja_sodisca/2010040815253998

The court of first instance ruled that the defendant, a Belarusian company, was to pay the claimant, a Slovenian company, a sum of 563.777,00 EUR resulting from damages under a contract of sale.

The defendant appealed the decision to the appellate court, maintaining that the claim for payment of the sum was prescribed because the limitation period of four years under article 8 of the Limitation Convention had passed. It asserted that the limitation period had begun on the date when it became possible to claim performance of the obligation. Both Slovenia and Belarus are parties to the Limitation Convention.

The court of first instance ruled that the defendant failed to demonstrate in time when the individual limitation periods for the individual claims had begun and when they had expired.

The appellate court upheld the judgement and added that, according to the provisions of the Limitation Convention, the court cannot consider the expiration of the limitation period on its own initiative since article 24 provides that the expiration of the limitation period shall be taken into consideration in any legal proceedings only if invoked by a party to such proceedings. Invoking the expiration requires statements regarding the commencement and expiry of the limitation period which the defendant had not presented during the proceedings in the court of first instance.

In addition to the question of claim limitation, the appellate court also dealt with the issue of interest. It found that the CISG was applicable to the contract between the parties as they had their places of business in different contracting states. Regarding the claimed interest, the court pointed to article 78 CISG, according to which a party is entitled to interest if the other party fails to pay the price or any other sum that is in arrears. It found that the CISG does not govern the issue of interest calculation. It therefore used, under the conflict-of-law rules, the seller's (Slovenian) law, which

contains the principle of *ne ultra alterum tantum* on this issue. Because the claimed amount of interest exceeded the principal, the appellate court overturned the decision of the court of first instance regarding defendant's payment of interest in excess of the principal.