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Contents

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Introduction

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

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

Case 1163: CISG [1; 25]; 58; 73(3); 74; [77]; 88
People's Republic of China: China International Economic & Trade Arbitration Commission [CIETAC]
7 April 2005
Original in Chinese
Published in English: http://cisgw3.law.pace.edu/cases/050407c1.html

Abstract prepared by Aaron Bogatin

A contract was concluded between a seller from Singapore and a buyer from China for the purchase of cotton gin motes in two deliveries.

On arrival of the second delivery, the goods were inspected by the buyer which found that the large majority did not conform to the original sample received and therefore were not in conformity with the contract (Article 35(2)(c) CISG). Upon the attempted return of the defective goods to the seller, the buyer was directed by the seller to its supplier in order to recover compensation. As the situation was not being resolved in a timely manner and the price of cotton was falling, the buyer decided to mitigate its damages and resell part of the usable goods.

The contract was silent on the governing law, thus the Arbitration Tribunal ruled that the CISG applied since the places of business of the buyer and the seller were in CISG countries. In its ruling on the merits the Tribunal held that acceptance of the first delivery by the buyer did not preclude the buyer from avoiding the contract at the time of the second delivery. The two deliveries were "interdependent" so neither could fulfil the purposes contemplated by the parties (Article 73(3) CISG).

It was also held by the Tribunal that resale of part of the goods was permitted due to the "unreasonable delay" in the seller taking them back (Article 88 CISG). The Tribunal further stated that the seller was responsible for damages payable to the buyer. The quantity of non-conforming goods was so large that it was deemed sufficient to amount to a fundamental breach, allowing the buyer to avoid the contract. After reducing the buyer's claim for loss of profit, the foreseeable damages were held to consist of the difference between the purchase price and the resale price and expenses including storage charge, demurrage charge, as well as other fees (Article 74 CISG).

Referring to the fact that the buyer's contractual relationship was with the seller, the Tribunal held that the buyer could only claim compensation from the seller. The seller, however, had the right to seek compensation from its supplier after compensating the buyer.

Case 1164: CISG 1; 6; [9; 34; 74]
People's Republic of China: China International Economic & Trade Arbitration Commission [CIETAC]
10 December 2003
Original in Chinese
Published in English: http://cisgw3.law.pace.edu/cases/031210c1.html>

Abstract prepared by Ashraf Shannak

The claimant (buyer), a United States (U.S.) company, entered into a contract with the respondent (seller), a Chinese company, to buy agriculture picks. Such picks were listed in the U.S. as dumped products. There were only a few Chinese companies whose picks products were exempted from the anti-dumping duty imposed by U.S. customs and the seller's company was one of them. As a result of that exemption, and based on confirmation from the seller's manager to the buyer that the seller was familiar with the procedures for exporting picks to the U.S. market, the buyer contracted with the seller. U.S. government procedures called for the filing of an application for anti-dumping review by providing relevant documents within a certain period. After three years of receiving the picks, the buyer received notice from the U.S. customs imposing a 98.77 per cent anti-dumping duty and interest because of not filing the application for review within the time required, and that it was the seller's obligation to file such an application. The buyer paid the amount and asked the seller for reimbursement, which the seller refused. The buyer applied for arbitration.

The parties had not stipulated the applicable law in their contract. Since the parties had their place of business in two Contracting States of the CISG, and they had not excluded the application of the Convention, the Arbitration Tribunal regarded the CISG as the applicable law according to Articles 1 and 6 of the Convention.

The Tribunal found that the seller had failed to file the application for the U.S. customs authorities on time as agreed between the parties, and that the seller should have been familiar with the procedure, given it had followed it several times before. This had been the practice between the seller and the buyer. Further, filing the application for review was an obligation of the seller. The Arbitration Tribunal did not accept the seller's argument that filing the application was not a precondition for the conclusion of the contract and that the seller had the right to choose whether or not to file the application afterwards. According to the Tribunal, if the seller could not follow such a procedure it would not be able to have buyers import its products to the U.S. The seller's experience of exporting to the U.S. market was the main reason the buyer entered into the contract.

The seller further defended that the buyer had not sent notice of the ship's arrival date. The Arbitration Tribunal stated that the "anti-dumping duty and interest were imposed on the goods … because of the seller's ignorance and mistakes, which has nothing to do with the buyer's failure to inform of the arrival date of the ship". There was no obligation on the buyer to send a notice of the ship's arrival date to the seller because the contract stipulated a CFR (Cost and Freight) delivery and according to INCOTERMS 2000 the buyer had no such obligation of a notice. Moreover, the contract did not provide that such a notice would be sent and there was no business practice that the buyer should inform the seller about the date of arrival.

The Tribunal held that there was sufficient time for the seller to file the application with U.S. customs within the required time, and, accordingly, it awarded damages to the buyer.

Case 1165: CISG 18(1); 19; [29; 53]; 74; 78
People's Republic of China: China International Economic & Trade Arbitration Commission [CIETAC]
18 April 2003
Original in Chinese
Published in English: http://cisgw3.law.pace.edu/cases/030408cl.html

Abstract prepared by Aaron Bogatin

The parties entered into a contract for the provision of a desulfurization reagent. The goods were to be delivered in three instalments (between July and September 2001) and transportation was to be organized by the seller.

Although the goods were delivered to the correct port by the due dates, the buyer only made a partial payment. The seller filed for arbitration asking for the balance and interest on the unpaid amount.

In its defence, the buyer asserted that it did not pay the full amount because instead of three deliveries of equal quantities, there where twelve deliveries with differing net weights in goods. Furthermore, a subsequent agreement ("the Agreement") made with the seller in March 2002 provided that the seller would deliver additional goods in return for the outstanding payments by the buyer. The Agreement reconstituted a contractual relationship between the parties. Since the seller did not deliver the additional goods, the buyer was not obliged to fulfil its obligation to pay.

The seller stated that the applicable law should be Chinese law, as the contract was concluded and performed in China and the place of arbitration was in China. It then alleged that the terms of the contract did not specifically say that there could only be three shipments of goods. The seller delivered exactly the required quantity of goods by the due date, it just occurred over a larger span of shipments: clause 12 of the contract supported this view. The Agreement was merely entered into to ensure that the buyer would not continue to breach the contract. It did not modify the terms of the original contract and it was thus not to be seen as excusing the buyer's breach under the original contract. The seller did not lose its right to claim damages to the buyer.

The buyer counter argued that the CISG should apply as both parties had their places of business in Contracting States to the Convention; the Agreement was not an independent contract but modified the payment terms of the original contract and, given the new terms of payment, the time for calculating interest should be set at April 2002.

Since the place of arbitration was in China the Arbitration Tribunal decided to apply the rules of conflict in Chinese law to determine the applicable law to the dispute. Pursuant to those rules, the Tribunal found that Chinese law should be applied directly to the case when it was in conformity with the CISG. The Convention was to be applied if the applicable Chinese law conflicted with the Convention, and international practice was to be applied when neither Chinese law nor the CISG had any relevant provisions.

Ruling on the merits of the case, the Tribunal held that the seller was not in breach of contract by providing deliveries in more than 3 instalments, thus the buyer was required to pay the balance of the contract. The Agreement was merely a way of ensuring compliance under the original contract and did not modify the original rights and obligations of the parties in any significant way. It did not "replace the [original] contract", it was an amendment. However, in line with the Agreement, that had laid down a new stipulation on the date of the outstanding payment, and Article 78 CISG, the interest due was to be calculated as from April 2002.

Case 1166: CISG [8]; 30; 38(1); 39(1); 45(1)(b); [50]; 74; [88]
People's Republic of China: China International Economic & Trade Arbitration Commission [CIETAC]
18 December 2002
Original in Chinese
Published in English: http://cisgw3.law.pace.edu/cases/021218c1.html

Abstract prepared by Aaron Bogatin

A contract was concluded between a German buyer and a Chinese seller for the delivery of 105 casks of pork sausage to Hamburg, Germany, no later than 20 July 2000. After receiving the goods on 19 October 2000, the buyer raised objection to the late delivery as well as to the quality of the goods. In response to the quality complaint, the seller agreed to fly to Germany to undertake a joint inspection of the goods. Shortly afterward the joint inspection, the Veterinary Bureau of Germany sealed 88 of the casks and ordered the buyer to destroy them. One day after the Bureau's order, the seller requested that all 105 casks be sent back to China for re-examination by the China Import and Export Commodities Inspection Bureau. The buyer replied that the request could not be fulfilled as 88 boxes had been sealed and set for destruction. The seller faxed to the buyer requesting it to convince the Veterinary Bureau to release the 88 sealed casks, stating that it would take responsibility for the sea freight back to China as well as some of the buyer's loss. Nevertheless, the 88 casks were destroyed.

The seller filed for arbitration. It argued that due to factors such as differing serial numbers found on the casks and different salting procedures, there was sufficient evidence that the contaminated casks were not those delivered by the seller. Further, it produced a certificate documenting the conformity of the goods that had been issued by the China Entry-Exit Inspection and Quarantine Bureau in July 2000.

Although the contract was silent as to the governing law, both parties had their places of business in CISG countries and both requested that the CISG be applied; the Arbitration Tribunal concurred. In its ruling on the merits, the Tribunal held that the buyer's "OK" found on the bottom of the seller's fax which changed the date of delivery amounted to an acceptance of the new delivery date and not merely a sign that the fax had been received. Hence, the buyer's claim that the goods were delivered late was not sustained.

The Tribunal disregarded the seller's claim that the goods sealed by the Veterinary Bureau were not the seller's goods since prior to arbitration the seller had never raised this objection. Moreover, the buyer provided rebuttal evidence.

The Tribunal also stated that the 88 casks of goods did not conform to the contract. The inspection in China, which occurred six weeks before the goods were shipped, was not sufficient to rebut this. The buyer inspected the goods and reported their non-conformity within a reasonable time (Articles 38 and 39 CISG). The disposal by the buyer of the 88 casks of non-conforming goods was a valid decision by the buyer as the direction to dispose of them by the German Veterinary Bureau was an effective administrative order. The seller was thus not entitled to any compensation for its travel to Germany to jointly inspect the goods. However, with respect to the remaining 17 casks, there was no evidence presented as to their lack of conformity. Therefore, the buyer had to pay their price.

The buyer had also claimed compensation for the expenses incurred as a result of the non-conformity of the 88 casks, which included rent for a second warehouse to store the bad smelling meat, disposal charges and transportation charges. However, since the buyer did not provide evidence as to any of these costs except for the disposal fee, it was not allowed to claim any compensation beside that fee (Article 45(1) CISG).

Case 1167: CISG [1]; 8(3); [47; 49]; 64(1)(a); [74]; [75]
People's Republic of China: China International Economic & Trade Arbitration Commission [CIETAC], Shenzhen Commission
8 November 2002
Original in Chinese
Published in English: http://cisgw3.law.pace.edu/cases/021108c1.html

Abstract prepared by Zhongjie Shao

A German buyer (claimant) entered into two contracts with a Chinese seller (respondent) for the purchase of canned asparagus. After the conclusion of the contracts the buyer issued two letters of credit ("L/C") for the full amount of the purchase to the seller. However, despite several requests, the seller refused delivery stating that the price of the products had increased. Eventually the buyer had to purchase substitute goods from another supplier. Due to the persisting refusal of the seller to bear the losses of the buyer, this latter filed for arbitration.

As there was no stipulation on applicable law in the two contracts, the Arbitration Tribunal deemed that, since the place of the formation and performance of the two contracts was in China and so was the seller's place of business, China had the closest relationship with the contracts. Chinese domestic law should be the applicable law. Further, the places of business of the buyer and the seller were in CISG States, thus the Convention should be applied if there was any contradiction with Chinese domestic law.

At the arbitration hearing, the seller alleged that the buyer had agreed to but failed to return a consistent amount of money for the price of goods purchased the previous year, which constituted a contract violation. Therefore the seller was entitled to avoid the asparagus contracts. In any event, these contracts were invalid because the seller's Vice President who had signed them had no authorization letter at the time of the conclusion of the contracts, and because neither party had affixed its seal to the contracts. The Arbitration Tribunal did not think that the seller was entitled to avoid the contracts on the former account and did not regard the contracts as invalid.

The seller also alleged that it was entitled to avoid the contracts because the conditions of the L/C the buyer provided made very difficult for the seller to negotiate payment in accordance with the L/C. Moreover, the buyer failed to provide labels and to send a loading notice, which made the seller unable to deliver the goods. The Arbitration Tribunal noted the past practices between the parties and the fact that, prior to the arbitration, the seller had failed to raise the L/C concerns and other concerns raised at arbitration. The Tribunal thus concluded that pursuant to Article 8(3) CISG, the requirements on conditions in the L/Cs "were not the main reason for the seller to refuse to make delivery of the goods". The Tribunal also rejected the seller's argument on the label and loading notice, holding that the seller had no right to avoid the contracts and that the seller's non-delivery was in breach of contract. Applying provisions of the Contract Law of the PRC, the Tribunal held that the buyer had the right to avoid the contracts and purchase replacement goods and ruled in the buyer's favour on most of the buyer's damage claims.

Case 1168: CISG [1; 25; 38]; 46(3);[1] [73; 74; 77; 78]
People's Republic of China: China International Economic & Trade Arbitration Commission [CIETAC]
31 January 2000
Original in Chinese
Published in Chinese: Zhong Guo Guo Ji Jing Ji Mao Yi Zhong Cai Wei Yuan Hui Cai Jue Shu Hui Bian [Compilation of CIETAC Arbitration Awards] (May 2004) 2000 vol., pp. 1291-1296
Published in English: http://cisgw3.law.pace.edu/cases/000131c1.html

Abstract prepared by MAA-Meihua Xu

A Chinese seller entered into a contract with a German buyer for the purchase of clothes. Later, the buyer discovered defects on two deliveries of the goods and raised objections, yet disposed of the goods. Upon receipt of the third delivery, the buyer refused to accept the goods asserting quality problems. The seller had to take the goods back to China and initiated arbitration proceedings requesting the Tribunal that the buyer should pay the price for the three deliveries and relevant interest plus the storage charge and returning cost of the third delivery. The payment of the price difference between air shipment and sea shipment was also claimed.

The buyer counter argued that since the goods delivered had severe defects, its clients refused to take them. Therefore, the seller violated the obligation to deliver the goods as required in the contract. The buyer had sent seventeen pieces of clothes back to the seller for inspection and the seller had confirmed that "we have found the problems you mentioned". Moreover, after being urged by the buyer, the seller had entrusted a specialized company to inspect the remainder of the goods in the buyer's warehouse, and the inspection report indicated that there were serious defects in material, colour, and workmanship. The seller admitted these problems in a fax to the buyer. The buyer thus stated that its refusal to take the third delivery was lawful and did not result in a breach of contract, and that the seller should bear the cost for returning the remaining clothes stored in the buyer's warehouse.

[1] The original text seems to refer to Article 48 CISG, however this is believed to be a typographical error. See also http://cisgw3.law.pace.edu/cases/000131c1.html.

The seller objected that although the buyer provided samples to show the defects of the goods, neither the source of the samples, nor the procedures followed in choosing them could prove the quality of the goods objectively, because the samples had been repaired by the buyer and they were chosen by the buyer without involvement of any independent inspection agency. As to the buyer's refusal to take the third delivery, the seller argued that those goods were delivered after being inspected by the buyer. The buyer's refusal two months later, when the goods were being shipped, was too late. Moreover, since the contract clearly stated that "the beneficiary is allowed to draw in the excess of letter of credit amount for the difference between air shipment and sea shipment", the buyer's refusal to pay the aforesaid amount raising quality problems was a breach of contract.

The seller finally stated that the buyer repaired the clothes in its factory. Pursuant to Article 46(3) CISG, the buyer may require the seller to remedy defects by repair, although this request must be made at the same time the buyer discovers the non-conformity of the goods, or within a reasonable period. Since the buyer had not given such a notice, it had lost its right to request repair.

The Arbitration Tribunal held that the CISG was the applicable law, as both China and Germany are Contracting States of the Convention.

Regarding the quality of the goods, although the parties did not stipulate an inspection clause, nor did they specify the inspection place or agency, the Arbitration Tribunal stated that the buyer has the right to inspect the goods after receiving them, pursuant to Article 38 CISG. Furthermore, the Tribunal noted that the seller, after receiving the seventeen defective clothes returned by the buyer, confirmed via fax that there were problems with the goods. The existence of defects was thus a fact confirmed by both parties.

The Arbitration Tribunal noted that although the buyer had given reason for refusing to take the third delivery, according to the CISG, its argument was unacceptable. The buyer should have raised the issue through legal procedure if it had objections to the quality of the goods, but could not refuse to take delivery. Therefore, the buyer's refusal constituted a breach of contract. Considering that the seller had already taken back the goods, the Tribunal ruled that the buyer did not have to pay their price, but had to bear the cost of transportation and related interest. The Arbitration Tribunal upheld the seller's claim for the difference between the air shipment and sea shipment since it was agreed by both parties before the delivery of the goods.

Regarding the buyer's claim on the cost for remedying the defects of the goods, the Tribunal held that the buyer had repaired the goods at a reasonable cost and resold them at the same price as provided in the contract. However, it should have given notice to the seller especially about the cost which it was going to incur. Therefore, the buyer had not properly performed its obligation to mitigate the loss and it had to bear 30 per cent of the cost of repairing. As to the defective goods inspected and remained unsold, the Tribunal decided that the buyer did not have to pay their price and the seller should pay the cost incurred in Germany, including transportation, moving and warehouse fees, and 20 per cent of the contract price as the loss of profit resulting from the defective goods.

Finally, the buyer had to pay the price of the goods which had been sold. As to the buyer's claims for customers' loss, loss of discount fee, and loss of orders, the

Arbitration Tribunal held that those losses were not foreseeable by the seller at the conclusion of the contract (Article 74 CISG), therefore, they should be dismissed.

Case 1169: CISG [1; 35]; 53; 74; [78]
People's Republic of China: China International Economic & Trade Arbitration Commission [CIETAC]
26 November 1998
Original in Chinese
Published in English: http://cisgw3.law.pace.edu/cases/981126cl.html

Abstract prepared by Aaron Bogatin

A German buyer and a Chinese seller entered into a contract for the purchase of leather gloves. The contract stated the way the goods were to be packaged, including number and weight of the boxes, and their delivery CIF (cost, insurance, freight) Hamburg, Germany.

During the performance of the contract, disputes arose over modifications of the original agreement, thickness of the leather, weight of the boxes and payment of the goods.

The seller alleged that the original contract was modified so that the weight of the boxes was adjusted and the contract became a sale by sample. The buyer raised objections over the weight of the boxes (which had to do with thinness of leather) as well as the quality of the goods delivered. Despite the seller claiming that several options were offered to the buyer to mitigate damages and solve the dispute, the buyer chose to resell the goods to a third party for a lower price. The buyer stated that after reselling the goods, a certain amount for the goods sold was paid to the seller.

The Arbitration Tribunal found that since the parties had their places of business in Contracting States to the CISG, the Convention would govern the contract.

On the merits, the Tribunal ruled that by not paying for the goods as provided under the contract the buyer had violated Article 53 CISG. According to the tribunal, the buyer had not provided any evidence that the actual price of the goods was paid to the seller, who denied receiving any sum. The Tribunal further noted that even though the buyer had failed to provide an inspection certificate showing the defects on the goods, the seller had agreed to exchange them and promised to bear the cost. Referring to the statements made by the parties, the Tribunal deemed that there were defects on the goods; therefore, it was reasonable to resell them at a discount price. After making an adjustment for defects in the quality of the goods, the Tribunal held that the buyer should be required to pay 70 per cent of the contract price.

The Tribunal denied the seller's request for recovery of bank interest, holding that "loss of bank interest was not foreseeable by the buyer; therefore, the seller shall bear it on its own".

Case 1170: [1; 6]; 11; [12]; 29; 45; 49; 74; [79(2); 96]
People's Republic of China: China International Economic & Trade Arbitration Commission [CIETAC]
31 December 1997
Original in Chinese
Published in Chinese: Zhong Guo Guo Ji Jing Ji Mao Yi Zhong Cai Wei Yuan Hui Cai Jue Shu Hui Bian [Compilation of CIETAC Arbitration Awards] (May 2004) 1997 vol., pp. 2885-2889
Published in English: http://cisgw3.law.pace.edu/cases/971231c1.html

Abstract prepared by MAA-Meihua Xu

A French buyer entered into a contract with a Chinese seller for the purchase of Lindane providing for payment by Letter of Credit ("L/C"). After conclusion of the contract, the buyer issued the L/C as per the agreement; however, the seller asked the buyer to modify it three times, (which the buyer did) prior to the first shipment of 18 tons of goods. The buyer then requested the seller to deliver the remaining 54 tons of goods; the seller agreed but asked for an increase in the original price. The buyer accepted and modified the L/C for the fourth time, but the seller never delivered the remaining goods.

The buyer asserted that since China and France are Contracting States of the CISG, and the parties did not exclude the application of the Convention, the CISG should be applied. Pursuant to the Convention and the relevant provisions in the contract, the seller had fundamentally breached the contract by not delivering the remaining goods. The buyer's avoidance of the contract after the deadline for loading and its request for compensation damages were thus grounded. The buyer's damages included the amount claimed for by its own client for the non-delivery of the remaining goods, and other costs the buyer had incurred to issue and amend the L/C, plus the customs charge and transportation fee.

The seller counter argued that while it was performing the contract, due to a production error, the seller's supplier ceased the production of the goods, which was beyond the control of the seller, and should be considered as force majeure. After the first delivery of the goods, the contract could not be performed any more, and the buyer did not raise objection to this, which indicated that the buyer implied an agreement to terminate the original contract. The parties thus reached a new agreement on both contract price and destination port, which, however, did not become a new contract due to the buyer's failure to sign the contract form sent by the seller. This new agreement had no legal relation with the original contract, and it never came into effect due to the buyer's behaviour.

The Arbitration Tribunal held the CISG applicable: as asserted by the buyer, the places of business of the parties were in Contracting States of the CISG, and the parties did not opt out of the Convention.

The Arbitration Tribunal noted that after the first delivery, the seller asked for a higher price for the remaining goods, and the buyer accepted it. The buyer also amended the L/C as requested by the seller. This demonstrated that the two parties were negotiating the delivery of the remaining 54 tons of goods. The parties came up with a newly agreed condition on both the price and the delivery terms. Those were amendments to the original contract and did not create a new one.

In addition, the Arbitration Tribunal noted that China, when ratifying the Convention, had denounced Articles 11 and 29 according to which the formation, modification and termination of a contract need not to be made in or evidenced by writing. Therefore, the contract had to be concluded in writing. The Arbitration Tribunal stated that the seller failed to provide relevant evidence that the parties had concluded a new agreement; therefore, the seller still had the obligation to deliver the remaining goods as stipulated in the original contract. The seller's non-delivery was thus a fundamental breach of contract, and in accordance with Articles 45 and 49 CISG, the buyer had the right to avoid the contract and claim damages.

Pursuant to Articles 45 and 74 CISG, the Arbitration Tribunal granted the buyer's claims for the damages its own client claimed for the 54 tons of undelivered goods, and the L/C issuing fee and amendment fee on the ground that those expenses were directly caused by the seller's non-delivery of the goods, which was foreseeable by the seller at the conclusion of the contract. However, the buyer's claims for custom charge and transportation fee and communication fee were denied as those were usual expenses in the trading business which were not related to the damages for breach of contract by the seller.