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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 1179: CISG 8(3); 77
Brazil:[1] Appellate Court of the State of Rio Grande do Sul – 5th Civil Chamber
70025609579
Prakasa Indústria e Comércio de Utilidades do Lar Ltda. v. Mercomáquinas Indústria, Comércio e Representações Ltda.
20 May 2009
Published in Portuguese on 27 May 2009: www.tjsp.jus.br
English translation: http://cisgw3.law.pace.edu/cases/090520b5.html

Abstract prepared by Marcelo Boff Lorenzen

This is a case between two parties from Brazil which contains dicta references to Articles 8(3) and 77 CISG. The case deals primarily with the duty of a party who relies on a breach of contract to mitigate losses arising out of the breach and the principles of fairness and good faith in performance and enforcement of contracts.

The buyer entered into a contract with the seller for purchase of an electrical discharge machine. Due to an alleged malfunction, which amounted to a lack of conformity of the machine, the buyer brought suit in the District Court of Porto Alegre claiming the recovery of costs incurred to repair the equipment to no avail and to arrange for the acquisition of another machine, as well as loss of profits resulting from the breach of contract. The seller claimed that the contract was duly performed and imputed the malfunction to the buyer, who purportedly failed to operate the equipment properly. The District Court granted judgment partially in favour of the buyer, ordaining that the seller pay for the repairing costs.

On appeal, the Appellate Court of the State of Rio Grande do Sul noted that the buyer [i.e. the plaintiff] was at fault, since it did not undertake measures to substitute the defective machine in order to be able to continue its business. The Court invoked Article 77 CISG — and its corresponding provision, enshrined in section 169 of the Brazilian Restatement of Law — to state that the party who relies on a breach of contract must take measures to mitigate the loss resulting from the breach. The Court held that the plaintiff failed to mitigate its own losses, thus having not acted as a reasonable businessman would have done in similar circumstances, as required under Article 8(3) CISG. On the substance, the Court further observed that the plaintiff failed to prove the claimed losses of profit. The Court also pointed out that, under Articles 187 and 422 of the Brazilian Civil Code, the parties are to act as required by fairness and good faith when entering a contractual relationship. The judgment was partially reversed in order to exempt the buyer from the payment of any fines.

[1] At the date of this CLOUT issue, Brazil is not yet a party to the CISG.

Case 1180: CISG 72
Brazil:[2] Appellate Court of the State of São Paulo – 4th Private Law Chamber
379.981-4/0
José Henrique S. N. de Souza and other v. Construtora Costa Norte Empreendimentos Imobiliários SC Ltda.
24 April 2008
Published in Portuguese on 21 May 2008: www.tjsp.jus.br
English translation: http://cisgw3.law.pace.edu/cases/080424b5.html

Abstract prepared by Marcelo Boff Lorenzen

This is a case between two parties from Brazil which contains a dicta reference to Article 72 CISG. The case deals primarily with the *exceptio non adimpleti contractus* doctrine, acknowledging that a party who commits a fundamental breach of contract is not entitled to compel the other party to fulfil its counter obligations.

A home builder [i.e. the seller] entered into a contract with the buyers for the sale of an apartment. Upon failure to pay some instalments of the mortgage loan related to the sale, the seller brought suit before the District Court of Guarulhos for payment. In their defence, the buyers claimed that the seller failed to timely complete its part of the bargain as previously agreed upon. Consequently, they refused payment of the remaining instalments due to the fundamental breach of contract. The District Court rendered judgment for the seller, forcing the buyers to pay the remaining amount plus a 10 per cent penalty.

On appeal, the Appellate Court of the State of São Paulo held that it was uncontroversial that the apartment was not delivered on time. The Court also observed that the buyers also failed to comply with their main obligation, which was to timely pay the corresponding price, but acknowledged that they did so because, prior to the date for performance, it was clear that the seller would not be able to fulfil its obligations. Applying the doctrine of *exceptio non adimpleti contractus*, the Court referred to the provisions contained in Article 72 CISG to state that a party who breaches its own obligation has no right to compel the other party to perform its counter obligation. The judgment was reversed in order to exempt the buyers from payment and to compel the seller to pay court expenses.

Case 1181: CISG 77
Brazil:[3] Appellate Court of the State of São Paulo – 16th Private Law Chamber
1.170.013-1
Auto Posto Shopping Diadema Ltda. and others v. Mercoil Distribuidora de Petróleo Ltda.
03 July 2007
Published in Portuguese on 27 July 2007: www.tjsp.jus.br
English translation: http://cisgw3.law.pace.edu/cases/070703b5.html

Abstract prepared by Marcelo Boff Lorenzen

This is a case between two parties from Brazil which contains a dicta reference to Article 77 CISG. The case deals primarily with the duty of a party who relies on a

[2] At the date of this CLOUT issue, Brazil is not yet a party to the CISG.
[3] At the date of this CLOUT issue, Brazil is not yet a party to the CISG.

breach of contract to mitigate losses arising out of the breach and the principles of fairness and good faith in performance and enforcement of contracts.

The buyers entered into a contract with the seller for fuel distribution. The contract contained a compulsory clause of minimum fuel distribution and foresaw specific penalties and interest rates to be applied in case of breach. Due to an alleged trademark usurpation, the seller brought suit in the District Court of Diadema requesting the rescission of the contract, contractual and moral damages. The District Court rendered a judgment partially favourable to the seller.

On appeal, the Appellate Court of the State of São Paulo noted that the failure of the seller (i.e. the plaintiff) to claim payment of contractual penalties for approximately one year after breach led the defendants to assume that the clause was no longer in force. The Court invoked Article 77 CISG — and its corresponding provision, enshrined in section 169 of the Brazilian Restatement of Law — to state that the party who relies on a breach of contract must take reasonable measures to mitigate the loss resulting from the breach. In the case, the Court held that the plaintiff failed to fulfil this duty, thus exempting the defendants from payment of any contractual penalties and partially reversing the Lower Court decision. The Court further observed that, under Articles 187 and 422 of the Brazilian Civil Code, fairness and good faith should permeate any contractual relationship.

Case 1182: CISG 35; 39; 74; 77; 79
Finland: Turun Hovioikeus; S 04/1600
24 May 2005
Original in Finnish
Unpublished

Abstract prepared by Jarno J. Vanto

This decision by the Turku Court of Appeals is primarily concerned with damages under Articles 74 and 77 CISG.

The Spanish defendant (seller) entered into a contract with the Finnish plaintiff (buyer) for the sale of 40 tons of paprika powder ("powder") for use in various spice mixes intended for onward sale. The contract specified that the powder needed to be steam-treated to reduce any microbe levels therein. However, laboratory sample tests established that the powder had been treated with radiation instead of steam. Under a European Union directive applicable to Finland and Spain, all consumer products treated with radiation must be marked as such in the packaging of the goods. According to the buyer, Finnish consumers do not wish to purchase products treated with radiation, rendering the powder useless for the purpose for which the buyer intended it.

The issues of the case were whether the buyer had given notice on time; whether the seller was in breach of contract because the powder was radiation-treated; if the seller was in breach of contract, did this cause damage to the buyer; what was the quantum of damages; and whether the seller is liable for such damage. Vis-à-vis the conformity of the goods under Article 35(1) CISG, the court concluded that even though the contract specified steam treatment and did not specifically exclude radiation treatment, both the buyer and the seller were experienced operators in the field and the seller ought to have considered in the light of the Directive that even in

the absence of a specific contractual exclusion radiation treatment was out of the question. Hence, the court concluded that the goods were not in conformity with the contract and the seller was in breach of the contract under Article 35(1).

On the buyer's timely notice to the seller about the non-conformity of the goods, the court stated that because the buyer had contacted the seller immediately after having learned of the non-conformity, as established by a government test laboratory, the buyer had given notice within a reasonable time as required under Article 39(1) CISG.

On damages, the court, quoting Article 74 CISG, first concluded that in determining damages the starting point is the economic position where the aggrieved party would have been if the contract had been performed correctly. Hence, the court stated that the amount of damages can be higher than the face value of the contract. According to the court, the seller knew that the buyer would incorporate the powder into its own products that would be sold onwards to the buyer's customers. Therefore, the seller must have understood at the time the contract was entered into that the buyer would not be able to deliver to its customers should the seller deliver non-conforming goods and that such a breach of the contract would cause damage to the buyer.

As damages, the buyer claimed compensation it gave to its own customers for pulling the tainted products from the market, expenses resulting from buying back the tainted products from its customers, expenses resulting from destroying the tainted goods and related inventory write-downs, and expenses relating to examining the issue including wages, travel expenses, freight costs, chemical analysis costs, and destruction costs. The court determined that each of the items claimed by the buyer is recoverable under Article 74 CISG.

The court went on to consider whether the seller's failure to perform its obligations was due to an impediment beyond its control that the seller could not reasonably be expected to have taken into account at the time of the conclusion of the contract or to have avoided or overcome it or its consequences in the sense of Article 79 CISG. The court concluded in the negative.

Finally, the court considered whether the buyer could have mitigated its damages as required under Article 77 CISG. The Appellate Court, agreeing with the Court of First Instance and relying on the facts as established by the lower court, determined that the buyer had not failed to mitigate its damages.

As the exact amount of some of the items claimed by the buyer as damages could not be determined to a sufficient degree, the court, following the procedural rules of the forum, awarded reasonable damages to the buyer.

Case 1183: CISG 1; 58(1)
Mexico: City of Tijuana, State of Baja California, Sixth Civil Court of First Instance
30 August 2005
Original in Spanish
English translation available at:
www.cisg.law.pace.edu/cisg/wais/db/cases2/050830m1.html

Abstract prepared by Arpan Kumar Gupta

The seller, a Californian corporation, agreed to deliver wood for sale and distribution within the territory of Mexico to the Mexican buyer. The goods were to be paid within a period of ten days following the date on which the buyer received the goods. The payment was guaranteed by the making of a cheque in an amount sufficient to cover each invoice. Between November 2003 and January 2004, several invoices were raised, which the buyer did not pay. The seller thus filed a commercial suit in Mexico claiming the outstanding amount.

The buyer raised as a defence that since there was no fixed date for payment in the contract, contrary to what required under Article 1080 of the Mexico Federal Civil Code, the seller never made a judicial demand for payment. The Court rejected this argument and stated that the CISG would be applicable in this case as this was a contract of sale between parties having their places of business in two different countries. The Court also considered a Supreme Court decision which had held that treaties held a superior position as compared to the federal law.

The Court then referred to Article 58(1) CISG, which states that if the buyer is not bound to pay the price at any other specific time, the price must be paid when the seller places either the goods or documents controlling their disposition at the buyer's disposal according to the contract and the CISG. In the case at hand, there was a specific date at which the goods were sent to the buyer by the seller and which had also been admitted by the buyer; thus the buyer was liable to pay the said amount along with interest.

Case 1184: CISG 7; 11; 25; 29(1); 54
Mexico: Comisión para la Protección del Comercio Exterior de México [Compromex]
M/115/97
Dulces Luisi, S.A. de C.V. v. Seoul International Co. Ltd. y Seoulia Confectionery Co.
30 November 1998
Published in Spanish: Diario Oficial (México) 29 January 1999, I, 69-74
www.uc3m.es/cisg/smexi3.htm
English translation available at: http://cisgw3.law.pace.edu/cases/981130m1.html

In the case at hand the claimant, a Mexican producer of sweets and candies, concluded a contract for the sale of its products to two Korean companies (i.e. the respondents).

This agreement followed two prior less significant ones, made over the same kind of products and under the same payment conditions, namely by letters of credit (L/C). Both prior contracts were executed without incidents.

In view of the previous satisfactory business experience and the time constraints, the claimant initiated production of the goods agreed in the third contract before receipt

of the L/C. Later on, the representatives of the respondents verbally requested the claimant that the goods be labelled with the date of production and a two-year expiration date.

At receipt of the L/C, the claimant noted discrepancies between the L/C and the agreed terms of contract, for instance the L/C established a one-year expiration date instead of two. In response to the seller's concerns on the matter, the respondents advised that Korean legislation imposed such a restriction and also required that the L/C be used as they were issued, but they agreed in a certified document to accept any discrepancies between the arranged terms and the L/C. Trusting the good faith of the Korean companies, the claimant decided to ship the goods to the respondents and solve this problem at a later stage.

However, the seller was not paid and it turned out that there was no government requirement as asserted by the buyers. Moreover, the buyers asked the seller to reduce the price of the candies and sweets asserting that the manner in which they were labelled did not conform to the terms of the L/C. The seller submitted a claim before Compromex (or the Commission).

The Commission, in a non-binding decision [Dictamen] referring to Article 7 CISG, stated that the buyers' conduct had been contrary to the basic principle of good faith. Compromex noted that this principle must prevail through parties' commercial relations, and must be understood in its international connotation and not in the meaning given by national laws.

Compromex also referred to Article 11 CISG, which states that the absence of a written agreement does not excuse the parties from meeting their contractual obligations and to Article 25 CISG, pursuant to which the buyer had committed a fundamental breach of contract as they had substantially deprived the seller of what it was entitled to expect under the contract. The buyers not only could have foreseen the result, but actually they sought after it by deliberately asking the seller to label the goods in a different way to that specified in the L/C. Moreover, the Commission stated that the buyers had failed to perform their obligation to pay the price for the goods contracted (Article 54 CISG).

Case 1185: CISG 38; 39; 40; 44
Court of Arbitration of the International Chamber of Commerce
Nr. 9474
February 1999
Published in English: ICC International Court of Arbitration Bulletin, Vol. 12/No. 2, 64; Unilex database
www.unilex.info/case.cfm?pid=1&do=case&id=716&step=FullText

Abstract prepared by Joseph Volpe

The National Bank of Country […] (i.e. the buyer) entered into a contract for the printing of bank notes from the seller ("the Original Contract"). When the seller supplied bank notes which did not conform with the quality standards set out in the Original Contract, the parties agreed to enter into another agreement ("Second Agreement") under which the seller would supply a new batch of bank notes at its own expense and, should that batch meet the standards set out in the Original Contract, the buyer would place an order for further bank notes.

The buyer was not satisfied with the second batch of bank notes either and did not place another order. The seller insisted that the buyer place an additional order as stipulated in the Second Agreement. Instead, the buyer sought relief for non-performance from the ICC International Court of Arbitration requesting damages for the consequences of the seller's non-performance.

The relevant arbitration clauses provided that the Arbitral Tribunal should decide "fairly". In determining what this term meant, the parties accepted the arbitral Tribunal's suggestion to apply "the general standards and rules of international contracts", which the Tribunal said did not exist in any specific international convention; however, it pointed to the Principles of European Contract Law and the UNIDROIT Principles of Commercial Contracts as recent expressions of this law.

Commenting on the relevance of the CISG, the Tribunal noted that the Convention embodies universal principles applicable to international contracts and that both parties were located in countries that were parties to the CISG. However, the Tribunal also noted that many of the circumstances of the arbitration pre-dated the ratification of the Convention by the claimant's state. Further, the Tribunal noted that if the parties had wanted the CISG to apply they would have expressed that in the contract and that the Second Agreement was not purely a sales contract, rather it contained elements of a settlement agreement. Therefore, the Tribunal used a combination of principles from the above-mentioned conventions to reach its conclusions.

The buyer claimed that the Second Agreement was null and void because one of its former employees was paid a generous fee by the seller to promote the agreement. The buyer argued that this fee should have been disclosed according to the reasonable standards of good faith, and referred specifically to the UNIDROIT Principles of International Commercial Contracts, Articles 3.5 and 3.8, and the Principles of European Contract Law 1997, Article 4.107. The Tribunal found that the buyer had not provided sufficient evidence and rejected its claim. The Tribunal explained that the evidence did not prove that the seller had any fraudulent intent and, furthermore, that the extent and effects of the influence of the former employee, including his influence over the buyer's decision to enter into the Second Agreement, was not clearly established.

The seller claimed that the buyer did not give notification within a reasonable time that the banknotes were not of the agreed quality and that the general principles of waiver and estoppel should preclude the buyer from asserting its claims of non-performance. The seller sought to rely on Articles 38 and 39 CISG.

The buyer argued in the first instance that it had given timely notice of its concerns about the quality of the goods in a letter. Referring to Art. 7.3.2 UNIDROIT Principles, which imposes an obligation of "reasonable time of a notice", the buyer noted that the article "is meant to prevent any harm due to uncertainty…" as to whether the aggrieved party would accept the performance. Given the nature of the Second Agreement and other circumstances, the buyer argued that it had acted within the meaning of "a reasonable time" so that any loss from the part of the seller could be prevented.

The buyer also argued that should Articles 38 and 39 CISG be applicable to the Second Agreement and the buyer was found to be in breach of these articles, Article 40 of the Convention would defeat the seller's right to rely on the buyer's

failure to give notice. Article 40 CISG does not allow a seller to rely on Articles 38 and 39 if the seller had knowledge of the lack of conformity of the goods. The buyer further stated that it could rely on Article 44 CISG which would allow it to claim damages if it had "a reasonable excuse for its failure to give the required notice."

According to the Tribunal, the party alleging waiver or estoppel bears the burden of proof and, in the case at hand, the seller had not submitted such evidence. Furthermore, the Tribunal stated that the seller could not rely on the buyer's failure to inspect the goods and to give timely notice of defects when it knew or ought to have known of the defects in the goods. The Tribunal explicitly referred to Article 40 CISG to support this conclusion. Given to these and other considerations, such as the nature of the Second Agreement and the general attitude of the defendant, the Tribunal upheld the buyer's claim for damages due to the seller's failure to perform.

Case relating to the United Nations Convention on Contracts for the International Sale of Goods (CISG) and to the Convention on the Limitation Period in the International Sale of Goods (amended 1980) (Limitation Convention)

Case 1186: CISG 1(1)(a); 7(2); 50; 71; Limitation Convention (1980 amended text): [3(1)(a); 25]
United States of America
District Court for the Northern District of Illinois, Eastern Division
Case No. 10 C 1174
Maxxsonics USA, Inc. v. Fengshun Peiying Electro Acoustic Company, Ltd.
21 March 2012
Original in English
Published in English

The buyer, a United States corporation, which sells aftermarket audio equipment, and the seller, a Chinese company that manufactures car amplifiers, entered into multiple contracts for delivery of car amplifiers between 2007 and 2009.

According to the buyer, a significant number of the amplifiers delivered by the seller during that period were defective and were returned by consumers to retail distributors. After the parties failed to resolve the issue amicably, they resorted to litigation.

The facts of the case were largely undisputed — the parties agreed that the buyer had paid $100,000 of the roughly $610,000 due under the invoices. According to the seller, this was done in retaliation for allegedly defective goods that the seller had shipped under previous unrelated purchase orders. Neither party disputed that each purchase order constituted a separate contract.

The seller moved for partial summary judgment on the grounds that the buyer was seeking a set-off from purchase orders unrelated to those at issue in the present dispute. It claimed that it had performed under the last six purchase orders, but that the buyer had breached the contract by withholding payment in retaliation for allegedly defective goods from previous purchase orders. Further, the seller argued that since neither party disputed the events there was no genuine issue of material fact and that the court was entitled to grant summary judgment as a matter of law.

The seller argued that the CISG governed the contracts, whereas the buyer relied on Illinois law (as it incorporates the Uniform Commercial Code (UCC)). The court applied the CISG on the grounds that the contracts arose between parties from the United States and China, both parties to the Convention.

With regards to the issue of set-off, the seller noted that the CISG has no provision governing set-offs, but argued that the court should reason by analogy and apply the Illinois UCC set-off rules in line with the CISG's anticipatory breach provisions (Article 71), and that set-off should only be available for claims arising under the same contract.

The court agreed with the seller's general conclusion concerning set-off, but disagreed on the legal justification.

In addressing the question, it found that other courts had generally approached the issue in one of two ways. First, it found that most courts applied national law after determining set-offs to fall outside the scope of the CISG because the general availability of set-off is a procedural issue not specified by the substantive law of the CISG. Second, it noted that the some courts did find set-off to fall within the general scope of the CISG, but that those same courts found the CISG to be silent on the specific issue and thus utilized the gap-filling provision under the CISG and applied national law in any case.

The court did note that under Article 50 CISG, the buyer may reduce the price of non-conforming goods, but noted that that remedy is not identical to set-off. It further noted that provisions relating to set-off are included in the Convention on the Limitation Period in the International Sale of Goods, but that the Convention was not applicable in this case because China is not a party to it.

Having made these observations, the court determined that national law would apply to the question of whether set-off would be permitted. It utilized the Illinois UCC as both parties had applied this law in their pleadings. Under Illinois UCC, set-offs are only available for claims arising under the same contract.

The court found that the buyer had effectively conceded that the six purchase orders created valid and enforceable contracts; that the buyer failed to pay the balance due after receiving the product; and that the resulting damages totalled roughly $510,202.34. At issue, however, was whether the seller had substantially performed its obligations.

The seller asserted that the buyer's officers had admitted to withholding payment because of defective merchandise from previous orders. It argued that the buyer had thereby conceded that the shipments at issue conformed to the contracts. However, the buyer contended that there was a genuine issue of material fact regarding performance under the contracts at issue, stating that 480 amplifiers from the last six orders in question had been returned by the customers as defective. The parties further disagreed about the buyer's methods of tracking of the sold amplifiers.

Thus, because the seller was unable to show an absence of disputed material facts, the court denied its motion for summary judgment.

The court explained its decision by noting that, if the buyer were seeking a set-off from the previous contracts, the seller would be entitled to summary judgment, as that would mean that this fact was not disputed between the parties. However,

insofar the buyer was seeking a set-off for faulty amplifiers in the orders relating to the dispute (i.e. the last six orders), that claim turned on factual questions that could not be resolved in a summary judgment; including whether the shipments in question contained defective amplifiers and the extent to which the buyer had been damaged by any such effects.