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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 1187: CISG 1(1)(a); 8(3); 57(1)(a)
Canada: Mazzetta Company, l.l.c. c. Dégust-Mer inc., 2011 QCCA 717 (CanLII) (Quebec Court of Appeal), affirming on other grounds 2010 QCCS 6100 (Quebec Superior Court)
12 April 2011
Complete text: Court of Appeal: canlii.ca/t/fl1fc (original French version); canlii.ca/t/fr2n0 (unofficial English translation); Superior Court: canlii.ca/t/2dvxz (original French version)
Commentary on the case: E. S. Darankoum, "Vente internationale de marchandises: la Convention de Vienne au Québec vingt ans après son adoption" (2012) 46 Revue Juridique Thémis 133

Abstract prepared by Geneviève Saumier, National Correspondent

A contract for the sale of frozen lobster tails was concluded orally between the seller in Quebec and the buyer in Illinois. The lobster was delivered in New Hampshire but the price was apparently not paid and the seller sued in Quebec. The only possible ground for jurisdiction in Quebec was that one of the contractual obligations was to be performed in the province (Art. 3138(3) Civil Code of Quebec, hereinafter CCQ). The seller alleged that payment was due in Quebec, thereby satisfying the jurisdictional requirement. The buyer challenged this on the basis that the contract being silent on the location of payment, the default rule under Quebec contract law applied and payment was deemed to be due at the buyer's place of business.

The trial judge considered that the contract had been concluded in Quebec and that since the seller had to perform its obligations in that province, the criterion under Art. 3148(3) CCQ was satisfied; he did not discuss the location of payment or consider the law applicable to that issue. On appeal, the Court of Appeal confirmed the jurisdictional finding but did so exclusively in relation to the place of payment issue. In so doing, the Court of Appeal noted that the issue was to be decided according to the CISG and not according to Quebec contract law.

In deciding whether the place of payment was in the U.S. (without mentioning any specific U.S. State), it looked to two provisions of the CISG. First, under paragraph 8(3) CISG, the Court looked to the pattern of payments between the parties. The evidence indicated that over the course of dealings between the parties, payment had always been made in Quebec. Second, under subparagraph 57(1)(a) CISG, the default rule is that payment is due at the seller's place of business. As the contract was silent on the place of payment, the Court concluded that under the CISG, payment was due at the seller's place of business. These findings allowed the Court of Appeal to hold that one of the contractual obligations, viz. payment, was to be performed in Quebec, thereby meeting the requirement for jurisdiction under Quebec's rule for international jurisdiction.

The Court dismissed the appeal without costs because "the CISG was not raised by the parties". Under Quebec law, if neither party pleads "foreign" law, the Court cannot take it into account (Art. 2809 CCQ). In this case, however, the Court cites a Quebec author who states that where the conditions under

subparagraph 1(1) (a) CISG are met, the Convention is "automatically applicable". The Court did not consider Art. 6 CISG and whether the parties' reference to Quebec law in their pleadings was an implicit exclusion of the Convention.

Case 1188: CISG [1]; 6; 7; 11; 12; 96
Colombia: Corte Constitucional
10 May 2000
Original in Spanish
Available at http://turan.uc3m.es/uc3m/dpto/PR/dppr03/cisg/scolo1.htm

Abstract prepared by Paulina Smykouskaya

According to the procedure stipulated by the legislation of the Republic of Colombia, the CISG was presented to the Constitutional Court after being approved as law of the country by the Congress [Act 518 of 1999]. For the CISG to be executable in Colombia, the Constitutional Court had to verify that all formalities were observed and confirm constitutionality of the CISG.

After examining the formal aspect of the adoption of the CISG by the national government and approval by the Congress, the Court observed that the necessary requirements were met.

In the course of material revision of the CISG the Court pointed out the importance of the provisions in the Preamble that affirm that the adoption of uniform rules applied to contracts for the international sale of goods entered into between different social, economic and juridical systems, would contribute to the elimination of juridical obstacles which impede international trade and would instead promote its development.

The Court took into consideration that economic integration with other States is a constitutional strategy that should be achieved on the basis of fairness, reciprocity and national convenience. The Court observed that the CISG complied with this purpose as an instrument "to unify the criteria for the international sale of goods in order for it to become more expeditious for parties located in different countries to engage in the commercialization of goods which translates into a better quality of life of the inhabitants of the Nations where they reside".

The Court found that CISG does not ignore the autonomy of the private consent (Arts. 13, 16, 333 of the Magna Charta; Arts. 16, 1151, 1518, 1524, 1532 of the Civil Code) and does not hinder the freedom of the parties to enter into any agreement, as the parties that conclude the contract can exclude totally or partially the application of the CISG dispositions, tacitly or expressly (Art. 6 CISG).

Equally, the Court found that the CISG respects the principle of good faith (Art. 83 of the Magna Charta; Art. 7 CISG).

Another point considered by the Court dealt with the provisions of the CISG regulating the form of contracts (Arts. 11, 12, 96 CISG). The Court found that Colombia would not have to make a declaration or reservation on the matter, since its commercial legislation does not require that contracts for the sale of goods be necessarily concluded in writing (Art. 824 of the Commerce Code).

The Court ruled that the principles and regulations incorporated in the CISG are consistent with the Colombian Constitution, since they are based on the sovereignty, the respect for the self-determination of nations and the recognition of the principles of international law accepted by Colombia.

For these reasons, the Court resolved to declare the CISG and Act 518 of 1999 executable.

Case 1189: CISG 7; 8; 18; 19
Italy: Tribunale di Rovereto n. 914/2006
Takap B.V. v. EUROPLAY S.r.l
21 November 2007
Original in Italian
Full text available in Iurisdata (database)
Abstract prepared by Maria Chiara Malaguti, National Correspondent

The case concerned a commercial relation between an Italian company, the seller, and a Dutch company, the buyer, for the sale of mirrors. Since the Dutch company had failed to make some payments, the seller sued it before the Italian Court of Rovereto. The Court concluded that the contract was avoided and issued an order of payment in favour of the Italian company.

The defendant objected to the order claiming that the Italian judge did not have the authority to decide the issue at stake, since the forum selection clause in favour of the Dutch Courts, contained in the standard terms incorporated into the contract, applied. The Court dismissed the defendant's argument stating that the parties had not validly agreed upon a forum selection clause, since none of the criteria set out in Art. 23 lit. (a) and (b) of European Council Regulation n. 44/2001 were met. The Court noted that the clause had never been accepted by the seller in writing, nor was it possible to consider the clause as accepted only on the ground that the seller had executed the buyer's order (Art. 18 CISG). As a matter of fact, the seller provided evidence that it used to send a written statement confirming the orders received and including its own standard terms, which the other party had to sign and return. According to the Court, this implied that the contract between the parties had been concluded by exchange of written statements and not by the seller's performance of the order.

Besides, the Court found that the standard terms of the Dutch company were not part of the contract (in particular the forum selection clause). Referring to Arts. 7 and 8 CISG, the Court reasoned that in order to consider the standard terms validly incorporated into a contract, the addressee of the proposal (i.e. the Italian seller) should have been aware of such terms. In the Court's opinion since there was no proof that the Italian company had knowledge of the buyer's standards terms, the forum selection clause in favour of the Dutch Courts could not apply. Furthermore, even if the buyer could demonstrate the opposite, the buyer's signature on the confirmation statement sent to it by the seller (and including the seller's terms) amounted to an acceptance of a counter offer (Art. 19 CISG) and was binding upon the parties.

For these reasons, the Court confirmed its jurisdiction over the case.

Case 1190: CISG 25; 38; 39; 40; 49; 50
Italy: Arbitral Tribunal - Chamber of National and International Arbitration of Milan
30 July 2007
Original in Italian

Abstract prepared by Maria Chiara Malaguti, National Correspondent, and Valentina Renna

In 2002, a Ukrainian and an Italian company entered into a purchase agreement whereby the former was to buy a machinery manufactured by a German firm but overhauled and sold by the Italian company. Soon after the conclusion of the agreement divergences concerning its performance arose between the parties: delivery, installation and operation of the machinery turned to be very problematic.

The buyer complained about the delayed delivery and installation of the machinery, its non-compliance with the technical and quality standards agreed by the parties as well as its running defects.

The contract contained an arbitration clause referring to the Rules of the Chamber of National and International Arbitration of Milan and providing for the application of private international law, including the CISG.

The buyer thus initiated arbitration in August 2005 under the auspices of the Milan Chamber. It declared the agreement avoided for fundamental breach of the seller, thus it claimed reimbursement of the purchase price and compensation for damages due to the seller's failure to comply with the agreed obligations, also considering that it did not provide any technical assistance.

The seller objected to all these claims; besides, it counterclaimed the reimbursement of a bank guarantee assuming its illegitimate collection by the buyer.

The Arbitral Tribunal applied the CISG to the case in compliance with the parties' intention.

The arbitrators, also on the basis of the documentary evidences provided by both parties, found the buyer's assumptions well grounded. The Arbitral Tribunal stated that a breach of contract actually occurred since at least for one year the buyer could not rely on the performance it was entitled to.

The seller assumed several obligations, particularly concerning the quality of the machinery, its complete overhaul, a final test to be carried out, providing also for the proper installation of the machinery. But it did not perform them in the right way or even at all: the alleged obstacles to the performance could actually be easily resolved. Under the arbitrators' reasoning, the seller got to consider somehow burdensome the agreement and it did not want to perform this any longer.

Moreover, the objections raised by the seller were not sustainable as some of them were based on Italian law (Articles 1491 and 1495 of the Italian Civil Code), which was not applicable to the case, while others — referring to the CISG (Articles 38, 39 and 40) — were groundless.

Nonetheless, in the view of the Arbitral Tribunal, the failure to perform was not fundamental (Art. 25 CISG), though serious; thus it could not lead to a declaration of avoidance of the contract.

First, the buyer itself acknowledged that the machinery could operate to a certain extent; secondly, a long period of time elapsed before the arbitration was initiated (not a reasonable time, pursuant to Art. 49 CISG); finally, if the buyer really intended to avoid the contract it should have returned the machinery to the seller instead of still operating it and making profit out of it.

As for the buyer's alternative claim, concerning a reduction of price on account of the defects (Art. 50 CISG), the Arbitral Tribunal stated it was grounded and assessed it together with the suffered damages (reducing the sum that the buyer had claimed). In its decision, the Tribunal took into consideration a technical report on the condition of the machinery (submitted in the proceedings) with an estimate of costs for its repair as well as other costs borne by the buyer.

The Arbitral Tribunal denied the seller's counterclaim.

Case 1191: CISG 31
Italy: Corte di Cassazione, Sezioni Unite; n. 20887/2006
Saneco S.A. v. Toscoline S.r.l.
27 September 2006
Original in Italian
Full text available in IurisData (database)

Abstract prepared by Maria Chiara Malaguti, National Correspondent

The claimant, an Italian company, sued the seller, a French company, demanding a reduction of price plus damages for the purchase of defective textiles.

The defendant alleged lack of jurisdiction of the Italian court as its standard contractual terms contained a forum selection clause in favour of the French Tribunal of Hazenbrouk. The defendant also claimed the application of Art. 5 of Council Regulation n°44/2001 (the Regulation) pursuant to which a person domiciled in a Contracting State (i.e. the seller) may be sued, in matters relating to a contract, in the courts where the place of performance is located (i.e. France). The plaintiff alleged that it had never been acquainted to or accepted the standard terms and that the Regulation wasn't in force at the time the contract was negotiated.

In deciding the case, the Supreme Court stated that the Italian Court had no jurisdiction over the case since the Regulation was in force at the time of the claim. The Court, according to Art. 23 of the Regulation, also found that the seller's standard terms were not applicable since the buyer had never accepted the relevant clause in writing and its conduct did not reveal the existence of any agreement on forum selection between the parties.

In assessing the question of jurisdiction, the Supreme Court pointed out that the Regulation (Art. 5) provides that, in the case of a sales contract, the place of performance (that determines jurisdiction) is where the goods are or should have been delivered. In order to determine the place of delivery, the Court applied Art. 31 (a) CISG, which provides that if the seller is not bound to deliver the goods at any other particular place, its obligation to deliver consists — should the contract of sale involve carriage of the goods — in handing the goods over to the first carrier for transmission to the buyer.

Therefore, the Supreme Court concluded that the Italian Court had no jurisdiction on the case since the goods had been handed over to the first carrier for transmission to the buyer partly in France and partly in Belgium and the "CIF" term incorporated in the contract would not imply that the parties had agreed upon delivery in Italy.

Case 1192: CISG [7(1)]; 25; 35(2); 39(1); 49(2)
Italy, Tribunale di Busto Arsizio
Plasticos de Exportacion Expoplast C.A. v. Reg Mac s.r.l.
13 December 2001
Original in Italian
Italian excerpts available in Iurisdata (database)
Full text published in Rivista di diritto internazionale private e processuale, 2003, p. 150.

Abstract prepared by Silvia Solidoro

An Italian seller and an Ecuadorian buyer entered into a contract for the sale of an industrial machinery to be used in recycling plastic bags for the packaging of food products. Since upon installation, the machinery turned out to be defective, the buyer, alleging non-conformity to the contractual specifications, brought an action before the Italian Court of Busto Arsizio, claiming avoidance of the contract besides damages. After stating that the contract was governed by the CISG, the Court applied Art. 35(2) of the Convention, finding that the good sold was not fit for the particular use made known to the seller at the time of the conclusion of contract. Indeed, in the Court's view, it had been widely demonstrated that during the negotiations the buyer had provided the counterpart with the sample of the material to be processed, expressly pointing out that all the industrial equipment supplied by the European manufacturers previously entrusted with the recycling had fallen under a serious malfunction because of the special features of the goods to be worked. Since the seller had assured the buyer of the high performance which its own machinery would reach in the manufacturing process, this could be deemed the prima facie evidence of its liability, taking account of the failure of the recycle system to produce bags in the quantity originally agreed.

The Court dismissed the seller's argument according to which the buyer had lost its right to rely on any lack of conformity of the good sold, because of late notice of the defects of the machine resulting from the installation. The Court actually found that the buyer's conduct had been consistent with the provisions of Art. 39(1) CISG, since the source of malfunction was very hard to discover due to its highly technical nature. In reaching this conclusion, the Court stated that the determination of the "reasonable time", which can't go beyond the 2 years limit, involves taking into account different factors, concerning, inter alia, the distinctive features of the defects. The Court further held that the special nature of the defects may justify the buyer's notice of non-conformity describing the defects as they appear without specifying their origin.

Finally, the Court stated that the buyer was entitled to avoid the contract, arguing that, consistent with the nature of the avoidance, i.e. an extreme ratio with respect to the other remedies available to the buyer under the system of the Convention, the latter had rightly notified the counterpart only after the failure of its attempts to solve the malfunctioning of the machinery. In reaching this conclusion, the Court

argued that Art. 49(2) CISG, whereby the buyer's declaration of avoidance must be notified within a reasonable time, requires the existence of a "fundamental breach" of the seller's obligations. In this regard, the notion of "reasonable time" expressed by Art. 49 differs from that under Art. 39 (1) CISG, which runs from the moment when the party discovers or ought to have discovered the non-conformity of the goods (regardless of the possibility to avoid the contract). The Court considered that the buyer's avoidance of the contract at the moment of the installation of the machine, and not after trying to fix its defects, would have been contrary to the principle of good faith which governs international transactions as well [as domestic ones].

Case 1193: CISG 7(1); 8; 9; 19(3)
Mexico: Primer Tribunal Colegiado en Materia Civil del Primer Circuito
Kolmar Petrochemicals Americas, Inc. v. Idesa Petroquímica S.A. de C.V.
10 March 2005
Original in Spanish
Published in Spanish: CISG-Spain and Latin America database
(www.uc3m.es/uc3m/dpto/PR/dppr03/cisg/smexi5.htm);
English translation: www.cisg.law.pace.edu/cases/050310m1.html

Abstract prepared by Andrey A. Panov

The Mexican seller and the US buyer initiated negotiation of a FOB sales contract of Mono Ethylene Glycol fibre by telephone. Afterwards, the buyer e-mailed the seller recapitulating the terms the parties had agreed upon. The seller acknowledged the order by e-mail, but mentioned that it was still awaiting confirmation as to the availability of the terminal to load. The seller further promised to give "final confirmation" later on. In response to this e-mail, the buyer wrote that the comment regarding the terminal was not very clear and asked the seller to call back to further discuss the matter. Apparently, no telephone call or e-mail from the seller ensued. After more than two weeks, the buyer wrote again to the seller notifying the designation of the ship to carry the goods and asked the seller to send back an acceptance of the designation. However, an acceptance did not come forth. Eventually, the seller wrote an e-mail to the buyer notifying that the transaction could not be concluded on the agreed terms. The seller suggested an increase of the sale price to avoid losing money in the transaction. It also noted that it was fully aware that they were not upholding the original agreement, but that seemed to be the only quick and direct solution to the problem.

In court, the buyer claimed performance of the obligations under the contract as well as damages, including loss of profit. The first instance court found in favour of the seller. The court concluded from the facts that no sales contract had been concluded, as the parties never agreed on the date and place of delivery. It further considered that the buyer's notification of ship designation showed that the buyer knew that no agreement regarding the date and place of delivery had been reached. The Superior Court for the Federal District (second instance court), to which the buyer appealed, upheld the decision of the first instance court.

The buyer filed an appeal against both decisions with the First Circuit Appellate Court (the "Appellate Court") arguing that the facts showed that a contract had been concluded. Furthermore, the seller in its correspondence acknowledged that the

contract had been breached. The finding that a ship designation demonstrated that the buyer knew there was no agreement regarding the time and place of delivery contradicted widespread usages of international trade regarding carriage of goods by sea. The interpretation of the CISG given by the Superior Court for the Federal District promoted bad faith, as it allowed the seller to walk away from its obligations under the contract.

The Appellate Court dismissed the appeal and upheld the decisions of the lower courts. The Court agreed with the reasoning of the lower courts that had found Art. 19(3) CISG applicable. The Appellate Court stated that the seller had not accepted essential elements such as the date and place of delivery, as it had pointed out that it would give a "final confirmation" regarding these elements. Those elements were crucial for the purposes of the CISG, and, therefore, the buyer's offer had not been accepted and a contract had not been concluded.

The Appellate Court agreed with the Superior Court for the Federal District which stated that the principle of good faith (Art. 7(1) CISG) had not been violated, for the contract was never concluded and there were only unfinished negotiations. The Court reached the same conclusion with respect to the parties' intent (Art. 8 CISG): with no doubts the parties intended to negotiate the purchase of goods at a specific price, but the negotiations were not finalized due to the lack of agreement on the key elements of the contract. Incomplete negotiations between the parties resulted in the non-existence of a contract.

As to the buyer's argument that the lower courts misunderstood the notion of widespread trade usages (Art. 9 CISG) when interpreting the buyer's communication regarding ship designation, the Appellate Court agreed with the reasoning of those courts. Such a communication was found to demonstrate the buyer's awareness that the parties did not agree upon the date and place of delivery.

Case 1194: CISG 1; [7]; 18; 23; 34; 35; 36(1); 96
Mexico: Compromex Arbitration
Conservas La Costeña S.A. de C.V. v. Lanín San Luis S.A. & Agroindustrial Santa Adela S.A.
29 April 1996
Original in Spanish
English translation available at
http://www.cisg.law.pace.edu/cisg/wais/db/cases2/960429m1.html

Abstract prepared by Giulia M. Vallar

A Mexican company (the claimant) entered into a contract with an Argentinean company (the respondent) according to which the latter would sell to the former a certain amount of boxes of fruit cocktail and half peaches. The goods had to be packaged according to the sample boxes provided by the claimant. They were sent to the claimant by a Chilean company which, at the time of the dispute, had been declared bankrupt and had been completely liquidated. Payment for the goods was made through a letter of credit (L/C) to the order of the Argentinean respondent which had to transfer the funds to the Chilean company.

Once the goods were delivered, the Mexican company complained that the boxes were not similar to the samples provided and for that reason the goods were badly

damaged in the shipment. The claimant filed an action before Compromex (or the Commission) for the restitution of the amount paid to the respondent plus damages, alleging that (i) the goods were sent by a company domiciled in Chile, causing it serious problems because the importation was made under the Mexico-Chile Economic Complementation Accord; (ii) the invoices originally sent by the respondent did not reflect the price paid by the claimant and the respondent never sent the correct invoices as the claimant required; and (iii) the goods were not of the quality and quantity specified in the contract.

The respondent alleged that (i) it was not the proper respondent in the dispute and therefore it would not have been bound by any recommendation or award; (ii) it had never received complaints by the claimant about the quality and quantity of the goods; (iii) the claimant agreed that the goods were to be dispatched from the Republic of Chile; (iv) the Chilean company, to which the respondent had subcontracted the sale of the goods, properly performed its duties and, since the contract contained the clause FOB, the risk was transferred to the claimant; (v) the evidence of the non-conformity produced by the claimant lacked any legal value; and (vi) the CISG did not apply to the dispute because of the Republic of Argentina's reservation under Art. 96 CISG.

Compromex held that on the basis of Arts. 18 and 23 CISG, a contract existed between the parties of the dispute: the exchange of letters between the Mexican and Argentinean companies provided evidence of such contractual relationship. Furthermore, the Argentinean company was the beneficiary of the L/C for the goods' purchase.

The Commission also stated that according to Arts. 35 and 36 CISG, the respondent, or the company to which it subcontracted, should have dispatched goods of the quality and quantity specified in the contract and contained or packaged in the manner required by it. Compromex noted that those CISG articles would be applicable even in the absence of a specific agreement of the parties on the issue of packaging. The contracted goods were damaged because of the inadequate containers and boxes that were used. Since it was known to the respondent and the Chilean subcontractor that transportation would be by sea, it was their duty to ship the goods using adequate containers and packaging to preserve and protect them during shipment.

On the issue of non-conforming documents raised by the claimant, the Commission noted that pursuant to Art. 34 CISG, the seller must deliver the documents related to the goods at the time and place and in the form required by the contract. The Commission found that in the case at hand the documents tendered to the buyer were non-conforming and that the Argentinean company was to be considered responsible as it had a duty to supervise the Chilean subcontractor.

As to the respondent's allegation that the CISG did not apply due to Argentina's reservation under art. 96 of the Convention, Compromex stated that the allegation had no substance in the case at hand given that the contract was appropriately evidenced in writing.

Finally, with regard to the FOB clause, the Commission argued that it did not exempt the seller from liability, since under Art. 36 (1) CISG this latter remains liable for any lack of conformity existing at the moment the risk shifts to the buyer, even if the lack of conformity becomes apparent later on.

Pursuant to its reasoning, Compromex issued a recommendation holding that the respondent was liable for not having properly supervised the performance of the contractual obligations by the company to which it had subcontracted and therefore had to pay to the Mexican company the money claimed by the latter and had to tender to it the invoices requested. As for the damages, no recommendation was issued, due to lack of sufficient evidence.