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Contents

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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.

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

Case 1340: CISG 18; 23; 29; 53; 54; 80
Spain: Cantabria Provincial High Court, Judgement No. 400/2013
9 July 2013
Complete text: www.cisgspanish.com/wp-content/uploads/2013/12/SAP-Cantabria-9-julio-2013.pdf

Abstract prepared by María del Pilar Perales Viscasillas, National Correspondent

A Spanish seller and a buyer from Dubai were in contention over the execution of a cost, insurance and freight (CIF) sales contract for steel cable from Dubai at a total value of US$ 1,860,000 (US$ 930,000 each). The court of first instance ruled that the contract had not been executed and that there had therefore been no breach. An appeal against the decision was lodged by the buyer before the Provincial High Court.

The Court heard that, on 31 January 2008, the buyer issued two purchase orders and that both orders were received by the seller, whose representative signed them in accordance with CISG articles 18 and 23. The form of payment for each of the orders was to be by open credit telegraphic transfer (TT) 90 days from bill of lading (B/L) date or letter of credit (L/C) at 90 days from bill of lading.

The day after the purchase orders were received, the seller sent two pro forma invoices, although it had been established that payment should be "by confirmed and irrevocable L/C at 90 days B/L date". The court of first instance held that the contract that had been put into effect by the purchase orders could not be amended and that the subsequent pro forma invoices could thus not have contractual effectiveness: that is, they could not vary what was initially agreed when the initial offer was accepted.

The Provincial High Court disagreed. It considered that a letter from the seller's representative of 13 February 2008 amounted to novation, when it informed the buyer that: "You currently have a credit of US$ 600,000, the order has already been processed, so you should receive the goods shortly. This credit does not cover everything, but a letter of credit or a letter of agreement from VSL int. [the buyer] may do." The Court therefore held that the conditions of the documentary credit had been changed, since that was what was implied by the use of the phrase "may do" in the e-mail and the provision of CISG article 29 that "a party may be precluded by his conduct from asserting such a provision to the extent that the other party has relied on that conduct. That was what had happened in this case, when, on 26 February 2008, the buyer had obtained an irrevocable and unconditional guarantee from a bank in Switzerland in favour of the seller in order to pay the first instalment of a sum not exceeding US$ 930,000.

Having established that the sales contract had been executed, the Court considered that the buyer had not complied with its obligation to pay the price under the conditions laid down in the contract and in the Convention (CISG arts. 53 and 54), which were, according to the e-mail of 13 February 2008, that "a letter of credit or a letter of agreement from VSL int." should be obtained, which should, on the face of it, guarantee the whole of the agreed price of US$ 1,860,000. However, the buyer had done no more than obtain a guarantee from a Swiss bank, which only partially

met the requirement of the "letter of agreement from VSL int." requested by the buyer, since it did not cover the whole of the price — US$ 1,860,000 — but only half that amount, US$ 930,000.

This failure to guarantee the price constituted a fundamental breach of the contract by the buyer, which meant that it could not invoke any breach of the seller's own obligations, in accordance with CISG article 80, which stated that "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."

Case 1341: CISG [1; 4; 9 (2)]; 11; 29; 61 (1)(a); 61 (1)(b); 64 (1)(b); 74; 75
Spain: Supreme Court, Judgement No. 438/2013
1 July 2013
Complete text: www.cisgspanish.com/wp-content/uploads/2013/12/STS-1-julio-2013.pdf

Abstract prepared by María del Pilar Perales Viscasillas, National Correspondent

A brokerage firm specializing in trading cereals issued an invoice on 17 June 2008, in which a Spanish company was given as the buyer and a French company as the seller in a deal involving 9,000 tons of forage wheat to be delivered in five batches (August, September, October, November and December 2008) at €195 per ton. The invoice specified the port of delivery, Tarragona, and included the commission of the brokerage firm. The invoice was issued to both the parties and in the days that followed no complaints or claims were made.

The invoice had a section headed "Comments", which had the following entry: "10 lay days available. Transaction subject to acceptance by [the insurance company]". The insurance company sent the seller a communication on 21 July 2008 formally agreeing to insure the transaction only for €150,000, out of the total value of €780,000.

On 18 August 2008, the seller made the first delivery at the port of Tarragona. There followed two further deliveries, which the buyer did not collect. The seller brought an action against the buyer for breach of contract and claimed damages, consisting of the difference in the price at which the wheat was sold to another buyer, storage costs and 5.5 per cent financing costs, and also, as regards the rest of the wheat contracted for but not sold on, the difference between the price agreed and the market price at the time of the avoidance of the contract in October 2008.

The ruling of the court of first instance was based on the fact that there existed a contract to buy and sell the wheat, documented in the brokerage firm's records, but it dismissed the seller's claim, on the grounds that the sale and purchase were subject to the condition that the risk was covered by the insurance company and that condition had not been met.

Hearing the appeal, the Provincial High Court held that the insurance provided by the insurer related to the payment of the price, so only the seller could protest at the lack of such insurance, not the buyer who was liable for payment. With regard to the execution of the contract, the Court's view was that it had not been executed by the parties, since it had not been signed by the buyer, while the brokerage firm's invoice

was not sufficient to indicate that the buyer had given its consent either explicitly or tacitly.

In its appeal before the Supreme Court, the seller contested the interpretation that the judgement of the Provincial High Court had put on the rules governing the formation and execution of contracts and its interpretation of the contract.

The Supreme Court held, first of all, that CISG applied, inasmuch as both the buyer and the seller had their head offices in contracting States, Spain and France. With regard to the execution of the contract, it held that the issuance of an invoice such as that provided by the brokerage firm and the absence of any complaint by either of the parties when it was received implied the acceptance by both parties of a usage of trade in the cereals market, whereby the invoice proved the existence of a sales agreement, which had been formally made by word of mouth — specifically, by telephone — in accordance with the general principle of freedom of form for the conclusion of a contract, as provided for in CISG article 11, unless the exception in CISG article 29 applied. Furthermore, it ruled that the same conclusion would have been reached under Spanish domestic law on the application of the general principle of freedom of form (art. 1278 of the Civil Code) and that there was no special requirement on the form of such transactions.

With regard to the breach of the contract, the Court held that, since the delivery of the first three batches to the buyer and the failure to pay the price were attested, the sale and purchase contract had clearly been correctly avoided by the seller, in accordance with the provisions of CISG articles 61 (a) and 64 (1)(b). It held the contract to have been avoided when the seller notified the buyer of that fact in a fax sent on 16 October 2008. The avoidance entitled the seller to claim damages, pursuant to CISG articles 61 (1)(b), 74 and 75. Moreover, in accordance with CISG article 74, the seller could claim damages for *damnum emergens* and loss of profits, while under CISG article 75, it could claim the difference between the contract price and the substitute transaction price, as well as any further damages recoverable under CISG article 74. That was what the seller had done, keeping a documentary record of resale invoices. It had also used invoices to prove the storage costs incurred for the first three deliveries of wheat, which would form part of the *damnum emergens* resulting from the breach, in accordance with CISG article 74. The Court found insufficient justification, however, for what the seller called the "total financing costs".

With regard to the rest of the wheat to be bought under the contract — the amount intended for delivery in November and December 2008 (4,000 tons) and the proportion of the three previous batches that had not been sold (350 tons) — the Court held that the seller was justified in claiming the difference between the contract price and the market price according to the data provided by the Barcelona Corn Exchange in October 2008 for the time that the contract was avoided. The seller was also entitled to claim interest on the damages, since an obligation to compensate arose with the avoidance of the contract.

Case 1342: CISG 25; 35 (2)(a); 38; 39; 75; 77; 79
Spain: Murcia Provincial High Court, Section 1, Judgement No. 267/2012
25 May 2012
Complete text: www.cisgspanish.com/wp-content/uploads/2013/07/murcia25mayo2012.pdf

Abstract prepared by María del Pilar Perales Viscasillas, National Correspondent

The parties, a Spanish seller and a buyer from the Netherlands, had concluded a series of contracts for the international sale and purchase of red chilli powder. There was no dispute between the parties with regard to the application of CISG.

A number of the batches of chilli delivered — a total of five between 15 November 2004 and 18 March 2005 — turned out to contain unauthorized colourants (Sudan Red and Para Red), which, in the buyer's view, made the goods unfit for human consumption and thus constituted a fundamental defect that amounted to a fundamental breach. The buyer therefore claimed for loss and damages caused to it by the breach (CISG arts. 25 and 35 (2)(a)).

The buyer alleged that various food regulations, both Spanish and European, had been breached. The case arose at a time when the presence of illegal colourants in chilli had produced a "food crisis" in Europe, leading to an intervention by the European Union, which issued its first warning on 14 April 2005. This prompted a subsequent policy intervention by the European Union, including the issue of an order to withdraw products containing more than a certain degree of contamination. It also turned out that there was some confusion regarding the method that could be used to analyse affected products, which had the additional result that the European authorities decision on food security had to be corrected. In view of all this, the Court considered that it could not rule on the breach of the European regulations.

With regard to four of the five batches, the Court held, on the basis of the analysis that had been conducted, that the presence of low levels of colourant was not due to any intentional policy on the part of the seller but resulted from a chance contamination of the environment or the machinery used to process the chilli, which, in turn, could have a variety of causes: the use of lubricants in the machines, the packaging used or the printing ink on the bags. The level of contamination was very low, so the seller was not obliged to withdraw and destroy its merchandise. As for the remaining batch, the Court ruled that the contamination exceeded the minimum levels permitted under European regulations. Unlike the previous batches, that batch had been made in part with pepper skins that the seller had acquired in Uzbekistan. The seller claimed that, as provided for in CISG article 79, the effect could not have been foreseen.

However, the Court considered that the criteria for determining unforseeability had not been met, particularly since the company operated in a sector in which safety concerns had to be paramount. The presence of contaminating colourants was not unusual in the food sector. Moreover, the fact that the health authorities had not issued warnings was not conclusive, particularly since the product concerned was from Uzbekistan — the first time that it had been bought from that country — and the pepper skins had been added in the interests of improving safety, which already indicated some lack of confidence in the product, particularly since other illegal colourants had been detected in another batch.

With regard to the breach of CISG articles 38, 39 and 77, the Court considered that, since the defect in the chilli was not obvious and no problem had previously arisen with the goods, it could not rule that the time limits for these articles had been breached.

Turning to the question of damages for the contaminated chilli powder, the Court considered various aspects of the case that supported the rulings of the lower court judge. Among the various aspects considered — the remaining stocks of the finished product, the cost of destroying the contaminated product, the leftover packaging, the cost of storing the product, the expenditure on containers and pallets, the hiring of additional transport, the adverse impact on the work management cycle and the costs of laboratory tests — attention may be drawn to the question of the difference between the contract price and the substitute transaction price (CISG art. 75). The buyer had had to buy replacement goods and was claiming the difference. However, the court dismissed the claim, on the grounds that, since the case did not concern the avoidance of the contract, the substitute transaction was not relevant.

Case 1343: CISG 1 (1)(a); 3 (1); 7 (1); 9 (2); 26; 35; 39; 45; 49; 74; 75; 76; 77; 78; 81

Spain: Fuenlabrada Court of First Instance No. 1, Judgement No. 114/2012
11 May 2012
Complete text:
www.cisgspanish.com/wpcontent/uploads/2013/07/fuenlabrada11mayo2012.pdf

Abstract prepared by María del Pilar Perales Viscasillas, National Correspondent

The parties to an international contract between an Italian seller and a Spanish buyer for the sale of a machine forming part of a production line making air conditioning ducts were in dispute concerning the machine's lack of conformity: once installed, it had failed to produce a single part.

With regard to the application of the Convention, the court considered that the Convention on the law applicable to contractual obligations (the Rome Convention) was subordinate to special regulations such as CISG, a special, uniform substantive law on the international sale of goods, of which both Spain and Italy — the countries where the parties were based — were contracting States (CISG art. 1 (1)(a)). Moreover, the contract in question related to the international sale of goods in the terms set out in CISG article 3 (1): the machine was manufactured in Italy, dismantled for transportation and reassembled in Spain. The fact that the goods to be delivered were prefabricated or preproduced did not change the fact that the contract in question was a sales contract and, if the buyer did not provide the materials, that also constituted strong grounds for calling the contract a contract for the sale of goods (Judgement of the European Court of Justice, 25 February 2010).

The judge also referred in general terms to the interpretative tools of CISG, making it clear that domestic law was not applicable in matters governed by the Convention and could not even be cited for interpretative purposes, since that would run counter to the principle of uniformity of application (CISG art. 7 (1)). He also emphasized that legal practitioners were helped in their work of interpretation by the United Nations Commission on International Trade Law (UNCITRAL), with its Case Law on UNCITRAL Texts (CLOUT), and the digest of case law on the United Nations

Convention on the International Sale of Goods (2012) was a particularly useful reference tool. He further stated that the case law of any country that could be invoked but was not grounded in the Convention would have doctrinal value but could not add anything to the Convention.

After considering the evidence, and particularly the expert reports submitted by the parties, the judge held that it was a matter of common sense that the component parts of an air conditioning duct should be assembled with sufficient precision to prevent the escape of the air circulating through it, regardless of whether or not there were rules governing the margin of tolerance for this kind of part. If the machine was not fit for the purpose for which it had been bought owing to the malfunctioning of the roller system, it must be considered a breach by the seller. It may be noted that the judge also gave due consideration to the fact that machine design was not in the buyer's line of business; the buyer did not have any qualified staff, nor had it provided proper training for operators, nor any manuals, nor had it participated in designing of the machine, although it had informed the seller of the use to which it proposed to put it. For all these reasons, the judge considered that there had been a breach of CISG article 35 (2).

The judge dismissed the seller's claim that CISG article 9 (2) applied with regards to presumptive evidence. The court flatly dismissed this claim, since CISG article 9 (2) had nothing to do with presumptive evidence and, in any case, the applicable article would be CISG article 35 (3), inasmuch as the seller knew of the defect or could not have been unaware of it. It also held that the buyer had complied with the provisions of CISG article 39, in that it had not been possible to find the defect until the machine was in operation, so the defect had remained hidden. Furthermore, it held that the date from which the time limit was calculated (*dies a quo*), as laid down in article 39 (2), had not even started, since there had been no formal recognition of the buyer's taking possession of the machine and its accessories, in the form of documentation relating to occupational safety protection. The judge also considered that, in the case of non-perishable goods, or where a delay did not adversely affect the seller's activities vis-à-vis third parties, the *dies a quo* of the "reasonable time" referred to in article 39 was the moment at which the buyer became certain, rather than merely suspecting, that the machine did not work (here he cited Saarbrücken Regional Court, 1 June 2004, and Forli District Court, 16 February 2009). Moreover, the *dies a quo* should be different in the case of goods requiring a period of training and regular repairs (here he referred to the District Court for the Southern District of Ohio, United States of America, 26 March 2009, and Versailles Court of Appeal, 29 January 1998).

With regard to the claim by the seller that there had been a double or reciprocal breach on the part of the parties, in that the seller had not paid the full amount, the judge said that, in such cases, it was necessary to determine which breach was the more serious, in order to reach a decision or dismiss a claim. The court applied the criteria laid down in the doctrine on the matter — chronology, causation and proportionality — and ruled that the breach on the part of the seller was the more serious and that the buyer's was caused by the seller's. The judge considered that the seller's breach was fundamental (CISG art. 25), so the action for avoidance (CISG arts. 45 (1)(a) and 49 (1)(a)), which was taken within a reasonable time (CISG arts. 26 and 49 (2)(b)), was appropriate and was supported by CISG case law. As for the effects of the avoidance, the judge considered the various sections of

CISG article 81. With regard to the question of damages, the court considered the various claims, in the light of CISG articles 74-77 and in some cases accepted them and in others dismissed them outright for lack of evidence.

With regard to interest, the court took the majority position, on the basis of CISG article 78 and the digest of case law on the Convention, that the issue was outside the scope of the Convention and that there appeared to be a clear trend to apply the rate that would be applicable according to the rules of private international law if the Convention were not applicable. In the current case, that would mean the rate under Italian law.

Case 1344: CISG 49 (1)(a); 25; 50; 51; 77; 78
Spain: Barcelona Provincial High Court, Section 14, Judgement No. 123/2012
8 March 2012
Complete text: www.cisgspanish.com/wp-content/uploads/2013/07/sapbarcelona8marzo2012.pdf

Abstract prepared by María del Pilar Perales Viscasillas, National Correspondent

The object of a contract between an Italian company — the seller — and a Spanish company — the buyer — was to construct, supply, transport, erect and start up four complete rotary bioreactors for the biofermentation and processing of organic and inorganic waste.

According to the information provided, various problems arose in connection with the assembling and setting up of the bioreactors, but the parties differed as to who was responsible for these problems. The seller considered that the defects in the bioreactors had been caused by errors and lack of skill on the part of the buyer's staff, the poor conditions at the plant and the fact that work was being carried out by other firms, delaying the installation and causing alignment problems in two of the bioreactors. When the problems appeared, the seller attempted to remedy them (CISG arts. 50 and 51), but the buyer prevented it from remedying them by denying access to the installations and making a contract with third parties, who carried out incorrect work that damaged the four bioreactors. In the seller's view, therefore, the buyer was liable to the full amount of the outstanding payment.

The buyer, for its part, denied that it was liable for the price and considered that the issue was a fundamental breach on the part of the seller (CISG arts. 49 (1)(a) and 25), since it had failed to comply with its obligations under the contract.

The parties were also in dispute about the value that should be placed on the specific obligations arising out of the contract and its subsequent amendment (alterations to electrical panels, the cost of dismantling and reassembling the discharge hopper of bioreactor No. 1, the cost of no-load tests of bioreactors Nos. 1 and 2 and the cost of repainting). They also disputed the total amount of damages, which included, among other items, the costs arising from the delay in starting up the equipment contracted for, the cost of relocating and accommodating the seller's technical staff in the buyer's facilities and the cost arising from the transport or import of materials that were stolen or disappeared from the buyer's facilities.

The seller also claimed that it was entitled to a bonus for having delivered the equipment within the agreed time and to the recovery of interest since the expiry of

the due date of the invoices, pursuant to CISG article 78. There was also a dispute about the applicable law: the Convention or else either Italian law, since the seller's closest links were with Italy, or, as the buyer argued, Spanish law, and specifically the provisions of the Civil Code. The court of first instance decided in favour of Spanish law and ruled that, with the delay, the seller had breached the obligation to start up the equipment and that it was also responsible for the operating defects. Both parties appealed against the judgement.

Giving the appeal judgement, the Provincial High Court ruled that, in view of the fact that the parties made no reference in the contract to the applicable law, article 4 of the 1980 Rome Convention should apply. Ruling that the contract was a performance contract, the Court accepted the arguments of the judgement under appeal whereby Spanish law applied, given that the activities undertaken were aimed at ensuring the operations of the bioreactors in the Barcelona plant. As the lower court judgement had pointed out, however, the result would be the same either way, since there were similar rules in the two countries, and the same would be true if the Convention were applied. On that point, the Court based its view on a Supreme Court judgement of 31 October 2006 relating to the avoidance of a contract (CLOUT Case 736).

The judgement upheld the lower court's conclusions to the extent of declaring that bioreactors Nos. 1 and 2, having passed the no-load tests, had been shown to be in conformity with the contract, but the same was not true of bioreactors Nos. 3 and 4, which had not passed either of the two tests. The Court also held that the costs of installing the bioreactors were the responsibility of the buyer, since that was clearly indicated in the contract. Since the rest of the contracted work had not been carried out by the seller, it could not now claim costs. Moreover, the Court held that it was a fundamental breach, in that two expert reports had shown that the defects were due to the design, that there had clearly been delays, that alignment problems had not been solved, that two of the bioreactors had not passed no-load tests and that the plant did not function as efficiently as promised. The fundamental breach of contract meant that the respondent was entitled not to pay for the unfulfilled part of the contract.

With regard to the extra costs, the Court dismissed some of the claims, on the basis that they had not been duly justified, but considered that others had been proved. It held that the costs arising from the delay in starting up the contracted equipment qualified as grounds for damages, despite a claim that article 77 of the Convention had been breached. Since it had been found that the breach was fundamental, and given the fact that, once the seller abandoned the job, there was no further possibility of its attempting to comply with the contract, the buyer could not be required to provide the seller with more opportunities, in the face of a completely uncertain outcome. Lastly, since the parties were mutually indebted, compensation must be paid, with the payment of legal interest from the date of the judgement of the court of first instance.

Case 1345: CISG 7 (2); 25; 39
Spain: Las Palmas de Gran Canaria Provincial High Court, Judgement No. 70/2012
16 February 2012
Complete text: www.cisgspanish.com/wp-content/
uploads/2013/07/saplaspalmas16febrero2012.pdf

Abstract prepared by María del Pilar Perales Viscasillas, National Correspondent

A contract was concluded between the parties on the purchase and sale of margarine for making croissants and puff pastry. There was no dispute as to the fact that it was governed by the United Nations Convention on the International Sale of Goods of 1980. The court of first instance ordered the buyer to pay the price, plus legal interest. The buyer appealed, on the grounds that the goods were not of the quality contracted for. The seller, for its part, claimed the price agreed under the contract and outstanding interest, in accordance with Act No. 3/2004 on late payment in commercial transactions between companies.

The Provincial High Court considered the issue of a fundamental breach (pursuant to CISG art. 25 and the judgement of the Supreme Court of 17 January 2008: CLOUT Case 802), but decided that there was insufficient evidence of this. It also considered the question of the claim of the goods' lack of conformity, although, since it considered the notification period laid down by the court of first instance to be valid and not open to appeal, it could not overturn the lower court's judgement on that point. However, the Court found that the goods had arrived in poor condition, the buyer having complained of defects five months after it had received them. In that connection, the Court held that, since margarine was undoubtedly a perishable product, the buyer had an obligation, under the Convention, to examine it as quickly as possible and, where appropriate, to complain of defects within a reasonable period of time. In the present case, the buyer had not undertaken such an examination nor lodged a complaint within a reasonable time, which should be measured in days or, at most, a number of weeks, but should never extend over a period of five months, which was the length of time that it had taken it to send a written communication clearly indicating the nature of the lack of conformity. It was important for reasons of legal protection that a reasonable period should be fixed, since trade relations ought not to be maintained in a state of uncertainty that left them open to question and delay for long periods, causing serious harm to economic operators. The time limit of two years referred to in CISG article 39 (2) should not call into question longer or shorter time limits, when the regulations were applicable to all kinds of goods, with the exception of the circumstances set out in CISG article 2, and thus covered goods ranging from simple, perishable goods to durable and complex goods that could require longer time limits, as in the case of complex equipment, for example. That did not, the court continued, preclude the need in specific circumstances to assess whether a claim was made within a reasonable time or not, with a view to ensuring that contractual relations were not terminated and that the passage of time did not introduce elements that might skew any possible claim. Thus, in the present case, the passage of time had raised doubts as to the moment at which the damage to the goods might have occurred, in view of their perishable nature and the care with which they should be treated and stored at all times. Failure to do so could have caused them damage.

The Court also held that a party could not cite the provisions of the Commercial Code, or the case law interpreting it, since it was clear that CISG took precedence,

its primacy reflecting the principle of the inviolability of treaties, as was frequently asserted by the case law and as stated in the second sentence of article 96, paragraph 1, of the Spanish Constitution; such a domestic law could be cited only with regard to questions not expressly settled by the Convention (CISG art. 7 (2)). Allowing a long deadline, with a two-year limit in circumstances such as those in the current case, could, in addition to the problems described above, leave it to the discretion of one or other of the parties to fulfil a contract, although that was prohibited under article 1256 of the Civil Code, because the goods were fully in its power and there was no possibility for the other party to take action.

Case 1346: CISG 8 (2); 8 (3); 58 (1)
Spain: Supreme Court, Section 1, Judgement No. 120/2011
17 March 2011
Complete text: www.cisgspanish.com/wp-content/uploads/2013/07/STS17marzo2011.pdf

Abstract prepared by María del Pilar Perales Viscasillas, National Correspondent

One of the parties alleged a breach of CISG article 58 (1), maintaining that the price was not payable, since the goods had not been delivered. The facts of the case showed that the parties had been in regular contact since 2000 and since that time large quantities of coffee had been bought and subsequently sold on.

The procedure followed by the parties was that:

- The buyer contracted, by telephone, to buy a large quantity of coffee at a price to be determined within a previously agreed range, in accordance with price movements in the composite index of the International Coffee Organization in London, plus a fixed supplement per ton of coffee;
- Once the seller had shipped the goods, the buyer sold the product to third parties and then proceeded to set the price to be paid in accordance with the agreement;
- In order to take delivery of the goods in question, the previous payment had to have been made, so the seller consigned the forwarder's bill of lading to the buyer's bank, which then made a payment.

In the course of one of these transactions, when the buyer was in financial difficulties and was unable to pay the seller, the seller agreed to recover the payment directly from the buyer's customers. The intended recovery was, however, unsuccessful, so the seller brought an action against the buyer for the amount that was owing. The buyer refused payment on the grounds that it was not actually a buyer but simply an intermediary that worked as a broker and, in the event of its being considered a buyer, it did not owe anything because the goods had not been delivered.

Both the courts of first instance and the Appeal Court considered that the contract between the parties was an international sales contract. The Supreme Court confirmed the interpretation adopted by the previous judgements, on the basis of their interpretation of the contract and the intent of the parties. It therefore ruled that CISG articles 8 (2) and 8 (3) applied, citing also in support of its ruling article 5: 101 of the Principles of European Contract Law and articles 4 (1) and 4 (2)

of the Principles of the International Institute for the Unification of Private Law (UNIDROIT).

With regard to the breach of CISG article 58 (1), the buyer claimed that it had not received either the goods or the documentation referring to them, for which reason it had not complied with the order to pay the price. The Supreme Court dismissed this claim and ordered the buyer to pay the price, given that payment to a third party — a creditor or the creditor's authorized representative — was the general rule under Spanish law (Civil Code, art. 1162).