United Nations A/CN.9/SER.C/ABSTRACTS/147

General Assembly

Distr.: General
18 July 2014
English
Original: Spanish

United Nations Commission on International Trade Law

CASE LAW ON UNCITRAL TEXTS
(CLOUT)

Contents

V.14-04832 (E) 010814 040814

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.

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

Case 1382: CISG

Spain: Murcia Provincial High Court,[1] Judgement No. 348/2011
8 July 2011
Original in Spanish
Complete text: www.cisgspanish.com/seccion/jurisprudencia/espana/

Abstract prepared by María del Pilar Perales Viscasillas, National Correspondent

The parties to a sales contract for lemons were in dispute over the price of the goods delivered.

In this regard, the Court considered the application of the Spanish Civil Code in relation to the price of the sales contract in the light of various international instruments.

In the Court's view, joint interpretation of the Civil Code rules on determining price in the sales contract must be based on an objective criterion, price not being determinable by one party alone. In the instant case, the objective criterion was the market price of lemons at the time the sale was concluded by the parties.

Price determination, the Court understood, should be tied to an objective criterion in keeping with international legal instruments relating to the sale of goods, which set out residual determination criteria referring to the possibility of objective determination (thus, both the United Nations Convention on Contracts for the International Sale of Goods and the UNIDROIT Principles of International Commercial Contracts include residual price determination standards that refer to objective criteria such as the market price, the price generally charged, or the "reasonable" price. Similar criteria are provided by legal texts that reflect efforts to harmonize the law of obligations and contracts within the European Union, namely the Principles of European Contract Law (PECL), published in 2000 and the current Draft Common Frame of Reference (CFR) based thereon).

Although such standards, the Court continued, were based on a different model of contract (open contract) and were mainly intended for systems in which criteria for residual price determination were available, nevertheless Spain's legal system endorsed the approach of always taking an objective criterion into account.

The Court determined finally that the sale of goods at issue was in accordance with the market price.

[1] Previously heard by Murcia Court of First Instance No. 8, 26 May 2010.

Case 1383: CISG 25; 30; 35; 38; 39
Spain: Madrid Provincial High Court[2]
14 July 2009
Original in Spanish
Complete text: www.cisgspanish.com/seccion/jurisprudencia/espana/

Abstract prepared by María del Pilar Perales Viscasillas, National Correspondent

A Spanish buyer and a Chinese seller concluded a contract for the manufacture of 198,000 flags of Portugal with specific characteristics (e.g. measurements, cutting system, inclusion of the signatures of the players from the Portuguese national football team), intended for a Portuguese end customer who had commissioned them for the occasion of the Football World Cup due to be held in Germany in June and July 2006, and for use as a promotional gift to accompany a publication. The price was paid in full by the purchaser. Subsequently, the buyer complained to the seller that the flags did not comply with the order.

Both parties filed expert reports on the condition of the goods. Both of the analyses conducted by the two experts on samples of the flags concluded that the flags presented defects such as marks on the fabric, frayed edges, fabric cut in a serrated and non-uniform manner, defective printing of players' signatures, unsatisfactory designs of hearts and coat-of-arms of Portugal, and colour bleeding. The differences in the expert reports stemmed mainly from the fact that the seller's expert had assessed the fitness for purpose of the goods, since the goods had been commissioned to serve as promotional gifts to accompany a publication and were of very low cost. The buyer's expert, on the other hand, concluded that the flags were not fit for sale, although it was recalled that they had not been intended for sale to the public but for free distribution (although this did not imply admissibility of defective goods).

The Court examined whether there had been a fundamental breach on the part of the seller in the light both of article 25 of the Convention and of the doctrine established in the Supreme Court's Judgement of 17 January 2008.[3] Thus, the Court took the view that the assessed defects in the flags produced and delivered by the seller, taking into consideration the purely promotional purpose of those goods, which were intended as promotional gifts to accompany a publication for general retail, as well as their low cost (acknowledged by both experts), did not allow a finding of fundamental or absolute breach of the obligation to deliver under article 25 of the Convention, but did allow a finding of partial breach which, while not exempting the buyer from meeting his obligation to pay, would entail a reduction in the agreed price.

As to whether the buyer had considered and reported the lack of conformity in accordance with articles 38 and 39 of the Convention, the Court considered the

[2] Previously heard by Colmenar Viejo Court of First Instance and Investigation No. 1, 23 July 2008.

[3] Judgement available at: http://turan.uc3m.es/cisg/espan67.htm, English translation at: http://cisgw3.law.pace.edu/cases/080117s4.html.

circumstances of the case and the doctrine established in the judgement of Pontevedra Provincial Court of 19 December 2007 (CLOUT 849).[4]

First, the goods were delivered in three phases starting from 15 April 2006, and the first written complaint by the buyer was made on 23 June 2006, approximately two months after the first delivery.

Second, pursuant to articles 38 and 39 of the Convention, the Court considered that, although the goods were non-perishable, other circumstances were present which, while less urgent, prompted expedited distribution, and therefore examination, of the goods, as the Portuguese flags, bearing the printed signatures of the Portuguese national football team players, had been manufactured to celebrate the Football World Cup in Germany in June and July 2006.

Third, the goods were intended to be examined not by the buyer directly but by the end customer in Portugal; and, as is clear from the correspondence between the parties from that day, 23 June, onwards, the buyer managed the shipment of goods to the customer without being able adequately to examine the condition of the goods, limiting itself initially to receiving complaints from the end customer and to examining the condition of the flags for itself only upon the return thereof.

Fourth, even had the buyer been able to examine the goods itself upon receipt, the conclusion would have been the same: as the goods had been received in three phases (in the second half of April and in May 2006) and a little over two months had elapsed between the first shipment and the complaint to the seller on 23 June 2006 (following examination of the goods), it must be concluded that the buyer complied with the duty to report any defects within a reasonable time after examining the goods within as short a period as was practicable.

Case 1384: CISG 25; 35; 49(1)(a)
Spain: Elche (Alicante) Court of First Instance No. 2
6 July 2009
Original in Spanish
Complete text: www.cisgspanish.com/seccion/jurisprudencia/espana/

Abstract prepared by María del Pilar Perales Viscasillas, National Correspondent

A contract was concluded between a Spanish seller (A) and a German buyer (B) for the sale of 21 tons of aluminium cans that were to be “clean and pressed into bales”. The buyer refused to receive the goods and notified the seller by e-mail on the day of delivery, alleging the very low quality of the delivered goods and the impossibility of processing them. Photographs of the goods were attached to the e-mail. The seller in turn demanded payment of the price from the buyer. The case simultaneously involved the non-payment of the price of the sale agreed between seller/buyer A and its seller Y, with A claiming the contract to be avoided owing to the low quality of the delivered goods, which had travelled directly from the warehouses of the seller Y to the German buyer B.

[4] Judgement available in Spanish at: http://turan.uc3m.es/uc3m/dpto/PR/dppr03/cisg/AP-PONTEVEDRA.htm and in English translation at: http://cisgw3.law.pace.edu/cases/071219s4.html.

The Court first examined the international contract and in particular the lack of conformity of the goods on the basis of article 35 CISG, citing the Supreme Court decision of 17 January 2008 as support for avoiding the contract owing to fundamental breach, and arguing that in accordance with article 217 of the Code of Civil Procedure the buyer must prove the lack of conformity. The Court considered in this regard that the goods delivered by the seller did not match the agreed specifications, since cans had been delivered packed together with scraps of other metals and waste of all kinds. The Court considered that there existed a fundamental breach (art. 25 CISG) on the part of the seller that allowed the buyer to avoid the contract (art. 49(1)(a) CISG) based, firstly, on a literal interpretation of what had been agreed by the parties, that is to say clean and pressed aluminium cans, which suggested that they should be free of any type of dirt such as organic or other waste, or different metals. Second, the Court based its decision on witness testimony, on an expert report which showed that the material that was mixed in with the cans would prevent them being processed, on samples provided (photographs where clean cans were required), and finally on the commercial activity of the buyer, dedicated to collecting entirely clean aluminium cans by means of selective gathering techniques, not taking cans from landfill sites.[5]

The national commercial sale consisted of a verbal contract for 21 tons of aluminium cans. The buyer refused to pay the price, given that the purchase was made for resale to the German buyer and that the German buyer rejected it owing to its low quality. The Court found that the Spanish buyer had not been able to prove a link between this national sale and the international sale, after which the Court proceeded to examine the national transaction in isolation and independent of the international sale, concluding that the buyer had not been able to prove that the seller had committed a breach, especially when the representative of the buyer accepted the goods without objection and without disputing their condition.

On appeal, the Alicante Provincial High Court of 11 May 2010 dismissed the appeal by the Spanish seller/buyer A on the grounds of erroneous evaluation of the evidence, and the Court stressed, albeit without citing CISG, its breach in relation to the German buyer.

Case 1385: CISG 74; 78
Spain: Alicante Provincial High Court[6]
24 April 2009
Original in Spanish
Complete text: www.cisgspanish.com/seccion/jurisprudencia/espana/

Abstract prepared by María del Pilar Perales Viscasillas, National Correspondent

The lower court had found that the German seller was not entitled to claim the costs of extrajudicial claims made by a specialized company and a law firm on the basis that such expenses may not include damages that might not be foreseeable by the respondent, as they consist of voluntary business actions.

---

[5] Judgement available at http://turan.uc3m.es/uc3m/dpto/PR/dppr03/cisg/espan67.htm.
[6] Previously heard by Elche (Alicante) Court of First Instance No. 6, 23 October 2008.

However, the Alicante Provincial High Court found that such costs could indeed be claimed because the Spanish buyer was aware of these collection efforts and of their amount, and because the terms and conditions of the contract between the parties established that, in the event of delay on the part of the buyer, the seller would be entitled to demand, in addition to interest of 12 per cent for late payment, expenses incurred due to payment notices, extrajudicial costs and costs incurred by resorting to the Austrian Creditors' Protection Association or by engaging a lawyer; that is, costs which would have been properly required in each case to ensure collection.

The Court considered this claim to be included in article 74 CISG, as well as the accrual of interest in article 78 CISG, although for the interest rate it referred to domestic law, i.e. to article 341 of the Code of Commerce according to which in the absence of agreement the legal interest rate shall apply from the day that the challenge is filed.

Case 1386: CISG 8; 9; 74; 76
Spain: Madrid Provincial High Court[7]
10 March 2009
Original in Spanish
Complete text: www.cisgspanish.com/seccion/jurisprudencia/espana/

Abstract prepared by María del Pilar Perales Viscasillas, National Correspondent

The case involved a contract for the sale of 20,880 bottles of medium sweet red table wine. During distribution of the wine the German buyer began to receive complaints from customers and bottles were sent back due to the defective quality of the product, the cost of which the buyer was obliged to refund, eventually amounting to a total of 5,197 returned bottles. This led to a series of demands for payment addressed to the Spanish seller. The seller did not dispute the shortcomings of the product and conceded that it had been sterilized with sorbic acid. The buyer commissioned a report on the wine. The samples contained benzoic acid, which is prohibited in the processing of wine.

The legitimacy of certain elements claimed as compensation for damages (art. 74 CISG) was disputed.

First, the transport costs incurred while returning goods to the seller were in dispute. The lower court and the appeal court dismissed this application for compensation made by the buyer since the decision to transport the goods to Spain after the discovery of shortcomings was made unilaterally by the buyer and disputed by the seller. This expense was incurred at the sole discretion of the buyer, and its usefulness or necessity not established; it thus should not impact the seller. It was also impossible to qualify the restitution of the unsuitable goods as "reasonable" behaviour which the seller should pay for in accordance with the provisions of articles 8 and 9 CISG. Regarding non-tradable goods, it was difficult to envisage what would require, or would make advisable, the transportation of these goods from the buyer's domicile to the seller's facilities, or why it would be impossible or more expensive to destroy or dispose of the goods in the place where they were located.

[7] Previously heard by Madrid Court of First Instance No. 37, 28 May 2008.

Second, in connection with the buyer's expenditure incurred by obtaining the report on the condition of the wine, the Court held that this was a checking activity into which the buyer was forced in a purely contractual and extrajudicial domain as the only way to ascertain the defective quality of the supplied goods, including their potential to harm consumers of the product, and also to put to the seller the consequences of its failure to comply with the contract. Therefore the claimed costs, directly derived from the breach attributable to the seller, must be borne by the seller.

Third, recognition or non-recognition of the amount claimed by the buyer in terms of loss of profit, equivalent to the profit lost by not selling on the wine that had been purchased, was based on the provisions of articles 74 and 76 CISG: that is, it depended on whether the loss suffered by the injured party was "foreseen or ought to have been foreseen at the time of the conclusion of the contract" by the party in breach.

Disagreeing with the reasoning of the lower court's ruling, the appeals court considered that the economic loss suffered in this regard was indeed foreseeable at the time of the conclusion of the contract. Simply because the seller was aware of the addition of benzoic acid to the wine supplied, and knew as a wholesaler in the sector that it was inappropriate to add that substance to wine, it was therefore foreseeable that it would be impossible to sell it to third parties and that the buyer would consequently suffer a certain loss. The buyer did not have the status of end consumer but of merchant, according to which status the buyer aimed to resell what it had acquired to third parties, consequently making a profit from the markup applied to the resale price. The defective quality of the wine intended by the buyer for resale to third parties was the foreseeable cause of a loss of profit.

Case 1387: CISG 1(1)(a); 53; 59
Spain: Valencia Provincial High Court[8]
12 May 2008
Original in Spanish
Complete text: www.cisgspanish.com/seccion/jurisprudencia/espana/

Abstract prepared by María del Pilar Perales Viscasillas, National Correspondent

The Spanish buyer and the English seller concluded a contract for the sale of 40 GPS-equipped radio sets to be subsequently leased to a golf club. The seller brought a suit for breach against the buyer in connection with payment of the price. The buyer, on the other hand, claimed that the seller exhibited clear negligence by never properly installing the appliances specified in the contract, which caused a large number of problems in operating them and that the seller also did not correctly provide the technical assistance service provided for in the contract. For this reason, the buyer did not pay some of the stipulated price and issued an invoice for the costs that had been directly incurred. The lower court, in the light of the evidence provided, upheld the seller's challenge in its entirety and ordered the buyer to pay some of the unpaid price.

[8] Previously heard by Valencia Court of First Instance No. 11, 30 June 2007.

Both parties appealed. The appeals court considered the relationship between the parties to be governed by 1(1)(a) CISG, noting no exclusions of the Convention of any kind, and did not suggest that this could be deduced from the fact that the price was specified in euros and not in pounds sterling.

The Court held that the seller had delivered the goods and therefore, in accordance with articles 53 and 59 CISG, there was an obligation to pay the price. In response, the non-observance of the seller was cited in terms of the poor installation, operation and maintenance of the goods supplied on the basis of the "*exceptio non rite adimpleti contractus*" (exception due to contractual breach). The burden of proof of the deficient non-compliance falls on the buyer, which failed to sufficiently prove breach of contract since it only presented one witness, one of its employees, while there were other witnesses who testified differently. The Court took the view that expert opinion would have been required given the eminently technical nature of the disagreement.

Similarly, from the date of installation of the GPS devices in May 2004 until November 2005, the seller had no record of any complaint from the buyer which, in the opinion of the Court, greatly exceeded the reasonable period of time mentioned in article 39 CISG.

Case 1388: CISG 48; 74
Spain: Madrid Provincial High Court[9]
18 October 2007
Original in Spanish
Complete text: www.cisgspanish.com/seccion/jurisprudencia/espana/

Abstract prepared by María del Pilar Perales Viscasillas, National Correspondent

The parties to a contract for the international sale of goods (Spanish buyer, seller potentially from India, since the goods were shipped from that country) disputed the application of a penalty clause laid down in the contract for delay in the delivery of the goods (seasonal textiles). The Court considered the application of articles 48 and 74 CISG.

It was thought that article 48 CISG did not apply as it has a general character in relation to ordinary cases of non-compliance, while the penalty clause was predicated on a unique character, its own autonomy and a specialized focus on certain breaches. The parties had freely determined the sanction which this clause would impose, from (and including) the first day of delay. The Court argued that article 74 CISG was also inapplicable because the penalty clause took the place precisely of compensation, thus representing an exception to the normal system of obligations, restrictively interpreted. The Court moderated the punishment, halving it by applying article 1.108 of the Civil Code.

[9] Previously heard by Madrid Court of First Instance No. 49, 17 November 2005.

Case 1389: CISG 25; 35(1)
Spain: Madrid Provincial High Court, Section 11[10]
22 March 2007
Original in Spanish
Complete text: www.cisgspanish.com/seccion/jurisprudencia/espana/

Abstract prepared by María del Pilar Perales Viscasillas, National Correspondent

The Spanish buyer purchased a machine from a Swedish seller. The machine was resold to a third party in Australia. It transpired that the machine did not function properly. The buyer made unsuccessful attempts to repair the machine, and was then obliged to refund the price to the subsequent buyer (the second buyer in Australia). The Court considered that there was a fundamental breach by the seller within the meaning of article 25 CISG and a breach of the provisions of article 35(1) CISG. Thus the lower court's judgement was upheld on appeal.

[10] Previously heard by Madrid Court of First Instance No. 15, 15 February 2005.