United Nations A/CN.9/SER.C/ABSTRACTS/149

General Assembly

Distr.: General
28 August 2014
English
Original: English/French

United Nations Commission on International Trade Law

CASE LAW ON UNCITRAL TEXTS (CLOUT)

Contents

V.14-05540 (E) 011014 021014

Introduction

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

CLOUT Case 1398: CISG 2(a); 35(3); 49(1)
Denmark: District Court Horsens
BS 150-1320/2010
Julie George v. Kristian Skovridder
7 December 2012
Original in Danish

Abstract prepared by Joseph Lookofsky, National Correspondent

In 2009 a Canadian resident (B) was in the market for a horse for her daughter (D) for use in jumping competitions at the highest international level, including qualification for the 2012 Olympic Games in London. To help select a suitable horse, B enlisted advisor (A) who contacted Danish seller (S), a horse-trader who sometimes also operated as an agent for potential buyers. Having located some 6-8 Danish warmbloods for sale, S took D and A to various stables where they could be considered and test-jumped. The two she liked best were named Cator and Ferrari. Cator was a 9-year old gelding with a competitive record comprising at least 9 high-level events. D test-rode Cator on November 8th and 9th and found him to be a good jumper. D then engaged a Canadian veterinarian (V-1) to examine him at an animal hospital in Denmark. V-1 summarized his results as follows:

> "Risk is defined as the likelihood or probability that illness, physical limitation or unsoundness is present at the time of the examination and likely to affect the horse in its intended use at this time or in the immediate future. […] There was no major health or soundness issue identified on this examination which suggests a high degree of risk. Most of the abnormalities of concern are associated with the right front limb. Each one of these findings is fairly minor on its own, but because there are several findings associated with a particular area they have an additive effect in increasing the perceived level of risk. The horse exhibited a slight positive flexion test on the right fore and showed a very slight degree of intermittent right front limb lameness when circling to the left. He also has a very mild radiographic variation in the right front coffin bone. These findings suggest an increased level of risk for right front foot lameness. However, there is no major evidence of weakness or pathology in this area."

One week after V-1 submitted his report, S sold Cator to B for 550,000 euros, then roughly equivalent to 4 million Danish kroner. Cator was delivered to B in Denmark on December 9th 2009 and then flown to Miami, Florida. On January 2nd 2010, D advised S that Cator, who had begun to limp, could no longer be ridden. On January 5th Cator was examined by veterinarian (V-2) who observed a presumably pre-existing injury to Cator's right front leg. On September 10, 2010, following the parties' failure to agree on an amicable solution proposed by S (the exchange of Cator for a different horse), B filed a lawsuit against S in Denmark, seeking avoidance of the contract and damages.

In order to obtain an impartial evaluation of Cator's condition at the time of contracting, the Danish court arranged for the issuance of yet another expert veterinary opinion, this time by V-3. In his report V-3 found it likely that Cator at

the time of delivery suffered from one or more disorders in his right front leg and that he was predisposed for an orthopaedic disorder; V-3 also found it highly likely that these disorders were connected to the findings V-1 made prior to the conclusion of the contract of sale. During the trial, S testified he had not read V-1's report prior to the conclusion of the contract. S conceded that he would not normally buy a horse with that description, but he observed that many riders become less risk-averse as the date for the Olympics draws near.

Having considered these facts and testimony, the City court rendered a unanimous (3-0) decision in favour of B.

As regards the issue of whether the transaction was within the CISG Scope, the court considered the purpose for which Cator was bought and the fact that D's only occupation was riding, competing, and dealing with horses, although her income from these activities was limited. On this basis the court held that the sale was not a "consumer sale" by reason of CISG Article 2(a) and that the contract was therefore governed — not by Danish domestic sales law, but — by the CISG.

As regards the non-conformity issue, the court held that Cator at the time of delivery was, at the very least, predisposed to develop one or more of the disorders observed shortly after his delivery and which rendered him useless as a jumper. For this reason and since B had purchased Cator for use as a jumper at the highest competitive level, the court held that Cator at the time of delivery did not conform to the contract of sale.

The court then proceeded to determine the CISG remedies to which B might be entitled, the first question being whether she was entitled to any remedial relief by reason of seller's breach (non-conformity). In this connection the court noted that under Article 35(3) the seller is not liable for non-conformity if the buyer at the time of the conclusion of the contract knew or could not have been unaware of such non-conformity.

The court continued (in near-literal English translation) as follows:

> "In consideration of the evidence the court finds that, prior to the conclusion of the contract, the buyer was informed that Cator had never been lame, had never received injections, and that he had been used continuously, and without pause attributable to his condition, as a jumper in high level competition. The court further finds that [V-1] during his examination of Cator observed a mild degree of sensitivity, together with mild stiffness or intermittent lameness in the right front leg, whereas he — also in consideration of Cator's positive history — did not opine that these findings were serious or gave occasion to additional tests, in that he assessed the risk level in such a sale as being between low and medium. Lastly, the court-appointed expert [V-3] — both in his report and his testimony — stated that [V-1] ought to have conducted additional tests and also observed Cator over a period of time before he had a sufficient basis for determining whether Cator was fit for use as a jumper in high-level competition. In addition [V-3] stated that the observations made by [V-1] were compatible both with a conclusion that the findings were insignificant, as well as with a conclusion that that the findings were serious.
>
> In light of the above-described facts the court is not in a position to declare that [B] knew or could not have been unaware of Cator's disorders or

predisposition for those disorders, nor that [B] had exhibited such a degree of negligence that she by virtue of CISG Article 35(3) is precluded from remedial relief for non-conformity.

In consideration of the fact that Cator was purchased for use as a jumper at the international level and that Cator is not fit for this purpose and is of no value as a jumper, the court holds that B by virtue of CISG Article 49(1) is entitled to avoid the sale. Her claim that S, upon return of the horse, shall return the purchase price of 550,000 euros is therefore accepted by the court."

Case 1399: CISG 38; 39; 49(1)(a); 51(2)
Germany: Hanseatisches Oberlandesgericht Hamburg
12 U 39/00
25 January 2008
Original in German
Published in: [2008] Internationales Handelsrecht (IHR), 98;
www.cisg.law.pace.edu/cisg/wais/db/cases2/080125g1.html (English translation)

Abstract prepared by Ulrich Magnus, National Correspondent, and Jan Lüsing

A Spanish company bought from a Dutch seller fittings and equipment for ice production to be used for an ice café in Palma de Mallorca. The seller was obliged to make the items available in ready to use conditions in Mallorca according to a deadline established in the contract, which, later on, the parties agreed to postpone. The contract also included a contractual penalty for any party failing to perform their obligations and stipulated Hamburg as place of jurisdiction.

The fittings for the café and the equipment for the ice cream production were delivered and the purchase price partly paid, however the inventory for the ice cream production was not installed. After granting additional time to the seller in order to make the machines available in a ready to use condition the buyer finally declared the contract avoided. The fittings and equipment were stored and eventually seized by court order and realized in order to cover the storage charge.

Further to an assignment document of the buyer's CEO, all claims of the buyer against the seller were assigned to the CEO and other buyer's assignees. They brought action for repayment of the purchase price and for payment of the contractual penalty, claiming that the defendant had delivered defective and incomplete items and failed to install the equipment. The defendant (the seller's inheritors) denied the alleged non-conformity of the goods delivered stating in addition that the buyer had not given notice of lack of conformity within reasonable time. Furthermore, the installation of the ice cream production equipment had failed because the buyer had not provided a suitable room for installation.

On first instance, the Regional Court dismissed the action; the Higher Regional Court overruled that decision and granted the buyer's assignees payment of the contractual penalty, although it rejected the claim for refund of the purchase price.

The Higher Regional Court stated that the contract between the parties was governed by the CISG, part of German law, which had been tacitly chosen by the parties when stipulating Hamburg as the place of jurisdiction. The court found that the buyer's assignees had no right to claim reimbursement of the part of the

purchase price that had already been paid neither under Article 81(2) nor under Article 50 CISG. According to the court, the buyer failed to notify the seller within reasonable time (Article 39 CISG) and to sufficiently specify the nature of the non-conformity. Relying on Article 8(2) CISG, the court did not find that the letters sent by the buyer to the seller could be considered as a complaint on the actual conditions of the goods, but they were to be understood as a mere reminder to install the equipment. With respect to the examination of the goods and the notification of non-conformity under Articles 38 and 39 CISG the court further stressed that the time limit, as applied by preceding jurisprudence, was usually of about fourteen days up to one month after receipt of the goods, except where particular circumstances shortening or extending the time are to be considered.

The court also held that no fundamental breach of contract (Article 25 CISG) had occurred, which would entitle the buyer to declare the contract avoided pursuant to Article 49(1)(a) CISG. Applying Article 51(2) CISG through analogy, the court found that avoidance of the entire contract could have been possible only if the missing installation of the equipment for the ice production had affected the buyer's use of the other part of the goods delivered. Since this had not been the case, and the buyer had not declared partial avoidance of the contract (i.e. only with reference to the equipment intended for the ice production), the court left undecided whether the buyer's declaration of avoidance had been timely and effective under Article 49(2)(b)(i) CISG.

However, since the seller's failure to install the ice cream production equipment was undisputed, the court, referring to Articles 79 and 80 CISG (as well as to domestic law), held that the seller could not be relieved from its obligation to make the machine available in a ready to use condition. The buyer's assignees were thus entitled to receive the contractual penalty established in the contract. Pursuant to Articles 74 and 78 CISG, the court awarded interest on the contractual penalty payment with interest rate being determined according to the national law applicable on the basis of the conflict of laws rules of the forum state, i.e. German law.

In its decision, the court also considered the assignment of contractual rights by the buyer's assignees, which had been contested by the seller's inheritors. According to these latter the assignment was ineffective since, among others, it had been revoked by the buyer's CEO. The Higher Regional Court, relying on Article 16(1) CISG, noted that a declaration of intent may only be revoked before the offeree dispatches an acceptance. Since the buyer's assignees had requested the assignment, the CEO's declaration to assign the claim was in fact a declaration of acceptance: its revocation was thus not possible.

Case 1400: CISG 25; [49(1)(a); 49(2)(b); 74; 81]
Switzerland: Pretore del Distretto di Lugano (Lugano District Court)
OA.2000.459
19 April 2007
Original in Italian
Published in Germany: www.cisg-online.ch; no. 1724

Abstract in German: Swiss Review of International and European Law (SRIEL), 1-2/2008, p. 193 ff.

Abstract prepared by Thomas M. Mayer

The court found that there had been a fundamental breach of contract under article 25 of the CISG. The Swiss buyers cancelled the sale of equipment for the construction of a children's playground because, firstly, the number and assembly of the play structures supplied did not correspond to what had been agreed and, secondly, the Italian seller had failed to provide safety certification. In addition, some of the goods presented manifest safety hazards, such as protruding screws. As the buyers had declared the contract avoided six days after the delivery of the disputed goods, the court acknowledged that indubitably the deadlines had been met.

The seller was therefore obliged to refund to the buyers the down payments received. The buyers were also seeking damages to cover customs duties, transportation and storage costs, loss of profit owing to a lease for the establishment of a retail business, a claim for damages lodged against them by the said retail business, and the personnel costs incurred due to the dismantling and storage of the goods. The court granted them compensation only for damage suffered as a result of customs and transportation costs as well as loss of earnings, the other elements of the claim not having been sufficiently proven.

Case 1401: CISG 6
Switzerland: Vaud Cantonal Court
224/2004
24 November 2004
Original in French

Abstract prepared by Thomas M. Mayer

The parties, with their headquarters in Spain, the Netherlands and Turkey, maintained contractual relations for the supply of cement. Accusing the defendants of having failed to deliver to it the quantities of cement stipulated in the contract of 25 October 1995, the Spanish plaintiff claimed payment from them of a contractual penalty and damages.

The court first needed to resolve the question of the application of the CISG. It considered that a choice of law in favour of the national law of one of the States party to the Convention could not be interpreted as a tacit exclusion of the application of the CISG. However, if the parties chose Swiss law as the applicable law without their contractual relations having any association with Switzerland whatsoever, as was the case here, it had to be inferred that their will was that their contract be governed by the Swiss Code of Obligations, and not by the CISG.

Case 1402: CISG 29; 36(1); 39(1); [45(1)(b); 53;] 74
Switzerland: Geneva Court of Justice
C/27897/1995
15 November 2002
Original in French

Abstract prepared by Thomas M. Mayer.

Through a Californian broker, commercial company A of Geneva purchased from commercial company E of Washington 10,000 metric tons of concrete-reinforcing steel for resale to company S, having its headquarters in London and in turn acting on behalf of a Chinese final purchaser. Subsequently, the order was extended to include 800 metric tons of steel wire coils.

The goods had been loaded in Lithuania on a ship bound for China. The consignee, S, challenged the quality of the goods on their arrival at the destination and initiated arbitration proceedings against company A. At the outcome of the proceedings, company S received $180,000 in addition to $70,000 on account of non-conformities and late delivery. Later, company E claimed from company A the outstanding 10 per cent of the sale price that company A had withheld to cover any eventual warranty claims. Company A asserted a counterclaim for damages for the share of costs in excess of the outstanding balance that were incurred as a result of the arbitration proceedings and various expert opinions. The competent court allowed the claim and dismissed the counterclaim. Company A appealed against this judgement.

The Court of Justice rejected the appellant's argument that a subsequent agreement relating to an inspection of the sold goods at the port of destination amounted to an amendment of the "free on board" clause agreed in the original contract. The court saw this merely as an extension of the prescribed time limit for reporting defects in the goods that had already been recorded during loading. The court found that the time limit had been respected and therefore allowed a claim against company A for damages on the grounds of defects in the goods. However, the court upheld as damages within the meaning of

article 74 of the CISG only the $180,000 in favour of S awarded in the arbitration proceedings. The appeal concerning the difference between this amount and the outstanding balance of the sale price owed by company A was dismissed.

Case 1403: CISG 4; 6; [53; 61(1);] 74; 77; 78; 79
Switzerland: Vaud Cantonal Court
CA99.000892 (476/2000/FJO)
8 December 2000
Original in French

Abstract prepared by Thomas M. Mayer

The Swiss plaintiffs and the defendant based in Germany had entered into an exclusive distribution agreement for a particular kind of coffin. The agreement contained a choice of law clause in favour of Swiss law.

The court held that it was necessary to begin from the assumption that a choice of law in favour of a contracting State also extended to the CISG. Unable to ascertain further evidence of the specified intentions of the parties beyond the above clause, the court subsequently held that the CISG was applicable. In the light of article 4 of the CISG, however, it examined under Swiss law the defendant's objections invoking invalidity of the contract. It did likewise for the defendant's claim to have validly terminated the agreement.

The individual orders, however, were examined by the court in accordance with the CISG. The court examined in a similar manner the contract clause that required the defendant to order at least 1,000 coffins every six months, an obligation qualified under the Convention as incumbent on the seller. The court ordered the defendant to pay damages under article 74 of the CISG for unpaid orders and, by virtue of the defendant's prior obligation to place orders, for orders unplaced, as well as for the failure to order a further 2,000 coffins. The amount granted corresponded to the difference between the cost price and the market value of the goods. The court denied that there was a case for applying article 77 of the CISG on the grounds that it was for the defendant to allege the existence of circumstances likely to reduce the damages, which it failed to do. The defendant, citing the lack of administrative authorizations required for the sale of coffins at the time in question, failed furthermore to obtain application of article 79 of the CISG.

The court recognized the plaintiffs' right to interest on arrears under article 78 of the CISG. The amount of interest was fixed according to the national law as determined by Swiss private international law, namely, for the agreement in question, Swiss private law.

Case 1404: CISG 1(1)(b); 6; 31(a); 32(2); 36; 66; [67(1)]
Switzerland: Vaud Cantonal Court
CA99.000456 (232/00/JGE)
26 May 2000
Original in French

Summary in German: Swiss Review of International and European Law (SRIEL), 1/2002, p. 146 ff.

Abstract prepared by Thomas M. Mayer

The dispute concerned a contract between a Swiss seller and a buyer with its headquarters in Brazil for the delivery of 2,000 metric tons of bitumen from Singapore to Mombasa (Kenya). "Cost and Freight" (CFR, Incoterms 1990) delivery was agreed. The seller entrusted the transportation of the goods to an ocean carrier secured via an intermediary. When the ship arrived at Mombasa, a significant portion of the goods had spilled from the transport barrels. In fact, the ship did not have the technical capacity to transport such goods, and furthermore the weather conditions during the crossing were poor. The buyer's insurer, subrogated to the rights of the buyer, claimed damages in court.

The court decided to apply the CISG (article 1(1)(b)). The choice of law clause in favour of Swiss Federal law contained in the contract did not require the exclusion of the CISG under article 6. The court therefore took into account the fact that, since the defendant's headquarters were located in Lausanne, there existed a relevant connection with Switzerland. In the absence of indications to the contrary, the court deemed that the reference to Swiss law should be taken to include not only the Swiss Code of Obligations but also the CISG.

The court then considered the question of the extent of the seller's obligations and the passing of risk. It noted that, under article 31(a) of the CISG, the seller must in principle hand over the goods to the first carrier. As delivery was subject, under the contract, to the Incoterm CFR, the defendant was obliged to arrange transportation

and, under article 32(2) of the CISG, to ensure the chartering of a means of transport appropriate for this type of goods. The passing of risk nevertheless occurred at the time of handover of the goods to the first carrier, during which the goods were checked by a neutral body, which certified their quality. The defendant had therefore fulfilled its obligations as seller.

The court denied the liability of the defendant under the second part of article 66 of the CISG (and also implicitly under article 36(2)). It concluded that the defendant had fulfilled its obligations under

article 32(2) of the CISG and could not be blamed for the choice of carrier or ship. The loading and securing of cargo was not the responsibility of the defendant. The application was therefore dismissed.

Case 1405: CISG 1; 6; 7; 30; 33; 45; 79; 79(1)
Ukraine: International Commercial Arbitration Court at the Ukrainian Chamber of Commerce and Industry
218y/2011
23 January 2012
Original in Russian

Abstract prepared by Anna Stepanowa

On 26 July 2011, a Swiss buyer commenced an arbitration before the International Commercial Arbitration Court at the Ukrainian Chamber of Commerce and Industry (tribunal) against a Ukrainian seller for a breach of contractual obligations to supply corn under a contract dated 14 June 2010.

The contract specified Ukrainian law as the governing law of the contract. Part 14 of the contract incorporated the provisions of Grain and Feed Trade Association standard contract No. 200 (Gafta No. 200), noting that they should be applied unless in contradiction of the provisions of the underlying contract. Gafta No. 200 Article 22 excludes application of the CISG.

One of the core issues raised by the parties was the question of the applicability of the CISG.

The tribunal reasoned that the underlying contract provided for the application of the law of Ukraine and that no provisions specifically limited this application to Ukraine's law governing domestic contracts. As Ukraine is a party to the CISG, the tribunal noted that the Convention is thus part of the law of Ukraine and is therefore the applicable law under Article 1 CISG. The tribunal added that pursuant to Article 6 CISG, "the parties may exclude the application of the Convention or, subject to Article 12, derogate from or vary the effect of any of its provisions". In the underlying contract, however, the parties did not expressly exclude the application of the CISG. The tribunal noted that the provisions of Gafta No. 200 are subsidiary to the provisions of the contract. Therefore, in light of the parties' selection of Ukrainian law, the provisions of Gafta No. 200 excluding the application of CISG contradict the provisions of the underlying contract and, accordingly, should not be applied. In line with this reasoning, the tribunal applied the CISG noting that if the parties wish to exclude the CISG or particular provisions, their intention must be express and clear. The tribunal added that, in line

with Article 7 CISG, Ukraine's law governing domestic contracts should be applied to the contract on a subsidiary basis.

The tribunal also considered the issue of the seller's failure to deliver the corn. Pursuant to the contract, the seller should have supplied the buyer with the corn in five shipments. The seller supplied the first shipment in conformity with the contract but failed to supply the remaining four shipments due to a change in domestic legislation making it impossible to obtain the license needed to export corn.

Here, the tribunal considered Articles 30, 33, 45, and 79 CISG. It noted the seller's obligations under Article 30 and 33 related to delivery. The tribunal also noted the remedies for breaching these obligations under Article 45 CISG.

Furthermore, the tribunal considered the parties' arguments concerning the impossibility of obtaining the license needed to export corn. The buyer contended that the introduction of the licensing requirement did not preclude the seller's obligation to make all the shipments of the corn. The seller argued that the remaining deliveries under the contract could not be effected due to the introduction of the licensing requirement which thus constituted an export prohibition allowing cancellation of the contract under Gafta No. 200 Article 13.

In considering this issue, the tribunal considered Article 79 CISG. The tribunal found that Article 79 CISG has the character of a "force majeure clause". The tribunal concluded, however, that the contract contained other provisions on force majeure than those found in Article 79(1) CISG. Therefore, applying Article 6 CISG allowing derogation or variance from the CISG, the tribunal noted that the provisions of the contract should prevail over Article 79(1). Having examined the provisions of the contract, the tribunal found that the failure to supply the second to fifth shipments of corn was due to "force majeure" circumstances as envisaged, in any case, both in the contract and Article 79 CISG.

Case 1406: CISG [7(2); 18;] 30; 39(2); 53; 59; 61; 62; 73; 78
Ukraine: The Commercial Court of Donetsk Region, 44/69
13 April 2007
Original in Russian
Available on the Internet: http://cisgw3.law.pace.edu/cases/071211u5.html

Abstract prepared by Sushen Srivathsan and Anna Stepanowa

On 3 October 2003, a Ukrainian buyer (the buyer) entered into a contract for the purchase of an automatic crucible press (the press) with a Swiss seller (the seller). The law of Switzerland was chosen as the law applicable to the contract. The purchase price was $344,500. The price was to be paid in instalments, but, eventually, $210,467 was overdue. On 26 January 2006, prior to bringing suit, the seller demanded payment of the balance. In hearing the dispute, the first instance court applied the CISG as the law of Switzerland, where both Switzerland and Ukraine are State parties to the CISG.

In the first instance court, the buyer argued that, contrary to the requirement of Article 30 CISG, the seller had failed to transfer the property in the goods. In addition, the buyer requested the first instance court to direct an official

examination of the goods with regard to the compliance of the press with the terms of the contract and international standards. As delivery and installation of the press was confirmed by relevant documents, the first instance court held that the seller had performed all of its obligations under the contract and the CISG. The first instance court held that, under the mandatory rules of Article 39(2) CISG, the buyer lost its right to rely on a lack of conformity of the press as it did not give notice thereof to the seller within two years from when the press had been handed over. Consequently, the first instance court rejected the buyer's objections as to the quality of the press and dismissed the motion to conduct a judicial examination of the goods. In addition, the first instance court held that the buyer is not entitled to rely on Article 30 CISG as, under the contract, the seller retains the property in the press until the date of complete payment of the purchase price.

The first instance court held that the buyer's failure to pay the complete purchase price constituted a breach of Articles 53 and 59 CISG. In addition, the first instance court held that the payment obligation should be fulfilled on the date fixed by the contract without the need for any request or the compliance with any formality on the part of the seller. Moreover, it was provided in the contract that if the buyer failed to fulfil its obligations then the seller was entitled to demand payment for the whole debt without further notice to the buyer. The first instance court held that Articles 61-62 CISG established the same rule. Hence, it considered that the seller's demand for the payment of a lump sum of the debt adjusted by interest and commercial sanctions was legally sufficient. Relying on the contract and Articles 73 and 78 CISG, the first instance court held that the buyer's overdue payment resulted in an obligation to pay the whole amount of the debt adjusted by 9 per cent interest on that amount since it became overdue.

During further hearings, the appellate court reversed the decision of the first instance court. The appellate court held that the CISG, as referred to by the seller and the first instance court, does not provide express indication that the court must apply the law of a foreign state to decide disputes between parties to foreign economic contracts. In addition, there is no bilateral treaty between Ukraine and Switzerland with respect to this issue. The appellate court held that the first instance court incorrectly interpreted Ukrainian substantive law and international law and confused the notion of "international treaty" and "foreign economic contract." Hence, the first instance court erroneously relied upon the CISG. Thus, the appellate court rejected the decision of the first instance court.

The Supreme Economic Court of Ukraine set aside the decision of the appellate court and reaffirmed the decision of the first instance court. Hence, the Court obliged the buyer to pay the balance of the purchase price with interest and penalties to the seller.