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Contents

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Introduction

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Each CLOUT issue includes a table of contents on the first page that lists the full citations to each case contained in this set of abstracts, along with the individual articles of each text which are interpreted or referred to by the Court or arbitral tribunal. The Internet address (URL) of the full text of the decisions in their original language is included, along with Internet addresses of translations in official United Nations language(s), where available, in the heading to each case (please note that references to websites other than official United Nations websites do not constitute an endorsement of that website by the United Nations or by UNCITRAL; furthermore, websites change frequently; all Internet addresses contained in this document are functional as of the date of submission of this document). Abstracts on cases interpreting the UNCITRAL Model Arbitration Law include keyword references which are consistent with those contained in the Thesaurus on the UNCITRAL Model Law on International Commercial Arbitration, prepared by the UNCITRAL Secretariat in consultation with National Correspondents. Abstracts on cases interpreting the UNCITRAL Model Law on Cross-Border Insolvency also include keyword references. The abstracts are searchable on the database available through the UNCITRAL website by reference to all key identifying features, i.e. country, legislative text, CLOUT case number, CLOUT issue number, decision date or a combination of any of these.

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

Case 1450: CISG 11; 12; 13; [66; 69;] 96
Czech Republic: Supreme Court of the Czech Republic
23 Cdo 1308/2011
Ideal Bike Corporation v. IMPEXO spol. s r.o.
17 December 2013
Original in Czech

Abstract prepared by Petr Dobiáš, Šárka Bittenglová and Zbysek Kordac

This case primarily deals with application of Article 13 CISG in relation to the use of e-mail correspondence in the conclusion of a contract.

The plaintiff (a Taiwanese seller) claimed payment of the purchase price for the delivery of bikes from the defendant (a Czech buyer). In order to conclude the contract, the plaintiff had authorized a third party, a German company, to act on its behalf. The defendant sent two orders by e-mail to the German company, which the latter confirmed by issuing two pro forma invoices that were sent to the defendant. In the resulting e-mail correspondence, the German company sent a revised pro forma invoice relating to the first order with the text: "JÍZDNÍ KOLA — F.O.B. TAIWAN" and requested this to be checked by the defendant. The defendant answered by e-mail with the text "OK". Both orders were then dispatched from Taiwan by the plaintiff. The goods however never reached the final destination, thus the defendant did not pay any money.

The key issue for the Courts was whether a valid contract was concluded; the second issue was the passing of risk in light of Articles 66 and 69 CISG. The Court of first instance held that the contract was validly concluded. However, the Appellate Court was of the opinion that the requirements for written form in accordance with the Article 13 CISG were not met. The Supreme Court of the Czech Republic, in turn, held that e-mail communication is to be considered as a valid written form of contract. The court's argument referred to the time when the CISG was being drafted, a period when the notion of correspondence could not logically refer to e-mail communication. The Supreme Court argued that Article 13 CISG does not contain an exhaustive list of forms that may be considered as made in writing. The forms listed in that article require that recorded information be remotely transmitted and that the addressee shall have a text at his disposal. Both requirements are now satisfied also by way of email or fax. The Supreme Court further argued that this conclusion was supported by academic literature of the nineties. The court also noted that Article 11 CISG (although subject to the limitation of Article 12 CISG) provides that the contract may not necessarily be concluded or evidenced in writing. Referring to Article 6 CISG, the court stated that the parties can agree on a specific form requirement to conclude a contract and that unless otherwise provided for by the existing practice between the parties or by the customs, electronic communications can be also considered as "writing". The court finally took into consideration the reservations of the People's Republic of China to Articles 12 and 96 CISG, as a result of which Article 11 CISG does not apply in this case, since the Czech Republic made a reservation to Article 1 (1) (b) CISG and one of the parties to the contract had its place of business in China. Because of the

reservations, the valid form of the contract had to be determined in accordance with Chinese law, which was applicable under the Czech conflict-of-laws rules. The Supreme Court finally reminded that Article 13 CISG is applicable even if Chinese law requires a written form for the contract of sale. The Supreme Court thus reversed the decision of the Appellate Court and referred the case back to it for further proceedings. If the Appellate Court comes to a conclusion that the contract was validly concluded, it shall assess whether the contract included provisions relating to transport which might be decisive for the issue of passing of risk and the claim for payment of the purchased price according to Articles 66-69 CISG.

Case 1451: CISG 18; 18(2); 18(3); 55
Czech Republic: Supreme Court of the Czech Republic
32 Cdo 824/2007
L.L.G. & C. K. v. K. a. s.
25 June 2008
Original in Czech

Abstract prepared by Petr Dobiáš and Šárka Bittenglová

This case relates to determining what constitutes a valid purchase contract and the evidence needed to prove the conclusion of such a contract. The courts made their decisions with reference to Articles 18 and 55 CISG.

The case ensued from the dispute between a German seller (plaintiff) and a Czech buyer (defendant) for payment of manufactured paint, damages and interest on late payment. The seller argued that the buyer breached its contractual obligations to pay the price for the goods and presented to the case materials the buyer's order (offer) to conclude a contract of sale and the documentary evidence by the deed (writing), which, according to the seller's opinion, should prove the existence of the contract of sale between the parties.

The Court of First Instance established that from the language of Article 55 CISG a price or a provision for its determining do not have to be stated explicitly but a contract of sale has to be validly concluded following the rules provided for in Article 18 CISG. The evidence presented by the seller, however, did not confirm that the respective proposal (the aforementioned buyer's order) for concluding the contract had been in any way accepted by the seller which also failed to prove the buyer's breach of contractual obligations and the buyer's delay in payment under the contract. Therefore, there were no grounds to deem that the contract of sale was concluded validly and, in the sense of Article 55 CISG, the buyer did not have any obligation to pay the price for the manufactured paint and the seller was not able to claim the payment of the price or damages as well as an interest on delay.

The Appellate Court agreed with the decision of the Court of First Instance. Relying on Article 18(3) CISG, it also assessed the fact that the seller did not prove its indication of assent by performing an act such as dispatching the goods, within the period of time laid down in Article 18(2), for example, on the basis of the mentioned order or as a result of the practices which the parties have established between them or of usage. In the Appellate Court's view the documentary evidence by the deed also could not help to prove the existence of the contract of sale between the parties because this document contained merely the buyer's request for explanation of the change in wrapping of the paint.

The seller brought an extraordinary appeal to the Supreme Court against the Appellate Court's decision, arguing that the conclusion of the court as to the non-existence of the contract of sale was incorrect and it was necessary to consider the practice established between the parties, usages and the subsequent conduct of the parties.

The Supreme Court, drawing on provisions of the CISG (Articles 55, 18(2), 18(3)), decided that the rules on the purchase price are applicable only on the condition that the contract of sale has been validly concluded. Therefore, it was necessary to assess whether there was a contract of sale and whether it was valid in accordance with Article 18, sections (2) and (3). Since the Supreme Court found that these facts were analysed by the lower courts and the reasoning of the Appellate Court did not contradict substantive law, i.e. Article 18 CISG, it dismissed the seller's appeal.

Case 1452: CISG 18; 18(3); 35; 35(1); 35(2); 35(2)(b); 50
Czech Republic: Supreme Court of the Czech Republic
32 Odo 725/2004
K., a. s., v. H.P.P., a. s.
29 March 2006
Original in Czech

Abstracts prepared by Petr Dobiáš and Šárka Bittenglová

The case focuses on the interpretation of statements made by the buyer and the seller's liability for defects of the delivered goods in relation to Articles 35 and 50 CISG.

A Slovak seller (plaintiff) and a Czech buyer (defendant) concluded a contract of sale on the basis of the buyer's order for carpets. The order specified the price, the quantity, and the purpose for which the carpets were to be used (in hotel rooms, corridors, stairways). The goods were delivered by the seller and taken over by the buyer who, however, did not pay the invoiced price of the goods. After the delivery the plaintiff reduced the price due to irreparable defects of the goods detected by the buyer. In addition, after the carpets were laid down, the defendant identified additional defects which were making the goods less durable and increasingly worn out. After the buyer's report to the seller regarding the additional defects of the goods and the claim of a 30 percent discount from the purchase price, the buyer decided to reduce the price of the carpets unilaterally. The seller sued for payment of the purchase price and interest.

Based on the expert statement on the carpets' quality, the Court of First Instance held that the quality of the goods did not comply with the standards set for a similar typology of carpets, therefore, the defendant had reasonably applied the price's reduction provided for in Article 50 CISG, which enables the buyer to reduce the purchase price in the same proportion as the value that the goods actually delivered had at the time of the delivery bears to the value that conforming goods would have had at that time.

The Appellate Court reversed the decision. The court held that, in accordance with Article 18(3) CISG, there was a valid contract of sale between the parties and that the delivered goods should conform to the requirements specified in the buyer's order as provided in Article 35(1) CISG. The court found that the buyer's request for

"ADOS type carpets" implied that the buyer ordered the goods whose quality was identified in the contract by the reference to their exact (business) name. If ADOS carpets were not "durable" carpets by their own typology, then the seller could not be deemed to have delivered defective goods and it cannot be concluded that the goods should meet the standards required for "durable" type of carpets. According to the court's ruling, the specifications provided by the buyer were to be referred to the size of locations where the carpets would be placed and not to their suitability for a particular purpose. For these reasons the court ruled in favour of the seller and ordered the buyer to pay the purchase price and interest.

The defendant appealed to the Supreme Court. Citing Article 8 CISG, the defendant argued that after the delivery of the carpets it immediately sent notification about the goods' defects to the plaintiff which never objected that the carpets were unsuitable for the purpose specified by the buyer in its order. The defendant further stressed, with reference to Article 35(2)(b) CISG, that the plaintiff was aware of the particular purpose of the carpets' usage and, therefore, it had an obligation to prove that the goods delivered were fit for this particular purpose as stated in the buyer's order.

The Supreme Court agreed with the decision of the Appellate Court and dismissed the appeal by the buyer. It stressed that, in accordance with Article 18(3) CISG, the contract between the parties was concluded when the requested goods were provided to the buyer. and that the quality of the goods was expressly agreed by the parties in the sense of Article 35(1) CISG by reference to the "ADOS type of carpets". The court came to conclusion that the application of Article 35(2) CISG was not possible since the seller could not be liable for the defects of the goods whose typology or parameters had been determined by the buyer. For this reason, the buyer was not entitled to reduce the price under Article 50 CISG.

Case 1453: CISG 1(1)(a); [1(3)]
Georgia: Supreme Court of Georgia
ას-1055-1085-2011
26 September 2011
Published in the database of the Supreme Court of Georgia; available at http://prg.supremecourt.ge

Abstract prepared by Mariam Jorbenadze

This case deals with the application of the CISG when parties to a contract are of different nationalities but have places of business in the same State.

A Georgian joint stock company (the buyer) concluded a sales contract with an individual entrepreneur, a citizen of the Islamic Republic of Iran (the seller) for the purchase of polyethylene granules, i.e. plastics. The buyer failed to pay the full amount of the purchase price to the seller in due time. Accordingly, the seller brought a claim before the city court, suing for the outstanding amount of the purchase price referred to in the sales contract. The buyer filed a counter-claim, suing for damages incurred as a result of a delay in the supply of the goods. Upon appeal, the final judgment was rendered by the Supreme Court of Georgia, which upheld the position of the buyer.

The applicability of the CISG was invoked at several points during the proceedings due to the case's cross border element, namely that the goods should have been delivered to Georgia from the Islamic Republic of Iran. The Supreme Court of Georgia shared the position of the lower instance courts on this point. The Court elaborated on Article 1(1)(a) of the CISG, stating that the Convention applies to contracts for the sale of goods between the parties whose places of business (described as commercial enterprises) are located in different States. The sales contract in this case was concluded between a Georgian joint stock company and an individual entrepreneur, who was a citizen of the Islamic Republic of Iran. However, the Court highlighted the fact that, when concluding the sales contract, the citizen of the Islamic Republic of Iran acted as an individual entrepreneur duly registered under the laws of Georgia. The Court further noted that the buyer was also a duly incorporated legal entity under Georgian law and thus the case should be resolved under domestic law.

Case 1454: CISG: [1(1)(b);] 38; 39; 40; 44; 50; [74;] 77; 82; 83; 84
Italy: Tribunale di Modena
Tehran Parand v. SAPI Spa
19 February 2014
Original in Italian

Abstract prepared by Maria Chiara Malaguti, National Correspondent, and Livia Oglio

In 1996, an Iranian manufacturer of fine toilet soap purchased pure beef tallow, fit for the purpose of manufacturing high-quality toilet soap, from an Italian company. The product's specifications had been established in the purchase order and pro-forma invoices. The buyer intended to procure the raw material required for a full year production. The goods were shipped by sea and reached the buyer's factory several weeks after this latter had paid the agreed price through five letters of credit. When the buyer's representatives inspected the goods, first at the port of destination and subsequently at the buyer's premises, it turned out that the beef tallow supplied did not conform to the high-quality product agreed upon in the contract and it was unfit for the buyer's manufacturing activity. The buyer tried anyhow to make use of the goods, but it encountered severe problems and incurred substantial financial losses. The business disruption associated with the supply of non-conforming raw materials also harmed its commercial reputation and caused it to lose substantial market shares.

The buyer filed a criminal complaint for fraud as a result of which the individual who had acted on behalf of the seller in the transaction was convicted. During the proceedings, the court appointed experts ascertained that the goods actually delivered were a mixture of animal and vegetal fats, not conforming to the contractual specifications and unfit for manufacturing high quality toilet soap. Moreover, the quantity delivered was lower than the agreed amount. The criminal court awarded provisional damages to the buyer.

After the decision of the criminal court became final, the Iranian manufacturer commenced a civil proceeding against the seller and the individual who had acted on behalf of the seller in the transaction. The buyer argued that it was entitled to avoid the contract, or to obtain a substantial reduction of price, and to receive price

re-payment and full damages compensation (in addition to the amounts already paid by the seller on the basis of the provisional damages awarded by the criminal court).

The court found that, pursuant to Article 82 CISG, the buyer could not avoid the contract, nor obtain restitution of the full price, since it had used and processed the goods, which could no longer be returned to the seller, as evidenced in the sworn report and damages evaluation made by the buyer's auditors.

The court, however, dismissed the defendants' argument that the buyer was not entitled to a price reduction since such request was late and time barred. According to the court, Articles 44 and 50 CISG do not set any time limit for the request to reduce the price; furthermore, pursuant to Article 40 CISG, the Italian seller was not entitled to rely on the provisions of Articles 38 and 39 CISG since it was well aware of the non-conformity of the beef tallow supplied. As a matter of fact, in the course of the criminal trial not only had been ascertained that the goods actually delivered were not conforming to the contractual specifications and unfit for the purpose, but one of the seller's representatives had admitted that he was aware that the beef tallow had been mixed to palm stearin.

The court further stated that the seller's breach of contract was proved by the evidence of the file and the undisputable outcome of the criminal trial and that pursuant to Article 83 CISG the buyer, although it had lost the right to avoid the contract, could still request a price reduction. As to the calculation of the price reduction, the court, applying Article 50 CISG, referred back to the conclusions of the criminal court appointed experts who had already determined the difference between the value of the goods actually delivered and the value that the conforming goods would have had. The court found that as per Article 84 CISG, legal interests shall be payable on that amount from the date of the payment of the purchase price to the settlement date.

Finally, the court awarded damages to the buyer, pursuant to Article 77 CISG, plus re-evaluation and legal interests from the date of the delivery of the goods to the date of the decision, and interest accrual. The court, however, dismissed the additional damages claim, considering that there was no evidence that the loss of market shares and damages to the commercial reputation that the buyer had raised in its submissions was exclusively attributable to the defendants' conduct nor that they could have foreseen such loss.

Case 1455: CISG: 6; [25;] 39
Italy: Tribunale di Foggia
Samuel Smith, The Old Brewery v. Vini San Barbato, snc
21 June 2013
Original in Italian

Abstract prepared by Maria Chiara Malaguti, National Correspondent, and Livia Oglio

In May 2003, the claimant purchased wine from the respondent. At that time, the wine was still "in the making" and required further processing. Therefore, according to the contract, the delivery and payment of the wine were subject to the positive audit of the respondent's premises by an independent consultant hired by the buyer as well as to the fact that the respondent before shipment should send to the buyer a

sample of the finished product together with the certificate of analysis from an independent laboratory, for the buyer's final approval.

However, the seller did not send any sample of the "finished" wine, but submitted to the buyer only an analysis report on the basis of which the buyer decided to make the advance payment to the seller. Once the wine was delivered, the buyer discovered that the product was not consistent with the analysis report sent by the seller and the sample tasted before concluding the contract (in March 2003). The buyer tried unsuccessfully to re-sell the wine to another local dealer, but the wine was rejected as it was found to be of very poor quality and not marketable.

The buyer made a formal complaint to the seller for fundamental breach of contract regarding both the seller's failure to submit the sample before shipment and the non-conformity of the wine actually delivered. Since the parties could not reach an amicable solution of the dispute, the buyer declared the contract avoided and sued the seller before the competent Italian court claiming that it was entitled to terminate the contract, on the ground of a fundamental breach by the seller, as well as to price restitution and damages compensation.

The court found that the seller's argument under Article 39 CISG, i.e. that the buyer had not given notice of the product defects within reasonable time, was without merit. The court reasoned that although the contract expressly derogated Article 6 CISG by setting a date of 8 days from the delivery of the merchandise for the purchaser's complaints, such a deadline had been complied with. The buyer's fax notifying the product defects and the seller's failure to send the agreed sample were sent the day after the delivery of the product.

The court further rejected the seller's argument that the visit of the buyer's consultant to its premises, during which the consultant sampled the "unfinished" wine, was to be meant as replacing the seller's obligation to send a sample of the final product to the buyer as stipulated in the contract. The court upheld the buyer's argument that the purpose of the consultant's visit was solely to inspect the seller's cellar, and that the consultant took no wine back with him as he could not carry it on the airplane, besides the fact the wine had yet to undergo the contractually stipulated processing. Thus, this visit could not possibly have served the purpose of approval of the sample mentioned in the contract.

The court found that the claim of defects in the essential qualities of the wine was grounded. Based on evidence of various analyses of the wine, the court noted the difference between the wine's alcohol volume and volatile acidity — reported in the laboratory's analysis reports, and those of the product actually delivered. According to the court, the analyses clearly proved that the wine delivered was substantially different from the sample analysed, the former being brown, rather than red, perfumed, rather than fruity, and dry and sharp, rather than well-structured. The court stated that this constituted a fundamental breach on the part of the seller to fulfil its contractual obligations, and that this latter had not provided sufficient evidence to exempt itself from responsibility for its performance failure.

The court also noted, further to the testimony of the independent consultant, that the buyer's attempts to resell the wine at a reduced price were unsuccessful, and that the buyer had no choice but to keep the wine in storage for years. According to the court this inability to market the wine demonstrated that the product was unfit for its agreed purpose, and that the seller had fundamentally breached its contractual

obligations. The buyer was therefore entitled to terminate the contract and the seller had to reimburse the buyer for the advance payment as well as for legal expenses. It also had to ship back to Italy, at its own care and expense, the wine already delivered by a date no later than 60 days following the court's decision.

In addition, the buyer was entitled to compensation for the costs sustained for the transport of the wine, payment to the consultant and the art work concerning the design and printing of labels for the wine that was never bottled.

The Court rejected, however, the buyer's additional claim for compensation based on the inactivity of its bottling line on the basis of lack of proof that the seller's failure to fulfil its contractual obligations had prevented the buyer from putting its resources to an alternative use.

The court also found groundless the buyer's claim of damages for cost of custody and storage of the wine, due to lack of data. The buyer's claim for lost earning opportunity on the resale of the wine was rejected as well due to lack of documented evidence of this loss.

Finally, the court held the seller liable for damages resulting from the breach of contract, the relevant compensation awarded to the buyer was subject to monetary re-evaluation according to Italy's consumer price index (ISTAT) from the date of the initial claim until the date of the court ruling; the court also awarded interest. The court clarified that the impossibility of establishing the euro/sterling exchange rate before the actual payment required the liquidation of damages in the currency of the damaged party.

Case relating to the Convention on the Limitation Period in the International Sale of Goods (Limitation Convention)

Case 1456: Limitation Convention 3

Serbia: Higher Commercial Court
Pž. 1670/08
24 December 2008[1]
Original in Serbian

Abstract prepared by Dina Prokić

At the beginning of 1992, a Bosnian seller delivered goods to a Serbian buyer. On 1 May 1992, war broke out in the Socialist Federal Republic of Yugoslavia, particularly in Bosnia and Herzegovina where the seller had its place of business, and lasted until 14 December 1995.

The seller commenced an action for the payment of the purchase price on 1 June 2007, claiming that the applicable limitation law was the Convention on the Limitation Period in the International Sale of Goods (the "Limitation Convention").

The first instance court stated that the Limitation Convention could not be applied in this case since, at the time of the conclusion and performance of the contract, the parties had their places of business in different territorial units of the same State, the

[1] Upholds Commercial Court of Valjevo, 14 January 2008.

Socialist Federal Republic of Yugoslavia. Thus, the court reasoned that Serbian law should apply instead.

According to the Serbian Law of Obligations, the limitation period does not run during military activities. Hence, the first instance court concluded that the limitation period began to run again on 15 December 1995. The first instance court concluded that, since the three-year limitation period envisaged in Article 374 of the Serbian Law of Obligations applied, the seller's claim was time-barred. The first instance court added that, even if the four-year limitation period envisaged in Article 8 of the Limitation Convention would apply, the seller's claim would still be time-barred.

The seller appealed to the Higher Commercial Court indicating that the war prevented it from submitting a claim earlier. In particular, the seller alleged that access to courts was impossible until 3 June 2004 when the Agreement on Succession Issues (United Nations, Treaty Series, vol. 2262, p. 251) came into force. The Higher Commercial Court dismissed the argument by indicating that in the given matter access to courts was available immediately after the end of military activities on 14 December 1995. The Higher Commercial Court also confirmed the decision of the lower court with respect to the applicability of the Limitation Convention.