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CASE LAW ON UNCITRAL TEXTS
(CLOUT)

Contents

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). Information about the features of that system and about its use is provided in the User Guide (A/CN.9/SER.C/GUIDE/1/Rev.1). CLOUT documents are available on the website of the UNCITRAL Secretariat on the Internet (http://www.uncitral.org).

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I. CASES RELATING TO THE UNITED NATIONS SALES CONVENTION (CISG)

[Original: English]

Case 316: CISG 1(1)(b); 38, 39, 49; 82(1); 82(2)
Germany: Oberlandesgericht Koblenz; 2 U 1899/89
27 September 1991
Original in German
Published in German: http://www.jura.uni-freiburg.de/ipr1/cisg/urteile/text/30.htm
Abstract published in Italian: [1996] Diritto del Commercio Internazionale No. 90, 621

An Italian seller, plaintiff, delivered marble slabs to a German buyer, defendant. The buyer informed the seller that the slabs were broken and had been stuck together. Thereafter, the buyer cut off the slabs and processed them. As the buyer refused to pay, the seller claimed payment of the purchase price.

The appellate court upheld the decision of the first instance court, which had admitted the seller's claim.

The court held that the rules of private international law of Germany led to the application of Italian law. Since the CISG was in force in Italy as of 1 January 1988, even though Germany was not a Contracting State at that time, the CISG was held to be applicable (article 1(1)(b) CISG).

The court found that it was not necessary to decide whether the marble slabs were broken and had been stuck together before delivery took place, whether the goods had been examined by the buyer in a short period of time (article 38 CISG), whether the buyer had given notice within a reasonable time after it had discovered the lack of conformity (article 39 CISG) or whether the seller had deceived the buyer with regard to the quality of the goods.

The court held that due to the processing of the marble slabs, it was impossible for the buyer to arrange for restitution of the marble slabs in the same condition in which it had received them. Therefore, the buyer had lost its right to declare the contract avoided (article 49 CISG) pursuant to article 82(1) CISG. Furthermore, the buyer had not met the requirements of article 82(2) CISG in order to exclude the application of article 82(1). The change in the slabs' condition had been caused by the buyer's own act and had not been the result of the examination of the goods under article 38 CISG.

[Original: English]

Case. 317: CISG Art. 1(1)(b); 6; 8(2); 31(a); 66; 67
Germany: Oberlandesgericht Karlsruhe; 15 U 29/92
20 November 1992
Original in German
Published in German: [1993] Neue Juristische Wochenschrift - Rechtsprechungsreport, 1316;
[1992] Die deutsche Rechtsprechung auf dem Gebiet des internationalen Privatrechts, No. 50, 103;
http://www.jura.uni-freiburg.de/ipr1/cisg/urteile/text/54.htm
Abstract published in Italian: [1995] Diritto del Commercio Internazionale, No. 63, 446
Commented on in German by Karollus in [1994] Recht der Wirtschaft, 386

In the framework of a long-term business relation, a French seller, plaintiff, sold goods to a German buyer, defendant. The seller delivered the goods according to its general business conditions "free delivery, duty-paid, untaxed" and handed the goods over to a carrier. The buyer denied that delivery had taken place and the seller produced an unsigned receipt with the buyer's stamp on it in order to prove delivery. The buyer refused to pay and the seller sued it for the outstanding purchase price.

The first instance court allowed the claim. The appellate court dismissed it.

The appellate court found that the CISG was applicable under article 1(1)(b) CISG, because the rules of German private international law led to the application of French law, which after ratification of the CISG, had incorporated the provisions thereof.

The court held that the seller was not entitled to claim the purchase price pursuant to articles 53 and 58 CISG. The stamped but unsigned receipt was not sufficient to proof delivery. Furthermore, the court held that the buyer had no obligation to pay the purchase price under articles 66 and 67 (1) CISG, as the risk had not passed to the buyer when the goods were handed over to the carrier for transmission to the buyer. The seller was bound to deliver the goods at the buyer’s place of business (article 31 CISG in conjunction with article 6 CISG) at its own risk, as provided by the agreement’s clause "free delivery...". The court found that this clause did not merely deal with the cost of the transport but also with the passing of the risk.

The court noted that the clause “free delivery...” had to be interpreted under German law, as the seller had used a clause common in German commerce, drafted in German and with a German buyer. The German doctrine and the jurisprudence show that this clause is generally interpreted as a rule dealing with costs as well as with the passing of risks. The court further noted that according to article 8 (2) CISG, the parties’ interpretation of the clause "free delivery..." had also to be taken into account. The court held that the fact that the seller concluded a transport insurance meant that it was prepared to take the risk of the transportation of the goods. In addition, the seller had sometimes carried certain goods for the buyer by its own means of transportation. This clearly indicated the parties' intention to accept the passing of the risk at the buyer’s place of business in Germany, and accordingly to deviate from article 31(a) CISG. The seller had not been successful in proving that the goods had been delivered to the buyer and as such, no passing of the risk to the buyer took place.

[Original: English]

Case 318: CISG Art. 74, 76, 77
Germany: Oberlandesgericht Celle; 3 U 246/97
2 September 1998
Original in German
Published in German: [1999] Oberlandesgerichts-Rechtsprechungsreport Celle, 360

A Dutch seller, plaintiff, delivered vacuum cleaners to a German buyer, defendant. After having sold the vacuum cleaners, the buyer objected to the quality thereof and declared the avoidance of the contract, refusing to effect payment. The seller sued the buyer for the outstanding purchase price and the buyer sought set-off with damages for loss of profit.

The first instance court allowed the claim and dismissed the set-off.

The appellate court found that the seller was entitled to claim the purchase price under article 53 CISG in conjunction with articles 14, 15, 18 CISG, because the buyer had not been able to return the vacuum cleaners.

As to the set-off, the court held that the buyer was not entitled to claim loss of profit, in view of the fact that it had omitted to assess its damages on the basis of a specific calculation as required by article 74 CISG. The court noted that, if it had been provided with the vacuum cleaners's current market price, an abstract calculation would have been admissible under article 76 CISG. In such case, the damages would have been calculated on the basis of the difference between the price fixed by the contract and the current market price at the time of the avoidance of the contract. However, as the current market price of the "no-name" vacuum cleaners was missing, damages could only be established on the basis of a specific calculation under article 74 CISG, which had not been provided by the buyer.

The court found that the buyer had failed to mitigate the loss under article 77 CISG, as it had made only efforts to effect replacement purchases in its region, without taking into account other suppliers in Germany or abroad.

The court determined to grant to the buyer only reimbursement of the costs related to recovery of the goods and allowed set-off in the corresponding amount.

[Original: English]

Case 319: CISG Art. 38, 39
Germany: Bundesgerichtshof; VIII ZR 287/98
3 November 1999
Original in German
Published in German: [2000] Zeitschrift für Insolvenzpraxis, 234; [2000] Transportrecht-Internationales Handelsrecht, 1; [2000] Der Betrieb, 569;[2000] Wertpapier-Mitteilungen, 481; **http://www.jura.uni-freiburg.de/urteile/text/475.htm;** [2000] Recht der Internationalen Wirtschaft, 381
Commented on in German by Taschner [2000] Transportrecht-Internationales Handelsrecht, 3

A German manufacturer of paper, plaintiff, purchased semi-finished articles from a Swiss seller, for the purpose of producing humid tissue-paper. The semi-finished articles had been treated in a paper machine furnished with a grinding equipment, delivered by X, defendant, to the seller. This paper machine suffered a total loss a few days after being used. The buyer gave notice to the seller that rust stains were found on the humid tissue-paper, and that a large portion of the delivered semi-finished articles also tended to develop brown stains. Upon receipt of an examination report carried out by an expert company, the seller made X liable for the damage, as it suspected that such damage had been caused by the defective grinding equipment. The seller assigned its rights to the buyer and the buyer claimed damages from X.

The appellate court left open the issue whether the semi-finished articles were in conformity with the contract. It held that the notice of lack of conformity was not timely given, and that therefore the buyer had lost its right to rely on a lack of conformity. Accordingly, the claim was dismissed. The buyer appealed to the Supreme Court.

The court found that the grinding equipment had a hidden defect, as it was not possible for the seller to notice the defect neither upon delivery nor after examination of the equipment (article 38 (1) CISG). The court did not decide on the issue whether under CISG, a hidden defect must be notified as soon as it is detected, so that the period set for giving notice pursuant to article 39 (1) CISG would commence when the defect is actually established, or whether such period should commence as soon as the hidden defect would objectively be recognized as such.

The court held that the total loss of the paper machine was due either to an operating fault or to the defective grinding equipment. It further held that, even if, through internal investigations and without specific expertise, an operating fault could have been excluded in a short period of time, a period of about one week had to be granted to the seller, allowing it to decide which further steps to take, such as the choice and appointment of an expert. Additionally, a period of two weeks had to be accorded for the expert's examination to be followed by a one month-period of time for notification, which according to the court, it was a reasonable time as required by article 39 (1) CISG. Therefore, the seller’s notice of lack of conformity was not untimely given.

Furthermore, the court stated that, in case of defective technical equipment, a description of the symptoms should suffice in order to satisfy the requirements of article 39 (1) CISG. A specification of the reasons causing the defect is not required. By giving notice to X that the buyer had found rust

stains on the humid tissue-paper treated with X's alleged defective equipment, the seller complied with the requirements of article 39 (1) CISG.

The court remanded the case to the appellate court, as it found that this court had not decided on the possible limitation of X's liability regarding the lack of conformity of the semi-finished articles as well as on the extent of the damages suffered by the buyer.

[Original: Spanish]

Case 320: CISG 1 (1) (b); 57 (1) (a)
Spain: Audiencia Provincial de Barcelona, Division 17
7 June 1999
Original in Spanish
Published in Spanish: [2000] Actualidad Civil, No. 5, 87; Jurisprudencia Española: http://www.uc3m.es/cisg/espan5.htm

The matter at issue was concerned with the determining of the jurisdiction of the Spanish courts and the declaring of Spanish law as the law applicable to a dispute which arose from a commercial sale of textiles in which a Spanish manufacturer, the plaintiff, was the seller and a British importer, the defendant, was the buyer. It had been agreed that payment for the purchased goods would take place at the seller's domicile, which does not appear to have happened. Since Spain is a party to the CISG and the United Kingdom is not, it had to be concluded that, in the event that Spanish law was applicable, the CISG would be the instrument governing the sale.

The Court noted that the essential service provided under the disputed contract was the supply of the purchased textiles by the seller, whose administrative headquarters are located in the city of Barcelona.

The Court accordingly ruled that the law applicable was Spanish law and hence the CISG would apply, even though the United Kingdom is not a party to the CISG. That ruling was in accordance with article 1 (1) (b) CISG, which states that the CISG applies to contracts of sale of goods between parties whose places of business are in different States when the rules of private international law lead to the application of the law of a contracting State, which is what happened in the present case.

The Court further indicated that the jurisdiction of the Spanish courts was based on article 57 (1) (a) CISG, which states that, if no other place is specified, the price has to be paid "at the seller's place of business". Consequently, that is the place of performance of the contract and the place that determines which courts have jurisdiction to hear the seller's claim and settle the dispute.

II. CASES RELATING TO THE UNCITRAL MODEL ARBITRATION LAW (MAL)

[Original: English]

Case 321: MAL 8
Zimbabwe: Harare High Court (Judge Smith); Judgment No. HH-20-2000
18 and 26 January 2000
Waste Management Services v. City of Harare
Original in English
Unpublished

A dispute arose between a contractor, plaintiff, and a local authority, defendant, as to the amount owed by the defendant to the plaintiff under a contract for carrying out refuse collection services. The plaintiff sued the defendant for the payment of the alleged outstanding amount.

The defendant raised a special plea that, in terms of the contract, any disputes arising between the parties had to be referred to an official of the local authority for determination. However, if the contractor was dissatisfied with the official's decision, it could refer the matter to arbitration. None of this had taken place and the defendant requested the court therefore to stay the proceedings. The plaintiff challenged the relevant clause of the contract, on the grounds that it was contrary to public policy, because it conferred a discretion on an official of one of the parties to determine the issue. It thus, offended the principle of "nobody should be a judge in his own cause".

The court held that if the official's decision was indeed to be final, then the provision would be contrary to public policy. However, it was saved by reason of the right to refer the matter to arbitration.

Furthermore, the court held that article 8 MAL was applicable and, since the defendant had so requested, the court had no option but to stay the proceedings and refer the matter to arbitration.

[Original: English]

Case 322: MAL 8
Zimbabwe: Harare High Court (Judge Smith); Judgment No. HH-249-99
15 December 1999
Zimbabwe Broadcasting Corporation v. Flame Lily Broadcasting (Pvt.) Ltd.
Original in English
Unpublished

The parties had entered into an arbitration agreement providing that all disputes arising out of their contract should be referred to arbitration.

Subsequently, one of the parties claimed in proceedings brought in the High Court payment of a sum of money due under the contract.

When the respondent requested the High Court to stay the proceedings and refer the matter to arbitration under Article 8 MAL, the claimant argued that Article 8 MAL applied only to international commercial cases whereas the present case related to a domestic dispute.

The High Court held that when Zimbabwe adopted the UNCITRAL Model Law under its Arbitration Act 1996, it applied the Model law to both domestic and international matters and moreover to all disputes, not only commercial disputes.

Furthermore, although initially on the papers before the High Court there was no evidence of a dispute, the respondent had subsequently filed a plea from which it was now clear that a dispute did exist.

Accordingly, Article 8 MAL applied and the matter was referred to arbitration.

[Original: English]

Case 323: MAL 34
Zimbabwe: Supreme Court (Chief Justice Gubbay and Judges of Appeal Ebrahim and Sandura);
Judgment No. S.C. 114/99
21 October and 21 December 1999
Zimbabwe Electricity Supply Authority v. Genius Joel Maposa
Original in English
Unpublished

An employee had been suspended from duty by his employer pending a disciplinary hearing into alleged misconduct. According to the terms of the applicable code of conduct, the matter was required to be referred to a disciplinary committee within 10 days. However, before the 10 days' period elapsed, the employee applied to the High Court for an order that the dispute be referred to arbitration instead of being decided by the disciplinary committee under the code of conduct.

The High Court granted the order and the issue was referred to arbitration. By then, the 10 days' period had elapsed. The arbitral tribunal, basing its decision on a mistake as to the date of the suspension, held that such suspension was unlawful, as the matter had not been referred to a disciplinary hearing within the 10 days' period. As a result, the arbitral tribunal did not appreciate and did not consider the effect of the employee's application to the High Court, namely that it precluded the employer from complying with the code of conduct.

The employer applied to the High Court to have the arbitral award set aside on the basis that it was contrary to the public policy of Zimbabwe pursuant to article 34 MAL. The employee sought an order for the enforcement of the arbitral award in accordance with article 35 MAL. The High Court dismissed both applications (see CLOUT Case No. 267). The employer next appealed to the Supreme Court on the same grounds and, in his notice of cross-appeal, the employee contended that the High Court, having correctly refused to set aside the arbitral award, should accede to the enforcement thereof.

The Supreme Court discussed the public policy under article 34 MAL. Whilst upholding the principle that it must be construed narrowly, the Supreme Court held that where an award was based on so fundamental an error, as in this case, that it constituted a palpable inequity that was so far reaching and outrageous in its defiance of logic or accepted moral standards that a sensible and fair minded person would consider that the conception of justice in Zimbabwe would be intolerably hurt by the award, then it should be contrary to public policy to uphold it. It further held that although no moral

turpitude attached to the conduct of the arbitrator, the arbitral award was contrary to the public policy of Zimbabwe in terms of article 34(2)(b)(ii) MAL.

Accordingly, the Supreme Court set aside the arbitral award and dismissed the employee's cross-appeal.

[Original: English]

Case 324: MAL 8
Zimbabwe: Harare High Court (Judge Smith); Judgment No. HH-19-2000
18 and 26 January 2000
The Eastern and Southern African Trade and Development Bank (PTA Bank) v. Elanne (Pvt.) Ltd. and R.G. Paterson and M. E. Paterson
Original in English
Unpublished

A bank made a loan to a company, which was guaranteed by the defendants. The company defaulted and the bank sued the defendants for the payment of the amounts due under the loan agreement. The defendants raised a special plea that proceedings be stayed and the matter be referred to arbitration in accordance with article 8 MAL and in terms of arbitration clauses contained in both the loan agreement and the deed of guarantee.

The court held that, although the defendants had argued that the bank had no right to interest payments actually made, no right to charge interest on interest and no right to claim commission charges, these were matters which could not be used in argument to establish the existence of a dispute. Since the defendants had not alleged that there was an actual dispute, article 8 MAL did not apply and the special plea was dismissed.

III. ADDITIONAL INFORMATION

Corrigendum

Document A/CN.9/SER.C/ABSTRACTS/29
(Arabic, Chinese, English, French, Russian, Spanish)

Case 315

The word "l'acheteur", which appears in the second line of the second paragraph *should read* "le vendeur"

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