United Nations A/CN.9/SER.C/ABSTRACTS/205

General Assembly

Distr.: General
15 July 2020
English
Original: Chinese/English/French

United Nations Commission on International Trade Law

CASE LAW ON UNCITRAL TEXTS
(CLOUT)

Contents

Page

Cases relating to the United Nations Convention on Contracts for the International Sale of Goods (CISG) . . . 3

Case 1877: CISG 6; 19; 74 – *Austria: Oberster Gerichtshof, Case No. 8 Ob 104/16a, A***** SpA v. K***** GmbH, ***** (29 June 2017)* . . . 3

Case 1878: CISG 1; 7(2) – *Canada: Ontario Superior Court of Justice, Case No. CV-19-79561, Best Theratronics Ltd. v. The ICICI Bank of Canada and The Republic of Korea (17 April 2020)* . . . 4

Case 1879: CISG 35 – *Czechia: Nejvyšší soud České republiky, Case No. 29 Odo 1206/2003, R.T. v. K. spol. s.r.o. (25 January 2005)* . . . 4

Case 1880: CISG 31 – *Czechia: Nejvyšší soud České republiky, Case No. 29 Od 5/2006-17, Z.S. v. Rio s.r.o. (4 December 2006)* . . . 5

Case 1881: CISG 7(2); 78 – *Czechia: Nejvyšší soud České republiky, Case No. 23 Cdo 427/2017, VÚB a.s. v. LITOZ, s.r.o. (29 January 2019)* . . . 5

Case 1882: CISG 4 – *France: Court of Cassation, Third Civil Chamber, Appeal No. 17-26674, Chelles v. Leuci international et al. (18 April 2019)* . . . 6

Case 1883: CISG 80 – *France: Court of Cassation, Commercial Chamber, Appeal No. 18-10969, Inmed v. Établissements JR Maruani (9 July 2019)* . . . 7

Case 1884: CISG 1(1)(a); 3(1); 7; 25; 29(1); 45(1)(b) and (2); 47; 48(1); 49(1); 58(1); 72(1); 74; 81(2); 84(2); 88(3) – *Germany: Bundesgerichtshof, Case No. VIII ZR 394/12 (24 September 2014)* . . . 8

Case 1885: CISG 28; 31(c); 46(1) – *United States of America: Circuit Court of the Seventeenth Judicial Circuit of Florida, Broward County, Case No. 09-043833 07, Styles v. Movie Star Muscle Cars (18 January 2017)* . . . 10

Case 1886: CISG 11; 79 – *People's Republic of China: Supreme People's Court, No. 20 [2020] of the Supreme People's Court, Guiding Opinions on several issues concerning proper adjudication of civil cases involving the COVID-19 pandemic (part III): Opinion 4 on applicable law (8 June 2020)* . . . 11

Cases relating to the United Nations Convention on the Limitation Period in the International Sale of Goods (Limitation Convention) . . . 12

Case 1887: Limitation Convention 8; 9 – *Sweden: SCC Arbitration Institute, Case No. V 2016/167, Russian party v. Bulgarian party (31 December 2016)* . . . 12

V.20-03755 (E) 240720 270720

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.3). CLOUT documents are available on the UNCITRAL website at: https://uncitral.un.org/en/case_law.

Each CLOUT issue includes a table of contents on the first page that lists the full citation of 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 a decision in its original language is included in the heading to each case, along with the Internet addresses, where available, of translations in official United Nations language(s) (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, all Internet addresses contained in this document were functional as of the date of submission of this document, but websites do change frequently). Abstracts on cases interpreting the UNCITRAL Model Law on International Commercial Arbitration include keyword references which are consistent with those contained in the Thesaurus on the Model Law, 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 on 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, by individual contributors, or 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.

Printed in Austria

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

Case 1877: CISG 6; 19; 74
Austria: Oberster Gerichtshof
Case No. 8 Ob 104/16a
*A***** SpA v. K***** GmbH, *****
29 June 2017
Original in German
Published in German: Ecolex 2017, 989 and SZ 2017/76
Available at: www.ris.bka.gv.at

Abstract prepared by Dr. Christian Rauscher, National Correspondent

This case deals with the incorporation of standard contractual terms and conditions (TC) into a contract and the recovery of reminder fees and collection costs in the event of breach for non-payment.

Starting in 2008 the plaintiff, a clothing manufacturer with place of business in Italy, sold knitwear to the defendant, who had its place of business and several apparel stores in Austria. In negotiating the first and some subsequent sales contracts, the defendant made reference to its TC, which provided for the application of Austrian law and the exclusion of the CISG. However, the parties did not explicitly discuss the TC and the TC were not made available to the plaintiff.

In 2013, the defendant refused to pay part of the price charged by the plaintiff relying on the provisions of its TC and the consequent exclusion of the CISG. The plaintiff instituted legal proceedings for the payment of the remaining price and reimbursement of reminder fees and collection costs that it had incurred through the engagement of a debt collection agency.

The court of first instance dismissed the plaintiff's claim on the basis that the TC had been incorporated into the contract. The court of appeal reversed the first instance decision and allowed recovery of most of the claim. On appeal, the Supreme Court (Oberster Gerichtshof) substantially upheld the court of appeal's decision.

The Supreme Court recalled that, within its scope of application, the CISG superseded national law, and that article 6 CISG dealt with CISG exclusion. It explained that the defendant's TC had to be validly incorporated into the contract according to part II of the CISG in order for the parties to exclude the application of the CISG, and that this required the TC to be sent to the other party or for them to be made available to the other party by other means, as mere reference to the TC did not suffice. It also indicated that the other party was under no obligation to actively ask or search for the TC's content ("Erkundungsobliegenheit").

Consequently, the Supreme Court held that the TC had not been validly incorporated in the contract, that the application of the CISG had not been excluded and that the defendant could not rely on the TC to refuse payment.

Finally, the Supreme Court held that, absent a special provision in the contract, the claim for recovery of reminder fees and collection costs had to be determined according to article 74 CISG. It indicated that such costs could be recovered if the effectiveness of the services offered by the debt collection agency exceeded the plaintiff's debt collection ability, but that this was usually not the case in cross-border trade. It added that, in a situation where the other party had already firmly refused payment and court proceedings were thus foreseeable, the engagement of a debt collection agency was no longer justified. It concluded that those costs were therefore not recoverable.

Case 1878: CISG 1; 7(2)
Canada: Ontario Superior Court of Justice
Case No. CV-19-79561
Best Theratronics Ltd. v. The ICICI Bank of Canada and The Republic of Korea
17 April 2020
Original in English
Published in: 2020 ONSC 2246 (CanLII)
Available at: www.canlii.org

The Public Procurement Services of the Republic of Korea (the "buyer") awarded a contract worth US$ 13,550,000 for the procurement of medical devices to Best Theratronics, a company with place of business in Canada (the "seller"). The contract required the establishment of a performance bond in favour of the buyer, a payment guarantee bond in favour of the seller and a counter-guarantee bond in favour of the buyer.

A dispute arose following the failure of the seller to obtain the third bond. The buyer called on the first bond, whereupon the seller obtained a temporary injunction from the Ontario Superior Court of Justice to prevent the bank from honouring it. The seller then commenced proceedings in that Court to extend the injunction.

In those proceedings, the seller raised issues with respect to jurisdiction and the interpretation of the forum selection clause contained in the contract and argued that the case should be heard in Ontario and not in the Republic of Korea. One argument made in that respect was that the CISG applied to the case given that both Canada and the Republic of Korea are parties to it and that its application had not been explicitly excluded in the contract, and, therefore, that the applicable law would be the same whether the matter was heard in Ontario or in the Republic of Korea.

The Court dismissed this argument by indicating that the CISG was not a "comprehensive code" and that recourse to the laws of the Republic of Korea may be required for any matters that were outside the scope of the CISG.

Case 1879: CISG 35
Czechia: Nejvyšší soud České republiky
Case No. 29 Odo 1206/2003; ECLI:CZ:NS:2005:29.ODO.1206.2003.1
R.T. v. K. spol. s.r.o.
25 January 2005
Original in Czech

Abstract prepared by Veronika Kubíková, National Correspondent

The plaintiff (R.T., with place of business in Germany) had concluded on 20 February 1995 a contract for the sale of strawberry pulp with the defendant (K. spol. s.r.o., with place of business in Czechia). The defendant refused to pay the price due to defects of the goods discovered after their handover. The plaintiff argued at the court of first instance that: (a) because of the transfer of the strawberry pulp from its tanks to the defendant's tanks, it was impossible to allocate liability; and (b) it was the defendant's duty to inspect the goods at the moment of taking them over, when the risk was passed to the buyer.

The contract fell under the scope of application of the CISG since it was a contract of sale of goods between parties whose places of business were in different Contracting States.

The key issue for the Supreme Court as the court of last instance was to determine whether the burden of proof lay on the plaintiff or on the defendant. The Supreme Court stated on this point that: "It can generally be agreed with the appellate court that the burden of proof for non-conformity of the delivered goods lies on the buyer, but whenever the buyer gave proof of its claim, and despite the fact that the seller claimed that the delivered goods were in conformity with the sample submitted pursuant to art. 35(2)(c) CISG, the burden of proof then shifted to the seller."

According to the Supreme Court, the appellate court erred in ruling against the defendant for failing to discharge the burden of proof without informing the defendant of the procedural obligation to adduce evidence in support of its allegations.

The Supreme Court remanded the case to the appellate court for review in light of the Supreme Court's statement.

Case 1880: CISG 31
Czechia: Nejvyšší soud České republiky
Case No. 29 Od 5/2006-17; ECLI:CZ:NS:2006:29.OD.5.2006.1
Z.S. v. Rio s.r.o.
4 December 2006
Original in Czech

Abstract prepared by Veronika Kubíková, National Correspondent

The case deals with the determination of the place of delivery of the sold goods for the purposes of establishing jurisdiction.[1]

The plaintiff (Z.S., seller with place of business in Czechia) had concluded a sales contract with the defendant (Rio s.r.o., buyer with place of business in Slovakia). The contract did not contain an arbitration clause or a choice-of-forum clause.

Since the buyer did not pay the purchase price, the seller filed a lawsuit with the Regional Court in Brno requesting payment of the purchase price. By a resolution of 25 November 2005, the Regional Court in Brno declared its lack of jurisdiction and referred the case to the Supreme Court.

The Supreme Court noted that the determination of the place of delivery was key to answering the question of jurisdiction, in accordance with European Council Regulation (EC) No. 44/2001. The Supreme Court indicated that in the event of lack of agreement on the place of delivery of the goods, the place of delivery under art. 31(1) CISG was the place where the goods were handed over to the first carrier. Accordingly, the Supreme Court ruled that the Regional Court in Brno had jurisdiction as court of first instance.

Case 1881: CISG 7(2); 78
Czechia: Nejvyšší soud České republiky
Case No. 23 Cdo 427/2017
VÚB a.s. v. LITOZ, s.r.o.
29 January 2019
Original in Czech
Available at: www.nsoud.cz

Abstract prepared by Petr Bříza and Natálie Tůmová

This case deals primarily with the (non-)applicability of the CISG to the matters of cross-border assignment (including factoring), set-off and late payment interest rate.

The claimant, VÚB a.s., was a Slovak company providing factoring services to the Slovak company Interplastics s.r.o.. Interplastics (the "seller") had entered into a contract with a Czech company called LITOZ, s.r.o. (the "buyer"). Pursuant to the contract, the seller supplied the buyer with the components for manufacturing. However, the buyer failed to pay the invoices. The seller assigned these claims to the claimant, its factor, and the claimant filed a lawsuit against the buyer. The first instance court dismissed the claim for the claimant's failure to prove that there had been a valid assignment of the claims. The appellate court reversed the first instance judgment and ordered the buyer to pay the full amount including late payment interest and dismissed the buyer's attempt to set off its alleged counterclaim. The appellate court determined Slovak law to be applicable to the sales contract, the assignment and

[1] This case was decided according to the law in force before the accession of the Czech Republic to the European Union.

the set-off. The buyer filed an extraordinary appeal to the Nejvyšší soud České republiky (the Supreme Court of the Czech Republic) (the "Court") claiming that the appellate court erred in applying Slovak law instead of the CISG to the underlying contract.

The Court noted that the sales contract between buyer and seller was governed by the CISG as the parties had not excluded its application.

With regard to the assignment, the Court – referring to relevant Czech writings – held that the assignment fell outside of the scope of the CISG, and that the Rome I Regulation[2] should be applied to determine the applicable law.

Regarding the law applicable to a cross-border set-off, the Court identified three instances when set-off may occur in relation to the CISG: (a) the claims arise from different contracts governed by different laws; (b) the claims arise from different contracts governed by the CISG; and (c) the claims arise from the same contract, which is governed by the CISG. Referring to the CISG Digest,[3] the Court concluded that in all three situations the set-off fell outside the CISG and that the Rome I Regulation should apply.

Lastly, the Court examined the issue of the rate of the late payment under art. 78 CISG. The Court, acknowledging the diverging views on the issue, made reference to the CISG Digest[4] and ruled that the matter of interest rate fell outside the scope of the CISG. Subsequently, the Court held that the applicable law is to be determined based on the Rome I Regulation.

In conclusion, the Court referred the case back to the appellate court.

Case 1882: CISG 4
France: Court of Cassation, Third Civil Chamber
Appeal No. 17-26674
Chelles v. Leuci international et al.
18 April 2019
Original in French
Available in French: Légifrance (www.legifrance.gouv.fr); CISG-France database (www.cisg.fr)

Abstract prepared by Claude Witz, National Correspondent

This judgment sets out the conditions determining the admissibility of direct action by a sub-buyer of non-conforming goods against the original seller where there is an international chain of contracts and the initial sale is governed by the CISG. The judgment of the Third Civil Chamber builds on the findings in a previous judgment handed down by the Commercial Chamber of the Court of Cassation.

A non-trading property company established in France built business premises which were subsequently rented to a media company. The premises were fitted with lights designed to illuminate large areas. The lights were sold and installed by company S, based in France, which had bought them from a manufacturer based in Italy, company L. The first contract, between the non-trading property company and company S, was governed by domestic French law, while the second contract, between company S and company L, was governed by the CISG.

The lights, which were found to have serious defects and to pose a fire hazard, had to be replaced. The non-trading property company initiated two actions. The first action was brought against the company's contractual partner, company S. Through a judgment of 21 June 2017 (amended on 18 January 2018), the Paris Court of Appeal acknowledged the admissibility of the claim on the basis of the respondent's failure

[2] Regulation (EC) No. 593/2008 of the European Parliament and of the Council of 17 June 2008 on the law applicable to contractual obligations (Rome I).
[3] UNCITRAL, Digest of Case Law on the United Nations Convention on Contracts for the International Sale of Goods. New York: United Nations, 2016, sub art. 4, para. 14.
[4] Ibid., sub art. 78, para. 13.

to deliver conforming goods in accordance with French domestic law. The second action brought by the non-trading property company was a direct claim against the Italian manufacturer L. The non-trading property company's action was dismissed on the ground that "given the chain of contracts, the non-trading property company cannot have a stronger claim against company L than company S". The Paris Court of Appeal based its decision on article 39 of the CISG, noting that company S had not given notice of the lack of conformity as required in that article. The Court of Appeal declared the action by company S against company L "time-barred", using an inappropriate term to refer to the buyer's loss of rights under article 39. As a result of that loss, the non-trading property company was denied recourse against the Italian manufacturer L. The Court of Appeal thus upheld the original judgment, although – paradoxically – that judgment acknowledged the admissibility of the direct action by the non-trading property company against the Italian manufacturer L on the basis of the guarantee against hidden defects established in the Civil Code. The Court of Appeal rejected the latter part of the original judgment.

In its appeal to the Court of Cassation, the non-trading property company argued against the finding of the Court of Appeal that its claims against company L were inadmissible. The Court of Cassation rejected that argument, stating that "in holding that the non-trading property company could not have a stronger claim than the intermediary seller in filing a direct action, company S, which lost its right to commence proceedings because it did not give notice in time of the lack of conformity in application of the CISG, the Court of Appeal rightly concluded [...] that the non-trading property company could not initiate proceedings against the manufacturer on the basis of the guarantee against hidden defects." The lessons to be learned from the judgment are clear. Since, in respect of the initial sale, which was governed by the CISG, the original buyer lost its rights against the seller, direct action by the sub-buyer against the original seller was certain to fail, whatever the contractual basis invoked by the sub-buyer.

Case 1883: CISG 80
France: Court of Cassation, Commercial Chamber
Appeal No. 18-10969
Inmed v. Etablissements JR Maruani
9 July 2019
Original in French
Available in French: Légifrance (www.legifrance.gouv.fr); CISG-France database (www.cisg.fr)

Commentary in French: Cyril Nourissat, La Semaine juridique, Edition générale, Chronique Droit du commerce international, 175, p. 304; La Semaine juridique, Entreprise et affaires, Chronique Droit du commerce international, 1109, p. 41; Claude Witz, Recueil Dalloz 2020, Panorama de droit uniforme de la vente internationale de marchandises, p. 1084.

Abstract prepared by Claude Witz, National Correspondent

The buyer, a company incorporated under Russian law, had ordered from a company established in France a machine for packaging dressings. The machine was designed to cut, shape and package haemostatic dressings originally produced in rolls. To enable the seller to configure the machine, the Russian buyer was required to provide the seller with rolls of dressing. On several occasions, the seller had complained about the poor quality of the products delivered by the buyer, but did not, however, reiterate its reservations during the final test. The buyer refused to take delivery of the machine owing to a lack of conformity. The Russian buyer commenced proceedings against the French seller in the Commercial Court of Pontoise for avoidance of the sale contract, restitution of the advance payments made and payment of damages. In response, the seller filed a counterclaim for performance of the sale contract. The Commercial Court of Pontoise ruled that both companies were at fault and ordered the French seller to compensate the Russian buyer for half the amount of the damage

it had suffered; however, it did not adjudicate on the avoidance of the contract or restitution of the payments made.

The Versailles Court of Appeal overturned the judgment and declared the contract avoided on the ground that the buyer could not be held responsible for the contract's lack of conformity because the seller had not reiterated its reservations about the condition of the rolls of dressing during the final test. The Court of Appeal therefore ordered the seller to refund the advance payments it had received, plus interest at the statutory rate in France and capitalization of the interest. In addition, the Court of Appeal awarded compensation for the costs that the buyer had had to pay for travel and accommodation in France and in order to supply the rolls required for the tests. The Russian buyer also argued that it had concluded a large sales contract for the dressings to be produced by the machine and claimed compensation for its loss of opportunity. The Court of Appeal dismissed that claim in accordance with article 74 of the CISG because the seller could not have foreseen that loss.

The French seller lodged an appeal with the Court of Cassation, which overturned and annulled the judgment of the Versailles Court of Appeal in its entirety. The Court of Cassation handed down its judgment on the basis of article 80, which it quoted in the judgment ("Whereas that text provides that a party may not rely on a failure of the other party to perform, to the extent that such failure was caused by the first party's act or omission"). The reasons given for the decision were brief. The Court of Cassation summarized the findings of fact of the Court of Appeal and the legal reasoning behind the contested judgment. The Court of Cassation overturned the judgment on the ground that it lacked a legal basis; the Court of Appeal should have "considered [...] whether the unsatisfactory results of the final tests carried out in March 2015 were at least partly due to the poor quality of the rolls supplied" by the buyer, whereas the Court of Appeal had noted that the French company "had pointed out that good results could be achieved only with a product of consistently good quality and had repeatedly requested" the dispatch of rolls of such quality. By using the words "at least partly", the Court of Cassation suggested that the exemption from liability might be only partial. As the French Court of Cassation did not rule on the findings of fact, it referred the case back to the Versailles Court of Appeal for consideration by a differently composed bench.

Case 1884: CISG 1(1)(a); 3(1); 7; 25; 29(1); 45(1)(b) and (2); 47; 48(1); 49(1); 58(1); 72(1); 74; 81(2); 84(2); 88(3)
Germany: Bundesgerichtshof
Case No. VIII ZR 394/12
24 September 2014
Original in German

Published in: Entscheidungen des Bundesgerichtshofs in Zivilsachen (BGHZ) 202, 258; Internationales Handelsrecht (IHR) 2015, 8; Neue Juristische Wochenschrift (NJW) 2015, 867 with article by Förster (830); Praxis des Internationalen Privatrechts (IPRax) 2017, 287 with article by P. Huber (268); Betriebsberater (BB) 2015, 398 with note by Schnell; note by P. Huber in LMK 2015, 366671; note by Ostendorf in Gesellschafts- und Wirtschaftsrecht (GWR) 2014, 500.

Abstract prepared by Ulrich Magnus, National Correspondent

The defendant, a company seated in Germany, is a mass producer of plastic car parts. For production it requires specially manufactured moulds into which liquid plastic is pressed in order to produce the car parts to the correct dimensions. Since 1998, the defendant obtained such injection-moulding tools, which were manufactured according to its specifications, from the (predecessor of the) claimant, which is seated in Hungary.

With respect to four supply contracts in 2000 and 2001, the defendant complained about defects in the tools which the claimant unsuccessfully tried to cure. The defendant declared these contracts terminated in January 2002 and claimed damages. In respect of a fifth contract, the defendant declared termination because of delay of

delivery already in October 2001. However, in November 2001 this tool was nonetheless delivered and accepted. Although this tool was also defective, the defendant did not again declare termination in respect of this contract for this reason. Later on, the defendant itself repaired all defects and used all delivered tools for its production.

In the present proceedings the claimant requested outstanding payments of approximately €180,000. The defendant rejected the claim because it had terminated the contracts. In addition, it declared set-off with its own damages claims – in the amount of approximately €550,000 – for the repair of the defects (and raised a counterclaim which was not the object of the present proceedings).

The Federal Court (BGH), the third instance, remanded the case.

The BGH first held that the CISG applied to the contracts in question, insofar as it was sufficient that the parties had their places of business in Germany and Hungary, which are CISG Contracting States (art. 1(1)(a) CISG), and that the parties had not excluded the CISG. According to art. 3(1), the CISG applies also to "contracts for the supply of goods to be manufactured or produced" unless the other party supplies "a substantial part of the materials necessary for such manufacture or production". Here, the defendant had supplied some components for the repair of the tools. However, since that had happened after the conclusion of the contract, the Court held that this contribution was irrelevant for the applicability of the CISG because only the time of the conclusion of the contract was decisive for art. 3(1). It was also held irrelevant that the tools were manufactured according to the specifications of the defendant. The specifications were not regarded as "the materials" in the sense of art. 3(1) CISG.

Contrary to the judgment of the second instance, the BGH denied the claimant's right to terminate the contracts. According to art. 49(1)(a) CISG, such termination requires a fundamental breach of contract and should not be accepted lightly but only as a remedy of last resort (*ultima ratio*). Its definition in art. 25 CISG requires that the aggrieved party's interest in the performance of the contract has essentially fallen away. Whether this was the case was a question of the factual situation of each case. All relevant circumstances must be taken into consideration. With respect to the four contracts, the lower court had neglected that the defendant itself repaired the tools and used them permanently for their contracted purpose. The lower court had merely relied on the claimant's inability to repair the defects as well as the defendant's time stress and therefrom inferred the justified termination of the contract. This was insufficient. The BGH held that the tools' defects did not constitute a fundamental breach and thus did not justify the termination, which therefore was invalid. The conduct of the defendant had shown that despite the defects of the tools, the defendant's interest in the performance of these contracts had not fallen away. In weighing all circumstances, this was regarded to be the ultimately decisive fact.

With respect to the fifth contract, the BGH held that the mere delay of delivery without any other factor (e.g., time being of the essence, or similar) did generally not give grounds for terminating the contract. An additional period of time for performance ("Nachfrist") in the sense of art. 47 CISG, the unsuccessful lapse of which would have justified the termination (art. 49(1)(b) CISG), was not set by the defendant. But even if the termination had been valid, the result would not have been different as the defendant had later accepted the belatedly delivered tool. The Court held that the parties had implicitly renewed the original contract (art. 29(1) CISG). Furthermore, the fact that this tool was defective could not be taken into account for the termination in October and the delay could not be upgraded to a fundamental breach because in October the not yet delivered tool was not yet defective. In the opinion of the Court, the defendant – in October – could also not rely on an anticipatory fundamental breach, which in principle could justify the termination of the contract in advance (art. 72(1) CISG), as such a breach could no longer be invoked when the breach (here: the delivery of the defective tool) had meanwhile occurred. In any event, the later acceptance of the tool would have also invalidated such a termination.

Contrary to the lower court, which had omitted to fully deal with the defendant's counterclaims concerning the repair costs, the BGH held that these claims were in principle justified according to art. 45(1)(b) and (2) and art. 74 CISG. Even if the buyers repaired defective goods themselves, they were entitled to compensation of reasonable repair costs unless the seller had a right to remedy defects in accordance with art. 48 CISG. The right to remedy did, however, not require the buyer, here the defendant, to set an additional period for performance. On the contrary, the Court held that the seller must approach the buyer and had an obligation (deriving from art. 7(1) CISG) to give notice of his intention if he intended to remedy a defect. This the claimant had not done. In any event, the defendant would have been entitled to refuse any remedy because several attempts by the claimant had already failed.

Special mention is made of the BGH's considerations on the set-off which the defendant had declared based on its claims for the repair costs for the tools. In general, set-off is not covered by the CISG, such that the rules of private international law determine which law applies to set-off. However, contrary to the prevailing view, the BGH decided that the CISG was applicable to the set-off of mutual claims which originated from the same CISG contract. The Court inferred from arts. 84(2) and 88(3) and from the synallagmatic contractual relationship as expressed in art. 58(1), second sentence, art. 81(2) CISG a general principle in the sense of art. 7(2): "Reciprocal monetary claims which are due can be set-off against each other if a party so declares." The main claim was then extinguished in the amount of the set-off claim. The Court acknowledged this principle not only for mutual claims arising from the same CISG contract but also if they stemmed from different CISG contracts between the same parties if an overall set-off corresponded with the parties' expressed or implied intentions. In the present case the claimant had claimed one single amount out of the different contracts and the defendant had declared the set-off against that amount. That sufficed to treat the claims and counterclaims out of the different CISG contracts as if they followed from one single contract.

Since the lower court had not sufficiently explored the extent and justification of the claims which the defendant had set off, the BGH remanded the case.

Case 1885: CISG 28; 31(c); 46(1)
United States of America: Circuit Court of the Seventeenth Judicial Circuit of Florida, Broward County
Case No. 09-043833 07
Styles v. Movie Star Muscle Cars
18 January 2017
Published in English: 2017 Fla. Cir. LEXIS 9983

Abstract prepared by Anjanette Raymond

This case deals primarily with whether the court would require specific performance on the seller under local law. This case also considers a seller's obligations for delivery when its agreement with a buyer does not provide a location for delivery.

Movie Star Muscle Cars, a foreign corporation (the "seller"), entered into a contract with an American individual, Styles (the "buyer"), for the purchase and delivery of a unique antique car. The buyer was instructed to wire the purchase price to a Canadian bank account owned by the seller. The buyer complied with this obligation and wired the full purchase price to the seller. The buyer then inquired as to the location of the vehicle. However, the seller did not provide the buyer with an exact location of the vehicle. Rather, in response to the buyer's inquiry, the seller responded that the vehicle was in Canada. In response to a subsequent inquiry by the buyer, the seller stated that the vehicle was located "20 minutes from Toronto". The seller did not make the vehicle available to the buyer. The buyer brought suit in a state circuit court in Florida, which applied Florida law to determine if specific performance was warranted and to address questions of delivery obligations.

The Court, in line with the buyer's pleadings and for the purpose of the buyer's summary judgment motion, set aside the buyer's contest of whether the CISG or

Florida's Uniform Commercial Code (UCC) is the governing law of the agreement. Looking to article 28 and 46(1) CISG, the Court determined that consideration of Florida law was also required to assess whether specific performance was an appropriate remedy. The Court also considered article 31 CISG to determine the seller's obligations for delivery when a location was not provided by the agreement with the buyer.

Florida common law does not provide specific performance as a matter of right but as an equitable remedy stemming from sound judicial discretion. It is to be granted only when: (1) the party is clearly entitled to it; (2) there is no adequate remedy at law; and (3) the judge believes that justice requires it. The Court reasoned the vehicle was of a unique character and value, being an antique, and there was no adequate remedy at law for the buyer. The Court further stated the CISG and Florida's UCC were both instructive on the question of delivery and found issues remained as to what costs, if any, the seller incurred as a result of the parties' dispute over the delivery of the vehicle. Therefore, the Court granted the buyer specific performance, pending the posting of a bond for an amount that would be determined by the parties or, if they failed to reach an agreement, by the Court.

Case 1886: CISG 11; 79
People's Republic of China: Supreme People's Court
No. 20 [2020] of the Supreme People's Court
Guiding Opinions on several issues concerning proper adjudication of civil cases involving the COVID-19 pandemic (part III): Opinion 4 on applicable law
8 June 2020
Original: Chinese
Available at: www.court.gov.cn/fabu-xiangqing-236501.html

Opinion 4, point 7:

When applying the United Nations Convention on Contracts for the International Sale of Goods, the people's courts should bear in mind that China withdrew in 2013 its declaration that it was not bound by article 11 of the Convention or by the provisions of the Convention relating to the content of article 11, while maintaining its declaration that it was not bound by article 1, paragraph 1 (b). Whether a country is a Contracting State to the Convention or not and whether it has made any corresponding reservations can be determined by referring to the status of Contracting States to the Convention as published on the UNCITRAL website. In addition, according to article 4 of the Convention, the Convention is not concerned with the validity of a contract or any effect which the contract may have on the property in the goods sold. For these two matters, the applicable law is to be determined by referring to the conflict-of-law norms contained in Chinese law, and it is to be applied accordingly in any relevant rulings.

If a party claims partial or full exemption from contractual liability on the grounds that it has been impacted by the epidemic or by measures to prevent or control the epidemic, the people's court shall examine the claim in accordance with the relevant provisions of article 79 of the Convention and shall assess, in a rigorous manner, the applicable conditions stipulated in that article. The provisions of the Convention should be interpreted bona fide based on the usual meaning of their terms in the context of the Convention and with reference to its objectives and purposes. At the same time, it should be noted that the digest of case law on the United Nations Convention on Contracts for the International Sale of Goods does not constitute an integral part of the Convention; it may be used as a reference in the hearing of cases but not as a legal basis.

Cases relating to the United Nations Convention on the Limitation Period in the International Sale of Goods (Limitation Convention)

Case 1887: Limitation Convention 8; 9

Sweden: Arbitration Institute of the Stockholm Chamber of Commerce
Case No. V 2016/167
Russian party v. Bulgarian party
31 December 2016
Original in English
Not published

Abstract prepared by Aybek Akhmedov

This case deals with determining when the four-year limitation period under the Convention on the Limitation Period in the International Sale of Goods (1974) starts to run.

The dispute arose out of a contract for supply of licensed goods between a company with place of business in the Russian Federation and a company with place of business in Bulgaria. The Bulgarian company (the "seller") agreed to supply the licensed goods to the Russian company (the "buyer"). The parties agreed upon an advance payment. The buyer undertook to provide an end-user certificate for the goods.

The buyer made the advance payment and provided a substitute end-user certificate. The seller rejected that certificate and demanded that a proper end-user certificate should be tendered. The buyer, realizing that it would not be able to obtain a proper end-user certificate, ordered the goods from third parties and demanded a refund of the advance payment. The seller refused indicating that the advance payment had been used to cover expenses related to manufacturing the goods. The seller added that it was still ready to supply the goods upon presentation of a proper end-user certificate.

Realizing that the seller would not refund the advance payment, the buyer initiated arbitral proceedings. The seller resisted the buyer's claims arguing that the claim was time-barred under the "Limitation Convention" since the arbitral proceedings had been commenced after the expiry of the four-year limitation period. More precisely, the seller suggested that the claim was time-barred since the parties concluded the contract in May 2012, whereas the claim was brought in November 2016. The seller also argued that the buyer had breached the contract by submitting the substitute end-user certificate in 2013, well after the expiration of the 30-day term set out in the contract in June 2012. In response, the buyer indicated that the limitation period shall start to run only from the date when the breach of contract occurred.

The arbitrator noted that the four-year limitation period under article 8 of the Limitation Convention should run from the date when the claim commences. The arbitrator also noted that seller and buyer were referring to different alleged breaches of contract in the arbitral proceedings: the seller's claim was based on the non-delivery of the end-user certificate while the buyer's claim was based on non-delivery of the goods and the refusal to refund the advance payment. The arbitrator held that only the breach of contract relied upon by the buyer was relevant for counting the four-year limitation period under article 8 of the Limitation Convention.

Based on factual elements, including discussions between the parties and the buyer's written acknowledgment of its obligations to the seller in November 2012, the arbitrator held that the breach of contract relied upon by the buyer could not and did not occur before November 2012, therefore, the buyer's claims were not time-barred under article 8 of the Limitation Convention.