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(CLOUT)

Contents

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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, 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 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.

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

Case 2107: CISG 1(a); 2; 6; 7; 8; 9(1); 26; 33; 35(1); 45(1)(b); 46; 49; 51(1); 75; 77; 78; 79

Egypt: Cairo Regional Centre for International Commercial Arbitration
Case No.1527/2021
19 February 2023
Original in English
Available at: https://cisg-online.org/files/cases/14186/fullTextFile/6272_38310986.pdf

Abstract prepared by Sherif El Saadani, Mazin Ezzeldin and Raghda Gad

A company with place of business in Italy (buyer) and a company with place of business in Egypt (seller) concluded, on 24 January 2021, a contract for the sale of diammonium phosphate (DAP) to be delivered by 2 March 2021. However, the seller only delivered part of the amount agreed upon and notified the buyer that, due to a price surge and the halt of production on the part of the manufacturer that supplied DAP to the seller, it was unable to ship the remaining amount of DAP agreed upon. The buyer deemed such action a breach of contract and, consequently, terminated the contract, concluded a cover purchase with another seller and initiated arbitral proceedings before the Cairo Regional Centre for International Commercial Arbitration. The buyer requested the arbitral tribunal to order the seller the payment of USD 369,600 amounting to the difference in DAP price, in addition to 5 per cent legal interest, calculated from the date of the purchase under the new contract.

Regarding applicable law, the arbitral tribunal noted that the parties had their places of business in different CISG contracting States and found that, as the parties had expressly indicated Egyptian Law as the applicable law, the CISG applied being an integral part of it and that, in the absence of the express or implied intention to exclude it, the CISG was applicable. The arbitral tribunal also noted that, in light of article 7 of the CISG, in the absence of Egyptian case law applying the CISG court decisions by other contracting States provided binding guidance.

Concerning the quantity of the goods to be delivered, the arbitral tribunal first noted that the seller did not object to the buyer's decision to select the carrier and the quantity of the product to be delivered. Considering articles 8(3) and 9(1) of the CISG, it noted that the parties had established a practice that the buyer determined the carrier and the quantity to be delivered, which was in the majority of cases never below a certain amount. The arbitral tribunal concluded that the seller had given the buyer and the supplier through correspondence the expectation of delivery of the quantity determined by buyer.

Regarding the seller's possible exemption from liability in light of the argument of the seller, that the change in circumstances qualified as hardship under domestic law leading to a renegotiation of the contract, the arbitral tribunal noted the differences in the notions of hardship under domestic law, the ICC Force Majeure Clause (ICC Clause) and article 79(1) of the CISG. Mindful that the parties had agreed to apply the ICC Clause, and in light of article 79(1) of the CISG, the arbitral tribunal indicated that the notion of hardship in the CISG did not allow renegotiating the contract and also highlighted that the CISG set a higher threshold for exemption of hardship than domestic law. Accordingly, the arbitral tribunal did not consider the price surge and the halt of production on the part of the supplier sufficient grounds to qualify as exempting impediments, and characterized such risks, including the supplier's position as the only DAP source in Egypt for the seller, as foreseeable and avoidable, so that the seller could have overcome the impediment, which was not beyond its reasonable control.

In addition, guided by article 35(1) of the CISG, the arbitral tribunal stated that, notwithstanding the assumption for the product to originate from Egypt, there was no evidence of an obligation to that effect. Furthermore, the tribunal did not consider the

differences between article 79(1) CISG and the ICC Clause as significant, namely, the inexistence in the CISG article of the word “reasonable” and the addition of “the effects” in the ICC Clause. By expressly mentioning that mandatory rules, i.e., the CISG, are not to be overridden, the ICC Clause, as chosen by the parties, did not exclude the CISG, placing the latter as the greater parameter for interpretation. In line with the predominant view of the judiciary and arbitral tribunals, the seller could not invoke its supplier’s default as the basis for an article 79(1) CISG exemption. Also, noting article 79(4) of the CISG concerning the obligation of notice to the buyer about the existence of an impediment, the tribunal noted the inadequacy of informing the buyer upon the latter’s inquiry. For the above reasons, the arbitral tribunal considered the force majeure argument raised by the seller to be unfounded.

As per the allocation of damages, the arbitral tribunal, guided by articles 33, 49(1)(b) and 51(1) of the CISG, found that the partial non-performance of the seller sufficed as a fundamental breach justifying the buyer’s avoidance of the contract, without the need for the buyer to establish an additional period for seller to deliver. Noting articles 75 and 77 of the CISG, the arbitral tribunal found that the buyer was entitled to terminate the contract and thereafter request damages for the cover purchase, and that it fulfilled its duty to mitigate the damages since, among others, a declaration of avoidance of the contract was communicated to the seller (article 26 of the CISG) and the substitute transaction and a notice thereof were carried out in a reasonable manner and time.

Since the buyer had prevailed in all claims, the arbitral tribunal ordered the seller to pay compensation and interests (article 78 of the CISG), applying the rate pursuant to Egyptian law. According to the arbitral tribunal, calculation of damages should begin from the date of the cover purchase only if this coincided with the date when the buyer could have used the money paid in excess for the cover purchase in a different manner.

Case 2108: CISG 7(2); 61(1)(b); 74; 79(1); 79(2)
Germany: Oberlandesgericht Jena (Court of Appeal Jena)
Case No. 5 U 1042/12
MITEC Automotive AG v. Ford Motor Company
8 December 2015
Original: German
Available at: https://cisg-online.org/

The plaintiff, an automotive supplier with place of business in Germany, and the defendant, an automobile manufacturer with place of business in the United States of America, entered into a long-term business relationship for the development and supply of harmonic balancers to reduce the movement and noise of engines. The contract between the parties provided for the supply of 300,000 units annually over a five-year period ending 31 December 2006, with the option of increasing the number of units.

The issues for consideration before the Court were whether the parties agreed to an extension of the contract beyond the initially agreed term to the end of 2007 and beyond, and whether the plaintiff was entitled to damages on the grounds that it was entitled to rely on the understanding that the contractual relationship would continue beyond the contractually agreed term.

The Court was also asked whether unauthorised disclosure of data and drawings relating to the harmonic balancer, albeit through third parties, that led to the reproduction of the engine part could give rise to liability and, if so, whether the claim was time-barred.

In deciding the first issue, the Court determined that, based on article 8, paragraph 3 CISG and with consideration given to the subsequent conduct of the parties, that the parties had not agreed on an extension of the contract.

In considering the second issue, the Court ruled that good faith formed a general principle underlying the CISG (see art. 7(2) CISG) and thus noted that a violation of the principle “*venire contra factum proprium*” may give rise to a breach of duty under article 25 of the CISG and an obligation to pay damages. However, on the facts of the

case, the Court found that the defendant did not make a qualified representation that could have reasonably induced the claimant to rely on the extension of the contract. The Court determined that the intention of the parties was to establish a long-term contractual relationship only until 31 December 2006, as stipulated in the contract.

As regards the third issue, the Court found that the defendant was liable to pay damages to the plaintiff due to a breach of contractual obligations (see articles. 61(1)(b) and 74 CISG) because the defendant had unauthorizedly disclosed data and drawings of the harmonic balancer useful for reproducing it. Applying article 79, paragraphs 1 and 2 of the CISG, the Court concluded that the fact that the defendant did not disclose the information was irrelevant because the defendant was responsible for a failure by a third person having relied on third parties for the performance of the contract either in full or partially. The Court also indicated that limitation matters for this claim did not fall within the scope of the CISG and that pursuant to the rules of private international law German law applied to those matters.

Case 2109: CISG [1]; 38; 39; 44; 74
Slovenia: Višje sodišče v Ljubljani (High Court of Ljubljana), VSL Sodba in sklep I Cpg 285/2019
29 October 2019; and
VSL Sodba I Cpg 677/2020
5 January 2021
Original in Slovenian
Available at: www.sodnapraksa.si/

Abstract prepared by Ana Vlahek and Tjaša Kalin

The parties concluded a contract for the supply of walnuts. The buyer (defendant), as an intermediary, resold the walnuts to its clients. Eventually, the seller (plaintiff) filed a claim with the court of first instance demanding payment of the invoices for the walnuts. The buyer objected, claiming that the seller's claim was time-barred and should anyway be offset against a claim for damages for breach of contract due to delivery of non-conforming walnuts. The buyer alleged that it had found out from one of its clients that the walnuts were of bad quality, and it had immediately informed the seller thereof, and that the seller had issued a credit note for the spoilt walnuts. The buyer added that two of its clients had stopped conducting business due to the poor quality of the walnuts resold to them.

The court of first instance found that a few shipments of walnuts were disputed and partially accepted the buyer's argument on the basis of the fact that the seller acknowledged the damage by issuing the credit note. However, the court did not find the seller liable for breach of contract because there was no proof of the breach of contract, the notifications of non-conformity were not timely, and the damage was not foreseeable for the seller. The buyer filed an appeal.

In its first judgement (VSL Sodba in sklep I Cpg 285/2019), the High Court of Ljubljana stated that the applicable law to the contract is the CISG, as a contract for sale of goods was concluded between parties having their place of business in different CISG Contracting States. The High Court found that the seller breached the contract and that the notification of the lack of conformity was valid and timely. The buyer had examined the goods in accordance with the HACCP standards, meaning that it examined three or four boxes of walnuts per pallet (a pallet consisting of 54 boxes containing ten kilograms of walnuts each), which is a standard examination in the food industry. The High Court indicated that a requirement to examine every box of walnuts would be unreasonable, especially as the buyer was only an intermediary. As for the timeliness of the notification given 8 or 10 days after delivery, the High Court stated that the notion of reasonable time should be interpreted in light of the facts of each individual case. Since the buyer notified the seller the same day as the buyer was informed by its clients, the notification was given in a reasonable time. In the opinion of the High Court, the walnuts were not such a perishable commodity to require an

immediate notification. Moreover, according to the Hight Court the timeliness of the notification was also shown by the fact that the seller granted the credit note.

In conclusion, the High Court in part granted the appeal and in part repealed the judgement of the first instance and remanded the case to the court of first instance. The court of first instance decided the matter again, awarding the buyer damages for the loss of profit due to the breach of contract. The seller again filed an appeal against the award of damages by claiming they were not foreseeable according to article 74 of the CISG.

In its second judgement (VSL Sodba I Cpg 677/2020), the High Court of Ljubljana explained that at that point the only disputed issue was the liability claim for the breach of contract. It confirmed that the seller breached the contract. Insofar as the limitation of the amount of damage to foreseeable damages, the High Court explained that a distinction should be made between typical and atypical contractual interests. It further explained that the party claiming the damages did not have to prove that it had brought typical contractual interests for specific types of contracts to the attention of the counterparty, but that it only had to indicate that the damage was caused by a typical risk which was presumed to be known to the debtor. It added that, for a buyer acting as an intermediary, the expected profit from the resale of goods was a typical contractual interest, and that the risk of lost business and lost profits was therefore a typical risk of such economic operations, which should be known to the counterparty. It also indicated that the foreseeability of the amount of damages within the meaning of article 74 of the CISG should not be understood in a literal sense, i.e., that the seller should be aware of the expected profit. Accordingly, the High Court dismissed the appeal and confirmed the judgement of the court of first instance.

Case 2110: CISG 8; 8(1); 8(2); 9(2)
Slovenia: Vrhovno sodišče Republike Slovenije (Supreme Court of the Republic of Slovenia)
Sklep III Ips 93/2013
28 January 2014; and
Vrhovno sodišče Republike Slovenije (Supreme Court of the Republic of Slovenia)
VS RS sklep III Ips 92/2014
14 July 2015
Original in Slovenian
Available at: www.sodnapraksa.si

Abstract prepared by Ana Vlahek and Tjaša Kalin

A buyer (plaintiff) with place of business in Slovenia and a seller with place of business in Sweden (defendant) concluded a sales contract for the supply of a machine. As the machine was not working properly, the buyer sued the seller before a court of first instance. The main issue of the case was whether the court had jurisdiction. According to the seller, the Orgalime S 2000 General Conditions for the Supply of Mechanical, Electrical and Electronic Products formed part of the sales contract concluded between the parties. Article 44 of the Orgalime terms provides that all disputes arising out or in connection with the contract should be settled under the Rules of Arbitration of the ICC. On the other hand, the plaintiff argued that the Orgalime terms had not become part of the contract.

It was undisputed that the parties had been in a business relationship since 1994 and had concluded two sales contracts incorporating general conditions UN ECE 188A, which had been updated by the Orgalime terms. Article 8 of the seller's contractual offer indicated that the seller's general terms formed part of the sales contract, and the seller offered assistance in case the terms of the offer were unclear. Moreover, the buyer was made aware of the Orgalime terms before the conclusion of the contract and accepted the offer in its entirety. While addressing the malfunctioning of the machine, the seller referred to Orgalime terms multiple times. Furthermore, the buyer did not comment or reply to an email received from the seller to which the Orgalime terms were attached.

Based on articles 8 and 9 of the CISG, the court of first instance held that the buyer, and any other reasonable person in the same position, should have known that the contract incorporated the Orgalime terms. Because these general terms included the arbitration clause, the court decided that it had no jurisdiction on the dispute at hand.

The buyer appealed stating that the general terms could become part of the offer only if the other party was reasonably aware of them, while the buyer was not aware of them. The buyer also indicated that the parties had not had a business relationship prior to the contract in question and that Orgalime terms were not a widely known international trade usage.

In its first judgement (Višje sodišče v Ljubljani (VSL) sklep I Cpg 573/2013 5 June 2013),[1] the High Court of Ljubljana, relying on article 8, paragraph 2 of the CISG, held that a reasonable person in the same circumstances as the buyer would have understood the offer and would be aware that the contract included Orgalime terms, which are standardized and widely used across Europe. Moreover, the High Court found that, while the parties had concluded only two sales contracts, their business relationship had lasted nine years. In the High Court's opinion, the court of first instance correctly considered the parties' past business relationship when interpreting the seller's statement in the offer under article 8 of the CISG and concluded that any other reasonable person would have understood the offer to include Orgalime terms. Nevertheless, the High Court stated that the fact that the parties had a prior business relationship was, in accordance with article 8(3) of the CISG, only one of the circumstances relevant to interpret a party's intent and conduct.

The High Court also found that Orgalime terms were of an international trade usage according to article 9, paragraph 2 of the CISG, and noted that they had been issued by an international organization and were commonly used in the mechanical, electrical and electronic industry across Europe, where the parties were operating. For these reasons, the High Court upheld the first instance judgement.

The buyer then filed an extraordinary remedy of revision before the Supreme Court (Sklep III Ips 93/2013) further discussing whether the parties agreed to Orgalime terms and therefore whether the arbitration clause contained in the Orgalime terms was valid. The buyer argued that article 8, paragraph 2 of the CISG applied only if article 8, paragraph 1 was inapplicable. The Supreme Court indicated that the CISG favoured a subjective interpretation of the contract but added that, if article 8, paragraph 1 of the CISG was inapplicable, an objective interpretation under article 8, paragraph 2 of the CISG applied. The Supreme Court further explained that article 8, paragraph 1 of the CISG could not be used when the parties had not put forward any claims regarding their intent, or when proving such intent would be difficult or ineffective, and that in such cases the court did not need to specify its reasons for not relying on article 8, paragraph 1 of the CISG.

Despite dismissing the substantive claims of the buyer, the Supreme Court upheld the claim regarding the alleged breach of the adversarial principle and returned the case to the High Court. The Supreme Court instructed the High Court to take into account that article 8 of the CISG applied in the interpretation of issues relating to the CISG, and that at the relevant time Sweden had not been a party to the CISG regarding its Part II.

In the repeated proceedings (VSL sklep I Cpg 245/2014 – 12 March 2014),[2] the High Court of Ljubljana, taking into account the status of the CISG in Sweden at the relevant time, reiterated that it based its arguments on article 8 of the CISG, which is contained in Part I of the Convention. The High Court recalled that whether the general terms were part of the contract depended on the interpretation of the statements and conduct of both parties according to article 8 of the CISG. Therefore, the High Court dismissed the appeal and confirmed again the judgement of the court of first instance.

[1] Available at www.sodnapraksa.si.
[2] Available at www.sodnapraksa.si.

The buyer again filed a revision claiming erroneous application of article 8 of the CISG due to Sweden not being party to Part II of the CISG. The Supreme Court held that, although article 8 of the CISG is located in Part I of the Convention, it could be applied only in connection with those parts of the CISG that are binding for Sweden. Since the issue of general terms fell within Part II of the CISG, the Supreme Court concluded that the CISG did not apply to the contract. The Supreme Court identified Swedish law as the law applicable to the contract and found the arbitration clause valid under Swedish law.

Case 2111: CISG 1(1)
Sweden: Arbitration Institute of the Stockholm Chamber of Commerce
Distributor v. Supplier
SCC No. 2023-5 [SCC Case No. 2020/m, 2022]
Original in English

A dispute arose between a distributor (claimant) and a supplier (respondent) when the latter failed to provide a medical product to the claimant under a purchase order in the context of a supply agreement. After the claimant sent two notices of breach to the respondent demanding payment of compensation under the supply agreement and following a series of unsuccessful negotiations between the parties, the respondent sent a notice of termination of the supply agreement to the claimant. The claimant then initiated arbitration proceedings before the SCC requesting payment of the compensation for breach of the supply agreement.

The arbitral tribunal examined, among other issues, whether the claimant had complied with the delay notice obligations under the provisions of the supply agreement and Swedish law. In that regard, the claimant had argued that the CISG applied to the supply agreement and that the CISG did not require it to give notice regarding delay. Alternatively, the claimant argued that the purchase order and its agreed conditions should be considered a separate contract of sales to which the CISG applied.

The arbitral tribunal noted that the CISG had been incorporated into Swedish law through the Swedish International Sales of Goods Act[3] and that both parties had their place of business in State parties to the CISG. However, the arbitral tribunal, citing case law,[4] also observed that the CISG did not apply to distribution contracts not covering the sale of specific goods and not including definite terms regarding quantity and price. It noted that the supply agreement in the case at hand did not cover the sale of specific goods, nor did it contain definite terms regarding the quantity of goods and that these were included in separate purchase orders. Accordingly, the arbitral tribunal found that the CISG did not apply to the supply agreement and that as the distributor's claim was not solely based on the purchase order, the question of whether the CISG applied to the purchase order was irrelevant.

Case 2112: CISG 1; 4; 6; 7; 92
Sweden: Högsta domstolens Stockholm (Swedish Supreme Court)
Case no. T-6032-16
CeDe Group AB v. KAN Sp. z o.o.
29 May 2020
Original in Swedish
Published in: Internationales Handelsrecht (IHR) (2021), 187–190 [Full text (translation) – in English]
Available at:
https://cisg-online.org/files/cases/13414/translationFile/5500_93804867.pdf

CeDe, a company with place of business in Sweden, entered into a supply agreement on 9 June 2010 with PPUB Janson Sp J. (PPUB), a company with place of business in Poland. The contract included a choice of law provision designating Swedish law

[3] Act 1987:822 of the enacting State.
[4] See CLOUT case No. 420 [U.S. [Federal] District Court for the Eastern District of Pennsylvania, United States, 29 August 2000].

as applicable to the contract. Before July 2011 PPUB declared bankruptcy, and the PPUB bankruptcy estate claimed from CeDe SEK 1.5 million as payment for delivered goods. CeDe responded with a SEK 3.9 million counterclaim for damages due to non-delivery of certain goods and defects in other goods and arising from pre-bankruptcy dealings. Eventually, the PPUB bankruptcy estate assigned the claim to the company KAN.

A preliminary decision excluded the applicability of the rules on private international law of the European Insolvency Regulation[5] to determine the law of the right of set-off.

The Swedish Supreme Court noted that since the parties had their places of business in two different CISG Contracting States, the CISG applied to the contract. However, it also noted that article 4 of the CISG defined the scope of application of the CISG, which did not include the relationship between the assignee and the obligor.

Noting under the Rome I Regulation[6] the law applicable to an assigned claim was the same as the law applicable to the original claim, the court considered whether the CISG applied to the right of set-off. Mindful of the different views on this point, and of the fact that the choice of law of the original parties to the supply agreement did not regard the right of set-off, the court declared that Swedish law applied to the right of set-off.

In a separate opinion, it was noted that the supply agreement was a framework agreement and, as such, the CISG did not apply to it, but it could apply to the individual sale contracts concluded under that framework agreement. It was also noted that at the time of the conclusion of the contract Part II of the CISG was not in force in Sweden, and that this might affect the ability to deduct general principles from the CISG relevant for determining its application to the right of set-off.

Case 2113: CISG 35; 39; 49; 74
Turkey: Istanbul Bolge Adliye Mahkemesi
Case No: E. 2019/1842 K. 2022/379
Turkish buyer v. Italian seller
31 March 2022
Original in Turkish
Available at: https://iicl.law.pace.edu/cisg/case/turkey-march-31-2022-regional-appellate-court-bolge-adliye-mahkemesi

Abstract prepared by Gizem Alper

The dispute concerned a sales contract for an automatic capsule filling machine executed between a Turkish buyer and an Italian seller. The parties agreed in the contract to the application of Swiss law and to the jurisdiction of Swiss courts. The seller delivered the said machine, and the buyer paid the purchase price; however, the buyer later alleged that the machine had latent defects which rendered it inoperable. So-called “acceptance tests” confirmed that the machine was not in conformity with the specifications outlined under the contract. The buyer declared the contract avoided and requested compensation of damages and the restitution of the purchase price.

The Istanbul Commercial Court of First Instance (Istanbul 9. Asliye Ticaret Mahkemesi) rendered a judgment on 16 April 2019 holding that, inter alia, Turkish courts had jurisdiction and that the CISG and the relevant provisions of Turkish Law (Code of Obligations and Commercial Code) were applicable. The court found that there were grounds for avoidance under the CISG and ordered the seller to repay the purchase price and compensate damages.

The seller appealed in front of the Istanbul Bolge Adliye Mahkemesi (Istanbul Regional Appellate Court) alleging that, as per the sales contract, Swiss courts had jurisdiction over the dispute and that the court of first instance had mistakenly applied

[5] Council Regulation (EC) No 1346/2000 of 29 May 2000 on insolvency proceedings. Official Journal L 160, 30 June 2000, p. 1–18.

[6] 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), Official Journal L 177, 4 July 2008, p. 6–16.

Turkish law rather than Swiss law and the CISG. Moreover, the seller alleged that the buyer had not complied with the notification requirements under article 39 of the CISG and that notice in due course was required to mitigate risks under article 77 of the CISG, but had not been given.

The court of appeal held that the defendant had not objected to jurisdiction within the given time period, and that, consequently, any jurisdictional claims had lapsed, and Turkish courts had jurisdiction. The court of appeal further held that Swiss law was the governing law, and that the CISG was applicable as part of Swiss law. The court also found that a fundamental breach of contract according to article 49 of the CISG had occurred, and that the buyer was entitled to remedies under the CISG. The court of appeal confirmed the judgment of the court of first instance stating that the buyer had notified the seller within the required time frame set under articles 38 and 39 of the CISG, and that damages had been calculated correctly in accordance with article 74 of the CISG.

B. Cases relating to the United Nations Convention on Contracts for the International Sale of Goods (CISG) and the United Nations Convention on the Limitation Period in the International Sale of Goods (Limitation Convention)

Case 2114: CISG 1; 6; 25; 26; 38; 39; 45; 49; 86; 86(1); 86(2); Limitation Convention 8
Slovenia: Višje sodišče v Ljubljani (High Court of Ljubljana)
VSL sklep I Cpg 1502/2015
28 April 2016; and
VSL Sodba I Cpg 322/2017 (High Court of Ljubljana)
10 May 2017
Original in Slovenian
Available at:**Error! Hyperlink reference not valid.**

Abstract prepared by Ana Vlahek and Tjaša Kalin

A dispute arose between a seller with place of business in Macedonia (plaintiff) and a buyer with place of business in Slovenia (defendant) over two consignments of onions. The seller filed a claim for the payment of the two consignments and the buyer filed a counterclaim based on the lack of conformity of the onions and demanded compensation of damages. The buyer claimed that the delivered onions were wet and rotten, and that it had notified the lack of conformity to the seller. It added that the seller had asked the buyer to dry the onions, but that the drying was ineffective and the onions had to be discarded. However, the court of first instance found in favour of the seller. The buyer filed an appeal with the Ljubljana High Court.

In its order (VSL sklep I Cpg 1502/2015), the High Court indicated that the CISG applied to the matter as both parties have their place of business in CISG contracting States and had not opted out according to article 6 of the CISG. In the case at hand, the seller and the buyer entered into a contract for the sale of onions which had been delivered to the buyer. The buyer refused to accept the delivery of the onions, stating that they were non-conforming with the terms agreed in the contract. Pursuant to the seller's request, the buyer took possession of the goods on behalf of the seller and took steps that were reasonable in the circumstances to preserve the onions (article 86 of the CISG). The buyer explained that it did not sign the consignment note evidencing receipt of the goods because it only took possession of the onions, but did not take them over. Moreover, the buyer reiterated that it notified the seller of the non-conforming quality of the onions immediately by the telephone and within a reasonable period by email.

The High Court recalled that, in accordance with article 53 of the CISG, the buyer is obliged to pay the price for the goods and take delivery of them, and explained that the buyer cannot refuse to take the delivery of goods if these are not in conformity, except

in case of fundamental breach and if the seller has been notified within a reasonable period. In that regard, the High Court stated that the notice of termination did not need to be explicit, but the will of the buyer to terminate the contract should be evident.

The High Court noted that under article 27 of the CISG, a delay or error in the transmission of the communication or its failure to arrive did not deprive that party of the right to rely on the communication, including when email is used. However, in confirming that the notification of non-conformity of the goods may be oral, the High Court added that the burden of proving the content of the oral communication and the fact that the addressee had accepted and understood it lied with the party who alleged it and chose the method of communication, i.e., the caller in case of telephone communication.

In light of the above, the High Court of Ljubljana referred the case back to the court of first instance. The court of first instance denied the claim in its entirety while partially awarding the damages requested by the buyer. The seller filed again an appeal.

In its second judgement (VSL Sodba I Cpg 322/2017), the High Court of Ljubljana confirmed that the CISG was the law applicable to the contract and that the notification of the lack of conformity was timely. It also indicated that the buyer declared the contract avoided by declining to take the onions when they were delivered and that it tried to dry them only because the seller requested it in accordance with article 86, paragraph 2 of the CISG. Moreover, in reply to the argument of the seller that the counterclaim for compensation of damages was time-barred under article 480 of the Slovenian Code of Obligations, the High Court confirmed the conclusion of the court of first instance that the Convention on the Limitation Period in the International Sale of Goods was applicable, and that, given the limitation period of four years (article 8 of the Limitations Convention), the counterclaim was not time-barred.

C. Cases relating to the United Nations Convention on the Carriage of Goods by Sea – The “Hamburg Rules” (HR)

Case 2115: Hamburg Rules 2(1)(a); 31(1)
France: Cour d’appel d’Aix-en-Provence
RG n° 20/01497
Helvetia Compagnie Suisse d’Assurances v SA CMA CGM
28 September 2023
Original in French: www.courdecassation.fr/decision/65166aaf788aac83189e94d9

This case deals with liability for the deterioration of sweet corn contained in a refrigerated container shipped from Senegal to the United Kingdom of Great Britain and Northern Ireland. The parties to the dispute were the insurer of the shipper, who had subrogated the shipper, and the carrier of the container. The determination of the applicable law is relevant in this case, in particular, to establish the limitation of liability of the carrier.

According to the insurer, the Hague-Visby Rules should apply since the place of discharge of the goods was located in the United Kingdom, which is a Contracting State to the Hague-Visby Rules; alternatively, the Hamburg Rules should apply because the place of loading of the goods was located in Senegal, which is a Contracting State to the Hamburg Rules. On the other hand, the carrier argued that the Hague Rules should apply based on the contractual terms contained in the bill of lading and their being in force in Senegal.

The Court of Appeal recalled that, when a Contracting State of the Hague Rules wishes to join the Hamburg Rules, it should denounce the Hague Rules (article 31, paragraph 1 of the Hamburg Rules), and that no evidence of such denunciation had been provided. It added that the agreement of the parties on the application of the Hague Rules, as reflected in the bill of lading, indicated that the parties did not intend to apply the Hamburg Rules.