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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.1). CLOUT documents are available on the UNCITRAL website: (www.uncitral.org/clout/showSearchDocument.do).

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

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

Case 1641: CISG 35(1); 38; 39
Republic of Korea: Seoul Central District Court
Decision 2012Gahap71645 (Petition for reduction of price etc. (confirmation)) – Dismissed
29 November 2013
Original in Korean

Prepared by Haemin Lee, National Correspondent

In this case, the plaintiff buyer purchased forelegs of pork from the defendant seller. The plaintiff made a claim for damages and reduction of sales price on the basis of lack of conformity with the contract due to the defendant's failure to eliminate lymphatic glands, which had resulted in the goods changing colour.

The Court found that the defendant had failed to deliver goods that were compatible with the description in the contract under Article 35(1) CISG. Consequently, absent extraordinary circumstances, the defendant was liable in principle, and therefore would have to reduce the sales price and pay damages for the loss.

However, the defendant argued that the plaintiff was precluded from claiming reduction of sales price and damages on the grounds that the plaintiff had failed to diligently examine the goods under Article 38 CISG and did not give the defendant notice specifying the nature of the lack of conformity in accordance with Article 39 CISG.

The Court considered that, under Articles 38 and 39 CISG, the buyer must: (1) examine the goods within as short a period as is practicable in the circumstances after the goods have arrived at their destination; (2) give notice to the seller specifying the nature of the lack of conformity within a reasonable time after he discovered it or ought to have discovered it; and (3) if it fails to give the seller such notice, the buyer loses the right to rely on the lack of conformity of the goods to claim damages or a reduction of sales price. The examination of the goods should be reasonable in light of the circumstances, consistent with commercial practices and adequate to discover any potential defect in the goods. Notice of the lack of conformity must have been given within a reasonable time after the buyer discovered it or ought to have discovered it following examination.

As the plaintiff had only notified the defendant of the lack of conformity more than ten months after receiving the goods, the Court considered that it had not given notice within a reasonable time after it had discovered or ought to have discovered the lack of conformity. The plaintiff had consequently lost the right to rely on the lack of conformity of goods. Therefore, the Court accepted the defendant's argument and rejected the plaintiff's claim.

Case 1642: CISG 14(1); 18(1); 19(1); 19(2); 19(3); 49(1)(b); 58(1); 72(1)
Republic of Korea: Seoul High Court
Decision 2012Na59871
19 July 2013
Original in Korean

Prepared by Haemin Lee, National Correspondent

The defendant buyer, a Korean company, entered into a contract with the plaintiff seller, a Taiwanese company, for the manufacture and supply of goods. The defendant sent an order to the plaintiff for the goods to be manufactured and supplied "FOB factory", specifying the quantity and price of the goods. The plaintiff sent the

defendant a pro forma invoice altering the payment condition into "FOB Taiwan Airport". Accordingly, the defendant opened a letter of credit ("L/C") for the plaintiff as "FOB Taiwan Airport".

At the plaintiff's charge for payment, the defendant responded by alleging that either: (a) the contract was not formed for lack of agreement on the time of performance; (b) the contract was legally avoided because the time of performance was not fixed and the plaintiff delayed its performance; or alternatively, (c) the defendant's duty to pay is in a concurrent performance condition with the plaintiff's duty to deliver the product.

The Court determined that the CISG is applicable even though Taiwan is not a signatory because the parties had agreed that the law of the Republic of Korea, a signatory to CISG, was the governing law.

Next, the Court held that Articles 14(1), 18(1), and 19(1)-(2) CISG define "offer" and "acceptance." In particular, (i) a reply to an offer which purports to be an acceptance but contains any additions, limitations or other modifications is a rejection of the offer and instead constitutes a counter-offer (Article 19(1)); (ii) a reply to an offer which purports to be an acceptance but contains additional or different terms which do not materially alter the terms of the offer constitutes an acceptance (Article 19(2)); and (iii) additional or different terms relating, among other things, to the price, payment, and place and time of delivery are considered to alter the terms of the offer materially (Article 19(3)). However, the Court expressed its view that alterations to the categories enumerated under Article 19(3) do not always constitute a material alteration of terms. Thus, the Court ruled that whether an alteration of terms is material must be evaluated in light of the overall circumstances.

In this case, the contract was formed by adding the alterations of the pro forma invoice to the offer contained in the order, and it would be reasonable to conclude that the method and standard to fix the time of performance was set out at least implicitly. Thus, the Court ruled that the contract in this case was formed on the date the pro forma invoice was sent, hence rejecting the defendant's claim.

Under Article 49(1)(b) CISG, the buyer may declare the contract avoided in case of non-delivery if the seller declares that it will not deliver the goods within the fixed period. In this case, however, the Court ruled that there was not enough evidence to conclude that the plaintiff had expressed its intent to definitively refuse to deliver the goods.

Additionally, Article 72(1) CISG provides that if, prior to the date for performance of the contract, it is clear that one of the parties will commit a fundamental breach of contract, the other party may declare the contract avoided. Article 58(1) CISG does not specifically provide for concurrent performance conditions, but in a transaction based on L/C such as this, the plaintiff's duty to deliver the goods and the defendant's duty to make payment are in a concurrent performance condition. Thus, the Court ruled that even where the plaintiff failed to deliver the goods within the time of performance, the plaintiff is not liable for the delay in performance provided that the defendant did not perform its duty or offer to perform it. Thus, the Court rejected the defendant's avoidance defence as well.

Nevertheless, the Court accepted the defendant's defence based on concurrent performance, and ordered the defendant to make payment at the same time it receives the plaintiff's delivery of goods "FOB Taiwan Airport".

Case 1643: CISG 47(1); 49(1); 51(1); 81(2)
Republic of Korea: Seoul High Court
Decision 2012Na27850[1] (Confirmation of nonexistence of duty to buy goods etc.), *dismissed for failure to submit appellate brief*, Supreme Court Decision 2013Da20090
17 January 2013
Original in Korean

Prepared by Haemin Lee, National Correspondent

In this case, the plaintiff buyer sought restitution of the sales price for failing to carry out a shipment of Casein, on the ground that the Casein sales contract was avoided.

Since 2009, the plaintiff repeatedly demanded that the defendant seller deliver the remainder of the as-yet undelivered seventh shipment of Casein as soon as possible. The defendant continued to refuse, whilst also demanding the plaintiff's performance of an obligation that was not contained in the substance of the Casein sales contract.

The plaintiff's demand for delivery lacked an explicit fixed period, and thus did not constitute fixing "an additional period of time of reasonable length for performance" under Article 47(1) CISG. Nevertheless, the Court deemed the case as one in which the defendant declared that it would not deliver within the period so fixed, due to the defendant's refusal to perform, whilst also demanding the plaintiff's performance of an obligation to which the plaintiff was not bound to perform.

Therefore, the Court determined that the plaintiff may declare the unperformed portion of the Casein sales contract avoided under Articles 49(1) and 51(1) CISG, and that the defendant bears the obligation to make restitution of the sales price equal to the sum avoided under Article 81(2) of the CISG.

Case 1644: CISG 8; 18(2); 23; 39; 42; 50; 74
Republic of Korea: Seoul High Court
Decision 2011Na62108[2] (Goods price), *non-continuation dismissal*, Supreme Court Decision 2012Da115861
15 November 2012
Original in Korean

Prepared by Haemin Lee, National Correspondent

In this case, the plaintiff seller made a claim for the sales price against the defendant buyer.

The Court premised its reasoning on its understanding of Article 8 CISG. It held that the primary means of interpreting a party's expression of intent under Article 8 is by reference to natural interpretation (i.e. the subjective intent of the parties). Failing this, reference should be made to normative construction.

On this premise, the Court held that although the sales contract (i.e., invoice) that had been originally signed by both parties indicated the product name as "6N" grade, this was not the product that the defendant intended to buy. In light of the indication of "99.99%" under the column on purity and due to the defendant's consistent demand for the supply of "4N" grade products thereafter, it seems clear that the defendant had intended to sign a sales contract for "4N" grade products from the outset and has expressed its intent accordingly. As such, the defendant's intent along with the understanding of a reasonable person in the plaintiff's position in the same circumstances suggests that the purchase products were "4N" grade products. The defendant's intent will be interpreted the same way, whether by reference to a natural

[1] First instance - Seoul Northern District Court Decision 2009Gahap7285.
[2] First instance - Seoul Southern District Court Decision 2010Gahap5206.

(i.e. the subjective intent of the party) or normative approach (i.e. the "presumptive" intent of the party). Thus the object of the sales contract of this case is a "4N" grade product.

The plaintiff claimed that the modified invoice had effectively withdrawn its acceptance of the contract. However, the Court held that the sales contract, once concluded, could not be effectively withdrawn by the plaintiff's unilateral expression of intent (Articles 18(2) and 23 CISG). Thus, the plaintiff had breached the sales contract by failing to supply the "4N" grade product.

Nevertheless, the Court held that under Article 74 CISG the breaching party of a contract is liable for damages consisting of a sum equal to the loss (including performance interest, reliance interest, direct loss and collateral loss) but only to the extent to which the party in breach foresaw or ought to have foreseen such damages. On this basis, the Court rejected certain damages claimed by the defendant on the grounds that the plaintiff could not have foreseen, or need not have foreseen, them.

In addition, the Court interpreted the first sentence of Article 50 CISG as acknowledging the buyer's formative right to request a reduction of price if the goods do not conform to the terms of the contract. In order to exercise this right, the buyer must give notice to the seller, specifying the nature of the lack of conformity under Articles 39 and 42 CISG.

The Court thus devised the following formula to calculate the price after the reduction: [contract price "multiplied by" the value of the goods actually delivered at the time of the delivery "divided by" the value that conforming goods would have had at that time]. The Court accordingly permitted the petition for the reduction of a certain part of the price.

Case 1645: CISG 35(2); 39; 77; 82(1); 86; 88(1); 88(3)
Republic of Korea: Seoul High Court
Decision 2011Na31258[3] (Damages), *final appeal dismissed*, Supreme Court
Decision 2012Da94704
27 September 2012
Original in Korean

Prepared by Haemin Lee, National Correspondent

The plaintiff buyer claimed that its contract with the defendant seller for the purchase of steel pipes was avoided on the ground that the Molybdenum content of the pipes did not conform with the contract.

The Court first considered that the plaintiff and the defendant had agreed to match the Molybdenum content to international standards so that the pipes could be supplied to power plants. Molybdenum content is the key factor in determining the strength of pipes. While the inspection certificate submitted by the defendant indicated that the Molybdenum content of the pipes matched international standards, in reality the Molybdenum content of the pipes was significantly less than this standard. Consequently, the pipes were not fit for the particular purposes that the plaintiff had intended to use them for and that it had expressly made known to the defendant. Thus, the plaintiff has the right to declare the contract avoided under Article 35(2) CISG.

In response, the defendant argued that the plaintiff had lost the right to rely on a lack of conformity of the goods to avoid the contract on the basis that the plaintiff had failed to give notice specifying the lack of conformity to the defendant within two weeks of receiving the pipes. However, the Court rejected this defence on the

[3] First instance - Seoul Central District Court Decision 2010Gahap67291.

ground that "a reasonable time after the buyer has discovered it or ought to have discovered it" (Article 39 CISG) had not passed.

The Court then considered that Article 86 CISG imposes a duty on the buyer to take such steps to preserve the goods as are reasonable in the circumstances if it intends to exercise, or has exercised, any right to reject them by, for example, declaring the contract avoided. Article 82(1) provides that the buyer loses the right to declare the contract avoided or to require the seller to deliver substitute goods if it is impossible for him to make restitution of the goods substantially in the condition in which he received them. However, Article 77 CISG provides that if the buyer fails to take such measures as are reasonable in the circumstances to mitigate the loss, the seller, as the party in breach, may claim a reduction in damages in the amount by which the loss should have been mitigated. Thus, despite the buyer's failure to perform his duty under Article 86, it cannot be deemed to have lost his right to rely on a lack of conformity to avoid the contract.

Even though the pipes in this case were corroded from being stored out in the field, the Court considered that this corrosion did not deprive the pipes of their substantial identity. Although the general rule is that a party in breach of Article 86 CISG loses the right to declare the contract avoided, in this particular case the right to declare the contract avoided is not lost by the extent of breach.

After confirming the defendant's intent to buy the pipes, the plaintiff notified the defendant of its intention to sell the pipes should the defendant fail to buy them. The plaintiff proceeded to sell the pipes and the Court held that this was a lawful sale under Article 88(1) CISG.

According to Article 88(3) CISG, the plaintiff must account to the defendant for the balance of the proceeds of sale. Even when one party's obligation in a concurrent performance condition has transformed into another obligation, this transformed obligation remains in a concurrent performance condition with the other party's reciprocal obligation. Therefore, the Court held that the plaintiff's obligation to return the proceeds of sale to the defendant remains in a concurrent performance condition with the defendant's duty to return the contract price and award damages to the plaintiff.

Case 1646: CISG 19(1); 19(3)
Republic of Korea: Busan District Court, 98gahap25606 (14. Apr. 1999); Busan District Court, 99na5033 (2. Feb. 2001); Supreme Court, 2001da17107 (25. Apr. 2003) (Guarantee Liability)
2 February 2001
Original in Korean

Prepared by Haemin Lee, National Correspondent

The plaintiff seller is a German corporation and the defendant and non-party companies are Russian corporations.

The defendant, as an agent of a non-party company, asked the plaintiff to inspect a ship's engine with a view to purchase. On 18 April 1995, the plaintiff sent the defendant written quotes of the engine. The defendant faxed the plaintiff expressing its agreement to the plaintiff's terms and conditions, and requested that the plaintiff sign and return the contract.

Again on 5 June 1995, the defendant finally faxed its order to the plaintiff for a partially reduced quantity of goods. The plaintiff drafted the contract accordingly and faxed it to the defendant the following day.

Article 9 of the former Conflict of Laws of Korea (current Act on Private International Law) provides that: (a) the parties' intention should prevail in choosing the applicable law on the establishment and validity of juristic acts; and (b) if the parties' intention is unclear, *lex loci actus* (i.e. the law of the place where the act occurred) would apply. Article 11(2) of the Conflict of Laws of Korea provides that the *lex loci actus* is the place of notification of the offer.

The plaintiff claimed that: (a) its quote dated 18 April 1995 was an offer; (b) the defendant's faxed order of 5 June 1995 that reduced the quantity of goods was an acceptance; and therefore, (c) German law should govern the sales contract.

However, Articles 19(1) and (3) CISG provide that modifying the quantity of goods materially alters the terms of the offer and thereby constitutes a counter-offer. Similarly, Article 534 of the Civil Act of Korea provides that if the offeree has accepted an offer subject to a condition or any modification, he shall be deemed to have rejected the original offer and has simultaneously made a new offer. In light of this, the District Court found that: (a) the defendant made an offer in its fax of 5 June 1995; and (b) the plaintiff expressed its intent to accept that offer by returning the contract on June 6 1995. The present sales contract was formed by this offer and acceptance. Therefore Russian law, rather than German law, governs the sales contract.

The Supreme Court affirmed the reasoning of the District Court.

Case 1647: CISG 36; 38(1); 39(1)
Russian Federation: Commercial Court of the North-West Circuit
Case No. A56-80906/2015
3 October 2016
Published in Russian: http://ras.arbitr.ru[4]

Abstract prepared by Alexander Muranov, National Correspondent, and Natalia Ivanova

A German company (the seller) and a Russian company (the buyer) signed a sale contract (the Contract) providing for delivery of semi-finished food product (the goods). The Contract directly provided for the application of the provisions of the CISG and, subsidiarily, Russian law.

The seller delivered the goods. The buyer took the delivery and resold the goods to the third company. The latter claimed non-conformity of the goods. Due to this, the buyer refused to pay for the goods. The seller, therefore, filed a lawsuit against the buyer seeking reimbursement of the value of the goods delivered to the buyer under the Contract.

The courts of first and second instances upheld the claim in full. The buyer filed a cassation complaint[5] to the Commercial Court of the North-West Circuit (the Court), claiming the following. Firstly, the buyer stated that the goods were of undue quality. The buyer did not agree with the lower courts that the Contract lacked any requirements regarding the issues of quality of the goods in question. For this purpose it referred to the manufacturer's specifications. Moreover, the buyer presented expert reports confirming non-conformity of the goods. Secondly, the buyer contested the

[4] Online database of court decisions.

[5] A cassation complaint is a complaint lodged by one of the parties to the case in order to reverse the acts of the courts of the lower instances. A commercial court of the cassation instance shall examine legality of the acts of the courts of the lower instances, correctness of application of the norms of substantive law and of the norms of procedural law. While examining a case, a commercial court of the cassation instance shall verify whether the conclusions of the courts of the lower instances and application of the legal norms correspond to the circumstances of the case and to the provided evidence.

expiration of time period for claiming non-conformity of the goods. The buyer believed that he could give such a notice within the shelf life of the delivered goods.

The Court upheld the acts of the lower courts, stating the following. Under Article 38(1) CISG the buyer must examine the goods, or cause them to be examined, within as short a period as is practicable in the circumstances. Under Article 39(1) CISG the buyer loses the right to rely on a lack of conformity of the goods if it does not give notice to the seller specifying the nature of the lack of conformity within a reasonable time after it has discovered it or ought to have discovered it. The Contract provided that a notice on the lack of conformity of the goods could be communicated to the seller within 20 days upon the delivery of the latter.

The courts of first and second instances found that the buyer failed to provide sufficient and admissible evidence proving undue quality of the goods. The courts correctly refused to accept the reports of the laboratories as evidence of the non-conformity of the goods as such reports were not prepared properly. Namely, the conclusions thereof did not relate to all the samples taken, it was not possible to assert whether the samples had been taken from the goods in question *etc*. The courts also found that taking samples without the seller prejudiced the reports. Moreover, the reports lacked information on storage conditions of the goods. The courts of first and second instances correctly reached the conclusion that the buyer had failed to comply with the obligation to give a due notice to the seller on a lack of conformity of the goods and to draw up an act on non-conformity of the goods. Moreover, the buyer received and resold the goods to the third party without examination. The buyer made a notice of non-conformity of the goods to the seller only because of the claim received from the said third party. At the same time, the buyer intentionally did not give the chance to the seller to examine the goods.

The courts of first and second instances found that the buyer violated the Contract and the CISG in respect of advancing a notice concerning quality of the goods. Accordingly, the buyer deprived the seller of the right to examine the claims and to participate in taking samples for experts' examination. Also, the Court indicated that the Contract did not contain any quality requirement related to the alleged non-conformity of the goods. Moreover, there was no evidence that the manufacturer's specifications to which the buyer referred constituted a part of the Contract. Therefore, they could not be taken as evidence of undue quality of the goods. In addition, the Court rejected the buyer's reference to Article 36 CISG, which stipulates the seller's liability for any lack of conformity which exists at the time when the risk passes to the buyer. The Court found that the buyer failed to provide sufficient evidence of receiving poor goods.

On the basis of the above, the Court dismissed the cassation complaint of the buyer.

Cases relating to the UNCITRAL Model Law on Electronic Commerce (MLEC)

Case 1648: MLEC 15(4)

Hong Kong Special Administrative Region (China): Court of the First Instance, High Court, (Hon Ng J)
Emirates Shipping Line DMCEST v. Trans Asian Shipping Services Pvt Ltd (HCCL 2/2013)
30 November 2015
Original in English
Published in: http://legalref.judiciary.gov.hk

This case deals with the determination of the place of formation of a contract concluded by electronic means in order to establish the jurisdiction of the court over the dispute arising from the contract.

The plaintiff, a company incorporated in Dubai, United Arab Emirates, and the defendant, a company incorporated in India, concluded a container liner service contract by exchange of emails. The plaintiff sued the defendant before the courts of Hong Kong, China, for breach of contract. In order to establish the jurisdiction of the courts of Hong Kong, the plaintiff had to establish, among others, that the contract had been concluded in Hong Kong, namely that the acceptance had been received by the offeror (plaintiff) in Hong Kong.

The plaintiff argued that it had received the email expressing acceptance of the offer in Hong Kong based on the fact that the contract had been negotiated and performed entirely by the plaintiff's representative based in Hong Kong, as evidenced by its physical address.

On the other hand, the defendant indicated that the plaintiff had not received the acceptance in Hong Kong, and consequently the court had no jurisdiction over the case. The defendant made reference to section 19(4) and (5) of the Electronic Transactions Ordinance (Chapter 553 of the Laws of Hong Kong), which is based on Article 15(4) MLEC, introducing a presumption that the place of receipt of an electronic communication is where the addressee has its place of business. The defendant suggested that the place of receipt of the acceptance was Dubai, which was the place of incorporation of the plaintiff, and that the plaintiff's representative only received the email accepting the offer in Hong Kong "by chance".

The Court rejected the defendant's arguments and found on the basis of the evidence presented that the plaintiff's representative was based in the Hong Kong SAR and worked in the office located there. Moreover, the Court took note of the fact that the emails exchanged between the plaintiff's representative and the defendant in relation to the contract contained an indication of the contact numbers of the direct line, fax line and mobile phone number of the plaintiff's representative, which were all preceded by the Hong Kong country code. The Court concluded that the plaintiff had received the email expressing acceptance of the contract in Hong Kong.