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CASE LAW ON UNCITRAL TEXTS
(CLOUT)

Contents

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Introduction

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

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

Case 1709: CISG 71; 71(1); 71(3)
The Republic of Belarus: International Court of Arbitration at the Belarusian Chamber of Commerce and Industry
Case No. 1352/24-14
5 January 2016
Original in Belarusian

Abstract prepared by Jan Iosifovich Funk and Inna Vladimirovna Pererva[1]

A contract was concluded between the plaintiff (Republic of Belarus) and the defendant (Republic of Cyprus) under which the defendant was to produce and transfer goods, namely components for machinery and equipment, to the plaintiff within a specified time frame. The plaintiff was to take delivery of and pay for the goods.

In accordance with the terms of the contract, the plaintiff was also to make a prepayment, which the plaintiff did while failing to meet some of the deadlines established by the contract. The contract provided that, as a consequence of non-compliance with the prepayment deadlines, the delivery deadlines would be extended, although no specific time period was given. One of the contract provisions, however, clearly indicated that in the event of a delay in the prepayment, the delivery would be postponed correspondingly. Although the plaintiff had made the prepayment in full as per the contract, the defendant delivered only part of the goods. In doing so, the defendant declared that it was suspending the performance of its obligations under the contract.

On the basis of articles 71(1) and (3) CISG, the Court did not accept the defendant's suspension of the performance of its obligations, for the following reasons.

Under article 71 of the Convention, the parties may indeed suspend the performance of their obligations if, after the conclusion of the contract, it becomes apparent that the other party will not perform a substantial part of its obligations as a result of a serious deficiency in its ability to perform or in its creditworthiness, or in its conduct in preparing to perform or in performing the contract. The party suspending performance must immediately give notice of the suspension to the other party and must continue with performance if the other party provides adequate assurance of his performance.

The Court found that the aforementioned requirements of article 71 CISG had not been met, as there were no precise grounds for suspension under that article and the procedure for suspension as provided for in the article had not been followed. The defendant had not proved a serious deficiency in the plaintiff's creditworthiness or any other circumstance established by article 71 CISG as a ground for suspension of a party's performance of its obligations, nor had the defendant informed the plaintiff of the suspension of its performance of its contractual obligations, thus depriving the plaintiff of the opportunity to provide adequate assurance of its performance of its prepayment obligations.

Therefore, the Court rejected the defendant's suspension of the performance of its obligations under the contract, as that suspension was found unjustified.

[1] At the time the abstract was prepared, J. I. Funk and I. Vladimirovna Pererva were Belarus' CLOUT National Correspondents.

Case 1710: CISG 45; 74; 77
The Republic of Belarus: International Court of Arbitration at the Belarusian Chamber of Commerce and Industry
Case No. 1372/44-14
22 October 2015
Original in Belarusian

Abstract prepared by Jan Iosifovich Funk and Inna Vladimirovna Pererva[2]

A contract for the delivery of power-generating units was concluded between the buyer (Republic of Belarus), appearing as the plaintiff, and the seller (Republic of Poland), appearing as the defendant.

Under a joint operating agreement (simple partnership), the plaintiff had transferred the operation of the units, which had been installed in small hydroelectric power stations, to a second Belarusian entity.

Defects were detected within the warranty period in the power-generating units delivered by the defendant and this prevented their further use. As a result, the units stood idle and insufficient electricity was produced for the Belarusian power supply system, that shortfall representing a specific monetary sum. According to the plaintiff, that amount was lost income that the plaintiff would have received in the normal course of business, and therefore represented a loss of profit. The amount was declared by the plaintiff as the amount of its claim.

The Court was guided by the CISG in settling the dispute, as the Republic of Belarus and the Republic of Poland are States parties to the Convention and neither party had excluded the application of the Convention itself or any of its individual provisions to the agreement in relation to which the dispute had arisen.

After considering the merits of the case, the Court reached the following conclusions. The Court ruled that the evidence in the case confirmed that the defendant was responsible for the breakdown of the power-generating units within the warranty period. The Court did not accept (the defendant's argument) that the plaintiff's claim was unfounded, because the joint operating agreement provided that the income generated would be divided between the parties and, that being the case, the plaintiff had also received less income owing to the fact that the power-generating units stood idle following their breakdown.

The Court based its settlement of the dispute on articles 45, 74 and 77 CISG and indicated that, on the basis of article 45, if the seller failed to perform any of its obligations, the buyer might claim damages as provided in articles 74 and 77 of the Convention.

On the basis of the provisions of articles 74 and 77 of the Convention, and also the provisions of civil law of the Republic of Belarus subject to subsidiary application, the Court indicated that, in order to confirm the legitimacy and validity of the plaintiff's claims for the recovery of loss of profit, it was necessary to establish all of the following legal facts, which would result in the defendant's liability for damages:

(1) The defendant had not fulfilled its contractual obligations;

(2) There was a causal link between the inappropriate actions (inaction) of the defendant and the violation of the plaintiff's rights;

(3) The defendant could have foreseen, at the time the contract was concluded, the loss suffered by the plaintiff as a consequence of breach of contract by the defendant in the light of the facts and matters of which it then knew or ought to have known;

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(4) It would have been possible for the plaintiff to receive the claimed income in the normal course of business;

(5) Necessary measures had been taken and appropriate preparations made for income generation;

(6) Actions had been taken by the plaintiff to reduce the amount of profit lost;

(7) The amount of profit lost had been established.

Having examined the case, the Court concluded that six of the seven circumstances indicated above applied, as the fact that the power-generating units were out of service was indeed the fault of the defendant. This situation had led to loss of income and there was therefore a causal link between the inappropriate actions of the defendant and the ensuing consequences. At the time the contract was concluded, the defendant could have foreseen that such acts or omissions would entail losses to the plaintiff. The amount that the plaintiff sought in the proceedings in compensation for lost income corresponded to the income that could have been expected in the normal course of business, as the price of a kilowatt hour of electricity was governed by Belarusian legislation. The conclusion of a joint operating agreement involved the plaintiff's taking the necessary measures and making arrangements to generate its claimed income. The plaintiff had done everything within its power to run the power-generating units, i.e. to mitigate loss of profit.

The Court noted, however, that in order for the claim for lost profit to be granted, in addition to the above-mentioned circumstances, the plaintiff should have proved that the amount claimed was the amount of profit lost, that is, it should have submitted a calculation of the damages claimed, with accompanying evidence. Moreover, the plaintiff should have been able to justify its chosen calculation method. The plaintiff was, in fact, not entitled to calculate its loss of profit on the basis of direct proceeds from the sale of electricity, as it could have expected to receive only a portion of the profits from the joint operations after determining the revenue and expenditure resulting from those operations and producing a balance sheet for a given period of time. The plaintiff itself did not sell electricity and did not receive — and, in the circumstances of the case, was not entitled to receive — a direct income from such sale.

The plaintiff calculated the damages not as part of the profits due to it as a result of its joint operations but as the total amount of proceeds not received, as a result of the non-production of electricity, by the parties to the agreement on joint operations. In addition, despite the Court's having granted several petitions by the defendant for the plaintiff to produce evidence of the costs to be taken into account when determining the profit lost, the plaintiff at no point during the trial presented a calculation of the deductions to be taken into account when determining the amount of profit lost.

Given these circumstances, the Court dismissed the plaintiff's claims, as the plaintiff itself had been unable to determine its above-mentioned costs and was not entitled to damages in the form of the full amount of profit lost owing to the shortfall in the amount of electricity supplied to the power system.

Case 1711: CISG 1; 3(2); 6; 53
The Republic of Belarus: International Court of Arbitration at the Belarusian Chamber of Commerce and Industry
Case No. 1279/40-13
4 March 2015
Original in Belarusian

Abstract prepared by Jan Iosifovich Funk and Inna Vladimirovna Pererva[3]

The Polish seller filed a claim against the Belarusian buyer concerning a contract under which the plaintiff had supplied the defendant with equipment on the basis of

[3] At the time the abstract was prepared, J. I. Funk and I. Vladimirovna Pererva were Belarus' CLOUT National Correspondents.

the Delivery Duty Unpaid (DDU) conditions of the Incoterms 2000. Under the terms of the contract, the plaintiff was to make a first advance payment by bank transfer of 15 per cent of the contract price. The defendant was to arrange unconfirmed documentary credit for the remaining amount, equivalent to 85 per cent of the contract price.

The defendant partly fulfilled its obligation to pay for the equipment, paying 90 per cent of the cost of the equipment supplied but refusing to pay the remaining 10 per cent, citing the lack of an acceptance report for the supervision of the installation and the fact that the equipment had not been put into operation. The plaintiff did in fact supply the equipment, but it was not put into operation.

Initially, it was the fault of the defendant that delivery of the equipment was suspended for a month and later on the supervision of its installation, as provided for by the contract, was suspended several times, which meant that neither party was able to make full use of documentary credit as a means of payment. In the circumstances, the plaintiff considered that the defendant's refusal to pay the full price of the contract was unfounded and requested payment of the remainder of the contract price. That request led to a dispute between the parties concerning the application of the CISG to their contractual relations.

On the basis of the provisions of the contract according to which any matters not covered by the contract would be settled in accordance with the legislation of the Republic of Belarus, the plaintiff justified its claim solely according to the provisions of Belarusian civil law, without reference to the provisions of the Convention.

The plaintiff's position was challenged by the defendant, according to which the parties should be guided first and foremost by the Convention and should apply the law of the Republic of Belarus only to issues not covered by the contract or the Convention. The defendant cited the provisions of article 1 of the Convention in support of its position, given that the Republic of Belarus and the Republic of Poland were States Parties to the Convention, and the provisions of article 3(2) CISG, according to which the Convention did not apply to contracts in which the preponderant part of the obligations of the party that provided the goods consisted in the supply of labour or other services. The defendant further argued that the contract under dispute was for the international sale of goods and that that fact was not altered by the inclusion in that contract of the plaintiff's obligations to provide the defendant with technical documentation, to supervise the installation of the equipment and to conduct commissioning work and staff training, as these were supplementary rather than core obligations of the seller enabling the defendant to fulfil the objective established in the contract, namely to receive the equipment in question. Lastly, the defendant asserted that the Convention was indeed applicable, as, under its article 6, the parties to the contract had not excluded its application to their contractual relations.

During the proceedings, the plaintiff adjusted its position regarding the application of the Convention and agreed that the provisions of the Convention did in fact govern its obligation to transfer the property in the goods to the defendant and the defendant's obligation to accept and pay for the goods. However, the plaintiff did not consider that the Convention could be applied to the relations between the parties with regard to the defendant's performance of its obligations to conduct the installation of equipment and the plaintiff's performance of its obligation to supply the defendant with technical documentation, supervise the installation of the equipment and conduct commissioning work and staff training.

Having examined the conditions of the contract, and taking into account the agreements and annexes supplementing the contract, the Court concluded that the defendant's position was appropriate and, on the basis of the provisions of articles 3 and 6 of the Convention, determined that in settling the contractual dispute it should be guided by the contractual terms agreed on by both parties, the Convention and, where necessary, with regard to matters not expressly regulated by the Convention, by the provisions of the legislation of the Republic of Belarus.

In respect to the plaintiff's claim that the defendant should pay the outstanding amount of the price for goods received, the Court reached the following conclusions on the basis of article 53 CISG.

The dispute over the payment of the remainder of the contract price was based on a difference in the legal assessment of the contract with regard to the assumption by the plaintiff not only of the obligation to supply equipment but also of the obligation to conduct the installation, calibration, testing and commissioning of the equipment and training of the defendant's staff. According to the plaintiff, the aforementioned obligations were included in the contract on a charge-free basis, as the total price of the contract only included the cost of the equipment, which, as both parties confirmed, the plaintiff had fulfilled its obligation to deliver. The defendant claimed that the total price of the contract included not only the cost of the equipment but also payments for the plaintiff to install, calibrate, test and commission the equipment and to train the defendant's staff, and that the terms of payment to the plaintiff of the remaining amount, equivalent to 10 per cent of the contract value, by unconfirmed documentary credit opened by the defendant required the submission to the designated bank of an acceptance report for the supervision of the installation work and/or the commissioning of the equipment, certifying the plaintiff's full and proper performance of its obligations to deliver and install the equipment and put it into operation.

Having reviewed all the evidence in the case, particularly the terms of the contract, and taking into account all the agreements and annexes supplementing the contract, the Court concluded that in accordance with the contract, the aforementioned additional obligations relating to labour and services supplied by the plaintiff should have incurred a charge and that the cost of that work was therefore included in the total price of the contract. In considering that the plaintiff had not provided proof of having duly performed its obligations to supervise the installation and commissioning works and to provide staff training, the court dismissed the plaintiff's claims with reference to article 53 CISG.

Case 1712: CISG 8(3)
The Republic of Belarus: International Court of Arbitration at the Belarusian Chamber of Commerce and Industry
Case No. 1340/12-14
3 September 2014
Original in Belarusian

Abstract prepared by Jan Iosifovich Funk and Inna Vladimirovna Pererva[4]

Joint stock company "A" (Republic of Belarus), appearing as the plaintiff, and a limited liability company (People's Republic of China), appearing as the defendant, signed a contract for the defendant to supply to the plaintiff a production line (equipment) for flagstones under Delivery Duty Unpaid (DDU) conditions to a Belarusian town and to supply related services involving supervision of the installation and the commissioning of the equipment.

Under the terms of the contract, the plaintiff was required to make the first advance payment of 15 per cent of the total contract price through an irrevocable letter of credit. The plaintiff fulfilled its obligations by transferring the advance payment.

Under the provisions of the contract, the first consignment of equipment should have been shipped within 150 days of receipt of the advance payment. The remaining equipment should have been shipped within 300 days of receipt of the advance payment. The contract provided for a penalty for each day by which the delivery of goods was late. A dispute consequently arose between the parties, as the plaintiff argued that the terms "delivery" and "shipment", used in the contract, were synonymous and that, since both parties had agreed that the goods would be delivered

[4] At the time the abstract was prepared, J. I. Funk and I. Vladimirovna Pererva were Belarus' CLOUT National Correspondents.

to the Belarusian town under DDU conditions, those terms referred to the date on which the goods would be handed over to the buyer in that town.

The defendant asserted that the date of shipment and the delivery date were two different dates. The contract had not established liability for delays in shipment and the parties had not agreed on actual dates or on the time frame for delivery. However, under the contract, the supervision of the installation of the equipment and the installation itself should have taken place within 200 days of receipt of the advance payment. The amount of time required to complete that work was established as being 120 days. Therefore, if the defendant's position and its understanding of the term "shipment" was accepted as correct, then, under the contract, if the equipment was put on board the vessel (as the equipment under the contract was transported by sea) within 50 days and installation had to begin within 200 days, the first consignment of the equipment would have to be shipped within 150 days; that first consignment having been delivered to the plaintiff, the plaintiff would have to complete all the necessary preparations to begin installation, and the installation of the entire production line could be completed within 20 days of the final shipment (320 days after receipt of the advance payment, less 300 days for the shipping of the whole production line). The defendant also asserted during the proceedings that the standard delivery time for equipment from the point at which the goods were loaded onto the vessel was approximately 120 days (it should be noted that the plaintiff postulated that that period would be between 45 and 60 days), which clearly made the defendant's above-mentioned interpretation of the provisions of the contract untenable.

Settling the dispute on the merits, the Court was guided by the CISG, as the Republic of Belarus and the People's Republic of China were States parties and the parties in dispute had not excluded the application of the Convention itself or any of its individual provisions to the contract in relation to which the dispute had arisen. On the basis of article 8(3) of the Convention, under which in determining the intent of a party due consideration was to be given to all relevant circumstances of the case, the Court concluded that the overall intent of the parties to the contract was the use of the terms "shipment" and "delivery" as synonymous concepts referring to the delivery of the goods, in other words, the transfer of the goods to the plaintiff for the purpose of preparation for installation rather than the transfer of the goods by the defendant to the carrier in the People's Republic of China.

The Court therefore concluded that the goods had been delivered late by the defendant and that the liability measures provided for by the contract could be imposed on the defendant.

Case 1713: CISG 6; 12; 38; 39
Belgium: Court of Cassation
Judgment No. C.11.0601.F
Aldes Aéraulique and Euro Register v. G.I., Delta Thermic, Devis Energieën and Établissment Druart
7 March 2014
Original in French and Dutch

Available from http://jure.juridat.just.fgov.be

Two companies (the "sellers") entered into a sales contract for the delivery of control gear (the "goods") with four companies (the "buyers"). Following delivery, the buyers discovered that the goods were not as ordered. They contacted the sellers to request compensation for the lack of conformity of the goods, but received no reply. The buyers therefore applied to the court of first instance, requesting it to order the sellers to pay damages for the lack of conformity of the goods. In the first instance, the judges rejected the claims of the buyers, who then appealed to the court of appeal. That court upheld the buyers' claims and ordered the sellers to pay damages. The sellers filed an appeal before the Court of Cassation to overturn the judgment of the court of appeal.

The Court of Appeal had to decide whether, in the current case, the CISG was applicable to the sale of the goods. The judges noted that the CISG was applicable to a sale if that sale fell within the scope of application of the Convention, and that, under article 6 of the CISG, "the parties may exclude the application of this Convention or, subject to article 12, derogate from or vary the effect of any of its provisions". The judges found that when placing their order, the buyers had clearly and unambiguously stated on several occasions that their general terms and conditions and special terms and conditions would apply to the contract. The sellers had not expressed disagreement on that point. Accordingly, the judges concluded that the sellers had tacitly accepted those contractual documents and the fact that they would govern the contractual relationship. Consequently, the CISG did not apply to the sale of the goods, which were excluded de facto through the application of the buyers' general terms and conditions and special terms and conditions. Therefore, articles 38 and 39 of the CISG, which relate to the conformity of goods and the obligation of the buyer to examine the goods within as short a period as is practicable in the circumstances, and which had been raised as arguments in defence by the sellers, were not applicable in the case.

After determining that the sale had been governed by the buyers' contractual documents, the judges decided that pursuant to those documents, the sellers had not complied with their obligation to deliver compliant goods as set out in the special terms and conditions, and that the buyers had notified the sellers of that lack of conformity within the time frames set out in the general terms and conditions of the order. Accordingly, the court of appeal judges ordered the sellers to pay damages to the buyers for their failure to comply with their contractual obligations.

During the appeal process before the Court of Cassation, the senior judges upheld the decision of the court of appeal that the CISG did not apply to the sale. It was the role of the trial judge to assess the existence and extent of the good intention of the contracting parties. That assessment of the facts fell to the Court of Cassation judges, who had no choice but to reject the sellers' argument.

CASE 1714: CISG 4; 7(1)
Brazil: Rio Grande do Sul Court of Justice, 12th Commercial Division
Appeal No. 70072090608 (CNJ 0419254-25.2016.8.21.7000)
Voges Metalurgia LTDA. v. Inversiones Metalmecanicas I.C.A. — IMETAL I.C.A.
30 March 2017
Original in Portuguese
Available at: tjrs.jus.br

Abstract prepared by Orlando José Guterres Costa Júnior

A Venezuelan buyer bought 16 engines from a Brazilian manufacturer, the buyer was requested payment in advance, but due to Venezuela's controls on currency exchange for import purposes, the agreed amount had to be paid again when the goods reached the port of delivery. The parties negotiated that the second payment had to be returned to the buyer, however the seller never performed the deal, and the buyer filed a collection claim in Brazilian courts. The seller argued that Brazilian courts had no jurisdiction to hear the claim, that the buyer did not prove that the payment was made twice and that the deal should be declared null, as it was performed as a fraud to Venezuelan law. The lower court found for the buyer and the seller filed an appeal to the Rio Grande do Sul Court of Justice.

With regard to the applicable law, as it was not clear if the agreement had been signed in Brazil or in Venezuela, the Court of Justice referred to the principle of closest relationship of the contract to reject the application of Venezuelan law to the dispute and stated that the CISG and Unidroit Principles were instead applicable. The Court noted that the CISG and the Principles are relevant sources of customary international law and they are particularly relevant in the Brazilian context since they provide a modern legal framework to deal with disputes arising out of international transactions.

The Court stated that as the CISG does not apply to the validity of contracts, pursuant to its article 4, the buyer's claim on this matter shall be decided based on the Unidroit Principles, as a subsidiary norm, which should prevail over the application of domestic law. The Court considered that since the Convention is to be interpreted in accordance with its international character, according to its article 7(1), the Court should not apply domestic laws, but provisions of the "new lex mercatoria" and uniform law relevant to disputes of international character. The Court emphasized that precedence of those provisions over domestic norms to fill "external gaps" of the Convention was also due to the fact that the legal remedies based on the Convention must be acceptable in different legal systems and traditions, which may interpret matters of international contract law differently and treat them differently.

The Court further noted that articles 3.3.1 and 3.3.2 of the Unidroit Principles state that where contract performance infringes a mandatory rule, whether of national, international or supranational origin, restitution may be granted where this would be reasonable according to the circumstances. However, the Court argued that the seller did not sufficiently prove that Venezuelan law on currency exchange for import purposes is an imperative norm. Moreover, even if Venezuela's legislation could be classified as mandatory, under the terms of which the parties stipulated the mode of payment of the contracted goods, the buyer would still be entitled to restitution by the seller. The Court considered the purpose of Venezuela's norms that were infringed (they mainly aim to ensure State intervention in import and export operations) and the seriousness of the infringement (which was deemed irrelevant, since the parties merely agreed on an advance payment while, under Venezuelan legislation, payment could only occur when the goods were delivered to customs) and held that those were reasonable circumstances, pursuant to the articles of the Unidroit Principles, to allow for refunding of the buyer.

Further, the Court noted that although the CISG does not concern the validity of contracts, article 7(1) CISG sets forth a duty of good faith as a fundamental legal standard for international trade, which shall not be neglected by the parties. Therefore, the seller has no right under the Convention to claim avoidance of the contract and argue that the buyer has no right to be refunded of the paid amount. The Court also noted that the Convention, aiming to create uniform rules applicable to international trade relationships, defines the concept of contract on the basis of two fundamental pillars, namely private autonomy and good faith, and that in conformity with these principles, parties have a duty to act fairly in negotiations and international sale contracts must be understood as a cooperative relation between the parties. Keeping up with this reasoning, the Court held that the allegations of the seller should be rejected because they were contrary to the principles on which the Convention is based and that rule contracts of international trade. The Court concluded that there was enough evidence regarding the duplicate payment made by the buyer and consequently upheld the decision of the lower courts and ordered the seller to refund the buyer of the amount paid in excess.

Case 1715: CISG 7.2
France: Court of Cassation, Commercial Division
Appeal No. 14-22144
Wolseley France Bois et Matériaux v. Ceramiche Marca Corona
2 November 2016
Original in French
Available in French from Légifrance: www.legifrance.gouv.fr; CISG-France Database: www.cisg-france.org No. 307

Commentary: AJ Contrat 2016, p.431-434, obs. David Sindres; Claude Witz and Ben Köhler, "Panorama: Droit uniforme de la vente internationale de marchandises" [Panorama: Uniform law on the international sale of goods], *Recueil Dalloz 2017*, pp. 613-625, particularly pp. 618 and 619, obs. Claude Witz

Abstract prepared by Claude Witz, National Correspondent

A company based in Italy sold tiles to a company based in France that specialized in the sale of wood and construction materials. The French company was ordered, under French domestic law, to compensate French customers for the damage that they suffered as a result of defects in the tiles. The French company then called on the Italian seller as guarantor. The seller claimed that the buyer's action was time-barred under Italian law (art. 1495, para. 3, of the Civil Code). The Court of Appeal of Bordeaux rejected the applicability of Italian law on the grounds that only the CISG was applicable to the case and that only the grounds of non-admissibility established therein could be relied upon by the parties (Court of Appeal of Bordeaux, 12 September 2013, CISG-France, No. 216).[5]

That decision was overturned by the Court of Cassation on the basis that it breached article 7 (2) of the CISG, the contents of which the Court described.

The senior court highlighted that, while the CISG established a deadline for giving notice of a lack of conformity, it contained "no rules on time-barring".

Although the Court of Cassation did not say so, the trial judges should have implemented the conflict-of-laws rules and applied the statute of limitations period established by the designated domestic law.

The case was referred to the Court of Appeal of Poitiers.

Case 1716: CISG 58; 59
France: Commercial Practices Review Board (CEPC)
Opinion No. 16-12 relating to a request for legal advice on the applicability of the legal limit on payment periods in an international context
24 June 2016
Original in French
Available from http://www.economie.gouv.fr/cepc/avis-ndeg16-12-relatif-a-demande-davis-dun-avocat-portant-sur-lapplication-plafond-legal-des

Commentaries: F. Leclerc, La lettre de la distribution, July-August 2016, p.1 et seq.; P. Le More, Chronique de droit de la concurrence et de la distribution, Lexbase Hebdo édition affaires No. 479 of 15 September 2016, p. 1 et seq., particularly p. 3 et seq.

Abstract prepared by Claude Witz, National Correspondent

A lawyer contacted the Commercial Practices Review Board to obtain its opinion on the applicability of the legal limit on payment periods established under article L. 441-6 I, paragraph 9, of the French Commercial Code to an international contract under the CISG.

Article L. 441-6 I, paragraph 9, of the Commercial Code, established under Act No. 2008-776 of 4 August 2008 and amended by Act No. 2015-990 of 6 August 2015, provides that, subject to the administrative penalties imposed by the Directorate-General for Competition, Consumer Affairs and Suppression of Fraud in the form of a fine, "the time period agreed between the parties for the payment of outstanding sums shall not exceed 60 days from the date of issue of the invoice. By way of derogation, the parties may agree to a maximum period of 45 days from the end of the month in which the invoice is issued, provided that that period is expressly stipulated in the contract and is not grossly unfair to the creditor. In the case of summary invoices within the meaning of article 289 I (3) of the General Tax Code, the time limit agreed between the parties cannot exceed 45 days from the date of issue of the invoice". Those provisions are in line with Directive No. 2011-7-EU of the European Parliament and of the Council of 16 February 2011 on combating late payment in commercial transactions. Article L. 441-6 I, paragraph 9, of the Commercial Code became article L. 441-6 I, paragraph 5, following Act No. 2016-1691 of 9 December 2016.

[5] See CLOUT No. 1508.

Unlike the French Commercial Code, which sets a limit on payment periods, the CISG allows the parties to stipulate the time of payment (arts. 58 and 59), without forcing the buyer to make payment within a maximum time frame.

The question therefore arises as to whether the mandatory maximum period established under article L. 441-6 I, paragraph 9, of the Commercial Code applies when the contract for the sale of goods is governed by the CISG.

It should be noted that although the Commercial Code expressly provides for only administrative penalties in the form of a fine, provisions to the contrary are voidable under the general rules of the Civil Code (art. 6 of the Civil Code until 1 October 2016, arts. 1102, para. 2, 1128 and 1162 of the Civil Code since 1 October 2016, which was the date of entry into force of Order No. 2016-131 of 10 February 2016 on the reform of contract law, the general regime and proof of obligations).

The CEPC delivered the following opinion: "Contracts for the international sale of goods under the CISG are not subject to the limit on payment periods established by article L. 441-6 I, paragraph 9, of the Commercial Code. Through the combined application of the Convention, the general principles on which it is based and Directive No. 2011/7/EU of the European Parliament and of the Council of 16 February 2011 on combating late payment in commercial transactions, payment periods agreed between the parties should not be grossly unfair to the creditor; in other words, they should not represent a clear deviation from good practice and business practice, or be contrary to good faith and fair use, taking into account the nature of the good." The reasoning behind that opinion was explained in detail. Essentially, the Commercial Practices Review Board found that the issue of payment periods reflected an internal gap in the CISG because the Convention neither established a voluntary additional payment period nor a maximum limit on the periods agreed by the parties. The Board therefore recommended settling that question in conformity with a general principle within the meaning of article 7, paragraph 2, of the CISG. Among the general principles on which the Convention is based, the Board referred to "the principle of party autonomy together with the principle of good faith (UNCITRAL Digest of case law on the United Nations Convention on Contracts for the International Sale of Goods, art. 7, p. 43), which implies, inter alia, that parties shall behave reasonably (P. Schlechtriem and C. Witz, 'Convention de Vienne sur les contrats de vente internationale de marchandises' [United Nations Convention on Contracts for the International Sale of Goods], *Dalloz 2008*, No. 83 p. 83)." The Board went on to state that "that does not appear to be the case when the buyer benefits from excessive payment periods in relation to the subject matter of the contract, standard practices and circumstances of the case".

The doctrine varies considerably in respect of the coexistence of the CISG and the national laws that have transposed Directive No. 2011/7/EU of the European Parliament and of the Council of 16 February 2011 on combating late payment in commercial transactions. Some of the doctrine supports the precedence of the CISG (V. A. Garnier and C. Baudouin, "Réforme des délais de paiement — mode d'emploi à l'usage des praticiens" [Reform of payment periods — guidelines for practitioners], JCP, E, No. 18, 30 April 2009, 1445). Through two ministerial responses to the written questions of members of parliament, the French Ministry of Foreign Trade also noted the inapplicability of French laws transposing the aforementioned Directive to sales covered by the CISG: "Unless expressly excluded by the parties, the provisions of the Convention (CISG) apply by default to international contracts and replace the rules of domestic law. Article 59 of that Convention, which contains rules governing the payment period, refers to the applicability of contractual provisions and does not establish a maximum payment period" (ministerial response to written question No. 22748, Official Journal, 30 July 2013, p. 8237; ministerial response to written question No. 22749, Official Journal, 1 July 2014, p. 5509). Another part of the doctrine holds that article L. 441-6 I, paragraph 9, of the Commercial Code should apply because issues relating to the validity of contractual terms establishing payment periods fall outside the scope of application of the Convention, according to article 4 of the CISG (C. Witz, "Panorama: Droit uniforme de la vente internationale de

marchandises" [Uniform Law on the International Sale of Goods], *Recueil Dalloz 2015*, p. 890-891).

It should be noted that opinion No. 16-12 reflects a change in the position of the Commercial Practices Review Board, which acknowledged, subject to certain limitations, the status of the legal limit on payment periods as a mandatory rule in the relationship between a French seller and a foreign buyer (opinion No. 16-1 relating to a request for legal advice on the mandatory nature of payment periods under an international contract, 10 February 2016, available from the Board's website).