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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 (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 1774: CISG 9; 74

Paraguay: Tribunal de Apelación en lo Civil y Comercial, Sexta Sala

Acuerdo y Sentencia No. 66

Ofelia Valenzuela Fernandez v. Paraguay Granos y Alimentos S.A.

4 October 2016

Original in Spanish

Abstract prepared by José Antonio Moreno Rogríguez

The parties, both Paraguayan, entered into an oral sales commission agreement. When the respondent terminated the agreement, the claimant filed a lawsuit claiming for damages for the respondent's contractual liability. The respondent appealed the ruling of the First Instance Judge on several grounds including that there is no contractual relationship between the parties since no contract was signed. The Appeals Tribunal ruled against the claim, referring to both national legislation on freedom of forms in contracts, as well as trends established by international legal instruments such as the UNIDROIT Principles (Article 1.2).

Once established the existence of a contract, the Tribunal examined whether the respondent's conduct amounted to non-performance. In order to establish such circumstance the Tribunal first clarified the meaning of the term "non-performance" by citing the definition adopted in Article 7.1.1 UNIDROIT Principles.

The Tribunal then examined whether the respondent was to be held responsible for non-performance. Pursuant to the parties' original agreement, the respondent would place the goods at the claimant's disposal at the respondent's place of business and the claimant would deliver them to the clients. However, the respondent eventually ended up delivering the products itself. According to the Tribunal, in doing so the respondent established a practice in its relation with the claimant. Referring to Article 9 CISG (and to Article 1.9 UNIDROIT Principles), the Tribunal stated that any usage established by the parties is automatically binding upon them unless otherwise agreed. The Tribunal further clarified that in order to define a practice as "established" it is necessary to refer to the circumstances of the case, which in the case at hand, clearly indicated that a practice existed. According to the Tribunal, by establishing the said practice, the respondent had agreed to the implied obligation to continue delivering the products, as set forth by Article 5.1.2(b) of the UNIDROIT principles.

As to the termination of the agreement, while recognizing the respondent's right to end it, the Tribunal drew attention to the effects of such revocation to third parties. Affirming that the agreement was governed by the rules on agency and citing Article 2.2.10 of the UNIDROIT principles, as well as the Principles of European Contract Law, German Civil Code and the Geneva Convention on Agency in the International Sale of Goods, the Tribunal stated that the termination of the agreement was effective in relation to third parties only if they had been informed of the termination or they ought to know about it. Therefore, the respondent was responsible for delivering the goods until the moment the customers could be considered informed of the termination of the agreement between the claimant and the respondent. Failing to deliver the goods until that moment amounted to non-performance of the contract by the respondent.

For these reasons, the Appeals Tribunal affirmed the Judgment of the First Instance Judge, although it modified the amount to be paid. Referring to Article 74 CISG, the Tribunal found the respondent responsible solely for the actual loss suffered by the claimant, in addition to interests, while it did not consider the respondent liable for loss of profit, non-material damage and currency revaluation.

Case 1775: CISG 1(1); [6; 25;] 39; [61(1); 62]¹

People's Republic of China: Supreme People's Court

(2014) Min Shen Zi no. 266

30 April 2014

Original in Chinese

Published on: *China Judgements Online*Available at: wenshu.court.gov.cn/

Abstract prepared by Xiang REN

An American buyer and a Chinese seller signed two contracts for the purchase of five-metre and eight-metre numerical-control bending machines. Because the contracts stipulated that the seller would produce the machines involved in the case in accordance with the drawings agreed on by both parties, and would be responsible for training the buyer's technical staff, the buyer would bear the costs of air tickets to and hotel lodging in the United States for the seller's production staff. After concluding the contract, the seller twice sent staff to the buyer's company location in the United States to calibrate the new machines and provide training.

However, the buyer contended that there were non-repairable quality defects in the machines purchased; following fruitless negotiations with the seller, the buyer brought suit in court. As interpreted by the court of first instance, the buyer unequivocally disagreed that repair of those machines should be undertaken, and insisted on pursuing its litigation claims that the contracts must be declared avoided and that payment for the goods must be refunded in full. The seller filed a counterclaim demanding that the buyer must pay the costs of the two trips to the United States undertaken to carry out after-sale service.

The court of first instance decided that the CISG was applicable and that the contracts involved in the case were legal and valid. The seller's defective customs declarations and commodity inspection and quarantine procedures, and its failure to provide VAT invoices or product-qualification certificates, as contended by the buyer, were matters to be handled by the Chinese administrative authorities, and did not legally invalidate the business relationship between the parties. Whether or not the seller was in fundamental breach of the contracts, giving the buyer the right to declare the contracts avoided, depended on whether or not the machines had had non-repairable quality problems that prevented the buyer from achieving the contractual objectives for which those machines had been purchased. In light of the buyer's having paid in full and accepted delivery of the goods, its having failed to provide adequate proof, while using them, that the machines had been non-repairable or that their quality had failed to fulfil contract commitments, and its having admitted during the proceedings that its insurance company had verified that the functioning and production of those machines had been sound when [that company] had agreed to provide insurance, the court held that the seller's sending staff to the United States was part of normal after-sale maintenance and training, and consequently rejected the buyer's argument. In line with Article 39 CISG, because more than two years had passed between the actual receipt of the goods and the initiation of the lawsuit, and the buyer had not provided proof that it had notified the seller of serious flaws in the quality of the machines during that time, the buyer should be deemed to have lost the right to claim that the machines were seriously defective. Moreover, the court maintained that while the seller had indeed replaced defective components in those machines on the two occasions it had sent staff to the United States, the primary purpose of those visits had been to calibrate the machines and train staff. For those reasons, the court of first instance rejected the buyer's litigation claims and supported the seller's counterclaim demanding that the buyer should pay the costs of the two visits to the United States by the seller's staff.

¹ This case is cited in the CISG Digest, 2016 Edition, available at www.uncitral.org.

The buyer filed an appeal on the grounds, among others, that the court should have applied the Contract Law of the People's Republic of China rather than the CISG. The court of second instance determined that because the place of business of the parties was located in different States Parties to the Convention and the parties had not excluded its application, the court of first instance had correctly assigned priority to applying the Convention. The court also confirmed the reasoning of the court of first instance on the other grounds of the claim; it thus dismissed the buyer's appeal and upheld the original judgment.

The buyer appealed to the Supreme People's Court, which upheld the rulings of the lower courts dismissing the buyer's application.

Case 1776: CISG 1(1)(a); 50²

People's Republic of China: Zhejiang Provincial High People's Court

(2011) Zhe Shang Wai Zhong Zi No. 16

26 August 2011

Original in Chinese

Published on: *China Judgements Online*

Available at: wenshu.court.gov.cn/

Abstract prepared by Xiang REN

A Chinese buyer and a Korean seller signed a contract for the purchase of a Korean-produced tea-leaf colour-sorting machine, with a special agreement that "if the buyer is not satisfied with the machine's performance up to twenty days after delivery, the machine can be returned unconditionally to the seller". The buyer paid a deposit on the day the contract was signed, and paid a further portion of the goods some time later. After the machine was delivered and installed, the buyer brought up problems regarding the machine's quality with the seller's representative. A salesman for the seller noted, on a copy of the contract retained by the buyer, that the "machine's performance [is] affected by problems such as slow flash frequency; company [to] arrange for staff to come and handle [this] as soon as possible". Following troubleshooting, the buyer remained dissatisfied, and sent a written notice to the seller's representative demanding that the machine should be returned and the costs already paid should be refunded. Thereafter, consultations between the two parties came to naught; the buyer did not return the machine, nor did it pay the remaining purchase price. The seller's repeated demands for payment remained fruitless, so it sued the buyer in court to demand payment of the remaining costs. The buyer counter argued, demanding that the seller be ordered to take back the machine and refund the costs already paid.

The court of first instance held that since the parties had agreed to it, Chinese law would be applied as the governing law of the case. Because there were indeed quality problems with the machine, the seller must bear the corresponding liability for breach of contract. In all fairness, however, since the buyer had continued to use that machine even after demanding its return, the court did not support the buyer's demand that the machine be returned and costs be refunded, but authorized a reduction of cost. The court thus ordered the buyer to pay a portion of the outstanding balance, and rejected the other litigation demands of both parties.

Both parties rejected the judgment and lodged separate appeals. The seller contended that the salesman in the case did not have the right to represent it, and that that person's annotating the buyer's [copy of the] contract was colluded with the buyer. The Zhejiang Provincial High Court held that since the salesman in this case was a member of the seller's sales staff, had a standard contract pre-imprinted with the seller's seal for the buyer to sign and was substantively responsible for related business and machine readjustment and maintenance, those facts determined that that

² This case is cited in the CISG Digest, 2016 Edition, available at www.uncitral.org.

salesman did indeed have the right of representing the seller. Moreover, as the seller had provided no evidence that the salesman's annotation had been forged, the Zhejiang Provincial High Court did not support that contention by the seller.

The court further held that in line with Article 1(1)(a) CISG, the Convention should have been applied in this case. Pursuant to Article 50 of the Convention, if the goods provided by the seller do not conform with the contract, the buyer has the right to demand that the seller should bear breach-of-contract liability for return of the goods or reducing their price. In considering the quality flaws in the colour-sorting machine and the buyer's continued use of that machine, the discretion of the court of first instance in determining a price reduction, however, was in no way incorrect; only its failure to apply the Convention had been improper and should be corrected. The appeal was dismissed and the original judgment upheld.

Case 1777: CISG 71³

People's Republic of China: Zhejiang Provincial High People's Court

(2011) Zhe Shang Wai Zhong Zi No. 11

18 April 2011

Original in Chinese

Published on: *China Judgements Online*

Available at: wenshu.court.gov.cn/

Abstract prepared by Xiang REN

A Korean seller and a Chinese buyer signed two contracts for the purchase of Korean waste paper, agreeing on quality standards for the waste paper and consenting to instalment shipments. Over the period from April to the end of May, the buyer received two consignments of waste paper under the contracts. On 3 April of the same year, the two parties signed another similar contract, agreeing that the buyer would issue a letter of credit (L/c) before 16 April, with a final shipping date of 20 June. Under this contract, the seller also agreed to provide a certificate of inspection issued in Korea by a designated organization.

After receiving the goods, the buyer discovered quality problems in the waste paper, and raised an objection with the seller. In its reply, the seller recognized that after the buyer had been authorized to carry out spot-testing, the quality of the goods was far inferior to the test result stipulated in the contract. After several rounds of communication, the two parties were unable to agree on a way to handle the quality problem in the goods. In May of that year, the seller sent a letter to the buyer contending that the buyer's failure to issue a L/c on the contractually agreed date constituted fundamental breach of contract. The buyer replied that the quality problems that had appeared in the waste paper already received had resulted in losses for the buyer, and that the seller had not provided a reasonable answer; consequently, the buyer had not issued the L/c because it had become unsure of the seller's ability to perform the third contract, and had already notified the seller to suspend performance of that contract. The buyer further explained that it was still in need of the waste paper it had contracted for, and was willing to issue a L/c predicated on a guarantee of quality by the seller. In June, the buyer commissioned testing of the waste paper shipped under the first and second contracts, with results far below the quality standard required in the contracts. The buyer forwarded the test results to the seller for its after-sale opinion and requested that the seller provide a quality certification from the China Certification and Inspection Group (CCIC) for the goods covered under the third contract. The parties were unable to negotiate a solution and the buyer applied for arbitration on the grounds that the quality of the goods under the first and second contracts had failed to conform to the contractual agreements. The arbitrator decided that because of the quality problems in the waste paper, the seller should compensate the buyer's losses. The parties had already substantially

³ This case is cited in the CISG Digest, 2016 Edition, available at www.uncitral.org.

suspended performance of the third contract. The seller held that the buyer was in fundamental breach of contract and took the case to court.

The court held that because the place of business of the parties were located in different States signatories to the CISG, the Convention should be applied, and that Chinese laws should be applied in matters not covered under the Convention. The focus of the dispute was whether or not the buyer should be held responsible for breach of contract for failing to issue a L/c on the date agreed in the third contract and whether or not the buyer was entitled to suspend performance of the contract in order to protect its rights. Referring to Article 71(1) CISG and Article 68 of the Contract Law of the People's Republic of China and in view of the fact that under the previous two contract the seller delivered waste paper well below quality standards and both parties failed to reach an agreed solution, the court decided that the seller should be liable for the buyer's enormous financial losses. Furthermore, the court held that the seller's performance of the two previous contracts had given the buyer reason to consider that the seller's trustworthiness was seriously damaged. From the discovery of serious problems in the quality of the waste paper involved in the case, to the numerous communications between the parties regarding those quality defects, as well as the buyer's demand that the seller provide a certification of quality, the court held that the seller could have deduced that the buyer intended to suspend performance of the third contract. The buyer's suspending the issuance of a L/c as a measure of protection against losses was reasonable and did not constitute breach of contract. The seller's claim was consequently rejected.

The seller filed an appeal. The Zhejiang Provincial High Court affirmed the reasoning of the lower court and held that the buyer had the right to suspend performance of the contract before the seller recovered the ability to perform or provided a guarantee. In this case, as could be seen from the fax transmissions from the seller to the buyer, the buyer had made objections regarding quality prior to 16 April, and the seller had admitted, during the court proceedings, that, having been notified by the buyer on 22 April that a L/c would not be issued, it had begun re-selling the goods on 25 April to reduce losses. This confirmed that, after having discovered serious defects in the quality of the goods delivered under the two previous contracts, the buyer had promptly objected to their quality and had notified the seller that a L/c would not be issued. Unable to provide the quality certification demanded by the buyer, or to provide other sufficient assurances within a reasonable time limit, the seller had no right to demand that the buyer resume performance of the contract. Moreover the parties had de facto terminated performance of the contract. As the seller could not establish grounds for appeal, the Provincial High Court dismissed the appeal and upheld the original judgment.

Case 1778: CISG 1(1); 1(1)(b); 48(2); 58; 93(1)⁴

People's Republic of China: Zhejiang Provincial High People's Court

(2010) Zhe Shang Wai Zhong Zi No. 99

15 December 2010

Original in Chinese

Published on: *China Judgements Online*

Available at: wenshu.court.gov.cn/

Abstract prepared by Xiang REN

In 2008, a seller in Hong Kong, China and a buyer in mainland China signed a business contract for the purchase of natural-rubber grade-3 ribbed smoked sheets. After concluding the contract, the buyer pre-paid 10 per cent of the goods cost, the seller shipped the goods to the port of destination and issued a payment notice informing the buyer that the goods were in port and requesting that the buyer pay the remaining 90 per cent of the goods cost within three days after receipt of notice, or

⁴ This case is cited in the CISG Digest, 2016 Edition, available at www.uncitral.org.

else the goods would be re-sold. The buyer received the notice but did not respond. The seller thus informed the buyer that the goods had been re-sold at a price below that set in the contract. The buyer replied that because it had not received either the original or a copy of the bill of lading, it was not obligated to pay the remaining goods cost. The seller sued in court on the grounds of the buyer's refusal to pay, and demanded that the buyer compensate it for the loss arising from the difference in the price of the re-sold goods and for costs incurred during the goods' warehouse storage. The buyer counter argued that the seller had unilaterally rescinded the contract and re-sold the goods, and demanded that the seller refund the goods pre-payment with interest.

The court of first instance held that because the places of business of the parties were in different States signatories to the CISG, the Convention should be applied and the laws of China, as the State with the closest connection to the contract, should be applied in matters not governed under the Convention. The focus of case was whether or not the buyer's failure to make payment for the goods constituted breach of contract in a situation where the seller had not provided a bill of lading, and whether or not the seller's re-sale of the goods constituted breach of contract where the buyer had not paid for those goods. The seller's consignment of the goods in this case did not mean that the seller had fully performed its delivery obligation, as providing consignment documentation was also an obligation of the seller. In light of the fact that the buyer and seller in this case had not specifically agreed on the time for providing the goods documentation or for paying the remainder of the goods costs, under Article 58 of the Convention, the buyer was obligated to pay the remaining goods costs at the time the seller handed over either the goods or documents controlling their disposition. The seller had failed to provide the goods documents to the buyer right up until the goods arrived in port, nor had it notified the buyer to take delivery of them, but had instead imposed a deadline for the buyer to pay the remainder of the goods costs and eventually resold the goods. As the seller did not transfer control of the goods to the buyer, nor had it provided the buyer an opportunity to examine the goods, the buyer had no obligation of payment; its failure to pay the remainder of the costs did not constitute breach of contract. Under the circumstances obtaining at the time, even if the seller had had no way to determine whether or not the buyer had received the goods, under Article 48(2) CISG, the seller could still have turned the goods documentation over to the buyer directly, thereby completing all of its obligations, and then demanded payment from the buyer. The buyer not having violated the contract agreement, the seller's actions constituted breach of contract. Although the court of first instance had ruled that the seller must refund the advance payment for the goods, the buyer had not demanded the refund of the advance goods payment until it filed its counterclaim, so the interest on the seller's refund payment should be calculated from the date of the buyer's counterclaim. The court rejected the other litigation claims of both parties.

The seller appealed, on the grounds that since its actual place of business was located in Hangzhou, the Convention should not have been applied. The Zhejiang Provincial High Court held that the seller was actually a Hong Kong corporation and the question of applicability of the Convention should be determined on the basis of Article 1(1) CISG. At the time of its accession to the Convention in 1986, China had expressed a reservation regarding Article 1(1)(b); moreover, Hong Kong had not formally acceded to the Convention. Under Article 93(1) CISG, as China had not expressly declared that the Convention was applicable in Hong Kong after the return of Hong Kong to China, the Convention could therefore not be considered applicable in Hong Kong. Moreover, as Hong Kong was an administrative region of China, the parties were not located in different countries, so the Convention should thus again not have been applied in this case. Under the principle of the "closest connection", the court determined that Chinese law was to be the governing law in this case.

Applying Articles 61 and 161 of the Contract Law of the People's Republic of China, the court held that the parties in the case at hand had an obligation of simultaneous

performance since neither an agreement was reached by the parties on an expected payment date of the goods, nor evidence of previous trade practice was provided. Therefore, the buyer must pay the price of the goods at the time the seller turns over the documentation for the goods. As the seller had acknowledged having turned over neither the bill of lading nor a copy of it to the buyer, the seller's re-sale of the goods constituted breach of contract. The Zhejiang Provincial High Court thus held that although the law had been improperly applied at first instance, the substance of the case had been handled correctly: it therefore dismissed the appeal and upheld the original judgment.

Case 1779: CISG [18; 19; 23;] 71(1)(a); [74]⁵

People's Republic of China: Tianjin Municipal High People's Court

(2006) Jin Gao Min Shi Zhong Zi No. 148

23 March 2007

Original in Chinese

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Available at: wenshu.court.gov.cn/

Abstract prepared by Xiang REN

In October 2004, a Canadian buyer and a Chinese seller signed a contract for the purchase of 72 tons of white grade-3 walnut kernels. In June of 2005, the parties negotiated, via electronic mails, the export of 24 tons of white grade-3 walnut kernels by the seller to the buyer for August delivery, but the seller did not perform the contract. Later on, Canadian clients of the buyer issued a letter of claim against the buyer, contending that because the buyer had failed to provide the white grade-3 walnut kernels as agreed, they were demanding compensation from the buyer. The buyer thereupon brought suit against the seller for the losses arising from the seller's failure to deliver the goods.

Applying the CISG as the governing law, the court of first instance held that the contract between the parties for the purchase of 24 tons of white grade-3 walnut kernels was lawful and valid, and that the seller should compensate the buyer for its economic losses caused by the seller's breach of contract in failing to deliver the goods. However, because the buyer had only provided its Canadian clients' letter of claim, but could not prove that it had actually paid the compensation amount, and was thus unable to prove that it had incurred losses, the court decided to reject the buyer's claim.

The buyer lodged an appeal, holding that Chinese law, not the Convention, should be applied as the governing law. The seller contended that because the buyer had proposed quality and time requirements based on the offer issued by the seller, the buyer's reply had not constituted acceptance of the offer but rather a new offer, so that the contract should be adjudged as not having been established. Even had the contract been established, in the light of the buyer's belated payment for the previous shipment, the seller had withheld delivery as a measure to protect its rights since reasonable grounds for insecurity had arisen with regard to the performance of the buyer, and thus did not constitute a breach of contract.

The Tianjin Municipal High Court ascertained that the Canadian clients of the buyer had confirmed their letter of claim, in which they had further asserted that they would deduct the claimed amount they were seeking from the next payment due to the buyer. The court affirmed the applicability of the Convention as the governing law in this case. Examining the correspondence between the parties, the court ruled that as it could not be ascertained that the buyer had proposed new conditions regarding quality or delivery date, its reply to the seller constituted a commitment, thereby establishing a business contract between the parties. Although the buyer had indeed delayed

⁵ This case is cited in the CISG Digest, 2016 Edition, available at www.uncitral.org.

payment, it had paid each instalment in full prior to the expiration of the seller's August delivery deadline; neither the buyer's ability to fulfil its obligations nor its credit-worthiness had come to such a point of serious deficiency, as stipulated in Article 71(1)(a) CISG, that the seller could suspend its contractual obligations on the basis of that provision. The seller's contention that it was entitled to exercise the "defence of insecurity" under that provision had no legal basis, and its failure to deliver the goods constituted a breach of contract. The buyer had provided no proof whatsoever with respect to its Canadian clients' withholding payment, the court therefore held that as the buyer in this case had incurred no actual losses, its request for compensation lacked a factual basis, and the court did not support the request. Therefore, the court dismissed the appeal and upheld the original judgment.
