UNITED NATIONS **A**

General Assembly

GENERAL
Distr.
A/CN.9/SER.C/ABSTRACTS/31

20 June 2000
ORIGINAL: ENGLISH

UNITED NATIONS COMMISSION
ON INTERNATIONAL TRADE LAW

CASE LAW ON UNCITRAL TEXTS
(CLOUT)

Contents

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). Information about the features of that system and about its use is provided in the User Guide (A/CN.9/SER.C/GUIDE/1). CLOUT documents are available on the website of the UNCITRAL Secretariat on the Internet (http://www.uncitral.org).

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I. CASES RELATING TO THE UNITED NATIONS SALES CONVENTION (CISG)

Case 325: CISG 3
Switzerland: Handelsgericht des Kantons Zürich; HG980280
8 April 1999
Original in German
Abstract published in German: [2000] Schweizerische Zeitschrift für internationales und europäisches Recht 113

A Swiss buyer, defendant, bought windmill drives from a German seller, plaintiff, for exclusive distribution. When the buyer failed to pay the outstanding purchase price, the seller sued it. The buyer challenged the jurisdiction of the court.

The court found that under article 5(1) of the European Communities Convention on Jurisdiction and Enforcement of Judgements in Civil and Commercial Matters, jurisdiction is based on the place of performance of the obligation at issue, which, in this case, had to be established by applying the CISG. The court held that distributorship agreements are framework agreements, and that the individual sales agreements entered into under the umbrella of the distributorship agreement, fall within the scope of the CISG.

The court rejected the buyer's argument that the CISG was not applicable in the present case because the main contractual obligation of the seller had been the provision of services. The court noted that neither the parties' agreement nor the seller's invoices for the individual deliveries contained stipulations regarding the supply of services. The court noted that the sales agreements could not be classified as service agreements solely because the engineering costs for the development of the drives were higher than the value of the raw and semi-manufactured materials used. Consequently, the fact that the value of the drives was much higher than the price of the materials used for their production, did not preclude the application of the CISG. The court determined that only in the event that the buyer supplies materials necessary for the manufacture of goods which are higher in value than the materials supplied by the seller, would the CISG not be applicable (article 3 (1) CISG).

Case 326: CISG [6]
Switzerland: Kantonsgericht des Kantons Zug; A3 1993 20
16 March 1995
Original in German
Abstract published in German: [1997] Schweizerische Zeitschrift für internationales und europäisches Recht 134

An English seller, plaintiff, sued a Swiss buyer, defendant, for damages in connection with a contract for the supply of cobalt. The buyer refused to accept delivery and as a consequence thereof, the seller sold the goods to a third party.

The court found that the legal relation between the parties had an international character. However, as the parties had not made an explicit choice of a foreign law and had not even made a reference to any foreign law or the CISG in their submissions, the court concluded that, during the proceedings, the parties agreed upon Swiss law to govern the contract. As a result, the court applied domestic Swiss law.

The court did not make any reference to the CISG, which could have been applied pursuant to article 1(1) (b) CISG.

Case 327: CISG 3 (2); 53; 74; 78
Switzerland: Kantonsgericht des Kantons Zug; A3 1998 153
25 February 1999
Original in German
Abstract published in German: [2000] Schweizerische Zeitschrift für internationales und europäisches Recht 114

The German seller, plaintiff, supplied to the Swiss buyer, defendant, roofing materials and in addition performed the roofing on the construction site. The seller sued the buyer for the outstanding purchase price, the price for its services, default interest and reimbursement of debt collection costs.

In its default judgement, the court applied the CISG , since the labour costs were not substantially higher than the costs of the supplies (article 3 (2) CISG). Thus, the contract was not classified as a service contract and accordingly, payment was due under article 53 CISG.

The court held that the seller was entitled to default interest according to article 78 CISG, the amount of which had to be determined by German domestic law as applicable under private international law provisions. In addition, the court found that the buyer had to indemnify the seller also for the debt collection costs (article 74 CISG).

Case 328: CISG 76(1)
Switzerland: Kantonsgericht des Kantons Zug; A3 1997 61
21 October 1999
Original in German
Abstract published in German: [2000] Schweizerische Zeitschrift für internationales und europäisches Recht, 115

A German seller, defendant, and a Swiss buyer, plaintiff, entered into an agreement for the supply of PVC and other synthetic materials for resale. Delivery was not forthcoming and the buyer declared the contract avoided. It further claimed damages. The buyer bought no goods in replacement.

The court held that damages resulting from the non-performance of the contract by the seller had to be assessed on the basis of an abstract calculation under article 76 CISG. Therefore, the buyer was entitled to claim the difference between the price fixed by the contract and the current average market price at the time of the avoidance of the contract.

Case 329: CISG 4(a)
Switzerland: Handelsgericht des Kantons St. Gallen; HG 48/1994
24 August 1995
Original in German
Abstract published in German: [2000] Schweizerische Zeitschrift für internationales und europäisches Recht 116

At their first meeting, representatives of a Swiss seller, plaintiff, and a German buyer, defendant, signed a standard form contract for the delivery of airfilters at a price of CHF 90'000. The buyer denied being bound by such contract, claiming that its representative had not verified the entries in the standard form agreement before signing it on the buyer's behalf. The buyer claimed that the parties had agreed only to the delivery of samples of the airfilters at a price of DEM 500, in order for it to be able to test the product.

The court held that the CISG was not applicable to the standard form contract, as it had been concluded on the basis of an error (article 4(a) CISG). As such, the court determined that the contract was governed by Swiss law in accordance with private international law provisions.

Case 330: CISG 11; 14(1)
Switzerland: Handelsgericht des Kantons St. Gallen; HG 45/1994
5 December 1995
Original in German
Abstract published in German: [1996] Schweizerische Zeitschrift für internationales und europäisches Recht 53

A German seller, plaintiff, sued a Swiss buyer, defendant, for payment of the purchase price of equipment. The buyer denied having actually become party to the purchase contract; instead, the buyer contended that the seller had concluded the contract with its German sister company.

The court found that the unsigned buyer's fax ordering the equipment constituted a proposal for concluding a contract with the seller, as it was sufficiently definite (article 14(1) CISG). Although it did not contain all the elements of a contract, it clearly expressed the buyer's binding intention to purchase the equipment. A signature was not necessary because a sales contract is not subject to any requirement as to form (Article 11 CISG). The court interpreted all relevant circumstances in connection with the conclusion of the contract, and held that the seller unequivocally supposed that the buyer and not the buyer's German sister company, was its contractual counterpart, and thus it was liable to pay the purchase price.

Case 331: CISG 1(1) (a); 3(1); 31; 38; 49(1)(b); 79 (2)
Switzerland: Handelsgericht des Kantons Zürich; HG970238
10 February 1999
Original in German
Abstract published in German: [2000] Schweizerische Zeitschrift für internationales und europäisches Recht, 111

A Swiss buyer, defendant, commissioned an Italian seller, plaintiff, on several occasions, to print, bind and supply art books. When the buyer failed to pay the outstanding purchase price, the seller sued it. Thereafter, the buyer claimed lack of conformity of one shipment of books, entitling it to a price reduction and damages. It also alleged that there was an agreement between the parties to

The court held the CISG to be applicable and classified the legal relation between the parties as a sale of goods to be manufactured pursuant to article 3(1) CISG.

As to the parties agreement to defer payment, the court found that whereas such agreement falls within the scope of the CISG, the CISG does not contain any stipulations regarding the burden of proof. However, it followed from the underlying principles, that the party making the claim should be the one bearing the burden of proof. As the buyer had not sufficiently substantiated its claim for deferment of payment, the court rejected it.

With regard to one shipment of books, the buyer claimed a price reduction as well as damages arising out of the seller's use of a slightly different paper from the one agreed upon. The court found that the buyer had given timely notice and had sufficiently specified the lack of conformity (article 38 CISG). The seller had offered to remedy at its own expense, but the buyer had refused such offer due to "shortage of time". The court held that the seller could only remedy, if this would not result in an unreasonable delay, inconvenience or uncertainty of reimbursement to the buyer. If late delivery as such would constitute a material breach of contract pursuant to CISG 49 (1)(b) or if the delay would lead to a material breach of contract, there would be an unreasonable delay. The court did not decide whether this was the case in the instance, since the buyer had failed to specify and to substantiate its claim for price reduction and damages.

With regard to a shipment of catalogues, which had to be sold at an exhibition and whose production was delayed for reasons attributed to the buyer, the court dismissed the buyer's claim for damages. In order to have the catalogues available at the opening of the exhibition, the seller commissioned a forwarding company, which had guaranteed timely delivery. Nevertheless, the catalogues arrived too late. The court held that pursuant to article 31 CISG, the seller was only obliged to arrange for transport, i.e. to hand the goods over to the first carrier to have them transmitted to the buyer. Thus, the seller had duly performed its obligation and it was not liable for the carrier's shortcomings. For the same reason, the seller could not, pursuant to article 79 (2) CISG, be held liable for the conduct of the carrier, whom it had engaged to perform part of the contract. The court concluded that a seller performs its obligations in time if it dispatches the goods in time and not if a buyer receives them in time.

In view of the above, the court decided that the seller was entitled to the payment of the purchase price as it had fulfilled its contractual obligations and dismissed the buyer's claims.

Case 332: CISG 8; 29
Switzerland: Obergericht des Kantons Basel-Landschaft; 40-99/60 (A15)
5 October 1999
Präsident des Bezirksgerichts Sissach; A 98/55
5 November 1998
Originals in German
Abstract published in German: [2000] Schweizerische Zeitschrift für internationales und europäisches Recht 115

A German seller, plaintiff, supplied a Swiss buyer, defendant, with a summer cloth collection. As the buyer did not pay the purchase price, the seller did not supply the upcoming winter collection. Thereafter, the buyer paid part of the outstanding amount and sent a letter to the seller in which it set a payment schedule for the balance as well as the delivery dates with respect to the winter collection concerned. The seller did not immediately react to this letter, but instead refrained from delivering

sought set-off with damages allegedly arising out of the seller's failure to deliver the winter collection.

The appellate court upheld the ruling of the court of first instance, which had dismissed the buyer's claim for set-off and had allowed the seller's claim.

The court interpreted the buyer's letter, having regard to all relevant circumstances (article 8 CISG) and concluded that the agreement between the parties had not been amended (article 29 CISG) to the effect that the seller should have been obliged to deliver the winter collection upon the partial payment for the summer collection. The language of the letter was ambiguous and the buyer was unable to demonstrate that its explanation as to the meaning of the letter had to prevail. The court found that the seller's silence could not be interpreted as acceptance of the contents of the letter.

Case 333: CISG 7; [50]; 54; 62
Switzerland: Handelsgericht des Kantons Aargau; OR.98.00010
11 June 1999
Original in German
Abstract published in German: [2000] Schweizerische Zeitschrift für internationales und europäisches Recht 117

Both, P AG and its subsidiary K AG, defendant, had bought for many years granular plastic from a French seller, plaintiff. Later, P AG took over the entire plastic business from K AG and K AG was renamed I AG. However, after the corporate restructuring, employees of P AG, formerly employed by K AG, continued ordering granulated plastic from the seller, using the letterhead and stamps of K AG. The respective invoices remained unpaid and the seller brought action against I AG, formerly K AG, for payment. I AG claimed that the materials had been ordered on behalf of P AG and that it was consequently not liable for the outstanding amount.

The court ruled on the question as to who was a party to the sales contract on the basis of article 7 CISG. The contract had to be interpreted applying the principle of good faith and with regard to all relevant circumstances of the case. Although the CISG does not contain any specific methods of interpretation, such interpretation nevertheless had to be based in principle on the CISG. The relevant national law should be applied only if this were not possible. The court as a matter of fact applied Swiss law and concluded that I AG had to respond to the claim.

The court held that pursuant to article 54 CISG, I AG was liable to pay the purchase price and that under article 62 CISG, the seller was entitled to claim such payment as a remedy for the buyer's failure to perform its obligation to pay.

As to the buyer's plea for a price reduction, the court found that the buyer had not fulfilled the conditions [under article 50 CISG] for such reduction.

Case 334: CISG [4]; 8; 14
Switzerland: Obergericht des Kantons Thurgau; ZB 95 22
19 December 1995
Original in German
Abstract published in German: [2000] Schweizerische Zeitschrift für internationales und europäisches Recht 118

A Swiss plaintiff, distributor of an Austrian manufacturer, sued a Swiss buyer, defendant, for payment of goods supplied by the manufacturer. The buyer sought to set-off this claim with a claim for damages which allegedly arose from later supplies that had no longer been forthcoming after the manufacturer had been declared insolvent. The buyer challenged the plaintiff's right to sue as a proper party since the sales agreement had been concluded with the manufacturer. Offer and acceptance were exchanged between the buyer and the manufacturer, while use was made of the letterhead of the manufacturer.

The court held that the CISG does not contain rules on agency agreements. However, with a view to establishing the contracting parties to the specific sales agreement -in accordance with article 14 CISG, which deals with the offer- the agency issue could be ignored.

The court interpreted the declarations of the parties upon conclusion of the sales agreement (article 8 CISG), having regard to all relevant circumstances. The court found that the manufacturer's behaviour demonstrated clearly that the manufacturer was meant to become party to the sales agreement, and not the plaintiff (article 14 CISG). However, the plaintiff was entitled to claim the payment of the purchase price, as it had assigned its claims to the manufacturer. The court determined that assignment of claims does not fall within the scope of the CISG. Therefore, the validity of the assignment was held to be governed by Austrian domestic law as applicable under international private law provisions.

Case 335: CISG 4
Switzerland: Repubblica e Cantone del Ticino, La seconda Camera civile del Tribunale d'appello; 12.95.00300
12 February 1996
Original in Italian
Abstract published in German: [1997] Schweizerische Zeitschrift für internationales und europäisches Recht 135

An Italian seller, plaintiff, sued a Swiss buyer, defendant, for payment of the purchase price for printing paper. The buyer alleged that it was not the proper party, since it had acted as agent for a Bulgarian company. Although both parties pleaded Italian law, the court held that the CISG was applicable to the case. However, as the CISG contains no rules on agency agreements, the court applied Swiss law, pursuant to the Swiss conflict of law rules.

Case 336: CISG 39
Switzerland: Repubblica e Cantone del Ticino, La seconda Camera civile del Tribunale d'appello; 12.99.00036
8 June 1999
Original in Italian
Abstract published in German: [2000] Schweizerische Zeitschrift für internationales und europäisches Recht 120

An Italian manufacturer and seller, plaintiff, sold wine bottles to a Swiss buyer, defendant, for distribution in Switzerland. The buyer did not pay the purchase price and claimed damages, alleging lack of conformity.

The court denied the claim. According to the agreement, the time-limit for notice of lack of conformity was 8 days from the date of receipt of the goods. The court held that the parties were entitled to make such an agreement and thereby to derogate from article 39 CISG. The buyer gave notice after the 8-day-period had elapsed, which resulted in a total loss of its right to rely on lack of conformity. Moreover, the court found that the belated notice did not sufficiently specify the nature of the lack of conformity.

Case 337: CISG 1(1)(a); 3(1); 7; 39(1); 39(2)
Germany: Landgericht Saarbrücken, 7 IV 75/95
26 March 1996
Original in German
Unreported

An Italian seller, plaintiff, delivered and installed furnishings for an ice-cream parlour of a German buyer, defendant. After delivery, the parties had agreed on a total purchase price taking into account a partial payment already made by the buyer. The buyer accepted and signed seven bills of exchange in respect of the outstanding purchase price. Subsequently, the buyer complained of failure by the seller to deliver parts of the work and objected to the quality of the furnishings. The seller sued the buyer for the payment of the outstanding purchase price. The court awarded the claim in summary proceedings for the enforcement of the bills of exchange.

The court upheld its decision in the ancillary proceedings.

The court held that the CISG was applicable according to article 1(1)(a) CISG, as the parties' places of business were in Italy and Germany, which are Contracting States of the CISG. The court classified the contract between the parties as a sale of goods to be manufactured under article 3(1) CISG.

The court found that the buyer had accepted the conformity of the furnishings when it agreed with the seller on the outstanding purchase price and had granted the bills of exchange. As neither a lack of conformity nor the alleged missing parts of the furnishings had been raised by the buyer at that time, the court interpreted this as an acknowledgement by the buyer that the delivered furniture was free from defects. The court further found that the buyer had to examine the goods pursuant to article 38 CISG. By accepting explicitly the furniture, the buyer had recognized the conformity of such furniture and had renounced to its right to rely on a lack of conformity under article 39 CISG. As such, the buyer was no longer in a position to complain that the furniture was defective, as such defects should have been discovered during examination. Otherwise, its behaviour would be

The court held that the buyer, at best, could rely on a lack of conformity, which appeared after the date of the parties' agreement on the outstanding purchase price, within the two year period provided by article 39(2)CISG. However, even here, the buyer failed to specify the nature of the defects of the furniture as required by article 39(1) CISG. The buyer's notice regarding the defects was not sufficiently detailed and substantiated. Moreover, such notice was delayed. The court elaborated that the purpose of giving notice to the seller specifying the nature of the lack of conformity as soon as it is discovered was to give it the opportunity to determine how to react, for example, to inspect the goods, to remedy or to redeliver.

Case 338 : CISG 1(1); 30; 31; 53; 66; 69(2); 71(1); 71(3)
Germany: Oberlandesgericht Hamm; 19 U 127/97
23 June 1998
Original in German
Published in German in [1999] Recht der Internationalen Wirtschaft , 786;
[2000] Transportrecht-Internationales Handelsrecht, 7; http://www.jura.uni-freiburg.de/ipr1/cisg/urteile/text/434.htm

Two Austrian sellers and a German buyer, defendant, concluded agreements for the delivery of furniture manufactured and stored in a warehouse in Hungary. When the goods were placed in the warehouse, the sellers issued storage invoices, which were subsequently sent to the buyer. Under the agreements, the buyer was entitled to order partial deliveries of the furniture, which had to be handed over by the sellers at the warehouse and loaded either on wagons or on the buyer's lorries for transmission to the buyer. Upon delivery, the buyer had to pay the purchase price on the basis of a delivery invoice. After having issued several storage invoices, the sellers assigned their rights to a third party, plaintiff. The buyer, upon receipt of the third party's notice of the assignment, accepted it in writing. However, as the buyer had not received the furniture listed in the storage invoices, it did not pay the purchase price. The Hungarian warehouse firm declared bankruptcy and the furniture disappeared from the warehouse. Subsequently, the plaintiff sued the buyer for the alleged outstanding purchase price on the basis of the storage invoices.

The appellate court upheld the decision of the lower court, which had dismissed the claim.

The court held the CISG to be applicable, as both parties had their places of business in different Contracting States of the CISG and had not excluded the application thereof under article 6 CISG.

The court rejected the plaintiff's assertion that the buyer's consent to the assignment amounted to an acknowledgement of the assigned claims. In the absence of a CISG provision dealing with the issue of acknowledgement, the court applied the rules of private international law of Germany, which led to the application of Austrian law. Pursuant to such law, the written acceptance of the assignment did not constitute an acknowledgement of the claims and as such, had to be denied.

The court held that the plaintiff was not entitled to claim the purchase price under article 53 CISG, as it had become apparent that the sellers would not be able to perform the delivery of the furniture, which constituted a substantial part of their obligations (article 30 CISG). Therefore, the buyer was allowed to suspend the performance of its obligations according to article 71(1)(a) CISG. The court interpreted the refusal of the buyer to pay the storage invoices as the required notice of suspension of performance under article 71(3) CISG.

The court found that the buyer was not obliged to pay the purchase price according to article 66 CISG, because the plaintiff did not prove that the goods were lost after the risk had passed to the buyer. In the case at hand, the passing of the risk had to be determined according to article 69(2) CISG, as under the parties' agreements, the buyer was bound to take over the goods at a place other than the seller's place of business. However, the conditions for the passing of risk pursuant to article 69(2) CISG, namely due delivery and the buyer's awareness that the goods were placed at its disposal, had not been fulfilled. Under the parties' agreements, delivery was due at the buyer's demand (article 33(a) CISG), which had not been made, and the sellers had failed to place the furniture at the buyer's disposal (article 31(b) CISG).

Case 339: CISG 35(2)(a); 35(2)(b); 35(2)(c); 39(1); 47; 48; 49(2)(b)
Germany: Landgericht Regensburg; 6 O 107/98
24 September 1998
Original in German
Published in German: [1998] Forum International, 104.

At a textiles fair, a German buyer, defendant, ordered fabrics from the seller, plaintiff, for the production of skirts and dresses. After delivery, the buyer objected to the quality and to the size of the fabrics, as they could not be cut in an economical manner. The buyer requested that the seller deliver "unobjectionable goods" within fourteen days. The seller sent samples of another fabric and asked the buyer for further information as to the problems faced by it for the manufacture of the skirts and dresses. When the buyer refused acceptance, the seller sued it for the purchase price.

The court allowed the claim. It held that the buyer had no right to refuse to pay the purchase price, as the fabrics were in conformity with the contract. Taking into account the quantity, the quality and the description of the fabrics, the court concluded that they were fit for the production of skirts and dresses (article 35(2)(a) CISG). The buyer had not provided the seller with information regarding the manner in which the fabrics had to be cut in order to be economical. Moreover, this requirement was not evident from the circumstances (article 35(2)(b) CISG). The properties and quality of the fabrics corresponded to the samples presented by the seller at the fair and as such, they were in conformity with the contract pursuant to article 35(2)(c) CISG.

Regarding the quality of the fabrics, the court held that the buyer failed to specify the nature of the lack of conformity, and even if the lack of conformity had to be admitted, the buyer had failed to give timely notice to the seller pursuant to article 39(1) CISG.

The court determined that, in any case, the buyer had lost its right to declare the avoidance of the contract, as it disregarded the provisions of article 49(2)(b)(ii) and (iii) CISG. The court noted that these provisions meant that the buyer could only declare the contract avoided after it had given the seller an opportunity to perform the contract. The court found that the buyer prevented the seller from exercising its right to remedy under article 48 CISG, by demanding re-delivery without specifying the character of the "unobjectionable goods" and by refusing the acceptance of another fabric, of which samples had been sent to it. The seller was entitled to send samples instead of a complete substitute delivery, because it could not be in a position to know whether the buyer would accept such substitute delivery. The delivery of the samples was timely, because the parties had not agreed on a particular date for such delivery. As such, the buyer had not fulfilled the conditions for avoidance of the contract pursuant to article 49 CISG.

Case 340: CISG 1(1); 4; 8; 25; 46; 47; 49 (2) (b); 53; 66; 69 (2)

22 September 1998
Original in German
Published in German: [2000] Oberlandesgerichts-Rechtsprechungsreport Oldenburg, 26

A Norwegian seller, plaintiff, sold raw salmon to a Danish Company (the "Company"), which after processing it, sold smoked salmon to a German buyer, defendant. When the Company got into financial difficulties, the seller sent a confirmation order to the buyer. Pursuant thereto, the seller had to deliver the raw salmon to a specified delivery address, which was other than the Company's place of business, under the incoterm DDP. Upon receipt of the confirmation order, the buyer signed and returned such order to the seller through the Company. Thereafter, the seller delivered the raw salmon to the Company and sent the invoices to the buyer. The invoices indicated the Company's place of business as the delivery address. As a result of the bankruptcy of the Company, the buyer did not receive the raw salmon and as such, refused to pay the purchase price. Then, the seller sued the buyer.

The first instance court allowed the claim. The buyer appealed declaring the avoidance of the contract. The appellate court upheld the decision of the first instance court.

The court determined that the CISG was applicable under articles 1 (1) CISG and 4 CISG.

The court held that the seller's confirmation order constituted an offer for the delivery of raw salmon and that the request for prompt confirmation clearly showed the seller's intention to conclude a purchase agreement with the buyer. The buyer accepted the offer by signing the confirmation order and as such, the parties concluded a purchase agreement. The court found that no additional interpretation of the confirmation order under article 8 CISG was necessary, and that the receipt of the signed confirmation order by the seller, through the Company, was of no particular relevance.

The court further held that the seller discharged its delivery obligation, although delivery occurred at a place other than the place stipulated by the contract and the incoterm DDP. This was insignificant, as the buyer was indicated as recipient of the raw salmon in the delivery note.

The court found that the seller was not in fundamental breach of contract under article 25 CISG. Despite the financial difficulties of the Company and the delivery of the salmon at the Company's place of business, the fulfilment of the contract was not jeopardized. The court further found that, even if there had been a breach of contract, the buyer had failed to declare the avoidance of the contract within a reasonable period of time as provided by article 49 (2) (b) CISG. Moreover, the buyer failed to require delivery at the stipulated place pursuant to articles 46 and 47 CISG and this was interpreted as the buyer's agreement to the delivery at the Company's address.

The court concluded that the seller complied with its obligations and that the risk had passed to the buyer (article 69 (2) CISG). Hence, the buyer was obliged to pay the purchase price (article 66 CISG), even if it did not receive the raw salmon.

Case 341 : CISG 1(1)(a); 39; 40; 52(2)
Canada : Ontario Superior Court of Justice (Swinton J.)
31 August 1999
La San Giuseppe v. Forti Moulding Ltd.
Original in English
Unpublished but available at [1999] Quicklaw, O. J. No. 3352; [1999] ACWSJ LEXIS, 14059; [1999] ACWSJ 31350; 90 All Canada Weekly Summaries 3rd, 871
Commented on in English: Ziegel [1999], Canadian Business Law Journal, Vol 32, 319

NB : This is the first decision by a Canadian court applying the CISG since it came into force in Canada in 1992.

An Italian seller, plaintiff, sold picture frame mouldings manufactured at its plant in Italy, to a Canadian buyer, defendant. There was no written agreement between the parties, who concluded several transactions between 1989 and 1996. The buyer had difficulty meeting payment deadlines and after further delays had been granted, the seller brought an action against it. The buyer counterclaimed for damages alleging lack of conformity of some goods and over-shipment.

Since the CISG came into effect in Canada in 1992 and in Italy in 1988, the court found that the CISG was applicable to shipments as from 1993 only, each of which was described as linked to a separate contract.

As to the conformity issue, the court rejected the claim because timely notice had not been given as required by article 39 CISG. Moreover, the buyer had not made any written complaints as to the lack of conformity. Furthermore, the court rejected reliance on article 40 CISG, as the evidence did not support a conclusion that the seller was aware of the defects or should have been aware.

As to the alleged over-shipment, the court found that the parties had agreed to a 10% variation of the ordered quantity and that on previous occasions higher quantities had been accepted and paid for by the buyer. The claim was therefore rejected pursuant to article 52(2) CISG.

The court awarded judgement in favour of the seller for the purchase price owing plus interest calculated in accordance with domestic law.

II. CASES RELATING TO THE UNCITRAL MODEL ARBITRATION LAW (MAL)

Case 342: MAL 35; 36
Zimbabwe: Harare High Court (Judge Chinhengo); Judgment No. HH 71-2000
1 March and 5 April 2000
Conforce (Pvt.) Limited v. The City of Harare
Original in English
Unpublished

A dispute between two parties had been referred to arbitration in 1990. The arbitrator issued his award in the matter in 1991. It was for an amount of some $700.000, plus interest which was to be calculated with effect from 1989.

The successful party applied to the High Court under article 35 MAL for the recognition and enforcement of the award.

The application was opposed under article 36 MAL on the basis that the award was contrary to public policy, since it contravened the *in duplum* (the double) rule, which applies in terms of the Common Law of Zimbabwe and under which interest ceases to run when it equals the capital sum owing.

The High Court held that if the award were to be taken literally, i. e. by calculating interest with effect from 1989 to the date of the award, the sum payable in terms of the award would amount to over $17 million. This result would be in conflict with the *in duplum* rule and would be contrary to public policy.

However, the High Court found that the arbitrator's award was capable of being interpreted as being impliedly subject to the *in duplum* rule; and it could be recognized and enforced accordingly.

The High Court further ruled that interest beyond the double of the capital sum did not run during the arbitration proceedings, i. e. the *in duplum* rule was not suspended by the commencement of arbitration proceedings.

In the result, the award was recognized and enforced by the High Court with interest calculated on the capital sum until it reached the double.

Interest would also run, on the double, from the date of the award to the date of payment provided that once again, it did not breach the *in duplum* rule.