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CASE LAW ON UNCITRAL TEXTS (CLOUT)

Contents

INTRODUCTION

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

Case 343: CISG 38; 39; 40; 45; 50; 77; 78
Germany: Landgericht Darmstadt; 10 O 72/00
9 May 2000
Original in German
Unpublished

A German seller, the plaintiff, delivered 8,000 video recorders and other electrical appliances to a Swiss buyer, the defendant. The buyer complained about defects of the recorders' arm-loading parts. The parties agreed that the purchase price would be reduced for 4,000 recorders which had to be repaired. The buyer asserted more defects and refused to pay the purchase price. The seller sued him. The buyer alleged that the electrical appliances were too expensive in order to be sold at a profit. Furthermore, the 4,000 recorders who had been object to reduction had other defects as well. Other video recorders had been defective too, so that their purchase price had also to be reduced. Moreover the buyer argued that the seller delivered only instruction booklets in German and failed to deliver booklets in the other languages spoken in Switzerland.

The claim was successful. The Court held that the seller granted reduction only for 4,000 recorders, since the buyer failed to prove that more recorders were defective and had to be repaired. The buyer lost his right to rely on further defects of the 4,000 recorders when agreeing upon the reduction of their purchase price although it had knowledge about such defects. This knowledge excluded the possibility for the buyer to rely on Article 40 according to which the seller's bad faith does not allow him to rely upon Articles 38 and 39.

In respect of the instruction booklets the Court found that the appliances had not been produced especially for the Swiss market. The delivery of instruction booklets in French and Italian had to be stipulated. In any case, the buyer had lost its rights since it failed to give notice regarding the missing instruction booklets. The Court also stated that if the buyer were entitled to the booklets, by ordering such booklets elsewhere instead of asking the seller to deliver them it violated its obligation to mitigate the loss under article 77 CISG.

The Court stated that the parties agreed on a concrete purchase price and that they had not impliedly made reference to the price generally charged for such goods (Article 55 CISG). As the CISG provided freedom of contract, it was not to be determined whether the purchase price corresponded to the current market-price or not.

The Court established that the interest rate was the German one, since German law was applicable by virtue of the rules of private international law of the forum.

Case 344: CISG 38; 39; 45; 53; 62; 74, 78
Germany: Landgericht Erfurt; 3 HKO 43/98
29 July 1998
Original in German
Unpublished

An Italian seller, the plaintiff, delivered soles to a German buyer, the defendant, for the production of sport shoes. The buyer objected to the quality of some soles by letter and refused to pay the full purchase price. The seller sued him for the outstanding amount. The buyer declared set-off with damages and alleged that it had to commission a third company to remedy the defects in the soles.

The court found that the seller's claim was justified under article 62 CISG. The buyer ordered the soles and received them.

The court held that the buyer was not entitled to claim damages under the Articles 74 et seq. CISG, the Articles 38 et seq. CISG and the Articles 45 et seq. CISG. Both letters of the buyer did not meet the requirement of Article 39 CISG as regards specification of the defect's nature. The notice should have allowed the seller to

assess the lack of conformity and to take all necessary steps to remedy it. Article 39 CISG demands that the buyer give notice about the essential results of the examination of the goods. As the buyer in this case failed to give such notice, it lost its right to rely on a lack of conformity pursuant to Article 39(2) CISG. For the same reasons the buyer was not entitled to recoup its expenses for remedying the defects (Articles 39 and 45 et seq.).

The court granted interest under article 78 CISG.

Case 345: CISG Art. 1(a); 4; 7; 8; 39; 45(1)(a); 45(2); 49(1)(a); 74(1); 74(2); 81(1); 81(2)
Germany: Landgericht Heilbronn; 3 KfH O 653/93
15 September 1997
Original in German
Unpublished

A German seller, the defendant, delivered a film coating machine for kitchen furnishings to an Italian leasing company for the use of an Italian lessee, the plaintiff. The buyer paid the purchase price. The negotiations were conducted in Italian. Under one of the seller's general terms and conditions which were drafted in German, the seller's liability was limited. When problems occurred with the machine, the lessee commissioned an expert report which concluded that the machine was defective. The buyer assigned his rights to the lessee, who declared the contract avoided. The lessee sued the seller for the reimbursement of the purchase price and damages.

The court applied the CISG by virtue of Art. 1(1)(a) CISG.

The court held that due to the defectiveness of the machine, the plaintiff was entitled to declare the contract avoided (Art 49 CISG), to claim reimbursement under Art. 81(1), Art. 81(2) and Art. 49(1) CISG and to claim damages under Art. 74(1), 45(1) and 45(2) CISG. As the CISG does not deal with the limitation period, this question was governed by the law applicable under the German rules of private international law, according to which the action was not time-barred.

The court stated that no special rules for the incorporation of general conditions were foreseen in the CISG. Therefore these rules had to be interpreted according to Art. 8 CISG. Following the underlying principles of Art. 8 CISG, general terms and conditions had to be drafted in the language of the contract, the Italian language in this case, because the negotiations had been in Italian. Consequently, the terms and conditions in German provided by the German seller were unenforceable and therefore the exclusion clause in German was also ineffective. To assess the validity of the seller's terms and conditions drafted in Italian the court applied German law. In the assessment it replaced the reference to German non-mandatory rules by reference to the rules of the CISG, namely Art. 74(2) CISG, and held that exclusion of liability in the terms and conditions to be void.

The court found that the buyer was not obliged to fix a final deadline for delivery, a condition normally required under German law to enable subsequent avoidance of the contract and damages. The relationship between the CISG and national law was governed by Art. 4 and Art. 7 CISG. Therefore, conditions foreseen under national law could only be applied if the issue was not addressed by the CISG. As the CISG provides an exhaustive set of provisions on remedies for breach of contract in Art. 45 et seq. CISG, no recourse could be had to German national law.

The final calculation of damages and their possible limitation to the foreseeable loss under Art. 74(2) was kept for the final decision.

Case 346: CISG 1(1)(a); 3(2); 45; 46(2); 46(3)
Germany: Landgericht Mainz; 12 HK.O 70/97
26 November 1998
Original in German
Unpublished

A Swedish seller, the defendant, delivered to a German buyer, the plaintiff, a cylinder for the production of tissue-paper. The parties agreed that the purchase price were to include loading, transport, unloading, installation, insurance until the end of installation and extra work. Soon thereafter, delivery problems occurred followed by negotiations between the parties. The buyer gave notice about defects in a detailed list.

More than two years later the buyer sued the seller for damages.

The Court applied the CISG by virtue of Art. 1(1)(a). The application was not excluded by Art. 3(2) CISG. The court found that in order to decide whether the preponderant part of the obligations of the seller consisted in the supply of labour or other services a comparison of the value of each performance in question was not admitted. The court considered the purpose of the contract and the circumstances of its formation and concluded that, under the agreement, the delivery of the cylinder was essential. Additional tasks involved, which amounted to services, such as the design of the machine, were to be regarded as part of the obligation to deliver the final product. Finally, the remaining aspects of performance, namely installation, attendance, transport and other services due under the agreement were of subordinate importance.

As to limitation of action the court held German law to be applicable. The limitation period commenced, when the buyer gave notice about the lack of conformity in the detailed list of damages (article 39 CISG). Since, according to German law, the limitation period was six months the claim was time-barred. This rule applied to all remedies open to the buyer under article 45 CISG including the claims for damages, subsequent delivery (article 46(2) CISG) or repair (article 46(3) CISG).

Case 347: CISG 9
Germany: Oberlandesgericht Dresden; 7 U 720/98
9 July 1998
Original in German
Unpublished

A Turkish seller, the plaintiff, and a German buyer, the defendant, came to an agreement about the delivery of textiles. Later, the buyer demanded reduction of the purchase price in the amount of a penalty agreed upon under a previous agreement. The seller did not answer the buyer's request. It delivered the textiles and sued the buyer for the purchase price. The lower court granted the seller's claim and gave no effect to the reduction of the purchase price by the buyer.

The court of appeal confirmed this judgement. It held that the seller did not consent to the buyer's reduction of the purchase price. The buyer did not prove that there was a usage known in international trade whereupon silence to a commercial letter of confirmation amounted to consent (article 9 CISG).

Case 348: CISG 25; 35(1); 45; 49(1); 49(2);74; 76; 81(1); 88(3)
Germany: Oberlandesgericht Hamburg; 1 U 31/99
26 November 1999
Original in German
Published in German in Oberlandesgerichts-Rechtsprechungsreport Hamburg 2000, 155

A Brazilian seller, the plaintiff, delivered jeans to a German buyer, the defendant. When inspecting the delivered jeans the buyer found the quantity to be incorrect. The jeans were also incorrectly labelled and the sizes were wrong. Some pairs had also become mouldy. The buyer declared the contract avoided and placed the jeans at the seller's disposal. When the seller refused to take the jeans back, the buyer sold them. The seller sued the buyer for the original purchase price and the buyer offset the claims with his own claim for damages. The lower court granted the seller the resale price reduced by the buyer's loss of profit and dismissed the counterclaim.

On appeal, the Court dismissed the claim entirely.

The Court held that the buyer was entitled to declare the contract avoided pursuant to Art. 49(1) CISG and that it was therefore released from the obligation to pay the purchase price under Art. 81(1) CISG. By delivering the defective jeans, the seller committed a fundamental breach of contract. The buyer gave notice about the lack of conformity specifying the nature of the lack within a reasonable time and declared the contract avoided (art. 49(1) CISG) in time (Art. 49(2) CISG).

The Court stated that the buyer was discharged from its obligation to pay the resale price to the seller (Art. 88(3) CISG) due to set-off. The buyer was entitled to claim damages under Art. 45 and 74 CISG despite the avoidance of the contract (Art. 81(1) CISG). The court found, unlike the lower court, that damages under Art. 74 CISG were not limited to the loss of profit. As damages cover the whole loss resulting from non-performance, the buyer was entitled to claim the difference between its interest in the performance of the contract and its saved costs. The interest in the performance of the contract was calculated on the basis of the total profit reduced by the original purchase price. The difference had to be established in a concrete calculation, differing from Art. 76 CISG, where the current price was decisive. The Court held that the fixed costs (so called general expenses) could not be considered as being part of the saved costs. The seller had to prove that the fixed costs in case of performance exceeded the fixed costs in case of non-performance. The interest in the performance had to be reduced by saved value-added tax and costs for taking delivery and resale of the goods (so called special expenses). The buyer's interest in the performance reduced by the value-added tax and the special expenses exceeded by far the benefit from the resale of the jeans.

The Court stated that the CISG governed the issue of set-off (Art. 7(2) CISG) as long as the set-off was to concern claims arising under the CISG. Therefore the buyer was entitled to set-off. The Court left however open the question of whether the buyer's right to keep the benefit of the resale could be directly inferred from the CISG or whether this issue was governed by the applicable German law, according to which set-off was also admissible.

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

Case 349: MAL: 16
Canada: British Columbia Supreme Court (Houghton J.)
September 13, 1991
Harper v. Kvaerner Fjellstrand Shipping A.S.
Original in English
Published in English: [1991] B.C.J. No. 2654

This case concerns a motion to stay court proceedings. The Plaintiff was a businessman from Victoria and the Defendant a Norwegian company. The representatives of the Defendant and Plaintiff entered into joint venture negotiations to establish a high speed ferry service between Vancouver and Victoria. Within this framework, a letter of intent was signed between the Defendant and a company controlled by the Plaintiff, which provided for an agreement to arbitrate in London in the case of disputes. The Plaintiff's claim against the Defendant is for breach of confidence and unjust enrichment. The Plaintiff had arranged for various stages and claims that the defendant has wrongfully refused to continue to deal with the Plaintiff still making use of the results achieved by the Plaintiff to establish the ferry line without compensating him. At issue was whether there was an enforceable arbitration agreement or whether termination of the contract included the arbitration clause.

The British Columbia Supreme Court held that the Defendant's wrongful refusal to continue to deal with the Plaintiff or its continued use of the efforts and results achieved by the Plaintiff to establish the ferry service without compensating the Plaintiff appeared to arise directly out of the contract between the parties that referred to arbitration. In addition, the court found that section 16 of the International Commercial Arbitration Act (MAL, article 16), accepted the principle of severability and that the contract being at an end had no effect on the continued validity of the arbitration clause.

Case 350: MAL: 8(1)
Canada: British Columbia Court of Appeal (Macfarlane J.A.)
October 18, 1995
Traff v. Evancic et al.
Original in English
Published in English: [1995] B.C.J. No. 2296, (1995) B.C.L.R. (3d) 85 (Lower Court Decision reported as CLOUT Case 180; reference (1995) B.C.J. No. 1437)

In this case, the defendants applied for leave to appeal to set aside service ex juris upon them and also applied to stay the action as it was subject to arbitration. At issue were claims of fraud and for an accounting. The lower court referred the accounting claim arbitration but maintained the fraud claim. Jurisdiction over the foreign defendants was justified on the basis that they were necessary parties to the action against domestic defendants. The defendants claimed that they were not proper parties, no claim of fraud having been made against them.

The Court of Appeal dismissed the application, did not grant leave to appeal, and did not stay the fraud claim. The pleadings alleged that the defendants were parties to the fraud in that they caused it. They were necessary and proper parties to the action. The court confirmed the judge's ruling on jurisdiction. As for the arbitration clause, the court held, referring to section 8(1) of the International Commercial Arbitration Act, that the fraud claim was not subject to arbitration as it was not contractual in nature and the claim in this action was not a claim under contract. It was held that the accounting claim was properly stayed, unlike the fraud claim which could not be stayed.

Case 351: MAL: 36
Canada: British Columbia Supreme Court (Drossos J.)
Food Services of America Inc. (c.o.b. Amerifresh) v. Pan Pacific Specialties Ltd.
March 24, 1997
Original in English
Published in English: [1997] B.C.J. No. 1921, (1997) 32 B.C.L.R. (3d) 225

This was an action to enforce an arbitral award rendered in the United States of America. The plaintiff was a Delaware corporation and the defendant was registered in British Columbia. An arbitration award was made pursuant to an agreement between the parties to conduct arbitration under the International Arbitration Rules of the American Arbitration Association. Through this agreement the parties specified that any court having jurisdiction could judge on the award. The question was to know if legislation precluded the applicant from bringing the proceedings in that an extra- provincial company, not meeting the statute's registration requirements, could not enter a proceeding in any court in the province pursuant to any contract made in the province. In addition, in their agreement, the parties had waived section 36 of the International Commercial Arbitration Act which provided grounds for a party to oppose enforcement.

The British Columbia Supreme Court allowed the application. The applicant could bring the proceeding since they were brought not on a contractual basis, but to enforce an international commercial arbitration award. Furthermore, the waiver was not limited to situations where there had been no jurisdictional or procedural breach by the arbitrators. Here the parties had waived any right to oppose enforcement stemming from section 36 of the International Commercial Arbitration Act. Hence, the respondent could not resort to any ground for opposing enforcement.

Case 352: MAL: 8(1)
Canada: British Columbia Court of Appeal (Southin, Huddart and Proudfoot JJ.A.)
February 23, 1998
Nutrasweet Kelco Co. v. Royal-Sweet International Technologies Ltd. Partnership
Original in English
Published in English [1998] B.C.J. No. 557, (1998) 49 B.C.L.R. (3d) 115, reversing [1997] B.C.J. No. 332

In an action before the British Columbia court, the plaintiff sought to obtain payment of a sum due by the defendants. The agreement between the parties provided for arbitration and the defendant sought a stay of proceedings, which was granted at first instance. On appeal, the stay was reversed on the grounds that the defendant had already delivered its defense and therefore, in accordance with section 8 of the International Commercial Arbitration Act, was foreclosed from invoking the arbitration clause.

Case 353: MAL: 9
Canada: British Columbia Supreme Court (Cohen J.)
July 6, 1998
TLC Multimedia Inc. v. Core Curriculum Technologies Inc.
Original in English
Published in English: [1998] B.C.J. No. 1656

The plaintiff, TLC, is a developer and publisher of education software located in the United States. The defendant, Core Curriculum Technologies Inc. ("CCT"), is a distributor and reseller of educational software based in British Columbia, Canada. TLC claimed breaches in the performance of the distribution agreement and sought to terminate it. Claiming that CCT continued to hold itself out as an authorized distributor of TLC's products, TLC sought an interlocutory injunction from the B.C. courts, to restrain CCT from continuing this alleged activity. In the meantime, TLC had began arbitration proceedings in Boston, according to the rules of the American Arbitration Association, as provided under the distribution agreement.

The Supreme Court of British Columbia noted that the relief sought by TLC was for an "interim measure of protection" within the meaning of section 9 of the International Commercial Arbitration Act. Under Section 9, it is not incompatible with an arbitration agreement for a party to request from a court, before or during arbitral proceedings, an interim measure of protection and for a court to grant that measure. It was held that the B.C. court had jurisdiction to grant interim relief in spite of the fact that the dispute had been submitted to arbitration in Boston. However, the court judged that the balance of convenience did not favour TLC, in that there was no real evidence of irreparable harm. The injunction application was denied.

Case 354: MAL: 8(1), 9
Canada: British Columbia Court of Appeal (Macfarlane, Newbury and Hall JJ.A.)
December 11, 1998
Silver Standard Resources Inc. v. Joint Stock Company Geolog, Cominco Ltd. and Open Type Stock Company Dukat GOK
Original in English
Published in English: [1998] B.C.J. No. 2887, (1998) 168 D.L.R. (4^{th}) 309, (1998) 59 B.C.L.R. (3d) 196, (1999) 7 W.W.R. 289.

Silver was a British Columbia-based mining company. Geolog was a Russian company. In early 1996, Silver and Geolog entered into contractual relations to explore and exploit deposits in Siberia. Geolog had an agreement with Cominco under which Geolog sold concentrate to Cominco. In June of 1998, Silver commenced an action Geolog to recover the Canadian equivalent of $3,213,450.87 (U.S.). This was the sum of various loans Silver had made directly to Geolog and expenses it had paid on Geolog's behalf to the co-defendant, Cominco Ltd. When Cominco was about to pay Geolog approximately $4,000,000 for purchases of concentrate, Silver obtained an ex parte Mareva injunction restraining Cominco from making any further payment to Geolog, and requiring Cominco instead to pay the money into court. Silver further obtained a Garnishing Order Before Judgment against Cominco. When Geolog and Dukat, a Russian supplier to Geolog, successfully had the

Mareva injunction and garnishing order set aside, Silver applied for leave to appeal and for a stay of the Chambers Judge's order. Leave was granted, with the variation that Cominco was at liberty to pay Geolog $800,000, the amount by which the amount Cominco owed to Geolog exceeded Silver's claim.

The appeal was allowed in part. The setting aside of the Mareva injunction was maintained. The Court found that it had jurisdiction, under section 9 of the International Commercial Arbitration Act, to order interim injunctions in relation to foreign arbitrations. Then, having reviewed the principles underlying Mareva injunctions in Canadian and English law, the Court concluded that the balance of convenience and justice generally weighed against the granting of an injunction that would prevent a defendant from paying a debt incurred in the ordinary course of business, simply to provide prejudgment security for a plaintiff. Despite this finding, the Court of Appeal reinstated the garnishment order, finding that the lower court erred in holding that the granting of the stay under section 8 of the International Commercial Arbitration Act meant that the garnishment order should be released. The Court found that conditions controlling Mareva injunctions and garnishment orders differed and, more specifically, that there was no authority requiring, as a condition of garnishment, that the debtor be shown to have an intention to avoid paying any judgment entered against it. The defendant did not meet the onus to show that it was just in all the circumstances that the garnishment order be released and the facts militated in favour of its continuance.

Case 355: MAL: 8(1)
Canada: British Columbia Supreme Court (Martinson J.)
January 15, 1999
Restore International Corp. v. K.I.P. Kuester International Products Corp.
Original in English
Published in English: [1999] B.C.J. No. 257

In response to an application for summary judgment by the defendant K.I.P., the plaintiff, Restore, sought a stay of the action and a referral to arbitration. Restore had granted K.I.P. exclusive distribution of Restore’s automobile products in Canada but a dispute had arisen as to the scope of the exclusivity. When negotiations between the parties failed, Restore sought damages in court and K.I.P. counterclaimed. Restore filed a defence to this counterclaim and its own action was later dismissed. Restore then sought to force K.I.P. to arbitrate its counterclaim. Restore argued that its filing of a defense in court had been done without prejudice to its right to seek arbitration.

The Supreme Court of British Columbia dismissed the application for a stay. The court invoked the International Commercial Arbitration Act under which Restore could not obtain a stay having filed the defence to the counterclaim.

Case 356: MAL: 8(1)
Canada: British Columbia Supreme Court (Bennett J.)
June 15, 1999
Seine River Resources Inc. v. Pensa Inc.
Original in English
Published in English: [1999] B.C.J. No. 2090

The corporate plaintiff Seine was located in British Columbia and was founded to develop resource properties in North America. Pensa was incorporated in Colorado to do business in mining and gas industries in the limited area around Colorado. The parties entered into negotiations over the sale of Pensa's interest in a gas project in Guatemala The agreement provided for an arbitration clause that required arbitration in Guatemala. Proceedings were commenced after disagreements arose between the parties. The defendants commenced an action in Colorado in January 1998. The plaintiff commenced its action in British Columbia in April 1998. The plaintiff successfully moved that the Colorado action be stayed by invoking the arbitration clause on July 20, 1998. Pensa did not invoke the arbitration clause before the B.C. court but instead filed a defense and counterclaim. Seine, having started arbitration proceedings in relation to the claim originally brought in Colorado, asked stay of Pensa’s counterclaim pending arbitration, on the grounds that the Colorado decision

prevented Pensa from bringing its claim before the B.C. court when the Colorado court had ordered it to arbitration.

The B.C. Supreme Court held that the entire action be stayed and that the entire matter be referred to arbitration. The court found that Seine was acting unfairly in both forcing Pensa to arbitrate its claim while Seine pursued its court action in B.C. Moreover, the court found that the arbitration clause had been invoked in prior proceedings before the delivery of the defense and counterclaim and therefore that section 8 did not apply to prevent a referral to arbitration.

Case 357: MAL: 5, 8(1), 16
Canada: British Columbia Supreme Court (Davies J.)
November 17, 1995
Continental Commercial Systems Corp. v. Davies Telecheck International, Inc.
Original in English
Published in English: [1995] B.C.J. No. 2440

The parties entered into franchise and licensing agreements that referred disputes arising under the agreements to arbitration. A dispute went to arbitration and the parties did not agree on accounts submitted by the respondent for expenses of persons attending the arbitration proceedings. The respondent sought to recover these costs in court. In seeking to stay the action, the applicant alleged the stay was mandatory by section 8 of the International Commercial Arbitration Act. To this, the respondent argued the agreement to pay expenses did not fall within the scope of section 8 as it was independent of the contracts.

The Supreme Court held that the scope of the agreements is determined by the arbitration tribunal. It concluded it was not clear the issues fell outside the terms of the arbitration agreement and stayed the action.

Case 358: MAL: 36(1)
Canada: British Columbia Supreme Court (Sinclair Prowse J.)
May 11, 1998
Canadian National Railway Co. v. Southern Railway of British Columbia Ltd.
Original in English
Published in English: [1998] B.C.J. No. 1097

The parties entered into an agreement with Johnson & Johnson Inc. by which CNR agreed to transport Johnson & Johnson's goods from Quebec to Alberta, and Southern agreed to transport the goods from Alberta to British Columbia. A fire occurred and some of Johnson & Johnson's goods were destroyed while in transit. CNR paid Johnson & Johnson compensation for the full loss of the goods. As per the agreement between CNR and Southern, the issue of responsibility was to be resolved by arbitration by the Association of American Railways. The arbitrators held that Southern was fully responsible for the loss but Southern refused to pay the balance of the amount paid by CNR to Johnson & Johnson, alleging, *inter alia*, that the arbitration committee's decision had been made on the basis of jurisdictional error or a breach of natural justice.

The Supreme Court rejected Southern’s objections to enforcement although it accepted that these objections were available under the International Commercial Arbitration Act (no specific provisions were cited). It held that the rules of the A.A.R. were complied with in terms of establishing the jurisdiction of the arbitration committee and that no breach of natural justice occurred since the committee was presented with evidence and answered the only question posed to it.

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