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(CLOUT)

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

Issues 37 and 38 of CLOUT introduced several new features. First, the table of contents on the first page lists the full citations to each case contained in this set of abstracts, along with the individual articles of each text which are interpreted by the court or arbitral tribunal. Second, the Internet address (URL) of the full text of the decisions in their original language are 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 by the United Nations or by UNCITRAL of that website; furthermore, websites change frequently; all Internet addresses contained in this document are functional as of the date of submission of this document). Third, abstracts on cases interpreting the UNCITRAL Model Arbitration Law now 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, and in the forthcoming UNCITRAL Digest on the UNCITRAL Model Law on International Commercial Arbitration. Finally, comprehensive indices are included at the end to facilitate research by CLOUT citation, jurisdiction, article number, and (in the case of the Model Arbitration Law) keyword.

Abstracts have been prepared by National Correspondents designated by their Governments, or by individual contributors. It should be noted that neither the National Correspondents nor anyone else directly or indirectly involved in the operation of the system assumes any responsibility for any error or omission or other deficiency.

I. Cases relating to the United Nations Sales Convention (CISG)

Case 543: CISG 49(1)(a)

Spain: Provincial Court of Orense, First Division, 207/2003

Framo S.R.L. v. Cooperativas Orensanas S. Coop. Lda.

12 February 2004

Background: Ruling by Court of Combined Jurisdiction No. 6 of Ourense, 5 March 2003

Full text: http://www.uc3m.es/cisg/sespan42.htm

Abstract prepared by María del Pilar Perales Viscasillas (National Correspondent)

The case concerned two Spanish companies in dispute over the existence of a virus in birds that had been sold. The lower court declared the contract void, on the basis of article 1494 of the Civil Code, since it involved animals suffering from an infectious disease, rejecting the defendant's claim that the CISG applied. The appeal court quashed the lower court's decision, holding that the outcome would have been the same if the CISG had been applied.

Case 544: CISG 75; 77

Spain: Provincial Court of Barcelona, First Division, 943/2002

Rico S.A. v. Sovena S.A.

2 February 2004

Background: Ruling by Court of First Instance No. 47 of Barcelona, 28 June 2002

Full text: http://www.uc3m.es/cisg/sespan33.htm

Abstract prepared by María del Pilar Perales Viscasillas (National Correspondent)

Among other matters, review was sought, through appeal, of damages awarded for loss of profit, on the ground that the resales of the goods in question to an Angolan company were not substitute transactions since they did not meet the requirements of the CISG. The court held that three of the four substitute transactions were in conformity with the CISG, but not the first, which had taken place when the contract was still in force and further shipments were expected. At the time when that sale took place, the contract had not been avoided; consequently, it was not possible to claim the difference in price from a resale. The court also pointed out that that sale could not be intended to mitigate the loss, as stipulated in article 77 CISG, given that that article establishes an exception precisely in favour of the party required to pay damages. In conclusion, it considered that the method for calculating the damages was in conformity with article 75 CISG.

Case 545: CISG 3(1)

Spain: Provincial Court of Madrid, Twenty-fifth Division, 588/2003

Cysapapel S.L. v. Diaures S.P.A.

11 November 2003

Background: Court of First Instance No. 4 of Arganda del Rey, 14 April 2000

Full text: http://www.uc3m.es/cisg/sespan35.htm

Abstract prepared by María del Pilar Perales Viscasillas (National Correspondent)

Although the dispute concerned the avoidance of a contract, the Vienna Convention was cited in relation to other matters. The lower court accepted the defendant's contention regarding the legal nature of the relationship between the parties that was considered to form a contract for the supply of goods on the basis of article 3(1) CISG. The court of appeal did not take up that matter but debated matters relating to the avoidance of the contract and lack of conformity under the provisions of the Commercial Code.

Case 546: CISG 11

Spain: Provincial Court of Barcelona, 701/2003 (Sixteenth Division)

Auto Internacional S.R.L. v. Sun's Garage S.L. and Special Office of the State Agency for Tax Administration (AEAT) in the Canary Islands

28 October 2003

Background: Court of First Instance No. 50 of Barcelona, 5 February 2003

Full text: http://www.uc3m.es/cisg/sespan36.htm

Abstract prepared by María del Pilar Perales Viscasillas (National Correspondent)

The dispute related not to a sales contract but to rectification of an order of seizure on a motor vehicle effected by the State Agency for Tax Administration. In examining the allegation relating to the rectification of the seizure order, the court had to determine who the owner of the vehicle was. The company that claimed ownership was a French limited liability company, while the company that had sold the vehicle was Spanish. The court cited the CISG and article 51 of the Commercial Code, pointing out that the contract of sale of the automobile could have been concluded verbally in accordance with the consensual nature of the contract, as recognized in the legal texts cited.

Case 547: CISG 7(1)

Spain: Provincial Court of Navarre, Third Division, 223/2003

Waukesha Engine Division/Dresser Industrial Products B.V. v. Ceramica Utzubar S.A.

22 September 2003

Background: Court of First Instance No. 4 of Pamplona, 13 September 2001

Full text: http://www.uc3m.es/cisg/sespan37.htm

Abstract prepared by María del Pilar Perales Viscasillas (National Correspondent)

In relation to the CISG, the court referred to the principle of good faith, pointing out that the Convention ascribed considerable importance to that principle "in that the content of a contract should be as anticipated by the parties, in accordance with the principle of reasonable expectation, which would be gravely undermined if, as the defendant claims, the clause on referral to arbitration contained in the contract of guarantee should be applied." The facts showed that there were two contracts: one a contract of sale, under which the parties were

subject to the Spanish courts, and the second a contract of guarantee, ancillary to the contract of sale, whose general provisions had been drafted unilaterally by the seller and which provided for referral to arbitration by the American Arbitration Association. The court, relying on the aforementioned rule in the CISG, held that there had been no express submission by the Spanish party to an arbitration agreement. In other words, it considered that there was not an unequivocal intent on the part of the buyer to submit to arbitration as required by article 6, paragraph 2, of the Law on Arbitration of 1988 and article II, paragraph 2, of the Convention on the Recognition and Enforcement of Foreign Arbitral Awards (New York Convention) of 1958. It also applied the principle of autonomy or separability of the arbitration clause in pointing out that the buyer could rely on the remaining provisions of the contract.

Case 548: CISG 35(2)(b)

Spain: Provincial Court of Madrid, Thirteenth Division, 290/2002

Manuel Fernández Fernández S.A. v. Kuhne Heitz N.V.

8 May 2003

Background: Court of First Instance No. 2 of Alcobendas, 14 February 2002

Full text: http://www.uc3m.es/cisg/sespan38.htm

Abstract prepared by María del Pilar Perales Viscasillas (National Correspondent)

The buyer claimed that the seller was in breach of paragraph (2)(b) of article 35 CISG. The court, without referring to any provisions of the Convention, concluded from the evidence adduced that the seller had failed to meet its obligation to package pieces of meat separately, which had led to the loss of the buyer's European subsidy and the payment of fines.

Case 549: CISG 1(1)(a); 1(1)(b); 2; 3; 7(1); 7(2); 19; 33; 39(1); 40

Spain: Provincial Court of Valencia, Sixth Division, 405/2003

Americana Juice Import Inc. v. Cherubino Valsangiacomo S.A.

7 June 2003

Background: Court of First Instance No. 16 of Valencia, 2 December 2002

Full text: http://www.uc3m.es/cisg/sespan39.htm

Abstract prepared by María del Pilar Perales Viscasillas (National Correspondent)

The parties were in dispute over whether there had been a contractual breach in regard to a contract for the international sale of 1,500 tons of concentrated grape must and also over the sum payable as damages. In its ruling, the lower court ordered the buyer to pay the seller damages of approximately 17 million pesetas.

The buyer (appellant) claimed that the CISG applied. The court of appeal applied the Convention on the basis of article 1, paragraph (1)(a).

The court also made interesting observations relating to the interpretation of the Convention. Firstly, referring to paragraphs (1) and (2) of article 7, it drew attention to the need for uniform interpretation, a principle found in other conventions, which reflects a current trend in international trade law. Secondly, it

referred to the relevance, in interpreting the Convention, of the commentary by the UNCITRAL Secretariat on the 1978 draft of the Convention, citing specifically the comments on article 6 of that draft. Thirdly, it referred to the importance of the legal principle that calls for an independent interpretation of the Convention vis-à-vis national law, for which purpose it is necessary to adopt a methodology different from that used in applying domestic law. Fourthly, the court pointed out that the only way in which to ensure uniformity in its application was to take into account what other courts in other countries had done when applying it in cases brought before them and to seek the expert opinion of legal writers in achieving such uniformity. The court referred specifically to the CLOUT system.

The court concluded this issue by stating that the CISG, precedents of other national or foreign courts, Spanish domestic law, contractual agreements, the claims of the parties and evidence presented would be the means by which the subject-matter of the dispute would be dealt with.

Turning to substantive issues, the sales contract contained an ex factory clause, which the court interpreted in the light of Incoterms 2000. The court also referred to the UNCITRAL recommendation regarding the use of Incoterms. The facts of the case showed that the buyer had failed to meet its obligation to collect the goods from the seller's establishment within the agreed period of time. The goods suffered significant loss of colour as a result of the delay; that delay was caused by problems experienced by the buyer in opening documentary credit, which was not done until the end of November 1997. The buyer claimed that it was entitled to collect the goods at any time between the end of October 1997 and February 1998. The court, however, pointed out that that period was not intended to benefit the buyer, such a contention not being provided for under article 33 or article 7 CISG (principle of good faith). The period for collection of the goods was closely linked to the nature of the goods, whose manufacture required the raw material to be available sufficiently in advance and entailed a complex process of preparation that was impossible to improvise. It was therefore unreasonable to argue that, in the absence of any express agreement, the matter should be left in the hands of the buyer, with the grave risk that such an arrangement represented for the seller. From the contractual documents the court concluded that the parties had agreed that the goods should be made available and delivered on a staggered basis between the end of October 1997 and February 1998.

Referring to the complaint of lack of conformity, the court concluded that the buyer had not lodged the complaint within a reasonable period. It alluded to CLOUT Cases 98 and 81 with a view to determining what constituted a reasonable period. In the case in question, in which there was an ex factory clause, it held that the buyer had not acted with due diligence, since it had not examined the goods—it only collected part of the total agreed quantity—until their arrival at their destination in the United States of America, which was particularly important in the case in question since grape must loses intensity of colour over time; also, the transportation had been inadequate. Citing CLOUT Case 251, the court ruled that the burden of proof was on the buyer.

Of those goods that had not been collected, the seller was able to sell only a part to third parties (resale). The profit gained through the resale had to be deducted from the damages in order to avoid unjust enrichment, since the amount of damages

would have been increased by the lost profit on the goods that the buyer had failed to collect.

Case 550: CISG 19

Spain: Provincial Court of Alicante, 176/2003

Promociones Don Sento S.L. v. Promociones Calle Blasco Ibáñez S.L.

3 April 2003

Background: Court of First Instance No. 1 of Elche, 21 October 2002

Full text: http://www.uc3m.es/cisg/sespan40.htm

Abstract prepared by María del Pilar Perales Viscasillas (National Correspondent)

The dispute concerned the conclusion of a national sales contract on a property and the consequent fixing of the commission due to the real estate agent. The contract was held not to have been concluded because the counter-offer had not been accepted by the agreed deadline. The court relied on a decision of the Supreme Court of 28 January 2000, which was based on article 19 CISG.

Case 551: CISG 30; 34

Spain: Provincial Court of Valencia, Seventh Division, 197/2003

Tozeto S.L. v. Molina y García S.L.

24 March 2003

Background: Court of First Instance No. 6 of Gandía, 22 May 2002

Full text: http://www.uc3m.es/cisg/sespan41.htm

Abstract prepared by María del Pilar Perales Viscasillas (National Correspondent)

The case involved a contract of carriage in regard to which the payment of transport charges was claimed. Reference was made in passing to articles 30 and 34 CISG to highlight the obligation of the seller to hand over the documents relating to the goods sold.

Case 552: CISG 66; 67

Spain: Provincial Court of Valencia, Sixth Division, 107/2003

Cerámicas Jovi S.L. v. Hanjing Shipping Co. Ltd.

15 February 2003

Background: Court of First Instance No. 21 of Valencia, 27 May 2002

Full text: http://www.uc3m.es/cisg/sespan32.htm

Abstract prepared by María del Pilar Perales Viscasillas (National Correspondent)

The dispute involved not the buyer and seller under the international sales contracts, but the Spanish buyer (consignee) and the carrier. The goods were destroyed as a result of a fire on board the vessel on which they were being transported. The buyer sought damages and to be declared the owner of the goods, which was considered moot by the lower court judge. The appeal court held that the buyer bore the risks of transport from the time at which the goods were loaded on to

the vessel. Citing article 66 CISG, it accordingly ruled that the buyer was the injured party and its claim justified.

Case 553: CISG 8(2); 25; 35(2)(b); 46(2); 46(3)

Spain: Provincial Court of Barcelona, Sixteenth Division, 862/2003

Sociedade de Construçoes Aquino & Filho Lda. v. Fundició Benito 2000 S.L.

28 April 2004

Background: Ruling by Court of First Instance No. 2 of Vic, 14 July 2003

Full text: http://www.uc3m.es/cisg/sespan31.htm

Abstract prepared by María del Pilar Perales Viscasillas (National Correspondent)

The dispute concerned the sale of metal inspection covers for sewerage systems, for which a Portuguese company (the buyer) had concluded a contract with a Spanish company (the seller) in 1999 with the aim of fulfilling its commitments as a contractor for two public works projects in Portugal. The covers ordered were of the Transit and Delta models. The Portuguese company alleged that the product did not meet the specifications set out in the contract and that the covers supplied were faulty, and it therefore claimed reimbursement of part of the price already paid plus damages for the loss incurred through the removal of the unusable covers already installed and their entire replacement with new ones (replacement covers were purchased from third parties). The seller filed a counter-claim, denying breach of contract and seeking payment of the outstanding sum. The lower court ruled in favour of the seller. The buyer lodged an appeal.

The court of appeal held that the parties had agreed that the CISG should apply. Regarding breach of contract, it examined firstly the allegations of the buyer that the Delta covers failed to meet the resistance standards indicated in the seller's catalogue and that there were certain defects in the polyethylene seals of the covers. The court pointed out that a lack of conformity with the resistance standards indicated could not be concluded from the expert reports. However, the seller had admitted that there had been defects in the seals and offered to replace them free of charge, an offer which had been rejected by the buyer. The court considered that the seller had complied with the provisions of paragraphs (2) and (3) of article 46 CISG and it had not been proven that replacement was not viable.

As regards the Transit covers, the buyer alleged firstly that the product was highly unsuitable for the purpose for which the buyer had intended it, that purpose being known to the seller. The court rejected the buyer's claim, citing article 35(2)(b) of the Convention. Firstly, it pointed out that the fact that the seller had achieved a business quality accreditation (International Standard ISO 9001) did not mean that it was under any obligation to be familiar with the needs of the buyer. Secondly, it rejected the contention that the way in which the various models of covers were presented in the seller's catalogue could have misled the buyer, since the buyer was a qualified public works contractor. Therefore, the buyer could not have been unaware that the project under which the Transit covers were to be installed required type D400 covers with a diameter of 600 mm, which neither matched the specifications given for the Transit covers in the catalogue nor was evident from the prior negotiations between the parties. In fact, the court held, citing article 8(2) CISG, that the seller had not been informed of the requirements of the

works for which the covers were intended and that, at the buyer's request that the covers bear the inscription "D400", the seller had replied that that would require the purchase of a different model, which had been confirmed following the conclusion of the contract, when the seller sent to the buyer a sample of the inscription, which did not incorporate what had been requested by the buyer.

Secondly, the buyer alleged that there were resistance deficiencies in the Transit covers. The court considered that allegation to be correct. The catalogue indicated a resistance of up to 40 tons, which according to experts allows tolerances of ±3. The seller's own resistance test carried out prior to delivery showed resistance indices of 25 to 35 tons, in spite of which the seller proceeded with the delivery. The court held that the seller had committed a fundamental breach (article 25 CISG).

However, since the buyer had also made an error in selecting the product (having ordered covers suitable for footways and verges, which it then installed on the carriageway of a road), the court found that the conduct of each of the contracting parties had contributed to the final outcome and it therefore reduced by 50per cent the sum payable to the seller for the sale of the Transit covers.

Case 554: CISG 71

Spain: Provincial Court of Cantabria, Second Division, 81863/2004

Ispat Unimetal S.A. v. Trenzas y Cables de Acero PSC. S.L.

5 February 2004

Background: Ruling by Court of First Instance No. 8 of Santander, 28 March 2003

Full text: http://www.uc3m.es/cisg/sespan28.htm

Abstract prepared by María del Pilar Perales Viscasillas (National Correspondent)

The parties had drawn up a contract of sale, subject to the CISG, for 2,000 tons of steel cable (wire rod). The date of delivery initially agreed—10 March 2000—had been brought forward to 21 February 2000. On 23 February, the buyer sent a communication to the seller, requesting delivery and referring to the delay in meeting its obligations to third parties. The goods arrived on 25 February, whereupon the buyer again contacted the seller to warn it of the consequences of any further delays in delivery, namely the need to turn to another supplier and a corresponding reduction in the seller's invoice. Upon receipt of that warning, the seller notified the buyer of its intention to request its branch in Spain to halt the dispatch of the material, which at that time was at the border, owing to a quality problem and the risk of non-payment. Thus, the seller had proceeded unilaterally to suspend delivery of the material on 29 February, although delivery was subsequently resumed on 22 March. On 23 March, the buyer turned back three of the lorries with the goods still loaded, claiming quality defects, although it took delivery of the remainder of the consignment.

The court held that the seller's unilateral conduct could not be deemed to be provided for under article 71 CISG and that the delay in delivery must have entailed some loss to the buyer which the seller had to bear.

However, the Provincial Court overturned the ruling of the lower court relating to the delivery of three defective rolls of wire rod, since the buyer was unable to prove the existence of those defects.

Case 555: CISG 35

Spain: Provincial Court of Barcelona, Sixteenth Division, 30/2004

Durero Packaging S.A. v. Badrinas S.A.

28 January 2004

Background: Ruling by Court of First Instance No. 1 of Badalona, 19 February 2003

Full text: http://www.uc3m.es/cisg/sespan27.htm

Abstract prepared by María del Pilar Perales Viscasillas (National Correspondent)

The parties were in dispute over the suitability of glue purchased for the sealing of boxes containing foodstuffs; the boxes were intended for a third party in Italy. The ruling cited article 35 CISG, which refers to notification of a particular purpose of the goods, over which the parties disagreed. The court, however, pointed out that the particular purpose "was made known not to the actual seller but to a travelling salesperson of the company; and the buyer, which obviously had a quality control department, should have been guided by its own criteria and not by any opinion expressed in that connection by the seller's commercial traveller".

Case 556: CISG 55

Spain: Provincial Court of Barcelona, Sixteenth Division, 783/2003

D. Blas v. Viatges Poblenou S.L.

27 November 2003

Background: Ruling by Court of First Instance No. 5 of Arenys de Mar, 7 September 2002

Full text: http://www.uc3m.es/cisg/sespan26.htm

Abstract prepared by María del Pilar Perales Viscasillas (National Correspondent)

The dispute involved not a contract for the international sale of goods but a contract between an individual and a travel agency for the hire of skiing equipment for a school group. The facts showed that there had been a change in the destination to which the skiing equipment was to be shipped, as a result of which the hire price had not been fixed. The parties disagreed over the price payable under the contract, in particular since the plaintiff had demanded for the service a price that was later described by the court as arbitrary. The Provincial Court referred to the provisions of the CISG, specifically article 55, and to article 277 of the Commercial Code, which deals with trade commission contracts, pointing out that "in view of the freedom of form and speed of conclusion of commercial contracts, it is not unusual for the price not to be determined". In that connection, it was pointed out that, although the cited provisions were not directly applicable to the case at issue, the principles underlying them were, and, since the contract price had not been fixed, the defendant (the travel agency) could legitimately assume, when the service was arranged and the consignment was dispatched, that the price of the ski hire would

not only be normal for school groups but would also be the normal price applied by the plaintiff in such situations.

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