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CASE LAW ON UNCITRAL TEXTS (CLOUT)

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V.06-53952 (E) 230506 230506

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Case 616: CISG 1 (1); 1 (2); 95; 100 (1) - *United States: U.S. [Federal] District Court, Southern District of Florida; No. 01-7541-CIV-ZLOCH, Impuls I.D. Internacional, S.L. v. Psion-Teklogix Inc. (22 November 2002)* 13

Case 617: CISG 1 (1)(a), 8, [14], [19], 35 - *United States: U.S. [Federal] District Court for the Northern District of California; No. C-00-0224-CAL; Supermicro Computer Inc. v Digitechnic, S.A. (30 January 2001)* 14

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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.

CASES RELATING TO THE UNITED NATIONS SALES CONVENTIONS (CISG)

Case 605: CISG 4; 7 (1); 8
Austria: Oberster Gerichtshof
1 Ob 49/01i
22 October 2001
Original in German
Published in Juristische Blätter (JBl) 2002, 327; Recht der Wirtschaft (RdW) 2002, 277; Zeitschrift für Rechtsvergleichung (ZfRVgl) 2002, 32

Abstract prepared by Martin Adensamer, National Correspondent

A Spanish seller (hereinafter "the plaintiff") entered into a business relationship for the sale of fruits and vegetables with an Austrian corporation (the "defendant"). When the buyer failed to meet his obligation of payment, the plaintiff sued him to obtain the purchase price. The defendant submitted that he had not entered any contracts with the plaintiff, but that the relationship was between the plaintiff and his subsidiary. The key issue before the court was thus the identification of the contracting party: i.e. whether the manager of the subsidiary company had acted on behalf of the subsidiary or as an agent of the parent company.

The plaintiff had addressed all of its correspondence and invoices to the defendant. He had demanded from the subsidiary's manager that the defendant placed all orders. In the event that the subsidiary's manager placed any orders, they had to be confirmed in writing on the defendant's stationery or approved with the defendant's stamp. The subsidiary's manager had used the defendant's stationery for the written confirmations of orders placed by phone.

The court of first instance dismissed the plaintiff's claim. It ruled that questions concerning the representation of a party were not dealt with by the CISG. They had to be settled in conformity with the law applicable by virtue of the rules of private international law.

The court of appeal reversed the decision. It held that the question of whether the subsidiary's manager had acted in the defendant's name depended on the interpretation of his statements. Therefore the CISG was applicable since the Convention settles both the formation of contract and the interpretation of statements made by the parties (article 8 CISG).

Based on the findings, the court stated that the contracts were concluded between the plaintiff and the defendant and that according to the principle of good faith (article 7 (1) CISG), and considering the type of business, the plaintiff was entitled to assume that the orders and confirmations came from the defendant.

The Supreme Court, though asserting that the CISG was applicable, overruled the decision of the court of appeal. The Court held that, pursuant to article 4 CISG, the Convention is not concerned with issues of representation. The matter was thus to be settled in conformity with the law applicable by virtue of the rules of private international law. The provisions of articles 7 and 8 CISG could not be applied to decide issues of apparent representation as the one discussed in the case.

Case 606: CISG 1 (1)(b); 35
Spain: Audiencia Provincial de Granada
2 March 2000
Original in Spanish
Available at Aranzadi database and El Derecho database
Published in English:
http://www.unilex.info/dynasite.cfm?dssid=2376&dsmid=13353&x=1;
http://www.cisg.law.pace.edu/cisg/wais/db/cases2/000302s4.html

Abstract prepared by María del Pilar Perales Viscasillas, National Correspondent

The dispute arose out of a contract between a Spanish seller and an American buyer who wanted to import the goods, consisting in "frozen hen and chicken legs for paella", in Ukraine. The buyer (hereinafter "the plaintiff") claimed that the seller had breached the contract, since the goods were in a state that made them not fit for their consumption and commercialization.

The Court of Appeal, reversing the decision of the lower judge, deemed the CISG applicable to the case, since Spain and the United States were both parties to the Convention (article 1 (b) CISG).

The Court first considered that the claimant had failed to demonstrate that the goods supplied differed from those inspected by one of his representatives. As a matter of fact, the required health certificates, issued by the competent veterinary after the compulsory controls, certified that the elaboration of the goods, their storing and loading conformed to the health rules in force.

The Court then took into consideration the provision of article 35 CISG which defines the standards for determining whether the goods conform to the contract. According to this provision, the goods conform to the contract, among others, when they are fit for the purposes for which goods of the same description would ordinarily be used and for any particular purpose expressly or impliedly made known to the seller at the time of the conclusion of the contract. Consequently, the seller is not responsible for any lack of conformity of the goods of which the buyer knew or could not have been unaware when the contract was concluded.

With this regard, the fact that in Ukraine the import and distribution of products with the characteristics of those purchased by the plaintiff were not allowed by law, did not mean that the goods were in bad condition or not fit for the agreed purpose. The court stated that it was the plaintiff's responsibility to ascertain which characteristics the goods needed to have in order to enter the country. Furthermore, the buyer had the opportunity to inspect a sample of the goods and did not raise any objections as to their nonconformity to the sanitary requirements in the country of destination.

Thus, the Court ruled in favour of the respondent and rejected the plaintiff's claim.

Case 607: CISG 8 (1); 8 (2); 31
Germany: Oberlandesgericht Köln
16 U22/01
16 July 2001
Original in German
Published in English: http://cisgw3.law.pace.edu/cases/010716g1.html

A Belgian seller and a German buyer concluded an oral contract for the sale of animals. The animals were to be delivered 'free farm'. When a dispute arose, the buyer brought suit in Germany. The court of first instance, applying the Brussels Convention (i.e. the Convention on Jurisdiction and the Enforcement of Judgements in Civil and Commercial Matters, 27 September 1968) to which both Germany and Belgium were parties, concluded that it had no jurisdiction over the claim.

The court of appeal upheld the decision of the lower court. The court analysed the concept of international jurisdiction and the relevance of article 5 (1) of the Brussels Convention to the case. The article states that, in matters relating to a contract, the place of performance of the obligation in question is relevant to determine the jurisdiction of the court. In the case examined by the court, the obligation "in question" was the seller's obligation to deliver the goods and the place of performance was to be determined by the law governing the contract. In order to ascertain the law of the contract the rules of private international law of the forum were to be applied: i.e. German private international law. Since in the specific case both Germany and Belgium were parties to the CISG, this latter would prevail over the German Code of Private International Law.

The CISG, however, leaves the determination of the place of performance primarily to the parties: article 31 of the Convention, which determines the place of "delivery", in fact applies only if the parties have not stipulated otherwise. In the case examined, the court of appeal held that there was no evidence of an agreement of the parties as to the place of delivery.

As a matter of fact, though the parties had agreed on a delivery "free farm", the court considered that there were insufficient grounds to infer the parties' subjective intent, according to the criteria set forth in article 8 (1) CISG. The court resorted then to the objective criteria provided for in article 8 (2) CISG according to which "statements and other conducts of a party are to be interpreted according to the understanding that a reasonable person would have under the same circumstances". In this regard, the court noted that in the prevailing opinion the similar clause "free house" does not have an unequivocal meaning in trade, but is to be interpreted following the circumstances of each case. However, in the case at hand the court found that no objective criteria could help determining the place of delivery.

Thus the court reverted to the general principles of article 31 CISG. Though this provision addresses three different cases for which different rules apply, the general rule appears to be that the seller's place of business is preferred as the regular place of performance. Consequently, the court concluded that the clause "free farm" included in the agreement was not meant to determine the place of delivery, but merely to allocate the cost of transportation to the seller. Accordingly, the requirements of article 5 (1) Brussels Convention were not met and the court of first instance had correctly declared its lack of jurisdiction over the case.

Case 608: CISG 7 (1); 7 (2); 39 (1)
Italy: Tribunale di Rimini
Al Palazzo S.r.l. v. Bernardaud s.a.
26 Novembre 2002
Original in Italian
English translation by F. G. Mazzotta and A. M. Romito in Vindobona Journal of International Commercial Law and Arbitration, 8:1:165, 2004;
Commented by Franco Ferrari, *International sale law and the inevitability of forum shopping; a comment on Tribunale di Rimini 26 November 2002*, Journal of Law and Commerce, 23:2:169, 2004; Franco Ferrari, *Vendita internazionale tra forum shopping e diritto internazionale privato: brevi note in occasione di una sentenza esemplare relativa alla Convenzione delle Nazioni Unite del 1980*, Giurisprudenza Italiana, I: 896, 2003.

Abstract prepared by Cristina Poncibò

An Italian innkeeper purchased porcelain tableware from a French manufacturer. The parties agreed that the price would be paid in two instalments, the first at the time of the conclusion of the contract and the second ninety days after the delivery of the goods. However, the second payment did not take place and the seller sued the buyer to recover the money.

In court the buyer alleged that, a few days after taking possession of the goods, it was discovered that several items were defective. The buyer also alleged that it immediately informed of the discovery a sales representative of the seller who agreed to replace the defective goods, but never did. Consequently, the buyer stated his right to set off the second payment against the value of the damaged goods. The seller replied denying that an oral notice had taken place, and that the buyer's notice had been given untimely since it was given with a letter sent only six months after taking possession of the goods.

The court first discussed some aspects relating to private international law. It noted that the relevant Italian rules for determining the law applicable to contracts for the international sale of goods were set forth by the Hague Convention on the Law Applicable to International Sales of Goods, 1955. It added, however, that, when available, uniform substantive rules should prevail over private international law rules. It noted that the direct application of uniform substantive rules would avoid the double-step approach of identifying applicable law and applying it, typical of private international law rules. The court concluded that CISG rules were more specific because they directly addressed substantive issues, and that therefore CISG rules should prevail over rules of private international law.

Moreover, the court added that the direct application of uniform substantive law might have an additional advantage over private international law in preventing forum shopping, in particular when, as in the case of the CISG, case law from different jurisdictions is easily available and therefore a uniform interpretation may develop. The court noted that foreign precedents, though not legally binding, have a persuasive value and should be taken into account by judges and arbitrators in order to promote uniformity in the interpretation and application of the CISG as requested by its article 7 (1).

On the scope of application of the Convention, the court stated that the CISG governed the contract as the two parties were located in contracting States and the

substantive requirements for the application of the Convention were met, i.e., the contract was a sales contract of an international nature and the parties did not exclude the application of the Convention.

In the merits, the court found that the buyer did not give notice of the defects of the goods within a reasonable time as required by article 39 (1) CISG. It stated that, even if the "reasonable time" for notices varied on the circumstances of each case and on the nature of the goods, a notice given six months after taking possession of the goods, as in the case, was clearly not timely.

While acknowledging that the matters relating to the burden of proof were not expressly settled in the CISG, the court stated that the principle that a party asserting certain facts should bear the burden of proving them was a general principle underlying the Convention for the purposes of article 7 (2) CISG. The court therefore rejected the buyer's assertion that it gave oral notice to a sales representative of the seller immediately after the discovery of the defects, as the buyer failed to produce the necessary evidence of such oral notice, and decided the case in favour of the seller.

Case 609: CISG 1 (1); 4
United States: U.S. [Federal] District Court for the Northern District of Illinois
No. 02 C 8708
Stawski Distributing Co., Inc., v. Zywiec Breweries PLC
6 October 2003
Published in English:
http://www.cisg.law.pace.edu/cisg/wais/db/cases2/031006u1. html

Abstract prepared by Peter Winship, National Correspondent

The issue before the court was whether to continue a temporary restraining order restraining the seller from terminating a distribution agreement until a later hearing on the buyer's motion for a preliminary injunction.

An importer and distributor of beer with its place of business in Illinois had a long-standing relationship with a brewery in Poland. Their agreement provided that the distributor was the exclusive distributor of the brewery's products in the United States. They concluded their most recent agreement in 1997. Pursuant to the terms of this agreement the brewery notified the distributor in July 2002 that the brewery would terminate the agreement one year later. The distributor applied to the court for a preliminary injunction and the court entered a temporary restraining order until the distributor's motion was heard.

The court continued the temporary restraining order as to Illinois but not as to other states of the United States. When considering whether the distributor had "some likelihood" of succeeding on the merits, the court ruled that the CISG did not pre-empt the Illinois Beer Industry Fair Dealing Act because Illinois had promulgated the law pursuant to the power reserved to states by the 21st amendment to the federal constitution. A duly ratified treaty could not, therefore, override this reserved power. Without further reference to the Convention, the court found that there was some likelihood that the Polish brewery had failed to comply with the Illinois Act when seeking to terminate the agreement.

Case 610: CISG 19
United States: U.S. [Federal] District Court for North Dakota; No. A3-97-28
19 February 1998
Primewood, Inc. v. Roxan GmbH & Co. Veredelungen
Published in English: 1998 WL 1777501

Abstract prepared by Peter Winship, National Correspondent

The issue before the court was whether the case should be dismissed before trial because a contract term designated another forum to hear disputes between the parties.

A corporation with its place of business in the United States purchased plastic foil manufactured by a company with its place of business in Germany. The buyer used the plastic foils as a finish for cabinet doors. When the buyer's customers complained that the doors were yellowing, the buyer notified the seller. The seller denied responsibility. The buyer brought claims for breach of contract and tort. The seller moved to dismiss because the court lacked jurisdiction.

The court declined to dismiss the buyer's suit. Without describing how the parties concluded their contracts, the court stated that under domestic law a proposed forum selection term was a material alteration and therefore does not become part of the parties' contract unless they expressly agree to it. The court noted that there would be the same result if the CISG governed so that it was unnecessary to determine whether the Convention or national law governed.

Case 611: CISG 74
United States: [Federal] Court of Appeals, Seventh Circuit; Nos. 01-3402, 02-1867 and 02-1915
Zapata Hermanos Sucesores, S.A. v. Hearthside Baking Company, Inc.
19 November 2002; corrected 17 December 2002
Published in English: http://www.ca7.uscourts.gov/fdocs/docs.fwx?caseno=01-3402&submit=showdkt&yr=01&num=3402

Abstract prepared by Peter Winship, National Correspondent

The issues before the Court were whether the fees of a successful litigant's lawyers are "losses" within the meaning of the Convention and an automatic entitlement of a plaintiff who prevails in a suit under the Convention, and whether they can alternatively be awarded on the inherent authority of the courts to punish the conduct of litigation in bad faith.

The defendant appealed the decision of the district court to award lawyers' fees as damages under article 74 of the Convention ("damages for breach of contract by one party consist of a sum equal to the loss, including loss of profit, suffered by the other party as a consequence of the breach"). The district court stated that this provision changed the "American rule" that each litigant must bear its own legal expenses.

The court of appeals reversed the district court's decision. The court distinguished procedural law and substantive contract law. It found that the question of whether a losing party must reimburse the winner for the latter's expense of litigation is normally a question of procedural law, not covered by the Convention. The court also pointed out that the position would be anomalous if the Convention were to

include such fees as part of the "loss", in that a successful plaintiff would normally recover them, but a successful defendant would not. The court also found that there was no evidence in the drafting history or ratification hearings to suggest that the Convention was intended to include lawyers' fees incurred in the litigation as part of a "loss", and that by the terms of the Convention itself any issue not addressed in the Convention must be decided according to domestic law. Hence the Convention would not change the "American rule" on lawyers' fees.

In its opinion, the court also distinguished lawyers' fees incurred in litigation from prelitigation legal fees that might be recovered as incidental damages where, for example, the expenses were designed to mitigate damages. It further found that there were no grounds to award the fees under the "inherent authority" described above.

[The U.S. Court of Appeals denied a rehearing *en banc* on 9 January 2003 (2003 U.S. App. LEXIS 375). On 16 June 2003 the U.S. Supreme Court requested the U.S. Solicitor General to file a brief requesting the United States to express a view in this case (Supreme Court Reporter 123, 2599.)]

Case 612: CISG 92
United States: U.S. [Federal] Court of Appeals, Third Circuit; No. 02-2169
Standard Bent Glass Corp. v. Glassrobots Oy
20 June 2003
Published in English: http://vls.law.villanova.edu/locator/3d/June2003/022169p.pdf

Abstract prepared by Peter Winship, National Correspondent

The issue before the court was whether to compel arbitration because the parties had agreed to arbitrate their disputes under a sales contract.

The plaintiff, a U.S. corporation with its place of business in the United States, exchanged communications with the defendant, a Finnish company with its place of business in Finland, for the purchase of a glass fabricating system. Although the parties did not execute a single contract document, but exchanged a series of letters, the defendant installed the system, the parties signed an acceptance test protocol certifying performance in accordance with the "Sales Agreement" and the plaintiff made full payment. A dispute subsequently arose about responsibility for alleged defects in the system. The plaintiff brought suit against the defendant and the defendant moved to have the dispute referred to arbitration pursuant to a clause in an appendix to one of the exchanged communications. The district court granted the motion to compel arbitration and the plaintiff appealed. The court dismissed the appeal, finding that a binding arbitration clause was incorporated by reference in the series of letters that constituted the contract.

The court applied U.S. domestic law to resolve the issue before it. Noting that Finland had declared that it would not be bound by Part II of the Convention (CISG article 92, which governs contract formation) and that the parties had not raised the Convention's possible applicability, the court declined to consider whether to, and therefore did not, apply the Convention.

Case 613: CISG 1 (1)(a), 4 (b)
United States: U.S. [Federal] District Court, Northern District of Illinois; No. 02 C 0540
Usinor Industeel v. Leeco Steel Products, Inc.
27 March 2002

Abstract prepared by Peter Winship, National Correspondent

The issues before the court were (1) whether the seller was entitled to recover possession from the buyer of steel sold to the buyer but for which the buyer had not paid, and, if not, (2) whether the seller could avoid the contract under the Convention.

The seller, a French company with its place of business in France, sold steel plate to the buyer, an Illinois corporation with places of business in the United States. The parties' contract provided that the seller retained title to the steel until the buyer paid the purchase price. The buyer took delivery of the steel but did not make full payment. The seller sued the buyer to recover possession of the steel that had not been sold by the buyer. The legal proceedings revealed that the buyer had granted a security interest in the steel to a bank that took due steps to publicize its interest.

The court found that the Convention governed the rights and obligations of the seller and buyer according to CISG article 1 (1)(a). However, the court stated that the rights of third parties in the goods, whether arising before or after the sale, are excluded from the coverage of the Convention (CISG article 4 (b)). Given the third party bank's rights in the steel, the court concluded that the seller was not entitled to recover possession of the steel or to avoid the contract. (The court also applied domestic United States law to determine the legal effect of the retention of title clause and the relative priority of the interests of the seller and the bank.)

Case 614: CISG 4 (a); 14; 18; 19; 29
United States: California Court of Appeal, Second District; No. B140757 (Los Angeles County Super. Ct. No. BC222146)
Regency Wines, Inc. v. Champagne Montaudon
13 December 2002
Published in English: 2002 Cal. App. Unpub. LEXIS 11536, 2002 Westlaw 31788972

Abstract prepared by Peter Winship, National Correspondent

The issue before the court was whether the parties to a distribution agreement had concluded a valid agreement on the exclusive forum to hear disputes between them arising from their contract.

The plaintiff, a corporation with its place of business in the United States, concluded an alleged oral distribution agreement with the defendant, a French company with its place of business in France, under which the defendant appointed the plaintiff as its exclusive agent in California. Invoices submitted by the defendant to the plaintiff included a term that purported to make a designated French court the exclusive forum for the resolution of disputes between the parties. This term was printed in small font italics at the bottom of each invoice. The defendant terminated the contract and the plaintiff brought suit, alleging, inter alia, breach of the contract. The defendant moved to dismiss the proceeding because the forum-selection clause

made the designated French court the exclusive forum. The district court stayed the proceeding. The plaintiff appealed.

Noting that the parties agreed that the validity of the forum-selection clause should be determined under the California Commercial Code, the appellate court concluded that the forum-selection clause was unenforceable because it was a "material alteration" of the parties' agreement, which contained no forum-selection clause. The court reversed the lower court on this point and remanded the case for a determination on whether the suit should be dismissed on the grounds of *forum non conveniens*.

[Rule 977(a) of the California Rules of Court prohibits courts and parties from citing or relying on this opinion because it has not been certified for publication or ordered published.]

Case 615: CISG 1 (1)(a); (35); (36)
United States: U.S. [Federal] District Court, Southern District of New York; No. 00 Civ. 5189 (RCC)
TeeVee Toons, Inc. v. Gerhard Schubert GmbH
28 March 2002
Published in English: 2002 U.S. Dist. LEXIS 5546, 2002 Westlaw 498627, http://cisgw3.law.pace.edu/cases/020329u1.html

Abstract prepared by Peter Winship, National Correspondent

The issue before the court was whether the plaintiff's claim against the defendant should be dismissed before trial on the ground that there was no contractual relationship between the plaintiff and the defendant.

The plaintiff, a corporation with its place of business in the United States, held a U.S. patent on packaging ("Biobox") for audio and video cassettes. The defendant, a German company with its place of business in Germany, entered into contract for the design and construction of a machine to manufacture the Biobox for the plaintiff. The plaintiff negotiated the contract with the exclusive agent of the defendant. The defendant delivered the machine almost two years after the agreed delivery date and the machine failed to meet the expected production rate. The plaintiff terminated the project and brought suit against the defendant (but not its exclusive agent) for failure to deliver conforming goods as required by the CISG.

The defendant brought a motion seeking dismissal of the plaintiff's claim on the following grounds: that the defendant was not a party to the contract concluded by its exclusive agent, that the agent had not been joined in the action and was a necessary party to it, and *forum non conveniens*.

The district court denied the motion, because the plaintiff had pleaded sufficient facts to suggest that the representative was either the actual or apparent agent of the defendant, creating contractual liability for the manufacturer. The court also concluded that the exclusive agent was not a necessary party to the litigation, and that it had authority over the parties (personal jurisdiction), based on the representative's contacts with the forum state as an agent for the defendant.

Case 616: CISG 1 (1); 1 (2); 95; 100 (1)
United States: U.S. [Federal] District Court, Southern District of Florida; No. 01-7541-CIV-ZLOCH
Impuls I.D. Internacional, S.L. v. Psion-Teklogix Inc.
22 November 2002

Abstract prepared by P. Winship, National Correspondent

The issue before the federal court was whether it had jurisdiction.

The plaintiffs were three related corporations, which distributed computers. One, with its place of business in Spain, distributed computers in Europe and South America; a second, with its place of business in the United States, distributed them throughout South America; the third, with its place of business in Argentina, distributed them in Argentina. The first corporation negotiated an alleged oral contract with an English manufacturer of computers for distribution of these computers in South America by delivery to the second corporation. Deliveries were made pursuant to this contract for approximately six months.

During this period, however, the English manufacturer (who was not a party to this action) acquired a Canadian corporation, and the resultant corporation was the defendant in the action. After the acquisition, the defendant terminated the distribution contract upon 90 days notice, though offered an alternative arrangement to the corporations to act as retail distributors, which the latter declined. They then brought suit against the Canadian corporation for breach of the distribution contract and promissory estoppel.

The court noted that jurisdiction to resolve the case on the merits required both authority over the category of claim in suit (subject-matter jurisdiction) and authority over the parties (personal jurisdiction). The court found that it would have subject-matter jurisdiction if the Convention applied to the contract. Although the three plaintiffs each had its place of business in a Contracting State, the distribution contract had been concluded with a manufacturer with its place of business in England, a non-Contracting State, and under article 1 (1)(a), the Convention would therefore not apply. Further, although article 1 (1)(b) allows for the application of the Convention when a party is not from a Contracting State, the United States rejected being bound by that article when ratifying the Convention. Even though the defendant subsequently became a party to the distribution contract and was from a Contracting State, the court held that case law showed that it was the place of business of the original parties to the contract that governed whether or not the Convention would apply, and the fact that the defendant, became a party to the contract "[was] to be disregarded" because it was not known to the parties "at any time before or at the conclusion of the contract". (Article 1 (2) CISG). The court therefore found that the Convention did not apply to the contract.

The court also found that it had no alternative subject-matter jurisdiction based on Article III of the United States Constitution, which extends the judicial power of the United States actions between United States entities and foreign entities, because both plaintiffs and defendant included foreign corporations.

Given the lack of subject-matter jurisdiction, the court found it should not proceed to address the other issues raised in the pleadings, and dismissed the action.

Case 617: CISG 1(1)(a), 8, [14], [19], 35
United States: U.S. [Federal] District Court for the Northern District of California; No. C-00-0224-CAL
30 January 2001
Supermicro Computer Inc. v. Digitechnic, S.A.

Abstract prepared by Peter Winship, National Correspondent

The issue before the court was whether a buyer's claim that goods were nonconforming should be dismissed before trial because a term in the seller's invoices limited its obligation with respect to the quality of the goods.

On fourteen occasions a manufacturer of computer parts with its place of business in California sold computer parts to an assembler and distributor of computer network systems with its place of business in France. On each occasion the French enterprise placed orders by telephone or electronic mail and the US manufacturer shipped the goods to France together with an invoice and a user's guide. The invoice and user's guide set out terms and conditions, including terms limiting the warranty given and the liability of the seller for any breach. When it experienced problems with some parts, the buyer demanded damages for its losses and brought suit in France. The seller subsequently brought suit in the United States seeking a declaratory judgment that it was not liable because of the contract terms.

The court dismissed the seller's claim without prejudice to the right to raise the claim in a later action. The court found that the Convention applied because the parties had their places of business in two different Contracting States, CISG article 1(1)(a). It concluded that while article 35 CISG addressed the seller's obligation with respect to the conformity of the goods, the Convention did not address the disclaimer of this obligation. Noting that the "mirror image" approach to contract formation allowed the court to inquire into the subjective intent of the parties (CISG art. 8), the court stated that the disclaimer might not be effective if the buyer established that it did not know of the disclaimer. Because the French court would address this issue, the court decided that this uncertainty was one of several reasons for not exercising its discretion.

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