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Introduction

This compilation of abstracts forms part of the system for collecting and disseminating information on court decisions and arbitral awards relating to Conventions and Model Laws that emanate from the work of the United Nations Commission on International Trade Law (UNCITRAL). The purpose is to facilitate the uniform interpretation of these legal texts by reference to international norms, which are consistent with the international character of the texts, as opposed to strictly domestic legal concepts and tradition. More complete information about the features of the system and its use is provided in the User Guide (A/CN.9/SER.C/GUIDE/1/Rev.3). CLOUT documents are available on the UNCITRAL website at: https://uncitral.un.org/en/case_law.

Each CLOUT issue includes a table of contents on the first page that lists the full citation of each case contained in this set of abstracts, along with the individual articles of each text which are interpreted or referred to by the court or arbitral tribunal. The Internet address (URL) of the full text of a decision in its original language is included in the heading to each case, along with the Internet addresses, where available, of translations in official United Nations language(s) (please note that references to websites other than official United Nations websites do not constitute an endorsement of that website by the United Nations or by UNCITRAL; furthermore, websites change frequently; all Internet addresses contained in this document are functional as of the date of submission of this document). Abstracts on cases interpreting the UNCITRAL Model Law on International Commercial Arbitration include keyword references which are consistent with those contained in the Thesaurus on the Model Law, prepared by the UNCITRAL Secretariat in consultation with National Correspondents. Abstracts on cases interpreting the UNCITRAL Model Law on Cross-Border Insolvency also include keyword references. The abstracts are searchable on the database available on the UNCITRAL website by reference to all key identifying features, i.e. country, legislative text, CLOUT case number, CLOUT issue number, decision date or a combination of any of these.

The abstracts are prepared by National Correspondents designated by their Governments, by individual contributors, or by the UNCITRAL secretariat itself. 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.

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Cases relating to the United Nations Convention on Contracts for the International Sale of Goods (CISG)

Case 2140: CISG 1 (1)(a); 25; 51(2); 74; 81; 84

People's Republic of China: Higher People's Court of Zhejiang Province
Case No.: (2022) Zhejiang People's Court of Final Instance Case No. 811
ARTPLAST Co., Ltd. v. Taizhou City Huangyan Smart Machinery Mould Co., Ltd.
31 July 2023
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Published as: Representative examples of the application of international treaties and international practices to foreign-related civil and commercial cases issued by the Higher People's Court, 28 December 2023
Available at: https://cicc.court.gov.cn/html/1/218/62/163/2432.html

Abstract prepared by Zhang Bona, National Correspondent

This case involves the invalidation of a contract for the international sale of goods and the legal consequences stemming therefrom. In May and June 2020, ARTPLAST Co., Ltd. (hereinafter referred to as ARTPLAST) and Taizhou City Huangyan District Smart Mechanical Mould Co., Ltd. (hereinafter referred to as Smart) negotiated and concluded a sales contract, agreeing that ARTPLAST purchase mask machines and components from Smart. Subsequently, ARTPLAST asserted that Smart delivered goods that were not brand new and thus did not conform to the contract.

ARTPLAST sued for invalidation of the contract, restitution of the payment for the goods and compensation for lost interest and for shipping and insurance costs. Smart argued that the machinery it provided was new, that there was video proof that the equipment had not rusted prior to shipment and that the rusting of the machinery in shipping to Europe was most likely caused by rain or disinfectant liquids. The original transaction was FOB Ningbo, and it was subsequently changed to Ex Works delivery, with ARTPLAST itself shipping it to Bulgaria and Smart company bearing no liability for it during shipment.

The court of first instance held that the subject of the sales contract between the two parties was the mask machine and components, but that it was not clear whether the machinery must be brand new. It held that the fact that the mask machine provided by Smart to ARTPLAST had problems such as rust spots or scratches was insufficient to conclude that such problems reached the point of "effectively depriving the purchaser of what the purchaser was entitled to expect under the contract", thus rejecting all of the claims put forward by ARTPLAST.

ARTPLAST appealed against the decision. The Zhejiang Province Higher People's Court held that the parties' places of business in this case are located in China and Bulgaria, respectively, both of which are CISG contracting States, and that as the parties did not explicitly exclude application of the CISG in the contract, the CISG should be applied to resolve disputes. The mask machine delivered by Smart showed many signs of wear and tear, corrosion, scratches and rust, etc., rendering it impossible for ARTPLAST to realize the contractual purpose of using the equipment to produce masks in short supply during the pandemic, and constituting a fundamental breach of contract under article 25 CISG. Under article 51 (2) CISG, ARTPLAST had the right to declare the contract avoided and to claim restitution of the price paid and the corresponding interest under articles 81 and 84 CISG. In addition, in accordance with article 74 CISG, at the time of the conclusion of the contract, Smart ought to have been able to foresee the transportation expenses, insurance premiums and other losses borne by ARTPLAST. Taking this into consideration, the court found that Smart must therefore provide compensation for them.

Case 2141: CISG 1 (1)(a); 25; 26; 30; 33; 36; 45; 49; 51(2); 73(3); 74; 78; 81(1); 84(1)

People's Republic of China: Beijing City Intermediate People's Court No. 4
Case No.: (2022) Beijing 04 People's Court of First Instance No. 294
Shaphar Group LLC v. Baiqi Holdings (China) Co., Ltd.
16 May 2023
Original in Chinese
Published as: Representative examples of the application of international treaties and international practices to civil and commercial cases involving foreign parties, issued by the Higher People's Court, 28 December 2023
Available at: https://cicc.court.gov.cn/html/1/218/62/163/2432.html

Abstract prepared by Zhang Bona, National Correspondent

This case deals with the avoidance of contracts for the international sale of goods and the legal consequences stemming therefrom. On 3 April 2020, Shaphar Group LLC (hereinafter referred to Shaphar) and Baiqi Holdings (China) Co., Ltd. (hereinafter referred to as Baiqi) entered into a contract for the sale of gloves, agreeing that Shaphar purchase gloves from Baiqi. Shaphar claimed that Baiqi Company breached the contract with such actions as defective performance and delayed delivery, and it sued for invalidation of the contract, return of payment and interest and compensation for losses caused by Baiqi's breach of contract.

After hearing the case, the court held that the countries where the parties had their places of business were the People's Republic of China and the United States of America, both of which were CISG contracting parties; that there were no circumstances precluding the application of the provisions of the Convention in this case; and that the parties had not excluded the application of the Convention. Therefore, the CISG should be applicable in this case. Among the goods delivered by Baiqi, more than half were defective, of quality inferior to the agreement's standard. To date, Baiqi had still not delivered some goods, thus seriously exceeding the delivery time stipulated in the contract and frustrating Shaphar's purpose of earning profits through the contract, constituting a fundamental breach of contract as stipulated in article 25 CISG. Under articles 45, 51 (2) and 73 (3) CISG, Shaphar was entitled to cancel the contract, i.e., to declare the contract avoided.

With regard to the time of avoidance of the contract, article 26 CISG sets out the essential elements for a declaration of avoidance, namely that "a declaration of avoidance of the contract is effective if made by notice to the other party". The CISG does not apply the principle of "effect upon arrival" to such notifications, but rather the principle of "effect when posted". Shaphar issued a lawyer's letter to Baiqi on 20 May 2021 notifying it of the cancellation of the glove sales contract. Although Baiqi Company signed for the lawyer's letter on 22 May, the glove sales contract in this case is invalid from the date when Shaphar sent the above-mentioned lawyer's letter. Accordingly, the court upheld all the claims of Shaphar and ruled that Baiqi should return the payment of US$ 945,000 to Shaphar and pay interest (as from 20 May 2021) and compensate an actual loss of US$ 18,882.12.

Case 2142: CISG 1 (1)(a); 38; 39; 74; 78

The Netherlands: Rechtbank Midden-Nederland (District Court)
WORLD WIDE QUALITY IN MEAT B.V. (Seller) v. Buyer
20 January 2016
Available in Dutch at: rechtspraak.nl (ECLI:NL:RBMNE:2016:412)

Abstract prepared by Jan Smits, National Correspondent, and Steven Debie

The dispute revolves around the delivery of frozen meat from the Seller to the Buyer. The core of the dispute concerns the quality of the delivered meat, with the Buyer asserting the presence of bone fragments, deeming it not in conformity with the agreed specifications and hence asserting a fundamental breach of contract. Also, the court had to establish the applicability of the CISG and the Seller's terms and conditions. Despite the choice of Dutch law, the CISG was not explicitly excluded by the parties,

and given its inherent application in the international sales of goods under Dutch law the CISG applies according to article 1(1) (a) CISG as both parties were from contracting states of the CISG (the Kingdom of the Netherlands and France). Worth mentioning was that the court ruled that there was a valid forum selection clause, as they are typically enforced in the trade sector by reference on invoices, without necessitating the actual provision of the general terms.

The court had to determine the applicability of the Seller's general terms and conditions. For this it referred to the CISG's principles, emphasizing the need for uniform interpretation and good faith in international trade. The court aligned with the CISG Advisory Council Opinion No 13, outlining "Black Letter Rules" which suggest that general terms are part of the contract if agreed upon (expressly or impliedly) and reasonably known to the counterparty. In this instance the court found that the Seller did not establish the provision of these general terms to the Buyer in any recognized manner, such as an attachment to contract-related documents or prior agreements. The Seller's reference to terms deposited with the Chamber of Commerce was deemed insufficient for constituting a reasonable opportunity for the Buyer to become acquainted with them.

Concerning the timely complaint about the meat's quality, Article 38 CISG obliged the Buyer to promptly inspect the goods and notify the Seller of any defects within a reasonable time, as stipulated in Article 39 CISG. The court stated that the presence of bone fragments should have been discovered during a proper inspection immediately after delivery. Therefore, the complaint period commenced right after receiving the meat. Considering the perishable nature of the goods, a short complaint period is typical, and the Buyers' delay of over a month to file the complaint exceeded a reasonable time frame, thus waiving their right to claim non-conformity. The court asserted that even if non-conformity were proven, the Buyer lost the right to invoke it due to the exceeded complaint term. Consequently, the court ruled in favour of the Seller for the payment of invoices, noting that even the application of Dutch Civil Code articles 7:23 and 6:89 would not alter the outcome due to the Buyer's failure to meet inspection and complaint obligations.

Regarding compensation for statutory interest and extrajudicial costs claimed by the Seller, Articles 74 and 78 CISG state that extrajudicial costs may be eligible for compensation and respectively that if a party fails to pay the price, the other party is entitled to interest. However, the Vienna Sales Convention does not specify the composition of the amount to be compensated, respectively the term and rate of the interest. Therefore, Dutch law applies for this determination. The court, applying Dutch law, awarded statutory interest and rejected the claim for extrajudicial costs.

Case 2143: CISG 38; 39; 45 (1)(a); 45 (1)(b); 49 (1); 25
The Netherlands: Gerechtshof's-Hertogenbosch (Court of Appeal)
Buyer v. Helichem B.V. (Seller)
22 September 2015
Available in Dutch at: rechtspraak.nl (ECLI:NL:GHSHE:2015:3666)

Abstract prepared by Jan Smits, National Correspondent, and Steven Debie

In this case, the dispute centred around the purchase of hand cleaning gel, hereafter: "the soap". The Buyer raised concerns over the quality of the soap across various batches, citing bacterial contamination that caused excessive foaming, leading to customer complaints. In the first instance, the District Court acknowledged the first delivery of soap was indeed defective due to preservation issues. However, the Buyer forfeited the right to hold the Seller accountable due to the failure to promptly inspect the goods, as is required under Article 38 CISG. The Buyer's inadequate actions in fulfilling the inspection and notification obligations led to the dismissal of claims related to not only the first delivery but also the subsequent second to fourth deliveries.

Upon appeal, the Court of Appeal underscored the necessity of immediate inspection to detect potential bacterial contamination, a standard practice for products like the

soap. Notably, the Seller had provided samples for testing, emphasizing the Buyer's responsibility to conduct such tests – also taking into account the relatively minor cost. The court furthermore pointed out the inconsistency in the Buyer's stance, imposing an inspection duty on its customers while failing to adhere to the same standards. Consequently, the court ruled that the Buyer did not satisfy Article 38(1) CISG's requirements and, by not notifying the Seller of the defects in time, as per Article 39 CISG, lost the right to claim non-conformity.

Regarding contract termination, the court noted that the Buyer advocated for termination and damages under Article 45(1)(a) and (b) CISG, correctly stating that breach assessment precedes compensation obligations. The Buyer posited that mutual consent for termination was evident due to the Seller's failure to address the delivery issues. However, the Seller's proactive communication and proposed solutions for quality assurance demonstrated its intent to continue the business relationship, leading the court to conclude that the Buyer's assumption of mutual termination was unjustified.

Lastly, the Buyer demanded a declaratory judgment to terminate the contracts, which the Seller contested. While Article 49(1)(a) CISG allows termination for fundamental breaches, as defined in Article 25 CISG, the Buyer failed to prove that the Seller could not have remedied the defects within a reasonable timeframe. More specifically the Buyer has not argued that it would have been impossible for the Seller to replace the delivered goods within a reasonable period if the Buyer (or its customer on its behalf) had inspected the soap shortly after receiving the samples or immediately after the delivery and had then promptly requested the Seller for a replacement. Without substantial grounds for a fundamental breach, the Buyer's argument fell short in establishing grounds for a fundamental breach and with that the compensation for any damage.

Taking the above into consideration, the Court of Appeal concluded that the Buyer did not exercise his rights under the CISG in a timely manner and therefore forfeited these rights. Furthermore, the court saw no reason to terminate the contract or why the contract would have already been terminated. Consequently, the Court of Appeal ruled that the Buyer had to pay the outstanding invoices as well as any damages incurred by the seller.

Case 2144: CISG 69
The Netherlands: Hoge Raad (Supreme Court)
Buyer v. Primar S.A.R.L. (seller)
17 April 2015
Available in Dutch at: rechtspraak.nl (ECLI:NL:HR:2015:1076)

Abstract prepared by Jan Smits, National Correspondent, and Steven Debie

At the heart of this dispute lies Article 69 CISG, which delineates the passing of risk associated with goods from a seller to a buyer. The judicial challenge in this case was to pinpoint the moment when the risk of potential defects or damages transitioned from the Seller to the Buyer. In this case, the Buyer questioned the quality of the tomatoes acquired from the Seller, as they were deficient upon delivery by the Buyer to the final destination in Moscow. The Buyer posited that there existed a fundamental defect, which detrimentally impacted the tomatoes' quality. This argument suggested that the flaw was present at the point of delivery at the Buyer's specified address, alluding to a root issue potentially tied to disease or pathogens.

In its deliberation, the Court of Appeal proceeded with the assumption that the tomatoes were in pristine condition upon their arrival at the Buyer's address. However, the court recognized the potential for the tomatoes to manifest defects at a later stage. Such defects could arise from disease, the natural aging process, or inconsistent adherence to requisite cooling protocols, particularly during transportation. The salient question was whether the deficiency in the tomatoes was a consequence of an infection contracted prior to transportation, as postulated by experts, or if it originated from another source.

The Court of Appeal, in accordance with Article 69 CISG, determined that the risk associated with the tomatoes shifted from the Seller to the Buyer upon their delivery to the Buyer's address. The ensuing transportation from the Buyer's address to Moscow, both arranged and financed by the Buyer, thus placed the associated risk on the Buyer. In the absence of definitive evidence from both the court and experts concerning the tomatoes' consistent cooling and transportation under standardized temperature conditions, the court could not rule out the possibility of damage during the tomatoes' transit from the Buyer's address to Moscow. This assessment led the court to depart from the expert conclusions, which refuted the potential for damage during transit. The court therefore ruled that the Buyer was responsible for the damages because they failed to provide compelling evidence that the tomatoes were consistently cooled and maintained at standard temperatures during transit to Moscow.

Upon appeal, the Supreme Court presented a contrasting viewpoint. The Supreme Court emphasized the necessity for clarity in the passing of risk and highlighted ambiguities about the transportation phase. While the Supreme Court agreed with the Court of Appeal's determination that the risk associated with the tomatoes shifted to the Buyer upon delivery at the Buyer's address, it took exception in its subsequent evaluation. The Court of Appeal considered the transportation conditions between the Buyer's address and Moscow as crucial in determining liability. However, the Supreme Court challenged this assessment, given the Buyer's detailed contention that the tomatoes were already defective upon delivery at the Buyer's address. If this assertion was upheld, the Seller would be liable for the damages, as stipulated by Article 69 CISG, which holds the seller accountable if goods do not align with the agreement when the risk transitions to the buyer. In this context, the conditions of the transit from the Buyer's address to Moscow become irrelevant. The Buyer's assertion regarding the defectiveness of the tomatoes upon delivery is therefore of paramount importance, and its neglect by the Court of Appeal was a notable oversight. Consequently, the Supreme Court overturned the ruling from the Court of Appeal and referred the case to another Court of Appeal for further scrutiny.

Case 2145: CISG 25: 49
The Netherlands: Gerechtshof Arnhem-Leeuwarden (Court of Appeal)
Bestvaer (seller) v. Obbo (buyer)
2 September 2014
Available in Dutch at: rechtspraak.nl (ECLI:NL:GHARL:2014:6781)

Abstract prepared by Jan Smits, National Correspondent, and Steven Debie

The central issue in this case concerns the question of whether there was a fundamental breach of contract, and if such a breach justifies the avoidance of the contract.

The Buyer in this case purchased 2,600 step scooters, with the contract stipulating a load capacity of 125 kg for each scooter. The Buyer contended that the delivered scooters did not meet the contractual specifications and thus sought to avoid the contract. Initially, the District Court ruled in favour of the buyer regarding the refund of the purchase price and compensation for lost profits. However, it rejected claims for damages concerning potential end-user claims and extrajudicial costs. Both parties appealed this decision. In reviewing the appeal, the Court of Appeal found Articles 49 and 25 CISG pertinent. Article 49 CISG states that the Buyer may declare a contract avoided if the failure by the Seller to perform his obligations under the contract or the CISG amounts to a fundamental breach of contract. Article 25 CISG states that a breach of contract is fundamental if it results in such detriment to the other party as substantially to deprive him of what he is entitled to expect under the contract.

The Buyer in this case cited several breaches of the contract: firstly, the scooters lacked the agreed-upon sticker indicating a 125 kg load capacity, displaying instead a 100 kg capacity. The Court of Appeal, however, did not consider this a fundamental

breach per Article 25 CISG, deeming it a minor issue that could be easily rectified. The Court of Appeal also dismissed concerns about standard packaging indicating a 100 kg capacity, suggesting the Buyer could have refused the packaging or requested modification of the packaging or sticker. Additionally, the Buyer alleged a technical or quality defect, asserting the scooters could only support 100 kg, not the agreed upon 125 kg. The Seller disputed this, claiming inspections conducted in response to the Buyer's complaints found the scooters satisfactory, a point the Buyer insufficiently contested. The Court of Appeal ruled that the Buyer failed to adequately substantiate these claims and did not present sufficient evidence or tests to support the assertion of defects. The Court of Appeal added that the step scooters were still in the possession of the Buyer, so there was nothing to prevent the Buyer from substantiating this claim.

The Buyer also raised issues regarding the absence or incorrect language of user manuals and instructions. The Seller countered these claims, stating that manuals were present during random checks and that no agreement on language was made. The Court of Appeal found the Buyer's substantiation and proof regarding these points insufficient.

Lastly, the Buyer claimed not all scooters were delivered, receiving only 2,372 out of 2,600. The Seller asserted that the scooters were fully delivered in two shipments, a claim the Buyer neither contested nor substantiated. In conclusion, the Court of Appeal determined that the Buyer failed to prove the alleged breaches of contract, except for the issue with the incorrect stickers, which, in isolation, did not warrant the avoidance of the contract. Consequently, the Court of Appeal overturned the District Court's ruling and dismissed the Buyer's claims grounded on the avoidance of the contract.

Case 2146: CISG 10(a); 39; 74
The Netherlands: Rechtbank Rotterdam (District Court)
POWERGEN S.R.L (Seller) v. Buyer
28 November 2012
Available in Dutch at: rechtspraak.nl (ECLI:NL:RBROT:2012:BY5298)

Abstract prepared by Jan Smits, National Correspondent, and Steven Debie

This case involves defects in chargers delivered by the Seller, most notably an explosion of a charger upon first use, leading to various claims for damages by the Buyer. The primary discussion revolved around the applicable law and jurisdiction. The court affirmed its jurisdiction based on Article 2(1) of the Brussels I Regulation in conjunction with Article 99 of the Dutch Code of Civil Procedure.

The CISG, since the parties were based in contracting States and had not excluded its applicability in their agreement, was determined to be the governing law. According to article 10(a) CISG, the place of establishment shall be considered the place that is most closely related to the contract and its performance, taking into account the circumstances known to the parties or considered by them at any time before or at the contracts' conclusion. The Buyer argued that Mr. [A]'s (his contact) business established in the Netherlands should be considered a branch of the Seller, closely involved in the contract and its execution. However, the Buyer failed to provide enough evidence to justify this claim. For a business to be recognized as a branch under the CISG, it must engage significantly and independently in the entity's economic and commercial activities. The longstanding business relationship, initial contacts with the Italian headquarters, and the consistent handling of orders and manufacturing by the headquarters underscored that the focal point of operations and contract execution was in Italy. The Buyer's dealings with Mr. [A] and his designation as "Sales Director Benelux" were insufficient to qualify his business as a branch under CISG, lacking the necessary commercial and economic autonomy.

For issues not covered by the CISG, the Rome I Regulation was invoked to determine the governing law of the contracts between the parties. With no specific contractual choice of law, Italian law was applied as the main rule, in line with the Seller's

principal office in Italy, which managed the execution of the purchase agreements. The court saw no compelling reason to deviate from this standard. Consequently, Italian jurisdiction, including the CISG, was deemed applicable by the court.

The court then addressed the claims of non-conformity of the chargers but noted that the Buyer did not file its complaints within a reasonable time as necessitated by Article 39 CISG (the Buyer expressed its concerns at first when filing this lawsuit). Therefore, the court ruled that the Buyer had forfeited his rights to claim non-conformity. The Buyer sought to offset their counterclaim against any dues in the main claim. This matter, not covered by the CISG, was assessed under Italian law. Although the Seller contested the counterclaim, the court found that a portion of the Buyer's claim was apparent and payable, permitting a set-off for the portion deemed appropriate.

The Buyer claimed a loss for some of the chargers, which the Seller acknowledged as mislabelled, thus accepting liability and allowing this loss to be considered for set-off. Regarding the explosive charger, the Buyer sought compensation for additional labour and transportation costs, plus a stock of unsellable batteries, and a significant loss in profits allegedly due to losing a major client following the charger's explosion upon first use. The explosion's cause was contested: the Buyer cited a manufacturing defect, while the Seller attributed it to a loose component during transport. The court determined non-conformity attributable to the Seller since the charger lacked the necessary properties for normal use at delivery. However, the court noted the Buyer's insufficient explanation and proof of the causal link between the defect and the claimed damages regarding the major client's loss and the stock of unsellable batteries. The court found it could not conclude that this loss was a foreseeable consequence for the Seller as stated in article 74 CISG. Finally, the Buyer sought damages for nine additional chargers but failed to clarify which chargers and their specific defects. Consequently, the court could not grant any damages for these chargers.

In conclusion, the court awarded the Buyer a minor portion of their claimed damages to offset against the Seller's main claim for unpaid invoices, ruling that the Buyer must pay the remaining amount to the Seller.

Cases relating to the United Nations Convention on Contracts for the International Sale of Goods (CISG) and the United Nations Convention on the Limitation Period in the International Sale of Goods (Lim Conv)

Case 2147: CISG [1]; 6; Lim Conv (amended text) 3

Slovenia: Višje sodišče v Celju (High Court of Celje)
VSC Sklep Cpg 18/2019
17 April 2019
And VSC Sklep Cpg 113/2020
20 January 2021
Original in Slovenian
Available at: https://www.sodnapraksa.si/

Abstract prepared by Ana Vlahek and Tjaša Kalin

A Hungarian seller and a Slovenian buyer entered in a framework agreement for the supply of semi-manufactured glass products. The buyer did not pay part of the purchase price claiming counterclaims against the seller. The seller initiated proceedings before the court of first instance for recovery of the outstanding balance and related interests. As the claims were based on invoices issued over a period of two and a half months at the end of 2013, and the court proceedings were initiated at the beginning of 2017, the buyer argued that they were time-barred under article 349 of the Slovenian Code of Obligations, which sets out a three-year limitation period for claims arising from commercial contracts.

The Court of first instance established that the CISG and the Limitation Convention were applicable to the contract. The buyer lodged an appeal, stating that the parties

had agreed upon Slovenian law as the law applicable to the contract, and that the Limitation Convention did not apply, because, among other arguments, the contract had been concluded in the Slovenian language, the claim had been filed under Slovenian substantive and procedural law, and the place of performance of the obligation was the place of business of the buyer, which was located in Slovenia. On the other hand, the seller argued for the application of Hungarian law as the law most closely connected to the contract.

The High Court of Celje (VSC Sklep Cpg 18/2019) stated that the Court of first instance had failed to inform the parties about its intent to apply the CISG and the Limitation Convention, and that therefore the parties did not have sufficient opportunity to plea based on these Conventions. Therefore, the High Court remanded the matter to the Court of first instance to determine whether the parties had in fact agreed on the applicable law.

The Court of first instance decided again upon the matter and reaffirmed that the CISG and the Limitation Convention were applicable to the contract. It noted that the first decision in the Court of first instance had indicated that there was no agreement between the parties on the law applicable to the contract. The buyer filed again an appeal claiming that Slovenian law was instead applicable.

In its second judgement (VSC Sklep Cpg 113/2020), the High Court of Celje reiterated the qualification of the contract as a contract for the international sale of goods. It noted that both Hungary and Slovenia were contracting parties to the CISG and to the Limitation Convention, and that the Rome I Regulation also applied. It added that the CISG, the Limitation Convention and the Rome I Regulation were international legal texts with direct applicability that were hierarchically above national laws. It explained that the defendant's claims that the parties had agreed on Slovenian law did not preclude the application of the mentioned international legal texts. In particular, it noted that, since the Limitation Convention was part of Slovenian law, it precluded the application of Slovenian national legislation on the limitation period. However, since the CISG and the Limitation Convention did not have provisions regarding the interest rate, Slovenian national law applied to that issue.

The High Court also recalled that the parties to the contract could exclude the application of the CISG and of the Limitation Convention. However, it noted that under its article 3 the Limitation Convention could be excluded only expressly, while article 6 CISG was more flexible with respect to the form of the exclusion.

The High Court returned the case to the Court of first instance for further consideration.

Cases relating to the United Nations Convention on the Use of Electronic Communications in International Contracts (ECC)

Case 2148: ECC 10(2)

Australia: Supreme Court of Queensland
Demex Pty Ltd v John Holland Pty Ltd [2022] QSC 259 (Before Justice Crowley)
25 November 2022
Available at: www.austlii.edu.au/cgi-bin/viewdoc/au/cases/qld/QSC/2022/259.html

Abstract prepared by Alan Davidson, National Correspondent

This case deals with the time of receipt of an email under the New South Wales Electronic Transactions Act 2000 (ETA). Section 13A deals with "Time of receipt" and is based on subarticle 10(2) of ECC.

Demex Pty Ltd (Demex) entered into a construction contract with John Holland Pty Ltd (John Holland). Pursuant to the Building and Construction Industry Security of Payment Act 1999 (NSW) (*Payment Act*) Demex could submit progress *Payment Claims* to John Holland. John Holland could accept the claim and make payment, or if it considered a lesser amount was payable, John Holland could provide Demex with

a *Payment Schedule* under the *Payment Act* setting out the amount it contended was payable, with reasons. On the facts and under section 14(4) of the *Payment Act*, John Holland must serve the *Payment Schedule* "within 10 business days after the payment claim is served".

The *Payment Claim* was sent by email on Saturday, 25 September 2021 claiming A$5,395,557.59. On 12 October 2021, John Holland issued a *Payment Schedule* in response, assessing the amount to be A$1,175,641.95. On 20 October 2021 Demex also issued a tax invoice to John Holland for the amount of A$1,175,641.95 in respect of the *Payment Claim*. On 25 October 2021, John Holland paid the Tax Invoice in full. However, at the hearing Demex contended that the *Payment Schedule* was invalid as it was not provided within 10 business days after the *Payment Claim* was served. Under the *Payment Act* if the *Payment Schedule* was not served within the 10 business days, then the full amount under the *Payment Claim* is due in full as a binding statutory debt, amounting to a balance of A$4,219,916.64 plus interest. John Holland claimed it was served in time.

If the payment claim was served on Saturday 25 September 2021, then the first day for counting 10 business days would be Monday 27 September 2021 and John Holland would have only until Monday 11 October 2021 to serve the *Payment Schedule*. John Holland contends that the email sent on 25 September 2021 was not received until Monday 27 September; then the first day for counting 10 business days would be Tuesday 28 September 2021 and John Holland would have until Tuesday 12 October 2021 to serve the *Payment Schedule*. (Note that in New South Wales Monday 4 October 2021 was a public holiday.)

There was no dispute that the *Payment Claim* was sent to the correct designated email address for John Holland. The Court equated "service" with the "time of receipt" under the ETA. Demex submitted that proof of receipt soon after the email is sent is an "obvious inference to be drawn in all the circumstances". Demex pointed to the evidence in the header to the main text of the email which stated: "Sent: 25 September 2021 2.06 pm". Demex argued that the Court should take judicial notice of the fact that emails are a means of "instantaneous" electronic communication and that the Court can rely upon a "presumption of regularity". Demex submitted that the Court should be satisfied that it is more probable than not that the email was received in the sense required by the ETA at or about the time it was sent. John Holland submitted that Demex had failed to prove that the email was received by it at, or about the time it was sent. It argued that Demex bore an evidential onus and that there was an absence of sufficient evidence to prove the asserted fact. It argued that the Court could not take judicial notice of emails being an "instantaneous communication" and that the Court should not apply some vague and unprecedented rule or principle to that effect. On the issues of onus of proof, John Holland submitted that to require the recipient to adduce evidence about receipt would amount to a reversal of the onus of proof. Finally, it submitted that proof of when the email becomes "capable of being retrieved" as required by the ETA, is a matter that must be established by Demex.

First, the Court considered that "the proper construction of these provisions is that service of a payment claim by email is effected when it is received at the nominated email address of the recipient party. There is no requirement that the recipient party must be aware of the receipt". The Court observed that whilst there is no dispute that the email was received by John Holland by at least Monday 27 September 2021, there is no direct evidence of the actual time of its receipt.

The Court expressed concern that Demex adduced little evidence on the receipt issue stating: "The absence of evidence on this point may perhaps have been due to Demex's misapprehension, revealed in the course of oral submissions, that there was 'no contest that this email was on the system ... on the day it was transmitted'". However, the point had not been conceded John Holland.

The Court held that the initial email was sent at or about 2:06 pm on Saturday, 25 September 2021; however, "proof of the date and time an email was sent does not automatically prove the date and time it was received".

On the submission that the Court should take judicial notice that the email was received at or about the time it had been sent, the Court stated: "Whilst I am prepared to take judicial notice of the fact that email is a form of electronic communication, I am not prepared to extend such notice to relieve Demex of the onus of adducing evidence proving that the Payment Claim email was received by John Holland on Saturday, 25 September 2021 at, or about, 2:06 pm." The Court stated that without more, it cannot take judicial notice of when an email is ordinarily *received* after sending, nor when an email ordinarily *reaches* the intended recipient's email address.

Demex argued the "presumption of regularity" in these terms: "when things are working properly … we're assisted with the presumption of regularity, that we all assume that mechanical devices work in a way that they're supposed to work unless there's some reason to draw an inference that they're not, and that's available here". However, the Court expressed its concern that it was not entirely clear what rule, principle or doctrine was said to be applicable. No authority was cited for the presumption. It may be a common law presumption of accuracy with respect to the readings or measurements produced by certain scientific or technical instruments. However, that was held not to apply to email delivery in this case.

The Court noted that an email contains a header which states the date and time it was sent. However, the Court stated that without more this cannot "be presumed to accurately prove the date and time the email was received". The Court considered that the issue must be proven on the balance of probabilities, and in this case, it was "not satisfied on the evidence adduced that the fact in issue has been established to that standard". It stated that it should not assume "that the email was received at or about the time it was sent … There is no 'reading' or 'measurement' showing the received date and time". The Court found that the only "definite finding of fact that the evidence permits me to make is that the Payment Claim email was received on Monday, 27 September 2021". Therefore, the *Payment Schedule* was served within 10 business days as required by the *Payment Act*. Accordingly, the *Payment Act* does not operate to permit the Demex to regard the unpaid portion of the claimed amount as a statutory debt.

Cases relating to the UNCITRAL Model Law on Electronic Commerce (MLEC)

Case 2149: MLEC 15(2)(a)(i)

Australia: Queensland Court of Appeal
Queensland Building Services Authority v J M Kelly (Project Builders) Pty Ltd [2013] QCA 320 (Before Chief Justice De Jersey, Fraser JA and Mullins J)
25 October 2013
Available at: www.austlii.edu.au/cgi-bin/viewdoc/au/cases/qld/QCA/2013/320.html

Abstract prepared by Alan Davidson, National Correspondent

This case deals with the time of receipt of an email under the Queensland Electronic Transactions (Queensland) Act 2001 (ETA). Section 24 ETA deals with "Time of receipt" and is based on subarticle 15(2) of the UNCITRAL Model Law on Electronic Commerce (MLEC).[1]

Section 72 of the Queensland Building Services Authority Act 1991 (QBSA Act) provided that where the Building Services Authority (Authority) is of the opinion that building work is defective or incomplete, it may "direct the person who carried out the building work to rectify the building work" within a stated period which must be at least 28 days. The Authority issued two directions, on 17 December 2010 and 17 June 2011. The first was by post and email, the second by post alone. The directions by post were found to be invalid because they would result in a period of time of less than 28 days. However, if the email direction was received on the same day as it was sent, it would be valid.

[1] In 2013 Queensland amended its ETA, including the time of receipt provision, to conform to article 10(2) ECC; however, the principle on reversal of the onus of proof stated in the reported case would apply equally.

In affidavit evidence the general manager of the respondent swore on oath that he could not determine whether the email was read or printed. However, he stated that "typically" such emails are reviewed by an administrative staff member who then takes steps to forward it to the relevant company representative. The general manager added that he had no recollection of receiving any such communication from that particular administrative staff member. On that evidence the primary judge held that the 17 December 2010 direction had not been effectively served by email on that date. The primary judge considered that there was no evidence that the email was received or opened on 17 December 2010. On the issue of proof of receipt, previous cases had held that the applicant in the case, that is the sender, had the onus of proving when the email had been received pursuant to the ETA. However, in the appeal to this case the Authority argued that the primary judge had erred in failing to find that the *respondent* did not fulfil the onus which lay upon it to prove that it had *not* received and opened the email on 17 December 2010.

The Court of Appeal accepted the Authority's argument, and reversed the onus of proof in determining the time of receipt and the time the email was opened. The Court of Appeal stated: "The respondent did not adduce direct evidence that the electronic direction attached to the email was not received and opened by an employee of the respondent acting within the scope of his or her employment". The general manager's affidavit suggests that the administrative staff member "had personal knowledge of the critically relevant circumstances, including whether he or she opened and examined the email and attached direction". Importantly the respondent did not adduce evidence explaining why the staff member did not give evidence, such that "the respondent's failure to adduce evidence from the staff member at least made it less likely that the court would draw the inferences for which the respondent contended". The Court of Appeal considered that the general manager "knew the identity" of the administrative staff member, adding that his "silence on that topic is deafening".

Hence the Court of Appeal found that there was "no evidence" capable of giving rise to any reasonable and definite inference "to negate the inference that the email and attached electronic direction were opened and read by an employee of the respondent". The Court of Appeal concluded: "There is no reason to doubt that the (sender) *effectively* directed the (recipient) to rectify the building work".