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CASE LAW ON UNCITRAL TEXTS
(CLOUT)

Contents

INTRODUCTION

This compilation of abstracts forms part of the system for collecting and disseminating information on court decisions and arbitral awards relating to Conventions and Model Laws that have emanated 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).

Unless otherwise indicated, the abstracts have been prepared by National Correspondents designated by their Governments. 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 120: CISG 1(1)(b); 18; 29; 38; 39; 47; 49
Germany: Oberlandesgericht Köln; 29 U 202/93
22 February 1994
Published in German: Praxis des Internationalen Privat- und Verfahrensrechts (IPRax) 1995, 393; Recht der Internationalen Wirtschaft (RIW) 1994, 972.
Commented on by Reinhart in IPRax 1995, 365

The German plaintiff was the assignee of the Nigerian seller, who sold and delivered rare wood to the German defendant. The defendant refused to pay the purchase price alleging that the delivered wood was of inferior quality; the plaintiff, in turn, declared that it would market the wood. The court of first instance ordered the defendant to pay the purchase price. The defendant appealed.

The Court of Appeal, applying the CISG as part of the relevant German law chosen by the parties as applicable law, held that the defendant had lost the right to declare the contract avoided under article 49 (1)(b) CISG, since it had failed to fix an additional period of time for performance by the plaintiff (article 47 CISG). However, the Court of Appeal found that the parties had mutually agreed to terminate the contract, which is expressly allowed by article 29 CISG, and that the mutual agreement to terminate the contract is governed by the same rules as the conclusion of the contract.

Noting that pursuant to article 18 CISG mere silence does not in itself amount to acceptance of an offer, the Court of Appeal found that, under certain circumstances, silence could be interpreted as a declaration of acceptance. In the case in question the seller had examined the wood delivered and had offered to take back the wood in order to market it. The buyer neither refused this offer nor claimed damages or replacement of the defective wood. The Court of Appeal held that the buyer thereby accepted the offer to terminate the contract of sale. The Court of Appeal therefore reversed the decision of the court of first instance and dismissed the suit for payment.

Case 121: CISG 1(1)(a); 14(1); 19(1)
Germany: Oberlandesgericht Frankfurt; 10 U 80/93
4 March 1994
Published in German: OLG Report (OLGR), 1994, 85

The Swedish plaintiff asked the German defendant to make an offer for special screws of a certain quality. The defendant filled in the prices and delivery periods and sent the letter back. The plaintiff then ordered 3,400 pieces of the named screws as well as 290 pieces of other articles not mentioned before. The defendant confirmed the order but requested payment in advance or a letter of credit. The plaintiff, in turn, asked for a pro-forma invoice. The defendant sent an invoice which listed articles of lower quality with their respective prices. The plaintiff objected immediately and demanded delivery of the articles in the "ordered" quality. The defendant proposed delivery of

higher-quality articles for a higher price, but the plaintiff insisted on delivery of the higher-quality items for the price listed in the invoice.

The court found that the CISG was applicable as both parties had their place of business in States parties to the CISG (article 1(1)(a) CISG). The court noted that, pursuant to article 19(1) CISG, a reply to an offer that contains terms at variance with the offer is a rejection of the offer and constitutes a counter-offer. Accordingly, the plaintiff's final order constituted a new offer. Yet, this new offer was not sufficiently definite in the sense of article 14(1) CISG, because the prices of some of the ordered articles were neither known nor determinable. Consequently, the court held the new offer could not lead to the effective conclusion of a contract as it did not comply with article 14(1) CISG.

Case 122: CISG 1 (1); 3 (1)
Germany: Oberlandesgericht Köln; 19 U 282/93
26 August 1994
Published in German: Recht der Internationalen Wirtschaft (RIW) 1994, 970

The plaintiff, a Swiss market research institute, had elaborated and delivered a market analysis, which had been ordered by the defendant, a German company. The defendant refused to pay the price alleging that the report did not comply with the conditions agreed upon by the parties.

The court held that the CISG was not applicable, since the underlying contract was neither a contract for the sale of goods (article 1(1) CISG) nor a contract for the production of goods (article 3(1) CISG). Noting that the sale of goods is characterized by the transfer of property in an object, the court found that, although a report is fixed on a piece of paper, the main concern of the parties is not the handing over of the paper but the transfer of the right to use the ideas written down on such paper. Therefore, the court held that the agreement to prepare a market analysis is not a sale of goods within the meaning of articles 1 or 3 CISG.

Case 123: CISG 35 (2); 49
Germany: Bundesgerichtshof; VIII ZR 159/94
8 March 1995
Published in German: Entscheidungen des Bundesgerichtshofs in Zivilsachen (BGHZ) 129, 75
Commented on by Daun in Neue Juristische Wochenschrift (NJW) 1996, 29; by Magnus in Lindenmaier/Möhring, Nachschlagewerk des Bundesgerichtshofs, CISG No. 2; by Piltz in Europäische Zeitschrift für Wirtschaftsrecht (EuZW) 1995, 450 and by Schlechtriem in Entscheidungen zum Wirtschaftsrecht (EwiR) Art 35 CISG 1/95 and in Praxis des Internationalen Privat- und Verfahrensrechts (IPRax) 1996, 12

The German Supreme Court confirmed the decision of the Oberlandesgericht Frankfurt a.M. (see CLOUT Case No. 84). It held that a Swiss seller, who delivered to the German buyer New

Zealand mussels containing a cadmium concentration exceeding the limit recommended by the German health authority, was not in breach of contract. The cadmium concentration itself constituted, in the court's opinion, no lack of conformity since the mussels were still eatable. Furthermore, the Supreme Court held that article 35 (2)(a) and (b) CISG does not place an obligation on the seller to supply goods, which conform to all statutory or other public provisions in force in the import State, unless the same provisions exist in the export State as well, or the buyer informed the seller about such provisions relying on the seller's expert knowledge, or the seller had knowledge of the provisions due to special circumstances.

The Supreme Court further held that the defendant had lost the right to rely on the lack of conformity and to declare the contract avoided in the ground of faulty packaging, since the defendant had waited more than a month before it notified the plaintiff about the non-conformity and thus had not acted within the reasonable time required by article 39 (1) CISG. According to the court, in this case one month after delivery would be a "generous" period of time but obviously acceptable as "reasonable time" for the purpose of notification.

Case 124: CISG 72; 49
Germany: Bundesgerichtshof; VIII ZR 18/94
15 February 1995
Published in German: Recht der Internationalen Wirtschaft (RIW) 1995, 505
Commented on by Schlechtriem in Entscheidungen zum Wirtschaftsrecht (EwiR) Art. 49 CISG 1/95; Schmidt-Kessel in RIW 1996, 60; and Enderlein in Praxis des Internationalen Privat- und Verfahrensrechts (IPRax) 1996, 182

The German plaintiff sold to the Swiss defendant a key stamping machine, which was manufactured by a German third party. The price had to be paid in three instalments. The parties agreed that the seller would retain title to the machine until payment of the last instalment. The manufacturer of the key stamping machine imposed a delivery stop upon the plaintiff. In October 1991, the manufacturer delivered the machine directly to the defendant. The defendant refused to pay the remaining two instalments to the plaintiff asserting that the plaintiff would not be able to transfer the property of the key stamping machine, since the plaintiff could not obtain the property directly from the manufacturer because of the delivery stop.

The court of first instance ordered the defendant to pay the purchase price whereas the Court of Appeal decided in favour of the defendant. The defendant appealed to the Supreme Court.

The Supreme Court held that the defendant was not entitled to declare the contract avoided under article 72 CISG. The period of time within which the buyer could declare the contract avoided under article 72 CISG was the time prior to the date of performance. After the contract had been performed by the parties, neither party could declare the contract avoided under article 72 CISG. The defendant accepted the machine in October 1991 and had to pay the last instalment in November 1991. Therefore, both parties fixed the date of performance for November 1991. As a result, the defendant could no longer invoke article 72 CISG in March 1992.

Leaving the question undecided whether the behaviour of the plaintiff constituted a

fundamental breach of contract, the court held that, in any event, the defendant had lost the right to avoid the contract under article 49 CISG, since the defendant had claimed avoidance of the contract five months after being informed of the delivery stop. This delay could not be considered as a reasonable time under article 49 (1)(b) CISG.

Thus, the Supreme Court reversed the decision of the Court of Appeal, restored the decision of the court of first instance and ordered the defendant to pay the purchase price.

Case 125: CISG 1(1)(b); 6; 46; 48
Germany: Oberlandesgericht Hamm; 11 U 1991/94
9 June 1995
Published in German: OLG Report (OLGR), 1995, 169-170

The plaintiff, an Italian manufacturer of doors and windows, concluded with the German defendant a contract for the sale of 19 windows. The windows were delivered to and installed by the defendant. Some of the delivered windows were found to be defective. The plaintiff agreed to replace the defective windows with new ones, which were subsequently installed by the defendant.

The defendant withheld payment of part of the price and argued that the outstanding balance was to be set off against the defendant's counter-claim for the costs incurred with the replacement of the defective windows.

The court found that the CISG was applicable to the contract, holding that the express reference made by the parties during the court proceedings to the German civil law amounted to a valid choice of law but not to an exclusion of the CISG, since the CISG is an essential part of German law (article 6 CISG).

As the CISG does not contain provisions on set-off, the court held that this question was to be decided in accordance with German law as the governing law chosen by the parties. According to article 387 of the German Civil Code, set-off presupposes the existence of a counter-claim. The existence of the defendant's counter-claim, however, had again to be determined according to the CISG. Although the CISG does not contain any explicit provision for reimbursement of replacement costs when the seller has delivered defective goods, the court interpreted article 48 (1) CISG to the effect that the seller had to bear the corresponding costs.

Furthermore, although the period of limitation of the applicable German statute of limitations had expired, the court noted that the defendant's counter-claim was not time-barred because article 478 of the German Civil Code allows set-off even after the limitation period if the buyer has given timely notice of the defects of the goods, which the buyer had done in this case. Accordingly, the court rejected the plaintiff's claim.

Case 126: CISG 1(1)(a); 3(2)
Hungary: Metropolitan Court
19 March 1996
Original in Hungarian
Unpublished

The contract between the Hungarian plaintiff and the Swiss defendant provided for the sale of instruments from the defendant to the plaintif. The contract also provided that the plaintiff would be the exclusive distributor of those instruments in Hungary.

The issue was whether the CISG applied to the exclusive distribution part of the contract as well. It was decided that the CISG is not applicable to exclusive distribution agreements.

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

Case 127: MAL 16
The Supreme Court of Bermuda (Meerabux J.)
Skandia International Insurance Company and Mercantile & General Reinsurance Company and various others
21 January 1994
Original in English
Unpublished

(Abstract prepared by Jeffrey Elkinson)

This case concerns proceedings initiated in the Supreme Court of Bermuda by Skandia International Insurance Company and other insurance companies ("Skandia and others") for an injunction to restrain Al Amana Insurance and Reinsurance Company Limited ("Al Amana") from continuing legal proceedings against Skandia and others in Kuwait.

Skandia and others were reinsurers of Al Amana, a company incorporated under the laws of Bermuda, in respect of real and personal property located in Kuwait and belonging to Alghanim Industries ("Alghanim") and its associated companies. Alghanim sustained extensive property damage in Kuwait during and consequential to the invasion of Kuwait by Iraq in August 1990. Disputes arose as to whether the losses sustained by Alghanim were excluded by virtue of a War Risks Exclusion Clause contained in the reinsurance agreements between Al Amana and Skandia and others.

Al Amana was sued by Alghanim in Kuwait and joined Skandia and others as third parties. Skandia and others argued that the Kuwaiti court had no jurisdiction over them as there were arbitration provisions in the reinsurance agreements with Al Amana. In the meantime, Skandia and

others served notices of arbitration on Al Amana and initiated the proceedings in the Supreme Court of Bermuda for an injunction to restrain Al Amana from continuing legal proceedings against them in Kuwait on the ground that there existed an agreement to have their disputes determined by arbitration "at the seat of the defendant party" (i.e., Bermuda).

Al Amana challenged, inter alia , the existence of an arbitration clause in one of the reinsurance agreements. Al Amana argued that article 7(2) MAL requires that, for incorporating an arbitration clause by reference into another document, the reference has to be "such as to make that clause part of the contract." Al Amana submitted that a reference to insurance coverage "as per wording attached" simply incorporated the description of the risks in respect of which reinsurance was effected, but could not incorporate the entirety of the policy and was inadequate to incorporate the arbitration clause contained in another document.

The Supreme Court held that there was prima facie evidence that the arbitration agreement existed and satisfied the requirements of article 7(1) MAL and Article II(2) of the Convention on the Recognition and Enforcement of Foreign Arbitral Awards (New York, 1958). The Supreme Court held, under reference to the travaux préparatoires of the MAL, that the contractual documents do not need to make an explicit reference to the arbitration clause and that general words of incorporation suffice under article 7 MAL. The Supreme Court pointed out, however, that, in any event, a challenge to the existence, validity and scope of the arbitration agreement was a matter to be first determined by the arbitral tribunal under article 16(3) MAL. Accordingly, the Supreme Court granted the injunction restraining Al Amana from continuing with the proceedings brought by it against Skandia and others in Kuwait.

Case 128: MAL 8(1)
Hong Kong: Court of Appeal (Nazareth V.P., Bokhary and Liu J.J.A.)
24 November 1995
Tai Hing Cotton Mill Limited v. Glencore Grain Rotterdam B.V. and another
Published in English: [1996] 1 Hong Kong Cases (HKC) 363

(Abstract prepared by Neil Kaplan Q.C.)

Glencore agreed to sell to Tai Hing 1,000 tonnes of raw cotton C&F Hong Kong. The contract provided for arbitration in Liverpool under the Rules of the Liverpool Cotton Association Limited and the contract contained a clause to the effect that the obtaining of an arbitration award should be a condition precedent to the right of either party to start legal proceedings in respect of any arbitrable dispute ("Scott v. Avery-clause").

Disputes arose and the judge granted summary judgement for specific performance of the contract of sale and dismissed Glencore's application for a stay under article 8 (1)MAL.

The Court of Appeal considered whether there were grounds for dismissing the application

for stay under article 8(1) MAL, despite the existence of the arbitration agreement. Following Guandong Agriculture v. Conagra International (CLOUT Case 41) and Zhan Jian E&T Dev. Area Service Head Co v. An Hau (CLOUT Case 61), the Court of Appeal held that under article 8(1) MAL "the Court is not concerned with investigating whether the Defendant has an arguable basis for disputing the Claim." The Court of Appeal held further that "if a claim is made against him in a matter which is the subject of an arbitration agreement and he does not admit the claim then there is a dispute within the meaning of the Article."

The Court of Appeal set aside the summary judgement and granted a stay under article 8 (1)MAL.

Case 129: MAL 8(1)
Hong Kong: High Court of Hong Kong (Leonard J.)
19 April 1996
Nassetti Ettore S.p.a. v. Lawton Development Limited
Original in English
Unpublished

(Abstract prepared by the Secretariat)

The plaintiff, an Italian company, sold to the defendant, a Hong Kong company, a production line for the manufacture of granite tiles to be delivered to China. The contract provided for arbitration in Stockholm under the auspices of the Stockholm Swedish International Chamber of Commerce.

Disputes arose and the plaintiff applied for summary judgement for payment of the balance due by the defendant under the contract. The defendant applied for an order that all further proceedings in the action should be stayed pursuant to article 8(1) MAL.

Under reference to Tai Hing Cotton Mill Ltd. v. Glencore Grain Rotterdam B.V. and another (CLOUT Case 128), the court held that under article 8(1) MAL "the Court is not concerned with investigating whether the Defendant has an arguable basis for disputing the Claim." The court also held that "the question is whether there is a dispute between the parties in the ordinary sense of that word" and that there is dispute "unless there is an unequivocal admission of liability and quantum".

The court found that it was the obligation of the court to refer the parties to arbitration and ordered that the proceedings be stayed accordingly.

III. ADDITIONAL INFORMATION

Cases 90-101

CLOUT abstracts published in French: Révue de droit des affaires internationales, 1995, 8, 1008.

Cases 93 and 94

Commented on by Veneziano: Rivista dell'Arbitrato, 1995, 3, 537.

Case 106

Commented on by Magnus: Praxis des Internationalen Privat- und Verfahrensrecht (IPRAX), 1996, 2, 145.

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