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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).

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

Case 130: CISG 72; 74; 75; 77
Germany: Oberlandesgericht Düsseldorf; 17 U 146/93
14 January 1994
Unpublished

The defendant, a German company, ordered 140 pairs of winter shoes from the plaintiff, an Italian shoe manufacturer. After having manufactured the ordered shoes, the plaintiff demanded security for the sales price as the defendant still had other bills to settle with the plaintiff. The defendant, however, did neither pay nor furnish security. Therefore the plaintiff declared the contract avoided and resold the shoes to other retailers: only 21 pairs for the same price as agreed upon with the defendant, 109 pairs for a much lower price, 10 pairs remaining unsold.

The plaintiff demanded compensation for various damages caused by the breach of the contract: (1) compensation for the difference between the contract price and the price in the substitute transactions, (2) the attorney's fees, (3) interest loss of 16,5%, (4) exchange rate loss of 15%, (5) and current interest of 16,5%. The defendant accepted responsibility in general but disputed the extent of damages which it attributed to the plaintiff's failure to resell the shoes in a reasonable manner.

The appellate court held that the plaintiff was entitled to avoid the contract according to article 72 CISG and consequently granted the plaintiff the rights listed in articles 74 and 75 CISG. Accordingly, the plaintiff was allowed to recover the difference between the contract price and the price in the substitute transactions (art. 75 CISG). In addition, the court found that the plaintiff had performed the resale in a reasonable time noting that the plaintiff was not obliged to resell the shoes before the date of avoidance. In the court's view, a resale nearly 2 months after avoidance (avoidance on 7 August, resale on 6 and 15 October) still succeeded within reasonable time and was no breach of the plaintiff's obligation under art. 77 CISG to mitigate the loss. In that regard, the court accepted the plaintiff's argument, who had offered the shoes on the Italian market, that in August most retailers have already filled their stock for the coming season and have no reason to buy more goods for the winter season.

The court also granted the interest loss according to article 74 CISG. The plaintiff argued that it had made use of a bank loan with an interest rate of 16,5%. The court accepted this allegation according to article 287 of the German Civil Procedure Code. However, the plaintiff's claim for attorney's fees was rejected. Although such fees in general could be recovered under article 74 CISG, in the present case this would lead to double compensation as the attorney had demanded his costs already in the special procedure for fixing costs.

The court also rejected the plaintiff's claim for damages to cover the exchange rate loss between the Italian Lira and the German Mark. The court found that there existed no general custom to exchange money paid in the local currency to a foreign one unless this was the claimant's usual practice. As this could not be established, it was held that the plaintiff had not suffered a damage.

Case 131: CISG 1; 14; 35 (2)(c); 39
Germany: Landgericht München I; 8 HKO 24667/93
8 February 1995
Unpublished

The German defendant ordered a computer programme from the French plaintiff. The programme was delivered and installed. The parties also intended to conclude a second contract concerning the use of the programme, but the negotiations on that contract failed. The defendant then refused to pay the purchase price of the programme, which was delivered and installed.

The court held that the CISG was applicable as the parties had their place of business in different CISG Contracting States and as the CISG applies to standard software. The court further found also that the parties had agreed on all particulars of the sale of the programme and therefore had concluded a sales contract.

It was held that the defendant could not rely on a possible lack of conformity of the software programme, since it had not effectively given notice of the defect but had only asked for assistance in addressing the problems identified. As a result, the court ordered the defendant to pay the purchase price and interest at the rate of 5%.

Case 132: CISG Art. 53; 74; 78
Germany: Oberlandesgericht Hamm; 11 U 206/93
8 February 1995
Published in German: Praxis des Internationalen Privat- und Verfahrensrechts (IPRax) 1996, 197; commented on by *Schlechtriem* in IPRax 1996, 184

The German defendant ordered several times large lots of socks from an Italian manufacturer. Four contracts were concluded in the Italian language, the defendant being represented by its Italian agent. The manufacturer delivered the socks and sent four invoices in Italian to the defendant. Before payment, the manufacturer assigned its payment claims to the plaintiff, an Italian bank, and gave notice to the defendant. The assignment notice was in French and English. Despite the notice, the defendant who understood only little English and no French paid to the manufacturer, against whom bankruptcy proceedings were instituted shortly afterwards. The plaintiff claimed (second) payment from the defendant.

Noting that the parties had their places of business in different Contracting States, the appellate court found the CISG to be applicable (art. 1 (1)(a); art. 100 (2) CISG).

The court further found that the plaintiff was entitled to payment from the defendant according to article 53 CISG since it had effectively acquired the relevant claims by assignment. Noting that assignment is not regulated by the CISG, and that, therefore, its preconditions and effects must be decided according to the rules of private international law, the court, applying

German private international law, found that Italian law was applicable.

As Italian law provided no specific rules on the "language risk", the court relied on the rules developed hereto under the CISG as part of the defendant's legal environment and found that the parties may either use the language agreed upon or customarily practised between them. In the court's view, if neither agreement nor practice exists at to which language is to be used, the circumstances of the case must decide. The court held that since the defendant in this case had recognized that the assignment notice could have some legal relevance, it was up to the defendant to clarify the precise contents of that notice.

The court also awarded 10% interest on the sum to be paid by the defendant (art. 78 CISG). As the CISG does not provide for a specific interest rate, the court took recourse to the governing contract law (in this case Italian law) which provides for 10 % interest (art. 1284 Codice civile). The requested interest at the rate of 14% could have been recovered under article 74 CISG only if the plaintiff had not failed to prove the higher interest damage.

Case 133: CISG 7; 25; 45; 49; 61; 74; 84
Germany: Oberlandesgericht München; 7 U 1720/94
8 February 1995
Unpublished

The plaintiff, an Italian trading company, and the defendant, a German automobile marketing company, concluded a sales contract concerning eleven cars for the price of about DM 400.000,--. The contract provided that the plaintiff was to furnish a bank guarantee for the sales price. A bank guarantee in the amount of DM 55.000 was granted in favour of the defendant. After the conclusion of the contract, the parties had some communications on the time of delivery and special features of the ordered cars. Five cars were finally ready for delivery in August, the remaining six in October. In October, the plaintiff informed the defendant that, due to extreme exchange rate fluctuations between the Lira and the Mark, acceptance of delivery of the cars was impossible. The plaintiff asked the defendant to try to defer delivery from the supplier. In the beginning of November, the defendant cancelled all orders it had made with its suppliers and demanded payment of the bank guarantee which was paid out. The plaintiff claimed repayment of the guaranty sum and damages.

The appellate court found the plaintiff to have a repayment claim against the defendant. It was held that, although the CISG will normally apply to German-Italian sales, it does not regulate the seller's rights concerning bank guaranties. The court, applying its rules of private international law, determined that German law was applicable.

The court found the defendant to have been unjustifiedly enriched according to 812 (1) 1 German Civil Code since the defendant obtained the payment of the bank guarantee without legal grounds. The court held that the bank guarantee was agreed upon to cover an obligation to pay and dismissed the defendant's argument that the bank guaranty should serve as a penalty for not taking delivery by the plaintiff.

Furthermore the court found that the defendant had not taken the appropriate legal measures to mitigate its loss (art. 77 CISG). By giving notice that the cars were ready to be picked up, the

defendant had in fact fulfilled its contractual obligations (art. 31 CISG) and the plaintiff committed a breach of contract by not taking delivery of the cars (art. 53 CISG). The defendant, therefore, was entitled to the remedies provided by articles 61 (1) (b) and 74 CISG. But, as the defendant never avoided the contract, it had disregarded its duty to mitigate its loss and could not claim damages. Therefore, the defendant was not entitled to the guaranty sum.

However, the court dismissed the plaintiff's claim for damages against the defendant according to articles 45 (1) (b), 45 (2), 49 (1) (a) and 25 CISG. Since the parties had not agreed on a precise date of delivery, the defendant's readiness to deliver in August and October was no breach of contract, let alone a fundamental one. Thus, the right to declare the contract avoided because of the non-delivery of the cars was lost by the plaintiff. To allow the plaintiff now, i.e., 2 1/2 years later, to declare the contract avoided would violate the principle of good faith (art. 7 (1) CISG).

The court held that the plaintiff was entitled to interest according to article 84 CISG. Even though the claim for repayment was based on article 812 German Civil Code, the claim for interest derived from the CISG, because the repayment was a refund of the price. As the CISG does not regulate the interest rate, German Law was applicable. In view of the fact that both parties were merchants, the interest rate of 5% applied (article 352 German Commercial Code) .

Case 134: CISG 11; 14; 53; 62; 92
Germany: Oberlandesgericht München; 7 U 5460/94
8 March 1995
Unpublished

A Finnish company sold 3000 tones of electrolyt nickel/copper cathodes to the German defendant for about 17 million US dollars. Only the defendant signed the written contract form. The metal was delivered but not paid for. The Finnish company then assigned the payment claim to the plaintiff who demanded payment. The defendant denied the jurisdiction of the German court because of an arbitration clause and the valid conclusion of a sales contract.

Concerning the arbitration clause, the court found that the form requirements of the applicable article 2 (2) of the United Nations Convention on the Recognition and Enforcement of Foreign Arbitral Awards of 1958 had not been satisfied, since the parties had not signed the agreement containing the arbitration clause and the Finnish company had not received the standard form which contained the clause.

Concerning the payment claim, the court applied the CISG since both parties to the sales contract had their places of business in different CISG Contracting States, namely in Finland and in Germany. It was held that a contract had been effectively concluded between the defendant and the Finnish company and that the plaintiff's claim for payment was justified under articles 53 and 62 CISG.

Even though Finland had declared that it would not be bound by Part II of the CISG concerning the "Formation of the Contract", an effective contract could still have been concluded.

According to the CISG other forms of consent are possible as long as they can be regarded as a mutual binding arrangement and the subject-matter of the contract is comparable to articles 14-24 CISG. In an obiter dictum, the court explicitly excluded recourse to the governing contract law. The defendant signed a contractual document thus showing its approval of the contract and also accepted the goods upon arrival. The Finnish company indicated assent to the contract by its conduct, namely through the delivery of the goods. A written contractual agreement is not necessary to evidence the parties' consent (art. 11 CISG).

Case 135: CISG 1(1)(a) 18 (1); 19 (1); 19 (3); 59; 62
Germany: Oberlandesgericht Frankfurt am Main; 25 U 185/94
31 March 1995
Unpublished

The plaintiff, a German glass manufacturer, agreed to manufacture and deliver 220.000 test-tubes to the Italian defendant. During the course of negotiations, the appropriate glass type was the point of discussion as different types were mentioned. The plaintiff finally delivered test-tubes in Fiolax quality and demanded payment. The defendant refused to pay and alleged to have ordered the better Duran quality.

The court found that the CISG was applicable (art. 1(1)(a) CISG). According to articles 62 and 59 CISG, the seller can claim the price, if a contract has been concluded, i.e., if there is a valid offer and acceptance. The court found that the acceptance of the plaintiff's offer was missing as the seller and the buyer did not reach an agreement towards a specific glass quality (art. 18 (1), 19 (1), 19 (3) CISG). It was held therefore that the plaintiff could not demand payment and the suit was dismissed.

Case 136: CISG 1(1)(a) 8; 47; 49; 81 (2); 84 (1)
Germany: Oberlandesgericht Celle; 20 U 76/94
24 May 1995
Unpublished

The plaintiff, an Egyptian businessman, and the defendant, a German company trading in used printing machines, concluded an oral contract for the sale of nine used printing machines that were to be shipped to Egypt. The parties agreed upon two shipments, the first including six machines and the second three machines. According to the contract, the plaintiff was obliged to pay a considerable part of the contract price before the first shipment, which he did. But the first shipment contained only three machines. After having demanded shipment of the missing machines several times, the plaintiff declared that it had no longer any use for three of the still missing machines. The defendant answered: "We are sorry that we shall not deliver the machines anymore which we have kept to your disposal ...". With respect to the last three machines, the plaintiff fixed a final period of two weeks for delivery. The defendant did not deliver within that period but offered shortly afterwards shipment against advance payment. The plaintiff refused this and declared, now seven weeks after fixing the additional delivery period, the contract avoided as far as the missing machines were concerned. The plaintiff demanded compensation for its loss as well as

repayment of the sum by which the advance payment exceeded the price of the three delivered machines.

The court found that the CISG was applicable as both parties had their places of business in different CISG Contracting States (art. 1 (1)(a) CISG), the sales contract had been concluded after the CISG had come into force for these States (art. 100 (2) CISG) and the application of the Convention was neither excluded (art. 6 CISG) nor had the parties subsequently chosen a specific law to be applicable.

The court found the plaintiff's repayment claim to be justified according to article 81 (2) CISG. As the first three missing machines were concerned, the parties had mutually terminated the contract. The plaintiff had refused to accept delivery and the defendant had but regretted the plaintiff's refusal. A reasonable person (art. 8 CISG) could have understood the defendant's letter as an acceptance of the termination of the contract.

With regard to the last three machines the contract was avoided by the plaintiff's unilateral declaration (articles 49 (1) (b), 47 (1) and 51 (1) CISG). The defendant had breached the contract by not delivering the machines within the time fixed by the contract (art. 33 (b) CISG), thus giving the plaintiff the right to fix an additional period of time (articles 49 (1) (b) and 47 (1) CISG). The plaintiff was, therefore, entitled to declare the contract avoided even if the additional delivery period of two weeks was perhaps too short. According to the court, the period of seven weeks between announcement and actual declaration of avoidance was reasonable. The fact that the defendant had offered shipment against advance payment in the meantime was found to be irrelevant since advance payment of the full contract sum was contrary to what had been agreed.

The court finally ordered the defendant to pay interest. According to article 84 (1) CISG, interest is due from the date on which the price was to be paid. The court held that the interest rate was to be determined in accordance with the applicable contract law which in the present case was German law. As the plaintiff had failed to justify a higher interest, the applicable interest rate was bound to be 4% (article 288 German Civil Code).

Case 137: CISG 11
United States: Supreme Court of Oregon SC S42285
11 April 1996
GPL Treatment, Ltd. v. Louisiana-Pacific Corp.
Published in English: 914 Pacific Reports (2d Series), 682; 323 Oregon Reports, 116
Intermediate appellate decision
United States: Court of Appeals of Oregon CA A81171
Published in English: 894 Pacific Reports (2d Series), 470; 113 Oregon Reports, Court of Appeals, 633
Commented on by Flechtner in 1995 Journal of Law & Commerce 15, 127.

Plaintiffs, three Canadian manufacturers and sellers of raw shakes (long wooden shingles), sued a U.S. corporation to recover damages for breach of alleged contracts for the sale and purchase

of truckloads of cedar shakes. Defendant denied entering into these contracts. Defendant moved *in limine* for dismissal on the ground that plaintiffs failed to satisfy the writing requirement of the "statute of frauds" of the Uniform Commercial Code (UCC) as enacted in Oregon. The trial court denied the motion. During the trial, the plaintiffs attempted to raise the issue of whether the CISG, rather than the UCC, governed, but the trial court ruled that plaintiffs' attempt was untimely and that they had waived reliance on that theory. The jury returned a verdict awarding lost profits to the plaintiffs and the trial court entered judgment on the verdict.

Defendant appealed to an intermediate appellate court on the ground, *inter alia*, that the trial court had erred when it denied defendant's motion *in limine*. A majority of the three-judge appellate court found that plaintiffs had satisfied the UCC statute of frauds. The dissenting judge disagreed with the majority's analysis of the UCC as applied to the facts in the case. In a final footnote, the dissenting judge also stated that he would have addressed the issue of whether the trial court abused its discretion in its ruling on the applicability of the CISG.

On appeal to the Oregon Supreme Court, the decision of the trial and intermediate courts were affirmed. The majority, concurring, and dissenting opinions do not address the issue of whether the CISG governed or whether the trial court abused its discretion.

Case 138: CISG 1(1)(a); 74; 75; 77; 78
United States: United States Court of Appeals, Second Circuit
December 6, 1995
Delchi Carrier SpA v. Rotorex Corp.
Published in English: 10 Federal Reporter (Third Series), 1024

This case involves an appeal against the decision in CLOUT Case 85.

The appellate court affirmed the trial court's award of damages but reversed that court's rejection of specific headings of damages. The appellate court held that plaintiff was entitled to recover damages for (1) shipping, customs, and incidentals relating to the shipments of nonconforming compressors, (2) obsolete materials purchased only for use with these compressors, and (3) obsolete tooling purchased only for production of units with these compressors. The appellate court also remanded to the trial court the issue of whether plaintiff's labor costs when the production line was idle were compensable variable costs or noncompensable fixed costs.

Case 139: CISG 14, 55
Russian Federation: Tribunal of International Commercial Arbitration at the Russian Federation Chamber of Commerce and Industry
Arbitral award in case No. 309/1993 of 3 March 1995
Original in Russian
Unpublished

An Austrian firm (claimant) brought a claim against a Ukrainian firm (respondent) for damages resulting from the latter's refusal to deliver a certain quantity of goods. The respondent

denied liability on the grounds that no such agreement had been reached between itself and the claimant.

In settling this dispute, the tribunal noted that, under article 14 CISG, a proposal for concluding a contract should be sufficiently definite. It was considered to be such if it indicated the goods and expressly or implicitly fixed or made provision for determining their quantity and price. A telex communication from the respondent regarding the delivery of the goods within a specified period indicated the nature of the goods and their quantity. However, it omitted to indicate the price of the goods or any means of determining their price. The indication in the telex that the price of the goods in question would be agreed ten days prior to the beginning of the new year could not be interpreted as making provision for determining the price of the goods, but was merely an expression of consent to determine the price of the goods at a future date by agreement between the parties. The claimant, who confirmed the contents of the telex communication, thus expressed its consent to the price of the goods being made subject to further agreement between the parties.

The tribunal also noted that in this particular instance article 55 CISG, allowing the price of goods to be determined where it was not expressly or implicitly fixed in a contract or where a contract made no provision for determining it, was not applicable since the parties had implicitly indicated the need to reach agreement on the price in future.

Agreement on the price had not subsequently been reached by the parties. The respondent indicated to the claimant that it was not possible to conclude a contract for the specified quantity of goods. Finding that no contract had been concluded between the parties, the tribunal dismissed the claim.

Case 140: CISG 74, 79
Russian Federation: Tribunal of International Commercial Arbitration at the Russian Federation Chamber of Commerce and Industry
Arbitral award in case No. 155/1994 of 16 March 1995
Original in Russian
Unpublished

A contract was concluded between a Russian seller and a German buyer for the supply of a specific quantity of chemical products within a period of time specified in the contract (fourth quarter of 1992). The goods were not delivered to the buyer within the specified period. From January to May 1993, the buyer repeatedly informed the seller that it insisted on the goods being delivered in accordance with the contract concluded and was ready to extend the time-limit for delivery. In May 1993, the buyer informed the seller that, as a result of the latter's breach of its contractual obligations, the buyer had purchased the goods specified in the contract from a third party. In May 1994, the buyer sued the seller for breach of contract, claiming compensation for damages suffered as a result of the buyer's failure to honour the contract, such damages consisting in the difference between the price of the goods established in the contract and the price at which the buyer was obliged to purchase the goods from the third party.

In its reply to the claim, the seller maintained that it should be discharged from liability on the grounds that it had been unable to deliver the goods for reasons beyond its control, namely because of an emergency production stoppage at the plant manufacturing the goods specified in the contract.

Referring to article 79 CISG, the tribunal decided that the seller (respondent) was unable to prove the facts that would have discharged it from its liability for non-performance of its obligations since refusal on the part of the manufacturer of the goods to supply them to the respondent could not be deemed sufficient grounds for such discharge from liability. The respondent should bear liability for failure to fulfil its obligations on the additional grounds that it was unable to establish that it could not reasonably be expected to take account, in concluding the contract, of the obstacle preventing its compliance with the contract or to avoid or surmount that obstacle or its consequences.

With regard to the amount of compensation for the damages, the tribunal considered that establishing the extent of damages on the basis of the difference between the contract price and the replacement purchase price was consistent in this instance with the provisions laid down in article 74 CISG for determining the amount of damages. In addition, account was taken of the fact that the respondent (seller) was not able to establish that the buyer would have been able to purchase the goods at a lower price when making the second purchase in replacement of the first.

Case 141: CISG 37, 52
Russian Federation: Tribunal of International Commercial Arbitration at the Russian Federation Chamber of Commerce and Industry
Arbitral award in case No. 200/1994 of 25 April 1995
Original in Russian
Unpublished

A contract was concluded in mid-November 1993 between a Swiss seller (claimant) and a Russian buyer (respondent) for the supply of chocolate confectionery products for a specified sum of money. The contract included a clause stipulating preliminary payment of the first two instalments of the goods — to be delivered by two vans — within three days of receipt by the seller of a banker's guarantee from the buyer for payment of the goods. The time-limit for delivery of the goods was one week after receipt of the banker's guarantee. As a consequence of further correspondence between the parties, the delivery was timed to fit in with the forthcoming Christmas holidays.

In mid-December 1993, the seller delivered the first of the two instalments on the basis of the buyer's written statement regarding guaranteed payment of goods. The buyer took delivery of the goods having completed all the customs and other formalities required for their import. However, the buyer subsequently failed to pay for the delivered goods. When explaining its position, it cited the fact that the seller had breached the contract by dispatching the goods before the buyer had transmitted the banker's guarantee. The buyer considered that such an infringement should be regarded as a fundamental breach of contract. In addition, the buyer stated that its non-payment was due to its subcontractors' refusal to accept previously ordered goods owing to the

changed economic situation in the country. The seller brought a claim for the payment of the delivered goods to the arbitral tribunal.

In settling this dispute, the tribunal noted that, under article 53 CISG, one of the main obligations of the buyer was to pay the price established for the goods. Violation by the seller of the terms specified for dispatch of the goods (delivery in the absence of a banker's guarantee) could not be considered sufficient grounds for discharging the buyer from its obligation to pay for the goods, since the buyer had taken delivery of them. Such violation could not be deemed a fundamental breach of contract, in the sense of article 27 CISG, such as to entitle the buyer to breach the contract. Under the CISG, if the violation of the contract on the part of the seller caused the buyer to suffer any damage, it would be entitled to compensation (art. 37 CISG). However, in this particular case the buyer had not brought any such claim. The tribunal thus found in favour of the seller.

Case 142: CISG 54, 79(1)
Russian Federation: Tribunal of International Commercial Arbitration at the Russian Federation Chamber of Commerce and Industry
Arbitral award in case No. 123/1992 of 17 October 1995
Original in Russian
Unpublished

A German seller (claimant) brought a claim against a Russian buyer (respondent) in connection with the latter's failure to pay for equipment supplied under a contract concluded between the two parties. The buyer acknowledged that the goods had indeed been delivered under the contract but stated that its non-payment was due to the failure on the part of the bank responsible for the buyer's foreign currency transactions to give instructions for the amount payable for the goods under the contract to be transferred to the seller. The bank did not transfer the foreign currency amounts to the seller on the grounds that there were no funds available in the buyer's account in freely convertible currency to pay for the goods. Citing these facts, the buyer requested the tribunal to discharge it from liability since, in its view, the fact that it did not have available foreign currency resources should be regarded as *force majeure* discharging it from liability for the non-performance of its contractual obligations.

The tribunal was not in agreement with the respondent's view that its lack of foreign currency should be regarded as *force majeure*, since the contract agreed between the two parties gave an exhaustive list of *force majeure* circumstances discharging them from liability for non-performance of their contractual obligations. The buyer's lack of foreign currency was not included in that list of *force majeure*.

In addition, the tribunal stated that, under article 54 CISG, the buyer's obligation to pay the price of the goods included taking such measures and complying with such formalities as might be required to enable payment to be made. On the basis of the case materials and the clarifications offered by the buyer during the proceedings, it was established that the only action taken by the buyer was to send instructions to the bank for the amounts payable under the contract to be

transferred, but that it had not taken any measures to ensure that the payment could actually be made.

The tribunal found in favour of the claimant and ordered the buyer to make the payment for the goods supplied.

Case 143: CISG 1(1)(a); 92(1); 100(2)
Hungary: Metropolitan Court
Original in Hungarian
Unpublished

The plaintiff, a Swedish company, sued the defendant, a Hungarian company, requesting payment of the price for the goods delivered. The defendant disputed the existence of a valid contract.

The court, noting that the parties had their places of business in different Contracting States of the CISG and that those States had ratified the Convention before the conclusion of the relevant contract between the plaintiff and the defendant, found the CISG to be applicable (art. 1(1)(a) and 100(2) CISG). Also noting that Sweden had accepted the Convention with a reservation concerning Part II (formation of the contract) (92(1) CISG), the court applied the provisions of the Hungarian private international law and found that Swedish law was applicable with regard to the formation of the contract.

Under the Swedish Act No. 28 of 1915, the contract had to be concluded in writing. The court found that the contract had in fact been concluded in writing, and, applying the CISG in all other respects, dismissed the defence of the defendant as unfounded and ordered the defendant to pay the price.

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

MAL 146: 18, 34(2)
Russian Federation: Moscow City Court
10 November 1994
Original in Russian
Unpublished

The plaintiff, whose claim in arbitration proceedings had been dismissed, filed an application to have the award set aside on the grounds that in the course of the arbitration proceedings article 18 of the Russian Federation Act on "international commercial arbitration" (corresponding to art. 18 MAL) had been violated in that the parties had not been treated with equality and the award was in conflict with public policy.

The plaintiff argued that the decision to dismiss the claim had been made despite the fact that the defendant partially acknowledged the claim brought against it. In that regard, the court held that such acknowledgement did not constitute grounds for setting aside the award since, in making the award, the arbitrators were not bound by an acknowledgement of the claim.

Since the plaintiff failed to establish that the award was in conflict with public policy, its claim in that respect was found to be unjustified. At the same time, the court noted that a procedural infringement in the arbitral proceedings had no relevance to the notion of "public policy".

On the basis of the facts presented, the court dismissed the plaintiff's application to set aside the arbitral award.

Case 147: MAL 7(2), 16(1)(3)
Russian Federation: Moscow City Court
13 December 1994
Original in Russian
Unpublished

The plaintiff appealed to the court on the grounds that the arbitral tribunal had found that as no arbitration agreement existed between the the parties, the tribunal had no competence to examine the dispute that had arisen between them.

The court confirmed the right of the arbitral tribunal under article 16(1) MAL to rule on its own jurisdiction. The court found that the question of whether or not a written agreement existed between the parties regarding the procedure for examining disputes had been thoroughly investigated by the arbitral tribunal. The arbitral tribunal had found that at the time of conclusion of the

contract, which gave rise to the dispute and which contained an arbitration clause, the person signing the contract on behalf of the defendant did not possess the necessary powers to do so.

On these grounds, the court upheld the ruling of the arbitral tribunal, namely that no arbitration agreement existed in writing between the plaintiff and the defendant.

Case 148: MAL 16(2)(3), 34(2)
Russian Federation: Moscow City Court
Decision on the application to set aside the award made by the Court of International Commercial Arbitration at the Russian Federation Chamber of Commerce and Industry in case No. 214/1993
10 February 1995
Original in Russian
Unpublished

The plaintiff filed an application to set aside an arbitral award made against it, citing as grounds for doing so the fact that as no arbitration agreement existed between the plaintiff and the defendant, the arbitral tribunal had no jurisdiction to examine the dispute in question. The plaintiff argued that the party signing the contract with the defendant had gone into liquidation as a commercial entity and that the plaintiff was not its legal successor and, hence, not a party to the contract concluded with the defendant which contained the respective arbitration clause. In addition, the plaintiff argued that the contract included an arbitration clause providing for the examination of disputes by the Tribunal of Arbitration at the USSR Chamber of Commerce and Industry, whereas the claim had been brought before the Tribunal of International Commercial Arbitration at the Russian Federation Chamber of Commerce and Industry (TICA), which was not competent to examine the dispute in question.

The court noted that article 16(2) and (3) of the Act of the Russian Federation on "international commercial arbitration" (art. 16 MAL) provided that a plea on the grounds that an arbitral tribunal did not have jurisdiction should be raised not later than the submission of the statement of defence. The court held that the plaintiff (respondent in the arbitral proceedings) had presented to the arbitral tribunal its defence against the claim in which it had stated that it was not the legal successor to the party to the contract which had given rise to the claim and could not be a defendant in the action in question. However, the plaintiff made no reference to the lack of jurisdiction of the arbitral tribunal either in its statement of defence or in the subsequent correspondence with the arbitral tribunal, and had not raised any plea regarding the jurisdiction of the arbitral tribunal during the hearing of the case. The court did not concur with the plaintiff's position that its submission in its statement of defence before the arbitral tribunal that it was not the legal successor and did not recognize itself as a party to the contract should be considered an objection to the jurisdiction of the arbitral tribunal. The court found that those references related exclusively to legal succession in respect of disputed legal relationships and to the validity of claims brought by the plaintiff.

The court did not concur with the plaintiff regarding the lack of jurisdiction of the TICA to examine the dispute in question. In that regard, the court noted that under paragraph 4 of the Statutes on the TICA, which was an annex to the Act of the Russian Federation on "international commercial arbitration", the TICA was the successor to the Tribunal of Arbitration at the USSR

Chamber of Commerce and Industry and, in particular, was entitled to settle disputes on the basis of agreement by the parties to refer their disputes to the Tribunal of Arbitration at the USSR Chamber of Commerce and Industry.

The court dismissed the plaintiff's application to set aside the arbitral award.

Case 149: MAL 34(2)
Russian Federation: Moscow City Court
18 September 1995
Original in Russian
Unpublished

The plaintiff, against whom an arbitral award had been made, applied to have the award set aside, arguing that the award was in conflict with the public policy of the Russian Federation, since it obliged the plaintiff (respondent in the arbitral proceedings) to pay the defendant (claimant in the arbitral proceedings) a sum of money in foreign currency whereas the plaintiff did not have a foreign currency account.

The court did not agree that the award made by the arbitral tribunal ordering the Russian plaintiff (respondant) to make the payment in foreign currency was in conflict with the public policy of the Russian Federation, even if the plaintiff did not have foreign currency at its disposal. In that connection, the court noted that, in the enforcement of the award, the competent court had the option of modifying the arrangements and procedures for enforcement.

III. ADDITIONAL INFORMATION

Case 70

Full text published in English: The Arbitration and Dispute Resolution Law Journal, 1996, 6, 117

Case 71

Full text published in English: The Arbitration and Dispute Resolution Law Journal, 1996, 6, 132

Case 85

Reviewed in: International Financial Law Review, 1996, 4, 57