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CASE LAW ON UNCITRAL TEXTS
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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 90: CISG 49(1)(a); 78; 84(1)
Italy: Pretura circondariale di Parma, sez.di Fidenza; 77/89
24 November 1989
Foliopack Ag v. Daniplast S.p.A.
Original in Italian
Unpublished
Reported on in English: [1995] UNILEX (a case collection system on CISG, published in paper and electronic form by Transnational Juris Publications, Inc., Irvington-on-Hudson, New York, Copyright: Italian National Research Council-Centre for Comparative and Foreign Law Studies), D.89-7

The plaintiff, a Swiss buyer, placed an order with the defendent, an Italian seller. The order contained a request that the goods be delivered within the following 10 to 15 days. Almost two months later, the seller, after asking the buyer to confirm its order, specified the purchase price and assured the buyer that all the goods would be dispatched within a week. Two months later, the buyer had not yet received the goods. As a consequence, the buyer sent the seller a notice canceling the order and requiring refund of the price. The seller admitted that it had handed over the goods to the carrier only after receiving the notice of cancellation from the buyer, and that, moreover, the delivery was partial. The buyer refused to accept the late and partial delivery and, as the seller did not refund the purchase price, commenced legal action claiming avoidance of the contract for breach by the seller. The buyer also claimed a refund of the purchase price with interest and damages.

The court found that according to the statements and conduct of the parties the contract was to be considered concluded at the time the order was confirmed, and that the seller was bound to dispatch all the goods within the following week. It was held that the delay by the seller in delivering the goods, together with the fact that two months after the conclusion of the contract the seller had delivered only one third of the goods sold, amounted to a fundamental breach of the contract according to article 49(1)(a) CISG.

The court held that the buyer was entitled to avoid the contract and to recover the full purchase price already paid to the seller. Without referring to CISG, the court awarded the buyer interest on the price to be refunded at the Italian statutory interest rate. Contrary to what is provided in article 84(1) CISG with regard to time of accrual of interest, the court held that interest was payable from the date of avoidance of the contract. The court did not grant any further damages as there was no evidence of any further damage suffered by the buyer.

Case 91: CISG 31; 67
Italy: Corte Constituzionale; 465
19 November 1992
F.A.S. Italiana s.n.c. - Ti.Emme s.n.c. - Pres.Cons.Ministri (Avv.gen.Stato)
Published in Italian: Giurisprudenza Constitutionale, 1992, 6, 4191
Reported on in English: [1995] UNILEX, D.92-27

Before the Italian Constitutional Court the argument was made that article 1510 para. 2 of the Italian Civil Code, stating that the seller performs its obligation to deliver the goods by handing them over to the carrier and thereby implicitly placing the risk for the carriage on the buyer, was inconsistent with the principle of equality provided for by article 3 of the Italian Constitution. In fact, according to the general rule contained in article 1228 of the Italian Civil Code the carrier should be considered as the agent of the seller, who would be liable for the agent's acts.

The Constitutional Court rejected the argument, inter alia, on the ground that article 1510 para. 2 of the Italian Civil Code reflected a rule generally accepted at international level and in this respect express reference was made to articles 31 and 67 CISG.

Case 92: CISG 1(1)(b); 6
Ad hoc Arbitral Tribunal - Florence
19 April 1994
Società X v. Società Y
Excerpts published in Italian: Diritto del commercio internazionale 1994 (8.3-4), 861
Commented on by Cappuccio in Diritto del commercio internazionale 1994 (8.3-4), 867
Reported on in English: [1995] UNILEX, D.94-9

A contract concluded by an Italian seller and a Japanese buyer for the supply of leather and/or textile wear contained a clause under which the contract was to be "governed exclusively by Italian law".

By majority, the arbitral tribunal decided that CISG did not apply to the contract, either because Japan had not yet ratified CISG or because the contract itself had been made subject exclusively to Italian law. In the view of the tribunal, the choice of Italian law by the parties amounted to an implicit exclusion of CISG (art. 6 CISG).

One of the arbitrators, dissenting, held that CISG did apply since the choice of Italian law confirmed that the parties intended to apply CISG pursuant to article 1(1)(b) CISG and was not a declaration pursuant to art. 6 CISG.

Case 93: CISG 1(1)(b); 7(2); 53; 58; 61; 74; 78
Internationales Schiedsgericht der Bundeskammer der gewerblichen Wirtschaft - Wien; SCH-4366
15 June 1994
Original in German
Unpublished
Reported on in English: [1995] UNILEX, D.94-12

In 1990 and 1991, an Austrian seller and a German buyer concluded contracts for the sale of rolled metal sheets. The initial contracts provided that the goods were to be delivered "FOB Hamburg", by March 1991 at the latest. Later, the seller allowed the buyer to take delivery of the goods in installments. The buyer resold the goods and had to pay the price and the storage costs promptly after receiving each invoice. The buyer took delivery of some of the goods without paying, and refused to take delivery of other goods. Pursuant to an arbitration clause contained in the sales contract, the seller commenced arbitral proceedings, demanding payment of the price. In addition, the seller demanded damages, including those arising from a sale of the goods, which the buyer refused to accept, to a third party.

The sole arbitrator held that, since the parties had chosen Austrian law, the contracts were governed by CISG as the international sales law of Austria, a contracting State (art. 1(1)(b) CISG).

With regard to the goods delivered but not paid for, the arbitrator found that the seller was entitled to payment of their price (articles 53 and 61 CISG). Regarding the sale made by the seller in order to mitigate its losses, the arbitrator held that the seller had the right, and, presumably, the duty to mitigate its losses (art. 77 CISG). As a result, the seller was found to be entitled to the difference between the contract price and the substitute sale price.

The arbitrator further held that interest on the price accrued from the date payment was due (articles 78 and 58 CISG). Since the parties' agreement required the buyer to pay after receiving each invoice, interest accrued from the date of such receipt, which occured within 10 days after issuance of each invoice.

Moreover, the arbitrator held that, since the interest rate was a matter governed but not expressly settled by CISG, it should be settled in conformity with the general principles on which CISG is based (art. 7(2) CISG). Referring to Arts. 78 and 74 CISG, the arbitrator found that full compensation was one of the general principles underlying CISG. It was also found that in relations between merchants it was expected that the seller, due to the delayed payment, would resort to bank credit at the interest rate commonly practiced in its own country with respect to the currency of payment. Such currency may be either the currency of the seller's country, or any other foreign currency agreed upon by the parties. The arbitrator observed that the application of art. 7.4.9 of the UNIDROIT Principles of International Commercial Contracts would lead to the same result. The interest rate awarded was the average prime rate in the seller's country (Austria), with respect to the currencies of payment (US dollars and German marks).

Case 94: CISG 1(1)(b); 7(2); 16(2)(b); 29; 74; 78
Internationales Schiedsgericht der Bundeskammer der gewerblichen Wirtschaft - Wien; SCH-4318
15 June 1994
Original in German
Unpublished
Reported on in English: [1995] UNILEX, D.94-11

An Austrian seller and a German buyer concluded a contract for the sale of rolled metal sheets. The goods were to be delivered in installments "FOB Rostock", specially packaged for export. Immediately after receiving the first two deliveries, the buyer sold the goods to a Belgian company which shipped them to a Portuguese manufacturer. The manufacturer found that the goods were defective and refused to accept the rest of them. The German buyer sent to the Austrian seller notice of non-conformity of the goods with contract specifications, but the seller refused to pay damages, alleging that the notice was not timely. The buyer commenced arbitral proceedings pursuant to an arbitration clause contained in its contract with the seller.

The sole arbitrator held that, since the parties had chosen Austrian law, the contract was governed by CISG as the international sales law of Austria, a contracting State (Art.1(1)(b) CISG).

It was found that the buyer had not complied with the particular requirements as to the examination of the goods and notice of non-conformity, which were contractually stipulated by the parties in derogation from articles 38 and 39 CISG. The buyer had sent to the seller written notice of the defects, together with an expert statement by an internationally recognized company, only six months after delivery, while, according to the contract, it should have done so immediately after delivery of the goods (or at the latest within two months after delivery).

With regard to the argument of the buyer that the seller had waived its right to raise the defense that notice of non-conformity was not timely given, the arbitrator held that the intention of a party to waive this right must be clearly established, which was not the case here. However, it was held that the seller was estopped from raising that defence, since the seller had behaved in such a way that the buyer was led to believe that the seller would not raise the defense (e.g., after receiving the notice the seller had continued to ask the buyer to provide information on the status of the complaints and had pursued negotiations with a view to reach a settlement. The arbitrator held that, while estoppel was not expressly settled by CISG, it formed a general principle underlying CISG ("venire contra factum proprium"; articles 7(2)), 16(2)(b) and 29(2) CISG).

The arbitrator awarded damages to the buyer for lack of conformity of the goods. With regard to interest, the arbitrator awarded interest at the average prime rate in the buyer's country (Germany) with respect to the currency of payment (US Dollars), giving the same reasons mentioned in case 93.

Case 95: CISG 1(1)(b); 3(1); 9(1) and (2); 11; 78; 100(1)
Switzerland: Civil Court of Basel-Stadt; P4 1991/238
21 December 1992
Unpublished
Original in German
Summarized in German: Schweizerische Zeitschrift für internationales und europäisches Recht 2/1995

The Austrian seller sued the Swiss buyer for the purchase price of fibre. In support of its suit, the seller argued that a sales contract had been concluded between the parties on the basis of an order sent by the Swiss buyer and a written confirmation sent by the seller.

The court found that the letter of confirmation sent by the seller and the subsequent omission of any reaction by the buyer reflected a usage as to the formation of contracts in the sense of article 9(1) CISG; that the parties had impliedly made that usage applicable to their contract since they knew or ought to have known the binding nature of such confirmations under both Austrian and Swiss law; and that there was no evidence of any other particular rules or usages prevailing in the trade of fibre. Furthermore, the court found that the exchange of confirmations was consistent with the practice which the parties had established between themselves and which was binding pursuant to article 9(2) CISG.

The court ordered the buyer to pay the purchase price with interest at the rate of 9%, i.e. the rate set out in the general terms of the letter of confirmation, which was found to be consistent with the applicable Austrian law, even though it was 3,5% higher than the Austrian discount rate.

Case 96: CISG 87
Switzerland: Cantonal Court of Vaud; 01 93 1308
17 May 1994
Unpublished
Original in French
Summarized in German: Schweizerische Zeitschrift für internationales und europäisches Recht 2/1995

The Swiss buyer of industrial machinery applied for a provisional measure requesting the German seller to deposit in the warehouse of a third party a device retained by the seller in its premises, which was necessary for the operation of the machinery delivered but not fully paid for. The seller invoked, inter alia, article 87 CISG, arguing that the buyer should bear the cost of the deposit of the device in a warehouse.

The court found that CISG was applicable. However, it held that, as long as its order was in accordance with cantonal rules of procedure, it was not bound by CISG on the matter of the expenses of the deposit, since that was a procedural matter and the Convention applied only to substantive law matters.

Case 97: CISG 1(1)(a); 3(1); 7(2); 38; 39; 78
Switzerland: Commercial Court of the Canton of Zurich; HG930138. U/HG93
9 September 1993
Unpublished
Original in German
Summarized in German: Schweizerische Zeitschrift für internationales und europäisches Recht 2/1995

The Italian seller of furniture sued the Swiss buyer for payment of the purchase price. The buyer had claimed that the furniture was defective, but neither accepted the seller's offer to remedy any defects nor paid the purchase price.

It was found that CISG was applicable since the parties had their places of business in different contracting States (art. 1(1)(a) CISG) and a contract for the supply of goods to be manufactured or produced, which amounted to a sales contract, was involved (art. 3(1) CISG).

The court held that it was implicit in the Convention that the buyer had to prove the existence of defects and that it gave notice of lack of conformity within a reasonable time (articles 7(2), 38 and 39 CISG). In view of the court's finding that the buyer had failed to meet its burden of proof, it was held that, even if the buyer ever had the right to rely on lack of conformity of the goods, the buyer had lost that right. The court ordered the buyer to pay the purchase price with interest at the statutory interest rate of the applicable Italian law (art. 78 CISG).

Case 98: CISG 1(1)(b); 38-40
Netherlands: Rechtbank Roermond; 900336
19 December 1991
Fallini Stefano & Co. S.N.C. (Italy) v. Fordic B.V. (Netherlands)
Excerpts published in Dutch: Nederlands Internationaal Privaatrecht (NIPR) 1992, 394
Reported on in English: [1995] UNILEX, D.91-14

(Abstract prepared by M. Sumampouw, Asser Institute)

The plaintiff, an Italian seller, sued demanding payment of the price of cheese sold and delivered to the defendant, a Dutch buyer. The defendant counterclaimed damages and reduction of the price on the ground of non-conformity of the goods with contract specifications.

Applying Dutch private international law, the court found that CISG was applicable as the law of Italy, i.e. the country where the seller had its place of business at the time of the conclusion of the contract (art. 1(1)(b) CISG). The court held that the reasonableness or the time of giving notice depended on the nature of the goods involved. In this case, the court found that the buyer had notified the seller of the non-conformity of the cheese shortly after delivery, which in the view

of the court was a reasonable time in view of the fact that cheese is a perishable item (articles 38 and 39 CISG).

The court further found: that the buyer did not notify the seller about the nature of the defect, i.e. that the cheese was infested; and that the fact that the cheese was frozen and not described in the contract was not sufficient reason for not examining it. It was held that, in order for the seller not to be able to rely on articles 38 and 39 CISG, the buyer had to prove its allegation that the seller knew or could not have been unaware that the cheese was infested already at the time it was frozen (art. 40 CISG). The court observed that, if the buyer were able to meet that burden of proof, it would be entitled to a reduction of the purchase price pursuant to article 50 CISG.

Case 99: CISG 1(1)(b); 78; 100
Netherlands: Rechtbank Arnhem; 1992/182
25 February 1993
P.T. van den Heuvel (Netherlands) v. Santini Maglificio Sportivo di Santini P & C S.A.S. (Italy)
Excerpts published in Dutch: Nederlands Internationaal Privaatrecht (NIPR) 1993, 445
Reported on in English: [1995] UNILEX, D.93-6

(Abstract prepared by M. Sumampouw, Asser Institute)

The plaintiff, an Italian clothing manufacturer, demanded payment of the purchase price, plus interest, for clothes sold and delivered to the defendant, a Dutch retailer of fashion goods. The defendant sought to set off against the plaintiff's claim its claim for overcharging, for non-conformity of the goods with contract specifications and for damages due to breach of contract by the plaintiff.

The court found that, pursuant to Dutch private international law, CISG was applicable as the law of Italy at the time of the conclusion of the contract (articles 1(1)(b), 100 CISG). The court allowed set off in respect of the defendant's claim for overcharging and non-conformity on the ground that neither party had contested the invoices of the other party. However, with regard to the claim for damages, the court held that set off was not settled by the Convention and, applying Italian law, rejected it.

The court found that the defendant had defaulted in the payment of the purchase price, and ordered the defendant to pay the balance of the purchase price plus interest (78 CISG).

Case 100: CISG 1(1)(b); 78
Netherlands: Rechtbank Arnhem; 1992/1251
30 December 1993
Nieuwenhoven Viehandel GmbH (Germany) v. Diepeveen - Dirkson B.V. (Netherlands)
Excerpts published in Dutch: Nederlands Internationaal Privaatrecht (NIPR) 1994, 268
Reported on in English: [1995] UNILEX, D.93-26

(Abstract prepared by M. Sumampouw, Asser Institute)

The seller, a German company, sued the buyer, a Dutch company, demanding payment of the purchase price for a consignment of live lambs sold and delivered to the buyer, plus interest. The buyer argued that the contract was avoided on the ground that the lambs were not ready to be slaughtered.

The court found that CISG was applicable pursuant to Dutch private international law as the law of Germany in force at the time of the conclusion of the contract (art. 1(1)(b) CISG). With regard to the fact that the lambs were not ready for slaughter, the court found that this was irrelevant, since according to the contract only the weight of the lambs had to be measured and that was found to be in conformity with the contract. The court awarded the full purchase price to the seller plus interest. It was held that it was reasonable for the court to apply German law in order to determine the rate of interest, which was not settled in the CISG, since the parties had agreed for payment of the price in German currency and, in any event, German law was applicable pursuant to Dutch private international law (art. 78 CISG).

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

Case 101: MAL 1(3); 11(3)(a)
Hong Kong: High Court of Hong Kong (Leonard J.)
27 January 1995
Private Company "Triple V" Inc. Ltd. v. Star (Universal) Co. Ltd. and Sky Jade Enterprises Group Ltd.
Original in English
Unpublished

(Abstract prepared by the Secretariat)

The plaintiff, a Russian company, bought from the defendants, two Hong Kong companies, a number of television sets and microwaves. Pursuant to the contract, delivery was to be made in Russia. The contract provided for arbitration in Hong Kong. The plaintiff alleged that the television sets were not delivered at all and the microwaves delivered were defective. The parties failed to agree on a procedure for appointing the arbitrator and the plaintiff requested the court to

make the appointment pursuant to article 11(3)(a) MAL. The second defendant argued that it was not part to the contract.

The court found that an international arbitration, as defined in article 1(3) MAL, was involved and that there was prima facie evidence of a dispute between the parties, and appointed a sole arbitrator. As to the second defendant, who in fact had not signed the contract, the court found that it was represented by the first defendant and ruled that, in any event, it was at the discretion of the second defendant to challenge the jurisdiction of the arbitrator in accordance with article 16(1) and (3).

III. ADDITIONAL INFORMATION

Cases 55-56

Summaries published in German: Schweizerische Zeitschrift für internationales und Schweizerisches Recht (SZIER) 5/1993, 653.

Case 60

Excerpts published in English: [1993] 1 Hong Kong Law Digest J 11.

Cases 1-8, 21-26, 45-56 and 79-86

Reported on in English: [1995] UNILEX (D.91-5, D.91-10, D.89-2, D.89-5, D.90-5, D.91-9, D.90-4, D.88-1, D.91-4, D.91-2, D.92-9, D.93-18, D.93-19, D.92-1, D.89-1, D.90-3, D.93-15, D.93-2, D.93-20, D.91-7, D.91-1, D.92-8, D.92-20, D.93-3, D.91-3, D.92-10, D.94-2, D.94-3,D.94-4, D.94-5, D.94-7, D.94-10, D.94-17, D.94-18 respectively).

Cases 39-41, 57, 60-64, 76 and 78

Reported on in English: [1992] The Arbitration and Dispute Resolution Law Journal (ADRLJ) 235, [1992] ADRLJ 240, [1993] ADRLJ 100 and [1994] ADRLJ 49, 295, 307, 291, 290, 298 respectively.

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