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## United Nations Commission on International Trade Law

### CASE LAW ON UNCITRAL TEXTS (CLOUT)

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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.1). CLOUT documents are available on the UNCITRAL website: ([http:// http://www.uncitral.org/clout/showSearchDocument.do](http://http://www.uncitral.org/clout/showSearchDocument.do)).

Each CLOUT issue includes a table of contents on the first page that lists the full citations to 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 the decisions in their original language is included, along with Internet addresses of translations in official United Nations language(s), where available, in the heading to each case (please note that references to websites other than official United Nations websites do not constitute an endorsement 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 Arbitration Law include keyword references which are consistent with those contained in the Thesaurus on the UNCITRAL Model Law on International Commercial Arbitration, prepared by the UNCITRAL Secretariat in consultation with National Correspondents. Abstracts on cases interpreting the UNCITRAL Model Law on Cross-Border Insolvency also include keyword references. The abstracts are searchable on the database available through the UNCITRAL web-site 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.

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## CASES RELATING TO THE UNITED NATIONS CONVENTION ON CONTRACTS FOR THE INTERNATIONAL SALE OF GOODS (CISG)

### **Case 975: CISG 1(1)(a); [35; 74; 77]; 78**

China: China International Economic and Trade Arbitration Commission (CIETAC)

CISG/2003/25

6 November 2003

Original in Chinese

English translation: <http://cisgw3.law.pace.edu/cases/031106c1.html>

Abstract prepared by Keisha Williams

This case deals primarily with a buyer's responsibility to provide proof of an alleged lack of conformity of goods.

The Chinese seller entered into a contract with the German buyer for the sale of fibreglass mesh in several instalments. After taking delivery of the first and second containers, the buyer claimed defects in the goods and refused to pay the remaining 50 per cent of their price. The buyer also refused to take delivery of the third instalment. In order to mitigate the loss, the seller took back the goods in the third instalment, incurring shipping fees for the round-trip transportation of the goods.

The seller commenced arbitration in which the buyer failed to participate without giving a reason. In lack of a choice of law by the parties, the arbitral tribunal applied the CISG under article 1(1)(a) of the Convention. The tribunal held that the parties had entered into an effective and binding contract and that the seller had performed its obligations under the contract. However, because the buyer failed to provide any evidence of the alleged quality defects, the tribunal was unable to conclude that the goods delivered to the buyer had quality problems. Therefore, the buyer's refusal to pay and take delivery of the goods constituted a breach of the buyer's duties under the CISG.

Accordingly, the arbitral tribunal ordered the buyer to pay the outstanding portion of the purchase price regarding the first two instalments, and to pay interest on that sum under article 78 CISG. The buyer was also ordered to bear the expense of the round-trip transportation fee of the third instalment.

### **Case 976: CISG 25; 74; 75; [76]; 77; 78; [79]**

China: China International Economic and Trade Arbitration Commission (CIETAC)

CISG/2003/10

26 June 2003

Original in Chinese

English translation: <http://cisgw3.law.pace.edu/cases/030626c1.html>

Abstract prepared by Aytekin Gurbuz

A Chinese buyer contracted to purchase 30,000 tons of alumina from a Hong Kong seller. The seller alleged that buyer breached the contract by failing to issue the required letters of credit (L/Cs). Therefore, the seller resold the goods to other buyers at reduced prices. The seller claimed the loss caused by the buyer's breach, including the loss of anticipated profits. The seller further requested interest, the arbitration fee, attorneys' fees and other expenses.

The buyer argued that it signed the contract under economic duress and it also raised a force majeure-type defence contending that it was unable to issue the L/Cs due to a change of regulations and a restriction of alumina imports to China. The buyer argued that it should be exempted from liability for the these reasons.

The contract, signed on 19 September 2001, stipulated that the contract is governed by Hong Kong law, and “the parties incorporate the provisions of Part II and Part III of the CISG except to the extent inconsistent with the express provisions” of the contract or contrary to the applicable law.

The arbitral tribunal ruled that Hong Kong law, as well as Part II and Part III of the CISG applied, except to the extent inconsistent with the express provisions of the contract or contrary to the applicable law. The tribunal held that the buyer did not prove the existence of economic duress, and denied the buyer’s force majeure-type defence, holding that the new regulation did not fully prohibit the importation of alumina to China. Therefore, this regulation did not render the buyer unable to perform its duty under the contract: it could still have taken delivery of the goods.

The tribunal ruled that, under Hong Kong sales law and the CISG, the buyer fundamentally breached the contract when it failed to open the L/Cs (article 25 CISG), and therefore, the seller was entitled to avoid the contract and claim for damages, including the loss of anticipated profits (article 74 CISG and article 52 of the Regulation of Sales of Goods of Hong Kong). The tribunal calculated the damages separately regarding all three instalments under article 75 CISG and held that the seller was obliged to mitigate the damages under article 77 CISG.

The tribunal denied the seller’s claim for interest under article 78 CISG because the amount claimed by the seller was actually damages, not related to any sum in arrears, and the seller did not incur any loss of interest.

**Case 977: CISG [25]; 35; 74; 77**

China: China International Economic and Trade Arbitration Commission (CIETAC)

CISG/2003/09

19 June 2003

Original in Chinese

English translation: <http://cisgw3.law.pace.edu/cases/030619c1.html>

Abstract prepared by Parag Parekh

This case deals primarily with the obligations of the seller to deliver goods in conformity with the contract and the buyer’s duty to mitigate any losses which may be incurred.

The parties entered into a contract for the sale of certain chemicals (PTA) which the buyer intended to resell. The buyer took delivery and delivered the goods to its customers. However, after the goods arrived at their destinations, the buyer was informed that the weight of the packages was less than the contracted weight, and it immediately informed the seller. Subject to an inspection clause in the contract, an inspection agency examined the packages and confirmed the non-compliance. The buyer’s customers terminated their contracts and the buyer claimed damages from the seller for the monetary loss suffered.

The buyer alleged that the seller did not deliver the goods with the proper weight as specified in the contract and in the required packaging under article 35 CISG. The buyer claimed damages under article 74 CISG.

The seller also argued that despite the faulty packaging the actual products were not defective thus there was no fundamental breach. The seller argued that it was not liable for any damages because there was no clear indication that the goods which were to be resold to the subsequent customers were the goods delivered by the seller to the buyer, the buyer had claimed damages after the time period stipulated in the contract had expired; and the buyer did not mitigate the damages under article 77 CISG.

The tribunal held that the buyer had not filed the claim for damages within time specified in the contract. The tribunal, however, held that the seller had known that the goods the buyer wanted to resell were the same goods it had bought from the seller. The tribunal found that the seller fundamentally breached the contract and article 35 CISG, because the packaging did not conform to the contractual requirements that were of special importance due to the nature of the goods, and the buyer became unable to perform the contracts with its customers. Since the buyer did not take such steps as were reasonable in the circumstances to mitigate its losses, the seller's liability was limited to what the buyer's loss would have been, had reasonable measures to remeasure and repack the goods been taken.

Although the buyer did not claim damages within the stipulated time, the tribunal awarded compensation to the extent that the material could be remeasured and subsequently sold in order to further mitigate the losses.

**Case 978: CISG 53; 61; 64; [74]; 75; 77; [78]**

China: China International Economic and Trade Arbitration Commission (CIETAC)

CISG/2002/30

30 December 2002

Original in Chinese

English translation: <http://cisgw3.law.pace.edu/cases/021230c1.html>

Abstract prepared by Alexander Shindler

This case deals with a fundamental breach by the buyer where the buyer failed to take delivery of the goods and pay the price, causing the seller to incur various fees and having to resell the goods for a lower price.

The Chinese seller contracted with a buyer from Luxembourg for the sale of manganese, CFR (cost and freight) Rotterdam. The seller shipped the goods to Rotterdam, but the buyer neither took delivery of the goods nor did pay for them. The seller persistently urged the buyer to pay for the goods under article 53 CISG. While the buyer initially faxed the seller a letter that it would pay the price, later it refused to make the payment. As a result, the goods remained at the destination port, and the shipping agent began charging the seller demurrage and dock rental fees. To mitigate its losses, the seller arranged to resell the goods, but it incurred a loss because the market price of manganese was dropping.

The arbitral tribunal ruled that the buyer fundamentally breached the contract and is therefore liable under articles 61 and 64 CISG. The seller fulfilled its obligation to deliver the goods, but the buyer refused to take delivery of the goods and make

payment, which constituted a fundamental breach of the contract. The subsequent resale of the goods by the seller under article 75 CISG was a reasonable measure to mitigate the damages under article 77 CISG. Because the market price was decreasing, the seller suffered a loss represented by the price difference after reselling the goods. The tribunal further found that the buyer must compensate for the various costs incurred by the seller.

The tribunal held that the seller was not entitled to interest on a bank loan which the buyer did not foresee when concluding the contract with the seller. The tribunal also denied the seller's claim for interest that the seller would have earned had the buyer paid the purchase price because ultimately the seller was able to resell the goods and already obtained the price difference.

**Case 979: CISG [74; 76; 77; 78; 84(1)]**

China: China International Economic and Trade Arbitration Commission (CIETAC)  
CISG/1999/02

28 May 1999

Original Text In Chinese

Published In: Zhongguo Guoji Jingji Maoyi Zhongcai Caijueshu Xuanbian [Selected Compilation of Awards of CIETAC] (1995-2002), (Beijing: Law Press) p. 272

English translation available at: <http://cisgw3.law.pace.edu/cases/990528c1.html>

Abstract prepared by Jean Ho

This case involved the calculation of damages under the CISG. After determining that the absent party had breached the contract, the tribunal calculated the damages.

The Malaysian seller and the Chinese buyer entered into a contract for the sale and purchase of 4,000 steres of Malaysian veneer. The parties agreed to chose Chinese law, and the tribunal applied the CISG as part of that law. The buyer applied for an irrevocable letter of credit (L/C) for the entire purchase price. Then the seller issued an invoice to the buyer and the buyer agreed to undertake the L/C for the invoiced sum. Subsequently, the buyer was informed that the seller was unable to deliver the goods. The buyer asked the seller to return the sum already paid by L/C. The seller remitted 60 per cent of that sum and withheld the remainder. Subsequently, the buyer entered into a substitute transaction for replacement goods. Before the arbitral tribunal, the buyer claimed payment of the unreturned portion of the price, interest, lost profit and liquidated damages.

The tribunal ordered the seller to return the remainder of the price, to pay interest, and to compensate for lost profits as consequences of the seller's breach of contract and late repayment. The tribunal however dismissed the liquidated damages claim because the buyer knew before conclusion of the resale contract that the seller was unable to deliver the goods and, furthermore, it had already received a partial refund from the seller. By nevertheless entering into a resale contract, the buyer did not mitigate its loss and was therefore liable for any loss suffered in this respect.

**Case 980: CISG 25; 74; [75; 78]**

China: China International Economic and Trade Arbitration Commission (CIETAC)  
CISG/1999/08

12 February 1999

Original in Chinese

Published in Chinese: Zong Guo Guo Ji Jing Ji Mao Yi Zhong Cai Wei Yuan Hui  
Cai Jue Shu Hui Bian [Compilation of CIETAC Arbitration Awards] (May 2004)  
1999 vol., pp. 1548-1522

English translation: <http://cisgw3.law.pace.edu/cases/990212c1.html>

Abstract prepared by Jean Ho

This case concerned the non-performance of a contract by joint buyers and the remedies available to the seller. A subsidiary issue was whether an employee can bind his employer by signing a contract on behalf of the employer.

The Swiss seller and two Chinese buyers concluded a contract for the sale of one set of chrome plating production line equipment CIP (cost and insurance paid) Shanghai. A certain percentage of the purchase price was payable by Letter of Credit (L/C) against the bill of lading. Prior to delivery, the seller asked the buyers to open the L/C immediately. The second buyer informed the seller that there were problems with its bank and it would be able to open the L/C only later. The first buyer informed the seller that the end-user could not obtain credit from its bank to purchase the equipment from the buyers and that the seller should contact the end-user and the second buyer. Ultimately, neither the first nor the second buyer opened a L/C as stipulated in the contract. Since the end-user had gone bankrupt and the buyers were unable to perform their obligations under the contract, the seller resold the equipment to another company.

The seller claimed damages for the price difference resulted by the substitute transaction less the amount already paid by the first buyer, interest, storage expenses and various costs and expenses.

The second buyer disputed the liability, arguing that its employee who negotiated and signed the contract had no power to conclude contracts that were binding on the second buyer as well. Relying on past practices, the first buyer disagreed.

The arbitral tribunal rejected the second buyer's argument of non-liability since an employee of the second buyer is not a third party to the contract and was therefore fully capable of representing and binding the second buyer by its signing of the contract. The tribunal held that both buyers had fundamentally breached the contract by failing to open the L/C upon the seller's performance of the contract (article 25 CISG) and were, therefore, liable for the seller's claims for damages since all the losses incurred as a result of the breach ought to have been foreseen by the buyers at the time of conclusion of the contract (article 74 CISG). The tribunal further held that the buyers were liable for the seller's legal fees and the costs of the arbitration and rearbitration.

**Case 981: CISG 74; [75]; 76; [78]**

China: China International Economic and Trade Arbitration Commission (CIETAC)  
CISG/1998/10

25 December 1998

Original in Chinese

Published in Chinese: Zhong Guo Guo Ji Jing Ji Mao Yi Zhong Cai Wei Yuan Hui  
Cai Jue Shu Hui Bian [Compilation of CIETAC Arbitration Awards] (May 2004)  
1998 vol., pp. 3034-3040

English translation: <http://cisgw3.law.pace.edu/cases/981225c2.html>

Abstract prepared by Jean Ho

This case concerned the non-performance of a sales contract by the seller and the amount of damages the buyer was entitled to claim because of the seller's breach.

The Chinese seller and Swiss buyer entered into a contract for the sale and purchase of 10,000 metric tons of pig iron. Prior to the delivery date agreed upon, the buyer opened the necessary L/C, then agreed to extension of the delivery date on the seller's request. Prior to the new delivery date, the seller notified the buyer that its supplier refused to deliver the goods at the price originally agreed upon and sold them to another customer. Then the seller informed the buyer that delivery would not take place and that the seller will compensate the buyer for non-performance of the contract. The buyer submitted the dispute for arbitration.

The buyer alleged that the seller's breach of the contract forced the buyer to obtain the goods from other sources, and at higher prices, in order to fulfil its contractual obligations towards third parties. The buyer entered into two contracts with other suppliers. The buyer claimed lost profit. Since one of the contracts for substitute purchase pre-dated the seller's breach of contract, the buyer took the position that the price of the goods for calculation of damages should be the price prevailing on the Chinese market in the month following the seller's breach (article 76 CISG). In addition, the buyer claimed expenses incurred in opening the L/C, a default penalty, and interest.

The seller did not dispute liability but disputed the method of calculating damages. The seller further argued that the prevailing price in the international market was a more appropriate reference point in the circumstances. The seller also argued that the Bill of Lading provided by the buyer did not indicate the supplier regarding one of the substitute transactions, and was therefore insufficient proof of the price at which the buyer had acquired substitute goods.

The arbitral tribunal rejected the seller's latter contention holding that under article 74 CISG, the loss of profit regarding the disputed substitute transaction must be calculated as the difference between the original contract price and the actual purchase price in that transaction. With regard to the second substitute transaction, the arbitral tribunal agreed with the seller that the "current price" as defined in article 76 CISG should be the international market price.

**Case 982: CISG 14(1); 23; 55; [74]; 75; [77]**

China: China International Economic and Trade Arbitration Commission (CIETAC)  
CISG/1998/11

25 December 1998

Original in Chinese

Published in Chinese: Zhong Guo Guo Ji Jing Ji Mao Yi Zhong Cai Wei Yuan Hui  
Cai Jue Shu Hui Bian [Compilation of CIETAC Arbitration Awards] (May 2004)  
1998 vol., pp. 3040-3046

English translation: <http://cisgw3.law.pace.edu/cases/981225c1.html>

Abstract prepared by Jean Ho

This case concerned the importance of specificity in the terms of a contract and the need to notify the other party once a decision to avoid the contract has been made.

The Chinese seller and Swiss buyer concluded a contract for the sale and purchase of 5,000 metric tons of Basic pig iron and 5,000 metric tons of Foundry pig iron. Under the contract, the buyer had to open an irrevocable Letter of Credit (L/C), and another L/C was to be opened concerning the import of 100,000 metric tons of Iron ore by the seller. The contract also provided for the delivery of 10,000 metric tons of Basic pig iron at a price to be mutually agreed, and 10,000 metric tons of Basic pig iron or Foundry iron also at a price to be mutually agreed. The Basic pig iron and the Foundry pig iron were to be supplied by two different factories named in the contract.

According to the seller, the buyer only performed its obligations with respect to the first 5,000 metric tons of Basic pig iron and subsequently compensated the seller for the first 5,000 metric tons of Foundry pig iron. In addition, the buyer did not fulfil its obligations with respect to the remaining 20,000 metric tons of Basic pig iron. This resulted in the seller having to resell the 10,000 metric tons of Basic pig iron to two other companies at a loss, and suffer further losses from its cancellation of an order for 10,000 metric tons of Basic pig iron from a domestic supplier. The seller claimed damages and interest as a result of the resale of the 10,000 metric tons of Basic pig iron, and costs incurred as a result of cancellation of the 10,000 metric ton Basic pig iron order.

The buyer alleged that the 10,000 metric tons of Basic pig iron which the seller eventually resold was in fact the subject matter of another sale and purchase contract concluded between them (see Case 981) The buyer also argued that the seller should not be allowed to claim losses due to the cancellation of the order of 10,000 metric tons of Basic pig iron since the domestic supplier was not the supplier agreed upon in the original contract.

The tribunal first considered whether a contract for the 20,000 metric tons of Basic pig iron had been concluded. It was decided that the first offer concerning 10,000 metric tons of Basic Pig Iron was “sufficiently definite” (article 14 (1) CISG) and it was accepted in accordance with article 23 CISG). However, the offer regarding 10,000 metric tons of Basic pig iron or Foundry pig iron was not “sufficiently definite” as there was uncertainty regarding the ultimate subject matter of the offer. Therefore, there was no offer, no acceptance and no contract concerning the remaining 10,000 metric tons of Basic pig iron.

Although the tribunal rejected the buyer’s contention that the 10,000 metric tons of Basic pig iron that was resold formed the basis of the other contract between the

parties since there was nothing in the latter contract to support the buyer's position, it held that the seller was nonetheless not entitled to losses incurred as a result of the resale. Documentary evidence showed that the seller and the buyer were still negotiating the price of these 10,000 metric tons of Basic pig iron. As the seller produced no evidence to show that it had avoided the original contract before the first resale by the seller took place, article 75 CISG did not apply to entitle the seller to claim damages because the seller's resale contracts with the two other companies were not concluded subsequent to an avoidance of the original contract.

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