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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 79: CISG 49(1); 78; 81(1)
Germany: Oberlandesgericht Frankfurt a.M.; 5 U 15/93
18 January 1994
Published in German: Recht der Internationalen Wirtschaft (RIW) 1994, 240
Commented on by Diedrich, RIW 1995, 11

The defendant, a German trading company, refused to pay the purchase price of shoes bought from the plaintiff, an Italian shoe manufacturer, on the grounds that the shoes were not delivered within the time limits prescribed in the contract and did not conform with the specifications of the contract.

The court held that the defendant was not entitled to declare the contract avoided and to refuse to pay the purchase price because it had not set a time limit within which the seller had to deliver and had failed to establish that a fundamental breach of contract was involved (articles 49(1) and 81 (1) CISG). The court noted that the defendant did not specify whether the shoes were just below standards (in which case the defendant could, e.g., reduce the price or claim damages), or totally unfit for resale (in which case the defendant could declare the contract avoided).

As a result, the court ordered the defendant to pay the purchase price and interest at the rate of 10%, which was the rate under Italian law, the law applicable under German private international law.

Case 80: CISG 57(1)(a); 58
Germany: Kammergericht Berlin; 2 U 7418/92
24 January 1994
Published in German: Recht der Internationalen Wirtschaft (RIW) 1994, 683

The plaintiff, the Italian assignee of the claim of the Italian seller for payment of the purchase price, sued the buyer, a German company, demanding payment. At issue was whether payment was due in German mark, as initially demanded by the seller, or in Italian lira, as agreed in the contract.

The court found that the CISG was applicable as the law of the country where the seller had its place of business. It was held that the application of the CISG could be excluded only if that was the actual and not the hypothetical intention of the parties. With regard to the validity of the assignment, the court applied other Italian law since the CISG did not address assignment.

The court held that, even if the parties had not agreed that payment should be made in Italian lira, the price would still be payable in Italian lira since the place of payment would be the place of business of the Italian seller (CISG 57(1)(a)). In addition, the court held that interest was payable from the time the purchase price became due, even if no notice was given (CISG 58).

Case 81: CISG 38; 39; 78
Germany: Oberlandesgericht Düsseldorf; 6 U 32/93
10 February 1994
Published in German: Recht der Internationalen Wirtschaft (RIW) 1995, 53

The defendant, a German buyer of textiles, refused to pay to the plaintiff, a French seller, the balance of the purchase price, on the grounds that the goods did not conform with the contract specifications. At issue was whether the defendant raised the objection of lack of conformity within a reasonable period of time. The fist instance court held in favour of the plaintiff.

The appellate court found that the contract had been concluded before the CISG entered into force for Germany and, applying German private international law rules, held that the CISG was applicable as part of the applicable law of France. On the merits of the case, the court found that the defendant had raised the objection of lack of conformity of the goods two months after delivery, while it could have discovered easily the defects and raised the objection within a few days after delivery, if it had conducted a random search. It was held that the defendant had lost its right to allege lack of conformity because it failed to raise it within a reasonable time.

The court of appeals held that interest was payable under article 78 CISG at the rate existing under other applicable French law. The case was remanded to the first instance court because of procedural errors.

Case 82: CISG 35(2)(b); 39; 45; 47(2); 49(1)(b); 51; 78; 82(1)
Germany: Oberlandesgericht Düsseldorf; 6 U 119/93
10 February 1994
Published in German: Recht der Internationalen Wirtschaft (RIW) 1994, 1050

The defendant, a German buyer, refused to pay the purchase price asserting that parts of the fabrics delivered by the plaintiff, an Italian seller of textiles, were of a colour different from that specified in the contract. The first instance court held in favour of the plaintiff.

The appellate court held that the fact that some of the textiles delivered were of a different colour did not amount to non-conformity with contract specifications, since the textiles were not unfit for the purpose for which they were bought (article 35(2)(b) CISG). The court held that such a delivery constituted partial non-performance, as a result of which the defendant was entitled to exercise the rights prescribed in articles 46 to 50 of the CISG (article 51 CISG). However, it was found that the defendant failed to fix an additional period of time of reasonable length for performance by the plaintiff, and consequently, it was held that the defendant could not exercise those rights (articles 39, 47(2) and 49(1)(b) CISG). The only right that the defendant had not lost as a result of its failure to fix an additional period of time for performance by the plaintiff was the right to demand payment of damages for breach of contract by the plaintiff (article 45 CISG). However, the court found that the defendant had not demanded such damages.

on another ground, namely that the defendant had sold further the goods bought, thus having made restitution of the goods impossible (article 82(1) CISG).

The appellate court confirmed the decision of the court of first instance and ordered the defendant to pay the purchase price plus interest (article 78 CISG). In view of the fact that the CISG does not specify the interest rate, the court applied the statutory interest rate of 5% of the applicable German law chosen by the parties. The court noted that, if the parties had not chosen German law as applicable law and Italian law were to apply, the interest rate would still be the same.

Case 83: CISG 35; 45(1)(c); 49(2); 50; 78
Germany: Oberlandesgericht München; 7 U 4419/93
2 March 1994
Published in: Recht der Internationalen Wirtschaft (RIW) 1994, 595

The plaintiff, a Swedish seller of coke which was delivered to a company in the former Yugoslavia under instructions of the defendant, a German buyer, sued demanding payment of the purchase price. The defendant objected mainly relying on a complaint made by the Yugoslav company that the coke was of inferior quality.

The court held that the supply of goods of inferior quality did not constitute a fundamental breach of contract that could justify the avoidance of the contract and the refusal to pay. It was found that, in any event, the defendant would have lost the right to declare the contract avoided since the defendant claimed avoidance of the contract four months after delivery, which could not be considered as a reasonable time under article 49(2) CISG.

In addition, it was held that the defendant should have expressed its intention to reduce the price in order to be entitled to a reduction of the purchase price for lack of conformity of the goods (articles 35 and 50 CISG). Moreover, it was held that the defendant was not entitled to damages under article 45(1)(c), since it failed to establish that it suffered any damages and to offset those damages against the purchase price.

The court ordered the defendant to pay the purchase price plus interest (CISG 78). As the CISG does not set an interest rate, the court applied the statutory interest rate of 8% according to the applicable Swedish law.

Case 84: CISG 35(2); 49
Germany: Oberlandesgericht Frankfurt a.M.; 13 U 51/93
20 April 1994
Published in German: Recht der Internationalen Wirtschaft (RIW) 1994, 593

The plaintiff, a Swiss company, sold New Zealand mussels to the defendant, a German company. The defendant refused to pay because the mussels had been found by the Federal Health Office to be generally not safe because they contained a cadmium concentration in excess of the statutory limit of 0,5 mg/kg. The first instance court ordered the defendant to pay. The defendant

statutory limit of 0,5 mg/kg. The first instance court ordered the defendant to pay. The defendant appealed.

The appellate court held that the supply of mussels with higher cadmium composition did not constitute a fundamental breach of contract justifying avoidance of the contract and a refusal of the buyer to pay the purchase price, since the statutory cadmium limit expressed an optimum situation of food items and was not a binding maximum limit. In addition, it was held that the high cadmium composition did not constitute lack of conformity of the mussels with contract specifications under CISG 35(2), since the mussels were still fit for eating.

Moreover, it was held that even if the defendant had established faulty packaging of the goods, as referred in the defendant's pleadings, the contract could not be avoided. In order to justify avoidance of the contract in these circumstances, faulty packaging must be a fundamental breach of contract; and such a breach must be easily detectable, which would enable the defendant to declare avoidance of the contract within a reasonable time after receiving delivery.

The appellate court ordered the defendant to pay the purchase price (CISG 78) and interest at the rate of 5%, which is the statutory interest rate under both German and Swiss law.

Case 85: CISG 1(1)(a); 74; 75; 77; 78
United States of America: U.S. District Court for the Northern District of New York
9 September 1994
Delchi Carrier, SpA v. Rotorex Corp.
Published in English: 1994 U.S. Dist. LEXIS 12820; and in 1994 WESTLAW 495787

The defendant, a Maryland manufacturer of compressors for air conditioners, agreed to sell 10800 compressors to the plaintiff, an Italian manufacturer of air conditioners. The sales contract provided for delivery in three shipments. The defendant made the first shipment. While the second shipment was en route, the plaintiff discovered that the compressors contained in the first shipment were nonconforming with contract specifications. The plaintiff rejected the second shipment, stored it at the port of delivery and, after having tried unsuccessfully to cure the defects, sued demanding damages for breach of contract pursuant to article 74 CISG.

The court held that the defendant breached the contract and granted the plaintiff damages to cover: (1) the plaintiff's expenses incurred when attempting to remedy the nonconformity in the compressors; (2) the sums paid by the plaintiff to expedite shipment of compressors from a third party in order to mitigate losses from orders that the plaintiff could not meet as a result of the defendant's breach of contract (article 77 CISG; the shipment of substitute compressors was not found to be covered under article 75 CISG - purchase of replacement goods by the buyer - because the compressors had been ordered prior to the breach of contract and thus could not have replaced the nonconforming compressors); (3) the plaintiff's costs for handling and storing the nonconforming compressors; and (4) the plaintiff's lost profits resulting from a diminished volume of sales, in respect of which the plaintiff was able to provide, in conformity with common law and the law of New York, "sufficient evidence [for the court] to estimate the amount of damages with reasonable certainty". The court rejected the plaintiff's claim for damages to cover expenses relating to the anticipated cost of production of air conditioners, holding that those costs were

accounted for in the claim for lost profits. Pursuant to article 78 CISG, the court held that the plaintiff was entitled to prejudgment interest; as the CISG does not specify an interest rate, the court applied the rate applicable for U.S. treasury bills.

Case 86: CISG 29(2)
United States of America: U.S. District Court for the Southern District of New York
22 September 1994
Graves Import Co. Ltd. and Italian Trading Company v. Chilewich Int'l Corp.
Published in English: 1994 U.S. Dist. LEXIS 13393; and in 1994 WESTLAW 519996

The plaintiffs were the agents of the defendant, a New York import-export company, in its dealings with an Italian manufacturer of footwear that were intended to be sold in Russia. The defendant refused to pay the plaintiffs' agency fees arguing that: the plaintiffs had breached their agency duties; and delivery of the shoes was a condition precedent to the payment of the agency fees. The defendant refused to accept delivery of a shipment of shoes sent from the Italian manufacturer arguing that the sales contract was orally modified to the effect that further deliveries would be subject to the Russian buyers paying for shoes previously delivered to them. The plaintiffs argued that their agency duties were limited to performing quality controls and that they had performed those duties. In addition, the plaintiffs rejected the existence of any condition precedent. Both the plaintiffs and the defendant applied for a summary judgement.

The court noted that in contract actions summary judgement was appropriate "when the contract terms are clear and not conducive to more than one reasonable interpretation" and rejected both applications for a summary judgement finding that the content of the agency agreement between the defendant and the plaintiffs was disputed. In the course of discussion, the court noted that the contract between the defendant and the Italian manufacturer incorporated a provision making modifications invalid unless they were in the form of a writing signed by both parties. Citing article 29(2) CISG, the court found that the defendant was precluded from asserting that there had been an oral modification of that contract making further deliveries of shoes by the Italian manufacturer to the defendant subject to payment by the Russian end-buyers of the price of shoes previously delivered.

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

Case 87: MAL 7(2)
Hong Kong: High Court of Hong Kong (Kaplan J.)
17 November 1994
Gay Constructions PTY Ltd. and Spaceframe Buildings (North Asia) Ltd. v. Caledonian Techmore (Building) Limited and Hanison Construction Co. Ltd. (as a third party)
Original in English
Unpublished

(Abstract prepared by the Secretariat)

Hanison, the main contractor in a construction project, applied as a third party for a stay of court proceedings instituted by Gay Constructions and Spaceframe Buildings, the sub-

subcontractors, against Caledonian, the subcontractor. The contract between the plaintiff and the defendant was in writing. It contained an arbitration clause but, while it was signed by Hanison, it was not signed by Caledonian.

At issue was whether the letters exchanged between Hanison and Caledonian provided a record of the contract, including the arbitration clause and whether there is an exchange of a statement of claim and defence in which the existence of the arbitration agreement is alleged and not denied (article 7(2) MAL).

The court held that the letters exchanged between the parties provided a record of their contract in the sense of article 7(2) MAL, despite the fact that no explicit reference was made in the letters to the arbitration clause contained in the contract. In addition, the court found that Caledonian had submitted to Hanison a claim called "contractual claim for loss and expense" on the basis of the contract and held that this claim constituted either a letter or, alternatively, a claim under article 7(2), in which the existence of the arbitration agreement was alleged by Caledonian and not denied by Hanison. The court noted that the phrase "statements of claim and defence" in article 7(2) MAL was not defined and found no reason why it should be interpreted as referring "only to pleadings in the formal sense once an arbitration has commenced". The court stayed the court proceedings under section 6 of the Hong Kong Arbitration Ordinance.

Case 88: MAL 36(1)(a)(ii)
Hong Kong: High Court of Hong Kong (Kaplan J.)
16 December 1994
Nanjing Cereals, Oils and Foodstuffs Import & Export Corporation v. Luckmate Commodities Trading Ltd.
Original in English
Unpublished

(Abstract prepared by the Secretariat)

The plaintiff obtained an arbitration award from the China International Economic and Trade Arbitration Commission (CIETAC) ordering the defendant to pay the purchase price of Peruvian fishmeal, which the defendant had bought from the plaintiff. The defendant failed to pay and the plaintiff applied to the court for leave to enforce the arbitral award.

The court granted leave for enforcement and the defendant requested the court to set aside the leave because it was not given a sufficient opportunity to present its case as to the quantum of the claim (sec. 44 of the Hong Kong Arbitration Ordinance, which is identical to article 36(1)(a)(ii) MAL). The defendant based its argument on the fact that the arbitral tribunal formed its opinion as to the amount of the claim "through independent investigation".

The court found that the defendant had ample opportunity to present its own evidence as to the amount of the claim but failed to do so. It was held that even if there were grounds for the court to set aside the award, it was at the discretion of the court to do so, since MAL provided that enforcement "may be refused" (emphasis added). The court dismissed the application to set aside the leave for enforcement of the arbitral award.

Case 89: MAL 8
Hong Kong: High Court of Hong Kong (Kaplan J.)
16 December 1994
York Airconditioning & Refrigeration Inc. v. Lam Kwai Hung Trading as North Sea A/C Elect. Eng. Co.
Original in English
Unpublished

(Abstract prepared by the Secretariat)

The plaintiff, a Hong Kong company, sold to the defendant, a Hong Kong agent of a Chinese company, water cooling machines that were to be installed in Beijing. The contract contained an arbitration clause for arbitration in Beijing under the CIETAC Rules. The defendant paid 30% of the price in Hong Kong, and for the balance a bill of exchange was drawn in Hong Kong on a Hong Kong party and accepted by the defendant. A dispute arose as to the quality of the goods and the defendant failed to honour the bill of exchange upon presentation. The seller sued in Hong Kong. A stay of court proceedings requested by the defendant was not granted by the Master of the court and the defendant appealed.

The court held that under the Chinese law applicable to the sales contract (the law of the place of arbitration), the bill of exchange was to be treated as a separate contract, which was not covered by the arbitration clause contained in the sales contract. In addition, it was held under the Hong Kong law applicable to the bill of exchange that the bill of exchange was a separate contract and a claim on the bill was not covered by the arbitration clause contained in the sales contract. The application for a stay of the court proceedings was dismissed and the claim of the defendant was referred to the appropriate court.

III. ADDITIONAL INFORMATION ON ABSTRACTS PUBLISHED IN A/CN.9/SER.C/ABSTRACTS/1, 2, 3, 4 and 5

Case 2

Commented on by Babiak in 6 Temple International and Comparative Law Journal, 124 (1992), and by Behr in 12 Journal of Law and Commerce, 271 (1993).

Case 23

Commented on by Perales Viscasillas in Derecho de los negocios, January 1995, 9 and by Del Duca and Del Duca in 27 Uniform Commercial Code Law Journal,331 (1995)

Cases 38-41, 43, 44, 62 and 64

Commented on by Kaplan in Asia Law January/February 1995, 23.

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