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(CLOUT)

Contents

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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). Information about the features of that system and about 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://www.uncitral.org).

Issues 37 and 38 of CLOUT introduced several new features. First, the table of contents on the first page lists the full citations to each case contained in this set of abstracts, along with the individual articles of each text which are interpreted by the court or arbitral tribunal. Second, the Internet address (URL) of the full text of the decisions in their original language are 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 web sites other than official United Nations web sites do not constitute an endorsement by the United Nations or by UNCITRAL of that web site; furthermore, web sites change frequently; all Internet addresses contained in this document are functional as of the date of submission of this document). Third, abstracts on cases interpreting the UNCITRAL Model Arbitration Law now 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, and in the forthcoming UNCITRAL Digest on the UNCITRAL Model Law on International Commercial Arbitration. Finally, comprehensive indices are included at the end, to facilitate research by CLOUT citation, jurisdiction, article number, and (in the case of the Model Arbitration Law) keyword.

Abstracts have been prepared by National Correspondents designated by their Governments, or by individual contributors. It should be noted that neither the National Correspondents nor anyone else directly or indirectly involved in the operation of the system assumes any responsibility for any error or omission or other deficiency.

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I. Cases relating to the United Nations Sales Convention

Case 477: CISG 9(2); 38; 39; 40
Austria: Oberster Gerichtshof
2 Ob 48/02a
27 February 2003
Original in German
Unpublished
Abstract prepared by Martin Adensamer, National Correspondent

The seller offered the buyer frozen fish. The buyer requested a sample and after testing ordered several cases of the fish for a customer in Latvia. Upon the arrival of the first container in Riga the buyer and its customer found out that the fish was from the previous year's catch, a fact that was known to the seller. The fish was not allowed to be imported into Latvia for human consumption as it was older than six months, and was therefore sent back to the buyer by its customer. The seller sought payment of the price.

The Supreme Court directed the Court of Appeal to make a determination whether an international usage existed that frozen fish are to be presumed to be from the current year's catch unless otherwise specified. The Supreme Court noted that if such a usage existed, and would be applicable pursuant to article 9(2) CISG, the goods would have been non-conforming and consequently the seller, under article 40 CISG, being aware of the non-conformity, could not rely on the failure of the buyer to give notice of non-conformity as required by articles 38 and 39 CISG.

Case 478: CISG 1; 35; 36
France: Court of Cassation
Y 00-13.453
SARL Coq'in, SA Mac Cold v. Polarcup Benelux BV
8 January 2002
Original in French
Published in French: Revue critique de droit international privé 2002, p. 343, note Horatia Muir Watt
http://witz.jura.uni-sb.de/CISG/decisions/080102.htm (French language text)
Abstract prepared by Claude Witz, National Correspondent with the assistance of Timo Niebsch

A French buyer of tubs of ice cream was ordered by the Court of Appeal of Grenoble, deciding the case in chambers, to pay to the seller, a Dutch company, the total invoiced amount for delivered goods. The French company appealed to the Court of Cassation and claimed that the Court of Appeal had, inter alia, failed to apply article 35 CISG and, on the assumption that CISG did not govern contentious sales, had refrained from determining the law applicable to the contract.

The Court of Cassation rejected the appeal. It ruled that there were no grounds for appeal because the Court of Appeal "was able to conclude from the conformity of the product sold—as defined by CISG of 11 April 1980, which the Court was thus implicitly applying—that the obligation of the buyer to pay the sale price could not seriously be contested, there being no need to further consider the merits of the case in order to determine the applicable law".

Case 479: CISG 42(2)
France: Court of Cassation
T 00-14.414
19 March 2002
SA Tachon diffusion v. Marshoes SL
Original in French
http://witz.jura.uni-sb.de/CISG/decisions/190302.htm (French language text)
http://cisgw3.law.pace.edu/cases/020319f1.html (English translation)
Abstract prepared by Claude Witz, National Correspondent with the assistance of Timo Niebsch

The seller, a Spanish company, delivered to the buyer, a French company, shoes with counterfeit ribbons. The holder of the intellectual property right received compensation from the buyer. The buyer brought an action against the Spanish company for reimbursement of the sum of 300,000 francs paid to the victim of the counterfeit and for payment of damages. The buyer's claim was dismissed by the Court of Appeal of Rouen.

The Court of Cassation rejected the appeal lodged against the decision of the Court of Appeal. The Court of Cassation cited the sovereign discretion of the trial judges who found that the buyer could not, as a professional, have been unaware of the counterfeit; therefore, the buyer acted with knowledge of the property right invoked. The Court of Cassation found that the Court of Appeal correctly applied article 42(2)(a) CISG and had properly concluded that the obligation of the seller did not extend to delivering goods free from any intellectual property right.

Case 480: CISG 1(1); 30; 53; 61; 77; 79
France: Court of Appeal of Colmar
Romay AG v. SARL Behr France
12 June 2001
Original in French
http://witz.jura.uni-sb.de/CISG/decisions/120601.htm (French language text)
Abstract prepared by Claude Witz, National Correspondent with the assistance of Timo Niebsch

A French manufacturer of air conditioners for the automobile industry (the defendant) concluded a "collaboration agreement" on 26 April 1991 with its supplier, a Swiss company (the plaintiff). The plaintiff undertook to deliver at least 20,000 crankcases over eight years according to the needs of the defendant's client, a truck manufacturer. The goods were described in a precise manner and the method of calculating the price was fixed for the entire duration of the contract initially envisaged by the parties. Following a sudden collapse in the automobile market, which caused the truck manufacturer to change its terms of purchase radically by imposing on the defendant a price for the air conditioners which was fifty per cent lower than the price of the incorporated components sold by the plaintiff, the defendant declared in a letter of 6 December 1993 its desire to stop using the crankcases manufactured by the plaintiff in the production of air conditioners. As at 31 December 1993, only 8,495 of the 20,000 casings had been delivered. On 19 June 1996 the plaintiff brought an action against the defendant before the Colmar District Court to obtain 3,071,962 Swiss francs in damages.

The Court of First Instance, competent pursuant to a jurisdiction clause that is effective under the terms of article 17 of the Lugano Convention on jurisdiction and the enforcement of judgements in civil and commercial matters, dismissed the plaintiff's claim for compensation. The court declined to apply the CISG on the grounds that the collaboration agreement could not be characterized as a sales contract because the total quantity of goods to be delivered was not determined. The agreement—a framework agreement on production and distribution—was governed by article 4 of the Rome Convention and the law applicable to the case was Swiss law. The Court of First Instance concluded that the agreement did not create any firm obligation to purchase on the part of the defendant.

The Court of Appeal reversed that judgement. It found the CISG to be applicable to the "collaboration agreement". Despite the title of the agreement, the Court defined it as a sales contract under the terms of CISG. The Court stated that the important factor was to determine the actual content of the agreement and to verify whether the parties had entered into the obligations of a buyer and a seller as defined in articles 30 and 53 CISG. The designation of the parties as manufacturer and buyer, the precise determination both of the goods to be delivered and of the method of calculating the price, and the fixing of a minimum quantity of 20,000 crankcases led to the conclusion that the agreement had all the characteristics of a sales contract. The Court recognized that the agreement did not contain any clause expressly imposing an obligation to buy on the defendant. However, "it follows from the general economic balance of the contract—and from the particular stipulation with regard to the obligation to build up inventory—that the delivery obligation expressly contracted by the [plaintiff] entails an implicit obligation on the [defendant] to buy the goods that the [plaintiff] undertook to deliver". Moreover, the court noted that "the obligation imposed on one party to deliver the goods—rather than merely to keep them available—implies the prior agreement of the counterparty to receive the goods at the agreed price and, therefore, the counterparty's undertaking to pay the price of the goods to be delivered".

The Court of Appeal then noted that the defendant had taken delivery of 8,495 crankcases at the time of termination of the contractual relationship. As the defendant had undertaken to receive and pay for 20,000 units, it had not performed its obligations. Pursuant to article 61 CISG, the plaintiff therefore had grounds for claiming damages unless the significant modification of the terms of purchase of the defendant's client could be found to constitute grounds for exemption under article 79 CISG. However, the Court emphasized that this modification, which made it very costly for the defendant to continue incorporating components produced by the plaintiff, was neither exceptional nor unforeseeable in a contract whose duration was fixed at eight years. The court observed that "it was up to the [defendant], a professional experienced in international market practice, to lay down guarantees of performance of obligations to the [plaintiff] or to stipulate arrangements for revising those obligations. As it failed to do so, it has to bear the risk associated with non-compliance".

The Court of Appeal thus concluded that the claim for compensation for the damage was in principle well-founded. However, the Court considered it necessary to carry out an expert evaluation before ruling on the amount of compensation. Article 77 CISG obliged the plaintiff to mitigate the loss. The Court noted that the damage alleged by the plaintiff—the loss of profit and the cost of the raw materials

which became unusable—might not have been so great if the inventory had been resold and if the sum invested in the implementation of the agreement could have been amortized in a different way.

Case 481: CISG 3(2); 49(2)
France: Court of Appeal of Paris
1998/38724
Aluminium and Light Industries Company (ALICO Ltd.) v. SARL Saint Bernard Miroiterie Vitrerie
14 June 2001
Original in French
http://witz.jura.uni-sb.de/CISG/140601.htm (French language text)
http://cisgw3.law.pace.edu/cases/010614f1.html (English translation)
Abstract prepared by Claude Witz, National Correspondent with the assistance of Timo Niebsch

The buyer, a company with its headquarters in the United Arab Emirates placed an order with the seller, a French company, for 128 decorated laminated glass panels for the construction of a dome in an Egyptian hotel. The buyer noted when the goods arrived at the port of Dubai in February 1997 that 35 of the panels were unusable because the decorative films had come unstuck and were creased. On 26 February 1997 the buyer sent a fax to the seller stating that "the product does not meet the required standards". The buyer had a number of amicable expert evaluations carried out with a view to finding out whether the lack of conformity of the goods was due to a manufacturing fault or a transport fault, but the reports produced conflicting results. On 6 May 1998 the buyer brought an action against the seller and claimed avoidance of the contract as well as restitution of the price with interest and payment of damages.

The Commercial Court of Paris dismissed the buyer's claims on the grounds that the buyer did not prove with certainty the origin of the defect in the glass panels.

The Court of Appeal of Paris disagreed with the reasoning of the Commercial Court, but nonetheless ruled the buyer's claim inadmissible. The Court stated first of all that CISG was applicable to the present contract, which it characterized as a sales contract rather than a contract for services. The Court observed that "the work required for the manufacture of decorated laminated glass cannot be regarded as the supply of labour or services under article 3(2) CISG".

However, the Court determined that the claim for avoidance of the contract and the secondary claims for restitution of the price and payment of damages were inadmissible because avoidance had not been declared within a reasonable time, as required by article 49(2) CISG. The claim for damages was also found to be inadmissible. In determining whether avoidance had been declared within a reasonable time, pursuant to article 49(2), the Court referred to the date on which the court action was brought—6 May 1998—whereas notice of non-conformity of the goods was given on 26 February 1997. With regard to the point at which the period of time commenced, the Court expressed hesitation. Initially, the Court cited the date on which notice of the defects was given; subsequently, in view of the amicable expert evaluations carried out to determine precisely the origin of the defects, it cited the submission of the last evaluation report on 22 August 1997 and

concluded that "the claim for avoidance of the contract, made more than eight months after the event, could not be regarded as having been made within a reasonable time".

In the last part of the ruling, the Court noted in addition that the buyer's claims were inadmissible on the merits, in view of the impossibility of determining with certainty the origins of the defects in the goods, since the defects could have been caused wholly or partly by the transport or storage conditions, which were the responsibility of the buyer.

Case 482: CISG 6; 7; 38; 39
France: Court of Appeal of Paris
2000/04607
Traction Levage SA v. Drako Drahtseilerei Gustav Kocks GmbH
6 November 2001
Original in French
http://witz.jura.uni-sb.de/CISG/decisions/061101.htm (French language text)
Abstract prepared by Claude Witz, National Correspondent with the assistance of Timo Niebsch

On 5 December 1994 the buyer, a French company, ordered lift cables from the seller, a German company. The seller delivered the goods on 9 January 1995 on reels that did not conform with the order. After repackaging them on 17 January 1995, the buyer sent the cables to its client, a French company responsible for the maintenance of the lifts in the Eiffel Tower. While installing the cables at the site in March 1995, the client noticed that the goods were defective and informed its supplier, the buyer. The buyer submitted a claim to the seller, the German company, by fax on 16 March 1995. On 7 October 1996 the buyer brought an action against the seller.

The Commercial Court of Paris dismissed the warranty proceedings brought by the French buyer against the German manufacturer. The Court found that the action was not time-barred, but concluded that the warranty proceedings were inadmissible because of the delay in the provision of notice of non-conformity to the seller.

The Court of Appeal of Paris upheld the judgement, except as regards time-barring. The Court emphasized that CISG was automatically applied to contracts for the sale of goods between parties whose places of business were in different Contracting States. A contractual exclusion of the application of the Convention, pursuant to article 6, had to be proved by the party which invoked that rule. A unilateral note in the buyer's commercial documents stating that any dispute would be governed by French law was found not to constitute adequate proof. Such a note did not demonstrate that the two parties intended to exercise the option set out in article 6 of the Convention, which, the Court observed, constituted French law applicable to such sales. In the absence of proof of a common intention of the parties to exclude the application of CISG, the sales contract was governed by CISG.

The Court of Appeal of Paris ruled that the time-barring of the right to bring action was a matter governed by the Convention, but not settled in it. French private international law, applicable under article 7 CISG, referred for matters of time-barring to the law by which the contract was governed. Article 3 of the Convention

on the Law Applicable to International Sales of Goods, done at the Hague on 15 June 1955, stated that the sales contract was governed by the domestic law of the country in which the seller had its habitual residence at the time when it received the order. The time-barring was therefore governed by German law. Article 3 of the German Introductory Act of 5 July 1989 and paragraph 477 of the German Civil Code (BGB) provided that the buyer could not bring an action for lack of conformity under CISG more than six months after giving notice. As the buyer had given notice of the lack of conformity of the cables on 16 March 1995, the court action brought by it on 7 October 1996 was found to be time-barred.

The Court of Appeal of Paris also ruled that the action would have been unfounded even if the time-barred period had been interrupted or suspended. Article 38 CISG obliged the buyer to check the goods after delivery. According to the Court, the buyer should have carried out this check at the latest when the cables were repackaged on 17 January 1995. As notice was not given to the seller until 16 March 1995, following the discovery of the defects by the client of the buyer, the buyer lost the right to rely on the lack of conformity of the goods under article 39 CISG.

Case 483: CISG 1(1)(b); 6
Spain: Provincial High Court of Alicante, section 7
16 November 2000
Published in Spanish: *Aranzadi Civil*, March 2001, 2413, pp. 1315-1317
Commented on by: Beatriz Campuzano Díaz, "Exclusion of the application of the 11 April 1980 Vienna Convention on Contracts for the International Sale of Goods because of the independence of the contracting parties". *Revista de Derecho Patrimonial*, 2001-2, No. 7, pp. 151-156
http://www.uc3m.es/cisg/espan13.htm (Spanish language text)
http://cisgw3.law.pace.edu/cases/001116s4.html (English translation)
Abstract prepared by Maria del Pilar Perales Viscasillas, National Correspondent

The buyer, a British firm, entered into a contract to purchase shoes from a Spanish seller. In a dispute over the contract, the Spanish court applied Spanish domestic sales law and found in favour of the seller. The buyer appealed, asserting that the Court should have applied the CISG, since the matter related to an international sale of goods.

The Court of Appeals affirmed the decision, concluding that the parties had tacitly excluded the application of CISG under article 6. Relevant factors included: (1) a term in the standard purchase contract which explicitly stated that the contract should be interpreted in accordance with English law (which, in the Court's view, was tantamount to excluding international law); (2) the parties submitted their petitions, statements of defence, and counterclaims in accordance with Spanish domestic law, rather than the CISG; and (3) the buyer did not raise the issue of applicability of the CISG until the time of appeal.

Case 484: CISG 26; 30; 35; 38; 39
Spain: Provincial Court of Pontevedra (Sixth Division)
3 October 2002
3036/2002
http://www.uc3m.es/cisg/sespan24.htm (Spanish language text)
Abstract prepared by Maria del Pilar Perales Viscasillas, National Correspondent

A Spanish seller and a Jordanian buyer entered into a contract for the CIF sale of frozen fish to be delivered to Jordan. The Jordanian authorities refused to permit the fish to be imported due to parasitic contamination, and the buyer notified the seller of the non-conformity. The seller resold the fish to a third party in Estonia, and refunded the price to the buyer, less the cost of the return shipment to Spain and the subsequent shipment to Estonia. The Court of First Instance concluded that the seller should reimburse the full freight costs it withheld from the buyer.

The Court of Appeals affirmed the decision, and reached its conclusions in law by reference both to CISG articles 26, 30, 35, 38, and 39 (as urged by the buyer), and to provisions of Spanish domestic law (as urged by the seller). In the Court's view, the buyer had examined and reported the defects in the goods within a reasonable time. The period in which the buyer carried out the examination of the goods was one month and the buyer gave notice within two months and filed a claim with the courts within two years. The Court also stated that "contrary to what happens in several domestic legal systems, avoidance is not judicial but becomes effective automatically after the obligation to give notice to the party in default is observed (article 26 of the Vienna Convention)". The Court also noted that the contract contained a cancellation clause which provided that the seller would assume full responsibility should the goods fail to pass health inspections in Jordan.

Furthermore, the Court noted that the seller acted against its own action (article 7.1 of the Spanish Civil Code) since the correspondence sent by the seller demonstrated that the seller assumed responsibility for the defects in the goods and also agreed to partial avoidance of the contract in reselling the goods and refunding part of the price to the buyer.

Case 485: CISG 88
Spain: Provincial Court of Navarre
22 January 2003
73/2002
http://www.uc3m.es/cisg/sespan23.htm (Spanish language text)
Abstract prepared by Maria del Pilar Perales Viscasillas, National Correspondent

The case arose out of a contract of carriage between two Spanish firms, Basque and Gimex, who disputed the ownership of a container of goods. Gimex, the freight forwarder, maintained that it was the owner of the goods, citing, among other grounds, article 88 CISG.

The Court, however, determined that Basque had purchased the goods from a Chinese company, and that article 88 CISG did not alter its status as the buyer of the goods "since it should not be forgotten that this possibility of a change of buyer is subject in any event to the requirement that 'reasonable notice of the intention to sell has been given to the other party' and this did not take place in the present case".

Case 486: CISG 39(1)
Spain: Provincial Court of Corunna (Sixth Division)
21 June 2002
201/2001
http://www.uc3m.es/cisg/sespan19.htm (Spanish language text)
Abstract prepared by Maria del Pilar Perales Viscasillas, National Correspondent

A Spanish buyer purchased 1,500,000 rainbow trout eggs from a Danish seller. The buyer received the goods on 31 March 1998. The buyer claimed the existence of hidden defects owing to the presence of infectious pancreatic necrosis virus (IPNV). The parties disputed whether the buyer had given notice of this lack of conformity of the goods within a reasonable time, as required by article 39(1) CISG. The Court stated that the reasonable time for the buyer to give notice of the existence of the defect had to be as short a period as was practicable, not only to enable the seller to prepare its defence but also, for reasons of public policy, to allow the seller to prevent the spread of the infection. In the Court's opinion, even if the buyer was found to have acted diligently by dispatching the trout eggs for analysis on 28 April 1998, the buyer did not notify the seller within a reasonable time since notice was not given until 12 June 1998. In this respect, the Court pointed out that the buyer could have, and should have, been aware of the defects by early May at the latest since, according to the expert report, the virus has an incubation period of approximately one week and the diagnosis can be made within two to seven days.

Also, the Court concluded that the buyer had not sufficiently proven the existence of the virus in the trout eggs as purchased since the analyses carried out prior to shipment found the goods to be virus-free.

Case 487: CISG 39; 50
Spain: Provincial Court of Barcelona (Fourth Division)
12 September 2001
566/2000
http://www.uc3m.es/cisg/sespan22.htm (Spanish language text)
Abstract prepared by Maria del Pilar Perales Viscasillas, National Correspondent

The buyer, a Spanish company, purchased from an Egyptian seller 139,050 kg of frozen cuttlefish and octopus on 5 May 1997. The goods were to be transported from Egypt to Spain. On their arrival, the buyer noted missing boxes and differences in the weight and size of the fish. The seller maintained that the action was time-barred. The Court referred to paragraphs (1) and (2) of article 39 CISG and noted that the claim had been submitted within the time-limit of two years, as required by article 39(2). It also pointed out that notice pursuant to article 39 had been given within a reasonable time. Specifically, loading took place in Egypt on 4 and 5 May 1997, the goods arrived in Barcelona on 17 May, at which time they were deposited in cold-storage premises of a third company. The reports on the condition of the goods were issued on 18 and 19 June and the claim was submitted on 30 June 1997. The Court of Appeals also found that compensation was due by reason of the lack of conformity of the goods, citing article 50 of the Convention.

Case 488: CISG 25; 32(2); 34; 49
Spain: Provincial Court of Barcelona (Fourteenth Division)
12 February 2002
114334/202
http://www.uc3m.es/cisg/sespan21.htm (Spanish language text)
Abstract prepared by Maria del Pilar Perales Viscasillas, National Correspondent

A Venezuelan seller and a Spanish buyer were in a dispute about the performance of a sales contract. The Court, citing article 329 of the Spanish Commercial Code and articles 25, 32(2), 34 and 49 CISG, held that the seller had failed to perform its main obligation, namely to place at the buyer's disposal the goods which were prepaid by the buyer, and in particular by failing to provide a certificate of origin of the goods which was necessary in order for the goods to be exported.

Case 489: CISG 86; 87
Spain: Provincial Court of Barcelona (Seventeenth Division)
11 March 2002
138814/2002
http://www.uc3m.es/cisg/sespan20.htm (Spanish language text)
Abstract prepared by Maria del Pilar Perales Viscasillas, National Correspondent

A Spanish buyer entered into a contract with an English seller for the purchase of protective labels for certain computer chips. The buyer considered the goods to be defective and sought to return them to the seller, who refused to take the goods back. The buyer then sought to place the goods in judicial deposit until the dispute was resolved. The Court of First Instance refused the request. The Court of Appeal instructed the lower court to reconsider the applicability of judicial deposit under the circumstances, given the obligation of the buyer who is seeking to reject merchandise to take reasonable measures to protect the goods, including depositing them with a third party pending return pursuant to articles 86 and 87 CISG, as well as applicable provisions of the Spanish Law of Civil Procedure.

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CISG 9(2)

Case 477: - *Austria: Oberster Gerichtshof, 2 Ob 48/02a (27 February 2003)*

CISG 25

Case 488: CISG - *Spain: Provincial Court of Barcelona (Fourteenth Division), 114334/202 (12 February 2002)*

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