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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 websites other than official United Nations websites do not constitute an endorsement by the United Nations or by UNCITRAL of that website; furthermore, websites 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.

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

Case 694: CISG 35; 36; 38; 39; 40; 50; 51; 74
United States: U.S. Bankruptcy Court for the District of Oregon
No. 02-66975-fra11
29 March 2004
In re Siskiyou Evergreen, Inc.
Published in English: 2004 Bankr. LEXIS 1044
See also: http://cisgw3.law.pace.edu/cases/040329u2.html

Abstract prepared by Peter Winship, National Correspondent

The case deals with the conformity of the goods and the possibility to claim for damages in case of non-conformity.

An American company (the seller) agreed to sell Christmas trees to a Mexican customer (the buyer). The contract provided that the trees were to be grade #1, a reference to a grading of Christmas trees established by the US Department of Agriculture. The seller delivered many trees of a lower grade than #1. The buyer could sell a number of the trees only at extremely low prices or not at all. The seller subsequently initiated a voluntary reorganization proceeding under the US Bankruptcy Code. The buyer filed a claim for his losses in these proceedings. The seller objected to recognition of the claim because it alleged that the buyer had failed to notify it of the non-conformity.

The issues before the bankruptcy court were whether the buyer was entitled to its claim for damages and, if entitled, the amount of these damages.

The court recognized the claim and calculated the amount of the claim. Noting that the parties had places of business in different Contracting States, the court applied the CISG. Citing article 40 CISG, the court found that the seller knew or should have known of the nonconformity of the trees. As to trees purchased by the seller from a third party supplier, the express terms of that purchase contract was for grade #3 trees. As to nonconforming trees harvested and shipped from the seller's own land, the seller's employees could not have been unaware of the nonconformity of the trees. The court also found that the buyer had complained orally to the seller many times about the quantity and quality of the trees. The court stated that the notice was not required to be in any particular form and that the purpose of the notice is to allow the seller to cure the nonconformity. Because of the limited season for the sale of Christmas trees, the discovery of the nonconformity came at a time when the seller would have been unable to cure.

The court calculated the amount of the buyer's claim in the bankruptcy proceeding. Citing article 50 CISG, the court stated that the seller was entitled to recover the amount paid for each nonconforming lot as well as the shipping and handling charges for these lots. The court also included lost profits in its calculation of damages under article 74 CISG. Because the buyer had permitted several of its sub-buyers to reject the trees without justification, the court approved the buyer's decision not to claim for such losses because the seller could not have foreseen them.

Case 695: CISG 4; 14; 55
United States: U.S. [Federal] District Court for the Eastern District of Pennsylvania
Civ. A. 00-2638
29 March 2004
Amco Ukrservice v. American Meter Company
Published in English: 312 F. Supp. 2d 681
See also: http://cisgw3.law.pace.edu/cisg/wais/db/cases2/040329u1.html

Abstract prepared by Peter Winship, National Correspondent

A representative of a manufacturer of gas meters with its place of business in the United States agreed with a Ukrainian enterprise to create a joint venture with its place of business in the Ukraine. The agreement provided that the joint venture had the exclusive right to manufacture, install and distribute gas meters in the former Soviet Union. The US manufacturer would assemble 90 per cent of the components and the joint venture would assemble the remaining 10 per cent using the US manufacturer's components. The number of components to be delivered was to be based on demand in the former Soviet Union. The joint venture subsequently submitted orders to the US manufacturer. The manufacturer shipped but subsequently stopped delivery of one order and refused to extend credit to the joint venture. This effectively terminated the joint venture. The joint venture sued the US manufacturer for breach of contract. The US manufacturer moved to dismiss the complaint because the joint venture agreement was unenforceable, inter alia, because the agreement did not set out definite prices and quantities as required by the CISG.

The CISG issue before the court was whether a distributorship agreement is covered by the Convention.

The court concluded that the joint venture agreement was not covered by the CISG. Citing decisions construing the CISG by US and non-US courts in support, the court concluded that the Convention does not govern distributorship agreements because these agreements provide a framework for future sales but do not lay down precise price and quantity terms. The court notes but does not resolve the difficulty of determining the relation between articles 14 and 55 CISG. It does, however, distinguish the framework agreement from individual sales contracts concluded in accordance with that agreement: the former is not covered by the CISG, but the latter may be.

In reaching its decision, the court rejected the seller's proposed distinction between the relational or agency provisions of the agreement and the sales provisions of the agreement. The court found the distinction untenable. If adopted, the distinction would make it difficult to conclude a framework distributorship agreement because the sales provisions would be invalidated because they did not designate definite quantities and prices. The distinction would also be unjust in the case before it because the seller would be entitled to enforce the relationship provisions (e.g. buyer's duty to promote the seller's products) under non-CISG law while retaining the right to terminate the sales provisions at will under the CISG.

In a decision of 13 April 2004 the district court denied the Ukrainian party's motion for certification of an order for immediate interlocutory appeal. The court rejected

the argument that it had ignored the effect of art. 3 (1) CISG on the ground that the agreement in dispute was not a sale or supply contract.

Case 696: CISG 29; 79
United States: U.S. [Federal]District Court for the Northern District of Illinois
No. 03 C 1154
7 July 2004
Raw Materials Inc. v. Manfred Forberich GmbH & Co.
Published in English 2004 U.S. Dist LEXIS, 53 U.C.C. Rep. Serv. 2d (Callaghan) 878

Abstract prepared by Peter Winship, National Correspondent

A corporation with its place of business in the United States concluded a contract with a seller resident in Germany to purchase used railroad rail. The original agreement provided that the rail was to be shipped "FOB Delivered Our Plant [Illinois]" from the port of St. Petersburg, Russia, by 30 June 2002. The parties agreed to change the date and place of delivery, although at the time of the court's decision the details of the changes had not been established definitively. The seller did not deliver the rail. The buyer sued the seller for breach of contract. The seller replied that it was excused because it could not load the rail in St. Petersburg as a result of an unexpectedly cold winter that closed the port. The buyer moved for summary judgement before trial.

The issue before the court was whether judgement should be rendered for the buyer before trial because the pleadings set out a breach of contract and no relevant facts were in dispute.

The court applied the CISG, noting that the parties agreed that the Convention governed the contract. When interpreting art. 79 CISG, however, the court looked to decisions in US cases construing "analogous" provisions of domestic US law. The court noted that this approach was proposed by the buyer and not disputed by the seller. Consequently, the court looked to whether (1) a contingency had occurred, (2) the contingency made performance impracticable, and (3) the nonoccurrence of the contingence was a basic assumption upon which the contract was made. The buyer argued that the seller did not satisfy the latter two conditions.

The court denied the motion for summary judgement because there were disputed factual issues with respect to the latter two conditions. The court stated that there were issues of fact as to whether the frozen port prevented performance and as to what modifications to the delivery term had been agreed to. There were also issues of fact with respect to the foreseeability of the extreme freezing. The court did note that the parties could modify the contract orally and by mere agreement as provided by art. 29 CISG.

Case 697: CISG 1 (1)
United States: U.S. [Federal] District Court for the Southern District of Iowa
No. 4:02-CV-30538-RAW
25 January 2005
Grace Label, Inc. v. Kliff
Published in English: 355 F. Supp. 2d 965
See also : http://cisgw3.law.pace.edu/cisg/wais/db/cases2/050125u1.html

Abstract prepared by Peter Winship, National Correspondent

A buyer with its place of business in California (USA) agreed with a seller with its place of business in Iowa (USA) to purchase foil trading cards bearing the likeness of a famous pop music star. The buyer purchased the cards for resale to a sub-buyer in Mexico that planned to include the cards in snack food packaging. The buyer rejected the cards because they became malodorous when they came in contact with food. The seller sued to recover the price of the cards. As part of its response, the buyer argued that the CISG governed the contract dispute because the seller was to ship the cards directly to the sub-buyer in Mexico.

The issue before the court was whether the CISG governed when the goods sold are to be shipped to a foreign country but the seller and buyer have their places of business in the same country. Citing art. 1 (1) CISG, the court concluded that shipment of the goods to a foreign country is irrelevant for the purposes of determining whether the Convention applied. Therefore, the Court retained the CISG not applicable and that, being the contract at hand a contract for the sale of goods, the US Uniform Commercial Code would apply.

Case 698: CISG 1 (1) [10]
United States: Superior Court of Massachusetts
No. 034305BLS
28 February 2005
Vision Systems, Inc. v. EMC Corporation
Published in English: 2005 WL 705107
See also : http://cisgw3.law.pace.edu/cisg/wais/db/cases2/050228u1.html

Abstract prepared by Peter Winship, National Correspondent

A representative from a US subsidiary of a multinational enterprise negotiated with a potential buyer with its place of business in Massachusetts (USA) for the sale of smoke detection units that could be integrated in the latter's data storage systems. The potential buyer consulted about technical details with an engineer at the US subsidiary. Although the parties did not sign a framework agreement proposed by the seller, the potential buyer did submit individual orders to the US subsidiary for the purchase of the seller's units at a price quoted by the seller as "FOB [buyer's place of business]". An Australian subsidiary of the multinational carried out all the research, development and manufacture of the units sold. After delivery and payment for the units ordered, the buyer notified the seller that it would purchase no more units. The US and Australian subsidiaries sued the buyer on several grounds, including breach of contract under the CISG.

The CISG issue before the court was whether the seller and buyer had their places of business in different countries for the purposes of art. 1 CISG.

Citing art. 1 the court concluded that the Convention did not govern the contractual relationship The court stated that the test for the scope of the CISG was similar to the "center of gravity of circumstances" test found in state unfair trade legislation. In the case before it, the court found that the center of gravity was Massachusetts. It stressed that the US subsidiary made the price quotations, that these quotations referred to delivery FOB Massachusetts, and that all the buyer's orders were submitted to the US subsidiary. The international component of the transaction, considered by the court a "jurisdictional pre-requisite" was lacking in this case. The international component of the transaction, considered a jurisdictional prerequisite, was thus lacking in this case.

Case 699: CISG 3; 4; 7; 14
United States: U.S. [Federal] District Court for the Eastern District of New York
03-cv-2835 (ADS) (JO)
29 March 2005
Genpharm Inc. v. Pliva-Lachema a.s. & Pliva d.d.
Published in English: 2005 U.S. Dist. LEXIS 4225
See also: http://cisgw3.law.pace.edu/cisg/wais/db/cases2/050319u1.html

Abstract prepared by Peter Winship, National Correspondent

A Canadian manufacturer of generic drugs concluded a contract with an enterprise with its place of business in the Czech Republic for the manufacture and supply of pharmaceutical ingredients. The agreement provided that the seller would notify the buyer in a timely fashion if the seller changed its place of manufacture. Both parties filed papers with the US Federal Drug Administration (FDA). The seller agreed that it would notify the FDA if the seller changed its place of manufacture. The seller later refused to permit the FDA to make a pre-approval inspection of the manufacturing site and soon thereafter the seller notified both the FDA and the buyer that it had moved the manufacturing site from the Czech Republic to Croatia. The buyer sued the seller and the seller's remote holding company, a Croatian enterprise, for breach of contract. The defendants moved to dismiss the suit for lack of jurisdiction or to decline jurisdiction under the doctrine of *forum non conveniens*.

The CISG issue before the court was whether it had subject matter jurisdiction because the suit arose from a breach of a contract governed by the Convention.

The court concluded that the CISG governed the contract and it therefore had subject matter jurisdiction. Quoting articles 3 and 7 CISG and referring to court opinions construing "analogous" state law, the court found that the essence or main objective of the contract was for the sale of goods and not for the rendering of services. The court stated that the CISG is not restricted to contracts after formation or contracts containing definite prices or quantities. In support of this statement the court cited art. 4 CISG but does not otherwise elaborate its reasoning.

Case 700: CISG 1 (1)(a); 4; [8(3)]; 18
Argentina: Appellate Court - Camara Nacional de Apelaciones en lo Comercial
No. 45.626
14 October 1993
Inta S.A. v. MCS Officina Mecánica S. P. A.
El Derecho 32 (1994) No. 8483, 25 April 1994, 3-7
See: http://cisgw3.law.pace.edu/cases/931014a1.html

This case deals with whether a choice of forum clause included on an invoice provided by the seller should be considered to be part of the contract between the buyer and the seller.

The Argentine buyer purchased goods from the Italian seller. The invoice provided by the seller included a choice of forum clause in favour of an Italian forum. Later on the buyer brought action in front of an Argentinean court claiming lack of conformity of the goods. The lower court declined its jurisdiction.

On appeal, the buyer disputed the applicability of the choice of forum clause, arguing that it had not signed the invoice. Therefore, it was argued, the invoice did not display the explicit manifestation of the buyer's decision to submit to the competence of a foreign judge, as required by Argentinean law.

The Court noted that, pursuant to article 4 CISG, the Convention was not applicable to "the determination of jurisdictional questions". Thus the issue was to be resolved according to Argentinean law as the applicable law. However the Court decided to refer also to the CISG in its reasoning, since the Convention would provide further support to the conclusion that the forum selection clause was enforceable.

The Court first noted that in this instance, the invoice had been sent prior to the conclusion of the contract, and that it had not been disputed by the buyer, save for an issue relating to the size of part of the object sold. Therefore, the buyer should have disputed the issue of the choice of forum clause prior to the conclusion of the agreement, rather than simply maintaining mental reservations about it.

Furthermore, the Court, referring to CISG Article 18 (3), noted that assent to an offer may occur through committing an act such as sending the merchandise or paying the price, and that acceptance takes place the moment in which the act of acceptance is made.

The Court noted that the buyer signed the invoice in order to obtain credit to pay for the merchandise, and considered this to be tacit acceptance of the conditions of the offer.

Consequently, the choice of law clause was to be considered binding upon the buyer, and Italy was the appropriate forum for the dispute. Similar conclusion was to be reached pursuant to the application of Argentine jurisdictional rules.

Case 701: CISG 1 (1)(a); 1(1)(b); 7 (2); 35 (2)(a)
Argentina: Appellate Court (Second Instance Court of Appeal) – Camara Nacional de Apelaciones en lo Comercial
24 April 2000
Mayer Alejandro v. Onda Hofferle GmbH & Co
Original language (Spanish):
http://www.unilex.info/case.cfm?pid=1&do=case&id=820&step=FullText
See for the English translation: htpp://cisgw3.law.pace.edu/cases/000424a1.html

This case deals with the scope of application of the CISG and the procedures that need to be followed by the buyer in order to determine the quality of the goods in view of claiming his rights for non-conformity of the goods.

The seller, whose place of business was in Argentina, entered into a contract for the sale of charcoal with a German buyer in 1988, agreeing on "FOB Buenos Aires". Later on, the seller brought an action against the buyer for breach of the obligation to pay the purchase price. The Buyer filed a counterclaim for damages, arguing that the quality of the charcoal was not in conformity with the contract and that it could not be used for the purpose for which it was bought. The lower court rejected the counterclaim and ordered the buyer to pay the sums claimed by the Seller. The buyer appealed the decision.

On appeal, the Court examined whether the contract was governed by the CISG. The CISG was not applicable by virtue of article 1 (1)(a), since in Germany the CISG had entered into force only after the conclusion of the contract. The Court noted that, according to Argentine private international law, the contract is governed by the law of the place where the main obligation, i.e. the delivery of the charcoal, has to be performed. Given that the parties had agreed on "FOB Buenos Aires", the main obligation had to be performed in Argentina, leading to the application of Argentine law. Hence, the Court concluded that the CISG was applicable pursuant to Article 1 (1)(b).

On the substance of the dispute, the Court stated that the CISG, while regulating the obligations of the seller with regard to the delivery of the goods as well as the rights of the buyer in case the goods are not in conformity with the contract, does not contain any provisions on the procedure to be followed by the buyer in order to determine the quality of the goods. The Court analysed this gap under Article 7 (2) and, resorting to the application of Argentine private international law, concluded that the proof of the defects of the goods was governed by the Commercial Code of Argentina. Since the buyer did not determine the quality of the charcoal in accordance with the expert arbitration procedures required by Article 476 of the Argentine Commercial Code, his evidence consisting of a testimony of a German witness, the quality of the charcoal could not be determined. Moreover the Court reasoned that even if the testimony was admissible, the charcoal would still be in conformity with the contract. In fact, the charcoal could, according to the Court, still be used for "gastronomical purposes", i.e. to grill food, reason for which the charcoal was "fit for the purpose for which goods of the same description would ordinarily be used" pursuant to article 35 (2)(a) and thus in conformity with the contract. Therefore the Court rejected the appeal and upheld the decision of the lower court.

Case 702: CISG 8
New Zealand - Court of Appeal Wellington
2000 NZCA 350
27 November 2000
Hideo Yoshimoto v. Canterbury Golf International Ltd.
See: http://cisgw3.law.pace.edu/cases/001127n6.html

This case involved the interpretation of a commercial contract, i.e. whether a particular clause of a contract should be interpreted according to its plain meaning or the context, and other circumstances of the contract, should also be considered in the interpretation.

A Japanese seller and a New Zealand buyer entered into a contract for the purchase of shares of a third company. The company had been formed to develop an international golf course. All of the shares of the company were owned by the Japanese seller. The purchase sum was to be paid in three instalments. The second instalment was only payable if and when the buyer would obtain the "necessary planning authorizations" and within a time frame of 12 months of the date of the contract.

The dispute arose when the Japanese seller demanded the payment of the second instalment arguing that, according to the plain meaning of the contract clause, the buyer had fulfilled the required conditions. After the High Court had rejected the seller's claim, the case was heard by the New Zealand Court of Appeal.

The Court of Appeal acknowledged the relevance of CISG, in particular of article 8. The Court noted that article 8 provides more latitude than the Common Law of New Zealand (and England) in admitting extrinsic evidence to interpret contracts. While at Common Law, the words of the contract are given their plain meaning unless some ambiguity is apparent (taking into account the whole document in question), the Court noted that the CISG provides for a range of extrinsic circumstances to be consulted in interpreting the meaning of a contract. This more liberal interpretation would also be supported by 1994 UNIDROIT principles of International Commercial Contracts.

The Court also noted that England has not adopted the CISG and that, except to allow for New Zealand's local conditions, New Zealand law must not deviate from English law. Therefore while the Court would consider to "bring the law in New Zealand into line with these international conventions", it decided to interpret the contract clause according to its plain meaning. The New Zealand Court of Appeal, in fact, was not the final appellate Court in the jurisdiction and the Privy Council in London would not permit a more liberal interpretation of the contract.

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