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Contents

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INTRODUCTION

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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 website 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 843: CISG 2 (a); 57 (1) (a)
Finland: Korkein oikeus (Finnish Supreme Court)
KKO 2005:114
14 October 2005
Original in Finnish
Published in: [2005] Korkeimman oikeuden ratkaisuja II, KKO 2005:114; [2005] KKO:n ratkaisut kommentein II (ed. Pekka Timonen), KKO 2005:114.
http://www.finlex.fi/fi/oikeus/kko/kko/2005/20050114
Abstract prepared by Johan Bärlund, National Correspondent

The plaintiff, a Finnish seller of log houses, sold a family house to a German buyer, who at the same time became the sales agent of the Finnish seller in Germany. The buyer, however, failed to make the last payment for the house and the plaintiff brought proceedings against the defendant in the court of the seller's place of business in Finland. According to the defendant, though, the Finnish court did not have jurisdiction.

The Supreme Court held that since the house had been purchased not only for personal use, but partly for the professional use of the agent, in accordance with article 2 (a) CISG, the Convention applied to the case. The court further stated that, according to article 57 (1) (a) CISG, the buyer must pay the price to the seller at the seller's place of business. Therefore, the seller could bring proceedings against the buyer in Finland, pursuant to the 1968 Convention on jurisdiction and the enforcement of judgements in civil and commercial matters (so called Brussels Convention).

Case 844: CISG 8 (1); 8 (2)
United States (Federal) District Court for the District of Kansas
Guang Dong Light Headgear Factory Co. v. ACI Int'l, Inc.
28 September 2007
Original in English
Abstract prepared by Harry M. Flechtner, National Correspondent

Following a long history of indirect dealings through an intermediary ("Intermediary"), a headgear manufacturer located in China ("the manufacturer") and a U.S. headgear broker ("the broker") signed a series of written sales contracts for specified headgear. The broker failed to make full payment for goods delivered under these contracts. The manufacturer commenced arbitration proceedings before the China International Economic and Trade Arbitration Commission ("CIETAC") pursuant to an arbitration clause in each of the sales contracts. The broker did not participate in the proceedings, and the panel issued an award for the full amount claimed by the manufacturer plus interest and fees.

The manufacturer began proceedings before a United States federal court (the U.S. District Court for the District of Kansas) to enforce the award pursuant to the Convention on the Recognition and Enforcement of Foreign Arbitral Awards (1958, so-called "New York Convention"), to which the U.S. is a party. The broker contested enforcement, arguing that the parties did not have a contractual

relationship, thus rendering the arbitration clause ineffective against the broker; as a result, the broker argued, disputes between the manufacturer and the broker were not arbitrable – one of the permitted grounds to contest enforcement of an arbitration award under the New York Convention. Specifically, the broker argued that, when it signed the sales contracts it did not intend to enter into a direct contractual relationship with the manufacturer, but rather intended to confirm orders that, as in prior dealings, it understood were being placed with the manufacturer by the intermediary. The broker contended that, under Article 8 CISG (which both parties agreed governed the alleged sales contracts, because each was located in a Contracting State), this intent bound the manufacturer, and thus no contracts and no agreements to arbitrate had been formed between the parties. After lengthy pretrial proceedings, the manufacturer brought a summary judgement motion challenging the broker's contentions.

The court first rejected the broker's argument that its subjective intent bound the parties under Article 8 (1) CISG. It found that, although the broker had offered evidence that it subjectively did not intend to enter a direct sales contract with the manufacturer, it had offered no evidence that the manufacturer "knew or could not have been unaware" of that intent as required by Article 8 (1).

Pursuant to Article 8 (2), the court then "consider[ed] whether [the broker's] actions made its subjective intent to treat the sales contracts as mere verifications known to the understanding of a reasonable person of the same kind as the other party … in the same circumstances." The court held that the broker had failed to establish that its interpretation should prevail under this standard. It noted that the sales contracts signed by the parties described the manufacturer as "seller" and broker as "buyer" while making no mention of the intermediary, and that the broker was bound by what it had signed whether or not it read or understood it. The court also noted that the conduct of the broker, including multiple acknowledgements that it owed the manufacturer the sales price for goods purchased, was consistent with a direct contractual relationship between the parties. The court therefore held that "the evidence … shows a contractual relationship between [the parties], which included an agreement to arbitrate." The court therefore granted the manufacturer's summary judgement motion and confirmed the arbitral award.

Case 845: CISG 1 (1) (a); [6]; 4; 18
United States (Federal) District Court for the Eastern District of Michigan
Easom Automation Systems, Inc. v. Thyssenkrupp Fabco, Corp.
28 September 2007
Original in English
Abstract prepared by Harry M. Flechtner, National Correspondent

A seller located in the United States agreed to sell machinery to a buyer located in Canada. The seller delivered the goods but the buyer failed to pay part of the purchase price. The seller sued for breach of contract and brought a motion for immediate recovery of the goods under a U.S. domestic (Michigan) statute that, the seller alleged, gave it a lien on the machinery sold to the buyer.

The court applied the CISG to the contract of sale between the parties, even though a written purchase order issued by the buyer contained a choice-of-law clause designating Canadian law. The buyer's purchase order was sent six weeks after the seller had given the buyer oral "quotes" on the machinery, which the buyer had

allegedly "accepted" (orally) the same day. The court held that the seller's quotes (which presumably did not contain a choice-of-law clause) could constitute an offer to sell under CISG Article 14 because they were "sufficiently definite" and indicated "the intention of the offeror to be bound in case of acceptance." The court then found that the buyer's alleged oral acceptance, if in fact given, would be valid under Article 18. Thus, the court reasoned, the contract might have been concluded without a choice-of-law clause, and the CISG would be applicable under Article 1 (1) (a) because each party was located in a different Contracting State. Even if the buyer's choice-of-law clause was a term of the contract, the court stated, the CISG would remain applicable: "Courts that have reviewed [CISG Article 6] have held that the parties must expressly opt out of applying the CISG to their agreement" (citing U.S. decisions). The buyer's choice-of-law clause, the court asserted, did not "expressly indicate[] that the CISG did not apply" because the law of Canada designated in the clause includes the CISG.

Although it held the CISG applicable to the parties' sales contract, the court found that, pursuant to the limitations on the scope of the CISG stated in Article 4, the Convention did not pre-empt the Michigan statute on which the seller based its claim to a lien on the goods. The court concluded, however, that it could not determine whether that statute applied and whether its requirements for a valid lien had been satisfied by the seller without further evidence; it therefore denied the seller's motion for immediate recovery of the goods.

Case 846: CISG 29; 47
United States: Federal Circuit Court of Appeals (3rd Circuit)
Valero Marketing & Supply Co. v. Greeni Oy
19 July 2007
Original in English
Abstract prepared by Harry M. Flechtner, National Correspondent

In a contract that the court assumed was governed by the CISG, a Finnish seller agreed to sell 25,000 metric tons of naphtha, a product used in gasoline, to a U.S. buyer. The contract required the naphtha to be delivered to the buyer's New York facilities between 10 and 20 September 2001 on board a vessel to be approved by the buyer, such approval "not to be unreasonably withheld." After the seller shipped the goods on a vessel that the buyer had not approved, the ship's master estimated that the cargo would not be delivered in New York until 21 September. The parties agreed on 14 September that, if the naphtha was delivered by midnight 24 September via barge, the buyer would accept the goods at a reduced price.

Because the seller could not arrange for delivery by barge immediately upon the goods' arrival in New York on September 22, the September 24 deadline was not met. The buyer sued the seller for breach; the seller counterclaimed because the buyer refused delivery when the goods were tendered by barge on September 26. The trial court ruled that the September 14 agreement was of no effect because, under Article 47, a buyer may not "resort to any remedy for breach of contract" if the buyer has granted the seller an additional period of time for performance. The trial court therefore ruled that the seller was only liable for the 2- delay between the original September 20 deadline and the arrival of the goods in New York harbour on September 22. Because this delay was not a fundamental breach, the trial court held,

the buyer itself breached when it demanded delivery by barge and when it refused delivery when ultimately tendered.

Citing the UNCITRAL CISG case law digest for Article 47, the appeals court reversed and remanded, commenting as follows:

"We do not agree with [the trial court's] reasoning. Assuming that the September 14 Agreement would not have been an appropriate use of Article 47 of the CISG, as the District Court held, that does not mean that the September 14 Agreement was an ineffective contract modification. Article 29 of the CISG discusses contract modification and states simply that '[a] contract may be modified or terminated by the mere agreement of the parties.' 15 U.S.C. App. Art. 29. Although Greeni asserted at trial that it agreed to the September 14 Agreement because it felt that it was a 'take it or leave it' proposition, the record is clear that Greeni did assent to that agreement. Greeni does not argue that it was under duress, and it was indeed free to leave the September 14 Agreement on the bargaining table, attempt to cover, and seek remedies for any breach of the August 15 Agreement. It chose instead to take the new deal. The 'mere agreement' of the parties reflected in the September 14 Agreement thus constituted a permissible contract modification under Article 29, rather than an extension of time for performance under Article 47 of the CISG. Accordingly, the September 14 Agreement was valid and governed the conduct of the parties for the remainder of their interaction."

Case 847: CISG [6]; 11; [14]; [19]; [35]
United States (Federal) District Court for the District of Minnesota
The Travelers Property Casualty Co. v. Saint-Gobain Technical Fabrics Canada Ltd.
31 January 2007
Original in English
Abstract prepared by Harry M. Flechtner, National Correspondent

In an action alleging that a seller of construction materials delivered defective products, a U.S. federal District (trial) court applied the CISG despite a choice-of-law clause in the buyer's purchase orders which designated the law of a particular U.S. state (Minnesota). The court noted that both the buyer and seller were located in Contracting States (the U.S. and Canada, respectively) so that the CISG would apply to the transaction unless excluded by the parties. It held that the choice-of-law clause did not establish such an exclusion, noting that "absent an express statement that the CISG does not apply, merely referring to a particular state's law does not opt out of the CISG." The court cited with approval another court's statement that "an affirmative opt-out requirement promotes uniformity and the observance of good faith in international trade, two principles that guide interpretation of the CISG." In support of its approach, the court stated that "[a] majority of courts interpreting similar choice-of-law provisions … conclude that a reference to a particular state's law does not constitute an opt-out of the CISG; instead, the parties must expressly state that the CISG does not apply" (citing U.S. decisions).

The seller had shipped the goods in response to the buyer's purchase orders before the seller dispatched invoices containing its own terms. The buyer argued that, under the CISG, the terms in the buyer's purchase order were thus necessarily incorporated into the party's contract. The court disagreed. It reasoned that, although it was possible that the seller had accepted offers on the buyer's terms,

pursuant to Article 11 CISG the parties may alternatively have formed contracts orally before the buyer's purchase orders were sent. [In addition, the court held that the buyer had to that point failed to provide sufficient proof of all the relevant purchase orders.] Thus it was necessary to hold a trial in order to determine the full facts of the transaction.

The court also discussed whether the buyer's allegations would establish a breach of the seller's obligations concerning the quality of the contracted-for goods. It analysed the question under U.S. domestic sales law – Article 2 of the Uniform Commercial Code ("UCC") – rather than the CISG. It justified its approach by explaining that the parties had assumed in their briefs that UCC Article 2 applied to the issue, and it cited dicta from an earlier U.S. CISG decision (dicta that has been followed in a number of other U.S. CISG decisions) stating that case law interpreting "analogous" provisions of U.S. domestic sales law may "inform" a court's interpretation of the CISG. In the court's view, therefore, the seller's obligations concerning the quality of delivered goods could be "analysed under the Minnesota UCC, as briefed by the parties".[1]

Case 848: CISG 4; 6; 74
United States (Federal) District Court for the Middle District of Pennsylvania
American Mint LLC v. GOSoftware, Inc.
6 January 2006
Abstract prepared by Harry M. Flechtner, National Correspondent

A U.S. software manufacturer ("the seller") sold software for processing credit card charges to a U.S. limited liability company ("the buyer") that was a wholly-owned subsidiary of a German firm. The seller allegedly represented that the software was compatible with German numeric conventions, which differ from those used in the U.S. The software was installed in the facilities of the buyer's German parent, which processed credit card sales for the buyer, but the software allegedly did not function properly: it generated reports of charges that exceeded those actually incurred by the buyer's customers.

The buyer, its German parent and the individual who led the German parent (a German citizen) sued for breach in a U.S. federal court (the U.S. District Court for the Middle District of Pennsylvania), seeking damages. Under U.S. law the court had jurisdiction over the litigation only if either 1) the plaintiffs claim arose under the Constitution, treaties or laws of the United States (as opposed, e.g., to the laws of a particular state of the United States) ("federal question jurisdiction"), or 2) the amount in controversy in the case exceeded $75,000 and there was "diversity of citizenship" between the plaintiffs and the defendant ("diversity jurisdiction"). The seller brought a motion challenging the court's jurisdiction.

In response to the seller's motion the plaintiffs argued that federal question jurisdiction existed because their claims arose under the CISG, a treaty of the United States. The software sales contract contained a choice-of-law clause designating the law of a particular U.S. state – Georgia – but the court held that this did not preclude application of the CISG. The court stated that "parties seeking to apply a [Contracting State's] domestic law in lieu of the CISG must affirmatively opt out of

[1] See footnote 4 of the opinion.

the CISG" (citing U.S. cases in support). It concluded that the choice-of-law clause in this case "fails to expressly exclude the CISG by language which affirmatively states it would not apply."

The court noted, however, that the CISG applied only to transactions between parties located in different States, whereas the immediate parties to the sale of the software in this case were both located in the U.S. The court had inquired after the plaintiffs' evidence that the German parent company and/or its leader were parties to the software sales contract. Plaintiffs had responded only that the leader of the German parent "would appear" to have signed the contract. The court found this evidence insufficient to establish that the German plaintiffs were party to the sales contract, particularly in light of the fact that the written contract "was addressed to [the U.S. Buyer] and that the software was paid for with a check tendered by [the U.S. Buyer]." Noting that "the CISG applies only to buyers and sellers, not to third parties" (citing CISG Article 4), the court found it lacked federal question jurisdiction over the controversy. The court did not discuss whether a sale of software constituted a sale of "goods" within the scope of the CISG.

With respect to diversity jurisdiction, the court noted that the requisite diversity of citizenship existed between the plaintiffs and defendant, but it questioned whether the amount in controversy exceeded $75,000 as required. Plaintiffs had claimed almost $982,000 in damages for bank charges (to correct erroneous credit card charges), lost profits, and attorney fees incurred in pursuing the litigation. A provision of the software sales contract, however, purported to limit the buyer's recovery to a refund of the $11,000 purchase price. The plaintiffs' sole argument in response was that the CISG did not permit a limitation on damages. Although it had found the CISG inapplicable to the transaction, the court added that had the CISG applied, it would not preclude the parties' agreement to limit damages. The court suggested that the damages the plaintiffs claimed (with the exception of damages for attorney fees) might qualify for recovery under CISG Article 74, but that under CISG Article 6 "Plaintiffs and Defendant were free to agree to liquidate damages in the event of a breach of contract." The court noted in a footnote that recovery of attorney fees as damages under Article 74 had been denied in several U.S. decisions.

Case 849: CISG 7 (2); 38; 39

Spain: Pontevedra Provincial High Court, First Section

Antecedents: Judgement of the Cambados Court of First Instance No. 1, 7 May 2007

19 December 2007

Full text in Spanish: http://www.uc3m.es/cisg/sespan70.htm and Aranzadi/Westlaw (2008/81370)

Abstract prepared by Pilar Perales Viscasillas, National Correspondent

The Spanish buyer was sued by the seller (possibly from the United States) for non-payment of the contract price for a trade in edible crabs, both cooked and frozen, and cockles. Specifically, a claim relating to certain invoices had been dismissed by the court of first instance on the grounds that the merchandise was defective and that the buyer had complained about the defect within a reasonable time, in accordance both with article 39 of CISG and with the Commercial Code and its associated case law. The seller considered, however, that articles 38 and 39 of CISG had not been correctly applied.

The Provincial High Court held that CISG, articles 38 and 39, imposed two essential obligations on the buyer: to examine the goods and to inform the seller of any lack of conformity. In order to determine compliance with these obligations, the court first took into account the perishable nature of the goods, which, although frozen, were for human consumption and therefore had to be treated with particular care. Secondly, the court considered that examination of the merchandise was a very straightforward matter and any defects could easily be spotted. It was sufficient to open any container in each batch at random in order to be able to assess the evidence of their deterioration by the characteristic colour and smell of goods in poor condition. Thirdly, the court noted that the defects had not been found until over four months after the first consignment, two months after the second and seven weeks after the third. The buyer had then delayed informing the seller of the defects for a further month. Fourthly, it appeared that in a previous contract a claim by the buyer had been lodged in a matter of days and resolved by means of a simple reduction in price. On the basis of all these considerations, the court held that the time exceeded that which could be considered a reasonable period of time under CISG, article 39, paragraph 1, and the time frame established for examination under article 38, paragraph 1.

In the court's view, a reasonable time should be counted in days or, at most, a number of weeks, although it could be longer in the case of durable or sophisticated merchandise. Setting a time frame was, in the court's view, sensible from the point of view of legal safeguards, since it was a question of ensuring that the passage of time did not introduce elements that might skew any possible claim and complicate evidentiary issues, such as those in the case before the court, where there were doubts about the time at which the defects occurred in the merchandise.

Lastly, the court held that a party could not cite national legislation – the Commercial Code or the associated case law – since CISG was the authority of choice, except where a case related to matters that were not expressly settled in CISG (art. 7, para. 2).

Case 850: CISG 8; 45; 49; 74; 75
Spain: Provincial High Court of Madrid, 14th Section
Antecedents: Judgement of Court of First Instance No. 9 of Madrid, 1 February 2006
20 February 2007
Full text in Spanish: http://www.uc3m.es/cisg/sespan60.htm and Aranzadi/Westlaw, (2007/152319)
Abstract prepared by Pilar Perales Viscasillas, National Correspondent

The Danish buyer brought an action for damages and loss against the Spanish seller for failure to comply with the quality specified in the contract. It maintained that the goods – olive stones – were of a humidity higher than the agreed 14 per cent and that some still had pulp attached. It also claimed compensation for the replacements that it had been forced to purchase as a substitute for the defective goods and, in addition, for dead freight, that is, the shortfall in the quantity contracted for in the first shipment, for which it had had to pay, having insufficient merchandise to fill the chartered vessel.

The contract signed between the parties, in English, contained a clause 4 setting out the specifications of the merchandise: “The merchandise shall consist of clean olive stones from an olive mill, approximately 2-5 millimetres in size. A separation procedure shall be carried out in order to remove pieces of pulp and remnants of fruit. The merchandise shall not contain olive flesh, pulp or other impurities”. This clause referred to an annex specifying that the level of humidity should not exceed 14 per cent. Clause 8 stated that, if the humidity exceeded 14 per cent, the price would be reduced, while clause 13 stated that “if the quality achieved is not in accordance with that stipulated by the contract, the buyer shall be entitled to cancel the agreement”. Deliveries of merchandise were to be made in the quantities stipulated by the parties, the buyer having an obligation to notify the seller of the quantity required for loading on the vessel not less than nine days before delivery at the port, where the seller was to deliver it in a quantity of not less than 400 tons per day.

When the first delivery was made, it was found both that the quantity sent was less than that requested and that the merchandise was of a higher humidity than specified. In respect of the quantity, the buyer was unable to load the vessel in accordance with the terms of the contract of affreightment and therefore had to pay dead freight, which was why it was claiming damages to cover reimbursement of this cost. As for the quality, the excessive humidity gave rise to a reduction in the price. The second consignment again exhibited excess humidity, and the buyer again reduced the price.

When this second consignment arrived, the buyer sent the seller a fax expressing its dissatisfaction with the level of humidity, and pointed out that the seller had the capacity to dry the merchandise in a professional drying plant, thus enabling it to comply with the maximum humidity of 14 per cent allowed for under the contract. The buyer stated that, if that was not done, it would need to charge for the costs resulting from the delivery of merchandise of higher humidity. After this, the parties held a meeting to resolve the question of humidity. On the basis of a guarantee by the seller, the buyer put in a new order; but an examination of the merchandise revealed that the olive stones were of a humidity higher than 14 per cent, as well as containing pulp. Following unsuccessful efforts by the seller to make good the merchandise, the buyer avoided the contract and purchased replacement goods, for which reason it sought to recover the extra cost as part of the damages that it claimed.

The court held that the parties had agreed on a specific quality for the merchandise (a fact that the seller could not, under CISG, article 8, have been unaware of) and that clause 8 of the contract, relating to the maximum humidity level and the price reduction if the humidity exceeded 14 per cent, “is no more than a precaution in the event that the humidity exceeds 14 per cent within admissible limits in one or several consignments or in the event that the buyer accepts goods with excessive humidity for the purpose of maintaining the contract. Obviously, if the goods have a minimum excess of humidity above 14 per cent, the clause makes sense, but a disproportionate excess of humidity does not make sense in terms of the ultimate purpose of the contract, which is energy production, since … it affects the balance of contract, producing an over costly result for the buyer, because the merchandise that is the subject of the contract has become unfit for its purpose …, and the cost of transport makes it uneconomic.” The court also held that the fact that the first

two consignments were accepted with a higher level of humidity and a consequent reduction in price did not imply estoppel on the part of the buyer, since the seller's obligation was crucial, particularly as the buyer emphasized the importance of this factor after the first two consignments. On the basis of this interpretation, the court held that the parties had agreed on an essential obligation such that non-compliance led to the avoidance of the contract. It therefore granted all the damages claimed both on the basis of the contract and by application of CISG, articles 45, 49, 74 and 75, both Denmark and Spain being contracting parties.