United Nations A/CN.9/SER.C/ABSTRACTS/104

General Assembly

Distr.: General
17 December 2010
English
Original: French/Spanish

United Nations Commission on International Trade Law

CASE LAW ON UNCITRAL TEXTS
(CLOUT)

Contents

V.10-58634 (E) 190111 200111

Introduction

This compilation of abstracts forms part of the system for collecting and disseminating information on court decisions and arbitral awards relating to Conventions and Model Laws that emanate from the work of the United Nations Commission on International Trade Law (UNCITRAL). The purpose is to facilitate the uniform interpretation of these legal texts by reference to international norms, which are consistent with the international character of the texts, as opposed to strictly domestic legal concepts and tradition. More complete information about the features of the system and its use is provided in the User Guide (A/CN.9/SER.C/GUIDE/1/Rev.1). CLOUT documents are available on the UNCITRAL website (www.uncitral.org/clout/showSearchDocument.do).

Each CLOUT issue includes a table of contents on the first page that lists the full citations to each case contained in this set of abstracts, along with the individual articles of each text which are interpreted or referred to by the Court or arbitral tribunal. The Internet address (URL) of the full text of the decisions in their original language is included, along with Internet addresses of translations in official United Nations language(s), where available, in the heading to each case (please note that references to websites other than official United Nations websites do not constitute an endorsement of that website by the United Nations or by UNCITRAL; furthermore, websites change frequently; all Internet addresses contained in this document are functional as of the date of submission of this document). Abstracts on cases interpreting the UNCITRAL Model Arbitration Law include keyword references which are consistent with those contained in the Thesaurus on the UNCITRAL Model Law on International Commercial Arbitration, prepared by the UNCITRAL Secretariat in consultation with National Correspondents. Abstracts on cases interpreting the UNCITRAL Model Law on Cross-Border Insolvency also include keyword references. The abstracts are searchable on the database available through the UNCITRAL 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.

The abstracts are prepared by National Correspondents designated by their Governments, or by individual contributors; exceptionally they might be prepared by the UNCITRAL Secretariat itself. 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 1025: CISG 6
France: Court of Cassation, Commercial Division
3 November 2009
Appeal No. 08-12399
Société Anthon GmbH & Co v. Société Tonnellerie Ludonnaise
Original in French
Published in French: Légifrance: www.legifrance.gouv.fr; CISG-France database: www.cisg-france.org; CISG-online database: CISG-online.ch, No. 2004; Unilex database: www.unilex.info
Abstract in English: Unilex database: www.unilex.info
English translation: http://cisgw3.law.pace.edu/cases/091103fl.html
Commentaries: Claude Witz, *Recueil Dalloz*, 2010, panorama, p. 924; Jean-Michel Jacquet, *Journal du droit international*, 2010, p. 496 et seq.

Abstract prepared by Claude Witz, National Correspondent, and Erico d'Almeida

A French leasing company sued for termination of a leasing contract relating to a piece of equipment and for avoidance of a sale agreed between the French company and the German manufacturer.

With regard to the avoidance of sale, the Bordeaux Appeal Court applied French domestic law, and specifically the provisions of the Civil Code relating to the beneficiary of guarantees of hidden defects, rather than CISG, on the grounds that, although the seller company had "cited the provisions of the Vienna Convention", with particular reference to article 82 relating to avoidance, "it had not requested the application of the Convention in the case before the court". In adopting this approach, the Court applied the formula of a judgement by the Court of Cassation, First Civil Division, of 26 June 2001, which had since been abandoned (First Civil Division, 25 October 2005, CLOUT No. 837).

The Appeal Court inferred that "the parties to the dispute thus recognized that the applicable provisions are those of the French Civil Code".

The judgement was rightly overturned by the Court of Cassation, Commercial Division, on the grounds that "the submissions had invoked provisions of both the Civil Code and CISG and the Appeal Court could not infer the wish of the parties to exclude the application of the Convention. Its ruling breached both provisions [Civil Code, art. 3, and CISG, art. 6]".

Case 1026: CISG 39
France: Court of Cassation, First Civil Division
8 April 2009
Appeal No. 08-10.678
Société Bati-Seul v. Società Ceramiche Marca Corona
Original in French
Published in French: Légifrance: www.legifrance.gouv.fr; CISG-France database: www.cisg-france.org; CISG-online database: CISG-online.ch, No. 1977
Abstract in English: *European Legal Forum* 2009, 1, p. 33
English translation: Pace database: http://cisgw3.law.pace.edu/cases/090408fl.html
Commentaries: Laurent Leveneur, *Contrats, concurrence, consommation* 2009, comment p. 187; Pauline Remy-Corlay, *Revue Trimestrielle de droit civil* 2009, p. 688 et seq.; Claude Witz, *Recueil Dalloz* 2009, p. 2907 et seq.

Abstract prepared by Claude Witz, National Correspondent, and Stephan Pache

The plaintiff, a French firm selling building materials, bought some tiles from the defendant, an Italian company, and sold them to a French client in December 1996. The latter laid them on his terrace in May 1997, since they were guaranteed to withstand frost. During the winter of 2001-2002, the tiles turned out not to be frost-resistant, swelling and breaking in places. Having been sued by its client, the French company instituted warranty proceedings against its Italian supplier.

The case was heard by the Agen Appeal Court, which dealt with the obstacle of the two-year deadline by taking as the starting point the date on which the damage appeared, on the grounds that the claim that the tiles were frost-proof could not be tested until they had been subjected to frost. The Appeal Court also ruled that the time limit accorded to the seller in the event of action for indemnity for warranty proceedings should begin at the time of its own writ of summons.

The Court of Cassation overturned this ruling on the grounds that it breached article 39 of CISG. In setting out its grounds, the Court recalled that, according to CISG, the buyer lost the right to rely on a lack of conformity of the goods if he did not give the seller notice thereof at the latest within a period of two years from the date on which the goods were actually handed over to the buyer.

Case 1027: CISG 39; 39 (2)
France: Court of Cassation, First Civil Division
3 February 2009
Appeal No. 07-21.827
Société Novodec/Société Sigmakalon v. Sociétés Mobacc and Sam 7
Original in French
Published in French: Légifrance: www.legifrance.gouv.fr; CISG-France database: www.cisg-france.org; CISG-online database: CISG-online.ch, No. 1843; Unilex database: www.unilex.info
Abstract in English: Unilex database: www.unilex.info
English translation: Pace database: http://cisgw3.law.pace.edu/cases/090203fl.html
Commentaries: Philippe Delebecque, *Revue Trimestrielle de droit commercial* 2009, p. 642; Laurent Leveneur, *Contrats, concurrence, consommation* 2009, commentary p. 96; Laurent Leveneur, *Semaine juridique*, business edition 2009, p. 1408; Jean-Baptiste Racine, *Revue de contrats* 2009, p. 1549 et seq.; Pauline Remy-Corlay, *Revue Trimestrielle de droit civil* 2009, p. 688 et seq.; Claude Witz, *Recueil Dalloz* 2009, p. 2907 et seq.

Abstract prepared by Claude Witz, National Correspondent, and Stephan Pache

The defendant, a company based in the Netherlands, had sold the plaintiff, a company based in France, some spray paints for sale to the general public. The caps of the spray paints had been found to be defective and the French company sued the Dutch exporter. The Amiens Appeal Court had dismissed the plaintiff's appeal on the grounds that it had failed to take action within two years, as required under CISG, article 39, paragraph 2.

The Court of Cassation overturned the judgement of the Amiens Appeal Court based on a breach of CISG, article 39, ruling that the two-year time limit laid down in article 39 was "a time limit for a complaint of lack of conformity and not a time limit for action".

The lesson of the ruling by the Court of Cassation is clear: care must be taken not to confuse the time limit set out in CISG, article 39, paragraph 2, with the time limit applicable to the action brought by the buyer against the seller.

Case 1028: CISG 39; 39 (2); 40
France: Court of Cassation, Commercial Division
Appeals Nos. 07-11.803 and 07-12.160
16 September 2008
Société Industrielle et Agricole du Pays de Caux (SIAC) v. Agrico Cooperatieve Handelsvereiniging Voor Akkerbouwgewassen BA
Original in French
Published in French: Légifrance: www.legifrance.gouv.fr; CISG-France database: www.cisg-france.org; CISG-online database: CISG-online.ch, No. 1821; Unilex database: www.unilex.info
Abstract in English: Unilex database: www.unilex.info
English translation: Pace database: http://cisgw3.law.pace.edu/cases/080916f1.html
Commentaries: Jean-Baptiste Racine, *Revue des contrats* 2009, p. 1549 et seq.; Claude Witz, *Recueil Dalloz* 2009, p. 1568 et seq.

Abstract prepared by Claude Witz, National Correspondent

A company based in France bought from an agricultural cooperative based in the Netherlands a large quantity of potato plants grown from seed produced by a Dutch farmer. Delivery took place in February 1998. The potatoes were planted out and harvested in September of the same year. Part of the crop was sold to retail potato producers and the rest was kept as seed. The tubers produced by the latter in September 1999 were sold on to various French growers, where they developed a bacterial disease, *ralstonia solanacearum*, commonly known as brown rot. A number of claims were lodged with the court of first instance in Rouen, one of which was by the French importer against the Dutch exporter. The others were lodged by French farmers whose crops had been affected by the disease and who claimed compensation for their loss from both the French and the Dutch company.

For the case relating to contractual liability brought by the plaintiff, the French importer, against the defendant, the Dutch seller, the Rouen Appeal Court applied CISG. It dismissed the plaintiff's claim because the two-year deadline set out in CISG, article 39, paragraph 2, had not been met. The goods had been delivered on 2 February 1998 and the deadline had expired on 2 February 2000, before the disease had appeared. Moreover, the Appeal Court declined to apply article 40, under which the two-year deadline could be set aside if the lack of conformity related to facts of which the seller knew or could not have been unaware and which he had not disclosed to the buyer.

The Court of Cassation rejected the plaintiff's appeal. Firstly, the Appeal Court had been justified in its decision not to apply CISG, article 40, on the grounds that the plants in question were accompanied by a certificate to show that tests for brown rot had been negative and that the Dutch farmer was not subject to any prohibition on production, since the mere fact that production areas surrounding the Dutch agricultural operation were contaminated with the disease was not, in itself, enough to infer that the seller had failed to give notice of a lack of conformity. Secondly, the plaintiff had claimed a breach of article 6 of the European Convention on Human Rights, which assured the right to a fair trial. In his appeal, the plaintiff had claimed that article 6 of the Convention prohibited a person from being denied a hearing upon the basis of a time limit for action in place before a defect was discovered, namely before proceedings were instituted. The plaintiff had raised this argument for the first time before the Court of Cassation, which found that line of reasoning

inadmissible, since it was a new argument and was a mixture of the factual and the legal. The Court of Cassation did not, therefore, consider the merits of the compatibility of CISG, article 39, paragraph 2, with article 6 of the European Convention on Human Rights, unlike the reporting judge, who had firmly asserted the complete compatibility of CISG, article 39, paragraph 2, and the European Convention.

Case 1029: CISG 18; 19; 23; 26; 35; 49; [74]; 75; 77
France: Rennes Appeal Court
27 May 2008
Société M.C.S. v. Société H.D.
Original in French
Published in French: CISG-France database: www.cisg-france.org; CISG-online database: CISG-online.ch, No. 1746; Unilex database: www.unilex.info
Abstract in English: Unilex database: www.unilex.info
English translation: Pace database: http://cisgw3.law.pace.edu/cases/080527f1.html
Commentary: Claude Witz, *Recueil Dalloz* 2010, panorama, p. 931

Abstract by Claude Witz, National Correspondent, and Stephan Pache

A company based in France had put in a series of orders to a company based in Italy for bra linings to be used in the manufacture of swimsuits. Citing manufacturing defects, the buyer cancelled his orders, obtained replacement goods and sued the Italian supplier for damages and interest in compensation.

Hearing an appeal against the Rennes Commercial Court, the Rennes Appeal Court ruled that two contracts had indeed existed, in accordance with the provisions of CISG, articles 18 and 23. The Court found, however, that a third contract had not taken effect, in view of the fact that the Italian company had changed the price mentioned in the order. In the Court's view, this constituted a counter-offer, containing an element that substantially altered the terms of the offer, in line with CISG, article 19.

The Appeal Court ruled that the goods lacked conformity under the terms of CISG, article 35, in that the adhesive used on the fabric did not stand up to handling. The Commercial Court had held the cancellation of the orders by the buyer to be a statement of intent that it considered effective under the terms of CISG, article 49. It had also held that the notification by facsimile was in accordance with the requirements of CISG, article 26. In explaining its reasoning, however, it had failed to examine whether the lack of conformity constituted a fundamental breach of contract, thus entirely overlooking the provisions of CISG, article 25.

The Appeal Court dismissed part of the plaintiff's claim for damages and interest. It ruled that the buyer was not entitled to the difference between the price on the contract and the price of the replacement goods, as he had claimed, since he had not acted in a reasonable manner under the terms of CISG, article 75, in that he paid what the judges considered an excessive price for his replacement goods.

The Court of Appeal also applied CISG, article 77. After making its complaint about the lack of conformity, the buyer had taken three days to stop the swimsuit production chain, thus contravening, in the court's view, his obligation to minimize the damage.

Case 1030: CISG 93
France: Court of Cassation, First Civil Division
2 April 2008
Appeal No. 04-17726
Société Logicom v. Société CTT-Marketing Ltd
Original in French
Published in French: *Bulletin civil* 2008, I, No. 96; Légifrance: www.legifrance.gouv.fr; CISG-France database: www.cisg-france.org; CISG-online database: CISG-online.ch, No. 1651; Unilex database: www.unilex.info
Abstract in English: Unilex database: www.unilex.info
English translation: Pace database: http://cisgw3.law.pace.edu/cases/080402fl.html
Commentaries: Inès Gallmeister, *Recueil Dalloz* 2008, p. 1141; Jean-Grégoire Mahinga, *Semaine juridique, générale édition*, 2008, Jurisprudence, No. 271; Jean-Frédéric Mauro, *Gazette du Palais* 2008, p. 1897 et seq.; Jean-Baptiste Racine, *Revue des Contrats* 2009, p. 683 et seq.; Pauline Remy-Corlay, *Revue trimestrielle de droit civil* 2008, p. 264 et seq.

Abstract by Claude Witz, National Correspondent, and Mathieu Richard

A French company had bought some telephone products from a company based in Hong Kong. The products were faulty and, in accordance with what had been agreed between the parties, were returned to the manufacturer. The seller failed to carry out the agreed repairs and the buyer therefore issued a writ against it for indemnity for loss.

The Aix-en-Provence Appeal Court awarded the buyer only part of the damages and interest that it had sought, basing its ruling on the law applicable in Hong Kong. The buyer lodged an appeal, on the grounds that the Appeal Court had not applied CISG.

The Court of Cassation rejected that argument on the basis of CISG, article 93, which allowed any Contracting State to apply the Convention to one or more of its territorial units in which different systems of law were applicable, in relation to the matters dealt with in the Convention, by means of a declaration to the Secretary-General of the United Nations expressly stating the territorial units to which it extended. The Court of Cassation found support, among the documents submitted, in a note from the French Minister for Foreign and European Affairs, who had asked the Chinese authorities about the issue of the applicability of CISG to Hong Kong. The note showed that CISG did not feature in the declaration made to the Secretary-General of the United Nations on 20 June 1997 by the People's Republic of China, where it set out which of the conventions to which it was party at that date should apply to the territory of Hong Kong. Since CISG had not applied to Hong Kong before its return to China by the United Kingdom and since China had made a declaration to the depositary of CISG of the kind required under CISG, article 93, the Court of Cassation deemed that the Appeal Court had been legally justified in declining to apply CISG.

Cases relating to the UNCITRAL Model Law on Electronic Commerce (MLEC)

Case 1031: MLEC 15 (2)
Colombia: Council of State, First Administrative Division
Judgement No. 6209
Rhone-Poulenc Agrochimie (Appeal)
31 August 2000
Original in Spanish
Text published in Spanish: http://190.24.134.67/pce/sentencias/ANALES%202000/SECCION%20PRIMERA/CE-SEC1-EXP2000-N6209.DOC

Abstract prepared by Adriana Castro Pinzón and Diego Rodrigo Cortés Ballén

In this case, the Council of State was deciding on the admissibility of an application and its annexes submitted by facsimile.

The plaintiff brought an action for annulment and reinstatement of rights following against a decision by the Superintendent of Industry and Trade denying a patent for an invention and refusing an appeal for reconsideration through governmental channels. The application and its annexes were sent by facsimile to the Council of State at 4.37 p.m. on 24 April, which was the last day before the case would lapse. The application was rejected as being out of time, since it had not been submitted in accordance with the regulations in force, which state that the courts' working day is from 8 a.m. to 4 p.m. The plaintiff made an application for reconsideration, on which the Council of State made the following ruling.

The Council of State upheld the decision that was being challenged. While recognizing the validity of documents transmitted either electronically or by facsimile (Colombian Code of Civil Procedure, art. 253, and Act No. 527 [art. 10] of 1999) (cf. MLEC, arts. 9 (1) and (2)), it ruled that the electronic submission of the document had not occurred within the legal time limit established for that purpose and that the late submission of a document — in this case, the application — entailed the consequences provided for. The Council of State deemed that to argue, as the plaintiff had done, that the limit for submission of the application was midnight of the day on which the case lapsed failed to recognize the existence of the courts' working hours, whereby the end of the day meant the end of the working day for court offices: those were the hours within which the parties and their representatives — and the government procurator's office — were required to submit documents to the relevant offices and not at other times. The courts' working hours had been established in order to impose order on the administration of documents relating to the activities for which the judiciary was responsible and to any other matter relating to the logistics required for good procedural order.

A document applying for an action for annulment and reinstatement of rights could be transmitted by facsimile. In order to be taken into account, however, it had to be submitted within the working hours established for the issuance of statements by the courts.

Case 1032: MLEC 2 (a); [8]; 9
Colombia: Council of State, Third Administrative Division
Judgement No. 17788
Sociedad Visimed S.A. v. Caja de Provisión Social de Comunicaciones - CAPRECOM E.P.S.
13 July 2000
Original in Spanish
Text published in Spanish: http://190.24.134.67/pce/sentencias/ANALES%202000/SECCION%20TERCERA/CE-SEC3-EXP2000-N17788.DOC

Abstract prepared by Adriana Castro Pinzón and Diego Rodrigo Cortés Ballén

This case dealt in part with the evidential weight of documents submitted for a trial solely in the form of photocopies sent by facsimile.

The plaintiff instituted executive proceedings in respect of a debt arising out of a service contract. The court of first instance issued a warrant of payment of the amount owed, imposed a penalty clause and late interest charges and ordered the seizure of 37 current bank accounts belonging to the entity being sued. That entity appealed for the decision to be reversed in respect of some of the bank accounts, owing to the fact that the money deposited in them consisted of investments by the social security system in the nation's health, constituting public money for a specific purpose that was exempt from seizure. The exemption was confirmed by copies of certificates transmitted by facsimile. The court of first instance accepted the certificates transmitted by facsimile and ordered the release of 12 of the bank accounts. The plaintiff challenged the ruling on the grounds, among others, that the documents placed on the file were not authentic and had not come from the relevant officials; he therefore argued that they did not constitute appropriate evidence to prove the nature of the funds or their exemption from seizure.

The Colombian Council of State ruled that the certificates placed on the file were public documents, transmitted by public officials in the exercise of their duties, as evidenced by the fact that they had been transmitted, their date and the statements made by the official who signed them (Code of Civil Procedure, arts. 251, 262, para. 2, and 264). The certificates provided for the proceedings by facsimile amounted to data messages, which were recognized as having the evidential weight of original documents, under the provisions of Act No. 527 of 1999, articles 2, [8], 10 and 11 (with regard to arts. 2 (a) and [8], cf. MLEC, art. 9, paras. 1 and 2). The Council of State held that the data messages supported the statements made by those who had signed them.

In order to nullify the effect of the presumption of authenticity of a public document recognized by the domestic legal order of Colombia (Code of Civil Procedure, art. 281), in this case data messages carried by certification, it would be necessary to establish that it was false, in accordance with the provisions of the Code of Civil Procedure, article 289.