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Contents

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Introduction

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Cases relating to the United Nations Convention on Contracts for the International Sale of Goods (CISG)

Case 1106: CISG 14, 35, 96
Russian Federation: Judicial Division of the Supreme Arbitration Court of the Russian Federation (VAS)
Case No. VAS-2499/11
15 April 2011
Original in Russian
Published in Russian: online database of court judgements http://kad.arbitr.ru

Abstract prepared by A. S. Komarov, National Correspondent, A. I. Muranov and N. S. Karetnaya

An agreement was signed between a German seller and a Russian buyer, which proposed the supply of three consignments of goods to two different States (the goods were described as materials for the renovation of a restaurant kitchen, materials for roofing a restaurant kitchen and materials for renovation of a restaurant). The agreement provided for different payment procedures for the different consignments. The buyer paid for only one consignment of goods, albeit before the agreement was signed.

The buyer sued the seller, claiming that the contract for international sale should be declared not concluded on the grounds that the parties had not agreed on the basic conditions of the contract.

The court upheld the claim in full. The higher courts upheld the decision of the court of first instance.

The respondent, claiming that the courts had incorrectly applied CISG, submitted a complaint to the Supreme Arbitration Court of the Russian Federation, which likewise upheld the earlier decisions, on the following grounds.

Since the commercial enterprises of the parties were located in the Russian Federation and the Federal Republic of Germany, CISG must be applicable to the business relationship between them. The form of the contract for the international sale of goods was governed by Russian law, in view of the declaration made by the Russian Federation under article 96 CISG that such contracts must be put in writing.

Under the Civil Code of the Russian Federation, a contract is regarded as being concluded if the parties have reached agreement on all the essential terms of the contract, in the form required by the type of contract in question. The condition governing a contract for international sale shall be considered as being fulfilled if the contract allows the type of goods and their quantity to be determined, which also satisfies the requirements of articles 14 and 35 CISG.

The goods were not identified in the agreement (the type and quantity of goods were not indicated), i.e. the subject of the contract was not specified. Moreover, the letter from the Russian organization referred to by the seller does not contain specific details which might identify the type and quantity of goods, and there is accordingly no reason to consider that letter as an offer. The delivery which was paid for before the parties signed the above-mentioned agreement appears to be a one-off delivery, judging from the terms and method of delivery. The other deliveries did not take place, and the goods to be delivered were not specified by the parties. The

agreement between the parties does not constitute an acceptance, given the actual circumstances of the case and the applicable law.

Case 1107: CISG 14, 18(1)
Russian Federation: Judicial Division of the Supreme Arbitration Court of the Russian Federation (VAS)
Case No. VAS-9900/10
2 November 2010
Original in Russian
Published in Russian: online database of court judgements http://kad.arbitr.ru

Abstract prepared by A. S. Komarov, National Correspondent, A. I. Muranov and N. S. Karetnaya

A Spanish seller sued a Russian buyer, claiming compensation for moneys owed and interest for the respondent's failure to pay in full for goods supplied (raw materials for the manufacture of ceramic floor tiles). The goods were supplied in separate, one-off, duly documented deliveries, for which the respondent sent the plaintiff an order for a specified quantity, and the plaintiff sent the respondent an invoice and a request for payment for the goods shipped in fulfilment of the order.

The plaintiff's claims were upheld in part, and that decision was confirmed by the higher courts.

The respondent, claiming that the courts had incorrectly applied the substantive law, submitted a complaint to the Supreme Arbitration Court of the Russian Federation, which upheld the decisions, on the following grounds.

The courts did not accept the respondent's argument that the contract was invalid because it had not been submitted in writing, since the case file contained both bills of lading showing that goods had been accepted for transport by sea and customs freight declarations, which proved that the goods had been delivered to the respondent's address and that the respondent had paid part of the price for them.

The respondent's proposal included a specification of the goods and their quantity, which meets the requirements of article 14 CISG for a proposal for concluding a contract. The price was shown in the invoices submitted by the plaintiff, which must be considered as a counter-offer. The goods were delivered under an international transportation agreement and documented in a bill of lading, in which the respondent was shown as the receiver of the goods. Taking delivery of goods was an action which implied that a contract had been concluded. This view is supported by article 18(1) CISG, which states that a statement made by or other conduct of the offeree indicating assent to an offer is an acceptance.

Case 1108: CISG 9, 12, 96
Russian Federation: Judicial Division of the Supreme Arbitration Court of the Russian Federation (VAS)
Case No. VAS-16382/09
23 December 2009
Original in Russian
Published in Russian: online database of court judgements http://kad.arbitr.ru

Abstract prepared by A. S. Komarov, National Correspondent, A. I. Muranov and N. S. Karetnaya

A Polish seller sued a Russian buyer, claiming the payment of moneys owed for goods supplied, plus interest.

The court upheld the claims in full, citing the creation of a business relationship between the parties relating to an international sale, governed by the practices established between the parties, as provided for in CISG. The decision of the court of appeal overturned that decision and rejected the claims for compensation. The court of cassation upheld the latter decision.

The Polish company, claiming the incorrect application of CISG, submitted a complaint to the Supreme Arbitration Court of the Russian Federation, which upheld the decisions of the court of first instance and court of cassation, on the following grounds.

Under articles 12 and 96 CISG, a provision is in force in the Russian Federation that a contract for international sale of goods must be put in writing. The sales transaction between the seller and the buyer was not put in writing. The receiver of the goods and the payer was a third party. The seller did not deliver the goods to the buyer's address, did not receive payment from the buyer and was not notified by the buyer that the goods had been transferred to the third party. Notwithstanding the plaintiff's argument that the custom and practice had grown up between itself and the respondent to deliver and pay for goods in this way, the Supreme Arbitration Court decided that CISG was not applicable, in particular article 9, under which the legal relationship relating to the sale could be governed by business practices established between the parties. Thus no contract for international sale existed between the parties to the dispute.

Case 1109: CISG [1], 3, 26, 81(2)
Russian Federation: Judicial Division of the Supreme Arbitration Court of the Russian Federation (VAS)
Case No. VAS-13520/09
16 December 2009
Original in Russian
Published in Russian: online database of court judgements http://kad.arbitr.ru

Abstract prepared by A. S. Komarov, National Correspondent, A. I. Muranov and N. S. Karetnaya

A Russian buyer sued a Czech seller, claiming restitution of the price paid for technical equipment of inferior quality, which had been supplied under a contract between the two parties. The total price of the contract included both the cost of the equipment and the cost of packaging, marking, installation and training of staff. The

plaintiff paid 90 per cent of the cost of the equipment. Hidden defects became apparent at the commissioning stage. The seller took steps to remedy the defects, but the buyer would not sign the commissioning certificate for the equipment. The buyer then withdrew from the part of the contract relating to the parts of the equipment in which the defects had been detected, and asked for the sum paid in respect of those parts to be returned and for the parts to be removed. When the seller failed to comply, the buyer sued the seller for restitution of the price of all the supplied equipment.

The court rejected the claim for compensation. The higher courts considered the case and upheld the decision of the court of first instance.

The plaintiff, alleging incorrect application of CISG, submitted a complaint to the Supreme Arbitration Court of the Russian Federation, which likewise upheld the decisions of the lower courts, on the following grounds.

The contract concluded between the parties was a mixed one, combining elements of a contract to supply goods, a contract to supply labour and a contract to supply services for payment. The question therefore arises whether CISG is applicable. In the light of article 3 CISG, it appears that, in this case, the seller's principal obligation was to supply equipment, since it was not possible to distinguish the parts associated with the supply of labour and training of the buyer's staff from the main contract (the buyer made a single payment covering everything). CISG is therefore applicable.

In respect of the performance of assembly, commissioning and staff training work, the contract was deemed to be not concluded, since it did not enable the start and finish dates for the work to be specified: these terms are essential for the conclusion of contracts of this type under the Civil Code of the Russian Federation.

Pursuant to article 81 CISG, avoidance of the contract, which the buyer is obliged to notify to the seller (article 26 CISG), entails the restitution of the price of the goods. The case file contains no evidence of any notice by the plaintiff informing the respondent of avoidance of the entire contract. The plaintiff had avoided the contract only in respect of certain parts of the equipment, and accordingly its claim for restitution of the price of all the equipment would be contrary to the provisions of CISG.

Case 1110: CISG 1, 3, 25, 33, 34, 49
Russian Federation: Judicial Division of the Supreme Arbitration Court of the Russian Federation (VAS)
Case No. VAS-11307/09
15 October 2009
Original in Russian
Published in Russian: online database of court judgements http://kad.arbitr.ru

Abstract prepared by A. S. Komarov, National Correspondent, A. I. Muranov and N. S. Karetnaya

A Russian buyer claimed compensation from an Austrian seller for avoidance of a contract for international sale of goods (technical equipment) and compensation for the cost of equipment, assembly, commissioning, training and materials.

The parties had concluded a contract stating that the seller took responsibility for the delivery of the goods and the provision of technical documentation, while the buyer undertook to pay for the supplied goods. The buyer paid for the goods in full.

In the buyer's opinion, the seller had breached the contract, in particular by not providing the technical documentation and failing to begin assembly of the supplied goods within the time period stated in the contract. The Austrian company submitted a counterclaim seeking to have the parts of the contract related to contract work for assembly and adjustment of the equipment declared not concluded, and seeking penalties and damages on the grounds that the buyer had not paid for the supplied goods on time.

The court upheld the claims for compensation in full and rejected the counterclaim, on the grounds that the plaintiff's claim was justified and that there was no justification for applying contractual penalties in respect of the counterclaim or for granting compensation because no proof had been submitted. The court of appeal overturned the decision relating to dismissal of the claim and rejected that claim, but upheld the rest of the decision. The court of cassation overturned the decision of the court of appeal and upheld the decision by the court of first instance.

The Austrian company, claiming incorrect application of CISG by the courts, submitted a complaint to the Supreme Arbitration Court of the Russian Federation, which upheld the decisions of the court of first instance and the court of cassation on the following grounds.

The seller's main obligation was to supply goods (articles 1 and 3 CISG). Its obligations relating to the assembly of the equipment were not fundamental. It was not possible to separate off the part of the contract relating to the provision of labour (all the terms were included in a single contract, a single payment was made, the cost of the labour was approximately 1 per cent of the total, and the work had to be done by the seller itself). In the light of the above, CISG should be applied to the entire business relationship between the parties relating to the disputed contract, including the assembly of the equipment.

The seller's failure to observe the conditions relating to assembly of the equipment constituted a fundamental breach of the contract, as provided for in article 25 CISG and the terms of the contract. The buyer could not bring in another contractor to assemble the equipment, since under the contract the guarantees for the equipment would only apply if it was assembled by the seller. During the guarantee period, the seller took responsibility for the quality of the supplied equipment (necessary preparations, assembly, construction and working conditions) and was obliged to remedy any shortcomings by repairing defective parts or replacing them with new ones at its own expense, which included assembly, dismantling, freight charges and staff transport costs. The seller's argument, justifying its failure to assemble the equipment by the buyer's failure to carry out preparatory work for the assembly process, was considered unfounded by the court, since the contract did not place any obligation on the buyer to create in advance the technical conditions which would be needed for the installation of the equipment, but did state that the seller was obliged to begin assembly of the equipment no later than 14 days after it had received notification in writing from the buyer that all the equipment had arrived at the buyer's warehouse.

The court also agreed that the seller had breached article 34 CISG by not proving the receipt by the buyer of authentic technical documentation, registration documents and certificates for the equipment.

In a letter dated 1 July 2008, the seller notified the buyer that it considered its contractual obligations relating to the delivery of the equipment and the technical documentation to have been discharged in full and considered that the signing of the final acceptance certificate had been delayed for reasons which were beyond the seller's control, and that the guarantee period for the goods had accordingly expired. On 7 July 2008, the buyer, in view of the seller's refusal to assemble the equipment, notified the seller of its avoidance of the contract. The court, basing its decision on article 49 CISG, agreed that the buyer had not exceeded a reasonable period for the submission of a claim of avoidance of the contract, since it had sent its reply to the seller six days after receiving a letter from the seller, which was the point at which the fundamental breach of the contract had taken place.

The counterclaim by the seller, that the part of the contract relating to the assembly of the equipment should be declared not concluded because of the failure to specify the start and finish dates for assembly of the equipment, was declared unfounded. According to the provisions of CISG (article 33) the seller should have fulfilled its obligations either on the date fixed by the contract, or within the period of time fixed by the contract, or within a reasonable time. Moreover, the contract stated that the seller must begin assembly of the equipment no later than 14 days from receipt of the written notification from the buyer that all the equipment was present in the buyer's warehouse. When the equipment was assembled and found to be in working order, the parties were obliged to sign the assembly completion certificate.

Case 1111: CISG 7(2), [53], 74, 77, 78
Russian Federation: Volga-Vyatka Area Federal Arbitration Court
Case No. A43-21560/2004-27-724
2 April 2007
Original in Russian
Published in Russian

Abstract prepared by A. S. Komarov, National Correspondent, A. I. Muranov and N. S. Karetnaya

A Croatian seller sued a Russian buyer, claiming payment of the price for goods supplied (accumulator batteries), interest on that sum and damages in respect of the buyer's failure to fulfil its obligations under the contract of sale (losses incurred through loans servicing, payment of a fine for infringements of Croatian foreign exchange legislation and the expenses of a visit to the Russian Federation).

The court granted the plaintiff's claims in part: it ordered the respondent to pay the moneys it owed for the unpaid goods, as well as interest and damages. When the court of appeal considered the case, it increased the amount of interest on the grounds that the court of first instance had incorrectly specified the applicable law, since the law of Croatia was applicable only in respect of issues not governed by CISG.

The buyer contested the court of appeal's decision before the court of cassation, asserting that the substantive law had been incorrectly applied in respect of the

interest and damages awarded and proposing that, since interest had been awarded, the damages should be reduced. The respondent further stated that the provisions of CISG were discretionary in nature and should be applied in the light of the agreement between the parties, the provisions of the applicable domestic legislation (in this case, the law of Croatia) and prevailing business practices. Since CISG does not lay down principles governing the correlation between penalties such as damages and interest, the issue should be resolved under the applicable provisions of Croatian law. The lower courts had incorrectly applied articles 277 and 278 of the Croatian Obligations Act, since they had not taken into account the potential for setting off the interest awarded against the damages awarded to the plaintiff, and had decided to order the payment of interest on the moneys used by the respondent as well as damages.

The respondent also considered that the courts had incorrectly applied article 74 CISG, by assuming a causal relationship between the actions of the debtor and the losses suffered by the creditor, and articles 266 and 267 of the Croatian Obligations Act, which limits the debtor's liability for losses suffered by the creditor if the latter does not take reasonable measures to mitigate the loss. The plaintiff did not use the payments it had received from the respondent in respect of the goods to pay off its loans, so that the amount of the loans had not decreased.

The court of cassation upheld the decisions of the lower courts, on the following grounds. CISG is applicable in the case in question. In respect of those issues not governed by CISG, by virtue of article 1211 of the Civil Code of the Russian Federation as the subsidiary law governing the transaction, the applicable law is that of Croatia (the law of the country of the seller). The court rejected the principle, provided for in Croatian law, of deducting interest from any damages awarded, on the grounds that, under article 78 CISG, if a party fails to pay the price or any other sum that is in arrears the other party is entitled to interest on the sum in arrears without prejudice to any claim for damages recoverable under article 74 CISG.

The court decided that, under that provision, if the obligation to pay for the goods was not duly fulfilled, any amount of damages might be awarded in addition to interest. According to the view expressed in CISG, the charging of interest does not constitute a penalty and is not the same as damages: rather, it reimburses the creditor for the unjustified use by the debtor of moneys belonging to the creditor. In the application of CISG, the calculation of interest is based not on an attempt to compensate the creditor for its loss, but on the presumption of ownership by the creditor of the increased value of the money illegally retained by the debtor, which would have accrued to the creditor if the payment had been made on time. Accordingly, if the offence created specific losses for the creditor, the latter could claim compensation independently of the interest awarded. Article 78 CISG, in the court's opinion, clearly and comprehensively regulated the question of the correlation between damages and interest, so that there was no need for subsidiary application of Croatian law pursuant to article 7(2) CISG.

The respondent's claim that the plaintiff had not taken steps to mitigate the extent of its losses by paying off the increased interest on its loan agreements, as provided for in article 77 CISG, was not upheld by the court on the grounds that the respondent must inevitably have foreseen that the plaintiff would suffer a loss of that kind if the respondent did not pay for the supplied goods. The court agreed that the plaintiff had rightly used the payment made by the respondent in respect of the goods to pay

off some of the interest, but not to pay off the loans themselves. The court also rejected the plaintiff's claim for compensation for the visit it had made, since the plaintiff had not established a causal link between those expenses and the respondent's breach of its contractual obligations.

Case 1112: CISG 1(1), 8(3), 25, 30, 32, 35, 36, 38, 39, 50
Russian Federation: Far East Area Federal Arbitration Court
Case No. F03-A73/05-1/4096
24 January 2006
Original in Russian
Published in Russian
Abstract prepared by A. S. Komarov, National Correspondent, A. I. Muranov and N. S. Karetnaya

A seller from the United States of America sued a Russian buyer for the payment of moneys owed for the purchase of goods (maize) and damages for the delay in payment. The respondent transferred the goods to third parties and notified the plaintiff that the financial obligation had been assigned to those third parties, which paid part of the price of the supplied goods.

The court of first instance upheld the claim. The court of appeal overturned that decision and rejected the claim on the grounds that, in breach of the contract, the goods had been supplied on an FAS rather than a CIF basis, so that the plaintiff had not paid freight and insurance costs. Moreover, the seller had supplied goods of inferior quality and had not supplied the full quantity ordered. On these grounds, the court of second instance considered that, under articles 25, 30, 32, 35, 38 and 50 CISG, the total costs which the plaintiff had failed to pay relating to CIF delivery, the direct losses due to the low quality of the goods and the extra customs dues paid by the respondent should be deducted from the payments due under the contract.

The seller contested the decision of the court of appeal.

The court of cassation overturned the decision of the court of appeal on the following grounds. The main issue in the dispute was a business relationship relating to the international supply of goods; CISG is thus applicable to the relationship between the parties. In accordance with the generally accepted standards of international law, enshrined in CISG and the Civil Code of the Russian Federation, private international law and Russian civil law are based on an acknowledgement of the equality of the participants in social interactions, the inviolability of property and the freedom to conclude a contract. However, the court of appeal did not consider the terms of the contract in the light of article 8(3) CISG and the Civil Code of the Russian Federation, taken in conjunction with the terms of delivery on an FAS or CIF basis, laid down in the Incoterms Rules and proved in the current case. The court of appeal's conclusion that the goods had been supplied on an FAS basis and its justification of the payment due and the amount of the payment were based on an unsatisfactory evaluation of the situation. The court of appeal's conclusion that the seller had failed to observe all the obligations arising from delivery on a CIF basis was unfounded, since the court had not properly determined, in the light of article 8(3) CISG, the terms governing the basis for the delivery agreed by the parties in the contract between them.

According to articles 35 and 36 CISG, the seller must deliver goods which are of the quantity, quality and description required by the contract and which are contained or packaged in the manner required by the contract. The seller is liable in accordance with the contract and with CISG for any lack of conformity which exists at the time when the risk passes to the buyer, even if the lack of conformity becomes apparent only after that time.

Article 39 CISG states that a buyer loses its right to rely on the lack of conformity if it does not give notice to the seller specifying the nature of the lack of conformity within a reasonable time after it has discovered it, or should have discovered it. No proof was submitted that the respondent had observed the procedure laid down in article 39 CISG.

The court of cassation overturned the decision of the court of appeal and sent the case for retrial, indicating that, in the reconsideration of the case, the violations which had previously been allowed should be rectified, the circumstances of the case should be fully and comprehensively investigated and the evidence presented by the plaintiff and respondent in support of their claims and counterclaims should be evaluated.

Case 1113: CISG 14, 53, 62
Russian Federation: North-West Area Federal Arbitration Court
Case No. A56-13238/04
14 April 2005
Original in Russian
Published in Russian

Abstract prepared by A. S. Komarov, National Correspondent, A. I. Muranov and N. S. Karetnaya

A German company (the seller) sued a Russian organization (the buyer), seeking the restitution of moneys forming part of the purchase price in a contract for the international sale of goods (reinforced concrete pipes). The court rejected the claim.

The court of appeal upheld that decision.

The German company contested the decision of the court of appeal, on the grounds that the respondent had misused its rights. The court of cassation upheld the decision of the court of first instance, on the following grounds.

On 6 September 2001, the parties had concluded an agreement, stating that “on the basis of the proposal made by the company, a contract will be concluded for the manufacture and delivery of reinforced concrete pipes”. When the company did not receive payment for the finished goods, it asked the Russian organization for payment of the price under articles 53 and 62 CISG.

The lower courts rightly stated that there was no contract between the parties. In support of this conclusion, they indicated that the agreement between the parties dated 6 September 2001 could not be considered a contract or an offer by the seller under article 14 CISG, since it did not include precise details about the seller or buyer. The courts did not deem the letter sent by the Russian organization to be an acceptance, since the wording did not confirm the formation of a contract under the conditions stated in the agreement of 6 September 2001.

The lower courts concluded that the plaintiff had not submitted evidence proving that it had duly fulfilled its obligation to supply the goods or that the goods had been received by the respondent. In support of that conclusion, the courts referred to the fact that, according to information received from the Russian Federation Customs service, a different Russian company had obtained concrete pipes from a different seller. No bank documents were recorded relating to payment for the delivery referred to in the claim. The plaintiff had not proved that it had submitted its claim to the correct respondent, i.e. to the entity with which the plaintiff had actually concluded a contract under the conditions stated in the agreement of 6 September 2001.

Case 1114: CISG 1(1)(a), [7(2)]
Russian Federation: Moscow Area Federal Arbitration Court
Case No. KG-A40/154-98
16 February 1998
Original in Russian
Published in Russian

Abstract prepared by A. S. Komarov, National Correspondent, A. I. Muranov and N. S. Karetnaya

An Argentine company (the seller) sued a Russian organization (the buyer) for the recovery of moneys paid following the Russian organization's failure to fulfil its obligations under a contract for the international sale of goods. The respondent submitted a counterclaim for penalties. The court upheld the claims of the company and organization, calculated the counterclaim and awarded moneys to the Argentine company. The Russian organization contested the decision, claiming that the rules of substantive law had been incorrectly applied.

The court of cassation reached the following conclusions.

The court of first instance, in upholding the claims of the Argentine company, followed the Civil Code of the Russian Federation, justifying its application by the agreement between the parties. The court of first instance rightly stated that the transaction agreed by the parties constituted a foreign economic transaction, since the commercial entities of the two parties were located in different States.

However, the court of first instance did not take into account the fact that, under the Constitution of the Russian Federation, international instruments to which the Russian Federation has acceded are incorporated into the country's legislation. CISG is applicable to the relations between the parties to a foreign sales transaction. The parties' agreement about the application of domestic law does not preclude the application of CISG under article 1(1)(a), since the commercial enterprises of the two parties are located in different States and these States are both party to CISG. In such a case, the application of the Civil Code of the Russian Federation can only be subsidiary in nature.

On these grounds, the court declared the decision of the court of first instance to be unfounded, overturned the decision and ordered a retrial, indicating the need to base a decision on the applicable substantive law.

Case 1115: CISG 2(e)

Russian Federation: Maritime Arbitration Commission at the Russian Federation Chamber of Commerce and Industry
Final Decision in Case No. 1/1998
Original in Russian
Unpublished. Stored in the archive of the Maritime Arbitration Commission at the Russian Federation Chamber of Commerce and Industry

Abstract prepared by A. S. Komarov, National Correspondent, A. I. Muranov and N. S. Karetnaya

A Russian organization (the plaintiff) and a Canadian company (the respondent) concluded an agreement under which the plaintiff sold to the respondent marine scrap metal in the form of a decommissioned diesel submarine. The parties explicitly stated that the contract had been drawn up and would be interpreted according to the law of the Russian Federation.

The Arbitration Commission considered whether CISG, which had been incorporated into Russian law, was applicable to the contract in question. It concluded that the submarine should be considered a marine vessel, even though it had been decommissioned by the Russian Navy, since the description "decommissioned" relating to the subject of the contract could denote only the loss of the submarine's status as a naval vessel, not the loss of its status as a marine vessel. The Arbitration Commission concluded that, while the submarine was capable of remaining afloat, even if it required the assistance of external devices to do so, it should be considered a marine vessel.

In the light of the above, the Arbitration Commission decided that CISG was inapplicable by virtue of the provisions of article 2.