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CASE LAW ON UNCITRAL TEXTS
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Contents

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Introduction

This compilation of abstracts forms part of the system for collecting and disseminating information on Court decisions and arbitral awards relating to Conventions and Model Laws that emanate from the work of the United Nations Commission on International Trade Law (UNCITRAL). 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.

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

Case 1230: MLEC 2; 6(1)
South Africa: Labour Court of South Africa (Braamfontein)
Case no. J700/08
Sihlali Mafika v. South African Broadcasting Corporation Ltd.
14 January 2010
Published in English: [2010] ZALC 1; (2010) 31 ILJ 1477 (LC); [2010] 5 BLLR 542 (LC)
Commented in: J. Hofman, "The Moving Finger: sms, on-line communication and on-line disinhibition", in Digital Evidence and Electronic Signature Law Review, Vol. 8 (2011), pp. 179-183
Original in English: www.saflii.org/za/cases/ZALC/2010/1.html
Cites CLOUT case no. 964

This case deals with a notice of termination of employment contract by sending an SMS (Short Message Service).

The applicant and the respondent, a South African Corporation, entered into a fixed term employment contract, under which the former was employed as a legal adviser. After learning from the press about allegations of impropriety, and pending an audit on those allegations, the applicant informed the respondent of his decision to "quit [his job] with immediate effect" by sending an SMS. The respondent replied with a letter accepting the resignation. Six weeks after sending the SMS, the applicant sent an email asserting that the employment contract was still valid. The respondent replied by indicating that the notice of resignation sent by SMS was valid, and that therefore the employment contract had been terminated.

The preliminary issue raised was whether an SMS sent by the applicant constituted a valid notice of resignation. Pursuant to South African labour law, a valid notice of termination of employment contract must be given in writing (unless the employee is illiterate). The court held that a communication by SMS is a communication in writing by referring to the Section 1 and Section 12 of the Electronic Communications and Transactions Act, No. 25 of 2002, which are based on articles 2 and 6(1) MLEC. The court thus confirmed that the applicant's notice by SMS was a valid written form of notice of resignation.

The court also took into consideration the capacity of the applicant to resign when he sent the SMS. The court noted that the applicant did not contend that he was unaware of the legal consequences of sending an SMS (a possible consequence of what is referred to as "on-line disinhibition"), but simply, after six weeks, he regretted his decision.

The court concluded that the employment contract had been validly terminated with the notice of resignation sent by SMS.

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

Case 1231: CISG 38; 39; 53; 71; 81(1)
Germany: Oberlandesgericht Köln
16 U 62/07
19 May 2008
Original in German
Published in:
http://cisgw3.law.pace.edu/cases/080519g.html (English translation)

Abstract prepared by Ulrich Magnus [National Correspondent][1] and Jan Lüsing

In this decision, the Higher Regional Court of Cologne focuses in particular on the requirements of article 71 CISG and stresses the notion of functional reciprocity (i.e. synallagma), which, according to the court, the article refers to.

Both the plaintiff and the defendant commercially distributed chemical products for agricultural use and maintained a long-standing business relationship. The plaintiff, based in Italy, sued for payment of the purchase price of several shipments of pesticides and for transport costs. The defendant challenged some of the claims, set off other claims against counterclaims or invoked a right to retention on the basis of the alleged counterclaims.

On first instance, the Regional Court largely granted the plaintiff's claim accepting only one of the defendant's objections and dismissing all counterclaims. Both parties appealed. The Higher Regional Court dismissed the appeals. With respect to the plaintiff's appeal, the court found that the parties had agreed on a termination agreement concerning one of the shipments in question. Applying article 81(1) CISG the court considered the defendant released from its obligation to pay the purchase price under article 53 CISG. With respect to the defendant's appeal, the court stated that the requirements for the set-off against the counterclaims were not met. As the CISG does not contain provisions regulating the right to set-off, the court fell back on article 1243 Italian Civil Code, which was applicable according to article 28(2) of German rules of private international law, in order to decide this question. The court also denied the right of retention, applying article 71 CISG. The court held that the right of retention aims to secure the claim and put pressure on the debtor to perform its obligation in due time. In the present case, however, the buyer was no longer interested in the performance of the seller, thus the connection between the seller performance and the buyer performance did not exist any longer. In addition, the court rejected a claim for damages for nonconformity of the goods delivered, because the defendant had failed to give notice of lack of conformity to the plaintiff within a reasonable time under article 39 CISG (according to the court a "reasonable time" should have been a period of 14 days).

[1] Professor Ulrich Magnus was CLOUT National Correspondent for Germany at the time this abstract was received.

Case 1232: CISG 2(a); 6; 49(2)(b); 74; 81(2)
Germany: Oberlandesgericht Stuttgart
6 U 220/07
31 March 2008
Original in German
Published in: [2008] Internationales Handelsrecht (IHR), 102;
www.cisg-online.ch/cisg/urteile/1658.htm (original);
http://cisgw3.law.pace.edu/cases/080331g1.html (English translation)

Abstract prepared by Ulrich Magnus [National Correspondent][2] and Jan Lüsing

The decision by the Higher Regional Court of Stuttgart is mainly concerned with two issues: the requirements for opting out of the CISG under its article 6 and the "reasonable time" to declare avoidance of the contract pursuant to article 49(2)(b) CISG.

The plaintiff, a Latvian corporation, bought a used car from the defendant, a German commercial car dealer. The pre-printed form of the purchase contract contained the handwritten remark "no repainted", which was added by the defendant on account of the plaintiff's request. The defendant had obtained the car from at least one intermediary. Previously, the car belonged to a Bank PLC and had been damaged and repaired, including paint work. After payment of the purchase price, the car was delivered to Riga at the expenses of the buyer. The buyer examined the car on 7 July 2006 for the first time detecting that the car had been repainted; furthermore, accident damage had not been professionally repaired and certain car accessories (stated in the contract) had not been delivered. In a letter dated 15 July 2006, the buyer demanded a payment of Euro 2,500 by 2 August 2006 at the latest, stating that it would avoid the contract and claim damages in case the seller refused to pay. After exchanging several letters, the buyer declared the contract avoided in a letter dated 25 September 2006.

The buyer sued for restitution of the purchase price and for reimbursement of the transfer and parking costs of the car. The Regional Court, in the first instance, sustained the buyer's claim. The Higher Regional Court reversed the decision allowing the defendant's appeal. The court stated that the contract between the parties was governed by the CISG: both parties had their place of business in contracting States and the "requirements for the application of the CISG" were also met: when the parties stipulated the contract, the seller was entitled to believe that the buyer was purchasing the car for professional purposes (article 2(a) CISG).

The Court also noted that application of the Convention had not been excluded either explicitly or tacitly. The CISG is incorporated into German law: thus, if the parties assume that German law will be applied, this will include the CISG as well. Exclusion of the Convention would rather require specific wording such as "The contract is governed by the sale of goods law of the BGB." Exclusion of the CISG is not implied even when the standard terms and conditions of the seller indicate Germany as the jurisdiction. Finally, application of the CISG cannot be excluded because both parties solely argued on the basis of German national law in the first instance.

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[2] Professor Ulrich Magnus was CLOUT National Correspondent for Germany at the time this abstract was received.

As to the substance of the case, the court rejected the plaintiff's claim for restitution of the purchase price under article 81(2) CISG and the reimbursement of the transfer and the parking costs under articles 74 CISG et seq. holding that the plaintiff lost its right to declare the contract avoided because it failed to declare avoidance within a reasonable time according to article 49(2)(b) CISG. The court stated that the notion of reasonable time under such article has to be determined according to all circumstances of the case. Special consideration must be given to the need for the seller to know, within a short time, how to re-utilize the goods delivered. In the present case, the court regarded the period of two months as reasonable to declare avoidance. The time commenced to run on 7 July 2006, when the buyer recognized the lack of conformity of the good for the first time. Avoidance could have thus been declared until 7 September 2006, which did not happen. For this reason the court stated that the buyer was "not entitled to any claims in addition to the restitution of the purchase price".

Case 1233: CISG 79; 45(1)(b); 74
Germany: Oberlandesgericht München
7 U 4969/06
5 March 2008
Original in German
Published in: BeckRS;
http://cisgw3.law.pace.edu/cases/080305g1.html (English translation)

Abstract prepared by Ulrich Magnus [National Correspondent][3] and Jan Lüsing

The decision of the Higher Regional Court of Munich clarifies the requirements for the exemption provided for in article 79 CISG and emphasises the restrictive interpretation of the article.

The plaintiff, an Italian commercial car dealer, resold a car, previously bought from the defendant, a German commercial car dealer, to an Italian client. However, the car turned out to be stolen and was seized and returned to its rightful owner by the Italian police. The Italian final customer declared the contract avoided and the plaintiff had to pay back the purchase price.

The Italian car dealer sued the German seller for damages on the grounds of non-performance of the obligation to transfer the property, demanding restitution of the purchase price, compensation for the loss of profit, and reimbursement of the attorney's fees. The defendant relied on the exemption rule under article 79 CISG, stating that it had ascertained that the car had not been stolen by inquiring at the motor vehicle registration office.

While on first instance the Regional Court dismissed the action, the Higher Regional Court reversed the decision upholding the plaintiff's claim. The Court stated that article 79 CISG does not shift the burden of contractual risks. The liability of the seller derives from its obligation to deliver goods according to the contract and to transfer the property in the goods. The exemption from the consequences of non-performance under article 79 CISG is possible only if the

[3] Professor Ulrich Magnus was CLOUT National Correspondent for Germany at the time this abstract was received.

impediment is beyond the seller's control; further the concept of seller's liability must be given an extensive interpretation. In the case at hand, the court found that the seller's lack of ability to transfer the property was not due to circumstances beyond its control. The court held that the seller's enquiries to the registration office were no reason for an exemption under article 79 CISG and that the seller had failed to prove that "[it] could not reasonably be expected to have taken the impediment into account at the time of the conclusion of the contract or to have avoided or overcome it or its consequences". Instead, several circumstances should have alerted the seller as to the origin of the car.

For this reason the court granted the buyer damages pursuant to articles 45(1)(b), and 74 CISG, "which comprises lost profit but does not exceed the loss which the party in breach foresaw or ought to have foreseen at the time of the conclusion of the contract".

Case 1234: CISG [4]; 8(1); 79; 49(1)(a); 71(1)(b); 74
Germany: BGH
X ZR 111/04
27 November 2007
Original in German
Published in: [2008] Internationales Handelsrecht (IHR), 49;
www.cisg-online.ch/cisg/urteile/1617.htm (original);
http://cisgw3.law.pace.edu/cases/071127g1.html (English translation)

Abstract prepared by Ulrich Magnus [National Correspondent][4] and Jan Lüsing

The decision by the Federal Court of Justice clarifies that a mistake in a calculation, which is part of the contract, is governed by article 8 CISG and that a disturbance of sales does not allow the reseller to terminate the agreement relying on article 79 CISG.

The seller, a German producer of glass bottles, entered into a contract for the manufacture and delivery of 50-ml and 100-ml glass bottles with a Greek corporation, which intended to export these goods to Russia. After concluding the contract, the buyer asked for an amendment, according to which it would pay a higher price, but the seller would pay in return a certain amount as "consulting and marketing fees" to a third company. The seller agreed. In addition, the parties agreed on the Greek corporation's granting an interest-free loan to the seller for manufacturing the press moulds required to produce the bottles.

After the delivery of the first batch of bottles, the buyer requested the seller to forward a higher amount of money to the third company, due to a mistake in the calculation of the "consulting fees". The buyer also informed the seller about its difficulty in the Russian market due to the decline of the currency rate and announced that it would take over only the bottles already produced. Finally, the buyer requested that the moulds be packed for transport to Russia, where it wanted to sell them. The seller refused and the buyer demanded it to pay back the loan, which the seller also refused.

[4] Professor Ulrich Magnus was CLOUT National Correspondent for Germany at the time this abstract was received.

Eventually, the buyer sued the seller for the payment of the outstanding amount of the "consulting fees" and for repayment of the loan. The seller challenged the plaintiff's claims and demanded compensation for loss of profits.

Contrary to the lower courts, the Federal Court of Justice sustained the plaintiff's claims.

The court held that pursuant to article 8(1) CISG the real intent of the contract's amendment proposed by the buyer was known to the seller, or, in any case, this latter could not have been unaware of it. As a matter of fact, the buyer had explained to one of the seller's employees, before sending the proposal to amend the contract, that the modifications were done in order to avoid that the buyer's Russian customers could find out the actual purchase price of the bottles. Furthermore, other circumstances, including the wording of the proposed amendment, easily revealed the true intentions of the buyer. The seller, thus, was in a position to understand that the buyer had committed a mistake in calculating the amount of the "consulting fees" in the amendment. With this regard, the court noted that the same conclusion would have been reached applying German law provisions on the so called "open error" (outside the scope of the CISG, see art. 4 of the Convention).

The court also supported the buyer's claim for loan repayment, due to the cessation of the bottles production, which the loan was supposed to cover. The Federal Court of Justice inferred the termination of production from the seller's claims for damages due to the buyer's failure to perform its outstanding obligations.

The buyer, however, was not entitled to declare the contract avoided (article 49(1)(a) CISG) since the seller's refusal to pay the remaining "consulting and marketing fees" did not amount to a fundamental breach of contract (article 71(1)(b) CISG). The buyer in fact had already announced it would not perform its duty to take further deliveries. The buyer was also not entitled to terminate the contract under article 79 CISG, since this is not the scope of the article. Furthermore, it still remained to be seen whether the ruble's fluctuations could amount to an impediment beyond the party's control.

The court upheld the seller's set-off claim, since the buyer had not fulfilled its contractual obligations, with the exception of the first delivery. However, it could not reach a decision on the set-off, since the Court of Appeal had not quantified the damages.

The Federal Court thus remanded the matter to the Court of Appeals for a new decision that would consider the issues outlined by the court.

Case 1235: CISG 30; 41; 43; 45(1)(b); 74; 79; 81(2); 82(2)
Germany: Oberlandesgericht Dresden
9 U 1218/06
21 March 2007
Original in German
Published in:
www.cisg-online.ch/cisg/urteile/1626.htm (original);
http://cisgw3.law.pace.edu/cases/070321g1.html (English translation)

Abstract prepared by Ulrich Magnus [National Correspondent][5] and Jan Lüsing

The decision of the Higher Regional Court of Dresden clarifies that if the purchased goods turn out to be stolen the seller fails to comply with articles 30 and 41 CISG and each failure represents an independent breach of contract to be considered separately.

The plaintiff, a citizen of the Republic of Belarus, purchased a used car in Germany from the defendant: the contract stipulated the exclusion of liability for defects. The car was paid and handed over to the buyer; however it turned out to be stolen and was seized by the Belorussian police. The buyer informed the seller about this fact one week after seizure. While the vehicle registration document showed no inconsistency, the vehicle identification number was only on a metal sheet, which had been affixed onto the original number by spot welding. The seller sued the buyer for damages including the purchase price, loss of profit, various expenditures and interests. The seller objected that the buyer failed to give notice of the defect within a reasonable time, that the liability for defects had been excluded, and that it could not be aware or supposed to become aware of the defects. Furthermore, the seller stated that in principle it could be ordered to reimburse the price only upon restitution of the car.

The Higher Regional Court upheld the buyer's appeal against the District Court's decision, which had sustained the seller's complaint. The Higher Regional Court stated that pursuant to the applicable German law (§ 935 civil code), which is applicable to the "property-related effects of the conclusion of the contract", the seller had failed to transfer the property in the car to the buyer. Therefore, the seller had breached its obligation under article 30 CISG as well as its obligation under article 41 CISG to deliver the good free from any right or claim of a third party.

The court found that while the exclusion of liability for defects deprive the buyer of its rights under article 41 CISG, the exclusion does not cover the seller's main obligation to transfer the property under article 30 CISG. Also, the duty to notify established under article 43 CISG does not apply to article 30 CISG. Holding that the seller could not rely on article 79 CISG, the court sustained that the buyer could claim damages pursuant to articles 45(1)(b), 30, 74 CISG. Finally, the court stated that articles 81(2) and 82(2)(a) CISG, ruling mutual restitution of performances, were not applicable to the case at hands.

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[5] Professor Ulrich Magnus was CLOUT National Correspondent for Germany at the time this abstract was received.

Case 1236: CISG 35; 35(2); 35(3); 44; 38; 39
Germany: Saarländisches Oberlandesgericht
5 U 426/06-54
17 January 2007
Original in German
Published in: [2008] Internationales Handelsrecht (IHR), 56;
www.cisg-online.ch/cisg/urteile/1642.htm (original);
http://cisgw3.law.pace.edu/cases/070117g1.html (English translation)

Abstract prepared by Ulrich Magnus [national correspondent][6] and Jan Lüsing

The decision by the Higher Regional Court of Saarbruecken clarifies the concept of objective minimum standard in respect to the seller's obligation to package the goods under article 35 CISG and gives an example of a reasonable excuse under article 44 CISG for the failure to give notice required according to articles 38 and 39 of the Convention.

The buyer, a German company dealing with natural stones, bought marble stone panels from the Italian seller. The contract did not contain ad hoc terms for packaging. During the carriage, an accident occurred damaging the panels. Since the expert entrusted by the transport insurance company stated that the seller's packaging was insufficient, the insurance company and the carrier refused to compensate the damages.

The buyer thus sued the seller claiming that because the latter had failed to load and package the panels in an adequate manner the goods were non-conforming, according to article 35(2) CISG. The seller objected that the buyer had failed to notify the lack of conformity within a reasonable time and that the buyer had no reasonable excuse for this failure (article 44 CISG). The seller also stated that the goods had been packaged in the same way for previous deliveries: therefore, its liability for the alleged packaging defects was to be excluded under article 35(3) CISG.

The Higher Regional Court dismissed the seller's appeal against the District Court's decisions, which had sustained the buyer's complaint. The Higher Regional Court stated that article 35(2) CISG sets an objective minimum standard for the usual or adequate manner of packaging of the goods: a packaging is adequate if it is sufficient for protecting the goods from damages on the foreseeable route of transport. Referring to the insurance expert's opinion, the court found that the seller had failed to package the marble stone panels in an adequate manner and that the seller's liability was not excluded under article 35(3) CISG, since it had failed to prove that the previous deliveries had been of the same kind of goods.

The court acknowledged that the buyer had not given notice of the defects in a reasonable time, but it found that the buyer had a reasonable excuse pursuant to article 44 CISG. According to the court, such an excuse can be accepted if the failure to notify is so "insignificant… that it can be waived in the course of usual and fair business dealings". The Court, however, stressed that being article 44 an exception, it must be narrowly interpreted and that its application requires balancing the interests of the parties. Such exercise requires considering the extent of the

[6] Professor Ulrich Magnus was CLOUT National Correspondent for Germany at the time this abstract was received.

buyer's failure to notify, the consequences of the complete loss of remedies for the buyer, the seller's detriment caused by the failure to notify, and the buyer's effort to meet the requirements of the notification.

Case 1237: CISG 1(1)(a); 53; 61; 74; 79

Russian Federation: Tribunal of International Commercial Arbitration at the Russian Federation Chamber of Commerce and Industry [Megdunarodniy Commercheskiy Arbitragniy Sud pri Torgovo Promishlennoj Palate Rossijskoj Federacii], Award No. 37/2002

24 December 2002

Published in Russian: Rozenberg, Praktika of Mejdunarodnogo Commercheskogo Arbitrajnogo Syda: Haychno-Practicheskiy Commentariy [Practice of the International Commercial Arbitration Court: Scientific — Practical Comments] Moscow (2001-2002) No. 80 [469-471]

English translation available at: http://cisgw3.law.pace.edu/cases/021224r1.html

Abstract prepared by Alexey Kostromov

This case deals primarily with the determination of the amount of damages suffered by the seller as the result of the breach of contract by the buyer.

A Russian company (the seller) entered into an international sales contract with an Estonian company (the buyer). The seller complied with its obligations under the contract. The goods were delivered and the respective bills of lading evidenced that the delivery was timely and that the buyer took over the goods without claims in respect of quality, quantity, description or packaging. The buyer failed to pay for the goods within the period of 50 days from the date of shipment as was agreed in the contract. Additionally, the buyer did not respond to the seller's request to pay for the delivery sent more than one month after the deadline for payment. The contract contained a governing law clause, according to which it was subject to Russian law, and an arbitration clause, according to which any disputes arising out of or in connection with the contract shall be resolved by the Tribunal of International Commercial Arbitration at the Russian Federation Chamber of Commerce and Industry (hereinafter referred to as the "Tribunal") in accordance with its Rules of Arbitration. Therefore, the seller initiated arbitration proceedings before the Tribunal.

The Tribunal applied the CISG as part of the Russian substantive law to which the parties agreed in Clause 10 of the contract; moreover, it found that the CISG applied by virtue of article 1(1)(a), since both parties had their place of business in Contracting States to the Convention at the time of the conclusion of the contract. The Tribunal also found Russian law applicable to the matters not settled in the CISG as a subsidiary law.

On the substance of the dispute, the Tribunal found that the failure of the buyer to pay the price of goods amounted to the breach of buyer's obligations under article 53 CISG, under which "[t]he buyer must pay the price for the goods and take delivery of them as required by the contract and this Convention." The buyer neither provided the Tribunal with the facts evidencing an exemption from liability for damages for a failure to perform its obligations under the contract (as provided by article 79 CISG) nor contested the nature and the amount of damages claimed by the

seller. The Tribunal held that the seller was entitled to the price of goods in accordance with article 61 CISG and to damages under article 74.

The damages suffered by the seller as the result of breach of the contract included the sum of money equal to an administrative penalty paid by the seller pursuant to a decision of the Russian Customs authorities due to the seller's failure to timely deposit foreign currency proceeds under the contract, and compensation of arbitration and attorneys' fees.

Cases relating to the UNCITRAL Model Law on International Credit Transfer (MLICT)

Case 1238: MLICT 5(2)
United States: U.S. [Federal] Court of Appeals for the First Circuit
11-2031
Patco Construction Co., Inc. v. People's United Bank
3 July 2012
Published in English: 684 F.3d 197 (1st Cir. 2012)
[www.ca1.uscourts.gov/pdf.opinions/11-2031P-01A.pdf] (English language text)

This case deals with determining the commercial reasonableness of a security procedure in electronic banking.

The plaintiff (a commercial customer) entered into an online banking (e-banking) agreement with a bank. The agreement for e-banking services stated that the use of the bank's password constitutes authentication of all transactions performed by the customer or in its behalf. The bank did not assume any responsibilities with respect to the customer's use of e-banking, electronic transmission of confidential business. The sensitive personal information was at customer's risk. Therefore, the bank would be liable only for its gross negligence (limited to a fixed amount). Additionally, the customer had to contact the bank immediately upon the discovery of an unauthorized transaction and notify the objection on the same day the debit occurs.

The bank authorized fraudulent withdrawals from an account held by the plaintiff via e-banking. The perpetrators answered correctly the security questions; however, the transactions were inconsistent with the timing, value and geographic location of plaintiff's regular payment orders. Even though the security system flagged the transactions as unusually "high-risk", the bank's security system did not notify its commercial customer and allowed the payments.

The plaintiff brought action against the bank claiming that this latter should bear the loss corresponding to the fraudulent withdrawal because the bank's security system was not commercially reasonable under Article 4A-202 UCC (compare

MLICT art. 5(2))[7] and the plaintiff had not consented to the security procedure. The district court held that the bank's security system was commercially reasonable.

Under Article 4A UCC, a bank receiving a payment order ordinarily bears the risk of loss of any unauthorized funds transfer. However, the bank may shift the risk of loss to the customer in two ways. First, if the payment order received is the authorized order of the person identified as sender with the authority to act for the customer. However, in the case of orders transmitted electronically, the bank usually has to act on the basis of electronic communications, and this rule may not be applicable. Second, irrespective of whether the payment order is authorized, the bank could shift the risk of loss if there is an agreement over a commercially reasonable security procedure and the payment order was accepted in good faith and in compliance with the security procedure.

The security procedure is a procedure agreed between a customer and its bank for the purpose of (1) verifying that a payment order or communication amending or cancelling a payment order is that of the customer; or (2) detecting error in the transmission or the content of the payment order or communication. The commercial reasonableness of a security procedure could be shown (1) by references to the wishes of the customer expressed to the bank, the circumstances of the customer known to the bank, (size, type and frequency of payment orders normally issued by the customer to the bank), alternative security procedures offered to the customer and security procedures in general use by similar customers and banks. Additionally, a presumption of reasonableness may exist under certain circumstances; the Court of Appeals considered the presumption did not apply to the case.

In light of the facts of the case, including the technology actually used compared to those prevailing at the time of the fraudulent transactions, as well the inability of the bank to monitor more closely wire transfers with a highly suspicious pattern, the Court of Appeals concluded that the security procedure was not commercially reasonable.

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[7] Although the Uniform Commercial Code is not, strictly speaking, an enactment of the UNCITRAL Model Law on International Credit Transfer (MLICT), both texts refer to a commercial reasonableness of a security method against unauthorized payment orders. Consequently, the interpretation of the former (UCC, Art. 4A-202) becomes relevant for the interpretation of the latter (MLICT, Art. 5(2)).