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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 1254: CISG 1(1)(a); 6; 8; 18(1); 19; 53; 74; 78
Belgium: Rechtbank van Koophandel Hasselt
M. v N.V. M
2 December 1998
Original in Dutch

Abstract prepared by Emily Nordin

After the conclusion of a sales contract and the buyer's failure to pay, the seller (i.e. the claimant) requests payment of the price and invokes two penalty clauses set up in the conditions of the contract: a penalty clause awarding damages for breach of contract and a penalty clause setting an interest rate for late payment. In court, the seller states that the conditions were established at the beginning of the contractual relationship and afterwards deposited at the Chamber of Commerce ("Kamer van Koophandel") in Zwolle. The respondent does not dispute the fact that it has to pay the price, but objects that it never had any knowledge of such conditions.

The Court first discusses which law is applicable. Since the buyer and the seller have their place of business in countries, i.e. Belgium and the Netherlands, which are parties to the CISG, the Convention is applicable (Article 1(1)(a) CISG).

The Court notes that pursuant to Article 53 CISG, the buyer is required to pay the price agreed upon; if it doesn't, the other party is entitled to damages (Article 74 CISG). When the breach of contract is due to a late or non-payment, interest is also awarded (Article 78 CISG) besides damages.

Referring to Article 6 CISG, the Court notes that it allows the parties to opt out of the CISG, derogate from or modify the effect of its provisions. The question is whether the general conditions of contract of one of the parties, which are not communicated to the other party but are available "elsewhere" (i.e. the Chamber of Commerce in Zwolle), can lawfully determine the amount of damages and interest to be awarded in case of a breach of contract. The Court, in fact, does not find any evidence that the conditions were communicated in some way to the buyer. The Court further notes that as per Article 18(1) CISG, which should be read in connection with Articles 8 and 19 of the Convention, silence in itself does not amount to acceptance. The Court thus concludes that since there is no evidence supporting the fact that the buyer knew the seller's conditions of contract, no derogation from the Convention is possible and the seller cannot rely on the two penalty clauses. However, this does not mean that the seller is not entitled to damages or interest through the application of Articles 74 and 78 CISG.

Case 1255: CISG 71; 73
Belgium: Rechtbank van Koophandel, Hasselt, AR 3641/94
J.P.S. BVBA v. Kabri Mode BV
1 March 1995
Original in Dutch

Abstract prepared by Emily Nordin

A Belgian plaintiff (i.e. the buyer) and a Dutch defendant (i.e. the seller) concluded contracts for the delivery of clothing of the winter collection. Two invoices were sent to the buyer, the first invoice dating 24 August 1993 and the second 27 August 1993. Under each invoice, the payment was due within 30 days. The goods were delivered, but only partly paid for by the buyer, which placed a new order for clothing of the summer collection. The dates for delivery of this order were 8 February 1994 and 25 March 1994.

On 25 April 1994, the seller wrote to the buyer requesting it to perform its obligation and make the payment in full of the first batch of goods delivered. The buyer replied stating that the delivery of the second order had to be done before 25 March 1994 and the seller was in breach of contract.

In court, the buyer claimed damages for the breach, while the seller counter-argued pursuant to Articles 71-73 CISG. The seller also requested the Court to declare the contract avoided.

The Court held that Articles 71-73 CISG applied, since the buyer had not performed its obligations after seven months from the date the payment was due. Such a severe delay justified the seller's concern that the second order would also not be paid and entitled the seller to suspend the delivery of the second order until receiving a full payment for the first order.

The Court further explained that under the provisions of the Convention, courts do not avoid contracts: this is an entitlement of the parties themselves. Therefore, the Court interpreted the seller's request to avoid the contract in the sense that the seller avoided the contract and requested the judge whether this avoidance was grounded. The Court declared the avoidance grounded and reduced the buyer's request for damages.

Case 1256: CISG 7(1); 8; 35(2); 35(2)(a); 35(2)(b)
New Zealand: Court of Appeal of New Zealand - [2011] NZCA 340, And [2011] NZCCLR 27, [2012] 2 NZLR 109 (CA)
RJ & AM Smallmon v Transport Sales Limited & anor[1]
22 July 2011
Original in English

Abstract prepared by Petra Butler, national correspondent

The appellants (i.e. the plaintiffs in the proceeding before the High Court) unsuccessfully appealed a decision of the High Court that failed to establish that the defendants breached Article 35(2) CISG.

[1] Lower instance: High Court of New Zealand, Christchurch - CIV-2009-409-000363 RJ & AM Smallmon v Transport Sales Limited & anor HC Christchurch - 30 July 2010.

The appellants operated a transport business in Queensland, Australia. They entered into an oral contract to purchase four trucks from the defendant, a New Zealand company. The trucks were imported into Australia without compliance plates attached (essentially a certificate that the vehicles were manufactured according to Australian Design Rules) and, consequently, were unable to be registered for road use in Queensland. It was common ground between the parties that there was never any discussion of any kind as to whether compliance plates were needed before the vehicles could be registered. Subsequently, exemption permits for the plaintiffs' trucks were granted on a limited basis by the Queensland authorities. The plaintiffs now sue the defendants, inter alia, for breach of contract and breach of implied terms under the Sales of Goods Act 1908 and the Sale of Goods (United Nations Convention) Act 1994.

The High Court considered that the relevant law to apply was the 1994 Act. Given the 1994 Act's operation as a code, the plaintiffs were precluded from suing under the 1908 Act.[2] The question was whether there was a breach of article 35(2) CISG, i.e. whether there was an implied term of the contract that the trucks met the requirements for registration in the buyer's home state, when the seller was located in a different country. Specifically, Article 35(2)(a) CISG requires that goods be fit for the purpose for which they are ordinarily used. In answering this question both counsel sought to rely on domestic sale of goods law.[3] However, the High Court was quick to point out that the wording of Article 35 CISG is clear: an autonomous interpretation should be preferred without reference to domestic case law.[4] Domestic case law is only relevant to fill gaps where there is insufficient overseas case law to inform an autonomous interpretation. The Court relied on Article 7(1) CISG in justifying its conclusion on this point. That Article forms the basis for the principle of autonomous interpretation. The Convention must be applied and interpreted exclusively on its own terms in order to promote "uniformity in application".[5] Consequently, recourse to domestic case law should be avoided.

The Court examined overseas authority in interpreting Article 35(2)(a) CISG in the context of import regulation compliance. It found that, as a general rule, a seller is not responsible for compliance with the regulatory provisions or standards of the importing country.[6] The defendant therefore did not breach an implied term under Article 35(2)(a) CISG by selling goods without compliance plates attached.[7] For completeness, the Court noted that there was a conflict in authorities on the Convention as to which party bears the burden of proving a breach under Article 35(2)(a) CISG.

The application of Article 35(2) CISG was the central issue on appeal as well. The Court of Appeal confirmed the High Court's ruling that in light of Article 7(1) CISG and the need to give the CISG an autonomous interpretation, recourse to domestic law must be avoided and international jurisprudence should be applied.[8] It further held that where the intent and conduct of the parties is in issue, Article 8 CISG

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[2] At [62].
[3] At [85].
[4] At [90].
[5] At [88].
[6] At [83].
[7] At [92]-[100].
[8] At [41].

should be applied to determine, firstly, the subjective intent of the parties and, failing that, the parties' objective intent.[9] The Court of Appeal also confirmed the applicable principles in interpreting Article 35(2) CISG. As a general rule, the seller is not responsible for compliance with the regulatory provisions or standards of the importing country even if it knows the destination of the goods unless (a) the same regulations exist in the seller's country; (b) the buyer drew the seller's attention to the regulatory provisions and relied on the seller's expertise; (c) the seller knew or should have known of the requirements because of special circumstances.[10] Special circumstances may include the seller maintaining a branch in the buyer's country, a long-standing business connection between the parties, the seller making regular exports to the buyer's country and the provision of goods in the buyer's country.[11]

The Court concluded that the appellants could not show that there were particular circumstances demonstrating that the defendant knew or ought to have known of the registration requirements in Queensland. Therefore the appellants failed under Article 35(2)(a) CISG. The Court of Appeal briefly considered the position under Article 35(2)(b) CISG. This was done on the basis that the appellants had made it known to the defendant that they wanted to use the trucks in Australia, and that this amounted to a particular purpose in terms of Article 35(2)(b) CISG.[12] However, it could not be shown that the appellants had relied on that purpose made known to them in purchasing the trucks. Therefore the appellants also failed under Article 35(2)(b) CISG.[13]

Case 1257: [CISG 8(3)][14]
New Zealand: High Court, Auckland, AP117/SW99
Thompson v Cameron
27 March 2002
Original in English

Abstract prepared by Petra Butler, national correspondent

The appellant and the respondent concluded a deed of settlement in respect of a conversion suit by the former against the latter. The appellant succeeded on appeal to the High Court, which remitted the case to the District Court for a rehearing. During the rehearing the parties negotiated and concluded a settlement. It required the respondent to pay the appellant the sum of $8000 over 3 instalments. Clause 2 stated that the payment was in full and final settlement of the conversion suit against the respondent. After this latter paid the sums owing in the settlement, the appellant issued bankruptcy proceedings against the respondent. This latter applied to have the bankruptcy proceedings annulled. The appellant appeals against that application.

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[9] At [36].
[10] At [26].
[11] At [47].
[12] At [71].
[13] At [72].
[14] Although the case does not apply the CISG, it includes meaningful reference to the Convention.

The issue was whether the settlement agreement was in full and final settlement of all claims by the appellant, or whether other costs not satisfied by the settlement remained outstanding.

The High Court considered that a contract with ambiguous words is to be interpreted with regard to its background and circumstances (the "factual matrix") at the time a contract is entered into.[15] Therefore pre-contractual negotiations and subsequent conduct are traditionally inadmissible in ascertaining the meaning and purpose which parties intended to attribute to a contract.[16] The judge did suggest that this traditional stance may need revision in light of Attorney-General v Dreux Holdings Ltd. In that case the Court of Appeal indicated that Article 8(3) CISG (which is incorporated into domestic New Zealand law by the Sale of Goods (United Nations Convention) Act 1994) expressly provides for consideration of pre-contractual negotiations and subsequent conduct in determining the intent of a party or the understanding a reasonable person would have had. While the Court of Appeal was able to construe the contract without considering subsequent conduct, it nonetheless expressed the view that New Zealand domestic contract law should be generally consistent with international best practice.[17]

The High Court did not conclude on whether Article 8(3) CISG could apply to New Zealand domestic law, instead noting that the law is unclear either way.[18] In the end its result was based on a traditional approach having regard to the "factual matrix" at formation. Evidence of the parties' pre-contractual negotiations and subsequent conduct was adduced, but this was ignored when the High Court formed its final view.[19] The respondent succeeded and the appellant's application for annulment of the bankruptcy proceedings was dismissed.

Case 1258: CISG 7(1)
New Zealand: Court of Appeal of New Zealand, [2002] 1 NZLR 506 (CA)
Bobux Marketing Ltd v Raynor Marketing Ltd
3 October 2001
Original in English

Abstract prepared by Petra Butler, national correspondent

The appellant and respondent entered into an agreement which required the former to supply babies' leather booties to the latter, where the respondent had the exclusive right to distribute the booties in the United Kingdom. After a falling out over the product range, the appellant gave the respondent nine months' notice of termination of the distribution agreement. Clause 19 of the agreement stipulated that it "may only be terminated…by the Supplier if the Distributor [has] failed to order at least the Minimum Quantity." The respondent argued that the termination provisions were clear and unambiguous; the right to termination could only be exercised where the distributor failed to meet the minimum purchase

[15] At [18].
[16] At [19].
[17] At [20].
[18] At [22].
[19] At [31].

requirements.[20] As the respondent continued to meet its minimum quantity obligations the agreement could not be terminated on an implied term of reasonable notice as contended by the appellant.

The express terms of the agreement directly addressed the question of termination and the balance of the contract document contained no indications of a contrary intention to support an implication of a right to terminate without cause on reasonable notice.[21] However, the judge dissenting considered that the Court would be prepared to import into the contract an obligation on the parties to perform the contract in good faith. It would be open to the appellant to allege that the respondent was in breach of that obligation.[22] The Court drew support for the notion of a general obligation of good faith from Article 7(1) CISG and Article 1.7 UNIDROIT Principles. The Court relied on that notion to find that the respondent was in breach for failing to demonstrate the requisite good faith,[23] however no further discussion was entered into concerning the interpretation or application of Article 7(1) CISG.

Case 1259: [CISG 1; 2(b)][24]
New Zealand: Court of Appeal of New Zealand, [2001] NZCA 86
Integrity Cars (Wholesale) Ltd v Chief Executive of New Zealand & anor
2 April 2001
Original in English

Abstract prepared by Petra Butler, national correspondent

The appellant imported used cars from Japan with the assistance of a Japanese-based company (TSY). After successfully purchasing ten cars in a Japanese auction the appellant paid TSY the auction price and auction fees. It also paid TSY for the cost of export fees and inspection charges. Under s 60 of the Customs and Excise Act 1996 an importer must specify to the New Zealand Customs Service the value of imported goods. The issue was whether this value included export fees and inspection charges as part of the total value. The Customs Service ruled that it did. The appellant appealed this determination to the High Court which held that the total value under s 60 includes export fees paid, but not inspection charges. The appellant appeals to the Court of Appeal against the inclusion of export fees under s 60.

Whether the export fee is part of the "price paid" by the appellant depends on the meaning of the relevant provisions of the second schedule to the Customs and Excise Act.[25] Schedule 2 is designed to give effect in New Zealand law to the Agreement on implementation of Article VII of the General Agreement on Tariffs and Trade 1994 (the Agreement).[26] The Court of Appeal considered that the relevant transactions, because of their international character, may have also been subject to the provisions of the CISG (however at the time in question Japan had not yet

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[20] At [62].
[21] At [73].
[22] At [17].
[23] At [47].
[24] Although the case does not apply the CISG, it includes reference to the Convention.
[25] At [19].
[26] At [7].

ratified the CISG).[27] The Court noted that neither counsel for the appellant or respondent raised argument on the applicability of the CISG to the present appeal. In the end, however, the Court considered that the relevant law directly applicable to the appeal was the Agreement.[28]

The Court then had to determine whether TSY acted, in the words of the Agreement, as a buying agent for the appellant when purchasing the ten cars for export to New Zealand. If TSY was considered to be the appellant's buying agent then the export fees were not includable as part of the price paid under s 60 (the Court held that this was so and the appeal was therefore allowed). As the CISG does not deal with agency its provisions were therefore of little assistance to the Court.

Case 1260: [CISG 2(a); 9(2); 38(3); 49(2)][29]
New Zealand: Court of Appeal of New Zealand - [1999] 1 NZLR 33
Tri-Star Customs and Forwarding Ltd v Denning
2 July 1998
Original in English

Abstract prepared by Petra Butler, national correspondent

The appellant and respondent had entered into a written agreement under which the respondent agreed to lease a commercial property to the appellant. Clause 4.1 of the agreement provided the appellant with an option to purchase the property for a price of $720,000 with no mention of GST. The respondents argued that as previous draft offers and agreements were "plus GST" they mistakenly believed they would receive net $720,000 instead of $720,000 less the payable GST incidence. The High Court therefore awarded the respondents relief based on a mistake under s 6 of the Contractual Mistakes Act 1977. The issue before the Court Appeal was whether relief under that section required the appellant to have actual knowledge of the existence of the mistake, or merely constructive knowledge based on an objective assessment of the facts.

The starting point is the use of the word "known" in s 6.[30] The Court found no justification for requiring anything other than actual knowledge by the use of that word in the section. An extended meaning which captures constructive knowledge is only possible where legislation expressly includes words such as "knew or ought to have known".[31] For example Articles 2(a), 9(2), 38(3) and 49(2) of the Sale of Goods (United Nations Convention) Act 1994 (which incorporates the CISG into domestic New Zealand law)[32] use the words "knew or ought to have known" to clearly capture constructive knowledge. Therefore where the word "known" is intended to have a meaning extending beyond its ordinary one, the legislature can be expected to spell that out.[33]

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[27] At [19].
[28] At [19].
[29] Although the case does not apply the CISG, it includes meaningful reference to the Convention.
[30] At [38].
[31] At [38].
[32] Sale of Goods (United Nations Convention) Act 1994, preamble.
[33] At [38].

In this case, it could only be shown that the appellant had constructive knowledge of the respondents' mistake, not actual knowledge as required by the word "known" in s 6.[34] The respondents were therefore not entitled to relief under s 6.[35]

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[34] At [39].
[35] At [41].