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(CLOUT)

## 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 citation of 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 a decision in its original language is included in the heading to each case, along with the Internet addresses, where available, of translations in official United Nations language(s) (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, all Internet addresses contained in this document were functional as of the date of submission of this document, but websites do change frequently). Abstracts on cases interpreting the UNCITRAL Model Law on International Commercial Arbitration include keyword references which are consistent with those contained in the Thesaurus on the Model Law, 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 on 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 1899: CISG 11; 12; 96; 64(1); 49(1); 77**
China: China International Economic and Trade Arbitration Commission
9 September 2009
Original in Chinese
Available at: http://www.cietac.org.cn/

In August 2008, a seller based in China and a buyer based in the United States of America signed a sales contract for children's tents. The tents under the contract fell into the category of speciality goods and were produced specifically for customers in the United States. The intellectual property rights in the tents were held by third parties that had obtained licences from the intellectual property owner. The goods were scheduled to be shipped in August or September 2008 and partial shipment was allowed. The contract price was approximately $390,000 and it was agreed that the buyer should make an advance payment of around $70,000 by wire transfer before the goods were produced and pay the balance of more than $320,000 by wire transfer prior to the shipment. The parties agreed that any dispute arising from the contract would be submitted to the China International Economic and Trade Arbitration Commission.

The buyer paid more than $70,000 as the advance payment for the order. In August 2008, the seller prepared the goods and asked the buyer to pay the full price as stipulated in the contract. On 5 September 2008, the buyer negotiated with the seller by telephone and both parties acknowledged that telephone conversation by email on 6 September 2008. However, a dispute arose between them with regard to the precise content of that communication. The buyer alleged that, during the telephone conversation, the parties had agreed to amend the payment terms set out in the original contract and, according to the amended terms, the buyer would make an additional payment of $80,000 in return for the seller's arranging to ship all the goods and the balance would be transferred to the seller within 30 days of the buyer's receipt of the goods. However, the seller denied that claim, arguing that while on 6 September 2008 the buyer had made it clear that it was willing to make a payment of $80,000 and settle the balance within 30 days, that timeline was unrelated to the seller's shipment of the goods. On 18 September 2008, the seller sent to the buyer by email the revised sales contract, which reflected the amount paid and stated that the balance of more than $240,000 was to be paid before shipment.

On 9 September 2008, the buyer remitted $80,000 to the seller in payment for the goods. On 16 September 2008, the seller informed the buyer that it had received that payment. However, given that the processing factory required full payment in order for the goods to be delivered, the seller was unable to arrange the shipment.

The buyer subsequently asked the seller to deliver a portion of the goods equivalent to the paid amount of more than $150,000, but the seller refused to make a part delivery and insisted on arranging for the goods to be shipped after receiving the full payment. The two parties negotiated many times without reaching agreement, as a result of which the contract remained unfulfilled. The buyer then turned to other factories for purchases. On 7 November 2008, the buyer declared its contract with the seller avoided.

The seller submitted the case to arbitration, naming itself as the claimant and the buyer as the respondent. The seller claimed that the buyer, after making an advance payment of more than $150,000, had failed to settle the balance of more than $240,000, which had been due in advance of shipment of the goods as stipulated in the sales contract, and that that non-payment constituted a breach of contract. The buyer, having reneged on the contract, was not entitled to terminate the contract. Moreover, since the goods in question were speciality goods produced specifically for the buyer and the intellectual property rights in those goods were owned by a third party, it was impossible for the seller to mitigate its loss by reselling the goods.

Accordingly, the claimant requested that the contract be rescinded and the buyer pay compensation for the direct loss, including loss of profit, resulting from its actions. The buyer claimed that the refusal of the seller to ship all the goods after receiving $80,000 violated the amended agreement. It therefore declared the contract avoided on the basis of breach by the seller and at the same time filed a counterclaim, demanding that the seller refund the payment of more than $150,000 and pay compensation for loss of profit.

The main focus of the dispute was as follows:

1. Applicable law

The arbitration tribunal held that since the parties' places of business were located in China and the United States, respectively, and that both countries were parties to the CISG, in the field of international sales of goods the CISG was an instrument of uniform substantive law applicable to both parties. Moreover, since neither party had stated any objection to the applicability of the CISG, the CISG should apply to their dispute.

2. The question of whether the parties had reached an agreement as to the modification of the contract

The claimant contended that the "oral agreement" reached by both parties on 5 September 2008 did not conform to the requirement with respect to written form as provided for in the CISG; in view of the declaration made by China with respect to article 11 CISG, the fact that that oral agreement was not in written form rendered it invalid. The respondent claimed that the oral agreement had subsequently been confirmed in the emails exchanged by the parties and that those emails conformed to the meaning of "writing" in article 13 CISG and the requirements with respect to contract modification in writing as set out in article 29, and that the declaration made by China with regard to article 11 CISG had no bearing on the matter.

The tribunal indicated that China had declared that it was not bound by article 11 CISG and the provisions relating to the content of article 11 and that that declaration had been made on the basis of the provisions of article 96 CISG. Since article 7 of the country's Act on Economic Contracts Involving Foreign Interests at that time required that economic contracts involving foreign interests must be concluded in written form, China was justified in making such a declaration in accordance with article 96 CISG. However, that declaration should not be construed to mean that China required all contracts to be concluded or modified in written form. According to the provisions of articles 96 and 12 CISG, the legal effect of the declaration was that where any party had its place of business in a Contracting State which had made a declaration under article 96 CISG, the parties could not derogate from or vary the effect of article 12. In other words, the principle of there being no requirement as to form did not apply where one party had its place of business in China, which had made a declaration under article 96 CISG. Accordingly, it was for the tribunal to determine the applicable law (by invoking the conflict-of-laws rules of the jurisdiction) insofar as the form of the contract was concerned. Given that the place where the disputed contract was concluded and performed, the seller's domicile and the arbitration institution were all located in China, according to the rules of private international law, the relevant provisions of the Contracts Act of China applied. Article 10 of that Act stipulates: "The parties may use written, oral or other forms in entering into a contract. A contract shall be in written form if the laws or administrative regulations so provide. A contract shall be concluded in written form if the parties so agree." However, the contract in the case in question did not fall into the category of contracts required by the relevant laws and administrative regulations to be in written form. Furthermore, the parties had not agreed that the contract should be in writing. Consequently, it was possible that the contract in question might not be required to be concluded in written form. Moreover, since China had made a reservation under

article 96 CISG, article 29 did not apply. However, in line with the above-mentioned principle, as the first paragraph of article 77 of the Contracts Act of China provides: “The parties may alter the contract after reaching agreement through consultation.” Thus, in the case in question, it was not necessary for the contract to be modified in writing.

3. The question of whether both parties had the right to declare the contract avoided

The tribunal indicated that, according to the relevant provisions of the CISG on avoidance of the contract, insofar as the case under consideration was concerned, the seller could declare the contract avoided on the basis of article 64 (1) CISG only in the following cases: (a) if the failure by the buyer to perform any of its obligations under the contract or the CISG amounted to a fundamental breach of contract; or (b) if the buyer did not, within the additional period of time fixed by the seller in accordance with paragraph (1) of article 63, perform its obligation to pay the price or take delivery of the goods, or if it declared that it would not do so within the period so fixed. The avoidance of the contract was based on the perceived lack of sincere intention on the part of the respondent to continue to perform the contract, and it was unrealistic to expect the respondent to proceed with the performance in an honest and pragmatic manner. However, once the contract had been modified, the seller was under obligation to ship the goods first and had no right to declare the contract invalid on the ground that the other party had not paid the balance.

At the same time, the tribunal indicated that the buyer could declare the contract avoided only on the basis of article 49 (1) CISG: “(1) The buyer may declare the contract avoided: (a) if the failure by the seller to perform any of his obligations under the contract or this Convention amounts to a fundamental breach of contract; or (b) in case of non-delivery, if the seller does not deliver the goods within the additional period of time fixed by the buyer in accordance with paragraph (1) of article 47 or declares that he will not deliver within the period so fixed.” Since in their contract the parties had not agreed on the fundamental significance of delivery on time as a term of the contract, there was no “fundamental breach of contract” as referred to in article 49, paragraph 1 (a). As far as paragraph 1 (b) was concerned, even if the delay in delivery did not constitute a fundamental breach of contract, article 47 CISG allowed the buyer to fix a reasonable additional period of time for delivery following expiry of the original delivery period. After the expiration of such an additional period of time, if the seller continued to fail to perform its obligations, the buyer could declare the contract avoided pursuant to article 49 (1) (b). Therefore, if the buyer fixed a specific additional period of time for the seller to fulfil the delivery obligation and the seller failed to deliver the goods within that additional period, the buyer could declare the contract avoided even in the absence of any evidence proving that the seller’s late delivery constituted a fundamental breach of contract, whereas if the buyer failed to fix any additional period of time in the case of late delivery, it could not declare the contract avoided. However, the buyer’s indication of the deadline must be crystal clear and a mere request for prompt delivery was insufficient, since such a request could not be regarded as confirming an additional period of time for delivery. In the case in question, the respondent did not provide any evidence to show that it had separately determined the relevant period of time for delivery to be from mid-October to 7 November, when the contract was declared avoided. It was clear that the buyer had at no point determined a reasonable additional period of time after the seller had failed to deliver the goods and that, consequently, the requirements of article 49 (1) (b) CISG had not been met. It was not until the claimant went to arbitration that the respondent declared the contract avoided. Therefore, the tribunal held that although the respondent had failed to effectively exercise the right to terminate the contract during the performance of the contract, it nonetheless had the right to file a counterclaim in connection with its declaration

of avoidance of the contract during the arbitration process. Since both parties indicated in categorical terms that it was impossible to continue with performance, the tribunal confirmed the termination of the contract.

4. The question of whether the claimant had fulfilled the obligation to mitigate loss

The respondent contended that even if it had breached the contract, according to article 77 CISG the claimant was still obliged to take reasonable measures to mitigate the loss, yet the claimant had rejected the respondent's reasonable request to ship a portion of the goods equivalent in value to $150,000 and had thus failed to fulfil that obligation. In respect of that portion of the goods at least, the claimant had no right to request the respondent to continue with performance.

In that regard, the tribunal pointed out that article 77 CISG appeared in section II (Damages) of chapter V of part III, which did not explicitly apply to other remedies provided for by the CISG, and that, consequently, the legal effect of violation of the obligation to mitigate loss was that the party in breach could claim a reduction in the damages in the amount by which the loss should have been mitigated. In other words, the legal effect could only be a reduction in the amount of damages. Therefore, the respondent's claim that the claimant had no right to require the respondent to continue with performance could not be supported on the basis of article 77 CISG.

Nevertheless, it was necessary to consider whether the shipment of a portion of the goods equivalent in value to $150,000 fell within the scope of the claimant's obligation to mitigate loss. That obligation was based on the assumption that the respondent had breached the contract, and it could be concluded from that breach that the question of whether the claimant should send the shipment would depend on the payment of the full amount by the respondent. Thus, requiring the claimant to perform its future obligation in the event that the respondent breached the contract by failing to pay the full amount might induce the respondent to breach the contract. Therefore, the respondent's argument that the shipment of a portion of the goods equivalent in value to $150,000 fell within the scope of the claimant's obligation to mitigate loss ran counter to the legislative purpose of the obligation to mitigate loss.

In conclusion, the tribunal held that since it was impossible for the contract to continue to be performed and the claimant had not delivered any goods under the contract, in principle, the claimant should return all payments received to the respondent. However, considering the fact that the respondent had breached the contract in the first place, and the fact that the claimant had produced all the goods according to the buyer's requirements and could not resell them to mitigate the loss owing to the specific nature of those goods, the tribunal decided that the claimant should return $80,000 of the $150,000 received to the respondent. Other claims put forward by the parties were not supported.

**Case 1900: CISG 25; 81; 82; 49; 38; 50**
China: China International Economic and Trade Arbitration Commission
6 August 2010
Original in Chinese
Available at: http://www.cietac.org.cn/

In January 2006, the buyer, based in China, the buyer's import agent and the seller, based in Denmark, jointly signed a sales contract according to which the buyer would purchase a high-speed multifunctional combined rotary printing machine from the seller, the contract price totalling more than €1.7 million. The main technical data were set out in the annex to the contract. The general clauses of the sales contract stipulated that the contract would be governed by Chinese law and that disputes relating to it would be submitted to the China International Economic and Trade Arbitration Commission.

After signing the contract, the buyer paid 16.8 million yuan to its import agent, as agreed in the contract, and the import agent paid 95 per cent of the total contract price – more than €1.65 million – to the seller.

The equipment was installed and debugged in December 2006 after its arrival at the factory of the buyer. The buyer and the seller organized acceptance tests in February 2007, April 2007 and March 2008 but the equipment did not pass those tests as it failed to meet the quality standard required by the contract.

In June 2008, the buyer applied for commodity inspection as provided for by law. In August 2008, the Inspection and Quarantine Bureau of a city in China inspected the equipment and issued a quality certificate. According to the opinion in the quality certificate, there was a problem that prevented the equipment from meeting the mandatory standards of China and therefore full liability lay with the consignor. That problem must be rectified in order to meet the mandatory standards promulgated by China before installation, commissioning and use were allowed. According to the relevant provisions of Chinese law, the conduct of the consignor had constituted a fundamental breach of contract.

In December 2008, the buyer entrusted the Entry-Exit Inspection and Quarantine Bureau of a city in China to appraise the equipment again. In January 2009, the appraisal certificate issued by the Entry-Exit Inspection and Quarantine Bureau set out the opinion that the equipment had serious quality defects caused by the manufacturer's failure to fully consider the characteristics of aluminium foil materials as listed in the contract during the process of design and manufacture.

The buyer informed the seller of the appraisal results and sent a reminder to the seller insisting on the need for that party to fulfil its contractual obligations within the time limit and requesting the seller to take remedial measures immediately upon the receipt of that reminder in order to ensure that the equipment met the quality standard as agreed in the contract within one month. However, the negotiations held between the two parties failed to achieve the desired results. The buyer claimed that the purpose of the contract could no longer be served. Consequently, it submitted the case to arbitration, requesting termination of the sales contract and claiming restitution relief as well as compensation for the entire amount paid, interest owed and all the expenses incurred in the performance of the contract. The claimant also sought compensation for the foreseen loss of profit and all expenses arising from the case.

The seller, as respondent, claimed that, as agreed in the contract, the claimant's legal representative had visited the seller's premises in person for a pre-acceptance assessment of the equipment before it was shipped and that the legal representative had confirmed that the equipment was in order and had endorsed its shipment. The equipment had been used by the claimant since its delivery to print relevant products. The records held by the staff of the respondent showed that, as of August 2009, the equipment had been switched on for more than 5,560 hours. On the basis of the incremental loss of consumables used by the equipment, the respondent had frequently sent technicians to the claimant's premises to replace the consumables and carry out product maintenance. In the meantime, the respondent had repeatedly asked the claimant to carry out an acceptance test as stated in the contract and as is customary in international practice, but the claimant had refused to do so.

The main focus of the dispute was as follows:

1. The law applicable to the dispute

   The general terms of the contract stipulated the following: "This contract shall be governed by the laws of the People's Republic of China and shall be subject to the interpretation of those laws, and the United Nations Convention on Contracts for the International Sale of Goods and other international treaties and practices may apply to it."

   The tribunal held that the above-mentioned contractual agreement was a valid agreement and that the dispute should therefore be governed by Chinese law.

The tribunal also noted that both parties had explicitly cited the provisions of the CISG during the proceedings and in their written submissions, thus indicating that they recognized the CISG as one of the applicable instruments. In the absence of relevant or clear provisions in Chinese law, the CISG and other international treaties and practices could be applied.

2. The validity of the claimant's request for termination of the contract and its request for restitution

The claimant claimed that the equipment delivered by the respondent had serious quality defects, which constituted a "fundamental breach of contract" as referred to in article 25 CISG, and consequently requested termination of the contract and restitution.

The tribunal was of the view that, while fundamental breach of contract constituted the basic condition for the non-breaching party to declare the contract avoided and demand restitution, even if such a breach was established, the non-breaching party should nevertheless meet a number of additional preconditions for contract avoidance. According to articles 81 and 82 CISG, in the case under consideration, even if the respondent had committed a fundamental breach of contract in the course of performance, which would entitle the claimant to declare the contract avoided, the claimant would lose the right to declare the contract avoided if it was impossible for it to make restitution of the goods substantially in the condition in which it had received them.

The claimant had at no point – neither in its request for termination of the contract nor during the proceedings – expressed its willingness or ability to return the equipment to the respondent in the condition in which it was received, nor did it explain to the tribunal that, to the extent that the equipment could not be returned in the condition in which it had been received, the circumstances were consistent with the exceptions specified in article 82 CISG. The tribunal held that, according to the relevant provisions of the CISG, given the circumstances of the case, even if the equipment delivered by the respondent had quality defects that amounted to a fundamental breach of contract, the claimant had nevertheless lost the right to declare the contract avoided on account of its own omission.

Furthermore, according to article 49 CISG, in cases where the seller has delivered the goods, even if the seller has committed a fundamental breach, the buyer, by failing to exercise its rights, loses the right to declare the contract avoided if it fails to inform the seller, within a reasonable period of time after it becomes aware or should have become aware of the seller's breach of contract, of its intention to declare the contract avoided.

With respect to the specific circumstances of the case under consideration, at least by March 2008, the claimant knew or ought to have known that there might be quality defects in the equipment delivered by the respondent, but it was not until March 2010 that the claimant stated formally and explicitly that it would exercise the right to declare the contract avoided during the arbitration proceedings. However, the claimant at no point provided any clarifications, explanations or relevant evidence in support of its declaration of avoidance of the contract after two years had passed. Therefore, the tribunal held that the point at which the claimant had exercised the right to declare the contract avoided was well beyond a reasonable time limit. Consequently, even if the respondent had committed a breach of contract, the buyer, by failing to exercise its rights, had lost the right to declare the contract avoided and thus the right to request restitution.

3. The question of whether the quality of the equipment delivered by the respondent was in conformity with the contract

Article 38 CISG stipulates that the buyer must examine the goods within as short a period as is practicable in the circumstances.

In the case in question, it was difficult for the tribunal to determine whether the claimant's two commodity inspections had been conducted within a reasonable period of time as specified in the CISG. The claimant did not provide reasonable clarifications, explanations or relevant evidence in that regard and the tribunal found it difficult to determine whether the failure of the equipment to pass the acceptance test was due entirely to the inherent quality defects of the equipment itself. With regard to the question of whether the quality of the equipment delivered by the respondent was in conformity with the provisions of the contract, the claimant and the respondent were unable to substantiate their claims with sufficient evidence and were therefore unable to resolve the dispute. Both parties should bear a certain degree of responsibility for that situation.

4. Was the claimant's request that the respondent be held liable for the foreseen loss of profit valid?

The tribunal indicated that the claimed foreseen loss of profit related in fact to loss caused by the defects in the respondent's product in the course of the claimant's business operations.

Article 50 CISG stipulates that "If the goods do not conform with the contract and whether or not the price has already been paid, the buyer may reduce the price in the same proportion as the value that the goods actually delivered had at the time of the delivery bears to the value that conforming goods would have had at that time." Thus, if the seller's goods do not conform with the provisions of the contract, the options usually available to the buyer when seeking damages do not cover operating loss or expected profit loss caused by defects in product quality. The rationale for that postulation is that when the buyer is able to obtain timely relief in the form of damages as specified by the Contracts Act of China and the CISG, compensation for the foreseen loss of profit is generally reflected in the relief awarded. Furthermore, under normal circumstances, it is often difficult for a seller to foresee that the sale of equipment to a buyer in a sense will constitute a guarantee of profit for the buyer's enterprise. Therefore, the tribunal held that, unless specifically agreed at the time of conclusion of the contract, or unless the claimant could prove that the respondent knew or ought to have foreseen at that time, that the seller would be liable for any operating loss or loss of profit on the part of the buyer's enterprise in the case of quality defects in the equipment sold, the claimant's request to be compensated for loss of profit could not be supported given the restrictive provisions or foreseeability requirement on liability in article 25 CISG.

**Case 1901: CISG 18(2); 19(1); 19(3); 33(2); 74; 75**
China: China International Economic and Trade Arbitration Commission
26 December 2014
Original in Chinese
Available at: http://www.cietac.org.cn/

On 17 April 2012, the claimant, a seller based in China, sent by email an offer in the form of a draft contract for the sale of urea to the respondent, a buyer based in Switzerland, and asked the respondent to make a commitment before 5 p.m. the same day. On 18 April 2012, the respondent sent by email a revised draft contract to the claimant and the claimant replied with a request for confirmation. Accordingly, both parties signed contract No. 1 and contract No. 2 and agreed that the seller would sell 25,000 metric tons of small-granule urea and 25,000 metric tons of large-granule urea, both types produced in China, in bulk to the buyer on the basis of free-on-board terms.

Contract No. 1 concerned the small-granule urea, which was worth over $450 per ton, while contract No. 2 concerned large-granule urea, which was worth $470 per ton. The payment initially agreed in the two contracts was to be made by means of irrevocable letter of credit but the method of payment was later changed through negotiation to telegraphic transfer.

With regard to the shipment period, both contracts specified that the goods must be delivered in July 2012 but no later than 31 July 2012. After the two contracts were signed, during performance the parties communicated further by email with respect to specific issues relating to stocking and dispatch of a ship to collect the goods, informing each other of developments in that respect.

Since May 2012, the domestic and international market prices for small- and large-granule urea had fluctuated: the free-on-board export price of large-granule urea increased in that month and then decreased steadily in June. From the end of May, the domestic ex-factory price and free-on-board export price of small-granule urea had both decreased considerably.

Delivery was not completed within the shipment period agreed in the two contracts owing to disputes over stocking and shipping. After the expiration of the shipment period, the parties entered into negotiations with regard to the continued performance of the contract but failed to come to an agreement. Subsequently, the seller resold the goods but suffered a loss as a result of the price difference arising from worsening domestic and international market conditions. The seller therefore went to arbitration, requesting that the two sales contracts be terminated and the respondent compensate for the loss resulting from the change in price, pay interest and bear all expenses arising from the case.

The main focus of the dispute was as follows:

1. The law applicable to the dispute

   The parties agreed neither in contract No. 1 nor in contract No. 2 on the law that would apply to any dispute arising between them.

   The tribunal noted that the parties' places of business were located in China and Switzerland, respectively, both of those States being parties to the CISG. At the same time, it noted that whether in writing or in court, both parties should proceed with their statements, pleadings and even debates by relying on relevant Chinese laws and regulations. Therefore, according to article 47, paragraph 2, of the Arbitration Rules of CIETAC: "Where the parties agree on the law applicable to the case, that agreement shall prevail. Where the parties do not reach an agreement, or their agreement conflicts with the mandatory provisions of the law, it is up to the arbitration tribunal to decide on the law applicable to the case." The tribunal decided to apply both the CISG and the relevant Chinese laws. Furthermore, article 16 of both contracts stated that the contracts were to be interpreted with reference to Incoterms 2010 and the revised version of those rules as formulated by the International Chamber of Commerce. Therefore, in making its decision on the rights and obligations of both parties concerning delivery as referred to in contract No. 1 and contract No. 2, the tribunal was to be guided by Incoterms 2010 and its revised version.

2. The validity of the two contracts

   The tribunal established that the two contracts had been concluded as follows: the claimant had initiated the transaction by sending an offer to the respondent by email on 17 April 2012, following which the respondent had returned the text of the contract specifying the terms of the transaction and bearing its signature. The claimant had subsequently added its own signature and official seal to the text of the contract upon receipt, the contract thus being concluded. Neither party expressed any objections to those findings.

   The tribunal found that the contents of the contracts in their entirety were in conformity with the law and that neither party had expressed any objection to the validity of the two contracts. The tribunal therefore concluded that the contracts represented the true intention of both parties, were in accordance with the relevant legal provisions and were both legitimate and valid.

3. The problem of stocking

(1) The time limit for stocking

The respondent claimed that when the claimant had sent its offer by email on 17 April 2012, clause 5 of that offer had indicated that the goods would be ready before the end of June. The respondent alleged that it had understood the offer to represent the true intention of the claimant to conclude a contract, as reflected in the content of the contract, which was confirmed by both parties. According to the respondent, the failure of the claimant to prepare the goods within the promised stocking period constituted an anticipatory breach of contract.

The claimant alleged that the respondent, having received the offer on 17 April 2012, sent a reply on 18 April 2012 in the form of the text of the contract setting out the various terms of the transaction. However, that text failed to include any "goods ready" clause and the respondent had also changed the price clause. The deadline for submitting the acceptance as specified in clause 9 of the offer dated 17 April 2012 was 5 p.m. on 17 April, whereas the respondent replied with the modified text of the contract – which effectively constituted a new offer – on 18 April. The claimant then accepted the new offer by adding its signature and seal to the text of the contract. Consequently, the offer dated 17 April and its "goods ready" clause (clause 5) should be assumed to be no longer valid. Since neither contract indicated that agreement had been reached with respect to the stocking period, the respondent's claim that the claimant had delayed stocking and thus breached the contract was supported neither by fact nor by the relevant laws.

The tribunal found that the respondent had not replied to the claimant's offer until 18 April 2012, which was later than the time limit specified in clause 9 of the offer. Article 18, paragraph 2, CISG stipulates that "An acceptance of an offer becomes effective at the moment the indication of assent reaches the offeror. An acceptance is not effective if the indication of assent does not reach the offeror within the time he has fixed or, if no time is fixed, within a reasonable time." Thus, the claimant's offer was invalid since the respondent's acceptance notice had not been delivered within the specified time frame, and the parties were therefore not bound by the content of the offer.

Article 19, paragraph 1, CISG stipulates that "A reply to an offer which purports to be an acceptance but contains additions, limitations or other modifications is a rejection of the offer and constitutes a counter-offer." Paragraph 3 of the same article stipulates that "Additional or different terms relating, among other things, to the price, payment, quality and quantity of the goods, place and time of delivery, extent of one party's liability to the other or the settlement of disputes are considered to alter the terms of the offer materially." The text of the contract sent by the respondent to the claimant on 18 April was essentially a new offer.

The fact that the claimant had signed and added its seal to the text of the contract sent by the respondent constituted acceptance by the claimant of the respondent's new offer. Consequently, both parties should take the terms stated in the final text of the contract as the basis for determining their rights and obligations.

The tribunal therefore disagreed with the claim made by the respondent to the effect that, since the "goods ready" clause was incorporated into the offer sent by the claimant on 17 April 2012, it was reasonable to assert that that clause had been confirmed by both parties at the time of signing the contract and subsequently included in the final terms of the contract. The two contracts eventually concluded did not include clauses on stocking by the seller or on the dispatch of a ship by the buyer, nor did they include the information which ought to have been reflected in the relevant clauses, such as stocking time, cargo collection time, estimated time of arrival and notice of ship dispatch.

(2) The question of shipment date in the contract

The claimant claimed that both parties had agreed on the time of delivery of the goods (the shipment date); the buyer was to ensure that the goods were shipped in July 2012 and no later than 31 July 2012. According to article 33 (b) CISG, if a period of time is fixed by or determinable from the contract, the goods may be delivered at any time within that period unless circumstances indicate that the buyer is to choose a date. Accordingly, the shipment period as stated in the contract in question should be understood to indicate that the claimant, as the seller, could deliver the goods at any time within the delivery period stated in the contract. The agreement did not set out any restrictions with respect to the time period for the seller's stocking of the goods.

The respondent alleged that the claimant had misinterpreted the provisions of article 33 (b) CISG. The shipment period as referred to in the two contracts, namely, the requirement that the buyer take delivery of the goods in July 2012, but no later than 31 July, represented an exception to article 33 CISG. The aforementioned provisions indicated that the buyer had the right to select a specific delivery date and to proceed with the carriage of goods at any time between 1 and 31 July 2012. The claimant was to prepare the goods prior to the shipment period (in other words, before 30 June 2012) so that the respondent could have the goods shipped at any time thereafter.

The tribunal indicated that the buyer was responsible for arranging transportation under the two contracts and the delivery by the seller ought to be coordinated with the transportation arranged by the buyer. The terms used to describe the "shipment period" in the two contracts suggested that the shipping clause usually intended to specify the period for delivery by the seller had been formulated as a time clause aimed at specifying the period within which the buyer could send a ship to take delivery of the goods. In other words, the buyer was entitled to send a ship to the port to take delivery of the goods on any day from 1 to 31 July 2012 but no later than 31 July. As long as the buyer sent a shipping notice to the seller, informing the seller of its specifically designated vessel, the seller was obliged to prepare the goods before the arrival of that vessel and load them onto the designated vessel in order to complete the delivery. The tribunal therefore dismissed the claimant's claim that it was entitled to prepare the goods on any day in July 2012 on the basis of article 33 (b) CISG.

However, the tribunal also indicated that, according to the free-on-board provisions of Incoterms 2010, the buyer must give the seller adequate notice of the name of the ship, the loading point and the delivery time (if necessary) selected by the buyer within the agreed period. As the respondent did not select a specific delivery time compatible with the shipment period specified in the two contracts, the claimant was not entirely liable for its failure to prepare the goods within the established time limit.

4. Damages

The claimant claimed that in mid-August 2012, when negotiations between the parties broke down, the claimant resold the goods under the contract in a reasonable manner and within a reasonable time as provided for in article 75 CISG. According to article 74 CISG, the respondent was liable for damages for breach of contract, including loss of profit, suffered by the claimant as a consequence of the breach.

In response to that claim, the tribunal indicated that since the parties had not agreed explicitly on clauses concerning stocking and the dispatch of a ship in the two contracts, both parties were at fault with regard to performance of the contract. Although the respondent had ultimately failed to rent and dispatch a ship, partly owing to the claimant's responsibilities, that failure did not constitute a fundamental breach, nor did it entitle the claimant to declare the

two contracts avoided. Therefore, with regard to the damages claimed by the claimant in order to recover the difference between the contract price and the resale price resulting from the resale the claimant had made after declaring avoidance of the contract in accordance with article 75 CISG, the tribunal held that those provisions were not applicable in the case in question.

Since it was impossible for the two contracts to be performed and neither party had expressed willingness to continue with performance, the tribunal declared the contracts terminated. In the dispute over the dispatch of a ship under the two contracts, the claimant was at fault for late stocking of the goods and the respondent had failed to fulfil its contractual obligation to dispatch the ship. The principle of fault-sharing dictated that the parties should be held jointly liable for failure to perform the two contracts. Insofar as legal liability was concerned, the share of the respondent was greater than that of the claimant. According to the principle of fairness and reasonableness, both parties should bear the loss arising from the price difference in a manner proportionate to their share of liability. The tribunal held that it was appropriate for the claimant to bear 45 per cent and the respondent 55 per cent of that loss.

**Case 1902: CISG 13; 20; 32(1); 38(2); 39; 40; 36(1); 40**
Egypt: Court of Cassation
Challenge No. 2490, Judicial Year No. 81
*The Australian Wheat Board v. General Company for Silos & Storage SAE*
23 June 2020
Published in Arabic by the Egyptian Court of Cassation

Abstract prepared by Ibrahim Shehata & Khaled El-Khashab.

This case mainly deals with the reasonable time for the notification of non-conformity of goods under the CISG and the effects of such notification on the buyer's right to seek remedies for non-conformity.

The Australian Wheat Board (the seller) entered into a contract on 19 April 1994 with the General Company for Silos & Storage SAE, an Egyptian public-sector company (the buyer) for the sale of Australian wheat. The seller shipped 63,000 tons of wheat to the buyer based on a sea waybill dated 16 March 2000. Upon arrival in Egypt, the shipment was examined and was withheld from entering Egypt on 18 April 2000 due to non-conformity with Egyptian standards with respect to excessive amount of Saponaria seeds. The buyer filed a lawsuit to claim damages for non-conformity of the goods. The court rejected the claim and the first-instance decision was appealed before the Cairo Court of Appeal.

On appeal, the court reversed the decision indicating that the amount claimed had to be paid in order to make the goods fit for human consumption. The appellate decision did not discuss the seller's defence that it had not been properly notified of the non-conformity of the goods, despite the notification allegedly made by the buyer on 10 December 2001.

Subsequently, the seller challenged the appellate decision before the Court of Cassation.

The Court of Cassation based its judgment upon the fact that the parties' transaction was governed by the CISG and that the object of the transaction was the sale of goods (wheat).

The court noted that, under article 38(2) CISG, if delivery is made in instances where it is not suitable to examine the goods except at the time of arrival (i.e., at customs), it is permitted to examine the goods at the point of arrival, even if the delivery to the buyer was made by handing the goods over to the first carrier according to article 31(a) CISG.

Furthermore, the court noted that article 39 CISG obliges the buyer to notify the seller of the lack of conformity of the goods within a "reasonable time" from the date of

discovery of the defect, or the date it ought to have been discovered, in order for the seller to be appraised of and cure such defect. The court also noted that the buyer lost its right to "rely on a lack of conformity of the goods" if the buyer did not notify the seller of such defect within two years as the buyer who did not examine the goods and notify their lack of conformity was either negligent or had accepted the goods as delivered. The court further noted that if the non-conformity, however, was related to matters that the seller knew or ought to have known, the seller may not rely on the provisions of articles 38 and 39 CISG in application of article 40 CISG.

The court indicated that means for notification were not limited to telephone or telex, as per article 13 CISG, but extended to any other effective means of instant communication according to article 20 CISG including electronic communications. In that respect, the court deemed the United Nations Convention on the Use of Electronic Communications in International Contracts supplementary to the CISG with regard to the use of electronic communications.

The court noted that the notion of "reasonable time" under article 39(1) CISG, as interpreted by international case law, starts at "any time after the day of delivery of goods or the detection of the defect" and may last any period of time not exceeding two years. The duration of this period of time is subject to the appreciation of the judge in each lawsuit in light of the circumstances of the agreement, type of goods, whether the defect was patent or latent, and the level of proficiency and the experience of the buyer. The court also indicated that the interpretation of the term "reasonable time" should be in line with the applicable customs of each type of trade. Accordingly, the court said that article 39(1) CISG set flexible time standards according to the circumstances, as opposed to the two-year standard specified under article 39(2) CISG. which was very strict except in case of contractual warranty period. As a result, the two-year period applied only when the time period specified in article 39(1) was longer than two years. Nevertheless, the parties could also agree to a longer or shorter period under article 6 CISG.

The court further noted that article 39(2) CISG set a lapse period and not a statute of limitation. Hence, this lapse period may not be subject to a stay or discontinuation and was not affected by the provisions of the Convention on the Limitation Period in the International Sale of Good, New York 1974, and its amending 1980 Vienna Protocol.

In conclusion, the Court of Cassation indicated that the Court of Appeal did not examine whether the buyer's alleged notification on 10 December 2001 had been properly communicated to the seller, and that the seller's defence arguing that the buyer's notice had not been properly communicated constituted an essential defence that could have changed the outcome of this case. Accordingly, the Court of Cassation found that the appellate decision was erroneous and remanded the case.

**Case 1903: CISG 7(2), 31, 50, 51(1), 57, 58, 59, 61(1)(a), 78**
Greece: Monomeles Protodikeio Thessalonikis
Case No. 43945/2007
*Johnson SA v. Liviana Conti Srl*
27 November 2007
Original in Greek

Abstract prepared by Soterios Loizou

A contract was concluded between a Greek seller, namely Johnson S.A., and an Italian buyer, namely Liviana Conti Srl, for the sale of various types of ready-made garments. The contract was concluded with the acceptance of the buyer's offer, which was communicated to the seller through the former's agent in Greece, namely Texteam Trading Co. As agreed, the goods were delivered to the buyer's agent in five instalments on 5 January 2006, 13 January 2006, 23 January 2006, 27 January 2006 and 3 February 2006, the price being payable on delivery of each instalment. Although the buyer fulfilled her contractual obligations for the first three instalments, she failed

to pay in full the fourth and fifth instalments. Therefore, the seller sought redress before the Greek courts for the payment of the remaining balance.

Against the seller's claims, the buyer raised several objections under articles 45(1)(a), 50, and 51(1) CISG. Specifically, she argued that: (i) certain pieces of garments had not been delivered; (ii) other garments had not been pre-ironed, as agreed; (iii) some clothes had been repaired; and (iv) other clothes had been totally ruined. Further, she claimed set-off for expenses incurred for repairing the defective clothes (arts. 7(2), 45(1)(b), 45(2), and 74 CISG, and arts. 440 and 441 of the Greek Civil Code). The buyer alleged that those contractual breaches had been brought to the attention of the seller on 27 and 28 March 2006, when the buyer sought 50 per cent discount of the remaining balance. Because the buyer's allegations lacked precision and substantiation, the seller, with letter dated 10 April 2006, rejected the buyer's request and insisted on the payment of the remaining balance.

In addressing the dispute, the Monomeles Protodikeio Thessalonikis (Single-Member Court of First Instance of Thessaloniki) explored whether it enjoyed international jurisdiction to try the case. It looked at the Brussels I Regulation (Reg. No. 44/2001) and noted that, in addition to the general jurisdiction basis of defendant's habitual residence under article 2(1), the European legislator provided, under article 5(1), for a special jurisdiction of the courts of the place of performance of the contractual obligation in question. In the case of sale of goods contracts, that place would be where, under the contract, the goods were delivered or should have been delivered (art. 5, para. 1(b)). In order to identify that place, the court looked at the substantive law governing the sales transaction, noting that, for sales contracts linked to European Union Member States parties to the CISG, the pertinent rules were delineated in the directly applicable substantive law provisions of the CISG. Hence, in identifying the place of performance of the sale of goods contract at hand, the Court scrutinized article 31 CISG. Because the goods were delivered to the buyer with physical delivery to the latter's agent in Greece, the Court held that it had jurisdiction to resolve the dispute.

Then, the Court proceeded to examine the merits of the dispute. At the outset, it stated that under the CISG all instances of abnormal development of contractual obligations are subsumed under the single head of "breach of contract". Turning to the main issue of the dispute at hand, i.e. the payment of the price, the Court explored the time of the payment of the price and set-off. Whereas the payment of the price was clearly regulated in the Convention, the Court held that matters pertaining to the interest rate and set-off were not specifically addressed by particular provisions or general principles of the CISG. Classifying both matters as "external gaps" of the Convention, the Court ruled that they had to be determined pursuant to the applicable substantive law as identified by the private international law (CISG art. 7(2)). That was found to be Greek law, because the litigating parties entered into a choice-of-law agreement under art. 3(1) of the 1980 Rome Convention by submitting concerted submissions citing the pertinent rules of the Greek Civil Code.

Furthermore, the Court noted that, pursuant to article 58(1) CISG, absent a special agreement between the parties, payment of the price should be effected when either the goods or documents controlling their disposition have been placed at the buyer's disposal in accordance with the contract and the CISG. Interest on the remaining balance accrues from that point onwards without need for any notice to the creditor and independently of the debtor's fault or the creditor's loss (articles 59, 78, and 79 CISG). The relevant point in time is that when risk passes from the seller to the buyer under CISG 67–69.

In light of the foregoing, the Court found for the seller and condemned the buyer to pay the remaining balance of the price plus interest from 4 February 2006. It did not note, however, the interest rate. The buyer's alleged losses, including opportunity losses, were rejected by the Court as unsubstantiated.