

Case abstract

ICC Arbitration Case No. 6281 of 1989

Case law on UNCITRAL texts (CLOUT) abstract no. 102

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The parties, of Egyptian and Yugoslav nationality, concluded a contract for the FOB sale of a certain quantity of steel. In conformity with the contract, the buyer announced that it wished to exercise its right to buy an additional quantity of steel at the price and on the conditions stipulated in the contract. The dispute arose from the seller's refusal to deliver the additional quantity of steel at the contract price, since the market price had gone up, as a result of which the buyer was forced to obtain the goods from another source at a higher price.

The tribunal found that, pursuant to Article 100(2) CISG, the Convention was not applicable, since the contract was concluded before the Convention entered into force in the countries involved (including France, the place of arbitration), even though those countries were parties to the Convention at the time of issuance of the arbitral award. Applying the private international law rules of the countries concerned and Article 3.1 of the Hague Convention of 15 June 1955 on the law applicable to international sales of goods, to which France is a party, the tribunal concluded that the applicable law was the law of Yugoslavia, as the law of the place where the seller had its principal place of business and where the contract was performed.

The tribunal compared the Yugoslav law with Article 74.1 of the Uniform Law on the International Sale of Goods (ULIS) and with Article 79(1) CISG and found that by refusing to deliver the additional goods at the contract price the seller had committed a breach of contract. The tribunal held that the seller could be relieved of the obligation to deliver the goods at the contract price only if the contract contained a price adjustment clause, or in case of frustration of the contract, which was not the case here, since the increase in the market price was, in fact, neither sudden nor substantial nor unforeseeable.

In order to determine the amount of compensation due to the buyer, the tribunal compared Yugoslav domestic law with Articles 75 CISG and 85 ULIS and held that the buyer was entitled to the difference between the contract price and the price actually paid in order to obtain the goods from another source.

Case abstract

ICC Arbitration Case No. 7153 of 1992

Case law on UNCITRAL texts (CLOUT) abstract no. 26

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In the absence of an agreement of the parties on the law applicable, the arbitral tribunal found that CISG is applicable to the contract for the provision and installation of materials destined for the construction of a hotel.

CISG entered into force in Yugoslavia and Austria, the countries of the buyer and the seller respectively, before the conclusion of the contract. In addition, the contract falls within the scope of application of CISG, since it is clear from the text of the contract that the provision of services is secondary to the sale.

Consequently, if CISG applies, the buyer in default is obligated to pay the price and the interest for delay in payment. As CISG does not indicate the applicable interest rate, the arbitral tribunal applied the national law applicable in accordance with the rules of private international law, that is the law of the place of payment. Since the contract does not specify the place of payment, the tribunal applied Article 57(1) CISG and designated the place of delivery of the goods as the place of payment.

Case abstract

GERMANY: OLG Frankfurt 18 January 1994

Case law on UNCITRAL texts (CLOUT) abstract no. 79

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The [buyer], a German trading company, refused to pay the purchase price of shoes bought from the [seller], an Italian shoe manufacturer, on the grounds that the shoes were not delivered within the time limits prescribed in the contract and did not conform with the specifications of the contract.

The court held that the [buyer] was not entitled to declare the contract avoided and to refuse to pay the purchase price because it had not set a time limit within which the seller had to deliver and had failed to establish that a fundamental breach of contract was involved (articles 49(1) and 81 (1) CISG). The court noted that the [buyer] did not specify whether the shoes were just below standards (in which case the [buyer] could, e.g., reduce the price or claim damages), or totally unfit for resale (in which case the [buyer] could declare the contract avoided).

As a result, the court ordered the [buyer] to pay the purchase price and interest at the rate of 10%, which was the rate under Italian law, the law applicable under German private international law.

Case abstract

AUSTRIA: Arbitral Tribunal - Vienna 15 June 1994, SCH-4366

Case law on UNCITRAL texts (CLOUT) abstract no. 93

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In 1990 and 1991, an Austrian seller and a German buyer concluded contracts for the sale of rolled metal sheets. The initial contracts provided that the goods were to be delivered "FOB Hamburg", by March 1991 at the latest. Later, the seller allowed the buyer to take delivery of the goods in installments. The buyer resold the goods and had to pay the price and the storage costs promptly after receiving each invoice. The buyer took delivery of some of the goods without paying, and refused to take delivery of other goods. Pursuant to an arbitration clause contained in the sales contract, the seller commenced arbitral proceedings, demanding payment of the price. In addition, the seller demanded damages, including those arising from a sale of the goods, which the buyer refused to accept, to a third party.

The sole arbitrator held that, since the parties had chosen Austrian law, the contracts were governed by CISG as the international sales law of Austria, a [C]ontracting State (Article 1(1)(b) CISG). With regard to the goods delivered but not paid for, the arbitrator found that the seller was entitled to payment of their price (Articles 53 and 61 CISG). Regarding the sale made by the seller in order to mitigate its losses, the arbitrator held that the seller had the right, and, presumably, the duty to mitigate its losses (Article 77 CISG). As a result, the seller was found to be entitled to the difference between the contract price and the substitute sale price.

The arbitrator further held that interest on the price accrued from the date payment was due (Articles 78 and 58 CISG). Since the parties' agreement required the buyer to pay after receiving each invoice, interest accrued from the date of such receipt, which occur[r]ed within 10 days after issuance of each invoice.

Moreover, the arbitrator held that, since the interest rate was a matter governed but not expressly settled by CISG, it should be settled in conformity with the general principles on which CISG is based (Article 7(2) CISG). Referring to Arts. 78 and 74 CISG, the arbitrator found that full compensation was one of the general principles underlying CISG. It was also found that in relations between merchants it was expected that the seller, due to the delayed payment, would resort to bank credit at the interest rate commonly practiced in its own country with respect to the currency of payment. Such currency may be either the currency of the seller's country, or any other foreign currency agreed upon by the parties. The arbitrator observed that the application of Article 7.4.9 of the UNIDROIT Principles of International Commercial Contracts would lead to the same result. The interest rate awarded was the average prime rate in the seller's country (Austria), with respect to the currencies of payment (US dollars and German marks).