United Nations A/CN.9/SER.C/DIGEST/CISG/9

General Assembly

Distr.: General
8 June 2004

Original: English

United Nations Commission on International Trade Law

UNCITRAL Digest of case law on the United Nations Convention on the International Sale of Goods*

Article 9

1. The parties are bound by any usage to which they have agreed and by any practices which they have established between themselves.

2. The parties are considered, unless otherwise agreed, to have impliedly made applicable to their contract or its formation a usage of which the parties knew or ought to have known and which in international trade is widely known to, and regularly observed by, parties to contracts of the type involved in the particular trade concerned.

* The present digest was prepared using the full text of the decisions cited in the Case Law on UNCITRAL Texts (CLOUT) abstracts and other citations listed in the footnotes. The abstracts are intended to serve only as summaries of the underlying decisions and may not reflect all the points made in the digest. Readers are advised to consult the full texts of the listed court and arbitral decisions rather than relying solely on the CLOUT abstracts.

V.04-54768 (E)

1. This provision describes the extent to which usages and practices established between the parties are binding on the parties to the contract.[1] In doing so, it makes a distinction between usages to which the parties have agreed and the practices which they have established (paragraph 1) on the one hand, and other relevant usages which bind the parties even in the absence of any agreement (paragraph 2) on the other hand.

2. Whether the usages that may bind the parties are valid, is an issue that falls outside the Convention's scope;[2] the Convention merely deals with their applicability;[3] consequently, the validity of usages is to be evaluated on the basis of the applicable domestic law.[4] Where the usages are valid, they prevail over the provisions of the Convention, independently of whether they bind the parties pursuant to article 9, paragraph 1 or article 9, paragraph 2.[5]

Usages agreed to and practices established between the parties

3. Pursuant to article 9, paragraph 1, the parties are bound by any usage to which they have agreed. As far as this agreement is concerned, one court pointed out that it must not necessarily be made explicitly,[6] but that it can also be made implicitly.[7]

4. That court also pointed out that the usages article 9. paragraph 1 refers to do not have to be usages that are internationally accepted, unlike under article 9, paragraph 2; consequently, where the parties agree on local usages, these local usages bind the parties as much as international usages agreed to by them.[8] In a

---

[1] See also United Nations Conference on Contracts for the International Sale of Goods, Vienna, 10 March-11 April 1980, Official Records, Documents of the Conference and Summary Records of the Plenary Meetings and of the Meetings of the Main Committee, 1981, 19.

[2] Oberster Gerichtshof, Austria, 22 October 2001, published on the Internet at <http://www.cisg.at/1_4901i.htm>.

[3] See Oberster Gerichtshof, Austria, 21 March 2000, published on the Internet at <http://www.cisg.at/10_34499g.htm>.

[4] See Oberster Gerichtshof, Austria, 21 March 2000, published on the Internet at <http://www.cisg.at/10_34499g.htm>; CLOUT case No. 240 [Oberster Gerichtshof, Austria, 15 October 1998] (see full text of the decision).

[5] See Rechtbank Koophandel Ieper, Belgium, 18 February 2002, published on the Internet at <http://www.law.kuleuven.ac.be/int/tradelaw/WK/2002-02-18.htm>; Rechtbank Koophandel Veurne, Belgium, 25 April 2001, published on the Internet at <http://www.law.kuleuven.ac.be/int/tradelaw/WK/2001-04-25.htm>; Rechtbank Koophandel Ieper, Belgium, 29 January 2001, published on the Internet at <http://www.law.kuleuven.ac.be/int/tradelaw/WK/2001-01-29.htm>; Oberster Gerichtshof, Austria, 21 March 2000, published on the Internet at <http://www.cisg.at/10_34499g.htm>; Juzgado Nacional de Primera Instancia en lo Comercial No. 10, Argentina, 6 October 1994, published on the Internet at <http://www.uc3m.es/uc3m/dpto/PR/dppr03/cisg/sargen8.htm>.

[6] For a case in which the parties expressly chose to be bound by trade usages, see China International Economic and Trade Arbitration Commission, Arbitration, award relating to 1989 Contract #QFD890011, published on the Internet at <http://www.cisg.law.pace.edu/cisg/wais/db/cases2/900000c1.html> (in the case at hand the parties chose to be bound by a FOB clause).

[7] Oberster Gerichtshof, Austria, 21 March 2000, published on the Internet at <http://www.cisg.at/10_34499g.htm>.

[8] *Id*.

different case, that same court also stated that the usages the parties agree to do not have to be widely known in order to be binding pursuant to article 9, paragraph 1.[9]

5. As expressly stated in article 9, paragraph 1, the parties are also bound by practices established between themselves, a principle which according to one arbitral tribunal "was extended to all international commercial contracts by the UNIDROIT Principles". Principle 1.8 provides that "the parties are bound by any usage to which they have agreed and by any practices which they have established between themselves."[10]

6. As for examples of practices established between the parties are concerned, one arbitral tribunal stated for instance that "a prompt delivery of replacement parts had become normal practice as defined by article 9, paragraph 1 of the [Convention]."[11] In another case,[12] a court held that since the Italian seller had been complying with the buyer's orders for months without inquiring about the buyer's solvency, when the seller decided to assign its foreign receivables by means of a factoring contract and to suspend its business relationship with the buyer, it should have taken into account the buyer's interest; as a consequence, the court found the seller liable for abrupt discontinuance of business relations between parties bound by long-standing practices. In a different case[13] (in which the conclusion of the international sales contract was in dispute), after pointing out that the seller had not proved, as it alleged, that it had not received the orders from the buyer, that same court held that the seller could not invoke the rule laid down in article 18 CISG (providing that silence does not in itself amount to acceptance) because, according to the practices previously established between the parties, the seller was used to performing the orders without expressly accepting them.

7. The Convention does not state when it is possible to speak of "practices established between the parties". According to some courts, for these practices to be binding on the parties pursuant to article 9, paragraph 1, it is necessary that the parties' relationship lasts for some time and that it has led to the conclusion of various contracts. One court expressly emphasized this requirement, as it stated that the practice it had to decide upon "does not establish usage in the meaning of [article 9, paragraph 1], which would require a conduct regularly observed between the parties and thus requiring a certain duration and frequency [...]. Such duration and frequency does not exist where only two previous deliveries have been handled in that manner. The absolute number is too low".[14] This rationale also underlies a decision by a different court that dismissed the seller's allegation that the indication on the invoice of the seller's bank account established a practice between the parties under which the buyer was bound to pay at the seller's bank. Although the court left

---

[9] CLOUT case No. 240 [Oberster Gerichtshof, Austria, 15 October 1998] (see full text of the decision).

[10] ICC Court of Arbitration, award No. 8817, published on the Internet at <http://www.unilex.info/case.cfm?pid=1&do=case&id=398&step=FullText>.

[11] ICC Court of Arbitration, award No. 8611/HV/JK, published on the Internet at <http://www.unilex.info/case.cfm?pid=1&do=case&id=229&step=FullText>.

[12] CLOUT case No. 202, France [Cour d'appel Grenoble, France, 13 September 1995] (see full text of the decision).

[13] CLOUT case No. 313 [Cour d'appel Grenoble, France, 21 October 1999] (see full text of the decision).

[14] CLOUT case No. 360 [Amtsgericht Duisburg, Germany, 13 April 2000] (see full text of the decision).

open the issue of whether the parties concluded one or two different contracts for the delivery of two ship cargoes, it held that under article 9, paragraph 1 of the Convention two contracts were insufficient to establish a practice between the parties. According to the court, in order for a practice between the parties to be established, a long lasting contractual relationship involving more contracts of sale between the parties is required.[15] Similarly, another court stated that one prior dealing between the parties did not lead to "practices" in the sense of article 9, paragraph 1.[16] According to yet another court, however, "[i]t is generally possible that intentions of one party, which are expressed in preliminary business conversations only and which are not expressly agreed upon by the parties, can become "practices" in the sense of article 9 of the Convention already at the beginning of a business relationship and thereby become part of the first contract between the parties. This, however, requires at least (article 8) that the business partner realizes from these circumstances that the other party is only willing to enter into a contract under certain conditions or in a certain form".[17]

8. As for the burden of proof, several courts stated that it is the party alleging the existence of practices established between themselves or usages agreed upon that bears it.[18]

Binding international trade usages (article 9, paragraph 2)

9. By virtue of article 9, paragraph 2, even in the absence of any agreement of the parties to that effect, the parties to an international sales contract may nevertheless be bound by specific trade usages, as long as these trade usages are usages that the parties knew or ought to have known and which in international trade are widely known to, and regularly observed by, parties to contracts of the type involved in the particular trade concerned. One court construed article 9, paragraph 2 differently, without limiting the applicable usages to the ones that meet the aforementioned requirements. According to that court, "the usages and practices of the parties or the industry are automatically incorporated into any agreement governed by the Convention, unless expressly excluded by the parties".[19]

10. In any case, usages that are binding on the parties pursuant to article 9, paragraph 2 prevail over the conflicting provisions of the Convention.[20] In case of a conflict between the usages applicable by virtue of article 9, paragraph 2 and clauses contained in the contract, these clauses prevail, as the primary source of

---

[15] CLOUT case No. 221 [Zivilgericht des Kantons Basel-Stadt, Switzerland, 3 December 1997] (see full text of the decision).

[16] Landgericht Zwickau, Germany, 19 March 1999, published on the Internet at <http://www.jura.uni-freiburg.de/ipr1/cisg/urteile/text/519.htm>.

[17] CLOUT case No. 176 [Oberster Gerichtshof, Austria, 6 February 1996] (see full text of the decision).

[18] CLOUT case No. 360 [Amtsgericht Duisburg, Germany, 13 April 2000] (see full text of the decision); CLOUT case No. 347 [Oberlandesgericht Dresden, Germany, 9 July 1998].

[19] *Geneva Pharmaceuticals Tech. Corp. v. Barr Labs. Inc.*, United States of America, 10 May 2002, published on the Internet at <http://www.cisg.law.pace.edu/cisg/wais/db/cases2/020510u1.html#vi>.

[20] Oberster Gerichtshof, Austria, 21 March 2000, published on the Internet at <http://www.cisg.at/10_34499g.htm>; CLOUT case No. 240 [Oberster Gerichtshof, Austria, 15 October 1998].

the international sales subject to the Convention is party autonomy, as can also be derived from the introductory language of article 9, paragraph 2.[21]

11. As mentioned above in paragraph 9, in order to be binding, any usage must or ought to be known by the parties, and must be widely known in the international trade and regularly observed. According to one court this does not mean that solely international usages can bind the parties. The court stated that it is also possible that, in certain circumstances, a local usage may be applicable to the contract. This is particularly the case with respect to usage applied within local commodity exchanges, fairs and warehouses, provided that such usage is regularly observed also with respect to businesses involving foreign dealers. The Court also stated that even a local usage applied only in a particular country may be applicable to a contract involving a foreign party, provided that the foreign party does business in the particular country on a regular basis and that it has concluded several contracts of the same manner in the same particular country.[22]

12. As far as the requirement that any usage must be known or ought to be known to the parties in order to bind them is concerned, one court[23] stated that a usage can bind a party only if it either has its place of business in the geographical area where the usage is applicable, or if the party permanently deals within the area where the usage is applicable. In an earlier decision, that court had already made a similar statement:[24] according to the court, a party to an international sales contract has to be familiar only with those international trade usages that are commonly known and regularly observed by parties to contracts of that specific branch in the specific geographic area where the party in question has his or her place of business.

13. As for the burden of proof, there is no difference between these usages and the usages agreed upon by the parties or the practices established between them:[25] the party that alleges the existence of any binding usage has to prove it, at least in those legal systems that consider the issue as being one of fact.[26] Where the party that carries the burden of proof does not succeed in proving it, the usages will not be binding. In one case this led a court[27] to find that since the buyer had not proven that an international trade usage existed that says that silence to a commercial letter of confirmation is sufficient for the contract to be concluded with the content of that letter, the contract was concluded with a different contents. In another case, failure to prove an alleged usage led a court to affirm that it had no jurisdiction; which the claimant exclusively based on a trade usage which, if it existed, would have allowed the court to hear the case.[28] In yet another case,[29] a court noted that although usual

---

21 For this solution, see CLOUT case No. 292 [Oberlandesgericht Saarbrücken, Germany, 13 January 1993] (see full text of the decision).

22 CLOUT case No. 175 [Oberlandesgericht Graz, Austria, 9 November 1995].

23 Oberster Gerichtshof, Austria, 21 March 2000, published on the Internet at <http://www.cisg.at/10_34499g.htm>.

24 CLOUT case No. 240 [Oberster Gerichtshof, Austria, 15 October 1998] (see full text of the decision).

25 See *supra* paragraph 8.

26 Oberster Gerichtshof, Austria, 21 March 2000, published on the Internet at <http://www.cisg.at/10_34499g.htm>

27 See CLOUT case No. 347 [Oberlandesgericht Dresden, Germany, 9 July 1998].

28 CLOUT case No. 221 [Zivilgericht des Kantons Basel-Stadt, Switzerland, 3 December 1997].

29 CLOUT case No. 176 [Oberster Gerichtshof, Austria, 6 February 1996] (see full text of the decision).

requirements for the formation of a contract under the Convention could be modified by usages, a usage to conclude contracts on the basis of rules different from those to be found in articles 14 to 24 of the Convention had not been proven, consequently the court applied the formation rules of the Convention. Another court relied on the fact that the party alleging a trade usage by virtue of which the place of performance was located in that party's country could not prove the existence of such trade usage to state that the place of performance was in the seller's country.[30] The European Court of Justice also referred to the issue of burden of proof when stated that for silence in response to a letter of confirmation to amount to acceptance of the terms contained therein "it is necessary to prove the existence of such a usage on the basis of the criteria set out" in article 9, paragraph 2 of the Convention.[31]

14. Several examples of courts resorting to usages should be mentioned. In one case,[32] an arbitral tribunal held that the revision of the price is a usage regularly observed by parties to contracts of the type involved in the particular trade (of minerals) concerned. In another case,[33] a court held that the bill of exchange given by the buyer had validly modified the contract according to article 29, paragraph 1 of the Convention to the effect that the date of payment of the purchase price was postponed until the date when the bill of exchange was due. In reaching this conclusion, the court took into account the existence of an international trade usage to this effect and its relevance pursuant to article 9, paragraph 2 of the Convention. In yet another case,[34] a court stated that a trade usage existed in the particular trade concerned in respect of the examination of the goods sold, according to which the buyer has to give the seller an opportunity to be present while checking the goods.

15. Several courts referred to usages to solve the issue of what interest rate should be applied to late payments. One and the same court expressly referred to international trade usages on the basis of article 9, paragraph 2 of the Convention to solve the issue. In one case, the court stated that payment of interest "at an internationally known and used rate such as the Prime Rate" constituted "an accepted usage in international trade, even when it is not expressly agreed between the parties".[35] In another case, that court held the same view, but in doing so it also stated that the "Convention attributes [to international trade usages] a hierarchical position higher than that of the provisions of the Convention".[36]

---

30 Hjesteret, Denmark, 15 February 2001, published on the Internet at <http://www.unilex.info/case.cfm?pid=1&do=case&id=751&step=FullText>.

31 *Mainschiffahrts-Genossenschaft eb (MSG) v. Les Gravihres Rhinanes SARL*, 20 February 1997, European Community Reports I 927 n.34 (1997).

32 ICC Court of Arbitration, award No. 8324, published on the Internet at <http://www.unilex.info/case.cfm?pid=1&do=case&id=240&step=FullText>.

33 CLOUT case No. 5 [Landgericht Hamburg, Germany, 26 September 1990] (see full text of the decision).

34 See Helsinki Court of Appeal, Finland, 29 January 1998, published on the Internet at <http://www.utu.fi/oik/tdk/xcisg/tap4.html#engl>.

35 Juzgado Nacional de Primera Instancia en lo Comercial No. 10, Argentina, 23 January 1991, published on the Internet at <http://www.unilex.info/case.cfm?pid=1&do=case&id=184&step=FullText>.

36 Juzgado Nacional de Primera Instancia en lo Comercial No. 10, Argentina, 6 October 1994, published on the Internet at <http://www.unilex.info/case.cfm?pid=1&do=case&id=178&step=FullText>.

Letter of confirmation, INCOTERMS and UNIDROIT principles

16. Several cases dealt with the issue of whether silence in response to a letter of confirmation signifies agreement to the terms contained in that letter of confirmation. One court[37] stated that "due to the requirement of internationality referred to in article 9, paragraph 2, it is not sufficient for the recognition of a certain trade usage if it is only valid in one of the two Contracting States. Therefore, [in order to bind the parties], the rules on commercial letters of confirmation would have to be recognized in both Contracting States and it would have to be concluded that both parties knew the consequences [...]. It is not sufficient that the trade usage pertaining to commercial letters of confirmation exists only at the location of the recipient of the letter." Since, however, the law of one of the States involved did not acknowledge the contractual effects of silence in response to a letter of confirmation, the court found that the terms contained in the letter of confirmation had not become part of the contract. In doing so, the court pointed out, however, that although there was no room for rules on silence in response to a letter of confirmation, "a letter of confirmation can have considerable importance in the evaluation of the evidence". Another court,[38] after holding that the letter of confirmation "only has contractual effect in the meaning of the Convention, if this form of contract formation can be qualified as commercial practice under article 9 of the Convention", stated that a commercial usage in the sense of article 9, paragraph 2 existed, since in the countries in which the parties had their places of business "the contractual effect of commercial communications of confirmation (in domestic contractual relations) is not denied" and since the "parties recognized the legal effects of such a communication and also had to take into account that they might be held to those legal effects".[39] Yet another court rejected the idea that the aforementioned rules on the effects of silence to a letter of confirmation may be relevant where the Convention is applicable.[40]

17. One court dealt with the relationship between article 9, paragraph 2 and INCOTERMS.[41] After observing that "the aim of INCOTERMS, which stands for international commercial terms, is to provide a set of international rules for the interpretation of the most commonly used trade terms in foreign trade" and that "these trade terms are used to allocate the costs of freight and insurance in addition to designating the point in time when the risk of loss passes to the purchaser", the court stated that "INCOTERMS are incorporated into the Convention through article 9, paragraph 2". The court further stated that pursuant to article 9, paragraph 2 of the Convention, "INCOTERMS definitions should be applied to the contract despite the lack of an explicit INCOTERMS reference in the contract"; consequently, the court held that where "a contract refers to CIF-delivery, the parties refer to the INCOTERMS",[42] even where an explicit reference to the INCOTERMS

---

[37] CLOUT case No. 276 [Oberlandesgericht Frankfurt am Main, Germany, 5 July 1995].

[38] CLOUT case No. 95 [Zivilgericht Basel-Stadt, Switzerland, 21 December 1992].

[39] Id.

[40] Landgericht Frankfurt, Germany, 6 July 1994, published on the Internet at <http://www.unilex.info/case.cfm?pid=1&do=case&id=189&step=FullText>.

[41] *St. Paul Insurance Company et al. v. Neuromed Medical Systems & Support et al.*, United States of America, 26 March 2002, published on the Internet at <http://www.cisg.law.pace.edu/cisg/wais/db/cases2/020326u1.html>.

[42] Id.

is lacking. As far as the latter issue is concerned, a similar statement can be found in a different arbitral award,[43] as well as in the decision of a State court;[44] on that occasion, the court interpreted the clause FOB in the light of the INCOTERMS, although a reference to the INCOTERMS was lacking.

18. One court held that the UNIDROIT Principles on International Commercial Contracts constitute usages of the kind referred to in article 9, paragraph 2 of the Convention.[45] Similarly, an arbitral tribunal stated that they echo international trade usages under article 9, paragraph 2.[46]

---

[43] Tribunal of International Commercial Arbitration at the Russian Federation Chamber of Commerce and Industry, Arbitration, award No. 406/1998, published on the Internet at <http://www.cisg.law.pace.edu/cisg/wais/db/cases2/000606r1.html>.

[44] Corte d'appello Genova, Italy, 24 March 1995, published on the Internet at <http://www.unilex.info/case.cfm?pid=1&do=case&id=198&step=FullText>.

[45] International Arbitration Court of the Chamber of Commerce and Industry of the Russian Federation, award No. 229/1996, summarized on the Internet at <http://www.unilex.info/case.cfm?pid=1&do=case&id=682&step=Abstract>.

[46] ICC Court of Arbitration, award No. 9333, published on the Internet at <http://www.unilex.info/case.cfm?pid=1&do=case&id=400&step=Abstract>.