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CISG Case Law in Spain

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To my 'surrogate father', Al Kritzer

A TRIBUTE TO PROFESSOR KRITZER

The commemoration of the 80th birthday of Professor Albert H. Kritzer is a splendid occasion to render tribute to the person who is the primary contributor towards one of the most important goals of the CISG:¹ The uniformity in its application and interpretation. Professor Kritzer has not only built a 'Cathedral of cases' in his electronic library on the CISG at the CISG W3 database,² but has had the initiative and infectious enthusiasm to engage many others like myself in the establishment of a whole collection of databases on the CISG³.

The impressive statistics of the CISG W3 database evidence an astonishing achievement by Al Kritzer:

- More than 1800 cases from Courts all over the world, and many arbitral awards from many arbitral institutions or arbitrations ad hoc, many of these translated in a translation programme run by Al to make them available in English.
- More than 7500 citations on Bibliography.
- More than a thousand of full texts of selected scholarly writings on the CISG and the UNIDROIT Principles of International Commercial Con-

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¹ The autor refers to the 1980 Vienna Convention on Contracts for the International Sale of Goods as 'CISG'.

² See <http://www.cisg.law.pace.edu>.

³ See the autonomous network of CISG websites (<http://www.cisg.law.pace.edu/network.html>)

tracts and the Principles of European Contract Law.

- More than 5000 case annotations

Many people would wonder - especially after visiting the CISG W3 database -, at the revelation that Professor Kritzer works with a very small team helping him build the database. This impressive database is mainly 'his creature' and it facilitates work for researchers, professors, lawyers and students particularly the participants of the Willem C Vis Moot.⁴ The CISG W3 has become such a substantial part of many lives in legal research, that we could not live without it today. It is fitting that the scholarly community offers him tribute through this Festschrift in a way which I am sure he would like the most. For my contribution, it was very logical to devote the topic of this paper to the CISG case law in my country, Spain.

I had the fortune, the privilege and the honour to work together with Prof. Kritzer during the academic year 1996-1997 where I spent a postdoctoral research and teaching period at Pace University. During that period, in which I was involved to a certain extent with the then brand new CISG W3 database, I had occasion to learn very much from Al Kritzer, not just as a CISG scholar, but mainly because of his humanity. Since then, I consider Al to be not only a mentor but a surrogate father. As one of his surrogate daughters, it was logical for me to assume the creation of a database of cases on the CISG from Spain and Latin America, and based on Prof. Kritzer's encouragement, Professor Illescas Ortiz and myself launched the CISG Spain and Latin America data base in 1998.⁵

INTRODUCTION

Spain ratified the CISG on 17th of July 1990; the text of the CISG was published in the Spanish Official Journal on the 30th January 1991. Although

⁴ The annual competition in commercial Arbitration mooting is an established giant in its own field, and one which Albert has helped to create; for more information on the moot see <http://www.cisg.law.pace.edu/vis.html>

⁵ See <http://www.uc3m.es/cisg>. The database is directed by Professor Rafael Illescas Ortiz and myself.

Currently there are cases from Argentina, Mexico and Spain, although the CISG has also been ratified by: Chile, Colombia, Cuba, Ecuador, El Salvador, Honduras, Paraguay, Perú and Uruguay.

more than 16 years have passed, case law is not yet abundant; this is probably due to the fact that it takes, at least, about 6 to 8 years to finalize the whole judicial process, and that the number of commercial cases that are finally heard in court are fewer than those in other areas of the law.

In general, it is somehow frustrating to see that the Spanish courts do not seem to be aware of the existence of legal literature or cases on the CISG, not even of the Spanish doctrine and case law, and that in some cases courts use both the rules of the Spanish Commercial Code and of the CISG, or that they interpret the CISG in the light of their domestic law. Sometimes, and this is not the fault of the courts but that of the lawyers, it can be seen that the courts are not at all aware of the existence of the CISG. One should also bear in mind that the explanation of the facts of the case is poor, and therefore an extra effort of imagination is needed. An example of a domestic interpretation of the CISG by the Spanish Courts is the case of Juzgado de Primera Instancia e Instrucción, nº3 of Tudela, 29 March 2005, which has been commented by Prof. Peter Schlechtriem and this author, so I will refer to the comments already made.⁶ In contrast, some decisions show that the CISG has been applied correctly; this could be of help for courts outside of Spain. Indeed, the decision of - Audiencia Provincial de Valencia, 7 June 2003⁷ - is a case that should be followed not only by Spanish courts but also by the courts of other jurisdictions. The teachings of that case in regard to the need of a uniform and international interpretation of the CISG⁸ are comparable to

⁶ See: Case note on decision of Court of First Instance of Tudela (Spain), 29 March 2005 (<http://www.cisg.law.pace.edu/cisg/biblio/perales4.html>). The case is translated into English by Mercedes Romero (<http://www.cisg.law.pace.edu/cisg/wais/db/cases2/050329s4.html>).

In Spanish, see the comments of Schlechtriem, P and Perales Viscasillas, P (2005) 'Interpretación en clave nacional de la Convención de Viena de 1980 sobre compraventa internacional de mercancías: STPI de Tudela (España), de 29 marzo 2005' *Derecho de los Negocios* 180 at 23-33. And from the same authors: (2005) 'Comentarios a un reciente fallo judicial español sobre compraventa internacional' *Foro de Derecho Mercantil* 179, at 121-138.

⁷ <http://cisgw3.law.pace.edu/cases/060522s4.html>.

⁸ In this case, the Spanish seller and the US buyer concluded a contract of sale of 1500 tons of concentrated wine. The court referred, first, to the application of the CISG to say that by virtue of Article I(1)(a) the CISG was applicable. Then, it referred to the interpretation of the CISG and held:

- firstly, that a uniform interpretation is needed (Article 7(1) and 7(2) CISG). This principle according to which conventions have to be interpreted uniformly can also be

those of the famous Italian decision rendered by the Tribunale di Vigevano on 12 July 2000⁹; in some respect it even goes further, as it enumerates the sources of interpretation of the CISG.

The following remarks will deal with the substance of the 11 new cases from Spain rendered between 2004 and 2006,¹⁰ after the last work on this subject in which I commented on about 42 first cases on the CISG in Spain.¹¹

CONCLUSION OF THE CONTRACT

The decision of Juzgado de Primera Instancia, n°3 of Badalona, 22 May 2006,¹² considers the conclusion of a contract through the exchange of an offer and an acceptance by e-mail. In this regard, it is to be noted that art.13 CISG does not refer to the modern means of communication as embodied

found in other international conventions; this shows that there is a trend in international commercial law in the respect;

- secondly, that in interpreting the CISG some importance has to be given to the Secretariat's Commentary, and it especially referred to Article 6 of the Draft Project of 1978;

- thirdly, that legal scholarship has an important role to play and that it requires an autonomous interpretation of the CISG separate from the domestic interpretation;

- fourthly, that a methodological approach different from that used in a domestic context is needed when interpreting the CISG;

- fifthly, that the only way to assure the uniformity of the interpretation of the CISG is to take into account what other tribunals have held when applying the CISG as well as the opinions of legal scholars. Furthermore, the court explained extensively the CLOUT system and referred to UN document A/CN.9/SER.C/GUIDE/1 and relied on several CLOUT cases, namely 98, 81, and 251.

⁹ <http://cisgw3.law.pace.edu/cases/000712i3.html>.

¹⁰ The cases are accessible at <http://www.uc3m.es/cisg>, as well as at Pace's database. There is only one case that I am not commenting: Tribunal Supremo, 24 February 2006, since it is a case in which the High Court refused to apply the CISG because the parties based their statements of claim and defence to the Appellate Court on domestic non-uniform law.

¹¹ See Perales Viscasillas, P (2005) 'Spanish Case Law on the CISG' in Ferrari, F (ed) *Quo Vadis CISG?. Celebrating the 25th Anniversary of the United Nations Convention on Contracts for the International Sale of Goods* Bruylant/Sellier. European Law Publishers/FEC at 235-261.

¹² <http://cisgw3.law.pace.edu/cases/060522s4.html>.

within the concept of writing under the Convention. This, however, is not a problem under the judicial interpretation of the Convention, and electronic communications are perfectly considered to be covered under CISG.¹³

NOTICE OF LACK OF CONFORMITY: REASONABLE TIME (ART.39)

In the case decided by the Audiencia Provincial de Cuenca, 31 January 2005¹⁴, the Spanish tribunal considered an international sale of goods contract between a German seller and a Spanish buyer. The goods sold - live calf - were inspected by a veterinary the second day after their arrival. The inspection showed that some of the animals were in poor condition, so the veterinary gave medication to them. The buyer notified the seller of the death of 21 animals between 20-25 days after their arrival. The Court considered that the period of time was reasonable under Article 39(1) CISG and it was adequate to provide the buyer with the conviction about the hygienic and sanitary conditions of the animals.

As it is well known the case law on regard to the reasonable time to notify the lack of the conformity of the goods is abundant. Certain criteria are offered by the CISG-AC in its Opinion n°2: 'The reasonable time for giving notice after the buyer discovered or ought to have discovered the lack of conformity varies depending on the circumstances. In some cases notice should be given the same day. In other cases a longer period might be appropriate. No fixed period, whether 14 days, one month or otherwise, should be considered as reasonable in the abstract without taking into account the circumstances of the case. Among the circumstances to be taken into account

¹³ See CISG-AC Opinion no 1, Electronic Communications under CISG, 15 August 2003. Rapporteur: Professor Christina Ramberg, Gothenburg, Sweden, available at: <http://www.cisg.law.pace.edu/cisg/CISG-AC-op1.html>; Eiselen, S (1999) 'Electronic commerce and the U.N. Convention on Contracts for the International Sale of Goods (CISG) 1980' *EDI Law Review* 6 at 21-46, available at: <http://www.cisg.law.pace.edu/cisg/biblio/eiselen1.html>. See also the concept of writing in Article 1.11 Unidroit Principles of International Commercial Contracts 2004, Article 1:301(6) European Principles of Contract Law and Article 20 United Nations Convention on the Use of Electronic Communications in International Contracts (2005).

¹⁴ <http://www.cisg.law.pace.edu/cisg/wais/db/cases/050131s4.html>.

are such matters as the nature of the goods, the nature of the defect, the situation of the parties and relevant trade usages¹⁵.

AVOIDANCE OF THE CONTRACT

A domestic reading of the avoidance of the contract: the identification between a fundamental breach and the aliud

A domestic reading of the CISG in regard to the avoidance of the contract can be found in the decision of Audiencia Provincial of Palencia of 26 September 2005¹⁶. The case was between a US seller and a Spanish buyer of a printing machine. The machine was proved to be inadequate for the buyer's purpose: to print on paper for a diary. The Court used the concept of the the aliud pro alio (i.e., the delivery of a completely different thing than that contracted for or the delivery of a thing that provokes a complete unsatisfaction on the buyer) in order to consider that a fundamental breach of the contract existed under Article 25 CISG¹⁷. The tribunal probably felt more comfortable

¹⁵ CISG-AC Opinion no 2, Examination of the Goods and Notice of Non-Conformity: Articles 38 and 39, 7 June 2004. Rapporteur: Professor Eric E. Bergsten, Emeritus, Pace University School of Law, New York, n°3, available at: <http://www.cisg.law.pace.edu/cisg/CISG-AC-op1.html>.

See also: Andersen, CB (1998) 'Reasonable Time in Article 39(1) of the CISG - Is Article 39(1) Truly a Uniform Provision?' *Review of the Convention on Contracts for the International Sale of Goods (CISG)* at 63-176; and Ramos Muñoz, D (2006) 'The Rules on Communication of Defects in the CISG: Static Rules and Dynamic Environments. Different Scenarios for a Single Player' available at: <http://www.cisg.law.pace.edu/cisg/biblio/munoz.html#2>.

¹⁶ But see other cases by the High Supreme Court of Spain (Tribunal Supremo) which adopt an international approach, detailed below.

¹⁷ There are now four regimes in Spain in regard to the lack of conformity of the goods. Apart from the CISG, that applies international commercial contracts within its sphere of application, and the law 23/2003 that applies to consumer contracts also within its field of application (transposing Directive 1999/44, which incidentally gives a reason for the UK to ratify the CISG), we have to add the regime of the Spanish Commercial Code that applies to domestic commercial contracts of sale (Articles 336 and 342, that refer to different periods of time, respectively 4 days and 30 days, to notify the lack of conformity of the goods; those fixed periods of time apply depending on the character of the lack of conformity: apparent or hidden defects) and Article 1690 Spanish Civil Code (six months), that applies to those civil contracts of sale not falling within

relying in the domestic concept of the *aliud pro alio* in order to find that the lack of the conformity of the goods amounted to a fundamental breach under Article 25 CISG. However, 'under the Convention, delivery of an *aliud*, in itself, would not suffice to constitute a fundamental breach'¹⁸. In the case at hand, it was clear that the breach was fundamental since the seller knew the specific conditions of the production process of the buyer.

As indicated by the CISG-AC 'In considering avoidance, one has to take into account whether the buyer can be required to retain the goods because he can be adequately compensated by damages or a price reduction. The substantiality of the detriment to the buyer may be ascertained by having regard to the terms of the contract, the purpose for which the goods are bought and finally, by the question of whether it is possible to remedy the defect. In any case, the question of time has to be given due consideration'¹⁹.

Avoidance of the contract under Article 73(2) CISG

The application of Article 73(2) CISG, which provides that 'If one party's failure to perform any of his obligations in respect of any installment gives the other party good grounds to conclude that a fundamental breach of contract will occur with respect to future instalments, he may declare the contract avoided for the future, provided that he does so within a reasonable

the sphere of application of the statute 23/2003. We will also need to add the doctrine of the Spanish Supreme Court, which usually goes beyond the classification of the contract (civil or commercial) in order to unify the regimes by applying the doctrine of the *aliud pro alio* already mentioned. In this situation, the period of time to apply in order to consider the correctness of the time to notify the lack of conformity of the goods and to sue would be the general period of time applicable in cases of breach of the contract (Article 1124 of the Spanish Civil Code, 15 years). It is clear that the doctrine of the Spanish Supreme Court is as onerous for the seller as the application of the rigid period of times of the Commercial Code is for buyer. In that situation, it is simply unjustified that the Spanish legislator has not unified the legal regimes on the lack of conformity of the goods, following the trend established by the CISG.

¹⁸ See Schlechtriem and Perales Viscasillas 'Interpretación en clave nacional de la Convención de Viena' *supra* fn 6 at 24.

¹⁹ CISG-AC Opinion no 5, The buyer's right to avoid the contract in case of non-conforming goods or documents, 7 May 2005, Badenweiler (Germany). Rapporteur: Professor Dr. Ingeborg Schwenzer, LL.M., Professor of Private Law, University of Basel. n°4.1, available at: <http://www.cisg.law.pace.edu/cisg/CISG-AC-op5.html>.

time', was rejected by the decision of Juzgado de Primera Instancia, nº3 de Badalona, 22 May 2006²⁰, on the ground that it is only applicable to contracts for delivery of goods by instalments, and not to a single contract for the sale of goods.

In the case at hand, the seller did not deliver the goods and avoided the contract on the ground that the goods sold - short pants ('bermudas') - in a previous transaction were found in a place different to that agreed in that previous transaction. However, it was proved during the course of the proceedings that the buyer sent the goods to the agreed places, but it was then when a third party resold them to the non-agreed places.

Although it is true that the contract of sale under consideration was not an instalment contract - ie a contract that provides for delivery of goods in separate lots -²¹ and thus Article 73 CISG might not be applied²², the Court should have brought into play Article 72 CISG, and specifically paragraph 1: 'If prior to the date for performance of the contract it is clear that one of the parties will commit a fundamental breach of contract, the other party may declare the contract avoided'. Whether or not a breach of a previous related transaction might be seen as a clear indication that one of the parties will commit a fundamental breach of the contract as required under Article 72(1) CISG might be discussed under an objective standard, i.e, the reasonable person²³. In this regard some case law have considered that anticipatory breach is possible if when the goods have to be delivered, the buyer has not fulfilled its obligations under previous contracts²⁴. In any case, the procedure to be followed under Article 72(2) CISG might have clarified the position of the

²⁰ <http://cisgw3.law.pace.edu/cases/060522s4.html>

²¹ UNCITRAL Digest, Article 73, nº3, available at: <http://www.cisg.law.pace.edu/cisg/text/digest-toc.html>.

²² It has to be noted that some decisions have considered the application of Article 73 CISG to parties that have an on-going relationship in regard with different contracts. See UNCITRAL Digest, Article 73, nº4; and UNCITRAL Digest, Article 72, nº3, available at: <http://www.cisg.law.pace.edu/cisg/text/digest-toc.html>. In the commented case, the parties have had previous contracts.

²³ Hornung, R in Schlechtriem, P and Schwenger, I (eds) (2005) *Commentary on the UN Convention on the International Sale of Goods (CISG)* (2nd ed) Oxford University Press at Art 72 para Article 12.

²⁴ See Landgericht Berlin (Germany), 30 September 1992; LG Krefeld (Germany), 28 April 1993 and OLG Düsseldorf (Germany), 14 January 1994.

parties as regard to the 'clear' future breach. According to paragraph 2 of Article 72, if time allows, the party intending to declare the avoidance, must give reasonable notice to the other party in order to permit him to provide adequate assurance of his performance.

In any event, in the commented case, the Court was clear as to the breach of the seller and that although the contract provided as an essential condition that the goods be delivered to certain places, the buyer did not have the obligation to control the destination of the goods once it delivered them to the agreed place. Therefore, the buyer was not in breach, but the seller was, since it did not deliver the goods.

Effects of avoidance

The effects of the avoidance of the contract are considered under Articles 81 to 84 CISG. The most important effect is considered under Article 81 CISG: avoidance releases both parties from their obligations under the contract, subject to any damages which may be due; and the performance rendered has to be restituted to the other party.

In the decision of Juzgado de Primera Instancia, nº3 of Badalona, 22 May 2006²⁵, the Court applied Article 81(2) CISG to a case in which the buyer asked for the total restitution of the contract price and not as the seller contended the price minus the expenses paid by the seller to the bank to transfer the money back to the buyer. As the tribunal correctly pointed out, under Article 81(2) CISG, restitution means an integral devolution of the entire contract price paid by the buyer. For the very same reason, and in application of Article 84(1) CISG ('If the seller is bound to refund the price, he must also pay interest on it, from the date on which the price was paid'), the Court also gave the buyer the interest on the price.

DAMAGES

Article 75 CISG

One of the most interesting cases is that of Audiencia Provincial of Valencia

²⁵ <http://cisgw3.law.pace.edu/cases/060522s4.html>.

of 31st March 2005²⁶. The contract of sale of oranges was made between a Spanish seller and a German buyer. The seller had to deliver 1500 tons of oranges during January and July 2002. The seller did not deliver any quantity of the goods. The buyer made replacement purchases and claimed the seller the difference between the contract price and the replacement purchases on the basis of Article 75 CISG, which states that: 'If the contract is avoided and if, in a reasonable manner and within a reasonable time after avoidance, the buyer has bought goods in replacement or the seller has resold the goods, the party claiming damages may recover the difference between the contract price and the price in the substitute transaction as well as any further damages recoverable under article 74'.

The first instance Court considered that Article 75 CISG was not applicable but Article 74 CISG since the avoidance of the contract was communicated to the seller after the replacement purchases²⁷. The appellate Court considered that Article 75 CISG was not complied with because of the late notification of the avoidance. It also considered that Article 74 CISG was not applicable since the buyer did not base its allegation on Article 74 but on Article 75 CISG, and thus the first instance court breached the principle of congruence. Furthermore, in an obiter dicta, stated that Article 74 CISG deals with a different situation to that of Article 75 CISG, and thus it is its determination, fixation and quantification of the damages.

The opinion of the Court about the relationship between Articles 74 and 75 CISG should be mentioned. The Court seems to consider that Articles 74 and 75 CISG deal with different situations and thus the claim of damages have to be based only on Article 75 CISG. This is not, however, a correct interpretation of the CISG.

²⁶ <http://www.cisg.law.pace.edu/cisg/wais/db/cases/050331s4.html>.

²⁷ Article 74 CISG states that: 'Damages for breach of contract by one party consist of a sum equal to the loss, including loss of profit, suffered by the other party as a consequence of the breach. Such damages may not exceed the loss which the party in breach foresaw or ought to have foreseen at the time of the conclusion of the contract, in the light of the facts and matters of which he then knew or ought to have known, as a possible consequence of the breach of the contract'.

First, one might based the claim on Article 75 CISG and in addition claim any further damages recoverable under Article 74 CISG²⁸.

Second, it might be considered an interpretation under which an aggrieved party may choose to claim under Article 74 CISG even if entitled to claim under Article 75 CISG²⁹.

Third, contrary to the majority of the cases which considers that Article 75 CISG only applies when the contract has been previously avoided³⁰, the aggrieved party might claim on the basis of Article 74 CISG if the conditions provided for in Article 75 are not complied with³¹. In this situation, the notification of the avoidance becomes crucial³², since it is clear that under Article 75 CISG damages in cases where a substitute transaction is made is subject

²⁸ Cf Article 75 CISG in fine; Schlechtriem, P (2005) 'Damages, Avoidance of the Contract and Performance Interest Under CISG' in *Festschrift Apostolos Georgiades* available at: <http://www.cisg.law.pace.edu> at 1; Stoll, H and Gruber, G in Schlechtriem & Schwenger *Commentary* supra fn 23 at Art 75 para 2 Article .

²⁹ See OGH, 28 April 2000 (Austria), at Schlechtriem 'Damages, Avoidance of the Contract and Performance Interest Under CISG' supra fn 28 at fn 5. See also: UNCITRAL Digest, Article 74, n°2, and n°5; and footnote 8 UNCITRAL Digest, Article 75, available at: <http://www.cisg.law.pace.edu/cisg/text/digest-toc.html>.

³⁰ See UNCITRAL Digest, Article 75, n°7, with further citations; and UNCITRAL Digest, Article 74, n°3, available at: <http://www.cisg.law.pace.edu/cisg/text/digest-toc.html>.

See also Audiencia Provincial of Barcelona, 2 February 2004 (<http://cisgw3.law.pace.edu/cases/040202s4.html>), where the court concluded that it is not possible to recover the loss of profit in a substitute transaction where it is made before the avoidance of the contract.

Scholars also seem to assume that avoidance is a precondition: Honnold, JO (1999) *Uniform Law for International Sales* (3rd ed) Kluwer Law International, at para 409; and Torsello, M (2005) 'Remedies for Breach of Contract Under the 1980 Convention on Contracts for the International Sale of Goods (CISG)' in Ferrari *Quo Vadis CISG?* supra fn 11 at 81.

³¹ ICC 1996/8574, where the substitute transaction was made without avoiding the contract. See UNCITRAL Digest, Article 75, n°3, available at: <http://www.cisg.law.pace.edu/cisg/text/digest-toc.html>.

³² It has to be pointed out that the case is not completely clear about the notification. The Court said that the seller did not send the goods corresponding to the month of January, so the buyer in mid February avoided the contract through its agent, and threatened to do the same with the subsequent deliveries in case the seller was delayed. At the same time, the Court considered that the notification of the avoidance was done after the replacement purchases which took place between February and June.

to the previous avoidance of the contract ('if the contract is avoided...')³³. However, under Article 74 CISG no such condition - avoidance and thus a notification - is required (Article 45(1)(b) CISG, in relation with Article 74 CISG), but a breach by the seller³⁴.

Fourth, at least one Court has concluded that notwithstanding the condition that the contract be avoided, Article 75 CISG applies if the other party made it clear that it could not perform within the time fixed³⁵.

As far as the calculation of damages under Article 74 CISG, some scholars and case law agree that one method is precisely that embodied under Article 75 CISG, and thus 'Article 75 CISG should not be regarded as an exclusive basis for this method of calculating damages'³⁶. The same applies to instalment contracts if the cover is made before declaring avoidance³⁷.

Apart from that, from the facts of the case it seems that the buyer avoided the first installment and make a substitute transaction. It also notified the seller, through its agent, that it will continue making such substitute transactions if the seller keep on breaching the future installments. Although these facts are mentioned in the decision, the Court did not discuss them. Having had them in mind, the Court might have considered, first, the fulfillment of Article 75 CISG in regard to the first delivery of the goods³⁸, and second whether the future declaration of avoidance of the next insatallments in case of breach by the seller was a valid declaration of avoidance under CISG³⁹.

³³ The scholars consider that the application of Article 75 CISG depends upon the avoidance: Stoll, H and Gruber, G in *Schlechtriem & Schwenger Commentary* supra fn 23 at Art 75 para Article 5.

³⁴ Stoll, H and Gruber, G in *Schlechtriem & Schwenger Commentary* supra fn 23 at Art 74 para 7.

³⁵ See UNCITRAL Digest, Article 75, n°7, footnote 15, available at: <http://www.cisg.law.pace.edu/cisg/text/digest-toc.html>, citing CLOUT 277, OLG Hamburg (Germany) 28 February 1997.

³⁶ *Schlechtriem 'Damages, Avoidance of the Contract and Performance Interest Under CISG'* supra fn 28 at 3; and footnote 9 UNCITRAL Digest, n°3, available at: <http://www.cisg.law.pace.edu/cisg/text/digest-toc.html>, citing CLOUT 243, 140, and 304.

³⁷ *Schlechtriem 'Damages, Avoidance of the Contract and Performance Interest Under CISG'* supra fn 28 at 13-14.

³⁸ See Article 73(1) CISG.

³⁹ In this situation where the buyer was trying to keep the contract alive as much as possible so giving the seller any time an instalment have to be delivered the opportunity to fulfill its obligations, Article 73(2) and (3) are not helpful at all.

From my point of view, and considering the facts of the case, the court might have considered as an issue whether an anticipatory notice of avoidance is valid under CISG⁴⁰. Since the purpose of the notice is that the party be aware of the consequences of a breach and thus that the contract is terminated, it is my opinion that in the light of the facts of the case, where the first instalment apparently was avoided and a substitute transaction took place, applying the good faith principle (Article 7(1) CISG), as well as Article 8 CISG on interpretation of conducts and statements made by the parties, an anticipatory notice of avoidance might be a valid notice of avoidance under CISG if it is made clear that the breach will amount to the termination of the contract⁴¹. In this regard, Courts have been flexible in order to validly consider notice of avoidance combined with the *nachfrist* notice or with the notice of non-conformity of the goods⁴², as well as considered valid implicit notices of avoidance or even that due to the circumstances a notice of avoidance was not required⁴³.

Type of losses covered under Article 74

What type of losses have to be included under the damages provision of the Convention was considered by the decision of Audiencia Provincial of Palencia, 26 September 2005⁴⁴, which was commented before in relation with the avoidance of the contract. In the case, a printing machine was sold by a U.S. seller to a Spanish buyer. The buyer alleged the non-conformity of the machine, while the seller considered that the buyer's premises were not in a good condition to place the machine, and as a consequence the machine did

⁴⁰ See ICC 8128/1995; and OLG Dusseldorf (Germany) 24 April 1997, in Illescas Ortiz, R and Perales Viscasillas, P (2003) *Derecho Mercantil Internacional. El Derecho Uniforme Cerasa* at 215-219.

⁴¹ However, it has been considered that a mere threat of avoidance is not a valid notice of avoidance: OLG München (Germany) 2 March 1994, at Jacobs, CM 'Notice of avoidance under the CISG: A practical examination of substance and form considerations, the validity of implicit notice, and the question of revocability' available at: <http://www.cisg.law.pace.edu/cisg/biblio/jacobs.html>, at 2.

⁴² See UNCITRAL Digest, Article 26, n^o5, available at: <http://www.cisg.law.pace.edu/cisg/text/digest-toc.html>.

⁴³ See Jacobs, CM 'Notice of avoidance under the CISG' supra fn 41 at 4-7.

⁴⁴ <http://cisgw3.law.pace.edu/cases/050926s4.html>.

not work properly. The Court, however, rejected those allegations made by the seller, and considered that the problem lied in the inadequate design of the machine that was not apt to fulfil the buyer's purpose. This amounted to a fundamental breach by the seller, and also the buyer had the right to damages.

The Tribunal held that within the damages provision of the CISG the following expenses made and proved by the buyer are included:

- The costs of the bank transfer to pay the price for the machine and the costs derived from importing the machine.
- The costs derived from the temporal connection to the electrical network due to the negative of the seller to keep on working with the electrical generator provided by the buyer. The expert's report considered the generator to be apt and thus the Court deemed it as an unnecessary expense made by the buyer obliged by the seller.
- The cost of buying a paper bobbin to the machine.
- The costs in electrical material and the mechanical pieces required by the seller.
- The costs of accommodation in Spain of the seller's technicians.
- Once that it was clear that the machine sold was not apt to the buyer's purpose, and due to the buyer's obligations toward third parties that have to be fulfilled shortly, the buyer had to contract printed work with third parties that generated high and unforeseen costs to the buyer. As these costs are a consequence of the breach by the seller have to be compensated⁴⁵.
- The costs of a second-hand machine. This expense was denied by the First instance court, however, the appellate court considered that although it was bought before the installation of the machine object of the claim, it was a foresight and risky decision that turned out to be correct. From the resale price, it discounted the price obtained from the resale to an Argentinean buyer.

⁴⁵ See also Juzgado de Primera Instancia, n°3 of Badalona, 22 May 2006, <http://cis-gw3.law.pace.edu/cases/060522s4.html>.

In the case of Juzgado of Primera Instancia, nº3 of Badalona, 22 May 2006⁴⁶, the Court considered within the loss of profit the extra judicial expenses - lawyer's fees - incurred by the German buyer to claim to the Spanish seller (apparently German lawyer's that extrajudicially claimed to the Spanish seller).

INTEREST:

A domestic reading of Article 78 CISG was done by the decision of Audiencia Provincial of Cuenca of 31 January 2005⁴⁷. In the case, a German seller and a Spanish buyer made a contract of sale of life calf. Some of them were in a poor condition and about 20 days after their arrival in Spain died. Also, it happened that some of them were not of the same race as the one specified in the contract. The court, in regard to the contention of the seller that the buyer paid interest on the sum due in accordance with Article 78 CISG, denied the claim applying the principle in *illiquidis non fit mora*, which means that interest for late payment only arise once the amount in arrears is certain or liquid.

Spanish Courts traditionally applied this principle in a very rigid way, so it was enough to discuss the amount of the debt in any of the instances of the process to have the interest denied until the final decision of the judge. As a consequence of this possible strategic behaviour of the debtor, no interest on late payment were due until the decision was firm, and then, of course, the interest did not accrue any more, since then it was substituted by the judicial interest, ie, the one applied by mandate of the civil law of procedure: legal interest rate plus 2 points. However, recently some Courts have discussed the application of the said principle and have flexibilized its application.

CISG scholars, however, consider rightly that under Article 78 CISG there is no room for the principle in *illiquidis non fit mora*⁴⁸. The same conclusion applies to the Directive 2000/35 on Combating Late Payment in

⁴⁶ <http://cisgw3.law.pace.edu/cases/060522s4.html>

⁴⁷ <http://www.cisg.law.pace.edu/cisg/wais/db/cases/050131s4.html>

⁴⁸ Bacher, K in Schlechtriem & Schwenzler *Commentary* supra fn 23 at Art 78 para 10; and Pantaleón, F (1998) 'Artículo 78' in Díez-Picazo, L (ed) (1998) *La compraventa internacional de mercaderías. Comentario de la Convención de Viena* Civitas at 632, and footnote 10 with further references.

Commercial Transactions of 29 June 2000⁴⁹ as incorporated into national laws, which might have a relevant role in regard to the interest rates under CISG⁵⁰.

APPLICATION OF THE CISG TO DOMESTIC CONTRACTS

One of the most interesting developments of the CISG has been its role as a model for international, regional and national legislations. Another interesting role of the Convention is that it has been applied as a tool of interpretation and supplementation of various kind of domestic contracts.

There are several cases that refer to these roles of the CISG.

We can point out to the decision of Audiencia Provincial of Barcelona, 9 November 2004⁵¹, which deals with a domestic contract of sale of textil to manufacture coats. The textil had very important defects: a serious loss of the colour derived from the use of the coats. The contract was an oral contract with no agreement as regard to the quality of the goods, so the Court referred to Article 35.2 CISG in order to determine the lack of conformity of the goods. In the case, the seller argued that the textil sold was not apt to manufacture coats, but the tribunal rejected the argument considering that in accordance with Article 35(2) CISG the seller had the obligation to have made known to the buyer that the textil was not fit for that purpose.

Also the provisions of the CISG on avoidance of the contract are cited by the Spanish tribunals in order to confirm a tendency in domestic case law. In the decision of Audiencia Provincial of Córdoba of 26 July 2005⁵² - a domestic contract for real state -, the Court referred to Article 26 CISG as well as Article 9:303 of the European Principles of Contract Law as rules that confirm the extrajudicial avoidance of the contract⁵³.

⁴⁹ OJ L 200, 8.8.2000.

⁵⁰ See Perales Viscasillas, P (2006) *La morosidad en las operaciones comerciales entre empresas. Ley 3/2004 y Directiva 2000/35* Thomson/Civitas, at 141-142, and at 227; id. 'Late Payment Directive 2000/35 and CISG', to be published in honour of Prof. Farnsworth.

⁵¹ <http://cisgw3.law.pace.edu/cases/041109s4.html>.

⁵² <http://cisgw3.law.pace.edu/cases/050726s4.html>.

⁵³ As far as I am aware the UNIDROIT Principles of International Commercial Contracts have been cited once by the Spanish Courts. See Tribunal Supremo, 4 July 2006.

Also in the cases decided by the High Court (Tribunal Supremo) on 5 April 2006 (domestic assignment contract), 20 July 2006 (domestic shareholders agreement), 31 October 2006 (domestic contract of real state) and 22 December 2006 (domestic lease contract between two corporations), the tribunal considered that previous case law on the conditions to declare a contract avoided were confirmed by Article 25 CISG, as well as Article 8:103 European Principles on Contract Law, on fundamental breach. Further three of the cases - STS 5 April 2006, 20 July 2006 and particularly 31 October 2006 - clarifies that the provisions of the CISG should be used to supplement Article 1124 Spanish Civil Code. Specifically STS 31 October 2006 states that the principle on fundamental breach as embodied in an international treaty and in a document which formulates the principles that integrate the *lex mercatoria* which is common to all the legal regimes in so far as they try to reflect and organize, in order to draft uniform rules, the practice followed in international business relationships, ought to be used to supplement Article 1124 Spanish Civil Code, which must be interpreted according to the social reality in which it has to be applied.

In the case an agency contract between an Spanish and a German party. German Law was applicable, and the High Court considered § 242 German Civil Code (good faith in the performance of the contract). The Court considered that that provision of the German Civil Code was embodied in Article 1:201 of the European Principles of Contract Law as well as in Article 1.7 Unidroit Principles, and that was similar to Article 7.1 Spanish Civil Code, and Article 57 Commercial Code.