Case 1022: CISG 35 (1); 36 (1); 45 (1)(b); 74; 78
Serbia: Expanded Tribunal of the Foreign Trade Court of Arbitration attached to the Serbian Chamber of Commerce
23 January 2008, T-9/07
Original in Serbian
Available at: http://cisgw3.law.pace.edu/cisg/text/080123serbian.pdf
Published in English: http://cisgw3.law.pace.edu/cases/080123sb.html
Commented on in Serbian: Vladimir Pavic, Milena Djordjevic, Primena Becke konvencije u arbitraznoj praksi Spoljnotrgovinske arbitraze pri Privrednoj komori Srbije, Pravo i privreda br. 5-8/2008, cited at pp. 572, 581, 586, 592, 601 and 606.

Abstract prepared by Andrea Vincze

The dispute arose out of a contract for the sale of white crystal sugar. The Italian buyer commenced arbitration before a Serbian court of arbitration against the Serbian seller to recover the customs the buyer had to pay in Italy as a result of withdrawal by the Serbian authorities of the certificates of origin required by the contract and ensuring exemption from the payment of customs. The seller challenged the jurisdiction due to incorrect denomination of the court of arbitration, contested its liability for any damages suffered by the buyer as a result of the withdrawal, and disputed the amount of damages requested arguing that the buyer had already requested compensation for the same losses in another proceeding.

Applying Articles 28 and 30 of the Serbian Arbitration Act (identical to Article 16 (1) and (3) of the UNCITRAL Model Law on International Arbitration) and Article V, paragraph 3, of the European Convention on International Arbitration of 1961, the arbitral tribunal ruled that it had jurisdiction despite the incorrect denomination; and rejected the seller's argument regarding identity of claims.

On the merits, the tribunal made its decision under a multiplicity of legal sources, i.e. the CISG, the UNCITRAL Model Law on International Credit Transfers, and several sources of *lex mercatoria*. Therefore, UNCITRAL texts represent only a part of the legal basis and the reasoning. [Only UNCITRAL texts are referred to in this abstract.]

The arbitral tribunal ruled, that under Article 35 (1) CISG, the provision regarding specific origin of the goods and the duty to provide the certification of origin was an express contractual term. Therefore, the seller was aware at the time of contract conclusion that a failure to provide the required certification of origin may have financial effects on the buyer, i.e. that buyer would lose the exemption from paying customs and relating charges in Italy.

The arbitral tribunal applied Article 36 (1) and 45 (1)(b) CISG and found that the seller was liable for non-conformity existing at the time of passing of the risk to the buyer because the seller had been aware of the express contractual term on the requirement to provide a certificate of origin as early as the conclusion of the contract, even though the non-conformity became apparent only at a later time.

Based on the above findings and under Article 74 CISG, the arbitral tribunal found that the seller could have foreseen at the time of the contract conclusion that the buyer may suffer damages if the specific certificate of origin is not available to the buyer, and ordered the seller to pay damages to the extent proved by the buyer.

Under Article 78 CISG, the arbitral tribunal ordered the seller to pay interest. In lack of a relating Serbian law, the interest rate was determined by applying *lex mercatoria* and Article 2 (1)(m) of the UNCITRAL Model Law on International Credit Transfers. The tribunal found that the applicable interest rate was the EURIBOR rate, being the short-term lending rate calculated on the basis of the currency involved.