

INTRODUCTION TO LEGAL CASE-SOLVING AND MOOTING

concerning § 5 Exercises in legal case-solving and mootng

Case 3

(facts of the case)

In spring 2013, the Australian company "Australian Coffee Shops" (A) orders a big quantity of "Golden Lotus Coffee" from its main supplier, the "Beijing Global Coffee Trade Company" (B) for a price of 6 USD per kilogram. The coffee is to be delivered on 01/12/2013. According to the sales contract, the deadline has to be met under all circumstances, since the buyer needs the "Golden Lotus Coffee" for a special promotion of a new product series in a huge pre-Christmas campaign in its coffee shops. "Golden Lotus Coffee" is a newly bred high quality coffee, which is grown in China, Vietnam and Laos only and which is not yet strong on the market. B buys it predominantly from Vietnamese suppliers.

In summer 2013, Vietnamese *cà phê sữa* becomes popular all around the world. Customers appreciate in particular the combination of the tasty "Golden Lotus Coffee" and sweet condensed milk. In autumn 2013, nobody wants to drink cappuccino or coffee latte anymore. Consequently, the price of "Golden Lotus Coffee" on the global market rises to 8 USD per kilogram and the Vietnamese suppliers, who produce most of this coffee worldwide, are not able to meet the demand and finally do not fulfill their contract with B.

On 15/11/2013 B informs A about these developments and asks A to agree to a delivery on 01/01/2014 for a price of 8 USD per kilogram. It wants to get the coffee from Chinese producers who sale it for a lower price but can only harvest the coffee in December. A rejects the proposal and reminds B that it needs the coffee in time, for its pre-Christmas campaign. On 20/11/2013 B declares that under the given circumstances, for the time being any delivery is absolutely excluded. As it indeed does not deliver the coffee, on 05/12/2013 A declares the sales contract avoid. Furthermore it informs B that it has bought the urgently needed coffee from another supplier but, with regard to the urgency of the delivery, had to pay a price of 9 USD per kilogram.

Is A entitled to require B to compensate for the additional costs of 3 USD per kilogram caused by the higher price of the cover purchase?

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Case 3
(discussion of the case)

SUBJECTS: How to structure a case solution; introductory and concluding sentences in a case solution; international sales law: right to damages (art. 45(1) lit. b, 74 et seq. CISG); force majeure; avoidance of contract

OUTLINE OF THE CASE SOLUTION:

Since B did not deliver the coffee in time and A needed it urgently for the pre-Christmas campaign in its coffee shops and therefore had to buy it from another supplier, A may be entitled to require B to compensate for the additional costs of 3 USD per kilogram caused by the higher price of the cover purchase under art. 45(1) lit. b, 75 of the United Nations Convention on Contracts for the International Sale of Goods (CISG). A has a right to damages under the CISG if the CISG is applicable in the given case, the contract between A (the buyer) and B (the seller) has been concluded effectively, B has breached a contractual obligation (without contributory cause set by A's act or omission), A suffered damage as a consequence of that breach and B is not exempt from liability under art. 79. This right includes the recovery of the difference between the contract price and the cover purchase price if the contract has been avoided, A has bought goods in replacement in a reasonable manner and within a reasonable time after avoidance and the price for these goods was higher.¹

A. Applicability of the CISG

There can only be a right to damages under the CISG if the Convention is applicable. In the given case, two contracting parties (A and B) with places of business in different CISG contracting states (Australia and China)² concluded a contract of international sale of goods (coffee) outside the sectors excluded under art. 2 CISG and did not exclude in their contract the application of the CISG. So the CISG is directly applicable according to art. 1 (1) lit. a CISG.

B. Effective formation of the international sales contract (cf. art. 14 et seq. CISG)

The buyer can only be entitled to require damages under art. 45(1) lit. b CISG if the international sales contract has been concluded effectively. In the given case, there is no contrary evidence so this has to be assumed.

C. Breach of a contractual obligation of the seller

The buyer is only entitled to claim damages under art. 45(1) lit. b CISG if the seller fails to perform any of his obligations under the contract or the Convention. In the given case, B (the seller) has not delivered the promised "Golden Lotus Coffee" at the date fixed in the contract (01/12/2013) and thus breached its

¹ For the structure of the examination of a right to damages of the buyer under art. 45(1) lit. b, 74 et seq. CISG see Diagram 2, p. 4. The introductory sentence should refer to the problem (B did not deliver the coffee in time and A had to buy it somewhere else urgently), to the legal basis and the requirements of the right to damages (cf. art. 45(1) lit. b) and to the special conditions under which the buyer may recover the difference between contract and cover purchase price as part of the damages (art. 75 CISG).

² See the list of the contracting states at the special UNCITRAL website, www.uncitral.org/uncitral/en/uncitral_texts/sale_goods/1980CISG_status.html.

obligation under art. 30, 33 CISG. Furthermore, on 20/11/2013 it has already declared seriously and ultimately that it will not deliver the goods for the agreed price at the agreed time. A refusal of compliance with the sales contract constitutes a breach of contract too. The announcement to withhold the promised goods, with the purpose to force through a higher price a posteriori, represents such a refusal of compliance.³

D. No causation of the seller's breach of contract by the buyer's act or omission (cf. art. 80 CISG)

In the given case, there are no facts indicating that any act or omission of A might have caused the failure of B to comply with its obligation to deliver the promised goods. In particular A's refusal to accept delivery by 01/01/2014 cannot be considered as such an act or omission, since B was obliged to deliver the coffee by 01/12/2013.

E. Damage suffered by the buyer as a consequence of the seller's breach of contract

The buyer can only claim damages if the seller's breach of contract has caused damage to him. This can be any loss suffered as a consequence of the breach (cf. art. 74 CISG). In the given case, A had to buy the "Golden Lotus Coffee", which it needed urgently for its pre-Christmas campaign but which was not delivered by B, from another supplier on the market for a higher price. Thus it has suffered a financial loss that represents a damage.

F. No exemption of the seller from liability under art. 79 CISG

Under the CISG the right to damages does not presuppose fault on behalf of the other party. However, according to art. 79(1) CISG a party is not liable for a failure to perform an obligation if the failure was due to an impediment beyond his control and he could not reasonably be expected to have taken that impediment into account at the time of the conclusion of the contract or to have avoided or overcome it, or its consequences (so-called *force majeure*). In the given case, B may be exempt from liability under this rule because in summer and autumn 2013, after the conclusion of the sales contract, the Vietnamese *cà phê sữa* suddenly became popular all around the world, even replacing cappuccino and coffee latte in the cafes, thus raising the global demand of "Golden Lotus Coffee" so extremely that the market price rised dramatically and the Vietnamese suppliers of B, who produce most of this coffee worldwide, were not able to meet the demand and finally did not fulfill their contract with B. B had not expected that one day, the public taste would shift globally and millions of committed coffee drinkers on the planet would give up the bad quality European style coffee and change over to the much finer and stronger Vietnamese *cà phê sữa* with its great taste and sophisticated style. There had been the example of the Hanoian beer, which is also much better and finer than the European beer but had not been exported much so far. Furthermore, B had not only committed a breach of contract but was a victim of a breach of contract too. However, if a seller of generic goods has problems with his suppliers, this does not yet constitute a force majeure event. The *seller's responsibility for his suppliers* is part of his *general procurement risk*, unless the contract includes a "delivery-against-supply clause", which limits his procurement risk to the supply received, or the buyer knows in advance about specific risks. The seller cannot object against his liability that his suppliers did not deliver the goods to him - even if this was unforeseeable and in breach of contract. By the way, the seller can overcome such an impediment as long as the goods are still available on the market. If he has to pay a higher price for them, even a much higher price leading to a loss in the deal, this is also part of his procurement risk. There might be a limit where the price has risen so extremely that it would be absolutely unreasonable to uphold the obligation of the seller, but this limit cannot be achieved if the price rises, as in the given case, by not more than 50 per cent. This applies in particular to international trade with a highly speculative character, such as the trade in coffee. So B is not exempt from liability under art. 79(1) CISG.

B is neither exempt from liability under art. 79(2) CISG because his Vietnamese suppliers act on their own account and have not been engaged to perform the contract between B and A, and because neither him nor they are exempt from liability under the conditions formulated in art. 79(1), as required in art. 79(2) lit. a and b CISG.

³ Cf. *Müller-Chen*, in: Schlechtriem/Schwenzer (editors), *Kommentar zum Einheitlichen UN-Kaufrecht - CISG* -, 4th edition 2004, art. 49 no. 6 with further references.

G. Special requirements for the recovery of the difference between contract price and cover purchase price as part of the damages (art. 75 CISG)

Since the CISG is applicable, the sales contract has been concluded effectively between A and B, B has breached its obligation to deliver the promised goods, A has suffered damage from that breach and B is not exempt from liability under art. 79, A is entitled to claim damages from B. However, this right includes the recovery of the difference of 3 USD per kilogram between the contract price and the cover purchase price only if the special requirements in art. 75 CISG are fulfilled:

I. Avoidance of the contract

Art. 74 provides for the recovery of the price difference only if the international sales contract has been avoided. In the given case, A has declared the contract avoid on 05/12/2013. However, the avoidance is only effective if there was a ground of avoidance. In the case of non-delivery, art. 49(1) lit. b CISG allows avoidance if the seller does not deliver the goods within an additional period of time of reasonable length fixed by the buyer in accordance with art. 47(1). A has not fixed such an additional period of time, as proposed by B, but has insisted on delivery on the due date (01/12/2013). So this ground of avoidance is not applicable. However, art. 49(1) lit. a CISG allows avoidance also on the ground of fundamental breach of contract. According to the legal definition in art. 25 CISG, a breach is fundamental if it results in such detriment to the other party as *substantially to deprive him of what he is entitled to expect* under the contract, unless the party in breach did not foresee and a reasonable person would not have foreseen such a result. In the given case, the delivery of the "Golden Lotus Coffee" on time was crucial because A needed the goods urgently for its huge pre-Christmas campaign. Since this campaign was limited to some weeks, every single day was important and this was evident from the contract, which insisted on a delivery on 01/12/2013 "under all circumstances". If A received the goods after Christmas, they were almost useless. Therefore, already the non-delivery of the promised coffee until 05/12/2013, the day when A declared avoidance, deprived A substantially of what it was entitled to expect under the contract. A delivery on 01/01/2014, as proposed by B, would have deprived him almost totally of it. The same applies to B's serious and ultimate refusal of delivery before that day (and for the agreed price). Such a refusal of compliance does not just represent a breach but even a *fundamental* breach of contract in itself.⁴ So B committed a fundamental breach of contract by both the non-delivery of the goods until the day of the declaration of avoidance and the refusal of compliance. The avoidance declared by A is effective.

II. *Purchase of goods in replacement in a reasonable manner within a reasonable time*

A must have bought the goods in replacement in a reasonable manner within a reasonable time. When B did not deliver the promised goods, A bought them without delay and therefore within a reasonable time from another supplier. A bought them also in a reasonable manner, even if it paid the price of 9 USD instead of the current price of 8 USD per kilogram on the market. Since A needed the "Golden Lotus Coffee" urgently in its pre-Christmas campaign, which had already started, immediate delivery was imperative and it was reasonable to pay a slightly higher price than the common market price. So these requirements are met.

III. *Higher price of the goods in replacement*

A must have paid a higher price for the goods in replacement than he would have paid under the sales contract with B. Since he finally had to pay 9 USD instead of the 6 USD per kilogram fixed in the contract with B, this is the case.

The special requirements in art. 75 CISG for the recovery of the difference between the contract price and the cover purchase price as part of the damages are fulfilled.

Conclusion: A is entitled to require B to compensate for the additional costs of 3 USD per kilogram caused by the higher price of the cover purchase under art. 45(1) lit. b, 75 CISG.

(Datei: Case 3 (Case-solving))

⁴ See Müller-Chen (note 3), art. 49 no. 6 with further references.

- A. Applicability of the CISG**
- B. Effective formation of the international sales contract (cf. art. 14 et seq. CISG)**
- C. Breach of a contractual obligation of the seller**
- D. No causation of the seller's breach of contract by the buyer's act or omission (cf. art. 80 CISG)**
- E. Damage suffered by the buyer as a consequence of the seller's breach of contract**
- F. No exemption of the seller from liability under art. 79 CISG**
- G. Special requirements for the recovery of the difference between contract price and cover purchase price as part of the damages (art. 75 CISG)**
 - I. Avoidance of the contract**
 - 1) Declaration of the avoidance**
 - 2) Ground of avoidance**
 - a) Non-delivery within an additional period of time (art. 49(1) lit. b CISG)**
 - b) Fundamental breach of contract (art. 48(1) lit. a CISG)**
 - II. Purchase of goods in replacement in a reasonable manner within a reasonable time**
 - III. Higher price of the goods in replacement**