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(CLOUT)

Contents

INTRODUCTION

This compilation of abstracts forms part of the system for collecting and disseminating information on court decisions and arbitral awards relating to Conventions and Model Laws that emanate from the work of the United Nations Commission on International Trade Law (UNCITRAL). Information about the features of that system and about its use is provided in the User Guide (A/CN.9/SER.C/GUIDE/1). CLOUT documents are available on the website of the UNCITRAL secretariat on the Internet (http://www.un.or.at/uncitral).

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I. CASES RELATING TO THE UNITED NATIONS SALES CONVENTION (CISG)

V.98-51162 (E) (a:\1998\legal.1)

Case 202: CISG 1(1)(a); 8(1); 9(1); 35; 39(1)
France: Court of Appeal of Grenoble (Commercial Division)
13 September 1995
Société française de Factoring international Factor France v. Roger Caiato
Original in French
Published in French: Journal du droit international [1996] 948; UNILEX 48992; CISG-France http://www.jura.uni-sb.de/FB/LS/Witz/130995.htm
Commented on in French: Witz, Journal du droit international [1996] 948; and Pardoël, Revue critique de droit international privé [1996] 666

In October 1992, a French importer, Mr. Caiato, placed two orders with the Italian Company Invernizzi to make deliveries to one of its clients. After receiving the orders, Invernizzi informed Caiato that it was not able to execute the orders unless Caiato obtained the clearance of the Ifitalia company, the manufacturing company to which it had assigned its receivables. On the ground of non-performance of the contract, Caiato refused to pay a number of invoices and terminated business dealings.

The French factoring company, a successive assignee of Ifitalia, brought an action against Caiato before the Commercial Court of Grenoble, which ordered Caiato to pay his disputed debts. Caiato lodged an appeal, invoking a number of debts which he claimed to be owed by Invernizzi.

The Grenoble Court of Appeal applied article 1(1)(a) CISG in order to determine the law applicable, the buyer and the seller being domiciled in different States parties to CISG.

The Court of Appeal found that it was incontestable, given the dealings carried on between the parties for a number of months, that Invernizzi knew that the goods were destined for the French market and that this knowledge obliged it, as provided by article 8(1) CISG, to comply with the marketing regulations in force in France. The Court considered that the failure to mark the composition of the goods on the packaging rendered them non-conforming within the meaning of article 35 CISG. In addition, the Court found that Caiato had observed the "reasonable time-limit" within the meaning of article 39(1) CISG, the buyer's complaint having been made within the month following the delivery. The Court also ruled that Invernizzi had been supplying Caiato for a long time without showing any concern for his solvency and by virtue of article 9 CISG, found Invernizzi liable for abrupt discontinuance of business relations between parties bound by long-standing practices.

Case 203: CISG 1(1)(a); 18(1); 18(2); 18(3); 19(1); 19(2); 35(1); 35(2)(a)
France: Court of Appeal of Paris
13 December 1995
Société Isea industrie SPA et al. v. SA Lu et al.
Original in French
Published in French: Semaine Juridique [1997], Ed. G, II, No. 22772; CISG-France http://www.jura.uni-sb.de/FB/LS/Witz/131295.htm
Commented on in French: de Vareilles-Sommières, Semaine Juridique [1997], Ed. G, II, No. 22772

A French company placed an order with an Italian company for outer wrappings of packets of biscuits. The order form of the French company, which carried on its reverse side a jurisdiction clause in favour of the Commercial Court of Paris, was sent back by the Italian company with its representative's signature. Ten days later, the Italian company confirmed the order, referring to its sales conditions, which included a jurisdiction clause in favour of the Court of Tortona.

Considering the wrappings sold to be defective, the French buyer sued its seller before the Commercial Court of Paris. Having raised a plea asserting lack of jurisdiction, the seller lodged an objection, invoking articles 18 and 19(2) CISG, but the Court of Appeal of Paris ruled to retain its jurisdiction.

In order to determine its jurisdiction, the Court of Appeal of Paris found that CISG was applicable since the sales contract had been concluded between two contracting parties with their places of business in two different States parties to CISG (article 1(1)(a)).

The Court noted that, in conformity with article 18(2) CISG, the contract had been formed at the moment the French company received the order form. It considered, however, that in the absence of an explicit reference on the front side of the form to the sales conditions indicated on the reverse side, the seller could not be deemed to have accepted those conditions. The Court of Appeal of Paris likewise rejected the applicability of the general sales conditions of the Italian company on the ground that the confirmation of the order, which was subsequent to the formation of the contract, was to be interpreted as a counter-offer within the meaning of article 19(1) CISG and was rendered absolutely inapplicable by the lack of acceptance by the buyer.

Referring to articles 35(1) and 35(2)(a) CISG, the Court concluded that these provisions linked the delivery and conformity of the goods with their use in such a way that the corresponding obligations were performed or were to be performed in the same place. The Court consequently found that, since the goods had been delivered on the premises of the French company located in Lorient, the dispute came under the jurisdiction of the Commercial Court of Lorient.

Case 204: CISG 1(1)(a); 35(2)(a); 36(1)
France: Court of Appeal of Grenoble (Commercial Division)
15 May 1996
Société Thermo King v. Société Cigna France et al.
Original in French
Published in French: CISG-France http://www.jura.uni-sb.de/FB/LS/Witz/150596.htm
Commented on in French: Witz, Recueil Dalloz [1997] 27ème Cahier, Sommaires commentés, 221

The company Sorhofroid, a franchised import dealer of the American company Thermo King, sold to the company Frappa a refrigeration unit, which was subsequently resold to the company Transports Norbert Dentressangle. The latter loaded goods to be delivered to the company Système U, which refused them because they had thawed.

Having before it an appeal lodged by the company Thermo King against the ruling of the Commercial Court, whereby liability for the damage due to thawing had been shared between Thermo King and Transports Norbert Dentressangle, the Court of Appeal allowed the action brought directly by the sub-purchaser against the initial seller.

The applicable-law clause in the contract (Minnesota law) and the arbitration clause contained in the initial contract between Thermo King and Sorhofroid, both of which clauses had been invoked by Thermo King, were found by the Court to be inapplicable to the sub-purchaser, which was not party to the initial contract. The Court ruled, moreover, that only the franchise contract and not sales made in application of that contract should be subject to the Minnesota law chosen by the parties. In addition, the Court stressed that CISG was applicable, unless otherwise agreed, to sales concluded after 1 January 1988 between a seller and a buyer with their places of business in the United States and France, respectively. The Court found that the sub-purchaser could base his action against the American seller on CISG, since the seller had issued a contractual guarantee in favour of the end-user.

The Court found articles 35(2)(a) and 36 CISG to be applicable with regard to the defects of the refrigeration unit, noting that the unit had broken down within a short period of time after it was first operated and that it was up to the seller, presumed liable, to prove that it was not responsible for the defect. Notwithstanding any more precise determination of the defect, the early breakdown established the Court's finding of lack of conformity and its assigning of full liability to Thermo King.

Case 205: CISG 1(1)(b); 57(1)
France: Court of Appeal of Grenoble (Commercial Division)
23 October 1996
SCEA des Beauches v. Société Teso Ten Elsen GmbH & CoKG
Original in French
Published in French: Revue critique de droit international privé [1997] 756; CISG-France http://www.jura.uni-sb.de/FB/LS/Witz/231096.htm
Commented on in French: Sinay-Cytermann, Revue critique de droit international privé [1997] 762

In May 1990, a French company ordered equipment and plant from a German company. The latter confirmed the order on the basis of its general terms indicated on the reverse side of the order form. After delivery and payment of the price, the French company demanded restitution of part of the price paid, because it considered that the amounts paid exceed the invoiced amount.

Its demand for reimbursement having been refused, the French company brought an action against its seller before Valence Commercial Court. Following dismissal of the action, it lodged an appeal before the Court of Appeal of Grenoble.

The Court of Appeal dismissed the jurisdiction clause on the ground that it had not been drawn up within the meaning of Article 17 of the Brussels Convention. The Court of Appeal ruled on the question of applicable law and sought to ascertain whether the French court could be deemed competent under article 5(1) of the Brussels Convention, which provided for special jurisdiction in contractual matters in favour of the court of the place where the obligation giving rise to the action had been or was to be performed. In order to determine this place, the Court of Appeal of Grenoble stated that jurisdictional competence must be assessed in the light of the provisions of the Vienna Convention, applicable in the case in point by virtue of Article 1(1)(b) CISG, French law being indicated by the provisions of private international law (Hague Convention of 15 June 1955 on the Law applicable to International Sales of Goods, art. 3(2)).

The Court of Appeal stated that the Vienna Convention established the place of payment of the price as the seller's place of business (art. 57(1)); and that the usual interpretation of this provision was that it expressed the general principle that payment should be made at the place of domicile of the creditor. The Court therefore concluded that the Valence Court was competent by combined application of CISG and article 5(1) of the Brussels Convention.

Case 206: CISG 6; 35(2)(a)
France: Court of Cassation (Commercial Division)
17 December 1996
Société Céramique culinaire de France v. Société Musgrave Ltd.
Original in French: Recueil Dalloz [1997] 337; Revue critique de droit international privé [1997] 72; CISG-France http://www.jura.uni-sb.de/FB/LS/Witz/171296.htm
Commented on in French: Witz, Recueil Dalloz [1997] 337; and Rémery, Revue critique de droit international privé [1997] 72

The seller, a company with its place of business in France, concluded in 1991 a contract with an Irish buyer for the sale of ceramic ovenware. The contract contained an applicable-law clause in favour of French law. Several months after the delivery, the Irish company informed the seller that the ovenware was insufficiently ovenproof. After unsuccessfully seeking an amicable agreement, the Irish buyer brought an action against the French company to avoid the sales contract for breach of the obligation to deliver goods in conformity with the contract, and claimed damages.

Following dismissal of its action by the Court of First Instance of Strasbourg, the seller lodged an appeal invoking CISG. The Court of Appeal of Colmar, however, rejected the applicability of CISG on the ground that, while the sales contract was indeed international in character, it must nonetheless be subject to French law, which had been expressly chosen by the parties for settling any dispute concerning them, and not to the Vienna Convention, as invoked by the Irish company. The Court noted that, as far as applicable law was concerned, the said Convention was waivable at the will of the parties, as expressly indicated in its article 6. Situating itself, in its reasons, in the context of the guarantee provided by French domestic law against hidden defects, and, in its operative words, in that of breach of the obligation to deliver, the Court of Appeal ordered the sale to be avoided.

When an appeal was brought against this judgement by the seller, the Court of Cassation quashed the decision delivered by the Colmar court on the sole ground that it lacked a sufficient legal basis in the light of French national law, there having been no criticism by the appellant of the non-application of CISG by the Court of Appeal. The Court of Cassation nevertheless expressed reservations regarding the dismissal of CISG by the lower court.

Moreover, referring to article 35(2)(a) CISG, the Court of Cassation considered that, while the unfitness of the sold article for its intended use represented a lack of conformity to the contract within the general meaning given to those terms by the provisions of the Vienna Convention, it now constituted, following the rejection of that convention's applicability, the hidden defect referred to in article 1641 of the Civil Code and was distinct from the failure on the part of the seller to comply with its obligation to deliver goods in conformity with those agreed.

Case 207: CISG 31
France: Court of Cassation (1st Civil Division)
2 December 1997
Société Mode jeune diffusion v. Société Maglificio il Falco di Tiziana Goti e Fabio Goti et al.
Original in French
Published in French: CISG-France http://www.jura.uni-sb.de/FB/LS/Witz/021297.htm

The seller, a company with its place of business in Italy, delivered goods to a French buyer in 1992. The buyer's order form contained a jurisdiction clause in favour of the Commercial Court of Roubaix-Tourcoing in France. However, the invoices sent by the Italian company to the French party to the contract referred to the jurisdiction of the Commercial Court of Prato in Italy.

Considering the goods to be defective, the French buyer sued the Italian company before the Commercial Court of Roubaix-Tourcoing. The Italian seller raised an objection that the Italian, not the French, court had jurisdiction. When the Court allowed the objection to jurisdiction, the French buyer lodged an appeal.

The Court of Appeal of Douaí then determined jurisdiction according to the place of performance of the seller's obligation to deliver as the obligation on which the claim was based within the meaning of article 5(1) of the Brussels Convention. The Court considered that, the sale being governed by CISG, the place of delivery was in Italy, this being the place where the goods were handed over to the first transporter for delivery to the buyer, in conformity with article 31 CISG.

The French seller brought an appeal against this ruling. The Court of Cassation rejected the appeal on the ground that it considered that the Court of Appeal had justified its decision from the legal point of view by finding that the place of performance of the seller's obligation to deliver was in Italy, the place where the goods were handed over to the buyer, this place being further indicated by correct application of article 31 CISG.

II. ADDITIONAL INFORMATION

Case 123 (A/CN.9/SER.C/ABSTRACTS/9)
Commented on in French: Witz, Recueil Dalloz [1997] 27ème Cahier, Sommaires commentés, 217

Case 138 (A/CN.9/SER.C/ABSTRACTS/10)
Commented on in French: Papandréou-Deterville, Recueil Dalloz [1997] 28ème Cahier, Sommaires commentés, 226

Case 171 (A/CN.9/SER.C/ABSTRACTS/12)
Commented on in French: Spiegel, Recueil Dalloz [1997] 27ème Cahier, Sommaires commentés, 218

Corrigendum

(A/CN.9/SER.C/ABSTRACTS/14)

Case 191
The entry "Commented on in French by Rosch in Recueil Dalloz, 27e Cahier, Sommaires commentés 225 [1997]" *should read* "Commented on in French by Rosch in Recueil Dalloz, 28ème Cahier, Sommaires commentés 225 [1997]"

Case 194
The entry "Commented on in French by Witz in Recueil Dalloz, 27e Cahier, Sommaires commentés 224 [1997]" *should read* "Commented on in French by Witz in Recueil Dalloz, 28ème Cahier, Sommaires commentés 224 [1997]"

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