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Contents

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INTRODUCTION

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CASES RELATING TO THE UNITED NATIONS CONVENTION ON CONTRACTS FOR THE INTERNATIONAL SALE OF GOODS (CISG)

Case 886: CISG 1(1)(b); 64(1)(b); 74; 77; 81
Switzerland: Handelsgericht des Kantons St. Gallen (Commercial Court of the Canton of St. Gallen); HG.1999.82-HGK
3 December 2002
Original in German
Published in German: CISG-online.ch, No. 727
English translation: http://cisgw3.law.pace.edu/cases/021203s1.html
Abstract in German: Swiss Review of International and European Law (SRIEL) 1/2003, p. 104; Internationales Handelsrecht (IHR) 4/2003
http://www.globalsaleslaw.com/content/api/cisg/urteile/727.htm

Abstract prepared by Thomas M. Mayer

The plaintiff, based in Tel Aviv, ordered a textile manufacturing machine from the defendant, a Swiss limited company, and made an advance payment to the defendant. The plaintiff subsequently became insolvent and could not meet further instalment payments. The defendant fixed a time limit for the plaintiff to effect settlement. The defendant then declined to execute the contract and claimed damages on the ground of non-performance. The plaintiff, having gone into liquidation, sought restitution of its advance payment of US$ 380,000. The defendant acknowledged its indebtedness for that amount but asserted a set-off claim for damages of approximately 1.5 million Swiss francs.

On the basis of article 1 (1) (b), the court applied the Vienna Convention since the law of one contracting State (Swiss law in the present case) had been chosen by the parties. In its determination of the case, the court based its finding on avoidance of the contract in accordance with article 64 (1) (b) CISG and on the existence of a reciprocal obligation to cease performance, in accordance with article 81 CISG, giving rise to a claim to restitution of the sale price in favour of the plaintiff. On the basis of domestic law, the court acknowledged that a set-off against any claims for damages was, in principle, admissible.

The court determined the question of the defendant's claim for damages in accordance with article 74 CISG, setting a maximum limit equal to the loss of revenue arising from loss of the sale price, less the amount of the reductions in charges arising from non-delivery and the amount that the defendant could have obtained from other disposal or use of the equipment (article 77 CISG). The court also acknowledged a right to compensation for the loss resulting from additional expenses incurred for transport, containers, storage and disassembly as well as for the loss on exchange caused by the increase in the value of the United States dollar since the time of the advance payment. However, the court declined to determine the specific amount of damages, merely stating that, in any case, they would exceed the plaintiff's claim.

Case 887: CISG 1(1)(b); 6; 25; 49(1)(a); [74]
Switzerland: Appellationsgericht des Kantons Basel-Stadt (Court of Appeal of the Canton of Basel-Stadt); 33/2002/SAS/so
22 August 2003
Original in German
Published in German: CISG-online.ch, No. 943
English translation: http://cisgw3.law.pace.edu/cases/030822s1.html
Abstract in German: Swiss Review of International and European Law (SRIEL) 1/2005, p. 125; Internationales Handelsrecht (IHR) 3/2005, p. 117 ff.
http://www.globalsaleslaw.com/content/api/cisg/urteile/943.pdf

Abstract prepared by Thomas M. Mayer

A Swiss company bought food-shaper products for making vegetarian escalopes from a Belgian supplier with a view to their exclusive resale to a producer company. It subsequently terminated the contract since the goods contained, contrary to a contractual warranty, genetically modified organisms (GMOs), and sought damages before the lower court.

The Court of Appeal of the Canton of Basel-Stadt, ruling on the dispute as the higher court, held that the CISG was applicable in accordance with its article 1 (1) (b). It did not view the choice of Swiss law by the parties as excluding the application of the CISG within the meaning of article 6. Any such exclusion would have had to be expressly agreed.

The court reaffirmed the existence of a fundamental breach of contract within the meaning of article 25 CISG. It concluded that the buyer had the right to declare the contract avoided in accordance with article 49 (1) (a) CISG and was entitled to claim damages. In spite of the contractual warranty concerning the absence of GMOs, a clause in the contract limiting the seller's liability for product defects to the total invoiced value was deemed admissible within the meaning of article 6 CISG.

The seller objected that only samples of the goods had been taken, which did not prove that all the goods were defective. The court did not uphold that objection, ruling that the buyer had the right to terminate the contract in its entirety and that the buyer's claim for damages should be determined on that basis.

Case 888: CISG [4; 7(2); 53]; 74; [78]
Switzerland: Kantonsgericht Schaffhausen (Cantonal Court of Schaffhausen); 12/2002/108
20 October 2003
Original in German
Published in German: CISG-online.ch, No. 957
Abstract in English: http://cisgw3.law.pace.edu/cases/031020s1.html
Abstract in German: Internationales Handelsrecht (IHR) 5/2005, p. 206 ff.
http://www.globalsaleslaw.com/content/api/cisg/urteile/957.pdf

Abstract prepared by Thomas M. Mayer

The plaintiff, whose place of business was in Germany, supplied food film wrap for household use to the Swiss defendant. Subsequently, the plaintiff sued for payment

of the sale price. The defendant pleaded a right of set-off on the ground of late delivery.

The court examined the question of admissibility of set-off in principle in the light of the law determined by Swiss private international law, i.e. the law governing the debt to be met. However, since the court did not acknowledge the set-off claims asserted, it left that question outstanding.

The court considered that the existence of a claim for damages due to late delivery based on article 74 CISG was not sufficiently demonstrated. A further set-off claim asserted by the defendant concerned the infringement of an agreement that guaranteed the defendant the exclusive right to supply certain customers. The court concluded that the CISG was not applicable to that agreement and that the claim thus asserted should be examined in the light of applicable national law (German law in the present case). The court also examined in the light of applicable national law a set-off claim based on an unlawful act.

Finally, the court ruled on the question of the amount of interest on arrears, also in the light of applicable national law.

Case 889: CISG [4]; 7(1); 8;[9(1)]; 25; [29(1); 59; 74]
Switzerland: Handelsgericht des Kantons Zürich (Commercial Court of the Canton of Zurich), HG010395/U/zs
24 October 2003
Original in German
Published in German: CISG-online.ch, No. 857
English translation: http://cisgw3.law.pace.edu/cases/031024s1.html
Abstract in German: Internationales Handelsrecht (IHR) 3/2005, p. 117 ff.
http://www.globalsaleslaw.com/content/api/cisg/urteile/857.pdf

Abstract prepared by Thomas M. Mayer

Under a business relationship of several years' standing, the Italian plaintiff supplied mattresses to the Swiss defendant. A dispute which had arisen over the goods supplied was the subject, in December 2000, of an accommodation agreement concerning the defendant's payment of its arrears and the plaintiff's guarantee obligation. As a result of that agreement, the defendant paid part of its arrears. With regard to the outstanding balance, the defendant maintained that its obligation had been extinguished as the plaintiff had refused to take back the defective mattresses. The plaintiff then claimed that amount before the competent court. As to the defective mattresses, the plaintiff stated that it was not liable for the defects in them but that they were attributable to harmful handling by the defendant or its customers, and that, in a conciliatory gesture, it had even supplied new mattresses, without any acknowledgment of liability on its part.

The court examined the agreement concluded between the parties in the light of the CISG, interpreting it in accordance with its article 8. On the basis of the contents of the agreement and the custom and practice between the parties, the court concluded that the plaintiff's guarantee obligation included a duty not only to supply new mattresses free from defects but also to take back the defective mattresses. The court nevertheless rejected the applicability of one clause of the agreement, according to which a delay by the seller in exchanging defective goods would cause any unsettled instalment payments to be forfeited. On the basis of the criteria set out

in article 25 CISG, the plaintiff had in effect honoured its essential obligations since the non-performance related solely to a minor and ancillary duty. The principle of good faith as established in article 7 (1) CISG did not allow the defendant to rely on the aforementioned clause. However, the defendant was justified in refusing to pay the outstanding balance until the defective mattresses had been taken back by the plaintiff.

A counterclaim by the defendant seeking damages for the replacement of defective mattresses supplied to its customers between 1997 and 2002 was rejected. The court interpreted a settlement clause in the agreement as meaning that it excluded any claims for damages. Also, the defendant, despite an order by the court, did not sufficiently demonstrate its loss.

Case 890: CISG 1(1)(a); [3(2)]; 8; [35]; 57(1); 79(2)
Switzerland: Tribunale d'appello del Cantone Ticino (Court of Appeal of the Canton of Ticino), 12.2002.181
29 October 2003
Original in Italian
Published in Italian: CISG-online.ch, No. 912; www.unilex.info/case.cfm?pid=1&do=case&id=986&step=FullText
English translation: http://cisgw3.law.pace.edu/cases/031029s1.html
Abstract in English: www.unilex.info/case.cfm?pid=1&do=case&id=986&step=Abstract
http://www.globalsaleslaw.com/content/api/cisg/urteile/912.pdf

Abstract prepared by Thomas M. Mayer

The dispute in question involved the sale of movable partitions by an Italian supplier to a company whose head office was in Switzerland. The seller sued for payment of the outstanding balance on the sale price before the lower court, which ruled in its favour on the principle. The buyer lodged an appeal against that decision.

The Court of Appeal of the Canton of Ticino, ruling on the dispute as the higher court, held the CISG to be applicable in accordance with its article 1 (1) (a), since the two parties had their places of business in different contracting States. The court observed, however, that the defects cited by the buyer were due not to the quality of the partitions but to their installation. In accordance with article 79 (2) CISG, the seller was liable only if the two persons in charge of the installation were acting at its request. According to the court, the burden of proof lay with the buyer. The court concluded that no such proof had been provided and ordered the buyer to pay the price.

Pursuant to article 57 (1) (a) CISG, the seller's place of business was taken as the place of performance of the payment. The indication of a bank account by the seller did not change the place of performance but merely entitled the buyer to discharge its debt by effecting settlement to that account. Payments made to the aforementioned two persons, whom, according to the principles set forth in article 8 CISG, the buyer had the right to regard as representatives of the seller, had to be allocated to the latter against the sale price before the indication of the aforesaid account.

Case 891: CISG [7(2)]; 35(1); 35(2) (a) and (b)
Switzerland: Federal Court; 4C.245/2003
13 January 2004
Original in French
Published in French: www.bger.ch/fr/index/juridiction/jurisdiction-inherit-template/jurisdiction-recht/jurisdiction-recht-urteile2000.htm; Cisg-online.ch, No. 838; www.unilex.info/case.cfm?pid=1&do=case&id=978&step=FullText; http://cisgw3.law.pace.edu/cases/040113s1.html;
Abstract in English: www.unilex.info/case.cfm?pid=1&do=case&id=978&step=Abstract
http://www.globalsaleslaw.com/content/api/cisg/urteile/838.pdf

Abstract prepared by Etienne Henry

The buyer's Geneva branch ordered Menthol USP Brand large crystals from a company whose head office was in Germany. The goods were stored in Rotterdam in a warehouse. An analysis carried out by the warehouse laboratory showed that the size of the menthol crystals varied from 0.4 to 4 cms. The buyer complained about what it regarded as a defect and requested that the goods be replaced. The seller rejected the claim, stating that the crystals were of standard quality, and offered to take back the goods. The buyer did not settle the invoice.

The seller brought proceedings before the lower court of Geneva. That court ruled in favour of the plaintiff and ordered the buyer to pay to the plaintiff the sum indicated on the invoice plus annual interest at 5 per cent. The Court of Justice upheld the lower court judgement. The buyer appealed against that decision to the Federal Court, which rejected the appeal.

The Federal Court recalled that, under the terms of article 35 (1) CISG, the seller had to deliver goods which were of the quantity, quality and description specified in the contract. Under the terms of article 35 (2) (a) and (b) CISG, the goods would not meet those requirements unless they were "fit for the purposes for which goods of the same description would ordinarily be used" or "fit for any particular purpose expressly or impliedly made known to the seller at the time of the conclusion of the contract". The burden of proving a fact lay with the party seeking to infer a right therefrom. In the context of article 35 (1) and (2), it fell to the seller to prove the conformity of the goods as long as the buyer had not accepted them. The buyer had to prove that a particular purpose relating to the goods had been expressly or impliedly made known to the seller at the time of conclusion of the contract.

It was pointed out that the seller supplied crystals of only one standard quality and that goods of that type ordinarily suited its customers. Also, the buyer did not provide any proof as to what it actually understood by "large crystals". Since there was no objective definition of the term "large crystals" appearing in the order, it was necessary to apply the principle of trust in order to determine how the term was to be understood by the seller. No facts allowed the inference that the seller had to understand that the term used implied a particular requirement within the meaning of article 35 (2) (b).

Case 892: CISG [7(2); 25; 26]; 35; 38; 39; 46(3); 47(2); 49(1)(a); 49(2)(b)(ii); 74; 81; 84(1)

Switzerland: Kantonsgericht Schaffhausen (Cantonal Court of Schaffhausen); 11/1999/99

27 January 2004

Original in German

Published in German: CISG-online.ch, No. 960

English translation: http://cisgw3.law.pace.edu/cases/040127s1.html

Abstract in German: Swiss Review of International and European Law (SRIEL) 1/2005, p. 122 f.

http://www.globalsaleslaw.com/content/api/cisg/urteile/960.pdf

Abstract prepared by Thomas M. Mayer

The judgement in question contained a detailed preamble on the extent of the obligation to examine goods and give notice to the seller of any non-conformity, in accordance with articles 38 and 39 CISG. The case, which was brought before the competent court in conformity with article 17 of the Lugano Convention, concerned the sale, by the defendant domiciled in Germany, of scale model locomotives to a buyer whose place of business was in the canton of Schaffhausen. At the time of delivery of a sample model and, subsequently, of a prototype prior to mass production, the buyer had reported significant defects and, in the opinion of the court, was not only justified in undertaking an in-depth examination of the goods upon delivery but also had an obligation to do so (to report defects). Taking into account the considerable time necessary for such an examination (from 75 to 150 hours), the court considered that notification of the defects within three weeks of receipt of the goods had taken place in a timely manner.

The court held that the goods disputed by the plaintiff did not in fact conform with the contract, within the meaning of article 35 CISG. The defects were sufficiently significant to represent a fundamental breach of contract within the meaning of article 25 CISG. Under the terms of article 49 (1) (a) CISG the plaintiff was in principle permitted to declare the contract avoided. However, the plaintiff first had to await the expiration of the period of time fixed by it for the defects to be remedied (articles 49 (2) (b) (ii) and 47 (2) CISG). The conditions laid down in article 46 (3) CISG had been fulfilled in the present case.

The plaintiff had fixed several additional periods of time. The last communication had been accompanied by the threat of cancellation of the contract in the event of non-performance, which the court deemed admissible.

The defendant was ordered to reimburse the sale price against restitution of the delivered goods by the buyer. Pursuant to article 84 (1) CISG, the defendant also had to pay interest on arrears. The amount of interest was to be fixed in accordance with the applicable law as determined by Swiss private international law, in the present case German law.

In compensation for the loss sustained by the plaintiff by reason of the shipment and customs clearance of the goods, its advertising costs and certain expenses incurred by it even prior to conclusion of the contract, the court also granted the plaintiff damages pursuant to articles 81 and 74 CISG. In that respect, it explained that compensation could be requested for the entire loss sustained, hence for the loss arising from cancellation of the contract itself as well as for the loss resulting from

subsequent re-performance. That also covered expenses needlessly incurred through cancellation of the contract.

Case 893: CISG 74; 78; 79; 79(1)
Switzerland: Amtsgericht Willisau (District Court of Willisau); 10 01 5
12 March 2004
Original in German
Published in German: CISG-online.ch; No. 961
English translation: http://cisgw3.law.pace.edu/cases/040312s1.html
Abstract in German: Swiss Review of International and European Law (SRIEL) 1/2005, p. 124 f.
http://www.globalsaleslaw.com/content/api/cisg/urteile/961.pdf

Abstract prepared by Thomas M. Mayer

The judgement in question contained a preamble on the obligation to pay interest on arrears in accordance with article 78 CISG and on exemption from liability within the meaning of article 79 CISG. If a party failed to pay the sale price or any other sum overdue, the other party was entitled to interest on it. The obligation to pay interest on arrears was not subject to any conditions other than expiry of the payment due date and delay. The debtor was not able to plead an exemption within the meaning of article 79 CISG.

In the present case, the Swiss buyer of a consignment of wood delayed payment of the sale price because of uncertainty as to who was entitled to receive the sale price. The plaintiff and a third person stated that they were the assignees of the sum owed to the seller domiciled in Germany. The court did not view that as an impediment to the discharge of the buyer's obligation to pay interest on arrears as from the payment due date. However, the defendant was exempt from payment of damages on the basis of article 79 (1) CISG.

The court acknowledged that the lawyer's costs borne by the plaintiff in order to recover the debt constituted a loss within the meaning of article 74 CISG. Account was taken of the requirement of foreseeability as set out in the second sentence of that article.

Case 894: CISG 7(2); 35; 45; 50
Switzerland: Federal Court; 4C.144/2004
7 July 2004
Original in German
Published in German:
www.bger.ch/fr/index/juridiction/jurisdiction-inherit-template/jurisdiction-recht/jurisdiction-recht-urteile2000.htm
http://jumpcgi.bger.ch/cgi-bin/JumpCGI?id=20.12.2006_4C.314/2006
www.polyreg.ch/d/informationen/bgeunpubliziert/Jahr_2004/Entscheide_4C_2004/4C.144__2004.html; www.cisg-online.ch, No. 848; www.unilex.info/case.cfm?pid=1&do=case&id=991&step=FullText;
Published in English: http://cisgw3.law.pace.edu/cases/040707s1.html
Abstract in German: Internationales Handelsrecht (6/2004), p. 252 s.
English translation: http://cisgw3.law.pace.edu/cases/040707s1.html; www.unilex.info/case.cfm?pid=1&do=case&id=991&step=Abstract
http://www.globalsaleslaw.com/content/api/cisg/urteile/848.pdf

Abstract prepared by Thomas M. Mayer

The Federal Court referred here to rules for the administration of proof as set forth in a previous judgement, dated 13 November 2003, based on the general principles of the CISG (article 7 (2)). The court again reaffirmed that a buyer who accepted goods without reservation and took possession of them had to prove their defective nature inasmuch as it inferred rights therefrom.

In the case ruled on, a Swiss buyer received a consignment of pipes and cables in 30 packages from a Milanese company. Without checking the quantity, the buyer's warehouse manager confirmed, on the delivery documents, the receipt of the goods, which had been packed on pallets and in drums. Three days later, the buyer examined the goods and found that part of the order was missing. The seller maintained that the entire order had been delivered. The court concluded that, in the circumstances indicated, it fell to the buyer to prove that the consignment was incomplete and it referred the case to the lower court for investigation.

The court observed that the buyer had paid in full for the disputed consignment and invoked a right to claim set-off, on the basis of unjust enrichment, against payment of the sale price of a subsequent order. The question of the existence of any such right was determined not in accordance with the CISG but in accordance with the law designated by Swiss private international law. The same applied to the question of admissibility of the set-off.