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Contents

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Introduction

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Each CLOUT issue includes a table of contents on the first page that lists the full citations to each case contained in this set of abstracts, along with the individual articles of each text which are interpreted or referred to by the Court or arbitral tribunal. The Internet address (URL) of the full text of the decisions in their original language is included, along with Internet addresses of translations in official United Nations language(s), where available, in the heading to each case (please note that references to websites other than official United Nations websites do not constitute an endorsement of that website by the United Nations or by UNCITRAL; furthermore, websites change frequently; all Internet addresses contained in this document are functional as of the date of submission of this document). Abstracts on cases interpreting the UNCITRAL Model Arbitration Law include keyword references which are consistent with those contained in the Thesaurus on the UNCITRAL Model Law on International Commercial Arbitration, prepared by the UNCITRAL Secretariat in consultation with National Correspondents. Abstracts on cases interpreting the UNCITRAL Model Law on Cross-Border Insolvency also include keyword references. The abstracts are searchable on the database available through the UNCITRAL website by reference to all key identifying features, i.e. country, legislative text, CLOUT case number, CLOUT issue number, decision date or a combination of any of these.

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Cases relating to the United Nations Convention on Contracts for the International Sale of Goods (CISG)

Case 1501: CISG 74
France: Court of Cassation, Commercial Division
Appeal Nos. 12-29550, 13-18956 and 13-20230
Dupiré Invicta industrie v. Gabo
17 February 2015
Original in French
Published in French: Légifrance: www.legifrance.gouv.fr; CISG-France Database: www.cisg-france.org No. 239

Abstract prepared by Claude Witz, National Correspondent, and Caroline Cohen

A company based in France committed itself to providing, over a period of several years, heating appliances to a company based in Poland, which marketed them in Poland and Slovakia. Citing an increase in the cost of raw materials, the seller refused to supply the appliances at the agreed prices.

The Court of Cassation was called upon to rule on several appeals filed against the judgement of the Court of Appeal of Reims ruling in the second instance.

In a first appeal (13-20230), the French company/seller criticized the Court of Appeal for having failed to recognize that it was in a situation of hardship. In the view of the French company, the Court of Appeal had not sought to ascertain whether the significant rise in the cost of raw materials exceeded the normal risks of increase assumed by the seller, and, in so doing, it had violated articles 1131 and 1134 of the French Civil Code, as well as article 6.2 of the Unidroit Principles.

The Court of Cassation dismissed the appeal, as the trial judges had deemed that a situation having fundamentally altered the equilibrium of the contract, liable to constitute a case of hardship, had not been established. In so doing, the Court of Cassation did not provide any response as to the admissibility of hardship under the Convention.

In a second appeal (12-29550), the Polish company inter alia contested the Court of Appeal's judgement for having rejected its application for compensation for damage suffered on account of the seller's refusal to honour orders following the rise in the cost of raw materials. The Court of Appeal had deemed that it was not possible, from the documentation prepared by the Polish company in support of the damage it had suffered, to conclude either the certainty of the existence and extent of the damage, or the foreseeability of the damage as required by article 74 of the Convention.

The Court of Cassation upheld the plea. It deemed that, in so ruling, without so much as a summary analysis of the documentation submitted to it, the Court of Appeal had failed to meet the requirements of article 455 of the French Code of Civil Procedure, according to which a judgement must be furnished with reasons.

Case 1502: CISG 19(3)
France: Court of Cassation, Commercial Division
Appeal No. 12-27188
X. v. LGDG
27 May 2014
Original in French
Published in French: Légifrance: www.legifrance.gouv.fr; CISG-France Database: www.cisg-france.org. No. 143
Commentary: JCP G 2014, p. 977, Chronique Droit du commerce international, No. 4, obs. Cyril Nourissat

Abstract prepared by Claude Witz, National Correspondent, and Caroline Cohen

In its judgement, the Court of Cassation dismissed the appeal against the judgement of the Court of Appeal of Rennes in the Franco-Belgian dispute over the sale of granite paving stones (CA Rennes, 9 May 2012, CLOUT, case No. 1511).

The sole focus of the Court of Cassation's judgement concerned article 19(3) of the Convention, according to which "[a]dditional or different terms relating, among other things, to the price, payment, quality and quantity of the goods, place and time of delivery, extent of one party's liability to the other or the settlement of disputes are considered to alter the terms of the offer materially".

The appellant had criticized the Court of Appeal of Rennes for having accepted that the sales contract had been formed, whereas the response of the consignee of the offer differed on the quantity of the paving stones proposed by the offeror. In so doing, the Court of Appeal had, in the appellant's view, breached article 19(3) of the Convention.

The Court of Cassation recalled the findings and evaluations of the trial judges. It went on to state that "in the light of those findings and evaluations, from which it emerges that evidence rebutting the rebuttable presumption of article 19(3) of the Convention had been provided, the Court of Appeal [...] legally justified its decision".

Thus, the Court of Cassation adopted the prevailing view that the presumption established in article 19(3) of the Convention is rebuttable.

Case 1503: CISG 35; 79(1)
France: Court of Appeal of Lyon
General Register No. 11/08237
M. v. E.
27 March 2014
Original in French
Published in French: CISG-France Database: www.cisg-france.org, No. 222
Commentary: D. 2015, Panorama Droit uniforme de la vente internationale de marchandises, p. 881, partic. 893, obs. Claude Witz

Abstract prepared by Claude Witz, National Correspondent, and Aurélie Swiderek

A French company sold used railway sleepers from the south of France to a Belgian company. The sale gave rise to a dispute between the parties owing to missing

quantities and the poor quality of goods delivered. The Court of Appeal of Lyon ruled mainly in favour of the buyer.

The seller claimed that it had been the victim of a theft of the missing sleepers. The Court of Appeal rejected the plea of article 79 of the Convention. On the one hand, theft had not been established. On the other hand, supposing that the theft had taken place, the late discovery thereof would have established negligence on the part of the seller as regards supervision of the goods, such that the failure to deliver the goods in full "c[ould] not be attributed to an impediment that was beyond its control, which was not proved and that, in any case, was not such that the seller could not reasonably have been expected to have taken the impediment into account at the time of the conclusion of the contract, or that it could have avoided it or overcome the consequences of it" (article 79(1) of the Convention).

The Court also held that the goods delivered were not of the quality required by the contract (article 35 of the Convention).

It may be said that the Court failed to apply the Convention in respect of avoidance of contract. On the one hand, it failed to verify the existence of a fundamental breach. On the other hand, it declared the contract avoided, as if that remedy were a judicial sanction.

Case 1504: CISG 25; 26; 49(2)(b)(i); 82(1)
France: Court of Appeal of Douai
General Register No. 11/08248
Getec v. Bystronic
6 February 2014
Original in French
Published in French: CISG-France Database: www.cisg-france.org, No. 221
Commentary: D. 2015, Panorama Droit uniforme de la vente internationale de marchandises, p. 881, partic. 893, obs. Claude Witz
Editor's comment: See, in the same case the previous CLOUT case No. 1512 (Court of Cassation, France, 8 November 2011)

Abstract prepared by Claude Witz, National Correspondent, and Aurélie Swiderek

The judgement of the Court of Cassation of 8 November 2011 was referred to the Court of Appeal of Douai.

The primary focus of the judgement was to rule on the duration of the reasonable period of time in which avoidance must be declared, in the event of a breach committed by the seller other than the late delivery of goods (article 49(2)(b)(i) of the Convention).

The Court of Appeal of Douai deemed that the period of time in which avoidance had been declared was reasonable.

It began by stating that "it was accepted in case law that a period of two years was reasonable [sic]". Then it deemed that, in the case in question, the period of thirteen months, which was less than the period of two years, seemed reasonable, taking into account the buyer's legitimate attempt to protect the contract and the usefulness of the machinery for its continued business activity.

The Court verified the substantive conditions for avoidance, recalled the requirement under article 25 of the Convention of a fundamental breach, considered the various malfunctions of the machines, noted that the buyer was continuing to use the machines and that it was impossible to attribute to the seller all the faults that had appeared, and referred to article 82(1) of the Convention and the 8 November 2011 judgement of the Court of Cassation, which, in its view, "clearly reminded that the impossibility for the buyer of making restitution of the machinery substantially in the condition in which it received same after six years' use caused it to lose the right to declare the contract avoided".

The Court dismissed the plaintiff's "application for avoidance of contract", reasoning thus in terms of judicial avoidance, whereas under the Convention avoidance is implemented by means of a declaration made by notice (article 26 of the Convention).

Case 1505: CISG 25; 49
France: Court of Cassation, Commercial Division
Appeal No. 12-23998
Socinter v. Wallace
17 December 2013
Original in French
Published in French: Légifrance: www.legifrance.gouv.fr; CISG-France Database: www.cisg-france.org, No. 142
Commentary: D. 2015, Panorama Droit uniforme de la vente internationale de marchandises, p. 881, partic. 892, obs. Claude Witz; JCP E 2014, 1211 and JCP G 2014, 256, Chronique Droit du commerce international, No. 4, obs. Cyril Nourissat; RTD com. 2014, 451, Chronique Droit du commerce international, No. 1, obs. Philippe Delebecque

Abstract prepared by Claude Witz, National Correspondent, and Caroline Cohen

A company based in France ordered several tons of vacuum-packed refrigerated fresh lamb from a company based in New Zealand. The goods were transferred by sea and land in three containers.

In its appeal, the seller criticized the Court of Appeal of Paris for finding the sale of goods in one of the containers avoided, while only two boxes of meat out of nine hundred and twenty-eight were erroneously labelled as regards the use by date, and of having thereby deprived its decision of a legal basis under articles 25 and 49 of the Convention.

In dismissing the plea, the Court of Cassation relied principally on the findings of the trial judges. The erroneous labelling of two boxes of meat had revealed uncertainties and inconsistencies regarding the production and use by dates, resulting in the seizure of 600 kg of meat by the veterinary services and the rejection of all the goods, without the seller being able to demonstrate that the erroneous labelling did not affect all the boxes from the container.

The Court of Cassation concluded therefrom that "in the light of those findings and assessments, establishing that the [New Zealand] company had committed a fundamental breach of the contract justifying its avoidance […], the Court of Appeal had legally justified its decision".

Case 1506: CISG 25; 33; 34; 49
France: Court of Appeal of Nancy
General Register No. 20/03154
O. v. P.
6 November 2013
Original in French
Published in French: CISG-France Database: www.cisg-france.org, No. 123
Commentary: D. 2015, Panorama Droit uniforme de la vente internationale de marchandises, p. 881, partic. 887 and 893, obs. Claude Witz

Abstract prepared by Claude Witz, National Correspondent, and Aurélie Swiderek

Company P. based in France sold to company O. based in the Netherlands a forestry tractor intended to be sold on to company V. Company O. made numerous transformations and adaptations of the tractor owing to the use that company V. intended to make of the tractor.

Company V. encountered various technical problems. It avoided the contract with company O., which in turn decided to avoid its sales contract with company P.

Having failed to secure the return of the purchase price, O. brought proceedings against P. for a declaration of avoidance of contract and claimed damages from P.

The Court of Appeal of Nancy deemed that the Convention was applicable. It referred to articles 33, 34, 49 and 25 of the Convention, which it considered be the main provisions applicable in the case. It averred that, according to established case law, it was incumbent on the buyer and not the seller to provide evidence of a lack of conformity in the case of unconditional acceptance of goods.

The Court upheld the decision of the Commercial Court of Nancy, which had rejected company O.'s application for declaration of unilateral avoidance as well as its application for compensation for damage. The Court noted that company O. had failed to provide any evidence that the modifications it had made to the tractor had been approved by company P. or that it had made such modifications in accordance with good practice. Regarding compensation for damage, the Court stated that mere claims of damage were not proof in themselves, appearing to base its decision on French domestic law.

Case 1507: CISG 7; 39(2)
France: Court of Appeal of Colmar
General Register No. 1 A 11/03748
Mr. K. v. W., M., K. and G.
6 November 2013
Original in French
Published in French: CISG-France Database: www.cisg-france.org, No. 217
Commentary: D. 2015, Panorama Droit uniforme de la vente internationale de marchandises, p. 881, partic. 885, obs. Claude Witz

Abstract prepared by Claude Witz, National Correspondent, and Aurélie Swiderek

A company based in France carried out paving work for a French manufacturer. Faced with proceedings under article 1792 of the French Civil Code regarding its liability as builder, the company called on the German paving stones supplier as

guarantor. The German supplier claimed that the action was time-barred under the German Civil Code.

The Court of Appeal of Colmar stated that "the invoked provisions of article 39(2) of the Convention do not define the time limit after which an action may not be brought but only the time limit for giving notice of the lack of conformity" and relied to that effect on a judgement of the Court of Cassation (see CLOUT case No. 1027 [Court of Cassation, France, 3 February 2009]).

The Court then referred to article 7 of the Convention and applied the rules of private international law, in this case the Hague Convention on the Law Applicable to International Sales of Goods of 15 June 1955, which then led it to German law.

The Court applied article 477 of the German Civil Code and declared the proceedings brought by the buyer of the paving stones to be time-barred.

Case 1508: CISG 35; 38; 39; 40
France: Court of Appeal of Bordeaux
General Register No. 12/01065
C. v. W.
12 September 2013
Original in French
Published in French: CISG-France Database: www.cisg-france.org, No. 216
Commentary: D. 2015, Panorama Droit uniforme de la vente internationale de marchandises, p. 881, partic. 884, obs. Claude Witz

Abstract prepared by Claude Witz, National Correspondent, and Aurélie Swiderek

An Italian company sold to a French company tile coverings, which it had itself manufactured. The French company resold them to private individuals. As the covering presented defects, the French company called on the Italian seller as guarantor within the framework of the dispute between it — the French company — and the end buyers.

The Court of Appeal of Bordeaux declared the Convention to be applicable, the two parties having their places of business in two different States parties to the Convention. It recalled that, under article 35 of the Convention, the seller must deliver goods which are of the quality and description required by the contract and that goods do not conform with the contract unless they are fit for the purposes for which goods of the same description would ordinarily be used. The Court underscored that, according to the expert's report, the goods were not fit for the normal use for which such goods were intended, as the enamel coating of the tiles was not sufficiently thick.

The buyer gave notice of the defects more than two years after delivery. Therefore, the buyer lost its rights to rely on a lack of conformity (article 39). However, under article 40, the seller is not entitled to rely on the provisions of articles 38 and 39 if the lack of conformity relates to facts of which it knew or could not have been unaware and which it did not disclose to the buyer. The Court noted that the contract provided for laboratory testing prior to delivery and that the seller refused to furnish the court expert with the test results. The Court considered that the fact that the seller had not made available to the expert the results of the tests and trials, the

conduct of which the seller did not dispute was mandatory, and had not provided any explanation of its failure to do so, necessarily led to the assumption that the results of those tests and trials were unfavourable and that therefore the seller had been aware, at the time of delivery of the goods, of the alleged lack of conformity. The Court concluded therefore that the conditions of application of article 40 had been met.

The seller also claimed that the buyer's action was time-barred under the Italian Civil Code, which subjected the buyer's action to enforce the guarantee to a limitation period of one year from delivery. Surprisingly, the Court of Appeal nevertheless declared the action admissible as, in its view, only pleas of non-admissibility provided for by the Convention could be made by the parties. As the buyer had not lost the right to rely on a lack of conformity under article 39, the Court of Appeal declared that its action was admissible. The Court of Appeal thus confused the period for giving notice of lacks of conformity with the limitation period for the buyer to bring legal proceedings against the seller.

Decision 1509: CISG 49
France: Court of Cassation, Commercial Division
Appeal No. 11-26971
Stella v. Reichenbacher Hamuel GmbH
26 March 2013
Original in French
Published in French: Légifrance: www.legifrance.gouv.fr; CISG-France Database: www.cisg-france.org, No. 124
Commentaries: D. 2013, Panorama Droit uniforme de la vente internationale de marchandises, p. 2874, partic. 2883, obs. Claude Witz; IHR 3/2014, Der neueste Beitrag der französischen Gerichte zur Auslegung des CISG (2012-July 2013), p. 89, partic. 91, obs. Claude Witz and Ben Köhler

Abstract prepared by Claude Witz, National Correspondent, Camille Jacquet and Aurélie Swiderek

A company based in France ordered a numerically controlled machining centre for the manufacture of staircases from a company based in Germany. After the machine suffered malfunctions, the company attempted to have the contract avoided and to have the German seller ordered to pay damages.

The Court of Appeal of Agen ruled against its request for avoidance of the contract and compensation for harm suffered, at which point the company filed an appeal with the Court of Cassation.

The appellant first criticized the Court of Appeal for having violated article 49 of the Convention in assuming the equipment was in conformity despite numerous breakdowns.

The Court of Cassation dismissed this part of the plea. It relied on the findings of the Court of Appeal, according to which the buyer, "who has the burden of proof", did not provide "any contrary technical opinion", and that "none of the documents produced are able to establish that the machine sold did not conform with its intended use." The assertion that the buyer has the burden of proof comes from the Court of Appeal, although that Court did not decide whether the principle emanated

from French domestic law, as a procedural law, or from the Convention. The Court of Cassation likewise left this question unresolved.

The appellant also criticized the trial judges for having violated article 1315 of the French Civil Code pertaining to the burden of proof in refusing to acknowledge that the seller had not met its obligation to advise even though it was incumbent on the seller to establish that it had performed this obligation. The Court of Cassation dismissed this part of the plea as well, without any reference to the Convention, ruling that "the Court of Appeal did not reverse the burden of proof when it held that [the seller] had not failed to meet its obligation to advise, as [the buyer] did not provide evidence that the machine sold was unable to fulfil the purpose for which it was intended and sold". In other words, there cannot be any violation of an obligation to advise in relation to the conformity of goods, if evidence of their lack of conformity is not provided.

The Court of Cassation's reasoning in this instance did not resolve the interesting question of whether the seller may be bound, under the Convention, to an obligation to advise the buyer.

Decision 1510: CISG 39(2)
France: Court of Cassation, Commercial Division
Appeal No. 11-14588
SMEG v. Rothelec
27 November 2012
Original in French
Published in French: Légifrance: www.legifrance.gouv.fr; CISG-France Database: www.cisg-france.org, No. 139
Commentaries: D. 2013, Panorama Droit uniforme de la vente internationale de marchandises, p. 2874, partic. 2884, obs. Claude Witz; JCP G 2013, p. 387 and JCP E 2013, p. 30, Chronique Droit du commerce international, No. 2, obs. Cyril Nourissat; RTD com 2013, p. 385, Chronique Droit du commerce international, obs. Philippe Delebecque; IHR 3/2014, Der neueste Beitrag der französischen Gerichte zur Auslegung des CISG (2012-July 2013), p. 89, partic. 91, obs. Claude Witz and Ben Köhler

Abstract prepared by Claude Witz, National Correspondent, and Aurélie Swiderek

A company based in France purchased induction cooktops from a manufacturer based in Italy, by means of various contracts staggered over the course of two years. Certain deliveries proved to be defective.

The Court of Appeal of Colmar, ruling in the second instance, declared that the buyer had lost the right to rely on a lack of conformity stemming from a technical failure common to several successive deliveries, on the basis of article 39(2) of the Convention pertaining to the two-year time limit.

In its appeal to the Court of Cassation, the buyer criticized the Court of Appeal for having failed to address the argument that the cooktops, which had been delivered successively, all suffered from the same technical failure, and therefore the period mentioned in article 39(2) of the Convention should have begun as of the first deliveries. Furthermore, the buyer argued that it fell to the seller company to prove that no notice of lack of conformity had been given within the

two-year period starting from the date the goods were delivered, which assumed that evidence of the successive delivery dates had been provided.

The Court of Cassation dismissed the appeal. According to the Court of Cassation, the Court of Appeal had legally justified its decision by stating that "the period mentioned in article 39(2) of the Convention begins as of the date on which the goods were actually handed over to the buyer, which assumes that the date of each sale is known precisely" and that "it is not possible to refer to the deliveries as a whole over the course of the years under consideration".

In addition to upholding the judgement of the Court of Appeal, the Court of Cassation also upheld the Court of Appeal's finding that the buyer company "had the burden of proving that it had given notice of the lack of conformity within the period" required, by providing evidence "of the various dates on which it had actually taken delivery of each contested cooktop". However, neither the Court of Appeal nor the Court of Cassation specified whether the question regarding the burden of proof emanated from the Convention or from domestic procedural law.

The judgement of the Court of Appeal of Colmar was nonetheless criticized for lack of legal basis in its refusal to apply a provision of the French Commercial Code punishing the abrupt termination of established contractual relations (article L.442-6-1-5°).

Decision 1511: CISG 19; 74; 78
France: Court of Appeal of Rennes
General Register No. 08/02374
SA H. v. SA G.
9 May 2012
Original in French
Published in French: CISG-France Database: www.cisg-france.org, No. 237

Abstract prepared by Claude Witz, National Correspondent, and Caroline Cohen

A company based in Belgium had ordered granite paving stones from a company based in France that produced and processed granite. The French company brought proceedings before the Commercial Court of Rennes against the seller for breach of contract, in particular for invoicing a quantity of paving stones that was not commensurate with the specified surface area; the company also refused to pay the outstanding amount due under the contract.

The Court of Appeal of Rennes applied the Convention after emphasizing that it constituted "French substantive law for international sales" and that "French judges are required to apply it, subject to its exclusion, even if tacit, under article 6 of the Convention starting from the moment the parties submit themselves to a different legal regime". Responding to an objection from the French company, the Court added that the reference to a jurisdiction clause had no bearing on which law was to be applied by the designated court. Moreover, according to the documents provided, neither party had expressed any desire to submit themselves to French law on non-international sales when making or accepting the order.

The facts underlying the dispute led the Court of Appeal to apply article 19 of the Convention. The Belgian company had made a purchase order for paving stones

indicating a specific number of paving stones based on the surface area to be covered, followed by a response from the French company indicating a slightly higher number of paving stones. The Belgian company had refused to pay for the additional paving stones delivered. The Court ruled that, on the basis of article 19(2) of the Convention, the response from the French company was not of such a nature as to materially alter the terms of the offer from the Belgium company, which had not reported the differences. Therefore, the price due was the price of the paving stones delivered.

Another aspect of the dispute had to do with interest on the unpaid price, compound interest and any potential additional damages. To address these questions, the Court of Appeal referred to articles 78 and 74 of the Convention. Regarding interest on arrears, the French company had invoked its General Conditions for Sale, which set an interest rate of 1.5 per cent per month following formal demand of performance. The Court of Appeal held that the parties had incorporated the General Conditions for Sale into the scope of the contract, as, upon receipt of the invoices following delivery of the paving stones, the Belgian company had made no comment, and was therefore deemed to have tacitly accepted the clause. However, according to the Court, the seller could not invoke article 1154 of the French Civil Code pertaining to compound interest, as it had failed to incorporate this provision into its General Conditions. Finally, the seller had made a claim to compensation in the amount of 10 per cent of the balance of the unpaid invoices, on the grounds that the interest on arrears did not compensate for the entirety of the harm suffered. The Court of Appeal dismissed this claim, as the seller had not demonstrated any loss suffered or profit lost following the delay in payment.

The judgement was appealed at the Court of Cassation, but the appeal was dismissed (Court of Cassation, Commercial Division, 27 May 2014, CLOUT case No. 1502).

Decision 1512: CISG 80
France: Court of Cassation, Commercial Division
Appeal No. 10-24691
Getec v. Bystronic
8 November 2011
Original in French
Published in French: Légifrance: www.legifrance.gouv.fr; CISG-France Database: www.cisg-france.org. No. 124
Commentaries: D. 2012, Panorama Droit uniforme de la vente internationale de marchandises, p. 1144, partic. 1156, obs. Claude Witz
Editor’s comment: See, in the same case, the judgement of the Court of Appeal to which the case was referred: Court of Appeal of Douai, 6 February 2014

Abstract prepared by Claude Witz, National Correspondent, and Aurélie Swiderek

The plaintiff company had ordered from the respondent company two press breaks, which presented malfunctions. It had then concluded agreements with the same company providing for new sales and compensation of mutual debts between the parties. Arguing that these agreements had not been honoured, it filed a claim with the competent Commercial Court to obtain, inter alia, avoidance of the sales in

contention, while the respondent company requested that the defendant be ordered to pay it damages.

In a judgement rendered on 20 May 2010, the Court of Appeal of Douai ruled against the plaintiff company's action for avoidance of sales, on the grounds that, although the documents produced in court demonstrated that the press breaks had experienced malfunctions of varying significance starting on 1 January 2005, the plaintiff had never notified the respondent company of its intention to have the contract avoided prior to its summons dated 16 March 2007. The Court of Appeal found the eighteen-month delay to be unreasonable.

In its appeal to the Court of Cassation, the plaintiff company asserted that it emerged from the conclusions of both parties that it had issued a writ dated 28 December 2006, summoning the respondent company to court in order to seek avoidance of the sales. The Court of Cassation found this argument to be legitimate, and consequently quashed the judgement of the Court of Appeal of Douai for misapprehending the terms of the dispute in violation of article 4 of the French Code of Civil Procedure.

In a cross-appeal, the respondent company criticized the Court of Appeal for having relied solely on one piece of evidence provided by the plaintiff in order to determine the amount of damages due, which, according to the respondent, constituted a violation of the principle according to which no one may create evidence in their own favour. The respondent company also criticized the Court for failing to address one of its arguments, based on article 80 of the Convention, in which it asserted that the great majority of malfunctions were due to improper use of the press breaks.

The Court of Cassation rejected this cross-appeal, without referring to the Convention. It ruled that the Court of Appeal was exercising its sovereign authority to evaluate evidence when it took into consideration the document produced by the plaintiff company in order to evaluate the harm it had suffered. According to the Court of Cassation, the Court of Appeal had also emphasized in its findings that the majority of the malfunctions, particularly the start-up problems and the malfunctions for which the seller company had fulfilled its obligation to provide assistance to the buyer company, could not be attributed to any improper use of the press breaks.

Decision 1513: CISG 6
France: Court of Cassation, Commercial Division
Appeal No. 09-70305
Cybernetix v. CD Systems
13 September 2011
Original in French
Published in French: Légifrance: www.legifrance.gouv.fr CISG-France Database: www.cisg-france.org No. 125
Commentaries: D. 2012, Panorama Droit uniforme de la vente internationale de marchandises, p. 1144, partic. 1147, obs. Claude Witz; D. 2012, Panorama Droit international privé, p. 1228, partic. 1232, obs. Hélène Gaudemet-Tallon and Fabienne Jault-Seseke; JCP E 2011, No. 1899, obs. Laurent Leveneur Contrats, conc. consom. 2011, comm. 254, obs. Laurent Leveneur; Petites affiches,

10 February 2012, No. 30, p. 9, note Chantal Granier; Rev. crit. DIP 2012, p. 88, note Horatia Muir Watt

Abstract prepared by Claude Witz, National Correspondent, and Caroline Cohen

A Colombian company and a company based in France concluded a sales contract for the purpose of establishing a production chain for contactless smart cards. Following the Colombian company's refusal to accept the goods delivered, the French seller attempted to obtain payment of the balance of the sale price, along with various expenses.

In a judgement rendered on 7 May 2009, the Court of Appeal of Aix-en-Provence ruled that the Convention was not applicable to the dispute. In article 17 of the "Appendix" to the sales contract, the parties had expressly chosen to subject their contractual relations to the laws of France. Consequently, the Court of Appeal concluded that the parties had wanted their disputes to be resolved under French domestic contract law. As the application of the Convention had thus been excluded in accordance with article 6 of the Convention itself, the Court of Appeal ruled that the Colombian company was responsible for avoiding the contract.

This ruling was quashed by the Court of Cassation, which cited the Court of Appeal's failure to apply the Convention. The Court of Cassation found that the Colombian company had not placed the settlement of its dispute with the French company under French domestic sales law, but under French substantive law as provided by the Convention, which lays down a uniform law for international sales of goods. By ruling otherwise, the Court of Appeal had violated article 6 of the Convention.

Decision 1514: CISG 25; 45; 49; 49(1)(a) 49(2)(b)(i) 82; 82(2)(c)
France: Court of Appeal of Bordeaux
Tonnellerie Ludonnaise v. Anthon
27 June 2011
Original in French
Published in French: Légifrance: www.legifrance.gouv.fr; CISG-France Database: www.cisg-france.org, No. 136
Commentaries: D. 2013, Panorama Droit uniforme de la vente internationale de marchandises, p. 2874, partic. 2885, obs. Claude Witz; IHR 3/2014, Der neueste Beitrag der französischen Gerichte zur Auslegung des CISG (2012-July 2013), 89-132, partic. 91, obs. Claude Witz and Ben Köhler
Editor's comment: See, in the same case, CLOUT case No. 1510 [Court of Cassation, France, 27 November 2012]; CLOUT case No. 1025 [Court of Cassation, France, 3 November 2009] and the judgement of the Court of Appeal of Bordeaux, France, 15 October 2007

Abstract prepared by Claude Witz, National Correspondent, and Aurélie Swiderek

A French company concluded a leasing contract in order to finance a machine that had been delivered to it on 5 May 2000. On that date, the company gave notice of defects in the equipment and summoned the German seller to court on 11 December 2001, seeking to have the sale avoided and receive damages as compensation for the harm suffered.

The case was referred to the Court of Appeal of Bordeaux by the Court of Cassation following a drawn-out process (See the aforementioned decisions).

The German seller presented an extended series of arguments before the Court of Appeal of Bordeaux. It alleged that the plaintiff company had lost the right to declare the contract avoided, as it was impossible for it to make restitution of the goods substantially in the condition in which it had received them (article 82 of the Convention). Even if avoidance were possible, the conditions for avoidance had not been fulfilled, as the buyer was not substantially deprived of what it was entitled to expect under the contract (article 49 of the Convention). Indeed, it was found that the machine in contention had been able to operate and that the plaintiff, who had initially taken out leasing, had exercised its purchase option in September 2005. Finally, the respondent argued that the plaintiff had forfeited the right to declare the contract avoided, as it had not done so within a reasonable time (article 49 of the Convention).

The Court of Appeal did not address whether there had been a fundamental breach of contract, a requirement for accepting avoidance (articles 49(1)(a) and 25 of the Convention), and simply mentioned the requirement that the avoidance be declared within a reasonable time (article 49(2)(b)(i)), noting merely that the buyer had given notice of the lack of conformity in time (5 May 2000, the day the machine was received) and had summoned the seller to court on 11 December 2001.

The Court found against the plaintiff company solely on the basis of article 82 of the Convention, ruling that “the fact that [the plaintiff] had purchased the machine upon expiration of the leasing contract and used it for nearly six years despite knowing about its deficiencies, and insofar as such use had certainly aggravated these deficiencies and impaired the machine further, as noted by the court expert M.B., warrants that it be deprived of its right to declare the contract avoided as defined in article 45 of the Convention, pursuant to the provisions of article 82(2)(c) of that same document.”