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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 835: CISG 71
France: Court of Cassation – Commercial Division, Appeal No. D 04-17752; Judgement No. 356 FS-P+B
Société Mim … v. Société YSLP
20 February 2007
Original in French
Available on CISG-France: http://www.cisg-france.org/decisions/200207.htm;
Légifrance: http://www.legifrance.gouv.fr
Abstract prepared by Claude Witz, National Correspondent, and Mathieu Richard

The case concerned a French company A, the seller, and a Venezuelan company B, the buyer. The former had granted the latter exclusive distribution of its products in Venezuelan territory under a contract dated 10 January 1991, which, originally valid for a period of two years and subject to implied renewal, provided that the parties could terminate it by giving notice of six months, subsequently reduced to three months under a codicil dated 5 June 1993. The seller alleged that the buyer was guilty of a number of breaches of its contractual obligations and, on 28 June 2002, notified it of the non-renewal of the contract as of 31 December 2002. The buyer, pleading the sudden and wrongful breach of commercial relations, sued the seller for damages.

The case was dismissed by the Versailles Court of Appeal on 19 February 2004 and application was made to the Court of Cassation for judicial review.

The plaintiff's application for judicial review was based on three arguments.

First, the buyer criticized the Appeal Court's ruling dismissing his claim of damages for harm caused by company A when it suspended supplies. In the first part of his argument, the plaintiff maintained that article 4 CISG did not apply to an obligation to supply under a framework distribution contract. In the plaintiff's view, the contract in question should be subject to the Convention on the Law Applicable to Contractual Obligations (Rome Convention), of 19 June 1980, which provides, in article 4, paragraphs 1 and 2, that the applicable law is that of the person owing the obligation to supply, namely, in this case, French law, since the licensor was based in France. French law, however, admits the defence of non-performance only if it is completed, under article 1184 of the Civil Code. On that basis, the Appeal Court ruling that the supplier was justified in refusing to supply the buyer after 8 March 2002, once it was established that the licensee had paid for all deliveries to date, was an error in law based on a mistaken interpretation of CISG article 71 and a failure to apply article 4, paragraphs 1 and 2, of the Rome Convention of 19 June 1980 or article 1184 of the Civil Code.

The second part of the plea criticized the Appeal Court for having applied CISG article 71, although the fears regarding the buyer's creditworthiness could not, under the article, be invoked until they had become apparent after the conclusion of the sale, whereas in fact they had already existed before the orders were suspended, in other words at the time that the sales contract was concluded.

The Court of Cassation dismissed the first part of the plea. In response to the first argument, the Court said that it would follow CISG, in view of the fact that the Appeal Court had stated that the parties had agreed to be subject to French law and that consequently CISG, which had been ratified by France, was applicable to the sales contracts between the French seller and the Venezuelan buyer, the parties not having agreed otherwise. The Court of Cassation upheld the Appeal Court's decision to consider the failures cited in the performance of the sales contracts in the light of provisions of CISG, which was applicable, even though such performance occurred in application of a framework contract of exclusive distribution that was not itself subject to the Convention.

With regard to the second argument, the Court of Cassation noted that the Appeal Court, while fully appreciating the elements of proof laid before it, had acknowledged that the seller had legitimate fears concerning the buyer's creditworthiness, in view of the fact that the buyer had habitually, since 1995, been behind with its payments. There could well be fears, therefore, of new difficulties with payment if the seller renewed deliveries without any guarantee, even though, on 8 March 2002, the buyer was, for the first time for a long time, up to date with its payments. Moreover, the buyer belonged to a group that was heavily indebted to the seller, which gave rise to serious doubts about its creditworthiness. Furthermore, the plaintiff had not cited in its appeal the fact that the seller had unilaterally set the deadline for payment, so the Appeal Court had not been required to look further into that matter.

The Court of Cassation did not consider the merits of the claim concerning the application of CISG article 71. It held that neither the pleading nor the ruling indicated that the buyer had argued before the court that fears concerning the buyer's creditworthiness could justify the suspension of deliveries in accordance with CISG article 71 only once the risk had become apparent after the conclusion of the sale. It was therefore a new argument, which included points of fact and law.

The Court of Cassation dismissed the argument relating to the dismissal of the application for damages pursuant to a mistake committed by the French company in terminating the distribution contract. Its response to this argument, which related to French domestic law, had no bearing on CISG.

The Appeal Court's ruling was, nonetheless, annulled, since the Court of Cassation accepted the merits of one argument that also related to French domestic law. The Appeal Court had dismissed the application for damages for harm caused by the licensee as a result of the non-performance of the licensor in ensuring the exclusiveness of the licence that it had granted the licensee after a dishonest distributor that had breached that exclusiveness had been identified. The Appeal Court had held that it was for the licensee to take such action as it deemed appropriate against the dishonest distributor. The Court of Cassation held that, in its ruling, the Appeal Court had erred in law in its interpretation of articles 1134 and 1135 of the Civil Code, since it was for the supplier to ensure the exclusiveness of the licence.

Case 836: CISG 4
France: Court of Cassation – Commercial Division, Appeal No. U 05-13.538; Judgement No. 283 F-D
Société D …, SARL v. Société S …
13 February 2007
Original in French
Available on CISG-France: http//www.cisg-france.org/decisions/130207.htm;
Légifrance: http://www.legifrance.gouv.fr
Abstract prepared by Claude Witz, National Correspondent, and Mathieu Richard

The case concerned a French buyer, the company D, and an American seller company S, and related to computer components supplied between May 1997 and December 1998 that had turned out to be defective. In February 1999, the buyer retained the services of an expert and the Bobigny Commercial Court ordered the seller to pay the buyer damages. The Paris Appeal Court set aside that decision in its judgement of 25 February 2005, ruling that the buyer's claims were inadmissible, in view of the time limitation clauses on the guarantee and exemption from responsibility, and that the clauses were valid under CISG.

The Court of Cassation annulled this ruling, since it was in breach of CISG article 4. The Court recalled that CISG governed only the formulation of a sales contract and the rights and obligations of the seller and the buyer arising out of such a contract; CISG was not concerned with the validity of a contract or of any of its provisions.

Case 837: CISG 1 (1) (b); 6; 35; 36; 37; 38; 39; 40
France: Court of Cassation – First Civil Division, Appeal No. U 99-12879; Judgement No. 1388 FS-P+B+I
Société HP, SA v. Société C, SA, Société FA, SA, NCC
25 October 2005
Original in French
Available in *Bulletin civil* 2005, I, No. 381;
CISG-France: http://www.cisg-france.org/decisions/251005.htm;
Légifrance: http://www.legifrance.gouv.fr; *Revue Lamy Droit civil* 2005, No. 22, p. 8, No. 898, obs. Cécile Le Gallou; *Revue des contrats*, 2006, No. 2, p. 515 et seq., obs. Pascale Deumier; *Actualité Juridique* (Dalloz 2005), p. 2872, obs. E. Chevrier; *Revue critique de droit international privé*, 2006, p. 373 et seq., note by Dominique Bureau; *Revue trimestrielle de droit commercial*, 2006, p. 249, obs. Philippe Delebecque; ibid., p. 468, obs. Bouloc; *Revue trimestrielle de droit civil*, 2006, p. 268 et seq., obs. Pauline Remy-Corlay; *Droit et Patrimoine*, Dec. 2006 (private international inheritance law), pp. 74-84, particularly pp. 78-79, obs. Maria-Élodie Ancel; *Panorama, Droit uniforme de la vente internationale de marchandises* (Dalloz 2007), p. 530, particularly pp. 532 and 539, obs. Claude Witz.
Abstract prepared by Noora Janahi, Isabelle Laydi, Marine Godefroy and Frank Miranda.

This case related to the tacit exclusion of the application of CISG by the parties, in accordance with article 6 of the Convention. The Portuguese company H, manufacturer of weedkiller products, sold its products to the French company F. The latter sold on 80,000 litres of weedkiller to the Tunisian company N, from which, in turn, they were bought by the French company C.

The weedkiller products exhibited a hidden defect attributable to the manufacturer.

The companies N and C sued the companies F and H on the basis of article 1641 et seq. of the French Civil Code.

On 28 January 1999, the Rennes Appeal Court ordered the latter two companies, jointly and separately, to pay sums in varying amounts to the plaintiffs, company H being held to be the guarantor of company F.

Company H contested the ruling on the grounds that, since the case involved an international sale, the Appeal Court should have automatically applied CISG articles 35-40, which related to the conformity of goods sold.

The question to be established was whether the parties had excluded the application of CISG, as they were entitled to do under article 6 of the Convention, and whether they had thereby intended to act in accordance with French domestic sales law.

The Court of Cassation ruled that the parties, which had invoked and discussed without reservation the regime of the guarantee of goods sold, as set out in the French Civil Code, which constituted domestic sales law, had, in so doing, with full knowledge of the international nature of the sale, decided tacitly to exclude the application of CISG. They were enabled to do so by virtue of article 6 of the Convention itself.

The Court of Cassation therefore dismissed the appeal by company H, which had contested the non-application of CISG, and ordered it to pay costs.

Case 838: CISG 38; 39; 40
France: Court of Cassation – First Civil Division, Appeal No. N 02-15.981; Judgement No. 1303 FS-P+B
Société ISF v. Société E, SA, Société Riv., SARL, Société A, SA, Société MB, SA, Société Rel., SARL
4 October 2005
Original in French
Available in *Bulletin civil* 2005, I, No. 360; CISG-France: http://www.cisg-france.org/decisions/041005.htm; Légifrance: http://www.legifrance.gouv.fr; *Panorama, Droit uniforme de la vente internationale de marchandises* (Dalloz 2007), p. 530, particularly pp. 532 and 539, obs. Claude Witz; *Revue trimestrielle de droit civil*, 2006, p. 272 et seq., obs. Remy-Corlay; *Revue trimestrielle de droit commercial*, 2006, p. 250, obs. Delebecque.
Abstract prepared by Claude Witz, National Correspondent, and Mathieu Richard

Between 1988 and 1990, the French company R, which subsequently became company E, a retailer, acting through an intermediary, company Rel., put in four orders for clutch shafts from their manufacturer, the Italian company ISF. The third batch was not accompanied by a summary analysis of the metal used, as provided for by the contract, but company R did not express any concern in that regard. In January 1992, the company MB, which had bought some of the shafts from the retailer (company R), pointed out some damage and had an analysis done. The results were inconsistent and it was only at the end of 1992 that the Italian manufacturer (company ISF) was advised of the non-conformity of the metal. Company MB, which thus stood in the relation of sub-purchaser to the Italian

manufacturer, lodged an appeal for a technical expert assessment and this was ordered under an interim relief order of 22 April 1994. The Italian manufacturer, which had been issued with a writ dated 31 March 1994 and given notice to attend meetings, did not participate in the technical assessment. In the light of the expert's conclusions, the sub-purchaser (company MB) applied for damages for harm from the retailer (company E) and its insurer, company A, which issued warranty proceedings against the intermediary seller (company Rel.) and the Italian manufacturer.

The Lyon Appeal Court ruled, in a judgement of 16 November 2000, that the expert assessment carried out under the interim relief order of 22 April 1994 was enforceable against the manufacturer (company ISF) and ordered it to indemnify the retailer (company E) and its insurer (company A) for their convictions and to pay damages to the retailer (company E). The manufacturer (company ISF) applied for judicial review.

One of the claims made in the plea was that the Lyon Appeal Court had, in applying CISG article 40, wrongly concluded, merely on the basis of the fact that the original vendor was also the producer or manufacturer, that the vendor should have known about the defect affecting the composition of the metal, without ascertaining what grounds the retailer or the insurer had for maintaining that the manufacturer had or could not fail to have knowledge of the defect. The Court of Cassation dismissed this argument, recalling that the Appeal Court judgement had noted, first, that the Italian manufacturer had not, when supplying the third batch, provided the buyer (company E) with a certificate of analysis of the composition of the metal, as specified in the order; secondly, that some of the steel supplied on that occasion contained too much carbon and did not meet the technical specifications of the order; and, thirdly, that the defect was attributable to a mixture of materials during the casting of the metal. The Court of Cassation held that the Appeal Court had correctly concluded from these facts that the manufacturer, which, as producer, could not be ignorant of the defect but had, on the contrary deliberately concealed it from the buyer by not providing a certificate of analysis relating to the composition of the metal, could not claim that the buyer was not entitled to bring proceedings concerning the non-conformity of the goods. The Court of Cassation thus held that the Appeal Court had legally justified its decision with regard to CISG articles 39 and 40.

The Italian manufacturer had also maintained in its plea that the purchaser of the shafts had omitted to examine the goods, in breach of CISG article 38. The Court of Cassation dismissed this argument, noting that CISG applied to international contracts for the sale of goods and governed only the rights and obligations arising out of such contracts between a vendor and a buyer. The argument, which was based, in the absence of the verification required under CISG article 38 of the composition of the metal, on a breach of warranty by the sub-purchaser, who was not party to the international sales contract, was therefore invalid.

Case 839: CISG 2; 3; 7; 8; 30; 74; 77; 79
France: Court of Cassation – First Civil Division, Appeal No. Y 01-15964; Judgement No. 1136 FS-P
Société B … v. Société R … AG
30 June 2004
Original in French
Available in *Bulletin civil*, 2004, I, No. 192;
http://www.cisg-france.org/decisions/041005.htm;
Légifrance: http://www.legifrance.gouv.fr; *Revue trimestrielle de droit civil*, 2004, pp. 845-849, particularly p. 847, obs. Philippe Delebecque; www.dalloz.fr, under Actualité, obs. E. Chevrier; obs. Isabelle Rueda, in Chronique "Droit International et Européen" (Juris Classeur Périodique, Edition Générale), 2005, I, 110, p. 208; *Revue des contrats*, 2005, p. 456, note Pascale Deumier; "Sources internationales", *Revue trimestrielle de droit civil*, 2005, p. 335 et seq., particularly pp. 354-357, Pauline Remy-Corlay; *Internationales HandelsRecht*, 2005, pp. 147-151, Florian Schumacher; *Droit uniforme de la vente internationale de marchandises* (Dalloz 2005); Panorama 2004, p. 2281, particularly 2289, obs. Claude Witz
Abstract prepared by Claude Witz, National Correspondent, and Mathieu Richard

The case involved a Swiss company, a spare parts manufacturer, and a French company subcontracted to a French truck manufacturer. Under an agreement dated 26 April 1991, the Swiss company was to supply the French subcontractor with polyurethane foam casings for air conditioners exclusively manufactured for the truck manufacturer. The contract stipulated that "at least 20,000 units over a period of eight years" should be supplied, according to the needs of the truck manufacturer, which were projected to be 3,000 to 6,000 units per year. The sum to be paid by the French company was fixed in accordance with the number of casings supplied each year. On 6 December 1996, the French company informed the Swiss party that, owing to a radical change in the truck manufacturer's terms of purchase, it would no longer be using the spare parts. The Swiss company claimed damages for harm resulting from the premature termination of the contract, particularly in view of the investments that it had made to meet the order. The Colmar Court of Major Jurisdiction dismissed the claim in a judgement of 18 December 1997. The Colmar Appeal Court set aside that decision in a judgement of 12 June 2001 (CLOUT case 480), deeming that the subcontractor had breached its contractual obligations and should pay damages in accordance with CISG articles 74 and 77. It was not permitted to invoke CISG article 79.

The First Civil Division dismissed the French buyer's appeal, stating, first, that the Appeal Court had, in interpreting the elements of proof laid before it in accordance with the principles set out in CISG article 8, including the provision whereby contracts were to be interpreted in good faith, rightly concluded from the agreement that it contained reciprocal obligations of supplying and purchasing specified goods at an agreed price. The Court of Cassation held that the Appeal Court had thus considered the agreement in the context of CISG, without having to set out expressly the manufacturer's obligation to supply the goods. The Court of Cassation thus deemed that the Appeal Court had legally justified its decision in accordance with CISG articles 2, 3, 7, 8 and 30.

Secondly, it declared inadmissible, as containing new evidence, the argument that the agreement between the buyer and the manufacturer was an integral part of the agreements between the buyer and the truck manufacturer.

Lastly, it considered the Appeal Court's ruling that, despite the change in the terms of purchase for the buyer, the latter should, as a professional well-versed in international commercial practice, had stipulated that the contract should contain guarantee or review mechanisms. The Court of Cassation held that the Appeal Court had rightly concluded that, failing such provisions, the buyer should have assumed the risk of non-performance and could therefore not invoke CISG article 79.

Case 840: CISG 74
France: Court of Cassation – Commercial Division, Appeal No. 01-16736
Société C v. Société M-V
11 February 2004
Original in French
Available on CISG-France: http://www.cisg-france.org/decisions/110204.htm;
Légifrance: http://www.legifrance.gouv.fr
Abstract prepared by Claude Witz, National Correspondent, and Mathieu Richard

The case involved two Algerian companies. It had been agreed by the parties that the seller company would supply the buyer with 100 tons of potatoes per week. Having supplied a certain number of potatoes during the course of two months, the seller informed the buyer that supplies would be suspended on the grounds of force majeure. It sought payment from the buyer for the outstanding invoices and issued a summons. The buyer made a counterclaim for compensation for damage suffered owing to the poor quality of the goods supplied, non-observance of the agreed quantities and the untimely termination of the contract.

The Nîmes Appeal Court, in a judgement issued on 22 February 2001, dismissed the buyer's claim for compensation for loss of profit, on the grounds that it had not submitted proof that the seller had unilaterally and improperly terminated the contract.

The Court of Cassation partially annulled the judgement dismissing the buyer's claim for compensation for loss of profit. The Appeal Court had held that the seller had not carried out its obligations and could not invoke force majeure, but the Court of Cassation ruled that the judges had not drawn the correct legal conclusions from their findings and had thus made an error in law concerning CISG article 74.

Case 841: CISG 31 (a)
Italy: Supreme Court of Cassation – Civil Division
B, SAS v. GP, SpA
3 January 2007
Original in Italian
Full text available in www.globalsaleslaw.org
Abstract prepared by Liboria Maggio, and Maria Chiara Malaguti, National Correspondent

An Italian seller and a French buyer entered into a contract for the sale of coloured synthetic fabrics to be used by the buyer for the manufacture of bags. The final products, however, were seriously defective and the buyer sued the seller before the French Court of Nanterre. The buyer obtained an expert judgement that declared the products defective, verified the responsibilities of the seller and determined the amount of damages.

Ten years after this decision, the seller sued the buyer before the Italian Court of Prato in order to obtain limitation of action as far as a warranty on the products was concerned. In response, the buyer claimed that the Italian judge lacked jurisdiction, since the place of delivery of the goods was in France, as established by the contract.

The Italian Court of Prato declared its jurisdiction and later on the Italian Court of Appeal of Florence confirmed the decision of the Court of Prato. Both Courts affirmed the Italian jurisdiction by virtue of CISG article 31, which states: "If the seller is not bound to deliver the goods at any other particular place, his obligation to deliver consists: (a) if the contract of sale involves carriage of the goods – in handing the goods over to the first carrier for transmission to the buyer." In accordance with this article, the delivery had to be considered as having been carried out in Italy.

The buyer appealed to the Italian Supreme Court, which also dismissed the appeal. The Court's opinion was again based on CISG article 31 (a). The Court dismissed the seller's argument that CISG article 31 (a) applied only if the contract did not indicate any place of delivery. If this interpretation were to be accepted, it would imply that contracts of international sales of goods involving carriage of the goods did not require the indication of the place of delivery of the goods. As a result, CISG article 31 (a) would end up being a default rule. In current and past commercial practice, however, the place of delivery was always determined by the parties and article 31 (a) simply made it clear that the seller's obligation to deliver the goods was always fulfilled by handing the goods over to the first carrier, if the contract did not provide otherwise. Since, in the case in question, the first carrier was based in Italy, the relevant obligation was thus performed in Italy.

The Court added that in the case of international sales involving transportation of goods, European Council Regulation (EC) No. 44/2001 provided that the place of delivery was where the goods were transmitted to the carrier. In the case in question, that place was in Italy; Italian jurisdiction was therefore also applicable, pursuant to EC Regulation No. 44/2001.

Case 842: CISG 1 (1) (b); 7 (2); 53; 57; 58
Italy: Modena District Court – Carpi Division
XX Cucine SpA v. Rosula Nigeria Ltd
9 December 2005, No. 138
Original in Italian
Full text available in www.globalsaleslaw.org
Italian excerpt published in *Rivista di diritto internazionale privato e processuale*, 2/2007, pp. 387-391
Abstract prepared by Liboria Maggio, and Maria Chiara Malaguti, National Correspondent

The case involved a contract between a Nigerian buyer and an Italian seller for the sale of professional cooking equipment to be used by the Nigerian Prison Service. After signing the contract, the buyer postponed payment and delivery several times, and only after several requests did it eventually lodge a deposit. Soon thereafter it failed to pay the outstanding invoices or to take any steps to receive delivery. As a consequence, the seller retained the deposit and informed the buyer of the termination of the contract. It then sued the buyer for non-performance at Modena District Court, also claiming damages in compensation.

The Court affirmed its jurisdiction by virtue of Italian Law No. 218/1995, 31 May 1995, which refers to the 1968 Brussels Convention on jurisdiction and the enforcement of judgements in civil and commercial matters (hereinafter the Brussels Convention). Because of the *renvoi* of Law No. 218/1995, the criteria of the Brussels Convention were considered applicable by the Court, although Nigeria is not a contracting member. According to the Brussels Convention, the courts of the place of performance of the obligation in question have jurisdiction over the case. The place of performance is to be determined according to the rules of private international law. In this case, the rules of private international law pointed to the application of Italian law and hence CISG (art. 1 (1) (b)).

The Court also referred to CISG article 57, which states: "If the buyer is not bound to pay the price at any other particular place, he must pay it to the seller: (a) at the seller's place of business." In the case in question, the seller's main office was located in Italy, thus the Italian judge had jurisdiction to hear the case.

The Court stated the buyer's obligation to pay the price, according to CISG articles 53 and 58, as a condition for the delivery of the goods. It also acknowledged the additional period of time for performance fixed by the seller, pursuant to CISG article 63. Based on the analysis of evidence, the Court held that the buyer was non-performing, since it had not executed due payment and that the seller had the right to terminate the contract.

However, in this particular case, the seller had not only declared avoidance of the contract but had also retained the deposit paid by the buyer. This issue required identification of the applicable law, since CISG was not applicable. The Court thus referred to CISG article 7, which states that questions concerning matters governed by the Convention, which are not expressly settled in it should be settled in conformity with the general principles on which the Convention is based or, in their absence, in conformity with the law applicable by virtue of international private law rules. Pursuant to these latter, the Court resorted to article 4 of the Rome Convention, according to which a contract is governed by the law of the

country with which it is most closely connected. In this case, Italy was the country most closely connected to the contract and Italian domestic law was the applicable law. The Court, referring to previous Italian case law by the Supreme Court, held that the seller had the right to retain the deposit.