United Nations A/CN.9/SER.C/ABSTRACTS/94

General Assembly

Distr.: General
28 April 2010

Original: English

United Nations Commission on International Trade Law

CASE LAW ON UNCITRAL TEXTS (CLOUT)

Contents

V.10-53146 (E) 100510 110510

INTRODUCTION

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

Case 939: CISG [1]; 39
The Netherlands: Court of Appeals of 's-Hertogenbosch
No. C0400675/HE
19 September 2006
Dutch company v Italian company
Available in Dutch: LJN: AY9447
Abstract prepared by J. Smits, National Correspondent, and Bas Megens

Both the Dutch and Italian company were tree nurseries. The appellant had bought trees from the defendant on several occasions. In September 2001, the parties entered into a contract for the sale of 100 Prunus Padus "Albertii" trees. The trees were delivered to the appellant in seven shipments in November and December 2001 and invoiced for a total amount of €43.195. All invoices had a term of payment of thirty days. In December 2001 the appellant sent the defendant a letter objecting to the quality of the trees from five of the shipments. The appellant paid the invoices for an amount of €16.315, but refused to pay the remainder of the purchase price. In April 2002 an expert hired by the appellant examined the trees, determined there to be problems with their quality and confirmed that these problems were partly similar to the objections raised by the appellant. The defendant utilized general terms and conditions for its sales including a reclaim term of "within 5 days of receipt of goods". The appellant, in its appeal, referred to the General Terms and Conditions of Trade of the Tree Nurseries in the Netherlands (HBN), which include a reclaim term of "within 6 working days of receipt of goods".

The Court of First Instance stated that the appellant did not reclaim its money within the prescribed period of time and therefore its claim should be dismissed. The appellant appealed the decision. The Court of First Instance had determined that the Dutch judge was competent and that the CISG applied to the case. This part of the decision was not appealed and the Court of Appeals did not address these issues. The Court of Appeals upheld the decision of the Court of First Instance: when it is established that the deliveries made by the defendant are non-conforming, it must then be determined whether the appellant has given notice of non-conformity to the defendant within a reasonable time and in the correct manner (article 39 CISG). As regards to the reasonable time for notification, the appellant had argued that a distinction had to be made based on the season in which the delivery had taken place. The Court, however, noted that nothing indicated that the tree nurseries made any such distinction.

Reference was therefore to be made to the period of time the parties had generally used, i.e. a period of five to six working days. This period started after each delivery, regardless of whether the delivery was part of a larger consignment of which other parts would be delivered later on.

The purpose of the relevant provisions of the CISG, according to the Court, is to help determine quickly whether or not the delivery conforms to the contract and whether the buyer can expect the seller to perform additional deliveries. An interpretation that allows the period for notification to start only after all partial deliveries have been made is irreconcilable with this purpose. This means that it

must be determined for each separate delivery, whether the period for notification has been complied with. Since the obligation of the defendant as to the transport of the trees ended when it handed over the goods and since both the costs and the responsibility for the transportation were apparently incurred by the appellant, the period for notification had to be deemed to have started one/one and a half days after transporting the trees from the defendant's premises and not at a later point in time as stated by the appellant. Therefore, the appellant had exceeded the reasonable time for notification referred to in article 39 CISG.

The appellant had also argued that by binding the trees to poles for transport, the defendant had deprived the appellant of the possibility to ascertain the quality of and possible damage to the trees immediately upon delivery. This claim was rejected by the Court since the appellant had failed to notify the defendant of its objections against this practice within a reasonable time. Moreover, the appellant had not sufficiently corroborated its claim that the notification to the defendant regarding the non-conformity of the trees could have been made at an earlier point in time if the trees had not been bound to poles. Finally, the appellant had not brought to the attention any concrete facts or circumstances that would allow for the conclusion that the defendant must be deprived of the possibility to rely on article 39 CISG on grounds of reasonableness and fairness. For all these reasons, the Court of Appeals rejected the buyer's appeal.

Case 940: CISG 1; 30; 31
The Netherlands: Court of Appeals of Arnhem
No. 2005/1012
15 August 2006
Seda Umwelttechnik (Austria) v Equipment B.V. (NL)
Available in Dutch: LJN: AY8731
Abstract prepared by J. Smits, National Correspondent, and Bas Megens

The parties entered into a contract for the sale of several drainage systems by the appellant to the defendant. The defendant claimed before the Court of First Instance of Zwolle-Lelystad (NL) that the delivery of the systems never took place; alternatively, that the appellant broke off negotiations in violation of the demands of reasonableness and fairness. The Court of First Instance determined its competence to hear the case, set a date for the arguments to be presented and determined that its decision on the competence could be appealed immediately. The appellant appealed the decision on competence.

Pursuant to article 2 of EU Council Regulation 44/2001 of 22 December 2000 on jurisdiction and the recognition and enforcement of judgments in civil and commercial matters, the Court of Appeals determined that the appellant should be summoned before an Austrian Court, since it was domiciled there. Insofar as the claim of the defendant was primarily based on the argument that the appellant had not performed the contract alleged to be in existence by the defendant, the appellant could also be summoned, on the basis of article 5 (1) of Regulation 44/2001, in the Courts of the place of performance of the obligation in question. The appellant argued that its general terms and conditions were part of the contract between the parties and that these terms and conditions determined the place of performance to be the company of the appellant in Austria. The Court held that while it is true that the place of performance can be agreed upon by the parties, the question whether

the parties had in the case at hand done so could be left unanswered. Being the Convention applicable to the contract by virtue of article 1 (1)(a) CISG (the contract related to the sale of movables, the seller and the buyer had their place of business in two CISG contracting States) if the parties had not agreed upon a place of performance, article 31 CISG would determine the place of delivery. Based on this article, the criteria would be:

(a) If the contract of sale involves carriage of goods, the place where the goods were handed over to the first carrier for carriage to the buyer (if the contract of sale involved carriage of the goods from Austria to the Netherlands, this place would thus be in Austria);

(b) In cases not within the preceding subparagraph, if the contract related to specific goods, or unidentified goods to be drawn from a specific stock or to be manufactured or produced, and at the time of the conclusion of the contract the parties knew that the goods were at, or were to be manufactured or produced at, a particular place, that place (in the present case the company of the appellant in Austria);

(c) In other cases, the place where the seller had its place of business at the time the contract was concluded (also Austria in the case at hand).

The Court noted that no facts had been brought forward that would allow for the conclusion that any of these places were located within the district of the Dutch Court of First Instance.

The defendant had argued that the appellant was under the obligation to deliver the goods to and install them for the defendant's clients. The Court considered that regardless of whether this statement (disputed by the appellant) was correct and regardless of whether the delivery and installation mentioned by the defendant could be considered to be delivery in the meaning of article 30 and following of the Convention, the facts referred to could not as such lead to the Court of First Instance being competent on the case. Nothing could corroborate the conclusion that any of the appellant's obligations had to be performed in the district of Zwolle-Lelystad. Particularly, it had not been argued, nor had it appeared, that the defendant's clients (at whose location the obligation would have to be performed) were resident in that district. For these reasons, the Court of Appeals held that the Court of First Instance was not competent to hear the claim.

Case 941: CISG 7; 39; 40
The Netherlands: Court of Appeals of Arnhem
No. 2005/1005
18 July 2006
Dutch company v German company
Available in Dutch: LJN: AY5784
Abstract prepared by J. Smits, National Correspondent, and Bas Megens

The appellant is a company specialized in growing and cultivating conifers. In November 2001, the parties entered negotiations regarding the delivery by the defendant of a potting soil mixture containing, among other things, a certain amount of Baraclay. The defendant faxed the appellant an offer for the sale of potting soil mixture containing "3 per cent Bara-Ton fein" per cubic metre. The appellant did not accept it. The defendant then sent a new offer for the sale of a mixture

containing “40 kg Baraclay” per cubic metre, which was accepted by the appellant. In May and June 2002 the defendant delivered seven batches of potting soil to the appellant. The “Lieferscheinen” signed by appellant each time indicated the potting soil to contain “3 per cent Bara-Ton fein”. In July 2002 the appellant contacted the defendant informing it that using the potting soil had caused the conifers to develop growing disorders. The appellant claimed that the potting soil did not conform to what was agreed (40 kg of clay per cubic metre) and claimed damages for the conifers that were destroyed after being grown in the potting soil.

The Court of First Instance, determining that the dispute was to be decided by reference to the CISG dismissed the appellant’s claim. The Court stated that this latter had not informed the seller of the nature of the lack of conformity within a reasonable time as required by article 39 (1) CISG.

The Court of Appeals upheld the decision of the Court of First Instance as to the application of the CISG to the case. On the substance the Court noted the following: Article 35 (1) of the Convention provides that the seller must deliver goods which are of the description required by the contract. The parties had agreed that the potting soil mixture would contain “40 kg Baraclay”. The invoice for the first delivered batch of potting soil, dated 17 May 2002, however, indicated that the soil contained “3 per cent Bara-Ton fein”. This in principle indicated that the delivered good did not conform to the agreed description, unless the appellant thought, and was reasonably entitled to think, that “3 per cent Bara-Ton fein” corresponded to “40 kg Baraclay”. The defendant disputed this interpretation. The Court stated that if the appellant did not think and was not entitled to think that “3 per cent Bara-Ton fein” corresponds to “40 kg Baraclay”, then the appellant should have given notice to the defendant on the day of delivery, when according to its signature on the delivery receipt, it discovered the discrepancy or at least should have discovered it. At the latest notice should have been given a few days after. The failure to do so entails that the appellant lost the right to invoke the non-conformity (article 39 (1) CISG). As a matter of fact, giving notice to the defendant in July 2002, one and a half months after the first delivery, can’t be considered a reasonable time to complain. Contrary to the appellant’s argument it is not necessary for the commencing of the period for complaint that the appellant knew or should have known that the non-conformity would lead or could lead to the alleged damage. It is sufficient that one knew or should have known that non-conformity existed in order for an obligation to notify the seller to come into existence. The appellant thus was not entitled to wait and ascertain whether the difference between 3 per cent Baraclay and 40 kg Baraclay would actually create difficulties. In determining the length of the period for notification, the Court noted, in particular that the appellant processed the potting soil almost immediately upon delivery. This necessitated a quick notification. The appellant argued that it gave the defendant the opportunity to inspect the potting soil, to formulate an opinion as to the viability of the complaint by the appellant and to collect evidence in this regard, but the appellant did not state that it did so at the relevant point in time, namely at or around May 17 2002. It did so in July 2002 at the moment it became aware of the growing disorders of the conifers. Furthermore, the Court considered, if the appellant had respected its obligation to notify the seller, further non-conforming deliveries, which the appellant knew would take place, could possibly have been prevented. The obligation to notify enshrined in article 39 CISG aims to prevent all difficulties, regardless of whether these problems have in fact manifested themselves. Finally, in

determining the reasonableness of the period during which the appellant was entitled to notify, the Court observed that the appellant was a professional and — in light of the amount of damages claimed — not a small undertaking.

The appellant did not argue that the defendant was or should have been aware of the non-conformity, something which could prevent the seller from invoking article 39 CISG. The buyer also did not object that it was reasonably excused for not having respected its obligation to notify, in which event it could have been entitled to claim price reduction and damages according to article 44 CISG. The appellant, however, argued that since the parties had attempted to arrive at a settlement and the defendant had not invoked the appellant's failure to comply with article 39 CISG prior to the proceedings before the Court of Appeal, this invocation by the defendant violated the obligation of good faith as required by article 7 CISG. The Court decided it could not consider the appellant's claim as it was only introduced during the oral arguments and the defendant had not unequivocally agreed to its being included in the dispute. The Court of Appeals therefore confirmed the judgment of the Court of First Instance.

Case 942: CISG 74; 77; 78; 87; 88
The Netherlands: Court of Appeals of Arnhem
No. 2003/1021
21 March 2006
Artimedes B.V. (NL) v G&P Toys B.V.B.A. (Belgium)
Available in Dutch: LJN: AV7619
Abstract prepared by J. Smits, National Correspondent, and Bas Megens

The parties entered into a contract for the sale of a consignment of sticker displays. After a first partial delivery, with a fax dated 29 October 2001 the buyer informed the seller that it could no longer accept the second partial delivery due to cancellations by its customers. The fax was concluded by the phrase "We shall attempt to rescue whatever we can and accept that number of goods for our clients that still wish to receive them". The seller stored the goods for quite some time, before they were finally sold. As the seller declared to the Court, they did not sell the sticker displays immediately after October 2001, because they held up hope for some time that the buyer would still wish to receive them, given its fax of 29 October 2001. The contract was rescinded in August 2002.

The question in the present case is whether a substitute transaction took place to minimize the loss. In its interim judgment, the Court of Appeals observed that the buyer had failed to prove such a transaction. Furthermore, a substitute transaction could not have occurred if the seller would have contracted with third parties even if the buyer had honoured the contract and the second partial delivery had taken place (thus the sticker displays did not have to be resold). The Court also held that no substitute transaction would have taken place if the seller had sold the goods of the second partial delivery to gift shops and book stores, the market in which the seller was already active.

The buyer argued that it could not be established that the seller had sold the second partial delivery to third parties only in August 2002 and that the seller, by reason of its sales prior to August 2002 and prior to the rescission of the contract, was not entitled to damages under article 88 (3) CISG except for the expenses of preserving the goods. The Court rejected this argument, since it had been sufficiently

established that the seller had stored the goods intended to be the second partial delivery until August 2002. With regard to the seller's argument that it had suffered damages in the form of non-realized profits, the buyer had objected that the amount stated by the seller should be limited. The Court dismissed the buyer's argument that the damages claimed by the seller for non-realized profit should be limited on the ground that the buyer could not foresee them at the time the contract was concluded (article 74 CISG). The Court noted that no facts or circumstances had been brought forward or had appeared from which it could follow that these damages could have not been foreseen by the buyer at the time of the conclusion of the contract.

In dismissing the arguments raised by the buyer, the Court was of the opinion that the seller was justified in waiting for a certain period of time after the fax of October 2001, before reselling the sticker displays. With that fax, the buyer had allowed for the (continued) possibility that it would still want to receive the second partial delivery. The buyer had not proved from which point in time the seller knew or should have understood that the buyer would no longer want to receive the second partial shipment. The mere contention by the buyer that the seller could have sold the stickers to third parties prior to August 2002 was insufficient to support the conclusion that the seller had insufficiently attempted to limit its damages (article 77 CISG). The Court therefore dismissed that argument. The Court also dismissed the buyer's claim that the expenses of preserving the goods were unreasonable (article 87 CISG), since this argument was not supported by appropriate evidence. Therefore the Court ordered the buyer to pay damages. The Court of First Instance had correctly condemned the buyer to pay the process fees. On appeal, however, the seller only claimed legal interest over the process fees. Therefore, there was no ground for awarding any legal interest over the primary sum. Insofar as the seller intended to claim interest as referred to in article 78 CISG, the Court concluded that this article was not applicable to the process fees.

Case 943: CISG 33; 60; 61; 63; 67; 68; 69; 85; 88
The Netherlands: Court of Appeals of 's-Hertogenbosch
No. C0300064/HE
20 December 2005
Dutch appellant v Pflanzen König GMBH (Germany)
Available in Dutch: LJN: AV2171
Abstract prepared by J. Smits, National Correspondent, and Bas Megens

The appellant, a tree nursery, sold trees to the buyer, a tree trader. The trees had to be accepted by 21 December 1993 (the end of the autumn) at the latest. The buyer did not do so and accepted only part of the trees at a later point in time. In the end the appellant had to cut down the trees, because they had become too large and/or because it needed the soil for other purposes. The appellant suffered damages which included both the purchase price of the trees and the costs of disposing of them.

In its interim judgment, the Court of Appeals determined that the CISG was applicable. In the final judgment, the Court noted the following: The appellant correctly argued that the Court of First Instance determined the Dutch law to be applicable and that the parties had not appealed this part of the judgment. Nevertheless, even though the Court of First Instance determined the Dutch law to be applicable, this did not answer the question of which rules of Dutch law were

applicable. In the case at hand both the Dutch Civil Code and the CISG could have been applied. The Court of Appeals referred to article 2 of the Law of 18 December 1991, Official Gazette 753 according to which under private international law rules if Dutch law is applicable to an international sale of movables in the meaning of the CISG, then the Convention is applicable. Because the Court of First Instance had not made a choice between the Civil Code and the CISG, the Court of Appeals did so ex officio. It did not appear that the parties had specifically opted for the Civil Code to be applicable and the case — contrary to what the appellant argued — concerned the sale of movables. The trees were bought in order to be planted elsewhere and had to be removed from the soil in order to be delivered.

It was originally agreed that delivery of the trees would take place in the autumn of 1993. The buyer stated, but did not sufficiently prove, that the parties had agreed to postpone delivery of (part of) the trees. To the Court it was clear that the appellant really did not have any other choice than to accept postponement of the delivery until 5 February 1994, since the contract concerned delivery of trees in soil. This behaviour, however, did not represent a modification of the contract. This is also consistent with article 63 CISG, which indicates that such a postponement does not imply that the seller loses its right to claim damages for late performance. Regarding the claim that the date of delivery was insufficiently specified, the Court of First Instance, referring to the Dutch Civil Code, determined that the provision referring to "autumn 1993" as the period of delivery was too wide and lacking in specificity to constitute a valid deadline. The Court of Appeals settled the issue by reference to the CISG. According to article 60 CISG the buyer is obliged to accept the goods; the provisions of article 33 CISG determine when the seller must deliver them: the obligation of the buyer to take delivery is a corollary thereto. Pursuant to article 33 CISG, the seller must, if a period for delivery has been agreed upon or can be determined from the contract, deliver within this period. For this reason the Court held that the term referred to in the fax, "autumn 1993", was sufficiently clear. The seller was obliged to deliver on the last day of that period, at the latest, and the buyer was obliged to take delivery on that day, at the latest. Therefore, the buyer has not fulfilled its obligation ex article 60 CISG. Pursuant to article 61 CISG, the appellant could, from that moment onwards, claim the purchase price.

With regard to the buyer's argument that the trees were bulk goods and that the risk did not transfer, since the trees had not been identified, the Court noted that the parties had agreed in writing on a delivery "Ab meine Betrieb (Frachtkosten für Ihnen)". Since the carriage of goods was not included in the contract, article 69 CISG would apply to determine the passing of risk. To the Court, it was clear that the buyer did not take delivery of some of the trees and that its refusal to take delivery constituted non-performance. The fact that the buyer's customer cancelled its order and that the buyer was unable to find another customer willing to take the trees does not contradict these facts. As to article 69 (3) CISG, it is undisputable that the trees would originate from the appellant's nursery; the possibility that there may be trees elsewhere that also conform to the same specifications is irrelevant. The buyer visited the nursery to look at the trees, on several occasions went to inspect them and it ordered the trees merely by referring to their size and location. Therefore, the trees in the appellant's nursery had been clearly identified for the contract (article 67 (2) CISG). For this reason, article 69 (3) cannot apply. The batch from which the trees ordered by the buyer could originate consisted of (only) those trees present at appellant's nursery; a batch which was clearly identified for the

fulfilment of the obligation. When the entire batch perishes, the risk burdens the buyer that has accepted delivery too late.

The Court finally examined the buyer's claim that the appellant had not taken reasonable measures for preserving the trees (article 85 CISG) and that it had failed to perform its obligations ex article 88 (2) CISG by not reselling the trees in a suitable manner. The Court agreed with the buyer that the seller must take those measures that are appropriate for preservation of the goods, according to the circumstances, when the buyer doesn't take delivery. The appellant's failure to do so, however, was not sufficiently proved by the buyer and was disputed by the appellant. Taking into account the fact that the trees, which kept growing, were placed at a limited distance of each other, because they were supposed to be sold before they became too big, it was inescapable that at one point they would "have grown out of the market", as the appellant said. The buyer's letter of 20 January 1994 indicated that the buyer prohibited the appellant from "digging out and thereby devaluing" the trees; therefore the buyer must also accept the consequence that those trees would therefore continue growing. The fact that the trees at some point became too large to be moved and that their tips become intertwined, seems self-evident to the Court and has not been disputed by the buyer. These circumstances cannot lead to the nursery being accused for having cared badly for the trees — of which the buyer should have taken delivery a long time before (article 85 CISG). With regard to the buyer's argument that the appellant should have sold the trees, ex article 88 CISG, the Court held that it could not be seen that the appellant — a tree nursery — could have succeeded in selling the trees where the buyer — a tree trader — could not. This claim was therefore rejected. The Court proceeded to reserve judgment until all evidence it had required from the parties had been delivered and decided upon.

Case 944: CISG 7; 38; 39; 49; 71
The Netherlands: Court of Appeals of 's-Hertogenbosch
No. C0400803/HE
11 October 2005
G&G Component Complementaries (NL) v Errelle S.R.L. (Italy)
Available in Dutch: LJN: AU6646
Abstract prepared by J. Smits, National Correspondent, and Bas Megens

The seller, an undertaking producing and selling print boards, entered into a contract with the buyer, a print board wholesaler, in 2000 for the sale of 3600 print boards. The buyer resold the goods to its customer in the Netherlands. Between October 2000 and February 2001 the seller delivered at least 2910 print boards to the buyer, which redispatched 2819 of them to its customer. After the seller had delivered the first 144 items in October 2000, the buyer informed it, by letter dated 12 October 2000, that its customer had discovered a number of defects on the goods and it required additional attention to quality and control. At some point the buyer examined 787 of the print boards already delivered and rejected 105 of these, sending them back to the seller in March 2001 and requesting the delivery of new boards. The buyer also informed the seller that it would cease payments, partly because its customer had done the same to it. Later, in May 2001, the seller agreed to replace the boards and requested that payments would commence again. In June 2001 the buyer proposed a payment schedule to the seller which would result in the total amount being paid over a period of 2 months. The seller accepted, but

after three payments the buyer failed to comply with the schedule. In December 2001 the buyer informed the seller that upon receiving a complaint by its customer it had examined 273 print boards together with the customer, discovering 78 of them lacking the required quality. It eventually requested the seller to send it a credit note for 1975 print boards. The seller refused.

The seller sued the buyer before the Court of First Instance, requesting the payment of the transaction. The buyer requested the Court to rescind the contract and claimed damages. The Court of First Instance granted the seller the payment and rejected the buyer's claims. The buyer appealed. The Court of Appeals upheld the decision of the Court of First Instance to apply the CISG. The key questions of the proceedings were whether the seller had incorrectly performed the obligations arising from the contract, whether the buyer was justified in ceasing payments and in rescinding the contract and whether it was entitled to damages. It was clear, according to the Court, that the buyer had ceased payments to the seller in March 2001. After that date, however, the parties drew up a schedule to ensure full payment, in instalments, of the unpaid invoices (regardless of whether or not the buyer's customer would fully pay the buyer). Noting that the buyer had initially adhered to the payment schedule, it was opinion of the Court that the buyer lost its right to suspend payments on 7 June 2001 (when it proposed the payments schedule and the seller accepted it), since there was nothing to indicate that the buyer after this fact, informed the seller that it would once again cease payments, ex article 71 (3) CISG.

As to the buyer's argument, pursuant to article 49 CISG, that the entire contract should be rescinded because the seller had incurred in late delivery with each delivered instalment, the Court stated that the buyer had failed to prove it. The order form on which the buyer indicated the delivery schedule it desired was not sufficient proof. The same applied to the faxes with which the buyer urgently requested the seller to deliver first 600 and then 300 printing boards. Since the buyer did not offer any further evidence, it could not be presumed that the seller had delivered the print boards too late. The contract of sale, thus, could not be rescinded on this ground.

The buyer had further argued that the contract should be rescinded, because the print boards did not conform to the contract for the same reason it had claimed damages. The buyer's letter of December 2001 contained a declaration of avoidance due to non-conformity. Nevertheless, the Court shared the Court of First Instance's determination that in regard to 249 print boards this rescission took place eight months after discovery of their defects — which according to the buyer's letters, occurred in October 2000 and March 2001. It thus did not take place within a reasonable time (article 49 (2)(b)(i) CISG). Therefore, the buyer could not claim rescission on this ground. As regards to the other print boards, the Court could not determine whether the buyer had lost its right to rescind on the basis of article 49 (2)(b)(i) CISG, since the seller had not argued on this point.

The seller had objected that the buyer had neither a right to avoid the contract nor a right to damages, because it had not sufficiently examined the print boards and had not complained to the seller within a reasonable time after it had or should have discovered the shortcomings. The Court noted the relevance of article 38 (1) and 39 (1) CISG to the case. However, in light of the fact that the parties can agree to deviate from the CISG, the Court stated that it had to be determined whether the parties — as the buyer claimed — had indeed agreed that the seller would examine and test the print boards so that the buyer would — in deviation of

article 38 (1) CISG — no longer have to examine them. Since the seller disputed this point with motivation, the order form was silent on the issue and the buyer did not offer any further evidence, the existence of the agreement could not be presumed. Therefore the Court concluded that under article 38 (1) CISG, the buyer was obliged to examine the print boards. As to the timing of the examination and its extent, the Court determined that since the delivery of the print boards took place, as agreed, in partial deliveries, the buyer should have examined each delivery separately and should have complained to the seller about each non-conforming delivery separately (article 38 (1) CISG). The buyer should have verified the number and type of the delivered boards and examined whether there were any visible shortcomings (a "simple examination"). Pursuant to article 38 (3) CISG, the buyer could defer a more thorough examination until the time at which the print boards had arrived at its customer's premises (but not until the moment when the customer started to assemble the goods). The Court acknowledged that the buyer had carried out the "simple examination" each time after receiving the print boards (and therefore conforming to article 38 (1) CISG). As regards to those defects that the buyer had discovered or should have discovered in such an examination, the reasonable time referred to in article 39 (1) CISG would commence at the moment at which the buyer executed this examination, i.e. directly after receiving the print boards. As regards to the other defects, the buyer should have discovered those, at the latest, shortly after the arrival of the print boards at its customer. At that moment, the reasonable time within which the buyer should complain to the seller commenced. The Court rejected the buyer's argument that the reasonable time referred to in article 39 (1) CISG would not have commenced as yet, since the seller had not yet delivered all the 3600 print boards. The buyer failed to recognize that the contract of sale entailed the delivery of the print boards in partial deliveries and that, since the case at hand concerned individual goods, the seller fulfilled its obligation to deliver with each delivered shipment of print boards. The Court ultimately stated that the buyer had given to the seller timely notice of non-conformity only with regard to 155 print boards. The Court, therefore, upheld the seller's claim. The Court also denied the buyer's argument that the seller's claim should be rejected by reason of reasonableness and fairness, since — apart from the fact that no concrete facts or circumstances had been put forward to reject the seller's claim — article 7 (1) CISG did not leave any room for deviation because of reasonableness and fairness. The Court finally granted the seller interests over the overdue purchase price under article 78 CISG. However, since the article does not determine which interest percentage should be applied, the Court, pursuant to article 7 (2) CISG, settled the issue by reference to the law applicable by virtue of the rules of private international law. The Court concluded that the contract was most closely connected with Italy, since the seller, which had to perform the main obligation, had its place of business in Italy. Italian law would thus apply to determine the interest rate.

Case 945: CISG 1 (1)(a); 7 (2); 74; 78
Slovakia: Okresný súd Galanta; 17Cb/7/2006
15 December 2006
Published in Slovak: website of the Ministry of Justice of the Slovak Republic http://jaspi.justice.gov.sk/jaspiw1/htm_sudr/jaspiw_maxi_sudr_fr0.htm
Reproduced in English and Slovak: http://www.cisg.sk/en/17cb-7-2006.html
Abstract prepared by J. Steincker, National Correspondent

A French seller and a Slovak buyer concluded an oral contract pursuant to which the seller was obliged to deliver the goods to the buyer and this latter was obliged to pay the agreed purchase price as specified in the invoices raised by the seller. The buyer failed to comply with its obligation after the goods were delivered.

The Court applied the CISG by virtue of the domestic Slovak Act on Private and Procedural International Law. In the absence of a choice of law by the parties, Section 10 of the Act stipulates that contracts shall be governed by the law which assures their reasonable solution. With reference to contracts of sale, these will be usually governed by the law of the country of the seller at the conclusion of the contract. Consequently, the Court stated that the legal relationship between the parties should be governed by the law of the French Republic, a Contracting State to the CISG. The Court, mentioning article 1 (1)(a) of the Convention, further stated that the CISG applies to parties whose places of business are in different States when the States are Contracting States.

Due to the fact that the Slovak buyer had failed to pay the purchase price, the seller, according to article 78 CISG, was entitled to interest on the sum in arrears. Since the amount of interest rate is not expressly settled in the CISG, the Court referred to article 7 (2) of the Convention according to which questions on matters not expressly settled in the CISG are to be settled in conformity with the law applicable by virtue of the rules of private international law. In the present case the issue was resolved according to French law.

Case 946: CISG [1(b)]; 7; 11; 63
Slovakia: Krajský súd v Bratislave; 26CB/114/1995
11 October 2005
Published in Slovak: website of the Ministry of Justice of the Slovak Republic http://jaspi.justice.gov.sk/jaspiw1/htm_sudr/jaspiw_maxi_sudr_fr0.htm
Reproduced in English and Slovak: http://www.cisg.sk/en/26cb-114-1995.html
Abstract prepared by J. Steincker, National Correspondent

An Austrian seller sued a Slovak buyer for the failure of the latter to pay the purchase price (which was invoiced in several invoices) for the goods delivered (furs from muskrat and red fox, ancillary material). The seller further claimed interest on the sum in arrears.

The Court applied the CISG dismissing the argument of the defendant that at the time of the conclusion of the contract in February 1991 (i.e. confirmation of the offer with respect to several invoices) the CISG was not in force in the then Czechoslovak Socialist Republic. As a matter of fact, the CISG came into force in the country on April 1, 1991. The Court proceeded according to the Section 10 (2) (a) of the Slovak Act on Private and Procedural International Law which stipulates that if the parties have not made a choice of law, their contractual

relationship will be governed by the law which assures its reasonable solution. The applicable law in case of a contract of sale is usually the law of the seller's country, i.e. in the case at hand the law of the Austrian Republic, where the Convention entered into force on January 1, 1989. Therefore the CISG was applicable to the case.

In accordance with article 11 CISG, the Court stated, on the basis of the seller's witnesses, that a valid contract of sale between the seller and the buyer had been concluded, although not concluded in or evidenced by writing.

By virtue of Article 10 (2) of the Slovak Act on Private and Procedural International Law the Court applied the Austrian law to the question of the expiration of the limitation period. Referring to both paragraphs of article 7 CISG, the Court stated that since the CISG does not settle the matter of time limitations, the question was to be solved in accordance with the Austrian law. Pursuant to the applicable articles of the Austrian General Civil Code, the Court found that the seller's action was belated as the limitation period had already expired.