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CASE LAW ON UNCITRAL TEXTS (CLOUT)

Contents

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Introduction

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

Issues 37 and 38 of CLOUT introduced several new features. First, the table of contents on the first page lists the full citations to each case contained in this set of abstracts, along with the individual articles of each text which are interpreted by the Court or arbitral tribunal. Second, the Internet address (URL) of the full text of the decisions in their original language are 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 by the United Nations or by UNCITRAL of that website; furthermore, websites change frequently; all Internet addresses contained in this document are functional as of the date of submission of this document). Third, abstracts on cases interpreting the UNCITRAL Model Arbitration Law now 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, and in the forthcoming UNCITRAL Digest on the UNCITRAL Model Law on International Commercial Arbitration. Finally, comprehensive indices are included at the end, to facilitate research by CLOUT citation, jurisdiction, article number, and (in the case of the Model Arbitration Law) keyword.

Abstracts have been prepared by National Correspondents designated by their Governments, or by individual contributors. It should be noted that neither the National Correspondents nor anyone else directly or indirectly involved in the operation of the system assumes any responsibility for any error or omission or other deficiency.

Cases relating to the United Nations Sales Conventions (CISG)

Case 589: CISG 31 (c); 57 (1) (a)

Germany: Landgericht Gießen
6 O 23/02
17 December 2002
Original in German
Published in German: Internationales Handelsrecht (IHR) 2003, 276
Abstract prepared by Klaus Bitterich

The interlocutory judgement deals with the international jurisdiction under Council Regulation (EC) No. 44/2001 of 22 December 2000 on jurisdiction and the recognition and enforcement of judgements in civil and commercial matters hereinafter Brussels I Regulation) with respect to a sales contract governed by the CISG.

A German trading company, the plaintiff, bought hazard-warning triangles from the Dutch defendant. The plaintiff's standard terms setting the German city of Linden as place of performance and providing that the courts of the German city of Gießen will have jurisdiction over disputes arising out of relationship were included in the contract between the parties. After having declared avoidance of the contract based on the allegation that the goods were non-conforming to the requirements of the sales contract, the plaintiff sued for restitution of the sales price and compensation for the storage expenses.

The Regional Court of Gießen found that it had jurisdiction pursuant to Art. 5(1)(a) of the Brussels-I-Regulation. According to this provision a person domiciled in a (?) Member State can be sued in the courts for the place of performance of the contractual obligation in question. As the CISG lacks an express provision as to the place of performance of an obligation to repay the sales price, the Court found Art. 57(1)(a) CISG applicable mutatis mutandis (and Art. 31(c) CISG as to the obligation to return the goods), i.e. unless the parties have not agreed otherwise, the buyer's place of business—in the case at issue the city of Linden—is the place of performance for the obligations to repay the price and to return the goods. In the Court's opinion the same is true for the claim for compensation. Therefore, the Regional Court of Gießen found that it had jurisdiction under Art. 5(1)(a) Brussels-I-Regulation and that the question whether the parties had entered into a valid and effective jurisdiction clause was irrelevant.

Case 590: CISG 38; 39; 45 (1) (b); 74

Germany: Landgericht Saarbrücken
8 O 118/02
1 June 2004
Original in German
Unpublished
Abstract prepared by Ulrich Magnus, National Correspondent, and Klaus Bitterich

The plaintiff, a company from Poland, delivered pallets to the defendant, a German company. The delivery was carried out between November 2000 and

November 2001. After a customs investigation, the German customs authorities informed the defendant in a preliminary report that neither the place of origin of the pallets was Poland nor enough repair work had been performed to consider Poland place of origin. The defendant received this information at the latest at the beginning of June 2002. On 18 June 2002, the defendant gave notice of non-conformity to the plaintiff, whereupon the plaintiff sent a written confirmation that Poland was the place of origin. On the same day representatives of the customs authorities and the defendant discussed the matter, following which the customs authorities sent the defendant a final report stating again that Poland was not the place of origin of the goods.

After the defendant once again had complained about the false indication of origin and refused to pay the price for the pallets, the plaintiff brought an action for payment. He pleaded that the defendant failed to examine the goods and to give notice of non-conformity within reasonable time. According to the plaintiff, the non-conformity was noticeable because a marking on the pallets indicated the place of origin (obviously not Poland). The defendant, who had been ordered by the customs authorities to pay customs duty on imports, in turn claimed to be entitled to damages for breach of the contract in question, including customs duty on imports. The defendant sought to offset his claims against the plaintiff's claim for payment of the price.

The Court allowed the plaintiff's claim and ruled that the defendant was entitled to damages pursuant to articles 45(1)(b) and 74 CISG and therefore his debt had been offset. The plaintiff had failed to perform his obligation to deliver goods conforming to the contract because the place of origin of the goods was not Poland. The defendant did not lose the right to rely on the lack of conformity of the goods under articles 38 and 39 CISG. The Court noted that the place of origin of the pallets is usually marked by the railway enterprise and does not tell where the pallets originally come from. Therefore, the earliest the place of origin could be discovered was when the German customs authorities informed the defendant with their report of June 2002. A mere suspicion of a lack of conformity with regard to the country of origin that may have incurred before that time was not regarded as a "discovery" under article 39 CISG. Thus the reasonable time period specified in article 39 CISG did not commence earlier than 18 June 2002, the date in which the matter was discussed between the customs authority and the representatives of the defendant. The notice of non-conformity of 18 June 2002 was therefore given within reasonable time.

Case 591: CISG 29 (1); 38; 39; 58 (1); 60 (a); 81 (2)

Germany: Oberlandesgericht Düsseldorf
I-17 U 20/02
28 May 2004
Original in German
Published in German: http://www.justiz.nrw.de/RB/nrwe/index.html
Abstract prepared by Ulrich Magnus, National Correspondent, and Klaus Bitterich

An Italian company (plaintiff) sold television sets both to the defendant, a German company, and to the defendant's affiliated German (Company E). The defendant had deducted about 100,000 DM from the invoiced price claiming that Company E was entitled to payment of this sum as a restitution for costs of repair

and customer service and that this deduction had been assigned to him by the Company E. The defendant argued that the plaintiff agreed to pay back such costs relating to customer complaints exceeding a 5 per cent quota of the television sets delivered to the Company E. As it had been sued for the outstanding debt, the defendant raised a compensation defence claiming the restitution of repair and customer costs. Moreover, the defendant further put forward a counterclaim for restitution of the price paid under another sales contract between the parties which had later been cancelled. The plaintiff in turn sought to compensate this claim with the interests accrued on the amount due, on the allegation that the defendant did not request the delivery of television sets although it was obliged to do so under various sales contract provisions the parties entered into in 1995 and 1996.

The Regional Court of Appeal dismissed the claim, on the argument that the plaintiff could not rely on a failure of the Company E to give notice of a lack of conformity under the provision of article 39 CISG. By agreeing to repay the costs of repair and customer service as far as more than 5 per cent of the delivered television sets were concerned, the parties did not alter the liability of the plaintiff under article 45 CISG. They intended, however, to allocate the risk of consumer complaints in an appropriate manner by excluding the provisions of the CISG. Therefore, there was no obligation of the Company E to examine the goods and to give notice of non-conformity pursuant to articles 38 and 39 CISG. As the plaintiff agreed to repay the costs of repair and customer service in excess of the outstanding purchase price, the Court concluded that the defendant extinguished his debt by setting it off.

The Court recognized the counterclaim of the defendant. Referring to the right to modify or terminate a contract pursuant to article 29(1) CISG by the mere agreement of the parties, the court ruled that the Convention is applicable on an agreement to terminate a contract governed by the CISG and that the effects of such an agreement have to be determined pursuant to article 81(2) CISG. Under this provision, the defendant was entitled to restitution of whatever he had paid under the contract.

With regard to the alleged interest debt, the Court referred to article 78 CISG and held that the facts of the case did not indicate a failure of the defendant to pay the price at the time specified in the contracts in question. Under the provisions of these contracts, the defendant was bound to pay the price “five days after delivery” and the plaintiff was bound to arrange for carriage of the goods. The defendant therefore was not obliged to pay the price before the plaintiff had placed the goods at his disposal pursuant to article 58(1) CISG. As the defendant did not refuse to accept delivery of the goods, therefore it did not fail to meet the requirements of article 60(a) CISG. Furthermore, according to the contract the defendant was not bound to request the delivery of the goods at a specified time. For these reasons, there was no ground for an entitlement to interest and, consequently, the defendant’s counterclaim could not be compensated by the alleged entitlement to interest.

Case 592: CISG 8 (2); 8 (3); 9

Germany: Oberlandesgericht Düsseldorf
I-23 U 70/03
30 January 2004
Original in German
Published in German: Internationales Handelsrecht 2004, 108, Annotation by Herber, 117; [2004] OLGR Düsseldorf 2004, 208
http://www.justiz.nrw.de/RB/nrwe/index.html
Abstract prepared by Ulrich Magnus, National Correspondent, and Klaus Bitterich

The decision of the Regional Court of Appeal deals primarily with the requirements of the incorporation of a jurisdiction clause which is part of the standard terms which the seller must meet under the provision of article 23(1)(b) of the Council Regulation (EC) No. 44/2001 on jurisdiction and the recognition and enforcement of judgements in civil and commercial matters.

The plaintiff, a German company, delivered several devices to the defendant, a Dutch company, for the construction and operation of sand pumps on an excavator vessel. The plaintiff used order forms titled "Conditions of Delivery" containing on the front page the handwritten clause "ex works..." and the (printed) instruction "send back to: see overleaf". The back page of the form contained the address referred to by the cited instruction on the front page and, among other provisions, the stipulation of Düsseldorf as place of performance and place of jurisdiction. On the front page no reference was made to this particular provision. After the delivery was carried out, technicians provided by the plaintiff on the defendant's request, assisted the defendant in implementing the devices first on the premises of the defendant, later on board the excavator vessel which was docked for a time near the Belgian coast and then in Cuxhaven (Germany). As problems occurred during the operation of the sand pumps, the plaintiff again sent technicians to replace certain parts of the pumps; furthermore, he delivered replacement parts to the defendant. The plaintiff brought an action for payment of both the technicians and the replacement parts.

As far as the CISG is concerned, the Court ruled that, in accordance with German law, standard terms can only be validly incorporated into a sales contract pursuant to articles 8 (3) and 9 CISG, as well as to the rule of interpretation provided for by article 8 (2) CISG, if the party receiving the offer is given a reasonable opportunity to take notice of such terms. When it is a matter of incorporation of the standard terms, the offeree must be given the opportunity to take note of them in a reasonable manner. Similarly to German law, the CISG requires that the offeror's intention to incorporate his standard terms in the contract be recognizable by the party receiving the offer. The court found that this requirement was not met in the present case. The order forms used by the plaintiff made it not clear enough that he intended to undertake the obligation to deliver the goods only if the contract included the standard terms printed on the back of the order forms. The fact that reference was made to the text on the back of the forms only with regard to the address to which the form had to be sent back did not sufficiently make clear the plaintiff's intent to incorporate the standard terms printed on the back page. Furthermore, the Court noted that the handwritten provision "ex works...", concerning the risk of carriage could be understood by an attentive reader as a conclusive term of delivery.

Since the plaintiff failed to furnish evidence of an agreement to confer jurisdiction pursuant to article 23(1) of Regulation No. 44/2001, the Court had no jurisdiction over the claim which was therefore dismissed on procedural requirements.

Case 593: CISG 39

Germany: Oberlandesgericht Karlsruhe
12 U 179/02
6 March 2003
Original in German
Published in German: Internationales Handelsrecht 2003, 226
Abstract prepared by Klaus Bitterich

The plaintiff sued for the payment of pullovers he manufactured and delivered in September 2001 to the defendant under a contract governed by the CISG. The defendant set up as a defence that the pullovers did not conform with the contract because of deviations in size and because about 25-30 per cent of the pullovers were not knitted properly, and raised a counterclaim for damages suffered because of the alleged defects of the pullovers.

The Regional Court rejected the counterclaim due to its late allegation in trial and ordered the defendant to pay the price. The Regional Court of Appeal reversed the judgement because the court of first instance ignored factual submissions of the defendant concerning the cause of the action and, moreover, failed to consider the defendant's counterclaim. Therefore, the Regional Court of Appeal did not decide on the merits of the claim but remanded the case to the court of first instance.

On remand, the Court made some remarks on the merits of the plaintiff's claim concerning the buyer's obligation under article 39 CISG to give notice of a lack of conformity. The Court referred to the defendant's pleading that, as a result of his complaint in a letter of October 2001, two representatives of the plaintiff visited the defendant's premises and that in the course of that visit he complained about the wrong size and the bad knitting. The Court held that the buyer is obliged to specify the non-conformity as specific as necessary for the seller to decide which remedy has to be taken. By showing the defective goods to the seller, the buyer gives the seller the opportunity to check the goods. It is therefore the most effective way to provide the information necessary for the seller. As article 39 CISG does not require a certain form, the requirements of article 39 CISG were met by the oral description of the defects in the course of the meeting on 9 October 2001. Finally, the Court had to determine whether the notice was given within due time. The meeting with the plaintiff's representatives took place 11 days after delivery. Mentioning legal literature indicating a period of one month or 14 days respectively as reasonable, the Court held that the reasonable time-period within the meaning of article 39 CISG has to be determined according to the circumstances of the case. As the goods were non-perishable and there were no other reasons for an especially urgent notice, the defendant's notice was considered as given within a reasonable time period.

Case 594: CISG 26; 31 (c); 45 (1); 46; 47; 49 (1); 81 (2); 82; 86 (1)

Germany: Oberlandesgericht Karlsruhe
19 U 8/02
19 December 2002
Original in German
Published in German: Internationales Handelsrecht 2003, 125; [2003], Recht der Internationalen Wirtschaft 2003, 544; [2003], OLGR Karlsruhe 2003, 237
Abstract prepared by Klaus Bitterich

The plaintiff contracted with a Swiss company, the defendant, for a machine to be manufactured by the defendant according to the plaintiff's requirements. The plaintiff refused to accept the machine upon an inspection at the defendant's place of business as well as a result of another inspection which took place after the good was delivered to the plaintiff. The plaintiff alleged defects and a lack of conformity with respect to the machine's clock speed, although it was not clear whether an agreement on a certain clock speed had in fact been reached by the parties. The defendant agreed, however, to take the machine back and improve it so that it would meet the requirements as described in the defendant's offer and in the confirmation of the plaintiff's order. In a subsequent letter the plaintiff fixed the deadline for performance and made it clear that after that he would not accept any performance. However, the machine was damaged while being returned to the manufacturer due to its negligent loading. The defendant refused to take delivery and to perform any upgrade, whereupon the plaintiff declared in a letter his refusal to accept performance and sued for the repayment of the payments already made in advance (a claim for damages was dropped on appeal).

The Regional Court dismissed the claim, mainly on the ground that the plaintiff had lost the right to avoid the contract according to article 82 CISG. The Regional Court of Appeal reversed the judgement and the defendant was ordered to refund the down payment on the purchase price made by the plaintiff.

The Court noted that the contract was governed by the CISG under articles 1 (1)(a) and 3(1). After the defendant declared his refusal to upgrade the machine and the plaintiff in turn declared his refusal to accept performance, the plaintiff was entitled to declare the contract avoided under articles 45(1), 46, 47, 49(1) CISG. Although the plaintiff did not expressly declare the contract avoided as required by article 26 CISG, his refusal to perform, expressed in writing in connection with the claim for repayment, was considered a sufficient notice of the declaration of avoidance.

The Court then discussed article 82(1), (2a) CISG which deprives the buyer of his rights under article 49 CISG if it is impossible for him to make restitution of the machine substantially in the condition in which he received it and could not prove that this impossibility was not due to his act or omission. The Court found that the defendant accepted the machine's non-conformity and therefore entered into the obligation to remedy the lack of conformity at his place of business. With regard to the plaintiff's obligations for the carriage of the machine back to the defendant the Court pointed out that according to the initial contract the defendant was bound to arrange for carriage. Therefore, the plaintiff's obligations under the agreement to take the machine back and remedy the lack of conformity also had to be determined applying article 31(c) CISG. The Court found that the plaintiff complied with his

obligation to place the machine at the defendant's disposal in a way suitable for shipping, regardless of whether packaging or placing the machine back into its rack might have guaranteed a more secure transport. The loading itself was not part of the plaintiff's obligations under article 31(c) CISG.

Furthermore, the Court ruled that the plaintiff complied with his obligation to preserve the machine as required by article 86 CISG regardless of whether the risk already passed to the plaintiff or not. The facts on record did not indicate that the plaintiff was aware or could have been aware of the improper loading made by the carrier. The Court therefore did not apply article 82 CISG and held that the plaintiff had not lost the right to declare the contract avoided.

Case 595: CISG 7 (1); 49 (1) (a); 76

Germany: Oberlandesgericht München
7 U 2959/04
15 September 2004
Original in German
Published in German: Zeitschrift für Wirtschaftsrecht (ZIP) 2005, 175; [2005] Internationales Handelsrecht (IHR) 2005, 70
Abstract prepared by Ulrich Magnus, National Correspondent, and Klaus Bitterich

An Italian tannery (the plaintiff) sued a German manufacturer of upholstered furniture (the defendant) claiming the outstanding purchase price for a delivery of leather ordered in summer 2000. The action failed before the court of first instance because the defendant had successfully exercised a compensation defence. The set-off claim was based on the plaintiff's refusal to make further deliveries in accordance with a promise made in February 2000. The court of first instance regarded this refusal to perform as a fundamental breach of contract. Consequently, under article 76(1) CISG the defendant could recover the difference between the price fixed by the contract and the price paid for the covering purchase.

The question of law raised on appeal was whether articles 49(1)(a) and 76(1) CISG would require the buyer's express declaration of avoidance of the contract—which was missing in the case at hand—even if the seller definitely refuses to fulfil his obligations under the contract.

The appellate court ruled that an express declaration of avoidance is dispensable in a situation where the seller seriously and ultimately refuses performance, when requiring an express declaration of avoidance would amount to an unjustified formalism. While some legal writers hesitate to release the buyer from an express declaration of avoidance, the Court pointed out that, in light of the principle of legal certainty, it should not be more difficult to determine the moment of the seller's refusal to perform his obligations than to determine the moment the buyer declared the contract avoided.

The Court sees its interpretation of articles 49(1a) and 76 CISG in accordance with the principle of an autonomous interpretation of the CISG. Although the duty to observe good faith in international trade pursuant to article 7(1) CISG does not allow equitable considerations of any kind, this provision enables the courts to apply established principles of the national law of the member States that consider the principle of good faith. Due to his serious and ultimate refusal to perform, the plaintiff could not rely on the requirement of a declaration of avoidance under

article 49(1a) CISG without contravening the prohibition of "*venire contra factum proprium*", an established principle of good faith. The appellate court therefore upheld the decision of the court of first instance.

Case 596: CISG 39; 40; 44; 45 (1) (b); 74

Germany: Oberlandesgericht Zweibrücken
7 U 4/03
2 February 2004
Original in German
Unpublished
Abstract prepared by Klaus Bitterich

An Iranian company, the plaintiff, and the defendant German company entered into protracted negotiations for purchasing used components for the construction of a milling facility in Iran. According to the information contained in a pro forma invoice and in a letter of credit used to process the transaction, the plaintiff ordered 12 "double-roll mills" of the type "M" and other similar components, such as filter elements of the type "B" all coming from a certain German manufacturer.

In a subsequent letter the defendant confirmed a change in the specifications of the mills upon request of the plaintiff. Because of this change, the defendant could not deliver the "M" or "B" products of the German manufacturer but had to resort to Russian-made parts, a fact he did not disclose to the plaintiff. The plaintiff stored the goods delivered by the defendant in their original packages until a new building for the milling facility was completed. In the course of constructing the milling facility a few years later, the plaintiff discovered that the double-roll mills were originally made by a Russian company and that other "components" were made by a Turkish company. Furthermore, it became obvious that a part of the control unit was not compatible with other parts and therefore did not work. Relying on these facts, the plaintiff claimed the partial repayment of the price.

The defendant rejected the contention that the parties reached an agreement under which the defendant promised to deliver the double-roll mills and the other components with the specifications contained in the pro forma invoice. Furthermore, the defendant referred to the fact that the plaintiff inspected the goods before shipping and accepted delivery of one of the mills without any objections before the others were delivered. These circumstances, according to the defendant, were to be regarded as an alteration of the contract and therefore the defendant maintained that he delivered the goods in conformity with the contract.

The Regional Court held that the plaintiff did not prove that it had standing in the dispute and dismissed the claim. The Regional Court of Appeal reversed the judgement and instead decided on the merits. The Court held that the CISG is applicable pursuant to article 1(1)(b) because under German private international law the contract is governed by German law and therefore, as a part of it, by the CISG.

The Court rejected the claim of non-conformity of the control unit device because the plaintiff failed to give notice as required by article 39 CISG. The fact that the goods had to be stored for several years could not be considered as a reasonable excuse for the failure to give the required notice, because the plaintiff did not disclose the need to store the goods to the seller. Therefore, the plaintiff's

intention to store the goods right after delivery did not become part of the basis of the legal relationship between the parties and the requirements for an exemption under article 44 CISG were not fulfilled.

As for the delivery of Russian and Turkish components, the Court ruled that the plaintiff was entitled to damages pursuant to articles 74, 45(1)(b) and 35 CISG. The Court held that the information given in the pro forma invoice and in the letter of credit had to be taken into account when determining the specifications of the subject of the sales contract. The specifications mentioned in these documents were regarded by the Court as a sufficient proof of the agreement reached by the parties on the requirements of the products made by the said German manufacturer. With regard to the double-roll mills the Court also relied on the letter of the defendant to the plaintiff wherein he confirmed the delivery of the "M" type with the specifications requested by the plaintiff. As the defendant failed to disclose the different origin of the goods to the plaintiff, the Court found that there was neither an express amendment of the contract nor an implied one, as the plaintiff apparently lacked the technical skills to discover the origin of the components in the course of the examination of the double-roll mills before their shipping or when taking delivery of the first mill. Finally, the defendant was not entitled to rely on the plaintiff's failure to give notice of the wrong delivery as required by article 39 CISG because the defendant knew of the Russian and Turkish origin of the mills and the other components which he did not disclosed to the plaintiff (art. 40 CISG).

Therefore, the Regional Court remanded the case to the lower court to determine the claim for damages and required it to obtain an expert opinion to determine the difference between the value of components as specified in the contract and the components delivered by the seller.

Case 597: CISG 35; 38; 39; 40; 44

Germany: Oberlandesgericht Celle
7 U 147/03
10 March 2004
Original in German
Published in German: Internationales Handelsrecht 2004, 106; [2004] OLGR Celle 2004, 416
Abstract prepared by Ulrich Magnus, National Correspondent, and Klaus Bitterich

A Polish transport company (plaintiff) bought a commercial vehicle from a German company (defendant). Shortly after the delivery was carried out, the plaintiff gave notice of non-conformity for deviation from the description of the vehicle the parties agreed upon. Some time after that, the plaintiff's counsel gave notice of other non-conformities in a letter to the defendant. The plaintiff brought an action for the reduction of the price and for damages, whereupon the Court of first instance ordered the defendant to restitute the difference between the purchase price and the actual value of the vehicle delivered.

The plaintiff appealed claiming to be entitled to a further reduction of the purchase price and damages for breach of the contract on grounds that the defendant had not only delivered the "wrong" vehicle but the vehicle was also defective.

The Regional Court of Appeal held that the plaintiff was not entitled to a further reduction of the price or to damages pursuant to articles 50 and 74 CISG,

because he failed to give notice of the alleged non-conformity as required by articles 38 and 39 CISG. These provisions require the buyer to specify each lack of conformity of the goods as accurately as possible. The notice given by the plaintiff after he had taken delivery of the vehicle only related to the fact that the defendant did not deliver the vehicle described in the contract and therefore the complaint was not sufficient to meet the requirements of article 39 CISG with respect to other non-conformities. Mentioning an exception made in case of a serious and ultimate refusal of the seller to perform, the Court stated that the facts of the case did not indicate such a refusal.

The Court then referred to article 40 CISG concluding that the defendant did not lose the right to rely on the provisions of articles 38 and 39 CISG because the plaintiff neither argued nor substantiated that the alleged non-conformities of the vehicle related to facts of which the defendant knew or could not have been unaware of and which he did not disclose to the plaintiff. The Court noted that, by using the term "could not have been unaware of", article 40 CISG requires at least gross negligence of the seller. With regard to article 44 CISG as a further exception to the rule established in article 39 CISG, the Court held that this provision does not alter the obligation of the buyer to give notice as required by article 39 CISG. Therefore, the plaintiff could not rely on his notice of the "wrong" delivery as a reasonable excuse for his failure to give notice of other non-conformities.

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