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CASE LAW ON UNCITRAL TEXTS (CLOUT)

Contents

	<i>Page</i>
Cases relating to the United Nations Convention on Contracts for the International Sale of Goods (CISG)	3
Case 930: CISG 6; 31 (a); 74; 78 - Switzerland: Cantonal Court of the Canton of Valais; C1 06 28 (23 May 2006)	3
Case 931: CISG 1; 14 (1); 18 (1); 18 (3); 19; 45 (1) (b); 55; 74; 79 (1) - Switzerland: Federal Court; 4C.92/2006 and 4C.474/2004 (12 July 2006 and 5 April 2005)	3
Case 932: CISG 4; 8; 74; 77 - Switzerland: Obergericht des Kantons Thurgau (Higher Court of the Canton of Thurgau); ZBR.2006.26 (12 December 2006)	4
Case 933: CISG 7 (2); 45; 49 (1) (b); 53; 58 (1) - Switzerland: Federal Court; 4C.314/2006 (20 December 2006)	5
Case 934: CISG 7 (2); 14 (1); 39; 53; 55; 59; 78 - Switzerland: Cantonal Court of the Canton of Valais; C1 06 95 (27 April 2007)	6
Case 935: CISG 7 (2); 33 (a); 47 (1); 49 (1) (b); 50; 53; 74; 78 - Switzerland: Handelsgericht des Kantons Zürich (Commercial Court of the Canton of Zurich); HG050430 (25 June 2007)	7
Case 936: CISG 1; 6; 49 (1); 71 - Switzerland: Federal Court; 4C.94/2006 (17 July 2007) ..	8
Case 937: CISG 25; 35; 49 (1) (a) - Switzerland: Cantonal Court of the Jura; I.37/04 (26 July 2007)	9
Case 938: CISG 25; 26; 39 (1); 49 (1) (a); 49 (2) (b); 50; 53; 74; 78 - Switzerland: Kantonsgericht des Kantons Zug (Cantonal Court of the Canton of Zug); A3 2006 79 (30 August 2007)	9

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). The purpose is to facilitate the uniform interpretation of these legal texts by reference to international norms, which are consistent with the international character of the texts, as opposed to strictly domestic legal concepts and tradition. More complete information about the features of the system and 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/clout/showSearchDocument.do>).

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

The abstracts are searchable on the database available through the UNCITRAL website by reference to all key identifying features, i.e. country, legislative text, CLOUT case number, CLOUT issue number, decision date or a combination of any of these. The abstracts are prepared by National Correspondents designated by their Governments, or by individual contributors; exceptionally they might be prepared by the UNCITRAL Secretariat itself. 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.

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

Case 930: CISG 1; [6; 31 (a)]; 74; 78

Switzerland: Cantonal Court of the Canton of Valais

C1 06 28

23 May 2006

Original in French

Published in French: CISG-online, No. 1532

Abstract in German: Swiss Review of International and European Law (SRIEL)

1-2/2008, pp. 206 f.

<http://www.globalsaleslaw.com/content/api/cisg/urteile/1532.pdf>

Abstract prepared by Thomas M. Mayer

The judgment in the present case related to a claim for payment of the sale price in respect of several deliveries from a French supplier of garments to a Swiss trader.

The court found that the seller had fulfilled its contractual obligations and was thus entitled to settlement of the outstanding invoices. That being so, it concluded that the fact that the contractual relationship was subject to the International Rules for the Interpretation of Trade Terms (Incoterms) did not mean an implicit exclusion but constituted rather a derogation from specific provisions of the CISG, such as those relating to the passing of risk. The CISG was therefore applicable to the contract by reason of its article 1 (1) (a), since both parties had their places of business in different contracting States.

The court ordered the defendant to pay, in addition to the sale price claimed, the costs of recovery for 790.00 Swiss francs pursuant to article 74 CISG. It also ordered the defendant to pay interest on arrears, the amount of which was to be fixed in accordance with national law as determined by Swiss private international law, i.e., in the present case, French law.

Case 931: CISG 1; 14 (1); [18 (1); 18 (3)]; 19; [45 (1) (b); 55; 74; 79 (1)]

Switzerland: Federal Court

4C.92/2006 and 4C.474/2004

12 July 2006 and 5 April 2005

Original in German

Published in German: www.bger.ch/fr/index/jurisdiction/jurisdiction-inherit-template/jurisdiction-recht/jurisdiction-recht-urteile2000.htm;

www.polyreg.ch/d/informationen/bgeunpubliziert/Jahr_2006/Entscheide_4C_2006/4C.92__2006.html

http://jumpcgi.bger.ch/cgi-bin/JumpCGI?id=12.06.2006_4C.92/2006

[www.privatrechthp.ch/forschung/rechtsprechung/2006/275/494 resp.](http://www.privatrechthp.ch/forschung/rechtsprechung/2006/275/494_resp)

http://jumpcgi.bger.ch/cgi-bin/JumpCGI?id=05.04.2005_4C.474/2004

www.polyreg.ch/d/informationen/bgeunpubliziert/Jahr_2004/Entscheide_4C_2004/4C.474__2004.html; www.cisg-online.ch/cisg, No. 1012;

www.unilex.info/case.cfm?pid=l&do=case&id=1025&step=FullText;

www.privatrechthp.ch/forschung/rechtsprechung/2006/275/395

English translation: <http://cisgw3.law.pace.edu/cases/050405s1.html>

Abstract in German: Swiss Review of International and European Law (SRIEL) 1/2007, pp. 148 ff., and 1/2006, pp. 203 ff.; Internationales Handelsrecht (5/2005), 204 ff.

Abstract in English:

www.unilex.info/case.cfm?pid=1&do=case&id=1025&step=Abstract

<http://www.globalsaleslaw.com/content/api/cisg/urteile/1012.pdf>

Abstract prepared by Thomas M. Mayer

The Swiss company X AG informed the German company Y GmbH that an Italian firm was offering some 70 tons of triethylenetetramine (TETA) for sale. Y GmbH subsequently sent a purchase confirmation to X AG for 60 tons. X AG was unable to acquire the product. Y GmbH, who had already resold the goods, was obliged to buy goods in replacement. It invoiced X AG for the difference in price. However, X AG refused to pay, alleging that no contract had been validly concluded between it and Y GmbH. Thereupon, Y GmbH brought the case before the competent district court, which ruled in the defendant's favour, as did the appeal court subsequently.

In its first judgment, the Federal Court, allowing the application of the CISG, in accordance with its article 1 (1) (a), contradicted both the lower and appeal courts, which had ruled that no contract had been concluded between the parties. The letter of confirmation issued by the plaintiff did not in fact amount to acceptance of a corresponding offer from the defendant within the meaning of article 14 CISG, but in turn constituted a counter-offer which the defendant, through its subsequent conduct (e.g., handing over of requested documents with reference to the purchase confirmation) had ratified by decisive acts (article 19 CISG).

In its second judgement, the Federal Court considered whether the defendant should assume responsibility for non-delivery to the plaintiff. It observed that the seller must, in principle, bear the risk of its suppliers' failure to deliver. To avoid that risk, it had to free itself of responsibility by means of an appropriate contractual clause. The lower court's finding that the existence of such an agreement could not, in the present case, be inferred from the specific circumstances was admissible.

Case 932: CISG 4; 8; 74; 77

Switzerland: Obergericht des Kantons Thurgau (Higher Court of the Canton of Thurgau)

ZBR.2006.26

12 December 2006

Original in German

Published in German: www.cisg-online.ch; No. 1566

English translation: <http://cisgw3.law.pace.edu/cases/061212s1.html>

Abstract in German: Swiss Review of International and European Law (SRIEL)

1-2/2008, pp. 201 ff.

<http://www.globalsaleslaw.com/content/api/cisg/urteile/1566.pdf>

Abstract prepared by Thomas M. Mayer

The dispute in question was between two companies which supplied each other with building materials. An action for payment of outstanding debts was instituted by T GmbH, whose principal place of business was in Italy, against M AG, a company having its principal place of business in Thurgau. The lower court allowed the claim; the defendant appealed against that ruling.

The court had to examine an agreement concluded between the parties, whereby the defendant acknowledged certain debts, which it undertook to settle by instalments in the form of a 5 per cent discount granted on all the plaintiff's purchases. The court concluded that such an agreement could not be defined as a contract of sale and thus did not fall within the sphere of application of the CISG. It accordingly interpreted the agreement on the basis of national law, but indicated that the application of the CISG rules (article 8), which it expounded at length, led to the same outcome.

The dispute related not only to that agreement but also to the price of one of the deliveries. Following a telephone call, the plaintiff supplied, instead of the agreed product, which was out of stock, a similar but more expensive product. The defendant deemed that to be a breach of contract, giving rise to a claim for damages within the meaning of article 74 CISG; in the defendant's view, acceptance of the goods should be regarded as a simple measure intended to mitigate the loss within the meaning of article 77 CISG. However, the court accepted the plaintiff's argument that the defendant's unconditional acceptance of the substitute goods implied agreement to a modification of the contract.

Case 933: CISG [7 (2); 45]; 49 (1) (b); [53; 58 (1)]

Switzerland: Federal Court

4C.314/2006

20 December 2006

Original in German

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<http://relevancy.bger.ch/AZA/liste/de/070125.htm>; www.cisg-online.ch, No. 1426

http://www.polyreg.ch/d/informationen/bgeunpubliziert/Jahr_2006/Entscheide_4C_2006/index.html

English translation: <http://cisgw3.law.pace.edu/cases/061220s1.html>

Abstract in German: Swiss Review of International and European Law (SRIEL)

1-2/2008, pp. 174 ff.; Internationales Handelsrecht (IHR) 3/2007, pp. 127 ff.

<http://www.globalsaleslaw.com/content/api/cisg/urteile/1426.pdf>

Abstract prepared by Thomas M. Mayer

X AG, whose principal place of business was in Switzerland, concluded with Y Sàrl two contracts of sale relating to sanding machines and other machinery. The first contract was executed. With regard to the second, X AG, as seller, had instituted proceedings seeking performance of the contract with regard to the outstanding items and payment of the balance of the sale price, since the buyer, Y Sàrl, had rescinded the contract with regard to the non-executed part. Both the lower and appeal courts having dismissed the action brought by the plaintiff (the seller), the latter referred the case to the Federal Court.

Le Federal Court held that, in accordance with article 49 (1) (b) CISG, the buyer could declare the contract avoided if the seller made delivery of the goods subject to a consideration to which it was not entitled.

The court observed that the defendant had proposed to the plaintiff that it would pay that part of the sale price which, in its opinion, was in fact due following set-off against outstanding debts under the first contract. The plaintiff did not accept that proposal and continued to demand payment of the full sale price still owed to it

under the contract. If the defendant's right of set-off in fact existed and the plaintiff's claim for payment of the sale price was consequently extinguished through set-off for a corresponding amount, that implied that the plaintiff was demanding a consideration to which it was not entitled in such a form. Thus the defendant had rightly declared the contract avoided.

The court held that the right of set-off pleaded by the defendant in respect of the costs of remedying defects under the first contract of sale was, in principle, well founded. The question of compliance with article 39 CISG was not examined since the plaintiff had acknowledged the defects.

With regard to the set-off claim, the court acknowledged that the debt in payment of the sale price under a contract could be wholly or partly extinguished by set-off against a counter-claim insofar as the applicable law recognized that effect of set-off. The question of set-off was not dealt with in the CISG, at least where, as in the present case, the reciprocal debts arose under different contracts.

The court, pursuant to applicable Swiss law, as determined by the private international law of the forum, observed that the set-off requirements had been met. However, it referred the case to the lower court, since that court had omitted to specify the amount of the set-off claim.

Case 934: CISG [7 (2); 14 (1)]; 39; [53; 55]; 59; 78

Switzerland: Cantonal Court of the Canton of Valais

C1 06 95

27 April 2007

Original in French

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Abstract in German: Swiss Review of International and European Law (SRIEL) 1-2/2008, pp. 184 ff.

<http://www.globalsaleslaw.com/content/api/cisg/urteile/1721.pdf>

Abstract prepared by Thomas M. Mayer

The case under consideration concerned legal proceedings brought by an Italian seller of cooking accessories against a hotel business in Valais. The seller sought payment of the sale price of an oven, while the defendant asserted warranty claims.

The court determined the sale price on the basis of the following argument: When a buyer placed an order for goods of a kind that the buyer had never purchased and without any reference to the price, the order constituted an invitation to make an offer and the seller made a proposal to enter into a supply contract. The buyer assented to the offer by accepting the goods, either using them or reselling them. If the seller did not indicate the price of the goods supplied, it was presumed to refer to the price normally charged.

In the present case, the court concluded that the amount claimed by the plaintiff was almost 30 per cent lower than the list price and hence of the market price, so that the sale was deemed to have been concluded at the price thus requested.

The court held that the CISG did not contain any rules on the currency in which payment had to be made or on lawful methods of payment. In the absence of any contractual provisions specifying the currency, that question was governed by

national law as determined by the conflict rules. In the light of those considerations, the claim submitted in Swiss francs was granted in euros.

With regard to the warranty claims asserted by the defendant, the court commented on the CISG rules applicable to defect warranties. Its deliberations included a brief analysis of judicial practice on determination of the question of the time limit for giving notice within the meaning of article 39 (1) CISG. However, that analysis was of no specific significance since the court concluded that the defendant had in any event forfeited any defect warranty rights owing to expiry of the two-year period specified in article 39 (2) CISG.

The plaintiff obtained payment of interest on arrears, pursuant to articles 78 and 59 CISG. The amount was fixed in accordance with national law as determined by Swiss private international law.

Case 935: CISG [7 (2)]; 33 (a); 47 (1); 49 (1) (b); 50; [53]; 74; 78

Switzerland: Handelsgericht des Kantons Zürich (Commercial Court of the Canton of Zurich)

HG050430

25 June 2007

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Abstract in German: Swiss Review of International and European Law (SRIEL)

1-2/2008, pp. 180 ff.; Internationales Handelsrecht (2008), pp. 31 ff.

<http://www.globalsaleslaw.com/content/api/cisg/urteile/1564.pdf>

Abstract prepared by Thomas M. Mayer

The action was brought by a printing works in Vienna. It manufactured printing products for the defendant, whose place of business was in the Canton of Zurich and which provided printing services in Switzerland. The aim of the action was to obtain payment of the balance of the sale price still outstanding from the last delivery.

The court affirmed that, in the event of a breach of article 33 (a) CISG by the seller, the buyer could, in accordance with article 49 (1) (b), declare the contract avoided, unless the seller performed within the additional period of time to be fixed in accordance with article 47 (1) CISG. In the case of a fixed-term agreement, a seller could declare the contract avoided without the prior fixing of an additional period of time for performance. The determining moment with regard to avoidance of the contract was the moment of communication of the declaration of cancellation, even if the seller had already despatched the goods at the time when that declaration was received.

In the present case, the defendant cancelled its order owing to a delay in delivery. However, it stated that it was willing to accept delivery and resell the goods at the seller's risk. A few days later, it accepted delivery of the goods dispatched and invoiced by the seller, even before the seller had received the aforementioned communication, and resold them to its customers. Subsequently, it paid part of the invoice. Given those circumstances, the court found that the contract of sale, and with it the obligation to pay the price, still existed, despite the defendant's declaration of cancellation. However, the court allowed the defendant a claim to a reduction of the price in accordance with article 50 CISG or damages in accordance

with article 74 CISG, as set-off against possible loss resulting from late performance.

The defendant was ultimately ordered to pay the full sale price since, despite the court's order, the defendant had not sufficiently detailed the asserted loss. The amount was granted in euros, since the sale price had been agreed in euros by the parties.

Pursuant to article 78 CISG, the court also granted interest on arrears as from the due date of payment to the plaintiff. In line with established precedents of the Swiss courts, the rate of interest was fixed in conformity with Austrian law, which, in accordance with Swiss private international law, was the national law applicable to the contract between the parties.

Case 936: CISG 1; 6; 49 (1); 71

Switzerland: Federal Court

4C.94/2006

17 July 2007

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<http://relevancy.bger.ch/AZA/liste/070809.htm>; www.cisg-online.ch, No. 1515;

www.polyreg.ch/d/informationen/bgeunpubliziert/Jahr_2006/Entscheide_4C_2006/index.html

www.unilex.info/case.cfm?pid=1&do=case&id=1318&step=FullText

English translation: <http://cisgw3.law.pace.edu/cases/070717s1.html>

Abstract in German: Swiss Review of International and European Law (SRIEL) 1-2/2008, pp. 177 ff.; Internationales Handelsrecht (IHR) 2007, pp. 206 ff.

Abstract in English:

www.unilex.info/case.cfm?pid=1&do=case&id=1318&step=Abstract

<http://www.globalsaleslaw.com/content/api/cisg/urteile/1515.pdf>

Abstract prepared by Thomas M. Mayer

The case under consideration concerned the sale of scooters, by a company based in Taiwan and in the People's Republic of China, to a firm having its principal place of business in the Canton of Zurich. The seller sought settlement of the sale price for goods whose delivery it had withheld owing to alleged payment arrears on the buyer's part amounting to over US\$ 7 million. The buyer stated that it had rescinded the contract, maintaining that, owing to the existence of sizeable claims on its part against the seller, the seller had wrongly retained the goods.

The seller instituted proceedings before the Commercial Court of Zurich, seeking payment of the sale price, plus the balance of the aforementioned US\$ 7 million. The court rejected the claim. The Court of Cassation of Zurich and the Federal Court upheld that judgement.

As justification for the application of the CISG, the Federal Court stated that, during the proceedings, the parties had chosen Swiss law as the applicable law, without precluding the applicability of the CISG, and that they had both subsequently referred to that Convention.

On the merits, the Federal Court observed that the seller had relied on article 71 CISG but without demonstrating the alleged deficiency in the buyer's creditworthiness. It thus had to be concluded that the seller had improperly withheld delivery, which entitled the buyer to declare the contract avoided within the meaning of article 49 CISG.

Case 937: CISG 25; 35; 49 (1) (a)

Switzerland: Cantonal Court of the Jura

I.37/04

26 July 2007

Original in French

Abstract in German: Swiss Review of International and European Law (SRIEL)

1-2/2008, pp. 192 f.

<http://www.globalsaleslaw.com/content/api/cisg/urteile/1723.pdf>

Abstract prepared by Thomas M. Mayer

The dispute concerned the sale of an industrial furnace for thermal processing. The German buyer rescinded the contract and sued the seller, based in the Jura, for restitution of the advance payments made and for damages. In that connection, it adduced a whole series of defects.

The court observed that the right of avoidance of a contract was subject to the existence of a fundamental breach of contract, within the meaning of article 25 CISG; in the course of detailed deliberations, it defined the conditions that had to be fulfilled for such a breach to have been committed.

The court acknowledged only one of the alleged defects; some areas of the furnace did not comply with European safety standards in regard to contact with heated surfaces. However, it ruled that that defect did not constitute a fundamental breach, concluding that it was possible to make a correction, specifically by installing additional protection, namely metal sheeting, the cost of which was not high. That minor defect, which could readily be made good at little expense, was not such as to affect the essential substance of the contract or seriously jeopardize the economic object pursued by the parties. Thus the court did not acknowledge the buyer's right of avoidance of the contract and it dismissed the buyer's claim.

Case 938: CISG 25; 26; 39 (1); [49 (1) (a); 49 (2) (b); 50; 53; 74]; 78

Switzerland: Kantonsgericht des Kantons Zug (Cantonal Court of the Canton of Zug)

A3 2006 79

30 August 2007

Original in German

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Abstract in German: Swiss Review of International and European Law (SRIEL)

1-2/2008, pp. 187 ff.

<http://www.globalsaleslaw.com/content/api/cisg/urteile/1722.pdf>

Abstract prepared by Thomas M. Mayer

The case under consideration concerned proceedings brought by a French firm in the electronics sector against a firm, based in Zug, operating in the same sector. The subject of the dispute was the plaintiff's claim for payment of the sale price in respect of an order for 5,000 GSM modules and other items. For its part, the

defendant alleged defects in the modules, namely that they produced echoes and their sound volume was not adjustable.

The court deliberated at length on the contents of notice of a lack of conformity, in accordance with article 39 (1) CISG, and the admissible period for giving such notice, but concluded that the defendant had in any event failed to demonstrate that the defects had been reported and thus it could not rely on the lack of conformity of the goods.

As further justification, the court affirmed that the defendant could declare the contract avoided only if there was a fundamental breach of contract within the meaning of article 25 CISG. For such a breach to exist, it was not sufficient that the defect could not be remedied. Avoidance of the contract was admissible only insofar as any other use of the goods, which was consistent with normal business practice and linked to a reduction of the price, proved impossible or could not reasonably be demanded. That was not so in the present case, since the defendant could incorporate the modules in a simpler item of equipment without any adjustment of the sound volume.

Also, the defendant was unable to prove that it had made a declaration of avoidance within the meaning of article 26 CISG. The facts did not reveal any declaration by the defendant to the effect that it was no longer willing to perform the contract owing to a breach of contract.

Finally, the defendant had to pay the full sale price still outstanding. The defendant was not allowed any deduction of damages by way of set-off, since the defendant had not sufficiently detailed the alleged loss.

The court granted the plaintiff interest on arrears, computed from the due date of payment of the amount claimed, pursuant to article 78 CISG. In line with the prevailing opinion of the Swiss courts, the rate of interest was fixed pursuant to national law as determined by Swiss private international law, in the present case French law.