

Case 45: CISG 38(1); 39(1); 40

International Chamber of Commerce, International Court of Arbitration
Arbitral award issued in 1989 in case no. 5713

Excerpts published in Yearbook Commercial Arbitration, Vol. XV - 1990, 70

Summary published in Italian: Diritto del commercio internazionale July-September 1993, 651

(Abstract prepared by Picard of the ICC International Court of Arbitration)

In a series of contracts for the sale of goods on f.o.b. terms, the buyer disputed, both prior to shipment and upon arrival, the conformity of goods covered under one of the contracts with certain contract specifications. The buyer treated the goods in order to make them more saleable and sold them at a loss.

The seller demanded full payment and the buyer filed a counterclaim demanding compensation for direct losses, financing costs, lost profits and interest.

The arbitral tribunal held, pursuant to article 13 (3) of the 1975 ICC arbitration rules, which allows the tribunal in the absence of a choice of law by the parties to determine the applicable law by applying the private international law rule that it deems appropriate, that the contract was governed by the law of the country where the seller had his place of business. In addition, pursuant to article 13(5) of the ICC arbitration rules, the tribunal decided to take into account CISG as a source of prevailing trade usages.

As the applicable provisions of the law of the country where the seller had his place of business appeared to deviate from the generally accepted trade usages reflected in CISG in that it imposed extremely short and specific time requirements in respect of the buyer giving notice to the seller in case of defects, the tribunal applied CISG.

The tribunal found that the buyer had complied with the requirements of CISG to examine the goods properly (art. 38(1) CISG) and to notify the seller accordingly (art. 39(1) CISG). It was held that, according to article 40 CISG, at any rate the seller would not be entitled to rely on non-compliance by the buyer with articles 38 and 39 of CISG for the reason that the seller knew or could not have been unaware of the non-conformity of the goods with contract specifications. The tribunal awarded the seller the full amount of its claim and set it off against part of the buyer's counterclaim.