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Jurisdiction	Arbitration
Tribunal	ICC International Court of Arbitration
Date of the decision	1989
Case no./docket no.	5713 (Final Award)
Case name	*CISG as reflection of trade usages case*

Excerpt:

[...]

The contract contains no provisions regarding the substantive law. Accordingly that law has to be determined by the Arbitrators in accordance with Article 13(3) of the ICC rules. Under that article, the Arbitrators will „apply the law designated as the proper law by the rule of conflicts which they deem appropriate".

The contract is between a Seller and a Buyer [nationalities] for delivery [third country]. The sale was F.O.B. so that the transfer of risks to the Buyer took place in [Seller's country]. [Seller's country] accordingly appears as being the jurisdiction to which the sale is most closely related.

The Hague Convention on the law applicable to international sales of goods dated June 15, 1955 (Article 3) regarding sales contracts, refers as governing law to the law of the Seller's current residence. [Buyer's country] has adhered to the Hague Convention, not [Seller's country]. However, the general trend in conflicts of law is to apply the domestic law of the current residence of the debtor of the essential undertaking arising under the contract. That debtor in a sales contract is the Seller. Based on those combined findings, [the law of the Seller's country] appears to be the proper law governing the Contract between the Seller and the Buyer.

As regards the applicable rules of [law of the Seller's country], the Arbitrators have relied on the Parties' respective statements on the subject and on the information obtained by the Arbitrators from an independent consultant [consultant's name]. The Arbitrators, in accordance with the last paragraph of Art. 13 of the ICC rules, will also take into account the „relevant trade usages".

[...]

The Tribunal finds that there is no better source to determine the prevailing trade usages than the terms of the United Nations Convention on the International Sale of Goods of 11 April 1980, usually called „the Vienna Convention". This is so even though neither [Buyer's country] nor [Seller's country] are parties to that Convention. If they were, the Convention might be applicable to this case as a matter of law and not only as reflecting the trade usages.

The Vienna Convention, which has been given effect to in 17 countries, may be fairly taken to reflect the generally recognized usages regarding the matter of the non-conformity of goods in international sales. Article 38(1) of the Convention puts the onus on the Buyer to „examine the goods or cause them to be examined promptly". The Buyer should then notify the Seller of the non-conformity of the goods within a reasonable period as of the moment he noticed or should have noticed the defect; otherwise he forfeits his right to raise a claim based on the said non-conformity. Article 39(1) specifies in this respect that: „In any event the buyer shall lose the right to rely on a lack of conformity of the goods if he has not given notice thereof to the seller within a period of two years from the date on which the goods were handed over, unless the lack of conformity constituted a breach of a guarantee covering a longer period" .

In the circumstances, the Buyer had the shipment examined within a reasonable time-span since [expert's name] was requested to inspect the shipment even before the goods had arrived. The Buyer should also be deemed to have given notice of the defects within a reasonable period, that is eight days after the expert's report had been published.

The Tribunal finds that, in the circumstances of the case, the Buyer has complied with the above-mentioned requirements of the Vienna Convention. These requirements are considerably more flexible than those provided under [the law of the Seller's country]. This law, by imposing extremely short and specific time requirements in respect of the giving of the notices of defects by the Buyer to the Seller appears to be an exception on this point to the generally accepted trade usages.

In any case, the Seller should be regarded as having forfeited its right to invoke any non-compliance with the requirements of Articles 38 and 39 of the Vienna Convention since Article 40 states that the Seller cannot rely on Articles 38 and 39, „if the lack of conformity relates to facts of which he knew, or of which he could not have been unaware, and which he did not disclose". Indeed, this appears to be the case, since it clearly transpires from the file and the evidence that the Seller knew and could not be unaware [of the non-conformity of the consignment to] contract specifications.

[...]

This provision (Article 70 of the New French Code or Civil Procedure), even assuming that it may apply in the circumstances, does not in any way require the tribunal to reject the counterclaim if its examination might delay that of the main claim. It simply states that the counterclaim for setting off is always admissible except only that the tribunal may find it appropriate to sever the counterclaim from the main claim lest a concurrent examination of the counterclaim should excessively delay the judgement on the merits. In the present case, the main Claim and the Counterclaim, in accordance with the Terms of Reference, have been examined together so as to be the subject of a single award, and there is no reason to separate them.

[...]