

Case 192: CISG 3(2); 38; 39

Switzerland: Obergericht des Kantons Luzern; 11 95 123/357

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The Italian seller of medical supplies sold a quantity of items to his exclusive distributor, the Swiss buyer, who resold the goods to a Swiss hospital. The hospital refused acceptance of the consignment on the ground of lack of conformity. Therefore, the buyer refused to pay the purchase price. The seller sued the buyer and the court of first instance ordered the latter to pay the purchase price.

On appeal, the court upheld that decision. With respect to the issue of the CISG's applicability, the court held that the CISG was applicable and had not been excluded by the parties since a valid choice of law could only be made by the parties if they consciously wanted their relation to be governed by a specific law. In addition, the court held that the CISG would not apply if other elements than those related to the contract of sale were preponderant (article 3(2) CISG). However, the court noted that a single sale of goods pursuant to, for example, an exclusive distribution or franchise contract would be governed by the CISG.

As regards examination of the goods by the buyer for the purpose of determining their conformity with the contract, the court found a period of ten days after delivery to be appropriate (article 38 CISG). As to the notice requirement for lack of conformity, the court held that a "rough average" of one month was also appropriate (article 39 CISG). After a review of international case law, the court stated that there were serious gaps in the construction of the terms "examination of the goods" and "notice of lack of conformity", with the extremely restrictive German case law, on the one hand, and the more liberal American and Dutch case law, on the other. The court observed that the gap between these two positions had to be narrowed.

The court held that the buyer had lost its rights on account of having notified the seller about the lack of conformity of the goods more than three months after their delivery.

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Commented on by Claude Witz in [1998] Recueil Dalloz, 35ème Cahier, Sommaires commentés 315.