CISG-online 228	
Jurisdiction	Switzerland
Tribunal	Obergericht des Kantons Luzern (Court of Appeal Canton Luzern)
Date of the decision	8 January 1997
Case no./docket no.	11 95 123/357
Case name	*Blood infusion devices case*

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[This is an appeal of a ruling in a case involving the sale of medical supplies (blood infusion devices) by an Italian firm [seller] to a Swiss [buyer]. Key issues include the interpretation of Art. 38 CISG and the meaning of the phrase «within a reasonable time» in Art. 39(1) CISG.]

Facts of the case

A. 1
On 7 October 1994, the Court of First Instance of *Luzern-Land* issued a Provisional Order to the effect that the [seller] is to be paid Fr. [Swiss Francs] 190,680 plus 5% interest since 31 December 1993. The [buyer] filed a motion for recourse, but the competent department (*Schuldbetreibungs- und Konkurskommission*) of the *Obergericht* [Appellate Court] refused to take action because of the [buyer]'s delayed payment on advance costs.

B. 2
On 4 January 1995, the [buyer] challenged the Provisional Order in the Court of First Instance and sought a declaration that either no valid claim for payment existed to the amount of Fr. 190,680 plus 5% interest since 31 December 1993, or that it had been set-off and lost.

C. 3
In its decision of 6 October 1995, the Court of First Instance sustained the [buyer]'s challenge

[*] All translations should be verified by cross-checking against the original text. Translator's note on abbreviations: BGE = *Entscheidungen des Bundesgerichts* [Official Reporter of the Federal Court, the highest Swiss court in civil matters]; ZPO = *Zivilprozessordnung* [Swiss Code on Civil Procedure].

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to the amount of Fr. 373.75 plus 5% interest since 31 December 1993 but rejected it in respect of the residual amount of Fr. 190,306.25.

D. 4
On 31 October 1995, the [buyer] appealed to the Obergericht, seeking:

1. Annulment of Items 2 to 5 of the decision of the Court of First Instance;
2. A declaration that [seller]'s claim for Fr. 190,680 plus 5% interest since 31 December 1993 must be disregarded because it does not validly exist or, alternatively, was set-off; that the provisional order of 7 October 1994 must therefore be annulled; and that
3. [Seller] should bear all costs and expenses.

On 1 February 1996, the [seller] requested rejection of the appeal, with costs and expenses to be borne by the [buyer].

E. 5
Pursuant to § 254 ZPO [Code of Civil Procedure], the parties waived their right to a court hearing for the appeal.

Considerations

1. 6
As is common practice, the written instrument is taken into the file. The examination of witnesses is waived as they do not have further influence on the outcome of these proceedings.

2. 7
In its challenge, the [buyer] puts forward a claim for damages with which it wants to set-off the [seller]'s claim for payment. The [buyer] acknowledged the existence of [seller]'s claim at Fr. 190,680. The [buyer] maintains that it suffered damages of Fr. 1,381,296 due to the delivery of 8,000 defective arterial blood infusion devices of type [...] and 6,000 venous blood infusion devices of type [...].

3. 8
In its appeal, dated 15 January 1996, the [buyer] alleges that the Court of First Instance applied Swiss law to the relationship of the parties, but the CISG is the law applicable to the sales contract. [Seller] alleges that, by relying on Swiss law during the proceedings leading to the provisional order, the [buyer] consented to its application to the contract.

According to Art. 116(1) IPRG [Private International Law Act], the law applicable to the 9
contract is the law chosen by the parties. This choice must be made expressly or must become apparent from the agreement or the circumstances. Neither in their exclusive distribution contract of 1 January 1990, nor at any other time did the parties expressly agree on the law governing the contract. The [seller] does not challenge this fact. The simple question therefore is whether the circumstances of the case imply a choice of law. According to judicial

authorities, an implicit choice of law can only be made where it can be assumed that the parties were aware of the problem and actually wanted to submit their relationship to a certain body of law (BGE 111 II 179; 111 II 278 with reference to BGE 82 II 552). The single fact that the [buyer] relied on Swiss law during the first stage of the proceedings (*Rechtseröffnungsverfahren*) does not allow the conclusion that both parties actually agreed on the applicability of Swiss law. Therefore, the Court has to establish the substantive law (§ 99(1) ZPO). The Court must determine the applicable law in line with the principles of private international law.

According to Art. 117(1) IPRG, the contract is governed by the law of the State to which it is most closely related. The closest relation is assumed to exist with the State in which the party performing the main and characteristic obligation of the contract has its usual residence. The Court of First Instance was right in declaring the exclusive distribution contract between the parties to be a mixture of elements of sales and agency. In cases of «mixed contracts», it is also correct to draw on the prevailing element, as is set out in several Federal Court decisions. In an exclusive distribution contract, the agency element prevails. In principle, therefore, Swiss law is applicable. However, the [buyer] is right in pointing out that, according to Art. 1(2) IPRG, international conventions prevail over national law. Thus the question arises whether, given the ratification of the CISG by Italy and Switzerland, the rules of the CISG are applicable as far as the sales element of the contract is concerned. **10**

Application of the CISG must be denied where, in the contemplation of the parties, other elements prevail over the typical legal elements of sales. According to Art. 3(2) CISG, the rules of the Convention do not apply to contracts which oblige the seller to mainly carry out works or services. This rule is particularly relevant in commercial distribution agreements, franchise contracts or other stipulations, which rather focus on the concept of distribution, the fixing of global commitments to delivery and acceptance or other framework conditions. The CISG remains principally applicable for the individual delivery transactions carried out under such distribution contracts (cf. Graf v. Westphalen, Handbuch des Kaufrechtsvertrages in den EG-Staaten einschliesslich Österreich, Schweiz und UN-Kaufvertrag). Therefore, the CISG is applicable to the purchase of 8,000 arterial and 6,000 venous blood infusion devices by the [buyer]. **11**

4.

(a) **12**
The [buyer] further maintains that it examined the received goods in accordance with Art. 38 and gave notice of lack of conformity in writing within the time limit of Art. 39 CISG.

According to Art. 38 CISG, the buyer must examine the goods, or cause them to be examined, within as short a period as is practicable in the circumstances (paragraph (1)). If the goods are redirected in transit or redispatched by the buyer without a reasonable opportunity for examination by it and at the time of the conclusion of the contract the seller knew or ought to have known of the possibility of such redirection or redispatch, examination may be deferred until after the goods have arrived at the new destination (paragraph (3)). **13**

According to Art. 39(1) CISG, the buyer loses the right to rely on a lack of conformity of the goods if [buyer] does not give notice to the seller specifying the nature of the lack of conformity within a reasonable time after [buyer] has discovered it or ought to have discovered it.

The time for such notice starts to run as soon as the lack of conformity is discoverable and, in any case, when the buyer has actually discovered it. Whether a lack of conformity is discoverable depends in particular on the specific requirements for the examination. In order to answer the question whether the [buyer] has given notice within a reasonable time pursuant to Art. 39 CISG, it is thus fundamental to determine the point of time at which the alleged lack of conformity was discoverable by [buyer]. 14

The [buyer] has admitted that it did not examine the blood infusion devices upon arrival at its facilities. The [buyer] rather argues that the [seller] knew that the goods were being redispatched. Additionally, [buyer] claims to have lacked an opportunity to examine the goods. Because of the necessity to keep such medical equipment sterile until its usage, the [buyer] allegedly was forced to pass on the sealed original boxes to its customers. [Buyer] says it had to have this medical equipment examined by its customers, in this case, the hospital. 15

(b) 16
A redispatch under Art. 38(3) CISG exists where the buyer or, in case of a direct purchase, the sub-purchaser, dispatches the goods to a new destination after receipt at the original destination. The mere on-sale without further transport of the goods – as is common in the retail business, where the buyer mainly stores goods in its own facilities – does not fall within the meaning of paragraph (3). However, the fact that the buyer lacked a reasonable opportunity to examine the goods because of an on-sale must also be considered under paragraph (1), both with respect to the method of the examination and especially regarding the reasonable period of time required for such an examination (cf. v. Caemmerer/Schlechtriem, Kommentar zum Einheitlichen UN-Kaufrecht, München 1995, Art. 38 n. 23).

In Item 4 of its appeal, the [buyer] states that the blood infusion devices ordered on 15 March 1993 were delivered on 16 June 1993. Subsequently, [buyer] resold them to its «Swiss customers.» In Item 15 of the appeal, the [buyer] also revealed that it stored a great amount of the goods received on 16 June 1993. The various delivery notes nos. 7377, 7391, 7405, 7408, 7420, 7432, 7490, 7517, 7518, 7538 and 1554 show that the [buyer] delivered and billed to the hospital blood infusion devices in portions of twenty to fifty. This clearly is not a redispatch under Art. 38(3) CISG. The fact that the hospital was allegedly the [buyer]'s only customer for the blood infusion devices ordered on 15 March 1993 does not change anything. Instead, it is decisive that the [buyer] did not dispatch the goods in their entirety but put the majority of the delivery in storage. Under these circumstances, one cannot say that the goods were packed or kept in repositories necessary to protect them during further transport. The fact that the goods were kept in plastic bags and carton boxes must rather be taken into account regarding the modality of the examination and its time limit (cf. v. Caemmerer/Schlechtriem, Art. 38 n. 23). It follows that in determining whether the time limit 17

was complied with, Art. 38(1) must be taken into account. The time limit generally starts upon delivery, i.e., 16 June 1993 in this case.

Even if this had been a redispatch under Art. 38(3) CISG, that does not automatically lead to a postponement of the date at which the time limit starts to run. Redirection or redispatch only causes such delay where the buyer did not have a reasonable opportunity to examine the goods. Whether this is the case depends on the period of time for which the buyer stores the goods prior to redispatch. In addition, the nature of the packaging is of primary importance (cf. v. Caemmerer/Schlechtriem, Art. 38 n. 25). The delivery took place on 16 June 1993. According to the delivery notes, deliveries from the [buyer] to the hospital were carried out on 30 June and on 8, 14, 21 and 27 July, as well as on 18 and 30 August, and on 9 and 16 September 1993. Given the scope of the necessary examination (see below at (c) and (d)), until 26 June 1993 there was sufficient opportunity for a check, before the goods were to be supplied to the hospital; besides, on 22 June 1993 the [buyer] sent to the hospital three complimentary blood infusion devices as samples, seeking examination and affirmation of their functioning as soon as possible. **18**

(c) **19**

In determining the time limit for the examination of the goods, one must consider the individual circumstances and the adequate possibilities of the parties. This includes, e.g., the place at which the goods are located and the way in which they are packaged. The nature of the goods themselves is particularly relevant (cf. v. Caemmerer/Schlechtriem, Art. 38 CISG n. 16). Goods which do not change their quality or go to waste can be expected to be examined for their quantity and type immediately. An immediate thorough examination of the quality cannot reasonably be expected if the buyer is also busy with other dealings (v. Caemmerer/Schlechtriem, Art. 38 n. 15–17). In the absence of a contractual stipulation or a particular trade custom, the buyer must examine the quality and quantity of the goods, their packaging and all other matters in a reasonable manner. The principle is an objective test. The examination must, in the light of all circumstances, be of such kind as to reveal discoverable defects. Where a large quantity of goods is delivered, the buyer does not need to examine the entire load, but must test samples. Where an examination may damage the substance of the goods, the buyer must check the weight, appearance, etc. In addition to that, it must also take samples even if the examined goods are destroyed in this process or cannot be used afterwards. However, the number of samples to be taken in such cases can be reduced to a few per thousand of the entire stock. This rule also applies to goods in their original packaging which cannot be sold after being opened (cf. v. Caemmerer/Schlechtriem, Art. 38 CISG n. 13, 14).

It follows that the scope of duty as described by no means excused the [buyer] from examining the ordered and delivered goods. [Buyer] was rather obliged to open sample carton boxes and plastic bags. One needs to bear in mind the [buyer]'s failure to prove that the blood infusion devices would have been damaged and become unfit for sale by opening the cartons for examination. In Item 28 of its claim, the [buyer] has expressly written that it had opened the delivered cartons and, to the extent possible, sorted out obviously faultless blood infusion devices in order to provide to the hospital goods free from defects in exchange for faulty **20**

material. It can be concluded that the opening of the cartons enabled the buyer to recognize defects and that the blood infusion devices could also be delivered in cartons already opened. The [buyer] further outlines in Item 26 of its claim the defectiveness of about one-fourth of the blood infusion devices, which originated from the delivery of 16 June 1993 and were delivered by [buyer] to the hospital. One can therefore assume that by opening of only a few samples per mille of the sterile plastic bags, the [buyer] would have discovered the lack of conformity. In summary, the [buyer] had a duty to examine the blood infusion devices for apparent lack of conformity and also had the opportunity to carry out such examination; the testing of samples would have revealed the criticized lack of conformity.

(d) **21**

Therefore, the question of the length of the time limit for an examination in the circumstances of this case remains. Bearing in mind the high quantity of purchased goods, the fact that they were packed in cartons and plastic bags and that they were durable, a time limit of ten days seems appropriate under the circumstances. The [buyer] itself acknowledges that the examination of its stock – which was carried out on 23 September 1993 after taking back defective blood infusion devices from the hospital – took three working days. According to the unchallenged statement of the [buyer], the goods arrived at its facilities on 16 June 1993. Therefore, the time limit for examination of the goods ran until 26 June 1993. One can thus assume that the [buyer] ought to have discovered the lack of conformity so that it should have notified the [seller] of it from 26 June 1993. Accordingly, the time limit for the notice of defect started to run on that date, pursuant to Art. 39 CISG.

(e) **22**

The calculation of the time limit in which to give a notice of defect varies. Whereas jurisdictions of the Germanic legal family demand an immediate notice, respectively a notice without delay, in Anglo-American and Dutch law the notification must be given within a «reasonable time» or within an appropriate time after discovery of the defects (cf. v. Caemmerer/Schlechtriem, Art. 39 n. 4). It appears to be highly uncertain how to determine the time limit for durable goods in standard cases. German authors tend to apply a limit of eight days. The first German decisions on the CISG also point in this direction. Where, due to a longstanding tradition of the national law, a notice of defect given several months after the discovery of the defect is deemed to be within an appropriate time limit – as is the case in U.S. law – this view is likely to affect the interpretation of the CISG. To avoid too wide a gap in interpretation, a convergence of those points of view seems inevitable. Therefore, an approximate medium time frame of at least one month seems appropriate (cf. v. Caemmerer/Schlechtriem, Art. 39 n. 17). Bearing in mind the uncertainty regarding the interpretation of a «reasonable time limit», which the authors of the v. Caemmerer/Schlechtriem Commentary call to our attention, it seems sensible to adopt their substantiated proposal and regard one month as a reasonable time limit. It follows that the time limit for the [buyer] started to run on 26 June 1993 and expired at the end of July 1993. The notice of defect given by the [buyer] on 6 October 1993 therefore came too late even if one wanted to double the time limit for the examination and notice of defect. The [buyer] thus lost its right to rely on a lack of conformity of the goods pursuant to Art. 39 CISG. [Buyer]

also loses all remedies that had been available under Art. 45 CISG. According to Art. 74 CISG, claims for damages are included in those remedies.

(f) 23
The [buyer] finally maintains that the expiration of the time limit remains without effect where the failure to comply with it can be reasonably excused as provided in Art. 44 CISG. However, [buyer]'s excuses depend on its allegation that the time limit for the examination started to run on 23 September 1993, i.e., on the day on which it took back defective blood infusion devices from the hospital. Contrary to the [buyer]'s assumption, the time limit for examining the blood infusion devices started to run on 16 June 1993. Therefore the reasons brought forward by the [buyer], namely that the small size of its enterprise did not allow itself to spare one full employee for the examination of the goods, do not excuse the (delayed) notice of defect given more than three months after receiving the goods.

(g) 24
It follows from these considerations that the [buyer] does not have any claim for damages with which to set-off the [seller]'s claim for payment. To the amount of Fr. 190,306.25 plus 5% interest since 31 December 1993, the [buyer]'s appeal must be rejected. In accordance with the decision of the Court of First Instance, its appeal is valid to the amount of Fr. 373.75.

5. 25
According to this conclusion, the [buyer] must bear the entire costs of the proceedings (§ 119 ZPO). The [buyer]'s small success does not justify the allocation of costs to the [seller]. The amount in dispute is FR. 190,000.

Judgment

1. 26
The [buyer]'s appeal is sustained only to the amount of Fr. 373.75.

2.
To the residual amount of Fr. 190,306.25 plus 5% interest since 31 December 1993, the [buyer]'s appeal is rejected; therefore, the Provisional Order made by the Court of First Instance on 7 October 1994 now becomes final and binding to this amount.

3.
The [buyer] must bear the entire costs of the proceedings in both instances.

The costs of the proceedings before the Court of First Instance amount to Fr. 4,000; the costs arising out of the proceedings before this Appellate Court amount to Fr. 3,800; both will be deducted from the advance payments.

Further, the [buyer] must bear the [seller]'s legal fees which amount to Fr. 8,605.20 in the proceedings before the Court of First Instance, and Fr. 5,181.25 (incl. expenses and VAT) in these Appellate Proceedings.