CISG-online 331	
Jurisdiction	Switzerland
Tribunal	Kantonsgericht Nidwalden (Court of First Instance Nidwalden)
Date of the decision	03 December 1997
Case no./docket no.	15/96 Z
Case name	*Italian furniture case I*

Translation[*] by Jan Henning Berg[**]

[...]

A. 1

The [Seller] is an Italian manufacturer of furniture. In particular, it provides entire bedrooms which it mainly exports. The Swiss [Buyer] acts as a dealer for furniture. The companies entered into a business relationship in 1988. The [Seller] sold the [Buyer] bedroom furniture which it had manufactured. This furniture was then resold abroad by the [Buyer] on its own account, mostly to Asia but in Switzerland as well. Since certain countries do not accept intermediary dealers, [Buyer] sometimes appeared as a sales agent for the [Seller], who consequently appeared as a direct seller to the end customer. [Buyer] received a commission for acting as an agent for [Seller]. Business relations were aborted by May 1995, when disputes arose between the parties.

Afterwards, [Seller] requested [Buyer] by letter dated 24 July 1995 to pay Italian lira [Lit] 251,057,396, being the difference between its claim for furniture sales and [Buyer]'s claim for commission payments. By letter dated 12 August 1995, [Buyer] refused to pay the requested sum. This claim remained in dispute between the parties. 2

B. 3

After a mediation hearing on 23 February 1996, [Seller] brought an action against the [Buyer] on 23 April 1996. The court refused the action for incompleteness. By way of a revised submission dated 20 May 1996, [Seller] entered legal proceedings against the [Buyer] before the Court of First Instance Nidwalden and sought the following relief:

1. The [Buyer] should be obliged to pay the [Seller] LIT 251,057,396 plus 10% interest since 1 January 1995.

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[*] All translations should be verified by cross-checking against the original text. For purposes of this translation, Claimant and Cross-Appellee of Italy is referred to as [Seller] and Respondent and Cross-Appellant of Switzerland is referred to as [Buyer]. Amounts in the former currency of Italy (Italian lira) are indicated as [LIT].

[**] Jan Henning Berg studied law at the University of Osnabrück (Germany) and at King's College London. He participated in the 13th Willem C. Vis International Commercial Arbitration Moot with the team of the University of Osnabrück and coached the team of the University of Osnabrück for the 14th Willem C. Vis and 4th Willem C. Vis (East) Moot.

2. Costs and expenses should be borne by [Buyer].

C. 4
The [Buyer] requested by way of its procedural response on 9 September 1996:

1. [Seller]'s action of 20 May 1996 should be dismissed in total.
2. Costs and expenses should be borne by [Seller].

At the same time, [Buyer] brought a cross-action against the [Seller] and requested: 5

1. [Seller] should be ordered to pay the [Buyer] LIT 304,468,221 plus 10% interest, in the alternative 5%, since 1 January 1995, in the alternative since the mediation hearing.
2. Costs and expenses should be borne by [Seller].

D. 6
The [Seller] fully renewed its counterplea before the court on 4 November 1996 and simultaneously responded to the cross-action with the following request for relief:

1. The cross-action should be dismissed in total.
2. Costs and expenses should be borne by [Buyer].

E. 7
On 12 December 1996, [Buyer] filed both its rejoinder against the counterplea and its own cross-action counterplea, in which it fully abided by its previous requests.

F. 8
[Seller] filed its factual defense against the rejoinder as well as the cross-action rejoinder. It also abided by the requests according to the previous cross-action response.

G. 9
[Buyer] filed factual defense on 7 March 1997.

The parties' written submissions will be referred to in the Court's legal reasoning whenever necessary and appropriate.

H. 10
The Court held an oral hearing on 12 November 1997. [Seller] was represented by its attorneys lic. iur. A. B. and Dr. iur. P. H., for the [Buyer] there were present E. L., being business representative and Dr. iur. K. Z. as attorney.

a) 11
The parties were given the opportunity to submit new evidence to the Court.

[Seller] submitted a new piece of evidence ([Seller]'s exhibit 39), which is identical to [Buyer]'s exhibit 41 in regard to content. [Seller] further argued in writing that the [Buyer] had submitted an imprecise translation of [Seller]'s General Business Conditions.

[Buyer] responded that it did not doubt the amount of commission set out in its exhibit 41. However, it did assert that this account was incomplete. [Buyer] alleged that the translation of the General Business Conditions was correct, because otherwise it would not have been ap- proved by the Italian Consulate. With regard to section II.5 of [Seller]'s written submission, [Buyer] holds to its own written argumentation.

[Buyer's requests:]

b) **12**
[Buyer] made the following procedural requests:

> The [Buyer] should be allowed to inspect the books and vouchers of the [Seller] that are relevant to the previous billing of commission until the closing of business relations. In the alternative, [Seller] should be ordered to edit these documents. [Buyer] expressly reserves the right to bring a successor action concerning the commissions, respectively, [Seller] had to bill those commissions which would be shown in the edited presentation of these documents.
>
> Possibly, the action needed to be suspended until the [Buyer] could definitely specify the relevant claims.

[Buyer] also made additional factual allegations. These were submitted in writing and will be referred to in the Court's reasoning whenever necessary. **13**

[Seller's response:]

[Seller] responded that [Buyer]'s request for an edited presentation of documents should be deemed irrelevant. Its prerequisites were not met since the basis of [Buyer]'s claim was not sufficiently substantiated. Therefore, the request for such documents is not admissible. [Seller] further contests the fact that it had ever accepted [Buyer]'s «debit notes» and referred to its written submissions. [Seller] went on to argue that [Buyer] had not given notice of non-conformity according to the applicable legal provisions. Finally, [Seller] alleged that hearing the witness Benetti would only make sense if a basis for [Buyer]'s claim had been sufficiently demonstrated. **14**

[Buyer's reply:]

[Buyer] replied that it was impossible to substantiate the claim because the necessary documents were not available at all. Consequently, it requested to inspect the [Seller]'s documents. Mr L. had constantly urged [Seller] to furnish the documents. This could be testified to by wit- ness Benetti. It was untrue that nothing had been substantiated; rather, the claim was substantiated as far as possible. **15**

c) **16**
Afterward, the parties negotiated a settlement at the Court's suggestion. The settlement provided for the [Buyer] to pay the [Seller] LIT 175,002,000 in instalments and that each party should bear its own expenses with the court fees divided equally. The parties stipulated that each could withdraw from the settlement until 30 November 1997.

I. 17
The Court delivered the settlement to the parties by written notification dated 13 November 1997. By letter dated 28 November 1997, [Buyer] withdrew from the settlement.

J. 18
The Court's judgment was sent to the parties on 9 December 1997 and received on 10 December 1997. By letter dated 10 December 1997 and within the given period of ten days, [Buyer] demanded the full reasoning of the Court over the subject matter.

Ruling of the Court:

1. [*Subject of the dispute*]

It is undisputed that [Seller] with its seat in Pesaro (Italy) and [Buyer] with its seat in Hergeswil (Switzerland) entertained business relations between 1988 and May 1995 and that [Buyer] acted as reseller and agent for furniture produced by [Seller]. 19

[Seller] now requests payment of unsettled claims for purchases. To the contrary, [Buyer] relies on claims for commission from its acting as a sales agent. This counterclaim of the [Buyer] is submitted partly as a set-off and partly as a cross-action. Certain of the [Seller]'s claims and certain of the [Buyer]'s cross-action claims are in dispute. 20

2. [*Applicable law*]

The parties have their places of business in different countries, thus the present dispute is of international character. The Court has to determine whether it must apply domestic or foreign law, § 54(1) of the Code of Civil Procedure of the Canton of Nidwalden (ZPO)). According to classic notion, proceedings are governed by the law of the Court's seat (*lex fori*; cf. Oscar Vogel, *Grundriss des Zivilprozessrechts*, 5th ed., Bern 1997, Chapter 1, N 87, p. 49). This would in turn lead to the application of the Code of Civil Procedure of the Canton of Nidwalden and Swiss federal law – as long as it contains procedural rules like, e.g., Art. 8 of the Swiss Civil Code (ZGB). Otherwise, if a Swiss Court rules on the dispute, the applicable law is deter- mined by the Federal Law on the Conflict of Laws (Art. 1 of the Swiss Federal Act on Private International Law (IPRG)). 21

Under the law of obligations, a contract is governed by the law designated by the parties. The choice of law must be expressly stipulated or unambiguously follow from the contract or the circumstances of the case, and this choice can be stipulated or modified at any time (Art. 116 IPRG). A certain procedural conduct by the parties to this dispute – especially a joint reference to the *lex fori* – is not an implied designation of Swiss law in itself. However, it may serve as an indication. With consideration to Art. 116(2)(1) IPRG, additional indicating factors are critical in order to assume the intention to deviate from objective conflicts of laws provisions and to directly determine another substantive law (cf. Marc Amstutz/Nedim Peter/Markus Wang, *Basler Kommentar*, Basel 1996, note 39 on Art. 116 IPRG; Swiss Federal Supreme Court, *Entscheidungen des Schweizerischen Bundesgerichts (BGE)* [Official Reporter on decisions by the Swiss Federal Supreme Court] 119 II 176; Swiss Federal Supreme Court, *BGE* 99 II 318). 22

Both parties are correspondingly and exclusively relying on the applicability of Swiss law. According to case law and literature cited above, this cannot in itself constitute an implied choice of law. However, there is another objective indicating factor in the case at hand: Art. 3.1 of the [Seller]'s «Condizioni Generali di Vendita» (General Sales Conditions; hereinafter referred to as «cgv») provides for Italian law to apply. These conditions were signed by both parties and submitted to the present proceedings. Therefore, the parties have known of their content and were aware of having made a choice of law in favor of Italian law. When the parties now expressly refrain from relying on these provisions and base their whole submissions solely on Swiss law instead, it means that such corresponding conduct is to be regarded as an implied choice of Swiss law. 23

As a consequence, the present dispute is governed by Swiss law. 24

The United Nations Convention on Contracts for the International Sale of Goods (CISG) (Vienna, 11 April 1980) governs contracts for the sale of goods between parties who have their places of business in different countries if these countries are Contracting States or if the rules of private international law lead to the application of either country's national law (Art. 1(1) CISG). Irrespective of whether Italian or Swiss law is applicable, the CISG must be applied due to both countries being Contracting States to the Convention and both parties having their places of business in member states. 25

As a consequence, the parties' legal relations are basically governed by Swiss law. The sales contracts in particular are governed by the CISG. 26

3. [*Adjudication on the parties' claims*]

[Seller] claims a sum of LIT 251,057,396 for various unsettled accounts from sales of furniture to [Buyer]. The sum resulted from a total claim for purchase prices of LIT 359,772,338 subtracted by a sum of LIT 108,714,942 in favor of [Buyer] from arrangements of business deals in the past. 27

The [Buyer] admits the [Seller]'s claims to a total amount of LIT 239,013,000 according to its exhibits 7-13 and 17-20. However, it contests the remaining claims. Moreover, it relies on counterclaims from set-offs amounting to the sum of undisputed claims in favor of [Buyer]. 28

a)

aa) [*Seller's claim from account no. 1253*] 29
[Seller] claims a sum of LIT 2,214,000 from account no. 1253, dated 11 July 1994, being the difference between the invoice value and the sum paid by the [Buyer]. [Buyer] objects that [Seller] had delivered spare parts for this sum as per account and argues that these parts had to be delivered free of charge. This followed, first, from the term «spare parts» and, second, from Art. 4.1 cgv which regulates the [Seller]'s duty to issue a guarantee.

The [Seller] rightfully objects that the term «spare parts» (cf. Robert Herbst, *Dictionary of Commercial, Financial and Legal Terms*, Volume 1: English-German-French, p. 966, Zug 1968, english term for *Ersatz- oder Reserveteile*) does not in itself signify a delivery of the said parts 30

under the guarantee, and thus free of charge. Hinting to Art. 4.1 cgv does not help either. It provides for the [Seller]'s duty to issue a guarantee only if the buyer had given a notice of non-conformity according to Art. 5 cgv (Art. 4.2 cgv). Under that provision, a notice of non- conformity is effective if it is sent by certified mail to the [Seller] with the defects precisely indicated (Art. 5.2 cgv). It is for the [Buyer] to prove that it gave an effective notice. However, [Buyer] did not submit any evidence to the Court in that respect. [Buyer]'s objection is therefore irrelevant; it is obliged to pay the price claimed by [Seller].

bb) [*Seller's claim from account no. 1367*] **31**
The [Seller] further relies on a residual claim of LIT 6,542,338 from account no. 1367, dated 25 July 1994. [Buyer] submits that it rightfully refused payment because the sum invoiced was too high. In contrast, the [Seller] properly argues that the [Buyer] did in no way substantiate why and to what extent this should have been the case. [Buyer] leaves the Court without any proof for its mere allegation. The [Buyer]'s objection cannot be considered; [Buyer] is ordered to pay the price on this account.

cc) [*Seller's claims from accounts nos. 2666, 2667 and 01; No reliance on lack on conformity by Buyer*] **32**
The [Buyer] objects to [Seller]'s claims from accounts nos. 2666 and 2667 of 30 December 1994 and no. 01, dated 4 January 1995. [Buyer] alleges that deliveries did not conform to the contract. [Seller] responds that [Buyer] failed to give any notice of non-conformity at all, respectively, failed to do so in due time.

In accordance with Art. 39(1) CISG, the buyer loses the right to rely on a lack of conformity of **33**
the goods if it does not give notice to the seller specifying the nature of the lack of conformity within a reasonable time after it had discovered it or ought to have discovered it. Under the provision of Art. 8 ZGB, the [Buyer] has to prove that it had given specific and timely notice of the alleged lack of conformity. If it fails to do so, it will bear the consequence of not being able to rely on the lack of conformity.

The [Buyer] submitted extensive correspondence with regard to the aforementioned ac- **34**
counts. However, those pieces of correspondence between the [Buyer] and its end customers do not at all affect the legal relation between [Seller] and [Buyer] and are therefore irrelevant to the present case. The other documents, correspondence between [Seller] and [Buyer], do not sufficiently prove that [Buyer] had given notice of the non-conformity in due time and that it had sufficiently specified the lack of conformity in terms of Art. 39(1) CISG. In view of the submitted correspondence between the parties, the [Buyer] particularly failed to give any exact description of the defects. Either it made some merely general statements («did not fulfil the obligations», «wrong parts», «full of breakages») or the submitted letters do not at all refer to the accounts in question. Thus, [Buyer] did not bring proof of having given effective notice of non-conformity. [Buyer] may not rely on a lack of conformity of the goods and is obliged to pay the purchase price in full.

[...]