

Case 251: CISG 1(1)(b); 4; 8; 35; 38(1); 39(1); 40; 73

Switzerland: Handelsgericht des Kantons Zürich; HG930634

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A Swiss seller, plaintiff, sold lambskin coats to a Liechtenstein buyer, defendant, which were to be delivered in Belarus. After some of the coats were delivered, the buyer gave notice of lack of conformity to the seller, who had not previously seen the goods and therefore examined them at the buyer's request, and declared the contract avoided. The buyer demanded reimbursement of payments that had been made and the seller sued for the remainder of the full contract price.

The court held that the CISG was applicable even though Liechtenstein is not a Contracting State. Under the rules of private international law in Switzerland, in conjunction with article 3(1) of the Hague Convention of 15 June 1955 on the Law Applicable to International Sales of Goods, the contract was governed by the law of the State of the seller's habitual residence, so that in this case the CISG as a part of Swiss law was applicable (article 1(1)(b) CISG).

The court characterized the sales agreement as a contract for the supply of goods by instalments and held that, even though the instalment deliveries were not of the same kind of goods, article 73 of the CISG, which differed in that regard from Swiss law, was applicable.

The court held that the buyer had lost its right to rely on a lack of conformity as a defense because examination of the goods and notification had not been carried out in time. It found that a period of "one week to ten days" for the examination and "a rather generous period" of two weeks for notification would have been adequate; the buyer could have easily examined the coats and could have limited the examination to random samples. The court stated that the period contemplated under the CISG has as its purpose to enable the buyer to notify the seller of any defects before the goods are resold; also, from the point of view of a functioning international trading system, there is no reason to extend these time periods for examination and notice (articles 38(1) and 39(1) CISG). Furthermore, the court found that the facts did not support the buyer's argument that the seller had known of and had not disclosed the lack of conformity. It held that if a seller examines the goods at the request of the buyer, the seller does not thereby waive its right to rely on late notification (article 40 CISG). The fact that the seller had invoked late notification after having examined the goods was not contrary to the principle of good faith (article 8 CISG).

The court found that the fact that some of the coats had been identified with article were found to be a defect, although the seller must deliver goods that conform to the contract, such a lack of conformity does not rise to the level of a breach of contract if the goods are of equal value and their utility is not reduced (article 35 CISG).

In addition, the court held that questions concerning the burden of proof are not governed by the Convention, but that due to its underlying systematic structure, certain principles may be inferred. As liability for the defect of goods is a critical aspect of the seller's obligations under the contract, it is incumbent upon the seller to prove the absence of defects at the time of passing the risk. The buyer bears the burden of proof for reasonable examination and notice of non-conformity, and, after having accepted the goods without giving notice of non-conformity, the burden of proof for the existence of any defects at the time of passing the risk shifts to the buyer (article 4 CISG).