CISG-online 415	
Jurisdiction	Switzerland
Tribunal	Handelsgericht des Kantons Zürich (Commercial Court Canton Zurich)
Date of the decision	30 November 1998
Case no./docket no.	HG 930634
Case name	*Macedonian lambskin coats case*

Translation[*] *by Veit Konrad*[**]

Facts of the case:

1. 1
In the Fall of 1992, [Seller], an export company seated in L[...], Switzerland, whose main field of business activity was Eastern Europe and Defendant [Buyer] of Liechtenstein entered into a sales contract for the delivery of lambskin coats. The lambskin coats were delivered to Belarus in instalments between the end of 1992 and the beginning of 1993. [Seller] had purchased the coats from a Macedonian intermediary trader who in turn had had been supplied by several lambskin coat producers. [Buyer] resold the delivered goods to the closely related company R[...], which sold the items to its Belarusian customer R[...].

2. 2
a)
On 23 October 1992, the [Buyer] and [Seller] entered into a contract for the delivery of 12,000 lambskin coats – 8,000 for women (Article No. O-1500); 4,000 for men (Article No. M-1600); conforming to the quality of a submitted sample – for the purchase price of US$ 140 per unit. The delivery was to be executed in the following instalments:

- 15 November 1992: 2,000 lambskin coats for women
- 30 November 1992: 2,000 lambskin coats for men
- 15 December 1992: 2,500 lambskin coats for women

  20 December 1992: 2,000 lambskin coats for men
- 15 January 1993: 2,500 lambskin coats for women

[*] All translations should be verified by cross-checking against the original text. For the purposes of this translation the Swiss Plaintiff is referred to as [Seller], the Defendant of Liechtenstein is referred to as [Buyer].
[**] Veit Konrad has studied law at Humboldt University, Berlin since 1999. During 2001–2002 he spent a year at Queen Mary College, University of London, as an Erasmus student.

- 30 January 1993: 1,000 lambskin coats for women

b) 3
In November 1992 and December 1992, [Buyer] received two instalments of 1,800 lambskin coats for women each, which it paid by opening an accredit (*Akkreditiv*).

A third instalment of 1,530 lambskin coats for women and a fourth instalment of 1,498 lambskin coats for men had been sent to [Buyer]'s store R[...] in Belarus. For the third and fourth delivery [Buyer] paid a total amount of US$ 150,000.00, leaving US$ 298,200.00 of the regular purchase price yet to be paid.

As regards the received deliveries, [Buyer] notified [Seller] that the quality of the delivered coats did not conform to the contract. The parties agreed to meet by end of March / beginning of April 1993 in order to discuss and check on the claimed quality deficiencies. Eventually, [Buyer] in a fax dated 30 June 1993 asked for restitution of all its payments of US$ 520,800.00 in total and in exchange proposed sending back the 5,460 coats that had been delivered.

3. 4
a)
On 27 September 1993, [Seller] effected an arrest (*Arrestbefehl*) of CHF 300,000.00 against [Buyer].

On 2 November 1993, [Seller] brought its prosequent claim (*Arrestprosequierungsklage*) before the Court. [Buyer] responded by bringing a counterclaim, to which [Seller] reacted with a counter-counterclaim.

b) 5
With its claim, respectively its counter-counterclaim, [Seller] seeks payment of the remainder of US$ 298,200.00 for the delivered lambskin coats. [Buyer]'s counterclaim seeks reimbursement of payments made in the total amount of US$ 520,800.00 in exchange for sending back to [Seller] the delivered items, which [Buyer] claims to be deficient.

c) 6
The quality of the delivered lambskin coats, as well as the question whether [Buyer] had complied to its duty of clear and specific notification of the claimed defects, is disputed between the parties.

4. 7
[...]

Reasoning:

1. 8
a)
Concerning the question of jurisdiction, the Court holds: [Seller] seated in L[...], Switzerland, brought its claim prosecuting the arrest (*Arrestprosequierungsklage*) against [Buyer], whose

place of business is Liechtenstein. Compliant to the arrest, [Buyer] provided a guaranty (*Solidarbürgschaft*) of the Swiss Bank Association of Zurich (*Schweizerischer Bankverein Zürich*; today's *UBS*) according to Art. 277 of the Swiss Statute regulating the Execution of Debts and Insolvencies (*Bundesgesetz über Schuldbetreibung und Konkurs*). Subject of the arrest is the amount of CHF 300,000.00. Pursuant to Art. 4 of the Statute regulating the Conflict of Private Laws (*Gesetz über das Internationale Privatrecht; IPRG*), which is subrogating § 9(2) of the Swiss Code of Civil Procedure (*Zivilprozeßordnung; ZPO*) [Seller]'s claim prosecuting the arrest may be brought before the Swiss forum of the arrest.

The Lugano Convention on Jurisdiction and the Enforcement of Judgments in Civil and Commercial Matters (*Lugano Übereinkommen über die Gerichtliche Zuständigkeit und die Vollstreckung gerichtlicher Entscheidungen in Zivil- und Handelssachen vom 19.9.1988*) which in Art. 3(2) defers jurisdiction from the *forum arresti* is not applicable, because Liechtenstein is not a Contracting State of that convention. Thus Zurich is the proper venue of jurisdiction for the case. § 63 of the Constitution of the Courts Act (*Gerichtsverfassungsgesetz; GVG*) points to the Court of Commercial Matters, considering that [Buyer] is listed in the Liechtenstein trade register. **9**

b) **10**
As concerns the question of the applicable substantive law, the Court must take account of the international character of the case. The parties did not regulate on the question of the substantive law to govern their contract as provided for under Art. 116 of the Statute regulating the Conflict of Private Laws (*Gesetz über das Internationale Privatrecht*).

According to Art. 117(1) of the Statute regulating the Conflict of Private Laws, the substantive law which has the closest connection to the case applies. For sales contracts involving movable property, it presumes that this may be the law of the country where the performance characteristic to the contract, i.e., the delivery of the goods, was due (Art. 117(2) and (3) of the Statute regulating the Conflict of Private Laws. However, as regards the sale of movable property, Art. 118 of the Statute regulating the Conflict of Private Laws declares the Hague Convention of 15 June 1955 on the Law Applicable to International Sales of Goods to be applicable. **11**

Art. 1(2) of the Statute regulating the Conflict of Private Laws (*Gesetz über das Internationale Privatrecht*) declares this Statute's applicability to be subsidiary to international conventions. Since 1 March 1991, Switzerland – but not Liechtenstein – has adopted the CISG, respectively the Vienna Convention (see Keller/Siehr, *Kaufrecht*, 3rd ed., 1995, page 170 *et seq.*). Under Art. 1(1)(b) of the Vienna Convention, the CISG applies to sales contracts between parties whose places of business are in different States, when the rules of private international law lead to the application of the law of a Contracting State. Art. 118 of the Statute regulating the Conflict of Private Laws in conjunction with Art. 3(1) of the 1955 Hague Convention, which presumes the law of the seller's residence to apply, refers to Swiss substantive law. Hence, pursuant Art. 1(1)(b) of the Vienna Convention (CISG), this Convention is applicable to the contract although Liechtenstein is not a Contracting State. **12**

Accordingly, the Vienna Convention governs comprehensively, and therefore also displaces the specific conflict of laws rules regarding the modalities of the goods' inspection that are **13**

contained in the 1955 Hague Convention (and in the Statute Regulating the Conflict of Private Laws (*Gesetz über das Internationale Privatrecht*)) (compare *inter alia* Keller/Kren/Kostkiewicz in *IPRG Kommentar*, edited by Heini et al., Zurich 1993, Art. 118 notes 19–21; Keller/Girsberger in *IPRG Kommentar,* Art. 125 notes 5–7). This is mainly due to the fact that the Vienna Convention unifies substantive law and therefore constitutes a more intensive international legal harmonization, thereby prevailing over a unification of conflict of laws and over domestic conflict of laws provisions (see Keller/Siehr, *ibid.*, page 177 *et seq.*). However, to the extent that the Vienna Convention does not regulate a specific issue, Art. 118 of the Statute Regulating the Conflict of Private Laws points to Art. 3(1) of the 1955 Hague Convention, under which due to [Seller]'s residence, Swiss law is to govern the case.

c) **14**
The Court has jurisdiction over [Buyer]'s counterclaim: [Seller]'s claim for payment and [Buyer]'s counterclaim for reimbursement of payments made in the amount of US$ 520,800.00, both relying on the same presupposed contract between the parties, are considered substantially related as required by Art. 8 of the Statute Regulating the Conflict of Private Laws (*Gesetz über das Internationale Privatrecht*).

d) **15**
[Seller]'s counter to [Buyer]'s counterclaim seeks payment up to the full amount of US$ 298,200.00 as the full contract price yet to be paid, thus exceeding [Seller]'s original claim which only aims for CHF 300,000.00, as the amount that had been arrested.

[Seller] is entitled to bring its counterclaim before the Court: Pursuant Art. 4 of the Statute Regulating the Conflict of Private Laws (*Gesetz über das Internationale Privatrecht*) the arrest constituted the venue for [Seller] prosequent claim (see Ruling of the Swiss Federal Court, BGE 117 II 90). Due to the connection of [Seller]'s claim and the counter to [Buyer]'s counterclaim, the Swiss Court as the venue for [Seller]'s claim also has jurisdiction over the counter-counterclaim (see Frank/Sträuli/Messmer, *Kommentar zur ZPO* (Commentary on the Code of Civil Procedure), 3rd ed., 1997, § 60 note 14).

In this context, it is irrelevant whether a judgment granting the [Seller]'s counter-counterclaim would be enforceable in Liechtenstein.

2. **16**
The contract for the delivery of lambskin coats by instalments falls within the scope of Art. 73 CISG. This provision applies irrespective of the fact that [Seller] had to deliver different items – lambskin coats for men and coats for women – by instalments. In this respect Art. 73 CISG differs from national law provisions (see Keller/Siehr, *ibid.*, page 215).

Under Art. 73 CISG, the obligations to performance arising from such a contract are to be considered separately with respect to each instalment: Specifying the provision of Art. 51 CISG, Art. 73(1) CISG decrees that the failure of a party to perform any of its obligations in respect of any instalment constitutes a fundamental breach of contract with respect to that instalment (see von Caemmerer/Schlechtriem, *Kommentar zum Einheitlichen UN-Kaufrecht – CISG* –, 2nd ed., 1995, Art. 73 note 14, note 16; Herber/Czerwenka, *Internationales Kaufrecht*, 1991, **17**

Art. 73 note 8 *et seq.*). Only in particular circumstances, may the failure to perform with respect to one instalment affect the contract as a whole (see Herber/Czerwenka, *ibid.*). Accordingly, each instalment has to be addressed separately.

3. 18
a)
It has been disputed between the parties whether company «L[...] GmbH» in W[...] acted *per procurationem* [with power of attorney] of [Seller] as regards the receipt of [Buyer]'s notice of non-conformity. While there can be no doubt that this company was involved in the performance of the contract, [Seller] denies to have ever given power of attorney to «L[...] GmbH», who therefore allegedly could not accept [Buyer]'s notice for [Seller]. The existence of a power of attorney has to be addressed as a preliminary matter, because it decisively affects the important question whether [Buyer] has given sufficient and timely notices of non-conformity.

The Vienna Convention does not expressly distinguish between contracts concluded by the parties themselves and those concluded by agents in the name of their principals (see Herber/Czerwenka, *ibid.*, Art. 66 note 1). In fact, the Convention does not regulate questions of representation at all (see Herrmann, in: Bucher (ed.), *Wiener Kaufrecht*, 1991, page 97). According to Art. 126(1) of the Statute Regulating the Conflict of Private Laws (*Gesetz über das Internationale Privatrecht*), the question of valid representation is governed by the law which is applicable to the contractual relation between the principal and its agent. As the Vienna Convention does not regulate that issue, the Swiss Law of Obligations (*Obligationenrecht; OR*) applies. 19

In a fax dated 17 November 1992, «L[...] GmbH» confirmed to [Buyer] that its office in W[...] was committed to the transaction of the parties. During the proceedings, [Buyer] submitted that its correspondence with [Seller] had been mediated through «L[…] GmbH». This has not been disputed by [Seller]. [Seller], however, insists on the presumption that «L[…] GmbH» was an authorized representative acting *per procurationem* of [Buyer]. Based on the submitted evidence, the Court assumes that the negotiations had been conducted – at least partially – by Mrs. L[...] of «L[…] GmbH», who at that time was also director of [Seller]. 20

According to Art. 32 and Art. 33 of the Swiss Law of Obligations (*Obligationenrecht*), the principal may authorize its agent expressly or implicitly to act *per procurationem* of it. In the named fax of 17 November 1992, «L[...] GmbH» notified [Buyer] in the name of [Seller] that its office in W[...] was committed with the transaction. It must be assumed that through Mrs. L[…] [Seller] knew – and in fact tolerated – that «L[...] GmbH» was negotiating on its behalf. Consequently, [Buyer] under the principle of good faith could rightfully rely on the assumption that «L[...] GmbH» functioned as [Seller]'s authorized agent committed with the transaction (*Duldungsvollmacht*) (see Watter, in: *Basler Kommentar Art. 1–529 OR*, 2nd ed., 1996, Art. 33 note 16). As concerns the scope of «L[...] GmbH»'s mandate, [Buyer] could reasonably assume that it extended to the receipt of complaint notes as well as of other declarations relevant to the execution of the contract. In turn, [Seller] must be considered aware of anything of which its agent had been notified (see Watter, *ibid.*, Art. 32 note 25). Thus, [Buyer] 21

could address its notification about the defective goods to «L[...] GmbH», and reasonably assume that [Seller] will become aware of it.

b) 22
[Buyer] refuses payment claiming that most of the delivered lambskin coats did not comply with the contractually agreed quality standards. Hence, it becomes relevant whether [Buyer] had given clear notice specifying the claimed lack of conformity within a reasonable time. Under Art. 35(1) CISG, the seller must deliver goods which are of the quantity, quality and description required by the contract and which are contained or packaged in the manner required by the contract.

Although the Convention does not regulate on the burden of proof as concerns the adherence to this obligation, the following principles can be drawn from the intrinsic systematic structure of the Convention: 23

- The seller's liability for the defect of goods follows from its primary obligations under the contract, i.e., delivery of the agreed goods. Hence, before passing the risk, the seller bears the burden of proof as regards the delivery of goods which in quality, quantity and description comply with the contract. 24

- The buyer bears the burden of proof concerning reasonable examination of received deliveries as well as concerning notification about the goods' non-conformity to the contract. 25

- After the passing of the risk at the time of acceptance of the delivery, the burden of proof for any defect shifts to the buyer. 26

Hence, it is up to the [Buyer] to prove that it had given notice of claimed defects to the other party. In the event of [Buyer]'s proper notification, compliant to the Vienna Convention, [Seller] then has to prove that its delivered goods had in fact complied with the contract. 27

[...]

4. 28
a)
[Buyer] submits that 881 of the 1,800 lambskin coats delivered in the first instalment have been deficient. [Buyer] bears the burden of proof as concerns its obligations of examination of the goods and notification of [Seller].

aa) 29
Under Art. 38(1) CISG, the buyer must examine the goods, or cause them to be examined, within as short a period as practicable in the circumstances. If the contract involves carriage of the goods, examination may be deferred until after the goods have arrived at their destination (Art. 38(2) CISG). It is assumed that the time limit for examination in general is no more than one week. Within this period, the buyer is expected to take at least samples from the

delivery for examination. In case examination requires particular technical effort, a longer period might be considered appropriate (see Herber/Czerwenka, *ibid.*, Art. 38 note 7; von Caemmerer/Schlechtriem, *ibid.*, Art. 38 note 15).

bb) 30
Art. 38(3) CISG provides, that 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 dispatch, examination may be deferred until after the goods have arrived at the new destination. Yet, if during this process the goods are intermediary stored on the buyer's stock, an opportunity for examination may be presumed (see Herber/Czerwenka, *ibid.*, Art. 38 note 12 *et seq.*).

Art. 38(3) CISG does not apply to the case at issue: Although [Buyer] alleged that an examination as required by the Convention was at the earliest possible when the coats had already been delivered to M[…], [Buyer] also admitted that the goods had been stored in its warehouse in B[...] – at least for a short period of time. In fact, a considerable part of the deliveries stayed at this location until these proceedings had been opened, and only thereafter had been sent to a custom warehouse in Antwerp. In any event, the Court assumes that it would have been possible for [Buyer] to take random samples from the stored goods for examination according to the provisions of the Convention. Besides, the Court believes in the testimony of Mrs. L[…], Director of [Seller], that it did not know about the intermediary storage of the goods at [Buyer]'s location in B[…]. Therefore Art. 38(3) CISG is not applicable. 31

[…] 32

cc) 33
Under Art. 39(1) CISG the buyer loses its right to rely on a lack of conformity of 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 has discovered it or ought to have discovered it. As concerns the period of time for notification, what may be regarded as a reasonable time must be decided taking account of the particular circumstances of the case. The following cases serve as examples: Notification about the lack of conformity of delivered shoes sixteen days after delivery is considered not to be adequate (see von Caemmerer/Schlechtriem, *ibid.*, Art. 39 note 16). In general, notification four weeks after delivery is regarded as too late (Herber/Czerwenka, *ibid.*, Art. 39, note 9). On the other hand, notification within one week after the goods had been delivered might suffice the requirement of Art. 39 CISG (Herber/Czerewenka, *ibid.*, Art. 39, note 9).

In any event, according to Art. 27 CISG, a delay or error in the transmission of buyer's notice, or its failure to arrive at the seller's may not deprive the buyer on the right to rely on its notice under Art. 39 CISG (see Herber/Czerwenka, *ibid.*, Art. 39, note 11). 34

Moreover, the Convention allows later notification in case the claimed defect could not have been disclosed by thorough examination. In that case the period of time provided by Art. 39 CISG begins to run at the time when the buyer knew or ought to have known about the defect (see Herber/Czerwenka, *ibid.*, Art. 39 note 1 and note 10). 35

The deadline of Art. 39(2) CISG does not apply to the case at issue.

dd) 36
According to Art. 39(1) CISG, the buyer's notice must be clear enough, specifying the claimed lack of conformity of the delivered goods with the contract. The mere submission that the goods would not conform to a given sample does not suffice this provision (see Herber/Czerwenka, *ibid.*, Art. 39 note 7). Equally a mere reference to the «poor quality» of the goods does not meet the requirements of Art. 39(1) CISG (see von Caemmerer/Schlechtriem, *ibid.*, Art. 39 note 7 with further references).

b) 37
Before the Court, [Seller] questions whether [Buyer] had examined the goods and whether it had given notice about the claimed defect as according to Art. 38 and Art. 39 CISG.

aa) 38
As to whether the notification clearly specified the claimed lack of conformity, it is undisputed between the parties that [Buyer] in its fax of 26 January 1993 notified [Seller] that the first and second instalment delivery did not conform to the contract, and that in this notice, [Buyer] expressly complained that in approximately 1,200 coats the patched lambskin parts did not match in their color, and/or would not meet the maximum weight standard stipulated in the contract. Hence, [Buyer]'s note of complaint was sufficiently clear and specific in the sense demanded by Art. 39 CISG. The fact that thereafter, the number of defective coats had turned out to be merely 881 items does not affect this conclusion: Taking account of the relatively short period when examination had been possible for [Buyer], it was entitled to roughly estimate the number of deficient coats by examining random samples of the delivery.

bb) 39
However, [Buyer] failed to give notice within a reasonable time. Based on its own submissions [Buyer] received 1,800 lambskin coats for women by end of November 1992 (first instalment), and another 1,800 lambskin coats for women by the middle of December 1992. Yet it did not give notice before 26 January 1993. Provided that the claimed defect, i.e., the non-matching colors of patched lambskin parts and the heavy weight of the coats, could have been disclosed easily, the Court holds that examination within one week to ten days (see above: 4.a) aa) and bb)) after the goods had been stored in [Buyer]'s warehouse in B[...] to be within a reasonable time in the sense required by Art. 38(1) CISG. Adding a period of another week up to fourteen days as reasonable time for notification of the other party under Art. 39(1) CISG (see above: 4.a) cc)), it becomes clear that [Buyer]'s notice as regards the first instalment was delayed.

The same applies as concerns the second instalment delivery which left M[...] on 16 December 1992 and arrived in [Buyer]'s location by the middle of December 1992. Taking account of the Christmas holiday 1992, it still might be expected that examination by random samples would have been completed by end of December 1992. Adding a rather generous period of fourteen days as reasonable time for notification under Art. 39(1) CISG, [Buyer]'s notice given on 26 January 1993 is to be regarded as not given within reasonable time. There is no reason whatsoever to assume a longer period for notification applicable to the second instalment. To the contrary: after [Buyer] knew that the first delivery had been deficient, it had very good reason 40

to examine the second instalment as soon as possible, i.e., immediately after it had reached its warehouse in B[...]. However, [Buyer] failed to do so.

The content of [Buyer]'s notice given on 26 January 1993 indicates that it had in fact obtained knowledge of the defects only after its customer had informed it about them. This allows the assumption the [Buyer] itself had only examined the goods after they had been resold and delivered to its customer who had discovered the defect first. Yet, Art. 39(1) CISG aims to take fair account of third parties' interests in particular, securing that the goods' quality was to be examined and ascertained right before they would be resold (see Herber/Czerwenka, *ibid.*, Art. 39 note 2 and 9). Hence, from the point of view of a functioning trade system, there is no reason to extend the time periods for examination and notice as contemplated under Art. 38(1) and Art. 39(1) CISG. 41

Therefore, it must be concluded that [Buyer] failed to comply with its obligation to give notice about the claimed lack of conformity within reasonable time, as regards the first as well as the second instalment delivery. Under Art. 39(1) CISG, it forfeited its right to rely on the defects. The goods are considered as accepted by him. 42

c) 43
In eventu, its notice is considered to be given delayed, [Buyer] argues that [Seller] under Art. 40 CISG may not rely on the provisions of Art. 38 and Art. 39 CISG, as the lack of conformity relates to facts of which [Seller] knew or could not have been unaware and which it did not disclose to [Buyer].

aa) 44
Under Art. 40 CISG, the seller is not entitled to rely on the provisions of Art. 38 and Art. 39 CISG, if [Seller] knew or could not have been reasonably unaware of the lack of conformity at the time of delivery of the goods. The burden of proof for this is allocated to the buyer, who relies on the provision (see von Caemmerer/Schlechtriem, *ibid.*, Art. 40 note 12; contra: Herber/Cerwenka, *ibid.*, Art. 40 note 7).

bb) 45
However, [Buyer] was not able to prove that [Seller] knew or ought to have known that some of the coats delivered in the first and second instalment had been patched together with lambskin parts that did not match in color and further that some of the coats were too heavy to meet the contractually agreed standards: The documents submitted by [Buyer] did not indicate [Seller]'s knowledge, respectively its wrongful unawareness of the defects. The testimonies of the several cited witnesses could not substantiate this presumption. An expert investigation which had been suggested by [Buyer] would not have been able to shed light on the relevant circumstances at the time of delivery. Hence, it must be assumed that [Seller] in fact did not know and ought not to have known of the facts constituting the lack of conformity of the delivered goods. Art. 40 CISG does not apply.

d) 46
Notwithstanding the provisions of Art. 39(1) and Art. 43(1) CISG, the buyer may reduce the price in accordance with Art. 50 or claim damages, except for loss of profit, if [Buyer] has a reasonable excuse for its failure to give the required notice (Art. 44 CISG). As concerns the

reasonable excuse in the sense of Art. 44 CISG, strict standards must apply (see Herber/Czerwenka, *ibid.*, Art. 44 note 2). Again, [Buyer] did not submit any evidence sustaining that its failure to give notice within reasonable time could be excused in the sense of Art. 44 CISG.

e) **47**
aa)
The seller may, on the other hand, deliberately waive its right to rely on the buyer's failure to give notification about the lack of conformity with the contract within time (see Herber/Czerweka, *ibid.*, Art. 39 note 17). This may be done implicitly by agreeing to a suggested expert investigation of the delivered goods after receiving the buyer's delayed notice of a defect (Herber/Czerwenka, *ibid.*, Art. 39 note 17). Yet the seller's mere checking on the defects after the period of time for notification had expired cannot be regarded as an implicit waiver of its rights (see Giger, *Kommentar zu Art. 184–215*, 1979, Art. 261 notes 86 and 106; von Caemmerer/Schlechtriem, *ibid.*, Art. 39 note 33). In that event, the seller's subsequent reliance on the buyer's failure to give notice within reasonable time does not constitute an abusive exercise of its right under the principle of good faith (see Giger, *ibid.*, Art. 201 note 107), which – as can easily be drawn from Art. 8 CISG – equally applies within the scope of the Vienna Convention (see declaration of the Swiss Bundesrat concerning the Vienna Convention, page 22 *et seq.*; von Caemmerer/Schlechtriem, *ibid.*, Art. 8 notes 6 and 9).

bb) **48**
At the end of January 1993, [Seller] inspected the presumably defective goods at [Buyer]'s customer's place of business in M[…]. Another inspection had been conducted in the beginning of March 1993, which however due to language problems between the parties had had to be broken up unsuccessfully. In a third meeting at the end of March 1993, representatives of [Buyer] and [Seller], together with representatives of the producer in M[...] as well as of [Seller]'s customer in B[...] examined the goods. Yet, it remained unclear among the parties whether the goods had in fact been defective and further, whether during these meetings [Seller] by its conduct had under the principle of good faith implicitly waived its rights to rely on [Buyer]'s failure to give notice according to the Convention.

The testimony of witness R[...] shed light on the question whether [Buyer] by the end of June 1993 could still rightfully reckon that [Seller] would take care of the claimed deficiencies, respectively replace all of the defective items. Witness B[...] could not clarify if during the meetings [Seller] had bindingly confirmed that it would take care of the claimed defects. In fact, the testimony of three other witnesses indicates that [Seller] had not given any such assurances. The documents submitted by both parties do not touch upon this point. Consequently, the Court assumes that during the meetings [Seller] had not bindingly promised to take measures as concerns the lack of conformity of the goods. The same applies for the submitted written correspondence between the parties. Therefore, it must be concluded that [Seller] did not forfeit its rights under the principle of good faith by entering into subsequent negotiations with the [Buyer] concerning the claimed lack of conformity.

To the contrary, the very principle of good faith commands that such negotiations as mere gesture of good will cannot be interpreted as a waiver of one's own rights (see Giger, *ibid.*, Art. 201 note 106; von Caemmerer/Schlechtriem, *ibid.*, Art. 39 note 33; Herber/Czerwenka, **49**

ibid., Art. 39 note 17; Baumann in *Zürcher Kommentar zu Art. 1–7 ZGB*, 1998, Art. 2 notes 161 and 389).

Equally, [Seller]'s offer to take back the delivery as given in a fax dated 24 June 1998 cannot be considered as a binding waiver of its right to rely on [Buyer]'s failure to give notice within reasonable time.

f) **50**
[Summary of the Court's hitherto drawn conclusions]

5. **51**
a)
As concerns the second instalment delivery, [Buyer] failed to give notice within reasonable time of the claimed lack of conformity as required by Art. 39(1) CISG and therefore cannot rely on the presupposed breach of contract (see above 4.). However, [Buyer] argues that the 1,800 lambskin coats for women that had been delivered by the middle of December 1992 were actually different items with different article numbers than those it had ordered by the contract. Thus, it claims that in the second instalment an *aliud* rather than a defective good which would not conform to the contractually agreed standards, had been delivered.

b) **52**
Contrary to the Swiss Law of Obligations (*Obligationenrecht; OR*), the Vienna Convention does not distinguish between the delivery of an *aliud* which would constitute a complete non-performance (*Nichtleistung*) under the contract, and the delivery of a defective good which does not conform to contractual standards and which would be considered as mal-performance (*Schlechtleistung*).

aa) **53**
According to Art. 35(1) CISG, the seller must deliver goods which are of the quality and description required by the contract and which are contained or packaged in the manner required by the contract. Except where the parties have agreed otherwise, the goods do not conform with the contract unless they are fit for the purposes for which goods of the same description would ordinarily be used (Art. 35(2)(a) CISG), or unless they are fit for any particular purpose expressly or impliedly made known to the seller at the time of the conclusion of the contract, (Art. 35(2)(b) CISG). If agreed by the parties, the goods must comply with any sample which had been agreed as reference for required standards (see Keller/Siehr, *ibid.*, page 191).

Under the contract [Seller] was to deliver:

- Lambskin coats for women (article no. O-1500) according to a provided sample;

- Lambskin coats for men (article no. M-1600) according to a provided sample.

bb) **54**
[Seller] admits that by the second instalment in December 1992, it delivered 1,591 lambskin coats for women of the article no. 9491. However, it asserts that these items were actually

equal in all relevant points to those coats which had been requested, i.e., the items no. O-1500. Further, according to [Seller], [Buyer] had accepted these goods, which would mean an implicit modification to the contract.

If an *aliud* had been delivered, [Buyer] was equally obliged under the Vienna Convention to give notice of the lack of compliance within reasonable time (Herber/Czerwenka, *ibid.*, Art. 39 note 4; von Caemmerer/Schlechtriem, *ibid.*, Art. 39 note 8), which [Buyer] had actually failed to do. 55

Yet, as [Seller] assertedly knew about the delivery of other than the requested items, Art. 40 CISG applies: The seller is not entitled to rely on the provisions of Art. 38 and Art. 39 CISG if the lack of conformity relates to facts of which it knew and which it did not disclose to the buyer. According to [Seller], it had been notified by its supplier about the fact that the second instalment contained coats of another article no. than requested, rather early after it had ordered the goods from its supplier. Yet, its supplier assured [Seller] that, except for the different article no., the coats delivered would in all relevant points equal the requested item and thus comply with the contract. As [Seller] knew about the differing article numbers at the time when the second instalment had been delivered to [Buyer], Art. 40 CISG applies: [Seller] therefore may not rely on [Buyer]'s failure to give notice in time. However, if [Seller] is able to sustain that except for the allegedly different article numbers the delivered lambskin coats would match in all relevant points the contractual standards, then the delivered goods are to be considered as conforming to the contract under Art. 35 CISG. The burden of proof as concerns the goods' conformity to the agreement in that case is allocated to [Seller]. Further, [Seller] must prove that [Buyer] had accepted the coats bearing a different article number, and thus impliedly consented to a modification of the contract as provided for under Art. 29(1) CISG. 56

cc) 57
Witness B[...], an employee of [Buyer]'s customer, Firm B[…], testified that the Belarusian customers willingly accepted that the lambskin coats bore a different article no. 9491. Their subsequent complaint only concerned the poor quality of the delivered coats, not the difference in the items' specification.

In a letter of 8 February 1993, B[…] *per procurationem* of Firm B[...], notified [Buyer] that by the second instalment goods of different article numbers had been delivered, and that its Belarusian customers had consented to a modification of their contract as concerns the specification of the items.

The fact that [Seller] failed to submit this document on time may not cause its preclusion as evidence for the proceedings, because under § 138 and § 115 No. 2 of the Code of Civil Procedure (*Zivilprozeßordnung; ZPO*), the piece of evidence contributes to clarification of relevant facts, and its delayed submission did not cause substantial retardation of the proceedings (see Frank/Sträuli/Messmer, *ibid.*, § 115 note 8; § 138 note 2). [Buyer]'s assertion that B[…]'s letter referred to another transaction and that in fact he, [Buyer], had never been notified of the difference in the article numbers cannot be substantiated.

[...]

Relying on these assumptions, it must be concluded that in accepting the lambskin coats for women which bore the article no. 9491 but were of the same quality as the requested items, [Buyer] consented to a modification of the contract. As concerns the question whether the delivered coats – besides the different article number – did in all relevant points match the contractually required quality standards, it must be noted that in its – delayed – notification [Buyer] did not even mention that the delivered items were of another article number. Therefore, it must be assumed that, except for the difference in the items' specification, the delivered coats did not have any defects on which [Buyer] could rely within the proceedings.

[The assumption of a modification of the contract is supported by the testimony of three other witnesses.]

6. **58**
By end of January 1993, a third instalment of another 1,530 lambskin coats for women and a fourth instalment of 1,458 lambskin coats for men had been delivered to company R's warehouse in Belarus. According to [Buyer], the goods delivered by both instalments were defective in the way as described above. Consequently, [Buyer] again gave notice about the claimed lack of conformity.

a) **59**
In a fax of 26 January 1993, [Buyer] demanded a stop of any further deliveries as regards lambskin coats for women and, concerning lambskin coats for men, declared that it would only accept deliveries until 31 January 1993.

In any event, this declaration does not affect the delivery of 1,530 lambskin coats for women on 21 January 1993 and the 1,458 lambskin coats for men that had been delivered on 26 January 1993: The third instalment had clearly arrived before [Buyer] ordered the stop, whereas the fourth instalment delivery of men's coats just arrived before [Buyer]'s set deadline on 31 January 1993 expired.

Art. 73(2) CISG only provides for an avoidance of the contract for the future if a party has good grounds to conclude a fundamental breach of contract with respect to future instalments. In any event, the avoidance of a contract under the Vienna Convention requires a fundamental breach of contract (see Art. 49 CISG). For obvious reasons, [Buyer]'s order to stop delivery cannot have effect under the Vienna Convention. **60**

b) **61**
Referring to the third and fourth instalment delivery, [Buyer] in a fax of 17 February 1993 merely declared:

> «... today we received notice of further defects by our customers... ».

A more detailed specification of the claimed defect was, though promised, never given by [Buyer]. Hence its notice failed to clearly specify the lack of conformity of the delivered goods as required by Art. 39(1) CISG. Besides, [Buyer] admits that the goods of the third and fourth delivery had arrived at its customers in Belarus. Hence, it appears that these goods must have been accepted by [Buyer] beforehand. **62**

c) 63
[Buyer] further argues that, with regard to the third and the fourth instalment delivery, Art. 40 CISG applies. Accordingly, [Buyer] has to sustain that [Seller] knew or could not have been unaware of facts relating to the claimed lack of conformity of the delivered goods and did not disclose them to [Buyer].

The reports of the examination that was conducted, which had been submitted by [Buyer], do not support its assertion that [Seller] had known about the claimed defects as concerns the third and fourth instalment. The same applies to the evidence documenting the correspondence between the parties on the third and fourth delivery. Several witnesses testified that [Seller] could in fact never have examined the goods because they had been delivered by its supplier directly to [Buyer]'s warehouse in B[...]. Hence, [Seller] could have hardly known about the defects. The only witness who declared that [Seller] knew about the defects as concerns the third instalment, stands in close relation to [Buyer] and could not give detailed facts to support this assumption. For this, the court cannot rely on its testimony and concludes that [Seller] did not have positive knowledge about the lack of conformity of the third and fourth delivery.

It could not be sustained that [Seller] ought to have been aware of the facts related to the presumed lack of conformity of the third and fourth delivery: [Seller] first inspected the goods on 31 January 1993 – after the last instalment on 26 January 1993 had been delivered. Therefore Art. 40 CISG does not apply with respect to the third and fourth delivery. Due to its failure to give notice within reasonable time, [Buyer] may not rely on the presupposed lack of conformity.

d) 64
Equally to the Court's reasoning concerning the first and second instalment (see above 4.e)), [Seller]'s conduct may not be interpreted as an implicit waiver of its rights concerning the third and fourth delivery. Nor can [Buyer] substantiate a reasonable excuse for its failure to give the required notice under Art. 44 CISG.

7. 65
a)
Based on these conclusions, the Court holds that due to its failure to give clear and specific notice of the lack of conformity within reasonable time according to Art. 39(1) CISG, [Buyer] may not rely on the claimed defects as concerns all four instalment deliveries. Therefore, inquiries concerning the actual quality of the delivered goods are unnecessary, as [Buyer] may not rely on them anyway.

[...] 66

b) 67
The question whether the presumed defects would constitute a fundamental breach of contract as required under Art. 49(1)(a), respectively under Art. 73 CISG, for an avoidance of the contract for the future, is irrelevant. In any event, a fundamental breach of contract in the sense of these provisions would have required that [Buyer]'s Belarusian costumers could have made no use of the delivered lambskin coats at all.

8. 68
Referring to [Seller]'s fax of 24 June 1993, [Buyer] alleges that the parties had agreed that [Seller] would take back the goods.

As explained supra (at 7 b)), the prerequisites for an avoidance of the contract by the buyer due to a fundamental breach of contract by the seller were not fulfilled. [Buyer] therefore only has a right to return the goods to [Seller] if the latter has agreed to take the goods back, which would constitute a termination of the contract by way of a party agreement. Under Art. 29 CISG, the parties to a contract may agree to terminate a contract for the future. In particular in cases in which the parties are in dispute about one party's right to unilaterally avoid the contract it is often necessary to also investigate whether the other party has agreed to a termination of the contract (see von Caemmerer/Schlechtriem, *ibid.*, Art. 49 note 67).

In a fax dated 24 June 1993 [Seller] declared: 69

> «... as we neither received payment for the delivered goods nor did you give notice in writing about presumed defects, we ask you to return the delivered lambskin coats...» (*translation from the German original*).

As for the first and the second instalment, [Seller] had actually received payment, this message must therefore refer to the third and fourth delivery for which [Buyer] had made only an initial payment of US$ 150,000.00. In [Buyer]'s response of 30 June 1993, in which it also demanded the taking back of 881 of the coats of the first instalment and 1,591 presumably deficient lambskin coats for women of the second instalment, it offered to return 5,460 items including those delivered by the third and fourth instalment in exchange for payment of US$ 520,000.00. 70

This offer was immediately rejected by [Seller] in a fax of 24 June 1993:

> «... Premised that the delivered goods are the property of the Banca della Svizzera Lugano, we insist on the return of 2,000 delivered items.»

A subsequent fax of [Buyer] dated 6 July 1993 did not expressly refer to the return of deliveries as had been demanded by [Seller]. Instead, [Buyer] made clear that in its opinion it had given notice of the claimed lack of conformity of the goods in time as required by the Vienna Convention. In a fax of 16 July 1993, [Buyer] again demanded that [Seller] take back the defective 5,460 lambskin coats [Seller] had delivered in exchange for restitution of the payments [Buyer] had made in the amount of US$ 520,800.00. It must therefore be concluded that during their entire correspondence, the parties never in fact agreed to a termination of the contract for the future.

For an agreement to terminate a valid contract, Art. 14 CISG *et seq.* apply analogously (see Herber/Czerwenka, *ibid.*, Art. 29 note 3). Similar to Swiss national law, the Convention requires that an offer to termination of a contract be accepted by the other party (See Honsell, *ibid.*, page 125). Under Art. 18(1) CISG, remaining silent or inactive to an offer does not itself amount to acceptance. 71

A reply to an offer which purports to be an acceptance but contains additions, limitations or other modifications is a rejection of the offer and constitutes a counter-offer (Art. 19(1) CISG). Based on the submitted evidence, it must be concluded that no party has ever validly accepted an offer to terminate their contractual agreement. Instead, both parties responded to the offers given by the other party always under conditions or additional terms which materially altered the proposal. The exceptions stated in Art. 19(2) CISG do not apply. 72

9. 73
a)
[Buyer] claims that it did not accept the third and fourth instalment delivery: Due to delay of the deliveries and other irregularities, [Buyer]'s bank, the Swiss Bank Association, refused to execute payment for the submitted letter of credit. [Seller], in turn, argues that the execution of the draft is irrelevant as concerns the binding agreement of the parties according to which the third and the fourth instalment had been delivered.

b) 74
According to the sales contract for the delivery of lambskin coats by instalments that the parties had concluded on 23 October 1992, payment should be executed by accreditation of the purchase price granted by [Buyer]'s Bank when the holder of the letter of credit provides several documents essentially indicating the proper execution of the transaction between the parties (*Dokumentenakkreditiv*). This method is common practice within the parties' field of business (Guggenheim, *Die Verträge der schweizerischen Bankpraxis*, 1986, page 167 *et seq.*; Meier-Hayoz/von der Crone, *Wertpapierrecht*, 1985, § 31 page 394 *et seq.*).

Yet, the clause stipulating the method of payment has no effect on the primary obligations the parties bound themselves to perform through their contract (see Guggenheim, *ibid.*, page 174; Meier-Hayoz/von der Crone, *ibid.*, § 31, note 54 *et seq.*); namely, the delivery of the goods by the seller under Art. 30 CISG, and acceptance of delivery and payment of the purchase price by the buyer according to Art. 53 and Art. 60 CISG. 75

c) 76
According to Art. 53 CISG, the buyer must pay the price for the goods and take the delivery of them as required by the contact and this Convention. In principle, the seller may require the buyer to take delivery under Art. 62 CISG. The buyer's obligation to take delivery consists in doing all the acts which could reasonably be expected of it in order to enable the seller to make delivery and in taking over the goods (Art. 60 CISG) (see Herber/Czerwenka, *ibid.*, Art. 53 note 9, Art. 60 note 5).

Considering the submitted evidence, it must be assumed that [Buyer] had accepted the third and fourth instalment delivery: According to [Buyer] itself, the delivered goods are still on stock in its warehouse in B[...], because any attempts to sell the defective coats have remained unsuccessful. A fax of [Buyer] dated 7 May 1993 in which it clearly refers to payments (*Akontozahlung*) of US$ 150,000.00 made for the third and fourth delivery, also supports the assumption that the goods had been taken over, although [Buyer] itself later referred to the paid amount as an implicit offer of a settlement of their dispute. Contrary to this submission, it 77

must be concluded that the goods of the third and fourth delivery had been taken over by [Buyer] and have been stored in its warehouse in B[...] ever since.

The duty to take delivery under Art. 60 CISG comprises the acceptance of all documents that [Seller], according to Art. 30 and Art. 34 CISG, has to provide. Pursuant Art. 54 CISG, [Buyer] was also obliged to comply with all formalities the accreditation has required (see Herber/Czerwenka, *ibid.*, Art. 54 notes 2–4). Considering this, the irregularities that occurred in the execution of the accreditation have no effect on the primary obligations [Buyer] bound itself with in concluding the contract. **78**

10. **79**
a)
Under the contract and the Vienna Convention [Buyer], is obliged to pay for the following deliveries:

- First and second instalment of about 3,600 items (US$ 150.00 each). As concerns these instalments, the full purchase price of US$ 540,000.00 has already been paid.

- Third and fourth instalment delivery of 2,988 items in total (US$ 150.00 each) for which [Buyer] paid US$ 150,000.00 leaving a debt of US$ 298,200.00 to be paid.

b) **80**
In its counter-counterclaim to [Buyer]'s reply, [Seller] reformulated its claim aiming for an amount in US dollars rather than in Swiss currency.

Undisputedly, the contract price for the delivered lambskin coats was due in US dollars originally. As the Vienna Convention does not regulate on questions of debt in foreign currencies, national law applies (see Herber/Czerwenka, *ibid.*, Art. 53 note 3 *et seq.*). Art. 84(2) of the Swiss law of Obligations (*Obligationenrecht, OR*), which Art. 147(2) of the Statute regulating the Conflict of Private Laws (*Gesetz über das Internationale Privatrecht; IPRG*) relates to, provides that the creditor to a debt in foreign currency is not entitled to claim for payment in Swiss francs (see Weber, *Kommentar zu Art. 68–96 OR,* 1983, Art. 84 note 348; Gauch/Schluep, *Schweiz. OR, Allg. Teil, Band II*, 6th ed. 1995, note 2343). Yet, in accordance with the principle of good faith (see Frank/Sträuli/Messmer, *ibid.*, § 54 note 16 and § 100 note 15, § 107 note 6), the debt originally was due in US dollars and [Seller]'s modified claim does not amount to a material changing of its claim; hence, must be admitted. **81**

In the arrest proceedings before a Swiss Court, [Seller] had actually been obliged to claim for the amount in Swiss francs pursuant to Art. 67(1) No. 3 of the Swiss Statute regulating the Execution of Debts and Insolvencies (*Bundesgesetz über Schuldbetreibung und Konkurs; SchKG*). Hence [Seller] cannot be blamed that in the proceedings prosecuting the arrest it maintained its claim for Swiss francs, rather than in US dollars as the agreed currency for the contact price (see Guldener, *Schweiz. Zivilprozessrecht*, 3rd ed., 1979, page 149; Commercial Court Zurich, ruling ZR 90/1991 No. 37). [Seller]'s subsequent changing of the claim regarding the currency – as required by applicable Swiss law – must therefore be admitted. **82**

c) 83
The changing of the claim with respect to the currency for payment pursuant Art. 67(1) No. 3 of the Swiss Statute regulating the Execution of Debts and Insolvencies (*Bundesgesetz über Schuldbetreibung und Konkurs; SchKG*) does not constitute a novation of the debt (see Vischer, *ibid.*, Art. 147 note 21; Fritzsche/Waldner, *Schuldbetreibung und Konkurs nach schweiz. Recht, Band I*, 1984, page 194 *et seq.*). Consequently, [Seller]'s claim – originally aiming for Swiss francs – must be admitted and yet [Buyer] is obliged to pay the agreed price for the deliveries in US dollars as required under the contract (see Leu, *in Basler Kommentar zu Art. 1–529 OR*, 2nd ed. 1996, Art. 84 note 10; Commercial Court Zurich, *ibid.*, No. 37).

d) 84
[Seller]'s claim in its modified form aiming for US$ 298,200.00 as the price for delivered goods yet to pay is justified. As concerns its execution, the amount of CHF 300,000.00 granted in the arrest must be taken into account.

11. 85
[Buyer] is not entitled to restitution of payments made in exchange for sending back the delivered lambskin coats. [Buyer]'s counterclaim for the amount of US$ 520,800.00 is dismissed.

12. 86
[Seller]'s claim entails 5% interest for delayed payment since 4 May 1993. If the buyer is not bound to pay the price at any other specific time, it must pay it when the seller places either the goods or documents controlling their disposition at the buyer's disposal in accordance with the contract (Art. 58(1) CISG). Under Art. 78 CISG, a party is entitled to interest on money due which is in arrears (see Herber/Czerwenka, *ibid.*, Art. 78 note 3). Contrary to Swiss national law, a letter of default is not necessary.

It has been agreed that payment was to be executed through accreditation, i.e., through submission of all relevant documents by [Buyer]. The parties did not fix a particular date when payment was due, nor did they determine an interest rate for delay. [Seller] had delivered the lambskin coats and all relevant documents by the beginning of 1993. [Seller]'s bills are dated February 1993; a subsequent reminder is dated 4 May 1993. [Buyer] had taken over the goods as well as the documents and had the opportunity to examine them at its warehouse in B[...]. Since that time, payment was due pursuant Art. 58 CISG. Hence, [Seller]'s claim for interest due to delay since 4 May 1993 is justified. As the Vienna Convention does not regulate the question of interest rate, Swiss national law applies (see Herber/Czerwenka, *ibid.*, Art. 78 note 6; Keller/Girsberger, in: *IPRG Kommentar*, 1993, vor Art. 123–126, notes 1–2; Keller/Siehr, *ibid.*, page 219). Art. 73(1) and Art 104(1) of the Swiss Law of Obligations (*Obligationenrecht; OR*) determine 5% interest in case of default payment. Hence, [Seller]'s claim as concerns the demand for interest is justified.

13. 87
[Reasoning as concerns the decision on the costs of the proceedings.]

[...]