

Case 261: CISG 1(1)(a); 7(1); 10(a); 32(2); 63(1); 64(1)(b); 72(1); 81(1); 81(2); 84(1)

Switzerland: Bezirksgericht der Saane (Zivilgericht); T 171/95

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An Austrian company, plaintiff, entered into a contract for the purchase and transport of spirits to Russia with the Swiss branch of a company that had its headquarters in Liechtenstein. The contract was never performed because a dispute arose among the parties regarding the mode of transport and the final date of performance. The Austrian buyer sued the Swiss seller for repayment of an advance payment, while the defendant claimed damages for breach of contract.

The court held that, even though Liechtenstein was not a Contracting State, the Convention was applicable because the Swiss branch, not the Liechtenstein headquarters, was the place of business that had the closest relationship to the contract and its performance (articles 1(1)(a) and 10(a) CISG).

The factual issue in dispute was whether the parties had agreed that the goods were to be transported by truck, as the buyer claimed, or whether the choice of the mode of transport had been left to the seller. The court held that, as the CISG does not contain rules on the burden of proof, it is necessary to rely on the rules of private international law of the forum, which, in this case, led to the application of Swiss domestic law (article 7(2) CISG). Since the buyer was unable to meet the burden of proof evidencing an agreement to transport the goods by truck, the court found that the choice of transportation mode had been left to the seller (article 32(2) CISG).

The court held that, since the buyer had not established a letter of credit as the parties had agreed, the seller had the right to declare the contract avoided after having fixed an additional period of time for performance (articles 63(1) and 64(1)(b) CISG). It rejected the argument made by the buyer under article 72(1), that, because the seller had held back delivery of the goods, the buyer was entitled to declare the contract avoided. Since avoidance of the contract released both parties from their obligations under it (article 81(1) CISG), the buyer was entitled to repayment of its advance payment together with interest (articles 81(2) and 84(1) CISG) calculated in accordance with Swiss law (article 7(2) CISG). The seller, on the other hand, was awarded only part of its claim for damages. Noting that the CISG does not address how damages are to be calculated if the amount cannot be determined, the court applied Swiss domestic law, which was found to be applicable under article 3(1) of the Hague Convention of 15 June 1955 on the Law Applicable to International Sales of Goods.