

Case 378: CISG 7(1), 6, 39(1), 7(2)

Italy: Tribunale di Vigevano (Judge A. Rizzieri) Date:

12 July 2000

*Rheinland Versicherungen v. S.r.l. Atlarex and Allianz Subalpina s.p.a.*

Original in Italian

Published in Italian: *Giurisprudenza italiana* 2000, 280-290.

Commented on by Ferrari, *Giurisprudenza italiana* 2000, 281-285; Ferrari, *Revue de droit des affaires internationales* 2001, 224-230.

An Italian seller delivered vulcanized rubber to a German buyer for the production of shoe soles. The soles produced by the buyer were sold on to an Austrian manufacturer who produced a certain number of shoes and commercialized them in Russia. Upon receiving complaints from its Russian customer, the Austrian manufacturer turned to the buyer who commenced legal action against the seller alleging lack of conformity of the raw material.

In its judgement, the Court relied for each issue on a number of decisions on the CISG already rendered by foreign courts and arbitral tribunals. Though precedents in international case law cannot be considered legally binding, in the Court's opinion they have to be taken into account by judges and arbitrators in order to promote uniformity in the interpretation and application of CISG (Art. 7(1) CISG).

According to the Court, while the parties are free to exclude application of CISG either expressly or impliedly (Art. 6 CISG), the mere reference to domestic law in the parties' pleadings is not in itself sufficient to exclude CISG. To this effect parties must first of all be aware that CISG would be applicable and moreover intend to exclude it.

As to the buyer's claim to damages for lack of conformity, the Court observed – referring to several international decisions on the same issue – that the “reasonable time” for notice under Art. 39(1) CISG depends on the circumstances of each case and on the nature of the goods. It starts running as from the time when the buyer is required to examine the goods under Art. 38(1), which as a rule is upon delivery or shortly thereafter and only exceptionally may be later, for instance when the defect is discoverable only by processing the goods.

In the case at hand, the Court held that a notice given four months after delivery was not timely. Indeed, even supposing that the defects could not have been discovered at delivery, the buyer should have discovered them at the latest when processing the goods and given notice immediately thereafter, while it waited until it received complaints by its own customer. A different conclusion could be drawn only if it were proved that the alleged defects were not discoverable during processing. The burden of bringing evidence thereof falls however on the buyer, who in the case at hand failed to bring such evidence.

Nor had the buyer sufficiently specified the nature of the lack of conformity according to Art. 39(1) CISG. A mere statement that the goods “caused problems” or “present defects” does not enable the seller to determine its conduct regarding the alleged lack of conformity.

Finally, the Court examined the question of the burden of proving the lack of conformity of the goods. The Court rejected the opinion that the burden of proof is a question excluded from CISG and governed by the applicable domestic law (Art. 4, first sentence, CISG). On the contrary, it held that the burden of proof is a matter governed but not expressly settled by CISG, and which therefore has to be settled in conformity with the general principles underlying CISG (Art. 7(2) CISG). In the Court's view, it is a general principle underlying the CISG that the claimant should bring evidence in favor of its cause of action. Such principle may be derived *inter alia* from Art. 79(1) CISG which expressly states that the non performing party must prove the circumstances exempting it from liability for its failure to perform, thereby implicitly confirming that it is up to the other party to prove the fact of the failure to perform as such. Therefore, it is up to the buyer to prove the existence of a lack of conformity and the damage ensuing from it.