

**Case 630: CISG 1 (1) (a); 3 (1); 45 (1); 46-50; 51; 71; 73 (1); 74-77; 78**

Switzerland, Court of Arbitration of the International Chamber of Commerce, Zurich

ICC Arbitration Case No. 9448

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The case involves a seller's demand for payment of goods under an instalment contract, and the buyer's claim that it should be allowed an offset in damages as the result of an alleged breach of the contract by the seller.

The seller, a manufacturer of roller bearings, entered into a frame contract for supplying the U.S. market through an exclusive representative, the buyer. The contract was performed satisfactorily for two years, after which the buyer fell behind on the payments and then ceased making payments. The seller initiated arbitration proceedings in order to be paid for outstanding invoices for the goods delivered, plus interest. The seller additionally sought interest on separate invoices that were paid late. The buyer claimed that the delivered goods were not in conformity with the contract, were delivered late, or were delivered in insufficient quantities, and argued that its damages should be offset against the seller's claimed amount.

The buyer failed to pay the advance costs fixed by the ICC International Court of Arbitration for its counterclaim. The Arbitral Tribunal thus decided not to consider the buyer's offset claims *per se* but simply as defences to the seller's claims.

The contract stipulated that the law of Switzerland applied to "all matters respecting the making, interpretation and performance of this contract." The Arbitral Tribunal determined that the contract between the buyer and the seller was a contract for sale of goods under article 3 (1) CISG, and that the CISG applied pursuant to article 1 (1) (a) CISG, as Switzerland is a Contracting State.

The Arbitral Tribunal denied the buyer's claim, based on article 50 CISG, to have the sale price reduced as a consequence of the nonconformity of the goods with the contract, because the nonconformity claim referred to goods delivered in 1995, whereas the invoices on which the seller based his claim referred to goods delivered in 1996. Additionally, the buyer claimed an offset because various shipments of goods had not been delivered on time or had not included the stipulated quantity of roller bearings. The buyer claimed that these deficiencies allowed it to withhold payment for the said shipments. The Arbitral Tribunal determined that the buyer was not entitled to withhold payment for partial or late shipments. It noted that, according to article 45 (1) CISG, if the seller fails to perform any of its obligations under the contract or the Convention, the buyer may either exercise the rights provided for in articles 46 to 52 CISG or claim damages as provided for in articles 74 to 77 CISG. According to article 51 CISG, when the seller delivers only a part of the goods, or if only a part of the goods delivered is in conformity with the contract, then articles 46 to 50 CISG apply. In the case of an instalment contract, should certain partial deliveries not be made on time, article 73 (1) CISG is applicable to determine the effect of such delay. Contrary to what is provided for in all these provisions, the buyer did not resort to the remedies offered by the CISG, but rather withheld payment of the amount due under the contract for deliveries already received. However, the Convention does not give him the right to do so.

The Arbitral Tribunal also considered the application of article 71 CISG to the dispute. This article gives a party the right to withhold its performance corresponding to a future anticipated breach. The Tribunal held article 71 CISG to be inapplicable in the case at hand, as the buyer was not attempting to suspend performance for a future breach, but was rather attempting to withhold payment for shipments already received.

According to article 78 CISG, finally, if a party fails to pay the price of any other sum that is in arrears, the other party is entitled to interest on it. The rate to be applied, however, is a matter of domestic law. The Arbitral Tribunal thus applied the Swiss law to determine the applicable interest rate to be paid by the buyer.