

**Case 575: CISG 1 (1) (a); 6; 7 (1); 9 (2); 36 (1); 39 (1); 40**

United States: [U.S.] Court of Appeals, Fifth Circuit; No. 02 20166

11 June 2003; corrected 7 July 2003

BP Oil International, Ltd. and BP Exploration & Oil, Inc. v. Empresa Estatal Petroleos de Ecuador et al.

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- (1) Federal Reporter (Third Series) 332, 333, <http://www.ca5.uscourts.gov/opinions/pub/02/02-20166-cv0.pdf>
- (2) Correction: <http://www.ca5.uscourts.gov/opinions/pub/02/02-20166-cv1.pdf>, 2003 U.S. App. LEXIS 13595, 2003 Westlaw 21523355

Abstract prepared by Peter Winship, National Correspondent

The issue before the court was whether the claim of the buyer should be dismissed before trial on the ground that there was no genuine issue as to material fact and the seller was entitled to judgment as a matter of law.

The seller, a corporation with its place of business in the United States, agreed to sell 140,000 barrels of unleaded gasoline to the buyer, a corporation with its place of business in Ecuador. The contract provided that the gasoline's gum content was to be less than three milligrams per one hundred milliliters as determined by a third party before shipment. Delivery was to be "CFR La Libertad-Ecuador." The contract form stated "Jurisdiction: Laws of the Republic of Ecuador".

The third party certified that the gum content limitation was satisfied before shipment. However, the buyer tested the oil after receiving it at La Libertad and found that the limit was not satisfied. The buyer refused to accept delivery of the oil and drew upon a letter of guarantee. The seller sold the oil to its supplier for a loss and sued the buyer for breach of contract and wrongful draw upon the letter of guarantee. The district court, applying domestic Ecuadorian law, granted summary judgment for the buyer. The seller appealed.

The appellate court concluded that the contract was governed by the Convention because the parties had their places of business in two different Contracting States pursuant to art. 1(1)(a) CISG. Applying an "affirmative opt-out requirement" because it best promoted uniform application of the Convention and good faith in international trade, the court also found that the parties had not excluded application of the Convention by their choice of the laws of Ecuador to govern the contract when Ecuador was a Contracting State (art. 6 CISG).

The court found that the seller had not breached its contract with respect to the quality of the oil sold because the gasoline conformed at the time that risk of loss passed to the buyer. (art. 36(1) CISG). The court also stated that Incoterms are "incorporated" into the Convention under article 9(2) because they are well known in international trade even if their use is not global. The relevant Incoterm states that the risk of loss passes when the goods pass the ship's rail. Having appointed a third party to inspect the gasoline before shipment, the buyer ought to have discovered the nonconformity ("defect") before the gasoline was shipped according to art. 39(1) CISG. Only if the seller "knew or could not have been unaware" of the nonconformity at the time that risk passed would the seller be responsible on the basis of art. 40 CISG.

The appellate court therefore reversed the lower court decision and remanded the case to determine whether the seller had provided nonconforming gasoline by failing to add sufficient gum inhibitor.