

Case 608: CISG 7 (1); 7 (2); 39 (1)

Italy: Tribunale di Rimini

Al Palazzo S.r.l. v. Bernardaud s.a.

26 Novembre 2002

Original in Italian

English translation by F. G. Mazzotta and A. M. Romito in *Vindobona Journal of International Commercial Law and Arbitration*, 8:1:165, 2004;

Commented by Franco Ferrari, *International sale law and the inevitability of forum shopping; a comment on Tribunale di Rimini 26 November 2002*, *Journal of Law and Commerce*, 23:2:169, 2004; Franco Ferrari, *Vendita internazionale tra forum shopping e diritto internazionale privato: brevi note in occasione di una sentenza esemplare relativa alla Convenzione delle Nazioni Unite del 1980*, *Giurisprudenza Italiana*, I: 896, 2003.

Abstract prepared by Cristina Poncibò

An Italian innkeeper purchased porcelain tableware from a French manufacturer. The parties agreed that the price would be paid in two instalments, the first at the time of the conclusion of the contract and the second ninety days after the delivery of the goods. However, the second payment did not take place and the seller sued the buyer to recover the money.

In court the buyer alleged that, a few days after taking possession of the goods, it was discovered that several items were defective. The buyer also alleged that it immediately informed of the discovery a sales representative of the seller who agreed to replace the defective goods, but never did. Consequently, the buyer stated his right to set off the second payment against the value of the damaged goods. The seller replied denying that an oral notice had taken place, and that the buyer's notice had been given untimely since it was given with a letter sent only six months after taking possession of the goods.

The court first discussed some aspects relating to private international law. It noted that the relevant Italian rules for determining the law applicable to contracts for the international sale of goods were set forth by the Hague Convention on the Law Applicable to International Sales of Goods, 1955. It added, however, that, when available, uniform substantive rules should prevail over private international law rules. It noted that the direct application of uniform substantive rules would avoid the double-step approach of identifying applicable law and applying it, typical of private international law rules. The court concluded that CISG rules were more specific because they directly addressed substantive issues, and that therefore CISG rules should prevail over rules of private international law.

Moreover, the court added that the direct application of uniform substantive law might have an additional advantage over private international law in preventing forum shopping, in particular when, as in the case of the CISG, case law from different jurisdictions is easily available and therefore a uniform interpretation may develop. The court noted that foreign precedents, though not legally binding, have a persuasive value and should be taken into account by judges and arbitrators in order to promote uniformity in the interpretation and application of the CISG as requested by its article 7 (1).

On the scope of application of the Convention, the court stated that the CISG governed the contract as the two parties were located in contracting States and the substantive requirements for the application of the Convention were met, i.e., the contract was a sales contract of an international nature and the parties did not exclude the application of the Convention.

In the merits, the court found that the buyer did not give notice of the defects of the goods within a reasonable time as required by article 39 (1) CISG. It stated that, even if the "reasonable time" for notices varied on the circumstances of each case and on the nature of the goods, a notice given six months after taking possession of the goods, as in the case, was clearly not timely.

While acknowledging that the matters relating to the burden of proof were not expressly settled in the CISG, the court stated that the principle that a party asserting certain facts should bear the burden of proving them was a general principle underlying the Convention for the purposes of article 7 (2) CISG. The court therefore rejected the buyer's assertion that it gave oral notice to a sales representative of the seller immediately after the discovery of the defects, as the buyer failed to produce the necessary evidence of such oral notice, and decided the case in favour of the seller.