CISG-online 737	
Jurisdiction	Italy
Tribunal	Tribunale di Rimini (District Court Rimini)
Date of the decision	26 November 2002
Case no./docket no.	3095
Case name	*Al Palazzo S.r.l. v. Bernardaud S.A.*

Translation[*] *by Angela Maria Romito*[**]

Edited by Francesco G. Mazzotta

Procedural history

[Buyer], by complaint duly and timely served upon [seller[, filed an action in response to summary judgment no. 1015/00 entered by the Tribunal of Rimini against the [buyer] and in favor of the [seller] on 22 September 2000, in the amount of 39,833 French francs or its equivalent in Italian liras through 1 January 1999, with interest thereon. The judgment was for residual payment on a contract of sale of porcelain plates to be used by the [buyer] for its restaurant.

In opposition to the judgment:

[Buyer] alleged that the goods had to be paid for in two installments: the first was duly paid at the time of conclusion of the contract; the second installment, the object of the present dispute, had to be paid within ninety days from the delivery of the goods.

[Buyer] alleged that the goods were delivered in December 1999, packaged in a manner that did not make them visible from the outside. Some days after the delivery, [buyer] opened the packages to use the goods, and found them to a large extent affected by defects -- some were chipped, others had spoiled decorations. [Buyer] quickly gave notice of the non-conformity to a representative of [seller].

[Buyer] further alleged that the representative of the seller after having personally inspected the goods and having verified their non-conformity, promised that the defective porcelains would quickly be replaced. Nevertheless, the seller, in subsequent correspondence, became reluctant to replace the goods, and instead asked for full payment of the price and denied the truth and value of the declarations of its representative.

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[*] All translations should be verified by cross-checking against the original text. For purposes of this translation, Bernardaud di Limoges S.A. of France is referred to as [seller]; Al Palazzo S.r.l of Italy is referred to as [buyer].

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The [buyer] asked for a reversal of the judgment for payment, and for reduction of the price of sale in an amount corresponding to the value of the non-defective goods.

The [seller] asked the Court to reject the [buyer]'s allegations for the following reasons:

First, the goods were delivered on 13 October 1999, as shown by the documents produced before the Court; thereafter [seller] did not received any payment;

Second, [seller] denied the existence of an agreement for payment in two installments, stressing that, in any event, the second installment had to be paid by 13 January 2000 (the ninetieth day after delivery), or not later than 31 March 2000 (in the hypothesis sustained by buyer according to which the delivery took place in December 1999). No payment had been made within the foretold dates.

Referring to the defects of the goods:

[Seller] pointed out that it received notice of the defects only by letter dated 13 April 2000;

[Seller] observed that the use of ordinary diligence imposed upon the [buyer] the duty to open the packages at the time of the delivery in order to examine the goods. [Seller] alleged that [buyer] lost its right to rely on the lack of conformity [(by failing to give the requisite notice in a reasonable time)];

[Seller] also alleged that the representative who promised the substitution of the goods was not authorized to commit [seller] to this.

[Seller] asked the Court to reject [buyer]'s opposition to the judgment for payment. [Seller] requested that the judgment for payment be affirmed and that [buyer] be directed to pay the second installment.

[...]

Reasoning

[*Determination of the applicable substantive law*]

1.
The case involves a supply of goods by a [seller], whose place of business is located in France, to a [buyer], whose place of business is located in Italy. The relationship between the parties therefore has an international character. The first issue to address is the applicable substantive law.

At first glance, the applicable law has to be determined on the basis of the rules of private international law (of the forum) dealing with international sales. As affirmed by the Supreme Court in a recent and authoritative opinion(see Cass. Civ. Sez. Un., 19 June 2000, n. 448, in Corr. giur., 2002, 369 ss.), in Italy, the applicable law must be determined by the Hague Convention of 15 June 1955 (ratified in Italy by Law dated 4 February 1958, n. 50, entered into

force on 1 September 1964), not by the Rome Convention 1980 on the Law Applicable to Contractual Obligations (ratified by Law dated 18 December 1984, n. 975, entered into force 1 April 1991 (see also Tribunale [District Court] Vigevano [Italy], 12 July 2000, n. 405, in Giur. it., 2001, 281]; and Tribunale [District Court] Pavia [Italy], 29 December 1999, n. 468, in Corr. giur., 2000, 932]). This conclusion is grounded on the conviction that the rules of private international law constitute the most appropriate source (and this is their purpose) for identification of the substantive law applicable to similar cases.

2.
However, this Court observes that the approach based on the application of substantive rules is preferable to the application of rules of international private law. It is therefore necessary to determine whether the case at bar falls within the scope of the United Nations Convention 1980 on Contracts for the International Sale of Goods (CISG) (ratified by Law dated 11 December 1985, n. 765, entered into force 1 January 1988).

Preference for the CISG (as a substantive uniform law convention) in comparison to the private international law Hague Convention 1955 (see also Tribunale Vigevano, 405/2000, cited and Tribunale Pavia, 468/99, cited) is due to the fact that application of the CISG is special compared to the application of the Hague Convention, the former being more specific [(than the latter)].

The CISG applies only to contracts for the international sale of goods; the internationality element is dependent on the contracting parties having different locations of their places of business, whereas the Hague Convention applies to every kind of «international» sales contract.

The specialty -- and therefore the prevalence -- of the CISG rules is grounded on a judgment of preference of substantive uniform law provisions over private international law provisions, regardless of the source (domestic or international) of the latter.

The provisions of the CISG have the character of specialty by definition, since they resolve the substantive issues «directly», avoiding the double-step approach (identification of applicable law and application thereof), which is needed when one resorts to the rules of private international law (cf. Tribunale Vigevano, cited).

It has also been pointed out by some scholars that the application of substantive uniform law has an additional advantage compared to the application of the rules of private international law: the avoidance of forum shopping, an activity which aims at reaching the most favorable jurisdiction for the interests of the litigating parties. Forum shopping would be avoided by the application of the same substantive law in different Contracting States. On the other hand, it may be that this is only a theoretical advantage, given that even when applying the CISG, the parties still could have an interest in forum shopping, by using the domestic procedural system which is more suitable to them. The truth is that the choice of the most favorable jurisdiction would likely depend on other factors ranging from the rules of evidence to the varying conditions of efficiency and rapidity of the judicial process, the language of the proceedings, the reputation for impartiality of the Court; the enforceability of the judgment; and, above all, the fact that conventions may be interpreted differently in each country with the possibility of inconsistent results being reached on substantive issues.

Nevertheless, this Court observes that this risk appears to be rather remote with reference to the CISG, which applies to this case. It is well known that there are many worthwhile publications that help to reduce interpretative differences, namely, data bases that collect and edit international case law and law reviews that specialize in international sales law (such as Internationales Handelsrecht).

In furtherance of the objectives of Art. 7(1) CISG, these publications aim at assuring uniform application and interpretation of the CISG through reference to the case law of different countries. The goal of uniformity can be advanced even if the court decisions and arbitral awards of other countries, which should be taken in consideration by judges, have only persuasive and not binding value.

For opinions that cite foreign decisions, see Tribunale Vigevano, cited; Tribunale Pavia, cited; see also: Usinor Industeel v. Leeco Steel Products Inc. [U.S. District Court, Illinois]; Rechtbank [District Court] van Koophandel Hasselt [Belgium], 6 March 2002; Oberster Gerichtshof [Supreme Court, Austria], 13 April 2000; Cour d'appel [Appellate Court] Grenoble [France], 23 October 1996; Tribunale [District Court] Cuneo [Italy], 31 January 1996.

3.
In light of these considerations and referring to the application of the CISG, it must be observed that several requirements must be met.

3.1
First, there must be a contract for the sale of goods.

Although the Convention does not provide any clear definition of «a contract for the sale of goods, «a definition can be derived from Articles 30 and 53 of the CISG (see also Tribunal Cantonal [Appellate Court] Vaud [Switzerland], 11 March 1996, n. 01 93 1061).

According to these Articles, a contract for the sale of goods is a contract pursuant to which the seller is bound to deliver goods, transfer the property in the goods and, if applicable, hand over any documents relating to the goods, while the buyer is obliged to pay for the goods. In the present case, there is no doubt that the contract at issue is a contract for the sale of goods as contemplated by the CISG.

The Convention also requires that the object of the sale, at the moment of delivery (on this issue see Cour d'appel [Appellate Court] de Grenoble [France], 26 April 1995), be moveable and tangible, as underscored by both an Italian Court decision (Tribunale Pavia, cited) and a foreign court decision (see Oberlandesgericht [Appellate Court] Köln [Germany], 26 August 1994, in Neue Juristische Wochenschrift Rechtsprechungs-Report, 1995, 246). It appears evident that the object of the contract in dispute also satisfies this requirement.

3.2
Furthermore, the application of CISG calls for the international character of the contract.

A contract for the sale of the goods is international when, at the time the contract was entered into, the parties have their relevant places of business, or the places from which the parties'

business activities are carried out, in different States. This requires a certain duration and stability as well as a certain amount of autonomy (for that definition, see Oberlandesgericht [Appellate Court] Stuttgart [Germany], 28 February 2000, in Internationales Handelsrecht, 2000, 66). In the present case, it is clear that this element of internationality exists. The [seller] has its place of business in France, the [buyer] in Italy. And this internationality was well known by the parties at the time the contract was entered into; consequently, this element cannot be considered irrelevant by virtue of Art. 1(2) CISG.

Even so, that international character of the contract by itself is not sufficient to warrant the application of the Convention (see Tribunale Vigevano, cited). It is also necessary that the countries in which the parties have their place of business are Contracting States to the CISG at the time the contract was entered into [Art.1(1)(a)], or that the rules of private international law lead to the application of the law of a Contracting State [Art.1(1)(b)]. In the present case, the CISG has been in force in both France and in Italy since 1 January 1988, long before the conclusion of the contract. Therefore CISG is applicable by virtue of Art.1(1)(a). Moreover, the parties did not exclude its application either expressly or implicitly, notwithstanding the fact they had this option, as often stated by the Italian and foreign case law (see, for instance, Oberster Gerichtshof [Supreme Court, Austria], 22 October 2001; Cour de Cassation [Supreme Court, France], 26 June 2001; Tribunale Vigevano, cited; Oberlandesgericht [Appellate Court] München [Germany], 9 July 1997, in International Legal Forum, 1997, 159).

These considerations lead to the conclusion that the CISG applies to the present dispute.

[*Seller's claim*]

4.
The next step is to ascertain whether the [seller]'s claim is well grounded.

The [buyer], does not contest either the existence of the right of seller to be paid, or the amount to be paid (in any event, it is shown in the records). Instead, the [buyer] complains about the delivery of defective goods.

[*Issues associated with: Early examination of the goods; and Timely notice of lack of conformity*]

The [seller] alleges that the [buyer] lost the right to rely on the lack of conformity of the goods by failing to give notice within a reasonable time.

The Court observes that the rules on defective goods are provided for in Art. 35 et seq. of the CISG. In particular, Art. 35 states that seller must deliver goods which are of quantity, quality and description required by the buyer, and which are contained or packaged in the manner required by the contract. Goods are defective:

- If they are unfit for the purpose for which goods of the same description would ordinarily be used;

- If they are unfit for any particular purpose for which the buyer made known to seller;

- If the goods do not possess the qualities of the goods that the seller has held out to the buyer as sample or model; or

- If the goods are not contained or packaged in the manner usual for such goods or where there is no such manner, in a manner adequate to preserve and protect them.

If the goods are defective, in order not to lose the right to rely on the lack of conformity, the buyer must notify the seller of the defects, specifying, as much as possible, the nature of the lack of conformity, within a «reasonable time» after the moment when he has discovered the defects, or ought to have discovered them [Art. 39(1)]. According to prevailing court opinion, «reasonable time» is a «general concept» (see Tribunale Vigevano, cited; Pretura [District Court] Torino [Italy], 30 January 1997) that requires the judge to evaluate all the circumstances of the case at bar (cf. Tribunale Cuneo, 31 January 1996, cited).

The time when a lack of conformity can be discovered can be determined by virtue of Art. 38 CISG, which states that «the buyer must examine the goods or cause them to be examined within as short a period as is practicable in the circumstances. »

It is evident that there is a close connection between Art. 38 and Art. 39 CISG (as underscored by foreign case law (see Oberlandesgericht [District Court] Düsseldorf [Germany], 10 February 1994, in Recht der internationalen Wirtschaft, 1995, 53). The duties of inspection and timely notice are both buyer's obligations.

The close link between Articles 38 and 39 does not, however, lead to the conclusion that to recover for defective goods, the buyer must previously inspect them. In fact, as correctly pointed out by scholars, lack of inspection by the buyer does not necessarily involve the loss of the right to rely on the lack of conformity of the goods, as long as the defects are notified (to the seller) in a timely manner, i.e., before a «reasonable period» of time has elapsed.

In the present case, in order to ascertain whether the [buyer] has lost the right to rely on the lack of conformity of the goods, it is necessary to consider the running of both the Article 38 inspection requirement and the Article 39 notice requirement.

Since the sales contract involved the carriage of the goods, Art. 38(2) applies, by virtue of which the examination of the goods may be (but does not have to be) deferred up to the moment of arrival at destination (see also Tribunale Vigevano, [cited]). The goal of this provision is to give the buyer the opportunity to carefully inspect the goods. However, once the goods reach their destination, they must be inspected in the shortest possible time.

In this case, the goods arrived at their destination on 13 October 1999. This is proved, in spite of different allegations of the [buyer], by the consignment note duly undersigned on which the date has been recorded (see. doc. 1 seller's file).

Therefore, the aforementioned «as short a period of time as practicable» period runs from this date. The above-mentioned period, along with the period within which the buyer must give notice of non-conformity, comprises the «reasonable time» that Art. 39(1), requires in

order to exercise buyer's rights. It is therefore necessary to ascertain when this term began to run and if it had expired.

The parties could have reached an agreement on this issue; it is known that Art. 39(1) is a provision that can be derogated by the parties (see Tribunale Vigevano, cited; Landgericht [District Court] Gießen [Germany], 5 July 1994, in Neue Juristische Wochenschrift Rechtsprechungs-Report, 1995, 438).

However, where, as here, the term for the notice has not been agreed by the parties, the Court must take into consideration the circumstances of the case (see Tribunale Vigevano, cited; Tribunale Cuneo, cited; Oberlandesgericht [Appellate Court] München [Germany], 8 February 1995; Oberlandesgericht [Appellate Court] Düsseldorf [Germany], 10 February 1994, in Recht der internationalen Wirtschaft, 1995, 53; Oberlandesgericht [Appellate Court] Düsseldorf [Germany], 12 March 1993, in Diritto del commercio internazionale, 1997, 723), looking at (among other elements) particularly, the nature of the goods and the object of the contract of sale, as often affirmed by Italian and foreign case law (see Tribunale Vigevano, cited; Pretura [District Court] Torino [Italy], 30 January 1997, in Giur. it., 1998, 982; Amtsgericht [Lower Court] Augsburg [Germany], 29 January 1996).

If the goods are perishable, the reasonable time within which buyer must give notice of non-conformity is shorter than for non-perishable goods (see Oberlandesgericht [Appellate Court] Saarbrücken [Germany], 3 June 1998, in Transportrecht-Internationales Handelsrecht, 1999, 41; Rechtbank [District Court] Zwolle [Netherlands], 5 March 1997, in Nederlands Internationaal Privaatrecht, 1997, no. 230; Amtsgericht [Lower Court] Kehl [Germany], 6 October 1995, in Neue Juristische Wochenschrift Rechtsprechungs-Report, 1996, 565). The same principle applies to seasonal goods (Oberster Gerichtshof [Supreme Court, Austria], 27 August 1999, in Österreichische Zeitschrift für Rechtsvergleichung, 2000, 31).

In addition, to determine whether a notice is timely, pursuant to Art. 9 CISG, the Court must consider usages (see Rechtbank [District Court] Zwolle [Netherlands], 5 March 1997, in Nederlands Internationaal Privaatrecht, 1997, no. 230; Rechtbank [District Court] van Koophandel Kortrijk [Belgium], 16 December 1996), as well as practices established between the parties (see Hungarian Arbitration award VB/94131 of 5 December 1995).

In the present case, lacking any agreement concerning the time of notice, Art. 38 and Art. 39(1) must be invoked to fill the gaps. Given that the goods in this matter are not perishable, the concept of a reasonable time does not have to be considered in an excessively restrictive way.

The records of the procedure show the material evidence that [buyer] sent notice to the [seller] complaining about defective goods by letter (attached by the [buyer] in its file) dated 13 April 2000.

No divergent information has emerged from witnesses. No witness declared that he was present at the time of previous phone calls; on this issue, only witness [...] (buyer's employee), referred to the complaint as «having been reported to him by his employer».

The same witnesses affirmed that they opened the packages in mid-December (in particular witness [...]) and at that time the defects became evident. The witnesses testified that the notice of defects was given to the agent of [seller] who went there personally «about one month later» (first witness), «perhaps two or three months later» (second witness).

It is therefore demonstrated that the notice of lack of conformity was given six months after the delivery of the goods. Considering this long period of time, it does not seem that the notice was timely.

The [buyer] could have previously inspected a sample of the goods that were sold; according to the consistent case law, that would have constituted diligent behavior (see, for instance, Oberlandesgericht [Appellate Court] Thüringer [Germany], 26 May 1998, in Transportrecht-Internationales Handelsrecht, 2000, 25; Obergericht [Appellate Court] Kanton Luzern [Switzerland], 8 January 1997, in Schweizerische Zeitschrift für internationales und europäisches Recht, 1997, 132).

In fact an immediate or prompt examination (rather than two months after delivery) would have probably allowed immediate discovery of the complained defects. Hence, the buyer was negligent in its obligation to examine the goods by virtue of Art. 38 CISG; as a consequence, hearing the testimony of a third witness who attended the late inspection, is irrelevant.

Furthermore, the six-month term appears indeed much too extended, both objectively and subjectively -- with reference to the nature of the goods and to their use.

Referring to the objective factor, it is useful to consider case law which refers to as untimely a notice given four months after delivery (Tribunale Vigevano, cited; Oberlandesgericht [Appellate Court] München [Germany], 11 March 1998, in Schweizerische Zeitschrift für internationales und europäisches Recht, 1999, 199 or three and a half months (Landgericht [District Court] Berlin [Germany], 16 September 1992 or even two months (Oberlandesgericht [Appellate Court] Düsseldorf [Germany], 10 February 1994, in Recht der internationalen Wirtschaft, 1995, 53).

Referring to the second aspect [the subjective factor], it has been stressed that the buyer has a restaurant; [buyer]'s business is used to dealing with dishes or pottery of the kind purchased. Considering the purpose for which the goods are used, a six-month term [for giving notice], also appears too extended.

In light of these considerations, the notice of lack of conformity given by the [buyer] was late; the objection of the [seller] is sustained.

It must be added that the buyer declared in its defensive briefs that it gave notice (under Art. 39 CISG) on December 1999. However, that declaration was not proved; the examined witnesses were not able to testify to any direct knowledge of this.

It must be reiterated that the principle «onus probandi incumbit ei qui dicit» [the party seeking to establish his rights must carry the burden of proof] is a general principle on which the CISG is based -- along with other general principles, i.e., the primary role of party autonomy,

the freedom-of-forms requirements of the contract, the binding value of usages and practices established between the parties, mitigation of damages by the party who suffered damages, the limitation of damages to those that are foreseeable or that ought have been foreseen.

Matters governed by the CISG which are not expressly settled in it are to be settled in conformity with the general principles on which it is based [Art. 7(2)]. Burden of proof is one of these matters (see Tribunale Vigevano, cited; Tribunale Pavia, cited; Handelsgericht [Commercial Court] Kanton Zürich [Switzerland], 26 April 1995, in Schweizerische Zeitschrift für internationales und europäisches Recht, 1996, 53).

Since the [buyer] did not prove a December 1999 notice, [buyer]'s claim to this effect is rejected. [Buyer]'s later notice of defective goods was too late with consequent loss of the right to any remedy for the lack of conformity.

The CISG has provisions aimed at mitigating the harsh consequences of untimely notice, such as Articles 40 and 44 that allow a buyer, in certain instances, to claim a lack of conformity even in the absence of proper notice. However, these provisions are inapplicable to the present case, in that although it was his burden, [buyer] failed to establish that the [seller] knew about the defects of the delivered goods or that [seller] could not have been unaware of them (Art. 40). Similarly, [buyer] did not establish any other elements that could reasonably have excused the late notice (Art. 44).

5.
[Buyer]'s opposition to the order of payment is dismissed; the decree of payment is confirmed with all consequent effects.

The costs of the procedure are charged against the losing party.