CISG-online 819	
Jurisdiction	Italy
Tribunal	Tribunale di Padova (District Court Padova)
Date of the decision	25 February 2004
Case no./docket no.	40552
Case name	*SO.M.AGRI s.a.s. v. Erzeugerorganisation Marchfeldgemüse GmbH & Co. KG*

Translation[*] *by Giovanna Micheli*[**]

Edited by Joseph Gulino

Reasoning of the Court

Plaintiff SO.M.AGRI S.a.s. [of Italy] [Buyer], owned by Ardina Alessandro & C., sued before the Judge of Este [as proper venue of the] Tribunal of Padua (Circuit Court of First Instance), Defendant Erzeugerorganisation Marchfeldgemüse GmbH & Co. KG [of Austria] [Seller], challenging the injunction for payment of Italian lira [ITL] 40,690,916 as the price due, along with interest and expenses, for the supply of agricultural products among which «winter potatoes.»

[Buyer]'s claim is based on the following allegations:

[*] All translations should be verified by cross-checking against the original text. For purposes of this translation, Plaintiff SO.M.AGRI S.a.s of Italy is referred to as [Buyer]; Defendant Erzeugerorganisation Marchfeldgemüse GmbH & Co. KG of Austria is referred to as [Seller]. Amounts in the currency of Italy (Italian lira) are indicated as [ITL].

Translator's note on other abbreviations: ABGB = Allgemeines Bürgerliches Gesetzbuch [Austrian Civil Code]; C.c. = Codice civile [Italian Civil Code of 1942]; CISG = Convention on Contracts for the International Sale of Goods, adopted in Vienna on 11 April 1980 (implemented with L. 11 December 1985, n. 7655); CPA = Cassa Previdenza Avvocati [Fund for Lawyer's Re- tirement Plan]; GmbH = Gesellschaft mit beschränkter Haftung [a company characterized by limited liability, management by members or managers, and limitations on ownership transfer; see, by way of comparison with U.S. law, the L.L.C. rules]; IVA = Imposta sul Valore Aggiunto [Value Added Tax]; KG = Kommanditgesellschaft [Limited Partnership; see, by way of comparison with U.S. law, the Revised Uniform Limited Partnership Act (R.U.L.P.A.)]; L. = Legge [Italian ordinary law, enacted by the Parliament]; R.g. = Ruolo general [Special register of the court]; S.a.s. = Società in accomandita semplice [Limited Partnership; see note supra]. S.r.l. = Società a responsabiitá Limitata [L.L.C.; see note supra]; Trib. = Italian Tribunal, Circuit Court of First Instance.

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1.
Before applying to the Tribunal, [Seller] never claimed against [Buyer] for the delay by demanding specific performance. [T]herefore, «[Buyer] could not know anything about [Seller]'s claim prior to the serving of the injunction» (see summon and complaint); consequently, the expenses liquidated by the Tribunal for the recognition of the injunction were not due;

2.
[Buyer] is the creditor of Erzeugerorganisation Marchfeldgemüse GmbH for the amount of ITL 245,605,200 as the price due for the sale of summer potatoes. [T]hus, the mean of com- pensatio [Note of translator: i.e., a defendant's claim to have the plaintiff's demand reduced by the amount owed by the plaintiff to the defendant, (see also set-off)] should apply.

The claim is not founded and it has to be dismissed.

First of all, with regard to point 1) the controversy concerns a relationship of indisputable international character. In view of the need to identify the applicable substantive law, it is necessary to consider the rules of private international law on international sales, which – as the Supreme Court has affirmed in a recent decision (Cass. Civ., Sez. Un., 19 June 2000, n. 448, in Corr. giur., 2002, 369 et seq.) – in Italy are the rules provided by The Hague Convention of 15 June 1955, ratified [in Italy] by the L. 4 February 1958, n. 50, and entered into force on 1 September 1964, rather than those provided for by the Rome Convention of 1980 on the Law Applicable to the Contractual Obligations, ratified by the L. 18 December 1984, n. 975, and entered into force on 1 April 1991 (on this view, see e.g., Trib. Rimini, 26 November 2002, n. 3095, in Giur. it. 2003, 896 et seq.; Trib. Vigevano, 12 July 2000, n. 405, in Giur. it., 2001, 281 et seq.; Trib. Pavia, 29 December 1999, n. 468, in Corr. giur., 2000, 932 et seq.). This conclusion is based on the opinion that the norms of private international law are the most suitable (and have been expressly created for) determining the applicable substantive regula- tions.

Nevertheless, a different approach must be preferred: [an approach] that supports the direct application of the rules of substantive law where possible. In the instant case, it is necessary to establish whether the requirements for the applicability of the United Nations Convention on Contracts for the International Sale of Goods of 1980 (hereinafter [CISG]) (ratified with the L. 11 December 1985, n. 765, and entered into force on 1 January 1988) are met.

[*Applicability of the CISG*]

The preference for [CISG] (which is a uniform substantive law rather than a private international law, as sometimes mistakenly asserted), over the rules of private international law established by The Hague Convention, is mainly due to the fact that the international area of applicability of [CISG], given that it is more limited, is special as compared with The Hague Convention. In fact, [CISG] applies only to contracts of sale whose internationality depends on the contracting parties' places of business being found in different States, while – as is known – The Hague Convention concerns every type of «international» sales contract. Moreover, the specialization of [CISG] is based on an opinion of the prevalence of the rules of uniform substantive law over those of private international law, regardless of the source (national or international) of the latter. The rules of uniform substantive law have a special character since they resolve substantive problems «directly.» Also, they avoid the two-step process that is always

compulsory in case of private international law, consisting first in the identification of the applicable law and then in the application of it.

From what has been said, we can gather that [CISG] requires different prerequisites for its application.

On the substantive side, it is necessary that the contract be a contract of sale, whose definition is not provided by [the CISG]. However, the lack of an express definition should not lead to turning to a national definition, e.g., as provided in Art. 1470 C.c. On the other hand, as with most of the concepts used in the [CISG] (among which that of «place of business,» «domicile,» and «goods,» but not the concept of «private international law,» which instead corresponds to the private international law of the forum), the concept of «sale» has to be identified autonomously, without referring to any domestic definition.

In this way, Arts. 30 and 53 [CISG] become relevant (see also, Tribunal cantonal de Vaud [Switzerland], 11 March 1996, no. 01 93 1061), from which it can be deduced that [for purposes of the CISG] a contract of sale is an agreement in which the seller is bound to tender the goods, transfer the property and, eventually, hand over any issued documents relating to them; while the buyer is obliged to pay the price due and to take delivery of the goods.

With regard to the case at issue, it is unquestionable that the contract between [Buyer] and [Seller] constitutes a contract of sale as above stated.

[CISG] also requires that, at the moment of the delivery, the object of the sale be movable and tangible, as stressed by Italian jurisprudence (See Trib. Rimini, supra; Trib. Pavia, supra) as well as by foreign jurisprudence (See OLG Köln [Germany], 26 August 1994, in Neue Juristische Wochenschrift Rechtsprechungs-Report, 1995, 246; Cour d'appel de Grenoble [France], 26 April 1995). Although not binding, as the minority view wishes, however, the jurisprudence on the Convention must be very carefully considered in order to assure uniformity in the application of [CISG], as required by its Art. 7(1). In fact, the mere autonomous interpretation of [CISG] – interpretation that does not refer to the meaning attributed to specific expressions by a particular national regulation – is by itself inadequate to assure the uniformity to which [CISG] aims in order to promote the development of international trade.

Based on a substantive analysis, [CISG] appears applicable since the contract in the case at issue presents the elements that have been just mentioned.

However, under the [CISG], it is also necessary to consider the contract as an international transaction. The requisite international character is defined by [CISG] (as is the case in most conventions of uniform substantive law). For this purpose, it is necessary that the parties have their places of business – the places where commercial activities are carried out and that are characterized by a certain duration, stability as well as a certain autonomy (Cf. OLG Stuttgart [Germany], 28 February 2000, in Internationales Handelsrecht, 2000, 66) – in different States at the time of conclusion of the agreement (it is irrelevant if this circumstance will change later on).

With reference to the contract at issue, [Seller] having its place of business in Austria, while the place of business of [Buyer] is in Italy, it is evident that [the] requisite of internationality exists. Moreover, the internationality of the contract was known by the parties at the time of conclusion [of the contract]. Hence, pursuant to Art. 1(2) of [CISG], it cannot be considered irrelevant. Though, the internationality of the contract is not alone sufficient to make [CISG] applicable. Also, as with many conventions of uniform substantive law, [CISG] requires another element: the States where the parties have their place of business must be Contracting States of [CISG] at the time of the conclusion of the contract (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] entered into force in Austria and Italy on 1 January 1989 and 1 January 1988, that is, prior to the conclusion of the contract. Thus, in accordance with Art. 1(1)(a), [CISG] must be considered applicable.

Moreover, the parties have not availed themselves of the possibility of excluding the applicability of [CISG], despite having this power – which they could even exercise impliedly. [This has] often been asserted by the Italian jurisprudence (Trib. Rimini, infra; Trib. Vigevano, infra) and by foreign case law as well (See, e.g., Oberster Gerichtshof [Austria], 22 October 2001; Cour de Cassation [France], 26 June 2001; OLG München [Germany], 9 July 1997, in International Legal Forum, 1997, 159 et seq.).

Further, the silence in the pleadings on the matter of the applicability of the law at issue is immaterial because, in the presence of all requisites mentioned above, [CISG] is applicable by operation of law (in this view also, French Cour de Cassation, 26 June 2001, in Recueil Dalloz, 2001, Jur. 3607). Thus, there is no need for any express or implied manifestations of willness by the litigating parties. Neither can it be substained that the silence of the parties constitutes an implied manifestation of the intent to exclude the application of [CISG] (See, German Federal Supreme Court, 23 July 1997, in Neue Juristische Wochenschrift, 1997, 3309 et seq.).

[T]he reference, in the [parties'] pleadings to the non-uniform domestic rule of a Contracting State alone is not, by itself, sufficient to exclude the applicability of the Convention – notwithstanding, hypothetically, it could represent an element that lay in favor of the choice of the domestic law of such State (in the same view, also French Cour de Cassation, 17 December 1996, in Revue critique de droit international privé, 1997, 72 et seq.; LG Düsseldorf [Germany], 11 October 1995; International Court of Arbitration of the International Chamber of Commerce, Award no. 7565, in ICC International Court of Arbitration Bulletin, November 1995, 64 et seq.; contra BG Weinfelden [Switzerland], 23 November 1998, in Schweizerische Zeitschrift für internationales und europäisches Recht, 1999, 198; Cour d'Appel de Colmar [France], 26 September 1995).

In order to consider the parties' intent in the way of the exclusion of the applicability of [CISG], it must clearly show that [the parties] were aware of its applicability, and that they nonetheless insisted on referring only to the domestic rule.

In the instance case, from the pleadings of the respective counsel, it does not turn out that the parties were aware of the applicability of [CISG]; therefore, they could not have excluded – even implicitly – the application of the CISG, by choosing to make an exclusive reference to

the Italian law. As a result, by virtue of the principle of iura novit curia, it is for the judge to determine the applicable Italian rules (accord, Trib. Vigevano, infra; Trib. Cuneo, 31 January 1996). [F]or all the reasons stated above, the rules have to be those present in the articles of [CISG] at issue.

[*Substantive issues*]

With regard to the substantive question raised by [Buyer], the applicability of [CISG] does not require that [Seller] ask for payment in writing before applying to the court. It is noted that the contracting parties have concluded their contract orally (consistent with Art. 11 of [CISG]), without specifying any term of payment of the price (term that cannot be inferred even from the respective defenses). It is not known whether the parties have fixed the moment at which buyer's duty would have to be performed. Therefore, it must be presumed that the parties have not agreed on a term for payment. In this situation, Art. 58 [CISG] states that:

«If the buyer is not bound to pay the price at any other specific time, – as alleged, in the present case – he must pay it when the seller places either the goods or documents controlling their disposition at the buyer's disposal in accordance with the contract and this Convention.»

[This] rule, which sets out the principle of the concurrence of the payment with the tender of the goods (or of their representative documents), applies whenever the parties have not agreed otherwise upon (e.g., by stipulating that the price has to be paid at different times: 30% at the time of placing the order of goods, 30% when the assembly begins, 30% when the installation ends, 10% when the inspection of the good takes place. See, Swiss Federal Supreme Court, 18 January 1996, in Schweizerische Zeitischrift für internationales und europäisches Recht, 1997, 129 et seq.), and [when] there are no usages (as in Art. 9(2) [CISG]) from which a different term can be inferred.

Here, the time for [Seller]'s right to payment came into existence in October 1999, since the delivery of all of the goods most likely took place in that month. From the moment of the delivery, when the buyer's debt became real, to that in which the injunction for payment has been filed [with the court] (on 5 May, 2000), at least six months passed without [Buyer] having made payment. Even to hypothesize, as does some of the doctrine, a duty on the part of the seller to grant the buyer a short time for performing the payment, [Seller] was not required to order the payment in writing (or by any other method) – in a case in which the buyer would know when the goods were tendered to him.

In fact, following Art. 59 of [CISG]:

«The buyer must pay the price on the date fixed by or determinable from the contract and this Convention without the need for any request or compliance with any formality on the part of the seller.»

Consequently, in the wake of the breach of the duty to pay, the buyer is automatically late (See, Handelsgericht des Kantons Aargau [Switzerland], 5 November 2002; LG Stendal [Germany], 12 October 2000, in Internationales Handelsrecht, 2001, 30), without any other action

by the seller being necessary (in this view also, AG Viechtach [Germany], 11 April 2002; Kantonsgericht Schaffhausen [Switzerland], 25 February 2002; Landgericht Aachen [Germany], 3 April 1990, in Recht der internationalen Wirtschaft, 1990, 491 et seq.). This does not mean that the seller cannot fix for the buyer an additional time for the performance; Art. 63(1) of [CISG] states forth expressly that:

«The seller may fix an additional period of time of reasonable length for performance by the buyer of his obligations»

This rule has the aim to grant the seller – who wants to utilize it, in case of breach of the duty to pay the price, to avoid the contract without having to conclude whether Art. 25 (which provides for a general concept of «fundamental breach») applies – a plain way to obtain the right to avoid of the contract. [This rule] is modeled on the German rule of Nachfrist, and [...] it provides for an entitlement rather than an obligation (Cour d'Appel Grenoble [France], 4 February 1999; contra, with reference to the Convention, apparently LG Göttingen [Germany], 20 September 2002).

If a seller decides not to grant an additional time, he can immediately take action to obtain payment, even by filing a claim before a judge (however, he can ask for the avoidance of the contract only if the breach was fundamental, as established by Art. 25). If instead, the seller decides to [grant] a supplemental period, until the expiration of this period, he can neither avoid the contract nor file an action for specific performance (however, when the time has expired, the seller can immediately ask for the avoidance of the contract, regardless of whether the breach can be qualified as «fundamental»– see, Austrian Supreme Court, 28 April 2000, in Zeitschrift für Rechtsvergleichung, 20 00, 80; LG Bielefeld [Germany], 18 January 1991; Cour d'Appel Grenoble [France], 4 February 1999 – as well, the seller] can seek payment of the price).

In addition, the excercise of the power to grant or not grant a supplemental period cannot be carried out arbitrarily, since the seller must follow the due diligence criteria (as can be inferred from the reference to the «reasonable duration» of the supplemental period, cf. LG Aachen [Germany], 14 May 1993, in Recht der internationalen Wirtschaft, 1993, 760 et seq.). More generally, the conduct of the contracting parties must respect the principle of the good faith, which – since it is one of the general principles on which [CISG] is based (See, Hof Beroep Gent [Belgium], 15 May 2002, available at <http://www.law.ku- leuven.ac.be/ipr/eng/cases/2002-05-15.html>; German Federal Supreme Court, 9 January 2002, in Internationales Handelsrecht, 2002, 19; German Federal Supreme Court, 31 October 2001, in Internationales Handelsrecht, 2002, 14 et seq.; Corte d'appello Milano, 11 Decembre 1998, in Rivista di diritto internazionale privato e processuale, 1999, 112 et seq.; German Federal Supreme Court, 25 November 1998, in Recht der internationalen Wirtschaft, 1999, 385; Arbitral award Dulces Luisi v. Seoul International, 30 November 1998 given by Comission para la Protecion del Comercio Exterior de Mexico, in Diario Oficial del 29 January 1999, 69 et seq.) must not only influence the entire regulation of the international sale (as regards see also, German Arbitral award of the Hamburg Court of Arbitration, 21 March 1996, in Recht der internationalen Wirtschaft, 1996, 766 et seq.), but also supplies an essential standard for the interpretation of the rules set forth in the [CISG] (See, Art. 7(1)).

One must conclude that it would be contrary to the principle of good faith to file a claim in court [just] few days after the expiration of the deadline [seeking] the payment of the price, without having demanded of the buyer adequate explanations for the delay or having conceded him a period for [«cure» by] providing performance. Conversely, the conduct of the seller can- not be regarded as unfair, where the seller brings a claim before the judge after having wait at least six months for payment of the price, without the buyer having communicated any excuse in the meantime.

As regards [Buyer]'s point 2), the [CISG] does not expressely regulate set-offs. The lack of a regulation in this matter has caused a dispute between those who maintain that set-offs have to be treated as matters regulated by [CISG], even if not expressely (lacuna praeter legem), and those, instead, who believe that set-offs are matter excluded from the scope of [CISG] (lacuna intra legem). In the first case, it is possible to turn to the general principles of [CISG], while in the second case, it is necessary to look to the rules of private international law to determine the applicable substantive law. In accord with most of the doctrine and jurisprudence, this judge is inclined to the second solution (See, e.g., OLG München [Germany], 9 July 1997]; OLG Koblenz [Germany], 31 January 1997, in OLG-Report Koblenz, 1997, 37 et seq.).

Compensatio [set-offs], as well as matters having to do with:

- Statutes of limitations (cf. LG Düsseldorf [Germany], 11 October 1995; OLG Hamm [Germany], 9 June 1995, in Neue Juristische Wochenschrift Rechtsprechungs-Report, 1996, 179; International Court of Arbitration of the International Chamber of Commerce, award no. 7660, in ICC International Court of Arbitration Bulletin, November 1995, 69 et seq.);

- Assignments (see OLG Hamm [Germany], 8 February 1995, in Praxis des internationalen Privat- und Verfahrensrechts, 1996, 197);

- Agency (Austrian Supreme Court, 20 June 1997, in Österreichische Juristenzeitung, 1997, 829 et seq.; AG Alsfeld [Germany], 12 May 1995, in Neue Juristische Wochenschrift Rechtsprechungs-Report, 1996, 120); and

- The validity of penalty clauses (International Court of Arbitration of the International Chamber of Commerce, award no. 7331, in Journal du droit international, 1995, 1001 et seq.) must be considered as questions excluded from the scope of [CISG]. The consequence is that, according to Art. 7(2), it is not possible to turn to the general principles of the Convention, among which it might be reminded, e.g.:

- [The principle] of the prevalence of the freedom of contract;

- Of the freedom of choosing the form of the contract;

- Of the binding effect of generally known usages, which are regularly observed by the parties;

- Of the principle of venire contra factum proprium;

- Of mitigation of damages by the damaged party;

- Of the limitation of liability of damages to foreseeable losses;

- Of the so-called principle of full compensation; as well as

- [The principle] that any notice, or any other kind of communication made or transmitted after the conclusion of the contract can cause effects from the moment of its dispatch; and

- The principle of onus probandi incumbit ei qui dicit,

even when considering counterbalancing credits arising from contracts subject to [CISG] (in this view instead, OLG Hamburg [Germany], 26 November 1999, in Internationales Handelsrecht, 2001, 19 et seq.).

This conclusion is reached on the basis of the consideration that [CISG] does not completely govern problems related to set-offs (e.g., the determination of the requisites which must exist in order to balance mutual debts); besides, in the course of the preparation [of the [CISG], the question has never been addressed. This explains the silence in the text [of CISG] on this issue. Because of the lack of definite criteria of reference, research of the matter among the rules of [CISG] (or [among] its general principles) would be a source of uncertainty. [C]onsequently, rather than promote uniform solutions, [CISG] would end up generating largely discretionary interpretative solutions which, at length, will turn out to be an obstacle to international trade development. In view of the lack of any other convention on uniform substantive law with respect to matters which not regulated by [CISG], set-offs are regulated by the applicable law according to the rules of private international law.

In the case at issue, it is necessary to go to the rules of The Hague Convention of 1955 which, pursuant to its Art. 3(1), lead to Austrian law since this is the law of [Seller]. Given that, as [Buyer] states, [Buyer]'s credit is to [Seller] – See, invoices in the evidence - (and with which [Buyuer] intends to balance [Seller]'s credit), it is necessary to determine also the law applicable to this second relationship. This being as well a sales contract, the above mentioned rules govern. [H]owever, [these rules] now lead to Italian law (as the law of the seller). Hence, Austrian law cannot be applied automatically to the legal set-off, which would be undoubtedly be applicable [only] if [Buyer]'s credit were also subject to Austrian law.

Austrian law will be applicable because it is the law that governs the contract from which the credit at issue, rather the one put in counterbalance, arose. [T]his, on the basis that with the counterclaim a discharge of the credit at issue essentially comes into question. As consequence, the legal compensation [check-off] is regulated by Austrian law because the credit at issue is submitted to the Austrain law. In particular, Art. 1438 of ABGB applies and it, among other things, requires that the subjects, who own the [contracts] from which the credits put in counterbalance arose, be the same.

As a result, [Buyer] cannot claim to have [Seller]'s credit extinguished by the amount it owed to Erzeugerorganisation Marchfeldgemüse GmbH, since they pertain to two different companies. [T]he first one – [Seller] – is a limited partnership (Società in accomandita semplice- [KG]) while the second one is a limited-liability company (Società a responsabiitá limitata [GmbH]). As deduced from the corporate documents put in the evidence by the defendant, the limited

partneship is a general partner (socio accomantadatario) of [Seller]. Then – according to Austrian law that, by virtue of art 25(2) of L. 218/95, applies to this matter (as it would be for the Italian law as well) – notwithstanding that [Seller] is the parent of and is managed by Erzeugerorganisation Marchfeldgemüse GmbH (actually, this [fact] justifies the coincidence of the headquarters), [Seller] is a subject formally distinguished from the other company.

Lacking the requisite of subjective equivalence, as per Art. 1438 ABGB, the offsetting counterbalance claim cannot be granted.

In conclusion, the [Seller]'s injunction for payment is confirmed; the judicial expenses for this proceeding follow; they will be liquidated as in [the following] ruling.

Italian Republic

On behalf of the Italian people the Tribunal of Padua detached section of Este

represented by the Judge (giudice monocratico), definitively ruling in case no. 40552 of the R.g. 2000, brought by [Buyer], headquartered in Monselice (Padua), with summons and compliant challenging injunction and on 24 June 2000 to [Seller], headquartered in Raasdorf (Austria), every appellate claim and counterclaim considered and rejected (contrariis rejectis),

1.
Rejects the claim challenging the injunction for payment issued by this Tribunal on 8 May 2000; and

2.
Declares [Buyer] held to and sentenced to compensate for the judicial expenses, which are liquidated in a total amount of Euro 2,750.00, whose Euro 1,400.00 for fee and Euro 1,000.00 for rights, apart from IVA and CPA as by law.