CISG-online 871	
Jurisdiction	France
Tribunal	Cour d'appel de Lyon (Court of Appeal Lyon)
Date of the decision	18 December 2003
Case no./docket no.	01/02620
Case name	*Automatic banknote-to-coin change machines case*

Translation [*] *by Andrea Vincze* [**]

Facts of the case – Procedure and Position of the parties:

On 27 April 2001, Company P. Service filed an appeal against the judgment of the Commercial Court of Lyon dated 16 March 2001, and Company L. for Public Transportation (SLTC) filed appeal on 9 May 2001 against the judgment that: 1

- Ordered judicial termination of the contract concluded on 31 July 1995 between Company L. for Public Transportation (SLTC) and Company P. Service, and Company P. Service [lost the case in its entirety];

- Ordered Company P. Service to pay Company L. For Public Transportation (SLTC) a sum of 1,055,177.64 French francs [FRF], the sum of 100,000 FRF under a liquidated damages clause and 10,000 FRF under Article 700 of the New Code of Civil Procedure, ordered the Companies N. and G. to pay the sum of 10,000 FRF under Article 700 of the New Code of Civil Procedure, exonerated Company F. Automatique and dismissed its other claims;

- Held that the claims of Company L. for Public Transportation (SLTC) and Company P. Service against Companies N. and G. are inadmissible under Article 477 of the BGB, taking into consideration that German law applies, since they were not introduced within six month after delivery;

- Ordered Company SLTC to pay Companies N. and G. a sum of 10,000 FRF under Article 700 of the New Code of Civil Procedure; and

- Rejected other claims of the parties.

[The Court considered] Article 455(1) of the New Code of Civil Procedure as included in the decree on 28 December 1998. 2

[*] For purposes of this translation, amounts in the former French currency (*French francs*) are indicated as FRF and amounts in European currency (Euro) are indicated as EUR.

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The claims and arguments of Company P. Service included in its submission of 14 August 2001, which may be referred to for more information, were aimed at reversing the judgment to the extent that it provided judicial resolution of the contractual matter, and that it ordered payment of liquidated damages of 10,000 FRF, and confirming the judgment regarding the dismissal of the claim by Company SLTC for damages and interest. Subsidiarily, [Company P. Service argues that] cancellation of the contract could be ordered solely regarding Companies N. and G.; or termination of the contract for the future can be ordered regarding Companies N., G., SLTC and SFA. [Company P. Service] submitted a counterclaim in which it requests the court to order SLTC to pay [Company P. Service] the sum of 227,644.56 FRF plus interest at the statutory rate from the date of issuing the invoices on 27 November 1997. [Company P. Service] was excluded from the transaction and consequently requested that N. and G. be ordered to pay [Company P. Service] the sums that the latter had paid to the subcontractors in the amount of 266,108 *f*. [Company P. Service] requests the Court to order Company N. to reimburse the sum [Company P. Service] had paid to it for procuring the respective machines, i.e., 576,716 FRF plus interest. [Company P. Service] requests the Court to order Companies N., G., SFA and SLTC to pay [Company P. Service], jointly and severally, damages and interest for the shortfall amount of 3,685,297.70 FRF plus interest. [Company P. Service] requests the Court to order Companies N., G., SFA and SLTC to pay [Company P. Service], jointly and severally, damages and interest as compensation regarding reinstatement of its harmed market image, in the amount of 50,000 *f*. **3**

In its arguments and the evidence submitted by Company L. for Public Transportation (SLTC) in its summary argument, dated 5 December 2002, which may be referred to for more information and which were aimed at reversing the judgment, [SLTC requested the Court to order] Companies P. Service, N., G. and SFA to pay jointly and severally to [SLTC] the sum of EUR 99,126.17 as delay penalty payable until the day of cancellation of the contract, in addition to the interest; and to reimburse, also jointly and severally, to [SLTC] the sum of EUR 160,860.79 as set forth under the contract in addition to interest; to order the latter to pay to [SLTC] jointly and severally the sum of EUR 77,000 for breach of the duty to inform and cooperate and for negligence, in addition to interest; to find that SLTC provided the equipment delivered to Company P. Service; and to confirm the previous judgment in that it ordered judicial termination of the contract between Company SLTC and P. Service on 31 July 1995. **4**

In the arguments and evidence submitted by Companies N. and G. in their summary argument dated 6 February 2003, which may be referred to for more information, [the latter companies requested the Court to] dismiss the claims of Companies L. for Public Transportation (SLTC), P. Service and finally F. Automatique (SFA) in their entirety and to confirm the judgment appealed in its entirety. **5**

In the arguments and evidence submitted by Company F. Automatique (SFA) in its summary argument on 14 October 2002, which may be referred to for more information, [Company SFA requested the Court to] confirm the judgment appealed and to partially reverse it and order Companies SLTC and P. Service to pay to [SFA] a sum of EUR 7,622.45 each, pursuant to Article 32-1 of the New Code of Civil Procedure, and to determine joint and several liability of Companies SLTC, P. Service, N. and G. subject to court-ordered compensation. **6**

The order of closure was rendered on 7 February 2003.

Reasons for the Decision:

I. Delivery of the machines under the contract concluded between Companies P. Service and SLTC, their lack of conformity to the order and their alleged malfunctioning

Under the contract signed on 31 July 1995, Company P. Service agreed to deliver to Company L. for Public Transportation (SLTC) forty automatic machines that would allow users of the subway network of Lyon to exchange banknotes to coins and facilitate transport ticket sales. 7

During performance of the contract, on 2 October 1995 Company P. Service delivered and installed the first batch consisting of six machines, two of which were put into service on 20 October 1995 and the remaining eight were put into service on 24 October 1995. 8

On 15 and 24 October 1995, Company SLTC detected defects during operation of the machines, as a result of which, on 26 October 1995, it notified Company P. Service about several concerns regarding non-conformity of the machines and anomalies that occurred as a result of the latter according to [SLTC]. 9

Upon request of Company N. to whom SFA distributes its brand in France, on 12 January 1996 Company F. Automatique (SFA) also intervened regarding the software problems of the two machines in dispute but failed to repair the defects of the equipment, and Company SLTC continued to complain about the malfunctioning during use of the machines. 10

Several correspondences were exchanged regarding the latter between Companies SLTC, P. Service and SFA in order to find the reason for the alleged malfunctioning and to eliminate the problem. 11

Consequently, a decision was made to send back one of the installed machines to the manufacturer, i.e., Company G. in order to perform the necessary tests that would allow making modifications on the machines installed and making them fully operable. 12

At the end of the year 1996, the nine machines that remained in the possession of Company SLTC still did not work. At this time, [SLTC] had already paid a gross sum of 800,000 FRF to Company P. Service for the acquisition. 13

[SLTC] requested an expert on 23 October 1996 and the expert, Mr. M.C., was appointed in an order on 29 October 1996. He presented his report on 15 May 1997, referring to the existence of defects and expressing an opinion regarding the responsibilities that were likely to be incurred in his opinion. 14

II. The claim of Company SLTC for termination of the contract concluded with Company P. Service on 31 July 1995

It is clear from the correspondences exchanged between Company P. Service and Company SLTC, as well as the expert report, that, on the one hand, the machines delivered did not conform to the particulars requested by Company SLTC in the order, which referred to a set of requirements to be met by the supplier and, on the other hand, the machines had defects that made it impossible to use them as intended, and in particular, according to the expert, the reader installed was inappropriately selected. 15

The appointed expert recommended that, because of the respective defects, the entire structure of the machine should be replaced, and therefore, the equipment must be returned to Company G. along with the equipment that Company P. Service had added, and finally, that it would have to return the equipment in working condition. 16

The seriousness and importance of the anomalies detected by the expert and the difficulties of Company P. Service in remedying them characterize the defects the machines had, and those made the machines unsuitable for their intended use. Therefore, the claim of Company SLTC can only be based on latent defects. 17

It does not matter much that [SLTC] refers to non-conformity of the equipment or that it failed to prove that it could not have discovered the alleged deviations at the time of taking delivery, in fact, it had made payment. 18

Therefore, only the concern regarding conformity of the goods at the time of taking delivery could be relied on, however, as this is a case of actual defects affecting the equipment, the appellant may not base its lawsuit on non-conforming delivery, and [SLTC] has no longer the choice it could otherwise have regarding filing of the lawsuit. 19

In any case, the concerns included in the minutes regarding the receipts of 27 November 1995 are subsequent to taking delivery of the goods and were all ultimately withdrawn. 20

The conclusions in the expert report do not leave any doubt regarding breach of contract by Company P. Service, which is therefore established. 21

It does not matter in this respect whether the breach of contract was total or partial. 22

The anomalies stated regarding such breach of contract justify cancellation of the contract of 31 July 1995, the seller may not require the supplier to replace the equipment, and regardless of the reasons for the lack of conformity in having failed to fulfill the contractual specifications, Company SLTC cannot rely on [the latter]. 23

The judgment appealed, that ordered termination of the sales contract of 31 July 1995, must be confirmed. 24

III. The counterclaim filed by Company P. Service against Companies G., N. and SLTC on exclusion from the contract

The delay by Company P. Service in performing the contract is sufficiently proved and therefore [Company P. Service] cannot complain about having been excluded from the contract. This is the result of its conduct toward its contractual partner, i.e. Company L. for Public Transportation which cannot be blamed for anything. Regarding the other companies [Company P. Service] intends to sue, Company P. Service did not prove that any of them had contributed to the exclusion from the contract because of the mistakes that were committed by such companies against [Company P. Service]. 25

Under such conditions, [Company P. Service]'s claim for damages and interest based on the harm caused by the exclusion from the contract is unfounded and must be rejected. 26

IV. The claim of Company P. Service against Company SFA on exclusion from the contract

Company P. Service requests the court to find Company SFA liable for lost profit as a result of exclusion from the contract. 27

As such claim may not be filed against Company SFA that did not, in any way, contribute to deterioration of the relationship between Company P. Service and Company SLTC, nothing can be held against Company SFA in this regard concerning any liability for the events and the consequences that Company P. Service had suffered. 28

This claim must be rejected for being unfounded. 29

V. Payment of the invoices by Company SLTC to Company P. Service

Company P. Service may not claim any payment from Company SLTC regarding unpaid invoices, as the contract was terminated as a result of Company P.'s sole wrongdoing. 30

The judgment appealed, that rejected the latter claim, must be confirmed.

VI. The claim by Company SLTC against Company SFA concerning quasi-delictual liability

It should be noted that Company SFA intervened upon request by Company L. for Public Transportation (SLTC) in agreement with Company P. Service only after the malfunction was discovered on the first machines delivered, in an attempt to remedy it. 31

As for Company SLTC, Company P. Service cannot rely on a discharge of duties regarding Company SFA, arguing that transfer of the contract took place for benefit of the latter, upon request of its supplier, Company N. in Germany. The effect of such transfer can, if it took place following this request, by no means, have an effect on Company SLTC unless it had agreed to that. 32

Company P. Service did not prove that there had been any contractual relationship between Companies SLTC and SFA. 33

Regarding the delictual liability that Company SLTC refers to, Company SLTC did not prove that the intervention by Company SFA has resulted in any way in a delay with overcoming the malfunctions of the machines that were involved in such intervention, the expert did not find any fault against it in performing the services, and [Company SLTC] also failed to prove that Company SFA had contributed in any way and in a malicious manner to delaying the litigation. 34

Because of the grave anomalies with the system installed on the machines resulted by the stated malfunction, in lack of any default, [Company SFA] is not liable for inefficiency of the intervention by Company SFA. 35

Consequently, the claim by Company SLTC is dismissed regarding its request to order Company SFA to pay compensation of the harm which is merely asserted but not proved. 36

The appealed judgment, that rejected the latter claim, must be confirmed. 37

VII. Liability of Companies N. and G., concerning defective performance of the contract with regard to Company SLTC and Company P. Service

Company SLTC, as well as Company P Service, claim that Company G. is liable as manufacturer of the software installed on the machines and that Company N. is liable as seller of the machines to Company P Service. 38

1. The reasons for malfunctioning of the machines and relating liability

The expert revealed that the difficulties of Company SLTC in using the machines (banknotes refused, stuck or torn in the machine) were caused by having chosen inappropriately the «NV1» reader that was installed in the machines, and which did not have the particular specifications included in the set of requirements presented by Company SLTC and received by Company P. Service with the order. 39

This wrong choice was made by Companies N. and G., that could not prove today that they had no knowledge of the technical conditions included in the set of requirements. 40

They were professionals, and as such, they had the necessary skills for that specific activity, they have to ask their client about the purposes for which the equipment to be delivered is to be used, and they had to deliver to Company P. Service the equipment in conformity with the standards that the user, i.e., the client of Company P. Service, may expect. 41

Companies N. and G. do not contest that a technical meeting was held on 22 June 1995 at the factory of G., with participation of Company P. Service, in order to provide the necessary details regarding delivery of the machines. Company G. also does not contest that it had made according modifications to the standard version of the machines (WGF 1000), as shown by the invoices dated 19 and 20 October 1995, established by Company N., regarding such modifications, which could not have been made without Company G. knowing the set of requirements. No evidence was submitted proving that they had knowledge of that set of requirements only after delivery took place, as Companies N. and G. assert. 42

Under such circumstances, Companies N. and G. clearly committed a default towards Company P. Service regarding the cause of the malfunction that Company SLTC had complained about. 43

2. The consequences of such liability of Companies N. and G. towards Company P. Service

The contractual relations between Company P. Service, a French company, and Companies N. and G., both German companies, give rise to application of the Vienna Convention on International Sale of Goods. 44

Company P. Service may not demand from Companies N. and G. reimbursement of the costs that [Company P. Service] had incurred due to breach of the contract, as the latter were held accountable for the breach, unless [Company P. Service] proves that such costs were incurred as a result of misconduct by Companies N. and G., as [Company P. Service] itself is liable for the breach of contract towards Company SLTC. 45

The claim of Company P. Service against Companies N. and G. must be dismissed, and the judgment appealed is confirmed. 46

3. The consequences to Company L. for Public Transportation (SLTC) regarding the liability determined

A. Applicable law

The applicable law is disputed. 47

The contract in dispute is not a supply contract, contrary to what Company P. Service alleges. The fact that Company N. had to furnish machines that conform to the set of requirements of Company SLTC is not sufficient to characterize the contract as such. That would require that the machines delivered are manufactured in conformity with particular and very specific standards submitted by the project manager to the manufacturer. This is not the case here because the modifications performed were merely adaptation of an existing system to the set of requirements. 48

This case involves a sales contract. 49

In order to avoid any liability, Companies N. and G. refer to the Hague Convention of 15 June 1955, pursuant to which, in lack of choice of law by the parties, a sales contract is governed by the law of the country where the seller has its habitual residence at the time when the order is received. 50

In fact, the direct lawsuit by the buyer [supplier] against the manufacturer is a contractual dispute, and, according to them, it is governed by contract law subject to the provisions of the Hague Convention. 51

Companies N. and G. inferred that the applicable law is the law of Germany, i.e., the German Civil Code which provides that the limitation period for a legal warranty for defects discovered 52

at the time of taking delivery or latent defects is six months from the delivery of movable goods, thus, the lawsuit filed by [Company SLTC] against them is time-barred.

However, it must be noted that German law includes the Vienna Convention of 11 April on International Sale of Goods that was ratified by Germany and France as well. 53

The latter convention is integral part of both French and German law, and the present dispute is governed by the Convention. As the general conditions of sale of Company N. did not exclude application of the [CISG], the reference to German law as the applicable law accordingly supports the contention that the Vienna Convention is applicable to the dispute. 54

B. Provisions of the Vienna Convention

Article 35 of the Convention provides that the seller must deliver goods fit for any particular purpose expressly or impliedly made known to the seller at the time of the conclusion of the contract. 55

Companies N. and G. had knowledge of the set of requirements specifying the demands of Company SLTC when they concluded and agreed to the transaction, as indicated in the minutes of the meeting on 22 June 1995 that took place between Company P. Service and the manufacturer, Company G., and the purpose of which was to find a solution to appropriately fulfilling the order of Company SLTC and [to discuss] its set of requirements. 56

Consequently, Companies N. and G. cannot refer to a lack of knowledge regarding the condition of the goods. 57

Article 39(2) [*Translator's note: The original French text referred to Article 38(2)*] of the Convention provides that the buyer loses the right to rely on a lack of conformity of the goods if he does not give the seller notice thereof at the latest within a period of two years from the date on which the goods were actually handed over to the buyer, however, the buyer does not have an obligation to pursue its claim within such deadline. 58

The first machines were put into operation on 24 October 1995, and on 26 October 1995, Company SLTC expressed its numerous concerns regarding unsuitability of the goods for the purpose they were intended to be used, due to malfunctioning experienced during use of the machines. 59

Article 47 provides that the buyer may fix an additional period of time of reasonable length for performance by the seller of his obligations, specifying that during such period of time, the buyer is not deprived of any right he may have to claim [damages for delay in performance]. 60

Company SLTC granted Company G. additional time to cure the malfunctions, in particular, it allowed [Company G.] to test a new software, therefore, during such period of time, the limitation period was suspended. 61

The period specified in the Convention necessarily starts when the additional period [to perform] ends. 62

The limitation period may also be suspended when the seller acknowledges the warranty, as shown in the correspondence exchanged between Company P. Service and Company SLTC. 63

The lawsuit was filed by Company SLTC on 23 October 1996 and 16 January 1997 against Companies N. and G., therefore, they were neither premature nor time-barred. 64

Application of the Vienna Convention renders the grounds invoked under the Hague Convention inoperable. 65

The lawsuit by Company SLTC is therefore admissible, contrary to what the court of first-instance held. 66

Companies N. and G. did not perform their obligations regarding Company SLTC, therefore, the latter is justified to file a direct lawsuit against [Companies N. and G.], demanding compensation for the harm [Company SLTC] had suffered. 67

The appealed judgment that dismissed the liability [of Companies N. and G.] must, therefore, be reversed. 68

VIII. Claims of Company SLTC against Companies P. Service and N. and G.

1. The claim for reimbursement of the sums paid to Company P. Service

As conclusion of the contract has binding effects on Company SLTC, Company P. Service must compensate for the resulting harm. 69

Company SLTC demands reimbursement of the sums it had to pay to Company P. Service under the contract for delivery of the equipment. 70

Consequently, Company P. Service is ordered to pay Company SLTC a sum of 1,055,177.64 FRF (i.e., EUR 160,860.79) as reimbursement of the latter sums. 71

The judgment appealed is confirmed in this regards. 72

2. The claim regarding failure to perform the duty to inform and assist

Company SLTC seeks an order against all defendant companies to require them to pay to [Company SLTC] damages and interest for their failure to perform their duty to inform and assist towards [Company SLTC]. 73

That obligation can only be raised against Company P. Service because Company SLTC had dealings only with that company before conclusion of the contract. 74

Company SLTC did not prove any harm other than the one it had suffered as a result of cancellation of the sales contract. 75

Therefore, the claim of [Company SLTC] is dismissed in this regard. 76

While the cancellation of the contract had the effect of reinstating the parties to the situation where they were prior to contracting, the claim based on the failure [to perform the duty to inform and assist] is unfounded and the relating claim of Company SLTC is dismissed. 77

3. The claim for losses due to poor performance of the contract

Finally, Company SLTC requests the court to order the defendants to pay the liquidated damages payable in case of poor performance of the contract. 78

This claim can only be submitted against Company P. Service because [Company SLTC] had a contractual relationship only with that company, subject to a liquidated damages clause, and the claim was computed at EUR 99,126.17. 79

The Court of First Instance awarded a sum of 100,000 FRF under that title to Company SLTC, finding it excessive [*Translator's note: It is unclear what was found excessive*.] 80

Taking into consideration the elements of this claim, it appears that the harm suffered will be sufficiently cured by payment of a sum of EUR 15,244.90 (100,000 francs) by application of the [liquidated damages] clause. 81

Under these conditions, Company P. Service must be ordered to pay the latter sum to Company SLTC, and the relating part of the appealed judgment is confirmed. 82

Company SLTC could demand damages and interest from Companies N. and G. for a delay only under a quasi-contractual theory, as [Company SLTC] is not in a contractual relationship with the latter. However, [Company SLTC] did not make such a demand. 83

IX. The demand by Company P. Service against Company N. to reimburse the purchase price of the machines

Company P. Service requests the court to order Company N., that sold it the machines, to reimburse the purchase price equaling EUR 87,919.79 (576,716 *f*), plus interest at the statutory rate calculated from 16 January 1997, i.e., the day when the expert was appointed. 84

However, Company P. Service cannot rely on cancellation of the sales contract with Company SLTC, or, that it was cancelled due to the default by Companies N. and G. (see page 23 of its submission) in requesting reimbursement of the sums that [Company P. Service] had to pay to Company N. for the acquisition, although it is not asking for cancellation of a contract with the latter company. 85

Therefore, the claims of [Company P. Service] in this regard are dismissed, and its demand for reimbursement of the price is unfounded. 86

X. The claim of Company P. Service concerning harm to its market image

Company P. Service did not provide any evidence to prove that it had suffered an irreparable harm arising from harm to its market image as a result of the actions of Companies N. and G. 87

and SFA, and it had itself contributed to the breach of contract committed against Company SLTC.

Therefore, the claim for damages and interests is dismissed in this regard. 88

XI. Other claims

It is unfair to order Company SLTC to bear the irrecoverable costs and it seems appropriate to allocate a sum of EUR 3,000, payable jointly and severally, to Companies P. Service, N. and G., and all other parties shall pay their own irrecoverable costs incurred on first instance and on appeal. 89

Companies P. Service, N. and G. are ordered to pay, jointly and severally, the costs of the first instance proceedings and the appeal, including the expert costs, and Company P. Service is ordered to pay the costs incurred by Company SFA. 90

Decision

For the above reasons, the Court confirms the appealed judgment regarding the following: 91

- The cancellation of the sales contract concluded on 31 July 1995 between Company P Service and Company SLTC, [asserting the liability of] Company P. Service;
- The court order ordering [Company P. Service] to pay Company SLTC a reimbursement of the purchase price of EUR 160,860.79 (1,055,177.64 *f*) as well as EUR 15,244.90 (100,000 *f*) as compensation for the harm under the liquidated damages clause;
- Dismissal of the counterclaim of Company P. Service against Company SLTC, regarding damages and interest for the yet unpaid invoices;
- Dismissal of the claim of Company SLTC for damages and interest against Company SFA for delay in performing the contract;
- Dismissal of the claims of Company P. Service against Companies N. and G.;
- Dismissal of the claims of Company SLTC against the defendants for damages and interest for failure to comply with the duty to inform and assist.

The Court reverses the rest of the first-instance judgment and holds that the Vienna Convention is applicable to the relationship between Company P. Service and Companies N. and G., on one side, and Companies N. and G. and Company SLTC. on the other.

The Court adds the following:

- The claim of Company P. Service for damages and interest against Company SFA is unfounded and it is dismissed;

- The claim of Company P. Service against Company N. for reimbursement of the purchase price of the machines is unfounded and it is dismissed;

- The claim of Company P. Service against Company N., G. and SFA for harm to its market image is unfounded and it is dismissed.

The Court orders Companies P. Service, N. and G. to pay to Company SLTC, jointly and severally, a sum of EUR 3,000 under Article 700 of the New Code of Civil Procedure; the other parties must bear their own irrecoverable costs as well as the expenses incurred by Company L. for Public Transportation (SLTC) and those payable to SCP J&W, attorneys, under the provision in Article 699 of the New Code of Civil Procedure. The expert fees are added to the costs payable by the parties jointly and severally, and the proportionate part of those fees payable by Company SFA must be paid by Company P. Service, and the law firm SCP BT has the right to enforce such payment against the latter under Article 699, subject to Article 700 of the New Code of Civil Procedure.