CISG-online 1137	
Jurisdiction	Switzerland
Tribunal	Tribunal Cantonal du Valais/Kantonsgericht Wallis (Court of Appeal Canton Valais)
Date of the decision	27 May 2005
Case no./docket no.	C1 04 33
Case name	*Welding devices case*

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

In its submission of 11 April 2002, Plaintiff [of Italy] (hereinafter «[Seller]») filed suit before the judge of the Sierre district, against Defendant [of Switzerland] (hereinafter «[Buyer]») for the payment of 105,560 Swiss francs [Sf], plus interest at 5% starting from 1 January 1999.

In its reply of 9 April 2002, the [Buyer] requested dismissal of the claim, and compensations for its fees and costs.

In its response of 20 September 2002, [Seller] upheld its initial claims.

During the preliminary hearing on 9 October 2002, the parties offered their evidence. The procedure consisted of questioning the parties, hearing the witnesses, editing and depositing the documents.

The district judge closed the procedure on 20 February 2004, and transferred the case file to the Cantonal Court.

The parties filed their respective statements and arguments. Following submission of its written statement on 7 April 2005, [Buyer] requested the Court to dismiss the [Seller]'s claim. In its submission dated 11 April 2005, [Seller] requested payment of 108,176 Sf, plus interest at 5% starting from 1 January 1999. At the final hearing on 12 April 2005, the parties maintained their respective arguments.

[*] All translations should be cross-checked against the original text. For purposes of this translation, Plaintiff of Italy is referred to as [Seller[and Defendant of Switzerland is referred to as [Buyer]. Amounts in Swiss currency (Swiss francs) are indicated as [Sf].

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Judgement of the Cantonal Court

I. [*Facts of the case*]

1.
a)
[Seller] is engaged in manufacturing and selling welding devices. C., Managing Director of the company got to know D. in 1995. Since 1 July 1996, D. had been working as a consultant of [Seller]. D. exercised this activity independently, which consisted of developing and consolidating new markets, in particular, in foreign countries. The contract, that was initially concluded for one year, was expressly and regularly extended for one-year periods, last time on 30 June 1999. The parties agreed upon a payment by way of commission. The commission, calculated for eight days of work per month, was approximately 80,000,000 liras per year during the first two years, and 86,000,000 liras afterwards. D. had a business card displaying his title as «Export Manager» of the company. On 23 February 2000, [Seller] terminated the contractual relationship with immediate effect, arguing that D. had started working for a competitor company. On 26 February, D. contested the «dismissal» and the reasons for his dismissal.

[Buyer] sells all kinds of steel products, performs related services and has interests in other businesses in Switzerland and abroad. D. is responsible for the share capital of [Buyer]. E. is sole director of the company that undertakes responsibilities with his sole signature. The place of business of [Buyer] is in Lens. [Buyer] has an office in Sierre, with company F SA (hereinafter: F SA) the sole director of which is also E.

b)
In 1999, D. expressed his intention to establish a limited liability company in Italy, in which a part of the share capital would be subscribed by [Buyer]. E. was asked and he agreed; and gave a power of attorney to G., advisor of D. and assigned by [D.] to establish the company in Italy. On 22 April 1999, G. acting on behalf of [Buyer], and H., D's spouse, established K Societa a «responsibilita limitata» (hereinafter: K), with its place of business in Genes. The share capital, equaling 20 million liras, was subscribed by Ms. H providing 2 million liras and [Buyer] providing 18 million liras. According to E., [Buyer] did not release the subscribed shares.

Although Ms. H. was the sole director of K., her husband managed the company. In particular, he negotiated the transfer of 80% of the share capital to L. G., who managed the accounting of K., prepared the balance sheet of K. with the «exclusive» assistance of D., that was necessary for contractual negotiations. During these negotiations, D. was talking to accounting expert M. who acted on behalf of the buyer. He said that «[Buyer] belonged to him and it was established for tax reasons. » When the negotiation was completed, D. declared that a power of attorney was needed from [Buyer] for the purposes of contracting. On 4 May 2000, E. gave D. two special powers of attorney. Under the first one, D. was authorized to sell to the «L. S.r.l» 80% of the share capital of K. for the price of 16 million liras. The second power of attorney authorized him to represent [Buyer] at the extraordinary general meeting on 5 May 2000. After the deed for reduction of the share capital was prepared, L. paid the purchase price to D. Then K. modified its company name to N. S.r.l. D. handled this as Managing Director.

c)
Since the end of 1997, D. regularly ordered goods from [Seller] on behalf of [Buyer]. Ac- cording to [Buyer], these were D's personal orders. [D.] asked E. to agree to an «advance payment» in paying off different invoices issued by [Seller] to [Buyer]. E. agreed and, acting on behalf of [Buyer], paid to the account of [Seller] a sum of 48,997,540 liras and 23,261,500 liras on 23 September 1998 and 16 March 1999, respectively, without specifying that it contested that [Buyer] was the debtor. Subsequently, according to E., D. reimbursed the [Buyer].

2.
a)
On 16 October 1998, D., stating that he, acting on behalf of [Buyer], ordered from [Seller] goods to be sold to Company O. GmbH in Holdorf, Germany, through common carrier «P». On the same day, [Seller] confirmed the order to [Buyer], which included the price, the destinations («Spedire a / Ship to address») and the invoice information («Fatturare a / Invoice to address»), as well as the terms of delivery, in particular, the identity of the shipper («Shipper»), interna- tional carriage company PP from Genes (Exhibit no. 25, p. 115). On 21 October 1998, the re- cipient signed the acknowledgement of receipt, one copy of which was handed over by the carrier to [Seller] (Exhibit no. 131, p. 221). On 26 October 1998, [Seller] issued an invoice to [Buyer], representing a sum of 19,772,000 liras. On 16 November 1998, [Seller] sent to [Buyer] a confirmation for the order of the goods to be delivered to O. GmbH in Holdorf, in the amount of 53,954,000 liras; which document contained the same boxes as the previous one. Companies PP. and Q. S.r.l, designated by D. (Exhibit no. 32, p. 122), were assigned with the carriage (Ex- hibit no. 30, p. 120). A representative of Q, S.r.l. signed the carriage document prepared on 11 November 1998 (Exhibit no. 29, p. 119; box: «Firma conducente»). On 24 November 1998, [Seller] issued the invoice for 53,954,000 liras.

On 25 January 1999, three orders were placed with [Seller] on a paper bearing [Buyer]'s letterhead and the signature of E. (Exhibit no. 39, p. 129; Exhibit no. 46, p. 136 and Exhibit no. 58, p. 148). On 28 January 1999, [Seller] confirmed to [Buyer] the two previous orders, specifying that the client would take possession of the goods «at the factory» (Exhibit no. 37, p. 127 and Exhibit no. 44, p. 134: «Customer pick up» and «Terms of delivery: ex works»). On the same day, [Seller] requested the price of the goods, up to 5,125,500 liras and 50,005,500 liras. The signed carriage documents constitute the appropriate evidence of taking delivery (Exhibit no. 36, p. 126 and Exhibit 43, p. 133). According to the records regarding the third order, the goods were to be sent to Company R. in Chatenoy-le-Royal, France. On 9 February 1999, [Seller] forwarded the order confirmation to [Buyer], indicating Company R. in Chalon-sur- Saone, France as recipient; and carriage had to be arranged for by S. (Exhibit no. 56, p. 146). [Seller] did not provide appropriate evidence to prove the dispatch by S.; the carriage document provided in this case does not contain any reference to that (Exhibit no. 55, p. 145), contrary to the waybill regarding the delivery to T. SA (Exhibit no. 69, p. 159; para 2b). On 11 March 1999, [Seller] requested [Buyer] to pay off the purchase price of 1,002,156 liras.

On 17 February, 19 May and 23 June 1999, [Seller] asked [Buyer] to pay the sums of 644,940 liras, 103,000 liras and 2,794,800 liras, pertaining to the goods sent to Sierre. [Seller] did not provide conformations for the first and second order, or the carriage documents regarding the latter. With his signature, D. attested that the first delivery took place (Exhibit no. 49, p.

139). On 18 June 1999, [Seller] confirmed the third order, specifying that the client took possession of the goods «at the factory» (Exhibit no. 67, page 157: «Terms of delivery: ex works»). Company U. S.r.l. in Genes was to perform the carriage; a representative of U. S.r.l. signed the document regarding the latter on 23 June 1999 (Exhibit no. 66, p. 156).

Meanwhile, on 16 June 1999, based on an unsigned order written on a paper bearing the letter- head of [Buyer], the [Seller] sent to the [Buyer] an invoice for 930,700 liras. [Seller] did not prove delivery of the respective goods by filing a carriage document or by any other proof.

b)
T. SA, having its place of business in Sion, is engaged in manufacturing and selling scaf- folding. In 1999, E. kept the accounts of this company, of which he was a Director as well. He introduced D. to V., Director of T. SA. V. ordered from D. a welding machine delivered on 28 June 1999. On the same day, [Seller] demanded the purchase price of 88,420 liras from [Buyer]. According to V., the fiduciary of T. SA had to make the payment.

On 17 February 1999, [Seller] successfully obtained a credit note of 152,100 liras from [Buyer] for the non-repairable equipment (Exhibit no. 72, p. 162).

c)
On 10 May 2000, after deducting the sum represented on the credit note, Attorney X, counsel in Genes, acting on behalf of [Seller], demanded from [Buyer] the payment of 134,268,916 liras regarding the above-mentioned invoices, payable within ninety days (para 2a and b), distributed as follows:

Invoice number	**Invoice date**	**Expiry date**	**Amount outstanding**
V8006878	26.10.1998	24.01.1999	19,772,000 liras
V8007878	24.11.0998	22.02.1999	53,954,000 liras
V9000487	28.01.1999	28.04.1999	5,125,500 liras
V9000488	28.01.1999	28.04.1999	50,005,500 liras
V9001020	17.02. 1999	18.05.1999	644,940 liras
[...]			
V9001673	11.03.1999	09.06.1999	1,002,156 liras
V9003532	19.05.1999	17.08.1999	103,000 liras
V9004521	16.06.1999	14.09.1999	930,700 liras
V9004417	23.06.1999	21.09.1999	2,794,800 liras
V9004538	28.06.1999	26.09.1999	88,420 liras

d)
[Buyer] contests that it had ordered or received the goods invoiced by [Seller]. Moreover, D. was not authorized to contract on behalf of [Buyer]. Upon receipt of the invoices, the grounds for which he did not know, E. ordered D. «to cease to mention company B. AG in affairs con-

cerning D. possibly in private matters (?) and not involving Company B. » The concerned party expressed its intent to settle the cases. Knowing that he was the «Export Manager» of [Seller], the Director of [Buyer] trusted him. Upon receipt of the reminder from Attorney X., he called upon D. to present proof of the payments. Thereafter, [Seller] did not address the invoices to [Buyer], prompting E. to believe «everything [was] in order». He noted that his signature on three order forms was forged. He added that when D. went to Sierre, he used the conference room there and the fax machine of F. SA. By means of the latter, D. placed an order with [Seller] on 12 December 1997. E. never talked to [Seller]'s personnel. His opinion is that the parties were «swindled» by D.

Essentially, C. stated that D. presented himself as being authorized by [Buyer]. Due to their relationship of trust, C. did not obtain any verification regarding the solvency of [Buyer] in particular. In addition, he never asked D. to show his authorization to represent. In the contractual relationship with [Buyer], [Seller] had always dealt with D.

II. [*Legal considerations*]

3.
a)
Pursuant to Article 1(2) of the Federal Law on Private International Law (LDIP), international contracts are subject to [provisions on] international jurisdiction, specifically the Lugano Convention of 16 September 1998 on Jurisdiction and the Enforcement of Judgments in Civil and Commercial Matters (hereinafter: LC), that entered into force in Switzerland and Italy on 1 September 1992 (Art. 61(3) LC). [Seller], having its place of business in Genes, filed a lawsuit against [Buyer], having its seat in Lens, therefore, the LC is applicable (Art. 54(1) LC; ATF 119 II 391 para 2; RVJ 1995, page 164, para 1(a).

In the absence of contrary provisions, persons who are not nationals of the State in which they are domiciled shall be governed by the rules of jurisdiction applicable to nationals of that State (Art. 2, sentence 1 LC).

b)
In the present case, [Buyer] has its seat in Lens, therefore, the regular judicial authorities of Canton Valais have jurisdiction as a result of the provision on domicile.

According to the arguments in the claim, the amount in dispute amounts to 108,176.80 Sf. This establishes the jurisdiction of the civil court to adjudicate the present dispute on first instance and on cantonal level (Art. 23(1)(b) CPC applied together with Art. 46 OJ).

4.
[Seller] alleges that between 26 October 1998 and 28 June 1999, it sold to [Buyer] different welding products, for which it issued invoices that remained unpaid, as well as a credit note. [Seller] also bases its lawsuit on the conclusion of an international sale of goods contract with [Buyer].

a)
Pursuant to Article 1(1)(a) of the United Nations Convention on International Sale of Goods

dated 11 April 1980 (hereinafter: CISG), the Convention applies to contracts of sale of goods between parties whose places of business are in different States when the States are Contracting States. The CISG that entered into force in Italy on 1 January 1988 and in Switzerland on 1 March 1991, governs only contract formation and the rights and obligations of such contracts between the seller and the buyer (Art. 4, first sentence). On the other hand, except as otherwise expressly provided, the CISG does not govern validity of the contract (Art. 4 CISG). Representation of physical and legal persons, as well as civil capacity are excluded from the scope of application of the CISG (Brunner, *UN-Kaufrecht* [UN Sales Law], 2004, no. 6 and 7 on Art. 4 CISG; Neumayer-Ming, *Convention de Vienne sur le contrats de vente international de merchandises: commentaire* [Commentary on the CISG], 1993, no. 10 on Art. 4 CISG). Such matters are subject to the national law designated by the conflict of laws provisions of the forum (Neumayer-Ming, no. 1 on Art. 4 CISG).

Pursuant to Article 154(1) LDIP, companies are governed by the law of the State in which they are established if, as in this case, they fulfill the conditions of publicity and registration set forth by that law. The applicable law, as set forth in Articles 156 to 161 LDIP, provides for the power of persons acting for a company to represent the company in accordance with its organization (Art. 155(i) LDIP). [Buyer], established in Switzerland, is therefore governed by Swiss law.

b) Under Article 718 (1), first sentence, of the CO [Swiss Code of Obligations], the Board of Directors represents the company towards third parties. The Board of Directors may delegate the power to represent to one or more of its members (Delegates) or to third parties (Directors; Art. 718(2) CO).

An apparent representation (Anscheinsvollmacht) and a tolerated representation (Duldungsvoll- macht) are also conceivable in terms of representation of the company by its organs (Watter, *Commentaire valois*, no. 26 et seq. on Art. 718 CO); Dittesheim, La representation de la société anonyme, these Lausanne 2001, p. 76). The notion of «organ» can actually be inferred from the external circumstances, by application of the principle of trust (ATF 117 II 570, para 3). Thus, when a third party in good faith, an honest and reasonable partner, infers from the circumstances that the person acting on behalf of the company has a position in an organ of the company, such party acquires that status (Ditesheim, op. cit. 9. 76). If the company does not knowingly object to the fact that one of its officers acts for the company while giving the impression that it is an organ, the company assumes the risk that the acts during the representation would be imputed to the company as if the company had done such acts personally, in its own name and on its own account (ATF 96 II 439, sentence 2; and referring to cit: Böckli, *Schweizer Aktienrecht*, 3rd ed., 2004, 13, no. 510; Homburger, *Commentaire zurichois*, no. 1150 on Art. 718 CO; Ditesheim, op. cit. p. 77 et seq.). An organ inferred from acts is not the same as a real organ of the company. In particular, the company can sue the former for damages; however, the company may not file suit under Article 754(1) CO against the latter because it knew the real extent of authorization of its agents (Ditesheim, op. cit. p. 74 et seq.; regarding the notion of «organe de fait» [real organ of a company], cf. ATF 128 III 29 para 3).

c) In the present case, [Buyer] knew that D. acted in his own name towards [Buyer]. In particular, the sole director, E. received invoices from [D.] and the reminder from Attorney X. Despite the unauthorized representation, the transactions took place repeatedly, and upon receipt of the documents, [Buyer] did not oppose to [Seller] regarding the representation by D. for [Buyer]. Actually, [Buyer] merely instructed [D.] to «cease to mention» the name of [Buyer]. Moreover, on 25 September 1998 and 16 March 1999, [Buyer] paid to the account of [Seller] the sums of 48,997,540 liras and 23,261,500 liras, equaling approximately 60,000 Sf invoiced upon the orders placed by D. The [Buyer] did not specify either at the first payment or at the second payment that it agreed with those payments, an advance to D. and that it contested being the debtor. Moreover, E. allowed D. to use the conference room and the fax machine of F. SA, so that [D] could place orders from the offices of the [Buyer], on a paper bearing the letterhead of the latter. Regarding the conduct of [Buyer], the [Seller] was entitled to admit in good faith that D., who acted in Italy as having been authorized by [Buyer], actually had the necessary right to represent. The acts of [D], which were not outrageous from the aspect of the company (cf. ATF 96 II 439 para 3b), must therefore be imputed to [Buyer]. This means that [Buyer] is a party to the sales contracts concluded in its name by D. Under such circumstances, it does not have to be decided upon whether E. had indeed signed the three orders of 25 January 1999.

5.
[Buyer] states that [Seller] did not deliver the goods.

a)
The seller's principal obligation is to deliver the goods, to transfer property of the goods, and to hand over all relating documents if there are any (Art. 30 CISG). Article 31 CISG sets forth the process to follow as well as the place of performance of an auxiliary nature. [Article 31] applies only if the parties did not agree upon a place that was explicitly or implicitly determined – in conformity with the usages and practices between the parties (Art. 8 CISG) – or with reference to commercial terms such as the Incoterms. The Incoterms are rules officially enacted by the International Chamber of Commerce (hereinafter: ICC) for the purposes of interpreting the terms that are most widespread in international commerce. The Incoterms actually cover the duty to deliver and the matter of passing of risk (Venturi, *Commentaire romand*, no. 66 on Art. 184 CO). Theoretically, Incoterms apply only upon agreement of the parties (Erdem, *La livraison des merchandises selon la Convention de Vienne*, thesis Fribourg 1990, now. 245, 272 and 377; Neumayer-Ming, no. 7 on Art. 31 CISG; ICC, Incoterms 1990, no. 22 p. 114). Most contracts contain clauses regarding delivery, resulting that Article 31 has only limited application (Erdem, op. cit., no. 350 et seq.; Neumayer-Ming, no. 1 on Art. 31 CISG).

In the absence of a choice by the parties, in distance sales contracts, when the agreement includes carriage of the goods between the seller and the buyer, the duty to deliver consists of handing over the goods to the first carrier for delivery to the buyer (Art. 31 CVIM; Neumayer-Ming, no. 6 on Art. 31 CISG). The duty to hand over the goods to the carrier for carriage to the buyer implies the conclusion of a carriage contract (Erdem, op. cit., no. 397; Neumayer-Ming, no. 4 on Art. 31 CISG). Independence of the carrier is essential: in order for Article 31 CISG to apply, a different physical or legal person must be involved that is not subordinate to the seller or the buyer (Brunner, no. 6 on Art. 31 CISG; Erdem, op. cit. nos. 407 et seq.; Neumayer- Ming,

no. 6 on Art. 31 CISG; Vulliéty, *Le transfert des risques dans la vente internationale*, these Geneve 1998, p. 294).

When the seller agrees to perform the carriage of the goods itself or through a third party that depends on [the seller], Article 31(a) CISG is not applicable because the parties agreed to deliver the goods from another specific place: the duty to deliver is not performed as long as the seller has possession of the goods directly or indirectly (Erdem, op. cit. no. 409; Neumayer-Ming, no. 6 on Art. 31 CISG; Vulliéty, op. cit., p. 293).

In the absence of a contrary contractual provision, handing over the goods (or the documents relating to the goods) and the payment of the price are concurrent and are mutually dependant on each other (Art. 58(1) CISG; Brunner, no. 1 on Art. 58 CISG; Neumayer-Ming, no. 2 on Art. 58 CISG).

b)
Even if the CISG does not contain any provision directly regulating the burden of proof, the proceeding judge should not rely on domestic law, because the Convention indirectly allows sharing the burden of proof as a result of the contents of the provisions included therein or because of the establishment of a relationship between a rule and the exception to it. Generally, [the person] who claims a right bears the burden to prove the conditions of existence [of such right], and conversely, the other party must prove the facts that bar or contest the claim raised (ATF 130 III 258 para 5.3; judgment no. 4C.105/2000 of 15 September 2000, para 5a; in: SJ 2001 I, p. 304 et seq.). The party who demands payment for the goods sold must also prove that delivery took place in conformity with the contract (judgment 4C.198/2003 of 13 November 2003).

c)
In this case, the documents reveal that the parties agreed upon a destination. This is mentioned in the order confirmations and in the invoices, in the box «Sedire a / Ship to address»; and it is also indicated in the carriage documents («Destinazione merce»). The place of delivery is not to be confused with the destination. The place of delivery is the place where the seller is released of its obligation to deliver the goods. The destination is the place where the goods have to be shipped (Erdem, op. cit., nos. 360 et seq.). For example, also the fact that in distance con- tracts the seller pays for the costs of carriage is insufficient for granting the destination the status of being the place were the obligation must be performed (ATF II 457).

The order confirmations in question specify the place where [Seller] must deliver the goods in order to get released from its obligation. According to the purpose of the sale, [Seller] had to perform the following:

- Hand over the goods to an independent carrier for delivery to [Buyer], or a third party;

- Make the goods available to [Buyer] in its own establishment («in the factory»), and [Buyer] must take delivery; and

- Arrange for sending, through S., the goods to [Buyer] or a third party.

[Seller] proved by filing the signed carriage documents that it was released of its obligation to hand over the goods to an independent carrier when it acted regarding invoices no. V8006878 representing 19,772,000 liras and V8007878 representing 53,954,000 liras.

In addition, the carriage documents filed in the present case represent the proof of taking delivery of the goods sold on 28 January, 17 February and 23 June 1999 (invoices no. V9000487 of 5,125,500 liras, V90004888 of 50,005,50 liras, V9001020 of 644,940 liras and V9004417 of 2,794,800 liras) at the factory, in accordance with the choice of the parties.

However, [Seller] failed to submit any proof regarding the goods concerning which it demanded payment on 19 May 1999 (103,000 liras) and on 16 June 1999 (930,700 liras). Furthermore, [Seller] did not prove that the goods invoiced on 11 March 1999 at 1,002,156 liras were shipped by S.; the relating order confirmation indicates a destination that is different from the one indicated in the order.

[Seller] cannot claim payment by [Buyer] for the welding machine delivered to T. SA, as V, on behalf of the latter, had actually concluded the sales contract with D. who represented [Seller].

T. SA does not contest its duty to pay 88,420 liras to the extent that it had not been paid by its fiduciary. This means that [Buyer] was not the purchaser in this transaction.

At the end of the day, the sum due from [Buyer] to [Seller] increases, following reduction of the credit note of 17 February 1999, to 132,144,640 liras [(19,772,000 liras + 53,954,000 liras + 5,125,500 liras + 50,005,500 liras + 644,940 liras + 2,794,800 liras) – 152,100 liras].

6.
a)
The CISG does not contain any provision regarding the currency and the lawful means of payment. In the absence of contractual provisions specifying the currency of payment, the national law applicable by virtue of conflict-of-laws provisions determines the currency (RVJ 1999 p. 227 para 3c; Neumayer-Ming, no. 4 on Art. 54 CISG). Therefore, Article 118 LDIP should apply (RSDIE 2005 p. 119; 2004 p. 106; RVJ 1999 p. 227 para 3c). Pursuant to this provision, the sale of moveable property is governed by the Convention on the Law Applicable to International Sale of Goods concluded in The Hague on 15 June 1955. Pursuant to Article 3, sentence 1, of the latter Convention, and disregarding the exception that does not apply in the present case, a sale shall be governed by the domestic law of the country in which the vendor has his habitual residence at the time when he receives the order.

The law applicable to the currency also determines the conversion rate in case of substituting one currency with another, within a State (for example in Brazil, the substitution of the cruzeiro with the cruzeiro real and subsequently the real) or within a community of States (this is the case with the Euro). (Bucher, Droit international privé, 2nd ed., 2004, no. 1139). The conversion rate is not the same as the exchange rate which may change according to the relating national economic performance and the market risks (Thévenoz, Droit Suisse et monnaie unique, in: *Journée 1996 de droit bancaire et financiere*, p. 20).

b)
In the present case, the orders were received at the seat of [Seller] in Genes, with a likelihood bordering on certainty. Italian law, hence the currency of Italy is therefore applicable; the order confirmations and the invoices also mention the lira as the currency of payment (Valuta / Currency: ITL). This currency was replaced by the Euro. Therefore, payment of the debt must take place by payment in that currency, calculated at the conversion rate in conformity with the Maastricht Treaty and two regulations regarding the Euro (cf. Dutoit, Droit international privé Suisse, 4th ed., 2005, no. 51 on Art. 117 LDIP). The official conversion rate, determined on 1 January 1999, expressed by the value of the euro against the lira, is 1,936.27. The amount of the debt is, therefore, EUR 68,247 (132,144,640 liras: 1,936.27).

c)
The buyer under formal notice must pay moratory interest from the time when the price is due, without a specific request from the seller (Art. 59 and 78 CISG; RSDIE 2004, p. 107 and ref. cit.; Neumayer-Ming, no. 24, p. 385).

Article 78 CISG provides for payment of default interest but does not determine the interest rate (RVJ 1998 p. 140 para 5b; 1995 p. 164 para 2c; Brunner, no. 7 on Art. 78 CISG). The interest rate must therefore be determined according to the law designated by the conflict laws provisions of the forum. Pursuant to Article 118 LDIP and Article 3, sentence one, of the Hague Convention of 1955 (on the application of those provisions, cf. RSDIE 2005 p. 120; 2004 p. 108; RVJ 1998 p. 140 para 5b; 1995 p. 164 consid. 2c), again, [the applicable law is] the domestic law of the country in which the vendor has his habitual residence at the time when he receives the order, i.e., Italian law.

Pursuant to Article 1284, sentence one, of the Italian Civil Code, the statutory rate for moratory interest is 5%. The Minister of Finance may modify annually this rate by a decree, and it was specified at 5% from 21 April 1942 until 15 December 1990, at 10% from 16 December 1990 until 31 December 1996, at 5% from 1 January 1997 until 31 December 1998, at 2.5% from 1 January 1999 until 31 December 2000, at 3.5% from 1 January to 31 December 2001, at 3% from 1 January 2002 until 31 December 2003 and at 2.5% since 1 January.

d)
In the present case, the invoices were payable within ninety days. Under these circumstances, [Buyer] must pay to [Seller] the sum of EUR 68,247 with interest from 20 March 1999 (average due date) at 2.5% until 31 December 2000, at 3.5% from 1 January until 31 December 2001, at 3% from 1 January 2002 until 31 December 2003 and at 2.5% from 1 January 2004.

7.
Essentially, [Seller] is the losing party, therefore, it must pay the costs and expenses (Art. 252(1) CPC).

a)
Depending on the amount in dispute, court fees vary between 5,000 Sf and 15,000 Sf (Art. 14(1) LTar). The degree of difficulty of the present case must be qualified as normal. Also regarding the principles of payment for the costs and the equivalence of performances (Art. 11(2) LTar), the court fees are established at 7,500 Sf and consist of 6,994 Sf of basic fees and

506 Sf of expenses under Articles 5 et seq, LTar (i.e., 406 Sf for compensation of witnesses and 100 Sf for bailiff services). Taking into consideration the advances paid by each party (4,500 Sf), [Buyer] is ordered to pay to [Seller] 3,000 Sf as reimbursement for the advances. The balance of advances in possession of the court clerk, i.e., 1,500 Sf, must be paid back to [Seller].

b)
The attorneys' fees vary between 10,100 Sf and 14,000 Sf for the entire procedure (Art. 32(1) LTar). The activities performed by the [Seller]'s counsel, in particular, consisted of drafting a statement of claim, a response memorandum and a memorandum of the pleadings, as well as participation in the preliminary hearing, two preliminary hearing sessions and the final hearing. Also taking into account the degree of difficulty of the case, the expense payable by [Seller] is 11,000 Sf (attorneys' fees and expenses included).

For the above reasons, the Court rules as follows:

Judgement

1.
[Buyer] shall pay to [Seller] a sum of EUR 68,247 with interest from 20 March 1999 at the rate of 2.5% until 31 December 2000, at the rate of 3.5% from 1 January until 31 December 2001, at the rate of 3% from 1 January 2002 until 31 December 2003 and at the rate of 2.5% from 1 January 2004.

2.
The court fees of 7,500 Sf must be paid by [Buyer].

3.
[Buyer] must pay to [Seller] the sum of 3,000 Sf as reimbursement for the advances and an

indemnification of 11,000 Sf as costs.