**Case 848: CISG 4; 6; 74**
United States (Federal) District Court for the Middle District of Pennsylvania
American Mint LLC v. GOSoftware, Inc.
6 January 2006
Abstract prepared by Harry M. Flechtner, National Correspondent

A U.S. software manufacturer ("the seller") sold software for processing credit card charges to a U.S. limited liability company ("the buyer") that was a wholly-owned subsidiary of a German firm. The seller allegedly represented that the software was compatible with German numeric conventions, which differ from those used in the

U.S. The software was installed in the facilities of the buyer's German parent, which processed credit card sales for the buyer, but the software allegedly did not function properly: it generated reports of charges that exceeded those actually incurred by the buyer's customers.

The buyer, its German parent and the individual who led the German parent (a German citizen) sued for breach in a U.S. federal court (the U.S. District Court for the Middle District of Pennsylvania), seeking damages. Under U.S. law the court had jurisdiction over the litigation only if either 1) the plaintiffs claim arose under the Constitution, treaties or laws of the United States (as opposed, e.g., to the laws of a particular state of the United States) ("federal question jurisdiction"), or 2) the amount in controversy in the case exceeded $75,000 and there was "diversity of citizenship" between the plaintiffs and the defendant ("diversity jurisdiction"). The seller brought a motion challenging the court's jurisdiction.

In response to the seller's motion the plaintiffs argued that federal question jurisdiction existed because their claims arose under the CISG, a treaty of the United States. The software sales contract contained a choice-of-law clause designating the law of a particular U.S. state – Georgia – but the court held that this did not preclude application of the CISG. The court stated that "parties seeking to apply a [Contracting State's] domestic law in lieu of the CISG must affirmatively opt out of the CISG" (citing U.S. cases in support). It concluded that the choice-of-law clause in this case "fails to expressly exclude the CISG by language which affirmatively states it would not apply."

The court noted, however, that the CISG applied only to transactions between parties located in different States, whereas the immediate parties to the sale of the software in this case were both located in the U.S. The court had inquired after the plaintiffs' evidence that the German parent company and/or its leader were parties to the software sales contract. Plaintiffs had responded only that the leader of the German parent "would appear" to have signed the contract. The court found this evidence insufficient to establish that the German plaintiffs were party to the sales contract, particularly in light of the fact that the written contract "was addressed to [the U.S. Buyer] and that the software was paid for with a check tendered by [the U.S. Buyer]." Noting that "the CISG applies only to buyers and sellers, not to third parties" (citing CISG Article 4), the court found it lacked federal question jurisdiction over the controversy. The court did not discuss whether a sale of software constituted a sale of "goods" within the scope of the CISG.

With respect to diversity jurisdiction, the court noted that the requisite diversity of citizenship existed between the plaintiffs and defendant, but it questioned whether the amount in controversy exceeded $75,000 as required. Plaintiffs had claimed almost $982,000 in damages for bank charges (to correct erroneous credit card charges), lost profits, and attorney fees incurred in pursuing the litigation. A provision of the software sales contract, however, purported to limit the buyer's recovery to a refund of the $11,000 purchase price. The plaintiffs' sole argument in response was that the CISG did not permit a limitation on damages. Although it had found the CISG inapplicable to the transaction, the court added that had the CISG applied, it would not preclude the parties' agreement to limit damages. The court suggested that the damages the plaintiffs claimed (with the exception of damages for attorney fees) might qualify for recovery under CISG Article 74, but that under CISG Article 6 "Plaintiffs and Defendant were free to agree to liquidate damages in the event of a breach of contract." The court noted in a footnote that recovery of attorney fees as damages under Article 74 had been denied in several U.S. decisions.

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[1] See footnote 4 of the opinion.