

CISG-online 1420

Arbitral Tribunal	ICC International Court of Arbitration
Date of the decision	2002
Case no./docket no.	11333 (Interim Award)
Case name	<i>Machines case I</i>

Facts

In 1991, a Canadian company entered into an Equipment Purchase Agreement (the Agreement) whereby the Canadian buyer agreed to purchase two machines from the Italian manufacturer [seller]. The Agreement also provided that the [seller] would supply engineering and supervision as well as additional accessories. In addition the [seller] agreed to warrant the delivered equipment against defects in material and workmanship for a period of twelve months from the final date of commissioning, but in no event exceeding eighteen months from the date of delivery.

Any dispute which could not be settled amicably was to be settled by ICC arbitration, in Paris, and the applicable law to the sales conditions would be French law.

The machines were delivered in 1992. In October 1998, the buyer and the insurer entered into a machinery insurance policy (the Policy) for the period 30 June 1998 to 30 June 1999. According to the Policy, the buyer's rights of recovery against any person or organization in the event of any payment made under the Policy were subrogated to the insurer. According to the insurer, in January 1999, one of the machines ruptured and the insurer indemnified the buyer for the damage. The insurer subsequently instituted arbitration against the [seller].

The proceedings were bifurcated and it was agreed that the arbitral tribunal would in the first stage determine the matters of applicable law and limitation periods.

The arbitral tribunal first determined the applicable law. Because the 1980 Convention on the International Sale Goods (CISG) entered into force in Canada after the conclusion of the contract, the CISG did not apply by the sole virtue of Art. 1(1)(a) which provides that the Convention applies when both contracting parties have their place of business in Contracting States. However, according to Art. 1(1)(b) the Convention would also be applicable if the rules of private international law led to the application of the law of a Contracting State. The relevant private international law is that of the forum state which in this case was France. Because arbitrators are, however, not bound by the conflict of laws rules of the forum, the principle of party autonomy prevails. Unless the parties had agreed to exclude the CISG, the reference to French law would mean that the Convention applied. After examining relevant doctrine and case law, the arbitral tribunal held that the reference to French law did not suffice to exclude the application of the CISG. Nor did the fact that the parties had agreed on a limitation period different from that in the CISG suffice to exclude the application of the Convention.

Regarding the statute of limitations, the CISG provides in Art. 39 that the buyer must notify the seller of a lack of conformity within a reasonable time after he discovered it, or ought to have discovered it. If the lack of conformity is not apparent, there is an absolute time limit of two years for notification. The notification was not made within two years, but Art. 40 CISG provides that Art. 39 does not apply in case of hidden defects. The arbitral tribunal noted that the time limitation of the CISG should not be confused with the statute of limitations which are determined by domestic law, namely, French law. It was in their view appropriate to apply the general ten-year limitation period provided by Art. 189*bis* of the French Code of Civil Procedure, and thus the claim was not time barred as less than ten years had elapsed between the conclusion of the Agreement in 1991 and the filing of the request for arbitration in 2000. This finding was without prejudice to the determination of whether the buyer knew or could not have been unaware of the alleged lack of conformity as this issue was not part of the issues which had been bifurcated.

Excerpt

[...]

I. The Applicable Law

1. Preliminary Remark

[1] «The buyer and the [seller] agreed in the Agreement that «[t]he law to be applied to the sales conditions is the French law», without any precision as to whether this reference includes the CISG or whether reference is made to domestic French law. 1

[2] «In their written submissions, the parties advanced conflicting opinions on this issue. While claimant has contended that the Agreement should be interpreted as meaning that domestic French law, particularly the French Civil Code, applies, [seller] has advocated the application of the CISG.» 2

2. The CISG is the French Law of International Sales of Goods since 1 January 1988

[3] «The CISG entered into force in France on 1 January 1988. Since then, it is the French law of international sales of goods.¹ In other words, the CISG will govern all international contracts for the sale of goods within the meaning of Art. 1 CISG, provided that they satisfy the conditions laid down in Art. 1 [(1)(a) and (1)(b)], that the sale is not one of a kind excluded (Art. 2 or Art. 3) and that the parties have not excluded the application of the CISG (Art. 6).» 3

3. The Conditions of Art. 1(1)(a) CISG Are Not Met

[4] «According to Art. 1(1)(a), the CISG «applies to contracts of sale of goods between parties whose places of business are in different States when the States are Contracting States». The 4

¹ See M. Fallon, «Le domaine d'application de la Convention de Vienne» in Ann. Dr. Louvain, 1998, p. 268.

relevant time for the examination of this condition is the date of the conclusion of the contract. Thus, Art. 100(2) provides that the CISG

«applies only to contracts concluded on or after the date when the Convention enters into force in respect of the Contracting States referred to in subparagraph (1)(a) or the Contracting State referred to in subparagraph (1)(b) of article 1».

[5] «In the case at hand, the CISG entered into force in Italy on 1 January 1988, i.e. before the conclusion of the Agreement in 1991. However, the CISG entered into force in Canada on 1 May 1992 only, i.e. after the conclusion of the Agreement.² Consequently, the CISG does not apply to the present instance by (the sole) virtue of Art. 1(1)(a).»

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4. The Conditions of Article 1(1)(b) CISG Are Met

[6] «Pursuant to Art. 1(1)(b), the CISG also applies to

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«contracts of sale of goods between parties whose places of business are in different States when the rules of private international law lead to the application of the law of a Contracting State».

It is commonly acknowledged that «the rules of private international law» referred to in Art. 1(1)(b) of the CISG are the conflict of law rules of the forum.³ However, an arbitrator, unlike a national judge, has no forum.⁴ It follows from this premise that arbitrators are not bound by the conflict of laws rules of a forum to choose the law applicable to the substance of the dispute.⁵

[7] «The principle of party autonomy, according to which the parties may freely choose the law governing their relationship, is without doubt part of «the rules of private international law» referred to in Art. 1(1)(b) of the CISG (*cf.* Art. 17(1) of the ICC Rules of Arbitrations and Art. 1496 of the New French Code of Civil Procedure).⁶ Accordingly, unless the parties agreed to exclude the application of the CISG, the reference made to «French law» in the Agreement

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² See «*Geltungsbereich des Übereinkommens*» in H. Honsell (ed.), *Kommentar zum UN-Kaufrecht* (Berlin and Heidelberg 1997) p. 1092.

³ K. Siehr, in H. Honsell (ed.), *Kommentar zum UN-Kaufrecht* (Berlin and Heidelberg 1997) no. 17, p. 51; B. Audit, *La vente internationale de marchandises* (L.G.D.J., Paris 1990) p. 22.

⁴ H. van Houtte, «The Vienna Sales Convention in ICC Arbitral Practice», in ICC International Court of Arbitration Bulletin Vol. 11/no. 2, p. 22; *Fouchard, Gaillard, Goldman, International Commercial Arbitration*, edited by Emmanuel Gaillard and John Savage (Kluwer Law International 1999) no. 1181, p. 637.

⁵ Art. 17(1) of the ICC Rules of Arbitration reads:

The parties shall be free to agree upon the rules of law to be applied by the Arbitral Tribunal to the merits of the dispute. In the absence of any such agreement, the Arbitral Tribunal shall apply the rules of law which it determines to be appropriate.

⁶ Art. 1496 of the New French Code of Civil Procedure reads:

The arbitrator shall decide the dispute in accordance with the rules of the law chosen by the parties or, in the absence of such choice, in accordance with the rules of the law he considers appropriate. In all cases he shall take the usages of the trade into consideration.

leads to the application of the CISG, which is, since 1 January 1988, the French law of international sales of goods. Thus, the issue is whether by referring to French law the Parties intended to exclude the CISG and agreed on the application of the French Civil Code.»

5. A Reference to a National Law Does Not Suffice to Exclude the Application of the CISG

[8] «According to Art. 6 CISG

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«[t]he parties may exclude the application of this Convention or, subject to article 12, derogate from or vary the effect of any of its provisions».

Rightly, none of the parties has contended that the application of the CISG has been expressly excluded. However, even though Art. 6 of the CISG does not specifically state it, such exclusion can also be tacit.⁷

[9] «In this context, it has been suggested that a choice of law clause in favour of a national law constituted a presumption that the parties intended to exclude the application of the CISG.⁸ However, the opinion advocated by these authorities, disputed by a large majority of commentators, is of no use in the present case. It concerns principally a different hypothesis, namely where the conditions of Art. 1(1)(a) of the CISG are met and the CISG would thus apply, but the parties nevertheless include in their contract a choice of law clause in favour of a national law. Yet, it has been demonstrated above that the CISG is not applicable in the present case by the (sole) virtue of its Art. 1(1)(a).

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[10] «Moreover, this opinion is far from being dominant and has been clearly rejected in several recent cases. In November 1998, the *Bundesgerichtshof* (German Supreme Court) has held that a choice of law clause such as «German law applies» does not contradict the finding that the CISG governs a legal relationship between a German party and an Austrian party even though the CISG is applicable through its Art. 1(1)(a) as both Germany and Austria are Contracting States.⁹

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[11] «The same determination has to be made where the parties, notwithstanding the *de plano* application of the CISG by virtue of Art. 1(1)(a), refer to the law of a third-party State (a State in which neither party has its place of business), very likely for the reason that such law is seen as a neutral law. Leading authors confirm the principle that, even in this case, a general reference to a particular national law should not be interpreted as a tacit exclusion of the

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⁷ R. Herber, in v. Caemmerer/Schlechtriem, *Kommentar zum Einheitlichen UN-Kaufrecht* (Verlag C.H. Beck, München 1995) no. 6, p. 84; K. Siehr, in *op. cit.*, no. 6, p. 81; K.H. Neumayer/C. Ming, *Convention de Vienne sur les contrats de vente internationale de marchandises, Commentaire* (CEDIDAC, Lausanne 1993) no. 3, p. 85; C. Witz, *Les premières applications jurisprudentielles du droit uniforme de la vente internationale* (L.G.D.J., Paris 1995) p. 44; V. Heuzé, *La vente internationale de marchandises* (L.G.D.J., Paris 2000) no. 95, p. 9.

⁸ K.H. Neumayer/C. Ming, in *op. cit.*, p. 89; W. Stoffel, «*Le droit applicable aux contrats de vente internationale de marchandises*», in *Les contrats de vente internationale de marchandises* (CEDIDAC, Lausanne 1991) p. 33; *Cour d'Appel de Colmar* (France), 26 September 1995, in Case Law on UNCITRAL Texts (CLOUT), case no. 326; *Tribunale Civile di Monza* (Italy), 14 January 1993, in CLOUT, case no. 54; Ad hoc Arbitral Tribunal, Florence (Italy), 19 April [1994], in CLOUT, case no. 49.

⁹ *Bundesgerichtshof* (Germany), 25 November 1998, in CLOUT, case no. 270.

CISG, unless the intention of the parties calls for a different conclusion.¹⁰ A similar trend can be observed in case law.¹¹

[12] «In the case at hand, it is not possible to infer such an intention to exclude (tacitly) the application of the CISG from the Agreement. In addition, the parties have not shown any element enabling this Tribunal to ascertain a common intention to exclude the application of the CISG.»

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6. The Contractual Modification of a Particular Provision of the CISG Does Not Suffice to Exclude the Application of the CISG

[13] «Claimant contends that the agreed limitation of [seller]'s warranty obligation to a duration of 12 months from the final date of commissioning is incompatible with the CISG and should be interpreted as meaning that the parties intended to exclude its application in favour of French domestic law.

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[14] «When a contractual clause governing a particular matter is in contradiction with the CISG, the presumption is that the parties intended to derogate from the CISG on that particular question. It does not affect the applicability of the CISG in general.¹² The parties' specific agreement to reduce, to 12 months, the two-year time limit provided for in Art. 39 CISG does not lead the Arbitral Tribunal to another finding. As stated in a recent award rendered under the auspices of the Stockholm Chamber of Commerce, Art. 40 CISG applies equally, whether the parties contractually modified the two-year time limit of Art. 39 CISG or not.¹³ Taking the above into consideration, the Arbitral Tribunal finds that the CISG is the law governing the merits of the present dispute.»

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II. The Statute of Limitations

1. Preliminary Remark

[15] «As far as the statute of limitations issue is concerned, both parties have argued their case under the CISG, be it as a subsidiary argumentation for claimant or as a principal one for [seller]. Claimant argues that Art. 39 CISG is not applicable to the present instance, which should be addressed in the light of Art. 40. [Seller] contends principally that Art. 40 CISG does not apply unless claimant shows that [seller] was aware or could not have been unaware of the alleged lack of conformity and that the whole case should be decided in the light of Art. 39.»

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¹⁰ K. Siehr, in *op. cit.*, no. 7, p. 82; B. Audit, in *op. cit.*, no. 43, p. 38; R. Herber, in v. Caemmerer/Schlechtriem, *Kommentar zum Einheitlichen UN-Kaufrecht*, no. 16, p. 86; C. Witz, *Les premières applications jurisprudentielles du droit uniforme de la vente internationale* (L.G.D.J., Paris 1995) p. 44; F. Ferrari, *Contrat de vente internationale* (Helbing & Lichtenhahn, Bâle 1999) p. 142; V. Heuzé, in *op. cit.*, no. 96, p. 93.

¹¹ ICC Award no. 9448, in ICC International Court of Arbitration Bulletin, Vol. 11/no. 2, p. 105; ICC Award no. 9187, in ICC International Court of Arbitration Bulletin, Vol. 11/no. 2, p. 95; ICC Award no. 6653, in JDI 1993, p. 1040.

¹² K. Siehr, in *op. cit.*, no. 9, p. 83; V. Heuzé, in *op. cit.*, no. 95, p. 92; F. Ferrari, in *op. cit.*, p. 147.

¹³ Stockholm Chamber of Commerce, Award of 5 June 1998, *Beijing Light Automobile Company, Ltd. v. Connell Limited Partnership*.

2. The Seller's Warranty Obligation under Arts. 39 and 40 CISG

[16] «The CISG affords the buyer several remedies if the sold goods are not in conformity with the contract (Arts. 35 *et seq.*) However, the buyer loses the right to a remedy on a lack of conformity if he does not give notice to the seller specifying the nature of such lack of conformity within a reasonable time after he has discovered it or ought to have discovered it (Art. 39)). When it comes to a lack of conformity which is not apparent and which the buyer is thus not in a position to notify to the seller, Art. 39(2) CISG sets an absolute time limit of two years from the date on which the goods were actually handed over to the buyer within which the buyer has to give notice to the seller. The buyer who fails to comply with these requirements cannot rely on the alleged lack of conformity and is deprived of the remedies which the CISG affords in case of lack of conformity.

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[17] «In the present instance, it is uncontested that claimant did not notify to [seller] any lack of conformity of the machines within the two-year time limit. However, the CISG offers a lifeline to the buyer who has not complied with the requirements of Art. 39. Art. 40 provides that

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«[t]he seller is not entitled to rely on the provisions of articles 38 and 39 if the lack of conformity relates to facts of which he knew or could not have been unaware and which he did not disclose to the buyer. »

In other words, if the conditions of Art. 40 CISG are met, the buyer is released from the requirements of Arts. 38 and 39.

[18] «By way of example, the seller who knows, from complaints received from other customers in the context of previous sales of similar goods, that the goods lack conformity cannot rely on the fact that the buyer did not give notice within the time limit of Art. 39 CISG.¹⁴ This Arbitral Tribunal is obliged to ascertain whether the seller knew or could not have been unaware of the lack of conformity, which claimant specifically preferred. This issue could be shunned only if, as [seller] pleads, claimant's action can be declared time-barred without any fact-finding. This is not the case, as we will now show.»

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3. The CISG Left the Time Limitation Issue to National Laws

[19] «The time-limit set by Art. 39 CISG exclusively pertains to the notice of lack of conformity to be given by the buyer and should not be confused with statute of limitations deadlines. The

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¹⁴ See B. Hanotiau, «*L'exécution du contrat selon la Convention de Vienne*», in Ann. Dr. Louvain, 1998, p. 291).

CISG does not deal with the limitation periods.¹⁵ Issues of limitation period are to be determined in conformity with the domestic law applicable by virtue of the rules of private international law.»¹⁶

4. The CISG Calls for the Application of a Sole Limitation Period

[20] «The application of national time-limitations in the context of the CISG is not straightforward. It is often difficult to identify, among various statute of limitations rules provided for by the applicable national law, the applicable rule in a particular instance. In the present instance, the law applicable by virtue of the rules of private international law is French law. Accordingly, it is under French domestic law that the validity of the defense raised by [seller] under the statute of limitations has to be determined.

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[21] «French law does provide various limitation periods the application of which could be contemplated. The parties have considered different limitation periods in their respective submissions. Among these various limitation periods, one may highlight the generally-applicable 10-year time limit from the conclusion of the agreement provided for in Art. 189*bis* of the French Code of Commerce and the five-year time limit of Art. 1304 of the French Civil Code. With respect to hidden defects, Art. 1648 of the French Civil Code requires the buyer to lodge its action «within a brief period» («*dans un bref délai*») which runs from the time he has discovered the defects.

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[22] «However, the application of different limitation periods to the rights provided for by the CISG amounts to artificially re-creating distinctions existing under the applicable national law and from which the CISG was detached with a view to international uniformity. This objective of uniformity would be defeated if each national law were to supply the judge or arbitrators with numerous time limits.¹⁷ Limitation periods provided for by the national laws have been adopted to apply specifically to particular actions of the national laws, and not to actions provided for a heterogeneous source of law such as the CISG.

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[23] «The Arbitral Tribunal is of the view that it is thus fit to apply the general 10-year limitation period, provided for by Art. 18*bis* of the French Code of Commerce, independently of the specific cause of action.¹⁸

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[24] «Consequently, the Arbitral Tribunal finds that claimant's claim is not time-barred by the 10-year statute of limitation applicable to it as less than 10 years have elapsed between the

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¹⁵ C. Witz, «*L'application de la Convention de Vienne en France*», in *Les ventes internationales, Journée d'étude en l'honneur du professeur Karl H. Neumayer* (CEDIDAC, Lausanne 1998) p. 18; F. Ferrari, in *op. cit.*, p. 158; V. Heuzé, in *op. cit.*, no. 313, p. 27.

¹⁶ U. Magnus, in Honsell (ed.), *Kommentar zum UN-Kaufrecht* (Springer Verlag, Berlin and Heidelberg 1997) no. 11, p. 440; C. Witz, «*L'application de la Convention de Vienne en France*», in *Les ventes internationales, Journée d'étude en l'honneur du professeur Karl H. Neumayer* (CEDIDAC, Lausanne 1998) p. 18; F. Ferrari, «*Contrat de vente internationale*», Helbing & Lichtenhahn, Bâle 1999) p. 158.

¹⁷ See V. Heuzé, in *op. cit.*, no. 313, p. 277; S. Marchand, *Les limites de l'uniformisation matérielle du droit de la vente internationale* (Helbing & Lichtenhahn, Basle and Frankfurt-on-the-Main 1994) no. 293, p. 286.

¹⁸ V. Heuzé, in *op. cit.*, no. 313, p. 278; C. Witz, «*L'application de la Convention de Vienne en France*», in *Les ventes internationales, Journée d'étude en l'honneur du professeur Karl H. Neumayer* (CEDIDAC, Lausanne 1998) p. 19.

conclusion of the Agreement in 1991 and claimant's filing of its *Demande d'Arbitrage* with the ICC in December 2000.

[25] «This finding is without prejudice to the obligation on claimant (in Art. 40 CISG) to demonstrate that [seller] knew or could not have been unaware of the alleged lack of conformity. This issue has not been «bifurcated», and neither the Parties' submissions nor this award did address it.»

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III. Award

[26] «Taking the above into consideration, the Arbitral Tribunal renders the following Award on preliminary issues:

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1. The CISG applies to the merits of the dispute, including the issue whether claimant's right to rely on a lack of conformity of the goods sold is lost under Arts. 39 and 40 CISG.
2. Claimant's claim is not barred by the 10-year statute of limitation applicable to it. (....)
3. All remaining issues shall be determined in a subsequent award.
4. The arbitration costs, legal fees and other expenses in connection with this preliminary award shall be addressed in the Final Award.»