

**Case 859: CISG 25; 33; 45; 81 (2)**

Canada: Ontario Superior Court of Justice, confirmed on appeal

Diversitel Communications Inc. v. Glacier Bay Inc.

6 October 2003; confirmed 26 April 2004

Published in English: [2003] Ontario Judgments No. 4025 (Lexis); confirmed [2004] Ontario Judgments No. 1702 <http://www.canlii.org/on/cas/onsc/2003/2003onsc11475.html>

Abstract prepared by Geneviève Saumier, National Correspondent

The plaintiff is a Canadian company doing business in research and development of satellite and terrestrial communications, and in related equipment. The defendant is an American company with its head office in Oakland, California. On 26 August 2002, the plaintiff entered into a contract with the defendant for the supply of vacuum panel insulation. The plaintiff required delivery of the insulation to meet the terms of a pre-existing contract with the Canadian Department of National Defence (DND). As a term of its contract with the defendant, the plaintiff set out a specific schedule of delivery of the insulation by the defendant. The plaintiff paid the defendant a certain amount when it issued its purchase order on 26 August 2002. The defendant admits it breached the terms of its contract by failure to deliver on time, as a result of problems it encountered with its principal supplier. The plaintiff eventually terminated the contract in November 2002, and commenced this action for the return of the amount already paid. In its defence, the defendant pleaded that the plaintiff terminated the contract without appropriate justification, and counterclaimed for damages for breach of contract and for loss of profits.

The court was seized of the dispute on a motion by the defendant for disclosure of documents relating to the plaintiff's contract with DND and its subsequent purchase of equipment from a competitor. The defendant argued that these documents were essential to demonstrate that the plaintiff was not justified in unilaterally repudiating the contract.

The plaintiff argued that under the CISG, breach of the delivery obligation under article 33 could amount to fundamental breach under article 25 which would allow the plaintiff to declare the contract avoided under article 49 and seek restitution under article 81 (2). The plaintiff submitted that the CISG established a lower threshold for the proof of fundamental breach than that required by the common law and provided foreign case law in support. The court was not convinced that these cases evidenced a lower threshold. In any event, the court agreed with the plaintiff that even the common law conditions for avoidance had been met in this case, on the finding that the parties had made time of the essence in the contract by their conduct and communications. The defendant's failure to perform in time was thus a fundamental breach as understood in the common law. The court granted summary judgment to the plaintiff and awarded pre- and post-judgment interest calculated according to local law.