Case 846: CISG 29; 47
United States: Federal Circuit Court of Appeals (3rd Circuit)
Valero Marketing & Supply Co. v. Greeni Oy
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Original in English
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In a contract that the court assumed was governed by the CISG, a Finnish seller agreed to sell 25,000 metric tons of naphtha, a product used in gasoline, to a U.S. buyer. The contract required the naphtha to be delivered to the buyer's New York facilities between 10 and 20 September 2001 on board a vessel to be approved by the buyer, such approval "not to be unreasonably withheld." After the seller shipped the goods on a vessel that the buyer had not approved, the ship's master estimated that the cargo would not be delivered in New York until 21 September. The parties agreed on 14 September that, if the naphtha was delivered by midnight 24 September via barge, the buyer would accept the goods at a reduced price.

Because the seller could not arrange for delivery by barge immediately upon the goods' arrival in New York on September 22, the September 24 deadline was not met. The buyer sued the seller for breach; the seller counterclaimed because the buyer refused delivery when the goods were tendered by barge on September 26. The trial court ruled that the September 14 agreement was of no effect because, under Article 47, a buyer may not "resort to any remedy for breach of contract" if the buyer has granted the seller an additional period of time for performance. The trial court therefore ruled that the seller was only liable for the 2- delay between the original September 20 deadline and the arrival of the goods in New York harbour on September 22. Because this delay was not a fundamental breach, the trial court held, the buyer itself breached when it demanded delivery by barge and when it refused delivery when ultimately tendered.

Citing the UNCITRAL CISG case law digest for Article 47, the appeals court reversed and remanded, commenting as follows:

"We do not agree with [the trial court's] reasoning. Assuming that the September 14 Agreement would not have been an appropriate use of Article 47 of the CISG, as the District Court held, that does not mean that the September 14 Agreement was an ineffective contract modification. Article 29 of the CISG discusses contract modification and states simply that '[a] contract may be modified or terminated by the mere agreement of the parties.' 15 U.S.C. App. Art. 29. Although Greeni asserted at trial that it agreed to the September 14 Agreement because it felt that it was a 'take it or leave it' proposition, the record is clear that Greeni did assent to that agreement. Greeni does not argue that it was under duress, and it was indeed free to leave the September 14 Agreement on the bargaining table, attempt to cover, and seek remedies for any breach of the August 15 Agreement. It chose instead to take the new deal. The 'mere agreement' of the parties reflected in the September 14 Agreement thus constituted a permissible contract modification under Article 29, rather than an extension of time for performance under Article 47 of the CISG. Accordingly, the September 14 Agreement was valid and governed the conduct of the parties for the remainder of their interaction."