CISG-online 2022	
Jurisdiction	Switzerland
Tribunal	Bundesgericht/Tribunal fédéral (Swiss Federal Supreme Court)
Date of the decision	17 December 2009
Case no./docket no.	4A_440/2009
Case name	*Swiss watches case II*

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

Facts of the case:

A. 1
Claimant A[…] (hereinafter «[Buyer]») is a legal person registered in the Ukraine; it is engaged in the retail sale of watches in a shop in Kiev, […]. In particular, it retailed watches supplied by Defendant Manufacturer B[…] SA [of Switzerland] (hereinafter «[Seller]») to […].

The [Seller] stopped the deliveries of its products after signing an exclusive distribution contract with another Ukrainian retailer. From then on, the [Buyer] had to get its supplies through this other retailer, incidentally [Buyer]'s direct competitor, and to agree to «retail» prices higher than «export» prices applicable in a direct sale. 2

In a letter dated 23 March 2005, the [Buyer] commanded the [Seller] to deliver at the latest on 8 April 2005 watches based on the order that was allegedly accepted; and in case of failure to do so, [Buyer] would have to cancel the performance of ongoing contracts, and reserves the right to ask for damages and interest in the amount of CHF 653,959.00. 3

B. 4
On 22 September 2005, the [Buyer] filed a lawsuit against the [Seller] in the Cantonal Court of Neuchâtel. [Buyer] requested the court to order [Seller] to pay the latter amount [CHF 653,959.00], with interest at the rate of 5% per year from the date when the [Seller] was notified of the claim. Essentially, [Buyer] claimed the amount of damages and interest equivalent to the amount of the difference between the «export» prices that it should have paid to [Seller] for thirty different watches, a total of CHF 572,530.00, on the one hand, and the retail value of these watches, on the other hand.

---

[*] For purposes of this translation, Claimant-Appellant of Ukraine is referred to as [Buyer], and Defendant-Appellee of Switzerland is referred to as [Seller]. Amounts in Swiss currency (Swiss francs) are indicated as CHF.

Translator's note on other abbreviations: ATF = Recueil officiel des Arrêts du Tribunal fédéral [Official collection of the decisions of the Swiss Federal Supreme Court]; CO = Code des Obligations [Swiss Code of Contract and Tort Law]; CPC = Code de procedure civile [Swiss Code of Civil Procedure]; LTF = Loi du 17 juin sur le Tribunal fédéral [Swiss Law on the Federal Supreme Court].

[**] Andrea Vincze, LL.M. (Pace) is an in-house counsel based in Switzerland.

[Seller] requested dismissal of the [Buyer]'s claim. 5

The Cantonal Court rendered its judgment on 29 July 2009; it rejected the [Buyer]'s claim. According to the judgment, the orders for only ten watches are still to be paid, at the total «export» price of CHF 191,000.00. Failing to submit the contracts concluded with its end buyers, [Buyer] did not prove the retail prices and, therefore, failed to establish the damages. Finally, in any event, the Court held that [Buyer] should have mitigated the amount of the damages by buying the watches through the retailer in the Ukraine. 6

C. 7
In the civil law appeal, [Buyer] requests the Supreme Court to reverse the judgment of the [Cantonal] Civil Court, so that [Seller] is ordered to pay CHF 653,956.00 with interest at the rate of 5% per year from 26 September 2005. Alternatively, [Buyer] requests reversal of the judgment and a new judgment on the subject matter by a Civil Court.

[Seller] argues for a dismissal of the [Buyer]'s appeal. 8

Considerations:

1. 9
The appeal is against a final judgment (Art. 90 LTF), in civil law (Art. 72(1) LTF) and in last cantonal resort (Art. 75(1) LTF). [The appellant] participated in the previous instance and lost the case (Art. 76(1) LTF). The amount in dispute exceeds the minimum legal amount of CHF 30,000.00 (Art. 51(1)(a) and 74(1)(b) LTF). The appeal is theoretically admissible because it was filed in a timely manner (Art. 100(1) LTF) and in accordance with the formal requirements (Art. 42(1) to (3) LTF).

An appeal is available for violation of federal or international law (Art 95(a) and (b) LTF). The Supreme Court applies this law, but not fundamental rights, ex officio (Art. 106 LTF). It is not bound by the arguments of the parties and it freely assesses the legal significance of the facts; however, it usually limits itself to the judicial questions raised by the appellant in its argument (Art. 42(2) LTF; ATF 135 III 397 para. 1.4, p. 400; 133 II 249 para. 1.4.1, p. 254), and it decides upon questions regarding fundamental rights when this is requested in a plea with a detailed reasoning (Art. 106(2) LTF; ATF 134 I 83 para. 3.2, p. 88; 134 II 244 para. 2.2, p. 246; 133 II 249 para. 1.4.2). 10

The Supreme Court must establish a legal reasoning based on the facts ascertained in the contested decision (Art. 105(1) LTF); generally, [new] allegations of facts and new means of evidence are not admissible (Art. 99(1) LTF). The court can complete or correct ex officio findings of facts that are obviously incorrect, i.e., arbitrary under Art. 9 Cst. (ATF 133 II 249 para. 1.1.2, p. 252), or established in violation of the law (Art. 105(2) LTF). An appellant is authorized to contest such incorrect findings of fact if the correction of the incorrect fact-finding is likely to affect the result (Art. 97(1) LTF). [The appellant] cannot simply challenge the contested records by means of its own allegations or through its own evaluation of the evidence; it should rather point out precisely why these fact-findings are in violation of the law or con- 11

tain an obvious error, and an argument that does not meet these requirements is not admissible (ATF 133 II 249 para. 1.4.3, p. 254; see also ATF 130 I 258 para. 1.3, p. 261–262; 125 I 492, para. 1b, p. 495).

2. 12
The Civil Court is correct in holding that the United Nations Convention on Contracts for the International Sale of Goods (RS 0.221.211.1; hereinafter: the Convention or CISG) is applicable to the relationship between the parties. In fact, [the parties] have their places of business in different States – Switzerland and the Ukraine – that are Contracting States to the Convention (Art. 1(1)(a) CISG)

3. 13
The Civil Court notes that [Seller] refused to deliver ten watches for which the relating order was accepted. [Seller] refers to these watches by their serial numbers and indicates for each the price that [Buyer] should have paid. The total amount is CHF 191,100.00. In addition, the Court indicates that «some» of the watches referred to in a list of pending transactions dated 10 December 2003, submitted by [Buyer] and referring to a total of forty-six watches, are «unaccounted for» in the documentation presented by the parties, and that, therefore, their price is not established.

Before the Supreme Court, [Buyer] argues that it is incorrect that some watches are «unaccounted for», stating that all watches on the list were confirmed as ordered, as shown on the file. 14

[Buyer] refers to Art. 8 CPC without success because this Article does not cover the weighing of evidence (ATF 131 III 222 para. 4.3, p. 226; 129 III 18 para. 2.6, p. 24–25). In addition, this Article is in principle not applicable to cases governed by the CISG (cf. ATF 130 III 258 para. 5.3, p. 264). 15

Since [Buyer] argues merely that there was an obvious error in the establishment of the facts, the argument is inadmissible. Indeed, in order to analyze the documents submitted – abstruse lists and order forms, the interpretation of which could be controversial – and clarify with certitude the operations between the parties, [Buyer] should have requested an expert examination in due time. Subject to the [rule regarding] limited review of the cantonal findings under Art. 97(1) LTF, the Supreme Court does not decide upon [such claims]. 16

4. 17
Under Art. 30 CISG, [Seller] must deliver the watches the order for which it had accepted. This duty was not performed and the other party is, therefore, entitled to ask for damages and interest under Art. 45(1)(b) CISG.

As a general rule, under Art. 74 CISG, the damages [and interest] consist of both the damage suffered and the lost profit of the aggrieved party. Thus, when the goods were not delivered and when, being known to the seller, they were meant to be sold at retail, the buyer can claim as lost profit the profit that was expected according to the common [profit] margins (Christoph Brunner, *UN-Kaufrecht – CISG*, 2004, no. 35 on Art. 74 CISG; Herbert Schönle and Thomas Koller, in Heinrich Honsell (ed.), *Kommentar zum UN-Kaufrecht*, 2nd ed., Berlin 2010, no. 37 on 18

Art. 74 CISG; Peter Schlechtriem and Claude Witz, *Convention de Vienne sur les contrats de vente internationale de marchandises,* Paris 2008, p. 264, no. 394; Ulrich Magnus, *in Staudingers Kommentar zum BGB, Wiener UN-Kaufrecht*, Berlin 2005, no. 40 on Art. 74 CISG; Gritli Ryffel, *Die Schadenersatzhaftung des Verkäufers nach dem Wiener Übereinkommen über internationale Warenkaufverträge,* 1992, p. 67; see also Ingeborg Schwenzer, in *Kommentar zum Einheitlichen UN-Kaufrecht,* 5th ed., 2008, nos. 36 and 55 on Art. 74 CISG).

According to several authors, the CISG does not specify the degree of evidence necessary to establish the retail price that the buyer could have received; this issue is governed by the law of the forum (Bruno Zeller, *Damages under the Convention on Contracts for the International Sale of Goods,* Dobbs Ferry 2005, p. 129; Martin Brölsch, *Schadensersatz und CISG,* Frankfurt am Main 2007, p. 59; see also Schönle/Koller, *op. cit.,* nos. 49 and 50 on Art. 74 CISG; Magnus, *op. cit.,* no. 61 on Art. 74 CISG). If the lawsuit is filed in Switzerland and the amount of the damages is not stated, the damages – including the lost profit – may be evaluated according to Art. 42(2) CO (Brunner, *op. cit.,* nos. 55 and 57 on Art. 74 CISG). According to another opinion, the requirements regarding [the degree of] evidence are set by the CISG, excluding [application of] the law of the forum, and the lost profit must be established «with a reasonable degree of certainty» (Schwenzer, *op. cit.,* no. 65 on Art. 74 CISG). **19**

The Civil Court held that [Buyer] could have presented in the proceedings the retail contracts the performance of which was the reason why the order was placed with [Seller], in order to establish accurately the exact retail prices. Consequently, according to the Court, [Buyer] is not entitled to request an estimation of the loss under Art. 42(2) CO. Having failed to present the contracts, [Buyer] failed to prove the damage suffered, therefore, all claims were dismissed. **20**

It will be shown that under the circumstances of the case, [Buyer] is, in any case, not entitled to full compensation for the lost profit. That is why it is not necessary to review the arguments that [Buyer] makes on the basis of Art. 42(2) CO, concerning the evidence of the retail prices or the assessment of the damages. **21**

5. **22**
Under Art. 77 CISG, the aggrieved party must take such measures as are reasonable in the circumstances to mitigate the loss, including loss of profit; if he fails to do so, the party in breach may claim a reduction in the damages in the amount by which the loss should have been mitigated.

When the goods are not delivered, this rule compels the buyer to purchase replacement goods if it is reasonably possible (Brunner, *op. cit.,* no. 8 on Art. 77 CISG; Schönle/Koller, *op. cit.,* nos. 36 on Art. 74 CISG and 8 on Art. 77 CISG; Schlechtriem/Witz, *loc. cit.*; Magnus, *op. cit.,* no. 11 on Art. 77 CISG; Brölsch, *op. cit.,* p. 99; see also Schlechtriem, 'Schadenersatz und Erfüllungsinteresse', in *Festschrift für Apostolos Georgiades,* Berne 2006, p. 394). The buyer is then entitled to damages [and interest] to be calculated under Art. 75 CISG, i.e., the difference between the price agreed upon between the parties and the price of the replacement goods. If the buyer did not purchase replacement goods and if it would have been reasonable to do so, **23**

the damages [and interest] are reduced to the amount that would be due if he had purchased the replacement goods.

The Civil Court noted that [Buyer] had the opportunity to purchase watches of the same model as [Seller] refused to deliver in breach of its obligations, through the retailer that was awarded exclusivity in the Ukraine. The relevance of this fact is not substantially challenged before the Supreme Court because [Buyer] restricts its arguments to Swiss domestic law, yet the dispute is subject to the CISG. Consequently, [Buyer] is not entitled under Art. 77 CISG to receive damages [and interest] calculated as the difference between the «export» prices and the retail value, but rather calculated as the difference between the «export» prices and the «retail» prices that the retailer would have charged to deliver the same watches. 24

The dismissal of all claims is contrary to Art. 74 and 77 CISG because [in that case] [Buyer] would not receive these reduced damages [and interest]. The Civil Court did not establish these «retail» prices and the Supreme Court is, therefore, not in a position to rule on this matter. It does not appear at first sight that these prices were not invoked and that they cannot be invoked anymore according to cantonal procedural law (cf. ATF 131 III 257 para. 4.2, p. 267–268). As the appealed judgment contains no determinant factual grounds under Art. 112(1)(b) LTF, the appealed judgment must be reversed in accordance with Art. 112(3) LTF. 25

6. 26
In its answer to the appeal, [Seller] claims to have stated before the Civil Court that its potential obligation to pay damages [and interest] is time-barred, and regarding this, [Seller] refers to its written submissions presented during the taking of evidence. This argument is inadmissible because on federal level Art. 42(1) and (2) LTF compel the parties to present their claims in the written submissions addressed to the Supreme Court; a reference to earlier written submissions presented during previous instances is not allowed (ATF 133 II 396 para. 3.2, p. 400; on Art. 55(1)(c) aOJ: ATF 131 III 384, para. 2.3, p. 387–388).

7. 27
The [Buyer]'s appeal is inadmissible regarding almost two-thirds of the amount in dispute and neither party wins the case on the remaining part. Therefore, it is justified to split the legal fees, the ratio of which shall be approximately 5/6 for [Buyer] and 1/6 for [Seller]. The costs, estimated at CHF 9,600.00 for each party, must be split in the same proportion. Upon setting off the monies due, [Buyer] must pay to [Seller] CHF 6,400.00.

Ruling of the Supreme Court:

For the above reasons, the Supreme Court holds that: 28

1. The [Buyer]'s appeal is partially admissible, regarding the parts [stated as] admissible; the appealed judgment is reversed and the case is sent back to the 2nd Civil Court of the Cantonal Court to make a new decision.

2. The parties shall pay the legal fees in the amount of CHF 8,500.00, [Buyer] paying CHF 7,000.00 Sfr and [Seller] paying CHF 1,500.00.

3. [Buyer] shall pay a sum of CHF 6,400.00 to [Seller] regarding the costs.

4. This judgment is communicated to the parties and to the Cantonal Court of Canton Neuchâtel.