

**Case 1186: CISG 1(1)(a); 7(2); 50; 71; Limitation Convention (1980 amended text):
[3(1)(a); 25]**

United States of America

District Court for the Northern District of Illinois, Eastern Division

Case No. 10 C 1174

Maxxsonics USA, Inc. v. Fengshun Peiyong Electro Acoustic Company, Ltd.

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The buyer, a United States corporation, which sells aftermarket audio equipment, and the seller, a Chinese company that manufactures car amplifiers, entered into multiple contracts for delivery of car amplifiers between 2007 and 2009.

According to the buyer, a significant number of the amplifiers delivered by the seller during that period were defective and were returned by consumers to retail distributors. After the parties failed to resolve the issue amicably, they resorted to litigation.

The facts of the case were largely undisputed — the parties agreed that the buyer had paid \$100,000 of the roughly \$610,000 due under the invoices. According to the seller, this was done in retaliation for allegedly defective goods that the seller had shipped under previous unrelated purchase orders. Neither party disputed that each purchase order constituted a separate contract.

The seller moved for partial summary judgment on the grounds that the buyer was seeking a set-off from purchase orders unrelated to those at issue in the present dispute. It claimed that it had performed under the last six purchase orders, but that the buyer had breached the contract by withholding payment in retaliation for allegedly defective goods from previous purchase orders. Further, the seller argued that since neither party disputed the events there was no genuine issue of material fact and that the court was entitled to grant summary judgment as a matter of law.

The seller argued that the CISG governed the contracts, whereas the buyer relied on Illinois law (as it incorporates the Uniform Commercial Code (UCC)). The court applied the CISG on the grounds that the contracts arose between parties from the United States and China, both parties to the Convention.

With regards to the issue of set-off, the seller noted that the CISG has no provision governing set-offs, but argued that the court should reason by analogy and apply the Illinois UCC set-off rules in line with the CISG's anticipatory breach provisions (Article 71), and that set-off should only be available for claims arising under the same contract.

The court agreed with the seller's general conclusion concerning set-off, but disagreed on the legal justification.

In addressing the question, it found that other courts had generally approached the issue in one of two ways. First, it found that most courts applied national law after determining set-offs to fall outside the scope of the CISG because the general availability of set-off is a procedural issue not specified by the substantive law of the CISG. Second, it noted that some courts did find set-off to fall within the general scope of the CISG, but that those same courts found the CISG to be silent on the specific issue and thus utilized the gap-filling provision under the CISG and applied national law in any case.

The court did note that under Article 50 CISG, the buyer may reduce the price of non-conforming goods, but noted that that remedy is not identical to set-off. It further noted that provisions relating to set-off are included in the Convention on the Limitation Period in the International Sale of Goods, but that the Convention was not applicable in this case because China is not a party to it.

Having made these observations, the court determined that national law would apply to the question of whether set-off would be permitted. It utilized the Illinois UCC as both parties had applied this law in their pleadings. Under Illinois UCC, set-offs are only available for claims arising under the same contract.

The court found that the buyer had effectively conceded that the six purchase orders created valid and enforceable contracts; that the buyer failed to pay the balance due after receiving the product; and that the resulting damages totalled roughly

\$510,202.34. At issue, however, was whether the seller had substantially performed its obligations.

The seller asserted that the buyer's officers had admitted to withholding payment because of defective merchandise from previous orders. It argued that the buyer had thereby conceded that the shipments at issue conformed to the contracts. However, the buyer contended that there was a genuine issue of material fact regarding performance under the contracts at issue, stating that 480 amplifiers from the last six orders in question had been returned by the customers as defective. The parties further disagreed about the buyer's methods of tracking of the sold amplifiers.

Thus, because the seller was unable to show an absence of disputed material facts, the court denied its motion for summary judgment.

The court explained its decision by noting that, if the buyer were seeking a set-off from the previous contracts, the seller would be entitled to summary judgment, as that would mean that this fact was not disputed between the parties. However, insofar the buyer was seeking a set-off for faulty amplifiers in the orders relating to the dispute (i.e. the last six orders), that claim turned on factual questions that could not be resolved in a summary judgment; including whether the shipments in question contained defective amplifiers and the extent to which the buyer had been damaged by any such effects.