

**Case 1632: CISG 1(1)(a); 6; 19; 92; 97(4); 100**

Denmark: Sjø og Handelsretten (Maritime and Commercial Court)

No. SH2015.H-20-14

*Blohm + Voss Oil Tools GmbH v. C.C. Jensen A/S*

15 September 2015

Original in Danish

Available at: <http://domstol.fe1.tangora.com>

Abstract prepared by Joseph Lookofsky, National Correspondent

In 2009, a German company (B), which had been commissioned to restore a historic yacht, engaged a Danish company (S) to replace the yacht's portholes. Claiming that the portholes subsequently supplied by S were defective, B sued S in the Maritime and Commercial Court in Denmark.

Although the parties agreed that their dispute regarding the conformity of the portholes was governed by "Danish law" (as opposed to German law), they disagreed as to whether or not the CISG, which is part of Danish law, applied in this case, and their disagreement on this applicable law issue was rooted in a classic "battle of forms". In the offer which S originally submitted to B, as well as on several subsequent occasions, S referred to "ECE 188", the well-known standard form which designates "the law of the Vendor's country" as the applicable law. In its reply to that original offer, however, as well as on several subsequent occasions, B referred to its own standard terms which expressly excluded the CISG, even when it would otherwise apply by default.

On the applicable law issue, the Danish court held in favour of B, ruling that the CISG did not apply in this case. In this connection the court emphasized that S, in its final revised invoice to B, had simply referred to B's final revised order, which included B's standard terms, i.e. on this particular occasion, S had not, as previously, referred to its own standard (ECE 188) terms. In holding in favour of the party who got in the "last shot", the court did not state whether it based that decision on Danish domestic law or on CISG Part II on Contract Formation. But since neither party's lawyers had argued on the basis of CISG Article 19 or any other CISG rules, the court's decision regarding the applicable law was surely grounded in Danish domestic contract formation rules. Notably in this regard, although the Article 92 declaration made by Denmark when it ratified the CISG had been withdrawn pursuant to Article 97(4) before this particular case was decided, that declaration nonetheless continued to exclude the application of CISG Part II in this situation, since the 'proposal for concluding the contract' between the parties in this case was made before the declaration was withdrawn, cf. Article 100.

Ultimately, on the merits, the court held in favour of the Danish defendant (S), in that B, who bore the burden of proof, failed to convince the court that the portholes were in fact defective. As noted by the court in this connection, neither party had argued as to whether the outcome on this conformity issue might have been different if the case had been decided under the conformity rules in CISG Part III.