

Case 1770: CISG 2(b)

Switzerland: Bundesgericht (Federal Supreme Court)

No. 4A_451/2016

8 November 2016

Original in German

Published in German: *Internationales Handelsrecht* (2017), 72–74; Swiss Federal Supreme Court database (<https://www.bger.ch/index.htm>); CISG-online database (<http://www.cisg-online.ch/>) No. 2803

Abstract prepared by Ulrich G. Schroeter, National Correspondent

An Austrian company specializing in photography auctions conducted an online auction of photographs via an internet platform (www._____.com). The internet platform was run by a company based in New York. During the online auction, the owner of a Swiss photography art gallery successfully bid for seven vintage photographs. The Austrian seller sent an invoice to the buyer, but the buyer failed to pay.

When the seller brought suit for payment of the price in the Commercial Court of Zurich, the Commercial Court applied the (domestic) sales law of the State of New York. Upon appeal the Federal Supreme Court confirmed that the CISG was inapplicable to the contract between the seller and the buyer, because Article 2(b) CISG excludes online auctions from the Convention's scope. In doing so, the Federal Supreme Court acknowledged that commentators differ on whether the term "auction" in Article 2(b) CISG also extends to online auctions as those conducted over the Internet, but did not give any reasons for its preferred interpretation.

The court went on to rule that the sales contract was governed by domestic Austrian law as the law of the country where the seller had his habitual residence at the time when he received the order (Article 3(1) Hague Convention on the Law applicable to the International Sale of Goods of 1955). It accordingly reversed and remanded the judgment of the Commercial Court of Zurich.