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CASE LAW ON UNCITRAL TEXTS (CLOUT)

Contents

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Introduction

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Cases relating to the United Nations Convention on Contracts for the International Sale of Goods (CISG)

Case 1733: CISG 7(1); 11; 30; 47(1); 49(1)(b); 53; 81(2); 100

Brazil: Appellate Court of the State of Rio Grande do Sul, 12th Private Law Chamber
Appeal No. 0000409-73.2017.8.21.7000
Anexo Comercial Importação e Distribuição Ltda. – EPP. v. Noridane Foods S.A.
14 February 2017
Original in Portuguese
Available at: http://www.tjrs.jus.br

Abstract prepared by Naíma Perrella Milani

In 2014 the buyer agreed to buy 135 tons of frozen chicken feet grade A and 27 tons of frozen chicken feet grade B from the Brazilian seller, which were to be delivered to the buyer's parent company. Claiming that it had paid part of the price but the goods were never delivered, the buyer sued the seller seeking termination of the contract and restitution of the amount paid. A lower court judge ruled in favour of the buyer. The seller appealed against this ruling to the Appellate Court of the State of Rio Grande do Sul.

The Court ruled that the United Nations Convention on Contracts for the International Sale of Goods (CISG) was applicable to the case even though the parties had entered into the sales agreement on 1 July 2014 and the CISG only came into force in Brazil on 16 October 2014. According to the ruling, the Convention was applicable due to the fact that it is an expression of the most widespread practice of the international sale of goods. Therefore, Article 100 of the Convention, which provides that the CISG applies to a contract when the proposal is simultaneous or subsequent to the entering into force of the Convention, was not enforced, since the CISG was regarded as customary law and not as positive law. Likewise, the Court found that the UNIDROIT Principles of International Commercial Contracts were also applicable to the case and that these Principles and the CISG are complementary.

The Court ruled that despite the fact that the parties did not enter into a written agreement, the existence of the legal relationship had been demonstrated by the invoices issued by the seller and the proofs of payment produced by the buyer. The contract was found to be existent in accordance with Article 11 CISG and Article 1.2 of the UNIDROIT Principles of International Commercial Contracts.

The Court also found that the buyer had performed its obligation of payment pursuant to Article 53 CISG, whereas the seller had not performed its obligations of delivery of goods and transfer of property under Article 30, which entitled the buyer to declare the contract avoided pursuant to Article 49(1)(b) and claim restitution of the amount paid under Article 81(2). The Court held that, in practice, the buyer's repeated attempts to contact the seller to obtain clarification on the date of delivery is tantamount to the granting of an additional period of time for performance by the seller of its obligations, as per Article 47(1) CISG. In addition, the Court decided that the seller had failed to proceed in good faith in accordance with Article 7(1) of the CISG and Article 1.7 of the UNIDROIT Principles of International Commercial Contracts.

Case 1734: CISG 3; 3(1); 3(2); 39

France, Court of Appeal of Colmar, First Civil Division, Section A
General Register No. 16/00946
SAS K. C. v. G. H.
18 October 2017
Original in French

Available in French from the CISG-France Database: www.cisg-france.org, No. 252

Abstract prepared by Claude Witz, National Correspondent, and Ben Köhler

A company based in France, K. C., which specialized in building timber frames and structures, was in a business relationship with a trader, G. H., who operated a sawmill and timber trading business based in Germany.

As a result of a number of unpaid invoices dating from 30 September 2010 to 21 February 2011, G. H. brought an action against K. C. before the District Court of Strasbourg. Through a counterclaim, K. C. claimed that there was a lack of conformity in various goods delivered.

The court of first instance found that the various contracts were governed by the United Nations Convention on Contracts for the International Sale of Goods (CISG) and that German law, designated under the Convention on the Law Applicable to Contractual Obligations of 19 June 1980, applied to interest on arrears. Furthermore, the court found that the action based on the non-conformity of the goods was time-barred under German law.

K. C. filed an appeal against the decision of the District Court of Strasbourg before the Court of Appeal of Colmar. The Court of Appeal confirmed that the CISG was applicable, because the two contracting parties were based in Germany and France, respectively. The Court emphasized that it was irrelevant that one of the disputed contracts, relating to the supply of exterior walls and roofing for a given site, could be defined under French law as a works contract or subcontract. It held to its view that CISG was applicable and concluded that a sale had taken place within the meaning of Article 3 of the Convention, reproduced below:

> "(1) Contracts for the supply of goods to be manufactured or produced are to be considered sales unless the party who orders the goods undertakes to supply a substantial part of the materials necessary for such manufacture or production.
>
> (2) This Convention does not apply to contracts in which the preponderant part of the obligations of the party who furnishes the goods consists in the supply of labour or other services."

On the one hand, with regard to Article 3 (1), the Court of Appeal found that K. C. had provided only instructions and drawings for the site to G. H., and had not supplied a substantial part of the materials necessary for such manufacture or production, meaning that the Convention was not applicable to the contract. As a result, the judgment of the Court of Appeal of Colmar rightly differed from the judgment of the Court of Appeal of Chambéry of 25 May 1993 (CLOUT decision No. 157).[1] On the other hand, with regard to Article 3 (2), the Court of Appeal noted that the CISG was applicable even though G. H. had designed and produced working drawings for the sole purpose of manufacturing the materials ordered by K. C. According to the Court of Appeal, those elements constituted "one single step in the execution of the order". The Court of Appeal further noted that the supply of services by G. H. to K. C., invoiced separately, did not constitute a preponderant part of the obligations of G. H. pursuant to Article 3 (2). The services relating to the site (design, monitoring of the site, etc.) were invoiced in the amount of 3,500 euros, which was less than 1.5 per cent of the total price of the contract (244,136 euros), while the transportation of

[1] See CISG Digest (2016 Edition), Article 3, No. 3, note 7. Available from www.uncitral.org

goods to the site was invoiced at 200 euros. In agreement with the court of first instance, the Court of Appeal found that the CISG was applicable.

With regard to the counterclaim for damages resulting from the alleged non-conformity of certain goods, which the District Court of Strasbourg declared time-barred under German law, the appellant argued that the law applicable to the disputed contract was French law owing to the place of construction of the building (Regulation (EC) No. 593/2008 of 17 June 2008).

The Court of Appeal began by recalling that the provisions of Article 39 CISG, which require the buyer to give notice of the lack of conformity within a certain time, do not establish a time limit for taking legal action.[2] Without settling the question of whether German or French law is applicable to the contract for matters not covered by the Convention, the Court of Appeal noted that even if French law was applicable, action would be time-barred.

Case 1735: CISG 4

France: Court of Appeal of Limoges, Civil Division
General Register No. 16/00318
SARL A. C. v. B. et M. and E. S.P.A.
21 February 2017
Original in French
Available in French from the CISG-France Database: www.cisg-france.org, No. 245

Abstract prepared by Claude Witz, National Correspondent, and Ben Köhler.

V. D., a company based in France, contracted company B., which subsequently became company A. C., also based in France, to carry out joinery, roofing and cladding works on a farm building. A. C. obtained wooden panels, manufactured by the company E. S.P.A., based in Italy, from the company B. et M., based in France. Water leaked into the building as a result of defects in the wooden panels. In view of that damage, V. D. initiated legal action against the companies A. C. and B. et M. and the Italian company E. S.P.A. before the Commercial Court of Limoges.

The Court of Appeal considered the question of whether the French company A. C. had the right to take direct action for breach of contract against the Italian company E. S.P.A. French domestic sales law provides for such action without the need for a contractual relationship between a sub-buyer and the supplier. Entitlement to take action to enforce a warranty for latent defects is regarded as passed down the contractual chain as an accessory to the sold good. While the court of first instance rejected direct action because the initial sale was governed by CISG, the Court of Appeal of Limoges admitted the direct action of A. C. against E. S.P.A.[3] The company A. C. had argued in vain before the Court of Appeal that Article 4 CISG "establishes an exclusive relationship between the manufacturer and the direct buyer in such a manner that E. S.P.A. is only accountable to the buyer and not to any third party to the sale, such a party being ineligible to initiate direct action against the manufacturer." The Court of Appeal rejected that reasoning, briefly stating, after setting out the content of Article 4 CISG, that: "Although the Convention exclusively governs the creation of the sales contract between the seller (the company E. S.P.A.) and the buyer, that Convention does not rule out the application of French law or the direct action of a sub-buyer against the seller, in such a way that company B (subsequently company A. C.) is entitled to bring direct action against E. S.P.A". Curiously, the Court of

[2] See also in that regard Court of Cassation, Civil Division, 3 February 2009, CLOUT No. 1027; Court of Cassation, Commercial Division, 21 June 2016, CLOUT No. 1633; see also CISG Digest (2016 Edition), Article 39, No. 29. Available from www.uncitral.org

[3] See also in that regard Court of Appeal of Lyon, 18 December 2003, CLOUT decision No. 492; see also the inapplicability of the CISG to the relationship between a sub-buyer and the original seller under Article 4 of the CISG, US District Court, Northern District of Illinois, E. D., 30 March 2005, (Caterpillar v. Usinor Industeel), CISG Digest (2016 Edition), Article 4, No. 14, note 67. Available from www.uncitral.org

Appeal remained silent on the substantive rules applicable to the direct action that it recognized as admissible.

Case 1736: CISG 1(1); 1(2); 3(1); 9(2); 14; 18(1); 18(2); 21(1)[4]

Germany: Higher Regional Court Dresden (OLG Dresden)
10 U 269/10
30 November 2010

Original in German

The Higher Regional Court in Dresden (Oberlandesgericht), functioning as the Court of appeals, amended a previous judgment by the first instance Land Court (Landgericht) in Zwickau. The Danish plaintiff, a producer of underwear, swimwear and nightwear, sought damages from the German defendant for the losses incurred due to the non-payment of an order of 9.560 pieces of lingerie. The plaintiff argued that the parties — which had a longstanding business relationship — had concluded a contract about the pieces of lingerie, whereas the defendant denied any contract closing and obligation to pay.

Previously, the defendant had indicated its interest in adding a certain lingerie series produced by the plaintiff to its assortment and had therefore requested samples. The defendant had also sent an order for the lingerie to the plaintiff; however, according to the defendant, the plaintiff had failed to confirm the order in a timely manner. After receiving the samples, the defendant asked for certain changes and improvements to the quality of the lingerie pieces, which the plaintiff was unable to provide even after further specification. An order confirmation that the plaintiff had attached to the correspondence was then explicitly objected by the defendant. Nevertheless, the plaintiff submitted that the parties had concluded a contract after an alleged previous order confirmation had not been objected. Therefore, the plaintiff asserted a damages claim amounting to the difference between the allegedly contractually agreed purchase price and the proceeds the plaintiff had obtained from selling the lingerie to a third party at a lower price after the defendant's refusal.

The defendant took the view that no contract had been concluded. Moreover, the defendant argued that the order sent to the plaintiff had been intended to merely serve planning purposes; the first alleged order confirmation had never been received and the second one objected.

The Court of first instance granted the damages claim to the plaintiff, stating that a contract had been concluded by way of the alleged first order confirmation, which — in the view of the Court — had been received and had not been objected by the defendant. Furthermore, the Court had no doubts that already the preceding order sent by the defendant had led to the conclusion of a contract, irrespective of the receipt of the alleged first order confirmation.

The defendant appealed, citing errors of law in the consideration of evidence. The Court of appeals held that the appeal was admissible and substantiated. Concerning the substantive part of the dispute, the Court found the CISG to be applicable pursuant to Articles 1(1), 1(2) and 3(1). With regard to the parties' correspondence, the Court acknowledged that the order sent by the defendant to the plaintiff constituted an offer in accordance with Articles 14 et seq. CISG and not merely an advance information or a planning aid. However, in the view of the Court, this offer was not accepted by the plaintiff. Contrary to the Court of first instance, the Court of appeals found that sending the order alone did not suffice to assume the conclusion of a contract. While under customary German law sending a commercial letter of confirmation can lead to the conclusion of a contract, the Court gathered from Article 18(1) and (2) CISG the principle that silence or inactivity cannot be understood as acceptance under the Convention. Therefore, the Court saw no lacuna that necessitated a recourse to German law and the (German) concept of a commercial letter of confirmation leading

[4] This case is cited in the CISG Digest, 2016 Edition, available at www.uncitral.org.

to the conclusion of a contract. As a result, the legal effect of an uncontested commercial letter of confirmation was limited either to the extent in which it was considered an international commercial usage in the sense of Article 9(2) CISG or to the extent in which the behaviour of the recipient could be considered as an approval of the confirmed content of the letter. In the present case, the Court found no indications for either possibility; hence, it dismissed the notion of the conclusion of a contract based solely on the silence and inactivity of the plaintiff. Besides, the Court noted that even in case of the applicability of German law, the plaintiff had not demonstrated that the requirements of a commercial letter of conformation under German law had been met.

With respect to the findings of the Court of first instance on the alleged order confirmation sent by the plaintiff to the defendant, the Court of appeals expressed doubts as to whether the confirmation had reached the defendant within reasonable time in the sense of Article 18(2) CISG. However, the Court found that this did not need to be determined since the plaintiff had procured insufficient evidence to prove that the defendant had actually received the order confirmation. Similarly, the Court found that the provision of samples to the defendant did not constitute an implied acceptance of the order.

The Court also considered whether the defendant had, without delay, approved the plaintiff's belated acceptance of the order pursuant to Article 21(1) CISG. While a belated acceptance by the plaintiff could be seen in an email sent by the plaintiff several weeks after the defendant's initial offer, the Court determined that the defendant never approved any such acceptance. Since the Court did not find any other possible corresponding offer and acceptance either, it concluded that the parties had not entered into a contract which would have obliged the defendant to purchase and pay the lingerie sets. Therefore, the plaintiff was not entitled to damages. Accordingly, the Court of appeals amended the ruling of the Court of the first instance and dismissed the plaintiff's claim.

Case 1737: CISG 14; 15; 19; 19(2)[5]

Germany: Higher Regional Court Koblenz (OLG Koblenz)
2 U 816/09
1 March 2010

Original in German

The Higher Regional Court in Koblenz (Oberlandesgericht), functioning as the Court of Appeals, confirmed a previous judgment by the first instance Land Court (Landgericht) in Trier. The German plaintiff (the seller) sought payment of the outstanding sum of the purchase price for an asphalt plant, arguing that it, and not a French subsidiary of the plaintiff, as claimed by the French defendant, was party to the contract and as such entitled to the payment. Moreover, in the view of the plaintiff, its general terms and conditions had become a component to the contract, prompting the judicial competence of the Land Court in Trier and the applicability of the CISG. The plaintiff also denied any nonconformity of the purchased good.

The defendant asserted that it had entered into the contract not with the plaintiff, but with the aforementioned French subsidiary. Therefore, the seller's general terms and conditions had not become part of the contract, and the applicability of the CISG was arguable. In lieu of the CISG, in the view of the defendant, substantive French law was applicable. On the chance that the plaintiff was nevertheless deemed to be the contractual partner of the defendant and the CISG was deemed applicable, the defendant argued that the asphalt plant was deficient, resulting in an offsetting counterclaim against the seller.

The Court of appeals held that the Court of first instance was internationally, locally, materially and functionally competent to decide the case since the jurisdiction clause

[5] This case is cited in the CISG Digest, 2016 Edition, available at www.uncitral.org.

in the general terms and conditions fulfilled both the formal and material requirements of Articles 5 and 23 Brussels I Regulation. With regards to whether the German company or the French subsidiary had become the contractual partner of the defendant, the Court found that this question constituted a doubly pertinent fact, i.e. with consequences for both admissibility and merit.

Concerning the admissibility, the Court acknowledged that it was an established practice to conduct only a limited conclusiveness test regarding admissibility as part of the test for international jurisdiction, based on the submission made by the plaintiff. In the view of the Court, there were no substantial indications for the inadmissibility of the case. Furthermore, the Court found that while the conclusion of a jurisdiction clause required written form, correspondence or transmission of copies of the paperwork was sufficient and a signature not necessary. Therefore, it considered the requirement of form to be met through the delivery of the general terms and conditions containing the jurisdiction clause.

Concerning the substantive part of the dispute, the Court found the CISG to be applicable. While French law might have applied if the defendant had entered into contract with the French subsidiary, the Court inferred that the German plaintiff had become the contractual partner. The Court based this finding on the fact that the first written offer, while satisfying the requirements set out by Articles 14 and 15 CISG, clearly identified the plaintiff as its originator even though the offer was signed by an executive of the French subsidiary. Nevertheless, in the view of the Court this fact did not bear significant weight, especially since the general terms and conditions of the German plaintiff were attached to the offer, and subsequently signed or at least initialled by the defendant.

Moreover, both the confirmation of order and the invoices sent to the defendant were issued by the plaintiff, combined with the fact that the defendant actually made payments, indicated to the Court that the French subsidiary functioned merely as a payee and French contact address of the German company. Similarly, in the opinion of the Court, the fact that the defendant had reacted to the initial offer by resending it with the added remark “non” could not be interpreted as a rejection of the offer in the sense of Article 19 CISG. Rather, since the remark only referred to possible technical configurations of the asphalt plant, the Court qualified it as a non-material modification to the offer’s terms and therefore as a purported acceptance in the sense of Article 19(2) CISG, and therefore as irrelevant to the conclusion of the contract as such.

Case 1738:[6] CISG 1(1)(a); 8; 30; 34; 49(1)(a)[7]

Russian Federation: Federal Arbitrazh Court of Far East Circuit
Decision No. FOZ-7781/2010 in Case No. A73-14198/2008
2 November 2010

Original in Russian

This case relates to the nature of the seller’s obligations in an international sale of goods, as required by the contract and CISG. It also deals with the interpretative criteria of the parties’ statements or conduct.

A contract was concluded between a Chinese seller and a Russian buyer relating to the purchase of warehouse metal frames. Under Section 4 of the contract, after making an advance payment in the amount of 20 per cent (within 10 calendar days after the conclusion of the contract), the buyer was required to pay the remaining 80 per cent of the purchase price by letter of credit (within 10 calendar days after notice that the goods were ready for shipment was provided). If the seller failed to deliver the goods, it was required to return the money received for the goods within 75 days from the date of the advance payment. According to the contract, the seller

[6] This case is cited in the CISG Digest, 2016 Edition, available at www.uncitral.org.

[7] Ms. A. Stepanowa, voluntary contributor, has contributed to the editing of this abstract.

should also send the documents concerning the purchased goods by express mail within 5 days from the date of conclusion of the contract.

In September 2008, the buyer made an advance payment to the seller as stated in the contract. In November 2008, the buyer sent to the seller a notice of termination of contract and a request to return the advance payment. However, the seller ignored the request. Pursuant to the Article 49(1)(a) CISG, the buyer sued the seller to declare the contract avoided claiming that the failure of the seller to perform its obligations amounted to a fundamental breach of contract.

In denying the claim, the lower instance courts relied on Article 8 CISG to interpret the statements and conduct of the buyer. The courts established that the contract does not specify the form of the notice that the product is ready to be shipped, as well as the place of such notification, transfer of the full package of documents and the list of documents. Based on the testimony of the buyer's representative and the relationship between the parties, including copies of the documents relating to the transactions and any other available information, the courts came to the conclusion that at the beginning of September 2008, the seller presented the required documentation to the buyer and informed it that the product was ready to be shipped after the final payment.

The Federal Arbitrazh Court of Far East Circuit did not agree with the conclusion of the lower courts that the contract does not contain any provisions regarding the transfer of documents and held that there was no evidence to support the argument that the parties were in compliance with the corresponding provisions of the contract.

First, the Federal Arbitrazh Court elaborated on the Article 1(1)(a) CISG. According to the Court, the CISG is applicable since the contract was between parties whose place of business is in Contracting States of the Convention and since the parties did not exclude the application of the Convention.

Referring to Article 30 CISG, the Court then reaffirmed the obligation of the seller to deliver the goods, hand over any relevant documents, and transfer the property in the goods, as required by the contract and CISG. Moreover, the Court stated that if the seller is bound to hand over documents relating to the goods, it must hand them over at the time and place and in the form required by the contract. If the seller has handed over documents before that time, it may, up to that time, cure any lack of conformity in the documents, if the exercise of this right does not cause the buyer unreasonable inconvenience or unreasonable expense. However, the buyer retains any right to claim damages as provided for in the Convention (Article 34 CISG).

Disagreeing with the position of the courts of lower instance, the Federal Arbitrazh Court was of the opinion that the parties had clearly agreed on the form and time of document delivery. The Court referred to Section 5 of the contract and noted that it clearly established the obligation of the seller to send the complete package of documents by express mail within 5 days after the conclusion of the contract. However, the Court found that there was no evidence that this obligation had been fulfilled. The documents that the lower courts considered were in Chinese and were not supplemented with a duly certified Russian translation, in violation of the Russian Arbitration Procedural Code. Also, the buyer's representative, who allegedly received the technical documentation, was not authorized to act on its behalf, which the lower courts failed to consider. Considering the lack of duly submitted evidence, the decision of the lower courts that the seller had fulfilled its obligations and the buyer had failed to pay the contract price, were premature.

The case was thus remanded for retrial at first instance.

Case relating to the Convention on the Limitation Period in the International Sale of Goods (as amended in 1980) (Limitation Convention)

Case 1739: Limitation Convention (as amended in 1980) 8; 17

France: Court of Cassation, First Civil Division[8]
Appeal No.: 15-28.767
17 May 2017
Original in French

Available in French from Légifrance: www.legifrance.gouv.fr

An Austrian company concluded with a natural person an exclusive sales representation agreement on Italian territory, under which that person was responsible for selling "on its behalf all its products on Italian territory". As a result of difficulties in the performance of the contract, the person initiated legal action against the company before the Italian courts to claim compensation for damage. Those courts were found not to have jurisdiction owing to the contractual clause governing jurisdiction, which assigned jurisdiction "to the Court of Strasbourg". After applying to the District Court of Strasbourg, the claimant filed an appeal against the judgment before the Court of Appeal of Colmar, which rejected the appeal. The claimant then appealed to the Court of Cassation to overturn the ruling rejecting the appeal.

The Court of Appeal faced a twofold problem in interpreting the contract: the legal nature of the contract and the clause therein governing applicable law. The judges determined that the contract was a sales concession contract and not a commercial agency contract. Although the contract was drawn up in two languages, German and Italian, the judges gave precedence to the German version, which stated that "the applicable law is international law". Accordingly, the Court of Appeal indicated that reference should be made to the international rules governing the matter in the context of the sale of goods, and in particular the Convention on the Limitation Period in the International Sale of Goods as amended by the Protocol amending the Convention on the Limitation Period in the International Sale of Goods. The Court of Appeal stressed that it was immaterial that the Convention had not been ratified by Austria and Italy; the parties had been free to decide that the Convention would govern their contract. Based on Articles 8 and 17 of the Limitation Convention (amended in 1980), the judges found that the action brought by the claimant before the District Court of Strasbourg was time-barred. Following the ruling that the Italian courts did not have jurisdiction, the claimant had a one-year time limit for bringing an action before another tribunal under the Limitation Convention. However, the claimant recommenced legal action against the Austrian company four years later.

The Court of Cassation overturned that decision under Article 3 of the Civil Code, on the sole ground that "the reference to international law could not be regarded as a choice of law to govern the contractual relationship". Therefore, the trial judges should have determined the national law governing the contract in order to establish the applicable limitation period.

[8] Contested decision: Court of Appeal of Colmar, 12 November 2014.

Case relating to the United Nations Convention on Contracts for the International Sale of Goods (CISG) and to the Convention on the Limitation Period in the International Sale of Goods (unamended, 1974) (Limitation Convention)

Case 1740: CISG [3(1)]; 3(2); [30; 31]; Limitation Convention 6(2) (unamended text, 1974)

European Union: Court of Justice of the European Union, 4th Chamber[9]
Case C-381/08
Car Trim GmbH v. KeySafety Srl
25 February 2010

Original in German

The German seller (i.e. the claimant) contracted, in the form of five supply agreements, with an Italian car manufacturer for the sale of components to be used in airbag systems. The respondent terminated the contracts though the claimant retained the view that the contracts should have run, in part, for four additional years and thus claimed the termination was in breach of contract. Subsequently, the claimant brought action before the Landgericht Chemnitz (Regional Court of Chemnitz, Germany) which held that it had no international jurisdiction. The appeal was also dismissed by the Higher Regional Court for the same reasons. The seller thus brought an appeal on a point of law before the Bundesgerichtshof (German Federal Court of Justice, hereinafter, BGH), which referred the case to the Court of Justice of the European Union (hereinafter, CJEU) for a preliminary ruling on the interpretation of Article 5(1) of Council Regulation (EC) No 44/2001 of 22 December 2000 on jurisdiction and the recognition and enforcement of judgments in civil and commercial matters. Two questions were referred for such preliminary ruling.

First, the BGH asked the CJEU to determine whether the contracts at hand were for the sale of goods or for the provision of services since they contained both provisions for the supply of goods to be produced or manufactured *and* for the provision, fabrication and delivery of the components to be produced, leaving open under which category the entire transaction could be classified. The CJEU was requested to determine what criteria were decisive for that particular distinction.

The CJEU noted that under the Article 3(1) CISG and Article 6(2) of the Limitation Convention (1974, unamended text), contracts for the supply of goods to be manufactured or produced are to be considered sales contracts unless the party that orders the goods undertakes to supply a substantial part of the materials necessary for such manufacture or production. In this case, the buyer did not supply any materials to the seller even though the buyer determined from which suppliers the seller had to obtain certain materials. This, to the Court, was evidence that the fact goods are to be delivered does not inherently alter the classification of the contract as a sales contract. Moreover, the seller was responsible for the quality of the goods and their compliance with the contract, which added to the contract's classification as a sales contract.

Secondly, the Court had to determine if in the case of a sales contract involving carriage of goods, the place where, under the contract, the goods sold were "delivered" or should have been "delivered", within the meaning of Article 5(1)(b) of EU Regulation no. 44/2001, is to be determined by reference to the place of physical transfer to the buyer.

[9] Council Regulation (EC) No 44/2001 of 22 December 2000 on jurisdiction and the recognition and enforcement of judgments in civil and commercial matters ("Brussels I Regulation") on which the decision is based has been replaced by Regulation (EU) No 1215/2012 of the European Parliament and of the Council on jurisdiction and the recognition and enforcement of judgments in civil and commercial matters ("Regulation 1215/2012" or "Brussels I*bis* Regulation") (12 December 2012). The Secretariat publishes this abstract as the case at hand is cited in the CISG Digest, 2016 Edition, available at www.uncitral.org.

In this regard, the Court noted that pursuant to that Regulation, the place of performance of the obligation can be determined by the parties in the contract. When such reference is not evident from the contract provisions, another criterion must be used. Two places of "delivery" can be considered for that purpose: the place of the physical transfer of the goods to the buyer and the place at which the goods are handed over to the first carrier for delivery to the buyer. The Court held that the place where the goods were physically transferred or should have been physically transferred to the buyer was the most consistent with the origins, objectives and scheme of Article 5(1) of Regulation No 44/2001. Furthermore, the place of physical transfer was fulfilling better the purpose of a sales contract as being the transfer of goods from the seller to the buyer, "an operation which is not fully completed until the arrival of those goods at their final destination".

The CJEU thus remanded the case to the BGH to determine the case in accordance with the CJEU's ruling.