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WAIVER OF LATE NOTICE OF NON-CONFORMITY UNDER ART 39(1) CISG

By Dr. Christopher King

On March 26, 2013, the Bundesgericht (highest court of Switzerland) decided a case of significant practical importance relating to belated notice of non-conformity under Art. 39 CISG. As most readers of this Newsletter know, in light of the provision for uniform international interpretation rule of Art. 7(1) CISG, the decision can be relied on outside of Switzerland as well.

In the case (No. 4A_617/2012, which can be viewed on the website of the Bundesgericht: www.bger.ch), a Swiss importer purchased three types of citrus fruit juice from a German supplier that were to supposed to have “Bio Suisse” certificates. Both Germany and Switzerland are signatories to the CISG, which accordingly applied to this sales contract pursuant to Art. 1 CISG. The seller delivered the juice but not the certificates. Six months later, the buyer noticed that the certificates were missing and requested the certificates. The seller provided the certificates two months later. The purchaser claimed damages for the late delivery of the certificates. The seller claimed that the purchaser lost its claim of non-conformity of the goods, which includes certificates related to the goods, under Art. 39 CISG by waiting more than “a reasonable time”, since the six months delay was unquestionably longer than a “reasonable time” within the meaning of Art. 39(1) CISG.

The buyer claimed that the seller waived its defense under Art. 39(1) CISG by agreeing to furnish the certificates after the time for a reasonable notice had expired. Art. 39(1) CISG is not a mandatory provision of law and can be (and often is) waived by sellers.

The Bundesgericht held that the mere agreement to furnish the certificate was not a waiver of seller’s rights under Art. 39 CISG. Such a waiver would have to show an express intention to accept the legal consequences, i.e. to be liable for the non-conformity despite the overdue notice. Mere actions to cure the non-conformity cannot be viewed as constituting such a waiver.

This was the case, even though the seller in casu only raised the issue of CISG 39(1) at a very late stage in the pleadings.

The reasoning of the Bundesgericht is not limited to non-conforming or missing documents, but also would apply to any other actions intended to cure the non-conformity of a delivery, e.g. sending a revised operating manual after the buyer could not get the product or a certain feature to work but had let the reasonable notice period (often held to be six weeks) expire. The case underlines the significant protection Art. 39 provides to sellers and the need for buyers to give prompt notice of non-conformity if they wish to preserve their rights.

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