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CISG: Italian Court and Homeward Trend - Queen Mary Case Translation Programme Corte d'Appello di Milano 20 March 1998 Italdecor s.a.s. Yiu's Industries (H.K.) Limited (default)

Angela Maria Romito

CASE COMMENTS

CISG: ITALIAN COURT AND HOMEWARD TREND

Queen Mary Case Translation Programme Corte d'Appello di Milano 20 March 1998 Italdecor s.a.s v. Yiu's Industries (H.K.) Limited (default)

Translation by
Angela Maria Romito†
Universities of Bari [Italy] and Pittsburgh School of Law

Editor: Charles Sant 'Elia††
Pace University School of Law[1]

Opinion before Corte d'Appello di Milano, 20 March 1998, Italdecor s.a.s versus Yiu's Industries (H.K.) Limited.

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† Angela Maria Romito holds a Law degree (cum laude) 1994, University of Bari, Bari, Italy. Admitted to the bar in 1997. LLM candidate at the University of Pittsburgh School of law, 2000-2001. CWES Scholarship. Lawyer in Bari, studio legale G. Romito. In addition to this contribution, she edited Italian cases for the Pace cisgw3 database.

†† Charles Sant 'Elia has a B.A. in Political Science and Italian Literature from New York University and studied Political Science at the Universitá degli Studi di Firenze. He received his J.D. from Pace University School of Law and is admitted to the Bar in New York and Connecticut. In addition to editing and translating cases for the Pace cisgw3 database, he has translated Italian texts on linguistics into English.

[1] The full text of the decision is published in Italian *at* http://www.cisgw3.law.pace.edu/cisg/text, and an abstract in English, is available on UNILEX, a computer data base of CISG materials-Center for Comparative and Foreign Law Studies, UNILEX: INTERNATIONAL CASE LAW AND BIBLIOGRAPHY ON THE 1980 U.N. CONVENTION ON CONTRACTS FOR THE INTERNATIONAL SALE OF GOODS (Michael J. Bonell ed., Transnational) [hereinafter Italdecor].

I. Synopsis by the Court

There is Italian jurisdiction over a claim by an Italian [buyer] against a Hong Kong [seller] when the former brings a claim for restitution of partial payment for the purchase of goods that were not delivered in the time fixed by the contract before an Italian judge.

The 1955 Hague Convention sets forth the choice of law rules for international sales of goods, notwitstanding the reference to the law of a non-Contracting State.

Pursuant to Article 3 of the 1955 Hague Convention, when the parties have not specified the applicable law, the sales contract is governed by the national law of the country where the vendor has his habitual residence.

According to Article 14, paragraph II, of Italian Law 218/1995, an Italian judge, when he cannot ascertain the substance of applicable foreign law (in this case, Hong Kong law), can apply Italian law.

Pursuant to Article 1(1)(b), the CISG is applicable to international sales of goods, not only when both parties have their place of business in Contracting States, but also when the rules of international private law lead to the application of the law of a Contracting State.

> Where the situation is appropriate, failure to receive delivery of the goods by the date fixed in the contract, as required by CISG Article 33, entitles the buyer to declare the contract avoided under CISG Articles 45(1) and 49(1), and the cancellation of the purchase order is equivalent to a notice of avoidance under CISG Article 26.[2]

A. *Procedural History*

By a complaint filed before the President of the Tribunal of Milan dated January 15, 1991, [buyer] asked the Court to order a judicial attachment[3] of a bank check in the amount of U.S. $6,000 issued in Hong Kong the previous November in favor of [seller], a firm with a place of business in that country [Hong Kong]. The check was issued on the price of knitted goods that the [buyer] purchased but were not received on the agreed delivery date.

After the trial judge authorized the requested injunction on the title to the check at the Milanese drawer bank, and after the execution started on January 25, 1991, [buyer] sued [seller] before the Tribunal of Milan requesting affirmance of this attachment. On the merits, the [buyer] sought avoidance of the contract signed on November 28, 1990 for [fundamental] breach by the seller, and refund of the sum paid.[4]

The defendant [seller] was in default, and the Tribunal, by an opinion dated March 9 – April 18, 1994, rejected the claim and refused to uphold the attachment. The Court recognized as "reasonable the seller's demand to proceed with the delivery of the goods against the settlement of payment," pursuant to Articles 1498, 1510 and 1182 of the Italian Civil Code, and held that

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[2] *See* United Nations Convention on Contracts for International Sale of Goods, Apr. 11, 1980, Doc. A/CONF.87/18, Annex I (1980) reprinted in United Nations: Conference on Contracts for International Sale of Goods, 19 I.L.M., art. 25 (1980), also available at http://www.cisg.law.pace.edu [hereinafter CISG].

[3] *See* Codice di procedura civile [C.P.C.] art. 679 (It.) (Judges can issue a judicial attachment when the subject property (either chattel or real estate) is in dispute and it is necessary to provide for its custody and management.)

[4] *See id.* art. 675 (The injunction is no longer valid if the proponent does not execute it within 30 days following issuance. It is a temporary restraining order, and as a consequence, in order to make it definitive, the proponent has to start a legal procedure on the merits.)

the plaintiff [buyer] did not prove that the term of delivery was essential, as the [buyer] claimed.

From this [trial] judgment, [buyer] appealed by notice dated September 25, 1995, asking for a full reversal.

[Seller] was in default and the [buyer] having submitted the final appellate brief, the procedure came before the Panel of judges for decision.

[The Court of Appeal of Milan reversed the trial judgment.]

B. *Reasoning*[5]

With respect to the law applicable to the pending case, the transaction is an international sale according to the 1955 Hague Convention, which entered into force for Italy on September 1, 1964.

According to Article 7 of the 1955 Hague Convention, the Contracting States incorporate Articles 1 to 6 in their domestic law in place of the national rules on the same issues; this is true even though the domestic law of the Contacting States refers to the law of a non-Contracting State.

This aspect of the 1955 Hague Convention creates its universal character. In fact, the sale contract in the instant case was concluded without any list of the products sold, and with few words (Delivery: December 3, 1990; Terms of payment: deposit U.S. $6,000.00; Balance: bank cheque) and without any statement by the parties as to choice of applicable law. As a consequence, according to Article 3 of the 1955 Hague Convention, the sale is governed by the domestic law of the country of the residence of the seller, in this case, Hong Kong. However, not

[5] According to Italian law, art. 72 of Law no. 218 (1995), a case can be decided by an Italian judge if there are rules that refer to Italian jurisdiction. When faced with a matter included in the sphere of application of the Brussels Convention 1968, Italian law sets out rules for the jurisdiction of Italian courts even if the defendant does not have his domicile in the territory of a Contracting State. With respect to the special competence of the court under art. 3(2) of Law no. 218 (1995), the interpretative rule expressed by the Court of European Justice must be recalled. According to this rule, in order to apply art. 5(1) of the Brussels Convention of 1968, it is necessary to refer to the contractual obligation, the non-performance of which is claimed to be the basis of the suit. There is Italian jurisdiction for litigation started by an Italian company against a company from Hong Kong when the former asks the Italian judge to certify its right to restitution of amounts paid for the purchase of goods that were not delivered within the time fixed in the contract.

having been able to ascertain Hong Kong law, Italian law governs in conformity to Article 14.2 of the Law no. 218/1995 reforming private international law. It has to be said that the applicable substantive Italian law is not the one stated in the Civil Code, but it is the law related to contracts of international sale introduced by the CISG, which entered into force in our judicial system on January 1, 1988.

The CISG applies not only when the parties have their places of business in [different] Contracting States (this is the case provided under Article 1(1)(a)), but also when the rules of international private law lead to the application of the law of a Contracting State (Article 1(1)(b): the latter is the applicable rule in the present case because it leads to the specific regulation of the national law.

CISG Article 33 applies here. According to this provision, the seller must deliver the goods on the date fixed in the contract, and as a consequence of a failure to perform this obligation (like the breach of any other obligation), the [buyer] has the right to ask the Court to declare the avoidance of the contract if failure to comply with the fixed time for delivery constitutes a fundamental breach of contract (CISG Articles 45 and 49(1)). This does not seem refutable according to that which is said below.

In the pending case, even though the contract was of extremely short duration, taking into account clarifications between the parties in the days following the agreement, there is no doubt that the agreed time of delivery was a fundamental term and that the contract turned on the availability of the goods just before [buyer's] end of the year sales. However, the seller let the fixed time pass without any excuse; this behavior is unjustifiable. The fact that the seller sent an explanatory fax on September 14th (see the fax in the record)[6] expressing the intention (never shown before) to immediately receive payment [before delivery], is not an excuse. The seller may have a right to immediate payment (CISG Article 58(1)), but not if it causes objective prejudice to the essential interest of the other party, because that could constitute "*une contravention au contract . . . essentielle.*"[7]

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[6] The court referred to a document in evidence.

[7] *See* CISG, *supra* note 2, art. 25.

In addition, in the middle of December, in response to the cancellation of the purchase order [by the buyer] – which, in light of the CISG has to be considered as a declaration of avoidance – the seller announced the imminent delivery of the goods ("we will release the goods for sale").

In light of these considerations, there exist the elements necessary to declare the contract avoided (CISG Article 26) and as a consequence [there exist the necessary elements to declare] the right to restitution of the part payment of U.S. $6,000 already attached, with interest thereon.

However there is no evidence to support [buyer's] further claim (pursuant to CISG Article 45(1) and (2)) *"a demander les dommages - interets prévus aux Articles 74 à 77"*[8] because there is no proof of any element relevant to this aspect.

As to the costs of the procedure [of this appeal],[9] in light of the emerging aspects of the investigation, these are charged against the unsuccessful party.

P.Q.M. [per tutti questi motivi (for all these reasons)]

The Court of Appeal of Milan, definitively pronouncing on the appeal brought by Italdecor s.a.s. [buyer] by notice served on May 29, 1995 versus Yiu's Industries (H.K.) Limited [seller] from the judgment of the Tribunal of Milan on March 9 - April 18, 1994, on the default of the Appellee [seller], in reform of the appellate ruling, decrees as follows:

The Court declares the right for the Appellant [buyer] to recover, by effect of the avoided contract, the total amount of US $6,000 which has already been attached, with interest thereon.

II. COMMENTARY

A. *Introduction*

The present case demonstrates that in spite of the widespread dissemination of judicial decisions to help judges in Contracting States apply the United Nation Convention on Contracts for the International Sale of Goods uniformly, CISG Article 7 is still a chimera.[10] Uniformity is a goal expressly ar-

[8] French phrase meaning "claim damages – interest as provided in Articles 74 to 77."

[9] These are the filing costs and include revenue stamps and duty stamps.

[10] CISG art. 7(1) states the following:

ticulated in CISG Article 7(1). To achieve this goal, the creation and the enactment of uniform laws is not sufficient, since the same uniform law can give rise to different autonomous interpretations and, thus, can be applied differently by the judges of different countries.[11]

It has to be stated clearly that while CISG Article 7 does not mandate absolute uniformity of results under the CISG, it does provide that in interpreting the CISG "regard is to be had. . .to the need to promote uniformity in its application. . .."[12] Thus the mandate is to promote uniformity. This mandate requires that those applying the CISG transcend the modes of analysis they are accustomed to using for domestic legal questions. Indeed they must develop a new international legal methodology incorporating the approaches and techniques found in other traditions.[13]

As one author said, the first step to be taken to minimize the danger of diverging interpretations and, thus, non-uniformity in the application of uniform law, is to reject the thesis according to which "by virtue of national proceedings, the [uniform law] conventions transform themselves into domestic law and therefore their interpretation and integration must take place according to the interpretative techniques. . .of the domestic legal system in which they are transplanted and will

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> In the interpretation of this Convention [CISG], regard is to be had to its international character and to the need to promote uniformity in its application and the observance of good faith in international trade; (2) Questions concerning matters governed by this Convention [CISG] which are not expressly settled in it are to be settled in conformity with the general principles on which it is based or, in the absence of such principles, in conformity with the law applicable by virtue of the rules of private international law.

See CISG, *supra* note 2, art. 7(1)

[11] *See* R. J. C. Munday, Comment, *The Uniform Interpretation of International Conventions*, 27 INT'L & COMP. L.Q. 450, 451 (1978). "[E]ven when outward uniformity is achieved following the adoption of a single authoritative text, uniform application of the agreed rules is by no means guaranteed, as in practice different countries almost inevitably come to put different interpretations upon the same enacted words." *Id.*

[12] CISG, *supra* note 2, art. 7(1).

[13] *See* Harry Flechtner, *The Several Texts of the CISG in a Decentralized System: Observation on Translations, Reservations and Other Challenges to the Uniformity Principle in Article* 7(1), 17 J.L. & COM 187, 207 (1998).

be applied."[14] This means that, in order to solve interpretative problems, one should have regard for the international character of the CISG and should not read international uniform law through the lenses of domestic law.[15] The interpretation of the CISG through the technique of the domestic legal system occured in the case translated above, where the decision of the judge of the Court of Appeal of Milan is not internally consistent, revealing, in such manner, the difficulty judges have in approaching international issues independent from the nationalistic approach.

Through an analysis of this decision this Commentary demonstrates that the aforementioned opinion can be criticized for several different reasons. First, the court preferred to dwell more on the jurisdictional analysis rather than on the applicable substantive law. Second, the court did not refer to any decisions rendered by the judicial bodies of other Contracting States. Third, the court at several points contradicted itself. Finally, the court applied the CISG in a parochial way, because the seller was absent.

B. *The Case and its Jurisdictional Aspect*

In summary, the facts are as follows: an Italian buyer (Appellant), and a seller from Hong Kong (absent Appellee) concluded a contract for the sale of knitted goods, with a clause requiring delivery of the goods and payment of the balance of the purchase price beyond a $86,000 deposit (by bank checks) by December 3rd. The goods were not delivered within this time, and shortly after the time for delivery had expired, the buyer cancelled the purchase order. On December 14th, the seller replied that he would deliver the goods after payment of the total amount due.[16]

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[14] Franco Ferrari, *Specific Topics Of The CISG In The Light Of Judicial Application and Scholarly Writing*, 15 J.L. & COM. 1, 9 (1995) (*quoting* Sergio Carbone, *L'ambito di applicazione ed i criteri interpretativi della Convenzione di Vienna*, *in* LA VENDITA INTERNAZIONALE (Milan 1981).

[15] *See* John O. Honnold, *The Sales Convention In Action - Uniform International Words: Uniform Application?*, 8 J.L. & COM 207, 208 (1988); *see also* C. MASSIMO BIANCA & MICHAEL J. BONELL, COMMENTARY ON THE INTERNATIONAL SALES LAW: THE 1980 VIENNA SALES CONVENTION 65, 72 (1987).

[16] *See* Italdecor, *supra* note 1.

The Italian Court issued an injunction in favor of the buyer, stopping payment. The buyer then sued the seller for confirmation of the injunction (meaning that the buyer claimed the refund of the sum paid) and, with reference to the substance, the buyer claimed avoidance of the contract for breach by the seller.

The first part of the court's opinion refers to jurisdiction. By a tortuous reasoning, the appellate court found that it had jurisdiction on the ground that the object of the pending proceeding was not the sale contract, but the "restitutory obligation."[17] The judge specified that the court was not dealing with the sale contract, but with the refund obligation,[18] which, as the court specified, depends on the lack of delivery of the goods in the time fixed in the contract. Therefore Italian jurisdiction was grounded on Article 3.2 of the Legge 218/1995 (the reform of international private law), which was remanded to Article 5.1 of the Brussels Convention.[19]

The first point worth noting is that the Italian judge spent more than three pages of the opinion explaining reasons for Italian jurisdiction and then only a few sentences about the substantive law applicable to the case.[20] In the opinion of the writer, this behavior is symptomatic of the lack of confidence of Italian judges concerning CISG issues.

C. *The Analysis of Applicable Law*

According to the court, the substantive law applicable to the case at hand is Article 7 of the 1955 Hague Convention, and since Italy ratified the Convention, it has to be considered as

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[17] The judge states that he was dealing with the restitutory obligation, which is the consequence of avoidance.

[18] This statement is contradicted later, when the judge, instead of making a judgment on the refund obligation, declares the contract avoided and consequently the attachment valid (resulting in restitution of the deposited amount).

[19] The court stated that pursuant to art. 3 of Law no. 218 (1995), cases are decided before the Italian court, even if the defendant does not have his domicile in the territory of a Contracting State, when the case is related to one of the matters to which the Brussels convention applies. Article 3(2) states special competence of the Italian Court since it states that it is necessary to refer to the contractual obligation whose non-performance is claimed. In other words, since the buyer was claiming the refund of the deposited money, art. 3 of Law no. 218 (1995) applies and the Italian judge has jurisdiction.

[20] *See*, CISG *supra* note 2, arts. 1(1)(b), 25, 26, 33(a), 45 and 49(1)(a).

part of the national law.[21] According to Article 3 of the 1955 Hague Convention, unless the parties choose a specific law applicable to their contract, the law of the seller's place of business governs the contract.[22] However, the court was unable to ascertain the applicable Hong Kong law, and as a consequence of the application of the Italian Rules of Private International Law,[23] determined that Italian law would govern the contract. However, the court stated that the Italian law that governed the contract was not the Italian Civil Code per se, but the CISG, pursuant to Article 1(1)(b), which had to be considered as domestic law.

According to the judges, the seller failed to perform his obligation under CISG Article 33(a), and the remedy for the buyer is provided by CISG Articles 45(1) and 49(1)(a). The court stated that, in spite of the duration of the contract between the parties, it was clear that the time of delivery was a fundamental element for the buyer, because of the circumstances (i.e. the goods were to be re-sold during Christmas time), and because of

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[21] The Hague Convention is considered as if it were a part of the Italian Civil Code, equal to Italian domestic law. Convention on the Law Applicable to International Sale of Goods art. 3, *available at* http://www.jus.uio.no/lm/hcpil/applicable.law.sog.convention.1955.toc.html [hereinafter 1955 Hague Convention].

[22] *See* id, art. 3. The 1955 Hague Convention. In default of law declared applicable by the parties under the conditions set by the preceding Article, a sale is governed by the internal law of the country where the vendor has his habitual residence at the time when he receives the order. If the order is received by an establishment of the vendor, a sale is governed by the internal law of the country where such establishment is located. However, a sale is governed by the internal law of the country where the purchaser has his habitual residence or where he has the establishment which gave the order, if the order was received in that country either by the vendor or his representative, agent, or traveling salesman. In case of a sale at the exchange or at a public auction, the internal law of the country where "the exchange is located or the action take place" governs the sale.

[23] *See* Italian Rules of Private International Law [hereinafter L218/1995] art. 14.2. The translation of the Article is as follows:

> (1) The ascertainment of the foreign law is made by the judge *ex officio*. For this purpose he can avail himself, in addition to the instruments mentioned in the international conventions, of information received by the Ministry of Justice; he can also request the aid of experts and specialized institutions.
>
> (2) When the judge cannot ascertain the foreign law, even with the help of the parties, he can apply the applicable law through other criteria. Otherwise he can apply Italian law.

Id.

the contacts that the parties had after the conclusion of the agreement.

In its reasoning, the court stated that the seller in this case could invoke CISG Article 58(1). According to this provision, if the contract is silent about the time of payment, the buyer must pay the price of the goods when the seller places either the goods or the documents at the buyer's disposal. Moreover, the seller may make payment a condition for handing over the goods or documents. The court observed that CISG Article 58 (1) stated a right that the seller can only exercise in a manner that does not cause an objective prejudice to the other party and that he cannot make total payment a condition for handing over the goods; otherwise, it would be a fundamental breach of contract. In fact, the seller demanded payment as a condition to shipment only in reply to the cancellation of the purchase order sent by the buyer (which the court said should be considered as equivalent to a notice of avoidance under CISG Article 26). Finally, the court stated that the seller is not entitled to recover damages under CISG Articles 74 and 77 since he did not prove his right to claim such damages.

Although the statements in this part of the opinion seem to be logical and coherent, a closer examination shows inconsistencies and weaknesses in the opinion.

D. *Examination of the CISG Articles.*

The reasoning of the court that led to the application of the CISG creates some elements of perplexity and its reasoning is quite peculiar. In spite of the fact that, pursuant to the 1955 Hague Convention, the contract is governed by the law of the seller's place of business, the court, stating that it was unable to ascertain the applicable Hong Kong law, applied Article 14.2 of the Italian Rules of Private International Law (L. 218/1995).[24] The last sentence of this rule states that, in such circumstances, Italian law will govern the contract.

The Court, however, did not take into account all the provisions of Article 14 of the above mentioned law. It simply jumped to the end, and stated that in the present case, Italian law governs the contract, and the Italian law in question is not the Ital-

[24] *See id.*

ian Civil Code, but the CISG pursuant to Article 1(1)(b), which has to be considered as domestic law. Reading carefully the provisions of Article 14 of L. 218/1995, the judge is obliged to research the foreign law and he is obliged to study it in order to be knowledgeable concerning the foreign provisions. This Article states that the Italian judges must ascertain the foreign law *ex officio,* using for this purpose (1) instruments mentioned in the international conventions; (2) information received by the *Ministero di Grazia e Giustizia*;[25] (3) the help of experts and specialized institutions; and (4) the help of the parties. Only if he fails to ascertain the foreign law through these resources can he move to another law applicable to the case, and only in the last instance, can he apply Italian law.

The Court of Appeal of Milan did not take into consideration all the provisions of Italian private international law, and merely stated that because determining Hong Kong law was difficult, Italian law (CISG) had to be applied. This solution theoretically seems unfair, but it could be argued that it would have been too expensive to be informed about Hong Kong law, given the failure of the seller to appear.[26] In other words, the judge seems to have chosen the shortest and easiest solution, in favor of the Italian buyer.

Would the result have been the same, (i.e., would the court have applied the law of the forum) if the case involved an American plaintiff appearing before an American Court? Probably yes, but only because in the United States, with its adversary system, the party who is absent from the proceeding has few rights.[27]

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[25] Ministry of Justice.

[26] This policy reason, in truth, seems to be a weak consideration in the Italian legal system, given the rule of *"libero convincimento del giudice."* This means that the judge, according to the Italian legal system, in his decisions is bound only to the legislative norms. He must simply apply them, without making value judgments.

[27] *See*, Sec. 44.1 Uniform Interest and International Procedure Act, 9 BULA, 305 (1962); *Tidewater Oil Co. v. Walter*, 302 F.2d 638 (10th Cir. 1962). *See generally* FEDERAL RULES OF CIVIL PROCEDURE (FRCP).

1. *CISG Article 1(1)(b)*

According to the Court, the applicability of the CISG in this case is governed by Article 1(1)(b).[28] CISG Article 1(1)(a),[29] states that "the Convention [CISG] is 'directly' applicable when the parties have their places of business in different Contracting States,"[30] and they have not excluded the CISG as the applicable law. However, the applicability of the CISG is not necessarily excluded where the parties do not have their place of business in different Contracting States. By virtue of what has been defined as a "classical solution" provided for in CISG Article 1(1)(b), the CISG can be applied even where one or both parties do not have their places of business in Contracting States,[31] provided that the rules of private international law lead to the application of the law of a Contracting State.[32]

In the present case, at the time of the proceeding, Hong Kong was a colony of England, and therefore the seller was not in a Contracting State; nevertheless, the application of the rules of L.218/1995 led to the application of the law of Italy, which is a Contracting State. It is for these reasons that the CISG applies here.

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[28] When the procedure started, Hong Kong was a British colony and the U.K. has never ratified the CISG.

[29] *See* CISG, *supra* note 2, art. 1(1) "This Convention [CISG] applies to contracts of sale of goods between parties whose place of business are in different States:

(a) when the States are Contracting States;

(b) when the rules of private international law lead to the application of the law of a Contracting State." *Id.*

[30] Ferrari, *supra* note 14, at 33; *See* ULRICH MAGNUS, ZUM RAUMLICH - INTERNATIONALEN PRIVAT - UND VERFAHRENSRECHT 390 (1993); Gert Reinhart, *UN-Kaufrecht. Kommentar Zum Überkommen Der Vereiten Nationen,* 11 ÜBER DEN INTERNATIONALEN WARENKAUF, 139 at 13 (1991) (evaluating the criterion laid down in Article 1(1)(a) in terms of leading to the "direct" or "immediate" application of the CISG.).

[31] *See* PETER SCHLECTRIEM, UNIFORM SALES LAW THE UN CONVENTION ON CONTRACTS FOR THE INTERNATIONAL SALE OF GOODS 24, n.45 (1986). The author asserts that the CISG can be applicable even if both parties do not have their place of business in Contracting States. "In cases where both parties do not have their place of business in Contracting States, Article 1(1)(b) CISG can be applied not only by the courts of Contracting States but also by the courts of non-Contracting States, provided the private international law of the non-Contracting State makes applicable the sales law of a Contracting State. . . ." *Id.*

[32] *See* Ferrari, *supra* note 14, at 37.

2. *CISG Article 33(a)*

The court stated that pursuant to CISG Article 33(a),[33] the seller has to deliver the goods by the date fixed by or determinable from the contract, and if the seller does not perform such obligation, and if time is an essential element of the contract, then the buyer has the remedies provided by CISG Articles 45(1) and 49(1)(a).[34]

It is peculiar that the court neither explored CISG Article 25, which is the prerequisite for the application of CISG Article 49(1)(a), nor verified if the fixed time was really an essential element. The court simply stated that in spite of the duration of the contract between the parties, there was no doubt that the time of delivery was a fundamental element for the buyer, in light of both the circumstances (i.e., the goods should have been re-sold by the buyer during Christmas time) and the contacts that the parties had after the conclusion of the agreement. This part of the opinion is weak, because the Court simply assumes, *without any other evidence*, that the late delivery is a fundamental breach that leads to avoidance of the contract.

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[33] CISG art. 33 states:

The seller must deliver the goods:

(a) if a date is fixed by or determinable from the contract, on that date;

(b) if a period of time is fixed by or determinable from the contract, at any time within that period unless circumstances indicate that the buyer is to choose a date; or

(c) in any other case, within a reasonable time after the conclusion of the contract.

See CISG, *supra* note 2, art. 33.

[34] In short, under the CISG the seller is under the obligation to "deliver the goods, hand over any documents relating to them and transfer the property in the goods." *Id.* art. 30. If a date or a period of time is fixed the delivery must take place "on that date" or "within that period." Otherwise he must perform "within a reasonable time after the conclusion of the contract." *Id.* art. 33. The seller, on the other hand, is required to deliver goods "which are of the quantity, quality and description required by the contract and which are contained or packaged in the manner required by the contract." *Id.* art. 35. In particular the goods must be fit for the ordinary or particular purpose known to the seller, possess the quality of a sample or model held out to the buyer and be contained in a usual manner or a manner adequate to protect and preserve the goods. If the seller does not comply with one of these requirements he is in breach of the contract. Also the buyer has certain obligations, and the most important are to "pay the price for the goods and take delivery of them." If the buyer fails to do so he is in breach of contact. *Id.* art. 53.

Generally speaking, CISG Article 33, lays down the rules governing the time when the seller must deliver the goods. It contemplates three scenarios: (1) when the contract specifies the exact date of delivery (that follows simply from the principle of freedom of the contract); (2) when the contract provides for a range of times for delivery to occur; and (3) when the contract does not provide a delivery date.[35]

The function of these rules is to determine the date when a buyer who has not received the goods is entitled to exercise his remedies under CISG Article 45 *et seq*. Starting from the moment when the seller fails to deliver the goods within the time described in the article, the buyer is entitled to bring an action requiring delivery,[36] to fix an additional period of time for performance with a view to declaring the contract avoided,[37] or if the delay amounts to a fundamental breach of contract within the meaning of CISG Article 25, to declare the contract avoided with immediate effect.[38] Moreover, from that time onwards the buyer is entitled to claim damages for delay under CISG Articles 45(1)(b) and 74, without giving prior notice of his intention to do so.[39] A buyer claiming a remedy under CISG Article 45 on account of the seller's failure to deliver on time generally bears the burden of proof.[40]

Unless the buyer has established a "*Nachfrist*" deadline under CISG Article 47, the buyer must show that the seller's breach was "fundamental" in order to avoid the contract.[41] With respect to fundamental breach, the question is, did late delivery "substantially" deprive the injured party of what he was entitled to expect under the contract? It is important to

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[35] *Compare* CISG, *supra* note 2, art. 33 *with* U.C.C § 2-309 (1977).

[36] *See* CISG, *supra* note 2, art. 46(1).

[37] *See id.* art. 49(1)(b).

[38] *See id.* art. 49(1)(a).

[39] *See* PETER SCHLECHTRIEM, COMMENTARY ON UN CONVENTION ON THE INTERNATIONAL SALES OF GOODS 356 (2d ed. 1998).

[40] *See* C.P.C. *supra* note 3, art. 2697. Article 2697 states that "the party who wants to state (demonstrate) its own rights before the judge, has to give evidence of the facts on which the rights are based." *Id.* This principle comes from the general latin rule *ei incumbit probatio, qui dicit, non qui negat*, and it has been stated in other cases by foreign judges. For example LG Frankfurt 2/1 O 7/94 (July 6, 1994), *available at* http://www.cisg.law.pace.edu/cisg/wais/db/cases2/940706g1.html.

[41] *See* CISG, *supra* note 2 art. 49(a).

note that in the above case the court does not refer to any decision rendered by judicial bodies of another Contracting State. This may be because, to date, in only one reported CISG case did a court hold that timely delivery was essential. That case involved a dispute between a British seller and a German buyer over the non-delivery of iron-molybdenum (CIF Rotterdam). The Hamburg Court of Appeals held that in CIF Rotterdam, the timely delivery clause in the contract is *per definitionem* an essential term.[42] In all the other cases, however, the buyer has failed to show that time was significant for him, in the sense that the contract stands or falls with timely delivery.

The Oldenburg District Court, for example, refused to find a fundamental breach in a dispute between a German buyer and an Italian seller, where the seller had dispatched summer clothes one day later than the stipulated time.[43] It is interesting to point out that, although the facts of this case were similar to the instant case, the analysis of the court is completely different. The German Court, according to the English translation of the abstract, stated two principles in contrast with the present opinion: (1) the contract *was not effectively avoided* by the buyer simply refusing acceptance and *returning the invoice*; and (2) in order to avoid the contract, the buyer *had to fix* an additional period of time for performance. Applying the same rules to the pending case, and assuming that the purchase order has the same value as the invoice, then arguably the result could have been the opposite.

In another case involving the sale of women's wear, where the French seller dispatched the goods two days after the stipulated time, the Ludwigsburg Petty District Court held that the inconvenience caused by the delay was only of minor importance to the German buyer and thus did not amount to fundamental breach.[44]

If the Italian judge had looked to foreign opinions, he probably would have had a different approach. In the case at hand,

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[42] *See* OLG Hamburg, FRG, (1995), 167 (195), *available at* http://www.jura.uni.freigburgh.de/ipr1/cisg/text361.htm.

[43] *See* LG Oldenburg, (FRG), No., 12 o 2541/95, UNILEX (March 27, 1996), *available at* http://www.jura.uni.freigburgh.de/cgi-bin/urtile/public/searcgdata,idc?nummer=188.

[44] *See* Amtsgeright Ludwigsburg, 4 (1990) 549 (590), *affirmed on appeal* LG Stuttgart, 16 (1991) 40 (91). S 40/91, UNILEX (August 13, 1991).

the judge did not ask the buyer for *any evidence* in order to prove that the time of delivery was an essential element, but he simply stated that the duration of the contract between the parties, and the contacts that the parties had after the conclusion of the agreement, were sufficient to determine that there was a fundamental breach due to the late delivery.

From the opinion it is impossible to properly identify the goods involved in the transaction (the opinion only states that they were knitted goods), but presumably the same goods could have been re-sold in the market even after Christmas time. In other words, I presume the goods in this contract were not goods distinctive of Christmas time (e.g. Christmas trees, or Christmas decorations). Rather they were winter goods (knitted clothes). As a consequence, the present case seems to be similar to the one heard by the Ludwigsburg Petty District Court.

If the buyer had taken delivery of the goods, instead of canceling the purchase order, very likely he would have re-sold the same goods on the market even after Christmas time, but probably at a lower price. Is this (possible) loss of profit sufficient to allow the buyer to declare the contract avoided? The question of whether damages caused by a delay in delivery amount to a fundamental breach of contract does not depend on the amount of damages, but rather on the terms in the contract concerning the time of delivery.[45]

In order to ascertain whether there is a fundamental breach of the contract depends upon the amount of damages or rather on the terms of the contact. A comparison with the foreign opinions on the same matter would have been helpful for the Italian Judge.[46] The Judge in his role as interpreter should have considered "what others have already done,"[47] and furthermore, even if he came to the same conclusion, he may have had different reasons.

Finally, in order to strengthen its decision, the court stated that the buyer, after the conclusion of the agreement, had sev-

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[45] *See* Italdecor, *supra* note 1.

[46] Although knowledge of foreign cases does not solve all the CISG's substantive and interpretative problems, foreign decisions can nevertheless have persuasive value.

[47] DIETRICH MASKOW, THE CONVENTION ON INTERNATIONAL SALE OF GOODS FROM THE PERSPECTIVE OF THE SOCIALIST COUNTRIES, LA VENDITA INTERNAZIONALE, 39-59 (1981).

eral contacts with the seller, and this made it clear to the seller that precise observance of the date of delivery was of fundamental importance to the buyer. In truth, the opinion is very short on this point, and it is unknown if the contacts between the parties after the conclusion of the contract made the seller understand the special interest of the buyer in punctual delivery. The judge seemed to have omitted the analysis of the requirement of foreseeability as indicated in CISG Article 25:[48] when the seller does not foresee or a "reasonable person of the same kind in the same circumstances would not have foreseen" the result that flowed from the breach, there is no fundamental breach. Here the question is, was the seller aware that the late delivery could substantially deprive the buyer of what he was entitled to under the contract? It is possible that the buyer only pressed for the delivery, without explaining its importance to the seller.

There would have been no doubt about the importance of the delivery date, if the parties had put "a time of the essence" clause into their contract. They could have agreed as follows: "Time is of the essence with regard to every obligation of the seller under this agreement. If the seller fails to deliver the products in accordance with the terms provided for in this contract, the buyer, in addition to the right to claim the damages accrued at that date, shall have the right to avoid the contract."

3. *CISG Article 45(1)*

The court took for granted that the time of delivery was an essential element of the contract. It stated that according to CISG Article 45(1) the buyer had several remedies for the breach of contract.[49] Italdecor exercised its right provided in CISG Article 49(1), and claimed damages provided in CISG Ar-

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[48] For a deeper analysis of Article 25 *see infra* Part II(d)(4).

[49] *Compare* CISG art. 45 *with* U.C.C. § 2-711 (buyer's remedies in general).

> (1) If the seller fails to perform any of this obligations under the contract or this Convention [CISG], the buyer may:
>
> (a) exercise the rights provided in Articles 46 to 52;
>
> (b) claim damages as provided in Articles 74 to 77.
>
> (2) The buyer is not deprived of any right he may have to claim damages by exercising his right to other remedies.
>
> (3) No period of grace may be granted to the seller by a court or arbitral tribunal when the buyer resorts to a remedy for breach of contract.

CISG, *supra* note 2, art. 45.

ticles 74 through 77. As has been said before, the court declared the contract avoided, but refused damages for the Appellant.

4. *CISG Articles 49(1) and 25*

Notwithstanding the premises for the court's claim to jurisdiction, according to which the only issue in this procedure was the seller's "restitutory" obligation, the judges discussed the sale obligation and declared the contract avoided because of a fundamental breach by the seller (under CISG Article 49(1)).[50] The court used this remedy in a careless way. Avoidance under CISG Article 49 is not available for just any breach of contract. Avoidance of contract clearly is a drastic remedy,[51] because once a contract has been declared avoided, it is terminated, and the parties are released from their obligations for the future. Academics and commentators[52] emphasize that this avoidance

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See also U.C.C. § 2-715(buyer's incidental and consequential damages), § 2-713 (damages for non delivery or repudiation), § 2-716 (specific performance), § 2-217 (deduction of damages from the price).

[50] CISG art. 49, states:

(1) The buyer may declare the contract avoided:
   (a) if the failure by the seller to perform any of his obligations under the contract or this Convention [CISG] amounts to a fundamental breach of contract; or
   (b) in case of non-delivery, if the seller does not deliver the goods within the additional period of time fixed by the buyer in accordance with paragraph (1) of Article 47 or declares that he will not deliver within the period so fixed.
(2) However, in cases where the seller has delivered the goods, the buyer loses the right to declare the contract avoided unless he does so:
   (a) in respect of late delivery, within a reasonable time after he has become aware that delivery has been made:
   (b) in respect of any breach other than late delivery, within a reasonable time:
      (i) after he knew or ought to have known of the breach;
      (ii) after the expiration of any additional period of time fixed by the buyer in accordance with paragraph (1) of Article 47, or after the seller has declared that will not perform his obligations within such an additional period; or
      (iii) after the expiration of any additional period of time indicated by the seller in accordance with paragraph (2) of Article 48, or after the buyer has declared that he will not accept performance.

CISG, *supra* note 2, art. 49.

[51] *See* Michael R. Will, art. 49, *in* COMMENTARY ON THE INTERNATIONAL SALE LAW, 359 (Bianca & Bonell eds., 1987).

[52] *See generally* PETER SCHLECTRIEM, UNIFORM SALES LAW- THE EXPERIENCE WITH UNIFORM SALES LAW IN THE FEDERAL REPUBLIC OF GERMANY, 1-28 (1991).

remedy should only be granted when there is a "very serious breach of the contract"[53] because it is costly and risky and contradicts the principle of *pacta sunt servanda*.

CISG Article 49(1) allows the buyer to avoid the contract in only two situations: (1) if the seller's failure to perform any of his obligations results in a fundamental breach as defined by CISG Article 25; or (2) if the seller fails or refuses to deliver the goods in an additional period of time allowed by the buyer in conjunction with CISG Article 47(1).[54]

As a consequence, before declaring the avoidance of a contract, the interpreter should verify if the elements required by CISG Article 25[55] are met. As a general principle, the seriousness of the breach should be defined by reference, not only to the extent of damages, but also by reference to the interests of the promise as laid down and circumscribed by the contract. In the instant case the judge should have explored the three elements indicated in CISG Article 25: detriment, expectation and foreseeability.

The meaning of detriment is very hard to determine. It should be interpreted in a broad sense, meaning not only the material loss or damages, but also intangible detriments such as losing a customer or losing resale possibilities.[56] Suffering a detriment occurs when the purpose the aggrieved party had for entering into the contract was foiled.[57] From this follows his interest in avoiding the contract. In other words, it can be said that when compensation for damages can serve as an adequate remedial action, this should be an indication of the fact that there is no fundamental breach under the CISG.

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[53] *See generally* Bianca & Bonell, *supra* note 51.

[54] Briefly, this procedure is called *Nachfrist,* and through it an agreed party can make the other side's failure to perform its basic obligations by a particular date the equivalent of a fundamental breach.

[55] CISG art. 25, states that:

> A breach of contract committed by one of the parties is fundamental if it results in such detriment to the other party as substantially to deprive him of what he is entitled to expect under the contract, unless the party in breach did not foresee and a reasonable person of the same kind in the same circumstances would not have foreseen such a result.

CISG, *supra* note 2, art. 25.

[56] *See generally*, COMMENTARY ON THE INTERNATIONAL SALE LAW, *supra* note 51.

[57] *See* SCHLECHTRIEM, *supra* note 52, at 48.

The opinions expressed by the other courts are useful for the proper interpretation of the rule. In particular, the German Supreme Court has emphasized the need to consider "whether the buyer can still make use of the goods or resell them in the usual commercial relationships without incurring any unreasonable difficulties."[58] It is only when one party's breach frustrates the purpose of the contract to the extent that the other party has no interest in its completion that a fundamental breach arises.

The expectation of the injured party referred to in CISG Article 25 is "what he is entitled to expect under the contract."[59] It is not the personal and subjective interest of the injured party that matters, but the expectation that can be determined by looking at the contract itself.[60]

Finally, referring to foreseeability, CISG Article 25 provides that a breach of contract is not fundamental if the party in breach did not foresee and a reasonable person of the same kind in the same circumstances would not have foreseen the detriment that results.

The detriment to the aggrieved party must "substantially" deprive him of what he is entitled to expect from the contract, and since the detriment to him may be affected by a wide variety of circumstances peculiar to him, the relevant detriment is limited to what the party in breach foresaw or should have fore-

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[58] Bbundesgerichtshof [BGH], VII ZR 51/95 (April 3, 1996), reprinted in UNILEX. The German Supreme Court was dealing with a case slightly different from the case at hand: a Dutch seller and a German buyer concluded several contracts for the sale of cobalt sulphate with specific technical qualities. On the one hand the buyer claimed the contract could be avoided on the ground that the goods he received were not conforming with the ones agreed, and on the other hand the seller denied the buyer's right to avoid and brought suit to recover the purchase price. The Court held that "the fact that the buyer might be forced to resell the goods at a lower price is not to be considered in itself an unreasonable difficulty. . .the buyer should at least have proved unreasonable difficulties in trading the goods in Germany. . . .the fact that the defects of the goods cannot be repaired, it is not itself enough to determine that the breach is fundamental." The same holding should be *a fortiori* valid in the pending case, where the dispute involved for the late delivery of the goods.

[59] CISG, *supra* note 2, art. 25.

[60] *See* A. LORENZ, FUNDAMENTAL BREACH UNDER CISG *available at* http://www.cisg.law.pace.edu/cisg/biblio/lorenz.html *citing* HEINRICH HONSEL, KOMMENTAR ZUM UN-KAUFTRECHT: UEBEREINKOMMEN DER VEREINTEN NATIONEN UEBER VERTRAEGEUEBER DEN INTERNATIONALEN WARENKAUF (1997).

seen. The purpose of this part of CISG Article 25 is to preclude a fundamental breach where the substantial detriment occurs unexpectedly.

It is well known that the main problem of foreseeability is with regard to the time that the detrimental result must be foreseen. The drafters intentionally did not specify in CISG Article 25 whether it should be determined as of the time of the contract formation (as it is under CISG Article 74), or at the time the breach occurred. However, this aspect of the rule has not been taken into consideration in this opinion. It could be argued that a violation of the time for performance constitutes a fundamental breach of contract when the other party cannot use the late delivery for the purpose intended in the contract. According to one author,[61] when the contract stipulates that time is of the essence or uses such customary terms as "fixed," "absolutely," "precisely," "at latest," it could be considered an agreement, where non-fulfillment of this condition will have to be regarded as a fundamental breach of contract. Proof that the legal prerequisites of such breach are not fulfilled is then inadmissible. The Italian court, however, said nothing about these three elements, and avoided the problem of valuation of the above elements by simply overriding these rules.

5. *CISG Article 26*

In order to justify the behavior of the buyer, who seemed to have decided to terminate the contract without much thought, the Italian Court stated that the cancellation of the purchase order is equivalent to a notice of avoidance under CISG Article 26.[62] While on the surface the Court's response seems logical, its reasoning is flawed.

The meaning and the purpose of CISG Article 26 are to forbid ipso facto avoidance. Therefore, requiring that notice be given by an avoiding party of a remedy as drastic as avoidance aims to encourage certainty in transactions. Without such a rule, tradesmen would be confused with regard to the rights

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[61] *See* FRITZ ENDERLEIN & DIETRICH MASKOW, UNITED NATION CONVENTION ON CONTRACTS FOR THE INTERNATIONAL SALES OF GOODS 114 (1992).

[62] *See* CISG, *supra* note 2, art. 26, which states that "a declaration of avoidance of the contract is effective only if made by notice to the other party."

and duties of the parties to an international sales contract, where one party was in breach.

Avoidance depends on a declaration. The party entitled to avoid can decide to continue to claim performance of the contract even when there are grounds for avoidance. For this reason, a specific form is required for avoidance insofar as it has to be made in the form of a declaration, which can be oral[63] or in writing. Avoidance of a contract by conduct implying intent is not sufficient.[64] Here one has to ask, is the cancellation of the purchase order in the form required for avoidance or is it merely conduct implying intent?

It must be kept in mind that a party's declaration of avoidance transforms the contract into a new relationship within which restitution is to be made. In fact, if the contract is avoided, the parties are released from their unperformed obligations with restitution being made for what has been supplied or paid under the contract.

Given the purposes of requiring notice of avoidance, to be effective the notice must inform the seller without ambiguity that the buyer will not accept or keep the goods.[65] Therefore, it must fulfill the requirements of clarity, unconditionality and irrevocability.[66] Moreover, the meaning of "notice" requires that there is clarity and precision in regard to the addressee's identity.

By virtue of the general principle of CISG Article 11, the declaration does not need to observe any requirement as to form, but any specific form required by the contract or by usage must be observed.

Consequently, applying these rules to the present case, the cancellation of the purchase order should be considered clear, unconditional and irrevocable conduct, precisely addressed to the seller, which declares implicitly, but unambiguously the will of the buyer. Therefore, in the opinion of this author, the cancellation of the purchase order is a valid form of notice of avoid-

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[63] *Compare* to U.C.C. §§ 2-602(1), 2-608(2) and 2-607(3).

[64] *See* ENDERLEIN & MASKOW *supra* note 61 at 74-75; *but see* Farnsworth, Article 8, *in* COMMENTARY ON THE INTERNATIONAL SALE LAW, 95-102 (Bianca & Bonell eds., 1987) (The concept of declaration also covers implicit conduct).

[65] The same requirement applies to the seller's declaration of avoidance.

[66] *See generally* CISG, *supra* note 2.

ance, unless any specific form is required by usage in Hong Kong.

6. *CISG Articles 74 and 77*

Referring to the claim for damages, the Italian court stated that the appellant had not proven any of the material elements of the claim. This finding is not consistent with the conclusion that the buyer had avoided the contract. If there is a breach of contract, and the contract is avoided, then the aggrieved party "automatically" has the right to recover for damages, and he does not need to give evidence in order to prove his right.

Most likely the judge wanted to say that the party did not prove the amount of damages, the loss of profit, the current price of the goods at the time of avoidance, and the expectation damages in general.

If in the present case, the delay in the time of delivery was a fundamental breach, it is obvious that the buyer suffered losses from being unable to resell the goods during Christmas time. In other words, there is no doubt that the buyer has suffered damages for which he can claim compensation (the court does not need evidence to prove the right of the buyer), but there is a lack of evidence for the *quantum* (the buyer should have proven the amount of the damages).

E. *Conclusion*

What conclusions can be drawn from this case?

The present case shows that sometimes the national courts still do not feel very confident in dealing with issues of international sales law, at least when the applicable law is the CISG and not the ordinary principles of domestic codes.

In this specific case, however, the decision of fundamental breach is inconsistent with both the CISG and the Italian Civil Code. As a general principle of the Italian Civil Code, the time of delivery is an essential element of the contract. If the time of delivery is not expressly stated between the parties, it can be assumed only if there are clear, unequivocal and univocal circumstances. However, in a contract concluded on November 28th for the sale of knitted goods, it is unclear whether one should assume an intention by the buyer to receive the goods in

time for the holiday season as an implicit term establishing the essentiality of time.

It seems that the "need to promote uniformity in [the CISG's] application"[67] remains at best an unrealized idea. In fact, the present case shows that it is not sufficient for courts to consider international uniform laws as "autonomous bodies of rules,"[68] but they must also consider the practice established by other States in applying the uniform law.[69] The interpretation moreover should look at the historical record surrounding the drafting of the CISG (*"travaux preparatories"*) and at the commentaries on the CISG.

The idea of uniform interpretation and of the circulation of decisions among all countries, is very far from the Court of Appeal of Milan.[70] The court did not look to other international "sources" and moreover, because of the inconsistencies in the reasoning explained above, its opinion will probably have little persuasive value for other CISG cases in foreign courts or arbitrational tribunals. The Italdecor decision is cryptic, and parochial, and it is written in a way that is hard to understand even for an Italian.[71]

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[67] CISG, *supra* note 2, art. 7.

[68] *See also* COMMENTARY ON THE INTERNATIONAL SALE LAW, *supra* note 51, at 74-75.

> An important reason for the autonomous interpretation of the Convention [CISG] relates to the Convention's [CISG] ultimate aim, which is to achieve worldwide uniformity in the law of international sale contracts. To this end it is not sufficient to have the Convention [CISG] adopted by the single States. It is equally important that its provision be interpreted in the same way in various countries.

Id.

[69] *See* Ferrari, *supra* note 14, at 12.

[70] *See* Italdecor *supra* note 1.

[71] At the time when this Article was written the Italian opinion dated July 12, 2000 was not yet available. In the opinion of the writer, that decision is outstanding and should be a sample for the future pending cases. The opinion is especially remarkable for the numerous foreign cases cited and for application of the CISG faithful to the letter and spirit of the uniform law. The text of the opinion is available on line at Pace University web site *at* http://cisgw3.law.pace.edu/cisg.