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Summary of Swiss case law on the CISG from 2008 until March 2013

Cette contribution résume toutes les décisions des tribunaux suisses prises entre 2008 et mars 2013 et relatives à la Convention des Nations Unies sur les contrats de vente internationale de marchandises, conclue à Vienne le 11 avril 1980. Toutes les questions juridiques soulevées dans ces décisions à propos de la Convention sont abordées, à l'exception des questions juridiques sur lesquelles il n'y a pas de controverse réelle. (sl)

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1 Introduction

[Rz 1] This is a digest of decisions of Swiss courts from 1 January 2008 until 31 March 2013 on the United Nations Convention on Contracts for the International Sale of Goods done in Vienna on 11 April 1980 (the «**CISG**») which was transposed into Swiss law with effect from 1 March 1991.

[Rz 2] The principal aim is to present the reasoning and holdings of the Swiss courts. Commentary is kept to a minimum, and is offered chiefly for the limited purpose of indicating where a different view may be taken than that of the decision.

[Rz 3] It is thought that this contribution will be of use, first, in relation to those dealing with the CISG in future cases before the Swiss courts, or which may come before the Swiss courts. Secondly, this contribution may serve as an indication of how the CISG may be interpreted by courts of other legal systems and arbitral tribunals. Lastly, wherever in an international sales case the CISG does not apply but rather suppletive Swiss law does, this contribution may prove of assistance.

2 Private international law determinations

2.1 Forum

2.1.1 Principal issues

[Rz 4] Swiss case law for our period has mainly raised the following questions concerning forum in relation to the CISG: i) the determination of the place of performance, and ii) whether the parties have reached agreement on a matter affecting jurisdiction.

2.1.2 Place of performance obligation

[Rz 5] The Swiss Supreme Court referred to the CISG to determine the place of performance for the purpose of jurisdiction under Article 5(1) of the 1988 Lugano Convention¹ on jurisdiction (the «**1988 Lugano Convention**»)².

[Rz 6] In another case, the Swiss Supreme Court accepted that the determination of place of delivery under Article 31 of the CISG is a valid means of determining jurisdiction based on place of performance obligation under Article 5(1) of the 1988 Lugano Convention.³

[Rz 7] The Berne Obergericht had to determine jurisdiction under Article 5(1) of the 1988 Lugano Convention⁴. The Court found that such an obligation was the obligation being litigated. Its approach was to apply the law determined by Swiss private international law as applying to the contract. On its facts, this was the CISG, and therefore the Court had reference to Articles 57(1) and Article 10 of the CISG to determine the place of performance of the obligation under dispute.⁵

[Rz 8] The St Gallen Kantonsgericht considered the application of the CISG in a case involving a seller based in St Gallen, and two Spanish buyers.⁶ On the facts there was a submission to the St Gallen courts in the seller's general

¹ Convention on Jurisdiction and the Enforcement of Judgments in Civil and Commercial matters done at Lugano on 16 September 1988. RS 0.275.11. The 2007 Lugano Convention (RO 2010 5609; RS 0.275.12) entered into force in Switzerland on 1 January 2011 and by its Article 63(1) only applies to proceedings instituted after that date. Article 5(1) of the 2007 Lugano Convention also provides that the place of performance is an alternative jurisdiction in contractual matters but in Article 5(1)(b) goes on to stipulate that for sale of goods contracts, unless the parties agree otherwise, the place of performance is the place where «the goods were delivered or should have been delivered».

² Decision of the Swiss Supreme Court 4A_24/2013 of 23 April 2013, consid. 4.

³ Decision of the Supreme Court 4A_131/2009 of 26 June 2009 (CISG-online 1907), consid. 4.4.1.

⁴ Berne Obergericht decision N° HG 06 36/SCA of 19 May 2008.

⁵ Berne Obergericht decision N° HG 06 36/SCA of 19 May 2008, consid. 3.2.

⁶ Decision of the St Gallen Kantonsgericht HG.2009.164 of 15 June 2010 (CISG-online 2159).

conditions, and the buyers disputed that they had accepted these general conditions. The Court began by affirming that the 1988 Lugano Convention applied to determine the question of forum, and notably that by its Article 17 the parties were free to make a choice of forum.⁷ Then the Court stated that it did not need to examine whether the requirements of such a choice of law had been made since by Article 5(1) of the 1988 Lugano Convention the courts of the place of performance also have jurisdiction, and it would go on to find that these were the courts of St Gallen anyhow.

[Rz 9] So the Court next enquired into where the place of performance was. It enquired whether the seller's conditions, in particular concerning the place of performance, had been accepted by the buyer. Those conditions chose Swiss law to the express exclusion of the CISG. The Court then decided to apply the CISG to determine whether the parties had made a choice of Swiss substantive law to the exclusion of the CISG in the seller's general conditions. The Court reasoned that it must apply the CISG since only by applying it is an exclusion of the CISG possible, namely by virtue of Article 6 of the CISG.

[Rz 10] The Court then went on to consider the parties' declarations relating to the adoption of their contract in light of Articles 18 and 19 of the CISG. In the end, the Court found that the buyer accepted the seller's general conditions, including the choice of Swiss substantive law to the exclusion of the CISG in that the buyer paid money to the seller on account. In the result then, the Court found that the CISG did not apply, but rather domestic Swiss law did.

[Rz 11] The Court then found that by Article 74(2) of the Code of Obligations («CO») the place of performance is the place of the creditor's establishment, i.e. the Canton of St Gallen, Switzerland. It therefore concluded that it had jurisdiction.

[Rz 12] It is peculiar that the Court did not proceed to determine whether there was a valid choice of forum as a matter of priority over any objective determination of the forum. There is no difficulty in applying the contract law of the forum to this question, since so applied the contract law is not substantive but rather a matter of private international law. In view of the fact that both parties had their domicile in 1988 Lugano Convention countries, the formal requirements of a valid choice of forum under Article 17 of that Convention would have had to be fulfilled.

[Rz 13] Only if the Court had found that there was no subjective connection, that is no valid choice of law, should it have proceeded to ascertain what objective connections there were. That would have involved a look first at the 1988 Lugano Convention, yielding as for the defendant's domicile and the place of performance of the obligation being litigated. The place of performance would then need to be determined as a

matter of the substantive law of the forum, in this case Swiss law. Again, it would appear the better view that the CISG is relevant here, in particular its Articles 30 and 31 (and not Article 74 CO).

[Rz 14] It is not incorrect that the Court had reference to the CISG in determining whether the buyer had accepted the seller's conditions, and with them the choice of Swiss law to the exclusion of the CISG.⁸ One needs to assess whether the parties intended to exclude the CISG not just for substantive application but also for private international law purposes. The law ordinarily accepts that a choice of law is limited to substantive matters, to the exclusion of private international law matters. The inference may lie therefore that an exclusion is so limited. But there may be a distinction in that, where there is a choice of law, accepting that it extends to private international law matters may result in the non-application of the substantive law apparently chosen and inasmuch may be seen to be contrary to what the parties must have intended. This does not obtain where parties exclude the CISG.

[Rz 15] If it is accepted that the parties intended to exclude the CISG only for substantive purposes, or, which is more likely, the court concludes that the parties' intentions are not clear, the application of the CISG as part of the jurisdictional or applicable law determination is an entirely defensible position. The CISG applies independently of the parties' proactive will. It applies for the purposes not just of substantive contract law determinations but also for the purposes of private international law determinations which refer to substantive contract law determinations. There is no suggestion otherwise in the instruments adopting the CISG into Swiss law. The CISG is an international instrument enjoying extremely broad acceptance around the world. Its rules are therefore neutral and international, and inasmuch are precisely suited to private international law determinations.

2.1.3 Party agreement affecting jurisdiction

[Rz 16] The Aargau Handelsgericht dealt with a case where there was a choice of the courts of Aargau between the defendant and the assignor of the agreement.⁹ The question was therefore whether the assignee claimant could avail itself of this choice of jurisdiction. The Court noted that the CISG did not cover matters of assignment, and in particular did not cover questions relating to whether a choice of forum has been validly assigned, with the result that the rules to which private international law leads apply.¹⁰

⁷ Decision of the St Gallen Kantonsgericht HG.2009.164 of 15 June 2010 (CISG-online 2159), consid. 5.b).

⁸ This was also the approach of the Berne Obergericht in decision N° HG 06 36/SCA of 19 May 2008, expressly following Ch. BRUNNER, *UN-Kaufrecht – CISG : Kommentar zum Übereinkommen der Vereinigten Nationen über Verträge über den internationalen Warenverkauf von 1980* (Berne: Stämpfli, 2004), 4 N 40.

⁹ Aargau Handelsgericht decision HOR.2009.29/DP/DP of 15 February 2011 (CISG-online 2431).

¹⁰ Aargau Handelsgericht decision HOR.2009.29/DP/DP of 15 February 2011

[Rz 17] The Zurich Obergericht decided a case where the central question was whether the parties had reached agreement on the place of the seller's delivery obligation within the meaning of Article 30 of the CISG for the purposes of determining jurisdiction under Article 5(1) of the 1988 Lugano Convention.¹¹ The Court held (reversing the court below on this issue) that a condition for jurisdiction under this article of the 1988 Lugano Convention was that the claim sounded in contract.¹² The Court stated that there were no formal requirements of such an agreement, and that the case law of the European Court of Justice had established that the formal requirements of Article 17 of the 1988 Lugano Convention were not conditions of the validity of agreement on the delivery obligation.¹³ The Court found that an oral agreement on the place of delivery was reached by the parties on an objective view of their dealings. It held further that this also constituted agreement on the place of the seller's obligation to deliver in that the seller agreed to deliver using its own personnel and means of transport. The Court explained that where the seller's obligations consist in several handlings of the merchandise, the place of the last handling is the place of the end of the seller's last handling.¹⁴

[Rz 18] The Aargau Handelsgericht dealt with a case where, as part of the jurisdictional determination, there was a question as to whether the contract was one of sale or one of commission.¹⁵ It determined that the contract was one of sale. The Court then proceeded to apply the CISG to determine the buyer's place of performance, i.e. the place where the purchase price was to be paid. By Article 57(1) (a) of the CISG this was the seller's place of business. It noted that the Swiss Supreme Court and the European Court of Justice have both accepted that there is such jurisdiction.¹⁶ Thus in this case the Court had jurisdiction.

2.2 Applicable law

2.2.1 Principal issues

[Rz 19] The Swiss case law for our period raised the following main issues in relation to applicable law and the CISG: i) the

application of the CISG as part of the seller's habitual residence, and ii) party choice of substantive law.

2.2.2 Habitual residence

[Rz 20] The Supreme Court applied the law of the habitual residence of the vendor as determined by Article 3(1) of the Hague Convention on the Law Applicable to International Sale of Goods of 15 June 1955 (the «**1955 Hague Convention**») referred to in Article 118(1) of the Swiss Private International Law Act (the «**Swiss PIL Act**») to determine the applicable law where the contract made no choice of law.¹⁷ That was the law of Switzerland, and since Switzerland is a signatory to the CISG, it applied the CISG as part of Swiss law.

[Rz 21] In a case before the Supreme Court there had been an auction over the internet.¹⁸ The Supreme Court held that there was no way to situate an auction over the internet for the purposes of Article 3(3) of the 1955 Hague Convention.¹⁹ By consequence, the Supreme Court applied Swiss law as the law of the seller's habitual residence (within the meaning of Article 3(1) of the Hague Convention referred to in Article 118 of the Swiss PIL Act) and with it the CISG.²⁰

[Rz 22] In a case before the Aargau Handelsgericht the claimant was an assignee, so the law applicable to an assignment of rights was an issue.²¹ The Court applied the private international law rule of the *lex fori*, i.e. Swiss law, and in particular Article 145(1) of the Swiss PIL Act, according to which the law of the underlying claim was applicable. The Court held that to determine the applicable substantive law of the claim the contract which was the subject of the claim must be characterized in principle in accordance with the *lex fori*.²² The claimant asserted that the contract was one of sale, while the defendant asserted it was one of commission. The Court stated that if the contract is characterized as one of sale then the CISG applied to the contract, but the CISG made no provision in relation to assignment. Thus the Court said one must look to suppletive law to which the 1955 Hague Convention directed. By Article 3(1) of the 1955 Hague Convention this was the law of the habitual residence of the original seller, which was German law. On the other hand, if the contract was one of commission, one must look to the place of establishment of the party making the characteristic performance, under Article 117(3)(c) of the Swiss PIL Act. For mandate-like

(CISG-online 2431), consid. 6.3.1.

¹¹ Zurich Obergericht decision Geschäfts-Nr. LN080035/U of 6 February 2009.

¹² Zurich Obergericht decision Geschäfts-Nr. LN080035/U of 6 February 2009, consid. 2.2.(b)

¹³ Zurich Obergericht decision Geschäfts-Nr. LN080035/U of 6 February 2009, consid. 2.1.

¹⁴ Zurich Obergericht decision Geschäfts-Nr. LN080035/U of 6 February 2009, consid. 2.3.(b) and (c).

¹⁵ Decision of the Aargau Handelsgericht HOR.2005.82/ds of 5 February 2008.

¹⁶ Decision of the Aargau Handelsgericht HOR.2005.82/ds of 5 February 2008, consid. 3.5.

¹⁷ Decision of the Swiss Supreme Court 4A_24/2013 of 23 April 2013, consid. 3. Equally, Decision of the Supreme Court 4A_68/2009 of 18 May 2009, consid. 10.2.

¹⁸ Decision of the Swiss Supreme Court 4A_58/2008 of 28 April 2008.

¹⁹ RS 0.221.211.4; RO 1972 1906.

²⁰ Decision of the Swiss Supreme Court 4A_58/2008 of 28 April 2008, consid. 1.4.

²¹ Decision of the Aargau Handelsgericht HOR.2006.79/AC/tv of 26 November 2006 (CISG-online 1739), consid. 4.1 and 4.2.

²² Decision of the Aargau Handelsgericht HOR.2006.79/AC/tv of 26 November 2006 (CISG-online 1739), consid. 4.1.

contracts, such as commission, this is the commissionaire's performance, and therefore Swiss law would be applicable.

2.2.3 Choice of substantive law

2.2.3.1 Party exclusion of the CISG

[Rz 23] The Swiss Supreme Court agreed with an arbitral tribunal that the parties had validly excluded the application of the CISG where the parties had expressly chosen the application of Swiss law «as if domestic parties had been concerned».²³

[Rz 24] The Geneva Cour de justice accepted that by Article 6 of the CISG parties can tacitly exclude the CISG and may do so even in the course of the legal proceedings. It noted that the parties referred to substantive Belgian law in their pleadings, but concluded that this was no tacit exclusion of the CISG inasmuch as the areas of law involved were not among those covered by the CISG.²⁴

[Rz 25] The St Gallen Kantonsgericht was requested to determine the applicable substantive law in a case where the seller was from St Gallen, Switzerland, and the buyers were established in Spain.²⁵ There was a stipulation for Swiss law with the express exclusion of the CISG in the seller's general conditions of sale, and the question was whether this choice was a valid one. The Court first adverted to the application of the 1955 Hague Convention as a matter of Swiss private international law, and in particular that by Article 2 the parties were free to choose the applicable substantive law. There was a battle of the forms, so Article 19 of the CISG was relevant. The Court found that the buyer had in fact rejected the seller's general conditions in adding and substituting material terms within the meaning of Article 19(3) of the CISG, including as regards dispute resolution. But as the buyer paid an account to the seller, the Court held that this was an acceptance of the seller's general conditions of sale, including the application of Swiss substantive law, to the express exclusion of the CISG.

2.2.3.2 Other

[Rz 26] In a 2009 decision the Obergericht of Aargau declined to determine which law was applicable, Swiss law without the CISG, the CISG, or Austrian law without the CISG in a case where a subcontractor had registered a building lien under Article 839 *et seq.* of the Swiss Civil Code («CC»)

against the claimant employer who sought resultant damages against the defendant general contractor.²⁶ The Court simply observed that under all three possible applicable laws there was an action for damages. For Swiss law the court stated that the action was for positive contractual breach («positive Vertragsverletzung») resulting in compensation under Article 97 CO. For the CISG there was a violation of the seller's duty under Article 41 of the CISG to transfer unencumbered title to the buyer, and damages under Article 74(1) of the CISG. Under Austrian law there was also positive contractual breach and damages under Article 1295 of the Austrian «Allgemeines Bürgerliches Gesetzbuch».²⁷ Although the Court did not determine which law was applicable, it adverted to the interesting issue in this relation of the extent to which a choice of forum may be an indication of the choice of the forum's substantive law.

[Rz 27] In a case involving a German buyer and a Swiss seller (based in Aargau) the Aargau Handelsgericht did not apply the rules under the 1955 Hague Convention (referred to in Article 118 of the Swiss PIL Act) to determine applicable law, but rather applied the test of «closest connection» under Article 117 of the Swiss PIL Act.²⁸ To do so, it first proceeded to characterize the contract. The possibilities were a commission contract (Articles 425 *et seq.* CO) and a sales contract.²⁹ In coming to this determination, the Court applied the interpretation rules in Article 8 of the CISG. The Court found that the better characterization was one of sale, since the parties did agree on a sales price and the buyer then bore the risk of the goods, and moreover the buyer never rendered accounts of its resales to the seller.³⁰

[Rz 28] It would seem preferable first to characterize the contract according to the rules of the Swiss *lex fori* prior to applying the choice of law provisions in the Swiss PIL Act. If that characterization causes the contract to fall under the 1955 Hague Convention (i.e. it is a contract for the sale of goods), then the rules under that Convention will determine the applicable law, and there will properly be no regard to the closest connection test under Article 117 of the Swiss PIL Act.

[Rz 29] In a recent case before the Supreme Court³¹ the subject of the contract of sale was an entire spinning factory including the ventilation and air conditioning systems if they could be removed. The Court held that the law of the place

²³ Decision of the Supreme Court 4A_240/2009 of 16 December 2012 (CISG-online 2047), consid. 2.2. («dass Schweizer Recht zur Anwendung gelange, und zwar so, wie wenn inländische Parteien («domestic parties») betroffen wären [...]»). (consid. 2.1)

²⁴ Geneva Cour de justice decision C/13279/2006 of 12 March 2010 (CISG-online 2426), consids. 2.2 and 2.3.

²⁵ Decision of the St Gallen Kantonsgericht HG.2009.164 of 15 June 2010 (CISG-online 2159).

²⁶ Decision of the Obergericht of Aargau ZOR.2008.16/Eb of 3 March 2009.

²⁷ Decision of the Obergericht of Aargau ZOR.2008.16/Eb of 3 March 2009, consid. 5.3.3.

²⁸ Decision of the Aargau Handelsgericht HOR.2005.82/ds of 5 February 2008.

²⁹ A case raising the same issue was decision of the Aargau Handelsgericht HOR.2006.79/AC/tv of 26 November 2006 (CISG-online 1739).

³⁰ Decision of the Aargau Handelsgericht HOR.2005.82/ds of 5 February 2008, consid. 3.4.2.3.

³¹ Decision of the Supreme Court 4A_753/2011 of 16 July 2012 (CISG-online 2371).

where the vendor as characteristic performer is established applied, and that this rule was not displaced by the fact that the transfer of the goods is linked to real estate in another place.³²

3 Use of the CISG as an interpretive instrument

[Rz 30] In a sales contract the parties provided for remedies in the event of a «material breach». They expressly excluded the application of the CISG. But the arbitral tribunal nonetheless interpreted the term «material breach» with reference, among other things, to how the term «fundamental breach» was used in the CISG. The Swiss Supreme Court held that the use of the CISG as a source of interpretation was not contrary to the parties' choice of law and not an erroneous assessment of jurisdiction justifying the annulment of the arbitration award under Article 190(2) (b) of the Swiss PIL Act. The Supreme Court held that such reference to the CISG was a valid means of interpreting the contract in accordance with the principle of confidence under Article 18 CO.³³

[Rz 31] Moreover, the Supreme Court held that it was not surprising, and therefore no violation of the right to be heard, and no ground of annulment of an arbitration award under Article 190(2) (e) of the Swiss PIL Act, for the arbitral tribunal to have referred to the CISG in interpreting the parties' contractual use of the term «material breach». The Supreme Court reasoned that the parties had made the question whether a material breach had occurred a central one in the arbitration, and that the parties had not defined the term «material breach» in their contract and it was not one that is indigenous to applicable Swiss law. The Court therefore held that it was foreseeable that the arbitral tribunal would look to the meaning of the term in international trade and have reference to the CISG.³⁴

4 Substantive scope of application of the CISG

4.1 Broader scope than sale under Swiss domestic law

[Rz 32] A case before the Supreme Court illustrates that in some instances a contract which materially would be a CISG contract would under Swiss domestic law be a work contract (contrat d'entreprise, Werkvertrag), within the meaning of

Articles 363 CO *et seq.* and not a contract of sale within the meaning of Article 184 CO *et seq.*³⁵ The goods in question were sophisticated laser machines which were made to order and took the Swiss producer two years to build. One destined for a client in Taiwan was damaged while being loaded onto a truck at the place where the machine was built. The question was whether the risk had passed already to the Taiwanese buyer. The CISG applies to «[c]ontracts for the supply of goods to be manufactured or produced [...]» (Art. 3(1) of the CISG), and every other requirement of the CISG was satisfied, so the CISG applied. The Court noted that passage of risk in this case was governed by Article 67(1) of the CISG: «the risk passes to the buyer when the goods are handed over to the first carrier for transmission to the buyer in accordance with the contract of sale [...]». Since the goods had not been handed over to the first carrier, it was the producer of the goods and not the buyer who bore the risk of their loss. The Court went on to review the position under domestic Swiss law. It found that the contract was not one for goods in stock or for mass production, but for a product that needed to be manufactured specifically for the order. It therefore found that this would have been a work contract under domestic Swiss law.

4.2 Service component

[Rz 33] The Supreme Court held that the CISG applied where the sales contract provided that the seller was under a duty to reassemble («Montagepflichten») the spinning factory sold. The Court based itself on the fact that the value of this service component was not the «preponderant» part within the meaning of Article 3(2) of the CISG.³⁶

4.3 Frame-work agreements

[Rz 34] The Aargau Handelsgericht stated that the CISG does not apply to contracts of exclusive distribution but it applies to the individual contracts for the sale of the goods thereunder from principal to distributor.³⁷

[Rz 35] The Geneva Cour de justice was required to determine whether the CISG applied to a framework agreement for the development and sale of ink-jet faxes, and, if so, to what extent.³⁸ It found that the framework agreement contained sufficiently determinate obligations comparable to a

³² Decision of the Supreme Court 4A_753/2011 of 16 July 2012 (CISG-online 2371), consid. 2.

³³ Decision of the Supreme Court 4A_240/2009 of 16 December 2012 (CISG-online 2047), consid. 2.2.

³⁴ Decision of the Supreme Court 4A_240/2009 of 16 December 2012 (CISG-online 2047), consid. 3.3.

³⁵ Decision of the Supreme Court 4A_326/2008 of 16 December 2008 (CISG-online 1800). The Geneva Cour de Justice also applied the CISG in a case involving the sale of goods to be developed, namely consumer electronics, in C/10127/2007, decision of 20 May 2011 (CISG-online 2429).

³⁶ Decision of the Supreme Court 4A_753/2011 of 16 July 2012 (CISG-online 2371), consid. 2.2.

³⁷ Decision of the Aargau Handelsgericht HOR.2008.42/rl/tv of 10 March 2010 (CISG-online 2176), consid. 2.3.1., 2.3.2. and 2.4.

³⁸ Decision of the Geneva Cour de justice of 20 May 2011 in C/10127/2007 (CISG-online 2429).

sales contract, such as the obligation to deliver a product of certain specifications, minimum purchase agreements, and sale price determination. Following a line of Swiss cases dealing with framework agreements for exclusive distribution, the Court determined that the CISG was applicable in relation to the sales elements of the framework agreement under consideration.³⁹

5 Interpretation of CISG contracts

5.1 General

[Rz 36] The Swiss Supreme Court held that the principles of interpretation of declarations and other manifestations of will under Article 8 of the CISG corresponded in substance to the principle of confidence under Swiss law.⁴⁰

[Rz 37] The Zug Obergericht rehearsed the settled law on the interpretation of contracts governed by the CISG.⁴¹ The question for the Court was how to interpret an obligation from one party to repay a significant portion of what that party paid as the purchase price under another contract of the same date. The defendant asserted that the repayment obligation was an under-the-table payment («Schwarzgeldzahlung») and therefore irrecoverable. The Court held that interpretation even under the CISG starts with the words the parties used in their contract although even where the wording is clear one must still have regard to the circumstances enunciated in Article 8 of the CISG. These words clearly showed that the repayment was required. But the Court found that there was ambiguity as to whether only the purchase price resulting from the deduction of the agreed repayment would be paid, or rather whether the larger amount stated in the sales contract paid, and the amount designated in the other contract repaid by the seller. The Court then proceeded to apply the complementary interpretative mechanisms in Article 8 of the CISG. It stated that the most important was the parties' behaviour in relation to the contractual negotiations, but found in this case no guidance. Moreover, there were no clear practices and usages established between the parties. The subsequent conduct of the parties was also inconclusive. The payment was not to the claimant seller's account but to that

of a person associated with the seller, but this was consistent with the claimant's benign explanation. In the result the Court preferred to accept the contract at face value, and concluded that the payment was not for illegal purposes.⁴²

[Rz 38] The Geneva Cour de justice held that a party can agree by acquiescence under Article 18 of the CISG, although silence will not suffice.⁴³

5.2 Party agreement on place of performance

[Rz 39] The Swiss Supreme Court held that by Articles 6 and 31 of the CISG the parties may freely agree on the place of delivery of the merchandise and that this place is also that where the buyer must accept to receive delivery in accordance with Article 53 of the CISG.⁴⁴

[Rz 40] The Swiss Supreme Court accepted that if the contract had stipulated that the price would be paid «against delivery of the merchandise» then by Article 57(1) (b) of the CISG the place of payment would have been the place of the delivery of the merchandise. In the absence of such agreement, the general rule under Article 57(1) (a) of the CISG applies, that is, that the place of payment is the seller's place of business.⁴⁵

5.3 Exclusion of guaranty for defects

[Rz 41] By Article 6 of the CISG the parties can agree that the goods are sold without a guaranty against defects. The Swiss Supreme Court found in a recent case⁴⁶ that the parties had not explicitly excluded the guaranty, and that only a very important reduction in price vis-à-vis the «objective value of the merchandise» can give rise to a tacit exclusion of guaranty. This supposes that both contractual parties are able easily to recognize the objective value of the merchandise. In this case the claimant invoked a value in a very approximate way, and proposed an expert's report to ascertain it. One must conclude from this that the value is not easily recognizable by both contractual parties. Moreover, the Supreme Court stated that such an easily recognizable differential is only an indication of the exclusion of a guaranty, which must be corroborated by other circumstances at the time the contract was entered into. No such corroborating circumstances existed. The court below rejected offers of evidence of the value of the machine, but the Supreme Court held that, since this value was not a

³⁹ Decision of the Geneva Cour de justice of 20 May 2011 in C/10127/2007 (CISG-online 2429), consid. 4.

⁴⁰ Decision of the Swiss Supreme Court 4A_24/2013 of 23 April 2013, consid. 4, citing ATF 135 III 410 consid. 3.2 p. 412; 133 III 675 consid. 3.3 p. 681. Decision of the Swiss Supreme Court 4A_741/2012 of 26 March 2013 citing these same cases. In decision of the Supreme Court 4A_753/2011 of 16 July 2012 (CISG-online 2371), consid. 3.8, the Supreme Court found that the court below had decided in accordance with the objective interpretation under Article 8(2) of the CISG in not concluding that it was not necessarily the parties' intent to evade currency export restrictions in not setting a place of contractual payment.

⁴¹ Zug Obergericht decision OG 2010 8 of 8 November 2011 (CISG-online 2425), consid. 3.3.2.

⁴² Zug Obergericht decision OG 2010 8 of 8 November 2011 (CISG-online 2425), consid. 3.3.4.

⁴³ Geneva Cour de justice decision C/13279/2006 of 12 March 2010 (CISG-online 2426), consid. 6.

⁴⁴ Decision of the Swiss Supreme Court 4A_24/2013 of 23 April 2013, consid. 4.

⁴⁵ Decision of the Swiss Supreme Court 4A_24/2013 of 23 April 2013, consid. 5.

⁴⁶ Decision of the Swiss Supreme Court 4A_741/2012 of 26 March 2013, at consid. 4.

factor that was determinative of the outcome of the action, there was no reason to interfere with the decision below.

5.4 Custom

[Rz 42] In a case before the Supreme Court there was a question whether, within the meaning of Art. 9(2) of the CISG, there was a custom in the international trade of used machines to sell them without a guaranty, with the seller, however, advising when the machine has been subject to an accident or presents a defect which he is aware of.⁴⁷ In this case the court held that the seller did not in fact alert the buyer to the fact of the accident such that such a custom would not assist the seller. Also, the clause «as is, without guaranty» does not prove a custom.

[Rz 43] The Valais Cour Civile had to decide whether there was a general custom within the meaning of Article 9(2) of the CISG and a custom between the parties within the meaning of Article 9(1) of the CISG that the seller would pay customs duties on the delivery of the goods. The contract stipulated «DDU [place]».⁴⁸ The Court noted that DDU in the INCOTERMS designated «delivered duty unpaid», and that in the then most recent set of INCOTERMS this denoted that the seller must deliver the merchandise at the buyer's premises but without import permission and without the payment of customs tax to the buyer, which is rather the buyer's duty to procure. The Court held that the adoption of the INCOTERMS in various contracts between the parties constituted the contents of the most recent INCOTERMS as customary rules binding upon the parties. Moreover, the Court found that the most recent INCOTERMS constituted an expression of general custom in international trade also of application to the contract. By consequence, the Court held that the buyer must bear the cost of customs duty.

6 Validity of the contract

[Rz 44] The Swiss Supreme Court was required to determine what law was applicable to determine whether or not a contract of sale was valid. It held that the CISG did not apply, since it did not cover questions of the validity of contracts.⁴⁹

[Rz 45] The Swiss Supreme Court held that the effect of a breach of a statutory prohibition or a violation of good morals is a question of the validity of the contract, within the

meaning of Article 4 of the CISG, to which subsidiary national law applies.⁵⁰

7 Time limitation

[Rz 46] The interplay of suppletive Swiss law on time limitation and the requirement in Article 39 of the CISG on the buyer to give notice of default to the seller within two years was at issue in a case that came before the Supreme Court.⁵¹ The court held that, provided the buyer gave notice of default within the «reasonable time» of discovery under Article 39 of the CISG, the buyer could rely on such default as a defence in an action brought by the seller beyond the time under Swiss law on time limitation (in this case, Article 210(1) CO). On this basis, the Supreme Court admitted the buyer's defence in this case.

[Rz 47] In another case the Swiss Supreme Court held that the one-year time-limitation period in Article 210 CO could not be shorter than the time period in Article 39(2) of the CISG, which grants the buyer two years after learning of the breach to notify the seller. The basis for the Supreme Court's decision was that it would be contrary to Switzerland's public international law obligations to implement the CISG if in some cases Article 39(2) of the CISG was rendered ineffective by municipal Swiss law.⁵²

[Rz 48] This decision of the Supreme Court was the first time it had to deal with the contradiction between Article 39(1) of the CISG and Article 210(1) CO.⁵³ The Supreme Court was correct in adjusting Swiss law to accommodate the demands of the CISG. Subsequently, the Swiss legislature amended Article 210(1) CO to extend its limitation period from one year to two, with effect from 1 January 2013.⁵⁴

[Rz 49] The Swiss Supreme Court has held that the

⁴⁷ Decision of the Swiss Supreme Court 4A_741/2012 of 26 March 2013, consid. 5.

⁴⁸ Valais Cour Civile Decision C1 08 45 of 28 January 2009 (CISG-online 2025).

⁴⁹ Decision of the Supreme Court 4A_429/2012 of 2 November 2012, consid. 2. See also the decision of the Geneva Cour de justice of 20 May 2011 in C/10127/2007 (CISG-online 2429), consid. 5.3.1.

⁵⁰ Decision of the Supreme Court 4A_753/2011 of 16 July 2012 (CISG-online 2371), consid. 6.3.

⁵¹ Decision of the Supreme Court 4A_753/2011 of 16 July 2012 (CISG-online 2371).

⁵² Decision of the Supreme Court 4A_68/2009 of 18 May 2009, consid. 10.3: «Die einjährige Verjährungsfrist des Art. 210 OR ist jedenfalls insoweit nicht anzuwenden, als dies dazu führen würde, dass die Verjährung vor Eintritt des Ablaufs der zweijährigen Rügefrist von Art. 39 Abs. 2 CISG eintreten und somit zu einem völkerrechtswidrigen Resultat führen würde.» «The one-year limitation period of Art. 210 CO is not to be applied inasmuch as it would lead to a situation where the time limitation took effect before the end of the two-year notification period under Art. 39(2) of the CISG and thus would lead to a result that is contrary to public international law.»

⁵³ In a decision of 10 October 1997 (CISG-online 295) the Cour de justice of Geneva had already adopted this approach of extending the time limitation in Art. 210(1) CO from one to two years.

⁵⁴ RO 2012 5415; FF 2011 2699, 3655. The legal literature had called for an adjustment of Art. 210(1) CO virtually in unison, although various solutions had been suggested. See Decision of the Supreme Court 4A_68/2009 of 18 May 2009, at consid. 10.3 for the three solutions advanced in the legal literature.

interruption of time limitation periods in regard to contracts governed by the CISG is also a matter for suppletive applicable law.⁵⁵ Thus for Swiss law, Article 135 CO applies. Thus time limitation is interrupted by a recognition of the claim, or by introducing administrative debt recovery proceedings (commandement de payer, Zahlungsbefehl). The Swiss Supreme Court explained that a recognition of the claim is any behaviour by the debtor which may be interpreted in good faith in the commercial context as a confirmation of legal obligation.⁵⁶ A seller's attempts to remedy insufficient contractual performance under Article 48 of the CISG are a recognition of legal obligation interrupting time limitation.⁵⁷

[Rz 50] The Swiss Supreme Court held that a buyer's failure to give timely notice of the non-conformity of the goods under Article 39(1) of the CISG deprived the buyer of all remedies under Article 45 *et seq.* of the CISG.⁵⁸

8 Evidence under the CISG

8.1 Burden of proof

[Rz 51] The Supreme Court has accepted that burden of proof is among the matters regulated by the CISG.⁵⁹ Thus if there is no express rule, one must apply general principles of the CISG.

[Rz 52] The court below had stated that it was such a principle that one should have regard to which party is best placed to provide the evidence, and in particular that the buyer who has received and unconditionally accepted the goods must prove any violation upon which she relies.⁶⁰

[Rz 53] In application of this principle, that court had found that the burden was on the seller to prove the adequacy of the performance and not on the buyer to prove its inadequacy. That court identified how the seller could satisfy its burden – by producing packaging lists, cargo lists, and the like, but it does not appear to have articulated why the buyer should be so indisposed in determining whether everything had been delivered. Perhaps it was the technical nature of the goods or the multiplicity of its parts – complete spinning factory, known best to its former operator, the seller.

[Rz 54] The Supreme Court disagreed. It pointed out that the buyer opened the goods without making objection, and the parties agreed that the seller was not present at the opening of the goods. The Supreme Court therefore held, consistent with its previous decisions, that the buyer took exclusive control of the goods and therefore was best placed to ascertain their contractual completeness. The burden was therefore on the buyer to prove that the goods were not complete.⁶¹

[Rz 55] The question arose before the Supreme Court as to which of the buyer and the seller bore the burden of proving various matters in relation to third party claims and the infringement of the seller's guarantee of quiet possession. The Court stated that in accordance with Article 42(1) of the CISG, the buyer is under a burden of proving that an intellectual property claim has been made against it.⁶² However the burden does not lie on the buyer of showing that the IP claim is justified or not.⁶³ Furthermore, if the seller disputes that the IP claim arises in relation to goods supplied by it, the buyer is not under the burden of proving that the third party IP claims are in regard to merchandise sold by the seller.

[Rz 56] The Zurich Obergericht dealt with issues relating to the burden of proving non-conformity by reason of defects.⁶⁴ First, the Court contended with the question of which party bore the burden of proving the point at which the buyer gained knowledge of the hidden defect, for the purposes of Article 39 of the CISG. It held that it would be too difficult for the buyer to have to prove the negative fact that it had not learned of the defect earlier than it said it did. It was therefore for the seller to prove that the buyer had learned of the hidden defect earlier than it said it did, but the buyer needed to prove the facts supporting its version of when it learned of the defect.⁶⁵

[Rz 57] The Zurich Obergericht was asked to determine⁶⁶ which party bore the burden of proving that the goods sold did not possess a promised characteristic. In that case the characteristic was the period of origin of a statue. The Court referred to the leading view («[d]ie überwiegende Lehre») in the case law⁶⁷ of various CISG contracting states that the beneficiary of the obligation («Pflichtengläubiger»), i.e. the buyer must prove the content of the contractual obligation but the

⁵⁵ Decision of the Supreme Court 4A_68/2009 of 18 May 2009, at consid. 10.3.

⁵⁶ Decision of the Supreme Court 4A_68/2009 of 18 May 2009, at consid. 10.3.

⁵⁷ Decision of the Supreme Court 4A_68/2009 of 18 May 2009, at consid. 10.3.

⁵⁸ Decision of the Supreme Court 4A_617/2012 of 26 March 2013 (CISG-online 2434), consid. 3.1.

⁵⁹ Decision of the Supreme Court 4A_753/2011 of 16 July 2012 (CISG-online 2371), consid. 8.

⁶⁰ Decision of the Supreme Court 4A_753/2011 of 16 July 2012 (CISG-online 2371), consid. 8.1.

⁶¹ Decision of the Supreme Court 4A_753/2011 of 16 July 2012 (CISG-online 2371), consid. 8.4.

⁶² Decision of the Supreme Court 4A_591/2011 (CISG-online 2346), consid. 2.2.

⁶³ Decision of the Supreme Court 4A_591/2011 (CISG-online 2346), consid. 2.3.

⁶⁴ Decision of the Zurich Obergericht HG060451-0/U/dz of 18 June 2012.

⁶⁵ Decision of the Zurich Obergericht HG060451-0/U/dz of 18 June 2012, consid. 4.2.4.(d).

⁶⁶ Decision of the Zurich Obergericht HG060451-0/U/dz of 18 June 2012.

⁶⁷ Decision of the Zurich Obergericht HG060451-0/U/dz of 18 June 2012, 4.3.1.(c). The Court did not directly refer to this case law but rather to the following thesis: T.M. Müller, *Ausgewählte Fragen der Beweislastverteilung im UN-Kaufrecht im Lichte der aktuellen Rechtsprechung* (Cologne : Thesis of the University of Cologne, 2005).

party bearing the obligation («Pflichtschuldner») must prove the fulfillment of the duty. The basis for this position is the rule behind Article 79(1) of the CISG that the party bearing the obligation must prove the existence of discharge from an obligation. The Court said that it followed from such reasoning that the seller must prove that the required characteristic existed at the time of the transfer of risk since the seller would thereby be seeking to discharge itself from its delivery obligation under Article 35(1) of the CISG and the elimination of the buyer's claim for performance.

[Rz 58] The Court then pointed out that there was a decision of the Zurich Handelsgericht and a decision of the Swiss Supreme Court which supported this approach, but that the Zurich Handelsgericht added that the burden passes to the buyer «after objection-free acceptance» («nach rügeloser Abnahme»).⁶⁸ The Court observed that there was therefore a question as to whether the transfer of the burden of proof occurred at the time the buyer knew or should have known of the defect or at the (earlier) time of the transfer. On the one hand, the Court noted, Article 44 of the CISG permits the remedy of price reduction in certain circumstances even if timely notice had not been given under Article 39 of the CISG. Thus the seller must retain the burden for this period. But the Court adverted, on the other hand, to the position under German legal writings and judicial decisions, which has been adopted by some in Switzerland, that the point of «objection-free acceptance» is the time of the transfer of the goods, on the basis that at that point the buyer becomes closer to the evidence than the seller («die Beweishöhe»). In support of this position the Court cited two decisions of the Swiss Supreme Court.⁶⁹ The Court pointed out that in the first case the goods in question were a textile cleaning machine which did not function and in the second miscellaneous goods («verschiedene Waren») the quantity of which was short. The Court distinguished its present facts on the basis that the seller gave a specific assurance («Zusicherung») about the characteristic in question, namely the period of provenance of the statue. Moreover, even though after the transfer the buyer had exclusive control over the statue, the seller obtained a prior expert opinion on the material characteristic in question, with the result that even then the seller was in no lesser position than the buyer as regards the evidence. Indeed, observed the Court, such a situation would obtain whenever there was no question whether or not the non-conformity arose after the transfer. By consequence, in this case the Court held that there was no shift in the burden of proof from seller to buyer but rather that at all times the burden was on the seller⁷⁰.

[Rz 59] The Valais Cour Civile held that the CISG contained

«indirect» general regulation on the burden of proof by reason of «the terms employed [in the CISG] and the establishing of a relation between a rule and its exception.»⁷¹ The Court observed that, as a general rule, whoever asserts a right bears the burden of proving the conditions of its existence, and conversely, the other party bears the burden of proving the facts which would exclude or oppose the right asserted.⁷² Accordingly, it held in this case that the seller must prove that it delivered the goods, and that it had failed to do so.

[Rz 60] The Zug Obergericht found that the CISG contained no provision relating to the burden of proving partial non-performance or performance. It stated that no general interpretive principles, within the meaning of Article 7(2) of the CISG applied either, and for practical and fundamental reasons («[a]us praktischen Gründen wie auch aus grundsätzlichen Überlegungen») it was unsatisfactory to apply the rules of suppletive national law. It therefore concluded that the only solution was to apply burden of proof rules derived from the supplementary interpretation of the CISG in view of its particular context as a legal instrument.⁷³ In application of this approach it found that the party asserting a legal rule bore the burden of proving the elements of that rule and the other party the burden of proving exceptions to the rule, but in some cases an adjustment needed to make where the result would be to create significant difficulties of proof. Thus where the question is whether the seller breached, the rule requires the seller to prove the breach within the period for the buyer's notice of non-conformity, but this may be reversed where the buyer is in a better position to provide the evidence. The Court held that it was very difficult for the buyer to prove the negative that it did not receive all parts, and so the burden of proving that all parts were supplied was properly placed upon the seller.

8.2 Standard of proof

[Rz 61] The Supreme Court observed that the assessment of evidence (in the sense of the probative value of the evidence proffered) by the judge is not covered by the CISG and is rather governed by the *lex fori*.⁷⁴ Under Swiss law, the assessment of evidence is arbitrary (as a ground of appeal under Article 97(1) of the Supreme Court Act) where the judge of the merits exceeds her considerable discretion for example by not taking into account significant evidence or by reaching manifestly untenable conclusions on the evidence.⁷⁵

⁶⁸ Decision of the Zurich Obergericht HG060451-0/U/dz of 18 June 2012, 4.3.1.(c).

⁶⁹ ATF 130 III 258; ATF 4C.144/2004 of 7 July 2004.

⁷⁰ Decision of the Zurich Obergericht HG060451-0/U/dz of 18 June 2012, 4.3.1.(c).

⁷¹ Valais Cour Civile Decision C1 08 45 of 28 January 2009 : «[...] cela en raison de la teneur des termes qui y sont employés ou de l'établissement d'une relation entre la règle et son exception.»

⁷² Valais Cour Civile Decision C1 08 45 of 28 January 2009, consid. 4.bb).

⁷³ Zug Obergericht decision OG 2010 8 of 8 November 2011 (CISG-online 2425), consid. 4.2.2.

⁷⁴ Decision of the Supreme Court 4A_753/2011 of 16 July 2012 (CISG-online 2371), consid. 3.4.

⁷⁵ Decision of the Supreme Court 4A_753/2011 of 16 July 2012 (CISG-online

[Rz 62] The Supreme Court held that a party had not proved a claim (under Art. 84(2) of the CISG, for the buyer's use of the filling and packaging machines which were the object of the contract) where it could have produced a rental contract, calculation tables, deductions or commercial terms of rental companies, or the testimony of an industry representative. The party had only produced an employee to testify, called an information person, and requested an expert's report to determine the value of the buyer's use of the contractual product. The court below had permissibly rejected this evidence, in the Supreme Court's opinion, on the basis that it was not apt to prove the relevant point.⁷⁶

[Rz 63] The Zurich Obergericht had occasion to express itself on the standard of proof relating to the determination of the time of provenance of a stone sculpture. The Court proceeded first to general observations relating to standard of proof. The *summa divisio* is between strict proof and a lesser degree of certainty. In both cases, what is at issue is the conviction of the judge, whether she is convinced, and whether any doubts that are present do not appear significant. Importantly, the Court noted that the nature of the enquiry may be such that the judge must satisfy himself on a probability based on general experience of life.⁷⁷ The Court held that the instant case was one of the latter, where the crucial point – the dating of stone sculptures – was not amenable of certain proof.

[Rz 64] The Zurich Obergericht was asked by a buyer to find that there was a fundamental breach within the meaning of Article 25 of the CISG inasmuch as the seller had agreed that the statue sold was from antiquity and after the purchase the seller had obtained two experts' reports concluding that the statue was of 19th century provenance.⁷⁸ The Court held that the seller had not sufficiently proven that the statue was not ancient: «[a] contractual violation by the seller does not arise from the mere fact that an expert has cast doubt on the authenticity of the sales object.»⁷⁹ In this case there was moreover evidence in favour of the statue's authenticity.

[Rz 65] The question of the standard of proof to determine the actual contractual intent of the parties within the meaning of Article 8(1) of the CISG arose before the Swiss Supreme Court, whether strict or on the balance of probabilities

(«überwiegend»)⁸⁰. The Court noted that there was a controversy as to whether Article 8 CC or principles derived from the CISG applied to decide the question. It held, though, that it did not have to decide the question, since the court below found that even the lower standard was not satisfied in the case.⁸¹

[Rz 66] The Zurich Handelsgericht dealt with the standard of proving damages in a CISG case.⁸² It applied suppletive Swiss law. The Court stated that in accordance with Swiss federal private law the standard of proof is that of «probability bordering on certainty».⁸³ Moreover, a fact is proved under this standard where the judge is convinced of that fact. Any remaining doubts must appear to be insignificant («unerheblich»).

[Rz 67] A St Gallen Kreisgericht proceeded upon the basis that evidence, in this case as to the terms of the contract, was a procedural matter and as such was subject to the *lex fori*.⁸⁴ The Austrian law of the forum included the CISG, so the Court applied the rule in Article 11 of the CISG that there was no formal requirement of parties' declarations in relation to the adoption of a contract. The Court applied this rule to the parties' behaviour in the proceedings before it, in which the defendant buyer did not take part. The Court therefore found that it did not require any written evidence of the absent buyer's acceptance for a contract to have arisen as asserted by the claimant seller. The Court then applied Article 14 of the CISG to find that a contract had arisen between the parties. It is not clear whether it applied Article 14 as part of the *lex fori* (Swiss law) or as part of the *lex causae* (Austrian law). As coincident offer and acceptance is not a matter of evidence, it would appear it was the latter.

[Rz 68] It would appear an oversimplification to treat all matters of evidence as within the *lex fori*. The better view, it would appear, is to apply the *lex causae*, especially where chosen by the parties, to its full extent (so for Swiss law this would include such evidential matters as Article 8 CC and Article 42(1) and (2) CO), and then use the *lex fori* to regulate any remaining matters. This ensures that no unnatural restriction is made to the *lex causae*, and ensures that some pre-existing rule will apply, which in turn presents advantages of legal certainty. To take an obvious example, the Swiss Civil Procedure Code contains no provision on burden of proof, since this is

2371), consid. 3.4.

⁷⁶ Decision of the Supreme Court 4A_68/2009 of 18 May 2009, at consid. 11.2.

⁷⁷ Decision of the Zurich Obergericht HG060451-0/U/dz of 18 June 2012, consid. 4.3.2: «Es kann sich nun aber aus der Natur der Sache ergeben, dass sich der Richter mit einer auf der Lebenserfahrung beruhenden überwiegenden Wahrscheinlichkeit begnügen muss.»

⁷⁸ Decision of the Zurich Obergericht HG060451-0/U/dz of 18 June 2012.

⁷⁹ Decision of the Zurich Obergericht HG060451-0/U/dz of 18 June 2012, consid. 4.2.2: «Eine Vertragsverletzung der Verkäuferin liegt nicht bereits deshalb vor, weil ein Experte Zweifel an der Echtheit der Kaufsache äusserte.»

⁸⁰ Decision of the Supreme Court 4A_753/2011 of 16 July 2012 (CISG-online 2371).

⁸¹ Decision of the Supreme Court 4A_753/2011 of 16 July 2012 (CISG-online 2371), consid. 5.2.

⁸² Decision of the Zurich Handelsgericht, Geschäfts-Nr. HG070223/U/dz of 22 November 2010 (CISG-online 2160).

⁸³ Decision of the Zurich Handelsgericht, Geschäfts-Nr. HG070223/U/dz of 22 November 2010 (CISG-online 2160), consid. 3.4 («an Sicherheit grenzenden Wahrscheinlichkeit»).

⁸⁴ Decision of the St Gallen Kreisgericht OV.2009.22-SG22K-RSU of 16 October 2009 (CISG-online 2023), consid. III.1.c).

regulated in Swiss substantive law. So applying Swiss *lex fori* with a foreign substantive law (in particular that of a common law system) may well result in a lacuna as regards burden of proof. Also, anywhere there is arbitration, it will usually be the case that there are no or virtually no *a priori* evidence rules, until a procedural order is adopted, and even then there may remain lacunae which would have been adequately supplied by application of the *lex causae*.

[Rz 69] In a CISG case the Zug Obergericht held that Swiss law on standard of proof generally permits a court to choose which of the two standards of proof it will apply to a determination.⁸⁵

9 Insolvency

[Rz 70] The Zug Obergericht found that the CISG did not cover matters of bankruptcy of parties to contracts governed by the CISG, and that therefore the effects of the bankruptcy on a party subject to a contract governed by the CISG are governed by the law to which the rules of private international law lead.⁸⁶

10 Recognition of debt

[Rz 71] The Aargau Handelsgericht held that the CISG did not contain provision concerning the recognition of debt and its set off effects. By consequence the law to which the forum's private international law rules leads applies.⁸⁷

11 Partial performance

[Rz 72] The Supreme Court accepted the dominant view that Article 51 of the CISG allowing remedies for partial performance is only available where the object of the sale is «a distinguishable economic unit».⁸⁸ The Court disagreed with the court below, and held that pieces of the spinning factory which was the object of the sale did not qualify. It bears noting that a performance's qualification under Article 51 of the CISG not only determines whether or not the remedies under that section are available, but it also affects time limitation under Swiss law. If the performance is simply defective, then (by

analogy to an action under Article 190 CO), the time limitation is 10 years (under Article 127 CO). But if it is complete failure of a part of the performance within the meaning of Article 51 of the CISG then time limitation is two years under Article 210(1) CO. Because of this error in placing the burden of proof, the Court found that it could not be known on the present state of the facts whether the buyer could prove the incompleteness. The Court therefore annulled the decision and remanded the case for rehearing.⁸⁹ The text of Article 210(1) CO is now sufficiently approximate to that of Article 39(1) of the CISG such that, in accordance with the good faith requirements of public international law, the Swiss court will treat it as identical and interpret it in accordance with the latter.

12 Currency of the purchase price

[Rz 73] The Valais Cour Civile held that where the parties do not agree on a currency the CISG contains no regulation to determine the currency of the purchase price but rather the rules of private international law must be resorted to, yielding the currency of the place of establishment of the seller.⁹⁰

[Rz 74] The Court of Martigny and St-Maurice held that the CISG contains no provision concerning the currency of the payment of the purchase price, and in particular whether payment may be made in the currency of the place of the place of payment even where the contract specifies another currency.⁹¹ The Court stated that Article 3(1) of the 1955 Hague Convention referred to the law of the seller's place of habitual residence to determine the applicable law. It then stated that Article 147(3) of the Swiss PIL Act referred to the law of the place where payment is to be made. The Court did not choose between these approaches since they both led to Swiss law.⁹²

[Rz 75] Article 5 of the 1955 Hague Convention identifies the substantive matters to which the Convention does not apply. The currency of payment of the purchase price does not feature there. The better view, it would seem, is for Swiss courts to apply the 1955 Hague Convention to determine which law applies to this matter.

[Rz 76] The Aargau Handelsgericht held that the agreed currency of the purchase price is not obligatory, but rather, in accordance with the compensation purposes of Articles 74 et seq. of the CISG, the currency adjudged should be that of the loss, or the foregone profit.⁹³

⁸⁵ Zug Obergericht decision OG 2010 8 of 8 November 2011 (CISG-online 2425),, consid. 4.3.1.

⁸⁶ Decision of the Zug Obergericht BISchK 2010 S. 164 of 4 March 2008.

⁸⁷ Decision of the Aargau Handelsgericht HOR.2005.82/ds of 5 February 2008, consid. 5.3.1.

⁸⁸ Decision of the Supreme Court 4A_753/2011 of 16 July 2012 (CISG-online 2371), consid. 7.4 («eigenständige wirtschaftliche Einheit»). It is interesting to note (as did the Supreme Court at 7.2) that the minority, broader interpretation of Article 51 of the CISG, accepted by the court below, originated in an arbitral award (ICC Award N° 7660, CISG-online Nr. 129). This view holds that Article 51 of the CISG also applies insofar as the missing performance can be ascribed an objective economic value (i.e. it is fungible, «austauschbar»).

⁸⁹ Decision of the Supreme Court 4A_753/2011 of 16 July 2012 (CISG-online 2371), consid. 8.5.

⁹⁰ Valais Cour Civile Decision C1 08 45 of 28 January 2009.

⁹¹ Court of Martigny and St-Maurice decision C 1 10 178 of 20 January 2011.

⁹² Court of Martigny and St-Maurice decision C 1 10 178 of 20 January 2011, consid. 5.cc).

⁹³ Decision of the Aargau Handelsgericht HOR.2008.42/rl/tv of 10 March 2010 (CISG-online 2176), consid. 7.2.1.1.

13 Agreement to terminate a CISG contract

[Rz 77] The Lucerne Amtsgericht Sursee was requested to determine whether the parties had reached an agreement to terminate their international sales contract.⁹⁴ The Court observed that Article 29(1) of the CISG recognized that the parties could effectively terminate their contract by bare agreement, and that this was a consequence of party autonomy consecrated in Article 6 of the CISG. The Court accepted the view in a German doctoral thesis that the party relying on the existence of such a termination agreement has the burden of proving it. The Court stated that the existence of outward consensus founding a termination agreement is regulated by Articles 14 to 24 of the CISG. It found, however, that matters of authority to bind a party (i.e. questions of valid representation) are determined by the law of the seat of the represented party, in accordance with Article 126(2) and (3) of the Swiss PIL Act. The effects of such an agreement were determined by the CISG, either by Articles 81 and 84 or Article 7(2) of the CISG.⁹⁵ On the facts, the Court found that a termination agreement had been reached, and that it did not matter that the non-conformity in the goods was not otherwise a fundamental breach. It found that the defendant's part of the agreement consisted in that the defendant seller had issued a credit note to the claimant buyer in the amount of the sale price (including various expenses related to delivery).⁹⁶ As regards the authority of the person who signed the credit note to bind the defendant, the Court held (in application of Swiss law to which Article 126 of the Swiss PIL Act directed) that the claimant objectively understood that that person had good authority, in particular since the way the original sales contract was entered into was essentially the same as the issuance of the credit note, notably the defendant company's letterhead was used, and the same person signed.⁹⁷ Lastly, the Court determined the effects of the termination agreement, by filling in the parties' agreement with the mirror-image of the regime concerning the delivery of the goods. For example, where the buyer was responsible for paying for the delivery, the seller was responsible for paying for the return of the goods to the seller.⁹⁸

⁹⁴ Decision of the Lucerne Amtsgericht Sursee 11 07 4 of 12 September 2008 (CISG-online 1728).

⁹⁵ Decision of the Lucerne Amtsgericht Sursee 11 07 4 of 12 September 2008, consid. 4.1.

⁹⁶ Decision of the Lucerne Amtsgericht Sursee 11 07 4 of 12 September 2008, consid. 4.2.

⁹⁷ Decision of the Lucerne Amtsgericht Sursee 11 07 4 of 12 September 2008, consid. 4.3.3 and 4.3.4.

⁹⁸ Decision of the Lucerne Amtsgericht Sursee 11 07 4 of 12 September 2008, consid. 6.1 and 6.2.

14 Damages

[Rz 78] The Swiss Supreme Court was required to determine whether an arbitrator's award of damages on the basis of a substitute transaction under Article 75 of the CISG was a violation of substantive public policy within the meaning of Article 190(2) (e) of the Swiss PIL Act.⁹⁹ The seller had disputed the existence of the buyer's substitute transaction before the sole arbitrator. The sole arbitrator did not make any determination on the matter, holding rather that it was not determinative of the outcome. The Supreme Court declined to express an opinion on the question, on the basis that the applicant had not identified any fundamental principle of public policy which allegedly had been violated.¹⁰⁰

[Rz 79] The Swiss Supreme Court held that in a claim for damages calculated under Article 74 of the CISG both the loss suffered and the lost profit are recoverable. Thus, held the Court, where the merchandise has not been delivered, and it was «manifestly intended to be resold», the buyer can claim as lost profit the expected profit in view of the usual margins.¹⁰¹

[Rz 80] The Swiss Supreme Court annulled a decision which denied a buyer damages under Article 75 of the CISG on the basis that, in violation of Article 77 of the CISG, it had failed to mitigate by entering into a substitute purchase of the watches in question. The Supreme Court held that the buyer was entitled to the difference between the contract price and the price it would have had had it properly mitigated. Since the court below did not identify what the mitigation price would have been, and it had nonetheless been alleged by the buyer, the Supreme Court remanded the case to the court below for determination of the amount of damages.¹⁰²

[Rz 81] The Supreme Court accepted that under the CISG an action for the reduction of the price¹⁰³ runs concurrently with an action for damages¹⁰⁴ where non-conforming goods are delivered, just as it does in domestic Swiss law.¹⁰⁵

[Rz 82] The St Gallen Kantonsgericht awarded damages under Article 74 of the CISG for a delictual action under Article 41 CO in relation to deception committed in entering into a contract governed by the CISG.¹⁰⁶ The Court went on to deal with difficulties in that in principle the level of damages

⁹⁹ Decision of the Supreme Court 4A_550/2009 of 29 January 2010.

¹⁰⁰ Decision of the Supreme Court 4A_550/2009 of 29 January 2010, consid. 6.2.

¹⁰¹ Decision of the Supreme Court 4A_440/2009 of 17 December 2009 (CISG-online 2022), consid. 4.

¹⁰² Decision of the Supreme Court 4A_440/2009 of 17 December 2009 (CISG-online 2022), consid. 5.

¹⁰³ Article 50 of the CISG.

¹⁰⁴ Articles 74 to 77 of the CISG.

¹⁰⁵ Decision of the Supreme Court 4A_538/2010, consid. 4.

¹⁰⁶ Decision of the St Gallen Kantonsgericht BZ_2007_55 of 13 May 2008.

in Article 74 of the CISG is the positive interest, while that for a breach of Article 41 CO is the negative interest.¹⁰⁷

[Rz 83] The Valais Cour Civile accepted that currency exchange loss was part of damages under Articles 74 to 77 of the CISG in relation to the late payment of the purchase price.¹⁰⁸ The Court observed that by Article 59 of the CISG the buyer must pay the purchase price at the time agreed by the parties (without the seller having to give notice) and in default of party agreement in accordance with the rules in Article 58 of the CISG. The Court noted that part of the damages for late payment of the purchase price is the loss on the exchange rate. The buyer must prove that it would have converted the payment into the buyer's currency immediately if the payment had been made on time, although there is a presumption of the same. The Court held moreover that exchange rates are notorious facts that require neither allegation nor proof.

[Rz 84] The Zug Kantonalgericht held that the costs of legal representation in relation to pre-litigation negotiation requirements were recoverable under Article 61(1) (b) in connection with Article 74 of the CISG as damages providing they were foreseeably required for the claimant's legal defence necessitated by the wrongful act of the defendant.¹⁰⁹ In this case the Court agreed that the expense was so justified since it was for relevant foreign law expertise which the claimant's Swiss lawyers in the Zug proceedings lacked.

15 Avoidance of a contract under the CISG

[Rz 85] Article 49(2)(b)(i) of the CISG allows the buyer to avoid the contract for fundamental breach if delivery has been made, and it has given the seller notice of a breach other than late delivery within a reasonable time of learning of the breach. The Supreme Court stated that the determination of the reasonable time is made with reference to the individual circumstances of the case and the purpose of Article 49(2) (b) (i) of the CISG.¹¹⁰ The relevant circumstances include the type of goods and the type of non-conformity, as well as the behaviour of the seller after receiving notice of non-conformity. The buyer is held to have knowledge of the non-conformity when it becomes aware of the existence, the degree and the breadth of the contractual violation. The Supreme Court explained that only then is the buyer in a position to ascertain whether a fundamental breach has occurred. In principle, stated the Supreme Court, a period of one or two months is

acceptable to ascertain these matters and make such notice, insofar as no circumstances exist which would justify an extension or reduction of this period.¹¹¹ In the instant case, the Supreme Court accepted that six weeks time was reasonable in respect of a complex filling and bottling machine.¹¹²

[Rz 86] The Supreme Court was asked to determine whether a contract had been justly avoided for fundamental breach.¹¹³ It observed that the notion of fundamental breach must be interpreted restrictively as the CISG favours the maintenance of the contract.¹¹⁴ There is a fundamental breach where the goods are «practically unusable or cannot be resold, or it would not be reasonable to expect that they be resold.» The determination of whether the goods can be sold or used entails in particular regard to whether the buyer is a trader, an end-user or a producer. The use or sale of goods by end-users and producers is as a rule denied.¹¹⁵ On the instant facts, the Court found that the producer buyer was objectively to be taken as having been deprived of substantially all of the value that it had contracted for in that the filling and packaging machine in question on any account was at least 40% slower than the contractually stipulated speed.¹¹⁶

[Rz 87] The Zurich Obergericht held that if it had been proven that a statue which was the object of the sale was not from ancient times as contractually guaranteed but rather from the 19th century then this would constitute a fundamental breach within the meaning of Article 25 of the CISG.¹¹⁷

[Rz 88] The Zurich Obergericht also held that where the seller guarantees a quality of the sales object the foreseeability requirements of Article 25 of the CISG do not apply, but rather the seller is strictly liable on the guarantee.¹¹⁸

[Rz 89] The Zurich Handelsgericht had to consider whether a seller's declaration months before the delivery term that it would not deliver constituted a fundamental breach of an installment of goods for future delivery within the meaning of Article 73 of the CISG, which was not excusable under Article 79 of the CISG.¹¹⁹ The Court answered the question in the affirmative. It noted that the seller's duty to deliver was its main

¹⁰⁷ Decision of the St Gallen Kantonsgericht BZ_2007_55 of 13 May 2008, consid. 3.c).

¹⁰⁸ Valais Cour Civile Decision C1 08 45 of 28 January 2009.

¹⁰⁹ Decision of the Zug Kantonalgericht A3 2004 112 of 27 November 2008 (CISG-online 2024), consid. 9.1.

¹¹⁰ Decision of the Supreme Court 4A_68/2009 of 18 May 2009, consid. 8.1: «der Käufer über Tatsache, Umfang und Tragweite der Vertragsverletzung im Klaren ist.»

¹¹¹ Decision of the Supreme Court 4A_68/2009 of 18 May 2009, consid. 8.1.

¹¹² Decision of the Supreme Court 4A_68/2009 of 18 May 2009, consid. 8.4.

¹¹³ Decision of the Supreme Court 4A_68/2009 of 18 May 2009.

¹¹⁴ Decision of the Supreme Court 4A_68/2009 of 18 May 2009, consid. 7.1.

¹¹⁵ Decision of the Supreme Court 4A_68/2009 of 18 May 2009, consid. 7.1: «[...] praktisch unbrauchbar oder unverkäuflich oder ihr Weiterverkauf jedenfalls nicht zumutbar ist [...]».

¹¹⁶ Decision of the Supreme Court 4A_68/2009 of 18 May 2009, consid. 7.2. It is significant that the court relied almost exclusively on Swiss case law and legal literature in support of these propositions.

¹¹⁷ Decision of the Zurich Obergericht HG060451-O/U/dz of 18 June 2012, consid. 4.2.2.

¹¹⁸ Decision of the Zurich Obergericht HG060451-O/U/dz of 18 June 2012, consid. 4.2.3.

¹¹⁹ Decision of the Zurich Handelsgericht, Geschäfts-Nr. HG070223/U/dz of 22 November 2010 (CISG-online 2160).

obligation and therefore in principle the non-fulfillment of this duty was a fundamental breach. As for the matter of excuse under Article 79 of the CISG, the Court held that the seller could not rely on the failure of its Chinese textiles supplier, since, according to the Court, it is well known that delivery problems are no rarities («keine Seltenheit») with Far Eastern textile suppliers, and therefore were foreseeable at the time of the contracting.¹²⁰

[Rz 90] The Geneva Cour de justice found that party agreement on the conditions of avoidance of their contract validly derogated from Article 49 of the CISG.¹²¹

16 Return of goods in substantially the same state

[Rz 91] Article 82(1) of the CISG precludes a buyer from claiming substitute goods if the goods have been delivered and the buyer can no longer return them to the seller substantially in the state in which they have been delivered. The Supreme Court declined to accept that the goods were not in such condition, inasmuch as the buyer failed to plead that they were not.¹²²

[Rz 92] This determination turns on Swiss procedural law, in particular the «principle of debates»¹²³ placing the burden on the parties to allege and prove the facts necessary for the legal determinations they seek. There is a question whether an arbitral tribunal, whether or not sitting in Switzerland, would follow this principle, in particular given the substantive injustice it may work in the individual case.

17 Interest

[Rz 93] Article 78 of the CISG provides that there is interest on the late payment of any amounts due. It does not stipulate the rate of interest that should be applied. The Zurich Handelsgericht found that, in accordance with predominant opinion in the legal literature and the case law, the law applying to this question is the law to which the choice of law rules lead.¹²⁴ Since in the case before it this law was Swiss law, the Court found that Article 104(1) CO applied and that therefore the interest rate was 5%. The Court also found that as a matter extending from the CISG itself that interest accrues from the time a payment is due under the CISG. The Court

held that, where, as in the instant case, the party seeking interest has not substantiated the time from which it accrues, it should be held to accrue at the time that that party first makes an adequately substantiated («in ausreichend substantiierter Weise») claim for it.

[Rz 94] In a decision of a St Gallen Kreisgericht 5% interest was claimed for amounts not paid as the purchase price.¹²⁵ The Court held that Article 78 of the CISG grounded a claim for interest, without any need for a notice of default («Mahnung»), and stipulated the date *a quo* as the time the claim arose. The Court held that it would grant interest as of the claimant's request for interest, which was later. It held, however, that the CISG did not regulate the rate of interest and that this was therefore a matter for the *lex causae*, i.e. Austrian law, which provided for 4% interest, which the Court duly awarded.

[Rz 95] A case before the Berne Handelsgericht also dealt with matters of interest in connection with the CISG.¹²⁶ The Court only awarded interest as of the date it was claimed on the basis that it had no power to award interest from a time earlier than that claimed.¹²⁷ It stated that since there had been several notices («Mahnungen») without the setting of a period for the payment of the debt, interest validly arose earlier under Article 78 of the CISG. As regards the rate of interest, the Court affirmed that a widely-held view was that the general principles of the CISG should be resorted to find an international solution. But it stated that the distinctly predominant view («wohl überwiegend») was that the matter was to be determined with reference to the suppletive *lex causae* (as in turn determined by the private international rules of the *lex fori*). The Court had earlier stated that the substantive law was to be determined by application of Article 118 of the Swiss PIL Act which ultimately led to the application of the CISG. It must therefore be understood that there was no party choice of law, but the CISG applied along with the rest of relevant Spanish substantive law as the law of the place where the seller was habitually resident (i.e. within the meaning of Article 3 of the 1955 Hague Convention). The Court then noted that the claimed purchase price was denominated in Euros, and converted to Swiss Francs only for the purpose of the request for payment as required under Article 67(1)3 of the Swiss Statute on Debt Enforcement and Insolvency.¹²⁸ The Court therefore applied the «EU Directive on Late Payments»¹²⁹ («Zahlungsverzugsrichtlinie der EU»)

¹²⁰ Decision of the Zurich Handelsgericht, Geschäfts-Nr. HG070223/U/dz of 22 November 2010 (CISG-online 2160), consid. 3.

¹²¹ Decision of the Geneva Cour de justice of 20 May 2011 in C/10127/2007 (CISG-online 2429), consid. 5.2.1.

¹²² Decision of the Supreme Court 4A_68/2009 of 18 May 2009, consid. 9.2.

¹²³ «Maxime des débats» or in German «Verhandlungsgrundsatz». See now Article 55(1) of the Swiss Code of Civil Procedure.

¹²⁴ Decision of the Zurich Handelsgericht Geschäfts-Nr. HG070223/U/dz of 22 November 2010 (CISG-online 2160).

¹²⁵ Decision of the St Gallen Kreisgericht OV.2009.22-SG22K-RSU of 16 October 2009 (CISG-online 2023), consid. 4.

¹²⁶ Decision of the Berne Handelsgericht Nr. HG 08 67/STH/LEI of 17 August 2009 (CISG-online 1995), para. 13.

¹²⁷ The Zug Kantonalgericht held the same in its decision A3 2004 112 of 27 November 2008 (CISG-online 2024), at consid. 9.2.

¹²⁸ Bundesgesetz über Schuldbetreibung und Konkurs (SchKG) of 11 April 1889.

¹²⁹ This is doubtless a reference to Directive 2000/35/EC of the European

which resulted in a 5% interest rate, which the Court observed corresponded to the Swiss approach («stimmt zudem mit dem schweizerischen Ansatz überein»).

[Rz 96] The Valais Cour Civile also held that the interest rate in a CISG case is to be determined by the rules of private international law, which for Switzerland meant Article 118 of the Swiss PIL Act referring to the 1955 Hague Convention.¹³⁰

[Rz 97] The Aargau Handelsgericht equally adopted this approach to the rate of interest in a CISG case, with helpful references to literature and Swiss case law.¹³¹

[Rz 98] The Zug Kantonsgericht held that the interest rate in a CISG case was to be determined in accordance with the parties' choice of Swiss law as the *lex contractus*, and was therefore 5%, in accordance with Article 104 CO.¹³²

[Rz 99] The Lucerne Amtsgericht for Sursee found that the interest rate was to be the usual rate at the place of establishment of the seller, which, being Switzerland, was 5%.¹³³

[Rz 100] The Court of Martigny and St-Maurice stated that the law applying to interest as a matter of Swiss private international law was a much controverted question. It noted that three views are often advanced, namely the law of the creditor, the law of the debtor, and the *lex monetae*. It found, however that a tendency had been established to apply the *lex contractus* on the basis that this is the position under the 1955 Hague Convention.

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Parliament and of the Council of 29 June 2000 on Combating Late Payment in Commercial Transactions, OJ L 200/35 of 8 August 2000. This Directive was required to be abrogated by 16 March 2013 by Directive 2011/7/EU of the European Parliament and of the Council of 16 February 2011 on Combating Late Payment in Commercial Transactions (Recast), OJ L 48/1 of 23 February 2011.

¹³⁰ Valais Cour Civile Decision C1 08 45 of 28 January 2009, consid. 5.

¹³¹ Decision of the Aargau Handelsgericht HOR.2006.79/AC/tv of 26 November 2006, consid. 10.1.

¹³² Decision of the Zug Kantonalgericht A3 2004 112 of 27 November 2008 (CISG-online 2024), consid. 7.3. See also the decision of the Geneva Cour de justice of 20 May 2011 in C/10127/2007 (CISG-online 2429), consid. 6.2. and the decision of the Court of Martigny and St-Maurice decision C 1 10 178 of 20 January 2011, consid. 6.aa (which contains an interesting discussion on Swiss private international law concerning interest).

¹³³ Decision of the Lucerne Amtsgericht Sursee 11 07 4 of 12 September 2008, consid. 7. The same approach was adopted in the Decision of the Aargau Handelsgericht HOR.2005.82/ds of 5 February 2008, consid. 5.4.