

## CISG CASES

**TITLE: *Playcorp Pty Ltd v Taiyo Kogyo Limited [2003] VSC 108 (24 April 2003)***

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Editorial comment Dr. Bruno Zeller.

This is another disappointing case where the CISG should have been applied but was in essence ignored. It appears that the CISG has not fallen on fertile ground in Australia.

This case between an Australian buyer and a Japanese seller deals with a breach of a distribution agreement as well as a claim for damages for the supply of defective goods. As there was no choice of law clause in the contract the CISG namely article 35 is applicable. As far as the distribution agreement is concerned domestic law needs to be applied pursuant to article 4.

It is astounding to note that the defence argued that the CISG is not applicable because Japan is not a signatory to the convention. The fact that they submitted to a Victorian court would have made it clear - and the court noted it- that they submitted to Victorian law. However equally astounding is the fact that the plaintiff and the court used terms contained in s 19 of the Goods Act 1958 Vic such as fitness for purpose and merchantable. The Court noted:

*“It was not suggested that there was any material difference or inconsistency between the provisions of art 35 and s 19(a) and (b) and because of that and the way the case was conducted, it is unnecessary to consider whether there is. Counsel proceeded on the basis that there was no material difference or inconsistency.”<sup>1</sup>[1]*

The question is not whether there is an inconsistency the simple fact is the Goods Act does not apply. The CISG does not use remedial terms such as breach of warranty or condition. Furthermore the remedial regime of article 35 is different to the one prescribed by s.19. The court did note that there was difficulty and uncertainty in the ascertainment of damages.

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Article 74 should have been the first step in looking for remedies or article 25 if a fundamental breach is envisaged. Instead the court looked at domestic case law for guidance and never consulted the CISG. It is well established in academic writing and case law that the CISG does not permit the use of domestic law in the interpretative process. It has been suggested - and it is also my view - that a breach of article 7 can lead to a successful appeal in law no different to a misapplication of any article within the convention.

It is also interesting to note that the defence never explored articles 38 and 39. In brief the buyer must examine the goods within a short period and pursuant to article 39 loses the right to any remedy if he does not notify the seller of such defects within reasonable time after discovery of the defects. Furthermore the question of mitigation of damages pursuant to article 77 was also never addressed.