

CISG CASES

TITLE: Summit Chemicals Pty Ltd v Vetrotex Espana Sa [2004] WASCA 109 (27 May 2004)

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Editorial Comments: Dr. Bruno Zeller

The facts are simple. Summit Chemicals the importer has to defend an action by Aqua Technics for the supply of defective goods. The defendant wishes to join the Spanish manufacturer as a First third party to the litigation. In this matter the defendant applied for leave to appeal as the court of first instance refused leave to amend third party statements of claim.

The appellant in the original statement of claim asked for damages for breach of contract and breach of duty of care. The legislation, which was relied upon, was the Sale of Goods Act and the Trade Practices Act, both domestic legislation. As this is an international Sale the CISG should have been applicable and not domestic legislation. Subsequently article 35 of the CISG was added to the claim. The court did not appreciate the fact that the original claim was wrong and that the inclusion of the CISG does created a new claim contrary to the view expressed by the court.¹[1] The court ought to have looked at *Perry Enge, P/L v Bernold AG*²[2] where the court dismissed a claim as domestic law namely the Goods Act was pleaded and not the CISG. The court did note that “an amendment will not be allowed to introduce a new cause of action not previously raised which would be time-barred under any applicable law of limitations ..”³[3]

The point was that the domestic limitation period of six years as well as domestic law determining amendments was taken as being relevant and not article 39 of the CISG, which puts the periods at two years. Of consequence is that the period to give notice “commences when the buyer discovered or ought to have discovered the lack of conformity”⁴[4]

The purchases dated from mid 1996 to 4/4/97. The court action started in July 97, which is outside the two-year limitation period. Amendment of claims are governed by domestic law as the CISG is silent on this issue however this cannot be done without notice being taken of article 39.

It appears that the goods were either not examined or no notice of lack of conformity was ever issued nor raised pursuant to articles 38 and 39. The only reference is a question as to moisture content which was answered by the seller. In essence the whole matter should have been argued on the question of the examination of the goods and whether a notice to that effect was issued within a reasonable time after discovery of the defects. Possibly article 40 could also be of relevance as it is not clear whether the seller knew that the goods were faulty or he merely gave wrong advice.