

# CISG CASES

## [Italian Imported Foods Pty Ltd v Pucci Srl \[2006\] NSWSC 1060](#)

Editorial by Lisa Spagnolo

(extracted from [The Last Outpost: Automatic CISG Opt Outs, Misapplications And The Costs Of Ignoring The Vienna Sales Convention For Australian Lawyers](#))

The case involved an Italian seller of preserved vegetables and an Australian importer. The seller sought to recover the price. The buyer argued the goods had been defective. A magistrate held the relevant time for assessing quality was upon delivery to the buyer's shipping agent in Italy, and that the buyer had not discharged its onus of proof regarding 'merchantable quality'.

Incredibly, neither side nor the Magistrate were aware that the *CISG* applied, and the trial case was argued and decided on the basis of the wrong law.

On appeal in the Supreme Court, buyer's counsel applied to amend pleadings to base the claim on the *CISG*. Despite realising the error, argument was still inadequate. In support of its contention that the Magistrate erred regarding the point in time for measurement of quality, rather than refer to arts 35–44 and relevant *CISG* case law which could have properly guided the decision, the Court was directed to non-*CISG*, and therefore irrelevant, English case law.

However, leave was refused, thus the *CISG* could not be relied upon on appeal. Unlike *Summit*, where more latitude to amend pleadings was shown, in *Italian Imported*, the arguments sought to be raised on appeal had not previously been heard at trial. The discretion to grant leave is not exercised as easily in such circumstances.

The Court gave two reasons for the refusal. The first was that the seller 'might have conducted its case differently at trial'. As a rule, appellate courts refuse leave where an issue was not litigated at trial.

The second reason given was that the amendment would be futile in any event. Thus *Italian Imported* differs from *Summit* because futility formed part of the basis for the procedural decision.

With respect, on this second point, the Court fell into error. The futility of the amendment to include a *CISG* claim could not be gauged without examination of its viability in light of arts 35–44. This was not undertaken. Instead, the Court discussed lack of proof that the goods were not 'merchantable' at any time, and the buyer's denial of responsibility for testing and consequent lack of evidence. The buyer's case might still have been weak, but its prospects could not be resolved by evaluation under domestic sales law, itself pre-empted by the *CISG*'s application.

Even if leave had been granted, Zeller argues the buyer had probably 'lost any chance' by its refusal to inspect the goods, since art 38 requires buyers to 'examine the goods ... within as short a period as is practicable in the circumstances'. Further, notice of non-conformity was not given until five months after delivery, so the right to damages was probably lost pursuant to art 39(1).

This conclusion is underscored by the unlikelihood on the facts that the buyer could have argued that there was a reasonable excuse for delay in giving notice.

There also seemed to have been little prospect of an argument under art 40 that the seller was already aware of the non-conformity.

The best that can be said about the case is that on appeal, the Court acknowledged that local sales law and the *C/ISG* 'are not the same'. Yet this mild encouragement pales against the Court's worst miscalculation. After refusing to allow *C/ISG* arguments to be raised on appeal, it treated the *Sale of Goods Act* as an alternative, fallback law. There is no second bite of the cherry. If a *C/ISG* claim fails for lack of proof of non-conformity or late notice, or for procedural reasons, the applicability of domestic sales law is not revived. The matter must stand or fall on the *C/ISG* when it is applicable law, since it displaces domestic sales law. To uphold a lower court's decision based on inapplicable law perpetuates an error of law that is borne of a misunderstanding of the *C/ISG*'s pre-emptive effect.

Perhaps because the quality of *C/ISG* interpretation had stepped up considerably elsewhere, or possibly because this was now the standard anticipated from Australian shores, the case barely raised an eyebrow internationally.