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Contents

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INTRODUCTION

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Cases relating to the United Nations Convention on Contracts for the International Sale of Goods (CISG)

Case 746: CSIG 1 (1)(a), 10, 26, 75, 76
Austria: Oberlandesgericht Graz
5 R 93/04t
29 July 2004
Original in German
Unpublished
Abstract prepared by Martin Adensamer, National Correspondent.

A partnership between a German and an Austrian company, carrying out construction work in Germany, sold three pieces of construction equipment to an Austrian company to be picked up at the construction site. The buyer took delivery of only one item but not the remaining two. The seller warned the buyer that it would claim for damages or declare the avoidance of the contract if the buyer would not take over the other items too and pay the price within a given date. The buyer opted for the avoidance of the contract. The seller sold the equipment to one of its partners and claimed for damages, which was the difference between the price they finally got and the price agreed upon with the defendant.

The court granted the claim and the buyer appealed. On the issue of applicability of CISG, the court considered the seller's place of business to be the construction site where the contract had been concluded and where the equipment was to be picked up by the buyer. As a matter of fact, pursuant to Art. 10 (a) CISG, the construction site had the closest relationship to the contract and its performance. Therefore the CISG was applicable according to Art. 1 (1)(a) CISG.

The court further stated that the seller was entitled to damages based on the difference between the contract and the cover purchase price pursuant to Art. 75 CISG, because the seller had actually resold the remaining two items. With respect to the declaration of avoidance pursuant to Art. 26 CISG, the court noted that the buyer had opted for avoiding the contract in response to the seller setting a deadline for avoidance and to claim for damages. The court found that, after the refusal of performance by the buyer, the requirement of a declaration of avoidance by the seller was redundant. In addition, the court observed that since the buyer had refused performance, the seller could claim damages without a formal notice of avoidance pursuant to Arts. 61, 74 CISG.

The appeal was dismissed and the claim granted.

Case 747: CISG 49, 50
Austria: Oberster Gerichtshof
3 Ob 193/04k
23 May 2005
Original in German
Published in IHR 2005, 165; ÖJZ 2005, 761 and JBl 2005, 787
Abstract prepared by Matthias Potyka.

The seller sold coffee machines to the buyer, who resold it to its customers. The coffee machines were defective and several attempts to repair them were made in vain. The defects were so serious that the coffee machines had no commercial value

at all. The buyer refused to pay the price, but it had lost the right to declare the contract avoided according to article 49 CISG, as it had not acted within reasonable time. Therefore, it argued that, pursuant to article 50 CISG, it was entitled to reduce the price to zero.

The Supreme Court ruled that article 50 CISG could be applied in cases were the buyer (in principle) could declare the contract avoided according to article 49 CISG and it allowed the buyer to reduce the price to zero if the goods had no value at all.

Case 748: CSIG 39
Austria: Oberster Gerichtshof
4 Ob 80/05a
24 May 2005
Original in German
Unpublished
Abstract prepared by Martin Adensamer, National Correspondent.

In reviewing this case, the Supreme Court found that the CISG has to be applied because the claimant had its place of business in Romania and the defendant in Austria. Moreover, the parties had neither excluded the application of the CISG nor chosen a law of a non Contracting Party.

On the question whether a notice under Art. 39 CISG is effective, the Supreme Court stated that any notice of the lack of conformity of the goods has to be given within a reasonable time after the lack has been discovered or should be discovered. The court observed that pursuant to Art. 27 CISG, if the notice does not to reach its destination, this does not deprive that party, who has sent that notice, of the right to rely on the communication. Consequently, the buyer only had to prove that it had actually sent the notice in due time, which, in fact, it had done.

The Supreme Court dismissed the appeal.

Case 749: CISG 25, 51
Austria: Oberster Gerichtshof
5 Ob 45/05m
21 June 2005
Original in German
Published in IHR 2005, 195
Abstract prepared by Matthias Potyka.

The seller sold software to the buyer. However, the CD-ROM that it delivered did not contain all the modules necessary to fully use the software. Although the buyer informed the seller of this lack of conformity, the latter failed to provide the required modules, as it turned out that the buyer needed a specific module for the use of the software in Austria, which did not exist.

The Supreme Court ruled that the supply of standard software programs on data storage mediums, in exchange for one-time payment, was to be considered a sale of moveable goods. The Court also discussed whether the lack of the module was to be considered a fundamental breach of contract under article 25 CISG or just a partial delivery according to article 51 CISG. The court pointed out that in the absence of an express agreement, the impact of the missing module on the usability of the other

software components was crucial for these issues. The Court thus remanded that the case to the court of first instance, as the fact finding of the lower court had been incomplete in this respect.

Case 750: CISG 9 (1)
Austria: Oberster Gerichtshof
7 Ob 175/05v
31 August 2005
Original in German
Unpublished
Abstract prepared by Maria Kaller.

The Austrian buyer ordered metal powder from a seller, a private limited company with its place of business in Hong Kong. English order forms were used with an English reference on the front page to the general terms and conditions on the backside. The general terms and conditions were in German, a language not spoken in Hong Kong. The forms had been used several times before. The seller could not detect that the buyer wanted only to conclude the contract under its general terms and conditions. Since the metal powder did not have the necessary quality, the buyer on the basis of the general terms and conditions avoided the contract. The seller claimed the price.

The Supreme Court decided that the German general terms and conditions were part of the contract, because the use of these terms and conditions had been a practice which the parties had established between themselves, according to Art. 9 (1) CISG. While usages have to be followed at least in certain trade sectors, practices are established between parties. Such practices could be behaviour patterns frequently upheld during a certain period and in a way that parties in good faith can rely on the fact that the practices will be followed in future occasions again. Implied perceptions of a party may also form such practices if, from the circumstances, it is clear to the other party that the party is ready to conclude the contracts under certain conditions and in a certain form. In this case, the seller had signed the order form for its first purchase and resent it to the buyer, thus accepting the general terms and conditions. In the subsequent purchases, the seller had not returned the forms, but accepted the buyer's offer and thus general terms and conditions by performing the contract.

Case 751: CISG 1 (1)(b)
Austria: Oberster Gerichtshof
1 Ob 163/05k
18 October 2005
Original in German
Unpublished
Abstract prepared by Bernd Terlitza.

The Italian seller sold machines and containers through 20 separate contracts to the Turkish buyer; the contracts were all based on a framework agreement. Later on the seller claimed the price in court. On the assumption that Italian law was applicable, as also agreed upon by the buyer during the proceedings, the claim was based on the CISG, since Italy is a Contracting State. The buyer only argued that the goods were

defective. The court of first instance granted the claim because the defendant, i.e. the buyer, could not prove that it had given notice of the lack of conformity in due time.

The court of appeal remanded the case to the court of first instance, arguing that in the absence of a valid choice of law under Austrian conflict of law rules, the Turkish law should be applied. Since Turkey was not a Contracting State to the CISG, the court found that Turkish sales law and not the CISG was to be applied.

The Supreme Court argued that the buyer's appeal had not concerned the question whether Italian law was to be applied or not and the defendant had not asked for a review of the legal grounds given by the court of first instance. Therefore, the Supreme Court ruled that the court of appeal should not decide on this issue and upheld the decision of the court of first instance.

Case 752: CISG 35
Austria: Oberster Gerichtshof
7 Ob 302/05w
25 January 2006
Original in German
Published in German: IHR 2006, 110
Abstract prepared by Christian Rauscher.

The Serbian claimant bought frozen pork-liver from the Austrian defendant in order to import it to Serbia. No specific level of quality was agreed upon nor any guidelines regarding the import to Serbia were given by the buyer. Although the goods were fully compatible with EU-regulations and absolutely qualified for consumption, they were regarded as defective and therefore rejected by the Serbian customs authorities. Due to the failed import of the goods the buyer suffered damages for which it sued the seller at an Austrian district court.

The lawsuit was dismissed by all three judicial instances. The Supreme Court confirmed that according to its constant jurisprudence the conformity of the goods to the purposes for which goods of the same description would ordinarily be used – Art. 35 (2)(a) CISG – is to be assessed according to the standards in the country of the seller. It is up to the buyer to take into account the provisions and standards of its country and, if need be, to include them into a specific agreement according to Art. 35 (1) or (2)(b). As in the given case the buyer had failed to specify particular requirements as to the quality of the product no liability of the seller was assumed.

Case 753: CISG 42, 43
Austria: Oberster Gerichtshof
10 Ob 122/05x
12 September 2006
Original in German
Unpublished
Abstract prepared by Maria Kaller.

A German Private Limited Company (the seller) sold blank CDs to an Austrian company (the buyer). The seller had bought the CDs from its Taiwanese parent company which had the license to produce and sell them. The license contract

allowed the parent company to sell the blank CDs in Germany, however it was silent on whether it was also entitled to sell them in Austria. Furthermore, after a dispute on the license fees with the licensor, the license contract had been dissolved and court proceedings between the Taiwanese parent company and the licensor had been filed.

When the buyer learned about the proceedings it asked the seller for clarifications without receiving any further information nor any information on the remedies in case of claims on the products bought. Therefore, the management board of the buyer decided to exercise their right of retention of payment of those seller's invoices relating to the goods sold and delivered after the license contract had been dissolved. According to the buyer, those goods were not free from third parties' claim and the buyer itself could be held liable for the license fees. The seller argued that there was no risk that the buyer could be held liable for the license fees, because there had been no breach of contract by the parent company. Furthermore, the CDs delivered to the buyer had been produced before the license contract had been dissolved and the delivered goods were free from any third party claim. Finally, the buyer had not given notice of the alleged defects of the goods within a reasonable time.

The court of first instance dismissed the seller's claim. According to Art. 42 CISG the seller must deliver the goods free from any rights or claims of a third party unless the buyer knew or could not have been unaware of these rights at the time of conclusion of the contract. According to the court, it had been silently agreed that the buyer should not be liable for any license fees. Therefore, the buyer was not obliged to investigate whether the license contract was still valid or whether its being dissolved was lawful. Given the circumstances, the buyer had informed the seller of its intention within reasonable time. Therefore, the buyer had the right to avoid the contract.

In appeal, the Court of Appeal recognized the right of the buyer to avoid the contract and to claim for damages, but not to retain the payment.

The Supreme Court, on the contrary, was of the opinion that the buyer had a right of retention in the case of breach of contract by the seller and until the seller fulfilled its contractual obligations. The seller's obligation to provide licensed goods was to be interpreted in the way that the goods had to be licensed in the State where they were resold, if at the time of the conclusion of the contract the parties had contemplated that the goods would be resold or otherwise used in that State; or, in any other case, in the State where the buyer had its place of business, Art. 42 (1)(a) and (b) CISG. The court further noted that the general burden of proof pursuant to the CISG was on the party that wanted to rely on a provision in its favour, unless reasons of equity would demand otherwise. The court of first instance, however, had failed to determine the State in which the goods would be resold or used as contemplated by the parties at the time of the conclusion of the contract. Consequently, the Supreme Court could not decide whether the seller had breached the contract. The case was remanded to the court of first instance in order to clarify the facts in this regard.