

Case 1057: CISG 1(1)(a); 6; 38; 39; 49; 74; 81; 82; 84

Austria: Supreme Court

8 Ob 125/08b

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In August 2002, a German buyer ordered a boiler plus several applications (in particular a pellet heating system) from an Austrian seller. The buyer entered the contract as one of its customers needed a heating system for two new buildings. The sellers' standard terms of purchase, accepted by the buyer, contained (amongst others) provisions on notification of lack of conformity (within one week after delivery), damages, contractual warranty and jurisdiction. According to the provisions all claims were subject "exclusively to Austrian law, except the rules on the conflict of laws, and the CISG"

The boiler did not work properly from the very beginning, and the buyer's customer informed the buyer. However, this latter failed to give notice to the seller. The seller was informed, by the buyer's customer, only in mid-February 2003. Despite several efforts to remedy the defects, the boiler still did not work properly. The seller thus offered to take the boiler back and reimburse the buyer's customer, while deducting a certain amount. The buyer's customer disagreed with the deduction and (in March 2003) sent a letter to the buyer declaring the contract avoided. The buyer sold its customer a new heating system.

In August 2005 the buyer brought action against the seller claiming avoidance of the contract and repayment of the purchase price as well as compensation for the installation of a new heating system. It also requested the court to declare the seller's liability for the dismantling of the boiler and the respective equipment. The Court of First Instance dismissed the claim. Pursuant to Austrian law, the court declared that the buyer had failed to give timely notice of the lack of conformity.

The Court of Appeal partially reversed the decision of the lower court. Applying the CISG, (article 1(1)(a)), the Court noted that the buyer had failed to comply with articles 38 and 39 of the Convention. However, the Court stated that the seller's attempts to repair the system several times, following the notice of the buyer's customer, could be considered as a waiver of the timely notice of non-conformity. Those attempts could not be considered the result of a mere warranty. Therefore, the seller had committed a fundamental breach of contract and the contract could be avoided pursuant to article 49 CISG, as actually done by the buyer. However, the buyer had failed to properly store the goods (Article 81 CISG), as it was obliged to return them in the same conditions they had been received (article 82 CISG). It also had to account for the benefits derived from the goods (Article 84 CISG). For these reasons, the seller was entitled to damages (Article 74 ff. CISG).

The Supreme Court considered the question of applicability of the CISG, pursuant to article 6 of the Convention. The Court noted the seller's argument that there was a typing error in the standard terms of contract. As a matter of fact, there should have been no comma between the words "and" and "CISG" in the choice of law clause. According to the Court, in matters of exclusion of the Convention, it is decisive whether the parties have relied on the non-uniform law of a State. Mere reference to the national law of a Contracting State does not constitute an exclusion of the CISG. In the absence of clauses stating the contrary — in particular a reference to the substantive law — the application of Austrian law includes the Convention. In the case considered, however, it could be assumed that the exclusion of application of both private international law and CISG was intended. This could be inferred from the fact that both parties had referred to § 377 commercial code (HGB) and thus to substantive Austrian law. The Court noted that the question of the application of the CISG was irrelevant, as the Court of Appeal had decided that that the notice of lack of conformity was belated both pursuant to the CISG and the Austrian Commercial Code.