CISG-online 108	
Jurisdiction	Germany
Tribunal	Oberlandesgericht München (Court of Appeal Munich)
Date of the decision	02 March 1994
Case no./docket no.	7 U 4419/93
Case name	*Coke case I*

Translation[*] *by Ruth M. Janal*[**]

Facts of the case:

The [seller], a Swedish stock corporation, demands from the [buyer], a German private limited company, payment of Deutsche Mark [*DM*] 116,535 for the delivery of Polish coke to the former Yugoslavia in the spring of 1991. 1

With fax of 11 March 1991, the [seller] confirmed to the [buyer] the sale to «franko Osijek» [former Yugoslavia]. The coke arrived in Osijek on 30 March 1991 and reached the company OL, which was invoiced by the [buyer] by letter of 2 April 1991. On 10 April 1991, company OL complained to the [buyer] about the composition of the coke. The [buyer] forwarded the complaint to the [seller] on 15 April 1991. 2

The [buyer] demanded that company OL return the coke to [buyer] in the beginning of June 1991. However, company OL, which by that time had gone bankrupt, refused to return the goods, arguing that the coke did not belong to the [buyer]. The [buyer] submits that company OL had entered into the contract between the [seller] and the [buyer]. [Buyer] holds that it notified the [seller] within reasonable time of the lack of conformity of the coke. 3

The previous instance granted the [seller]'s claim. The [buyer]'s appeal is unsuccessful. 4

Reasons for the decision:

1. *[Delivery of the goods and payment of the price]*

The [seller]'s claim for payment of the purchase price results from Arts. 53 and 58(1) CISG. The CISG is applicable by virtue of its Art. 1(1)(a), because the parties had their places of business in two different Contracting States to the CISG at the time of the conclusion of the contract. 5

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[*] All translations should be verified by cross-checking against the original text. For purposes of this translation, the Defendant-Appellant of Germany is referred to as [buyer]; the Plaintiff-Respondent of Sweden as [seller]. Amounts in German currency (*Deutsche Mark*) are indicated as DM.

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The [seller] placed the coke sold at the [buyer]'s disposal in accordance with the contract, i.e., the [seller] dispatched the goods directly to the [buyer]'s customer (company OL) in Osijek, as had been agreed between the parties. The [buyer] does not dispute that the goods were to be delivered to company OL. This fact furthermore results from the fixing of the delivery destination in the [buyer]'s order and the [seller]'s confirmation. [...] 6

Company OL already confirmed to the [buyer] the receipt of the coke on 5 April 1991. [...] It also needs to be said that the [buyer] – for months after the delivery – was still of the opinion that the coke had been delivered to company OL on [buyer]'s behalf. Otherwise, it would be inexplicable why the [buyer] would have asked company OL to hand over the coke. 7

[...]

2. ***[No declaration of avoidance by seller]***

The [seller] himself did not declare the contract avoided under Art. 64 CISG. The [seller]'s fax of 19 April 1992 does not constitute a declaration of avoidance, but is rather a reminder of the [buyer]'s obligation to pay the purchase price and a comment on the possibility of a cancellation of contract. [...] 8

3. ***[No grounds for declaration of avoidance by buyer]***

There is also no avoidance of contract declared by the [buyer] under Art. 49 CISG. 9

a) ***[Buyer's loss of right to declare avoidance after delivery]***

An avoidance of contract by the [buyer] already fails because the [buyer] did not – as it would have been required under Art. 49(2)(b) CISG – declare the contract avoided within a reasonable time after it had become aware of the alleged breach of contract. 10

At the earliest, a corresponding declaration can be seen in the [buyer]'s letter of 6 September 1991 or in the [buyer]'s statement of defense on 6 November 1991. However, following the [buyer]'s own submissions, it knew since 10 April 1991 that the data of the delivered coke allegedly did not conform to the contract. [Buyer] furthermore knew – according to its own submissions – since 19 April 1991 that the [seller] had allegedly transferred the property of the coke directly to company OL, thereby eliminating the [buyer] from the transaction. 11

However, a time period from mid-April 1991 to the beginning of September 1991, that is, of more than four months, does not constitute a reasonable period of time in the meaning of Art. 49(2)(b) CISG. This provision is intended to prevent a long state of uncertainty for the [seller] after the delivery and to inform the [seller] of how it itself may proceed with the goods. At the same time, the provision is supposed to exclude speculation on the part of the [buyer]. It seeks to prevent the possibility that the [buyer] initially tries and demands the – possibly profitable – purchase price owed by company OL and then, after the failure of this attempt, releases the goods to the [seller]. 12

b) ***[No fundamental breach by seller]***

In any case, the [seller] did not commit a fundamental breach of contract in the meaning of Art. 49(1)(a) CISG. 13

aa) ***[Conformity of the goods]***

If one supposes that the measured data reported by company OL were true for the entire delivery of coke, the goods would not conform to their description in the order confirmation (Art. 35(1) CISG). However, this lack of conformity would not constitute a fundamental breach of contract, as the deviation was objectively not of considerable importance. [...] 14

bb) ***[Place of delivery]***

A fundamental breach of contract also does not exist with respect to the [buyer]'s allegation that the [seller] sold the coke to company OL in [seller]'s own name on 18 April 1991. The Appellate Court does not need to conduct a hearing of evidence in this matter. It could be argued that the [seller] breached the contract by not transferring the property of the goods to the [buyer]. However, the [seller] did exactly what had been agreed between the parties, i.e., [seller] delivered the coke to company OL. If this led to the result that the property was not transferred to the [buyer], but directly to company OL, the result conformed to the contractual agreement, which did not provide for any further actions on the part of the [seller]. The direct sale of the coke by the [seller] to company OL and the elimination of the [buyer] from the transaction – as it was alleged by the [buyer] – could constitute an interference with the [buyer]'s rights and therefore a breach of the [seller]'s post-contractual obligations (*cf*. Schlechtriem/*Huber*, Art. 31 CISG n. 76). 15

However, such a breach of contract would not be fundamental, i.e., a breach which is objectively of considerable importance for the [buyer]. In the present case, the [buyer] possessed its own claim for payment of the purchase price against company OL from the beginning. This claim was also governed by the CISG, because Yugoslavia was at that time also a Contracting State. Under the CISG, however, company OL would not have been entitled to refuse paying the purchase price to the [buyer], even if OL and the [seller] had subsequently also formed a sales contract regarding the coke that had already been sold to OL by the [buyer]. 16

4. ***[Remedy of reduction of price]***

A reduction in price under Art. 50 CISG cannot be considered in regards with the alleged lack of conformity of the coke. This is because the [buyer] did not make a corresponding declaration, which would have been necessary (Schlechtriem/*Huber*, Art. 50 CISG n. 11). 17

5. ***[Remedy of damages]***

Any claims for damages under Art. 45(1)(b), 74 *et seq*. CISG the [buyer] might possibly possess cannot be considered by the Appellate Court, because the [buyer] did not declare a set-off 18

with such claims. Contrary to the avoidance of contract (Art. 81 CISG), the [buyer] is not automatically (*ipso iure*) released from its obligation to pay the purchase price. Therefore, a set-off would have been necessary.

In any case, a claim for damages already fails because the [buyer] did not plead that it suffered damages. It was neither submitted nor is it obvious that the [buyer] suffered a loss as a consequence of the alleged deviation of the coke composition. The same goes for the alleged conduct of the [seller] towards OL and the forwarding agent in mid-April 1991. Again, it was neither submitted nor is it obvious that without the [seller]'s conduct the goods would not have reached OL (as the delivery had already been effected fourteen days prior to that time), or that otherwise OL would have paid the coke, or that the goods would have at least been handed over to the [buyer] by OL following [buyer]'s demand for a return in June 1991. 19

6. ***[Interest on sums in arrears]***

The claim for interest is based on Art. 78 CISG, since the [buyer] failed to pay the purchase price due under Art. 58 CISG. Following Art. 28(2) sent. 1 EGBGB, the rate of interest is determined by Swedish law, as the [seller]'s obligation is the one characteristic of a sales contract. Under Swedish law, the [seller] is entitled to interest at a rate of 8% on top of the discount rate of the Swedish State bank, par. 6 Räntelag (1975: 635) (*cf*. *Högland,* Sveriges Rikes Lag, date: 1 January 1991, p. 530/531). 20

There, a surcharge (*«tillägg», cf*. *Parsenow,* Fachwörterbuch für Recht und Wirtschaft Schwedisch/Deutsch Deutsch/Schwedish, 2nd ed., p. 168) of 8% (*«atta», cf*. *Kornitzky,* Taschenwörterbuch Schwedisch/Deutsch, 1958, p. 521) is fixed. Therefore, the lower interest rate referred to in the literature (*cf. Fischler/Vogel,* Schwedisches Handels- und Wirtschaftsrecht mit Verfahrensrecht, 3rd ed. 1978, p. 94) is incorrect. 21