

**CISG-online 117**

Jurisdiction	Austria
Tribunal	Oberster Gerichtshof (Supreme Court)
Date of the decision	10 November 1994
Case no./docket no.	2 Ob 547/93
Case name	<i>Chinchilla furs case</i>

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On 27 October 1992, the Bezirksgericht Leibnitz [Court of First Instance] ruled in favor of the Claimant [seller]. Upon appeal by the defendant [buyer] the Landesgericht Graz in its function as Court of Appeal affirmed the judgment of the Court of First Instance on 4 March 1993. The matter involves a claim of sA 66,740 [Austrian schillings].

The defendant [buyer] has appealed against the ruling of the Court of Appeal.

The claimant [seller], the breeder of fur animals, is represented by Dr. Harald Gerl, attorney from Graz. The defendant [buyer], an insurance agent, is represented by Dr. Kurt Klein and Dr. Paul Wuntschek, attorneys from Graz.

The Oberster Gerichtshof [Supreme Court] is composed of the Supreme Court's Senate, Dr. Melber, as the chairman and Dr. Graf, Dr. Schinko, Dr. Tittel and Dr. Baumann as accompanying judges.

Upon the defendant's [buyer's] appeal the Oberster Gerichtshof, in its function as court of last resort and sitting in camera has come to the following:

***[Decision:]***

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

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The [second] appeal [of the buyer] is rejected.

The defendant [buyer] is ordered to reimburse the claimant [seller] for the costs of the proceedings in this final instance set at sA 4,346.80 (including sA 724.80 of turnover tax) within fourteen days.

**[Findings:]**

In April 1991, the seller, resident in Germany, sent to the buyer, resident in Austria, 249 Chinchilla furs. The buyer sold them to an Italian fur trader and paid to the seller an (converted) amount of DM 2,400 [German marks].

1

The seller demands further payment of sA 66,740 on the grounds that it had sold to the buyer furs of constantly good quality at a price between DM 35 and DM 65 per fur.

The buyer seeks rejection of the claim on the grounds that it had sold on the furs on account of the seller and could not get a higher purchase price than DM 2,400.

The Court of First Instance sustained the seller's claim relying on the following facts:

2

In March 1991 the buyer ordered from the seller, who breeds Chinchilla in Germany, a larger number of Chinchilla furs at an exhibition in Fuerstenstein [Germany]. The parties stipulated that the furs should be of medium or superior quality at a price range between DM 35 and DM 65 per item. At the beginning of April, the seller packaged a total of 249 furs 236 of which were of average (medium) and 13 of which were of inferior quality, and sent them to the buyer. On 6 April 1991, the buyer delivered these packaged furs to an Italian fur trader where the packages were opened for the first time. The Italian fur trader purchased a total of 236 furs. The buyer sent to the seller a (collective) fur-list in which it complained of and listed by item numbering the 13 furs that had been excluded. Apart from that [buyer] did not raise any other complaints with the seller. Chinchilla furs of medium quality are traded at a price of up to DM 60 per item. In terms of law, the Court of First Instance decided that the buyer had to perform the sales contract entered into by the parties and thus was to pay the residual purchase price. In accordance with paragraph 273 ZPO [Austrian Code of Civil Procedure], a unit price of DM 50 was deemed adequate for 236 furs of medium quality.

The Court of Appeal rejected the buyer's appeal against this decision.

3

The Court argued that the matter contained international aspects and assumed that the parties had neither made a choice of law in the sense of paragraph 35 IPRG [Austrian Private International Law Act] nor excluded the application of the CISG. As the parties to the contract had their places of business in different Contracting States and the subject matter of the contract fell within the scope of the Convention, the CISG was directly applicable.

The Court reasoned that, by ordering from the seller a larger number of Chinchilla furs of medium or superior quality at a price range of DM 35 to DM 65 in March 1991, the buyer had made a proposal to the seller for concluding a contract, which had been sufficiently definite in light of the stipulations made on the goods, their quantity and quality. The seller had accepted this offer so that the sales contract was validly concluded between the parties.

4

[According to the judges], the agreed price range between DM 35 and DM 65 did not affect the valid conclusion of the contract. According to Article 55 CISG, it would be assumed that where a contract has been validly concluded but does not expressly or implicitly fix or make provision for determining the price, the parties are considered, in the absence of any indication to the contrary, to have impliedly made reference to the price generally charged at the time of the conclusion of the contract for such goods sold under comparable circumstances in the trade concerned. The parties had referred to the price generally charged for such furs as were sold to the buyer. Under the contract and the Convention, the buyer was therefore obliged to pay the purchase price. In lack of a provision to the contrary, the buyer had to pay the seller at its place of business as soon as seller delivered the goods to buyer. As it was established that Chinchilla furs of medium quality are traded in the market at a price up to DM 60, and, due to the fact that the decision of the Court of First Instance to set the purchase price at DM 50 per item was not challenged, this purchase price -- also in application of paragraph 273 ZPO -- was to be regarded as the basis for the buyer's obligation to pay. It was not established that furs of inferior quality had been delivered. The buyer was facing a true foreign currency debt because the place of performance was foreign [to buyer]. In these circumstances, the creditor [seller] was entitled to request a payment order in Austrian shillings instead of German Mark. Taking into account the part payment already made and the exchange rate applicable at the date the payment became due, the remaining purchase price amounted to sA 67,097.20; the buyer could not regard itself prejudiced by an order to pay an amount of only sA 65,800.

5

The Court of Appeal allowed the further revision on points of law because no leading case law on the Vienna Convention on Contracts for the International Sale of Goods existed so far.

6

In its appeal, buyer argues that the decision [of the Appeal Court] was based on legally incorrect considerations and requests that it be changed into a full rejection of the seller's claim. Alternatively, buyer requests the setting-aside of the decision.

The seller demands rejection of the appeal.

Leave to appeal on questions of law is granted because there is indeed no leading case law on 19 the United Nations Convention on Contracts for the International Sale of Goods of 11 April 1980.

7

[...]

The United Nations Convention on Contracts for the International Sale of Goods (hereafter CISG) was concluded on 11 April 1980. Pursuant to Article 99(1) it became effective as of 1 January 1988. Pursuant to Article 99(2) the Convention came into effect for Austria on 1 January 1989. The CISG was published in BGBl 1988/96 [official Austrian legal gazette]. The Federal Republic of Germany joined the Convention with effect from 1 January 1991. **8**

The basic condition for the application of the CISG is the existence of an "international" sales contract. Sales contracts on goods must be concluded between parties who have their places of business in different Contracting States (see Karollus, UN-Kaufrecht, 20, 28). The term "sales contract" is not expressly defined but it refers to a contract, which obliges one party (seller) to deliver goods and transfer the right of property, and the other party (buyer) to pay the purchase price and accept delivery. It therefore is an exchange relationship "goods for money". "Goods" means moveable property (Karollus, 20 et seq.). **9**

A further condition is that the parties to the contract have their places of business in different States. "Place of business" is every location from which [a party] participates in economic transactions in a somehow independent manner. If a party does not have a place of business, e.g., a natural person, pursuant to Article 10(b) CISG, the habitual place of residence becomes relevant. **10**

It has been established that the parties have their habitual places of residence in two Contracting States to the Convention; thus the CISG is applicable in accordance with Article 1(1)(a), because neither had the parties made a choice of law nor had they excluded the application of the Convention. Further, the sales contract on furs, a sales contract on moveable property, was concluded at a time after the Convention came into force. **11**

The Court of Appeal was right to consider the CISG applicable.

It was also correct in taking the view that by ordering a larger amount of Chinchilla furs, the buyer had made an offer to the seller for the conclusion of a sales contract. **12**

According to Article 14 CISG, a proposal to conclude a contract addressed towards one or more specific persons constitutes an offer if it is sufficiently definite and indicates the intention of the offeror to be bound in case of acceptance. A proposal is sufficiently [page 150] definite if it indicates the goods and expressly or implicitly fixes or makes provision for determining the quantity and the price. **13**

Therefore, the content of the proposal must be sufficiently definite. This is the case where a proposal indicates the goods and expressly or implicitly fixes or makes provision for determining the quantity and the price. The condition is fulfilled where the essentialia negotii are expressly fixed in the offer; however, the second sentence of Article 14(1) CISG also allows for an "implicit determination", i.e., [giving] criteria which allow for an interpretation that results in a definite price, definite goods or (and) their quantity (Schlechtriem in v. Caemmerer/Schlechtriem Kommentar Art. 14 no. 4). For the validity of the offer [i.e., whether **14**

it can be validly accepted], it also suffices that the required minimum content can be understood as being sufficiently definite by "a reasonable person of the same kind" as the other party (offeree) would have "in the same circumstances" (Art. 8(2) CISG). According to Article 8(3) CISG, in determining the intent of a party or the understanding a reasonable person would have had, due consideration is to be given to all relevant circumstances of the case including the negotiations, any practices which the parties have established between themselves, usages and any subsequent conduct of the parties. In summary, therefore, an implicit determination suffices as well as a provision enabling the determination by circumscribing the quantity and the price of goods (Karollus aaO 61; v. Caemmerer/Schlechtriem aaO and Art. 55 no. 7; Piltz Internationales Kaufrecht paragraph 3 no. 25).

Applying these principles, the buyer's view that the "order of a larger amount of Chinchilla furs" lacked the necessary definiteness of the quantity of the goods must be rejected. **15**

The primary point to be taken into consideration is the buyer's later conduct of selling on the delivered furs apart from a small number, without raising any objection as to the quantity of the goods delivered. Based on the later conduct of the parties, it must be assumed that the order of "a larger number of furs" is to be seen as sufficiently definite. **16**

According to the principles outlined above, the requirement of definiteness of the agreed price under Article 14 CISG has also been met in this case. This condition is already fulfilled where the parties have implicitly referred to an at least determinable price without expressly indicating the relevant factors for its determination, i.e., providing criteria which allow for the determination of a definite price (v. Caemmerer/Schlechtriem Art. 14 no. 4; Piltz paragraph 3 nos. 23, 25). By agreeing upon a price range between DM 35 and DM 65 for furs of medium and superior quality the parties have provided sufficient criteria from which a definite price can be drawn depending on the quality of the delivered furs. [page 151] This price agreement must be viewed as sufficient in the sense of Article 14 CISG. The contract has thus been concluded with an at least determinable quantity and an at least determinable price. In this case, the question can remain open whether, at the relevant point of conclusion and in absence of an express or implicit determination of the price, a contract can be validly concluded through the fiction of an agreement on the usual price (Article 55 CISG). **17**

Finally, the argument raised in the appeal that the Court of Appeal wrongly considered the place of performance to be the seller's (i.e., claimant's) place of business must also be rejected. **18**

According to Article 57 CISG, the place of performance is primarily established by the parties' agreement. In lack of such agreement, Article 57(1) CISG contains a dispositive provision for the determination of the place of payment. Thus, pursuant to Article 57(1)(a) CISG the place of payment is the seller's place of business. If the payment is to be made against the handing over of the goods or documents, the place of payment is the place where the handing over takes place. This latter provision ties up to the principle of mutual simultaneous performance laid down in Article 58 CISG; it is only reasonably applied where intermediaries (e.g., a ware-

house-keeper or carrier) are used and payment is to be made to these intermediaries. Otherwise payment must be made to the seller. In this case, after delivery of the goods, the buyer has to pay the purchase price at the seller's place of business (Karollus aaO 167, Hager in Caemmerer/Schlechtriem Art. 57 nos. 3, 13). Since, in the present case, the goods were delivered to the buyer by post and no intermediary was used as a collecting agent, the place of payment remains the seller's (i.e., the claimant's) place of business.

The Court of Appeal's reasoning does not contain legal errors.

**20**

Insofar as [buyer] criticizes in its appeal that an expert report had not been commissioned on the market price of Chinchilla furs of medium quality, [buyer] objects to an error of procedure, which it failed to raise in front of the Appeal Court. Buyer's objection cannot be reintroduced in these proceedings (EFSlg 57.817).

**21**

Therefore the appeal is rejected in its entirety.