

Case 136: CISG 1(1)(a) 8; 47; 49; 81 (2); 84 (1)  
Germany: Oberlandesgericht Celle; 20 U 76/94  
24 May 1995  
Unpublished

The plaintiff, an Egyptian businessman, and the defendant, a German company trading in used printing machines, concluded an oral contract for the sale of nine used printing machines that were to be shipped to Egypt. The parties agreed upon two shipments, the first including six machines and the second three machines. According to the contract, the plaintiff was obliged to pay a considerable part of the contract price before the first shipment, which he did. But the first shipment contained only three machines. After having demanded shipment of the missing machines several times, the plaintiff declared that it had no longer any use for three of the still missing machines. The defendant answered: "We are sorry that we shall not deliver the machines anymore which we have kept to your disposal ...". With respect to the last three machines, the plaintiff fixed a final period of two weeks for delivery. The defendant did not deliver within that period but offered shortly afterwards shipment against advance payment. The plaintiff refused this and declared, now seven weeks after fixing the additional delivery period, the contract avoided as far as the missing machines were concerned. The plaintiff demanded compensation for its loss as well as repayment of the sum by which the advance payment exceeded the price of the three delivered machines.

The court found that the CISG was applicable as both parties had their places of business in different CISG Contracting States (art. 1 (1)(a) CISG), the sales contract had been concluded after the CISG had come into force for these States (art. 100 (2) CISG) and the application of the Convention was neither excluded (art. 6 CISG) nor had the parties subsequently chosen a specific law to be applicable.

The court found the plaintiff's repayment claim to be justified according to article 81 (2) CISG. As the first three missing machines were concerned, the parties had mutually terminated the contract. The plaintiff had refused to accept delivery and the defendant had but regretted the plaintiff's refusal. A reasonable person (art. 8 CISG) could have understood the defendant's letter as an acceptance of the termination of the contract.

With regard to the last three machines the contract was avoided by the plaintiff's unilateral declaration (articles 49 (1) (b), 47 (1) and 51 (1) CISG). The defendant had breached the contract by not delivering the machines within the time fixed by the contract (art. 33 (b) CISG), thus giving the plaintiff the right to fix an additional period of time (articles 49 (1) (b) and 47 (1) CISG). The plaintiff was, therefore, entitled to declare the contract avoided even if the additional delivery period of two weeks was perhaps too short. According to the court, the period of seven weeks between announcement and actual declaration of avoidance was reasonable. The fact that the defendant had offered shipment against advance payment in the meantime was found to be irrelevant since advance payment of the full contract sum was contrary to what had been agreed.

The court finally ordered the defendant to pay interest. According to article 84 (1) CISG, interest is due from the date on which the price was to be paid. The court held that the interest rate was to be determined in accordance with the applicable contract law which in the present case was German law. As the plaintiff had failed to justify a higher interest, the applicable interest rate was bound to be 4% (article 288 German Civil Code).