

Case 308: CISG 1(1)(a); 4; 8; 11; 15(1); 18(1); 25; 26; 29(1); 61; 63; 64

Australia: Federal Court of Australia SG 3076 of 1993 FED No. 275/95

28 April 1995

Roder Zelt- und Hallenkonstruktionen GmbH v. Rosedown Park Pty. Ltd. and Reginald R. Eustace

Original in English

Published in English: http://www.austlii.edu.au/au/cases/cth/federal_ct/unrep7616.html;

<http://www.scaleplus.law.gov.au>

Abstract published in English: [1996] UNILEX; <http://www.cisg.law.pace.edu/cisg/wais/db/cases2/950428a2.html>

Commented on in English by Ziegel [1999] Review of the Convention on Contracts for the International Sale of Goods, 53

A German seller of large scale tents and marquees, plaintiff, sold tents to an Australian buyer, defendant. Under the contract, the buyer had to pay for the tents by instalments. However, as the buyer was in acute financial difficulty, it fell in arrears with its payments to the seller. Subsequently, it was placed under administration in accordance with the Australian Corporations Law. The seller sued the buyer and the administrator, claiming that it had retained ownership of the tents by virtue of a retention of title clause in the contract with the buyer, and seeking an order for the tents to be returned to it and for damages to be paid.

The court held the CISG to be applicable, as both Germany and Australia had ratified the CISG (1(1)(a) CISG).

The court ruled that the question whether the contract contained a retention of title clause was a question of fact to be determined on the basis of articles 8, 11, 15(1), 18(1) and 29(1) CISG, and that the validity of the retention of title clause had to be determined in accordance with the appropriate domestic law, as the CISG was not concerned with property rights (article 4 CISG). The court further ruled that the contract contained an effective retention of title clause in the seller's favour, which was a valid clause pursuant to the appropriate domestic law.

The court found that the seller was entitled to avoid the contract under articles 61 and 64 CISG due to the appointment of the administrator by the buyer, which constituted a fundamental breach of the contract within the meaning of article 25 CISG. The placement of the buyer in administration resulted in such detriment to the seller as to substantially deprive it of what it was entitled to expect under the contract. In addition, the court found that the administrator, who was by virtue of that position constituted as agent of the buyer, had been asked by the seller to return the tents to it, but the administrator had refused to do so, denying that there was any retention of title agreement in the contract. This also amounted to a fundamental breach of the contract.

The court noted that prior to the administrator's appointment, the buyer was in breach of the contract in that interest payments were overdue. However, the seller had neither demanded payment nor fixed an additional period of time for performance of its obligations by the buyer pursuant to article 63 CISG. Therefore, the court concluded that this breach of contract by the buyer did not constitute a fundamental breach that would justify avoidance of the contract.

The court held that the seller, by filing a statement of claim with it, had satisfied the condition for an effective avoidance of the contract required by article 26 CISG, namely to give notice of avoidance to the other party.

The court determined that the contract included a valid retention of title clause, whereby title to the goods did not pass to the buyer until the purchase price had been paid in full and that the seller was entitled to immediate re-possession of the tents as from the time when the buyer's creditors approved a Deed of Company Arrangement for the restructuring of the buyer's business and the payment of its debts.