

Case 176: CISG 8(1); 9(1); 41; 54

Austria: Supreme Court; 10 Ob 518/95

2 February 1995

Original in German

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The plaintiff, a German buyer, and the defendant, an Austrian seller, entered into an agreement for the FOB delivery of a certain quantity of propane gas. The parties exchanged communications by facsimile and telephone on the terms of their agreement, including the method of payment (letter of credit). The buyer, however, did not obtain a letter of credit since an essential element was missing, i.e. the seller failed to name the port of origin. In addition, the seller made the delivery of the gas subject to the condition that it was not to be resold in the Benelux countries.

The parties had initially intended to enter into a “basic agreement”, which would contain the general conditions of the seller and would constitute the trade usages that would govern the transactions between the parties, but could not reach an agreement. The draft of the “basic agreement” stated that all orders should be in writing. However, the seller could not prove that the “basic agreement” nor the general conditions had been made known to the buyer.

The court found that the parties could be bound by any trade practices or usage established between themselves (article 9(1) CISG). In such instances, article 9(1) CISG must be interpreted in the light of article 8(1) CISG to the effect that a party must have known of the intent of the other party.

As regards the letter of credit, the court found that under article 54 CISG the buyer would be under an obligation to obtain a letter of credit. However, the court held that the buyer did not violate such an obligation since the seller failed to provide the necessary details and the buyer was under no obligation to obtain a “blank” letter of credit.

With respect to the conditional delivery of the propane gas, the court held that, if delivery of the goods is made, after the formation of the contract, subject to a limitation of export destinations, such a limitation must be regarded as a violation of the duty of the seller under article 41 CISG.

Corrigenda

Case 176

The date entry in the case caption *should read* “6 February 1996” instead of “2 February 1995” in the Arabic, Chinese, English, French, Russian and Spanish texts of document A/CN.9/SER.C/ABSTRACTS/13.