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| Jurisdiction | Austria |
| Tribunal | Oberster Gerichtshof (Austrian Supreme Court) |
| Date of the decision | 06 February 1996 |
| Case no./docket no. | 10 Ob 518/95 |
| Case name | *Propane gas case* |

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## Grounds for the decision

On 26 September 1990 the manager of the plaintiff [buyer], Juergen S, and the managing partner of the defendant [seller], Harald D., engaged in a preliminary business conversation. In the course of that conversation Harald D. used for promotional purposes a blue brochure with the title «*H. Cooperationsgesellschaft mbH & Co KG*» [firm of the sellers]. It cannot be established whether the [buyer] has ever received this brochure containing a supplement with the AGB (general conditions of sale of the [sellers]), whether thereafter the [buyer] ever agreed to include these general conditions of sale into future contracts, or that the [buyer] specifically agreed to include these terms into the contract during the contract negotiations on 19 December 1990. 1

On 8 October 1990, a further conversation between the parties took place in Stuttgart. In the course of this conversation, the draft of a framework agreement serving as the basis for business contacts with Saudi Arabia was generally agreed upon. This framework agreement was not to be applied to so-called routine contracts, which are usually carried out under Incoterms. Subsequently, on 17 October 1990, the [sellers] sent to the [buyer] a draft of the framework agreement, which the [buyer], however, regarded as too one-sided and therefore did not pursue any further. The framework agreement was not suitable for routine contracts because these involve finding buyers for specific products on short notice, and are therefore primarily agreed upon and executed by phone. As the business relationship between the parties was new, they agreed to secure every contract with a letter of credit. 2

[*] All translations should be verified by cross-checking against the original text. For purposes of this translation, the German Defendants-Appellants are referred to as [sellers], the Austrian Plaintiff-Respondent as [buyer]. Monetary amounts in Austrian schillings are indicated as [*sA*].

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Following several offers by fax, which were not accepted by the [sellers], on 18 December 98, the [buyer] made an offer to purchase approximately 700 to 800 tons of natural gas. In response to this offer, the [sellers], sent a fax to the [buyer] on 19 December 1990 (10:17 a.m.), which read: 3

> «Butane and propane can be delivered immediately FOB: ARA, with a price of US$ 18/mt. However, preferably, we should […] a larger quantity than the 1,000/mt. mentioned by you.
>
> This deal is ready to be concluded in all its details. As we have larger quantities at our disposition due to term contracts, since today, we are making every effort to find a customer.»

The abbreviation ARA refers to the greater area of Amsterdam-Rotterdam-Antwerp.

Another fax of the [sellers] dated 19 December 1990 (11:46 a.m.) said: 4

> «In accordance with our discretionary powers, we can currently accept an average price of US$ 376 at the maximum.»

Then, the [buyer] sent a fax to the [sellers] on 19 December 1990 (2:16 p.m.): 5

> «We are pleased to confirm the first contract regarding liquid gas. According to your offer, we have bought as follows:
>
> Product: propane, upon mutual agreement a maximum of 2% butane and a maximum of 5% olefin.
>
> Quantity: approximately 700-800 tons
>
> Price: up to US$ 376 FOB: refinery Rotterdam for export to Belgium
>
> Delivery: December 1990
>
> As we intend to begin to take the merchandise over on 20 December 1990, please provide us with the details of delivery.
>
> Payment: We suggest ten days after date of delivery upon invoice by telex. In addition, we are working on the delivery of a shipload of approximately 1,000 tons this year.
>
> We are awaiting your immediate notification regarding the ship to be loaded on 2 January 1991.
>
> Further details will be discussed in the course of the afternoon.»

Belgium was mentioned as the final destination for export in order to inform the refinery of the country for which the customs documents should be prepared.

The last written communication on 19 December 1990 was the fax of the [sellers] to the [buyer] (3:19 p.m.), which read as follows: 6

> «. . . I still have to confirm the exact place of loading in the US within the next two hours. This also applies to the time of loading, despite the fact that we still have the problem of payment.
>
> «Payment should not be made later than three days after takeover of the goods. Due to this new business relationship in almost all regards, we have to ask for a bank confirmation of the order. This would be the easiest way.
>
> «And the date of 2 January 1991 could also be already confirmed. Please let us know, at what time your bank will be able to confirm. Then we will immediately provide you with our account information. Meanwhile, we will hopefully have further information from the US. Unfortunately, this does not go faster.»

Beside this ample communication by fax, the parties equally communicated by phone on 19 December 1990, whereby the negotiations were conducted by Juergen S. and Harald D. Following the fax of the [buyer] of 2:16 p.m., another telephone conversation took place, in the course of which – in contrast to the initial proposal of the [buyer] – the parties agreed upon a deadline of payment of three days after takeover of the goods and a letter of credit of the [buyer] to secure this contract of sale. It could not be established whether the [sellers] still had reservations regarding the final destination of Belgium. 7

During the negotiations with the [sellers], the [buyer] made contacts with the company of «G-T Holland» to discuss the resale of the merchandise ordered from the [sellers]. As the [buyers] opportunity to sell took a more concrete shape, the [buyer] agreed upon the takeover of the first 700 to 800 tons with the [sellers]. When Harald D. urged the [buyer] to purchase a larger quantity, the [buyer] made every effort to sell a larger quantity, in which [buyer] finally succeeded on that very afternoon. When a corresponding offer of [buyer's customer] G-T was made, the [buyer] finally agreed upon a quantity of approximately 3,000 tons instead of the 700–800 tons initially envisaged. The [buyer] and G-T agreed upon a resale price of US$ 381 per ton. 8

In the opinion of the [buyer], the contract with the [sellers] was concluded on the evening of 19 December 1990 – with the exception of the place of loading, which still remained unclear. The [buyer] was still waiting for the information of the loading place in order to have the necessary details for the letter of credit. Jürgen S., who went on vacation on 20 December 1990, especially asked his secretary urge the [sellers] to provide this information. During his vacation, he also had several telephone conversations in this regard with Harald D. Furthermore, the [buyer] asked the [sellers] to notify them of the place of loading in a telefax of 2 January 1991. On 3 January 1991 the [buyer] informed the [sellers] of the fact that the letter of credit could not be processed by the bank on that day because the necessary and promised documentation was not available. 9

The [sellers] answered to this by sending a telefax on 7 January 1991, informing the [buyer] for the first time that they did not have the authorization of their supplier for export of the 10

natural gas into the Netherlands, Belgium, or Luxembourg, resulting in the fact that the delivery of the natural gas was not possible anymore.

Consequently, neither did the [sellers] name a place of loading nor did the [buyer] execute a letter of credit. On 8 January 1991, the [buyer] let the [sellers] know, that [buyers] customer G-T already had made substitute purchases and that the [buyer] was trying to sell the quantity already purchased in Germany. On the same day, the [sellers] also told the [buyer] that the natural gas could not be sold to customers in the so-called Benelux countries at all. 11

In a letter dated 15 January 1991, the [buyer] gave the [sellers] a list of the losses of its customer. Then, the [buyer] transmitted to the [sellers] the claims of G-T arising from the substitute purchase in the amount of US$ 144,131 who, however, rejected them. 12

Meanwhile, G-T sued the [buyer] in the Circuit Court of Rotterdam for damages in the amount of $ 144,131 resulting from the substitute purchase. 13

The [buyer] demands from the [sellers] payment of 168,000 Austrian shillings as a reimbursement of damages. 14

The [buyer] substantiated its claims as follows:

The [buyer] ordered 3,000 mt propane at a price of $ 376/mt from the [sellers] on 19 December 1990. Upon conclusion of this contract of sale and on the same day, the [buyer] resold the 3,000 mt propane to the Dutch company G-T. Despite several deadlines set by the [buyer], the [sellers] did not deliver the quantity of propane ordered and agreed upon, so that the [buyer] was not able to fulfill its contractual obligations with G-T Holland on time. The resulting additional costs amounted to $ 144,131 plus 1% interest per month. In addition, the [buyer] suffered a loss of profit of $ 5 per ton, resulting in additional damages for the [buyer] in the amount of $ 15,000 (i.e., 168,000 Austrian shillings). The first defendant [seller] is the general partner of the second defendant [seller]. In spite of requests by the [buyer] to the [sellers] to make the [buyer] whole, the [sellers] denied any claim of the [buyer] and so far failed to make an according payment.

The [sellers] filed a motion to dismiss the lawsuit. 15

The [sellers] submit that a contract of sale was never concluded between the parties. According to the general conditions of sale of the [sellers] and the underlying framework agreement, the offer could only be accepted in writing by the [sellers]. This, however, did not happen. Furthermore, no agreement was reached on the terms of payment, which, however, was an essential factor for the [sellers] to be able to agree to a contract. In addition, the [buyer] intended to resell the propane to buyers in the Benelux countries. This, however, was not possible due to restraints imposed on the [sellers] with regard to their supplier. In hindsight, it is quite obvious that the [buyer] just tries to claim the conclusion of a contract of sale in order to be able to claim damages from the [sellers] due to the substitute purchase. Actually, the [buyer] did not incur any monetary loss which it could not have prevented due to its all-encompassing duty to prevent and minimize damages.

The District Court (*ErstG* or Court of First Instance) granted the [buyers] claim with the exception of a part of the claim for interest. **16**

The reasoning for this decision was as follows:

The business relationship between the parties to this lawsuit is governed by the CISG. According to the CISG, the parties reached an agreement upon the amount, quality and price of the natural gas to be sold by the [sellers]. The terms of payment (i.e., by letter of credit) and the deadlines for payment were agreed upon contractually on the evening of 19 December 1990. Only the nomination of a place of loading by the [sellers] was still left open. This means that a valid contract without conditions was in existence.

The Court of First Instance found that the terms of the framework agreement never constituted the basis for the specific deal. The general conditions of sale of the [sellers] were not agreed upon. According to Article 53 CISG, the [buyer] was under a contractual obligation to make sure the letter of credit would be granted. A clause to open a letter of credit serves to secure the obligations of both parties to a contract; especially the buyer wants to make sure that payment is only made when the contractual obligations of the [seller] (i.e., delivery of the mutually agreed upon amount and quality at the mutually agreed upon time) have been fulfilled. This means that the buyer has an overwhelming interest in determining the details of the letter of credit and of the documents to be presented already upon conclusion of the contract. In the case of an FOB clause, the [seller] has to deliver the goods onboard a ship named by the buyer at a mutually agreed upon harbor according to the customs of the harbor, and at a mutually agreed upon time or within a mutually agreed upon time framework.

Furthermore, the seller has to inform the buyer immediately that the goods have been delivered to the ship. This means that the seller has to bear the costs and risk of the goods until the time when the goods actually cross the railing of the ship in the mutually agreed upon harbor of shipment. In order to completely secure the contractual rights of the buyer by letter of credit, the nomination of the harbor of loading by the seller is of utmost importance to the buyer. The fact that a letter of credit can be opened without naming the exact place of loading, is not a decisive factor here, because the [buyer] explicitly asked the [sellers] to name the place of loading to completely secure the [buyers] order. The [sellers] had assured the [buyer] they would inform the [buyer] of the place of loading within two hours, which, however, did not happen. Therefore, the non-issuance of a letter of credit was due to an omission of the [sellers]. If the [sellers] had ever considered the issuance of a general letter of credit as a fulfillment of their contractual obligations, they should have informed the [buyer] about this. Failing to act or merely waiting for the remittance of any kind of letter of credit by the [buyer] is contrary to the legal principle of bona fide [good faith].

Furthermore, one has to note, that in the end not the non-issuance of the letter of credit by the [buyer], but the determination of the final place of export by the [supplier] of the [sellers] led to the failure of the contract. Therefore, the reason for the non-fulfillment of the delivery of the goods can be found in the sphere of the [sellers], i.e., their inability to get clearance from their [supplier] to export the goods to the Benelux countries. **17**

The Court of First Instance concluded that according to Art. 74 CISG, the [sellers] are obligated to indemnify the [buyer] for the loss of profit in the amount of $ 5 m/t. The [buyer] proved its special interest to be granted a declaratory judgment by showing the existence of a business relationship and a contractual obligation towards G-T. The motion for declaratory judgment was justified following the [sellers] rejection of any of [buyers] claims, especially with regard to the running of the limitation period and the doubtful outcome of the suit for damages in Rotterdam. 18

The Court of Appeal rejected the [sellers'] appeal, basing its decision on the lower courts factual findings on the grounds that they were the result of a flawless procedure. 19

The Court of Appeal's reasoning was as follows:

The contract of sale at issue is governed by the UN Sales Convention according to Art. 1(1)(b) CISG. According to the CISG, as under Austrian law, a contract is formed by two corresponding declarations of intent. Art. 11 CISG does not provide for any form requirements for the conclusion of a contract. In this case, the framework agreement does not apply, because it had not been concluded. The CISG does not put up specific requirements for the inclusion of general conditions of sale in a contract. The necessary rules are to be developed employing Art. 8 CISG. Consequently, general conditions of sale of one party can be a part of the offer due to the contract negotiations between the parties or the practices developed between them. In all other cases, a reference to general conditions of sale which are not attached to the offer, has to be so explicit that a reasonably prudent person from the perspective of the recipient is able to understand it.

The contract at issue was the first one in the newly developed business relationship between the parties. Therefore, practices between the parties could not have been developed yet. The lower court did not find that the general conditions of sale of the [sellers] were part of the contract negotiations. The [sellers] did not explicitly note that they would only be willing to enter into the contract if their general conditions of sale were included. Therefore, the inclusion of the [sellers] general conditions of sale into the contract was not agreed upon. Consequently, the written form stipulated therein did not apply to the confirmation of the acceptance of an order and does not have an effect on the validity of the sales contract. Furthermore, the estoppel exception of Art. 29(2), sentence two, CISG would apply here, if the parties agreed orally on the conclusion of a sales contract without one of the parties informing the other party about the requirement of a written form for the conclusion of said contract. As a result, the parties agreed partly orally and partly in writing upon a contract of sale for approximately 3,000 tons of liquid gas on 19 December 1990. In addition, agreement was reached about the terms of payment, i.e., a deadline for payment of three days after acceptance of the goods by the buyer and the securing of the sale by a letter of credit were agreed upon in detail.

The [buyer] did not open the letter of credit and the [sellers] did not deliver the goods of sale, i.e., the liquid gas. The Court of Appeal held that it was irrelevant whether the non-opening of the letter of credit by the [buyer] represented a breach of contract, which would have given the [sellers] the right to declare the contract avoided under Art. 64(1) CISG. The performance 20

of the contract failed, not because the [buyer] did not open the letter of credit, but because the [sellers] were not able to get approval from their [supplier] to export the liquid gas to Belgium. If it is already certain that the seller is unable to fulfill his obligation to deliver the purchased goods, then the buyer is entitled to suspend its duty to open a letter of credit (Art. 71 CISG). Furthermore, the [sellers] never explicitly declared to the [buyer] the avoidance of the contract according to Art. 26 CISG. Instead, the [sellers] always claimed that a contract of sale was never concluded in the first place. The [sellers] did not fulfill their obligation to deliver the purchased goods, and as a consequence the [buyer] can demand damages according to Arts. 45(1)(b), 74–77 CISG. According to Art. 74 CISG, damages for breach of contract by one party consist of a sum equal to the loss, including loss of profit, suffered by the other party as a consequence of the breach. According to the findings of the lower court, the loss to the [buyer] amounts to 168,000 Austrian shillings. Consequently, the [buyer] has already suffered damages resulting from the breach of contract. Additionally, it is a fact that the [buyer] has been sued by [buyers] business partner, G-T, for damages in the Circuit Court of Rotterdam with the consequence that the [buyer] could suffer additional damages resulting from the [sellers] breach of contract. There are no reasons to assume collusive conduct between the [buyer] and G-T, as claimed by the [sellers]. The Court of Appeal authorized this appeal on points of law (revision).

The [sellers] appeal the decision of the Court of Appeal to this Court on grounds of a faulty procedure and incorrect legal assessment of [buyers] claim. They request the Supreme Court to overturn the appealed decision as well as the decision of the Court of First Instance and to reject the claim. In the alternative, they request a setting-aside of the above-mentioned judgments. **21**

The [buyer] requests dismissal of this appeal.

## Legal reasoning:

The appeal is dismissed.

A reason to decide in favor of the [sellers] on procedural grounds does not exist. According to the [sellers], the appellate procedure was faulty because further factual findings were necessary to adequately make a decision. Therefore, the [sellers] claim the existence of secondary mistakes of findings, which, however, cannot be advanced by an appeal under § 503 No. 2 ZPO [Austrian Code of Civil Procedure], but can only be claimed in connection with an appeal on material grounds (SSV-NF 3/29; EFSlg 55.115; JBl 1982, 311; EFSlg 34.500, ua) **22**

Before the Court of Appeal, the [seller] claimed that the Court of First Instance had made procedural mistakes by failing to take evidence in several ways (testimony of the parties, the reading of the motions of the foreign suit between the [buyer] and G-T, the questioning of an informed witness belonging to G-T). As the Court of Appeal rejected the [sellers] submissions, the alleged mistakes of the Court of First Instance cannot be examined by the Supreme Court as a mistake of the appellate proceeding itself (for consistent case law of the Supreme Court; *see* JUS 1989 Z/265; EvBl 1989/165=NRsp 1989/159 = WBl1989, 317; SSV-NF 3/18, 7174, ua).

Insofar as the [sellers] claim as a ground for appeal that the lower courts found that the [buyer] had suffered a loss of profit of $ 5 per mt of propane gas, they attack the factual findings, which is not allowed before this Court. The lower courts found that the parties agreed upon a price of $ 376/mt and that the [buyer] sold the natural gas to G-T at a price of $ 381/mt. The Supreme Court does not decide on the facts, but on the law only. The Supreme Court is not entitled to examine whether the lower courts in their taking of evidence established the facts of the case correctly.

Both parties in this case assume correctly that the question whether a contract of sale was concluded on 19 December 1990 between the [buyer] residing in Germany and the [sellers] with their residence in Austria, as well as the decision about the obligations resulting from such a contract and the consequences arising from the breach of such a contract, are governed by the UN Convention on Contracts for the International Sale of Goods (CISG); the parties have their places of business in different countries. Though the contract of sale was concluded one day before the CISG entered into force in Germany (on 1 January 1991, BGBl. 1990/303), Art. 1(1)(b) CISG provides for the application of this Convention if the rules of private international law lead to the application of the law of one of the Contracting States to the Convention (*«Vorschaltlösung»*, *cf.* Karollus, *UN-Kaufrecht*, 30). According to Art. 36 IPRG [Austrian Code of Private International Law], synallagmatic contracts, whereby one party at least predominantly owes money to the other party, and for which a choice of the applicable law has not been made by the parties, are governed by the law of the country in which the other party has its usual residence. Consequently, Austrian law applies to the business relationship between the parties, because the [sellers] place of business is in Austria. As the CISG was already in force in Austria (since 1 January 1989, BGBl 1988/96) at the time the contract at issue was concluded, the contract is governed by this Convention (*cf.* RIW 1991, 952). **23**

According to Art. 14 CISG, a contract is concluded by two corresponding declarations of intent, that is, the offer of one party and the acceptance of the other party, and the contract of sale does not have to be in writing nor is it subject to any other form requirements (Art. 11 CISG). The offer, which must be sufficiently definite in that it indicates the goods, the quantity and the price (the latter two must be at least determinable), is interpreted according to the offerors intent where the offeree could not have been unaware of such intent (Herber/Czerwenka, *Internatio-nales Kaufrecht*, Art. 14 n. 10). According to Art. 8(3) CISG, when interpreting the offer, the negotiations of the parties, the practices which the parties have established between themselves, and the subsequent conduct of the parties have to be taken into consideration. **24**

The CISG does not contain specific requirements for the incorporation of standard business conditions, such as the [sellers] general conditions of sale, into a contract. Therefore, the necessary requirements for such an inclusion are to be developed from Art. 14 *et seq*. CISG, which contain the exclusive requirements for the conclusion of a contract (*cf.* Piltz, *Internationales Kaufrecht*, § 5 n. 75). Consequently, the general conditions of sale have to be part of the offer according to the offerors intent, where the offeree could not have been unaware of that intent, in order to become a part of the contract (Art. 8(1) and (2) CISG). This inclusion into the offer can also be done implicitly or can be inferred from the negotiations between the parties or a practice which has developed between them. **25**

The fundamental question at issue is whether the parties concluded a contract of sale regarding 3,000 mt propane gas, which the lower courts decided in the affirmative. In denial of the existence of a contract of sale, the [sellers] argue that it can be inferred from the general conditions of sale, the draft of the framework agreement, and the correspondence between the parties that the [sellers] generally only conclude contracts in writing and only when the payment is guaranteed by letter of credit or some other means of securing payment; in addition, in the preliminary correspondence, the [buyer] explicitly referred to the «usual conditions» and «delivery on a contractual basis». The [sellers] admit that no prior contract has been concluded between the parties and that this, therefore, would constitute their first contract – if a contract was ever concluded, which is still denied by the [sellers] – with the consequence that practices in the meaning of Art. 9 CISG could not have been developed between the parties. The [sellers] claim, however, that prior business conversations between the parties (the general conditions of sale, the prior correspondence and the draft of the framework agreement) show the [sellers] usual approach when concluding contracts, i.e., their principle of concluding contracts in writing only. According to the [sellers], this prior conduct can qualify as «practices» in the sense of Art. 9 CISG, which means that a contract has not been agreed upon, because the written form requirement was not observed. **26**

The argument of the [sellers] is without merit:

It is generally possible that intentions of one party, which are expressed in preliminary business conversations only and which are not expressly agreed upon by the parties, can become «practices» in the sense of Art. 9 CISG already at the beginning of a business relationship and thereby become part of the first contract between the parties. This, however, requires at least (Art. 8, especially paragraph (1) of Art. 8 CISG) that the business partner realizes from these circumstances that the other party is only willing to enter into a contract under certain conditions or in a certain form. In the present case, it cannot be determined whether the [sellers] general conditions of sale were given to the [buyer], whether agreement was reached about their application, or whether the [buyer] got to know them at all. The lower courts could not determine that the [buyers] general contract manager had ever received the brochure containing the general conditions of sale; and the findings of the lower courts do not support the conclusion that the [buyer] was informed of the contents of the general conditions of sale in the aftermath (i.e., following the first informational conversations). As it cannot be determined that the [buyer] had knowledge of the general conditions of sale of the [sellers], the Court cannot draw the conclusion that they formed the basis of the contractual agreement between the parties in the meaning of Art. 9 CISG. **27**

The parties also discussed the draft of a framework agreement. The intended framework agreement, which in the end was not concluded, because the parties could not agree upon it, was supposed to form the basis for so-called tender contracts. According to the findings of the lower courts, these are principally different from routine contracts, such as the contract in question. Routine contracts involve the finding of customers for specific products on short notice; they are mainly negotiated and executed by phone. It cannot be assumed that the [buyer] knew or had reason to know that the [sellers] intended to make those conditions the basis for the conclusion of routine contracts, which were discussed, and finally rejected, in the framework of negotiations for the conclusion of a framework agreement for tender contracts. **28**

Only if the [buyer] had been aware of both of these conditions and the [sellers] intent to make them a basis for all of their contracts, these conditions could have been part of the contractual agreements pursuant to Art. 9 CISG without special agreement.

The correspondence of the parties does not support the [sellers'] point of view either. The mere allusion to «usual conditions» or to «on a contractual basis» does not mean that the [buyer] was referring to the [sellers'] general conditions of sale or to general contractual conditions, which were discussed in connection with the completely different framework agreement, which ultimately was not agreed upon and which did not even cover the kind of contract at issue here. 29

As the [sellers'] general conditions of sale did not become part of the contract, their content is of no relevance here and no determinations regarding their content had to be made by the courts. It was equally unnecessary to determine the content of the parties' correspondence (as the [sellers] demanded), because even if the [sellers'] claims regarding those facts could be substantiated, this would not lead to a different result. 30

As a specific form for the conclusion of a contract was not agreed upon during the negotiations of 19 December 1990 and the facts do not establish that it was self-evident for the parties (Art. 9(1) CISG) that contracts could only be agreed upon in writing as a condition for the conclusion of a contract, the observance of the form requirement, i.e., the written form, was not a condition for the formation of a valid contract (Art. 11 CISG). When deciding this question, oral declarations of the parties have to be equally taken into consideration. 31

Therefore, the Court of Appeal correctly decided that neither the contractual negotiations nor the practices having developed between the parties could have made the general conditions of sale of the [sellers] part of their offer. It is true that the usual requirements for the formation of a contract can be modified by industry usages (Karollus, *UN-Kaufrecht*, 52), if the parties refer to such usages upon conclusion of the contract (Art. 9(2) CISG); however, a custom in the oil industry to conclude contracts of sale in writing only was neither found nor claimed by the [sellers] in this case. 32

The [sellers] argue in their appeal in this regard that the existing written documents (telefaxes) are insufficient to assume the existence of an agreement of the parties. The [sellers], however, neglect essential factors, if they argue – only based on the contents of the telefaxes – that the declarations of the parties are not sufficient to assume the existence of an agreement. Indeed, it is certain that several telephone conversations were made between the parties on 19 December 1990, the contents of which need to be considered when answering the essential question whether a contract was concluded. Accordingly, on 19 December 1990 the parties agreed partially orally and partially in writing upon the delivery of 700 to 800 tons of liquid gas at a price of $ 376 per mt. The mere approximate determination of the quantity was customary in the natural gas industry; the quality or other characteristics of the natural gas have never been disputed by the parties not even at the trial level. The terms of payment, i.e., a deadline of three days after acceptance of the goods and secured payment by letter of credit, were also agreed upon in detail. 33

Therefore, it is irrelevant whether the proposal of the [buyer], which was mentioned in the telefax of 19 December 1990, to pay ten days after delivery of the goods and after telex invoice, constituted a material deviation of the [buyers] acceptance from the [sellers] offer (in that case, the response of the [buyer] would have to be regarded as a counter-offer according to Art. 19(1) CISG, which would require a new consensus of the parties) or just a proposal of the offeree mentioned for future business between the parties, which does not fall under Art. 19(1) CISG (*cf.* von Caemmerer/Schlechtriem, *Kommentar zum Einheitlichen UN-Kaufrecht*, Art. 19 n. 7). In fact, in a telephone conversation, the parties reached agreement about a deadline of three days. **34**

The fact that the parties in this case did not pursue the quantity originally agreed upon, but instead agreed upon the delivery of 3,000 tons of liquid gas, is valid with regard to Art. 29(1) CISG (providing for a subsequent modification of the contract by agreement of the parties), and does not prevent the conclusion of a contract regarding the quantity, which was finally agreed upon. **35**

Furthermore, the [sellers] are precluded by the factual findings of the lower courts from challenging the agreement of the parties about the quantity of 3,000 mt propane gas. The lower courts decided that the increase of the quantity to be delivered (which was incidentally desired by the [sellers]) was agreed upon by phone on the afternoon of 19 December 1990. According to the factual findings, an agreement was also reached about the opening of a letter of credit. **36**

The deal between the parties, therefore, was concluded on the evening of 19 December 1990. In the aftermath, however, neither did the [buyer] open the letter of credit nor did the [sellers] deliver the sold goods, i.e., the liquid gas. **37**

According to Art. 54 CISG, the buyer has the obligation to pay the purchase price and to comply with such formalities as may be required under the contract or any laws and regulations to enable payment to be made. If, as in this case, the opening of a letter of credit was agreed upon, the buyer is obligated to make sure it is opened on time. This can only be assumed as being done when the [seller] has acquired the claim against the bank. Therefore, the agreement about a letter of credit requires the buyer to perform before the seller does. It is only after the letter of credit is opened that the buyer acquires the claim against the [seller] to perform as agreed upon (Avancini/Iro/Koziol, *Bankvertragsrecht II*, n. 4/26). According to the unanimous opinion of scholars (*cf.* Karollus, 171; von Caemmerer/Schlechtriem, Art. 54 n. 3), the opening of a letter of credit is part of the obligation to pay the purchase price with the consequence that the non-performance in this regard triggers the legal remedies of breach of contract (Art. 61 *et seq*. CISG) and not just the remedies of an anticipatory breach (Arts. 71 to 73 CISG, *cf.* von Caemmerer/Schlechtriem, Art. 54 n. 7). **38**

However, the letter of credit was not issued because the [sellers] did not inform the [buyer] of the place of loading despite their obligation to do so and their express confirmation in this regard (last telefax of 19 December 1990). Though Juergen S., even when on Christmas vacation, urged the [sellers] to release this information, the [sellers] did not even inform him of the place of loading at the beginning of January. As a consequence, the notice of the [buyer] **39**

in the telefax of 2 January 1990 can only mean that [buyer] obviously thought that the release of this information would happen on that very day, but that [buyer] could not take any measures anymore on that very day due to the little time left. The fact that the [buyer] did not fulfill its obligation – the advance performance by means of opening a letter of credit – until the beginning of January, is the [sellers] fault, who did not name the place of loading despite their corresponding obligation, even though they had reason to know that the [buyer] would only issue the letter of credit after being informed of the place of loading. It is irrelevant whether the opening of a letter of credit would have been possible even without information about the place of loading, because the parties expressly agreed upon the naming of the place of loading by the [sellers]. Due to this agreement, the [sellers] had the primary duty to name the place of loading. Only after this act on the part of the [sellers], did the [buyer] have the obligation to issue the letter of credit. The non-issuance of the letter of credit, therefore, was caused by an omission of the [sellers], and – following Art. 80 CISG – the latter cannot rely on the [buyers] failure to open the letter of credit.

Furthermore, the non-issuance of the letter of credit was not the cause for non-fulfillment of the contract. In accordance with the holdings of the lower courts, this Court finds that the [sellers] are responsible for the non-fulfillment of the contract, because they did not obtain clearance of their supplier for export of the liquid gas into Belgium. **40**

According to Art. 30 CISG, the seller is obligated to deliver the goods in accordance with the terms of the contract. The argument of the [sellers] in their appeal to the effect that the prohibition of export into Belgium and the resulting consequences are part of the sphere of the [buyer], because the latter did not make the possibility of export into Belgium a condition of the contract, is without merit. Upon conclusion of a contract of sale, the buyer can generally assume in the absence of special circumstances (embargo, legal restrictions, general restrictions known to the industry) that the further use the goods is unlimited and is not subject to further restrictions. It is not the duty of the buyer to obtain an assurance that further delivery restrictions do not exist. To the contrary, it is the obligation of the seller to mention such restrictions of delivery, which limit the normally unrestricted use of the goods. If the seller omits to mention such restrictions, the buyer can justifiably assume that such restrictions do not exist. According to Art. 41 CISG, the seller has to deliver goods, which are not subject to the rights of third parties, unless the buyer has previously agreed to accept such goods in fulfillment of the contract. If the supplier of the seller has restricted the export of the goods, then the goods are burdened with such a restriction. This consequently means that the delivery of goods, which are subject to such a restriction, constitutes non-fulfillment of the contract in the absence of the buyer's consent. **41**

As the [sellers] did not fulfill this obligation, the [buyer] has the right to full indemnification of its damages (Karollus, 211). This means that the aggrieved party always has to be placed in the position that he or she would have been in if the other party had fulfilled the contractual obligation breached by him (Karollus, 215). The other party does not have to be at fault or have to act illegally to be held liable in this respect (Karollus, 206). In its Arts. 75 and 76, the CISG contains specific provisions about the calculation of damages only for the case of avoidance of a contract following a breach. The breach of a contractual obligation never leads to the automatic avoidance of the contract by law – even if, as is the case here, one party is **42**

substantially deprived of what she is entitled to expect under the contract (Art. 25 CISG; *cf.* Karollus, 151; von Caemmerer/Schlechtriem, Art. 49 n. 28). The avoidance of a contract is made by unilateral declaration of the party faithful to the contract to the other party (*cf.* Karollus, 151); it does not require a specific form and generally, with the exception of the cases of Art. 49(2) CISG, is not subject to a specific deadline (*cf*. Karollus, 146).

In this case, the controversy about whether the declaration to avoid the contract in the sense of Art. 49(1) CISG has to be explicit (*cf.* Karollus, 151) or whether conclusive conduct is sufficient (*cf.* von Caemmerer/Schlechtriem, Art. 49 n. 29), is irrelevant. For even if a conclusive declaration to avoid a contract is regarded as sufficient, the intention of the buyer not to adhere to the contract anymore has to be obvious beyond any doubt (*cf.* LG Frankfurt am Main, RIW 1991, 952/953). In this respect, the requirements for the clarity of the declaration have to be set at a high level (*cf.* von Caemmerer/Schlechtriem, Art. 26 n. 10). The factual findings of the lower courts do not suggest that the contract of sale in this case has been explicitly avoided by the [buyer], which, besides, has never been argued by the [buyer] itself. Furthermore, a declaration to avoid the contract cannot be concluded beyond any doubt from the fact that the [buyer] provided the [sellers] with a list of the losses of [buyers] customer. Consequently, the [buyers] damages in the present case have to be calculated in a way that is based on the existence and performance of the contract according to Art. 74 CISG. This may include the damages resulting from the delay of the delivery of the goods or from defects of the product, including loss of profit as consequential damages (*cf.* von Caemmerer/Schlechtriem, Art. 74 n. 5). However, if the buyer loses profits, which [buyer] could have realized by reselling the goods had the seller not breached his obligations, the seller is only liable for this loss of profit if he had to reckon with the buyers resale. In the case of the sale of commercial goods to a merchant, this can always be assumed without any further indications (*cf.* von Caemmerer/Schlechtriem, Art. 74 n. 41). In addition, the [sellers] themselves admit that they knew that the [buyer] would sell the goods. **43**

However, insofar as the damages for breach of contract, including the loss of profit, could have been mitigated by measures reasonable in the circumstances, compensation cannot be demanded (*cf.* von Caemmerer/Schlechtriem, Art. 77 n. 3; Karollus, 225). A possible measure to reduce damages is reasonable, if it could have been expected as bona fides [good faith] conduct from a reasonable person in the position of the claimant under the same circumstances (*cf.* von Caemmerer/Schlechtriem, Art. 77 n. 9). Apparently, the [sellers] refer to this provision when they claim a breach of the duty to mitigate damages. However, this argument has to be rejected because the [sellers] have not advanced any detailed facts to support it. The claim of the breach of the duty to mitigate damages is an exception leading to the loss of the claim for damages. It requires the [sellers] to put forward detailed facts and the supporting evidence showing why the [buyer] has breached its duty to mitigate damages, the possibilities of alternative conduct and which part of the damages would have been prevented by this alternative conduct. The [sellers] did not bring forward any of these submissions. They solely claimed the breach of the duty to mitigate damages in a general manner in the course of the suit, and it was not until the appellate level that they raised the argument that the [buyer] was obligated to conclude substitute contracts at an appropriate time and in an appropriate time framework according to Art. 75 CISG. Beside the fact that new arguments cannot be **44**

raised on the appellate level, these arguments themselves contain only the legal language of Art. 77 CISG without even trying to advance specific facts such as the ones mentioned above.

In addition, the arguments raised by the [sellers] against a declaratory judgment are without merit. Upon the sale of commercial goods to a merchant, the seller has reason to believe that the buyer will be held liable by her customers if the seller delivers non-conforming goods or does not fulfill his duty to deliver at all (*cf.* von Caemmerer/Schlechtriem, Art. 74 n. 42). Therefore, the [buyer] has a legal interest in the award of a declaratory judgment regarding the [sellers] liability for all future damages resulting from the breach of contract, in particular because the possibility exists that the breach may cause even further damages (EFSlg 55.030). Besides, in this case it is certain that the [buyer] has already been held liable by its customer, which is the subject of a lawsuit in Rotterdam. **45**

When the [sellers] claim collusive conduct of the [buyer] and G-T to the detriment of the [sellers], these are mere presumptions without any substance whatsoever. **46**

Therefore, the decision of the Court of Appeal is upheld and the appeal is dismissed. **47**