

Case 189: CISG 8(2); 14(1); 19(2)(3)

Austria: Oberster Gerichtshof; 2 Ob 58/97m

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The plaintiff, a company, with its place of business in Russia, ordered from the defendant, a company with its place of business in Austria, 10,000 tons +/- 10% of monoammoniumphosphate (MAP) with the specification “P 205 52% +/- 1%, min 51%”. However, the seller accepted instead to deliver 10,000 tons +/- 5% MAP with the specification “P 205 52% +/- 5%, min 51%”.

The court of first instance held that the negotiations between the parties had not led to a valid contract. The court of appeal vacated that decision and remanded the case to the court of first instance.

The defendant appealed against the decision of the court of appeal to the supreme court, which held that the findings of fact of the court of first instance were incomplete. The specification by the seller appeared to be contradictory since “52% +/- 5%” described a range from 47% to 57%, whilst that range was restricted in the seller’s offer to a minimum of 51%. Therefore, the supreme court stated that the court of first instance should have clarified whether, in the light of article 8(2) CISG, for a “reasonable person of the same kind as the other party ... in the same circumstances” the reply to the offer could be regarded as sufficiently definite pursuant to article 14(1) CISG. If the offer could be regarded as sufficiently definite, the court of first instance should have decided whether the reply altered the terms of the offer materially. The supreme court also held that the alterations listed in article 19(3) CISG are not to be considered as altering the terms of the offer “materially” in the sense of article 19(2) CISG if, in the light of usages, the negotiations and the very circumstances of the case, they are not deemed essential. In particular, it was held that alterations merely in favour of the other party do not require an express acceptance.

Accordingly, the supreme court, in remanding the case to the court of first instance, stated that the court should make the relevant findings and then decide whether the alterations were to be considered material and if the alteration with regard to the quantity was merely in favour of the buyer.