CISG-online 269	
Jurisdiction	Austria
Tribunal	Oberster Gerichtshof (Austrian Supreme Court)
Date of the decision	20 March 1997
Case no./docket no.	2 Ob 58/97m
Case name	*Monoammonium phosphate case*

Translation[*] *by Jan Henning Berg*[**]

Edited by Institut für ausländisches und internationales Privat- und Wirtschaftsrecht der Universität Heidelberg

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[...]

FACTUAL BACKGROUND

Plaintiff [Buyer] requests payment of US$ 69,500 and submits to have bought from [Seller] 10,000 metric tons of mono ammonium phosphate (hereinafter: MAP) on 30 July 1993. After hints given by [Seller]'s employees, [Buyer] asked [Seller] by letter dated 10 and 11 August 1993 to admit to the contract. As this request remained unanswered, [Buyer] declared avoidance of the contract by fax dated 12 August 1993. Although [Buyer] immediately concluded a cover transaction, it suffered loss of profit in the amount of US$ 65,000 due to an increase in prices. Processing the cover purchase, correspondence, traveling costs, attorneys' fees and other expenses amount to further damages of US$ 4,500. 1

[Seller] argued that there had not been any conclusion of contract between the parties. [Buyer] had not accepted the offer in due time; instead, [Buyer] had submitted a modified offer. Several issues of the alleged contract had lacked proper agreement by the parties. 2

RULING OF THE COURT OF FIRST INSTANCE

The Court of First Instance rejected the [Buyer]'s claim. It essentially assumed the following factual findings: 3

A critical part of the intended sales contract was for [Buyer] to acquire MAP, specification «P 205 52% +/- 1 min 51%». P 205 is an important ingredient of MAP. The latter specification means that the MAP must contain 52% of P 205 with a maximum tolerance of only 1% less or

[*] All translations should be verified by cross-checking against the original text. For purposes of this translation, Plaintiff of Austria is referred to as [Buyer] and Defendant of Russia is referred to as [Seller].
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more. During negotiations, [Buyer] assumed it would receive FROM [Seller] MAP of the said specification.

Contrary to what [Buyer] expected, [Seller] assumed the required specification to be «P 205 52% +/- 5 min 51%». Given this specification, the [Seller] would be much more flexible, since deviations in 4

either direction up to the said limits are in conformity to the contract.

[Seller] was willing to sell for US$ 96 per metric ton (mt). [Buyer], however, only wanted to pay US$ 95.75/mt. [Buyer] stated that it might be willing to pay US$ 96/mt. However, [Seller] finally indicated that it would be willing to sell for US$ 95.75 as well. 5

By the end of July 1993, the negotiating parties understood their positions to be corresponding in many points, but erred about the other one's expectation regarding the content of P 205. «In view of this background» [Seller] made an offer on 30 July 1993 of 10,000 mt +/- 5% «subject to selection of the ship». US$ 96/mt was mentioned as the price; the specification was stated as «P 205 52% +/- 5 min 51%». 6

On the same day, [Buyer] sent a fax to [Seller], accepting the offer provided that the amount would be 10,000 mt +/- 10% subject to selection of the ship instead of +/- 5%. When this document was transmitted, [Buyer] expected the previous offer by [Seller] to contain a P 205 content of 52 +/- 1% min 51%. *Irina K.* (of [Seller]) announced during a telephone call that there were no objections to the modification of the amount. It could not be determined whether there had been a binding promise for delivery by *Irina K.* on 30 July 1993 or whether this should be provided only after consultation with [Seller]'s CEO. At any rate, on the same day or one day afterwards, [Buyer] sent a fax mentioning a price of US$ 95.75 and a P 205 content of «52% +/- 1 min 51%». 7

It could not be determined whether a second fax was transmitted to [Seller].

It was obvious to the parties in dispute that they had different expectations as to the specification of P 205 content at the latest during the communication following the last fax. MAP with «P 205 52% +/- 5 min 51%» was useless for [Buyer]. However, [Seller] did not want to accept the specification «P 205 52% +/- 1 min 51%». There was no settlement, despite further negotiations until after 4 August 1993. 8

[Seller] send a fax to [Buyer] dated 4 August 1993, in which it pointed out that it was not able to deliver between 20 and 30 August 1993, lacking export authorization by the Russian railway authority. A promise for delivery between 20 and 30 August 1993 could only have been given if a written notice confirming the conclusion of contract had been presented to the Russian railway by 3 August 1993. 9

Following several requests by [Buyer] to perform delivery between 20 and 30 August 1993, [Buyer] declared avoidance of the contract on 12 August 1993. 10

It could not be established that there had been a trade usage which would suggest that a change in the amount from «+/- 5% subject to selection of the ship» to «+/- 10% subject to selection of the ship» was a modification of only minor significance. 11

In terms of governing law, the Court of First Instance held that failing a choice of law, the Convention on Contract for the International Sale of Goods (CISG) was applicable. Austria and the Russian Federation are Member States to this Convention. Provided that the parties to the contract had their places of business in different Member States (Art. 1(1)(a) CISG), or if alternatively, the conflict of laws rules – as in this case § 36 IPRG – led to the substantive law of a Member State (Art. 1(1)(b) CISG), the CISG would apply. [Seller]'s fax dated 30 July 1993 indicated the goods, price and quantity; it was therefore sufficiently definite to be considered a valid offer. However, there was no acceptance to this offer by [Buyer] because the content of its fax deviated in a critical point from [Seller]'s offer. [Buyer]'s fax thus constituted a counter-offer, which was not subsequently accepted. 12

RULING OF THE COURT OF APPEAL

The Appellate Court called by [Buyer] set aside the judgment of the Court of First Instance and referred the issue back to that court for an additional hearing and a second judgment. It declared that recourse to the Federal Supreme Court was admissible as there was Supreme Court jurisdiction in respect to the interpretation or avoidance of contracts under the CISG. 13

The Appellate Court followed the Court of First Instance insofar as it held that the present case was to be adjudicated under the CISG. It ruled that [Buyer] had made a material change in its answer to [Seller]'s offer. According to Art. 19(3) CISG, any modifications or deviations regarding price, payment, quality and quantity of the goods are considered to alter the terms of the offer materially. It was not true that [Seller] could not suffer any disadvantages following a change in the amount sold. A broader tolerance would be disadvantageous in case the selected ship had a lower capacity. However, [Seller] accepted the counter-offer by telephone. By virtue of this confirmation by [Seller] to the amount «+/- 10% according to ship's capacity», the contract was concluded according to [Seller]'s offer, yet with the change to «+/- 10% according to ship's capacity». 14

Regarding the specification of the promised goods, the Appellate Court was of the opinion that there was consent between the parties, because acceptance by [Buyer] conformed to the offer. The objective understanding of both declarations was that the goods had to contain 52% of P 205, with a maximum tolerance of +/- 5% per charge and that 51% was the required average content of P 205, yet not more than 57% was allowed. During the proceedings in the Court of First Instance, there was no reliance on mistake by either of the parties. 15

The fact that [Buyer] continued negotiations and that it sent the [Buyer] partially modified contract drafts, was not regarded as of any relevance. Under Art. 26 CISG, a declaration of avoidance of the contract is valid only if it reaches the other party. There had been no express declaration of the contract's avoidance. In cases of implied declarations, the actual intent of the parties has to be considered according to Art. 8(1) CISG. Should any misunderstandings remain, interpretation follows the objective content as measured by a reasonable person of the same kind as the other party in the same circumstances (Art. 8(2) CISG). In either case, due consideration is to be given to all circumstances of the case which might be important for interpreting declarations and facts. Applying these principles, there had not been any common intent of the parties to avoid the contract, particularly not in respect to their subsequent conduct. Under the assumption of the contract's validity, the proceedings were not yet ripe for decision, failing determination of the amount of damages. 16

POSITIONS OF THE PARTIES

[Seller]'s recourse aims against this judgment by the Appellate Court with the request to alter the decision in a way that the judgment of the Court of First Instance would be restored. Alternatively, it requests referral to the Court of First Instance. 17

[Buyer] responded to [Seller]'s recourse and requests to dismiss the appeal as inadmissible. 18

[…] 19

REASONING OF THE COURT

[Seller]'s recourse is admissible – as there is no jurisdiction of the OGH in respect to the present issue on the CISG – but not justified. 20

In its appeal, [Seller] relies on the fact that there was no conclusion of contract between the parties during the telephone conversation with witness *K.* due to her lack of authority. Furthermore, it could not be determined whether or not a binding promise of delivery was made during this call. Even assumed that there had been an implied conclusion of contract, both parties effectively avoided the transaction due to mistake, which had been obvious. This avoidance was mutually accepted, respectively, at least by [Seller]. Finally, the commencement of further negotiations about substantial aspects of the contract clearly indicated the intent to avoid any contract which had been concluded in the meantime. Both parties therefore assumed that there was no consent. 21

Due to the fact that Austria and the Russian Federation are signatories to the UN Convention on Contracts for the International Sale of Goods (CISG; BGBl 1988/96), it applies by virtue of autonomous link (Art. 1(1)(a) CISG). The Convention's material scope of application is given as well, since the present contract is for the sale and delivery of goods. 22

It is now to determine whether a valid contract has been concluded between the parties, which first requires a binding offer. According to Art. 14(1) CISG, a proposal for concluding a contract constitutes an offer if it is sufficiently definite and indicates the intention of the offeror to be bound in case of acceptance. Under the subsequent second sentence, a proposal is sufficiently definite if it indicates the goods and expressly or impliedly fixes or makes provisions for determining the quantity and the price. An offer is also valid in accordance with Art. 8(2) CISG, if the essential minimum content can be interpreted according to the understanding «a reasonable person of the same kind» as the other party would have had «in the same circumstances» (*von Caemmerer/Schlechtriem*, Kommentar zum Einheitlichen UN-Kaufrecht, Art. 14 para. 4). On the basis of the fact finding of the Court of First Instance, it cannot be finally determined whether [Seller] has issued a sufficiently definite offer. The corresponding document contains in regard to the goods' specification the term «P 205 52% +/- 5 min 51%». There seems to be a contradiction between «52% +/- 5» and the term «min 51%». 52% +/- 5 leads to a tolerance from 47% to 57%, which cannot be brought in line with «min 51%» (minimum 51%?). 23

The Court of First Instance will have to discuss this issue with the parties and take evidence in the case of contradicting submissions by the parties.

However, assuming that there has been a valid offer by [Seller], it is then necessary to determine whether it has been accepted by [Buyer]. According to Art. 19(1) CISG, a reply to an offer which purports to be an acceptance but contains additions, limitations or other modifications is a rejection of the offer and constitutes a counter-offer. However, a reply to an offer which purports to be an acceptance but contains additional or different terms which do not materially alter the terms of the offer constitutes an acceptance, unless the offeror, with undue delay, objects orally to the discrepancy or dispatches a notice to that effect. If it does not so object, the terms of the contract are the terms of the offer with the modifications contained in the acceptance (Art. 19(2) CISG). Additional or different terms, especially relating to quality and quantity, are considered to alter the terms of the offer materially (Art. 19(3) CISG). According to the leading doctrine in Austria (*Karollus* 70; *F. Bydlinski*, in: *Doralt*, Das UNCITRAL-Kaufrecht im Vergleich zum österreichischen Recht, 72; similar for Germany *Schlechtriem*, Art. 19 para. 8; contrary *Herber/Czerwenka*, Internationales Kaufrecht, Art. 19 para. 11 with further references), the enumeration of Art. 19(3) CISG constitutes a rule for interpretation that is refutable in individual cases. Even though Art. 19(3) CISG enumerates certain modifications and qualifies them as material, it may as well be that modifications to these points within the declaration of acceptance are to be considered not material to the agreement. This might be a result of the special circumstances of the case, previous negotiations or of usages in the particular business or between the parties. Modifications in favor of the offeror, in particular, do not require a counter-acceptance (*F. Bydlinski*; *Karollus*; *Schlechtriem*, Art. 19 para. 8). Now, it cannot yet be determined for the present case whether or not the modification in quantity as stated in [Buyer]'s acceptance is only in favor of [Seller]. The offer is «10,000 mt +/- 5% subject to selection of the ship» while the acceptance is «10,000 mt +/- 10% subject to selection of the ship». The question whether this acceptance is solely in favor of [Seller], depends on who may select the ship. If selection is on [Seller], the declaration of acceptance by [Buyer] does constitute an advantage for [Seller], as it will have greater influence on the quantity owed. However, if [Buyer] is entitled to select the ship the modified quantity term may well lead to a disadvantage for [Seller], meaning that the reply to the offer would constitute a counter-offer in accordance with Art. 19(1) CISG. The Court of First Instance will have to discuss this matter with the parties and take a position in case of contradicting submissions. **24**

Should these supplementary proceedings lead to the result that [Seller]'s offer has not been accepted by [Buyer], it would be critical to establish if [Buyer]'s counter-offer has effectively been accepted by [Seller] through witness *K*. The ruling of the Appellate Court cannot yet be revised definitely. First, there are contradictory findings by the Court of First Instance in that respect. The court held that witness *K.* stated not to have any objections against a modification in the quantity term. On the other hand, it held that it was not possible to determine whether a binding promise of delivery was made in the course of that phone call (or on 30 July 1993, respectively) by witness *K.* or whether acceptance should be posted only after consultation with [Seller]'s CEO. The Court of First Instance will have to make precise findings on that point. Furthermore, there are no findings as to whether or not witness *K.* was actually authorized to issue such declarations (acceptance of [Buyer]'s counter-offer) for [Seller]. The CISG does not contain any rules regarding authority and agency; this question is to be settled according to the domestic law applied under conflict of laws rules (*Karollus* 41). According to § 49(2) IPRG, requirements and effects of agency are, failing any corresponding provision in the applicable law, determined by the law of that State, in which the agent shall act under the reasonably perceptible intent of the principal; in this case Austria. **25**

There are no concerns against the view of the Appellate Court when it held that there had not been any mutual avoidance of contract. It is referred to the corresponding statements of the Appellate Court according to § 510(3) ZPO. **26**

The question of mistake as raised by [Seller] in its appeal must be determined under the domestic law applied by virtue of conflict of laws rules, as well (*Karollus* 41). In this case, this will be Austrian law, according to § 36 IPRG. However, [Seller] has not substantiated that the requirements of § 871 ABGB are met in this case. Moreover, a joint mistake is not apparent. **27**

The repealing resolution by the Appellate Court is therefore justified, so that [Seller]'s recourse is dismissed. **28**

The decision on costs and expenses is based on § 52(1) ZPO.

[...]