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| Tribunal | Schiedsgericht der Börse für landwirtschaftliche Produkte in Wien (Arbitral Tribunal of the Exchange for Agricultural Products in Vienna) |
| Date of the decision | 10 December 1997 |
| Case no./docket no. | S 2/97 |
| Case name | *Austrian summer malting barley case* |

Translation[*] by Tobias Koppitz[**]

Edited by Jan Henning Berg[***]

## I. Statement of facts

The following undisputed statements of facts are ascertained: With Contracts of Sale No. 9604394 (Attachment ./B) and No. 9700093 (Attachment ./A) of 16 January 1997, the Plaintiff [Seller] sold the Defendant [Buyer] a total of 6,300,000 kg Austrian summer-brew-barley harvest 1996, pure Maresi, loose per TADS-wagons for the price of Austrian schillings [sA] 225.- per 100 kg (regarding the amount of 4,800 t to be delivered according to the Contract Attachment ./A in the months March to June 1997, the price was supposed to change on the «basis reimbursement ECU 28.99» pro/contra respectively) to the dates January/February 1997 regarding the amount of 1,500,000 kg (Contract Attachment ./B) and March-June 1997 regarding the amount of 4,800,000 kg (Contract Attachment ./A), each according to the disposition of the buyer with weight set-off «according to the bill of lading final at departure» and parity «DAF Lichkov-Miedzylesie or Zebrzydowice». Regarding the quality of the goods, it was 1

[*] All translations should be verified by cross-checking against the original text. For purposes of this translation, the Plaintiff of Austria is referred to as [Seller] and the Defendant of Poland is referred to as [Buyer]. Amounts in the currency of Austria (Austrian schillings) are indicated as [sA]. Translator's note on other abbreviations: ABGB = Allgemeines Bürgerliches Gesetzbuch [Austrian Civil Code]; HGB = Handelsgesetzbuch [Austrian Commercial

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agreed: «healthy, customary in trade, at least 90% over 2.5 mm, 15% humidity at most, germination capacity at least 95%, stocking 29% at most, protein basis 11.5% 12% at most, quality final according to SGS-certificate.»

Both contracts were based on the usages of the market for farm products in Vienna and the seller's «standard terms» printed on each back, which in their item 11 call for the application of Austrian law. In case of dispute, the contractual partners subjected themselves to the decision of the Arbitral Court of the market for farm products in Vienna (according to the introductory sentence of the contract). In their item 4, the seller's standard terms read: «The retention and counter-set-off of claims due on grounds of counterclaims of our contractual partner, which are not accepted by us explicitly and in writing, is not admissible and is equally inadmissible under the provision concerning warranty.» Item 9 of these standard terms reads: «Warranty and liability: Should the goods not be in conformity with the contract conditions, the goods are to be taken at a reduced price to be determined by the competent Arbitral Court. In case of unsuitability of the goods, the goods are to be taken back by the seller against the reimbursement of the sales price.» 2

The payment was supposed to be made by irrevocable and confirmed letters of credit for shipments of over 500 tons each.

The [Seller] had delivered to the [Buyer] 200 tons of summer-brew-barley in January of that year and another 300 tons in February of that year and had made use of the letter of credit for that. 3

## II. Seller's claim

In [Seller]'s claim filed on 28 April 1997, the [Seller] alleges that the [Buyer] had refused the further acceptance of the summer-brew-barley it bought with the incorrect substantiation that the quality of the goods was defective and that [Buyer] finally, by letter of 7 April 1997 (Attachment ./C), declared its «waiver» («on any deliveries»). However, the time for complaint by [Buyer] about the quality of the goods had expired and was thus dismissed. [Buyer] has not protested in due time (Attachments ./D and ./E). By complaining about the goods, the [Buyer] was merely trying to achieve a price reduction for the amounts not yet delivered, as the [Buyer] had seen the possibility of purchasing at [sA] 2,100,- per ton from a third party; this is also the price which the [Buyer] proposed to the [Seller] in order to adjust the contract. The unreliability of the quality complaint by the [Buyer] is also derived from the certificates of tSGS Austria ControllCo Plc of 28 January 1997 (Attachments ./G and ./H) and of 24 February 1997 (Attachment ./I) as well as from the investigation report of the Austrian Beverages Institute (österreichisches Getränke Institut) of 3 April 1997 (Attachment ./J). In a conversation between the parties on 16 April 1997, the [Buyer] declared that it still wanted to think about whether it wanted to accept the goods not yet delivered, but by letter of 21 April 1997 (Attachment ./F) [Buyer] declared that it no longer felt bound by the contract. For reasons of «extreme caution» the [Seller] avoided the contract. Due to the breach of contract by the [Buyer], the [Seller] was justified to demand damages from the [Buyer] in the sense of the 4

usages of the market for farm products in Vienna (§ 50 et seq.) according to the «lost-profit-determination» presented as Attachment ./K in the following summary:

[...]

It is referred to Attachments ./K and T 1-T 18. Alternatively, the [Seller] relies on the assessment of its damage claim according to § 51(2)(d) of the «usages». 5

[Seller]'s damage amounts to at least [sA] 711,256,- which the [Buyer] is indebted to compensate plus 10% interest from 1 May 1997 on.

The amount of the interest claim is based on item 5 of the standard terms, which stipulates interest of at least 5% above the respective National Bank interest rate.

## III. Buyer's defense

The [Buyer] filed for the dismissal of the claim and submitted the following: 6

Prior to the conclusion of the contracts, the [Buyer] had already notified the [Seller] that the sample goods sent did not correspond with the provided contract terms. The [Seller] had, however, assured that the quality of the goods to be delivered would correspond with the contract terms. The barley that was then delivered did not factually correspond with the agreed quality. Following the quality faults of the barley, the [Buyer] had lost customers for whom these goods were intended, and only for that reason had the [Buyer] directed the request for a price reduction to the [Seller]. In order not to lose a customer who did not take the defective goods delivered by the [Seller], the [Buyer] purchased 100 tons of barley from the RWA in Austria. The quality faults were communicated to the [Seller] and complained about without delay. Even though the [Seller] was requested, by letter and by phone, to send a person to the station of discharge in Poland to be present at the taking of samples, nobody was sent there by the [Seller]. This is why the [Buyer] had the examination of the goods carried out by a person especially ordered for that. This was Mrs. Jolanta Witkowska, who works as sampler for the Polish Institute PISiPAR. On 4 March 1997, [Buyer] sampled from the barley that the [Seller] had delivered, at the station Strzegom. The result of the analysis is displayed in the Attachment ./30 of the Laboratory of the Central Inspection for Standardization (Laboratorium der Zentralinspektion für Standardisierung). The [Seller] did not properly react to the notice of defects in due time by the [Buyer]; in this regard, the [Buyer] refers to § 56(a) and § 56(b) of the usages of the Vienna product market. By calling its own experts, the [Buyer] itself acted in the sense of this provision.

The [Buyer] suffered financial detriments from the defectiveness of the delivered barley, because it had to sell the first delivery of 300 tons with a loss of [sA] 19,200.- and the second delivery of 200 tons with a loss of [sA] 23,400.- and suffered a loss of profit in the amount of [sA] 846,800.- from the unperformed further deliveries. [Buyer]'s total damage thus amounts to [sA] 889,400.- and this amount is asserted against the claim. 7

## IV. Seller's response

The [Seller] denies the correctness of the [Buyer]'s submission as far as it is in contrast with the statement of claim; with regard to the asserted counterclaim, [Seller] refers to item 4 of its standard terms (exclusion of set-off). 8

[...]

## VI. Applicable law

The «usages of the market for farm products in Vienna» as well as «the following and overleaf conditions» are mentioned as the basis of the contracts in the clause introducing the text of both contracts and, under the heading «Jurisdiction, item 11, the [Seller]'s «standard terms» printed on reverse of the contracts states that the Arbitral Court that shall have jurisdiction «must apply Austrian law». Thus, a choice-of-law agreement of the contracting parties concerning the law of obligations to be applied to their contractual relation is present («The law governing contractual obligations» [«Schuldstatut»], cf. *Schwimann* in Rummel, ABGB, 2nd ed., No. 2 before § 35 IPRG), which, according to dominant opinion, can effectively be determined in standard terms and conditions (*Schwimann*, id. § 35 IPRG) – the submission of the contractual partner presupposed, which is given here – and which, in light of the foreign relation of the contracts of sale (the Defendant as buyer has its place of business in the sense of § 36 IPRG in Poland) in the sense of § 35(1) IPRG, leads to the application of Austrian material law to this dispute; an outcome, which in the absence of the parties' agreement as to the governing law, would have also been reached according to § 36 IPRG, because according to this provision, for contracts of sale the decisive material law is that of the State in which the seller as the debtor of the «characteristic performance» of the contract has its place of business and the [Seller] has its place of business in Austria. Both Austria and Poland are Contracting States of the United Nations Convention on Contracts for the International Sale of Goods (CISG, also called «Vienna Sales Law»), which became effective on 11 April 1980. It became effective on 1 January 1989 in Austria and on 1 June 1996 in Poland and applies to contracts of sale of goods between parties whose places of business are in different States when these States are Contracting States of the CISG or when the rules of private international law lead to the application of the law of a Contracting State (Article 1 of the Convention). 9

In the present case, the scope of application is already determined through this «autonomous connecting factor» of the nature of the countries of the places of business of the contracting parties being Contracting States (Austria and Poland) pursuant to Art. 1(1)(a) of the Convention, but the otherwise subsidiary indirect connecting factor («Vorschaltlösung» pursuant to Art. 1(1)(b)) is also given, because according to the decisive Austrian private international law (IPRG), this Convention is to be applied, as has already been presented, and the law of the CISG undoubtedly also belongs to the decisive Austrian material law. The wording in item 11 of the [Seller]'s standard terms, that «Austrian law is to be applied» therefore also includes the CISG. A total exclusion of the application of the CISG – permissible pursuant to Art. 6 CISG – is not given, so that it is to be applied in the present case, as far as it is not in contradiction with individual conditions, i.e., terms «negotiated» by the parties, and general conditions, i.e., 10

defined in the [Seller]'s standard terms and conditions, as well as with the «usages» explicitly included in both contracts (provisions for the business dealings at the market for farm products in Vienna). The Arbitral Court addresses the questions of law at issue as follows.

## VII. Issues of law present

1. 11
The substance of the claim is a damages claim of the [Seller] against the [Buyer], which is based in two respects on «breach of contract» by the [Buyer] in the sense of §§ 50 et seq. of the «usages» of the market for farm products in Vienna: After delivery of two installments of barley with a total weight of 500 tons, the [Buyer] refused, as is undisputedly established, to accept further deliveries with the explanation that the goods delivered were defective and declared its «waiver» of further deliveries; after raising protest in the sense of § 50(1) and (2) of the «usages» and fixing an additional period of eight days for the performance of the contract (§ 51 No. 1 of the «usages»). Following the [Buyer]'s «waiver» of further deliveries of goods, the [Seller] finally declared the contract avoided.

1.1. 12
Under these facts and circumstances, it is first to be examined, whether, according to the law to be applied to both contracts of sale, the [Buyer] as purchaser of the barley had the right to avoid the contract with regard to the further installments which had not yet been delivered and which had not yet even been ready for delivery or acceptance, on grounds of the alleged qualitative defectiveness of the installments of 500 tons of the goods that had been already delivered, assuming the correctness of the [Buyer]'s allegation of defectiveness.

1.2. 13
Neither the negotiated text of the contract, nor the «usages» give an answer to this question, so that the CISG with its regulations in that regard has to be consulted. The regulations of the CISG are contained in Arts. 72 and 73, which both provide for anticipated breach of contract as a reason for the avoidance of contract, while Art. 73, specifically for contracts for delivery of goods by installments, allows the avoidance of contract due to the apprehension of a future fundamental breach of contract in respect of future installments due to a fundamental breach of contract that has already occurred with installments already performed. According to the Arbitral Court's opinion, both contracts are to be considered a unitary transaction from an economic point of view insofar, as they provide for the delivery of the absolute same kind of goods in installments during the period January to June 1997 under the same legal terms – with slightly differing terms of payment – and they had been concluded the same day. Thus, these two contracts have to be regarded as a contractual unity, which actually comprise a total amount of barley as the object of sale, and they thus have to be subjected to the provision for contracts for delivery of goods by installment in the sense of Art. 73 CISG with regard to the installments, which had not yet been delivered.

Art. 73(2) CISG reads: 14

> «If one party's failure to perform any of its obligations in respect of any instalment gives the other party good grounds to conclude that a fundamental breach of contract will occur with respect to future instalments, it may declare the contract avoided for the future, provided that it does so within a reasonable time.»

Should, as the [Buyer] alleges, the already delivered barley really be defective amounting to a breach of contract with regard to its quality, then this would have to be attributed to the [Seller] as a fundamental breach of contract in the sense of the definition of Art. 25 CISG, because then the [Buyer] would have been substantially deprived of what it was entitled to expect under the contract, i.e., barley of the agreed quality. Such a breach of duty, should it be regarded as proven, could in the Arbitral Court's opinion give the [Buyer] «good grounds to conclude» that future installments might also be subject to equal or mostly similar defects in quality, especially with regard, that the breach of duty should have been present on two installments and still the seller did not weaken the buyer's apprehension, that the already proven defect on the installments already performed would also cling to future installments, by sufficient explanations and measures with respective probability. According to the dominant opinion in the literature concerning the CISG, a less strict standard is to be applied to the level of probability with which equal fundamental breaches of contract are to be expected on future installments after the breaches of duty so far, as is demanded in the case of Art. 72 CISG (*Honsell*, Art. 73 No. 50) which governs the anticipated breach of contracts which are not contracts for delivery of goods by installments. In that regard, a «common assumption» or «plausible reasons» are generally mentioned, sometimes also the opinion that the future breach of contract had to be «sure to expect» (cf. in detail the references listed in *Honsell*, id. no. 50). 15

*Honsell* (id. No. 51) is of the opinion, that the term «good grounds» in Art. 73(2) presupposes the least level of probability for the assumption of a future breach of contract, it suffices when for the reasons ascertained a defect in the performance of the future installments will occur with «predominant probability». The court of decision is of the same opinion; it thereby takes into consideration the buyer's regular impairment of confidence – due to the defective deliveries so far – in the seller's correct performance of contract, whose task it would be to weaken this apprehension of its contractual partner by sufficient explanations and measures, for example, through the proof that the goods to be delivered in the future would come from a different source (different producer, different trader, different silo-filling, etc.), so that equal defects are then not to be feared. 16

The burden of making sufficient allegations and the burden of proof for those facts, which can lead with sufficient probability to the assumption of future fundamental breaches of contract on the further installments («good grounds») is, according to general rules, borne by the person who relies on those facts as a reason for the avoidance of contract; thus, in the present case the Defendant as [Buyer]. 17

It would be the Plaintiff's obligation as [Seller] then, to allege and prove those facts, which refute this assumption, i.e., the certified basis for prognosis.

1.3. 18
In this regard, the Arbitral Court also has to deal with the question of law, whether the legal consequences for the omission of the notice of defects in due time provided for in Arts. 39 and 43(1) CISG also lead to the [Buyer]'s loss of the right to demand the avoidance of the contract pursuant to Art. 73(2) CISG, with regard to the installments of the goods which have not yet been delivered – as the [Seller] obviously wants to express with its objection of the lapse of time for the notice of lack of conformity of the installments of the goods that had already been delivered.

The Arbitral Court came to the following conclusion: Art. 43(1) CISG could not be applied to this assumption as this paragraph exclusively relates to Art. 41 (freedom of the goods from any right or claim of a third party) and Art. 42 (freedom of the goods from industrial property rights of third parties) and denies the buyer only the reliance on these articles. 19

Art. 39(1) CISG (whose paragraph 2 is not to be considered here, due to the lack of the passing of the period of two years denoted there), which expresses generally and without individual specification the loss of a buyer's right to rely on the breach of contract of the goods, only relates to the concrete criticized delivery of goods itself, thus, in case of contracts for the delivery of goods by installments, to the respective criticized installment, and encompasses exclusively the legal consequences provided in that respect, i.e., the right to require delivery of substitute goods or to require remedy by repair (Art. 46(2) and (3)), the right to reduce the price (Art. 50), the right to avoid the contract pursuant to Art. 49 and the right to claim damages (Art. 45(1)(b)), however, not also the right to require the avoidance of contract pursuant to Art. 72(2) regarding the further installments not yet delivered, if the buyer relies on the – even if criticized not in due time – defectiveness of prior installments as indication for its prognostic assumption that even the further installments which have not been delivered yet will produce the same defects, in order to substantiate [Seller]'s request for avoidance based on that. In other words, the CISG does not deprive the buyer of this right by the omission of the notice of defect in due time regarding the installments already delivered. 20

1.4. 21
It is thus to be stated as an intermediate result that the [Buyer] is not prohibited from seeking recourse to the legal remedy of requesting the avoidance of contract regarding the installments of barley not yet delivered, which it had bought from the [Seller].

1.5. 22
The answering of the legally relevant question of fact, whether the installments of barley already delivered by the [Seller] conformed with the agreement in terms of quality or whether they were defective, is dependent on the findings of the taking of evidence. It cannot be said that the contractual clause relating to the agreed quality of the goods: «final according to SGS-certificate», has the legal effect of the exclusion of the proof to the contrary by the buyer of the goods, as can be deferred from the respective submission of the [Seller]. According to the

Arbitral Court's opinion, it is rather the case that this merely shifts the burden of making sufficient allegations and the burden of proof to the buyer of the goods insofar, as the buyer has to allege and also prove the incorrectness of this certificate of the SGS Austria Controll-Co Plc [SGS Austria Controll-Co GmbH]. It should, however, not be left unattended that the [Buyer] in this dispute had declared in the oral hearing concerning the claim on 16 September 1997 (page 4 of the minutes of 16 September 1997, ON 13), «that [Buyer] does not contest the correctness of the certificates presented by the [Seller] (Attachments ./G, ./H and ./I), but that [Buyer] alleges, that the quality of the goods had not been faultless at the time of the arrival at the [Buyer]». The Arbitral Court had thus first assumed that the [Buyer] alleges defects, which had only occurred in the goods after the passing of risk during the transport to the place of destination (Art. 68 CISG). Only from the correspondence of the parties from the time prior to the dispute and from the documents presented by the [Buyer], especially those which declare Polish examination results (Attachments ./21-29) it resulted, that in truth exclusively such defects were alleged, which would have had to have clung to the goods already prior to their dispatch, should they be regarded as proven. This is why the taking of evidence on the quality of the goods was admitted for the purpose of allowing the [Buyer] the proof of the incorrectness of the present certificates of the SGS Austria Controll-Co Plc [SGS Austria Controll-Co GmbH], regarding the installments of 500 tons barley in total, which had already been delivered, Attachments ./G, ./H and ./I. To reexamine the correctness of the samples of the delivered installments and their testing by the SGS Austria Controll-Co Plc [SGS Austria Controll-Co GmbH], the Arbitral Court of its own motion heard the inspectors concerned, Erich T. and Maria P., as well as the employee Rosemarie K., who is employed in the quality control of the Institute, as witnesses. The outcome of the evidence gained by that will be presented yet.

1.6. **23**
In case the [Buyer] did not succeed in presenting the evidence for the incorrectness of the quality-certificates, so that it would not have had the right to request the avoidance of contract pursuant to Art. 73(2) CISG, it would have to be examined, whether due to the [Buyer]'s refusal to take delivery of the goods bought, the [Seller] is justified in demanding the avoidance of contract; as has already been presented above, the [Seller] had already in the claim declared the rescission of the contract for this reason – which [Seller] terms a «breach of contract» in the sense of the «usages» («for reasons of extreme caution»).

Neither the contracts of the parties, including the [Seller]'s standard terms and conditions, **24**
nor the «usages» of the market for farm products in Vienna foresee the seller's right to repudiate the contract (in the terminology of the CISG: to request «avoidance of contract») in case of the buyer's refusal to take delivery. Obviously, this is because neither the ABGB, nor the HGB or the «usages» know the refusal to take delivery as a case of debtor's delay and the conclusion linked to that, that if there is no other special reason for the obligation of the buyer, then this is a case of creditor's delay, for which other legal consequences than rescission of contract are foreseen, is understandable. But the CISG governs this differently: Art. 60 concerns the reception of the goods bought by taking them over (subpara. (b)) and the contractually provided request for deliveries of the respective goods ordered (subpara. (a)) as an obligation of the debtor and gives the seller, amongst others, also the legal remedy to request the avoidance of contract pursuant to Art. 64(1)(b); in this case, the seller does not have to fix

an additional time for the buyer, if the buyer had declared that it did not want to perform the contract anymore (*Karollus*, UN-Kaufrecht, 1979; *Reinhart*, UN-Kaufrecht, Art. 64 No. 4). The fixing of an additional period would make no sense in such a case. However, it is undisputed, that in the case here the [Seller] had fixed the [Buyer] an additional period of eight days in its protests of 7 April 1997, Attachments ./D and ./E, (under reference to § 51 No. 1 of the «usages», whose applicability is questionable here, as at the time of their entry into force on 1 December 1966, the creditor's delay of the buyer was seen in the refusal to take delivery and this was a general opinion of law, which was only subject to a change by the CISG for its scope of applicability).

As a result, it can therefore be stated that in case of the denial of the [Buyer]'s right to require the avoidance of contract pursuant to Art. 73(2) CISG, the [Seller] was justified to avoid both contracts pursuant to Art. 64(1)(b) CISG and as a consequence thereof also to demand damages as a form of compensation. This, of course, according to the provisions of the «usages» of the market for farm products in Vienna (§ 51 No. 2 lit. b, c or d), which have to be preferred over the relevant CISG, as those provisions partly exclude (Art. 6 CISG) the CISG through the contract-reference. 25

In that regard, should the prerequisites be regarded as given, the required findings are yet to be established.

In this case, it is also necessary to discuss the [Seller]'s request for interest as a secondary claim to the compensation claim. The [Seller]'s standard terms and conditions, which are to be regarded as a part of the contract, provide under item «5. delay in payment» for the case of the buyer's delay «in the payment of the purchase price or another payment to be made by reason of this final certificate» (sentence 1) the obligation to pay «interest of at least 5% above the respective National Bank rate of interest,» The [Seller] relies on that interest rate, but demands 10%, even though the discount rate of the Austrian National Bank (Oesterreichische Nationalbank) remained unchanged since 19 April 1996 at 2.5%, so that the request for interest would only be justified at an amount of 7.5% and the request for more would have to be dismissed (cf. the last publication in «Statistisches Monatsheft der Oesterreichischen Nationalbank», volume 9/1997, page 74). Neither the text of the negotiated contracts, nor the text of the standard terms and conditions or the text of the «usages» mention anything as to from when on this interest is to be paid. According to general opinion, the CISG only governs the obligation to pay interest for default in payment of the purchase price or any other amount due (Art. 78) also as obligation to pay interest for late payment, which occurs at the maturity of a compensation claim (Art. 74; *Karollus*, id. Nos. 226 et seq.). With its claim, which it handed over to the Arbitral Court on 28 April 1997, the [Seller] let the compensation claim become due and per 1 May 1997, the [Seller] demanded interest. As far as the request for the compensation of damages should prove to be justified, the [Seller] will have to be awarded 7.5% interest from 1 May 1997 on and the request in excess of that will have to be dismissed. 26

1.7. 27
In case the [Seller]'s claim should prove to be justified, then in that extent the question has also to be examined, whether the [Buyer] has the right to oppose the claim by way of set-off

with its alleged counterclaims for damages, which are based on the alleged defects in quality of the installments already delivered and the avoidance of contract that is in its opinion justified (pursuant to Art. 73(2) CISG).

Item 4. of the [Seller]'s general terms and conditions excludes set-offs against counterclaims, including those from warranty of title, which are not explicitly and in writing acknowledged by [Seller]. 28

Such a set-off prohibition is generally acknowledged as effective in the Austrian scope of law (*Rummel* in Rummel, ABGB, para. 1440 No. 29 with further references), as far as the counterclaim is not already acknowledged or ascertained by the court.

As these prerequisites are not met, the [Buyer]'s motion for set-off has to be dismissed due to the contract prohibition of set-offs (*Fasching*, Zivilprozeβrecht2, No. 1293).

[...]

## IX. Legal conclusion concerning the Buyer's and Seller's avoidance of contract

1. 29
The [Buyer]'s request for the avoidance of contract pursuant to Art. 73(2) CISG is not justified, so that it was still obliged to continuously request for the delivery of the goods ordered and to continuously take delivery of the installments of barley at that time not yet delivered of 5,800 tons in total. Therefore, its declared refusal to request for the delivery of the goods bought and to take the delivery is to be evaluated as a fundamental breach of contract, which justifies the [Seller] to avoid both contracts pursuant to Art. 64(1)(b) CISG and to demand from the [Buyer] the compensation of damages as well as lost profit; this, of course, pursuant to the provisions of the «usages» of the market for farm products in Vienna (§ 51 No. 2 lit. b, c or d), which, following the direct reference in the contract, force back the respective CISG provisions.

The [Seller] explicitly subjected its alleged lost profit to its compensatory claim. Such a claim is also explicitly provided by Art. 74 CISG, which includes it, however, in the positive interest as an equally compensable consequence of the fundamental breach (*Karollus*, id. No. 214), which also has to be equaled to the term «lost benefit» of § 51 No. 2 lit. c of the «usages» of this market. Accordingly, the application of this legal term has to follow the Austrian adjudication and doctrine regarding lost profit in the sense of § 1293 ABGB. 30

2. 31
Lost profit is present, when the occurrence of an increase in wealth is prevented, thus, when a possible earning is destroyed; this leads to a decrease in turnover of the aggrieved party, because it was thwarted of profit making sales of the goods. If such a chance has been destroyed, then it is regarded as an independent asset, from which the protectable right is deferred to demand that, which was to be expected in the normal course of business (*Koziol*,

österreichisches Haftrecht 2 I 16 et seq. with further references; *Reischauer* in Rummel, id. § 1293 ABGB No. 12 with further references).

3. 32
The [Seller] has calculated its lost profit, divided in 18 tables, in a way that it opposed for the months January to June 1997 the constant contract sales price of 2,250 [sA]/ton and the cost of acquisition and that it assessed the respective export reimbursement in ECU, so that its calculated «loss in earnings» or its «span» results from the difference between the sales price and the cost of acquisition minus the EC-export reimbursement.

4. 33
The [Buyer] did not provide any substantial declaration contesting these calculations and their factual basis, so that – lacking concern of the Arbitral Court against the correctness of the submitted purchase price, which very well resembled the Austrian domestic market situation of that time – the respective submissions may be regarded as being correct.

5. 34
In the question of the amount of the respective assessed EC-export reimbursement amounts in ECU, it is however the obligation of the Arbitral Court of its own motion to check the correctness in that regard.

Proceeding from the [Seller]'s submission of the cost of acquisition, based as correct, the following calculation of the export reimbursement amounts in ECU/ton for the time relevant here from January to June 1997 results, with regard to the export licenses of the European Community granted to her, regulation EEC (EWG) 1144/96 of 25 June 1996, which has been presented by the Arbitral Court on its own motion: 35

a.
The export license AT No. 006474 granted on 20 January 1997 for 1,500 tons of «barley other than for sowings» with the final validity date 31 May 1997 determined the basic export reimbursement at 28.49 ECU/ton.

b.
The export license AT No. 018153 granted on 30 January 1997 for 1,500 tons of «barley other than for sowings» with the final validity date 31 May 1997 determined the basic export reimbursement at 27.49 ECU/ton.

c.
The export license FR No. X 44398 granted on 29 April 1997 for 1,904 tons of «barley other than for sowings» with the final validity date 31 May 1997 determined the basic export reimbursement at 27.98 ECU/ton.

d.
The export license FR No. 44402 granted on 5 May 1997 for 1,904 tons of «barley other than for sowings» with the final validity date 31 May 1997 determined the basic export reimbursement at 27.89 ECU/ton.

According to the Council regulation (EC) No. 1576/96 of 30 July 1996 concerning the fixing of the monthly surcharge on the grain prices for the economical year 1996/97 (Official Journal of the European Communities No. L 206/3), the intervention price increases by 1.1 ECU/ton each month, so that the surcharge of the basic export reimbursement in the single export licenses is to be increased by 1.1 ECU/ton in the months following the respective factual export until the month of the last day of the validity of the license. 36

8. 37
For the remaining contractual amount of 1,200 tons of barley to be delivered in the course of the month June 1997, the tendering of export reimbursements had been suspended temporarily, so that the [Seller] could not have received any export reimbursement, if it had actually – the further validity of the delivery contract fictively presumed – had the remaining contractual amount delivered that month. All its export licenses were thus limited in their validity by 31 May 1997.

As the shortfall of the export reimbursement in June 1997 had quite obviously not been thought about by the parties at the time of the conclusion of the contract, the export reimbursement however having been the basis for the agreed price in contract Attachment ./B – as can be deferred from the respective clause – the parties are also lacking an agreement as to what is to be right in such a case. This therefore forms a real contractual gap, which is to be filled. Even the «usages» of this market, to be applied first, do not deal with this problem, so that again the CISG is to be consulted, which apparently does not give a direct answer, whether and under which conditions contractual gaps are to be filled by the court (cf. *F. Bydlinski* in Doralt, CISG (UN-Kaufrecht), 77). Art. 8 CISG deals with the construction of the subjective statements and the subjective conduct of the contractual parties and demands the application of objective measures, such as how «a reasonable person of the same kind as the other party», thus a fictive recipient of a declaration, would have understood this. Such an objective measure is, of course, also generally applied at the real supplement of a contract for the purpose of gap-filling. In the Arbitral Court's opinion, the present case does not deal with the question of the construction of statements or conducts of a contractual party, but with the missing of a declaration of will of either sort (statement or other conduct) to answer the decisive question. Art. 9 CISG refers to the supplement of contract by the practices between the parties or by acknowledged commercial usages and also leaves the question unanswered, whether a supplement of contracts of sale by the court with what reasonable contractual partners would have agreed is admissible according to this law or whether this is subject to the substantive law subsidiary to the decisive private international law – in this case thus Austrian law. 38

The Arbitral Court is of the opinion, that according to the present level of the application of the law of the CISG by the courts of the Contracting States, there is no clarity as to whether this law itself provides the supplementary construction of contract and is therefore of the opinion, that the national substantive law, concretely qualified by the rules of international private law, has to be applied, in this case thus Austrian law. 39

On the basis of the dominant opinion in the Austrian doctrine and adjudication (cf. *Koziol*/*Welser*, «Grundriß des bürgerlichen Rechts» I10, 92 with further references in footnotes 39 and 40) it is, under consideration of the contractual purpose intended by the parties, to be asked, what solution reasonable parties would have agreed upon in the above presented, but at the time of the conclusion of the contract not thought about, case. Had parties of this kind thought about the cessation of export reimbursement amounts in the last month of the allotted installment by way of regulation of the competent EC-government body, then they would have, in the interest of the maintenance of the contract for delivery of goods by installments also in regard to the last installment effected by the said measure, on the one hand, and in the interest of a reasonable equation of the contractual interests of both sides in light of the date of delivery and the date of the taking of delivery as well as the time of payment of the purchase price, on the other hand, agreed, that for the purpose of obtaining of the export reimbursement amounts still possible for the month of May 1997, the last installment should be performed in this month, possibly towards its end, whereas, on the other hand, payment of the purchase price only falls in the first half of the month June 1997. **40**

On this basis, the Arbitral Court has also ascertained the [Seller]'s calculation of the damage through loss of profit incurred by the [Buyer]'s refusal to fulfill its obligation.