

Case 248: CISG 25; 39; 49(1)(a); 74

Switzerland: Schweizerisches Bundesgericht (I. Zivilabteilung); 4C.179/1998

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The German sellers, plaintiffs, delivered frozen meat by ship to Egypt and Jordan for a Swiss buyer, defendant. The buyer claimed lack of conformity of the goods and refused to pay the purchase price. The lower court ruling in favour of the sellers was confirmed by the appellate court. The buyer appealed further to the superior appellate court.

The issues before the court were whether the buyer had a right to declare the contract avoided and whether the buyer was entitled to damages for the loss of clientele, which the buyer claimed had resulted from the seller's breach of contract.

The court held that the difference in quality between that as had been agreed and that as was delivered was not significant enough to give the buyer a right to declare the contract avoided, even though experts estimated that the decrease in value of the goods, which were too fat and too wet, amounted to 25.5 per cent. The court stated that the CISG operates from the principle that the contract shall be avoided only in exceptional circumstances and that the right to declare a contract avoided is the buyer's most serious remedy. Whether or not this remedy is justified has to be determined by taking into account all the relevant circumstances of the particular case. Such factors include the buyer's ability to otherwise process the goods or to sell them, even at a lower price. The court confirmed the lower court's finding that the buyer had had such alternatives and therefore denied the buyer the right to declare the contract avoided. The buyer could merely avail itself of a reduction in price of 25.5 per cent (articles 25 and 49(1)(a) CISG).

In regard to the second issue, the lower appellate court had held that the buyer's loss of clientele as a result of the breach was not foreseeable and that the seller could be expected to undertake such an exceptional risk only if representations were made during the negotiations and if the seller had had an opportunity either to decline responsibility or take it into account when fixing the price. By contrast, the superior appellate court held that such loss was foreseeable, particularly since the buyer was a wholesale trader in a sensitive market and had no alternative in order to carry out its obligation in time. Under the circumstances of the present case, no specific agreement as to the seller undertaking such risk was needed (article 74 CISG). For these reasons, the court found that the buyer was entitled to damages but referred the case back to the lower court as to the amount of the damage award.

Not at issue before the superior appellate court was 1) the holding by the lower court that a notice of lack of conformity made within 7 to 17 days was in time, given that the goods in question concerned meat that was frozen, not fresh (article 39 CISG); and 2) the ruling that, as the CISG does not expressly deal with the burden of proof, such lacuna must be filled by interpretation of the Convention.