

**Case 422: CISG 7(2), 29, 81, 82, 83, 84**

Austria: Oberster Gerichtshof, 1 Ob 74/99k

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Original in German

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<http://cisgw3.law.pace.edu/cases/990629a3.html> (English translation)

Abstract prepared by Martin Adensamer, National Correspondent

In the course of an ongoing business relationship, a German seller, the plaintiff, delivered wall panels which had been prepared by drilling and shaping to a construction site for the Austrian buyer. In October 1992, unprepared panels were delivered. It was agreed that these panels should be returned, consequently the defendant contracted with a carrier for return shipment. The day after the plaintiff acknowledged receipt without reservation it was found that the panels were severely damaged. The plaintiff sought compensation.

The Supreme Court stated that under the CISG the delivery of goods different from those ordered is to be seen as delivery of non-conforming goods regardless of the extent of the non-conformity. The Court noted that there is no requirement as to the form of termination of the contract and therefore pursuant to article 29 CISG the parties agreed on termination of the contract. The Court stated that under article 7(2) CISG, in the absence of a contractual provision on the effect of termination of the contract, the gap is to be filled by applying article 81 CISG *et seq.* As of the time of the avoidance, the parties are released from their mutual obligations. Nevertheless they are bound to return what they have received under the contract (article 81 CISG). The Court observed that articles 81 through 84 CISG on the allocation of the risk in the context of avoidance of the contract supersedes where applicable the general risk allocation rules of articles 66 to 70.

The Court noted that there is no provision in the CISG regarding the place where the goods have to be returned, and the provision in the contract regarding the place of delivery must apply to the return as well. The defendant's obligation was only to care for the return of the goods. Under article 82 CISG, the risk for any deterioration of the goods also lies with the seller unless it is caused by an act or omission of the buyer. The Court stated that the reason for allocating the risk of loss to the seller arising from the return of defective goods under article 82 CISG is justified because the risk of such loss arose due to the asserted failure of the seller to deliver conforming goods. The Court concluded that the seller's claim to compensation for damage to the returned goods failed because the seller did not prove that such damage was due to the acts or omissions of the buyer.