CISG-online 483	
Jurisdiction	Austria
Tribunal	Oberster Gerichtshof (Austrian Supreme Court)
Date of the decision	29 June 1999
Case no./docket no.	1 Ob 74/99k
Case name	*Partition panels case*

Translation[*] *by Dr. Peter Feuerstein* [**]

Translation edited by Todd J. Fox[***]

Grounds for the decision

Of the two partial claims by [seller] for 16,140.10 DM [Deutsche Mark] and 12,875.20 DM, the latter was undisputedly dismissed. Therefore, it is no longer dealt with.

[Background information]

In the context of a longer business relationship, [seller], domiciled in Germany, delivered cut and drilled dividing wall panels to a building site in Vienna serviced by the domestic [buyer]. The condition «ex factory» was agreed between the parties for all deliveries. In October 1992, non-formatted (i.e., neither cut, nor drilled) panels, manufactured for the [seller] by P-GmbH (below referred to only as manufacturer) in Peiting, Germany, were delivered to the [buyer] instead of the cut and drilled panels ordered in the contract. Employees of the parties agreed over the telephone on the return of these panels by the [buyer]. The assertion of the [seller] that, according to the agreement, the return of the panels to the manufacturer would have to be undertaken by the [seller] remained unproven. On 29 October 1992, at the time of the

[*] For purposes of this translation, the Appellant-Defendant of Austria is referred to as [buyer]; the Respondent-Plaintiff of Germany is referred to as [seller]. Monetary amounts in *Austrian schillings* are indicated by [*sA*], amounts in German currency (*Deutsche Mark*) by [*DM*].

Translator's note on other abbreviations: BGBl = *Bundesgesetzblatt* [Federal Official Journal]; HGB = *Handelsgesetzbuch* [Austrian Commercial Code]; ZPO = *Zivilprozessordnung* [Austrian Civil Procedure Code].

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delivery by the forwarder commissioned by the intervener, the manufacturer confirmed the receipt of the panels without reservation on the CMR consignment note, showing the manufacturer as the recipient. While unloading the panels on the following day, the manufacturer established that they were damaged. It could not be established whether the damage originated in the course of the return transportation of the panels by the carrier retained by the intervener. On 26 March 1993, the [seller] sent an invoice to the [buyer] in the amount of 16,140.10 DM for «Transport damage of 29 November 1992 - Delivery from Vienna to Peiting.»

[Seller's position]

[Seller] asserted in support of its claim for 16,140.10 DM E, as far as still relevant, that the panels it sold for this amount had displayed transport damage after their return. The panels were received by the manufacturer in such a poor condition that they could only be used as burning material. The panels were not correctly shipped by the intervener. The [buyer] assumed the transportation risk.

[Buyer's position]

[Buyer] objected, as far as still relevant, that the returned panels had been accepted by the manufacturer without any reservation on the CMR consignment note. By delivering goods not in conformity with the contract, the [seller] has to bear the risk of the return transportation of the goods. The agreement on the transfer of risk «ex factory» refers only to panels which were ordered [as per the contract], but not to the panels concerned in this case, namely, [panels] which were not delivered in conformity with the order. In any event, the [buyer] had not caused the damage to these panels.

[Intervener's position]

The intervener mainly alleged that the goods were, at least, partly damaged at the time of the delivery to [buyer]. The asserted damage originated prior to the loading and after the delivery of the goods and did not occur within the [seller's] charge. The [seller] had first sent written notice to the intervener concerning the claimed damages on 4 May 1993. Any claim arising from transportation damage expired, according to Art. 30 of the CMR, because the transported goods were received without any reservation and therefore are to be considered as received in the condition described in the consignment note. The [buyer] is also not liable for transportation damage since it did not act as carrier.

[Commercial Court (Court of First Instance) of Vienna - Handelsgericht Wien]

The Court of First Instance rejected the [seller's] claim due to the statute of limitations (prescription period for receipt of notice). Furthermore, the recipient of goods not in conformity with the contract does not have a duty of care.

[Court of Appeals of Vienna - Oberlandesgericht Wien]

The Court of Appeals affirmed the decision of the Court of First Instance concerning the partial rejection of the [seller's] claim for 12,875.20 DM sA [sic]; quashed the partial rejection of the [seller's] claim for 16,140.10 DM sA [sic]; returned the case to the Court of First Instance for any supplementary proceedings and a new decision; and found the final appeal to the Supreme Court to be admissible. Since, due to the stated detailed considerations according to the applicable German law, the statute of limitations had not yet run, the Court of First Instance would have to decide on the prerequisites for liability according to Art. 74 et seq. CISG and reach the relevant conclusions in the resumed proceedings. The Court of First Instance only made the negative finding that it could not be ascertained that the damage to the goods occurred in the process of the return transportation. However, if the debtor fails to fulfill an obligation he is liable under Art. 74 CISG regardless of his misconduct or fault [Garantiehaftung]. This liability, which in principle is not dependent on fault, is limited by the liability exemption under Art. 79 CISG, which must be proved by the debtor.

Reasoning of the Supreme Court of Austria - Oberster Gerichtshof

The legal remedies of the [buyer] and the intervener are admissible and justified. They are treated together.

a)
Since the sales contract in question was concluded before 1 December 1998 and it was also avoided / terminated by common consent, the provisions of EuVU, BGBl [*] III 1998/20 cannot be applied to these facts. The General Business Conditions of the [seller] were neither expressly nor implicitly included in the contract. The parties have also not contested this in their appeals.

The Court of Appeal correctly found that the United Nations Convention for the International Sale of Goods («CISG»), which was enacted in Austria on 1 January 1989 (BGBl 1988/96) and on 1 January 1991 in Germany, is applicable to the contractual relationship of the parties. The object of the dispute between the parties is a contract for the sale of «goods» from October 1992. The disputing parties have their respective places of business in Austria and Germany, thus, in different Contracting States (Art. 1(1) CISG), and the parties also have not contractually excluded the application of this Convention (Art. 6 CISG).

The CISG creates substantive law (Kozio/Welser, Grundriss, 10th ed., 341).

b)
For [seller's] delivery to the [buyer] the term «ex factory» was stipulated; thus, the buyer had to bear the transportation risk from the factory of the German manufacturer. The delivery of the panels produced by the manufacturer, which differed from those ordered since they were not «formatted», constitutes a breach of contract. The CISG broadly interprets the concept of defective goods (lack of conformity to the contract) and understands by this also the delivery of goods different from those owed. Therefore, a false / incorrect delivery (Falschlieferung) is to be judged according to Art. 35 et seq. CISG and is not a case of non-delivery (Nichtlieferung). This equally applies to the deviation in quality of generic goods («Qualitäts-aliud»), as well as

deviation in description («Identitäts-aliud») for the sale of specific, ascertained goods. In contrast to з 378 HGB [*], it does not matter whether the incorrect delivery is subject to approval, nor does it depend on the degree of the deviation (Karollus, in Honsell, Kommentar zum UN-Kaufrecht, Art. 30, Annotation 9 with further references; ibid., UN-Kaufrecht 105, Wilhelm, UN-Kaufrecht 12 et seq., 21). For breach of contract, the CISG allows the buyer to claim compensatory damages and provides several other alternative legal remedies, among them the right of avoidance of the contract under Art. 49 CISG. In the present case, the parties have validly and by mutual understanding (Art. 6 CISG) agreed on the avoidance of the sales contract. Through Art. 29 CISG, which regulates modification or termination of the contract, it is clear that the formation of such contracts is subject to the CISG. The avoidance of a sales contract subject to the CISG is, in principle, not subject to formal requirements. Thus, avoidance could also be done orally, or as here, over the telephone, as well as impliedly (Karollus, op. cit., Art. 29, Annotation 9 with further references; Herber/Czerwenka, Internationales Kaufrecht, Art. 29 UN-K, Annotation 4). A reservation as to form under Art. 29(2) CISG was never asserted.

The CISG does not regulate the ownership aspects or the consequences deriving from a consensual avoidance of contract. It is up to the parties to reach adequate arrangements or agree upon adequate provisions for the avoidance (Schlechtriem, in v.Caemmerer/Schlechtriem, Kommentar zum Einheitlichen UN-Kaufrecht, 2d ed., Art. 29 Annotation 4, with further references in footnote 17; see also Weber, in Honsell, Kommentar zum UN-Kaufrecht, Preliminary Statements, Art 81-84 Annotation 7). Should, however, as here, no adequate arrangements have been made, the resulting gaps are to be filled under the CISG and not through recourse to national law (Weber, op. cit., Preliminary Statements, Arts. 81-84, Annotation 1 with further citations). In so far as the parties do not autonomously regulate the legal consequences of the consensual avoidance of the contract in their agreement for avoidance - particularly the bearing of risk, the place of performance and the bearing of the costs -the remaining gap must be filled by interpretation according to Art. 7(2) CISG, with reference to Art. 81 et seq CISG.

According to the CISG, the contract is not entirely annulled by the avoidance, but rather it is «changed» into a winding-up relationship (Ziegler, Leistungsstörungsrecht nach dem UN-Kaufrecht, 195 with further citations in footnote 142; Leser, in v.Caemmerer/Schlechtriem, op. cit., Art. 81 Annotation 9; Weber, op. cit., Art. 81 Annotation 4 f, 15 with further citations.) The parties are released from their primary contractual obligations due to the avoidance according to Art 81(1) CISG. Exceptions from this are obligations for damages, as well as other provisions which regulate the consequences of the avoidance for the parties, as set out in the second sentence of Art. 81(1) CISG. This encompasses all provisions connected with the undoing of the contract, such as the obligation to «return» (Rückgewahr / «restitution») all items received in connection with the contract (Ziegler, op. cit., Art. 81 Annotation 10), including the obligation to send back delivered goods (Leser, op. cit., Art. 81 Annotation 10). Along with restitution, the results of the (partial) performance of the contract must be dislodged, but not through the establishment of a hypothetical goal such as «as if the contract had been duly performed» or «as if the contract had never been concluded.» Rather, as in

Roman law, the claim for the return of the rendered performance (Rückforderung) is permitted and thereby tied to the item of performance itself (Leistungssache) and to its fate. Articles 81-84 CISG contain at their core a risk distribution mechanism, which within the framework of the reversal of the contract (restitution), overrides the general provisions on the bearing of risk contained in Art. 66 et seq. CISG (Leser, op. cit., Preliminary Statements, Art. 81-84, Annotation 10.)

The CISG does not contain any provisions pertaining to the place of performance for restitution. Nevertheless, the gaps arising from the absence of relevant agreements within the framework of Art 7(2) CISG can be bridged without recourse to national provisions (Leser, op. cit., Art. 81 Annotation 17; Weber, op. cit., Art. 81 Annotation 21). The place of performance for the obligations concerning restitution should mirror the place of performance for the primary contractual obligations (Posch, in Schwimann, 2d ed., CISG Art. 81, Annotation 9). If, under Art. 31 CISG, the delivery obligations require the goods to be picked up at the seller's place of business (or as here, the manufacturer's), or if the seller is obliged to give the goods to a carrier for delivery, then, in the event of a consensual avoidance of the contract and in the absence of a different arrangement, the seller has to pick up the goods at the buyer's place of business or the buyer has to hand the goods over to a carrier for return delivery to the seller (or, as here, the manufacturer), respectively. Restitution is to be effected in these cases at the buyer's place of business (Leser, op. cit., Art. 81 Annotation 17 et seq.; Weber, op. cit., Art. 81 Annotation 21; Herber/Czerwenka, op. cit., 81 Annotation 2, with further citations; Posch, op. cit.). Since in this case, the primary contractual performance was of a sale by delivery to a place other than the place of performance, with the risk passing to the German manufacturer, this arrangement for the passing of the risk must also reversibly apply for a consensual avoidance of the contract. Subsequent to the consensual avoidance of the contract, the passing of risk to the seller is effected with the handing over of the goods to be returned to the commissioned carrier at the place of business of the buyer. According to the agreement, the [buyer] had to send the panels back to the manufacturer. The [seller] also did not claim that the delivery of the panels to the intervener as a commissioned carrier was equal to a breach of contract. Moreover, in filling the gap, the principles in Art. 82 CISG are to be applied (loss of right to declare the contract avoided or to deliver substitute goods). Under these provisions, the principle of returning the goods undamaged as a prerequisite to exercising the right of avoidance suffers considerable restrictions which turn the principle into an exception (Leser, op. cit., Art. 82, Annotation 16). According to Art. 82(2)(a) and (b) CISG, the seller bears the risk during the undoing of the contract for any deterioration and/or loss of the goods, so far as this is not due to acts or omissions of the buyer. Thus, the seller alone bears the risk of chance accidents and force majeure. This one-sided or predominant burdening of the seller with the risks of restitution can only be explained by the [seller] having caused these risks with his breach of contract (Weber, op. cit., Art. 82, Annotation 16; Leser, op. cit., Art. 82, Annotation 18). In the absence of a differing agreement, this Court is of the opinion that the application of these rules is to be considered regarding the rights of the parties in consensual avoidance (Leser, op. cit., Art. 82, Annotation 18 with further evidence in footnote 47).

The [seller's] claim for compensation, to be judged in accordance with the CISG, can only successfully be asserted if the deterioration to the goods is due to acts and omissions of the [buyer]. The [seller] has not shown this. The [seller] itself claimed that it was the result of the transportation of the goods to the manufacturer that the panels arrived in such a desolate condition, useful only as burning material. This assertion is no different than claiming that the damage occurred during the return transportation. That this transportation - as the [seller] furthermore asserted - was done contrary to agreement, was not proven. Since the [seller] bore the risk of the return transportation, as already discussed above, the [seller] has to carry its consequences. The legal understanding of the Court of Appeal [Court of Second Instance], that each party is liable for restitution of performance in the same way as for the primary obligations of the contract - meaning, in the event of the loss of the goods by the buyer after the avoidance of the contract, the buyer is obliged to pay damages in accordance with Art. 74 et seq. CISG (Ziegler, op. cit., 196; Schönle, in Honsell, Kommentar zum UN-Kaufrecht, Art. 74 Annotation 19 with further citations) - is irrelevant due to the stated legal position pertaining to the transfer of risk.

The questions concerning the statute of limitations objection, as well as other objections of the [buyer] and the intervener pertaining to the foundation of the claim (the [seller] cannot have suffered any damage) and to the amount of the claim (the incorrectly cut panels no longer had a market value), or the possibility of exoneration of the party having committed the breach of contract according to Art. 79 CISG, need not be addressed here. It is also unnecessary to discuss the foreseeability rule under Art. 74(2) CISG based on the French and Anglo-American legal tradition (the so-called contemplation rule) or the obligation to mitigate damages according to Art. 77 CISG. Whether the [seller] has to bear the costs for the return transportation is likewise not to be decided here (cf. Leser, op. cit., Art. 81, Annotation 19; Weber, op. cit., Art. 81, Annotation 22).

Order of the Supreme Court

- Due to these considerations, the supplementary procedure ordered by the Court of Appeal [Court of Second Instance] is not needed. The (total) dismissal of the [seller's claim] by the Court of First Instance is proved to have been correct.

- The lifting order of the Court of Second Instance is therefore to be modified through the reinstatement of the judgment of the Court of First Instance including the partial dismissal of 16,140.10 DM.

- The decision on the costs of the proceedings is based on 33 41 and 50 ZPO [*].