

Case 423: CISG 38, 39(1)

Austria: Oberster Gerichtshof, 10 Ob 223/99x

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Original in German

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http://www.cisg.at/1_22399x.htm (German language text)

<http://cisgw3.law.pace.edu/cases/990827a3.html> (English translation)

Abstract prepared by Sonja Niederberger

The Italian plaintiff (seller) sold to the Austrian defendant (buyer) hiking shoes which were resold and directly delivered to a Scandinavian enterprise. About three weeks after the last partial delivery, the buyer informed the seller of defects which had not been detectable upon initial inspection. The seller refused to take back the shoes and demanded payment of the price. The buyer asserted that due to the failure of the seller to deliver goods in conformity with the contract it had suffered loss of profit and asserted its right to set-off its damages.

The court of first instance dismissed the claim. The Court of Appeal set aside the judgement and remanded the case to the court of first instance. The Supreme Court confirmed the decision of the court of appeal. It found that according to article 38(1) CISG the buyer must examine the goods within a short period. This time frame varies according to the circumstances, e.g. the size of the firm of the buyer, the kind of goods and their complexity. Each partial delivery has to be examined separately. The Court stated that normally, in the absence of special circumstances the buyer should notify the seller of any lack of conformity pursuant to article 39(1) CISG within about 14 days from delivery.

Under the facts, the Supreme Court found no reason to extend this time-limit, particularly given that the shoes were seasonal goods and the seller's need to sell them during the season must be considered. Thus the notice was delayed and the buyer lost the right to rely on the lack of conformity, unless the defects could not be discovered by an examination pursuant to normal business practice. The Court found that in the absence of any applicable business practice the goods must be examined thoroughly and in a professional manner. The Court noted that in any case the burden of proof regarding notification of non-conformity in due form and time lies with the buyer.

As the findings of the court of first instance were not sufficient to assess whether the mere visual inspection of the delivered shoes was in line with the relevant business practices and whether the notification was in time or not, the case was remanded to the court of first instance.