CISG-online 485	
Jurisdiction	Austria
Tribunal	Oberster Gerichtshof (Austrian Supreme Court)
Date of the decision	27 August 1999
Case no./docket no.	1 Ob 223/99x
Case name	*Bulgarian trekking shoes case*

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Edited by Birgit Kurtz[**] and Peter Konwitschka

The Supreme Court, through the Vice President of the Supreme Court, Dr. Schlosser, as presiding judge and through the Hofräte of the Supreme Court Dr. Schiemer, Dr. Gerstenecker, Dr. Rohrer und Dr. Zechner as further judges in the case of the plaintiff N***** S.r.l., ***** Italy, represented by Dr. Helga Hönel-Jakoncig and Dr. Veronika Staudinger, attorneys at law in Innsbruck, versus the defendant H***** Aktiengesellschaft, *****, represented by Dr. Erhart Weiss, attorney at law in Vienna, where the amount in dispute was ATS 1,110,088.80 plus interest and costs, due to defendant's appeal against the decision of the Oberlandesgericht Inns- bruck as the court of appeals dated May 21, 1999, Index No. 4 R 80/99t-81, by which the deci- sion of the Landesgericht Feldkirch dated January 18, 1999, Index No. 8 Cg 86/97t-66, had been reversed due to plaintiff's appeal, in a non-public hearing, has ordered:

The appeal is dismissed.

Grounds for the decision:

In September and October of 1995, plaintiff [seller] delivered, pursuant to the order of defendant [buyer], approx. 28,000 pairs of trekking shoes made in Bulgaria directly to a Scandinavian company, which operates more than 240 retail stores. Because the initial delivery date (end of September 1995) could not be adhered to, the parties agreed on its postponement for approxi- mately one month. The [seller] charged the various partial deliveries with partial invoice to the [buyer], whereby 13 of these invoices from the period between September 28 and October 31, 1995 were paid by the [buyer]. On December 13, 1995, the [seller] granted a credit entry for a further partial invoice dated October 31, 1995, for 3,012 pairs of trekking shoes for juveniles and took the entire partial delivery that had been charged by this invoice back after the [buyer] had given notice to the [seller] dated October 10, 1995, that it would not accept

[*] All translations should be verified by cross-checking against the original text.

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any more shoe deliveries after October 20, 1995. Two partial invoices (dated September 8 and September 18, 1995) concerning trekking shoes for adults remained unpaid.

[*Summary of seller's allegations*]

The [seller] claims payment of the latter unsettled partial invoice in the total amount of (converted) ATS 1,110,088.80 plus interest and costs. The [seller] argued that the charged shoes had never been subject to a correct notice of lack of conformity. Only in February 1996, a notice of lack of conformity was given, but without specification of the number of goods. The defects alleged by the [buyer] could have been discovered immediately. The notice of lack of conform- ity was too late and not in conformity with the legal requirements. Furthermore, all disputes between the parties were settled by the credit entry dated December 13, 1995. The partial de- liveries had been effected on account of [buyer's] separate orders, which is why the [buyer's] «setoff» claim resulted from an independent transaction and would therefore not be permissible. The transaction agreed between the parties had to be adjudicated according to Italian law, which requires a notice of lack of conformance within eight days. This obligation also arises from [seller's] General Conditions of Sale to which [buyer] had submitted.

[*Summary of buyer's allegations*]

The [buyer] argued that it had notified [seller] on November 8, 1995, that the Norwegian company to which delivery was made had claimed defects of the heels, the upper part of the shoes and the soles of the children's shoes. Because of these defects, the Norwegian company had withdrawn 5,739 children's trekking shoes from the market and had taken back 562 adult's trek- king shoes as well as 382 children's trekking shoes after their sale [to consumers] and had re- turned them to the [buyer]. The deficiencies that had appeared on the shoes (separating sole rims, separation of main soles from intermediate soles, hooks coming off, defective upper leather etc.) could not have been detected by a visual examination; therefore, latent defects are at issue. Although the [seller] had agreed to take back 6,142 pairs of shoes in May 1996, it rejected their return in September 1996. Deducting handling costs and [buyer's] lost profit mar- gin, the emergency sale had yielded net profits of US$ 24,458.76. [Seller] had delivered at least 6,000 pairs of shoes with irreparable and fundamental defects, which is why [buyer] lost profits at least in the amount of the [seller's] claim; these lost profits were pleaded as a set-off defense; [buyer] set off the already paid purchase price for 6,121 pairs of children's trekking shoes (Ital- ian Lira 259,836,450) against [seller's] claim. The order to deliver athletic shoes to the [buyer] and/or the Scandinavian buyer was one single order.

[*Summary of the decision of the trial court*]

The trial court dismissed the complaint. [Seller] knew that the athletic shoes were intended for a Scandinavian company. [Seller] bought the raw material, production took place in Bulgaria. During the production, a technician of the [seller] was present and constantly performed inspec- tions. At the beginning of the production phase in September of 1995, a [buyer's] representative was also in Bulgaria for two to three days and inspected the shoes' correct welding of the sole. He did not discover any defects, but he also did not use pliers to inspect the tensile strength. By telefax dated November 8, 1995, [seller] was informed that the Scandinavian company had received an «alarming number» of complaints, although the shoes had

been offered for retail sale for only one week. The shoes had holes, the outer sole of the children's shoes and the heels were loosening. [Buyer] demanded [seller's] confirmation that the shoes «had passed the usual quality inspections». The parties agreed at first, that the shoes should not be returned. The Scan- dinavian company should try to sell the shoes. Further complaints were made in November and December 1995, shoes were returned continuously, and [seller] was informed thereof. Accord- ing to an agreement between the parties, the problem was supposed to be discussed during a spring fair in Munich. It was not ascertainable if and what kind of agreement was reached during this fair. Because no agreement was reached, [buyer] sold 5,332 pairs of shoes by means of an emergency sale and it achieved a price of ATS 100 per pair. Due to shipping, storage of the goods and other freight handling, [buyer] incurred costs. In fact, most of the athletic shoes de- livered by the [seller] showed (reparable and irreparable) defects. The employees of the Scan- dinavian company carried out a visual quality inspection at their facility. The defects that had occurred could have been detected by a «normal acceptance control» only if it was performed by a skilled worker of the shoemaker's craft. In the shoe trade, the «normal inspection of in- coming shipments» is limited to outward appearance and fit. In the case of defects of shoelaces and velcro fastenings, the ordinary use was limited only partially, i.e., as far as velcro fastenings were concerned. An irreparable defect existed in that case of shoes on which a correction of the seams was necessary, because this had a negative effect on water resistance. In case of the discovered «sole defects», ordinary use of the shoes was prevented in those cases where the main sole separated from the intermediate sole. Out of two pairs of shoes on which the «water test» was performed, the children's shoe did not pass the water test; in the case of the men's shoe, the water absorption/intake was minimal.

[*Further proceedings*]

As to the legal issues, the trial court stated, that the UN Convention on Contracts for the International Sale of Goods (hereinafter referred to as «CISG») applied to the purchase agreement at issue. It was a single order to deliver approx. 28,000 pairs of athletic shoes. [Buyer] fulfilled its obligation to immediately examine the goods within the meaning of Art. 38 CISG, because the Scandinavian company performed a visual examination upon receipt of the goods. A further examination (by a skilled worker of the shoemakers' craft) was not required of the [buyer] or the Scandinavian company; such an obligation to ascertain a lack of conformity imposed on a buyer would be exaggerated. [Buyer] also gave notice of the defects to the [seller] within the period set forth in Art. 38 CISG; in the telefax dated November 8, 1995, the types of defects were specified precisely enough. It therefore did not lose its right vis-à-vis the [seller] arising from the delivery of the athletic shoes to rely on a lack of conformity of the faulty or defective quality. In the case of lack of conformity with the contract, Art. 50 CISG grants the buyer the right to declare a reduction in price; in the case at issue, this claim exceeds the plaintiff's claim. Hence the defendant's further (exceeding) claim does not have to be discussed.

The court of appeals reversed the decision of the trial court and remanded the matter back to the trial court for further trial and decision. It held that the appeal to the Supreme Court was permissible. Only one order to deliver approx. 28,000 pairs of sport shoes was placed. The defects that appeared on the shoes could only have been detected by skilled workers of the shoemakers' craft. There was no indication that the [seller's] General Conditions of Sale were

part of the purchase contract between the parties. The General Conditions of Sale's eight-day period to give notice was therefore not relevant. The provisions of the CISG applied to the purchase agreement. Pursuant to Art. 38, the goods must be examined, or must be caused to be examined, within as short a period as is practicable under the circumstances; in the case of a further dispatch (known to the seller), examination may be deferred until after the goods' arrival at the new destination. Pursuant to Art. 39 CISG, the buyer loses the right to rely on the lack of conformity of the goods if he does not give notice to the seller specifying the nature of the lack of conformity within a reasonable time after he has discovered or ought to have discovered it. Whether the notice was given within a reasonable time, depends on the objective and subjective facts of the concrete case, but the period for the required examination and for the notice that must be given must be viewed less rigidly than pursuant to § 377 HGB. Insofar as there are no specific circumstances militating in favor of a shorter or longer period, one must assume a total period of approximately 14 days for the examination and the notice. In the case at issue, the examination period began upon arrival of the goods at the [buyer's] customer in Scandinavia, and for each partial delivery separately. An appropriate examination that is customary in trade or commerce, had to be performed; the examination had to be thorough and professional. The examination must be appropriately diligent, even in the case of goods' features that are hard to examine; if necessary, the buyer must call in experts. Costly and expensive examinations cannot be expected. It must still be clarified how an examination of athletic shoes, that is customary in trade or commerce, must be performed; in this respect, the expert's opinion did not give clear insights. [Buyer] did not meet its obligation to examine [the goods] as defined by Art. 38 CISG by the spot-check-like performance of a merely visual examination, unless a merely visual ex- amination (control), not performed by a skilled person, was (as an exception) customary in the trade or commerce of shoes. The burden of proving that the defects could not have been detected by a thorough and professional examination of the athletic shoes, rested with the [buyer]; the [buyer] did not produce such evidence. The notice of lack of conformity given by the [buyer] by telefax dated November 11, 1995, complied with the requirement to specify the lack of con- formity sufficiently. But it is doubtful whether this notice of lack of conformity was timely. There are no specific circumstances that would militate in favor of an extension or a reduction of the aforementioned 14-day period to examine and give notice, if one assumed that a thorough and professional spot-check-like examination had been reasonable for the [buyer] after the ar- rival of each partial delivery. The trial court's findings of fact are not sufficient to judge whether the notice of lack of conformity dated November 8, 1995, took place within the 14-day period after arrival of the goods at the Scandinavian company. There is a lack of facts as to when the partial deliveries arrived that contained the objectionable shoes. If it should turn out that no more shoe deliveries arrived at the Scandinavian company after October 20, 1995, then the notice of lack of conformity dated November 8, 1995, was untimely as to all athletic shoes insofar as a professional and thorough examination of the goods was customary in the trade or commerce of shoes. Regarding a timely notice of lack of conformity, it must be noted that the [buyer] never claimed a reduction of the purchase price, but rather undoubtedly and clearly demanded the avoidance of the contract. The prerequisites for that relief (fundamental breach of contract by the seller and timely declaration by the buyer) must be examined. As to the damage claims raised by the [buyer], it must be clarified whether the requirements of Arts. 74 to 76 CISG were met, in addition to the – also in this case absolutely necessary – timely and proper notice of lack of

conformity. [Seller] is entitled to claim – if its claim is valid at all – payment in Austrian Schillings, because [buyer] was in default.

[*Ruling and reasoning of the Supreme Court*]

[Buyer's] appeal is not justified.

The lower courts stated correctly that the provisions of the CISG apply to the purchase agreement, since neither the [seller's] General Conditions of Sale were included in the purchase agreement nor a trade usage existed which – in accordance with the CISG's optional character – prevails over the provisions of this treaty (JBl 1999, 318; SZ 69/26).

This Panel concurs with the court of appeals' elaborations concerning the duration of [buyer's] period to examine and to give notice pursuant to Arts. 38 and 39 CISG. The court of appeals correctly named the relevant criteria in accordance with the judicial guidelines developed by the Austrian Supreme Court in JBl 1999, 318 (= 2 Ob 191/98x): Hence, the short period for the examination depends on the size of the buyer's company, the type of the goods to be examined, their complexity or perishability or their character as seasonal goods, the type of the amount in question, the efforts necessary for an examination, etc. Here, the objective and subjective cir- cumstances of the concrete case must be considered, in particular the buyer's personal and busi- ness situation, characteristic features of the goods, the amount of the delivery of goods or the type of the chosen legal remedy. Although the periods for the required examination and notice must be viewed less rigidly than pursuant to § 377 HGB («immediately»), the reasonable peri- ods pursuant to Arts. 38 and 39 CISG are not long periods. The reasonable period pursuant to Art. 39 CISG has to be adapted according to the circumstances. Insofar as no specific – above mentioned – circumstances speak for a shorter or longer period, one in fact must assume a total period of approximately 14 days for the examination and the notice (JBl 1999, 318 with approving case note by Karollus; see also Wilhelm's case note in ecolex 1999, 262; Posch in Schwimann, ABGB, 2d ed., Art. 38 UN-KR [CISG] n. 6, Art. 39 UN-KR [CISG] n. 3 – 5; Magnus, in Honsell (ed.), *Kommentar zum UN-Kaufrecht* [Commentary on the UN Sales Law], Art. 38 n. 20, 22, Art. 39 n. 22; Schwenzer, in von Caemmerer/Schlechtriem, *Kommentar zum Einheitlichen UN-Kaufrecht (CISG)* [Commentary on the CISG], 2d ed., Art. 38 n. 15; Art. 39 n. 15 et seq.). That is, it must not be overlooked that, even in spite of the CISG's «buyer-friendly tendencies», Art. 38 as well as Art. 39 shall serve the purpose of achieving clarity concerning whether performance was properly made; claims and disputes based on later defects, which could be explained by the buyer's improper handling or the buyer's failures, should be excluded as far as possible (Magnus, id., Art. 38 n. 4). Besides, the [buyer] itself assumes that the shoes it had ordered are «seasonal goods» (see response to the appeal p. 6 and appeal p. 3); particularly in such a case, a longer period than the 14-day period granted by the court of appeals would not comport with the purposes of Arts. 38 and 39 CISG, as attention shall be paid to the buyer's interest in the use of «seasonal goods» in the current season (com- pare Posch, id., Art. 38 n. 6). In the appellate proceedings, the parties doubt neither that the examination period pursuant to Art. 38 CISG commenced upon the arrival of the goods in Scan- dinavia (Art. 38(3)), nor that the [buyer's] obligation as a middleman to examine the goods itself or have them examined by its customer (Posch, id. Art. 38 n. 6; Magnus, id., Art. 38 n. 9, 21, 29; Schwenzer, id., Art. 38 n. 22 et seq. and 26).

This Panel also concurs with the court of appeals' elaborations concerning the manner of the examination that must be performed by the buyer. Primarily relevant for the type of examination are the agreements between the parties. In the absence of any such agreements, the required manner of examination can be gleaned from trade usage and practices (Schwenzer, id., Art. 38 n. 11; Magnus, id., Art. 38 n. 14). Insofar as the court of appeals deemed – in this sense – a clarification of the question to be necessary as to whether the merely visual examination is a customary examination in the case of large quantity shoe purchases, because the expert's opin- ion did not give a clear answer in this respect, this Panel cannot oppose this – well founded – opinion. But should this question have to be answered in the negative, then this Panel must follow the court of appeals' opinion that a reasonable examination, which must be thorough and professional, must definitely take place. Although costly and expensive examinations are un- reasonable, the buyer must, in the case of a large quantity shoe purchase as here, call in experts in the broadest sense (experts skilled in the shoe trade) in order to comply with its obligation to examine (Magnus, id., Art. 38 n. 15 – 17; Schwenzer, id., Art. 38 n. 13 et seq.). By demanding such an examination procedure, the demands for an examination the buyer must perform are not carried too far. The court of appeals correctly elaborated in this connection that the defend- ant as the buyer must prove that the defects noticed later could not have been discovered by the required professional spot-check-like examination. The burden of proof that the notice of lack of conformity was given timely and properly rests always with the buyer (RdW 1998, 736 with further references).

Contrary to [buyer's] opinion, it is necessary to ascertain the arrival dates of the partial deliveries that contained defective shoes at the place of destination in Scandinavia, because in the case of partial deliveries, the buyer must examine each delivery separately (Magnus, id., Art. 38 n. 10).

On the other hand, this Panel cannot agree with the [seller's] argument that the telefax dated November 8, 1995, should not be viewed as a notice of lack of conformity. In this respect, the elaborations of the court of appeals are also logical and legally flawless. The notice of lack of conformity is specified insofar as it described the lack of conformity quite exactly (Posch, id., Art. 39 n. 7; Karollus, *UN-Kaufrecht* [UN Sales Law], p. 126). However, it must be noted that the notice of lack of conformity preserves only the right to claim the sufficiently specified defects and that a «no- tification of other defects afterwards» is not possible (Karollus, id.).

In all, this Panel shares the court of appeals' legal opinion that the defendant as the buyer lost its right to rely on a lack of conformity of the goods insofar as it did not give notice of lack of conformity of the purchased shoes properly and timely. In that case, it has lost all legal remedies it would have had under Art. 45 CISG (Schwenzer, id., Art. 39 n. 30).

[Buyer's] appeal must therefore be dismissed.

The reservation to decide on the cost of the proceedings is based on § 52 ZPO.