

Case 331: CISG 1(1) (a); 3(1); 31; 38; 49(1)(b); 79 (2)

Switzerland: Handelsgericht des Kantons Zürich; HG970238

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A Swiss buyer, defendant, commissioned an Italian seller, plaintiff, on several occasions, to print, bind and supply art books. When the buyer failed to pay the outstanding purchase price, the seller sued it. Thereafter, the buyer claimed lack of conformity of one shipment of books, entitling it to a price reduction and damages. It also alleged that there was an agreement between the parties to

The court held the CISG to be applicable and classified the legal relation between the parties as a sale of goods to be manufactured pursuant to article 3(1) CISG.

As to the parties agreement to defer payment, the court found that whereas such agreement falls within the scope of the CISG, the CISG does not contain any stipulations regarding the burden of proof. However, it followed from the underlying principles, that the party making the claim should be the one bearing the burden of proof. As the buyer had not sufficiently substantiated its claim for deferment of payment, the court rejected it.

With regard to one shipment of books, the buyer claimed a price reduction as well as damages arising out of the seller's use of a slightly different paper from the one agreed upon. The court found that the buyer had given timely notice and had sufficiently specified the lack of conformity (article 38 CISG). The seller had offered to remedy at its own expense, but the buyer had refused such offer due to "shortage of time". The court held that the seller could only remedy, if this would not result in an unreasonable delay, inconvenience or uncertainty of reimbursement to the buyer. If late delivery as such would constitute a material breach of contract pursuant to CISG 49 (1)(b) or if the delay would lead to a material breach of contract, there would be an unreasonable delay. The court did not decide whether this was the case in the instance, since the buyer had failed to specify and to substantiate its claim for price reduction and damages.

With regard to a shipment of catalogues, which had to be sold at an exhibition and whose production was delayed for reasons attributed to the buyer, the court dismissed the buyer's claim for damages. In order to have the catalogues available at the opening of the exhibition, the seller commissioned a forwarding company, which had guaranteed timely delivery. Nevertheless, the catalogues arrived too late. The court held that pursuant to article 31 CISG, the seller was only obliged to arrange for transport, i.e. to hand the goods over to the first carrier to have them transmitted to the buyer. Thus, the seller had duly performed its obligation and it was not liable for the carrier's shortcomings. For the same reason, the seller could not, pursuant to article 79 (2) CISG, be held liable for the conduct of the carrier, whom it had engaged to perform part of the contract. The court concluded that a seller performs its obligations in time if it dispatches the goods in time and not if a buyer receives them in time.

In view of the above, the court decided that the seller was entitled to the payment of the purchase price as it had fulfilled its contractual obligations and dismissed the buyer's claims.