CISG-online 488	
Jurisdiction	Switzerland
Tribunal	Handelsgericht des Kantons Zürich (Commercial Court Canton Zurich)
Date of the decision	10 February 1999
Case no./docket no.	HG 970238.1
Case name	*Art books case*

Translation[*] *by Ruth M. Janal*[**]

I. History of the proceedings

1.
With the submission of its statement of claim on 13 June 1997, the [seller] initiated the current proceedings. After the receipt of the statement of defense on 9 January 1998, the Court invited the parties' representatives for a hearing and settlement negotiations. However, when the [buyer] announced that it was not in the position to accept settlement offers, the Court – with order of 23 February 1998 – withdrew the summons and ordered that the written proceedings be continued. Subsequently, the [seller]'s reply was received on 19 May 1998 and the [buyer]'s reply to [seller]'s brief was received on 22 September 1998. The main proceedings were closed by order of 22 September 1998. As the trial is ready to be decided, the Court hands down its decision.

2.
It needs to be recorded that the [buyer] effected payment in the amount of [Swiss francs] *Sf* 5,000 (= Italian Lire [*It£*] 5,980,861) on 3 December 1997. With respect to this amount, the Court considers the claim settled and irrelevant.

II. Procedural requirements

The [seller] is a stock corporation under Italian law, active in the printing trade, with place of business in Turin [Italy]. The [buyer], also a stock corporation, is a publishing house for art books in T. [Switzerland].

[*] All translations should be verified by cross-checking against the original text. For purposes of this presentation, Plaintiff of Italy is referred to as [seller]; Defendant of Switzerland is referred to as [buyer]. Amounts in Italian currency (*Italian Lire*) are indicated by [*It£*], amounts in Swiss currency (*Swiss francs*) are indicated by [*Sf*] and amounts in German currency (*Deutsche Mark*) are indicated by [*DM*].

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The Court possesses the local and functional jurisdiction over the dispute as well as the jurisdiction over the subject matter (Art. 2 Lugano Convention in connection with Art. 1(2) IPRG as well as § 63(1) in connection with § 62(1) GVG. Moreover, the [buyer] entered an appearance without contesting the Court's jurisdiction.

III. Parties' submissions and facts of the case

1. *[Seller's claim:]*

During the years 1995 and 1996, the [seller] – and in part company A[…] S.p.A., who the [seller] merged with on 23 December 1995 – received various commissions by the [buyer], who is acting as a publishing house for art books. The orders concerned the printing, binding and delivery of art books and catalogues. With [seller]'s claim, [seller] demands payment of outstanding invoices regarding various commissions. The dates of the invoices submitted lie in the period between 24 October 1995 and 25 June 1996.

The [buyer] does not deny that the contracts were formed and deliveries were made. However, [buyer] claims that it is able to set-off various claims for damages as well as reductions in price. The background of the dispute is the [buyer]'s allegation that the [seller] repeatedly failed to deliver art books, respectively art catalogues, in time for exhibition openings or presentations. [Buyer] claims that, as a result, it lost the trust of extremely important private art patrons and consequently suffered large damages.

2. *[Buyer's counterclaim:]*

The [buyer] seeks to set-off the following claims of damages against the [seller]'s claim:

2.1 Christian Vogt «***In Camera***»

[Buyer] claims that these art books are of inferior quality, as the [seller] did not use the agreed paper when it bound the book, but used paper of lower quality instead. While this was not visible on first sight, the books «showed an inferior quality which had to have repercussions for the [buyer]» during the course of use. The [buyer] submits that it never approved these books, it notified the [seller] of the lack of conformity in a timely manner and only refused the [seller]'s offer for remedy because a remedy would have been impossible for lack of time. [Buyer]'s «lenient conduct» towards the [seller] was founded solely on the special circumstances of the art book trade. Therefore, [buyer] now invoices the [seller] with the lower value of the delivered art books in the amount of the binding costs (*It£* 20,000,000).

The [seller] replied to this submission that it had performed the order properly. While it was true that the bookbinder had accidentally used paper slightly different from the paper desired, the [seller] was not responsible for this matter. The [buyer] had abstained from the offer to change the paper. The book was also accepted by the customers without objections, a lower value did not exist.

2.2 «***100 Years – 100 Pictures***»

[Buyer] submits that the catalogues were delivered too late to the exhibition by the Frankfurt Art Association, which had been sponsored by the B[…]-Bank. The time and date of the opening of an exhibition formed an absolute «deadline» for the delivery of exhibition catalogues. The catalogues, however, did not arrive until 3 1/2 hours after the opening. The [seller] had been aware of the time of the exhibition opening, 29 September 1995, and it had accepted the responsibility for the timely delivery of the books. The [seller] was responsible for the transport, or at a minimum chose and commissioned a forwarding agency in its own name and on its account. The B[...]-Bank maintains an independent photography program in the framework of its art sponsorship. [Buyer] submits that, as a reaction to the delay, the B[...]-Bank deleted the [buyer] from its list of suppliers and no longer invited [buyer] to make any offers. Consequently, [buyer] received neither a commission for the 13 photographic exhibitions sponsored by the B[...]-Bank in year 1996 nor an order for the 14 exhibitions in year 1997. [Buyer] argues that as one of the three European publishing houses specializing on the production of such catalogues, [buyer] would have received at least a third of the commissions, that is a total of 10. [Buyer] sets off an average loss of profit of [Deutsche Mark] *DM* 18,000 per commission, *DM* 180,000 overall.

In its statement of claim and reply to the statement of defense, the [seller] made the following pleadings and objections regarding this claim.

The parties had set intermediate deadlines. The keeping to those deadlines had been an indispensable precondition for the [seller]'s readiness to dispatch the catalogue, which had originally been set for 27 September 1995. The most important intermediate deadline had been 15 August 1995, on which date all films were supposed to be available at the printing place in Ae [Italy]. This was necessary for the printing to be effected on 30 August 1995 and the binding on 4 September 1995. However, the films had still not arrived by 11 September 1995, the last films had even been delivered only on 19, 20 and 24 September 1995. Because of the [buyer]'s delay, the parties had agreed on 13 September 1995 on a dispatch of the catalogues on 28 September 1995. The [seller] had kept to that schedule.

2.3 «***Steven Arnold***»

[Buyer] submits that the parties agreed upon an early delivery of these art books on 8 December 1995 for the artist's presentation in Frankfurt in the morning and the press conference in New York on the same day. However, the books did not arrive in time. In Frankfurt, they arrived on 8 December 1995 at 9:30 in the evening, after the last visitor had long since left the exhibition, and in New York the press conference on 8 December 1995 also had to be held without the book. Again it had been the [seller] who had commissioned the freight agency. Since the [buyer] was unable to sell the book at the exhibition opening, it suffered a loss of profit in the amount of *DM* 10,829.

The [seller] is of the opinion that the agreed delivery date was 15 December 1995. On 5 December 1995, the [buyer] had voiced its request to receive a small number of the books for the exhibition opening in Frankfurt and the simultaneous press conference in New York only three days later on 8 December 1995. The [seller] had tried to fulfill the request as a favor to the [buyer]. This was foiled by a strike of various couriers. The [seller]'s obligingness

neither led to the agreement of an earlier delivery date, nor did the [seller] accept the cost and risk of transport.

2.4 «***Ralph Gibson***»

The [buyer] argues that the [seller] delivered this work too late for a presentation date. Again, this had the result that the [buyer] was subsequently never again considered by a private sponsor, the M[…]-Bank, and suffered damages in the consequence.

The [seller] objects to this submission and argues that it handed over the books in time to the forwarding agency commissioned by the [buyer], even though the [buyer] had delivered the setting copies much too late. In any case, the parties had reached a settlement regarding this commission.

In the following considerations, the Court will go into these and the further submissions made by the parties insofar as they are of importance to the legal proceedings.

IV. Considerations of the Court

1. Applicable law

a)
As the legal relations in the present case possess an international correlation, the Court initially has to determine the question of the applicable law. The [seller] pleaded that the present dispute is governed by the «Vienna Sales Law» (United Nations Convention on Contracts for the International Sale of Goods of 11 April 1980, CISG). The Court concurs.

b)
Both parties have their places of business in Contracting States and the legal relations in dispute regard a time period after the Convention entered into force in both countries. Regarding the subject matter, it needs to be stressed that the Vienna Sales Law primarily governs the pure international sale of goods. However, under Art. 3 CISG, contracts for the supply of goods to be manufactured or produced are to be considered sales «unless the party who orders the goods undertakes to supply a substantial part of the materials necessary for such manufacture or production.» In the present case, it is undisputed that – while the [buyer] delivered the setting copies for the artistic content of the art catalogues – the [seller] itself had to acquire the material for the execution of the printing orders. Therefore, the CISG applies insofar as it contains relevant provisions for the parties' contractual relationship (*v. Caemmerer/Schlechtriem,* 2nd ed., Munich 1995, Art. 4 n. 3).

c)
For matters not settled in the Convention, Italian law would principally find supplementary application if one qualified the parties' contractual relationship as a sales contract (Art. 118 IPRG in connection with Art. 3(1) of the Hague Convention on the Law Applicable to Contracts for the International Sale of Goods). However, the [seller] in its statement of claim suggested to simplify matters by simply applying Swiss law for questions not settled in the CISG. The [buyer] did not explicitly object to this suggestion.

It is undisputed in the case law and the relevant literature that a choice of law of the parties is still possible and admissible during the course of the proceedings with respect to such legal relations that are at the parties' disposal (Art. 116 IPRG). Nevertheless, it is questionable whether such a choice can be made by virtue of a sole statement in a party's brief, which is first and foremost directed to the Court. The [buyer] does not explicitly position itself regarding the [seller]'s suggestion, but solely states in a different context: «[...] and this is true for both Italian and Swiss law, to which the Vienna Sales Law refers in the end.» However, a choice of law during the course of the proceedings may also be formed implicitly. This requires that the parties are conscious of the problem of the applicable law and that the parties' intent to make a choice of law is sufficiently evident (*cf*. *Jagmetti,* Zur Anwendung von ausländischem Rechts von Amtes wegen, in FS von Castelberg, Rechtsschutz, Zurich 1997, p. 106; BGE 119 II 173 *et seq*.; ZR 90 (1991), no. 19).

In the present case, both the [buyer]'s statement of defense and its brief replying to the [seller]'s reply show that the [buyer] was aware of the international context of the case. However, it cannot be gathered from [buyer]'s legal arguments – which are made without reference to the statutory provisions – that the [buyer] wished to choose either one of the legal regimes. Therefore, Italian law finds supplementary application next to the Vienna Sales Law by virtue of the rules of private international law.

2. [Seller]'s claims

a)
The total claimed by the [seller] of originally *It£* 168,310,712 is composed of invoices regarding five different commissions:

- «*Christian Voigt: In Camera*»

  It£ 51,472,225 as outstanding amount of the invoice of 29 February 1996.

- «*Donigan Cumming*»

  The [seller] acknowledges that the [buyer] paid *It£* 1,288,548 and – without receipt – *It£* 19,564,878 of the total amount of *It£* 21,564,760 that was invoiced. This leads to a balance in favor of the [seller] in the amount of *It£* 711,334.

- «*Steven Arnold*»

  It£ 16,972,000 invoice of 29 February 1996, as the last of four invoices regarding this commission which has allegedly not been paid.

- «*100 years – 100 pictures*»

  It£ 57,102,000 (two installments at *It£* 28,551,000 each) for the order invoiced on 24 October 1995; the amounts currently claimed are based on the acknowledgement of indebtedness and agreement of payment by installments of 14 June 1996.

- «*vivir la muerte*»

  It£ 38,719,836 invoices of 25 June 1996.

Total: *It£* 164,977,395.

The [seller] adds the accumulated interest in the amount of *It£* 3,333,317 which would lead to an overall amount of *It£* 168,310,712. The [seller] subtracts from this total a payment effected by the [buyer] on 3 December 1997, that is, after the action was brought, in the amount of *Sf* 5,000 (= *It£* 5,980,861).

b)
The [buyer] denies neither the commissions nor their performance. [Buyer] itself explicitly states that the [seller] principally performed its obligations without fault, apart from the binding work regarding the order «*Christian Vogt*».

c)
The contracts concluded by the parties are contracts for the supply of goods to be manufactured or produced in the meaning of Art. 3(1) CISG. The [seller] undisputedly effected the agreed performances and the [buyer] never queried the works, with the exception of the order «*Christian Vogt*» (which the Court will come back to). The amounts requested by the [seller] are proven by the invoices in the file.

d)
However, the [buyer] is of the opinion that its payments on account and its acknowledgements of indebtedness were made under the «discernible condition» (for the [seller]) that the [buyer], as had been implicitly agreed, would be granted enough time to solve its financial difficulties. [Buyer] therefore basically pleads that it was granted a respite in payment regarding the [seller]'s claims.

The agreement of a respite in payment and its effects are governed by the CISG (*cf*. *Honsell* (ed.), Kommentar zum UN-Kaufrecht, Berlin 1996, Art. 4 n. 14). The burden of proof is not explicitly provided for in the Vienna Sales Law, but it can be deduced from the Convention's rule-exception principle (*v. Caemmerer/Schlechtriem, op. cit*., Art. 45 n. 12 and 13; *Honsell, op. cit*., Art. 4 n. 10). Therefore, the [buyer] bears the onus of proof for the agreement of a respite in payment.

A hearing of evidence however presupposes that a party makes substantiated submissions of legal relevance which the other party disputes (*Vogel,* Grundriss des Zivilprozessrechts, 5th ed., Bern 1997, p. 253 n. 79a). A party cannot simply rely on general allegations which it intends to specify only in the hearing of evidence, even if that hearing is already possible during the main proceedings. Submissions must be clear, complete and definite (*Frank/Sträuli/Messmer,* 3rd ed., Zurich 1997, § 54 ZPO n. 7). The [buyer] however does not make concrete submissions where and between which natural persons the parties are supposed to have agreed on a respite in payment. [Buyer] solely states that it only gave its promises of payment with the motivation of a respite in payment. [Buyer] does not give any indication how the [seller] was supposed to have become aware of [buyer]'s motives.

Failing a sufficient submission under law, the Court can therefore not take evidence regarding the agreement of a respite in payment. It follows that the Court must assume that that a respite in payment regarding the [seller]'s claims was not agreed between the parties.

e)
The [buyer] further objects to the rate of interest and the time from which interest is

requested. The [buyer]'s pleadings regarding the time frame, for which the interest is requested, is based on [buyer]'s allegation regarding an agreement of respite in payment. Since the Court, as explained above, does not follow the [buyer]'s argument regarding such an agreement, only the matter of the extent of the interest rate remains.

Under Art. 78 CISG, interest is due on any sum in arrears based on a sales contract governed by the Convention. The [seller] claims interest on its individual claims, respectively from 90 days after issuance of the invoice at the Italian discount rate submitted by it. In doing so, [seller] refers to a letter of the Bank San Paolo in Turin [Italy] of 11 June 1997. Following established opinion, the interest rate is determined by the applicable national law, in the present case by Italian law (*Honsell, op. cit*., Art. 78 n. 12). Under Art. 1284(1) C.c., the legal interest rate in Italy is 10%. Contractual interest is calculated at the same rate, unless the parties have agreed upon a different interest rate, which has not submitted by either party to the present dispute (Art. 1284(2) C.c.; see also *v. Caemmerer/Schlechtriem, op. cit*., p. 672 *et seq*.).

The [seller]'s claims therefore are subject to an interest rate of 10%. Following the principle of parties' disposition, only the higher interest claimed by the [seller] is to be corrected to 10%, whereas the lower interest claimed is to be granted according to the [seller]'s legal request. Therefore, the interest claimed by the [seller] for the time period between 1 October until 31 December 1996 needs to be reduced from 11.5% to 10%.

The [seller]'s invoice regarding the amount of the interest accumulated until 30 September 1996 also needs to be corrected, as [seller]'s calculation was based on an interest rate of 11.5%. Calculated with an interest rate of 10%, the reduced total of accumulated interest up until 30 September 1996 amounts to *It£* 2,728,004.

f)
Following the above-mentioned corrected interest calculation and the subtraction of the amount paid by the [buyer] after the action was brought, the [seller]'s claims amount to a total of *It£* 161,724,538. As a preliminary result, the [seller]'s claims are to be granted – subject to the claims set off by the [buyer] which will be examined below – in the amount of *It£* 161,724,538 plus interest on *It£* 164,997,395 at a rate of 10% from 1 October 1996 to 31 December 1996, at 9.875% from 1 January 1997 to 31 May 1997, at 9.375% from 1 June 1997 to 3 December 1997, as well as 9.375% on *It£* 158,996,534 from 4 December 1997.

3. Claims set off by the [buyer]

3.1 Christian Vogt «***In Camera***»

a)
The [buyer] bases its claim on the allegation that the books delivered by the [seller] did not conform to the contract. [Buyer] mainly submits the books' lower value, but also suggests a damage to its image (at least in the statement of defense).

b)
The [seller] acknowledges that the paper used for the art book was at least «slightly» different. With fax of 13 February 1996, the [buyer] notified the [seller] of the non-

conformity. The [seller] thereupon contacted the bookbinder and informed the [buyer] with fax of 14 February and 15 February 1996 of the bookbinder's mix-up. The latter fax concludes with a request that the further proceedings be discussed. Following the [buyer]'s own submissions, it decided to refuse the remedy offered by the [seller] due to time considerations. On 30 June 1996, the [buyer] informed the [seller] that [buyer] would pay the invoices for the commission «*Vogt*» as soon as it managed to solve its problems of liquidity, which should be the case in the beginning of July. The alleged lack of conformities are not mentioned in this letter. With letter of 7 July 1996, the [buyer] told the [seller] that it had contacted [buyer]'s bank regarding a raise of its credit limit in order to solve its liquidity problems.

c)
The reliance on a lower value of the goods presupposes, under Art. 38 CISG, that the buyer examines the goods within as short a period as is practicable in the circumstances. Otherwise it loses the right to rely on a lack of conformity. The buyer furthermore needs to notify the seller specifying the nature of the lack of conformity within a reasonable time after it has discovered it or ought to have discovered it. It is both undisputed by the [seller] and evident from the file that the [buyer] conformed to these obligations.

If the goods do not conform to the contract, the buyer is always entitled, by virtue of Art. 50(1) CISG, to reduce the price corresponding to the lower value of the goods. This is independent of whether or not the price has already been paid. If the seller remedies the non-conformity or the buyer refuses to accept the remedy, buyer is not entitled to reduce the price. In this case, the only option left to the buyer is to claim damages under Art. 45 CISG (*Keller/Siehr,* Kaufrecht, 3rd ed., Zurich 1995, p. 198).

However, the seller is only entitled to remedy the lack of conformity if the buyer can reasonably be expected to accept the belated remedy. The remedy may not cause «unreasonable delay», «unreasonable inconveniences» or «unreasonable uncertainty» regarding the compensation of expenses. An unreasonable delay will generally be caused if a failure to keep to the delivery date already constituted a fundamental breach of contract or if the further delay led to a fundamental breach (*Honsell, op. cit*., Art. 48 n. 22). There is a refusal to accept the offered remedy, if the buyer unequivocally and seriously declares to the seller that [buyer] will not accept a remedy (*Honsell, op. cit*., Art. 50 n. 24).

The [buyer] submitted that it was unable to accept the [seller]'s remedy offer because otherwise it could not have kept to the agreed date and because a request to remedy the commissioned work would only have had a negative impact on the [buyer] regarding its customers. The [seller] objected that the [buyer] consciously did without the remedy because the goods were not of inferior quality and lower value. [Seller] thereby implicitly pleads that the [buyer] lost its right to a reduction in price by refusing the offer for remedy.

Because of the following considerations, the Court does not need to assess these contradictory submissions:

Under Art. 50 CISG, the reduction in price is determined by a proportional calculation. The reduced sales price is supposed to bear to the contractual purchase price the same proportion as the value that the goods actually delivered had at the time of the delivery

bears to the value that conforming goods would have had at that time (*v. Caemmerer/Schlechtriem, op. cit*., p. 502). This is the mandatory method of calculation and it is therefore inadmissible to instead simply use the estimated value of the delivered goods as the reduced purchase price, or to determine the reduced purchase price by subtracting the cost of repair from the contractually agreed price. The [buyer] claims damages in the amount of the binding costs without making a connection between the binding costs and the lower value of the goods. The [buyer] neither specifies the alleged lower quality of the goods, nor does it submit any indicators which would enable the Court to calculate the lower value according to the applicable proportional calculation method. The simplistic reference to the binding costs does not allow any conclusions as to the relation between the originally agreed reimbursement on the one hand and the gravity of the non-conformity on the other. The [buyer] therefore in no way managed to expound a lower value according to the respective provision of the Vienna Sales Law, which [buyer] itself referred to. Let alone did the [buyer] even come close to sufficiently substantiate the alleged lower value.

If the pleadings of one party are unclear, insufficient or undetermined, the matter of the judge's obligation to question the party under § 55 ZPO is raised. However, regarding the insufficient substantiation of a claim or a set-off claim, it is supposed in case law that if a plaintiff does not present all facts necessary to support his legal right, especially in case of a representation by an attorney, these facts do not exist and because of that were not submitted by that party (*cf*. *Frank/Sträuli/Messmer, op. cit*., § 55 ZPO n. 4; ZR 81 n. 118).

While it was determined that the [seller], respectively its bookbinder, used a different type of paper than was agreed, the [buyer] failed to sufficiently specify the effect upon the quality of the work and the extent of a resulting lower value. Under these circumstances, the claim for a reduction of the purchase price must be dismissed.

Even if one interpreted the [buyer]'s claim not as a reduction of the purchase price, but as a claim for damages, the [buyer]'s submissions regarding the damage with which it is allegedly setting off do not come close to a sufficient substantiation. While the «good will-damage» suggested by the [buyer] can certainly be compensated under the CISG (*v. Caemmerer/Schlechtriem, op cit*., Art. 74 n. 20 and 43), it also needs to be substantiated and explained concretely. However, a connection between the binding costs and a «good will-damage» was neither submitted by the [buyer], nor is it in any way evident.

Following these considerations, the [buyer]'s set-off claim is to be dismissed.

3.2 «***100 years – 100 pictures***»

a)
In this instance, the [buyer] claims damages for loss of profit because of the belated delivery of the work at the exhibition opening.

b)
It is revealed by the submitted files that the parties fixed a time schedule when the order was commissioned (*cf*. «time schedule»: films on 15 August in Ae, printing on 30 August, binding on 4 September and «copies ready for shipping» on 27 September 1995). The

[buyer]'s fax of 22 August 1995 contains a remark regarding the time schedule under the heading «Deadlines»: «ready for shipping 26/9» and in brackets «(28/9 opening of the exhibition)». The further correspondence submitted, on which the [seller] relies for its exoneration, shows that the [buyer] was in delay with the delivery of the films. On 13 September 1995, the [seller] informed the [buyer] that the books would be ready for dispatch on 28 September 1995, and that there was consequently half a day available for the forwarding agency and that one forwarder had confirmed that [seller] would be able to deliver the books at the latest on 29 September 1995, 10 a.m. The [buyer] answered «Ok! Yes! Do so.»

It is undisputed between the parties that the catalogues arrived in Frankfurt at least 3 hours late.

On 14 June 1996, Dr. T. signed an acknowledgement of indebtedness for the [buyer]. Referring to the agreement of 23 May 1996 and the [seller]'s fax of 27 May 1996, it committed itself to payment of three installments at *It£* 28,551,000 each, in order to receive a credit of *It£* 16,800,960 after the last installment had been paid.

c)
The Vienna Sales Law also governs a settlement agreement (*Honsell, op. cit*., Art. 4 n. 14). The [buyer] denies that it reached an agreement to balance all claims with the [seller]. However, [buyer] does not make a concrete statement regarding the «Acknowledgement of debt» submitted by the [seller]. The Court does not need to examine whether the [buyer]'s general challenge is sufficient, because, as the following considerations show, the [buyer] does not possess a claim for damages.

d)
aa)
The buyer may claim damages under Art. 45(1)(b) in connection with Arts. 74–77 CISG, if the seller fails to perform its delivery obligation. In principle, the liability for damages is a liability for the guaranteed performance of the seller's obligations, which is independent of the seller's fault. In the meaning of this provision, «obligations of the seller» are all obligations which the seller is subject to because of the specific legal transaction. They may result from an explicit provision or interpretation of the contract, from the supplementary provisions of the Convention as well as the relevant trade usages or the usages established between the parties (*Honsell, op. cit*., Art. 45 n. 16).

bb)
Regarding the handing over of the goods, none of the parties plead that the [seller] was to perform the carriage of the goods. It is however disputed which party was to bear the risk for the forwarding agent. The [seller] is of the opinion that a dispatch ex-works was agreed upon. [Seller] submits that it organized the forwarder solely as a favor and without a corresponding obligation. The [buyer] in turn argues that the commission of the forwarding agency and the responsibility for its actions was the [seller]'s obligation.

cc)
Art. 31 CISG, which deals with the content of the seller's delivery obligation, distinguishes between contracts that involve the carriage of goods and such contracts where carriage is

not necessary. Art. 31 CISG does not include a situation where the seller itself has to deliver the goods to one of the buyer's places of business. Such a form of delivery of the goods owed is not provided for in Art. 31. In doubtful cases, such an obligation cannot be assumed: If the contract requires carriage of the goods at all, it is an obligation to dispatch the goods; in other cases the goods are to be placed at the buyer's disposal at the seller's place of business (*Honsell, op. cit*., Art. 31 n. 44).

The seller's delivery obligation therefore consists in initiating the transport of the goods: [Seller] must hand over the goods to the first carrier for transmission to the buyer (*Honsell, op. cit*., Art. 31 n. 44). By handing over the goods to the carrier for transmission to the buyer, the seller fulfills its delivery obligation. For this reason, the buyer may no longer hold the seller liable for non-performance under Art. 45(1)(b) CISG, if the goods are destroyed or misdirected during transport or if the handing over to the buyer is delayed. The carrier's mistakes are therefore not within the liability sphere of the seller (*v. Caemmerer/Schlechtriem, op. cit*., Art. 31 n. 33; *Honsell, op. cit*., Art. 67 n. 6 and 14). The question of whether the contract was fulfilled in time is therefore also determined by the timely dispatch and not by the time of arrival of the goods.

dd)
It is evident from the files and the corresponding statements of the parties that 28 September 1995 was agreed as «ready for shipping». The [buyer] does not plead that the seller did not keep to this date, instead [buyer] even acknowledges that the seller made the goods ready for dispatch in time. [Buyer] further does not contend that the [seller] accepted a contractual obligation to effect delivery of the goods at the place specified by the [buyer]; [buyer] solely holds the view that the [seller] assumed the organization and the responsibility for the forwarding agent. It is therefore undisputed that the [seller] on 28 September 1995 handed over the goods to the carrier commissioned by it. By this action, [seller] fulfilled its obligations under the law and therefore performed within time.

e)
The [buyer] nevertheless argues that the carrier commissioned by the [seller] needs to be regarded as [seller]'s vicarious agent and that the carrier's conduct has to be attributed to the [seller]. [Buyer] therefore raises a claim based on the liability for third persons engaged by one party, following Art. 79(2) CISG. Under the Vienna Sales Law, a party is principally liable for the non-performance of a contract, which was caused by the conduct of a third party that the party engaged for the performance of the contract, unless one of the exemptions of Art. 79 or 80 CISG is given. It is therefore a requirement that the third person was engaged for the performance of the contract, i.e., that it performs one of the obligations described by Art. 31 CISG as forming the content of the contract.

As was determined above, the carriage of the goods specifically does not belong to the seller's contractual obligations. Thus, by virtue of Art. 31(a) CISG, the [seller] is not liable for the mistakes of the carrier to whom he handed over the goods for transmission to the [buyer]. The [seller] fulfilled its delivery obligation by handing over the goods to the first carrier. [Seller] therefore did not engage the forwarding agent «for the performance» of its delivery obligation. In this context, the carriers are not vicarious agents in the meaning of

Art. 79(2) CISG (*v. Caemmerer/Schlechtriem, op cit*., Art. 31 n. 12). The [seller] is therefore not responsible for the carrier's miscellaneous mistakes.

f)
The [buyer] further does not contend that the [seller] issued a guarantee for the timely delivery through the carrier. [Buyer] does make corresponding suggestions, but does not make any specific submissions when, how and by whom such a declaration of a guarantee was supposedly made. In this respect, the [buyer] would have to plead a formation of contract, which it fails to do. Again, it needs to be emphasized that it is upon the legally represented [buyer] to completely and definitely submit all facts that it bases its claims on. Otherwise, the Court is entitled to assume that the respective facts are not given. Finally, it needs to be considered that the principle of party presentation bars the judge from making use of facts in favor of a party, if that party does not rely on the facts and the circumstances are only evident from the files (*Frank/Sträuli/Messmer, op. cit.*, § 54 ZPO n. 1; ZR 95 n. 12).

g)
Due to these considerations, the claim, which the [buyer] is seeking to set-off, is dismissed.

h)
Finally, the Court points out that the [buyer]'s set-off claim would also fail with respect to the problem of an insufficient substantiation of the damage. Loss of profit is reimbursable under the Vienna Sales Law. The CISG does not determine which degree of certainty is necessary for a judge to form his or her profit hypothesis, and what is the relevant point in time for the calculation. However, the thwarting of a pure profit chance generally does not lead to a reimbursable damage. The buyer's loss of profit must be considered normal for the buyer's kind of business, and the seller, at the time of the conclusion of contract, must have been in the position to foresee such a consequence. The seller is only liable for further, extraordinary loss of profit if buyer has pointed out the risk of that particular type of loss and if it was ascertained that the seller is willing to bear this additional risk (*v. Caemmerer/Schlechtriem, op. cit.*, Art. 74 n. 45). This in turn requires that the buyer make specific submissions, which are missing in the present case.

3.3 «***Steven Arnold***»

a)
The [buyer] again bases this set-off claim on the contention that the late delivery of the works caused it to suffer a loss of profit. Again, [buyer] argues that the [seller] was responsible for the timely delivery of the goods on 8 December 1995 for the artist's presentation in Frankfurt and the press conference in New York. [Buyer] calculates the damage suffered at *DM* 10,829 on the assumption of a possible sale of 170 catalogues at a sales price of *DM* 98 each, minus 35% discount. The [seller] does not dispute these amounts, but again generally objects to its liability. Furthermore, the [seller] refers to the [buyer]'s acknowledgements of indebtedness and payment declarations.

b)
The [buyer] did in fact pay three invoices and stated in a letter to the [seller] on 7 May 1996 that [buyer] did not reduce the price with respect to the invoices issued, despite the late arrival of the books.

The Court can leave open the question whether this constitutes an acknowledgement of indebtedness, as the [seller] has argued, because again there is no legal basis for the [seller]'s liability. It was explained above, that the carrier whom the [seller] handed over the works to within time, as is undisputed by the buyer, is not a third party engaged by the [seller] in the meaning of Art. 79(2) CISG (see above, «*100 years – 100 pictures*»).

The [buyer] does also not explicitly claim with respect to this commission that the contract provided for the carriage risk to be borne by the [seller], i.e., the agreement of a specific Incoterm clause. While [buyer] does dispute the agreement of an ex-works clause as alleged by the [seller] (*cf*. in this regard *Honsell, op. cit*., Art. 67 n. 32), [buyer] solely argues that the carriage was organized by the [seller], but again does not submit that the [seller] itself was obliged to perform the delivery. It is also evident from the submitted files that the parties agreed upon an obligation to dispatch the goods. In the [seller]'s offer, the prices are referred to as «ex-works prices» and the confirmation of order describes the performance date with the term «ready for delivery.»

The [buyer]'s set-off claim is therefore dismissed.

3.4 «***Ralph Gibson***»

The [buyer] neither denies commissioning the order nor that the art books were printed and delivered. This also results from the files. The Court may leave undecided whether the parties, as was pleaded by the [seller], formed a settlement with a balancing clause. Based on the wording «Balance to be paid», there is a lot to indicate that the [seller]'s submission is true. Regardless, the [buyer] does not even come close to substantiating its supposed set-off claim. Neither does the [buyer] submit when, where and how much too late the delivery was effected, nor does it provide any grounds to conclude that the Mn-Bank gave it the prospect of further commissions and that this would have led to a profit (in what amount?). The [buyer] does not even state that the Mn-Bank has ever since become active as an arts sponsor in any form. It is not the Court's task to calculate like a bookkeeper the [buyer]'s possible profit chances.

Again, there is no reason to fall back upon the judge's obligation to question under § 55 ZPO. This duty does not exist if the other party has already unsuccessfully pointed out the deficiency of incomplete submissions, which is what the [seller] explicitly did in its reply to the statement of defense (*Frank/Sträuli/Messmer, op. cit*., § 55 ZPO n. 7; ZR 84 n. 52 E. 3a).

The claim with which the [buyer] was seeking to set-off was therefore dismissed.

4. Summary

It can be summarized that the [seller]'s claims are proven by the files and their existence is principally not disputed by the [buyer], which is why they are granted with the exception of a correction regarding the applicable interest rate. In contrast, the [buyer]'s set-off claims for damages and reductions in price lack a legal basis and a sufficient substantiation regarding the facts, which is why they are dismissed in their entirety.

V. Costs and reimbursement

The Court decides:

The claim is settled with respect to an amount of *It£* 5,980,861 because of irrelevance.

and thereupon adjudges:

1. The [buyer] is ordered to pay to the [seller] an amount of *It£* 161,724,538 plus interest on *It£* 164,997,395 at 10% from 1 October 1996 to 31 December 1996, at 9.875% from 1 January 1997 to 31 May 1997, at 9.375% from 1 June 1997 to 3 December 1997 as well as 9.375% interest on *It£* 158,996,534 from 4 December 1997.

[...]