

Case 362: CISG 1(1)(a); 19(1), (2); 33(a), (c); 47(1); 49(1)(b); 74; 75

Germany: Oberlandesgericht Naumburg; 9 U 146/98

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This decision dealt with the determination of a reasonable period of delivery under article 33(c) CISG. The defendant, a German car retailer, ordered a car from the plaintiff, a wholesaler having its place of business in Denmark. The order stipulated that the car be delivered by a specified date. The plaintiff accepted, adding its standard conditions in which it reserved a change of the date of delivery. When the car was not delivered by the date specified in defendant's offer, the defendant fixed an additional period of one week. The plaintiff did not reply. After the additional period had lapsed without result, the defendant declared the contract avoided. Consequently, when the car finally arrived seven weeks later, the defendant refused to pay. The plaintiff then sued for the difference between the contract price and the price obtained from the sale of the car to another buyer.

The Court dismissed the claim. It held that defendant had correctly avoided the contract under article 49(1)(b). It stated that the clause reserving a change of the delivery date in plaintiff's standard conditions did not constitute a material alteration under article 19(2) and had therefore become part of the contract. However, since the clause did not determine a period of delivery, it had to be interpreted according to article 33(c) CISG, which provides for delivery to be made within a reasonable time after the conclusion of the contract. Even though the date specified in the defendant's offer was not binding on the plaintiff, it could still serve as an indication of a reasonable time of delivery. When the plaintiff did not deliver by that date, defendant was entitled to fix an additional period of time under article 47(1) after which it could declare the contract avoided pursuant to article 49(1)(b). The Court stressed that it did not consider the question whether an additional period of one week was sufficient in the case at hand, because the fixing of too short a period only triggers a reasonable period, which would also have lapsed by the time defendant declared avoidance.