

## CISG-online 512

Jurisdiction	Germany
Tribunal	Oberlandesgericht Naumburg (Court of Appeal Naumburg)
Date of the decision	27 April 1999
Case no./docket no.	9 U 146/98
Case name	<i>Ford Escort Cabrio case</i>

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*Translation edited by Ruth M. Janal\*\*\**

### Grounds for the Decision

The appeal is admissible in terms of its form and the time it was submitted. The [seller]'s appeal was not successful. The [seller] is not entitled to damages according to Art. 75 in connection with Arts. 64(1)(b), 63 CISG. 1

The CISG is applicable to the dispute. According to Article 1(1)(a) of the CISG, the Convention is applicable when the parties have their places of business in [different] Contracting States. Both Germany and Denmark are Contracting States. Therefore the CISG takes precedence over the German Civil Code. 2

The [seller] cannot recover the difference of DKR [Danish krona] 16,800 between the contract price and the price it reached in its substitute transaction, because the [buyer] rightfully declared the contract avoided under Art. 49(1)(b) CISG. 3

1. 4  
In [buyer]'s written communication of 26 January 1997, the [buyer] had issued an offer to the [seller] (Art. 14(1) CISG). The time of delivery was set at «no later than 15 March 1997». On 29 January 1997, the [seller] accepted this offer (Art. 18(1), first sentence, CISG) even though with regard to the time of the delivery the [seller] had given a different delivery date. The time of delivery was named by the [seller] as «April, time of delivery remains reserved».

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\* All translations should be verified by cross-checking against the original text. For purposes of this translation, the Claimant-Appellant of Denmark is referred to as [seller], and the Respondent-Appellee of Germany is referred to as [buyer]. Amounts in the currency of Denmark (*Danish krona*) are indicated as DKR.

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An acceptance that contains alterations is generally regarded as a counter-offer that constitutes a rejection of the offer (Art. 19(1) CISG). However, this reply did not materially alter the terms of the offer, especially since it did not regard the goods sold. It would therefore have been up to the [buyer] to object to the reply (Art. 19(2) CISG). Such an objection has undisputedly not taken place here. The alteration has thus become part of the contract.

On the other hand, the alteration does not bring forward a fixed date for delivery and because the stipulated delivery period was qualified as «reserved», the date is not determinable from the contract (Art. 33(a) CISG). Thus the delivery was to be effected within a reasonable time after the conclusion of the contract (Art. 33(c) CISG). The contract was concluded with the receipt of [seller]’s acceptance on 29 January 1997. While the [buyer]’s request for delivery no later than 15 March 1997 did not become part of the contract, it has to be considered in determining the reasonable time for performance under Art. 33(c) CISG. Because it was clearly important to the [buyer] that the delivery take place within this time frame (29 January 1997 – 15 March 1997), the [seller] would have had to deliver by that date in order to have delivered within a reasonable time.

It is irrelevant whether delivery delays of two to four weeks are common in the international sale of vehicles. When determining a reasonable time for delivery, it is of the essence to consider the statements of the parties and the concrete contractual circumstances. A delivery by 15 May or 3 June would no longer have been reasonable.

2.

The rights of the buyer are determined on the basis of Arts. 45 *et seq.* CISG. The buyer may declare the contract avoided in case of a non-delivery when the seller does not deliver the goods within the additional time frame set by the buyer (Art. 49(1)(b) CISG). While Art. 47(1) CISG only states that the buyer may fix an additional period of time of reasonable length for the performance by the seller, the setting of the time frame is a prerequisite for avoiding the contract (Magnus in: *Staudinger, BGB* [Commentary on the German Civil Code], 13<sup>th</sup> ed. 1994, Art. 47 note 2).

According to the hearing of evidence, the [buyer], represented by witness R[...], on 16 March 1997 and on 21 March 1997 orally fixed an additional period of time for performance by the [seller] until 24 March 1997 by the latest. The testimony of the witness is credible. It does not speak against the witnesses’ credibility that he is related to the director of [buyer]’s firm and that he may have an economic interest in the case as an employee. The witness unambiguously confirmed that he called the [seller]’s managing director on the dates named and requested delivery within the period given. As to the fact that 16 March 1997 was a Sunday, he convincingly explained how he managed to reach the [seller]’s manager on the phone. The Court does not need to decide whether the additional period of time set by the [buyer] until 24 March 1997 was too short, as in that instance a reasonable period of time would have started to run. Such a reasonable period of time would have elapsed at the latest by 11 April 1997, the day on which the [buyer] sent a further communication to the [seller].

The evidentiary hearing confirmed that the [buyer] sent this further written communication on 11 April 1997. While Witness R[...] could not provide information as to the concrete content

of the communication and whether it had been sent on 11 April 1997, Witness K[...] credibly testified that the letter was sent to the [seller] on that very day. She convincingly explained why she remembered facts that happened over two years ago. She further testified that according to [buyer]'s post outbox records the said documents had in fact been sent on that day. There is no reason to doubt the credibility of Witness K[...]. The fact that she is employed by the [buyer] casts no shadow on its credibility.

In its written communication of 11 April 1997, the [buyer] declared the contract avoided (Art. 49(1) CISG). It is irrelevant whether the [seller] received this letter. Contrary to § 130 of the German Civil Code, the buyer only needs to prove the sending, not the arrival of a communication under Art. 27 CISG. The sender may rely on the original content of its communication as long as it sent the notice by means appropriate in the circumstances, even if it reaches the addressee too late, altered or not at all (Magnus, *ibid.*, Art. 27 note 20). Because the [buyer] validly declared the contract avoided, the [seller] is not entitled to reimbursement of its losses. A claim for damages under Art. 74 *et seq.* CISG requires a breach of contract by the other party (von Caemmerer/Schlechtriem (eds.), *CISG* [Commentary on the CISG], 2<sup>nd</sup> ed., Art. 74 note 26). This, in any case, has not been committed by the [buyer], as it rightfully declared the contract avoided.

The appeal thus was denied.

The division of expenses is determined on the basis of § 97 of the German Code of Civil Procedure (ZPO).

The interim enforceability of the judgment is based on the Code of Civil Procedure.

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