

CISG-online 563	
Jurisdiction	Germany
Tribunal	Landgericht Mainz (District Court Mainz)
Date of the decision	26 November 1998
Case no./docket no.	12 HKO 70/97
Case name	<i>Cylinder for the production of tissue-paper case</i>

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

### Facts of the Case

The [buyer] is a well-known manufacturer of tissue paper situated in Germany. The [seller] is the Swedish subsidiary of a Finnish company with a world-wide mechanical engineering business. Its customers are mainly from the paper and timber refining industries. [Seller] specializes in manufacturing so-called crepe-cylinders (also known as Yankee-cylinders in the business).

On 16 February 1993, the parties concluded a contract for the production and delivery of a crepe-cylinder. According to the agreement, the [seller] was obligated to manufacture a cylinder with the diameter 5500 x 5950 mm curved surface length and to deliver it to the [buyer]. The contract of 16 February 1993 stipulates:

«We thank you for your order and confirm the production and delivery of a crepe-cylinder, diameter 5500 x 5950 mm curved surface length, groovy on the inside, including a jamming body and the inside equipment to drain condensation, according to the technical specifications attached:

item 1: 1 crepe-cylinder

item 2: 2 pieces of steam and condensation containers

item 3: 2 pieces of isolation tops

item 4: 1 transport sledge

item 5: technical data of the crepe-cylinder

item 6: installation and first operation

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\* All translations should be verified by cross-checking against the original text. For purposes of this translation, the Claimant of Sweden is referred to as [seller]; the Respondent of Germany is referred to as [buyer]. Amounts in German currency (*Deutsche Mark*) are indicated as [DM].

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item 7: destruction of the existing crepe-cylinder

Fixed price for items 1 through 7: a total of 2,450,000.- DM [Deutsche Mark].

This amount includes the costs for loading, transport, unloading, installation and insurance until the end of installation, the waste management of the old cylinder as well as all extra work under additional agreements.»

The crepe-cylinder possesses a diameter of 5.5 m x 5.95 m, a wall thickness of roughly 80 mm and weighs an overall 150 tons. The high-quality unit is responsible for drying a still-moist length of paper in only one rotation, thereby making it possible to produce a large amount of tissue paper at high speed. The one rotation reduces the moistness of the paper from 60% to 5%. To serve this purpose, the cylinder is heated up with hot steam. Therefore, the crepe-cylinder needs to be fitted with a complete condensation system to drain the condensation water. This includes a precise mechanical system of condensation collection tubes (so-called headers) as well as a rising pipe which draws off the condensation water. The further details of how the crepe-cylinder operates are set out in the briefs submitted by the parties and the accompanying attachments.

In September of 1993, the crepe-cylinder was delivered to the [buyer] by the [seller]'s employees. Only a short period afterwards (still in 1993) and from then on in regular intervals, the cylinder gave cause for complaints that led to constant negotiations between the parties (beginning at the end of 1993).

[Buyer] is requesting damages for breach of contract with respect to those defects and submits the following:

Already in November of 1993 the crepe cylinder had not run smoothly (so-called rattle-feel-effect). In December of 1993, considerably premature, the entire cylinder had had to be re-ground. In January of 1994, the defect had led to a disturbance in the cylinder top. Each of these disturbances led to a considerable loss of production (630 tons, 940 tons and 207 tons of paper). In April of 1994, it had turned out that the collection tubes, which had led to the reception of the condensation, had not been installed in the correct manner. Periodically at later times, the cylinder had failed to run smoothly and had led to stoppages of and losses of production. As a result, the parties met for negotiations at the [buyer]'s place of business on 30 August 1994. There, they had agreed that the [seller] would try to remedy the defects and that they would commission an expert report on the various non-conformities. On 11 November 1994, the report by Prof. Dr. [...] was issued.

[Buyer] submits that since the cylinder had continuously given rise to complaints, it informed the [seller] by letter of 7 December 1994 of accrued damages in the total amount of roughly 15 million DM.

Before the Court, [buyer] calculates its damages as follows. Due to loss of production, additional expenditures for staff, the purchase of a new storage case and the lower value due to the life span of the cylinder, [buyer] suffered damages in the amount of 3,270,150.09 DM. Relief is sought in this amount.

- [Buyer] asks the Court to order the [seller] to pay [buyer] 3,270,150.09 DM with interest of 7% from 1 January 1995. 9
- [Seller] asks the Court to dismiss [buyer]'s claim. 10
- [Seller] denies that it is responsible for the various complaints put forward by the [buyer] and the causal connection to the damage. [Seller] furthermore invokes the period of limitation. 11
- With respect to the limitation of action, [seller] submits that irrespective of the contractual agreement that German law was to govern the contract, the Convention on Contracts for the International Sale of Goods has to be applied. However, according to the relevant statute law, the period of limitation had commenced six months after the first notice of non-conformity given by the [buyer]. Therefore, the claim had been time-barred long before the [buyer] brought the action. When considering the various elements of the contract, the essential obligation consisted in the delivery of the crepe-cylinder, therefore the rules for the sale of goods have to be applied. This led to the application of the CISG as well as the specific limitation period for sales. This period also extended to other concurrent remedies under German law, because the CISG superseded the remedies given under German statutes and the relevant case law. Therefore, a recourse to the period of limitation for *positive Vertragsverletzung* was inadmissible. 12
- [Seller] submits a counterclaim asking the Court to issue a decree declaring that the [buyer] is not entitled to alleged further damages in the amount of 26,566,700.38 DM with respect to the delivered crepe-cylinder. 13
- With respect to the counterclaim, the [seller] submits that the further claims for damages alleged by the [buyer] are completely unfounded. Therefore, a counterclaim requesting a declaratory judgment denying the [buyer]'s claim is both admissible and justified.
- [Buyer] asks the Court to dismiss [seller]'s counterclaim. 14
- With respect to the counterclaim, the [buyer] is declaring attornment. [Buyer] submits that it does not assert any further claims beyond the ones raised in this proceeding.
- [Seller] therefore requests that the Court issue a partial decree by consent. The parties are still arguing about the costs for the acknowledged counter-claim. 15
- With respect to the further submissions of the parties, the Court refers to the submitted briefs and the accompanying attachments.

## Reasons for the Decision

### A. The [buyer]’s claim

The [buyer]’s claim is dismissed as unfounded. The [seller]’s invocation of the period of limitation is successful.

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### I. Legal basis for the contract

The Convention on Contracts for the International Sale of Goods forms the legal basis for the contract and therefore the basis for the decision that the claim is time-barred. The CISG is to be applied if the parties to the contract have their place of business in different Contracting States (Art. 1(1)(a) CISG). Both the Federal Republic of Germany and Sweden ratified the Convention (*cf. v. Caemmerer/Schlechtriem*, Kommentar zum Einheitlichen UN-Kaufrecht, Annex I, p. 801).

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As a result, the provisions of the CISG have to be applied to the case at hand (Art. 3 of the German Act implementing the CISG (Vertragsgesetz) in connection with Art. 45 CISG).

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The contract is not excluded from the Convention by virtue of Art. 3(2) CISG. We reach this conclusion as follows.

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According to Art. 3(2) CISG, the Convention does not apply to contracts in which the preponderant part of the obligations of the party who furnishes the goods consists in the supply of labor or other services. The Court therefore needs to assess whether the parties saw the preponderant part of [seller]’s obligations in the delivery of the crepe-cylinder (the sales element) or in the services accompanying the delivery (installation etc.). As it is impossible to ascertain the value of [seller]’s various obligations under the contract (*cf. v. Caemmerer/Schlechtriem, ibid.*, 2<sup>nd</sup> ed., Art. 3 CISG n. 8 with further references), both the contractual documents and the circumstances of the formation of the contract have to be taken into account.

The wording of the contract and the resulting legal proceedings make it obvious to the Court that the preponderant part of the contract was the sale and the delivery of the crepe-cylinder itself and that [seller]’s other services were of lesser importance. In the contract, the parties defined the production and delivery of the crepe-cylinder with the relevant diameter and technical equipment as the subject of the contract. Therefore, at the time of the conclusion of the contract, the parties put the emphasis of the contractual obligations on the sale and delivery of this high-quality unit. The classification as a sales contract is also not rebutted by the fact that the parties agreed that [seller] was not only obligated to manufacture and deliver the unit, but also to load, transport and install it and furthermore provide other by-services such as maintenance. The Court is aware that before the cylinder (which had been fitted for [buyer]’s individual needs) was produced and delivered, a major engineering effort as well as planning and conceptual work was required. However, these engineering efforts contributed to the production and delivery of the unit, determine its value, and therefore do not change the fact that the focus of the contract was the cylinder itself. [Seller]’s further contractual obligations (transport, installation, maintenance) are therefore accessory obligations that pale

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in comparison to the value of the manufactured cylinder. This assessment leads to the application of the United Nations Convention on Contracts for the International Sale of Goods (*cf. v. Caemmerer/Schlechtriem*, *Einheitliches UN-Kaufrecht*, 2<sup>nd</sup> ed., Art. 3 n. 8).

This legal constellation leads to the application of Art. 3 Vertragsgesetz in connection with Art. 45 CISG and §§ 477, 478 BGB. However, §§ 477, 478 BGB need to be applied correspondingly, so that the period of limitation stipulated in § 477 BGB commences on the day the buyer gives notice of a lack of conformity to the seller under Art. 39 CISG. As a result, the buyer's remedies for defective goods become time-barred six months after the notice of non-conformity is given (*v. Caemmerer/Schlechtriem*, *Einheitliches UN-Kaufrecht*, 2<sup>nd</sup> ed., Art. 45 n. 62).

This short period of limitation also applies to the [buyer]'s claim at hand, which is based on *positive Vertragsverletzung*. With respect the remedies provided for in Art. 45 CISG, the Convention supersedes all claims under national law. Art. 45 CISG includes the remedies of repair, of substitute delivery and of damages. Every breach of contract with respect to the delivered goods is therefore covered by Art. 3 Vertragsgesetz in connection with the CISG, irrespective of whether the cause of the resulting damage is the lower value of the goods, consequential damages or the breach of an accessory obligation. Therefore, the period of limitation for the breach of accessory obligations in international sales contracts is not thirty years as stipulated by § 195 BGB, but the period of limitation provided for sales contracts in § 477 BGB (*cf. v. Caemmerer/Schlechtriem*, *Einheitliches UN-Kaufrecht*, 2<sup>nd</sup> ed., Art. 3 n. 4 with references to case law).

In the case at hand, the relevant period of limitation is therefore six months, commencing on the day the notice of the lack of conformity was given.

## II. Commencement of the period of limitation

Due to the expiry of the period of limitation, [buyer]'s claim for damages became time-barred six months after it gave notice of the non-conformity of the merchandise. After the cylinder was delivered to the [buyer] in September of 1993, the parties negotiated during the time period between 30 August 1994 and 23 March 1995. These negotiations suspended the running of the limitation period.

The parties at first negotiated about the [seller]'s effort to repair the goods and commissioned an expert report analyzing the cause of the damage (the report was issued on 11 November 1994). The parties' negotiations led the [buyer] to inform the [seller] by letter of 7 December 1994 that [buyer] was considering a claim for damages and that the damages might amount to roughly 15 million DM. [Buyer] again calculated and informed [seller] of the possible overall damage in a detailed list on 23 March 1995. This itemization of damages at the latest ends the suspension of the running of the limitation period under § 639(2) BGB. Therefore, this date at the latest has to be considered as the day on which a notification of the defect had been given.

The period of limitation thus expired at the end of September 1995 at the latest. The action brought on 21 May 1997 was therefore already time-barred. At the time the [buyer] commenced judicial proceedings, the period had expired and could therefore no longer cease to run. 26

In view of these facts, the Court finds that [buyer]'s claim has to be rejected. 27

#### **B. [Seller]'s counterclaim**

Due to the [buyer]'s attornment, the Court issues a partial decree by consent with respect to [seller]'s counterclaim. The decree is based on the [buyer]'s declarations before the Court on 10 August 1998 and on 29 October 1998 as stipulated by § 307(1) ZPO. 28

[The remaining paragraphs of the decision deal with the costs of the proceeding.] 29–32