

Case 424: CISG 19(1), 75

Austria: Oberster Gerichtshof, 6 Ob 311/99z 9

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http://www.cisg.at/6_31199z.htm (German language text)

<http://cisgw3.law.pace.edu/cases/000309a3.html> (English translation)

Abstract prepared by Martin Adensamer, National Correspondent

The Austrian buyer ordered goods from the German seller. The buyer paid 28 Austrian shillings (ATS) per kg according to a general agreement while the seller sought 40 ATS per kg. The seller claims the unpaid balance of the price.

Because the seller had not accepted the buyer's order at 28 ATS but offered the goods for 40 ATS which the buyer subsequently accepted, the Supreme Court found that the contract was concluded on the basis of 40 ATS. The reply of the seller at the higher price was a counter-offer under article 19(1) CISG because it materially altered the terms of the buyer's order.

The Supreme Court rejected the buyer's argument that the contract had to be adapted to the conditions of the general agreement on the ground that the seller had acted in bad faith, knowing that the buyer urgently needed the material. The Court found that the buyer possibly could claim damages for the breach of the general agreement but had no right to an adaption of the actual contract. The Court also found that, as the buyer never declared the contract avoided, the buyer could not claim possible damages on the basis of article 75 CISG but should take into account that the contract remained valid. Since the buyer did not claim damages, it was irrelevant whether the seller knew of the buyer's urgent need of the goods.