

Case 426: CISG 35; 45

Austria: Oberster Gerichtshof, 2 Ob 100/00w

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Original in German

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http://www.cisg.at/2_10000w.htm (German language text)

<http://cisgw3.law.pace.edu/cases/000413a3.html> (English translation)

Abstract prepared by Christian Mosser

The German plaintiff (seller) sold four used machines to the Austrian defendant (buyer), who had long-standing business connections with the seller. In past dealings, machines delivered to the buyer had not carried the European Community “CE” mark, indicating that the product conformed to applicable European Community directives. This time, the buyer refused to pay the rest of the purchase price on the ground that the four machines, of which one presumably had been imported from the Czech Republic or Slovakia, lacked this certification.

The court of first instance found that all four machines should have been certified. Pursuant to EC Directive 89/392 in conjunction with the German law on machinery, the CE-marking was compulsory not only for machines imported from outside the European Economic Area (EEA), but also for machines which had been significantly changed (based on the court’s finding, the handling systems had been removed from the machines concerned). The buyer had been assured of being able to sell the machines on the market within the EEA. The court found that since this condition had not been fulfilled by the seller and the buyer gave notice regarding the lack of conformity with the contract without delay, the buyer was entitled to retain the price.

In remanding the case to the court of first instance, the Court of Appeal stated that the court of first instance should consider the legal issues arising under the CISG, and the security and certification standards on the basis of Austrian law, and make the relevant findings.

The Supreme Court affirmed the decision of the Court of Appeal regarding the application of the CISG. The Court noted, that under article 35 CISG, the seller must deliver goods which are of the quantity, quality and description required by the contract and which are contained or packaged in the manner required by the contract. Where the contract does not specify these conditions the standards of article 35(2) CISG become relevant. Whether the goods are fit for the purposes for which the goods of the same description would ordinarily be used is to be decided on the basis of the standards in the country of the seller; the goods need not meet the security, certification and production standards of the importing country. Consequently, the seller was not obliged to follow these legal standards, even though the seller was aware of the place of delivery. It was up to the buyer to consider these requirements and to incorporate them into the contract on the ground of article 35(1) or 35(2)(b) CISG. The Court stated that requirements which apply in the Contracting State of the buyer were to be taken into consideration only if they also exist in the Contracting State of the seller, or have been agreed upon by the parties or made known to the seller according to article 35(2)(b) CISG. Therefore, the Supreme Court directed the court of first instance to determine which security provisions and standards had to be applied and whether the machines complied with such provisions.