

**Case 430: CISG 3(1); 3(2); 31**

Germany: Oberlandesgericht München; 23 U 4446/99

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<http://www.jura.uni-freiburg.de/ipr1/cisg/urteile/text/585.htm> (German language text)

<http://cisgw3.law.pace.edu/cases/991203g1.html> (English translation)

Abstract prepared by Rudolf Hennecke

The decision concerns both paragraphs of article 3 CISG, i.e. the sale of goods to be manufactured as well as the supply of additional services by the seller. The buyer, a German manufacturer of windows, had ordered from the Italian seller a window manufacturing unit. It was agreed that some parts for the unit should be provided by the buyer. Moreover, the unit was to be modified according to the buyer's specifications and to be delivered to the buyer's place of business, where it was to be assembled by the seller's technicians.

When the seller declared that it would not be able to deliver the manufacturing unit by the agreed time, the buyer fixed an additional period of time for delivery and, after that time had passed, declared the contract avoided.

The seller filed suit in Italian court for damages arising out of the avoidance of the contract. The buyer filed suit in Germany for lost profit and the cost of a substitute transaction. The seller contested the jurisdiction of the German court, asserting that the suit should be brought in Italy, the place of performance, pursuant to article 5(1) of the Brussels Convention.

The Oberlandesgericht München (Higher Regional Court of Munich) found that the German court of first instance had jurisdiction. As an initial matter, the Court stated that the CISG was applicable pursuant to article 1(1)(a) CISG since the two parties had the places of business in Contracting States. The Court then applied article 31 CISG, finding that the place of performance of the delivery of the manufacturing unit was the buyer's place of business in Germany, since according to the contract the unit was to be assembled there by the defendant's technicians. A clause in the contract stating the net price "at the seller's place of business" was considered immaterial in this respect, since it only clarified that the transport costs had to be borne by the buyer.

The Court observed that the contract was a contract for the sale of goods pursuant to article 3(1) CISG, since the parts for the unit to be provided by the buyer were not substantial in value or function. Finally, the Court concluded that the application of the CISG was not excluded by article 3(2) CISG. The mere fact that the machine was to be assembled by the seller's technicians at the buyer's place of business did not constitute a preponderant part of the seller's obligations. The value of the labour of the installation only amounted to a small part of the total value of the contract, and the main interest of the buyer was still the machine itself and not its installation.

The Oberlandesgericht München (Higher Regional Court of Munich) remanded to the court of first instance for a decision on the merits (pending a prior decision on jurisdiction by the court in Italy pursuant to the Brussels Convention).