CISG-online 613	
Jurisdiction	Austria
Tribunal	Oberster Gerichtshof (Austrian Supreme Court)
Date of the decision	22 October 2001
Case no./docket no.	1 Ob 49/01i
Case name	*Spanish fruits and vegetables case*

Translation[*] *by Ruth M. Janal*[**]

Translation edited by Jan Henning Berg[***]

HISTORY OF THE CASE

On 28 June 2000, the District Court of Feldkirch [Court of First Instance] dismissed Plaintiff [Seller]'s claim (docket no. GZ 7 Cg 284/97b-107). Upon [Seller]'s appeal, the Innsbruck Court of Appeals reversed the decision of the District Court on 14 November 2000 (docket no. GZ 7 Cg 284/97b-107). 1

COURT COMPOSITION: PARTIES: COUNSEL. The Supreme Court, acting as the final Appellate Court, composed of its Vice-President Dr. Schlosser as presiding judge and Dr. Gerstenecker, Dr. Schiemer, Dr. Rohrer and Dr. Zechner as accompanying judges, sitting in a non-public session over the matter of Plaintiff A [...], [Seller], represented by Dr. Hans G. Mondel, attorney in Vienna, versus First Defendant 1. F [...] GmbH & Co. KG [*][Buyer], and Second Defendant 2. F [...] private limited company [Second Defendant], both represented by Dr. 2

[*] All translations should be verified by cross-checking against the original text. For purposes of this translation, Plaintiff A of Spain is referred to as [Seller]; Defendant 1.F of Austria is referred to as [Buyer] and Defendant 2.F as [the second defendant]. Also, monetary amounts in Austrian Schillings are indicated by [sA] and amounts in German currency (Deutsche Mark) by [DM].

Translator's note on other abbreviations: AGBG = Allgemeines Bürgerliches Gesetzbuch [Austrian Civil Code]; BGBl = Bundesgesetzblatt [Austrian Federal Law Gazette]; GmbH & Co. KG = a Society whose only personally liable partner is a Private Limited Company; IPRG = Gesetz über das Internationale Privatrecht [Austrian Code on Private International Law]; JBl = Juristische Blätter [Austrian law journal]; SZ = Entscheidungen des österreichischen Obersten Gerichtshofs in Zivilsachen [Official Reporter on Decisions of the Austrian Supreme Court in Civil Matters].

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Clement Achamer, attorney in Feldkirch, concerning payment of 3,376,786.50 sA [Austrian schillings].

The Supreme Court has rendered the following decision: 3

- The [Defendants'] appeal is denied.
- [Seller] is to reimburse [Defendants] for the cost of the appellate proceedings in the amount of 32,055.60 sA (including 5,342.60 sA, in turnover tax) within fourteen days.

FACTUAL BACKGROUND

[Seller] is an agricultural goods processing society, registered with the Spanish General Register for agricultural goods processing societies. Under Spanish law, [Seller] possesses both legal capacity and the capacity to sue. 4

[Buyer] founded a subsidiary company as a private limited company [subsidiary], the registered capital of which was held by [Buyer] alone. Between September 1996 and March 1997, the [subsidiary]'s business purpose was the trade of fruit and vegetables. By Court Order of 7 May 1997, the [subsidiary]'s estate was declared bankrupt. [Second Defendant] is the only personally liable partner of [Buyer]. 5

The reasons for founding the [subsidiary] were, on the one hand, that there was free warehouse capacity on [Buyer]'s premises and, on the other hand, that [Buyer] hoped for synergies between the two companies. The [subsidiary]'s daily business was to be conducted by a manager employed on 1 August 1996; the manager spoke Spanish and had contacts in the Spanish market. [Seller] was assisted by a second manager, the son of one of the managers of [Buyer]. 6

The [subsidiary] rented business premises and warehouse space from [Buyer]. The companies had the same address and the [subsidiary]'s office could be entered either via [Buyer]'s storeroom, or via its open-plan office. [Buyer] provided the [subsidiary]'s manager with a key to its office premises; [Buyer] also did the accounting for the [subsidiary]. 7

In October of 1996, one of [Second Defendant]'s managers and the [subsidiary]'s manager traveled to Spain to establish business contacts. The two managers got in touch with [Seller] via a Spanish commercial agent who acts as a go-between for foreign fruit and vegetable importers and Spanish traders. Subsequently, [Seller] introduced both [Buyer] and the [subsidiary] to [Seller]'s export insurer. The export insurer merely agreed to insure [Seller]'s possible export claims against [Buyer]. However, it was unwilling to insure claims against the [subsidiary]. Upon this, [Seller]'s director, who had been in touch with the other parties, gave the order to orally notify [Buyer] that [Seller] had accepted [Buyer] as its contracting party. All invoices were to be «run in [Buyer]'s name«. The [Seller] demanded from the [subsidiary]'s manager that [Buyer] place all orders. In the event that the [subsidiary]'s manager placed any orders, they had to be confirmed in writing on [Buyer]'s stationery or with [Buyer]'s stamp affixed. 8

Subsequently, the [subsidiary]'s manager used [Buyer]'s stationery for its written confirmations of orders placed over the phone, but occasionally it sent those confirmations itself from the [subsidiary]'s fax machine. Written complaints, which were also sent by fax, were drawn up by the manager on the [subsidiary]'s stationery. The Court of First Instance did not establish that [Seller] objected to this procedure. 9

[Seller] addressed all of its correspondence and invoices to [Buyer]. The Court of First Instance was unable to ascertain whether [Seller] only pretended to contract with [Buyer] for insurance reasons, or whether [Seller] instead intended to have the [subsidiary] as its true contracting party. 10

[The Supreme Court explains that the [subsidiary]'s manager ordered goods in [Buyer]'s name, even though the [subsidiary]'s manager did not possess an power of representation. [Buyer] did not allow the [subsidiary]'s manager to use [Buyer]'s stamp and stationery; when needed, the manager nevertheless obtained stamp and stationery from [Buyer]'s office where the items were kept unlocked. [Buyer] was aware of the fact that its [subsidiary] had problems acquiring foreign suppliers, and while it could not be established whether [Buyer] had agreed with its [subsidiary] to pretend that [Buyer] was the contracting party, the [subsidiary]'s manager chose a similar procedure with seven other foreign suppliers. Mail addressed to [Buyer] was brought to [Buyer]'s authorized signatory who opened the mail and forwarded it to the individual departments. [Buyer]'s employee, who was responsible for foreign invoices, brought [Seller]'s letters - which had been partially opened - to the [subsidiary]'s office and handed them over to the [subsidiary]'s managers. 11

The [Seller]'s deliveries were mainly made directly to the customers. If [Seller]'s deliveries did reach [Buyer]'s place of business, [Buyer] was the one who loaded and unloaded the goods. The [subsidiary]'s manager notified [Seller] of alleged non-conformities, partly on the phone and partly in writing. The Court of First Instance was unable to establish whether, to which extent and regarding which deliveries [Seller] had received notices of non-conformity. The [subsidiary] paid to [Seller] a total of 934,863.22 DM [Deutsche Mark]. Payment was effected either by crossed checks via the [subsidiary]'s DM-account, or by bank transfer -- the [subsidiary] was named as the payer on the transfer receipts. For the period between 2 January 1997 and 23 January 1997, invoices over the total of 477,858.42 DM remain unpaid. 12

[With its action on 16 October 1997, [Seller] claims payment of the remaining purchase price in the amount of 477,858.42 DM.] 13

[Seller's position]

[The [Seller] submits that [Buyer] had ordered fruit and vegetables from it and that [Seller] delivered such at the agreed and reasonable price. [Seller] argues that the [subsidiary]'s manager had acted under an agency by estoppel for [Buyer], because it was able to obtain [Buyer]'s stamp and stationery. [Seller] also bases its action on a claim for damages, because [Buyer] knowingly employed an incapable manager for its [subsidiary] and did not exercise the required control over that company.] 14

[Buyer's position]

[[Buyer] submits that it did not have a business relationship with [Seller]. The [subsidiary]'s manager had agreed with [Seller] that the invoices would be addressed to [Buyer] for insurance purposes, but [Seller] knew from the outset that [Buyer] was not its contracting party. The [Seller] also knew that the [subsidiary]'s manager was not entitled to act for the [defendant; thus, the question of an agency by estoppel did not arise. The amount claimed by [Seller] was also incorrect, as the invoices contained arbitrary prices which did not conform with the agreements; [Seller], furthermore, did not allow for justified notices of non-conformity and price discounts. Due to the [subsidiary]'s inadequate business papers, [Buyer] was unable to substantiate which deliveries had been defective, but the fact was that goods delivered to the customers were lacking in conformity.] 15

DECISION OF THE DISTRICT COURT OF FELDKIRCH - COURT OF FIRST INSTANCE

The Court of First Instance dismissed [Seller]'s claim. The Court of First Instance explained that the applicable United Nations Convention on Contracts for the International Sale of Goods (CISG) governs only the formation of the contract of sale and obligations of the seller and the buyer arising from such a contract. Questions concerning the representation of a party are to be settled in conformity with the law applicable by virtue of the rules of private international law (IPRG [*] § 49(3)). This provision applies to issues regarding agency and determines that the matter shall be governed by the law of the country in which the power of authority was used. The place in which the power of authority is used by the representative is regarded as the place in which the representative «acts» as such, i.e., the place in which it actually undertakes the representative acts. As the [subsidiary]'s manager regularly acted from within Austria, Austrian domestic law applies. 16

[The Court of First Instance held that [Buyer] had given [Seller] well-founded reasons to believe that the [subsidiary]'s manager acted as [Buyer]'s agent. However, [Seller] could have realized that the [subsidiary]'s manager did not possess such power of authority and was, therefore, not entitled to the bona fide protection of an agency by estoppel. Therefore, the Court of First Instance dismissed [Seller]'s claim.] 17

DECISION OF THE COURT OF APPEALS OF INNSBRUCK

Upon [Seller]'s appeal, the Court of Appeals reversed the decision of the Court of First Instance and ordered the Defendants to pay the amount of 3,361,987.23 sA to [Seller]. The Court of Appeals allowed the orderly appeal to the Supreme Court on points of law. The Court of Appeals held that the alleged contract between [Seller] and [Buyer] is governed by the CISG. Therefore, the prerequisites for the formation of a contract also need to be determined under the Convention. While the existence of an agency by estoppel has to be assessed under the [internal] law of the country in which the agent conducted its representative acts (IPRG [*], § 49), the question of whether this person acted in someone else's name at all, depends on the interpretation of its declarations. Accordingly, the matter has to be determined under the 18

CISG, because the Convention settles both the formation of contract and the interpretation of statements made by the parties.

The Court of Appeals explained that, under the CISG, statements are to be interpreted according to the understanding that an average businessperson would have had. Whether «other conduct» possesses a declaratory content depends on whether a reasonable person would have deduced from such conduct the intention of the other party to create legal consequences. The focus of Art. 8 CISG is on the subjective horizon of the recipient. In contrast, the subjective declaratory intent of the declaring party is only decisive if the recipient knew or could not have been unaware of that intent, i.e., if the intent was easily discernible and the recipient acted in gross negligence. According to the Court of Appeals, it could be deduced from the findings of fact that [Buyer] knew that the [subsidiary] did not possess the required financial standing for the intended trade with Spanish suppliers. This was why the security or respective declarations of patronage by [Buyer] were necessary. [Seller] told both [Buyer]'s manager and the [subsidiary]'s manager unambiguously that [Seller] was only willing to accept [Buyer] as a party to the contract, because it was only in this case that it was covered by its insurance for defaulted claims. **19**

The Court of Appeals further held that the [subsidiary]'s manager had used [Buyer]'s stationery and stamp for the confirmation of orders. The invoices addressed to [Buyer] had reached [Buyer]'s authorized signatory. [Buyer]'s responsible employee for foreign invoices then forwarded [Seller]'s letters -- which had been partly opened -- to the [subsidiary]'s manager. The invoices addressed to [Buyer] were never queried and [Buyer] never objected that it was not the proper party. It had to be concluded that the sales contracts were formed between [Seller] and [Buyer] because [Seller] did not have to notice that [Buyer] was unwilling to bind itself with the orders or confirmations sent by the [subsidiary]'s manager. Rather, [Seller] reasonably interpreted [Buyer]'s conduct as an acceptance of [Seller]'s invitation to form a contract -- after all, [Buyer]'s business also occasioned other transactions like those in dispute. The [Seller] was, therefore, not obligated to inquire whether the signatory of the orders and confirmations did in fact possess representative authority for [Buyer]. There is no respective investigation duty in commerce, as long as the transaction is not unusual. It cannot be overlooked that [Seller] knew that the party with whom it refused to contract was a 100% subsidiary of [Buyer]. Thus, [Seller] was not obliged to suspect that the use of [Buyer]'s stationery and stamp was not legal. For this reason, it was moreover insignificant that payments and complaints were made by the [subsidiary] -- such conduct only implied an internal arrangement regarding the performance of the contract between [Buyer] and its [subsidiary]. Under the principle of good faith -- applicable by virtue of Art. 7 CISG -- and taking into account the type of business, [Seller] could assume that the orders and confirmations did in fact stem from [Buyer]. **20**

The Court of Appeals held that [Buyer] did not prove that the requirements for a price reduction were satisfied, even though the burden of proof was on [Buyer] under the CISG. Therefore, [Seller]'s claim was also held to be justified in its amount, as it was established that the prices stated in the invoices corresponded to the agreements. 21

[...]

RULING OF THE FEDERAL SUPREME COURT OF AUSTRIA

The contracts concluded in the years 1996 and 1997 are in principal governed by the CISG because -- independent of the questions of representation to be considered -- the parties have their places of business in different Contracting States (Art. 1(1)(a) CISG). The Republic of Austria became a member on 1 January 1989 (BGBl [*], 96/1988), Spain acceded on 24 July 1990 (BGBl, 108/1991). 22

According to Art. 4 CISG, the Convention governs only the formation of the contract of sale and the rights and obligations of the seller and the buyer arising from such a contract. Unless otherwise expressly provided in the Convention, it is not concerned with the validity of the contract or of any of its provisions or of any usage (Art. 4(a) CISG). Other matters, such as the contracting capacity or the limitation of actions (cf. Supreme Court, 4 Ob 1652/95; SZ [*] 71/115 [also available at <http://cisgw3.law.pace.edu/cases/951024a3.html>]) are not settled in it, just as the problem of representation is not provided for (cf. Supreme Court, JBl [*] 1997, 592 [also available at <http://cisgw3.law.pace.edu/cases/970320a3.html>]; Posch in Schwimann, AGBG [*], 2d ed., vol. 5, Art. 4, n. 11). The matter is to be settled in conformity with the law applicable by virtue of the rules of private international law (cf. Supreme Court, JBl 1997, 592, Karollus, UN-Kaufrecht, 41). 23

Contrary to the opinion voiced by the Court of Appeals, the provisions of Arts. 7 and 8 CISG, cannot be utilized to decide whether one party is liable for giving the other party the impression of a legal position (this being the relevant matter in the present dispute). This can already be deduced from the wording of the above-mentioned provisions (Art. 7: «In the interpretation of this Convention [...]»; Art. 8: «For the purposes of this Convention [...])». 24

[The Supreme Court of Austria goes on to explain that Austrian law applies to the question whether an agency by estoppel existed. The Supreme Court holds that: 25

The [Buyer] gave [Seller] the impression that the [subsidiary]'s manager was acting in [Buyer]'s name; 26

The [Seller] had proven that an agency by estoppel existed. 27

The [Defendants'] appeal is dismissed.] **28**