

Case 605: CISG 4; 7 (1); 8

Austria: Oberster Gerichtshof 1 Ob 49/01i

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Abstract prepared by Martin Adensamer, National Correspondent

A Spanish seller (hereinafter “the plaintiff”) entered into a business relationship for the sale of fruits and vegetables with an Austrian corporation (the “defendant”). When the buyer failed to meet his obligation of payment, the plaintiff sued him to obtain the purchase price. The defendant submitted that he had not entered any contracts with the plaintiff, but that the relationship was between the plaintiff and his subsidiary. The key issue before the court was thus the identification of the contracting party: i.e. whether the manager of the subsidiary company had acted on behalf of the subsidiary or as an agent of the parent company.

The plaintiff had addressed all of its correspondence and invoices to the defendant. He had demanded from the subsidiary’s manager that the defendant placed all orders. In the event that the subsidiary’s manager placed any orders, they had to be confirmed in writing on the defendant’s stationery or approved with the defendant’s stamp. The subsidiary’s manager had used the defendant’s stationery for the written confirmations of orders placed by phone.

The court of first instance dismissed the plaintiff’s claim. It ruled that questions concerning the representation of a party were not dealt with by the CISG. They had to be settled in conformity with the law applicable by virtue of the rules of private international law.

The court of appeal reversed the decision. It held that the question of whether the subsidiary’s manager had acted in the defendant’s name depended on the interpretation of his statements. Therefore the CISG was applicable since the Convention settles both the formation of contract and the interpretation of statements made by the parties (article 8 CISG).

Based on the findings, the court stated that the contracts were concluded between the plaintiff and the defendant and that according to the principle of good faith (article 7 (1) CISG), and considering the type of business, the plaintiff was entitled to assume that the orders and confirmations came from the defendant.

The Supreme Court, though asserting that the CISG was applicable, overruled the decision of the court of appeal. The Court held that, pursuant to article 4 CISG, the Convention is not concerned with issues of representation. The matter was thus to be settled in conformity with the law applicable by virtue of the rules of private international law. The provisions of articles 7 and 8 CISG could not be applied to decide issues of apparent representation as the one discussed in the case.