Supreme Court of Austria (*Oberster Gerichtshof*)

22 October 2001 [1 Ob 77/01g]

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

Edited by Jan Henning Berg[***]

HISTORY OF THE CASE

On 21 June 2000, the Commercial Court Vienna [Court of First Instance] affirmed [Seller]'s claim (Docket no. GZ 15 Cg 140/96x-53). Upon [Buyer]'s appeal, the Vienna Court of Appeals affirmed the decision of the Court of First Instance on 23 November 2000 (Docket no. GZ 1 R 197/00y-59).

JUDGMENT

The Supreme Court, acting as the final appellate court, and composed of its Vice-President Dr. Schlosser as presiding judge and Dr. Schiemer, Dr. Gerstenecker, Dr. Rohrer and Dr. Zechner as accompanying judges, sitting in a non-public session over the matter of Plaintiff M [...] joint-stock corporation of Hungary, [Seller], represented by Dr. Ulrike Rein, attorney in Vienna, versus Defendant A [...] joint-stock corporation of Austria, [Buyer], represented by Schuppich, Sporn & Winischhofer, attorneys in Vienna, concerning payment of US $4,948,669.43 has rendered the following decision:

The appeal is denied.

The [Buyer] is to reimburse [Seller] for the cost of appellate proceedings in the amount of *S.* [Austrian Shillings] 167,137 within 14 days.

FACTUAL BACKGROUND

On 4 February 1994, the Hungarian Plaintiff [Seller] and the Austrian Defendant [Buyer] concluded a supply contract over the delivery of gasoline and gas oil for the period of 1 February 1994 to 31 January 1995. The contract contained a choice of law clause in favor of Austrian law. After this supply contract had ended, [Seller] sent to [Buyer] the draft of an annual contract for the delivery of gasoline and gas oil on 28 February 1995 pertaining to the period 1 March

[*] All translations should be verified by cross-checking against the original text. For purposes of this translation, plaintiff company M of Hungary is referred to as [Seller]; defendant company A of Austria is referred to as [Buyer]. Amounts in the former currency of Austria (*Schilling*) are indicated as [*S.*], amounts in U.S. Dollars by [US $], and amounts in Hungarian Forint by [*Ft*].

[**] Ruth M. Janal, LL.M. (UNSW) is a PhD candidate at Albert-Ludwigs-Universität Freiburg. The second-iteration redaction of this translation was by Dr. John Felemegas of Australia.

[***] Jan Henning Berg is a law student at the University of Osnabrück, Germany, who participated in the 13th Willem C. Vis Moot with the Osnabrück team. He has coached the team of the University of Osnabrück for the 14th Willem C. Vis and the 4th Willem Vis (East) Moot.

1995 to 29 February 1996. The proposal was already signed by [Seller] and contained the following provisions:

> «*I. Price*:
>
> Platt's FOB Barges Rotterdam average medium quotation of the previous month for gas oil
>
> 1. plus US$ 12/Ton [US Dollars per ton] for different gas oil
>
> 2. plus US$ 10/Ton for diesel
>
> 3. Platt's CIF MED Basis Genova-Lavera average medium quotation of the previous month plus US$ 5/Ton for gas oil max. 0.2% sulphur
>
> «*II. Price*:
>
> 1. Eurosuper: Platt's FOB Barges Rotterdam average medium quotation of the previous month for Prem. Unl. plus US$ 15/Ton
>
> 2. Normal gasoline: Platt's FOB Barges average medium quotation of the previous month for Reg. Unl. plus US$ 14/Ton
>
> «FOR PART I AND PART II: delivery parity: Prices are FOB Szazhalombatta.
>
> DELIVERY: 1 March 1995 – 29 February1996
>
> PAYMENT: credit transfer within 30 days after delivery date
>
> OTHER MATTERS: for matters not settled in this contract the provisions of Incoterms, last edition, apply. The contract is governed by Austrian law [...].»

Although [Buyer] did not sign [Seller]'s proposal, [Buyer] placed numerous orders with [Seller]. From these deliveries, invoiced with a number of bills, an amount of US$ 4,948,668.43 remains outstanding and is claimed by [Seller].

A further Hungarian joint-stock corporation [the Buyer's assignor] had maintained a business relationship with [Seller]'s predecessor in title. The [Buyer's assignor] had imported gas oil between 15 January 1992 and 15 May 1993, stored it at [Seller]'s place of business and allegedly possessed a claim for *Ft* [Hungarian Forint] 609,810,397 against [Seller]. The [Buyer's assignor]'s claim was based on unjustified enrichment, because it had paid taxes in this amount for [Seller] (according to [Seller], the matter concerned excise tax; according to [Buyer]'s submission, it was gasoline tax). By written agreement of 14 June 1995, the [Buyer's assignor] assigned the account receivable to [Buyer]; [Seller] was notified. The agreement read in part:

> [...]

On 27 August 1996 the [Buyer's assignor] applied to the Hungarian National Bank (the foreign exchange authority) for a confirmation that the assignment did not have to be authorized; in the alternative, that authorization of the assignment of *Ft* 609,810,397 be granted. (As will be

shown, the Court can dispense with an account of the proceedings before Hungarian authorities and courts regarding the foreign exchange authorization).

POSITION OF THE PARTIES

Position of [Seller]

[Seller] claims payment of the purchase price in the amount of US$ 4,949,668.43 for the orderly delivery of gas oil and gasoline.

Position of [Buyer]

[Buyer] objects that the claim was redeemed due to [Buyer]'s set-off with a counterclaim of 609,810,397 *Ft*.

[*The Court recounts Buyer's submissions regarding the Buyer's assignor's asserted claim against Seller.*]

On 14 June 1995, the [Buyer's assignor] had transferred its claim to [Buyer].

RULING IN FIRST AND SECOND INSTANCE

The Court of First Instance granted [Seller]'s claim. The decision was mainly based on the consideration that the assignment of the claim was invalid, because the condition set by the Hungarian National Bank had not been met (Hungarian Civil Code § 215, in connection with Hungarian Foreign Exchange Code § 9(1), § 27(1) and § 3 n.18). Therefore, [Buyer]'s declaration of a set-off could not redeem [Seller]'s claim. The Court held that as the assignment was invalid, it was irrelevant whether the alleged claim could be set off (The exclusion of a set-off could have resulted either from its nature as a specified currency debt or because the claim could not be converted and was therefore dissimilar to [Seller]'s claim).

The Court of Appeals confirmed the decision of the Court of First Instance. After repeating the hearing of evidence, the Court made additional findings regarding the content of [Seller]'s contractual proposal of 28 February 1995, which are also accounted above. The Court's legal finding was that [Buyer] – upon whom fell the burden of proof – failed to give sufficient evidence that a valid foreign exchange authorization of the assignment existed under Hungarian law. Furthermore, [Buyer] would not have been entitled to set-off [Buyer]'s alleged counterclaim, which constituted a specific currency debt. In the sphere of the CISG, a real foreign currency debt, which was based on the parties' agreement, always constitutes a specific foreign currency debt that cannot be offset. The Court explained this finding with various considerations.

REASONING OF THE COURT

[Buyer]'s appeal on points of law was permitted by the Court of Appeals. The appeal is admissible, but not justified.

a) In these final appeal proceedings, it is no longer disputed between the parties that the Hungarian [Seller] delivered gasoline and gas oil to the Austrian [Buyer]; that a framework contract was concluded despite the fact that [Buyer] had not signed [Seller]'s proposal of 28 February 1995; that Austrian law governs the contract; and that the deliveries were to be paid in [US

dollars]. Based on different considerations, the previous instances denied that the claim of unjustified enrichment, which had been transferred to [Buyer] by the [Buyer's assignor], was suitable to redeem [Seller]'s claim for payment of the purchase price.

b) The previous instances considered the question of the applicable law, affirmed the valid agreement of a choice of law clause between the parties, and correctly applied Austrian domestic law to the parties' contractual relationship following IPRG §§ 11 and 35(1). Despite Hungary's declaration under Art. 96 CISG (*cf.* Posch in Schwimann, Art. 96, n. 2), the requirements as to the form of the – only implicitly concluded – framework contract are determined by Austrian domestic law according to IPRG § 8 (*cf.* Posch, *op. cit.*, Art. 11 n. 5 and Art. 96 n. 4). Consequently, the contract is not subject to any form requirement and was validly concluded.

[Buyer]'s appeal wrongly doubts the finding of the previous instances (which referred to the precedent in decision 7 Ob 336/97f, at RdW 1998, 552 [*also* available at <http://cisgw3.law.pace.edu/cases/980310a3.html>]), that the CISG is to be included in the law governing the contract. At the time of the conclusion of the contract, the CISG had entered into force both in Hungary (as of 1 January 1988) and in Austria (as of 1 January 1989). The parties, who have their places of business in different Contracting States, concluded a (framework) contract for the delivery of goods (Art. 1(1)(a) CISG). Therefore, the choice of Austrian law generally includes the CISG, which forms part of the Austrian legal system. If the CISG is applicable, parties who do not wish to have the Convention govern their contract need to reach a corresponding agreement to exclude its application; the exclusion may be made expressly or impliedly (*cf.* Posch, *op. cit.*, Art. 6 n. 3). [Buyer] does not even submit that the parties explicitly excluded the application of the Convention. Contrary to [Buyer]'s appeal, there is also no indication of an implicit exclusion: an implicit exclusion may only be assumed if the corresponding intent of the parties is sufficiently clear. If it cannot be established with sufficient clarity that an exclusion of the Convention was intended (taking into account the criteria provided by Art. 8 CISG for the interpretation of a party's statements and other conduct), then the CISG is to be applied (*cf.* Posch, *op. cit.*, Art. 6 n. 7).

According to the prevailing opinion, the general choice of law of a Contracting State to the Convention does not lead to its exclusion, unless there are further indications to the contrary – which is not the case in the present dispute (*cf.* Posch, *op. cit.*, Art. 6 n. 8 with further references; Honsell, Kommentar zum UN-Kaufrecht, Art. 6 n. 5 *et. seq.*, Ferrari in Schlechtriem ed., *Kommentar zum Einheitlichen UN-Kaufrecht*, 3rd ed., Art. 6 n. 22 with further references). In decision 2 Ob 328/97t, [SZ 71/21 = JBl 1999, 54 (*commented by* Karollus) = ecolex 1998, 692 (*commented by* Wilhelm) = Zfrv 1999, 65 (*commented by* Posch) [case presentation *also available at* <http://cisgw3.law.pace.edu/cases/981112a3.html>], the Supreme Court held that the CISG applies if two parties to an installment contract have their places of business in different States and choose the law of a CISG member State, even if they do not explicitly agree on its application. The choice of law without an explicit declaration that the Convention be excluded does not constitute an implicit exclusion, because the CISG is a part of the chosen law, it is therefore included in the referral, and takes precedence over the non-unified law which would otherwise be applicable (*cf.* Achilles, Kommentar zum UN-Kaufrechtsübereinkommen, Art. 6 n. 4; Ferrari, *op. cit.*, Art. 6 n. 22, each with further references to case law and authorities; Siehr, *op. cit.*, Art. 6 n. 7, with various case examples).

The agreement to apply Incoterms – as in the present case – also does not necessarily indicate an agreement to exclude the CISG, because they provide only for singular aspects of the sales contract and do not require the basis of a certain sales law that diverges from the CISG (Ferrari,

op. cit., Art. 6 n. 29; Siehr, *op. cit.*, Art. 6 n. 7; Lorenz in *Witz/Salger/Lorenz*, International Einheitliches Kaufrecht, Art 6 n.16, each with further references). The [Buyer]'s appeal further fails to show in which point Incoterms are supposed to take priority over the CISG. The application of the CISG was consequently not validly excluded under its Art. 6 (*see also* decision 1 Ob 292/99v, *available* at EvBl 2000/167; RdW 2000, 660; ZfRV 2000, 188), because the facts reveal that the choice of law clause referred to the Austrian legal system as a whole and not to only parts of it.

According to the findings of the previous instances, the purchase price was to be paid in US dollars, that is, in a foreign currency. Failing an agreement to the contrary, the interpretative rule of Art. 57(1)(a) CISG determines that [Buyer] was bound to pay the price at [Seller]'s place of business in Hungary ([Seller]'s place of business needs to be established under Art. 10 CISG). The purchase price is a debt payable at the creditor's place of business (Achilles, *op. cit.*, Art. 57 nn. 1, 3, with further references). That the prerequisites of Art. 57(1)(b) are met (place where the handing over of the goods takes place), was neither submitted nor has it been established.

c) It has to be noted that Art. 4 CISG does not solve every question that arises regarding the determination of the sphere of application of the Convention. A sales contract is simply integrated in a network of civil law institutes, which need to be assessed under the applicable national law if they are not settled in the Convention. Among other matters, this applies to the set-off of a claim that does not result from a contract governed by the Convention – in the present dispute the claim of unjustified enrichment assigned to [Buyer] (*cf.* Posch, *op. cit.*, Art. 4 n. 11). As the CISG does not provide for a set-off of such claims, the effects of the set-off, its validity, and possible impediments to the set-off need to settled under the domestic law applicable by virtue of the rules of private international law (Siehr, *op. cit.*, Art. 4 n. 21; Ferrari, *op. cit.*, Art. 4 n. 39; *see also* decision 6 Ob 632, 633/89, *also* at IPRE 3/158; and decision 8 Ob 364/97f, at SZ 71/115, *also available* at <http://cisgw3.law.pace.edu/cases/980526a3.html>). This is regularly the same law which governs the claim against which the party is seeking to offset (Achilles, *op. cit.*, Art. 4 n. 10; Schwimann, *op. cit.*, before § 35 IPRG n. 7, each with further references). Therefore, the relevant question in the present case, *i.e.*, whether there is an impediment to the set-off, is to be assessed under Austrian law. This leads to the application of ABGB § 1440 and raises the question whether [Buyer]'s counterclaim possesses the prerequisite of similarity which is necessary for the settlement by set-off (*cf.* Mayrhofer in *Ehrenzweig*, 3rd ed., n. 597; *Rummel* in *Rummel*, 2d ed., § 1440 ABGB n. 2; *Honsell/Heidinger* in *Schwimann*, 2d ed., § 1440 ABGB n. 2, each with further references to case law; *see also* Seiler, Zur Kompensation beim Fremdwährungskredit, in ÖBA 1987, 615 *et. seq.*)

d) [*The Court assesses the matter and finds that Buyer's counterclaim in Hungarian Forint is not «similar» to Seller's claim in US dollars as required by ABGB* § *1440*]

If one supposed that the recourse to domestic law was not admissible and that the CISG was applicable – contrary to [Buyer]'s appeal – the following needs to be emphasized: According to the predominant view of scholarly authorities (*cf.* Hager in Schlechtriem, Kommentar zum Einheitlichen UN-Kaufrecht, 3rd ed., Art. 54 n. 10; Schnyder/Straub in Honsell, *op. cit.*, Art. 54 n. 28, each with further references; Witz in Witz/Salger/Lorenz, *op. cit.*, Art. 53 n. 6; *diverging opinion voiced by* Herber/Czerwenka, Internationales Kaufrecht, Art. 53 n. 6) – an opinion supported by the Court of Appeals – the buyer is not entitled to pay the price in a currency other than the one agreed upon, in particular the currency of the State where the seller has its place of business, because the CISG does not provide for such a right. The payment in a different currency or a corresponding right of the buyer requires an agreement between the parties, which

may in the case be deduced from the parties' conduct after the conclusion of the contract (CISG Art. 29). As a result, a real foreign currency debt in the sphere of the application of the CISG always constitutes a specific foreign currency debt.

In view of all of these considerations, the question whether the similarity of the two claims is also lacking – because the Hungarian Forint [*Ft*] cannot be converted – need not be decided. The same applies to the question regarding the foreign currency authorization of the assignment and a further exploration of Hungarian law. The [Seller]'s objection that [Buyer]'s counterclaim is time-barred also need not be considered.

Therefore, the previous instances correctly granted [Seller]'s claim.

The appeal is unsuccessful on grounds of law.