

Case 877: CISG 4(a); 8; 35; [49(1)]

Switzerland: Federal Court, 4C.296/2000

22 December 2000

Original in German

Published in German: CISG-online.ch. No. 628

English translation: <http://cisgw3.law.pace.edu/cases/001222s1.html>

Abstract in German: Swiss Review of International and European Law (SRIEL), 1/2002, pp. 140 ff.

Abstract in English: www.unilex.info/case.cfm?pid=1&do=case&id=729&step=Abstract

<http://www.globalsaleslaw.com/content/api/cisg/urteile/628.pdf>

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The subject of the dispute related to the sale of a used textile machine by a seller having its headquarters in Switzerland to a buyer having its place of business in Germany for resale to Iran. The buyer discovered defects in the goods sold and demanded the refitting of the machine, setting a time limit. The time limit having expired without result, the buyer thereupon repudiated the contract. The seller then terminated the contract, retaining the down payment by way of a penalty, as stipulated in the contract. The buyer brought an action before the cantonal commercial court, claiming reimbursement of that amount. The court dismissed the claim.

The Federal Court had first to consider whether a possible fundamental mistake arising at the time of conclusion of the contract, as alleged by the plaintiff, had been remedied by decisive action (i.e., requesting performance of the contract and subsequently damages for delayed performance). Pursuant to Swiss law, the court found in the affirmative. It considered that the CISG was not applicable to the matter (which was concerned with the validity of the contract), citing article 4(a).

The court then examined article 35 of the Convention. It considered that that article did not contain any specific rule on promised qualities. However, the seller was required to guarantee all the qualities, as stipulated in the contract, which the buyer was entitled to expect in the goods sold. Pursuant to article 8 CISG, the court concluded that, in the present case, the plaintiff had professional knowledge in the matter and was aware that the offer related, not to a new machine, but to a used machine which had been built some 14 years earlier and consequently did not incorporate the latest technical developments. It therefore lay with the plaintiff to make enquiries as to the machine's functioning and fittings. The lower court had therefore correctly acknowledged the defendant's right to accept that the plaintiff had entered into the contract with full knowledge of the machine's technical capacity and fittings. In line with the lower court ruling, it had to be accepted that the sold machine had been supplied in conformity with the contractual requirements within the meaning of article 35(1) CISG. The claimant had therefore wrongly invoked the defect warranty. In view of that fact, the defendant was, in accordance with the provisions of the contract, entitled to terminate the contract. The dismissal of the claim had therefore been correct.