CISG-online 628	
Jurisdiction	Switzerland
Tribunal	Bundesgericht/Tribunal fédéral (Swiss Federal Supreme Court)
Date of the decision	22 December 2000
Case no./docket no.	4C.296/2000
Case name	*Roland Schmidt GmbH v. Textil-Werke Blumenegg AG*

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

Edited by Daniel Nagel[***]

[Background information and facts of the case:]

A. 1

The [Buyer], whose place of business is in Haldenwang [Germany], trades in textile machinery. The [Seller], with seat in Goldach [Canton St. Gallen, Switzerland] tried to sell its used textile machines in the year 1998. Following an initial contact in December of 1998, the [Seller] sent to the [Buyer, a list of the machinery offered for sale including a «price offer»], in the beginning of January 1999. On 12 January 1999, the [Buyer]'s manager and two prospective customers from Iran viewed various machines. On the following day, [Buyer]'s manager declared that he would be interested in certain machines, but disagreed with the prices.

By letter of 24 February 1999, the [Buyer] again contacted the [Seller] and, referring to the machinery list, expressed an interest in a rotary printing machine «Stork» RDIV Airflow A 640.000 plus equipment. This letter, as well as a confirmation of the order by the [Seller] dated 1 March 1999, reveals that the machine was supposed to be sold to the Iranian customers. After the [Seller] had confirmed in writing its willingness to sell the machine on 26 February 1999, the [Buyer] faxed a «purchase confirmation» with a detailed description of the furnishings of the machine and the equipment on 9 March 1999. It was further noted that the machine contained a «rapport equipment 641 mm – 1,018 mm» and that the machine was «complete and operating as viewed.» 2

[*] All translations should be verified by cross-checking against the original text. For purposes of this translation, Claimant-Appellant of Germany is referred to as [Buyer], and Respondent-Appellee of Switzerland is referred to as [Seller]. Also, monetary amounts in *Deutsche Mark* are indicated as DM; amounts in Swiss francs are indicated as CHF. The abbreviation OR refers to the *Obligationenrecht* [Swiss Law of Obligations].

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[The sales contract:]

On 9 March 1999, the [Seller] and the [Buyer] signed a sales contract which read in part: 3

«The parties agree to the sale of

- 1 piece rotary printing machine, brand *Stork*, Type RD-IV Airflow A 640.000, Rapportausrüstung 641 mm – 1018 mm, [...], with the following equipment:

  [...]

  from the [Seller]'s property to the [Buyer] at a price of DM [Deutsche Mark] 233,000.00.

The following conditions apply:

1. The price is ex works excluding dismantling, loading, transport, insurance etc. These obligations are to be performed by the buyer or a company commissioned by buyer. The costs accrued have to be borne by the buyer in their entirety.
2. The collection has to be effected – following a prior agreement on the exact date – by 30 June 1999 at the latest.
3. The purchase price is payable:
   - 30% down payment = DM 69,900.00 – immediately;
   - 70% final payment = DM 163,100.00 – before dismantling.

   If the machine is not collected until the date named under clause 2., the seller is entitled to avoid the contract without meeting any further requirements. In this case, the seller is entitled to keep the down payment as a stipulated penalty.
4. [...]
5. The goods for sale are taken over by the buyer in the present conditions, any guarantee or rights to remedy are waived.»

After the [Buyer] made the down payment in the amount of DM 69,900.00 on 11 March 1999, the [Buyer]'s manager viewed the machine again fourteen days later and realized that it was only equipped for a rapport length of 641 mm. By letter of 12 April 1999, the [Buyer] complained to the [Seller] that the stencil holders for a rapport length of 1018 mm were missing. [Buyer] referred to the contract, in which a «rapport equipment 641 mm – 1018 mm» had been assured. Because used stencil holders were not available and new holders would cost DM 99,000.00, the [Buyer] suggested the following options: 4

«Alternative 1: 5

You accept that the delivery does not correspond to the sales contract, you withdraw from the contract and reimburse the down payment in the amount of DM 69,900.00.

Alternative 2:

You accept a reduction in price in the amount of DM 60,000.00, as a contribution to the purchase of new stencil holders. This means that you bear roughly 60% of the additional costs, while the [Buyer] bears approx. 40%.»

6 By letter of 13 April 1999, the [Seller] turned down these proposals. [Seller] pointed out that the [Buyer] had declared on 9 March 1999 that it would buy the machine «complete and operating as viewed.» [Seller] alleged that the remark regarding the rapport equipment in the sales contract only referred to the technical bounds and did not allow for any conclusions as to the measurements of the existing stencil holders.

7 On 26 April 1999, the [Buyer] wrote to the [Seller] that it would refuse to accept the machine and, under OR Art. 107, refuse the belated performance unless the [Seller] assured [Buyer] by 10 May 1999 that «a machine was sold conforming to the contract, which contained an operating rapport equipment between 641 mm and 1018 mm.» When the [Seller] insisted on its position, the [Buyer], in accordance with OR Art. 107(2), on 4 June 1999 declared that it renounced any further performance. On 1 July 1999, the [Seller] declared the avoidance of the contract of 9 March 1999 in writing referring to contract clause 3 and that it would keep the down payment as the stipulated penalty.

[The Court of First Instance and the pleadings of the parties:]

8 B.
In September 1999, the [Buyer] brought an action against the [Seller] before the Commercial Court of the Canton St. Gallen [Court of First Instance]. The [Buyer] requested that the [Seller] be ordered to pay the amount of *Sf* [Swiss francs] 87,920.00 with 5% interest since 4 June 1999. In its decision of 21 August 2000, the Court of First Instance dismissed the [Buyer]'s claim.

9 C.
With this appeal, the [Buyer] requests the Supreme Court to reverse the decision of the Court of First Instance and to order the [Seller] to pay the amount of *Sf* 87,920.00 with 5% interest since 4 June 1999; in the alternative to refer the matter back to the previous instance for a new decision.

The [Seller] requests the Supreme Court to dismiss the [Buyer]'s appeal.

The Supreme Court considers:

10 1.
The Court of First Instance held that while the parties had a different understanding of the wording of the contract «rapport equipment 641 mm – 1,018 mm», a normative consensus had been reached. In view of the [Buyer]'s purchase confirmation of 9 March 1999, in which [Buyer] had declared that it would take over the machine «complete and operating as viewed», the [Seller] was entitled to believe that the [Buyer] also supposed that the machine was not equipped for a rapport length of 1,018 mm. Based on the provisions of the United

Nations Convention on Contracts for the International Sale of Goods (CISG), in particular Art. 8(2) CISG, which governs the sales contract, the contract had to be viewed as normatively formed with this meaning. (The Convention entered into force in Switzerland on 1 March 1991 and in Germany on 1 January 1991).

The Court of First Instance then took into account that the [Buyer]'s manager possibly did not inspect the machine closely enough during the first visit on 12 January 1999 and that, therefore, his perception had not been in accord with the reality. The Court of First Instance left open whether the [Buyer] was in mistake in the meaning of Art. 24(1) no. 3 OR when [Buyer] declared its intent, because the [Buyer] never declared that it would not perform the contract, according to Art. 31(1) OR. Furthermore, the [Buyer] had failed to show that the [Seller] knew or should have been aware of the fact that the [Buyer] was under a misapprehension. Thus, it had to be assumed that the [Seller] could not have realized the [Buyer]'s mistake. Consequently, the contract had been validly concluded in the version submitted by the [Seller]. **11**

2. **12–14**
[*The Supreme Court dismisses the* [*Buyer's*] *claim that the Court of First Instance did not correctly ascertain the relevant facts.*]

3. **15**
The [Buyer] further challenges the findings of the Court of First Instance that [Buyer] had never declared that it did not wish to be bound by the contract because of mistake. [Buyer] submits that the Court of First Instance violated Art. 31 OR by disregarding that [Buyer]'s request for reimbursement of performances constituted an implicit contestation, respectively refraining from an approval of the contract. In the [Buyer]'s opinion, the Court of First Instance should have realized that [Buyer] repeatedly demanded the reimbursement of the down payment within the period of one year. From this, the Court of First Instance should have concluded that the contract was invalid due to the [Buyer]'s mistake and the implicit contestation of [Buyer]'s declaration of intent.

a) **16**
Based on Art. 3 of the Hague Convention on the Law Applicable to International Sale of Goods (1955), the Court of First Instance held that Swiss domestic law was superseded by the rules of the CISG. According to Art. 4(a) CISG, the Convention is not concerned with the validity of the contract nor of any of its provisions, which is why the provisions of the Swiss Civil Code apply. The Court of First Instance left open whether the [Buyer] was in mistake regarding the declaration of its intent in the meaning of Art. 23(1) no. 3 OR. As the following considerations show, the Court of First Instance correctly held that this question need not be decided.

b) **17–18**
[*The Supreme Court explains that the* [Buyer] *implicitly approved the contract by setting a time limit for the performance of the contract on 26 April 1999, by declaring the contract avoided in accordance with Art. 107(2) OR on 4 June 1999 and by announcing a claim for damages for non-performance*.]

4. 19
The [Buyer] further submits that the Court of First Instance failed to understand the matter in regard to the remedy for breach of contract, in particular the fact that the [Seller] assured a «rapport equipment 641 mm – 1,018 mm» and, therefore, [Seller] was liable under Art. 197 OR. [Buyer] asserts that the Court of First Instance erred in failing to clarify how things stood with the assured characteristics of the machine. The Court of First Instance did not allow the [Buyer] to prove via an expert opinion that the description of the rapport length of a «Stork» machine conformed to the [Buyer]'s comprehension of that term.

However, as the Court of First Instance correctly held, the prerequisites and the remedies for 20
breach of contract do not result from Art. 197 OR, but from Art. 35 CISG (*cf.* Magnus in *Staudinger's Kommentar zum Bürgerlichen Gesetzbuch, Wiener UN-Kaufrecht* [Commentary on the CISG], Berlin 1999, Art. 35 para. 2). According to Art. 35 CISG, the seller must deliver goods which are of the quantity, quality and description required by the contract and which are contained or packaged in the manner required by the contract. The assessment of the agreement on the characteristics of the goods and their inclusion in the contract needs to be established – if necessary – by interpretation of the parties' statements under Art. 8 CISG. In contrast to Art. 197 OR, Art. 35 CISG does not contain a specific rule on warranted characteristics. Instead, the seller is generally liable for any quality which the buyer is entitled to expect under the contract (*cf.* Schwenzer in von Caemmerer/Schlechtriem (eds.), *Kommentar zum Einheitlichen UN-Kaufrecht* [Commentary on the CISG], 2nd ed., Munich 1995, Art. 35 para. 37; Magnus, *op. cit.*, Art. 35 para. 16; Conrad, *Die Lieferung mangelhafter Ware als Grund für eine Vertragsaufhebung im einheitlichen UN-Kaufrecht (CISG) unter Berücksichtigung des öffentlichrechtlich bedingten Sachmangels* [Delivery of Defective Goods as a Condition for Contract Avoidance under the CISG with Special Regard to Defects Caused by Administrative Law], [Thesis] Zurich 1999, p. 17).

The Court of First Instance adopted this – objective – interpretation in deciding that the 21
[Buyer] was not entitled to expect that it would be able to print a rapport length of 1,018 mm on the acquired machine without installing additional holders. The Court of First Instance held that the [Seller] was entitled to assume that the [Buyer] realized that the remark regarding the rapport equipment was meant as technical information in respect to the possible rapport length, which could be printed if the necessary equipment was used.

The [Buyer] does not submit, nor is it apparent, how the Court of First Instance violated the 22
provisions of the CISG, in particular Art. 8(2) CISG, according to which statements made by a party are to be interpreted according to the understanding that a reasonable person of the same kind as the other party would have had in the same circumstances. The [Buyer] is an expert and knew that it was not offered a new machine, but one which was built fourteen years ago and consequently did not conform to the latest technical expectations. It was therefore up to [Buyer] to inform itself about the operation and equipment of the machinery, an act that the [Buyer] apparently only embarked on after the contract had been concluded. In view of these facts, it is without doubt compatible with Art. 8(2) CISG if the Court of First Instance held that the [Seller] was entitled to expect that the [Buyer] had concluded the contract in full knowledge of the technical possibilities of the machinery and its equipment. For these

reasons, the Supreme Court concurs with the Court of First Instance that the sold machine was offered to the [Buyer] in conformity with the specifications of the contract.

Therefore, the [Buyer]'s claim for remedy for breach of contract is not justified. **23**

5. **24–26**
[*The Supreme Court upholds the finding of the Court of First Instance that* [*buyer's*] *refusal to collect the machine by 30 June 1999 entitled the* [Seller] *to rescind the contract under contract clause 3(2). The* [Seller] *was entitled to keep the down payment as the stipulated penalty.*]

[The Supreme Court's order:]

6. **27**
For these reasons, the [Buyer]'s appeal is dismissed and the appealed decision is affirmed. The [Buyer] bears the cost of the proceedings and has to reimburse the [Seller] for its costs.

[...]