CISG-online 637	
Jurisdiction	Switzerland
Tribunal	Handelsgericht des Kantons Zürich (Commercial Court Canton Zurich)
Date of the decision	17 February 2000
Case no./docket no.	HG 980472
Case name	*Software case II*

Translation[*] by Thomas Frey

Edited by Camilla Baasch Andersen[**]

Application of the plaintiff [seller's assignee]: The court shall order the [buyer] to pay the [seller's assignee]:

- Swiss francs [Sf] 114,593.70 (to the value of Austrian schillings [öS] 960,953.30) plus interest of 6% as of 30 March1998;

- [Sf] 280.00 enforcement costs;

- [Sf] 436.00 miscellaneous expenditures.

Subsequently, the court shall remove the order to stay the enforcement proceedings. All costs of the proceeding shall be borne by the [buyer].

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[*] All translations should be verified by cross-checking against the original text. For purposes of this translation, Company Z of Austria is referred to as [seller], the Plaintiff is referred to as [seller's assignee], and the Defendant of Switzerland is referred to as [buyer]. Amounts in Swiss currency (Swiss francs) are indicated as [Sf]; amounts in Austrian currency (Austrian schillings) are indicated as [öS].

Translator's note on other abbreviations: GVG = [Civil Procedure Act of the Canton of Zurich]; IPRG = Bundesgesetz über das Internationale Privatrecht [Swiss Code on the Conflict of Laws]; LugÜ = Lugano Convention [EC/EFTA Convention on Jurisdiction and Enforcement of Judgments in Civil and Commercial Matters; OG = Bundesgesetz über die Organisation der Bundesrechtspflege [Swiss Federal Code on Court Organization]; OR = Bundesgesetz betreffend di Ergänzung des Schweizerischen Zivilgesetzbuches (Fünfter Teil: Obligationenrecht [Swiss Civil Code]; URG = [Swiss Copyright Act]; ZGB = [Swiss Civil Code]; ZPO = Zivilprozessordnung [Swiss Code of Civil Procedure].

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Amended application of the [seller's assignee]: The court shall order the [buyer] to pay the [seller's assignee]:

- [öS] 960,953.30 (to the value of [Sf] 114,593.70, exchange rate: 11.925) plus interest of 6% as of 30 March 1998;

- [Sf] 280.00 enforcement costs;

- [Sf] 436.00 miscellaneous expenditures.

Subsequently, the court shall remove the order to stay the enforcement proceedings. All costs of the proceeding shall be borne by the [buyer].

The court takes into consideration:

I.
On 18 November 1998, the application and the memorandum of claim were submitted to the Court by the [seller's assignee]. Having received the memorandum of defense of the [buyer] on 14 January 1999, a preliminary hearing took place on 8 April 1999 which the [buyer] failed to attend without any excuse. By order of the Court of 16 April 1999, the [buyer] was ordered to bear the [seller's assignee]'s costs incurred by attending the preliminary hearing regardless of the outcome of the case. On 31 August 1999, the [seller's assignee] filed a reply to the statement of defense. As the [buyer] failed to submit a rejoinder in due course, the Court declared the main procedure terminated on 27 September 1999.

II.

1.
The claim in dispute, before being assigned several times, originates from a contractual relationship entered into between a Company Z [seller] and the [buyer]. The [seller] concluded several agreements with the [buyer] according to which the [seller] had to install software and hardware, in connection with two different projects between September 1997 and February 1998 and, subsequently, had to train the [buyer]'s employees in the use of the installed devices.

2.
With the present application, the [seller's assignee] claims the payment of several invoices to the amount of [öS] 960,953.30 plus interest and costs incurred.

3.
The [buyer] denies the claim.

III. 1. It is plain that the Commercial Court of the Canton of Zurich has territorial and factual jurisdiction over the dispute as first, the sum in dispute exceeds the pecuniary threshold enabling an appeal to the Swiss Federal Supreme Court; second, both parties are registered in the commercial register; third, the place of business of both parties lies in Switzerland; and finally,

the [buyer] entered appearance before this court (§ 62 GVG; § 12 ZPO; Art. 6 IPRG; Art. 18 LugÜ).

2.
The amendment of action from Swiss francs to Austrian schillings occurred upon indication of the Court and is admitted as the legal position of the [buyer] is not put at a disadvantage, nor will the proceedings be delayed thereby (§ 61(1) ZPO).

IV.

1.

a)
The Austrian [seller], domiciled in Linz, undertook to install hardware and software for the [buyer], domiciled in Switzerland, and to train the [buyer]'s employees in handling the installed computer programs. Neither the [seller] and the [buyer] nor the actual parties to this process have chosen the law governing the contract.

b)
A standard software and hardware contract constitutes an indefinable contract and cannot be subsumed under a specific category of contracts (Amstutz, in Schluep (ed.), *Kommentar zu Art. 1 - 529 OR*, 2d ed., Basel und Frankfurt a. M. 1996, Einleitung vor Art. 184 et seq., N 271) but can be influenced by the law of associations. Besides that, such a contract also contains elements of a purchase and leasing agreement, elements of a contract of manufacture and a mandate. In case of performance of the entire contract by only one supplier, it has to be assessed according to the intention of the parties whether there is only one single or several independent legal consequences for the different elements of the contract. Conversely, when hardware and software and additional services are delivered by different suppliers, existence of several independent contracts is presumed (Schluep / Amstutz, Einleitung vor Art. 184 et seq. N 272, 276 et seq.). In general, a standard software and hardware contract can be split up into the following elements (Schluep / Amstutz, Einleitung vor Art. 184 et seq. N 277):

- Consulting and customer information constitute an element of a mandate;

- Transfer of property of the standard software constitutes an element of a purchase;

- Transfer of the rights to use the standard software constitutes an element of a purchase or licensing agreement;

- Installation of the hardware and software constitutes an element of a contract of manufacture;

- Granting of a test period constitutes an element of the duty to examine the goods after the purchase;

- Maintenance of the system and the software constitutes an continuous obligation including elements of a contract of manufacture and a mandate;

- Training of the staff, lending of staff and general support constitute an indefinable element.

The procurement of an individual data processing system regularly includes the delivery of standard software, which constitutes an element of a purchase contract, and the development of individual software according to the special needs of the client which includes an element of a contract of manufacture. Furthermore, the contractor must carry out all tasks arising in the course of the project and requiring specific computer knowledge which form elements of a mandate and a contract of manufacture. With regard to the nature of further possible services, the Court refers to the explanations regarding the procurement of standard software (Schluep / Amstutz, Einleitung vor Art. 184 et seq. N 279.).

c) The purchase of software as well as the joint purchase of software and hardware constitutes a sale of goods that falls within the ambit of the CISG (v. Caemmerer / Schlechtriem, *Kommentar zum einheitlichen UN-Kaufrecht (CISG)* [Commentary on the CISG], 2d ed., München 1995, Art. 1 N 21 - see also Art. 3 and Art. 51 N 4). Generally, pursuant to Article 3(1) CISG, not only pure contracts for sales of goods, but also contracts of manufacture come within the sphere of application of the CISG. The [seller's assignee] contends that in the contract entered into between [seller] and the [buyer], the elements of a purchase agreement are predominant because of the installation of merely standard software. Although [seller] carried out some work to adapt the software and trained the employees of the [buyer], the typical element still remains as a sale of goods. Consequently, the CISG has to be the governing law of the contract. The services rendered by [seller] can be described as follows:

1. Oracle database delivered and installed;

2. Standard software delivered and installed;

3. Staff trained.

4. Software adapted according to the needs of the client.

The procurement of the user rights to the standard software, including the installation thereof, contributes with a quota of 45%, the training of the staff with a quota of 20% and the development of the individual software on the basis of the standard software with a quota of about 35% to the total costs of the order. The [buyer] failed to submit a rejoinder in order to rebut these contentions. Consequently, as far as the facts are concerned, these contentions of the [seller's assignee] have to be considered as acknowledged by the [buyer]. Hence, neither the work carried out, nor the performance of other ancillary services, prevail in the present contract and the contract is thus not predominately one of service.

Both Switzerland and Austria have ratified the CISG (v. Caemmerer / Schlechtriem, § 801). Accordingly, the contract in question is governed by the CISG.

2.

a)
Contractual assignments of a chose in action are primarily governed by the law agreed to by the parties (Art. 145 Abs. 1 IPRG, Dasser, *Kommentar zum IPRG*, Basel und Frankfurt a. M., 1996, Art. 145 N 23). Also, the choice of law clause itself is governed by the chosen law of the contract (Art. 116(2) 2nd sentence IPRG; Amstutz / Vogt / Wang, *Kommentar zum IPRG*, Art. 116 N 36) and does not require specific formalities to be effective (Amstutz / Vogt / Wang, Art. 116 N 36); in other words, the choice of law clause can be introduced into the contract expressly or by implication. By referring to article 164 OR in their contract, the contracting parties implicitly showed their intention to have the two assignments of 6 January and 10 March 1998 governed by Swiss law of obligations. Although the two assignments are signed only by the [seller] (assignor), existence of a valid and effective choice of law clause can be construed from the assignee's acceptance of the notifications received (see article 116(2) IPRG). The [buyer]'s statement of defense did not mention facts allowing a different interpretation.

b)
The formality of the assignment is exclusively governed by the law governing the assignment contract (article 145(3)). Accordingly, the governing law of the executing agreement (assignment contract) is determined independently (Dasser, Art. 145 N 4). However, where, as in the present case, no distinction is made between the executing agreement of the assignment and the actual disposition of the choice in action, the choice of law applies to both (Dasser, Art. 145 N 9).

c)
Subsequently, both the assignment contracts of 6 January and 10 March 1998, and the assignment dispositions of the same dates, are governed with respect to the formality and all other aspects, by the laws of Switzerland.

d)
However, the proper law of the original claim originating from the relationship between [seller] and the [buyer] is not affected by said assignment (Dasser, Art. 145 N 16).

e)
All four assignments contain the term «according to article 164 OR [*] and are signed by the assignor. They are therefore in any respect governed by the Swiss law of obligation, with the consequence that no acceptance of the debtor is required for rendering the assignment effective and valid (see art. 164(1) OR). Furthermore, the four notifications of the assignments fulfil the requirement of being issued in writing (art. 165(1) OR) and are therefore valid (see Gauch / Schluep / Rey, *Schweizerisches Obligationenrecht, Allgemeiner Teil*, Band II, 7th ed., Zürich 1998, N 3544).

3.

a)
The [buyer] contends that the following invoices were directly paid to [seller]:

- Invoice No. 970193 dated 27 October 1997 in the amount of [öS] 119,500.-
- Invoice No. 970199 dated 17 November 1997 in the amount of [öS] 184,780.-
- Invoice No. 970218 dated 18 December 1997 in the amount of [öS] 186,153.30
- Invoice No. 970225 dated 31 December 1997 in the amount of [öS] 156,840.-, partially paid.

In addition, [buyer] contends that the Oracle database was directly paid to [seller].

The [seller's assignee] denies these assertions, and maintains that except for the invoice for the Oracle database, no payments were made. According to Art. 53 CISG, the payment of the price is part of the [buyer]'s obligations. Consequently, the burden to prove proper payment lies on the [buyer], who has to substantiate its assertion (§ 54(1) and § 113 ZPO [*]). Pursuant to § 55 ZPO, by Order of the Court dated 16 April 1999, the [buyer] was asked to produce evidence for the alleged payments. The court's request read:

«You contend that the following invoices were directly paid to [seller]:

- Invoice No. 970193 dated 27 October 1997 in the amount of [öS] 119,500.-
- Invoice No. 970199 dated 17 November 1997 in the amount of [öS] 184,780.-
- Invoice No. 970218 dated 18 December 1997 in the amount of [öS] 186,153.30
- Invoice No. 970225 dated 31 December 1997 in the amount of [öS] 156,840.-, partially paid.

«a) What evidence do you have to substantiate this assertion?

«b) Do you intend to submit any items of evidence to the court?

«c) When have you performed the payments?

«d) How much have you directly paid to Oracle for the Oracle database?»

By failing to file a rejoinder the [buyer] waived its right to substantiate its allegations. However, an evidential procedure requires the citation of relevant facts on the part of the party on which the onus of proof lies (see Frank / Sträuli / Messmer, *Kommentar zur zürcherischen Zivilprozessordnung*, 3d ed, Zürich 1997, § 113 N 5). Because the [buyer] failed to produce corroborating evidence as to when and how (e.g., cash, transfer by bank or post) the respective invoices were paid, no evidence of payment exists. As the [buyer] refused to comply with the Court's request to produce substantive evidence proving the payment of the invoices in

question, the Court is constrained to take into account only the insufficient statement of defense when making its decision. (Frank / Sträuli / Messmer, § 113 N 14, § 55 N 12). The Court therefore comes to the conclusion that the [buyer] did not pay the invoices.

b)
With respect to invoices No. 970229, No. 980047 and the outstanding amount of the invoice No. 970225 of [öS] 104,560.-, the [buyer] claims that after being asked to credit the said sum it did so on 16 March 1998. However, the [buyer] failed to show how eventual payments to [seller] could have fulfilled its obligation to pay the [seller's assignee]. The mere assertion does not suffice to establish conclusive evidence proving the payment (see § 133 ZPO [*]).

c)
Even if the [buyer] had performed the alleged payments to [seller], the payment obligation would not have been properly fulfilled. By giving notification to the [buyer], the [buyer's assignee] lawfully informed the [buyer] that a valid performance is only possible by effecting the payments directly to the [seller's assignee]. All invoices contain a note stating that «according to the factoring agreement entered into this invoice was assigned to [the seller's assignee]». By its own admission the [buyer] received all invoices before effecting the respective payments, and it also took note of the notifications of the assignments. As a consequence, the [buyer] could no longer validly pay the outstanding invoices to [seller] (see Gunter Ertl, in Peter Rummel (ed.), *Kommentar zum Allgemeinen bürgerlichen Gesetzbuch*, 2. Band, 2d ed., Wien 1992, § 1395 N 2).

4.

a)
With regard to the content of the contracts entered into between [seller] and the [buyer], the [seller's assignee] contended initially that [seller] had installed software and had trained employees of the [buyer]. However, the order of enforcement mentions only claims stemming from delivery of goods to the [buyer]. As the [seller's assignee] states, it was not possible to provide more precise information about the work done by [seller], until the filing of the present application due to missing documentation and information requested from the [buyer].

b)
As the respective statements of the parties do not sufficiently describe their mutual obligations and effected performances, the Court ordered the parties to amend their statements accordingly.

Consequently, the [seller's assignee] stated that the following services were rendered by [seller] in favour of the [buyer]:

- Training of the employees from 22 September 1997 till 26 September 1997

- Training of the employees from 8 October 1997 till 9 October 1997

- Training at Oracle (regarding Oracle 7) course 3321 and 3311

- Training of the employees from 3 November 1997 till 7 November 1997
- Training of the employees from 20 October 1997 till 24 October 1997
- Training of the employees from 1 December 1997 till 3 December 1997
- Training of the employees from 16 December 1997 till 17 December 1997
- Service rendered on 24 January 1998
- Installation from 21 November 1997 till 23 November 1997
- Services rendered and installations from 24 November 1997 till 27 November 1997
- Training of the employees from 11 December 1997 till 13 December 1997
- Training of the employees from 16 December 1997 till 18 December 1997
- Training of the employees from 9 September 1997 till 10 September 1997
- Services rendered from 21 January 1998 till 23 January 1998
- Services rendered from 26 January 1998 till 29 January 1998
- Training of the employees from 11 February 1998 till 13 December 1998

In order to further substantiate its claim, the [seller's assignee] refers to the invoices submitted and hereby integrates them into its statement of claim. Such a reference is admissible as it allows the [buyer] to clearly assess the exact amounts of money that are claimed by the [seller's assignee] for the respective services rendered. These statements are considered contentions of the [seller's assignee]. Lacking any response to these contentions they must be deemed recognized (see Frank / Sträuli / Messmer, § 113 N 4). Hence, it is sufficiently established for the Court that the described services were rendered. The claimed amounts of the respective invoices remained uncontested. Therefore, the [seller's assignee] is entitled to payment (CISG art. 53).

5.

a)
Yet, the [buyer] asserts that it informed [seller] that the services rendered were deficient. Upon this complaint, the [buyer] was requested by [seller] to replace the EU-software with a perfectly working software which was ready for instant use. Consequently, the EU-software was removed from the system. Thereby the removal of the ORACLE database, an integral part of the EU-software, caused some difficulties. On enquiry, ORACLE Switzerland AG stated that the license for the ORACLE database was not reported to ORACLE. Neither [seller] nor the [buyer] possesses original software of the ORACLE database. Therefore, both the [buyer] and ORACLE Switzerland AG assume that [seller] failed to correctly install the license of the ORACLE database. However, the aforementioned explanations do not show exactly the nature of

the lack of conformity as required by CISG Art. 39(1). A non-specific and general notice to the seller that the EU-software is not working properly does not meet the specification requirement of CISG Art. 39(1) (see Herber / Czerwenka, *Internationales Kaufrecht* [International Sales Law], München 1991, Art. 39 N 7). The reference in the fax of 13 February 1998 attached to the memorandum of the [buyer] also does not fulfil this requirement. The [buyer] fails to explain which parts of the attached document shall be part of the claim. As a mere exhibit, this document cannot be regarded as part of the contentions of the party. The only plea inserted into the statement of defense is that the license for the ORACLE database was not registered in Switzerland. However, this plea was rendered void by the following statements of the [seller's assignee]. [Seller] acquired for the [buyer] on the occasion of the ordering of the ORACLE database in Austria, a license under the No. CSI WIN-NT. This remained uncontested. Subsequently, in accordance with Art. 12(1) URG, this license is also valid in Switzerland. Therefore, also in this respect the performance of the [seller] was not at all deficient. As already mentioned above, the Court expressly informed the [buyer] of its insufficiently substantiated plea. Nevertheless, the [buyer] failed to submit to the Court an additional statement of reply as offered. Given the express warning, the Court is obliged to base its decision only on the insufficient contention (Frank / Sträuli / Messmer, § 55 N 12). Consequently, there is no right to an evidential procedure as to the alleged deficiencies.

b)
Even if the [buyer] had sufficiently specified the nature of the lack of conformity, the fax would not have served as a satisfactory notice of non-conformity to [seller]. The [buyer] did not claim to have given proper notice to [seller's assignee] in either the statement of defense nor in the subsequent oral hearing. Accordingly, the [buyer] is cut off from relying on a lack of conformity (art. 39(1) CISG).

6.
The [seller's assignee] contended that as a result of the invoices issued by [seller], the debt has to be paid in Austrian Schillings. This remains uncontested and is evidenced by the mentioned invoices. Hence, the [seller's assignee] has also amended the claim. The [buyer] is therefore obliged to pay the [seller's assignee] the amount of [öS] 960,953.30.

7.
The overdue interest of 6 percent claimed as of 30 March 1998 remained uncontested as to the interest rate and period, and must be paid by the [buyer]. For the same reasons, the latter must bear the costs of the preliminary enforcement order totalling [Sf] 208.-.

8.
The defense raised against the preliminary enforcement order remains unfounded and must therefore be removed.

9.
According to the outcome of the present procedure, the [buyer] has to bear the general fee for the court proceedings (§ 64 et seq. ZPO). The sum in dispute depends on the application of the claimant [seller's assignee] at the outset of the case and totals [Sf] 114,593.70.

Accordingly, the court decides to admit the amendment of action and orders:

The [buyer] is to pay the [seller's assignee] [öS] 960,953.30 plus interest of 6% as of 30 March 1998 and [Sf] 208.- for the preliminary enforcement order;

The defense against the preliminary enforcement order is removed;

The general fee of the court proceedings is determined at [Sf] 7,000.- and that the other costs amount to:

- [Sf] 651.- fee for the clerk

- [Sf] 380.- miscellaneous expenditures;

These fees and costs must be born by the [buyer];

The [buyer] is obliged to pay the [seller's assignee] the legal fees of the latter amounting to [Sf] 12,000.- (plus 7.5% VAT and [Sf] 436.- costs);

This decision has to be addressed to the parties in writing.

Against this decision:

a.)
An appeal can be lodged with the Court of Appeal of the Canton of Zurich within 30 days upon receipt of this decision according to § 288 ZPO;

b.)
An appeal to the Federal Supreme Court of Switzerland can be lodged at the Commercial Court of the Canton of Zurich within 30 upon receipt of this decision according to art. 43 OG.