CISG-online 638	
Arbitral Tribunal	Schiedsgericht der Hamburger freundschaftlichen Arbitrage (Hamburg Friendly Arbitration)
Seat of the arbitration	Hamburg (Germany)
Date of the decision	29 December 1998
Case no./docket no.	RKS E 5a Nr. 19
Case name	*Czech cheese case*

Translation[*] *by Todd Fox*[**]

Translation edited by Dr Loukas Mistelis[***]

Facts:

The [buyer] demands reimbursement of its prepayment for a non-performed delivery of 20 tons of cheese from the [seller]. This was a partial delivery out of a not fully performed contract for 300 tons of cheese. Both parties are commercial enterprises in the form of corporations. The respondent is registered in the Czech Republic as «spolecnost s rucením omezeným (spol. s.r.o.),» thus, as a Czech corporation with limited liability. 1

[…] 2

On 21 January 1998 the parties agreed on delivery of 15 truckloads of cheese, 20 tons a piece, at $ 2,520 U.S. per ton each payable per TT [telegraphic transfer] within five days after delivery in form of collection at the plant distribution depot in the Czech Republic. G[…], an Austrian company acting as broker had claim to a commission. On the same day the [buyer] confirmed the purchase contract for the specified 300 tons of cheese for February at $ 2,520 U.S. per ton, delivery at the plant [ex warehouse], with «payment: 5 days after taking delivery.» Under «special conditions» only «Hamburg Friendly Arbitration» was agreed upon. 3

[*] All translations should be verified by cross-checking against the original text. For purposes of this translation, the Claimant of Germany is referred to as [buyer]; the Respondent of Czech Republic is referred to as [seller].

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[…] 4

The first installment of 20 tons at $ 2,520 U.S. each, totaling $ 50,400 U.S., was, as per agreement and upon prepayment by the [buyer], loaded on to one of [buyer's] trucks on 13 February 1998. After a second prepayment of $ 50,400 U.S. on 16 February 1998 the second installment was not delivered. Since until the end of the February, the month for delivery in the contract, no more deliveries were made, the [buyer] demanded that the [seller] return the prepayment of $ 50,400 U.S. offering to cover the costs involved. 5

[…]Thereafter, through intervention by G[…], two partial deliveries for 4 March 1998 were planned; however, the [seller] refused them. 6

[…] 7

[…] 8

[…] 9

The [buyer] initiated the arbitration proceedings of the contractually agreed upon «Hamburg Friendly Arbitration» by serving papers on the [seller]. The [buyer] demanded the return of the performed prepayment of $ 500,400 U.S. with interest at 9.5% from 16 February 1998. It also expressly declared the contract avoided due to non-performance and refusal to perform. The [buyer] named an arbitrator and requested the [seller] to do the same. As the [seller] delayed in naming an arbitrator, the Hamburg Chamber of Commerce named one for it upon petition by the [buyer]. The action was mostly successful. 10

[…] 11

[…] 12

Reasons for the Decision:

I.
Arbitral Tribunal

1.
Arbitration Agreement

The arbitration tribunal has jurisdiction conferred upon it by the parties' written agreement to arbitrate under «Hamburg Friendly Arbitration» (see §§ 1025 et seq., 1029, 1031(1)(2), 1040 ZPO;[1] Art. I–II UN Convention on the Recognition and Enforcement of Foreign Arbitral Awards – UN Convention –, Art. I European Convention on International Commercial Arbitration – European Convention –; see BayObLG,[2] 17 September 1998 – 4Z Sch 1/98, RIW 1998, 965). This arbitration clause is part of the 21 January 1998 sales contract. As is 13

[1] *Zivilprozeßordnung*, the German Code of Civil Procedure.
[2] *Bayerisches Oberlandesgericht*, the Bavarian Court of Appeal.

evident in the preliminary correspondence, not only the [buyer], but also the [seller] relies upon its validity.

2.
Arbitration Proceedings

The arbitration proceedings of the «Hamburg Friendly Arbitrage» are governed by § 20 *Platzusancen* [local usage][3] for Hamburg commerce of goods (*Platzusancen*). According to these rules the [buyer] properly commenced the arbitration proceedings by naming an arbitrator for the dispute at issue and requesting the [seller] to also name an arbitrator (§ 1044 ZPO). After the fruitless expiration of a reasonable time, the Hamburg Chamber of Commerce alternatively appointed an arbitrator on 10 July 1998 (§ 20 Nr. 2 *Platzusancen*). **14**

II.
Applicable Procedural Law

The chosen «Hamburg Friendly Arbitration» occurs in «seat Hamburg» (§ 20 *Platzusancen*, § 1043 ZPO). Absent any other agreement German procedural law applies from this choice of seat of arbitration (§ 1025(1) ZPO, Art. V(1)(d) UN Convention).

III.
[Seller's] Delay

Despite the [seller's] (unexcused) delay, the arbitral tribunal must decide the dispute according to the present record (§ 1048 ZPO), since the [seller] was properly put on notice of the arbitration proceedings and took no advantage of its afforded hearing (Art. V(1)(b) UN Convention, Art. IX(1)(b) European Convention). **15**

Before the [seller's] declaration that it would neither negotiate nor comment, it was served by courier or certified mail with the arbitration commencement papers, [which included] the [buyer's] statement of claim, a deadline, a summons to an oral hearing, and an addition to the [buyer's] statement. This was the case even though it would have been enough to merely send these through the mail according to § 175(1) sentence 2 ZPO, since no domestic agent had been appointed (OLG[4] Munich, 30 September 1997 – 7 W 2520/97, RIW 1998, 969).

IV.
Applicable Substantive Law

1.
Choice of Law[5]

[3] Local usage – Hamburg arbitration rules.
[4] *Oberlandesgericht*, Court of Appeal.
[5] Note that the Tribunal, with no apparent reason, did not apply the 1998 version of the German law. According to § 1051 the applicability of the law of the seat to the substance of the dispute is by no means automatic: § 1051 ZPO:

From the [Tribunal's] viewpoint the applicable substantive law is determined by German private international law (BGH,[6] 24 September 1995 – VII ZR 248/94, NJW 1996, 54; BB 1995, 2472). Under German private international law the choice of arbitration venue in Hamburg not only leads to local procedural law but, absent other agreement, also to the choice of German substantive law (§ 1051(1) ZPO, Art. 27 EGBGB;[7] Art. VII(1) European Convention; Arbitral Tribunal of the Hamburg Chamber of Commerce (Schiedsgericht der Handelskammer Hamburg – Arbitration Court of the Hamburg Chamber of Commerce) – SchiedsG HK – 21 March 1996, NJW 1996, 3229, RIW 1996, 766, Cases of Commercial Arbitration (Rechtsprechung kaufmännischer Schiedsgerichte) – RKS – E 5 b Nr. 84; Palandt/Heldrich, BGB, 58th edition, Art. 27 EGBGB n. 6 with further references). 16

2.
UN Sales Law

Under German as well as Czech law, UN sales law applies for sales contracts between parties in different States (United Nations Convention on Contracts for the International Sale of Goods of 11 April 1980 – CISG –). Here both the prerequisites of Art. 1(1)(a) and Art. 1(1)(b) CISG are present, since the states of both parties' places of business are Contracting States (Art. 1(1)(a) CISG), and the rules of private international law lead to application of the law of a Contracting State (Art. 1(1)(b) CISG). 17

3.
Supplementary Application of German Law

Under Art. 7(2) CISG only in so far as questions are neither settled in the CISG nor soluble according to the principles of the CISG can domestic law, as determined from the rules of private international law, be used as a supplement. Here, for purposes of supplementary application of law, the domestic law is determined to be German law. 18

V.
[Buyer's] Principal Claim: Prepayment Reimbursement

«Rules applicable to substance of dispute

(1) The arbitral tribunal shall decide the dispute in accordance with such rules of law as are chosen by the parties as applicable to the substance of the dispute. Any designation of the law or legal system of a given State shall construed, unless otherwise expressed, as directly referring to the substantive law of that State and not to its conflict of laws rules.

(2) Failing any designation by the parties, the arbitral tribunal shall apply the law of the State with which the subject-matter of the proceedings is most closely connected. [...]»

Note also that the application of the law of the seat with regard to procedure is implied for proceedings held in Germany.

[6] *Bundesgerichtshof*, the German Federal Supreme Court.

[7] *Einführungsgesetz zum Bürgerlichen Gesetzbuch*, Introductory Act to the German Civil Code, which largely codifies German choice of law rules.

The action for reimbursement of the performed prepayment is with merit. The [buyer] can claim repayment from the [seller] of the $ 50,400 U.S. for the non-performed second partial delivery under Art. 81(2) sentence 1 CISG, after it declared the (installment) contract with all outstanding partial deliveries avoided. 19

1./2.
Installment Contract

The 21 January 1998 sales contract within the meaning of Art. 4 CISG in the present case is to be interpreted in accordance with Arts. 8, 9, and 11 CISG as requiring the 300 tons of cheese at $ 2,520 U.S. per ton in individual truckloads (15 to 20 tons) to be collected by the [buyer] in the Czech Republic. Therefore it is an installment contract within the meaning of Art. 73 CISG (see SchiedsG HK, NJW 1996, 3229, RIW 1996, 766, RKS E 5 b Nr. 84 m.w.N.; Cour d'Appel Grenoble, 22 February 1995 – «SARL Bri Production Bonaventure c/Sté Pan African Export», Recueil Dalloz Sirey – D.S. – 1995, Informations Rapides – IR –, 100). The [seller] was to make the goods available in the [seller's] plant distribution depot in accordance with Arts. 30 and 31(b) CISG. This understanding comes from the context of the performance in the previous contracts as well as from the preliminary negotiations and from the performed first partial delivery on January 13, 1998 after the previous delivery date arrangement. 20

3.
Prepayment

The rendered prepayment is, in the meaning of Art. 81(2) first sentence CISG, performance of the contract on the part of the claimant as buyer according to Art. 53 et seq. CISG. This performance was for the procurement of the [seller's] expected second partial delivery upon payment made on 16 February 1998. Due to the actually rendered prepayment the prerequisites of Art. 81(2) CISG are already fulfilled, independent of the fact that the originally agreed upon payment conditions («5 days after taking delivery») were changed to please the [seller] so that for the first two partial deliveries prepayment should be required. It was repeatedly confirmed by G[…], and also indirectly by the [seller], that the sum paid in February was actually prepayment for the second partial delivery. Furthermore, the [seller] did not dispute this on any of the [buyer's] claims. 21

4.
No Other Use of the Prepayment

a)
In the negotiations lead by G[…] with the cooperation of both sides in Prague on 19 March 1998 nothing was changed concerning the purpose of the prepayment for the next partial delivery, which was still due since February.

b)
Another use of the prepayment wished by the [seller] was not agreed upon by both parties

(…)

5.
Seller Has No Right to Other Set-off and to Retain the Prepayment

The [seller] may not, on the basis of legal claims under the CISG, unilaterally set-off and retain the prepayment. The prerequisites for the [seller's] possible rights to damages (Art. 61 et seq. in conjunction with Art. 74 et seq. CISG), storage of the goods (Art. 85 in conjunction with Art. 87 CISG) or self-help sale (Art. 85 in conjunction with Art. 88 CISG) are not fulfilled. 22

a) 23
These types of seller's rights would first of all require a violation of the [buyer's] incumbent obligations as buyer to pay the sale price (Art. 54 et seq. CISG) or to take delivery (Art. 60 CISG). Such obligation violations are not evident here. In as much as the [seller] in the preliminary correspondence asserts that the contract was not performed in its intended quantitative complete scale; this does not infer that the [buyer] did not meet its obligation to take delivery. In the extensive correspondence between the parties and G[…] before the arbitral tribunal there is no concrete indication that the [buyer] was not prepared to take delivery of the goods placed at its disposal and – so far not yet occurred – prepared to pay the price in accordance with the contract. According to the [buyer's] undisputed presentation the [seller] cancelled the second partial delivery on 16 February and again on 4 March and 26 March 1998. It is shown in the correspondence that the [seller] cancelled the last two loading dates.

b) 24
A claim to seller's damages under Art. 61(1)(b) in conjunction with Art. 74 et seq. CISG would have furthermore first required that a reasonable additional time for the taking of delivery be set and expire or that the [buyer] give notice that it will not fulfill its obligations. Especially concerning these prerequisites nothing is shown.

6.
Contract Avoidance by the Buyer for Future Partial Deliveries

The claimant's claim as buyer under Art. 81(2) first sentence CISG for reimbursement of the prepayment first requires contract avoidance (Art. 81(1) first sentence CISG). The [buyer] effectively declared [the contract avoided] with regard to the partial delivery due and to the further due partial deliveries. 25

a) 26
The claimant's right as buyer to avoid the contract stems from Arts. 45, 47, 49 CISG, and for the installment contract from Art. 73 CISG.

aa) 27
Avoidance of the contract by the buyer requires that the seller did not fulfill its obligations (Art. 45(1)(a) CISG) and that such deficiency amounts to a fundamental breach (Arts. 49(1)(a), 25 CISG) or, in the case of a non-delivery, that the seller did not deliver the goods within a fixed additional period of time per Art. 47 (1) CISG or the seller declared that it would not deliver within such fixed period (Art. 49(1)(b) CISG). Without depending on an additional fixed period of time for delivery (as here until the 4th or 26th of March 1998), the buyer can only rightly avoid the contract when the seller declares that it will not deliver at

all, cannot deliver, or will only deliver for additional consideration (SchiedsG HK, NJW 1996, 3229, RIW 1996, 766, RKS E 5b Nr. 84; Huber in von Caemme-rer/Schlechtriem, CISG, 2nd ed., Art. 49 n. 6, 22).

It is an unjustified anticipatory breach when, as here, the seller, after agreeing to delivery upon prepayment, then makes its delivery dependent on the performance of other demands. Absent opposing facts, a prepayment agreement is generally – also in international commerce (see Art. 8 CISG) – in itself to be understood as calling for the performance in return for prepayment to be accomplished without other demands being settled beforehand (SchiedsG HK, NJW 1996, 3229, RIW 1996, 766, RKS E 5 b Nr. 84; BGH, 18 May 1995 – I ZR 151/93, MDR 1995, 1017 = NJW 1995, 2917). 28

bb) 29
If the [seller] had insisted upon its asserted demands when it refused to make the prepayment delivery, the [buyer] would thereafter have had reason to avoid the contract in case of dispute.

cc) 30
In the case of an installment contract, a fundamental breach of obligations concerning a partial delivery warrants avoidance of the contract for this partial delivery (Art. 73(1) CISG); an expected breach of contract for future partial deliveries allows avoidance of the contract for the future (Art. 73(2) CISG). Within the last meaning, an anticipatory breach can also pertain to all future installments and entitle the buyer to declare the contract avoided for all deliveries still due.

Such are the relations in the present dispute, since the [seller] refused not only the second partial delivery but also further deliveries under the conditions agreed upon in the installment contract. Thus, the [buyer] could declare the contract avoided for the partial delivery that was not performed upon prepayment and for all future partial deliveries under the installment contract. 31

b) 32
The [buyer] also declared its avoidance of the contract to the [seller] in accordance with Art. 26 CISG.

A fitting declaration, under Art. 11 CISG without requirements as to form, that is directed to the termination of the business relationship is sufficient for such a notice (see SchiedsG HK, NJW 1996, 3229, RIW 1996, 766, RKS E 5b Nr. 84; Leser in von Caemmerer/Schlechtriem, CISG, 2nd ed., Art. 26 n. 8 et seq.).

In this sense the [buyer] expressed in its fax of 26 March 1998 that it would not do any business with the [seller] in the future.

Furthermore, the [buyer] repeated the declaration of avoidance through the legal papers initiating the arbitration.

c)
Under Art. 81(2) CISG, the consequence of the buyer's (claimant's) avoidance of the contract

is its claim to restitution of that which it paid. In avoiding an installment contract for the partial deliveries still due the restitution claim pertains only to that which was performed – here reimbursement of the prepayment for the unrealized second partial delivery – (see Leser in von Caemmerer/Schlechtriem, CISG, 2nd ed., Vor Arts. 81–84 n. 15).

VI.
No Right to Set-Off or Right of Retention

1.
As explained above in V. 4–6a, no counterclaims of the respondent as seller – for instance, for damages – are apparent from the 21 January 1998 installment contract. Other eventual counterclaims do not entitle set-off and retention of the prepayment during the time of the delivery obligation.

2. **33**
The [seller] also has no right to set-off or retention after avoidance of the contract. After avoidance of the contract, within the framework of reimbursement of the prepayment, a set-off or right of retention for the [seller] due to other counterclaims could be examined: for instance, counterclaims due to a possible agreement in Prague over the palette costs from earlier delivery relationships and over the payment for the delivery of labels. In this respect – as mentioned above in IV 3 – German law would apply to supplement the UN sales law (Art. 7(2) CISG, §§ 387, 273 BGB).[8] However, after avoidance of the contract and in the present arbitration proceedings the [seller] will not assert such counterclaims. As they can only be considered in case of a defense, the arbitral tribunal is not concerned with them. They can no longer be held against the present claims of the [buyer] but rather may only be pursued by the [seller] in a new arbitration proceeding. There the [seller] is at liberty to examine its pre-proceedings arguments concerning the question of the liability of the agreements made in Prague.

VII.
Secondary Claim for Interest

Under Art. 84(1) CISG the seller (respondent) must pay interest on the buyer's (claimant's) prepayment reimbursement claim from the day of payment (2 February 1998). **34**

The amount of the interest claim is attained through supplementary application of national (German) law (Art. 7(2) CISG; SchiedsG HK, NJW 1996, 3229, RIW 1996, 766, RKSE 5 p Nr. 84 m.w.N.; LG[9] Oldenburg, 9 November 1994 – 12 O 674/93, RIW 1996, 65). **35**

[8] *Bürgerliches Gesetzbuch*, the German Civil Code.
[9] *Landgericht*, District Court.

Correspondingly, under § 352 Commercial Code (HGB)[10] the [buyer] can only demand the statutory interest rate of 5% from the beginning of the interest period (16 February 1998) and, under §§ 284, 286 BGB, can only claim the asserted overdue interest after the renewed payment request (26 March 1998). **36**

Decision on Costs

Without agreement by the parties over the arbitration costs the arbitral tribunal must decide upon this according to § 1057 ZPO, including the reimbursement of out-of-court costs (see SchiedsG HK, 21 June 1996, NJW 1997, 613, RIW 1996, 771, RKS B 5 Nr. 21 m.w.N.). **37**

In conformity with the outcome of these proceedings the [seller] must bear the costs. **38**

[10] *Handelsgesetzbuch*, the German Commercial Code.