

**Case 541: CISG 8 (2); 38; 39; 45 (1) (b); 74**

Austria: Oberster Gerichtshof

7Ob 301/01t

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An Austrian buyer ordered from the German seller a cooling device according to custom specifications for its special intended use in a water plant. The general terms of delivery and payment of the contract contained a choice of German law and special rules on the notice of lack of conformity. As the seller did not deliver on the agreed date, the equipment had to be delivered directly to the construction site and could not be tested, as originally planned, before it was set into place. Due to a construction flaw, the cooler could be operated only provisionally and had later to be completely rebuilt by the buyer. The buyer notified the lack of conformity of the cooling device to the seller. The buyer also warned the seller that he would be held responsible for damages to the main contractor if the cooling device could not be made fully operational on schedule and that the repair of the cooler might be very expensive. In fact, the damages stemming from the malfunctioning of the cooling device considerably exceeded its price, and the buyer declared their set off with the price for other equipment delivered by the seller under a different contract.

Unlike the first instance judge, both the Court of Appeal and the Supreme Court deemed the CISG applicable to the contract. In particular, the Supreme Court discussed three issues: whether the examination of the good was performed properly and timely; whether the notice of non-conformity was timely and sufficiently specific; and the amount of damages to be paid, with special regard to the circumstances and conditions under which the damages to be paid could exceed the price of the goods. On these points, the Supreme Court upheld the decision of the Court of Appeal and gave additional reasoning on the foreseeability of the damages.

The Supreme Court held that, while the period for the examination of the goods under article 38 CISG may vary with the circumstances, one week should be a standard term for this operation. The Court also held that, in case of goods difficult to examine, experts may be consulted, but there is no obligation to carry out exceedingly costly examinations. Further, the court stated that the period for the notice of non-conformity of the goods under article 39 CISG starts as soon as the period for examination has elapsed and amounts normally to one week, and that the notice of non-conformity should therefore reach the seller within two weeks from the delivery of the goods.

The Supreme Court specified that each instance of non-conformity of goods needs to be notified, with specific indication of its nature, so that the seller could take adequate measures. It added that additional details should be notified only if they are discovered within the period given for the examination and at a reasonable cost, and that the notice informing of the buyer's intention to remedy should be given within reasonable time after the notice on the lack of conformity. In the present case, the Court noted that a full examination was not possible due to the late delivery and to the fact that the non-conformity could be detected only in part.

Further, the Supreme Court stated that if the seller fails to repair the non-conforming goods within reasonable time, the buyer may do so and claim compensation from the seller for the related expenses, which amount to damages within the meaning of article 45 (1) (b) CISG. The Court added that the same mechanism applies when the seller cannot be expected to carry out a repair, but that the expenses for such a repair may be compensated only insofar as they are reasonable in relation to the intended use of the sold goods. Taking into account all the circumstances of the case (urgency, time needed to replace the faulty device, claims from the main contractor), the Court held that the buyer could set off the damages against the full amount of the contractual price.

Finally, the Supreme Court noted that the right to damages under article 74 CISG follows the principle of foreseeability and full compensation, and that all losses, including expenses made in view of the performance of the contract and loss of profit, are to be compensated to the extent they were foreseeable at the time of the conclusion of the contract. According to the Court, the foreseeability requirement is met if, all the circumstances of the case considered, a reasonable person could have foreseen the consequences of the breach of contract, even if not in all details and in their final amount (article 8 (2) CISG). Consequential loss may also be compensated, if not excluded by parties' agreement, as it was not in this case.

