CISG-online 643	
Jurisdiction	Austria
Tribunal	Oberster Gerichtshof (Austrian Supreme Court)
Date of the decision	14 January 2002
Case no./docket no.	7 Ob 301/01t
Case name	*Cooling machine case*

Translation[*] *by Todd J. Fox*[**]

Translation edited by Jan Henning Berg[***]

In a closed hearing, the Supreme Court, sitting as an Court of Appeal, through Chamber President Dr. Schalich as Chairman, and Court Counselors Prof. Dr. Danzl, Dr. Schenk, Dr. Schaumüller and Dr. Kalivoda as further Judges, rendered the following decision in the matter of the Plaintiff [Seller], represented by Dr. Wolfgang Lirk and other attorneys in Salzburg, against the Defendant [Buyer], represented by Dr. Horst Koch and other attorneys in Linz for the sum of DM 60,815.20 (ATS 436,288.24 = EUR 31,094.32) on [Seller]'s appeal from the decision of the Oberlandesgericht [Court of Appeal] of Linz of 18 July 2001, GZ 11 R 167/01k-67, in which the decision of the Landesgericht [District Court] of Linz of 27 December 2000, GZ 2 Cg 181/97h-59, dismissing the suit was partially confirmed, and partially reversed.

Judgment

[Seller]'s appeal is partially granted.

The challenged decision, which otherwise (regarding the extent of the reversal) is confirmed, is modified so that the partial judgment is reversed and the case (also regarding the amount of the rejection of DM 35, 329.56 (= 18,063.72 EUR), complete with 5% interest since 19 June 1996), is remanded to the District Court for supplemental proceedings and a new decision.

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[*] All translations should be verified by cross-checking against the original text. For purposes of this translation, seller of Germany is referred to as [Seller] and buyer of Austria is referred to as [Buyer]. Amounts in German currency (Deutsche Mark) are indicated as DM; amounts in Austrian currency (Austrian schillings) are indicated as ATS.
Translator's note on other abbreviations: BGB = *Bürgerliches Gesetzbuch* (German Civil Code); SZ = *Sammlung der Entscheidungen des Obersten Gerichtshofs in Zivilsachen* (official collection of decisions of the Austrian Supreme Court); ZPO = *Zivilprozessordnung* (Austrian Code of Civil Procedure).

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The costs of this appeal are to be added to the total cost of the proceedings.

Reasons:

[Facts of the case:]

[Seller] corporation, whose place of business is in Germany, offered [Buyer] as per its request of 11 November 1995, a specially to-be-produced two-cycle table cooler, which was meant for a waterworks built by the municipal water supply association F[...] in V[...] (Germany) and which was to be delivered to [Buyer]'s place of business in L[...] in order to be inspected there. In its offer, [Seller] made reference to the application of its «delivery and payment terms» (hereinafter «standard terms») printed on the reverse of its invoices. [Buyer] was already aware of these standard terms from three previous properly concluded business dealings. These terms included the following provisions: 1

«Notice of Defects 2

The seller is liable for defects only under the following circumstances:

(a) The buyer must inspect the delivered goods for amount, conformity, and any expressly warranted condition immediately upon arrival. Written notice is to be given for obvious defects within eight days after receipt of the goods.

(b) Upon justified complaints the seller has the choice to either cure the defective goods or make a substitute delivery. The goods complained of are to be returned carriage paid.

[...]

Warranty

The warranty period is twelve months from delivery from our factory. Liability for damages arising from improper assembly or setting into operation, as well as defective or negligent handling by the buyer or a third party, is excluded.

Consequential damages are excluded.

Place of Performance, Venue, Choice of Law

Place of performance and exclusive venue for deliveries and payments, as well as any and all disputes arising between the parties, is the principle place of business of the seller.

The relations between the parties to the contract are governed exclusively by the laws in force in the Federal Republic of Germany.»

[Buyer], who for its part had promised its customer, Company S[...], delivery of the table cooler by April 1996 (while S[...] facing stipulated penalties in the millions, had obliged itself to turn over the facility to its customer – the operator of the waterworks – by 1 June 1996) accepted 3

[Seller]'s offer on 10 January 1996, thereby ordering the table cooler at the price of DM 21,144.60.

When [Seller] thereafter requested an extension of the delivery time until 13 May 1996 due to technical problems (the specified noise levels were exceeded), [Buyer] saw no other possibility but to grant the request since a third party would have required four or five months to construct a two-cycle table cooler. However, since [Seller] also did not keep the extended delivery date, but rather was not able to deliver until 28 May 1996, [Buyer] directed [Seller] to deliver the unit directly to the construction site in V[...]. Consequently, [Buyer] had to do without an inspection at its factory in L[...]. At the construction site on 28 May 1996, employees of [Buyer] could only undertake a visual inspection, whereby visual and qualitative defects, namely, corrosion damage and processing defects, were ascertained. [Seller] was immediately notified. 4

Despite these defects, due to deadline pressure [Buyer] was forced to install the table cooler immediately (from 29 May to 1 June 1996). Subsequently, during a first test run it was discovered that [Seller] had incorrectly installed the temperature registers and the stipulated temperature output could not be produced. This defect could only be provisionally rectified by reversing the ventilators, as suggested by [Seller]. 5

On 3 June 1996, [Buyer] notified [Seller] in writing that the operation beginnings on 31 May 1996 had to cease due to diverse, individually cited, defects (for instance, because the loading air temperature already reached 70 degrees Celsius after only twenty minutes). Furthermore, [Buyer] pointed out that as a consequence of the delayed commencement, high additional costs were to be expected due to stipulated penalties.

Thereafter, employees of [Seller] attempted to repair the defects noted by [Buyer] at the construction site. In the meantime, Company S[...] had also given notice to [Buyer] of these defects. On 12 June 1996, [Seller] notified [Buyer] that it had repaired the defects. On the same day, [Buyer] once again gave notice of defects per fax. [Buyer] claimed defects with the arrangement of the circulation systems, that the noise levels were too high, and defects with the overflow receptacle, with the pipes container, with the welding seams, etc. Furthermore, [Buyer] informed [Seller] that the plant was opened for provisional operation so that the unit, even with existing defects, would be available for its customer. 6

According to its writing of 25 June 1996, [Seller] accepted the defects noted by [Buyer] and promised to cure them by 5 July 1996. A cure was attempted on 3 July 1996. On 12 July 1996, [Buyer] informed [Seller] that its customer was not willing to accept the cooler in its present condition, but rather expected the complete exchange of the cooling system. In its written response dated 15 July 1996, [Seller] asserted that the notice of defects was unjustified, since it had already cured all justifiably asserted defects. In its written response to that assertion dated 23 July 1996, [Buyer] insisted on its point of view and demanded that the defects be cured by 26 July 1996 at the latest or replacement measures would be taken. [Buyer] claims that by 1 September 1996 the waterworks were obliged to perform a contract with a local energy company to supply electricity, which is the reason why the table cooler had to be free 7

of defects and accepted by Company S[...] by this time; otherwise, [Buyer] would be subject to considerable damage claims.

On 31 July 1996, [Buyer] further notified that (as has since been confirmed) the temperature register was distorted, the contractually stipulated performance (amount of energy) was not attained, and the contractually agreed-upon noise level was far from being reached. In order to keep the damages caused by [Seller] to a minimum, a replacement from a third party was immediately solicited. There was no (longer) any reaction to this by [Seller]. [Buyer] was therefore constrained to procure a two-cycle table cooler that met with contract specifications itself. In agreement with Company S[...], [Buyer] disassembled the table cooler delivered by [Seller] and brought it to its plant to address the defects. There [Buyer], among other things, had to rebuild the rain roof and the fluid collection receptacle and reverse the temperature registers. Subsequently (already in September 1996), the unit was again brought to V[...] and assembled and the visual quality was now accepted by [Buyer]'s customer. However, during operation it was determined that the unit, as constructed by [Seller], could not be aerated and was therefore not fully capable of functioning. 8

Due to the electricity contract, from 1 September 1996 the unit necessarily remained installed for the time being; in the following winter, provisional operation was possible thanks to the low outdoor temperatures. However, [Buyer] had to commit itself to deliver a functional unit to its customer thereafter. [Seller] was no longer informed of these events. 9

In accordance with the agreement with its customer, in early 1997 [Buyer] again brought the cooler to L[…]. There, the unit was once again dismantled and newly designed temperature registers were installed so that, regarding this, an entirely new delivery was submitted with which all defects were finally cured. The table cooler was subsequently brought to its correct destination, installed, and is since in proper operation.

In the meantime, [Seller] had delivered to [Buyer] four single-cycle ventilator coolers as per its further order of April 1996 and presented its invoice for DM 60,815.20. [Buyer] did not pay this invoice. Instead, it responded by way of a letter from its attorney dated 2 January 1997 announcing its intention to set-off the costs of curing the defects with the table cooler, which it figured at DM 175,299, against [Seller]'s claim.

[Positions of the parties in the District Court proceedings:]

[Seller's claim for the purchase price:]

In the case at hand, [Seller] is seeking from [Buyer] payment in the amount of DM 60,815.20, payable in Austrian schillings, for the delivery of the four ventilator coolers. 10

[Buyer's counterclaim:]

[Buyer], who in its subsequently raised counterclaim demanded DM 175,299 in damages from [Seller] from the «table cooler» transaction, requested that [Seller]'s action be rejected. 11

[Seller's response to the counterclaim:]

[Seller] responded, as far as relevant in appellate proceedings, that the defects with the table cooler, insofar as notice was timely given, were cured on 7 July 1996. Further complaints, it claims, were too late, both under the standard terms of the contract and under commercial law. 12

According to the standard terms, notice of defects could only be given in writing within eight days. Furthermore, liability for improper installation or operation is excluded, as well as liability for consequential damages. Moreover, the alleged repair expense of DM 175,299 is disproportionate since it bears no relation to the value of the goods. An irreparable defect is therefore to be presumed. The delivered unit was not returned, so [Buyer] owes compensation of DM 21,144.60. 13

[Buyer's further arguments:]

[Buyer] also submitted, in case the CISG applies, that since [Seller] knew at the time of conclusion of the contract (for the table cooler unit) where and under what conditions the unit would be installed, it must have foreseen that in the event of defective performance, damages in the amount claimed could arise. 14

[Seller] disputed this.

[Judgment of the District Court:]

The District Court dismissed the case. The facts were essentially already summarized here. Further determinations were that in the process of repairing the table cooler and procuring a replacement, [Buyer] incurred costs of DM 73,608.26, which sum also includes the rental cost of a replacement unit used in the summer of 1996 (DM 34,593) and an expert opinion obtained for the preservation of evidence (DM 3,685.70). 15

With regards to legal findings, the District Court was of the opinion that [Seller]'s standard terms became part of the contract. Under these conditions, German law applied, specifically § 373 et seq. HGB [German Commercial Code]. 16

In the court's view, the CISG did not apply since the ventilator coolers and the table cooler were each individually built to order and therefore the performance of a service was the preponderant part of the obligation. [Seller] had a claim for payment of DM 60,815.20 for the delivery of the single-cycle ventilator coolers. However, [Buyer] justifiably claimed a set-off under § 387 et seq. BGB [German Civil Code]. Since [Seller] delivered a defective two-cycle table cooler to [Buyer] and was no longer willing after 15 July 1996 to either cure the legitimately claimed defects or effect an exchange, [Buyer] was presumably obliged to repair the defects itself. The costs of this surpassed the damages claim, so the claim was settled out of court by a set-off. 17

[Judgment of the Court of Appeal:]

As a partial judgment, the Court of Appeal confirmed the District Court's rejection of DM 35,329.56. It modified the rest of the decision by partially granting [Seller]'s appeal in that it reversed the District Court regarding rejection of the remaining DM 25,485.64, payable in Austrian schillings, and remanded the case to the District Court for supplemental hearings and a new decision. It also pronounced that appeal to the Supreme Court was permissible. **18**

The United Nations Convention on Contracts for the International Sale of Goods (hereinafter CISG) was applicable to the contractual relations of the parties here. This was by virtue of the fact that between the parties, whose places of business are in different States (Contracting States of the Convention), a contract for work and materials was formed, which, under Art. 3(1) CISG is equivalent to a contract for the sale of goods. The CISG did not contain a complete ordering of all rights that could arise from a delivery of goods. Particularly, the CISG did not contain any special rules for the assessment of whether standard terms and conditions were to be qualified as part of an offer. This question was to be determined according to the general principles of Art. 14 CISG, which regulate the formal formation of a contract. Accordingly, in order for the standard terms to be incorporated into the contract, they must have become part of the offer for the offeree according to the discernable intent of the offeror (Art. 8(1) and (2) CISG). This could also occur impliedly or on the basis of dealings between the parties or from a practice they have established between themselves. In the present case, it was established that [Buyer] had known the contents of [Seller]'s standard terms. Moreover, it was established that [Seller] referred to the application of its standard terms in its offer to deliver the two-cycle table cooler and [Buyer] did not raise any objection. [Seller]'s standard terms thus became part of the contract. **19**

The provision within the standard terms, that the relations between the parties to the contract were governed exclusively by the laws in force in the Federal Republic of Germany did not imply a complete exclusion of the Convention, which was possible under Art. 6 CISG (subject to Art. 12 CISG). It could not be inferred from the relevant provision of the standard terms that such wording meant (only) domestic non-uniform law. Insofar as no other clause of the standard terms provides otherwise, the CISG applied to the present case. **20**

According to [Seller]'s standard terms, the immediate inspection of the goods and the timely notice of obvious defects was meaningful for the seller's liability. However, if the buyer does not give proper notice of the defects in accordance with Art. 39 CISG, the buyer generally lost all rights regarding these defects that he would have had under Art. 45 et seq. CISG, as long as the exceptions of Art. 40 and Art. 44 CISG did not apply. In particular, a damages claim for defective goods required that the buyer give proper notice of non-conformity within the given time limits in accordance with Art. 39 CISG. Also, claims for delivery of substitute goods and repair under Art. 46(2) and (3) CISG were available only under this condition. However, the legal consequences of Art. 39 CISG had no effect if they are disclaimed, when the seller waives compliance of the notice requirements, or when it would be contrary to good faith. **21**

A waiver of notice could be, for example, that the seller accepted a late or unsubstantiated notice and offers a remedy. Such a waiver of notice must also be presumed here on the basis

of [Seller]'s standard terms, insofar as [Seller] accepted what under its terms would constitute a late or unsubstantiated notice and offered a remedy. Accordingly, [Seller] could not claim that [Buyer] did not immediately inspect the goods and did not give written notice of obvious defects within eight days, when [Seller] offered a remedy regarding the defects here (obvious defects discoverable with immediate inspection and notice not given within eight days). [Seller]'s standard terms did not contain any provision concerning content requirements for notice, so that here in any case the CISG was to be consulted, which also governed the notification period for other than obvious defects.

According to Art. 38 CISG, the buyer must examine the goods, or cause them to be examined, within as short a period as is practicable in the circumstances. Under Art. 39(1) CISG, the buyer must give notice to the seller specifying the nature of the lack of conformity within a reasonable time after he has discovered it or ought to have discovered it. The inspection period began the moment the goods are made available to the buyer at the place of delivery. The duration of this period depended on the objective conditions of the individual case, especially regarding the type of goods and defect, as well as the necessities and time expenditure required, as for instance with technical test procedures, test runs, etc. As a rough assessment for orientation purposes, an inspection period of one week (five working days) could apply. A reasonable inspection customary in the trade should occur that is thorough and business like. With characteristics of the goods that are difficult to inspect (such as technically complicated functions), the buyer might have to bring in experts; however, unreasonably expensive or demanding inspections were not required. **22**

According to Art. 39 CISG, notice must be given within a reasonable time period. With discoverable defects, the notice period began immediately after the short inspection period of Art. 38 CISG had run. With hidden defects, it began as soon as the buyer actually discovers such a defect. However, the buyer must investigate serious reasons to suspect error. As a rough norm for orientation, a notice period of one week could be set. Thus resulted an orientation time-frame of approximately fourteen days for the entire inspection and notice period. [Seller]'s standard terms deviated from this only in that written notice of obvious defects was to be given expressly within eight days after receipt of the goods. The obligation to immediately inspect the goods upon receipt, however, did not indicate that demands stricter than those of Art. 38(1) had been desired. **23**

The requirements regarding the contents of notice should not be pushed too far. Notice must specify the nature of the lack of conformity adequately enough to put the seller in a position to be able to reasonably react to it. The buyer was obliged to provide further details only inasmuch as he could discover the extent of the lack of conformity (except for deviations in quantity) with reasonable effort during the notice period. Each defect was to be substantiated. Notice of one defect did not mitigate the duty to give notice regarding further defects, either present or arising later. Notice for these must also be given, should that be the case. In giving notice of a lack of conformity, the buyer did not yet need to communicate the rights he wants to assert. Whether for claims demanding substitute goods or repair (see Art. 46(2) and (3) CISG) or demanding contract avoidance (Art. 49 CISG), the buyer had a further reasonable time period available. The buyer could claim price reduction and money damages, subject only to Art. 39(2) CISG and statute of limitations provisions. **24**

Based on this legal position, [Seller] claimed (wrongly) that notice of defects was late. The defect of not reaching the stipulated temperature output was due to the design and first became discoverable during provisional operation in the fall of 1996. The defective ventilation of the unit was also due to design. Notice that would have given [Seller] enough cause to remedy these design related defects (at most by substitute delivery), had long existed. Already during the first test run it was ascertained that the temperature gauges were incorrectly installed, so that the stipulated temperature output could not be reached. 25

Notice of this defect was given immediately. The instructions of [Seller] to reverse the direction of the ventilators did not present a long-term solution, and therefore were not a remedy of the defect. Only after correct arrangement of the temperature gauges could [Buyer] first discover that also in this condition the stipulated temperature performance values were not reached. 26

Besides the visual defects, for which [Buyer] gave notice by 3 July 1996, there is also the notice regarding the excessive noise levels given by fax of 12 June 1996. Due to the waiver of notice (which is to be presumed from the conclusion that [Seller] accepted the notified defects with its writing from 25 June 1996), a timely notice was given here as well. In the written notice of defects of 3 June 1996, it was already specified, among other things, that the loading air temperature was too high. 27

The right to demand a cure (Art. 46(3) CISG) is, like the right to demand substitute delivery, a special expression of the general right to performance. It presupposes that the delivered goods are defective and that notice of the defect was timely given, which can be presumed in the case at hand. 28

A natural requirement is that the defect be one that is capable of being repaired. Also, having regard to all the circumstances, a repair must not be unreasonable for the seller (Art. 46(3) CISG). Particularly, it is unreasonable if the cure is disproportionately expensive for the seller. However, the relation between the cost to cure and the purchase price is irrelevant. The seller has the burden to prove (and to claim) the facts from which the unreasonableness of the cure is alleged, since the obligation to cure is the rule and unreasonableness the exception. If it is unreasonable to cure, in the case of an objectively serious defect the buyer can require delivery of substitute goods (Art. 46(2) CISG) or declare the contract avoided (Art. 49 CISG), which the seller can avert by an offer to promptly deliver substitute goods. Within a reasonable time after giving notice, the buyer must clearly declare that it is requesting a cure or it will lose this right. 29

The facts of this case are characterized by the peculiarity that, due to technical design defects, an impossibility to effect the requested cure (repair) of the visual defects was not yet ascertainable at the time the cure was requested. If the seller does not effect a cure within a reasonable time, the buyer can remedy the defect itself or through a third party and claim the costs from the seller as damages (Art. 45(1)(b) CISG). The buyer can also remedy the defect itself (claiming the cost as damages against the seller), if a cure is not expected by the seller, i.e., a claim for cure under Art. 46(3) CISG is not available. However, in doing so, the buyer may not undertake any unreasonable expenditures (Art. 77 CISG): if the costs to effect a cure 30

stand in no reasonable proportion to the benefit of the cure for the buyer, then they are not recoverable. From this follows that the expense counterclaim is proper insofar as the cost of obtaining a substitute is reasonable (measured by the benefit of the cure for the buyer, having regard to his situation). Thus, it is significant that [Buyer] would have been subject to considerable damages claims, of which it had also informed [Seller].

In reason of the situation (deadline pressure, ordering a substitute unit from a third party would have taken months, the fundamental design defects were not yet ascertainable, substantial damages claims were threatening) and the costs to remedy the defects, which are recoverable as damages under these principles, the costs to obtain a substitute to remedy the «visual» damages were therefore correctly charged against the [Seller]. Despite the disparity between the value of the original delivery (approx. DM 21,000) and the amount of [Seller]'s claim set-off here, they do not seem unreasonable. **31**

However, in examining the total expense of DM 73,608.26 determined by the District Court, the general disclaimer of liability for consequential damages found in [Seller]'s standard terms must be observed. The rental costs for the preparation of a substitute unit, as well as the «costs for preservation of evidence,» figure into this. **32**

Thus, from the District Court's estimation of the costs to remedy the defects, determined to be DM 73,608.26, the total rental costs of DM 34,593, as well as the costs for evidence preservation at DM 3,685.70, are to be subtracted. Accordingly, the damages claim, after the charge against it, remains at only DM 35,329.56 (DM 73,608.26 minus DM 38.278.70) after the charge against it. To this extent, the District Court's decision to reject is confirmed. **33**

[Seller] objects that only the net amount should be considered from these costs since [Buyer] is entitled to deduct prior turnover tax and it already recovered the sales tax in its dealings with the tax office. However, whether or not the sales tax has been recovered has not been determined and the claim here is one for damages. According to accepted precedent, the District Court was correct in awarding the sales tax, regardless of a possible deduction entitlement. [Seller]'s attempt to assert a counter set-off with the price of the two-cycle cooler fails not only because of the rejected possibility of a counter set-off, but also because no declaration to set-off was made. [Seller] merely stated that it was entitled to such.

Regarding the remaining sum of DM 25,485.64 of [Seller]'s claim, the issue is not ripe for decision. It is not excluded that, with an alleged total claim of approximately DM 175,000, the requested set-off is legitimate in this amount. The District Court determined that the amount of approximately DM 73,608.26 comes «alone from this list,» namely, the costs cited by the District Court to remedy the defects. This phrase expresses that further claimed items remained open. The entire damages claim of [Buyer] actually also includes planning and installation costs of ATS 525,200, which at first were excluded. The question of law at issue in this appeal within the meaning of § 502(1) ZPO [Austrian Code of Civil Procedure] concerns the judgment criteria under the CISG for the reasonable relation of the costs to remedy defects with the benefit of the cure for the buyer. There are no Supreme Court cases on this issue. A specific solution for the individual case is not directly inferable from the general criteria described. **34**

[Positions of the parties before the Austrian Supreme Court:]

[Seller's appeal:]

[Seller] appeals the appellate decision, claiming incorrect legal judgment, and (as a result), requests a modification of the previous decisions by granting its complaint. [Seller]'s appeal argumentively disputes not only the partial judgment, but also the part of the appellate decision that was reversed. It is therefore to be viewed and treated as an appeal as well as a recourse [Rekurs = an appeal against a court order], since under § 84(2) ZPO incorrectly naming an appeal does no harm if, as here, that sought is clearly discernable. Alternatively, [Seller] has also filed a motion to reverse. **35**

[Buyer's appellate response:]

[Buyer] filed an answer and requests therein that the (partial) judgment of the Court of Appeal be affirmed.

[Ruling of the Austrian Supreme Court:]

[Seller]'s appeal is permissible insofar as it regards the reversed part of the challenged decision, but it is not justifiable. However, the challenge to the partial judgment through the motion to reverse is justifiable. **36**

The central issue in the case at hand is whether, or to what degree, [Seller]'s claim (in itself undisputed) is compensated through an out-of-court set-off based on a counterclaim of [Buyer] arising from the «table-cooler» transaction. Since [Seller]'s request holds to a three-part judgment, [Seller] is once again (as already explained by the Court of Appeal) referred to the difference between a liability-discharge defense based on an out of court set-off declaration and a procedural defense based on a set-off. In the case at hand, [Buyer] claimed an out-of-court compensation. In contrast to the set-off defense, this claim must be declared; thus, recognition of the principal claim is a prerequisite (EvBl 1979/171; 8 ObA 293/99t, RIS-Justiz RS003397) and, if successful, leads to dismissal of the case. The consent of the opposing party is not required (SZ 43/60; RZ 1973/85; SZ 50/35; RIS-Justiz RS 0033835). If the set-off is asserted with a liability discharge defense, then the court must adjudge only the justifiability of the relief sought, with due consideration to whether and to what degree at the close of oral hearings the claim is satisfied by set-off (8 ObA 293/99t, ARD 5123/1672000; 3 Ob 49/99y ua). In German law as well, a declaration to set-off operates to discharge the principal claim and is consequently a performance substitute (*Palandt, BGB* [Commentary on the German Civil Code], 60th ed., § 387 para. 1, § 389 para. 1; *Staudinger, BGB* [Commentary on the German Civil Code], vol. II §§ 362–396, pp. 222, 223; Fikentscher, *Schuldrecht* [Textbook on German Private Law], 8th ed., para. 292). In view of [Buyer]'s set-off, declared out of court with its writing of 2 January 1997, [Buyer]'s acknowledgement of [Seller]'s claim is presumed, which leaves only the justifiability of the counterclaim to be examined. **37**

The application of CISG, which came into force in Austria on 1 January 1989 (BGBl. 1988/96) and in Germany on 1 January 1991 (BGBl. 1990/303) (and subsidiary German law), as well as the application of [Seller]'s standard terms, no longer represents a point of dispute in these **38**

proceedings. Accordingly, it is sufficient to refer to the appropriate statements of the Court of Appeal, which conform to the theory and court decisions cited regarding the relevant provisions of Arts. 1, 3, 6, 8 and 14 CISG (see Siehr, in Honsell (ed.), *Komm UN-Kaufrecht* [Commentary on the CISG], Art. 3 para. 3; Karollus, *UN-Kaufrecht* [Textbook on the CISG], pp. 22, 23; Posch, in Schwimann (ed.), *ABGB* [Commentary on the Austrian Civil Code], 2nd ed., vol. V, Art. 3 CISG para. 2.; Magnus, in *Staudinger, CISG* [Commentary on the CISG] (1999]), Art. 3 para. 13 et seq.; Siehr, in Honsell, *loc. cit.*, Art 6 paras. 4, 7 and 13; Magnus, *loc. cit.*, Art. 6 para. 8 et seq.; Schnyder/Straub, in Honsell, *loc. cit.*, Art. 14 paras. 55, 56; Schlechtriem, in Schlechtriem (ed.), *Komm UN-Kaufrecht* [Commentary on the CISG], 3d ed., Art. 14 para. 16; Magnus, *loc. cit.*, Art. 14 paras. 40, 41; 10 Ob 518/95, SZ 69/26 = RIS-Justiz RS0104921; 2 Ob 328/97t, SZ 71/21; 1 Ob 292/99v, RIS -Justiz RS0113574).

According to the legal situation of this case, correctly represented by the Court of Appeal, [Seller]'s standard terms and, as far as these do not deviate therefrom, the provisions of the CISG are of relevance (since according to Art. 6 the provisions of the CISG, with exception of Art. 12, here not relevant, can be derogated from). By applying Arts. 38 and 39 CISG, which regulate the obligation to inspect and give notice, considering the available remedies to the buyer in case of a seller's breach of contract, found in Art. 45 et seq. CISG, as well as the damages claim for the non-breaching party regulated in Art. 74 et seq. CISG, the Court of Appeal reached the conclusion that the counterclaim was (in principle) justified. **39**

This legal opinion is correct, and here one can refer as well to the applicable explanations of the Court of Appeal (§ 510(3) ZPO). The opinion is also particularly in harmony with the jurisprudence of the Supreme Court developed in 2 Ob 191/98x, *Juristische Blätter* (1999), 318 and confirmed in 1 Ob 223/99x regarding the available inspection and notice periods under Arts. 38 and 39 CISG. In this jurisprudence, the short time period for inspection especially depends on the size of the buyer's enterprise, the type of goods to be inspected, their complexity or perishable nature or their character as seasonal goods, the type of quantity in question, the expenditure required for the inspection, etc. (RIS-Justiz RS0110999). The objective and subjective circumstances of the individual case are to be considered: in particular the business and personal circumstances of the buyer, peculiarities of the goods, the extent of the delivery or the type of chosen legal remedy (RIS-Justiz RS0111000). Even though the time periods for inspection and notice are to be judged less strictly than under the domestic provision of § 377 HGB [Austrian Commercial Code] («immediately»), the reasonable periods under Arts. 38 and 39 CISG are not of long duration. In any case, the reasonable period of Art. 39 CISG must be correspondingly adapted to the particular circumstances. **40**

[Seller] further asserts merely that [Buyer] did not (timely) meet its obligation to give notice regarding the so-called design defects. It suggests with this assertion (diverging from the undisputed determinations of the District Court, which were also confirmed by the Court of Appeal) that [Buyer] did not give notice of design defects with its writings of 3 June 1996, 12 July 1996 and 31 July 1996. Since this assertion does not arise from the determined facts of this case, it is in this respect not presented in accordance with the procedural law and consequently immaterial. **41**

The Court of Appeal has correctly explained that the requirements regarding the contents of notice should not be pushed too far. Notice must be specific inasmuch as it specifies the lack of conformity. Sweeping statements and general complaints are in this respect not sufficient to meet the content requirements demanded for notice (Posch, *loc. cit.*, Art. 39 CISG para. 7 with citations from German court decisions), so that the seller is put in a position to be able to reasonably react. According to prevailing opinion, it must nevertheless be sufficient if the seller is informed of the essential result of a proper inspection, so that the seller can form an idea of possible defects (Magnus, in Honsell, *loc. cit.*, Art. 39 para. 9 with further citations). Whether or not an inspection was properly carried out depends on the circumstances of the individual case, especially the type of goods (Magnus, *loc. cit.*, Art. 38 para. 14 with further citations). **42**

In the case at hand, [Buyer] was deprived of a more thorough inspection at its plant due to [Seller]'s delay. At the place of destination, the goods could only be inspected in a limited manner so that the important design defects could only be tentatively discovered. We confirm the opinion of the Court of Appeal, that under these circumstances, in view of the limited inspection results attainable, [Buyer]'s notice of non-conformity was sufficient in content. The fact that [Buyer], after it rejected a (further) attempt to remedy the non-conformity, no longer informed [Seller] of its further dealings, in particular of its arrangements with its customer regarding the defect remedies, cannot (again in agreement with the Court of Appeal) change anything regarding the satisfaction of the obligation to inspect and to give notice. The objection of an untimely and insufficient notice maintained in this appeal is therefore not valid. **43**

If the buyer, through timely notice, preserved the right to claim lack of conformity, then these claims expire according to the applicable statute of limitations (Magnus, *loc. cit.*, Art. 39 para. 36; Magnus, in Staudinger, *loc. cit.*, Art. 39 para. 71). According to German law applicable here, under Art. 3 of the German Act implementing the CISG (VertragsG) the limitations period begins to run from the day notice of non-conformity is given. It is essentially determined according to § 477 German Civil Code (BGB) and lasts six months. [Seller] also maintains its statute of limitations objection, first raised during appellate proceedings. It is unnecessary to further go into its arguments on this point, however, since its (uncorroborated) position that § 477 BGB is to be reviewed by the court (since it deals with a preclusive time limit) is in error. The statute of limitations is only to be considered when brought as an objection that can still be asserted in appellate proceedings under German procedural law (Honsell, in *Staudinger, BGB* [Commentary on the German Civil Code] (1995), § 477 BGB, para. 57; von Feldmann, in *Münchener Kommentar zum BGB* [Commentary on the German Civil Code], 3d ed., § 222 BGB para. 3; Heinrichs, in *Palandt, BGB* [Commentary on the German Civil Code], 60th ed., § 222 BGB para. 1). However, under Austrian procedural law applicable here, there is no comparable provision to § 537 of the German ZPO (points of contention verified by the Court of Appeal) and the objection must be asserted at the District Court level. Since this did not occur with this case, under the amendment prohibition of § 482 ZPO [Seller]'s statute of limitations objection must be disregarded. **44**

The opinion of the Court of Appeal was that [Buyer] had a counterclaim under Art. 74 et seq. CISG since after rejection of an offer to correct the problem [Buyer] justifiably undertook to remedy the defect itself and then set off [Seller]'s claim out of court with its counterclaim. **45**

This opinion withstands all objections in these proceedings. Also, [Buyer]'s efforts to remedy the situation under the ascertained circumstances cannot be characterized as unreasonable.

The damages claim of the non-breaching party (here: [Buyer]) under Art. 74 CISG, which does not require fault (Magnus, in *Staudinger, CISG* [Commentary on the CISG] (1999), Art. 74 CISG para. 11 with further citations; Loewe, *Internationales Kaufrecht* [Commentary on the CISG], p. 92; Schönle, in Honsell, *loc. cit.,* Art. 74 para 2 et seq.) and which can only be paid in monetary damages (Magnus, *loc. cit.,* para. 24; Posch, *loc. cit.,* Art. 74 para. 4; Stoll, in Schlechtriem, *loc. cit.,* Art. 74 para. 25; Loewe, *loc. cit.*) as a consequence of the other party's breach of contract (here [Seller]), serves as an equalizer. By way of monetary damages, the obligee should be put as closely as possible in the economic position in which he would have been, had the contractual obligations been properly performed (Magnus, *loc. cit.,* para. 16 with further citations). The CISG is based on the principle of full compensation (SZ 69/26, RIS-Justiz RS0104937): generally under Art. 74 CISG the entire loss, including lost profits, should be compensated (total reparation; see Magnus, *loc. cit.,* para. 19 with further citations; Posch, *loc. cit.,* Art. 74 para. 4). As Magnus explains (Magnus, *loc. cit.,* para. 20), Art. 74 CISG thereby protects not only the obligee's interest to not suffer any loss to his goods due to breach of contract (indemnity interest), but also and especially does it protect the interest of receiving the benefits of proper performance of the contract (expectation interest). In the event of non-performance or other form of breach of contract, the obligee is generally justified (as long as the obligor is not entitled to cure under Art. 48 CISG) to undertake reasonable measures by itself to generate a situation corresponding to proper performance and then invoice the obligor the costs as damages incurred. **46**

Finally, Art. 74 CISG can also protect the obligee's interest that expenses created by the contract do not become worthless due to breach of contract (reliance interest). Expenses incurred because of the contract itself can be recoverable if it is determined that they would not have been incurred were it not for reliance on performance of the contract and that they lost their purpose through the breach of contract. Moreover, from the viewpoint of a reasonable person in the same circumstances (Art. 8(2) CISG), such expenses must have been appropriate and reasonable for the performance of the contract (see Magnus, *loc. cit.,* paras. 21 and 53 with further citations; Stoll, *loc. cit.,* para. 3. But see Schönle, *loc. cit.,* Art. 74 para. 17 and Art. 75 para. 6 (for unlimited recovery of frustrated expenditures); Rummel, 'Schadensersatz, Höhere Gewalt und Fortfall der Geschäftsgrundlage', in Hoyer/Posch (eds.), *Das Einheitliche Wiener Kaufrecht* [Uniform Vienna Sales Law], p. 179 (rejecting recovery of reliance damages)). **47**

Under Art. 74 CISG, however, (as [Seller] in this appeal rightly objects, asserting that [Buyer]'s damages claim many times exceeds the price of the table cooler at issue), the damages claim is limited to those losses which were foreseeable for the obligee at the time of the conclusion of the contract. With regard to the purpose of the contract, foreseeability must refer to losses that can be a possible consequence of a breach of contract. The foreseeability of a breach of contract or fault regarding breach does not matter (Magnus, *loc. cit.,* para. 32 with further citations). Foreseeability in Art. 74 CISG refers therefore only to losses that at the time of the conclusion of the contract were an assessable consequence of a possible breach of obligation, and for which the obligor cannot exempt himself under Art. 79 CISG by proving that the failure to fulfil his contractual obligations was due to an impediment beyond his control, which he **48**

was not expected to take into account at the time of the conclusion of the contract and was not obliged to have avoided or overcome (Posch, *loc. cit.,* Art. 79 para. 4).

According to prevailing opinion, Art. 74 CISG does not require precise and detailed foreseeability of losses, and certainly not a numbered sum on the extent of loss (Magnus, *loc. cit.,* para. 34 with further citations). On the other hand, the invariably foreseeable possibility that a breach of contract will produce some type of loss is not sufficient. However, a (typical) loss due to non-performance is under prevailing opinion generally foreseeable (Stoll, *loc. cit.,* Art. 74 para. 38; Magnus, *loc. cit.,* para. 40 with further citations). It is necessary that the obligor could recognize that a breach of contract would produce a loss essentially of the type and extent that actually occurred (Magnus supra, with further citations). Generally an objective standard is applied for foreseeability here. The obligor must reckon with the consequences that a reasonable person in his situation (Art. 8(2) CISG) would have foreseen considering the particular circumstances of the case. Whether he actually did foresee this is as insignificant as whether there was fault (Magnus, *loc. cit.,* para. 35 with further citations). Yet, subjective risk evaluation cannot be completely ignored: if the obligor knows that a breach of contract would produce unusual or unusually high losses, then these consequences are imputable to him (Magnus, *loc. cit.,* para. 36 with further citations; see also Schönle, *loc. cit.,* para. 25). **49**

Consequential damages are, insofar as they are pecuniary losses, also generally recoverable under the CISG if at the conclusion of the contract the loss could be viewed as a sufficiently probable consequence. For instance, a buyer of defective goods can foresee an obligation to pay damages to his own customers, as long as the obligation does not exceed the usual extent (Magnus, *loc. cit.,* para. 45 with further citations). Since, however, in the present case, as already emphasized, [Seller]'s standard terms (which supersede the provisions of the CISG) exclude the recovery of consequential damages, the Court of Appeal correctly rejected other such losses claimed by [Buyer] in the amount of DM 38, 278.70. This is also no longer disputed in this appeal. **50**

However, the Court of Appeal failed to consider the limitation of damages through the foreseeability rule of Art. 74 CISG. As just explained, the determination of the amount of [Buyer]'s set-off counterclaim also depends to a large degree on what possible losses a reasonable person would have foreseen at the time of the conclusion of this contract for work and materials. As also already explained, this foreseeability of loss within the meaning of Art. 74 CISG is determined according to the particular circumstances at the time of the conclusion of the contract. However, the District Court, which erred in denying application of the CISG, failed to determine these. There was also no determination made regarding [Seller]'s subjective risk evaluation at the time of the conclusion of the contract. In particular, [Buyer]'s last claim brought was also not discussed, namely, that [Seller] knew at the conclusion of the contract where and under what conditions the table cooler was being installed and [Seller] therefore must have foreseen that in the event of defective performance a loss in the amount claimed could arise. The proceedings are in this regard yet incomplete, also regarding the extent of the rejection of DM 35, 329.56 with the partial judgment. **51**

Regarding the objection brought in this appeal that [Buyer] breached its duty to mitigate damages, we note that loss caused by a breach of contract is not recoverable if it could have been reduced by taking reasonable measures. A potential measure to mitigate damages is reasonable, if in good faith it could be expected under the circumstances. This is to be determined according to the actions of a reasonable person in the same circumstances (SZ 69/26, RIS-Justiz RS0104931). It was not shown in this appeal that [Buyer] failed to take such a measure to mitigate damages, nor is this perceived. In this context it is once again worth mentioning that a particularity of this case that [Seller]'s breach of contract put [Buyer] under pressure to keep a deadline, which at first only allowed a provisional remedy and correspondingly prevented a thorough inspection at [Buyer]'s place of business and also made it necessary to ship the table cooler several times to [Buyer]'s business in Linz. **52**

From Art. 74 CISG arises the necessity to determine to what degree a reasonable person within the meaning of Art. 8(3) CISG in the circumstances known to [Seller] at the time of the conclusion of the contract could (or should) foresee such problems and expenses; and if need be, also whether or to what degree such damages (in this manner determinable, foreseeable, exceeding the loss, and resulting directly from [Seller]'s breach of contract) of [Buyer] were actually foreseeable for [Seller] at the time of conclusion of the contract. Since the time of the conclusion of the contract is the relevant moment, the circumstance emphasized by the Court of Appeal, that [Seller] was informed of the threatening damages claims of [Buyer]'s customer, would only be of essential importance to the decision if this information was given prior to or during the conclusion of the contract.

In order to reliably answer the question of foreseeability within the meaning of Art. 74 CISG according to these criteria, and thus determine the value of the counterclaim from the out-of-court set-off, the District Court must clarify the questions of fact which have still been left open in corresponding supplemental proceedings. The question of foreseeability of loss at the time of conclusion of the contract, which will then be judicable, will be of determining importance for the question of law identified by the Court of Appeal as important within the meaning of § 502(1) ZPO regarding the reasonableness of [Buyer]'s claimed costs to remedy the defects. **53**

Regarding [Seller]'s repeated objection in this appeal that the value of the cooling unit it delivered to [Buyer] and which [Buyer] used should be compared to [Buyer]'s claimed costs, it is enough to refer to the correct explanations of the Court of Appeal given above (§ 510(3) ZPO). **54**

[Seller]'s reference to Art. 84(2) CISG overlooks that [Buyer] (which as the non-breaching party is the only one entitled to avoid), did not declare the contract avoided under Art. 49 CISG, which is why under Art. 74 CISG only one form of damages calculation is considered, that based on the maintenance and carrying out of the contract (SZ 69/26; 6 Ob 311/99z; RIS-Justiz RS0104930). **55**

Finally, insofar as [Seller] in this appeal once again refers to the set of difficulties with the sales tax and contends that [Buyer] cannot claim anew sales taxes that it already received, [Seller] disregards the fact that it neither asserted nor showed this during the District Court proceedings. It is sufficient therefore to point out that the opinion of the Court of Appeal (that in **56**

compensation proceedings, sales tax is to be awarded independent of an eventual entitlement to deduct prior turnover tax) corresponds to accepted precedent and prevailing doctrine (Reischauer, in Rummel (eds.), *ABGB* [Commentary on the Austrian Civil Code], 12th ed., § 1323 para. 25 with further citations from court decisions).

It should be further noted, however, that in EvBl 1976/22 the Supreme Court pronounced that the sales tax should also be awarded when the deduction (prior to the end of the trial court proceedings) was already made. The proceedings should not be made more difficult or delayed due to tax questions (SZ 53/154). If the injured party is entitled to deduct prior turnover taxes, the other party has a restitution claim under Art. 12(3) EGUStG (SZ 50/26 = JB1 1977, 322), as soon as and to the same degree the injured party could have deducted the prior turnover tax (Art. 12 (3) EGUStG). Whether and when this tax was actually deducted is not significant (SZ 51/78; SZ 53/154). The legislature assumes the abstract possibility of a deduction of the prior turnover tax (SZ 51/78; SZ 53/154). If the injured party does not use the deduction, this has no effect on the restitution claim (SZ 53/154; SZ 63/46).

Costs are determined according to § 52(1) ZPO . **57**