Case 480: CISG 1(1); 30; 53; 61; 77; 79
France: Court of Appeal of Colmar Romay AG v. SARL Behr France
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Original in French
http://witz.jura.uni-sb.de/CISG/decisions/120601.htm (French language text)
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A French manufacturer of air conditioners for the automobile industry (the defendant) concluded a "collaboration agreement" on 26 April 1991 with its supplier, a Swiss company (the plaintiff). The plaintiff undertook to deliver at least 20,000 crankcases over eight years according to the needs of the defendant's client, a truck manufacturer. The goods were described in a precise manner and the method of calculating the price was fixed for the entire duration of the contract initially envisaged by the parties. Following a sudden collapse in the automobile market, which caused the truck manufacturer to change its terms of purchase radically by imposing on the defendant a price for the air conditioners which was fifty per cent lower than the price of the incorporated components sold by the plaintiff, the defendant declared in a letter of 6 December 1993 its desire to stop using the crankcases manufactured by the plaintiff in the production of air conditioners. As at
31 December 1993, only 8,495 of the 20,000 casings had been delivered. On 19 June 1996 the plaintiff brought an action against the defendant before the Colmar District Court to obtain 3,071,962 Swiss francs in damages.

The Court of First Instance, competent pursuant to a jurisdiction clause that is effective under the terms of article 17 of the Lugano Convention on jurisdiction and the enforcement of judgements in civil and commercial matters, dismissed the plaintiff's claim for compensation. The court declined to apply the CISG on the grounds that the collaboration agreement could not be characterized as a sales contract because the total quantity of goods to be delivered was not determined. The agreement—a framework agreement on production and distribution—was governed by article 4 of the Rome Convention and the law applicable to the case was Swiss law. The Court of First Instance concluded that the agreement did not create any firm obligation to purchase on the part of the defendant.

The Court of Appeal reversed that judgement. It found the CISG to be applicable to the "collaboration agreement". Despite the title of the agreement, the Court defined it as a sales contract under the terms of CISG. The Court stated that the important factor was to determine the actual content of the agreement and to verify whether the parties had entered into the obligations of a buyer and a seller as defined in articles 30 and 53 CISG. The designation of the parties as manufacturer and buyer, the precise determination both of the goods to be delivered and of the method of calculating the price, and the fixing of a minimum quantity of 20,000 crankcases led to the conclusion that the agreement had all the characteristics of a sales contract. The Court recognized that the agreement did not contain any clause expressly imposing an obligation to buy on the defendant. However, "it follows from the general economic balance of the contract—and from the particular stipulation with regard to the obligation to build up inventory—that the delivery obligation expressly contracted by the [plaintiff] entails an implicit obligation on the [defendant] to buy the goods that the [plaintiff] undertook to deliver". Moreover, the court noted that "the obligation imposed on one party to deliver the goods—rather than merely to keep them available—implies the prior agreement of the counterparty to receive the goods at the agreed price and, therefore, the counterparty's undertaking to pay the price of the goods to be delivered".

The Court of Appeal then noted that the defendant had taken delivery of 8,495 crankcases at the time of termination of the contractual relationship. As the defendant had undertaken to receive and pay for 20,000 units, it had not performed its obligations. Pursuant to article 61 CISG, the plaintiff therefore had grounds for claiming damages unless the significant modification of the terms of purchase of the defendant's client could be found to constitute grounds for exemption under article 79 CISG. However, the Court emphasized that this modification, which made it very costly for the defendant to continue incorporating components produced by the plaintiff, was neither exceptional nor unforeseeable in a contract whose duration was fixed at eight years. The court observed that "it was up to the [defendant], a professional experienced in international market practice, to lay down guarantees of performance of obligations to the [plaintiff] or to stipulate arrangements for revising those obligations. As it failed to do so, it has to bear the risk associated with non- compliance".

The Court of Appeal thus concluded that the claim for compensation for the damage was in principle well-founded. However, the Court considered it necessary to carry out an expert evaluation before ruling on the amount of compensation. Article 77 CISG obliged the plaintiff to mitigate the loss. The Court noted that the damage alleged by the plaintiff—the loss of profit and the cost of the raw materials which became unusable—might not have been so great if the inventory had been resold and if the sum invested in the implementation of the agreement could have been amortized in a different way.