

Case 886: CISG 1(1)(b); 64(1)(b); 74; 77; 81

Switzerland: Handelsgericht des Kantons St. Gallen (Commercial Court of the Canton of St. Gallen);

HG.1999.82-HGK

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<http://www.globalsaleslaw.com/content/api/cisg/urteile/727.htm>

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The plaintiff, based in Tel Aviv, ordered a textile manufacturing machine from the defendant, a Swiss limited company, and made an advance payment to the defendant. The plaintiff subsequently became insolvent and could not meet further instalment payments. The defendant fixed a time limit for the plaintiff to effect settlement. The defendant then declined to execute the contract and claimed damages on the ground of non-performance. The plaintiff, having gone into liquidation, sought restitution of its advance payment of US\$ 380,000. The defendant acknowledged its indebtedness for that amount but asserted a set-off claim for damages of approximately 1.5 million Swiss francs.

On the basis of article 1 (1) (b), the court applied the Vienna Convention since the law of one contracting State (Swiss law in the present case) had been chosen by the parties. In its determination of the case, the court based its finding on avoidance of the contract in accordance with article 64 (1) (b) CISG and on the existence of a reciprocal obligation to cease performance, in accordance with article 81 CISG, giving rise to a claim to restitution of the sale price in favour of the plaintiff. On the basis of domestic law, the court acknowledged that a set-off against any claims for damages was, in principle, admissible.

The court determined the question of the defendant's claim for damages in accordance with article 74 CISG, setting a maximum limit equal to the loss of revenue arising from loss of the sale price, less the amount of the reductions in charges arising from non-delivery and the amount that the defendant could have obtained from other disposal or use of the equipment (article 77 CISG). The court also acknowledged a right to compensation for the loss resulting from additional expenses incurred for transport, containers, storage and disassembly as well as for the loss on exchange caused by the increase in the value of the United States dollar since the time of the advance payment. However, the court declined to determine the specific amount of damages, merely stating that, in any case, they would exceed the plaintiff's claim.