CISG-online 727	
Jurisdiction	Switzerland
Tribunal	Handelsgericht des Kantons St. Gallen (Commercial Court Canton St Gall)
Date of the decision	3 December 2002
Case no./docket no.	HG.1999.82-HGK
Case name	*Sizing machine case*

Translation[*] *by Stefan Kuhm*[**]

[*] All translations should be verified by cross-checking against the original text. For purposes of this translation, the Plaintiff of Israel is referred to as [buyer] and the Defendant of Switzerland is referred to as [seller]. Monetary amounts in the (former) currency of (i) Switzerland (Swiss francs) are indicated by [SFr], (ii) United States of America (US Dollars) are indicated by [US $], and (iii) Germany currency (Deutsche Mark) is indicated by [DM].

Translator's note on other abbreviations: Amstutz/Vogt/Wang = Basler Kommentar zum Gesetz über das internationale Privatrecht [Basle Commentary on the Swiss Code on International Private Law]; BGE = Entscheidungen des Schweizer Bundesgerichts [Official Reporter of Cases of the Swiss Supreme Court]; CIF = Cost, Insurance, Freight as defined in the Incoterms of the ICC, 1990; Frank/Sträuli/Messmer = Kommentar zur Zivilprozeßordnung [Commentary on the Swiss Code on Civil Proceedings, 3d edition, 1997]; Guhl/Koller = Kommentar zum Obligationenrecht [Commentary on the Swiss Law of Obligations]; Hague Convention = Haager Übereinkommen betreffend das auf internationale Kaufverträge über bewegliche körperliche Sachen anzuwendende Recht, 15. Juni 1955 (SR 0.221.211.4) [Hague Convention on the Applicable Law with regard to International Sale Contracts for Movable Goods of 15 June 1955]; Honsell = Kommentar zum Übereinkommen der Vereinten Nationen über Verträge über den Internationalen Warenkauf vom 11. April 1980 [Commentary on the CISG, Berlin/Heidelberg 1997]; IPRG = Bundesgesetz über das Internationale Privatrecht, 18. Dezember 1987 [Federal Code on Swiss International Private Law]; Kummer = Berner Kommentar zum Zivilgesetzbuch [Commentary of Bern on the ZGB]; Leuenberger/Uffer = Kommentar zur Zivilprozeßordnung St. Gallens [Commenary on the Code on Civil Procedures in St. Gallen]; Magnus = Kommentar zum UN-Kaufrecht [Commentary on the CISG]; OG = Bundesgesetz über die Organisation der Bundesrechtspflege [Swiss Federal Code on Court Organization]; OR = Bundesgesetz betreffend die Ergänzung des Schweizerischen Zivilgesetzbuches (Fünfter Teil: Obligationenrecht), 30. März 1911 (Swiss Federal Code regarding a Supplement of the Swiss Civil Code (5th division: Law on Obligations), 30 March 1911; SchKG = Bundesgesetz über Schuldbetreibung und Konkurs [Swiss Federal Code on the Recovery of Debts and Bankruptcy Proceedings]; Schönle = Kommentar zum Un-Kaufrecht [Commentary on the CISG]; Stäubli/Dubacher = Basler Kommenar zum SchKG [Basel Commentary on the Swiss Bankruptcy Code]; Weber = Kommentar zum UN-Kaufrecht [Commentary on the CISG]; Weber = Berner Kommentar zum Obligationenrecht [Commentary of Bern on the Swiss Federal Code]; Wiegand = Basler Kommentar zum Obligationenrecht [Basle Commentary on the Swiss Federal Code]; WKR = Wiener Kaufrechtsübereinkommen, SR 0.221.211.1, 11 Januar 1989 [UN Convention on Contracts for the International Sales of Goods, 11 January 1980]; ZGB = Schweizerisches Zivilgesetzbuch [Swiss Civil Code of 10 December 1907]; ZPO = Zivilprozessordnung [Swiss Code on Civil Procedures]

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On 3 December 2002, President Dr. Rolf Germann, Surrogate Judge Dr. Christoph Rohner, Commercial Judges Albert Bürkler, Otmar Elsener and Dr. Rolf Roth handed down this decision in a dispute between [buyer] as plaintiff and [seller] as defendant about [buyer]'s legal action. This decision was recorded and stenographed by the Court Assistant Jakob Zeliweger.

[Buyer]'s pleading

[Buyer] asks the Court to direct [seller] (i) to pay [buyer] US $380,000 plus accrued interest of 5% since 17 February 1997 and (ii) to bear any costs, expenses and compensation payments.

[Seller]'s pleading

[Seller] asks the Court to dismiss [buyer]'s legal action and to direct [buyer] to bear any costs, expenses and to indemnify [seller] against any costs and expenditures occurred during this proceeding.

REASONING OF THE COURT

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[Ruling of the Court]

I. FACTS OF THE CASE

1.
[Summary of buyer's order and payment liabilities]

[Buyer], incorporated in Tel Aviv, Israel, ordered from [seller] a super power textile manufacturing facility at the beginning of 1995 (warp sizing machine associated with 20 rollers at that warping machine). The purchase price was Swiss francs [SFr] 1,420,000. [Seller] sent a confirmation note upon this order on 1 February 1995 which was headlined «Confirmation No. H40704/W04026». According to the altered «Confirmation No. H40704/W04026» of 30 April 1996, [buyer] pre-paid overall an amount of US $380,000 and provided for the issue of a letter of credit in the amount of SFr 590,000. Further, [buyer] also had the duty to pay an additional amount of SFr 398,960 before the aforementioned machine would be delivered via ship from Switzerland to Israel.

2.
[Buyer's insolvency and bankruptcy proceedings]

Creditors of the [buyer] applied for the commencement of bankruptcy proceedings over the [buyer]'s assets on 3 July, which were supposed to cause [buyer]'s dissolution. The District Court of Tel Aviv-Jatta appointed attorney ___ as [buyer]'s «temporary liquidator» on 16 October 1996. The relevant and competent Israeli court handed down a permanent liquidation order on 24 November 1996, in which it upheld and confirmed the commencement of [buyer]'s liquidation and dissolution proceedings. Furthermore, the District Court of Tel Aviv appointed ___ as «permanent liquidator» on 14 April 1997.

[Buyer's non-performance; seller's setting additional period to perform; seller's avoidance of the contract]

Subsequently, [buyer] did not meet any of its payment obligations so that [seller] has not delivered the machine the [buyer] ordered. [Seller] set an additional period of grace for [buyer]'s payment on account of the aforementioned SFr 398,960 before it might provide for delivery of the machine, since [buyer]'s pre-payment of this amount was a condition precedent for delivery by [seller]. [Seller] also set an additional period of grace to provide for a further valid letter of credit in the amount of SFr 590,000 as the letter of credit that was formerly issued had expired. In the event that [buyer] would not perform and meet its obligations to provide for payment and sufficient security, [seller] advised that it would pursue its claim under Art. 107 OR [*]. In its note of 17 February 1997, [seller] waived and objected to any subsequent performance by [buyer] according to its former communication and claimed compensation for damages that occurred due to [buyer]'s non-performance of its payment obligation pursuant to Art. 107 Par. OR [*].

3.
[Pleadings of the parties]

[Buyer's submission and pleading]

[Buyer] filed its legal action with the Court on 30 September 1999. [Buyer] seeks restitution of its pre-payment of US $380,000. [Buyer] alleges that because of [seller]'s objection to any subsequent performance, the contractual relationship between the parties had been transformed into a relationship for restitution. For this reason, [buyer] alleges that it is entitled to repayment of the aforementioned amount plus accrued interest of 5% since the declaration of [seller]'s waiver and objection.

[Seller's counterclaim for damages and loss of profit]

In principle, [seller] recognizes and acknowledges [buyer]'s claim for restitution of the amount paid under their sales contract. However, [seller] sets-off against this claim its own claims for damages in an overall aggregate amount of SFr 1,462,1960.60. Those claims for damages derive from and encompass costs for (i) ground material of the ordered machine, (ii) the machine's production and manufacturing, assembly and certain specified additional charges, (iii) parts delivered by [seller]'s suppliers, (iv) parts of the machine assembled and produced solely for that machine and the costs for delivery of the machine to [buyer]. Further, [seller]'s claim for damages also comprises loss of profit as well as costs for (i) re-transport, (ii) additional storage and (iii) disassembly of the ordered production facility.

[Seller's submissions as to its counterclaim and pleading]

[Seller] alleges that it produced the machine solely for [buyer] so that it was unique. Therefore, [seller] was not in the position to re-sell this specially-produced manufacturing facility to another customer without any obstacles. For this reason, it disassembled the machine and re-utilized some of its individual parts on its own in order to mitigate damages and losses. In particular, quite a few costs and expenditures with regard to the delivery did not arise because [seller] was not obliged to (i) deliver the machine, (ii) assemble the machine in its factory and (iii) pay a commission fee. In the light of the mitigation techniques that [seller] employed, it may have saved an amount of altogether SFr 329,075. [Seller] should be allowed to set-off with its claim for payment of the purchase price as well as any remaining costs for transport, disassembly and storage of the machine reduced by the aforementioned savings. In consideration of its submissions and arguments, [seller] asks the Court to dismiss [buyer]'s legal action. [Seller] files with the Court that it has not commenced a counter-action, since the probability to succeed tends to nil, whilst insolvency proceedings have already been opened against [buyer].

4.
[Consideration of parties' submissions and particulars]

The Court will thoroughly consider any submissions as to the facts of the case given in the parties' particulars in its reasoning for this judgment thereafter.

5.
[Direction to deposit security]

In the court directions of 16 December 1999 and 27 February 2002, the President of the Commercial Court, District of St. Gallen, directed [buyer] to pay a security deposit with regard to any expected expenses and costs of this court proceedings and any other attorney's and legal fees.

6.
[Overview of evidence taken and of the proceedings]

In its decision of 7 November 2001, the Court decided to rule on the issue of the saleability of the machine. The Court mandated an expert. Dr. Urs Meyer, a professor for textile mechanical engineering at the ETH Zurich, provided its expert opinion on 27 August 2002. Dr. Meyer responded to certain supplementary queries in his itinerary review of 4 October 2002. The final hearing of the Court was on 3 December 2002 (Art. 175 ZPO [*]).

II. [JURISDICTION BEFORE SWISS COURTS]

1.
[Particulars of the parties]

[Buyer] has its seat in Israel. [Buyer] is an Israeli company registered with the Israeli commercial register and scheduled to be liquidated and dissolved. [Seller] is a Swiss stock corporation seated in the ____, district of St. Gallen.

2.
[Capacity of buyer to be sued as «bankrupt's assets»]

With reference to the security deposit decision handed down by the President of the Court on 16 December 1999, the Court restates that [buyer] is to be classified as «bankrupt's assets» scheduled to be liquidated. The Court concludes that [buyer] is scheduled to be party to a court proceeding, which is to a significant extent the equivalent to Swiss bankruptcy proceedings or respectively Swiss proceedings on legal succession plus simultaneous assignment and transfer of all assets. The Court consequently rules that [buyer] shall be treated as «bankrupt's assets». The ability of «bankrupt's assets» to be sued and to participate as a party in a legal proceedings has to be decided pursuant to the regime of the state in which the bankruptcy proceedings have been commenced and opened (see Frank/Sträuli/Messmer [*], Secs. 27 and 28, Note 34). With reference to [seller]'s filings and particulars, the Court concludes that, pursuant to Israeli law, [buyer] is deemed to be able to be a party to this legal proceeding and to be sued in Switzerland. Particularly, regard is to be had to the positive decision on the grant of financial aid as to legal costs and expenses in favor of [buyer] to commence the current Swiss legal proceeding.

3.
[Decision on the Court's jurisdiction]

[Explicit choice of Swiss law and jurisdiction of Swiss courts]

Under Term No. 11 of [seller]'s «General Terms of Delivery» - notwithstanding that all of the confirmation letters use a nomenclatura such as «General Conditions of Erection» - it is stated that place of jurisdiction shall be in Switzerland and courts in the district of St. Gallen shall have the competence to hear all disputes arising under the agreement. Furthermore, the General Terms of Delivery call for the application of Swiss law as the governing law for the parties' sales contract with regard to its interpretation, extent and content of any provisions, obligations, liabilities and duties thereunder. [Seller] had these general terms posted to [buyer] who received them incidentally in the «Confirmation of Order» of 1 February 1995 and of 30 April 1996. [Buyer] explicitly acknowledged that it has assented to the application of those General Terms of Delivery.

[Seller's appearance at the Court without any objection]

[Seller] appeared at Court and has not formally objected to be sued; [seller] has also declared its intention to proceed and appear with regard to the subsequent main proceedings before the Court (see Amstutz/Vogt/Wang [*], Art. 6 IPRG [*], Note 14). Where there are no bilateral or multilateral agreements on the place of jurisdiction, the international jurisdiction to hear a legal proceeding is to be decided in accordance with Art. 2 et seq. IPRG (see Art. 1 IPRG). According to Art. 6 IPRG, any appearance at court without any objections thereto whatsoever founds the basis for the jurisdiction of a Swiss court where the respective plaintiff filed its legal action, unless that Swiss court is in the position to deny its international jurisdiction pursuant to Art. 5 Par. 3 IPRG [*]. Since [seller] has its seat in the Canton St. Gallen, the Court is locally competent to hear this legal action and has jurisdiction. Due to the [seller]'s appearance at the Court without any objections as to the Court's jurisdiction and competence, it may remain undecided whether or not the parties' agreement on the place of jurisdiction may be deemed valid, binding and enforceable in accordance with its terms.

4.
[Court's competency as to the matters and value in dispute]

In this case, the parties are, on the one side, a Swiss stock corporation and, on the other side, an Israeli company registered with the competent Israeli commercial register. The parties are in dispute over [buyer]'s order for a textile production facility from [seller]. The value of this dispute amounts to more than SFr 30,000. For this reason, all necessary preconditions for the Court's competence and jurisdiction are complied with pursuant to Art. 14 ZPO [*].

III. [GOVERNING LAW OF THE CONTRACT]

1.
[Buyer's and seller's position as to the governing law]

[Buyer] alleges that the parties entered into an agreement on choosing Swiss law as the governing law for their sales contract according to Art. 11 of their «General Terms of Delivery». Swiss private international law refers to the Hague Convention [*]. The Hague Convention [*] refers back again to Swiss law as governing law. Because of the international character of the parties' sales contract, the CISG may be applicable. Further, [seller] assumes the application of Swiss law as the governing law and particularly the CISG for the sales contract.

[Valid choice of Swiss law by virtue of parties' submissions and assumptions]

Since there are no applicable bilateral or multilateral agreements on the subject, the governing law for disputes under sales contracts must be specified and defined pursuant to Art. 112 et seq. IPRG [*] (Art. 1 IPRG). Art. 116 IPRG establishes the principle that a choice of law of the parties shall generally prevail over any statutory assumption. Consequently, any agreement shall principally be governed by the law the parties have chosen (Art. 116 IPRG Par. 1). The choice of law must be made either explicitly or implicitly, i.e., it must at least undoubtedly ensue from the provisions of the parties' contract or from the circumstances (Art. 116 Par. 2 IPRG). However, the parties can also choose the governing law impliedly (see Amstutz/Vogt/Wang [*], Art. 116 IPRG, Note 39]. The parties may further opt to make their choice of the governing law only after the valid and binding conclusion of their sales contract. As a result, such a subsequent choice may have retrospective effect, i.e., back to the moment when the parties entered into their agreement (Art. 116 Par. 3 IPRG). But the latest moment when the parties may make their subsequent choice is predominantly influenced by and has to follow any civil procedural rules and provisions of the relevant Canton (see Amstutz/Vogt/Wang, Art. 116 IPRG, Note 49). In the current proceeding, both parties presume their valid and binding choice of Swiss law as the governing law for their sales contract with regard to Art. 11 of the «General Terms of Delivery». Hence, the Court assumes as well the application of Swiss law as the governing law for the parties' sales contract.

[Supplementary argument for Swiss law based on place of characteristic performance in Switzerland]

In other respects, even Art. 117 IPRG [*] - if applicable - would not lead to another conclusion. According to this provision, if a contract is silent on the governing law, the law of that state shall apply with which the contract or respectively the characteristic performance is most closely linked and connected (Art. 117 Par. 1 and 2 IPRG [*]). In the event of contracts for the provision of ownership and for the sale of goods, the seller renders the characteristic performance. With regard to building contracts (Werkverträge), the characteristic performance is the manufacturing and supply of the relevant goods (Art. 117 Par. 3 IPRG; see Amstutz/Vogt/Wang [*], Art. 117 IPRG, Note 24 and 43). Therefore, the basis for the specification and definition of the governing law under Art. 117 IPRG can be the place of [seller]'s establishment in Uzwil, Switzerland, leading to the application of Swiss law as the governing law as well.

2.
[Application of the CISG]

A question present is whether or not the CISG is applicable to the parties' sales contract. Israel has not ratified the UN Convention on Contracts for the International Sale of Goods (CISG). According to Art. 1 CISG, its provisions shall apply even though both parties do not have their places of business in Contracting States where the relevant conflicts of laws rules lead to the application of the law of a Contracting State as the governing law.

In this case, Swiss law is applicable and the parties' dispute cannot be deemed an international dispute under Art. 1 IPRG [*]. As a result, all of the provisions of the Swiss IPRG apply and must be complied with, insofar as there are no bilateral or multilateral agreements which contain special provisions on the matters and issues in question (Art. 1 Par. 2 IPRG).

According to Art. 1(1)(b) CISG, its provision as a multilateral agreement shall apply and be adhered to, if:

(i) First, any national conflicts of laws rules refer to any valid and binding State contracts of Switzerland as the place of the forum;
(ii) Second, the State of the forum has not implemented a reservation under Art. 95 CISG; and
(iii) Third, the parties have not explicitly or impliedly excluded the application of the CISG through the direct choice of any national substantive law (see Siehr, in: Honsell [*], Art. 1 CISG, Note, 15).

[Question of implied exclusion of CISG]

In this case, the only exclusion issue is whether the parties have impliedly excluded the application of the CISG, because they have undisputedly chosen Swiss law as the governing law of their sales contract (see Art. 6 CISG), and one may assume its general application. Apart from an explicit exclusion, parties may impliedly exclude the application of the CISG pursuant to Art. 6 CISG. However, the Court does not assume such an implied exclusion, where the parties have not recognizably restricted their choice of Swiss law as the governing law merely to national substantive law of Switzerland (see Siehr in Honsell [*], Art. 6 CISG, Note 6). Further, the CISG applies to sales contracts in a strict sense as well as to agreements for the manufacturing and supply of goods, as in this case (Art. 3(1) CISG); see Siehr in Honsell [*], Art. 3 CISG, Note 3). For this reason, the CISG is applicable to the parties' sales contract.

IV. [SELLER'S COUNTERCLAIM AND SET-OFF]

1.
[Summary of buyer's payment obligations]

It is undisputed that [buyer] ordered from [seller] a machine for the production of textiles - type BEN-SIZETEC. The «Confirmation of Order» of 30 April 1996 is decisive as to the contents of [buyer]'s order. The parties previously agreed to August 1996 as the prospective delivery

date. At the second «Confirmation of Delivery», the parties agreed to that delivery as decisive and binding - [buyer] had already pre-paid an amount on account (Akontozahlung) of US $380,000. Before [seller] was obliged to deliver the goods, [buyer] had the duty to pay an additional amount on account of SFr 398,960 and to provide for the re-issuance of the expired letter of credit.

[Court's restatement of buyer's default as to payment obligations]

The Court restates that [buyer] has been unable to pay any debts and that bankruptcy and liquidation proceedings have been commenced since 24 November 1996 at the latest. In fact, in October 1996 [buyer] or respectively the temporary liquidator asked [seller] for the restitution of all prepaid amounts on account. The Court concludes this fact from [seller]'s note of 4 November 1996 addressed to [buyer]. Therein, [seller] notified [buyer] that the ordered machine had been ready and available for delivery and shipment to [buyer] since 14 August 1996. However, [buyer] had not complied with the conditions precedent for the delivery, i.e., the necessary and required pre-shipment payment and the re-issue of the already expired letter of credit. [Seller] expressly stated it still requests and asks [buyer] to abide by its payment obligations. [Seller] set a period of grace until 30 November 1996. By this date, [buyer] should provide for the payment of the still outstanding and remaining amount of SFr 988,960. [Seller] reprimanded [buyer] to pay its outstanding debts in an amount of SFr 398,960 pre-shipment, plus an additional amount of SFr 590,000 via letter of credit once again in its letter of 4 February 1997 wherein [seller] set a final period of grace up to 15 February 1997. Furthermore, [seller] stated that it would refuse and object to any later performance and claim damages instead. After [buyer] did not pay any of the aforementioned debts by 15 February 1997, [seller] waived its right for performance under the sales contract on 17 February 1997 and filed its claim for damages. The Court concludes that [buyer] has been in arrears with its payment obligations since this point at the latest.

2.
[Outline of general right and preconditions for seller to declare avoidance of contract]

According to Art. 64 CISG, a seller of goods is entitled to declare the avoidance of a sales contract -- it may rescind the contract (see Art. 81 et seq. CISG) -- provided that the buyer does not perform its obligations to pay the purchase price or to accept the goods within an additional period of grace as subsequently fixed by the seller. The declaration of avoidance has the consequence that both parties shall be released from any contractual obligations, subject to any damages which may be due and payable, and that they are vested in with claims for restitution in respect of any performances in part previously rendered (relationship for restitution (Rückabwicklungsschuldverhältnis); Art. 81(1),(2) CISG). Furthermore, the avoiding party may also claim compensation for any loss and expenditures including any loss of profit suffered as a consequence of the other party's breach of contract (Art. 74 CISG). The party claiming damages has a duty to mitigate any loss (Art. 77 CISG). Although a party is not liable for a failure to perform any of its obligations if [seller] proves that the failure was due to an impediment beyond its control and ability to influence and that it could not reasonably be expected to have taken the impediment into account at the time of the conclusion of the sales

contract or to have avoided or overcome it or its consequences (Art. 79 CISG), mere lack of financial wherewithal and capital is generally irrelevant; this general rule is even more applicable if the lack of financial ability is based on mismanagement (see Magnus [*], Art. 79 CISG, Note 13 et seq.).

[Valid and binding declaration of avoidance by seller]

In this case, there was undisputedly a valid and binding agreement on the manufacturing and supply of goods, whose performance was in turmoil due to [buyer]'s non-performance; [buyer] did not provide for the required pre-shipment payment of SFr 398,960 and for the re-issuance of the expired letter of credit, after [buyer] had already pre-paid on account an amount of US $380,000 and had provided for the issuance of a letter of credit in the amount of SFr 590,000. [Seller] was ready to act in accordance with its obligations under the sales contract in August 1996; however, it was only obliged to deliver the goods via shipment and to have the machine installed and introduced at the [buyer]'s factory, when [buyer] performed its pre-payment obligations. The background to the non-performance of [buyer]'s payment duty was apparently [buyer]'s bankruptcy and insolvency that occurred in July 1996 at the latest. [Buyer]'s bankruptcy led to the appointment of a liquidator since 24 November 1996 at the latest. The mere inability to repay outstanding and mature debts is not at all a factor relevant to absolving and releasing [buyer] from its contractual duties and obligations. [Buyer] has not come forward with any other circumstances or facts that may have exculpated and excused [buyer]. Further, [buyer] was not in the position to declare the avoidance of the contract for the manufacturing and supply of goods, because it was in default in [buyer]'s contractual obligations and duties under this agreement. In opposition, [seller] was allowed to waive any subsequent performance after the lapse of the fixed additional period of grace and claim damages instead due to [buyer]'s non-performance (Art. 61(1) and (2) in connection with Art. 64(1) CISG). [Buyer] neither denies nor objects to the fact that [seller] has already given [buyer] a valid and binding notice about its declaration of avoidance of the contract, waiving any rights thereunder except claims for damages. [Seller]'s declaration causes the termination of their sales contract pursuant to the system of the CISG (Art. 64(1)) whereby this contract will be altered into a relationship for restitution (Art. 81 et seq. CISG; see Weber [*], Arts. 81-84 CISG, Note 9). A confirmation of this unilateral right to have an agreement altered and avoided does not deprive [seller] of its right to claim damages under Art. 74 et seq. CISG (see Arts. 61(2) and 81 CISG).

3.
[Buyer's claim for restitution]

The aforementioned relationship of restitution is predominantly influenced and governed by the result that both parties will be released from any contractual obligations under their sales contract subject to any due and payable claims for damages (Art. 81(1) CISG). In the event that one of the parties has partly or wholly performed its obligations thereunder, this party may claim restitution of its performance (Art. 81(2) CISG). Such a restitution would pertain to [buyer]'s payment on account of US $380,000. [Seller] appreciates and acknowledges such a claim for restitution but it concurrently sets-off its own counterclaims for damages due to

[buyer]'s breach of contract (Art. 74 et seq. CISG). These counterclaims exceed in extenso [buyer]'s claim for restitution.

4.
[Jurisdiction and governing law as to seller's counterclaim]

To determine the competence and jurisdiction of a court as to a counterclaim and set-off, jurisprudence and case law focuses on the lex fori (see Amstutz/Vogt/Wang [*], Art. 148 IPRG [*], Note 15). In the present case, the counterclaim envisages a claim for damages due to an international contractual relationship. Therefore, the definition and specification of the governing law and jurisdiction for the counterclaim under international private law follows the jurisdiction and governing law of the predominant claim. As a result, Swiss law and the CISG are applicable with regard to [seller]'s counterclaim too. The Court is hence competent and has jurisdiction -- internationally and locally -- to decide on the counterclaim as well (see Leuenberger/Uffer [*], Art. 70 ZPO [*], Note 3).

5.
[Impact of buyer's insolvency on seller's right to set-off]

According to Art 148 Par. 2 IPRG [*], the applicable law ensues from the law of the underlying claim which shall be extinguished by setting-off [seller]'s counterclaim. Consequently, Swiss law shall be applicable (see Amstutz/Vogt/Wang [*], Art. 120-126 OR [*], Note 7). The CISG does not encompass any provisions dealing with set-off and counterclaims so that one may make recourse to the Swiss law of obligations (OR [*]).

Under Swiss law, prerequisites for set-off are merely in turn: (i) legal existence of the counterclaim; (ii) its maturity; (iii) its mutuality; and (iv) the similarity of both claim and counterclaim.

In general, all necessary ingredients for a set-off between [seller]'s claim for damages and [buyer]'s claim for repayment have been fulfilled. [Buyer] argues in its first reply that [seller]'s claim for damages cannot be filed with a court while there are insolvency and liquidation proceedings still ongoing in Israel against [buyer]. Therewith, [buyer] refers to Art. 123 Par. 2 OR [*] in connection with Art. 213 Par. 2 No. SchKG [*] to give the raison d'être for [buyer]'s arguments. These provisions exclude any set-off with claims against a company against which insolvency or bankruptcy proceedings have already been opened, provided that the relevant debtor has become the holder of a counterclaim against the insolvent creditor only after the commencement of those bankruptcy proceedings. However, it is possible to declare a set-off, if the counterclaim stems from legal matters and facts which were in existence prior to the start of those insolvency proceedings (see Stäubli/Dubacher [*], Art. 213 SchKG, Note 21; BGE [*] 111 Ib 149 et seq. E.3).

[Rise of seller's counterclaim prior to buyer's insolvency]

[Seller] has changed its original contractual claim for payment of the purchase price pursuant to Art. 107 OR [*], respectively, Art. 64 CISG, into a claim for damages by virtue of [buyer]'s default. [Seller] has introduced this counterclaim in the current action to have it set-off with [buyer]'s claim for repayment and restitution. Although that claim has already been changed and altered, timely and factually, it falls back to the time of the conclusion of the sales contract here in question. As a consequence, [seller]'s counterclaim arose prior to the commencement of the insolvency and bankruptcy proceedings against [buyer]. The Court's point of view is in accordance with the CISG whereby the person who suffered any damages or losses may choose between compensation of its negative or positive interest in the contract after the contract has been avoided and terminated (see Schönle [*], Prenotes to Arts. 74-76 CISG). By the same token, there are no obstacles or impediments to the declaration of a set-off by [seller], so that the Court may principally allow [seller] to proceed with its counterclaim and set-off. Thereby, it may remain undecided whether or not the provisions in question of the national SchKG [*] can be actually transplanted to an international relationship where several bankruptcy systems are competing and significantly differing, since the SchKG [*] is limited to the territory of Switzerland and any bankruptcy proceedings occurring therein.

6.
[General scope of seller's claim for damages]

The claim for damages under Art. 74 CISG, which [seller] has introduced for a set-off, encompasses compensation for either the negative or positive interest in the sales contract of the party who suffered any loss or damages due to a culpable breach of contract of the other party (see Art. 79 et seq. CISG). Furthermore, the aforementioned right for compensation of either the negative or positive interest may be chosen in the event of a valid declaration of avoidance of the underlying sales contract (Schönle [*], Art. 74 CISG, Note 17]. This claim for damages particularly entails any depreciation in the value of assets, i.e., losses and damages, and especially loss of profits (Art. 74 sentence one CISG). However, this claim may not exceed the loss which the party in breach foresaw or ought to have foreseen at the time of the conclusion of the contract, in the light of the facts and matters of which [seller] then knew or ought to have known, as a possible consequence of the breach of contract. (Art. 74 sentence two CISG). On the other side, the party claiming for damages is to take mitigating techniques and measures as to the loss occurred which seem reasonable under the relevant circumstances. If the claimant fails to comply with its own mitigating duties, [seller] has to bear any extended and intensified damages and losses so that its own claim shall be reduced accordingly (see Art. 77 CISG).

7.
[Buyer's allegations as to lack of substantiation of seller's counterclaim]

[Buyer] alleges that [seller] has not substantiated its counterclaim sufficiently. The ingredients of the required substantiation of a party's statements and arguments at court are dealt with in the Cantonal civil procedure rules. Nevertheless, the application of the principle of negotation as embedded in most of the Cantonal civil procedure rules must not aggravate or impede the application of any Federal legislative act. According to the latest jurisprudence of

the Federal Supreme Court, Federal law ultimately decides within its ambit to what extent any statement of the parties has to be substantiated. Therefore, Federal law is the decisive factor to consider on the question whether facts brought forward may be subsumed under Federal law so that a court may hand down its legal opinion on such an assertion. But the Federal Supreme Court further states that, in principle, the Cantonal sovereignty with regard to any procedural rules shall remain unaffected, unless such a Federal restriction is necessary to secure the application of Federal substantive law (see BGE [*] 108 II 339 et seq. E 2 and 3; 98 II 117; see also BGE 117 II 113 et. seq. E. 2).

a)
[Substantiation of allegations under civil procedure laws of St. Gallen]

Under the civil procedure laws of St. Gallen, any contention of a party is sufficiently substantiated, if -- broken down in several singular facts -- it is detailed to such an extent that a court is in a position to take evidence on that allegation (see Leuenberger/Uffer [*], Art. 56 ZPO [*], Note 2a/aa). Even under the jurisprudence of the Federal Supreme Court, the necessary substantiation may not just allow the application of Federal law on that case but it must also provide for the ability of the relevant court to take evidence in order to have such contentions proven (BGE [*] 108 II 341 E. 3). Case law shows further that court hearings shall not play the role of supplementing missing data and thrusts in the relevant parties' particulars and filings as to the facts of the case. For this reason, it is not a violation of Federal law to come to the conclusion that a substantiation may be refused and denied whose gaps are be filled through a court hearing (BGE [*] 108 I 341 E. 3). Hence, it does not infringe Federal law per se, if Cantonal law and legal practice require a defendant to comply with a certain level of substantiation in respect of its objections to plaintiff's allegations. All of its objections are to be given as detailed as possible, so that any court may solely specify with a look at them to which contentions of the plaintiff shall be objected (see Leuberger/Uffer [*], Art. 56 ZPO [*], Note 2b; BGE [*] 117 II 113 et seq.). However, the defendant's burden to object in a substantiated manner does not lead to a reversal of the burden of proof. According to an obviously correct argument and allegation, a Court must not appreciate any explicitly asserted facts that may have been proven throughout a court's hearing, if they belong in a certain sense to the alleged facts (see Leuenberger/Uffer [*], Art. 56 ZPO [*]. Therefore, civil procedural rules of St. Gallen do comply with the Federal framework as filled in.

b)
[Burden of proof as to counterclaim]

[Seller] bears the burden of proof for the counterclaim it seeks to set-off. [Seller] demonstrated that [buyer] was in default with its payment obligations as well as that [seller] was not able to realize the purchase price of SFr 1,420,000. Consequently, [seller] has generally acted in accordance with the aforementioned principle of substantiation. [Seller]'s counterclaim is sufficiently specified. Furthermore, [seller] has also brought forward enough and sufficient facts as to the quantity and quality of its counterclaim in that (i) [seller] gave proven evidence of its manufacturing costs and expenditures and loss of profits suffered, and (ii) it also asked for the hearing of several witnesses and for mandating an expert. The same

applies to the additional costs for transport, storage and disassembly of the machine. [Seller] even substantiated and demonstrated satisfactorily the amount by which its counterclaim shall be reduced. As a consequence, the Court rejects [buyer]'s reprimand of lack in [seller]'s substantiation and does not recognize this argument at all.

8.
[Decision on seller's counterclaim]

[Seller] claims compensation for the agreed manufacturing and supply costs as well as for any additional costs for transport, storage and disassembly by way of set-off. Concurrently, it agrees to a reduction of its claim in an amount of SFr 329,075 by virtue of its duty to mitigate damages. In particular, [seller] claims as follows:

Purchase price:	SFr	1,420,000.00
Re-transport, additional costs for storage and containers	SFr	12,784.08
Costs for disassembly	SFr	19,230.10
Aggregate Amount	SFr	1,452,014.18

a)
[Determining the level of damages under Art. 74 CISG]

The decisive variable for the determination of the level of damages occurred is the difference between the value of [seller]'s present assets and the hypothetical value of its assets under the assumption that [buyer]'s breach of contract had not occurred (see Schönle [*], Art. 74 CISG, Note 11).

b)
[Restatement of Seller's right to compensation by way of set-off]

The Court assumes that [seller] may claim compensation for its positive interest in the parties' contract by setting-off. Consequently, its counterclaim may generally reach the level of the purchase price of SFr 1,420,000 as agreed to. Additional devaluing factors of its assets are the costs for storage and furthermore the costs for the re-transport to the relevant storehouse as [seller] listed correctly in its rejoinder. However, the expenditures for the initial transport to the harbor cannot be deemed additional costs, because they were included in the overall price for the manufacturing and supply of the goods. This leads to a slightly different list of additional costs as follows:

Costs of the re-transport		
- ½ of the transport costs (SFr 14,563)	SFr	7,281.50

- ½ of the container costs (US $5,706)	US	$2,853.00
Storage costs [in Deutsche Mark (DM)]	DM	2,210.00

With regard to the costs for disassembling the ordered machine, one has to take notice of the principle that such costs can only be acknowledged if the disassembly was necessary or at least justifiable or arguable (duty of mitigation; Art. 77 CISG). The Court will come back to this issue at a later stage in this judgment.

9.
[Extent and scope of seller's claim for damages]

Under Art. 74 sentence two CISG, damages may not exceed the loss which the party in breach foresaw or ought to have foreseen at the time of entering into the contract, in the light of the facts and matters of which [seller] then knew or ought to have known, as a possible consequence of the breach of contract.

Loss of profit -- reduced by reasonable mitigating measures -- is a generally foreseeable result of non-performing contractual obligations. In particular, the actual level and amount of damages occurred is not a necessary prerequisite of the aforementioned foreseeability to grant a claim for damages (see Schönle [*], Art. 74, Note 24) but the ability to foresee the general possibility of the occurrence of damages due to a breach of contract as subsequently occurred (see Schönle [*], op. cit.). An objective assessment of the probability for the occurrence of damages is decisive and suffices. Risks being recognizable for everyone such as the possibility of negative movements in the price for the goods concerning any covering sales and acquisitions and particularly of the market price count with regard to listing all positions that [seller]'s claim for damages comprises (see Schönle [*], Art. 74 CISG, Note 24). This principle shall apply in the case of obvious difficulties to re-sell the goods by virtue of seller's duty to mitigate any loss. The Court may only decide otherwise, if force majeure, i.e., absolutely unexpected movements in the market, may have unforeseeably impeded or aggravated the re-sale of the sold textile manufacturing machine. Further, the existence of this type of force majeure must be based on an expert's opinion of the market for textile machines. Such an expert's opinion or even any facts for force majeure have not been demonstrated by [buyer]. In other respects, the Court will come back to the particular market situation hereinafter.

10.
[Analysis of seller's compliance with duty to mitigate]

The Court has to analyse whether [seller] has truly complied with its duty to mitigate the occurrence of any losses and damages as was reasonable in the circumstances (Art. 77 CISG). [Seller]'s counterclaim may be reduced to the extent it took measures to mitigate the losses or ought to have taken such measures. Such measures entail namely the re-sale or respectively the re-utilization of the sold machine, if there was not any market place for such

a kind of production machine, because it was unique. Furthermore, these measures also entail the avoidance of any unnecessary expenditures and costs (see Magnus [*], op. cit.).

a)
[Statements of the parties as to seller's mitigating measures]

[Buyer] alleges that the ordered machine could have been entirely re-utilized as a whole or at least via disassembling all individual parts. [Seller] did not give any evidence which measures exactly it had taken to have the machine resold as a whole or to have all of its parts re-utilized in the best and most effective manner. [Buyer] contends that since [seller] did not substantiate the mitigating measures it has taken, one must assume that it did not carry out sufficient mitigating measures.

[Seller] objects to [buyer]'s allegations; it argues the machine was unique. For this reason, such a machine could not have been further re-sold or re-utilized except to the extent it had already done. [Seller] brought forward it had disassembled the machine and reutilized some individual parts of that machine in an aggregate amount of SFr 151,295. Additionally, [seller] could save costs and expenditures in the amounts of SFr 29,480 (assembly of the machine ex factory), SFr 142,000 (commission fees) and SFr 6,300 (freight costs). In the light of the aforementioned additional savings and additional income due to re-utilizing parts of the machine, [seller] acknowledges the aggregate amount of SFr 329,073. By this amount, its claim for damages shall be reduced. However, [seller] has not given any details and facts as to which measures it might have taken to mitigate its losses occurred up to the maximum and why those measures were unsuccessful.

b)
[Evidence heard and taken upon seller's mitigating measures]

[Buyer] objects to [seller]'s acknowledged positions that may reduce its own claim for damages as unsubstantiated and insufficiently, in that [buyer] brings forward that [seller] might have been obliged to take additional measures to mitigate the damages and losses occurred. Insofar the Court does have the duty to take evidence on these arguments. However, [buyer] bears the burden of proof in its capacity as the person who may be held liable for the contended damages pursuant to Art. 8 ZGB [*] (see Magnus [*], Art. 77 CISG, Note 16). The Court appreciates that it might be extremely burdensome and difficult to prove [buyer]'s allegations to the satisfaction of the Court, because [seller] only is in the position to give notice about its particular measures to mitigate. This is a general, widespread and very common problematic situation (see Art. 324 Par. 1, 337c Par. 2 OR [*]). Nonetheless, the difficulty to give good evidence and proof does not justify a reversal of the burden of proof in a strict sense (see Kummer [*], Art. 8 ZGB [*], Note 186 et seq.). Nonetheless, such a situation may lead to [seller]'s (procedural) duty to assist with regard to taking evidence. In the event that [seller] does not adhere to such a duty to help and assist although it seems unreasonable and not in compliance with the principles of good faith, the Court may include this fact in its opinion on and weighing of the evidence taken (see Leuenberger/Uffer [*], prenotes to Art. 123-133 ZPO [*] and Art. 123 ZPO, Note 9).

[Burden of proof and seller's duty to assist]

It is worth noting that the aforementioned duty to assist and help is not equal to the substantiating duty as mentioned above borne by the party who bears the burden of proof pursuant to Art. 8 ZGB [*]. The latter party is to assert individual and independent facts in its particulars and to give evidence for each particular allegation and contention [see Leuenberger/Uffer [*], Art. 56 ZPO [*], Note 2a/aa). In fact, this duty to assist is a mere procedural duty and obligation, which any judge and court may reprimand to comply with in respect of its preceding of the legal action. Nevertheless, one shall also require that the party who obviously holds the means of evidence in question may independently come forward with any facts that are positive for its legal position; such an independent statement may also be effected in its own interest. It cannot be a judge's and the other party's business to independently investigate any distant facts that might be given by the party who has the duty to mitigate the occurrence and intensification of any losses and damages. Furthermore, substantive law also asks for an autonomous duty to disclose any necessary facts for the party who has to mitigate (Art. 77 CISG). Hence, the Court is in the position to request a certain level of the parties' arguments and statements of facts as to their substantiation without the application of the Swiss provisions for substantiation under Federal and Cantonal law.

c)
[Initial statement of the Court as to common sense and its belief]

The Court notes beforehand that one cannot assume according to common sense that [seller] did not take the necessary and sensible measures to mitigate any losses and damages, because [seller] has its own self-interest reasons for minimizing any prospective loss and damages to the extent possible.

d)
[Seller's ability to resell the machine wholly or separately]

In consideration of the parties' arguments on [seller]'s duty to mitigate, the Court has to decide mainly the question whether one could assume that [seller] was able to re-sell the machine wholly under the circumstances of the market place for used textile manufacturing machines and the particularities of the sold machine. It is thereby decisive whether that machine was unique or more or less a standard model without any detailed specifications. The way one classifies the machine may lead to a different response to the aforementioned question. Further, the classification may also give additional hints about any potential opportunities to resell that machine or to re-utilize it in any other manner, i.e., whether or not the machine could have been resold wholly or just partly re-utilized after its disassembly.

[Expert's opinion on the level of mitigating measures]

The question of what [seller] could have done to mitigate the level and amount of damages that occurred was part of Mr. Meyer's expert opinion. In this opinion, the expert stipulates general statements as to the organization of the market place for used textile machines. The

expert restated in its court hearing that used manufacturing machines might normally be purchased by intermediaries for the sale of used machines ex loco or these middle-salesmen get hold of those machines only in commission. In general, the purchase price is always a question of the individual case and negotiations with regard to used machines. In the opposite, individual parts from different manufacturing facilities may only exceptionally be exchanged respectively disassembled and re-utilized for any new production facilities due to lack of their compatibility. Modern production facilities with digital processing shall further be valued very modestly in the market place for used textile machines. The machine that was supposed to be delivered to [buyer] was specially produced and specified for [buyer]'s range of products. Buyer has merely one sow box [a container (trough, pan) of the size solution of a warp-sizing machine, often steam jacked and/or provided with open or closed steam piping for heating the size solution]. Therefore, this individually manufactured machine was specified for a limited amount of weaver's beams and threads. Consequently, the probability to have this special machine resold for a reasonable and adequate price within as a fast time as possible seems very low. Overall the entire production facility contained parts that might have been used widespread and re-utitilized as well as pieces that were merely defined, designed and specified to [buyer]'s particular order and situation. The expert is of the opinion that the maximum amount for a prospective sale on the market place for used machines without any further specification is within a range of SFr 500,000 and SFr 900,000. Notwithstanding, the opportunity to have this machine resold as a whole is deemed very improbable. Furthermore, the expert's assessment presumes an overall purchase price for the partial re-sale of individual modules in an amount of SFr 301,000 at the maximum. In the event that [seller] might have used all of the modules and individual parts of the machine for its own purposes, the expert states a possible re-utilizing value of up to SFr 500,000.

[Court's conclusions in the light of expert's opinion]

The Court concludes from the expert's opinion, hearing and its written statement (No. 2.1 to 2.5) that a purchase price of SFr 900,000 might have been possible under very favorable circumstances but correspondingly very improbable as well. However, seeking a purchaser for the whole manufacturing facility might have led to [seller]'s very burdensome and time consuming activities in this respect and to additional storage of all of the different parts of the machine. According to the expert's opinion, the actions [seller] took as it disassembled the machine in order to rapidly re-utilize any saleable parts were the most reasonable, sensible and prudent actions it might have taken in a technical and commercial sense.

[Court's restatement of seller's compliance with duty to mitigate]

The Court further restates that the expert's arguments and conclusions are convincing without any doubts. The expert gave satisfying, conclusive and convincing answers to all of [buyer]'s redefining and specifying questions. For this reason, the Court agrees with the expert's conclusion that [seller] acted principally in compliance with its duty to mitigate the occurrence of losses under these circumstances. This conclusion ought not to be changed merely due to the fact that the expert assumed a possible maximum purchase price of SFr 301,000 in the case of reselling all parts and modules separately, which was higher than the overall income

[seller] actually received from the resale of the machine. Thereby, it is worth noting that [buyer] has not brought forward any further and additional general objections to the expert's conclusions and statements during the Court's hearing of the expert and at a later stage.

e)
[Costs for disassembly of machine within scope of seller's counterclaim]

[Seller]'s decision to have the machine very rapidly disassembled was the most reasonable and prudent solution according to the expert's opinion. Therefore, the costs for disassembling the production facility are also deemed part of the damages [seller] suffered, in an amount of SFr 19,230.10. Furthermore, the Court takes the view, which is absolutely in compliance with the expert's statement, that re-utilizing the machine may have been only a possibility which could have caused significant losses.

f)
[Restatement of sufficient specification of the disassembly costs by the expert and seller]

[Buyer] alleged that [seller]'s contentions -- that the individual parts of the machine could not be re-utilized in another way than it had done and with respect to which parts were used in what particular way and how they were re-utilized -- have not been satisfactorily specified and defined. In the expert's opinion, all of the individual parts, modules and components of the machine were specified and listed in detail. Further, [seller] informed all participating parties to this proceeding about the prospective purchase price for each of these components. The expert pointed explicitly at the fact that those prospective purchase prices are based on assumptions and assessments due to assumed manufacturing costs and the usual market price in the market place for used textile machines. These assumptions apply vice versa in the case of the resale of single components over this market place in that the expert assumed a maximum purchase price within a range of SFr 105,000 to SFr 220,000 and under the most favorable circumstances up to SFr 301,000. At any rate, [seller]'s solution to have the components of the machine re-utilized on its own resulted in a significantly higher purchase price of SFr 500,000 than the sale at the market place for used machines. The Court agrees with this assumption and conclusion in this case as well.

11.
[Currency and currency exchange rate applicable to repayment of [buyer]'s payment on account]

[Buyer] seeks from [seller] the redemption of an amount in US dollars. [Seller] has refused to be held liable to repay the equivalent amount of US $380,000 in Swiss francs under the current exchange rate. [Seller] asserts that the parties agreed to a fixed exchange rate as to the paid US $380,000. The amount of US $300,000 shall be equal to SFr 338,400; the amount of US $80,000 shall be identical with SFr 92,640, i.e., the exchange rate for an amount of US $300,000 was SFr 1.128; and for the further US $80,000 was SFr 1.158. [Seller] argues that it had the amount of US $380,000 converted immediately into Swiss francs. If [seller] is obliged to redeem this amount received, it should be allowed to do so in Swiss francs according to

their contractual agreement. [Seller] should be only obliged to repay as many US dollars as were the equivalent to SFr 431,040 in respect of the then current exchange rate. Any subsequent negative movement in the exchange rate of the US dollar ought not to lead to an increase in its obligation to repay a larger amount to [buyer] due to [buyer]'s default and breach of contract.

[Principle of payment in debtor's local currency in the absence of any specific provision]

According to Art. 84 Par. 1 OR [*] payment duties which are to be performed and fulfilled in fiat money have to be paid in the current national currency. If the relevant agreement refers to and defines a particular currency which cannot be exchanged into the local currency at the place of payment and performance of this debt, then it is an option for the debtor to provide for payment of its debt owed in its own local currency at maturity pursuant to Art. 84 Par. 2 OR, unless the agreement uses the wording «effective» or any similar expression in order to claim explicitly the performance of and compliance with each provision, letter and syllable in that relevant agreement. Art. 84 Par. OR [*] is deemed to protect the legal rights and position of debtors (see Weber [*], Art. 84 OR, Note 346). In this case, the purchase price under the parties' sales contract was to be paid in the legal currency of Switzerland, i.e., Swiss francs; the payments on account in question are dedicated to Swiss francs and US dollars.

[Buyer's default predominant argument for seller's right to choose currency]

The stipulation of the currency for the purchase price and the payment on account may lead to the assumption of a contractual right for [buyer] to choose the legal tender for its payments under their sales contract. The Court stipulates that the parties' sales contract does not entail any provision providing for an effective payment and its currency. Therefore, [buyer] did have a right to pay its debts in both Swiss francs or US dollars under any circumstances. The relationship for restitution amongst the parties after [seller]'s declaration of avoidance of the sales contract serves to restore the current status to the status quo ante (see Weber [*], Art. 81 CISG, Note 4). One might conclude from the aforementioned recovery of the status quo ante that the debtor might have a legal right to claim redemption of any pre-paid amount in the same currency as the debtor paid for. However, in any relationship for restitution the debtor for the redemption of the pre-paid amount is concurrently the creditor of the purchase price. This fact gives an argument that now this party might have the right to choose the relevant currency pursuant to Art. 84 Par. 2 OR [*]. The main thrust for such an argument is mainly built on the fact that the overall purchase price was dedicated to Swiss francs only and that -- in a certain sense -- all of the payments on account could be performed in both currencies for the prevailing exchange rates at that time.

However, the declaration of avoidance of the sales contract by [seller] was a result of [buyer]'s default and the claim for damages derived therefrom is still in existence, since [buyer] has not been able to exculpate itself (see Weber [*], op. cit., Art. 81 CISG, Note 9). Under ordinary Swiss provisions dealing with the default of any debtor, such a claim for damages includes compensation for any damages occurred by virtue of any exchange rate losses. Those Swiss provisions about a debtor's default and its consequences are at least analogously applicable

in this case. With regard to debtor's default, there is a valid factual assumption that the relevant creditor of a foreign debt might have immediately exchanged that amount into Swiss francs when it had received this payment at maturity (see Weber [*], Art. 84 OR, Note 362; Guhl/Koller [*], Sec. 32, Note 10). Unless the party in arrears proves otherwise, a creditor is empowered to claim damages for any suffered exchange rate loss due to the default, i.e., [seller] may claim for the payment of an amount calculated on the more favorable exchange rate at maturity date (see Wiegand [*], Art. 103 OR [*], Note 6). Correspondingly, the same shall apply in respect of a relationship for restitution by virtue of debtor's default, because [buyer] has not been able to exculpate itself. [Seller] asserts -- in accordance with the factual assumption mentioned above -- that it had the prepayment it received immediately exchanged into Swiss francs. Notwithstanding, [buyer] has not offered any counter-argument and proof. Any exchange back into US dollars might be even more expensive right now. If [seller] were directed to repay the prepaid payments on account, all aforementioned arguments lead to the result that -- in analogy to Art. 84 Par. 2 OR [*] -- it might be allowed to comply with such a possible duty under this judgment either in Swiss francs (SFr 338,400 plus SFr 92,640 = SFr 431,040) or in the equivalent amount in US dollars under the current exchange rate.

12.
[Restatement of seller's counterclaim in foreign currencies]

All of the aforementioned foreign currencies (see No. 8.b)) shall be calculated with their exchange rate at the respective maturity date (container invoice of 22 October 1996 and paid on 28 October 1996; invoice for storage costs by Fa. Schenker of 23 December 1996 and paid on 16 January 1997). According to the confirmation given by the Cantonal Bank of St. Gallen, the average foreign exchange rate for US dollars was SFr 1.2572 in October 1996 and for Deutsche Mark SFr 86.69 in January 1997.

Consequently, the positions mentioned above under No. 8.b) are in turn:

- costs for the transport back to Switzerland:		
-- including ½ of the transport costs (SFr 14,563)	SFr	7,281.50
-- including ½ of the container costs (US $5,706) (exchange rate 1.257)	SFr	3,586.22
- storage costs: DM 2,210.60 (exchange rate 86.69)	SFr	1,916.36
total amount	SFr	12,784.08

13.
[Restatement of seller's counterclaim in the aggregate amount]

In summary, [seller]'s counterclaim for damages includes overall the following positions in turn:

- purchase price	SFr	1,420,000.00
- transport back to Switzerland; container and storage costs	SFr	12,784.08
- disassembly costs	SFr	19,230.10
total amount	SFr	1,452,014.18

[Seller]'s counterclaim is to be reduced by the amount mentioned by the expert Meyer. As mentioned above (No. 11), [seller] is generally obliged to redeem [buyer]'s prepaid payment on account of SFr 431,040. If one assumes in accordance with the expert's opinion that disassembling and re-utilizing the machine for its own purposes were the most reasonable and prudent mitigating measures [seller] could have taken, the maximum achievable amount to have reduced the damages and losses that occurred was SFr 500,000. Even if one assumes that [seller] could achieve a maximum amount of SFr 900,000, to have the occurred damages and losses mitigated, its counterclaim might at any rate go well beyond [buyer]'s claim for restitution.

[Seller's counterclaim: impact of Art. 74 sentence two (foreseeability of damages)]

According to Art. 74 sentence two CISG, damages may not exceed the loss which the party in breach foresaw or ought to have foreseen at the time of the conclusion of the sales contract, in the light of the facts and matters of which [seller] then knew or ought to have known, as a possible consequence of the breach of the sales contract. On this issue, the expert mentioned that the damages that occurred were only foreseeable for specialists who have a broad knowledge base of the cost structure for complex and connected assembly lines. Nevertheless, a specialist in the field of weaving might overview and understand the broad range and diversity of offered sizing machines, so that such a person would be in a position to estimate the significant difference between the market price for a new and specially produced and redefined manufacturing machine and for a used machine. For this reason, [buyer] in its capacity as a participant in the wholesale textile market had to have a rough understanding of the entire marketplace for textile machines and even more of the differences in the price for new and used machines on the opposite and assembly lines. This opinion suffices to come to the conclusion that [buyer] had to presume the occurrence of a significant difference between the purchase price under their sales contract and the possible purchase price in the event of a public auction on behalf of the seller or self-utilization of the production facilities and any parts of it. The ordered textile machine was produced for [buyer]'s individual purposes and consists of especially defined and manufactured components. Therefore, the Court denies any additional reduction of [seller]'s counterclaim.

14.
[Dismissal of buyer's legal action]

In consideration of all of the aforementioned facts and arguments, the Court wholly dismisses [buyer]'s claim and legal action and directs [buyer] to bear all costs of this proceeding and to indemnify [seller] against any costs and legal fees occurred.

15.
[Ancillary decision of the Court as to legal fees and expenditures]

Any costs and expenditures for this proceeding are borne by [buyer] (Art. 264 Par. 1 ZPO [*]). The Court sets the court's fee for this decision at SFr 25,000 with regard to the amount in dispute of SFr 560,000 (see the bailment decision of the President of the Commercial Court, St. Gallen, on [buyer]'s security deposit to commence its legal action in St. Gallen of 16 December 1999) and concerning the evidence taken. In addition, the Court added the expenditures associated with the expert's mandate and the opinion he provided in the amount of SFr 6,000. [Buyer]'s liability as to the legal costs are reduced in an amount of SFr 1,000 (fee for commencing this proceeding), SFr 25,000 (security deposit as to the potential legal fees and costs) as well as SFr 10,000 (pre-payment of prospective legal costs and expenditures. Respectively, the financial department of the Court is directed to redeem [buyer] the excessive amount of SFr 5,000. [Seller] has the right to indemnification for any attorney's fees incurred (Art. 263 Par. 1 ZPO). Its attorney pleaded for the payment of a lump sum in the amount of SFr 42,000 in respect of [buyer]'s paid security deposit for its honorarium, expenditures plus value added tax in the final Court's hearing. This amount is identical to the honorarium as restated in the security decision of 16 December 1999 and of 27 February 2002. The Court refers entirely to the reasoning of those decisions. [Buyer] is to indemnify [seller] in a lump sum of overall SFr 42,000. The financial department of the Court is directed to pay [seller] the security deposit as given by [buyer] in the amount of SFr 42,000 when this judgment becomes res judicata.

RULING OF THE COURT

The Commercial Court of St. Gallen rules that:

1. [Buyer]'s claim shall be dismissed.
2. [Buyer] is directed to pay all legal fees for this proceeding: SFr 31,000 encompassing the decision fee for this judgment; SFr 25,000 plus the expenditures for the expert's opinion of SFr 6,000. [Buyer]'s liability for the legal costs are reduced in an amount of SFr 1,000 (fee for commencing this proceeding), SFr 25,000 (security deposit for the potential legal fees and costs), and SFr 10,000 (pre-payment for prospective legal costs and expenditures. Respectively, the financial department of the Court is directed to redeem [buyer] the excessive amount of SFr 5,000.
3. [Buyer] is directed to indemnify [seller] in a lump sum of SFr 42,000. The financial department of the Court is directed to pay [seller] the security deposit given by [buyer] in the amount of SFr 42,000 when this judgment becomes res judicata.

President of the Commercial Court St. Gallen

Secretary of the Commercial Court

[...]