CISG-online 797	
Jurisdiction	Austria
Tribunal	Oberlandesgericht Graz (Court of Appeal Graz)
Date of the decision	24 February 1999
Case no./docket no.	4 R 224/98p
Case name	*Weapons case*

Translation[*] *by Veit Konrad*[**]

Translation edited by Institut für ausländisches und Internationales Privat- und Wirtshaftsrecht der Universität Heidelberg
Daniel Nagel, editor[***]

JUDGMENT

Defendant [Seller]'s appeal against the judgment of the Court of First Instance [District Court (Landesgericht)] of Klagenfurt of 29 July 1998 (26 Cg 84/97t-16)) is dismissed. [Seller] is liable to pay, within fourteen days, AUS (Austrian schillings) 31,131.18 (including AUS 5,188.53 of turnover tax (Umsatzsteuer)) as the cost of the appellate proceedings.

Further appeal (ordentliche Revision) is permissible under § 502(1) of the Austrian Code of Civil Procedure (Zivilprozessordnung; ZPO).

REASONING

In the first instance, Plaintiff [Buyer] of Slovenia claimed for payment of DM (Deutsche Mark) 134,000.00 and submitted the following:

[Buyer]'s position

[*] All translations should be verified by cross-checking against the original text. For purposes of this translation, the Plaintiff-Appellee of Slovenia is referred to as [Buyer]; the Austrian Defendant-Appellant is referred to as [Seller].

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[Buyer] is registered as a limited liability company (Gesellschaft mit beschränker Haftung, GmbH) under Slovenian law and qualifies as a commercial company. In response to an offer from [Seller], which had been placed together with a «pro-forma-bill» dated 11 November 1993, [Buyer] ordered diverse spare parts for Puch-Mercedes in the total amount of DM 130,000.00. As [Seller] insisted on payment in advance, [Buyer] on 23 December 1993 transferred DM 134,000.00 to [Seller]'s account at its bank in Klagenfurt on 23 December 1993. As completion of the contract failed, the agreement between the parties was cancelled by mutual consent. [Seller] at first promised to transfer the paid purchase price back to [Buyer]. Later, however, [Seller] refused repayment and unrightfully declared a set-off of the amount in question set off against losses from business relations with other contractors, i.e., other Slovenian companies, which, however, stood in no relation to [Buyer].

[Seller]'s defense

[Seller] admitted having received the amount of DM 134,000.00 from [Buyer], but denied that the parties had entered into business relations with one another. [Seller] alleged that the amount in question had been transferred to [Seller], on the initiative of certain institutions of the Slovenian State, which has been [Seller]'s actual business partner. Within the young State of Slovenia, governmental procurement had been conducted through State enterprises, which meanwhile might have been partly privatized. The Slovenian State -- acting through its organs and official representatives in its governmental ministries -- had entered into business relations with [Seller]. [Buyer] had only been involved as an intermediary in the execution of the deal. The use of several of such intermediaries by Slovenian State authorities had been common practice. The intermediate private companies -- among them [Buyer] -- had played a purely formal part in the business transactions with [Seller], which were actually directed by the Slovenian Ministry of Defense. With respect to the sales contract in question, the Ministry of Defense had ordered [Buyer] to act on its behalf in order to disguise its own involvement. Hence, the State of Slovenia, not [Buyer], had become part of the contract. Consequently, [Seller] claimed that a cancellation of the sales contract by mutual consent of the actual parties has never taken place. Payment of the purchase price had only been «effected through» [Buyer], executing an order in the sense of § 1400 of the Austrian Civil Code (Allgemeines Bürgerliches Gesetzbuch). In transferring the amount, [Buyer] had not actually performed its duties towards [Seller], but fulfilled obligations to the Slovenian State. Hence, [Buyer] is not entitled to claim the money back under the provisions of undue enrichment.

[Buyer]'s response

In response, [Buyer] based its claim for restitution on the provisions of undue enrichment as well as other causes of action. [Buyer] reduced its claim to DM 126,750.00, taking into account samples received in the total amount of DM 7,250.00. [Buyer] insisted that it had been totally unaware of its role as a mere intermediary in the deal. If [Buyer] had known this, [Buyer] would never have undertaken the transaction on its own risk.

Ruling of the Court of First Instance

The Court of First Instance granted [Buyer]'s claim -- except for the interest demanded exceeding 5%. The Court reasoned as follows:

- Since the 1960s, [Seller], through its Managing Director at the time, Mr F., has been doing business in former Yugoslavia. Commencing in 1989, F. entered into business relations with representatives of the later State of Slovenia, who were interested in importing «certain goods» from Austria. For the execution of these transactions, the state representatives employed foreign trade companies, such as Orbis, Iskra, Norikum, and Unitex. Initally, [Seller] cooperated with the firm Orbis -- the first company to supply the newly raised army of Slovenia, a company which had close connections with the Ministry of Defense. Originally, these foreign trade companies had been structured by communist patterns, which had survived the breakdown. The people of Slovenia commonly owned them. Later, these companies were made private legal persons under newly established Slovenian law. The import of goods by the Slovenian state through these intermediate companies continued after they had been privatized.

- In the beginning, [Seller]'s business was executed through the firm Orbis, which used to place orders and invoices in its own name. [Seller]'s first contact with [Buyer], initiated by the Slovenian Ministry of Defense, concerned the supply of the national Biathlon team. The Slovenian Ministry of Defense itself determined the concrete amount of weapons and ammunition, to be delivered. Pro forma, [Buyer] signed the contract for the delivery of these items, and also received bills and delivered payment.

- On a visit to the Slovenian Ministry of Defense in May and June 1993, [Seller]'s Managing Director F. was notified that the building of a new factory had been planned, and that «samples of a certain kind» would be needed for testing purposes. During these negotiations, it was brought up that officially the deal should be about Mercedes spare parts. [Seller] was offered a 10% commission for this deal. It was apparent to [Seller]'s Managing Director F. that the pro forma deal with [Buyer] was to disguise the involvement of the Slovenian Ministry of Defense. [Seller] was asked to send a pro forma bill, which [Seller] did on 29 October 1993. In a fax of 22 November 1993, [Seller] confirmed that delivery should take place «franco» at the Slovenian border. On 10 November 1993, [Buyer] notified [Seller] that [Buyer] was in possession of the DM 134,000.00 bill of 29 October 1993 and asked for another pro forma bill concerning the same amount, which had to be addressed to [Buyer] itself. In turn, [Seller] on 11 November 1993 sent another bill for the amount of DM 134,000.00 to [Buyer] directly.

- The bill concerned twenty Mercedes spare parts of various kinds. In a letter of 21 December 1993, [Buyer] placed an order for these items and on 23 December 1993 transferred the purchase price of DM 134,000.00 to [Seller]'s account. The money was given to [Buyer] by its principal, the Slovenian State. It could not be proven whether [Buyer]'s standard terms had been incorporated into the contract. Eventually, an

installment delivery valued at about DM 7,250.00, which had been taken over from [Seller]'s place in Ferlach without invoicing, reached its ultimately destined customer. Notified only thereafter, [Buyer] agreed to this procedure. There had been no further deliveries. In 1995, the firm Orbis went insolvent. Before this happened, F. had on several occasions insisted on payment of [Seller]'s bills. On a personal visit of the Slovenian Ministry of Defense, F. was told that the bills would be dealt with in future transactions. In the insolvency proceedings, [Seller] was granted a quota of 10% of its claimed amounts.

- By June 1995, [Buyer] became aware that the order of 21 December 1995 was unlikely to be executed in the manner agreed. In a fax of 16 June 1995, [Buyer] asked [Seller] to confirm that the DM 134,000.00 were still held on [Seller]'s account. In a fax of 22 June 1995, [Seller] confirmed that the order -- except for an installment worth DM 7,250.00 - had not been executed, yet. [Seller] offered to «activate» the held credit with future transactions, but also pointed out that there was an open bill for an order from the firm Orbis dating from 1993, which was yet to be paid.

- On 12 October 1995, [Buyer] called for delivery of Mercedes spare parts, which were ultimately destined to Firm C. On 17 October, [Seller], referring to its letter of 22 June 1995, again assured its interest in sorting out the business relations with [Buyer], and confirmed that it would execute [Buyer]'s order of 22 October 1995, as soon as the Orbis bill of 1993 had been paid. On 31 January 1996, [Buyer] asked [Seller] to confirm that the price rates for Mercedes spare parts which [Seller] had been offering the year before would still apply, as [Buyer] planned to place an order worth DM 134,000.00. The intent was that [Seller] should buy the requested spare parts from Firm C. and sell them to [Buyer]. Hence, the previously transferred credit of DM 134,000.00 could be set off against the purchase price of this transaction, and also [Seller] would have earned a commission to cover its losses from the Orbis deal.

- Thus in a fax of 19 March 1996, [Buyer] confirmed having received another pro forma bill of 5 March 1996 from [Seller] and asked [Seller] to pay its debts to Firm C. However, [Seller] disagreed and hence the transaction was not completed as planned. Within the further correspondence, both parties kept to their perspectives on the failed transactions. [Seller] again insisted that it had been in the best interest of the Slovenian Ministry of Defense, as the real principal of the orders, that the transactions were mediated by [Buyer] and thus concealed. The Ministry of Defense, in turn, asked [Buyer] to pay back the remaining amount, which has not happened yet.

In its evaluation of evidence, the Court of First Instance held that Nada S., employed as secretary of [Buyer] at the time, was not aware of the true nature of the transactions.

In its evaluation of the legal issues, the Court of First Instance found that a contract between [Buyer] and [Seller] for the delivery of goods had been concluded. Another contract was underlying the relation with [Buyer] and the Slovenian Ministry of Defense on whose mandate

[Buyer] ordered the spare parts. Yet, these two contracts were to be seen as entirely independent. [Buyer] and the Ministry of Defense were to be considered two different contracting parties, despite the fact that the Ministry had mandated the transaction. [Seller] knowingly accepted this constellation. This indicated the fact that [Seller] agreed to readdress the bills originally sent to the Slovenian Ministry of Defense to [Buyer]. The same constellation was chosen in [Seller]'s previous transaction with Orbis. Therefore, [Seller] never did enter into a contract with the Ministry of Defense directly. On the other hand, regarding the relations with [Buyer], [Seller] had been awarded its due quota during the insolvency proceedings. [Buyer] had performed the advance payment in fulfilment of its contractual obligations. This was not to be qualified as an order under § 1400 of the Austrian Civil Code (Allgemeines Bürgerliches Gesetzbuch), as that would have required the Slovenian Ministry of Defense to become part of the contract. In the present constellation, it is [Buyer]'s right, and not the Defense Ministry's right, to claim performance of the contract, i.e., to claim delivery. The fact that the goods ordered (up to a value of DM 7,250.00) had been directly delivered to the Defense Ministry does not reflect an unusual practice within the industry, and does not deny that the delivery had been legally owed to [Buyer]. As [Seller] did not comply with its contractual duties (despite the delivery of goods worth DM 7,250.00), [Seller] is liable to restitute the remaining money. [Seller] admitted that by 1995 it had become obvious that «Mercedes spare parts» (i.e., weapons) were never going to be delivered any more. [Seller] itself confirmed that the remainder of the amount that had been credited to its account would be set off in future transactions. However, [Seller] refused to pay it back, insisting first on compensation for losses suffered from the Orbis deal. As the first contract between [Seller] and [Buyer] has been cancelled by mutual consent and another contract could not be agreed upon, [Seller] is obliged to pay back the money it had received from the [Buyer]. The losses suffered in [Seller]'s business relation with the Orbis firm cannot be set off against the money received from [Buyer], because the two positions stem from different transactions with different parties. The fact that in both cases the goods had been ultimately delivered to the Slovenian Ministry of Defense is irrelevant.

Ruling of the Appellate Court

[Seller]'s appeal (Berufung) against the judgment of the Court of First Instance is based on alleged procedural errors, a deficient taking and evaluation of evidence, and an incorrect interpretation of the applicable substantive law. [Seller] seeks to have [Buyer]'s claim dismissed entirely. Alternatively, [Seller] wants the first instance's decision set aside and the case to be referred back for retrial. [Buyer], in turn, seeks the dismissal of the appeal.

[Seller]'s appeal is not justified.

1.
The alleged procedural errors

[Seller]'s claim that the Court of First Instance's refusal to summon two of [Seller]'s witnesses constituted a procedural error cannot be followed. The Court of First Instance did actually assume that the state of Slovenia used certain foreign trade companies -- such as [Buyer] -- as

intermediaries to disguise its own business activities. Hence, the testimony of the witnesses called by [Seller] to prove this was not necessary. Whether, in the transaction at issue, [Buyer] itself entered into the contract with [Seller], or whether its consent immediately bound the Slovenian State, as its principal, to the contract, constitutes a question of substantive law which must be decided based on the assumed facts of the case. The summoning of Witness Z and Witness C was by no means necessary.

The summoning of Witness D, on the other hand, would mean a consideration of evidence, which had investigative effects (Erkundungsbeweis), and is therefore not admissible. That this witness could shed light on [Seller]'s relation to the Orbis firm has not been properly submitted by [Seller] in the first instance.

2.
The taking and consideration of evidence

As [Seller] eventually admitted, the question of with whom [Seller] actually had contracted -- [Buyer] or the Slovenian State -- concerns the interpretation of the applicable substantive law. This is true, irrespective of the fact that the Court of First Instance had dealt with this question within its consideration of the evidence.

The Court of First Instance clearly acknowledged that the business transactions between the parties in fact concerned the delivery of weapons rather than Mercedes spare parts. That this finding on the facts of the case had been expressed within the Court's reasoning on the applicable law is irrelevant to the appeal.

The Court of First Instance's conclusion on the legal personhood of Firm Orbis is irrelevant, given that Orbis went insolvent. [Seller] obviously was unable to supply evidence that would have laid doubt upon the Court's conclusions.

[Seller]'s further submissions in the appeal concern presumably deficient findings on the facts, which are derived from an incorrect interpretation of the law (sekundäre Feststellungsmängel). Such defects must be brought within the claimed misinterpretation of substantive law (see 3.) (Kodek in Rechberger, § 471 note 6, § 496 note 4 with further references; RIS-Justiz RS 0043304).

The Appellate Court affirms the Court of First Instance's findings on the facts of the cases as correct and bases its own reasoning upon these facts (§ 498 of the Austrian Code of Civil Procedure (Zivilprozessordnung; ZPO).

3.
The interpretation of the substantive law

Due to the international character of the case, the Court has to consider the question of the applicable law:

In 1993, [Seller] contracted to deliver weapons to the Slovenian State. To disguise the character of this transaction, the contract officially stipulated the delivery of Mercedes spare parts. As had been common practice at the time, the Slovenian State used a foreign trade company -- [Buyer] -- as an intermediary. [Buyer] requested and received the pro forma bills from [Seller], and on 21 December 1993 placed an order for the delivery of «Mercedes spare parts». Eventually, [Buyer] transferred the agreed purchase price to [Seller]'s bank account. The contract between [Seller] and [Buyer], in its official wording as well as in its true character, constitutes an international sales agreement for the delivery of goods. Austria (since 1 January 1989 (BGBl 1988/96)) and Slovenia (since 25 June 1991) are both Contracting States to the CISG (Posch in Schwimann, AGBG, Einleitung zum UN-Kaufrecht, note 11). As no other law has been explicitly or implicitly stipulated under § 11 and § 35 of the Austrian Act concerning Private International Law (Internationales Privatrechtsgesetz; IPRG), and as the CISG has not been excluded under Art. 6 of the Convention, the contract is governed by the CISG.

According to Art. 4 CISG, the Convention only regulates the formation of a contract of sale and the rights and obligations of the seller and the buyer arising from such an agreement. Except as otherwise expressly provided in the Convention, it does not govern the validity of the contract or any of any of its provisions (Art. 4(a) CISG). Questions concerning the validity of an international sales contract for the delivery of goods are hence not governed by the CISG. This principle concerns the substantive requirements of a valid sales agreement, i.e., the actual «inner consent». These questions are regulated by the applicable national law, as referred to by the provisions of the Act concerning Private International Law (Internationales Privatrechtsgesetz; IPRG) (Posch, ibidem, Art. 4 UNK, notes 2 and 6). This applies also to questions of agency on behalf of an undisclosed principal (Posch, ibidem, Art. 4 UNK note 11), and of disguised dummy transactions. If not expressly provided otherwise, the CISG only governs the requirements of formal «outer» validity (Posch, ibidem, Art. 4 UNK note 8).

Within the scope of the CISG, statements made by and other conduct of a party are to be interpreted according to his intent where the other party knew or could not have been unaware of what this intent was (Art. 8(1) CISG).

Statements must be interpreted according to the actual intent of the party. Yet, this intent is legally relevant only as to how it is, or could be understood by the other party. The other party needs to know, or could at least not have been unaware of the real intent expressed in the statement. Only if the other party had been unaware of the intent due to its own gross negligence, the statement becomes binding as intended by the declaring party anyway (Posch, ibidem, Art. 8 UNK note 2).

[Seller] never submitted that [Buyer] had declared to act as an agent (direkter Stellvertreter) to immediately bind its principal, the Slovenian State, to the agreement with [Seller]. On the contrary, [Seller] assumed [Buyer] had acted upon its mandator's order as provided under § 1400 of the Austrian Civil Code (Allgemeines Bürgerliches Gesetzbuch; ABGB). Due to the submitted evidence and statements of the parties, direct agency (direkte Stellvertretung), which would immediately have bound the principal, was not intended. Whether there has been any indirect form of acting upon the State's mandate and what legal consequences

would follow from such a constellation (see § 49 of the Act concerning Private International Law (Internationales Privatrechtsgesetz; IPRG)) is irrelevant. The only relevant question for the Court is whether [Buyer] bound itself to the contract with [Seller] and hence is entitled to bring an action for restitution of the paid purchase price. This must be answered in the affirmative for the following reasons:

- [Seller] complied with [Buyer]'s request to send a pro forma bill in the amount of DM 134,000.00 to [Buyer]. Relying on this bill, [Buyer] placed a written order for the «spare parts» and transferred the price on [Seller]'s account.

- It must be concluded that [Buyer] wanted to conclude the contract with [Seller] for itself and in its own name. This rules out the assumption of an order according to § 1400 of the Austrian Civil Code (Allgemeines Bürgerliches Gesetzbuch; ABGB) (Ertl in Rummel, ABGB, § 1401 ABGB, note 3).

The Court of First Instance assumes that [Buyer]'s secretary, Nada S., who was the only employer at [Buyer]'s firm to deal with the transaction, had been unaware of the true nature of the deal and the involvement of the Slovenian State. Within the appellate proceedings, both parties had admitted this. Yet, thereafter [Seller] suddenly argued that Nada S. knew that «the parties never seriously intended to conduct their transactions in the way they had officially declared.» [Seller] failed to supply any evidence in support of this presumption. Even [Seller]'s Managing Director at the time, F., testified that Nada S. could not possibly have known about the real constellations underlying the transaction (AS 113). The Court of First Instance followed this version of the facts and ignored [Seller]'s deviating submissions.

Both under Austrian national law (§ 861 of the Austrian Civil Code (Allgemeines Bürgerliches Gesetzbuch; ABGB)) and under the CISG a sales contract is concluded by formal mutual consent, i.e., by an offer and its acceptance (Arts. 14 to 24 CISG) (Posch, ibidem, Art. 19 UNK note 2). Whether in the present case the consent suffered from certain defects - according to § 36 of the Austrian Act concerning Private International Law (Internationales Privatrechtsgesetz; IPRG) -- must be decided under Austrian national law. § 916(1) of the Austrian Civil Code (Allgemeines Bürgerliches Gesetzbuch; ABGB) states that a fictitious transaction (Scheingeschäft) does not have any legal effect; the contract becomes binding in the form it has been truly intended by the parties (Rummel in Rummel, ABGB, § 916 notes 2 and 3 with further references; Binder in: Schwimann, ABGB, § 916 note 10; RIS-Justiz RS 00181369). The fictitious contract is ineffective as it lacks the seriously intended consent of the parties: Neither of them had relied upon the other part's fictitiously submitted statement (7 Ob 624/80). Within such a legally irrelevant sham transaction in the sense of § 916 of the Austrian Civil Code (Allgemeines Bürgerliches Gesetzbuch; ABGB), both parties intentionally agree (dolus) at the time the contract is concluded, that their mutually given statements are merely fictitious and not seriously intended to be carried out by either side (RIS-Justiz RS 0018107, RS 0018149; SZ 63/94). If a party claims a transaction to be fictitious and hence ineffective under § 916(1) of the Austrian Civil Code (Allgemeines Bürgerliches Gesetzbuch;

ABGB), he bears the burden of proof for all of the provision's requirements (RIS-Justiz RS 0018084; RZ 1991/7).

[Seller] was not able to substantiate that both [Seller] and [Buyer] had secretly agreed upon the fact that their contract was to be concluded merely fictitiously to disguise the true transaction going on between [Seller] and the Slovenian State. The available evidence suggests that [Buyer] had not even been aware of [Seller]'s undiscovered agreement with the Slovenian State. Hence, it must be concluded that only [Seller], not [Buyer], knew and intended the transaction with [Buyer] to be merely of fictitious character. Such a secret, one-sided mental reservation (Mentalreservation) has no legal effect on the binding character of [Seller]'s contractual commitment, when the other party, had no positive knowledge about it (RIS-Jusitz 001473; Rummel, ibidem, § 869 note 4). Whether the other party reasonably ought to have been aware of the secret reservation is irrelevant, as there is no legal duty to enquire into the seriousness of a contractor's intention (SZ 65/11; 6 Ob 569/87).

Applying these principles, the Court of First Instance correctly held that [Seller] and [Buyer] had entered into a binding sales agreement -- irrespective of the fact that [Buyer] was acting on the mandate of the Slovenian State, which happened to be the ultimate destined customer of the delivered goods. Further considerations as to how much [Buyer] had actually been involved in the negotiations of the price and as to whether the Slovenian State had actually demanded that [Buyer] contract with [Seller] are irrelevant as these do not change the fact that in the agreement with [Seller], [Buyer] bound itself in its own name -- and nobody else. Consequently, [Buyer] is entitled (Aktivlegitimation) to claim back the money that was transferred to [Seller]'s bank account in fulfilment of contractual obligations.

Under the CISG, the cancellation of a contract can either be one-sided as under Art. 26 CISG, or be effected by mutual consent of the parties as provided in Art. 29(1) CISG. In the present case, the Court of First Instance correctly assumed that the originally concluded contract had been avoided consensually by [Buyer] and [Seller]: By June 1995, both parties assumed that the sales contract they had concluded on 21 December 1993 was never going to be completed. Consequently, the purchase price that had been paid -- as far as it has not been set off against other positions -- should be «activated» in future transactions. However, as the parties thereafter never entered into another sales agreement, and as further the avoidance releases both parties from their contractual obligations (Art. 81(1) CISG), [Buyer] may, under Art. 81(2) CISG, claim restitution of the remaining money paid.

[Seller] further alleges error in the consideration of evidence -- derived from a misinterpretation of the applicable law (sekundärer Feststellungsmangel) (see 2.) -- that the Court of First Instance wrongly assumed the cancellation to affect the whole contract and not only the original specification of the goods to be delivered. This assumption, however, stands in contradiction to the facts assessed by the Court of First Instance -- which [Seller] during this appeal had never put into question (see Kodek in: Rechberger, ZPO, § 471 note 8 with further references).

[Seller]'s appeal is therefore dismissed as unjustified.

The decision on the cost of the appeal relies upon § 41 and 50 of the Austrian Code of Civil Procedure (Zivilprozessordnung; ZPO). For the amount of AUS 887,250.00 at issue in the appeal, TP 3 B of the Austrian RATG determines a rate of AUS 10,377.06. According to Art. 23(9) of the Austrian RATG (as stated in the WGN 1997) this rate has to be multiplied by three.

The questions raised as to what law shall govern [Buyer]'s entitlement to bring its claim (Sachlegitimation) and what law shall regulate the cancellation of the sales contract and its legal consequences, are considered to be of fundamental legal significance in the sense of Art. 500(2) No. 3 of the Austrian Code of Civil Procedure (Zivilprozessordnung; ZPO). Further appeal (ordentliche Revision) is therefore permissible under § 503(2) of the Austrian Code of Civil Procedure (Zivilprozessordnung; ZPO).

[...]