

**Case 594: CISG 26; 31 (c); 45 (1); 46; 47; 49 (1); 81 (2); 82; 86 (1)**

Germany: Oberlandesgericht Karlsruhe 19 U 8/02

19 December 2002

Original in German

Published in German: Internationales Handelsrecht 2003, 125; [2003], Recht der Internationalen Wirtschaft 2003, 544; [2003], OLGR Karlsruhe 2003, 237

Abstract prepared by Klaus Bitterich

The plaintiff contracted with a Swiss company, the defendant, for a machine to be manufactured by the defendant according to the plaintiff's requirements. The plaintiff refused to accept the machine upon an inspection at the defendant's place of business as well as a result of another inspection which took place after the good was delivered to the plaintiff. The plaintiff alleged defects and a lack of conformity with respect to the machine's clock speed, although it was not clear whether an agreement on a certain clock speed had in fact been reached by the parties. The defendant agreed, however, to take the machine back and improve it so that it would meet the requirements as described in the defendant's offer and in the confirmation of the plaintiff's order. In a subsequent letter the plaintiff fixed the deadline for performance and made it clear that after that he would not accept any performance. However, the machine was damaged while being returned to the manufacturer due to its negligent loading. The defendant refused to take delivery and to perform any upgrade, whereupon the plaintiff declared in a letter his refusal to accept performance and sued for the repayment of the payments already made in advance (a claim for damages was dropped on appeal).

The Regional Court dismissed the claim, mainly on the ground that the plaintiff had lost the right to avoid the contract according to article 82 CISG. The Regional Court of Appeal reversed the judgement and the defendant was ordered to refund the down payment on the purchase price made by the plaintiff.

The Court noted that the contract was governed by the CISG under articles 1 (1)(a) and 3(1). After the defendant declared his refusal to upgrade the machine and the plaintiff in turn declared his refusal to accept performance, the plaintiff was entitled to declare the contract avoided under articles 45(1), 46, 47, 49(1) CISG. Although the plaintiff did not expressly declare the contract avoided as required by article 26 CISG, his refusal to perform, expressed in writing in connection with the claim for repayment, was considered a sufficient notice of the declaration of avoidance.

The Court then discussed article 82(1), (2a) CISG which deprives the buyer of his rights under article 49 CISG if it is impossible for him to make restitution of the machine substantially in the condition in which he received it and could not prove that this impossibility was not due to his act or omission. The Court found that the defendant accepted the machine's non-conformity and therefore entered into the obligation to remedy the lack of conformity at his place of business. With regard to the plaintiff's obligations for the carriage of the machine back to the defendant the Court pointed out that according to the initial contract the defendant was bound to arrange for carriage. Therefore, the plaintiff's obligations under the agreement to take the machine back and remedy the lack of conformity also had to be determined applying article 31(c) CISG. The Court found that the plaintiff complied with his obligation to place the machine at the defendant's disposal in a way suitable for shipping, regardless of whether packaging or placing the machine back into its rack might have guaranteed a more secure transport. The loading itself was not part of the plaintiff's obligations under article 31(c) CISG.

Furthermore, the Court ruled that the plaintiff complied with his obligation to preserve the machine as required by article 86 CISG regardless of whether the risk already passed to the plaintiff or not. The facts on record did not indicate that the plaintiff was aware or could have been aware of the improper loading made by the carrier. The Court therefore did not apply article 82 CISG and held that the plaintiff had not lost the right to declare the contract avoided.