CISG-online 817	
Jurisdiction	Germany
Tribunal	Oberlandesgericht Karlsruhe (Court of Appeal Karlsruhe)
Date of the decision	19 December 2002
Case no./docket no.	19 U 8/02
Case name	*Coil winding machine case*

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

Edited by Institut für ausländisches und Internationales Privat- und Wirtschaftsrecht der Universität Heidelberg

Daniel Nagel, editor[***]

[...]

Judgment

The appeal (*Berufung*) is admissible and, except for the claim for higher interest, it is justified. The District Court (*Landgericht*) failed to allow Plaintiff [Buyer]'s claim for restitution of paid installments on the purchase price for the wrapping machine that was to be delivered by Defendant [Seller].

I.
The District Court correctly held that according to the provisions of Arts. 1(1)(a) and 3(1) CISG, the contract between the parties is governed by the CISG.

II.
[Buyer]'s claim for restitution for paid installments is sustainable under Art. 81(2), second sentence, CISG. Contrary to the District Court's judgment, this Court holds that [Buyer] could rely on Art. 49(1) CISG and declare the contract avoided as [Seller] had definitely refused delivery of the purchased goods. Moreover, [Buyer] did not forfeit this right to declare the contract avoided under Art. 82(1) CISG.

1.
After damage had occurred during carriage of the goods, [Seller] refused to render the required corrective measures and to deliver a wrapping machine that did conform with the contract. In turn, [Buyer] refused to accept performance, after an additionally set time limit

[*] All translations should be verified by cross-checking against the original text. For purposes of this translation, Plaintiff of Germany is referred to as [Buyer] and Defendant of Switzerland is referred to as [Seller].

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for delivery had expired. Thus, [Buyer] was entitled to declare the contract avoided in accordance with Arts. 45(1), 46, 47 and 49(1) CISG. It is true that the [Buyer] did not make a distinct declaration of avoidance of the contract (Art. 26 CISG) by notice to [Seller], nevertheless his intentions were clearly expressed in a letter dated 29 January 1999, in which he notified [Seller] that he would deny acceptance of any further delivery and asked for reimbursement of installments on the purchase price that were already paid (see Huber, in: Schlechtriem, CISG, 3rd ed., Art. 49 note 29).

2.
[Buyer] did not forfeit his claim for restitution (Art. 81(1) CISG) by the provisions of Art. 82 CISG, as he cannot be held responsible for the damage that had occurred during the transit. [Seller] delivered the wrapping machine in April 1998. It is undisputed that [Buyer] did not accept the machine as it did not conform with the contract. Instead, [Buyer] gave notice of the lack of conformity and [Seller] agreed to take the machine back to [Seller]'s factory in order to correct the lack of conformity. The Court does not need to inquire as to what corrections [Seller] exactly bound herself to perform. In particular it is irrelevant, whether it was part of the agreement, that the machine should be made adaptable to a certain production speed (or accurate clock rate). However, the letters dated 30 October 1998 and 1 December 1998 clearly indicate, that [Seller] agreed to optimize the machine to the extent that it would meet the standards that had been the basis of the negotiations between [Buyer] and [Seller]. Hence, [Seller] conceded that the machine, as it had been delivered, did not fully conform with the contract, and that the defects had to be remedied. For that reason, [Buyer] was asked to hand the delivered goods back to [Seller], so that the machine could be taken back to the factory.

Irrespective of whether delivery had taken place, or whether the risk for damage had passed or not, in any case [Buyer] was obligated to take all reasonable steps to preserve the goods [Buyer] received, as stated in Art. 86(1) CISG. Yet, this duty was limited to the time when the machine was actually in [Buyer]'s possession, i.e., before [Seller] would take the machine back to [Seller]'s factory. It did not entail the carriage of the machine itself, as this carriage fell within [Seller]'s responsibility. Therefore, [Buyer]'s obligation was only to place the machine ready and fit for transportation at [Seller]'s disposal, just as Art. 31(c) CISG reduces the seller's liability to place the goods at the buyer's disposal at the place where the seller had his place of business at the time of the conclusion of the contract (see: Huber, *ibid.*, Art. 31(c) CISG note 56; Achilles, UN-Kaufrecht (2000), Art. 31 CISG, note 11). This duty to offer the goods ready and fit for carriage includes all necessary packaging (Huber, *ibid.* note 55, Achilles, *ibidem*). As in case of Art. 31(c) CISG, proper stowage would fall within the [Buyer]'s responsibility, it was [Seller]'s obligation to dispatch the machine that [Buyer] placed at [Seller]'s disposal in the present case.

The delivered stand for the machine, which also had to be given back to [Seller], cannot be considered as a part of the package. It must be assumed that packaging was not necessary and that the machine was ready and fit for dispatch and transportation just as it was.

There is no clause in the agreement between [Seller] and [Buyer], that requires the stand to be installed for transportation of the machine. [Seller]'s order to [Seller]'s carrier, given on 17 December 1998, (even provided it had been known to [Buyer]) did not indicate that it

was [Seller]'s wish that the machine should only be transported together with its stand. Naturally, a carriage together with the stand would have made the transportation of the machine safer. However, this does not change the fact that the machine was offered to [Seller] in a state in which it was ready and fit for transportation just as it was.

It cannot be derived from the contract that [Buyer] had assumed liability for the proper stowage of the machine on the van of the carrier. Hence, [Buyer] cannot be held responsible for the lack of safety mechanism on the van which caused the damage to the machine. Neither can such a duty of care be drawn from the CMR, which applies as this is a case of transnational transport. As the CMR does not provide for the question of who is responsible for damages due to improper stowage, national law has to be applied subsidiary (Thume (1995), Art. 17 CMR, note 31; Thume, in: Fremuth/Thume, Transportrecht (2000), Art. 17 CMR, note 87; Koller, Transportrecht, 4th ed., Vor Art. 1 VMR, note 8). According to Art. 28(4) of the Introductory Act to the German Civil Code (*Einführungsgesetz zum Bürgerlichen Gesetzbuch*; EGBGB), German law applies, because the carrier was legally seated in Germany when the contract had been concluded, and because the goods had been dispatched in Germany. § 412(1) of the German Commercial Code (*Handelsgesetzbuch*; HGB) allocates to the consignor liability for secure customary dispatch, provided this would not run counter to commercial custom or good reason. The consignor is the party that entered into the contract with the carrier (Fremuth, in: Fremuth/Thume, *ibid.*, § 407 HGB, note 13; Koller, *ibid.*, note 7). Here, [Seller] must be regarded as the consignor. As § 412(1) of the German Commercial Code only affects the obligations between the consignor and the carrier (Fremuth, *ibid.* § 412, note 1), the norm does not impose any liability on [Buyer]. Therefore, the case depends on who actually assumed liability for the stowage of the machine according the agreement between [Buyer] and [Seller]. According to the submissions of [Seller] that had been approved in the judgment of the District Court (*Landgericht*), it was [Buyer] who, in placing the machine separated from its stand, at the disposal of [Seller], set the main cause for the accident and the damage of the machine. This conclusion cannot be upheld. The main reason for the damage was not the separation of machine and its stand, but it was the improper stowage of the machine on the van of the carrier. This cause does not fall within [Buyer]'s responsibility (see: Leser/Hornung, in: Schlechtriem, *ibid.*, Art. 82, note 20). The case would have had to be considered differently if [Buyer] had actually assumed liability for the proper stowage of the goods, or if [Buyer] had been aware, or could have easily been aware of the improper stowage of the machine. In this case, a liability for the preservation of the goods could have been derived from either Art. 86(1) CISG or from the principle of good faith. However, there is no evidence for this being the case.

The testimonies of witness O[…] and witness M[…] put doubt on [Seller]'s submission that [Buyer] was responsible for the stowage. Both testified that the stowage was not conducted by [Buyer] but by witness O[…] who directed a forklift and its driver. Witness O[…] asserted that he did not receive any instructions from [Buyer] as regards how to dispatch the machine. Hence, a liability of [Buyer] cannot be assumed.

Further, O[…]'s testimony does not support [Seller]'s submission that employees of [Buyer] or of a Commissioned Company I[…]. (Gesellschaft mit beschränkter Haftung, GmbH) confirmed the proper stowage of the machine. According to O[…], the machine had been properly dispatched: It had been fixed on a firm grounding and had been sufficiently secured

against falling off the van. O[…] decided that additional safety belts were not necessary. However, O[…] had wrongly estimated the center of gravity of the machine to be lower than it actually was.

[Buyer] does not dispute that he failed to draw O[…]'s attention to the relatively high center of gravity of the machine. But this does not constitute a liability of [Buyer] under Art. 82(2)(a) CISG. A duty to warn could have only been laid on [Buyer], if it had been obvious for either himself or for witness M[…], that witness O[…] grossly underestimated the gravity of the machine and thus failed to take precautions that would have been necessary for a secure stowage. Only under these conditions, would it have been appropriate for [Buyer] to insist on additional safety measures for the dispatch of the machine (see: Achilles, Art. 82, note 7; Staudinger/Magnus, Art. 82, note 22). However, this has not been the case. As transportation and stowage were mandated to a professional carrier, whose qualification to retain a knowledgeable driver was unquestionable, there was no point for [Buyer] whatsoever, that would have raised doubt on the proper dispatch and carriage of the machine.

3.
Undisputedly, losses in interest have been suffered. The interest rate due is determined by Art. 45(1)(b), Art. 74, Art. 84(1) CISG. A claim for further interest is not substantiated. In particular, § 288 of the German Civil Code (*Bürgerliches Gesetzbuch*, BGB) does not apply. Instead, as the CISG does not provide for rate of interest (Achilles, Art. 84, note 2; Staudinger/Magnus, Art. 84, note 9), § 28(2) of the Introductory Act of the German Civil Code (*Einführungsgesetz zum Bürgerlichen Gesetzbuch*; EGBGB) refers to the Swiss Law of Obligations (*Schweizerisches Obligationenrecht*; OR) as the applicable law). Arts. 73 and 104 of the Swiss Law of Obligations determine an interest rate of 5%. A claim for further interest is sustainable only to the extent that had already been granted in the judgment of the District Court (*Landgericht*).