

CISG-online 848	
Jurisdiction	Switzerland
Tribunal	Bundesgericht/Tribunal fédéral (Swiss Federal Supreme Court)
Date of the decision	7 July 2004
Case no./docket no.	4C.144/2004
Case name	<i>Cables and wires case</i>

Translation by Veit Konrad***

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A. FACTS OF THE CASE

Company A... S.r.l., seated in Milan, Italy (hereafter referred to as [Seller]), has had long established business relations with public limited company B... (Aktiengesellschaft; AG) (hereafter referred to as [Buyer]), which has its place of business in Ostermündingen, Switzerland. According to a bill of 26 April 2001, [Seller] owed the delivery of cables and conductors (30 packages; total weight 6,115 kilograms) for the total amount of SFR (Swiss francs) 35,641.21. On 2 May 2001, [Seller] handed goods packed on pallets and drums to its carrier firm C. On 3 May 2001, C. delivered the cable drums and pallets express by van to [Buyer]'s place of business in Ostermündingen. Without examining the delivery upon arrival, [Buyer]'s store manager receipted the whole consignment as conforming to the bill of 26 April 2001. About three days later, [Buyer] examined the delivery and discovered, according to [Buyer]'s statement, that a part of the ordered goods was missing. [Buyer] then notified [Seller] of this defect by telephone. After the search for the missing goods on [Buyer]'s premises remained unsuccessful, [Buyer] on 15 May 2001 sent [Seller] a fax specifying the goods (17 drums and one pallet) that were missing.

1

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

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By fax of 22 May 2001, [Buyer] again asked [Seller] to initiate a search for the missing goods at the factory where the goods had been produced. In its response writing of 12 June 2001, [Seller] took the position that according to the chronological order of the delivery process the whole consignment had been delivered to [Buyer] as ordered.

2

[Buyer] made a first partial payment of SFR 14,700.00 in response to [Seller]'s bill of 26 April 2001, but held back the remainder, due to the alleged incomplete delivery. By the middle of June 2001, [Buyer] had paid the remaining SFR 20,940.50. At the end of September 2001, however, [Buyer] declared a set-off for this amount against two subsequent bills from [Seller]. On 24 September 2001, [Buyer] made another payment. In total, an amount of SFR 22,222.06 corresponding to the missing goods remains as yet to be paid.

3

B. [LOWER COURT RULINGS]

Judgment of the Court of First Instance

On 29 April 2002, [Seller] filed a claim with the District Court (Gerichtskreis) of Bern VIII, Bern-Laupen, against [Buyer] for payment of SFR 20,222.06 plus interest due for being in default. By judgment of 8 May 2003, the District Court of Bern VIII, Bern-Laupen, ruled that [Buyer] had to pay to [Seller] SFR 20,222.06 plus interest of 10 percent since 29 August 2003. The Court of First Instance held that:

4

- The sales contract between the parties was governed by the United Nations Convention of Contracts for the International Sale of Goods (hereafter referred to as CISG).
- Under Art. 38 CISG, Buyer was obliged to examine the number and quality of delivered goods immediately upon delivery.
- As Buyer failed to do so, Buyer cannot rely on its rights under Art. 45 CISG.

Ruling in Second Instance

[Buyer] brought an appeal (Berufung) against this judgment before the Appellate Court of the Canton of Bern (Appellationshof des Kantons Bern). The Appellate Court quashed the ruling of the Court of First Instance and dismissed [Seller]'s claim (decision of 10 /11 February 2004). Contrary to the Court of First Instance, the Appellate Court found that by examining the goods within three days after delivery on 3 May 2001, [Buyer] had satisfied its duty under Art. 38 CISG, and that [Buyer] had given notice about the presumably missing cables to [Seller] within reasonable time as required under Art. 39 CISG.

5

According to the Appellate Court, it fell within the responsibility of [Seller] to prove that the delivery had been complete. As [Seller] had failed to substantiate this, the Appellate Court, ruling in favor of [Buyer], held that [Buyer] was entitled to deduct the purchase price of the presumably missing goods.

6

C. [SUPREME COURT APPEAL]

Against this decision, [Seller] now appeals to the Swiss Federal Supreme Court (Eidgenössische Berufung). [Seller] seeks to have the decision of the Appellate Court of the Canton of Bern set aside and the judgment of the Court of First Instance to be re-upheld.

7

[Buyer] seeks the dismissal of [Seller]'s appeal.

REASONING OF THE SUPREME COURT

1.

1.1.

[Seller]'s appeal is admissible. It concerns a value in dispute of more than SFR 8,000.00, and a decision which cannot be appealed against with any of the ordinary remedies available within the Canton (see Art. 46 and Art. 48 of the Swiss Law of Obligations (Obligationenrecht; OR). [Seller]'s appeal satisfies all necessary formal requirements.

8

1.2.

The subject of the appeal is an alleged violation of Swiss federal law, including an international convention that the Appellate Court ruled has been validly incorporated into Swiss law (Art. 43(1) of Swiss Law of Obligations (Obligationenrecht; OR)). Since the two contracting parties have their place of business in different Contracting States, the contract is governed by the CISG (Art. 1(1)). Therefore, the application of the CISG may be examined in an appellate procedure.

9

2.

2.1.

The Appellate Court correctly found that the presumably incomplete delivery would constitute a breach of contract under Art. 35 CISG (See Hans-Christian Salger, in: Witz/Salger/Lorenz, International Einheitliches Kaufrecht: Praktiker-Kommentar und Vertragsgestaltung zum CISG, Art. 35 CISG note 6; Ingeborg Schwenzer, in: Schlechtriem (ed.), Kommentar zum Einheitlichen UN-Kaufrecht - CISG - 3d ed., Art. 35 CISG note 8). Taking account of various legal opinions, the Appellate Court concluded that the [Buyer] had complied with its duty under Art. 38(1) CISG to examine the delivered goods within an adequate period of time and further that [Buyer] had satisfied its duty to give timely notice of missing goods under Art. 39 CISG (for the content of the given notice see: BGE 130 III 258 E.4.3. p. 262). The Appellate Court decided on the timely examination of the delivery and notice of the missing goods by referring to its own judicial discretion. [Seller] does not argue

10

that the Appellate Court has unduly exceeded its scope of discretion. In any event, there is no indication that this had been the case.

3.

3.1.

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The Appellate Court held that, as a general rule, a seller, who claims for payment of the purchase price, has to prove that the goods he delivered conformed to the contract. The burden of proof, however, will be passed to the buyer when he accepts delivery without giving timely notice of defects as demanded by Art. 38 and Art. 39 CISG. Acceptance in this sense does not only mean taking delivered goods, but is indicated by the expiration of the period of time that is considered appropriate for giving notice of defects according to Art. 38 and Art 39 CISG. If, on the other hand, the buyer notifies the seller of a defect within reasonable time, then the burden of proof concerning the conformity of the goods at the time before the risk had passed remains with the seller. For the case at issue, the Appellate Court assumed that [Buyer], in compliance with the relevant CISG provisions, had indeed notified [Seller] that parts of the ordered goods were missing. Thus, it was up to [Seller] to substantiate that its delivery had been complete.

3.2.

12

In its appeal, [Seller] argues that the Appellate Court mistakenly placed the burden of proof for completeness of the delivery upon [Seller]. [Seller] alleged that, as [Buyer] had accepted the delivery without giving notice as required by the CISG, [Buyer] bears the risk to sustain that parts of the ordered goods had been missing.

3.3.

13

The allocation of the burden of proof between the parties is regulated by the CISG. In case an explicit rule is not available, a court has to resort to the general principles underlying the Convention. As one of these principles, it must be taken into account how close each party is to the relevant facts at issue, i.e., a party's ability to gather and submit evidence for that point. Hence, if a buyer takes on a delivery without giving notice for any claimed deficiencies, thus establishing his exclusive possession of the goods, then he, the buyer, has to prove any claimed lack of conformity of the delivered goods (see BGE 130 III 258 E. 5.3. p. 264 et seq.).

3.4.

14

[Buyer] unconditionally accepted the goods that were delivered by [Seller]'s carrier without notifying [Seller] of any of the subsequently claimed defects. Therefore, as far as its argument relies on this presumption, [Buyer] has to sustain that the delivery did not conform to the contract, i.e., that part of the ordered cables had been missing, in order to deduce the right to abate the purchase price. There is no indication whatsoever to deviate from this principle in this particular case at issue. Even if one follows the Appellate Court's conclusion that, due to the vast volume of goods, which all had to be unloaded quickly from [Seller]'s carrier's van, [Buyer] was not obliged to check on the completeness of the delivery immediately upon arrival, it must be concluded that in the time thereafter, when an examination of the goods was possible and reasonable, the goods were already in [Buyer]'s exclusive possession. Only

[Buyer] could have taken measures to check on the number and kind of the delivered goods at that time. [Seller], on the other hand, was not in a position to conduct such an examination and, thus, to gather and preserve evidence on this point.

4.

4.1.

Based on these considerations, this Court concludes that the burden of proof concerning the conformity of the delivered goods passed to [Buyer] at the time when [Buyer] took on the delivery without giving any notice. Therefore, it is up to [Buyer] to prove that the delivered goods did not conform to the contract -- not for the [Seller] to prove the opposite. [Seller]'s argument that the Appellate Court had mistakenly set the standard for the adequacy of proof too high by not acknowledging the submitted letter of consignment as sufficient evidence to sustain the completeness of the delivery does not need to be decided by the Court (see BGE 120 II 5 E. 20 p. 7).

15

4.2.

In its appeal, [Seller] argues that its original claim is justified, as [Buyer] has failed to prove that the delivery did not comply with their contract. This, however, does not take into account that the Appellate Court did not consider this question in its decision, as it assumed the burden of proof to lie with [Seller]. Equally, the Court of First Instance, on whose assumptions the Appellate Court relied, failed to reason upon this point: It found [Buyer]'s claim unjustified due to [Buyer]'s failure to give notice within reasonable time. Hence, the factual question whether [Buyer] was able to prove the delivery had been incomplete, has yet to be considered by a court. Therefore, the ruling of the Appellate Court of the Canton of Bern has to be set aside and the case referred back to the Appellate Court, which will have to consider new evidence on this relevant question (Art. 64(1) of the Swiss Law of Obligations (Obligationenrecht; OR)).

16

4.3.

If the Appellate Court finds that [Buyer] cannot substantiate its claim that part of the ordered cables was missing, then [Seller]'s original claim is justified, as [Buyer] owes payment of the full purchase price due as agreed in the contract. If, on the other hand, the Appellate Court finds, in favor of [Buyer], that the incompleteness of [Seller]'s delivery can be sustained, then indeed [Buyer] would have been entitled to a proportionate reduction of the price. In that case, however, the Appellate Court must not simply dismiss [Seller]'s claim, but will need to take into account that [Buyer] had already paid the full price for the delivery and only thereafter declared its claim for reimbursement set off with other more recent positions of [Seller]. Therefore, [Seller]'s claim may be dismissed only as far as [Buyer] is entitled to claim back the paid money for undue enrichment. Such claims do not fall within the scope of the CISG (see Huber, in: Schlechtriem (ed.) Kommentar zum Einheitlichen UN-Kaufrecht, 3d ed., Art. 52 CISG, note 11). The applicable provisions of international private law define which national law shall govern [Buyer]'s counterclaim for undue enrichment (Art. 128(1) of the Act concerning Private International Law (Internationales Privatrechtsgesetz; IPRG)). The Appellate Court will need to decide whether [Buyer] is indeed entitled to restitution under the

17

applicable national law, i.e., if [Buyer] can provide sufficient evidence to sustain its counterclaim for undue enrichment.

Only then may the Appellate Court consider [Buyer]'s declared set-off, which, again, is not regulated by the CISG but by the applicable national law (see Ferrari, *ibidem*, Art. 4 CISG, note 39; Manuel Lorenz, in: Witz/Salger/Lorenz, *International Einheitliches Kaufrecht: Praktiker-Kommentar und Vertragsgestaltung zum CISG*, Art. 4 CISG note 29 with further references).

18

5.

The Court finds [Seller]'s appeal justified as far as it concerns the quashing of the decision of the Appellate Court in the Second Instance. But, for the aforesaid reasons, the Court cannot grant [Seller]'s original claim, because crucial evidence still needs to be taken. Due to the partial success of [Seller]'s appeal, the Court deems it justified that each side shall bear half of the court costs and its own attorneys' fees and expenses (Art. 156(3) and Art. 159(3) of the Swiss Law of Obligations (Obligationenrecht; OR)).

19

JUDGMENT

1. [Seller]'s appeal is justified in part; the decision of the second Chamber of the Appellate Court of the Canton of Bern of 10 / 11 February 2004 is set aside. The case is referred back for retrial.

2. Each party bears half of the court costs of SFR 2,000.00.

3. Each party bears its own attorneys' fees and expenses.

[...]