Case 596: CISG 39; 40; 44; 45 (1) (b); 74

Germany: Oberlandesgericht Zweibrücken 7 U 4/03
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An Iranian company, the plaintiff, and the defendant German company entered into protracted negotiations for purchasing used components for the construction of a milling facility in Iran. According to the information contained in a pro forma invoice and in a letter of credit used to process the transaction, the plaintiff ordered 12 "double-roll mills" of the type "M" and other similar components, such as filter elements of the type "B" all coming from a certain German manufacturer.

In a subsequent letter the defendant confirmed a change in the specifications of the mills upon request of the plaintiff. Because of this change, the defendant could not deliver the "M" or "B" products of the German manufacturer but had to resort to Russian-made parts, a fact he did not disclose to the plaintiff. The plaintiff stored the goods delivered by the defendant in their original packages until a new building for the milling facility was completed. In the course of constructing the milling facility a few years later, the plaintiff discovered that the double-roll mills were originally made by a Russian company and that other "components" were made by a Turkish company. Furthermore, it became obvious that a part of the control unit was not compatible with other parts and therefore did not work. Relying on these facts, the plaintiff claimed the partial repayment of the price.

The defendant rejected the contention that the parties reached an agreement under which the defendant promised to deliver the double-roll mills and the other components with the specifications contained in the pro forma invoice. Furthermore, the defendant referred to the fact that the plaintiff inspected the goods before shipping and accepted delivery of one of the mills without any objections before the others were delivered. These circumstances, according to the defendant, were to be regarded as an alteration of the contract and therefore the defendant maintained that he delivered the goods in conformity with the contract.

The Regional Court held that the plaintiff did not prove that it had standing in the dispute and dismissed the claim. The Regional Court of Appeal reversed the judgement and instead decided on the merits. The Court held that the CISG is applicable pursuant to article 1(1)(b) because under German private international law the contract is governed by German law and therefore, as a part of it, by the CISG.

The Court rejected the claim of non-conformity of the control unit device because the plaintiff failed to give notice as required by article 39 CISG. The fact that the goods had to be stored for several years could not be considered as a reasonable excuse for the failure to give the required notice, because the plaintiff did not disclose the need to store the goods to the seller. Therefore, the plaintiff's intention to store the goods right after delivery did not become part of the basis of the legal relationship between the parties and the requirements for an exemption under article 44 CISG were not fulfilled.

As for the delivery of Russian and Turkish components, the Court ruled that the plaintiff was entitled to damages pursuant to articles 74, 45(1)(b) and 35 CISG. The Court held that the information given in the pro forma invoice and in the letter of credit had to be taken into account when determining the specifications of the subject of the sales contract. The specifications mentioned in these documents were regarded by the Court as a sufficient proof of the agreement reached by the parties on the requirements of the products made by the said German manufacturer. With regard to the double-roll mills the Court also relied on the letter of the defendant to the plaintiff wherein he confirmed the delivery of the "M" type with the specifications requested by the plaintiff. As the defendant failed to disclose the different origin of the goods to the plaintiff, the Court found that there was neither an express amendment of the contract nor an implied one, as the plaintiff apparently lacked the technical skills to discover the origin of the components in the course of the examination of the double-roll mills before their shipping or when taking delivery of the first mill. Finally, the defendant was not entitled to rely on the plaintiff's failure to give notice of the wrong delivery as required by article 39 CISG because the defendant knew of the Russian and Turkish origin of the mills and the other components which he did not disclosed to the plaintiff (art. 40 CISG).

Therefore, the Regional Court remanded the case to the lower court to determine the claim for damages and required it to obtain an expert opinion to determine the difference between the value of components as specified in the contract and the components delivered by the seller.