

Case 749: CISG 25, 51

Austria: Oberster Gerichtshof

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The seller sold software to the buyer. However, the CD-ROM that it delivered did not contain all the modules necessary to fully use the software. Although the buyer informed the seller of this lack of conformity, the latter failed to provide the required modules, as it turned out that the buyer needed a specific module for the use of the software in Austria, which did not exist.

The Supreme Court ruled that the supply of standard software programs on data storage mediums, in exchange for one-time payment, was to be considered a sale of moveable goods. The Court also discussed whether the lack of the module was to be considered a fundamental breach of contract under article 25 CISG or just a partial delivery according to article 51 CISG. The court pointed out that in the absence of an express agreement, the impact of the missing module on the usability of the other software components was crucial for these issues. The Court thus remanded that the case to the court of first instance, as the fact finding of the lower court had been incomplete in this respect.