CISG-online 1047	
Jurisdiction	Austria
Tribunal	Oberster Gerichtshof (Austrian Supreme Court)
Date of the decision	21 June 2005
Case no./docket no.	5 Ob 45/05m
Case name	*Software case III*

Translation [*] *by Jan Henning Berg*[**]

Translation edited by Daniel Nagel [***]

[...]

Reasons:

[Facts of the case:]

By way of the framework contract of 16 November 2000, [Buyer] granted [Seller] a license for the distribution of software (*inter alia*, product G[…]) within Austria. Under this contract, [Buyer] ordered from [Seller] on 15 January 2003 the software «G[…] FKTO with T[…], additional carriers M[…], U[…], T[…], network for up to 5 connections» for use at the Office of the Regional Government for Lower Austria at a price of EUR 4,713.60, insofar as this is still relevant for the appellate proceedings. 1

By the end of January 2003, [Seller] delivered a CD-ROM which was supposed to contain the respective computer programs. However, when an employee of the [Buyer] attempted to install program G[…] including all the modules, it turned out that the CD-ROM did not contain all the programs but that modules U[…] and T[…] were missing. After having raised a complaint, [Seller] decided to transmit module U[…] over the telephone line to [Buyer]'s customer. 2

Even though [Buyer] requested [Seller] to transmit the software properly and including all additional modules, [Seller] did not act accordingly. [Seller] had also failed to deliver the other module T[…]. 3

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[*] All translations should be verified by cross-checking against the original text. For purposes of this translation, Claimant-Appellant of Germany is referred to as [Seller] and Respondent-Appellee of Austria is referred to as [Buyer]. Amounts in the uniform European currency (*Euro*) are indicated as EUR.
Translator's note on other abbreviations: RIS-Justiz = *Rechtsinformationssystem des Bundes* [Austrian Federal Database on Law]; SZ = *Sammlung Zivilsachen* [Austrian collection of private law judgments].

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[Positions of the Parties before the Court of First Instance:]

[Position of Seller:]

Insofar as this is still relevant for the appellate proceedings, [Seller] requested [Buyer] to pay the purchase price for the software ordered. [Buyer] had not ordered a T[…] module (M[…] Austria). It was true that the module ordered by [Buyer] had been called «module T[…]», however, it had corresponded to the German T-M[…] module. No Austrian T-M[…] module had existed at that time. Having delivered the German module, [Seller] had properly performed all of its obligations. 4

[Position of Buyer:]

[Buyer] requested the dismissal of [Seller]'s action on the grounds that [Seller] had not fully performed the obligations it had invoiced for. Thus, [Seller] had no right to claim the purchase price. 5

[Decision and Reasoning of the Court of First Instance:]

The Court of First Instance dismissed [Seller]'s action – as far as this is still relevant for the appellate proceedings. [Seller] could not claim the purchase price because it had failed to perform according to the order until negotiations were closed and thus the purchase price had not yet been due. The dispute was governed by Austrian law according to Art. 10 of the 1980 Rome Convention on the Law Applicable to Contractual Obligations which provided that due to the manner of the contract performance, the applicable law was the law of the State where performance is taking place. 6

[Decision and Reasoning of the Court of Appeal:]

The Appellate Court dismissed [Seller]'s appeal against the judgment by the Court of First Instance. The Appellate Court adopted the view that, for individual contracts of sale concluded under a contract of appointed dealership, the applicable law had to be determined according to Art. 4(2) of the Rome Convention, which would lead to the law applicable at the seat or place of business of the buyer. Accordingly, issues regarding performance of contract were generally to be assessed according to the law applicable to the contract (Art. 10(1) Rome Convention), which also encompassed the relevant conditions for performance of an obligation in general and in particular situations (severable and non-severable obligations). 7

However, in case the individual sales contracts came within the scope of application of the CISG, provisions of the latter would generally prevail. Thus, the relevant provisions of the domestic law applicable under conflict of laws rules would only be relevant insofar as particular issues were not addressed by the CISG. As the application of the CISG had not been excluded in accordance with Art. 6 CISG and as the CISG had been in legal effect for both Austria and Germany at the time of the conclusion of the contract, it had to be considered as part of the respective domestic law. 8

The purchase of computer programs constituted a purchase of movable and tangible property, so that the CISG applied. In case of severable obligations there was only a limited right to retain performance. In particular, for the purchase of a package of computer software which had been ordered for the Office of the Regional Government for Lower Austria, it had to be considered that individual modules and the software necessary for their operation constituted one common unit. Until then, [Seller] had failed to deliver a T-M[…] module and the U[…] module had not been existent on the CD-ROM which was intended for the customer. In addition to providing an instruction manual, it was a primary obligation under a contract for the delivery of computer software to provide a program CD-ROM, wherefore [Seller] had committed a fundamental breach of contract. Furthermore, it had to be assumed that the delivery of a T-M[…] module suitable for Austria had formed part of the contract, because the computer program was supposed to be used in Austria. 9

The Appellate Court held that ordinary appeal was admissible because until then there had not been any jurisprudence by the Austrian Supreme Court on the question of maturity of the purchase price and, in this context, a possible right of retention on the part of the buyer in case of an incomplete or partially non-conforming delivery under the CISG. 10

[Positions of the Parties upon appeal to the Supreme Court:]

[Position of Seller:]

[Seller] requests that the judgment be amended. In the alternative, [Seller] requests that the Court repeal the judgment of the Appellate Court. 11

[Position of Buyer:]

[Buyer] requests the Court to dismiss [Seller]'s appeal. 12

[Decision and Reasoning of the Supreme Court:]

[Seller]'s appeal is admissible and justified with respect to the request to repeal the judgment of the Appellate Court. 13

Art. 4(1) Rome Convention provides that a contract shall be governed by the law of the country with which it is most closely connected. Nevertheless, a severable part of the contract which has a closer connection with another country may by way of exception be governed by the law of that other country. According to Art. 4(2) Rome Convention it shall be presumed that the contract is most closely connected with the country where the party who is to effect the performance which is characteristic of the contract has his habitual residence at the time of the conclusion of the contract, or, in the case of an association, corporation or legal person, its central administration. It follows – and the Appellate Court has already correctly made reference thereto – that the contract of sale is governed by the law of that State in which [Seller] has its seat. Hence, German law applies irrespective of the framework contract. 14

At the time of the conclusion of the contract, the CISG had been legally effective for both Germany (as of 1 January 1991) and for Austria (as of 1 January 1989). The CISG applies to 15

contracts of sale of goods between parties whose places of business are in different States when the States are Contracting States, or when the rules of private international law lead to the application of the law of a Contracting State (Art. 1(1)(a) and (b) CISG). In the present case, the CISG applies by way of both of these rules provided that the transaction constitutes a contract for the sale of goods.

16 The handing over of a storage medium containing standardized software against a lump-sum payment is qualified as a sale of movable property (5 Ob 504/96 = SZ 70/202; 7 Ob 94/02b; RIS-Justiz RS0108702; *cf*. also RIS-Justiz RS0113876). Consequently, the contract is governed by the CISG, because the parties have not excluded the application of the CISG (Art. 6 CISG). German law only applies subsidiarily to the CISG.

17 Art. 51(1) CISG provides that if the seller delivers only a part of the goods or if only a part of the goods delivered is in conformity with the contract, Arts. 46 to 50 CISG apply in respect of the part which is missing or which does not conform. In this case, the buyer may declare the contract avoided in its entirety only if the failure to make delivery completely or in conformity with the contract amounts to a fundamental breach of the contract, Art. 51(2) CISG.

18 It follows from Art. 51 CISG that the buyer is generally not entitled to reject in its entirety a delivery which is partially not in conformity, because his rights and remedies exist only in relation to the non-conforming part (Honsell (ed.), *Kommentar zum UN-Kaufrecht* [Commentary on the CISG], Art. 51 para. 38; Müller-Chen, in: Schlechtriem/Schwenzer (eds.), *Kommentar zum Einheitlichen UN-Kaufrecht – CISG* [Commentary on the CISG], 4th ed., Art. 51 para. 1). Since the buyer is obliged under Art. 53 CISG – in the absence of an agreement to the contrary – to pay the purchase price at the time when he has accepted the delivery of the goods, the purchase price for the conforming part of the delivery of goods must equally be paid in accordance with Art. 51(1) CISG. A different assessment may apply only in cases where the obligation cannot be severed in the sense of Art. 51(2) CISG, due to the fact that the non-conforming delivery of goods amounts to a fundamental breach of contract. A right of retention of the whole purchase price applies if the non-conformity of the goods constitutes a fundamental breach of contract (Karollus, *UN-Kaufrecht* [Textbook on the CISG], p. 84).

19 Pursuant to Art. 25 CISG a breach of contract committed by one of the parties is fundamental if it results in such detriment to the other party as substantially to deprive him of what he is entitled to expect under the contract, unless the party in breach did not foresee and a reasonable person of the same kind in the same circumstances would not have foreseen such a result. First, a fundamental breach of contract in terms of Art. 25 CISG requires that the party which has acted in accordance with the contract has suffered a detriment. This detriment must also be of such impact as substantially to deprive him of what he is entitled to expect under the contract. The expectation of the party which acted in accordance with the contract is decisive (Karollus, in: Honsell (ed.), *Kommentar zum UN-Kaufrecht* [Commentary on the CISG], Art. 25 para. 15). It is primarily for the parties to the contract to express the importance which is to be attached to certain partial obligations (Schlechtriem, in: Schlechtriem/Schwenzer (eds.), *Kommentar zum Einheitlichen UN-Kaufrecht* [Commentary on the CISG], 4th ed., Art. 25 para. 9).

Furthermore, a fundamental breach of contract may be assumed only if it is foreseeable that the other party will be deprived of what he is entitled to expect under the contract. The impact of a failure to perform an obligation is assessed by looking at whether the debtor knew or could have been aware of the particular expectations on the part of the creditor (Schlechtriem, in: Schlechtriem/Schwenzer, *loc. cit.*, Art. 25 para. 11). 20

In general, an obligation is severable if the goods consist of multiple independent items, where each item forms an independent commercial unit for the buyer (Honsell, *loc. cit.*, Art. 51 para. 9). 21

The facts of the present case do not seem to present any particular problem in the application of these criteria. 22

The purchase referred to the delivery of a storage medium containing the standard computer program G[…] with additional modules which were to be delivered by [Seller]. The T[...] module has not been delivered (neither the German version nor a version which could be used in Austria) and the module is accordingly not stored on the CD-ROM. The failure to deliver the module and the failure to store it on the CD-ROM undoubtedly constitutes a detriment, plainly because the actual performance does not correspond to what has been agreed upon. 23

However, in order to assume that the breach of contract is fundamental and thereby to trigger the different remedies under Art. 51(1) or (2) CISG, it must be determined whether the breach of contract is also fundamental in terms of Art. 25 CISG. Contrary to the view adopted by the Appellate Court, the arguments submitted by the parties provide no indication as to which agreement between them had formed the basis for the delivery, that is, whether or not it had been discussed that the delivery of the main program and the modules should form an inseverable unit so that the absence of one carrier would render the whole delivery useless for [Buyer] or – in case this cannot be established – what impact the absence of a carrier might have on the program and the remaining modules respectively. Not until the particular circumstances relating to the present order of the software or the actual usability of the goods delivered have been determined, will it be possible for the Court to determine whether the detriment which has arisen out of the breach of contract is substantial enough to render the parts which have in fact been delivered useless for [Buyer]. 24

The particular agreement between [Buyer] and its customer is irrelevant in this respect, unless this agreement has likewise become part of the contract between [Buyer] and [Seller]. The same applies for the failure to make delivery all modules on the storage medium. 25

For the sake of completeness, reference is made to the second requirement of a fundamental breach of contract, namely that [Seller] had to foresee the detriment, respectively, that the detriment was foreseeable by a reasonable party. In this respect, [Seller] instructed [Buyer] to distribute its goods in Austria. However, if it is well known that the program and the respective modules are intended for use in Austria, then any detriment resulting from the fact that the goods are not delivered because it could not have been used in Austria in any event is undoubtedly foreseeable and plainly obvious. Corresponding factual findings will have to be carried out in order to determine the extent to which the detriment resulting from incomplete 26

delivery has been foreseeable for [Seller]. Only if on a more detailed factual basis a fundamental breach of contract by the partial delivery can be assumed in terms of Art. 51(2) CISG, will [Buyer] – failing performance by [Seller] – be exempt from payment of the purchase price for the part of the goods which has already been delivered. However, in case a partial delivery in the sense of Art. 51 CISG is present, further findings will have to be made to determine which exact part of the purchase price corresponds to the delivered part of the goods.

Due to the fact that the present case can only be adjudicated after supplementing the factual basis, the judgments rendered by the courts in the previous instances have to be repealed. **27**

[...]