CISG-online 1156	
Jurisdiction	Austria
Tribunal	Oberster Gerichtshof (Austrian Supreme Court)
Date of the decision	08 November 2005
Case no./docket no.	4 Ob 179/05k
Case name	*Glass recycling machine case*

Translation[*] *by Jakob Heidbrink*[**]

Edited by Todd Fox[***]

In the matter between the Plaintiff [Seller] SV I[…], Italy, represented by Denk & Kaufmann Rechtsanwälte GmbH in Vienna, and the Defendant [Buyer] E[…], represented by Dr. Hermann Holzmann, lawyer in Innsbruck, regarding € 107,498.51, and following the [Buyer]'s appeal against the decision of the Court of Appeal (*Oberlandesgericht*) of Innsbruck on 21 April 2005, no. 2 R 58/05d-33, which annulled the judgment of the District Court (*Landesgericht*) of Innsbruck on 2 December 2004, no. 41 Cg 17/04z-27, the Supreme Court, represented by Division President Hon. Prof. Dr. Griß, presiding, the *Hofrätin* of the Supreme Court, Dr. Schenk, and the *Hofräte* of the Supreme Court, Dr. Vogel, Dr. Jensik, and Dr. Gitschthaler, 1

rules

as follows:

The appeal is dismissed.

The costs of the appeal are to be added to the total cost of the proceedings.

Grounds for the Decision:

The [Seller], a limited company with its seat in Italy, is in the business of building machines. It produces crushing and sieving machines for use in quarries for the production of grit and gravel. The [Buyer] is a waste removal and recycling enterprise. The [Buyer] engaged the [Seller] to design, produce, and deliver a machine for crushing and sieving (order of 21 October 2

[*] All translations should be verified by cross-checking against the original text. For purposes of this translation, the Plaintiff of Italy is referred to as [Seller] and the Defendant of Austria is referred to as [Buyer]. Amounts in the European currency (*Euro*) are indicated as €.
Translator's note on abbreviations: ABGB = *Allgemeines Bürgerliches Gesetzbuch* [Austrian Civil Code]; Codice civile = [Italian Civil Code]; ZPO = *Zivilprozessordnung* [Austrian Code of Civil Procedure].

[**] Jakob Heidbrink, LL.D., M.Jur. (Oxon) is Associate Professor in Law at Gothenburg University (Sweden).
[***] Todd Fox received his J.D. from Rutgers University (U.S.A.) and his LL.M. *summa cum laude* from the University of Freiburg (Germany). A member of the Bar of the State of Pennsylvania, he is an Associated Partner of the law firm Gleiss Lutz of Stuttgart (Germany), specializing in commercial arbitration.

2002). It was agreed that the remuneration would be € 813,000: 20% was to be paid up front, 60% upon delivery or notice of delivery, and the remaining 20% upon the activation of the machine, at the latest 60 days after notice of delivery. The agreed upon place of delivery was the [Seller]'s plant in Italy. The [Seller] gave – provided the machine was used in accordance with its purpose – a twelve-month warranty for all component parts, excluding parts prematurely worn, ordinary wear and tear, and damage arising from misuse or incompetent repairs. The machine was delivered during the last days of December 2002 and was installed in the [Buyer]'s plant in Austria by the [Seller]'s technicians, aided by employees of the [Buyer].

[Seller's position:]

The [Seller] demands the payment of € 107,498.51. This sum comprises an outstanding claim of € 82,741.48 for the design, manufacture, and delivery of the machine, as well as further invoice items for deliveries and services provided by the [Seller] after the machine was put into operation. The [Seller] maintains that the machine meets all requirements of the contract. [Seller] states that it was explicitly agreed that the machine – a prototype – should only crush and sieve glass from monitor screens and other assorted types of glass. The machine was not designed to process other materials. It had not been agreed that the recycled glass would be free from materials that are not part of monitors. Accordingly, the [Buyer] ordered a sieving machine for wooden and plastic parts only in response to an offer made on 15 May 2003. Nor was any certain degree of cleanliness (of the glass) agreed upon. **3**

On delivery of the machine, the [Buyer]'s manager was thoroughly instructed in the use and servicing of the machine. The machine worked without any problem during the presence of the [Seller]. The contractual design envisages the manual placement of the monitors (television or computer screens) to be processed on the conveyor belt, whereupon the machine crushes the monitors and separates the cone and glass from other parts of the monitor. Prior to this, all parts not belonging to the monitor tube, such as wires, copper, lead, nickel casings, magnetic material, plastic, wood, etc. must be removed manually. The machine may only be loaded with «naked» monitors consisting of screen glass and conic glass. The machine works flawlessly if these requirements are respected. Also, the [Buyer] used the machine at full capacity. **4**

Despite delivery in accordance with the contract, the [Buyer] asked for changes to be made and made various orders between May and October 2003; the [Seller] also performed these deliveries and services in accordance with the agreement. Notices of defects were unfounded. Upon inspection of the machine, the [Seller] found no defects; however, it found evidence of serious errors in the handling of the machine. For example, the staff of the [Buyer] had tried to process materials which the machine had not been designed to process, causing damages. Even stones, materials from the waste dump, and iron parts had been fed into the machine. Moreover, the [Buyer] had used a motor water pump without adding water or using grease, which had led to the motor being damaged. The [Buyer] also had made changes to the machine on its own and changed original factory settings; this, too, had led to damages for which the [Seller] is not responsible. Nor was the machine properly monitored and serviced. The [Buyer] has neither given notice of, nor timely specified, possible defects that may nevertheless have affected the machine. **5**

In July 2003, the [Buyer] made additional requests to make the prototype more efficient. The features requested were not included in the original agreement. The [Seller], in a cooperative spirit, declared itself ready to make the requested changes, provided the [Buyer] retract all unjustified notices of defects and pay the contractually agreed remuneration. None of the parties understood the word «improvement» used in the letter of 22 July 2003 in the technical sense of the Austrian law of warranties. 6

In accordance with the agreement of 22 July 2003, the [Buyer] expressly acknowledged the sums in question in the present proceedings and promised payment, but it has not kept its promise. Since the [Seller] declared itself prepared to perform the additional requests free of charge only on the condition that the [Buyer] fulfill its obligation to pay – which did not happen – the [Seller] terminated the agreement of 22 July 2003 before rendering the additional performance. As regards this additional performance, there is therefore no obligation to deliver. The additional performance merely concerns the adjustment of the dry cleaning and dust removal, which represent an insignificant expense compared to the claims the [Buyer] has not yet met, such that the [Buyer]'s withholding of payment amounts to legal abuse and is contrary to good faith. «*Ö norms*» were neither explicitly nor impliedly agreed to. It is exclusively the responsibility of the buyer to observe national norms, in particular labor safety regulations; if the [Buyer] had any requirements concerning such norms, it should have given notice thereof to the [Seller]. That the machine could have been improved in the certain areas pointed out by the expert is unavoidable given that it is a prototype. The machine, however, was built in accordance with the specifications of the [Buyer]. In a legal sense therefore, it is without defect. The [Buyer]'s counterclaim has not been sufficiently developed. The contract is subject to Italian law. 7

[Buyer's position:]

The [Buyer] requests the dismissal of this appeal. Due to numerous defects in the machine, the sum demanded by the [Seller] is not due. The picture tubes and monitor screens which the machine, according to the contract, must be capable of processing, are built into electrical appliances such as computers and television sets, and are therefore connected to other materials, such as plastic attachments, wooden joints, and composites from the explosion protection frame. The delivered machine must, according to the agreement, be capable of processing such materials, and of separating the screen glass from other components such as wood, plastic, and metal. It is therefore fitted with a blow separator, a dry cleaner, a sieve, and a magnetic separator. It was agreed that the processed glass should be free of plastic, wood, metal, and other materials. The machine does not fulfill these requirements. It has defects and flaws of which the [Buyer] has given notice. Despite repeated attempts to repair – defects have been partly remedied – the machine still is not in accordance with the contract. The [Seller] in its letter of 22 July 2003 announced nine corrective measures to be taken, yet the defects have not been remedied. 8

Due to the remaining defects, the machine often stops, which accordingly leads to operation interruptions inflicting losses on the [Buyer] which greatly exceed the claim in these proceedings. These losses arise from the loss of orders, and from the additional efforts necessary to accomplish the cleansing. The claim for compensation arising from these losses – which has 9

been quantified by the [Buyer] – will be set off against any possibly existing claim for remuneration. Furthermore, the machine was not ready in December 2002. The silo was not installed, the machine did not process any materials, and no test runs had been made. The issue of a confirmation of delivery and of the entering into operation of the machine (which confirmation was requested by the [Buyer]) was necessary in order for the [Buyer] be able to claim the investment growth premium for 2002. The confirmation, however, did not have the legal effect alleged by the [Seller]. An examination by the Labor Inspection Authority demonstrated that improvements were also necessary because labor safety regulations had not been complied with.

[Decision by the District Court:]

The District Court allowed the [Seller]'s claim to the amount of € 847.94. It also allowed a counterclaim up to that amount, and therefore dismissed the action. It determined that Karl L[…] had established the contact between the parties. He had agreed with the Managing Director of the [Buyer] to design, build, and deliver a machine to crush and cleanse monitor and computer screen glass. Conic glass – glass of lower quality on the back side of screens – was to be processed. The crushed material was to be spread on a conveyor belt by way of a funnel; whole screens were to be placed on the belt manually. **10**

After several meetings, the [Buyer] had issued an order on 21 October 2002; the machine was delivered in the last days of December 2002. In compliance with the request of the [Buyer], and on a form sent to the [Seller] by the [Buyer], the [Seller] confirmed the delivery of the machine in November 2002, and its entry into use in December 2002. In reality, the first attempts at using the machine were not made until the beginning of January 2003. Although this machine was a prototype, there was no agreement as to any testing phase. **11**

Since March 2003, the machine had been used for 798 hours. From the beginning it was defective. Due to the composition of the crushed material (at the end of the filling stage, there was proportionally more iron than glass), there were disturbances in the shredder; also with regard to large television sets, too much was demanded of the shredder. The [Seller] had not, until now, adjusted the blow separator, which blows away and vacuums up plastic and wooden parts from the glass. The shaking sieve used to remove plastic and wooden parts from the washing water did not work properly. The rubber conveyor belts delivered by the [Seller] were not suitable for the transport of broken glass, splinters, and glass dust. The transmitting and discarding stand was not suitably designed. When using conveyor belts with an inclination of more than 17 degrees, the belts must have belts to prevent the back flow of materials. The inclined conveyor belt carrying the magnetic materials was fitted with an unsuitable rubber surface, which was cut by the sharp edges of the tin parts. On occasion of an inspection of the work place by the Labor Inspection Authority, it was established that labor safety regulations had not been complied with; on 2 April 2004, the [Buyer] was instructed to take several safety measures. **12**

In February or March 2003, the Managing Director of the [Buyer] informed employee of the [Seller] Dino S[…] by telephone that the machine was not working. The [Seller] had made several attempts to rectify the defects. To remove plastic and wooden parts from the washing **13**

water, a shaking sieve was installed by the [Seller], who, however, invoiced € 20,551.80 for the measure taken. The dust protector mentioned on the same invoice also is a part of the attempts to remedy the defect. In the area of the magnetic cutter, the [Seller] had replaced the magnetic rubber conveyor belt in an attempt to remedy the defects, but had also issued an invoice regarding the replacement for € 1,380. On 10 July 2003, a meeting took place during which the [Seller] promised the improvement of the dry cleaner's effect and changes to the drum washer and the conveyor belts. The defects in the dry cleaner and the drum washer have not been rectified, although it had been agreed that the work should be done by 18 August 2003.

The [Buyer] had entered into a contract with a German firm for the recycling of used electric and electronic appliances. It was intended that 3,000 metric tons of screens be processed; this was not possible during 2003 and 2004, as the machine did not work properly and repeatedly stopped. The [Buyer] received € 70 per ton in remuneration. It could have earned an additional € 110 per metric ton iron, and € 30 per ton glass through further sales; the screens in question consist of approximately 10 percent iron, and 90 percent glass. 14

The District Court also ascertained in detail the days during which the machine had stood still in the years of 2003 and 2004, as well as the cause of the standstills. The facts were evaluated legally in accordance with Italian law. The [Seller] had given a twelve months' warranty. Its claim, excluding one item on the invoice, was not due until the defects had been rectified. Only the claim for € 847.94 for substituting the water pump was justified. The counterclaim, in any case, exceeded this amount; the [Seller]'s claim was dismissed. 15

[Decision by the Court of Appeal:]

The Court of Appeal allowed the appeal of the [Seller], reversed the appealed judgment and referred the claim back to the District Court for renewed trial and judgment. It gave leave to appeal to the Supreme Court, as the question whether the CISG allows a general right to refuse performance has not been answered in the highest instance. 16

The central question in contention in this litigation was whether, according to the agreements of the parties, the delivered recycling machine had to be suitable only for the processing of glass (and not other materials such as metal, wood, or plastic), or whether it had to be suitable for the recycling of not only glass, but also of other materials such as wood, metal, or plastic. The District Court had regarded the latter as proven. In finding this, and in its evaluation of the evidence, it had based its findings on one document supported by the statement of the Managing Director of the [Buyer], and had not examined in detail the evidence contradicting the document and the supporting statement. In particular, it had not examined the contradicting statement of the witness Karl L[…], who had maintained that it had been clear from the outset that the machine had to be capable of crushing and cleansing monitor screen and computer glass, and that the sets of appliances had to be dismantled before the process. The reasons for the judgment in the first instance were not in accordance with § 272(3) ZPO. The crucial question in the judgment was what technical specifications of the machine had been agreed upon. The functioning of the machine and the defects it may have had, had to be assessed on the basis of the machine's agreed technical standard. 17

In the renewed trial, the District Court would have to apply the CISG. When a party ordering goods does not supply a substantial part of the materials needed to manufacture those goods, contracts for the manufacture of goods are legally equivalent to contracts for the sale of goods. According to the CISG, the buyer has to examine the goods, or cause them to be examined, as soon as is reasonable under the circumstances. He loses his right to rely on the non-conformity of the goods if he does not give notice specifying the nature of the defect to the seller within a reasonable time. The issue of timeliness of the notice of defect is therefore not determined pursuant to Italian law but rather pursuant to the CISG. The judgment in the first instance established neither the time of the notice of defect nor the content of the notice; thus, the timeliness and specificity of the notice could not be finally established. 18

The question of whether under the CISG a party can claim a general right to refuse performance when the other party is in breach of contract has not been answered uniformly in the literature. The Court of Appeal, however, subscribed to the academic opinion that a general right of retention flows from Art. 58 CISG. According to this provision, whether payment is due depends on whether the goods were delivered in conformity to the contract, as otherwise the right to inspection in Art. 58(3) would be meaningless. A prerequisite for the retention of the price, however, is a timely and sufficiently detailed notice of non-conformity; regarding this question, the District Court must sufficiently establish the facts. The District Court also must deal with the allegation of the [Seller] that the [Buyer] had acknowledged its claim. Any possible acknowledgement had to be evaluated according to Italian law. It was also necessary to discuss whether the content of the original agreement had been subsequently altered by additional contracts, as alleged by the [Seller]. 19

Decision

For the reasons stated by the Court of Appeal, the [Seller] has leave to appeal but the appeal is unfounded. 20

The [Seller] alleges that the CISG does not provide for any right of the buyer to refuse performance in the case of non-conforming (defective) performance on the part of the seller. It alleges that a general right for the innocent party to refuse performance is contrary to the system of the Convention. The [Seller] states that Art. 45 CISG exhaustively governs the rights of the buyer. The [Seller] alleges that Art. 48 CISG allows the seller to remedy defects and reserves for the buyer only the right to claim avoidance and damages. Further, the [Buyer] is alleged to have given belated and unsubstantiated notice of the defects: according to Art. 39 CISG; this alone is said to suffice to prevent [Buyer] from relying on any possible non-conformity. 21

In its reply, the [Buyer] disputes the application of the CISG. Its position is that the contract was for the design, building, and delivery of a machine, and, in this context, questions of the law of sales were not of primary relevance. 22

1. Applicable law

The parties have not agreed on the applicable law. The District Court, in accordance with Art. 4(1) and (2) of the Rome Convention, applied Italian law as the law of the State in which the [Seller] (being the party rendering the characteristic performance) has its seat, or, as the case may be, its main place of business at the time of formation of the contract. The Court of Appeal, characterizing the contract as the purchase of goods to be manufactured or produced in the sense of Art. 3(1) CISG, applied the CISG. 23

The CISG is applicable when the contract between the parties falls into the material sphere of application of the Convention. Whether it is applicable is to be assessed *ex officio* (Magnus in Staudinger, *Kommentar zum BGB* [Commentary to the German Civil Code] (2005), Art. 1 CISG para. 128). The material sphere of application of the Convention extends to «contracts for the sale of goods». Art. 3 CISG – disregarding one exception which is not applicable in the present case – expands the sphere of application to «contracts for the supply of goods to be manufactured or produced». According to Art. 3(2) CISG, however, the Convention does not apply to contracts in which the preponderant part of the obligations of the party who furnishes the goods consists in the supply of labor or other services. This can be the case when the contract is of a mixed type, such as for the delivery of machines, which (as is the case in the present litigation) comprises obligations to design, manufacture, deliver, and install the goods (RV 94 BlgNr 17. GP 51; Posch in Schwimann, *AGBG,* 2nd ed., Art. 3 CISG para. 5; Magnus, *supra*, Art. 3 para. 27; Schlechtriem/Schwenzer, *Kommentar zum einheitlichen UN-Kaufrecht* [Commentary to the Uniform UN Sales Law], 4th ed., Art. 3 para. 18; Siehr in Honsell, *Kommentar zum UN-Kaufrecht* [Commentary to the UN Sales Law], Art. 3 para. 6; Piltz, *Neue Entwicklungen im UN-Kaufrecht* [New Developments in UN Sales Law], NJW 2005, 2126). Contracts of a mixed type are not encompassed by the CISG if the proportion of non-sale obligations clearly preponderates in monetary terms or according to the intentions of the parties (Magnus, *supra*, para. 27; Siehr in Honsell, *supra*, para. 6; Schlechtriem/Schwenzer, *supra*, para. 17 *et seq*.; Achilles, *Kommentar zum UN-Kaufrechtsübereinkommen* [Commentary to the UN Sales Convention], Art. 3 para. 6). It is the relation in the individual case between obligations alien to, and obligations typical for, sales contracts which is decisive (Achilles, *supra*, para. 6). The burden of proving that the obligations uncharacteristic to sales contracts are preponderant, and thus the non-applicability of the CISG, is on the party claiming that the Convention does not apply (Schlechtriem/Schwenzer, *supra*, para. 20; Magnus, *supra*, para. 32; Achilles, *supra*, para. 9). 24

The lower instances have not discussed the question of whether obligations typical for sales contracts or uncharacteristic for sales contracts preponderate in the contract between the parties. The applicability of the CISG, however (as shown above), depends on the answer to this question. Central to the decision in this case is whether the CISG is applicable since – as will be shown in due course – the CISG and the otherwise applicable Italian law differ regarding the giving of notice of defects. 25

2. The right to refuse performance according to the CISG and Italian law

The CISG does not contain any explicit provision generally allowing one party to withhold its performance in case of the other party's breach of contract. The notion of breach of contract 26

in the Convention encompasses cases of breach of warranty (Posch, *supra*, Introduction to Art. 45 CISG para. 3). Some authors find a buyer's general right to refuse performance in the event of non-conforming performance by the other party in Art. 58 CISG, since under this provision the payment of the price becomes due only when the goods delivered to the buyer are in conformity with the contract. Otherwise, they claim, the right of examination in Art. 58(3) CISG would be meaningless. If the goods delivered are not in conformity with the contract and if the buyer, in accordance with Art. 46(2) and (3) CISG, requires substitute delivery or repairs, the buyer is therefore said to be able to rely on the fact that payment is not yet due (Schlechtriem/Schwenzer, *supra*, Art. 45 para. 22).

Magnus derives the buyer's right to withhold the buyer's own performance from the principle of simultaneous exchange of performances contained in the Convention, and from the principles underlying Arts. 58, 71, 80, 85, and 86 CISG (Magnus, *supra*, Art. 4 CISG para. 47a, and Art. 58 para. 23). On the other side, Schnyder/Straub in Honsell (*supra*, Art. 48 para. 55 *et seq*.) maintain that the Convention does not contain any general right for one party to withhold its performance; if the contract is breached, the innocent party may only rely on the remedies contained in the Convention. The lack of any right for the buyer to refuse performance is said to follow from Art. 48 CISG. This provision allows the seller to remedy the non-conformity of his performance and explicitly reserves for the buyer only claims for avoidance and damages, but no right to refuse performance. **27**

This Court follows the opinion of Schlechtriem/Schwenzer (*supra*, Art. 45 para. 22) and Magnus (*supra*, Art. 58 para. 23, and Art. 4 para. 47a). The question of whether the buyer has the right to withhold the price (or any part thereof) in the event of non-conforming performance on the part of the seller is a question governed by the Convention. As such, it allows the gap-filling mechanism of Art. 7(2) CISG to apply. Art. 45 CISG refers the buyer, in the event of non-conforming performance by the seller, to Arts. 46 to 52, as well as to the possibility of claiming damages according to Arts. 74 to 77 CISG. Neither the remedies provided in Art. 45 CISG (specific performance, substitute delivery, nor repair as regards Art. 46 CISG; avoidance as regards Art. 49 CISG; and price reduction as regards Art. 50 CISG), nor the detailed provisions contained in these Articles, touch on the question as to when payment of the price (or payment of the remuneration in cases covered by Art. 3(1) CISG) becomes due. Nor do they in any way exclude the right of the buyer to refuse performance in the event of non-conforming performance. Moreover, contrary to the opinion of Schnyder/Straub (in Honsell, *supra*, para. 56), it does not follow from Art. 48 CISG that the buyer lacks the right to refuse payment of the price. The possibility provided to the seller in Art. 48 CISG to rectify his performance, and to the buyer to refuse such rectification and/or to claim damages, does not tell us anything about the point in time at which the buyer has to pay; nor does it tell us whether it is permissible under the principle of simultaneous exchange of performances for the buyer to refuse to perform on the basis of a non-conforming performance of the contract. **28**

The principle of simultaneous exchange of performances also underlies the CISG (explicitly so stated in the *travaux préparatoires* regarding the implementation of Art. 58 into Austrian law, RV 94 BlgNR 17. GP 63 f.; Magnus, *supra*, Art. 4 para. 47a). The principle finds its expression in the right to suspend one's own performance under Art. 71 CISG, as well as in the provision **29**

regulating the duty to examine the goods in Art. 58(3) CISG. The *travaux préparatoires* regarding the implementation of Art. 71 into Austrian law (RV 94 BlgNR 17. GP 66) explicitly note that Art. 71 CISG rests on the same considerations underlying § 1052 ABGB; the provision is therefore said to be «together with Art. 58 a consequence of the non-codified principle of simultaneous exchange of performances.» As a consequence of this principle, under Art. 58(3) CISG, the buyer is not bound to pay the price before the buyer had the opportunity to examine the goods. Schlechtriem/Schwenzer (*supra*, Art. 45 para. 22) rightly point out that this right to examine the goods would be meaningless if the buyer were bound to pay the price even when he found during the examination that the goods were not in conformity with the contract and desires substitute delivery and repair of the goods.

The principle of simultaneous exchange of performances also acknowledged in the CISG enables the buyer to raise the objection that the contract has not been (properly) performed and to withhold his own performance until such time as the other party is prepared to render (simultaneous) performance (Apathy in Koziol/P. Bydlinski/Bollenberger, *ABGB,* § 1052 para. 2). The right to withhold one's own performance until the counter-performance has been rendered can also be found in other provisions of the CISG; for example, Arts. 58 and 86 CISG allow the retention of the goods if and so long as the costs necessary for their preservation have not been reimbursed. Therefore, according to the principles shown above and additional interpretation in accordance with Art. 7(2) CISG, the buyer (or the buyer in the contract for the sale of goods to be manufactured or produced under Art. 3(1) CISG) has the right to withhold payment of the price when the performance rendered is not in conformity with the contract. The [Buyer] – who here demands substitute delivery and repairs in accordance with Art. 46 CISG – thus also has the right according to the Convention to withhold the remaining remuneration until such time as the [Seller] has performed its obligations in conformity with the contract. To this extent, the law regulating defective performance does not differ from Italian law (Art. 1668 Codice civile). According to the latter, the buyer in the sale of goods to be manufactured or produced has the right to withhold remuneration until defects in the goods have been removed (Cian, *Commentario breve al Codice civile* [Short Commentary to the Italian Civil Code], 7th ed., Art. 1668). **30**

3. Notice of non-conformity according to the CISG and Italian law

The rules pertaining to the giving of notice regarding defects in the CISG differ from those of Italian law. **31**

According to Art. 1667 Codice civile the buyer must give notice of deviations from the contract and defects within 60 days of their discovery, lest he lose the right to rely on them. No notice is required if the seller [manufacturer] has acknowledged, or kept secret, such deviations or defects. The right to sue the seller [manufacturer] becomes barred two years after the goods are handed over. A buyer who is sued for payment can always rely on the implied warranty as to conformity with the contract if notice of the deviations or defects was given within 60 days of their discovery and before two years have expired from the delivery of the goods. **32**

In contrast, Art. 38(1) CISG requires the buyer to examine the goods, or cause them to be examined, within as short a time as is reasonable under the circumstances. The buyer loses **33**

his right to rely on any non-conformity with the contract if he has not given the seller notice within a reasonable time, and has not specified in what sense the goods do not conform with the contract (*cf*. in this respect Resch, *Zur Rüge von Sachmängeln nach UN-Kaufrecht* [On Giving Notice of Defects Under UN Sales Law], ÖJZ 1992, 470; Piltz, *Neue Entwicklungen im UN-Kaufrecht* [New Developments in UN Sales Law], NJW 2005, 2126). The notice period starts running, at the latest, at the time the buyer realized, or ought to have realized, the non-conformity (Art. 39(1) of the Convention). When considering whether the buyer has kept within a reasonable time, regard must be given to the objective and subjective circumstances of the individual case (Posch, *supra*, Art. 39 CISG para. 5; stRsp RIS-Justiz RS0111000). Although the requirements as to the content of the notice must not be exaggerated, the notice must be specific in that it must describe the non-conformity in detail (7 Ob 301/01t = SZ 2001/1 = RIS-Justiz RS0116099).

In the present case, it has not yet been ascertained whether the timeliness and the content of the notice of non-conformity are to be assessed according to Italian law or according to the CISG. The decisive factor is whether the contract between the parties, according to Item 1 of this judgment, is subject to the material sphere of application of the CISG, or whether as a consequence of the dominant obligations being alien to sales, it is to be assessed as a contract for services under Italian law. In order not to surprise the parties with any legal opinion, a discussion and the establishment of the corresponding facts after a renewed trial are necessary. **34**

4. Remanded trial to be conducted by the District Court

On the basis of the considerations above concerning the material sphere of application of the CISG, the District Court – after hearing the parties to the extent necessary – will have to establish the facts necessary to allow an assessment of whether obligations alien to sales contracts, or obligations typical for sales contracts, preponderate in monetary terms or according to the intentions of the parties. **35**

To the extent the Court of Appeal is of the opinion that certain facts pointed out by the Court have not yet been sufficiently established, the Supreme Court – which is not a fact-finding instance – cannot object (stRsp RIS-Justiz RS0042179). This concerns, in particular, the necessary establishment of the content of the contract regarding the technical specifications of the machine the parties agreed to, and the possible (additional) establishment of defects. It also concerns the demand by the Court of Appeal that additional facts be established regarding the time and the exact content of the notice of non-conformity, as well as the acknowledgement by the [Buyer] alleged by the [Seller]. Further, it concerns the question of whether the invoices that are the object of this action concern additional assignments to develop the prototype, or attempts to remedy defects. **36**

The appeal by the [Seller] against the decision of the Court of Appeal to reverse the judgment at first instance, therefore, is not justified. **37**

The decision as to costs follows from § 41 and § 50(1) ZPO. **38**