

**Case 753: CISG 42, 43**

Austria: Oberster Gerichtshof

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A German Private Limited Company (the seller) sold blank CDs to an Austrian company (the buyer). The seller had bought the CDs from its Taiwanese parent company which had the license to produce and sell them. The license contract allowed the parent company to sell the blank CDs in Germany, however it was silent on whether it was also entitled to sell them in Austria. Furthermore, after a dispute on the license fees with the licensor, the license contract had been dissolved and court proceedings between the Taiwanese parent company and the licensor had been filed.

When the buyer learned about the proceedings it asked the seller for clarifications without receiving any further information nor any information on the remedies in case of claims on the products bought. Therefore, the management board of the buyer decided to exercise their right of retention of payment of those seller's invoices relating to the goods sold and delivered after the license contract had been dissolved. According to the buyer, those goods were not free from third parties' claim and the buyer itself could be held liable for the license fees. The seller argued that there was no risk that the buyer could be held liable for the license fees, because there had been no breach of contract by the parent company. Furthermore, the CDs delivered to the buyer had been produced before the license contract had been dissolved and the delivered goods were free from any third party claim. Finally, the buyer had not given notice of the alleged defects of the goods within a reasonable time.

The court of first instance dismissed the seller's claim. According to Art. 42 CISG the seller must deliver the goods free from any rights or claims of a third party unless the buyer knew or could not have been unaware of these rights at the time of conclusion of the contract. According to the court, it had been silently agreed that the buyer should not be liable for any license fees. Therefore, the buyer was not obliged to investigate whether the license contract was still valid or whether its being dissolved was lawful. Given the circumstances, the buyer had informed the seller of its intention within reasonable time. Therefore, the buyer had the right to avoid the contract.

In appeal, the Court of Appeal recognized the right of the buyer to avoid the contract and to claim for damages, but not to retain the payment.

The Supreme Court, on the contrary, was of the opinion that the buyer had a right of retention in the case of breach of contract by the seller and until the seller fulfilled its contractual obligations. The seller's obligation to provide licensed goods was to be interpreted in the way that the goods had to be licensed in the State where they were resold, if at the time of the conclusion of the contract the parties had contemplated that the goods would be resold or otherwise used in that State; or, in any other case, in the State where the buyer had its place of business, Art. 42 (1)(a) and (b) CISG. The court further noted that the general burden of proof pursuant to the CISG was on the party that wanted to rely on a provision in its favour, unless reasons of equity would demand otherwise. The court of first instance, however, had failed to determine the State in which the goods would be resold or used as contemplated by the parties at the time of the conclusion of the contract. Consequently, the Supreme Court could not decide whether the seller had breached the contract. The case was remanded to the court of first instance in order to clarify the facts in this regard.