

| CISG-online 1427     |  |
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| Jurisdiction         | Switzerland  |
| Tribunal             | Obergericht des Kantons Zug (Court of Appeal Canton Zug) |
| Date of the decision | 19 December 2006   |
| Case no./docket no.  | OG 2006/19   |
| Case name            | <i>Tube furnace case</i>                                 |

*Translation\* by Jan Henning Berg\*\**

*Edited by Daniel Nagel\*\*\**

Defendant-Cross-Plaintiff-Appellant [Buyer] has requested that:

1. The Court approve the [Buyer]'s appeal and dismiss the judgment in First Instance;
2. Plaintiff-Cross-Defendant-Appellee [Seller] be ordered to bear all costs and expenses of the proceedings; and
3. The Court rule that [Buyer] is entitled to collect damages from [Seller].

[Seller] has requested that:

1. The Court dismiss in full the appeal filed by [Buyer] on 11 May 2006; and
2. [Buyer] be ordered to bear all costs and expenses of the proceedings.

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\* All translations should be verified by cross-checking against the original text. For purposes of this translation, Plaintiff-Cross-Defendant-Appellee of Germany is referred to as [Seller] and Defendant-Cross-Plaintiff-Appellant of Switzerland is referred to as [Buyer]. Amounts in the currency of Switzerland (Swiss francs) are indicated as [Sfr.]. Amounts in the uniform European currency (Euro) are indicated as [EUR].

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### Facts:

1.

Following an inquiry of [Buyer], [Seller] made an offer on 8 September 2003 concerning the delivery of a stove including its transport and installation for a total price of EUR 28,760. The target date for delivery was proposed as «about ten weeks, after clarification of all technical details.» On the basis of this offer, [Buyer] ordered the stove from [Seller] on 12 September 2003 and requested as target date for delivery «as soon as possible, ten weeks at the latest.» The stove was delivered on 8 April 2004. Afterward, [Buyer] refused to pay [Seller]'s invoice of EUR 27,941.40 for the stove which had been delivered and installed. [Buyer] alleged that the stove was defective.

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2.

On 4 May 2005, [Seller] commenced legal action before the District Court (*Kantonsgericht*) Zug against [Buyer] for payment of EUR 27,941.40 plus interest.

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[Buyer] requested the Court to dismiss the [Seller]'s action and filed a cross-action against [Seller] for damages in the amount of Swiss francs [Sfr.] 35,000.

3.

The District Court Zug, 3rd division, affirmed [Seller]'s claim for the purchase price in its judgment of 6 April 2006 except for the additional interest claim. The [Buyer]'s cross-action was dismissed.

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4.

[Buyer] filed its appeal before the Canton Appellate Court (*Obergericht*) Zug on 11 May 2006 with the requests set out above. [Seller] has also repeated the requests as stated above.

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5.

The parties adhered to their (initial) legal positions during the appellate hearing of 12 December 2006. A settlement proposal made by [Buyer] to [Seller] was denied by the latter.

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### Reasoning of the Court:

#### 1. [Jurisdiction]

[Buyer] has properly ceased to challenge the jurisdiction of the Courts of the Canton of Zug to hear the merits of the international dispute. Jurisdiction of its Courts follows from Art. 2(1) Lugano Convention on Jurisdiction and the Enforcement of Judgments in Civil and Commercial Matters, which states that persons domiciled in a State bound by this Convention (Germany and Switzerland are Member States) may, whatever their nationality, be sued in the courts of that State. [Buyer] is domiciled in the Canton of Zug and therefore may be sued in the respective courts.

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**2. [Application of CISG]**

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The Court of First Instance qualified the contractual relationship between the parties as a contract of sale and assessed the dispute according to the provisions of the United Nations Convention on Contracts for the International Sale of Goods (CISG) which has been ratified by Germany and Switzerland.

It is not evident from the documents whether or not [Seller] had an obligation – besides the obligation to deliver – to produce the stove according to the specifications stated in the offer of 8 September 2003. This question, however, may remain unresolved as Art. 3(1) CISG provides that contracts for the supply of goods to be manufactured or produced are to be considered sales.

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However, the CISG 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 labour or other services (Art. 3(2) CISG). Apart from being obliged to effect delivery, [Seller] had an obligation to install the stove. Such contracts generally fall within the scope of application of the CISG since the installation is often of only minor relevance when compared to the whole transaction volume (Ferrari, in Schlechtriem (ed.), *Kommentar zum einheitlichen UN-Kaufrecht (CISG)*, [Commentary on the CISG], 3rd ed., Art. 3 para. 17). Even if, pursuant to [Seller]'s offer, the installation took three days for a technician, this does not imply that the installation should be regarded as more expensive than the delivered good itself.

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Therefore, the present dispute is to be governed by the provisions of the CISG. The question of applicable law must be settled *ex officio*. Thus, it is irrelevant that [Buyer] did not contest the applicability of the CISG.

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**3. [No right for Buyer to retain the purchase price]**

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[Buyer] alleges that the delivered stove suffered from severe defects and therefore was unusable. Consequently, it refuses to effect payment. [Buyer] impliedly relies on the right set out in Art. 49(1) CISG to declare the contract avoided, which is granted to the buyer in case of a fundamental breach of contract by the seller.

Still, the buyer may only successfully rely on its legal remedies following a non-performance if it has notified the seller of the non-conformity within due time. According to Art. 39(1) CISG, the buyer loses the right to rely on a lack of conformity of the goods if he does not give notice to the seller specifying the nature of the lack of conformity within a reasonable time after he has discovered it or ought to have discovered it. Art. 38(1) CISG requires the buyer to examine the goods, or cause them to be examined, within as short a period as is practicable in the circumstances. Therefore, the buyer needs to comply with two periods of time: First, the period for examination of the goods and, second, the subsequent period to notify. [Buyer] asserts to have given timely notice of the non-conformity.

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As a basic rule for durable goods which are not perishable and which are not affected by major fluctuations in price – subject to adjustment in either direction – a period for examination of two weeks but at least one week or five working days seems appropriate. In order to give a rough benchmark, the subsequent period to notify should be set as one month. This amounts

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to a total period for the notification of non-conformities of six weeks, consisting of an examination period of fourteen days and a notification period of four weeks. It is for the buyer to prove that he has submitted a timely notice (Brunner, *UN-Kaufrecht (CISG)*, [UN Sales Law], Art. 38 para. 7, Art. 39 paras. 13, 27).

It is undisputed that the stove was delivered on 8 April 2004. In consideration of the three days of installation works, the stove was at the full disposal of [Buyer] on 11 April 2004. It follows from [Buyer]'s submissions made during the main hearing before the District Court that the stove had then been put into operation, meaning that [Buyer] could have examined it. The total period for the notification of any possible defects therefore lasted until about the end of May 2004. It is evident from the documents that [Buyer] complained to [Seller] about the non-conformity of the goods for the first time in its fax of 10 August 2004. As this notice had been given after about four months, it was clearly not given within due time. Nevertheless, [Buyer] asserts to have given an earlier and oral notice to the CEO of [Seller]. This, however, is contested by the latter. That means [Buyer] had to put forth evidence in favor of the purported notice, which in fact it did not do. Consequently, [Buyer] had lost its rights to rely on a lack of conformity on the basis of a delayed notice of non-conformity.

Moreover, [Buyer] did not specify the nature of the lack of conformity in its fax of 10 August 2004 as required by Art. 39(1) CISG. It could be expected from [Buyer] as a technically versed party to submit a more specific identification of defects than could be expected from a mere layman (Schwenzer, in Schlechtriem (ed.), *Kommentar zum einheitlichen UN-Kaufrecht (CISG)*, [Commentary on the CISG], Art. 39 para.7). Contrary to the allegations made by [Buyer], [Seller] had never affirmed the purported defects. On the contrary, [Seller] contested in its response of 13 August 2004 to the notice of non-conformity the existence of any defects. It is irrelevant in this case that [Seller] has replaced a flange after installation.

As a conclusion to this, [Buyer] is obliged to pay the invoiced purchase price which remained uncontested in its amount.

#### **4. [No right for Buyer to claim damages]**

[Buyer] further asserts that the stove was delivered too late and that this breach of contract had also caused damages. According to the contractual agreement between the parties, the stove was to be delivered at the latest ten weeks after the conclusion of the contract. This implies a target date for delivery of about 24 November 2003. However, the stove was not delivered before 8 April 2004 and therefore long after the end of the period agreed upon under Art. 33(b) CISG. This constitutes a breach of contract which generally entitles [Buyer] to damages pursuant to Art. 45 in conjunction with Art. 74 CISG).

[Buyer] has to prove the existence and the extent of the damage as well as that the breach had caused the damage (Stoll, in Schlechtriem (ed.), *Kommentar zum einheitlichen UN-Kaufrecht (CISG)*, [Commentary on the CISG], Art. 74 para. 47). However, [Buyer] neither brought sufficient evidence in order to establish the existence of damages nor did it substantiate the amount. Therefore, [Buyer] is not entitled to claim damages.

5.

Conclusively, [Buyer] has forfeited its right to rely on any non-conformity and failed to substantiate damages from the delayed delivery. Thus, it has to pay the purchase price. [Seller]'s action is justified while [Buyer]'s cross-action is not justified. The appeal of [Buyer] is dismissed.

**6. [Allocation of costs]**

In the light of this outcome of the dispute, [Buyer] also has to bear the costs and expenses of the appellate proceedings. Additionally, it has to compensate [Seller] for its inconveniences and expenses suffered in this respect.

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**Judgement:**

1.

The appeal is dismissed and the judgment of the District Court Zug, 3rd division of 6 April 2006 is affirmed.

2.

The costs of the appellate proceedings amount to Sfr. 2,000 as fees for the judgment, Sfr. 15 for attorneys' fees, Sfr. 40 additional expenses. Total = Sfr. 2,055. These costs have to be borne by [Buyer].

3.

[Buyer] is ordered to compensate [Seller] for the appellate proceedings in the amount of Sfr. 4,000.

4.

This judgment is subject to a further appeal within a period of 30 days after service of this judgment before the Federal Court according to Art. 43 et seq. to the Organization of the administration of federal justice (OG). The appeal has to contain duly reasoned requests.

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