

Case 932: CISG 4; 8; 74; 77

Switzerland: Obergericht des Kantons Thurgau (Higher Court of the Canton of Thurgau)

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<http://www.globalsaleslaw.com/content/api/cisg/urteile/1566.pdf>

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The dispute in question was between two companies which supplied each other with building materials. An action for payment of outstanding debts was instituted by T GmbH, whose principal place of business was in Italy, against M AG, a company having its principal place of business in Thurgau. The lower court allowed the claim; the defendant appealed against that ruling.

The court had to examine an agreement concluded between the parties, whereby the defendant acknowledged certain debts, which it undertook to settle by instalments in the form of a 5 per cent discount granted on all the plaintiff's purchases. The court concluded that such an agreement could not be defined as a contract of sale and thus did not fall within the sphere of application of the CISG. It accordingly interpreted the agreement on the basis of national law, but indicated that the application of the CISG rules (article 8), which it expounded at length, led to the same outcome.

The dispute related not only to that agreement but also to the price of one of the deliveries. Following a telephone call, the plaintiff supplied, instead of the agreed product, which was out of stock, a similar but more expensive product. The defendant deemed that to be a breach of contract, giving rise to a claim for damages within the meaning of article 74 CISG; in the defendant's view, acceptance of the goods should be regarded as a simple measure intended to mitigate the loss within the meaning of article 77 CISG. However, the court accepted the plaintiff's argument that the defendant's unconditional acceptance of the substitute goods implied agreement to a modification of the contract.