

CISG-online 1566

Jurisdiction	Switzerland
Tribunal	Obergericht des Kantons Thurgau (Court of Appeal Canton Thurgau)
Date of the decision	12 December 2006
Case no./docket no.	ZBR.2006.26
Case name	<i>Construction materials case V</i>

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Facts of the case

1.

By order of the Friedensrichteramt Weinfelden of 21 September 2006, the B[...] GmbH (limited liability company) [Seller] brought a claim against M[...] AG (public incorporated company) [Buyer] for payment of EUR 10,774.26 plus 5% interest:

- on EUR 50,130.06 for the period from 20 February 2004 until 11 March 2004;
- on EUR 40,156.22 for the period from 12 March 2004 until 31 August 2004; and
- on EUR 10,774.26 since 1 September 2004,

and for payment of SFR 1,045.60 plus 5% interest since 17 August 2004.

The dispute between the parties concerned the interpretation of an agreement of 2 July 2003, according to which B[...] GmbH [Seller] should receive a charge of 5% on all sales to M[...] AG [Buyer].

It also concerned the question whether or not [Buyer] ordered product J[...], respectively, product F[...] for the price that had been named in [Seller]'s offer of 27 October 2003.

* All translations should be verified by cross-checking against the original text. For purposes of this presentation, the Claimant-Appellee of Italy is referred to as [Seller], and the Respondent-Appellant of Switzerland is referred to as [Buyer].

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2.

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By judgment of 20 January/17 February 2006, the District Court (Bezirksgerichtliche Kommission) of Weinfelden [Court of First Instance] held the [Seller]'s claim to be justified to the amount of 10,774.26 plus 5% interest:

- on EUR 50,130.06 for the period from 20 February 2004 until 11 March 2004;
- on EUR 40,156.22 for the period from 12 March 2004 until 31 August 2004; and
- on EUR 10,774.26 since 1 September 2004.

As for the remainder, the Court of First Instance dismissed the claim.

3.

a)

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Against this judgment, [Buyer] brought an appeal (Berufung) seeking the dismissal of the entire claim. At the hearing of 12 December 2006, [Buyer] submitted that the parties had concluded a sales contract for the delivery of product J[...]. Subsequently, [Seller] notified [Buyer] that due to a shortage of supply, the amount of product J[...] that had been ordered could not be delivered in due time. Instead, [Seller] offered delivery of the equivalent product F[...] as replacement. [Buyer] accepted delivery of this replacement. Given these circumstances, Buyer alleges that no extra charge had become due.

The agreement about an extra charge of 5% in the contract of 2 July 2003 was to be interpreted in accordance with the principle of good faith and thus in the sense that the stipulated extra charge of 5% was already included in the offered purchase price.

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b)

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[Seller] seeks dismissal of the appeal.

It has submitted that pursuant to the agreement of 2 July 2003, [Seller] had indeed been justified to add the stipulated extra charge of 5% on sales to [Buyer]. After the deliveries had taken place, the extra charge was invoiced and explicitly listed as such in itemized bills with the comment «according to the agreement with Mr. Fischer». [Buyer] had never questioned these bills.

[Seller] was entitled to add the extra charge in addition to the purchase price mentioned in the offer. The parties had concluded a sales contract for the delivery of product J[...] for the price named in [Seller]'s offer of 23 October 2003. Thereafter, [Buyer] had accepted the delivery of product F[...] as a replacement for J[...]. [Buyer] knew the prices for both products. Therefore, [Buyer] had effectively changed its original order into an order for the delivery of product F[...], and was thus obliged to pay the purchase price for product F[...] as set out in [Seller]'s offer.

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Reasoning

1.

[Seller] alleges that it delivered goods for a total sum of EUR 50,130.06, that [Buyer] had paid EUR 9,973.84 on 11 March 2004 and EUR 29,381.96 on 31 August 2004, and that EUR 10,774.26 remained yet to be paid.

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[Buyer] denies that [Seller] is entitled to the claimed amounts arguing that the offer of the delivery of product F[...] was a replacement for the unavailable product J[...], and therefore already included the agreed extra charge of 5%. As for the replacement product F[...], the cheaper price of product J[...] would apply. It has not been questioned by either party that all products that were invoiced had actually been delivered. Apart from the dispute concerning product J[...] and F[...], the invoices have all been correct.

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2.

a)

As [Seller] is seated in N[...], Italy, and [Buyer] has its place of business in Weinfelden [Switzerland], the dispute involves an international transaction. On the one hand, it concerns the question whether [Seller] was in default of delivery under the sales contract. On the other hand, it turns on the correct interpretation of the parties' agreement as regards the stipulated particulars of payment of the purchase price.

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b)

According to Art. 1 of the United Nations Convention on Contracts for the International Sale of Goods (hereafter referred to as CISG), this Convention applies to contracts of sale of goods between parties whose places of business are in different States when the parties are Contracting States, or when the rules of private international law lead to the application of the law of a Contracting State.

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The Convention only governs the formation of the contract of sale and the rights and obligations of the seller and the buyer arising from such a contract. In particular, except as otherwise expressly provided in the Convention, it is not concerned with: the validity of the contract or of any of its provisions or of any usage; the effect which the contract may have on the property in the goods sold. Art. 4 CISG.

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c)

The CISG does not regulate all legal aspects of an international sales contract, nor does any other convention. According to its clear wording, it is confined to the formation of the contract of sale and the rights and obligations of the seller and the buyer arising from such a contract. This provision is intended to define the extent of the CISG's regulatory effect, not its scope of application. The regulatory effect must be clearly distinguished from the scope of application: While the latter concerns the question whether or not the CISG is applicable to a contract at all, the former defines to what extent contracts are covered, i.e., governed by the provisions of the CISG.

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As far as it is expressly provided for, this distinction is not very difficult. However, the distinction in questions of law, which are not expressly mentioned, e.g., questions concerning aspects of breach of contract, culpa in contrahendo, interest, et cetera, may become rather intricate. Either these questions must be decided by the national law provisions, which are applicable according to the conflict of law rules of the state of the forum, or they are decided by otherwise applicable international law. The same holds true for legal questions which are mentioned, but not expressly decided by the CISG, to the extent that these questions cannot be decided by resort to the general principles underlying the Convention (Schlechtriem/Schwenzer, *Kommentar zum einheitlichen UN-Kaufrecht* [Commentary on the CISG], 4th ed., Art. 4 para. 3 et seq.).

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d)

By letter of 7 July 2003, which had been addressed «to the attention of Hansjörg T[...]» of T[...] GmbH, Heinz Fischer confirmed for [Seller]:

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«According to our meeting of 2 July 2003, we hereby confirm that M[...] AG [Buyer in the contract with Seller] will grant you a rebate of 5% on all of your purchases. We further state that on all purchases of goods 5% have to be calculated. This agreement shall have effect until the «OP» of PM [...] Baumaterial will be balanced.»

By way of this arrangement, the parties agreed that the open positions («OP», see above) of the PM [...] AG should be paid by [Buyer] in instalments, by way of granting T[...] GmbH a rebate of 5% on all orders it may place from [Buyer], on the one hand, and by way of adding 5% on all purchases of [Buyer] from [Seller], on the other hand. Yet, this agreement is not based on a sales contract; in other words, it does not constitute or specify the secondary obligations of a sales agreement. Instead, it must be considered as an acknowledgement of Heinz F[...] to be liable for all open positions of PM [...] Baumaterial. On the other side, it recites the arrangement of a mutually granted rebate of 5% and the calculation of a 5% charge on all purchases as a stipulated settlement of this debt. This agreement only governed the payment modalities concerning all future sales transactions. Yet, it is not based on a sales contract itself. Therefore, the prerequisites of Art. 1 CISG or Art. 4 CISG are not met in this respect. The applicable law is to be defined by the conflict of law rules of the forum, which for the case at hand are set out in the Swiss Federal Act concerning Private International Law (*Bundesgesetz über das internationale Privatrecht*; hereafter referred to as IPRG).

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3.

a)

If not stipulated otherwise, Art. 117 IPRG provides that the law of the State to which it has the closest connection shall govern a contract. There is a presumption that a contract has the closest connection to the law of the State in which the party that provides the characteristic performance under the contract is permanently domiciled, or, if it has concluded the contract as part of its business or commercial activity, where this party has its place of business (Art. 117(2) IPRG). The rebuttable presumption stated in Art. 117(2) IPRG thus specifies the general rule of Art. 117(1) IPRG.

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The specifications in Art. 117(2) and Art. 117(3) IPRG are corroborated by the established practice of Swiss Federal Courts, which, too, define the closest (spatial) connection by way of the characteristic performance under the contract at issue. Yet, this practice would only apply if the contract did not have a closer connection to the law of a State other than that of the State where the party owing the characteristic performance was seated (Keller/Kostkiewicz, in: Heini/Keller/Vischer/Volgen (eds.), *IPR-Kommentar* [Commentary on the Swiss IPRG], Zürich 1993, Art. 117 note 20). There is no generally applicable statutory definition of the characteristic performance under a particular contract. As adequate criterion to determine the characteristic performance, performance in kind shall be given preference to cash performance. If the contract concerns mutual cash benefits, then the cash performance shall be found characteristic, which is considered functional to the contract, in contrast to mere consideration (Honsell/Vogt/Schnyder, *Basler Kommentar*, Art. 117 IPRG note 17).

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b)

Under the contract at issue, [Buyer] promised to grant T[...] GmbH a rebate of 5% for all purchases of goods in order to settle in steps the debts («open positions») of PM [...]. It has further been agreed that on all purchases of goods, 5% was to be calculated, i.e., T[...] GmbH was entitled to raise these extra 5% to pay for this debt.

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Thereby [Buyer], respectively, Heinz Fischer, accepted the liability to pay the open bills of PM [...] AG. PM [...] AG as well as [Buyer], both are seated in Switzerland. Applying the criterion of functional connection, the acknowledgment of open debts defines the characteristic performance under the contract and points to Swiss Law as the law with the closest connection to the contract at issue. Therefore, the Court of First Instance correctly held the Swiss Law of Obligations (*Obligationenrecht*; hereafter referred to as OR) to be applicable.

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4.

a)

Unquestionably, the parties on 2 July 2003 agreed that [Seller] should add an extra charge of 5% on all purchases of [Buyer], and that [Buyer] should grant [Seller] a rebate of 5% on all of its purchases. However, it is controversial among the parties whether the rebate of 5% was already included in [Seller]'s offer, or whether it was to be subtracted from the prices stated in the offer. The agreement entailed the clause that «for all purchases of goods another 5% have to be taken into account.»

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b)

Due to Art. 1(1) OR, the formation of a contract requires mutual and congruent declarations of the parties' intent to bind themselves under the contract. These declarations may be stated expressly or impliedly (Art. 1(2) OR). According to Art. 2 OR, the parties must consent on all essential aspects of the agreement. As for the correct interpretation of the form and the material content of a contract, the parties' actual intent must be considered, irrespective of whether they had used incorrect terms or expressions in their statements due to error or malicious deceit (Art. 18(1) OR).

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c)

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If the wording of a contract does not correspond with the parties' actual intent, priority shall be given to the latter.

Thus, every legally relevant declaration of intent is primarily to be interpreted according to the actual intent of the declaring party (Wiegand, *Basler Kommentar*, Art. 18 OR note 1). From this rule, stated in Art. 18 OR, it follows that a contract is validly concluded if the parties have actually reached consensus over the substantial aspects of the agreement, i.e., have consented as required under Art. 1 OR. Every interpretation of a contract must resort to this actual consent of the parties and therefore has to enquire into their actual natural intent. If it turns out that such natural consensus has in fact never been reached, it may still be the case that the parties have established a normative or legal consensus. This is the case if a party misunderstood the declaration of intent of the other side, but has to be protected under the principle of good faith. If the meaning of an agreement is disputed between the parties, the true meaning must be determined by interpreting the wording of the agreement.

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In establishing the true intent of the parties, every relevant fact and every relevant factor set at the conclusion of the contract has to be considered. In particular, preliminary events, the acts of the parties in the specific context before and after conclusion of the contract, and the purpose of the agreement must be given consideration (Wiegand, *Basler Kommentar*, Art. 18 OR, note 26 et seq.)

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The principle of good faith must be regarded as the most important principle applying to the legal interpretation of a contract (see Decision of the Swiss Federal Supreme Court (*Bundesgericht*; BGer), BGE 116 II p. 347). All contracts must be interpreted in accordance with this principle and the established commercial customs. As a rule for cases of doubt in which a party has phrased an ambiguous clause and which allows for at least two different interpretations, the ambiguity shall go to the disadvantage of that party (see Decision of the Swiss Federal Supreme Court, BGE 116 II p. 373).

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d)

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By order of 7 July 2005, the Court of First Instance decided that [Seller] bears the burden of proof for the alleged fact that it had been entitled to add an extra charge of 5% on top of the purchase price as mentioned in its offers. At the hearing of 20 January 2006 the Court of First Instance questioned Hansjörg T[...], Heinz F[...], and Peter K[...].

e)

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The Court of First Instance correctly inquired into the question whether there had indeed been a true consensus about the relevant aspects of the contract. As for all these questions, it is hereby referred to the reasoning as laid down in the judgment of the Court of First Instance (pp. 11 et seq.). The agreement concluded between the parties was meant to have effect until the open positions of PM [...] AG were balanced. Also, it was part of the agreement that [Buyer] granted T[...] GmbH a 5% rebate. Considering the overall purpose of the agreement, it becomes clear that the parties wanted to conclude the agreement in addition to the business relations that had existed up to that moment.

Yet, in these relations it had been established as a practice that, before conclusion of a sales contract, the parties would exchange offers based on which the agreement would then be concluded or not. Undisputedly, neither an offer nor an invoice had ever been directed to Heinz Fischer directly, but had been processed by other employees who had not been informed about this particular rule. For that reason in particular, it appears clear that the offers were based on market prices, because [Buyer] decided on the basis of these offers whether or not to contract with [Seller]. Only if the offers were based on market prices and an additional charge of 5% was invoiced, would both parties have been in a position to check how much was actually to be paid on the open positions of the PM [...] AG, and whether a submitted offer would indeed be the best one available to them.

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Also, [Buyer], in the same agreement, granted a rebate of 5%. As a general rule, a granted rebate will not be named in an offer, but will only be taken into account in the subsequent invoice. The fact that in the case at hand a granted rebate of 5% in the agreement refers to the extra charge of 5%, indicates that both the 5% rebate as well as the charge of 5% were meant to be itemized separately. The documents [Buyer] has submitted within the appellate proceedings do not suggest otherwise. Exactly because the wording of the agreement is ambiguous, the Court cannot merely enquire into the meaning of the expression «taking into account» that was used to decide this point.

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In its bills, [Seller] itemized the 5% charge as a separate position with the comment «according to the arrangement with Mr. F[...]» (see complaint note under 9.1 to 9.4). The bills are dated 17 to 19 November 2003. The Court of First Instance correctly found that [Buyer]'s allegation that it had received unreadable bills did not have any effect on the legality of those bills. [Buyer] protested only after it had received the original bills in February 2005, did [Buyer] protest. Hence, [Buyer] never submitted that it had complained about the actual invoicing of the charge. The Court of First Instance saw this as a clear indication that [Buyer] had indeed understood the agreement in the same way as [Seller].

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The Court of First Instance correctly concluded that, in addition to the price named in the offer, an extra charge of 5% was to be added, as had been established by [Seller]'s submitted evidence. As the charge had never been questioned as to its amount, the appeal on this point must be dismissed.

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5.

a)

The same conclusion would have to be drawn even on the assumption that the agreement between the parties fell under the CISG.

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b)

According to Art. 8(1) CISG, statements made by or other conduct of a party are to be interpreted according to his intent where the party knew or could not have been unaware what that intent was. If Art. 8(1) CISG is not applicable, statements made by and other conduct of a party are to be interpreted according to the understanding that a reasonable person of the same kind as the other party would have had in the same circumstances, Art. 8(2) CISG.

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In determining the intent of a party, or the understanding a reasonable person would have had, due consideration is to be given to all relevant circumstances of the case including the negotiations, any practices which the parties have established between themselves, usages and any subsequent conduct of the parties, Art. 8(3) CISG. 35

c) 36
 Art 8 CISG regulates the interpretation of statements and other conduct of the parties to a sales contract that falls under the CISG. It excludes the application of rules of interpretation provided by national law.

In particular, statements, which amount to the formation of the contract are subject to interpretation (Schlechtriem/Schwenzer, *supra*, Art. 8 CISG para. 1). Art 8 CISG refers to the understanding a reasonable person would have had as recipient of the statement. It applies to all declarations, actions and omissions of the parties that may have an effect on the conclusion or execution of the contract. Unclear, flawed or ambiguous statements, e.g., the flawed incomplete transmission of a statement, are to be interpreted according to the true intent of a party, if the recipient knew this intent in the circumstances of the particular case. Even if not expressly mentioned, the principle of good faith always applies in any event (Melis, in: Honsell (ed.), *Kommentar zum UN-Kaufrecht* [Commentary on the CISG], Zürich 2007, Art. 8 note 5). 37

If, as is often the case, the subjective intention of a party cannot be determined, statements made by or other conduct are to be interpreted according to the objective criteria stated in Art. 8(2) CISG. According to Art. 8(3) CISG, the enquiry into a party's actual intent as well as into the recipient's perspective must take into account all relevant circumstances, such as the mentioned established practices, usages and subsequent conduct of the parties (Melis, *supra*, Art. 8 CISG note 9 et seq.). The Convention requires that the interpretation take account of the contract as a whole. 38

Individual clauses must be considered as an integral part of the contract and are to be interpreted in their context rather than in isolation. In this respect, the interests of the parties, too, have to be given due consideration. The principle of good faith serves as a guideline for the interpretation. Furthermore, the negotiations and the particular setting of the formation of the contract must be considered (Schlechtriem/Schwenzer, *supra*, Art. 8 CISG para. 29 et seq.). 39

d) 40
 If the arrangements between the parties were to be interpreted according to the provisions in Art. 8 CISG, considering that in that case the agreement were to be classified as an annex to the sales contracts, the principle of good faith and the circumstances of the conclusion of the agreement, it would become clear that apart from the rebate, an extra charge of 5%, which had to be added on top of the usual market price as named in the offers, was due. Thus, if CISG provisions governed the interpretation of the contract, this would not make any difference to the interpretation according to the Swiss Law of Obligations.

6. 41

a)
 Unquestionably, [Seller] sent [Buyer] an offer in writing for the delivery of products J[...] and F[...] on 23 October 2003. [Buyer] ordered only product J[...]. Undisputedly, [Seller] notified

[Buyer] by way of a telephone conversation that the entire quantity of product J[...] could not be delivered, and offered [Buyer] the delivery of product F[...] instead. [Buyer] argues that this constituted a breach of contract on [Seller]'s side, which entitled [Buyer] to compensation, and that [Buyer] had only accepted the replacement in order to comply with its duty to mitigate damages accruing to the other side, but naturally had supposed that the delivery of the replacement F[...] should have the same price as had been initially agreed for the delivery of J[...].

[Seller], on the other hand, argues that by accepting the replacement, [Buyer] had actually made a change to its original order based on the written offer.

b)

Damages for breach of contract by one party consist of a sum equal to the loss, including loss of profit, suffered by the other party as a consequence of the breach. Such damages may not exceed the loss which the party in breach foresaw or ought to have foreseen at the time of the conclusion of the contract, in the light of the facts and matters of which he then knew or ought to have known, as a possible consequence of the breach of contract (Art. 74 CISG).

A party who relies on a breach of contract must take such measures as are reasonable in the circumstances to mitigate the loss, including loss of profit, resulting from the breach. If he fails to take such measures, the party in breach may claim a reduction in the damages in the amount by which the loss should have been mitigated (Art. 77 CISG).

c)

A breach of contract in the sense of the CISG is constituted by every objective failure to comply with a contractual duty, whether that failure is temporary or permanent. It suffices that a party fails to perform its contractual duty when it becomes due. The CISG does not restrict liability of the party in breach to negligent or willful failure to perform. It does not require any notice of default by the other side, or the expiration of an additionally set period to perform. A party's serious and definitive refusal to perform one of its contractual obligations may constitute a breach of contract under CISG provisions even before this duty has become due to be performed. So can the serious and definitive refusal to pay a security, which complies with commercial customs and the established usages between the parties (see Schlechtriem/Schwenzer, *supra*, Art. 74 CISG para. 8). Damages under Art. 74 CISG require a loss be caused by a party's breach of contract, and that the loss to be foreseeable by the party in breach at the time of the conclusion of the contract as a possible consequence of the breach of contract (Schönle, Art. 74 CISG note 8).

d)

Before the delivery, [Seller] had notified [Buyer] that owing to a shortage of supply, the whole amount of product J[...] that had been ordered could not be delivered on the due date. This notice, however, only made [Buyer] aware of possible delays in the delivery. At that point of time, there had been neither a breach of contract nor any loss occurring to [Buyer] in the sense required under Art. 74 CISG. Undisputedly, the parties did not negotiate a new purchase price when the original order had been changed from product J[...] to F[...]. At that time,

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[Buyer] had been well aware of [Seller]’s offer and thus knew about the prices for both products. If [Buyer] had wanted to rely on compensation provided under Art. 74 CISG before a loss and a breach of contract had actually occurred, [Buyer] would have needed to actively notify [Seller] of that circumstance.

Art. 74 CISG is meant to regulate compensation due to breaches of contract that have actually occurred. In the case at hand, [Seller] could have overcome the shortage of delivery of product J[...] by choosing another supplier, or could have decided to accept liability for defaulted delivery. If [Buyer] had wanted to rely on a breach of contract before any damage had accrued, it would have had to give notice to [Seller] declaring that it would only accept delivery of product F[...] instead of the originally ordered J[...] if product F[...] was delivered for the originally stipulated purchase price for product J. In page 17 of its judgment, the Court of First Instance correctly found that [Seller] had given notice of the shortage of supply before the date of due delivery, and that [Buyer] had changed its original order for the delivery of an amount of F[...] instead of J[...] in order to be able to comply with its own obligations to supply its customers. Undisputedly, the parties had not discussed the price on occasion of the said arrangement of a change of the order.

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[Seller] therefore was entitled to believe that [Buyer]’s change of its order had been based on [Seller]’s submitted offer, and that [Buyer] had been aware that product F[...] was sold for a higher purchase price than product J[...].

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e)

As for the ordered quantities of product F[...], the invoice had never been questioned.

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Hence [Buyer]’s appeal concerning this point must be dismissed.

7.

In summary, the [Buyer]’s appeal is unjustified. The claim is founded to the amount of EUR 10,774.26 plus 5% interest:

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- on EUR 50,130.06 for the period from 20 February 2004 until 11 March 2004,
- on EUR 40,156.22 for the period from 12 March 2004 until 31 August 2004, and
- on EUR 10,774.26 since 1 September 2004.

As for the remainder, the claim is dismissed. Consequently, the decision on costs of the previous instance is upheld. [Buyer] is liable to pay court fees of SFR 3,000.00 for the appellate proceedings, and has to reimburse [Seller] for its expenses in the amount of SFR 2,200.00 plus 7.6% VAT.