

**Case 746: CSIG 1 (1)(a), 10, 26, 75, 76**

Austria: Oberlandesgericht Graz

5 R 93/04t

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Abstract prepared by Martin Adensamer, National Correspondent.

A partnership between a German and an Austrian company, carrying out construction work in Germany, sold three pieces of construction equipment to an Austrian company to be picked up at the construction site. The buyer took delivery of only one item but not the remaining two. The seller warned the buyer that it would claim for damages or declare the avoidance of the contract if the buyer would not take over the other items too and pay the price within a given date. The buyer opted for the avoidance of the contract. The seller sold the equipment to one of its partners and claimed for damages, which was the difference between the price they finally got and the price agreed upon with the defendant.

The court granted the claim and the buyer appealed. On the issue of applicability of CISG, the court considered the seller's place of business to be the construction site where the contract had been concluded and where the equipment was to be picked up by the buyer. As a matter of fact, pursuant to Art. 10 (a) CISG, the construction site had the closest relationship to the contract and its performance. Therefore the CISG was applicable according to Art. 1 (1)(a) CISG.

The court further stated that the seller was entitled to damages based on the difference between the contract and the cover purchase price pursuant to Art. 75 CISG, because the seller had actually resold the remaining two items. With respect to the declaration of avoidance pursuant to Art. 26 CISG, the court noted that the buyer had opted for avoiding the contract in response to the seller setting a deadline for avoidance and to claim for damages. The court found that, after the refusal of performance by the buyer, the requirement of a declaration of avoidance by the seller was redundant. In addition, the court observed that since the buyer had refused performance, the seller could claim damages without a formal notice of avoidance pursuant to Arts. 61, 74 CISG.

The appeal was dismissed and the claim granted.