Appellate Court (*Oberlandesgericht*) Graz

29 July 2004 [5 R 93/04t]

Translation[*] *by Jan Henning Berg*[**]

Edited by Institut für ausländisches und internationales

Privat- und Wirtschaftsrecht der Universität Heidelberg

Daniel Nagel, editor[***]

JUDGMENT

1. Defendant-Appellant [Buyer]'s appeal is dismissed.
2. [Buyer] has to reimburse Plaintiff-Appellee [Sellers]' costs of EUR 1,817.98 (including EUR 303 VAT) for their appellate response within 14 days.
3. Further appeal (*Revision*) is not admissible in accordance with § 502(1) ZPO.

FACTS

The Walter Bau-Aktiengesellschaft has its seat in Augsburg, Germany. It has various subsidiaries, *inter alia* in Munich [first Plaintiff-Appellee] and in Dresden. The Jäger Bau GmbH [second Plaintiff-Appellee] has its seat in Schruns, Austria. The joint Plaintiff-Appellees are referred to as [Sellers]. These two legal persons have established the ARGE Sandbergtunnel (hereafter: ARGE) with an allocation of shares of 50% each, which had been operating a tunnel construction site in D-99326 Niederwillingen / Behringen, Germany. The General Kommerz Handels-Gesellschaft mbH [Buyer] has its seat in Kammern in Liesingtal, Austria. Since registration, its CEO has been Mr. Manfred Lanzmaier.

POSITIONS OF THE PARTIES BEFORE THE COURT OF FIRST INSTANCE

Position of [Sellers]

With the present action, [Sellers] demand from [Buyer] payment of EUR 21,787.45 on the grounds that [Sellers] had sold to [Buyer]:

- a tunnel excavator «Liebherr 932 HD» (hereafter: the tunnel excavator), unrepaired, at a price of EUR 85,379.53;

---

[*] All translations should be verified by cross-checking against the original text. For purposes of this translation, Walter Bau-Aktiengesellschaft of Germany is referred to as [first Plaintiff-Appellee], Jäger Bau GmbH of Austria is referred to as [second Plaintiff-Appellee] and the joint Plaintiffs-Appellees are referred to as [Sellers]. Defendant-Appellant of Austria is referred to as [Buyer]. Amounts in the uniform European currency (Euro) are indicated as [EUR].
Translator's note on other abbreviations: **RIS-Justiz** = *Rechtsinformationssystem des Bundes* [Austrian Federal Database on Law]; **ZPO** = *Zivilprozessordnung* [Austrian Code on Civil Procedure].

[**] Jan Henning Berg has been a law student at the University of Osnabrück, Germany and at King's College London. He participated in the 13th Willem C. Vis Moot with the team of the University of Osnabrück. He has coached the team of the University of Osnabrück for the 14th Willem C. Vis and 4th Willem C. Vis (East) Moot.

[***] Ph.D. candidate Daniel Nagel has studied law at the University of Heidelberg and at the University of Leeds.

- a hydraulic hammer «Krupp HM 1000» (hereafter: the hydraulic hammer) at a price of EUR 35,790.43; and

- a replacement chisel for the hydraulic hammer at a price of EUR 997.02.

Each item was sold ex construction site ARGE. [Buyer] had only accepted the delivery of the tunnel bagger, but failed to perform its contractual obligations concerning the other items. By letter dated 2 July 2002, ARGE set [Buyer] a time limit for collection and payment until 10 July 2002. ARGE further announced that it would claim damages in case [Buyer] failed to meet its obligations within that time limit. [Buyer] requested [Sellers] via letter of 14 July 2002 to cancel the contract in relation to the hydraulic hammer and the replacement chisel. Thereupon, [Sellers] were able to make cover sales of these two items at a price of not more than EUR 15,000, which meant that the claimed sum constituted their financial damage.

Position of [Buyer]

[Buyer] requested the dismissal of [Sellers]' action before the Court of First Instance and argued that [Sellers] – contrary to the content of their letter of 2 July 2002 – had not declared avoidance of the contract and that [Buyer] itself had asked for cancellation of the contract concerning the hydraulic hammer and the replacement chisel by way of its letter of 14 July 2002. Apparently, [Sellers] had accepted [Buyer]'s request because they had concluded cover sale contracts in respect to these items with [first Plaintiff-Appellee]; a sale to itself was, however, not legally possible. In any event, [Sellers] failed to comply with their duty to mitigate losses because the price of their cover sale clearly constituted a dumping price given that both items had been in a mint condition. [Sellers] had been obliged to intensify their efforts for a cover sale in which case they would have been able to contract at a price of EUR 37,000. In any case, no price difference in the amount now claimed by [Sellers] would have accrued. Furthermore, [Buyer] had not previously been made aware of [Sellers]' internal deal at that dumping price.

JUDGMENT BY THE COURT OF FIRST INSTANCE

The Court of First Instance allowed [Sellers]' claim.

Reference is made to the findings of the Court of First Instance which are reproduced on pp. 4-12 of its judgment. It set out in terms of law that the rights and obligations arising out of the present contract were governed by the CISG. In accordance with Art. 1(1)(a) CISG, the Convention applies to all transnational contracts of sale of movable and tangible goods between persons who have their places of business in different Contracting States, without requiring any express decision to opt into the CISG. In the present case, a contract of sale concerning construction machinery had been concluded between an Austrian and a German company which meant that the parties to the contract had their places of business in different Contracting States. The CISG governed the conclusion of contracts of sale and the respective rights and obligations of buyer and seller arising out of it.

Pursuant to Art. 25 CISG, a breach of contract committed by one of the parties is fundamental if it results in such detriment to the other party as substantially to deprive him of what he is entitled to expect under the contract. The issue in the case at hand was whether [Buyer] had properly performed its obligation under the contract or whether it had been in breach of the contract.

The obligations of a buyer are set out in Arts. 53 *et seq*. CISG. The buyer has the obligation to pay the purchase price and to accept the goods in accordance with the contractual agreement. The parties to the present contract had agreed that the buyer would be obliged to collect the goods at ARGE's construction site after having made payment. [Buyer] had performed the contract only partially since it had neither collected nor paid for the hydraulic hammer and the replacement chisel, without having given any further explanation to ARGE. ARGE thus correctly requested [Buyer] to pay for the devices and collect them. The CISG contains a duty of the buyer to accept purchased goods.

The content of [Sellers]' letter could not be interpreted in a way that [Buyer] should be granted a right to cancel the contract in relation to these two items. Instead, [Sellers] threatened to bring legal claims should [Buyer] continue its conduct. [Buyer]'s letter in response could very well be understood in a way that [Buyer] definitely refused to perform the residual part of the contract if one took [Buyer]'s previous conduct into account. Hence, a breach of the contract by the [Buyer] could be assumed. This even amounted to a fundamental breach of contract in terms of Art. 25 CISG due to the fact that the contracting parties correspondingly stipulated incorrect amounts for each single item and that each of the parties attached importance to the «package as a whole».

According to Art. 64(1)(a) CISG, [Sellers] (as members of ARGE) were not only entitled to claim damages but also to request avoidance of the contract which they unambiguously did by their subsequent conduct, namely, their cover sale of the hydraulic hammer and replacement chisel as well as their subsequent letter of claim against [Buyer]. A claim for damages under the CISG does not require fault; the party in breach of its obligations is liable for the damage accrued according to Art. 74 CISG, irrespective of fault. Compensation has to be made in full and damages include lost profit. In the present case, the [Sellers] had concluded a cover sale and were thus entitled under Art. 75 CISG to claim the difference between the price agreed in the contract and the price achieved in the course of the cover sale as damages. Art. 77 CISG provides for a duty to mitigate losses. According to this provision, a party who relies on a breach of contract must take such measures as are reasonable in the circumstances to mitigate the loss. [Sellers] had – by virtue of their substitute sale of hydraulic hammer and replacement chisel – clearly performed this duty, in particular because no more favorable sale could have been concluded in the specific circumstances.

POSITIONS OF THE PARTIES BEFORE THE APPELLATE COURT

Position of [Buyer]

[Buyer]'s appeal challenges the judgment of the Court of First Instance. [Buyer] asserts improper proceedings, incorrect factual findings and errors of law and requests the Appellate Court to repeal the judgment as well as to dismiss [Sellers]' action. In the alternative, [Buyer] requests the judgment to be repealed and the dispute to be referred back to the Court of First Instance.

Position of [Sellers]

[Sellers] requests the Court to dismiss [Buyer]'s appeal.

Since neither party made an application for an appellate oral hearing and since the Court does not think this is necessary, the appellate judgment has been rendered in private session according to § 492 ZPO.

REASONING OF THE COURT

[Buyer]'s appeal is not justified.

[Buyer]'s assertion of improper proceedings is incorrect. [Buyer] mainly argues that the Court of First Instance committed a procedural error because, after hearing the Witness Mr. Clemens Pacher and presentation of the repair offer by Company Nagel Industriemaschinen GmbH, the value of the «whole package» could be readily determined. However, [Buyer] has entirely failed to comprehensibly explain why this should be relevant for a final adjudication of the present dispute. [Buyer]'s submissions can further be challenged by the undisputed determination that the tunnel excavator has been purchased *in unrepaired state*, and – even in accordance with the statements made by [Buyer]'s CEO during his hearing (ON 12, pp. 16 and 17) – the purchase price for the tunnel excavator had been determined by subtracting the necessary costs for remedying the existing damage.

[Buyer] challenges the factual finding of the Court of First Instance that the excavator showed damage at its arm as well as that the corresponding repair costs had already been considered in the course of the excavator's price calculation, made by an employee of Company Nagel in an estimation of costs, of which [Buyer]'s CEO had at least been aware. In lieu of this finding, [Buyer] reques(ts the Court to find that [Buyer]'s CEO had seen the estimation of costs by Company Nagel at the most within the documents of [Sellers]' chief technician. The remaining parts of the challenged factual finding should apparently be deleted without substitution because p. 8 of the application for appeal reads under item a): «No evidence has been collected to assume and determine that there was damage at the arm and that this was in turn considered in the purchase price calculation.»

The very part of the factual findings which are now challenged by [Buyer], however, is not only supported by the statements made by Witness Mr. Michael Ketterer (ON 12, p. 10), but particularly by a document (exhibit B) indicating that [Buyer]'s CEO had received an estimation of costs by Company Nagel Industriemaschinen GmbH in relation to the repair of all substantial damage during his visit to ARGE's construction site. The need to repair the tunnel excavator (at its «arm»; contrary to [Buyer]'s opinion, no «fracture of the arm» was determined but a mere «damage») follows from the statement made by Witnesses Mr. Markus Meiler (ON 12 pp. 3 and 5) and Mr. Michael Ketterer (ON 12, p. 10), and is further supported by [Buyer]'s hearing as a party (ON 9, p. 4) which gives rise to the factual determination concerning the purchase price calculation for the tunnel excavator (ON 12, pp. 16 and 17). It is therefore incorrect to argue that, in the course of its factual determinations, the Court of First Instance improperly gave predominant weight to the reports of the aforementioned witnesses. The same determinations readily follow from statements made by [Buyer]'s CEO. Hence they cannot be challenged.

[Buyer] further contests the following factual finding: «Since both [Buyer] – who already acquired a potential buyer for the excavator and the hammer – and ARGE Sandbergtunnel attached decisive importance to the total price of both sold devices (excavator and hammer), Mr. Ketterer, Mr. Meiler and also Mr. Lanzmaier accepted the fact that the documents underlying the purchase displayed the reinstatement value for the hammer and too low a price for the excavator.» Instead, [Buyer] requests the Court to determine that the sale of the excavator as such was still a profitable business, respectively, that it was commercially viable even without the sale of the hammer and the replacement chisel.

However, as has already been set out by the Court of First Instance, the challenged finding primarily follows from the statements made by [Buyer]'s CEO himself (see ON 9, p. 8; ON 12,

p. 17). [Buyer]'s arguments concerning non-credibility of Witness Mr. Michael Ketterer are readily opposed by the consideration that his statement was not entirely reproduced by [Sellers] due to the fact that the witness has also stated that it was possible that the estimation of costs had been handed over to Mr. Lanzmaier (ON 12, p. 10), which also follows from the documents (exhibit B) and which has already been determined in this way. The Appellate Court thus has no reason not to adopt the challenged finding. Moreover, the substitute finding requested by [Buyer] would not be supported by any evidence which means that, in any event, it would be without any bearing to the present dispute.

[Buyer] goes on to challenge the findings of the Court of First Instance to the effect that, in the course of a telephone call (about two or three days prior to the actual collection of the tunnel excavator), Mr. Ketterer had not told Mr. Lanzmaier that it would be fine if [Buyer] only purchased the excavator instead of the hammer with the chisel, respectively, that he would not care whether the excavator was to be sold with the hydraulic hammer. Instead, [Buyer] requests the factual determination that the commercial director of the construction site, Mr. Ketterer, and [Buyer]'s CEO had agreed that [Sellers] were fine with an «individual sale» of the excavator and that [Sellers] did not care whether the hammer and replacement chisel were additionally sold, since these two items could be mounted on numerous similar machines and since there were sufficient opportunities to put these items onto the market.

There is no evidence to support the last part of the requested finding, meaning that this part of the proposed substitute finding cannot be given consideration. The consideration of evidence made by the Court of First Instance is correct in regard to the essential issues of fact in this dispute; reference is made to its reasoning. In particular, it is referred to the finding that [Buyer]'s CEO never mentioned any amendment to the contract over the telephone in the course of his hearing. Instead, when he was asked whether there had been specific negotiations about an individual purchase of the excavator without the hammer, he explained that no such talks had been conducted (ON 9, p. 6). This is also consistent with the content of exhibit P (letter by [Buyer] to ARGE of 24 May 2002, received on 24 May 2002), which reads: «The invoiced Krupp hydraulic hammer with replacement chisel will be delivered to Croatia by carrier within the next days.» It was only during his second hearing that [Buyer]'s CEO asserted to have called Mr. Ketterer and asked whether they could purchase the excavator individually and that Mr. Ketterer had answered that this had been possible.

[*Translator's note: At this point the German text of the decision is incomplete and a small part of the decision cannot be translated.*]

Furthermore, it is absolutely implausible that a sales contract – concluded by ARGE and in written form – which according to the undisputed facts was also approved by ARGE's supervisory body (see US 8) could have been amended by an employee of [first Plaintiff-Appellee] simply over the telephone and without any prior consultation. The correctness of the evaluation of evidence by the Court of First Instance is also supported by the fact that the sale of the machinery subject to this litigation by ARGE to Walter Bau Aktiengesellschaft, Dresden subsidiary, was also approved by ARGE's supervisory body (see US 11).

[Buyer]'s arguments can further be challenged because ARGE had already threatened to exercise claims for non-performance in its letter dated 2 July 2002 (exhibit D). The letter dated 27 August 2002 (exhibit L) can be seen as the declaration which has been announced by [Sellers] in their letter of 17 July 2002 (exhibit H).

[Buyer] also contests the factual findings made in document US 9 that, at the day of the collection of the excavator by carrier (30 May 2002), Mr. Ketterer had once again had a telephone conversation with Mr. Lanzmaier on the occasion of which he did not confirm to [Buyer]'s CEO that it was fine if he only purchased the excavator. [Buyer] seems to propose a factual scenario which is similar to its aforementioned allegation. Therefore, reference can be made to the previous reasoning of the Court. It should be added, however, that if 30 May 2002 was assumed as the day of collection of the excavator – which has not been contested by [Buyer] – and if consideration is given to the content of [Buyer]'s letter of 24 May 2002 which reached ARGE at that day, it seems impossible to assume that there had been a previous contract amendment to the effect that [Buyer] would only purchase the tunnel excavator.

In relation to the contested findings in document US 10 that [Buyer]'s CEO had not given ARGE any notice until receipt of this letter (the letter of 14 July 2002) – which stated that [Buyer] would no longer want to purchase the hydraulic hammer and replacement chisel – challenge of factual findings can therefore not be considered by the Court.

Finally, [Buyer] challenges that the Court of First Instance held that only a purchase price of EUR 15,000 could have been achieved in respect to the objects of the present contract. Based on the content of exhibits E, H and L, this should be substituted by the finding that [Sellers] accepted much too low a price for the hammer and chisel («dumping price») at the time of the «cover sale» – which amounted to a «self-retention» because of legal frustration. [Sellers] had failed to once again offer [Buyer] at least the intended resale price of EUR 15,000 for a counterbid or acceptance.

However, these documents do not support the substitute factual finding proposed by [Buyer]. Moreover, the Court of First Instance has comprehensibly explained the basis of the challenged findings in its evaluation of evidence (see US 15 and 16). Reference is made to these documents. Additionally, it has to be considered that [Buyer] failed to offer suitable evidence in support of its proposed factual scenario and that not even its CEO was able to make specific statements during his hearing. Therefore, the factual findings were once again improperly challenged.

The desired factual finding that [second Plaintiff-Appellee] had its seat in Austria has already been made in document US 4.

Consequently, the Court adopts all factual findings made by the Court of First Instance as the basis of the Court's judgment (§ 498(1) ZPO).

On that basis the [Buyer]'s legal challenge is unsuccessful as well.

1. According to Art. 1(1)(a) CISG, the Convention applies to contracts of sale of goods between parties whose *places of business* are in different States when the States are Contracting States. It is undisputed that both Germany and Austria have been Contracting States to the CISG at the time of conclusion of the present contract of sale. Contrary to the view taken by [Buyer], the nationality, respectively, the domestic law applicable to a legal person, is irrelevant (Art. 1(3) CISG).

Since [second Plaintiff-Appellee] – having its seat in Schruns, Austria – is connected with [first Plaintiff-Appellee] as «ARGE» and since they operated a tunnel construction site in Niederwillingen/Behringen, Germany, it has to be assessed whether this amounts to a «place of business» in terms of Art. 1(1) CISG. The term «place of business» must be broadly interpreted but

does not constitute a technical legal term. It refers to any place from which participation in commercial transactions with third parties takes place with a certain autonomy. It is not necessary to have the epicenter of commercial activity or the seat of the business management at that place. The «place of business» merely requires to execute a minimum of actual functions within the business of the company concerned. Only mere ancillary functions will not qualify to establish a place of business. In case of multiple places of business, Art. 10(a) CISG provides that the relevant place of business is that which has the closest relationship to the contract and its performance, having regard to the circumstances known to or contemplated by the parties at any time before or at the conclusion of the contract (Hoyer / Posch, Das Einheitliche Wiener Kaufrecht, 34 *et seq.*; Karollus, UN-Kaufrecht, 28 *et seq.).*

In consideration of this meaning of the term «place of business» and the fact that the contract of sale and the execution of the transaction in relation to [second Plaintiff-Appellee] has been concluded with ARGE, which deployed its actions from the tunnel construction site, the site which was operated at the time of conclusion of contract for ARGE by [second Plaintiff-Appellee] in Germany, must be considered as a place of business under Art. 1(1) CISG. Since this very place of business has the closest relationship to the contract and its performance, the provisions of the CISG govern the present business transaction.

2. Art. 76 CISG provides that if the contract is avoided and there is a current price for the goods, the party claiming damages may, *if he has not made a purchase or resale under Art. 75*, recover the difference between the price fixed by the contract and the current price at the time of avoidance as well as any further damages recoverable under Art. 74.

This provision – which has been relied upon by [Buyer] – cannot be applied as it has been established that [Sellers] have in fact concluded a cover sale. They are entitled to claim damages according to Art. 75 CISG. According to this provision, they may recover the difference between the contract price and the price in the substitute transaction as well as any further damages recoverable under Art. 74 if the contract is avoided and if they have made a cover sale in a reasonable manner and within a reasonable time after avoidance.

According to the factual findings, it must be assumed that [Sellers] could not achieve a price higher than EUR 15,000 for the hydraulic hammer and the replacement chisel, despite having obtained several purchase offers. Thus, the cover sale has been executed «in a reasonable manner». Consequently, a claim for damages amounts to the difference between *the contract price* and the price achieved in the cover sale – the actual value of the goods is irrelevant.

The CISG does not know any *ipso facto* avoidance of the contract but requires the party relying on avoidance to direct a declaration to the other party (Art. 26 CISG). In order to achieve legal certainty, only an express declaration to that effect will be sufficient. This is as well applicable in the case of the previous setting of a grace period. Expiration of this period solely gives rise to a right to avoid the contract which in turn has to actually be exercised by means of a declaration of avoidance. However, under the CISG it will be possible to issue an anticipated declaration of avoidance at the time of the setting of a grace period (Karollus, 151 *et seq.*; RIS-Justiz RS0104937).

It has been established that [Sellers] requested [Buyer] by letter dated 2 July 2002 to make payment for the hydraulic hammer and the replacement chisel and to collect these items from the construction site by 10 July 2002. It has been added: «Should you fail to make payment and collect the identified machinery until 10 July 2002, we will rely on claims for damages because of non-performance or avoid the contract.» This passage in itself cannot be interpreted as an

anticipated declaration of avoidance. However, since [Buyer] responded to this sentence of [Sellers]' letter in [Buyer]'s letter dated 14 July 2002 by requesting cancellation of the contract for the hydraulic hammer and the chisel, the Court takes the view that no further declaration of avoidance by [Sellers] was necessary. [Buyer] itself expressly requested avoidance of the contract and [Sellers] merely adhered to this request.

Apart from this, in case of breach of contract by the buyer, the seller may leave the contract in existence but demand damages for non-performance according to Art. 74 CISG in lieu of that performance. In this case, the loss suffered as a consequence of the breach of contract including any loss of profit can be recovered. According to scholarly opinion, the party relying on a breach of contract may demand a claim for the price difference even without a formal act of contract avoidance by executing the cover transaction and thereby abdicating any further execution of the contract (Karollus, 155; RIS-Justiz RS0104929).

Thus, the [Sellers] are entitled to claim the requested amount irrespective of the legal position taken.

3. It is irrelevant in the present case whether [Sellers] form a unified party in litigation in terms of § 14 ZPO. The CISG is the applicable law. Neither party attempts to draw claims from the agreed exclusion of warranty rights. Therefore, it may remain undecided whether this exclusion could be considered as grossly discriminating and thus contrary to public policy.

In addition, the sale of the machinery to an owned company does not amount to a «self-retention.» This is due to the fact that [Sellers] as members of ARGE and co-owners of the machinery sold it to the Dresden subsidiary of Walter Bau-Aktiengesellschaft, which constitutes an autonomous legal entity (see US 11, *cf.* also exhibit O).

Since [Buyer] explicitly declared in its letter of 14 July 2002 that it would not adhere to the sales contract concerning the hydraulic hammer and the replacement chisel, [Sellers] were under no obligation to previously announce the intended cover sale and to request a better offer than the existing purchase offers. Furthermore, even if this had been the case, there would have been a claim for damages in the amount of the price difference.

There is also no violation of a duty to mitigate losses. [Buyer]'s submissions to this effect are mere speculation and lack any support by facts or reliable evidence established by the Court of First Instance.

Consequently, [Buyer]'s appeal is unsuccessful.

The decision on costs is based on §§ 41, 50(1) ZPO.

The decision on the admissibility of a further appeal is based on § 500(2) No. 3 ZPO. Further appeal is not admissible due to the fact that the case does not contain any legal issues of considerable importance in terms of § 502(1) ZPO – the decision depended on the assessment of the present factual scenario.