

## CISG-online 1768

Jurisdiction	Switzerland
Tribunal	Kantonsgericht St. Gallen (Court of Appeal Canton St Gallen)
Date of the decision	13 May 2008
Case no./docket no.	BZ.2007.55
Case name	<i>Snowchains case</i>

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

### Facts

I.

On 27 October 2004, Plaintiff [Buyer] ordered from Defendant [Seller] so-called «Spikes-Spider» skid chains and adaptors at a total price of Euros [EUR] 74,891.44 (defendant's exhibit 1). According to [Seller]'s submissions, which have been contested by [Buyer], the transaction was concluded after a corresponding assurance by the [Buyer] under the condition and that the goods should be intended for resale solely in countries Z and that they should not be delivered into country Y under any circumstances. However, it is undisputed that the goods which had been delivered by [Seller] (defendant's exhibit 1) finally arrived in country Y.

On 23 November 2004, [Buyer] ordered from [Seller] «a small additional consignment which we require urgently», which means skid chains and adaptors at an additional value of EUR 15,476.16 (plaintiff's exhibit 2 and 3). This price has been paid in advance.

By letter of 25 November 2004 (two days later), [Seller] complained to [Buyer] that the latter had allegedly -- contrary to its assurance -- forwarded the goods received from the initial order of October 2004 into country X instead of countries Z. At the same time, [Seller] requested

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

Translator's note on other abbreviations: BGE = Bundesgerichtsentscheidung [Reported decisions of the Swiss Federal Supreme Court]; OR = Obligationenrecht [Swiss Code on the Law of Obligations]; SJZ = Schweizerische Juristen-Zeitung [Swiss law journal]; SR = Systematische Sammlung des Bundesrechts [Official database of Swiss federal legislation]; ZGB = Schweizerisches Zivilgesetzbuch [Swiss Civil Code]; ZPO = Zivilprozessordnung des Kantons St. Gallen [Code on Civil Procedure of the Canton St. Gallen].

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[Buyer] to submit a written confirmation that the second consignment be delivered into countries V and not once again into country X (plaintiff's exhibit 6). When W. thereupon confirmed that it was the purchaser of the skid chains and adaptors ordered by [Buyer] (plaintiff's exhibit 8), but [Seller] refused to perform the delivery, [Buyer] set [Seller] by fax of 2 December 2004 a time limit until 3 December 2004 in order to either make delivery of the goods ordered or reimburse the advance payment (defendant's exhibit 13). Despite that, [Seller] refused both delivery of the goods and reimbursement of the sum of EUR 15,476.16. Thereupon, [Buyer] declared avoidance of the second contract by letter dated 11 February 2005.

### **Position of the Parties before the Court of First Instance**

#### **Position of [Buyer]**

On 13 July 2005, [Buyer] brought an action before the Petty District Court (Kreisgericht) [Court of First Instance] and claimed reimbursement of the advance payment concerning the second order of EUR 15,476.16 plus 5% interest since 11 February 2005 as well as damages for loss of profit in the amount of EUR 1,839.84 plus 5% interest since 18 February 2005 and, finally, reserved its right to assert additional claims. 4

#### **Position of [Seller]**

In its statement of defense of 26 October 2005, [Seller] requested the Court to dismiss the action in its entirety. It declared to rescind the second contract because of deceit and further asserted a claim for damages of Swiss francs [Sfr.] 167,631.34 (which had arisen out of the first, impliedly authorized transaction) that would be subject to a set-off against [Buyer]'s reimbursement claim. 5

Subsequent to the procedure of taking evidence (hearing of the parties and witnesses), the Court of First Instance rendered its decision on 9 May 2007 and ordered [Seller] to pay [Buyer] EUR 15,476.16 plus 5% interest since 11 February 2005 as well as EUR 1,839.84 plus 5% interest since 18 February 2005. It also acknowledged [Buyer]'s reservation to amend its action and ordered that [Seller] pay the court fees of Sfr. 3,000. Finally, [Seller] was ordered to compensate [Buyer]'s legal expenses of Sfr. 8,914.30. 6

The Court of First Instance assumed that the contract of 23 November 2004 (second order) was cancelled following [Buyer]'s declaration of avoidance. It not only allowed [Buyer]'s claim for reimbursement of EUR 15,476.16, but also allowed the [Buyer]'s additional claim for damages over EUR 1,839.84. Thereupon, the court assessed whether [Seller] was entitled to a counterclaim which would have arisen out of the contract of 27 October 2004 (first order / delivery) because of breach of contract. This counterclaim was not allowed, which means that the court has also impliedly denied the alleged deceit. Therefore, the court allowed [Buyer]'s action in its entirety. 7

## Position of the Parties on Appeal

### Position of [Seller]

On 11 June 2007, [Seller] brought an appeal against this decision of the Court of First Instance (sent to the parties on 11 May 2007, served on [Seller] on 12 May 2007) before the Appellate Court (Kantonsgericht). It requested the Court to repeal the judgment rendered by the Court of First Instance and to dismiss [Buyer]'s action. 8

### Position of [Buyer]

[Buyer] requested in its appellate response of 29 August 2007 to dismiss the [Seller's] appeal and to confirm the judgment rendered by the Court of First Instance.

No oral hearing has taken place. The parties also waived their opportunity to make a second series of submissions under Art. 234(2)(a) ZPO [\*].

## Reasoning of the Appellate Court

In the following, reference is made to the parties' submissions where necessary.

II.

1. 9

The appeal is admissible because all requirements for a decision on the merits are fulfilled in the present case (Art. 20(a), 79, 224 and 225 ZPO).

2. 10

The Court of First Instance correctly affirmed its jurisdiction over the present dispute and held that the United Nations Convention on Contracts for the International Sale of Goods (CISG) of 11 April 1980 (SR [\*] 0.221.211.1) is the substantive law governing the relationship between [Buyer] and [Seller] (judgment, at 4.4). It must be considered that the CISG is only a fragmentary body of law. When the parties -- as in the case at hand -- have not made a choice of law, the contract will subsidiarily be governed by the domestic law applicable to the contract. This leads to the application of Swiss law since [Seller] is obliged to effect the characteristic performance under the contract and its seat lies in Switzerland (Art. 3 Convention on the Law Applicable to International Sales of Goods of 15 June 1955 (SR 0.221.211.4; Vischer / von Planta, Internationales Privatrecht, 2nd ed., 186 et seq.). In particular, this applies to the controversial questions concerning the content and validity of the contract (interpretation, lack of legally relevant intent, et seq.).

III.

1. 11

The parties correctly imply that both contracts concerning the sale of skid chains and adaptors have been validly concluded. First, it must be assessed whether [Seller] is legally bound by any of these contracts. This is contested by [Seller], who has asserted that it was wilfully deceived by [Buyer] in terms of Art. 28 OR [\*].

a)

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[Seller] had concluded an exclusive contract for delivery of skid chains with company C (general importer for country Y), which granted a right for exclusive distribution (agreement of 25 April 2004, defendant's exhibit 14). In this context, [Seller] argues that -- as a clear condition for delivery -- [Buyer] should confirm that the goods were intended for a customer in the countries Z and would not be delivered to country Y under any circumstances. [Seller] submits that thereupon, [Buyer] gave the respective assurance.

This argument is contested by [Buyer] with respect to the first order.

b)

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The alleged assurance is not supported by any documents. In order to establish proof, [Seller] relies on the statement by E and the witness statement of F. On the other hand, [Buyer] seeks to prove the contrary, supported by the statement of L and the witness statement of M.

E is the CEO of [Seller] and has stated concerning the first transaction that he had told M over the telephone that country Y was explicitly excluded as a destination for the goods. Thereupon, the latter had stated that the consignment would be exported into countries V (protocol, 6). [Seller]'s employee F denies to have taken note of this particular agreement (protocol, 5). Thus, F is aware of the agreement only from hearsay. L, [Buyer]'s CEO, indicates that he was not in contact to anyone of [Seller] in relation to the first order. Instead, this order was received through his son M (protocol, 4). M, who had spoken with E, [Seller]'s CEO, over the telephone, contests E's factual submissions, stating that the particular destination of the goods subject to the first transaction was not an issue whatsoever, and that problems had arisen only after the second order, at which time it was suddenly stated that no exportation might occur into country X (protocol, 3).

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These statements will have to be evaluated by the Court in the context of the following aspect.

c)

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In order to prove the correctness of its submission, [Seller] further relies on a letter by [Buyer] dated 28 January 2005. In this letter, [Buyer] raises complaints about the shipping company D- GmbH, which had handed the bills of delivery over to [Seller], «which indicate that the first consignment was delivered to country Y». This had allegedly taken place against [Buyer]'s firm instruction that «the manufacturer may not under any circumstances be made aware of the final recipient of the goods (because we assumed that in this case, the goods would not be cleared).» [Buyer] had gone on to complain that under these circumstances «the second delivery was not cleared and the advance payment withheld» (defendant's exhibit 8).

The respective instruction to the shipping company indicates that [Buyer] sought to prevent the consequences which have eventually occurred, namely, that [Seller] denies the execution of additional deliveries if it was made aware of the fact that the goods were being forwarded to country Y. This is in support of [Seller]'s submissions. [Buyer]'s counter-argument -- that this was a mere measure of precaution in order to protect its own customer contacts, because [Seller] dubiously used to approach large customers directly as a means to realize larger profits -- is generally comprehensible (cf. in this respect judgment, 10), but is not convincing in the overall context of the case.

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The relevant letter of 28 January 2005 is particularly insightful with respect to the credibility of [Buyer]'s factual submission concerning the intended destination of the second consignment (allegedly countries V and W, pp. 4 et seq. of the action, letter of 2 December 2004, plaintiff's exhibit 11, statements by M and L, protocol, 5 and 2). Contrary to [Buyer]'s statements in its appellate response, its letter of 28 January 2005 to the shipping company does in fact prove that the second consignment was intended for country Y, as well. It is undisputed that the first consignment already reached this destination, given that the letter reads: «Our customer in country X ... had given a new order (in the absence of another delivery of a pallet by cargo plane, which would be urgently needed)», which was thereupon «immediately forwarded to K». In this respect, [Buyer] had allegedly «made an immediate payment of about EUR 15,500». This additional order, which has been mentioned in the letter of 28 January 2005, undoubtedly constitutes the second order for EUR 15,476.16, which is the «small additional consignment which we require urgently» ([Buyer]'s fax to [Seller] of 23 November 2004, plaintiff's exhibit 2). Based on the consideration that the second consignment was intended for country Y instead of countries V, G's undated confirmation (plaintiff's exhibit 8, apparently prepared only after [Seller]'s involvement in the present legal proceedings) is without any bearing on the assessment.

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d)

Given that the second consignment was intended for export into country Y, [Buyer]'s factual submission that the consignment was brought into countries V must be incorrect just as the respective statements by L and M. Under these circumstances, [Seller]'s submissions must be seen as correct, namely, that [Buyer] had already assured with respect to the first order that no delivery would occur into country Y, despite [Buyer]'s assertions to the contrary and despite the implausible testimony by M. This, in turn, suffices as evidence for the asserted wilful deceit caused by [Buyer]. It is irrelevant whether or not the deceit caused a material misapprehension on the part of [Seller] (Art. 28(1) OR [\*]). [Buyer] has to bear the consequences of its deceit even if it was caused by M of company H, who had spoken to E over the telephone. The former person did not act as a third party (cf. Art. 28(2) OR), but apparently as an auxiliary person of [Buyer] (Art. 101 OR).

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e)

On the basis of all the circumstances, especially because of the contract for exclusive distribution and with consideration of [Buyer]'s subsequent conduct, it is evident that [Seller] would not have concluded the two contracts if it had been aware that country Y was to be the destination of the goods. This establishes the required causal connection between the deceit and the conclusion of the contracts. The contracts will have no legal effect on [Seller].

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f)

According to Art. 31(1) OR, a contract concluded with deceit will be ineffective only if the affected party declares against the other party within one year that it does not want to be bound by the contract. If the affected party omits this declaration or if it does not claim restitution of any performances, the contract will become definitely effective.

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In the present case, [Seller] has duly asserted in its statement of defense of 26 October 2005 that it would not want to be bound by the second order of 23 November 2004. It has effectively rescinded the second contract. The first contract however, which has already been performed by both parties, is deemed to be legally effective because [Seller] has not claimed restitution.

2.

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It follows from the lack of legal effect of the second contract that [Buyer] is entitled to claim reimbursement of its advance payment on the purchase price but not to claim damages for loss of profit. Therefore, [Buyer]'s claim for EUR 15,476.16 plus interest is founded while the other claim for EUR 1,839.84 is unfounded. It must be assessed whether [Seller]'s asserted counterclaim for Sfr. 167,631.35 (in relation to the first contract) is founded and may be used as a defense against [Buyer]'s claim.

3.

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[Seller] bases its counterclaim for damages on Art. 41 OR and the principles of culpa in contrahendo (statement of defense, 13 et seq. and 16 et seq.; pleading notes 11 et seq.; appellate submission 20 et seq.). The Court considers under Art. 78 ZPO [\*] that the counterclaim asserted by [Seller] may also be legally based on Art. 61(1)(b) and 74 CISG, which grant a claim for damages for breach of contract.

a)

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The claims asserted by [Seller] are evidently in existence.

It is accepted in literature and jurisprudence that any wilful deceit in terms of Art. 28 OR will always constitute a tort («private law fraud») pursuant to Art. 41(1) OR and / or a case of culpa in contrahendo (August Egger, *Schadensersatz bei absichtlicher Täuschung* (OR Art. 31(3)), in *SJZ* [\*] 18/1922, 217 et seq. (218); von Thur / Peter, *Allgemeiner Teil des schweizerischen Obligationenrechts*, vol. 1, Zurich 1979, 339; Guhl / Koller / Schnyder / Druey, *Das Schweizerische Obligationenrecht*, 9th ed., Zurich 2000, 149 et seq. para. 11; Eugen Bucher, *Schweizerisches Obligationenrecht, Allgemeiner Teil*, 2nd ed., Zurich 1988, 222; Hans Merz, *Vertrag und Vertragschluss*, 2nd ed., Freiburg 1992, 81 et seq. para. 141; Bruno Schmidlin, *Berner Kommentar*, Bern 1995, Art. 31 OR para. 141; Ingeborg Schwenger, *Basler Kommentar*, 4th ed. 2007, Art. 31 OR para. 23; BGE [\*] 108 II 119 et seq. (121); BGE 109 Ia 5 et seq. (10)).

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While, pursuant to Art. 31(3) OR, damages may be claimed only in exceptional cases where a transaction has been subsequently authorized, namely where a rescission would have caused an additional detriment on the part of the affected party which cannot be reasonably born (BGE 109 Ia 10 et seq. with reference to the prevailing notion). However, such exceptional case is given at hand because restitution of the skid chains against reimbursement of the purchase price is impossible under the present circumstances.

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Consequently, [Seller] is entitled to claim damages from [Buyer] on the basis of Art. 41 OR and the principle of culpa in contrahendo.

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b)

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It has been stated above that [Buyer] assured [Seller] that it would not make any deliveries into country Y. This assurance constitutes an (express) contractual secondary obligation in terms of a negative covenant (cf. Wolfgang Wiegand, *Basler Kommentar*, Art. 97 OR paras. 32 et seq. and 37; Rolf H. Weber, *Berner Kommentar*, OR paras. 92 et seq.). Given that [Buyer] nevertheless made deliveries into that country through company H (defendant's exhibit 1), it has definitely breached this obligation.

Accordingly, a claim for damages on the part of [Seller] has arisen pursuant to Art. 74 CISG. It is without bearing on this claim that, apparently, [Buyer] had an intention from the outset not to comply with its covenant, which establishes just another deceit vis-à-vis its contracting partner. It would be possible for [Seller] to claim damages and at the same time to refrain from relying on the deceit. It is evident that this alternative for [Seller] cannot be excluded because [Buyer] was not only in breach of contract but had even committed a fraud beforehand. This is irrespective of the fact that [Seller] seeks to rescind the second, unperformed contract because of the deceit in contrast to the first contract. A person who is affected by a common wilful deceit and has thus been induced to conclude multiple contracts may decide at discretion which of the contracts shall remain in effect and which shall not. No rule can be inferred from statutory law according to which this discretion were limited in such a way that the affected person would have to choose between the validity of all contracts and the invalidity of all contracts (cf. Gauch / Schluep / Schmid / Rey, *Obligationenrecht Allgemeiner Teil I*, 8th ed., Zurich 2003, para. 871b, who argue that the rules on non-performance may apply if a deceit by one party affects the quality of the performance).

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c)

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The wording of Art. 74 CISG clearly indicates that the corresponding claim for damages compensates for the pecuniary interest in due performance of the contract (expectation interest, positives Interesse).

On the other hand, the extent of damage compensated according to Art. 31(3) in conjunction with Art. 41(1) OR [\*] and according to the principle of culpa in contrahendo is subject to academic argument. It is common ground that a claim for damages will generally compensate for nothing more than the reliance interest (negatives Interesse, Vertrauensschaden). The person affected by deceit shall be put into the hypothetical position which it would have been in had the contract not been concluded. Legal scholars von Thur / Peter (above, 140 et seq.), Alfred Koller (*Schweizerisches Obligationenrecht Allgemeiner Teil 1*, 297 para. 196; *ibid.* in Guhl / Koller / Schnyder / Druey, above, 150 et seq. para. 13) and Keller / Schöbi (*Allgemeine Lehren des Vertragsrechts*, Basel und Frankfurt am Main 1988, 166 et seq.) would not allow any exception to this legal principle which has been derived through a logic and systematic interpretation (however, von Thur / Peter (above, 341) make a single exception for cases where the statements made by a person guilty of fraud may be understood as a guarantee. Other scholars argue that further exceptions exist.

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For instance, August Egger has argued in favor of a more equitable approach with reference to Art. 26(2) OR: If someone who is affected by a negligent mistake may claim the expectation interest, it would be even more appropriate and just to grant the expectation interest in all

31

cases of deceit (above, 220). In the same vein, Hermann Becker argues that Art. 26 and 39 OR demonstrate that «there do exist cases, in which compensation for the reliance interest is not enough despite the contrary decision by legislature» (Berner Kommentar, Bern 1941, Art. 31 OR para. 17). Furthermore, Bruno von Büren criticizes the reluctant practice of compensating for damages under recourse to the mere reliance interest as «highly inequitable» (Schweizerisches Obligationenrecht Allgemeiner Teil, Zurich 1964, 226). Exceptions to the statutory rule are also advocated by Bruno Schmidlin (while the result achieved by authorization and the claim for damages «may not exceed the amount of expectation interest, above, para. 870), Ingeborg Schwenzer («there could also be an application of Art. 26(2) by way of analogy», above, Art. 31 para. 23) and apparently Eugen Bucher, who mentions a limitation to the reliance interest only in the context of rescission, but not in the context of authorization of the contract (above, 222 et seq.).

After all, it may remain undecided in the present case which of these proposals should be followed. In any event, Art. 74 CISG clearly entitles [Seller] to claim damages equal to the expectation interest.

d)

Art. 8 ZGB [\*] provides that [Seller] bears the burden to prove existence and extent of the damage, which has been contested by [Buyer]. Moreover, [Seller] will have to demonstrate the causal connection between the deceit (delivery to country Y against the content of the contract, which is unlawful and has been committed faultily in terms of Art. 41 OR and the elements of culpa in contrahendo) and the damage.

4.

In order to demonstrate the asserted damage, [Seller] refers to the agreement of 25 April 2004 which has already been mentioned above. According to this agreement, company C was inter alia obliged to purchase at least 4,000 pairs of Spikes-Spiders for country X and for the season 2004/2005 (defendant's exhibit 15). It is argued that owing to [Buyer]'s delivery to a competitor in country Y, dumping prices were caused so that company C could only purchase 3,035 pairs (i.e., 965 less than necessary). Since company C suffered a violation of its exclusivity rights, [Seller] could «apparently not bring a claim for the insufficient quantity so purchased,» but instead would have to defend itself against claims filed by company C following breach of contract. The average procurement price for one pair was Sfr. 255.27 which led to a loss of revenue of Sfr. 246,335.55 and to lost profit (damage) of Sfr. 167,361.34 based on a profit margin of 68.05% as has been the case in 2003 (statement of defense, 8 et seq. para. 9; rejoinder, 17 et seq. paras. 22 and 23; pleading notes, 9 et seq. paras. 15-18). These allegations are all contested by [Buyer] (counterplea, 9 et seq. para. 9; pleading notes, 5 et seq.; appellate response, 15 et seq. para. 20).

a)

It may be readily assumed that [Seller] has suffered damages in form of lost profit after company C purchased a lesser quantity of skid chains compared with what had been agreed beforehand. [Buyer]'s argument that there was no proof that only 3,035 pairs had in fact been sold (counterplea, 10 para. 9; appeal, 16 para. 20) is irrelevant. Under the rule of *negativa non sunt probanda*, it would be for [Buyer] to argue and to prove that [Seller] was actually able to

deliver a higher quantity (cf. also the individual orders and their summary (defendant's exhibits 15-20) and the letter by [Seller] to company C dated 22 August 2005 as well as the latter's response of the same day; defendant's exhibits 22 and 6).

Likewise, [Buyer]'s additional allegation, that no damage occurred because company C had forfeited its exclusivity right failing a due order and had also been obliged to purchase the other skid chains to the effect that [Seller] would be entitled to bring claims against company C (pleading notes, 5; appeal, 15 para. 20), is without relevance to the case. An uncertain claim against a contracting partner whose exclusivity rights have been infringed (cf. below III.4.b.bb) is less valuable than a materialized profit. No further reasoning is necessary at this point.

b)

However, it is more difficult to establish the asserted causal connection, namely that company C was being prevented from the purchase of the other 965 pairs of skid chains on the market for country X by dumping offers, which had been caused by [Buyer]'s unlawful delivery into country X.

aa)

[Buyer] has already indicated during the proceedings before the Court of First Instance that - in accordance with the contract (recital 3 para. 2 of the agreement, defendant's exhibit 14) - company C would have had to order the skid chains until 25 August 2004 at the latest (pleading notes, 5; appellate response, 15 para. 20). However, this has not been the case whereupon [Buyer] sent the letter of 22 August 2005 as a reminding notice that only 3,035 pairs had been ordered for the season 2004/2005.

It is also correct that the goods which had been delivered into country X (total value of EUR 74,891.44) were ordered by [Buyer] only on 27 October 2004. Therefore, the asserted dumping offer in country Y could not have caused an incapability on the part of company C to fully comply with its contractual obligation to acquire 4,000 skid chains from [Seller] until 25 August 2004.

bb)

On the other hand, it is evident that the delivery of goods ordered on 27 October 2004 into country X has negatively affected [Seller]'s position, as it has correctly argued (rejoinder, 18 para. 23). Respectively, the opportunities for [Seller] to claim performance of the contract from company C have apparently been finally compromised so that any possible claim for damages was then worthless. It can be taken as proven that the said delivery into country Y had bypassed company C (who had an exclusive distribution right under the agreement of 24 April 2004), given the content of the corresponding letter by company C (defendant's exhibit 6 = response to defendant's exhibit 22), despite the fact that it was sent only after the commencement of legal proceedings. The Court may thus reasonably refrain from hearing witness O (request in statement of defense, 5), irrespective of Art. 111(1) ZPO.

cc)

The natural causal connection between [Seller]'s delivery (this has been caused by the conclusion of contract by deceit) and the subsequent damage must therefore be assumed. Since the present course of events is usual, there is also an adequate causal connection.

c)

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In the present case, it is justifiable not to demand evidence for the damage actually incurred but to determine by way of an estimation in terms of Art. 42(2) OR a sum which would not exceed the actually incurred damage with sufficient certainty. This is appropriate because a considerable claim for damages has merely been brought as a defense against the relatively small claim asserted by [Buyer].

Since 965 pairs have not been purchased, a loss of revenue of Sfr. 200,000 may be used as a rough approximation (instead of Sfr. 246,335.55 as claimed by [Seller]). Moreover, a profit margin of only 12.5% (instead of 68.05% claimed by [Seller]) may be assumed in the light of [Seller]'s accounts for 2003 (defendant's exhibit 28). This leads to a sum of Sfr. 25,000, which will certainly not exceed the damages actually suffered.

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4.

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Consequently, this claim on the part of [Seller] of at least Sfr. 25,000 exceeds the amount of [Buyer]'s claim for reimbursement of the advance payment of EUR 15,476.16 (= Sfr. 24,761.85). Therefore, [Buyer]'s claim is subject to a set-off and must be denied in its entirety.