

Case 1519: CISG 49(1)(a); 80

Austria: Supreme Court (Oberster Gerichtshof)

4 Ob 159/11b

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The plaintiff, an Austrian company, ordered from the German seller video equipment for a complete monitoring of its ice cream parlours. After the cameras were installed by the seller and the buyer had paid the price, it turned out that the system did not allow a complete monitoring. Following some exchange of correspondence, the seller was willing to repair the installation but the buyer did not allow the seller to enter the parlours and declared avoidance of the contract because it had lost confidence in the seller. Reparation would have been possible, however costly. The plaintiff claimed damages. Both the Regional Court and the Court of Appeal dismissed the claim for damages. The Supreme Court endorsed the decision of the Court of Appeal.

The Supreme Court considered whether the breach of contract can be fundamental in the sense of Article 49(1)(a) CISG if it is still remediable. The court discussed different opinions and finally adopted a compromising approach. To qualify a breach of contract as fundamental so as to allow a declaration of avoidance of the contract, all relevant circumstances of the case are to be considered objectively. In order to find the required balance of interests, the kind and extend of the breach and its consequences for the other party, any possibility for reparation or new delivery within reasonable time, its costs and reasonableness for the buyer are to be taken into consideration. In the present case, the circumstances of the case and the balancing of interests resulted in the finding that the conditions to declare the contract avoided were not met. The Supreme Court also considered that under Article 80 CISG the party loses the right to declare the contract avoided where it had rejected supplementary performance without reason, as it had happened in this case.