

CISG-online 2346	
Jurisdiction	Switzerland
Tribunal	Bundesgericht/Tribunal fédéral (Swiss Federal Supreme Court)
Date of the decision	17 April 2012
Case no./docket no.	4A_591/2011
Case name	<i>EAS tags case</i>

Translation by Anna Blatz***

Facts

A.

A.a

[Seller] (defendant and appellee) delivered 229,000 EAS tags to [Buyer] (plaintiff and appellant), or more specifically to its German sales company, from 2002 until the beginning of 2005. Thereafter, [Buyer], or more specifically its German sales company, had EAS tags delivered by A[...]. A[...] delivered a total of 202,000 EAS tags.

A.b

At a hearing before the Regional Court (*Landgericht*) of Frankfurt on 15 March 2007, [Buyer] reached a settlement with [Third Party] after the latter sued for infringement of its design right Z[...]. In this settlement, [Buyer] committed itself to destroying any EAS tags in its possession and/or ownership at its own expense.

[Buyer] subsequently disposed of 317,295 EAS tags.

* All translations should be verified by cross-checking against the original text. For purposes of this text, the plaintiff-appellant of Switzerland is referred to as [Buyer], the defendant-appellee of Germany is referred to as [Seller] and the third party referred to as [Third Party]. Amounts in the currency of Switzerland (*Swiss francs*) are indicated as CHF.

Translator's note on other abbreviations: BGE = *Bundesgerichtsentscheidung* [Reported decisions of the Swiss Federal Supreme Court], BGG = *Bundesgerichtsgesetz* [Swiss Code on the Functioning of the Federal Supreme Court], OR = *Obligationenrecht* [Swiss Code of Obligations]

** Translation prepared by Anna Blatz, a law student at the Albert Ludwig University of Freiburg.

A.c

3

[Buyer] then demanded that [Seller] pay its share of the costs allegedly incurred by the German court proceedings as well as the destruction and replacement of the tags. [Seller] declined to pay.

B.

B.a

4

In a lawsuit filed with the District Court (*Bezirksgericht*) of March, [Buyer] demanded that [Seller] be ordered to pay CHF 210,464.00 plus 7.6% value added tax to CHF 164,735.55.

The District Court of March dismissed the case by judgment of 21 December 2010.

B.b

5

[Buyer] filed for appellate proceedings before the Court of Appeal (*Kantonsgericht*) of Schwyz with the request that the decision rendered by the District Court of March be repealed and the court proceedings remanded to the District Court.

[Buyer] filed a claim for [Seller] to be alternatively ordered to pay CHF 118,663.00.

By judgment of 30 August 2011, the Court of Appeal of Schwyz dismissed the appeal and confirmed the contested decision, insofar as it did not write off the suit as settled due to partial withdrawal.

6

C.

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In a complaint in civil matters filed with the Federal Supreme Court (*Bundesgericht*) on 29 September 2011, [Buyer] demanded that the judgment of the Court of Appeal be reversed and that the case be remanded to the District Court of March for further clarification of the facts.

[Seller] has applied for the appeal to be dismissed. The lower court requests that the appeal be dismissed if it is admitted.

D.

8

On 17 April 2012, the Federal Supreme Court held public deliberations on the judgment.

Reasoning of the Supreme Court

[Jurisdiction of the Federal Supreme Court]

1.

9

This appeal is directed against a decision upon the conclusion of proceedings (Art. 90 BGG) rendered by a higher cantonal instance that acted in the form of a cantonal final instance in a civil case on account of an appeal (Art. 75 in conjunction with Art. 72 BGG), [Buyer]'s legal claims were not protected in the cantonal proceedings (Art. 76(1) BGG), the relevant value of

the dispute amounts to more than CHF 30,000.00 (Art. 51 in conjunction with Art. 74(1)(b) BGG) and the time limit for lodging the complaint has been observed (Art. 100(1) BGG).

2.

[Requirement of the Lower Court to Provide Sufficient Reasoning]

2.1

Pursuant to Art. 112(1)(b) BGG, decisions that are subject to appeal to the Federal Supreme Court must enclose the relevant factual and legal reasoning. The decision must clearly declare which ascertained facts the lower court assumed and the legal considerations it employed (BGE 135 II 145 E. 8.2 with references). Only then can the Federal Supreme Court verify the correct application of the law in the individual case (BGE 135 II 145 E. 8.2). The Federal Supreme Court may remand a decision that does not meet these requirements to the cantonal authority for improvement or repeal it (Art. 112(3) BGG).

10

[Subject of Dispute Between Buyer and Seller is Burden of Proof]

2.2

The parties disagree as to which facts [Buyer] must prove. In [Buyer]'s view, the lower court violated Art. 42 CISG by wrongly placing the burden of proof on [Buyer] that [Seller] delivered goods that did not conform to the contract. This is because pursuant to Art. 42 CISG, [Buyer] has, in this regard, only to prove that a third party has claimed an intellectual property right against it. In [Seller]'s view, however, [Buyer] must prove that the goods it delivered effectively infringed upon the intellectual property rights of a third party.

11

[Buyer Bears Burden of Proof that Third-Party Rights or Claims on Goods Have Been Asserted and that the Goods Originate from the Seller]

2.3

Pursuant to Art. 42(1) CISG, the seller must deliver goods that are free from any right or claim of a third party based on industrial or other intellectual property, of which at the time of the conclusion of the contract the seller knew or could not have been unaware, provided that the right or claim is based on industrial or other intellectual property. Should the seller fail to fulfill this obligation, the buyer may, in accordance with Art. 45(1) CISG, exercise the rights provided in Art. 46-52 CISG or claim damages in accordance with Art. 74-77 CISG.

12

The buyer, according to the undisputed opinion also held in legal theory, bears the burden of proof that third-party property rights or claims have been asserted (see only *Magnus*, in: Honsell [Publ.], Kommentar zum UN-Kaufrecht, 2nd ed. 2010, Art. 42 CISG para. 20; *Schwenzer*, in: Schlechtriem/Schwenzer, Kommentar zum Einheitlichen UN-Kaufrecht, 5th ed. 2008, Art. 42 CISG para. 29). It is therefore not necessary for the asserted property claims to be effectively substantiated (*Christoph Brunner*, UN-Kaufrecht – CISG, 2004, Art. 42 CISG para. 4). As is already clear from the wording of Art. 42 CISG, claims based on legal warranty exist only against the seller in respect to whose goods third-party claims are asserted. Should the buyer

13

have multiple sellers and the seller dispute that the third-party claims concern its own delivered goods, the buyer's mere proof that third-party claims have been asserted will not suffice. Such a deduction cannot be made from the cited commentaries either. This is because it appears self-evident that these claims must concern the respective goods of the seller in question as opposed to the goods of a different seller (see also clearly *Schönle/Higi*, Zürcher Kommentar, 3rd ed. 2005, Art. 194 OR para. 26).

[Assessment of the Reasoning of the Lower Court as Insufficient for Judgment by the Federal Supreme Court]

2.4

14

It cannot be determined from the judgment of the lower court with sufficient clarity whether the lower court applied these principles in conformity with the law in its reasoning for the judgment. While it is correctly stated initially in consideration 3 that it is irrelevant whether [Third Party] rightly or wrongly claimed the design right against [Buyer], the lower court states, e.g. in consideration 4a, that [Buyer] bears the main burden of proof that [Seller] sold unlicensed EAS tags. However, it is especially unclear for which facts the lower court deemed the evidence to have succeeded or failed. Namely, it cannot be discerned from the lower court judgment whether [Seller] disputed that the claims [Third Party] asserted pertains to the EAS tags that [Seller] supplied. The Federal Supreme Court is unable to assess the present case without this information. Therefore, in application of Art. 112(3) BGG, the contested judgment is to be set aside and remanded to the lower court for a renewed decision due to the lack of clear enough information concerning the relevant reasons of factual and legal nature.

[Decision of the Federal Supreme Court]

3.

15

Due to the aforesaid, the judgment of the Court of Appeal of Schwyz of 30 August 2011 shall be set aside and the case remanded to the lower court. By cause of this procedural outcome, [Seller] is held liable for costs and compensation (Art. 66(1) as well as Art. 68(2) BGG).

The Federal Supreme Court recognizes accordingly:

16

1. The judgment of the Court of Appeal of Schwyz of 30 August 2011 is set aside and remanded to the lower court.
2. The court costs of CHF 5,000.00 are imposed upon [Seller].
3. [Seller] shall compensate [Buyer] for the federal court proceedings with CHF 6,000.00.
4. This judgment is to be communicated in writing to the parties and to the Court of Appeals of Schwyz, 1st Civil Chamber.