

Case 1877: CISG 6; 19; 74

Austria: Oberster Gerichtshof

Case No. 8 Ob 104/16a

A***** SpA v. K***** GmbH, *****

29 June 2017

Original in German

Published in German: *Ecolex* 2017, 989 and *SZ* 2017/76

Available at: www.ris.bka.gv.at

Abstract prepared by Dr. Christian Rauscher, National Correspondent

This case deals with the incorporation of standard contractual terms and conditions (TC) into a contract and the recovery of reminder fees and collection costs in the event of breach for non-payment.

Starting in 2008 the plaintiff, a clothing manufacturer with place of business in Italy, sold knitwear to the defendant, who had its place of business and several apparel stores in Austria. In negotiating the first and some subsequent sales contracts, the defendant made reference to its TC, which provided for the application of Austrian law and the exclusion of the CISG. However, the parties did not explicitly discuss the TC and the TC were not made available to the plaintiff.

In 2013, the defendant refused to pay part of the price charged by the plaintiff relying on the provisions of its TC and the consequent exclusion of the CISG. The plaintiff instituted legal proceedings for the payment of the remaining price and reimbursement of reminder fees and collection costs that it had incurred through the engagement of a debt collection agency.

The court of first instance dismissed the plaintiff's claim on the basis that the TC had been incorporated into the contract. The court of appeal reversed the first instance decision and allowed recovery of most of the claim. On appeal, the Supreme Court (Oberster Gerichtshof) substantially upheld the court of appeal's decision.

The Supreme Court recalled that, within its scope of application, the CISG superseded national law, and that article 6 CISG dealt with CISG exclusion. It explained that the defendant's TC had to be validly incorporated into the contract according to part II of the CISG in order for the parties to exclude the application of the CISG, and that this required the TC to be sent to the other party or for them to be made available to the other party by other means, as mere reference to the TC did not suffice. It also indicated that the other party was under no obligation to actively ask or search for the TC's content ("Erkundungspflicht").

Consequently, the Supreme Court held that the TC had not been validly incorporated in the contract, that the application of the CISG had not been excluded and that the defendant could not rely on the TC to refuse payment.

Finally, the Supreme Court held that, absent a special provision in the contract, the claim for recovery of reminder fees and collection costs had to be determined according to article 74 CISG. It indicated that such costs could be recovered if the effectiveness of the services offered by the debt collection agency exceeded the plaintiff's debt collection ability, but that this was usually not the case in cross-border trade. It added that, in a situation where the other party had already firmly refused payment and court proceedings were thus foreseeable, the engagement of a debt collection agency was no longer justified. It concluded that those costs were therefore not recoverable.