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# Translation from German - Court of Appeal (Oberlandesgericht) of Braunschweig - October 28, 1999 - Docket No. 2 U 27/99

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# Translation from German

# Court of Appeal (Oberlandesgericht) of Braunschweig October 28, 1999 Docket No. 2 U 27/99

**English translation by Jarno Vanto***

*Editor*: Ruth M. Janal**

**Key CISG provisions at issue:**
Articles 4; 6; 7(2); 57(1)(a); 61(1)(b); 64(1)(a); 74; 77; 78; 88
[Also cited: Articles 14; 18; 24; 31(1); 71(1)(b); 76; 85]

**Key issues addressed:**
Choice of law, Place of payment, Jurisdiction, Scope of Convention, Statute of limitations, Standard terms and conditions, Avoidance [cancellation] of contract, Damages, Loss of profits, Preservation of goods, Storage of goods, Cover transactions, Mitigation of loss, Interest

FACTS:

A German seller (the plaintiff) sold to a Belgian buyer (the defendant) 12600 kg of deer meat [venison]. The contract stipulated that the meat be shipped to Antwerp. Shipment was to be made upon payment of the invoice. Shortly after formation of the contract the seller informed the buyer that part of the meat would arrive via plane at Brussels. The seller asked the buyer to accept the goods at Brussels and Antwerp and issued invoices for the two shipments. The buyer refused to take the goods at Brussels. The seller then offered to deliver all of the goods to Antwerp within the time limit of the contract and reiterated its

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demand for immediate payment. The buyer did not pay, arguing that the seller had refused to perform under the contract with regard to the place of performance. The seller then sued for damages for non-performance. The first instance court (Landgericht Braunschweig February 3, 1999, 9 O 332/97) ruled in favor of the [seller].

GROUNDS FOR THE DECISION

The [buyer's] appeal is admissible but unsuccessful apart from a change to the damages awarded to the [seller] for the delay in payment and an adjustment to the applicable interest rate.

The [buyer], a Belgian firm, fundamentally breached the contract concluded between her and the [seller], a German firm, on November 3, 1995 by finally and unequivocally refusing to take over the venison meat that was the subject matter of the contract. The [seller] is therefore entitled to a damages award by the Court of First Instance irrespective of whether UN Sales Law (CISG) or the German Civil Code applies.

I. The international jurisdiction of the German courts is based on Art. 17 EuGVÜ.[1] The parties expressly concluded their contract on the basis of [seller's] standard terms. Section 17 of these terms names the legal forum as being at Goslar [Germany]. Since the parties are acting in their commercial capacity, the incorporation of these standard terms is valid both under domestic German law (Art. 27 Abs. 3, 31 Abs. 1 EGBGB,[2] § 24 sent. 1 AGBG,[3] see Palandt/Heinrichs BGB 58th ed. § 2 ABGB n.23) and under the alternatively applicable UN Sales Law (CISG). Following the undisputed submission of the [seller], his standard terms were already used by the parties in a series of earlier transactions and were also made accessible to the [buyer].

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[1] EuGVÜ = Europäisches Übereinkommen über die gerichtliche Zuständigkeit und die Vollstreckung gerichtlicher Entscheidungen in Zivil- und Handelssachen [European Convention on Jurisdiction and the Enforcement of Judgments in Civil and Commercial Matters].

[2] EGBGB = Einführungsgesetz zum Bürgerlichen Gesetzbuche [German Code on the Conflict of Laws].

[3] AGBG = Gesetz zur Regelung des Rechts der Allgemeinen Geschäftgsbedingung [German Code on General Terms and Conditions].

In the event the CISG is the law governing the contract, the international jurisdiction of the German Courts also results from Art. 5 No. 1 EuGVÜ (forum at the place of performance). Under CISG Art. 57(1), the place of performance for the [buyer's] obligation to pay the purchase price is the seller's place of business. The secondary obligations under CISG Art. 61 - including the above-mentioned claim for damages - follow the primary obligation of payment of the purchase price. Consequently, the place of performance for a remedy for breach of contract is also determined by CISG Art. 57(1)(a) (Ensthaler/ Achilles, § 382 Art. 31 n.15, Art. 57 n.1).

II. The damages in question are based on CISG Art. 61, if the CISG applies. In the event one finds the standard terms to contain an implicit choice of German domestic law, the [seller's] claim for damages results from § 326 of the German Civil Code (BGB). Contrary to the [buyer's] submission, these claims are not time barred, as the period of limitations - to be determined under German domestic law - is four years and has not yet run out (Art. 31(1) no. 4 EGBGB, § 196(1) no. 1 BGB, cf. Palandt/ Heinrichs, § 195 Rn. 8).

1. If the CISG governs the contract, the [seller] may claim damages on the basis of CISG Art. 61, because the [buyer] fundamentally breached her duties under the contract. Contrary to the agreed advance performance by the [buyer], she did not pay the purchase price, which was due immediately after the [seller's] invoice had been issued, and [buyer] renounced the contract in its entirety with her letter of December 11, 1995. The Court neither follows the [buyer's] position that she was not yet obliged to pay for the goods due to a faulty invoice, nor does the Court follow her allegation that the [seller] had not sufficiently fulfilled his duty to deliver. [Seller's] invoice of December 5, 1995 covering the majority of the goods delivered cannot be queried; it correctly described the agreed payment and delivery conditions. At the latest by fax of December 7, 1995, the [seller] in addition clarified that the goods would be placed at [buyer's] disposal at the agreed place of delivery, Antwerp. The same goes for [seller's] invoice of December 7, 1995, for in the above mentioned fax there was a written promise by the [seller] to fulfill the contract, leading to immediate payment du-

ties on the part of the [buyer]. The [seller's] fax of December 8, 1995 did not hinder the [buyer] from fulfilling her duties under the contract. That written message was not a conditional declaration of avoidance on the part of the [seller]. Instead, it contained a statement announcing a claim for damages for non performance, combined with the accurate remark that the [buyer] - whose conduct had given rise to doubts regarding her willingness to pay - was obliged to pay the price upon the receipt of the invoice and afterwards obliged to take possession of the goods in Antwerp.

The [buyer's] submission that [seller] was unready to deliver the goods, is unconvincing. Quite apart from the question whether the [buyer's] clear unwillingness to perform would have entitled the [seller] to suspend his performance on the basis of CISG Art. 71, the [seller] was not under any duty to perform in advance. The [seller] was in particular not under a duty to place the goods at the [buyer's] disposal before the payment had taken place (as a side note: contrary to the [buyer's] submission, it would have been sufficient if the [seller] had released the goods by naming the place of delivery). The [buyer] was unable to show that the [seller] would not have been willing or able to correspondingly perform his obligation if the [buyer] had resumed her loyalty to the contract.

In her written document of December 11, 1995, the [buyer] had, with final and serious intent, renounced the concluded contract. Admittedly, the [buyer] currently questions that interpretation of her statements. However, as late as in the brief arguing her appeal, she submitted that this letter contained a refusal to perform the contract. Following the understanding that a reasonable person of the same kind as the [seller] would have had in the same circumstances, no other interpretation of the [buyer's] letter makes sense. In view of the [buyer's] clear and growing unwillingness to perform the contract, the [seller] reasonably had to assume that the [buyer] would not take delivery of the goods. Based on these circumstances, the [seller] was entitled to declare the contract avoided under CISG Art. 64(1)(a) and did not have to keep up his readiness to fulfill his contractual duties.

2. If German domestic law were applied, the duty to pay damages would result from § 326 of the German Civil Code (BGB). In particular, the [seller's] fax message of December 8, 1995, as mentioned before, did not fix an additional period of time for performance combined with a conditional declaration of avoidance that - if judged to be premature - could possibly be seen as a breach of contract on the part of the [seller]. As late as in her brief arguing the appeal, the [buyer] submits that she herself did not interpret the [seller's] letter as the fixing of an additional period of time combined with a conditional declaration of avoidance, but concluded that the [seller] intended to hold on to the contract.

Following the [buyer's] unequivocal refusal to perform, which was expressed in her letter of December 11, 1995, the [seller] was entitled to avoid the contract without fixing an additional period of time and to claim damages for non-performance. He did so by letter of March 26, 1996, in particular because the [buyer] at no point in time signaled that she would return to a conduct loyal to the contract.

3. The following losses are to be compensated as damages:

When applying the CISG, the duty to pay damages is based on Article 74, in part also on Article 85. The Court does not follow the [buyer's] submission that the seller failed to take obvious steps to mitigate damages and that the reimbursement of his damages should consequently be reduced under CISG Art. 77. The [seller] was not obliged to undertake a substitute transaction. First, the [seller] did not have to agree to partial substitute sales of goods which he then would have possibly lacked, had the [buyer] desired to go through with the transaction after all. Second, CISG Art. 77 does not principally oblige a party to enter a substitute transaction. It is only in exceptional circumstances that the seller is obliged to rescind his primary rights to performance for secondary rights in the form of damages (Ensthales/Achilles, after § 382, Art. 77 n.4). Scholarly opinion correctly assumes that the seller is not obliged to enter a substitute transaction even if prices are falling, as this basically means putting himself in a position of inability to perform the contract. Exceptions apply if the promisee delays avoiding the contract without a plausible reason or speculatively, that is, if enough

time has passed to expect a decision by him whether he intends to require performance or ask for remedies for breach of contract (cf. v. Caemmerer/Schlechtriem/Stoll, Kommentar zum Einheitlichen UN-Kaufrecht, 2d edition, Art. 77 n.10).

Such an exception is not given in the present case. In particular, the [seller] could not have been expected to decide during the last remaining days of the year 1995, whether to require the [buyer] to pay the purchase price and take over the goods or to declare the contract avoided and to confine himself to secondary remedies. As long as this decision had not been made – and he was not required to make it — the seller was not under a duty to sell the goods to third parties. In a similar manner, the [seller] was not under a duty to sell the goods under CISG Art. 88, because the meat in question could be preserved through freezing, because the cost of such preservation did not exceed 10% of the value of the meat, and because the decrease in prices in venison to be expected after the Christmas holidays does not constitute a deterioration in the meaning of CISG Art. 88 (Ensthaler/Achilles, § 382 Art. 88 n.6).

The following damages and expenses were held as acceptable:

a. The Court of First Instance determined the [seller's] loss of profit under CISG Art. 74 as being DM [Deutsche Mark] 20,148.99. In accordance with the undisputed expert testimony, the Court held that the prices for frozen venison are on decline and that the profit margin of 10%, as set by the [seller], is at the lowest possible level. The Court of First Instance was thus entitled to estimate the [seller's] loss of profit - to be determined under CISG Art. 76 - as constituting 10% of the purchase price agreed with the [buyer].

b. Regarding the 1,365 kilograms of venison that the [seller] had been able to sell to a third party before preservation at only one-third of the price the [buyer] had agreed to pay, the [seller] can demand a sales commission of DM 500 as damages. These losses represent additional expenditures which would not have been accrued had the contract concluded between the parties to this dispute been performed (CISG Art. 74).

c. The sum of DM 527.90 also falls under damages to be compensated under CISG Art. 74. Again, these expenses would not have been accrued had the [buyer] not breached her duty to

take over the meat which was ready to be placed at her disposal.

d. The same goes for the expenses incurred by processing the meat for cold storage. These expenses, amounting to DM 1.15/kg, were regarded as extraordinarily low by the (undisputed) expert's testimony, therefore the Court of First Instance was entitled to rely on them for its estimation under § 287 of the German Civil Procedure Code (ZPO).

e. In addition to the loss of profit resulting from deterioration of the meat, the [seller] may claim the disputed transportation costs under CISG Art. 74 resulting from transporting the meat in Belgium. The [buyer] does not dispute that these expenses led to an additional loss of profit upon the resale of the stored meat; therefore, these damages are to be compensated under CISG Art. 74.

f. The Court of First Instance held that the phone expenses of DM 50 were compensable, relating to the necessary efforts by the [seller] to resell the goods. The Court of Appeals upholds this.

g. The additional costs for storing the goods, namely cold storage of the meat in Goslar [Germany], were considered to be exceptionally low by the undisputed testimony of the expert. The Court of First Instance thus correctly included these breach-induced costs in the calculation of damages under CISG Art. 74.

h. This Court reverses the appealed decision only with respect to the damages resulting from a delay in payment. The [seller] may not rely on the interest clause contained in Section 7 of his standard terms. This section of his standard terms determines delay damages as an abstract lump-sum without giving due consideration to the actual nature of the damages (cf. § 11 no. 5(b) AGBG). Following §§ 9 and 24 AGBG, such a varying clause is also forbidden in business transactions. The CISG does not diverge from these provisions. The decision of the domestic German law to regard such a clause as invalid comes in under CISG Art. 4(a), EGBGB Art. 31(1). Because the [seller] does not submit a concrete basis for determining the interest rate, the [buyer's] duty to pay interest is based on CISG Art. 78, whereas the interest rate is to be determined by the law applicable by virtue of the rules of private international law, that is

§ 352 HGB[4] (cf. Ensthaler/Achiles, after § 382, Art. 78 n.3). Consequently, the DM 3,887.40 interest determined by the Court of First Instance is to be replaced by only DM 2,556.10.

The interest on the [seller's] entire claim again is based on CISG Art. 78, while the interest rate is determined by § 352 of the German Commercial Code (HGB). Following the above reasoning, the decision on interest also needs to be adjusted so that the [seller] receives an interest rate no higher than 5% per annum.

[4] HGB = Handelsgesetzbuch [German Commercial Code].