

INTRODUCTION TO LEGAL CASE-SOLVING AND MOOTING

concerning § 5 Exercises in legal case-solving and mootng

Case 2

(facts of the case)

The Bavarian company "Bayern Software" (BS) has developed a sophisticated software program for the administration of chains of beer gardens. It allows a reliable and efficient central administration of all related beer gardens (which are connected online), including a cost-effective beer and food supply just in time, the central booking of musicians performing pop songs in the beer gardens and a system of loyalty cards for customers, allowing them to get the fourth beer for free if they have been in three other beer gardens of the same chain before. The software is sold as general software on a DVD. It works well in many Bavarian and some American beer garden companies.

Vietnam has signed and ratified the CISG. Two years later, the Hanoian company "Bia hoi sống tốt hơn!" (BH) orders that software after BS had promised that it would run in Vietnam without any problems. BH has informed BS that it needs the software to administrate its more than 500 beer gardens all over Vietnam but BS has answered that this would not present a problem. The software on the DVD is in English but allows to type Vietnamese names with diacritics.

When BH starts to use the software, there is some surprise. The software often sends the beer supply to the wrong places so that the recipients have no use for it while other beer gardens are running out of supply and losing their outraged customers. The same happens to the musicians so that some singers perform their traditional revolutionary, anti-imperialistic songs to Western foreigners in Hồ Tây while some tough hard rock bands play in traditional bia hoi for the local elderly people. Furthermore, the software ignores the diacritics and often sends the bill for Mr. "Đung" to Mr. "Dung" who is not pleased by that. The software also forgets to register some of the free beers, allowing loyal customers to get numerous free beers after having been in three beer gardens. This makes them more loyal but is not favourable for the profit of BH.

As it turns out, the central database module of the software is not really prepared for diacritics: It allows to type them but does not process them and therefore does not distinguish letters written with or without the various diacritics. In order to fix this, BS would have to re-program the whole module. The costs would amount to 20 per cent of the costs caused by the original programming of the software. Furthermore, it turns out that the architecture of the program is unsuitable for the administration of chains of more than 200 beer gardens. Theoretically it is possible but in practice the software will not be stable and reliable anymore. BS did not know that because the software had run nowhere with more than 100 beer gardens connected. The costs of developing a new architecture would amount to 30 per cent of the costs of the original programming.

A. BH still wants to use the software for the administration of its more than 500 bia hoi. Is it entitled to require BS to repair the software?

B. BH prefers to get the money back and to invest it in the programming of an own software of a better quality, made in Vietnam. Is it entitled to avoid the contract?

INTRODUCTION TO LEGAL CASE-SOLVING AND MOOTING

concerning § 5 Exercises in legal case-solving and mootng

Case 2

(discussion of the case)

SUBJECTS: How to structure a case solution; introductory and concluding sentences in a case solution; international sales law: right to repair (art. 46(3) CISG), avoidance of contract (art. 49(1) CISG), fundamental breach of contract (art. 25 CISG)

OUTLINE OF THE CASE SOLUTION:

A. Right of BH to repair (art. 46(3) CISG)

Since there are some problems with the beer gardens administration software delivered by BS to BH, BH may be entitled under art. 46(3) of the United Nations Convention on Contracts for the International Sale of Goods (CISG) to require BS to repair the software. This is the case if the CISG is applicable in the given case, the contract between BH and BS has been concluded effectively, the goods delivered by BS do not conform with this contract, the lack of conformity has not been caused by an act or omission of BH and the request to repair is reasonable.¹ If the CISG is applicable, any right to repair emanating from national civil or commercial law is excluded.²

I. Applicability of the CISG

The CISG is applicable in the given case if the contract concluded by the software order and its acceptance³ represents a contract of international sale of goods, does not concern a sector excluded under art. 2 and falls within one of the categories of application of the CISG, and if the parties have not excluded the application.⁴

1) Contract of international sale of goods (art. 1(1) CISG)

The applicability of the CISG requires that the contract on the delivery of the beer garden administration software between BH and BS represents a contract of international sale of goods. Since BH has its place of business in Vietnam and BS has its place of business in Germany (Bavaria is a region in Southern Germany), there is no doubt about the international aspect.

¹ For the structure of the examination of a right to repair of the buyer under art. 46(3) CISG see Diagram 2, p. 2. The introductory sentence should refer to the problem (the software that is not functioning properly) and to the legal basis and the requirements of a right to repair, enumerating the questions to discuss and outlining the structure of the following examination. The last two requirements listed in Diagram 2 (that the request for repair must be made within a reasonable time after notifying the seller and before the expiration of the limitation period) are only relevant if the other preconditions are fulfilled and therefore should not be mentioned in the introductory sentence if it is clear that this is not the case.

² Note: This sentence should be added in order to explain why the case solution only discusses a right to repair under the CISG and not any corresponding rights under German or Vietnamese civil or commercial law. If the requirements of art. 46(3) CISG are not met, BH cannot require repair at all.

³ Note: Since the facts of the case do not provide more detailed information about the conclusion of the contract, the introductory sentence should - shortly - mention that there has been an offer (the order of the software by BH) that has been accepted by the other party (BS).

⁴ For the structure of the examination of the applicability of the CISG see Diagram 1. The aspect of the temporal sphere of application of the CISG (art. 100) does not need to be discussed because it is obvious that the CISG applies in Vietnam two years after the signing and ratification of the CISG by Vietnam. Note that this is a simulated case and therefore the fact that in reality Vietnam has not yet signed the CISG is irrelevant for our case solution!

However, it may be questionable if a contract on software constitutes a contract of sale of goods. Goods (in the sense of art. 1(1) CISG) are moveable and tangible objects.⁵ Software itself is not tangible. However, if it is sold on a physical storage medium like a DVD, for practical reasons the whole entity of the DVD and the stored software should be considered as a good. This applies at least if the software is not programmed individually for a special customer but written and distributed to the public as a general product.⁶ So the software order and its acceptance represent a contract of international sale of goods.

2) Contract outside the sectors excluded from the application of the CISG (art. 2 CISG)

The sales contract does not concern any sale of goods excluded from the sphere of application of the CISG under art. 2.

3) Contract falling within one of the categories of the application of the CISG

The CISG is only applicable if the contract of international sale of goods falls within one of the generally recognised categories of application of the CISG: direct (autonomous) application (art. 1(1) lit. a CISG), indirect application (according to international private law, art. 1(1) lit. b CISG) or application through the parties' choice of law. In the given case, the contract has been concluded between parties whose *places of business* are *in different contracting states*. Germany has been a contracting state for more than twenty years.⁷ According to the facts of this (simulated) case, Vietnam has signed and ratified the Convention two years ago and now also is a contracting state. So the contract falls within the first category.

4) No exclusion of the application of the CISG by the parties (cf. art. 6 CISG)

When entering into the contract, BH and BS have not excluded the application of the CISG. In the given case, the CISG is applicable. It applies directly, according to art. 1(1) lit. a CISG.

II. *Effective formation of the international sales contract (cf. art. 14 et seq. CISG)*

The buyer can only be entitled to require repair under art. 46(3) CISG if the international sales contract has been concluded effectively. In the given case, there is no contrary evidence so this has to be assumed.

III. *Lack of conformity of the goods with the contract (cf. art. 35 et seq. CISG)*

The buyer is only entitled to require repair under art. 46(3) CISG if the delivered goods (here: the beer gardens administration software) do not conform with the contract, in other words do not meet the requirements under art. 35 et seq. CISG. In the given case, the software is not fit for the purpose for which software of the same description would ordinarily be used (cf. art. 35(2) lit. a): It has been sold as general software for the administration of *chains* of beer gardens (not of individual beer gardens) without limitation of the number of connected beer gardens. Moreover it has been sold for the administration of chains of beer gardens at any places in the world (not just in Germany or Europe). However, when operating in a beer garden enterprise with a larger number of connected beer gardens in Vietnam, the software sends the beer supply and the booked musicians to the wrong places, confuses the names of the customers in the bills and grants free beers to customers who have already had them. This affects the functioning of the enterprise seriously.

Furthermore, the software is not fit for the particular purpose expressly made known by the buyer (BH) to the seller (BS) at the time of the conclusion of the contract (cf. art. 35(2) lit. b): that the software must be able to deal with more than 500 connected beer gardens and with the situation (including the language particularities) in Vietnam. The seller had answered that these requirements would not present a problem. Since the architecture of the program is unsuitable for the administration of chains of more than 200 beer gardens and the database module is not prepared for the use of names with diacritics, this has turned out to be wrong and the purpose specified by the buyer is missed.

As required in art. 46(3) CISG, the goods do not conform with the contract.

⁵ *Schwenzer/Fountoulakis/Dimsey*, International Sales Law, 2nd edition 2012 [Kindle edition], art. 3, part II.

⁶ For another approach, including even individually produced software in the concept of "goods", see *Schwenzer/Hachem*, in: *Schlechtriem/Schwenzer* (editors), *Commentary on the Convention on the International Sale of Goods (CISG)*, 3rd edition 2010, art. 1 no. 18.

⁷ See the UNCITRAL table on the status of the CISG, www.uncitral.org/uncitral/en/uncitral_texts/sale_goods/1980CISG_status.html.

IV. No causation of the lack of conformity by the buyer's act or omission (cf. art. 80 CISG)

According to art. 80 CISG a party may not rely on a failure of the other party to perform if that failure was caused by the first party's act or omission. In the given case there has not been any act or omission of BH linked to the malfunctioning of the software delivered by BS in its chain of beer gardens. In particular, BH had informed BS about its special needs in order to make sure that the ordered product would be fit for its purposes. So a possible right to repair is not excluded under art. 80 CISG.⁸

V. Reasonableness of the request to repair

Even if the goods do not conform with the contract, this does not mean automatically that the buyer has a right to repair. Art. 46(3) also requires that the remedy by repair is not unreasonable having regard to all the circumstances. In the given case, a repair is *possible*: The seller could re-program the central database module, in order to prepare the software for the correct use with diacritics, and update the architecture of the software, in order to make it suitable for the administration of chains with more than 200 beer gardens. However, the requirement of reasonableness also involves that the burden imposed to the seller must be *proportionate*, that means in a reasonable ratio to the price received for the goods. In the given case, the costs for the re-programming of the central database module would amount to 20 per cent and the costs of developing a new software architecture would amount to 30 per cent of the costs of the original programming. That means that BS would have to invest 50 per cent of the capital that it had once invested in the making of software sold to many customers in the "repair" of that software for just one customer. It must be assumed that these costs would be much higher than the price for which the software was sold to BH. Furthermore, there are no clues in the facts of the case indicating that BS might be able to sell that software afterwards to many other customers, since there are not so many chains of beer gardens in Vietnam and not so many big chains of more than 200 beer gardens in the world. So all in all the burden caused by a possible repair of the software is unproportionate. A request to repair would not be reasonable.⁹

Conclusion: The conditions of a right under art. 46(3) CISG are not met. BH is not entitled to require BS to repair the software.

B. Right of BH to avoid the contract (art. 49(1) CISG)

Since the beer gardens administration software delivered by BS to BH causes serious problems that put into question its usability, BH may be entitled to avoid the contract under art. 49(1) CISG. In this case, BH may, after avoidance within a reasonable time, require restitution of the payment of the price under art. 81(2) CISG.¹⁰ The right to avoidance presupposes that a contract to which the CISG applies has been concluded effectively, that there is a ground of avoidance, that this ground has not been caused by an act or omission of the buyer (cf. art. 80 CISG) and that the buyer can reconstitute the received goods in unimpaired conditions (cf. art. 82).¹¹

I. Applicability of the CISG and effective formation of the international sales contract

As stated above, a contract of international sale of goods, to which the CISG applies, has been concluded effectively between BH and BS (see supra, A.I./II.).

II. Ground of avoidance

A right to avoid the contract presupposes a ground of avoidance. Under the CISG, this may be a fundamental breach of contract (art. 49(1) lit. a), an anticipatory fundamental breach of contract

⁸ Note: The fact that BH had informed BS about the special conditions for the employment of the software excludes any exception under art. 80. This information by BH may not have been necessary at all, because the software was sold for the administration of chains with an unlimited number of beer gardens all over the world. However, shortly mentioning this aspect underlines that there is no possible co-responsibility of the buyer.

⁹ Note: When examining criteria such as reasonableness or proportionality, detailed reasoning with regard to the individual facts of the case is necessary. There is always an element of arbitrariness in the assessment of the situation with regard to these criteria. However, a thorough consideration of all facts and aspects may reduce it to a minimum.

¹⁰ Note: This sentence is not absolutely necessary to answer the case question. However, since BH asks this question because it wants to get its money back and to invest it in the programming of an own software, the sentence is useful to elucidate the context.

¹¹ For the structure of the examination of a right to avoidance of the contract see Diagram 2, p. 3.

(art. 72) or the non-delivery of the promised goods within an additional period of time (art. 49(1) lit. b). In the given case, the promised good, the software program stored on a DVD, has been delivered but does not function correctly. As stated above, it is not fit for its purpose (cf. art. 35(2) lit. a and b CISG) and therefore does not conform with the contract (see supra, A.III.). However, under the CISG not every breach of a contractual obligation of the seller, not even any lack of conformity of the goods with the contract, entitles the buyer to avoid the contract. The CISG tries to prevent the significant harm, which is usually caused to the parties by the avoidance of the contract. Therefore, the lack of conformity of delivered goods with the contract is only recognized as a ground of avoidance if it represents a fundamental breach of contract (cf. art. 49(1) lit. a CISG). This is the case if it results in such detriment to the buyer as substantially to deprive him of what he is entitled to expect under the contract and if this consequence was foreseeable by the seller (art. 25 CISG).

In the given case, the buyer was entitled to expect a software program, which functions well for the administration of a chain with more than 500 beer gardens all over Vietnam (that means under Vietnamese conditions, including language conditions). BH, the buyer, had informed BS, the seller that it wanted to employ the software for this purpose, and BS had answered that this would not present a problem. In actual fact, the software sends the beer supply to the wrong places so that the recipients have no use for it while other beer gardens are running out of supply. As these beer gardens are losing their outraged customers, this represents a *serious problem for the buyer* of the software. The same applies to the fact that the software program sends the booked musicians to the wrong places so that some singers perform their traditional revolutionary and anti-imperialistic songs to Western foreigners in Hồ Tây while some tough hard rock bands play in traditional bia hoi for the local elderly people. Such malfunction of the software may cause a lot of anger among the different customers of the bia hoi and in the worst case even result in public disorder. It also constitutes a serious problem for the buyer that the software program ignores the diacritics in the Vietnamese language and therefore often sends the bills to the wrong persons (to Mr. "Dung" instead of Mr. "Đùng") who are not pleased by that. These three software faults may repel many customers and thus endanger the beer garden company substantially. Furthermore, the software program forgets to register some of the free beers granted to loyal customers, with the consequence that they get too many beers for free, thus causing considerable *financial damage*. Taken together, these four software faults are so serious that they substantially deprive BH of what it is entitled to expect under the contract. Since BH had informed BS about the intended use of the software, BS was able to foresee this disastrous result.

In the given case, the lack of conformity of the software program with the contract does represent a fundamental breach of contract in the sense of art. 25 CISG and, consequently, leads to a ground of avoidance under art. 49(1) lit. a CISG.

III. *No causation of the seller's failure to perform by the buyer's act or omission (cf. art. 80 CISG)*

Since there has not been any act or omission of BH linked to the malfunctioning of the software, the exception under art. 80 does not apply. BH may rely on the failure of BS to perform.

IV. *No impossibility to restitute the received goods in unimpaired conditions (art. 82 CISG)*

The buyer loses the right to declare a contract of international sale of goods avoided if it is impossible for him to make restitution of the goods substantially in the condition in which he received them (cf. art. 82 CISG). In the given case this does not hinder BH from avoiding the contract because BH may just uninstall the software and send back the DVD with the software program to BS.

Conclusion: BH is entitled to avoid the contract under art. 49(1) lit. a CISG. He must do so within a reasonable time after he has noticed the malfunctioning of the delivered purpose (cf. art. 49(2) lit. b CISG).¹²

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¹² Note: Since there is no clue in the facts of the case indicating that BH may have waited too long already, this aspect should not be discussed as a condition of the right to avoidance but as rule, which BH has to observe when making use of this right. - Diagram 2, p. 3 also mentions the non-expiration of the limitation period as a condition of the right to avoidance. However, since there are no facts indicating that this period may have expired or may expire soon, in the given case this aspect should not be mentioned.

A. Right of BH to repair (art. 46(3) CISG)

I. Applicability of the CISG

- 1) Contract of international sale of goods (art. 1(1) CISG)**
- 2) Contract outside the sectors excluded from the application of the CISG (art. 2 CISG)**
- 3) Contract falling within one of the categories of the application of the CISG**
 - here: direct application (art. 1(1) lit. a CISG)
- 4) No exclusion of the application of the CISG by the parties (cf. art. 6 CISG)**

II. Effective formation of the international sales contract (cf. art. 14 et seq. CISG)

III. Lack of conformity of the goods with the contract (cf. art. 35 et seq. CISG)

- 1) Under art. 35(2) lit. a CISG**
- 2) Under art. 35(2) lit. b CISG**

IV. No causation of the lack of conformity by the buyer's act or omission (cf. art. 80 CISG)

V. Reasonableness of the request to repair

B. Right of BH to avoid the contract (art. 49(1) CISG)

I. Applicability of the CISG and effective formation of the contract

II. Ground of avoidance

- here: fundamental breach of contract (art. 49(1) lit. a CISG)

III. No causation of the seller's failure to perform by the buyer's act or omission (cf. art. 80 CISG)

IV. No impossibility to retribute the received goods in unimpaired conditions (art. 82 CISG)