CISG-online 2845	
Jurisdiction	Austria
Tribunal	Oberster Gerichtshof (Austrian Supreme Court)
Date of the decision	29 June 2017
Case no./docket no.	8 Ob 104/16a
Case name	*Italian knitwear case III*

Translation[*] *by Daniel Nagel*[**]

Reasoning:

The Claimant [seller], an Italian-based manufacturer of knitwear fashion goods, has been continuously supplying knitwear since 2008 to the Respondent [buyer], who operates several clothing stores in Austria. The first contact of the parties in dispute was between an employee within the purchasing department of the [buyer] and a commercial agent working for the [seller]. 1

These persons discussed the specific goods, prices, and terms of payment by telephone and e-mail, and that delivery dates had to be met. In the course of this communication, the [buyer]'s employee also referred to the [buyer]'s General Terms and Conditions (Terms and Conditions of Purchase), but these were not discussed in terms of content and not transmitted in writing. The language used by the representatives of the parties in dispute for the negotiations was always German, only the invoices were written in Italian. The first letter from the [buyer] to the [seller], dated 24 September 2008, contains, inter alia, the note «*General Terms and Conditions: it is expressly agreed that our Terms and Conditions of Purchase are exclusively valid*». The order forms sent with this letter also stated that «*all orders are subject exclusively to our Terms and Conditions of Purchase*». The delivery terms provided for «*free delivery*» [in German: «*frei Haus*»], for the payment terms «*10 days after receipt of goods -5%*» and the value date set at «*30 days*». Generally, the [buyer] did not send any order confirmations; only for one of the subsequent orders in 2009, a signed order confirmation by the company was sent by the [buyer]. 2

The [seller] never requested the transmission of the [buyer]'s General Terms and Conditions. 3

The deliveries of goods in dispute in the months September to November 2013 were delayed, in some cases for several weeks, but the [buyer] accepted the delayed deliveries. The [seller] issued six invoices for this period for a total of EUR 251,212.10. 4

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[*] For purposes of the present translation, the Claimant of Italy is referred to as [seller], and the Respondent of Austria is referred to as [buyer].

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With reference to point 1.6 of its «General Terms and Conditions (Terms and Conditions of Purchase)» (hereinafter referred to as «GTC»), the [buyer] subsequently claimed deductions for price reduction, for (undisputed) short deliveries, (disputed) quality defects and discounts from the invoice amounts in a letter referred to as «Notice of Defects and Debit Note», referring to its GTC, and transferred the remaining amount of EUR 170,451.41 to the [buyer] on 9 December 2013. 5

The [seller], claiming that the [buyer]'s GTC had not become part of the contract and that the agreed discount period had already expired, seeks the payment of the balance of EUR 80,488.66 plus EUR 1,878.74 dunning- and debt-collecting agency costs. 6

The [buyer] repeated its deductions, which were itemised in the debit notes, as counterclaims in the proceedings, claiming that the [seller] had accepted the [buyer]'s GTC, which stipulated the applicability of substantive Austrian law excluding the CISG. 7

[Decision by the Court of First Instance:]

The Court of First Instance dismissed the claim. It concluded that the [buyer]'s GTC constituted a legal ground and that the deductions were therefore justified. 8

[Decision by the Court of Appeal:]

The Court of Appeal partially upheld the [seller]´s appeal. It ruled that the claim of EUR 81,574.58 was justified, whereas the additional claim of EUR 792.82 and the counterclaim of the [buyer] were not. 9

The Court of Appeal argued that the contractual relationship between the parties to the dispute was governed by the UN Convention on Contracts for the International Sale of Goods (CISG), which has been ratified by both, Italy and Austria. Accordingly, the UN Convention on Contracts for the International Sale of Goods is applicable in principle, unless the parties to the dispute have effectively excluded this in accordance with Art. 6 CISG. However, the question of whether an opt-out clause was validly incorporated into the contract is not to be interpreted according to national law, but according to the principles of Arts. 14 to 24 CISG. The [buyer]'s GTC together with the opt-out clause contained therein would only have become part of the contract if they had either been sent or otherwise made accessible so that the [seller] had at least the opportunity to become acquainted with their contents. The [seller] was not under an active obligation to make inquiries.

In the absence of a valid inclusion of the [buyer]'s GTC, the CISG had to be applied and invoice deductions based on the validity of the GTC were just as unjustified as the discount was claimed long after the expiry of the 10-day period from receipt of the goods. The only exception was a partial amount of EUR 792.82, the rejection of which was not challenged in the appeal.

According to Art. 74 CISG, the [buyer] must compensate the [seller] for the costs of appropriate extrajudicial legal measures.

The Court of Appeal declared the ordinary appeal [*ordentliche Revision*] admissible in lack of a supreme court jurisdiction on the provisions according to which the conclusion of an opting-out agreement within the meaning of Art. 6 CISG is to be assessed, and whether the user of GTC is obliged to provide information within the sphere of application of the CISG.

[Buyer's appeal to the Austrian Supreme Court:]

In its final appeal, the [buyer] seeks to have the decision of the Court of First Instance restored. The [seller] has submitted an appellate response and seeks the dismissal of the remedy. **10**

[Decision by the Austrian Supreme Court:]

The final appeal is admissible on the grounds already set out by the Court of Appeal. However, it is only partially upheld on the merits. **11**

[Formation of agreement to exclude the CISG (Art. 6 CISG) is governed by Arts. 14–24 CISG:]

1. **12**

The legal opinion of the Court of Appeal, according to which the existence and the validity of opting-out of the application of the CISG is determined according to its provisions on the formation of the contract in Art. 14 et seq. CISG, corresponds to the leading doctrine in legal literature, the previous jurisdiction of the Supreme Court as well as the jurisdiction of the courts in other member states of the Convention (Schacherreiter, 'Gerichtsstand, Erfüllungsort, Rechtswahl und Ausschluss des UN-Kaufrechts in Allgemeinen Geschäftsbedingungen', *Österreichisches Anwaltsblatt* (2016), 75, 81; Hager, 'Zur Auslegung des UN-Kaufrechts – Grundsätze und Methoden', in: *Festschrift für Ulrich Huber zum 70. Geburtstag* [2006], 319, 327; Piltz, *Internationales Kaufrecht*, 2nd ed., para. 2-112; Saenger, in: Bamberger/Roth (eds.), *Kommentar zum BGB,* 3rd ed., Art. 6 CISG para. 2; Magnus, in: *Staudinger's Kommentar zum BGB,* [2013], Art. 6 CISG para. 11; Schlechtriem/Schroeter, *Internationales UN-Kaufrecht*, 5th ed., para. 47; Ferrari, in: Schlechtriem/Schwenzer (eds.), *Kommentar zum Einheitlichen UN-Kaufrecht – CISG –,* 6th ed., Art. 6 CISG para. 13; Schroeter, in: Schlechtriem/Schwenzer, *op. cit.*, Vor Art. 14–24 CISG para. 14b; Oberster Gerichtshof [Austria], 17 December 2003 – 7 Ob 275/03x, *Österreichisches Recht der Wirtschaft* (2004), 275 = *Juristische Blätter* (2004), 449 = *Zeitschrift für Europarecht, Internationales Privatrecht und Rechtsvergleichung* (2004), 110 = *Sammlung Zivilsachen* (2003), 175; Oberlandesgericht Oldenburg [Germany], 20 December 2007 – 8 U 138/07, *Internationales Handelsrecht* (2008), 112; Oberlandesgericht Frankfurt [Germany], 24 March 2009 – 5 U 214/05, *Internationales Handelsrecht* (2010), 250; Landgericht Aachen [Germany], 22 June 2010 – 41 O 94/09, *Internationales Handelsrecht* (2011), 82; Rechtbank Rotterdam [Netherlands], 25 February 2009 – *Fresh-Life International B.V. v. Cobana Fruchtring GmbH & Co KG*, CISG-online 1812; Handelsgericht St. Gallen [Switzerland], 15 June 2010 – HG 2009.164, *Internationales Handelsrecht* (2011), 149).

As far as the sphere of application of the CISG is open and the Convention contains a provision on a particular matter, it supersedes national law. The opt-out of the UN Convention on Contracts for the International Sale of Goods determines its application and is expressly regulated **13**

in Art. 6 CISG. In this respect, the Convention therefore takes precedence and an opt-out of the CISG presupposes a substantive agreement between the parties, the valid conclusion of which is autonomously subject to the rules on formation of a contract (cf. Schacherreiter, *op. cit.*, *Österreichisches Anwaltsblatt* (2016), 75, 81).

The court does not follow a differentiation occasionally found in the literature between the application of the CISG to interpretation, but not to the validity of opting-out (Huber, in: *Münchener Kommentar zum BGB*, 7th ed., Art. 6 CISG paras. 4 et seq.), nor the application of a national law that may be mentioned at the same time (Siehr, in: Honsell (ed.), *Kommentar zum UN-Kaufrecht*, 2nd ed., Art. 6 CISG para. 4). 14

[Standard terms' text needs to be made available to the other party in order to include the terms into the CISG contract:]

2. 15
Therefore, the determinant factor to the question whether the parties to the dispute have validly opted out of the UN Convention on Contracts for the International Sale of Goods is whether the GTC of the [buyer] were included into the parties' contract in accordance with the provisions of Arts. 14 et seq. CISG.

On the one hand, this requires that the party employing GTC intends that these should be part of its offer and that it is only willing to conclude business transactions under these conditions. This intent must be clearly recognisable to the contractual partner. An explicit agreement is not strictly necessary for this purpose, the inclusion can also be implied, conclusive, resulting from the negotiations of the contracting parties or resulting from a customary practice between them (RIS-Justiz RS0104921; RS0104924). 16

According to the findings, the [buyer] referred to its GTC «altogether» already in the preliminary discussions on the contractual relationship and confirmed this statement in writing in the letter accompanying the first order. Under these circumstances, the [seller] had to be aware that the [buyer], as a rule, was only willing to conclude the transactions on the basis of its own GTC. 17

Nevertheless, the decision of the German Supreme Court [*Bundesgerichtshof,* BGH], 31 October 2001 – VIII ZR 60/01 provided for a general acceptance that GTC are only included in the contract if the text has been sent to the other party or «made otherwise available» to it (cf. Schroeter, in: Schlechtriem/Schwenzer, op. cit., Art. 14 CISG paras. 40 et seq.; Magnus, in: *Staudinger, op. cit.,* Art. 14 CISG para. 41; Saenger, *op. cit.,* Art. 14 CISG para. 7; Ventsch/Kluth, 'Die Einbeziehung von Allgemeinen Geschäftsbedingungen im Rahmen des UN-Kaufrechts', *Internationales Handelsrecht* (2003), 61, 65; Janssen, 'Die Einbeziehung von Allgemeinen Geschäftsbedingungen in internationale Kaufverträge und die Bedeutung der UNIDROIT und der Lando-Principles', *Internationales Handelsrecht* (2004), 194, 199; Piltz, *Internationales Kaufrecht*, 2nd ed., para. 3-84; for a partially diverging opinion see Gruber, in: *Münchener Kommentar zum BGB*, 7th ed., Art. 14 CISG paras. 29 et seq.; critical Schmidt-Kessel/Meyer, 'Allgemeine Geschäftsbedingungen und UN-Kaufrecht', *Internationales Handelsrecht* (2008), 177, 178 et seq.). In the above-mentioned decision, the German Supreme Court stated: 18

«*Despite the fact that in many cases, it will be possible to obtain information on the content of the respective general terms and conditions referred to, this may lead to delays in the conclusion of the business transaction, which is in the interest of neither party. The user of the clause, on the other hand, will have no difficulty in attaching the general terms and conditions – which are regularly advantageous for it – to its offer. It would therefore be contrary to the principle of good faith in international trade (Art. 7(1) CISG), as well as to the parties' general duty of cooperation and information, to impose on the contracting party an obligation to make enquiries regarding the clauses that have not been sent and to burden him with the risks and disadvantages of unknown opposing general terms and conditions (...).*» **19**

The final appeal is unable to present any substantive counterarguments. According to Art. 7(1) CISG, the interpretation of this Convention must consider its international character and the need to promote uniformity in its application and the observance of good faith in international trade. Thus, national legal practitioners are held to be aware of the international character of the provisions when interpreting the CISG and to take into account the jurisprudence of other states (among others Posch, in: Schwimann/Kodek (eds.), *ABGB Praxiskommentar, Vol. IV*, 4th ed., Art. 7 CISG para. 6). **20**

The fact that the appellant submits that in the course of the business relationship, which lasted several years, the [seller] was repeatedly and unambiguously informed of the application of the [buyer]'s GTC on order forms and their cover sheets, and therefore it would have been reasonable for the [seller] to ask about the text of the GTC is, however, not convincing. **21**

Clear and precise communication to the business partner to avoid misunderstandings is in the mutual interest and corresponds both to the diligence of a conscientious businessperson and to good faith in the context of courses of business. If one party to the contract only wishes to contract with the other party under conditions which deviate substantially from dispositive law, then it is also incumbent upon him to state these conditions concretely and in a manner, which enables the other party to take direct notice. Leaving the other party in the dark and clarifying the contractual terms only in dependence of requests and time of requests by the addressee is pointless and would be contradictory to the principle of good faith in international trade (Art. 7 CISG). Under such circumstances, later disputes are virtually likely to arise. **22**

Moreover, the content of general terms and conditions is not standardised. The addressee of a mere reference to general terms and conditions, without having access to its content, does not have to assume from the outset that these GTC include substantial deviations from the dispositive law. In addition, GTC can be changed by their user at any time. According to the legal opinion of the appellant, the [seller] would have had to inquire about the current status of the GTC for each individual partial order during the years of the business relationship in order to be aware of their current content. Such an obligation would not be compatible with the requirements of efficient international trade. **23**

The requirement of sufficient disclosure of GTC results in particular from Art. 19(1) or rather (3) CISG. According to these provisions, a response to an offer which, although intended to constitute an acceptance, contains additions, limitations or other modifications is a rejection **24**

of the offer and constitutes a counteroffer. Supplements or deviations, particularly relating to the price, payment, quality and quantity of the goods, to the place and time of delivery, to the extent of liability of one party to the other or to the settlement of disputes, are considered to materially alter the terms of the offer under Art. 19(3) CISG.

Since it is not possible to determine on the basis of a mere reference to inaccessible GTC whether the ordering party is thereby proposing a material alteration to the offeror's terms and conditions, this procedure cannot be sufficient for a valid inclusion of the GTC within the CISG regulatory system. 25

The [buyer]'s objections based on the validity of its GTC were therefore rightly disregarded by the Court of Appeal. 26

[Contractually agreed discount for timely payment:]

3. 27
The reasoning of the Court of Appeal on the claimed discount deduction are also correct (§ 510(3) ZPO [*Zivilprozessordnung*, Code of Civil Procedure]).

In the absence of a valid agreement regarding its GTC, the [buyer] cannot invoke a postponement of the due date regulated therein. 28

Irrespective of this, however, the wording of the discount agreement chosen by the company itself must also be held against it. The wording «10 days after receipt of goods -5% discount *[Skonto]*» clearly and exclusively refers to the time in which the delivery is taken over. Contrary to what has been said in the final appeal, it is not plausible that a difference of opinion on contractual penalties and deductions for defects should extend the discount period precisely for that part of the invoice amount which was to be paid in any case and indisputably. 29

[Recoverability of pre-trial legal expenses (dunning costs; fees of debt-collecting agency) as damages under Art. 74 CISG:]

4. 30
In addition, the final appeal is combating the claim for dunning costs *[Mahnspesen]* (EUR 15.34) and the costs of engaging a debt-collecting agency (EUR 1,863).

The appellant must be accorded that, contrary to the statements of the Court of Appeal, it actually contested the appropriateness of the dunning and debt-collecting costs at first instance (AS 60), so that its acceptance can be challenged in the appeal procedure. However, to the extent that its legal arguments are based on the premise that the parties to the dispute validly excluded the application of the CISG, they are not justified, as explained above. 31

The CISG itself does not contain any special regulations regarding dunning and debt-collecting costs. In general, Art. 74 CISG provides that damages for a breach of contract by one party shall be compensated for the loss incurred by the other party as a result of the breach of contract, including loss of profit. Such damages shall not exceed the loss which the party in 32

breach foresaw as a possible consequence of the breach of contract at the time of the conclusion of the contract or ought to have foreseen in light of the facts and matters which he then knew or ought to have known.

33 According to the prevailing opinion, Art. 74 CISG basically also covers extrajudicial debt enforcement measures (Posch, in: Schwimann/Kodek (eds.), *ABGB Praxiskommentar, Vol. IV*, 4th ed., Art. 74 CISG para. 12; Piltz, *Internationales Kaufrecht*, 2nd ed., para. 5-539). In particular, the compensation in the context of pre-litigious legal dunning letters was recognised, provided that the involvement of a lawyer was required and the costs did not exceed the necessary extent (Saenger, *op. cit.,* Art. 74 CISG para. 6; Huber, in: *Münchener Kommentar zum BGB*, 7th ed., Art. 74 CISG para. 42 with further references; Landgericht Berlin [Germany], 21 March 2003 – 103 O 213/02, *Internationales Handelsrecht* (2003), 228; Landgericht Potsdam [Germany], 7 April 2009 – 6 O 171/08, *Internationales Handelsrecht* (2009), 205). The liability for such costs within the scope of Art. 74 CISG was justified by the fact that they are objectively necessary expenses for the exercise of rights, which the other party must expect as a generally customary reaction to its behaviour breaching the contract (Oberlandesgericht Düsseldorf [Germany], 11 July 1996 – 6 U 152/95, *Recht der Internationalen Wirtschaft* (1996), 958).

34 However, the question whether the costs of engaging a debt-collecting agency also constitute reimbursable legal costs within the meaning of Art. 74 CISG is controversial. This opinion is largely rejected (among others Landgericht Frankfurt am Main [Germany], 16 September 1991, *Recht der Internationalen Wirtschaft* (1991), 952 = CISG-online 26; Huber, *op. cit.,* para. 45 with further references; Schwenzer, in: Schlechtriem/Schwenzer (eds.), *Kommentar zum Einheitlichen UN-Kaufrecht – CISG –,* 5th ed., Art. 74 CISG para. 31).

35 Compensation for debt-collecting expenses could be granted in individual cases if they – applying an extremely strict standard – were exceptionally useful for appropriate and reasonable prosecution and were therefore foreseeable (Huber, *op. cit.,* Art. 74 CISG para. 45). The involvement of a debt-collecting agency can be regarded as an appropriate measure of legal action only in cases in which the debt-collecting agency can take legal action to a broader extent than the creditor. This, however, is usually not the case, particularly in cross-national legal communication (Landgericht Frankfurt am Main [Germany], 16 September 1991 – 3/11 O 3/91, CISG-online 26 [Italian debt-collecting agency]). If there are no particular indications that the debtor would pay at the request of a debt-collecting agency and the involvement of a lawyer is therefore unavoidable anyway, the costs of the prior commissioning of a debt-collecting agency are not compensable, even from the point of view of the duty to minimise damages (see also Landgericht Berlin [Germany], 6 October 1992 – 103 O 70/92, CISG-online 173; Amtsgericht Tiergarten [Germany], 13 March 1997 – 2 C 22/97, *Praxis des Internationalen Privat- und Verfahrensrechts* (1999), 172). As soon as the creditor knows that the involvement of the debt-collecting agency will not lead to success, its costs cannot be compensated (Magnus, in: *Staudinger, op. cit.,* Art. 74 CISG para. 51; see also Oberlandesgericht Köln [Germany], 3 April 2006 – 16 U 65/05, CISG-online 1218). An unsuccessful outcome of extrajudicial debt-collecting attempts is to be assumed in particular if the debtor has already expressly refused payment (Landgericht Frankfurt am Main [Germany], 16 September 1991 – 3/11 O 3/91, CISG-online 26).

In the present proceedings, it is common ground that the [buyer] complained to the [seller] about shortfalls and delays in delivery, claimed a price reduction and further invoice deductions for this in a letter dated 30 October 2013 and paid the differential amount calculated by the [buyer] at the beginning of December 2013. Subsequently, the representatives of the parties to the dispute corresponded by e-mail about the claimed deductions. The first letter of the Italian debt-collecting agency, however, is dated 20 December 2013. At this point in time, the [seller] already knew that the [buyer] generally refused to accept any further payment obligation. Under these circumstances, the necessity of a judicial assertion was foreseeable and neither a reminder nor the involvement of a debt-collecting agency could be regarded as objectively promising measures to enforce the open claims. The appeal is therefore upheld to the extent of the disputed accessory claims of a total of EUR 1,878.74. **36**

5. **37**
The decision on the costs of the proceedings is based on § 43(2) and § 50 ZPO. The appellant was able to ward off only a minor part of the claim, the assertion of which also did not cause any special costs. This minor victory has no influence on the obligation to compensate for costs.