

**District Court of Turku 15 June 1995**  
**Turku Court of Appeal 18 February 1997**

*Abbreviation and translation: Tuula Ämmälä*

**DISTRICT COURT OF TURKU**

Judgement 1(13)

5990

16 June 1995, S 94/4988

Claimant: Heinsberg, West Germany [seller]

Defendant: Turku, Finland [buyer]

**Case Report**

1. The [seller] demanded, among other things, that the [buyer] should pay the [seller] 32,741.28 DM as per the invoice, 16 % interest due on 17 November 1994 and expenses. Alternatively, if the Finnish Interest Act could not be applied in this case, the [seller] demanded that the interest ought to be paid according to the German Bank-Debet-Zinsen.
2. The [buyer] had ordered packages for animal food from the agent of the [seller's] company, Sf. The confirmation of the order was signed by the agent on 6 August 1992. The following were delivered: 36,864 packages marked PG, weighing 100 grams, at 0.52 DM per package, totalling 19,169.28 DM; 21,600 packages marked PrG, weighing 150 grams, at 0.62 DM per package, totalling 13,392 DM; and 12 packages marked Ep, at 15.00 DM per package, totalling 180 DM.
3. The [buyer] was sent an invoice for 32,741.28 DM, on 18 February 1993, the date of payment being 20 March 1993. In spite of the [seller's] reminders, the [buyer] did not pay the purchase price.
4. The alternative demand for interest made by the [seller] was mentioned in the general conditions of sale which were printed on the reverse side of the forms the [seller] used in its business.
5. The [buyer] had ordered the goods mentioned in the case. According to the [buyer's] requirements, the delivery was to be made as soon as possible after the labels were printed. The delay in starting the printing was caused by the [buyer]. The [buyer] had sent the proof corrections to the [seller] over six weeks later. This was the reason why the printing had taken so long and the delivery of the goods was made on time. The fact that the [buyer] had arranged for the carriage of the goods from Camurg to Cuxhaven and from Cuxhaven to Turku proves clearly that the [buyer] had accepted the delivery. The [buyer] had not stated that the delivery was delayed until its rejoinder.
6. The [seller] had argued that the CISG should be applied.
7. The [buyer] contested the action and claimed that it should be rejected. The [buyer] argued that because the printing was delayed and the deliverer had difficulties with its new factory in the former Eastern Germany, they declared the contract avoided in autumn 1992. In spite of this the labels were made for future use.
8. However, the delivery was delayed fundamentally because it took about 14 weeks, whereas in the international sale of food stuffs the delivery time is normally 5-6 weeks from the date of the order. Delivery therefore took over twice the time that is usually accepted in international practice. In spite of the delay the seller did not ask the buyer if he was still ready to accept the sale. For this reason the [buyer] argued that the parties were bound by the avoidance of the contract.

9. Immediately after the goods had arrived in Finland, the [buyer] gave notice to the agent of the seller of the former avoidance of the contract and of the fundamental delay. The [buyer] had given notice to the [seller] that the [buyer] would not take over the goods. The seller retained title to the goods.

10. After the reclamation, the parties agreed that they and the agent should try to sell the goods, but because similar cheaper animal food was available, they failed.

11. The [buyer] argued that the Finnish Sale of Goods Act should be applied in this case.

12. The [seller] argued that the [buyer] had not submitted that the contract was avoided until this trial. Furthermore, the [buyer] had not indicated any difficulties with the factory of the deliverer.

13. The goods had been sold under the Ex works term. This term provides necessarily that the buyer takes measures. That is why the buyer has accepted the goods and transported them to Finland in his own name.

14. The [buyer] stated that the fact that they had paid for the carriage of goods was of no relevance in this case.

### **The Arguments of the Judgement**

15. The District Court of Turku decided that the CISG should be applied according to the Finnish Sale of Goods Act, paragraph 5 and the Finnish Act on Law Applicable to Sale of Goods of International Character.

16. The [seller] had sent a telefax to the [buyer] confirming the order on 6 August 1992. Agent N testified as a witness that the goods ought to have been delivered as soon as possible after the printing of the labels. No proof of any other time of delivery was shown.

17. The delivery took over 14 weeks. The District Court considered that the delivery was delayed.

18. The buyer had fulfilled his obligation to deliver the labels to the seller on 14 November 1992.

19. No reliable evidence had been provided regarding the avoidance of the contract in autumn 1992. The fact that the [buyer] delivered the corrected proofs of the labels on 11 November 1992 supports the view that the contract was not avoided in autumn 1992 and that there was no intention to avoid it.

20. The [buyer] failed to prove that they had given notice of the delay or any other matter in autumn 1992 or thereafter.

21. The [seller] had received an acceptance of the carriage from Camburg to Cuxhaven from the [buyer].

22. *Summary.* According to Article 49 of the CISG, the buyer may declare the contract avoided if the failure by the seller to perform any of his obligations under the contract amounts to a fundamental breach of the contract. According to Article 25 of the CISG, a breach of a contract committed by one of the parties is fundamental if it results in such detriment of the other party as substantially to deprive him of what he is entitled to expect under the contract, unless the party in breach did not foresee and a reasonable person of the same kind in the same circumstances would not have foreseen such a result. The devaluation of the Finnish Mark does not constitute such a fact which the [seller] or a reasonable person of the same kind in the same circumstances could have foreseen. When considering all the relevant circumstances, the delay in question cannot be regarded as fundamental. According to Article 49(2)(a), in cases where the seller has delivered the goods, the buyer loses the right to declare the contract avoided unless he does so in respect of late delivery, within a reasonable time after he has become aware that delivery has been made. The [buyer] failed to prove that they had declared the contract avoided within a reasonable time after they had become aware that the goods had arrived in Turku. The [buyer] had failed to prove that they had given notice of the avoidance of the contract before in this trial.

23. The District Court therefore ruled that the [seller] had proved their case. The [buyer] was obliged to pay the [seller] the amount of the invoice minus the amount the district customs office had already restored to the [seller], 16 % interest due on 20 March 1993, expenses, and the VAT.

## THE DECISION OF THE APPEAL COURT

24. According to Article 1(1)(a) of the CISG the Convention applies to contracts of sale of goods between parties whose places of business are in different States, when the States are Contracting States. The place of business of [seller] is in West Germany and of [buyer] in Finland. Both States are Contracting States. The CISG is applicable in this case.

25. There are no provisions in the CISG concerning whether a partial payment ought to be credited primarily as a payment of the capital or the interest. Therefore, the applicable law is the law of the State according to the rules of the Finnish Act on Law Applicable to Sale of Goods of International Character. The Agent of [seller] had received the order in Finland, where [buyer] is domiciled. The applicable law in this question is Finnish law, i.e., the Finnish Commercial Code (The Act on Law Applicable to Sale of Goods of International Character, § 4,2).

26. [Buyer] had accepted the proof corrections on 12 November 1992. Before that date, [seller] had an obligation to deliver the goods. The goods had been sold under the Ex works term. According to this, the time of the delivery was the time of their arrival at [seller's] factory, not the time of their arrival in Finland as the District Court had ruled. The goods left the factory on 18 February 1993. The time from the acceptance of the proof corrections to the delivery was 14 weeks. The usual, reasonable time of delivery in the field is a maximum of 8 weeks. The delivery was delayed.

27. According to Article 49(1)(a), the buyer may declare the contract avoided if the failure by the seller to perform any of his obligations under the contract amounts to a fundamental breach of the contract. A fundamental breach is defined in Article 25 of the CISG.

28. When determining the fundamentality of the breach, the appeal court took into consideration the following points: The devaluation of the Finnish Mark had already happened before the delay caused by [seller] and it therefore has no bearing on the right of [buyer] to avoid the contract. The delivery was delayed by about 6 weeks. When taking into consideration the quality of the goods and the fact that [buyer] is a company engaged in wholesale business selling daily goods, it cannot be concluded on the basis of the time of delay alone that the delay would result in such detriment of the company as substantially to deprive them of what they are entitled to expect under the contract. [Buyer] had not shown that the delay had resulted such detriment.

29. The delay caused by [seller] was not regarded as fundamental. [Buyer] had no right to avoid the contract. Therefore whether [buyer] had given notice of the avoidance of the contract or not was of no relevance.

30. The copy of the telefax sent on 24 May 1993 did not indicate that [seller] accepted the avoidance of the contract. It can only be concluded from the contents of the telefax that the parties had tried to make an adjustment at that stage as [buyer] had not paid the price. This does not constitute an acceptance of the avoidance of the contract. [Buyer] had not shown that [seller] would have accepted the avoidance of the contract.

31. No payment can be credited as a capital before the interest has been paid. (The Finnish Commercial Code, chapter 9, § 5). The amount the district customs office already paid to [seller] has to be credited as payment of the interest.

32. [Buyer] was obliged to pay [seller] the capital of the invoice 32,741.28 DM, the interest due on 17 November 1994, plus expenses.

The decision has become final.