District Court (*Landgericht*) Hamburg

26 September 1990 [5 O 543/88]

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REASONING FOR THE DECISION

I. [ADMISSIBILITY OF THE LEGAL ACTION]

The legal action is admissible. In particular, the District Court, Hamburg, is the competent court to hear the legal proceeding in this case.

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[*] All translations should be verified by cross-checking against the original text. For purposes of this translation, the Plaintiff of Italy is referred to as [seller], the Defendant of Germany as [buyer]. Amounts in German currency (Deutsche Mark) are indicated as [DM].

BGB = Bürgerliches Gesetzbuch [German Civil Code]; BGBl. = Bundesgesetzblatt [German Federal Law Gazette]; BGH = Bundesgerichtshof [Federal Court of Justice, the highest German Court in civil and criminal matters]; BGHZ = Entscheidungen des Bundesgerichtshofes in Zivilsachen [Official Reporter of Decisions of the German Federal Supreme Court for Civil Matters]; v. Caemmerer/Schlechtriem/et al. = Kommentar zum Einheitlichen UN-Kaufrecht – CISG –, München 1990 [Commentary on the CISG, Munich 1990]; C.c. = Codice Civile Italiano [Italian Civil Code]; CISG Implementation Act = Gesetz zu dem Übereinkommen der Vereinten Nationen vom 11. April 1980 über Verträge über den internationalen Warenkauf sowie zur Änderung des Gesetzes zu dem Übereinkommen vom 19. Mai 1956 über den Beförderungsvertrag im internationalen Straßengüterverkehr [German Code on the Implementation of the CISG of 11 April 1980 as well as on the Alteration of the German Implementation Act on the International Convention of 5 June 1956 on the Transportation of Goods in the International Traffic of 5 June 1989, Federal Law Gazette 1989 II 586]; EGBGB = Einführungsgesetzbuch zum Bürgerlichen Gesetzbuche [German Code on Private International Law]; Enderlein/Maskow/Stargardt = Kommentar, Konvention der Vereinten Nationen über Verträge über den internnationalen Warenkauf, Konvention über die Verjährung beim internationalen Warenkauf, Protokoll zur Änderung über die Verjährung beim internationalen Warenkauf, Berlin (DDR) [Commentary on (i) the CISG, (ii) the UN Convention on the Limitation of Claims within International Sales and (iii) the Protocol on the Amendment of Limitation of Claims within International Sales, Berlin (German Democratic Republic) 1985; EuGVÜ = Europäisches Gerichtsstands- und Vollstreckungsübereinkommen, 1968 [Convention of 27 September 1968 on Jurisdiction and the Enforcement of Judgements in Civil and Commercial Matters, succeded by the Council Regulation on Jurisdiction and the Recognition of Judgements in Civil and Commercial Matters [44/2001/EC]; Friendship, Commerce and Shipment Treaty = Freundschafts-, Handels- und Schiffahrtsvertrag zwischen der Bundesrepublik Deutschland und der Republik Italien, BGBl. II 1959, S. 962 (Bilateral Treaty between the Federal Republic of Germany and the Republic of Italy on Friendship, Commerce and Shipment, Federal Law Gazette II 1959, p. 962); HGB = Handelsgesetzbuch [the German Commercial Code]; NJW = Neue Juristische Wochenschrift [a well-known German Law Journal]; NJW-RR = Neue Juristische Wochenschrift – Rechtsprechungs-Report [Report on important and recent decisions by German courts] Palandt [the most renowned and influential commentary to the German Civil Code]; RIW = Recht der Internationalen Wirtschaft [Legal Journal on the Law of International Commerce]; ULF = 1964 Hague Uniform Law on the Formation of Contracts for the International Sale of Goods = EAG = Einheitliches Gesetz über den Abschluss von internationalen Kaufverträgen über bewegliche Sachen [German Uniform Code on the Formation of Contracts for the International Sale of Movable Goods, 17 July 1973, Federal Law Gazette I, p. 868]; ULIS = 1964 Hague Convention on Uniform Law on the International Sale of Goods = EKG = Einheitliches Gesetz über den international Kauf beweglicher Sachen [German Uniform Code on the International Sale of Movable Goods, 17 July 1973, Federal Law Gazette I, p. 856, 1973 I p. 358]; WM = Zeitschrift für Wirtschafts-und Bankrecht [Legal Journal on Commerce and Banking]; ZPO = Zivilprozessordnung [German Code on Civil Procedure].

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According to Art. 2 Par 1 EuGVÜ, the Court has jurisdiction over this case. The aforementioned Convention on the Jurisdiction and Enforcement of Courts' Decisions is applicable, since both Italy and the Federal Republic of Germany are Contracting States to that convention and the present case falls within its scope (Art. 2 Par. 1 EuGVÜ). The common place of the [buyer]'s local jurisdiction is the place of its residence (*see* Art. 2 Par. 1 EuGVÜ).

II. [FOUNDATION OF THE LEGAL ACTION]

The lawsuit is materially founded.

1. [Restatement of the seller's claim against the buyer]

The [seller] has a claim for payment of the purchase price in an amount of *DM* [Deutsche Mark] 94,893 pursuant to Art. 53 of the UN Convention on the International Sale of Goods of 11 April 1980 (CISG, BGBl. 1989 II p. 588).

a) [*Entering into a sales contract*]

The parties entered into a valid and binding sales contract on 2 June 1988. The parties complied with the necessary prerequisites for entering into a valid and binding agreement. In particular, the parties acted coherently to the prerequisites of Art. 23 CISG.

aa) [*Application of the CISG*]

Italian law is the applicable legal regime pursuant to Art. 31 Par. 1 EGBGB, according to which the Court is to decide, whether or not the parties entered into a valid and binding sales contract.

As part of the Italian substantive law, the CISG applies to the analysis of the question of whether the sales contract was validly executed and is binding on the parties.

[Application of German Conflicts of Laws Rules]

Art. 31 Par. 1 EGBGB is applicable in this case, because neither any international harmonized substantive law nor any other international convention on conflicts of laws apply with regards to the valid and binding execution of the sales contract (*see* Art. 3 Par. 2 EGBGB). It is worth noting, that the 1964 Hague Convention on Uniform Law on the Formation of Contracts for the International Sale of Goods [ULF] is not applicable. The preconditions for its application have not been met by the parties under Art. 1 ULF, since the 1964 Hague Convention on Uniform Law on the International Sale of Goods [ULIS] would not be applicable, if the parties entered validly and binding into a sales contract (Art. 1 in connection with Art. 14 ULF. The ULIS applies merely to sales contracts on movable goods as set out in Art. 1 Par. 1 ULIS, in that the parties to such sales contracts must have their establishment or ordinary residence in two different Contracting States within the meaning of the ULIS (*see* Art. 1 Par. 1, 2 ULIS).

In this case, however, those pre-conditions for the application of the ULIS have not been met. According to Art. 102 ULIS, Contracting States are only those, that are concurrently Contracting States of the Hague Convention on Uniform Law on the International Sale of Movables of 1 July 1964, i.e., the so-called «***ULIS Convention***», Federal Law Gazette II 886; 1974 II 146. On 2 June 1988, the Federal Republic of Germany was a Contracting State to the aforementioned Hague Convention but Italy was not (*see* BGBl. 1987 II p. 231).

Even Art. 3 Par. 2 S. 1 EGBGB does not have the consequence in this case, that Art. 14 *et seq*. CISG might prevail over the application of Art. 31 Par. 1 EGBGB. The CISG does not apply per se as internationally unified substantive law by virtue of its own application rules (*see* Art. 1(1)(a) CISG). Though Italy was a Contracting State to the CISG on 2 June 1988 (*see* BGBl. 1987 II 231, at 232), the Federal Republic of Germany was not a Contracting State at that time (*see* with regards to the effectiveness of the CISG in Germany Art. 7 Par. 2 CISG Implementation Act.

[Italian law as the contractual regime for the sales contract]

Italian law is the relevant -- hypothetical -- governing law regime for the parties' sales contract pursuant to Art. 31 Par. EGBGB. This ensues from Arts. 28 Par. 1 S. 1, Par. 2 EGBGB in connection with Art. 35 EGBGB. Further, there are not any primary statutes prevailing over the aforementioned articles of the EGBGB. Internationally unified substantive law or conflicts of laws rules cannot be used for the identification of the relevant contractual legal regime. Therefore, the aforementioned conclusion applies to the ULIS, because Italy, as already mentioned above, was not a Contracting State to the CISG on 2 June 1988.

[CISG not directly applicable]

The CISG is not directly applicable as decisive contractual law for the sales contract, since the Federal Republic of Germany, as already considered above, was not a Contracting State to the CISG on 2 June 1988. At the level of autonomous international private law, it is impossible to use any superseding connective rule prevailing over the general connective rule of Art. 28 EGBGB. In particular, Art. 27 EGBGB is not applicable, cause of the lack of an express choice of law clause. Further, the parties have not even agreed to any governing law during this pending legal proceeding.

[Italian law as the governing law]

Italian law is the -- hypothetical -- governing law for the sales contract. This sales contract has its closest connection to Italian law, so that the presumption of Art. 28 Par. 2 EGBGB leads to Italian law as the governing law for the sales contract as well. The [seller] has its main administrative office in Italy. Furthermore, only the [seller] is of relevance for the determination of the governing law pursuant to Art. 28 Par. 1 S. 1, Par. 2 EGBGB. Under the sales contract, the [seller] was obliged to deliver textiles and thus to perform in its capacity the characteristic performance under the parties' sales contract. In consideration of all circumstances of this case, the Court cannot conclude, that the presumption of Italian law, as being the governing law under Art. 28 Par. 2 EGBGB, may be prevailed over via closer connections to the Federal Republic of Germany (*see* Art. 28 Par. 5 EGBGB). The reference to Italian law is exhaustive, since it refers directly to substantive Italian law (*see* Art. 35 EGBGB).

According to Italian legal principles, Art. 14 *et. seq*. CISG shall prevail over any autonomous Italian contractual law within the Codice Civile. This ensues from Art. 1(1)(b) CISG. One has to recognize this specific provision as part of the Italian substantive law, since Italy had not declared any reservation pursuant to Art. 95 CISG (*see* Herber, Considerations on the Implementation of the CISG, RIW 1987, p. 340, 341 left column).

[Conditions for the Application of the CISG via Art. 1(1)(b)]

In this case, the preconditions on the application of the CISG as set out in Art. 1(1)(b) CISG are met. Italy is a Contracting State to the CISG. Further, Italian law is accounted for as the

governing law of the sales contract pursuant to the international private law of another state, i.e., the Federal Republic of Germany. The parties have their establishments, respectively their ordinary residences (*see* Art. 10(b) CISG) in different states, viz the [seller] in Italy and the [buyer] in Germany. This suffices. Art. 1(1)(b) CISG does not entail any further requirement, that all of the respective states must be Contracting States to the CISG (*see* v. Caemmerer/Schlechtriem/Herber, Art. 1 note 35; Bianca/Bonell/Jayme, Commentary on the International Sales Law, the 1980 Vienna Sales Convention, Milan 1987, Art. 1 Note 2.5).

bb) [*Entering into a sales contract*]

The parties declared the necessary offer and acceptance pursuant to Art. 23(1) CISG. Insofar, it might remain undecided, which of the parties declared the offer and which one the acceptance. Both the [seller] and the [buyer] made at least during their negotiations on 2 June 1988 their declarations to enter into and execute the sales contract in question. The Court concludes this fact, in that the [buyer] undisputedly «ordered» various textiles for an amount of *DM* 94,893 with the [seller] on 2 June 1988.

The aforementioned declarations are effective vis-á-vis the parties to this legal proceedings. The [buyer]'s declaration particularly binds the [buyer], but not any third party. The [buyer] is the counter-party to the [seller].

(A) [*No attribution of the buyer's declarations to a third party*]

The [buyer]'s declaration of 2 June 1988 does not bind AMG GmbH, because the applicable Art. 8 CISG does not consider an attribution to any third party.

One has to recognize Art. 8 CISG within the application of Art. 23 CISG (*see* Bianca/Bonell/Farnsworth, *loc. cit*., Art. 8 note 2). This provision encompasses the interpretation of both declaration and behavior of the parties. The interpretation of any declarations made and behavior conducted by the [buyer] prevails over the question, whether or not it might have probably acted in the name and on behalf of AMG GmbH, so that its declarations might have effect towards that third party. Only that question would be solved in compliance with the proxy regime, which has to be stipulated independently (*see* Art. 37 No. 3, Alt. 1 EGBGB as well as Kegel, International Private Law, 6th edition 1987, p. 397; v. Caemmerer/Schlechtriem/Herber, Art. 4, Note 11). Conversely, the interpretation of the declarations shall be governed by the law regime governing the execution of the contract. In this case, this is the CISG as implemented into Italian law. Insofar, Art. 8 CISG is absolutely exhaustive.

Interpreting the conduct and behavior of the parties under Art. 8 CISG, the [buyer]'s declarations cannot be attributed to AMG GmbH. Even more, it may remain undecided, whether the [buyer] did actually have the secret intention and will to act for and on behalf of AMG GmbH on 2 June 1988. At any rate, the [seller] did not have any knowledge about such secret intention and will (Art. 8(1), 2nd HS., 1st Alt.). Further, the [seller] could not also be aware of such an intention (Art. 8(1), 2nd HS., 2nd Alt. CISG; Art. 8(2) and (3) CISG). The court restates the aforementioned fact, in that the [buyer] neither mentioned its pure internal and secret intention nor made the [seller] become aware of it. This statement is independent from the question, whether the notion of awareness, based on the [seller] under Art. 8(1), 2nd HS., 2nd Alt. CISG (*see* Bianca/Bonell/Farnsworth, loc. cit., Art. 8(1), Note 2.3) or the notion of awareness, based on the accepted standards of the average reasonable person under Art. 8(2), (3) CISG (*see* Bianca/Bonell/Farnsworth, *loc. cit*., Art. 8, Note 2.4; v. Caemmerer/Schlechtriem/Junge, Art. 8, Note 7) shall be applicable. Therefore, it may remain undecided, which party bears the onus of proof and subject to which statutes the onus of proof might have been determined (*see*

on the one side: v. Caemmerer/Schlechtriem/Herber, Art. 4, Note 22; on the other side: v. Caemmerer/Schlechtriem/Huber, Art. 46, Note 18 a) to c))

The Court is definitely convinced, that the [seller] did not have positive knowledge or at least awareness or ought to have known, that the [buyer] might have acted in the name and on behalf of AMG GmbH.

According to Art. 8(3) CISG, any action, conducted at a later stage, shall also be considered for the interpretation of any declarations of the parties. Considering the [seller]'s activities, as conducted after execution of the sales contract, there is no reason to interpret the [buyer]'s activities of 2 June 1988, as if the [seller] or any other reasonable person instead (Art. 8(2) CISG) became aware or ought to have become aware, that the [buyer] acted in the name and on behalf of AMG GmbH.

(B) [*No Attribution of the buyer's declarations to* «*AMG*»]

The [buyer]'s declarations cannot be attributed to a company by the name of «AMG» without any reference to its limitation of liability either, although the [buyer] expressly acted in the name of such a company on 2 June 1988.

The interpretation of the [buyer]'s activities has to be conducted within the regime of Art. 8 CISG (see *supra* A.). It ensues from such an interpretation, that the [buyer] acted vis-á-vis the [seller] in the name of company «AMG» on 2 June 1988, whereby it did not mention any limitation of its liability.

The attribution of a declaration has to be decided according to German autonomous law. Hence, the [buyer]'s declarations can neither be attributed to company «AMG Import-Export» nor to company «AMG Import-Export Peter Voss.» Such a company is not able to be the holder of any liabilities or duties. Hence, even if one accepted such a theoretical possibility, it would not have acquired its own legal personality at any rate.

(1) [*Applicable Legal Regime for Corporate Entities*]

German autonomous law is applicable to the question, whether company «AMG» had come into existence with its own legal personality. This question is preliminary to the question, whether the [buyer] validly acted as representative in the name and on behalf of that company, so that any of its declarations should be attributed to that company (*see* Kegel, *loc. cit*., pages 231 *et seq*. giving further references as well as Art. 37 No. 3 EGBGB; v. Caemmerer/Schlechtriem/Herber, pre Art. 14 to 24, Note 3). The aforementioned question has to be decided in compliance with the hypothetical legal regime for corporations. This determines whether a legal entity has come into existence, to which an own legal personality had been afforded too (*see* Staudinger/Grossfeld, International Corporate Law, Note 190; Reithmann/Martiny/Hausmann, p. 828, Note 860).

[German law as the legal regime for corporations in this case]

In this case, German law shall apply as the governing legal regime for corporations under any circumstances, notwithstanding the independent question about the applicable conflict of laws rules. Hence, the seat as well as the place of incorporation and foundation were situated within the Federal Republic of Germany. The business card, attached as exhibit K 1, states two German addresses and premises. Henceforth, the Court is not obliged to decide, which kind of conflict

of laws rules shall be applicable, autonomous or the one endorsed within a bilateral or multilateral treaty (*see* Art. 33(1) Friendship, Commerce and Shipment Treaty; Kropholler, International Private Law, 1990, p. 459 *et seq*., Par. 55 I). At any rate, the Court cannot adhere to any other connective point than the situation of the seat or foundation of a company. Both situation of the seat and of the foundation lead to German law as the applicable legal regime for a corporation in this case.

(2) [*Lack of valid incorporation of* «*AMG*»]

According to German autonomous law, company «AMG» has not validly come into existence as a legal entity, entitled to be a holder of legal rights and duties. Even if the [buyer] signed with such a firm name pursuant to Section 17 HGB, such a company, i.e., the firm, would not be a legal entity anyway, being able to hold rights and duties (argumentum e Sec. 17 HGB; *see* Heymann/Emmerich, HGB, 1989, Section 17 Note 13).

b) [*Seller's claim for purchase price is founded*]

The [seller] has a claim for payment of the purchase price in an amount of *DM* 94,893 under the sales contract pursuant to Art. 53 CISG. In the light of the definition of the claim for payment of the purchase price, the CISG is applicable as part of the body of Italian law; hence the governing law for the sales contract is the equivalent to the hypothetical contractual regime, as already defined *supra* a) pursuant to Art. 31 EGBGB.

[Maturity of the purchase price]

According to Art. 58(1) sentence one CISG, the claim for payment under the sales contract is due and payable, since the [seller] delivered the goods, as amongst the parties agreed to the [buyer]. The [seller] delivered the goods to an addressee «AMG Import-Export», which is, in this case, deemed to be a delivery to the [buyer]. This assumption is independent from the question, whether the [buyer] was entitled to sign under the name of a firm under German law, which is decisive in that respect. Even if there was such a company in existence, then the delivery would have to be attributed to the [buyer] anyway, hence it was the [seller]'s counter-party under the sales contract (arg. e Sec. 17 HGB). If there was not such a company in existence, then that delivery would have to be attributed to the [buyer] even more as the [seller]'s counter-party.

[Claim for purchase price not extinguished]

The [seller]'s claim for payment under the sales contract has not been extinguished. In particular, the issuance of a bill of exchange, in which AMG GmbH has been stated as Drawee and Acceptant, is not deemed to be a discharging assumption of all obligations and liabilities under the parties' sales contract under Italian law. Furthermore, Italian law is applicable to decide, whether there was an individual discharging assumption of liabilities and obligations, because Italian law would also apply to the possibly assumed obligation to pay the purchase price (*see* Palandt/Heldrich, Art. 33 EGBGB, Note 4; Kegel, *loc. cit*., p. 481; Kropholler, *loc. cit*., p. 416, par. 52 VI 4). According to Italian autonomous law, there should have been a very clear and distinct expression of the [seller] as creditor under the sales contract, in order to effectuate such an aforementioned assumption of all obligations and duties under the sales contract. However, the [buyer] did not express its will and intention in such a way (Trimarchi, Istituzioni di diritto privato, 7th edition Milano 1986, p. 431). The mere physical acceptance of that bill of exchange cannot be interpreted to have such very extensive effects.

2. [Seller has a claim for interest]

The [seller] is the holder of a claim for interest payment of 13% since 15 September 1988 pursuant to Art. 78 CISG in connection with Art. 1284 Par. 1 C.c. and Art. 74 CISG.

According to Art. 32 Par. 1 No. 3 EGBGB, Italian law on contracts is applicable to determine any liability to pay interest on a debt. Hence, such a liability results from the non-performance of the contractually agreed obligation to pay the purchase price (*see* Palandt/Heldrich, Art. 32 EGBGB, Note 2.a.cc). Under Italian law, as already mentioned above, one is to apply primarily the CISG, so that autonomous Italian civil law would only apply alternatively as assistance.

a) [*Foundation for claim of 5% interest*]

Up to 5%, the claim for interest payment is based on Art. 78 CISG. Art. 1284 Par. C.c. is then decisive to determine the actual level of the interest rate (for text of the C.c. *see* Bauer/Eccer et. al., Italian Civil code, Codice Civile, Bilingual edition, Bozen 1987).

aa) [*Applicable law for the parties' arrangement to defer payment*]

The [buyer] is generally obliged to pay interest on a debt pursuant to Art. 78 CISG, because it has been in default on its payment of the purchase price, being due and payable under Art. 58 CISG since 15 September 1998. Though the purchase price had already become due and payable under Art. 58 CISG at that time, when the [seller] provided for the goods under the sales contract and an invoice at the [buyer]'s establishment in Hamburg on 9 June 1988. The [seller], however, deferred the payment of the purchase price until 15 September 1988. The [buyer] and the [seller] entered into an agreement to have the payment deferred when they agreed to issue a bill of exchange at the end of July or at the beginning of August 1988. Such a deferral arrangement is a valid and binding alteration of the sales contract pursuant to Art. 29(1) CISG. The CISG does apply, because there is not a specific legal regime with regards to this deferral arrangement within the international private law as applicable. According to Art. 32 Par. 1 No. 2 EGBGB, the CISG as part of Italian law on contracts applies to such a deferral arrangement as well. One has to consider Art. 32 Par. 1 EGBGB, because this arrangement refers to the timely performance of the obligation to pay the purchase price. Thus far, it is within the scope of the general statutory test (*Regelbeispiel*) of Art. 32 Par. 1 No. 2 EGBGB.

[Review of the preconditions for a valid amendment of the sales contract]

All pre-requisites have been fulfilled for a valid alteration of the sales contract in respect of the purchase price becoming due and payable pursuant to Art. 29(1) CISG. Hence, the parties acted in accordance with Art. 14 *et seq*. CISG. These provisions also apply to such an agreement to amend a sales contract (v. Caemmerer/Schlechtriem, Art. 9, Note 3; Enderlein/Mas-kow/Stargardt, Art. 29, Note 1.2).

The parties declared the necessary offer (Art. 23 CISG) as well as the acceptance (Art. 18 CISG) for an alteration concerning a deferred payment (Arts. 14, 15 CISG).

In consideration of the guidelines and principles to interpret any declarations of the parties involved in an international sale under Art. 8(2), (3) and Art. 9(2) CISG, the meeting of the minds upon the issuance of a bill of exchange served two functions:

- On the one side, the payment of the debt under that instrument at the maturity date of the bill of exchange on 15 September 1988 was deemed to be the payment of the purchase price pursuant to Arts. 53, 54 CISG too.
- On the other side, the liability to pay the purchase price should be deferred to the maturity date of the debt under the bill of exchange as drawn upon.

Further, interest should not be accrued up to the maturity date of that bill of exchange. The drawing upon and handing over of the bill of exchange can only be interpreted in that way amongst merchants as influenced by trade usages for international commerce.

(B) [*Valid and binding amendment of the sales contract*]

The aforementioned alteration of the sales contract is valid and binding for both parties involved.

The [buyer] impliedly accepted the drawing upon a bill of exchange. Hence, it was present at the handover of that instrument, being in its interest, and did not sensibly object. As a result, it may remain undecided, who was the real Drawer of that bill of exchange.

The witness R's declarations, as made while physically accepting the bill of exchange, are attributed to the [seller]. In this context, it can remain undecided, whether and according to which law the agent R acted on the [seller]'s behalf in Hamburg. The [seller] gave its assent to the alteration of the sales contract, as negotiated by R, at the time of presenting the bill of exchange on 15 September 1990 at the latest. This approval is valid and binding under Italian law as applicable. Italian law does apply as the legal regime for the transaction of the amended sales contract (*see* Reithmann/Martiny/Hausmann, *loc. cit*., Note 967-968). Since the CISG does not comprise of any provision for such an approval and no other international treaty is applicable, one has to revert to autonomous Italian law. It is of no importance, whether the Geneva Convention on Representation during an International Sale of Goods of 1983 applies in Italy. Under any circumstances, the substantive provisions of that aforementioned convention are not applicable (*see* Stocker, WM 1983, p. 778 *et. seq*.). According to Art. 1399 Par. 1, 2 C.c., an approval is valid and binding *ex tunc*, i.e., from the date of entering into the agreement, by the agent, unless the agreement in question had not already come into effect due to the application of general agency laws.

bb) [*Owed interest rate of the claim for interest payment*]

The actual rate of the claim for interest under Art. 78 CISG is to be extracted from Art. 1284 Par. 1 C.c. Under that aforementioned Italian provision, the Italian owed statutory interest rate is 5% [*p.a.*]. Art. 1284 Par. 1 C.c. is applicable, because the actually owed interest rate has not expressly been regulated within the CISG (v. Caemmerer/Schlechtriem/Enderlein, *loc. cit*., Art. 78, Note 2), so that that the interest rate has to be determined in accordance with the relevant national law, being applicable pursuant to the general principles of conflicts of laws (*see* Art. 7(2) Alt. 2 CISG; v. Caemmerer/Schlechtriem/Enderlein, Art. 78, Note 3; Bianca/Bo-nell, loc. cit., Art. 78, Note 2.1). The governing law is, as already mentioned above under a), Italian law pursuant to Art. 32 Par. 1 No. 3 EGBGB. Further, there is not the case, that German law shall extraordinarily apply as the legal regime of the debtor (Asam/Kinder, Compensation for any damages concerning interest and depreciation of currency under the CISG, RIW, p. 841-842; dissenting opinion Stoll, Current issues of international private law in respect of national supplements of the CISG, Festschrift Ferid, 1988, p. 495, 510).

b) [*Basis for claim for an interest rate above 5%*]

The claim for interest payment above 5% is based on Art. 74 CISG pursuant to Art. 78 at its end CISG (v. Caemmerer/Schlechtriem/Stoll, Art. 74, Note 39). The [seller] has incurred a loss of 13 per cent on *DM* 94,893 due to the non-payment of the purchase price since 15 September 1988. The Court estimates the loss of interest payment incurred by the [seller] pursuant to Sec. 287 ZPO.

aa) [*Estimating the loss of interest payment occurred*]

Estimating the actual level of any loss of interest payment under Sec. 287 ZPO is admissible. Hence, Sec. 287 ZPO is part of the *lex fori* and thus applicable nonetheless the *lex causae* is not the same (Geimer, International Law on Civil Proceedings, 1987, Note, 2065; *see* v. Caemmerer/Schlechtriem/Stoll, Art. 74, Note 41), since Sec. 287 ZPO has to be qualified as a pure procedural rule (*see* Kegel, *loc. cit*., p. 393).

bb) [*Italian discount rate determines the loss of interest payment*]

The estimated loss of interest payments as incurred by the [seller] amounts to 13% [*p.a.*]. This actual figure ensues from the Italian discount rate of 21 November 1988, i.e., date of the writ.

In the light of doing business within Germany and Italy, it is allowed to revert to the discount rate of the creditor's country, if the relevant creditor has its establishment in Italy. Hence, market rates are at least at the same level as the then prevailing discount rate in Italy. This ensues from the fact that Italy, as Contracting State of the ULIS, accepted for years that the interest rate under Art. 83 ULIS was always 1 per cent above the discount rate (*see* Asam/Kindler, *loc. cit*., p. 844).

The [seller] is rendering German-Italian trade. The Court concludes this fact from the entering into the sales contract in question on 2 June 1988. In the event, that a debtor is in default to pay its debt of more than *DM* 90,000 within the context of German-Italian trade, there is *prima facie* evidence that the [seller] suffers a loss of interest payment amounting to at least the discount rate of the relevant country.

The level of the Italian discount rate of 21 November 1988 leads to the conclusion that the loss, occurred due to the [buyer]'s default, amounts to 13% [*p.a.*] since 15 September 1988. Hence, it is sufficiently probable that the discount rate during that period of time was not well below 13%, so that consequently the market interest rate, being usually above the discount rate, would have been below 13% as well. On the other side, it is not of importance whether the discount rate during that period amounted to more than 13%. Hence, in any event in this case, the Court is prevented from recognizing any interest rate which is beyond 13% pursuant to Sec. 308 Par. 1 S. 2 ZPO. [*A Court cannot grant anything that has not been applied for by the parties to a legal action*]

III. [ANCILLARY DECISIONS]

The Court's decision upon legal fees, costs and expenditures is based on Sec. 92 Par. 2 ZPO. The decision upon preliminary enforcement is based on Sec. 709 S. 1 ZPO.