

Case 6: CISG 1(1)(b); 25; 49; 78

Germany: Landgericht Frankfurt a.M.; 3/11 O 3/91

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A German retailer ordered in September 1989 from an Italian manufacturer through a commercial agent 120 pairs of shoes "Esclusiva su B". After delivery in March 1990 and having resold 20 pairs, the buyer learned that identical shoes supplied by the Italian manufacturer were offered for sale by a competing retailer at a considerably lower price. Since attempts to enjoin the competing retailer failed, the buyer returned the unsold 100 pairs and cancelled the "order of March 1990" promising payment for the 20 pairs upon receipt of the credit.

The court, applying CISG as the relevant Italian law, held that a valid contract had been concluded at the latest at the time of delivery and that this contract had not been avoided under article 49 CISG. The cancellation of the "order of March 1990" was not an express declaration of avoidance of the order of September 1990 since it referred to another

— order. Even if a declaration of avoidance could be made impliedly (a point on which authors disagree), the buyer did not reject the entire contract as evidenced by the promise to pay for 20 pairs. Even assuming such rejection, the buyer was not entitled to avoid the contract for lack of a fundamental breach of the exclusive contract according to article 25 CISG. The manufacturer had no knowledge about the branches of its business partners, and any knowledge of the commercial agent could be imputed to the manufacturer only if the agent had acted as a closing agent.

The court refused reimbursement of fees incurred by the manufacturer in engaging an Italian collection agency since such engagement constitutes an appropriate measure of pursuit of right only if the collection agency can take steps superior to those that the creditor could take. No interest beyond the statutory rate was awarded and a set-off claim by the buyer based on loss of profit was rejected, both for lack of substantiation.