

Case 227: CISG 8(2); 18(1); 19(1); 52; 61(1)(b); 64(1)(a); 74; 75; 76; 77; 78

Germany: Oberlandesgericht Hamm; 19U 97/91

22 September 1992

Original in German

Published in French by Claude Witz, [1995] Les premières applications jurisprudentielles du droit uniforme de la vente internationale-Convention des Nations Unies du 11 avril 1980, Librairie Générale de Droit et de Jurisprudence (L.G.D.J.), Collection Droit des affaires (Paris) 142 Abstract in German in [1993]

Oberlandesgerichtsrechtsprechungs-Report Hamm 27

A German buyer, defendant, offered to purchase ten lots of “wrapped” bacon from an Italian seller, plaintiff. The seller’s reply to the buyer’s offer referred instead to “unwrapped” bacon. However, in its reply to the seller, the buyer did not object to the change in terms. After four lots had been delivered, the buyer refused to accept further deliveries. Therefore, the seller declared the contract avoided and sold the remaining six lots at a price much lower than both the market- and the agreed purchase- price. The seller claimed damages, the outstanding purchase price and interest.

The court held that the seller’s reply to the buyer’s offer was a counter-offer (article 19(1)CISG) and not an acceptance (article 18(1) CISG), and that the buyer’s reply to the counter- offer, inasmuch as it did not contain any objections to the change in terms, should be considered an unconditional acceptance (article 8(2) CISG). Consequently, the seller was entitled to declare the contract avoided because the buyer’s failure to take delivery of more than half of the goods constituted a fundamental breach of contract (article 64(1)(a) CISG).

The court also held that the seller was entitled to claim damages (articles 61(1)(b) and 74 CISG). To assess damages, priority had to be given to the method of calculation under article 75 CISG. In mitigating its loss, however, the seller was obliged to undertake a profitable resale of the goods (article 77 CISG). As the seller had been unable to resell the goods for more than the market price, i.e. the market price at the place of delivery rather than that at the seller’s place of business, the method of calculation under article 76 CISG was applied. Lastly, the court granted the outstanding purchase price (article 52 CISG) and interest (article 78 CISG).