

CISG-online 62	
Jurisdiction	Germany
Tribunal	Landgericht Krefeld (District Court Krefeld)
Date of the decision	24 November 1992
Case no./docket no.	12 O 153/92
Case name	<i>Italian shoes case XI</i>

*Translation\* by Jan Henning Berg\*\**

### Facts of the case:

Plaintiff [Seller's assignee] has commenced the action on the basis of a claim assigned to it by [Seller], shoe manufacturer Z[...] S.p.A., domiciled in [...], Italy. [Seller] delivered shoes to Defendant [Buyer] according to order confirmation [...]. It was based upon order [...], acquired by a company «*Handelsvertretung-Großhandel [...]*» (hereafter: Zimm.) for Company B[...] GmbH [...]. [Buyer] complained to B[...] by way of counter-invoices dated 30 October 1991 and 15 February 1992 [...] that, according to an agreement reached with Zimm., shoes at a price of (a) DM 3,217.08 and (b) DM 8,122.04 (both including 14% VAT) as stated in the award of this judgment were to be taken back as being excessive or wrong deliveries.

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#### **[Position of the parties:]**

#### **[Position of Seller's Assignee:]**

[Seller's assignee] accepts that the agreement purportedly made between [Buyer] and Company Zimm. will have adverse effect on its own legal position. [Seller's assignee] thus reduces the initial value of the claim from DM 27,216.40 by the sums of DM 3,217.08 and DM 8,122.04 and requests the Court to order [Buyer] to pay DM 15,877.28 plus interest of 10% since 19 June 1992.

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

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**[Position of Buyer:]**

[Buyer] requests dismissal of [Seller's assignee]'s action. It submits three arguments to that effect:

1.

[Buyer] denies being in contractual relations with [Seller]. [Buyer] had directed its order to Company B. Only B. was its supplier or seller, respectively.

2.

[Buyer] casts doubt upon the assignment set out in exhibit [...] on which [Assignee of seller] relies. It was not proved that this document had been signed by an authorized representative of [Seller].

3.

[Buyer] furthermore relies on a right to retention. It was obliged to effect payment only conditional upon taking back the shoes, which had to be done by Company B. upon agreement with Company Zimm.

[...]

**Reasoning of the Court:**

[Seller's assignee] succeeds with its action in a predominant part.

1.

Deliverer and seller in this case is the Italian [Seller]. In fact, [Buyer] directed its order [...] to Company B [...], represented by Company Zimm. However, following this order [Buyer] received an order confirmation from [Seller]. This confirmation contained the counter-offer of [Seller] directed to [Buyer] to the effect that the sale should be processed with itself instead of company B [...]. This counter-offer made by [Seller] was impliedly accepted by [Buyer] by not objecting to the confirmation and by accepting deliveries made by [Seller].

2.

[Seller]'s claim for the purchase price has been assigned to [Seller's assignee]. As the Court knows from other proceedings, if a customer refuses payment it is common practice for Italian exporters which have made deliveries to the Federal Republic of Germany to assign their claims to German companies or persons in order for them to enforce the claims before the Court at the debtor's domicile. It is also common practice for the corresponding defendant-buyers to raise defenses of any kind so as to require a taking of evidence in Italy and thus to delay the proceedings by several years.

Against this background, the Court does not accept [Buyer]'s argument insofar as it asserts that the assignment had not been executed by an authorized representative of [Seller]. In the opinion of the Court, this assertion is absurd. Having presented the document of assignment

issued by [Seller], [Seller's assignee] has submitted all essential written contract documents which it could possibly have received from [Seller]. Moreover, some of these documents, e.g. the reminder by [Seller] of 4 December 1991, bear the same signature which has also been applied on the document concerning the assignment of 6 June 1992. Given that, the Court has no reason to cast doubt on the fact that the assignment has been executed by an authorized representative of [Seller]. [Buyer] has failed to substantiate any particular facts which would indicate that a non-authorized person had concluded the assignment contract with [Seller's assignee] without [Seller]'s board being aware of that.

3.

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However, [Buyer]'s defense is successful insofar as it relies on a right to retention.

a)

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[Seller's assignee] accepts to the detriment of its own legal position the agreements reached between [Buyer] and Company Zimm. These agreements establish a partial avoidance of the sales contract.

b)

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With respect to the scope of application of §§ 459 *et seq.* BGB, it is generally accepted that, in case of avoidance, the seller will have to collect the sold item at the buyer's domicile, which is the location where it they are supposed to be (BGHZ 87, 109). This means: The seller has an enforceable claim against the seller for collection of the sold item in relation to which there had been an agreement on avoidance of the contract.

c)

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The same reasoning applies within the scope of the applicable CISG (*cf.* von Caemmerer/Schlechtriem/Leser, CISG, Art. 81 para. 17 with reference to Dölle, EKG, Art. 78 para. 6). Consequently, [Buyer] has a right against [Seller] to request the latter to collect those shoes from its domicile in Krefeld which are listed in the counter-invoices of 30 October 1991 and 15 February 1992.

d)

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In accordance with §§ 404, 273(1) BGB, [Buyer] is entitled to use its claim as a defense against [Seller's assignee]'s claim with the consequence that the Court will award a claim only conditional upon performance of the counterclaim.

e)

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However, [Buyer] is in error when it argues that its right to retention would block [Seller's assignee]'s claim for payment in its entirety. In terms of § 273 BGB the provision of § 320(2) BGB must be applied by way of analogy. The Court assesses the interest of [Buyer] in the collection of the said shoes at about DM 300. Therefore, [Buyer] can exercise its right to retain performance against [Seller's assignee] only in relation to a partial sum of DM 877.28. The remainder of the claim must be paid by [Buyer] without condition.

4.

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The obligation to pay interest is based on Art. 74 CISG. [Seller's assignee]'s submission that the statutory interest rate in Italy was 10% has not been challenged by [Buyer].

[...]