

CISG-online 123	
Jurisdiction	Germany
Tribunal	Oberlandesgericht Frankfurt am Main
Date of the decision	18 January 1994
Case no./docket no.	5 U 15/93
Case name	<i>Lori s.r.l. v. Parandian GmbH</i>

Translation by Eva Diederichsen***

Oberlandesgericht Frankfurt am Main, 18 January 1994, 5 U 15/93

[Subjects:] CISG¹ Article 49. Lack of conformity of goods and right to avoid the contract; CISG Article 78. Amount of interest.

[Introduction and Summary of Facts:]

This case, decided by the Oberlandesgericht² Frankfurt a.M. in January 1994, relates to a common set of facts that raises basic problems of international sales law. In January 1991 the plaintiff [seller], whose place of business was in Italy, contracted to sell women's shoes to the defendant [buyer], located in Germany. The [seller] delivered the shoes to the [buyer] and issued invoices for the purchase price. The [buyer] paid only a portion of the price.

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* All translations should be verified by cross-checking against the original text.

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¹ United Nations Convention on Contracts for the International Sale of Goods, U.N. Conference on Contract. for the International Sale of Goods, Final Act, U.N. Doc. A/CONF.97/18 (1980) [hereinafter «CISG» or «Convention»], *reprinted* in S. Treaty Doc. No. 9, 98th Cong., 1st Sess. and in 17 INT'L LEGAL MAT. 668 (1980). All footnotes in the following material were supplied by the author/translator, and did not appear in the original material.

² The German term for the Court of Appeal is *Oberlandesgericht* [hereinafter referred to as «OLG»]. The OLG has exclusive jurisdiction over civil appeals from, *inter alia* judgments of the *Landgericht*. The OLG may, in some circumstances, act as a court of first instance. For a more complete account of German appellate procedure, see TIMOTHY KEARLY & WOLFRAM FISCHER, CHARLES SZLADITS' GUIDE TO FOREIGN LEGAL MATERIALS: GERMAN 16-29 (2 ed. 1990) [hereinafter SZLADITS].

The [seller] sued for the balance of the purchase price and interest on that sum in German currency pursuant to the sales contract. Alternatively, the [seller] asserted the claim in Italian currency.

The [buyer] denied any further obligation for the price by asserting that the contract was avoided. The [buyer] maintained a right to avoid for (a) late delivery; and (b) non-conformity of the goods.

The court dismissed the principal claim but granted the [seller] the motion for alternative relief.

[Headnotes:]

1. Under CISG, avoidance of a contract because of non-conformity [i.e. defectiveness of the goods] is available only if there is a fundamental breach of contract (CISG, Article 49(1)(a)).
2. Deviating from domestic German sales law, the Convention implies a duty on the part of the buyer to accept goods that are non-conforming goods to a considerable extent and to invoke different remedies (reduction of price, damages) for the deficit in performance.
3. [In order to avoid a contract under the Convention,] the buyer generally must prove specific defects and the non-feasibility of further use of the goods, because otherwise the existence of a fundamental breach cannot be evaluated [by the court].
4. Pursuant to German international private law,³ to determine the interest rate under CISG Article 78, the court must refer to national law.

[Reasoning of the Court:]

Aside from a part of the interest claim, the claim is well-founded on the basis of the motion for alternative relief, because the [seller] has a right to the asserted purchase price in Italian currency pursuant to CISG, Article 53. The sales contracts concluded by the parties to the action in 1991 are governed by the CISG pursuant to Articles 1 and 100(2) of the Convention. Both Italy and Germany are parties to the Convention (Herber/Czerwenka,⁴ *Internationales Kaufrecht* [International Sales Law] 1991, before Article 1, Rn. 16⁵). The Convention came into force on January 1, 1991 in Germany and on January 1, 1988 in Italy.

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³ «International private law» is the translation for *Internationales Privatrecht*, the German legal term for rules of conflict of law.

⁴ The court here cites to a commentary on the law to support its position. ROLF HERBER & BEATE CZERWENKA, *INTERNATIONALES KAUFRECHT* n. 16 (1991).

⁵ «Rn.» is the abbreviation for *Randnummer* – i.e. marginal note.

The claim is based on two invoices...for the supply of women's shoes. The [seller] is suing the [buyer]...for the residual purchase money. The conclusion of the sales contract, the delivery of the shoes and the proper calculation of the purchase price are uncontested.

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The [buyer] is committed to pay the purchase money only if it did not effectively declare the contract avoided (CISG, Article 49). The avoidance of the contract releases both parties from their contractual obligations subject to any damages that may be due (CISG, Article 81(1)). Insofar as the [buyer] maintains that the shoes had not been delivered within the stipulated time period, the [buyer] does not have any right to avoid the contract, since it is not established that the [seller] failed to perform within a fixed additional period of time (CISG, Articles 49(1)(b), 47(1)).

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The [buyer] also does not succeed in showing that the delivered shoes have been predominantly non-conforming.

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According to the Convention, the defectiveness of goods does not qualify as non-delivery, but is a breach of contract, which has to be distinguished as to whether or not it is a fundamental one. Avoidance of contract is only available as a remedy in those cases in which non-performance of the seller's duties under the contract or under the agreement is a fundamental breach of contract (CISG, Article 49(1)(a)).

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Contrary to German national sales law, which except for insignificant deviations in principle grants the right to cancellation of the contract on grounds of a defect, under the Convention, the buyer is expected to accept to a considerable extent even non-conforming goods and to invoke different remedies (reduction of price, damages) to compensate for the defect(s). For example, it is possible that there is no fundamental breach in cases in which the buyer eventually can make some use of the defective goods (von Caemmerer-Huber,⁶ Kommentar zum Einheitlichen UN-Kaufrecht – CISG [Commentary on the Uniform UN Law of Sales – CISG], 1990, Article 46, Rn. 64, Article 49, Rn. 27; Piltz,⁷ Internationales Kaufrecht [International Sales Law], 1993, § 247). An examination [by the court] of this kind also is compelled in cases in which the non-conformity consists in a lack of correspondence between the goods and a sample or model presented at the conclusion of the contract (CISG, Article 35(2)(c)). Consequently, the buyer normally is required to report explicitly on the defects and the unacceptability of any further use, since otherwise the examination [by the court] would not be possible as to whether or not there had been a fundamental breach as is required for avoidance. The allegations by the [buyer], however, overall preclude the required examination [by the court].⁸

⁶ KOMMENTAR ZUM EINHEITLICHEN UN-KAUFRECHT-CISG, Article 46, Rn. 64; Article 49, Rn. 27 (Ernst von Caemmerer [sic] & Peter Schlechtriem eds., 1990) [hereinafter VON CAEMMERER & SCHLECHTRIEM].

⁷ PILTZ, INTERNATIONALES KAUFRECHT, § 5, Rn. 247 (1993).

⁸ I.e., because of the insufficiency of its allegations, the [buyer] failed to meet the statutory requirement for avoidance of the contract.

The [buyer] has only testified that...[the shoes] were «defective in all makings». Thus, the material had shown defects. The manufacturing had been «varying», «sometimes» the shoes had been «stitched», others had been «folded up». In all, they did not correspond to the original sample. It is not possible to draw from these submissions the precise defects alleged. As to the deviation from the sample, the evidence given by the [buyer] is not sufficient to determine whether or not she could reasonably be expected to use the shoes...

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The [buyer]...also complains about the shoes being made of the material «S. Oro» instead of «Metallic Leather Gold» which caused the shoes not to be smoothly manufactured but to have heavy wrinkles. These [allegations] do not allow for any judgment as to whether or not the shoes were – apart from the different material and consequently different appearance – defective and unfit for use...

[...] ⁹

During the oral proceedings the court¹⁰ granted the possibility to the [buyer] to substantiate its several claims. Supplementary allegations have not been presented.

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[...] ¹¹

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The [seller] does not have the principal claim to payment in German currency, because the purchase price had been stipulated in Italian currency (Piltz,¹² § 4, Rn. 124). Therefore, the suit had to be dismissed with respect to the principal claim.

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The interest claim is well-founded only to the extent of 10%. The claim is justified on grounds of CISG, Article 78. Pursuant to this article, the contracting party in default either as to payment of the purchase price or any other amount due has to pay interest rates for the sum owing (von Caemmerer-Eberstein,¹³ Article 78, Rn. 9, 10; Herber/Czerwenka,¹⁴ Article 78, Rn. 3; Asam RIW¹⁵ 1989, 942, 945). Under CISG, Articles 58 and 59, the date of payment for the shoes which were delivered no later than October 19, 1991 was even prior to the dates given by the [seller]. Nothing has been submitted as to any other agreement concerning the due date.

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⁹ A paragraph dealing in depth with the nature of the defects is omitted.

¹⁰ The original German wording here is «der Senat» which refers to a certain division or panel of the court.

¹¹ Another paragraph dealing in depth with the nature of the defects in the goods is omitted.

¹² PILTZ, *supra* note 8, at § 4, Rn. 124.

¹³ VON CAEMMERER & SCHLECHTRIEM, *supra* note 7, at Article 78, Rnn. 9 & 10.

¹⁴ HERBER & CZERWENKA, *supra* note 5, at Article 78, Rn. 3.

¹⁵ Herbert Asam, *UN-Kaufrechtsübereinkommen im deutsch-italienischen Rechtsverkehr*, RIW, 942, 945 (1989). «RIW» is the abbreviation for *Recht der Internationalen Wirtschaft* [Law of International Commerce], a monthly journal on international trade law and practice.

Since the amount of recoverable interest has been left unregulated in CISG, Article 78 (as opposed to EKG [ULIS] Article 83¹⁶, according to the predominant legal opinion, pursuant to German international private law, the domestic German Law is applicable (see comments in Senat, Urt. v. 13. Juni 1991 – 5 U 261/90 – NJW 1991, 3102¹⁷). In the case before the court, pursuant to Article 28(2) EGBGB¹⁸, Italian law is applicable to the claim for the purchase price and it also governs the accompanying interest claim.

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According to the isolated deviating opinion by Stoll (Festschrift für Ferid, 1988, 495, 509f.; similar: von Caemmerer-Leser,¹⁹ Article 84, Rn. 13 on the obligation to pay interest under CISG Article 84(1)), the legal rate [of interest] has to be determined by the domestic sales law of the debt-or. Whether or not Stoll's opinion has to be followed did not have to be decided in the [previ-ous] ruling of this court rendered on June 13, 1991,²⁰ because in that case the [seller] at the very beginning limited her interest claim to 5%, a rate that is justified both under German and under French Law.²¹ In this case, however, the court has to decide according to the prevailing legal opinion. Since the amount of interest intentionally is not prescribed in the Convention, the answer can only be taken from the rules of international private law. Absent any point of reference, no principle can be derived from the Convention such as saying that the domicile of the debtor would be decisive, because the duty to pay interest was aimed at preventing the withholding of money from being advantageous to the debtor (Stoll as referred to above [Fest-schrift für Ferid, *supra*]) who still has the possibility to use or invest the funds as compared to payment. Furthermore, this argument is not persuasive, since it is not guaranteed that the domes-tic legal rate [of interest] fully compensates for (see § 352 HGB)²² the advantage of non-payment and any other calculation of interest would erase the dividing line [between interest and] damages.²³ The practical disadvantage of eventually being obliged to investigate foreign law to calculate the interest has to be accepted because of the partial in-

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¹⁶ «EKG» is the abbreviation for *Einheitliches Gesetz über den internationalen Kauf beweglicher Sachen vom 17. Juli 1973* [Uniform Law on International Sale of Goods (ULIS) of July 17, 1973]. This was the German Law which implemented the 1964 Hague Convention on the International Sale of Goods into German national law. [ULIS] ceased to be in force on December 13, 1990 when the CISG went into force and, pursuant to Article 99 of CISG, Germany denounced the 1964 Hague Convention.

¹⁷ The opinion refers here to a ruling of the court of June 13, 1991, filing number 5 U 261/ 90. «NJW» is the abbreviation for *Neue Juristische Wochenschrift* [New Weekly Law Journal], a law journal covering all fields of law. It contains mainly court rulings and commentaries by lawyers and scholars. For the meaning of «Senat,» see *supra* note 11.

¹⁸ «EGBGB» is the abbreviation for *Einführungsgesetz zum Bürgerlichen Gesetzbuch* [Introductory Law on the Civil Code]. This introductory section to the Civil Code contains the German rules on conflict of laws. See Szladits, *supra* note 2, at 65-66.

¹⁹ VON CAEMMERER & SCHLECHTRIEM, *supra* note 7, at Article 84, Rn. 13.

²⁰ [OLG Frankfurt 13 June 1991, 5 U 261/90.]

²¹ A German court only has to discuss a deviating scholarly opinion if the discrepancy would have an impact on the outcome of the case.

²² «HGB» is the abbreviation for *Handelsgesetzbuch* [Code of Commercial Law].

²³ In Germany, statutory interest is not classified as damages.

completeness of the Convention arising from unsettled disputes during the negotiation process (Herber/Czerwenka,²⁴ Article 78, Rn. 1). Besides, disadvantage can be diminished by the availability of adequate charts (Piltz,²⁵ § 5, Rn. 415). Pursuant to Article 1284 Codice Civile²⁶ as of December 16, 1991 (Statute No. 353 of November 16, 1990) the interest rate amounts to 10% (Piltz,²⁷ § 5, Rn. 415; Kindler²⁸ RIW 1991, 304 f.).

The [seller's] claim for default interest at an amount of 13.5% could not be awarded. CISG, Article 78 does not bar a claim for damages under CISG, Article 74 to recover additional loss resulting from finance charges (Herber/Czerwenka,²⁹ Article 78, Rn. 8). However, the [seller] has no shown evidence of any further loss caused by using credit (as to the burden of proof: von Caemmerer-Stoll,³⁰ Article 74, Rn. 41). The submitted certificates issued by the Banca d'Italia only refer to the discount [rate] fluctuations.

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²⁴ HERBER & CZERWENKA, *supra* note 5, at Article 78, Rn. 1.

²⁵ PILTZ, *supra* note 8, at § 5, Rn. 415.

²⁶ The *Codice Civile* is the Italian Civil Code.

²⁷ PILTZ, *supra* note 8, at § 5, Rn. 415.

²⁸ Kindler, *Zur Anhebung des Gesetzlichen Zinssatzes in Italien*, RIW, 304 (1991).

²⁹ HERBER & CZEWENKA, [sic] *supra* note 5, at Article 78, Rn. 8.

³⁰ Von Caemmerer & Schlechtriem, *supra* note 7, at Article 74, Rn. 41.