

Case 120: CISG 1(1)(b); 18; 29; 38; 39; 47; 49

Germany: Oberlandesgericht Köln; 29 U 202/93

22 February 1994

Published in German: Praxis des Internationalen Privat- und Verfahrensrechts (IPRax) 1995, 393;  
Recht der Internationalen Wirtschaft (RIW) 1994, 972.

Commented on by Reinhart in IPRax 1995, 365

The German plaintiff was the assignee of the Nigerian seller, who sold and delivered rare wood to the German defendant. The defendant refused to pay the purchase price alleging that the delivered wood was of inferior quality; the plaintiff, in turn, declared that it would market the wood. The court of first instance ordered the defendant to pay the purchase price. The defendant appealed.

The Court of Appeal, applying the CISG as part of the relevant German law chosen by the parties as applicable law, held that the defendant had lost the right to declare the contract avoided under article 49 (1)(b) CISG, since it had failed to fix an additional period of time for performance by the plaintiff (article 47 CISG). However, the Court of Appeal found that the parties had mutually agreed to terminate the contract, which is expressly allowed by article 29 CISG, and that the mutual agreement to terminate the contract is governed by the same rules as the conclusion of the contract.

Noting that pursuant to article 18 CISG mere silence does not in itself amount to acceptance of an offer, the Court of Appeal found that, under certain circumstances, silence could be interpreted as a declaration of acceptance. In the case in question the seller had examined the wood delivered and had offered to take back the wood in order to market it. The buyer neither refused this offer nor claimed damages or replacement of the defective wood. The Court of Appeal held that the buyer thereby accepted the offer to terminate the contract of sale. The Court of Appeal therefore reversed the decision of the court of first instance and dismissed the suit for payment.