CISG-online 127	
Jurisdiction	Germany
Tribunal	Oberlandesgericht Köln (Court of Appeal Cologne)
Date of the decision	22 February 1994
Case no./docket no.	22 U 202/93
Case name	*Iroko wood case*

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Edited by Birgit Kurtz[**] *and William M. Barron*

[...] 1–14

Excerpt of grounds

Plaintiff [seller's assignee] does not have a cause of action against [buyer] for the claimed amount based on the sales contract between the [seller] and [buyer] nor for unjust enrichment. 15

The claim must be analyzed under German law after the parties consented to the application of German Law (EGBGB Art. 27(2)) in the hearing before the trial court (the Landgericht). As a result, the U.N. Convention on Contracts for the International Sale of Goods («CISG») of April 11, 1980, which became effective in Germany on January 1, 1991 (BGBl. II 1989, 588), is also applicable as far as the claim is based on the law of sales. This results from CISG Art. 1(1)(b), according to which the Convention is applicable to contracts for the sale of goods between parties whose places of business are in different countries, if the Conflict of Laws rules – here EGBGB Art. 27(2) – lead to the application of the law of a Contracting State. 16

1. 17
According to the provisions of the CISG, the [seller's] claim for the purchase price arose here from the contract for the delivery of the wood to [buyer], but it was voided before the assignment to plaintiff because of the cancellation of the purchase contract.

Contrary to [buyer's] argument, a sales contract was indeed formed by the [seller] and [buyer]. It may be left open whether [buyer] has already admitted this in her answer and whether such an admission is binding. In either case, [buyer's] own correspondence shows that she and the 18

[*] All translations should be verified by cross-checking against the original text. For purposes of this translation, the Plaintiff's assignor of Nigeria is referred to as [seller], the Defendant of Germany is referred to as [buyer].

BGB = Bürgerliches Gesetzbuch [German Civil Code]; BGB1 = Bundesgesetzblatt [Germany's official gazette for fed- eral legislation]; EGBGB = Einführungsgesetz zum Bürgerlichen Gesetzbuch [Introductory Law to the German Civil Code]; «H» presumably = the first letter of the city where the wood was stored.

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[seller] had agreed on the wood delivery in oral negotiations on January 27, 1992. Her «Purchase Order» («Bestellschreiben») dated January 28, 1992 merely represents a written confirmation of the verbal agreement concluded earlier («we hereby confirm our order»). According to the provisions of the CISG with respect to the conclusion of a sales contract – see CISG Art. 18(1) 2d sentence – there is no room for a reference to the German Conflict of Laws provisions regarding the conclusion of a contract by silence as an acceptance of a commercial letter of confirmation (von Caemmerer, in Schlechtriem (ed.), *Kommentar zum einheitlichen UN-Kaufrecht* [Commentary to the Uniform U.N. Law of Sales], before CISG Arts. 14 – 24 & 6; Herber/Czerwenka, *Internationales Kaufrecht* [International Law of Sales], CISG Art. 14 & 18). Neverthe- less, the importance of the commercial letter of confirmation as evidence for the formation of the contract remains unaffected (von Caemmerer/Schlechtriem, supra, citations omitted). In the present case, it can be concluded from [buyer's] letter dated January 28, 1992 and a further letter dated March 25, 1992, also referring to an «agreement» of January 27, 1992, that the [seller] and [buyer] had agreed upon a sales contract on January 27, 1992.

[Buyer's] argument that she cancelled her order with the approval of the assignor was correctly rejected by the trial court as unsubstantiated. On appeal, [buyer] similarly did not set forth the content of the [seller's] verbal statement from which, by interpretation, the [seller's] approval of the cancellation of the order could possibly be inferred. The correspondence between [buyer] and the [seller] does not reveal that the [seller] agreed to the cancellation of the order. The [seller's] letter dated April 27, 1992 merely expresses regret about [buyer's] unilateral cancella- tion, it does not, however, contain a statement of acquiescence. As far as the [seller] asked for «reconfirmation» in the letter, it was obviously meant only as a confirmation of the order dated January 28, 1992, rather than a new contract. **19**

Furthermore, no concrete facts have been presented to prove that [buyer] changed the purchase contract into a consignment contract through a modified agreement with the [seller]. To the contrary, [buyer's] letter dated May 5, 1992, in which she rejected a price increase by the [seller], clearly shows that even [buyer] assumed that the sales purchase agreement still existed. **20**

Similarly, [buyer] cannot claim that she declared the contract avoided due to the delay in the [seller's] delivery. As far as [buyer] objects to the [seller's] failure to meet the desired delivery date (mid-March 1992), she could only have declared the contract avoided pursuant to CISG Art. 49(1)(b) if she had granted the [seller] an additional, reasonable period of time for the delivery (CISG Art. 47). [Buyer] failed to do so. **21**

The parties, however, cancelled the contract by mutual agreement after [buyer's] notice of the defects. **22**

[Buyer] sufficiently set forth the claimed defects of the wood delivery and clearly expressed at the same time that she considered the defects to be material. On appeal, she further stated she had given notice of the defects to the [seller] on or before July 8, 1992, as proven by the [seller's] faxletter dated July 8, 1992, which is no longer contested by [seller's assignee]. The examination of the goods carried out by Company O in the beginning of July 1992 was still timely pursuant to CISG Art. 38; the goods had to be sent on to [buyer's] customer from H – **23**

which was known by the [seller] – with the consequence that, according to CISG Art. 38(3), the examination could be deferred until the wood delivery had arrived at Company O's facilities. The objection to the defects, which was raised on or before July 8, 1992, was made within a reasonable time after the discovery of the defects (CISG Art. 39), particularly since July 4 and July 5, 1992 were a weekend (compare Herber/Czerwenka, supra, CISG Art. 39 & 9). It is irrelevant whether [buyer's] cancellation of the agreement based on the alleged defects was timely, i.e., within a time equivalent to the reasonable time allotted for the notice of defects (von Caemmerer/Schlechtriem, supra, CISG Art. 49 & 44). Either way, following the notice of defects, the [seller] manifested her intention to cancel the purchase agreement, and [buyer] con- clusively agreed hereto. This follows from the [seller's] written answer concerning the notice of defects, as well as from [buyer's] further conduct with respect to the agreement.

The [seller] had already announced in her letter dated July 8, 1992 that she would come to Germany in order to market the wood herself. In a further faxletter dated July 27, 1992, the [seller] confirmed [buyer's] notice of defects – with reservations – after examination of the goods («not as bad as you claim»), and informed her that she had found a Dutch company which would market the wood for her. This was the latest indication from which [buyer] was able to infer that the [seller] did not want to be bound by the agreement any longer. Because the [seller's] intention to market the wood herself was expressed without a reservation or limitation, there was no reason, contrary to plaintiff's argument, to presume that the [seller] only wanted to assist in the marketing, while leaving the responsibility for the marketing with [buyer]. On the other hand, the [seller] could infer from [buyer's] conduct that [buyer] acquiesced in the cancellation of the agreement, since she neither objected to the letters dated July 8 and July 27, 1992, nor demanded replacement goods free of defects. **24**

CISG Art. 29(1) expressly permits such a cancellation by agreement. The same rules apply to the formation of a contract to cancel an agreement as apply to the formation of the agreement itself (von Caemmerer/Schlechtriem, supra, CISG Art. 29 & 3). An offer to cancel can, there- fore, pursuant to CISG Art. 18(1), not be accepted by silence or inactivity of the other party; together with other circumstances, however, silence can indeed be important and may be interpreted as the acceptance of an offer of cancellation. Such circumstances exist here, because [buyer] not only remained silent but also refrained from further fulfillment of the agreement, specifically from insisting on the delivery of replacement goods or from asserting other warranty claims. Thus, the [seller] lost her claim to the purchase price. **25**

2. **26**

A claim based on unjust enrichment (BGB § 812), which could have been assigned [by seller] to plaintiff, does not exist either. Plaintiff did not show that [buyer] had received any proceeds from reselling the delivered wood, which then had to be turned over to the [seller] after the cancellation. Rather, [buyer] stated in the hearing that, according to available information, the wood is still stored at Company O's facilities.

[…] **27–29**