

CISG-online 162

Jurisdiction	Germany
Tribunal	Amtsgericht Kehl (Local Court Case)
Date of the decision	6 October 1995
Case no./docket no.	3 C 925/93
Case name	<i>Italian knitwear case I</i>

Translation by Gerd A. Zimmermann***

*Translation edited by Ruth M. Janal****

[Facts of the Case:]

The [seller] plaintiff manufactures knitwear; the [buyer] defendant sells knitwear. Initially, the [buyer] ordered two sample sweaters from the [seller]; the [buyer] was charged DM [Deutsche Mark] 103. Based on these samples, the [buyer] then ordered 310 sweaters for a total price of DM 9765.

The samples as well as the merchandise at issue were ordered through the [seller]’s sales representative, Mr. M. The [seller] submits that the [buyer] later asserted that the goods did not conform to the contract. In the [buyer]’s opinion, the material was not sufficiently resistant to washing.

The [seller] objects to the [buyer]’s notice of non-conformity as being unspecified and belated. The goods were not defective and were identical to the samples.

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

Translator's note on other abbreviations: IPRax = *Praxis des Internationalen Privat- und Verfahrensrechts*; NJW = *Neue Juristische Wochenschrift*; RIW = *Recht der Internationalen Wirtschaft*. All three are German legal periodicals.

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Regarding the further details of the [seller]’s pleadings, the Court refers to the [seller]’s briefs of 8 September 1993, 24 February 1994, 18 May 1994, 8 September 1994 and 21 November 1994.

The [seller] requests the Court to order the [buyer] to pay it DM 9,374.40 with 10% interest from 9 January 1993.

The [buyer] requests the Court to dismiss the claim.

[Buyer] pleads that:

- The goods arrived on 18 December 1992, and were examined by the internal quality assurance department on 28 December 1992;
- The goods underwent a laundry test in the department: this showed that the goods were defective;
- Immediately thereafter, on 5 January 1993, the [buyer] gave notice to the [seller] explaining the defects over the phone;
- At the same time, part of the goods were shipped back to the [seller], so [seller] could examine the defects himself;
- In addition, the [buyer] expressly declared the contract avoided, insofar as such a declaration had not already been made on 29 January 1993.

With respect to the [buyer]’s further pleadings, the Court refers to the briefs of 20 January 1994, 2 May 1994, 28 July 1994, 7 November 1994, 19 July 1995 and 28 September 1995. The Court took evidence by questioning the witnesses [...] and [...]. Regarding the findings of the hearing of evidence, the Court refers to the record of the proceedings on 3 August 1995.

[Reasons for the Decision:]

The [seller]’s claim is justified.

I.

1.

The sales contract concluded in December of 1992 is governed by the United Nations Convention on Contracts for the International Sale of Goods (CISG), following the Convention’s Arts. 1(1)(a) and 100(2). Both Italy and the Federal Republic of Germany are Contracting States. The Convention entered into force in Italy on 1 January 1988 and in the Federal Republic of Germany on 1 January 1991.

It can be left open whether the parties' general conditions lead to the application of Italian or German law. In either case, the CISG is applicable by virtue of its Art. 1(1)(b). 12

2. 13

The [buyer] is under obligation to pay the purchase price, since [buyer] lost the right to rely on the lack of conformity pursuant to CISG Article 39(1). [Buyer] failed to give notice to the [seller] specifying the nature of the lack of conformity within a reasonable time after [buyer] discovered the defect. Based on the hearing of evidence, it is not proven that Witness W. gave such a notice of defect for the [buyer] in a telephone conversation dated 5 January 1993.

a) 14

Witness W. testified that she was unable to remember whether she informed the [seller] of the defects in a telephone conversation on 5 January 1993. She solely assumes to have acted accordingly, because there is a receipt regarding the removal of one sweater out of storage.

b) 15

Even if one supposes that Witness W. did make the call, her testimony does not reveal who was her counterpart on the [seller]'s side. In particular, it does not follow that she specified the nature of the lack of conformity.

c) 16

The defects were described more precisely only in a fax dated 29 January 1993 that also contained the measurements of the sweaters after the laundry test.

Since the [buyer] had already received the merchandise on 18 December 1992, notice was not given within a reasonable time in the sense of CISG Article 39(1) (see LG Stuttgart [31 August 1989], RIW (1989) 984 = IPRax (1990) 317). 17

It moreover needs to be noted that the delivered sweaters were seasonal fashion goods, which is why a prompt notice of non-conformity was required (cf. v. Caemmerer/Schlechtriem, Kommentar zum Einheitlichen UN-Kaufrecht, Art. 39 n. 16). 18

II.

1. 19

The claim for interest is legitimate pursuant to Art. 78 CISG. According to this provision, the party that fails to pay the price or any other sum in arrears shall pay the other party [at maturity] interest on these amounts. Pursuant to Arts. 58, 59 CISG, the purchase price for the sweaters delivered on 8 December 1992 became due prior to the date from which the [seller] requests interest (9 January 1993).

2.**20**

Since Art. 78 CISG does not provide for an interest rate, the matter is to be settled in conformity with the law applicable by virtue of the rules of German private international law (see OLG Frankfurt a.M. [18 January 1994], NJW (1994) 1013 at 1014).

a)**21**

German law would be applicable in the event that the [buyer]'s General Conditions were effectively included in the contract.

The [buyer] based its order on its General Terms of Purchasing for Finished Products. The [seller] submits to have accepted the order based on its own General Conditions, a point that the [buyer] contests.

22**aa)****23**

Assuming that [seller] had sent its General Conditions to the [buyer], this would have constituted a counter-offer in the sense of CISG Article 19(1).

However, it follows from the performance of the contract that both parties were in agreement about the *essentialia negotii*. Thus, it must be assumed that they waived the enforcement of their conflicting Standard Terms or that they derogated from the application of Article 19, taking advantage of their party autonomy under Art. 6 CISG. In this case, the contract would have been entered into in accordance with the terms of the CISG (see v. Caemmerer/Schlechtriem, Article 19 n.20).

24**bb)****25**

If the [seller] did not send its General Conditions to the [buyer], it still cannot be assumed that the [buyer]'s Terms for Purchasing became part of the contract.

On the one hand, the [seller] denies having received the [buyer]'s General Terms of Business; on the other hand, the [buyer] did not state that it had included an Italian translation of its Terms for Purchasing. Since the language of the contract in the present case was not German, the General Terms of Business written in German did not become part of the contract (v. Caemmerer/Schlechtriem, Article 14 n.16).

26**b)****27**

Therefore, Italian law governs the obligation to pay the purchase price under Art. 28(2) EGBGB [German Code on Private International Law], and it also applies to the accompanying claim for interest. Pursuant to Article 1284 Cc [Italian Civil Code], the interest rate is 10% since 16 December 1990 (see OLG Frankfurt a.M. [18 January 1994], NJW (1994) 1013 at 1014).

III.**28**

[...]