

Case 232: CISG 1(1)(a); 4(a); 18; 38(1); 39(1); 40; 49; 50; 53

Germany: Oberlandesgericht München; 7 U 4427/97

11 March 1998

Original in German

Abstract in German in [1998] Entscheidungen zum Wirtschaftsrecht 549

Commented on in German by Schlechtriem in [1998] Entscheidungen zum Wirtschaftsrecht 549

A German buyer, defendant, ordered cashmere sweaters from an Italian seller, plaintiff. The seller sued the buyer for the outstanding purchase price. The buyer sought set-off, claiming that it had notified the seller that the sweaters were defective.

The court held that the CISG was applicable and that the seller was entitled to the purchase price under the CISG (articles 1(1)(a) and 53 CISG). The buyer's set-off claim was not granted as set-off claims are prohibited under the Standard Conditions of the German Textile and Clothing Industry, which the parties had made applicable to their contract (article 18 CISG). The set-off issue was to be determined in accordance with German law (article 4(a) CISG).

In addition, the court held that the buyer could not declare the contract avoided (article 49 CISG) or reduce the purchase price (article 50 CISG). The buyer had lost the right to rely on the alleged lack of conformity of the goods as it should have examined the goods within as short a period as the circumstances required (articles 38(1) and 39(1) CISG). The parties had agreed to set this period for examination at two weeks by incorporation of the Standard Conditions and the buyer failed to comply with that agreement.

Moreover, the court stated that application of article 39(1) CISG could not be excluded by operation of article 40 of the CISG, which would have been applicable only if the seller had overlooked obvious defects in the goods that could have been detected through the exercise of ordinary care. In this case, since the buyer had distributed the goods to its own customers, the goods were clearly neither unusable nor unsaleable.