CISG-online 329	
Jurisdiction	Switzerland
Tribunal	Handelsgericht des Kantons Aargau (Commercial Court Canton Aargau)
Date of the decision	26 September 1997
Case no./docket no.	OR.96.00013
Case name	*Solingen cutlery case*

Translation[*] *by Veit Konrad*[**]

[Facts of the case:]

A.

1. 1
Claimant is a limited partnership under German Law (*Kommanditgesellschaft;* KG) seated in Solingen, Germany. Claimant trades cutlery sets of all kinds.

The Respondent 1 is a private limited liability company *(Gesellschaft mit beschränkter Haftung;* GmbH*)* seated in W[…], Switzerland. Its business activities comprise the trading of goods of all kinds, in particular consumer durables, as well as the performance of services related to the use of these goods. The Respondent 2 owned the private firm H[...]-S[...] S. P[...], which was struck off the commercial register *(Handelsregister)* on 6 May 1994. With the establishment of Respondent 1, it took over all assets and liabilities of H[...]-S[...] S. P[...].

Respondent 2 is shareholder *(Gesellschafter)* and managing director *(Geschäftsführer)* of Respondent 1.

2. 2
Since 1991, the firm H[...]-S[...] S. P[...] [Buyer] has purchased supplies of cutlery sets and matching cutlery cases from Claimant [Seller] to retail them within Switzerland. Each of [Buyer's orders specified the installments for delivery of the goods by number, quality and quantity in advance. After its orders had been placed, [Buyer] then used to gradually call up the deliveries.

[*] All translations should be verified by cross-checking against the original text. For purposes of this presentation, Claimant of Germany is referred to as [Seller]; Respondent 1 and Respondent 2 of Switzerland are referred to as [Buyer].

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3. 3
The parties' dispute concerns the delivery of goods which allegedly had been ordered on 10 April and 26 May 1992 but were not called up by [Buyer].

B.

[Seller's position:]

1. 4
On 21 February 1996, [Seller] brought a claim before the Court demanding:

> «(1) Payment of the following amounts by Respondents 1 and 2 [Buyers] under the principle of joint and several liability:
>
> a) Damages to be determined by the Court, at least to the amount of DM (Deutsche Mark) 43,304.55 (equivalent to SFR (Swiss francs) 35,401.45) plus 5% interest since the commencement of the action;
>
> b) DM 24,488.91 (equivalent to SFR 20,019.65) plus 5% interest since commencement of the action;
>
> c) DM 47,970.30 (equivalent to SFR 39,215.70) plus 5% interest since 8 November 1995;
>
> d) SFR 1,463.70 plus 5% interest since commencement of the action.
>
> (2) As concerns the positions under 1, [Seller] seeks judicial confirmation *(Rechtsöffnung)* of the prosecution orders *(Betreibung)* No. 125341 and No. 125342 of the relevant authority, the Prosecution Office *(Betreibungsamt)* of Wettingen.
>
> (3) The costs of the proceedings are to be attributed to [Buyer].»

To justify its claim [Seller] argues that [Buyer]'s orders constitute unambiguous mutually binding contractual obligations between [Seller] and [Buyer] and that [Seller] fulfilled its part of the contract by providing the cutlery sets, which – in compliance with [Buyer]'s orders – had been branded with [Buyer]'s signet and had been partially gold plated. The cutlery cases had been also branded with [Buyer]'s signet. [Seller] alleges that [Buyer] had failed to call up delivery of the goods ordered on 26 May 1992 within the agreed period of time. As the goods had been custom made according to [Buyer]'s specifications, they could not be resold to other customers. [Seller] maintained the ordered goods and held them ready for delivery on [Buyer]'s call. 5

After [Buyer] fell in default of taking delivery of the goods ordered on 10 April 1992 and also failed to call up delivery of the goods ordered on 26 May 1992, [Seller] offered renegotiations, which, however, were implicitly rejected by [Buyer]'s remaining silent. When [Seller] in September 1993, on its own initiative, delivered the goods, [Buyer] refused to accept them and sent the cutlery items back to [Seller]. On 12 October 1993, [Seller] sent [Buyer] its invoices for the cost of the failed delivery, which however have not been paid. In response, [Buyer] in a letter of 7 December 1993 claimed that the sales contract between the parties had been cancelled well before the delivery in question was due to be called up. 6

After Respondent 1 had taken over all assets and liabilities from firm H[...]-S[...] S. P[...], it declared that it would not come up for its liabilities to [Seller]. [Seller] pursued prosecution against both, Respondent 1 and Respondent 2 in October 1994 and October 1995. The Respondents reacted by bringing an inter-pleader action challenging the prosecution *(Rechtsvorschlag)*. Thereafter, [Seller] in a letter dated 27 October 1995 set a final deadline for the Respondents to comply with their contractual obligations. After the expiration of this deadline, [Seller] declared the contract avoided and now claims damages for breach of contract. 7

[Seller] submits that: The sales contract between it and [Buyer] is governed by the CISG. [Buyer]'s failure to take delivery constituted a fundamental breach of contract under CISG provisions. Until the contract had been avoided, [Seller] fulfilled its contractual duty to preserve and maintain the goods ready for delivery. As the cutlery sets and cases had been branded with [Buyer]'s signet, they could not have been resold by [Seller]. In such a case, the principle of full compensation *(Totalreparation)* must apply as constituted by CISG provisions. The custom made goods had to be resold in several substitute transactions highly underpriced. Excluding those items that could not have been resold, [Seller] claims as a minimum amount for compensation 10% of the purchase price, i.e., DM 43,304.55 (equivalent to SFR 35,401.45). As concerns unsold goods, [Seller] claims the full purchase price of DM 24,486.91 (equivalent to SFR 20,019.65). On both positions, [Seller] claims 5% interest for the time of [Buyer]'s default, i.e., DM 47,551.82. [Seller] further calculates DM 418.48 as costs for the failed delivery. [Seller] also seeks to be compensated for its expenses for legal counseling preliminary to the trial in the amount of SFR 1,463.70. 8

[Buyer's position:]

2. 9
In its reply of 3 June 1996, [Buyer] seeks the dismissal of [Seller]'s claim and states that [Seller] should come up for the costs of the proceedings.

[Buyer] submits that: The private firm H[...]-S[...] S. P[...] has done business with [Seller] since July 1991. As an established practice between the parties, cutlery sets usually had been ordered three weeks prior to call, and had been modified to [Buyer]'s requests in the meantime. The correspondences of 10 April and 26 May did not constitute binding orders, but merely unbinding prearrangements of possible future orders. They had been made by [Buyer] with the clear intention to place the actual orders thereafter. In particular, [Buyer]'s letter of 26 May 1992 did not constitute a sales contract for the delivery of cutlery sets and cases by installments. In fact, it did not constitute a binding sales agreement at all. Furthermore, it had never been stipulated that [Seller] would produce the total amount of ordered goods in advance. 10

During a visit of Mr. S[...] P[...] and Mr. M[...] G[...] on 24 April 1992, the parties addressed certain unclear points and particularly discussed the modalities and possible quantities of future deliveries. On occasion of this meeting, [Buyer] pointed out that it had to insist on being exclusively supplied with the cutlery sets by [Seller], as [Buyer] did not want to face competition from warehouses offering the same cutlery. According to [Buyer], [Seller] in its letter dated 24 April, guaranteed [Buyer] the exclusive supply – in particular concerning model 11

580 – and confirmed that a contract about the delivery on call had been concluded between the parties. [Buyer] further maintains that exclusive supply of the cutlery models had been an essential condition to the entire business relations between [Buyer] and [Seller]. Under the concrete circumstances and the established practices between them, [Seller] reasonably had to assume that the negotiations concerned prearrangements of future deliveries and were yet to be subsequently confirmed in binding orders. Only the latter would have constituted obligations for payment. In support of this interpretation, [Buyer] submits that the parties constantly annulled calls for delivery. Hence, the negotiations in question could not be regarded as establishing a binding sales contract, but were merely preliminary arrangements. They did not entail mutual consent to enter into a binding sales contract.

Moreover, [Buyer] argues that, even under the assumption that a binding sales contract had been concluded, [Seller] failed to keep to the guaranteed exclusivity of supply, and thus failed to comply with its contractual obligations. Consequently, [Buyer] was entitled to cancel its order of 26 May 1992, which it did orally. The cancellation was confirmed in November 1992. Hence, [Buyer] claims that a presumed contract between the parties has been avoided in September 1992 at the latest, as [Seller] at that time had broken its guaranteed duty of exclusive supply which constituted a fundamental breach of the presupposed contract. **12**

Furthermore, [Buyer] submits that [Seller] failed to submit any evidence indicating that the goods had already been manufactured before they were to be called up. [Buyer] denies having gotten in default of taking over delivery: The relevant negotiations did not amount to binding orders, and, even if they did, [Seller] did not comply with its duty to ensure exclusive supply. Moreover, only dessert knives had been branded with an «H S» signet. Hence, only this part of the goods was unfit for resale. **13**

[Seller's response:]

3. **14**

In its counter reply of 7 August 1996 [Seller] specifies its claim:

> «The Respondents 1 and 2 are liable to payment of the following amounts under the principle of joint and several liability:
>
> a) Damages to be determined by the Court, at least to the amount of DM 43,304.55 (equivalent to SFR 35,401.45) plus 5% interest since the commencement of this action;
>
> b) DM 24,488.91 (equivalent to SFR 20,019.65) plus 5% interest since commencement of action;
>
> c) DM 47,970.30 (equivalent to SFR 39,215.70) plus 5% interest since 8 November 1995;
>
> d) SFR 1,463.70 plus 5% interest since commencement of action.»
>
> [...]

[Seller] alleges that: The evidence that has been submitted by [Buyer] itself would indicate that [Buyer] used to give binding orders to manufacture the requested cutlery items, which **15**

were later to be called up for delivery. The fact that quality and quantity of the goods had been specified in advance whereas the exact time of delivery had been left open indicates that a sales contract for the delivery of goods by installments has been concluded between the parties. What [Buyer] considers to be an unbinding preliminary arrangement actually amounts to a binding contractual agreement of the named kind. Considering the established practices between the parties, [Seller] was entitled to and in fact had to understand the orders of 2 April and 26 May 1992 as referring to binding sales contracts. If these had been mere unbinding prearrangements, [Buyer] would hardly have felt the need to explicitly cancel them and then, in addition, subsequently confirm the cancellation.

[Seller] submits that it had only guaranteed exclusive supply of model 580, but not models 9000 and 540. **16**

[Seller] did not know that [Buyer]'s financial situation was precarious. The order given on 26 May 1992 comprised goods valued at around DM 380,000.00. With the rightful execution of the contract, this would have resulted in payments of roughly DM 60,000.00 per installment – an amount ranging within the usual sales volume of the parties. [Buyer] would have violated the principle of good faith if its arrangements had overreached its own financial means. Under the agreement of 26 May 1992, [Seller] prepared itself to deliver the first installment by the middle of October 1992. Firm B[...]'s confirmations of the orders indicate, moreover, that the cutlery items requested by [Buyer] had been already manufactured. **17**

[Seller] denies that the order of 26 May 1992 had been cancelled by [Buyer]. According to [Seller], [Buyer] first presupposed the cancellation of the order in its letter of 7 December 1993, after [Buyer] refused acceptance of [Seller]'s delivery. In September 1992, [Seller] still was entirely unaware of any presumed cancellation of the order. On the contrary, [Seller] then was prepared to willingly fulfil its obligations under the sales contract: [Seller] produced and composed the cutlery sets according to [Buyer]'s specifications which deviated considerably from the standard procedure. **18**

[Seller] maintains that: A sales contract for the delivery of goods by installments, respectively, a sale on call arrangement, had been established between the parties. [Buyer] could not substantiate the claimed guarantee of exclusive supply. In fact, [Buyer]'s reliance thereon during the court proceedings must be considered doubtful. Even in the event such a guarantee were held to have been given, it can hardly be seen as a primary obligation under the contract *(Hauptpflicht)* whose breach would entitle [Buyer] to declare the contract avoided. **19**

[Buyer's response:]

4. **20**
In its counter reply of 23 September 1996 the [Buyer] holds to its plea to dismiss [Seller]'s claim and to assign to [Seller] the costs of the proceedings

[Buyer] submits that: During the business activities between the parties, orders have been continuously changed and cancelled as an established practice, which apparently had been accepted by [Seller]. Hence, [Seller] at no point of time could have rightfully relied on the assumption that [Buyer]'s prearrangements constituted binding orders. Further, [Seller] still **21**

fails to prove that the relevant cutlery sets had been manufactured in advance. In fact, given that [Buyer] merely made unbinding prearrangements which were continuously subject to modification, [Seller]'s submission that it, in advance, produced cutlery sets valued around DM 400,000.00 remains doubtful. Further, [Seller] fails to substantiate and quantify its claimed additional efforts.

C. **22–26**
[details the procedural steps taken by the Commercial Court]

Reasoning of the Commercial Court:

I. Formal considerations

1. **27**
As [Seller] is seated in Germany and the Respondents 1 and 2 [Buyers] both were domiciled and seated in Switzerland, the business relation between the parties concerns matters of private international law. As a principle thereof, the judge always applies the domestic procedural law of the forum *(lex fori)* (see O. Vogel, *Grundriss des Zivilprozessrechts und des internationalen Zivilprozessrechts der Schweiz* [Textbook on the law of civil procedure and of international civil procedure of Switzerland], 4th ed., Bern 1995, ch. 1 note 87; H.U. Walder, *Einführung in das Internationale Zivilprozessrecht der Schweiz* [Introduction to the law of international civil procedure of Switzerland], Zurich 1989, Par. 1 note 4 and Par. 3 notes 1, 2, and 7). It follows that the Court has to apply the Code of Civil Procedure (*Zivilprozessordnung*; ZPO) of the Canton Aargau as well as the relevant provisions of the Swiss Federal Constitution *(Bundesverfassung)*, of the Lugano Convention on jurisdiction and the enforcement and enforcement judgments (Lugano Convention) and of the European Convention of Human Rights (*Europäische Menschenrechtskonvention*; EMRK).

2. **28**
All three parties to the proceedings have been listed in a commercial register:

[Seller] is listed as a limited partnership (*Kommanditgesellschaft*; KG) under German law at the commercial register of the local court *(Amtsgericht*) of S[…]. Respondent 1 is listed as a limited liability company (*Gesellschaft mit beschränkter Haftung;* GmbH) under Swiss law seated in W[…] in the commercial register of the Canton of Aargau.

Respondent 2 was the owner of the private firm H[...]-S[...] S. P[...], which had been listed in the commercial register of Aargau until 6 May 1992. Today he is shareholder *(Gesellschafter)* and managing director *(Geschäftsführer)* of Respondent 1.

The amounts at issue in [Seller]'s claim meet the requirements for an appeal to a federal court as stated in Art. 46 of the Swiss Federal Federal Courts Organisation Act (*Bundesgesetz über die Organisation der Bundesrechtspflege;* OG). The subject matter of the claim relates to the business enterprise managed by Respondent 1. This establishes the Commercial Court of Aargau as the competent venue for the case under Art. 112(1) of the Swiss Act concerning Private

International Law (*Internationales Privatrechtsgesetz*; IPRG), Art. 2 and Art. 53 of the Lugano Convention, and § 26 and § 404(1)(a) of the Code of Civil Procedure of the Canton Aargau.

3. **29**
The subsequent insolvency proceedings did not affect the legal personhood and the judicial standing of Respondent 1, just as the staying of these proceedings due to lack of estate capital did not imply any acknowledgement of presumed debts on the side of the Respondents. Hence the proceedings before the Court are to be continued (see *Schweizerische Juristen-zeitung* (1984), p. 132 et seq.).

4. **30–31**
[...]

5. **32**
The business relations between the parties must be considered an international contract for the sale of goods. As Germany (since 1 January 1991) and Switzerland (since 1 March 1991; SR.0221.211.1) are Contracting States of the Convention (Art. 1(1) CISG) and the parties did not exclude its application [Art. 6 CISG], the contract is governed by the CISG. Art. 102 of the Swiss Act concerning Private International Law explicitly states that in cases like this, international conventions such as the CISG shall prevail over the domestic Swiss Law of Obligations (*Schweizerisches Obligationenrecht; OR*) (see Keller/Siehr, *Kaufrecht* [Treatise on Swiss Sales Law], 3rd ed., Zurich 1995, p. 178).

To the extent no solutions are provided for in the CISG, the rules of the Swiss Act concerning Private International Law shall apply (Herber in Schlechtriem (ed.), *Kommentar zum Einheitlichen UN-Kaufrecht* [Commentary on the CISG], Munich 1990, Art. 4 WKR note 6; Siehr in Honsell (ed.), *Kommentar zum UN-Kaufrecht* [Commentary on the CISG], Berlin, Heidelberg, New York, 1996, Art. 4 WKR notes 1 and 4 et seq.). Art. 118 of the Swiss Act concerning Private International Law refers to the Hague Convention of 15 June 1955 on the law applicable to international sales of goods (SR.0221.211.4). **33**

6. **34**
[...]

II. Considerations on the merits of the case

A. Role of Respondents 1 and 2 as parties to the court proceedings

[...] **35–37**

B. Conclusion of the Contract

1. **38**
The dispute between the parties concerns the question whether the fax sent on 26 May 1992 constitutes a binding order within a sales contract for the delivery of goods by installments or whether, on the other hand, it is to be seen as a mere unbinding preliminary arrangement

concerning possible future orders. According to Art. 4 CISG, the Convention governs the formation of a sales contract and the rights and obligations of the seller and the buyer arising from such an agreement. Hence the matter at issue is to be decided by CISG provisions, which as stated in Art. 7 CISG, are to be interpreted autonomously in their own right. Art. 8(1) CISG declares that within the scope of the Convention, statements made by and other conduct of a party are to be interpreted according to his intent where the other party knew or could not have been unaware what that intent was.

2.

a) **39**
A binding sales contract under the CISG is concluded by acceptance of a bindingly made offer (see Art. 14(1) CISG; Schlechtriem, *loc. cit.*, Art. 14 WKR note 4). A proposal for concluding a contract addressed to one or more specific persons constitutes an offer if it is sufficiently definite and indicates the intention of the offeror to be bound in case of acceptance (Art. 14(1) CISG).

b) **40**
In its fax dated 26 May 1992, [Buyer] asked for exactly specified cutlery sets. [Buyer] provided [Seller] with the exact quantity of goods to be delivered and with a rough time for delivery. [Buyer] explicitly asked for confirmation of its «order» – in particular, concerning the delivery dates. The contents and the exact wording of the fax unambiguously indicate that a binding order rather than an unbinding prearrangement has been given.

c) **41**
In its responding fax of 12 June 1992, [Seller] referred to [Buyer]'s order of 26 May 1992. [Seller] confirmed to [Buyer] that the current price rates per item would apply and that delivery would take place on the requested dates.

3. **42**
The faxes constitute a binding sales contract under Art. 14(1) CISG: [Buyer]'s fax requests an «order for delivery on call» concerning exact quantities of variously specified cutlery sets and cases which were to be delivered within periods of time agreed upon in advance. In its response, [Seller] accepted [Buyer]'s offer.

43 The parties' written agreement did not regulate all essential points of the transaction: The applicable price rates, for instance, had only been confirmed in a telephone conversation between the parties. However, considering the correspondence in its entirety, it must be concluded that each of the mutual proposals has been made with the clear intent to bind oneself to the given statement *(Geschäftswille)*. [Buyer]'s later submission in these proceedings that its statement had to be seen as an unbinding prearrangement concerning possible future orders cannot be substantiated. [Buyer] itself did not deny that on occasion of a meeting with [Seller] on 24 April 1992 in S. the issue of delayed deliveries had been addressed and to help resolve this problem, it had been agreed to roughly determine the quantities and dates for future deliveries in advance. [Buyer] also admitted that relying on the fax dated 26 May 1992 («order on call»), [Seller] was entitled to make preparations for its first delivery of 150 «model 540» cutlery sets due in October 1992 right after receiving the document. Moreover, it must

be concluded that a subsequent cancellation would not have been necessary if the proposal in question was not to be regarded as a binding order in the first place.

4. 44
Concerning the order of 10 April 1992, part of the purchase price due is still in dispute between the parties. Yet, for this particular transaction, [Buyer] explicitly acknowledged that it constituted a binding order on [Buyer]'s side. As [Seller] has accepted the order, the conclusion of a binding contract for these goods can be unquestionably assumed.

5. 45
As [Seller] accepted two binding orders of [Buyer], [Seller] was entitled to place an order for the requested items with [Seller]'s supplier, firm B[…].

C. Guarantee of exclusive supply

1. 46
In [Buyer]'s response to the claim, [Buyer] claims that [Seller] failed to comply with its guarantee of exclusive supply concerning the whole range of cutlery sets sold. [Seller] replies that exclusive supply has only been guaranteed for model 580.

2. 47
The guaranteed exclusive supply at least for model 580 therefore remains undisputed.

Concerning exclusive supply of model 540, the submissions of the parties deviate in parts: 48
[Buyer] claims that guaranteed exclusive supply extended also to the delivery of model 540 sets. [Seller]'s representative denied this. He submitted that [Seller] only guaranteed that [Seller] itself would not deliver any model 540 sets to Switzerland, but yet also notified [Buyer] that [Seller]'s supplier, firm B[...], on its own account, would sell model 540 cutlery sets to Swiss customers. Notwithstanding further reservations, [Buyer] admitted that this had been the case but insisted on the fact that this information had been given to [Buyer] only subsequent to its orders. This last submission cannot be established beyond doubt: There is no reason why exclusive supply within Switzerland was guaranteed in advance in writing as regarding model 580, but not for model 540. The fact that [Buyer] cannot bring any written evidence concerning model 540 strongly suggests that the parties have not agreed upon on exclusive supply for this model.

3. 49
As [Buyer]'s reply relies upon the presumed scope of the guaranteed exclusive supply, [Buyer] bears the burden of proof according to Art. 8 of the Swiss Civil Code *(Zivilgesetzbuch; ZGB*). [Buyer], however, has failed to provide sufficient evidence to support that [Seller] has given a warranty of exclusive supply also for model 540.

4. 50
Originally, witness M[…] G[…] had been called upon to testify on this question. Yet, at the trial, on 21 February 1997 both parties refrained from a summoning of the witness. A subsequent summoning of the witness is not required now either, as it appears that G[…] never did

properly understand the relevant exclusivity agreement and further that he does not even properly remember the whole situation (see his letter of 12 February 1997).

D. Cancellation of orders

1. 51
[Buyer] in its letter of 7 December 1993 claimed that it had cancelled its order orally some time in September 1992 and that it had confirmed this cancellation in writing in November 1992.

2. 52
As concerns the presumed written confirmation: [Buyer]'s reply apparently relies on its fax of 18 November 1992. However, this document only implies that [Buyer] was intending to renegotiate the business relationship with [Seller] «after the remaining 110 sets of cutlery – model 522 – will be sold». The role of these items remains unclear within the proceedings. Undoubtedly, this does not amount to a cancellation (or confirmation thereof) of the whole order. Moreover, the named fax does not bear any record indicating that it had actually been sent to [Seller]. [Seller]'s representative in fact denies that [Buyer] had cancelled its order in November 1992. He claims that [Seller] has never been sent certain relevant attached documents and that he therefore first became aware of [Buyer]'s plan to cancel its order when he received [Buyer]'s letter sent on 7 December 1993.

3. 53
In its letter dated 7 December 1993, [Buyer] refers to three invoices for deliveries (on 10 April 1992, on 26 May 1992 and [Seller]'s failed self-initiated delivery), which [Seller] had sent [Buyer] on 12 October 1993. It can hardly be assumed that [Seller] would have sent these invoices, if [Seller] and [Buyer] had bindingly agreed upon the cancellation of the orders one year before.

4. 54
As [Buyer]'s reply relies on the claimed cancellation, [Buyer] bears the burden of proof following Art. 8 of the Swiss Civil Code. Yet, [Buyer] fails to provide sufficient evidence for the presumed facts.

E. Avoidance of the contract

1. 55
In its letter of 27 October 1995, [Seller] set a final deadline for [Buyer] to comply with its contractual duties by 6 November 1995. After this had unsuccessfully expired, [Seller] declared the contract avoided in its letter of 8 November 1995 and notified [Buyer] that [Seller] would try to resell [Buyer]'s items to other customers in order to recover its losses.

2. 56
In its reply, [Buyer] claims that there existed no binding contract between the parties which could possibly have been avoided by [Seller]. Moreover, [Buyer] alleged that [Seller] had failed to comply with its warranty of exclusive supply, and that [Buyer] itself had already cancelled its orders in 1992. Therefore, the contract cannot subsequently be avoided by [Seller].

3. 57
It appears that the only point the parties agree upon is that a binding order for delivery on call does not exist any more.

According to [Buyer], it itself had cancelled the order in fall 1992. Such unilateral cancellation would only be valid under certain circumstances.

According to [Seller], it declared the contract avoided in its letter of 8 November 1995.

The court must evaluate the submitted evidence to decide which version of the facts is to be followed:

F. Evaluation of evidence and legal conclusions

1. 58
The CISG regulates on the conclusion of a sales contract (Art. 14 CISG et seq.) and also provides for the contractual obligations of the parties and for mutual remedies in case of breach of these duties (Art. 30 et seq., Art. 45 et seq., Art. 53 et seq., and Art. 61 et seq. CISG).

2.

a) 59
If the seller does not comply with his contractual or statutory obligations, the buyer may exercise his rights as provided by Art. 45 to Art. 52 CISG and may claim damages under Arts. 74 to 77 CISG (Art. 45(1) and (2) CISG; see Huber in Schlechtriem (ed.), *loc. cit.*, Art. 45 WKR note 2).

Under Art. 49(1)(a) CISG, the buyer is entitled to declare the contract avoided if the seller's failure to perform any of his obligations under the contract or under the Convention amounts to a fundamental breach of contract. A breach of contract committed by one of the parties is fundamental if it results in such detriment to the other party as substantially to deprive him of what he is entitled to expect under the contract, unless the other party in breach did not foresee and a responsible person of the same kind and in the same circumstances would not have foreseen the same result (Art. 25 CISG; Schlechtriem, *loc. cit*, Art. 25 WKR note 9; Reinhart, *UN-Kaufrecht* [Commentary on the CISG], Heidelberg 1990, Art. 25 WKR note 5). The non-compliance with a presupposed contractually obtained guarantee of exclusive supply must be considered a fundamental breach of contract, because it would amount to a substantive detriment to the other party. It cannot merely be seen as violation of a secondary duty. 60

b) 61
The facts which may constitute a fundamental breach of contract have to be submitted and proven by the party whose claim relies on them (Karollus in Honsell (ed.), *loc. cit.*, Art. 25 WKR note 25).

[Buyer] submitted that it itself cancelled its orders in 1992, because [Seller] did not comply with its guarantee to provide [Buyer] with exclusive supply for Switzerland as concerns all deliveries. According to [Buyer], this constituted a fundamental breach of contract. 62

c) 63
As held above (II. C. 2. And 3.), [Buyer] could not submit sufficient evidence indicating that the guaranty of exclusive supply comprised models other than model 580. Under such circumstances, [Buyer] was not entitled to unilaterally cancel its orders. Moreover, a cancellation of the orders with [Seller]'s given consent cannot seriously be assumed.

3.

a) 64
Under Art. 53 CISG, the buyer must pay the price for the goods and take delivery of them as required by the contract and the Convention. If the buyer fails to comply with these duties, the seller may exert his rights under Arts. 62 to 65 CISG (Art. 61 CISG) and claim damages according to Arts. 74 to 77 CISG.

The seller may fix an additional period of time of reasonable length for performance of the buyer's obligations (Art. 63(1) CISG). The seller then may declare the contract avoided if the buyer does not perform his obligation to pay the price or take delivery of the goods within this time (Art. 64(1)(b) CISG). 65

b) 66
In its letter of 18 November 1992, [Buyer] demanded «not to be bothered by anything related to model 522 in future». In its fax dated 18 May 1993, [Buyer] notified [Seller] that it would not take any future deliveries of this model from D[…] B[…]. In fall 1993, [Buyer] refused to accept delivery of the remaining goods from [Seller]'s carrier «DANZAS».

This constitutes a breach of [Buyer]'s obligation under the contract and the Convention to pay the price and take delivery of the goods; i.e., a fundamental breach of contract under Art. 25 CISG. 67

c) 68
[Seller] was entitled to fix an additional period of time for compliance with the contract – as it did in its letter of 27 October 1995 – and to declare the contract avoided after this deadline had unsuccessfully expired.

4.

a) 69
To support its version of the facts, [Buyer] argued that it has been an established custom to modify and cancel orders for future deliveries after they had been given.

b) 70
Customs as provided for in the Convention are usages and individual practices of conduct established between two or more parties within their business relationship (Junge in Schlechtriem (ed.), *loc. cit.*, Art. 9 WKR note 7). Under Art. 9(1) CISG, the parties are bound by their customs, i.e., by any usage to which they have agreed and by any practices which they have established between themselves. Customs in this sense presuppose business relations over a considerable period of time including a number of several individual sales transactions. As a matter of proof, it must be established that similar situations have always been handled

by the parties in the same manner and that this has never given reason for complaint by either party (Melis, in Honsell (ed.), *loc. cit.*, Art. 9 WKR note 4; Junge in Schlechtriem (ed.), *loc. cit.*, Art. 9 WKR note 7).

c) 71
To prove that it was customary to have orders modified and cancelled, [Buyer] submitted its fax of 26 March 1992, wherein [Buyer] asked [Seller] to change a forthcoming delivery of cutlery sets in parts. [Buyer] also submitted a letter by [Seller] dated 24 April 1992 in which a previously made order for delivery on call had been cancelled. Within the proceedings before this court, [Seller]'s representative did not declare anything as towards the claimed subsequent modifications and cancellations of given orders. However, the evidence submitted by [Buyer] proves that changes and cancellations had been made after individual orders had been given and that [Seller], apparently, had accepted this behavior of [Buyer]'s. Hence, it must be considered an established custom between the parties.

However, as found above (II. D. 2.–4.), [Buyer] failed to provide evidence to prove that the parties had actually agreed upon cancellations of made orders. Hence, it remains to be inquired how the unrightful cancellation of orders affects [Seller]'s claim. 72

III. Quantitative issues

A. Legal considerations

1.

a) 73
As has been mentioned above (see F. 3.a), a seller may exert his rights under Art. 61 CISG and Arts. 62 to 65 CISG in the event that the buyer does not perform his obligations under the contract or the Convention.

Namely, the seller may require the buyer to pay the agreed purchase price, take delivery or perform his other obligations under Art. 62 CISG. He may also fix an additional period of time for compliance with the contract (Art. 63 CISG) and may thereafter declare the contract avoided (Art. 64(1)(b) CISG) and claim damages under Art. 74 CISG et seq. Without prejudice to any other of his rights, the seller may specify the goods to be delivered, in case the buyer fails to do so (Art. 65 CISG). 74

b) 75
In its letter of 27 October 1995, [Seller] set [Buyer] an additional period of time to comply with its contractual obligations until 6 November 1995, after [Buyer] had refused to take delivery and had initiated proceedings to suspend the execution of [Seller]'s claim *(Rechtsvorschlag)*. After the fixed deadline had expired, [Seller] declared the contract avoided and notified [Buyer] that [Seller] would seek to recover its losses by re-selling the ordered cutlery items to other customers. In doing so, [Seller] relies upon provisions of Art. 61, Art. 64(1)(b), and Art. 75 CISG.

2. 76
When the seller has resold the goods in a substitute transaction, he may recover the difference between the contract price and the price in the substitute transaction as well as any further damages recoverable under Art. 74 (Art. 75 CISG). This extends to all losses due to the breach of contract, including losses of profit, suffered by the other party as a consequence of the breach (Art. 74 CISG; Stoll in Schlechtriem (ed.), *loc. cit.*, Art. 75 WKR note 10 et seq.).

3. 77
A seller, seeking damages under Art. 75 CISG, bears the burden of proof for all facts his claim relies upon. In particular, the seller must substantiate that he actually has resold the goods within a substitute transaction in an appropriate manner and within an appropriate period of time after the contract had been avoided (Schönle in Honsell (ed.), *loc. cit.*, Art. 75 WKR note 26).

B. Scope of the [Seller]'s claim

[Seller]'s claim covers the following positions: 78

- Capitalized interest on defaulted payment as concerns the amount asked for in [Seller]'s three invoices (i.e., purchase price plus transport costs) since 12 October 1993 until 8 November 1995 plus transport costs of DM 418.48: DM 47,925.44 plus interest;

- Recovery for damages: losses resulting from the resale within the substitute transaction (DM 43,261.00) as well as losses due to the fact that not all ordered cutlery items could be resold (DM 24,488.91), plus interest on both amounts;

- Costs of preliminary legal counseling: SFR 1,463.70 plus interest.

1. Capitalized interest on defaulted payment plus transport cost:

a) 79
Following Art. 78 CISG, a party is entitled to interest without prejudice to any claim for damages if the other party fails to pay the agreed purchase price or any other sum that is in arrears. Damages under Art. 74 not only embrace losses from the executed substitute transaction but all other losses which arise as a consequence of the other party's breach of contract including damages due to defaulted payment which have occurred before the resale of the goods (Stoll in Schlechtriem (ed.), *loc. cit.*, Art. 75 WKR note 10 in connection with Eberstein in Schlechtriem (ed.), *loc. cit.*, Art. 78 WKR note 78). Unlike Art. 102 of the Swiss Law of Obligations, default under CISG provisions does not require that reminders have been sent to the debtor. Under Art. 78 CISG, a party is in default if he fails to pay the purchase price when due (Eberstein in Schlechtriem (ed.), *loc. cit.*, Art. 78 WKR note 8; Magnus in Honsell (ed.), *loc. cit.*, Art. 78 WKR note 8 et seq.).

The three invoices sent by [Seller] on 12 October 1993 indicate that payment had been due «immediately after the bill has been received». Adding three days for posting entitles [Seller] to interest since 15 October 1993. 80

b) 81
Art. 78 CISG does not regulate the applicable interest rate for money in arrears. Hence, the interest rate is determined by the applicable Swiss provisions of private international law. Art. 118 of the Swiss Act concerning Private International Law refers to the Hague Convention of 15 June 1955 (SR.0.221.211.4), whose Art. 3(1) holds the law of the seller's habitual residence to apply. As [Seller]'s habitual residence is in Germany, German law determines the interest rate that shall apply to [Seller]'s claim. Given that both parties qualify under §§ 1 and 4 of the German Commercial Code (*Handelsgesetzbuch; HGB*), the applicable interest rate is determined as 5% by § 352 of the German Commercial Code (analogous to Art. 104(1) of the Swiss Law of Obligations).

c) 82
Damages recoverable under Art. 74 CISG comprise the cost of failed delivery (Reinhart, *loc. cit.*, Art. 78 WKR note 2). The latter amount to DM 418.48 due to a bill of firm D[…] dated 17 September 1993. This amount became due when [Buyer] received [Seller]'s invoice of 12 October 1993. Taking into account three additional days for posting, [Seller] would have been entitled to interest for defaulted payment since 15 October 1993, however, following its own claim (§ 75(2) of the Code of Civil Procedure of the Canton Aargau, interest is to be awarded from 8 November 1995 onwards.

d) 83
[Seller] declared the contract avoided when the fixed additional deadline for performance expired on 6 November 1995. Until this date, both parties had been bound by their obligations under the contract, i.e., [Buyer] owed payment of the contract price plus interest for being in arrears (Stoll in Schlechtriem (ed.), *loc. cit.*, Art. 75 WKR note 5). Hence, [Buyer] must pay 5% interest on DM 47,925.44 as the overdue purchase price from 15 October 1993 until 6 November 1995. This means a capitalized interest (assuming a financial year of 360 days, i.e., 742 days) of DM 47,194.60 (equivalent to SFR 38,581.60 assuming an exchange rate factor of 0.8175). The applied exchange rate has not been questioned by [Buyer].

e) 84
Compound interest on this capitalized interest, claimed by [Seller] for the period since 8 November 1995, cannot be awarded: Both § 289 of the German Civil Code *(Bürgerliches Gesetzbuch; BGB)* as well as Art. 105(3) of the Swiss Law of Obligations preclude awards of compound interest.

f) 85
Following [Seller]'s claim, to the transport cost of firm D[…] (see III. B. 1.c) must be added the capitalized interest for defaulted payment. This amounts to a total sum of DM 47,613.08 (equivalent to SFR 38,923.70).

2. Losses arising from substitute resale

a) 86
Due to resale of ordered goods within substitute transactions, [Seller] during the proceedings reduced the claimed amount to DM 43,261.35 (equivalent to SFR 35,366.15).

To substantiate the claimed losses, [Seller] submits that as the ordered cutlery sets had been modified according to [Buyer]'s specifications, it is self-evident that they had to be resold under price. [Seller] leaves it to the Court to quantify and determine the losses, which [Seller] should be entitled to recover, as a precise estimate thereof would mean a disproportionate effort to him. In any event, [Seller] presumes the suffered losses to be at least 10% of the originally agreed purchase price. This minimum hardly covers the additional efforts [Seller] had to take to resell the cutlery items. To precisely estimate its damage, [Seller] asks for a judicially initiated expertise to quantify its losses. **87**

T[…] K[…], [Seller]'s managing director submitted within the proceedings that the cutlery sets ordered consisted of 50 atypical parts and 72 standard parts. The latter could be sold en bloc excluding 12 knife blades of each set, which had been branded with [Buyer]'s signet. The remaining 50 parts units had to be dispatched and recomposed. The 60-parts standard units (72 parts minus 12 knife blades) had to be recomposed and packed as well. Every recomposing is likely to cause scratches on the cutlery, which means further devaluation. Hence, [Seller] points out that its claimed 10% of the contract price means an absolute minimum. It does not reflect the real devaluation and effort to be expected. **88**

[Seller] suffered considerable losses form [Buyer]'s refusal and sending back of [Seller]'s delivery: In order to be able to resell the goods, [Seller] had to sort out the 50 atypical parts of each cutlery set, recompose them to new units. [Seller] further had to sort out the 12 modified knives from the remaining 72 parts. The remaining 60 standard parts had to be completed with 12 new unmodified knives, packed in new cases or alternatively were added to other units. Additionally [Seller] had to take considerable effort from the substitute transactions (i.e., sending of samples, negotiation of offers, preliminary negotiations, delivery, etc). **89**

Damages recoverable under Art. 74 CISG, besides losses resulting from the substitute resale, include any losses caused by the other party's breach of contract (Stoll in Schlechtriem (ed.), *loc. cit.*, Art. 75 WKR note 10). A majority of the judges assumes that it is impossible to exactly estimate and quantify [Seller]'s efforts. Based on the court's own experience, it considers the claimed damage of 10% of the purchase price as substantiated. Accordingly, [Seller] is entitled to DM 43,261.35 (equivalent to SFR 35,366.15). **90**

b) **91**
A minority of the judges holds that [Seller]'s claim should be dismissed as far as it concerns damages resulting from the resale of the cutlery items because, according to them, [Seller] did not sufficiently substantiate losses it claimed to have suffered in the substitute transaction: Although [Seller] in his first plaint note had offered to provide the receipts of the resale, he never actually submitted such evidence. The mere offer of evidence cannot satisfy the procedural standards applicable to this trial. It was not even indicated for a judge of this court to remind [Seller] to submit the evidence. This falls within the responsibility of [Seller]'s legal representative. [Seller]'s request for an expertise to estimate the losses [Seller] actually suffered was to be dismissed as well, as an expertise must not be used to unduly amend a hitherto unsubstantiated claim by introducing new facts into the proceedings. The request is further to be dismissed under Art. 42(2) of the Swiss Law of Obligations, as [Seller] was apparently

well capable to substantiate and quantify the claimed losses itself, by actually providing the evidence it had itself offered.

3.

a) **92**
[Seller] alleges that it was unable to resell those knives, which had been branded with [Buyer]'s signet. [Buyer] does not question this in particular, however, [Buyer] doubts whether all the cutlery parts had been actually produced in advance at that time. The receipt of the manufacturer, firm B[...], dated 4 June 1992 clearly indicates that 2,500 knives and 2,500 dessert knives, to be branded with [Buyer]'s signet, had been ordered by [Seller]. [Seller]'s representative was further able to prove that the items had actually been produced in advance.

b) **93**
[Seller] claims damages of DM 24,488.91 as the presupposed purchase price for the knives. [Buyer] argues that as the fish sets, the spoon, and the forks had not been modified, damages could only possibly amount to DM 14,299.20. [Buyer] did not disclose to the Court how it calculated this amount. However, in a letter of 25 January sent to [Buyer]'s representative, [Seller] specified that 840 dessert knives, 804 knives, fish sets, Mocca spoons, serving spoons, and carving forks remained unsold. But, undisputedly, only the knives and the dessert knives have been branded with [Buyer]'s signet. The price for these particular items, according to [Seller]'s letter, was DM 14,2999.20. As to this amount, [Seller] is to be awarded damages, to which Respondent 1 and Respondent 2 are liable under the principle of joint and several liability.

c) **94**
As concerns the remainder, [Seller] eventually managed to resell the cutlery. However, [Seller] claims compensation for its additional efforts. These efforts amount to DM 10,189.71 as the difference of 24,488.91 and DM 14,299.20. Following the majority of the judges [Seller] is entitled to claim 10% of this amount, because [Seller]'s efforts concerning the resale of these items are comparable to the effort [Seller] had to take in the above mentioned substitute transactions (see III. B. 2.a). [Seller] is therefore entitled to DM 1,019.00 as damages. Pursuant to the minority's opinion, [Seller] should not be awarded such damages as it failed to sufficiently substantiate its claimed losses.

d) **95**
[Seller] is further entitled to 5% interest on the total amount of DM 58,579.55 (DM 43,261.35 plus DM 14,299.20 plus DM 1,019.00) (Art. 78 CISG) since 21 February 1996 when [Seller]'s claim became pending.

4.

a) **96**
Under Art. 74 CISG, [Seller] is entitled to damages including lost profits. [Seller] can also recover the cost of preliminary legal counseling (Reinhart, *loc. cit.*, Art. 74 WKR, note 2).

b) 97
Due to the bill of [Seller]'s lawyer of 26 September 1995, [Seller]'s expenses for legal advice preliminary to the proceedings amount to SFR 1,463.70.

c) 98
Compensation for costs of the legal expertise became due after [Seller]'s plaint note, including the claim for these expenses, had been delivered to [Buyer] on 23 April 1996. The delivery of the plaint note implicitly entailed a reminder on those payments. Hence [Buyer] since this date was in arrears and has to pay interest.

5. 99
[Seller]'s claim is justified concerning the following positions:

- DM 47,613.08 (equivalent to SFR 38,923.70) plus 5% interest since 8 November 1995;
- DM 58,579.55 (DM 43,261.35 plus DM 14,299.20 plus DM 1,019.00) plus 5% interest since 21 February 1996;
- SFR 1,463.70 plus 5% interest since 23 April 1996.

Hence, [Seller] is entitled to SFR 88,276.20 plus interest (i.e., a large part of [Seller]'s originally claimed SFR 96,100.50; see § 16 of the Code of Civil Procedure of the Canton Aargau. Under the minority opinion, [Seller]'s claim would be justified only to a smaller part. 100

6. 101
[Seller] further seeks confirmation *(Rechtsöffnung)* of the pursued prosecution orders No. 125341 and No. 125342 as far as it concerns the rightfully claimed positions. As the claim had been brought before the court within one year's time (Art. 88(2) of the Swiss SchKG), [Seller]'s claim can be admitted as far as it concerns the amounts mentioned in the bills of 12 October 1993. However, the costs of preliminary legal counseling have not been included in the prosecution orders.

IV. Decision on costs of the procedure

[...] 102–103

Judgment

1. 104
[Seller]'s claim is justified in most parts. Respondents 1 and 2 are jointly and severally liable to pay the following amounts:

a) DM 47,613.08 (equivalent to SFR 83,923.70) plus 5% interest on DM 418.48 (equivalent to SFR 342.10) since 8 November 1995;

b) DM 58,579.55 (equivalent to SFR 47,888.80) plus 5% interest since 21 February 1996;

c) SFR 1,463.70 plus 5% interest since 23 April 1996.

2.
As regards the prosecution orders No. 125341 and 125342 of 12 October 1995 [Buyer]'s suspending appeals *(Rechtsvorschläge)* concerning SFR 38,923.70 plus 5% interest on SFR 342.10 since 8 November 1995 as well as SFR 47,888.80 plus 5% interest since 21 February 1996 are set aside. [Seller] is hereby granted definite confirmation *(Rechtsöffnung)* of the prosecution [Seller] sought.

[...]