

Case 275: CISG 25; 45(1)(b); 47(1); 49(1)(a); 49(1)(b); 51(1); 58(1); 71(1); 78

Germany: Oberlandesgericht Düsseldorf; 6 U 87/96

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An Italian manufacturer, plaintiff, sold shoes to a German buyer, defendant, but failed to deliver the agreed quantity. The manufacturer claimed partial payment. The buyer sought set-off with damages arising from the non-performance and, secondly, claimed the right to suspend payment until delivery of the outstanding quantity of shoes.

The court allowed the manufacturer's claim (article 51(1) CISG). It stated that the buyer had no right to declare the contract avoided, a right that was essential to a damage claim. The prerequisite for declaring a contract avoided under article 49(1) of the CISG is either a fundamental breach of contract or non-delivery within the additional period of time fixed. It held that partial delivery did not lead to a fundamental breach of contract (article 49(1)(a) CISG). Non-delivery on the agreed date of performance will amount to a fundamental breach of contract only if the buyer has a special interest in delivery on time by which the seller can foresee that the buyer would prefer non-delivery instead of late performance (for example, in the case of seasonal merchandise) (article 25 article 47(1) of the CISG. As the buyer failed to prove that it had fixed an additional period of time for delivery, it could not declare the contract avoided under article 49(1)(b) of the CISG.

Since the seller had made partial performance, partial payment was due under the first clause of article 58(1) of the CISG. Therefore, the buyer was not entitled to suspend partial payment with regard to the outstanding delivery under the second clause of article 58(1) or article 71(1) of the CISG. The seller was entitled to interest according to article 78 of the CISG, and, using the rules of private international law, the court applied Italian law to determine the rate of interest.