CISG-online 385	
Jurisdiction	Germany
Tribunal	Oberlandesgericht Düsseldorf (Court of Appeal Düsseldorf)
Date of the decision	24 April 1997
Case no./docket no.	6 U 87/96
Case name	*Calzaturificio Piceno di Roberto Catinari & Uvaldo Raccosta v. Vivace Mode GmbH*

Translation[*] *by Julian Waiblinger*[**]

Reasons for the decision:

The appeal is admissible. On the merits, however, it is successful only in respect of a part of the interest claim. As for the rest, the appeal is not legally justified. 1

As a result, the Plaintiff [seller] is entitled to claim payment of the asserted amount of 13,373,397 Italian Lira [LIT] along with the individual interest mentioned in the operative part of the judgment.

I. 2
The [seller] is entitled to the asserted principal claim amounting to 13,373,397 LIT according to Art. 53 CISG as the purchase price for 241 pairs of shoes which were delivered by the [seller] as agreed and which were subject of the invoices of 3 February 1995, 14 February 1995 and 3 March 1995.

1. 3
The provisions of the United Nations Convention on the International Sale of Goods of 11 April 1980 (hereinafter «Sales Convention» or «CISG») are applicable to the contract of sale regarding the above-mentioned deliveries of goods (*German Federal Gazette* (1998), Part II, pp. 588 et seq.) The places of business of the parties are in Italy and Germany, thus in different Contracting States to the Sales Convention (Art. 1(1)(a), Art. 100(2) CISG). The Convention entered into force in Italy on 1 January 1988 (compare Martiny, in: *Münchener Kommentar zum BGB* [Commentary on the German Civil Code], 2nd ed., Appendix II to Art. 28 EGBGB para. 2). In the Federal Republic of Germany, the Convention took effect on 1 January 1991, on the basis of a respective ratification statute (*German Federal Gazette* (1990), Part II, p. 1477).

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

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2. 4
On account of Art. 53 CISG which is therefore applicable, the [buyer] owes the [seller] the purchase price for the shoes which the [buyer] got from the [seller] and which were subject of the above-mentioned invoices.

According to the undisputed agreement between the parties as to the time for payment, the purchase price to be paid for these deliveries of goods became due 60 days after the above-mentioned invoices were issued.

II. 5
The [seller]'s claim amounting to 13,373,397 LIT has not expired due to the [buyer]'s statement of set-off regarding an alleged damage claim, exceeding the principal claim, for an alleged delay of the delivery of a further 234 pairs of shoes.

1. 6
According to Art. 32(1) No. 4 EGBGB, the law governing contractual obligations is, *inter alia*, decisive for the various ways of discharge of an obligation. Consequently, it is also decisive in respect of the right to set-off, the effect of which has to be assessed according to the governing law of the principal claim against which the right to set-off is being exercised (cf. German Supreme Court, *Entscheidungen des Bundesgerichtshofs in Zivilsachen* vol. 38, 254, 256; German Supreme Court, *Neue Juristische Wochenschrift* (1994), 1413, 1416; Court of Appeal Hamm, *Recht der Internationalen Wirtschaft* (1995), 55; Heldrich, in Palandt (ed.), *BGB* [Commentary on the German Civil Code], 56th ed., Art. 32 EGBGB para. 6 with further citations; Martiny, *loc. cit.*, Art. 32 EGBGB para. 37 with further citations). The authoritative law is the law applicable to the asserted claim. Consequently, the Sales Convention is primarily applicable and, in so far as it does not provide a regulation, the applicable law according to the general provisions under German international private law.

Since the Sales Convention does not contain provisions governing a set-off, the admissibility and the effect of the statement of set-off in the present case consequently does not keep to CISG but to the provisions of the complementary applicable national law (cf. Court of Appeal Koblenz, *Recht der Internationalen Wirtschaft* (1993), 934, 937; Eberstein/Bacher, in: von Caemmerer/Schlechtriem (eds.), *Kommentar zum Einheitlichen UN-Kaufrecht – CISG* [Commentary on the CISG], 2nd ed., Art. 78 para. 19; Piltz, *Internationales Kaufrecht* [International Sales Law], § 2 para. 148). According to German private international law, for lack of a choice of law between the parties according to Art. 27(1) EGBGB, contracts of the nature at issue are governed by the law of the State (Art. 28(1) sentences 1 and 2 EGBGB) in which the party that has to perform the characteristic obligation, has its place of business. As regards contracts of sale, the characteristic obligation is generally performed by the party which delivers the object of sale (cf. Court of Appeal Cologne, *Recht der Internationalen Wirtschaft* (1993), 144; Court of Appeal Karlsruhe, *Neue Juristische Wochenschrift – Rechtsprechungs-Report* (1993), 568; Court of Appeal Hamm, *Recht der Internationalen Wirtschaft* 1995, 54; Court of Appeal Düsseldorf, 7 July 1994 – 6 U 61/93; Court of Appeal Düsseldorf, 19 December 1996 – 6 U 115/95; Martiny, *loc. cit.,* Art. 28 EGBGB para. 108 with further citations; Heldrich, *loc. cit.*, Art. 28 EGBGB para. 8 with further citations; Piltz, *Neue Juristische Wochenschrift* (1989), 617). Since in 7

the case at hand, the [seller] had to deliver shoes from the [seller]'s place of business in Italy, Italian law is applicable.

2. 8
The [buyer]'s statement of set-off which therefore has to be assessed according to Art. 1241 et seq. Codice civile, did not cause the extinction of the claim, since the [buyer] was not entitled to the alleged damage claim.

The [buyer] claims damages from the [seller] for partial non-performance of the obligations to deliver according to the contract of sale of 24 October 1994. Thereby, the [buyer] not only demands mere damages for delay in addition to the claim for performance. The [buyer] also claims action for damages due to non-performance for allegedly lost profits amounting to 34,074,606 LIT, expressly combining this compensation claim with the alleged right to terminate the contract. The only legal basis for the damage claim with which the [buyer] intends to set-off can be found in Art. 45(1)(b), Art. 49(1) and Art. 81, 74–77 CISG. However, the requirements for that cause of action are not met. 9

The termination of contract and, as a consequence, the compensation for non-performance can only be claimed according to Art. 49(1) CISG if the non-performance of the [seller]'s obligations either constitutes a fundamental breach of contract (Art. 49(1)(a) CISG) or, in case of non- delivery, if the seller does not deliver the goods within the fixed final deadline according to Art. 47(1) CISG or rather gives notice not to deliver within the prescribed time limit (Art. 49(1)(b) CISG). In the case at hand, these requirements are not met. 10

a. 11
In the present case, a delayed delivery occurred during the settlement of the contract of 24 October 1994 as the [seller] did not carry out the partial delivery of 243 pairs of shoes at the designated date of delivery in November 1994 respectively in 1995.

This non-compliance with the delivery deadline, however, does not constitute a fundamental breach of contract. According to Art. 25 CISG, a fundamental breach can only be established where the violation caused a detriment to the affected party, namely where it essentially misses what could be expected ac- cording to the contract. A fundamental breach in this sense, however, can generally not be seen in the mere non-compliance with a date of delivery. In so far, it is required that the precise compliance with the delivery deadline is of particular interest to the buyer, namely that the buyer prefers not to receive delivery at all than receiving delayed delivery and that this is apparent for the seller at the conclusion of contract (cf. Huber, in: von Caemmerer/Schlechtriem, *loc. cit.*, Art. 49 CISG para. 5; Schlechtriem, in: von Caemmerer/Schlechtriem, *loc. cit.*, Art. 25 CISG para. 18). The particular importance of the date of delivery can result from the contract itself, as for example in the case of a transaction where time is of the essence, as well as from the circumstances, e.g. in the case of delivery of seasonal items (cf. Huber, in: von Caemmerer/Schlechtriem, *loc. cit.*; Enderlein/Maskow/Strohbach, *Internationales Kaufrecht* [International Sales Law], Art. 25 CISG para. 3.4; Kappus, *Neue Juristische Wochenschrift* (1994), 985). 12

In the case at issue, it is obvious that the parties did not agree upon a transaction where time is of the essence. Neither was the subject of the contract of sale a seasonal item, the delivery 13

of which would be of no interest to the [buyer] after the end of season. This can clearly be inferred from the fact that the [buyer] did accept the first partial delivery under the contract of sale even four months after the originally designated date of delivery and reminded the [seller] of the finally lacking delivery even a fairly long time after that date.

b. 14
Since a fundamental breach of contract cannot be established, the [buyer] could only claim damages for non-performance as a consequence of an avoidance of the contract according to Art. 49(1)(b) CISG, if the [buyer] had fixed a final deadline according to Art. 47(1) CISG in respect of the lacking partial delivery. Such an extension of delay must contain a precise request for performance that is combined with the fixing of a specific deadline. A reminder without fixing a deadline, however, does not suffice (cf. Huber, in: von Caemmerer/Schlechtriem, *loc. cit.*, Art. 47 CISG paras. 6, 7).

The [buyer] failed to submit conclusively that such a fixing of a final deadline had taken place. 15
In the litigation at issue, the [buyer] cannot refer to the allegations put forward at first instance, namely that the [buyer] had criticized the delayed delivery only in December 1994 and had fixed the end of January as a final deadline to perform. This reminder combined with a fixing of a deadline can only have referred to the part of the goods which was to be delivered already in November 1994 according to the contractual stipulations. Partial de- liveries, though, as owed by the [seller] for November 1994 were delivered in the meantime and accepted as such by the [buyer]. In absence of further submissions from the [buyer], it has to be assumed that the delivery of goods which was not carried out, concerned the shoes which were to be delivered only in January 1995 according to the contractual agreement. The [buyer], however, did not submit that also in that respect the [buyer] was warned, combined with the fixing of a specific deadline. In that respect, the [buyer] merely submitted that in January, February and March 1995 «reminders (to the [seller]) by telephone and fixings of a deadline» took place permanently. The [buyer] does not submit when this should have happened, especially which specific deadline was fixed. An understandable and conclusive submission regarding the fixing of a deadline within the meaning of Art. 47(1) CISG was not established.

Even in consideration of the [buyer]'s remark regarding the correspondence of March and the 16
fact that the [buyer] had reminded the [seller] «with the fixing of a final deadline to deliver promptly» again by telephone in March, this interpretation is not to be altered. A specific fixing of a deadline cannot be inferred from the correspondence put forward by the [buyer], regardless of whether these writings can be attributed to the [buyer] at all. The alleged «fixing of a deadline to deliver promptly» by telephone, however, does not suffice as it merely constitutes an urgent request to perform but does not contain a sufficiently specific time limit (cf. Huber, in: von Caemmerer/Schlechtriem, *loc. cit.*, Art. 47 CISG para. 6 with further citations; Herber/Czerwenka, *Internationales Kaufrecht* [International Sales Law], 1st edition, Art. 47 CISG para. 3).

c. 17
Moreover, the fixing of a deadline was not dispensable for the fact that the [seller] would have refused to fulfil the remaining obligations under the contract of sale. Such a refusal to fulfil an

obligation which constituted a fundamental breach of contract within the meaning of Art. 49(1)(a) CISG (cf. Huber, in: von Caemmerer/Schlechtriem, *loc. cit.*, Art. 49 CISG para. 6 with further citations), is not at hand. In fact, the [buyer] alleged before the Court of Appeal that the [seller] finally declared the inability to deliver. This, however, cannot be considered as a substantiated submission of a refusal to fulfil an obligation. Apart from the fact that the [buyer] does not plead when, where and how the alleged statement of the [seller] should have occurred, no circumstances can be inferred from the [buyer]'s submissions which would conclusively suggest that the [seller] had seriously and finally refused to fulfil the remaining obligations under the contract. Only such a refusal could render the fixing of a final deadline dispensable (cf. Court of Appeal Düsseldorf, *Neue Juristische Wochenschrift – Rechtsprechungs-Report* (1994), 506; Huber, in: von Caemmerer/Schlechtriem, *loc. cit.*, Art. 49 CISG para. 6; Herber/Czerwenka, *loc. cit.*, Art. 72 CISG para. 3).

III. **18**
Not even the [buyer]'s alternatively announced set-off with allegedly assigned claims from company M.B. GmbH & Co. KG under an existing agency contract between the assignor and the [seller] does succeed in the end. Since the international jurisdiction of the German courts is in so far lacking, the adjudicative senate cannot rule in respect of the set-off and the counter- claims arising from the above-mentioned legal relationship which are inconnex with the asserted claim.

Since a decision on the set-off claims can establish a *res judicata* according to § 322(2) German Civil Code, the German courts can only rule in respect of the counterclaims as far as they have the international jurisdiction (cf. German Supreme Court, *Neue Juristische Wochenschrift* (1993), 2753 with further citations; Geimer, in: Zöller (ed.), *ZPO* [Commentary on the German Civil Code], IZPR, para. 89; Geimer, *Praxis des Internationalen Privat- und Verfahrensrechts* (1986), 208, 211–2). The international jurisdiction of the German courts in respect of the asserted counterclaims could only be established if the German courts had also the international jurisdiction over the assertion of these claims by way of taking legal proceedings independently (cf. German Supreme Court, *Neue Juristische Wochenschrift* (1993), 2753 with further citations; Geimer, *loc. cit.*, IZPR, para. 89; Martiny, *loc. cit.*, Art. 32 EGBGB paras. 40, 41; Geimer, *Praxis des Internationalen Privat- und Verfahrensrechts* (1986), 208, 211). This, however, is not the case. **19**

The international jurisdiction in this case keeps to the regulations of the 1968 Brussels Convention on Jurisdiction and Enforcement of Judgments in Civil and Commercial Matters which entered into force between Germany and Italy on 1 February 1973 (compare *German Federal Gazette* (1973), Part II, p. 60). However, the jurisdiction of German courts regarding the claims under the agency contract cannot be inferred from that Convention. **20**

1. **21**
According to Art. 2(1) Brussels Convention, Italian Courts would have the jurisdiction as the [seller] has the place of business in Italy.

2. 22
Neither does Art. 5 No. 1 Brussels Convention provide a differing jurisdiction of the German Courts.

[...] 23

Accordingly, the [seller]'s objection concerning the jurisdiction put forward for the first time at second instance may be considered. 24

IV. 25
Finally, the defense of the [buyer] has to remain unsuccessful in so far as the [buyer], for the first time at second instance, claims a right of retention regarding the claim for performance under the contract of sale in respect of the delivery of the remaining 243 pairs of shoes. As a result, the [buyer] is not entitled to such a right of retention.

1. 26
In particular, the [buyer] cannot plead the rights of retention laid down in Art. 58(1) and Art. 71(1) CISG. On the basis of these rights of retention, merely the performance can be retained which is mutual with the performance owed by the creditor. However, they do not entitle the debtor – as intended here by the [buyer] – to retain a different performance than the one which is mutual with the performance to be demanded of the debtor. A differing judgment is not necessary in so far as both the obligation to deliver owed by the [seller] and the [buyer]'s obligation to pay the purchase price derive from the same contract of sale. Since the [seller] legitimately provided partial deliveries which – as follows from Art. 51(1) and Arts. 46, 50 CISG – the [buyer] was not entitled to repudiate, the contract of sale as a whole was split up; thus, the purchase money claim for the delivered goods put forward by way of claim is mutual only with respect to the already carried out obligation to deliver for which the [buyer] has not yet provided counter-performance.

2. 27
Finally, the [buyer] cannot even claim a right of retention stemming from another legal reason. It can be left open whether or not it is possible to fall back on a general right of retention besides the rights of retention governed by the Sales Convention and which legal system this could be inferred from, should the occasion arise. The assertion of such a general right of retention can be ruled out anyway since the [buyer]'s claim for delivery of the 243 pairs of shoes is not due at present. Certainly, the continued existence of the contract of sale can be assumed, even though the [buyer] explained that the [buyer] wanted to cancel the contract. Yet, since the [buyer]'s declaration of avoidance of the contract was – as explained above – not justified and the [seller] neither agreed upon the declaration of avoidance nor declared the termination of contract on the [seller]'s behalf, the contract of sale continues to exist automatically. Though, the conduct of the buyer resulted in the obligation to perform in advance in respect of the purchase price. The Plaintiff, as the seller of the goods must have the possibility to demand payment of the purchase price from the [buyer] without carrying out the delivery beforehand, even if the purchase price falls due under the contract or according to the law (Art. 58(1) CISG) only after the seller has carried out the delivery. This follows, if not

only from the principal of good faith (Art. 7(1) CISG), at any rate from an extended interpretation of Art. 80 CISG. In that respect, it has to be considered that the defendant as the buyer caused the temporary non-performance of the [seller]'s obligation to deliver in so far as the [buyer] unjustifiably refused performance of the contract of sale (cf. Huber, in: von Caemmerer/Schlechtriem, *loc. cit.*, Art. 49 CISG para. 70). After the [buyer]'s declaration of avoidance of the contract, it could not be expected of the [seller] to carry out the delivery in that situation, even though the seller had to expect definitely that the [buyer] would refuse the taking delivery and especially would not pay the purchase price on account of the unjustified declaration of avoidance of the contract. Therefore, the seller is entitled to postpone the performance of the obligation to deliver in the meanwhile until the [buyer] has paid the due purchase price before. Due to this obligation to perform in advance, the [buyer] cannot retain further obligations to perform in respect of the [buyer]'s claim for performance as regards the delivery of the remaining 243 pairs of shoes which is not due at present.

V. **28**
According to Art. 78 CISG and Art. 1282, 1284(1) Codice civile, the [seller] is entitled to the interest claim amounting to 10% awarded in the operative part of the judgment.

According to Art. 78 CISG, the interest claim generally exists where a party fails to pay the due purchase-money claim. Neither a reminder nor fault within the meaning of the German law is required therefore (cf. Eberstein/Bacher, in: von Caemmerer/Schlechtriem, *loc. cit.*, Art. 78 CISG para. 9; Herber/Czerwenka, *loc. cit.*, Art. 78 CISG para. 3). On the contrary, interest must be paid on the purchase price from the maturity date onward, whereas the maturity depends on the agreement of the parties. Hence, the payment of the purchase price was due 60 days after the relevant submissions of account. Consequently, the [buyer] must pay the interest according to Art. 78 CISG from that point on. **29**

The Sales Convention, however, does not regulate the amount of the interest rate. It depends on the relevant national law which is to be determined according to the general conflict-of-laws rules (cf. Court of Appeal Düsseldorf, *Neue Juristische Wochenschrift – Rechtsprechungs-Report* (1994), 506, 507; Court of Appeal Frankfurt am Main, *Neue Juristische Wochenschrift* (1994), 1013, 1014; Eberstein/Bacher, in: von Caemmerer/Schlechtriem, *loc. cit.*, Art. 78 CISG para. 21 with further citations; Herber/Czerwenka, *loc. cit.*, Art. 78 CISG para. 6). As laid down above, Italian law is applicable to the contract of sale at hand according to Art. 28(1) sentence 1 EGBGB and Art. 28(2) EGBGB since the [seller] provided the performance which is characteristic for the contract and has the place of business in Italy. Under Italian law, the statutory interest rate at present amounts to 10% according to Arts. 1282, 1284 Codice civile (cf. also Court of Appeal Frankfurt am Main, *Der Betrieb* (1994), 472). **30**

The [seller], however, is not entitled to a further interest claim in form of the damage claim according to Art. 74 CISG. Apart from all the other requirements, such a damage claim is to be ruled out as the [seller] did not put forward and prove to utilize a bank credit amounting to the claim for which the [seller] demands interest exceeding the statutory interest rate. The certificate from Bank N.A. which was submitted by the [seller] at first instance, merely gives **31**

information on the demanded credit rates. However, the certificate does not contain any information whatsoever as to whether the [buyer] actually makes use of a credit exceeding the principal claim.