

This dispute concerned the requirements needed to establish a practice between the parties and the allocation of the burden of proof for an alleged agreement on the place of delivery.

The defendant, the owner of a pizzeria in Germany, ordered 90 stacks of pizza cartons from the plaintiff, an Italian manufacturer of pizza-cartons. The defendant paid the price in advance. When the cartons were delivered in July 1998, the defendant noticed they had been damaged by the carrier and notified the plaintiff. On two previous such occasions, the plaintiff had credited to the defendant the amount of the damages. On this occasion however, no amount was credited.

In October 1998, the defendant again ordered pizza cartons from the plaintiff, which arrived undamaged. The defendant refused to pay the price purporting to set-off the plaintiff's claim for the contract price of the October shipment against his alleged counterclaim arising from the faulty July shipment. He based this counterclaim on the practices that had been established between the parties. Alternatively, he asserted that as the parties had agreed upon Duisburg as the place of delivery, the risk of damage passed only at Duisburg, so that plaintiff remained responsible for the damage caused by the carrier.

The Court ordered the defendant to pay the price for the October shipment plus interest from November 1998.

As far as the question of set-off is concerned, which is not covered by the CISG, the Court applied Italian law, which was applicable under the German conflict-of-law rules.

The Court then dismissed the defendant's first argument, stating that the crediting of the amount of damages on two occasions did generally not suffice to establish a practice between the parties under article 9(1) CISG.

The defendant's second argument was also dismissed. The Court held that, under article 31, the buyer was under an obligation to prove an alleged agreement on the place of delivery. Since the defendant had failed to produce any evidence of such an agreement, the general rule set out in article 31(a) applied. Under article 31(a), the seller (plaintiff) was only obliged to hand over the goods to the carrier. According to article 67(1), the risk of damage passed to the buyer (defendant) at the time that the goods were handed over to the carrier. Therefore, the seller could not be held responsible for the subsequent damage caused by the carrier.