CISG-online 659	
Jurisdiction	Germany
Tribunal	Amtsgericht Duisburg (Local Court Duisburg)
Date of the decision	13 April 2000
Case no./docket no.	49 C 502/00
Case name	*Pizza boxes case*

Translation[*] *by Ruth M. Janal*[**]

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Facts of the Case:

The [seller] demands payment of a delivery of pizza cardboard boxes made in October 1998.

The [seller] is an association under Italian law and has its place of business in Italy. The [buyer] is an Italian citizen with place of business in Duisburg, Germany, who trades with packaging. The [seller] has been delivering pizza cardboard boxes to the [buyer] for quite some time.

In the course of their business relationship, the [seller] twice granted the [buyer] credits to its account because the [buyer] had complained that it had received damaged boxes. This was standard business practice between the parties before July 1998.

In July 1998 the [buyer] ordered pizza boxes and paid the invoice in advance, trusting on the previous business practice. The goods were delivered through a carrier on 29 July 1998. Attached was a delivery note which was then signed by an employee of the [buyer]. Upon delivery 90 packages of 200 boxes each were damaged. They were no longer fit for the packing of pizza. The value of the damaged goods was 3,012.- DM [Deutsche Mark], and the damage was entered on the delivery note. The goods were not placed at the disposal of the [seller].

After delivery, the [buyer] charged the carrier DM 3,012.-. The invoice was not paid and passed on to the [seller]. The [seller] did not credit the [buyer]'s account.

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

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In the fall of 1998, the [buyer] again ordered boxes from the [seller], which were delivered through a carrier. On 29 October 1998, the [seller] issued an invoice for this delivery in the amount of 2,336,250 Italian Lira. Under the heading «times of payment», the invoice contained a line with the note «29/11/98».

The [seller] sent the [buyer] a reminder and unsuccessfully asked for payment of the invoice until 3 February 1999.

After initially demanding payment of interest starting from 30 October 1998, the [seller] has partly withdrawn its claim. [Seller] now requests the Court to order the [buyer] to pay it 2,336,250.- Lira with interest of 10% from 30 November 1998.

The [buyer] requests the Court to dismiss the claim.

The [buyer] submits that the parties had agreed that the goods were to be handed over to [buyer] in Duisburg [Germany]. [Buyer] is of the opinion that it is entitled to payment of 3,012.- DM resulting from the delivery of damaged goods on 29 July 1998. [Buyer] declares a set-off with this claim. [Buyer] reasons that when the [seller] had credited the amounts of previous damaged boxes, it had acknowledged that it was liable for the damage.

Reasoning of the Court:

The claim is predominantly justified.

I.
The [seller] is entitled to payment of the purchase price of 2,336,250.- Lira under Art. 53 CISG.

1.
The United Nations Convention on Contracts for the International Sale of Goods (CISG) applies to the contract according to Art. 3(2) EGBGB and Art. 1(1) CISG. The parties have their places of business in different Contracting States. Place of business in the meaning of Art. 1 and 10 CISG is the actual place of business (*cf.* Staudinger/Magnus, UN-Kaufrecht, 13th ed. 1999, Art. 10 n. 4). The [seller]'s only place of business is in Italy, the [buyer]'s place of business in Germany.

Both Germany and Italy were Contracting States of the CISG in the decisive period of time. Neither State has declared a reservation under Art. 95 CISG. The parties concluded a contract for the sale of pizza cardboard boxes. They did not agree to exclude the Convention. The goods are not for personal, family or household use, thus the Convention is also not excluded under Art. 2 CISG.

2.
The formation of contract followed Art. 14 et seq. CISG. The [seller] performed its delivery obligation. The [buyer] received the goods ordered.

3.
The claim for payment of the purchase price is due. November 29, 1998 was fixed as the date of payment in the meaning of Art. 58(1) CISG in the [seller]'s invoice of 29 October 1998. The invoice names this date under the heading «time of payment» and thus fixes a due date.

II.
The claim did not vanish by way of set-off by the [buyer]. The [buyer] does not possess a claim against the [seller] which would entitle it to a set-off under Art. 1241 Cc.

1.
Italian law applies to the question of set-off.

The CISG does not contain explicit rules concerning the set-off of claims. While it is accepted that a set-off with reciprocal claims resulting out of the same sales contract is possible (*cf.* Staudinger-Magnus, UN-Kaufrecht, Art. 4 n. 47), this is not the case in the present dispute. The [buyer] declares set-off with claims resulting from a different – earlier – sales contract between the parties.

According to Art. 7(2) CISG, questions concerning matters governed by the Convention which are not expressly settled in it and which cannot be settled in conformity with the general principles on which it is based, are to be settled in conformity with the law applicable by virtue of the rules of private international law. Following Art. 32(1) no. 4 EGBGB in connection with Art. 28(1) and (2) EGBGB, this leads to the application of Italian law. The parties did not agree on a choice of law clause as possible under Art. 27 EGBGB. The contract has its closest connection to Italy, as the [seller] has its main place of business in Italy and formed the contract as part of its commercial activity. The [seller] is the party whose performance characterizes the sales contract (*cf.* Palandt-Heldrich, 59th ed. 2000, Art. 28 EGBGB n. 8), as it is its obligation to hand over the goods and transfer the title.

2.
Under Art. 1241 Cc, a set-off requires a valid claim of the [buyer] against the [seller]. This is also true for the legal offset under Art. 1243(1) Cc («*compensazione legale*», see for the specific prerequisites Kindler, Einführung in das italienische Recht, 1993, § 14 n. 15) and for the judicial offset under Art. 1243(2) Cc («*compensazione giudiziale*», *cf.* Kindler, § 14 n. 16).

3.
The [buyer] does not possess any claims against the [seller] from the delivery made on 29 July 1998. Just as the delivery of October 1998 (*supra*, I.1.), this delivery is also governed by the United Nations Convention on Contracts for the International Sale of Goods (CISG).

a)
The [buyer] is not entitled to a credit in the amount of DM 3,012.- following the previous standard practice between the parties (Art. 9(1) CISG). The practice does not establish usage in the meaning of this provision, which would require a conduct regularly observed between the parties and thus requiring a certain duration and frequency (cf. Staudinger-Magnus, Art. 9 n. 12). Such duration and frequency does not exist where only two previous deliveries have been handled in that manner. The absolute number is too low. A different assessment

would only be possible if damages had only occurred in three or four deliveries – or if the business relationship had commenced only recently. This, however, has not been submitted by the [buyer], who bears the burden of proving the asserted usage between the parties (*cf.* Staudinger-Magnus, Art. 9 n. 33).

b)
The [buyer] is also not entitled to damages for breach of contract under Art. 45(1)(b) and Art. 74 CISG. The [seller] did not breach its contractual obligations. In this context, it is irrelevant whether the [buyer] received soiled and torn boxes with the delivery of 29 July 1998. Irrespective of this matter, the [seller] fulfilled its obligation to deliver the goods under Art. 31(a) CISG.

bb)
The sales contract required carriage of the goods.

aaa)
The parties did not derogate from Art. 31(a) CISG by agreeing that the [seller] was bound to deliver the goods at the [buyer]'s place of business. The [buyer] neither submits, nor is it evident that a trade usage or business practice in the meaning of Art. 9 CISG existed between the parties to that effect. The [seller] was not obliged to hand over the delivery of 29 July 1998 to the [buyer] in Duisburg. The [buyer] failed to prove its submission that the parties formed an agreement leading to such an obligation. The documents presented do not show that the parties included any further conditions in the contract which forms the basis of the delivery of 29 July 1998. A «free to the door»-remark or any other diverging arrangement has neither been submitted, nor is it apparent. In particular the delivery note presented does not contain any indication for a deviating agreement. The [buyer] does not offer any other means of proof.

The onus of proof is on the [buyer] as the party who contends that the parties derogated from the Convention by agreeing on a different place of performance (*cf*. Staudinger-Magnus, Art. 31 n. 33). According to Art. 31(c) CISG, the [seller]'s place of business is the place of performances in case the parties have not formed an agreement to the opposite.

The wording of Art. 31 does not lead to a shift in the burden of proof. The stipulation that «if the seller is not bound to deliver the goods at any particular place, its obligation to deliver consists» in the acts referred to in paras. (a)–(c) is simply a clarification.

This interpretation finds its first footing in the wording of the provision itself. The use of the word «particular» shows that the [buyer] bears the onus of submission and proof that a place for the handing over of the goods was agreed on.

[*Translator's note: The German translation of Art. 31 CISG uses the word* «*bestimmt*»*, which has not only the meaning of* «*particular*»*, but can also be translated as* «*agreed*» *or* «*determined*»*.*]

This is further supported by the structure of Art. 31 CISG. The paragraphs (a) and (b) provide the rules for special instances, followed by the general rule in paragraph (c). It would be

inconsistent with this structure to apply paragraph (c) only if the seller proves that a particular place of performance has not been defined.

Finally the interpretation corresponds to the systematic position of Art. 31 CISG and its corresponding purpose. The provision applies to cases in which the parties failed to form a contractual agreement (*cf.* Staudinger-Magnus, Art. 31 CISG n. 1). Keeping this in mind, it would be unreasonable if the provision at the same time put the burden of proof on the seller. If that was the case, Art. 31 CISG would deviate from the general rule that each party bears the onus of proof for the provisions which are favorable to [seller] and which it therefore relies upon. In the case of an agreement stipulating the [buyer]'s place of business as the place of performance, the favored party is the buyer. Were Art. 31 CISG to be interpreted as putting the burden of proof on the seller, the provision would effectively restrict its own sphere of application. That is not the purpose of Art. 31 CISG.

bbb)
The [seller] submits that – since the contract involved the carriage of the goods – it was obliged under Art. 31(a) CISG to hand the goods over to the first carrier for transmission to the buyer. The Court bases its decision on the [seller]'s submission, as the [buyer] failed to prove a diverging agreement. The [seller] did hand over the goods to the first carrier for transmission to the buyer. This is undisputed between the parties and obvious from the fact that the [buyer] received the cardboard boxes.

cc)
It is of no importance whether the boxes were of the quality and description required by the contract (Art. 35 CISG). The [seller]'s liability for any such non-conformity is excluded under Art. 36 CISG.

aaa)
According to Art. 36 CSIG the [seller] is not liable for a non-conformity of the goods which was formed after the passing of risk. Under Art. 67 CISG, the risk passed to the [buyer] when the [seller] handed over the goods to the first carrier for transmission to the [buyer].

Art. 67 is applicable. The [seller] was not obliged under the contract to hand over the goods at any particular place. Again the [buyer] fails to prove the asserted agreement between the parties that the seller was to hand over the goods in Duisburg. And again it bears the onus of proof. The negative wording of Art. 67 does not establish a duty to prove an agreement according to which a particular place for the handing over of the goods was not agreed upon. The provision solely intends to clarify. The systematics of the CISG shows that the Convention regularly assumes a carriage of the goods. The Court thus refers to the explanation given above (under bb)).

The fact that Art. 69(1) CISG provides a general rule for cases not within Art. 67 and 68 CISG does not lead to a change in the interpretation. This provision does not put the place of performance at the buyer's place of business. Art. 69 CISG applies to cases in which the goods are placed at the disposal of the buyer at the seller's place of business (*cf.* Staudinger-Magnus, Art. 69 n. 7). The Court follows this opinion because Art. 69(2) CISG contains a special rule for cases in which the goods are not taken over by the buyer at the seller's place of business.

This corresponds with the conception of the CISG as a Convention for the international sale of goods: as a matter of fact such cross-border transactions regularly involve the carriage of goods over long distances. This regularly includes the assignment of a carrier.

The [seller] handed over the goods to the first carrier under Art. 67 CISG. In this matter, the Court refers to its explanations under bb), as the word «carrier» has the same meaning within Art. 67 CISG as under Art. 31 CISG (Staudinger-Magnus, Art. 6 n. 11).

The passing of risk is not hindered by Art. 67(2) CISG. The shipping documents clearly identified the goods to the contract between the parties. The delivery note identifies the [buyer] as the recipient; the [seller]'s place of business is named as the place of takeover; the goods are clearly characterized through description, packaging, quantity of packages and gross weight.

bbb)
The exception of Art. 36(2) CISG does not apply. The [buyer] neither submits nor is there any indication that the [seller] committed a breach of contract.

c)
The [buyer] is not entitled to claim restitution of the purchase price following an avoidance of contract under Art. 45(1)(a) CISG in connection with Art. 2033 Cc. It is irrelevant whether the act of sending back the invoice can be interpreted as a declaration of avoidance. The [seller] did not commit a fundamental breach of contract as it complied with all of its contractual obligations.

4.
A set-off by way of mutual agreement under Art. 1252 Cc does not exist, as the [seller] objects to the set-off.

III.
The [buyer] is not discharged from its obligation to pay the price under Art. 66 CISG. The goods have been paid after the risk passed to the [buyer] and the damage is not due to an act or omission of the [seller]. For the passing of risk, see the explanations above (II.3.b) cc)).

IV.
The [seller] is also entitled to interest of 5% from 30 November 1998. According to Art. 78 CISG interest accrues from the time the payment is due, in the present case on 29 November 1998.

The rate of interest is stipulated in Art. 1284(1) Cc. The CISG is silent on this matter. The Court leaves open the question of whether the relevant rate of interest is to be determined under the law of the creditor's place of business (*cf*. LG Stuttgart, RIW 1989, 984) or under the law of the debtor's place of business (*cf*. OLG Frankfurt, NJW 1991, 3102). Both approaches lead to the application of Italian national law, as the [seller] has its place of business in Italy and the rules of German private international law (Art. 28(2) EGBGB) lead to the application of Italian law.

V.
With respect to the further requests made by the [seller] the claim is unfounded. The [seller] is not entitled to a higher interest rate. Art. 74 CISG does not lead to a higher rate of interest as the [seller] does not submit that it suffered a respective damage.