

CISG-online 672	
Jurisdiction	Germany
Tribunal	Oberlandesgericht Rostock (Court of Appeal Rostock)
Date of the decision	25 September 2002
Case no./docket no.	6 U 126/00
Case name	<i>Seafood and meat case</i>

*Translation * by Ruth M. Janal ***

*Translation edited by Veit Konrad ****

By way of written proceedings under § 128(2) ZPO [*] and following the expiration of the period allowed for the filing of briefs until 30 August 2002, the 6th Civil Senate of the Court of Appeals Rostock on 25 September 2002 hands down the following

DECISION

Following the [buyer]'s appeal, the decision of the District Court [Landgericht] Rostock of 17 April 2000 - docket no. 10 O 421/99 - is partially revised and (taking into account the partial decision of this Court of 10 October 2001) is entirely rendered as follows:

The [buyer] is ordered to pay to the [seller] 20,839.49 € [Euro] (= 40,758.47 DM [Deutsche Mark]), plus 5% interest on

2,495.88 € (= 4,881.51 DM) from 9 February 1998,

352.79 € (= 690.00 DM) from 20 February 1998,

* All translations should be verified by cross-checking against the original text. For purposes of this presentation, the Plaintiff-Appellee of France is referred to as [seller] and the Defendant-Appellant of Germany is referred to as [buyer]. Amounts in the currency of the Eurocurrency Area (Euro) are indicated as [€]; amounts in the currency of Germany (Deutsche Mark) are indicated as [DM]

Translator's note on other abbreviations: HGB = Handelsgesetzbuch [German Commercial Code]; ZPO = Zivilprozessordnung [German Code on Civil Procedure].

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255.85 € (= 500.40 DM) from 20 February 1998,
 212.29 € (= 415.20 DM) from 20 February 1998,
 2,262.47 € (= 4,425.00 DM) from 21 May 1998,
 187.75 € (= 367.20 DM) from 25 June 1998,
 1,747.08 € (= 3,417.00 DM) from 1 July 1998,
 195.11 € (= 381.60 DM) from 25 June 1998,
 281.42 € (= 550.40 DM) from 25 June 1998,
 904.99 € (= 1,770.00 DM) from 25 June 1998,
 435.20 € (= 851.18 DM) from 25 June 1998,
 375.19 € (= 733.80 DM) from 21 July 1998,
 257.28 € (= 503.20 DM) from 23 July 1998,
 452.49 € (= 885.00 DM) from 16 July 1998,
 1,055.31 € (= 2,064.00 DM) from 13 August 1998,
 2,323.48 € (= 4,544.34 DM) from 27 August 1998,
 4,396.21 € (= 8,598.24 DM) from 27 August 1998, and
 2,648.70 € (= 5,180.40 DM) from 19 October 1998.

The remainder of the claim and the appeal are dismissed. The [buyer] bears the cost of the appellate proceedings. The decision is preliminarily enforceable. (The Court refrains from giving the facts of the case following § 543(1) ZPO [*] in its former version).

REASONS FOR THE DECISION

The appeal is to be admitted up to the amount stated above. Considering the list of individual claims in dispute that the District Court's decision was based upon and taking into account the partial decision of 10 October 2001 and the partial withdrawal of the claim in the meantime, the Court had to decide partially or entirely with respect to the following items:

Item	Invoiced amount	Queried by the appeal	Not queried by the appeal
5	4,425.00 DM	4,425.00 DM	-

6	367.20 DM	367.20 DM	-
8	381.60 DM	63.60 DM	318.00 DM
10	1,770.00 DM	1,770.00 DM	-
11	851.18 DM	851.18 DM	-
15	885.00 DM	885.00 DM	-
16	2,196.00 DM	958.50 DM	1,237.50 DM
17	4,544.34 DM	4,544.34 DM	-
18	8,598.24 DM	8,598.24 DM	-

The [seller] is not entitled to a claim for payment of 67.49 € (= 132.- DM) against the [buyer] under item no. 16. For the justification, the Court refers to the explanations in the partial decision of 10 October 2001. Nevertheless, the tenor (operative part) of that judgment is incomplete; the appeal was dismissed with respect to an amount of 422.58 € (= 826.50 DM), however, the District Court's decision was not modified as to the dismissal of the claim with respect to the above-mentioned remaining amount.

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Under Art. 53 CISG, the [seller] possesses a claim for payment against the [buyer] of 10,995.11 € (= 21,504.56 DM) regarding items 5, 6, 8, 10, 11, 15, 17 and 18. The parties entered into sales contracts for the delivery of the ordered goods that oblige the [buyer] to pay the purchase price. Regarding the applicability of the United Nations Convention on Contracts for the International Sale of Goods (CISG), the Court also refers to the explanations in the partial decision of 10 October 2001.

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The [buyer] cannot object to the [seller]'s claims for payment of the purchase price on the basis of the delivery of the wrong kind of goods, too high a quantity of the goods or non-conforming goods. [Buyer] lost the right to rely on the alleged lack of conformity of the goods under Art. 39(1) CISG. Therefore, it must be assumed that [buyer] accepted the goods as properly delivered. The obligation to give notice under the mentioned provision also applies to evident deliveries of quantities too high, that is where the deviation in quantity is apparent from the documents, in particular the invoice. Art. 40 CISG does insofar not apply, because the seller has disclosed the deviation through the statement in the documents. If the buyer takes delivery of the goods or if the buyer fails to give a notice within reasonable time, the purchase price is raised proportionally following Art. 52(2) sent. 2 CISG (cf. v.Caemmerer/Schlechtriem/Schwenzer, Kommentar zum Einheitlichen UN-Kaufrecht, 3rd ed., 2000, Art. 35 n. 8, Art. 39 n. 30).

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The [buyer] did not notify [seller] of deviations from the contractual agreements within reasonable time after [buyer] discovered or ought to have discovered them. The [buyer] was unable to prove its submission that it gave to one of [seller]'s employees notice of the deviation from the agreed qualities of the delivered shrimp (items no. 5, 15, 17 and 18) immediately after the receipt of the goods. The testimony of the [buyer]'s witness K.D. was insofar unproductive. Witness K.D. was able to remember notices of complaint due to a deviation regarding the ordered size and kind of shrimp in connection with the [seller]'s

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shrimp deliveries. However, due to the passing of time the witness was unable to connect such notices with individual deliveries, specified by dates, and was in particular also no longer sure about the frequency of complaints, which she assumed to have been two or three per day. Even if it is concluded that individual notices were in fact given, this would not be sufficient for the dismissal of the claim with respect to individual amounts, as there is no possibility to make a connection between these notices and specific deliveries.

The same applies to the proof of notice of lack of conformity allegedly given immediately after receipt of the goods with respect to items no. 6, 8, 10 and 11. The [buyer] insofar submits that the deliveries deviated in quality and quantity from the content of the orders. These items were delivered to the [buyer] on 24 April 1998, that is, on the same day. Witness K.D. testified that usually after the receipt of several non-conforming deliveries on one day all items in question were queried in one singular complaint call to the [seller]. At the same time, the recollections of witness K.D. regarding the notice of lack of conformity of the deliveries of 24 April 1998 are incomplete or even contradictory. She was not able to remember complaints of the [buyer]'s manager concerning item 6 (octopus) and item 11 (rainbow trout). Regarding item no. 8 (guinea fowl legs) she no longer remembered which person gave the notice of non-conformity on behalf of the [buyer]. However, she assumed that such a notice had been given, because a remark was made on the invoice and the delivery slip; but she stated that she had not looked at those documents since. Regarding item no. 10 (shrimp), she referred to its above-mentioned memories regarding the shrimp deliveries of items no. 5, 15, 17 and 18. Due to the passing of time, the witness was overall not able to assign complaints to the corresponding deliveries.

There are no doubts regarding the credibility of witness K.D., which could be based upon the conduct or the content of her testimony; such doubts in particular do not necessarily result from the personal relations of a witness with one of the parties or of the witness' own interests in the disputed events. The witness stated her memories calmly and impartially and evidently tried to recall the events truthfully. Tendencies to burden or support one party or the other could not be detected. The witness matter-of-factly admitted when she was unable to remember particular details. Her testimony was in itself plausible and conclusive.

The [seller]'s claim for interest on the purchase price -- beginning with the time of delivery -- up to the amount stated above follows from Arts. 59, 78 CISG. The interest rate is determined by §§ 353, 352 HGB [*], as the sale is a commercial transaction for both parties in the meaning of § 343 HGB. Since Art. 78 CISG does not provide for an interest rate, the rate needs to be determined by the national law which finds supplementary application or by the interest level of the country in whose currency the price is to be paid (cf. v.Caemmerer/Schlechtriem/Bacher, op. cit., Art. 78 n. 27, 33); either way, this leads to the application of German law in the present case.

The procedural decisions are based upon §§ 92(2), 269(3), 708 no. 10, 711, 713 ZPO [*]. The appeal on points of law was not admitted, because the prerequisites of § 543(2) ZPO have not been met. The judgment obliges the [buyer] to a payment in the amount of 10,995.11 € (= 21,504.56 DM).

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