CISG-online 709	
Jurisdiction	Germany
Tribunal	Oberlandesgericht Köln (Court of Appeal Cologne)
Date of the decision	14 October 2002
Case no./docket no.	16 U 77/01
Case name	*Designer clothes case*

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REASONS FOR THE DECISION

The appeal is formally unobjectionable and is essentially successful. The claim is, however, not founded because the Defendant [Buyer] effectively made use of its right of avoidance of the contract. 1

[*] All translations should be verified by cross-checking against the original text. For purposes of this translation, the Italian Plaintiff is referred to as [Seller] and the German Defendant is referred to as [Buyer].

Translator's note on abbreviations: BGB = Bürgerliches Gesetzbuch [German Civil Code]; Codice civile = Italian Civil Code; EGBGB Einführungsgesetzbuch zum Bürgerlichen Gesetzbuche [German Code on Private International Law]; IHR Internationales Handelsrecht = [German Law Journal]; IPRax = Praxis des Internationalen Privat- und Verfahrensrechts [German Law Journal]; MDR = Monatsschrift für Deutsches Recht [German Law Journal]; NJW = Neue Juristische Wochenschraift [German Law Journal]; OLG = Oberlandesgericht [German Appellate Court]; TranspR-IHR = Beilage Internationales Handelsrecht zur Zeitschrift Transportrecht [German Law Journal]; ZPO = Zivilprozessordnung [German Code of Civil Procedure].

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The United Nations Convention on Contracts for the International Sale of Goods (CISG) is applicable to the contract for sale of goods between the Italian company F. and the Defendant of Germany -- with the Plaintiff [hereinafter referred to as «Seller»] of Italy by mutual consent a party on the seller's side -- because the parties have their places of business in different States and Italy as well as Germany are Contracting States (Art. 1(1)(a) CISG). 2

The [Seller] has no right to claim payment of the remaining purchase price for the first partial delivery according to Art. 53 CISG. In accordance with Arts. 25, 49(1)(a) CISG, the [Buyer] had the right to avoid the contract, which, by its fax of 17 March 1999, it effectively exercised one day after the delivery of the goods with the consequence that, according to Art. 81(1), sentence one, CISG, [Buyer] is released from its obligation to pay the purchase price. 3

Legally correct, the Landgericht [Court of First Instance] assumes that the avoidance of contract requested by the [Buyer] requires a fundamental breach of contract pursuant to Arts. 25, 49(1)(a) CISG and that it is in so far decisive whether or not it is possible for the buyer to otherwise manufacture or sell the goods in regular business dealings, possibly even with a price reduction, without unreasonable expense, despite the deviation of the goods from the contractually agreed quality or despite another defect. In that respect, the buyer has to submit that, as a consequence of the breaches of contract of the seller, [Buyer] was substantially deprived of what it was entitled to expect under the contract. 4

At the examination, under what circumstances -- in case of missing explicit contractual agreements -- a breach of contract by the seller essentially deprives the buyer of its positive interest, due consideration is also foremost to be had to the tendency of the CISG to restrain the remedy of avoidance of contract in favor of other possible legal remedies, especially reduction of price or compensation for damages (Arts. 50, 45(1)(b) CISG). The remedy of avoidance shall only be available to the seller as the last resort to react to a breach of contract by the other party, which is so fundamental that it essentially deprives it of its positive interest (German Federal Supreme Court [3 April 1996] NJW [*] 1996, 2364 = MDR [*] 1996, 778; Swiss Federal Supreme Court [15 September 2000 (4C.105/2000)], TranspR-IHR [*] 2000, 14; Lurger IHR [*] 2001, 91, 96). Therefore, not only the weight of the defect, but also the preparedness of the seller to cure the defect without unacceptable delay and burden to the buyer is of importance. Even a serious defect is not a fundamental breach of contract if the seller is prepared to replace the goods without unacceptable burden to the buyer (OLG Koblenz [31 January 1997], OLGR 1997, 37; Lurger, id. p. 98; Schlechtriem/Huber, CISG, 3rd ed., § 49 No. 12 et seq.; Staudinger/Magnus, BGB, revision 1999, Art. 49 CISG No. 14 with further references). 5

In that regard, the decision of the Court of First Instance is unobjectionable. The [Seller] reacted immediately to the [Buyer]'s notice of defects. It could not be concluded from the only generally worded submission of the [Buyer] having the obligation to present the case to the court and bearing the burden of proof (cf. in that regard German Federal Supreme Court id.; Lurger id. p. 92), that the complaints, as far as they portrayed a defect of the goods, could not have been remedied within a reasonable time by way of replacement by other sizes or by way of another solution to the problems offered by the [Buyer]. 6

Now, in the appellate proceedings, the situation is, however, a different one. In the submitted reasons for appeal and in the course of the proceedings, the [Buyer] presented in detail, under reference to a private expert opinion of expert W. obtained by it, that the first partial delivery of the goods was mostly cut badly and was and is unmarketable as high-quality women's outer garments. Pursuant to § 138(1) ZPO [*], the [Seller] was obliged to plead with regard to the new statement of facts based amongst others on W's expert opinion. The [Seller] does not deny that the items of clothing examined by the expert are those from the first partial delivery, which had remained with the [Buyer] after the partial return of the goods. The [Seller] also does not question the correctness of the findings of the expert, especially regarding the fit of the goods. The [Seller] submitted that the ready-made clothing sizes of the two women, with whom the expert demonstrated the fit, had «obviously» not matched with the sizes of the garments. It cannot understandably be extracted from this submission whether the [Seller] wants to contest, that -- as the expert has stated -- one woman had the ready-made clothing size 38 and the other size 40, or whether [Seller] wants to contest that -- as is also respectively clearly stated in the expert opinion -- for example, the woman with the size 40 had worn the linen-blazer and the leather coat in exactly that size, especially since prior to the proceedings the [Seller] had already conceded in its letter of 2 April 1999 that, in any case, the fit of the goods partly does not match with the ready-made clothing size, i.e., the fit is too small. As a consequence, that the facts contained in W's expert opinion concerning typical defects which are not explainable with a bold decision of the designer anymore and which are obvious even for a layperson are regarded as conceded according to § 138(3) ZPO [*]. 7

A repudiation of the respective submissions of the [Seller] according to § 538(2) ZPO old version or § 527 ZPO old version is not possible. Undisputed submissions, including the submission conceded according to § 138(3) ZPO, cannot be repudiated, because even at their consideration the dispute remains ripe for judgment and the question of a delay due to the necessity of further clarification of the facts and circumstances is not posed. Furthermore, the [Buyer] can also not be precluded with its submission, because due to reasons which lie in the sphere of the [Seller], the matter had to be adjourned in the hearing of 1 July 2002 and in case of the necessity of further clarification of the facts and circumstances, measures regarding the judicial control of the proceedings would have been possible until the new hearing on 23 September 2002. 8

Such measures were, however, not necessary because the assumption of a fundmental breach of contract is already justified by the multitude of defects regarded as conceded and obvious to a layperson in connection with further undisputed facts. As to the individual models, the following applies: 9

- The leather coat (J20735) has an armhole that is too tight, which even in case this should be based on a decision of the designer leads to the fact that the goods are in breach of contract in the meaning of Art. 35 CISG. This is because a feature of accountrement, which is naturally presupposed in high-quality goods, is not given and the resale possibility is fundamentally impaired. According to all experience of life, a customer will hardly buy a garment, where it has to force itself into the armholes. 10

- The leather-TOP (020738) is so tight in the neckline that it cuts off the air. 11

- The leather-corsage (No. 0 20806), with regard to which the [Seller] already conceded a non-fitting size in size 38 by letter of 2 April 1999, misses 12-14 cm to close it. It is about three sizes too small and therefore corresponds to a child-size in the end. 12

- With the leather wound skirt (D20795), it might be a model-dependent decision of the designer that this skirt, due to a short under godet, unbars widely to the crotch when sitting. But that the hooks bar and that they are so tight that within the shortest time they will tear out and damage the skirt irreparably is merely and simply a mistake relating to handicraft. 13

- The wound skirt made out of silk (D20846) is, according to the evaluation of the private expert W, cut badly with the consequence that the fabric wafts in the area of the seat and the side pocket crumples. That this also leads to an unsaleability of high-quality and accordingly expensive goods is obvious. 14

- The blazer with corsage (J20781) is also three sizes too small and not wearable closed. This model is also cut badly, even if the shoulders, which are too broad in the opinion of the expert, might have been wanted. In any case, the armhole, which is also too tight here, is unacceptable. 15

- The same problems with the hooks as in the case of the leather wound skirt (D20795) exist in the case of the fabric wound skirt (D20811). On top of that, the under godet is about 6 cm shorter, even though in the case of the leather model the under and over godet are of the same length. The model is therefore cut badly, which -- as can be clearly seen on the picture taken by the expert -- has a very unattractive optical effect. 16

- The two trouser-models (A20756 and A20786) are also much too small in their fit and cut so unfavorably that strong transverse pleats form, which is regularly not accepted by customers of high-quality goods. The trouser-model A20756 is additionally cut so tight in the thigh area that it cannot be pulled up to the crotch area and eventually is not useable. 17

Thus, almost all of the delivered goods prove to be unmerchantable in that condition. As this was only the first partial delivery, the [Buyer] was justified in having the apprehension that the same problems would arise with the goods still to be delivered and its trust in the efficiency of the [Seller] could seriously be shaken. In light of the multitude of defects, the [Buyer] did not have to accept the [Seller]'s willingness to remedy the defects as announced by letter of 2 April 2002, especially as this only related to a part of the goods. In this respect, it has also to be regarded that the [Seller] did not mention a certain point of time for the 18

subsequent delivery, but -- apart from two models, where a subsequent delivery was promised without restrictions - only pronounced the intent to «try» to deliver goods in a faultless fit or to find a solution. It was thus uncertain whether it would be possible to receive merchantable goods as soon as possible. In that regard, further consideration is to be had to the fact that all this is about fashion products for the summer season in the high price segment and that, in this market segment, the sale already starts at the beginning of May, when even faultless goods are only saleable with a discount.

Finally, the avoidance of the contract was also effectively declared. It has to be made by a declaration from which it can be deduced, without a doubt, that the buyer does not want to abide by the contract anymore (cf. e.g., Supreme Court of Austria, Vienna IHR [*] 2001, 206). Such a will has been clearly expressed by the declaration of the [Buyer] in its fax of 17 February 1999, which it repeated in the same-worded registered letter of 25 March 1999 and in which it proclaimed, that it puts the delivery «immediately and totally» at the [Seller]'s disposal, that [Buyer] expects the immediate refund of the down payment, and that it will not accept any further goods from the not yet fully performed contract of sale (cf. regarding a similar constellation, German Federal Supreme Court, NJW [*] 1998, 2073). **19**

From the above it also follows that, according to Art. 81(2) CISG, the [Buyer] is entitled to claim restitution of the performances already made on each side. Thus, the [Buyer] can demand return of its down payment minus the price for the two jumpers sold in the amount of 5,887.09 concurrently with the returning of the goods not yet sent back. The cross-action is thus founded with the newly worded request in the proceedings of appeal. **20**

The interest claim of the cross-action is based on Art. 78 CISG. Concerning the amount for which according to the majority of opinions, especially the consistent adjudication of the Appellate Courts, the subsidiary applicable national rules are decisive (cf. e.g., OLG [*] Rostock IPRax [*] 2000, 230; Schlechtriem/Bacher id. Art. 78 Nos. 78 et seq. with further references to the opinions); Italian law is to be applied. The legal relations between the parties are judged by Italian provisions of substantive law. In order to determine the applicable law according to Art. § 28(2) BGB [*], it is decisive for the applicable law, where the party which has to effect the characteristic performance of the contract has its seat at the time of the conclusion of the contract. In case of contracts for the sale of goods for which the obligation to deliver goods is characteristic, this is regularly the seat of the seller (cf. Palandt/Heldrich, BGB [*] 61st edition, Art. 28 EGBGB [*] Nos. 3, 8). **21**

According to Art. 1284(1), sentence one, Codice civile [*] in the version of 1999 in connection with the ministerial decrees of 10 December 1998 and 11 December 2000, the legal interest in Italy amounts to 2.5% for the years 1999 and 2000 and to 3.5% from 2001 on (cf. Kindler in Jahrbuch für italienisches Recht [Yearbook for Italian Law], vol. 14 p. 351). Thus, the exceeding interest claim for the cross-action relying on § 288 BGB in the version valid until 31 December 2001 had to be dismissed. **22**

[...] **23**