

CISG-online 1733

Jurisdiction	Germany
Tribunal	Oberlandesgericht Koblenz (Court of Appeal Koblenz)
Date of the decision	21 November 2007
Case no./docket no.	1 U 486/07
Case name	<i>Italian boots case</i>

Translation by Daniel Nagel***

Judgement

The judgment of the District Court Mainz of 15 February 2007 is changed to:

The [Seller]'s claim is dismissed;

The [Seller] has to bear the costs of the proceedings;

The judgment is provisionally enforceable.

Facts

The present dispute concerns the payment for a delivery of shoes. The [Buyer], who runs a shoe shop in M___, Germany, bought goods from the [Seller], an Italian manufacturer, on a regular basis. The last order concerned the delivery of 319 pairs of boots, brand S, at a price of DM [*] 24,800.00 (= EUR 12,680.04) in total. This order was delivered and invoiced to the [Buyer] between March and September 2001. 1

Starting in July 2001, more and more female customers complained about the boots due to loose seams and soles. The [Buyer] gave specified notice thereof in respect to 36 pairs of 2

* 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] and the Defendant-Appellee of Germany is referred to as [Buyer]. Amounts in the uniform European currency (Euro) are indicated as [EUR]. Amounts in the former currency of Germany (Deutsche Mark) are indicated as [DM].

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

Conversion (Wandelung): former legal term used in the previous version of § 469 BGB [German Civil Code]. This term has been replaced in the course of the modernization of the German law of obligations (Schuldrechtsmodernisierung) in 2002 by a right of rescission.

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boots. For further details, reference is made to the copies of the complaints which are attached to the file (p. 147 et seq.). The [Seller] granted two credit notes in the amount of EUR 426.55 in total. The [Buyer] paid EUR 1,276.00 in respect to the purchase price. The [Seller] claims payment of the remaining purchase price of EUR 10,927.49.

On 12 December 2001, the [Buyer] declared via letter that it would rely on «conversion» [*] in respect to the 154 pairs of boots which were left in its possession and sent them back to the [Seller]. Reference is made to the copy of this letter which is attached to the file (p. 48 et seq.). The [Buyer] alleges that it could not be expected to perform its contractual obligation due to the preceding complaints. 3

Judgement of the Court of First Instance

The Court of First Instance granted a reduction in price of EUR 978.63 in respect to the pairs of boots which had been sent back on the basis of a specified notice of their lack of conformity. Furthermore, the Court held that there was proof that a cheque-payment had been effected by the [Buyer] in the amount of EUR 2,885.02; hence, the [Seller] would be entitled to claim 7,094.34. The District Court held that an avoidance of the contract would not have been possible as only 35 pairs of boots out of 319 had provably shown a lack of conformity. This quota could not justify an avoidance of the contract according to Article 49 CISG.

Position of the Parties in the Appellate Proceedings

Position of the [Buyer]

The [Buyer] appealed against the judgment of the Court of First Instance. It alleges that the amount of defective shoes should be compared to the amount of sold shoes, as it is undisputed that the lack of conformity could only be discovered after a few days of wearing the boots. The quota of 21.2 % would constitute a fundamental breach of contract, wherefore an avoidance of the contract according to Article 49 CISG would be justified. [Buyer] could not have been expected to sell further shoes of this delivery. 4

The [Buyer] does not reiterate its allegations in the appellate proceedings insofar as the [Buyer] purported in the course of the proceedings before the Court of First Instance that it had made further payments (EUR 527.29, EUR 1,276.18 and credit note no 726 in the amount of EUR 161.56). 5

The [Buyer] requests that the judgment of the District Court Mainz of 15 February 2007 be changed and that the [Seller]'s claim be dismissed 6

Position of the [Seller]

The [Seller] requests that the [Buyer]'s appeal be dismissed. 7

It alleges that an avoidance of the contract would not be possible due to a lack of the fixing of an additional period of time, which would be required according to Article 47 CISG. The declarations of conversion of 12 December 2001 and 24 January 2002 would hence be invalid and, 8

in addition, too vague as they did not refer to a specific contract or a specific invoice respectively. Furthermore, the [Buyer] had forfeited its rights as it had failed to declare the avoidance of the contract in timely manner in the sense of Article 49(2) CISG. The declarations of conversion had been effected approximately one year after the first delivery and the [Buyer] had stated that it had received many complaints starting in July 2001. Finally, the 36 pairs of boots which had provably shown a lack of conformity would not justify an avoidance of the contract.

Moreover, the [Seller] alleges that the subject matter of the declarations of conversion had been shoes which belonged to a previous delivery and which had not been included in the invoice which is relevant in the present case. The notice of 2 July 2001 could not refer to the delivery of 27 July 2001 and 31 August 2001 and could thus only refer to the delivery of February 2001. If the list of boots of the declaration of conversion was compared to the latter delivery there would not be a correspondence in respect to the reference numbers. Therefore, the declaration of conversion had not been preceded by the notice.

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The court refrains from further referring to the facts as established by the Court of First Instance or the presentation of changes according to §§ 540 Section 2, 313 a Section 1 Phrase 1 ZPO [*]

Reasoning

The [Buyer]'s appeal is admissible and justified. The [Seller] is not entitled to claim payment of the remaining purchase price. The [Buyer] was entitled to avoid the contract and be released from its obligations according to Article 81 CISG. Therefore, the [Seller] cannot rely on Article 53 CISG.

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According to Article 1(1)(a) CISG, the United Nations Convention on Contracts for the International Sale of Goods has to be applied to the present contractual relationship as the parties have their places of business in Italy and Germany and as both States are Contracting States to this Convention.

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A buyer is entitled to avoid the contract according to Article 49(1)(a) CISG, Article 51(1) and (2) CISG if a fundamental breach of contract is present. A declaration of avoidance is effective only if made by notice to the other party according to Article 26 CISG.

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The [Buyer] has expressed in its letter of 12 December 2001 that it would no longer be willing to maintain the contractual relationship due to the complaints and that it would declare conversion in respect to the remaining pairs of boots which were left in its possession.

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This constitutes a declaration of avoidance in the sense of Article 26 CISG. The declaration has been sufficiently specified as the [Buyer] referred both to the boots by expressly stating the model, the reference number as well as the amount and to the complaints which have been transmitted in advance. It was not necessary to refer to specific delivery notes or invoices as the [Buyer] has both compiled a list of the respective boots and sent the boots back, wherefore there could not have been any doubts in respect to the scale of the declaration of avoidance.

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The [Buyer] is entitled to declare the contract avoided.

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According to Article 49 CISG, a buyer may declare the contract avoided if the failure by the seller to perform any of his obligations under the contract or this Convention amounts to a fundamental breach of contract. A seller *inter alia* has to deliver goods which are of the quality required by the contract according to Article 35(1) CISG. If the parties have not agreed on a certain quality, the goods do conform with the contract if they are fit for the purposes for which goods of the same description would ordinarily be used (Article 35(2)(a) CISG).

The 36 pairs of shoes which have been given specified notice were defective. The glue started to dissolve, the leather was cracked, seams and soles were partially loose and the leather material often was too short. This constitutes - as the Court of First Instance undisputedly held - a lack of conformity, as one should be able to wear a boot at a price of DM 79.00 to DM 89.00 more than once without any loss in quality.

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The [Buyer] was entitled to avoid the contract in its entirety even though only a part of the boots has obviously been defective. In the event that only a part of the goods is defective, an avoidance of the contract in its entirety is only possible if the failure to make delivery in conformity with the contract amounts to a fundamental breach of the contract (Article 51(2) CISG).

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A breach of contract committed by one of the parties is fundamental if it results in such detriment to the other party as substantially to deprive him of what he is entitled to expect under the contract, unless the party in breach did not foresee and a reasonable person of the same kind in the same circumstances would not have foreseen such a result (Article 25 CISG).

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In the present case, the goods were of poor material or were poorly manufactured. The customers of the [Buyer] complained about the boots regularly. From an objective point of view the [Buyer] had to fear that the remaining pairs of boots which had not yet been sold would as well be -- at least partially -- defective. Thus, a so-called latent defect was present in respect to the delivery in its entirety.

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The complaints which had already been received by the [Buyer] supported the fear that there would be a decline in sales, as a lack in quality can lead to a general loss of trust on behalf of one's customers. This particularly applies to the present case as the [Buyer] runs a small shoe shop even if the defective goods only form a small part of its range of goods. In contrast to big low price department store chains, the sale of defective shoes entails a severe loss of face for small shops, as negative experiences are usually spread by word of mouth and thus have an impact which exceeds the actual defect. The [Seller] knew that the goods that had been delivered to the [Buyer] were to be sold to consumers.

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As the [Buyer] cannot be denied the right to satisfy its customers, a delivery which led to 36 complaints constitutes a fundamental breach of contract. No specific quota is necessary in this respect. The crucial fact is that the [Buyer] had to fear further complaints in respect to this delivery. It is irrelevant in this respect which delivery contained the defective boots, as the [Buyer] could not be expected to further sell boots of the brand S due to the preceding complaints. This could only be interpreted differently if there was a considerable difference in

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quality between the deliveries, e.g., due to a change in material or due to the involvement of a new subcontractor. Such circumstances which could deny the latent defectiveness of the remaining boots have not even been alleged by the [Seller]. Hence, a fundamental breach of contract has been present. The [Buyer] was entitled to rely thereon.

According to Article 39 CISG, the buyer loses the right to rely on a lack of conformity of the goods if he does not give notice to the seller specifying the nature of the lack of conformity within a reasonable time after he has discovered it or ought to have discovered it.

There is no doubt in the present case that the [Buyer] fulfilled these requirements as -- according to the facts as established by the Court of First Instance, which have not been contested -- the [Buyer] sent the defective boots back to the [Seller] or its authorized commercial agents, respectively, immediately after receipt of the complaints. The [Buyer] has submitted copies of delivery notes which prove that the boots have been sent back to the [Seller] in short intervals (e.g., on 27 September 2001, 29 September 2001, 9 October 2001, 19 October 2001 and 26 October 2001) and thus without delay after receipt of the complaints.

The individual complaints clearly specify the lack of conformity as can be seen from the copies of accompanying letters which have been submitted (p. 147 et seq.). They, e.g., state «right boot dissolves on the side, insufficient leather», «left boot front leather bulges, bothers while walking», «boot dissolves on the right side, material insufficient, cannot be repaired» or «right boot top in the middle, loose seam», wherefore the [Seller] has been aware of the nature and the scale of the lack of conformity.

The [Buyer] has not forfeited its right to declare the contract avoided according to Article 49(2)(b) CISG. According to this provision the [Buyer] has to declare the contract avoided within a reasonable time after he knew or ought to have known of the breach. Such a declaration was issued by letter on 12 December 2001.

The first complaints of customers were received by the [Buyer] in July 2001. More complaints were received regularly and in September and October the number of complaints increased considerably, as boots were sent back on 27 September 2001, 29 September 2001, 9 October 2001, 19 October 2001 and 26 October 2001. By 26 October 2001, 25 pairs of boots had been handed back to the [Buyer]; on 12 December 2001, a further 5 pairs of boots followed. Due to these facts, the Court assumes that the declaration of avoidance on 12 December 2001 was given within a reasonable time. The [Buyer] did not act hastily due to individual complaints but reacted following the unusual amassment of complaints by declaring the contract avoided. This cannot be interpreted as too late, as according to Articles 49, 51 CISG only a fundamental breach of contract entitles to declare the contract avoided in its entirety.

In contrast to the allegations of the [Seller], the [Buyer] did not have to fix an additional period of time of reasonable length for performance by the seller of his obligations according to Article 47 CISG. If goods are delivered that show a lack of conformity the right of the buyer to declare the contract avoided only depends on whether the lack of conformity can be seen as a fundamental breach of contract in the sense of Article 25 CISG (Schlechtriem/Schwenzer, UN-Kaufrecht, 4th edition, Article 47, margin number 1).

The fixing of an additional period of time of reasonable length does not constitute a requirement if a fundamental breach of contract is present -- as can already be seen from the wording of Article 49 CISG (lit. a/ lit. b «or») (Schlechtriem/Schwenzer, UN-Kaufrecht, 4th edition, Article 49, margin number 8).

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Hence, the [Buyer] was entitled to declare the contract avoided in its entirety on 12 December 2001, wherefore both parties are released from the obligations under the contract; the residual purchase price thus cannot be claimed. Therefore, the [Seller]'s claim had to be dismissed in its entirety.

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The [Seller] has to bear the costs of the proceedings according to § 91(1) ZPO [*] as the claim was dismissed in its entirety.

The decision on the provisional enforceability is based on § 708 No 10 ZPO. A decision on security according to § 711 ZPO is not necessary according to § 713 ZPO.

The value of the appeal is set at EUR 7,094.34.