

**Case 1736: CISG 1(1); 1(2); 3(1); 9(2); 14; 18(1); 18(2); 21(1) <sup>4</sup>**

Germany: Higher Regional Court Dresden (OLG Dresden)

10 U 269/10

30 November 2010

Original in German

The Higher Regional Court in Dresden (Oberlandesgericht), functioning as the Court of appeals, amended a previous judgment by the first instance Land Court (Landgericht) in Zwickau. The Danish plaintiff, a producer of underwear, swimwear and nightwear, sought damages from the German defendant for the losses incurred due to the non-payment of an order of 9.560 pieces of lingerie. The plaintiff argued that the parties — which had a longstanding business relationship — had concluded a contract about the pieces of lingerie, whereas the defendant denied any contract closing and obligation to pay.

Previously, the defendant had indicated its interest in adding a certain lingerie series produced by the plaintiff to its assortment and had therefore requested samples. The defendant had also sent an order for the lingerie to the plaintiff; however, according to the defendant, the plaintiff had failed to confirm the order in a timely manner. After receiving the samples, the defendant asked for certain changes and improvements to the quality of the lingerie pieces, which the plaintiff was unable to provide even after further specification. An order confirmation that the plaintiff had attached to the correspondence was then explicitly objected by the defendant. Nevertheless, the plaintiff submitted that the parties had concluded a contract after an alleged previous order confirmation had not been objected. Therefore, the plaintiff asserted a damages claim amounting to the difference between the allegedly contractually agreed purchase price and the proceeds the plaintiff had obtained from selling the lingerie to a third party at a lower price after the defendant's refusal.

The defendant took the view that no contract had been concluded. Moreover, the defendant argued that the order sent to the plaintiff had been intended to merely serve planning purposes; the first alleged order confirmation had never been received and the second one objected.

The Court of first instance granted the damages claim to the plaintiff, stating that a contract had been concluded by way of the alleged first order confirmation, which — in the view of the Court — had been received and had not been objected by the defendant. Furthermore, the Court had no doubts that already the preceding order sent by the defendant had led to the conclusion of a contract, irrespective of the receipt of the alleged first order confirmation.

The defendant appealed, citing errors of law in the consideration of evidence. The Court of appeals held that the appeal was admissible and substantiated. Concerning the substantive part of the dispute, the Court found the CISG to be applicable pursuant to Articles 1(1), 1(2) and 3(1). With regard to the parties' correspondence, the Court acknowledged that the order sent by the defendant to the plaintiff constituted an offer in accordance with Articles 14 et seq. CISG and not merely an advance information or a planning aid. However, in the view of the Court, this offer was not accepted by the plaintiff. Contrary to the Court of first instance, the Court of appeals found that sending the order alone did not suffice to assume the conclusion of a contract. While under customary German law sending a commercial letter of confirmation can lead to the conclusion of a contract, the Court gathered from Article 18(1) and (2) CISG the principle that silence or inactivity cannot be understood as acceptance under the Convention. Therefore, the Court saw no lacuna that necessitated a recourse to German law and the (German) concept of a commercial letter of confirmation leading to the conclusion of a contract. As a result, the legal effect of an uncontested commercial letter of confirmation was limited either to the extent in which it was considered an international commercial usage in the sense of Article 9(2) CISG or to the extent in which the behaviour of the recipient could be considered as an approval of the confirmed content of the letter. In the present case, the Court found no indications for either possibility; hence, it dismissed the notion of the conclusion of a contract based solely on the silence and inactivity of the plaintiff. Besides, the Court noted that even in case of the applicability of German law, the plaintiff had not demonstrated that the requirements of a commercial letter of confirmation under German law had been met.

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<sup>4</sup> This case is cited in the CISG Digest, 2016 Edition, available at [www.uncitral.org](http://www.uncitral.org).

With respect to the findings of the Court of first instance on the alleged order confirmation sent by the plaintiff to the defendant, the Court of appeals expressed doubts as to whether the confirmation had reached the defendant within reasonable time in the sense of Article 18(2) CISG. However, the Court found that this did not need to be determined since the plaintiff had procured insufficient evidence to prove that the defendant had actually received the order confirmation. Similarly, the Court found that the provision of samples to the defendant did not constitute an implied acceptance of the order.

The Court also considered whether the defendant had, without delay, approved the plaintiff's belated acceptance of the order pursuant to Article 21(1) CISG. While a belated acceptance by the plaintiff could be seen in an email sent by the plaintiff several weeks after the defendant's initial offer, the Court determined that the defendant never approved any such acceptance. Since the Court did not find any other possible corresponding offer and acceptance either, it concluded that the parties had not entered into a contract which would have obliged the defendant to purchase and pay the lingerie sets. Therefore, the plaintiff was not entitled to damages. Accordingly, the Court of appeals amended the ruling of the Court of the first instance and dismissed the plaintiff's claim.