

**Case number:** 125

**Article number:** sales convention / 1(1)(b); 6; 46; 48

**Thessaur's issue:**

**Country of decision:** Germany

**Year of decision:** 1995

**Type of decision:** Judicial decision

Case 125: CISG 1(1)(b); 6; 46; 48

Germany: Oberlandesgericht Hamm; 11 U 1991/94 9 June 1995

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The plaintiff, an Italian manufacturer of doors and windows, concluded with the German defendant a contract for the sale of 19 windows. The windows were delivered to and installed by the defendant. Some of the delivered windows were found to be defective. The plaintiff agreed to replace the defective windows with new ones, which were subsequently installed by the defendant.

The defendant withheld payment of part of the price and argued that the outstanding balance was to be set off against the defendant's counter-claim for the costs incurred with the replacement of the defective windows.

The court found that the CISG was applicable to the contract, holding that the express reference made by the parties during the court proceedings to the German civil law amounted to a valid choice of law but not to an exclusion of the CISG, since the CISG is an essential part of German law (article 6 CISG).

As the CISG does not contain provisions on set-off, the court held that this question was to be decided in accordance with German law as the governing law chosen by the parties. According to article 387 of the German Civil Code, set-off presupposes the existence of a counter-claim. The existence of the defendant's counter-claim, however, had again to be determined according to the CISG. Although the CISG does not contain any explicit provision for reimbursement of replacement costs when the seller has delivered defective goods, the court interpreted article 48 (1) CISG to the effect that the seller had to bear the corresponding costs.

Furthermore, although the period of limitation of the applicable German statute of limitations had expired, the court noted that the defendant's counter-claim was not time-barred because article 478 of the German Civil Code allows set-off even after the limitation period if the buyer has given timely notice of the defects of the goods, which the buyer had done in this case. Accordingly, the court rejected the plaintiff's claim.