

Case 276: CISG 9(2)

Germany: Oberlandesgericht Frankfurt am Main; 9 U 81/94

5 July 1995

Original in German

Published in German: <http://www.jura.uni-freiburg.de/ipr1/cisg/urteile/text/258.htm>

Abstract published in Italian: [1997] Diritto del Commercio Internazionale 742

Commented on in Spanish: Perales, [1997] Contratos y Empresas

A French producer of chocolates, plaintiff, and a German buyer, defendant, negotiated over the delivery of chocolate. The seller sent a letter of confirmation to which the buyer failed to reply. After delivery, the seller sued for the outstanding purchase price, arguing that a contract had been concluded because the buyer had failed to reject the letter of confirmation. When the court of first instance dismissed the claim, the seller appealed.

原告であるフランスのチョコレート製造業者と被告であるドイツの買主が、チョコレートの引渡しについて交渉した。売主は確認書を送ったが、買主はそれに返信しなかった。引渡し後、売主は、本件契約は買主が確認書を拒絶しなかったため締結されていると主張し、未払いの購入代金を求めて訴えを提起した。第一審が請求を棄却したので、売主は控訴した。

The court held that no contract had been concluded by means of a letter of confirmation followed by silence. Although there is an established trade usage which recognizes such a conclusion of contract by silence in the jurisdiction of the recipient's place of business, due to the international character of the CISG, regard is to be given only to trade usages that are known to the law both in the jurisdiction of the offeror and in the jurisdiction of the recipient (article 9(2) CISG). Moreover, the legal effects of the trade usage have to be known to both parties.

裁判所はその後に返答がなかった確認書によって契約が締結されることはないと判示した。受取人の営業地の法域において、そのような沈黙による契約の締結を認める確立した取引慣習があるとしても、CISGの国際的な性格からすれば、考慮されるべきは申込人の法域と受取人の法域の両方の法が認めている取引慣習である（CISG 9条2項）。さらに、その取引慣習の法的効果を両当事者間が認識していなければならない。

Despite that ruling, the court allowed the seller's appeal. It found that a contract already had been concluded between the parties prior to the letter of confirmation.

そのように判示しながらも、裁判所は売主の控訴を認容した。裁判所は、契約は確認書に先行してすでに締結されていたと認定した。