Lower Court (Amtsgericht) Oldenburg in Holstein

24 April 1990 [5 C 73/89]

Translation[*] by Jakob Heidbrink[**]

FACTS

The Claimant [Seller] demands that the Defendant [Buyer] pay the purchase price of Deutsche Mark [DM] 4,583 plus interest.

The [Seller], having its seat in Italy, is engaged in the business of producing clothes. The [Buyer] runs a textiles shop in Neustadt in Holstein; her husband runs a shop in Dahme. The [Buyer], on 11 February 1989, through the agent of the [Seller] – a Mr H. – ordered the delivery of various textiles during the year of 1989. This was for a delivery of autumn wares. In the order, the period of delivery is noted as: «July, August, September + -».

On 12 September 1989, the [Seller] issued an invoice to the [Buyer] of DM 3,727 relating to a partial delivery; and, in an invoice dated 22 September 1989, the [Seller] requested an additional partial payment of DM 846. The [Seller] allowed the [Buyer] a payment period of, at the longest, 60 days after the date of the invoice. According to the rail waybill, the goods referred to in the invoice of 12 September 1989 were dispatched from the railway station München-Ost on 19 September 1989. There was an attempt to deliver the goods to the [Buyer] on 26 September 1989. The [Buyer] refused to accept delivery. It is disputed whether the goods referred to in the invoice of 22 September 1989, were also offered to the [Buyer] for acceptance in September 1989. It is undisputed that, according the post delivery list dated 4 October 1989 of firm M. – the firm charged with the carriage – that the goods referred to in the invoice of 22 September were handed over by firm M. to the postal services only on that day.

It is also undisputed that the [Buyer] refused to take delivery of the goods referred to in the invoice of 22 September 1989. The [Buyer] returned the goods to the [Seller] accompanied by a letter dated 2 October 1989, contending that the period for delivery had expired. The [Seller], in a letter dated 13 October 1989, stated that it did not accept the return of the goods by the [Buyer], alleging that the order note clearly envisages deliveries up to, until, and including September 1989. It is impossible to ascertain the present whereabouts of the goods referred to in the invoices of 12 September 1989 and 22 September 1989.

[Seller's position]

The [Seller] is of the opinion that the phrasing of the order note – the use of a «+ -» sign – indicates that the end of the delivery period was to be open. This was to be so also because the [Buyer] knew that the [Seller] usually closes its production site during the summer and resumes work only on 1 September each year.

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[*] All translations should be verified by cross-checking against the original text. For purposes of this translation, the Plaintiff of Italy is referred to as [Seller] and the Defendant of Germany is referred to as [Buyer]. Amounts in the former currency of Germany (Deutsche Mark) are indicated as [DM].

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Furthermore, the goods referred to in the invoice of 22 September 1989 were also delivered to the [Buyer].

The [Seller] requests the Court to order that the [Buyer] pay to the [Seller] DM 4,583 plus interest at the annual rate of twelve percent accruing on a principal capital of DM 3,737 as of 13 November 1989, and on DM 846 as of 23 November 1989. The [Buyer] requests the Court to dismiss the claim.

[Buyer's defense]

The [Buyer] alleges that, as the order was for autumn wares, the goods ought to have been delivered after the summer sales at the end of July, and after the beginning of August 1989, respectively. As concerns the annotation in the order note «July, August, and September», the parties had assumed that 113 items of the goods were to be delivered in July, 113 items in August, and 113 items in September 1989; the [Buyer] had not attached any significance to the «+ -» sign.

This understanding of the order note is said to be in accordance with the usages of the trade, as concerns the date of delivery.

The date of delivery was also important, as the [Seller] produces highly fashionable goods which can be sold a year later only at discount prices. Moreover, sales in Neustadt in Holstein slumped after the end of the season; the shops of the [Buyer]'s husband usually close in October of each year. The Agent of the [Seller], Mr H., therefore assured the [Buyer] that the goods would be delivered earlier than July/August/September 1989. The goods referred to in the invoice of 22 September 1989 were delivered to the [Buyer], at the earliest, on 7 October 1989; refusal to take delayed delivery is customary in the trade.

REASONING OF THE COURT

The [Seller]'s suit is admissible and is substantiated in its entirety. According to Arts. 54, 74, 78, 59 of the UN Convention on Contracts for the International Sale of Goods – CISG –, the [Seller] is entitled to demand of the [Buyer] payment of DM 4,583 plus interest at the rate of twelve percent on a principal capital of DM 3,737 as of 13 November 1989, and on DM 846 as of 23 November 1989.

In the present case, the United Nations Convention on Contracts for the International Sale of Goods of 11 April 1980 (Bundesgesetzblatt 1989, Part II, p. 588 et seq.) is applicable. Neither the Uniform Law on the International Sale of Goods of 17 July 1973 (Bundesgesetzblatt, Part I, p. 856 et seq.), nor the Uniform Law on the Formation of Contracts for the International Sale of Goods of 17 July 1973 (Bundesgesetzblatt, Part I, p. 868 et seq.) are applicable to the present sale and purchase. This is due to Italy having renounced those Conventions on 31 December 1987 (cf. Bundesgesetzblatt, Del II, 1987, p. 232, and also Palandt-Putzo, 49th Edition, Preliminary Remarks Prior to sec. 433 of the German Civil Code, Note 5 b, with additional references). In this case, the CISG is applicable by way of Arts. 27, 28 of the German Code of Private International Law [the Private International Law Code].

The parties have not explicitly agreed on the applicable law in accordance with Art. 27(1), first sentence of the Private International Law Code. Nor does it emerge from the provisions of the contract, or from the circumstances, that German law is to be applied (Art. 27(2), second sentence, second alternative, as well as Art. 27(1), second sentence, third alternative of the

Private International Law Code). Nor have the parties subsequently freely agreed on the applicable law – the application of German law – in accordance with Art. 27(2) of the Private International Law Code.

The [Seller] maintains that Italian law is to be applied, and hence the CISG; the [Buyer], on the other hand, alleges that German law is applicable.

The Court concludes that, as the requirements of Art. 27 of the Private International Law Code are not fulfilled, the applicable law must be ascertained by way of Art. 28 of the Private International Law Code. Art. 28(1) of the Private International Law Code provides that the contract be governed of the law of the State with which it has the closest connection. According to Art. 28(2) of the Private International Law Code, it is, in this context, assumed that the contract is most closely connected to the State in which the party performing the characteristic obligation, at the time of the conclusion of the contract, has its habitual residence, or, if it is a corporation, an association or a legal person, its main center of administration. In a contract of sale, the characteristic performance is the delivery of the goods (Palandt-Heinrich, 49th Edition, Note 2 b to Art. 28 of the Private International Law Code).

The [Seller] was the debtor of this obligation. As the debtor has its seat in Italy, according to Art. 28(2), first sentence, of the Private International Law Code, Italian law is, without anything more, applicable. In this context, Art. 32 of the Private International Law Code provides that the law of the contract is determinative, in particular, of the interpretation of the contract; of the fulfilment of the obligations laid down by the contract; of the consequences of complete or partial non-performance of these obligations, including the measure of damages; of the various ways in which the obligation may cease to exist; of the statute of limitation and the loss of rights resulting from the expiry of a time limit; as well as of the consequences of the invalidity of the contract (cf. Art. 32(1)(1)-(5) of the Private International Law Code). As regards the manner in which performance is to be rendered, and the measures to be taken by the creditor when performance is defective, however, the law of the State in which performance is rendered – in the present case, the law of the Federal Republic of Germany – is to be had regard to (cf. Art. 32(2) of the Private International Law Code). In the present case, the law of the contract in accordance with Art. 28(2) and (2), as well as Art. 32(1) of the Private International Law Code is the CISG, as Italy, as of 1 January 1989, has implemented as its private international law the United Nations Convention on the Contract for the International Sale of Goods, resulting in that Convention being applicable by virtue of Art. 1(1)(b) of the CISG (cf. Asam, Recht der internationalen Wirtschaft 1989, p. 942 et seq.); this is true in particular as, in the present case, there is a contract of sale in accordance with Art. 1(1) as compared to Art. 3(1) of the CISG.

A seller's claim pursuant to Art. 54 of the CISG for the payment of the purchase price requires the seller to have fulfilled his obligations stipulated in Art. 33 of the CISG. According to this provision, the seller must deliver the goods, if a date is fixed by or determinable from the contract, on that date, or, if a period of time is fixed by or determinable from the contract, at any time within that period unless circumstances indicate that the buyer is to choose a date, or, in any other case, within a reasonable time after the conclusion of the contract. Even if one were to assume, for the benefit of the [Buyer], that the parties had agreed that one third of the goods were to be delivered in July, one third in August, and an additional third in September 1989, the [Buyer] could not, by refusing to accept delivery, impliedly declare that it wanted to terminate, or – as it is expressed in Art. 49 of the CISG – avoid the contract. According to the statement of the [Buyer], by the expiry of the months of July, August, and September, respectively, there had been non-delivery of one third, respectively, of the goods.

To assess the question, therefore, Arts. 47 and 49 of the CISG are pertinent. Art. 47 of the CISG provides in its first paragraph that the buyer may stipulate a reasonable additional period of time for the seller to fulfil his obligations. The second paragraph of this provision provides that the buyer may not, during this period, resort to any remedy for breach of contract, unless he has received notice from the seller that he will not perform within the period so stipulated. The buyer, however, retains the right to claim damages for the delayed delivery.

Art. 49(1)(b) of the CISG further provides that the buyer may declare the contract avoided if, in case of non-performance, the seller has not delivered the goods within the period stipulated by the buyer in accordance with Art. 47(1), or if he declares that he will not deliver within the stipulated period. This provision is complemented by Art. 49(2)(a) of the CISG. If the seller has delivered the goods, the buyer loses his right to declare the contract avoided unless he does so, in respect of late delivery, within a reasonable time after he has become aware that delivery has been made (this is the wording of Art. 49(2)(a) of the CISG). The construction of this provision reveals that, if there is a non-delivery within the scope of the Article, the buyer first must stipulate an additional period in accordance with Art. 47 of the CISG. If the seller does not deliver the goods within the additional period of time stipulated, the buyer is entitled to avoid the contract in accordance with Art. 49(1). If, however, the seller either delivers within the period of time stipulated, or delivery is effected after the stipulated period has expired, the buyer, according to Art. 49(2)(a), in order to preserve his right to avoid the contract, must claim this right within a reasonable time after delivery has taken place.

In the present case, the [Buyer] was not entitled to avoid the contract, despite non-delivery, the [Buyer] did not at the respective dates stipulate an additional period of time in accordance with Art. 47(1) of the CISG. From all this, it emerges that the [Buyer] does not have any right to avoid the contract by reason of the delays in delivery it alleges. Therefore, it is bound to pay the purchase price of, in all, DM 4 583 stated in the invoices of 12 September 1989 and 22 September 1989. The [Buyer] cannot claim that payment should be effected only against the delivery of the goods ordered. To the extent that the question in the present case relates to the manner in which the obligations of the [Seller] are to be discharged, according to Art. 32(2) of the Private International Law Code, German law is to be applied as a supplement. According to German law, the [Buyer] was in delay of taking delivery, as the goods had been offered for delivery in September 1989 (the goods referred to in the invoice of 12 September 1989), and at the beginning of October 1989 (the goods referred to in the invoice of 22 September 1989).

When a buyer refuses to take delivery, it is in delay of taking delivery in accordance with sec. 293 et seq. of the German Civil Code. If the buyer is in delay of taking delivery, the obligation of the seller to perform first disappears (cf. Palandt-Heinrichs, 49th Edition, Note 4 c at sec. 320 of the German Civil Code). In accordance with all of this, the [Buyer], in relation to the principal claim, must be ordered to pay.

The claim as to interest results from Arts. 59, 78, 74 of the CISG. In the present case, a payment period of 60 days after the date of the invoice applied, so that the claim for payment of the purchase price became due, as regards the invoice of 12 September 1989, on 13 November 1989; the claim regarding the invoice of 22 September 1989 became due on 23 November 1989 (Art. 59 of the CISG).

By way of Art. 78 of the CISG, the legal interest rate of Art. 1284(1) of the Italian Civil Code (Codice civile) of five percent per annum is, prima facie, substantiated (cf., about the application of Art. 1284(1) Codice civile Asam, Recht der internationalen Wirtschaft 1989, p. 942, p. 945 et seq.).

The interest demanded by the [Seller] in excess of this rate is also substantiated. This emerges from Art. 78 of the CISG. According to this provision, the seller may claim excess interest by way of damages, the interest damage arising from the seller's not being able to profitably invest the purchase price, or from his needing to take up a loan as a consequence of the failed payment (see Asam, ibid.).

These prerequisites have, in the present case, been relied upon by the [Seller] in his Statement of Claim.

The decision as to costs rests on sec. 9(1) of the Civil Procedure Rules. The decision as to preliminary enforceability results from sec. 709(1) of the Civil Procedure Rules.