CISG-online 149	
Jurisdiction	Germany
Tribunal	Bundesgerichtshof BGH (Federal Supreme Court)
Date of the decision	15 February 1995
Case no./docket no.	VIII ZR 18/94
Case name	*Key press case*

Translation[*] *by Birgit Kurz*[**] *& William M. Barron Esq.*

Federal Supreme Court (*Bundesgerichtshof*), 15 February 1995 [VIII ZR 18/94]

[Headnote:]

Regarding the time limitations of a right to declare a contract avoided due to anticipatory fundamental breach of contract.

[Main Holding:]

Upon appeal by plaintiff [seller], the judgment of the Sixth Division for Civil Matters of the Higher Regional Court [*Oberlandesgericht*] of Düsseldorf dated November 18, 1993 is reversed with regard to costs and to the extent that the judgment found against the [seller]. The cross-appeal is dismissed.

To the extent that the judgment was reversed, the case is remanded to the Court of Appeals for another hearing and decision, also regarding the costs of the appeal.

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[*] All translations should be verified by cross-checking against the original text. For purposes of this translation, the Plaintiff of Germany is referred to as [seller]; the Defendant of Switzerland is referred to as [buyer]. Amounts in German currency (*Deutsche Mark*) are indicated as [*DM*].
Translator's note on other abbreviations: BGBl. = *Bundesgesetzblatt* [Federal Law Gazette]; BGH = *Bundesgerichtshof* [German Federal Supreme Court]; BGHR = *Systematische Sammlung der Entscheidungen des Bundesgerichtshofs (LB1)* [Systematic Collection of Decisions of the German Federal Court of Justice (looseleaf)]; BGHZ = *Die amtliche Sammlung der Entscheidung des Bundesgerichtshofes in Zivilsachen* [Official reporter of Decisions of the German Federal Court of Justice in Civil Matters]; LG = *Landgericht* [District (trial) Court]; OLG = *Oberlandesgericht* [Higher Regional Court, a Court of Appeals]; ZPO = *Zivilprozeßordnung* [German Code of Civil Procedure].

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[Facts:]

On March 4, 1991, defendant [buyer] ordered a key-embossing machine with a round switch-table from the [seller] for a purchase price of DM [Deutsche Mark] 259,900. The [seller] accepted the order by confirmation dated March 22, 1991, and the purchase price was payable in three installments of 30% each upon confirmation of the order, at the time of notice of readiness for delivery, and at the time of invoicing, and the remaining 10% was payable after acceptance of the equipment; until the full purchase price was paid, the [seller] retained title to the machine, which was to be delivered in September 1991 „subject to the usual reservation.“ The manufacturer of the machine, with whom the [seller] was connected through the distribution agreement dated February 21/23, 1979, was the intervenor [manufacturer]; the machine was supposed to be accepted in advance by the [buyer] at the manufacturer's place of business. The [buyer] paid the [seller] the down payment in the amount of DM 77,970, which was due at the time of the confirmation of the order. After disputes arose between the manufacturer and the [seller] during the subsequent period of time, the manufacturer terminated the distribution agreement for cause without notice by letter dated July 18, 1991 and imposed, by letter dated August 14, 1991, a halt of delivery of goods against the [seller] until claims described in detail were satisfied. By letter dated August 26, 1991, the manufacturer notified the [buyer] that it was ready to make delivery to the [buyer] and attached its own invoice for the second installment in the amount of DM 77,970. Thereafter, the [buyer's] employees performed the pre-acceptance of the machine in the absence of the [seller] at the manufacturer's factory on September 11, 1991; following that, the [buyer] paid the requested second installment to the manufacturer. The latter delivered the machine including accessories in the beginning of October 1991 to the [buyer's] business, who accepted the machine on October 18, 1991 after installation and training. 1

By facsimile dated November 4, 1991, the [seller] requested from the [buyer] payment of the remaining purchase price in the amount of DM 181,930 setting a deadline for payment. After the manufacturer had argued that it had „stepped into“ the existing orders after the termination of the distribution agreement and after it required payment to itself, the [buyer] made no further payments to either the [manufacturer] or the [seller]. In its complaint, the [seller] demands that the [buyer] pay to the [seller] the remaining purchase price in the amount of DM 181,930 plus interest. The [buyer], supported by the manufacturer as the intervenor, claimed that the machine had been delivered to it by the [manufacturer] under retention of title in the [manufacturer's] own name and on the [manufacturer's] account. Arguing that the [seller] had not performed its fundamental obligation to deliver the purchased item and to transfer ownership, the [buyer] further declared the contract avoided pursuant to Art. 49(1)(a) of the U.N. Sales Convention. Alternatively, it set off the [seller's] claim against the claim that arose under the agreement for services, in favor of the key-embossing machine in the amount of DM 102,240.35, which had been assigned to it by the [manufacturer] on April 2, 1992. 2

The Trial Court [*Landgericht*] granted the complaint except for part of the interest. After filing the appeal, the [buyer] declared a set-off against all of the payment claims of the [manufacturer] arising from the manufacture of the key-embossing machine and amounting to DM 186,333, based on the additional contract of assignment dated July 29, 1993 which was submitted by the [manufacturer's] brief dated September 7, 1993. Furthermore, the [buyer], by facsimile of its attorney dated October 16, 1992, set a deadline of November 16, 1992 for the [seller] to prove that the [seller] was entitled to transfer ownership of the already delivered key-embossing machine in order to remove the existing defect of title, and after the time limit had expired without result, the [buyer] again, in the alternative, declared the contract avoided. With regard to the [buyer's] alternative set-off, the [seller] asserted that the assignment of the [manufacturer's] claim to the [buyer] had no effect because the [manufacturer] had already assigned this claim to someone else after the order was made, and, additionally, that it [the seller] had set off the [manufacturer's] claim arising under the agreement for services against claims of higher amounts by a letter of its attorney dated November 22, 1991. **3**

The Court of Appeals [*Oberlandesgericht*] amended the decision of the trial court and merely ordered the [buyer] to pay DM 3,577 plus interest and otherwise dismissed the claim. On appeal, the [seller] demands the reinstatement of the trial court's decision. By brief dated November 22, 1991, the [manufacturer] filed a cross-appeal on behalf of the [buyer], requesting full dismissal of the claim irrespective of the alternative set-off. **4**

[Grounds:]

I. **5**

In the opinion of the Court of Appeals, which applies the United Nations Convention on Contracts for the International Sale of Goods of April 11, 1980 (CISG) to the legal relationship between the parties, the [seller] had a claim for the balance of the purchase price in the amount of DM 181,930 pursuant to CISG Art. 53 until the [buyer] declared the set-off. Because of the [seller's] lack of cooperation and consent, [the court ruled that] the [buyer] and the [manufacturer] were unable to replace the contracting party in such a way that, from then on, the [manufacturer] had become the contracting partner of the [buyer] instead of the [seller].

[The Court found that] the [buyer] also did not effectively declare the contract avoided because the requirements of CISG Art. 49(1) were not met. The Court held that, as anticipated, the [buyer] first obtained possession of the machine and, taking into account the retention of title, a legal expectancy right of the machine ordered by it; in this respect, [the Court reasoned that] its legal position was no different than if the [buyer] had considered the [seller] its supplier. The [buyer] should have given the [seller] an additional delivery deadline according to CISG Art. 47(1) after the [manufacturer] had refused to deliver in the [seller's] name; then, after expiration of the time-limit without result, it could have declared the contract avoided under CISG Art. 49(1)(b); but it failed to do this. [The Court stated that] after obtaining possession of the machine and using it, it was no longer possible to set an additional time-limit for the purpose of declaring the contract avoided. **6**

[The Court ruled that] the [buyer] could not successfully rely on the facsimile dated October 16, 1992. [It held that] it does not constitute a fundamental breach of contract that the [seller] was not yet able to transfer full ownership of the machine to the [buyer]. [The Court stated that] the [buyer] itself did not comply with its contractual duties, because it refused to fulfil its obligation to pay the purchase price to the [seller]; furthermore, the [buyer] was supposed to perform in advance considering the retention of title to which the [seller] and the [buyer] had agreed. [The Court found that] in any case, according to CISG Art. 80, the [buyer] could not rely on the still outstanding transfer of ownership, because the transfer of ownership had failed, among other things, for the reason that the [buyer] had not given the [seller] the opportunity, by granting a certain time-limit according to CISG Art. 47(1), to meet the requirements for the transfer of ownership after complete payment of the purchase price. 7

[The Court held that] the [seller's] claim for the balance of the purchase price in the amount of DM 181,930 had, however, become void by way of set-off against a claim arising out of a right assigned by the [manufacturer] in the amount of DM 178,353, so that the [buyer] only had to pay DM 3,577. 8

II. 9
These elaborations do not withstand legal scrutiny in all points.

1. 10
The Court of Appeals correctly assumes that, pursuant to CISG Art. 1(1)(a) in connection with CISG Art. 3(1), the United Nations Convention on Contracts for the International Sale of Goods of April 11, 1980 (BGBl. 1989 II, 588) applies to the contract between the parties dated March 4/22, 1991 concerning the delivery of a key-embossing machine.

2. 11
As the Court of Appeals further correctly states, the [seller's] claim for the purchase price has not become void because of the alleged agreement between the [buyer] and the [manufacturer], since, due to the lack of the [seller's] participation, the consent of all the parties (BGHZ 96, 302, 308 with further citations) required for such an assignment of the contract is missing.

3. 12
With respect to the result, there is no objection to the assumption of the court of appeals that the contract between the parties continues to exist, because the [buyer] has neither in its answer to the complaint nor in its appeals brief effectively declared the contract avoided.

a) 13
It need not be decided whether the [buyer] was entitled to declare the contract avoided pursuant to CISG Art. 72 after it had obtained knowledge of the [manufacturer's] imposing a halt on the delivery of goods and whether there was, therefore, a risk that the [seller] would possibly no longer be able to transfer ownership of the machine to the [buyer]. It is true that, according to CISG Art. 72, the other party may declare the contract avoided if, prior to the

date of performance of the contract, it is apparent that one of the parties will commit a fundamental breach of contract. The purpose of this provision, however, is only to protect a party against a future breach of contract, and it therefore takes place before the delivery and its different forms of disruptions (*see* von Caemmerer/Schlechtiem, Kommentar zum Einheitlichen UN Kaufrecht, 1990, Art. 72 para. 4). With respect to breaches of contract that occur only after the obligation has become due, the ordinary provisions applicable hereto remain in force, especially the right of the buyer to declare the contract avoided pursuant to CISG Art. 49.

After the [buyer] had accepted the machine on October 18, 1991 and valid delivery had thereby taken place, it was obligated to pay the balance of the purchase price after another six weeks, at the latest, pursuant to the contract entered into by the parties on March 4/22, 1991, i.e., it was obligated to pay by November 29, 1991, in order to cause the transfer of ownership of the machine. Therefore, performance of the contract was set by both parties for the end of November 1991, so that the [buyer] was able to exercise its right to declare the contract avoided pursuant to Art. 72 CISG only until that point. Although the [seller] had demanded, by facsimile dated November 11, 1991, that the [buyer] pay the balance of the purchase price in the amount of DM 181,930, so that the [buyer] had to assume that the [seller] insisted on the performance of the contract, the [buyer] exercised its right to declare the contract avoided for the first time in its answer to the complaint dated March 30, 1992.

b) **14**

The [buyer's] claim to declare the contract avoided is also not justified under CISG Art. 49, as the court of appeals has correctly found in the outcome. In this respect, it can be left undecided here as well, whether the [seller] committed a fundamental breach of contract by failing to perform its obligations, which would have given the [buyer] the right to declare the contract avoided according to CISG Art. 49(1)(a). In any case, the [buyer] lost this right because it did not exercise it within a reasonable period of time (CISG Art. 49(2)(b)). At the latest, when the [buyer] received notification that the [manufacturer] had imposed a halt of delivery of the goods to the [seller] in November 1991, it was apparent to the [buyer] that the [seller] would not be able to perform its obligation of transferring ownership even after receiving payment of the purchase price. If, however, the [buyer] let approximately five months pass until it declared the contract avoided for the first time during the lawsuit commenced by the [seller], it lost its right to declare the contract avoided, the exercise of which should not be delayed unreasonably in the interest of quick clarification of the legal relationships between the parties. Therefore, the [buyer's] cross-appeal properly was unsuccessful.

4. **15**

The Court of Appeals is, however, wrong in assuming that the [seller's] claim for the balance of the purchase price in the amount of DM 181,930 is voided by the [buyer's] set-off against a claim in the amount of DM 178,353 arising out of an assigned right.

a) 16

Nevertheless, on appeal, the [seller] argues unsuccessfully that the set-off already does not hold up because the [buyer] has not submitted evidence showing that the claim for the balance due under the agreement for services was assigned effectively to the [buyer] by the [manufacturer]. The appeal thus refers to the [seller's] allegation that the [manufacturer] had already assigned its claim against the [seller] arising under the order dated March 26, 1991 to the G.-Bank in B. after the order was placed; the Court of Appeals considered this statement irrelevant because an allegation of the point in time of the alleged other assignment was missing.

aa) 17

It is true that the [seller's] allegation may be interpreted as the defense of another prior assignment because a subsequent (further) assignment would not have affected the preceding assignment.

bb) 18

Even if the [seller] had denied the validity of the assignment to the [buyer] by arguing that there was a prior assignment of the claim of the [manufacturer] to G.-Bank and that, consequently, the [buyer] had the burden of proof regarding the absence of the alleged assignment as a negative fact, the principles established by case law with respect to furnishing so-called negative evidence are of advantage to it. According to these principles, the [seller] first had to deny the validity of the assignment of the claim to the [buyer] by substantiated specification of the alleged prior assignment, while the [buyer] then had to prove the falsity of the other party's argument (*compare* BGH, decision dated February 5, 1987 IX ZR 65/86 = WM 1987, 590 at II 1 = BGHR ZPO § 286 Negativbeweis 1 with further citations; *see also* Zöller/Greger, ZPO, 19th ed., before § 284 para. 24). A substantiated specification of the alleged prior assignment to G.-Bank, which the [buyer] denied by pleading lack of knowledge and which the [manufacturer] denied as false, is, however, missing so that the court of appeals has rightly assumed, at least with respect to the result, that this argument was irrelevant.

b) 19

The Court of Appeals has, however, as the appeal correctly argues, made a procedural error by rejecting the [seller's] argument as untimely under ZPO §§ 527, 520(2), 296(1), that it [the seller] had set off the claim assigned to the [buyer][***] against claims amounting to more than DM 218,000 by letter of its attorney dated November 22, 1991.

[***] Translator's note: The original German text states "the claim assigned to plaintiff [seller]," which does not make sense in this context.]

aa) 20

Insofar as the [buyer] has, with reference to the [manufacturer's] brief dated September 9, 1993, declared a set-off exceeding the assignment dated April 2, 1992, for the first time on appeal in accordance with the submitted assignment agreement dated July 29, 1993, a failure to observe the deadline to answer set for March 1, 1993 (ZPO § 520(2)) cannot be considered in any event, because, until this time, the set-off had not yet been declared in this respect. If the [seller], therefore, by brief dated September 22, 1993, substantiated, for the first time, its counter-claims, with which, according to its submissions, it declared a set-off against the [manufacturer's] claim by letter from its lawyer dated November 22, 1991, this was not too late.

bb) 21

The question, whether the [seller's] argument was late with respect to the partial amount of DM 102,240.35, which was designated for set-off at trial because of the assignment dated April 2, 1992, does not have to be decided. Because the [seller's] contention that the [manufacturer's] claim arising under the agreement for services was void because of the counter-set-off pursuant to the letter dated November 22, 1991, must be investigated as explained above, a delay of the proceedings according to ZPO §§ 527, 520(2), 296(1) will equally not be considered insofar as the [seller's] objection is aimed at the assignment of the claim to the partial amount of DM 102,240.35 according to the assignment declaration dated April 2, 1992.

5. 22

The challenged decision therefore must be reversed upon the [seller's] appeal insofar as it found against the [seller], and the matter must be remanded to the court of appeals to that extent for clarification of the question whether the alleged counter-set-off dated November 22, 1991 was valid.

Prior decisions: OLG Düsseldorf November 18, 1993, 6 U 228/92; LG Düsseldorf July 9, 1993, 31 O 223/91.