CISG-online 192	
Jurisdiction	Germany
Tribunal	Landgericht Kassel (District Court Kassel)
Date of the decision	21 September 1995
Case no./docket no.	11 O 4261/94
Case name	*Wooden poles case*

Translation[*] *by Jan Henning Berg*[**]

Edited by Institut für ausländisches und internationales Privat- und Wirtschaftsrecht der Universität Heidelberg

Daniel Nagel, editor[***]

Facts of the case:

The parties are in dispute about the execution of their contractual relationships. 1

Plaintiff [Buyer] is a corporation under American law. Since 1990 it has entertained business relations with Power Supply Company E. By contract of 24 December 1992, [Buyer] was obliged to deliver 50,248 wooden poles at a total price of US$ 3,232,070.17 to the latter company. Since E attached great importance to the adherence of contractual time limits, it insisted on the acceptance of considerable penalty clauses. Furthermore, [Buyer] had to provide a guarantee worth US$ 323,207 with respect to its contractual performance. This was effected by certificate dated 11 May 1993.

After [Buyer] had attempted to procure the required poles on its own throughout 1993, it finally turned to Defendant [Seller], which was also trading in wooden products and had already processed transactions with E directly in 1992. Considerable problems had occurred in the course of their execution – a circumstance unknown to [Buyer]'s representatives at that time. 2

The parties met for their first negotiations in Bebra, Germany on 5 and 6 December 1993. [Seller] commented on these negotiations by letter dated 10 December 1993. [Buyer] responded on 11 December 1993 and pointed out that a timely first delivery was absolutely 3

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

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necessary in order to comply with its own obligations. This is why the CEO of [Seller] – which should finally assume [Buyer]'s obligations arising out of [Buyer]'s contract of 24 December 1992 with end-user Power Supply Company E – was made aware of the content of the aforementioned contract as well as of the respective delivery dates and their being subject to contractual penalties.

After E, upon [Buyer]'s request, declared approval of a delivery of the ordered poles within the first seven months of 1994, by letter dated 13 December 1993, the [Buyer] and [Seller] concluded a delivery contract concerning 50,248 peeled wooden poles for power supply lines at a price of US$ 135 per cubic meter on 23 December 1993. The contract also provided for: 4

> «*(5) Conditions of delivery*: All poles are to be delivered C+F to the Greek port of Corinth or Prevesa according to Incoterms 1990.
>
> - First delivery: 10,000 poles on 28 February 1994. These may be poles of any category;
> - Second delivery: 15,000 poles on 30 April 1994, poles of any category;
> - Third delivery: 15,000 poles on 15 June 1994, poles of any category;
> - Final delivery: The remaining 10,248 poles under the contract on 30 June 1994, poles of any category.
>
> Delivery will be definitive in accordance with the end of examinations conducted by Buyer E. The poles must be loaded onto the ships at the dates of delivery stated above.
>
> *(7) Quality*: The required quality of the poles is defined according to the specifications set out in the appended paper GR of Power Supply Company E, being the final purchaser of the poles.
>
> *(8) Examination*: Quantity and quality of the poles of each delivery will be examined by personnel of E before loading. Only examined and approved poles will be delivered to Greece. The seller will inform the buyer 20 days prior to the loading of one consignment, in order to be able to send E's inspection personnel to the places where the poles are ready for examination so that the inspectors will be able to approve of the poles.
>
> *(9) Payment*: After signing the contract, the buyer's bank will confirm to the seller that it will issue a letter of credit after each examination corresponding to the quantity examined. Upon closing of each examination, the seller will issue an invoice in relation to the delivery of examined and approved poles and send via fax, upon which the buyer's Greek bank will be issuing a letter of credit in relation to each delivery before that delivery will be loaded. On the basis of the letter of credit, payment will be effected within five bank working days after unloading of the respective delivery in the Greek port which will be proved by the protocol of unloading.»

In accordance with these requirements, [Buyer] prepared the first arrival of the inspectors, scheduled for calendar week 8, and – after being informed by [Seller] via telephone of upcoming problems – reiterated expressly that adherence to the dates of delivery agreed upon was 5

absolutely vital on the basis of impending contractual penalties. [Seller] replied on 14 February 1994 that it was aware of the penalty clauses but was not able to operate as planned due to bad weather conditions. At the same time, [Seller] suggested a first examination to be carried out during calendar week 10. On 15 February 1994, [Seller] announced another delay of two weeks and asked for postponement of the examination until calendar week 11. At the same time, [Seller] further demanded to be allowed to deliver poles that were treated with wood-protective substances and announced that, in this case, it would be able to deliver a higher quantity for the short term. [Buyer] replied on 18 February 1994 saying that E had agreed to another delay of the examination, and that they were already approaching the second date of delivery under the contract. Therefore, at least 15,000 poles should be available by that date. [Seller] thereupon promised on 25 February 1994 to attempt everything in order to fulfill this request by the end of March.

6 In preparation for the examination scheduled at the end of the month, witness Z, an employee of [Buyer], traveled to Rostock, Germany with the CEO of [Seller] on 15 March 1994 in order to inspect the poles that were allegedly stored. However, only about 200 poles were available and stored in Riga, Latvia, being of bad quality. Thereupon, the upcoming examination had to be re-scheduled once again, which caused considerable dissatisfaction on the part of [Buyer]. It complained about [Seller]'s conduct by letter dated 21 March 1994 and requested a binding response as to which quantity would be available by 10 April 1994. [Seller] replied on 24 March 1994 stating that in addition to its activities in Riga it had also commenced chopping trees in Breitenbach and that it would communicate the quantity within a few days. Upon that, [Buyer] once again on 28 March 1994 pointed towards the impending threat caused by any further delay, which, however, did not cause [Seller] in the further course to make any specific promise. Therefore, witness Z visited [Seller]'s production facilities in Bebra, Germany and Breitenbach on 6 April 1994, where he, however, only found a couple of poles. Another check in Rostock on the following day did not produce a better result.

7 Instead, the CEO of [Seller] had to admit on 20 April 1994 that they were not even able to deliver 5,000 poles as a first partial delivery. In order to prevent any major losses, [Buyer] agreed in the course of an additional arrangement of 20 April 1994 to conclude cover purchases with suppliers from Poland and the Czech Republic in relation to 5,000 poles. According to that agreement, any additional costs as well as necessary expenses should be borne evenly by both parties. At the same time, it was confirmed in writing that [Seller] had already effected a partial payment of DM 24,000.

8 The respective efforts of witness Z remained in vain; [Seller] communicated on 9 May 1994 that it was in preparation of an examination for the time after 20 May 1994 because a quantity of 700 cubic meters each had become available in both Riga and Rostock as well as that until the date of the actual handing over the production would continue at normal speed in both locations. Thereupon, [Seller] inquired on 19 May 1994 into the state of [Buyer]'s additional attempts for procurement and asked for a timely announcement of when E's inspectors would arrive in Riga. On the basis of this request, [Buyer]'s CEO together with witness Z traveled to Rostock, where, however, only 220 poles of bad quality were available. Even [Seller]'s CEO agreed on that occasion that an inspection under these circumstances would be pointless.

Therefore, he promised that 10,000 poles could be made available by 13 June 1994, a condition which [Buyer] confirmed in its letter of 28 May 1994 without objections. While once again preparations for the upcoming inspection were made, [Seller] now demanded an increase of the price previously agreed upon to US$ 145 per cubic meter as well as a postponement of further dates of delivery to August, October and December 1994. Even these conditions were accepted by [Buyer] according to its letters of 28 May and 12 June. However, [Buyer] made its final acceptance conditional upon the assumption of a guarantee with respect to the performance of the contract. [Seller] replied on 7 June 1994 stating that it would not affect any such guarantee, but that it itself still expected the stipulated bank confirmation under item 9 of the contract of 23 December 1993. At the same time, [Seller] announced that it would withhold performance of the contract should that confirmation not be issued by 10 June 1994.

Thereupon, [Buyer] told its contracting partner on 9 June 1994 that – as had been stated – the inspectors would arrive in the afternoon in Riga; [Buyer] also responded to [Seller]'s correspondence of the same day as follows: **9**

> «In your fax dated 7 June 1994, you are referring to a binding confirmation by our bank, but you seem to have forgotten that we have agreed on a different procedure concerning the letter of credit and that the obligation under item 9 of our contract has changed with effect from 15 March 1994. On 15 March 1994, you went to your bank B with our representative Mr. P and you agreed that the procedure would be as follows:
>
> E will open a letter of credit in favor of the bank account of (...) as soon as the poles have been examined by E's inspectors, and then (...) will transfer that letter of credit to the bank account of (...). Thereupon, the bills of delivery, a certificate of origin and a report of phytopathology should be presented to your bank which will be the very moment when the letter of credit will be opened and payment will be effected. You will therefore understand that our bank has nothing to do with this procedure in relation to the letter of credit; our bank would, of course, not be in a position to give you any such binding confirmation.»

Without having received the requested response, [Buyer] then additionally accepted on 14 June 1994 to immediately open a letter of credit in favor of [Seller] as soon as the latter would state which of the four consignments were available for examination and what that consignment was composed of. [Seller] replied on the same day that the contract was no longer valid because [Buyer] had not complied with its obligations referred to in the letter of 7 June 1994. At the same time, it offered a partial delivery of about 10,000 poles subject to the purchase price being paid in advance. **10**

By letter dated 15 June 1994, [Buyer]'s legal representative once again demanded timely performance of the contractual obligation and pointed out that it would immediately open the required letters of credit. [Seller] only reacted to further delay the dispute on 22 June 1994 and its legal representative declared that a claim for performance would no longer exist. Simultaneously, E announced by letter of 7 July 1994 that it would cancel the contract of 24 December 1992, make use of all corresponding penalty claims and exclude [Buyer] from any further transactions in case the owed delivery would not be effected in due course. **11**

By way of legally effective interim judgment rendered by the Court on 22 June 1995, the admissibility of the action was determined. Simultaneously, [Buyer] was asked to bring forth securities in favor of [Seller] in relation to the costs of the proceedings. This occurred as requested. 12

[Position of the parties:]

[Buyer's position:]

[Buyer] asserts that, with respect to [Seller]'s assurance of 25 February 1994, it asked its bank for a confirmation in accordance with item 9 of the contract of 23 December 1993, which had been given already by letter dated 4 April 1994. This confirmation had been valid until 31 July 1994 and had been known to [Seller] (proof: hearing of witness Z). However, [Seller] had in any case no longer been interested in that confirmation; because at [Seller]'s request a different procedure had been agreed upon in order to effect faster payment: [Seller] should have first issued an invoice after examination of the available poles by E. After that, it should have been for E to open a letter of credit in favor of [Buyer], payable upon presentation of the bills of delivery. On the basis of that letter of credit, [Buyer] itself wanted to transfer to [Seller] a sum representing the partial purchase price by way of irrevocable payment order. Payment to [Seller] could have therefore been possible upon presentation of bills of delivery, the certificate of origin as well as a phytopathological report, i.e., prior to the departure of the ship to Greece (proof: hearing of witnesses Z and G). On the occasion of a common visit at [Seller]'s bank on 15 March 1993, the bank representative had at first raised some concerns about the validity of the suggested irrevocable payment order, as she wanted to receive assurance on the matter from the bank's legal department. However, she stated that she would open two accounts for the processing of the payment in case that these concerns were sorted out, (proof: hearing of witnesses Z and G). After the latter had occurred, as is evident from the letter of 27 April 1994, [Buyer] assumed that a mutual agreement had been reached in that respect (proof: hearing of witness Z). 13

Therefore, [Buyer] argues, it was not under a duty to take further action in the first place. Rather, it was [Seller] who seriously and definitely denied performance of its own obligations without sufficient justification. Therefore, it had to pay damages for non-performance. The damage subject to compensation resulted at the first stage from the difference between purchase and resale price in the amount of US$ 608,879.77 (US$ 3,232,070.16 minus US$ 2,623,190.49) and at the second stage from the fact that [Buyer] had already at this stage lost further orders from E. At least one order concerning delivery of 20,000 waterproof poles – to which the offer of 11 May 1994 for US$ 2,358,000 referred – would have been secured by [Buyer], while its own costs for procurement would not have exceeded US$ 1,912,350. That means that already at that time [Buyer] had suffered additional lost profit of US$ 445,650; further consequential damages could not be finally ascertained. In any event, [Buyer] was threatened by the guarantee for contract performance in the amount of US$ 323,207 as well as by the loss of other transactions. [Buyer] also had to expect having to pay the contractual penalty. 14

Reference is made to the letter of 18 August 1994 and its amendment of 27 December 1994 for further details of [Buyer]'s action.

[Buyer] requests the Court: 15

(1) To order [Seller] to pay:

- US$ 1,054,529.77 plus 5% interest on US$ 121,174.92 since 28 February 1994,
- On an additional US$ 181,762.38 since 30 April 1994;
- On an additional US$ 181,762.38 since 15 June 1994;
- On an additional U$ 124,180.05 since 30 July 1994, as well as on
- An additional US$ 445,650 since pendency of proceedings (24 September 1994).

In the alternative: to order payment of the corresponding amount in DM, to be calculated at the time of the last oral hearing; and

(2) To declare that [Seller] is obliged to compensate for all additional damages that have accrued or will in the future accrue from the fact that [Seller] had not complied with its obligations under the contract of 23 December 1993 either in time or not at all, particularly to compensate [Buyer] for the damage the latter had suffered due to the guarantee for contract performance issued to Power Supply Company E in the amount of US$ 323,207 in case [Buyer] should be required to perform the guarantee as well as to compensate [Buyer] for the performance of any penalty clauses which have been or will be relied upon on the basis of the contract of 24 December 1992.

[Seller's response to the action:]

[Seller] requests the Court to dismiss [Buyer]'s action. 16

[Seller] argues that it was under no obligation to pay damages because [Buyer] had not complied with its obligations arising out of the contract of 23 December 1993. According to that agreement, it was solely for [Buyer] to furnish a confirmation about the future opening of the letters of credit, which in itself can be seen as an expression of doubtful solvency status, because under commercial usage [Buyer] should have secured its obligations through letters of credit immediately after the conclusion of the contract (proof: obtaining of an expert opinion). Any first act by [Seller] – given the considerable time pressure upon [Buyer] – meant mere courtesy towards the other party. [Seller] had relied upon [Buyer] to keep its promise to present the bank confirmation as soon as possible. Simultaneously, [Seller] had effected considerable performance in advance when it invested DM 70,000 in order to install a machine at its wood processing plant in Latvia and invested another DM 20,000 in order to get its personnel on that site. 17

Although there had been some delays caused by adverse weather conditions, this had been rectified through the mutual agreement to reschedule the examination date. By that date, [Seller] would have been able to deliver 10,000 wooden poles if [Buyer] had adhered to its contractual obligations. At that time, [Seller] had already entered into a contract with the forest administration authority of Hesse, Germany for the delivery of 25,000 raw poles (proof: hearing of witness R). [Seller] was able to process these poles in due time because all facilities had been running normally after the end of winter (proof: hearing of witnesses O, N and W). Any subsequent reduction of production output had been caused solely by [Buyer]'s conduct. Upon the latter's request, there had been talks on 15 March 1994 in the course of which witness Z surprisingly declared that its principal, the [Buyer], wanted a change of the agreed payment terms. The change meant that [Seller] should do without the bank confirmation and be satisfied with an irrevocable payment order. Since [Seller]'s bank had warned the latter of such procedures, it had not agreed to the suggestion (proof: hearing of witness V), but had insisted upon the original payment terms. Apparently, [Buyer] had not been able to act in accordance with these terms; even the confirmation of 4 April 1994 – which it never had received and whose authenticity it contested – only referred to a delivery in a quantity of 15,000 poles, however, not to the full volume of the contract. **18**

Since [Buyer] had not been able to furnish any financial securities for [Seller]'s own advance efforts, the latter had not made any promises concerning any future deliveries even though constant pressure had been exercised since the end of March 1994. Rather, [Seller] had offered [Buyer] the available 5,000 wooden poles and had also agreed to the additional agreement of 20 April 1994, which implied some ascertainable financial risk. This, however, had only been done in order to secure performance of the transaction, which finally had been impossible due to [Buyer]'s lack of solvency. As witness Z had stated that a delivery from Poland had been on its way, it itself had assumed in its letter of 19 May 1994 that the agreed examination could take place on 20 May 1994. However, both this date and the subsequent date of 13 June 1994 had been conditional upon [Seller] receiving financial securities in the first place. Such expectation was in particular justified because witness Z had received additional payments of DM 12,000 and 4,000 by [Seller] on 2 May and 3 June 1994 under the amended contract. **19**

Moreover, the stated witness had borrowed a further amount of about DM 9,200 (proof: hearing of witness ...) as the latter had not even been able to pay for his stay in a hotel, which was invoiced on 16 May and 3 June 1994. [Seller] had also learned by the end of 1994 that witness Z had sent the money to his family and had furthermore attempted to receive further loans from representatives of [Seller] (proof: hearing of witness V). Finally, [Seller] had learned from telephone calls made by witness V that [Buyer] had apparently not been willing to pay for the future deliveries (proof: hearing of witness V). That is why [Seller] finally had to insist in its letter dated 7 June 1994 on presentation of the bank confirmation. After [Buyer] had not responded to this letter in due course, [Seller] had been entitled to cancel the contract. **20**

By way of precaution only, [Seller] would also point to its own expenses and rely on a set-off against any claims of [Buyer] as follows: **21**

1. Lost profit arising out of the contract of 23 December 1993 (19,431.04 solid cubic meters x DM 50): DM 971,552

2. Storage costs of poles already prepared in Rostock: DM 160,000

3. Interest for procurement costs of poles in Rostock: DM 22,100

4. Loss incurred from cover sale (3,350 solid cubic meters x DM 70): DM 234,500

5. Investment for machinery in Latvia: DM 70,000

6. Expenses for personnel in Latvia: DM 20,000

= DM 1,478,152

[Seller] further argues that because it thus did not owe [Buyer] anything, the latter was under a duty to effect compensation in relation to expenses necessary for execution of the additional (amended) contract terms amounting to DM 40,000. Since it was undisputed that [Buyer] had not adhered to [Seller]'s corresponding request of 14 June 1994, the former had to compensate the interest damage incurred through continuous usage of a bank loan at 14.25% interest. **22**

For further details of [Seller]'s arguments, reference is made to the statement of defense of 7 November 1994 as well as supplementary statements of 23 January 1995.

[Seller's counterclaim:]

By way of counterclaim, [Seller] requests the Court to order [Buyer] to pay DM 40,000 plus 14.25% interest since 18 June 1994. **23**

[Buyer's response to the counterclaim:]

[Buyer] requests the Court to dismiss the counterclaim. **24**

[Buyer] submits that the payments relied upon by [Seller] had been exclusively intended to compensate for the granted support according to the additional agreement of 20 April 1994. Since – as stated in that document – [Seller] had not even been able to perform the first delivery until 20 May 1994, witness Z had assisted only upon [Seller]'s particular request. Only that can properly explain why the witness made reference to the agreement in question in the confirmation of receipt dated 2 May 1994. Naturally, [Seller] had stated that it would pay for hotel costs of the witness and had only denied settling the additional invoices when the relations between the parties had become problematic in the course of June 1994. [Buyer] had only agreed to compensate [Seller] for its debts against Z in the amount of DM 1,074.76 in order to prevent third persons from suffering financial detriment caused by the dispute between the parties. The sum already claimed by [Buyer] was therefore increased by the respective claim to receive compensation.

Reasoning of the Court:

I. 25
Since [Buyer]'s action has already been held admissible through the legally effective interim judgment of the Court of 22 June 1995, this Court need not further examine this issue (Zöller, *ZPO,* 19th ed., § 380 para. 8). The action is also justified on the merits. According to Art. 45(1), (2) in conjunction with Art. 74 CISG, [Buyer] is entitled to a claim against [Seller] for compensation of its losses, including lost profit, because the latter at least could have foreseen the damage at the time of conclusion of the contract as a consequence of its breach of contract.

(1) 26
Failing any choice of law, the contractual relationship of parties to a contract is determined according to the law of the State in which the party having to effect the characteristic performance is seated, Art. 28(1)(1), (2) EGBGB. In the execution of a contract of sale, which is the nature of the relevant agreement of 23 December 1993, therefore, the seat of the seller is decisive (Palandt, *BGB,* 54th ed., Art. 28 EGBGB para. 8). In the present case, [Seller] is seated in the Federal Republic of Germany. At the same time, the content and effect of an obligation are determined – according to the generally recognized principles of the inter-temporal law of obligations – by the law that is applicable at the time of its creation (BGH NJW 1989, 3097 (3098)). With regard to this dispute, these principles have been specified by Art. 5(2) of the German Act Implementing the CISG of 5 July 1989 (BGBl. II p. 586) in a way that the CISG shall apply to contracts concluded after the entering into force of that Act.

(2) 27
Pursuant to Art. 30 CISG, the seller must deliver the goods, hand over any documents relating to them and transfer the property in the goods, as required by the contract and this Convention. If the seller does not fulfill these obligations, the buyer will be entitled without prejudice to any of its remedies under Arts. 46 *et seq*. CISG to claim damages according to Art. 45(1), (2), while the extent of compensation follows from Arts. 74 *et seq*. CISG. In fact, this impliedly presupposes that a claim for performance of the contract has subsisted until the cancellation of contract. However, that claim subsists in the present case in spite of [Seller]'s letter dated 14 June 1994. This is because Art. 64(1) CISG entitles the seller to unilaterally avoid the contract only if (a) the failure by the buyer to perform any of his obligations amounts to a fundamental breach of contract, or (b) the buyer does not, within the additional period of time fixed by the seller in accordance with Art. 63(1) CISG, perform his obligation to pay the price or take delivery of the goods, or if he declares that he will not do so within the period so fixed. It is not necessary to determine to which sphere of obligations the presentation of a bank confirmation concerning the future opening of letter of credits – as has been agreed upon – belongs. This is because [Buyer]'s conduct does not indicate any relevant failure to perform its obligations. The factual basis to assume that either of the two grounds were fulfilled is not established even in the case that it be assumed in favor of [Seller] that item 9 of the contract of 23 December 1993 had remained unaltered.

(a) 28
First of all, the failure to present a bank confirmation does not constitute a fundamental breach of contract under Art. 25 CISG. A breach of contract is fundamental under that provision only if it results in such detriment to the other party as to substantially deprive him of what he is entitled to expect under the contract. This presupposes a considerable distortion of the contractual relationship, which needs not always pose a particularly severe threat to assets, but which must be of such importance that under a balancing of both parties' interests it becomes unacceptable to further bind the party that fulfils its contractual obligations (v. Caemmerer/Schlechtriem, *Kommentar zum Einheitlichen UN-Kaufrecht,* 2nd ed., Art. 25 para. 9). This cannot be assumed in the case at hand under due consideration of the agreements reached and the conduct shown by the parties. The bank confirmation could only – and then quite imperfectly – serve as a security of some advance performances made by [Seller], which however were not at all aimed at a transfer of assets to [Buyer]. These advance performances were rather connected to the internal procurement of the goods which naturally forms part of a seller's obligations. [Seller]'s only risk in that respect was that it might not have succeeded in reselling the procured goods. However, this risk was comparably small even according to its own statements. The extensive correspondence between the parties until the first setting of a time limit on 7 June 1994 gives no indication that the failure to present the requested confirmation would have caused an impediment to the due execution of the envisaged transaction. Quite to the contrary, it was [Seller] that through its statements of 14, 15 and 25 February 1994 as well as of 24 March, 9 May and 19 May 1994 demonstrated that it was generally willing to perform its obligation to deliver, constrained only by some disadvantageous conditions. This conclusion is also reasonable not only with respect to the additional agreement of 20 April 1994 under which [Seller] was obliged to pay half of additional expenses of a cover purchase arising out of delivery problems, but also with respect to the fact that it made an advance payment for that purpose of DM 24,000 without any security. Considering furthermore that [Seller] effected additional payments of DM 26,000 in total until 3 June 1994, it cannot be assumed that the intention of both parties was such as to attach fundamental relevance to the bank confirmation of future opening of letters of credit in terms of Art. 25 CISG.

This solution is further supported as [Seller] was sufficiently protected by the remedies pursuant to Art. 71(1) CISG in case of a failure to present the confirmation at issue. Under this provision, a party may suspend the performance of his obligations if, after the conclusion of the contract, it becomes apparent that the other party will not perform a substantial part of his obligations as a result of a serious deficiency in his ability to perform or in his creditworthiness, or his conduct in preparing to perform or in performing the contract. If [Seller] had not wanted to engage in the execution of the contract without the bank confirmation, it would have been entitled to temporarily suspend its acts until sufficient assurances were granted provided that it previously gave the corresponding notice under Art. 71(3) CISG (v. Caemmerer/Schlechtriem, *ibid.,* Art. 71 para. 21). However, [Seller] was not entitled to declare avoidance of the contract (v. Caemmerer/Schlechtriem, *ibid.,* Art. 71 paras. 23, 40); since temporary suspension of performance, which sufficiently remedies the need of [Seller] to receive assurances, only leads to a limited state of pendency and as such has no effect on both parties' primary obligations. 29

It can remain unresolved whether any sort of subsisting distortion could finally be regarded as a fundamental breach of contract despite immediate notice of suspension and additional announcement of denial in terms of Art. 72(2) CISG, which in turn would justify immediate avoidance of the contract according to Art. 72(1) CISG. Any subsisting distortion of the mutual relationship cannot be attributed to [Buyer]. Instead, [Buyer] itself had attempted to reach a reasonable settlement of the problems in due time after receipt of the letter dated 7 June 1994, It was [Seller] who denied any appropriate solution through its denial to perform of 14 June 1994: A debtor who seriously and definitely denies its obligations commits a severe breach of contract even if in that course it relies on a non-existent right to withdraw from the contract (v. Caemmerer/Schlechtriem, *ibid.,* Art. 72 paras. 27, 28). **30**

(b) **31**
It is doubtful whether the duty to present the owed bank confirmation concerning the future opening of letters of credit can alternatively be attributed to the buyer's sphere of obligations as circumscribed by Art. 64(1)(b) CISG. While the buyer must take all measures required for payment (Art. 54 CISG), the confirmation in question can hardly be considered as a proper bank assurance preliminary to the future payment of the purchase price. In particular, the confirmation was not related to the issuing of a letter of responsibility or of an irrevocable guarantee, a condition which is already evidenced by the payment clause in the contract. According to that clause, an «irrevocable confirmed letter of credit» (*cf*. BGH BGHR BGB §780, Dokumenten-Akkreditiv 1) had to be presented only after examination and approval of each consignment, which indicates that the previous confirmation should not serve any similar purpose, as at the time of the opening of the respective letters of credit the bank had to act in accordance with its client (BGH BGHR BGB § 665, Dokumenten-Akkreditiv 1). Therefore, the bank could not have acted after confirmation without participation of [Buyer]. [Seller] – apparently well-experienced in commercial transactions – could not have overlooked this and according to its objective conduct it did not attach any consideration to this issue other than that it concerned a mere declaration of intent or solvency. Consequently, [Seller] has been unable in the present proceedings to substantiate that and why the bank confirmation would have advanced the payment in any way.

This issue therefore does not need further discussion. Even if this duty of [Buyer] was brought in the context of Art. 54 CISG, this would not justify a different legal assessment. In that case, Art. 64(1)(b) CISG would be relevant, a provision which entitles the seller to unilaterally declare avoidance of the contract only after lapse of a reasonable time set in accordance with Art. 63(1) CISG. This time limit had not by any means expired when [Seller] by letter of 14 June 1994 seriously and definitely denied the performance of any contractual obligations for the future. The appropriate time limit must be determined according to the objective circumstance of the particular case. The actual technical possibility only forms a minor point of consideration. This is due to the fact that the necessity of granting an additional time limit is supposed to grant the debtor a short, however realistic possibility to effect performance. Therefore, the setting of the time limit must be assessed according to § 242 BGB, i.e., it must not be abused as a means of getting rid of a contract which has been considered as disadvantageous in retrospect. The setting of too short a time limit can in exceptional circumstances be completely devoid of any legal effect, if the creditor has only set it in pretense or if the latter has demonstrated that it would not accept performance in any case – even if it would take place **32**

within the limits of an appropriate time (BGH NJW 1985, 2640; BGH BGHR BGB § 326(1), Fristsetzung 2). Consequently, in the course of assessing the time limit, any existent particular interest of the creditor to receive performance in due course must be taken into consideration (BGH NJW 1985, 2640 (2641)); (v. Caemmerer/Schlechtriem, *ibid.,* Art. 63 para. 3); on the other hand, the creditor must not surprise the debtor with its generally justified request beyond the limits of good faith. In case the creditor has given the impression by his previous conduct that it would not attach great importance to an issue, it acts against good faith when it suddenly – and without notice – claims that a comparably irrelevant part of the performance should now constitute a pivotal obligation and that its adherence to the contract should depend on the performance within a few days, while non-performance had been previously accepted.

This is exactly what has happened in the present case: As already discussed, [Seller] had unconditionally cared for performance of the contract until 3 June 1994 and announced to make deliveries over and over again, without ever claiming that the missing bank confirmation constituted a major impediment to its own performance. Rather, it constantly and exclusively referred to adverse conditions, wherefore it also assumed a considerable financial burden by way of the additional agreement of 20 April 1994. Even if serious doubts had arisen on the part of [Seller] concerning the solvency of [Buyer], it would have been reasonable commercial practice to discuss any suspicions with their representatives in order to achieve an appropriate solution. However, under the state of affairs as of 7 June 1994, there had been no reasonable motive to demand the bank confirmation within three days. As the execution of the transaction had by that time already taken more than half a year and as delivery dates had been amply postponed over and over again for other reasons, [Seller]'s situation could not suddenly materially change through immediate rectification of doubts as to [Buyer]'s solvency, while the latter would have had to undertake huge efforts and immediate action in order to comply with the proposed time limit. **33**

Such conduct could not reasonably be expected from [Buyer], especially because – according to commercial usage – it could expect a response to its letter of 9 June 1994. It was obvious for [Seller] from the content of the letter that its contracting partner possibly wrongly assumed that there had been a different subsequent agreement, which would have properly explained why no bank confirmation had been issued until then. Since there had in fact been negotiations in relation to this issue, any such assumption could not have been completely absurd. If [Seller] was nevertheless of the opinion that [Buyer] had made a wrong assumption, it was under good faith for the former to rectify the misapprehension by an indication. In the face of the express request for a reply, [Seller] could not reasonably understand [Buyer]'s statements as a definitive denial. A high standard must be met before a definitive denial to effect performance may be assumed (BGHZ 104, 6 (13)). Mere disagreement in relation to the content of the contract, which might have existed in this case, is not sufficient (BGH LM BGB § 326, Dc No. 2; BGH NJW 1971, 798). Instead, the debtor must have unambiguously expressed its intention not to comply with its contractual obligations in part or in full in the sense of a «last word» (BGH NJW 1986, 661; BGH BGHR BGB § 326(1), Fristsetzung 3). **34**

There is clearly no such intention on the part of [Buyer] in the present case. This can also be seen in its subsequent conduct. The letter of 9 June 1994 indicated that [Buyer] had in fact **35**

attempted to state the relevant issues comprehensibly from its perspective. Should that view be incorrect, it was up to [Seller] to seek clarification in due course. If the latter – despite the additional offer by [Buyer] of 14 June 1994 which would have complied with [Seller]'s desire to receive assurances – rejected it just in order to unambiguously and persistently declare avoidance of the contract on the same day and only one week after the first setting of a time limit, then it is this conduct which amounts to a severe breach of contract (*cf*. BGH BGHR BGB § 326(1), Fristsetzung 1; BGHZ 49, 56 (59 *et seq*.)), Even if one assumed that the request of 7 June 1994 was not already legally irrelevant – on the basis of a time limit clearly being far too strict and thus constituting a pretense time limit – but that indeed an appropriate time limit had commenced, that relevant time was not already expired on 14 June 1994 given the circumstances discussed above.

(3) **36**
On the basis of the thus established fundamental breach of contract, [Buyer] was entitled to declare avoidance of the whole contract, Art. 73(2) CISG. The statement required to that effect under Art. 26 CISG can be made impliedly (v. Caemmerer/Schlechtriem, *ibid.,* Art. 26 para. 10), and can at least be assumed with respect to the statement of claim of [Buyer]. This is when the latter perceptibly claimed compensation for the damage which had arisen from the complete failure of the transaction at hand.

II. **37**
[Buyer]'s action is, so far as being ready to be decided, justified at least in a partial amount of US$ 580,000.

(1) **38**
Pursuant to Art. 74 CISG, damages for breach of contract by one party consist of a sum equal to the loss, including loss of profit, suffered by the other party as a consequence of the breach so long as these do not exceed the loss which the party in breach foresaw or ought to have foreseen at the time of the conclusion of the contract, in the light of the facts and matters of which he then knew or ought to have known, as a possible consequence of the breach of contract. The compensable loss is to be calculated specifically, without recourse to the deviating provision of § 252 BGB. It is for the creditor claiming damages to demonstrate all corresponding requirements and to prove them before court (v. Caemmerer/Schlechtriem, *ibid.,* Art. 74 para. 24).

This also affects the issue of foreseeability which must be clearly assumed in relation to the immediate damage caused by the very act of non-performance which [Buyer] calculated at US$ 608,879.77. The relevant representatives of [Seller] had been aware of [Buyer]'s contract with a third party and the dangers and opportunities attached thereto, which is established by the mutual correspondence and especially by the letter of 14 February 1994. It was plainly obvious for [Seller] that any breach of its own obligations could have led to the communicated damages. **39**

The same result would hold true even if a stricter foreseeability test were applied (v. Caemmerer/Schlechtriem, *ibid.,* Art. 74 para. 43) in relation to the disputed and until this day only insufficiently proven financial detriments, which [Buyer] suffered for example from **40**

the loss of future orders by E. It is readily apparent from its notices of 18 and 25 February 1994 that [Buyer] seriously expected the conclusion of another contract concerning delivery of 20,000 poles – a transaction which was obviously endangered by failure of the present transaction. According to simple commercial experience, business relations with unreliable suppliers will be terminated in due course.

(2) **41**
If [Seller] was able to foresee the whole of the damages claimed by [Buyer], it would already now be under a duty to compensate for lost profit suffered from the contract that [Buyer] concluded with E on 24 December 1992. The relevant content of this contract, the conclusion of which is not substantially disputed by [Seller] according to its declarations in the oral hearing of 1 December 1994, is readily perceptible from the document submitted in relation to it. On the basis of that document, [Buyer] had agreed with its customer E on a sale price of US$ 3,232,070.17, while the corresponding cover transaction of 23 December 1993 led to expenses of US$ 2,623,190.40. The hasty denial by [Seller] to execute the cover transaction which in turn prevented [Buyer] from duly complying with its sub-contract and led to its inability to gain the purchase price, caused a loss of revenue of US$ 608,879.77 in the first place which, however, must not be considered as the profit subject to compensation. Experience tells that the execution of a transaction of the kind as the present causes additional expenses which lead to a lower profit and which have been saved in the case at hand. For example, it is undisputed that [Buyer] was to bear the costs of the owed examination of poles by inspectors of company E, which would have cost US$ 1,000 in each case. Furthermore, [Buyer] would have had to have a number of letters of credit opened which in turn generally leads to considerable bank fees that have now been saved as well. Finally, [Buyer] itself at least temporarily would have had to pre-fund the amounts due to payment, which generally causes expenses. If these savings are taken into account, to which neither party referred in detail, it appears justifiable to award [Buyer] damages in the amount of US$ 580,000, § 287 ZPO, while the action needs to be dismissed in relation to the exceeding partial sum of US$ 28,879.77 (US$ 608,879.77 – US$ 580,000).

(3) **42**
In this case there is no reason to require [Buyer] to request payment in domestic currency, contrary to its primary procedural request. In deviation from the principle of restitution in kind, damages pursuant to Art. 74 CISG are always payable in money (v. Caemmerer/ Schlechtriem, *ibid.,* Art. 74 para. 25), without the need to request a particular currency. If additional recourse is made to the non-unified German law, the circumstance that an amount of damages has been particularized in foreign currency is usually relevant only as a yardstick to measure the debt of the person that has to pay compensation. The amounts of damages calculated in foreign currency constitute calculation factors in order to determine the exact amount of damages payable by the debtor in the currency of his residence (BGHZ 14, 212 (217); BGH WM 1977, 478 (479); OLG Köln NJW-RR 1988, 30). With reference to the case at hand, it must however be considered that the currency of the contract both in the relation between [Buyer] and [Seller] as well as between [Buyer] and its customer had been US dollars. Any profit or corresponding damage from non-performance could only accrue in this currency in the first place. Giving further consideration to the principle of full compensation which applies under the CISG and the fact that [Seller] has not objected to compensation in US dollars,

the assumption is thus justified that the parties at least impliedly agreed on an execution of their relationship solely on the basis of that currency.

(4) 43
[Buyer]'s claim for interest is justified as far as it refers to 5% since 24 September 1994 in relation to the sum of US$ 580,000 awarded under item II.2. above, Art. 78 CISG in conjunction with § 352 HGB.

However, interest calculated on the basis of US$ 121,174.92 since 28 February 1994, an additional US$ 181,762.38 since 30 April 1994, an additional US$ 181,762.38 since 15 June 1994 and an additional 124,180.05 since 30 July 1994 will not be awarded: The damages claim at hand due to non-performance replaces the claim for contract performance at the time of the avoidance of the contract, Art. 81 CISG. A sufficient declaration of avoidance of contract has been made only by submitting the statement of claim to the Court on 24 September 1994. [Seller] failed to effect payment of interest in terms of Art. 78 CISG since that date. It is true that this does not prevent [Buyer] from relying on a particular claim for payment in arrears, the abstract calculation of that claim was, however, not permitted under Art. 74 CISG (v. Caemmerer/Schlechtriem, *ibid.,* Art. 74 para. 17). Rather, it had to specifically prove any financial detriment suffered by the non-compliance with each delivery date, which [Buyer] failed to do. 44

Therefore [Buyer]'s action is dismissed in that regard as well as the further claim for interest. 45

III. 46
The set-off declared by [Seller] does not hinder the enforcement of any justified compensation claims by [Buyer]. This is because [Seller] is not entitled to the counterclaim for payment of damages in the amount of DM 1,478,152 which it argued as the basis for the set-off. The claim at hand, which is aimed at compensation of a loss from non-performance, could have its basis solely in such a breach of contract on the part of [Buyer] which would cause a total non-performance and which would justify the avoidance of the contract, Art. 61(1), (2) CISG. In the light of its own persistent denial to perform the contract, [Seller] cannot rely on such a breach.

IV. 47
A final judgment in relation to the additionally specified damage of US$ 445,650, to the request for declaratory judgment as well as to the counterclaim will not be made under the present state of proceedings.