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Jurisdiction	Germany
Tribunal	Bundesgerichtshof (German Supreme Court)
Date of the decision	23 July 1997
Case no./docket no.	VIII ZR 134/96
Case name	*Benetton II case*

Translation[*] *by Alexander P. Imberg*

Translation edited by Ruth M. Janal

Facts of the case

The Italian [seller] is the company «Benetton», which inter alia manufactures clothing. Benetton sells those clothes via independent retailers, such as the German [buyer]. The second defendant is the [buyer's] general partner, who is personally liable for the debts incurred by the [buyer]. The [seller] invoiced the [buyer] a total of 110,970.20 DM [Deutsche Mark] for goods delivered to the [buyer] between 30 September 1993 and 4 October 1994. [Seller] is seeking payment of the purchase price from the [buyer] and its general partner. 1

Between 1998 and January 1995, the [buyer] was running several clothing retail shops. In their lay-out and furnishing, those shop were geared towards the [seller's] products and only the [seller's] clothing was sold. The [buyer] was non-exclusively and revocably entitled to use the [seller's] trademark «Benetton» without adding its own name, as long as the [seller] was delivering to [buyer]. It was only by mistake that the [buyer's] general partner did not sign a corresponding declaration of 16 September 1987, which had been drawn up by the [seller]. The [buyer] and its general partner argue that a franchise agreement was implicitly formed between the [seller] and the [buyer], which violated German and European anti-trust regulations and was therefore invalid. The nullity of this franchise agreement also rendered void the individual contracts for the sale of goods which formed the basis of the [seller's] claim. 2

In the alternative, the [buyer] and its general partner submit a set-off with a claim for damages based on Benetton's shocking world-wide advertisement campaign. Since 1991, the [seller] has chosen pictures for Benetton's campaign that show the suffering in the world and contain the remark «United Colors of Benetton». The [buyer] alleges that it suffered a slump in sales and a resulting loss of profit in the amount of 655,322 DM through the [seller's]

[*] 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]; the Defendant of Germany is referred to as [buyer]. Amounts in German currency (*Deutsche Mark*) are indicated as [*DM*].

advertisements, which became the topic of heated public discussions [*cf*. BGH in «Benetton I»].

In a further alternative, the [buyer] submits a set-off with an alleged compensation claim resulting from an analogy to § 89b HGB [compensation claim of commercial agents under the German Commercial Code]. The [buyer] calculates this claim at 217,251 DM.

The Regional District Court (*Landgericht*) ruled in favor of the [seller], denying the validity of all of [buyer's] defenses and counterclaims. Upon appeal by the [buyer] and its general partner, the Court of Appeals (*Oberlandesgericht*) affirmed the decision of the Court of First Instance. The [buyer] and its general partner then lodged an appeal on points of law.

Grounds for the decision

[…] **3–11**

A) **12**
Without any error of law, the Court of Appeals granted the [seller] a claim for payment of the purchase price based on Arts. 53, 54 CISG in the amount of DM 110,970.00 for textiles delivered to and billed to the [buyer] between September 1993 and October 1994. With regard to the [buyer's] general manager, the claim is based on §§ 161(2), 128 sent. 1 HGB.

1. **13**
The Appeal Court's finding that the parties chose the applicability of German law (Art. 27 EGBGB, without excluding the application of the CISG, does not contain a mistake of law. The [buyer's] appeal argues that by choosing German law, the parties excluded the applicability of the CISG under Art. 6 of the Convention. In doing so, [buyer] overlooks that an agreement on the applicability of substantive German law by itself cannot be seen as an exclusion of the CISG. The reference to German law [as the applicable law] includes the CISG as a part of the same (*cf*. Schlechtriem/Herber, CISG, 2d ed., Art. 6 n. 16; and, with regards to ULIS, BGHZ 96, 313, 322 et seq.). While an implicit exclusion of the Convention is generally possible if the parties correspondingly refer to specific provisions of German national sales law (BGHZ 96, 313 (321)), there is no room for such an assumption in the present dispute. The Court of Appeals held – unchallenged by the [buyer's] appeal – that the [buyer] and its partner explicitly agreed to the application of the CISG during the oral hearing before the Court of Appeals.

2. **14**
The Court of Appeals rightfully left open the question of whether individual or all of the further distribution agreements between the parties, which were ascertained by the Court as they had been alleged by the [buyer], violated German (§§ 15, 18, 34 GWB) or European (Art. 85(1) EEC Treaty) Antitrust Law. The appeal challenges without success the Appeal Court's finding that the individual contracts – which form the basis of [seller's] claim – are valid even if the distribution agreements were not.

According to Article 4(a), the CISG is not concerned with the validity of contracts to sell. Therefore, the causes of nullity and invalidity [i.e., the defenses to the formation of a contract] of German domestic law, as the applicable law by virtue of the rules of private international law (Arts. 27, 31(1) EGBGB), take effect (Schlechtriem/Herber, id. Art. 4, n. 4, 6; Hoyer, in Hoyer/Posch, Das Einheitliche Wiener Kaufrecht, p. 39 et seq.). Accordingly, the Court of Appeals concluded without error of law that the sales contracts which form the basis of the [seller's] claim are not affected by a possible nullity of the parties' distribution agreements under § 139 BGB.

[…] **15–38**

Translator's note: The Court then enters into a discussion strictly of the findings of the Court of Appeals and substantive German law. No more articles of the CISG are discussed. The Court affirms the Appeal Court's decision and enters a ruling in favor of the [seller].