Landgericht Darmstadt 9 May 2000

Translation[*] *by Ruth M. Janal*[**]

Translation edited by Camilla Baasch Andersen[***]

FACTS OF THE CASE

The [seller] is a German company that produces and sells electronic appliances, especially video recorders, televisions and hi-fi sets. [Seller] delivers to wholesalers and retailers both within Germany and abroad. The [buyer] owns a wholesale business for electronic products in Switzerland. The parties have maintained a business relationship for quite a while, during which the [buyer] repeatedly ordered goods from the [seller]. Every invoice as well as the back of each delivery slip contained the [seller]'s General Conditions. Section 6(3) of the General Conditions stipulates Frankfurt am Main [Germany] as the sole forum. For the details of the invoices, the Court refers to the [seller]'s statement of claim. The parties agree that the invoiced goods were delivered, and the price of the goods is not in dispute. After subtracting various credits, the invoices lead to an amount of DM [Deutsche Mark] 3,384,932.36.

These invoices include a delivery of 8,000 video recorders. The [buyer] had notified the [seller] that these video recorders were non-conforming due to defects of their "arm-loading parts". With its letter of 1 February 1999 [buyer] -- via its former representative -- made a final refusal to pay any of the purchase price for the recorders. The Court refers to the letters of 20 and 23 November 1998, which [buyer] sent to the [seller] following a conversation between the parties in the year 1998.

The [seller] submits that its General Conditions were effectively incorporated into the individual contracts, as the [buyer] repeatedly accepted the General Conditions without voicing objections. In its opinion, this leads to the international and local jurisdiction of the Court. Moreover, the United Nations Convention on Contracts for the International Sale of Goods (CISG) also leads to the jurisdiction of the Court, as the [buyer] was bound to pay the purchase price at the [seller]'s place of business. The [seller] further alleges that, starting from 5 February

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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*]; amounts in Swiss Currency (*Swiss francs*) are indicated as [*Sf*].Ruth M. Janal, LL.M. (UNSW) is a Phd candidate at Albert-Ludwigs-Universität Freiburg.

Translator's note on other abbreviations: **BGB** = *Bürgerliches Gesetzbuch* [German Civil Code]; **BGH** = *Bundesgerichtshof* [Federal Court of Justice, the highest German Court in civil and criminal matters]; ***Brussels Convention*** = Convention of 27 September 1968 on Jurisdiction and the Enforcement of Judgments in Civil and Commercial Matters]; **EGBGB** = *Einführungsgesetzbuch zum Bürgerlichen Gesetzbuche* [German Code on Private International Law]; **HGB** = *Handelsgesetzbuch* [German Commercial Code]; **LG** = *Landgericht* [Regional Court]; **NJW-RR** = *Neue Juristische Wochenschrift Rechtsprechungs-Report* [German law journal]; **OLG** = *Oberlandesgericht* [Court of Appeals]; **ZPO** = *Zivilprozeßordnung* [German Code on Civil Procedure].

[**] Ruth M. Janal, LL.M. (UNSW), a PhD candidate at Albert-Ludwigs-Universität Freiburg, has been an active participant in the CISG-online database of the University of Freiburg.

[***] Camilla Baasch Andersen is a Lecturer in International Commercial Law at the Centre for Commercial Law Studies, Queen Mary, University of London and a Fellow of the Institute of International Commercial Law of the Pace University School of Law. She is currently finishing her PhD thesis on the uniformity of the CISG at the University of Copenhagen.

1999, it has continuously used a bank loan over the amount of the purchase price at an interest rate of 8.75%.

The [seller] requests the Court to order the [buyer] to pay it DM 2,664,932.48 with 8.75% interest from 5 February 1999.

The [buyer] objects to the international jurisdiction of the Court and requests the Court to dismiss the claim.

The [buyer] submits that the forum for the dispute is to be in Switzerland. [Buyer] maintains that there are no detailed terms for the cooperation between the parties. While it is true that the parties had maintained a business relationship over several years, the [seller]'s General Conditions had not been incorporated into the contracts.

[Buyer] further submits that the [seller]'s entire company group was experiencing financial difficulties, with the result that the [seller] was delivering products of inferior quality. The appliances delivered by the [seller] had been sold at a price that was above the current price of the goods. Contrary to the "business plan 11/1996" developed by the [seller], the [buyer] had been unable to realize a profit margin of 21%. The [buyer]'s considerable initial investments had been made in the expectation of a long-term cooperation with the [seller]. The [seller] had not kept its oral promise that the video recorders would be delivered at a "competitive price". The [seller] only consented to credit the [buyer] an inclusive sum for repair of DM 180.00 each for the defective video recorders. This amount did not cover the costs, especially the consequential damages that had not been foreseeable at the time of the settlement.

The [buyer] further submits: Regarding the invoiced amount of 3,385,236.00, the [seller] was only entitled to claim 69.71% of this as a realistic price. The claim was thus unfounded with respect to DM 807,067.91. The examination of the video recorders required working time and material in the amount of *Sf* [Swiss Francs] 149.50. Moreover, the [seller] had been aware of the design fault of the arm-loading part. [Seller] had thus violated the loyalty obligations arising out of the parties' framework relationship. The [seller] also failed to deliver instruction booklets in all official languages of Switzerland, causing the [buyer] considerable expenditure for the production of such manuals. Seven hundred and four (704) appliances possessed *Schuko* safety plugs that could not be used in Switzerland, again making additional expenditures necessary.

The [seller]'s conduct had led to a loss in turnover of over DM 2 million. Due to the inferior quality of the products, advertising expenditures were useless. For the market entry of the appliances, discounts of an average 6% had been granted to retailers, adding up to an amount of DM 477,700.64. The [buyer]'s reputation in Switzerland had been damaged beyond repair. While the loss of reputation was difficult to calculate, it at least amounted to *Sf* 500,000.00 (DM 602,400.00) and was open to the Court's estimate under § 287 ZPO.

The Court further refers to the [buyer]'s briefs of 30 June 1999 and 10 December 1999.

GROUNDS FOR THE DECISION

The Court possesses international jurisdiction over the dispute, making the [seller]'s claim admissible. Regarding the incorporation of [seller]'s General Conditions into the contract, the Court refers to the decision of the LG Frankfurt of 1 February 2000. The General Conditions do not lead to an effective forum selection, as simply the acceptance of General Conditions is insofar insufficient (prevailing opinion, *cf.* BGH NJW 1994, 2699). The Court's international

jurisdiction results from Art. 5 no. 1 Brussels Convention, which allows a party to be sued at the place of performance of an obligation under the contract. The place of performance is to be determined according to the law governing the contract. Contrary to § 270(4) BGB, the place of performance for the payment obligation under the United Nations Convention on Contracts for the International Sale of Goods (CISG) is the seller's place of business. Under Art. 57(1)(a) CISG, if the buyer is not bound to pay the price at any other particular place, [buyer] must pay it at the seller's place of business. Disregarding the [seller]'s General Conditions, which were not validly incorporated, the parties did not agree on any particular place for the payment of the purchase price. Thus, the Court possesses jurisdiction.

The [seller]'s claim is justified.

The [seller] invoiced the [buyer] with the agreed price for the delivered goods, which -- when taking into account several credits granted to the [buyer] -- leads to an overall amount of DM 3,384,932.36. The [seller] correctly reduced the purchase price for 4,000 delivered video recorders at a price of DM 180.00 each. The [buyer]'s record of the relevant meeting shows that the parties reached an agreement regarding the documented repair of each individual device for the price of DM 180.00. The note of 20 November 1998 does not yield any additional information. Insofar as [buyer] alleges that the [seller] did not request proof for each individual defective appliance its submission is unsubstantiated. The [buyer] neither submits which person at what time waived which requirement, nor does such a waiver follow from the [buyer]'s own records of the meetings or letters of confirmation. The [seller] only allowed the [buyer] to keep back 4,000 x DM 180.00 until the final settlement of the repair cases. There was no short-term protest of the [buyer], and its letter of November 1998 contains no clues that the [seller] relinquished its right to claim the full purchase price in all 8,000 cases. The [buyer] would have had to substantiate and prove its submission. Instead, its own letters of confirmation show that a deduction of DM 180.00 was only granted for the cases of repair.

The [buyer]'s defense is unsatisfactory since it failed to offer any proof of the extent and quantity of repairs undertaken within a reasonable time (from the time the video recorders were delivered until the current state of the proceedings). Insofar as [buyer] relies on further remedies under the CISG, the parties' agreement to reduce the price by DM 180.00 each stands in the way. [Buyer] itself submits that at the time this agreement was formed, it was aware of all the circumstances of the case, it was in possession of the [seller]'s repair instructions, and it knew that the [seller] was also informed of the problem. [Buyer] decided to form the agreement in view of the above facts, and is therefore barred from claiming ignorance and/or wilful deceit on the part of the [seller]. [Buyer] agreed to waive all further claims for damages against payment of an inclusive sum for each proven repair. The agreement -- confirmed by letter of the [buyer] -- is unambiguous in that regard. All the remedies available to a buyer under the CISG can be derogated from or are open to an inclusive compensation. There is no indication that [buyer] was tricked into the settlement through wilful deceit on the part of the [seller]. The [seller] thus waived its right to payment of the price only temporarily. This would enable it to claim even higher amounts than the ones sought in this proceeding, as the last appliances were delivered over one and one-half years ago and the [seller] denies that each and every item was a case for repair, while the [buyer] failed to offer proof for the number of defective goods.

The [buyer]'s submission that instruction manuals for the marketing of the products in the entire territory of Switzerland were not delivered is also insufficient. The delivery of manuals in French and Italian would have required a respective agreement, as the [seller] undisputedly delivered stocked goods. It was not a production for the Swiss domestic market. The [buyer] therefore had to expect that it would receive goods produced for the German market, which

might therefore be accompanied only by a manual in German. The [buyer] does furthermore not submit that it gave a notice of lack of conformity, leading to the loss of any purported rights on its part. Under Art. 39(1) CISG the buyer loses the right to rely on a lack of conformity if it does not give notice to the seller specifying the nature of the lack of conformity within a reasonable period of time after [buyer] has discovered it or ought to have discovered it. If the [buyer] had possessed such a right, it could have reasonably been expected of it to require performance by the [seller] of its obligations, that is, delivery of the manuals. While the Court does not find that the [buyer] possesses a claim for damages, it would like to point out that the [buyer] -- by ordering the production of the manuals elsewhere instead of requesting delivery from the [seller] -- violated its obligation to mitigate damages under Art. 77 CISG. At least the [seller]'s parent company, a global player in the market, would have been able to provide a delivery of manuals in French and Italian without necessitating translation costs. However, a party that is unaware of a purported lack of conformity is unable to make arrangements for remedy. In the end, the matter is of no importance, as a businessperson acquiring goods in stock for the German market must expect instruction manuals to be in German. This might have been different had the goods been produced exclusively for the Swiss market. However, even in that scenario, an agreement regarding the percentage of the expected language provenances of the [buyer]'s customers would have been necessary.

The [buyer]'s submission regarding its allegedly useless advertisement campaign does not lead to a claim for damages. The [buyer] neither submits that its solely advertised the defective products, nor does it submit which percentage of the advertised goods were defective, nor does it maintain that none of the purportedly defective devices were sold at all. This was repeatedly pointed out by the [seller] during the proceedings.

Regarding the [buyer]'s submission that some of the appliances delivered possessed *Schuko* safety plugs, the question arises why 704 items should not have possessed *Europlugs*. Again, Art. 39(1) CISG applies, leading to the [buyer]'s loss of the right to claim damages since it failed to give a proper notice of a lack of conformity. Apart from this (and without the taking of evidence), the Court finds the [seller]'s submission quite conclusive. The devices were produced years after the use of *Schuko* safety plugs had been stopped. It is thus inconceivable why 704 items should have all of a sudden been delivered with such plugs. Even if that had been the case, this would have constituted a wrong delivery that was plain to see even for a lay person and should have been discovered immediately, at the latest after making sample examinations of the delivered goods. In the end, the matter is of no importance, because the [buyer]'s submission is too rudimentary. A submission that cannot be scrutinized cannot be contradicted and is consequently not substantiated sufficiently. Regarding these procedural rules, German internal law and principles apply.

The [buyer] further alleges a considerable amount of useless advertisement costs (6% of the turnover). The [seller] correctly pointed out that only a part of the delivered devices were purportedly defective, that advertisement costs do not necessarily represent losses, that the [buyer] still sells the [seller]'s products and that the queried delivery ended up being sold. The Court concurs with the [seller]'s opinion that the [buyer]'s submissions are not sufficiently substantiated and conclusive.

With respect to the purported loss of turnover, the [buyer] does not present documents regarding the delivery and future expectation of the business. A loss in turnover can furthermore not be equated to a loss of profit. A loss of profit that demonstrably results from the alleged circumstances is neither submitted nor supported by calculations.

The [buyer] does not offer proof regarding the further alleged "serial defects" and "design faults". [Buyer] has not given a notice of lack of conformity specifying the defects or deviation from the agreed performance. As the [seller] correctly pointed out, the [buyer] neither calculated nor named the amount of respective damages.

The [buyer]'s allegation of liquidity problems in the [seller]'s company group may have a foundation, but does not affect the decision of the present dispute.

The [buyer] is not entitled to retain 30% of the invoiced purchase price. [Buyer] does not submit that the price is unconscionable. The allegation that the price differs from the current price of the goods is unsubstantiated and does not lead to any right of the [buyer] under the CISG. The [buyer]'s submission obviously refers to Art. 55 CISG.

[*Translator's note*: *The text of the case refers to "*Art. 55*". Presumably, this is a typo, with a reference to "*Art. 50*" intended.*]

However, there is no indication that the parties formed an implicit agreement on the price generally charged at the time of the conclusion of the contract. The [buyer] presented the [seller]'s calculation charts and thereby admitted that the parties agreed on the price as invoiced by the [seller]. [Buyer] objected to the prices for the first time during the course of the current proceedings. The [buyer] does not submit that it was delivered the goods at a different, that is, a higher price than German customers ordering the according quantity. [Buyer] does not even submit or prove that it only managed to obtain considerably lower prices when re-selling the products. [Buyer] does not submit that the [seller] is liable for calculated profit margins. Freedom of contract is a principle that underlies private international law and especially the CISG. It is manifest -- and supported by all the documents presented by the [buyer] -- that prices were negotiated and then invoiced accordingly. Whether or not these prices corresponded to the current price of the goods is absolutely irrelevant, as the agreement on price is each businessperson's own responsibility.

The Court does not follow [buyer]'s argument regarding its allegedly damaged reputation. The [buyer] cannot claim a loss of turnover, on the one hand -- which could be reimbursed in the form of lost profits -- and then, on the other hand, try to get additional compensation for a loss in reputation. A damaged reputation is completely insignificant as long as it does not lead to a loss of turnover and consequently lost profits. A businessperson runs its business from a commercial point of view. As long as it has the necessary turnover, it can be completely indifferent towards its image. [Buyer] does not prove that its allegedly damaged reputation harmed its sales quotas. For this reason, it "is unable to calculate the exact losses resulting from the damaged reputation." It may very well be that if defective products are sold and marketed, the further development of the business does not correspond to the reasonable expectations. However, the Court expects at least a minimum of sufficiently substantiated submissions. The [seller] was right in pointing out that the [buyer] failed to fulfil that expectation. The generic claim that customers transferred their business to [buyer]'s competitors is not concrete enough to form the basis of a hearing of evidence. The fact that retailers wandered off to other suppliers could be documented easily enough from the [buyer]'s business papers. It does not require a "survey evaluation".

Finally, the [buyer] needs to decide whether the marketing of the [seller]'s products harms its business -- in this case, the [seller]'s termination of the exclusive sales agreement should be in its interest -- or whether its damaged reputation results from the fact that the [seller] cancelled the contract. It is either good for its not to market the defective products, in which case there is

no damage, or the damage results from the fact that the [seller] no longer delivers to its exclusively. The latter damage cannot be liquidated. The [buyer] correctly points out in other instances that there was no framework contract between the parties, and therefore [seller]'s General Conditions were not incorporated. Thus, the [buyer] does not enjoy a legal protection of its trust to be delivered with the [seller]'s products in the future. As the [buyer] does not possess a respective right, all the more so does it not have a right to be the [seller]'s "exclusive distributor" in Switzerland. It is moreover not conclusive why the [buyer] should wish to keep marketing the [seller]'s products if [buyer] suffered damages of 9 million DM for each 3 million DM in turnover.

Apart from the arm-loading parts of the video recorders -- which had possibly in fact been badly constructed -- the [buyer] did not specify any defects of the goods that could be scrutinized. It can therefore not be ascertained in the individual instances whether the [buyer] complied with its obligations under Arts. 38, 39 CISG. As the [buyer] was aware of the lack of conformity, that is, the alleged defects of the arm-loading part of the video recorders, the seller cannot have been in bad faith under Art. 40 CISG . The [buyer] also does not submit that the requirements of a reduction of the purchase price as set out by Art. 50 CISG are met.

It is furthermore possible that by selling the goods without any notice specifying a lack of conformity (apart from the arm-loading parts) the [buyer] lost all of its rights under Art. 45 CISG by approving the goods -- or that such rights could only be asserted if the [buyer] submitted complaints of the end users.

The Court thus orders the [buyer] to pay the purchase price. The [seller]'s claim for interest results from Art. 78 CISG in connection with § 352 HGB. Under Art. 78 CISG, the [seller] is entitled to interest on any sum that is in arrears. As the CISG does not stipulate the interest rate, the rate is to be determined according to the law applicable by virtue of the rules of private international law (prevailing opinion - *cf.* v. Caemmerer/Schlechtriem, *Kommentar zum einheitlichen UN-Kaufrecht*, 2nd ed. Art. 78 n. 27). Since the parties did not agree on a choice of law clause (Art. 27(1) EGBGB), the law governing the contract is the law of the [seller]'s place of business (Art. 28(2) EGBGB). This law supplements the CISG (*cf.* OLG München, 2 March 1994; OLG Düsseldorf, NJW-RR 1994, 506 (507)). Regardless of how the interest rate is being determined, the re-financing of a businessperson at an interest rate of 5% can be assumed in the Federal Republic of Germany and a return of 5% on an amount of one million DM cannot seriously be questioned. Such a return neither requires specific knowledge nor risky transactions. As the [seller] did not prove a higher loss resulting from bank loans, its claim for interest was reduced by the Court to the 5% stipulated by § 352 HGB, owed from the date of the [buyer]'s final payment refusal on 1 February 1999.