District Court (*Landgericht*) München

16 November 2000 [12 HKO 3804/00]

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

Translation edited by Veit Konrad[***]

The District Court Munich I, 12th commercial chamber, represented by the presiding judge at the District Court Dr. Bachmann as chairman and commercial judges Dr. Bauer and Schornstein as associate judges, following the oral hearing on 28 September 2000, hands down the following

FINAL DECISION

I. The [buyer] is ordered to pay to the [seller] 21,192.00 *DM* [Deutsche Mark] plus 5% interest from 17 April 1999.

II. The [buyer] bears the cost of the proceedings.

III. The decision is preliminarily enforceable against lodging of security in the amount of 27,000.00 *DM*.

FACTS OF THE CASE

On 19 September 1998, the Italian [seller] concluded a contract with Mr. R.C. for the delivery of pizzeria fittings. Regarding the content of this contract the Court refers to attachment K2 of the [seller]'s brief of 19 May 2000. The [seller] installed the fittings into restaurant-facilities in [...] and invoiced the [buyer] – whose place of business is in Munich [Germany] – for the delivery. The [buyer] made two payments by check. With its claim, the [seller] is seeking the unpaid amount from its invoices, while subtracting a commission owed to the [buyer] in the amount of 10,000.- *DM*. [Seller] submits that the [buyer] took over the contract concluded with Mr. R.C.

After withdrawing part of the claim in the amount of 808.- DM, the [seller] requests the Court to order the [buyer] to pay to the [seller] 21,192.- *DM* plus 5% interest from 17 April 1999.

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[*] All translations should be verified by cross-checking against the original text. For purposes of this translation, the Plaintiff of Italy is referred to as [seller]; the Defendant of Germany is referred to as [buyer]. German currency (*Deutsche Mark*) is indicated as [*DM*].

Translator's note on other abbreviations: **BGB** = *Bürgerliches Gesetzbuch* [German Civil Code]; **EGBGB** = Einführungsgesetzbuch zum Bürgerlichen Gesetzbuche [German Code on Conflict of Laws]; **GKG** = *Gerichtskostengesetz* [German Code on the Costs of Judicial Proceedings]; **HGB** = *Handelsgesetzbuch* [German Commercial Code]; **ZPO** = *Zivilprozeßordnung* [German Code on Civil Procedure].

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The [buyer] requests that the claim be dismissed.

The [buyer] submits that the [seller] did not prove that [buyer] took over the contract. Furthermore, the [buyer] claims numerous lacks of conformity of the restaurant-fittings. As an alternative pleading, the [buyer] declares a set-off with a claim for payment of a commission in the amount of 18,500.- *DM*. [Buyer] had found a customer for the [seller] in Neugablonz [Germany], who ordered the fitting of a restaurant. [Buyer] submits that [buyer] is entitled to a commission of 10% for this arrangement.

Regarding the further submissions of the parties, the Court refers to the exchanged briefs and to the attachments thereto.

REASONS FOR THE DECISION

[Seller]'s claim is admissible and justified. The [buyer] is obliged to pay to the [seller] the amount claimed.

The [buyer] is party to the contract in dispute. [Buyer] entered into the contract in place of the original contract party, Mr. R.C. There was a take-over of the contract.

[Buyer] does not dispute the [seller]'s submission that Mr. R.C. turned to the [seller] in October of 1998 and told the [seller] that [buyer] was unable to sell the ordered fittings to its intended customer. Mr. R.C. asked the [seller] to consider whether the ordered goods could not be sold to a different customer. In this context, it would not have been admissible for the [buyer] to dispute [seller]'s pleadings with ignorance of the facts, as [buyer] itself submitted that Mr. C.'s plans had been shattered and that Mr. C. knew that the [buyer] had repeatedly acted as a broker for the [seller] regarding the sale of restaurant fittings, including the installation, to third parties. The [buyer] also does not dispute the [seller]'s further pleadings, according to which [buyer]'s manager met with [seller]'s manager and formed an agreement that the [buyer] would take over the order made by Mr. C. [Buyer] only submitted that it was incorrect that it took over Mr. C.'s order „in its full extent".

Consequently, the [buyer] did not dispute the [seller]'s pleadings regarding the consent to [buyer]'s take-over of the contract. With its further submissions, [seller] also indicated the point in time (October 1996) at which [buyer] entered into the contract, replacing Mr. C. In its reply, the [buyer] disputed neither this submission, nor the [seller]'s further pleadings that the [buyer]'s manager and Mr. C. had emphasized to the [seller]'s manager the fact that they were partners and that the [buyer] was to be charged for the restaurant facilities. It follows from the [seller]'s pleadings that a contract was formed between Mr. C. and the [buyer]'s manager regarding a take-over of the contract, and that the [seller] gave its consent to this take-over. The – undisputed – submission that Mr. P. and Mr. C. were partners, as well as the demand that the [buyer] be charged with the restaurant fittings, also explains why the shipping document and the working hours report were signed by Mr. C. A take-over of the contract is furthermore indicated by the fact that the [buyer]'s manager signed the two checks regarding two partial payments to be made on the invoice and that those checks were handed over to the [seller]. When [buyer] handed over the checks, [buyer] did not declare that it was effecting payment on account of a third person. Consequently, by handing over the checks, [buyer] acknowledged that it owed the price for the restaurant fittings.

The contract in dispute was a contract for the sale of goods to be manufactured. Following Art. 3(1) CISG, such contracts are to be considered contracts for the sale of goods. Under

Art. 3(2) CISG, the Convention would not apply if the preponderant part of the obligations of the [seller] consisted in the supply of labor. This was not the case in the present dispute. According to the written contract, the price for the „entire delivery" was determined by the addition of the individual prices for individual articles. The „construction", that is, the installation of the fittings, was included in the overall price, as was the shipping; a service fee was not invoiced. This indicates that the preponderant part of the [seller]'s obligations was the delivery of the fitting articles and not the work rendered during the installation. The individual articles evidently did – at least predominantly – not become essential components of the house where they were put up or installed. The length of the period necessary for installation – which is revealed by the working hours report – also does not change the fact that the preponderant part of the [seller]'s obligations consisted in the delivery of the ordered fitting objects. In view of the considerable amount and value of the objects, which can be gathered from the individual prices, the delivery of goods does not diminish against the performed works, even if a longer period of time is required for the installation. The manufacture of the fitting objects to be delivered did also not constitute the preponderant part of the [seller]'s obligation. While it is true that the contract contained measurements of various articles which were based upon the customer's requests, respectively the nature of the restaurant, the [seller] was nevertheless able to definitely determine the price of the individual objects. The [seller] neither made a costs estimate nor did it draw up a list of obligations with standard prices, which were then to form the basis of the final price of its performance. The drawing submitted by the parties is evidently an implementation drawing, as it is dated 21 September 1998, whereas the contract in dispute was already formed on 7 August 1998. It follows that the fitting objects were not designed by the [seller], but that they were standard goods which were only adjusted in their measurements to the customer's requirements and the conditions of the restaurant facilities. Consequently, the production of the objects also did not constitute a performance of works or services, which is in the fore in contrast to the delivery of goods.

It is irrelevant in the present context whether the goods constituted fungibles, that is, whether it would have been difficult or impossible for the [seller] to sell these goods to a different customer. Art. 3 CISG does not make a distinction between fungibles and non-fungible goods, but solely distinguishes between the delivery of goods – covered by the Convention – from those cases, in which the delivery of goods is of lesser importance than the supply of labor or other services. Under German law (§ 651(2) BGB), such contracts are considered contracts for services. However, the German law also treats commercial contracts for the delivery of non-fungible goods manufactured by the supplier equal to contracts for the sale of goods, as is stipulated by § 381(2) HGB.

As the present contract is not a contract for services, but a contract of sale of goods, an acceptance of the services rendered by the [seller], that is, the customer's approval, is not necessary. The physical acceptance [taking delivery] of the goods – stipulated by Art. 53 CISG – has occurred. The [buyer] is not entitled to rely on a possible lack of conformity of the delivered goods, as [buyer] failed to notify the [seller] thereof within the period required under the CISG.

Following Art. 38(1) CISG, the [buyer] was obliged to examine the delivered restaurant fittings within as short a period as was practicable in the circumstances. The [seller]'s standard sales terms stipulated a period of five days, during which possible defects of the delivered fittings were to be reported. In any case, the [buyer] would have had to examine the delivered and installed goods within a period of roughly ten days; at least, however, [buyer] was bound to give notice to the [seller] specifying the possible non-conformities within a reasonable time, starting after the expiry of roughly ten days (Art. 39(1) CISG). The said periods of time are

applicable irrespective of whether [buyer]'s manager was present at the time of the delivery of the goods; if necessary, [buyer]'s manager would have had to engage someone to examine the goods and notify the [seller].

The [buyer] failed to notify the [seller] of the non-conformity of the goods within the period of time provided by Art. 39(1) CISG, but for the first time queried the goods in [buyer]'s reply to the statement of claim of 17 April 2000 – „some lack of conformities" and then with [buyer]'s brief of 7 September 2000 – „numerous lack of conformities". Since the delivery of the fittings – according to the [seller]'s undisputed submissions – had already been effected at the end of April 1999, the notice of lack of conformity was severely late. The [buyer] did not submit any facts that [buyer] gave an orderly notice to the [seller] specifying one or more non-conformities at any prior point in time. It is solely revealed by the [seller]'s brief of 9 December 1999 that the [buyer] notified [seller] of „some defects"; it does not follow from this brief that the nature of the lack of conformity was specified. The letter of [buyer]'s manager, which – according to the [seller]'s pleadings – was dated 6 August 1999, complains of the non-delivery of two mirrors that were undisputedly not invoiced by the [seller]. Moreover, the letter complains of a „wrongly delivered ice-cream cabinet". Even if this notice was taken to specify the lack of conformity, it was not given within the period of time stipulated by Art. 39 CISG. According to this provision, the [buyer] consequently lost its right to rely on the lack of conformity.

The [buyer]'s objection that [buyer] was charged a price for the entrance door to the kitchen – which was not provided for in the contract – in the invoice of 16 April 1999 that was unusual and that the usual local price for such a door was „at a maximum 200.- *DM*", was not raised with the required submission of facts. In [buyer]'s letter of 6 August 1999, [buyer] solely noted that the entrance door was „very expensive". The [buyer], who, according to its own submissions, has repeatedly commissioned fittings for restaurants, would have been obliged to plead more detailed circumstances, from which the Court could have gathered that the invoiced price was unusual. That is, the [buyer] would have had to specify the kind of the delivered door and comparative prices, which are usually charged for a door of the kind delivered. It would have had to follow from [buyer]'s submissions that doors of the delivered kind are usually not invoiced with more than 200.- *DM*. In view of [buyer]'s failure to submit corresponding facts, the commissioning of the offered expert report would have constituted investigative and inquisitive evidence not admissible in Civil proceedings.

Regarding the [buyer]'s declaration of set-off with a counter-claim for commission, the Court does not follow the [seller]'s pleadings that the set-off is governed by Italian law. The parties concluded a brokerage contract with respect to the arrangement of customer P. in N. The characteristic obligation of that contract, the arrangement of a customer in Germany, was owed by the [buyer]. Therefore, under Art. 28(1) and (2) EGBGB, the brokerage contract is governed by the law of the country (Germany) in which the [buyer] has its place of business.

However, the [buyer]'s set-off claim is unfounded, as the [buyer] failed to submit any facts from which an agreement with the [seller] regarding a commission of 10% could follow. The [buyer] would have been obliged to make corresponding pleadings, as the [seller] already argued with letter of 6 August 1999, and then again during the judicial proceedings, that the parties had explicitly agreed upon a flat-rate of 10,000.- *DM* for the arrangement of the contract with customer P. The [seller] also subtracted this sum from the claimed amount. The [buyer] furthermore did not offer proof for its allegation that there was an agreement regarding the order of customer P. of a 10% commission. [Buyer]'s offer of evidence regards different orders. Even if the [seller] had regularly paid a commission of 10% for „repeatedly" arranged orders, this does not result in a respective agreement for the present case.

The extent of the [seller]'s claim is undisputed; it results from the [seller]'s undisputed pleadings. The claim follows from Art. 78 CISG. The [seller]'s claim became due with [buyer]'s receipt of the invoice dated 16 April 1999. The interest rate corresponds to Art. 1284 of the Italian Civil Code.

The decision on costs is based upon § 92(2), § 269(3) ZPO; the amount which the [seller] originally claimed too much and with respect to which the claim was later withdrawn was insignificant in comparison to the founded claim. The decision on the preliminary enforceability follows from § 709 ZPO. The sum in dispute was fixed at 40,500.- *DM*. The amount of the counterclaim alternatively submitted by the [buyer] for set-off was added to the sum claimed by the [seller] (§ 19(3) GKG).