CISG-online 681	
Jurisdiction	Germany
Tribunal	Oberlandesgericht Köln (Court of Appeal Cologne)
Date of the decision	28 May 2001
Case no./docket no.	16 U 1/01
Case name	*Motorcycle clothing case*

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

Facts of the case:

The Italian [Seller], whose sole shareholder had been the CEO of Plaintiff [Seller's successor], delivered clothing and other accessories for motorcyclists made of textiles and leather to the wholesaler Defendant [Buyer] from 1995 on. 1

Prior to the business relationship between the parties, there had been ongoing correspondence, in the course of which [Seller] exposed its plans for a cooperation. According to these plans, [Buyer] was to act as sole distributor for [Seller] in the German market. Textiles should be acquired by [Buyer] from [Seller] and then resold at a price fixed by [Buyer], whereas leather goods should be put into [Buyer]'s stock and then resold for commission fees of 15% in favor of [Seller]. The purchase price was to be paid at [Seller]'s German bank account. 2

By fax dated 15 May 1995, [Seller] sent [Buyer] a detailed list of items to be regulated by way of a contract draft. The CEO of [Buyer] made some handwritten comments on the draft, among them the comment «cannot possibly work out» alongside the item providing for direct payment to the [Seller]. Subsequently, [Seller] stated that its shareholder affirmed the amendments on the whole and that it would contact [Buyer]'s CEO during the following week for further discussions concerning the contract. Later on, namely by fax dated 13 June 1995, 3

[*] All translations should be verified by cross-checking against the original text. For purposes of this translation, Claimant of Italy is referred to as [Seller's successor] and Respondent of Germany is referred to as [Buyer]. The Italian seller is referred to as [Seller]. Amounts in the former currency of Germany (Deutsche Mark) are indicated as DM.
Translator's note on other abbreviations: BGB = *Bürgerliches Gesetzbuch* (German Civil Code); BGH = *Bundesgerichtshof* (German Federal Supreme Court); EGBGB = *Einführungsgesetz zum Bürgerlichen Gesetzbuche* (German Code on Private International Law); GmbH = *Gesellschaft mit beschränkter Haftung* (German corporate form with limited liability); HGB = *Handelsgesetzbuch* (German Commercial Code); NJW = *Neue Juristische Wochenschrift* (a German law journal); NJW-RR = *Neue Juristische Wochenschrift Rechtsprechungs-Report* (a German law journal); OLG = *Oberlandesgericht* (German Court of Appeal); RIW = *Recht der Internationalen Wirtschaft* (Journal on International Commercial Law); S.r.l. = *Società a Responsabilità Limitata* (Italian corporate form with limited liability); ZPO = *Zivilprozessordnung* (German Code on Civil Procedure).

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[Seller] mentioned the problem that if invoices were issued only by [Buyer], [Seller] would lose all possibility to remind debtors in default; on the other hand, separate invoicing by both [Seller] and [Buyer] would be too confusing for customers.

Therefore, it was proposed that [Buyer] inform [Seller] at the end of each month of the quantity of goods sold. Thereupon, [Seller] would issue an invoice against [Buyer] with a target date for payment of 45 days. The [Seller was generally inclined to pay an additional commission of 1.5% on leather products, amounting to a total of 16.5%. The CEO of [Buyer] commented «alright».

On the same date, [Buyer] submitted an order for goods to be delivered by the end of July 1995. In case of a termination of the contract by [Seller], [Buyer] requested a settlement of 4% on the difference in sales of the previous year. [Seller] proposed that, with regard to a retained direct delivery to Company P, a commission of 2.5% should be paid; this proposal was then raised to 3% by fax dated 28 June 1995. [Buyer]'s CEO responded to that fax on 29 June 1995 with the comment «alright». 4

On 4 September 1995, [Seller] submitted to [Buyer] a draft of an extensive distribution contract which had been prepared by a German attorney, to which reference will be made. This draft was not subsequently signed. However, deliveries were made to [Buyer] and [Seller] informed its German customers by 14 November 1995 that distribution of the motorcyclist equipment would be carried out by [Buyer] following the end of November 1995. 5

In the course of ensuing correspondence between [Seller] and [Buyer], «leather clothing» was differentiated from textiles. In their correspondence, the parties repeatedly referred to «goods on consignment», «leather goods on consignment» or «consignment», cf. only [Seller]'s letters of 15 January 1996 and 8 April 1997. For further details, reference is directed to the documents attached to the file. 6

After problems had accrued by May 1998 over the parties' business relations, [Seller] announced to [Buyer] by letter dated 4 June 1998 that it would continue to cooperate with a different exclusive importing company for Germany. It would cease to effect deliveries of leather clothing to [Buyer] by the time of the trade fair «Intermot» on 16 September 1998. Over the following period, the parties coordinated their business activities in order to process the delivery of leather clothing which had allegedly already been sold by [Buyer]. These deliveries were made between 23 June and 3 August 1998 and were invoiced at a total price of Deutsche Mark [DM] 76,700. A proposal made by [Seller] on 5 June 1998 concerning amended payment conditions was denied by [Buyer] on 8 September 1998. The [Buyer] pointed out that it intended to properly settle the invoices, to check any unsettled invoices and to prepare another cheque. 7

[Position of Seller's successor:]

[Seller's successor] demands payment of DM 76,700 and a further sum, being the price for three leather suits for race drivers. The claim amounted to DM 79,709 in total. [Seller's successor] subtracts a bonus of DM 1,455. 8

[Seller's successor] requests the Court to find that [Buyer] be obliged to pay DM 78,254 plus 5% interest since 1 October 1998. 9

[Position of Buyer:]

[Buyer] requests dismissal of the action. It also raised a counterclaim and requests the furnishing of information by [Seller's successor] to disclose details about any turnovers which [Seller] had effected through sales and deliveries of motorcyclist equipment to Company P. Motorradbekleidungs- und Sportswear GmbH & Co. KG, D., between 1 September 1995 and 16 September 1998. 10

[Buyer] also contests the status of [Seller's successor] as [Seller]'s legal successor. It further alleges that the leather clothing had been sold on consignment. [Buyer] alleges that this position is supported by the correspondence and the draft distribution contract. [Buyer] argues that there had been consent by the parties concerning all issues discussed and those which were included in the contract draft. The parties merely forgot to sign the contract in the course of a busy season. In fact, both parties had acted in accordance with the contract draft, which provided inter alia for a return of goods which were not sold at the end of each season. This right to return was then restricted to 300 units in the parties' agreement reached in October 1996 during the bicycle trade fair «IFMA» - in the event that the parties desired to end their business relations. As [Seller] denied to accept the goods returned, they were subsequently sold en bloc by [Buyer] as a means of mitigation of damages. 11

Another point of the parties agreement had been a [provision] of 3% for all direct sales between [Seller] and Company P. According to [Buyer]'s counterclaim, [Seller] had been obliged to give information and to prepare an accounting concerning these transactions. Following this claim, [Buyer] relies on a right to retain the sum claimed by [Seller's successor]. Finally, [Buyer] also relies on a set-off, based on an alleged claim of DM 33,000 against [Seller's successor]. [Buyer] argues that a settlement rate of 3% of the turnover difference had also been agreed upon, which amounted to DM 1.1 million during the previous business year. 12

[Response by Seller's successor:]

[Seller's successor] requests dismissal of the [Buyer]'s counterclaim. It asserts that the transactions had been contracts of sale and that the distribution contract draft remained unsigned because the parties had not reached mutual consent over all relevant aspects. In particular, [Buyer] denied an intended clause providing for exclusion of third-party contracts. Business relations ceased due to the fact that [Buyer] had intended to sell copies bearing its own logogram. 13

[Decision by the District Court:]

In its judgment of 22 August 2000, the District Court of Aachen affirmed [Seller's successor]'s claim and dismissed [Buyer]'s counterclaim. That judgment will be referred to in this decision. 14

[Appeal to the Court of Appeal; position of the parties:]

After being served the judgment on 31 August 2000, [Buyer] initiated appellate proceedings by way of a memorandum submitted on 2 October 2000. After a corresponding time extension, the appeal was supported in detail by another memorandum dated 2 January 2001. 15

Under repetition of its submissions in the First Instance, [Buyer] contests the District Court judgment. In the alternative, it is submitted that [Buyer]'s CEO had assigned a partial claim, to which it was entitled by virtue of a resolution on costs and expenses against [Seller's successor] by the District Court of München I of 21 November 2000, Case docket 21 0 19491/99. 16

[Buyer] requests repeal of the judgment of the Aachen Court of First Instance in a way that corresponded to its final requests in the First Instance.

[Seller's successor] requests dismissal of the [Buyer]'s appeal. 17

[Seller's successor] defends the judgment of the Court of First Instance. Furthermore, it contests any assignment of claims from the said resolution on costs and expenses and pleads ignorance with respect to these matters. [Seller's successor] argues that an appeal was initiated against the judgment of the District Court of München I on the issue in question. Moreover, [Buyer] failed to effect security which had been necessary for enforcement of the resolution on costs and expenses.

Reasoning:

The [Buyer]'s appeal is admissible but unfounded on the merits. [Seller's successor]'s claim is well-founded. [Buyer]'s counterclaim is dismissed. 18

[Capacity to sue; no choice of law:]

I. 19
As was properly held in the First Instance, P is the legal successor to [Seller] which acted as a one-man-business. Its proprietor, F. B., used its company as an investment in kind for the S.r.l., similar to a GmbH. Therefore, [Seller's successor] has the right to sue and to be sued concerning any claims arising from the transactions. After the furnishing of documents proving the successorship, [Buyer] even impliedly relies on [Seller's successor]'s capacity by its assertion of a counterclaim.

Uncontested by any party, the District Court also rightfully found that there had been an implied designation of German law. It is sufficient for an implied choice of law that both parties jointly assumed a certain jurisdiction to govern their dispute, respectively, that they jointly argue under consideration of a domestic law (cf. Heldrich, in: Palandt (ed.), *BGB*, 60th ed., Art. 27 EGBGB para. 7 with references. This concept applies to the case at hand. Already in the First Instance, the parties founded their submissions on provisions of German substantive law. Moreover, the District Court expressly stated that it would consider an implied designation of the applicable provisions of German law (HGB or CISG), which was not contested by either party in the appellate proceedings. 20

[Legal effects of sales transactions between Seller and Buyer:]

II.

According to Art. 53 in conjunction with Art. 1(1)(a) and (b) CISG, [Buyer] is obliged to pay [Seller] the sum of DM 78,254. 21

In the event the transactions in question (deliveries of leather clothing) are held to constitute contracts of sale, [Buyer] expressly admits that [Seller] would be entitled to claims worth DM 78,254. [Buyer] restrains itself to the assertion of counterclaims in that respect (right to a retention due to purported commission and set-offs). 22

Even if it was found that [Buyer] argued under a proper factual basis, the transactions between [Seller] and [Buyer] would need to be considered as sales contracts. The question of whether the deliveries of goods followed transactions of sale or of commission is a mere point of interpretation which would not at all affect the legal assessment of the present dispute. The subject matter at hand is [Seller]'s request for payment of a given sum following a certain factual background (deliveries of leather combos according to agreements being partially in dispute). It is purely a question of law whether these facts were to be applied under Art. 1 et seq. CISG, respectively §§ 433 et seq. BGB, under §§ 84 et seq. HGB or under §§ 383 et seq. HGB. 23

[No acting of B as sales representative:]

1. 24

Through legal assessment of the facts, this is not case of an acting as a sales representative. Undisputedly, [Buyer] did not resell the goods on behalf of [Seller], but on its own behalf and on its own account. §§ 84 et seq. HGB could only be applied by analogy if [Buyer] had been an authorized dealer for [Seller]. However, this is irrelevant in order to assess the requested claim and would only bear relevance regarding the counterclaim. In cases of an authorized dealership, one must differentiate between agreements that cause the typical integration into the distribution system of the manufacturer and the manner in which single transactions are being processed. It is possible, yet not mandatory that these single transactions constitute sales contracts, which would be governed by the CISG, if applicable (BGH, *NJW* (1997), 3309; OLG Koblenz, *RIW* (1993), 936; Ferrari, in Schlechtriem (ed.), *Kommentar zum Einheitlichen UN-Kaufrecht (CISG)* [Commentary on the CISG], 3rd ed., Art. 1 para. 33; Magnus, in *Staudinger, CISG* [Commentary on the German Civil Code, volume on the CISG], Art. 1 para. 37).

[Transactions between Seller and Buyer qualify as contracts of sale:]

2. 25

Even if it was assumed that, according to [Buyer]'s argument, the deliveries of leather clothing was based on an agreement that [Buyer] should receive a commission of 16.5% – respectively 20% as of October 1997 –, that the commission had already been subtracted from the prices invoiced by [Seller], that invoices were to be paid only after resale of the goods and, finally, that any remaining goods in stock could be returned at the end of each season, the transactions at hand would still constitute sales contracts. It is irrelevant both that the parties jointly referred to transactions on consignment in their correspondence and that [Seller] itself had

differentiated between deliveries that had to be paid at once and those which were to be paid after resale.

In order to classify commission and sales transactions, it must not be geared to the parties joint denomination, but to the actual content of their agreements (cf. Hopt, *HGB* [Commentary on the German Commercial Code], 30th ed., Überbl. vor § 373 para. 7, § 383 para. 3; Achilles, in: Enstahler (ed.), *GK-HGB* [Commentary on the German Commercial Code], 6th ed., § 383 paras. 4, 6). In the context of a corresponding interpretation, the stipulation for a commission may serve as an indicating factor towards a consignment sale. In the case at hand, the commission was even split into 15% with an additional del credere commission of 1.5%. However, it may as well be argued that this should serve as a basis for a calculation of prices instead of being a salary for services according to § 383 HGB (cf. Achilles, para. 4). This might be the case through a bonus on the purchase price or – as alleged by [Buyer] – through subtraction from the dealer's base price. 26

Finally, it is crucial to assess that [Buyer] had not resold the leather clothing on [Seller]'s account, but on its own account. Moreover, § 1 item 3 of the distribution contract draft provided for a sale of the goods by [Buyer] on its own behalf and account. Furthermore, the parties neither agreed on any accounting duty of [Buyer], nor had the [Buyer] ever accounted any transaction in the course of the enduring business relation. [Buyer]'s procedural response, stating that an accounting of the sales was effected «as agreed», lacks substance. This is further supported by the fact that [Buyer] simultaneously alleged that not every item sold was accounted; finally, [Buyer]'s correspondence hints to the contrary. Therefore, an accounting was merely effected with regard to the goods in inventory which is sensible in case of sales contracts due to maturity of the purchase price claim and the alleged right to return goods. However, both a sale on the account of another person and the duty to manage accounting are indicators that typically point towards consignment transactions (§§ 383, 384(2) HGB). Their lack of existence is thus a major indicator towards transactions of sale (cf. Hopt, § 383 para. 3; Achilles, para. 4). 27

In addition to that, [Seller] invoiced the price already at the time of delivery and [Buyer] effected partial payment already before resale was conducted. Giving due consideration to the fact that these are wholesale transactions for clothing where sales «on consignment» are usually conducted (Hopt, Überbl. vor § 373 para. 7), it is held that [Seller] and [Buyer] concluded contracts of sale. 28

[Claims for the purchase prices in favor of Seller:]

3. 29
The existence of a claim for the purchase price in favor of [Seller] is neither hindered by an alleged right of return of the goods, nor by the fact that [Buyer] had resold part of the goods as a self-help measure. In these cases, the goods would not have been delivered under the condition precedent of resale, but under the resolutory condition of a return. Although a condition precedent will be generally presumed (BGH, *NJW* (1975), 776; Achilles, para. 6), a resolutory condition can be founded on the fact that [Seller] not only effected immediate accounting of the leather combos of [Buyer], but the [Buyer] even began to effect performance by

virtue of partial payment. These facts indicate that both parties intended to attribute legal impact to their transactions even before resale.

In order to determine a resolutorily conditioned sale «on consignment», it is irrelevant if such condition is derived from party autonomy by means of Art. 6 CISG (in that way Schlechtriem) or if it will be inferred from the subsidiarily applicable domestic law (in that way Honsell/Schnyder/Straub, in: Honsell (ed.), *Kommentar zum UN-Kaufrecht* [Commentary on the UN Sales Law], Art. 23 para. 5). The relevant provisions would be §§ 158 et seq. BGB. 30

In the present case, [Buyer] did not contest [Seller]'s assertion that it had offered 108 leather combos to its present exclusive importer at normal prices. Therefore, at any rate, [Buyer] could only be entitled to compensation claims from a possible difference between the price stipulated with [Seller] and the corresponding sales revenues because of the refusal of [Seller]. Such claims are neither part of [Buyer]'s procedural defense nor were they definitely assessed. 31

It is therefore irrelevant to determine if – following the deliveries in question – it may not be referred to the usages practiced earlier because they had been given effect only after the announcement of [Seller] not to deliver any longer for the next season and because they had referred to goods which were allegedly resold under the list communicated on 8 June 1998. 32

[No right for Buyer to rely on a set-off; no right to retention:]

II. 33
The [Seller]'s original claim for the purchase price is neither terminated by a set-off as claimed by [Buyer] under § 389 BGB, nor is its enforceability hindered by a right to retention which would lead to ordering performance conditional upon the counter-performance. [Buyer] had properly employed its right to retention, which, according to preponderant notion – particularly in jurisprudence –, is not to be considered under the CISG but under the domestic law applicable by conflicts of laws rules (Ferrari, *loc. cit.*, Art. 4 para. 39), being German law in this case. However, counterclaims do not exist in favor of [Buyer].

[No counterclaim in favor of Buyer from its resale:]

1. 34
The counterclaim for a lump-sum settlement of 3% (DM 33,000) employed by [Buyer] for the alleged set-off is unfounded.

Supposed that [Buyer]'s factual submissions were veritable, this would have constituted a claim that would lack any relation to sales contracts and that would be rather concerned with the integration and retirement of [Buyer] from the distribution network of [Seller]. Its legal relevance including the prerequisites for accrual are not determined by the CISG but solely by domestic law (cf. BGH, *NJW* (1997), 33; OLG Koblenz, *RIW* (1993), 936; Ferrari, *loc. cit.*, Art. 1 para. 33; Magnus, *loc. cit.*, Art. 1 para. 37). 35

Even under the factual submissions of [Buyer], one cannot readily determine whether the parties had finally agreed on a lump-sum settlement. It is established that [Buyer] responded to [Seller]'s fax of 28 June 1995, containing a proposal for a settlement rate of 3% instead of 4%, 36

by fax dated 29 June 1995, containing the handwritten comment «alright» by its CEO. However, this does not sufficiently indicate a final agreement of the parties. At that time, the parties had been in negotiation for a distribution contract with the question of a settlement being only one of many aspects to be coordinated. A mere partial consent on one of these issues does not constitute an agreement on the contract as a whole, which is not legally binding according to § 154(1)(2) BGB.

Should [Buyer] argue that such provision had been valid following the contract draft, [Buyer] failed to sufficiently substantiate that the parties had agreed on all material issues and that they merely «forgot» to sign the contract draft. In particular, during proceedings in the First Instance, [Buyer] did not object to [Seller]'s submission that the contract remained unsigned because [Seller] did not want to sign the exclusivity clause and the competition ban of § 7 item 2. Moreover, following [Buyer]'s factual submissions, a later signing of the contract was intended. According to § 154(2) BGB, when in doubt an unsigned contract has not been concluded in the present case. **37**

There is no recognizable indication to establish that the parties subsequently agreed to refrain from requiring a signing of the contract. The fact that delivery had been effected to [Buyer] over several years and that [Seller] had introduced [Buyer] as its new distribution partner in November 1995 does not allow corresponding findings. The individual sales transactions were legally independent and could have been effected also without the integration of distribution into a common legal framework (cf. for a similar constellation BGH, *NJW-RR* (1991), 1053). **38**

[No counterclaim in favor of Buyer from commission for direct deliveries:]

2. **39**
The same applies to the commission of 2% for direct deliveries to Company P by [Seller]. Likewise, a mere partial consent does not legally bind the parties under § 154(1)(2) BGB. Obviously, [Buyer] previously even assumed that this had been the case as it refrained from raising any such claims in the course of several years. In the light of these facts, the proposal of [Seller]'s CEO for an amicable procedural settlement by payment of DM 20,000 must not be considered as the latter might have erroneously felt obliged to pay. Even in this dispute, the provision critical for legal assessment – § 154(1)(2) BGB – was not put forth until the oral hearing before this Appellate Court. Lacking the existence of a primary claim, [Buyer] is not entitled to claims that could lead to a set-off. Consequently, [Buyer] may not rely on any right to retention.

[No other counterclaims in favor of Buyer:]

3. **40**
Another purported set-off amounting to DM 8,619.44 is not admissible in accordance with § 530(2) ZPO. [Seller] disagreed to admit it. Furthermore, an admission would not be appropriate because otherwise resolution of this dispute that is ripe for decision would have been unnecessarily delayed by assessing the counterclaim; [Buyer] would need to be granted the possibility to furnish proof of the assignment. Moreover, this claim for compensation of costs from a different legal dispute lacks any factual connection to the present proceedings between the parties. Admitting that set-off would not even contribute to resolving this dispute.

[Interest claim:]

4. **41**
The claim for interest on the primary claim follows Art. 78 CISG and is granted in an amount calculated by virtue of § 353 HGB in conjunction with Art. 229 EGBGB.

III. **42**
It directly follows from the aforementioned that the [Buyer]'s counterclaim is unfounded.

[...]