

**District Court (*Landgericht*) Kiel**

**27 July 2004 [16 O 83/04]**

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

*Edited by Institut für ausländisches und internationales Privat- und Wirtschaftsrecht der Universität Heidelberg Daniel Nagel, editor* [\*\*\*]

**JUDGMENT**

Defendant [Buyer] is ordered to pay Plaintiff [Seller] the sum of Euros [EUR] 680,000 plus interest of 8% above the prime lending rate on EUR 340,000 since 7 February 2003 and on another EUR 340,000 since 17 March 2003.

The action is dismissed in relation to the additional claim for interest.

[Buyer] is ordered to bear the costs of the proceedings.

The judgment is provisionally enforceable against a security deposit of 110% of the enforceable amount.

**FACTS**

[Seller] is a company established under Dutch law and claims payment of the purchase price from [Buyer].

By letter of 25 November 2002, [Seller] confirmed vis-à-vis [Buyer] the purchase of 1,000 tons of industrial deep fryer fat, specification "FFA max. 10%, hardening value min. 97%" at a price of EUR 360 per ton. [Buyer] did not object to this letter and accepted the 1,000 tons of fat, which were delivered by Company \_\_\_ from Rotterdam on 18 December 2002.

By letter of 2 December 2002, [Seller] confirmed the purchase of another 1,000 tons of the said deep fryer fat at a price of EUR 340 per ton. This letter was accepted by [Buyer] without any objection, as well. [Buyer] also accepted the 1,000 tons of fat, which were delivered by Company \_\_\_ on 9 February 2003. The deliveries were invoiced by [Seller] via letters dated 31 December 2002 and 7 February 2003. According to the invoices, [Seller] demanded payment of the delivery of 18 December 2002 by 8 January 2003 and payment of the delivery of 9 February 2003 by 15 February 2003. After [Seller] had urged [Buyer] on 20 May 2003 to pay the two invoices, on 31 October 2003 [Buyer] finally made a partial payment of EUR 20,000 with respect to the invoice dated 31

December 2002. Subsequently, [Buyer] did not make any further payments.

## **POSITION OF THE PARTIES**

### **Position of [Seller]**

[Seller] alleges that it had orally concluded sales contracts in respect to more than 2,000 tons of fat by way of telephone calls. In addition, [Seller] relies on the legal effect of the two commercial letters of confirmation (*kaufmännische Bestätigungsschreiben*) dated 25 November 2002 and 2 December 2002, in response to which [Buyer] had not raised any objection. Therefore, [Seller] asserted that [Buyer] would also be obliged to make payment due to the fact that it failed to object.

[Seller] further asserts that German law had been agreed upon to govern the two contracts.

[Seller] requests the Court to order [Buyer] to pay EUR 680,000 plus annual interest of 8% above the prime lending rate on EUR 304,000 since 30 January 2003 and on another EUR 340,000 since 10 February 2003.

### **Position of [Buyer]**

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

[Buyer] alleges that [Seller] had not been its contractual partner, but instead Company \_\_\_\_\_. [Buyer] further alleges as a defense that it had notified [Seller] of the fact that the fat was not in conformity with the contract.

Reference is made to the content of the parties' submissions concerning their further allegations.

## **REASONING OF THE COURT**

The action is admissible and justified, except for a small portion of interest claimed in excess. This results from the following summary of factual and legal reasoning (*cf.* § 313(3) ZPO [\*]).

### **I. [Jurisdiction]**

The international jurisdiction of German courts follows from Art. 2 in conjunction with Art. 60 Council Regulation (EC) No 44/2000 of 22 December 2000 on Jurisdiction and

the Recognition and Enforcement of Judgments in Civil and Commercial Matters (OJ [\*] No. L 12 of 16 January 2001, pp. 1 *et seq.*). Territorial jurisdiction of the District Court (*Landgericht*) Kiel follows from § 17 ZPO, because [Buyer] has its seat in \_\_\_\_\_. Being a "*Besloten Vennootschap*" (limited liability company) established under Dutch law, [Seller] has legal capacity and may appear as a party in court according to § 50(1) ZPO. This has not been contested by [Buyer].

## II. [Seller's claim for the purchase price]

The sum of EUR 680,000 claimed by [Seller] as the purchase price for the delivery of 2,000 tons of fat follows from Arts. 53 and 62 of the United Nations Convention on Contracts for the International Sale of Goods of 11 April 1980 (BGBl. [\*] 1989 II, p. 588, hereafter: CISG). Under these provisions, a seller may claim the purchase price from the buyer.

### 1. [Application of the CISG]

The legal relationship between the parties is governed by the CISG. Its territorial scope of application is established pursuant to Art. 1(1)(a) CISG, because the parties have their places of business in different Contracting States to the Convention, the Netherlands and the Federal Republic of Germany (*cf.* BGBl. 1991 II, p. 675). The CISG also applies to the present subject matter, because the 2,000 tons of deep fryer fat constitute goods in terms of Art. 1(1) and Art. 2 CISG, owing to the fact that they have been purchased in the course of [Buyer]'s business. It may remain undecided whether the parties -- as submitted by [Seller] -- have agreed to choose German law or whether this should have been contested by [Buyer]. The CISG forms part of German law and would have been embraced by this choice of law pursuant to Art. 27(4) in conjunction with Art. 31(1) EGBGB [\*] (in this respect, see BGHZ [\*] 96, 313 (323) for the former ULIS [\*]; in a similar vein BGH [\*] NJW [\*] 1999, 1259 (1260) for the CISG), unless there are clear indications to the effect that the parties intended to apply solely the internal domestic sales law of the designated country (*cf.* Art. 6 CISG and *Schlechtriem*, Internationales UN-Kaufrecht, 2nd ed. 2003, margin number 20).

### 2. [Contract conclusion]

The parties have concluded two contracts of sale for 2,000 tons of fat in total. It may remain undecided whether there has been an oral conclusion of contract over the telephone. In any event, the contracts have been concluded according to the conditions asserted by [Seller] as [Buyer] failed to object to [Seller]'s letters of confirmation of 25 November 2002 and 2 December 2002. In the present case, the principle of 'silence upon a commercial letter of confirmation' (*Schweigen auf ein kaufmännisches Bestätigungsschreiben*) is applicable. This legal principle is part of German law -- the law applicable at [Buyer]'s seat -- by way of customary right and must therefore be considered as a commercial usage under Art. 9(2) CISG.

a) Pursuant to Arts. 14 and 18 CISG, a contract of sale is concluded by way of offer and acceptance. Art. 18(1)(2) CISG provides that silence or inactivity does not in itself amount to acceptance. Thus, for the purposes of Art. 18 CISG, no legal effect is attached to a 'silence upon a commercial letter of confirmation' (OLG [\*] Köln IPRax [\*] 1995, 393 (394); *Witz / Salger / Lorenz*, International Einheitliches Kaufrecht, 2000, Art. 18 margin number. 15; *Staudinger / Magnus*, Wiener UN-Kaufrecht - CISG, Neubearbeitung 1999, Art. 19 margin number 26; differently *Huber*, *RabelsZ* [\*] 1979, 448 *et seq.*).

National German law construes a conclusion of a contract based on the content of a commercial letter of confirmation where no contract has actually been concluded thus far, provided that the letter is drafted within direct and immediate context of the contractual negotiations, that it expresses an assumption on the part of the author that a contract exists, that there is no deviation from the previous negotiations in bad faith and that its addressee does not immediately object to the content of the letter (*cf. Münchener Kommentar zum HGB / Karsten Schmidt*, vol. 5, 2001, § 346 margin number 141 with further references). In contrast, silence will in general not be of any legal effect as far as the CISG is concerned. Nevertheless, silence may -- in deviation from Art. 18(1)(2) CISG -- result in an acceptance of the terms contained in the letter of confirmation, if there is a corresponding commercial usage in terms of Art. 9(2) CISG which can be readily identified by the parties (*Staudinger / Magnus*, cited above). Such commercial usage can be assumed if the parties have their places of business in countries whose laws contain rules on commercial letters of confirmation and on the legal effects of silence on the part of the addressee and if these rules are similar to that under German law (leading doctrine, *cf. only Schlechtriem / Schlechtriem*, *Kommentar zum Einheitlichen UN-Kaufrecht - CISG*, 3rd. ed. 2000, vor Art. 14-24 margin number. 4; *Staudinger / Magnus*, Art. 9 margin number 27). In this respect, the relevant law is that applicable at the addressee's seat (*Münchener Kommentar zum HGB / Karsten Schmidt*, § 346 margin number 170a with reference to Art. 31(2) EGBGB [\*]). In the present case, German law applies at [Buyer]'s seat.

b) [Seller]'s letters of 25 November 2002 and 2 December 2002 qualify as commercial letters of confirmation, the content of which is legally effective to the disadvantage of [Buyer] according to Art. 9(2) CISG, [Buyer] -- being the addressee -- undisputedly accepted the letters without having raised any objections. In terms of form, content and object, both letters fulfill the legal requirements for commercial letters of confirmation because they were intended to clarify the outcome of the previous contractual negotiations. The Court is convinced on the basis of the undisputed facts that there have been contractual negotiations between the parties, because [Buyer] has not only accepted two deliveries from [Seller] of 1,000 tons of fat each, but has moreover paid a sum of EUR 20,000 on the invoice dated 31 December 2002. These circumstances might in themselves justify that the contracts have already been concluded over the telephone as alleged by [Seller] and that their contents have subsequently been set out in the two commercial letters of confirmation. It may remain unresolved whether this has been the case or whether [Seller] merely assumed that contracts have been concluded, given that even the second alternative has eventually led to the conclusion of contracts.

[Buyer]'s allegation, that it has never had any contact of legal significance with [Seller], is both not credible and irrelevant due to the reasons set out above.

In particular, [Buyer]'s assertion that it had instead been in contractual relations with the Company \_\_\_ does not have any relevance to the present dispute. This submission does not change the fact that [Buyer] accepted the 2,000 tons of fat from [Seller] and remained silent in response to the commercial letters of confirmation. Moreover, the mere fact that [Buyer] has purchased fat from \_\_\_ is unsuitable to rebut the argument that there have been contractual relations with [Seller].

c) [Buyer]'s argument that it had notified a lack of conformity of the goods has been raised in the letter which was submitted in the course of the oral hearing on 26 July 2004 (pp. 35-43), but is without relevance to the present dispute because only Company \_\_\_ has been notified.

In any event, the lack of conformity would have been notified too late. [Buyer] was under a duty to notify a lack of conformity within a reasonable time pursuant to Art. 39 CISG. Even under a generous interpretation, this period does not normally exceed one month (*Witz / Salger / Lorenz*, Art. 39 margin number 10 with further references).

### **III. [Seller's claim for interest]**

[Seller]'s claims for payment of interest follow from Art. 78 CISG in conjunction with §§ 286(1), (3), 288(1), (2) BGB [a], because the interest rate is governed by the internal laws of Germany.

1. According to Art. 78 CISG, the seller may claim payment of interest from the buyer if the latter fails to pay the purchase price.

Due to the fact that the CISG does not govern the interest rate, the applicable interest rate is under dispute (in this respect, see *Schlechtriem / Bacher*, Art. 78 margin numbers 27 *et seq.* with further references). The Court follows the leading doctrine in jurisprudence and literature, which gears to the law applicable at the debtor's seat (LG [a] Berlin, IHR [a] 2003, 228 *et seq.*; *Stoll*, in: *Festschrift Ferid*, 1988, p. 510; *Neumayer*, RIW [a] 1994, 99 (106); *Witz / Salger / Lorenz*, Art. 78 margin number 9). This connection is appropriate because it responds to the situation in which a buyer, by way of withholding the purchase price, may invest the money to a possibly greater financial advantage than the advantage gained through the performance of the contract (*Stoll*, cited above). The buyer is unjustifiably enriched by using the assets, and this very enrichment has occurred at its seat (*Witz / Salger / Lorenz*, cited above).

2. According to § 288 (2) BGB, the default interest rate is 8% above the prime lending rate because the parties are businesses and the present dispute concerns a monetary claim.

[Buyer] has been in arrears since 30 days after the time of maturity and receipt of the invoices (§ 286(3)(1) BGB). The invoices show dates of maturity, namely 8 January and 15 February 2003. Therefore, both partial claims of EUR 340,000 each are subject to an interest claim since 7 February or 17 March 2003, respectively.

[Seller]'s claim for additional interest is dismissed.

IV. The ancillary procedural decisions follow from §§ 92(2) No. 1 and 709 ZPO [\[\\*\]](#).

## FOOTNOTES

\* All translations should be verified by cross-checking against the original text. For purposes of this translation, Plaintiff of The Netherlands is referred to as [Seller] and Defendant of Germany is referred to as [Buyer]. Amounts in the uniform European currency (*Euro*) are indicated as [EUR].

Translator's note on other abbreviations: **BGB** = *Bürgerliches Gesetzbuch* [German Civil Code]; **BGBl** = *Bundesgesetzblatt* [German Federal Law Gazette]; **BGH** = *Bundesgerichtshof* [German Federal Supreme Court]; **BGHZ** = *Entscheidungen des Bundesgerichtshofes in Zivilsachen* [Officially reported decisions of the German Federal Supreme Court in Civil Matters]; **EGBGB** = *Einführungsgesetz zum Bürgerlichen Gesetzbuche* [German Code on the conflict of laws]; **IHR** = *Internationales Handelsrecht* [German law journal]; **IPRax** = *Praxis des Internationalen Privat- und Verfahrensrechts* [German law journal]; **LG** = *Landgericht* [German District Court]; **NJW** = *Neue Juristische Wochenschrift* [German law journal]; **OJ** = *Official Journal of the European Community*; **OLG** = *Oberlandesgericht* [German regional appellate court]; **RabelsZ** = *Rabels Zeitschrift für ausländisches und internationales Privatrecht* [German law journal]; **RIW** = *Recht der Internationalen Wirtschaft* [German law journal]; **ULIS** = *Convention relating to a Uniform Law on the International Sale of Goods*; **ZPO** = *Zivilprozessordnung* [German Code on Civil Procedure].

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