

Case 1234: CISG [4]; 8(1); 79; 49(1)(a); 71(1)(b); 74

Germany: BGH X ZR 111/04

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<http://cisgw3.law.pace.edu/cases/071127g1.html> (English translation)

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The decision by the Federal Court of Justice clarifies that a mistake in a calculation, which is part of the contract, is governed by article 8 CISG and that a disturbance of sales does not allow the reseller to terminate the agreement relying on article 79 CISG.

The seller, a German producer of glass bottles, entered into a contract for the manufacture and delivery of 50-ml and 100-ml glass bottles with a Greek corporation, which intended to export these goods to Russia. After concluding the contract, the buyer asked for an amendment, according to which it would pay a higher price, but the seller would pay in return a certain amount as “consulting and marketing fees” to a third company. The seller agreed. In addition, the parties agreed on the Greek corporation’s granting an interest-free loan to the seller for manufacturing the press moulds required to produce the bottles.

After the delivery of the first batch of bottles, the buyer requested the seller to forward a higher amount of money to the third company, due to a mistake in the calculation of the “consulting fees”. The buyer also informed the seller about its difficulty in the Russian market due to the decline of the currency rate and announced that it would take over only the bottles already produced. Finally, the buyer requested that the moulds be packed for transport to Russia, where it wanted to sell them. The seller refused and the buyer demanded it to pay back the loan, which the seller also refused.

Eventually, the buyer sued the seller for the payment of the outstanding amount of the “consulting fees” and for repayment of the loan. The seller challenged the plaintiff’s claims and demanded compensation for loss of profits.

Contrary to the lower courts, the Federal Court of Justice sustained the plaintiff’s claims.

The court held that pursuant to article 8(1) CISG the real intent of the contract’s amendment proposed by the buyer was known to the seller, or, in any case, this latter could not have been unaware of it. As a matter of fact, the buyer had explained to one of the seller’s employees, before sending the proposal to amend the contract, that the modifications were done in order to avoid that the buyer’s Russian customers could find out the actual purchase price of the bottles. Furthermore, other circumstances, including the wording of the proposed amendment, easily revealed the true intentions of the buyer. The seller, thus, was in a position to understand that the buyer had committed a mistake in calculating the amount of the “consulting fees” in the amendment. With this regard, the court noted that the same conclusion would have been reached applying German law provisions on the so called “open error” (outside the scope of the CISG, see art. 4 of the Convention).

The court also supported the buyer’s claim for loan repayment, due to the cessation of the bottles production, which the loan was supposed to cover. The Federal Court of Justice inferred the termination of production from the seller’s claims for damages due to the buyer’s failure to perform its outstanding obligations.

The buyer, however, was not entitled to declare the contract avoided (article 49(1)(a) CISG) since the seller’s refusal to pay the remaining “consulting and marketing fees” did not amount to a fundamental breach of contract (article 71(1)(b) CISG). The buyer in fact had already announced it would not perform its duty to take further deliveries. The buyer was also not entitled to terminate the contract under article 79 CISG, since this is not the scope of the article. Furthermore, it still remained to be seen whether the ruble’s fluctuations could amount to an impediment beyond the party’s control.

The court upheld the seller’s set-off claim, since the buyer had not fulfilled its contractual obligations, with the exception of the first delivery. However, it could not reach a decision on the set-off, since the Court of Appeal had not quantified the damages.

The Federal Court thus remanded the matter to the Court of Appeals for a new decision that would consider the issues outlined by the court.

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