CISG-online 2513	
Jurisdiction	Germany
Tribunal	Bundesgerichtshof (German Supreme Court)
Date of the decision	28 May 2014
Case no./docket no.	VIII ZR 410/12
Case name	*Bowling alleys case*

Translation[*] *by William Euler*[**]

Judgment

a) An obligation to rebuy as set forth in a contract which is subject to the CISG is also subject to the CISG.

b) The interpretation of such a contract is subject to Art. 8 CISG if the contract is a standard form contract (in continuation of the Federal Supreme Court of 31 October 2001 – VIII ZR 60/61, *BGHZ* 149, 113, 116 et seq.). In such an interpretation, ambiguous declarations are to be interpreted «contra proferentem», meaning that such ambiguities should be resolved in disfavor of the declaring party.

The VIII. Civil Chamber of the Federal Supreme Court, after oral hearings of 28 May 2014 before the Justice Dr. Milger as Chair as well as the Justices Dr. Achilles, Dr. Schneider, Dr. Bünger and Kosziol

held:

On appeal of the [Buyer], the decision of the 19th Civil Chamber of the Court of Appeal Munich of 10 December 2012 is reversed.

The appeal of the [Seller] against the decision of the 23rd Civil Chamber of the District Court Munich I of 27 January 2012 is rejected.

The [Buyer] bears the cost of the appeals process.

[*] All translations should be verified by cross-checking against the original text.

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Facts:

1. The [Buyer] is a Belgium-based lessor in the recreational industry, the Munich-based [Seller] builds bowling alleys. In November 2004, the [Buyer] bought 20 bowling alleys with equipment and concluded a lease contract with A. B. C GmbH (German Limited Liability Company). The contract concluded between the [Seller] and the [Buyer] was written in English and titled «Equipment Purchase and Repurchase Agreement.» Paragraph F of said contract, titled «Repurchase agreement» stated, inter alia:

> «1. In the event the Client [ABC] does not exercise its purchase option under the Lease Agreement, or in the event of a termination of the Lease Agreement by F[...] [Buyer] due to a default by the Client, or a filing for bankruptcy by Client, or in the event that bankruptcy proceedings are commenced by, or petitions filed by or against Client, under any bankruptcy, administration, liquidation or dissolution procedure, and such proceedings are not withdrawn within seven (7) days, and on the written request of F[...] made within a reasonable time after any such event (at F[...]'s sole discretion) [Seller] shall purchase the Equipment from F[...], as is, where is, at the Repurchase Price on the date of such written request as defined in Article A.
>
> [...]
>
> 9. F[...] [Buyer] shall not be under any obligation to sell the Equipment to [Seller] pursuant to the terms thereof but once F[...] [Buyer] shall have sold or otherwise disposed of the Equipment to a person other than [Seller], the liability of [Seller] hereunder shall cease. [...]»

2. A legal dispute arose between the [Buyer] and ABC due to unpaid leasing instalments in the years of 2007 and 2008. In December of 2008, ABC settled for 88.403 € payable in three instalments. In addition, ABC agreed to make regular payments as per a prior agreement from December 2008 onward. On 16 October 2009, the [Buyer] terminated the contract with ABC and based its termination on the allegation that ABC did not make the payments as per settlement. Based on this termination, with letter of 19 October 2009, the [Buyer] requested payment from the [Seller] in the amount of 100.000 € until 23 October 2009. The [Buyer] did so with reference to the repurchase agreement and the repurchase prices in chronological instalments. On 1 January 2010, proceedings for declaring bankruptcy of ABC were commenced, after an insolvency administrator had been appointed in September 2009.

3. On 30 January 2010, the [Buyer] and M.J.F.C. GmbH (MJFC) concluded a leasing contract for the bowling alleys with monthly instalments of 2.839 €. MJFC used the bowling alleys in the same building that ABC had used them in. The contract was concluded for a period of time until 2015. According to the assertions of the [Buyer], MJFC had paid the instalments only from September to December 2010 in the amount of 11.356 €. Afterwards, MFCJ allegedly stopped paying and «disappeared», which is why the leasing contract was terminated without notice.

4. In May 2011, the [Seller], rejecting that it had any obligation to repurchase the alleys and stating that the alleys were damaged and incomplete, and following lengthy correspondence with the [Buyer], dismantled several elements of the 18 alleys still in existence. With the company K., the owner of the premises, the [Seller] reached, inter alia, the following understanding:

> «[...] as discussed by telephone with Mr. D, we will remove the machines and the scoring system from the bowling alleys in A. The alleys themselves as well as accompanying equipment will stay on the premises. You agree with this. Any other removing of elements is not compelled and is not demanded by you. We politely ask you to consult F[...] and reach an agreement with them as well as to the remaining of the alleys with you. [...]»

5. The [Seller] claims from the repurchase agreement payment in the amount of 90.061,99 € plus interest with counter-performance cession of claims arising from the leasing agreement between the [Seller] and ABC with the exception of claims already due for instalments as well as cession of claims arising from a guarantee for the obligations of ABC under the leasing contract. The Regional Court rejected that claim. On appeal by the [Buyer], the Higher Regional Court ordered the [Seller], derogating from the lower court's findings, to pay with the exception of part of the claim for interest. On appeal to the Chamber, the [Seller] claims restoration of the first-instance decision.

Grounds:

I.

6. The appeal is successful.

7. The Court of Appeal (Court of Appeal Munich, 10 December 2012 – 19 U 842/12) reasoned, insofar as is of interest for this appeal:

8. The [Buyer] could, based on the repurchase agreement, demand the [Seller] to repurchase the leased out bowling alleys. The necessary scenario triggering such an obligation had occurred when bankruptcy proceedings had been opened. This agreement was also valid, any concerns with regard to the «personal purchase obligation» notwithstanding. In that case, an obligation for surrender would have existed for the [Buyer], which, in the end, the [Buyer] complied with. For one, the [Seller] had taken the alleys back in accordance with the understanding it had with K. In addition, the repurchasing goods had been approved in the sense of § 377(2) BGB since the [Seller] had not reported complaints with regard to the missing alleys as defined by § 377(1) BGB and a «reporting of complaints in advance» is not required in German law, which is why the letters sent prior to the removing of the alleys are irrelevant. In addition, the [Seller], carrying the burden of persuasion, failed to present any incompleteness of the alleys. Insofar as the Seller claims that the repurchase agreement had not yet come into existence and the [Seller] had not become owner of the repurchasing goods or had not wanted to become owner, respectively, the [Seller] is barred from doing so due to § 242 BGB. The [Seller] at all times had been obligated to conclude a repurchase agreement and accept the repurchasing goods. Besides, it could be derived from the

correspondence with regard to the removing of the alleys, that in the process of removing, the [Seller] had became owner of the alleys impliedly.

II.

9. This finding cannot be upheld.

10. The [Buyer] cannot claim the payment of the repurchase price. The appeal rightly argues that the repurchase obligation set forth in section F 1 of the contract expired according to section F 9 of the contract because the [Buyer] had re-leased the bowling alleys to MFJC.

11. Contrary to the findings of the lower appeals court, the contract concluded between the parties is not based on the German Civil Code, but rather on the CISG. Section F 14 of the contract does state that the agreement and the resulting rights and obligations are subject to German law. Since the purchase of the leasing object is a purchase of goods and since the parties in dispute are from different contracting states, the choice of law clause (which is to be considered according to Art. 3(1)(1), Art. 27(1) EGBGB in its version until 16 December 2009) leads to an application of the CISG in accordance with Art. 3(2) EGBGB (former version), Art. (1)(1)(b) CISG (see also Federal Supreme Court, 25 November 1998 – VIII ZR 259/97, *WM* 1999, 868, III.1).

12. This Chamber has repeatedly decided, that repurchase obligations in leasing agreements that are subject to the German Civil Commercial Code, are to follow the legal rules for the sale of goods (most recently: Federal Supreme Court 19 March 2003 – VIII ZR 135/02, *WM* 2003, 1092 at II.2; also: *MünchKommBGB*/Koch, 6th ed., Finanzierungsleasing, ¶ 56; Wolf/Eckert/Ball, *Handbuch des gewerblichen Miet-, Pacht- und Leasingrechts,* 10th ed., ¶ 1956). The same can be said for the disputed obligation of the [Seller], which is to be considered a sale of goods in the sense of Art. (1)(1) CISG.

13. Repurchase agreements are, despite the specifics of leasing law and consequent particularities, essentially contractual obligations that are – as a mirror image to the obligations of the original sales contract for the procurement of the leasing object – regulated for the [Seller] in Art. 30 CISG and for the buyer in Art. 53 CISG (see also Ferrari in Schlechtriem/Schwenzer, *Kommentar zum Einheitlichen Kaufrecht – CISG –,* 6th ed. Art. 1 ¶¶ 22, 28; Schroeter in Schlechtriem/Schwenzer, *op. cit.*, Vor Artt. 14–24 ¶ 41; Magnus in *Staudinger, Wiener UN-Kaufrecht,* 2013, Art. 1 ¶ 22; Enderlein/Maskow, *International Sales Law*, 1992, Art. 1 ¶ 1). The agreement that the bowling alleys were to be dismantled by the [Seller] for the purposes of delivery does not prevent their character as a good in the sense of Art. (1)(1) CISG (Saenger in Ferrari/Kieninger/Mankowski, *Internationales Vertragsrecht,* 2nd ed., Art. 1 CISG ¶ 6). Such a mode of performance is also not as disconnected from the obligations of the [Seller] set forth in Art. 30 et seq. CISG as to disqualify the transaction as a sale (Piltz in Kröll/Mistelis/Viscasillas, *UN Convention on the International Sale of Goods (CISG)*, 2011, Art. 30 CISG ¶ 11, Art. 31 ¶ 8; with regard to domestic German sales law Federal Supreme Court, 19 March 2003 – VIII ZR 135/02, *op. cit.*).

14. The Court of Appeal, despite several suggestions of the [Seller], ignored the fact that the obligation of the [Seller] to repurchase as set forth in section F 1 of the contract was cancelled out by section F 9 of the contract when the [Buyer] re-leased the bowling alleys to

MJFC in 2010. This section, which this chamber can interpret because the Court of Appeal did not and because additional findings are not to be made, gives as a reason for the obligation to repurchase to cease to exist («the liability of the seller hereunder shall cease») the re-lease of the alleys to a third party.

15. The reason for the obligation to cease contained in this clause, which was supplied by the [Buyer] («once F[...] shall have [...] otherwise disposed of the Equipment to a person other than the seller») is ambiguous because the term «otherwise disposed of» can be interpreted in different ways, depending on whether one interprets the clause only in a literal sense or within context. Only one of these different interpretations would include the re-lease as a reason for the obligation to cease. This ambiguity is to be resolved in disfavor of the [Buyer], since the [Buyer] supplied its own standard form contract.

16. The English verb «to dispose of» is often understood as «have at one's command, to sell», meaning the final abandonment of an object or a right in favor of a third person (von Beseler/Jacobs-Wüstefeld, *Law Dictionary Englisch – Deutsch*, 4th ed., p. 569; Dietl/Lorenz, *Wörterbuch für Recht, Wirtschaft und Politik, Teil I: Englisch-Deutsch.* 6th ed, p. 247; Allen, *The Concise Oxford Dictionary of Current English*, 8th ed., p. 337). In legal terminology, this is, however, not the only understanding. Rather, especially in a number of English-language statutory definitions, it also includes leasing an object to somebody; for example Saunders, *Words and Phrases legally defined*, 3rd ed., Vol. 2, p. 91; similar the definitions in Art. 2(a) Maltese Disposal of Government Land Act of 1977, in sec. 18 of the Property Law Act of the state of Victoria, Australia of 1958 or in part XII sec. 205 of the English Law of Property Act of 1925): «'Disposal' means disposal by way of sale, exchange or lease [...]».

17. Nor can the meaning of the term «otherwise disposed of» be reduced to a final abandonment of the leased goods to a third party as to mean an effect similar to that of «sold», if one interprets the term in context. The reason for the obligation to cease is triggered by a premature termination of the leasing contract due to a breach of contract by the lessee or a severe increase in the lessees insolvency risk. Therefore, the obligation to repurchase the goods in their current condition at a fixed price serves the economic purpose of a guarantee for the correct performance of the leasing contract by the original lessee (Federal Supreme Court, 31 January 1990 – VIII ZR 280/88, *NJW* 1990, 2546 at II.4.b)

18. The taking over of risk by the party delivering the leasing object for the correct performance of the leasing agreement would escalate without bounds if the lessor had in his hands the power to command over the leasing object and – in case of a failure of the contract – leave this risk with the party delivering the leasing object, without that party being able to influence a decision about the new lessee or the use of the leasing object and any consequent deterioration of the object. An interpretation of this clause that takes the interest of both parties into account can therefore serve as an argument to follow an actually possible extensive interpretation of the term «to dispose of» to the effect that re-leasing the leasing object to a third party, under consideration of the extensive risk this carries for the party delivering the leasing object, would cease the repurchase agreement.

19. These different possible interpretations of section F 9 of the contract are detrimental to the [Buyer], who introduced the clause to the contract.

20. According to Art. 4 first sentence CISG, contracts subject to the CISG are to be interpreted solely according to the interpretative rules set forth in Art. 8 CISG. This applies to terms and conditions contained in these contracts (Federal Supreme Court, 31 October 2001 – VIII ZR 60/01, *BGHZ* 149, 113, 116 f.; Schmidt-Kessel in Schlechtriem/Schwenzer, *op. cit.*, Art. 8 ¶ 59; Magnus in *Staudinger, op. cit.*, Art. 8 ¶ 18). It is not apparent by itself or through the submissions by the parties that the clause contained in section F 9 of the contract was based on a common understanding of the parties or that the clause is a widely used standard clause that carries only one general understanding in the relevant business circles (see also Art. 8(1) CISG; Schmidt-Kessel in Schlechtriem/Schwenzer, *op. cit.*). The Court of Appeal, with reference to scholars commenting on leasing law (Koch in *Münchener Kommentar zum BGB*, *op. cit.*, ¶¶ 56 et seq.), found a wide use of repurchase clauses in leasing agreements between business persons. From this, one cannot draw inferences about the specific clause nor the interpretation of the clause since the Court of Appeal consider the specific clause.

21. Therefore, the clause in question needs to be interpreted based to Art. 8(2) CISG, according to which statements made by and other conduct of a party are to be interpreted according to the understanding that a reasonable person of the same kind as the other party would have had in the same circumstances. In these cases, the internationally recognized rule that ambiguous statements are to be interpreted «*contra proferentem*» applies; meaning that ambiguities are to be resolved to the disfavor of the declaring party – in this case, the Buyer as the supplier of the standard form contract (see also Schmidt-Kessel in Schlechtriem/Schwenzer, *op. cit.*, Art. 8 ¶¶ 47, 59; Magnus in Staudinger, *op. cit.*; see also CISG Advisory Council Opinion No. 13 – Inclusion of Standard Terms under the CISG, Rule 9, *IHR* 2014, 34, 42). Under this rule, section F 9 is to be given the interpretation unfavorable to the [Buyer], meaning that obligation for the [Seller] to repurchase the goods ceased when the bowling alleys were re-leased to MJFC.

22. The Court of Appeal did not make findings on whether a repurchase agreement materialized subsequently. Insofar as the Court of Appeal finds that the [Seller] cannot invoke the lacking materialization of a repurchase agreement according to § 242 BGB because the [Seller] was always obliged to conclude such an agreement and was obliged to receive the goods, this cannot hold true as the obligation to repurchase had ceased to exist. It does not need to be determined whether the Court of Appeal was correct in finding that the correspondence of the parties with regard to the removing of the alleys show implied consent to pass ownership when the parts were removed. Even if ownership had passed with regard to those parts removed from the premises, one cannot thereby conclude that the [Seller] wanted to revive the obligation to repurchase, especially repurchase the entire bowling alley, of which essential parts remained on the premises

III.

23. Therefore, the decision of the Court of Appeal cannot be upheld (§ 562(1) ZPO). This chamber can decide the matter since no further findings have to be made (§ 563(3) ZPO)). This leads to a restoring of the decision of first instance.