Case 1884: CISG 1(1)(a); 3(1); 7; 25; 29(1); 45(1)(b) and (2); 47; 48(1); 49(1); 58(1); 72(1); 74; 81(2); 84(2); 88(3)
Germany: Bundesgerichtshof
Case No. VIII ZR 394/12
24 September 2014
Original in German

Published in: Entscheidungen des Bundesgerichtshofs in Zivilsachen (BGHZ) 202, 258; Internationales Handelsrecht (IHR) 2015, 8; Neue Juristische Wochenschrift (NJW) 2015, 867 with article by Förster (830); Praxis des Internationalen Privatrechts (IPRax) 2017, 287 with article by P. Huber (268); Betriebsberater (BB) 2015, 398 with note by Schnell; note by P. Huber in LMK 2015, 366671; note by Ostendorf in Gesellschafts- und Wirtschaftsrecht (GWR) 2014, 500.

Abstract prepared by Ulrich Magnus, National Correspondent

The defendant, a company seated in Germany, is a mass producer of plastic car parts. For production it requires specially manufactured moulds into which liquid plastic is pressed in order to produce the car parts to the correct dimensions. Since 1998, the defendant obtained such injection-moulding tools, which were manufactured according to its specifications, from the (predecessor of the) claimant, which is seated in Hungary.

With respect to four supply contracts in 2000 and 2001, the defendant complained about defects in the tools which the claimant unsuccessfully tried to cure. The defendant declared these contracts terminated in January 2002 and claimed damages. In respect of a fifth contract, the defendant declared termination because of delay of delivery already in October 2001. However, in November 2001 this tool was nonetheless delivered and accepted. Although this tool was also defective, the defendant did not again declare termination in respect of this contract for this reason. Later on, the defendant itself repaired all defects and used all delivered tools for its production.

In the present proceedings the claimant requested outstanding payments of approximately €180,000. The defendant rejected the claim because it had terminated the contracts. In addition, it declared set-off with its own damages claims – in the amount of approximately €550,000 – for the repair of the defects (and raised a counterclaim which was not the object of the present proceedings).

The Federal Court (BGH), the third instance, remanded the case.

The BGH first held that the CISG applied to the contracts in question, insofar as it was sufficient that the parties had their places of business in Germany and Hungary, which are CISG Contracting States (art. 1(1)(a) CISG), and that the parties had not excluded the CISG. According to art. 3(1), the CISG applies also to “contracts for the supply of goods to be manufactured or produced” unless the other party supplies “a substantial part of the materials necessary for such manufacture or production”. Here, the defendant had supplied some components for the repair of the tools. However, since that had happened after the conclusion of the contract, the Court held that this contribution was irrelevant for the applicability of the CISG because only the time of the conclusion of the contract was decisive for art. 3(1). It was also held irrelevant that the tools were manufactured according to the specifications of the defendant. The specifications were not regarded as “the materials” in the sense of art. 3(1) CISG.

Contrary to the judgment of the second instance, the BGH denied the claimant’s right to terminate the contracts. According to art. 49(1)(a) CISG, such termination requires a fundamental breach of contract and should not be accepted lightly but only as a remedy of last resort (ultima ratio). Its definition in art. 25 CISG requires that the aggrieved party’s interest in the performance of the contract has essentially fallen away. Whether this was the case was a question of the factual situation of each case. All relevant circumstances must be taken into consideration. With respect to the four contracts, the lower court had neglected that the defendant itself repaired the tools and used them permanently for their contracted purpose.

The lower court had merely relied on the claimant's inability to repair the defects as well as the defendant's time stress and therefrom inferred the justified termination of the contract. This was insufficient. The BGH held that the tools' defects did not constitute a fundamental breach and thus did not justify the termination, which therefore was invalid. The conduct of the defendant had shown that despite the defects of the tools, the defendant's interest in the performance of these contracts had not fallen away. In weighing all circumstances, this was regarded to be the ultimately decisive fact.

With respect to the fifth contract, the BGH held that the mere delay of delivery without any other factor (e.g., time being of the essence, or similar) did generally not give grounds for terminating the contract. An additional period of time for performance ("Nachfrist") in the sense of art. 47 CISG, the unsuccessful lapse of which would have justified the termination (art. 49(1)(b) CISG), was not set by the defendant. But even if the termination had been valid, the result would not have been different as the defendant had later accepted the belatedly delivered tool. The Court held that the parties had implicitly renewed the original contract (art. 29(1) CISG). Furthermore, the fact that this tool was defective could not be taken into account for the termination in October and the delay could not be upgraded to a fundamental breach because in October the not yet delivered tool was not yet defective. In the opinion of the Court, the defendant – in October – could also not rely on an anticipatory fundamental breach, which in principle could justify the termination of the contract in advance (art. 72(1) CISG), as such a breach could no longer be invoked when the breach (here: the delivery of the defective tool) had meanwhile occurred. In any event, the later acceptance of the tool would have also invalidated such a termination.

Contrary to the lower court, which had omitted to fully deal with the defendant's counterclaims concerning the repair costs, the BGH held that these claims were in principle justified according to art. 45(1)(b) and (2) and art. 74 CISG. Even if the buyers repaired defective goods themselves, they were entitled to compensation of reasonable repair costs unless the seller had a right to remedy defects in accordance with art. 48 CISG. The right to remedy did, however, not require the buyer, here the defendant, to set an additional period for performance. On the contrary, the Court held that the seller must approach the buyer and had an obligation (deriving from art. 7(1) CISG) to give notice of his intention if he intended to remedy a defect. This the claimant had not done. In any event, the defendant would have been entitled to refuse any remedy because several attempts by the claimant had already failed.

Special mention is made of the BGH's considerations on the set-off which the defendant had declared based on its claims for the repair costs for the tools. In general, set-off is not covered by the CISG, such that the rules of private international law determine which law applies to set-off. However, contrary to the prevailing view, the BGH decided that the CISG was applicable to the set-off of mutual claims which originated from the same CISG contract. The Court inferred from arts. 84(2) and 88(3) and from the synallagmatic contractual relationship as expressed in art. 58(1), second sentence, art. 81(2) CISG a general principle in the sense of art. 7(2): "Reciprocal monetary claims which are due can be set-off against each other if a party so declares." The main claim was then extinguished in the amount of the set-off claim. The Court acknowledged this principle not only for mutual claims arising from the same CISG contract but also if they stemmed from different CISG contracts between the same parties if an overall set-off corresponded with the parties' expressed or implied intentions. In the present case the claimant had claimed one single amount out of the different contracts and the defendant had declared the set-off against that amount. That sufficed to treat the claims and counterclaims out of the different CISG contracts as if they followed from one single contract.

Since the lower court had not sufficiently explored the extent and justification of the claims which the defendant had set off, the BGH remanded the case.