CISG-online 2545	
Jurisdiction	Germany
Tribunal	Bundesgerichtshof (German Supreme Court)
Date of the decision	24 September 2014
Case no./docket no.	VIII ZR 394/12
Case name	*Hungarian injection moulding tools case*

Translation by Till Maier-Lohmann[*]

[Guiding principles of the decision:]

CISG Articles 25, 49(1)(a)

> a) If the breach of contract is based on a deviation from the contractually agreed quality (Article 35(1) CISG) or on any other non-conformity (Article 35(2) CISG), then it is not only the severity of the non-conformity that is decisive when assessing whether there is a fundamental breach of contract, but more importantly whether the [buyer]'s interest in performance has essentially ceased to exist due to the weight of the breach of contract. If he can use the object of sale permanently, albeit under restrictions, a fundamental breach of contract will often have to be denied (continuation of German Supreme Court, judgment of 3 April 1996 - VIII ZR 51/95, BGHZ 132, 290, 297 et seq.).
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> b) When deciding whether a breach of contract by the seller substantially deprives the buyer of his interest in performance, the parties' agreements shall be taken into account first and foremost. In the absence of express agreements, particular regard is to be had to the tendency of the CISG to limit the avoidance of the contract in favour of the other possible remedies, in particular reduction of price or damages. The avoid-

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To facilitate the understanding of the judgment, the parties' names and respective procedural positions during the proceedings before different courts were harmonised to always read '[seller]' or '[buyer]'. The concrete parties are referred to as 'it', while sellers and buyers in general are referred to as 'he' to stay consistent with the wording of the CISG. Moreover, the translator added (sub-)headings to allow for a quick orientation. These were not part of the original judgment which is why they are–like other additions by the translator–found within square brackets '[]'.

ance shall only be available to the buyer as a measure of last resort (ultima ratio) following a breach of contract by the other party that is so important that it substantially deprives its interest in the performance (following German Supreme Court, judgment of 3 April 1996 - VIII ZR 51/95, *ibid*).

CISG Articles 4, 7(2)

The set-off of mutual monetary claims arising from the same contract, which is subject to the CISG, shall be assessed according to Convention-internal offsetting standards. Set-off can be declared impliedly or explicitly. The consequence of set-off is that the mutual monetary claims–insofar as no set-off exclusions have been agreed upon–are discharged to the extent that they correspond in amount (further development of German Supreme Court, judgements of 23 June 2010 - VIII ZR 135/08, WM 2010, 1712 para. 24; and of 14 May 2014 - VIII ZR 266/13, WM 2014, 1509 para. 18).

[Operative part of the judgment:]

Following the hearing of 24 September 2014, the 8th Civil Panel of the Supreme Court encompassing Presiding Judge Dr Milger and Judges Dr Hessel, Dr Fetzer, Dr Bünger and Kosziol has

ordered, adjudged and decreed:

The judgment of the 8th Civil Panel of the Court of Appeal Zweibrücken of 29 October 2012 is set aside in respect of the appeal (*Revision*) by the [seller] regarding the decision on costs and to the extent that it denied the [seller's] claim.

The aforementioned judgment shall be set aside upon the [buyer]'s cross-appeal (*Anschlussrevision*) insofar as the [buyer] has been ordered to pay EUR 97,684.35 plus interest.

To the extent of the annulment, the case will be remanded to the Court of Appeal for a new hearing and decision, including on the costs of the appeal against denial of leave to appeal (*Nichtzulassungsbeschwerde*) and the appeal proceedings (*Revisionsverfahren*).

de jure

Facts:

The [buyer], who is a supplier to the automotive industry and based in P., manufactures mass-produced car parts out of plastic. To produce these parts, it requires specially manufactured tools, including the moulds into which liquid plastic is pressed for the accurate manufacture of the parts. Since 1998, it has procured injection moulds of this type to be manufactured according to its specifications from the Hungarian-based [seller], the plaintiff's legal predecessor.[1] 1

Disputes arose during the execution of the last delivery orders placed by the [buyer] in 2000 and 2001. The [buyer] complained that the tools ordered and delivered under order numbers 40117, 40118, 40686, 40086/40087 were deficient. After the [seller] was unable to remedy the defects to the satisfaction of the [buyer], the latter finally declared the 'rescission of the contract' on 21 January 2002 with regard to the contracts with the order numbers 40117 and 40118, and additionally claimed damages. 2

As regards a further contract (order number 40175), the [buyer] had already declared on 31 October 2001–before delivery of the tools–the 'rescission of the contract' due to late delivery and additionally claimed damages. The [buyer] had initially informed the [seller] that the latter no longer needed to deliver. However, the buyer later accepted the tools offered on 26 November 2001 and subsequently notified the seller of deficiencies. 3

Following these events, the [buyer] remedied the tools' deficiencies itself and then put them to use in its production. 4

Based on the five orders that form the substance of this dispute, the [seller] has claimed in total for a remuneration of EUR 178,472.54, the overwhelming majority of which it continues to pursue before the Supreme Court (*Revisionsinstanz*). The [buyer] opposes these claims and argues that the seller's claims for remuneration have lapsed as far as it declared the 'rescission of the contract'. Moreover, the [buyer] had declared a set-off against the claims, with its–in existence and amount contested–expenses for remedying the tools (order numbers 40117, 40118, 40174, 40686 and 40086/40087) totalling EUR 552,226.53. Furthermore, regarding order number 40686, the [buyer] refers to a contractual agreement whereby a late delivery empowered it to reduce the remuneration to EUR 13,392. It has declared a set-off with regards to this claim too. Besides, it has–based on a further contractual relationship (order number 40603)–filed a counterclaim for payment of EUR 154,278.04 (plus interest). 5

[1] [Simplifying, the plaintiff is characterised as the seller, even though it is its legal predecessor.]

[History of the proceeding:[2]]

The District Court (*Landgericht*) granted the [seller's] claim in the amount of EUR 177,472.47 plus interest and granted the [buyer's] counterclaim in the amount of EUR 46,169.67 plus interest while rejecting the rest of the claim. Upon the [buyer]'s appeal, the Court of Appeal amended the judgment of the District Court both in respect of the claim and in respect of the counterclaim. The appellate Court upheld the [seller's] claim only in respect of the remaining remuneration from some of the contracts (order numbers 40686 and 40086/40087) amounting to a total of EUR 97,684.35 plus interest. With regard to the [seller's] claims for the purchase price brought under the other contracts (order numbers 40117, 40118 and 40174), it dismissed the claims. It granted the [buyer]'s counterclaim in the amount of EUR 101,291.47 in total. 6

The [Supreme Court's 8th Civil] Panel allowed the appeal upon the [seller]'s appeal against denial of leave to appeal (*Nichtzulassungsbeschwerde*) insofar as the Court of Appeal denied its claim. Conversely, the Panel rejected the appeal against denial of leave to appeal (*Nichtzulassungsbeschwerde*) insofar as the [seller] was ordered to pay EUR 101,291.47 based on the counterclaim. With its appeal, the [seller] seeks the restoration of the judgement of the District Court to the extent of the admissibility of the appeal. The [buyer] has lodged a cross-appeal (*Anschlussrevision*) against [the seller's appeal], with which he is seeking to rely on the set-off he has declared to have the claim dismissed in its entirety. 7

Reasons for the decision:

Both the appeal of the [seller]–to the extent to which it is admissible–and the cross-appeal (*Anschlussrevision*) of the [buyer] are successful. 8

I. ***[Reasoning of the Court of Appeal:]***

The Court of Appeal, insofar as it is still of relevance for the appeal proceedings (*Revisionsverfahren*), has, in essence, stated the following: 9

[2] [The seller sued before the District Court (*Landgericht*), buyer appealed to the Court of Appeal (*Berufung zum Oberlandesgericht*), seller then appealed the judgment to the Supreme Court (*Revision beim Bundesgerichtshof*) to which the buyer reacted with a cross-appeal (*Anschlussrevision*).]

The supplier relationships in question were subject to the United Nations Convention on Contracts for the International Sale of Goods (CISG). On this basis, the [seller]'s remuneration claims arising under the contracts with the numbers 40117, 40118 and 40174 lapsed because the [buyer] had rightfully declared the avoidance of the contract pursuant to Article 49(1)(a) CISG through its letters of 21 January 2002 and 31 October 2001 (Article 26 CISG) addressed to the [seller]. [The buyer] was, therefore, released from its contractual obligations according to Article 81 CISG. **10**

Considering the result of the taking of evidence before the District Court, the tools supplied under order numbers 40117 and 40118 had been non-conforming under Article 35 CISG. With regard to both contracts, this was a fundamental breach of contract under Article 25 CISG. The decisive factor was whether the buyer's expectations were–due to a serious breach of the seller's obligations–frustrated to such an extent that the buyer's interest in the performance of the contract would cease. This was held to be the case regarding the tools supplied under order numbers 40117 and 40118. In both cases, the tools had been defective to a considerable extent and could not be used. Despite several attempts at repair, the [seller] failed in producing a functional and usable tool. Furthermore, it had to be taken into account that the [buyer] had been under time pressure because of existing delivery obligations towards its customers, which the [seller] had been made aware of in their extensive correspondence. Since the [buyer]'s confidence in the [seller]'s ability was rightly shaken in this situation, the fact that the non-conformity of the goods could be remedied did not exclude a fundamental breach of contract. **11**

As regards delivery 40117, there was a proper notice of non-conformity under Article 39 CISG. As for the rest, it can be left open whether the buyer notified the seller of the non-conformities under Article 39 CISG. Under Article 40 CISG, even if a notification of non-conformities is late or does not comply with Article 39 CISG, this would not be detrimental to the buyer's remedies if the seller knew or could not have been unaware of the facts on which the lack of conformity was based and did not disclose them to the buyer. This applies to the case at hand. The existing non-conformity had to 'catch the eye' of the [seller], which is why he could not have been unaware of them. **12**

The Court of Appeal further concluded that the avoidance of the contract had been declared–in a letter dated 21 January 2002–within a reasonable time under Article 49(2)(b) CISG. The absence of a (further) period of time under Article 47 CISG did not hinder the avoidance of the contract, because such a period of time is not required in case of a fundamental breach of contract. Finally, the avoidance of the contract was not excluded by the fact that the [buyer] could not return the tools in the original condition. In the meantime, he had put them into a functioning condition. Only negative changes to the goods are detrimental in this respect; improvements to the goods, on the other hand, do not lead to the loss of the right to avoid the contract. The latter applied here according to the Court of Appeal. The [buyer] had improved the tools. In addition, the return of the goods was still possible at the relevant time when the declaration of avoidance was sent. Whether it becomes impossible later is irrelevant. **13**

The [buyer] was also entitled to avoid the contract with regard to the tool supplied under order number 40174. In a letter dated 31 October 2001–even before the goods had been delivered–the [buyer] had declared the avoidance due to delay of delivery (*Verzug*) and thus clearly expressed that he was no longer prepared to fulfil its contractual obligations due to the [seller]'s breach of contract. The tool was nevertheless delivered on 26 November 2001 and showed considerable deficiencies, despite six complaints and attempts to remedy defects for more than a year; in particular, the electrical and hydraulic equipment for this tool which had not been completely produced. Due to Article 40 CISG, the fact that no further notice of non-conformities was made after delivery did not carry any consequence, because the defects were 'eye-catching', and the [seller] could not have been unaware of them. Therefore, the [buyer] was released from the obligation to pay the remaining remuneration following the effective avoidance of the contract governing this delivery (Article 81 CISG). 14

However, the Court of Appeal considered the [seller] to be entitled to claims for payment of remaining remuneration of EUR 97.684,35 plus interest against the [buyer] arising from the contractual relationships with the order numbers 40686 and 40086/40087. Additionally, the [buyer] has not avoided the two contracts, nor have the remuneration claims lapsed by offsetting with claims for damages due to the repair work done by the buyer. The [buyer] had not proven in the process of evidence taking before the District Court that the costs it had incurred through reworking and repair work amounted to those which he claimed. There was no reliable basis for the court to estimate a minimum damage under § 287 German Code of Civil Procedure. 15

II. *[Reasoning of the Supreme Court:]*

[This assessment of the Court of Appeal] does not stand up to legal scrutiny in several respects. 16

A. On the appeal (*Revision*) of the [seller] 17

1. Neither the purchase price claims asserted by the [seller] (Article 53 CISG) under the contracts with order numbers 40117 and 40118, nor the purchase price claim (Article 53 CISG) under the contract with order number 40174, can be denied on the grounds provided by the Court of Appeal. Contrary to the opinion of the Court of Appeal, the [buyer] has not rightfully avoided any of the aforementioned contracts. In the case of contracts with order numbers 40117 and 40118, only Article 49(1)(a) CISG can be contemplated. However, its requirements are not fulfilled because there is no fundamental breach of contract (Article 25 CISG). Regarding order number 40174, there exists neither a fundamental breach of contract nor a non-delivery, despite setting an additional period of time (Article 49(1)(a) and (b) CISG). Furthermore, there is also no anticipated breach of contract pursuant to Article 72(1) CISG. 18

[Applicability of the CISG:]

a) As the Court of Appeal rightly held and as has also not been called into question by the appeal (*Revision*), the disputed supply contracts are subject to the CISG. The contracting parties have their places of business in different States that are both Contracting States of the Convention (Article 1(1)(a) CISG). The fact that the [seller] had to manufacture the goods to be delivered himself does not change anything with respect to the applicability of the CISG. This is because the unified sales law not only applies to sales contracts, but according to Article 3(1) CISG also to contracts for the supply of goods to be manufactured or produced, unless the party who orders the goods supplies a substantial part of the materials necessary for such manufacture or production. Accordingly, supply contracts should also be treated as equivalent to sales contracts if the supplier manufactures the goods to be supplied according to the specifications and instructions of the party who orders the goods (see Court of Appeal Oldenburg, IHR 2008, 112, 117; Court of Appeal Frankfurt am Main, NJW 1992, 633; Schlechtriem/Schwenzer/Ferrari, CISG, 6th edition, Art. 3 para. 10; MünchKommHGB/Benicke, 3rd edition, Art. 3 CISG para. 2, 4 with further references). It is neither established nor apparent that the [buyer] has assumed the obligation to contribute a substantial part of the materials required to produce the tools ordered. Finally, the applicability of the CISG to the contracts is not excluded by the fact that, after delivery of the tools, the [buyer] still contributed some components for the purpose of remedying the defects. This is because the law applicable to the contract, which is generally determined at the time of conclusion of the contract, is not affected thereby (Staudinger/Magnus, BGB, 2013, Art. 3 CISG para. 17). **19**

[Non-conformity of goods delivered under of contracts no. 40117, 40118 and 40174:]

b) The Court of Appeal did not err in law in finding that the tools supplied by the [seller] under order numbers 40117, 40118 and 40174 were not in conformity with the contract under Article 35(1), (2)(a) and (2)(b) CISG, because the [buyer] had not received–as owed–functioning tools suitable for its manufacturing process. These findings are not called into question by the appeal. **20**

[Wrongful interpretation of the avoidance of contracts with order numbers 40117 and 40118:]

c) However, the Court of Appeal erred in ruling that the [buyer] was entitled to avoid the contracts with order numbers 40117 and 40118 due to a fundamental breach of contract under Article 25 CISG, and that the buyer was consequently released from its obligation to pay the price pursuant to Article 81 CISG. A fundamental breach of contract is to be denied despite the non-conformity of the delivered tools found by the Court of Appeal. **21**

aa) Article 49(1)(a) CISG entitles the buyer to avoid the contract only if the breach of a seller's obligation under the contract or the provisions of the CISG constitutes a fundamental breach of contract under Article 25 CISG. According to the definition in Article 25, a breach of contract is fundamental if it results in such detriment to the other party as substantially to deprive him of what he is entitled to expect under the contract, unless the party in breach did not foresee and a reasonable person of the same kind in the same circumstances would not have foreseen such a result. 22

(1) The fundamental contractual interest can in principle be adversely affected in this sense by contractual obligations of any kind, irrespective of whether they constitute a main or an accessory obligation, or concern quality, quantity, delivery date or other modalities of performance (judgment of the German Supreme Court of 3 April 1996 - VIII ZR 51/95, BGHZ 132, 290, 297 with further references). It can also stem from the delivery of non-conforming goods (judgment of the German Supreme Court of 8 March 1995 - VIII ZR 159/94, BGHZ 129, 75, 79). A breach is fundamental if it compromises the legitimate contractual expectations of the other party to such an extent that their interest in fulfilling the contract is essentially lost (cf. Staudinger/Magnus, *ibid*, Art. 25 CISG paras. 9, 13; MünchKommBGB/ Huber, 6th edition, Art. 25 CISG para. 12; Honsell/Gsell, *UN Sales Convention*, 2nd edition, Art. 25 CISG paras. 12–16; Enderlein/Maskow/ Strohbach, *International Sales Convention*, Art. 25 CISG note 3.1; Ferrari, IHR 2005, 1, 4; in each case with further references). First and foremost, the agreements reached between the parties must be taken into account (judgment by the German Supreme Court of 3 April 1996 - VIII ZR 51/95, *ibid*; Staudinger/Magnus, *ibid* para. 13; Schlechtriem/Schwenzer/Schroeter, *ibid* para. 21). 23

In the absence of express agreements regarding the importance of specific obligations, the assessment to be carried out under Article 25 CISG as to whether a breach of contract by the seller essentially eliminates the buyer's interest in performance, shall, above all, take into account the tendency of the CISG to limit the avoidance of the contract in favour of the other possible legal remedies, in particular a reduction of price or damages. The avoidance shall only be available to the buyer as a measure of last resort (ultima ratio) in order to react to a breach of contract by the other party which is so important that it substantially deprives his interest in the performance (judgment of the German Supreme Court of 3 April 1996 - VIII ZR 51/95, *ibid* p. 298–299 with further references; Swiss Federal Supreme Court, IHR 2010, 27, 28; Austrian Supreme Court, IHR 2012, 114, 116; Court of Appeal Hamburg, IHR 2008, 98, 100). 24

[Defining the standard of a fundamental breach under Article 25 CISG:]

(2) For the assessment of whether a breach of contract reaches the threshold of severity required under Article 25 CISG, ultimately, the respective circumstances of the individual case are decisive (judgment of the German Supreme Court of 3 April 1996 - VIII ZR 51/95, *ibid* p. 299; Swiss Federal Court, *ibid* p. 28–29; Austrian Supreme Court, *ibid* p. 117; Soergel/Lüder- 25

itz/Fenge/Budzikiewicz, 13th ed., Art. 25 CISG para. 2; Staudinger/Magnus, *ibid*; Enderlein/Maskow/Strohbach, *ibid* note 3.2; Ferrari, *ibid*). However, some guidelines can be established for certain groups of cases.

If the breach of contract–as in this case–is based on a deviation from the contractually agreed upon quality (Article 35(1) CISG) or on any other non-conformity (Article 35(2) CISG), the severity of the non-conformities shall not be the sole factor to be taken into account (cf. judgment of the German Supreme Court of 3 April 1996 - VIII ZR 51/95, *ibid* April 1996 - VIII ZR 51/95, *ibid*; Swiss Federal Supreme Court, SZIER 1999, 179; Ferrari, *ibid* cit. p. 7; Honsell/Gsell, *ibid* cit. para. 43; in each case with further references). The decisive factor is, rather, whether the buyer's interest in performance has essentially lapsed due to the severity of the breach of contract (Court of Appeal Hamburg, *ibid* p. 100). Therefore, the non-conforming goods must be of almost no use to the buyer; if he can use them, albeit with restrictions, a fundamental breach of contract will often have to be denied (Court of Appeal Hamburg, *ibid*). **26**

Accordingly, a non-conformity does not constitute a fundamental breach of contract if the goods can nonetheless be processed or sold elsewhere in the ordinary course of business without disproportionate expense, in a reasonable manner and, if necessary, at a price reduction (judgment of the German Supreme Court of 3 April 1996 – VIII ZR 51/95, *ibid* p. 298; see also Swiss Federal Supreme Court, SZIER 1999, 179; IHR 2010, 27, 28–29; MünchKommBGB/Huber, 6th edition, Art. 49 CISG para. 39; Herber/Czerwenka, *International Sales Law*, Art. 25 CISG para. 7; Soergel/Lüderitz/Fenge/Budzikiewicz, *ibid*; Soergel/Lüderitz/Schüßler-Langeheine, *ibid*, Art. 49 para. 3; Staudinger/Magnus, *ibid*, Art. 25 CISG para. 12; Ferrari, *ibid* p. 7). **27**

The same applies if the non-conformity can be remedied–by the seller, but under certain circumstances also by the buyer himself (cf. Schwenzer, CISG-AC Opinion No. 5, para. 4.5)–within a reasonable period of time and with reasonable effort (cf. Swiss Federal Court, IHR 2010, *ibid*; Austrian Supreme Court, IHR 2012, 114, 117–118; MünchKommBGB/Huber, *ibid* para. 38; Ferrari/Kieninger/Mankowski/Saenger, *Internationales Vertragsrecht*, 2nd ed, Art. 49 CISG para. 7; Honsell/Schnyder/Straub, *ibid*, Art. 49 para. 23a; Staudinger/Magnus, *ibid*, Art. 49 para. 14; Ferrari, *ibid*; [remedy by buyer]; Botzenhardt, *Die Auslegung des Begriffs der wesentlichen Vertragsverletzung im UN-Kaufrecht*, 1998, p. 221; contra Neumayer, RIW 1994, 99, 106). Finally, the fact that the buyer has used the non-conforming goods, which were not intended for resale, for the intended purpose in the long term and has, thereby, shown that they were not without use to him, can also tip the scales against the existence of a fundamental breach of contract under Article 25 CISG (Court of Appeal Hamburg, *ibid*). **28**

[Applying the standard of a fundamental breach:]

bb) Whether there is a fundamental breach of contract under Article 25 CISG measured against these standards is primarily a matter to be assessed by the trial judge (*Tatrichter*) (judgment of the German Supreme Court of 3 April 1996 - VIII ZR 51/95, *ibid*). The Court of Appeal's (*Berufungsgericht*) assessment of the case can only be reviewed to a limited extent for legal and procedural errors by the Supreme Court (*Revisionsgericht*), i.e. in particular whether the court misjudged the relevant legal standards of assessment, did not fully appreciate the facts of the case submitted to it or violated laws of thought and general empirical judgement. Such errors of law are present here. **29**

(1) As the appeal (*Revision*) rightly contends, the Court of Appeal failed to accord sufficient weight to the fact that the CISG gives priority to the preservation of the contract when classifying the non-conforming deliveries (order numbers 40117 and 40118) as fundamental breaches of contract under Art. 25 CISG (cf. Swiss Federal Supreme Court, *ibid* p. 28). Due to this priority, avoidance of the contract is only available to the buyer–as the most severe sanction–if the breach of contract has essentially caused the latter's interest in performance to cease. In its assessment, [the Court of Appeal] focused primarily on the non-conformity of the delivered goods, on the [seller]'s failed attempts at remedying the defects, on the time pressure which the buyer was under due to its own delivery obligations, and on its shaken confidence in the [seller]'s ability. Thus, it did not–as required–take all circumstances of the case into account. Rather, the Court of Appeal found that the [buyer] had an interest in an 'immediate avoidance of the contract', without attaching decisive weight to the fact that the [buyer] did not intend to return the defective tools to the [seller] at the relevant time of receipt (Article 26 CISG) of its 'declaration of avoidance' of 21 January 2002. He wanted to remedy the remaining defects himself and subsequently used the tools permanently in its production. Contrary to the assessment of the Court of Appeal, these aspects are of decisive importance. **30**

(2) Since no further relevant findings are necessary, the [8th Civil] Panel [of the Supreme Court] can decide whether there was a fundamental breach of contract as defined in Article 25 CISG, which entitled the [buyer] to avoid the contract pursuant to Article 49(1)(a) CISG. That is not the case despite the non-conformities, which were not insignificant, the unsuccessful attempts by the [seller] to remedy the defects, the time pressure placed on the [buyer], and its conviction that the [seller] would no longer remedy the non-conformities in a timely manner. This is because the [buyer]'s conduct and its motivation to complete the tools in its own operation prove, as the appeal (*Revision*) rightly contends, that the [buyer]'s interest was at no time directed towards the avoidance of the two contracts (with the legal consequences of Articles 82 et seq. CISG). On the contrary, [the buyer] used the delivered, albeit non-conforming, tools for the contractually presumed purpose. The fact that the claims for damages asserted exceed the [seller]'s purchase price claim by far is–as the [buyer] argues–irrelevant. This is because the [buyer] ultimately receives, through its own repair of the defects and through the claims for damages–insofar as these are justified–essentially what he could have expected under the contracts (cf. on this point of view Austrian Supreme Court, CISG-online 2399, insofar not printed in RdW 2013, 124; Schlechtriem/Schwenzer/Müller-Chen, *ibid*, Art. **31**

49 para. 7). In light of the foregoing, the [buyer]'s interest in the performance of the two contracts has not ceased to exist. Since he was not entitled to avoid the contracts with order numbers 40117 and 40118 because there was no fundamental breach of contract, the [seller]'s purchase price claims resulting from these deliveries did not lapse pursuant to Article 81(1) CISG.

[Avoidance of contract no. 40174:]

d) The appeal (*Revision*), furthermore, successfully alleges that the Court of Appeal erred in law in assuming that the [buyer]'s obligation to pay the purchase price with regard to the contract with order number 40174 had lapsed as a result of an effective avoidance of the contract. The Court of Appeal has–as the [buyer] also asserts–(probably) seen a ground for avoidance not in the delay in delivery asserted by the [buyer] alone, but also in the one year-long repair work before delivery of the tools and in the non-conformity, which ultimately was still not remedied even at the time of delivery. On the one hand, it has not made it sufficiently clear whether it based its affirmation of the avoidance of the contract on Article 49(1)(a) CISG (fundamental breach of contract) or Article 49(1)(b) CISG (non-delivery within a set additional period of time). On the other hand, it overlooked the fact that, although the [buyer] substantiated its declaration of avoidance of 31 October 2001 with both a delivery date that, in its view, had already elapsed ('because of delay') and with non-conformities existing at that time, the avoidance of the contract could not, by its very nature, be based on a non-conformity remaining at the time of the subsequent delivery on 26 November 2001. **32**

aa) Neither a possible delay in delivery, nor the non-conformities of the goods that undisputedly existed before delivery of the tools and the fruitless attempts of the [seller] to remedy the defects that had already existed at the time of receipt of the declaration of avoidance (Article 26 CISG) of 31 October 2001, fulfil the requirements of Article 49(1) CISG, which is the only conceivable provision. An avoidance of a contract due to anticipated breach of contract under Article 72(1) CISG is excluded from the outset. This provision merely serves to protect against a future breach of contract. It, therefore, does not apply to breaches of contract which–as asserted here by the [buyer]–occur on or after the due date (judgment of the German Supreme Court of 15 February 1995 - VIII ZR 18/94, NJW 1995, 2101 under II 3a; see also judgment of the German Supreme Court of 3 April 1996 - VIII ZR 51/95, *ibid* p. 296). **33**

The Court of Appeal has not made any conclusive findings as to the existence of a [seller's] delay in delivery (*Lieferverzug)* alleged by the [buyer]. This allegation is disputed by the [seller] with reference to an alleged [buyer]'s delay in performance regarding an advance performance (*Vorleistung*) (Article 80 CISG). Therefore, it must be assumed for the purposes of the appeal proceedings (*Revisionsverfahren*) in favour of the [buyer] that the [seller] is in delay of delivery (*Lieferverzug*). Yet, neither did this constitute a fundamental breach of contract under Article 49(1)(a) CISG, nor had the [buyer] set an additional period of time before its declaration of avoidance, which would have allowed for an avoidance under Article 49(1)(b) CISG in the case of fruitless expiration. **34**

(1) As expressed in Article 49(1) CISG, a mere delay in delivery is, in principle, not a fundamental breach of contract in the sense of Article 49(1)(a) CISG (Schlechtriem/Schwenzer/Müller-Chen, *ibid*, Art. 49 CISG para. 5; MünchKommBGB/Huber, *ibid*, Art. 49 para. 34; MünchKommHGB/Benicke, *ibid*, Art. 25 CISG para. 20; Ferrari, *ibid* p. 7; Court of Appeal Düsseldorf, CISG-online 92 and 385; each with further references). Rather, a delay in delivery (*Lieferverzug*) can generally only be a fundamental breach of contract if an on-time delivery is of particular interest to the buyer (cf. Schlechtriem/Schwenzer/Müller-Chen, *ibid*; Staudinger/Magnus, *ibid*, Art. 49 para. 12; MünchKommBGB/Huber, *ibid*; Ferrari/Kieninger/Mankowski/ Saenger, *ibid*, Art. 49 para. 2; Ferrari, *ibid* p. 7 et seq.). Where further circumstances arise, however, a failure to meet the delivery date may in individual cases also reach the threshold of a fundamental breach of contract (Schlechtriem/Schwenzer/Müller-Chen, *ibid* with further references). Although the Court of Appeal recognised this to some extent, it did not sufficiently take into account that merely the factual situation at the time of receipt of the declaration of avoidance (Art. 26 CISG) is decisive and that later developments (here: defects in delivery on 26 November 2001) cannot be considered to this end. **35**

(2) An avoidance pursuant to Article 49(1)(b) CISG, which was not expressly examined by the Court of Appeal, would first require a non-delivery despite it being due (cf. MünchKommBGB/Huber, *ibid*, Art. 49 CISG para. 48). Second, it would require a fruitless elapsed additional period of time within the meaning of Article 47(1) CISG, i.e., a request by the buyer to perform in combination with the setting of a specific period of time (Court of Appeal Düsseldorf, CISG-online 385; MünchKommBGB/Huber, *ibid*, Art. 47 CISG para. 9; Honsell/Schnyder/Straub, *ibid* paras. 18 et seq.; Schlechtriem/Schwenzer/Müller-Chen, *ibid*, Art. 47 para. 4). The Court of Appeal (*Berufungsgericht*) has not made any findings as to the existence of these prerequisites; overlooked submissions before the District Court and the Court of Appeal are not brought forward by the [buyer] in this respect. **36**

bb) Irrespective of this, the [seller]'s claim to payment of the purchase price would not have lapsed pursuant to Article 81 CISG even if the contract had been effectively avoided by the declaration of 31 October 2001. For even if this had been the case, the [seller] later delivered the tools (on 26 November 2001) and the [buyer] accepted them as owed performance. Thereby, the parties amended the contractual relationship, which had entered the reverse transaction stage, in accordance with Article 29(1) CISG and impliedly re-established the original contract, which is possible under Article 11(1) and (2) Introductory Act to the German Civil Code old version (cf. Schlechtriem/Schwenzer/Müller-Chen, *ibid*, Art. 49 para. 22). The [8th Civil] Panel [of the Supreme Court] can rule itself on this point, since no further facts have to be established in this regard. **37**

cc) The fact that the tool still had serious non-conformities after delivery could not–as already stated–be the basis of the declaration of avoidance of 31 October 2001. Instead, the [buyer] could at most have been entitled to a renewed avoidance of the contract (in this instance because of non-conformities still existing after delivery). According to the findings of the Court of Appeal, however, there was no renewed declaration of avoidance after the delivery of the tools. Moreover, with regard to the actual use of the tool in the production process of the **38**

[buyer], after the remedying of defects by the [buyer] himself, there would also be no fundamental breach of contract in this respect. In this regard, reference can be made to the remarks on the contracts with order numbers 40117 and 40118.

[Counterclaims by the buyer and set-off:]

2. The decision of the Court of Appeal is also not correct for other reasons (§ 561 German Code of Civil Procedure). **39**

In defence against the purchase price claims asserted by the [seller] under the contracts with the order numbers 40117, 40118 and 40174 (Article 53 CISG), the buyer has declared a set-off with counterclaims, which exceed the purchase price claims. These counterclaims are based on alleged expenses for repairing all tools and, with regard to the contract with order number 40686, on a contractual agreement according to which it may reduce the remuneration due to delay of delivery (*Lieferverzug*) by a total of EUR 13,392. To decide whether these counterclaims exist, however, further factual findings by the trial judge are required. **40**

The Court of Appeal–for reasons of consistency with its prior reasoning–did not address the counterclaims asserted for the deliveries in question here under order numbers 40117, 40118 and 40174. Rather, it examined the existence of such counterclaims only in connection with the [seller]'s remuneration claims for the tools supplied under order numbers 40686 and 40086/40087. These counterclaims are the subject of the cross-appeal (*Anschlussrevision*). In doing so–as will be discussed later–the Court of Appeal did not exhaust the available evidence (*Prozessstoff*) in violation of procedural law and insufficiently appreciated the evidence gathered. The existence of such counterclaims cannot be ruled out in light of the submission to be taken as a basis by the Supreme Court (*Revisionsinstanz*). **41**

[The buyer's claims for costs for repair and the seller's right to cure under Article 48 CISG:]

a) According to the findings of the Court of Appeal, which were free of errors in law and were in this respect not challenged in the appeal proceedings (*Revisionsverfahren*), the [buyer] repaired the delivered tools at its own expense. In this regard, pursuant to Article 45(1)(b), (2), Article 74 CISG, he is generally entitled to a claim for reimbursement of the required and reasonable costs of remedying defects of the tools regardless of fault on the part of the seller. In the event of non-performance or non-conforming performance of the contract, the buyer shall be allowed–insofar as the seller is not entitled to cure the non-conformity pursuant to Article 48 CISG–to take appropriate measures to bring about a situation corresponding to the proper performance and to charge the seller the costs as damages within the limits of Article 77 CISG (cf. judgment of the German Supreme Court of 25 June 1997 - VIII ZR 300/96, NJW 1997, 3311 under III 2; Austrian Supreme Court, IHR 2002, 76, 80; Honsell/Schnyder/Straub, **42**

ibid, Art. 46 CISG paras. 109 et seq.; Staudinger/Magnus, *ibid*, Art. 77 CISG para. 15; Schlechtriem/Schwenzer/Müller-Chen, *ibid*, Art. 46 CISG para. 46; Schönknecht, *Die Selbstvornahme im Kaufrecht*, 2007, p. 123 et seq.).

aa) The Court of Appeal found that all tools delivered under order numbers 40117, 40118, 40174, 40686, 40086/40087 were still defective at the time of delivery without errors in legal reasoning. Neither the buyer nor the seller challenge this finding before the Supreme Court. **43**

bb) The [buyer]'s claim for damages–contrary to the interpretation of the [seller]–is also not excluded by the fact that the [buyer] did not again request the [seller] to remedy the non-conformity after delivery of the non-conforming tools. The [buyer] was not obligated to take such a step for several reasons. **44**

The [seller's interpretation] already fails to recognise that according to the conception of the CISG–which deviates from the law of obligations of the German Civil Code–the buyer is not obligated to give the seller the opportunity for cure on its own initiative. Rather, Article 46(2), (3) CISG only grants the buyer the right ('may') to demand delivery of substitute goods or to demand remedy of the lack of conformity under certain conditions. Yet, the buyer is not obligated to do so. Instead, the CISG grants the seller the right to remedy the defect under Article 48(1) CISG ('may remedy'). However, the seller who wishes to make use of this right must inform the buyer of its intention and willingness to remedy the defect at its own expense within a reasonable period of time. Although this is not expressly provided for in Article 48(1) CISG, it is a duty arising from the principle of good faith enshrined in Article 7(1) CISG (MünchKommBGB/Huber, *ibid*, Art. 48 para. 8a). If the seller does not comply with this duty, he loses his right to cure under Article 48(1) CISG (MünchKommBGB/Huber, *ibid*). **45**

The Court of Appeal did not find that the [seller] had notified the [buyer] of its willingness to remedy the defects within a reasonable period of time. Rather, the [seller] merely announced in the letter of 30 January 2002 that it would first compile a plan of action for all the tools supplied with the aim of overhauling them in cooperation with the [buyer] to the mutual satisfaction of both parties. The [seller] does not identify factual submissions before the District Court and the Court of Appeal (*Tatsacheninstanzen*) that were ignored in this regard. **46**

(2) Irrespective of the fact that it has not been established that the [seller] has fulfilled its duty to notify, (further) subsequent performance would have led to unreasonable delays or unreasonable inconvenience for the [buyer] within the meaning of Article 48(1) CISG. **47**

(a) Whether the threshold of reasonableness established by Article 48(1) CISG has been exceeded can only be assessed on the basis of the circumstances of the individual case (Schlechtriem/Schwenzer/Müller-Chen, *ibid*, Art. 48 CISG para. 9) and is primarily a matter for the trial judge (*Tatrichter*). Unreasonableness does not only arise if the disadvantages associated with the repair would lead to a fundamental breach of contract under Article 25 CISG (Schlechtriem/ Schwenzer/Müller-Chen, *ibid*; Staudinger/Magnus, *ibid* Art. 48 CISG para. 14; Soergel/Lüderitz/Schüßler-Langeheine, *ibid* Art. 48 CISG para. 7). In fact, unreasonable inconvenience may lie, in particular, in the fact that the buyer is threatened by damage claims by **48**

his customers, or in the fact that the seller that has repeatedly but fruitlessly attempted to remedy the defect obviously acts in an unprofessional manner (Schlechtriem/Schwenzer/Müller-Chen, *ibid* para. 11; MünchKommHGB/Benicke, *ibid* para. 6; Honsell/Schnyder/Straub, *ibid* Art. 48 para. 25; contra Schlechtriem/U. Huber, CISG, 3rd ed., Art. 48 para. 14). The assessment of the trial judge (*Tatrichter*) can only be reviewed to a limited extent under revision law (*revisionsrechtlich*) as to whether the judge(s) misunderstood the relevant legal assessment criteria, did not give an exhaustive consideration to the facts submitted or violated laws of thought and general principles of experience.

(b) Measured against these standards, the Court of Appeal found without legal error that the (further) subsequent performance by the [seller] of the defective tools supplied under order numbers 40117, 40118 and 40174 would have been unreasonable for the [buyer]. In the context of the reasonableness of further attempts to remedy the non-conformities–as discussed in connection with the question of avoidance of the contract–it was appropriate for the Court of Appeal to focus on the repeated unsuccessful attempts of the [seller] to remedy the defects, the time pressure known to the [seller] to which the [buyer] was exposed vis-à-vis its customers, and (with regard to order numbers 40117 and 40118) the announcement of the [seller] in the letter of 30 January 2002, which did not take sufficient account of this time pressure. According to this announcement, the [seller] first wanted to draw up a plan of action for all delivered tools with the aim of overhauling them in cooperation with the [buyer] to the mutual satisfaction of both parties, instead of proceeding directly to remedying the defects. Insofar as the [seller] assesses these circumstances differently from the Court of Appeal on the basis of the assessment of the District Court (*Landgericht*), it inadmissibly substitutes its own assessment for that of the Court of Appeal. **49**

(c) With regard to the deliveries made under order numbers 40686 and 40086/40087, the Court of Appeal did not deal with the question of the reasonableness of further repairs because it denied the [buyer]'s damage claims due to a lack of evidence regarding recoverable damage. However, in contrast to what the [seller] argues, this does not lead to the conclusion that the damages claim of the [buyer] is unsuccessful for this reason alone. Since the Court of Appeal has made no findings in either direction in this respect, it must be assumed in the appeal proceedings (*Revisionsverfahren*), in favour of the [buyer], that such a measure was unreasonable for the [buyer]. **50**

[Set-off under the CISG:]

b) In the case at hand, the CISG applies to the set-off. While the CISG does not address set-off as such, it contains certain general principles on the offsetting of mutual claims that are both subject to the Convention (Article 7(2) CISG). To the extent that claims arising from the same contract can be offset against each other, these principles shall apply directly in accordance with Article 4 sentence 1 CISG. Insofar as the counterclaims, with which set-off is sought against the respective purchase price claims, are based on one of the other four delivery relationships (staggered set-off), these principles shall apply here pursuant to Article 32(1) No. 4, **51**

Article 27(1) Introductory Act to the German Civil Code old version (cf. Article 1 No. 4 of the Act on the Adaptation of the Provisions of Private International Law to Regulation [EC] No. 593/2008 of 25 June 2009 [*German Federal Law Gazette I*, p. 1574]). This is because the parties have impliedly agreed on their applicability in this respect.

aa) According to the provision of Article 32(1) No. 4 Introductory Act to the German Civil Code old version, which is still applicable in the case at hand, the set-off would, in principle, be subject to the legal system applicable to the principal claim (*Hauptforderung*), i.e. in this case to non-harmonised Hungarian law (Article 28(1) sentence 1, (2) Introductory Act to the German Civil Code old version). This *lex contractus* of the principal claim, therefore, also determines the prerequisites, the occurrence and the effects of the set-off (see judgment of the German Supreme Court of 23 June 2010 - VIII ZR 135/08, WM 2010, 1712 para. 24 with further references). This is not true, however, insofar as–as in this case–the CISG provides for autonomous and, thus, overriding rules on set off (Article 3(2) Introductory Act to the German Civil Code old version), or insofar as the parties have effectively agreed on a deviating law applicable to the set-off (Article 27(1) Introductory Act to the German Civil Code). **52**

With regard to the relationship between uniform law and non-harmonised law, [this] Panel [of the Supreme Court] has so far merely stated that the CISG does not govern the set-off of claims that do not arise exclusively from the same contractual relationship (judgment of the German Supreme Court of 23 June 2010 - VIII ZR 135/08, *ibid*; of 14 May 2014 - VIII ZR 266/13, WM 2014, 1509 para. 18; Austrian Supreme Court, IHR 2002, 24, 27; Swiss Federal Supreme Court, IHR 2004, 252, 253; so-called set-off against Convention-external claims). But the question that arises here, as to whether set-off is governed by the CISG if it concerns only claims arising from contractual relationships that are subject to the CISG (set-off against Convention-internal claims), has not yet been clarified by the [Supreme Court]. Opinions are divided in the case law of the lower courts and in the literature. **53**

(1) The prevailing opinion in that case also applies the non-unified (national) law applicable under the international private law of the forum state to the set-off due to the lack of an explicit provision in the CISG (Court of Appeal Koblenz, RIW 1993, 934, 937; Court of Appeal Düsseldorf, NJW-RR 1997, 822, 823; District Court Mönchengladbach, IHR 2003, 229 230; Schlechtriem/Schwenzer/Ferrari, *ibid* Art. 4 para. 39; Ferrari/Kieninger/ Mankowski/Saenger, *ibid*, Art. 4 para. 20; Soergel/Lüderitz/Fenge, *ibid*, Art. 4 para. 10; Saenger/Sauthoff, IHR 2005, 189, 191; Piltz, NJW 2000, 553, 556; similar to MünchKommHGB/Benicke, *ibid*, Art. 4 CISG para. 15). According to a different view, set-off should always be assessed according to the standards laid down in the Convention itself, where (monetary) claims are governed exclusively by the CISG, irrespective of whether they originate from the same or different contractual relationships (Staudinger/Magnus, *ibid*, Art. 4 CISG para. 47; MünchKommBGB/Westermann, *ibid* Art. 4 CISG para. 12). Other courts and scholars apply the CISG only for the set-off of (monetary) claims arising from the same contractual relationship, while the set-off is otherwise to be assessed under the applicable non-uniform (national) law (Court of Appeal Hamburg, IHR 2001, 19, 22; District Court (*Amtsgericht*) Duisburg-Hamborn, IHR 2001, 114, 115; Schlechtriem/Schwenzer/ Fountoulakis, *ibid* Art. 81 paras. 21 et seq. with further references; **54**

Kröll/Mistelis/Viscasillas/Djordjevic, *UN Convention on the International Sales of Goods*, 2011, Art. 4 paras. 40 et seq. with further references; Honsell/Siehr, *ibid*, Art. 4 paras. 24 et seq.; similar Court of Appeal Karlsruhe, IHR 2004, 246, 251; Swiss Federal Supreme Court, CISG-online 1426).

(2) [This] Panel [of the Supreme Court] agrees with the latter view. The CISG does not expressly govern offsetting and is also limited in its scope of application. It exclusively governs the formation of the sales contract and the rights and obligations of the seller and the buyer arising from it (Article 4 sentence 1 CISG). However, Article 7(2) CISG stipulates that questions that concern matters governed by the CISG which are not expressly settled in the Convention shall be judged primarily according to the general principles underlying the Convention and only secondarily according to the law which is to be applied according to the rules of international law [the Court probably meant to refer to 'rules of private international law']. **55**

(a) Such a general principle inherent in the CISG can be derived from a synopsis of the legal concept underlying the provisions in Article 88(3), Article 84(2) CISG and the principle of concurrent performance (*Zug-um-Zug-Grundsatz*), which is–inter alia–enshrined in Article 58(1) sentence 2 and Article 81(2) CISG (Schlechtriem/Schwenzer/Fountoulakis, *ibid*; MünchKommBGB/Westermann, *ibid*; Staudinger/Magnus, *ibid*, Art. 4 para. 47; Art. 81 para. 15). This legal concept reveals that the CISG closely links the fate of mutual claims arising from the same contractual relationship (Article 4 sentence 1 CISG) and consequently allows such claims to be offset if they are governed exclusively by the CISG and are directed towards payment in money (Schlechtriem/Schwenzer/Fountoulakis, *ibid*; MünchKommBGB/Wester-mann, *ibid*; see also–albeit with more far-reaching conclusions–Staudinger/ Magnus, *ibid*, Art. 4 CISG para. 47). **56**

(aa) The discharge of mutual monetary claims from a single, uniform sales contract as a result of offsetting is expressly provided for in Article 88(3) CISG, for example. Also, in the case of Article 84(2) CISG, offsetting the purchase price to be repaid against the benefits of use to be paid is permitted without further requirements (Schlechtriem/Schwenzer/Fountoulakis, *ibid*, Art. 84 para. 9 with further references; Schlechtriem/Schwenzer/Ferrari, *ibid*, Art. 4 para. 39; Staudinger/Magnus, *ibid*; MünchKommHGB/Benicke, *ibid*). These provisions reveal–albeit tailored to certain groups of cases–that under the CISG, a set-off concerning mutual pecuniary claims arising from the same contract (Article 4 sentence 1 CISG) is possible instead of the performance by both sides. **57**

(bb) A set-off against Convention-internal claims in the above-mentioned cases cannot be denied by the argument that the requirements for such a set-off could not be sufficiently determined (contra Schlechtriem/Schwenzer/Ferrari, *ibid*). In particular, it cannot be doubted that the offsetting has to be declared, expressly or impliedly (Staudinger/Magnus, *ibid*; Schlechtriem/Schwenzer/Fountoulakis, *ibid*). This can be derived from several passages of the CISG, which express in a generalisable way that the party opposing a claim invokes his counterclaim (cf. Article 81(2), Article 84(2) CISG; see also Article 88(3) CISG; on the broader topic Staudinger/Magnus, *ibid*; Schlechtriem/Schwenzer/Fountoulakis, *ibid*). Furthermore, it can be inferred from the provisions that shape the principles of the CISG that a set-off can only be deemed possible in the case of mutual monetary claims (cf. Art. 4(1) [sic] CISG); in the case of **58**

non-congeneric claims, the CISG only provides for a right of retention (cf. Article 58(2), (3), Article 71 CISG).

The consequence of set-off according to autonomous principles of the Convention is that the opposing, mutual monetary claims are discharged by set-off, insofar as no prohibition of set-off has been agreed upon, the claims correspond in amount, and the set-off has been declared (Staudinger/Magnus, *ibid*; Schlechtriem/Schwenzer/Fountoulakis, *ibid*). 59

(b) However, the principles outlined only apply to a set-off of claims arising from a single contractual relationship. A set-off of claims from different contracts, which are all subject to the CISG, on the other hand, is not covered by the CISG. The subject matter of the CISG is the respective, individual sales contract (Article 4 sentence 1 CISG); pursuant to Article 7(2) CISG, general principles of the Convention can only be resorted to as far as the scope of application of the Convention extends. The scope of the Convention is exceeded if the counterclaim, with which set-off is sought, results from other CISG-contracts than the asserted principal claim (*Hauptforderung*). Nevertheless, the parties in such a case can agree to subject offsetting to the principles of the CISG in line with Article 27 Introductory Act to the German Civil Code old version (Schlechtriem/Schwenzer/Fountoulakis, *ibid* para. 22). 60

bb) Measured against these principles, the set-off declared by the [buyer] is to be assessed according to the internal standards of the CISG and not according to the non-uniform (national) law applicable under private international law. The [seller] asserts a claim (Article 53 CISG) which consists of purchase price claims from five different delivery relationships. Against this, the [buyer] offsets with claims for damages (Article 45(1)(b), (2), Article 74 CISG)–also arising from these individual delivery relationships. The respective purchase price claim and the respective (primary) counterclaim asserted against it, thus, result from the same contractual relationship. 61

However, this is (no longer) the case insofar as the counterclaims of the [buyer] based on the individual delivery relationships exceed the respective purchase price and the [buyer]–in accordance with the order in which it sets off–sets off the excess part of the respective counterclaim against purchase price from the other delivery relationships (staggered set-off (*gestaffelte Aufrechnung*)). Nevertheless, in the case at hand, the set-off is to be assessed uniformly in accordance with the set-off standards of the Convention, and is not subject in part to the non-uniform Hungarian law with regard to the exceeding residual monetary claims from different contractual relationships. By their conduct during the proceedings, the parties have (impliedly; cf. Article 11(1), (2) Introductory Act to the German Civil Code old version) signalled that they want the individual delivery contracts to be assessed as a uniform (overall) legal relationship, which shall be subject to the CISG. The [seller] has combined all purchase price claims from the individual deliveries into one claim in the present lawsuit, and the [buyer] has declared set-off against this claim with all claims for damages asserted under the supply contracts (as well as with regard to the contract with order number 40686 with a claim based on an allegedly agreed purchase price reduction). As a result of this subsequent (implied) agreement, the factual and legal situation is ultimately no different than if the parties had concluded a uniform contract for all deliveries from the outset. 62

[Misjudgement of evidence:]

c) However, the Court of Appeal erred in law by holding that the counterclaims, with which set-off is sought, were not proven (in terms of amount). The [buyer] rightly asserts that the Court of Appeal had ignored the facts submitted in this case and insufficiently assessed the evidence gathered by the District Court (*Landgericht*) (§ 286(1) German Code of Civil Procedure). The assessment of the evidence gathered is, in principle, reserved to the trial judge (*Tatrichter*), to whose findings the Supreme Court (*Revisionsgericht*) is bound pursuant to § 559(2) German Code of Civil Procedure. The Supreme Court (*Revisionsgericht*) can only review whether the trial judge (*Tatrichter*) has dealt with the trial material comprehensively and without contradiction, the outcome of the taking of evidence in accordance with the requirement of § 286 German Code of Civil Procedure, i.e. whether the assessment of evidence is complete and legally possible and does not violate the laws of thought and the principles of experience (constant jurisprudence; most recently for example German Supreme Court, judgments of 16 April 2013 - VI ZR 44/12, VersR 2013, 1045 para. 13; and of 20 May 2014 - VI ZR 187/13, juris para. 28; in each case with further references). The judgment of the Court of Appeal fails to withstand legal scrutiny against this standard. **63**

aa) In addition to the witnesses Sp., S., G., B. and P. heard, the [buyer] has already before the District Court (*Landgericht*) named numerous other witnesses on the scope of the work he has carried out to remedy the defects in the respective tools. In its appeal to the Court of Appeal, the [buyer] referred to his submission before the District Court on the expenditure relating to remedying defects and even expressly repeated the submission of evidence (*Beweisantritt*) with regard to witness W. This witness was named in many of the lists submitted as an employee involved in the repairs. The Court of Appeal erred by not pursuing the [buyer]'s offers to provide evidence (*Beweisangebote*). The blanket reference to assertions and submissions of evidence before the [District Court] is generally not sufficient for a duly substantiated appeal (German Supreme Court, judgment of 24 February 1994 - VII ZR 127/93, NJW 1994, 1481 under II; Musielak/Ball, *ZPO*, 11th ed., § 520 para. 29). It is another matter, however, if the [District Court] did not consider the submission to be in need of proof; in this respect, the submissions before the lower courts continue to have effect even without express reference (German Supreme Court, judgment of 11 October 1996 - V ZR 159/95, juris para. 9; Musielak/Ball, *ibid*). This applies to the case at hand. The District Court (*Landgericht*) did indeed collect some evidence, but then, for legal reasons, did not consider the [buyer]'s submission on the scope of the work carried out to remedy the defects to be in need of evidence and refrained from collecting further evidence. **64**

bb) Furthermore, the [buyer] rightly asserts that the Court of Appeal did not consider the testimony of witness G. in its assessment of whether the witness statements heard by the District Court (*Landgericht*), regarding the extent of the costs of remedying the defects for the individual tools, were convincing. This witness, however, confirmed that she had prepared the tables submitted by the [buyer] in the proceedings to substantiate the costs and time required for the individual tools on the basis of handwritten records–specifically relating to certain tools–of the employees assigned to remedy the defects. The Court of Appeal did not consider **65**

this statement and, therefore, incompletely assessed the evidence gathered. At its reassessment, the Court of Appeal will also have to examine whether–as the [seller] asserts in the appeal proceedings (*Revisionsverfahren*)–witness G. was only heard on the deliveries with order numbers 40118 and 40174 and, if necessary, whether a more comprehensive hearing of this witness (§ 398 German Code of Civil Procedure) and also of the other witnesses heard by the District Court (*Landgericht*) is required.

The judgment of the Court of Appeal is also based on the errors in law identified (§ 545(1) German Code of Civil Procedure). In the case of a violation of procedural provisions, the possibility suffices that the Court of Appeal may have reached a different result without the procedural defect (judgment of the German Supreme Court of 17 February 2010 - VIII ZR 70/07, NJW-RR 2010, 1289 paras. 30 et seq. with further references). In the case at hand, it cannot be ruled out that the Court of Appeal would have come to a different conclusion had it heard the other witnesses named by the [buyer] on the scope of work done to remedy the deficiencies, in particular witness W., as well as the testimony of witness G.. Insofar as the [seller] begs to differ with this assessment, it disregards the prohibition of anticipated assessment of evidence (*Verbot vorweggenommener Beweiswürdigung*). 66

B. On the cross-appeal (*Anschlussrevision*) of the [buyer] 67

1. The cross-appeal (*Anschlussrevision*) of the [buyer] is admissible. With it, the buyer challenges the order to pay the purchase price claims arising from the contracts with numbers 40686 and 40086/40087 and also asserts that the Court of Appeal erred in finding that the set-off with counterclaims was unjustified. 68

Under § 554(2) sentence 1 German Code of Civil Procedure, the admissibility of the cross-appeal (*Anschließung*) does not require that the appeal (*Revision*) has also been allowed for the party lodging the cross-appeal (*Anschlussrevisionskläger*). Therefore, a cross-appeal may also be lodged if it does not concern the subject matter of the dispute to which the admission of the appeal (*Revision*) relates (German Supreme Court, judgments of 24 June 2003 - KZR 32/02, NJW 2003, 2525 sub I; of 26 July 2004 - VIII ZR 281/03, NJW 2004, 3174 sub II B 1; of 22 November 2007 - I ZR 74/05, BGHZ 174, 244 para. 39; of 11 February 2009 - VIII ZR 328/07, juris para. 31). However, the revised version of the cross-appeal (*Anschlussrevision*) in § 554 German Code of Civil Procedure does not change the fact that, as a non-independent legal remedy, it is of an accessory nature (*akzessorischer Natur*) (German Supreme Court, judgment of 22 November 2007 - I ZR 74/05, *ibid* para. 40). It would be inconsistent with this dependency of the cross-appeal (*Anschlussrevision*) if it were possible to introduce with it a matter of dispute that has neither a legal nor an economic connection with the subject matter of the main appeal (*Hauptrevision*) (German Supreme Court, Judgments of 22 November 2007 - I ZR 74/05, *ibid* paras. 40–41, 38 with further references; of 11 February 2009 - VIII ZR 328/07, *ibid*; of 18 September 2009 - V ZR 75/08, NJW 2009, 3787 para. 27). 69

Such a connection exists in the present case as a result of the set-off declared by the [buyer]. Indeed, the [seller] opposes the denial of its remuneration claims from the contracts with order numbers 40117, 40118 and 40174 with its appeal (*Revision*), while the [buyer] challenges the ruling in respect of its partial liability under the contracts with order numbers 40686 and 40086/40087 with its cross-appeal (*Anschlussrevision*). However, the [buyer] has set off counterclaims relating to its own expenses for the repair of defects in all tools supplied against all the purchase price claims pursued by the [seller]. As explained above under II A 2 and with regard to the [seller]'s purchase price claims that form the subject matter of the appeal (*Gegenstand der Revision*), the Court of Appeal will, therefore, also have to decide (for the first time) on the claims made by the [buyer] for set-off. The necessary legal or economic connection between appeal (*Revision*) and cross-appeal (*Anschlussrevision*), thus, exists. **70**

2. The cross-appeal is well founded. This is because the [buyer] is in principle entitled–as explained above under II A 2–to claims for damages due to necessary and appropriate costs of remedying defects pursuant to Article 45(1)(b), (2), Article 74 CISG for the tools delivered under order numbers 40117, 40118, 40174, 40686 and 40086/40087, with which he has also declared set-off against the purchase price claims from the contracts with order numbers 40686 and 40086/40087. In this respect, the [buyer] also rightly criticises that the Court of Appeal erred in procedural law (§ 286(1) German Code of Civil Procedure) by having not fully pursued the [buyer]'s submissions of evidence concerning the scope of remedying the defect and by having failed to give sufficient consideration to the testimony of the witnesses heard by the District Court (*Landgericht*). In order to avoid repetitions, reference is made to the explanations under II A 2 c above, which apply here accordingly. **71**

III. ***[Remanding the case to the Court of Appeal:]***

In the light of the foregoing, the judgment under appeal fails to withstand legal scrutiny; it must be set aside in its entirety with regard to the claim of the [seller] (§ 562(1) German Code of Civil Procedure). The legal dispute cannot be decided [by the Supreme Court], yet, because further findings must be made with regard to the [counter-]claims brought forward for set-off, in particular with regard to the amount, necessity and appropriateness of the costs of remedying the non-conformities. The case is, therefore, to be remanded to the Court of Appeal for a new hearing and decision to the extent of the setting aside (§ 563(1) sentence 1 German Code of Civil Procedure). **72**

For the further proceedings, [this] Panel [of the Supreme Court] points out that–as the [buyer] rightly asserts–contrary to the opinion of the Court of Appeal, a discretionary estimate of the costs of remedying defects pursuant to § 287(1) German Code of Civil Procedure is not excluded from the outset. The reason for liability and the occurrence of damages have been **73**

established and the [buyer]'s liability[3] for the expenses can be affirmed. It is only necessary to determine the exact amount of the recoverable damage. In such a case, the granting of a damages claim may not generally be denied with the reasoning that its amount cannot be determined with certainty, in particular because there are no sufficient indications for an estimate of the total damage pursuant to § 287 German Code of Civil Procedure (constant jurisprudence; see for example judgments of the German Supreme Court of 5 July 1967 - VIII ZR 64/65, juris para. 14; of 12 January 2000 - VIII ZR 19/99, NJW 2000, 1413 under III; in each case with further references). Rather, in these cases it must be ascertained to what extent the facts submitted to the court provide a sufficient basis for the estimation of at least a minimum amount of damages which occurred in any case (see only German Supreme Court, judgments of 12 January 2000 - VIII ZR 19/99, *ibid*; of 6 June 1989 - VI ZR 66/88, NJW 1989, 2539 under II 1; in each case with further references). With regard to § 287 German Code of Civil Procedure, the party invoking the provision cannot be required to substantiate the facts giving rise to the claim in the same way as with regard to other factual questions (judgment of the German Supreme Court of 12 January 2000 - VIII ZR 19/99, *ibid* with further references). An estimation pursuant to § 287 German Code of Civil Procedure may, therefore, only be denied if no useful indications at all, even for a minimum estimate, are presented to the court (see German Supreme Court, judgments of 6 June 1989 - VI ZR 66/88, *ibid*; of 12 January 2000 - VIII ZR 19/99, *ibid* with further references; of 29 May 2013 - VIII ZR 174/12, NJW 2013, 2584 para. 20 with further references).

Indications for an estimate can in any case be found in the spreadsheet submitted by the [buyer] and its further description of the expenses incurred when remedying the defect. If necessary, an expert opinion can be obtained to this end (§ 287(1) sentence 2 German Code of Civil Procedure). At the present stage of the proceedings, [this] Panel [of the Supreme Court] is unable to undertake the missing estimate because the Court of Appeal has not yet exhausted and has insufficiently assessed the trial material. In addition, as a task assigned to the trial judge (*Tatrichter*), it can only be performed by the Supreme Court (*Revisionsgericht*) if conclusive findings have been made by the trial judge (*Tatrichter*) regarding the basis of the estimates (for the standard of review, see judgment of the German Supreme Court of 19 April 2005 - VI ZR 175/04, NJW-RR 2005, 897 sub II 2 a). **74**

Dr Milger Dr Hessel Dr Fetzer

Dr Bünger Kosziol

[3] [In the translator's view this should rather read '[seller]'s liability' and might be a misspelling by the Supreme Court.]