

## Case Details

### Case Details

National ID	VIII ZR 265/03
Mitgliedstaat	Deutschland
Common Name	link
Decision type	Sonstiges
Decision date	17/03/2004
Gericht	BGH
Betreff	
Kläger	
Beklagter	
Schlagworte	

### Directive Articles

Distance Selling Directive, [Article 6, 1.](#)

### Headnote

Widerrufsfristbeginn bei Kauf auf Probe

1. Bei einem Kauf auf Probe gem. § 454 BGB ist die Billigung des Vertrags als der nach § 355 Abs. 1 S. 1 BGB maßgebliche Zeitpunkt anzusehen, von dem an die Widerrufsfrist für die auf den Abschluss des Verbrauchervertrags gerichtete Willenserklärung des Käufers zu laufen beginnt.

### Facts

The respondent placed a telephone order on 29.10.2002 with the claimant, who carries on an art mail order business, in which a sale on approval was agreed. The good was dispatched on 5.11.2002. In an attached letter, the principle conditions of the sale on approval were stated first. In a further section of the letter was printed: "I m p o r t a n t: notification of withdrawal rights: you may cancel the contract of sale on approval within two weeks without giving reasons, otherwise the sale on approval becomes binding. The time limit for withdrawal begins upon receipt of the pictures via delivery to you. A timely dispatch of withdrawal to firm E... (claimant) is sufficient for the time limit. If you cancel the contract, you are obliged to return the received pictures at my expense and risk. It is sufficient for the exercise of withdrawal if you return the pictures within two weeks to the addressee of the declaration of withdrawal. The two-week limit begins with the receipt of the pictures by delivery to yourself. It is sufficient to comply with the time limit if they are dispatched within this time ..." On 20.11.2002 the respondent returned the goods to the claimant by post. The claimant sues for payment of the sale price against delivery of the graphics portfolio. The AG (Amtsgericht – in this sense equivalent to small claims court) allowed the claim, the LG (Landgericht – in this sense appellate court) rejected the respondent's appeal. The Revision (appeal on points of law) was successful and the claim was dismissed.

### Legal issue

### Entscheidung

The BGH (Bundesgerichtshof – Federal Supreme Court) initially stated that a sale upon approval was validly concluded upon expiry of the time limit for accepting the sale. In contrast to the view of the court below, the respondent validly withdrew from the contract according to §§ 312d (1), 1st sentence BGB by returning the goods

on 20.11.2002.

The BGH argued that without doubt a distance contract within the meaning of §§ 312b (1) and (2) BGB was concluded, so that the respondent had a right of withdrawal according to §§ 312d (1), 1st sentence, 355 BGB. In respect of the beginning of the time limit for withdrawal, the BGH stated that the right of withdrawal is predominantly understood as a special form of rescission right, which through withdrawal of the consumer's declaration to conclude the contract brings about a liquidatory relationship. This also corresponds to Art. 6 Directive 97/7/EC. The right of withdrawal can therefore arise at the earliest when the contract of sale becomes valid, thereby only after expiry of the time limit for agreeing the sale on 19.11.2002. In any event, the end of the time limit for agreeing the sale is to be regarded as the beginning of the time limit for exercising the right of withdrawal, because at this point in time the contract of sale is not yet binding upon the buyer and its validity is dependent upon his agreement to the sale.

The BGH supports its argument furthermore on the different aims of the time limit for agreeing the sale in § 455 BGB on the one hand and the right of withdrawal according to § 312d BGB on the other hand. Whereas the aim of the time limit for accepting the sale in the context of sale on approval is primarily to give the customer opportunity to examine the suitability of the good, the law on distance contracts aims to protect against the specific dangers of contracts with unknown third parties. The regulatory purpose of distance contracts law as consumer protection law and the purpose of sale on approval thus stand alongside one another. If the buyer who has concluded a sale by approval enjoys both the contractual approval time limit of § 455 BGB DK an LMS – wohl 454 BGB? as well as the statutory right of withdrawal in §§ 312d, 355 BGB, then these time limits should remain available to him to their full extent.

The BGH therefore arrived at the conclusion that the time limit for withdrawal had not yet expired, as the respondent returned the graphics portfolio to the claimant by post on 20.11.2002 and thereby exercised his right of withdrawal (312d (1), 1st sentence, 355 (1), 2nd sentence BGB). As the claimant additionally failed to correctly inform the respondent about the beginning of the time limit for withdrawal, then the respondent's right of withdrawal had simply not expired according to § 355 (3), 3rd sentence BGB. In the absence of a valid contract of sale, the claim is therefore unfounded, and is accordingly to be dismissed.

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