

GERMANY

BGH “Filmscanner” judgment reviewed

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In its “Filmscanner” judgment, the Bundesgerichtshof (BGH) deals with the question whether parties to a research and development cooperation owe a warranty obligation with regard to a shortcoming in the technical concept which prevents completion of the development. Moreover, the court deals with the treatment of such a conceptual shortcoming in case of divestment of the contractual legal position to a third party, where the decisive question is whether the third party can rescind the purchase agreement due to the failure of the development project resulting from the deficiency of the technical concept.

The cooperation agreement between the two original parties provides for the development of a film scanner for digitizing 35mm-movies. A contract clause specifies that no repayment obligations should arise in the event that it transpires, during the development, that the film scanner lacks technical feasibility.

The BGH concludes that the economic risk must be borne equally by both contractual parties since they were aware that a failure of the development project could occur, even immediately prior to completion of the entire development. The components to be developed by each of the parties and their interaction should have been functional. Therefore, the BGH considers that a warranty obligation of one of the two parties for a conceptual deficiency is not given.

According to the BGH, it cannot be concluded that an agreement between the party divesting its legal position and the third party acquiring this position is based on the same risk distribution. An agreement might have been reached for a specific level of development of the technical concept, from which a warranty obligation arises for the feasibility of the development project.

However, only if the parties to the purchase agreement ascribe specific properties to the previous development work carried out by the original parties, as well as their results, which they do not actually have, can a warranty obligation of the transferor come into question. The unilateral expectation or notion of the purchaser about the level of development already achieved is insufficient; even if these are supported by information from the transferor who presents the development success as being possible.

The “Filmscanner” judgment illustrates once again to the parties to a development cooperation agreement and their successors the importance of having precise contractual agreements about development activities rendered and those still to be performed, so as not to face unexpected economic risks in the event of project failure.