



## **Reconsider your willingness to accommodate - Avoiding unclear circumstances when the statute of limitations is suspended through negotiations**

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According to § 203 BGB (German Civil Code), the limitation period is suspended if negotiations take place between the debtor and the creditor regarding the claim or the circumstances justifying the claim. At the beginning of the suspension, the statute of limitations stops running and then continues to run after the end of the suspension, i.e. it does not start anew.

The application of this provision entails considerable legal uncertainty, because in practice the case-law of the Federal Court of Justice does not provide a clear orientation as to when negotiations take place, which claims are the subject of negotiations - and thus of suspension - and when the suspension begins and ends. It is therefore advisable to establish contractual provisions between the parties that clarify or amend the statutory provision.

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In the following, the essential principles for the interpretation of § 203 BGB developed in the case law are first presented. Subsequently, practical hints on the contractual provisions are given. The subject matter is particularly important in the case of distribution and supply contracts. In these cases, contractual provisions serve the interest of the respective party to extend or shorten the running of the limitation period or to create legal certainty through provisions amending § 203 BGB. The outline of the relevant issues shall be based on the following typical case constellation:

*Buyer (B) orders goods from Seller (S) which prove to be defective. B asserts his claims for defects against S in a letter of claim. How is the run of the limitation period to be assessed if S does not reject the claim, but promises to examine the alleged defects and then reports the result of the examination to B?*

*Variant 1: What is the legal situation if the order is based on a framework agreement and further deliveries are also reported as defective?*

*Variant 2: In the course of time, B incurs further damages and wants to assert these against S. In the first place, S and B exchange views on their positions. Then S rejects the claim and further discussions about it in writing.*

*Variant 3: What is it like if the negotiations simply "fall asleep"?*

*Variant 4: Later, in variants 2 and 3, B recommences the negotiations about his claim and S accepts to conduct them. What is the effect of such developments on the running of the statute of limitations?*



## **A. Essential principles for the interpretation of § 203 BGB**

### *I. Negotiations*

The constituent element of pending negotiations within the meaning of § 203 BGB is to be interpreted broadly. The buyer only has to make it clear that he is asserting a claim and on what he wants to base it, e.g. in a letter of claim. Subsequently, any serious exchange of views on the claim or its factual basis triggers the suspension of the running of the statute of limitations, unless the seller immediately and visibly rejects it. Negotiations already float if, for example, S makes declarations which makes B think, S would be prepared to get involved in discussions about the justification of the claim or its scope. It is not necessary that the willingness to settle or to make concessions is indicated or that there is a prospect of success with regard to a solution.<sup>3</sup> It must also be taken into account that a negotiation situation covered by § 203 BGB also arises in a supply contract if S, in agreement with B, checks the existence of defects or their elimination.<sup>4</sup> The examination of the existence of a defect, discussions about the "Whether" and "How" of the removal of the defect and its actual implementation then lead to the suspension of the limitation period within the meaning of § 203 BGB. The suspension continues until S informs B of the result of the defect inspection or declares to him that the defect has been rectified or refuses to continue the rectification.<sup>5</sup>

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<sup>3</sup> BGH, judgment of 14.07.2009 – XI ZR 18/08 – quoted from juris Rz. 16.

<sup>4</sup> Cf. BGH, judgment of 26. 10. 2006 - VII ZR 194/05, NJW 2007, 587 Rz. 12.

<sup>5</sup> Cf. BGH, judgement of 30.10.2007 – X ZR 101/06, NJW 2008, 576 Rz. 21.



According to these principles, in the fact pattern described above the limitation period for the time of the examination (and, if applicable, also the elimination) of the alleged defects is suspended. Depending on their respective positions the parties should make clear what happens to the suspension thereafter.

The application of the principles described above is problematic if the seller rejects to attend a meeting proposed by the buyer but is at the same time in general prepared to hold negotiations. Are there then negotiations within the meaning of § 203 sentence 1 BGB? In this respect, it can be inferred from a decision of the Federal Court of Justice of 30 June 1998 that negotiations only end if a continuation of the negotiations is clearly and unambiguously refused.<sup>6</sup> In that case, the debtor (i.e. S in our hypothetical) had rejected a claim, but at the same time stressed his willingness to re-examine the matter if, in fact, further information was presented in a verifiable and comprehensible manner or sufficiently substantiated. The Federal Court of Justice has decided that such a letter does not constitute a rejection to conduct further negotiations.<sup>7</sup> From this it can be deduced that in the event of a corresponding reaction to a claim letter, negotiations within the meaning of § 203 BGB will be considered by the German courts to be pending.

## *II. Subject of the negotiations*

According to § 203 sentence 1 BGB, the object of the

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<sup>6</sup> BGH, judgment of 30. 6. 1998 - VI ZR 260–97, NJW 1998, 2819, 2820.

<sup>7</sup> BGH, judgment of 30. 6. 1998 - VI ZR 260–97, NJW 1998, 2819, 2820.



negotiations is the claim or the circumstances giving rise to the claim. The notion of a claim is to be understood broadly in the sense of a request for the satisfaction of an interest derived from a factual pattern.<sup>8</sup> The application of these principles causes, for example, difficulties in discussions with regard to remedial work for defects on the basis of various project agreements deriving from a framework agreement (see case variant 1). Can a uniform economic project be assumed in this respect with the consequence that the statute of limitations for all project works are being suspended? Or are the deficiency works within the framework of the respective project contracts to be considered in isolation? According to our research, there is no case law on this question. This results in a certain uncertainty in the application of § 203 BGB. In our opinion, a basic differentiation should be made between the deliveries for which the buyer demands the remedy of defects. If, for example, the buyer only asserts defect rights for ten out of 20 deliveries, the limitation period for negotiations on these deliveries only should be considered suspended.

### *III. Beginning of the suspension*

With regard to the beginning of the suspension, it must be taken into account that according to a decision of the Federal Court of Justice dated 19.12.2013, the suspension has retroactive effect to the time at which the buyer has asserted his claim against the seller, for example with a letter of claim.<sup>9</sup> This retroactive effect favors the

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<sup>8</sup> BT-Drs. 14/6040, 112.

<sup>9</sup> BGH, decision of 19.12.2013 – IX ZR 120/11 – quoted from juris Rz. 2.



buyer unreasonably and is therefore criticized in the literature.<sup>10</sup> This becomes particularly clear when a reaction of the seller takes place only after a longer period of time.<sup>11</sup> In our hypothetical, the suspension thus begins at the time of receipt of the letter of claim. From the seller's point of view, cases in which negotiations are suspended for a longer period of time and then resumed are also problematic. Should the suspension then also apply retroactively? In our opinion not.

#### *IV. End of suspension*

With regard to the end of the suspension, two constellations have to be distinguished: On the one hand the situation as in case variant 2 that further negotiations are rejected, and on the other hand the situation that negotiations, as in case variant 3, simply "fall asleep".

In case variant 2, the suspension ends at the point in time at which the continuation of further negotiations is refused.

If negotiations, as in case variant 3, are not continued, i.e. fall asleep, the question arises when the suspension ends. According to a decision of the Federal Court of Justice of 6 November 2008, it can be assumed that the negotiations will be broken off by "falling asleep" if, for example, B allows the time to elapse at which an answer to the last communication from S could have been expected from him at the latest.<sup>12</sup> The necessary consideration of the

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<sup>10</sup> Boemke/Dorr, NJOZ 2017, 1578, 1584.

<sup>11</sup> Boemke/Dorr, NJOZ 2017, 1578, 1584.

<sup>12</sup> BGH, judgment of 6. 11.2008 - IX ZR 158/07, NJW 2009, 1806 Rz. 10 f.



circumstances of the individual case<sup>13</sup> in this context entails considerable uncertainties. The judgment of the Federal Court of Justice of 15.12.2016 provides a certain orientation here: According to the judges, negotiations are concluded at the point in time at which, for example, B has set S a deadline for making a statement and S does not react to it within this deadline.<sup>14</sup> In case variant 3, S should set a time limit for B to submit its observations. If B does not make a statement within this time limit, the negotiations are terminated with the expiry of this time limit. B can also declare the negotiations to have failed at a certain point in time. It is important that the parties are aware that 'letting the negotiations go' leads to legal uncertainty. This circumstance is often not sufficiently taken into account.

Finally, the provision in § 203 sentence 2 BGB is to be considered for the purposes of when the suspension ends. According to that sentence, the limitation period ends at the earliest three months after the end of the suspension. This provision becomes significant if the limitation period remaining after the end of the negotiations is shorter than three months. If, for example, the statute of limitations normally ends on 31.12.2018 and the parties were in negotiations in the period from 8.11.2018 to 21.11.2018, the statute of limitations pursuant to §§ 203 sentence 1, 209 BGB would end upon the expiry of 14.1.2019. In accordance with § 203 sentence 2 BGB, however, the statute of limitations does not expire until three months after 21.11.2018 at the earliest, i.e. at the end of

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<sup>13</sup> Boemke/Dorr, NJOZ 2017, 1578, 1583

<sup>14</sup> BGH, judgment of 15.12.2016 – IX ZR 58/16, quoted from juris Rz. 16.



21.2.2019.<sup>15</sup>

*V. No retroactive effect of the resumption of aborted negotiations with effect as of the start of the original negotiations*

In practice, one frequently encounters the constellations described in case variant 4, in which negotiations had been initially conducted, but are later not continued for a certain period of time and then finally resumed. For such situations, the question arises as to whether the resumption of negotiations would lead to a suspension of the statute of limitations retroactively with effect as of the beginning of the original negotiations. This question was answered in the negative by the Federal Court of Justice in its judgment of 15 December 2016.<sup>16</sup> This clarifies that the resumption of negotiations leads to a renewed suspension which does not have retroactive effect as of the start of the original negotiations. As a result, the statute of limitations runs for those periods in which negotiations were not conducted, provided the suspension was not continuing because the situation was unclear as described above.

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<sup>15</sup> Cf. Boemke/Dorr, NJOZ 2017, 1578, 1585.

<sup>16</sup> BGH, judgment of 15.12.2016 – IX ZR 58/16, quoted from juris Rz. 23.





## **B. Practical aspects regarding the drafting of contracts considering Section 203 of the German Civil Code (BGB)**

The above-mentioned uncertainties in the application of § 203 BGB can be avoided by respective contractual provisions. The following recommendations give an initial orientation in this respect, but do not replace the advice of an experienced lawyer in each individual case.

### *I. Exclusion of suspension due to negotiations*

An exclusion of suspension due to negotiations should be subject to the proviso that the parties could agree in writing on the suspension of the limitation period due to ongoing negotiations. The scope of such an exclusion may vary depending on whether a suspension is to be excluded on the basis of an examination of the existence of a defect and discussions about the "Whether" and "How" of remedying the defect and its actual implementation or also on the basis of discussions about possible consequential warranty claims. There are various possible combinations in this respect. It is important to make clear to what situations the exclusion should apply to.

### *II. Object of the suspension*

As regards the determination of the subject-matter of the suspension, it should be made clear in the case of project contracts carried out in the execution of a framework contract that work to remedy defects under individual supply contracts shall only suspend



the limitation period in respect of those supply contracts in respect of which the buyer complains about a defect.

### *III. Beginning of suspension*

In this respect, the requirements (written form, addressee, certainty) for the declaration triggering the start of the suspension should be clarified. As regards the level of detail of such a declaration, it should be provided that an express request for negotiation is necessary to trigger suspension. In addition, provisions should be made that the claims which shall be the object of the suspension are described in sufficient detail.

### *IV. End of suspension*

There is thus a need to shape the situation with regard to the case described in variant 2, in which the debtor (S) clearly rejects both the claim and further talks about it. In addition, the parties should also include in their considerations the case constellation in variant 3, namely that the negotiations are simply not continued ('fall asleep'). With regard to variant 2, it should be regulated which requirements must be met by the creditor (B) when refusing further negotiations (written form, addressee). Often the communication between the parties is not so clear, because aspects of diplomatic conduct are included in the correspondence. With regard to variant 3, it is advisable to provide for an automatic termination of



negotiations if, for example, B does not reply to a letter from the S within a certain period of time. If there is no reply, the negotiations are over. A later resumption of the talks may not then lead to a retroactive effect of the suspension to the point in time of receipt of the letter of claim from B addressed to S.

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