CISG-online 5488	
Jurisdiction	Germany
Tribunal	Bundesgerichtshof (German Supreme Court)
Date of the decision	26 November 2020
Case no./docket no.	I ZR 245/19
Case name	*Ground mace case*

Abstract

by Ulrich G. Schroeter[*]

In 2012, the German buyer purchased 1,500 kilograms of ground mace (a spice) from the Dutch seller by way of three separate contracts. Each contract was concluded by the buyer ordering the goods and the seller confirming each order through a written letter of confirmation. The letters of confirmation all referred to both the contract conditions of the «Nederlandse Vereniging voor de Specerijhandel (N.V.S.)» (the Netherlands Spice Trade Association) and to the seller's «general conditions of sale and delivery». While the N.V.S. Conditions contained an arbitration clause, the seller's general conditions contained a forum selection clause in favour of the district court at the seller's registered office. The buyer did not respond to any of the letters of confirmation concerned. Neither the text of the N.V.S. Conditions nor the text of the seller's general conditions were ever transmitted to the buyer.

After the mace had been delivered to the buyer and had been sold on to his customers, (alleged) contaminations of the mace were discovered, leading to the buyer paying compensation to his customers. These payments were reimbursed by the buyer's insurance, who in turn brought a lawsuit against the seller and the producer of the mace (a company based in Belgium) in the District Court Bremen (Germany). The District Court dismissed the suit for lack of jurisdiction, after the seller had raised the existence of the arbitration clause in the N.V.S. Conditions. The Court of Appeal reversed and remanded, holding that the N.V.S. Conditions had not been agreed upon by the parties. The seller brought the present appeal on points of law to the German Supreme Court (at this stage, the Belgian mace producer was no longer a party to the proceedings).

The German Supreme Court affirms the Court of Appeal's decision and holds that no valid arbitration agreement had been concluded between the parties. It first points out that no arbitration agreement «in writing» in the sense of Art. II(2) of the 1958 New York Convention existed, because the buyer had never reacted in writing to the seller's letters that referred to the N.V.S. Conditions.

The Supreme Court then turns to the «more favourable law» clause in Art. VII(1) of the 1958 New York Convention and investigates whether an arbitration agreement had been concluded in conformity with § 1031(3) of the German Code of Civil Procedure (= Art. 7(2) sentence 3 of

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the 1985 UNCITRAL Model Law on Arbitration), because the reference in the seller's letters of confirmation to the N.V.S. Conditions had been «such as to make [the arbitration clause in the N.V.S. Conditions] part of the contract[s]». Interpreting § 1031(3) of the German Code of Civil Procedure, the Supreme Court first holds that the requirements for making an arbitration clause part of a contract by reference do not follow from § 1031(3) of the German Code of Civil Procedure itself, but from the applicable substantive law. Where the incorporation of an arbitration clause into a CISG contract by reference to standard terms is concerned, such requirements therefore those of the CISG.

The Supreme Court then outlines that there are currently two different schools of thought regarding the question whether the CISG can be applied to arbitration agreements: While the prevailing view among both international courts and commentators believes that Art. 14–24 CISG can apply in this regard, the opposing view rejects the CISG's application, pointing to the wording of Art. 4 sentence 1 CISG and to the doctrine of severability. The Supreme Court holds that at least in cases in which recourse is had to domestic law via the more favourable law clause in Art. VII(1) of the 1958 New York Convention, Art. 14–24 CISG can apply to the formation of arbitration agreements. Both Art. 19(3) and Art. 81(1) sentence 2 CISG speak for this approach. The doctrine of severability provides no argument to the contrary, because this doctrine merely says that the main contract and the arbitration agreement may be governed by different laws, without meaning that they can never be governed by the same law.

However, the Supreme Court clarifies that the freedom of form principle in Art. 11 CISG does not apply to arbitration agreements in CISG contracts, so that the writing requirement of Art. II(2) New York Convention (or domestic arbitration laws) remains unaffected.

Turning to the application of Art. 14–24 CISG to the arbitration agreement of the present case, the Supreme Court concludes that no agreement about the arbitration clause in the N.V.S. Conditions had been reached between the seller and the buyer. As a reason, the Court refers to the prevailing interpretation of Art. 8(2) CISG (as notably established by the German Supreme Court's own decision of 31 October 2001 in the «Machinery case», CISG-online 617), according to which an offer referring to standard terms can only be interpreted from the viewpoint of a «reasonable person of the same kind as the other party» (Art. 8(2) CISG) as incorporating standard terms into the offer if the standard terms' text had been sent or otherwise made available to the other party. As the N.V.S. Conditions' text had never been made available to the German buyer in any way, the arbitration clause therein had therefore not been agreed upon between the parties under the CISG.

Finally, the Supreme Court addresses the seller's argument that the CISG cannot be applied to the arbitration agreement in the present case because the N.V.S. Conditions contain a choice-of-law clause in favour of Dutch law, expressly excluding the CISG. The Court leaves open whether such a choice of law for the main (sales) contract would be interpreted as also extending to the arbitration agreement, because the formation of a party agreement that seeks to exclude the CISG's application (Art. 6 CISG) is in any case governed by the provisions of the CISG itself, i.e. Art. 14–24 and Art. 8 CISG. Referring to its earlier conclusion that the N.V.S. Conditions had not been agreed upon in the present case, the Supreme Court therefore rules that the CISG's application had not been excluded according to Art. 6 CISG.