CISG-online 594	
Jurisdiction	Germany
Tribunal	Oberlandesgericht Frankfurt am Main (Court of Appeal Frankfurt am Main)
Date of the decision	30 August 2000
Case no./docket no.	9 U 13/00
Case name	*Twisted yarn case*

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Facts of the Case:

The [Claimant] is bringing an action against the buyer for payment of the purchase price for 330 boxes of textile yarn in the amount of US$ 79,036.-. 1

The [Claimant], a Swiss company, is the legally independent subsidiary of the [Claimant's parent company]. The [buyer] is a German textile trader. 2

The parties agree that in November of 1997 the [buyer] arranged for the sale of five containers of twined yarn to its customer from [Claimant's parent company]. Because the [Claimant's parent company] was experiencing delivery problems, it was agreed that the [buyer] would acquire a certain quantity of the yarn intended for its customer, have it twined by a different yarn twining firm and then deliver it to its customer. 3

By fax of 2 March 1998 the [Claimant] wrote the [buyer] the following in English: 4

> «... On 27 February 1998 we received a fax by [Claimant's parent company] with the request to send you an invoice concerning a container which is to be sold to you. Could you please provide us with the delivery address? ... »

The [buyer] answered by fax of 5 March 1998, also in English, naming its yarn twining firm's place of business as the delivery address. By fax of 10 March 1998, the [Claimant]'s managing agent sent the [buyer] the invoice, no. 1758/208, dated 11 March 1998. 5

On 11 March 1998 the [Claimant] informed the [buyer] that the goods had to undergo customs clearance in Italy. The goods were subsequently sent to the address indicated by the [buyer]. 6

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VAT [Value Added Tax] still had to be added to the amount stated in the invoice already sent to the [buyer]. The [buyer] would therefore receive a new invoice, once it had informed the [Claimant] of its VAT-number. The [buyer] responded by fax on the same day, giving its VAT-number. The [Claimant] then sent the [buyer] an invoice dated 11 March 1998, which included VAT and was in the overall amount of US$ 79,036.-. Both invoices issued by the [Claimant] contained the remark:

> «all transactions & sales are subject to Swiss law.»

Either on 16 or on 18 August 1998 the [Claimant] asked the [buyer] to provide it with an adequate assurance of payment in the form of a promissory note in advance of the shipment of the goods.

By fax sent on the same day the [buyer] sent the [Claimant] the desired promissory note in English. The address read: 7

> «[Claimant's parent company], [place of business of this company], [followed by the name of the [Claimant]'s employee and its fax number.]»

Following this, the [Claimant] asked the [buyer], by fax dated 18 March 1998, to provide it with an extended promissory note. The [buyer] replied by fax, also on that same date, promising to send the desired declaration. Even though the [buyer] did not follow suit, the [Claimant] still delivered the goods on 22 March 1998 to the delivery address provided by the [buyer]. 8

By fax of 17 February 2000, the [Claimant's parent company] confirmed to the [Claimant] that the [parent company] had sold the yarn to the [Claimant] and that the [parent company] did not have a contract of sale with the [buyer]. 9

The issue of the claim is the purchase price, which the [buyer] failed to pay, despite a request for payment sent to it by [Claimant]'s attorney. 10

[Parties' position in the Court of First Instance:]

The [Claimant] submitted that a contract of sale was formed between it and the buyer through the exchange of faxes on 2 March and 5 March 1998. 11

The [Claimant] requested the Court to order the [buyer] to pay it US$ 79,036.- with interest of 5% from 12 April 1998. 12

The [buyer] requested the Court to dismiss the claim. 13

The [buyer] submitted that it did not conclude a contract for the sale of the yarn with the [Claimant]. Instead, the [Claimant] had merely acted as an agent for its parent company. The 330 boxes of yarn had been part of the agreement between the [buyer] and [Claimant's parent company], as recorded in [buyer]'s letter to the latter on 26 February 1998. 14

[Decision by the Court of First Instance:]

The Court of First Instance dismissed the [Claimant]'s claim in its decision of 7 January 2000. The Court held that the [Claimant] did not give conclusive arguments for the existence of a contract between itself and the [buyer]. For the detailed reasoning, please refer to the judgment itself [Landgericht Frankfurt (2-21 O 273/99) 7 January 2000]. 15

[Parties' position in the Court of Appeal:]

The [Claimant] is appealing this decision. 16

The [Claimant] submits that the fax of 2 March 1998 was an offer for the formation of a sales contract. The wording showed that the [Claimant] intended to sell the container to the [buyer]. The [Claimant]'s intention to be bound was also evident from the letter. It was moreover not necessary to define the goods, price and quantity in detail, because the [buyer] had already reached an agreement with [Claimant's parent company] with respect to the details of the sales contract that was to be concluded. During the preliminary negotiations between the [Claimant's parent company] and the [buyer] the parties had agreed that – due to the delivery difficulties of the [parent company] – the [buyer] would acquire the raw material through the [Claimant]. The [Claimant] indicated in its fax of 2 March 1998 that the agreement between its parent company and the [buyer] was to form the basis of the sales contract to be concluded with the [Claimant]. The [Claimant] had previously bought the yarn from [its parent company]. [Plaintiff] further submits that the [buyer] accepted its offer by fax of 5 March 1998. At any rate, the promissory note given on 16 March 1998 had to be considered as an acceptance of the offer. The Court of First Instance had underestimated the commercial comprehension of the [buyer] when it held that it had sent the promissory note to the [Claimant], but intended it for [Claimant's parent company]. According to the understanding of a reasonable person, the [Claimant] had to be allowed to interpret the letter in the way that the [buyer] had intended to carry out the contract with it. Finally, it was on the [buyer] to prove that it had wanted to conclude the contract with a different partner. 17

The [Claimant] requests that the Court reverse the decision of the Court of First Instance and order the [buyer] to pay it US$ 79,036.- with interest of 5% from 12 April 1998. 18

The [buyer] requests that the Court dismiss the appeal. 19

The [buyer] supports the previous decision, and adds the following: The [Claimant]'s submission was contradictory. Before the Court of First Instance the [Claimant] had held that no contract had been formed between [its parent company] and the [buyer]. Now [Claimant] submits that a contract with [its parent company] had initially been formed, but that it had later stepped into the [parent company]'s place. However, according to the [parent company]'s letter of 17 February 2000, a contract between the [buyer] and the [parent company] had never been concluded. In any event, the [buyer] had never voiced its agreement to alter the contract. 20

Reasoning of the Court:

While the [Claimant]'s appeal is admissible in form and timeliness, it is not successful. 21

The Court of First Instance reached the correct decision when determining that the [Claimant] is not entitled to a claim of US$ 76,036.-, on the grounds that the [Claimant] is not the legitimate owner of the claim for the purchase price. 22

[Applicability of the CISG:]

The dispute between the parties is governed by the United Nations Convention on Contracts for the International Sale of Goods (CISG), as both Germany and Switzerland are Contracting States (*cf.* Honsell, *Kommentar zum UN-Kaufrecht* [Commentary on the CISG], 1st ed., Art. 1 para. 31). The parties did not validly exclude the application of the CISG through the remark contained on the [Claimant]'s invoices that «all transactions & sales are subject to Swiss law.» Due to its ambiguous wording this clause cannot lead to an exclusion of the CISG, as the CISG is Swiss law. An effective agreement to apply Swiss national law would require that the relevant Swiss Code was named (*cf.* Honsell, Art. 6 paras. 5 and 7). 23

The [Claimant]'s right to demand payment of the purchase price for the delivered yarn could be based on Art. 54 CISG, if a valid contract of sale had been formed between the parties. This, however, is not the case, since the [Claimant] did not even make an offer in the meaning of Art. 14 CISG. 24

[No offer by Claimant in accordance with Art. 14 CISG:]

The [Claimant]'s fax to the [buyer] on 2 March 1998 cannot be considered as an effective offer because it does not satisfy the requirements of Art. 14 CISG, failing to sufficiently define the goods, the quantity and the price (*cf.* Honsell, Art. 14 para. 22 et seq.). 25

The invoice of 11 March 1998, which the [Claimant] sent to the [buyer] twice, is also not an offer under Art. 14 CISG. The invoice does contain all the essentials required under Art. 14 CISG and the [Claimant] intended it to be an offer for the sale of goods. However, [Claimant]'s intent is irrelevant, as it cannot be assumed that the [buyer] knew of or could not be unaware of such intent. Under Art. 8 CISG, it has to be established whether a reasonable person in the position of the [buyer] would have understood the invoice as an offer for sale. Under the present circumstances, this has to be denied. 26

According to [Claimant]'s fax of 2 March 1998, which preceded the invoice, [Claimant's parent company] had asked the [Claimant] to issue an invoice to the [buyer]. [Plaintiff]'s fax of 10 March 1998, which accompanied the invoice, explicitly stated that it was acting on order of [its parent company]. 27

Especially the latter fax could lead the [buyer] to conclude that the goods would be delivered based on a contract of sales between it and [Claimant's parent company], and that this com- 28

pany instructed it to pay the purchase price solely to the [Claimant], who would also be entitled to demand payment of the price. The same conclusion can be reached when interpreting the wording of the letter of 2 March, that [Claimant's parent company] had asked the [Claimant] to issue an invoice to the [buyer].

This interpretation is not affected by the fact that the fax refers to a sale of goods. The wording «to make an invoice to sell you a container» leaves open the question of whether [Claimant] itself intended to be the seller or whether this was a mere reference to an existing contract of sale between the [buyer] and [Claimant's parent company]. 29

Also, the invoice itself does not sufficiently indicate that the [Claimant] was to be the seller. While it names the [buyer] as «buyer», the [Claimant] is referred to not as «seller», but as «exporter». 30

Finally, [Claimant]'s fax of 16 March 1998, by which it requested the [buyer] to provide it with an assurance of payment, does not indicate that its invoice had to be considered as an offer for the formation of a sales contract. Again, the [Claimant] used the wording «we have been instructed ... », and it could only have received such instructions from a third party. Thus, the [buyer] had to gain the impression that the [Claimant] was not acting in its own interest, but on orders from [its parent company]. 31

[In any case, no acceptance of an offer in accordance with Art. 18 CISG:]

For the sake of the argument, even supposing that the [Claimant]'s invoice of 11 March 1998 had constituted an effective offer under Art. 14 CISG, the [buyer] did not accept this offer. 32

The promissory note sent on 16 March 1998 cannot be viewed as an acceptance under Art. 18 CISG. An acceptance of offer can be made by conduct other than statements if the conduct indicates the assent of the offeree. Under Art. 8 CISG, such conduct is to be interpreted according to the understanding that a reasonable person of the same kind as the other party would have had in the same circumstances (*cf.* Honsell, Art. 8 para. 9). The [Claimant], however, could not interpret the [buyer]'s conduct as an acceptance of its offer, because [buyer]'s fax of 16 March 1998 was addressed to [Claimant's parent company]. It is not contradictory that the [buyer] faxed the note to the [Claimant] and named its employee as the recipient. In the [buyer]'s view the [Claimant] had been instructed by [its parent company] to request and receive this declaration. 33

The [Claimant] was not satisfied with the [buyer]'s declaration and requested an extended promissory note which *inter alia* was to be addressed to the [Claimant]. This shows that [Claimant] itself was in doubt as to whether [buyer]'s fax of 16 March 1998 had established legal ties between the parties. 34

[Decision on costs:]

Under § 97(1) ZPO [*Zivilprozessordnung*, German Civil Procedure Code], the [Claimant] bears the cost of the appeal, which was unsuccessful in its entirety. 35