

**Case 445: CISG 1(3); 2(a); 7(1); 14; 18**

Germany: Bundesgerichtshof; VIII ZR 60/01

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<http://www.cisg.law.pace.edu/cisg/text/011031g1german.html> (German language text)

<http://cisgw3.law.pace.edu/cases/011031g1.html> (English translation)

Abstract prepared by Rudolf Hennecke

This decision by the Federal Supreme Court of Germany deals primarily with the incorporation by reference of standard terms into sales contracts under articles 8 and 14 CISG.

The defendant (seller), a German company, sold to the plaintiff (buyer), a Spanish corporation, a used gear-cutting machine for the price of DM 370,000. The written confirmation of the order by the seller contained a reference to its standard conditions of sale, which were not attached to the confirmation. These standard conditions of sale contained an exemption clause, which excluded any liability for defects of used equipment.

After delivery, the machine could only be rendered operational with the assistance of outside experts. In its claim against the seller, the buyer sought reimbursement for the costs involved.

In an appeal on questions of law, the main question before the Federal Supreme Court concerned the requirements for the incorporation by reference of standard conditions into international sales agreements. The court first observed that the CISG did not provide any specific rules on the incorporation of standard terms by reference. Thus, the general rules on contract formation, articles 14 and 18 CISG, were applicable. Whether the standard terms had become part of the offer had to be determined in accordance with article 8. The court stated that the recipient of an offer must be given a reasonable chance of considering the standard conditions, if these conditions are to become part of the offer. This requires that the recipient is made aware of the offeror's intention to include the standard terms. Moreover, it also requires that the offeree is sent the standard conditions or otherwise given the opportunity to read them.

The court noted that, due to the differences between the many legal systems and traditions worldwide, standard terms used in one particular country often differ considerably from those used in another. Therefore, knowledge of such terms is vital to the offeree. For a party wishing to rely on these terms it does not constitute any difficulty to attach them to the offer. If the recipient, on the other hand, had to inquire about the standard terms, this would often lead to delay in the formation of the contract, which would be unnecessary and unwelcome to both parties. The court thus concluded that it would contravene good faith in international trade, as embodied in article 7(1) CISG, as well as the parties' duty to cooperate, to request the offeree to inquire about standard conditions and to hold the offeree liable in case such an inquiry was not made. Therefore, standard conditions could only become part of the offer if they were attached to it or otherwise placed at the disposal of the offeree.

The court observed that this general result was also necessary with regard to the protection of consumers, which was not an issue in this case. Concerning the applicability of the CISG, the court noted that article 1(3) CISG does not distinguish between merchants and other parties, and that only if the seller is aware at the time of contract formation that the buyer is a consumer is the application of the Convention excluded under article 2(a) CISG, consequently, if the seller is not aware of dealing with a consumer, the CISG applies. In such cases, the necessary consumer protection laws also require that the standard conditions are sent with the offer.