CISG-online 617	
Jurisdiction	Germany
Tribunal	Bundesgerichtshof (German Supreme Court)
Date of the decision	31 October 2001
Case no./docket no.	VIII ZR 60/01
Case name	*Machinery case*

Translation[*] *by Birgit Kurtz*[**]

Facts:

Defendant No. 1 [seller] sold to the plaintiff [buyer], a company located in Spain, pursuant to an order confirmation of 25 June 1998, «based» on [seller's] Sales and Delivery Terms, a used computer-controlled CNC rolling-milling machine of the make L[...], model L 1202, year of manufacture 1981, «incl. the provision of an L[...] mechanic at your plant for the duration of one business day» for the price of DM [Deutsche Mark] 370,000; the Sales and Delivery Terms of the [seller], according to which used machines are sold and delivered «without any warranty against defects,» were not attached to the order confirmation of 25 June 1998. 1

After the machine was transported to Spain by a moving company hired by the [buyer], the [buyer] had the machine installed and connected by a Spanish company. Mechanic A[...], who was dispatched by company L[...], was unable to put the machine into operation during his visits of 15–18 July 1998 and 21–27 July 1998. With the assistance of an electronics specialist from company L[...], only during a third visit of 28 September to 1 October 1998, were the problems resolved; since then, the machine has been working without problems. 2

The Plaintiff [buyer] demands from the Defendant No. 1 [seller], and from Defendant No. 2, the personally liable shareholder, the damages that arose in connection with this work. 3

The *Landgericht* [District Court, Court of First Instance] granted the [buyer's] claim in the amount of DM 46,519.18 plus interest and dismissed [buyer's] claim with respect to an amount of DM 3,449.57. The Court viewed the order confirmation of 25 June 1998 as providing that the [seller], by promising to provide a mechanic for the duration of one business day, wanted to be responsible for the successful putting into operation of the machine, so that the 4

[*] All translations should be verified by cross-checking against the original text. For purposes of this translation, the Plaintiff of Spain is referred to as [buyer], Defendant No. 1 of Germany is referred to as [seller], and Defendant No. 2, the personally liable shareholder of Defendant No. 1, remains referred to as Defendant No. 2. Also, monetary amounts in German currency (*Deutsche Mark*) are indicated by DM.
Translator's note on other abbreviations: BGB = *Bürgerliches Gesetzbuch* [German Civil Code]; HGB = *Handelsgesetzbuch* [German Commercial Code]; ZPO = *Zivilprozessordnung* [German Code of Civil Procedure].

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[seller] was responsible for dispatching a sufficiently qualified technician and is liable for the costs of the technically under-qualified mechanic A[...].

The *Oberlandesgericht* [Court of Appeal, Court of Second Instance] vacated the judgment of the Court of First Instance insofar as the Defendants were found liable to pay and remanded the matter to the Lower Court.

With their – admissible – appeal, the Defendants further pursue their motion to dismiss.

Reasons for the decision:

I. 5
The Court of Appeal explained that the proceeding in the District Court suffers from a material defect because the District Court did not completely understand and take into consideration the statements of the [seller] concerning the «provision of an L[...] mechanic,» thus incorrectly interpreted the agreement of the parties and, on this basis, omitted the necessary further clarification. The duty to «provide an L[...] mechanic … for the duration of one business day» is already «per se,» according to its wording, unambiguous and not to be interpreted the way the appealed decision did. The undisputed statements of the [seller] that the agreement was reached within the framework of the price negotiations after the [seller] was not prepared to agree to further price reductions and the [buyer] pointed to its costs for the installation and instruction, squarely contradicts the interpretation of the District Court. Against this background, the Court of Appeal held that the temporally clearly-defined promise to «provide an L[...] mechanic» must be deemed a financial accommodation alone.

The Court of Appeal held that the lawsuit is also not ripe for decision for any other reason. 6
The [buyer] has properly pleaded a claim for damages under Arts. 45(1)(b), 35(1), 74 CISG against the [seller], for which Defendant No. 2 is liable under §§ 162(2), 128 HGB. The [seller] has not effectively precluded its liability for any breach of contract. Because the [seller's] Sales and Delivery Terms were not made applicable to the contractual relationship pursuant to the CISG, the warranty exclusion in that body of law does not apply. The decision of the lawsuit, thus, depends on whether the rolling-milling machine was afflicted with a defect that was covered by a warranty at the time of the transfer to a freight carrier and what costs arose from its removal. The District Court must evaluate the evidence relating to this issue.

II. 7
These arguments do not withstand legal scrutiny in all respects.

1. 8
The appeal successfully argues that the conditions of a remand by the Court of Appeal to the District Court under § 539 ZPO were not met.

a) 9
According to the jurisprudence of the German Federal Supreme Court, a serious procedural error within the meaning of § 539 ZPO is only given when the proceeding in the trial court suffers from such a vital defect that it cannot be the proper foundation for a final judgment.

The rule in § 539 ZPO, which presents an exception to the duty under § 537 ZPO of the Court of Appeal to fully analyze and decide the matter again, must be narrowly interpreted (Federal Supreme Court, Decision of 1 December 1993 – VIII ZR 243/92, *NJW-RR* 1994, 377 = *BGHR* ZPO § 539 procedural defect 12 under II 1; Federal Supreme Court, Decision of 10 December 1996 – VI ZR 314/95, *NJW* 1997, 1447 = *BGHR* ZPO § 539 procedural defect 16 under II 2 a, each with further citations). Mistakes in the interpretation of a contract by the trial court are generally defects in the application of substantive law and, therefore, do not justify the remand of the matter under § 539 ZPO. The interpretation of a contract can, however, in special cases, be based on procedural errors, e.g., if the Court not only improperly evaluated the content of contractual provisions or not only did not grant them the necessary significance, but when obvious contractual provisions were not noted at all or were linguistically misunderstood (Federal Supreme Court, Decision of 3 November 1992 – VI ZR 362/91, *NJW* 1993, 538 = BGHR ZPO § 539 procedural defect 10 under II 2 a, with further citations; Federal Supreme Court, Decision of 19 March 1998 – VII ZR 116/97, *NJW* 1998, 2053 = *BGHR* ZPO § 539 procedural defect 17 under II 1, in *BGHZ* 138, 176 et seq., not printed).

b) **10**

When considering these principles, a serious procedural defect by the District Court cannot be found. The District Court interpreted the agreement, according to which the [seller] had to provide the [buyer] with an «L[...] mechanic» for one business day in Spain, to contain a duty of the [seller] to successfully put into operation the rolling-milling machine. The Court of Appeal, on the other hand, viewed the agreement as «per se» unambiguous and not subject to interpretation; the Court of Appeal held that, in any event, the interpretation by the District Court is «squarely» contradicted by the undisputed statements of the [seller], which have not been taken into consideration by the District Court, that the agreement was entered into within the framework of the price negotiations after the [seller] was not prepared to agree to further price reductions and the [buyer] pointed to its costs for the installation and instruction. The Court of Appeal, therefore, viewed the temporally fixed promise to provide a mechanic merely as a financial accommodation, not as an obligation to provide a success-based secondary duty exceeding the duty to deliver the machine. The Court of Appeal, thus, believed that a violation by the District Court of generally accepted principles of interpretation is present because not all the facts that are material for the interpretation were taken into consideration. Such a violation does not, however, represent a procedural defect but a mistake in the interpretation of substantive law (Federal Supreme Court, Decision of 3 November 1992, *supra*; Federal Supreme Court, Decision of 19 March 1998, *supra*). Even if the District Court did not expressly address the [seller's] statements concerning the negotiations, it cannot be assumed from that Court's decision that it did not consider the statements and, thus, violated the [seller's] right to be heard. Rather, the District Court interpreted the statements of the [seller] as to their legal significance and scope different from the Court of Appeal (Federal Supreme Court, Decision of 3 November 1992, *supra,* under II 2 b).

2. **11**

Because of the lack of a serious procedural error by the Court of First Instance, the appealed decision can therefore not stand.

III. 12
The Panel is, however, not able to issue its own decision pursuant to § 565(3) No. 1 ZPO. It is true that such a decision is available to the Supreme Court in the case of a vacating decision by the Court of Appeal for reasons of judicial economy if the analysis to be performed under § 539 ZPO shows that the substantive analysis of the relationship between the parties leads to a final and conclusive result (Decision of the Panel of 31 January 1996 – VIII ZR 324/94, *WM* 1996, 822 under III; Decision of the Panel of 22 January 1997 – VIII ZR 339/95, *WM* 1997, 1713 under II 4; Federal Supreme Court, Decision of 3 April 2000 – II ZR 194/98, *NJW* 2000, 2099 = *BGHR* ZPO § 539 remand 2 under B II 3 a). That would be the case if the [seller] had effectively precluded its liability for breach of contract within the meaning of Art. 45 CISG. As the Court of Appeal correctly found, however, a valid inclusion of the Sales and Delivery Terms of the [seller], which provide the exclusion of warranties for used machines in Item No. 6, into the agreement existing between the [buyer] and the [seller], is missing.

1. 13
According to the general view, the inclusion of general terms and conditions into a contract that is governed by the CISG is subject to the provisions regarding the conclusion of a contract (Arts. 14, 18 CISG); recourse to the national law that is applicable based on a conflict of laws analysis is generally not available (Staudinger/Magnus, 2000, Art. 14 CISG para. 40; Schlechtriem/Schlechtriem, *CISG*, 3rd ed., Art. 14 para. 16; Soergel/Lüderitz/Fenge, 13th ed., Art. 14 CISG para. 10; Schmidt in Ulmer/Brandner/Hensen, *AGBG,* 9th ed., Appendix § 2 para. 12; Lindacher in Wolf/Horn/Lindacher, *AGBG,* 4th ed., Appendix § 2 para. 76; Piltz, *Internationales Kaufrecht,* 1993, § 3 para. 75; Piltz, *NJW* 1996, 2768, 2770). The CISG does not, however, contain special rules regarding the inclusion of standard terms and conditions into a contract. This was not deemed necessary because the Convention already contains rules regarding the interpretation of contracts (Schlechtriem/Schlechtriem, *supra,* fn. 100).

2. 14
Thus, through an interpretation according to Art. 8 CISG, it must be determined whether the general terms and conditions are part of the offer, which can already follow from the negotiations between the parties, the existing practices between the parties, or international customs (Art. 8(3) CISG). As for the rest, it must be analyzed how a «reasonable person of the same kind as the other party» would have understood the offer (Art. 8(2) CISG).

It is unanimously required that the recipient of a contract offer that is supposed to be based on general terms and conditions have the possibility to become aware of them in a reasonable manner (Staudinger/Magnus, Art. 14 para. 41; Schlechtriem/Schlechtriem, *supra*; Soergel/Lüderitz/Fenge, *supra*; Reithmann/Martiny, *Internationales Vertragsrecht,* 5th ed., para. 651). An effective inclusion of general terms and conditions thus first requires that the intention of the offeror that he wants to include his terms and conditions into the contract be apparent to the recipient of the offer. In addition, as the Court of Appeal correctly assumed, the CISG requires the user of general terms and conditions to transmit the text or make it available to the other party in another way (see also Piltz, *Internationales Kaufrecht,* § 3 para. 77 et seq.; Piltz, *NJW, supra*; Teklote, *Die Einheitlichen Kaufgesetze und das deutsche AGB-Gesetz [The Uniform Sales Law and the German Law on General Terms and Conditions],* 1994, p. 112 et seq.; Hennemann, *AGB-Kontrolle im UN-Kaufrecht aus deutscher und französischer Sicht [General* 15

Terms and Conditions Control and the CISG from the German and French Viewpoints], Ph.D. Thesis 2001, p. 72 et seq.; similarly, Staudinger/Magnus, *supra,* with reference to the Austrian Supreme Court, *RdW* 1996, 203, 204 with an annotation by Karollus *RdW* 1996, 197 et seq.; but see Holthausen, *RIW* 1989, 513, 517).

The opponent [other party] of the user of the clause can often not foresee to what clause he agrees in a specific case because significant differences exist between the particular national clauses in view of the different national legal systems and customs; also, a control of the content of general terms and conditions under national law (Art. 4(a) CISG) is not always guaranteed (Soergel/Lüderitz/Fenge, *supra*). It is true that, in many cases, there will be the possibility to make inquiries into the content of the general terms and conditions. This can, however, lead to delays in the conclusion of the contract, in which neither party can have an interest. For the user of the clauses, however, it is easily possible to attach to his offer the general terms and conditions, which generally favor him. It would, therefore, contradict the principle of good faith in international trade (Art. 7(1) CISG) as well as the general obligations of cooperation and information of the parties (Staudinger/Magnus, Art. 7 para. 47; Schlechtriem/Ferrari, Art. 7 para. 54) to impose on the other party an obligation to inquire concerning the clauses that have not been transmitted and to burden him with the risks and disadvantages of the unknown general terms and conditions of the other party (Teklote, *supra,* p. 114; Hennemann, *supra,* p. 74). **16**

3. **17**
Insofar as the general terms and conditions at issue become a part of the contract under German non-CISG law and/or in commercial relations between merchants where the customer does not know them but has the possibility of reasonable notice – e.g., by requesting them from the user (compare *BGHZ* 117, 190, 198; Panel Decision of 30 June 1976 – VIII ZR 267/75, *NJW* 1976, 1886 under II 1, each with further citations), this does not lead to a different result. In the national legal system, the clauses within one industry sector are often similar and usually known to the participating merchants.

To the extent that this does not apply to a commercially-active contract party, it can be expected of him, in good faith, that he make the clauses available to the other party, if he wants to close the deal - as offered by the user based on the general terms and conditions. These requirements do not, however, apply to the same extent to international commercial relations, so that, under the principles of good faith of the other party, a duty to inquire cannot be expected of him. **18**

4. **19**
The Court of Appeal correctly notes that, pursuant to Art. 1(3) CISG, it is irrelevant to the application of the Convention whether the parties are «merchants or non-merchants,» so that, in a different interpretation, non-merchants would also be subject to the heightened duty of inquiry. To the extent that the appeal argues that a «consumer purchase» under Art. 2(a) CISG is excluded from the application of the Convention, this argument cannot be followed. The purchase referred to in Art. 2(a) CISG requires that the seller know or should have known the purpose before or at the time of the conclusion of the contract, whereas, if the buyer is a consumer within the meaning of § 13 BGB, it does not require such knowledge of the seller.

This can, therefore, lead to an overlap, where sales contracts are subject to binding national consumer protection laws and, at the same time, to the CISG (Staudinger/Magnus, Art. 2 para. 29; Schlechtriem/Ferrari, Art. 2 para. 24). In the interest of a practical application of the law as well as to avoid discrimination against non-commercial contract parties, it is, therefore, necessary to make the inclusion of general terms and conditions for contracts governed by the CISG subject to uniform principles.

5. **20**
If, therefore, the effective inclusion of the Sales and Delivery Terms of the [seller] into its contract with the [buyer] is missing, the objections raised – in the alternative – by the [buyer] against the effectiveness of a complete exclusion of warranties in the sale of used machines, is irrelevant.

IV. **21**
The appealed judgment is thus vacated, and the matter remanded to the Court of Appeal for further clarification concerning the defects in the delivered rolling-milling machine alleged by the [buyer] and, if appropriate, concerning the extent of the necessary expenses for removal.

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