CISG-online 651	
Jurisdiction	Germany
Tribunal	Bundesgerichtshof (German Supreme Court)
Date of the decision	09 January 2002
Case no./docket no.	VIII ZR 304/00
Case name	*Milk powder case*

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

Facts of the case:

The plaintiff [buyer 1] and the assignor [buyer 2], both located in the Netherlands and trading in dairy products, purchased a total of 2,557.5 tons of powdered milk in the first half of 1998, based on a number of contracts, from defendant [seller 1], which is headquartered in Germany, and its major shareholder [seller 1A]. Of this powdered milk, [buyer 1] and [buyer 2] sold 7.5 tons to the Dutch company I. and 2,550 tons to the Algerian company G.I., owned by P.L. S.p.A. (hereinafter G. S.p.A.), formerly known as O.R. S.p.A. 1

The contents of the telephonic orders were recorded by [buyer 1] and [buyer 2] and/or by [seller 1] and [seller 1A] in written confirmations. The letters of confirmation of delivery of [seller 1] and [seller 1A] (whose production facility in L. [seller 1] acquired in the beginning of 1998 with all existing contractual relationships) each contained in the footer the following text: 2

> «We sell exclusively pursuant to our general terms and conditions. Contrary statutory conditions or contrary general terms and conditions of the buyer are expressly not acknowledged and are therefore not part of the contract.»

The terms and conditions at issue contain the following warranty clause: 3

> «*VI. Warranty and Notification of Defects*
>
> The buyer must inspect the goods immediately upon delivery and note any complaints on the delivery note…

[*] All translations should be verified by cross-checking against the original text. Amounts in German currency [*Deutsche Mark*] are indicated as [*DM*]; amounts in Dutch currency [*Dutch florin*] are indicated as [*Hfl*].
Translator's note on other abbreviations: BGB = *Bürgerliches Gesetzbuch* [German Civil Code]; BGH = *Bundesgerichtshof* [German Federal Supreme Court]; BGHZ = *Die amtliche Sammlung der Entscheidungen des Bundesgerichtshofes in Zivilsachen* [Official Reporter of Decisions of the German Federal Supreme Court in Civil Matters]; NJW = *Neue Juristische Wochenschrift* [German weekly law journal].

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> Defects that are not noticeable at the time of delivery can only be claimed before the printed expiration date…
>
> The buyer must make available the goods at issue or enough samples of the goods at issue; if he does not do so, the buyer cannot make any warranty claims.»

Condition No. 8 in the so-called M.P.C. conditions referred to by [buyer 1] provides: 4

> «*Section 10. Sampling and Complaints*
>
> Notwithstanding any duty of the seller to pay back the purchase price, or a part thereof, the liability of the seller for damages suffered (and/or to be suffered) is at all times limited to the invoiced amount for the delivered goods.»

The powdered milk, which was packaged and delivered by [seller 1], was inspected through spot-checks by [buyer 1] and/or [buyer 2] with the assistance of «I.S. Nederland B.V.» (hereinafter «I.S.») without any special results, then it was newly palletized in the harbor of Antwerp and thereafter shipped to Algeria and, to the extent it was sold to I., to Aruba/Netherland Antilles. 5

After local subsidiaries of G S.p.A. processed the powdered milk delivered to Algeria, some of the produced milk had a rancid taste. Thereupon, G. S.p.A. complained to [buyer 1] and [buyer 2] about a total of 207.6 tons of powdered milk as well as part of the powdered milk that had already been processed into 10,000 liters of milk. On 24 June and 19 August 1998, representatives of G. S.p.A., of [buyer 1], of [buyer 2] and of [seller 1] had several meetings in A. to clarify the question of the compensation for G. S.p.A. The result of these negotiations, during which [buyer 1] and [buyer 2] each promised certain compensation to G. S.p.A., was recorded in four «minutes of amicable settlement»; these documents were also signed by the representative of [seller 1]. 6

By letter dated 24 August 1998, the legal department of [seller 1A], which was entrusted by [seller 1] with the resolution of the matter, informed [buyer 1] and [buyer 2] of the following, among other things: 7

> «We acknowledge that a partial quantity of 177 tons of the total quantity of 3,495 tons of powdered milk, delivered pursuant to the letters of confirmation of delivery dated … did not meet the contractual requirements.
>
> «We do not deny that you have warranty claims because of the quality deviation, but the following two aspects must be considered:
>
> 1. […]
> 2. All letters of confirmation of delivery mentioned above refer to our general terms and conditions, which must therefore govern our legal relationship. Thus, S. AG does not have to deal with any warranty or damages claims raised by company G.

«… We expressly emphasize here that we are willing to rescind the contractual relationship with you and/or company A. because of the 177 tons of inadequate powdered milk. Further claims that company G. may raise against you or company A. are not substantively justified and will not be accepted by us.»

By letter dated 1 September 1998, [buyer 2] claimed damages from [seller 1] in the amount of $198,150.36; it assigned this claim to [buyer 1] on 30 November 1998. 8

Company I. also complained to [buyer 1] regarding the delivery of 7.5 tons of powdered milk because of, among other things, a sour taste of the powdered milk, and claimed damages in the amount of *Hfl* [Dutch florin] 29,256, which [buyer 1] paid.

[Buyer 1] alleged that the rancid taste, noticed by the ultimate buyers, was caused by an infestation of the powdered milk by lipase that already existed at the time of the transfer of the risk as a result of the faulty processing of the milk. [*Translator's note*: lipase *is an enzyme*.] This defect was only noticeable after the delivery and was immediately complained of by it. [Seller 1] acknowledged its warranty in the agreements recorded in Algeria as well as in its letter dated 24 August 1998. Under the rules of the CISG, [seller 1] is liable for the damages incurred by [buyer 1] and [buyer 2] that resulted from the payment of damages to the ultimate purchasers and the travel costs for the meeting in A., totalling *DM* [Deutsche Mark] 780,506.46; this was not excluded by [seller 1]'s general terms and conditions of delivery. 9

[Seller 1] alleged that the lipase infestation of the powdered milk delivered to Algeria first occurred after the transfer of the risk, or at least it was not caused by it. The powder delivered to company I. could not be consumed because of an insect infestation. In any case, the application of the CISG is excluded by its general terms and conditions. Thus, the German BGB governs, with the consequence that [buyer 1] has no claim for damages because the delivered powdered milk did not lack an assured quality. 10

The District Court [*Landgericht*] dismissed the complaint for payment of the above-referenced amount. On appeal by [buyer 1], the Court of Appeal [*Oberlandesgericht*] granted the claim in the amount of *DM* 633,742.45 – after obtaining an oral expert opinion regarding the cause of the defect – and dismissed the appeal as to the rest, especially insofar as the complaint concerns the last partial delivery to G. S.p.A. on 6 July 1998 (650 tons) and the delivery to company I. On appeal to the Supreme Court, [seller 1] continues to request the dismissal of the case in its entirety. 11

Grounds for the decision:

I.
The Court of Appeal stated in essence:

The warranty claims asserted by [buyer 1], based on its own rights and on rights assigned to it, are justified according to the rules of the CISG. The CISG was neither totally nor partially replaced by the General Terms and Conditions and Delivery Conditions of [seller 1] nor by the M.P.C. conditions used by [buyer 1]. The latter did not become part of the agreements with 12

[buyer 2] and was also altogether superseded by the rejection clause in the General Terms and Conditions of [seller 1]. The fact that the mutual general terms and conditions partially contradicted each other did not prevent the existence of the sales contracts because the parties did not view this contradiction as an obstacle to the execution of the contracts.

[Seller 1] must pay damages under Arts. 74, 75 CISG because 177.6 tons of the delivered powdered milk must be considered defective, the defects were claimed in time and the liability of [seller 1] was not excluded under Art. 79 CISG. According to the expert report of Prof. Dr. F., the powdered milk was infested by lipase. Because [seller 1] acknowledged the defect in 177.6 tons of powdered milk by letter dated 24 August 1998, which caused a reversal of the burden of proof according to the applicable (non-CISG) German law, it was its duty to show and prove that the powdered milk met the requirements of the contract at the time of the transfer of the risk. [Seller 1] did not submit such evidence. According to the expert report of Prof. Dr. F., it cannot be ruled out that the powdered milk was infested by inactive lipase at the time of the transfer of the risk. This assumption was not changed by the considerations of the private expert Prof. Dr. B. (who was retained by [seller 1]), which are based on the fact that no lipase activity was diagnosed in the analysis of the powdered milk by I.S.; that is so because the expert does not deal with the question whether the contamination by inactive lipase could have been determined. Therefore, the commissioning of another report, as requested by [seller 1], is not necessary, the more so since the expert Prof. Dr. F. has testified that, in 1998, there was no scientifically accepted method to quantitatively determine inactive lipase in powdered milk.

13 The assertion of [seller 1] about the comprehensive sensory, physical and microbiological examination of the powdered milk, carried out in its facilities, can be assumed to be correct, because also through this examination, knowledge could also not be gained about the existence of inactive lipase. Even if – as asserted by [seller 1] – the powdered milk was stored in Algeria at high temperatures and very high humidity, according to the statements of the expert Prof. Dr. F., it must remain undecided whether the cause of the spoiled flavor commenced first after the transfer of the risk or whether the powdered milk was infested by lipase from the outset. At least to that extent, a new trial is not necessary because the improper storage is only one possible explanation for the spoiled flavor, which does not, however, exclude the oxidation processes caused by lipase.

Finally, a contamination by inactive lipase that already existed at the time of delivery cannot be excluded by the fact that the lipase-induced taste allegedly appeared already at the time the powdered milk was mixed because that could be easily explained with inactive lipase existing in the powdered milk.

14 [Seller 1] did not sufficiently set forth the requirements of an exemption from the duty of compensation under Art. 79(1) CISG. It may remain open whether this rule can generally be applied to goods that do not meet contractual requirements; in any case, [seller 1] did not show that the causes for the inactive lipase were outside its sphere of influence. It is true that, because of the expert report of Prof. Dr. F., it can be ruled out (in favor of [seller 1]) that the powdered milk was infested by lipase-forming microorganisms or by inactive lipoprotein-li-

pase (at the time of the transfer of the risk). But there is still the possibility of the contamination by inactive lipase, which must have developed either in the milk that was delivered by the milk producers, or in the production process at [seller 1]'s facilities; [seller 1] is liable for either.

In addition, [seller 1] also did not show that it was unable to avoid the lipase infestation. It is true that, according to the expert report, it must be assumed that, even with the highest diligence, the existence of heat resistant lipase in the powdered milk cannot be ruled out with certainty. That does not, however, say anything about the question whether the undisputedly existing lipase was caused by a development that was fateful for [seller 1] or by the failure to comply with optimal standards.

The amount of damages granted must not be diminished because of a violation of a duty of [buyer 1] and [buyer 2]. [Seller 1] has agreed to the stipulated resolution of the damages question between [buyer 1], [buyer 2] and G. S.p.A., and it therefore cannot now argue that the defective powdered milk cannot be returned to it.

II. **15**

These elaborations do not withstand legal scrutiny on all points. Because of the current status of the facts and the dispute, it cannot be ruled out that the defects in the powdered milk are based on causes for which [seller 1] is not liable under Arts. 36, 45, 74 CISG.

1. **16**

The Court of Appeal, however, correctly assumed that the compensation rules of the CISG for the claims of [buyer 1] are not excluded by its General Terms and Conditions («M.P.C. conditions»), which provide considerable limitations of liability for the seller, *inter alia*, by restricting any compensation to the amount invoiced for the delivered goods.

a) **17**

The Court of Appeal correctly assumed that the partial contradiction of the referenced general terms and conditions of [buyer 1] and [seller 1] did not lead to the failure of the contract within the meaning of Art. 19(1) and (3) CISG because of the lack of a consensus (dissent). His judicial appraisal, that the parties have indicated by the execution of the contract that they did not consider the lack of an agreement between the mutual conditions of contract as essential within the meaning of Art. 19 CISG, cannot be legally challenged and is expressly accepted by the appeal.

b) **18**

The Court of Appeal further correctly stated that the warranty clauses in the M.P.C. conditions used by [buyer 1], which are beneficial to [seller 1], were replaced by the rejection clause of [seller 1]. The objections raised by the appeal in this regard are not persuasive.

The question to what extent colliding general terms and conditions become an integral part of a contract where the CISG applies, is answered in different ways in the legal literature. According to the (probably) prevailing opinion, partially diverging general terms and conditions become an integral part of a contract (only) insofar as they do not contradict each other; the statutory provisions apply to the rest (so-called «knock-out theory» *[Restgültigkeitstheorie]*; **19**

e.g., Achilles, *Komm. zum UN-Kaufrechtsübereinkommen* [Commentary to the CISG], Art. 19 para. 5; Schlechtriem/Schlechtriem, *CISG* (3d ed.), Art. 19 para. 20, esp. p. 226; Staudinger/Magnus, *CISG* (1999), Art. 19 para. 23). Whether there is such a contradiction that impedes the integration, cannot be determined only by an interpretation of the wording of individual clauses, but only upon the full appraisal of all relevant provisions. The appeal misunderstands this when it wants to compare only the limited rejection clause of [seller 1] to [buyer 1]'s warranty clauses, which are favorable to [seller 1]. As the Court of Appeal has correctly determined, the Dutch M.P.C. conditions contain substantial deviations from the CISG's warranty rules - which would essentially remain applicable based on the General Terms and Conditions of [seller 1] – and it cannot be assumed that [buyer 1] wanted to have the M.P.C. conditions, which are internally balanced, apply to it insofar as they are noticeably more detrimental than the statutory provisions without having the benefit of the clauses that are favorable to it. Vice versa, there is nothing to show that [seller 1] wanted those clauses of the M.P.C. conditions that are unfavorable to it apply to the contracts.

The result is no different if one follows the contrary opinion («last shot» doctrine; re. the current status of opinions and the concerns against the application of this theory where the CISG applies, compare Schlechtriem/Schlechtriem, *supra,* para. 20 and fn. 62). Certainly under the point of view of good faith and fair dealing (Art. 7(1) CISG), [seller 1] should not have assumed that the question whether certain provisions of the opposing terms and conditions contradicted its own (even insofar as it served its Terms and Conditions last) could be answered in isolation for individual clauses with the consequence that the individual provisions that were beneficial to it would apply. **20**

2. **21**
We also reject as unsubstantiated the argument in the appeal to this Court that the Court of Appeal incorrectly placed the burden of proof on [seller 1] for the allegation that the partial amount of 177.6 tons of the delivered powdered milk met the requirements of the contract at the time of delivery.

a) **22**
According to the case law of the Panel [of the Federal Supreme Court] referenced by the Court of Appeal, where the CISG applies and where the goods were accepted by the buyer without any complaints, it is the buyer who must show and prove that the goods did not meet the contractual requirements, and it is not the seller who must show and prove that the goods met the contractual requirements (BGHZ 129, 75, 81). It is true that, in the instant case, no claim was made at the time of delivery. But the Court of Appeal correctly assumed that the letter from [seller 1A] dated 24 August 1998 led to a reversal of the burden of proof.

The appeal objects to this holding mostly with the argument that the CISG also regulates the question of the burden of proof, so that any recourse to the national laws is blocked; [the appeal argues that] the CISG does not, however, contain a reversal of the burden of proof based on actual admissions of liability. [The appeal argues, that] thus, the rule/exception principle, which applies to all burdens of proof where the CISG applies, remains. [The appeal argues that,] as a consequence, [buyer 1] must prove that the goods were already defective at **23**

the time of delivery; [the appeal argues that] the uncertainty acknowledged by the Court of Appeal therefore had be detrimental to [buyer 1]. This argument cannot be followed.

b) 24
The starting point of the appeal to this Court is correct, that the CISG regulates the burden of proof explicitly (e.g., in Art. 79(1)) or tacitly (Art. 2(a)), so that consequently, recourse to the national law is blocked to that extent, and that the CISG follows the rule/exception principle (compare in detail Baumgärtel/Laumen/Hepting, *Handbuch der Beweislast* [Manual of the Burden of Proof], Vol. 2 (2d ed.), Introduction before Art. 1 CISG, paras. 4 et seq. and 16 et seq.; Achilles, *supra,* Art. 4 para. 15; Schlechtriem/Ferrari, *supra,* Art. 4 para. 48 et seq.; Staudinger/Magnus, *supra,* Art. 4 paras. 63 et seq.; also Panel [of the Supreme Court] decision BGHZ 129, 75, 81).

The appeal to this Court overlooks, however, that the burden of proof rules of the CISG cannot go farther than the scope of its substantive applicability. That scope results from Art. 4(1) CISG; according to that provision, the CISG regulates exclusively the execution of the sales contract and the duties and responsibilities of the buyer and the seller resulting from that contract. The question whether and possibly which evidentiary consequences an actual admission of liability has, is not part of that scope. That question – just like the meaning of a defective *mens rea*, an assignment, a set-off, or similar issues – does not implicate a specific sales-law-related problem, but rather a legal aspect of a general type; there is no intimate relationship to the actual or legal aspects of the international trade in goods, which make up the regulatory subject of the CISG. 25

c) 26
Under these circumstances, we do not fault the Court of Appeal's view that the letter from [seller 1A] dated 24 August 1998 contained a statement that was, as an actual admission, generally able to result in the reversal of the burden of proof, and that it further came to the conclusion, based on its judicial evaluation of the letter, that in the letter, [seller 1A] acknowledged the existence of a defect for which it was liable – with an effect for and against [seller 1]. In view of the clear wording of the latter, which mentions a partial amount «that does not meet the contractual requirements» and «defective» powdered milk and «the rescission of the contractual relationship,» the appeal to this Court with the argument that the letter was only meant to clarify that [buyer 2] did not have any legal right to damages, is baseless.

The special circumstances of the case – dispatch of two employees of [seller 1] to the Algerian purchaser of [buyer 1]'s goods, where at least one of them was able to gain its own knowledge regarding the quality of the powdered milk and the milk produced from the powdered milk, [seller 1]'s own expertise – justify the evaluation that the content of the letter resulted in a reversal of the burden of proof and did not serve only as circumstantial evidence. 27

d) 28
The argument in the appeal to this Court that the prerequisites for a reversal of the burden of proof are not present because [buyer 1] and [buyer 2] did not, in reliance on the letter, give up on otherwise possible exploratory possibilities and they therefore did not suffer any evidentiary problems, is also baseless; according to the appeal to this Court, that is so because

the proof that the powdered milk was infested by inactive lipase could not have been ascertained before or after the letter dated 24 August 1998. The appeal to this Court explains that, except for cases of factual statements of actual observations of the party, the reversal of the burden of proof is only possible in cases where such reliance must be protected (compare BGH, Decision of 10 January 1984, VI ZR 64/82, NJW 1984, 799). This argument cannot be successful for factual reasons. In the part of the Court of Appeal's opinion referenced by the appeal to this Court, the Court of Appeal explained that, according to the expert report of Prof. Dr. F., the result of the analysis of I.S. – which was based on a spot check analysis of the powdered milk upon arrival in Antwerp – did not permit a definitive statement about the «sole decisive question» whether the powder was infested by inactive lipase at the time of the transfer of the risk. It thus does not seem far-fetched that, upon targeted investigations after 24 August 1998 – for example, if [seller 1A] had denied all liability – the existence of inactive lipase at the time of the transfer of the risk could have been proven or that at least other causes, especially the subsequent contamination of the powdered milk or the spoiling through inadequate storage, could have been excluded. Thus, the evidentiary situation has deteriorated to the detriment of [buyer 1] and [buyer 2] by the fact that they relied on the written statement of [seller 1] dated 24 August 1998 and therefore refrained from conducting further investigations.

Based on all this, the Court of Appeal correctly assumed that, based on the reversal of the burden of proof resulting from the letter dated 24 August 1998, [seller 1] should have shown and proven that the powdered milk at issue met the requirements of the contract at the time of the transfer of the risk. **29**

3. **30–37**

[In this section of the decision, the Supreme Court, based on its prior case law, discusses the Court of Appeal's incorrect evaluation of the evidence as a procedural error. The expert opinion presented by [seller 1] regarding the defect in the powdered milk at the time of the transfer of the risk contradicted the oral expert opinion (which had been commissioned by the Court) in a decisive point. According to the Supreme Court, the Court of Appeal, without its own know-how in this question, should have at least obtained a supplementary statement of the expert on the issue of the contradictory expert opinion presented by [seller 1].]

III. **38**

For the further proceedings, the Panel [of the Supreme Court] notes the following:

If, after a new trial, it should appear that an infestation of the powdered milk by microbiological inactive lipase cannot be excluded at the time of the transfer of the risk, the outcome will depend on whether [seller 1] is not liable for this infestation under Art. 79 CISG. The appeal to this Court is of the opinion that Art. 79 CISG also applies to the delivery of goods that do not meet the requirements of the contract (left open in the Panel [of the Supreme Court] decision BGHZ 141, 129, 132); it argues that the failure to fulfil the contractual duties to perform of [seller 1] was based here on a ground for which it was not responsible under Art. 79 CISG because (according to its evidence) the powdered milk had been manufactured according to the current knowledge of science and technology and that any existing lipase stock

could have only been such stock that could have never been excluded based on standard procedure. In this context, we note, as a precaution, that [seller 1] can only be freed from its obligation to pay damages for its failure to comply with the contract if it can prove that any lipase infestation of the delivered milk would not have been detectable, even upon the careful use of the necessary methods of analysis before any further processing, and that a possible infestation in the manufacture of the powdered milk was based on grounds that were outside of its sphere of influence. As long as the cause of the lipase infestation before the transfer of the risk cannot be determined, the factual testimony of [seller 1], as taken into account by the appeal to this Court, lacks the necessary cumulative exonerative proof.

Dr. Deppert Dr. Beyer Wiechers

Dr. Wolst Dr. Frellesen