Case 722: CISG 3, 4, 18, 19 (3)
Germany: Oberlandesgericht Frankfurt a. M.
26 Sch 28/05
26 June 2006
Original in German Published in:
http://www.cisg-online.ch/cisg/urteile/1385.htm (original);
http://cisgw3.law.pace.edu/cases/060626g1.html (English translation)
Abstract prepared by Ulrich Magnus, National Correspondent, and Jan Losing

Following an application for enforceability of an arbitral award, the Higher Regional Court of Frankfurt had to decide whether an arbitration clause becomes a legally effective part of the contract, if the arbitration clause means an additional term to the offer by the replying party.

The applicant, a Dutch company, and the opponent, a customer from Germany, entered into a contract for the production and delivery of printed matters for the packaging of CDs. The opponent sent two written orders by fax to the applicant containing the specific notice that only its own general terms and conditions were applicable. The applicant confirmed the placing of orders by fax, with the reply pointing out that the provisions of the Graphics Industry of the Netherlands, containing an arbitration clause in its article 21, were part of the contracts. Since the respondent did not pay the invoice after the applicant's performance, the applicant instituted arbitration proceedings, with the court of arbitration ordering the respondent to pay the remunerations pursuant to the contracts plus interest and costs.

The Higher Regional Court dismissed the application for enforceability denying the recognition of the arbitral award.

The court found that according to article II (2) of the United Nations Convention on the Recognition and Enforcement of Foreign Arbitral Awards of New York, 10 June 1958 (New York Convention), which is to apply under § 1061 (1) German Code on Civil Procedure (ZPO) to foreign arbitral awards, the arbitration clause had not become a legally effective part of the contract, since article II (2) New York Convention requires a written agreement of the parties. Therefore the one-sided sending of order confirmations did not establish an arbitration agreement. The court also discussed whether, notwithstanding article II (2) New York Convention, an arbitration agreement had been reached by the one-sided reference to the standard provisions of the Graphics Industry of the Netherlands pursuant to § 1031 ZPO. Under § 1031 (1) and (3) ZPO an arbitration agreement may be reached by reference to general terms and conditions in case of business transactions. The court argued, that the specific emphasis to the exclusive validity of general terms and conditions excludes different or additional terms of the other party, and that the resulting discrepancy between the terms of the parties however does not frustrate the validity of the contract itself provided that the contract has been performed amicably. Furthermore, holding that according to article 3 (1) CISG the case is subject to CISG, the court stated that the validity of the arbitration clause cannot be derived from article 19 (2) CISG. An arbitration clause, as provision concerning the settlement of disputes, is always considered to alter the offer materially under article 19 (3) CISG, thus the silence of the respondent can not be considered as acceptance of the applicant's general terms and conditions.