CISG-online 1385	
Jurisdiction	Germany
Tribunal	Oberlandesgericht Frankfurt am Main (Court of Appeal Frankfurt am Main)
Date of the decision	26 June 2006
Case no./docket no.	26 Sch 28/05
Case name	*Printed works for CD covers case*

Translation[*] *by Jan Henning Berg*[**]

Edited by Daniel Nagel[***]

Reasons:

[Facts of the case:]

I. 1
[Seller] requests the declaration of enforceability of an arbitral award under which Defendant [Buyer] was ordered to pay the purchase price for delivered goods.

In June 2004, the parties agreed that [Seller] should produce and deliver several printings for Compact Disc (CD) packagings for [Buyer]. Following a previous telephone conversation, whose content is in dispute between the parties, [Buyer] submitted to [Seller] two written orders by fax dated 17 June 2004 and pointed towards the exclusive standing of its standard purchase terms. [Seller] confirmed the orders by fax the same day. Both order confirmations hinted at a clause providing that the order was governed by the «Provisions of the Graphics Industry of the Netherlands», which contained an arbitration clause in its Art. 21. 2

Pursuant to [Buyer]'s failure to effect payment, [Seller] commenced arbitral proceedings. It is in dispute between the parties whether [Buyer] was properly involved in the proceedings. At any rate, the arbitral tribunal ordered [Buyer] to pay EUR 32,761.76 plus interest and costs by arbitral award of 20 April 2005. 3

[Seller] asserts to have already pointed out during the telephone conversation that it was only willing to contract under the terms of the Graphics Printing Industry. [Seller] alleges that 4

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[*] All translations should be verified by cross-checking against the original text. For purposes of this translation, Claimant of the Netherlands is referred to as [Seller] and Respondent of Germany is referred to as [Buyer].

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[Buyer] had not objected to this statement. Moreover, the standard business terms had been attached to order confirmations.

[Position of the Parties:]

[Position of Seller:]

[Seller] has requested to declare the arbitral award, rendered by the Court of Arbitration of the Graphics Industry, seated in Amstelveen, The Netherlands, comprised of arbitrators of 20 April 2005 as enforceable. By virtue of this award, [Buyer] was ordered to settle the primary claim of EUR 32,761.76 plus an interest claim of EUR 96.97 until 15 August 2004 as well as statutory interest since 15 August 2004 until the date of full payment as well as out-of-court costs of EUR 1,158 and costs of arbitral proceedings amounting to EUR 2,680.48. 5

[Position of Buyer:]

[Buyer] requests the dismissal of [Seller]'s request for enforcement of the arbitral award. 6

[Buyer] argues that failing an effective inclusion of standard business terms, there had not been any agreement for arbitration between the parties. Consequently, it was inadmissible to declare the award enforceable. 7

Regarding the factual submissions of the parties, reference is made to [Seller]'s memoranda of 18 October 2005, 21 December 2005, 17 March 2006 and 31 March 2006; and to [Buyer]'s memoranda of 8 November 2005, 23 February 2006 and 13 April 2006, each with its additional exhibits.

[Reasoning of the Court of Appeal:]

II. 8
The request for a declaration of enforceability of the arbitral award of 20 April 2005 is admissible (§§ 1025(4), 1061(1)(1), 1064(1)(1) German Code of Civil Procedure *(Zivilprozeßordnung – ZPO)*, Art. VII(1) United Nations Convention on the Recognition and Enforcement of Foreign Arbitral Awards of New York, 10 June 1958 (New York Convention), *German Federal Gazette* (1961) II, p. 121.

The Court has jurisdiction under §§ 1025(4), 1062(1) No. 4, (2) German Code of Civil Procedure; [Buyer] has its place of business in the region of Hesse, Germany. 9

However, the request is not justified. The recognition of the arbitral award in Germany is to be denied (§ 1061(2) German Code of Civil Procedure), because the arbitral award was not sufficiently authorized by an «agreement in writing» in terms of Art. II(2) New York Convention (Art. III(1), Art. V(1)(a) New York Convention). Since the absence of a valid arbitration agreement must generally be put forward during foreign arbitral proceedings, this defense can no longer be raised during the proceedings aiming at a declaration of enforceability. However, this preclusion is not effective as far as the required written form under Art. II New York Convention is in dispute (cf. Bavarian Supreme Court (Bayerisches Oberstes Landesgericht), 10

Recht der Internationalen Wirtschaft (2003), 383; Schwab/Walter, *Schiedsgerichtsbarkeit* [Treatise on Arbitration Law], Ch. 57 para. 2).

This requirement of written form is not fulfilled in the present case. According to Art. II(2) New York Convention, an «agreement in writing» in terms of Art. II(1) New York Convention is defined as an arbitration clause in a contract or an arbitration agreement that has been signed by the parties or is contained in letters or telegrams that have been exchanged. 11

The burden to prove that a corresponding agreement has been effected is on the party requesting the declaration of enforceability (cf. Voit in Musielak (ed.), *ZPO* (Commentary on the German Code of Civil Procedure), 4th ed., § 1061 para. 14; Bavarian Supreme Court, *ibid*.). 12

Considering the submissions of [Seller], it cannot be determined that an arbitration agreement was made in the required form. 13

The purported oral agreement would not satisfy the requirements of Art. II(2) New York Convention; hence, any arbitral award would not have been legitimated by the parties. 14

[Seller] has not succeeded in presenting a written contract that has been signed by the parties and that contains an arbitration clause or a signed arbitration agreement. 15

Likewise, a corresponding agreement cannot be found in the course of the parties' correspondence. The second alternative of Art. II(2) New York Convention requires mutual correspondence. With reciprocity being the decisive criterion, a one-sided sending of a contract draft is insufficient just like any one-sided written confirmation of an oral agreement. Neither an oral nor an implied acceptance of a contract offer are sufficient to constitute an effective arbitration agreement in terms of the second alternative of Art. II(2) New York Convention (cf. Bavarian Supreme Court, *ibid*.; Gottwald, in *Münchener Kommentar zur ZPO* [Commentary on the German Code of Civil Procedure], 2nd ed., vol. 3, Art. II New York Convention para. 11; Albers in *Baumbach/Lauterbach, ZPO* [Commentary on the German Code of Civil Procedure], 60th ed., Art. II New York Convention para. 2; Voit, *ibid*., § 1031 para. 18; Schwab/Walter, *ibid.*, ch. 47 para. 7). 16

In the light of this background, there is no correspondence between the parties that would fulfill the requirements set out by the second alternative of Art. II(2) New York Convention. 17

In its orders, [Buyer] had pointed to the applicability of its standard terms which apparently do not contain any arbitration clause. Following the order confirmations by [Seller] – to which its standard terms for delivery had been purportedly attached –, [Buyer] did not give any response in the affirmative by means of letter, telegram or fax. 18

Moreover, it cannot be held that the requirement of a mutually signed arbitration agreement in writing or a mutual correspondence was dispensable by considering Art. VII(1) New York Convention, § 1061(1)(2) German Code of Civil Procedure. In particular, [Seller] is not allowed to rely on the lower prerequisites for an effective arbitration clause contained in § 1031(2) and (3) German Code of Civil Procedure. It can already be questioned whether a recourse to § 1031 German Code of Civil Procedure is at all admissible for proceedings at an international 19

place of arbitration. German law explicitly refers to the New York Convention by way of § 1061 German Code of Civil Procedure (denying that possibility: Voit, *ibid*., § 1031 para. 18 with further references; in the affirmative: Schlosser in *Stein/Jonas, ZPO* [Commentary on the German Code of Civil Procedure], 22nd ed., Anhang zu § 1061 para. 159; Schwab/Walter, *ibid.*, ch. 44 para. 12; expressly left open in German Supreme Court, *Neue Juristische Wochenschrift* (2005), 3499).

Even assuming an (underlying) approach favoring recognition of the principle set out by Art. VII(1) New York Convention and § 1061(1)(2) German Code of Civil Procedure, an effective arbitration agreement can still not be adjudged in the present case. Pursuant to § 1031(2) and (3) German Code of Civil Procedure, an arbitration agreement may be concluded in business transactions through reference to standard terms of a party, e.g., by way of an order confirmation, without the standard terms being actually attached to the correspondence. However, [Seller]'s standard terms have not effectively become part of the contract. Both parties have pointed towards the validity of their own standard terms. By virtue of having employed the term «exclusively», [Buyer] had clearly pointed out that it would not be willing to accept standard terms of its contracting partner. **20**

A corresponding defensive clause excludes not only contradictory, but also complementary clauses by the other party (cf. German Supreme Court, *Neue Juristische Wochenschrift Rechtsprechungs-Report* (2001), 484 for German law). This applies likewise to contracts that are governed by the CISG (German Supreme Court, *Neue Juristische Wochenschrift* (2002), 1651; cf. Schlechtriem/Schwenzer, *CISG* [Commentary on the CISG], 4th ed., Art. 19 para. 20). However, the apparent corresponding dissent does not hinder the validity of the contract under the notion of § 306 German Civil Code *(Bürgerliches Gesetzbuch – BGB)* as long as the parties moved on to execute the contract amicably (cf. German Supreme Court, *ibid.*; Schlechtriem, *ibid.*; cf. also Heinrichs in *Palandt, BGB* [Commentary on the German Civil Code], 65th ed., § 305 para. 55 with further references). **21**

The validity of [Seller]'s standard terms cannot be adjudged under Art. 19(2) CISG, as any provisions for the settlement of disputes are always considered as material amendments (Art. 19(3) CISG). Therefore, the silence of [Buyer] to [Seller]'s order confirmations is not to be considered as an affirmation of [Seller]'s standard terms referred to. **22**

It follows from Art. 1(1), Art. 3(1) CISG and Art. 28(1) and (2) German Act on Private International Law *(EGBGB)* that the contract at hand is governed by the provisions of the CISG. Both Germany and the Netherlands are Contracting States to the UN Convention of 11 April 1980. **23**

Furthermore, [Seller] has not substantiated that the validity of its standard terms should have been considered under Dutch law. Moreover, Dutch law would probably be inapplicable to this question of law. A recourse to domestic law with regard to effective inclusion of standard terms is generally barred whenever the CISG is applicable (cf. Schlechtriem, *ibid.*, Art. 8 para. 52). **24**

Moreover, the lack of form has not been cured during arbitral proceedings when considering the undisputed factual basis at hand. A possible cure of the lack of form is possible by an express declaration of submission to arbitration to the arbitral tribunal's protocol, by a mutual **25**

intent in correspondence geared at the appointment of the arbitral tribunal in order to have it settle a certain dispute, or at least by an uncontested acceptance of commencing arbitral proceedings (cf. Voit, *ibid.*, § 1031 para. 18; Gottwald, *ibid.*, Art. II New York Convention para. 16; Court of Appeal Hamburg, *Neue Juristische Wochenschrift Rechtsprechungs-Report* (1999), 1738). None of these requirements is fulfilled in this case. Particularly, the fact that [Buyer] refrained from making a declaration to the arbitral tribunal cannot be qualified as an uncontested acceptance. The defense of an ineffective arbitration agreement cannot be excluded in those cases where a party did not state any views during the arbitral proceedings (cf. Bavarian Supreme Court, *ibid*.).

In conclusion, the Court denies recognition of the arbitral award in Germany. The decision on costs and expenses is based on § 91(1) German Code of Civil Procedure. **26**

The procedural value of the claim is based on § 3 German Code of Civil Procedure. **27**