CISG-online 1935	
Jurisdiction	Germany
Tribunal	Oberlandesgericht Dresden (Court of Appeal Dresden)
Date of the decision	23 October 2000
Case no./docket no.	2 U 1181/00
Case name	*Milk powder case*

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

JUDGMENT

Upon Plaintiff [Buyer]'s appeal, the judgment which has been rendered by the 5th Chamber for Commercial Matters of the District Court (Landgericht) of Dresden on 31 March 2000 (case

[*] All translations should be verified by cross-checking against the original text. For purposes of this translation, Plaintiff of the Netherlands is referred to as [Buyer] and Defendant of Germany is referred to as [Seller]. The Dutch assignor of claims is referred to as [Assignor]. Amounts in the currency of the United States (U.S. dollars) are indicated as [US $]; amounts in the former currency of Germany (Deutsche Mark) are indicated as [DM]; amounts in the former Dutch currency [Dutch florin] are indicated as [Hfl].

Translator's note on other abbreviations: AGBG = Gesetz zur Regelung des Rechts der Allgemeinen Geschäftsbedingungen [former German Act Governing the Law of Standard Terms and Conditions]; BauR = Baurecht [German law journal]; BGB = Bürgerliches Gesetzbuch [German Civil Code]; BGBl = Bundesgesetzblatt [German Federal Law Gazette]; BGH = Bundesgerichtshof [German Federal Supreme Court]; BGHR = BGH-Report [German law report on jurisprudence of the Federal Supreme Court]; BGHZ = Entscheidungen des Bundesgerichtshofes in Zivilsachen [Officially reported decisions of the German Federal Supreme Court in Civil Matters]; C.c. = Codice civile [Italian Civil Code]; EGBGB = Einführungsgesetz zum Bürgerlichen Gesetzbuche [German Code on the Conflict of Laws]; HGB = Handelsgesetzbuch [German Commercial Code]; IPRax = Praxis des Internationalen Privat- und Verfahrensrechts [German law journal]; IPRspr = Internationales Privatrecht Rechtsprechung [German law report on private international law]; MDR = Monatsschrift für Deutsches Recht [German law journal]; NJW = Neue Juristische Wochenschrift [German law journal]; NJW-RR = Neue Juristische Wochenschrift Rechtsprechungsreport [German law journal]; OLG = Oberlandesgericht [German Regional Appellate Court]; OLGR = OLG-Report [German law report on jurisprudence of the Higher Regional Appellate Courts]; RabelsZ = Rabels Zeitschrift für ausländisches und internationales Privatrecht [German law journal]; RGZ = Entscheidungen des Reichsgerichts in Zivilsachen [Officially reported decisions of the former German Empire Supreme Court in Civil Matters]; RIW = Recht der Internationalen Wirtschaft [German journal on international commercial law]; WM = Wertpapiermitteilungen [German law journal]; ZIP = Zeitschrift für Wirtschaftsrecht [German journal on commercial law]; ZPO = Zivilprozessordnung [German Code on Civil Procedure].

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docket: 45 O 908/98) is repealed with respect to the decision on costs. The other parts of the judgment are modified and reformulated as follows:

Defendant [Seller] is ordered to pay [Buyer] Deutsche Mark [DM] 633,742.45, plus 5% annual interest payable on DM 306,308.89 since 18 September 1998, plus 5% annual interest payable on DM 324,451.40 since 6 October 1998, plus 5% annual interest payable on DM 2,982.16 since 30 September 1998.

The remainder of the action is dismissed.

[Buyer]'s appeal is dismissed as concerns the additional applications.

[Buyer] bears 2/11 of the costs of the present proceedings. [Seller] bears 9/11 of the costs.

The judgment is preliminarily enforceable. [Buyer] may avert enforcement by providing a security deposit of DM 5,000.00, unless [Seller] has already provided the same deposit beforehand. [Seller] may also avert enforcement by providing a security deposit of DM 750,000.00, unless [Buyer] has already provided the same deposit beforehand.

The security deposit may be delivered as an unconditional and unlimited guarantee issued by a credit insurance institution or bank that is certified by the European Community.

The value of the appeal is set at DM 780,506.46; [Buyer]'s gravamen amounts to DM 146,764.01; the gravamen of [Seller] amounts to DM 633,742.45.

FACTS

[Buyer] claims damages with respect to a purchase of powdered milk. The powdered milk has acquired a rancid flavor in the course of its processing into finished milk. The claims are based both on [Buyer]'s own right and on rights which have been assigned to [Buyer] by Company N.S.M. b.v. [Assignor]. 1

[Buyer] and [Assignor] are both domiciled in the Netherlands. They purchased 2,557.5 tons of powdered milk from [Seller] and its majority shareholder (Dairy Company A. M. GmbH & Co. KG) during the first term of 1998. The invoiced value of the powdered milk amounts to about DM 15,000,000.00. [Buyer] has resold 2,550 tons of this powdered milk to the Algerian Company G I. (hereafter: Company G), which is owned by Company P. L. and which was formerly known as Company O.R.L. S.p.A. (hereafter: Company O.). Another 7.5 tons of powdered milk have been resold to Dutch Company I. 2

Orders for powdered milk were being placed over the telephone. The exact content of these orders is evidenced by mutual letters of confirmation which have been exchanged between the parties (cf. for instance:

- [Buyer]'s confirmation of 3 March 1998, see exhibit K2;

- [Assignor]'s confirmation of 3 February 1998, see exhibit K3;
- Confirmation of Company A. M. GmbH & Co. KG of 3 March 1998, see exhibit K4;
- [Seller]'s confirmation of 30 March 1998, see exhibit K5).

At the beginning of 1998, [Seller] acquired the production facility of Company A. M. GmbH & Co. KG and entered into the existing contractual relationships. The terms of delivery of both [Seller] and Company A. M. GmbH & Co. KG contained the following provision: 3

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

These general terms and conditions (exhibit B1), which have been referred to in the order confirmations, contain a provision which [Seller] relies upon as a means of arguing that the United Nations Convention on Contracts for the International Sale of Goods (CISG) does not apply in conjunction with the German Statute of 1 July 1989 (BGBl. [*] II pp. 586 et seq.). 4

This provision reads:

«[...]

V. Force majeure. In case of force majeure or other unpredictable and exceptional circumstances [...], the relevant time periods to perform deliveries will be reasonably extended. In this instance, any claims for damages or rights of the buyer to declare the contract avoided are excluded.

[...]

VI. Warranty and notification of defects. [...] 3. If any goods are subject to complaint, the buyer must make either the goods themselves or sufficient samples available so that a quality check can be performed. If he does not do so, the buyer will lose any of his warranty claims.» 5

The powdered milk was packaged by [Seller]. Samples have been examined by [Buyer] and [Assignor], who had commissioned the Institute S.N. b.v. (hereafter: Institute S.) (exhibit K6a, K6b and K7; court file pp. 479 et seq.). The powdered milk was then repackaged in the port of Antwerpen, Belgium. Following its resale, the powdered milk was shipped to Algeria and Aruba, Netherlands Antilles. 6

I. 7

Company G, whIch had purchased the powdered milk, delivered these goods to its subsidiary companies in Algeria. These subsidiaries processed the goods into milk. Parts of the finished milk products had a rancid flavor. Therefore, Company G notified [Buyer] that the following quantities of powdered milk lacked conformity with the contract:

Buyer	Vessel	Arrival at Algiers	Quantity delivered	Quantity subject to complaint
[Assignor]	Loire	12 April 1998	250 tons	16.5 tons
[Assignor]	Eurocarrier	26 April 1998	450 tons	56.250 tons
[Assignor]	Bluwing	27 June 1998	500 tons	19.875 tons
[Buyer]	Eurocarrier	26 April 1998	700 tons	84.975 tons
[Buyer]	Tozeur	6 July 1998	650 tons	30 tons plus 10,000 liters of processed milk

FACTS OF THIS CASE IN DETAIL

1. **8**

By letter dated 8 June 1998 (exhibits K9 and K10), Company G informed [Buyer] and [Assignor] about the rancid and abnormal flavor of certain quantities of the powdered milk.

[Buyer] forwarded this information to [Seller] in writing on 8 June 1998 (cf. exhibit K11). On 24 June 1998, representatives of Company G, [Buyer], [Assignor] and Employee S. of [Seller] held a meeting in Algiers. The minutes of this meeting -- which were signed by all participating parties (cf. exhibits K12, K13) -- contain the following passage: **9**

Extract from exhibit K12: **10**

«[...]

This meeting is intended to ascertain the quality of sprayable unskimmed powdered milk type 260-0 among the present parties. The powdered milk has been delivered by Company N. S. under the contract mentioned above. Delivery has been made from the factory S. AG L. COD.

When the powdered milk was being examined at its current storage site, it turned out that certain batches tasted unpleasantly. Thereupon, the parties reached the following agreement:

1. Company G (formerly Company O.) will continue to sort out the defective batches and notify the delivering Company N. S. of the quantities of powdered milk which contain the rancid flavor.

2. Company N. S. is obliged to compensate Company G for non-conforming quantities which contain the rancid flavor. Company N. S. is further obliged to notify Company G about the results of its examination of the goods.

[Signed by representatives of Companies N. S., S. AG and G.]»

Extract from exhibit K13: 11

«In the course of an examination of the powdered milk at its current storage site, it has turned out that certain batches tasted unpleasantly. Thereupon, the parties reached the following agreement:

1. Company G (formerly Company O.) will sort out the defective batches and notify the delivering Company A. of the quantities of powdered milk which contain the rancid flavor.

2. Company A. is obliged to compensate Company G for non-conformity quantities which contain the rancid flavor. Company N. S. is further obliged to notify Company G about the results of its examination of the goods.

[Signed by representatives of Companies A., S. and G.]»

2. 12

On 28 July 1998, Company G notified [Assignor] about the lack of conformity of the consignment which had arrived on 27 June 1998 by cargo ship Bluwing (exhibit K15). Thereupon, two meetings were being held in Algiers on 19 August 1998. These meetings were attended by representatives of Company G, [Buyer], [Assignor] and [Seller]. The minutes of the meetings (exhibits K17 and K18) were recorded in French and signed by the participating parties. Employee T. of [Seller], who did not understand French, signed the minutes on 10 August 1998 under a reservation that he would receive a German translation of the minutes. It is undisputed that this has also taken place.

The «protocol of an amicable settlement» (exhibit K17) with respect to [Assignor]'s deliveries of powdered milk makes a reference to the meeting of 19 August 1998. This protocol contains a list of the allegedly non-conforming quantities, an estimation of the damage (U.S. dollars [US $] 206,150.36) and the following provision: 13

«In the light of the foregoing, the parties have come to the following agreement:

Company N. S. accepts that it will fully compensate the estimated damage by 25 August 1998 at the latest. Otherwise, Company G reserves its right to call upon the security of US $776,000.00 which has been provided by Company S. in order to guarantee the proper performance of contractual obligations.

[Signed by representatives of Companies N. S., S. and G.]»

The «protocol of an amicable settlement» (originally titled in French as «process-verbal de reglement à l'amiable», cf. exhibit K18 and p. 504 of the court file) with respect to [Buyer]'s deliveries of powdered milk refers to the meeting held on 19 August 1998. According to this protocol, the damage caused by non-conforming deliveries of powdered milk amounts to US $181,818.06 and also contains the following provision: 14

«[...]

In the light of the foregoing, the parties have come to the following agreement: Company A. accepts that it will fully compensate the damage as estimated above by 25 August 1998 at the latest. Otherwise, Company G reserves its right to call upon the security of US $781,000.00 which has been provided by Company A. in order to guarantee the proper performance of contractual obligations.»

15 On 24 August 1998, the legal department of Company A. M. GmbH & Co. KG -- which had been commissioned by [Seller] to handle the case -- notified [Buyer] and [Assignor] of the following circumstances (exhibit K19):

«[...]

With respect to the entire quantity of 3,495 tons of powdered milk, we have acknowledged that a partial quantity of 177 tons does not conform to the specifications required under the contract. The contract for the delivery of powdered milk is based on order confirmations dated 4 February, 18 February, 25 February, 9 April and 28 April 1998 (these being addressed to Company S.) and on further order confirmations dated 3 March, 6 March, 30 March, 19 May, 20 May, 29 May, and 4 June 1998 (these being addressed to Company A.).

We do not contest that you are entitled to warranty claims under the contract as a consequence of the lack of conformity. However, the following two aspects should be considered:

1. [...]

2. All of the order confirmations that have been mentioned above refer to our general terms and conditions. Therefore, these terms apply to govern our legal relationship.

It follows from the statements made above that Company S. is not under any duty to perform claims for damages or other contractual remedies vis-à-vis Company G.

Our general terms and conditions state that the laws of Germany shall be applicable. The law of contractual warranty contained in the BGB [*] does not grant any claims for damages. Moreover, an avoidance of contract means that the non-conforming goods are to be returned to the seller versus reimbursement of the purchase price. We would like to point out that we are willing to unwind the contract to an extent of 177 tons which lack conformity in favor of you or Company A., respectively. Any additional claims which might possibly be asserted by Company G against you or Company A. are unfounded on the merits and we do not accept any such liability.

[...]»

16 By letter of 1 September 1998 (exhibit K20), [Assignor] claimed damages from [Seller] in the amount of US $198,150.36. On 30 November 1998, [Assignor] assigned this claim for damages to [Buyer] (exhibit K24).

3. 17

By fax of 2 September 1998 (exhibit K29), Company G notified [Buyer] about the lack of conformity in the delivery of 650 tons of powdered milk which had arrived in Algiers on 6 July 1998 by the cargo ship Tozeur. This notice was specified by another letter of 6 November 1998 (exhibit K32). By fax dated 1 September 1998, [Buyer] informed [Seller] about a notice of non-conformity. The [Buyer] also complained about the quality of 15 tons of this delivery by letter of 14 October 1998 (exhibit K31). On 18 November 1998, Company G sent [Buyer] another letter (which was forwarded by fax to [Seller] on 24 November 1998, cf. exhibit K33) by which [Seller] was informed about the extent of the complaints and invited to Algeria for an examination of the case.

II. 18

Of the contingent which had been purchased from [Seller], [Buyer] sold 7.5 tons of powdered milk to Company I., which, in turn, resold this part to a company based in Aruba (exhibit K41). By faxes of 29 September 1998 and 8 October 1998 (exhibit K42), Company I. made the following notification to [Buyer]. This notification was accompanied by a certificate which had been issued by the Health Agency of Aruba on 6 October 1998 (exhibit K22).

«re: 300 bags of powdered milk, arrival in Aruba on 4 May 1998

After this powdered milk arrived, we have discovered that it has a dark color and sour flavor (similar to old butter).

Upon your request, we have nevertheless produced 650 gallons of ice-cream. The results have been quite disastrous: Complaints have been raised by customers etc. Furthermore, it turned out that the powdered milk contains an insect which is called «guru guru». This has been discovered in the course of a visit by the Health Agency. After further consideration, it was decided that the goods were to be disposed of immediately. The consequence of it is an inability on our part to produce goods in a regular manner for more than one month. The actual damage incurred is far greater than what is merely reflected by the 300 bags of powdered milk.»

Consequently, Company I. claimed a compensation of Dutch florin [Hfl] 29,256.00 for the losses which it had incurred. Thereupon, [Buyer] paid for these losses. 19

POSITION OF THE PARTIES BEFORE THE COURT OF FIRST INSTANCE

Position of [Buyer]

[Buyer] has asserted that the rancid flavor of the milk and ice-cream products which have occurred at the final customer level could be traced back to an infestation of the powdered milk with lipase. [Buyer] alleged that: the goods were already infected by the time the risk had passed from [Seller]; this hidden lack of conformity was caused by an improper processing of 20

fresh milk into the powdered milk; [Seller] was notified about the lack of conformity immediately after it had been discovered. [Seller] has also acknowledged its liability for warranty claims in its letter of 24 August 1998 (exhibit K24) and by virtue of the agreements which had been reached in Algeria on 19 and 20 August 1998 (exhibits K17, K18).

[Buyer] has taken the view that [Seller] was liable according to the provisions of the CISG, and that the application of the CISG was not excluded by virtue of [Seller]'s general terms and conditions. The damages which had been incurred as a consequence of non-conforming deliveries of powdered milk were to be calculated as follows: 21

Damage incurred by	**Description**	**Amount of damage**
[Assignor]	Non-conforming powdered milk delivered by cargo ships Loire, Eurocarrier, Bluwing	US $198,150.36 (= DM 324,451.40)
[Buyer]	Non-conforming powdered milk delivered by cargo ship Eurocarrier	US $181,818.06 (= DM 306,308.89)
[Buyer]	Travelling expenses / meeting in Algiers on 24 June 1998	Hfl 8,161.16 (= DM 7,240.91)
[Buyer]	Non-conforming powdered milk delivered by cargo ship Tozeur	US $63,894.00 (= DM 106,830.77)
[Buyer]	Travelling expenses / meeting in Algiers from 1 until 4 December 1998	Hfl 10,928.44 (= DM 9,696.04)
[Buyer]	Delivery of non-conforming powdered milk to Company I.	Hfl 29,256.00 (= DM 25,978.45)

[Buyer] has requested the Court to order [Seller] to pay DM 780,506.46 plus 5% in annual interest on DM 306,308.89 since 18 September 1998, on DM 7,240.91 since 25 June 1998, on DM 324,451.40 since 6 October 1998, on DM 106,830.77 since 24 December 1998, on DM 9,696.04 since 16 December 1998 and on DM 25,978.45 since 18 April 1999.

Position of [Seller]

[Seller] has requested the Court to dismiss [Buyer]'s action. 22

[Seller] has asserted that the sales contracts underlying the individual deliveries had been concluded either over the telephone or by the subsequent transmission of order confirmations which made reference to [Seller]'s general terms and conditions. An infestation of the powdered milk with lipase occurred only after the risk had already passed. In any event, the infestation was not caused by [Seller]. The powdered milk which was being processed on the Netherlands Antilles became defective only as a result of an infestation by insects. 23

[Seller] has further argued that the liability for damages provided by the CISG regardless of negligence or fault was excluded by virtue of its general terms and conditions. According to the applicable German BGB [*], [Buyer] and [Assignor] were not entitled to any claims for damages. The powdered milk had not lacked any feature subject to an express warranty. By way of precaution, [Seller] has challenged any relevant declarations which it might have made by its signing of the protocol dated 20 August 1998. Its Employee T. signed the protocol only after he had been threatened that without his signature he might not be able to return safely from Algeria. Moreover, [Seller] already objected to the content of the protocol after it had been received by letter of 24 August 1998 (exhibit K19). The reservation declared by its Employee T. was properly exercised. 24

REASONING OF THE COURT OF FIRST INSTANCE

The 5th Chamber for Commercial Matters at the District Court of Dresden had dismissed the [Buyer]'s action in its judgment of 31 March 2000 (cf. pp. 310 et seq. of the court file). Reference is directed to this document. The District Court has mainly reasoned that -- as a consequence of [Seller]'s general terms and conditions being included in the contract -- the claim for damages under the CISG regardless of negligence or fault was not applicable. 25

[Seller] neither acknowledged any claim for damages on the part of [Buyer] nor was the latter entitled to claim damages in accordance with the provisions of the BGB. 26

POSITION OF THE PARTIES

Position of [Buyer]

With its appeal, [Buyer] seeks to have this judgment overturned. [Buyer] has reiterated and specified the arguments which it had already made before the District Court. Now, [Buyer] also bases its claim for damages on [Seller]'s declaration of 24 August 1998, where [Seller] had acknowledged that a partial amount of 177 tons in fact lacked conformity with the contract. Moreover, [Buyer] alleges that [Seller] is liable on the basis of the protocols dated 20 August 1998. 27

[Buyer] has requested the Appellate Court to repeal the judgment rendered by the District Court (Landgericht) of Dresden on 31 March 2000. Additionally, [Seller] should be ordered to pay DM 780,506.46 plus 5% of annual interest on DM 306,308.89 since 18 September 1998, on DM 7,240.91 since 25 June 1998, on DM 324,451.40 since 6 October 1998, on DM 106,830.77 since 24 December 1998, on DM 9,696.04 since 16 December 1998 and on DM 25,978.45 since 18 April 1999.

Position of [Seller]

[Seller] has pleaded in favor of the judgment rendered by the District Court and has requested the Court to dismiss [Buyer]'s appeal. 28

For further details of the parties' arguments, reference is directed to the memoranda submitted by the parties as well as the minutes of the oral hearings which have been held by the District Court and the Appellate Court of Dresden in this case. The Court has taken evidence by having heard the expert Prof. Dr. H.F. Reference is also directed to the minutes of the oral hearing held on 4 September 2000 (pp. 503 et seq. of the court file).

REASONING OF THE COURT

[Buyer]'s appeal is well founded to the major extent. 29

A. [Admissibility]

The action is admissible. Arts. 1(1) and 2 Brussels Convention of 27 September 1968 on Jurisdiction and the Enforcement of Judgments in Civil and Commercial Matters (cf. for its entering into force for the Netherlands: Declaration of 12 January 1973, BGBl. [*] II p. 60) establish the international jurisdiction of German courts. 30

B. [Merits]

The action is founded on its merits to the major extent. 31

[Buyer] is entitled to claim damages from [Seller] in an amount of DM 309,291.05 as a consequence of lack of conformity of the powdered milk which was delivered to Algeria by the cargo ship Eurocarrier. Moreover, [Buyer] is entitled to another claim for damages against [Seller] in an amount of DM 324,451.40 which have been assigned to it by [Assignor]. This claim is based on lacks of conformity of powdered milk which was delivered by cargo ships Bluwing, Loire and Eurocarrier. The total claim for damages amounts to DM 633,742.45 (see below at I.). However, [Buyer]'s appeal is unfounded insofar as damages have been claimed for lack of conformity of powdered milk which was delivered by the cargo ship Tozeur. Moreover, [Buyer] cannot claim damages with respect to powdered milk that has been resold to Company I. (see below at II.). 32

I. [Seller's liability for damages]

[Seller] is obliged to pay damages for lack of conformity of 177.6 tons of powdered milk. The Court has to assume that the following deliveries of powdered milk have been affected by lipase at the time when the risk passed. According to Arts. 74, 45 CISG, [Seller]'s breach of contract establishes its obligation to pay damages. 33

Buyer	Vessel	Arrival at Algiers	Quantity delivered	Quantity subject to complaint
[Assignor]	Loire	12 April 1998	250 tons	16.5 tons
[Assignor]	Eurocarrier	26 April 1998	450 tons	56.250 tons
[Assignor]	Bluwing	27 June 1998	500 tons	19.875 tons
[Buyer]	Eurocarrier	26 April 1998	700 tons	84.975 tons
Total		177.6 tons		

1. [Application of the CISG]

[Buyer] is entitled to claim damages from [Seller] both in its own right and on the basis of claims which have been assigned to it. The claims are justified under the provisions of the United Nations Convention on Contracts for the International Sale of Goods (CISG) and the German Statute of 5 July 1989 on the Implementation of the CISG (BGBl. II pp. 586 et seq.). 34

a) 35

The CISG applies because each of the contracting parties has its place of business in a Contracting State to the CISG (cf. for the Netherlands: Declaration of 11 April 1991, BGBl. II p. 675). By virtue of Art. 28(2) EGBGB [*], the present contractual relationship is governed by the laws of Germany. This is because [Seller] is domiciled in Saxony, Germany, [Buyer] and [Assignor] used to collect the goods at [Seller]'s works and prices have been specified in German currency (cf. OLG [*] Düsseldorf MDR [*] 2000, 575 et seq.; see also BGH [*] NJW [*] 1987, 1141 et seq. for the former legal situation).

b) [Seller]'s argument does not present any sufficient indication to the effect that the parties had in fact decided to exclude the provisions of the CISG in its entirety or certain parts of it. 36

aa) First of all, [Seller] has correctly argued that the CISG may be excluded in accordance with its Art. 6 if general terms and conditions have been included into the contract and if these terms can only be applied in a sensible manner when the contract is being governed by a certain non-unified domestic law (cf. Holthausen, RIW [*] 1989, 513 (518); Magnus, in: Staudinger, BGB, 13th ed., Art. 6 CISG para. 42 with further references; arguing in favor of a choice of law: BGH IPRspr. [*] 1997 no. 43; OLG Bamberg OLGR [*] 1999, 149). 37

bb) 38

However, an exclusion of the CISG can neither be derived from [Seller]'s general terms and conditions (see below at (1)), nor from the M.P.C. terms (exhibit BB2, pp. 431 et seq. of the court file), which -- according to [Buyer]'s argument -- were being included into the contract (see below at (2)).

(1) 39

Items IV and VI No. 3 of [Seller]'s general terms and conditions contain provisions which retain a meaningful regulation if the contractual relationship was not governed by the German BGB [*] but by the CISG.

(1.1) 40

In fact, the exclusion of claims for damages in case of force majeure or other unpredictable and exceptional circumstances appears even more reasonable if Arts. 74, 79 CISG are applied than if non-unified domestic law were applicable. It is true that German domestic law also stipulates a liability of the seller regardless of negligence or fault if the goods are not of an expressly warranted quality. In this case, however, §§ 4, 24 AGBG [*] provide that liability cannot be excluded once again by virtue of general terms and conditions -- even with respect to contracts concluded between two businesspeople (cf. Ulmer, in: Ulmer / Brandner / Hensen, AGBG, 8th ed., § 4 para. 12 at footnote 30; see also BGHZ [*] 50, 200 (207) for the former legal situation).

Moreover, item VI No. 3 of [Seller]'s general terms and conditions designates certain obligations of the buyer which are not based on any non-unified domestic law. Instead, this provision intends to impose additional legal requirements before a claim for damages may arise under another set of laws -- this being the CISG. 41

(1.2) 42

Therefore, it may remain undecided whether [Seller]'s general terms and conditions have in fact become part of the contracts concluded with [Buyer] or whether their application is barred by the reference to the M.P.C. terms.

(2) 43

Moreover, it need not be decided whether the application of Art. 74, 79 CISG is barred by § 10 No. 7 and 8 of the M.P.C. terms. These terms have not been made part of the contractual relationship between [Seller] and [Buyer] (and [Assignor], respectively).

(2.1) 44

The M.P.C. terms have not been included into the contracts concluded by [Assignor], because its confirmations of delivery do not contain any reference to them.

(2.2) 45

While [Buyer] has referred to the M.P.C. terms in its confirmations of delivery, the terms have not become part of the contract because of the references by [Seller] to its partially deviating standard terms and conditions.

(2.2.1) 46

The protective clause which has been employed by [Seller] supersedes the M.P.C. terms. This holds true, irrespective of whether competing standard terms and conditions are governed by the specific rules on interpretation contained in Art. 19 CISG or by the provisions of the domestic law applicable to the contract (cf. in this regard: BGH NJW 1995, 665 (666); BGH NJW-RR [*] 1986, 984 (985); cf. for scholarly opinions on this matter: Schlechtriem, in: von Caemmerer/Schlechtriem, CISG, Art. 19 para. 4 and paras. 19 et seq., with further references in footnotes 49 et seq.; Reinhart, UN-Kaufrecht, Art. 19 para. 7; Schwenzer, NJW 1990, 602 (604); with respect to commercial letters of confirmation, see also: OLG Köln RIW 1994, 972).

(2.2.2) 47

There is also no indication to the effect that the particular warranty rules of the M.P.C. terms -- which do not conflict with [Seller]'s standard terms and conditions -- had become part of the contract.

The Court does not misconceive the rule under both the CISG and German domestic law that the corresponding parts of otherwise conflicting standard terms and conditions may become part of a contract (cf. for the CISG; Schlechtriem, in: von Caemmerer/Schlechtriem, CISG, Art. 19 para. 20 with further references in footnotes 57 et seq.; Holthausen, RIW 1989, 513 (517 et seq.); cf. for German domestic law: BGH NJW 1991, 1604 (1606), this part not being reported in BGHZ 113, 251; BGH NJW 1985, 1838 (1839 et seq.). However, such partial application of the M.P.C. terms is barred since these terms contain rules on contractual warranty which are considerably different from those of the CISG. Additionally, the M.P.C. terms have been referred to by [Buyer] as a whole. It cannot be assumed that [Buyer] intended to accept validity of these M.P.C. terms -- which have been drafted by market participants of different levels of supply -- against itself only with respect to unfavorable provisions on warranty. At the same time, [Buyer] would have dispended with its ability to enjoy the benefits of other provisions which may be more favorable (cf. Ulmer, in: Ulmer / Brandner / Hensen, AGB-Gesetz, 8th ed., § 2 paras. 102 et seq.). 48

Furthermore, [Seller] may not rely on the part of the M.P.C. terms governing warranty by virtue of its own protective clause. 49

(3) 50

Contrary to the opinion adopted by [Seller]'s legal representative in its memorandum of 26 September 2000, the fact that there are partially conflicting standard terms and conditions does not affect the conclusion of sales contracts as such.

(3.1) 51

Art. 19(3) CISG merely specifies the content of Art. 19(2) CISG. However, the former provision does not exclude a possibility that the parties in fact seek to establish contractual obligations despite the fact that their standard terms and conditions contain partially conflicting provisions on warranty.

(3.2) 52

A corresponding intent of the parties is to be assumed in the present case. In spite of conflicts between [Seller]'s standard terms and conditions and the M.P.C. terms referred to by [Buyer], the parties have entertained a long-lasting commercial relationship. Moreover, they have performed deliveries of powdered milk to a considerable extent, without ever having raised the issue of conflicting terms. By virtue of this conduct, the parties have demonstrated that any lack of consistency between [Seller]'s standard terms and conditions and the M.P.C. terms should not be material in terms of Art. 19 CISG. Therefore, we have a minor formal irregularity which does not affect the mutual intent of the parties to conclude and perform their contract (cf. Schlechtriem, in: von Caemmerer / Schlechtriem, CISG, Art. 19 para. 20; Holthausen, RIW 1989, 513 (518)).

(4) 53

Finally, [Seller]'s argument does not give any indication to the effect that an application of non-uniform domestic law was designated by implied term before the filing of the action.

2. [Lack of conformity of the goods; no exemption from liability]

[Seller] is obliged under Arts. 74 and 45 CISG to pay damages because 177.6 tons of powdered milk lack conformity with the contract (see below at a). The right to rely on a lack of conformity has not been lost by virtue of the obligation to notify the non-conformity (see below at b). Finally, there is no exemption from liability in accordance with Art. 79 CISG (see below at c). 54

a) 55

The specific part of powdered milk deliveries which has been complained about by [Buyer] and [Assignor] (dates of arrival: 12 April, 26 April and 27 June 1998) is not in conformity with the contract (Art. 35(1) and (2)(a) CISG).

aa) 56

The powdered milk would have been in conformity with the contract if it had not been affected by lipase at the time of passing of risk (Art. 36(1) CISG).

(1) 57

[Seller] has correctly argued that the parties have not come to any express agreement stating that the powdered milk should be free from lipase. Moreover, an express warranty does not follow from the classification «ADPI extra» (cf. exhibits K4 and K5), which makes a reference to «Specific Grading Requirements for Dry Whole Milk» (exhibit B9).

(2) 58

However, the lack of an express warranty does not change the fact that the contract could only be properly performed with powdered milk unaffected with lipase (cf. BGHZ 129, 75 (80)).

The stipulation of the highest quality class «ADPI extra» already indicates that [Seller] was obliged to deliver powdered milk which should be suitable for the production of finished milk. However, edible milk containing the typical flavor of milk requires that -- at the time when the risk passes to the buyer -- the powdered milk would neither be affected by lipase-producing micro-organisms nor by inactive lipase substances. 59

(2.1) 60

The leading German expert on biological processing technologies, Prof. Dr. F., has explained in detail that any form of lipase infestation will trigger a process which finally causes a rancid flavor of the finished milk.

(2.2) 61

It is immaterial whether the powdered milk is contaminated by micro-organisms (in particular: yeasts or mold fungus) which produce lipase substances in humid environments, whether lipase has been generated in the course of powdered milk production, or whether [Seller]'s suppliers of fresh milk failed to kill off any remaining lipoprotein-lipase. Prof. Dr. F. has convincingly stated that the flavor of the finished milk may be negatively affected either by micro-organisms, by already existing lipase substances, or at the time of processing powdered milk into finished milk.

In the case of micro-organisms -- which remain inactive in sufficiently dry powdered milk -- the relevant process occurs because these micro-organisms are stimulated when powdered milk is being turned into finished milk. Lipase is being separated as a waste product and triggers oxidation. While lipase substances that are contained in powdered milk cannot affect the quality of powdered milk in a dry environment, the relevant adipolytic processes are activated again at the time when it is turned into finished milk. 62

bb) 63

[Seller] has not proved that the relevant 177.6 tons of powdered milk were in conformity with the contract.

It has been assumed by the Court in favor of [Seller] that any powdered milk which has been delivered to [Buyer] and [Assignor] was not affected by any thermo-resistant lipase-producing 64

micro-organisms at the time of passing of risk. Nevertheless, the available facts indicate that the powdered milk was infected with inactive lipase of micro-biological origin.

(1) 65

[Seller] bears the burden to demonstrate that the powdered milk was actually in conformity with the contract, because Company A. M. GmbH & Co. KG had acknowledged the non-conformity of the relevant 177.6 tons of powdered milk by their letter dated 24 August 1998. This has reversed the burden of proof and demonstration from [Buyer] (cf. BGHZ 129, 75 (81)) to [Seller] (cf. for factual circumstances and individual statutory elements: OLG Saarbrücken OLGR 1998, 380 (381); Marburger, in: Staudinger, BGB, 13th ed., § 781 paras. 37 and 40; cf. for the acknowledgement of legal relationships: BGHZ 66, 250 (254 et seq.); BGH NJW 1984, 799; OLG Hamm OLGGR 1994, 98).

(1.1) 66

The legal department of Company A. M. GmbH & Co. KG had been commissioned by [Seller] to deal with the present case. In their letter of 24 August 1998, the deliveries of powdered milk were acknowledged as not being in conformity with the contract. Therefore, [Seller] has given an account in contradiction of its own argument.

(1.1.1) 67

The wording of this letter distinguishes the actual findings and the legal reasoning which is based on those findings. In the first part, the lack of conformity of powdered milk deliveries is unconditionally acknowledged. Legal issues are addressed only at a later stage in the letter.

There are no indications to the effect that [Seller] intended to acknowledge the lack of conformity only conditional upon an endorsement of its position in terms of law. 68

(1.1.2) 69

Moreover, the overall context shows that the statements made by Company A. M. GmbH & Co. KG should not mean that the powdered milk deteriorated only later, i.e., when it was processed into finished milk. Instead, the letter of 24 August 1998 records that the lack of quality had already been apparent at the time when the risk passed. Any legal department must be aware that this is the relevant point in time to assess the lack of conformity of goods.

This interpretation of the letter is further supported by the statements made in relation to contractual warranty. They make sense only if the previous factual argument refers to the time when the goods were handed over. 70

(1.2) 71

While these statements have been addressed only to [Assignor], they have also been made vis-à-vis [Buyer]. [Assignor] and [Buyer] have acted as joint parties in the course of the earlier negotiations. In its letter of 24 August 198, the legal department of Company A. M. GmbH & Co. KG deals with warranty claims of both [Buyer] and [Assignor].

(1.3) 72

Contrary to the view taken by [Buyer], the letter of 24 August 1998 does not necessarily mean that [Seller] has waived any legal defenses with respect to warranty claims raised against it. For instance, [Seller] has not acknowledged the existence of any claims for damages. It has merely stated that the relevant powdered milk deliveries were not in conformity with the contract. However, it is true that these factual assertions also contain a certain legal appraisal. Therefore, [Seller] bears the burden in the present proceedings to prove that the powdered milk was in conformity.

(1.3.1) 73

This is appropriate since [Seller] has not actually adopted the content of [Buyer]'s and [Assignor]'s notices of non-conformity. Likewise, [Seller] has not assumed these notices as being correct without further examination. On two occasions, it had sent employees to Algeria. In particular, Employee S. was able to get his own picture of the finished milk which was produced using the powdered milk in question.

The letter of 24 August 1998 was not subject to any pressure which was allegedly put on Representative T. in Algeria. First, the lack of conformity of the powdered milk was acknowledged only after Employee T. had returned from Algeria. Second, the factual findings are partially based on the perception of [Seller]'s Employee S. This employee had never been put under any relevant pressure. 74

Moreover, [Buyer] and [Assignor] could reasonably assume that [Seller] and Company A. M. GmbH & Co. KG (one of the largest dairy producers in Saxony and in Germany) would appraise for itself the possible causes of the rancid flavor of the finished milk that had been detected in Algeria, and whether the relevant cause could already have been apparent by the time when the risk passed. 75

(1.3.2) 76

The letter dated 24 August 1998 was also generally capable of assuring [Buyer] and [Assignor] that they would be in a safe position with respect to warranty issues. It appeared that [Seller] unconditionally acknowledged the lack of conformity of the powdered milk, meaning that it was not necessary to conserve pieces of evidence or engage additional measures (cf. BGH NJW 1984, 799). This applies even more because [Seller] had known that the time limits granted in favor of [Buyer] and [Assignor] by virtue of the amicable settlements with Company G would expire on 25 August 1998. If these settlements were to become final and definitive, Company G might no longer be willing to support a further examination of the relevant facts.

(1.3.3) 77

It has been established so far that [Seller] has unconditionally acknowledged that the powdered milk was not in conformity and that this acknowledgement at least theoretically impacted upon the examination of facts. Consequently, it is appropriate to impose the burden of proof and demonstration concerning the conformity of the goods on [Seller]. This result is not affected by the fact that [Seller] also demands restitution of the non-conforming powdered milk in the letter of 24 August 1998. This restitution was not intended to conserve evidence but to minimize commercial detriment.

(1.4) **78**

The Court was bound to assess the legal effects of the letter sent by Company A. M. GmbH & Co. KG on 24 August 1998 under non-uniform German domestic law. The CISG does not address the consequences of factual acknowledgements on procedural questions relating to evidence. Therefore, recourse must be had to the general rules embraced by the domestic law which is applicable in accordance with Art. 28(2) EGBGB (cf. OLG Rostock IPRax 2000, 230 (231); OLG Düsseldorf IPRspr. 1996 No. 37, OLG Stuttgart RIW 1995, 943 (944)).

(1.5) **79**

Contrary to [Seller]'s position, the burden of proof and demonstration in relation to a lack of conformity of the powdered milk has not been reversed to [Buyer] as the consequence of an alleged frustration of evidence.

Company A. M. GmbH & Co. KG had to assume that [Buyer] and [Assignor] would basically lose their influence as soon as the time limits for declaration contained in the settlements that had been concluded with Company G expired. Afterwards, it would not have been possible at all or only with considerable difficulties to gather any additional information about the condition of the powdered milk. If one considers that [Seller] has unconditionally acknowledged the lack of conformity of the powdered milk in its letter of 24 August 1998, [Buyer] and [Assignor] could reasonably understand that [Seller] did not attach any importance to additional factual findings. **80**

This appraisal of the letter dated 24 August 1998 is further corroborated by the fact that [Seller]'s demand for restitution of the powdered milk merely sought to minimize the losses and not to accomplish further factual findings. **81**

(2) **82**

[Seller] has not successfully proven that the relevant deliveries of powdered milk (dates of arrival: 12 April, 26 April and 27 June 1998) were not contaminated with inactive lipase substances at the time of passing of risk.

(2.1) **83**

The expert Prof. Dr. F. has set out that the examinations conducted by Institute S. merely indicate that it was highly likely that the powdered milk was not affected by any lipase-producing micro-organisms at the time when the goods were handed over. However, the expert

has further testified that the examination conducted by Institute S. does not give any information as to whether the powdered milk was affected by inactive lipase substances.

(2.1.1) 84

The Court is convinced that the expert has given a correct account of the facts. This holds true even with due consideration of [Seller]'s submissions in its memorandum of 26 September 2000 (p. 527 of the court file) and the attached opinion of its expert Prof. Dr. H. B. dated 24 September 2000 (pp. 544 et seq. of the court file). There is no need to schedule another oral hearing or to hear the appointed expert Prof. Dr. F. once again.

The expert who has been commissioned by [Seller] merely finds that no lipase activities could have been detected at the time when Institute S. made its examination. However, the opinion of [Seller]'s expert does not deal with the question of whether an infestation with inactive lipase substances might have been detected by Institute S. in its analysis. In this respect, the findings of [Seller]'s expert do not conflict with those of the expert appointed by the Court. Therefore, the Court sees no reason whatsoever to doubt the plausible and convincing account which has been given by Prof. Dr. F.

(2.1.2) 85

The Court does not see any reason to follow the request which was filed by the end of the oral hearing to obtain another expert opinion. The appointed expert Prof. Dr. F. has unambiguously testified that inactive lipase substances cannot trigger oxidation or adipolytic processes. Thus, sensory analyses will not be able to identify whether or not inactive lipase substances are present. The expert Prof. Dr. F. has also stated that by 1998 there had not been any scientifically acknowledged methods in order to determine the existence and quantity of inactive lipase substances in powdered milk. Such scientific method is currently only being developed under his contribution.

There is also no indication that the Court would obtain a different expert of higher expertise than Prof. Dr. F. Not only has he appeared as a very competent expert before the Court, but other scientists engaged in issues of milk processing have described him as one of the most critically acclaimed experts throughout Germany.

(2.2) 86

Therefore, [Seller] cannot establish any meaningful proof by asserting that all relevant deliveries of powdered milk were being thoroughly examined in terms of physics, sensorics and microbiology. The Court further assumes that certain certificates of quality, which have been presented by [Seller] in the oral hearing of 4 September 2000, are correct with regards to content (chemical, physical and microbiological examinations).

According to the statements made by the expert Prof. Dr. F., the existence of inactive lipase substances in powdered milk can neither be identified nor excluded by virtue of a sensorial analysis. Not even [Seller]'s own expert has contested this. Moreover, the chemical, physical and microbiological examinations conducted by [Seller] prior to delivery are insignificant in

order to determine whether there was an infestation with inactive lipase substances or not. The available parameters show that [Seller]'s examination has not provided any more detailed information in comparison with the analysis of Institute S.

(2.3) **87**

[Seller] cannot rebut that there has been an infestation with lipase at the time of passing of risk by asserting that even the powdered milk as such changes its flavor over time. In this respect, [Seller] refers to the examinations conducted by the parties and Company G in Algeria on 24 June 1998 (cf. exhibits K12a-K13b) and to those conducted by company C. O. v. K. in L. (Netherlands) on 1 July 1998 (cf. exhibit K14). These analyses indicate that there has apparently been a negative sensorial impact on the powdered milk in the time between the examination by Institute S. on 20 April 1998 (cf. pp. 479 et seq. of the court file) and the taking of samples in Algeria on 24 June 1998 or, respectively, the subsequent examination conducted in the Netherlands on 1 July 1998. Nevertheless, this argument is not capable of ruling out the existence of inactive lipase substances at the time of passing of risk as the relevant cause for the oxidation.

(2.3.1) **88**

The mere fact that powdered milk is already infected with active lipase substances is not suitable to conclude with sufficient certainty that the infestation occurred only at a later stage in the form of lipase-producing micro-organisms. This holds true even if it is being assumed in favor of [Seller] that powdered milk has been stored at 40 degrees Celsius and that it has been subjected to a very humid environment. Prof. Dr. F. has stated that it was uncertain to say -- even in this case -- whether a rancid flavor was due to an activity of micro-organisms which would have affected the powdered milk only after the passing of risk and triggered metabolic processes. It could also be the case that the powdered milk was infected with lipase from the outset and that this lipase was only re-activated by high temperature and humidity.

(2.3.2) **89**

[Seller] has argued after the closing of the oral hearing with reference to the statements made by Prof. Dr. B. that an improper storage may equally affect the sensorial quality of powdered milk even without an infestation with lipase. However, the Court does not see any reason to schedule another oral hearing on this issue.

(2.3.2.1) **90**

It is not for the Court to decide whether an application of § 156 ZPO [*] is barred in the present case. It has been common ground among the parties in both instances that the powdered milk took on a rancid flavor as a result of lipase and respective adipolytic reactions. There has merely been a disagreement about the exact time when the infestation with lipase or lipase-producing micro-organisms had occurred.

(2.3.2.2) **91**

In any event, there is no sufficient reason to schedule another oral hearing on this question. [Seller]'s argument is insufficient in order to prove that the powdered milk was actually in conformity with the contract. The Court has no information as to whether oxygen radicals contained in powdered milk might be able to affect non-hydrolyzed fat at 40 degrees Celsius. However, even if such reaction were possible, respective oxidations would be no more than one of many possible causes of the rancid flavor. This is in line with what Prof. Dr. B. has testified. [Seller]'s submission is not suitable to exclude with sufficient certainty that oxidations have been triggered by lipase substances.

(2.3.3) **92**

Additionally, [Seller] has not even demonstrated that the particular consignments of powdered milk -- which have been delivered to Algiers on 12 April and 26 April 1998 by cargo ships Loire and Eurocarrier -- had been affected even before they were processed into finished milk. The consignment carried by cargo ship Bluwing on 27 June 1998 has not been affected in any event. Anomalies with respect to the flavor of the powdered milk were first discovered when samples had been taken on 24 June 1998 and on 1 July 1998. Nothing has been submitted concerning the particulars of how the powdered milk was stored. Thus, the Court has to consider the possibility that Company G decided to store the powdered milk improperly only after the lack of conformity had been identified.

(2.4) **93**

Similarly, [Seller] cannot rebut the existence of the infestation of powdered milk with inactive lipase substances by the time of delivery by virtue of its assertion that a lipase-related flavor was already determined when the powdered milk was agitated.

It is true that this may argue against an existence of micro-organisms which would have needed to stimulate their metabolism in order to discharge lipase, engage adipolytic reactions and to oxidize. However, these events might be equally attributable to inactive lipase substances already contained in the powdered milk. Moreover, [Seller] has not made any submission concerning the exact time of appearance and the intensity of the rancid flavor.

(2.5) **94**

Finally, an infestation of the powdered milk with lipase cannot be ruled out simply by virtue of [Seller]'s allegation that its production had proceeded without any fault.

First, [Seller] has not submitted the exact date on which the powdered milk -- that was delivered to Algiers on 12 April and on 26 April 1998 -- had been produced at its factory in L. Additionally, no statements have been made concerning the particular steps of production and

hygienic circumstances. [Seller] itself has argued that an appearance of thermo-resistant lipase could not be definitely ruled out under its chosen production procedures. Thus, a flawless output could not be guaranteed even if production was properly conducted.

b) 95

[Buyer] and [Assignor] have not lost their rights to rely on a lack of conformity concerning the 177.6 tons of powdered milk in accordance with Arts. 38 and 39 CISG (duty to examine the goods and to notify any lacks of conformity).

aa) 96

It may remain undecided whether [Buyer] and [Assignor] had a duty to examine the powdered milk for a possible infestation with inactive lipase substances or whether such duty was excluded by the fact that the expert Prof. Dr. F. has stated that there was not yet any scientifically acknowledged method to identify inactive lipase.

bb) 97

By virtue of the letter sent by the legal department of Company A. M. GmbH & Co. KG on 24 August 1998, [Seller] has effectively waived its opportunity to rely on Arts. 38 and 39 CISG.

(1) 98

According to consolidated legal opinion, the contracting parties may dispose of Arts. 38 and 39 CISG. In particular, the parties may subsequently exclude their legal consequences by negotiating about the extent of contractual warranty rights (cf. BGH RIW 1999, 385 (386); BGH RIW 1997, 1037 (1038); Escher, RIW 1999, 495 (500); Magnus, in: Staudinger, Art. 39 CISG para. 18; Otte, IPRax 1999, 352 (353 et seq.)).

(2) 99

Even if such exclusion was not possible in order not to frustrate an amiable performance of contractual warranty by the seller (cf. for § 377 HGB [*]: BGH NJW 1991, 2633 (2634)), the rights under Arts. 38 and 39 CISG have been unequivocally waived in the present case (cf. BGH RIW 1999, 285 (386)).

First of all, it is insufficient that [Seller] merely sent representatives to Algeria on two occasions after it had received the notices of non-conformity in order to settle the affair together with [Buyer], [Assignor], and Company G. Nevertheless, [Seller] has declared by virtue of the letter sent by Company A. M. GmbH & Co. KG on 24 August 1998, that it would unconditionally acknowledge the lack of conformity of the deliveries of powdered milk. It means that [Seller] has also waived its right to rely on a failure by [Buyer] to comply with its duties to examine and notify. This conclusion is appropriate because [Seller] acknowledged the lack of conformity without any condition or limitation and because it offered to unwind the contract of sale. 100

The subsequent waiver by [Seller] of its right to rely on Arts. 38 and 39 CISG is not affected by the fact that [Seller] has -- at all occasions -- denied its liability for damages. This argument 101

was based on a reference to the warranty provisions contained in [Seller]'s standard terms and conditions and on an exemption from liability under Art. 79 CISG. However, [Seller] has not sufficiently demonstrated that it later sought to contest the existence of warranty rights on the part of [Buyer] because of a possible failure to act in accordance with Arts. 38 and 39 CISG.

c) **102**

[Seller] has failed to comply with its burden to demonstrate and prove that its liability for damages was exempt under Art. 79(1) CISG.

aa) **103**

It may remain undecided whether an exemption from liability for [Seller] already fails because its breach of contract has caused the lack of conformity of the goods (cf. for the current state of legal discussion: BGH RIW 1999, 617 (618)). [Seller] has not demonstrated that the inactive lipase substances originated from outside of its sphere of control. This proof, however, is critical in order to argue in favor of an exemption from liability (cf. BGH RIW 1999, 617 (618), with further references).

(1) **104**

For instance, an exemption might have applied if the powdered milk had been infested with lipase-producing micro-organisms or inactive lipoprotein-lipase. However, the expert Prof. Dr. F. has testified before the Court that this scenario is highly unlikely.

(2) **105**

In any case, [Seller]'s liability would not have been exempt even if inactive lipase substances had existed and if these had originated from micro-organisms. In that case, those lipase substances were being generated either within the milk which had been delivered by the dairy farmers, or in the course of [Seller]'s production processes. Therefore, [Seller] is responsible for the infestation with lipase.

bb) **106**

Furthermore, [Seller] has not demonstrated that the infestation with lipase was beyond its control in terms of Art. 79(1) CISG.

It is true that -- according to the statements made by the expert Prof. Dr. F. -- the existence of thermo-resistant lipase in powdered milk cannot be ruled out with absolute certainty. However, this does not reveal anything about whether the existing lipase substances have originated merely from unfortunate events or from a failure by [Seller] to comply with optimum standards in the course of its production of powdered milk.

3. [Amount of damages]

[Buyer]'s claim for damage under Art. 74 CISG amounts to DM 309,291.05. [Assignor]'s claim for damage amounts to DM 324,451.40. Thus, the overall claim for damage aggregates DM 633,742.45. 107

a) 108

[Seller] is liable to reimburse the payments over US $387,968.42 which have been made by [Buyer] and [Assignor] in favor of Company G

aa) 109

It is undisputed that [Buyer] and [Assignor] have reached a settlement with Company G. It is also undisputed that, according to the settlement, the latter should receive US $181,818.06 and US $206,150.36 as lump-sum payments in order to compensate any losses that would be caused by warranty claims owing to the purchase of non-conforming powdered milk. [Buyer] has sufficiently demonstrated that these payments have actually been performed (exhibits K45 et seq.).

bb) 110

These expenses have been incurred as a result of the powdered milk's lack of conformity with the contract. Thus, the expenses are to be attributed to [Seller]'s breach of contract.

(1) 111

It need not be finally decided whether the relevant damage under Art. 74 CISG (cf. in this respect: Roßmeier, RIW 2000, 407 et seq.; Schlechtriem, in: von Caemmerer / Schlechtriem, CISG, Art. 74 para. 13) is to be determined by applying the same criteria which also apply under non-unified domestic law with respect to the relevance of settlements (cf. BGH NJW 1998, 2048 (2050); BGH NJW 1993, 1139 (1141); BGH NJW 1993, 2797 (2799)).

(2) 112

In any event, [Buyer]'s and [Assignor]'s expenses are to be compensated because [Seller] has co-signed the settlement contracts. Therefore, [Seller] has acknowledged that the payments provided for in the settlements may be attributable to itself in case of liability for damages.

(2.1) 113

[Seller] has correctly argued that the signing of the settlements by its Employee T. has not given rise to an original liability for damages on its part.

Neither the wording of the settlement contracts -- which do not identify [Seller] as a contracting party -- nor their other material content provide any indication to the effect that all possible claims, rights and obligations arising out of the non-conforming powdered milk deliveries between Company G, [Buyer] and [Assignor] should be settled by virtue of this three-page 114

agreement. Moreover, the additional circumstances do not indicate that [Seller] sought to acknowledge any liability for damages in the amount which had been mentioned vis-à-vis Company G (cf. BGH ZIP [*] 2000, 1260 (1261); BGH ZIP 1999, 1923 (1924); BGH BauR [*] 1995, 232 (234)). Until then, claims for damages had never been the subject of discussions or negotiations.

(2.2) **115**

Nevertheless, [Buyer] and [Assignor] could reasonably understand [Seller]'s signing of the instruments of settlement as an acknowledgement that -- in case of liability for damages -- [Seller] would not raise any fundamental objection against the amount or accountability of the sum contained in the settlement.

(2.2.1) **116**

[Seller]'s signing of the settlement by means of its Employee Mr. T. had to bear a legally relevant meaning. If that had not been the case, there would have been no reason at all to sign the settlement, particularly among businesspeople.

If the sole purpose of the signing were to prove that the Employee T. had been present at the meeting, a list of participants would have been made up. It would be unusual in that case to apply a signature at the bottom of the contract document. Additionally, Mr. T. was sent to Algeria in order to reach a final settlement of the case. Thus, it is evident that his signature bears an independent and legally relevant meaning. Otherwise, it would also not be feasible why his consent was given only conditionally upon a correct translation of the contract documents.

(2.2.2) **117**

The signing of the instruments of settlement embodies a declaration of legal effect. In particular, [Seller] has declared that it acknowledges the settlements which were concluded between [Buyer], [Assignor] and Company G as reasonable in the light of the relevant facts. This conclusion is even more appropriate because it was evident for [Seller] that [Buyer] and [Assignor] had a reasonable interest not to make dispute resolution vis-à-vis [Seller] even more difficult by virtue of settlements concluded with Company G. [Buyer] and [Assignor] entered into the settlements with Company G in order to resolve any possible and complex issues with respect to the law of damages and not to relocate these issues onto the legal relationship towards [Seller].

Similarly, [Seller] had a reasonable interest in encouraging an amicable settlement with Company G. The latter had announced that it would call upon bailments in a total amount of US $1,557,000.00. This would have meant a considerable extension of the damage, unless a definitive settlement was reached by 25 August 1998. This settlement with Company G is represented by the instruments dated 19 August 1998.

(2.3) 118

[Seller] has not validly rescinded the legally effective declaration which was made by its Employee T.

The signing of the settlements is a declaration of intent and generally falls within the scope of § 123(1) BGB. However, [Seller] has not sufficiently argued that there is also a ground to rescind the declaration. It has not identified any person or occasion that might have pressed Employee T. to sign the settlements with possible difficulties in returning from Algeria. Since the Court is not fully aware of the circumstances surrounding Employee T.'s decision to sign, it cannot be decided whether there has been a legally relevant coercion in terms of § 123(1) BGB. Moreover, [Buyer] would be absolutely unable to defend itself in court if [Seller] were entitled to rely on coercion while not submitting particular facts. [Seller] would have had to submit which person under which circumstances had allegedly threatened Employee T. with an impossibility to return from Algeria. [Seller] is not entitled to rescind the declaration of intent. 119

(2.4) 120

[Seller] is also not entitled to revoke the declarations of intent represented by Employee T.'s signatures. The reservation declared by him only refers to the accuracy of the translation. This, however, is not affected in the present case.

cc) 121

Additionally, the claims for damages are not subject to a reduction by the residual value of the infected powdered milk at the time of restitution. [Buyer] and [Assignor] have not failed to mitigate their losses (cf. Art. 77 CISG).

(1) 122

It need not be determined whether the lipase-infected powdered milk could have even been re-imported to Germany in accordance with the applicable provisions on food safety and healthcare, and whether the residual value of the powdered milk exceeded the costs of re-importation.

(2) 123

A failure to comply with the duty to mitigate losses is already excluded by the fact that [Seller] has signed the contracts of settlement. It has also acknowledged its liability to pay damages for the case that [Buyer] and [Assignor] would not demand restitution of the non-conforming powdered milk from Company G

b) 124

Finally, [Buyer] is entitled to claim compensation for traveling expenses incurred by its Employee R. in an amount of Hfl 3,361.16.

(1) 125

It was foreseeable in terms of Art. 74 CISG that [Buyer] and [Assignor] would be held liable for damages by Company G as a consequence of the lack of conformity of the powdered milk (cf. Herber / Czerwenka, Internationales Kaufrecht, Art. 74 CISG, para. 12; Magnus, in: Staudinger, Art. 74 CISG, para. 45). Given the extent of the lack of conformity, it was also foreseeable that [Buyer] would seek and reach a definitive settlement of the case with Company G The expenses incurred by [Buyer] as a consequence of non-conformity of the powdered milk are appropriate in the circumstances, because it was also [Seller] that sent one of its employees to Algeria in order to identify the damage and to settle the case.

(2) 126

In accordance with § 287 ZPO, [Buyer] has sufficiently demonstrated the amount of its expenses (cf. with respect to the application of this provision on CISG claims: Asam / Kindler, RIW 1989, 841). [Buyer] has submitted flight tickets and hotel bills (exhibit K25). Telephone costs and other services which are referred to in the hotel bills are also subject to compensation in the circumstances of the case at hand. It must also be considered that [Buyer] paid its employee R. DM 250.00 for ancillary expenses.

However, [Buyer] has not sufficiently demonstrated that damages in excess of Hfl 3,361.16 were payable. In particular, [Buyer] is not entitled to another Hfl 4,800.00 which would reflect the costs incurred as a function of its employee R.'s dedication in the present case. The CISG does not grant damages for this type of loss (cf. with respect to attorneys' fees and other litigation costs as damages under the CISG: Magnus, in: Staudinger, Art. 74 CISG paras. 51 et seq.; Stoll, in: von Caemmerer / Schlechtriem, Art. 74 para. 14; concerning the issue of financial compensation for dedicated time under non-unified German law: BGHZ 131, 220 (225 et seq.); BGHZ 75, 230 (231 et seq.); BGHZ 66, 112 (114 et seq.)). 127

(3) 128

The parties have not waived their rights to claim compensation for traveling expenses by virtue of their settlement contracts dated 20 August 1998.

It has already been set out before that these contracts contain binding settlements between Company G, [Assignor] and [Buyer], respectively. Nevertheless, there are not sufficient indications in support of an intention on the part of [Buyer] to impliedly waive its right to claim additional damages. At least, this holds true for those claims which would not arise out of its relationship with Company G but out of its own legal relationship vis-à-vis [Seller].

c) 129

While [Buyer] has incurred the relevant losses in US and Dutch currencies, it is entitled to claim compensation in German currency (Deutsche Mark).

It may remain undecided whether Art. 74 CISG in general entitles the creditor to claim compensation for losses which have been incurred in foreign currencies in the German currency if 130

the debtor is domiciled in the Federal Republic of Germany (cf. Magnus, in: Staudinger, Art. 74 CISG, paras. 48 et seq.; Magnus, RabelsZ [*] 1989, 116 et seq.; Asam / Kindler, RIW 1989, 841 (846 et seq.)). In any event, here, [Buyer] is entitled to claim its damages in German currency because [Seller] has impliedly accepted this by virtue of its conduct within the present proceedings and because of favorable exchange rate fluctuations (cf. for non-unified domestic law: BGH WM [*] 1977, 478 (479); Karsten Schmidt, in: Staudinger, BGB, 13th ed., § 244 paras. 23 et seq., in particular at paras. 28 et seq.).

[Seller] is not put to a disadvantage by the fact that [Buyer] has calculated its losses on the basis of exchange rates which were valid at the time when the expenses had been incurred. [Buyer] would also be entitled to rely on the exchange rates applicable at the time of the closing of the oral hearing (cf. for non-unified German law: BGH WM 1977, 478 (479); RGZ [*] 109, 61 (62 et seq.); BGH, order of 19 December 1991, case docket III ZR 5/91, reported in BGHR BGB, § 244, Geldentwertungsschaden 1). At least with respect to the U.S. Dollar, the latter exchange rate of 4 September 2000 would be detrimental for [Seller] to an appreciable extent. **131**

d) **132**

In conclusion, [Buyer] is entitled to claim damages in the following amount:

Payments to Company G in the amount of US $181,818.06 (applicable exchange rate: DM 1.6847 per US $) DM 306,308.89

Payments to Company G in the amount of US $198,150.36 (applicable exchange rate: DM 1.6374 per US $) DM 324,451.40

Travelling expenses of its employee R. in the amount of Hfl 3,361.16 (applicable exchange rate: DM 0.88723 per Hfl) DM 2,982.16

Total DM 633,742.15

II. [No liability of Buyer with respect to another consignment]

[Buyer] has not demonstrated that it is entitled to damages under Arts. 74, 79, 45 CISG for a lack of conformity of powdered milk which was delivered to Algiers on 6 July 1998 by cargo ship Tozeur and which was forwarded to Company I. **133**

1. **134**

With respect to these deliveries, [Buyer] has not even proved that the powdered milk had been infected with lipase-producing micro-organisms or inactive lipase substances at the time of passing of risk (cf. Art. 36 CISG).

a) 135

The above reasoning (see at B.I.2.a) has shown that the cause of the powdered milk's rancid flavor -- which had been determined in Algeria -- cannot be determined with sufficient certainty. In particular, it cannot be determined whether the relevant chain of causation was triggered by inactive lipase substances which had already existed at the time of delivery or whether an infestation with lipase-producing micro-organisms occurred only at a later stage.

Even more so, the cause of rancid flavor of those consignments of powdered milk which was processed to ice-cream in Aruba, Netherlands Antilles cannot be ascertained. 136

b) 137

Furthermore, the burden of proof and demonstration has not shifted to [Seller] in the present case. [Seller]'s conduct surrounding the delivery of powdered milk to Algiers by cargo ship Tozeur and to Aruba do not provide any justification to reverse the burden of proof in favor of [Buyer].

2. 138

It need not be decided whether [Buyer] would have lost its rights to rely on a lack of conformity by virtue of a failure to examine and notify according to Arts. 38 and 39 CISG.

C. [Claim for interest] 139

The claim for interest is based on Art. 78 CISG. Concerning [Buyer]'s claim for compensation of traveling expenses, interest is payable only as of the date when [Buyer] first gave an account of the claimed amount of damages (this being its letter dated 15 September 1998 which arrived on 30 September 1998, cf. exhibit K25).

The applicable interest rate is not governed by the CISG. It must determined with recourse to § 352 HGB as part of the domestic law applicable to the contract (cf. Roßmeier, RIW 2000, 407 (412 et seq.); Piltz, Internationales Kaufrecht, § 5 para. 412; Reinhart, IPRax 1991, 376 (377 et seq.); OLG Düsseldorf IPRspr. 1994 No. 27; OLG München IPRspr. 1994 No. 30; Arbitration Award rendered by the Chamber of Commerce in Hamburg, RIW 1996, 766 (771); different opinion advocated by Neumayer, RIW 1994, 99 (106); for further references see Berger, RabelsZ 1997, 313 (331 et seq.). 140

D. [Ancillary decisions] 141

The ancillary decisions are based on §§ 92(1), 708 No. 10, 711 ZPO.