CISG-online 396	
Jurisdiction	Germany
Tribunal	Bundesgerichtshof (German Supreme Court)
Date of the decision	24 March 1999
Case no./docket no.	VIII ZR 121/98
Case name	*Vine wax case*

Translation by Birgit Kurtz[*]

Facts of the case:

[Buyer] runs a vine nursery in Austria dealing, *inter alia,* with the breeding and refinement of vines as well as the sale of these vines. In the grafting process, [Buyer] uses a special wax in order to protect the vines from drying out and in order to reduce the risk of infection. The wax, which [Buyer] also in part resold, was purchased by [Buyer] for many years from [Seller], whose owner also runs a vine nursery. [Seller] in turn obtained the wax from the F[...] W[...] company. The manufacturer of the wax was the company S[...] Werke GmbH. 1

In a letter dated 18 January 1994, [Buyer] asked [Seller], as in previous years, to submit an offer for «about 5,000 kg black vine wax.» With reference to this letter, [Seller] offered to [Buyer], in a letter dated 21 January 1994, 5,000 kg of «black vine wax» at the price of DM [Deutsche Mark] 5.43 per kilogram. On 31 January 1994, [Buyer] placed such an order. 2

The wax which was thereupon delivered to [Buyer] was a type of wax newly developed by S[...] Werke, as requested by [Seller]. [Seller] had neither actually received nor inspected the goods prior to delivery to [Buyer]. The delivery took place in the original packaging directly from the manufacturer, S[...] Werke, as requested by [Seller] via the F[...] W[...] Company. 3

[Buyer] partially used the wax for the treatment of its own vines. In addition, [Buyer] also sold the wax and vines which had been treated in its nursery with the wax to other nurseries which, in turn, treated their vines with the wax and also delivered vines that had been treated with the help of the wax to other customers. 4

In a letter dated 16 June 1994, [Buyer] gave notice of the defective wax to [Seller] and complained of major damage to vines treated with the wax. In the lawsuit at issue, [Buyer] demands the value of sA [Austrian Schillings] 14,146,348.40 in damages from [Seller]. [Seller] refuses to compensate [Buyer]. [Seller] attributes the alleged damages to frost and argues that it is exempt from any liability as an intermediary pursuant to Art. 79 CISG because the reasons for the damages are out of its control. In addition, [Seller] argues that the asserted damages are excluded by its general terms and conditions of sale. 5

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The *Landgericht* [Court of First Instance] dismissed the complaint. Upon the appeal of [Buyer], the *Oberlandesgericht* [Court of Appeal] held that the complaint presented a valid cause of action and remanded the case to the *Landgericht* for further hearings on the amount of damages. The appeal of [Seller] argues against this and requests the reinstatement of the *Land-gericht* judgment. 6

Reasons for the Decision:

[Reasoning of the Court of Appeal:]

I. 7
The Court of Appeal held:

[The Court held that] [Buyer] had a claim for damages against [Seller] pursuant to Art. 45(1)(b) CISG in connection with Arts. 74–77 CISG, from which [Seller] could not be exempted by Art. 79 CISG. 8

[The Court found that] the black vine wax delivered by [Seller] did not meet industry standards and was therefore not in conformity with the contract pursuant to Art. 35(1) CISG. [The Court stated that] on the basis of the expert's opinion, the defectiveness of the wax was proven without a doubt. [The Court pointed out that] insofar as [Seller] denied that the delivered vine wax was the cause of the damage, this was unsubstantiated. 9

[The Court held that] [Seller]'s liability was not excluded by [Seller]'s terms and conditions of sale. They did not become part of the contract. Moreover, they were invalid because they violated § 9 AGBG [German Act on Standard Terms] by excluding damage claims completely. 10

[The Court held that] [Seller]'s liability was also not exempted by Art. 79 CISG. Because [Seller] itself herself had commissioned the development of the new type of wax that was delivered to [Buyer], an exemption was only possible if [Seller] could rely on the newly developed wax having been exhaustively tested. This was not, however, the case. [The Court stated that] as a result, the impediment pursuant to Art. 79(1) CISG was not beyond [Seller]'s control. [Seller] could have avoided the defect. [Seller] should have had the new product tested for plant compatibility. 11

[The Court held that,] therefore, [Buyer] has a cause of action for compensation of its actual financial damages because of the delivery of the defective wax in 1994. 12

[The Court held that,] with respect to the extent of the damages caused by the defect, the matter was not yet ripe for decision. For this purpose, further determinations, especially an evidentiary hearing, are necessary to determine the extent of the damages suffered by [Buyer] in its own vine nursery with respect to the vines intended for sale as well as the extent of its losses as a result of having to reimburse its customers for damages suffered due to the defective vines and its customers' property loss caused by the use of the defective wax. 13

II. 14
These views do not withstand legal scrutiny on appeal in all points.

[Non-conformity of the vine wax according to Art. 35(2)(a) CISG:]

1. 15
The appeal tries unsuccessfully to overturn the decision of the Lower Court with respect to the defectiveness of the black vine wax delivered to [Buyer] by [Seller] in 1994.

The Court of Appeal correctly justifies its decision by the fact that the expert determined, without any reservations, that pursuant to his experiments and analyses there is no doubt that a causal connection existed between the vine wax used and the damages to the vine nursery's field. 16

The appeal unsuccessfully attacks the expert's knowledge with the reproach that, while he was only an expert in biology, he still conducted chemical and physical experiments and analyzed the results himself. The deciding determination that the use of the sold wax caused the damage to [Buyer]'s plants, was found by the expert in a field test whereby 500 vines were paraffined with the result that the plants that were treated with the wax in dispute were heavily damaged. Contrary to the argument of the appeal, there is no need for an additional expert's opinion based on chemistry and physics to determine which specific harmful substance in the wax was responsible for the damages. The Court of Appeal correctly relies on the fact that [Seller] was obligated, pursuant to Art. 35(2)(a) CISG, to deliver wax that is suitable for the treatment of vines, but that the black vine wax delivered by [Seller] in 1994 did not meet the industry standards – of which both parties were aware and which both parties applied – and that therefore the wax was not in conformity with the contract within the meaning of Art. 35 CISG. 17

[No exemption of [Seller] under Art. 79 CISG:]

2. 18
The appeal further asserts that [Seller] is, in any event, not liable for the damages caused by the use of the vine wax because it was only the intermediary and, therefore, the vine wax's non-conformity with the contract was beyond its control (Art. 79 CISG). This attack is also unsuccessful.

[Defective delivery by supplier is no impediment beyond the seller's control under Art. 79(1), (2) CISG:]

a) 19
It may remain undecided whether Art. 79 CISG encompasses all conceivable cases and forms of non-performance of contractual obligations creating a liability and is not limited to certain types of contractual violations and, therefore, includes the delivery of goods not in conformity with the contract because of their defectiveness (*compare* Stoll, in: Schlechtriem (ed.), *Kommentar zum Einheitlichen UN-Kaufrecht*, 2nd ed. 1995, Art. 79 paras. 45–47; Magnus, in: *Staudinger, [Kommentar zum BGB], Wiener UN-Kaufrecht*, 1994, Art. 79 paras. 25–26; Piltz, *Internationales Kaufrecht*, Munich 1993, § 4 Rn. 217 *et seq.*; Herber/Czerwenka,

Internationales Kaufrecht, Munich 1991, Art. 79 para. 8; Schlechtriem, *Internationales UN-Kaufrecht*, Tübingen 1996, p. 164 *et seq.*), or whether a seller who has delivered defective goods cannot rely on Art. 79 CISG at all (*compare* Nicholas, 'Impracticability and Impossibility in the UN Convention on Contracts for the International Sale of Goods', in: N.M. Galston/H. Smit (eds.), *International Sales*, New York, Mathew Bender, 1984, Chapter 5 – 5.10 to 5.14; Tallon, in: Bianca/Bonell (eds.), *Commentary on the International Sales Law*, Milan 1987, Art. 79 note 2.6.2.; J.O. Honnold, *Uniform Law for International Sales under the United Nations Convention*, December 1982, Art. 79 para. 427; *compare also* Lautenbach, *Die Haftungsbefreiung im internationalen Warenkauf nach dem UN-Kaufrecht und dem schweizerischen Kaufrecht*, Doctor's Thesis at the University of Zurich, 1990, p. 33 *et seq.*; Keil, *Die Haftungsbefreiung des Schuldners im UN-Kaufrecht*, Doctor's Thesis at the Law Faculty of the Ruhr-University Bochum, Frankfurt am Main 1993, p. 18 *et seq*.).

An exemption pursuant to Art. 79 CISG, upon which the Court of Appeal correctly based its decision, is not applicable because, in any case, the defectiveness of the vine wax was not outside [Seller]'s control. It is, therefore, responsible for the consequences of a delivery of goods not in conformity with the contract. **20**

The possibility of exemption under Art. 79 CISG does not change the allocation of the contractual risk. According to the [CISG], the reason for the seller's liability is that he has agreed to provide the purchaser with goods that are in conformity with the contract. If the supplier's (or suppliers') breach of the contract is a general impediment within the meaning of Art. 79 CISG at all, it is generally an impediment that the seller must avoid or overcome according to the content of the contract of sale. This follows the typical meaning of such a contract (Magnus, in: Honsell (ed.), *Kommentar zum UN-Kaufrecht*, 1997, Art. 79 para. 10; *but see* Stoll, *supra*, Art. 79 paras. 47 *et seq*. with further citations). From the buyer's point of view, it makes no difference whether the seller produces the goods himself – with the consequence that the non-performance is generally in his actual control so that, as a rule, an exemption pursuant to Art. 79(1) CISG is generally excluded – or whether the seller obtains the goods from suppliers. Just as in the case of unspecified obligations *[Gattungsschulden]*, where the seller is liable for the timely delivery by his supplier (compare, e.g., Magnus in Staudinger, *supra*, Art. 79 para. 22; Stoll, *supra*, Art. 79 paras. 30 et seq.), he is also responsible to see that his supplier delivers defect-free goods. In this respect, the [CISG] does not distinguish between an untimely delivery and a delivery of goods not in conformity with the contract. For both breaches of contract, the same standard of liability applies. The appeal does not indicate that the parties agreed to a different allocation of risk at the formation of the contract, nor is this otherwise apparent. **21**

Pursuant to Art. 79 CISG, the seller's exemption from consequences of goods not in conformity with the contract can only be considered – if at all (see above) – when the non-conformity cannot be deemed to be within the seller's control. Because the seller has the risk of acquisition (as shown), he can only be exempted under Art. 79 (1) or (2) CISG (even when the reasons for the defectiveness of the goods are – as here – within the control of his supplier or his sub-supplier) if the defectiveness is due to circumstances out of his own control and out of each of his suppliers' control. The appeal cannot show this. Insofar as the appeal points out that the manufacturer, in 1994, used an inappropriate raw material possibly imported from **22**

Hungary during the production of the delivered vine wax, this is not relevant with respect to Art. 79 CISG because the manufacturer would be liable – and thus also [Buyer] vis-à-vis [Seller] – for those product defects within its control.

[Seller's fault irrelevant under the CISG:]

b) 23
For this reason, the basic responsibility of [Seller] for [Buyer]'s damages is not questioned by the appeal's argument that the damage would have occurred in the same way if [Seller] in 1994 had delivered the same vine wax to [Buyer] as it had delivered in prior years and that was used by [Buyer] without any damages instead of the newly developed vine wax, because all brands of vine wax produced by the manufacturer in that year had the same defect due to the defective raw materials used only in this year. That is so because [Seller] would also have been liable for [Buyer]'s damages in this hypothetical case. The liability under the [CISG] is, contrary to the Lower Court 's opinion, not based on the supplier's obligation to inspect the goods before delivery to its purchaser, which – according to the appeal – was not necessary in this case because the vine wax previously purchased had always been free of defects. That is so because the seller's culpability is not important due to the statutory allocation of risk and the lack of a different agreement between the parties concerning the allocation of risk, resulting in a guarantee [warranty] liability of the seller.

[No valid contractual limitation of liability:]

3. 24
We do not disagree with the Court of Appeal's view (not questioned on this appeal) that [Seller]'s liability was not excluded under its terms and conditions because they did not become part of the contract and, moreover, violated § 9 ABGB by completely excluding damage claims.

[[Buyer]'s failure to mitigate the loss in accordance with Art. 77 CISG:]

4. 25
The appeal, however, correctly argues that the Court of Appeal did not review the question whether and to what extent [Buyer] carries a joint responsibility for the damages pursuant to Art. 77 CISG.

a) 26
The question whether, during the litigation with respect to the legal basis of the claim, a decision must be made concerning the violation of an obligation to mitigate the damages pursuant to Art. 77 CISG or whether it is reserved for separate proceedings concerning the amount of the claim, must be decided according to the principles developed with respect to § 254 BGB [German Civil Code]; the principle of autonomous interpretation of the [CISG] (Art. 7 CISG) is not contradictory because this is a question of procedural law.

Art. 77 CISG establishes a defense that may exclude a claim and must be considered *sua sponte* (Stoll, *supra*, Art. 77 CISG para. 12 with further citations). The failure to meet the duty to mitigate damages can result in the complete exclusion of compensation insofar as damages 27

could have been avoided altogether (compare Stoll, *supra*). As a rule, the review of the failure to observe the duty to mitigate damages pursuant to Art. 77 CISG must take place as part of the decision as to the existence of a cause of action. Only when it is certain that the failure to meet the duty to mitigate damages does not lead to the exclusion of liability and, thus, a claim of the injured party remains, the decision about [the failure to mitigate damages] can be reserved for separate proceedings concerning the amount of the claim. If, in the decision with respect to the existence of a claim, some individual questions regarding the existence of a claim are ignored and their clarification is left to a separate proceeding concerning the amount of the claim, the main holding, or at least the grounds of the decision, must show which points concerning the existence of the liability have not been decided in the decision on the existence of a claim. This has long been accepted by the Courts in the review of contributory negligence pursuant to § 254 BGB (*compare* BGH, 11 July 1974 – II ZR 31/73, *VersR* 1974, 1172 at 6; BGH, 31 January 1990 – VIII ZR 314/88, *NJW* 1990, 1106 at II 2 b aa; BGH, 31 January 1996 – VIII ZR 243/94, *NJW-RR* 1996, 700 at II 1 d aa), and the same applies to Art. 77 CISG.

b) **28**
The Court of Appeal did not, as the appeal correctly argues, deal with the question of [Buyer]'s joint responsibility for the damage, neither in the main holding nor in the grounds for the decision. It thus passed over [Seller]'s argument that [Buyer] continued to use the vine wax in dispute after it – when only a little more than half of the vines in the vine nursery had been treated – had learned about its defectiveness. Because the Court of Appeal did not make an appropriate reservation, it would be prevented by § 318 ZPO [German Code of Civil Procedure] from considering [Buyer]'s alleged joint responsibility for the damages in the further course of the lawsuit (*compare* BGH, 31 January 1990, *supra*).

[Court of Appeal's failure to address the alleged misuse of the vine wax for different purposes:]

5. **29**
Finally, the appeal correctly argues that the Court of Appeal did not address [Seller]'s argument that [Buyer] had also applied the wax for a purpose not intended, namely the treatment of young vines supposed to be planted into so-called «young fields,» even though it was only offered by [Seller] and ordered by [Buyer] for the purpose of vine grafting.

If [Buyer] used the delivered vine wax for a purpose for which it was not meant to be used under the contractual agreement, [Seller] is not liable for resulting damages. There would be no causal connection between the violation of the statutory obligations set forth in Art. 35 CISG and the damages appearing in the young fields. According to the reasons under Point 4, the [Court of Appeal] should have either made an explicit decision about [Seller]'s liability for the damages caused by the use of the delivered wax on «young fields,» or – if not – the Court at least should have made an appropriate reservation in the decision. Both are missing. **30**

[Decision reversed and case remanded to Court of Appeal:]

III. **31**
Because further determinations by the trial judge are necessary, the Court of Appeal's decision must be reversed and remanded to the Court of Appeal for further trial and decision.