CISG-online 426	
Jurisdiction	Switzerland
Tribunal	Bezirksgericht der Saane (Court of First Instance Saane)
Date of the decision	20 February 1997
Case no./docket no.	T 171/95
Case name	*Royal Feinsprit 96% for Moscow case*

Translation[*] *by Stefan Kuhm*[**]

[…]

II. REASONING OF THE DISTRICT COURT

1.
[Competence of Swiss courts to hear the claim and the counterclaim]

The Plaintiff [buyer] has its head office in Austria. The Defendant [seller] is an establishment of «D e C AG» (registered office in Liechtenstein) and has its head office in X (files 1/1 and 3/2). The parties have not chosen the jurisdiction in their agreement. Consequently, one has to decide the international and local competence for hearing this legal proceeding pursuant

[*] All translations should be verified by cross-checking against the original text. For purposes of this translation, the Plaintiff of Austria is referred to as [buyer] and the Defendant of Switzerland is referred to as [seller]. Amounts in Swiss currency (Swiss francs) are indicated by [Sf] and amounts in German currency (Deutsche Mark) are indicated by [DM].

Translator's note on other abbreviations: act. = actorum [Page of the files of the Court]; BGE = Entscheidungen des Bundesgerichts [Official Reporter of Cases of the Swiss Supreme Court]; CIF = Cost, Insurance, Freight as defined in the Incoterms, 1990; CISG = Wiener Kaufrechtsübereinkommen [WKR], SR 0.221.211.1, 11 Januar 1989 [UN Convention on Contracts for the International Sale of Goods]; CMR = Internationales Frachtververkehrsabkommen auf der Strasse [Geneva Convention on the Contract for the International Carriage of Goods by Road, 19 May 1956]; GOG = Gesetz über die Organisation der richterlichen Behörden, 1992 [Swiss Code on the Organization of the Judicial Administration of 17 May 1992]; Hague Convention = Haager Übereinkommen betreffend das auf internationale Kaufverträge über bewegliche körperliche Sachen anzuwendende Recht, 15. Juni 1955 (SR 0.221.211.4) [Hague Convention on the Applicable Law with regard to International Sale Contracts upon Movables of 15 June 1955]; IPRG = Bundesgesetz über das Internationale Privatrecht, 18. Dezember 1987 [Federal Code on Private International Law of Switzerland]; OG = Bundesgesetz über die Organisation der Bundesrechtspflege [Swiss Federal Code on Court Organization]; OR = Bundesgesetz betreffend die Ergänzung des Schweizerischen Zivilgesetzbuches (Fünfter Teil: Obligationenrecht), 30. März 1911 [Swiss Federal Code regarding a Supplement of the Swiss Civil Code (5th division: Law on Obligations], 30 March 191; ZGB = Schweizerisches Zivilgesetzbuch, 10. Dezember 1907 [Swiss Civil Code of 10 December 1907].

[**] Stefan Kuhm is a Member of the Bar Association, Frankfurt a.M., and a Ph.D. candidate at Eberhard-Karls-Universität Tübingen. The second-iteration redaction of this translation was by Dr. John Felemegas of Australia.

to Art. 112(2) of the Federal Code on Private International Law of Switzerland [IPRG]. According to the provisions of the IPRG, the Swiss courts that are established within the same area and place as any Swiss establishment being party to the legal proceeding shall be locally and pertinently competent to hear the commenced legal action.

According to Art. 8 IPRG, the competent court in which the main legal action is pending may also decide any counterclaim, provided that there is a connection in facts between the main legal connection and the counterclaim. In this case, there is such a factual connection, hence the parties' claims can be derived from exactly the same legal transaction and facts (see Vogel, Compendium of the Law on Civil Proceeding, 3rd extended edition, Bern 1992, p. 116 and 178)

Considering the above, the District Court of Saane is the local and pertinent competent court for hearing both the main legal action and the counterclaim.

2.
[Pleadings of the parties]

2.1
[Buyer's position]

The [buyer] requests in its action for performance that:

I. The [seller] be held liable to pay to the [buyer] an amount of US $23,730, plus accrued interest of 8% since 25 January 1994;

II. The enforcement proceedings be allowed to commence regarding the recovery order no. 679'374 of the Prosecution Office [Beitreibungsamt], District of Saane, and regarding the costs of this recovery order in an amount of Swiss franks [Sf] 111.80; and

III. The [seller] be held liable to pay any costs and remedies regarding this legal proceeding (act. 1/2).

2.2
[Seller's position]

The [seller] responded on 19 October 1995 and brought its counterclaim before the Court. The [seller] requests that:

I. The [buyer]'s claim for performance be dismissed in total;

II. The [buyer] be held liable to pay the [seller] an amount of

(i) US $15,270 plus accrued interest of 5% since 14 March 1994 and

(ii) Sf 3,000 plus accrued interest of 5% since 14 March 1995; and that

III. The [buyer] be held liable to pay any costs and remedies regarding this legal proceeding (act. 12/2).

In its replica of 8 January 1996, the [buyer] requests that

I. [Buyer]'s claim for performance be held to be founded;

II. The [seller]'s counterclaim of 19 October 1995 be dismissed in total; and that

III. The [seller] be held liable to pay any costs and remedies regarding this legal proceeding (act. 17/2).

In its duplica of 20 March 1996, the [seller] confirms again its requests as set forth in its response and counterclaim dated 19 October 1995 (act. 21/2).

3.
[Facts of the case]

With reference to the trial procedure of taking evidence, the parties' dispute mainly comprises the facts as follows:

3.1
[Summary of the facts which are partly not in dispute between the parties]

A company, named «D H; C, P», charged the [buyer] to acquire and arrange the transportation of the bottles of the Alkohol Royal Feinsprit [liquor] in question. The company «D H; C, P» wanted to sell the Alkohol Royal Feinsprit to its customers in Moscow. That order might have expressly (i) comprised the prerequisite that the goods, i.e., the Alkohol Royal Feinsprit, shall be transported by truck and (ii) excluded any other means of combined transportation by truck and train. The [buyer] introduced itself to the [seller], after a company, named «A, B», had notified the [seller] that the [buyer] is interested in a trade on Alkohol Royal Feinsprit (act. 1/3, 12/3, 17/3).

The [seller] submitted to the [buyer] its offer in respect of the execution of such a trade on Alkohol Royal Feinsprit within a pro-forma invoice in its letter of 17 December 1993 (act. 3/3). In the light of this offer, 300,000 one-litre bottles «Alkohol Royal Feinsprit Royal Feinsprit 96%» should be delivered to Moscow for a purchase price of US $1.13 per litre (sum in total: US $339,000). The parties might have based and stipulated the aforementioned price and offer as CIF [*] Moscow. According to the pro-forma invoice of 17 December 1993, the [seller] shall deliver the goods ex factory by 15 January 1994 at the latest if:

(i)
The [buyer] provides uno actu for an advance payment into the [seller]'s account an amount of 7% of the overall purchase price (i.e., US $23,730); and

(ii)
The [buyer] has opened an irrevocable, confirmed, transferable and divisible letter of credit in favor of the [seller]. Furthermore, the seller might only accept such a letter of credit, provided that it shall be payable at delivery of the goods ex factory and presentation of the CMR [*] documents. The [buyer] countersigned the pro-forma invoice and sent it back to the [seller] (act. 3/3). Further, [buyer] also gave its instruction for the requested advance payment of US $23,730 to the [seller]'s account on 17 December 1993 (act. 3/7).

3.2
[Buyer's arguments which are in dispute between the parties]

The [buyer] argues that it has expressly stipulated vis-á-vis the [seller] that it accepted as mode of transportation only the delivery of the goods by truck (act. 1/3, 17/3, 23/4). Furthermore, the parties agreed to such an exclusive mode of transportation by truck, while they were negotiating the contract of sale of the Alkohol Royal Feinsprit, and they have not altered their agreement in any respect. Furthermore, the [seller] represented and warranted the aforementioned exclusive transportation of the goods by truck, what one should learn from the [seller]'s fax of 21 December 1993 (act. 1/4, 3/6). It was only because of the [seller]'s representation and warranty that the [buyer] gave its instruction for the requested advance payment of US $23,730 to the [seller]'s account. After the settlement of the transfer of US $23,730 into the [seller]'s account, the [seller] arbitrarily chose the combined transportation of the goods by truck and train. Hence, this arbitrary choice might also appear as a breach of the sales contract (act. 1/4, 1/5, 17/4, 23/2).

3.3
[Seller's arguments which are in dispute between the parties]

In opposition, the [seller] argues that the parties have never agreed to an exclusive transportation of the goods by truck as a prerequisite for the sales contract, so that implicitly any other means of transportation would have been prohibited. If there were such a prerequisite, the [seller] would have been obliged to expressly deny and refuse such a condition. It is scarcely possible to organize transportation by truck during any public holidays, since the transportation costs amount to more rather than transportation by train (two or three times more) during such a period. Regarding the price of US $1.13 per litre, the [buyer] should at least have realized that the [seller]'s offer could not be limited to transportation of the goods exclusively by truck (act. 12/3 and 23/9). Further, the [seller] did not represent or warrant such an exclusive transportation by truck, either on phone or by any other means of communication. In the light of the [seller]'s statements, just the opposite might be the truth. Hence, the [seller] always refused any agreement to an exclusive transportation of the goods by truck.

The [buyer]'s reference to the [seller]'s fax of 21 December 1993 (act. 3/6) does not ensue anything else. The [seller] submitted a new offer in that fax, but the [buyer] has never accepted it. The price, as set forth in this new offer, was based on exclusive transportation of the goods by truck. The price for the goods was therefore higher than the purchase price as

set out in the pro-forma invoice dated 17 December 1993. This new offer was contingent on the confirmation by the [seller]'s carrier on the availability of the necessary trucks in order to transport the goods. It is further worth noting that the [seller] would have been able to arrange those trucks only after the opening of a confirmed letter of credit as requested (act. 12/4). The [buyer]'s payment instruction of 17 December 1993 was based on the pro-forma invoice issued at the same day. Henceforth, this payment instruction was not a result of the negotiations and discussions between the parties but of the pro-forma invoice (act. 12/4).

3.4
[Arguments of the parties concerning the conditions for delivery]

The [buyer] introduced the [seller] to company «D: HC» [hereinafter D] which mandated that [buyer] order the Alkohol Royal Feinsprit from the [seller] (act. 1/5, 12/5). According to the statements of the [buyer]'s representative during the hearing of the District Court on 19 June 1996, the [buyer] only introduced these parties to each other, after it had already rescinded the sales contract but was, nonetheless, still interested in the performance of the trade in Alkohol Royal Feinsprit (act. 23/3).

[Assertions of the buyer regarding the delivery period]

The [buyer] asserts that [D] expressly notified the [seller] in a letter dated 27 December 1993, that a combined transportation by truck and train is, under any circumstances, absolutely unacceptable for [D] (act. 1/5, 3/10). In the same letter, [D] referred to a delivery and transportation period of 10 to 14 days, to which the parties apparently agreed under the provisions of the sales contract. According to the [seller]'s written response of 28 December 1993 to [D], the [seller] denied even having ever talked about the aforementioned delivery and transportation period of 10 to 14 days for the goods. During the negotiations between the parties about the sales contract, the [seller] was of the opinion, that the parties spoke, in fact, only about a delivery period of 15 to 20 days. In the same letter, the [seller] itself might have referred to its representation and warranty to deliver the goods exclusively by truck to Moscow (act. 1/5, 1/6). Henceforth, the [buyer] might have indicated in its letter of 30 December 1993 to the [seller], that the parties had already agreed to a delivery period of 10 to 14 days (act. 1/6, 3/12).

[Assertions of the seller regarding the delivery period]

The [seller]'s representative declared at the hearing of 9 June 1993 that, on his understanding, the [buyer] rescinded the sales contract on 14 March 1994 (act. 23/10). In the light of the agreed delivery period, the [seller] argues that it originally submitted an offer for the delivery of the goods ex factory (transportation by train) by 15 January 1994 at the latest. This offer was contingent on the opening of a letter of credit in favor of the [seller] by 30 December 1993 at the latest. The [seller] only mentioned a delivery and transportation period of 10 to 14 days in its offer of 21 December 1993. However, this offer referred to transportation by truck and the [buyer] has never accepted it (act. 12/5). In its letter dated 28 December 1993, extension to [D], the [buyer] entirely confirmed and accepted all conditions for the delivery

and transportation, as set out in the [seller]'s pro-forma invoice of 17 December 1993. These conditions were:

(i)
Delivery of the goods ex factory by 15 January 1994 at the latest, if the letter of credit were opened by 3 January 1994 at the latest; and

(ii)
If the letter of credit were not opened at that time, the transportation of the goods would be performed by the end of January 1994 at the latest (transportation by train always takes 15 days, plus approximately one or two more days; that additional time is usual for this route and distance).

According to [D]'s letter dated 27 December 1993, one has to reconcile that [D] itself was not clear about the mode of transportation, hence [D] only excluded therein a combined transportation but did not decide to have the goods transported exclusively by truck. This ensues from [D]'s question on the expenses of transportation by train (act. 12/5). Therefore, the [buyer] was simply interested in suppressing its non-performance of a fundamental prerequisite of the sales contract within the given time period. Hence, it did not have the requested letter of credit opened and confirmed within the aforementioned time period. The [buyer] could have never expected a delivery of the sold goods, i.e., the Alkohol Royal Feinsprit, before the opening of the letter of credit (act. 12/6).

3.5
[Buyer's outline of the dispute between the parties upon the agreed purchase price]

The [buyer] further argues that the [seller] first notified the [buyer] in its fax dated 30 December 1993 (act. 3/13), that it:

(i)
makes a claim of damages; and

(ii)
will set-off this claim of damages against the pre-paid amount of US $23,730, if the [buyer] does not perform and execute the sales contract under the conditions agreed therein.

The parties have never agreed to the liability of the [buyer] to pay for damages suffered by the [seller] by virtue of non-compliance with the prerequisites as set forth in the sales contract. The [seller] undermined the importance of the delivery period which should have been corrected, because the [seller] insisted nonetheless on the opening of the letter of credit as fast as possible (act. 1/6). One might conclude from the [seller]'s fax of 30 December 1993, that the parties have agreed to a delivery and transportation period of 10 to 15 days. Hence, the [seller] has not expressly denied having altered the aforementioned delivery period to a period of 15 to 20 days and further it has not denied that a combined transportation of the goods to Moscow might be impossible within a period of 10 to 15 days. The [buyer] did not

have the letter of credit opened in favor of the [seller], since the [seller] did not act in compliance with the provisions of the sales contract any longer when it arbitrarily and under breach of contract intended to deliver the goods via a combined transportation (act. 17/5, 23/5).

[Arguments of the buyer regarding the inclusion of the transportation costs in the original offer of 17 December 1993]

After that, the [buyer] stated once again in its letter of 31 December 1993 (act. 3/14) under which conditions (i) the parties entered into the sales contract; and (ii) the [buyer] arranged the transfer of the requested advance payment on the [seller]'s account. The [buyer] further requested the [seller] to declare under which conditions would it be in a position to commence the transportation of the sold goods to Moscow (act. 1/7 and 3/15). The [seller] distanced itself from the provisions set out in the agreed sales contract as, in [seller]'s letter of 3 January 1994, it requested a purchase price of US $0.99 per litre of Alkohol Royal Feinsprit as well as additional transportation costs of DM 12,000 or DM 13,000 per truck approximately. Henceforth, the [seller] might have unilaterally altered the sales contract already agreed (act. 1/7 and 3/15). Thereafter, the [seller] submitted to the [buyer] a new and altered offer in its letter of 7 January 1994. The purchase price should thereupon be US $0.99 per litre of Alkohol Royal Feinsprit plus US $0.24 per litre regarding the additional costs for the transportation by truck (act. 24/19). The [buyer] expressly denied the acceptance of this new offer because it was not in compliance with the already agreed provisions of the sales contract dated 17 December 1993, i.e., US $1.13 per litre Alkohol Royal Feinsprit including any costs of transportation by truck (act. 23/1, 23/2).

[Application for a recovery order regarding the advance payment by the buyer]

The [buyer] requested the [seller] to redeem the advance payment amount of US $23,730, transferred to the [seller]'s account on 17 December 1993, because it could not accept those new conditions for the sales contract (act. 3/16, 23/8). By registered post of 25 January 1994, the [buyer] reminded the [seller] that it is obliged to meet its re-payment obligation in respect of the amount paid in advance. The [seller] did not react in any respect upon the reminder (act. 1/7 and 3/17). On 1 March 1995, the [buyer] had a recovery order delivered to the seller through the Prosecution Office, District Saane. Then, the [seller] pleaded against this recovery order at the competent authority (act. 1/8 and 3/18).

[Outline of the dispute upon the opening of the letter of credit]

The [seller] argues that the opening of a letter of credit was an inevitable prerequisite for any further progress regarding the performance under the sales contract, and that the [buyer] also accepted this prerequisite based on the countersigned pro-forma invoice of 17 December 1993 (act. 12/6, 23/11).

With reference to the [buyer]'s letter of 31 December 1993 (act. 12/6, 23/11), the [seller] demonstrates that the [buyer] asked for rescheduling the lapsed time period for the opening

of the letter of credit. Furthermore, the [seller] should have been obliged to offer to the [buyer] once again an altered transportation scheme for the transportation of the goods (act. 12/6). According to a telephone call between the parties, dated 31 December 1993, the [seller] should have even been obliged to submit to the [buyer] a new offer for the sale of Alkohol Royal Feinsprit without any delivery and transportation. The [seller] further indicated to the [buyer] how important the opening of the letter of credit was, as the [seller] may only then be in the position to meet all other time periods as set forth in the sales contract (act. 12/6, 13/2]. On 9 January 1994, the [buyer] informed the [seller] that the opening of the letter of credit might take place only on 10 January 1994. Due to the fact that this prospective opening date was once more not within the scheduled period, the [seller] ought to seek rescheduling of the delivery dates with its bottling-supplier. The [seller] gave notice to the [buyer] with regard to those rescheduled dates for delivery. Contemporaneously, the [seller] further requested the [buyer] to give notice of the specified date for the opening of the letter of credit (act. 12/7, 13/3).

[Seller's arguments for the justification of his counterclaim]

On 9 January 1994, the [buyer] might have requested the [seller] to enter into a sales contract with a Mr. D of the company «GT.D i A» regarding the delivery of 300,000 litres of Alkohol Royal Feinsprit at a fixed purchase price of US $363,000. The [seller] did not accept this offer because the [buyer] might have delayed any further progress regarding the performance of the sales contract up to that point of time and did not grant any kind of guarantee in favor of the [seller] (act. 12/7, 13/4a and 13/4b).

In a letter of 15 January 1994, the [seller] stipulated for the last time a final period for the acceptance and taking delivery of the sold goods. Therein, the [seller] further indicated that it might retain the pre-paid amount as equivalent to its claim of damages, if the [buyer] (i) neither paid the overall sum in the amount of US $339,000 (ii) nor effected the opening of the letter of credit in favor of the [seller] by 28 January 1994 at the latest. Hence the [seller] had already used the advance payment to pay its orders for the Alkohol Royal Feinsprit in regards to its suppliers (file 12/7, 13/S). The [buyer] was not interested at all to either send a response to the aforementioned [seller]'s letter or even to effectuate any of the [seller]'s requests.

In opposition, the [buyer], in its letter of 25 January 1994, requested the repayment of the advance payment (US $23,730) (act. 12/7 and 3/17). After this request, the [seller], in its letter dated 14 March 1994, informed the [buyer] that it was obliged to resell the 300,000 litres of Alkohol Royal Feinsprit sold under the sales contract between the parties for a purchase price of US $300,000 in order to avoid incurring any further damages. The present damages, as incurred, amount to US $39,000 comprising loss of profit, excluding any out-of-pocket expenses and other ancillary costs. The [seller] set-off the aforementioned amount of claimed damages against the pre-paid amount of US $23,730 which the [seller] has retained in order to cover its damages. Consequently, the [buyer] is still liable to pay the [seller] an amount of US $15,270. Therefore, the [seller] herewith makes a claim for the payment of US $15,270. The [buyer] has not fulfilled the [seller]'s request for payment of the aforementioned amount, i.e., the remaining amount after the set-off (act. 12/8, 13/6 and 13/7). Furthermore, the

incurred out-of-pocket expenses and ancillary costs, i.e., any costs for the activities due to the various offers, the entire correspondence by post with the [buyer] (including telephone costs to P) and unexpected storage costs, amount to a further Sf 3,000 (act. 12/9).

[Buyer's arguments regarding the counterclaim]

The [buyer] expressly denies that the [seller] was actually obliged to sell the 300,000 litres of Alkohol Royal Feinsprit for a price of US $300,000. Consequently, the [buyer] asserts that the [seller] has not suffered any loss of profit. Furthermore, the [buyer] expressly denies that storage costs and other out-of-pocket expenses or ancillary costs occurred in the amount of Sf 3,000 (act. 17/6).

[DISTRICT COURT'S SUMMARY OF THE FACTS]

In conclusion, there is a dispute between the parties regarding the means of transportation and delivery period the parties agreed upon. As a result, the [buyer] did not have the letter of credit opened within the time agreed between the parties. Finally, the letter of credit has never been opened. The [seller] refused to take delivery of the goods as long as the letter of credit was not opened. The agreed transaction has never been executed and performed. Consequently, the [buyer] claims for the repayment of the advance payment of US $23,730 dated 17 December 1993. The [seller] is willing to set-off this amount with damages, i.e., loss of profits, it incurred in the amount of US $39,000. Additionally, the [seller] claims for a further amount of Sf 3,000 (out-of-pocket expenses, ancillary costs and unexpected storage costs). The [buyer] expressly denies that the [seller] really suffered damages by virtue of the sale of the goods at a cheaper price and by virtue of unforeseeable and unexpected storage costs.

4.
[LEGAL ANALYSIS BY THE DISTRICT COURT]

After the [buyer] had contacted the [seller], the [seller] submitted a written offer within a pro-forma invoice dated 17 December 1993. The [buyer] countersigned this written offer and sent it back to the [seller] on 17 December 1993. Therefore, the parties entered into an agreement. Thereby, the parties agreed upon:

- The form, kind and quantity of the product (300,000 one-litre bottles of «Alkohol Royal Feinsprit 96%»);

- The price as consideration (acquisition and transportation price in total: US $339,000); and

- The destination for delivery of the goods sold (Moscow).

The parties further agreed to the following prerequisites for the goods to be delivered ex factory by 15 January 1994 at the latest:

- A payment on the [seller]'s account to be effected in the amount of 7% of the overall purchase price due, i.e., US $23,730 on 17 December 1993; and

- A letter of credit (irrevocable, confirmed, transferable and divisible) to be opened with a western European universal bank, whereby this letter of credit should be payable at the delivery of the goods ex factory and presentation of the relevant CMR [*] - documents.

In the light of those further agreements, the parties also agreed on (i) the amount that the [buyer] should pay in advance, (ii) the time period for the delivery of the goods, (iii) the place for and date of payment as well as (iv) the mode of payment. However, the parties did not agree in writing on the mode of transportation and the period for the delivery of the goods.

4.1
[Legal classification of the sales contract]

The agreement, which the parties entered into on 17 December 1993, is to be classified as an international sales contract (delivery of and transfer of title on the goods against payment of the purchase price). In particular, the parties' contract is further to be classified as a purchase of fungible goods, whereby the sold goods shall be delivered to a place other than the place of performance.

[Determination of the governing law]

In the light of any international case, one has to give an answer to the question which law shall be applicable and govern the relevant sales contract. In this case, the parties have not agreed on the governing law.

If the parties to a sales contract have their establishment in different States, being member States to the CISG, when they enter into their sales contract, the CISG shall be applicable and govern the contract (Art. 1(1)(a) and Art. 100(2) CISG). According to Art. 10(a) CISG, a company has always an establishment at such a locality from which the company carries out significant trading activities. If there are various different establishments, the relevant one regarding the determination of the governing law for the sales contract will be the one which has the «closest relationship» with the sales contract, its performance and execution.

The [buyer] has its head office in Austria and, from a legal perspective, the [seller] is an establishment incorporated in Switzerland (act. 3/2). The CISG has been implemented and entered into force in Austria on 1 January 1989 and in Switzerland on 1 March 1999. Due to the fact that the parties' establishments are within the territory of member States to the CISG, the parties' sales contract is an agreement to an international sale of goods and the parties did not exclude the application of the CISG pursuant to Art. 6 CISG, thus, the CISG is immediately applicable to international sales contracts as a special branch of the law (see Keller/Siehr, Law of Sale, 3rd reviewed and supplemented edition, Zürich 1995, p. 163, 168 et. seq.; Honsell, Swiss Law on Obligations, Special Division, Bern 1991, p. 100 et. seq.).

4.2
The [seller]'s offer to the [buyer] of 17 December 1993 satisfied the test of Art. 14 CISG in respect of being sufficiently specified and detailed. Hence, it contained (i) the specification of and information about the goods and (ii) the determination of the quantity and purchase price. The [buyer] accepted this offer by countersigning the pro-forma invoice and re-sending it at the same day to the [seller] (see Art. 18 CISG). Consequently, the parties entered into a sales contract on 17 December 1993 (see Art. 23 CISG).

4.3
[Legal analysis whether or not the parties agreed to an exclusive mode of transportation]

a)
[Summary of the parties' arguments brought before the Court]

It is in dispute between the parties which means of transportation they have agreed upon. The [buyer] asserts that it expressly clarified that it could only accept as exclusive mode of transportation a delivery by trucks. The [seller] might have agreed via telephone with this proposal regarding the means of transportation. Only after the [buyer] had provided for the transfer of the advance payment of US $23,730 did the [seller] suggest that the goods sold should be transported to Moscow via a combined transportation by train and truck (act. I/3, I/4, 1' 7/3 and 17/4). In opposition thereto, the [seller] argues that it has never undertaken the obligation to transport the goods exclusively by truck. Furthermore, if there were such a request, the [seller] would have been obliged to expressly deny such a prerequisite for the delivery, i.e., exclusively by truck, since one might not be able to organize such transportation by truck during bank holidays; even if one organizes such transportation, it might incur more costs than transportation by train. In the light of the purchase price offered for the goods including their delivery, the [seller] maintains that the [buyer] should have realized that this offer could not have limited the means of transportation exclusively to a delivery by trucks (act. 12/3].

b)
[Legal opinion of the Court on an agreement of the parties to a specific mode of transportation]

The parties did not agree to any specific mode of transportation in the pro-forma invoice of 17 December 1993. The [buyer]'s representative mentioned in his statement at the District Court's hearing of 19 June 1996 that the parties orally agreed to transportation exclusively by trucks at any time thereafter. This statement is in contrast to the given statement by the [seller]'s representative who asserts that the parties never agreed to transportation of the goods exclusively by trucks. The [buyer] only wished, respectively asked for a supplement to the sales contract, in which the parties should agree to a specific mode of transportation. But, the [buyer] mentioned its request only after the execution of the pro-forma invoice, i.e., entering into the sales contract (act. 23/2 and 23/9).

In its letter of 8 July 1996, the [buyer] further requested the Court to take evidence by hearing Ms. LA, a member of the [buyer]'s board. Ms. LA wished to give evidence in respect of every oral agreement via telephone regarding the transportation of the goods by truck. In fact, she might have listened to all various negotiations between the [buyer]'s representative (its spouse) and the [seller]'s representative through the [buyer]'s telephone equipment that is suitable for listening in (act. 26). The Court denied the admission of Ms. LA as a witness. In fact, it appears as being credible that this witness, as offered by the [buyer], listened in the conversations of and negotiations between the parties. However, the proposed witness Ms. LA is a member of the [buyer]'s board. In this role as the [buyer]'s representative, she might have only confirmed the statements which the [buyer]'s procedural representative already made at the court hearing of 19 June 1996. Therefore, a hearing of Ms. LA as further witness would not have brought out any further facts, which would be a supplement to the facts already stated by the District Court. The [seller]'s statements would have been further in opposition to the [buyer]'s, so that there might not be any alteration regarding the onus of proof and status of the given evidence.

The District Court can base its decision on the issue whether or not the parties agreed to a specific mode of transportation merely on the documents presented and files besides the opposing statements of the parties:

aa)
[Impact of the CIF clause on the question whether or not there was an agreement to a specific mode of transportation]

In the pro-forma invoice, the parties agreed that the purchase price for the sold goods should be US $339,000. The parties further agreed therein that this purchase price is calculated on the basis as being «CIF Moscow» (act. 3/3). The [seller] argues that this provision means that the purchase price payable under the sales contract comprises «all costs for the goods sold, for their insurance and for the freight to the main station of Moscow» (act. 21/2). According to Incoterms 1990, this CIF clause refers to an offshore or inland transportation on vessels and shall mean: «Cost, Insurance and Freight ... (named port of destination).» In the light of such a CIF clause, the risk of loss of the goods should pass to the [buyer] at the place of delivery. The purchase price should include all costs for the delivery of the goods to the specified place of destination and the [seller] is to have the goods insured (act. 27/1 and 27/2). Since Moscow is not a seaport, the CIF clause could not mean that the goods should be transported on a vessel.

Consequently, the provision in the pro-forma invoice («the price is calculated on the basis as being CIF Moscow») shall mean that, on the one hand, the purchase price of US $339,000 includes all transportation costs; and, on the other hand, this provision addresses the place for delivery, the pass over of the risk of extinction, the costs for and the insurance of the goods. However, this CIF clause does not give any hints to the agreed mode of transportation.

bb)
[Impact of a new submitted offer of the seller on the aforementioned question]

In the [seller]'s fax dated 21 December 1993 (act. 3/6), it reffered to the quantity of the goods, sold under the sales contract, as «14,000 bottles/container, 2 Container/truck.» Therein, the [seller] explicitly defined the mode of transportation. But the purchase price of DM 615,000, as stated therein, was not in compliance with the already agreed purchase price for the goods, as set forth in the pro-forma invoice of 17 December 1993. According to an assumed average exchange rate between DM and US $ at 1.7097 in December 1993, this altered purchase price corresponded to a total amount of US $359,712.20, i.e., US $1.199 per bottle of Alkohol Royal Feinsprit. The [buyer] has never accepted this new and altered offer of the [seller] (file [*] 23/7).

cc)
[Impact of [D]'s letter of 27 December 1993 on the aforementioned question]

[D] was the company that charged [mandated] the [buyer] to acquire and arrange the transportation of the goods. In the light of the letter [D] addressed and sent to the [buyer] dated 27 December 1993, one has to conclude that [D] did not make a decision in respect of the mode of transportation to be used under the sales contract (act. 3/10). In fact, [D] expressly excluded therein a combined transportation by train and truck. However, [D] did not stipulate a specific mode of transportation. Therefore, this issue was still unsettled. [D] did not clarify which mode of transportation should be used instead of a combined transportation for the delivery of the goods under the sales contract. One concludes the aforementioned fact of lack of clarification by [D] according to No. 2 of the aforementioned letter. Therein, [D] stipulated that the goods should be transported exclusively by truck, only if [D] determined that such a mode of transportation should be used. Furthermore, [D] asked for the costs of a transportation by train calculated on a basis as being CIF Chop, CIF Moscow, or CIF Irkutsk. The fact that [D] as the [buyer]'s mandator mentioned the expression «CIF Moscow» with regard to a transportation of goods by train, can be interpreted in two different ways:

This fact may indicate either that the abbreviation «CIF» did not have any impact on a possible agreement between the [seller] and the [buyer] on a specific mode of transportation, or that the parties also considered transportation by train through the expression «CIF Moscow», as used in the pro-forma invoice of 17 December 1993.

In its letter of 31 December 1993, the [buyer] asked the [seller] to submit a new offer for the transportation of the goods by truck calculated on the basis as being «CIF Moscow.» Therein, the [seller] should separately indicate the price for the transportation (act. 3/14). The [seller] responded and informed the [buyer] that the net sum, to be paid for one litre of the goods ex factory, was US $0.99. Transportation of the goods to Moscow might amount to DM 12,000 or DM 13,000 per truck. However, it is extremely burdensome to organize trucks, hence the [seller] is only in the position to deliver the goods sold by train (container) (act. 3/15).

The [seller] submitted a new and revised offer to the [buyer] in its letter of 7 January 1994. Thereupon, the [seller] might only sell the Alkohol Royal Feinsprit on the term ex factory for a purchase price of US $0.99 (in total: US $297,000) and the [buyer] should be obliged to pay

the transportation costs, i.e., US $0.24 per litre, directly to the relevant carrier (act. 24/19). The [seller] gave reasons for this new offer insofar as the increased transportation costs might not be covered by the agreed purchase price of US $1.13 (in total: US $339,000). Hence, in the light of a transportation by truck, the purchase price amounts to US $0.99 plus additional transportation costs of US $0.24 (total sum: US $1.23 per litre). The [buyer] rejected this offer too, because it was not in compliance with the agreed provisions of 17 December 1993 (act. 23/1 and 23/2).

The [buyer] in its letter of 9 January 1994 requested that the [seller] enter into a sales contract directly with «G. T D i A» in respect of the 300,000 litres of Alkohol Royal Feinsprit. Thereupon, the goods should be delivered by exclusively truck and the purchase price should amount to US $1.21 (in total: US $363,000) (act. 13/4a and 13/4b). The [seller] did not even react to this request (act. 12/7).

All activities of the parties, as carried out after 21 December 1993 (fax of the [seller], act. 3/6), indicate that both parties petitioned for a supplement to the sales contract of 17 December insofar as they both wanted to agree on a specific mode of transportation by truck. The parties could not agree by virtue of dissenting opinions in respect of the purchase price. Under the assumption of a fixed sales price of US $297,000 for the Alkohol Royal Feinsprit, one can ascertain that the transportation costs - as indicated in the [seller]'s offer letters dated 21 December 1993 (act. 3/6) and 7 January 1994 (act. 24/19) and in the [buyer]'s offer letter of 9 January 1994 (act. 13/4b) - were approximately US $20,000 or US $30,000 more expensive than the transportation costs as indicated in the pro-forma invoice. Such a great difference might be an indication that the purchase price of US $339,000, as set out in the pro-forma invoice, could not have included transportation by truck.

The statements of the parties are in opposition to each other in respect of the agreed mode of transportation (see No. 4.3 above). In the light of the files of the Court, there are even more indications for than against [the conclusion] that the parties did not agree to transportation by truck within the pro-forma invoice of 17 December 1993. The District Court, however, has not reached the necessary certainty regarding this issue which is in dispute between the parties. As a result, the general rules for the allocation of the onus of proof do apply.

The CISG does not contain any rules regarding the onus of proof. Therefore, one has to reconsider the private international law of the relevant jurisdiction of the lawsuit pursuant to Art. 7(2) (second part) CISG (see Reller/Sichr, Law on Sales Contracts, 3rd revised edition, Zürich 1995, p. 173). According to Art. 118 IPRG [*] in connection with Art. 3 S. 2 Hague Convention [*], Swiss substantive and procedural law is applicable. According to Art. 8 ZGB [*], the party that asserts the existence of a fact and claims to derive any rights from this fact bears the onus of proof, unless as otherwise provided by law.

ee)
[Conclusion of the Court regarding the choice of the mode of transportation]

The [buyer] has not given evidence for the fact, on which its claim is inter alia founded, that the parties in their agreement of 17 December 1993 agreed to an exclusive transportation of the goods by truck. Hence, the [buyer] has to bear the consequences of this lack of giving evidence (BGE [*] 107 II 275). As a result, the dispositive law of the CISG [*] is applicable in this case, in particular, Art. 32(2) CISG. Under Art. 32 CISG, a seller who is obliged to provide for the transportation and delivery of the goods, must enter into any agreements which might be necessary to meet his obligation, i.e., the transportation of the goods to the determined destination. Thereby, a seller has to choose such a means of transportation as appears appropriate in the specific circumstances and necessary to the general terms for such transportation. In this case, the [seller] had to provide for the transportation and delivery of the goods. The District Court gathers the aforementioned fact from the statements of the parties in the hearing of the Court of 19 June 1996 as well as from the correspondence of the parties after 17 December 1993. Hence, the choice of the mode of transportation was in the [seller]'s own discretion, who, in opposition to the [buyer], already had experience with regard to transactions with Alkohol Royal Feinsprit in Russia (act. 23/3, 12/3). Therefore, one cannot blame the [seller] with an anticipated breach of contract because of its choice of the mode of transportation, i.e., transportation of the goods by train.

4.4
[Dispute regarding the duration period for the delivery of the goods]

The parties have a further dispute over the duration period for the delivery of the goods, to which they have agreed (see the No. 3.3 above).

The parties agreed in the pro-forma invoice of 17 December 1993, that the goods shall be delivered ex factory by 15 January 1994 at the latest, provided that the [buyer]:

(i)
arranges for payment of US $23,730 to the [seller]'s account on 17 December 1993; and

(ii)
opens a letter of credit, which shall be due and payable at the delivery of the goods ex factory and at presentation of the CMR [*] - documents (act. 3/3).

But the parties in their written agreement of 17 December 1993 did not agree to any duration period during which the transportation should be carried out.

The [seller]'s fax of 21 December 1993, which determines a delivery period of a maximum of 10 to 14 days after the receipt and acceptance of the payment guarantee, is a new offer for transportation by truck. The [buyer], however, did not accept this new offer (act. 3/6). Henceforth, the [buyer] cannot argue that the parties in their agreement of 17 December 1993 might have agreed to a delivery period of 10 to 14 days.

The duration for the transportation and delivery coincides with the means of transportation. The [seller] had the right to choose a mode of transportation that is reasonable and suitable

in the specific circumstances of the case (see No. 4.3 above). Since the parties did not agree to a specific duration period for the delivery of the goods, this period would have been the equivalent to the time that a transportation usually takes via the chosen mode of transportation for such a distance (see art. 33(b) CISG). In this case, it is further important, that the commencement of the delivery of the goods was contingent on the opening of the letter of credit. Consequently, the aforementioned usual duration period would have started only after satisfying this prerequisite.

STATEMENT OF FACTS AS ESTABLISHED BY THE DISTRICT COURT

The Court states the fact that the [buyer] has not met its obligation to have the letter of credit opened by 30 December 1993. [Buyer] insisted on a transportation of the goods by truck, but the [seller] had the right to choose the suitable means of transportation. The [buyer] also did not meet this obligation, even if the [seller] rescheduled that opening period up to 3 January 1994, thereafter up to 10 January 1994 (act. 3/13, 3/14, 24/19, 13/4b and 13/3). As a result, the [seller] did not arrange for the delivery and transportation of the goods ex factory. Furthermore, the [seller] stipulated a final period up to 28 January 1994 during which the [buyer] should have opened the letter of credit and accepted the goods sold (act. 13/5).

The [buyer] caused a delay in the delivery of the goods by virtue of its breach of the contract. The delivery has never been performed and the goods could not be transported. However, the [seller] is not to be held liable for an anticipated breach of contract merely because it assumed another period for the delivery of the goods. The [seller] calculated a duration period for transportation by train, which it could validly choose, and it informed the [buyer] about the duration of the transportation under such circumstances.

5.
[Avoidance of the contract]

The sales contract, which the parties concluded on 17 December 1999, has not been performed by either the [seller] or the [buyer]. Henceforth, one has to examine the further issues: (i) who rescinded the contract; (ii) who was entitled to rescind; and (iii) when was a declaration of avoidance effective.

5.1
[Avoidance of the contract by the buyer]

The [buyer] argues that it rescinded the sales contract after it had transferred the requested advance payment to the [seller]'s account on 17 December 1993, but in any case before 21 December 1993. Everything that happened thereafter was part of new and separate negotiations between the parties. However, during these new negotiations, the [buyer]'s incentive was limited to being an intermediary between [D] and the [seller] (act. 23/6 and 23/7).

The CISG does not use the expression «rescission» of the contract but declaration of avoidance of the contract (Arts. 49, 64 and 81 et. seq. CISG). The party that petitions for the avoidance of the sales contract must expressly declare the agreement avoided vis-á-vis the opposite party so that there are not any remaining doubts upon the incentive of the petitioning party. Hereby, the declaring party exercises a right to influence the parties' contractual relationship by his unilateral declaration. Hence, such a declaration has the same effect as the declaration of a rescission. However, such a declaration of avoidance must be explicitly recognizable and realizable to the other party (Keller/Siehr, op. cit. p. 200).

The [buyer] entered into the sales contract with the [seller] due to an order by and on behalf of [D] but in its own name (act. 1/3 and 3/3). However, one cannot conclude from the files of the Court that the [buyer] declared the contract avoided before 21 December 1993. Furthermore, even the behavior carried out by the [buyer] does not appear as a hint to the [buyer]'s rescission of the sales contract. Hence, the [buyer] was obliged to expressly inform the [seller] about its incentive to declare the sales contract avoided, which the [buyer] entered into in its own name. In the light of its behavior, it was not obvious for the [seller] that all further activities carried out by the [buyer] should lead only to the entering and execution of a new agreement between the [seller] and [D]. Due to the fact that the new [buyer]'s offers have never been accepted, the sales contract has not been altered pursuant to Art. 29(1) CISG.

In its letter dated 15 January 1994, the [buyer] required the repayment of the advance payment, because the transaction might not be exercisable and realizable (act. 3/16). Only at that point was it obvious and recognizable to the [seller] that the [buyer] claimed the avoidance of the sales contract.

The [buyer] declared the sales contract avoided because the [seller] was unwilling to transport the sold goods timely to Moscow by truck for the agreed purchase price, albeit it was obliged to do so under the sales contract (act. 1/8, 1/9). As already mentioned above, the [buyer] did not prove that the parties agreed to an exclusive transportation of the goods by truck in their sales contract of 17 December 1993. As a result, the [seller] had the right to choose the mode of transportation, which was suitable regarding the circumstances of the case, pursuant to Art. 32(2) CISG (see No. 4.3 above). Further, the parties did not agree in writing on the actual duration period for the delivery of the goods. Hence the goods should have been delivered after leaving the [seller]'s factory within the period which was usual for transportation by the chosen mode of transportation (see No. 4.4 above). Finally, the [seller] did not provide for the delivery of the goods, since the [buyer] delayed the opening of the letter of credit in a breach of the sales contract.

In the light of the aforementioned reasoning, the [seller] cannot be held liable for an anticipatory breach of contract. Therefore, the [buyer] was not entitled to declare the sales contract avoided on 15 January 1994 pursuant to Art. 72(1) CISG. It is worth noting that Arts. 49(1)(b) and 47(1) CISG are also inapplicable, because the [seller] was not obliged under the sales contract to arrange for the repayment of the advance payment amount of US $23,730. In its letter of 15 January 1994, the [buyer] stipulated to the [seller] a period of grace up to the lapse of the third calendar week in 1994. [Buyer] also sent a reminder to the [seller] on 25

January 1994 and even rescinded the sales contract at that time. However, in the light of the aforementioned facts, all of those activities and actions were absolutely irrelevant. As mentioned above, the [buyer] cannot argue that it was entitled to rescind the sales contract or declare it avoided because of an anticipatory breach of contract conducted by the [seller] (see Art. 72(1) CISG).

5.2
[Declaration of avoidance of the sales contract regarding the non-opening of a letter of credit]

The parties further agreed in the pro-forma invoice dated 17 December 1993 that the [buyer] must have a letter of credit opened by 30 December 1993 at the latest, which should be due and payable at delivery of the goods ex factory and at the presentation of the CMR [*] documents (act. 3/3). The [seller] repeatedly stipulated a period of grace in respect of the opening of the letter of credit. At first, the [seller] rescheduled the period to 3 January 1994 and, thereafter, to 7 and finally 10 January 1994 (act. 3/13, 24/19, 13/3). In its letter of 15 January 1994, the [seller] stipulated a final time period until 28 January 1994 for (i) either the payment of the purchase price or (ii) the opening of the letter of credit and the acceptance of the goods sold. If the [buyer] did not meet the requirements as set out in the aforementioned letter, the [seller] would use the advance payment amount of US $23,730 to satisfy its claim of damages. Furthermore, the [seller] would then deny any further performance and acceptance of the goods by the [buyer] under the sales contract (act. 13/5). The [seller] stipulated herewith a period of grace regarding the performance of the [buyer]'s contractual duties until 28 January 1994. At the same time, it expressly declared the avoidance of the sales contract by virtue of denying any further performance and acceptance under the sales contract, if the [buyer] did not meet the requirements as set out in [seller]'s final request to the [buyer] to perform.

A buyer is obliged not only to pay the purchase price, but also to take such steps and to comply with such formal requirements as may be appropriate and necessary to actually perform and guarantee the payment of the purchase price under a sales contract (see Art. 54 CISG). The [buyer] did not meet its contractual duty and obligation to have a letter of credit opened at the stipulated date (at first on 30 December 1993, then several times rescheduled up to 10 January 1994).

Under Art. 63(1) CISG, a seller is henceforth entitled to stipulate to the buyer a reasonable period of grace so that the buyer should fulfil its contractual obligations. A seller is further entitled to declare the avoidance of the sales contract, if the buyer does not fulfil its obligations either (i) to pay the agreed purchase price or (ii) to take delivery of the goods within the stipulated time period (Art. 64(1)(b) CISG). The [seller] stipulated exactly such a period of grace and expressly declared the avoidance of the sales contract in its letter of 15 January 1994. In the light of this request, the [buyer] could obviously and unambiguously realize what the [seller] sought to express, i.e., the declaration of the avoidance of the contract, if the [buyer] does not fulfil its contractual obligations (act. 13/5). The [seller] was also entitled to stipulate such a period of grace and declare the avoidance of the contract

because the [buyer] did not meet its contractual obligations (i) to pay the purchase price and (ii) to provide for the agreed mode of payment within the stipulated period.

5.3
[Consequential rights after the declaration of avoidance of a sales contract]

The avoidance of the sales contract discharged both the [seller] and the [buyer] from any duties and liabilities under the contract, except any possible claims for damages (Art. 81(1) sentence one CISG). If one party under a sales contract has already fulfilled all or part of his contractual duties and liabilities, that party is entitled to reclaim such performance from the other party (Art. 81(2) sentence one CISG).

In the pro-forma invoice dated 17 December 1993, the parties agreed that the [buyer] shall arrange for a payment to the [seller]'s account in an amount of US $23,730 on 17 December 1993 (act. 3/3). The [buyer] gave the instruction for this advance payment on 17 December 1993; the payment transfer was also settled at the same day (act. 1/4, 3/7). Henceforth, the [buyer] paid partly the purchase price owed under the sales contract. The [seller] does not assert the opposite in this respect, because it is willing to set-off that advance payment with its claimed damages incurred in amount of US $39,000 (act. 12/8, 3/13 and 13/5). Therefore, the [seller] is held liable to repay the advance payment amount of US $23,730.

In opposition, the [seller] has not performed its obligation to deliver the goods and henceforth the [seller] is not entitled to reclaim anything.

[Interest owed on the sum due and payable for repayment after the effectiveness of the avoidance]

If a seller is obliged to repay the relevant purchase price, it has to further pay accrued interest on this amount since the day of actual payment (Art. 84(1) CISG). The CISG has not implemented a rule about the actual figure of the interest rate which one can claim pursuant to Art. 84(1) CISG. Consequently, the figure of the owed interest rate is calculated according to the law of that State whose law is the governing law of the sales contract. Thereby, the governing law has to be decided pursuant to the private international law of the court that is hearing the case, i.e., the forum's private international law (Art. 7(2) second clause CISG). According to Art. 118 IPRG [*] and Art. 3 S. 2 Hague Convention, Swiss law is the governing law with regard to the sales contract and is applicable. Therefore, the interest rate is 5% pursuant to Art. 73(1) OR [*]. In this case, the owed interest rate is not founded on a default by one party, so that Art. 104(3) OR is not applicable. On the one side, the [seller] was not in default in respect of his obligations under the sales contract but, on the other side, [seller]'s obligation did not comprise the performance of payment of owed money, but the delivery of the sold goods. Only when the [seller] declared the avoidance of the sales contract, did [seller] become liable to repay the pre-paid amount to the [buyer], plus an accrued interest since that day of actual payment.

[Payment order of the District Court]

The [seller] is held liable to repay to the [buyer] the amount of US $23,730, plus accrued interest of 5% since 17 December 1993.

6.
[Reasoning of the decision on the seller's counterclaim]

The [seller] asserts that it was forced to sell the Alkohol Royal Feinsprit in order to prevent any further damages, after it had stipulated a final time period for the acceptance of the goods (act. 13/5) and this time period lapsed without any reaction of the [buyer] towards performance. The [seller] ordered the Alkohol Royal Feinsprit with its supplier, company «B. C L» (hereinafter mentioned as [B]), on 17 December 1993 after the receipt of the pre-paid amount. The purchase price was US $339,000. The [seller] could resell this Alkohol Royal Feinsprit just for a price of US $300,000. Consequently, the [seller] suffered damages, i.e., loss of profit, in the amount of US $39,000. Furthermore, the overall expenses for the activities regarding the several offers, the out-of-pocket expenses (post, mail, telephone costs) as well as the unexpected storage costs shall be assessed at an additional amount of Sf 3,000 (act. 12/9, 13/6 and 13/7).

6.1
[Consequences of the declaration of avoidance to the right to claim damages]

Art. 61(2) CISG explicitly stipulates the principle that a seller of goods does not forfeit its right to claim damages if it petitions for any other remedies. Therefore, the declaration of avoidance does not exclude any claim for damages. If a faithful seller entered into a covering purchase agreement, acting in the appropriate manner and within a reasonable time period after the declaration of the avoidance, it should be entitled to claim for the difference between the purchase price, as originally agreed, and the price as received under the covering purchase agreement; and any further and additional damages incurred (Art. 75 CISG; see Keller/Siehr, op. cit., p. 217 et. seq.).

Thereby, the [seller] bears the onus of proof in respect of any damages incurred.

6.2
[Weighing up the evidence regarding the damages incurred]

The [seller] gave evidence for its order by presentation of a receipt dated 18 December 1998, whereupon it ordered with [B] 300,000 litres of Alkohol Royal Feinsprit (concentration: 96%; type: Royal «Feinsprit») on 17 December 1993. The purchase price should be US $339,000 calculated on the basis as being «CIF Moscow». Furthermore, the [seller] was also obliged to make an advance payment of US $39,000 to [B] (act. 13/6). In a letter of 8 March 1994, [B] informed the [seller] about the fact that [B] had already sold those 300,000 litres of Alkohol Royal Feinsprit, which the [seller] had ordered for an overall purchase price of US $339,000 on 17 December 1993, to another purchaser for a price of US $300,000. Due to the fact that

neither the [seller] nor the buyer, i.e., the plaintiff in this case, paid the invoice as already sent out, the [seller] should be liable for the remaining difference between the aforementioned amounts, i.e., US $39,000. Thereby, this difference might be covered by the advance payment paid by the [seller] (act. 13/7).

The buyer countersigned the pro-forma invoice on 17 December 1993 and sent it back to the [seller] on the same day. Furthermore, the [buyer] arranged for the advance payment of US $23,739 to the [seller]'s account with its instructions dated 17 December 1993. This pre-paid amount was also credited to the [seller]'s account on the same day (act. 1/4, 12/4, 3/3 and 3/7). The [seller] asserts that it ordered the Alkohol Royal Feinsprit immediately after the receipt of the advance payment by the [buyer] (see act. 13/6 «... on the same day, on 17 December 1993 ...»). It is worth noting that this was well before the [buyer] should have provided the opening of the letter of credit (act. 23/11). It is more incredible rather than credible that the [seller] ordered such a large quantity of Alkohol Royal Feinsprit with [B] and paid in advance an amount of US $39,000 to [B]'s account, although the [buyer] paid in advance only an amount of US $23,730 and it did not arrange for the opening of a letter of credit. Furthermore, the behavior of the [seller]'s representative in the hearing of 19 June 1996 was also contrary to the assertion of the [seller]. Since the [seller]'s representative denied to give the details about the Italian supplier with whom [B] entered into a contract regarding the delivery of the Alkohol Royal Feinsprit (act. 23/11), the [seller] cannot demonstrate that [B] effectively ordered 300,000 litres of Alkohol Royal Feinsprit with [B]'s Italian supplier. [Seller]'s assertions are merely based on [B]'s letter of 18 December 1993, which does not contain any signature (act. 13/6).

After the [buyer], in its letter of 31 December 1993, had asked the [seller] for a revised offer in respect of the acquisition of the Alkohol Royal Feinsprit without any transportation, the [seller] notified the [buyer] that the net purchase price for one litre of the Alkohol Royal Feinsprit «96% Royal» should amount to US $0.99 (in total: US $297,000) ex factory, North Italy (act. 3/15, see also 24/19). The transportation costs were added to this purchase price, which varied from one means of transportation to another. The [seller] argued that his new and altered offer dated 21 December 1993 was more expensive because this new offer, in opposition to the previous one, was based on an exclusive transportation of the goods by truck rather than a combined transportation (act. 12/4). Under the assumption of an average exchange rate between DM and US $at 1.7097 in December 1993, the price of the new offer of 21 December 1993 equaled an amount of US $20,712. Thereby, the transportation costs amounted to US $42,000 and the [buyer] would have to pay US $297,000 for the Alkohol Royal Feinsprit according to the offer of 17 December 1993. In the altered offer of 7 January 1994 (act. 24/19), the transportation costs amounted to US $0.24 per litre Alkohol Royal Feinsprit (in total: US $72,000) whereby the [buyer] should directly pay to the Italian carrier all costs of transportation by truck. Hence these costs were US $30,000 more than in the pro-forma invoice of 17 December 1993. The [seller] even agreed that the [buyer]'s customers would have organized on their own the transportation of the goods (act. 13/2 and 3/5).

In the light of the latter offers of the [seller], it is clear that the price for the Alkohol Royal Feinsprit (in total: US $297,000) was fixed. Notwithstanding, the [seller] might have further agreed to alter (i) the sales contract in respect of the mode of transportation and (ii) consequently the overall price owed under the sales contract. According to the letter of [B] dated 18 December 1993, the [seller] had ordered the Alkohol Royal Feinsprit for a purchase price of US $339,000 (act. 13/6). In the light of this order, it is obvious that the transportation costs were already included therein. The [seller] clarified vis-á-vis [D] that it has the right to choose the suitable mode of transportation and it works together with a faithful and honest Italian carrier (act. 3/11). It is highly unlikely that [B] or the unknown Italian seller were obliged to organize and arrange the transportation of the goods on behalf of the [seller]. This ensues from the [seller]'s willingness to offer several times new and altered means of transportation for the goods. According to these altered offers, one would have expected that the overall price of US $339,000 which the [seller] would have been obliged to pay to [B] under its order as asserted, might also have been altered. For this reason it is not understandable why the [seller]'s order should already have included the transportation costs rather than merely the sales price of the Alkohol Royal Feinsprit in an amount of US $297,000. Hence, the [seller] was obliged to arrange and organize the transportation of the goods.

The [seller] further asserts that it was obliged to sell the sold goods for a price of US $300,000 after the lapse of the time period for the acceptance of the goods, which the [seller] stipulated to the [buyer] (act. 12/8 and 12/9). According to [B]'s letter dated 8 March 1994, [B] rather than the [seller] sold the goods (act. 13/7). The [seller] could not demonstrate that [B] actually ordered the goods with its Italian supplier on behalf of the [seller]. Furthermore, the [seller] was even not in the position to give evidence that it was obliged to on-sell the goods to another purchaser for a purchase price of US $300,000. It is further unknown to which purchaser the [seller] might have sold the goods and where the [seller] might have delivered them. The price for the Alkohol Royal Feinsprit amounted to US $297,000. In the light of the letter of 8 March 1994, it is not clear whether or not the asserted purchase price of US $300,000 should include the transportation costs and if so, how much they were. Due to the fact that it is further unknown where and even if the Alkohol Royal Feinsprit was to be delivered by [B] and if [B] were to bear the transportation costs, one cannot define the amount of [B]'s loss of profits. Hence, the transportation costs as well as the commission fees in favor of the [seller] were included in the amount of US $339,000, as set forth in the first order of 17 December 1993 (see act. 23/11). Furthermore, [B]'s letter dated 8 March 1994 is even less credible due to the fact that the difference between the covering purchase and the original purchase price (coincidentally?) was exactly the equivalent amount to the [buyer]'s prepaid amount. Furthermore, it is even less credible because that letter is not signed.

Under the aforementioned reasoning, the [seller] has neither given evidence nor showed a probable cause that it (i) ordered the Alkohol Royal Feinsprit in a quantity of 300,000 litres with [B]; (ii) paid in advance an amount of US $39,000; and (iii) was obliged to on-sell the goods with a loss in profit and hence suffered damages.

6.3
The [seller] argues that its damages amount to US $39,000 regarding the loss of profit (act. 12/8, 12/9). As already mentioned (in No. 6.2 above), the person, if any, who sold the goods and suffered a loss thereby, could only be [B] and definitely not the [seller]. But, the [seller] did not give evidence that at least [B] suffered damages. In the light of the pre-paid amount of US $39,000, which the [seller] might have paid to [B] and [B] might also have retained, the [seller] might have suffered only a pecuniary damage, i.e., a decrease in its assets (damnum emergens) rather than a loss of profit (lucrum cessans).

The [seller]'s representative mentioned at the hearing of the Court on 19 June 1996 that the amount of US $339,000 included the [seller]'s profit and that both parties agreed to a 10% commission fee in favor of the [seller]. However, the commission fee might have been only a theoretical margin. [B] might have paid that commission fee (act. 23/11). It is unclear whether this statement should be interpreted so that the commission fee of 10% should be calculated on US $339,000, i.e., US $33,900, or that the purchase price of US $339,000 already included the margin of 10% payable in favor of the [seller]. There is no evidence (i) that [B] and the [seller] agreed on a commission fee; (ii) what such a margin would have been in a percentage ratio; and (iii) on which amount such a margin should have been calculated. Even in [B]'s letter of 18 December 1993 (act. 13/6), there is not any hint to any kind of agreement to a commission fee, which [B] should pay at the execution and performance of the transaction. On the contrary, [B] even requested an advance payment of US $39,000.

Both [B]'s letter dated 18 December 1993 and 8 March 1994, are inappropriate to provide evidence for the possible occurrence of loss of profit by the [seller]. Henceforth, the [seller] does not have a claim for damages against the [buyer] so that the [seller] is not entitled to set off with the amount of US $23,730 paid in advance.

6.4
[Claim for ancillary costs]

The [seller] further claims the payment of Sf 3,000 regarding its costs for the carrying out of significant activities for the various offerings, the whole correspondence (including telephone calls to P) and the unexpected storage costs (act. 12/9).

According to the reasoning in No. 6.2, the [seller] did not give evidence that it had already ordered the goods sold under the sales contract. Therefore, it is highly unlikely that the [seller] had to bear unexpected storage costs. The [seller] did not present any documents or receipts, which might provide evidence of the place, the period and the price of the storage of the goods.

In the light of the files of the Court, one has to conclude that the [seller] (i) drafted the pro-forma invoice on 17 December 1993; (ii) sent the [buyer], due to its request, an illustration of the bottle and a copy of the etiquette as prospectively used; and (iii) informed the [buyer] about the means of the wrapping of the bottles (act. 3/3, ľ, 3/5 and 3/8).

The [seller] elaborated a new offer regarding an exclusive transportation of the goods by truck on 21 December 1993. Thereafter, the [seller] had a further communication with [D] and the [buyer] (act. 3/6, 3/11 and 3/13). The [seller] asserted to the [buyer] to submit a further offer with regard to the sale of the Alkohol Royal Feinsprit without any transportation of these goods ex factory on 31 December 1993. Furthermore, the [seller] informed the [buyer] about the net-price for each litre of the Alkohol Royal Feinsprit delivered ex factory (act. 13/2 and 3/15). The [seller] submitted to the [buyer] a new and altered offer for the sale of the goods «directly ex factory» on 7 January 1994. The [seller] gave further notice to the [buyer] in its letter of 10 January 1994 that part of the ordered goods had already been confirmed for delivery by its own bottling supplier (act. 24/19, 13/3). Since the [seller] repeatedly requested from the [buyer] to have the letter of credit opened and the [buyer] did not provide for such a letter of credit as requested several times, the [seller] in its letter of 15 January 1994 finally stipulated a final date for accepting the goods up to 28 January. Furthermore, the [buyer] should also have opened the letter of credit or paid the purchase price for the goods within this time period (act. 13/5).

In the light of these activities carried out by the [seller], it ensues that the [seller] incurred additional costs: on the one hand, for the elaboration of the new and various offers regarding a transportation by truck; and, on the other hand, for unexpected and additional costs by virtue of the non-opening of the letter of credit.

All of the aforementioned additional costs derive from the [buyer]'s undetermined behavior. Hence the [seller] might not have been obliged to bear the costs for all of these additional activities, if the [buyer] had the letter of credit opened and the goods were delivered pursuant to the conditions as set out in the pro-forma invoice of 17 December 1993. The Court is persuaded that the [seller] suffered damages in respect of the aforementioned additional costs and expenses (except the storage costs).

The [seller] claims a lump sum, i.e., damages in an amount of Sf 3,000 in order to be indemnified against the loss suffered due to the additional activities and the storage costs (act. 12/9). However, the [seller] has not verified that it generally ordered the goods and it had to bear any additional storage costs (see No. 6.4). It is still unknown how much the [seller] might have paid as storage costs. The [seller] also did not specify the amount regarding the further ancillary costs as claimed. Henceforth, the exact amount of the [seller]'s damages is not verifiable.

The CISG does not provide any principle regarding damages whose exact figure is not verifiable. According to Art. 118 IPRG [*] and Art. 3 Hague Convention [*], Swiss law is applicable to give an answer to the question whether or not there is any principle for the determination of the exact figure of non-verifiable damages. The Swiss law on obligations, i.e., OR [*], regulates (i) the rescission of the contract, which is the equivalent to the avoidance of a sales contract pursuant to the CISG, and (ii), in particular in Art. 109 (1) and (2) OR, the prerequisites of a claim for any consequential damages. Basis for the specification of the damages is the reference as set out in Art. 99(3) OR. In the light of this reference, the specified figure of the damages shall be calculated on the law of torts, although it is a liability for

damages under Art. 97 et. seq. OR (Gauch/Schluep, Swiss Law on Obligations, General Part, Volume II, 6th edition, Zurich 1995, N 2786).

According to Art. 42(2) OR, damages that cannot be verified in respect of their exact figure shall be calculated in the sole but reasonable discretion of the relevant judge. The judge shall base his discretionary decision on the due course of conducting business in the relevant trade and with regard to the measures and activities as carried out by the person who suffered the damages (see Brehm, Commentary of Bern, N 96 et. seq. of Art. 42 OR). The presented files of the Court contain enough clues that are appropriate to conclude the existence of damages suffered by the [seller]. However, in this case, it is impossible to stipulate the exact figure of the suffered damages, because the damages consist of costs for (i) correspondence, (ii) several telephone calls and (iii) activities in respect of the elaboration of the various new and altered offers. Hence the District Court estimates in its reasonable discretion that the suffered damages amount to Sf 1,500 (see Vogel, op. cit., p. 168). Furthermore, the debtor of the damages has to pay additional interest on the damages since the time of occurrence of the damaging incident. In this case, the damaging incident took place on 28 January 1994 (date of the declared avoidance of the sales contract by the [seller]). The interest rate is 5% (Gauch/Schluep, op. cit., N 2791).

The [buyer] is held liable to pay the [seller] the amount of Sf 1,500 plus accrued interest of 5% since 28 January 1994.

6.5
[Impact of the declared set-off to the right to request additional costs]

In a letter of 14 March 1994, which has not been presented to the Court, the [seller] might have requested the [buyer] to pay the amount of US $15,270, after the [seller] had already set off the amount of US $39,000 with the advance payment amount of US $23,730 (act. 12/8). Thereby, the [seller] has implicitly declared to set-off the requested US $39,000 with the amount of US $23,730 as required by the [buyer] in its lawsuit. Hence the [seller] claims the payment of US $15,270. However, the [seller] is willing to enforce its aforementioned claim in an amount of Sf 3,000 beyond the set-off (file 12/2, see further 12/8 and 12/9).

The right of set-off shall be enforced through a unilateral declaration of the party setting off. Such a set off shall be declared vis-á-vis the other party, who must actually receive such a declaration. Furthermore, the enforcement of a set-off declaration is a right to influence a legal relationship through a unilateral declaration. The basic principle is: As long as there is not any setting off declaration, the set-off will be ineffective (Gauch/Schluep, op. cit., No. 3370). A declaration vis-á-vis a judge may be not satisfying (BGE [*] 35 I 488).

The commencement of a counterclaim cannot be interpreted, under any circumstances, as an implicit setting-off declaration. Hence, the plaintiff of the counterclaim might have a substantial interest to have his claim enforced beyond a set-off. A possible result, that the claim of the legal action as well as the claim of the counterclaim shall be held founded by the relevant court, is not inconsistent per se. However, such two decisions might sometimes be

even more suitable regarding the will of the parties in the concrete case. A judge shall respect such will (Aepli, Commentary of Zürich, Zürich 1991, N 66 of Art. 124 OR [*]).

The [seller] has not enforced its right to set-off its claim for damages in an amount of Sf 3,000 with the [buyer]'s claim. The [seller] has neither declared the set-off vis-á-vis the [buyer] nor implicitly expressed such a will by any other means (see the [seller]'s counterwrit act. 12/2). Therefore, both amounts, which the District Court holds to be founded in favor of the parties, are not capable of being offset.

[...]

The District Court holds:

1.
The lawsuit to be founded.

The [seller] is to pay to the [buyer] the amount of US $23,730 plus accrued interest of 5% since 17 December 1993.

2.
The enforcement proceedings are to commence up to an amount of:

(i)
Sf 29,876.05 plus accrued interest of 5% since 1 February 1994 with regard to the prosecution order No. 679'374 of the Prosecution Office of the District of Saane; as well as

(ii)
Sf 111.80 regarding the costs of the recovery order mentioned above.

3.
The counterclaim is partly founded.

The [buyer] is to pay the to [seller] the amount of Sf 1,500 plus accrued interest of 5% since 28 January 1994.

In the light of the remaining amount as claimed for, the counterclaim is dismissed.

[...]