

Case 272 : CISG 8(3); 35(1); 45(1)(b); 74; 79(1); 79(2)

Germany: Oberlandesgericht Zweibrücken; 8 U 46/97

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A German seller, defendant, sold vine wax for the treatment of grapevine stocks to an Austrian buyer, plaintiff. When some plants were damaged after treatment with the wax, the buyer claimed lack of conformity of the goods and sued the seller for damages. The seller denied liability, arguing that it had acted purely as an intermediary and that the failure of the product was due to defective production by its supplier, an impediment that was beyond its control.

The court held that the buyer was entitled to claim damages according to article 45(1)(b) of the CISG; prerequisites for a claim under this article are failure of the seller to perform its obligation, causation and damage, which must be proven by the claimant. By contrast, if the seller seeks to rely on article 74 of the CISG, the seller must prove that it was unable to foresee the damage.

The court found that the goods delivered by the seller did not meet the demands of practice and were therefore not in conformity with the contract (article 35(1) CISG). It then considered whether the seller's liability was excluded by an exemption clause contained in the seller's general terms and conditions of sale. It held that, as the CISG does not provide specific requirements for the incorporation of standard terms and conditions into a sales contract, whether such terms have become part of the contract must be determined by the application of article 8 of the CISG. In this case, there had been no negotiations or established trade usage between the parties by which the terms and conditions might have become part of the contract (article 8(3) CISG). Apart from that question, the court also held that, as the CISG does not provide rules on the validity of an exemption clause, this must be decided by recourse to the national law that is found to be applicable according to private international law rules. The court found that, under German law, the complete exclusion of liability, irrespective of the degree of fault, would have been void.

The court noted that delivery of defective goods may constitute an impediment under article 79(1) of the CISG. It also noted that, in order to be exempted from non-performance, the seller would have to prove that the non-performance was due to an impediment beyond the seller's control, that the impediment was not taken into account at the time of the conclusion of the contract or that the impediment or its consequences could neither have been avoided nor overcome by a reasonable seller (article 79(1) CISG). The court held that, in the given circumstances, the defect had not been beyond the seller's control; despite the on-going business relationship, it was not reasonable for the seller simply to have relied on its supplier's product without tests, because it was a newly developed product. The court further held that, even if the seller had acted only as an intermediary, it was still liable for the lack of conformity of the goods. In such cases, the supplier of the intermediary could not be regarded as a third party according to article 79(2) of the CISG.

The seller appealed to the Supreme Court (see Case No. 271).