

CISG-online 481

Jurisdiction	Germany
Tribunal	Oberlandesgericht Zweibrücken (Court of Appeal Zweibrücken)
Date of the decision	31 March 1998
Case no./docket no.	8 U 46/97
Case name	<i>Vine wax case</i>

Translation by Veit Konrad***

Facts of the case:

Plaintiff-Appellant [Buyer] claims damages for deficient black vine wax, which Defendant-Appellee [Seller] delivered in the year 1994.

[The [Buyer] had also brought action against the manufacturer of the goods, the former Defendant no. 2). With respect to that action, the District Court (*Landgericht; LG*) of Frankenthal (Pfalz), as the Court of First Instance, had referred the case to the District Court (*Landgericht; LG*) of Itzehohe (LG Itzehohe, 3 O 201/97) as the proper place of venue (see: Court Order (*Beschluss*) of the District Court of Frankenthal of 15 May 1997).]

[Buyer] and [Seller] had established business relations over several years.

[Buyer] runs a vine nursery in [...]. It is engaged in the cultivation and sale of grapevine rootstocks and the conditioning of grapevines. For this purpose, [Buyer] uses a specific grapevine grafting wax which protects the rootstocks and the cuttings against dehydration and infections. This vine wax, which [Buyer] was also selling on to other customers, had been supplied by [Seller] for several years. [Seller] acquired the wax from the company [...]. Company [...] has been producing the wax for many years.

[Seller] mainly engages in the manufacturing and sale of special vinicultural machines and implements, but also – like [Buyer] – sells grapevines and accessories such as vine wax. Also, the owner of [Seller]’s company runs a vine nursery.

By letter of 18 January 1994, [Buyer] asked [Seller] to submit an offer for the delivery of «about 5,000 kilograms of vine grafting wax, black» as in the years before. With reference to this letter, [Seller], per its letter of 21 January 1994, offered the delivery of 5,000 kilograms black vine wax for the price of DM (*Deutsche Mark*) 5.43 per kilogram. [Buyer] ordered 5,000

* All translations should be cross-checked against the original text. For the purposes of this translation, the Plaintiff-Appellant of Austria is referred to as [Buyer], and the Defendant-Appellee of Germany is referred to as [Seller].

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kilograms of black vine wax for the offered purchase price. Delivery was to take place in two installments by the end of February and the end of April.

[Seller] invoiced the subsequent deliveries as follows:

- Invoice of 18 February 1994 for the delivery of 2,450 kilograms of vine wax, black 17638, for the agreed purchase price of DM 5.43 per kilogram;
- Invoice of 11 April 1994 for the delivery of 2,550 kilograms of vine wax, black 17638, for the agreed purchase price of DM 5.43 per kilogram;
- Invoice of 29 April 1994 for the delivery of 1,500 kilograms of vine wax, black 17638, for the agreed purchase price of DM 5.43 per kilogram.

On the backside of each bill, [Seller] had printed its General Terms and Conditions. § 15 of these general terms and conditions stipulated:

«Complaints will only be considered, if a written notice specifying the reason for the complaint is presented to the seller within 14 days after delivery was received. The rejected goods must be sent back to the seller without delay to allow the examination of the defects. If the complaint is justified, the buyer is only entitled to a replacement of the defective parts of the delivery. If the whole product is defective, the buyer may rescind the contract. All other remedies, in particular the right to damages for defective goods and to a reduction of the purchase price, shall be excluded. Replaced parts remain with the seller.»

The vine wax that [Seller] delivered to [Buyer] had been supplied by company [...]. The latter had ordered the wax from the manufacturer, company [...]. The manufacturer delivered the goods in the original bags directly to [Buyer]. [Seller] had neither taken over nor examined the goods.

[Buyer] partly used the wax in the conditioning process of its own grapevine cultivation. The conditioned grapevines were sold to other vine nurseries. The other part of the delivered wax was sold by [Buyer] directly on to customers, who then treated their own vines with the wax and sold their wax-conditioned products on to others. (As for the impact and effects of grafting wax (resp. paraffin) treatment in the conditioning process of grapevines, see the expert report of Dr. [...], p. 234 of the attachment).

In the year of 1994, the grapevine cultivation in [...] as well as in the Federal Republic of Germany suffered from considerable set-backs, which not only affected the users of the particular wax product being the subject of the case at hand, but also those winegrowers that were using [...], another comparable grafting wax produced by a competitor.

By letter of 16 June 1994, [Buyer] notified [Seller] about defects of its product. [Seller], in turn, by letter of 17 June 1994 forwarded the complaint to its supplier, company [...] (see Decision of the District Court (*Landgericht; LG*) of Stade 5 OH 14/94, p. 9). As concerns the wax of the competitor, the exact cause of the damages that occurred had not been conclusively determined because the respective parties eventually reached a private

settlement of their dispute. Dr. [...], as the summoned expert at the time, related the damages in the vine cultivation in 1994 to an aggressive substance that was not to be found before in the year of 1993.

[Proceedings in the Court of First Instance:]

[Buyer's position in the Court of First Instance:]

[Buyer] submitted the following:

The vine wax [Seller] delivered in 1994 had been deficient and led to substantive damages in the conditioning process of the vine. For [Buyer] itself as well as for its customers and their business partners, the wax had had devastating effects on the grapevines. Partly, the tissue on the contact points of the rootstocks with the cuttings had irreversibly died. Partly, the grafted grapevines had grown shoots, which however all had dried out immediately thereafter: first the leaves had withered and then the entire shoot had died.

Referring to expert reports of Dipl. Ing. [...] dated 27 October 1994, and of Dipl. Ing. [...] of 28 February 1995, [Buyer] explicated that the negative results of 1994 could clearly be traced back to the vine wax provided by [Seller]. In particular, differences in the chemical structure of the wax delivered in 1994, and the wax delivered in the years before could be detected, as set out in the expert report by Prof. Dipl. [...] of November 1994.

[Buyer] alleged that in the year 1994 [Seller] had delivered a different product – i.e., an *aliud* – than the vine wax [Buyer] had actually ordered. The order of 31 January 1994 had to be seen in the context of the orders [Buyer] had placed in the years before. Undisputedly, [Buyer] had already asked for delivery of «about 5,000 to 6,000 conditioning wax, black, as last year» in its letter of 7 January 1993. According to its product range catalogue (K 16), [Seller] in 1992 had offered [Buyer] black vine wax of the specification number [...]. As subsequently vine wax of another specification number (17638) was delivered without further notice, this mere fact alone, according to [Buyer], amounted to a fundamental breach of contract. Further, [Seller] had been aware of the fact that the wax delivered in 1994 had been a different product that had not been tested before. This had to be concluded from the fact that, by summer 1994, [Seller]'s managing director had informed [Buyer] that he had not deemed it necessary to give notice about the modifications of the redesigned wax, as they would have only resulted in overall improvement of the product.

[Buyer] argued that [Seller] was liable for damages under Art. 45 of the United Nations Convention on Contracts for the International Sale of Goods (hereafter referred to as CISG). The exemptions provided under Art. 79 CISG would not apply to the case at issue. Due to the defective vine wax, [Buyer] claimed that damages accrued in the amount of 14,146,381.40 öS (*Austrian schillings*). As [Buyer] itself was liable to its customers, the damages [Buyer] suffered could not be fully quantified at that moment.

The manufacturer of the wax and former Defendant no. 2), company [...], according to [Buyer], was also liable for damages under the Austrian Product Liability Act as well as under tort law principles.

[Buyer's claims in the Court of First Instance:]

In first instance [Buyer] claimed:

1. Both (former) Defendants to be jointly liable to payment of an amount in *Deutsche Mark* equivalent to 6,349,840.00 öS (*Austrian schillings*), according to the official exchange rate applicable at the day of payment, *in eventu*, payment of 6,349,840.00 öS, plus 5% interest on the respective amount
 - regarding Defendant no. 1) [Seller] since 29 September 1995;
 - regarding Defendant no. 2) since the commencement of the proceedings;
2. Against Defendant no.1) [Seller], payment of a further amount equivalent to 7,796,541.00 öS (*Austrian schillings*), according to the official exchange rate applicable at the day of payment, *in eventu*, payment of 7,796,541.00 öS plus 5% interest on the respective amount since 29 September 1995,
3. To find Defendant no. 1) [Seller] liable for all further damages that have accrued or will accrue to [Buyer] due to the use or sale of the black vine wax delivered in 1994.

[Seller's defense in the Court of First Instance:]

The (former) Defendants in the First Instance sought to have the claims dismissed.

- Former Defendant no. 2) disputed the Court of First Instance's jurisdictional competence on the case;
- Former Defendant no, 1) [Seller] submitted:

He claimed damages were not related to the cultivating process of the vine. Rather the vine perished by cold. In any event, it could not be established that the defective goods caused the damages. By effective adoption of [Seller]'s valid standard terms, any claims for damages were excluded. Moreover [Buyer] had failed to give notice of the defect as required by Art. 39 CISG.

Lastly, [Seller] claimed that the exemption from liability provided under Art. 79 CISG applied. As far as the wax was supplied by company [...], [Seller] argued that this company was known within the industry as a vine wax specialist supplier. Only in the proceedings concerning the preservation of evidence (*Beweissicherungsverfahren*) that had been undertaken by the District Court (*Land-gericht*) of Stade (5 OH 14/94), the company [...] disclosed that the wax had actually been produced by former Defendant no. 2). In the years before, the wax that had been supplied by company [...] never caused any problems. However, as for the wax at issue delivered in 1994, [Seller] denied to have placed an order for that particular wax by sending a particular sample. Also, [Seller] alleged that it was not obliged to view or to examine the product.

In addition, [Seller] questioned the amount [Buyer] claimed for damages. In particular, [Seller] denies that [Buyer] was entitled to claim compensation for indirect damages that occurred to third or fourth parties.

[Ruling by the Court of the First Instance:]

The District Court took evidence as per order of 25 April 1996, amended by order of 25 July 1996, by way of the written expert report of Dipl. Agr. Ing. Dr. [...] and the later presentation before the Court on 27 February 1997.

Per part-judgment of 17 April 1996, the Court dismissed [Buyer]'s claim as far as it concerned Defendant no. 1). As far as it concerned Defendant no. 2), the Court referred the case to the District Court of Itzehoe (order of 15 May 1996). Per final judgment of 15 May 1996, the Court charged [Buyer] with the costs of the proceedings against Defendant no. 1) [Seller].

Concerning the dismissal of [Buyer]'s claim against the former Defendant no. 1) [Seller], the Court of First Instance reasoned as follows:

[Buyer] was not entitled to any damages from [Seller]. There was no basis for [Buyer]'s action. Hence [Buyer]'s claim had to be dismissed.

On the one hand, [Buyer] had indeed given notice of the defect in compliance with Art. 39 CISG (*explicated in further detail in the judgment*). And the right to damages had not been excluded by § 15 of [Seller]'s standard terms and conditions. In this regard, the question whether the terms and conditions had been effectively incorporated into the contract, did not need to be decided. In any event, the general exclusion of damages by standard terms' provisions was invalid under § 9(2), No. 1, of the German Act governing Standard Terms and Conditions of Business (*Gesetz über Allgemeine Geschäftsbedingungen; AGBG*) (*explicated in further detail in the judgment*). Moreover, the Court of First Instance stated that [Seller] had breached its contractual duties in the sense provided for under Art. 35 CISG. When the wax was handed over to [Buyer] it bore substantive defects. This clearly had to be concluded from the expert report of Dr. [...], respectively the oral presentation of this report given in the hearing before the court (*explained further in the judgment*).

Nevertheless, [Buyer]'s claim for damages was barred by the exemption provided under Art. 79 CISG.

- Art. 79(2) CISG, according to the Court, did not take effect. This provision only applies to cases, in which one party to the contract engaged third persons to perform its contractual duties to performance as being their own responsibility. Yet, the third persons that had been involved in the case at issue only acted as suppliers of the goods.
- However, the exemption stipulated under Art. 79(1) CISG, according to the Court, might apply to cases in which non-conforming goods had been delivered, if the impediment to performance would neither be attributable to the debtor by objective standards, nor would it be due to a specific risk, for which the debtor had contractually obtained responsibility. The Court found that these conditions were met in the case at issue. [Seller] was not obliged to bring into account the non-conforming quality of the wax, because in the past this wax never gave rise to any complications.

- The impediment to performance also lied beyond [Seller]'s sphere of control. It could not be reasonably expected that [Seller] had avoided or overcome it. According to the District Court, Art. 79 CISG defines the lack of control over a risk to be a principle cause for the exemption of liability. The risks involved in the procurement of conforming goods could not solely be laid upon [Seller]; [Buyer] was aware of these risks, too. The case at issue concerned concealed defects of goods that had been supplied by third persons. For [Seller]'s lack of control over the causes of these defects, [Seller] could not be held liable. Even if the goods had been examined by all means that were considered just and reasonable to a party in the position of [Seller] at the time, the defects could not have been detected. The damaging effect of the vine wax would have only been detectable, if [Seller] had undertaken large-scale field trials. However, the obligation to undertake such extensive and costly examinations could not be considered as just and reasonable to [Seller].
- In addition, liability under tort law was excluded, as these national law provisions were abrogated by the Convention as *lex specialis*. Moreover, it could not be sustained that [Seller] had acted in default. And provisions of the German Act governing Product Liability (*Produkthaftungsgesetz*) would not apply as [Seller] was not the manufacturer of the wax. The same applies as to the Austrian Act governing Product Liability (*Produkthaftungsgesetz*).

[Appellate proceedings:]

In its appeal (*Berufung*), [Buyer] maintains all of its claims to the full extent and submits as follows:

The District Court failed to acknowledge that the CISG provisions put the seller under strict statutory liability to deliver goods that are free from defects and conform to the contract. The Court misinterpreted and wrongly applied Art. 79 CISG. Only insufficiently did it inquire whether the particular requirements of the CISG were met in the case at hand. In particular, the Court failed to acknowledge that the cause for the defects of the sold items was typically allocated in the seller's sphere of responsibility. Thus, [Seller] was responsible for the defects caused by its supplier. [Buyer] pointed out that the defects were not due external causes, i.e., circumstances beyond the parties' control.

Further, the District Court would have been bound to hear the offered witnesses. The Court failed to acknowledge that [Buyer] submitted that the wax No. 94 was designed and produced after a sample that [Seller] had provided. Witness [...] placed the order for the deficient wax relying on the data and specifications of the sample that [Seller] had provided. Moreover, witness [...] had expressly pointed out to [Seller] that examination of the wax as to whether it would be fit for its use in the process of grapevine conditioning was required. [Seller] was aware of the redesigned chemical composition of the wax.

By implication, the damaging effects of the vine wax would have been detectable in a field trial. Given all the particular circumstances of the case at hand, such field trial, e.g., a test planting, would have been just and reasonable for [Seller] to undertake.

Throughout the proceedings, the District Court did not recognize the allocation of the burden of proof as stipulated by Art. 79 CISG. It was irrelevant, whether or not an examination of delivered goods would turn out to be difficult. In any event, chemical analyses would not have been necessary.

[Buyer] had ordered black vine wax «as in the years before». Therefore, [Buyer] could rightly trust that the same wax as in the years before would be delivered.

Yet, [Seller] ordered a modified wax from its supplier and delivered it to [Buyer]. Due to this very fact, [Seller]’s own liability insurance had denied coverage because of [Seller]’s unmotivated and unauthorized modification of the product. Meanwhile, however, [Seller] had reached agreement with its insurance carrier and received an unnamed amount as compensation for the damage.

Alternatively, [Buyer] aims to sustain its claim arguing that [Seller] had indeed delivered an *aliud*.

As regards compensation under national tort law provisions, the District Court failed to recognize that §§ 823 *et seq.* of the German Civil Code (*Bürgerliches Gesetzbuch; BGB*) were also applicable in cases in which a party may additionally rely on contractual damages under sale and trade law provisions. As the vine wax that caused the damages had been manufactured according to a sample provided by [Seller], [Seller] had defaulted on its general legal duty to maintain safety by bringing the wax on the market.

[Buyer’s appeal:]

In its appeal (*Berufung*), [Buyer] seeks an amendment of the judgment of the District Court of Frankenthal of 17 April 1997. [Buyer] claims for

- payment of an amount in *Deutsche Mark* equivalent to 6,349,840.00 öS (*Austrian Schilling*), according to the official exchange rate applicable at the day of payment;
- *in eventu*, payment of 6,349,840.00 öS;
- plus 5% interest on the respective amount since 29 September 1995.

[Seller’s response:]

[Seller] wants the appeal to be dismissed. [Seller] submits the following to the Appellate Court:

[Seller] argues that it could rightfully trust its supplier as a renowned specialist. [Buyer], on the other hand, was fully aware of the fact that [Seller] only acted as intermediary.

It also could never be clarified what exactly had caused the damages of the grapevines. [Seller], thus, denies that the damages were caused by its delivered wax.

According to the [Seller], the District Court did not misinterpret Art. 79 CISG. In fact, [Buyer], in an unsustainable manner, overstates the requirements and duties of an intermediary in [Seller]'s position. The exemption formula of Art. 79 CISG includes subjective elements. The delivered vine wax was a redesigned product developed in 1993, which had undergone several tests by the manufacturer in 1993. In these tests, neither a flawed chemical composition nor aggressive other substances was found. Of the redesigned wax, a sample, namely, Sample [...] – black – had been taken and sent to [Seller] on 16 July 1993. As the summoned expert explained in the proceedings at the First Instance, neither this sample, nor the reference sample that had been kept by the supplier, contained the aggressive substance that had later been detected.

The sample that [Seller] sent to witness [...] on 6 July 1993 had been taken from a product of a competitor [...] of the production year of 1993. Considering all this, the cause for the damages that occurred in the case at hand, can only lie in an aggressive substance which was found only in products of the production year of 1994, and in fact was contained in the competitor's product of 1994. Therefore, even on the assumption that the proof of causality for the damages had been established, the cause would have been totally beyond the control of [Seller].

[Seller] had never provided witness [...] with a sample from the production year of 1994. The witness never gave notice about further tests being required.

[Buyer]'s managing director himself asked for a slightly modified wax, which was less sticky than the original product [Buyer] used before.

In tests comparing the wax of 1994 with products of the years before, no defects were detected.

With respect to the amount claimed as compensation and the cause of the damage, [Seller] maintained that, even based on [Buyer]'s own submissions, the damages were not likely to be caused by the use of a defective wax. Rather, the plants perished from cold, overlapping, or dehydration. In that regard, the opinion of the expert who was heard was inconsistent and in fact self-contradictory. For damages caused by cold, it was typical that the closed knots of the rootstock would first grow shoots, which then perished. This was exactly what happened in [Buyer]'s case.

Apart from that, [Buyer] had received subsidies for the damages suffered in 1994.

In 1996, [Buyer] again suffered losses of 80% – far above the average.

The quantity of damages that [Buyer] actually suffered in the case at issue could not be substantiated by the mere reference to the submitted charts and figures. By no means was [Buyer] entitled to claim third party damages. Also, [Buyer] failed to clearly differentiate between damages that occurred in the vine nursery and damages that occurred in the fresh fields.

Moreover, as had been established by the Court of First Instance, liability had been effectively excluded by [Seller]'s standard terms of business.

The Court considered further evidence, and – by orders of 20 January 1998 and 10 March 1998 – heard witness [...].

[...]

Reasoning of the Court of Appeal:

The [Buyer]'s appeal is preliminarily granted.

I.

As far as [Buyer]'s claim for damages is subject to this appeal, it is justified as to the cause of [Buyer]'s action. Regarding the question of quantification of the damages, still more evidence needs to be considered. Therefore, the Court issues a judgment on the basis of the cause of action (*Grundurteil*) as provided for under § 304(1) of the German Code of Civil Procedure (*Zivilprozessordnung; ZPO*). The remainder of [Buyer]'s claim is to be dismissed pursuant to § 538(1) No. 3, of the German Code of Civil Procedure. The Court does not make use of § 540 of the German Code of Civil Procedure, which provides for an alternative way to proceed: Considering the still pending crucial questions as to the quantification of the damages, doing so would not seem to be suitable in the case at hand.

II.

[Buyer] is entitled to damages under Art. 45(1)(b) and Arts. 74–77 CISG. [Seller] may not rely on the exemption provided under Art. 79 CISG.

The Federal Republic of Germany as well as Austria, both are Member States to the UN Convention on Contracts for the International Sale of Goods (hereinafter referred to as CISG). Pursuant to Art. 1 CISG, the Convention applies to govern the contracts for the delivery of black vine wax in 1994 which the parties had concluded as according to the invoices of 18 February 1994, 11 April 1994, and 29 April 1994.

If the seller does not comply with its duties defined by the contract or CISG provisions, the buyer is entitled to damages according to Art. 45(1)(b) and Arts. 74–77 CISG.

1.

According to Art. 74 CISG, damages for breach of contract by one party consist of a sum equal to the loss, including loss of profit, suffered by the other party as a consequence of that breach. Such damages may not exceed the loss which the party in breach foresaw or ought to have foreseen at the time of the conclusion of the contract, in the light of the facts and matters of which he then knew or ought to have known, as a possible consequence of the breach of contract. This liability does not depend on the quality of the breach of contract, or on the fault of the party in breach. Yet, for particular cases, Art. 79 CISG provides for an exemption (see *Staudinger/Magnus, Wiener UN-Kaufrecht (1994)*, Art. 74 CISG note 11 with further references).

As a general principle the party, claiming damages under the Convention must prove the facts and matters that are required under the CISG provisions governing compensation,

namely, the other party's breach of contract, the particular cause of the damage, and the quantity of the suffered loss (see *Staudinger/Magnus*, *ibid.*, Art. 74 note 62).

2.

According to Art. 35 CISG, the seller must deliver goods which are of the quantity, quality and description required by the contract and which are contained or packaged in the manner required by the contract. Except where the parties have agreed otherwise, the goods do not conform with the contract unless they are fit for the purposes for which goods of the same description would ordinarily be used (Art. 35(2)(a) CISG).

Art. 35 CISG defines the seller's duty of performance as concerns the quantity, quality and description of the goods. If the seller does not comply with these obligations, the [Buyer] may pursue his rights set out by Art. 45, provided that he gave timely and specified notice as require Arts. 38 and 39 CISG. The seller's liability is only excluded, if he knew or could not have been unaware of the lack of conformity of the goods at the time of the conclusion of the contract, Art. 35(3) CISG. This is not the case here.

The quality of a good, being the issue of [Buyer]'s complaint, comprises all immediate properties of a product, including its composition. In the case at hand, none of the parties – who were both competent experts in this field of business – stipulated particular requirements for the quality of the wax. Indeed, doing so would not have been necessary, as the product's intended purpose had been clear to both of the parties due to their long established business relations and due its long use in practice. As expert [...] initially had pointed out comprehensibly and in detail in his report of September 1996, since mulching film came into use in grape vine nurseries in 1974, grapevines are being treated with paraffin at least once. The first application of the vine wax immediately follows the conditioning of the grapevines (*Braunparaffinierung [brown paraffin treatment]*). As is commonly known in the industry, waxes with a relatively high melting point of about 68 degrees Celsius and more are being processed at about 80 degrees Celsius. A second paraffin treatment usually precedes the grapevines release from the vine nursery. At this stage, the green shoots and the developed callus are being treated (*Grünparaffinierung [green paraffin treatment]*). For this second treatment, two different kinds of wax are commonly used: some use waxes with a high melting point just as within the first processing; sometimes waxes with a lower melting point of under 60 degrees Celsius are preferred. A third treatment is often given before the grafted grapevines are planted in the vineyard. Here again, waxes with a higher melting point (65 degrees Celsius) are used.

Both parties knew that the ordered vine wax was meant to be used in the process as described above.

Yet, the black wax [Seller] had delivered in 1994 was not fit for such use, and therefore did not conform to the contract.

As must be concluded from the parties' correspondence as it is documented in the court record, even [Seller] itself only halfheartedly denies this fact. Following [Buyer]'s written note of complaint of 16 June 1994, [Seller] sent a written complaint to its supplier, company [...], as early as on 17 June 1994. In its letter, [Seller] referred to the notification that had been made in a telephone conversation the day before. On 8 August 1994, [Seller] initiated

proceedings concerning the preservation of evidence (*Beweissicherungsverfahren*) against [...] and company [...] claiming that the supplied black vine wax No. [...] was deficient; due to a too low melting point and due to impurities, the use of the wax would cause damaging effects such as the drying out of the shoots, burnings at the bases of the shoots and puny growth of the young shoots.

Numerous expert statements have established beyond doubt that the black vine wax that had been delivered in 1994 was indeed deficient. The summoned experts have ruled out the possibility that other factors might have caused the damages. As the expert Dr. [...] again pointed out to the Court in his presentation referring to his report, the large-scale trials that were undertaken had indicated that no other factors might have caused the damages. In the appellate proceedings, [Seller] admitted that the vine conditioning treatments in 1994 had resulted in substantive damages. Whether, apart from the black vine wax produced by company [...], other products of the competing company, company [...], were involved as well, is irrelevant to the case at hand. Also irrelevant is, whether for the competitor's product, the particular cause of the damages could have been isolated. There are many indicators for the assumption that in 1994 – unlike in the years before or after – a particular aggressive substance had been added to the competitor's wax.

In page 6 of its defense to [Buyer]'s appeal, [Seller] admitted that only an aggressive substance could have caused the damages subject to [Buyer]'s claim. If [Seller] – in another context – denied that its delivered vine wax had caused the damages, this must be regarded as mere unsubstantiated speculation at best, respectively, as a meaningless defensive lie against better knowledge, considering all of [Seller]'s other submissions before the Court, its pretrial behavior as well as the summoned expert opinions.

From the evidence taken, in particular from the matching expert opinions that were summoned in these and in other proceedings, the Court is convinced that the black vine wax of 1994 caused the damages to [Buyer] and its customers. No further evidence needs to be considered on this point.

It is therefore established that [Seller] delivered defective goods and thus violated its contractual duties as stated under Art. 35 CISG.

The expert report of Dr. [...] rules out the possibility that [Buyer] would have known of, or could not have been unaware of the lack of conformity of the goods. [Seller] does not even argue that this had been the case.

Therefore, the Court concludes that [Seller] delivered goods that did not conform to the contract and thus did not comply with its contractual duties under Art. 45 CISG. Consequently, [Buyer] may claim damages under Art. 74 *et seq.* CISG.

III.

As the District Court rightly contended, [Seller]'s liability had not been excluded by the adoption of [Seller]'s standard terms of business.

According to § 15 of these standard terms of business, the buyer is only entitled to a replacement of the defective parts of the delivery. If the whole product is defective, the

buyer may rescind the contract, if the seller does not grant a replacement of the delivery as a whole in such case. All other remedies, in particular the right to damages for defective goods and to a reduction of the purchase price, according to [Seller]'s standard terms of business, shall be excluded.

1.

[Seller]'s standard terms of business were not effectively incorporated into the contract by the parties. The CISG does not contain specific rules regarding the inclusion of standard terms of business into a contract. These requirements are to be derived from the provisions of Art. 8 CISG, which generally govern the interpretation of statements made by and conduct of a party to a contract within the scope of the Convention. Hence, one party's standard terms of business may already become part of an offer if this follows from the understanding a reasonable person would have considering the negotiations, or the established practices among the parties (Art. 8(3) CISG). In case the standard terms of business are not attached to the offer, the offer must make clear and explicit reference to the standard terms in a way a reasonable person of the same kind as the other party would understand it (see *v. Caemmerer/Schlechtriem*, UN-Kaufrecht, 2nd ed., Art. 14 note 6). Apart from this, the recipient of a contract offer that is supposed to be based on standard terms must have had the possibility to become aware of the content of the standard terms in a reasonable manner. In accordance with the prevailing opinion (see: *Staudinger/Magnus*, BGB Wiener UN-Kaufrecht (1994), Art. 14 note 40 with further references) the Court finds that only CISG provisions shall govern the question of effective incorporation of standard terms and conditions into contracts within the scope of the Convention. Recourse to national law provisions that would be applicable based on a conflict of laws analysis – such as for instance § 2 of the German General Terms and Conditions Act (*Gesetz zur Regelung des Rechts der Allgemeinen Geschäftsbedingungen; AGBG*) – is generally not available. Thus, through an interpretation according to Art. 8 CISG, it must be determined whether the standard terms of business have been effectively incorporated into the contract.

[Seller]'s offer does not contain any reference to its standard terms of business. This fact alone rules out the possibility that [Seller]'s standard terms of business have become part of the contract.

2.

In any event, it is very doubtful, whether [Seller]'s standard terms and conditions could have been effectively incorporated even under German domestic law. § 2 of the German General Terms and Conditions Act (*Gesetz zur Regelung des Rechts der Allgemeinen Geschäftsbedingungen; AGBG*) does not apply to commercial transactions between professionals (§ 24 No. 1, of the German General Terms and Conditions Act). Here, too, a party's standard terms of business can only apply if they have been effectively incorporated into the contract (see Judgment of the German Federal Supreme Court (*Bundesgerichtshof; BGH*) in: NJW 1992, p. 1232). Whether or not the parties have reached agreement on the adoption of the standard terms has to be derived from interpretation pursuant to the provisions under §§ 133 and 157 of the German Civil Code (*Bürgerliches Gesetzbuch; BGB*) and § 356 of the German Commercial Code (*Handelsgesetzbuch; HGB*). [Buyer] and [Seller] did not expressly stipulate that [Seller]'s standard terms of business should be included in the contract. As for a tacit incorporation by way of conduct, it is required that the offeror makes clear and

understandable reference to his standard terms of business, and that the recipient does not object to the inclusion of the standard terms (Judgment of the German Federal Supreme Court (*Bundesgerichtshof; BGH*) in: BGHZ Vol. 117, p. 194). The offeror's reference must define the applicable set of rules of its standard terms in a clear and unambiguous manner so that the recipient have the possibility to become aware of it (Judgment of the German Federal Supreme Court (*Bundesgerichtshof; BGH*) in: BGHZ Vol. 102, p. 304). As a general rule, the reference must be made during the time of the negotiations for the particular contract. This has not been the case here. Reference to previous transactions between the parties – as a principle – is not sufficient (see: *Palandt/Heinrichs*, BGB, 56th ed., § 2 AGBG note 24). This shall also apply if the standard terms, which have been referred to in previous contracts, stipulate that they shall apply to future transactions as well (Judgment of the German Federal Supreme Court (*Bundesgerichtshof; BGH*) in: BGHZ Vol. 117, p. 192; other opinion: *Rüffert*, in: MDR 1992, p. 922).

Yet, it is generally considered sufficient that, within constant business relations established over a longer period of time through transactions of a certain frequency, standard terms may become part of a contract by frequent reference to them in bills or other documents, in a manner that the recipient has the possibility to become aware of them only through a quick scan over the documents (Judgments of the German Federal Supreme Court (*Bundesgerichtshof; BGH*) in: BGHZ Vol. 42, p. 55; NJW-RR 91, p. 571; and *Fischer* in: BB 1995, p. 2491; other opinion: Judgment of the Court of Appeal (*Oberlandesgericht; OLG*) Karlsruhe in: NJW-RR 1993, p. 568). This shall also apply in relations to foreign customers (see: Judgment of the Court of Appeals (*Oberlandesgericht; OLG*) Cologne in: VersR 94, 1496). However, mere reference to standard terms of business printed on the backside of bills (see OLG Hamburg in: ZIP 1984, p. 1241), or on delivery notes does not suffice these requirements, as the representatives of the recipient often do not become aware of these documents (Judgment of the German Federal Supreme Court (*Bundesgerichtshof; BGH*) in: BGHZ Vol. 78, p. 2243).

3.

Even on the assumption that [Seller]'s standard terms of business had been effectively incorporated by tacit conduct, the Court of First Instance correctly contended that the standard terms were invalid because they stipulate an overall exclusion of damages for breach of contract and thus violated § 9 of the German Standard Terms and Conditions Act. This must hold true in particular for contracts that are governed by the CISG, as the Convention stipulates a stricter liability for delivery of defective goods than the domestic provisions of the German Civil Code.

All rights the buyer may rely on under Art. 45 CISG – generally – are non-mandatory and, thus, may be excluded by agreement of the parties pursuant to Art. 6 CISG. The question of validity of such non-liability clauses in the seller's standard terms of business is not provided for by the CISG (see Art. 4(a) CISG). It is governed by domestic regulations as held applicable under the Rome Convention (*Übereinkommen von Rom über das auf vertragliche Schuldverhältnisse anzuwendende Recht vom 19. Juni 1980; EVÜ*) (see: *v. Caemmerer/Schlechtriem*, *ibid.*, Art. 45 note 67). If the Rome Convention points to the German Standard Terms and Conditions Act (*Gesetz zur Regelung des Rechts der Allgemeinen Geschäftsbedingungen; AGBG*) as the applicable domestic law, the particular

requirements of § 9 AGBG are defined by the standards of the CISG and not by those of the German Civil Code (*v. Caemmerer/Schlechtriem*, *ibid.*, Art. 45 note 70 with further references). Under the German General Terms and Conditions Act, exclusion of liability clauses may not deviate from the fundamental values that are intrinsic to the CISG provisions (*Staudinger/Magnus*, *ibid.*, Art 45 note 45). If the contract between the parties remains overall valid, as in the case at hand, the buyer is entitled to remedies for the seller's breach of contract as defined by Art. 50 CISG. Yet, from Art 79(5) CISG it must be concluded that these provisions cannot be excluded by agreement of the parties; the buyer may rely on these rights under all circumstances (*Staudinger/Magnus*, *ibid.*, note 46 with further references).

The overall exclusion of damages for breach of contract, irrespective of whether the party in breach acting in default, i.e., intentional or negligent, is so unusual that the other party need not expect to encounter it. Therefore such a clause is invalid.

4.

As the District Court rightly found, [Buyer], in compliance to Arts. 38 and 39 CISG, had given timely and specific notice of the defect of the delivered wax in its letter of 16 June 1994. Within these appellate proceedings, [Seller] did not deny this fact.

V.

Contrary to the reasoning of the District Court, [Seller]'s liability is not excluded by the provisions under Art. 79 CISG.

According to Art. 79 CISG, a party is not liable for a failure to perform any of his obligations if he proves that the failure was due to an impediment beyond his control and that he could not reasonably be expected to have taken the impediment into account at the time of the conclusion of the contract or to have avoided or overcome it or its consequences. If the party's failure is due to the failure by a third person whom he has engaged to perform the whole or a part of the contract, that party is exempt from liability only if:

- (a) he is exempt under the preceding paragraph; and
- (b) the person whom he has so engaged would be so exempt if the provisions of that paragraph were applied to him.

1.

Unlike under German domestic law, a party to a contract governed by the CISG is strictly liable for any failure to perform under the contract, irrespective of whether he was at fault or not.

This regime of strict liability was modeled on English and American common law, which is based on the principle that the parties must keep their mutual promises. Hence, any objective failure to perform contractual duties shall result in the right to recovery for the other party, irrespective of the cause for that failure. The party in breach of contract, therefore, is not exempt from his liability if he manages to prove that he was not at fault (see *v. Caemmerer/Schlechtriem*, *ibid.*, Art. 79 CISG note 6). He shall only be exempt if he proves that the failure was due to an impediment beyond his control. Art. 79 CISG, thus, defines the lack of control over certain risk to performance as an overall concept for the

exemption of a party's liability (see *v. Caemmerer/Schlechtriem*, *ibid.*, Art. 79 CISG note 6). This concept had been fundamental for the understanding of Art. 74 of the Uniform Law on the International Sale of Goods (*Einheitliches Gesetz über den internationalen Kauf beweglicher Sachen; EKG*) (hereinafter referred to as ULIS). It is now clearly expressed in the wording of the provision under Art. 79 CISG: «impediment beyond his control = *außerhalb ihres Einflußbereiches liegender Hinderungsgrund = empêchement indépendant de sa volonté*».

The control over the risk to perform may not be defined as an abstract term detached from the particular contract. It must be conceived as a rebuttable indication for the assumption that the party has taken the impediment, respectively, its overcoming, into account at the time of the conclusion of the contract. The particular circumstances under which the contract had been concluded, its implied content, as well as express agreements may limit or widen a party's liability beyond the framework set out by Art. 79 CISG (see *v. Caemmerer/Schlechtriem*, *ibid.*, note 7 with further references). Art. 79 CISG does not resort to the parties' (presumed) intent, as did Art. 74 ULIS. The reason for this lies in the legislators' intention to limit the scope of exemptions of liability and to base them on more objective criteria. Art. 79(1) CISG, thus, sets an objective standard depending on whether a reasonable person in the position of the party would have had the possibility to know of and to take precautions against the impediment. As a general principle, it is assumed that every party must be liable for its promised ability to perform according to the contract. Only for very exceptional external factors, i.e., natural disasters, or war, the party under the duty to perform may not be held accountable.

Here, the Court, in accordance with the prevailing opinion, acknowledges that an impediment to performance may also be due to defective delivery (*Herber/Czerwenka*, *Internationales Kaufrecht*, Art. 79 note 8; *Staudinger/Magnus*, *ibid.*, Art. 79 notes 12 and 25; *v. Caemmerer/Schlechtriem*, *ibid.*, Art. 79 notes 12 and 45). The term «impediment» in the sense used in Art. 79(1) CISG mainly defines an event that has a limiting effect on the obligor's ability to perform, in particular its ability to procure the goods. However, according to the prevailing opinion, in very exceptional cases it cannot be entirely ruled out that even defective goods may constitute an impediment and thus an exemption to liability under Art 79 CISG.

2.

The District Court correctly found Art. 79(2) CISG not applicable because, in the case at hand, the third persons involved, i.e., the company [...] and the former Defendant no. 2), had not been engaged by [Seller] to perform its duties under the contract, as required under Art. 79(2) CISG, even though the vine wax [...] had been a modified version of the wax produced in the years before 1994.

As explained above, the District Court must also be followed in its contention that in exceptional circumstances defective goods may constitute an impediment and, thus, an exemption under Art. 79 CISG.

The District Court further held that [Seller], acting as an intermediary, did not need to bring into account the defects of the wax delivered in 1994; as in the past [Seller] had always

acquired the wax from the same supplier and unquestionably this had never given rise to problems. The District Court concluded that [Seller] had not been able to avoid or overcome the impediment to the delivery of non-defective wax. [Seller]'s obtained risk of procurement for the sold goods did not entail a guarantee that the seller would acquire and deliver non-defective goods. The damages had been caused by hidden defects of the goods of which [Seller] only owed delivery in kind. As the exact cause of the damages could not have been determined at the time, the District Court reasoned that [Seller] was not to be held responsible for the defect, as even if [Seller] had been under a duty to examine the goods, these defects would not have been detectable. Large-scale field trials could not have been reasonably expected from [Seller].

3.

[Buyer]'s appeal against this reasoning is justified. Relying on the legal opinion of *v. Caemmerer/Schlechtriem*, the District Court did not apply very high standards for deciding the question whether [Seller] was able to prove the requirements for an exemption of its liability in case of delivery of defective unascertained goods. However, in the case at hand, it must be concluded for the better reason that [Seller] was indeed liable for its failure to perform and could not rely on an exemption under Art. 79 CISG.

a)

Art. 79 CISG will exempt the obligor from its liability to perform, if three requirements are met:

- aa) The breach of contract must be due to an impediment beyond the obligor's control.
- bb) The impediment must have been one that he could not have been reasonably expected to have taken it into account at the time of the conclusion of the contract.
- cc) The obligor could not reasonably be expected to have avoided or overcome the impediment or its consequences.

Regarding aa): Most importantly, Art. 79(1) CISG requires that the impediment to performance lies beyond the obligor's control. That means, it must not lie within the obligor's sphere of responsibility and control. In order to determine whether the impediment lied beyond a party's control, a court needs to undertake a risk analysis, making regard to any allocation of risk that is apparent from the contract and to any usages and practices that may be relevant.

In cases of delivery of defective goods, an exemption under Art. 79 CISG may only be applicable if the defects were caused by unforeseeable events. Under «normal» circumstances, the seller's promise to perform delivery implies that the delivered goods comply with the contract. If the seller is the manufacturer of the goods, he is liable for any fault in construction or instruction [*Konstruktions- oder Instruktionsfehler*] without exemption. Only in cases of faulty design [*Entwicklungsfehler*], the prevailing opinion grants the possibility to rely on an exemption in very narrow circumstances (see *Staudinger/Magnus*, *ibid.*, Art. 79 note 25). If the fault is caused by exceptional and uncontrollable external events (for instance: terrorists impregnate oranges with poison), then, the seller may rely on an exemption of his liability.

Even if the seller acts only as an intermediary, he is liable to his customer for any defect of the goods. Yet, – similar to cases of faulty design – the seller may be exempt if the defects were undetectable despite thorough examination (*Staudinger/Magnus*, *ibid.*, note 26; for a wider scope of the exemption: *v. Caemmerer/Schlechtriem*, *ibid.*, note 47, other opinion: *Huber* in: *JurBlatt* 89, p. 284; see also *Herber/Czerwenka*, *Interationales Kaufrecht*, Art. 79 note 19).

In its appeal, [Buyer] rightly claims that the Court of First Instance took incorrect, respectively, insufficient account of its submissions as to the manufacturing of the wax in 1994 after a sample provided by [Seller]. In its complaint note of 28 February 1996, [Buyer] had submitted within the proceedings of the First Instance that defective vine wax had been manufactured after a sample provided by [Seller]. In the hearing of 18 November 1997, [Seller] admitted that in the letter of 21 June 1993 [Seller] provided company [...] with a sample of the vine wax of [...] with the remark that this wax had been by far the most commonly used and the most biocompatible as concerns the plants. [Seller] had asked its supplier to design and produce wax that would meet its quality specifications and had asked for a quick reply. Company [...] forwarded the sample to its manufacturer company [...] GmbH (*limited liability partnership under German law*). The manufacturer undertook experiments to design a vine wax according to the provided sample. By letter of 16 July 1993 (see: Judgment 6 O 87/95 of the District Court of Frankenthal (Pfalz) p. 27), Company [...] informed [Seller] about the results of the development process. Hence, it is established that [Seller] itself had given an order for the design of a new vine wax in order to remain capable to stand competition against the other [...] waxes.

[Seller]'s owner had run a vine nursery himself and thus had had long years of experience in the use of vine wax in the grape vine conditioning process. Therefore, [Seller] could not reasonably have been unaware of the risks involved in the modification of the commonly used and approved black vine wax [Seller] had been selling up to that time.

Given these circumstances, there would have only been room for an exemption of [Seller]'s liability under Art. 79 CISG if the redesigned product had passed a strict and comprehensive testing concerning all of its modified properties – in particular its biocompatibility – that was undertaken by company [...] or by the manufacturer. This, however, had not been the case.

By letter of 16 July 1993 (see: Judgment 6 O 87/95 of the District Court of Frankenthal (Pfalz) p. 27), witness [...] had informed [Seller] that an equivalent product had been designed which in the undertaken tests had reacted similar to the product of a competitor. However, the letter entailed an explicit notice that no statement could be made concerning biocompatibility. In this regard, witness [...] explained, testing had to be undertaken by [Seller] itself. Eventually, witness [...] asked [Seller] to inform him about the results of future test trials with the newly designed wax type.

The considered evidence sustains that this new product had yet been unproven in particular as concerns its biocompatibility. In all further decisions concerning the sale and distribution of this new product, [Seller] had to take this fact into account. In particular, the considered evidence does not indicate that witness [...] had wrongfully assured [Seller] that tests on

biocompatibility had already been undertaken. Doing so, he would have countervailed his own statements in the letter of 16 July 1993.

Witness [...] testified that company [...] (the former Defendant no. 2)) had been given a neutral sample on 12 July 1993 by witness [...] with the request to design a comparable wax. This sample was provided by [Seller] and had been taken from a product of a competitor. Hence, [Seller] could not have been unaware of the fact that the redesigned wax that witness [...] had ordered, did not have the same chemical and physical properties as the black wax [Seller] had been supplied with before, and that so far the new wax had not been approved in practice. Considering the practices the parties had established in their business relations before, [Seller] could not have reasonably expected that either witness [...] himself, a trained applications engineer, or his company as a producer of petrochemicals, would have even considered the question whether their newly designed product would have an organic impact on either the growth of grapevine shoots or on the grafted grapevine rootstocks. It was apparent to [Seller] that vine wax had to be produced from organic material. For this reason alone, the manufacturer could not obtain any warranties concerning biocompatibility.

The Court believes witness [...]’s testimony that in the business relations he and [Seller]’s managing director had established over many years, witness [...] had no expertise on application techniques but relied on the expertise and the specifications of his customers as concerns the design of the waxes. Witness [...] reliably stated that in the early 1970s in two cases the producers at the time had initiated examinations of modified wine waxes by vinicultural institutes. Thereafter, neither he himself nor the contacted manufacturer had initiated further examinations on the biocompatibility of the waxes, which had been redesigned and modified time and time again. The industrial customers such as company [...] or [Seller] were responsible to undertake such tests. Witness [...] reliably explained that the manufacturer was only responsible that certain physical requirements and key figures would be met in the design of a wax, such as a certain oil content, the requested viscosity, certain melting and solidification points, as well as a certain penetration. Other examinations such as gas chromatographic analysis were not commonly undertaken by manufacturers who produce waxes used in many different industries. In the gross number of cases, the customers did not request such examinations to be undertaken.

As a general rule, a manufacturer was not responsible to examine the biocompatibility of its product in its particular usage. Thus, [Seller], itself a distributor of vine wax who also ran a vine nursery, knew better than anybody else what specifications and properties were required for the wax in its particular usage. In order to keep up with its competitors, [Seller] had to comply with the wishes of its customers. Yet, [Seller] could not reasonably expect that the newly designed wax had been approved in undertaken field trials. Equally, [Seller] could not reasonably expect that the waxes that had been supplied by company [...] via witness [...] in the years before 1993 and 1994, had been approved in practice before.

The mere fact that in the early 1970s, when the use of vine wax started to spread in the vine growing industry, some manufacturers together with some vinicultural authorities had examined waxes on their practical usability cannot lead [Seller] to expect that in all the later years, when the use of wine wax had become widely established as part of the grapevine

conditioning process, a manufacturer would undertake large-scale field trials following every minor modification of a product.

The Court concludes that, under the given circumstances, that were also known to [Seller], the impediment to performance did not lie beyond [Seller]'s sphere of control in the sense required under Art. 79(1) CISG. This holds true in particular considering that the supplier was a manufacturer of the petrochemicals seated in Northern Germany, and thus had only limited possibilities to undertake examinations.

Therefore, [Seller] reasonably had to take into account that the redesigned black vine wax of 1994 at the time had not been approved in practice, in particular concerning its biocompatibility, and that the sale and distribution of such product involved considerable risks.

[Seller] ought to have avoided, respectively, overcome the impediment to performance by undertaking tests on the product's biocompatibility, respectively, by initiating such tests to be conducted by approved authorities. In defense, [Seller] may not argue that technically [Seller] was not able to do so. As witness [...] reliably stated and witness [...] confirmed, it was [Seller]'s own free decision in 1994 to not use the same black vine wax [Seller] had used and approved of in the years before. Instead, [Seller] trusted in a newly designed product for which only certain physical data had been available then.

Impediments to performance that were unforeseeable at the time of the conclusion of the contract do nevertheless not constitute an exemption to liability under Art. 79(1) CISG, if the obligor can avoid or overcome them or its consequences. For the time after the contract has been concluded, the obligor must undertake any reasonable effort to perform in compliance with the contract.

In the third party sale transaction at issue, [Seller] had passed the unapproved newly designed product on to [Buyer] without any notice about the modifications of the wax. Whether or not [Seller] could have become aware of the changed consistency of the wax, i.e., its modified haptic properties, by a simple visual inspection is not the solely decisive question. It could have reasonably been expected that [Seller] would either undertake field trials itself, which [Seller] was well able to conduct, or that [Seller] would at least give notice to [Buyer] about the fact that the new goods were not approved in practice and then recommend that [Buyer] undertake such tests.

As [Seller] delivered the new wax to [Buyer] without any notice about the modifications that had been made, [Buyer] could rightfully expect that the wax was the same as in the years before, or was at least a product that was equivalent in all relevant aspects and had been well proven in practice.

In the court hearing of 10 March 1998, [Buyer] confirmed again that it had been using [Seller]'s black vine wax in its nursery without complaints for the first time since two years ago. First, [Buyer] had applied the wax only to about one-third of its plants, for the remainder [Buyer] had used wax of a different color. [Buyer] could rightfully trust that the wax ordered for 1994 would have the same properties as the wax [Buyer] had used before. The redesigned wax was delivered in neutral looking bags; only the print on number on the

bags was different than in the years before. This alone, however, did not indicate to [Buyer] in sufficient clarity that a different new product had been delivered.

In any event, the exemption under Art. 79(1) CISG cannot apply, as [Seller]'s managing director had cancelled an already given order for the old black vine wax. Instead, he decided to order the hitherto unproven redesigned vine wax and deliver it to its customers. As witness [...] had reliably testified, [Seller] could have well decided to supply its customers with the approved wax [Seller] used to deliver in the years before as this had never given rise to complaints.

Therefore, it must be concluded that [Seller] could not sustain facts that would have led to an exemption from liability under Art. 79(1) CISG. In the given circumstances, a reasonable person in the same position as [Seller] would have had sufficient reason and opportunity to undertake the necessary field trials in order to avoid or at least minimize the risk of plant intolerability. In any case, [Seller] would have been obliged to notify [Buyer] of the fact that the delivered wine wax had been redesigned and, to that point of time, had not been approved by practical usage.

What particular properties or ingredients (i.e., a low melting point, or an impurity in the chemical structure) of the redesigned wax had actually given cause to the occurred damage does not need to be determined. For the case at hand, it is sufficient to conclude that [Seller] failed to substantiate and prove one of the exceptional causes in which the exemption under Art. 79(1) CISG was applicable in a case of defective delivery.

Hence, no further expert opinions need to be considered on the question of the causality of the damage.

Also, no further evidence needs to be taken regarding [Seller]'s submission in the hearing of 10 March 1998 that «in the past, biological examinations of the vine wax were always undertaken by the manufacturers and not by [Seller].» For an exemption under Art. 79(1) CISG, it is irrelevant who used to be responsible for the examination of new products in the past, and what practices in this respect had been established with other manufacturers. Given witness [...]’s written statements of 16 July 1993, [Seller] would have had good cause to ensure that the redesigned product came into use without risk to the non-informed consumers. The allocation of the spheres of liability in [Seller]'s business relation to company [...] is irrelevant for the case at hand. Of relevance here is only the contractual relation of [Buyer] to its supplier, which is governed by the CISG. Due to its expertise and specific knowledge, the risks involved in the use of the unproven redesigned vine wax were by no means beyond [Seller]'s control.

All of [Seller]'s offers to provide further evidence may remain unconsidered by the Court as they were all irrelevant (respectively, were not sufficiently substantiated) to the question whether under the strict requirements of Art. 79(1) CISG [Seller] could rely on the assumption that the newly designed product had been examined on its biocompatibility by the manufacturer.

b)

Therefore, [Buyer]'s claim for damages caused by the wax that [Seller] delivered in 1994 is justified as concerns the cause of its action.

As for the amount of the damages, the claim is not ready for decision. Further evidence needs to be taken and considered in particular regarding the losses [Buyer] had suffered in its own vine nursery and the indirect damages [Buyer] is liable for due to the damages and losses of its customers, caused by their use of the defective vine wax.

[...]