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| Jurisdiction | Austria |
| Tribunal | Oberster Gerichtshof (Austrian Supreme Court) |
| Date of the decision | 12 September 2006 |
| Case no./docket no. | 10 Ob 122/05x |
| Case name | *Blank CDs case* |

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

*Edited by Institut für ausländisches und Internationales Privat- und Wirtschaftsrecht der Universität Heidelberg*

*Daniel Nagel, editor* [***]

## Reasoning:

***[Facts of the case:]***

According to the decision of the District Court Düsseldorf on 20 July 2004, Plaintiff [Liquidator of Seller's assets] administers the property of P[…] GmbH [Seller]. 1

[Seller] is a German affiliate of P[…] Corporation [Seller's parent company] with place of business in Taiwan. Between 1997 and 2000, it operated a factory in Taiwan for the fabrication of blank CD-R media. [Seller] bought blank CD-R media from [Seller's parent company] for resale in Europe. The goods were delivered from Taiwan to Rotterdam by ship and deposited at a storehouse. Customers were supplied from that location, among them Defendant [Buyer]. 2

[Seller's parent company] had concluded a license agreement with company Ph[…] [Licensor] on 23 June 1997. By virtue of that contract, [Seller's parent company] was given the right of fabrication and worldwide distribution of CD-R media (non-rewritable CD media) and CD-RW media (rewritable CD media). The contract provided for a license fee to be paid by [Seller's parent company] for each successful distribution of a CD. Since the fourth quarter of 1997, [Seller's parent company] had one-sidedly reduced the agreed fees. Later on, it finally stopped paying license fees at all. [Licensor] terminated the license contract on 21 March 2000 with instant effect. 3

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[*] All translations should be verified by cross-checking against the original text. For purposes of this translation, Plaintiff of Germany is referred to as [Liquidator of Seller's assets] and Defendant of Austria is referred to as [Buyer]. The insolvent seller is referred to as [Seller]. Seller's proprietary company is referred to as [Seller's parent company]. Amounts in the uniform European currency (*Euro*) are indicated as [*EUR*].

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Since 1998, [Buyer] had also produced blank CD media in T[...]. It also purchased additional CDs from [Seller] on a grand scale in order to resell them to retailers in Austria, Germany and Switzerland. Even after termination of the license contract by [Licensor], [Seller] supplied [Buyer] with CD media; the [Buyer], however, did not pay for the ten most recent invoices, forming the subject matter of the present dispute. 4

The [Liquidator of Seller's assets] requested payment of EUR 283,606.71 for ten invoices (delivery of 1,584,800 blank CDs). (During the proceedings, the invoices were referred to as «invoice nos. 3 to 12».) 5

***[Position of the parties:]***

***[Buyer's position:]***

[Buyer] objected to [Liquidator]'s purchase price claim alleging that, until December 2000, it could reasonably believe that [Seller] had delivered properly licensed products. However, on that date and following its own research, [Buyer] had discovered that patent rights had been in dispute between [Seller] and [Licensor] for some time already. [Buyer] immediately had communicated its concerns to [Seller]. In the course of the talks and correspondence that followed, [Seller] had conceded the existence of disputes with [Licensor] over patent rights. However, [Seller] had refused to give any further information regarding the affected goods and had refused to effect a cure of the alleged deficiency in title by way of subsequent licensing of the goods. [Seller] had also refused to indemnify [Buyer] through submission of a bank security or to compensate [Buyer]. [Buyer] thus had to assume that all goods acquired from [Seller] in the year 2000 had not been properly licensed. On the basis of license fees due in 2000 alone, [Buyer] would be liable in an amount easily exceeding the value of this claim. Lacking [Seller]'s proper performance of the contract, [Buyer] had the right to retain its corresponding performance, especially in consideration of the fact that [Licensor] vehemently prosecuted patent right violations. 6

Furthermore, [Buyer] feared to be confronted with recourse claims from its customers as they were also in danger of being sued by [Licensor]. [Buyer] had given timely notice of the deficiency in title. 7

***[Position of Liquidator of Seller's assets:]***

The [Liquidator of Seller's assets] replied that all CDs delivered by [Seller] to [Buyer] had been produced prior to the termination of the license contract. Thus, the goods had not been affected by any deficiency in title. Moreover, [Licensor] did not hold patent and license rights concerning all kinds of storage media. Any such license rights needed to be registered in each national jurisdiction. [Buyer] did not comply with its burden to prove which particular patent and license rights had allegedly been violated by [Seller]. Especially, it had not been substantiated which license provision had been violated to the disadvantage of [Licensor] as the allegations had lacked a statement in respect to registry numbers and the extent of license protection. The license contract concluded between [Seller's parent company] and [Licensor] – following extraordinary high license fees – had infringed moral standards and therefore was 8

void. Consequently, [Licensor] would not be able to exercise any claims against [Seller's parent company].

No such claims had been exercised by [Licensor] against [Seller's parent company] or against [Buyer]. Furthermore, any claims by [Licensor] had already been time-barred. Not only was [Buyer]'s assertion of a breach of contract unjustified, but it also did not have any right to retain payment for the goods. Any claims on the side of [Buyer] were further excluded under Art. 42(2)(a) CISG, because at the time of ordering the deliveries in dispute, [Buyer] knew that legal disputes over the license fee had arisen between [Seller's parent company] and [Licensor]. In addition to that, [Buyer] had not complied with its duty to notify pursuant to Art. 43 CISG. «Since [Seller] had properly performed under the contract, [Buyer] was unjustifiably enriched by the amount in dispute.» 9

***[Decision by the Court of First Instance:]***

The Court of First Instance awarded [Liquidator of Seller's assets] a sum of EUR 3,233.80 – not being subject to appellate proceedings – and dismissed [Liquidator of Seller's assets]'s request for a further EUR 283,606.71. 10

Apart from the undisputed factual basis set out above, the Court of First Instance assumed the following:

[Licensor] is holder of European Processing Patent EP[…] with regard to the licensed goods. This patent was registered on 17 January 1989 using a priority of 22 January 1998 from the Dutch Patent Registration […]. Assignation of the patent was published on 3 November 1993. Germany is one of the Contracting States mentioned in the patent. The German patent which followed from the European patent has entered into force. 11

[Seller's parent company] and [Seller] itself stated that termination of the license contract by [Licensor] on 23 March 2000 had been ineffective due to the fact that the net sales price of a CD-R medium decreased from 333 Yen to less than 100 Yen after the conclusion of the license contract. In fact, [Seller's parent company] reduced payment of the license fees during the fourth quarter of 1997. From then on, there had not been any further accounting of license fees for the number of sold goods by [Seller] against [Licensor]. 12

In [Seller]'s view, it had the right to retain license fees in light of the decline in prices. Finally – probably by the start of 1998 – the Taiwanese [Seller's parent company] began to retain all license fees. Irrespective of the concluded license contract, [Seller] further stated that [Licensor] was not the holder of any invention protected by patent laws and if so, patent protection would have already expired. 13

In 1999, there had been proceedings in the Netherlands between [Licensor] as plaintiff and the Taiwanese [Seller's parent company] of [Seller] as defendant. The subject matter of the dispute had been unsettled license fees and the corresponding accounting up to 31 March 2000. These Dutch proceedings were still pending in 2001. Possibly, [Buyer] only learned of the proceedings by the start of December 2000. 14

[Buyer] usually ordered the CD media from [Seller] via telephone order. Delivery was effected by carriage of the goods, free domicile. According to the parties' agreement, the Taiwanese goods were to be delivered from the Netherlands to [Buyer]'s premises in Austria. [Seller] would only accept orders if the goods had already arrived at its Dutch storehouse. 15

As regards the invoices in dispute (nos. 3 to 12), which had been issued between 19 September and 20 November 2000, it is neither established that the correspondingly delivered goods had been produced by the Taiwanese [Seller's parent company] before 23 March 2000 (date of termination of license contract), nor that the goods had already been distributed from Taiwan to [Seller] (loading onto ship). [Seller] had no interest in storing a lot of goods at its storehouse as it had to pay for the storage space, which it actually used. Whenever [Seller] ordered goods from the Taiwanese [Seller's parent company], it took only some six weeks until delivery was effected at the Dutch storehouse. 16

The Court of First Instance considers as evident that the goods delivered to [Buyer] – corresponding to invoices nos. 3 to 12 – originated from deliveries by [Seller's parent company] which had been produced at the Taiwanese factory after 23 March 2000. It was further evident that the ordering of these goods at [Seller's parent company] by [Seller] had been effected after 23 March 2000, considering that [Seller]'s management had already been aware of the termination of the license contract by [Licensor] against the Taiwanese [Seller's parent company]. [Seller's parent company] has a high production capacity. Its plant was capable of fabricating one CD every six seconds. 17

It was possible – yet not finally established – that around 18 October 2000 [Buyer]'s management had made a resolution not to pay any longer for invoices from [Seller], because [Buyer] had become aware of the termination of the license contract by [Licensor] against [Seller's parent company] of [Seller]. 18

[Buyer] did not settle invoice nos. 3 to 12, being the subject matter of the dispute. The above-mentioned resolution on the side of [Buyer] was made at the beginning of December 2000 at the latest. This was caused by the information received by [Licensor] that [Seller's parent company] would not yield license rights to [Licensor] any more. This information referred to the instant termination by [Licensor] of 21 March 2000. This termination reached [Seller's parent company] on 23 March 2000. [Buyer] justified its non-payment of unsettled invoices from [Seller] by fax dated 3 December 2000, stating that: «There was uncertainty and the risk that [Licensor] would try to collect from their customers the license fees which [Seller] denied to pay.» 19

A conference took place between board member of [Buyer] (Pa[...]) and the CEO of [Seller] (K[...]) in Taiwan on 8 October 1999. The conference was aimed at establishing a closer cooperation between [Seller] and [Buyer]. Pa[...] was not informed by K[...] about the dispute pending between [Seller's parent company] and [Licensor] and about the fact that license fees requested by [Licensor] were not paid any longer. The Court does not accept the submission that K[...] informed Pa[...] during that conference in Taiwan on 8 October 1999 about these facts. 20

The first written submission by [Seller]'s attorney of 5 December 2000 was accompanied by a declaration of guarantee, according to which [Seller] engaged itself to indemnify [Buyer] from all possible recourse claims filed by [Licensor] from non-payment of license fees. 21

The deliveries of CD media are no longer in [Buyer]'s possession as the goods had meanwhile been resold. It cannot be established in this dispute that the parties had agreed to apply Austrian law to govern their contract. Furthermore, there did not exist any framework contract which the orders in dispute could be subjected to. Finally, the Court could also not establish that [Seller] and [Buyer] waived applicability of the CISG (negative choice of law) or that any particular substantive law was agreed on to govern their commercial sales transactions. 22

The Court of First Instance reasoned that under the applicable CISG, the seller must deliver goods which are free from any right or claim of a third party based on industrial property or other intellectual property, of which at the time of the conclusion of the contract the seller knew or could not have been unaware (Art. 42 CISG). This implies that the seller will be released from this duty if it clarified to the buyer that a third party relied on industrial property rights in regard to the goods. [Liquidator of Seller's assets], who had been aware of [Licensor]'s industrial property right, failed to prove that such clarification was made. The seller's liability is, however, excluded if after the conclusion of contract the buyer has become aware or ought to have become aware of the right or claim and does not give notice to the seller within a reasonable time. In case of suspicious circumstances, the buyer is generally under no corresponding duty to investigate. 23

Therefore, a duty for [Buyer] to investigate whether the license contract was still in effect cannot be assumed. Consequently, [Buyer]'s notice by letter dated 3 December 2000 was given in the time required by Art. 43(1) CISG. In any case, [Liquidator of Seller's assets] had been aware of the patent or industrial property right of [Licensor], meaning that giving notice was not even necessary. It is true that [Buyer] did not expressly exercise its right to avoid the contract, yet this would not help [Liquidator of Seller's assets] in terms of these proceedings. It was not for [Buyer] to prove the existence of [Licensor]'s industrial property right and [Liquidator of Seller's assets]'s awareness of it at the time of the conclusion of the contract. § 155 öPatG, § 139(3) dPatG and Art. 34 TRIPS provided for the burden of proof to shift to [Liquidator of Seller's assets]. [Buyer] was therefore entitled to retain the purchase price in full after occurrence of the alleged deficiency in title, irrespective of whether the goods had already been resold. [Liquidator of Seller's assets] did not argue that [Buyer] had forfeited its remedies from non-performance by resale of the CD media. [Liquidator of Seller's assets] further failed to substantially object to the argument that licensing of the CDs constituted a description impliedly agreed upon. Undisputedly and pursuant to auxiliary agreements, [Buyer] should not be obliged to pay licensing fees. The circumstance that [Seller] was obliged under the said commercial sales to perform in advance does not hinder [Buyer] from avoiding the contract. Therefore, [Seller]'s claim is justified only in regard to invoice no. 2 in an amount of EUR 3,233.80. The residual claim was to be dismissed. 24

***[Decision by the Court of Appeal:]***

The Court of Appeal held that [Buyer]'s appeal was justified and amended the judgment of the Court of First Instance in a way that [Buyer]'s was awarded the sum of EUR 283,606.71, now being the matter in dispute. Reprehensions against evidence by both parties were considered partially unjustified and partially irrelevant. The reasoning on the merits is based on the finding that under the special provision of Art. 42 CISG, which governs the seller's liability for deficiencies in title caused by industrial property rights of third persons, the seller was liable if an attempt is made to restrict the buyer in the use of the goods. As, in general, unjustified third-party claims may already trigger the seller's liability, the same legal consequence had to be effected *a fortiori* in cases where an industrial property right actually existed. As a result, a deficiency in title occurred whenever an industrial property right existed, or if the buyer is being sued by the proprietor or if both aspects are met at the same time. **25**

The burden to prove a deficiency in title was on the buyer. The liability of the seller for deficiencies following the property right was territorially limited under Art. 42(1)(a) and (b) CISG. Therefore, the seller had to guarantee that no third-party rights existed only with reference to certain countries, but not on a worldwide level. First, it was liable for deficiencies in title caused by industrial property rights according to the law of the country in which the goods should be used or marketed. This would apply if the parties at least recognizably considered this country as a potential place for resale at the time of conclusion of contract, which is to be substantiated by the buyer. Subsidiarily, the seller was liable for conflicting property rights in the buyer's country. **26**

In the case at hand, [Buyer] successfully proved that the said blank CD media delivered by [Seller] were burdened with a patent right of [Licensor]. It was established that [Licensor] possessed a European Processing Patent. It consisted of a batch of national patents. It was not determined whether the European Processing Patent for blank CD media held by [Licensor] also applied in Austria. Likewise, [Buyer], which had the burden of proof, failed to deliver procedural submissions on that point. In any case, it was definitely determined that [Licensor]'s European patent had entered into effect in Germany. It can be assumed that the parties took into consideration a resale of the blank CD media within Germany, although [Seller] had delivered the goods ordered by [Buyer] to Austria. Both [Buyer] and [Seller] supplied retailers in Germany. Following this common market, [Seller] could have been aware of the fact that [Buyer] would resell the blank CDs *inter alia* in Germany. Such awareness is further supported by the fact that [Seller] even delivered part of the goods to Germany which can already be concluded from [Seller]'s submissions in regard to invoice no. 1. By virtue of this invoice, [Seller] requested payment of the German VAT, which in turn would have never occurred if delivery had been effected to Austria. Since [Seller] had been aware or could have been aware that [Buyer] re-sold the purchased goods *inter alia* in Germany, it can be assumed that the parties took that country into consideration at the time of the conclusion of the contract. Therefore, the prerequisites were met in order to assume that the blank CD media were deficient in title. **27**

Pursuant to Art. 42(2)(a) CISG, [Seller]'s liability for deficiencies in title would be excluded if [Buyer] had been aware or could not have been unaware of [Licensor]'s industrial property **28**

right at the time of the conclusion of the contract. However, [Buyer]'s awareness concerning the license fee dispute between [Seller's parent company] and [Licensor] cannot be put on a par with [Buyer] being aware of any existing property right on the side of [Licensor]. The mere dispute over license fees would not at all affect the validity of the license contract concluded between [Seller's parent company] and [Licensor]. Only blank CD media produced after a termination of the license contract were subject to a patent right of [Licensor]. According to the factual findings, [Buyer] had discovered that the license contract was terminated at the beginning of December 2000 at the latest. The corresponding information was given by [Licensor] after the delivery of the CD media in dispute.

The burden of proving the awareness or culpable unawareness of the buyer in terms of Art. 42(2)(a) CISG was on the seller. [Liquidator of Seller's assets] did not sufficiently substantiate that, before December 2000, [Buyer] had been already aware of the termination of the license contract by [Licensor] and, therefore, of the existence of its industrial property rights regarding the CD media delivered in May and from September to November 2000 and those produced after the termination. Therefore, [Liquidator of Seller's assets] was liable for any deficiencies in title concerning the blank CD media that followed from industrial property rights of [Licensor]. This is corroborated by the fact that [Seller] undoubtedly had been aware of the termination of the license contract between [Seller's parent company] and [Licensor] when it concluded the contracts in question. **29**

It was irrelevant for the liability for deficiencies in title that claims of [Licensor] against [Liquidator of Seller's assets] were possibly time-barred. First, the time of delivery is decisive in order to determine the existence of deficiencies in title; second, even an unjustified claim of the third party against the buyer would trigger the seller's liability. **30**

[Liquidator of Seller's assets] could not rely on an exclusion from liability following an alleged omission by [Buyer] to give notice under Art. 43(1) CISG. [Seller] had been aware at the time of termination of the license contract of [Licensor]'s industrial property right in respect to the CD media (Art. 43(2) CISG). **31**

Lacking any corresponding submissions from the proceedings in the first instance, it cannot be assumed that [Seller] cured the deficiency in title by having filed a declaration of guarantee which would constitute a remedy of lack of conformity under Art. 46(3) CISG. On the contrary, the procedural submission made by [Buyer] that it unsuccessfully requested [Seller] to remedy the deficiency either by subsequent licensing of the blank CD media or by an indemnification or by issuing a bank security needs to be considered. [Liquidator of Seller's assets]'s objection was not sufficiently substantiated so that [Buyer]'s submissions must be assumed as proper pursuant to § 267(1) ZPO. It followed that [Seller] had not remedied the deficiency in title. It must therefore be determined which legal consequence is borne by that lack of conformity. **32**

Under the CISG, the buyer might declare avoidance of the contract and claim damages from the seller. In any case, the buyer was entitled to a reduction in price. The CISG did not provide for any other remedies on the side of buyer in a similar situation. In particular, the buyer is not entitled to retain its performance. [Buyer] did explicitly and exclusively rely on a right to **33**

retain the purchase price following a deficiency in title. Since there was no right to retain performance for [Buyer], it was obliged to pay the purchase price.

Regular appeal was admissible as there has not been any jurisprudence by the Federal Supreme Court concerning the major legal issues in question (existence of a deficiency in title in terms of Art. 42(1) CISG, allocation and extent of burden of proof for such deficiency, legal consequences in case of non-remedied deficiency in title); these questions were of particular relevance in accordance with § 502(1) ZPO. 34

***[Position of Buyer upon appeal:]***

[Buyer]'s appeal is aimed against this judgment. It is submitted that, due to an incorrect legal assessment, the judgment should be amended in a way that the [Seller]'s claim was dismissed. In the alternative, [Buyer] requests repeal and a referral to the previous instances. 35

***[Position of Liquidator of Seller's assets upon appeal:]***

[Liquidator of Seller's assets] requests in its appellate response that the Federal Supreme Court affirm the decision of the Court of Appeal. 36

***[Reasoning of the Supreme Court:]***

The [Buyer]'s appeal is admissible; it is also justified in respect to a repeal of the judgment of the Court of Appeal. 37

These appellate proceedings merely deal with the issue whether the CISG grants the buyer a right to retain performance in case of a breach of contract by the seller. In that respect, the Federal Supreme Court, after an in-depth discussion of the different statements in literature, already followed the notion prevailing in the German-speaking area that even under the CISG a debtor had the right to raise the defense of non-performance and to retain its own performance until the contracting partner was willing to simultaneously effect counter-performance in its decision 4 Ob 179/05k (EvBl 2006/28 = RIS-Justiz RS0120302). There is no reason to depart from the opinion expressed in 4 Ob 179/05k in the present case. 38

It is therefore of critical relevance whether [Seller] had breached its contractual duty. Generally, under the CISG the burden to prove the factual prerequisites of a provision is on the party that intends to employ it to its own advantage (see Ferrari, in: Schlechtriem/Schwenzer (eds.), *Kommentar zum Einheitlichen UN-Kaufrecht [Commentary on the CISG]*, 4th ed. (2004), Art. 4 paras. 50, 52; Art. 7 para. 56; Antweiler, *Beweislastverteilung im UN-Kaufrecht [Burden of proof under the CISG]*, 1995, p. 197). Consequently, the burden to prove the breach of contract is on [Buyer]. In exceptional circumstances, considerations of equity can lead to a shifting of the burden of proof, *e.g.*, a closeness to evidence or unacceptable difficulties for one party to furnish evidence (Magnus, in: *Staudinger, Kommentar zum BGB, Wiener Kaufrecht,* 2005, Art. 4 para. 69 with further references; Ferrari, *supra*, Art. 4 para. 51). 39

[Buyer] argued that it had to assume that at least those goods which were delivered by [Seller] during the year 2000 had not been licensed. [Liquidator of Seller's assets] responded that [Licensor] would not even hold patent and license rights on all storage media and it apparently had not registered its rights in all countries. 40

This submission by [Buyer] requires some further discussion and ascertainment. In general as mentioned above, the burden to prove the extent of an alleged industrial property right of [Licensor] establishing the lack of conformity is on [Buyer] being the party relying on the breach (Antweiler, *supra*, p. 190). The industrial property rights under Art. 42 CISG refer to patents of any kind (Magnus, in: Honsell (ed.), *Kommentar zum UN-Kaufrecht [Commentary on the CISG]*, 1997, Art. 42 para. 6). These can likewise be processing patents (Magnus, in: *Staudinger, supra*, Art. 42 para. 11), as patent protection also embodies the direct products manufactured by a patented process (see *e.g.*, Kucsko, *Geistiges Eigentum [Intellectual Property],* 2003, p. 913 *et seq.*). In that respect, the Court of Appeal made a proper legal assessment when it territorially limited the seller's liability for deficiencies in title following a third-party right in terms of Art. 42(1)(a) and (b) CISG. The seller merely has to guarantee a corresponding conformity in certain countries, but not on a worldwide level (Langenecker, *UN-Einheitskaufrecht und Immaterialgüterrechte [Uniform Sales Law and Intellectual Property Rights]*, 1993, p. 153; Posch, in: Schwimann (ed.), *ABGB, IV [Commentary on the Austrian Civil Code, Vol. 4]*, 3rd ed., Art. 42 para. 3 *et seq.*; Magnus, in: Honsell, *supra*, Art. 42 paras. 8 *et seq.*). It is primarily liable for any conflict with property rights under the law of the State in which (not: «into which»!) it is being resold or in which it is supposed to be used, provided that the parties took this State into consideration at the time of the conclusion of the sales contract. The burden of proof in this respect is on the buyer (Schwenzer, in: Schlechtriem/Schwenzer (eds.), *Kommentar zum Einheitlichen UN-Kaufrecht [Commentary on the CISG]*, 4th ed. (2004), Art. 42 para. 29; Magnus, in: Honsell, *supra*, Art. 42 para. 20). 41

In this respect, a discussion of the undifferentiated submission of [Buyer] is necessary. The assumption by the Court of Appeal that the parties allegedly had – recognizably for the [Seller] – considered Germany as the State in which the blank CD media were to be used is inadmissible without a corresponding discussion with the parties. Therefore, this cannot be employed as an indicating factor pointing to a lack of conformity. 42

It must be remarked in this context that there is no conflict with the judgment in 7 Ob 302/05w (Zak 2006/359, 212. In that judgment, the Federal Supreme Court held with references to previous jurisprudence that the minimum standard for delivered goods (Art. 35(2) CISG) – apart from particular exemptions – is determined by provisions of public law in the seller's country (likewise Magnus, in: Honsell, *supra*, Art. 35 para. 14; differentiating, yet tending to the contrary Schwenzer, *supra,* Art. 35 paras. 16–17a). In contrast, the wording of Art. 42(1) CISG already refers to the country where the goods will be resold or otherwise used. 43

Furthermore, the Court of Appeal's assessment was correct when it held that a seller would breach the contract at any rate if an industrial property right of a third person actually existed; under the additional requirements of Art. 42 CISG the seller is also liable if any industrial property right is being unrightfully claimed. It is part of the seller's sphere of risk to deal with the 44

third party in such cases (Magnus, in: *Staudinger, supra*, Art. 41 paras. 15–17, Art. 42 para. 13, each with further references).

Finally, it is to be pointed out that [Liquidator of Seller's assets] did not base its claim in the first instance on an extra-contractual claim following unjust enrichment. The only hint to such a basis for a claim can be found in the written submission ON 46, however in a different context («due to the fact that [Seller] had properly effected its performance, [Buyer] was in turn enriched in the amount of the purchase price»). This, however, can only be seen as a confirmation of the contractual basis for [Seller]'s claim. **45**

Following the necessary discussion of the parties' submissions: **46**

- Regarding the existence of a deficiency because of the alleged industrial property right of [Licensor], and

- Regarding the country that the parties considered for the use of the blank CD media

there is further need for a hearing in the first instance. Hence the judgments made in the second instance have to be repealed. Elaboration of any other legal assessments made by the Federal Supreme Court is not to be considered at the moment since the result of the additional hearings have to be awaited first.

The reservation on costs and expenses is based on § 52 ZPO. **47**