

**Case 724: CISG 35 (2)(d), 36, 39, 45, 49 (2)(b), 50, 66, 67, 69**

Germany: Oberlandesgericht Koblenz

2 U 923/06

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<http://www.cisg-online.ch/cisg/urteile/1408.htm> (original);

<http://cisgw3.law.pace.edu/cases/061214g1.html> (English translation)

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The decision of the Higher Regional Court of Koblenz on the claimant's appeal shows the independence of the remedies of avoidance of the contract (article 49 (1)(a) CISG) and price reduction (article 50 CISG).

The claimant, an Italian manufacturer of wine bottles, sued the buyer, a customer from Germany, for payment of the purchase price of several shipments of bottles, after the defendant had declared that it would not pay. The defendant argued that due to defective packaging by the claimant the bottles had been either broken or had lost their sterility and therefore became unsuitable for further use. The contract obliged the claimant only to deliver "ex factory" while it was up to the defendant to take delivery.

On first instance, the Regional Court partly rejected the claim, on the ground that the buyer had declared the contract avoided pursuant to article 49 (1)(a) CISG and declared its unwillingness to pay. The Higher Regional Court dismissed the claimant's appeal against the judgement of the Regional Court.

The Higher Regional Court held that the claimant had failed to perform its obligation, pursuant to article 35 (2)(d) CISG, to provide packaging for the bottles in a manner adequate for transport by truck. Therefore the court regarded the seller to be liable for the damage to the bottles under articles 36 (2) and 66 CISG, although the risk of loss or damage passed to the buyer, when the bottles were taken over by the buyer's carrier. However, contrary to the Regional Court's reasoning in first instance, the Higher Regional Court stated that the requirement of article 49 (2)(b) CISG to declare the contract avoided within a reasonable time does not allow to consider the buyer's refusal of payment to be an implied declaration of avoidance. The court considered the buyer's refusal to be a declaration of reduction of the purchase price to zero. Explicitly the court pointed out that the buyer may reduce the price according to article 50 CISG even if it had lost its right to avoid the contract for instance as a result of missing the deadline pursuant to article 49 (2)(b) CISG. According to the court the right to reduce the price may also be used as an objection against a claim for the payment of the purchase price. As for the interpretation of article 50 CISG itself the court stated that the wording "at the time of delivery" means the time the goods are available to the buyer after having arrived at their destination.

The failure of the claimant to provide adequate packaging for the bottles to preserve them and to ensure their arriving in a marketable condition was deemed as a fundamental breach of contract by the court under article 25 CISG.

Concerning the notice of defects as per article 39 CISG the court clarified that the requirement of "specifying the nature of the lack of conformity" is satisfied if the buyer describes the divergence from quality by description of the symptoms, while a specification of the causes is not required.