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| Jurisdiction | Germany |
| Tribunal | Oberlandesgericht Koblenz (Court of Appeal Koblenz) |
| Date of the decision | 14 December 2006 |
| Case no./docket no. | 2 U 923/06 |
| Case name | *Wine bottles case* |

*Translation*[*] *by Veit Konrad*[**]

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*Daniel Nagel, editor*[***]

## RULING (*BESCHLUSS*)

I. Plaintiff [Seller]'s appeal against the judgment of the District Court (Landgericht; LG) of Bad Kreuznach, Commercial Division (Kammer für Handelssachen) of 26 May 2006 in favor of Defendant [Buyer] is dismissed.

II. The [Seller] bears the costs of the appeal.

## REASONING

[Seller]'s appeal (Berufung) is not justified. 1

During the proceedings, on 10 October 2006, the Court has already communicated its opinion that the appeal does not concern legal issues of fundamental importance for the unity of jurisdiction, which would justify further appeal under § 522(2) sentence one of the German Code of Civil Procedure (Zivilprozessordnung; ZPO). On that occasion, the Court also informed the parties that most likely the appeal would be found unjustified. 2

[*] All translations should be verified by cross-checking against the original text. For purposes of this presentation, the Plaintiff-Appellant of Italy is referred to as [Seller]; the Defendant-Appellee of Germany is referred to as [Buyer].

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The [Seller]'s subsequent submissions do not change the Court's opinion. In particular, the Court has taken account of the fact that, under the contract that had been concluded between the parties, [Seller] was obligated to deliver the bottles «Ex factory». [Seller] has acknowledged this several times during the proceedings at the first instance, as well as in the appellate proceedings. In its appeal, [Seller] maintained that the parties had agreed that [Buyer] would take over the deliveries in L.... and that [Buyer] employed a carrier who took over the goods from the Italian manufacturer. [Seller] argued that: 3

- The transaction would not qualify as a sale to destination according to the buyer's instructions (Versendungskauf).

- Hence, the risk passed to [Buyer], when [Seller] offered the goods to [Buyer]'s carrier at the Italian manufacturer's place of business. The risk for the further carriage of the goods was therefore to be borne by the [Buyer].

This cannot be followed by the Court: 4

- [Seller] fails to acknowledge that the defects of the bottles were actually not due to their miscarriage, but due to their improper packaging with a particular porous and unsuitable foil.

- In this respect, [Seller]'s appeal expressly does not focus on the Court of First Instance's finding that the packaging was deficient due to the improper bottles that had been used. [Seller] admitted that it fell within its own sphere of responsibility to provide for packaging that allowed for a safe and secure carriage by truck to their final destination as defined under the contract (see Art. 35(2)(d) CISG).

[Seller] further fails to acknowledge that this duty existed irrespective of whether, by handing over the goods to [Buyer]'s carrier, the risk of loss or damage had been passed to [Buyer] according to Arts. 66, 67, 69 CISG. Art. 66 CISG stipulates that loss and damage to the goods after the risk has passed to the buyer does not discharge him from his obligation to pay the price, unless the loss or damage is due to an act or omission of the seller. 5

The CISG provisions regulating the passing of the risk presuppose that the loss or damage does not fall within the responsibility of the seller. On the other hand, if loss or damage results from a breach of contract by the seller, then Articles 45 et seq. of the Convention regulate the buyer's remedies for that case. 6

- Art. 36 CISG clearly distinguishes these two scenarios, stating that the seller is liable for any lack of conformity which exists at the time when the risk passes to the buyer, or after that time, when it is due to a breach of any of the seller's contractual obligations.

- Accordingly, Art. 66 CISG constitutes an exception to the passing of the risk regulations, in case the loss or damage to the good is due to an act or omission of the seller. Such an act causing loss or damage to the sold goods prima facie constitutes a breach of contract (Schlechtriem, Kommentar zum Einheitlichen UN-Kaufrecht-CISG, 3ld ed., 2000, Art. 66 note 5).

Hence, [Seller] is liable for damages that occurred due to improper packaging prior to the passing of the risk to [Buyer] or, respectively, to [Buyer]'s carrier. As a general principle, although the risk might have been passed, the seller is not entitled to receive the full purchase price for goods that are defective due to his own non-compliance with the contract (Staudinger, BGB, Wiener Un-Kaufrecht (CISG), 2005, Art. 66 note 12, 13). **7**

The buyer may also declare the reduction of the price, if -- as in the case at issue -- he lost the right to declare the contract avoided for some reason, e.g., due to missing the deadline of Art. 49(2)(b) CISG, or if he violates his duty to give notice (Schlechtriem, ibidem, Art. 50 note 13; Staudinger, ibidem, Art. 50 note 23). The right may also be used as an objection to the seller's claim for payment of the purchase price (Schlechriem, ibidem, Art. 50 note 16). **8**

[Buyer]'s refusal to pay the purchase price -- after [Buyer] had given specified notice of the lack of conformity of the delivered bottles -- can be interpreted as a reduction of the price to zero (Art. 50, Art. 45 et seq. CISG; see Schlechtriem, ibidem, Art. 50 note 13 with further references; Staudinger, ibidem, Art. 50 note 23). [Seller] wrongly argues that, pursuant to Art. 50 sentence one CISG, the Court has to compare bottles that have been poorly packed at the place of delivery (i.e., before the transport by the carrier), but which are otherwise conforming to the contract, with bottles that were properly packed. According to [Seller], both have the same value. Hence, [Seller] alleges that [Buyer] would not be entitled to reduce the price, but may only resort to damages for breach of contract. This cannot be upheld by the Court: If the packaging of the bottles had been deficient to a degree that would not allow safe carriage of the goods to their final destination, then the damages that occurred, i.e., the breaking of the bottles and their lack of sterility, entitle [Buyer] to a complete reduction of the price. A reduction of the price under Art. 50 CISG, does not take into account the value of improper packaging in respect to proper packaging (GA 128). **9**

As in distance selling, the risk of loss or damage is passed to the buyer at the time the seller offers the delivery to the carrier, irrespective of the value of the good at that particular time. The value of the goods, which in accordance with the seller, are to be packed for further carriage, is determined, ex ante, by how much the goods will be worth when they arrive at their final destination. The value of the goods «at the time of delivery» is compared with the value of the goods after they have arrived at their destination. With respect to a reduction of the price, one has to compare the real with the supposed value of the goods at the time the goods have arrived at their destination as defined in the contract. The Art. 66 CISG stipulation that loss of or damage to the goods after the risk has passed to the buyer does not discharge him from his obligation to pay the price, only applies to damages occurring in the time between the passing of risk and the time the goods are inspected at their final destination, **10**

unless the loss or damage is due to an act or omission of the seller (Schlechtriem, ibidem, Art. 50 note 11). However, in the present case, the damage of the bottles is due to a fundamental breach of contract by [Seller] that happened before the risk has passed to [Buyer]. When the goods actually arrived at their destination they were no longer of any value at all. Therefore, a reduction of the price to zero seems justified.

In its appeal, [Seller] wrongly questions the Court of First Instance's presumption that [Buyer] gave specified notice of the claimed defects as required by Art. 39 CISG. As the Court has explained to the parties during these proceedings, Art. 39 CISG is designed to ensure that the seller is provided with sufficient information about the lack of conformity of the delivered good, so that the seller can take all necessary steps to make up for the defect. Therefore, the buyer has to specify the non-compliance of the good with the contractually agreed qualities. It suffices that the buyer describes the symptoms of the claimed defect. The buyer does not need to enquire into its causes (see German Federal Supreme Court (Bundesgerichtshof, BGH), NJW-RR 2000, page 1361 with further references). These requirements of Art. 39 CISG were met, when in a telephone conversation with Mr. Ca. Mr. C described the state of the delivered bottles in Italian language. In particular, he mentioned that the pallets had been wrongly piled and that the foil had been torn apart. Thus, he sufficiently specified the lack of conformity of the packaging as required under CISG regulations. **11**

[Seller]'s supplementary submissions of 28 November 2006 only concern speculations on what might have caused the defects in the foil wrapping. [Seller] argues that possibly the tearing of the foil happened due to improper piling of the pallets by [Buyer] or, respectively, by its carrier. Or the defect might have occurred during the dispatching of the goods at the premises of [Buyer]'s carrier. All this, however, does not accord with the Court of First Instance's conclusion after the evaluation of the evidence that the used foil, because it was porous and unsuitable for that kind of use, could not provide for the stability and sterility of the bottles. This defect was specified and communicated to [Seller] within reasonable time as required by the CISG provisions. **12**

The [Seller['s appeal is therefore unjustified and is dismissed. **13**

The decision on the costs relies on § 97(1) of the German Code of Civil Procedure (Zivilprozessordnung; ZPO).

[...]