| CISG-online 1731 | |
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| Jurisdiction | Switzerland |
| Tribunal | Zivilgericht Basel-Stadt (Court of First Instance Basel-Stadt) |
| Date of the decision | 08 November 2006 |
| Case no./docket no. | P 2004 152 |
| Case name | *Filling and packaging plant case* |

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

## Facts

I. 1
Claimant [Buyer] is a Spanish joint stock corporation domiciled in Porriño, Spain. It is a producer and seller of jet nebulizers, insecticides and air fresheners for domestic use.

Respondent [Seller] is a Swiss joint stock corporation domiciled in Basel, Switzerland. It is a worldwide commercial agent and acts as a distribution and sales company within the Italian Q-Group. This group is a manufacturer of packaging machines which are being used in the following industries: pharmaceuticals, cosmetics, foodstuffs, lamps and films. 2

1.1 3
On 12 December 2000, [Buyer] and [Seller] concluded a contract concerning the purchase of a machine as an overall system for the purpose of automated processing, bottling and packaging of three of [Buyer]'s products for a purchase price of Spanish pesetas [Pta.] 247,278,337.00 (= Euros [EUR] 1,486,172.74) (hereafter referred to as the «contract»). The purchase price also included the installation and commissioning of the packaging machine by [Seller].

The contract includes the delivery of a packaging machine as an overall system, while the machine consists of ten individual devices as well as the transportation and connection systems 4

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[*] All translations should be verified by cross-checking against the original text. For purposes of this translation, Claimant of Spain is referred to as [Buyer] and the Respondent of Switzerland is referred to as [Seller]. Amounts in the uniform European currency (Euro) are indicated as [EUR]. Amounts in the currency of Switzerland (Swiss francs) are indicated as [Sfr]. Amounts in the former currency of Spain (Spanish peseta) are indicated as [Pta].
Translator's note on other abbreviations: BGE = *Entscheidungen des Schweizerischen Bundesgerichts* [Official Reporter of decisions of the Swiss Federal Supreme Court]; DIN = *Deutsches Institut für Normung* [German Office for Standardization]; IPRG = *Bundesgesetz über das Internationale Privatrecht* [Swiss Code on the Conflict of Laws]; OR = *Obligationenrecht* [Swiss Code on the Law of Obligations]; ZPO = *Zivilprozessordnung des Kantons Basel-Stadt* [Code on Civil Procedure of the Canton Basel-Stadt].

[**] Jan Henning Berg studied law at the University of Osnabrück (Germany) and at King's College London. He participated in the 13th Willem C. Vis International Commercial Arbitration Moot with the team of the University of Osnabrück and coached the team of the University of Osnabrück for the 14th Willem C. Vis and 4th Willem C. Vis (East) Moot.

between them. The packaging machine is designed to process certain of [Buyer]'s products: «Kill-Paff», «One-Touch» and «Frank». For this purpose, bottles or vials are assembled in several steps of production. Moreover, they are bottled, sealed, weighed, labelled and individually packaged into an envelope. Afterwards, the goods are pooled in groups. Each group is then packaged and several groups are once again pooled in larger groups. Finally, they are packaged for transport and weighed once more. The contract stipulates that the machine is intended for the automated packaging of [Buyer]'s vials. Both the contract and the services description of 3 August 2000 furnished by [Seller]'s representative, Company Z. S.A., reference the nominal velocity («velocidad nominal») and actual velocity («velocidad effective») of each individual device.

1.2 **5**
According to the contract, the machine was to be handed over at [Buyer]'s works on 15 June 2001. The date was designated because it was anticipated that, by then, all parts of the machine would be installed and the machine would be ready for operation. After initial test-runs had been conducted at [Seller]'s works, the machine was dismantled and transported to Spain. In September 2001, the components of the machine arrived at [Buyer]'s works. In the course of October 2001, the personnel of [Seller]'s Spanish representative companies Z. S.A. and W. S.A. reassembled the machine.

1.3 **6**
After the machine had been installed at [Buyer]'s works, certain problems occurred which concerned the performance of the machine, in particular. Thereupon, [Seller] attempted to resolve these problems on site. On 12 August 2002, [Seller] notified [Buyer] that it intended to conduct a certification run of the machine. The entire machine should be tested at a performance of up to 150 vials per minute. [Buyer] did not agree to conduct this test run and demanded a performance of 180 vials per minute (e-mail of 13 August 2002).

On 29 October 2002, [Seller] proposed once again to conduct a certification run. [Buyer] did not agree to this proposal and indicated that the machine had not met the specifications required under the contract. [Seller]'s representative A. responded by e-mail dated 4 November 2002 and stated that the machine's performance could be improved and that a performance of 145 vials per minute could be achieved. He proposed either to conduct further examinations or to reach some kind of amicable settlement. However, [Buyer] adhered to its position that the machine had not achieved the required performance (e-mail of 5 November 2002). **7**

[Seller] indicated by fax of 17 November 2002 that – in the past – it had unsuccessfully attempted to achieve a performance of the machine in the range of 120–130 vials per minute. [Seller] also confirmed by fax dated 27 November 2002 that there were problems concerning the machine's performance. Therefore, it offered to refurbish two of the devices at the manufacturer's works in Italy in order for them to achieve a performance of 150 vials per minute. Nevertheless, [Buyer] still adhered to its position by claiming that a performance of 180 vials per minute had been required under the contract, but was never achieved. [Buyer] announced that it would declare the contract avoided (e-mail of 28 November 2002). In its response of 6 December 2002, [Seller] explained why the demanded performance rates were technically impossible to attain. **8**

On the basis of a meeting held at the [Buyer]'s on 20 January 2003, [Seller] proposed a settlement on 14 February 2003. By virtue of this settlement, [Seller] offered that it would increase the performance of the machine over a reference period of eight hours. It also offered to adjust the device SM80 in a way that it would achieve an output of 130 envelopes per minute (plus or minus 5%) over eight hours. Moreover, the device L60 should be adjusted to achieve an output of up to 170 vials per minute over a period of eight hours. On 23 March 2003, [Buyer] rejected this proposal, declared avoidance of the contract and demanded that [Seller] reimburse the purchase price and pay damages. 9

1.4 10
After negotiations between the parties with respect to an amicable settlement had failed, [Buyer] commenced debt enforcement proceedings against [Seller] on 9 February 2004 for the amount of Swiss francs [Sfr.] 4,205,259.30.

***[Position of the Parties and case history:]***

***[Position of Buyer:]***

II. 11
[Buyer] filed an action on 5 August 2004 and applied for the Court to order [Seller] to reimburse EUR 495,390.91 plus 5% interest since 22 January 2001 and to reimburse EUR 495,390.91 plus 5% interest since 19 November 2001. These amounts should be reimbursed versus restitution of the machine delivered by [Seller] under the sales contract concluded between the parties on 12 December 2000. Moreover, [Seller] should be ordered to pay EUR 110,393.48 plus 5% interest since 25 March 2003, EUR 13,007.20 plus 5% interest since 10 February 2004 and EUR 177,632.37 plus 5% interest since 22 June 2004 (avoidance of the contract; subject to a possible later increase of the claimed sums).

In the alternative, [Seller] should be ordered to pay EUR 1,301,450.77 plus 5% interest since 1 October 2001, EUR 13,007.20 plus 5% interest since 10 February 2004, EUR 177,632.37 plus 5% interest since 22 June 2004 (subject to a possible later increase of the claimed sums). This sum would have to be reduced by the final installment of the purchase price of EUR 495,390.91 (reduction of the purchase price).

[Seller] should also be ordered to bear all costs incurred by [Buyer] in relation to the present proceedings. A mediation hearing be scheduled by the Court in accordance with § 45a ZPO.

In its brief reasoning of 11 October, [Buyer] states that the machine has never achieved the performance required under the contract in spite of various attempts by [Seller] to remedy the problems. The promised actual velocity of the entire machine was based on the actual velocity of device SM/80/S, which was supposed to produce 15 boxes per minute, as designated on p. 21 of the sales contract. With each box containing 12 units, the device was supposed to deliver an output of 180 units per minute. However, the entire machine never produced more than 60 units per minute in the long run. This constituted a breach by the seller of its obligation to deliver goods which are in conformity with the contract in terms of Arts. 35 et seq. of the applicable United Nations Convention on Contracts for the International Sale of Goods (CISG). It also amounted to a fundamental breach of contract in terms of Art. 25 CISG 12

which entitled the buyer to declare the contract avoided pursuant to Art. 49 CISG and to claim damages on the basis of Arts. 74 et seq. CISG. Therefore, [Buyer] had a right to have the contract unwound by way of restitution. In the alternative, [Buyer] was entitled to reduce the purchase price.

III. 13
The mediation hearing was held on 19 October 2004 but did not lead to an amicable settlement between the parties.

IV. 14
[Buyer] has further specified its argument by virtue of a reasoned submission dated 11 February 2005. It also asserts that the machine required under the contract was never actually delivered. The contract provided that delivery of the machine was properly effected only if it operated to [Buyer]'s full satisfaction. This had never been the case. [Buyer] was thus entitled to declare the contract avoided at any time subsequent to the fixing of an additional period of time in accordance with Art. 49(1)(b) CISG. Avoidance was also declared by [Buyer] on 25 March 2003.

V. 15
[Seller] has requested the Court on 21 March 2005 to dismiss [Buyer]'s submission. [Buyer] should be required to amend its submission and to fix a reasonable additional period of time for [Seller] to perform the contract. [Buyer]'s statement of claim was too long-winded and violated the principle of procedural efficiency. This principle required inter alia that statements of claim have to be sufficiently concise.

VI. 16
[Buyer] responded on 11 April 2005 and petitioned the Court to dismiss [Seller]'s application. Its statement of claim did not contain any formal improprieties and complied with all requirements imposed by the Code of Civil Procedure of the Canton of Basel.

VII. 17
By order of 12 April 2005, the Presiding Judge dismissed [Seller]'s application. A time limit was granted for [Seller] to submit its statement of defense.

***[Position of Seller:]***

VIII.

1. 18
[Seller] submitted its statement of defense on 9 September 2004 and filed an additional cross-action against [Buyer]. [Seller] requests the Court to dismiss [Buyer]'s action. [Buyer] should be ordered to pay EUR 731,675.19 plus 5% interest on EUR 495,390.31 since 23 October 2001, on EUR 159,268.21 since 23 October 2001, on EUR 3,053.60 since 26 June 2002, on EUR 2,024.42 since 26 June 2002, on EUR 8,097.42 since 25 October 2002, on EUR 62,854.00 since 14 November 2002 and on EUR 986.63 since 14 November 2002, subject to a possible later increase of the claimed sums. [Buyer] should also be ordered to bear all costs incurred by [Seller] in relation to the proceedings concerning claim and counterclaim.

2. 19
[Seller] argues that it properly complied with all of its obligations under the contract. The machine had already operated to [Buyer]'s full satisfaction at the time when it had been handed over at the manufacturer's works in Italy on 28 and 29 August 2001 («factory acceptance test»; FAT). [Buyer] also made payment of the second instalment on the purchase price immediately after the FAT. [Buyer] was not entitled to claim a performance of 180 vials per minute with respect to the overall machine since this had not been agreed upon. The contract was to be interpreted in accordance with DIN standard No. 8743 (version of June 2004). Pursuant to this standard, the performance of an entire machine was not equivalent to the slowest device being part of the machine. Instead, the overall performance of the machine had to be calculated by way of multiplying the actual velocity of the slowest device by the degrees of efficiency of the devices connected upstream and downstream. This resulted in an overall performance of 127 vials per minute required under the contract. Upon [Buyer]'s request, [Seller] modified device ASB38 in order to reduce its output to 140 vials per minute. This led to a total performance of 122 vials per minute with respect to the machine as a whole. This performance could be reached only if high-quality packaging material was used and if sufficiently qualified personnel operated the machine. Instead, [Buyer] used packaging material that did not fall within the allowance. The supervising personnel also failed to act in accordance with [Seller]'s instructions. Moreover, [Buyer] refused to perform a test-run at a performance of 120 vials per minute. This rendered it impossible for [Seller] to prove that it had properly performed its obligation under the contract. [Buyer] had long forfeited any right to avoid the contract. Any remedies with respect to contractual warranty were subject to a time-bar. Therefore, [Seller] was entitled to claim the third installment of the purchase price, payment of a palletizer machine (which [Seller] had delivered as a result of an amendment of the contract dated 22 November 2000 and which was being used by [Buyer]) and payment of damages for certain performances effected by [Seller] for [Buyer] without any respective contractual obligation. In the alternative, [Seller] should be granted compensation for [Buyer]'s use of the machine if the latter was indeed entitled to declare the contract avoided.

IX. 20
[Buyer] filed its counterplea and statement of defense with respect to the cross-action on 13 February 2006. It adheres to its position that has already been set out in its statement of claim. [Buyer] requests the Court to dismiss [Seller]'s cross-action and to order [Seller] to bear all costs which have been incurred with respect to the present proceedings.

[Buyer] has argued that the 2004 version of DIN standard No. 8743 was not applicable. This 21
standard had not become part of the contract. It had not even existed either at the time of conclusion of contract (2000) or at the time of delivery (2001). Finally, the standard was not generally acknowledged. Instead, the 1987 version of DIN standard No. 8743 applied at the time of conclusion of the contract. [Seller] had to accept the validity of this earlier version. The provisions contained therein state that the overall performance of a machine was to be determined on the basis of the device having the lowest output. In this case, the lowest output was produced by the devices NCX and SM80/S with a warranted velocity of 180 vials per minute. This velocity was the relevant overall velocity of the entire machine as required by the contract. However, the actual velocity of the machine merely ranged between 50 and 70 vials per minute. [Buyer] had not demanded a modification of device ASB38. The material used by

it did not violate the applicable allowances. [Seller] could not argue that [Buyer]'s personnel incorrectly operated the machine, because the former was obliged to deliver a fully automated machine which did not require any manual intervention except for the furnishing of raw material and the removal of the finished goods. Additionally, the required performance was far from achieved during test-runs which were being conducted by [Seller]'s technicians.

X. 22
[Seller] submitted its rejoinder and counterplea with respect to the cross-action on 6 July 2006. It mainly argues that the machine operated at an effective output of about 120 vials per minute. It was irrelevant whether the 1987 or the 2004 version of DIN standard No. 8743 applied. Both versions led to the same result; namely, that the contract required an overall performance of 122 or rather 127 vials per minute. [Buyer] acknowledged that device ASB38 had been modified and now achieved a performance of 140 vials per minute. Moreover, [Buyer] failed to provide [Seller] with samples and material within the required time. [Buyer] also inserted material into the machine which did not meet the specification.

XI. 23
On 10 July 2006, the Court ruled that the exchange of memoranda between the parties was closed.

XII. 24
The oral hearing before the District Court *(Zivilgericht)* was held on 8 November 2006. It was attended by Mr. G. for [Buyer] and by Mr. R. and Mr. A for [Seller]. The hearing was further attended by the legal representatives of both parties. Oral submissions have been made. The judgment will be rendered and served in writing after the oral hearing. With respect to the particulars of the Court's reasoning, reference is directed to the minutes of the hearing and the following written reasoning.

## Reasoning of the Court

***[Jurisdiction of the Court:]***

1. 25
By virtue of their sales contract, the parties have established exclusive jurisdiction of the Courts in the Canton of Basel-Stadt. International and territorial jurisdiction of the District Court *(Zivilgericht)* Basel-Stadt follows from Art. 17 Lugano Convention on Jurisdiction and the Enforcement of Judgments in Civil and Commercial Matters.

***[Applicability of the CISG:]***

2. 26
The United Nations Convention on Contracts for the International Sale of Goods of 11 April 1980 (CISG) applies to contracts of sale of goods between parties whose places of business are in different Contracting States. Art. 3 CISG states that contracts for the supply of goods to be manufactured or produced are to be considered sales. A contract for delivery which also

contains obligations to assemble the goods, train personnel or to provide maintenance services falls within the scope of application of the CISG if these additional obligations are only ancillary with respect to the primary obligation to make delivery (Schlechtriem/Schwenzer (eds.), *Kommentar zum UN-Kaufrecht* [Commentary on the CISG], 4th ed., Art. 3 para. 17).

The parties have their places of business in different Contracting States of the CISG. Their contract provided for delivery of a machine, but also contained an obligation to put the machine into operation at [Buyer]'s works as well as to train [Buyer]'s personnel. These additional obligations are only ancillary to the predominant obligation of [Seller] to perform delivery of the machine. Thus, the CISG governs the present contract of sale, which is not in dispute between the parties. **27**

***[Subject matter of the sales contract:]***

3.

3.1 **28**
The parties argue about the performance of the machine required by their contract. [Buyer] asserts that it is entitled to claim an output of 180 vials per minute with respect to the machine as a whole. [Seller] states that the machine can achieve an effective output of 127 vials per minute at the most. Also, this maximum performance can be attained only under ideal conditions (use of high-quality packaging material, employment of qualified personnel, proper maintenance and so forth) and for a limited period of time.

3.2 **29**
Art. 8 CISG provides that statements made by and other conduct of a party are to be interpreted according to his intent where the other party knew or could not have been unaware what that intent was. If that is not applicable, statements made by and other conduct of a party are to be interpreted according to the understanding that a reasonable person of the same kind as the other party would have had in the same circumstances. In determining the intent of a party or the understanding a reasonable person would have had, due consideration is to be given to all relevant circumstances of the case including the negotiations, any practices which the parties have established between themselves, usages and any subsequent conduct of the parties.

3.3 **30**
In order to interpret the contract, regard must primarily be paid to the perceptible intent of both parties. The negotiations preceding the conclusion of contract and any subsequent conduct must also be considered.

The contract itself designates an effective velocity with respect to each device. The lowest effective velocities are achieved by devices NCX and SM80/S, which have an output of 180 vials per minute. The contract does not contain any direct information about the required effective velocity of the entire machine. This means that the intent of the parties at the time of contract conclusion with respect to the required velocity of the entire machine must be determined by virtue of the preceding correspondence between them and the offers which had been made by [Seller]. [Buyer] has stated in its e-mail of 27 July 2000: **31**

> «We are highly interested in your offer for a packaging machine with a performance of 180 vials per minute, as has been discussed beforehand. We would like to make the following comments: […]».

[Seller] has not objected to this statement in its subsequent fax dated 28 July 2000. Thus, [Buyer] has disclosed its intent concerning the desired overall performance of the machine and [Seller] has taken account of it. These facts have been set out by [Buyer] and have not been sufficiently rebutted by [Seller]. [Seller]'s offer of 3 August 2000 designates nominal and effective velocities for each individual device. The same applies to the later contract. However, this offer contains the following additional note with respect to the velocities of devices SM80/S and NCX: «at the actual velocity of the packaging machine». **32**

Neither [Seller]'s second offer of 7 November 2000 nor the draft contract of 11 December 2000 contains any information about required velocities of the individual devices. Moreover, there is no information about the required overall velocity of the machine as a whole. Nevertheless, [Buyer] has – by virtue of its letter of 11 December – insisted that velocities, capacities and estimated duration for replacement of equipment become part of the contract, in accordance with the offer of 3 August 2000. This indicates that [Buyer] sought to purchase a machine which would be capable of operating at a performance of 180 vials per minute and that [Seller] had to perceive that this intent on the part of [Buyer] existed. [Seller] had never indicated before conclusion of the contract that the overall machine would not achieve an output of 180 vials per minute. Moreover, no reference was ever made in the course of negotiations to the fact that the performance of the overall machine was calculated by multiplying certain degrees of efficiency. Such calculation is also not contained in the contract. **33**

Furthermore, the subsequent conduct of the parties after the conclusion of contract is to be considered. After the machine had been installed at [Buyer]'s works, [Seller] attempted for more than one year in vain to increase the output. While these attempts were being made, [Seller] was constantly forced to lower the expectations with respect to the increase in performance. In August 2002, [Seller] offered to hand the machine over at an output rate of 150 vials per minute. In November 2002, only 145 vials per minute could be promised. By the end of November 2002, [Seller] had to concede that it finally failed to achieve an output of between 120 and 130 vials per minute. Currently, [Seller] reckons that it is not possible to operate the machine at an output of more than 122 to 127 vials per minute. This course of events demonstrates that [Seller] originally assumed an obligation to deliver a machine which would be able to produce at least more than 122 to 127 vials per minute. These expectations were lowered when problems appeared irresolvable, which was long after the conclusion of the contract. [Buyer] rejected all of these offers and pointed out that they were below a performance of 180 vials per minute and therefore not in conformity with the contract. Other than [Seller], [Buyer] never disavowed its position concerning the performance of the machine required under the contract. **34**

Therefore, an interpretation of the declarations made by the parties in accordance with Art. 8(1) and (3) CISG establishes a relevant intent on their parts to conclude a contract for the sale of a machine with an output of 180 vials per minute. **35**

3.4 36
This result becomes even more evident if objective factors are also being taken into account for the purpose of contract interpretation (Art. 8(2) CISG). Statements made by and other conduct of a party are to be interpreted according to the understanding that a reasonable person of the same kind as the other party would have had in the same circumstances. Technical standards and specifications may be consulted in order to facilitate the interpretation (Schmidt-Kessel, in Schlechtriem/Schwenzer, *loc. cit.*, Art. 8 para. 45).

The Q-Group, [Seller] and their representatives are experts in the field of production, installation and distribution of packaging machines. Similarly, [Buyer] has been experienced for a long time in the field of packaging of chemical products for domestic use. It employs personnel that are well-trained in technical matters. In the present case, it is clearly appropriate to take recourse to technical standards. 37

[Seller] asserts that the effective output of the packaging machine is equivalent to the output of the device having the lowest performance, multiplied by the individual degrees of efficiency of the upstream and downstream devices. [Seller] refers to DIN standard No. 8743 (version of June 2004) as well as to an expert opinion. It argues that the degree of efficiency describes the relation between the number of packages which are actually produced and the number of packages which can be packaged. [Seller] relies on its own expert opinion, asserts a certain degree of efficiency for each individual device and arrives at a total degree of efficiency for the overall machine of 70.8%. Without consideration of possible operational losses, this resulted in an output of the overall machine of 127 vials per minute. 38

First, it must be said that the contract itself does not make any reference at all to certain degrees of efficiency. These degrees of efficiency submitted by [Seller] with respect to the individual devices are not more than unsubstantiated allegations. Its submission cannot be readily understood. Furthermore, [Seller]'s argument, that the term «velocidad effectiva» meant a certain output, is absurd. The term «velocidad effectiva» can only reasonably describe an effective or actual velocity. However, the critical point is that the 2004 version of DIN standard No. 8743 had not even existed at the relevant time of contract conclusion (12 December 2000). A reasonable person in the same situation in which the parties had been in had to have interpreted the content of the contract without any consideration of the method of calculation concerning the velocity of packaging machines, because this standard was only introduced at a later point in time. It is obvious that the 2004 version of DIN standard No. 8743 cannot have any bearing on the present contract. 39

Instead, the 1987 version of DIN standard No. 8743 does apply to this contract. The latter standard defines four parameters with respect to the output of a packaging machine: The nominal output, the adjusted output, the effective output and the operational output. The «nominal output» specifies the output per unit of time for which the packaging machine is designed. It can be attained only under ideal conditions. This parameter is equivalent to the nominal velocity which has been referred to in the contract. The «adjusted output» specifies the manually adjusted velocity of the machine and is dependent on the products which are being inserted into the machine. As a theoretical parameter, it does not designate the actual output of flawless products because a certain amount of scrap is to be expected from every 40

machine. The adjusted output is relevant with respect to the specific calibration of the machine for a certain product. It is less relevant for the buyer, who will be more interested in the actual output promised by the seller. This actual output of a machine falls within the seller's sphere of influence and is referred to as effective output. The «effective output» is defined as the number of packages which are being produced in proper condition in the normal course of operation. The «normal course of operation» includes both the effective runtime of the machine as well as any periods of malfunction caused by the machine itself. In contrast, the «operational output» also embodies those periods of malfunction which are caused by outside factors, e.g. by incorrect packaging material. Thus, the operational output is partially beyond the seller's sphere of control.

Among these four parameters which are defined in the 1987 version of DIN standard No. 8743, only the effective output can be equated with the «effective velocity» as designated in the present contract. This follows from the wording «effective» and from the reasonable interests of the buyer of a machine which have already been mentioned beforehand. Moreover, recital 5 of the DIN standard mentions that the standards not only apply to individual devices, but also to entire packaging facilities. The overall performance of such a machine is equivalent to the individual performance of the device having the lowest output. Thus, it is not doubtful that – in accordance with DIN standard No. 8743 (version of January 1987) – [Buyer] is entitled to receive a machine whose overall performance matches the effective output of the individual device having the lowest output. **41**

3.5 **42**
Consequently, the contract is to be interpreted to the effect that the parties have agreed on the delivery of a packaging machine which yields an output of 180 vials per minute in the course of general operation.

3.6 **43**
It needs to be determined whether [Buyer] agreed to a performance of the overall machine lower than 180 vials per minute after the contract had already been concluded.

In that respect, [Seller] first asserts that device ASB38 was modified in accordance with an amendment of the purchase order by [Buyer]. This modification was ordered in order for the machine to properly handle the additional item «Rasca y Huele», which had not been referred to in the original contract. The modification led to a reduction of the adjusted output of device ASB38 from formerly 180 vials per minute to 140 vials per minute. Also, [Seller] argues that the effective output of the entire machine was reduced to a mere 122 vials per minute. [Buyer] does not contest that this modification was actually performed in order to make the machine compatible with another type of goods. However, [Buyer] has pointed out that the modification was not at any time in actual use. **44**

The Court holds that the available documents about the machine and [Seller]'s explanations demonstrate that either device NCX or device ASB38 is being operated, depending on the particular item which is supposed to be packaged. [Seller] does not contest that the modified version of device ASB38 was not put into operation. [Seller] has also argued in its rejoinder and in the oral hearing that an effective output of 127 vials per minute was owed. However, **45**

its own calculations indicate that this performance could only be achieved with device NCX, but not with the modified device ASB38. Even if it was assumed that [Buyer] declared its consent to a performance-mitigating modification of device ASB38, a required output of 180 vials per minute would remain with respect to device NCX in any event. A subsequent bilateral reduction of the required output of the machine can only be argued with respect to the operation of device ASB38.

[Seller] further submits that the machine had properly operated to [Buyer]'s complete satisfaction in the course of the Factory Acceptance Test (hereafter: FAT), which was conducted at the manufacturer's works on 28 and 29 August 2001. [Buyer] could not approve the machine without reservation at the manufacturer's works and subsequently deny its approval at the time of handing-over at its own works. In this regard, the Court considers that [Seller] has not sufficiently proved that [Buyer] was in fact completely satisfied when the FAT had been finished. There are not any documents of approval or other letters which make reference to the results of the FAT. Also, it is doubtful whether the entire machine was tested as a composition of various devices (this has been contested by [Buyer]), or whether the devices were tested only individually. Finally, [Seller] does not deny that the machine should actually be approved only at [Buyer]'s works. Therefore, it cannot be argued that [Buyer] dispensed with an approval at its own works or even declared any intent to amend the contract with regard to the machine's performance by its payment of the second installment of the purchase price after the FAT. **46**

3.7 **47**
Additionally, the parties are in dispute with respect to the interpretation of their contract about the required duration of an adjustment of the machine between any given types of goods. The contract identifies an estimated duration for every individual device which would be necessary to adjust the machine for another type of goods by qualified personnel. One magazine and two scales are excluded. The devices L60/8-12A-12V, HV/1, NCX and SM80/S require up to 45 minutes for an adjustment. The devices ASB38/TRM38 require up to 30 minutes, L105/V requires 15 minutes and Autoetik requires 2 minutes. [Buyer] asserts that, according to the contract, an adjustment performed by three workmen should require 90 minutes at best. [Seller] submits that the machine could be adjusted to another type of goods only within between 182 and 197 minutes if performed by qualified personnel. This argument implied that – depending on the product being inserted – only device ASB38 or NCX is in use, so that only one device needs to be adjusted. Supposed that three workmen perform the adjustment, the required time would be reduced to a third. However, [Seller] indicates that there are various factors which might delay the adjustment process and which are beyond its control.

The Court holds that a required duration of adjustment was agreed between the parties with respect to each individual device. However, it is doubtful whether a required duration can be derived with relevance for an adjustment of the entire machine to another type of goods. Before the conclusion of contract, [Seller] has commented on a possible configuration of the machine by the operating personnel (cf. e-mail of 28 July 2000). According to this e-mail, the machine could generally be operated by two or three workmen, depending on their skills. These statements by [Seller] refer to the going operation of the machine but not to a possible **48**

adjustment for a different type of goods. Neither the contract nor the correspondence between the parties makes any reference to the process of such an adjustment. Thus, it is not possible to determine certain required time limits for an adjustment of the machine by virtue of contract interpretation. Merely the durations which have been estimated for each individual device have been incorporated into the contract. After all, [Seller] must accept the content of its own statements, according to which an adjustment of the machine for a different type of goods requires between 182 and 197 minutes (if performed by one workman) or between 61 and 66 minutes (if performed by three workmen).

***[Avoidance of contract by Buyer:]***

4. **49**
[Buyer] has declared the avoidance of contract on 25 March 2003. [Buyer] relies on a complete failure by [Seller] to deliver the goods owed under the contract. In the alternative, [Buyer] relies on a fundamental breach of contract by [Seller].

4.1 **50**
Pursuant to Art. 49(1) CISG, The buyer may declare the contract avoided: (a) if the failure by the seller to perform any of his obligations under the contract or the CISG amounts to a fundamental breach of contract; or (b) in case of non-delivery, if the seller does not deliver the goods within the additional period of time fixed by the buyer in accordance with Art. 47(1) CISG or declares that he will not deliver within the period so fixed.

A breach of contract committed by one of the parties is fundamental if it results in such detriment to the other party as substantially to deprive him of what he is entitled to expect under the contract (Art. 25 CISG). With relevance to lack of conformity of the goods, the breach will be fundamental if the buyer's legitimate expectations cannot be satisfied by the mere granting of a claim for damages or the right to reduce the purchase price or where it is not reasonable for the buyer to commercialize the non-conforming goods (Schlechtriem/Schwenzer, *loc. cit.*, Art. 25 paras. 17, 20). **51**

If goods have been delivered which are not in conformity with the contract, the buyer is primarily under a duty to notify the seller within a reasonable time (Art. 39 CISG). Art. 49(2) CISG provides that the buyer loses the right to avoid the contract if this has not been declared within a reasonable time. This period of time commences as soon as the buyer has become aware or ought to have become aware of the breach of contract. The period of time also commences after the expiration of an additional period of time fixed by the buyer or after the seller has indicated that he will not comply with his obligations within the additional period of time. **52**

Art. 49(1)(b) CISG grants the buyer an additional opportunity in case of non-delivery to declare the contract avoided. This remedy is not dependent on the existence of a fundamental breach of contract and only requires that an additional period of time has been fixed and that it has expired. As long as the goods have not been delivered, the buyer does not need to declare avoidance of the contract within any period of time. Thus, he may wait for as long as he wishes before he actually exercises the right to avoid the contract. This rule applies irrespective of whether the avoidance is based on a fundamental breach or on the fact that an additional **53**

period of time for the seller has expired. Even if the additional period of time for the seller to perform the contract has expired, the buyer is still entitled to claim performance as stipulated in their contract without losing his right to change its mind at any time and to declare avoidance (cf. Schlechtriem/Schwenzer, *loc. cit.*, Art. 49 paras. 18, 24).

The CISG draws a general distinction between non-delivery and the lack of conformity of delivered goods. The buyer is only entitled to avoid the contract after an additional period of time in accordance with Art. 49(1)(b) CISG in cases of non-delivery but not in cases where goods have been delivered which lack conformity (Schlechtriem/Schwenzer, *loc. cit.*, Art. 25 paras. 19; Ulrich Ziegler, *Leistungsstörungen nach dem UN-Kaufrecht*, pp. 48, 49). **54**

4.2 **55**
[Buyer] argues that [Seller] has never actually delivered the packaging machine. The contract provided that the machine be delivered only as soon as it operates to [Buyer]'s full satisfaction. However, this has not been the case. As a result, [Buyer] was entitled under Art. 49(1)(b) CISG to avoid the contract at any time after the expiration of an additional period of time. Avoidance was also declared with legal effect on 25 March 2003. In the alternative, [Buyer] had also been entitled to declare avoidance of the contract pursuant to Art. 49(1)(a) CISG, because if the goods were to be considered delivered, [Seller] would have committed a fundamental breach of contract.

The machine has been installed at [Buyer]'s works and is being used by the latter for its production. In accordance with the legal regime provided by the CISG, delivery would in fact have taken place. Therefore, it must be determined whether [Buyer] was nevertheless entitled to declare the contract avoided pursuant to Art. 49(1)(b) CISG on the grounds of non-delivery. The CISG itself does not provide for such a remedy subsequent to delivery. On the other hand, the rules contained in the CISG are at the parties' disposal and the CISG does not proscribe this kind of remedy. Under Art. 6 CISG, the parties may exclude the application of the CISG or derogate from or vary the effect of any of its provisions. The parties may therefore reach agreements on additional remedies which are not expressly contained in the CISG. The question of whether such an agreement is valid must be decided on the basis of the domestic law applicable to the contract. Art. 4 CISG states that the CISG is not concerned with the validity of the contract or any of its provisions. The relevant laws are those of the State whose laws would have applied had the CISG not governed the respective contract (Schlechtriem/Schwenzer, *loc. cit.*, Art. 6 para. 36. In the present case, the applicable domestic law must be determined by virtue of the IPRG. Arts. 18 and 118 IPRG in conjunction with Art. 3 of the 1955 Hague Convention on the Law Applicable to International Sale of Goods, mandatory provisions of Swiss law are to be taken into consideration. This refers to Arts. 19 and 20 OR, in particular. **56**

In the present case, the parties have used the term «delivery» in a different manner than what is generally understood as «delivery» throughout the territories in which the CISG applies. The contract contains the following provision under the caption of «date of delivery»: **57**

> «The handing over of all devices shall take place on 15 June 2001. The date of handing over shall refer to the date when all devices are properly installed at the [Buyer]'s works and when they operate to its full satisfaction. »

The parties seem to equate delivery with the handing over of the goods, while the handing over shall be conditional upon conformity of the machine with the contract and upon [Buyer]'s satisfaction. Delivery in this case does not merely resemble the actual shipment of the machine, which is indeed the approach adopted by the CISG. Instead, the parties have designated that delivery shall be accomplished only after a machine has been installed which operates to [Buyer]'s full satisfaction. It means that the parties have opted for an autonomous definition of the term «delivery». As a result, the consequences linked with a failure to make delivery under the CISG will apply only where there is actually a failure to make delivery with respect to the parties' autonomous meaning of this term. **58**

This is possible under Art. 6 CISG. Also, it does not constitute a violation of mandatory legal rules. However, the contract is to be interpreted in a way that the consequences of a failure to deliver shall apply only if [Buyer] is being substantially deprived of what it is entitled to expect from performance of the contract. In other words, a failure to deliver will occur if a breach of contract is fundamental. It would be inequitable if [Buyer] was entitled to rely on a failure to make delivery and engage the remedies connected thereto where there is only a minor lack of conformity. **59**

4.3 **60**
The contract states that the machine should be installed, put into operation and handed over at [Buyer]'s works. The parties have designated that the act of handing-over should be performed by virtue of a certification run. [Seller] does not contest the fact that the line of production has never been approved. Instead, [Seller] itself has demanded on various occasions that the certification run be performed. However, [Seller] asserts that [Buyer] unjustifiably refused to declare its approval. However, the latter was entitled under the contract to refuse its declaration of approval for as long as the machine would not operate to its full satisfaction. This has never been the case. The output performances of the machine which have been offered by [Seller] ranged between 122 and 150 vials per minute (cf. above at 1.3 and 3.3). Consequently, [Seller] has never proposed to conduct a certification run of a machine which was capable of achieving the performance required under the contract.

[Seller] has not sufficiently proven the accuracy of its argument that [Buyer] had inserted incorrect materials into the machine. Moreover, this is not even a material point. First of all, [Seller] has never demonstrated that a velocity of 180 vials could have been achieved even with correct materials inserted. Second, it has not pointed out the exact requirements of those materials which could be properly inserted, which allowances applied and how it had allegedly been able to identify cases where incorrect materials had been used. Finally, [Buyer] has – at all occasions – objected to [Seller]'s argument concerning the alleged use of incorrect materials. **61**

Consequently, [Buyer] was entitled to reject the handing-over of the machine. In terms of the present contractual relationship, the machine is to be regarded as not delivered by [Seller]. **62**

4.4 **63**
[Buyer] asserts that the product «One Touch» had to be taken off the market after production using the machine had led to excessive scrap and had become too expensive. The product

«Frank» was not even launched since it was impossible even to test the production process. The only item compatible with the machine was the product «Kill Paff». However, the respective average velocity of production was not higher than mere 52 vials per minute. This low velocity of production was caused by weak output rates, excessive downtimes in the course of machine adjustments and by the machine's general susceptance to failure.

4.4.1 **64**
[Seller] has objected to these assertions. It has stated that it was an autonomous commercial decision on the part of [Buyer] not to produce part of its products. This had nothing to do with the performance of the machine. It could not be finally determined whether [Buyer] was responsible for the low outputs or whether the products «One Touch» and «Frank» could not be processed by virtue of machine-related defects.

4.4.2 **65**
Furthermore, [Seller] contests [Buyer]'s allegation that its product «Kill Paff» could be processed only at a velocity of 52 vials per minute. In this respect, [Seller] has referred to the video clip submitted by [Buyer] which shows the machine in operation. The video clip shows that the machine has been capable of achieving velocities of about 110 to 115 vials per minute over brief periods of time. However, this evidence can certainly not prove that the packaging machine operated continuously and reliably at these velocities throughout the period of time until the contract was declared avoided. [Buyer] has presented internal records which demonstrated that the output of the machine with respect to the product «Kill Paff» averaged only 52 vials per minute within the period of time between the commencement of test-runs in October 2001 and the declaration of avoidance of 25 March 2003.

4.4.3 **66**
With respect to the times required for an adjustment of the machine to the various types of items, it must be noted that [Seller] made a proposal to [Buyer] for the modification of the machine by its fax dated 14 February 2003. The times designated in this proposal partially exceed the times which are stipulated in the original contract. According to the proposal, an adjustment of the machine by a single worker would require between 265 and 280 minutes, instead of between 182 and 197 minutes as mentioned in the contract. If performed by three workers, an adjustment would require 90 minutes whereas 60 minutes have been designated in the contract. Therefore, [Seller] has impliedly acknowledged the fact that it eventually failed to achieve the required time limits and that it was also impossible to comply with these limits by virtue of implementing a modification of the individual devices. [Seller] has not proved its argument that its proposal merely constituted an act of courtesy towards [Buyer] (see below at 4.4.5). It has been established that an adjustment of the machine requires more than between 265 and 280 minutes (respectively, more than 90 minutes if performed by three workers). These circumstances may be considered even though [Buyer] currently operates the packaging machine solely to process its product «Kill Paff», which means that adjustments are not taking place any longer. The contract requires the machine to be capable of processing all three kinds of [Buyer]'s products in any event.

4.4.4 67
It is not doubtful that the machine is very susceptible to failures. This is already evidenced by the numerous and unsuccessful attempts by [Seller] to fix the machine. Moreover, [Seller] has not submitted any serious counter-argument.

4.4.5 68
[Seller] has not sufficiently substantiated its allegation that [Buyer] had inserted incorrect materials into the machine (cf. above at 4.3). Moreover, [Seller]'s argument, that [Buyer]'s personnel had not properly operated the machine, cannot be considered. First of all, the contract establishes a duty on the part of [Seller] to instruct [Buyer]'s personnel. Second, [Seller]'s technicians have performed all of the unsuccessful attempts to fix the machine as well as the respective test-runs – [Buyer]'s personnel was not involved.

4.4.6 69
The machine's actual performance lags well behind the performance which has been promised under the contract. Even though a maximum velocity of 115 vials per minute seems to be possible (as is suggested in the video clip), the decisive criterion is [Buyer]'s long-term average output of 52 vials per minute. [Buyer] has demonstrated this average actual performance with detailed documents. These documents show that the average actual velocities fluctuated heavily from time to time. In turn, this indicates that the machine has been highly susceptible to transitory failures, which also explains why the machine could have been operated only at such low velocities.

Given that an output of 180 vials per minute was promised and that merely 52 vials per minute have been achieved, [Buyer] suffers a loss of productivity of 71%. Even if the conformity of the machine with the contract were not to be determined with regard to the long-term average output but with regard to the short-term maximum output of 115 vials per minute, a loss of productivity of about 40% would remain in any event (also as a result of extended downtimes). According to the contract, [Seller] owes an automated and continuously operating high-precision packaging machine. [Buyer] is entitled to expect that such machine eventually achieves the designated performance. This has not been the case by far. 70

Therefore, [Buyer] has been substantially deprived of what it is entitled to expect under the contract. [Buyer] would not have concluded the contract had it been aware of the machine's actual performance, because even its former packaging machine had been capable of achieving a similar performance. A reduction of the purchase price is not an applicable remedy in this case, because [Buyer]'s estimated loss of productivity throughout the lifetime of the machine exceeds the purchase price by far. Also, [Buyer] cannot reasonably resell the machine in order to mitigate its commercial loss. Consequently, [Seller] is liable for a fundamental breach of contract. 71

***[Art. 49(1)(b) CISG:]***

4.5 72
Art. 49(1)(b) CISG states that the buyer may declare the contract avoided in case of non-delivery, if the seller does not deliver the goods within the additional period of time fixed by the buyer in accordance with Art. 47(1) CISG. An additional period of time has only been properly

fixed if the buyer clearly requests the seller to deliver the goods within a definite reasonable period of time (Schlechtriem/Schwenzer, *loc. cit.*, Art. 47 paras. 7, 9). In accordance with these requirements, the buyer may declare the contract avoided at any time chosen by him (cf. above at 4.1). By letter dated 5 December 2001, [Buyer] has requested [Seller] to modify the machine by 20 December 2001 to the effect that it operate to [Buyer]'s full satisfaction and that it may be considered as being delivered. Given that [Seller] had already attempted for two months at [Buyer]'s works to modify the machine for compliance with the contract, an additional period of two weeks is reasonable. This period of time has unsuccessfully expired. Therefore, [Buyer] has effectively declared the contract avoided on 25 March 2003.

***[Art. 49(1)(a) CISG:]***

4.6 **73**
In the following, it will be demonstrated that [Buyer] has been entitled not only to avoid the contract because of non-delivery. [Buyer] has also been entitled to declare avoidance because of a fundamental breach of contract, Art. 49(1)(a) CISG.

4.6.1 **74**
First of all, [Buyer] has notified the lack of conformity within a reasonable time (Art. 39(1) CISG). [Buyer] immediately notified [Seller] about the defects after the machine had been installed and after the first test-runs had been completed. The first notification dates back to 5 October 2001. The following correspondence between the parties also shows that [Seller] continuously attempted to fix the machine. Until December 2002, [Buyer] composed more than twenty letters, which set out in detail the individual defects still remaining after the numerous attempts to remedy the problems of the machine.

4.6.2 **75**
In addition to that, avoidance of contract must be declared within a reasonable time. The relevant period of time commences as soon as the buyer knows or ought to know of the breach, or after the expiration of any additional period of time fixed by the buyer, or after the seller has declared that he will not perform his obligations within such an additional period. This additional period will not expire if the seller decides to examine the lack of conformity or if he attempts to remedy the lack of conformity upon the buyer's notification. In cases where the seller indicates that he is actually able and willing to examine and remedy the lack of conformity, the breach will not be fundamental in terms of the CISG, even if the lack of conformity as such may be severe. A breach will result in such detriment to the buyer «as substantially to deprive him of what he is entitled to expect under the contract» (Art. 25 CISG) only if the seller has failed to remedy the non-conformity, if the seller declares that there is no non-conformity or that it has already been remedied or if the seller rejects any further efforts.

The reasonable time in terms of Art. 49(2)(b) CISG commences as soon as the examination by **76**
the seller has been completed or if the latter has completed his attempt to remedy the non-conformity. A buyer who seeks to declare the contract avoided will have to act within a reasonable time only if it is ascertained that the seller denies to remedy the lack of conformity, if he fails to take action within a reasonable time or if he has attempted – but failed – to remedy the lack of conformity (Schlechtriem/Schwenzer, *loc. cit.*, Art. 49 paras. 49, 46). With respect

to the question of what is a reasonable time, regard must be had inter alia to the provisions of the contract, the nature of the goods and of the lack of conformity and the conduct by the seller subsequent to the buyer's notification. Art. 49(2)(b) CISG does not impose strict requirements with respect to the interpretation of the term «reasonable». The buyer is not obliged to take immediate action. Depending on the circumstances of the individual case, it may be reasonable to grant the buyer a certain time to consider and examine the situation and to seek legal advice (Schlechtriem/Schwenzer, *loc. cit.*, Art. 49 para. 44).

4.6.3 **77**
[Seller] has attempted for more than one year to remedy the lacks of conformity of the packaging machine. Thereafter, it first declared by letter of 6 December 2002 that the performance of 180 vials per minute – as demanded by [Buyer] – could not be achieved. [Seller] also proposed further modifications on that occasion. By letter dated 10 December 2002, [Buyer] pointed to the commercial damage which it had suffered until then as a consequence of the non-conformity. It requested [Seller] to fix an additional period of time that would be necessary to install a properly-operating machine and to offer a price for the service. Subsequent to a conference held at the [Buyer]'s, [Seller] made a proposal for an amicable settlement on 14 February 2003. However, the performance of the machine so proposed by it once again lagged well behind the performance required under the contract. It turned out only by then that [Buyer] would be substantially deprived of what it had been entitled to expect under the contract and by correct performance on the part of [Seller]. Consequently, the relevant period of time for [Buyer] to declare avoidance of the contract (Art. 49(2)(b) CISG) has commenced at this point in time.

On 23 May 2003, [Buyer] has thus declared avoidance of the contract within a reasonable time. It must be considered that the case is of high complexity. Extensive legal, administrative and commercial clarifications were necessary. Therefore, [Buyer] was to be allowed a period of more than two months for consideration. **78**

4.7 **79**
[Buyer] has not lost the right to declare the contract avoided pursuant to Art. 82 CISG. [Seller] has modified the packaging machine in order for it to comply with its obligations under the contract. These modifications cannot establish a ground for exclusion of the right to declare avoidance. Moreover, the right to declare avoidance is not excluded by the fact that the machine has been put in operation (Brunner, *UN-Kaufrecht – CISG* [Commentary on the CISG], Berne 2004, Art. 82 para. 14). Any modifications of the machine which are caused by ordinary use are not substantial. [Seller] has asserted that [Buyer] has modified a certain part of device ASB38. However, this does not mean that it would now be impossible to restore the original condition. [Seller] has not provided any evidence to the contrary.

4.8 **80**
Consequently, [Buyer] has effectively declared the contract avoided.

***[Statute of limitations:]***

5. 81
The CISG does not contain any provisions on limitation. Art. 148 IPRG states that questions of limitation and termination of claims are governed by the domestic law applicable to the claim. In the present case, Swiss law applies in accordance with Art. 118 IPRG (cf. above at 4.2). Under Art. 210 OR, claims arising out of contractual warranty because of lacks of conformity become time-barred one year after the goods have been delivered to the buyer.

This provision is in conflict with Art. 39(2) CISG, which provides that the buyer loses the right 82
to rely on a lack of conformity of the goods if he does not give the seller notice thereof at the latest within a period of two years from the date on which the goods were actually handed over to the buyer, unless this time-limit is inconsistent with a contractual period of guarantee. In the present case, an application of this two-year term of exclusion under Art. 39(2) CISG is not affected by the fact that the parties have designated a warranty term of only six months in their contract. The latter warranty term was supposed to commence only by the date when [Seller] would have delivered a fully functional packaging machine. However, [Seller] has not done so. The limitation provisions contained in the Swiss OR can be reconciled with Art. 39(2) CISG in the following ways: Either will the general limitation period of ten years apply in accordance with Art. 127 OR, or the limitation period of Art. 210 OR will be extended to two years (Schlechtriem/Schwenzer, *loc. cit.*, Art. 39 para. 29).

In the present case, [Buyer]'s action is not subject to a time-bar. This is irrespective of whether 83
the relevant are subject to limitation after two or after ten years. [Seller] has not achieved to deliver the packaging machine until the present day. The period of limitation under Art. 210 OR has not yet commenced. In any case, [Buyer]'s claim would not be time-barred even if the limitation period commenced at the time when the machine had been installed at [Buyer]'s works. [Seller]'s attempts to remedy the lacks of conformity (the final attempt occurred on 31 October 2002) amount to an acknowledgement of liability in terms of Art. 135 OR and have led to a suspension of the period of limitation (cf. also BGE 121 III 270, 272 at E.3.c with further references). Consequently, [Buyer] has filed its action (9 February 2004) within the two-year term. The filing of the action has once again suspended the period of limitation. Therefore, the ten-year limitation period under Art. 127 OR has not expired in any event.

***[Consequences of valid avoidance of contract:]***

6.

6.1 84
By virtue of [Buyer]'s avoidance of contract, the parties are no longer obliged to perform their primary obligations arising out of the contract. Liability for damages is not affected by avoidance. Any performances which have already occurred are subject to concurrent restitution (Art. 81 CISG). In that case, interest must be paid on the purchase price from the date on which it was paid (Art. 84 CISG). In case of avoidance, the creditor is entitled under Arts. 61(2) in conjunction with Art. 74 CISG to claim damages. This claim is intended to compensate any losses which the creditor has suffered as a result of the breach of contract, including any loss of profit (Schlechtriem/Schwenzer, *loc. cit.*, Art. 74 para. 2).

6.2 **85**
[Buyer] has paid two installments on the purchase price of EUR 495,390.91 each. The first installment was paid on 22 January 2001 and the second installment was paid on 19 September 2001. [Seller] is obliged to restitute these two payments of EUR 990,781.82 in total, plus an annual interest payment of 5% on EUR 495,390.91 since 22 January 2001 and of another 5% on EUR 495,390.91 since 19 September 2001. Payment will have to be occur concurrently with restitution by [Buyer] of the packaging machine which had been delivered by [Seller] under their sales contract of 12 December 2000.

6.3 **86**
[Buyer] is entitled to claim damages in the following amount:

a)
Banking fees of EUR 776.14 for transfer of the two installments on the purchase price;

b)
Expenditures of EUR 5,494.47 incurred because of travels of [Buyer]'s technicians to [Seller]'s works in order to prepare the installation of the packaging machine;

c)
Expenditures of EUR 103,218.15 for preliminary installation services at [Buyer]'s works which had to be performed prior to the start of operation of the packaging machine. It follows from the invoices issued by the involved engineering agencies that these services are closely linked to the installation of the machine (the invoices refer to the new packaging line);

d)
Costs of EUR 904.72 for soliciting services and translations which have been incurred in the context of the declaration of avoidance;

e)
Expenditures of EUR 13,007.20 for pre-trial attorneys' fees;

f)
Additional costs of EUR 152,012.52 which have been suffered as a consequence of the fact that the packaging machine did not achieve the required performance. [Buyer] has calculated this sum as being the difference between its unit labor costs with three workmen under the machine's actual performance and its unit labor costs with three workmen under the machine's performance as was required by the contract, multiplied by all units produced between September 2001 and December 2003. This calculation is comprehensible and appears to be correct.

g)
Additional costs of EUR 25,619.85 for the assignment of additional workmen caused by problems of operating the packaging machine.

These sums amount to EUR 301,033.05 in total and are to be compensated by [Seller] in favor of [Buyer] plus annual interest of 5%. [Seller]'s liability to pay interest commences at the time **87**

when the relevant damage has been suffered. With respect to the above items a) to d) (EUR 110,393.48 in total), the liability for interest commences at the time of avoidance of contract, because it turned out at this point in time that the individual expenditures had been incurred in vain. [Buyer] claims that interest is due as of 10 February 2000 concerning the pretrial attorneys' fees, this being the point in time when the services were purchased. This relevant point in time has not been contested by [Seller] and must be considered by the Court. With respect to [Buyer]'s losses of productivity and its expenditures for additional workforce, the damage (EUR 177,632.37) was continuously incurred. [Buyer] claims damages for losses of productivity until 31 December 2003 and for additional workforce until 22 June 2004. Interest must be paid on this amount since 22 June 2004 in accordance with [Buyer]'s submission.

6.4 **88**
[Seller] is not entitled in the present case to claim compensation for [Buyer]'s use of the packaging machine. The decisive point is that [Buyer] would not have been able to engage in production if it had not made use of the packaging machine, which in turn would have magnified the damage. Therefore, [Buyer] has mitigated its losses by operating [Seller]'s packaging machine even after it had declared avoidance of the contract. [Buyer] has complied with its duty to mitigate losses in accordance with Art. 77 CISG. Pursuant to this duty, [Buyer] was in fact obliged to operate the machine in order not to be made liable for any downtime. [Seller] cannot be entitled to claim compensation for such involuntary use.

6.5 **89**
Consequently, [Buyer]'s action is to be allowed. [Seller]'s cross-action is dismissed.

***[Conclusion:]***

7. **90**
[Seller] is obliged to compensate [Buyer] for any costs which the latter has incurred in relation to the present proceedings.

The value of the present action is set at EUR 1,291,814.87 (= Sfr. 2,053,000.00). The value of the cross-action is set at EUR 731,675.19 (= Sfr. 1,160,000.00). The regular costs amount to Sfr. 66,500.00 (consisting of Sfr. 45,000.00 for the action, Sfr. 20,000.00 for the cross-action and Sfr. 1,500.00 for the mediation proceedings). The fees invoiced by attorney Dr. Bucher amounts to Sfr. 193,040.00 (= 3% of Sfr. 3,213,000.000 plus bonuses of 60% for expenditures, 10% for the mediation proceedings and 30% for the statement of defense concerning the cross-action) plus 7.6% VAT. The out-of-pocket expenses amount to Sfr. 20,797.50 plus VAT. Therefore, the additional uncommon costs amount to Sfr. 230,089.19.

## Judgment

Consequently, the Court holds that:

1. [Buyer]'s action is allowed and [Seller] is ordered to: **91**

   - Reimburse EUR 495,390.91 plus 5% interest since 22 January 2001 and to reimburse another EUR 495,390.91 plus 5% interest since 19 September 2001 concurrently with restitution of the packaging machine which had been delivered by [Seller] under the contract concluded between the parties on 12 December 2000;

   - Pay EUR 110,393.48 plus 5% interest since 25 March 2003;

   - Pay EUR 13,007.20 plus 5% interest since 10 February 2004;

   - Pay EUR 177,632.37 plus 5% interest since 22 June 2004.

2. [Seller]'s cross-action is dismissed.

3. [Seller] is ordered to bear the regular costs caused by the action and the cross-action. These costs consist of a litigation fee of Sfr. 65,000.00, a mediation fee of Sfr. 1,500.00 and out-of-pocket expenses of Sfr. 330.00. [Seller] is also ordered to bear the additional uncommon costs caused by the action and the cross-action of Sfr. 230,089.19 including out-of-pocket expenses and VAT.