CISG-online 1734	
Jurisdiction	Germany
Tribunal	Oberlandesgericht Brandenburg (Court of Appeal Brandenburg)
Date of the decision	18 November 2008
Case no./docket no.	6 U 53/07
Case name	*Beer case II*

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

Judgement

Upon Defendant-Appellant [Buyer]'s appeal, the partial and provisional judgment on the merits rendered by the 2nd Chamber for Commercial Matters of the District Court (Landgericht) Frankfurt/Oder, case docket 32 O 58/05, is partially amended and the operative part is reformulated as follows:

[Buyer] is ordered to pay Plaintiff-Appellee [Seller] Euros [EUR] 1,500,224.39 plus 8% interest on EUR 1,488,389.13 since 22 June 2005.

[Seller]'s claim for damages concerning the «PET manufacturing and bottling service contract» of 1 December 2003 is justified on the merits because of quantity shortages over 250,494.50 hectoliters of pilsener beer and 23,068.50 hectoliters of wheat beer for the time period between June 2004 and March 2005 and because of a quantity shortage over 41,641 hectoliters of pilsener beer and 7,717 hectoliters of wheat beer in April 2005.

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[*] All translations should be verified by cross-checking against the original text. For purposes of this translation, Plaintiff-Appellee of Germany is referred to as [Seller] and Defendant-Appellant of Belgium is referred to as [Buyer]. Amounts in the uniform European currency (Euro) are indicated as [EUR].

Translator's note on other abbreviations: BGB = Bürgerliches Gesetzbuch [German Civil Code]; BGH = Bundesgerichtshof [German Federal Supreme Court]; BGHZ = Entscheidungen des Bundesgerichtshofes in Zivilsachen [Officially reported decisions of the German Federal Supreme Court in Civil Matters]; HGB = Handelsgesetzbuch [German Commercial Code]; JW = Juristische Wochenschrift [a former German law journal]; NJW = Neue Juristische Wochenschrift [a German law journal]; NJW-RR = Neue Juristische Wochenschrift Rechtsprechungsreport [a German law journal]; RG = Reichsgericht [Federal Supreme Court of the former German Empire]; ZPO = Zivilprozessordnung [German Code on Civil Procedure].

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[Buyer] is ordered to compensate [Seller] for any damages which the latter has suffered since 1 May 2005 as a consequence of the avoidance of their «PET manufacturing and bottling service contract» of 1 December 2003, based on the avoidance declared on 31 March 2003.

The remainder of [Seller]'s action is dismissed with respect to the following applications:

Claim for interest on EUR 11,835.26 as part of the purchase price claim;

Declaration that [Buyer] is liable to pay damages because of avoidance of the «can manufacturing and bottling service contract» of 1 December 2003; and

Claim for damages because of insufficient purchases in the course of the «PET manufacturing and bottling service contract» between January 2004 and April 2005 in the amount of EUR 299,691.54.

The remainder of the [Buyer]'s appeal is dismissed.

The decision on costs is deferred until the final judgment.

The judgment is preliminarily enforceable. [Buyer] may avert preliminary enforcement by providing a security in the amount of 120% of the enforceable sum, unless [Seller] has already provided a security in the same amount beforehand.

Facts and case history

The parties are in dispute about reciprocal claims in the context of two contracts concluded between them on 1 December 2003 concerning the bottling of beer. The dispute further concerns [Seller]'s right to avoid these contracts.

Both parties are breweries. [Seller] is a fully-owned subsidiary of T. Holding GmbH (hereafter: T.), which is domiciled in B. The two CEOs of [Seller], M. G. and K. U., are also the CEOs of company T.

[Buyer] is a company established under Belgian law and is registered with the commercial register in T___ (Belgium).

[Seller] had been founded by T. in order to acquire the brewing company O. This company O., whose CEO had been Mr. Z. (now co-CEO of [Seller]), was supposed to be divested from company B. & B. AG because of the introduction of the can recycling deposit in Germany. In fall 2003, T. and [Buyer] considered a joint acquisition of brewing company O., and made a corresponding public announcement. For instance, B. M. reported these plans in a newspaper article dated 4 November 2003.

The parties -- respectively, T. and [Buyer] -- discussed a commercial partnership in the form of a corporate interest in [Seller] (by way of a joint venture). However, the execution of this interest was hindered by the fact that [Seller] would not have received any public subsidies in this case. On 13 November 2003, [Seller] filed before Public Authority I. an «application for the grant of public funding support for commercial companies (...) in the context of regional

economy schemes (p. 1074 of the court file). [Seller] requested financial support which was to be used for the expansion and modernization of a production site in the amount of EUR 6,500,000.

On 1 December 2003, [Seller] and [Buyer] concluded two written manufacturing and bottling service contracts. The date «1 December 2004» as indicated in one of the contracts is a mere typographical error. Both contracts concerned the manufacturing of beer and the provision of bottling services. One contract (hereafter: «can contract») concerned the canning of beer. The other contract (hereafter: «PET contract») concerned the bottling of beer into PET bottles.

The can contract contained the following main provisions:

§ 2 -- Product Configuration / Packaging

[...]

All materials necessary for the manufacturing and bottling (trays, cans, outer packaging) are to be provided free of charge by the ordering party.

§ 3 -- Quantities

The parties fix an annual quantity of 400,000 hectoliters. It is intended that 100,000 hectoliters will be used for the production of 0.5-liter cans, while 300,000 hectoliters will be used for the production of 0.33-liter cans. The contracting parties agree to determine a plan for the annual quantity at the beginning of each business year on the basis of seasonal formulas.

§ 4 -- Production of Beer

The contracting parties assume manufacturing costs of EUR 8.00 per hectoliter of beer which is to be brewed according to the German Purity Law (Deutsches Reinheitsgebot), containing an original wort (Stammwürze) of 11.3%. The prices may be adjusted in case of any deviations from this specification.

[...]

§ 6 -- Prices

With respect to the performances described in § 5, calculations are based on EUR 11.08 per hectoliter concerning the 0.5-liter cans, and on EUR 10.25 per hectoliter concerning the 0.33-liter cans. Invoices will be issued after accomplishment of the order. VAT is not included in the prices.

In order to reflect any price increases, the tendering party is allowed to exercise a price adjustment of 1.5% of the net value of the goods for any of its performances due in 2005 and 2006.

[...]

§ 8 -- Transport

The ordering party is generally responsible for disposition and distribution of the finished goods.

In order to achieve efficient logistics, both parties agree on a close cooperation concerning possible framework agreements to be concluded with shipping companies. In general, the stipulated service and bottling payments are valid ex works of the tendering party.

[...]

§ 10 -- Payment

Payment must be made within 30 days at the end of the month after receipt of the invoice. No deductions apply.

§ 11 -- Duration of the Contract

This contract commences on 1 January 2004 and ends on 31 December 2006.

[...]

The PET contract contains in §§ 4 and 7-13 provisions which correspond to those under the can contract. § 5 determines the performances owed under the PET contract. Additional deviating provisions are contained in the following recitals:

§ 1 -- Object of the Contract

The tendering party exercises the production and bottling of beer in PET bottles for the ordering party. The contract enters into force as soon as the PET facility has been successfully put into operation.

§ 2 -- Product Configuration / Packaging

[...]

The «pre-forms» will be provided free of charge by the ordering party.

§ 3 -- Quantities

The parties fix an annual quantity of 600,000 hectoliters. The contracting parties agree to determine a plan for the annual quantity at the beginning of each business year on the basis of seasonal formulas.

§ 6 -- Prices

With respect to the performances described in § 5, calculations are based on EUR 21.50 per hectoliter plus VAT. Invoices will be issued after accomplishment of the order.

In order to reflect any price increases, the tendering party is allowed to exercise a price adjustment of 1.5% of the net value of the goods for any of its performances due in 2005 and 2006.

By letter dated 15 December 2003, I. assured [Seller] that it would be granted a subsidy payment of EUR 5,586,100 if the latter complied with certain conditions (p. 189 of the court file). [Seller] has eventually received these subsidies (p. 150 of the court file).

On 19 December 2003, [Seller] acquired the O. Brauerei GmbH by integrating the target business into its own corporate structure.

By letter of 12 December 2003, [Buyer] confirmed to [Seller] that the production and bottling service contracts were effective for a period of 36 months as of completion of the PET facility.

The parties attempted at least until January or February 2004 to determine an appropriate organizational structure for their common business which would comply with the subsidy guidelines. [Seller]'s representative attempted with its e-mail of 30 January 2004 to clarify some basic parameters for the joint transaction, which inter alia concerned the proportion of shares held by the M. Group, on the one hand, and by the T. Group, on the other hand (exhibit B52, p. 867 of the court file).

In order to comply with the PET contract, the parties planned to construct a modern PET bottling and filling facility on the site of brewery O. This meant an investment volume of EUR 20,000,000 for [Seller]. The banks involved made the financial funding dependent on the existence of sustainable and long-term production and bottling contracts. This criterion was fulfilled by the parties' PET contract. Additionally, [Buyer] provided by 11 March 2004 a guarantee in favor of Bank ___ (limited until 30 June 2005) for any of [Seller]'s debts in the amount of EUR 300,000, so that the value of [Seller]'s current account could be raised.

The banks involved furthermore demanded from [Seller] an increase in its equity financing by EUR 500,000. [Seller] was able to raise this sum by means of a loan which had been granted by its parent company T. In turn, company T. financed this transaction by way of another loan over EUR 150,000 which had been granted by [Buyer]. Moreover, the bank demanded a repurchasing contract with respect to the PET facility. This was concluded between [Seller] and the companies involved in the manufacturing and delivery of the facility (company K. Maschinen- und Anlagenbau AG and company S. S.A.S.).

On 15 March 2004, [Seller] finally ordered that the PET facility be constructed. [Buyer] provided [Seller] with its technical know-how during the construction process. [Buyer] was also responsible for on-site coordination, supervision and consultation. In particular, the performance of the facility was adapted to [Buyer]'s specific needs.

The parties established a connection for the processing of data between each other, which enabled [Buyer] to order specified quantities at designated times. In turn, these quantities were supposed to be made available by [Seller] at certain times and collected by [Buyer] or by shipping companies instructed by [Buyer], respectively. Invoices should be issued on the day after collection of the delivery.

In May 2004, [Buyer] informed [Seller] that it sought to amend the quantities designated in their PET contract. Upon that request, the parties agreed on annual quantities of 500,000 hectoliters of pilsener beer and 100,000 hectoliters of wheat beer. They also agreed on EUR 22.50 per hectoliter as the applicable price for wheat beer.

The parties commenced execution of their can contract on 1 January 2004. [Seller] started to supply [Buyer] with PET bottles by June 2004.

In August 2004, [Seller] prompted negotiations about the exact target quantities and a purchasing plan. [Seller] notified [Buyer] by e-mail of 6 September 2004 that it had been agreed during the meeting in B. that it should receive a monthly plan by the end of August 2004 but that this plan had not then arrived. By letter dated 17 September 2004, [Seller] requested [Buyer] to comply with the purchasing obligations set out in their PET production and bottling service contract. [Seller] had run into a very difficult situation after [Buyer]'s refusal to purchase the stipulated quantities. The quantity plan for the rest of the year, which had been promised during a meeting, had not been prepared by the end of August. Moreover, [Buyer] had purchased beer only occasionally after August 2004. [Buyer] had also declared during the meeting of 15 September 2004 that it would not purchase any more beer within the coming eight weeks. The initial plans between the parties of May had provided that 154,000 hectoliters were to be produced until 20 August 2004. Additionally, large quantities of wheat beer were produced but not collected and these quantities were about to deteriorate. In this letter, [Seller] demanded that [Buyer] purchase the designated quantities (325,000 hectoliters for the year 2004) and that [Buyer] draft the promised purchasing plan. [Seller] fixed a time limit until 22 September 2004 for [Buyer] to provide a binding declaration.

[Buyer] responded with a letter which was prepared by its legal representative in the Flemish language. Upon [Seller]'s request, a translated German version of the letter was sent on 7 October 2004. In this letter, [Buyer] indicated that it had entered into a definitive partnership with company T. and that the conclusion of both contracts had to be considered against this background. During a conference on 16 June 2004, T. had for the first time indicated its intention that the cooperation between [Seller] and [Buyer] should not be a partnership but a mere commercial relationship. In the course of another meeting on 15 September 2004, [Buyer] had urged the other companies to receive its 50% interest in [Seller]. A confirmation had been expected until the end of October to the effect that the partnership agreement would finally be executed. Otherwise, [Buyer] would reserve its right to suspend the contractual agreements, to cancel the contract, to claim damages from company T. or [Seller] and to claim back the loan over EUR 250,000.

In its letter, [Buyer] expressed that [Seller] would intend to make direct deliveries to company A. (one of [Buyer]'s most important customers). [Buyer], however, fully complied with the PET contract. The plans for the following eight weeks were communicated on 15 September 2004. The parties had not agreed on a purchase of 154,000 hectoliters until 20 August 2004. [Buyer] had paid all invoices within the required time.

[Seller] and company T. responded to this letter on 27 October 2004 through their legal representatives. They stated that, while the parties had discussed a possible share interest, the

primary issue had been the operation of the PET facility by [Buyer] as a means of ensuring that the annual quantities owed vis-à-vis A would be met. The annual quantity plan for the PET contract was determined over the telephone on 30 April 2004. In the following, [Seller] did not receive any amended quantity plan.

In the time between June and September 2004, [Buyer] only purchased 86,759 hectoliters of beer in PET bottles. Therefore, a target quantity of 514,241 hectoliters was still outstanding with respect to the first 12-month period. A final period of grace was set for [Buyer] until 12 November 2004. The latter was demanded to confirm within this period that it would purchase the agreed quantities until 31 May 2005. Moreover, [Buyer] should declare in writing that it would prepare an updated quantity plan on the basis of seasonal formulas.

By e-mail of 24 September 2004 (p. 220 of the court file), [Seller] offered [Buyer] various other beer products at a price of EUR 21.50 per hectoliter «within the context of our PET production and bottling service contract. » By e-mail of 19 November 2004, [Seller] made [Buyer] another offer to produce «Radler» (Translator's note: German term for beer with lemonade) and «Diesel» (German term for beer with coke) under the PET contract at a price of EUR 23.33 per hectoliter for Radler and EUR 24.85 per hectoliter for Diesel. The offer was valid until 3 December 2004.

By letter dated 28 September 2004, [Seller] issued a credit note in favor of [Buyer] over EUR 123,952.21 «for returned goods and for quantities not purchased by A., respectively» (p. 443 of the court file). The [Seller] subtracted costs for scrap, packing, loading and unloading of EUR 16,585.06 from the sum credited. [Buyer] complained about the subtraction in its e-mail of 20 October 2004 (p. 326 of the court file) and, in return, invoiced shipping costs incurred in relation to the return of goods of EUR 26,119.

On 31 December 2004, [Buyer] issued three invoices against [Seller] for EUR 164,544 in total (exhibit B19, pp. 333-335 of the court file). These invoices concern services for «commercial consulting in F. by Mr. F. Ma.», «technical consulting in F. by Mr. J. M. and Mr. G. V.» and «IC. by Mr. P. B. and Mr. R. E.» for the time between January and June 2004.

By fax dated 6 January 2005, [Seller] proposed to [Buyer] a seasonal formula for both bottling contracts and over the entire year 2005 (p. 96 of the court file). [Buyer] responded by fax of 18 January 2005 and declared that it could not accept the proposed formulas, because the two contracts were considerably different from each other. In particular, different volumes had been stipulated for each of the contracts and this was not reflected in [Seller]'s proposal. The contract obliged the parties to confer with each other on the seasonal formula. Thus, [Buyer] proposed to schedule a meeting in due time.

[Buyer] made a proposal for an amicable settlement through letter of 7 January by its legal representative of. Under the proposed settlement, [Buyer] would waive its right for an interest in [Seller] and conclude new contracts for the production and bottling of beer with an extended duration but with identical annual target quantities (p. 205 of the court file). [Seller] rejected the settlement on 28 February 2005 (p. 208 of the court file).

By e-mail of 11 January 2005 (p. 332 of the court file), [Seller] declared that it had still not received the payment on the unsettled invoices from November 2004 of EUR 479,382.09 by 31 December 2004. [Buyer] responded on 12 January 2005 by stating that this sum had already been paid on 10 January 2005, subject to a deduction for malt deliveries (p. 332 of the court file).

By letter of 20 January 2005 (p. 538 of the court file), [Seller] commented on [Buyer]'s «invoices for consulting services». The letter contains the following additional passage:

«By way of precaution, we indicate once again that we expect the entire payment for the December production by 2 March. Any counterclaims which are in dispute or which have not yet been allowed in court cannot be set off against our invoiced sums in accordance with our standard terms, which are reproduced in every invoice. »

By e-mail of 1 February 2005, [Buyer] requested about 400 pallets of «Ka. wheat beer» for calendar week 6 (hereafter: c/w). Thereupon, [Seller] notified [Buyer] on the same day that the quantity would be bottled immediately, because reconstruction measures and general maintenance would not allow the bottling of beer into PET bottles within c/w 6 to 8. [Seller] asked whether a larger quantity should be produced by way of precaution. Thereupon, [Buyer] requested 600 instead of 400 pallets, which should be a sufficient amount until c/w 8 (p. 223 of the court file).

In its e-mail of 7 February 2005, [Seller]'s factory manager requested [Buyer] to announce a «reliable quantity which would be purchased within c/w 9-13» in order to achieve a more efficient production and storage schedule (p. 228 of the court file). Furthermore, the letter mentions the necessity to receive a «projected production for all PET products» through the following months.

[Buyer] responded by e-mail of 11 February 2005 (p. 230 of the court file) and inter alia communicated the plan over eight weeks until c/w 14 and announced that this projection would be continuously extended by two more weeks, as had already been practiced for canned beer. A confirmation of this order was expected from [Seller].

[Seller] confirmed this order by letter dated 17 February 2005 (p. 230 of the court file). However, it also indicated that, at that time, the parties were in dispute about their contractual obligations. Moreover, [Seller] indicated in its letter that its former request for guaranteed target quantities was not then handled.

By e-mail of 2 March 2005, [Buyer] communicated a new projection for PET bottles until c/w 17 (p. 251 of the court file), in which the original order with respect to «Mat. pilsener» was divided into «Mat. pilsener» and «Ka. pilsener». [Seller] responded on the following day by e-mail in which it stated that a confirmed production and bottling plan was available until c/w 15, which only provided for «Mat. pilsener» and «Ka. wheat beer». [Buyer] altered the plan quite late. Therefore, [Seller] proposed to stick to the existing and confirmed production and bottling plan until c/w 15 (p. 250 of the court file).

By e-mail of 4 March 2005, [Seller]'s CEO (at that time) notified [Buyer]'s CEO inter alia that the «projection until c/w 17/2005 would be performed» (p. 113 of the court file). Therefore, «Ka. pilsener» would be incorporated into the plan as of c/w 10 and the respective quantity of «Mat. pilsener» would be reduced. Additionally, the e-mail ascertained an agreement for the upcoming execution of the order. According to this agreement, all unsettled invoices had been paid «up to date».

In its e-mail of 14 March 2005, [Buyer] communicated the projection until c/w 19 and requested a number of alterations. [Seller] responded still on the same day and indicated that the increased quantity of wheat beer was possible only as of c/w 14. Thereupon, [Buyer] adjusted the projection on 15 March 2005 accordingly (p. 257 of the court file).

By e-mail dated 22 March 2005, [Buyer] issued the projection for canned beer and between c/w 12-14 (p. 263 of the court file). By additional e-mail of 24 March 2005, it issued the PET projection for the time between c/w 13 and 20 (p. 102 of the court file).

In its letter of 30 March 2005, [Buyer] mentioned that the orders of the previous four weeks were not properly performed and [Seller] was in arrears (p. 271 of the court file).

[Seller] invoiced [Buyer] a total sum of EUR 296,035.70 with respect to deliveries of beer during February 2005. Payment was due by 30 March 2005. [Buyer] instructed its bank to process the payment. The sum was deducted from [Buyer]'s account on 1 April 2005 and was credited on [Seller]'s bank account on 5 April 2005.

By letter of 31 March 2005, [Seller] declared avoidance of both contracts with immediate effect. Reference is directed to the letter itself (p. 114 of the court file) for the particulars. [Buyer] rejected this avoidance by letter dated 14 April 2005 (p. 338 of the court file).

On 6 April 2005, [Seller] set the relevant conditions for the release of retained quantities of beer which had already been produced. Inter alia, [Seller] demanded payment of EUR 234,140.44 (due immediately), EUR 1,107,309.73 (due on 30 April 2005) and EUR 129,086.25 (due on 30 May 2005) (p. 554 of the court file).

[Buyer] indicated through letter by its legal representative of 2 May 2005 that it suffered past and future damages which had been caused by [Seller]'s breach of contract and which amounted to EUR 5,805,894. [Buyer] declared a set-off against the sum of EUR 1,107,309.73 as claimed by [Seller] as of 30 April 2005 (p. 556 of the court file).

[Buyer] has commenced formal proceedings for the gathering of evidence before the Commercial Court in T ___ (Belgium) in order to prepare its claim for damages incurred by [Seller]'s cancellation. These proceedings have not been completed yet. [Buyer] has mentioned in its memorandum of 24 March 2006 its intent to file a counterclaim after the precise amount of damages has been ascertained (p. 636 of the court file).

In the course of the present proceedings, [Seller] has set [Buyer] a period of grace on 14 November 2005 to pay the purchase price of EUR 1,205,832.34 until 18 November 2005. By way

of precaution, [Seller] once again declared avoidance of both contracts in question for non-performance (p. 544 of the court file).

Position of the Parties before the Court of First Instance

Position of [Seller]

[Seller] has argued:

There had never been any agreement concerning a business acquisition by [Buyer]. Moreover, the latter's respective submissions were not conclusive. [Buyer]'s performances (inter alia: guarantee, provision of know-how) were effected as a consequence of the long-term payment targets contained in the PET contract and because of the fact that [Buyer] was supposed to become the main customer of products manufactured using the PET facility. It had requested a facility which matched its needs.

The PET facility was put into operation on 31 May 2004. It had become partially ready for operation on 27 May 2004, and ready in its entirety on 7 June 2004, which was proven by the certificate of company S. (p. 452). Therefore, the suspensive condition contained in the PET contract was triggered. This is also supported by the fact that [Buyer] had purchased considerable quantities of beer in PET bottles since June 2004.

At the time of conclusion of the PET contract, both parties had assumed that [Seller]'s performance would not be subject to VAT and to beer taxes. This unexpected tax liability further increased the pre-financing sums raised by [Seller] and thus the commercial credit granted in favor of [Buyer].

[Seller] was also entitled to avoid the contract because of numerous blatant breaches of contract on the part of [Buyer]:

The missing seasonal formula caused considerable problems in the operation of [Seller]'s business. It was unable to plan its production in any reasonable manner. This was particularly relevant with respect to the PET facility. In order to make any commercially viable use of the facility, [Seller] would have had to achieve an annual workload of 900,000 hectoliters. This meant that it had to market some 300,000 hectoliters in addition to the quantity which was to be purchased by [Buyer]. However, this was only possible if it had the possibility to know at what times there would be free capacities for production. This is why it repeatedly urged [Buyer] to provide a seasonal formula.

[Buyer]'s non-compliance with the purchase obligations under the contract was of an even higher commercial impact.

- In 2004, [Buyer] merely accepted delivery of 236,291 hectoliters in 0.33-liter cans and 71,827 hectoliters in 0.5-liter cans.

- Between January and March 2005, merely 41,612 hectoliters in 0.33-liter cans and 17,605 hectoliters in 0.5-liter cans were accepted.

- Finally, there were deliveries of 106,293 hectoliters of pilsener beer and 48,289 hectoliters of wheat beer in PET bottles between June 2004 and March 2005.

- Under consideration of [Buyer]'s additional order of 24 March 2005, it had accepted delivery of only about 184,000 hectoliters of pilsener beer and 67,000 hectoliters of wheat beer. This was clearly less than what had been owed under the contract.

This led to a considerable commercial loss of profit on the part of [Seller].

[Seller] itself had always properly performed any of [Buyer]'s orders. Any purported failure to produce «Radler» and «Diesel» beers over 120,000 hectoliters should not be considered, since the parties had not come to any agreement for an amendment of their contract in terms of price. [Seller] was under no duty to accept an amendment of the contract. Moreover, there could not be any consideration of quantities which [Seller] had delivered to the discount supermarkets P. and N. The conclusion of contracts with these companies had not been arranged by [Buyer]. In any case, there was no clause which would provide for consideration.

[Buyer]'s complaint about non-executed orders and its reference to «projections» was unjustified because these cases did not constitute final and binding orders. Instead, a binding order was placed only at a later stage and under conditions which considerably deviated from those terms contained in the «projections».

The PET facility was able to produce 17,300 hectoliters of bottled beer per week.

[Seller] suffered damages until April 2005 as a result of the quantity shortages of EUR 630,360.44 with respect to the can contract and EUR 5,776,840.30 with respect to the PET contract. Any fixed costs could not be taken into account as a means of mitigating the amount of damages. Reference is directed to exhibit K24 (p. 125 of the court file) and [Seller]'s submissions for the particulars of its calculation of damages.

It would not have been possible to produce or to purchase the outstanding annual quantity under the PET contract between 31 March 2005 and June 2005. [Seller] itself was able to produce a maximum additional quantity of 148,848 hectoliters, which would not have sufficed to compensate for the shortage of 445,518 hectoliters.

Furthermore, [Buyer] substantially breached its payment obligations under both contracts. Except for one single case (invoice for canned beer of May 2004 over EUR 125,750.14), all invoices had been paid either too late, only partially or not at all.

It was proven by a debtor invoice of 31 January 2005 (exhibit K18) that [Buyer] owed a total sum of EUR 222,946.57 by 2 March 2005. [Buyer]'s CEO promised in March 2005 that any unsettled claims would be paid immediately. By memorandum of 21 September 2005, [Seller] has illustrated the claimed positions of the damages calculation, which had been contested by [Buyer]. Reference is directed to this memorandum (pp. 744-746).

Additional claims -- based on invoices of February 2005 for EUR 982,885,77 in total -- became due on 30 April 2005. This resulted in a total unsettled purchase price claim of EUR 1,205,832.34 by 30 April 2005.

[Seller] has asserted that the contract with [Buyer] was governed by the CISG. On the basis of [Buyer]'s breaches of contract, the former had a right to declare the contracts avoided and was thus entitled to claim compensation for its loss of profit.

[Buyer]'s conduct (accepting delivery of too little quantities) prevented [Seller]'s business from operating in a profitable manner. Moreover, [Seller] was rendered unable to prepare any reliable plans with respect to third-party contracts.

[Seller] was not required to issue a legal reminder or to set a period of grace for [Buyer] to perform its obligations before the contract could have been avoided. In any event, [Seller] had announced a future avoidance in writing in February 2005.

[Seller] has requested the Court

To order [Buyer] to pay EUR 7,613,033.18 plus 8% interest since the filing of the action,

To determine with legal effect that [Buyer] is obliged to compensate [Seller] for any damage which it has incurred since 1 May 2005 as a consequence of non-performance of the two production and bottling service contracts of 1 December 2003.

Position of [Buyer]

[Buyer] has requested the Court to dismiss [Seller]'s action.

[Buyer] has argued as follows:

The contracts in question could not be viewed in isolation from the joint venture planned between the parties. It had been agreed in the course of many discussions since 2003 that both [Buyer] and company T. should acquire 50% of the share interests in [Seller]. This alone was the reason why [Buyer] provided considerable commercial support, inter alia the signing of a guarantee, the granting of a loan and the provision of technical know-how. Only as a result of negotiations conducted by [Buyer]'s Principal Director had it been possible that the discount supermarkets N. and P. were being provided with beer in PET bottles by [Seller] as of fall 2004. This acquisition of customers was achieved only through the intended partnership. Moreover, the conclusion of the redemption contracts was mainly achieved in the course of negotiations conducted by [Buyer].

[Seller] severely breached the existing agreement when it refused to transfer the shares. [Buyer] had provided its know-how with respect to the construction of the PET facility only because the parties had arranged that an interest in [Seller]'s business would be transferred to the former.

[Buyer] contests the invoices contained in exhibit K18, nos. 25-28 and 145.

The PET bottling facility was able to operate only by the end of July 2004 (p. 155 of the court file), respectively, by the end of August (p. 179, 831 of the court file). A time of eight to ten weeks would usually pass by between the completion of such PET facility and operation under full workload. As a result, [Buyer] was no longer able to conclude a beer delivery contract with its main customer A. for the peak season of 2004 (March until August). Thus, a purchase of the entire annual quantity was not possible before 2005.

The PET facility was able to produce up to 25,000 hectoliters of bottled beer per week.

[Buyer] was not in breach of any obligation to determine the seasonal formula. [Seller] had failed to respond to [Buyer]'s letter of 18 January 2005, although the latter had repeatedly reminded the other party to propose a meeting.

[Buyer] was also not in breach of obligations to accept deliveries of beer. Instead, it was [Seller] who had not been able to comply with the projected quantities requested by it in July and August 2004. [Seller] produced considerably less beer than had been ordered by [Buyer]. The reason for this shortage was that [Seller] simultaneously performed deliveries to a third-party customer in Hungary.

[Buyer] has argued in the first place that, under the PET contract, the stipulated annual quantity was to be purchased between 1 August 2004 and 31 July 2005. However, it has submitted in its memorandum of 21 September 2006 that the target quantity referred to the respective calendar year, meaning that it would have still been possible to produce the outstanding quantity for 2005 after 31 March 2005.

[Buyer] was looking for alternative suppliers because there were no deliveries to A. during the peak season of 2004, which had been caused by the delayed operability of the PET facility. [Seller] deliberately increased the prices for the production of 120,000 hectoliters of Radler and Diesel beers to the effect that their inclusion in the PET contract was impossible. Therefore this quantity of 120,000 hectoliters was to be deducted from the annual target quantity.

Furthermore, a deduction was to be made following the cease of production during c/w 6 to 8 and because of the fact that [Buyer] had arranged for the conclusion of direct delivery contracts between [Seller] and N. and P.

Throughout 2005, [Buyer] placed orders for beer in PET bottles over 362,435 hectoliters in total. Thus, it complied with its purchase obligations with respect to the first year of the contract.

In 2004, [Buyer] purchased 228,799.67 hectoliters in 0.33-liter cans and 85,552.62 hectoliters in 0.5-liter cans. Moreover, [Buyer] placed orders for the delivery of another 39,123 hectoliters in 0.33-liter cans and 9,262.58 hectoliters in 0.5-liter cans, which had been required by [Buyer] but which were not delivered by [Seller].

There was no breach by [Buyer] of its payment obligations which might have entitled [Seller] to avoid the contract. The [Buyer] always complied with its obligations to pay. Moreover, there

were occasional problems with respect to [Seller]'s invoices, in particular the setting-off of credits and counter-invoices.

[Seller] was not entitled to declare the contracts avoided, especially because it had never fixed a period of grace combined with the announcement to declare avoidance. The CISG was not applicable. With regard to the calculation of damages, the meaning of «variable costs» was not evident and it was not shown why fixed costs should be considered. Furthermore -- supposed that the production costs determined by the expert were correct - on the basis of the contracts themselves (§ 4 of each contract), it must be assumed that [Buyer] was entitled to claim a price adjustment.

[Buyer] was not in breach of any obligations to accept delivery of certain quantities. The term «taking delivery of the goods» under Art. 64 CISG merely referred to the actual process of taking over of the goods.

In the course of proceedings before the Court of First Instance, [Buyer] has relied on a set-off with the following counterclaims:

Damages caused by the delivery of packing materials, etc. of EUR 1,078,281.74

Claim for payment of consulting services of EUR 166,544

Claim for payment of EUR 45,357.67

[Buyer] has submitted with respect to its first counterclaim:

Under its duty to mitigate losses, [Buyer] arranged for the collection of non-used packing materials from [Seller] after the latter had declared the avoidance of contract. However, some of those materials were missing for which [Buyer] had paid EUR 1,078,281.74 in total. It was not possible that such a large quantity would be consumed in the course of normal operation.

Reference is directed to [Buyer]'s memorandum of 19 January 2006 (pp. 662 et seq. of the court file) and the exhibits for the particulars of this claim.

[Buyer] has submitted with respect to the second counterclaim:

[Buyer] had to invoice the consulting services provided in 2004 on the basis of customary charges in order to reduce the losses caused by the conduct of [Seller] and T. which was not in conformity with the contract. It could not honestly be expected from [Buyer] to incur costs in order to visit [Seller]'s production site, pay for accommodation and to engage its manpower to construct a high-end bottling facility to the advantage of a competing brewery.

[Buyer] has submitted with respect to the third counterclaim:

It was undisputed that [Seller] granted a credit for EUR 123,952.21 because it had delivered wheat beer of poor quality. The counterclaim concerned costs which [Buyer] incurred because [Seller] had used a wrong foil in its PET facility. The latter acknowledged [Buyer]'s claim by granting the credit. [Seller] was responsible for the deficient goods.

Furthermore, [Buyer] has made reference in its memorandum of 8 December 2005 (p. 551 of the court file) to the set-off which it had declared on 2 May 2005 (before the legal proceedings) over a sum of EUR 5,805,894.

Finally, [Buyer] has declared in its memorandum of 21 September 2006 of its intent to rely on a set-off of EUR 403,082.22 because of an alleged excess payment under the can contract (p. 823 of the court file). Reference is directed to the said memorandum for further details.

[Seller]'s response

[Seller] has contested these claims asserted by [Buyer].

[Seller] has submitted with respect to the first counterclaim that [Buyer] had not considered the remaining quantities which had been stored as well as the loss of material which could not be used after the date of expiry. Reference is directed to the memorandum of 21 September 2005 and the exhibits 29-31 (pp. 746 et seq. of the court file).

[Seller] has argued against the second counterclaim that there was no legal basis for this claim. The parties had never concluded a contract for consulting services for a consideration. Moreover, [Buyer]'s submissions was not conclusive.

With respect to the third counterclaim, [Seller] has contested the allegation that it had used a wrong foil. Instead, the shipping company was legally responsible for the damage.

Reasoning of the Court of First Instance

The District Court (Landgericht) Frankfurt/Oder has commenced proceedings for the collection of evidence on 15 December 2005 (p. 558 of the court file) and sought to obtain an expert opinion. Reference is directed to the expert opinion provided by Dr. W. and Fu. on 7 July 2006 and to the explanation given by the expert Mr. Fu. in the oral hearing of 25 January 2007.

In the following, the District Court rendered a «partial and provisional judgment on the merits» on 29 March 2007 which contained the following operative part:

The Court finds that:

a)
[Seller]'s claim for the purchase price arising out of the production and bottling service contract with [Buyer] dated 1 December 2003; and

b)
[Seller]'s claim for damages against [Buyer] as a result of the avoidance of both contracts are justified.

[Buyer] is ordered to pay [Seller]:

a)
EUR 1,102,982.02 plus 8% interest since 22 June 2005 with reservations concerning the decision on the set-off declared by [Buyer] because of a counterclaim over EUR 1,078,281.74; and

b)
EUR 330,668.90 plus 8% interest since 22 June 2005.

[Seller]'s action is dismissed to the extent of its additional claim for EUR 18,860.81 plus interest.

The District Court has based its judgment mainly on the following reasoning:

[Seller]'s action was admissible. The District Court Frankfurt/Oder had territorial jurisdiction.

On the merits, [Seller] was entitled to claim from [Buyer] the unsettled purchase price as well as damages as a result of a valid avoidance of the contracts concluded on 1 December 2003. The claim for the purchase price was based on Art. 53 CISG in conjunction with § 6 of the two contracts. The claimed sum of EUR 1,205,832.34 was to be reduced by the disputed invoice items 25-28 and 145 over EUR 57,492.65 and EUR 45,357.67 because of valid set-offs asserted by [Buyer] which had arisen out of counterclaims for damages for non-conforming deliveries of beer. At the time of judgment, the dispute could not be finally decided with respect to these deductions. Therefore, only a partial judgment could be given. Moreover, the District Court was forced to give only a provisional judgment because [Buyer] had relied on set-offs over EUR 1,078,281.74 because of an alleged loss of packing materials and because this counterclaim could not be decided on its merits.

[Buyer] was not entitled to the asserted counterclaim for EUR 166,544 arising out of the provision of consulting services for consideration. There was not sufficient evidence that the respective services should be performed against payment.

On the other hand, [Seller] was entitled to claim damages as a consequence of its avoidance of contract under Art. 64(1)(a) CISG in conjunction with Art. 74 CISG. [Seller] was entitled to avoid the contract without the requirement to set a period of grace because [Buyer] had fundamentally breached the contracts by not having cooperated in the process of compiling a seasonal formula.

Additionally, a right of avoidance was also justified in accordance with Art. 64(1)(b) CISG. The necessary period of grace was unequivocally set by [Seller] in its letters dated 17 September and 27 October 2004.

Therefore, it may remain undecided whether or not a right to declare avoidance also followed from a breach of obligations to make payment and to accept delivery of the goods.

The amount of damages must be determined according to the amount of lost profit which had been incurred. In this respect, a hypothetical acceptance of the goods by [Buyer] was irrelevant. The dispute could only be decided up to the amount of EUR 330,668.90. This constituted the damages which had arisen out of the «can contract» during the year 2004, as had been

demonstrated by the convincing expert opinion. The damages claimed by [Seller] in excess of this sum (EUR 18,860.81) could not be allowed.

Position of the Parties on the Appeal

Position of [Buyer]

[Buyer]'s appeal seeks to contest this judgment rendered by the District Court. It continues to request the Court to dismiss [Seller]'s action.

[Buyer] submits:

The District Court failed to gather a sufficient factual basis for its decision. [Buyer] was not granted the right to be heard. The proceedings conducted by the District Court were gravely improper, given that there had been a change of judges and a change in the legal opinion of the Court.

In its assessment of whether there was a fundamental breach of contract, the District Court failed to consider that the parties had not only planned but also largely executed the joint acquisition and operation of the brewery F. The avoidance of the contract by [Seller] ran against good faith in the light of this close commercial relationship.

[Buyer] did not fundamentally breach contract in terms of Art. 25 CISG because of its failure to prepare a seasonal formula. The wording of the relevant contract provision did not indicate that the existence of the contract should be dependent on compliance with this obligation. The provision of a seasonal formula only constituted an ancillary obligation under the contract. Moreover, the circumstances showed that the preparation of a seasonal formula did not play any relevant role in the performance of the contract. For instance, [Buyer] purchased canned beer since 2004 without any underlying seasonal formula.

In any event, it was not even possible to give any precise projection of the quantity which would be required within any given month. [Buyer] mainly delivered beer in PET bottles to large discount supermarkets like company A. which placed their orders only on short notice and the amounts strongly varied. This was because A. itself had no large storage capacities and insisted on the provision of beer with a shelf-life of four months or more. The parties used «projections» in order to comply with these requirements. Each projection contained the anticipated amounts of beer required by [Buyer] within the following eight weeks. On this basis, [Seller] could not expect any more specific seasonal formula because these practices were usual in the relevant field of business and did not amount to a grave detriment for [Seller].

[Buyer] was also willing to prepare a seasonal formula. However, [Seller]'s correspondence of 6 January 2005 was useless, since it had not considered the seasonal fluctuations which usually occurred in any dealings with discount supermarkets. [Seller] did not respond to [Buyer]'s subsequent proposal to schedule a meeting.

Given that the testing phase of the PET facility was successfully completed only in August 2004, the remaining necessary action was to determine the proportionate target quantities

for the remainder of the year. The obligation to purchase certain quantities existed only with respect to each calendar year, which followed from [Seller]'s letter of 17 September 2004. Therefore, an entire plan for annual target quantities was to be made only for the year 2005. Both parties clearly reckoned with the fact that an operation under full load not could be achieved before 2005 and that large consignments were to be delivered only in spring and summer of 2005.

[Seller]'s letters of 17 September and 27 October 2004 did not constitute reminding notices of any legal relevance. The testing phase had just been completed and [Seller] itself provided its seasonal formula only after these dates. Subsequently, both parties continued to operate on the basis of the projections. Throughout the meetings of fall 2004, the stipulation of a seasonal formula had never appeared on the agenda. For instance, [Seller] did not mention any seasonal formula in its e-mail of 22 March 2005. Instead, it recommended a performance of the contract on the basis of the projections. The subsequent declaration of avoidance by [Seller] was surprising and unjustified.

Moreover, [Seller] acted against good faith. Both parties intended to jointly acquire and operate the breweries O. and F. by [Buyer] in concert with company T. The respective contracts merely constituted a certain part of a cooperation which had already been exercised to a given extent. The contracts were mainly concluded as a means for [Seller] to be able to provide proof of turnover vis-à-vis its banks.

Both parties as well as T. intended to exercise a joint venture with [Seller] being the target company.

In the course of the transaction, [Buyer] was supposed to remain passive in the meantime, because any acquisition of share interest would have led to certain difficulties in the raising of subsidies.

An acquisition of the brewery by T. on 19 December 2003 was only possible because [Buyer] participated as a partner company. In public, [Buyer] was repeatedly mentioned as being [Seller]'s «cooperating partner». The parties jointly intended to deliver beer to the final customer A. from their common place of business in F.

[Buyer] had provided a multitude of performances in favor of [Seller]. For example, [Buyer] made a payment over EUR 250,000 in the beginning of 2004 «to the other party». A normal customer would never do anything like this. Furthermore, it was undisputed that [Buyer] entered into a guarantee contract over EUR 300,000 in favor of [Seller]. Finally, [Buyer]'s undisputed assistance in the construction of the PET facility readily demonstrated the existence of a partnership agreement. These performances were invoiced by [Buyer] only after [Seller] had refused to perform any existing agreements. The existence of a partnership agreement was also corroborated by the conclusion of redemption contracts and the acquisition of customers.

There had been negotiations about the future course of action throughout the months after [Seller]'s declaration in June 2004 where it stated that it was unwilling to establish a new company. Owing to these developments, the commercial basis for the existence of the bottling service contracts was destroyed.

The District Court was incorrect when it did not consider the fixed costs in its calculation of damages for the year 2004 with regard to the can contract. This legal question could not be readily resolved by the expert itself. The circumstances of the present case (partnership agreement) required a consideration of these costs.

The parties and company T. had orally agreed on the provision of consulting services by [Buyer] for a consideration. This was also incorporated in the prepared agreement for cooperation. The services were invoices only as a consequence of [Seller]'s abortion of commercial relations and as a means of mitigating the losses.

Any asserted claim on the part of [Seller] for performance of the contract or damages for non-performance due to shortages in the quantities purchased by [Buyer] was already time-barred. Furthermore, [Seller] was precluded from amending its action in the course of the present proceedings in such manner.

By order of 29 April 2008, the Court has taken the competence to decide the present dispute insofar as part it was still pending before the District Court (Landgericht) Frankfurt/Oder. Reference is directed to this order (p. 1358 of the court file).

[Seller] has declared in the oral hearing of 7 October 2008 of its intent to withdraw the claim under no. 26 of exhibit K18 (EUR 43,434.30) and to withdraw its request to consider the credit granted under no. 28 of exhibit K28 (EUR 7,066.45. [Buyer] has agreed to the partial withdrawal.

[Buyer] has requested the Court on appeal to repeal the judgment rendered by the District Court and to dismiss [Seller]'s action.

Position of [Seller]

[Seller] has requested the Appellate Court

To dismiss [Buyer]'s appeal;

To adjudicate the requests which had been filed before the District Court, insofar as they have not yet been decided upon or withdrawn. In this respect, [Seller] now seeks a declaratory award to the effect that [Buyer] be obliged to compensate [Seller] for any damages which the [Seller] has incurred since 1 May 2005 as a consequence of its avoidance (declared on 30 March 2003) of the «PET and can production and bottling service contracts» of 1 December 2003.

In the alternative, [Seller] requests the Court to render a declaratory award in this manner under consideration of the avoidance dated 28 November 2005.

In response to [Seller]'s alternative request, [Buyer] has requested the Court to dismiss the action in this respect, as well.

[Seller] has provided the following argument in defense of the favorable judgment which has been rendered by the District Court:

The partial judgment rendered by the District Court was admissible. Should the Appellate Court find that it was inadmissible, the case would have to be remanded to a first instance court. Otherwise, a comprehensive taking of evidence would have to be conducted in the course of proceedings before the Court of second instance.

[Buyer] committed a fundamental breach of contract when it failed to cooperate with [Seller] in the course of preparing a seasonal formula. Only a proper annual plan would allow [Seller] to efficiently allocate its production capacities on the market ([Buyer] only purchased about two-thirds of [Seller]'s output of PET bottles). While the parties operated on the basis of projections «for some time», [Seller] had never withdrawn its demand for a seasonal formula. [Buyer]'s respective submission was inadmissible under § 531(2) ZPO [*], so that [Seller] would not need to make any further comments.

The claim for damages was based on the quantity plans dated 17 August 2004, 6 September 2004, 17 September 2004 (exhibit K8), 6 January 2005 (exhibit K12) and 17 February 2005.

Moreover, a total sum of at least EUR 1,100,000 was due and unsettled at the time when the contract was avoided. This repeated refusal to pay in the course of the long-term delivery contract also amounted to a fundamental breach. The same applied to [Buyer]'s failure to perform its obligation of accepting delivery.

At the time of avoidance, it could already be anticipated that [Buyer] would not be able to comply with its obligation to accept delivery of 600,000 hectoliters of beer in PET bottles. This constituted an implied and final refusal to perform the contract, meaning that a fundamental breach existed. A granting of a period of grace did not make any sense under these circumstances.

[Seller] had no possibility to engage in any form of «anticipated production» of beer.

The correctness of the District Court's reasoning is not affected by the asserted intended partnership arrangement. The parties had never formed a partnership; neither as a share interest, nor as a joint venture, nor as a contract of cooperation. They had merely negotiated about a possible partnership arrangement by means of a share interest or a joint venture, respectively. However, the parties finally decided not to enter into the partnership, because this would have undisputedly violated the relevant conditions for the granting of subsidies. Consequently, [Seller] would not have received any funds for the construction and operation of its facility. These negotiations ended in February 2004 at the latest.

Moreover, any alleged partnership arrangement was never exercised.

[Buyer] was not entitled to rely on a legally relevant distortion of the parties' implicit purpose of their contract (Wegfall der Geschäftsgrundlage). The CISG does not contain this legal principle. In any case, [Buyer]'s respective submissions were not conclusive.

Furthermore, [Buyer] could not argue that the judgment rendered by the District Court came as a surprise. The underlying considerations had been comprehensively discussed between the parties. They had also formed the subject matter of the oral hearing.

[Buyer]'s defended that [Seller]'s claim was already time-barred was declared too late and could not be considered. The defense was also unfounded because [Seller] had not claimed performance of the contract but damages. Any claims concerning quantities of beer which had not been ordered or accepted by [Buyer] were claims for damages.

[Buyer]'s further submission

In its order of 29 April 2008, the Court has indicated that the set-off (declared by [Buyer]) was inadmissible then. It failed to identify the order in which the claims were to be made subject of the set-off.

Thereupon, [Buyer] has provided the following order in its memorandum of 11 June 2008 (p. 1372 of the court file):

Damages incurred as a result of the delivery of packaging materials etc. over EUR 1,078,281.74 and because of unjustified avoidance of contract,

Claim for EUR 166,544,

Claim for EUR 45,357.67,

Claim for damages because of unjustified avoidance of contract on the part of [Seller] (exact amount not yet determined).

These claims were set-off in the designated order against the claims asserted by [Seller] in the following order:

Claim for payment of EUR 1,205,832.34,

Claim for damages which had arisen out of the can contract of EUR 630,360.44,

Claim for damages which had arisen out of the PET contract of EUR 5,776,840.39.

For the additional submissions by the parties, reference is directed to their memoranda and their exhibits.

Reasoning of the Court

[Buyer]'s appeal is admissible but only partially founded at present. [Buyer] correctly asserts that the District Court was not entitled to render a partial judgment. Normally, it would have

to be repealed and the case remanded to that District Court. However, the Appellate Court has decided not to do so for reasons of procedural efficiency. Instead, it has decided to assert its competence over the present case in its entirety (including the part which was still pending before the District Court) in order to render a uniform judgment (see below at A.).

Upon [Buyer]'s appeal, [Seller]'s action will be dismissed on the merits only with respect to the claim for damages under the can contract as of 2005 (see below at D.II.) and the corresponding declaratory award (see below at B.II.). The remainder of [Seller]'s action will be allowed, with respect to the claim for the purchase price (see below at C.), the claim for damages because of quantity shortages in 2004 under the can contract (see below at D.I.) and the requested declaratory award concerning the PET contract (see below at B.III.). [Buyer]'s appeal is unfounded and unsuccessful in this respect. The dispute cannot yet be adjudicated with respect to an alleged duty of [Buyer] to pay damages as a result of quantity shortages between June 2004 and April 2005 under the PET contract. However -- in concurrence with the opinion of the District Court --, this claim can be allowed on the merits (see below at E.). [Buyer] is not entitled to any claims which might be set-off against these claims (see below at D.I.4.).

A. [*Procedural management of the case*]
The decision rendered by the District Court (Landgericht) Frankfurt/Oder contains an inadmissible partial judgment. The Appellate Court has refrained from a decision under which the dispute would be remanded to the District Court (§ 538(2) No. 7 ZPO [*]). Instead, the Court has asserted its own competence to decide over the part which was still pending before the District Court, as well.

The partial judgment could not be lawfully rendered because [Seller]'s action for performance is a combination of numerous positions and because [Buyer] has declared a set-off with a counterclaim which also forms a combination of several positions. Given that, the District Court has rendered a judgment with which it had only decided on a part of [Seller]'s action (through a partial judgment) and, likewise, only decided on a part of [Buyer]'s counterclaim. The connection between the asserted claims and the asserted counterclaims as well as the fact that there was no decision over individual positions within [Buyer]'s counterclaim, established the danger that contradictory judgments might possibly be rendered over the remainder of [Seller]'s action (cf. BGH [*] NJW [*] 2000, 958).

In addition, the District Court has rendered its judgment on the merits without due consideration of all procedural requests. It has merely decided on the payment claim (first request) on the merits. It has not decided on the request for a declaratory award (second request). This follows from the operative part of the judgment, but also from the reasoning of the District Court, which does not make any reference to this request for a declaration. Apart from that, a judgment on the merits could not have been possibly rendered with respect to the unspecified request for a declaration (BGH NJW 2001, 155). Once again, this approach taken by the District Court caused a danger of contradictory judgments. With regard to the request for a declaratory award, it had to decide on that very factual context upon which [Seller] (partially) bases its claim for performance.

According to the jurisprudence of the Federal Supreme Court (Bundesgerichtshof), there is a danger of contradictory decisions in cases of a joined action (containing both claims for performance and requests for declaration), where the individual claims are being asserted on the same factual basis. Therefore, a court may not render distinct decisions by means of a partial judgment (BGH NJW 2001, 155 with further references).

The Court lawfully exercises its discretion by asserting its competence over the whole dispute under considerations of procedural efficiency. This will obviously expedite the proceedings, which is preferable with due consideration to their duration in both first and second instance. Procedural efficiency also prevails over the fact that the parties now partially lose their interest in having appellate proceedings in the present case.

B. [*Claim for damages under PET and can contract since 1 May 2005*]
On the basis of the PET contract, [Seller] is entitled to claim compensation for the damage which it has incurred since 1 May 2005 as a result of the avoidance declared on 31 March 2005. The Appellate Court may render this declaratory award because it has asserted its competence over the entire dispute. However, [Seller]'s request for a declaration with respect to the can contract is unfounded.

The request for a declaration is admissible.

I. [*Procedural issues*]
The previous formulation of [Seller]'s request for a declaratory award (as it was brought before the District Court) was not admissible, because it did not sufficiently specify the requisite legal relationship. In order to comply with the requirements of § 253(2) No. 2 ZPO [*], a plaintiff has to identify the specific event which gives rise to the asserted claim for damages (BGH, judgment of 10 January 1983, NJW 1983, 2247; BGH, judgment of 4 October 2000, NJW 2001, 445). The former request did not meet this requirement when it merely made a reference to «breaches of contract».

Upon indication by the Court, [Seller] has clarified its request in the course of appellate proceedings in such a way that it is now admissible. [Seller] has specified the exact event which would oblige [Buyer] to pay damages. This complies with § 253(2) No. 2 ZPO.

[Seller] has also a justified interest in a declaratory judgment. At the time of initial filing of the request (May 2005), the alleged damage was still developing and did not need to be exactly calculated. Despite the fact that the duration of the contract has run out in the meantime, courts will not demand an alteration of the request for declaration into a request for performance.

II. [*Claim for damages under the can contract since 1 May 2005*]
The requested declaration with respect to the can contract is unfounded (both the primary and secondary part) insofar as it seeks a declaration of [Buyer]'s liability for damages concerning the can contract. The can contract was neither effectively avoided by way of the declaration of 31 March 2005, nor by way of the declaration of avoidance dated 28 November 2005.

The justification of an avoidance of contract must be determined separately for the can contract and the PET contract. Both contracts are legally independent of each other. This conclusion is supported by the fact that they are contained in separate contract documents, they provide for different starting dates (even though this was clarified only later) and each of the contracts could be exercised without the other contract. [Seller] has not convincingly demonstrated any compelling reasons why both contracts should be seen as a common unit with respect to the issues of breach of contract and right for avoidance despite the formal separation and despite the deviating starting and ending dates. Therefore, breach of one of the contracts does not justify an avoidance of both contracts. [Seller] has made a corresponding submission merely on p. 22 of exhibit K33 which contains the expert opinion of Prof. Dr. Gr. It is being argued that the common legal configuration of the contracts (conclusion at the same time and use of similar wording) showed an obvious interest of both parties to set up one common legal framework. The parties sought to secure a commercially viable basis for [Seller]'s investments. However, the latter assertion rather argues against the unity of the contracts. For instance, a unity of contracts would also apply with respect to [Buyer]'s possible rights to declare avoidance. Therefore, in case of a fundamental breach of the can contract by [Seller], [Buyer] would have been entitled to declare avoidance of the PET contract, as well. However, [Seller] is much more interested in the PET contract and would lose the respective commercial basis way too easily. The mere similarity and partial identity of the wording is no argument because -- despite this partial identity -- the parties have decided to draft separate contract documents and thus decided against the possibility to conclude a contract in one single document.

1.
[Seller] asserts a right to declare avoidance of contract on the basis of three grounds: First, it relies on a breach by [Buyer] of its obligations to accept deliveries (see below at aa). Second, it relies on a breach of its obligation to pay (see below at bb). Third, [Seller] claims that [Buyer] breached its duty to cooperate in the process of determining a seasonal formula (see below at cc). With respect to the can contract, none of these assertions is founded.

a)
[Seller] argues that throughout the year 2004 and the first three months of 2005, [Buyer] did not order and accept the required quantities of beer as designated in the contract. However, this does not justify avoidance under the relevant legal provisions of the CISG. In the course of proceedings before the Court of second instance, [Buyer] no longer contests that the CISG is applicable. Moreover, the District Court has correctly determined the application of the CISG. Reference is directed to that part of the contested judgment (pp. 7 and 8).

aa)
First, any quantity shortages with respect to the first quarter of 2005 are irrelevant because [Buyer] was under no contractual duty to order a specific quantity. The parties merely stipulated target quantities with relevance for each «term of 12 months». Given that the can contract entered into effect on 1 January 2004, this term corresponds to a full calendar year. Therefore, the relevant term for the year 2005 had not then expired. It would have also been possible to make up for any shortages throughout the remainder of the calendar year.

It may remain undecided whether or not the contractual agreement on a seasonal formula led to specified obligations per each month. Undisputedly, the parties did not reach an agreement on a seasonal formula for the year 2005.

Given that, a breach of the can contract by [Buyer] is only possible with regard to the designated target quantity of 400,000 hectoliters for 2004.

bb)
[Seller] is not entitled to declare avoidance under Art. 73(2) CISG. In general, it may be possible to declare a contract for delivery of goods by installments avoided for the future if one party's failure to perform any of his obligations in respect of any installment gives the other party a justified reason to conclude that a fundamental breach of contract will also occur with respect to future installments. However, avoidance must be declared within a «reasonable time» and [Seller] has not done so. The relevant period commences at the point in time when the creditor has become aware of the most recent non-conforming installment (Staudinger/Magnus, Art. 73 CISG, para. 24 with further references). [Seller] could readily determine by 1 January 2005 that [Buyer] had not complied with the designated target quantities for the year 2004. There are no definite criteria in order to determine which period of time is still reasonable. Instead, the reasonable time must be determined for each individual case under consideration of all circumstances. However, it is clearly unreasonable to wait until 31 March 2005 (almost three months) before avoidance is declared.

cc)
Furthermore, [Seller] was not entitled to avoid the contract because of [Buyer]'s failure to comply with the target quantities for the year 2004 according to Art. 64(1)(b) CISG. Under this provision, the seller may declare the contract avoided if the buyer does not perform his obligation to pay the price or take delivery of the goods within the additional period of time fixed by the seller. This provision does not apply inter alia because the term «take delivery» means the physical handing over of goods which have already been produced. However, the breach of contract asserted by [Seller] refers to the act of ordering goods which is a precedent to production. The act of ordering is not connected to the act of delivering of the goods in terms of a physical handing over. Thus, it is not embraced by the term of taking delivery in Art. 64(1)(b) CISG (cf. Honsell/Schnyder/Staub, Art. 60 CISG para. 30).

dd)
Finally, [Seller] has no right to declare avoidance under Art. 64(1)(a) CISG. It provides that the seller may declare the contract avoided if the failure by the buyer to perform any of his obligations under the contract or this Convention amounts to a fundamental breach of contract in terms of Art. 25 CISG. The CISG does not determine any relevant period of time within which this right must be exercised. It also does not require the seller to fix an additional period of time before avoidance may be declared. The provision applies to contracts for delivery of goods by installments as well. Thus, it applies in concurrence with Art. 73 CISG.

[Buyer]'s failure to comply with the target quantities for the year 2004 does not fulfil the requirements of Art. 64(1)(a) CISG. This breach of contract is not fundamental.

According to Art. 25 CISG, 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, unless the party in breach did not foresee and a reasonable person of the same kind in the same circumstances would not have foreseen such a result. In general, any obligation under a contract may give rise to a relevant expectation, irrespective of their nature as primary obligations, ancillary obligations or mere modalities of performance (BGH [*], judgment of 3 April 1996, NJW [*] 1996, 2364). In this respect, the general tendency of the CISG must be considered, which is to grant the right of avoidance only as an exceptional remedy, namely, when other remedies (price reduction or damages) are not desirable. Avoidance of contract shall be available only a last resort for either the buyer or the seller (BGH, judgment of 3 April 1996, cited above; Staudinger/Magnus, Art. 64 CISG para. 4).

Primarily, it is for the court of first instance to decide whether a breach of contract is fundamental. It is determined by the circumstances of the individual case (BGH, judgment of 3 April 1996, cited above). In the present case, the breach by [Buyer] of its obligation to order and accept delivery of the stipulated annual target quantity does not amount to a fundamental breach.

As stated in the convincing expert opinion obtained by the District Court, it may be assumed that [Buyer] accepted deliveries of 225,030 hectoliters of beer in 0.33-liter cans and 83,948 hectoliters of beer in 0.5-liter cans from [Seller] throughout the year 2004. This means that [Buyer] was liable for a quantity shortage of 91,022 hectoliters in the light of a target quantity of 400,000 hectoliters. In fact, this amounts to a shortage of almost 23% for the year 2004. However, Art. 64 CISG provides (insofar different from Art. 73(2) CISG) that the whole contract must be taken into account instead of individual partial deliveries. Thus, the fundamentality of the breach must be determined in the light of the entire duration of the contract over three years. Only this broader consideration achieves a delineation of the scopes of Art. 64 CISG, on the one hand, and Art. 73 CISG, on the other hand. In total, [Buyer] was obliged to order 1,200,000 hectoliters of canned beer over a period of three years. The respective quantity shortage in 2004 only amounts to 7.5%. In the light of the considerable total volume of the contract, the Court does not find that this shortage (and the consequential damage incurred by [Seller]) may be seen as a substantial detriment.

b)
According to the declaration of avoidance and its submissions before the Court, [Seller] bases its right to declare avoidance on a material delay of payment on the part of [Buyer].

However, [Seller] has not been entitled under Arts. 64(1)(a), (b) and 73(2) CISG to declare the can contract avoided as of 31 March 2005. This is because [Seller]'s submissions are insufficient to assume a delay of payment with respect to the specific contract. In its declaration of avoidance, [Seller] has mentioned that the sum of EUR 518,982.27 was in arrears. Yet, there is no indication as to how this sum arises out of either the can contract or the PET contract. With reference to this sum, [Buyer] has paid some EUR 296,035.70 at the beginning of April 2005. While [Seller] has broken down the remaining claim for EUR 222,946.57 in exhibit K18, it has failed to show how this sum is allocated to the can contract and the PET contract. It was not for the Court to determine whether an allocation of this sum may have become possible

on the basis of the circumstances and the contexts which have been argued in the course of proceedings. Instead, [Seller] had to make a specific demonstration in its memoranda of how the outstanding sum was apportioned between the two contracts. This is necessary because -- as shown above -- both contracts are to be assessed separately and because any breach of contract will only affect the respective contract. Without this crucial submission, the Court cannot properly determine whether and in which amount there had been any delay of payment concerning the can contract.

The Court has already indicated these considerations in express terms during the final oral hearing. Nevertheless, [Seller] has failed to make any additional submissions despite the presence of its CEO in that hearing.

In particular, the Court cannot find that there has been a fundamental breach in accordance with Art. 64(1)(a) CISG as a consequence of a failure by [Buyer] to pay the sum by the date of maturity.

Moreover, the right to declare avoidance under Art. 64(1)(b) CISG is inapplicable because [Seller] has not fixed an additional period of time for [Buyer] to perform. While [Seller] has in fact reminded [Buyer] to pay the open invoices by letter of 20 January 2005, it specifically refers to the deliveries of December 2004. However, the invoices in question became mature only by 31 January 2005. The determination of an additional period of time even before the respective claim has become mature cannot constitute a relevant period in terms of Art. 63 CISG -- despite the fact that the period (2 March 2005) was to end after the date of maturity. The right to set an additional period of time arises only when the designated time of performance has expired (Staudinger/Magnus, Art. 63 CISG para. 10, with further references).

Even the purported agreement and promise to effect payment (e-mail dated 4 March 2005) cannot constitute the fixing of an additional period of time. This piece of correspondence merely refers to a past circumstance («... we have been urged by you to effect payment ... »). [Seller] has not argued to which specific claims this statement should have referred.

c)
Finally, [Seller] bases its right to declare avoidance on [Buyer]'s refusal in breach of § 3 of both contracts to prepare a plan for annual target quantities using a seasonal formula. This submission neither justifies avoidance under Art. 73(2) CISG nor under Art. 64(1)(a) CISG. It already follows from the term «take delivery» (as described above) that the asserted breach of contract does not fulfill the requirement of Art. 64(1)(b) CISG. Therefore, the question of whether additional periods of time have been set has no bearing on this case.

Art. 73(2) CISG does not apply. Even if it was assumed that [Buyer] breached contract by not having prepared a seasonal formula, [Seller] would nevertheless not have declared avoidance within a reasonable time. According to the contract itself, the obligation to determine a seasonal formula was to be performed «at the beginning of each business year». The parties have decided to bring their «business year» in line with each calendar year. Therefore, the seasonal formula would have had to be prepared by the beginning of 2004. A declaration of avoidance of March 2005 may not be based on that breach. Moreover, an avoidance declared on that date cannot refer to the breach of preparing a seasonal formula for the year 2005. In this

respect, the same principles apply as outlined above in relation to the annual target quantities: [Seller] has clearly waited for too long a time when it seeks to declare avoidance almost three months after the alleged breach.

Furthermore, Art. 64(1)(a) CISG does not entitle [Seller] to declare the can contract avoided. There is no fundamental breach. This result can be derived from the fact that § 3 of the can contract does not establish a unilateral obligation of [Buyer] to communicate a seasonal formula, but merely provides for a coordinated preparation. Coordination means that both parties are equally involved in the process of its preparation, which is a bilateral process. In the first place, both parties were equally obliged to do nothing more than participate in this process of coordination. This bilateral obligation would have only been turned into a unilateral obligation if [Seller] had complied with its obligation and if it had expressly urged to cooperate, possibly in conjunction with the setting of a time limit. [Seller]'s respective submissions with regard to the can contract do not indicate that this has been the case. In fact, [Seller] had communicated a seasonal formula for the year 2005 by letter dated 6 January 2005, which should have been valid for both the PET and the can contract. Nevertheless, [Buyer] refused to accept the seasonal formula by letter of 18 January 2005 by stating that the formula had not complied with the respective objects of the contracts and their seasonal volumes. [Buyer] has proposed to schedule a meeting in due time in order to determine an appropriate seasonal formula.

[Seller] bears the burden to prove that there has been a breach of contract by [Buyer]. However, it has not submitted how it responded to the said letter of 18 January 2005. In particular, [Seller] has not argued that it accepted the proposal for a meeting or that it took any other steps in order to jointly determine the seasonal formula. It merely contested [Buyer]'s argument that the latter had attempted at various occasions by the beginning of 2005 to schedule a meeting. This is insufficient in order to demonstrate that [Seller] had actually complied with its obligation to cooperate. While [Seller] has submitted a document dated 17 February 2005 according to which [Buyer] failed to accept its «proposals and requests concerning the seasonal formula,» this does not sufficiently prove whether and how [Seller] responded to [Buyer]'s letter of 18 January 2005. The said document of 17 February 2005 does not contain any request to prepare a formula but merely states that no agreement had been reached by that time.

In the light of these facts, the process of determining a seasonal formula was halted by the beginning of 2005. This could not establish a specific unilateral obligation on the part of [Buyer]. Its conduct does not amount to a breach of contract which would entitle [Seller] to declare avoidance. [Seller] itself has not made any further efforts in order to prepare a formula, but seemingly accepted the projections over eight-week terms. Thus, [Seller] cannot rely on a breach by [Buyer] of its obligations.

Even if there had been a corresponding unilateral breach of contract by [Buyer], it would not have constituted a fundamental breach as required by Art. 25 CISG. It must be considered that the parties decided to execute their contract on the basis of projections over eight weeks. Moreover, [Seller] has in fact produced considerable quantities of beer for third-party customers despite the absence of a seasonal formula for the year 2004. According to the findings

contained in the expert opinion, about 40% of the 522,957 hectoliters of canned beer which had been produced in 2004 were delivered to third-party customers. Given that, [Seller]'s mere allegation that it would have required a seasonal formula in order to determine and allocate the capacities is not convincing. [Seller] has also failed to specify the amount of its purported loss of profit caused by [Buyer]'s breach of contract and to which extent a maximization of profit could have been possibly achieved by a more efficient workload of the facility in 2004 and 2005.

2.
Additionally, [Seller]'s alternative request with regard to the can contract is unfounded. The asserted declaration of avoidance of 28 November 2005 has no legal effect. The avoidance is based on [Buyer]'s failure to pay the purchase price despite the fixing of an additional period of time. However, Art. 64(1)(b) CISG does not entitle [Seller] to avoid the contract because it has failed to substantiate [Buyer]'s delay of payment separately for each of the two independent contracts (see above). Without such separate arguments, it is not possible for the Court to determine that [Buyer] breached the can contract on 28 November 2005. Reference is directed to the reasoning set out above.

III. [*Claim for damages under the PET contract since 1 May 2005*]
[Seller]'s request for a declaratory award concerning the PET contract is founded. [Buyer] is obliged to compensate [Seller] for any damage which the latter has incurred as a consequence of its avoidance of the PET contract (concluded on 1 December 2003) of 31 March 2005 since May 2005, cf. Art. 74 CISG. [Seller] has effectively avoided the PET contract by way of its letter of 31 March 2005 following a fundamental breach of contract on the part of [Buyer]. This right to declare avoidance follows from Art. 64(1)(a) CISG. Therefore, the Court does not need to explain that this right does not follow from Art. 64(1)(b), 72(1) and 73(2) CISG.

[Buyer] has failed to order and accept delivery insufficient quantities of beer in PET bottles until 31 March 2003 to the effect that [Seller] was rendered unable to produce the annual residual quantity within the remaining time. This amounts to a fundamental breach of contract which has entitled [Seller] to avoid the contract. In particular, [Buyer] was responsible for a quantity shortage of 273,563 hectoliters of beer in PET bottles by 31 March 2005.

1.

a)
Concerning the obligation of [Buyer] to allow [Seller] the possibility to achieve the annual target quantity:

In general, [Buyer] was obliged to order as much beer per month as has been stipulated by the seasonal formula. This formula would have specified the obligations of each party with respect to each month: First, [Buyer] obligation to order a specific quantity and, second, [Seller]'s consecutive obligation to produce the quantity so ordered. Since there had been no determination by the parties of a seasonal formula for the PET contract, [Buyer] was thus at least obliged to order and accept enough beer so that [Seller] remained well able to produce the remaining quantity within the remaining time until the end of the respective year. This

ancillary obligation follows from § 3 of the PET contract. [Buyer] has acknowledged the obligation to accept delivery of a certain annual quantity, which should have been apportioned throughout the year in a way which satisfied the interests of both parties: First, [Buyer]'s interest in seasonal production periods and, second, [Seller]'s interest in producing the required quantities and to allocate any remaining capacities in favor of third-party customers. Each party is obliged to respect these legitimate interests even in the absence of an applicable seasonal formula. Thus, [Buyer] was under a unilateral duty to place orders for the stipulated annual quantity in such a way which takes regard not only to its own seasonal needs but which also enables [Seller] to achieve the respective annual quantities within the remaining period of time. In particular, [Buyer] was obliged under § 3 of the PET contract to achieve the annual quantity of 600,000 hectoliters by the end of the year and to take this annual target quantity into account in the course of its placement of orders. For instance, [Buyer] would have breached this obligation if it had ordered only a fraction of the annual quantity during the first ten months and then ordered the outstanding quantity through the remaining two months, while it had been clear that [Seller] would not be able to produce those quantities within the remaining time. On the other hand, [Seller] was not obliged to check whether the orders placed by [Buyer] might eventually lead to quantity shortages by the end of the year and to produce sufficient quantities ahead of schedule in order to remain able to comply with [Buyer]'s larger orders in the future. Such production of beer ahead of schedule is not reasonably possible because of the short storage life of beer and because of demands by the discount stores to acquire beer with a considerable remaining shelf life. Moreover, this would have forced [Seller] to incur considerable storage costs without any certainty as to whether [Buyer] would actually place the orders for the remaining quantity.

Therefore, [Buyer] was not only obliged to place the orders necessary to achieve the annual target quantities by the final day of the year. Instead, obligations have arisen each month with respect to the remaining period of time.

b)
In order to determine the extent of this obligation by 31 March 2005, the applicable 12-month period contained in § 3 of the PET contract needs to be ascertained. The period for the acceptance of 600,000 hectoliters of beer in PET bottles ran from 7 June 2004 until 6 June 2005, because the 12-months period refers to the inception of the contract and not to the business year (see below at aa)). The PET contract became legally effective as of 7 June 2004 (see below at bb)).

aa)
The 12-months period under § 3 of the PET contract refers to the time since the contract has become legally effective. This follows from an interpretation according to Art. 8 CISG. The primary criterion for the purpose of interpretation is the actual intent of the parties (Art. 8(1) CISG). Art. 8(2) CISG makes reference to the objective content of a statement only in case the actual intent cannot be determined. In the present case, there appears to be an actual intent of the parties to construe the relevant provision of the contract in the same similarly to the interpretation adopted by the Court. Indeed, [Seller] mentioned in its letter of 17 September 2004 (p. 77 of the court file) a remaining quantity «during this calendar year». However, the

parties have subsequently -- but before commencement of legal proceedings -- correspondingly assumed that the 12-months period would begin to run only by the time of completion of the PET facility and thus after the contract has turned into legal effect. This interpretation follows from [Seller]'s letters dated 27 October 2004 and 31 March 2005 as well as from [Buyer]'s letter of 14 April 2005. The parties have also given support to this interpretation throughout the first stages of legal proceedings. [Buyer] has started to rely on a calculation of the quantities per calendar year and with reference to [Seller]'s letter of 17 September 2004 only after the expert has submitted his opinion before the Court (memorandum of 21 September 2006, p. 830 of the court file). In the light of the conduct which has been shown by the parties (see above), this is not convincing.

However, even if this subsequent conduct of the parties was insufficient to imply a respective common actual intent, the same result would follow from the objective content of § 3 of the PET contract. The fact that the first sentence of § 3 does not specify a calendar year or business year (as is the case with the second sentence) supports the view that the 12-months period means a deviating type of time period with a flexible starting point. The parties have therefore stipulated that, for example, in case of an inception of contract in the middle of the calendar year, the respective quantities would not be owed until the end of that calendar year but, instead, until the end of 12 months after the starting date. Moreover, this interpretation is sensible because any artificial separation of annual quantities to mere parts of a calendar year could not possibly take consideration of different seasonal demands of beer and would place an unjustified burden on [Buyer]. Apparently, the parties have not expressly clarified this question in § 3 because, in the first place, the contract was supposed to commence on 1 January 2004 (in concurrence with the can contract). In this case, the 12-months period would have corresponded to a calendar year. The present problem has occurred only because the inception of contract no longer matches the beginning of the calendar year.

bb)
Therefore, the decisive point in time to calculate the 12-month period is 7 June 2004, being the time of inception of the PET contract. Indeed, the contract document mentions 1 January 2004 as the time of inception. However, it is undisputed that the parties have bilaterally agreed on an amendment to the effect that the PET contract should enter into effect at the time of completion of the PET facility and that it should run for 36 months. Construction of the PET facility was completed on 7 June 2004. This is proven by the protocol prepared by the commissioned company, which has been submitted before the Court by [Seller]. The protocol indicates that production commenced on that date. In the light of this document, no earlier date can be derived despite [Seller]'s argument to the contrary.

[Buyer]'s argument that the PET facility was ready for operation only at a later date is insufficient to rebut the above findings concerning the date of completion. [Buyer] would have had to make more specific submissions that it had not been able to order the respective quantities of beer from [Seller] as of 7 June 2004. Moreover, [Buyer] has not indicated any facts which point to non-completion by that date. It is not evident that the parties had understood «completion" as referring to an operation under full load. Instead, the term «completion» refers to the usual start of operation of the facility as has occurred on 7 June 2004. Given that, [Buyer] may not argue that a period of eight to ten weeks lapsed between the time of completion and

the time when operation under full load was achieved. Completion by June 2004 is also corroborated by the fact that [Buyer] had at the time already ordered considerable quantities of beer from [Seller].

2.

a)
The above reasoning makes reference to 31 March 2005, being the time when avoidance of the contract was declared. Until that date, [Buyer] was obliged to order enough quantities of beer so that [Seller] would remain well able to produce the residual quantity of beer in PET bottles within the remaining period of time between 1 April 2005 and 6 June 2005. The expert opinion of 7 July 2006 has convincingly indicated a maximum workload of 2,565 hectoliters per working day. On that basis, [Seller] would have been able to produce a maximum quantity of 171,855 hectoliters within the remaining period (67 days). This means that [Buyer] had been obliged to place orders over 428,145 hectoliters (annual quantity of 600,000 hectoliters minus 171,855 hectoliters until 31 March 2005. With consideration to the ratio of pilsener and wheat beer (5 to 1 = 500,000 hectoliters of pilsener and 100,000 hectoliters of wheat beer) stipulated in May 2004, [Buyer] had been obliged to order 356,787.50 hectoliters of pilsener and 71,357.50 hectoliters of wheat beer.

b)
However, [Buyer] has merely placed orders for 106,293 hectoliters of pilsener and 48,289 hectoliters of wheat beer within the time between June 2004 and March 2005. [Seller] has conclusively argued that these are the correct quantities. [Buyer] has not sufficiently contested them. Since the relevant orders refer to a specific period of time, [Buyer] would have had to present a detailed calculation because it could have easily ascertained the correct quantities. It has not done so. [Buyer] has merely referred to certain parts of the relevant period according to its «eight-week projections» and argued that it had ordered more beer than which was actually delivered (244,944 hectoliters). This is insufficient in order to convince the Court that [Buyer] has complied with its contractual obligations to a greater extent than which has been argued by [Seller]. The latter has conclusively submitted that the eight-week projections did not constitute any binding orders but that definitive orders were being placed only later and that these orders sometimes deviated considerably from the previous projections. In that context, [Buyer] would have had to demonstrate specifically when and to which extent [Seller] had not performed any orders placed by [Buyer]. It has not done so.

c)
The following quantities shortages have accrued by the time when avoidance was declared:

Pilsener beer:

356,787.50 hectoliters (which were to be ordered)

106,293.00 hectoliters (which have been ordered)

= 250,494.50 hectoliters (total shortage)

Wheat beer:

71,357.50 hectoliters (which were to be ordered)

48,289.00 hectoliters (which have been ordered)

= 23,068.50 hectoliters (total shortage)

d)
The above-mentioned shortages could have neither been rectified by any proposed transaction over the purchase of 120,000 hectoliters of other beer products, nor by a production downtime between c/w 6 to 8.

While it is undisputed that [Seller] did not produce any beer in PET bottles for [Buyer] during c/w 6 to 8, this does not constitute an unjustified refusal to perform the contract, as has been argued by [Buyer]. Instead, a general overhaul of the PET facility was underway which had also been announced by [Seller] as evidenced by the correspondence between the parties. As a consequence of the announced overhaul, [Buyer] accepted [Seller]'s offer to place larger orders throughout the previous weeks in order to cover the subsequent shortages. [Buyer] has not successfully contested this submission by [Seller]. The available correspondence does not indicate that [Buyer] actually wanted to purchase even more beer throughout these three weeks. [Buyer] has not made any specific argument to that effect.

Moreover, the quantity shortage was not subject to a correction over 120,000 hectoliters in favor of [Buyer]. The latter's argument, that [Seller] had «deliberately boycotted» the purchase of other beer products, is unfounded. Undisputedly, it was [Seller] who offered the production of those beers «in the course of our contract» (being the PET contract) on 24 September 2004 at a price of EUR 21.50. [Buyer] has not substantiated that it eventually accepted the offer. Since [Seller] has contested [Buyer]'s respective argument, [Buyer]'s mere allegation of such agreement -- without any indication as to the time, place, form and content of the purported agreement or the persons involved -- must remain unconsidered. [Buyer] has not submitted any letter of acceptance. Moreover, it has not argued that it accepted the offer of 19 November 2004, which contained an increased price. [Seller] could legitimately make an offer containing a higher price two months after the initial and unaccepted offer. [Buyer] cannot argue that the respective conduct was against good faith or a deliberate boycott.

In the light of the foregoing, the additional transaction is not based on any contract. Therefore, [Buyer] may not rely on a quantity shortage of 120,000 hectoliters in the course of the PET contract.

e)
The quantity shortage is also not subject to a reduction with due consideration of [Seller]'s deliveries to companies N. and P. While [Buyer] asserts that it arranged for the conclusion of these direct delivery contracts, this would not be of any bearing on the obligations arising out of the PET contract. [Buyer] has not even sufficiently substantiated that these contracts were concluded exclusively as a result of its own effort. [Buyer] has not stated how, when, where and by whom the purported arrangement had actually taken place. The mere submission of

[Seller]'s offering letter of February 2004 and the reference to [Buyer]'s receipt of copies of the offers is insufficient to establish that [Buyer] acted as a broker and that this would be relevant for the PET contract. In fact, it has merely argued at one occasion that the parties reached such an agreement. This does not convince the Court.

3.
The quantity shortage of 273,563 hectoliters in total by 31 March 2005 constitutes a fundamental breach of contract in terms of Arts. 64(1)(a) and 25 CISG. This quantity amounts to 15.2% of the entire volume of the contract over three years (1.8 million hectoliters). With due consideration to all circumstances of the present case, this is equivalent to a detriment which substantially deprives [Seller] of what it is entitled to expect under the contract. [Buyer] was supposed to be the primary customer of beer in PET bottles. It is evident that the said quantity shortage of more than 15% threatened both the commercial viability of the PET facility for [Seller] and even the very commercial existence of the latter party.

[Buyer] may not refer to an initially intended partnership as a relevant excuse. It is undisputed that the parties had considered exercising such partnership in the first place, which is obvious from the various documents submitted to the Court. However, there is no proof to the effect that the partnership agreement was actually (orally) concluded. Yet, even if a partnership agreement had been concluded, this would not have had any bearing on the appraisal of the present breach of contract. Both the PET and the can contract were concluded with legal effect. The two contracts bound [Seller] and [Buyer], irrespective of whether or not [Buyer] would hold an interest in [Seller]. It is also irrelevant whether the partnership agreement constituted the commercial basis for the two contracts. Even if that basis was missing, the fundamental breach would remain. The principle under German law of a legally relevant distortion of the parties' implicit purpose of their contract (Wegfall der Geschäftsgrundlage) cannot be applied as such within the ambit of the CISG (Staudinger/Magnus, Art. 71 CISG para. 42). However, Art. 7(1) CISG provides that the principle of good faith is inherent to the CISG (Staudinger/Magnus, Art. 7 CISG para. 43). Some commentators construe the principle of good faith in a way which grants a right to demand adjustment of obligations under a contract (Staudinger/Magnus, Art. 79 CISG para. 24). However, this is not relevant for the present case. [Buyer] has not presented any argument as to why and in which manner the failed partnership arrangement should have had an impact on the agreed annual target quantities. It may be assumed that [Buyer] adjusted the ordered quantities according to its own needs and how much beer it probably required to perform the deliveries to its own customers (apart from own production). This yardstick is not affected by a failure of the partnership arrangement. The same result can be derived from [Buyer]'s offer for a settlement dated 7 January 2005. In this letter, it stated inter alia to waive its future interest in [Seller] and to conclude another contract «containing the same annual target quantities» over five years.

At best, the PET contract might be affected with respect to the agreed remuneration. However, [Buyer] has not sufficiently argued that the existing price was set at too high a level because of the intended partnership. In any event, this would not be relevant for [Buyer]'s breach of contract concerning the quantity shortages.

[Seller]'s right to declare avoidance of the contract is not affected by the circumstance that -- undisputedly -- [Buyer] entered into the PET contract inter alia in order to present the contract to its bank and to achieve the financing of the PET facility. First of all, it was not only [Seller] who benefited from the construction of the PET facility. Moreover, [Buyer] also enjoyed particular benefits and the facility was constructed according to its specific needs. Second, [Buyer] may not argue that it was an act of mere courtesy, meaning that [Seller] could not have been entitled to avoid the contract. Even if [Buyer] in fact supported [Seller] in the said manner, this would not justify the former's breaches of contract. [Seller] does not need to accept such fundamental breach of contract by [Buyer].

This result remains unchanged even with due consideration of [Buyer]'s argument, that it lost peak-season business with its primary customer (company A.) as a result of completion of the PET facility in summer 2004. It is not evident that [Seller] should have to bear the risk of a loss by [Buyer] of its own customers. Moreover, it is uncertain whether [Buyer] actually concluded the PET contract in light of the expectation that it would be able to make deliveries to company A. already by March 2004 (the purported start of the peak season). Instead, it appears as though [Buyer] could and had to understand the risk of not being able to perform deliveries to the customer in time. If [Buyer] accepts the obligation to purchase 600,000 hectoliters per year despite knowing that the facility yet needed financing and construction, it will not be later entitled to argue that it could not comply with the annual quantity by March 2004 as a result of failed contract conclusions. Additionally, [Buyer] had agreed with [Seller] in May 2004 -- after the purported failure to conclude the peak-season transaction with company -- to adjust the target quantities by re-apportioning the pilsener-wheat beer ratio, but not to reduce the quantities. Given that, [Buyer] should have obviously attempted in May 2004 to negotiate for a reduction in the annual quantity if [Buyer]'s non-compliance with the target quantities was really caused by the lost transaction for the peak-season 2004. The existence of any such agreements has not been demonstrated. [Buyer] has merely alleged without sufficient substantiation that the parties had reached an agreement (at a point in time not specified) according to which the annual target quantity was to be met only by 2005.

In general, the mere fact that the breach of contract occurred within the first year of operation of the PET facility cannot lead to an advantage of [Buyer]. Initially, it was [Seller] who bore the direct risk of commercial imponderability (failures in production processes, technical problems during startup). Against this background, the crucial risks were borne by [Seller], who had promised [Buyer] such considerable annual quantities and who would have been liable for damages in case of any production failures or insufficient deliveries.

4.
Avoidance was justified under Art. 64(1)(a) CISG even without the previous setting of an additional period of time. Moreover, this requirement does not follow from Art. 7(1) CISG, the principle of good faith, the close cooperation between the parties or the originally intended partnership. [Buyer] cannot demand to be put in the position it would have been in if the partnership arrangement had been exercised. The relevant party, with whom the partnership arrangement was to be negotiated, has not been [Seller] but its parent company T. Finally, the failure of the intended partnership arrangement does not give [Buyer] a justification for its fundamental breach of contract. The relevant issues have been discussed above.

Furthermore, [Seller] has unambiguously instructed [Buyer] about the importance of complying with the annual target quantity already by letter of 27 October 2004. Therefore, [Buyer] was sufficiently aware of the fact that substantial non-compliance of its obligations would induce [Seller] to exercise its legal remedies, avoidance of contract being one of them. It is neither evident nor has it been submitted by [Buyer] that the setting of an additional period of time would have finally remedied the breach of contract. There is no indication that [Buyer] would have taken all necessary measures to purchase the annual target quantity and to prevent avoidance of contract.

C. [*Claim for the purchase price*]
[Seller] is entitled to claim the purchase price for deliveries of beer in the asserted amount. [Buyer]'s appeal is unfounded in this respect. Contrary to the view taken by the District Court (Landgericht), [Buyer] is not entitled to a relevant counterclaim.

I. [*Procedural issues*]
In the first place, [Seller] has claimed the purchase price for beer which has been produced and delivered to [Buyer] of EUR 1,205,832.34. This claim was inadmissible because the legal matter in dispute was not sufficiently specified. Indeed, [Seller] has specified the content of its action by its submission of a comprehensive exhibit (K18), where the individual invoices are being mentioned. However, the register does not only contain invoices by [Seller] against [Buyer], but also a credit over EUR 7,066.45 which was subject to a set-off (item no. 28). [Seller] has not indicated which of its individual claims should be reduced by that credit. This indication was necessary in order to determine the specific amount of each individual invoice as part of the action. It is neither evident nor has it been argued that the parties expressly or impliedly agreed on a current account under § 355 HGB [*].

Moreover, item no. 26 of [Seller]'s action (cf. exhibit K18) refers to a claim for EUR 43,343.30. The respective exhibit K28 shows that this claim consists of numerous individual invoices over EUR 1,000,444.36 in total, payments on that invoice as well as of a credit. This, however, means that [Seller] -- once again -- has filed an inadmissible claim.

The Court has notified [Seller] about these lacks of admissibility during the final hearing. [Seller] has sufficiently remedied the inadmissibility because it has removed the relevant positions from its total claim. [Buyer] has agreed to the amendment of [Seller]'s action. Thus, the sum claimed by [Seller] is reduced to EUR 1,169,555.49 (EUR 1,205,832.34 + EUR 7,066.45 EUR 43,343.30).

II. [*Merits of the clai*m]

1.
[Seller] is entitled to claim this residual amount on the basis of the contract with [Buyer]. The latter has not contested that [Seller] has delivered the invoiced quantities of beer and is thus entitled to receive the purchase price. Except for few positions, [Buyer] has merely relied on counterclaims. Contrary to the opinion of the District Court (Landgericht), [Buyer]'s objections against the claimed positions are not to be considered. In particular, it has contested positions 25-28 and 145 of exhibit K18. In that context, [Buyer] no longer argues against positions 26

and 28. Positions 25 and 27 refer to claims for default interest and they have been substantiated and proven by [Seller]. After [Buyer] flatly raised objections against position 145, [Seller] has properly specified the claim with relevant documents (bill of delivery). Thus, it would have been for [Buyer] to further specify its argument that [Seller]'s submissions were incorrect. It has not done so.

2.
[Buyer] is not entitled to rely on set-offs against the purchase price claim. It is not even relevant whether or not any respective counterclaims actually existed. [Seller]'s standard terms -- which were part of each invoice -- exclude a set-off if the relevant counterclaims are contested or not yet determined in Court. [Seller] has already indicated this aspect in its letter of 20 January 2005. The Court has once again referred to this early indication. However, [Buyer] has not provided any additional argument in this respect.

Even if a set-off had been generally admissible, this would not have led to a different outcome. [Buyer] is not entitled to any counterclaims. This will be set out in detail below (at D.I.4).

D. [*Claim for damages under PET and can contract between 2004 and April 2005*]
In the course of the first instance proceedings, [Seller] has claimed overall damages of EUR 630,360.44 because of lost sales under the can contract from 2004 until March 2005 and as a consequence of avoidance of the contract with respect to April 2005. The District Court (Landgericht) has (partially) allowed the claim for damages with regard to the year 2004 in the amount of EUR 330,668.90. The District Court has dismissed the remainder of the claim of EUR 18,860.81 for the year 2004. It has rendered a judgment on the merits of [Seller]'s claim with respect to the year 2005.

The Court holds that [Seller] is entitled to claim damages of EUR 330,668.90 for the year 2004. [Buyer]'s appeal is unfounded in this regard.

[Seller] is not entitled to any claims concerning the year 2005 because the can contract has not been validly avoided. This part of the action is dismissed.

I. [*Claim for damages with respect to the year 2004*]
[Seller] is entitled to claim the sum stated above for the year 2004, because [Buyer] has ordered and purchased only 308,978 hectoliters of canned beer instead of 400,000 hectoliters, being the stipulated annual quantity. This has given rise to a claim for damages in favor of [Seller].

1.
[Seller] has argued in the course of the first instance proceedings that [Buyer] had merely purchased 308,118 hectoliters of canned beer (exhibit K14). On the other hand, [Buyer] has stated that 314,352.29 hectoliters had been purchased in 2004. The expert opinion has confirmed that some 308,978 hectoliters had been purchased, and this quantity appears plausible on the face of the written opinion. Neither [Seller] nor [Buyer] has sufficiently contested these findings in the course of the second instance proceedings. Neither of the parties has given any conclusive indications as to why the findings of the expert should have been incorrect. Thus, the stated quantity had to be considered.

[Buyer]'s argument during the first instance proceedings, that it had in fact ordered a quantity larger than the quantity actually delivered by [Seller], cannot be given consideration. [Buyer] would have had to provide specific evidence of orders which were being placed but not performed. The mere filing of some eight-week projections is insufficient. The reasoning set out for the PET contract (above) applies in this case, as well. This is also valid insofar as [Buyer] has argued that it had been forced in 2004 to produce 48,385.58 hectoliters of canned beer by itself as a result of [Seller]'s «delayed deliveries», and that this should be credited against the annual quantity. However, this submission is not convincing without any specific demonstration by [Buyer] of which particular orders were not being performed in which months and in which months [Buyer] was forced to switch to own production. [Seller] had already contested at an earlier occasion that it had not been able to perform all orders placed by [Buyer] and that this had led to a bilateral relocation of production. Therefore, it would have been for [Buyer] to make a substantiated counter-argument.

2.
The quantity shortage of 91,022 hectoliters of canned beer (item no. 1) constitutes damages of EUR 330,668.90. This is equivalent to the sum which [Seller] has suffered as a loss of profit. Spared own costs have already been deducted. This has been plausibly and convincingly demonstrated by the expert opinion. The Court adopts the calculation of damages as contained in the expert opinion and as set out by the expert during the oral hearing before the District Court.

[Buyer] has not raised any relevant defenses. In particular, the fixed costs incurred by [Seller] must not be considered. According to the jurisprudence of the German Federal Supreme Court, fixed costs can generally not be included in the calculation of damages (cf. BGH [*], judgment of 1 March 2001, NJW-RR [*] 2001, 985). An exception to this principle may apply only where the individual purchases by the buyer have required additional investments by the seller, thus leading to an increase in fixed costs. The buyer bears the burden to prove that those uncommon extra costs have been spared by the seller as a result of non-performance by the former (BGH, judgment of 22 February 1989, BGHZ [*] 107, 67 (69)). In that particular judgment, the German Federal Supreme Court had to rule on the damage incurred by a brewery, as well. The Court has given the following reasoning:

«... Damages for non-performance seek to put the plaintiff in the position it would have been in had the defendant properly performed the contract. Due performance would not have led to an increase in fixed costs incurred by [Seller]. This holds true if the plaintiff had enough capacity in order to perform deliveries of beer to the defendant in concurrence with deliveries to third-party customers. The defendant has not even asserted the latter case. However it bears the burden to prove and substantiate this argument (RG [*], JW [*] 1936, 797 (798, at the end)). This follows from a general assumption that fixed costs are being incurred in any event (with respect to the reverse case of omitted resale by the buyer, see Baumgärtner/Strieder, Handbuch der Beweislast im Privatrecht, vol. 1, § 252 para. 13 with further references).»

The same reasoning applies to the present case. [Buyer] misconceives the allocation of the burden of proof when it argues that [Seller] should be required to justify why no reduction

should be applied for spared fixed costs. In the course of the oral hearing before the District Court, not even the expert could identify any commercially sound reason which might justify a reduction of damages on the basis of fixed costs in the present case. [Buyer]'s mere reference to the intended partnership arrangement is not relevant because it does not relate whatsoever to the principles of damage calculation as stated above.

This calculation remains unaffected by any possible counterclaim of [Buyer] for adjustment of the purchase price. [Buyer] is not entitled to this claim. It has sought to derive a corresponding claim from § 4 of the can contract and from the fact that the parties had assumed production costs of EUR 8, while the expert has determined «costs» of EUR 6.69 (0.33-liter can) and EUR 6.71 (0.5-liter can). However, these sums contained in the expert opinion are not equivalent to costs of production, which has already been convincingly set out by the expert himself during the oral hearing before the District Court. Instead, the respective sums merely reflect the spared variable costs. A correct calculation of [Seller]'s actual costs of production would require an addition of fixed costs. It has been shown above that these fixed costs have no bearing on the calculation of damages. This is why the expert has not identified them in further detail. As a consequence, there is no relevant deviation from the actual production costs. Thus, [Buyer] is not entitled to claim a price adjustment under § 4 of the can contract.

3.
[Seller]'s claim is not time-barred. Contrary to [Buyer]'s argument, the claim has already been subject of the action before the District Court. From the outset, [Seller] has based its claim on the argument that [Buyer] had not purchased the required quantities of beer in breach of its obligation under the contract. Therefore, the present action was concerned with a claim for damages at any time, irrespective of the question of a valid avoidance of contract. [Seller] has not amended its action in the course of proceedings.

4.
[Buyer] is not entitled to relevant counterclaims against [Seller]'s claims for payment. The Court has definitively determined the existence of the latter's claims.

[Buyer] has properly declared a set-off only after it has provided the Court with a list which identifies the individual claims and their order. The Court has to decide only on the following claims:

Damages caused by delivery of packaging materials etc. of EUR 1,078,281.74

Claim for EUR 164,544

Claim for EUR 45,357.67

The Court assumes that the parties do not want to continue to rely on any set-offs which had already been declared at an earlier stage.

[Buyer]'s reference to a set-off of 2 May 2005 in the amount of EUR 5,805,894 relates to counterclaims which had allegedly arisen out of an unjustified avoidance by [Seller]. In that respect, [Buyer] has referred to the proceedings running in Belgium and repeatedly stated to file a

counterclaim. Thus, the Court assumes that this purported claim should not be subject to a set-off. Moreover, [Buyer] has never provided a specific value of the claim. An unspecified claim cannot possibly be subject to a set-off.

[Buyer] has declared a «precautionary» set-off with a claim for EUR 403,082.22 in its memorandum of 21 September 2006. This claim has been based on a purported breach by [Seller] of an obligation of to adjust the price for canned beer, which had caused an unjustified excess payment. However, [Buyer] has failed to transfer this counterclaim to its list of claims which are to be made subject of a set-off. Thus, the Court may assume that [Buyer] no longer seeks to exercise this claim. In any event, it has not indicated the necessary specific order in which the set-off should be exercised.

[Buyer] is not entitled to the three remaining claims (as listed above). In detail:

a)
[Buyer] argues that its claim for EUR 1,078,281.74 arises out of [Seller]'s failure to restitute packaging materials with respect to both the PET and can contract. The former asserts that it had paid this sum in favor of [Seller]. Such claim for damages may be exercised on its merits, irrespective of whether or not the relevant contracts were effectively avoided by [Seller]. In case of effective avoidance, [Seller] would be obliged to restitute any non-used materials and would be liable for damages in case of non-performance, Art. 81(2), 45(1)(b), 74 CISG. Were the contracts not avoided with legal effect, any packaging materials which have not been used in the course of production and which have not been restituted would constitute frustrated expenses incurred by [Buyer]. The latter asserts that these expenses were subject to a claim for damages under Art. 74 CISG, as well (Staudinger/Magnus, Art. 74 CISG, para. 53).

[Buyer] bears the burden to prove the existence of its alleged claims. In particular, it has to demonstrate that the relevant materials have not been used for production as well as the volume of non-restituted materials. However, its submissions are insufficient to comply with the burden of proof.

It has mainly relied on a submitted summary document (exhibit B27) in order to justify the claims. Moreover, [Buyer] has only very roughly explained how this document should be understood. It has announced the submission of bills of delivery in case its argument concerning the used volume was to be contested by [Seller]. However, they have not been presented to the Court. Additionally, [Buyer] has offered evidence by expert opinion in its memorandum of 19 January 2006 only with respect to its argument that [Seller]'s production could not have possibly caused wastage of 2.9 PET blanks and 12 million can caps.

[Seller] has responded to this argument by its presentation of an additional document (exhibit K29), which readily indicates how and why the parties have calculated different volumes. The main differences have been caused by the calculation of how much material was returned, how much was needed in the course of production, how much was wasted (expiry of use-by date) and how much was still being stored at [Seller]'s premises, although [Buyer] had been requested to collect it.

Thereupon, [Buyer] has merely responded in its memorandum of 18 January 2007 that it would offer evidence by expert opinion and that any materials remaining at [Seller]'s premises had become useless in the meantime.

This is an insufficient argument in order to demonstrate the existence of the alleged claim. In the light of the documents furnished by [Seller], it would have been for [Buyer] to specify the method of calculation of the figures contained in exhibit B27. In this respect, it could have given proof by reference to particular bills of delivery, which would indicate the produced quantities. Furthermore, [Buyer] would have had to make a more specific counter-argument against the returned quantities asserted by [Seller] (column B of exhibit K29). Not even exhibit B34 (extract from the legal proceedings pending in Belgium, p. 678 of the court file) as submitted by [Buyer] does not contain any further information.

[Buyer] has also not sufficiently contested [Seller]'s statement concerning quantities which had been wasted and which had remained in stock. The former's submission, that the materials could no longer be used, is insufficient to establish that [Seller] has breached contract. This holds true, because [Buyer] has not explained the reason why it did not collect this part of the materials despite [Seller]'s requests to do so.

Even if [Buyer]'s respective argument was accepted as a sufficient factual argument with regard to the materials remaining at [Seller]'s premises, it would nevertheless not have offered useful evidence in order to support its argument. Instead, [Seller] has made a sufficiently substantiated counter-argument. While [Buyer] has offered evidence by way of an expert opinion in its memoranda dated 19 January 2006 and 18 January 2007, this would have only related to the questions of how much material was being wasted in the course of production as well as to the exact value of the claim. However, the expert opinion does not provide any useful evidence in order to determine the asserted quantities as the basis for the corresponding calculation. Such a specific offer for evidence would have been necessary. The Court is not required to collect the necessary evidence by itself.

The extract from the legal proceedings pending in Belgium (exhibit B34) merely contains a summary of the factual basis collected by the Belgian Court. Thus, the exhibit does not contain any information useful for the present proceedings.

The Court has indicated in the course of the last oral hearing that [Buyer]'s argument was not sufficiently substantiated. However, it has failed to provide any further statement or to deliver additional pieces of evidence. Therefore, [Buyer] has not complied with its burden of proof.

b)
The second claim over EUR 164,544 in total consists of three invoices of 31 December 2004, which were issued by [Buyer] with respect to the provision of consulting services. The fact that [Buyer] has repeatedly mentioned the sum of EUR 166,544 in its memoranda (pp. 626 and 1382 of the court file) appears to be a typographical error.

[Buyer] is not entitled to claim EUR 164,544 from [Seller]. The respective argument put forward by [Buyer] does not establish the claim on any possible legal basis. Ultimately, [Buyer] seeks to justify the invoices by referring to a «mitigation of damages» concerning the conduct

shown by company T. in the context of the failing partnership arrangement between [Buyer] and [Seller]. The former has not argued in any way that the parties had reached an agreement to the effect that consulting services were to be performed by [Buyer] for a consideration. The reference to a draft agreement of cooperation (exhibit B54) is to no avail, since this agreement has not been turned into a definitive, legally binding agreement. It has not been signed by company T. and [Buyer]. Furthermore, any possible agreement between company T. and [Buyer] would not give rise to claims against [Seller], but only to claims against company T. The same applies to possible claims for damages with respect to services performed in the context of the intended (but failed) partnership arrangement. The Court does not need to discuss if or how any such claim against company T. might be justified. In any event, the claim cannot be asserted against [Seller] as a legal person which is independent of company T.

[Buyer] has not sufficiently argued that a particular oral agreement has been reached between it and [Seller] concerning the provision of consulting services for a consideration.

Moreover, [Buyer] has not sufficiently argued that it was entitled to a claim against [Seller] under the law of unjustified enrichment.

Despite the fact that these issues have been discussed before the Court in the course of the oral hearing, [Buyer] has failed to make further submissions in support of its argument.

c)
The third claim in the amount of EUR 45,357.67 consists of various partial claims, as well. [Buyer] alleges that [Seller] had unjustifiably applied a gross reduction for scrap products and packaging costs of EUR 19,238.67 (net EUR 16,585.06) in the context of a credit over EUR 123,952.21 and an undisputed return of beer deliveries. Moreover, [Buyer] incurred additional transport costs of EUR 26,119.

[Buyer] is also not entitled to this claim, because its respective argument is not substantiated.

It would only be entitled to claim the «additional transport costs» of EUR 26,119 provided that the return was caused by [Seller] acting in breach of its obligations. It must be considered that [Buyer] was the responsible party for transport of the goods. It was obliged to purchase the goods ex [Seller]'s works and had to arrange for the transport. [Buyer] has merely submitted that [Seller] had used a wrong type of foil for the packaging of beers. However, this argument does not give any useful indication of the specific charge against [Seller] and how it should have acted. Moreover, [Buyer] does not set out why this should establish a right of the final customer to reject the goods. It is possible that damages accrued during transport. However, it would have been for [Buyer] to specifically identify the relevant conduct by [Seller] which had been the cause of the damage. This results from [Buyer]'s general responsibility for transport. Without the required description of the charge, it cannot be made subject of proof by evidence. [Buyer] has also failed to make a substantiation of the extent of the claim. It is not at all evident how the «additional transport costs» have been calculated. Therefore, its argument is not conclusive. The fact that [Seller] actually accepted the return of the goods is not equivalent to an acknowledgement of possible claims arising out of the return.

With respect to the extent of the credit, [Buyer] would have had to specify in detail that and why the decisive cause of the return transport rests with [Seller], and not with the shipping company. Since [Buyer] relies on a payment claim, it bears the full burden of proof. Nevertheless, it has failed to assert further details and causes of the return transport. Therefore, [Buyer] is not entitled to the third counterclaim over EUR 19,238.67, as well.

[Buyer] has not submitted any further argument upon the indication given by the Court in the final oral hearing, that its argument was insufficient. Rather, the CEO of [Seller] has confirmed that this part of the dispute was concerned with damages suffered during transport. No further statements have been made by [Buyer].

II. [*Claim for damages between January and April 2005*]
[Seller] is not entitled to an additional claim for damages over EUR 280, 837.73 because of alleged quantity shortages with respect to the can contract between January and March 2005 and because of avoidance of contract with respect to April 2005. Damages cannot be awarded for April 2005 because the avoidance declared by [Seller] had not been legally effective by that time.

With regard to the time between January and March 2005, damages cannot be awarded because on 31 March 2005, [Buyer] was not then in breach of its obligation to purchase 400,000 hectoliters of beer. In general, there was no obligation to purchase any particular quantity of beer per month. While [Buyer] was obliged under the contract to place monthly orders in a way which enabled the residual annual quantity within the remaining time (see above for the similar reasoning concerning the PET contract). However, this obligation has been fulfilled with regard to the can contract and the remaining nine months. The fact that no further deliveries have been performed is a cause of [Seller]'s avoidance of contract.

E. [*Extent of the claim for damages*]
[Seller] claims damages for quantity shortages in the course of the PET contract for the time between June 2004 and March 2005 and for April 2005 as a result of avoidance of contract (dated 31 March 2005) of EUR 5,776,840.39 in total. At present, this claim for damages exists only on its merits, while the exact extent of the claim cannot yet be determined. Since the remainder of the dispute can be decided at present, the Court renders a judgment on the merits only. However, the judgment is different from the judgment on the merits rendered by the District Court (Landgericht).

[Seller] is entitled to claim damages as a result of quantity shortages of 250,494.50 hectoliters of pilsener and 23,068.50 hectoliters of wheat beer for the time between June 2004 and March 2005. This follows directly from the above reasoning concerning [Seller]'s right to avoid the PET contract. The same applies the claim for damages on its merits for April 2005. With regard to this month, [Seller] has calculated on the basis of quantities (41,641 hectoliters of pilsener and 7,717 hectoliters of wheat beer) which are significantly less than the quantities which it would have been able to produce. Since [Buyer] has not contested the propriety of these quantities, they are to be considered in this judgment on the merits. The action cannot be decided at present with respect to the exact damage suffered by [Seller] per hectoliter of beer. This must be determined by another expert opinion. The relevant quantities of beer are

made part of the operational part of this judgment on the merits, so that they cannot be subject of further dispute.

F. [*Claim for interest*]
[Seller] is also entitled to claim interest for the time since pendency of proceedings. With regard to the claim for the purchase price, merely positions no. 25 (EUR 4,304.90) and no. 27 (EUR 7,530.36) do not give rise to an interest claim. As stated above, these individual claims already constitute interest claims. § 289 BGB provides that no compound interest may be awarded and this also applies in the ambit of the CISG.

G. [*Ancillary decisions*]
The decision of preliminary enforceability is based on §§ 708 No. 10, 711 ZPO [*]. This judgment does not contain a decision on costs. This decision will become part of the final judgment.

Further appeal on legal grounds (Revision) is not admissible, because the relevant legal conditions are not fulfilled. In particular, the case is of no general relevance beyond the mere individual dispute. A decision by the Federal Supreme Court is also not justified by any need for the development of the law.