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Jurisdiction	Switzerland
Tribunal	Bundesgericht/Tribunal fédéral (Swiss Federal Supreme Court)
Date of the decision	18 May 2009
Case no./docket no.	4A_68/2009
Case name	*Filling and packaging plant case*

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

Facts:

A.
Defendant-Appellant [Seller] – a corporation which is domiciled in Basel, Switzerland – and the Spanish Plaintiff-Appellee [Buyer] concluded a contract for the sale of a packaging machine on 12 December 2000. The purchase price of the machine as a whole amounted to Spanish pesetas [ESP] 247,278,337.00 (= Euros [*EUR*] 1,486,172.74). The packaging machine consisted of ten individual devices as well as several transportation and interconnection systems. [Seller] was also obliged under the contract to install the packaging machine and prepare its operation at the [Buyer]'s works.

[Seller] sought to perform a certification run of the packaging machine after installation was accomplished. In the following, the parties began a dispute about which exact performance of the machine was required under the contract. [Buyer] mainly asserted that an output of 180 vials per minute had been promised by [Seller]. On the other hand, the latter argued that such overall performance was neither possible nor had it ever been agreed upon by the parties. [Seller] attempted on several occasions to increase the performance of the machine which had been well below 180 vials per minute at that time.

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[*] All translations should be verified by cross-checking against the original text. For purposes of this translation, Plaintiff-Appellee of Spain is referred to as [Buyer] and the Defendant-Appellant of Switzerland is referred to as [Seller]. Amounts in the uniform European currency (*Euro*) are indicated as EUR. Amounts in the currency of Switzerland (*Swiss francs*) are indicated as CHF. Amounts in the former currency of Spain (*Spanish pesetas*) are indicated as ESP.
Translator's note on other abbreviations: BGE = *Bundesgerichtsentscheidung* [Reported decisions of the Swiss Federal Supreme Court]; BGG = *Bundesgerichtsgesetz* [Swiss Code on the Functioning of the Federal Supreme Court]; BV = *Bundesverfassung der Schweizerischen Eidgenossenschaft* [Swiss Federal Constitution]; IPRG = *Bundesgesetz über das Internationale Privatrecht* [Swiss Code on the Conflict of Laws]; OR = *Obligationenrecht* [Swiss Code on the Law of Obligations]; SJZ = *Schweizerische Juristen-Zeitung* [Swiss law journal]; SR = *Systematische Sammlung des Bundesrechts* [Official database of Swiss federal legislation].

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

On 23 March 2003, [Buyer] declared avoidance of the contract and claimed both restitution of the purchase price and additional damages. On 9 February 2004, [Buyer] applied for a writ of execution to be issued with respect to its claims against [Seller].

B.
By submission dated 5 August 2004, [Buyer] filed an action against [Seller] before the District Court (*Zivilgericht*) Basel-Stadt. It requested that [Seller] be ordered to reimburse EUR 495,390.91 plus 5% interest since 22 January 2001 and another EUR 495,390.91 plus 5% interest since 19 November 2001. These amounts should be reimbursed versus restitution of the machine delivered by [Seller] under the sales contract concluded between the parties on 12 December 2000. Moreover, [Seller] should be ordered to pay EUR 110,393.48 plus 5% interest since 25 March 2003, EUR 13,007.20 plus 5% interest since 10 February 2004 and EUR 177,632.37 plus 5% interest since 22 June 2004 (avoidance of the contract; subject to a possible later increase of the claimed sums). In the alternative, [Seller] should be ordered to pay EUR 1,301,450.77 plus 5% interest since 1 October 2001, EUR 13,007.20 plus 5% interest since 10 February 2004, EUR 177,632.37 plus 5% interest since 22 June 2004 (subject to a possible later increase of the claimed sums). This sum would have to be reduced by the final instalment of the purchase price of EUR 495,390.91 (reduction of the purchase price).

[Seller], on the other hand, filed a cross-action against [Buyer] and claimed the remaining part of the purchase price plus additional damages. [Seller] requested that [Buyer] be ordered to pay EUR 731,675.19 plus interest, subject to a possible later increase of the claimed sums.

On 8 November 2006, the District Court rendered the following judgment on the merits of the case:

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

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

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

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

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

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

Subsequently, [Seller] filed for appellate proceedings before the Court of Appeal (*Appellationsgericht*) Basel-Stadt. [Seller] requested the Court of Appeal to repeal the judgment that had been rendered by the District Court. Instead, [Buyer]'s action should be dismissed. [Buyer]

should also be ordered to pay EUR 731,675.19 plus interest in accordance with the cross-action. However, the Court of Appeal confirmed and upheld the previous ruling by its judgment of 26 September 2008.

C.
[Seller] has now filed a second appeal against the ruling of the Court of Appeal of 26 September 2008. [Seller] demands that this judgment be reversed. [Buyer]'s action should be dismissed and the case on the cross-action should be remanded to the Court of Appeal for reconsideration. In the alternative, both [Buyer]'s action and [Seller]'s cross-action should be remanded to the Court of Appeal for reconsideration.

On the other hand, [Buyer] has applied before the Court to dismiss [Seller]'s appeal and to confirm the judgment rendered by the Court of Appeal. The Court of Appeal has stated that [Seller]'s appeal is unfounded.

D.
By order of the Presiding Judge of 9 April 2009, [Seller]'s appeal has temporary suspensive effect.

Reasoning of the Supreme Court:

1. ***[Introduction]***

By virtue of the present judgment on the merits, [Seller]'s request for temporary suspensive effect of its appeal has become meaningless.

2. ***[Subject of appeals before the Swiss Federal Supreme Court]***

2.1
An appeal concerning matters of private law may be filed as a defense against alleged violations of law in terms of Art. 95 and 96 BGG. The appeal must be sufficiently substantiated. The appeal will not be allowed on points where the appellant has failed to submit a sufficiently reasoned submission. The statement of appeal must contain a brief argument on why the contested act of justice has violated the law (Art. 42(2) BGG). The Swiss Federal Supreme Court will assess an alleged violation of basic rights, cantonal and inter-cantonal law only where such complaint has been precisely laid out and substantiated by virtue of the statement of appeal (Art. 106(2) BGG; BGE 134 II 244 E. 2.2; 133 III 439 E. 3.2).

2.2
An appeal before the Swiss Federal Supreme Court may contest findings in terms of fact only if the respective findings by the lower courts are evidently incorrect or where they are based on a violation of law under Art. 95 BGG and where the asserted impropriety is of relevance for the outcome of the proceedings (Art. 97(1) BGG). The meaning of the term «evidently incorrect» is equivalent to «arbitrary» (BGE 133 II 249 E. 1.2.2).

If the appellant seeks to challenge the factual findings of the courts of first or second instance, he cannot simply replace the contested findings with other ones asserted by him. Also, he

cannot succeed just by giving an explanation of how the evidence should have been appraised instead. It is for the appellant to give a qualified and clear account of why the contested findings (respectively, a possible omission to find facts) should be evidently incorrect or why they were based on a violation of law pursuant to Art. 95 BGG. A mere criticism of the findings of fact of the lower courts does not meet these standards and must therefore be dismissed (BGE 133 II 249 E. 1.4.3; 133 III 350 E. 1.3, 393 E. 7.1 p. 398, 462 E. 2.4).

2.3
In accordance with persistent jurisprudence, «arbitrariness» in terms of Art. 9 BV is not present in cases where a different decision might be justifiable just as well or where a different decision might even appear preferable. The Swiss Federal Supreme Court will repeal a decision of a cantonal court on the grounds of arbitrariness only if it that decision can evidently not be sustained, if it clearly contradicts the factual situation, if it blatantly violates a provision or well-established principle of law or if it clearly runs contrary to fairness and equity. Moreover, arbitrariness requires not only that the reasoning of a decision is unsustainable. The same must apply to the outcome of a case (BGE 134 I 140 E. 5.4 p. 148; 133 I 149 E. 3.1; 132 III 209 E. 2.1; each citation with further references).

It must be considered that the lower courts – which find and evaluate the factual basis of a case – have a wide margin of discretion (BGE 120 Ia 31 E. 4b p. 40). The Swiss Federal Supreme Court will allow a respective appeal only in those cases where the lower courts have abused their power of discretion, *e.g.* by drawing evidently unsustainable conclusions or by arbitrary ignorance towards critical pieces of evidence (*cf.* BGE 132 III 209 E. 2.1; 129 I 8 E. 2.1; 120 Ia 31 E. 4b p. 40).

3. ***[Applicability of the CISG]***

The Court of Appeal has appraised the present case according to the United Nations Convention on Contracts for the International Sale of Goods of 11 April 1980 (CISG; SR 0.221.211.1). Neither party has challenged the application of the CISG on their case (*cf.* Art. 1(1)(a) in conjunction with Art. 3 CISG).

4. ***[Summary of Seller's argument]***

However, the parties are in dispute about whether [Buyer] has effectively declared avoidance of the contract of 12 December 2000 concerning the delivery of a packaging machine on 23 March 2003. [Seller] argues that the Court of Appeal has been wrong in assuming a valid avoidance. In particular, [Seller] asserts that the Court of Appeal has violated the provisions of Arts. 8, 25, 49(2)(b), 82(1), 84(2) CISG as well as of Arts. 210(1) OR in conjunction with Arts. 116 *et seq.* and 148 IPRG. [Seller] also raises several complaints against the findings of fact.

5. ***[Summary of the Court of Appeal's ruling]***

With respect to the subject of the sales contract concluded between [Buyer] and [Seller], the Court of Appeal concluded that the parties had agreed on a required total output of 180 units per minute. It was undisputed that the packaging machine had not in fact achieved this performance required by the contract. The Court of Appeal confirmed the reasoning adopted by

the District Court concerning [Buyer]'s avoidance of contract. [Buyer] was entitled to declare avoidance both under Art. 49(1)(b) CISG because of non-delivery and under Art. 49(1)(a) CISG because of a fundamental breach of contract. The Court of Appeal further reasoned that [Buyer] had not forfeited its right to declare avoidance by virtue of Art. 82 CISG and that [Seller]'s argument on limitation was unfounded. With respect to the cross-action, the Court of Appeal held that [Seller] failed to prove and substantiate the existence of the asserted claim.

6. ***[Overview of the Court of Appeal's reasoning]***

According to the Court of Appeal, [Buyer] was entitled to declare avoidance of contract because of non-delivery and because of a fundamental breach of contract. The right to declare avoidance because of non-delivery existed as a result of the fact that the parties adopted a meaning of the term «delivery» which is in deviation to the meaning adopted by the CISG. According to the parties, «delivery» should refer to the day when installation of the packaging machine has finished and when the machine is operating to [Buyer]'s full satisfaction. Consequently, delivery of the packaging machine never actually occurred in the present case.

[Seller] challenges this reasoning on the grounds that the Court of Appeal interpreted the respective provision of the contract in violation of Art. 8(2) and (3) CISG. It may remain undecided whether this argument is indeed well-founded, *i.e.* whether [Buyer] was thus entitled to declare avoidance as a result of non-delivery (Art. 49(1)(b) CISG). It will be demonstrated in the following that [Buyer] was in any event entitled to declare the contract avoided because of a fundamental breach of contract (Art. 49(1)(a) CISG).

7. ***[Assessment of Seller's allegation that there has been no violation of Art. 25 CISG]***

[Seller] objects to the Court of Appeal's conclusion that [Buyer] has been entitled to declare the contract avoided owing to a fundamental breach of contract. The Court of Appeal violated Art. 25 CISG by having assumed the existence of a fundamental breach.

7.1
Pursuant to Art. 49(1)(a) CISG, the buyer may declare the contract avoided if the failure by the seller to perform any of his obligations under the contract or the CISG amounts to a fundamental breach of contract. A breach of contract is fundamental in terms of Art. 25 CISG, 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.

The term «fundamental breach» under Art. 25 CISG is to be interpreted narrowly. If it is doubtful whether or not a breach may qualify as fundamental, it should generally be assumed that no fundamental breach is existent (judgment by the Swiss Federal Supreme Court of 15 September 2000, case docket 4C.105/2000, E. 2c/aa). It must be considered that the CISG in general seeks to uphold the performance of contracts. Primary contractual obligations should be maintained even in case of failures by one of the parties to act in accordance with the contract. Avoidance of contract is supposed to constitute an exceptional remedy. Breaches of contract should primarily be compensated by virtue of a reduction of the purchase price and damages.

A party should be entitled to have the contract unwound only as a last resort and if this is necessary to react to breaches of contract which substantially deprive the creditor of its interest in performance of the contract. The specific circumstances of the individual case must be taken into account in order to determine whether a breach amounts to a fundamental breach under the aforementioned standards – in other words: whether the remedy of avoidance is indeed justifiable (judgment by the Swiss Federal Supreme Court of 28 October 1998, case docket 4C.179/1998, E. 2b with further references).

With respect to Art. 25 CISG, the critical question is whether the creditor is substantially deprived of what he is entitled to expect under the contract. This must be assessed under an objective standard, while mere subjective expectations are immaterial (judgment by the Swiss Federal Supreme Court of 28 October 1998, case docket 4C.179/1998, E. 2a with further references). In general, only considerably severe lacks of conformity will meet the requirements imposed by Art. 25 CISG (*Brunner*, UN-Kaufrecht - CISG, 2004, Art. 25 paras. 8 and 16; *Staudinger/Magnus*, Kommentar zum Bürgerlichen Gesetzbuch, CISG, 2005, Art. 25 para. 26). This applies in particular to those lacks of conformity which cannot be remedied within reasonable time and by reasonable efforts to the effect that the goods are practically useless, unmerchantable or cannot be appropriately resold (*Brunner*, Art. 25 para. 16; *Staudinger/Magnus*, Art. 25 para. 26; *cf.* also *Schlechtriem/Schroeter*, in: Schlechtriem/Schwenzer, Kommentar zum Einheitlichen UN-Kaufrecht, 5th ed. 2008, Art. 25 para. 27). If the goods are essentially inappropriate for the buyer's own production, resale or other needs, he will be entitled to declare the contract avoided. With respect to the question of whether it can still be expected from the buyer to resale or use the non-conforming goods, it must be taken into account whether the buyer is a professional reseller (trader), manufacturer or final customer of the respective type of goods. Generally, it will not be appropriate for a manufacturer or final customer to use or resell goods of inferior quality, if he is not at all engaged in trading the individual components or materials (*Brunner*, Art. 25 para. 16).

7.2
The Court of Appeal has entirely upheld the reasoning adopted by the District Court, which assumed the existence of a fundamental breach. The District Court held that the actual performance of the packaging machine was well below the performance which had been required under the contract. Despite the fact that a maximum velocity of 115 vials per minute seemed to be possible – as was evidenced by the video clip – the long-term average output of merely 52 vials per minute had to be considered in accordance with [Buyer]'s line of argument. [Buyer] provided an extensive set of documents in order to show that higher outputs could not be attained. These documents indicated that the average actual velocities had heavily fluctuated from time to time. This was a major indicator of the packaging machine being highly susceptible to failures. This, in turn, explained why the machine had to be operated at only low velocities. The actual output of 52 vials per minute was equivalent to a loss of production of 71% in comparison with 180 vials per minute as had been agreed in the contract. Even if the existence of a breach of contract were not to be determined by reference to the long-term average output but by reference to the maximum performance of 115 vials per minute, the loss of production would still amount to 40% as a result of extended downtimes (assumption: 8-hour shifts and downtimes extended by the factor 1.5). In its statement of defense, [Seller] had stated that the packaging machine was an automated and continuously-operating high-

precision packaging machine. According to the District Court, [Buyer] was entitled to expect that the machine delivered by [Seller] would actually achieve the promised performance.

However, this was not the case by far. Therefore, [Buyer] was substantially deprived of what it had been entitled to expect. It would not have concluded the particular contract had it been aware of the packaging machine's actual performance. Even [Buyer]'s former packaging machine – which had been used before in order to process the three types of goods in question – had been capable of achieving a similar performance. A price reduction could not be considered because [Buyer]'s loss of productivity throughout the expected lifetime of the machine exceeded the purchase price by far. Moreover, it was not possible for [Buyer] to resell the machine and thereby (partially) compensate its losses. Consequently, [Seller] was liable for a fundamental breach.

7.3
It is undisputed that [Seller] has breached the sales contract of 12 December 2000. It had delivered a packaging machine which failed to achieve the performance required under the contract. In the course of proceedings before the District Court and the Court of Appeal, a major issue was to determine the exact performance of the packaging machine which was required by the contract. After the Court of Appeal extensively evaluated the available evidence, it found that the parties had agreed on the delivery of a packaging machine which should achieve a performance of 180 vials per minute. [Seller] has refrained in its current statement of appeal from challenging this particular finding of fact.

However, [Seller] has objected to the reasoning of the Court of Appeal concerning the actual performance of the packaging machine. The Court of Appeal confirmed the District Court's conclusion and held that the long-term average performance of 52 vials per minute was the relevant value.

7.4
[Seller] has alleged that the factual finding concerning an average performance of 52 vials per minute is arbitrary.

However, [Seller] has not sufficiently proved the existence of an arbitrary decision by the Court of Appeal. Neither the Court of Appeal nor the District Court assumed an average performance of 52 vials per minute without any findings of fact and their evaluation. The District Court has in fact appreciated the documents submitted by [Buyer], which demonstrated its manufacturing processes and operation times over a period of two-and-a-half years. It has also considered the video clip submitted by [Seller]. Contrary to [Seller]'s view, it was not an arbitrary decision by the District Court to conclude that the machine achieved a performance of less than 115 vials per minute. The video clip merely indicates that the asserted performance was attainable over a brief period of time. [Seller] has not sufficiently explained and substantiated why it should be unsustainable to take recourse to the excel spreadsheet and other documents submitted by [Buyer] and to base the reasoning on a reference period of several years. With respect to the excel spreadsheet and other documents showing the relevant operation times, [Seller] has merely argued that it would challenge the correctness of their account. [Seller] has failed to demonstrate that and why it should have been arbitrary to

appreciate them. Moreover, [Seller] has referred to the fact that [Buyer] refused to perform test-runs of the packaging machine at velocities of 150 and 145 vials per minute. However, this is also insufficient to establish an arbitrary decision. [Seller]'s arguments amount to a mere criticism of the reasoning adopted by the Court of Appeal. Its submissions are unfounded (*cf.* above at 2). [Seller] further asserts that it was arbitrary when the District Court rejected its application to obtain an expert opinion on the actual condition of the packaging machine. This allegation is also unfounded, because it cannot be assumed that an expert would have been capable of determining the past performances of the machine from an *ex post* perspective. Any expert would have had to take [Buyer]'s documents into consideration. [Seller]'s challenging of the finding and evaluation of facts is unfounded. Consequently, the reasoning of the Court of Appeal and the District Court – which assumed a relevant actual performance of 52 vials per minute – is upheld.

7.5
It has been found that the packaging machine achieves an actual performance of 52 vials per minute while 180 vials per minute were required under the contract concluded between the parties.

This deviation establishes a fundamental breach of contract in terms of Art. 25 CISG. The Court of Appeal has not violated Art. 25 CISG by having assumed a fundamental breach in the light of an actual performance of 52 vials per minute compared with a required performance of 180 vials per minute. The packaging machine delivered by [Seller] only achieved 29% of the agreed performance. Given a loss of productivity of 71%, [Buyer] is substantially deprived of what it has been entitled to expect under the contract. This amounts to a fundamental breach. The numerous attempts by [Seller] to cure the lack of conformity also demonstrate that the non-conformity could not be remedied within a reasonable time. Moreover, the particular packaging machine was specifically designed for [Buyer]'s individual needs. Therefore, any resale of the machine has been impossible or at least inappropriate for [Buyer]. Even [Seller] itself assumes that – based on a performance of only 52 vials per minute – its breach of contract was indeed fundamental. [Seller] merely asserts that the breach would not be fundamental if an actual performance of 115 vials per minute was to be taken into account. [Seller] has failed to submit any convincing argument against the reasoning of the Court of Appeal and the District Court, according to which an actual performance of only 52 vials per minute (with 180 vials per minute being owed) amounted to a loss of productivity of 71% and thus qualified as a fundamental breach of contract.

8. *[Assessment of Seller's allegation that there has been no violation of Art. 49 CISG]*

[Seller] further alleges that [Buyer] had not declared avoidance of the contract within a reasonable time on 23 March 2003. It is [Seller]'s position that, since the Court of Appeal held that [Buyer] had not forfeited its right to declare avoidance, it committed a violation of Art. 49(2)(b) CISG.

8.1
Pursuant to Art. 39(1) CISG, the buyer loses the right to rely on a lack of conformity of the goods if he does not give notice to the seller specifying the nature of the lack of conformity

within a reasonable time after he has discovered it or ought to have discovered it. Art. 39(2) CISG provides that, in any event, the buyer loses the right to rely on a lack of conformity of the goods if he does not give the seller notice thereof at the latest within a period of two years from the date on which the goods were actually handed over to the buyer, unless this time-limit is inconsistent with a contractual period of guarantee.

Under Art. 49(2)(b)(i) CISG, the buyer loses the right to declare the contract avoided in respect to any breach other than late delivery, if he does not make that declaration within a reasonable time after he knew or ought to have known of the breach. The question of whether any given period of time may still qualified as «reasonable» in terms of Art. 49(2)(b) CISG must be determined in accordance with all circumstances of the individual case and the purpose of this provision. *Inter alia*, regard must be had to the nature of goods and lack of conformity as well as the conduct of the seller subsequent to the buyer's notice of non-conformity (*Müller-Chen*, in: Schlechtriem/Schwenzer, Art. 49 para. 31). Art. 49(2)(b)(i) CISG provides that the relevant period of time commences as soon as the buyer has become aware or ought to have become aware of the breach of contract. This requires that the buyer has fully appreciated the existence, extent and scope of consequences of a breach of contract. Only if he has done so will he be capable of assessing whether there is actually a fundamental breach of contract which justifies avoidance of contract under Art. 49(1)(a) CISG (*Müller-Chen*, in: Schlechtriem/Schwenzer, Art. 49 para. 34). In general, a period of one to two months will be necessary and reasonable for the buyer to sufficiently examine the situation, unless there is a special case which would objectively justify either an extended or a reduced period (*cf. Brunner*, Art. 49 para. 12; *Müller-Chen*, in: Schlechtriem/Schwenzer, Art. 49 para. 32 and footnote 114).

8.2
The Court of Appeal confirmed the reasoning of the District Court. The latter has held that [Buyer] declared avoidance of the contract within a reasonable time. The District Court also held that [Buyer] properly notified the lack of conformity in accordance with Art. 39(1) CISG. [Buyer] immediately notified [Seller] of the problems which had appeared after the packaging machine had been installed and after the first test-runs had been conducted. The first of these notifications was given on 5 October 2001. The following correspondence between the parties indicated that [Seller] persistently attempted to remedy the machine's lack of conformity. Until December 2002, [Buyer] sent more than twenty letters which contain detailed accounts of the still existing defects subsequent to the respective attempts to remedy. After [Seller] had undertaken these unsuccessful attempts for more than one year, it declared for the first time on 6 December 2002 that a performance of 180 vials per minute as demanded by [Buyer] could not be possibly achieved. At the same time, [Seller] made further proposals of how the actual performance might be increased. Thereupon, by letter dated 10 December 2002, [Buyer] referred to the extent of its losses which had been incurred until then by virtue of the lack of conformity of the machine. [Buyer] also demanded that [Seller] announce a definite date on which it would have accomplished the installation of a properly-operating machine. After a meeting at [Buyer]'s works, [Seller] made a proposal for an amicable settlement by letter dated 14 February 2003. However, [Seller] proposed a target performance which was once again well below the performance required by the contract. It turned out only by this point in time that [Buyer] would be substantially deprived of what it was entitled to expect under the contract. Therefore, the District Court concluded that the relevant period of time

for a declaration of avoidance in terms of Art. 49(2)(b) CISG commenced on 14 February 2003. Since [Buyer] declared avoidance of contract on 23 March 2003, it acted within a reasonable time. It had to be considered that the complexity of the case required considerable examinations in legal and commercial matters before a declaration of avoidance could have been expected. Consequently, [Buyer] had to be granted a period of almost one-and-a-half months.

8.3
[Seller] claims that the Court of Appeal has wrongly and arbitrarily determined that [Buyer] had become aware of the fundamental breach of contract by 14 February 2003. [Seller] submits that it had pointed out already in its letter of 6 December 2002 that the packaging machine would never be capable of achieving an output of 180 vials per minute. As a consequence, its failure to perform the contract had become definitive. The District Court was not entitled to conclude that the fundamentality of the breach had become apparent only by 14 February 200. This decision by the District Court was not consistent with its reasoning concerning the letter dated 6 December 2002. In that respect, the District Court came to an evidently incorrect and arbitrary determination of the facts.

[Seller]'s argument is unfounded. [Seller] has ignored that by virtue of the letter dated 6 December 2002, it merely turned out that the performance of 180 vials per minute as required by the contract could not be achieved. It was not readily apparent by this point in time which exact performance was possibly attainable by way of additional attempts to partially remedy the lack of conformity. Likewise, [Buyer] was not aware by that date about whether or not the breach of contract would turn out as a fundamental one. [Buyer] has become aware that the breach is indeed fundamental only subsequent to the meeting with [Seller]'s representatives and the latter's proposal for an amicable settlement. Therefore, neither the Court of Appeal nor the District Court can be accused of an inconsistent – let alone an arbitrary – reasoning.

8.4
Given that [Buyer] had become aware of the fundamental breach of contract in terms of Art. 49(2)(b)(i) CISG only by 14 February 2003, it has not forfeited its right to declare avoidance by making that declaration on 23 March 2003. [Buyer] has declared avoidance within a reasonable time as provided in Art. 49(2)(b) CISG. Finally, even [Seller] has acknowledged that a period of between one and two months is generally reasonable.

9. ***[No violation of Art. 82(1) CISG]***

[Seller] goes on to allege that the Court of Appeal has violated Art. 82(1) CISG by holding that [Buyer] did not lose its right to declare avoidance as a result of its utilization of the machine.

9.1
Under Art. 82(1) CISG, the buyer loses the right to declare the contract avoided or to require the seller to deliver substitute goods if it is impossible for him to make restitution of the goods substantially in the condition in which he received them. Therefore, the buyer is entitled to declare the contract avoided only if it is capable of restituting the goods in mint condition. However, the rule of restitution in mint condition is subject to a twofold constraint. Art. 82(1) CISG itself only requires that the goods must be restituted «substantially in the condition» in

which the buyer received them. This provision has the effect that the right to declare avoidance will be lost only cases where the condition of the goods has changed in such a way that it would be unreasonable to expect the seller to redeem the goods (*Weber*, in: Honsell, Kommentar zum UN-Kaufrecht, 1997, Art. 82 paras. 1 *et seq.*; *Hornung/Fountoulakis*, in: Schlechtriem/Schwenzer, Art. 82 para. 6). Normally, long-lasting goods are subject only to insignificant changes in their condition as a result of ordinary use (*Weber*, in: Honsell, Art. 82 para. 7). Moreover, Art. 82(2) CISG contains certain exemptions from the general principle of restitution in mint condition. In particular, Art. 82(1) CISG does not apply if the impossibility of making restitution of the goods or of making restitution of the goods substantially in the condition in which the buyer received them is not due to his act or omission (Art. 82(2)(a) CISG) or if the goods or part of the goods have been sold in the normal course of business or have been consumed or transformed by the buyer in the course of normal use before he discovered or ought to have discovered the lack of conformity (Art. 82(2)(c) CISG).

9.2
Neither the reasoning of the District Court nor of the Court of Appeal gives any indication towards the fact that it would be impossible for [Buyer] to make restitution of the packaging machine in the condition in which he received it. [Seller] has also not brought forward any respective objection to the determination or evaluation of facts. Consequently, it must be considered that the packaging machine can be restituted substantially in the condition in which [Buyer] received it. The latter has not lost its right to declare avoidance of contract pursuant to Art. 82 CISG. Therefore, [Seller]'s argument on this point is unfounded, as well.

10. ***[No violation of provisions governing the limitation period]***

[Seller] asserts that the provisions of Art. 210(1) OR in conjunction with Arts. 116 *et seq.* and 148 IPRG have been violated. [Seller] claims that any claims on the part of [Buyer] were already subject to limitation. The Court of Appeal failed to apply the one-year limitation period of Art. 210 OR to the present case.

10.1
The CISG does not govern the limitation of claims arising out of contracts for the international sale of goods (*Brunner*, Art. 4 para. 18; *Dasser*, in: Basler Kommentar, Internationales Privatrecht, 2nd ed. 2007, Art. 148 IPRG para. 3; *Ferrari*, in: Schlechtriem/Schwenzer, Art. 4 para. 35; *Honsell*, Schweizerisches Obligationenrecht, Besonderer Teil, 8th ed. 2006, p. 154; *Keller/Girsberger*, in: Zürcher Kommentar zum IPRG, 2nd ed. 2004, Art. 148 IPRG para. 7; *Siehr*, in: Honsell, Art. 4 CISG para. 23; *Staudinger/Magnus*, Art. 4 para. 38).

Therefore, the assessment of whether an asserted claim arising out of a contract governed by the CISG is in fact subject to a time-bar must be decided in accordance with the domestic substantive law applicable by virtue of the conflict of laws rules of the forum State. If the conflict of laws rules of the forum State lead to the application of the substantive law of a Contracting State to the United Nations Convention on the Limitation Period in the International Sale of Goods of 14 June 1974, the issue of limitation is to be determined in accordance

with this Convention (*Brunner*, Art. 4 para. 18; *Koller*, Die Verjährung von Ansprüchen des Käufers aus der Lieferung nicht vertragskonformer Ware im Spannungsfeld zwischen UN-Kaufrecht (CISG) und nationalem Partikularrecht, recht 2003, p. 42).

10.2
[Seller] has its habitual residence in Switzerland. Thus, the Court of Appeal has correctly decided that the issue of limitation of the right to declare the contract avoided is governed by Swiss law (Art. 118 in conjunction with Art. 148 IPRG in conjunction with Art. 3 of The Hague Convention on the Law Applicable to International Sale of Goods of 15 June 1955 (SR 0.221.211.4). Since Switzerland has not become a Contracting State to the United Nations Convention on the Limitation Period in the International Sale of Goods of 14 June 1974, its four-year limitation period concerning all claims arising out of contracts for the international sale of goods cannot apply in the present case. It means that the question of limitation of claims arising out of the contract concluded between [Buyer] and [Seller] is governed by the Swiss Code on the Law of Obligations of 30 March 1911 (OR; SR 220).

10.3
[Seller] has submitted before the Court that the limitation period was governed by Art. 210 OR. Pursuant to Art. 210 OR, a buyer's claims arising out of a lack of conformity of the goods become time-barred one year after the goods have been delivered to it by the seller.

In certain cases, an application of this one-year limitation period (Art. 210 OR) to contracts governed by the CISG will be problematic: It might happen that claims arising out of a lack of conformity of the goods would already be time-barred whereas the period for notification under Art. 39(2) CISG has not even expired. As stated beforehand, the buyer loses the right to rely on a lack of conformity of the goods in accordance with Art. 39(2) CISG if he does not give the seller notice thereof at the latest within a period of two years from the date on which the goods were actually handed over to the buyer. Therefore, legal scholars tend to argue that Art. 210 OR should be inapplicable to sales contracts governed by the CISG (*Brunner*, Art. 4 CISG para. 25; *Dasser*, in: Basler Kommentar, Art. 148 IPRG para. 3; *Honsell*, p. 154; *Keller/Girsberger*, in: Zürcher Kommentar zum IPRG, Art. 148 IPRG para. 7; *Koller*, pp. 47 *et seq.*; *Will*, Zum Wiener UN-Kaufrecht/Verjährung, SJZ 1998, 146 *et seq.*). The Court holds that this is an appropriate solution. The one-year limitation period provided for in Art. 210 OR cannot be applied at least to those cases where it would subject a claim to limitation even before the two-year notification period of Art. 39(2) CISG has expired. Otherwise, there would be a violation of provisions of public international law.

There are various possible solutions to adapt the rule contained in Art. 210 OR (*cf.* in particular: *Brunner*, Art. 4 CISG paras. 25 *et seq.*; *Koller*, pp. 45 *et seq.*). For instance, some scholars propose that the general limitation period of ten years under Art. 127 OR should apply instead of Art. 210 OR (*cf.* references at Schlechtriem/Schwenzer, Art. 39 CISG para. 29 at footnote 141). Others suggest that the period under Art. 210 OR should either be extended to two-years (judgment by the Cour de Justice de Genève of 10 October 1997 = CISG-online No. 295) or that the one-year period of Art. 210 OR should not already commence at the time of delivery but only by the time when the lack of conformity has been notified (judgments by the

Commercial Court of the Canton Berne of 30 October 2001 = CISG-online No. 956, and of 17 January 2002 = CISG-online No. 725).

In the present case, it may remain undecided which of these solutions should be applied. In particular, it is immaterial whether the relevant limitation period is two or ten years. The Court of Appeal has correctly reasoned that the laws of Switzerland also govern a possible suspension of the running of the limitation period. Art. 135 OR provides that the running of a limitation period will be suspended either if the debtor acknowledges the existence of the claim or if the creditor files an action with respect to the claim. The debtor may acknowledge the existence of a claim against itself by virtue of any conduct which may be reasonable understood by the creditor as a confirmation of its liability in law (judgment by the Swiss Federal Supreme Court of 16 May 2002, case docket 4C.60/2002, E. 1.3). By virtue of its final attempt to cure the lack of conformity of the machine on 31 October 2002, [Seller] has suspended the running of the limitation period (*cf.* BGE 121 III 270 E. 3c, p. 272). [Buyer] has also filed an action with respect to the questionable claim on 9 February 2004. Consequently, the asserted claim would not be subject to a time-bar even if a two-year limitation period were applied.

10.4
Therefore, [Buyer]'s claims and other rights following the existence of a fundamental breach of contract are not time-barred. [Seller] has not raised any objection against the magnitude of the demanded sums. The Court of Appeal has made a correct decision also with respect to the issue of limitation.

11. ***[No violation of law by the Court of Appeal in dismissing the cross-action]***

Finally, [Seller] argues that the Court of Appeal has violated Art. 84(2) CISG and Art. 29(2) BV when it denied [Seller] the possibility to rely on a set-off based on a counterclaim for compensation for use of the machine.

11.1
The Court of Appeal decided not to resolve whether the District Court was right to disallow [Seller]'s counterclaim on the grounds that [Buyer]'s obligation to mitigate its losses under Art. 77 CISG excluded any possibility to exercise a set-off in regard to asserted compensation for utilization of the machine. Instead, the Court of Appeal held that [Seller] failed to sufficiently substantiate and prove the existence of its counterclaim. The mere application to have the value of utilization determined by means of an expert opinion is not sufficient to substantiate a claim since [Seller] itself would have been well-able to calculate the value of the counterclaim. Apart from this application for an expert opinion, [Seller] merely suggested that one of its own employees be heard by the court. It could hardly amount to useful evidence if that employee were being heard as a witness. Moreover, the evidence offered by [Seller] was ineligible. Witnesses could only be such persons who are actually aware from their own sensory perception of the facts subject to being proven. However, witnesses were not suitable to take the burden of substantiation. Consequently, the Court of Appeal ruled that [Seller] neither substantiated nor proved the existence of a counterclaim within the required time which might have been put to a set-off. The District Court had been right to dismiss the counterclaim asserted by [Seller] for compensation of [Buyer]'s utilization of the packaging machine.

11.2
However, [Seller] argues that it sufficiently substantiated the existence of its claim for compensation for [Buyer]'s utilization. It also offered suitable pieces of evidence. It is correct that [Seller] has in fact provided a precise calculation with respect to its alleged claim for compensation of use by way of its statement of defense and statement of claim concerning the cross-action. In the first place, [Seller] argued that a reasonable compensation for [Buyer]'s utilization of the machine should be determined by way of expert opinion. Nevertheless, [Seller] has later claimed EUR 1,997,416.16 as being the exact amount of compensation with respect to the time between October and September 2005. [Seller] also stated that it offset a rental charge of 2.8% per month relative to the purchase price. Mr. A[...] should be heard as a witness.

11.3
It appears doubtful whether the Court of Appeal correctly concluded that [Seller] had failed to sufficiently substantiate its counterclaim. In any event, however, the Court of Appeal was correct in deciding that [Seller] had not complied with its burden of proof in this regard. In its statement of defense and statement of claim with regard to the cross-action, [Seller] has merely claimed the rental charges without having offered any evidence which might support the propriety of the argument. In particular, [Seller] failed to submit documents related to similar rental agreements, any tables of commercial calculation, invoices or terms of business of leasing corporations. [Seller] could have also nominated a representative of the respective industry who might have testified that it was actually common to have these rental charges. Nonetheless, [Seller] merely appointed one of its own employees as a witness and further demanded that an expert opinion be obtained. The Court of Appeal has not violated Art. 29(2) BV when it decided to reject [Seller]'s pieces of evidence. A court may do so if pieces of evidence have been offered by one party but are not suitable from the outset to prove the asserted facts (BGE 131 I 153 E. 3, p. 157 with further references).

12. *[Conclusion]*

As a consequence, [Seller]'s appeal is dismissed as unfounded. The latter is liable to bear all relevant costs in relation to the present proceedings (Art. 66(1) and Art. 68(2) BGG).

JUDGMENT

The Swiss Federal Supreme Court rules that:

1. [Seller]'s appeal is dismissed.

2. [Seller] is ordered to bear the court fees of Swiss francs [CHF] 20,000.00.

3. [Seller] is ordered to compensate [Buyer] with respect to the proceedings before the Swiss Federal Supreme Court in the amount of CHF 22,000.00.

4. This judgment will be served in writing on both parties and the Court of Appeal of the Canton Basel-Stadt.