

Case 84: CISG 35(2); 49

Germany: Oberlandesgericht Frankfurt a.M.; 13 U 51/93

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The plaintiff, a Swiss company, sold New Zealand mussels to the defendant, a German company. The defendant refused to pay because the mussels had been found by the Federal Health Office to be generally not safe because they contained a cadmium concentration in excess of the statutory limit of 0,5 mg/kg. The first instance court ordered the defendant to pay. The defendant appealed.

The appellate court held that the supply of mussels with higher cadmium composition did not constitute a fundamental breach of contract justifying avoidance of the contract and a refusal of the buyer to pay the purchase price, since the statutory cadmium limit expressed an optimum situation of food items and was not a binding maximum limit. In addition, it was held that the high cadmium composition did not constitute lack of conformity of the mussels with contract specifications under CISG 35(2), since the mussels were still fit for eating.

Moreover, it was held that even if the defendant had established faulty packaging of the goods, as referred in the defendant's pleadings, the contract could not be avoided. In order to justify avoidance of the contract in these circumstances, faulty packaging must be a fundamental breach of contract; and such a breach must be easily detectable, which would enable the defendant to declare avoidance of the contract within a reasonable time after receiving delivery.

The appellate court ordered the defendant to pay the purchase price (CISG 78) and interest at the rate of 5%, which is the statutory interest rate under both German and Swiss law.