

Case 171: CISG 25; 49(1)(a)(b); 58

Germany: Bundesgerichtshof; VIII ZR 51/95

3 April 1996

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Commented on by Karollus in Juristenzeitung (JZ) 1997, 38; by Koch in Recht der Internationalen Wirtschaft (RIW) 1996, 687; by Magnus in Lindenmaier/Möhring, Nachschlagewerk des Bundesgerichtshofs (L/M), CISG No. 3; by Piltz in Europäische Zeitschrift für Wirtschaftsrecht (EuZW) 1996, 448; by Schlechtriem in Entscheidungen zum Wirtschaftsrecht (EWiR), Art 25 CISG 1/96, 597

The Dutch plaintiff was the assignee of a Dutch company, which had sold four different quantities of cobalt sulphate to the defendant, a German company. It was agreed that the goods should be of British origin and that the plaintiff should supply certificates of origin and of quality. After the receipt of the documents, the defendant declared the contracts to be avoided since the cobalt sulphate was made in South Africa and the certificate of origin was wrong. The defendant also claimed that the quality of the goods was inferior to what was agreed upon. The plaintiff demanded payment. The German Supreme Court held that there were no grounds for avoidance of the contract and thus found for the plaintiff.

According to the Court, the declaration of avoidance could not be based on article 49(1)(b) CISG since the plaintiff had effected delivery. The delivery of goods which do not conform with the contract either because they are of lesser quality or of different origin does not constitute non-delivery.

The Court also found that there was no fundamental breach of contract since the defendant failed to show that the sale of the South African cobalt sulphate in Germany or abroad was not possible (article 49(1)(a) CISG). Thus, the defendant failed to show that it was substantially deprived of what it was entitled to expect under the contract (article 25 CISG).

Lastly, the Court held that the delivery of wrong certificates of origin and of quality did not amount to a fundamental breach of contract since the defendant could obtain correct documents from other sources. Accordingly, the defendant could not refuse payment under article 58.

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Commented on in French: Spiegel, Recueil Dalloz [1997] 27ème Cahier, Sommaires commentés, 218