CISG-online 135	
Jurisdiction	Germany
Tribunal	Bundesgerichtshof (German Supreme Court)
Date of the decision	3 April 1996
Case no./docket no.	VIII ZR 51/95
Case name	*Cobalt sulphate case*

Translation[*] *by Peter Feuerstein*[**]

Translation edited by Ruth M. Janal[***]

Facts of the case

The plaintiff [seller's assignee] requests from the defendant [buyer] payment of the purchase price for 15,000 kg cobalt sulphate 21%. The basis of the claim constitutes four sales contracts dated 10 and 14 January 1992, which the [seller] had made with the [buyer]. The [seller] had its place of business, as does the [seller's assignee], in the Netherlands. The [buyer] deals with chemical products; its place of business is Hamburg [Germany]. 1

The two written purchase agreements of 10 January 1992, negotiated through a mercantile broker and formulated by [seller], concerned 3,000 kg and 2,000 kg of cobalt sulphate and contained the following details: 2

> «Product: Cobalt Sulfate 21% Quality; ex M. Payment: CAD [cash against documents] by cable transfer; Documents: Certificate of Analysis.»

In the final remarks of the mercantile broker, the goods were described as «cobalt sulphate, at least 20/21%; origin: England». Pertaining to the delivery of the 2,000 kg, the description of the goods contained after the percentage the addendum: «Feed Grade». The payment clause stated: «Net cash against documents». Under «remarks», it was stated: «Certificate of Origin and Certificate of Analysis have to be provided by the [seller]». The two purchase contracts of 14 January 1992 for 5,000 kg cobalt sulphate each, were concluded via phone. The written 3

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[*] All translations should be verified by cross-checking against the original text. For purposes of this translation, the Plaintiff's assignor of Netherlands is referred to as [seller]; the Defendant of Germany is referred to as [buyer]. Amounts in German currency (*Deutsche Mark*) are indicated as [*DM*].
Translator's note on other abbreviations: *aliud* [supplying totally different goods = no delivery] vs. *peius* [supplying non-conforming goods = delivery] is a concept that has had a certain significance in internal German sales law, as partially explained in the Court's opinion; BGB = *Bürgerliches Gesetzbuch* [German Civil Code]; NJW = *Neue Juristische Wochenschrift* [German law journal]; RIW = *Recht der Internationalen Wirtschaft* [German law journal].

[**] Dr. Peter Feuerstein was an International Legal Consultant. He conducted his post graduate research at Cambridge University (England), where he studied at Clare College in preparation of his doctoral dissertation. He received his Dr. jur. from Philipps-University of Marburg (Germany) in 1977.

[***] Dr. Ruth M. Janal, LL.M. (UNSW) received her Dr. jur. from Albert-Ludwig-Universität Freiburg (Germany).

version of these contracts, drawn up by the [seller] on that very day, contained the same description of the goods and payment conditions as the contracts of 10 January 1992. Under «documents», it was stated: «Certificates of Analysis and Origin». All four contract documents contained the following remark: «Without return of a signed copy by mail within 2x24 hours (after you received originals) we consider this contract accepted». No response to this remark was made by the [buyer].

On 29 January 1992, [seller] sent to the [buyer] at its request and for its information the Certificate of Analysis of firm M, dated 2 December 1991, concerning another contract. On 2 March 1992, [seller] informed the [buyer] that the goods were ready for collection at a warehouse in Antwerp. The [seller] then sent to the [buyer] two invoices for DM [Deutsche Mark] 172,000 and DM 348,250, a Certificate of Origin of the Chamber of Commerce of Antwerp, wherein it was stated that the goods had their origin in the EEC, as well as a Certificate of [chemical] Analysis of firm M. The [buyer] considered these documents insufficient and complained about differences between the Certificate of Analysis provided on 29 January 1992 and the Certificate of Analysis provided on 2 March 1992. About the Certificate which was subsequently provided to her, the [buyer] complained that it contained two, moreover, two different values of zinc. After [seller] provided another Certificate of Analysis on 17 March 1992, the [buyer] declared, via fax of 19 March 1992, the avoidance of all four contracts. The [buyer] explained that, due to the unresolved discrepancies and after a further inquiry with the London based manufacturer M, it had great doubts about the correctness of the Certificates of Analysis presented. At the proposal of [seller], who had objected to the avoidance by the [buyer], the [buyer] agreed to an examination of the goods by an expert, to be commissioned by [buyer]. 4

By letter dated 26 March 1992, firm M informed the [buyer] that the objected different values of zinc in the Certificate of Analysis of 2 March 1992 were due to a typo. After the [buyer] had obtained the opinion from the commissioned expert, the [buyer] stated in a fax to [seller], dated 23 April 1992, that due to the discrepancies found in the chemical values of the examined goods, the [buyer] confirmed its avoidance of 19 March 1992. In the correspondence that followed, [seller] insisted on the payment of the purchase price. The [buyer] repeated its declaration of avoidance after an additional period of time, granted by [buyer] to the [seller] to provide four separate Certificates of Analysis, had elapsed without result. Expressly, the [buyer] now also based its avoidance on the fact that the goods consisted of 2% of indissoluble parts and that, therefore, the goods did not constitute customary trade quality. On 8 January 1993, the [buyer] declared once again the avoidance of the contracts, now also for the reason that the goods were neither of English origin, as stipulated, nor did they have their origin in the EEC, as stated in the Certificate of Origin. In the course of the legal proceedings, it became undisputed between the parties that the cobalt sulphate had been manufactured by a South African firm for firm M. The District Court granted [seller]'s motion for payment of the full purchase price of DM 520,250. The Court of Appeals dismissed the appeal by the [buyer]. With the final appeal, the [buyer] continues to pursue the dismissal of the claim. 5

Grounds for the decision:

I. 6
The Court of Appeals stated:

According to Art. 53 of the United Nations Convention on Contracts for the International Sale of Goods (CISG), which applied in the present dispute, the [buyer] was obligated to pay the purchase price.

The Court held that the [buyer]'s declaration of avoidance based on Art. 49(1)(a)(b) CISG does not prevail because there was no fundamental breach of contract in the meaning of Art. 25 CISG. Even if one assumed that the delivery of English goods had been stipulated and that cobalt sulphate was actually manufactured in England, goods produced in South Africa would admittedly constitute an *aliud*. However, such an *aliud* is treated under the Convention as a delivery of goods not in conformity with the contract, which in the present case does not cancel the [buyer]'s contractual interest. The [buyer] neither submitted that the goods were not usable in the normal course of business, nor that it could not be expected for it to attempt to resell the goods. As far as the [buyer] referred to export business with India and other countries in South East Asia with which the [buyer] would have had «unforeseeable difficulties» due to the (then existing) embargo for goods from South Africa, [buyer]'s pleading was unsubstantiated. The [buyer] did not show that it would have been more difficult, possible only at lower prices, or completely impossible to sell the goods in other countries. The [buyer]'s allegation that [seller] deceived [buyer] about the origin of the goods also does not have any merit. It was not apparent that the [seller] knew or at least considered that an English origin of the goods was decisive for the [buyer]'s purchase. In particular, the [buyer] did not sufficiently disprove the [seller]'s allegation that firm M only distributes cobalt sulphate manufactured in South Africa and customarily affixes on these goods an English («UK») Certificate of Origin; for this reason, the [buyer]'s orders were also to be understood in this sense. 7

The Court of Appeals stressed the above in view of the fact that the parties did not conduct direct negotiations for the two purchase contracts of 10 January 1992, but acted through a broker. It is undisputed that the origin of the goods was not expressly discussed in the course of the later negotiations about the purchase contracts of 14 January 1992. The [seller]'s assertion about the existence of a trade custom pertaining to the British («UK») Certificate of Origin being issued for cobalt sulphate from South Africa was disputed by the [buyer]. Still, neither the [buyer]'s challenge nor the fact that such a usage would have to be disapproved of as unfair and legally unbinding, excludes the possibility that such an actual handling has spread and that the [seller] understood the [buyer]'s offer accordingly. 8

As far as the condition of the goods is concerned, the parties are in dispute over whether the [buyer] bought cobalt sulphate in technical quality or fodder quality. At any rate, the [buyer] did not submit that it expressly requested technical quality. Even if one assumed such a stipulation, this does not mean that the delivery of fodder quality constitutes a fundamental breach of contract entitling the [buyer] to avoid the contract. The [buyer] did not state that 9

such cobalt sulphate was more difficult for it to resell, that it could only have resold such cobalt sulphate at a lower price, or that such an attempt of disposal, perhaps with the help of the already employed broker, could not have been expected from [buyer] at all.

The Court of Appeals further held that the delivery of incorrect documents by the [seller] did not give the [buyer] the right to avoid the contract. The Court left open whether the case concerned a typical documentary transaction and whether the delivery of the Certificate of Analysis and the Certificate of Origin was a main obligation of the [seller]. At least with the expert's opinion commissioned by the [buyer], the [buyer] received a correct Certificate of Analysis. Likewise, the expected success of the transaction was not defeated by the delivery of the incorrect Certificate of Origin; the [buyer] was able to obtain a correct Certificate of Origin without difficulties from the local chamber of commerce. 10

The Court of Appeals also found that the [buyer]'s loss of trust caused by the delivery of inaccurate documents did not constitute a ground for avoidance of contract. The discrepancies between the respective Certificates of Analysis were in part excused, and in part they were not material. Apart from that, the Court held that Art. 49 CISG deals extensively and conclusively with the avoidance of contract as the «*ultima ratio*». It does not provide for avoidance of contract for a fundamental loss of trust, based upon the principles of loyalty and good faith. The question whether the [buyer] can request release from the obligation to pay the purchase price under the aspect of tort according to German or Dutch domestic law and whether such a claim can come into consideration besides the CISG, does not have to be discussed, as the [buyer] did not plead a deception by the [seller]. Furthermore, the payment is also due, as the [buyer] does not have a right of retention. The [buyer] was obligated to pay at the presentation of the documents, and it obtained them. The [buyer] did not request a new (correct) Certificate of Origin and Warehouse Receipt. Furthermore, the [buyer] cannot claim a right of retention under a different aspect. 11

II.
These findings withstand the test of legal review in all major points.

1. 12
The Court of Appeals was correct to apply the CISG. The parties to the sales contracts have their respective place of business in different States, which both are signatories to the CISG (Art. 1(1)(a) CISG; *cf.* Schlechtriem/Schlechtriem, 2nd ed., Annex 1).

2. 13
a)
The Court of Appeals also correctly held – and was insofar unchallenged by the final appeal – that only Art. 49 CISG can constitute the legal basis for the [buyer]'s avoidance of contract. An application of Art. 72 CISG is not possible, because the [seller] complied with its contractual obligation to store the goods in a warehouse in Antwerp and to notify the [buyer] that it could pick up the goods, while at the same time sending the documents. With this, the [seller] performed its delivery obligation, even though this performance was defective. Thus, there is no room to assume only an imminent future breach of contract, which is required for the preventive avoidance of contract under Art. 72 CISG.

b) 14
Nevertheless, the [buyer] in its appeal expresses the opinion that the seller can only request payment of the purchase price if it fulfils its obligation to deliver goods that conform to the contract (Art. 30 CISG). Buyer alleges that as long as the seller does not submit and, if necessary, prove such delivery of conforming goods, the breach constitutes a case of non-delivery, entitling the buyer to avoid the contract under Art. 49(1)(b) CISG. Therefore, [buyer] asserts that it is irrelevant whether the [seller]'s breach of contract was fundamental in the sense of Arts. 25, 49(1)(a) CISG.

[Buyer]'s position is incorrect. Contrary to German domestic law, the CISG does not differentiate between delivery of different goods and delivery of goods that do not conform to the contract. Under the CISG, an *aliud* delivery does therefore, at least generally, not constitute a non-delivery, but constitutes a delivery of non-conforming goods. The CISG is different from German domestic law, whose provisions and special principles are, as a matter of principle, inapplicable for the interpretation of the CISG (Art. 7 CISG). 15

The Court does not need to resolve whether, in the event of a blatant divergence from the contractual condition, a non-delivery in the meaning of Art. 49(1)(b) CISG can arise (*see* the references at Schlechtriem/Schwenzer, Art. 35 n. 10, fn. 32, and at Soergel/Lüderitz, 12th ed., UN-Kaufabkommen, Art. 35 n. 5 fn. 5). Such a violation of contract did not occur in the present case. The [buyer] bought cobalt sulphate 21%; this has been delivered by the [seller]. According to the [buyer]'s submissions in the final appeal proceedings, the Court must assume that the [buyer] did not order the delivered fodder quality, but technical quality; i.e., goods without the flow auxiliaries. This divergence is certainly not severe enough to regard the delivery not only as non-conforming, but as not having been made at all (*cf.* Herber/Czerwenka, *Internationales Kaufrecht,* Art. 49 n. 8; Schlechtriem/Schwenzer, *op. cit.,* n. 9 and 10; Art. 49 n. 19; Soergel/Lüderitz, *op. cit.,* Art 35 n. 5; Staudinger/Magnus, *BGB*, 13th ed., Art. 35 CISG n. 7 et seq.; Holthausen, *RIW* 1990, 101, 106; Kappus, *NJW* 1994, 984). 16

c) 17
aa)
As a legal basis for the [buyer]'s avoidance of the contract, only the provision of Art. 49(1)(a) CISG remains. This provision states that the buyer may declare the contract avoided if the failure by the seller to perform any of its obligations under the contract amount to a fundamental breach.

A breach is fundamental according to the definition of Art. 25 CISG, if it results in such a detriment to the other party, as to substantially deprive it of what it 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.

Basically, contractual obligations of every kind are to be considered for the determination of a substantial contractual interest, irrespective of whether they constitute a main or ancillary obligation or concern quality, quantity, time of delivery or other manners of performance. The agreement of the parties is of first and foremost relevance (Art. 35(1) CISG). Except where the parties have agreed otherwise, the goods do not conform with the contract unless they are fit 18

for the purposes for which goods of the description would ordinarily be used; unless they possess the qualities of goods which the seller has held out to the buyer as a model or sample; and unless the goods are packed in the usual and necessary manner (Art. 35(2) CISG). If the non-conformity results from a divergence from the contractual quality or another deficiency of the goods, it needs to be ascertained whether a different method of processing or sale of the goods was possible and reasonable in the normal course of business, even if it had to be combined with a price reduction (*cf.* Herber/Czerwenka, *op. cit.,* Art. 25 n. 7; Soergel/Lüderitz, *op. cit.,* Art. 25 n. 2 and Art. 49 n. 3; Staudinger/Magnus, *op. cit.,* Art. 25 CISG n. 12; Kappus, *op. cit.,* p. 984 at II).

bb) **19**
For the final appeal proceedings, it has to be assumed that the goods delivered by [seller] did not conform with the contractual agreement pertaining to their origin and condition. However, as the Court of Appeals correctly stated, the [buyer] – who is insofar burdened with the obligation to submit and prove the facts – did not substantially submit that it was substantially deprived of what it was entitled to expect under the contract as a result of the [seller]'s breaches.

cc) **20**
The [buyer] did not make use of the – useful (*see* Kappus, *op. cit.,* p. 985 at II; Holthausen, *op. cit,* p. 102) – opportunity to expressly state in the contracts which obligations it considered essential. An implicit agreement to this extent cannot be concluded from the circumstances of the contracts.

dd) **21**
In the absence of express contractual stipulations, the Court needs to determine whether the seller's breach of contract substantially deprives the buyer of what it was entitled to expect under the contract. In doing so, regard is to be had to the CISG's tendency to limit avoidance of contract in favor of other possible remedies, in particular a reduction of the purchase price or a claim for damages (Arts. 50, 54(1)(b) CISG). As the Court of Appeals correctly stressed, avoidance of contract is only supposed to be the [buyer]'s last resort to react to a breach of contract by the other party which is so grave that the [buyer]'s interest in the performance of the contract essentially ceases to exist (*cf.* Kappus, *op. cit.*; similar Herber/Cerwenka, *op. cit.,* Art. 49 no. 1 and 2; Schlechtriem/Huber, *op. cit.,* Art. 49 n. 2). Only if the buyer has substantiated and, if necessary, proven these prerequisites, does the question arise whether the seller foresaw or could have reasonably foreseen this result. This has to be assumed according to Art. 25 *in fine* CISG.

The [buyer]'s appeal holds that it is solely decisive for the differentiation between a fundamental and a non-fundamental breach whether the defect can be remedied by the seller. The Court does not follow this position. The present case does not warrant a decision on whether the possibility of a subsequent remedy of the goods excludes the assumption of a fundamental breach, either completely or for a period of time (*cf*. Schlechtriem/Schlechtriem, *op. cit.,* Art. 25 CISG n. 12; Schlechtriem/Huber, *op. cit.,* Art. 49 n. 9, 12; Staudinger/Magnus, *op. cit.,* Art 25 CISG n. 12). Even if, as in the dispute at hand, a subsequent remedy of the non-conformity is impossible, it does not necessarily follow that the [buyer]'s performance interest **22**

essentially ceases to exist (quite independent of the kind and extent of the non-conformity). «Fundamental» in the meaning of Arts. 49 and 25 CISG requires a considerable breach of contract – both when interpreting the wording, and when looking at the purpose of the CISG's provisions regarding the buyer's legal remedies. Such gravity can be derived from the contract itself, from the relevant circumstances (Art. 8 CISG), or from the reasons listed in Art. 35(2) CISG. If a considerable breach does not follow from these criteria, then even a defect of the goods which cannot be remedied does not entitled the buyer to avoid the contract under Art. 49(1)(a) CISG.

It is mainly up to the trial judge to determine whether a breach of contract is deemed fundamental according to the above standard. The circumstances of the case are always decisive (*cf*. Soergel/Lüderitz, *op. cit.,* Art. 25 n. 2; Staudinger/Magnus, *op. cit,* Art. 25 n. 13). In particular, it has to be considered whether it can be expected for the buyer to put the goods to another reasonable use. The Court of Appeals has followed these principles. Thus, its finding that in the present case there is no fundamental breach cannot be rejected as an error of law. **23**

aaa) **24**
Concerning the origin of the goods: The [buyer]'s submission that it exports and sells «primarily» to India and South East Asia and that it would have had «unforeseeable» difficulties there due to the South Africa embargo, is not sufficient to demonstrate that the possibility to export the goods to one of these countries constituted an essential part of the contract for the [buyer]. The [buyer] neither named potential customers in one of these countries nor specified its previous export business, nor did the [buyer] submit that a disposal in Germany or an export to another country was not possible or only possible with unreasonable difficulties.

bbb) **25**
Concerning the condition of the goods, the above said also applies. A remedy of the goods (removal of the auxiliary flow) is not possible. Not even the [buyer] submits that a certain quality was expressly agreed upon (Art. 35(1) CISG). But the [buyer] pleaded and offered corresponding proof that, failing the specification of a certain condition, technical quality was agreed upon (Art. 35(2)(a) CISG). However, under the present circumstances it cannot be concluded that the – allegedly non-conforming – delivery of cobalt sulphate with auxiliary flow (fodder quality) constitutes a fundamental breach in the meaning of Art. 49(1)(a) CISG. A major indication to the contrary is the fact that the [broker]'s final remark on the contract of 10 January 1992 (concerning the delivery of 2,000 kg cobalt sulphate 21%) regarding the description of goods contains the addendum «feed grade». The [buyer] did not object to this specification.

d) **26**
Furthermore, the [buyer] pleads that it was also entitled to avoid the contract because the seller had delivered false documents and had let elapse the fixed additional time to deliver four original Certificates of Analysis and four Certificates of Origin. The [buyer] pleads that the [seller] also failed to perform its contractual obligations in this regard, and that consequently the prerequisites of an avoidance of contract were present according to Art. 49(1)(b) CISG.

aa) 27
It is correct that the delivery of contractually stipulated documents can be an essential contractual obligation, which, if breached, may entitle the buyer to declare the contract avoided according to Art. 49(1) CISG (*cf*. Schlechtriem/Huber, Art. 49 n. 16, 25 et seq.; Staudinger/Magnus, Art. 49 CISG n. 9 and 33). However, it is not necessary to discuss in detail whether the present contracts constituted true documentary transaction with regard to the clause «cash against documents», resp. «CAD by cable transfer». This is because the sales contracts of 10 January 1992 mentioned only the Certificate of Analysis as a document and the contracts of 14 January 1992 named solely the Certificate of Origin; neither mentioned the Certificate of Deposit, which the [buyer] needed in order to receive the goods at the place of deposit. The [buyer] did not plead in the trial phase that the seller withheld the Certificate of Deposit. But even if all four sales contracts were to be considered as typical documentary transactions there would be, contrary to [buyer]'s assertion, no case of non-performance. The same principles apply to the documents which apply to the goods themselves: If the documents – though faulty – are handed over to the buyer, they are «delivered» with the consequence that Art. 49(1)(b) CISG does not apply. It is then relevant whether the buyer, through the defective documents, is substantially deprived of what it was entitled to expect under the contract. For this, one cannot consider solely the documents alone and whether the goods could be traded or not with the delivered documents. If the buyer can remedy the defect itself without difficulty by obtaining a correct document, it is able to sell the goods or the goods to be manufactured from them without difficulty, unless the goods themselves have grave defects. In such a case it cannot be said that the essential interest in the contract ceases to exist. It is also conceivable that the origin of the goods is irrelevant for the further disposal of the goods (sale or manufacturing). If that is the case, the faulty documents all the more so do not lead to a substantial deprivation of the contractual interest.

bb) 28
This is how the matter lies in the dispute at hand.

The [buyer] is correct when it points out that the Certificate of Origin from the Antwerp Chamber of Commerce that was delivered by the [seller] was incorrect and that a use of this certificate in the course of the on-sale could not be expected from [buyer]. The term «origin» is understood – both according to the normal usage as well as the relevant provisions of the EEC – to refer to the place of production or the place of the (essential) manufacturing. The [seller]'s objection that one has to rely mainly on the correct import, and that the Certificate of Origin «EEC» was therefore at the time of its issuance correct, is consequently not convincing. However, if the [buyer] itself was able to obtain a correct Certificate of Origin, as the [seller] submitted without the [buyer]'s objection, then the [buyer]'s substantial contractual interest was preserved as far as such a certificate was needed for the resale of the goods. The same principles apply to the Certificate of Origin as to the goods themselves. The [buyer] did not plead that it could not utilize the cobalt sulphate with a correct Certificate of Origin «South Africa».

cc) 29
As far as the Certificates of Analysis to be presented by the [seller] are concerned, it has to be concluded that none of the four documents presented was in accordance with the contractual requirements. However, this fact also does not lead to the [buyer] being substantially deprived

of what it was entitled to expect under the contract. At the [seller]'s proposal, the parties agreed to have the delivered cobalt sulphate examined by an expert to be chosen by the [buyer]. The Court of Appeals held that the [buyer] received a correct Certificate of Analysis with the expert report and that therefore one cannot speak of a cessation of its contractual interest. This Court does not object to those findings. The fact that the [seller] did not hand over four Certificates of Analysis for the deliveries, which undisputedly stemmed from one production, provides even less justification for an avoidance of contract. At the [buyer]'s order, the expert viewed all the goods in store, took samples and examined these samples. Therefore, its expert opinion included the deliveries pertaining to all four contracts for the sale of goods. Even if the [buyer] had intended to dispose of the four lots separately and would have needed a Certificate of Analysis for each of them, [buyer] could have produced additional certificates itself by making photocopies.

e) **30**

It is questionable, whether – as the [buyer] asserts – the fraudulent foisting of non-conforming goods (here: South African origin) always constitutes a fundamental breach of contract under Arts. 25, 49 CISG. The question does not have to be decided in the present case, as the [buyer] did not show any fraudulent behavior by the seller. Such behavior would require that the seller consciously took advantage of the [buyer]'s alleged ignorance of the South African origin of the goods. The [buyer] pleaded and rendered proof that neither the [buyer], nor the broker knew that the cobalt sulphate delivered by the [seller]'s supplier, firm M, is produced exclusively in South Africa, and that this was also not general knowledge. Furthermore, the [buyer] holds that the [seller]'s assertion that firm M only delivers cobalt sulphate stemming from South Africa is incorrect. The [buyer]'s submission has to be interpreted – following its general context – in the way that the supplier also deals with English goods. This assumed, there was still no fraudulent behavior on the part of the seller. The [buyer] neither submitted nor provided any proof that the [seller] had ordered South African goods from firm M or even knew that the delivery was going to be made from there. On the other hand, if one follows the [seller]'s argument that firm M exclusively distributes cobalt sulphate produced in South Africa and affixes an English certificate of origin, then the assumption of fraudulent behavior fails for lack of the subjective requirements. If this was the case, there would be a misconception about the origin of the goods on the part of the [buyer], but not a conscious exploitation of this misconception on the part of the [seller]. The [seller] submitted – undisputed by the [buyer] – that the [buyer] was aware of these practices. In doing so, the [seller] plausibly explained the incorrectness of the origin of the goods, which consisted either already in the contractual agreement about goods stemming from England, or at the latest in the delivery of a false Certificate of Origin. It would have been the task of the [buyer] to contradict this explanation (Baumgärtel/Laumen, *Handbuch der Beweislast im Privatrecht, Vol. 1,* 2nd ed., § 123 BGB n. 13).

f) **31**

Thus the [buyer] did not substantially submit a tortious act by the [seller]. Contrary to the [buyer]'s opinion, the Court of Appeals consequently did not have to examine whether the [buyer] was entitled to refuse payment of the purchase price under the aspect of damages from tort under German or Dutch domestic law.

3. **32**
Also without merit is the appeal's objection that [buyer] was at least entitled to exercise a right of retention according to Art. 58(1) CISG.

According to this provision, the buyer is only bound to pay the purchase price when the seller places the goods or the documents controlling their disposition at the buyer's disposal. Documents in this sense are mainly the so-called true transfer documents, besides this, also similar documents granting the buyer a right of disposition to the goods and excluding the seller from same (*cf.* Schlechtriem/Hager, *op. cit.,* Art. 58 n. 10). Among these are in particular the Warehouse Receipt, but not the Certificate of Origin or of Quality: their tender is normally neither necessary nor sufficient to found the maturity of the purchase price (*cf.* Staudinger/Magnus, *op. cit.,* Art. 58, n. 21). The [buyer] never pleaded in the course of the trial phase that the [seller] was not able and willing to turn over the Warehouse Receipt against concurrent payment of the purchase price. The [buyer]'s assertion that the goods were no longer available was apparently made without any actual basis; the [buyer], and also the hired expert, could have ascertained the existence of the goods by inspecting them at any time. Whether the [buyer] would have been entitled to retain the payment of the purchase price because of the initially incomplete documents or the false EEC Certificate of Origin, even though the payment clause «cash against documents,» respectively CAD was agreed, does not have to be decided. At any rate, such a right of retention would have ceased to exist prior to the end of the trial phase. The [buyer] received the correct Certificate of Analysis with the expert's report. The [buyer] itself would have been able to obtain the correct Certificate of Origin at the latest after the issue of the origin of the goods was resolved.