

Case 277: CISG 7(1); 25; 47(1); 49(1)(a); 49(1)(b); 79(1)

Germany: Oberlandesgericht Hamburg; 1 U 167/95

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Abstract in German: [1997] Entscheidungen zum Wirtschaftsrecht 791

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An English buyer, plaintiff, and a German seller, defendant, entered into a contract for the supply of iron-molybdenum from China, CIF Rotterdam, delivery in October 1994. The goods were never delivered to the buyer, as the seller did not itself receive delivery of the goods from its own Chinese supplier. After expiry of an additional period of time for delivery, the buyer concluded a substitute transaction with a third party and sued the seller for the difference between the price paid and the price under the contract.

The court held that the buyer was entitled to damages under article 75 of the CISG. It found that the contract had been avoided under article 49(1) of the CISG, both under paragraphs (a) and (b). As to paragraph (a), it said that, although delay in time is not generally considered as a fundamental breach of contract, it can constitute a fundamental breach if delivery within a specific time is of special interest to the buyer, which must be foreseeable at the time of the conclusion of the contract (article 25 CISG). The incoterm "CIF" by definition determines the contract to be a transaction for delivery by a fixed date. As to paragraph (b), it found that the buyer had fixed an additional period of time for delivery (article 47(1) CISG) within which the seller had failed to deliver.

The court held that an explicit declaration of avoidance was unnecessary once the seller refused to perform its delivery obligation and that to insist on such a declaration would be contrary to the principle of good faith (article 7(1) CISG). Such a declaration is dispensable as long as the avoidance of the contract is possible in principle and it is certain that the seller will not perform its obligations at the time the substitute purchase is made. The court held that a substitute purchase within two weeks after the failure of performance was made in reasonable time.

The court held that the seller was not exempt from liability, neither under a force majeure clause of the contract, nor under article 79(1) of the Convention. The seller bears the risk of itself receiving delivery of the goods from its own supplier. Only if goods of an equal or similar quality were no longer available on the market would the seller be exempted from liability. Furthermore, the court held that it was incumbent upon the seller to bear the risk of increasing market prices at the time of the substitute transaction. Although the market price had risen to an amount triple the price that had been agreed at the time of the conclusion of the original contract, this did not amount to a sacrificial sale price, as the transaction was said to be highly speculative.