CISG-online 261	
Jurisdiction	Germany
Tribunal	Oberlandesgericht Hamburg [Provincial Court of Appeal]
Date of the decision	28 February 1997
Case no./docket no.	1 U 167/95
Case name	*Iron molybdenum case*

Translation by Linus Meyer***

[PARTICULARS OF THE CASE:]

The Buyer requests damages for the non-fulfilment of a sales contract. 1

By Contract No. WMME 941047 of 12 October 1994, the Buyer bought iron-molybdenum from the Seller, amount: approx. 18,000 kg, concentration of molybdenum: at least 64%, at a price of US $9.70/kg molybdenum CIF Rotterdam, delivery October 1994 «from China port to Rotterdam». The contract named Hamburg as place of jurisdiction. The Seller's general conditions of contract contains the following Clause No. 2: 2

«The Seller shall not be held responsibility if due to force majeure, Seller fails to make delivery within the time stipulated in this sales contract or cannot deliver the goods. However, the Seller shall inform the Buyer immediately by telex or fax message.»

Upon the Seller's explicit request via fax of 20 October 1994, the Buyer confirmed that these general conditions should become a part of the contract by the note on that fax: «OK. We accept», dated the same day. 3

The Seller informed the Buyer by fax on 20 October 1994, that its Chinese supplier now demanded US $10.50/kg molybdenum CFR Rotterdam and asked the Buyer for a corresponding adjustment of the purchase price. The Buyer refused by fax dated 24 October 1994. The Seller then informed the Buyer by fax on 31 October 1994, that it could only deliver 4

* All translations should be verified by cross-checking against the original text. For purposes of this translation, Plaintiff-Appellee of Great Britain is referred to as [Buyer]; Defendant-Appellant of Germany is referred to as [Seller]. Amounts in U.S. currency (dollars) are indicated as [US $]; amounts in the former currency of Germany (Deutsche Mark) are indicated as [DM].

Translator's note on other abbreviations: BGB = Bürgerliches Besetzbuch [German Civil Code]; BGHZ = Entscheidungen des Bundesgerichtshofes in Zivilsachen [Official Reporter of Decisions of the German Federal Supreme Court on Civil Matters] EGBGB = Einführungsgesetzbuch zum Bürgerlichen Gesetzbuche [German Code on Private International Law]; HGB = Handelsgesetzbuch [German Commercial Code]; JZ = Juristenzeitung [German law journal]; NJW = Neue Juristische Wochenschrift [German law journal]; RabelZ = Rabels Zeitschrift für ausländisches und internationals Privatrecht [German law journal]; ZP0 = Zivilprozessordnung [German Code on Civil Procedure].

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iron-molybdenum of lower quality, with a concentration of molybdenum of 60%, at a price of US $10.20/kg molybdenum CIF Rotterdam, shipment in November / early December from «China port» to Rotterdam. The Buyer reacted to this message by fax on the same day, in which it accepted the lower concentration of molybdenum, but insisted on the price originally agreed upon and a shipment date before or on 15 November 1994. The Buyer announced it would make a cover purchase and hold the Seller responsible for all additional costs in case the Seller did not comply with these requirements.

5 After the Seller had declared that it could not comply with the time limit, the Buyer, by fax dated 3 November 1994, reluctantly granted another time limit for shipment: 30 November 1994. The fax again contained the threat of a cover purchase in case of non-compliance with the time limit. The Buyer declared that compliance with the time limit was very important, because it had to fulfil obligations from a resale contract.

6 Upon the Buyer's demand, the Seller declared on 15 November, that it would do its best to fulfil the contract in November 1994. On 2 December 1994, the Seller then informed the Buyer by fax, that the 20-foot container with 19.20 tons of iron-molybdenum had had been shipped from Tianjin to Rotterdam at the end of November. The parties agreed upon a price of 24 USD/kg for the 1.2 tons which were not owed under the original contract.

7 On 13 December 1994, the Seller informed the Buyer by fax that it had not been provided with iron-molybdenum by its supplier and asked for some time to fulfil the contract. The Buyer informed the Seller by fax on the same day that it needed the material. The contract would have to be fulfilled, otherwise it [the Buyer] would be forced to make a cover purchase at the current market price of US $31 /kg and hold the Seller responsible for additional costs. The Buyer did, however, also propose a compensation payment by the Seller to deal with the matter. By fax on 14 December 1994, the Buyer informed that it still tried to fulfil the contract, but needed time for negotiations for damages with its supplier. As an alternative, the Seller offered to pay a compensation in the amount of US $10,088. The Buyer declined this offer of compensation and declared that it would hold the Seller responsible for contract fulfilment as well as for damages. Another offer of compensation in the amount of US $15,000 on 29 December 1994 was declined by the Buyer, the Buyer stating that its loss, calculated on the basis of the market price, was US $230,000.

8 According to Exhibit K 19. the Buyer concluded a contract for about 17-20 tons of Chinese iron-molybdenum, CIF Rotterdam concentration of molybdenum: 60%, with the China-N.N-Metals Imp. & Export Corp. (In the following: China-N). The contract stipulated January/February 1995 as time of delivery. The price for the molybdenum was US $30 /kg.

9 In a fax dated 17 January 1995, the Seller offered iron-molybdenum, concentration of molybdenum 65.19% at a price of US $29.5/kg. The Buyer declined the offer by fax on the same day, referring to a telephone call in which it purportedly had informed the Seller that it had made a cover purchase. The Buyer again called upon the Buyer to make an offer for compensation in order to resolve the dispute. On January 18, 1995, the Seller send a fax offering a compensation of US $17,000, payable in three instalments. The Buyer declined this offer.

The Buyer has submitted the invoice from China-N as Exhibit K 20. The amount of the invoice is US $340,880.06. The quantity delivered was 17.942 kg of iron-molybdenum with a concentration of molybdenum of 63.33%. This leads to a result of 11,362.668 kg of molybdenum which, at a price of US $30/kg, amounts to US $340,880.06. 10

The Buyer is pursuing an action for arrest against the Seller in Rotterdam. This action had already been pending before the memorandum to begin the present legal dispute was filed with the District Court (Landgericht) of Hamburg. 11

The Buyer has brought an action for damages in the amount of the difference between the price agreed upon in the contract and the price it had to pay for the iron molybdenum it bought from China-N on 11 January. The Buyer has argued that it would have been obliged to pay a purchase price of US $122,040, if the Seller had delivered as contracted. The Buyer has calculated the price as follows: 18.000 kg x 60 % concentration of molybdenum = 10,800 kg x US $9.7/kg = US $104,760 and 1,200 kg x 60% concentration of molybdenum = 720 kg x US $24 = 17,280. This leads to the total amount of US $122,040. The difference to the US $340,880.06 paid to China-N leads to the amount demanded: US $218,840.06. A translation on the basis of the dollar-rate of the date of the cover purchase, 11 January 1995: 1.5264 DM/US $ leads to the amount of 334,037.46 DM. This is the amount of the claim brought. The Buyer argues that the «cover purchase» was necessary in order to fulfil obligations from resale contracts that it had planned to fulfil by delivery the material it would have received from the Seller. Buyer further argues that it had financed the purchase price by a bank credit and had already paid US $5,998 interest for that bank credit. 12

[POSITION OF THE PARTIES:]

The Buyer has asked the Court to order the Seller to pay 334,037.46 DM plus 9,155.34 DM interest, in the alternative US $218,840.06 plus US $5,998 interest. The Seller has asked the Court to dismiss the action.

The Seller has argued that the District Court of Hamburg had to declare itself incompetent with respect to the action for arrest in Rotterdam or at least suspend the proceeding until the proceedings before the Dutch courts had ended with a legally binding decision. It further argues that the non-delivery in breach of the contract by its supplier had been an unpredictable event that led to an exemption under Art. 79 CISG. It also argues that the Buyer had violated its duty to mitigate damages by declining the offers for compensation of 14 December 1994 and 29 December 1994. Those offers had represented the difference between the contract price and the market price at those dates. The Seller also contests that the Buyer had had obligations to third parties with respect to the material owed under the contract and that it had fulfilled those obligations with the material acquired by the cover purchase. 13

By its judgment of 2 October 1995 the District Court (Landgericht) of Hamburg has ordered the Seller to pay US $218,840.06 plus 5% interest since 8 June 1995 and rejected the claim for further interest. The District Court has given the following reasons for its decision: The action for arrest in Rotterdam did not hinder the admissibility of the action, as the action for Arrest 14

was not an action in the sense of Arts. 21, 22 of the Brussels Convention on jurisdiction and the enforcement of judgments in civil and commercial matters (in the following: Brussels Convention). The court further stated that the Buyer was entitled to damages in the amount of the difference between the purchase price and the contract price under Art. 75 CISG, because the Seller had not complied with its obligation to deliver under the contract of 12 October 1994. The Buyer had therefore been entitled to avoid the contract under Art. 49(a) and (b) CISG. Art. 79 was irrelevant as well as No. 2 of the contract conditions, since the non-delivery did not result from an impediment beyond the Seller's control. A claim for interest had, however, not been sufficiently proven, therefore only 5% interest could be awarded for the time the legal dispute had been pending.

15 The Seller has appealed the decision, which was served upon it on 11 October 1995 on Monday, 13 November 1995 by submitting a memorandum. The Seller has given reasons for its appeal by a memorandum of Monday, 15 January 1995 after the period of time for giving reasons had been extended by one month for the Seller.

The Seller continues to argue that the action was inadmissible with respect to the pending action for arrest at the court in Rotterdam. It also argues that the claim was not justified. The Seller argues that it was exempted from liability according to its contract conditions and Art. 79 CISG. It purports to have concluded a contract for the goods to be delivered to the Buyer already on 26 August 1994 with its supplier: J Provincial Metals and Minerals Import & Export Corporation (hereafter: J Provincial Metals). The Seller states that it had executed several contracts with this company before and therefore could not have anticipated that J Provincial Metals would, despite reassuring several times that delivery would be made, eventually refuse to deliver the goods because of difficulties in production and shortages in supply.

The Seller also contests obligations of the Buyer to resell the material as well as the usage of the material acquired in the cover purchase to fulfil such obligations. Furthermore, the Seller contends that the Buyer had violated its duty to mitigate damages. Such a violation resulted from the fact alone, that the Buyer had not had any obligations to resell. It also resulted from the date of the cover purchase. The price for iron-molybdenum had risen by an average of US $17.9/kg molybdenum from 13 December 1994 to 11 January 1995.

The Seller has asked the Court to change the decision appealed and reject the claim, in the alternative to suspend the proceeding.

16 The Buyer has asked the Court to reject the Seller's appeal. The Buyer contends that the Seller could neither rely on a limitation of liability under the contract nor under Art. 79 CISG. The true reason for non-delivery was that the Seller had not been able to acquire the goods at its desired price on the Chinese market and had therefore thought that its profit margin was too low. The market price for iron-molybdenum had, already on 16 December 1994 been at around US $30, and had, between 16 December 1994 and 11 January 1995, only varied slightly, around US $1 - $2 from the US $30 level.

17 By decision of 12 July 1996, the Court of Appeals had rejected the appeal by the Seller as inadmissible by decision of. Upon the immediate complaint by the Seller, the Federal Supreme Court has, by its decision of 16 November 1996, annulled the decision of 12 July 1996.

In addition to the facts stated here, reference is made to the memoranda which have been added to the record.

[DECISION OF THE APPELLATE COURT:]

The appeal, which is admissible, is unsuccessful. The claim is admissible (1.) and justified, as far as it was successful in the first instance (2.) 18

1.
[Admissibility of claim; application for interim measures pending at different court]

The claim is admissible. The objection of lis alibi pendens under Arts. 21, 22 Brussels Convention cannot be raised. 19

The Brussels Convention is generally applicable, as the Netherlands as well as the Federal Republic of Germany are parties to the Convention, which went in force already on February 1, 1973. Art. 21 of the Convention does, however, not apply to the present case, because the main action and an application for interim measures do not cover the same «claim» in the sense of Art. 21 (cf. Kropholler, Europäisches Zivilprozessrecht, Kom. zum EuGVÜ, 5th ed. 1996, Art. 21 para. 11 with further references). However, this result cannot just be founded by the German procedural law's view of the relation between main action and action for interim measures. According to the decisions of the European Court of Justice (8 December 1987, Rs- 144/86, Gubisch Maschinenfabrik v. Palumbo, NJW [*] 1989, p. 665; 6 December 1994, C 406/92 Tatry vs Maciej Rataj, JZ [*] 1995, 616, 619) the terms used in Art. 21 to characterize the situation of proceedings pending at two places have to be interpreted according to the objective of the Convention: to ease the recognition of court decisions of other States which are party to the Convention. This objective calls for an autonomous interpretation independent from the national procedural law of a particular Member State. 20

The wording, system and objective of the Brussels Convention support the result that an application for interim measures before the court of a Member State should not conflict with a proceeding before the court of another Member State on the main action. The Brussels Convention's terminology clearly distinguishes between «actions» (Art. 21) and «applications for interim measures» (Art. 24). An arrest is an interim measure in this sense. The objection of lis alibi pendens under Art. 21, does, according to the wording, only apply to «actions» concerning the same claim at courts of different Member States. The system of the Convention also does not allow the application of Art. 21 beyond its wording to the relationship between applications for interim measures and main actions. As Art. 24 of the Brussels Convention allows application for interim measures at the courts of one Member State, even though the courts of another Member State have the competence to decide the claim, it would be possible for one party to deprive the other party of the court originally competent (cf. Kropholler, Art. 21 para 11). This would overstretch purpose of Art. 21 which is only aimed at avoiding contradicting decisions of the main claim, not at creating a uniform place of jurisdiction for main action and interim measures. 21

Also, the proceeding can neither be suspended at the Court's discretion under Art. 22 para. 1 nor does the Court have the option of declaring itself incompetent under Art. 22 para. 2. 22

Art. 21 is inapplicable for the reason that the main action as well as the application for interim measures are not pending before first instance courts. In addition, the application for arrest is not an action in the sense of Arts. 21, 22 Brussels Convention (cf. Kropholler, Art. 22 para. 5 with further reference). Moreover, the connection required by Art. 22 para. 3 is not given, because the danger of contradicting decisions does not exist. The final decision overrules any interim decision that is only aimed to regulate the situation in the time it takes to make a final decision.

Art. 22 para. 2 does not allow German courts to declare themselves incompetent, because a joinder of the two proceedings would be inadmissible under German law. § 147 ZPO [*] only allows a joinder if both proceedings are pending at the same court. **23**

2. **24**
The claim is justified as far as it was successful at first instance. The Buyer has a claim for damages under Art. 75 in connection with Art. 74 of the Convention on Contracts for the International Sale of Goods of 11 April 1980 (CISG) in the amount of the additional cost caused by the cover purchase, US $218,840.06 plus 5% interest since 8 June 1995. The conclusions of the Court are:

The CISG is applicable to the present case; **25**

The requirements of Arts. 75 and 74 for the compensation of additional costs caused by a cover purchase are satisfied;

The contract concluded by the Buyer on 11 January 1995 was an appropriate cover purchase in the sense of Art. 75 CISG;

The Seller cannot rely upon an exemption from liability under No. 2 of the contract conditions or Art. 79 CISG;

The Buyer has not violated its duty to mitigate damages;

Therefore, the Buyer has a claim for US $218,840.06 plus 5% interest since 8 June 1995.

(a) **26**
[Applicable law]

The CISG is applicable to the legal relationship between the parties according to its Art. 1(1) in connection with the rules of the German international private law, especially Art. 28 EGBGB [*].

According to Art. 1(1), the CISG is applicable to contracts for the sale of goods if the parties have their place of business in different States, where these States are parties to the Convention or if the rules of international private law lead to the application of the law of a Contracting State. Great Britain, the State where the Buyer has its place of business is not a Contracting State. The rules of international private law do, however, lead to the application German law. The CISG entered into force in Germany on 1 January 1991. **27**

According to Art. 28 EGBGB, in the absence of a choice of law, a contract with a relation to another country is subject to the law of the State to which it has the closest connection. A choice of law was not made in the present case. For a contract which was concluded for a commercial purpose, the place of business of the party which has to perform the characteristic obligation of the contract is the most important indication for this (Art. 28 para. 2, 1st and 2nd sentence EGBGB). The characteristic obligation of a sales contract is the obligation to deliver the goods (cf. Palandt-Heldrich, 56. ed. 1997, Art. 28 EGBGB para. 3). The Seller, which had to deliver the goods has its place of business in Germany, therefore German law is applicable and Art. 1(1)(b) CISG leads to the application of the CISG. 28

(b) [Damages established by cover transaction after avoidance] 29

The requirements Art. 75 CISG establishes for awarding damages for concluding a cover purchase are given.

The Buyer was entitled to avoid the contract of October 12, 1994 under Art. 49(1)(a) as well as under Art. 49(1)(b) CISG.

The Seller had not fulfilled its obligation to deliver under the sales contract of 12 October 1994, on time at the time the cover purchase was concluded on 11 January 1995. Not fulfilling the obligation to deliver on time has to be regarded as a fundamental breach of contract in the sense of Art. 49(1)(a), Art. 25 CISG. A delay does not generally amount to a fundamental breach, but only, if the exact compliance with the delivery date is of special interest for the Buyer and if the Seller could recognize this at the time of contract conclusion (Huber in: v. Caemmerer/Schlechtriem - in the following: Schlechtriem/Author - Kommentar zum einheitlichen UN-Kaufrecht - CISG - , 2nd edition, 1995, Art. 49 CISG para. 5; Staudinger-Magnus, 13th ed. 1994, Art. 49 CISG para. 11). This special interest can be inferred from the use of the Incoterm «CIF» which makes clear that the contract was a contract for delivery by a fixed date (Baumbach/Hopt, HGB [*], 29th ed. 1995, Incoterms No. 6 para. 2) under which timely delivery is a fundamental obligation. Moreover, a fundamental breach is also given because the Seller stated by fax of 14 December 1994 that it was negotiating with its supplier about contract fulfilment or damages and therefore needed time. By this statement, the Seller left the Buyer in complete uncertainty as to whether and when it would comply with its obligation to deliver. 30

The Buyer was also entitled to avoid the contract under Art. 49(1)(b) CISG. The declaration by the Buyer on 3 November 1994, that it agreed to a loading date not later than 30 November 1994 and that this time limit was very important has to be regarded as the setting of an additional period of time under Art. 49(1)(b) CISG. The Buyer has thereby clearly and warningly urged to perform by a certain date (cf. Schlechtriem-Huber, Art. 49 CISG para. 20) and has also threatened to make a cover purchase in case of non-compliance with the date fixed. It has not been contested that the Seller has not complied with this additional period of time. Therefore, the Buyer had a right to avoid the contract irrespective of whether it was the Seller's fault (cf. Staudinger-Magnus Art. 49 CISG para. 8) that the goods were not delivered. 31

The Court does not have to investigate whether the Buyer has avoided the contract before concluding a cover purchase, as Art. 75 CISG would normally require. Doubts about a 32

declaration of avoidance before the conclusion of the cover purchase are caused by the fact that the fax of 17 January 1995 does not exactly prove when the Buyer informed the Seller of the cover purchase and thereby impliedly declared the contract avoided. The communications before -- the faxes of 13 December 1994, 16 December 1994 and 29 December 1994 -- do not make clear that the Buyer intended to avoid the contract. A declaration of avoidance under the condition of performance which is generally admissible, (BGHZ [*] 74, 193, 204 and Schlechtriem-Huber, Art. 49 CISG para. 31), was not made. Such a declaration cannot be seen in the fax messages mentioned above, nor in the fax message of 3 November 1994, because this would require that the Buyer actually wanted to lose its right to choose between contract fulfilment and damages by sending the messages. The communication submitted to the Court would contradict that conclusion because the Buyer insisted on its claim for «performance of the contract».

However, an explicit declaration of avoidance was not necessary because, before Buyer made the cover purchase, the Seller had seriously and finally refused to perform under the sales contract. Although the CISG does not make an exception from the requirement of a declaration of avoidance, the rule of the «observance of good faith in international trade» (Art. 7(1) CISG) leads to the result that a declaration of avoidance is not necessary, if it is certain that the other party will not perform its obligations in a case (cf. Schlechtriem-Stoll Art. 75 CISG, para. 5; Staudinger-Magnus, Art. 75 CISG para. 8 and Stoll, RabelsZ [*] vol. 52 (1998), 617, 635). **33**

The Seller uttered its serious refusal at the latest by the fax of 29 December 1994, which was the answer to the Buyer's fax of 16 December 1994, in which the Buyer continued to demand contract fulfilment and threatened to demand damages. It has not reacted to the Buyer's fax by a new offer to fulfil the contract but has merely offered the payment of a «compensation». While knowing that the Buyer obviously did not want to wait for the result of the negotiations between the Seller and its Chinese supplier, the Seller did not want to fulfil its obligations by acquiring the goods from a different source but only by paying damages or a compensation. In this situation, the Seller could not in good faith assume that it would still have the option to fulfil the contract, especially since it knew that the contract was a fixed-date transaction and since the Buyer had emphasized the importance of timely delivery several times. **34**

Obviously, the Seller did not assume that it still had the option to fulfil the contract, as it has stated in a memorandum of 14 August 1995 that the Buyer could undisputedly no longer expect delivery in January 1995. Although the requirements to assume a refusal to deliver are high, at least the fax of 29 December 1994 has to be regarded as such a refusal. The Seller did not need the protection by a declaration of avoidance since it did not itself try to fulfil the contract. **35**

This result is not opposed by the fax of 17 January 1995, in which the Seller again offered to deliver iron-molybdenum. This offer was obviously not intended as an offer for the fulfilment of the sales contract of 12 October 1994 but represented an offer for the conclusion of a new sales contract. This cannot only be inferred from the new price which deviates considerably from the old one but also from the reference to the non-fulfilment of the contract of 11 October 1994, for which the new and purportedly cheap offer should be a compensation. **36**

(c) 37
[The cover purchase]

The contract which was concluded by the Buyer on 11 January 1995 is an appropriate cover purchase in the sense of Art. 75 CISG. Under this contract, which resembles the contract of 12 October 1994, (amended on 31 October 1994, Exhibits K 4 and K 6) with respect to the amount and the quality of the iron-molybdenum, the Buyer has acquired material from a third party, therefore the contracts suitability to cover the Buyer's fulfilment interest. Also the connection in time between the two contracts is so close that reasonable doubts concerning the contract's designation as a cover transaction are not present. With respect to the development of prices which is proven by the Seller's offer of 17 January 1995, no indication is given for the assumption that the cover purchase was not concluded in a manner in accordance to business usage. The cover purchase was also concluded within a reasonable period of time, approximately two weeks, after the refusal to deliver which replaces the declaration of avoidance in the instant case. This period of time has to be granted for orientation and consideration and for inviting offers, especially since -- in contrast to § 376 para. 3 HGB [*] -- the CISG does not require the Buyer to conduct the cover purchase «immediately» (cf. Staudinger-Magnus, Art. 75 CISG para. 18; Schlechtriem-Stoll, Art. 75 CISG para. 8).

(d) 38
[No force majeure or Art. 79 exemption]

The Seller is also not exempted from liability under No. 2 of the Contract Conditions («force majeure») or under Art. 79 CISG. It is not necessary to refer to the wording of No. 2 of the «Conditions» to discover that this clause does not lead to an exemption from liability that would have a greater effect than Art. 79 CISG. Impediments that do not fall within the contractual sphere of risk of a party and could not be controlled by the Seller are «force majeure» in the sense of this provision. Therefore, the provision has the same effect as Art. 79 CISG according to which a party is not liable for non-fulfilment if it was caused by an impediment which was outside its sphere of influence and could not be avoided or overcome, while in this context the possibility to avoid or overcome an impediment has to be judged according to the contractual allocation of risks (cf. Schlechtriem-Stoll, Art. 79 CISG, para. 16 et seq.).

The requirements of an exemption under Art. 79 CISG are not given. The delivery by one's own supplier is a part of the general risk to acquire the goods, which is, according to the typical sense of the contract, born by the Seller if the contract is not limited to a certain production or storage. The Seller is not exempted if its supplier has not delivered, even if the supplier's action was unforeseeable and a breach of contract. Such an impediment can be overcome by the Seller as long as there are replacement goods available on the market. Even if the exact quality required by the contract of 12 October 1994 could not be acquired on the Chinese market, an argument the Seller has not even raised, replacement material slightly deviating with respect its composition but reasonable according to commercial perception could have been acquired. The Buyer would have accepted the delivery of such slightly worse material, as the fax of 31 October 1994 shows. 39

The acquisition risk is therefore only exceeded and the Seller is only exempted, if the goods were not available in comparable quality and if the Seller did not need to take this into account at contract conclusion (Schlechtriem-Stoll, Art. 79 CISG, para. 30). The Seller bore the burden of proof on this issue and has not demonstrated this. Also, the Seller cannot rely on having excluded liability in case it had not been supplied correctly and on time. It is irrelevant whether such a reservation can be inferred from No. 2 of the Contract Conditions. This objection by the Seller is unfounded because the transaction of August 29, 1994 submitted as Exhibit B2 only in the appeal does not meet the requirements for a congruent cover purchase (cf. BGHZ 92, 396, 401). The fulfilment of those requirements: corresponding amount and quality as well as corresponding times for delivery and loading has not been demonstrated by the Seller. In addition, the Seller has not made any declaration as to why its supplier did not deliver, therefore the requirements of Art. 79(2) (exemption of a third person) are not given as well. **40**

The Seller is also not exempted by the fact that acquiring the goods elsewhere would have led to considerable financial loss because it would have had to pay a higher price. The Seller generally bears the risk of considerable extra expenses in connection with acquiring the goods elsewhere, even the loss of transactions, as it has accepted the risk of acquiring the goods and the risk that they cannot be acquired at a certain price. Despite of the triplication of market price that had to be paid for Chinese iron-molybdenum, an excess of the absolute limit of sacrifice is not given (cf. Schlechtriem-Stoll, Art. 79 CISG para. 40). For parties doing business in a sector that has a very speculative aspect the limits of reasonability are very high. The contract was therefore not commercially unreasonable to an extent that it could be regarded as frustrated. **41**

(e) **42**
[Duty to mitigate damages]

The Buyer's claim for damages is not limited by a failure to mitigate damages in the sense of Art. 77 CISG.

It has to be assumed that the increase in the market price for iron molybdenum until 29 December 1994 was within the Seller's sphere of risk, since before that date an avoidance of the contract could not be assumed and consequently the Seller had to acquire replacement goods if necessary. **43**

The earliest point in time when the Seller should have organized a cover purchase was after receiving the fax the Seller sent on 29 December 1994. The Seller has, however, neither demonstrated that a considerable rise in the price of iron-molybdenum had occurred between the end of December 1994 and 11 January 1995 nor given any indication why the Buyer had violated its duty to mitigate damages by not taking appropriate efforts to conclude a cheaper cover purchase. In this respect it has to be taken into account that it took the Buyer only two weeks to conclude the cover purchase. The Buyer had to decide within this time, if and when it wanted to conclude a cover purchase. The Seller has not sufficiently demonstrated that a cheaper cover purchase would have been possible within this period of time. The Buyer was not obliged to refrain from a cover purchase merely because of the high market price. **44**

(f) 45
[Interest]

The Buyer has calculated the additional costs caused by the cover purchase correctly: the amount is US $218,840.06. The Seller has not contested this calculation. The District Court has correctly ordered a payment in US dollars, because under a concrete calculation of damages as it is required by Art. 75 CISG damages in the currency of the loss are owed (cf. Schlechtriem-Stoll, Art. 74 CISG para. 30).

The Buyer's claim for 5% interest since the dispute was pending results from §§ 286, 288 BGB [*] in connection with § 352 HGB [*]. 46

[Decision on costs:]

The Seller is the party that was not successful. It has to bear the costs of the appeal according to § 97 para. 1 ZPO [*]. 47

The other side-decisions result from §§ 708 No. 10, 711 and § 546 ZPO.