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| Jurisdiction | Germany |
| Tribunal | Oberlandesgericht Hamburg (Court of Appeal Hamburg) |
| Date of the decision | 28 February 1997 |
| Case no./docket no. | 1 U 167/95 |
| Case name | *Iron molybdenum case* |

*Translation* by Linus Meyer***

## Facts 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 Chinese iron molybdenum from the [Seller], amount: approx. 18,000 kilograms, molybdenum concentration: at least 64%, at a price of USD 9.70/kilogram molybdenum CIF Rotterdam, delivery October 1994 «from Chinaport to Rotterdam». The contract named Hamburg as place of jurisdiction. The [Seller]'s general conditions of contract contain the following Clause No. 2: 2

> «The Sellers shall not be held responsibility if their owing to Force Majeure cause or cause fail to make delivery within the time stipulated in this Sales contract or can not deliver the goods. However, the Sellers shall inform immediately the Buyers 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 USD 10.50/kilogram 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 iron molybdenum of lower quality, with a molybdenum concentration of 60%, at a price of USD 10.20/kilogram 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] 4

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* The translation should be verified by cross-checking against the original text. For purposes of this translation, Claimant-Appellee of the United Kingdom is referred to as [Buyer], and Respondent-Appellant of Germany is referred to as [Seller]. Amounts in U.S. currency (dollars) are indicated as «USD»; amounts in the former currency of Germany *(Deutsche Mark)* are indicated as «DEM».

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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.

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. 5

Upon the [Buyer]'s demand, the [Seller] declared on 15 November 1994 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 been shipped from Tianjin to Rotterdam at the end of November. The parties agreed upon a price of 24 USD/kilogram for the 1.2 tons which were not owed under the original contract. 6

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 USD 31/kilogram 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 USD 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 USD 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 USD 230,000. 7

According to Exhibit K 19 the [Buyer] concluded a contract for about 17–20 tons of Chinese iron molybdenum, CIF Rotterdam, molybdenum concentration: 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 USD 30/kilogram. 8

In a fax dated 17 January 1995, the [Seller] offered iron molybdenum, molybdenum concentration of 65.19% at a price of USD 29.5/kilogram. 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 18 January 1995, the [Seller] send a fax offering a compensation of USD 17,000, payable in three instalments. The [Buyer] declined this offer. 9

The [Buyer] has submitted the invoice from China-N[…] as Exhibit K 20. The amount of the invoice is USD 340,880.06. The quantity delivered was 17.942 kilograms of iron molybdenum with a molybdenum concentration of 63.33%. This leads to a result of 11,362.668 kilograms of molybdenum which, at a price of USD 30/kilogram, amounts to USD 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) Hamburg. 11

***[Position of the parties in the Court of first instance:]***

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 USD 122,040, if the [Seller] had delivered as contracted. The [Buyer] has calculated the price as follows: 18.000 kilograms x 60% molybdenum concentration = 10,800 kilograms x USD 9.7/kilogram = USD 104,760 and 1,200 kilograms x 60% molybdenum concentration = 720 kilograms x USD 24 = 17,280. This leads to the total amount of USD 122,040. The difference to the USD 340,880.06 paid to China-N[…] leads to the amount demanded: USD 218,840.06. A translation on the basis of the dollar rate of the date of the cover purchase, 11 January 1995: 1.5264 DEM/USD leads to the amount of 334,037.46 DEM. 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 delivering 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 USD 5,998 interest for that bank credit. 12

The [Buyer] has requested the District Court to order the [Seller] to pay 334,037.46 DEM plus 9,155.34 DEM interest, in the alternative USD 218,840.06 plus USD 5,998 interest.

The [Seller] has requested the District Court to dismiss the action. The [Seller] has argued that the District Court of Hamburg has 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

***[Decision of the Court of first instance:]***

By its judgment of 2 October 1995, the District Court (Landgericht) of Hamburg has ordered the [Seller] to pay USD 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 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 of 27 September 1968 (in the following: Brussels Convention). The District Court further stated that the [Buyer] was entitled to damages in the amount of the difference between the purchase price and the 14

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(1)(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.

***[Position of the parties in the Court of Appeal:]***

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 USD 17.9/kilogram 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 USD 30, and had, between 16 December 1994 and 11 January 1995, only varied slightly, around USD 1–2 from the USD 30 level.

17 By decision of 12 July 1996, the Court of Appeals had rejected the appeal by the [Seller] as inadmissible. 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.

## Reasons for the Decision:

I. 18
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.)

***[Admissibility of claim; application for interim measures pending at different court:]***

1. 19
The claim is admissible. The objection of *lis alibi pendens* under Arts. 21, 22 of the Brussels Convention on Jurisdiction and the Enforcement of Judgments in Civil and Commercial Matters of 27 September 1968 cannot be raised.

The Brussels Convention is generally applicable, as the Netherlands as well as the Federal Republic of Germany are parties to the Convention, which already entered into force on 1 February 1973. Art. 21 of the Brussels 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, Kommentar zum EuGVÜ* [article-by-article commentary on the Brussels Convention], 5th ed. (1996), Art. 21 para. 11 with further references). However, this result cannot just be based on 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, Case 144/86 – *Gubisch Maschinenfabrik v. Palumbo*, *Neue Juristische Wochenschrift* [German law journal] (1989), 665; 6 December 1994, Case C-406/92 – *Tatry v. Maciej Rataj*, *Juristenzeitung* [German law journal] (1995), 616, 619) the terms used in Art. 21 of the Brussels Convention 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 of the Brussels Convention) and «applications for interim measures» (Art. 24 of the Brussels Convention). An arrest is an interim measure in this sense. The objection of *lis alibi pendens* under Art. 21 of the Brussels Convention, 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 of the Brussels Convention 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 21

originally competent (cf. Kropholler, Art. 21 para 11). This would overstretch purpose of Art. 21 of the Brussels Convention 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.

Also, the proceeding can neither be suspended at the Court's discretion under Art. 22(1) of the Brussels Convention nor does the Court have the option to declare itself incompetent under Art. 22(2) of the Brussels Convention. Art. 21 of the Brussels Convention is inapplicable for the reason that the main action as well as the application for interim measures are not pending before courts of first instance. In addition, the application for arrest is not an action in the sense of Arts. 21, 22 of the Brussels Convention (cf. Kropholler, Art. 22 para. 5 with further reference). Moreover, the connection required by Art. 22(3) of the Brussels Convention is not given, because a risk 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. 22

Art. 22(2) of the Brussels Convention does not allow German courts to declare themselves incompetent, because a joinder of the two proceedings would be inadmissible under German law. § 147 of the German Code of Civil Procedure *(Zivilprozessordnung, ZPO)* only allows a joinder if both proceedings are pending in 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 UN 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, USD 218,840.06 plus 5% interest since 8 June 1995. The conclusions of the Court are:

The CISG is applicable to the present case (under a) below); the requirements of Arts. 75 and 74 CISG for the compensation of additional costs incurred through a cover purchase are satisfied (under b) below); the contract concluded by the [Buyer] on 11 January 1995 was an appropriate cover purchase in the sense of Art. 75 CISG (under c) below); and the [Seller] cannot rely upon an exemption from liability under No. 2 of the contract conditions or under Art. 79 CISG (under d) below). As the [Buyer] has not violated its duty to mitigate damages (under e) below), the [Buyer] has a claim for USD 218,840.06 plus 5% interest since 8 June 1995 (under f) below). 25

***[Applicable law:]***

a) 26
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 private international law, especially Art. 28 of the *Einführungsgesetz zum Bürgerlichen Gesetzbuch* [EGBGB, the German private international law act].

According to Art. 1(1) CISG, the Convention 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 27

the Convention or if the rules of international private law lead to the application of the law of a Contracting State. The United Kingdom, where the [Buyer] has its place of business, is not a CISG 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.

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(2), first and second sentence EGBGB). The characteristic obligation of a sales contract is the obligation to deliver the goods (cf. Heldrich in *Palandt, BGB* [article-by-article commentary on the German Civil Code], 56th 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

***[Damages established by cover transaction after avoidance:]***

b) 29
The requirements that Art. 75 CISG establishes for awarding damages for concluding a cover purchase are given.

The [Buyer] was entitled to avoid the contract of 12 October 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 von Caemmerer/Schlechtriem (eds.), *Kommentar zum einheitlichen UN-Kaufrecht – CISG –* [article-by-article commentary on the CISG], 2nd ed. (1995) (in the following cited as: author in *Schlechtriem*), Art. 49 CISG para. 5; Magnus in *Staudinger* [article-by-article commentary on the CISG], 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* [article-by-article commentary on the German Commercial Code], 29th ed. (1995), Incoterms No. 6 para. 2) under which timely delivery is a fundamental obligation (compare also § 376(1) of the German Commercial Code *(Handelsgesetzbuch, HGB)*). 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 31

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. Huber in *Schlechtriem*, 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. Magnus in *Staudinger*, Art. 49 CISG para. 8) that the goods were not delivered.

**32** The Court of Appeal 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 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 precedent that performance has not occurred within an additional period of time fixed for performance *(Nachfrist)*, which is generally admissible (German Supreme Court, 28 March 1979 – VIII ZR 37/78, 74 *Entscheidungen des Bundesgerichtshofes in Zivilsachen* [*BGHZ* – Official Reporter of Decisions of the German Supreme Court in Civil Matters] 193, 204; Huber in *Schlechtriem*, 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».

**33** 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 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 (cf. Stoll in *Schlechtriem,* Art. 75 CISG para. 5; Magnus in *Staudinger*, Art. 75 CISG para. 8 and Stoll, 'Zur Haftung bei Erfüllungsverweigerung im Einheitlichen Kaufrecht', 52 *Rabels Zeitschrift für ausländisches und internationales Privatrecht* [German law journal] (1988), 617, 635).

**34** 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.

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

***[[Buyer]'s cover purchase:]***

c) 37
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) 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 accordance with commercial custom. 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(3) of the German Commercial Code – the CISG does not require the [Buyer] to conduct the cover purchase «immediately» (cf. Magnus in *Staudinger*, Art. 75 CISG para. 18; Stoll in *Schlechtriem*, Art. 75 CISG para. 8).

***[No force majeure or Art. 79 CISG exemption:]***

d) 38
The [Seller] is also not exempt 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. Stoll in *Schlechtriem*, 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 of procuring 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 a reasonable replacement according to commercial standards 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 procurement risk is therefore only exceeded and the [Seller] 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 (Stoll in *Schlechtriem*, 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 29 August 1994 submitted as Exhibit B2 only in the appeal does not meet the requirements for a congruent cover purchase (cf. German Supreme Court, 14 November 1984 – VIII ZR 283/83, 92 *Entscheidungen des Bundesgerichtshofes in Zivilsachen* [*BGHZ* – Official Reporter of Decisions of the German Supreme Court in Civil Matters] 396, 401). The fulfilment of those requirements, namely 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 also not given. **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 procuring the goods elsewhere, even the loss of transactions, as it has accepted the risk of procuring 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. Stoll in *Schlechtriem*, 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**

***[No violation of [Buyer]'s duty to mitigate damages under Art. 77 CISG:]***

e) 42
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

***[Calculation and currency of damages; [Buyer]'s right to interest on sum:]***

f) 45
The [Buyer] has calculated the additional costs caused by the cover purchase correctly: the amount is USD 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. Stoll in *Schlechtriem*, Art. 74 CISG para. 30).

The [Buyer]'s claim for 5% interest since the dispute was pending results from §§ 286, 288 German Civil Code *(Bürgerliches Gesetzbuch, BGB)* in connection with § 352 German Commercial Code *(HGB)*. 46

***[Decision on costs:]***

II. 47
The [Seller] is the party that was not successful. It has to bear the costs of the appeal according to § 97(1) German Code of Civil Procedure *(ZPO)*.

The other ancillary decisions result from §§ 708 No. 10, 711 and § 546 German Code of Civil Procedure *(ZPO)*.