

Case 271: CISG 7; 77; 79

Germany: Bundesgerichtshof; VIII ZR 121/98

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Original in German

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[1999] Recht der Internationalen Wirtschaft 617; [1999] Wertpapier-Mitteilungen 1466; [1999]

Juristenzeitung 791; [1999] Monatsschrift für Deutsches Recht 1009; [1999] Lindenmaier- Möhring:

Nachschlagewerk des Bundesgerichtshofs in Zivilsachen CISG No. 6 and No. 7; Entscheidungssammlung zum Wirtschafts- und Bankrecht, IV F Art 79 CISG 1.99; [1999] Recht der Landwirtschaft 250; <http://www.jura.uni-freiburg.de/ipr1/cisg/urteile/text/396.htm>

Translated into English: <http://www.cisg.law.pace.edu/cisg/wais/db/cases2/990324g1.html> Head Note in German:

[1999] Eildienst: Bundesgerichtliche Entscheidungen (EBE/BGH), BGH-Ls 323/99

Commented on in German: Schlechtriem, [1999] Juristenzeitung 794; Stoll, [1999] Lindenmaier- Möhring:

Nachschlagewerk des Bundesgerichtshofs in Zivilsachen CISG No. 6 and No. 7; Magnus,

Entscheidungssammlung zum Wirtschafts- und Bankrecht, IV F Art 79 CISG 1.99;

Commented on in English: <http://www.cisg.law.pace.edu/cisg/wais/db/cases2/990324g1.html> The seller, the unsuccessful party in Case No. 272, appealed to the Supreme Court.

The court confirmed the seller's liability without deciding whether or not article 79 was applicable, stating that even if it were applicable, it would not exclude the seller's liability since the only exempt from liability under article 79 if the failure to perform is due to an impediment beyond the control of the seller and each of the seller's suppliers. Thus, the court left open the question of whether or not article 79 of the CISG can be raised as a defense against all kinds of non-performance, including the delivery of defective goods. The court also pointed out that the exemption provided under article 79 does not alter the allocation of risk. Liability of the seller resulted from its failure to comply with its obligation to deliver conforming goods; it made no difference whether the defect was the fault of the seller or its supplier.

However, since the appellate court had failed to consider whether there had been any failure on the part of the buyer to mitigate its loss, the Supreme Court set aside the judgement and remanded the case back to the appellate court. It noted that, as failure to mitigate by one party could lead to the total exclusion of liability of the other party, in such a case, German law would require that the matter be considered in conjunction with the decision on the merits and not in a separate proceeding concerning the amount of damages (article 77 CISG). As this was a question of procedural rather than substantive law, the court said that it was not governed by article 7 of the CISG but rather, by the relevant provisions of German law.

*Addenda/Corrigendum*

Document A/CN.9/SER.C/ABSTRACTS/26 (Arabic, Chinese, English, French, Russian, Spanish)

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