

**Case 696: CISG 29; 79**

United States: U.S. [Federal] District Court for the Northern District of Illinois

No. 03 C 1154

7 July 2004

Raw Materials Inc. v. Manfred Forberich GmbH & Co.

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Abstract prepared by Peter Winship, National Correspondent

A corporation with its place of business in the United States concluded a contract with a seller resident in Germany to purchase used railroad rail. The original agreement provided that the rail was to be shipped "FOB Delivered Our Plant [Illinois]" from the port of St. Petersburg, Russia, by 30 June 2002. The parties agreed to change the date and place of delivery, although at the time of the court's decision the details of the changes had not been established definitively. The seller did not deliver the rail. The buyer sued the seller for breach of contract. The seller replied that it was excused because it could not load the rail in St. Petersburg as a result of an unexpectedly cold winter that closed the port. The buyer moved for summary judgement before trial.

The issue before the court was whether judgement should be rendered for the buyer before trial because the pleadings set out a breach of contract and no relevant facts were in dispute.

The court applied the CISG, noting that the parties agreed that the Convention governed the contract. When interpreting art. 79 CISG, however, the court looked to decisions in US cases construing "analogous" provisions of domestic US law. The court noted that this approach was proposed by the buyer and not disputed by the seller. Consequently, the court looked to whether (1) a contingency had occurred,

(2) the contingency made performance impracticable, and (3) the nonoccurrence of the contingency was a basic assumption upon which the contract was made. The buyer argued that the seller did not satisfy the latter two conditions.

The court denied the motion for summary judgement because there were disputed factual issues with respect to the latter two conditions. The court stated that there were issues of fact as to whether the frozen port prevented performance and as to what modifications to the delivery term had been agreed to. There were also issues of fact with respect to the foreseeability of the extreme freezing. The court did note that the parties could modify the contract orally and by mere agreement as provided by art. 29 CISG.