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Jurisdiction	Germany
Tribunal	Bundesgerichtshof (German Supreme Court)
Date of the decision	08 March 1995
Case no./docket no.	VIII ZR 159/94
Case name	*New Zealand mussels case*

Translation[*] *by Birgit Kurtz*[**]

Facts:

Respondent [buyer], who runs a fish import business in D[...] [Germany], bought 1,750 kilograms (kg) of New Zealand mussels for USD 3.70 per kg from Claimant [seller], who resides in Switzerland. [Seller] delivered the goods, as agreed, in January 1992 to a storage facility belonging to [buyer] and located at Company F[...] in G[…], and invoiced [buyer] on 15 January 1992 in the amount of USD 6,475, payable within 14 days. 1

At the end of January 1992, Company F[…] informed [buyer] that the federal veterinary agency of G[…] had taken samples of the goods for examination purposes. After the veterinary agency confirmed at the end of January/beginning of February 1992, upon [buyer's] request, that an increased cadmium content was discovered in the mussels and that further examinations by the responsible veterinary examination agency of Southern Hesse were necessary, [buyer] informed [seller] of these facts by facsimile dated 7 February 1992. According to the report by the veterinary examination agency of Southern Hesse, which was received by [buyer] on 26 February 1992 and forwarded to [seller] by [buyer], cadmium contents of between 0.5 and 1.0 milligram per kilogram (mg/kg) were ascertained in four of the examined bags of mussels; these contents did not yet exceed twice the amount of the 1990 standard of the federal public health agency, but further examinations by the importer were found necessary. An examination commissioned by [seller] and conducted by the federal agency for veterinary matters in Liebefeld-Bern determined a cadmium content of 0.875 mg/kg. 2

[*] All translations should be verified by cross-checking against the original text. For purposes of this translation, the Respondent of Switzerland is referred to as [seller]; the Claimant of Germany is referred to as [buyer].
Translator's note on abbreviations: BGBl. = *Bundesgesetzblatt* [German Federal Law Gazette]; Bundesgesundhbl. = *Bundesgesundheitsblatt* [German Federal Health Gazette]; BVerwGE = *Bundesverwaltungsgerichts-entscheidungen* [Official Reporter of cases decided by Germany's highest Federal Administrative Court]; EKG = *Einheitliches Gesetz über den internationalen Kauf beweglicher Sachen* [German Uniform Law on the International Sale of Goods (ULIS), implementing the 1964 Hague Convention into German law]; LG = *Landgericht* [District (trial) Court]; MDR = *Monatsschrift für Deutsches Recht* [German monthly law journal]; OLG = *Oberlandesgericht* [Court of Appeal].

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By facsimile dated 3 March 1992, [buyer] announced to [seller] that she was going to send the mussels back at [seller's] expense since the veterinary agency had declared them «not harmless» due to their high cadmium content; simultaneously, she complained that the goods were «no longer in their original packaging as required» and that, furthermore, the packaging was unsuitable for frozen food. Thereafter, [seller] informed [buyer] by telephone that she would not accept the goods. Consequently, [buyer] did not return the goods. According to a report of the chemical examination laboratory of Dr. B[…] dated 31 March 1992, which had been commissioned by [buyer] for further examination, three samples revealed 1 mg of cadmium per kg; a doubling of the federal public health agency standards could not be «tolerated,» and at least 20 additional samples of the entire delivery had to be examined. 3

[Buyer] requested that [seller] cover, among other things, the future expenses of the examination; [seller] did not reply. 4

In the complaint, [seller] demands payment of the purchase price of USD 6,475 plus interest. She claimed that the mussels were suitable for consumption because their cadmium content did not exceed the permitted limit; furthermore, [buyer] had not given timely notice of the defects. [Buyer], on the other hand, declared the contract avoided due to a fundamental breach of contract because the mussels were defective and had been complained of by the responsible authorities. Thus, the mussels were not permitted to be delivered out of the storage facility. And by now, the «expiration date of 12/92,» affixed to the merchandise by [seller], had come and gone anyway. 5

The Trial Court (the «*Landgericht*») obtained an expert opinion from the federal public health agency. With respect to the question whether the mussels were suitable for consumption having the reported cadmium content, the federal public health agency elaborates that the ZEBS (central registration and evaluation office of the federal public health agency for environmental chemicals) standards are guidelines indicating an unwanted concentration of harmful substances in food for purposes of preventative consumer health protection. Occasionally exceeding the individual standard which are not toxicologically explainable, usually does not lead to harmful effects on one's health, even if the measured concentration reaches twice the amount of the standard. If twice the amount of the standard is exceeded, the responsible state control authorities usually declare that, analogous to the procedure legally required for enforcement of the meat hygiene regulations (*Fleischhygiene-Verordnung*), the relevant food can no longer be considered suitable for consumption according to the foodstuffs and consumer goods law (§ 17(1) No. 1 of the «*Lebensmittel- und Bedarfsgegenständegesetz*» or «LMBG»). 6

The Trial Court ruled against [buyer] in accordance with [seller's] petition. On appeal, buyer claimed, as a precaution and with offer of proof, that the cadmium content of the mussels was even higher than 1 mg/kg. The Court of Appeal (*Oberlandesgericht*) dismissed [buyer's] appeal. In the appeal to this Court, [buyer] continues to move for a dismissal, whereas [seller] pleads for a dismissal of the appeal. 7

Reasoning of the Supreme Court:

The appeal is unsuccessful.

I. 8
The Court of Appeals has explained:

The U.N. Convention on Contracts for the International Sale of Goods dated 11 April 1980 (CISG) applies to the legal relationship between the parties. 9

According to Art. 53 CISG, [seller] is entitled to the purchase price. 10

[Buyer] can only declare the contract avoided pursuant to Art. 49(1)(a) CISG in case of a fundamental breach of contract by seller. It is true that a delivery of goods that do not conform with the contract can be a fundamental breach of contract within the meaning of Art. 25 CISG; in case of a lack of express agreement, Art. 35(2) CISG governs the question whether the goods conform with the contract. The question whether only goods of average quality are suitable for ordinary use (Art. 35(2)(a) CISG) or whether it is sufficient that the goods are «marketable» may be left open. The delivered mussels are not of inferior quality even if their cadmium content exceeds the examination results known so far. The reason for this is that the standard for cadmium content in fish, in contrast to the standard for meat, does not have a legally binding character but only an administratively guiding character. Even if the standard is exceeded by more than 100%, one cannot assume that the food is no longer suitable for consumption, because mussels, contrary to basic food, are usually not consumed in large quantities within a short period of time and, therefore, even «peaks of contamination» are not harmful to one's health. That is why it is no longer relevant whether the public law provisions of those countries, to which an export was possible at the time of conclusion of the contract, have no influence on the conformity of the goods with the contract according to Art. 35(2)(a) CISG. 11

The fact that the standard was exceeded is similarly not relevant to the elements of Art. 35(2)(b) CISG (fitness for a particular purpose). There is no evidence that the parties implicitly agreed to comply with the ZEBS standards. Even if [seller] knew that [buyer] wanted to market the goods in Germany, one cannot make such an assumption, especially since the standards do not have legal character. 12

The demand to declare the contract avoided is also not legally founded based on [buyer's] allegation that the goods were not packaged properly. [Buyer's] pleadings in this respect are not substantiated and can, therefore, not be accepted. In any event, the statement to declare the contract avoided is statute-barred by Art. 49(2) CISG. This is so because on 3 March 1992, [buyer] gave notice for the first time that the packaging of the goods delivered in the beginning of January did not conform with the contract; therefore, she did not give notice within a reasonably short time. 13

II. 14
These elaborations hold up against a legal re-examination with respect to the result.

1. 15
The application of the CISG provisions to the contract between the parties is expressly no longer questioned and is also correct (Art. 1(1)(a) CISG). The prerequisite to [buyer's] right to declare the contract avoided pursuant to Art. 49(1)(a) CISG due to the cadmium contamination of the delivered mussels is, therefore, a fundamental breach of contract by [seller] within the meaning of Art. 25 CISG. This is the case when the purchaser essentially does not receive what he could have expected under the contract, and can be caused by a delivery of goods that do not conform with the contract (*see*, *e.g.*, Schlechtriem *in* von Caemmerer/Schlechtriem (eds.), *Kommentar zum Einheitlichen UN-Kaufrecht [Commentary on the CISG]*, 2nd ed., Art. 25 para. 20 (with further citations)). Not even a non-conformity with the contract within the meaning of Art. 35 CISG can, however, be determined.

a) 16
In this respect, an agreement between the parties is primarily relevant (Art. 35(1) CISG). The Court of Appeal did not even find an implied agreement as to the consideration of the ZEBS standards. [Buyer] did not argue against this finding, and it is not legally objectionable. The mere fact that the mussels should be delivered to the storage facility in G[...] does not necessarily constitute an agreement regarding the resalability of the goods, especially in Germany, and it definitely does not constitute an agreement regarding the compliance with certain public law provisions on which the resalability may depend.

b) 17
Where the parties have not agreed on anything, the goods do not conform with the contract if they are unsuitable for the ordinary use or for a specific purpose expressly or impliedly made known to the seller (Art. 35(2)(a) and (b) CISG). The cadmium contamination of the mussels, that has been reported or, above that, alleged by [buyer], does not allow us to assume that the goods, under this rule, do not conform with the contract.

aa) 18
In the examination of whether the goods were suitable for ordinary use, the Court of Appeal rightly left open the question – controversial in the legal literature – whether this requires generic goods of average quality or whether merely «marketable» goods are sufficient (*see*, *e.g.*, Schwenzer *in* von Caemmerer/Schlechtriem, *supra*, Art. 35 para. 15 (with further citations)). Even if on appeal, goods of average quality were found to be required, [buyer] has still not argued that the delivered mussels contain a higher cadmium contamination than New Zealand mussels of average quality. It is true that, according to the report from the examination laboratory of Dr. B[...], submitted by [buyer] to the trial court, and the contents of which is thereby alleged, «there are also other imported New Zealand mussels on the market … that do not show a comparable cadmium contamination.» It does not follow, however, that average New Zealand mussels on the market contain a smaller amount of cadmium than the mussels delivered to [buyer].

The appeal wrongly requests that [seller] submit a statement that New Zealand mussels usually have such a high cadmium contamination. After taking delivery without giving notice 19

of the lack of conformity, the buyer must allege and prove that the goods do not conform with the contract and the seller does not have to allege and prove that they do conform with the contract (*see, e.g.*, Herber/Czerwenka, *Internationales Kaufrecht [International Sales Law]*, 1991, Art. 35 para. 9; Piltz, *Internationales Kaufrecht [International Sales Law]*, 1993, § 5 para. 21; Schwenzer, *supra*, para. 49 (with further citations)). Contrary to [buyer's] contention at trial, she accepted the mussels by physically taking delivery (Art. 60(b) CISG) at the place of destination in G[...], and she did not give notice of the lack of conformity of the goods at that time.

bb) **20**
Admittedly, from the point of view of salability and, therefore, resalability of the mussels and contrary to the Court of Appeals' opinion, even if twice the amount of the ZEBS standard is exceeded, as [buyer] alleged, this would not change anything regarding the suitability of the mussels for consumption pursuant to § 17(1)(1) LMBG, and, considering the report from the federal public health agency and the documented administrative practice of the state health agencies, there would be reservations, if the public law provisions of the Federal Republic of Germany were relevant.

This, however, is not the case. According to the clearly prevailing opinion in the legal literature, **21**
which this Court follows, the compliance with specialized public law provisions of the buyer's country or the country of use cannot be expected (Schwenzer, *supra*, Art. 35 para. 16 *et seq.*; Stumpf *in* von Caemmerer/Schlechtriem, 1st ed., Art. 35 paras. 26 *et seq.*; Staudinger/Magnus, *BGB [Commentary on the German Civil Code]*, 13th ed., Art. 35 CISG para. 22; Herber/Czerwenka, *supra*, Art. 35 paras. 4, 5; Piltz, *supra*, § 5 paras. 35, 41; Enderlein *in* Enderlein/Maskow/Stargardt, *Konvention der Vereinten Nationen über Verträge über den internationalen Warenkauf, Kommentar [UN Convention on Contracts for the International Sale of Goods, Commentary]*, 1985, Art. 35 para. 4; Enderlein, *in* Enderlein/Maskow/Strohbach, *Internationales Kaufrecht [International Sales Law]*, 1991, Art. 35 para. 8; Bianca *in* Bianca/Bonell, *Commentary on the International Sales Law,* 1987, Art. 35 para. 2.5.1, p. 274 *et seq.*, para. 3.2, p. 282 *et seq.*; Audit, *La vente internationale de marchandises [The International Sale of Goods]*, 1990, para. 98, p. 96; Heuzé, *La vente internationale de marchandises [The International Sale of Goods]*, 1993, para. 290; Neumayer/Ming, *Convention de Vienne sur les contrats de vente internationale de marchandises [Vienna Convention on Contracts for the International Sale of Goods]*, 1993, Art. 35 para. 7; *probably also* Hutter, *Die Haftung des Verkäufers für Nichtlieferung bzw. Lieferung vertragswidriger Ware nach dem Wiener UNCITRAL-Übereinkommen über internationale Warenkaufverträge vom 11. April 1980 [Seller's Liability for Non-delivery or Delivery of Goods Not Conforming with the Contract pursuant to the Vienna UNCITRAL-Convention on the International Sale of Goods dated 11 April 1980]*, doctoral thesis 1988, at 46 *et seq.*; Otto, MDR 1992, 533, 534; *probably different* Schlechtriem *in International Sales* §§ 6.03, 6.21 (Galston/Smit eds., 1984); *not clear* Soergel/Lüderitz, *BGB [German Civil Code]*, 12th ed., Art. 35 CISG para. 11; *inconsistent* Heilmann, *Mängelgewährleistung im UN-Kaufrecht [Liability for Non-Conformity under the CISG]*, 1994, *compare* p. 184 *with* p. 185; *concerning the legal situation pursuant to ULIS*, *compare*, *e.g.*, Dölle/Stumpf, *Kommentar zum Einheitlichen Kaufrecht [Commentary on the Uniform Law of Sales]*, 1976, Art. 33 ULIS para. 18

(with further citations) *with* Mertens/Rehbinder, *Internationales Kaufrecht [International Sales Law]*, Art. 33 ULIS paras. 16, 19).

Some uncertainties, noticeable in the discussions in the legal literature and probably partly caused by the not very precise distinction between subsections (a) and (b) of Art. 35(2) CISG, do not require clarification in the evaluation of whether this question must be integrated into the examination of the ordinary use of the goods or the examination of the fitness for a particular purpose. There is, therefore, no need to finally decide whether, within the scope of Art. 35(2)(a) CISG, as most argue, the standards of the seller's country always have to be taken into account (*see, e.g.*, Bianca, *supra*, para. 2.5.1; Piltz, *supra*, para. 41; Enderlein *in* Enderlein/Maskow/Strohbach, *supra*; Aue, *Mängelgewährleistung im UN-Kaufrecht unter besonderer Berücksichtigung stillschweigender Zusicherungen [Liability for Non-Conformity under the CISG with Special Consideration of Implied Warranties]*, doctoral thesis 1989, at 75; *probably different* Schlechtriem, *supra*; Hutter, *supra*, at 40), so that it is not important for the purpose of Art. 35(2)(a) CISG whether the use of the goods conflicts with public law provisions of the import country (*see*, *e.g.*, Herber/Czerwenka, *supra*, para. 4). In any event, certain standards in the buyer's country can only be taken into account if they exist in the seller's country as well (*see*, *e.g.*, Stumpf *in* von Caemmerer/Schlechtriem, *supra*, para. 26; Schwenzer, *supra*, para. 16; Bianca, *supra*, para. 3.2) or if, and this should possibly be examined within the scope of Art. 35(2)(b) CISG, the buyer has pointed them out to the seller (*see*, *e.g.*, Schwenzer, *supra*, paras. 16, 17; Enderlein, *supra*) and, thereby, relied on and was allowed to rely on the seller's expertise or, maybe, if the relevant provisions in the anticipated export country are known or should be known to the seller due to the particular circumstances of the case (*see*, *e.g.*, Piltz, *supra*, para. 35; Bianca, *supra*). None of these possibilities can be assumed in the case at hand: **22**

aaa) **23**
[Buyer], who bears the burden of proof, did not allege that there are any Swiss public law provisions concerning the contamination of mussels with toxic metals. The appeal similarly does not mention anything in this respect.

bbb) **24**
The agreement regarding the place of delivery and place of destination is in itself, even if it could be viewed as an indication by [buyer] of the anticipated marketing in Germany, neither under Art. 35(2)(a) CISG nor under Art. 35(2)(b) CISG sufficient to judge whether the mussels conform with the contract pursuant to certain cadmium standards used in Germany (*compare*, *e.g.*, Stumpf, *supra*, para. 27; Schwenzer, *supra*, para. 17; Piltz, Enderlein and Bianca, each *supra*). It is decisive that a foreign seller can simply not be required to know the not easily determinable public law provisions and/or administrative practices of the country to which he exports, and that the buyer, therefore, cannot rationally rely upon such knowledge of the seller, but rather, the buyer can be expected to have such expert knowledge of the conditions in his own country or in the place of destination, as determined by him, and, therefore, he can be expected to inform the seller accordingly.

This applies even more in a case like this, where, as the reply to the appeal rightly points out, there are no statutes regulating the permissible cadmium contamination and where, instead, the public health agencies apply the provisions, that are only valid as to the meat trade (*compare* Exh. 6 No. 3 of the regulation for meat hygiene dated 30 October 1986, BGBl. I 1678, as modified by the regulation dated 7 November 1991, BGBl. I 2066)), applied «by analogy» and, seemingly, not uniformly in all the German *Länder* (federal states) (*compare* the announcements of the federal public health agency in *Bundesgesundhbl.* 1990, 224 *et seq.*; 1991, 226, 227; 1993, 210, 211) to the exceeding of standards in the fish and mussels trade and where the legal bases for measures of the administrative authorities do not seem completely certain (*compare*, in a different context, *e.g.*, BVerwGE 77, 102, specifically 122). 25

ccc) 26
This Court need not decide whether the situation changes if the seller knows the public law provisions in the country of destination or if the purchaser can assume that the seller knows these provisions because, for instance, he has a branch in that country (*see*, *e.g.*, Neumayer/Ming, *supra*), because he has already had a business connection with the buyer for some time (*see*, *e.g.*, Schwenzer, *supra*, para. 17), because he often exports into the buyer's country (*see*, *e.g.*, Hutter, *supra*, at 47) or because he has promoted his products in that country (*see*, *e.g.*, Otto MDR 1992, 533, 534). [Buyer] did not allege any such facts.

ddd) 27
Finally, the appeal argues unsuccessfully that the mussels could not be sold due to the «official seizure» and were, therefore, not «merchantable». There is no need to go into great detail with respect to the question whether [buyer] has even alleged a seizure of the goods and whether she could have reasonably and with a chance of success attacked such a measure. In any event, a seizure would have been based on German public law provisions which, as set forth above, cannot be applied in order to determine whether the goods conformed with the contract (*supra*, specifically II(1)(b)(bb)(bbb)).

2. 28
The Court of Appeal also correctly denied the [buyer's] right to declare the contract avoided because of the improper packaging of the goods. The question whether [buyer's] allegations were sufficient for a conclusive statement of a fundamental breach of contract (Art. 25 CISG) or of any lack of conformity with the contract at all (Art. 35(2)(e) *[sic]* CISG) may remain unanswered. In any event, [buyer] lost her rights that might have resulted from these allegations due to untimeliness. This does not, however, result from the «untimeliness» of the declaration to avoid the contract pursuant to Art. 49(2)(b)(i) CISG, but from the untimeliness of the notice of the lack of conformity required by Art. 39(1) CISG, which must be considered first (*compare* Huber *in* von Caemmerer/Schlechtriem, 2nd ed., *supra*, Art. 49 paras. 45 *et seq.*).

In that respect, it does not make any difference whether the mussels were delivered «in the beginning» of January 1992, as the Court of Appeal assumed, or not until 16 January 1992, as the appeal alleges pointing to the «Betreff» («Re.») section of [buyer's] facsimile dated 7 February 1992. The first notice of the lack of conformity of the packaging in the facsimile dated 3 March 1992 was untimely even if the latter date of delivery was decisive. [Buyer] had to examine the goods or had to have them examined within as short a period after they arrive 29

at the place of destination as practicable under the circumstances (Art. 38(2) in connection with Art. 38(1) CISG). At least during the working week from 20 to 24 January 1992, [buyer] could have easily done this, whether by herself at the storage facility not far from her place of business or by a person employed by company F[...] and designated by [buyer]. The allegedly improper packaging could have easily been ascertained in an external examination.

The time limit for the notice of the lack of conformity, which starts at that moment (Art. 39(1) CISG), as well as the time limit to declare the contract avoided pursuant to Art. 49(2) CISG (*compare* judgment by this Court dated 15 February 1995 – VIII ZR 18/94 at II(3)(b), intended for publication) should not be calculated too long in the interest of clarifying the legal relationship of the parties as quickly as possible. Even if this Court were to apply a very generous «rough average» of about one month, taking into account different national legal traditions (*see* Schwenzer, *supra*, Art. 39 para. 17 (with further citations); *stricter*, *e.g.*, Herber/Czerwenka, *supra*, Art. 39 para. 9; Piltz, *supra*, § 5 para. 59; Reinhard, *UN-Kaufrecht [UN Sales Law]*, 1991, Art. 39 para. 5), the time limit for the notice of the lack of conformity with the contract had expired before 3 March 1992. **30**

The appeal's reference to an examination of the mussels already carried out by the public health agency as well as [buyer's] earlier notice of the increased cadmium content do not affect the assumption that the notice of lack of conformity was untimely. If the goods do not conform with the contract in various aspects, it is necessary to state all defects individually and describe them (*see*, *e.g.*, Schwenzer, *supra*, Art. 39 para. 10; Herber/Czerwenka, *supra*, Art. 39 para. 8). The buyer cannot claim those defects, of which he gave no timely notice. **31**