CISG-online 413	
Jurisdiction	Switzerland
Tribunal	Bundesgericht/Tribunal fédéral (Swiss Federal Supreme Court)
Date of the decision	28 October 1998
Case no./docket no.	4C.179/1998
Case name	*Frozen meat case*

Translation[*] *by Kirstin Stadtländer*[**]

Edited by Jan Henning Berg[***]

Facts:

A. 1

Plaintiffs 1, 2 and 3 [Sellers], all seated or domiciled in Germany, lodged a claim with the Cantonal Court of Zug against Defendant [Buyer] with its seat in Switzerland. [Sellers'] claim is based on unpaid invoices for the delivery of meat to [Buyer]. [Buyer] refused payment alleging that the meat which was shipped on the *MV Kronshtadtskiy* as well as on the *MV Atlas-Venture* and arrived at the port of Alexandria, Egypt, on 1 September 1992 and on 21 October 1992 was deficient. The Cantonal Court of Zug upheld the [Sellers'] claim in most aspects and ordered [Buyer] to pay to [Seller 1] the amount of Deutsche Mark [DM] 56,675.73 and US$ 363,861.85 plus interest, to [Seller 2] the amount of DM 66,231.94 and US$ 225,020.38 plus interest, and to [Seller 3] the amount of US$ 74,066.64 plus interest.

An appeal lodged by [Buyer] was partly allowed by the Court of Appeals of the Canton Zug. By judgment of 24 March 1998 – explained by order of 29 April 1998 on request of [Sellers] – the Court ordered [Buyer] to pay to [Seller 1] the amount of DM 56,675.73, to [Seller 2] the amount of US$ 158,543.00 and DM 66,231.94 and to [Seller 3] the amount of US$ 62,001 plus in each case interest of 10% from the respective payment date. 2

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[*] All translations should be verified by cross-checking against the original text. For purposes of this translation, the Plaintiffs of Germany are referred to as [Sellers] and the Defendant of Switzerland is referred to as [Buyer]. Amounts in U.S. currency (*dollars*) are indicated as [*US$*]; amounts in the former currency of Germany (*Deutsche Mark*) are indicated as [*DM*]; and amounts in the currency of Switzerland (*Swiss francs*) are indicated as [*Sfr*].

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B. 3
[Buyer] appealed to the Supreme Court against the judgment of the Court of Appeals. [Buyer] seeks to have the judgment quashed and the [Sellers'] claim rejected.

[Sellers] request the rejection of the [Buyer's] appeal.

Reasoning of the Court:

1. 4
The Court of Appeals correctly ruled that the United Nations Convention on Contracts for the International Sale of Goods of 11 April 1980 (in the following: CISG) is applicable. The parties to the sales contracts have their seats in different States, namely Germany and Switzerland, which are Contracting States of the CISG (Art. 1(1)(a) CISG).

2. 5
The previous instance came to the conclusion that, according to the rules of the CISG, [Buyer] only has a right of price reduction and not a right of complete or partial avoidance of the contract concerning the meat that was transported by the *MV Kronshtadtskiy*. In the appeal, [Buyer] puts forward that the challenged judgment violates the rules of the CISG in this aspect.

a) 6
As a legal ground for avoidance of the contract, Art. 49(1)(a) CISG must be considered. It requires that the non-fulfilment of a duty of the seller constitutes a fundamental breach of contract. A breach of contract is fundamental according to Art. 25 CISG if it causes such consequences for the other party that it is substantially deprived of what it could have expected under the contract, except if the party committing the breach of the contract did not foresee this consequence and a reasonable person in the same position would not have foreseen the consequence in the same situation, either. The central element of Art. 25 CISG is the issue whether the party which obeyed the contractual obligations is essentially deprived of what it could have expected under the contract. In determining that, it is not the subjective estimation which is decisive, but an objective standard must be used. In a second step, the foreseeability-barrier can lead to an exculpation of the seller (Karollus, in: Honsell (ed.), *Kommentar zum UN-Kaufrecht*, Berlin 1996, Art. 25 paras. 15 and 16 as well as 24 *et seq*.).

b) 7
If the breach of contract is based on a deviation from the contractual characteristics of the goods or any other deficiency of the goods, it must be determined whether a further processing or disposal of the goods in the usual course of business – even with a markdown or something alike – is possible without an unreasonable effort and is reasonable (BGHZ 132, 290–305, at E.II/2c aa; Schnyder/Straub, in: Honsell, *supra*, Art. 49 para. 28; Herber/Czerwenka, *Internationales Kaufrecht*, Munich 1991, Art. 25 para. 7). Thereby, it must be kept in mind that the CISG establishes the preference of the preservation of the contract: in case of doubt, the contract shall also be preserved in case of disturbances, while the avoidance of the contract shall be exercised only under exceptional circumstances (Karollus, *supra*, Art. 25 para. 11). The buyer shall primarily make use of the other remedies, namely price reduction

and compensation, with the reversed transaction constituting the last recourse in reacting to the other party's breach of contract which is that essential that it deprives that party of its interest in the fulfilment of the contract (BGHZ 132, 290–305, at E.II/2c dd). Whether a breach of contract in the given situation is fundamental, according to the explained standard and if the most severe remedy of avoidance of the contract is justified, depends on the particular circumstances of the individual case.

c) 8

The Court of Appeals determined that the meat which was delivered by the *MV Kronshtadtskiy* had a reduced value of 23.5% due to an excessive proportion of fat and of 2% due to blood and wetness in the pieces of meat. To the extent that the [Buyer] in the appeal also refers to the rancidity of the meat (reduced value of 16.7%) as well as the brown discoloration (reduced value of 2.5%) determined by Dr. [...], this contradicts the factual determinations of the previous instance (Art. 63(2) OG) due to which these losses of quality only took place after the passing of the risk (shipping in Beverwijk) and therefore cannot be asserted against [Sellers] and which determinations are binding on the Supreme Court. The proportion of fat of the meat was between 43.6% (sample of the laboratory of Dr. [...]) and 53.5% (average result of the samples taken by Dr. [...]), while the standard agreed upon for the industrial processing of the meat in Egypt was a proportion of fat of 30%. It can further be taken from the factual findings of the previous instance that the reduced value is caused by the loss of the fat tissue in the processing. Apart from that, the meat was judged to be of good quality, namely concerning the storage life and in bacteriological regard. In the first written notice of deficiencies of 16 October as well as in the second one of 22 October 1992, [Buyer] offered to take the meat at a lower price.

d) 9

[Buyer] wants the offer to take the meat at a lower price to be understood in the sense that it was only an offer in order to mitigate the damages, from which it cannot be concluded that [Buyer] did not regard the deficiency as fundamental in the sense of Art. 49 CISG in connection with Art. 25 CISG. This is probably true, but still does not change the fact that [Buyer] did see the possibility and, according to its own estimation, did actually have the ability to dispose of the meat despite its reduced value at a lower price in the frame of its own business activity in Egypt. This possibility existed, even taking into account the reduced value due to the rancidity and discoloration which cannot be blamed on the [Sellers] according to the determinations of the previous instance. [Buyer] further asserts that in German food trade involving fruit and vegetables, the buyer is not limited to price reduction but can also claim rescission of the contract in case of a deviation of quality of more than 10% (see Huber, in: von Caemmerer/Schlechtriem (eds.), *Kommentar zum Einheitlichen UN-Kaufrecht*, 2nd ed., Munich 1995, Art. 46 para. 36 footnote 70). The comparison is not convincing because, not only the gravity of the deviation of quality is decisive, but also the kind of deviation and whether a processing is possible and reasonable in the particular circumstances of the individual case. And this was exactly the case here. The deviation of quality was constituted by the excessive proportion of fat and too much wetness which leads to the loss of weight in the industrial processing which was provided for. A further detriment cannot be taken from the factual findings of the previous instance. Under these circumstances, the deviations from the

contract are not that fundamental that the avoidance of the contract must be the adequate legal consequence.

3. **10**
a)
According to the factual findings of the previous instance, [Buyer] gave notice of defects concerning 5,500 boxes (equivalent to 133 tons) and concerning 6,601 boxes (equivalent to 162 tons) while it did not find fault with the rest of the delivery of 209 tons and thereby accepted it. Concerning this aspect, it is asserted in the appeal that the statement of the amounts in the notice of deficiencies of 22 October 1992 was made erroneously and that these have been corrected by the writing of 26 November 1992. Contrary to that, it must be noted that the notice of defects only referred to the goods marked with «NB», not to the whole amount of the delivery. As well in the mentioned writing of 26 November 1992, [Buyer] refers to its allegation that [Sellers] had refused its proposal to consider the part of the delivery marked with the expression NB for a lower price. Due to that, with regard to the principle of good faith, [Sellers] did not have to understand the notice of deficiencies in the way that it referred to the whole amount of the delivery. Finally, in the writing of 26 November 1992, [Buyer] did refer to the whole amount of the delivery. However, a notice of defects at that time would have been too late, as according to Art. 39(1) CISG it must be made within a reasonable period of time after the moment in which the buyer discovered the deficiency or should have discovered it. The delivery was at [Buyer]'s disposition for examination on 5 October 1992 as [Buyer] itself concedes. The previous instance correctly assumes that the notice of defects of 22 October 1992 did meet the requirement «within a reasonable time», but this is not true for the extended notice of 26 November 1992, as [Buyer] would have been able to examine the whole delivery from the beginning and to refer the notice of defects to the whole delivery respectively.

b) **11**
In the appeal, [Buyer] further asserts that the previous instance would have had to adjudge damages to it concerning the delivery on the *MV Kronshtadskiy*. This assertion is unfounded. In general, a right to damages can stand besides the right of price reduction (Art. 45 CISG). However, it must be taken into consideration that a right to damages is excluded concerning the respective deficiency itself (Schnyder/Straub, *supra*, Art. 50 para. 57; Huber, *supra*, Art. 45 para. 43: the amount of price reduction reduces the total damage to be compensated). The rights asserted by [Buyer] are to be seen in the context with avoidance of the contract which was correctly refused by the previous instance and do not refer to other rights which could stand besides the price reduction.

4. **12**
Concerning the delivery on the *MV Atlas-Venture*, [Buyer] finds fault with the fact that the previous instance adjudged to [Sellers] the insurance payment in the amount of US$ 25,495. [Buyer] alleges that the insurance payment «did not have anything to do with any amounts payable by [Buyer] to [Sellers] due to the sales contracts.» However, in the challenged judgment, the Court of Appeals based the setting-off on the reference to [Buyer]'s own elaborations according to which the insurance payment received for the damage of the *MV Atlas-Venture* delivery had to be set off pro-rata against the claim of [Sellers]. Thereby, the Court of

Appeals justifies its decision purely on procedural law. However, the application of the Cantonal procedural law cannot be reviewed in an appeal (Art. 55(1)(c) OG).

5. 13
a)
[Buyer] further alleges that the previous instance did not adjudge the compensation it had claimed as a counterclaim in the amount of US$ 144,000 for the lost profits caused by the loss of a client. Concerning this, the Court of Appeals elaborates with reference to Stoll (in: von Caemmerer/Schlechtriem, *supra*, Art. 74 paras. 24, 36 and 45) that it might be foreseeable for the seller that in case of a delivery of deficient goods to a wholesaler, in the view of the existing competition, an essential part of the clients to whom the goods are sold would withdraw and that this would cause fundamental damage. However, the buyer can only rely on the assumption of such an extraordinary risk by the seller if it gave detailed information on that during the contractual negotiation and if the seller had had the opportunity to refuse liability or to include the risk in the calculation of the price; the buyer must be aware that the seller usually calculates the price without considering such a special risk. As there are no substantiated elaborations on that, it is not necessary to determine whether the damage did actually take place.

b) 14
Art. 74 CISG sets forth that the damage may not exceed the loss which the party in breach of the contract foresaw as a possible consequence of the breach or ought to have foreseen due to the circumstances which it knew or ought to have known. This limitation to foreseeable damages (the so-called contemplation rule) traces back to Anglo-American law (Herber/Czerwenka, *supra*, Art. 74 para. 10; in detail: Florian Faust, *Die Vorhersehbarkeit des Schadens gemäss Art. 74 Satz 2 UN-Kaufrecht*, Tübingen 1996, p. 75 *et seq*.).

Indeed, it is true that for foreseeability, the contractual agreements and the surrounding circumstances at the time of the conclusion of the contract, such as hints to the objective of the contract and special requirements for the goods, are of decisive relevance (Piltz, *Internationales Kaufrecht*, Munich 1993, pp. 291 f., nos. 452, 454). Yet it is not possible to establish a general rule which says that certain damages are only foreseeable if they have been expressly dealt with in the contractual negotiations. This is also true for goodwill disadvantages and for damages that are caused because a buyer loses a client due to a deficient delivery. Such damages can be foreseeable by the seller if the buyer is obviously an intermediary in a sensitive market and in addition has no possibility to otherwise supply its clients with complying goods within the time limit due to its own precautions (see judgment of the German Supreme Court of 24 October 1979, published in *IPRax* 1981, p. 96 *et seq*., accord Herber/Czerwenka, *supra*, Art. 74 para. 12). An express hint to this risk is – contrary to the previous instance – not necessary if the seller is or ought to be otherwise aware of it due to the concrete circumstances, as this has nothing to do with foreseeability (Weitnauer, 'Nichtvoraussehbarkeit eines Schadens nach Art. 82 S. 2 des Einheitlichen Gesetzes über den internationales Kauf beweglicher Sachen', *IPRax* 1981, p. 84, at IV.1 *in fine*). [Sellers] knew that they were delivering to a wholesaler who would resell the meat. The *Atlas*-delivery, furthermore, constituted a large amount, 172 tons, of meat. Therefore, at the time of the conclusion of the contract, [Sellers] must have been aware that a deficient delivery would cause problems between [Buyer] and 15

its clients which could not be easily solved by [Buyer], e.g., through a short-time substitute delivery. [Sellers] also had to take into account that [Buyer] could lose clients completely in case of a deficient delivery and that it could thereby suffer additional damages.

The previous instance, therefore, incorrectly negated foreseeability in the sense of Art. 74 CISG. The challenged judgment is contrary to the law in this respect so that it must be rescinded. The Supreme Court cannot itself decide on the claim for damages in the amount of US$ 144,000 due to the lack of factual findings on the existence and the amount of the damages. Therefore, the case is remanded to the previous instance for a new decision in the sense of these considerations. 16

6. 17
Finally, [Buyer] finds fault with the obligation to payment of default interest at the rate of 10%. It alleges a violation of Art. 78 CISG on the basis that under the German Commercial Code, which is applicable here, only interest at a rate of 5% is due.

In the challenged judgment, it is determined that [Buyer] did contest the interest rate in the appellate proceedings but that it did not give any further details why the first instance incorrectly calculated it; in so far it is referred to the elaborations of the previous instance, which means of the Cantonal Court. In so far as the Cantonal Court declared the statement of [Buyer] to be irrelevant for procedural reasons, they cannot be put forward by [Buyer] again at the Supreme Court due to the prohibition of new factual assertions (Art. 55(1)(c) OG). 18

For the rest, the following can be stated. The claim for interest can generally be based on Art. 78 CISG. According to that, the party to the contract which fails to pay the price or any other amount due must pay to the other party interest on these amounts. However, as the interest rate is not regulated in the CISG, the national law that is, according to the rules of international private law, the law governing the contract must be applied (Magnus, in: Honsell, *supra*, Art. 78 para. 12; Herber/Czerwenka, *supra*, Art. 78 para. 6). In the present case, this is undisputedly German law, as the [Sellers] have their domicile in Germany (Art. 118(1) IPRG in connection with the Hague Convention of 15 June 1955 concerning the Law Applicable to International Sales of Movable Goods). According to the judgment of the Cantonal Court, the default interest rate is 5% under § 252 of the German Commercial Code, while under the aspect of the default damage a higher interest damage exists if the creditor asserts the expenditure of credit interest under § 286 of the German Civil Code. This second question which does not concern the interest rate, is not determined by application of German law but by application of the CISG. This is expressly reserved by Art. 78 CISG for a claim of damage according to Art. 74 CISG so that the creditor of the payment can assert default damages due to the usage of credit which exceeds the claim of interest (Herber/Czerwenka, *supra*, Art. 78 para. 8; Magnus, *supra*, Art. 78 para. 10). From the legal point of view, this is congruent with the result reached by the Cantonal Court, and by reference to their elaborations also the Court of Appeals. The Supreme Court is bound by the factual findings of the proceedings at the Cantonal Court which state that [Sellers] 1 and 2 used current account credit at an average rate of 10%. In the appeal, no admissible challenges of these factual findings have been put forward according to Art. 63(2) or 64 OG. [Buyer]'s assertion of a violation of Art. 78 CISG is therefore unfounded as far as it is admissible. 19

7. **20**
For these reasons, the appeal is partly founded, the challenged judgment is rescinded and the case is remanded to the previous instance for a new decision in the sense of these considerations.

[Buyer] did only in so far succeed with its requests in the appeal as the case is in one aspect remanded to the previous instance for a new decision. Under these circumstances it is justified to impose two-thirds of the costs of the federal court to [Buyer] and one-third of these costs to [Sellers] (Art. 156(3) OG). [Buyer] further has to pay [Sellers] a reduced party compensation (Art. 159(3) OG). **21**

Therefore the Supreme Court orders: **22**

1. The appeal is partly allowed, the judgment of the Court of Appeals (Civil Division) of the Canton of Zug of 24 March 1998, explained by order of 29 April 1998, is rescinded and the case is remanded to the previous instance for a new decision in the sense of these considerations.
2. The court fee of Swiss francs [Sfr.] 12,000 is imposed on [Buyer] at two-thirds in the amount of Sfr. 8,000 and on [Sellers] in joint liability at one-third in the amount of Sfr. 4,000.
3. [Buyer] has to pay [Sellers] a reduced party compensation in the total amount of Sfr. 4,000 for the federal court procedure.
4. This judgment will be sent to the parties and to the Court of Appeals (Civil Division) of the Canton of Zug in writing.