

CISG-online 619	
Jurisdiction	Germany
Tribunal	Landgericht Flensburg (District Court Flensburg)
Date of the decision	19 January 2001
Case no./docket no.	4 O 369/99
Case name	<i>Live sheep case</i>

Translation by Stefan Kuhm***

*Edited by Camilla Baasch Andersen****

Facts of the case:

[Undisputed facts:]

Both the [buyer] and the [seller] are cattle-dealers. At the beginning of January 1999, the [buyer] ordered 400 sheep from the [seller] via telephone. The consideration was DM 75.00 per sheep. The [seller] was obliged to deliver the sheep to two different places of destination in the northern part of Jylland in Denmark. On 19 January 1999, a Dutch transportation company delivered the sheep, born and originated in the Netherlands, to the places of destination as set out in the freight and transportation documents. A smaller part of the shipment was delivered to an abattoir in Gjerlev in the area of Aarhus [Denmark]. The greater part was unloaded at the farm of Mr. [...], whose farmhouse is in Lindum, official district of Viborg [Denmark]. At the same time, the [seller] invoiced the [buyer] for the amount of DM 30,000. Notwithstanding the delivery of the sheep, the [buyer] has not paid the [seller] any portion of this purchase price.

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[Facts in dispute:]

The parties dispute whether the [seller] delivered sheep in conformity with the quality ordered.

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* All translations should be verified by cross-checking against the original text. For purposes of this translation, the Plaintiff of Germany is referred to as [seller]; the Defendant of Denmark as [buyer]. Amounts in German currency (*Deutsche Mark*) are indicated as [DM].

Translator's note on other terms and abbreviations: *aliud* (totally different goods) = no delivery vs. *peius* (non-conforming goods) = delivery; BGB = *Bürgerliches Gesetzbuch* [German Civil Code]; LG = *Landgericht* [District Court]; ZPO = *Zivilprozessordnung* [German Civil Procedure Act].

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[Seller's position:]

The seller alleges that the [buyer] ordered sheep that the [buyer] wanted to fatten up. At any rate, the sheep should be of the same kind and quality as in a former trade transaction between the parties in December 1998. Thereby, to the [buyer] total satisfaction, the [seller] had delivered to the [buyer] sheep of such kind and quality, that were born and had their origins in the Netherlands.

[Buyer's position:]

Conversely, the [buyer] alleges that she ordered sheep mature for butchering immediately and that the sheep, that were delivered, were too raw-boned and in an extremely bad physical condition.

It is further in dispute whether the [buyer]:

- (i) called to the [seller] attention the lack of conformity regarding the quality of the delivered sheep in a sufficiently precise manner within as short period as one could reasonably have expected from the [buyer]; and
- (ii) informed the [seller] about the eventual level of damages as claimed by the [buyer] by virtue of a lack of conformity regarding their quality and the consequential longer period of fattening up the sheep, until [buyer] would be in the position to have them butchered.

[Pleadings of the parties:]

The [seller] seeks to have the [buyer] directed to pay to the [seller] DM 30,000 plus accrued interest of 14% since 28 January 1999. 3

The [buyer] seeks to have the legal action dismissed. 4

In the light of any detail in the parties' argumentation, the Court refers to all statements of the parties and any attached schedules to those statements vis- vis the Court. The Court heard evidence under its order of evidence dated 22 September 2000, whereby the Court heard several witnesses. The Court heard the parties in persona, in order to investigate and exploit the facts of the case. In the light of the result of the aforementioned hearing of the witnesses and of the parties, the Court refers to the minutes of the Court hearings of 16 November 2000 and 14 December 2000. 5

Reasoning of the Court:

The [seller] legal action is founded and successful. 6

[Admissibility of the legal action:]

The [seller] legal action is admissible.

[Application of the CISG:]

The Vienna Convention on the International Sale of Goods, dated 11 April 1980 [CISG], is applicable in respect of the sales contract entered into by the parties, i.e., the [seller] and the [buyer]. The parties entered effectively into a sales contract between contractual parties that have their establishments in different States (see Art. 1 CISG). The notion of «goods» under the CISG includes livestock. Denmark and Germany are Contracting States to the CISG.

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Denmark has made use of the reservation of Art. 92 CISG with the effect that only the CISG's provisions on the parties' rights and obligations apply whenever – as here – one party has its place of business in Denmark and the other party has its place of business in a non-Scandinavian Contracting State. However, the reservation does not affect the CISG's applicability in the present case, because the dispute at hand pertains to the [buyer]'s obligation to pay the purchase price under their sales contract. This appears to be a dispute on the substantive law of sales, i.e., on the application and interpretation of the CISG.

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[Jurisdiction of the Court:]

According to Art. 57(1)(a) CISG, the obligation to pay the purchase price under a sales contract is generally an obligation to be performed at the creditor's, i.e., the [seller]'s, place of business, provided that (i) a seller performed in advance his delivery duties under the relevant sales contract; and (ii) the obligations of the parties are not to be performed concurrently pursuant to Art. 57(1)(b) CISG. In this case, those preconditions are satisfied. The [seller] delivered the sheep to Denmark and invoiced the amount owed under the sales contract at the day of delivery. Thus, the place, where the payment obligation is to be fulfilled is the place of the [seller]'s establishment, viz Breklum [Germany]. With regard to the [seller] establishment, the District Court of Flensburg is the local and pertinent competent court to hear these legal proceedings.

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[Foundation of the seller's legal action:]

The [seller] legal action is fully founded.

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[Basis for the seller's claim against the buyer:]

The [seller] is the holder of a claim against the [buyer] for payment of the agreed purchase price of DM 30,000 under Art. 53 CISG in combination with the sales contract entered into by the parties on a purely oral basis.

[The sheep delivered are deemed to be in conformity with the contract:]

The [seller] delivered 400 sheep, ordered by the [buyer] via telephone, to the places of destination stipulated by the [buyer]. This follows from the copies of the freight and transportation documents, filed with the Court by the [seller]. The [buyer] does not seriously dispute this fact. Furthermore, the sheep are deemed to be in conformity with the quality standard which the [buyer] ordered and as set forth in the sales contract. The [buyer] has not given evidence, that he duly and timely gave to the [seller] notice of the lack of conformity of the quality of

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the delivered sheep with the ordered quality standard within a reasonable time (see Arts. 38, 39(1) CISG).

[Buyer's compliance with its examination duties under Art. 38 CISG:]

A buyer must examine the goods, or cause them to be examined, within as short a period as is practicable in the circumstances (see Art. 38(1) CISG). The buyer loses the right to rely on a lack of conformity of the goods, if he does not give notice to the seller specifying the nature of the lack of conformity within a reasonable time, after he has discovered it or ought to have discovered it (see Art. 39(1) CISG). In consideration of the result of the evidence taken, the Court is of the opinion that the [buyer] adhered to the aforementioned duty to examine the goods. The [Buyer]'s sons [...] as well as witness [...] consistently declared that the [buyer]'s sons examined the sheep within a reasonable time after they had been notified of the arrival of the sheep at the farm of witness [...] and after they had given notice to the slaughter, to whom the main proportion of the sheep had already been resold. That main part of the quantity of the sheep was delivered to the farm of witness [...]; the smaller remainder of those sheep had been directly delivered to and unloaded at the abattoir of [...]. Notwithstanding, the Court recognizes the fact that the given statements by witness [...], the driver of the transportation truck for the sheep, contradicted the statements of the [buyer]'s sons with regard to the exact time at which all of the aforementioned happened. In this case, it may remain undecided which might be the truth in respect of the exact time, because an examination of the sheep would have been timely and absolutely compliant on the day after the arrival of the sheep, even if such an examination took place in the following night as declared by the witnesses.

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[Buyer's lack of compliance with its notice requirements under Article 39(1) CISG:]

However, the [buyer] was not in the position to prove that he (i) notified the [seller] of lack of conformity within a reasonable period of time, in compliance with Art. 39(1) CISG and (ii) specified the nature of the breach of contract and lack of conformity, as required.

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The [buyer] might not be obliged to act in compliance with Art. 39(1) CISG, if the delivered goods were so fundamentally and obviously different from the goods ordered in the first place, so that the delivered goods had nothing in common with those ordered. [See translator note on *aliud vs. peius*]. Hence such a delivery might obviously not appear as performance under a sales contract. In this case, however, the Court cannot take the view, that the delivery could never appear as the performance under the sales contract between the parties according to the common statements to be recognized by the Court during its hearings. The [buyer] ordered sheep; the [seller] delivered sheep. The only dispute between the parties is, whether those sheep were in compliance with the weight as assumed by the [buyer] and the physical condition as presumed by the [buyer]. In the light of this, the Court concludes that this is merely a question of quality of the delivered livestock, not a question whether it was such a delivery of sheep, being so different to the ordered quality, kind and quantity of the goods, that (i) a reasonable merchant would not even dare or try to offer those goods; and (ii) under any circumstances (even if not by the way of the [buyer] approval), a buyer cannot be expected to keep those delivered goods as performance under a sales contract. In the light of

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the [buyer] statements given during the Court hearings, the delivered sheep do not appear as an *aliud*, being incapable of a buyer approval.

[Definition of «reasonable time» under Article 39(1) CISG:]

In order to estimate the adherence to the duty of giving notice within a reasonable period of time pursuant to Art. 39(1) CISG, one must consider the specific circumstances of the specific case. In the first place, it is important whether the goods are perishable or durable. The former often require a notification within a few hours or at latest within a few days (see Schlechtriem (ed.), *Kommentar zum einheitlichen UN-Kaufrecht* [Commentary on the CISG], 1990, note 39 to Art. 39 providing further literature references). In the case of sheep which did not need to be fattened up but were to be butchered within three days, one is in the position to put those specific kinds of sheep into the category of perishable rather than durable goods. One is even more in the position to take this view due to the facts mentioned by the [buyer]. The [Buyer] alleges not merely a lack of conformity regarding the weight of the delivered sheep, but a truly bad physical condition of the sheep due to their transportation. Partly, some of those sheep might already be dead when the [seller] delivered them and there might be the threat that further sheep should die immediately after the delivery took place. Further, the [buyer] mentioned that he had already resold several of those sheep for their immediate utilization by butchering them. In particular, the [buyer] himself made use of the afore-mentioned sheep by butchering them, which ensues from the hearing of witness [...]. The [buyer]’s sons were not even able to indicate how many sheep they could really examine. Under these circumstances, a period of two to three days only would appear as reasonable to give notice and to query the lack of conformity under the afore-mentioned relevant provisions of the CISG.

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In the light of the result of the Court hearing and the evidence taken, the Court cannot conclude that the [buyer] gave the [seller] notice of the ostensible lack of conformity and defects of the delivered goods within the aforementioned reasonable period of two to three days. Witness [...] declared that he might have examined the delivered sheep together with his brother on 19 January 1999, the day of their arrival at Northern Jylland, and might have concurrently tried to reach the [seller] via telephone, in order to query the quality of the delivered sheep; however, he could not reach the [seller] on that day, but in the evening of the day after. Witness [...] confirmed this statement, whereby he could only give primary evidence on the examination of the sheep on the day of their delivery, and further on the fact, that one tried to reach the [seller] via telephone at the same day. For the rest, however, he was only in the position to give secondary evidence, i.e., state facts that he learned and heard from his brother afterwards. Henceforth, only witness [...] could give primary and concrete evidence due to his own knowledge about the material fact -- when the [seller] was exactly reached and informed about the lack of conformity via telephone.

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The indications and statements of witness [...] are not satisfying to convince the Court, that the [buyer] notified the [seller] of any defects in quality of the delivered sheep via telephone in the evening of the day following their arrival at the place of destination. Those stipulations are too vague in respect of the given details to enable one to be in the position to draw a clear picture of the facts.

Furthermore, those indications are not in compliance with certain already stated facts and statements of other witnesses. On the one hand, it is worth noting that neither the [buyer] nor any of his sons took the opportunity to simply send to the [seller] a fax, although they had done this before under other circumstances, viz on 4 February 1999, for instance. Insofar as witness [...] argued that one did send to the [seller] a fax within a short period after the arrival of the sheep, this statement has not been proven, or at least underpinned by any other fact or given statement. Even the [buyer] does not assert that he had sent to the [seller] such a notice via fax. On the other hand, witness [...] particularly stipulated and made it definitely and repeatedly clear, that he did not have a distinct view of the happenings regarding the factual and timely matters at those days in detail, but only reconstructed those days during the court hearing. Thereby, witness [...] oriented his statements on the dates as set forth in the questions of the Court, upon which he should give evidence. Hence, according to his given evidence, the day of the delivery of the sheep had to have taken place on Thursday, 19 January 1999, and both the [seller] and he might have examined those sheep for the first time in Lindum on Sunday, 24 January 1999. Thus, he might have reached the [seller] for the first time on Friday, 20 January 1999. In fact, the delivery date, i.e., 19 January 1999, was a Tuesday rather than a Thursday. Further, witness [...] was not in the position to demonstrate why he could remember in detail that he might have been in Lindum together with the [seller] on 24 January 2001. Witness [...] could not give any reason for this visit to Lindum together with the [seller] at all, because he did not participate in any examination of the sheep, carried out by the [seller]. The witness [...] stipulated absolutely distinct dates: In the light of his strong remembrance, the livestock should have been delivered on 27 January 1999 and even on the following day German should have examined the sheep together with the [buyer] sons. This statement is in contrast to the dates as set forth in the freight and transportation documents regarding the date of delivery. Furthermore, this statement does not concur with the statements of the [buyer] and witness [...] in respect of the time difference between the date of examination of the sheep and their actual delivery.

In consideration of the statements mentioned above, it is only possible for the Court to follow the [seller] statement, given at his hearing on 16 November 2000 with regard to the exact date of the necessary notification, when the [buyer] gave him a call concerning the delivery of the sheep. Hence, he spoke for the first time on the telephone with the [buyer] on 23 January 1999, i.e., a Saturday, and thus on the fourth day after the delivery of the sheep, after the [buyer] requested a recall by the [seller] at the same day.

Due to the fact that the lapse of four days does not meet the prerequisites for a reasonable time pursuant to Art. 39 CISG, the Court cannot additionally state that the [buyer] met his obligation to specify the lack of conformity with provisions as set out in the sales contract merely by having had that sole telephone conversation. Hence, such a specification is also a precondition for a valid and binding notice of any lack of conformity of the goods under Art. 39 CISG. Thus, the [seller] solely declared that the [buyer] gave him notice that the [buyer] does not agree with the delivered livestock. But, one cannot conclude from the contents of such a notice from the [buyer], that the [seller] was concurrently in the position to have a concrete and specific view about the nature and kind of the lack of conformity of the delivered goods. In particular, the [seller] was not in the position to take any measures to mitigate or

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remove any lack of conformity by, for instance, substituting the delivered sheep, or by a second delivery of new sheep, or by seeking remedies vis- vis his purveyor.

[Sufficiently specific notice provided 12 days after delivery not within reasonable time:]

The [buyer] gave notice to the [seller] only with regard to the specific details of the queried lack of conformity and defects of the sheep at their common examination. However, the specific date of this common examination is still in dispute amongst the parties and the Court hearing could not prove any specific date as well. By virtue of the afore-mentioned inconsistencies in their statements regarding the indication of the exact date of delivery, the [buyer] witnesses were not able to give evidence on the facts with which the Court might have confidence. In the light of the [seller] statements, a common examination took place at the beginning of February, thus definitely not at the day of the first given notice via telephone, i.e., a Sunday. This statement concurs with the [buyer] argumentation and the statement given by witness [...], since they also do not assert in any respect that the [seller] came to Lindum at the same day, when they finally reached the [seller] via telephone, but on a Sunday. This would have been then on 31 January 1999, i.e., twelve days after delivery of the sheep. Under the circumstances of this case, such a long period appears in any event as too long, thus unreasonable, so that the necessary specification of the claimed and queried non-conformity of the delivered goods was too late.

[Article 40 CISG does not apply:]

The [buyer] is not in a position to claim the application of Art. 40 CISG, whereby a seller is not entitled to rely on the provisions of Arts. 38 and 39 CISG if the lack of conformity relates to facts of which he knew or could not have been unaware and which he did not disclose to the buyer. The onus of proof with regard to such awareness and knowledge is borne by the buyer, the Defendant in this case. Initially, one could take the view that the onus of proof has been ostensibly undertaken by the [seller] through his given statement, that the parties agreed to the delivery of sheep that should be fattened up rather than butchered immediately, although the greater portion of those sheep should be delivered directly to an abattoir. However, in the light of a thorough weighing of the circumstances of this case and the residue of the Court hearing, the [buyer] is still obliged to bring forward full evidence for such a breach of contract committed by the [seller]. Hence, according to the freight and transportation documents, a further proportion of the livestock, namely 100 sheep, had to be delivered for the purpose of being fattened up. Witness [...] stated further that one had stipulated vis- vis him to be aware of a large quantity of sheep, which he should keep in custody on his farm, even if this happened in February. Though witness [...] declared that he ordered in the name and on behalf of his father, i.e., the [buyer], 400 sheep via telephone. During this telephone conversation, one spoke about the breed to which the sheep should belong, and about their weight. Thereby, one agreed to the fact that all of these sheep would be quite small with an average living weight of 40 to 50 kilograms. However, he further declared that he could not remember any further details. Though it is worth noting that witness [...] could not demonstrate and clarify why the [seller] had delivered at least 100 sheep intended to be fattened up, according to the freight documents.

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The Court can only conclude from those given facts and statements that the [seller] and witness [...] agreed via telephone to the delivery of small and thus light-weight sheep. Further, one portion of those sheep should be delivered directly to an abattoir but the other to the farm of witness [...]. The Court is, however, not in the position to state the fact whether or not the parties further agreed to a specification of the sheep as sheep intended to be fattened up or intended to be butchered immediately. The Court is particularly impeded in its ability to take another point of view regarding the relative light-weight sheep, because the [seller] classified the sheep unilaterally as sheep intended to be fattened up by virtue of the stipulation of their prospective weight. Notwithstanding, it is undisputed that the [seller] delivered a similar class of sheep, originated and born in the Netherlands, to the [buyer] in December 1998, whereby the [buyer] totally agreed with their quality. According to the argumentation brought before the Court by the [seller] and not denied by the [buyer], the Court is to assume that this latter order for the delivery of sheep in question should comprise livestock of a similar origin and quality as the former one in December 1998. The [seller] ordered again the new batch of sheep in the Netherlands, as he had done in December 1998. Similarly, the [seller] did not examine or even watch the sheep prior to their unloading. In the light of these circumstances, the Court cannot state that the [seller] knew or ought to have known the queried lack of conformity.

[Loss of buyer's claim for lack of conformity of the goods:]

In conclusion, the [buyer] has lost his right to rely on a lack of conformity of the goods, since he did not notify the [seller] about such a lack of conformity in detail with sufficient specificity and within a reasonable time pursuant to Art. 39 CISG. Therefore, the [buyer] is directed to pay the entire purchase price.

[Seller's claim for interest:]

The [seller] is entitled to claim for payment of interest pursuant to §§ 284 et seq. BGB. The [seller] demonstrated coherently and undisputedly that the parties agreed to the obligation of the [buyer] to pay the purchase price within eight days after the actual delivery of the goods. Furthermore, the [seller] stated coherently the level of such damage regarding interest, which the [seller] had to pay for by arranging credit with his bank, and the [buyer] has not denied that statement.

[Decision regarding costs and further ancillary decisions:]

The decision of the Court regarding the costs of this court proceeding is based on § 91 ZPO. The decision upon the preliminary enforcement of this judgment is based on § 709 ZPO.