

Case 425: CISG 4(a), 9, 39(1)

Austria: Oberster Gerichtshof 10 Ob 344/99g

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http://www.cisg.at/10_34499g.htm (German language text)

Abstract prepared by Sonja Niederberger

The German plaintiff (seller) sold wood to the Austrian defendant (buyer). The seller contended that the “Tegernseer Gebräuche” (regional trade usages) were applicable to the sales contract.

The court of first instance found that the “Tegernseer Gebräuche” are terms of contract commonly used for sales contracts on wood between German and Austrian parties and were thus applicable according to article 9(2) CISG.

Both the Court of Appeal and the Supreme Court confirmed this decision. The Supreme Court found that article 9 CISG is a provision on the applicability of a usage but not on its validity. While article 9(2) assumes that the parties wish to be bound by usages of international trade, under article 9(1) the usages the parties have agreed upon expressly or impliedly need not be international usages. In the sense of article 9(2) a usage is widely known and regularly observed when it is recognized by the majority of persons doing business in the same field. To be applicable such usages must be known or at least should have been known by the parties having their place of business in the area of the usages. The Supreme Court affirmed the findings of the court of first instance, noting that since the plaintiff in its acceptance of the order expressly stated the applicability of the “Tegernseer Gebräuche” and had delivered wood to the defendant before, the defendant must have known these usages.

The Supreme Court further stated that pursuant to article 39(1) CISG the goods are presumed to be accepted if the buyer does not give notice of a lack of conformity within a reasonable period of time, specifying the nature of the lack of conformity; this rule does not only apply in cases where the goods are deficient but also where the seller delivers goods other than those ordered by the buyer.