CISG-online 641	
Jurisdiction	Austria
Tribunal	Oberster Gerichtshof (Austrian Supreme Court)
Date of the decision	21 March 2000
Case no./docket no.	10 Ob 344/99g
Case name	*German timber case*

Translation[*] *by Veit Konrad*[**]

Translation edited by Jan Henning Berg[***]

[...]

Judgment (*Beschluss*)

Respondent [Buyer]'s extraordinary appeal to the Supreme Court *(außerordentliche Revision)* does not meet the requirements of § 502(1) of the Austrian Code of Civil Procedure (*Zivilprozeßordnung*; ZPO) and thus, pursuant to § 508(2) of the Austrian Code of Civil Procedure, has to be dismissed.

Reasons:

Under § 502(1) of the Austrian Code of Civil Procedure, an appeal to the Supreme Court is admissible only if the case depends on a point of law which is of vital importance in terms of the unity, certainty or development of jurisprudence. For instance, an appeal to the Supreme Court is to be admitted in case a decision of the Court of First Appeal diverged from the Supreme Court's established jurisprudence on a certain matter, or in case such a jurisprudence had not yet clearly been established by the Supreme Court. 1

Although an extraordinary appeal can be dismissed without any reasons to being provided (§ 510(3), sentence 3 of the Austrian Code of Civil Procedure), the grounds for appeal presented will be briefly addressed as follows: 2

[Buyer] brings its extraordinary appeal arguing that its case depends on several substantial legal questions, amongst others questions concerning Arts. 39, 40, 49, 50 CISG, on which the 3

[*] All translations should be verified by cross-checking against the original text. For purposes of this translation, Claimant of Germany is referred to as [Seller] and Respondent of Austria is referred to as [Buyer].

[**] Veit Konrad studied law at Humboldt University (Berlin). During 2001–2002, he spent a year at Queen Mary College, University of London, as an Erasmus student.

[***] Jan Henning Berg studied law at the University of Osnabrück (Germany) and participated in the 13th Willem C. Vis Moot with the Osnabrück team. He has coached the team of the University of Osnabrück for the 14th Willem C. Vis and the 4th Willem Vis (East) Moot.

Supreme Court has not yet established a clear jurisprudence. However, [Buyer]'s submissions cannot be sustained:

[Factual background of the case:]

Claimant [Seller], seated in Germany, sold wood to Defendant [Buyer] whose domicile was in Austria. Both parties' places of business were thus in Contracting States to the CISG. According to Art. 1(1) CISG, the case is governed by the Convention. 4

[Austrian usages in the wood trade as usages under Art. 9 CISG:] 5

In a former judgment (Austrian Supreme Court, Judgment of 15 December 1998 – 2 Ob 191/98x; see also the favorable comment by Karollus in *Juristische Blätter* (1999), 318), the Supreme Court stated that Austrian usages in wood trade, which fall among commercial customs under § 346 of the Austrian Commercial Code (*Handelsgesetzbuch*; HGB), do not only apply if expressly or impliedly introduced by the parties into their trade contract. To the extent that they are being referred to by legal provisions, trade usages will be adopted as part of these legal provisions themselves. Thus, being a part of the governing law, they must be applied irrespective of whether agreed upon by the parties or not – even in case they have been totally unknown to the parties.

According to Art. 4(a), the Convention, unless expressly provided otherwise, does not govern the validity of usages. The question of validity must be assessed under national law. In Art. 9 CISG, the Convention only governs the applicability of valid usages. 6

Art. 9(1) CISG states that the parties to a contract are bound by any usage to which they have agreed and by any practices which they have established between themselves. According to Art. 9(2) CISG, the parties are considered, unless otherwise agreed, to have impliedly made applicable to their contract or its formation a usage of which they knew or ought to have known and which in international trade is widely known to, and regularly observed by, parties to contracts of the type involved in the particular trade concerned. Yet, usages which are expressly or impliedly agreed upon by the parties (Art. 9(1) CISG) do not need to be widely applied in international trade. 7

Art. 9(2) CISG generally assumes in terms of law that parties wish to be bound by usages of international trade, if they had or ought to have had knowledge of them. International trade usages are widely known and regularly observed in the sense Art. 9(2) CISG demands, when these are recognized by the majority of persons doing business in the same field. Additionally, in order to be applicable these usages must be known or ought to be known to parties which either have their place of business within the area of these usages, or which continuously do business in this area for a considerable period of time. 8

Thus adopted, agreed usages, established practices and – widely known and regularly observed – usages prevail over any deviating CISG provisions. 9

The question whether Austrian wood trade usages constitute commercial customs acknowledged by Austrian commercial law is a question of fact rather than of law, and therefore is not 10

to be decided within appellate proceedings before the Supreme Court. The same applies to the question whether these trade usages could be considered to be widely known and regularly observed in international trade under Art. 9(2) CISG (see Austrian Supreme Court, Judgment of 15 December 1998 – 2 Ob 191/98x with further references).

The Court of First Instance followed [Seller]'s submission, which has not been disputed by [Buyer], that the «Tegernseer Gebräuche» are commercial customs for sales contracts on wood and fall under Art. 9(2) CISG. They were widely known and regularly observed in wood trade contracts between German and Austrian parties. As the parties had entered into business relations before and as [Seller] in his confirmation of [Buyer]'s order expressly assumed these usages to be applicable, the Court of First Instance's contention that [Buyer] ought to have known these usages does not result from a gross misinterpretation of the law. 11

As acknowledged customs, the «Tegernseer Gebräuche» take priority over other CISG provisions. The Court of First Appeal correctly found that § 12 of the «Tegernseer Gebräuche» obliges the buyer to take the delivery and to give a written notice to the seller clearly specifying the lack of conformity of the delivered wood within fourteen days after he was or would have been able to examine the goods. Also, a gross misinterpretation of the law cannot be found in the Court's further assumption that [Buyer] had lost its right to rely on the lack of conformity, because [Buyer]'s notification to [Seller] – only vaguely referring to «a lack of conformity with the agreed standards» – had not been clear and specific enough to become relevant. Consequently, the delivered goods must be presumed to have been accepted by [Buyer]. 12

[Arts. 39, 40 CISG not relevant upon extraordinary appeal to the Supreme Court:] 13

Under Art. 39(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 also Austrian Supreme Court, Judgment of 15 December 1998 – 2 Ob 191/98x). The burden of proof as concerns this duty to specific notification within a reasonable time is upon the buyer (see Austrian Supreme Court, Judgment of 27 August 1999 – 1 Ob 223/99x, *Österreichisches Recht der Wirtschaft* (2000), 20). It is not a relevant question of law whether a seller may have waived his rights to object under the principle of good faith by responding to a delayed and unspecified notice of lack of conformity (see Magnus in Honsell (ed.), *Kommentar zum UN-Kaufrecht*, Art. 39 para. 35). This has to be decided taking account of the specific circumstances of the case and thus cannot be an issue in appellate proceedings before the Supreme Court.

Consequently, it is not necessary to elaborate on the extensive legal submissions in terms of the CISG as made by [Buyer]. In particular, an interpretation of Art. 40 CISG is of no relevance, which would only apply in the context of Art. 38, 39 CISG. The Court of Appeal correctly held [Buyer]'s further submission that [Seller] did not deliver deficient goods, but rather delivered goods of a different kind than those ordered *(aliud)* to be irrelevant because the duty of notification stated in Art. 39 CISG equally applied to both cases (see Karollus, *UN-Kaufrecht* [Textbook on the CISG], p. 105; Wilhelm, *UN-Kaufrecht* [Textbook on the CISG], pp. 17, 21). Equally, 14

[Buyer] cannot rely on the right to declare the contract avoided (Art. 49 CISG) nor on the right to reduce the purchase price (Art. 50) as both provisions would require that [Buyer] had given specified notice of the lack of conformity within reasonable time (Schnyder/Straub in Honsell (ed.), *ibid.*, Art. 49 para. 32; Posch in Schwimann (ed.), *ABGB* [Commentary on the Austrian Civil Code], 2nd ed., vol. 5, 1997, Art. 50 para. 3).

[Extraordinary appeal found to be inadmissible:] 15

[Buyer]'s further submissions can either not be upheld or, as far as they are sustainable, they do not concern important questions of law in the sense of § 502(2) of the Austrian Code of Civil Procedure requires. Therefore, the appeal is not admissible.