

CISG-online 710	
Jurisdiction	Germany
Tribunal	Oberlandesgericht Schleswig (Court of Appeal Schleswig)
Date of the decision	22 August 2002
Case no./docket no.	11 U 40/01
Case name	<i>Live sheep case</i>

Translation by Stefan Kuhm***

*Translation edited by Institut für ausländisches und Internationales
Privat- und Wirtschaftsrecht der Universität Heidelberg
Daniel Nagel, editor****

Previous instance: District Court (Landgericht) Flensburg, 19 January 2001, 4 O 369/99, IHR (2001) 67]

JUDGMENT

1. The decision of the judge of the 4th Civil Chamber is amended in respect to the rate of interest (rate reduced to 5% since 28 January 1999) . The further appeal of the Defendant [Buyer] is dismissed.

2. The [Buyer] has to bear the costs of the first instance proceedings;

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

BGB = Bürgerliches Gesetzbuch [German Civil Code]; OLG = Oberlandesgericht [Appellate Court]; v. Caemmerer/Schlechtriem = Kommentar zum einheitlichen UN-Kaufrecht, München 1990 [German Commentary on the CISG, Munich 1990]; GKG = Gerichtskostengesetz [German Code on Fees for Court Proceedings]; HGB = Handelsgesetzbuch (German Commercial Code); NJW-RR = Neue Juristische Wochenschrift - Rechtsprechungs-Report [Law Journal: Report on important and recent decisions by German courts]; RIW = Recht der Internationalen Wirtschaft [Law Journal on the Law of International Commerce]; ZPO = Zivilprozessordnung [German Civil Procedure Act].

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3. The costs of the appellate proceedings are to be borne by the [Buyer] (80%) and the [Seller] (20%);
4. The judgment is provisionally enforceable.
5. Dispute value: EUR 7,669.38.

REASONING FOR THE APPELLATE COURT DECISION

The [Buyer]'s appeal is not successful, except with regard to a part of the claim for interest.

1.

[Summary of the undisputed facts]

At the beginning of 1999, the [Buyer], represented by his son, ordered via telephone 400 sheep at a price of Deutsche Mark [DM] 75.-- each. The sheep were to be delivered to Denmark. On 19 January 1999, the [Buyer] received the sheep at the respective places of delivery. The [Seller] invoiced the [Buyer] for an amount of DM 30,000 on 19 January 1999. The purchase price is part of this appeal.

[Application of the CISG]

The CISG is applicable since the parties entered into a sales contract and the parties have their places of business in different Contracting States; the [Seller] has its seat in Germany whereas the [Buyer] has its seat in Denmark. According to Art. 53 CISG, the [Seller] can claim the agreed purchase price by virtue of the sales contract concerning the delivery of sheep.

2.

[Summary of the buyer's pleading and statement of disputed facts]

The [Buyer] accuses the [Seller] of misperformance of the sales contract. [Buyer]'s main accusation focuses on the delivery of sheep that are too gaunt. [Buyer] asserted in the first instance that the purchase price should be reduced to an amount of DM 15,000 due to an agreement with the [Seller]. Additionally, [Buyer] claimed for damages in an amount of DM 21,288.80 to cover [Buyer]'s expenditures to fatten the gaunt sheep.

[Outline of the relationship between buyer's claim for damages and reduction of purchase price]

In general, the [Buyer] would be entitled to have the purchase price reduced, if the goods had any defects or were generally non-conforming. Furthermore, the [Buyer] could also claim for damages under Art. 74 CISG. According to Art. 74 CISG, the party in breach of the sales contract, has to compensate his counter-party for any damages incurred including loss of profit. This kind of claim for damages competes with other legal remedies, particularly with the claim for a reduction of the purchase price. However, a creditor is not in the position to claim for damages any longer, if he successfully claimed for another legal remedy, so that he

has already achieved his aim to have the damages entirely or partly removed (v. Caemmerer/Schlechtriem [*], Art. 74, Note 5). Insofar, claims for reduction of price and damages overlap, because the fattening of the sheep after their delivery leads to a physical condition of the sheep, which could justify the entire purchase price. As a result, the concurrent granting of a claim for reduction of price and damages could lead to disadvantages for the [Seller]. Furthermore, it has to be noted, that the actual level of damages is in dispute between the parties. In compliance with the evidence given by witness A, [Seller] asserted that all additional costs and expenditures had been borne by the subsequent purchaser of the sheep to whom the [Buyer] resold the livestock.

[Denial of buyer's right to set-off with its claim for damages]

The [Buyer] accuses the District Court of not having considered its right to set-off its claim for damages against the [Seller]'s claim. Therefore, the [Buyer] alleges that the District Court committed a procedural error. The Appellate Court does not agree and cannot follow this accusation, since the District Court expressly objected that the [Buyer] had a warranty claim under substantive reasons. The aforementioned lack of a warranty claim applies to the reduction of the purchase price as well as to the claim for damages. Hence the District Court was not obliged to deal with the question whether the [Buyer] could rely on several different warranty claims and how those claims would correlate with each other.

3.

[Outcome of other alleged procedural irregularities]

The [Buyer] reprimanded the drafting of the minutes of the District Court's hearings in his appeal. In particular, [Buyer] criticizes that the minutes give evidence that witness A had confirmed his approval to his dictated witness statement, after he had had a thorough discussion about the contents of that dictate with his interpreter. However, the [Buyer] has not demonstrated that the witness statements were not dictated correctly. The [Buyer] should have done this because any procedural error is only significant, if it has affected the decision of the Court of First Instance in any respect. During the hearing of the Court, the [Buyer]'s legal representative expressly stated, that the [Buyer] did not want to assert that the minutes of the witness' statements had been incorrect or flawed in any respect. Therefore, the [Buyer]'s reprimand of procedural irregularities has been resolved on factual grounds.

4.

[Matters pertinent to the asserted defects of the goods]

The [buyer] objects to payment of the purchase price due to several alleged defects of the goods.

[Deterioration of physical condition of the sheep due to appalling transport conditions]

The [Buyer] first alleged that the sheep had been in very bad physical condition by virtue of appalling transport conditions at the time they arrived . However, pursuant to Art. 67(1) CISG,

however, a seller is not responsible for depreciation of the goods once the goods are handed over to the carrier for transmission to the buyer. The [Seller] would only be held liable for any defect of the goods concerning their delivery if, for example, he had instructed the carrier to transport 700 sheep in just one truck. In that case, the [Seller] would be responsible for any depreciation of the sheep, because he would be jointly responsible in respect to the overloading of the truck and thus caused bad physical condition of the sheep. According to the carrier's route plan, 700 sheep had been loaded onto the truck, so that it might have been overloaded. However, the freight documents only indicate, that 300 sheep plus another 100 sheep had actually been delivered. Those indications are in accord with the statements of witness B who was the driver of the truck transporting the sheep. According to this witness, he delivered only 400 sheep altogether. Frankly, there is no doubt whatsoever in respect to the correctness of his statement as witness B is no longer employed by his former employer. Accordingly, the [Buyer]'s plea, that the Appellate Court should order the [Seller] to present every document pertinent to the delivery of the additional 300 sheep, grasps at nothing since such documents cannot exist.

[Incorrect earmarks on the sheep]

The [Buyer] also brings forward, that the earmarks of the sheep were partly incorrect. However, the [Buyer] has not demonstrated what disadvantages might have been caused by that ostensible non-compliance of the goods. Therefore, the Court does not understand why there should have been a defect of the goods in this respect. One could only recognize such a defect if the [Buyer] would have at least demonstrated that, due to that kind of non-conformity, the sheep could not be slaughtered. However, even the official veterinarian has not concluded anything from the alleged non-conformity of the earmarks. At any rate, this defect has to be subsumed under Arts. 38, 39 CISG and thus leading to the loss of any (ostensible) right to reprimand such non-conformity, because the [Buyer] gave notice of that defect for the very first time during this legal action. [Thus, the notification has not been given «within a reasonable time».]

[Analysis of the main defect of the goods: delivery of sheep of the wrong race and quality]

The [Buyer] asserts -- as a main defect -- to have bought sheep, mature to be slaughtered immediately and that the [Seller], conversely, delivered sheep, that had to be fattened before slaughter could take place. Before the Court has to consider whether the [Buyer] violated his duty to notify a defect and non-conformity of the goods and thus lost his right to do so pursuant to Arts. 38, 39 CISG, the Court first has to consider whether or not the [Seller] delivered goods which were defective and non-conforming.

[Duty of a seller under a sales contract to deliver conforming goods]

According to Art. 35(1) CISG, a seller must deliver goods which are of the quantity, quality and description required by the sales contract and which are contained or packaged in the manner required by the sales contract. According to the freight documents and health certificates presented, the [Seller] delivered 100 sheep that should be fattened and 300 sheep, mature to

be slaughtered immediately. Consequently, a non-conformity could only be present in respect to 100 sheep. If the [Seller] delivered stock-to-be-fattened, instead of sheep for slaughter, there was a discrepancy in quality of the livestock, since sheep, mature to be slaughtered immediately qualify as livestock of a higher quality and hence for a higher price. Any discrepancy in quality would, however, only appear as a breach of a sales contract, if the [Buyer] had (explicitly) ordered sheep for slaughter. The [Buyer] has to prove that it had notified the [Seller] about the intended purpose of the ordered livestock (see v. Caemmerer/Schlechtriem [*], Art. 35, Note 50).

[Court denial of the delivery of non-performing and defective livestock]

In fact, the [Buyer], however, could not give sufficient evidence to convince the Court that [Buyer] informed the [Seller] about its intention to have the sheep slaughtered immediately. Only witness C can give such evidence about the contents of the order for the delivery of the sheep, since T ordered the sheep via telephone. For this reason, there cannot exist any further means of evidence. Witness T alleges to have agreed with the [Seller], that the [Seller] should provide for the delivery of approximately 400 sheep, mature to be slaughtered immediately, to an abattoir in Gjerlev. Thereby, the parties allegedly talked about the weight of the sheep. But, the witness could not remember the exact figure of the weight. Furthermore, the witness was not able to state the race of the sheep. He stated that they had agreed on small sheep with live weight between 40 and 50 kg. However, the witness could not remember the price per sheep. This witness' statement is unspecified and thus does not necessarily lead to the conclusion that the parties involved in fact agreed on the delivery of sheep, mature to be slaughtered immediately. Such an agreement could have also meant that it would suffice if the sheep reached at least a live weight of 40 to 50 kg. Furthermore, T's witness statement cannot be brought into compliance with N's witness statement, whereupon about 360 sheep were unloaded. Even if witness N indicated 27 January 1999 as the date of the delivery of the livestock and, in fact, the delivery took place on 19 January 1999, N's statement clearly demonstrates, nonetheless, that the delivery had been previously notified but took place earlier than indicated. The delivery of the livestock should not take place before 1 February 1999. Since witness N had to fatten the sheep and had already been informed about this duty before the actual delivery of the sheep, it seems to be almost impossible that the [Buyer] ordered 400 sheep, mature to be slaughtered immediately.

5.

[Exclusion of any warranty claim]

The [warranty claim is excluded, because the [Buyer] did not act in accordance with its duty to examine the goods and to notify the [Seller] about any detected defects and/or non-conformity of the goods.

[Buyer's duty to examine the goods and to notify the seller about defects]

Under Art. 38(1) CISG, a buyer is obliged to examine the goods, or cause them to be examined, within as short a period as is practicable in the circumstances. According to Art. 39(1) CISG, a

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. This legal consequence, i.e., loss of the remedy for lack of conformity, does not occur if Art. 40 CISG applies, if the respective seller acted in bad faith [i.e., if the lack of conformity relates to facts of which a seller knew or could not have been unaware and which he did not disclose to the buyer].

[Specificity of buyer's notice of lack of conformity]

The Court of First Instance heard evidence on the issue of when the [Buyer] gave notice to the [Seller] about the bad physical condition of the sheep. If this notice of lack of conformity was not sufficient in the first place, any further taking of evidence would have been unnecessary. In consideration of T's witness statement, it could be concluded that the notice of lack of conformity of the livestock was sufficiently specific. According to his statement, witness T explained to the [Seller] in detail, the physical condition the sheep had been in and that he could not bear any responsibilities for the quality of the sheep under such circumstances. Due to the fact that the sheep were not in compliance with Danish regulations concerning the slaughter of livestock, he was not in the position to accept the delivered sheep. Therefore, the [Seller] should pick them up. Hence the [Seller], who is a livestock trader, could easily have noticed that the [Buyer] intended to reprimand the weight of the sheep.

[Timeliness of buyer's notice of lack of conformity]

Under the assumption, that the notice of lack of conformity was sufficiently specific to satisfy Art. 39 CISG, the remaining relevant issue is, whether this notice was timely [i.e., took place «within a reasonable time»]. With regards to durable livestock, that duty to notify the seller about any kind of non-conformity has usually to be fulfilled within a period of three to four days. Moreover, this period can be further shortened under specific circumstances of the particular case (OLG Düsseldorf in NJW-RR [*] 1993, p. 999, 1000; OLG Karlsruhe in RIW [*] 1998, p. 235, 236). In the case of a lack of conformity of the goods, the notice has to be given within a reasonable time. The [Seller] admitted during its own hearing, that a notice of lack of conformity was given on 23 January 1999. With regards to a delivery of livestock, this notice was given well beyond the acceptable time, because the status of the livestock has to be examined at the delivery date or on the following day at the latest. Physical conditions might change within a relative short period due to (i) insufficient provision for water and nutrition; or (ii) accommodation for the livestock. The [Buyer] could not give evidence of notification at an earlier stage based on T's witness statement, since T's statement was flawed by his assumption that the delivery had taken place on Thursday, 19 January 1999. However, 19 January 1999 was a Tuesday. As a result, all further indications, given by that witness, about any dates cannot be trusted by the Court.

[Loss of remedies pursuant to Art. 39(1) CISG]

Any right for the [Buyer] to claim for breach of contract concerning the 100 sheep that should be fattened has been forfeited according to Art. 39(1) CISG. In the present case, the

exemption under Art. 40 CISG is not applicable, since this provision would require that the parties had agreed on the delivery of sheep, mature to be slaughtered immediately and that the [Seller] had positive knowledge of this fact. In the light of the remaining caveats concerning the details of the agreement between the [Seller] and witness T [representing the buyer], the Court cannot hold to such a view.

6.

[Interest computation]

The [buyer] further pursues with its appeal a challenge of the actual level of the claim for default interest accrued. The Court of First Instance applied § 284 et seq. BGB [*] to [Seller]'s claim for interest payment and granted the entire claim. The [Seller] is of the opinion that this claim for interest payment is justified under relevant Danish law. The [Seller]'s claim for interest payment stems from Art. 78 CISG. According to that provision, the defaulting party has to pay interest, provided that payment of the purchase price or any other amount due and payable has been in default. However, the actual level of the interest rate is not stated in this provision. Hence, national law can be applied complementarily. In the case of international sales contracts, it is assumed pursuant to Art. 28 Par. 2 EGBGB [*], that the national law of the seat of the [Seller] shall be applicable with regards to the payment of the purchase price (v. Caemmerer/Schlechtriem [*], Art. 78, Note 27). Since the [Seller] has not given conclusive evidence that it had to borrow money at least at an amount equivalent to the purchase price and that it is able to redeem such credit at any time, [Seller] is not entitled to claim for a higher interest rate than the statutory interest rate. Consequently, the interest rate as claimed for is limited to 5 % [p.a.] pursuant to § 352 HGB [*].

7.

[Ancillary Decisions]

The ancillary decisions taken by the Court follow from §§ 92(1) and 708 No. 10, 713 ZPO [*] in conjunction with § 25(2) GKG [*]. As far as this second instance is concerned, the claim for a higher interest payment than granted by this Court was not trivial; thus the costs for the legal proceedings should be divided pro rata between the [Seller] and the [Buyer] (see BGH in NJW 1988, p. 2173, 2175).