

Case 536: CISG 9 (2); 35 (2); 38; 39; 40

Austria: Oberster Gerichtshof

2Ob 48/02a

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The buyer, after testing a sample, ordered several containers of frozen fish for resale to a customer in Latvia. Upon arrival of the first container in Riga the buyer and its customer realized that the fish was from the previous year's catch. The fish was not admitted for human consumption in Latvia and sent back; consequently, the buyer refused to pay the price for the first shipment and to receive the additional shipments agreed in the contract. The seller filed an action for the payment of the price.

The first instance judge found that the plaintiff's managing director was aware of the existence of an international trade usage widely known to and regularly observed by fish merchants, according to which, lacking any specification to the contrary in the contract, the fish should be from the same year's catch. The fact that a sample belonging to the previous year's catch had been offered, but that this detail had not been disclosed to the buyer, precluded the plaintiff from relying on the provision of article 35 (2) (c) CISG on the conformity of the sold goods to the sample. Moreover, under article 40 CISG the seller had lost the right to object to the timeliness of the notice of non-conformity, since he was aware of the actual fish catch season.

The Court of Appeal reversed the decision, finding the existence of the trade usage not sufficiently proven and the evaluation of the evidence regarding the seller's awareness of the year's catch not persuasive. The Supreme Court held that the Court of Appeal had dismissed the existence of the trade usage without sufficient investigation and remanded the case for additional fact-findings.