

**Case 477: CISG 9(2); 38; 39; 40**

Austria: Oberster Gerichtshof 2 Ob 48/02a

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The seller offered the buyer frozen fish. The buyer requested a sample and after testing ordered several cases of the fish for a customer in Latvia. Upon the arrival of the first container in Riga the buyer and its customer found out that the fish was from the previous year's catch, a fact that was known to the seller. The fish was not allowed to be imported into Latvia for human consumption as it was older than six months, and was therefore sent back to the buyer by its customer. The seller sought payment of the price.

The Supreme Court directed the Court of Appeal to make a determination whether an international usage existed that frozen fish are to be presumed to be from the current year's catch unless otherwise specified. The Supreme Court noted that if such a usage existed, and would be applicable pursuant to article 9(2) CISG, the goods would have been non-conforming and consequently the seller, under article 40 CISG, being aware of the non-conformity, could not rely on the failure of the buyer to give notice of non-conformity as required by articles 38 and 39 CISG.