CISG-online 794	
Jurisdiction	Austria
Tribunal	Oberster Gerichtshof (Austrian Supreme Court)
Date of the decision	27 February 2003
Case no./docket no.	2 Ob 48/02a
Case name	*Frozen fish case I*

Translation[*] *by Birgit Kurtz*[**]

In a closed hearing, the Supreme Court of Austria, sitting as an Appellate Court, through Court Counsellor Dr. Schinko as the Chairperson, as well as Court Counsellors Dr. Tittel, Dr. Baumann, Hon. Prof. Dr. Danzl and Dr. Schaumüller as further judges, rendered the following decision in the matter of Plaintiff [seller] H.J. de B[...] B.V., [...], represented by Dr. Gregor Schett, attorney in Vienna, against Defendant [buyer] Alexander L[...] GmbH, [...], represented by Dr. Peter Kisler and Dr. Karl Pistotnik, attorneys in Vienna, for US $226,895.18 and Netherlands Guilders [NLG] 94,128.04, each (plus attorneys' fees, costs and interest) (amount in dispute EUR 217,103.65), on the [buyer]'s appeal from the decision by the *Oberlandesgericht* [Court of Appeal] Vienna of 23 October 2001, GZ 2 R 50/01i-24, in which, upon the [seller]'s appeal, the 30 November 2000 judgment of the *Handelsgericht* [Commercial Court] Vienna, GZ 25 Cg 135/99i-19, was modified: 1

Holding

1. The appeal is denied, to the extent it asserts that the decision below is void. 2

2. As for the rest, the appeal is granted.

The decision of the Court of Appeal is vacated and remanded for a new decision after possibly another hearing.

The costs of this appeal are to be added to the total cost of the proceedings.

[*] All translations should be verified by cross-checking against the original text. For purposes of this translation, the Plaintiff of Netherlands is referred to as [seller]; the Defendant of Germany is referred to as [buyer]. Amounts in U.S. currency (*dollars*) are indicated as [*US$*]; amounts in Dutch currency [*Netherlands Guilders*] are indicated as [*NLG*]; amounts in European currency are indicated as [*EUR*].

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Grounds for the Decision

The [seller] seeks payment of US$ 226,895.18 (plus attorneys' fees, costs and interest) and NLG 94,127.04 (plus attorneys' fees, costs and interest) from the [buyer]. The [seller] alleges that, in June of 1997, the [buyer] bought 24 tons of plaice as a sample, which was delivered, received and paid for. It claims that, in August of 1997, the [buyer] purchased another 198 tons of this plaice, «same as last,» but thereafter refused to accept or pay for these goods. The [seller] claims that, through the partial use of this plaice, the [seller] earned $ 20,745. It alleges that the storage and insurance for the rejected goods cost the [seller] NLG 94,127.04, NLG 67,574.43 of which it demanded from the [buyer] in invoice no. 2131E. In the beginning of July 1997, the [seller] claimed, it delivered a load of hake filet to the [buyer] and charged the purchase price of US$ 29,593.20 in invoice no. 8189E. The [seller] claimed that the [buyer] paid only a part of the sum, which is why US$ 22,274.20 are still outstanding. (The exact amount of the claim is broken down in the Court of Appeal's decision.) 3

The [seller] claimed that the FDA Health Certificate was issued for shipment to Europe and confirmed that the fishery products had been produced, processed, stored, transported and frozen according to the applicable standards of the EU guidelines, but did not give an indication of the catch date, which was known to the [buyer]. The [seller] claimed that it had not been agreed that the goods would first be inspected in Riga.

The [buyer] moved for a dismissal of the complaint against it. The [buyer] claimed that, in its offer of 10 June 1997, the [seller] did not refer to the fact that «old goods» (from the April 1996 catch) were at issue, which is why, according to commercial custom within the international fish business, one could assume that the fish came from the most recent catch-quota. The [buyer] claimed that that assumption was underscored by a health certificate issued in Seattle on 6 June 1997, because, according to international custom, the «original» veterinary attestation is issued on the date on which the goods are unloaded or transferred from the fishing boat at the fishery's harbor. The [buyer] claimed that, in an effort to inspect the goods, it demanded that the [seller] make samples available, in response to which the [seller] shipped two 12 kg transport pouches to Vienna. The [buyer] claimed that the samples were not, however, taken from the shipment that the [seller] tried to have delivered. It claimed that it ordered and also paid for a container of goods conforming to the samples. It claimed that the parties agreed that the goods would be first inspected by its customer in Riga. The [buyer] claimed that, there, it came to light that the shipment consisted of old, small fish that did not conform to the sample. The [buyer] claimed that that was why it did not realize an order for an additional 200 metric tons that had been envisioned by the parties. The [buyer] claimed that it offset the US$ 28,272 claim that arose from the return of the shipment with claims of the [seller] arising out of the delivery of Peruvian hake filets. The [buyer] claimed that the [seller] informed the [buyer] on 4 December 1997, that it had the opportunity to sell 200 tons of the goods to China for the price of US$ 750, and that since it had not taken that opportunity, it had failed to mitigate its damages. 4

[Findings of the Trial Court:]

The Trial Court rejected the [seller]'s claim. Its findings are summarized as follows: **5**

The [seller] had ordered a large amount of frozen yellow-fin plaice from an American distributor in the Spring of 1997. The goods were originally intended for another customer. Since the goods could not be delivered on their original delivery date in May 1997, and the original customer had lost interest, the [seller]'s managing director offered the goods to the [buyer] in June of 1997. The [seller]'s managing director knew at all times that the fish did not stem from the current 1997 catch-quota, but rather had already been caught in 1996. It is customary in the international high sea fish trade that, in the purchase of frozen goods, the reference is always to fish stemming from the most recent catch, unless the contrary was agreed. In several former Eastern-Bloc countries, fish showing a production date of more than 6 months ago cannot be imported for human consumption. Also, fish stemming from the previous year's catch are more difficult to sell, or only with substantial discounts in price. **6**

The [seller] was informed on 10 June 1997, that the first three containers of fish were being transported by ship to Europe. The [seller] offered the [buyer], with which it had already established business relations, these three containers for purchase. An employee of the [buyer], who was responsible for the fish trade, thereupon made contact with a business partner in Riga, Latvia, who showed interest in making a deal. The employee of the [buyer], who was not familiar with the fish type yellow-fin plaice, obtained two pouches of frozen yellow-fin plaice, which did not, however, come from the deliveries at issue here and also failed to indicate a production date, and had them tasted. On 23 June 1997, the [seller] again offered to sell the three containers, each with 24 tons of fish, to the [buyer], and offered further that the containers could also be delivered to the Daalimpex storage facility in Holland, with which the [buyer] was working together. The [buyer]'s employee advised by facsimile that the [buyer] ordered one container. The container was initially to be delivered to the customer in Latvia. The [seller]'s managing director knew that the shipment was supposed to be delivered to the «Eastern Bloc,» although he did not know exactly which company. He never informed the [buyer]'s employee that the fish came from the 1996 catch-quota. After the arrival of the fish on 26 June 1997, one container was sent directly to the Daalimpex storage facility. The production date of April or May 1996 was clearly visibly printed on the pouches in which the fish was wrapped. The [buyer] failed to inspect the goods and also did not have samples sent to it because the container was supposed to be picked up immediately by the Latvian customer. Because of delays on the part of the Latvian customer, the goods did not arrive in Riga until the end of August 1997. The [buyer] had already paid the purchase price for the first container by the end of July 1997. **7**

Because the Latvian customer had told the [buyer]'s employee that it had a larger demand for this fish, the employee ordered three more containers (72 tons) on 7 August 1997, for the same price he had agreed to for the first container. Subsequently, the [buyer]'s employee ordered the rest of the shipment at issue in this action (71.34 tons, 33.111 tons), and, on 12 August 1997, finally a further 21.684 tons. **8**

The parties clearly discussed that the ordered amounts would consist of the same goods as those delivered in the first container. The follow-up orders of 7 and 11 August 1997 were also not made contingent on the Latvian customer's approval of the first container that was delivered and already paid for. 9

As the first container subsequently arrived in Riga, the [buyer] and its Latvian customer became aware for the first time of the fact that the fish was from April and May of 1996 and not from 1997. For this reason, the Latvian customs officials disallowed the importation of the goods for human consumption. The Latvian customer complained to the [buyer] regarding the age of the fish, sent the fish back to Holland immediately and ended its business relationship with the [buyer]. 10

The [buyer] informed the [seller] of the customer's complaints immediately and refused to accept the goods that had been ordered in August 1997, which were still in the storage facility. The [buyer] offset its claim for return of the purchase price for the container it was not able to sell in the end but had paid for, with an invoice of the [seller] from a contract for hake filets. 11

The Trial Court held that the CISG applied. The Court held that the delivery of fish that was no longer fresh constituted the delivery of defective goods, and the defect was fundamental in nature. With respect to the 198 tons of yellow-fin plaice, upon which the contested invoices were based, the [buyer] could not have failed to complain about the defect in a timely manner because the defect had been complained of even before acceptance. With respect to the 24 ton shipment, reference had to be made to Art. 40 CISG, which provides that the seller cannot rely on Arts. 38 and 39 CISG when the non-conformity with the contract is based on facts he knew – or could not have been unaware of – and did not disclose to the buyer. For this reason, the [buyer] was correct in offsetting its claim for repayment of the purchase price for the first container against the [seller]'s demand. It follows also that the failure to complain of a defect in the sample shipment does not allow the seller to assume that the defect has become a basis of the purchase contract for the main shipment. The [seller] cannot protect itself by arguing that the main shipment exhibited the same defects as the sample shipment. 12

[Ruling of the Court of Appeal:]

The Court of Appeal to which the [seller] turned granted [seller]'s appeal, ordered the [buyer] to pay $ 226,895.14 (plus attorney's fees, costs and interest) as well as NLG 94,127.04 (plus attorney's fees, costs and interest) and declared its decision appealable. 13

It explained that the interpretation of the evidence by the Trial Court regarding the disputed determination that the [seller]'s managing director knew at all times that the fish stemmed not from the 1997 catch-quota but from 1996, was not comprehensible. It was true that the managing director of the [seller] testified that he did not know the age of the yellow-fin plaice at the time of the purchase; but if the Trial Court assumed the opposite, it could do so best on the basis of an expert opinion that had to show that the price paid by the [seller] under the circumstances at the time indicated that old fish was bought, rather than fresh fish. 14

Similarly, the interpretation of the evidence by the Trial Court regarding the contested determination that the [buyer] did not inspect the sample, was also not convincing, although this fact was irrelevant. 15

In the end, the determination contested by the [seller] that it was customary in the international high sea fish trade in sales contracts for frozen goods, fish from the latest catch were always referred to, had to be discarded, just like the determination that fish that showed a production date of more than six months ago, could not be imported any more for human consumption in several countries of the former Eastern Bloc. While it was true that the [buyer] relied on such business customs with respect to the indication of the age of the goods in its answer to the complaint, [buyer] failed to offer any evidence on this point. Moreover, the determination that, also otherwise, fish that was from the preceding year's catch quota was more difficult to sell, or could only be sold at a substantial discount, had to be discarded because this question could only be answered by an expert. It could not be accepted when the Trial Court wanted to show business customs or expert questions through witness or party testimony. 16

It was true that, for the most part, the Trial Court's resolution of this evidentiary question – to the extent challenged – missed the mark, but a supplementation of the evidence by the Court of Appeal was out of the question where the Trial Court either failed to take any evidence or only appeared to take evidence, because the Court of Appeal «would act as a court of first instance, not as a court of review.» As the alleged lack of factual evidence was otherwise irrelevant, the Court was still able to decide the legal question, even if it proceeded from the incorrect set of facts. 17

According to Art. 35(1) CISG, the seller must deliver goods which are of the quantity, quality and description required by the contract and which are contained or packaged in the manner required by the contract. When the parties to an international sales contract have failed to contractually fix the requirement on the condition of the goods, the minimum standard set out in Art. 35(2) CISG becomes relevant: Whether a breach of the duty to deliver has occurred depends on whether the goods that are the object of the contract are fit for an ordinary or particular purpose, conform to a model or a sample, or are packaged in an adequate manner. Fitness for ordinary purposes is defined solely by the standards of the country of the seller. Fitness for ordinary purposes does not include that the goods meet the safety, labeling or composition regulations of the country of importation. The seller cannot be expected to know the special regulations of the country of purchase or final use. The seller cannot be expected to comply with the legal provisions in effect in the designated country of importation simply because the purchaser has informed the seller of that designation. It is up to the purchaser to worry about the special legal provisions of the country of use and to make them a part of the contract. Certain guidelines of the country of the purchaser only apply if they also apply in the country of the seller, when they are agreed upon, or when they have been brought to the seller's attention according to Art. 35(2)(b) CISG at the time the contract is entered into. 18

In the present case, the [seller] sent the [buyer] a container as a sample. The sample was purchased, paid for, and the main shipment was ordered. The [buyer] did not complain that the fish did not correspond to the sample. For the first time in the facsimile dated 27 August 19

1997, did the [buyer] complain that the samples had no production date on their boxes. This was irrelevant because the sample container was filled with pouches and not boxes. It must be assumed that the goods corresponded to the sample shipment. Because the sample shipment was not rejected, but paid for and therefore implicitly accepted, the quality of the sample shipment was agreed upon. It is irrelevant whether the sample shipment was checked or complained of because the [buyer] could have rejected the sample delivery at any time. A complaint after acceptance is logically impossible because, upon acceptance, the quality of the sample shipment is considered agreed upon. Art. 40 CISG is inapplicable here. A regular appeal to the Supreme Court is permissible, because the question of whether Art. 40 CISG applies to a purchase upon a sample is open.

[Parties' position upon appeal to the Supreme Court:]

The [buyer] attacks this decision based on the appeal-grounds of nullity, procedural defects, inconsistency with the record as well as the incorrect legal evaluation, and requests that the appealed decision be modified such that the [seller]'s claim be denied in its entirety. Alternatively, a motion to set aside the decision has been made. **20**

The [seller] has moved that the appeal to the Supreme Court be rejected as impermissible, or denied.

The appeal to the Supreme Court is permissible and justified within the meaning of the motion to set aside. **21**

Legal Reasoning [of the Supreme Court]

The claimed nullity reason of § 477(1) No. 9 ZPO does not, however, apply. This nullity reason exists only if (*inter alia*) the judgment is internally contradictory. This applies only to the holding; contradictions in the grounds do not suffice (compare Kodek in Rechberger (ed.), *ZPO [Commentary on the Austrian Code of Civil Procedure]*, 2nd ed., n. 12 on § 477 ZPO with further citations). The fact that the Court of Appeal, on the one hand, found that the evidentiary challenges were justified in large parts and, on the other hand, based on conclusions it determined to be false, explained its decision, is therefore not enough to fulfill the claimed nullity reason. Before the appeals grounds of procedural defect and inconsistency with the record can be addressed, the legal status must first be cleared up. **22**

It is uncontested in this action that the CISG applies. Only to the extent that certain questions are not regulated in the CISG, the provisions of the national law that is applicable according to conflict of laws rules apply (SZ 71/115; 2 Ob 100/00w = RdW 2000, 535 = ZfRV 2000, 231 = IPRax 2001, 149). **23**

According to Art. 35(1) CISG, the seller is required to deliver goods which are of the quantity, quality and description required by the contract and which are contained or packaged in the manner required by the contract. If the parties have not set out or not sufficiently detailed performance conditions in their contract in accordance with Art. 35(1) CISG, Art. 35(2) CISG applies, which provides a series of objective criteria for determining conformity with a **24**

contract. In such a case, special importance is ascribed to the purpose for which the goods are provided. Whether a violation of the delivery duty has occurred then depends on whether the goods that are the subject of the sale are fit for the ordinary or particular purpose, conform to a model or a sample or are packaged in the usual and adequate manner (Posch in Schwimann (ed.), *ABGB [Commentary on the Austrian Civil Code]*, 2nd ed., n. 7 on Art. 35 CISG). Fitness for ordinary purposes is generally defined by the standards in the country of the seller (2 Ob 100/00w).

Where, however, international business customs with respect to certain characteristics exist, these must be presented as a minimum of quality (Schwenzer in Schlechtriem (ed.), *Kommentar zum Einheitlichen UN-Kaufrecht [Commentary on the CISG]*, 3rd ed., n. 16 on Art. 35). **25**

It is true that the parties are bound by any usage to which they have agreed, and by the practices that they have established between themselves (Art. 9(1) CISG), but, according to Art. 9(2) CISG, it is assumed that, in their contract or when they entered into it, they impliedly referred to usages of which they knew or ought to have known, and which, in international trade, are widely known to, and regularly observed by, parties to contracts of the type at issue. **26**

According to Art. 38 CISG, the buyer must examine the goods or cause them to be examined within as short a period as is practicable in the circumstances. According to Art. 39 CISG, the buyer loses the right to rely on a lack of conformity with the contract if he does not give notice to the seller within a reasonable time after he has discovered it or ought to have discovered it, specifying in detail the nature of the lack of conformity with the contract. **27**

If the lack of conformity with the contract relates to facts of which the seller knew – or as to which the seller could not have been unaware – and which he did not disclose to the buyer (Art. 40 CISG), the seller is not entitled to rely upon the provisions of Arts. 38 and 39 CISG. **28**

According to the findings of the Trial Court, the [seller], which had previously had another buyer in mind, offered the goods to the [buyer] in June of 1997. An employee of the [buyer], who was not familiar with the kind of fish, obtained two pouches of frozen fish, which did not, however, stem from the shipment at issue, had them tasted and finally ordered a container (24 tons) of yellow-fin plaice on 23 June 1997. The employee was of the opinion that the fish he ordered came from the catch-quota of 1997. According to further findings of the Trial Court, the [seller]'s managing director knew at all times that the goods at issue came from the catch-quota of 1996, but he did not inform his contract partner of this fact. According to the above explanations, it follows then that, if indeed an international business custom existed, whereby one could assume that one was always dealing with fish from the current catch-quota, unless something contrary was agreed, then non-conformity with a contract must be assumed. If the [seller]'s managing director knew that the delivery at issue did not stem from the current catch-quota, then the [seller] could not, according to Art. 40 CISG, point to any belated complaint by the [buyer]. The [seller] can also not claim that the characteristics of the first shipment, which it hid from the [buyer], became part of the contract for the subsequent order. If the seller, knowing the international trade custom that fish must be from the current catch-quota, nonetheless delivers (old) fish as a sample without disclosing that fact, then the **29**

lack of conformity with the contract in this shipment (of the sample) is not a characteristic within the meaning of Art. 35(2)(c) CISG.

On the one hand, the Court of Appeal based its decision on the «false» findings of the Trial Court, and on the other hand, it explained that both the existence of a trade custom, according to which, in the international fish trade, only fresh fish that came from the current catch would be assumed, had not been established, because such a custom could only be established by expert testimony, and, on the other hand, it did not deem convincing the interpretation of the evidence by the Trial Court with respect to the determination that the [seller]'s managing director knew at all times that the delivery at issue did not come from the current catch-quota. The existence of a trade custom must be qualified as a question of fact and must already be pleaded at the Trial Court level (Kerschner in Jabornegg (ed.), *Kommentar zum HGB [Commentary on the Austrian Commercial Code]*, n. 69 on § 346 with further citations). All methods of proof of the ZPO may be used in the determination of this question of fact (Kerschner, *id*., n. 70). **30**

The [buyer] referred to the existence of such a trade custom already in the proceeding before the Trial Court. The Trial Court made such a determination. The Court of Appeal's procedure, on the one hand, to reject the interpretation of the evidence by the Trial Court and not to accept individual determinations without, however, stating which determinations are specifically rejected and, on the other hand, based upon the «incorrect» determinations, to hold an unacceptable legal view, represents a defect in the Court of Appeal's procedure. In order to conclusively evaluate the facts of the case, the Court of Appeal will have to directly address the evidentiary objections and possibly supplement the evidentiary proceeding and thereafter make concrete determinations regarding the existence of the claimed trade custom and the knowledge of the [seller]'s managing director regarding the production date of the fish. **31**

Costs of the procedure are determined by § 52 ZPO. **32**