

Case 773: CISG 4, 36, 38, 39 (1), 40, 44

Germany: Bundesgerichtshof

VIII ZR 321/03

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Juristische Wochenschrift (NJW), 3181; [2004] Monatsschrift für Deutsches Recht (MDR), 1305; [2004] The European Legal Forum (EuLF), 385;

<http://www.cisg-online.ch/cisg/urteile/847.htm> (original);

<http://cisgw3.law.pace.edu/cases/040630g1.html> (English translation);

<http://www.unilex.info>

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The decision deals with the conditions that would allow shifting the burden of proof under article 40 CISG.

The plaintiff, a company located in Spain, sold the defendant paprika powder and oil. The defendant set it off against an alleged claim for damages as a result of non-conformity of the goods previously delivered.

The previous delivery consisted of sweet paprika, which were not to be irradiated according to the parties' agreement. The buyer inspected the goods merely with respect to the degree of purity but not for radiation exposure, as such an examination is costly and time-consuming. Only after an article in a test magazine had given an indication for radiation exposure the defendant initiated tests of four samples of the delivered goods proving radiation exposure. Following the test reports, the defendant complained by letter about the radiation exposure of the goods delivered. Subsequently it demanded damages. The plaintiff disputed the radiation exposure of the goods.

The Regional Court granted the seller the full purchase price and the Higher Regional Court rejected the buyer's appeal. The buyer appealed to the Federal Court of Justice.

The Federal Court found, in accordance with the judgment of the Higher Regional Court, that the buyer lost his right to rely on a lack of conformity of the goods under article 39 (1) CISG as it had failed to give notice of the non-conformity within reasonable time. The Federal Court stated that the period of notice had started as of the receipt of the test report, because a prior routine testing of the paprika powder for radiation exposure was unreasonable for the buyer in view of the expenditure related to such a measure. It held that the period of more than two months between the buyer's knowledge of the first test report and its notice of complaint however could not be deemed to be within a reasonable time as per article 39 (1) CISG.

In the Higher Regional Court's judgment it was assumed that the buyer did not present a reasonable excuse for its failure to give timely notice (article 44 CISG) and had not provided evidence that the seller knew or could not have been unaware of facts concerning the irradiation of the paprika powder (article 40 CISG). The Federal Court, however, did not agree with the lower Court as far as article 40 CISG is concerned. While in principle the buyer has to prove the factual requirements of article 40 CISG because this article is the exception to article 39 CISG, the Federal Court stated that the Higher Regional Court had not sufficiently considered the question of which of the parties can provide evidence of the factual requirements more easily (proof proximity). The Court stated that if the production of evidence means unreasonable difficulties of proof for the buyer, the burden of proof can shift to the seller, claiming that this principle is accepted within the scope of the CISG and is taken into account by article 40 CISG. The article not only refers to the seller's actual knowledge of the facts on which the breach of contract is based, but also covers its negligent ignorance. Furthermore, gross negligence is to be assumed, if the goods widely deviate from what is required by the contract and the non-conformity results from a fact within the seller's domain.

In the present case, however, the Federal Court did not affirm that gross negligence was to be assumed, due to the difficulty to detect radiation exposure, but found that it resulted from the principle of "proof proximity". While the buyer should prove that the goods delivered by the seller were irradiated, the seller should demonstrate that it did not act with gross negligence. If the buyer's allegations were correct, it should further be proved either that the irradiation took place at the seller's facilities or at the facilities of the seller's supplier. In this case it would be for the seller to explain that it did not act with gross negligence since the breach of contract occurred in its domain.

The Federal Court of Justice reversed the judgment of the Higher Regional Court and remanded the matter for a new hearing and judgment to the Higher Regional Court.

