CISG-online 847	
Jurisdiction	Germany
Tribunal	Bundesgerichtshof (German Supreme Court)
Date of the decision	30 June 2004
Case no./docket no.	VIII ZR 321/03
Case name	*Paprika powder case II*

Translation[*] *by Alston & Bird LLP*

Edited by Birgit Kurtz[**]

Upon the hearing of 30 June 2004, by the Presiding Justice Dr. Deppert and Justices Dr. Beyer, Wiechers, Dr. Wolst, as well as Justice Hermanns, the Eighth Civil Panel of the Federal Supreme Court of Germany for Civil and Criminal Matters has adjudged that:

- Upon the Defendant [Buyer]'s appeal, the judgment of the 3d Civil Panel of the Court of Appeals of Celle, dated 24 September 2003, is herewith reversed;

- The matter is remanded to the Court of Appeals for a new hearing and judgment, also with regard to the costs of the appeal to the Supreme Court.

Facts of the case:

The parties are in dispute over a claim for damages with which Defendant [Buyer] has set off the Plaintiff [Seller]'s purchase price demand, which is uncontested as to basis and amount. 1

[Seller], a company located in Spain, and [Buyer], which is located in L. and produces and distributes spices, have had a long-standing business relationship. On 28 February 2001, [Seller] supplied [Buyer] with paprika powder and oil for a total amount of Euro 30,816. [Buyer] has acknowledged the basis and amount of the demand, but has set off the amount of the claim against a claim for damages based on the alleged contractual non-conformity of the goods delivered earlier. The set-off claim is based on the following facts: 2

In September 2000, a delivery of 5,000 kilograms of «sweet paprika» was made, which was not to have been irradiated according to the terms of the agreements between the parties. Upon delivery, [Buyer] examined the goods merely with respect to the degree of purity; 3

[*] All translations should be verified by cross-checking against the original text. For purposes of this translation, the Plaintiff-Appellee of Spain is referred to as [Seller] and the Defendant-Appellant of Germany is referred to as [Buyer].

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[Buyer] did not examine the goods for radiation exposure because this procedure is very time-consuming and costly and, therefore, is not part of the regularly performed lab tests. Thereafter, [Buyer] processed the paprika powder by mixing it with «chili» to produce the product «paprika, hot, ground», and sold it to one of its customers in December 2000.

By registered letter dated 26 March 2001, [Buyer] complained to [Seller] that the paprika powder delivered in September 2000 had been irradiated. In a letter dated 20 April 2001, [Buyer] listed the damages it incurred – replacement to its customer, cost of an expert's report and miscellaneous costs – at a total of Deutsche Mark [DM] 65,309.48; [Buyer] later lowered its claim for damages to DM 41,613.48. 4

[Buyer] claims that the goods were irradiated; it received an indication of this only from an article in a consumer test magazine. [Buyer] had also agreed with its customer to deliver non-irradiated goods. Upon an inquiry, [Seller] stated on 8 January 2001, that the goods had not been irradiated. A laboratory test of four samples from the goods delivered by [Seller], however, proved radiation exposure, as shown in the test reports dated 22 January, 5 February and 20 February 2001. 5

The Landgericht [Court of First Instance] granted [Seller]'s claim for the full purchase price. [Buyer]'s appeal of this decision was rejected by the Oberlandesgericht [Court of Appeals]. Through its appeal to the Supreme Court, which was accepted by the Panel, [Buyer] continues to prosecute its motion to dismiss the complaint. 6

Grounds for the decision:

I. 7
The Court of Appeals did not decide whether the paprika powder delivered by [Seller] was actually irradiated and explained: The notice given by [Buyer] was untimely according to Art. 39(1) CISG, which applies here, so that [Buyer] lost the right to rely on a lack of conformity of the goods with the contract. The Court held that [Buyer] was already aware that the powder was irradiated since the test report was dated 22 January 2001; nonetheless, it waited until 26 March 2001, to complain. Since a reasonable time period to complain is usually two weeks, the notice was given too late. [Buyer] did not present any excuse within the meaning of Art. 44 CISG. The Court stated that, finally, [Buyer] could not invoke Art. 40 CISG because it did not proffer the necessary evidence that [Seller] knew or should have known of the irradiation of the paprika powder. [Seller] was not obligated to test the goods because that type of laboratory test would have been economically unreasonable according to [Buyer]'s submission.

II. 8
These considerations do not entirely withstand legal scrutiny.

1. 9
The Court of Appeals correctly assumed that any rights of [Buyer] based on the alleged lack of conformity of the goods with the contract are governed by the provisions of the UN Sales

Convention (CISG) because the parties are each domiciled in a member state of the treaty (Art. 1(1)(a) CISG).

It also correctly assumed that, according to Art. 39(1) CISG, the buyer loses the right to rely on the lack of conformity of the goods with the contract (Art. 36 CISG) if he does not give notice to the seller within a reasonable period of time after he discovered or should have discovered it, specifying the exact nature of the lack of conformity. 10

Finally, the Court of Appeals was also correct in ruling that while, in this case, the notice period did not start before receipt of the test report dated 22 January 2001, because – as was the tacit assump- tion of the Court of Appeals – an earlier routine testing of the paprika powder was economically unreasonable for the [Buyer] due to the related expense, but the period of more than two months could no longer be deemed a reasonable period within the meaning of Art. 39(1) CISG. 11

2. 12
We cannot, however, agree with the Court of Appeals to the extent it finds that the requirements of Art. 40 CISG are not met, based on the determinations reached thus far and [Buyer]'s submissions on appeal. According to this provision, the seller cannot rely on the untimeliness of a notice of non-conformity (Art. 39 CISG) if the contractual non-conformity of the goods is based on facts he knew or of which he could not have been unaware.

a) 13
The Court of Appeals reasoned that [Seller] cannot be denied the right to rely on the untimeliness of the notice because [Buyer] had not proffered evidence showing that [Seller] knew or should have known of the (alleged) non-conformity of the goods with the contract. It is correct that, generally, the burden of proof lies with the buyer as to the seller's bad faith; that is so because, as the Panel previously decided, the CISG, even to the extent it does not expressly determine the burden of proof, follows the principle of rule and exception (Panel decision of 9 January 2002 – VIII ZR 304/00, NJW 2002, 1651 = WM 2002, 1022 under II 2 b with further citations).

Most lower courts have ruled that the burden of proof lies with the buyer (OLG Karlsruhe, BB 1998, 393, 395; OLG Munich, Transp.R-IHR 1999, 20, 22; OLG Ko- blenz, OLGR Koblenz 199, 49, 50). The question as to the burden of proof within the frame- work of Art. 40 CISG has also been the subject of a number of foreign rulings (Arbitral Panel of the Stockholm Chamber of Commerce, decision of 5 June 1998, CISG-online 379; Arrondissementsrechtbank Roermond/Netherlands, decision of 19 December 1991, CISG- online 29, 900336; ICC International Court of Arbitration, CISG-online 705; Ontario Superior Court of Justice (Canada), IHR 2001, 46). 14

Also according to the majority of the commentators in legal literature, the burden of proof gen- erally lies with the buyer with respect to the factual requirements because he wants to avoid the legal consequences of Art. 38 et seq. CISG (Bamberger/Roth/Saenger, BGB, Vol. 3, Art. 40 CISG, n. 6; Baumgärtel/Laumen/Hepting, *Handbuch der Beweislast im Privatrecht* [Manual of the Burden of Proof in Civil Law], 2d ed., Vol. 2, Art. 40 WKR n. 1; Schwenzer, in: 15

Schlechtriem (ed.), *Kommentar zum Einheitlichen UN-Kaufrecht (CISG)* [Commentary on the CISG], 3d ed., Art. 40 n. 12).

b) 16
For cases like the present one, this means first that, in principle, the buyer must present, and possibly also prove, the factual requirements of Art. 40 CISG, since he relies on the exception to the (rule) provision of Art. 39 CISG regarding the loss of the right to give notice of a contractual non-conformity.

The Court of Appeals, however, did not sufficiently consider that an exception in an individual case must be allowed under the aspect of «proof-proximity» [Beweisnähe] or if an evidentiary showing results in unreasonable difficulties of proof for the buyer. 17

Within the scope of the CISG, it is recognized that a strict application of the exception-to-the-rule principle can lead to inequities and that, therefore, a correction is necessary according to the principles set forth herein (compare Baumgärtel/Laumen/Hepting, supra, nos. 28 to 30 be- fore Art. 1 WKR; Staudinger/Magnus (1999) Art. 4 CISG n. 69; Ferrari, in Schlechtriem (ed.), supra, Art. 4 n. 51), but prudence is appropriate. The law allows for this aspect within the framework of Art. 40 CISG in that it does not always demand proof of the seller's knowledge of the facts on which the contractual breach is based, but rather deems it sufficient that the seller «could not have been unaware of» those facts; thus, Art. 40 CISG also covers cases of negligent ignorance (Achilles, *Kommentar zum UN-Kaufrechtsübereinkommen* [Commentary on the UN Treaty on the Sale of Goods (CISG)], Art. 40 n. 1; Lüderitz, in: Soergel (ed.), 12th ed., EKG Art. 40 n. 1; Lüderitz/Schüßler-Langeheine, in Soergel (ed.), 13th ed., CISG Art. 40 n. 1, 2). Under certain circumstances, the required proof can already be deduced from the type of defect itself so that, in the case of extreme deviations from the contractually agreed upon condition, gross negligence is assumed if the breach of contract occurred in the seller's domain (Achilles, supra, Art. 40 n. 4; Soergel/Lüderitz, supra, Art. 40 EKG n. 1; see also Soergel/Lüderitz/Schüßler-Langeheine, supra, Art. 40 CISG n. 3; Staudinger/Magnus, supra, Art. 40 n. 13). According to the principles mentioned above, it may be necessary to limit the buyer's burden of proof in the case of a gross breach of contract and in view of the aspect of «proof-proximity» in order to avoid unreasonable difficulties in providing proof. 18

c) 19
In the instant case, the type of breach of contract assumed on appeal does not in itself allow conclusions to be drawn as to the knowledge or grossly negligent ignorance of [Seller] as to the breach; that is so because the irradiation of the paprika powder was not externally identifiable and could only be determined upon expensive laboratory testing. This works to [Seller]'s advantage with respect to the question whether gross misconduct on its part must be assumed. Based on conclusions reached thus far, and considering the facts submitted by [Buyer] on appeal, it appears possible, however, that, considering the aspect of [Seller]'s «proof-proximity» and the unreasonable expectation that [Buyer] make a full evidentiary showing that also addresses [Seller]'s needs, proof requirements must be eased.

It is true that [Buyer] must first provide full proof of the fact that the goods supplied by [Seller] were irradiated; this requires that the material tested by the laboratory was the paprika powder delivered by [Seller] – which [Seller] has denied – and that the goods, per [Buyer]'s statement, were irradiated neither in its own, [Buyer]'s, domain, nor in the domain of its customer. If these allegations of [Buyer] should turn out to be correct, the proof of the breach of contract would at the same time prove its claim that the powder was irradiated either in [Seller]'s facility or at the facility of [Seller]'s supplier. Based on its own knowledge, [Buyer] is unable to determine which of these two possible causes, which were not within the scope of its responsibility, led to the contractual non-conformity of the paprika powder. 20

[Buyer] could only allege «into the blue» as to the internal operations of [Seller]; it cannot be expected, as an outside buyer, to have sufficient knowledge of the internal production conditions of its seller, which produced the supplied goods or processed them. In contrast, [Seller] was certainly able to make a statement in this regard. In this connection, [Seller] testified that the paprika powder was not irradiated in its facility and that this is excluded already by the fact that it does not possess the necessary equipment. If [Buyer] is able to provide proof that the goods were irradiated before delivery, it will need to address [Seller]'s evidence to support its claims to the contrary. If the paprika powder was in fact irradiated in [Seller]'s facility, it could, if this was merely a mistake, claim slightly negligent behavior only if it could sufficiently explain how this type of serious error occurred in its facility, despite appropriate precautions, and why it did not become aware of this; that is so because the burden of explanation must be put on the seller, in whose domain the breach of contract occurred, as to why such a serious error occurred and how it went undetected in its facility (compare Panel Decision of 5 July 1989 – VIII ZR 123/88, NJW 1989, 3097 under 2 d re. Art. 40 EKG). 21

A different consideration applies under the aspect of grossly negligent ignorance if the raw material that [Seller] purchased from its supplier was already contaminated. It is true that the delivery of irradiated powder to [Buyer], contrary to the agreements made, would constitute a significant breach of contract. But this is not an indication yet that [Seller] remained unaware, as a result of gross negligence, of the pre-contamination of the goods. To that extent, it must be taken into consideration that at least a random sample testing of the paprika powder for irradiation could be expected as little from [Seller] as from [Buyer] due to the related costs. There would be no gross negligence if [Seller] could show that it had taken suitable other precautions, for example, appropriate contractual stipulations with its supplier, ensuring that only uncontaminated raw material would be used for [Buyer]'s order. 22

3. 23
If, according to the conclusions reached thus far, it can therefore not be excluded that the paprika powder delivered to [Buyer] – according to its statements on appeal that the irradiation allegedly took place at [Seller]'s facility or in that of its supplier – was irradiated at the time of the passing of the risk, contrary to the contractual agreements, and if it must further be assumed, on the basis of [Buyer]'s assertions, that the breach of contract could not have been concealed from [Seller], then [Seller] could not rely on the untimeliness of [Buyer]'s notice pursuant to Art. 40 CISG. As a result, the set-off declared by [Buyer] of its claim for damages against [Seller]'s price demand would prevail.

III. 24

In view of the above, the appealed judgment cannot stand because, based on the above, additional clarification is required for a ruling on this legal dispute. Upon [Buyer]'s appeal to the Supreme Court, the judgment by the Court of Appeals is therefore vacated, and the matter is remanded to the Court of Appeals for a new hearing and decision (§ 563(1) ZPO). In the new hearing on appeal, the parties will have the opportunity to supplement their submissions regarding the factual and legal aspects addressed here.