CISG-online 999	
Jurisdiction	Germany
Tribunal	Bundesgerichtshof (German Supreme Court)
Date of the decision	02 March 2005
Case no./docket no.	VIII ZR 67/04
Case name	*Frozen pork case I*

Translation[*] by Birgit Kurtz[**]

Facts

[Seller's assignee] seeks payment of the purchase price for various meat deliveries based on the assigned rights of the Belgian wholesale meat distributor [Seller]. 1

In April 1999, [Buyer] ordered a larger amount of pork from [Seller]. The goods were to be delivered directly from the [Seller] to the [Buyer]'s customer, H[...] in K[...], and from there be further distributed to a trading company in Bosnia-Herzegovina/Republic of Srpska. The delivery was made in partial amounts on 15 April, 27 April and 7 May 1999. [Seller] issued invoices to [Buyer] for the above deliveries for Deutsche Mark [DM] 49,106.20, DM 29,959.80 and DM 49,146.75 respectively, referencing the delivery dates. The invoices were payable at the latest on 25 June 1999, and were accompanied by so-called certificates of fitness for consumption. The goods arrived in Bosnia-Herzegovina at the latest on 4 June 1999. [Buyer] paid DM 35,000 towards the total amount due of DM 128,212.75. [Seller] assigned its claim to the remaining amount of DM 93,212.75 (Euro 47,658.92) to [Seller's assignee]. 2

Starting in June 1999, the suspicion arose in Belgium and Germany that meat produced in Belgium was contaminated with dioxin. As a result, in Germany, an ordinance for the protection of consumers from Belgian pork was issued (effective 11 June 1999) in which the meat was declared to be unmarketable, insofar as no certificate was presented declaring the meat to be free of contaminants. In this regard, the European Union issued an ordinance about the necessity of certificates of fitness for consumption, confirming dioxin-free goods. Finally, on 28 July 1999, identical ministry ordinances were issued in Belgium about the confiscation of fresh meat and meat products from beef and pork that, among other things, also contained provisions regarding meat that had already been exported abroad at that point in time. 3

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[*] All translations should be verified by cross-checking against the original text. For purposes of this translation, the Claimant of Belgium is referred to as [Seller's assignee], and the Respondent of Germany is referred to as [Buyer]. Amounts in the former currency of Germany (*Deutsche Mark*) are indicated as [*DM*]; amounts in the European currency are indicated as [*Euro*].

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[Seller's assignee] demands payment of the remaining amount. [Buyer] claims that the purchased pork was placed in a customs storage facility, and a confirmation that the meat was free of dioxin was demanded for customs clearance in Bosnia-Herzegovina at the end of June 1999. On 1 July 1999, a notification was received from Bosnia-Herzegovina that prohibited the sale of the delivered goods. After receipt of the notification of the prohibition of sale, [Buyer] requested numerous times that [Seller] produce a health clearance certificate. Since [Seller] did not provide such a certificate, the goods were finally destroyed. 4

The Court of First Instance gathered evidence by questioning a number of witnesses and obtaining an official notification from the German Federal Ministry of Health, and then dismissed the claim. The appeal by [Seller's assignee] against this decision was rejected by the Court of Appeal. [Seller's assignee] is now prosecuting its application for relief to the full extent after the Panel found the appeal to be procedurally admissible. 5

Reasons

I. 6
The Court of Appeal had essentially decided as follows:

The claim is without merit because the goods delivered did not conform with the contract within the meaning of the applicable provisions of the CISG (Arts. 36, 67(1) CISG). According to jurisprudence of the German Supreme Court, the suspicion of dioxin contamination alone is a defect which the [Seller's assignee] did not disprove. It is true that a seller is generally not liable for the goods meeting the public law regulations valid in the country of consumption. In this case, however, the product itself caused the issuance of protective regulations under public law, and not only in the ultimate consumer's country (Bosnia-Herzegovina), but also throughout the entire European Union, including the country of origin, Belgium. The fact that the ordinance at issue was enacted in Belgium only very late – at the end of July 1999 – is irrelevant; in any case, the prescribed comprehensive confiscation is a strong indication that dioxin contamination already existed when the disputed deliveries were made. Through the evidence gathered in the lower court proceeding, it was finally proven that [Buyer] attempted unsuccessfully to obtain from [Seller] a certificate guaranteeing the absence of dioxin in the goods.

II. 7
Because [Buyer] was not represented in the appeal proceeding despite timely notification, at [Seller's assignee]'s request, the appeal is to be decided by default judgment, insofar as the appeal was successful. To that extent, however, the judgment is based not on the default, but rather on an analysis of the substance (compare German Supreme Court, 4 April 1962 – V ZR 110/60, 37 *Entscheidungen des Bundesgerichtshofs in Zivilsachen,* p. 79, at 81). Insofar as the appeal proves to be unfounded, this is a contradictory judgment (German Supreme Court, 1 June 1967 – II ZR 130/65, *Neue Juristische Wochenschrift* (1967), 2162).

The considerations of the Court of Appeal do not entirely withstand legal scrutiny. [Seller's assignee] is entitled to payment for the meat delivery based on the assigned rights of [Seller] in the amount of Euro 7,233.12, plus interest. 8

1. 9
The Court of Appeal's legal starting point was correct, namely that the merits of the purchase price demand at issue in the proceeding are governed by provisions of the CISG, because both parties to the sales contract are domiciled in different CISG Contracting States (Art. 1(1)(a) CISG). However, insofar as the Court of Appeal refers to the German Supreme Court's decisions of 16 April 1969 (VIII ZR 176/66, 52 *Entscheidungen des Bundesgerichtshofs in Zivilsachen*, p. 51), of 14 June 1972 (VIII ZR 75/71, *Neue Juristische Wochenschrift* (1972), 1462 = *Wertpapiermitteilungen* (1972), 1314), and of 23 November 1988 (VIII ZR 247/87, *Neue Juristische Wochenschrift* (1989), 218), in analyzing the question whether, at the time the risk passed, the delivered meat conformed with the contract within the meaning of Arts. 35, 36 CISG, it ignored the fact that these decisions were issued before the CISG entered into force in Germany and refer to § 459 German Civil Code (old version).

The principles developed there cannot simply be applied to the case at hand, although the factual position – suspicion of foodstuffs in trans-border trade being hazardous to health – is similar; that is so because, in interpreting the provisions of CISG, we must consider its international character and the necessity to promote its uniform application and the observance of good faith in international trade (Art. 7(1) CISG). The provisions of the CISG are, therefore, generally to be interpreted autonomously, *i.e.*, by themselves and within the overall context of the Convention, without recourse to the rules developed regarding the standards of the non-uniform national laws. Only insofar as can be assumed that national rules are also recognized internationally – where, however, caution is advised – can they be considered within the framework of the CISG. 10

2. 11
As to the substance, the Court of Appeal, without expressly clarifying this, but obviously in agreement with the Court of First Instance, assumed that [Buyer] was justified in reducing the purchase price because the delivered goods did not conform with the contract (Arts. 35, 36, 50 CISG). The other possible appeals and objections on the Buyer's and the Seller's side were not addressed; this is, however, not harmful because a substitute performance (Art. 46 *et seq*. CISG) was obviously excluded under the special circumstances of this case and an avoidance of the contract (Art. 49 CISG) was not declared by [Buyer].

3. 12
Only a price reduction in the amount of DM 79,066.00 (= Euro 40,425.80) is justified, so that a purchase price claim in the amount of Euro 7,233.12 is still outstanding.

a) 13
According to Art. 50, first sentence CISG, the buyer can reduce the price in the proportion that corresponds to the lower value of the goods if the goods did not conform with the contract during the relevant point in time when the risk passed, regardless of whether the purchase price has already been paid or not; this was – contrary to the opinion of the Court of Appeal,

however, only partially – the case (see below b) through d)). [Buyer] was, therefore, allowed to reduce the purchase price to zero for the non-conforming partial shipments because there was also no other possibility for utilizing the meat – e.g., for processing into feeding stuffs. The fact that [Buyer], obviously still unaware of the suspicion of dioxin contamination of beef and pork produced in Belgium, made partial payments in the amount of DM 35,000 on [Seller's] invoices before refusing to make further payments, does not conflict with the reduction of the purchase price.

b) **14**
In its conclusion, the Court of Appeal correctly assumed that the pork delivered by [Seller] did not conform with the contract; this applies, however, only to the deliveries made on 15 and 27 April 1999. This does not apply to the last delivery made on 7 May 1999, according to the submission by [Seller's assignee], which, in this respect, has not been contradicted (compare below at 4).

According to Art. 35(1) CISG, goods (only) conform with a contract if they are of the quantity, **15**
quality and description required by the contract. If the parties have not agreed otherwise, the goods only conform with the contract if they are fit for the purposes for which goods of the same description would ordinarily be used (Art. 35(2)(a) CISG). In international wholesale and intermediate trade, an important part of being fit for the purposes of ordinary use is the goods' resaleability (tradeability) (German Supreme Court, 8 March 1995 – VIII ZR 159/94, 129 *Entscheidungen des Bundesgerichtshofs in Zivilsachen,* p. 75, at 81; Achilles, *CISG* [German-language article-by-article commentary on the CISG], Art. 35 para. 4; Schlechtriem/Schwenzer, *CISG* [German-language article-by-article commentary on the CISG], 4th ed., Art. 35 para. 14 with further references; Witz/Salger/Lorenz, *International Einheitliches Kaufrecht* [German-language article-by-article commentary on the CISG], Art. 35 para. 9). In the case of foodstuffs intended for human consumption, resaleability includes that the goods are harmless as to health, i.e., at least not hazardous to health. Insofar as the compliance with public law regulations is relevant here, the circumstances in the seller's country are generally controlling because the seller cannot be generally expected to know the relevant provisions in the buyer's country or – in a case where the wholesaler sells directly to the client/consumer at the retailer's request – in the country of the ultimate consumer (German Supreme Court, 8 March 1995 – VIII ZR 159/94, 129 *Entscheidungen des Bundesgerichtshofs in Zivilsachen,* p. 75, at 81 with further references; also decisions by the Austrian Supreme Court of 13 April 2000 – 2 Ob 100/00w, *Zeitschrift für Europarecht, Internationales Privatrecht und Rechtsvergleichung* (2000), 231, and of 27 February 2003 – 2 Ob 48/02a, CISG-online no. 794). The situation is only different, however, if the provisions in the seller's and the buyer's country are essentially the same, or if the seller is familiar with the regulations in the buyer's country due to particular circumstances (German Supreme Court, 8 March 1995 – VIII ZR 159/94, 129 *Entscheidungen des Bundesgerichtshofs in Zivilsachen,* p. 75, at 84). The provisions of the country Bosnia-Herzegovina, which were, according to the [Buyer]'s disputed allegation, the reason behind the confiscation and destruction of the entire goods, are therefore not applicable.

c) 16
At the decisive point in time of the passing of the risk – here: at the time of the delivery of the goods at the seller's Belgian domicile to the first forwarding agent (Art. 67, first sentence CISG) in April 1999 – there was neither the suspicion of a harmful dioxin contamination of the pork, nor – more importantly – had the relevant ordinances yet been enacted in Belgium, Germany and the EU.

This circumstance, however, does not contradict the goods' lack of conformity with the contract as assumed by the lower courts; that is so because the non-conformity is already given, as expressly clarified in Art. 36(1) *in fine* CISG, at the point in time the risk passes if it already exists at this point in time but only later becomes apparent, i.e., if it is a hidden defect. 17

Exactly this was the case here, insofar as it relates to the deliveries made on 15 and 27 April 1999; according to the invoices, the meat in question was processed and frozen on 3 March 1999. The suspicion of dioxin contamination harmful to health existed for all pigs slaughtered between 15 January and 23 July 1999 (Art. 3 Belgian Ministerial Ordinance of 28 July 1999). 18

The meat was, to the extent it was still in Belgium, confiscated for precautionary reasons (Art. 1 Belgian Ministerial Ordinance); it was only to be sold if, by 31 August 1999, at the latest, by tracing the origin of the goods or through lab analysis, the suspicion of dioxin contamination was dispelled (Arts. 2, 3 Belgian Ministerial Ordinance) vis-à-vis the responsible control authorities. To the extent the suspicion proved to be true, meat already exported was supposed to either be destroyed abroad or shipped back to Belgium, where it would also be confiscated and destroyed (Art. 11 Belgian Ministerial Ordinance). It is undisputed that the Seller failed to produce proof of the absence of dioxin as required by it. 19

d) 20
Accordingly, it was also clear for the Belgian territory, at the latest by the end of July 1999, that the meat delivered to [Buyer] by [Seller] in April 1999 was not resaleable and thus did not conform with the contract within the meaning of Arts. 35(1) and 35(2)(a) CISG. The characteristics that led to the confiscation and the loss of tradeability were already attached to the meat at the time the risk passed because, objectively, already at this point in time, it was clear that it originated from the dioxin contaminated inventory. The fact that the suspicion became known only weeks later and led to far-reaching official precautionary measures in Germany, the European Union and finally also in Belgium, does not change the existence of the character of the goods as potentially harmful to health at the time the risk passed.

Whether and to what extent the meat delivered to [Buyer] was actually contaminated with dioxin is irrelevant because the suspicion alone, which excluded the marketability, which became apparent later and which was not invalidated by the seller, has a bearing on the resaleability and tradeability. 21

We also do not need to decide whether the suspicion that certain goods may be harmful to health always represents a breach of contract with regard to foodstuffs. At least if the suspicion – as in this case – has led to public measures that preclude the goods' tradeability, 22

the goods must be viewed as not conforming with the contract for the area of wholesale and intermediate trade.

4. 23
The situation is different with respect to the 7 May 1999 delivery. To that extent, [Seller's assignee] had already submitted in the Court of First Instance, without objection, that the meat had already been processed on 12 January 1998, to which the appeal correctly points, with reference to the corresponding note in the invoice of 7 May 1999. Because the delivery included a certificate, customary at the time and deemed sufficient, stating the goods were fit for human consumption, the goods were resaleable and unaffected by the precautionary measures ordered in Germany and Belgium in June and July 1999 for meat originating from animals slaughtered after 15 January 1999. If, however, as [Buyer] claims, this delivery was also confiscated and destroyed in Bosnia-Herzegovina, this was certainly not the result of a breach of contract on the side of the Seller.

5. 24
Based on the above, [Buyer] correctly reduced the purchase price to zero for the deliveries made on 15 and 27 April 1999.

On the other hand, it owes – as the Panel itself can decide because further determinations are not expected – to [Seller's assignee] the full purchase price for the delivery made on 7 May 1999 in the amount of DM 49,146.75. After deducting the partial payments adding up to DM 35,000, there is a balance due of DM 14,146.75 = Euro 7,233.12. Accordingly, the Court of Appeal's judgment on the appeal by [Seller's assignee] – otherwise rejected – is to be repealed and the judgment of the court of first instance is to be amended because no additional findings are required; the complaint for further relief is denied. 25