CISG-online 1223	
Jurisdiction	Austria
Tribunal	Oberster Gerichtshof (Austrian Supreme Court)
Date of the decision	25 January 2006
Case no./docket no.	7 Ob 302/05wg
Case name	*Pork liver case*

Translation[*] *by Jan Henning Berg*[**]

Edited by Daniel Nagel[***]

Order

The appeal is dismissed.

The [Buyer] has to reimburse EUR 665.66 (including EUR 110.94 turnover taxes) for costs of the appellate response within 14 days.

Reasoning

According to § 508(1) Austrian Code of Civil Procedure (ZPO), the Supreme Court is not bound by the Court of Appeal's ruling on the admissibility of the appeal. Contrary to what the Court of Appeal held, the appeal is inadmissible as it does not concern a significant question of law. Under § 510(3)(4) ZPO, rejection of such an appeal may occur by mere explanation of the legal grounds of rejection. 1

[Facts of the case:]

[Buyer], residing in Serbia, purchased 18 pallets of frozen pork liver from [Seller], located in Austria. The goods were supposed to be imported into Serbia of which [Seller] was aware. The parties neither talked about nor agreed upon any particular quality of the goods nor did they stipulate any auxiliary agreement. Furthermore, [Buyer] did not inform [Seller] about any special regulations that were applicable to the import of goods to Serbia. Although the pork liver complied with EU requirements and was perfectly fit for human consumption, it was 2

[*] All translations should be verified by cross-checking against the original text. For purposes of this translation, Claimant of Serbia is referred to as [Buyer] and Respondent of Austria is referred to as [Seller]. Amounts in the uniform European currency (Euro) are indicated as [EUR].

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defined as defective by virtue of Serbian import provisions, with the consequence that its import into Serbia was rejected. The return of the goods and their subsequent sale below value caused loss in the amount of EUR 8,403.

[Rulings in previous instances:]

The Court of First Instance denied [Buyer]'s claim for recovery of these damages. It held that the goods had been fit for the purpose for which goods of the same type were usually purchased. Provisions of public law in the buyer's country (e.g. concerning critical levels of harmful ingredients in food) could not in itself set the required standard of quality under Art. 35 CISG (cf. Posch in Schwimann (ed.), *ABGB [Article-by-article commentary on the Austrian Civil Code]*, Art. 35 CISG para. 7). [Buyer] could not reasonably rely on [Seller] foreseeing whether or not Serbian authorities would ban the goods' import. Since [Seller] had sufficiently performed its obligation, [Buyer] could not claim damages following avoidance of the contract according to Art. 49 CISG. 3

The Court of Appeal affirmed this decision and held that further appeal was admissible, because the Supreme Court had not yet decided on the issue whether provisions of public law in the buyer's country were relevant for a seller who is aware of a supposed export into that country. 4

[Position of the parties:]

This is also the position of [Buyer] in its appellate submission: The citation employed by the Court of Appeal (Posch in Schwimann (ed.), *ABGB [Article-by-article commentary on the Austrian Civil Code]*, Art. 35 CISG para. 7) served as mere reference to case law of the Court of Appeal Frankfurt (Germany). Furthermore, it has not yet been decided by the Supreme Court whether an export of goods constitutes a «particular purpose» in accordance with Art. 35(2)(b) CISG for which the goods must be fit if the seller knew that the buyer purchased them solely for this purpose and if the seller had appropriate experience with marketing these goods within the buyer's country. 5

[Reasoning of the Supreme Court:]

The appeal, however, is indmissible. 6

Contrary to what is set out above in respect to the admissibility of the legal remedy in question, it is in accordance with jurisprudence that if there is no provision on a certain quality of goods in an international contract of sale, the required quality will be determined by the objective minimum standards under Art. 35(2) CISG. With reference to the case at hand, it must be determined whether the goods are fit for their ordinary purpose (Art. 35(2)(a) CISG) or a particular purpose (Art. 35(2)(b) CISG). The ordinary use is generally determined by standards prevailing in the seller's country (RIS-Justiz RS0113448; most recently: Austrian Supreme Court, 27 February 2003 – 2 Ob 48/02a), unless there is an exceptional case as enumerated by Austrian Supreme Court, 13 April 2000 – 2 Ob 100/00w. Thus, both the Court of Appeal and [Buyer] overlooked the fact that the Supreme Court has already dealt with the relevant questions of law in its decision of 13 April 2000 – 2 Ob 100/00w (SZ 73/70 = *Praxis* 7

des Internationalen Privat- und Verfahrensrechts (IPRax) (2001), 149 (criticized by Schlechtriem, *ibid.*, 161). The Supreme Court held that:

> «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. If, however, the parties to an international contract of sale fail to specify the required quality of the goods, the objective minimum standard provided by Art. 35(2) CISG will be decisive: Whether there is a breach of the duty to deliver depends on whether the goods conform to the ordinary use, the particular purpose, possess the quality of a sample or model or are contained or packaged in an usual and adequate manner (Posch in Schwimann (ed.), *ABGB [Article-by-article commentary on the Austrian Civil Code]*, Art. 35 CISG para. 7). With respect to fitness for ordinary use, the standards in the seller's country are generally of primary significance. This fitness for ordinary use does not imply that the goods conform to any provisions for safety, labelling or composition in the importing country (Posch in Schwimann (ed.), *ABGB [Article-by-article commentary on the Austrian Civil Code]*, Art. 35 CISG para. 7; Magnus, in *Staudinger's Kommentar zum BGB [Article-by-article commentary on the German Civil Code (BGB) and related laws]*, Art. 35 CISG para. 22; Magnus in: Honsell (ed.), *Kommentar zum UN-Kaufrecht [Article-by-article commentary on the CISG]*, Art. 35 para. 14; Piltz, *Internationales Kaufrecht [Textbook on the CISG]*, § 5 para. 41). It cannot be expected from a seller to be aware of any particular provisions in the country of the buyer or wherever else the goods are to be used. Even the fact that the buyer mentioned the country of destination to the seller cannot impose an obligation on the seller to observe the applicable provisions of public law in that place. On the contrary, it is for the buyer to take the provisions of the country where the goods will be put to their use into account. It is hence his task to include them into the contract in accordance with Art. 35(1) or Art. 35(2)(b) CISG (Schwenzer in Schlechtriem (ed.), *Kommentar zum Einheitlichen UN-Kaufrecht [Article-by-article commentary on the CISG]*, 3rd ed., Art. 35 para. 17). Therefore, special provisions in the buyer's country are of relevance only if they do apply likewise in the seller's country or if they were agreed upon or if they had been made known to the seller under Art. 35(2)(b) CISG (Magnus, in *Staudinger's Kommentar zum BGB [Article-by-article commentary on the German Civil Code (BGB) and related laws]*, Art. 35 CISG para. 22; German Supreme Court, 8 March 1995 – VIII ZR 159/94, *Praxis des Internationalen Privat- und Verfahrensrechts (IPRax)* (1996), 29).» (Austrian Supreme Court, 13 April 2000 – 2 Ob 100/00w) **8**

The court also adhered to this judgment in its recent decision of 27 February 2003 (2 Ob 48/02a). In his affirming review (in *Praxis des Internationalen Privat- und Verfahrensrechts (IPRax)* (2004), 358 at 359), P. Huber points out that the leading doctrine does in general not consider the country of the buyer or wherever else the goods are to be used, but the seller's country in respect to the compliance of goods with public law provisions. It cannot be expected from the seller to be aware of any such provisions in the buyer's country (P. Huber, *ibid.*). Consequently, special provisions in the buyer's country are of relevance only if they do apply likewise in the seller's country or if they were agreed upon or if they had been made **9**

known to the seller under Art. 35(2)(b) CISG. The Supreme Court rightfully followed this in the decision of 27 February 2003.

Undisputedly, none of these requirements are met in the present case. The assessments made by the courts in previous instances correspond to the principles of jurisprudence of the Supreme Court (cf. above). Thus, the prerequisites of § 502(1) ZPO are not fulfilled. Under the given factual basis, there is no necessity to comment on the partial criticism of the decision of the Austrian Supreme Court, 13 April 2000 – 2 Ob 100/00w (cf. Schwenzer in Schlechtriem & Schwenzer (ed.), *Kommentar zum Einheitlichen UN-Kaufrecht [Article-by-article commentary on the CISG]*, 4th ed., Art. 35 para. 17a and Lurger, 'Die neuere Rechtsprechungsentwicklung zum UN-Kaufrecht' [Recent case law on the CISG], *Juristische Blätter* (2002), 750 at 762 et seq., both with reference to Schlechtriem, *Internationales UN-Kaufrecht [Textbook on the CISG]*, paras. 137 et seq.). 10

With respect to the further appellate submissions, it still has to be held that recently even Posch (for cases which are to be resolved by Art. 35(2)(a) and (b) CISG) holds a view that is «basically identical to the opinion expressed by the Federal Supreme Court» (Posch in Schwimann (ed.), *ABGB [Article-by-article commentary on the Austrian Civil Code]*, Art. 35 CISG paras. 7 et seq.). He expressly relies on the decision of the Austrian Supreme Court, 13 April 2000 – 2 Ob 100/00w as well as on further German, French and U.S. case law (Posch, *ibid.*, footnote 4) and explains: 11

> «As a question of major practical relevance, it must be determined to what extent provisions of public law in the buyer's country (e.g. concerning critical levels of toxic load for food) can establish a required quality that needs to be observed by the seller. This is only the case if (1) the relevant provisions do apply likewise in the seller's country, (2) the buyer drew the seller's attention to their existence or (3) the seller knew or could not have been unaware of them under the circumstances of the case.» 12

Magnus argues with essentially the same result (Magnus, in *Staudinger's Kommentar zum BGB [Article-by-article commentary on the German Civil Code (BGB) and related laws]*, Art. 35 CISG para. 22). He, however, expressly states that the compliance of goods with compulsory provisions in the importing country is generally not part of their ordinary use (Art. 35(2)(a) CISG). Consequently, he assesses the usability of goods in its own country as the risk of the buyer. Just as the decision Austrian Supreme Court, 13 April 2000 – 2 Ob 100/00w, he mentions only the first two of the exceptions enumerated above and for the rest merely concedes that it might follow from «the particular circumstances» that the seller is in a position to be obliged to observe statutory provisions in the country of destination. For example, this concept would apply whenever a seller runs an office in that place or if it advertises into that country or if the sale into that country traces back to its own initiative. However, under the approach in Staudinger (Magnus, in *Staudinger's Kommentar zum BGB [Article-by-article commentary on the German Civil Code (BGB) and related laws]*, Art. 35 CISG para. 34), this provision can only be applied with certain restrictions in order to find whether a particular purpose, Art. 35(2)(b) CISG, does also embody the compliance of the goods with requirements of public law. An application is only possible if the buyer has communicated the country in which the goods were supposed to be used as well as their purpose and if he can 13

reasonably rely on the understanding of these provisions by the seller, e.g., because he is specialized in exporting goods to that country.

Apparently, [Buyer] relied on this exception – which was not mentioned in the above case law of the Supreme Court – in its appellate submission. It argues that according to Schwenzer (in Schlechtriem (ed.), *Kommentar zum Einheitlichen UN-Kaufrecht [Article-by-article commentary on the CISG]*, 3rd ed., Art. 35 para. 17), restrictions imposed by public law were to be observed by the seller even without an express notification by the buyer if the seller had already been aware of them, e.g., from previous transactions with the buyer or, as in the case at hand, if he regularly exports goods into that country. Moreover, it had to be considered as a sufficiently communicated particular purpose under Art. 35(2)(b) CISG when the seller is aware that the goods are to be exported in a certain country. Therefore, the buyer in this case could reasonably expect from the seller (as an experienced salesman in international trade) to deliver goods that are fit for an export into Serbia, as has been the case in all prior sales transactions between them. **14**

The issue whether these circumstances are able to establish another exception from the principle mentioned above does not, however, need be resolved, since the required factual basis is lacking in the present dispute. The Court's findings are based on the following facts: **15**

There had been no problems with goods that had been sold to Serbia by [Seller] through other transactions. Also [Buyer] had already previously (by way of company F[…]) purchased pork liver from [Seller] and – as [Buyer] has itself stated – imported to Serbia without any difficulties. **16**

With reference to the delivery in question, Serbian authorities had pointed to germs found in samples of the pork liver. Since these particular germs could be basically detected in any sample of liver, a quantification of the germs was necessary in order to determine if the goods were indeed spoilt. This had not taken place in Serbia. The test results of the Serbian authorities do not allow any definite conclusion that the liver was indeed spoilt. **17**

If Serbia demanded that no germs at all were allowed in frozen pork liver, an import would need to be banned from basically all over the EU, because it was «absolutely impossible» to free raw liver products from all germs before transport. **18**

This, however, implies that [Seller] did not know or must not have been aware of the Serbian import restrictions which have prevented the import in the case at hand. These restrictions required raw pork liver to be germ free, being a condition that was «absolutely impossible». Furthermore, it cannot be assumed that [Buyer] had any particular reason in this regard to rely on a superior knowledge of [Seller], which cannot be assumed without further proof (cf. Magnus, in *Staudinger's Kommentar zum BGB [Article-by-article commentary on the German Civil Code (BGB) and related laws]*, Art. 35 CISG para. 34 with further references). The appellate issues raised by [Buyer] are therefore irrelevant to this dispute. **19**

Lacking questions of legal significance, [Buyer]'s appeal has to be dismissed. **20**

The decision on costs and expenses is based on §§ 41, 50 ZPO. [Seller] has pointed in its appellate response to the remedy's inadmissibility. **21**