

**Case 1518: CISG 40**

Austria: Supreme Court (Oberster Gerichtshof)

10 Ob 4/12d

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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 with its place of business in Austria, bought from the defendant, a company based in Israel, paprika powder, which was 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 testing the products containing the paprika powder the buyer realised that the powder had been exposed to radiation. The buyer returned a major part of the goods and claimed damages disputing the radiation exposure of the goods.

Whereas the Court of first instance (Landesgericht Salzburg) dismissed the claim, because the buyer had lost its right to rely on a lack of conformity of the goods under Article 39(1) CISG, the Court of Appeal (Oberlandesgericht Linz) set aside this decision and remanded the case to the Court of first instance in order for that court to examine the case in light of Article 40 CISG and decide whether the seller knew or could not have been unaware of the lack of conformity of the goods. The defendant appealed to the Supreme Court.

Examining whether it is up to the buyer to prove that the seller could not be unaware of the lack of conformity of the goods, or if the seller has to prove that it could not have such knowledge, the Supreme Court discussed a decision by the German Federal Court on a quite similar case (Bundesgerichtshof 30 June 2004 (Paprika case, CLOUT case No. 773). The Supreme Court found that case both convincing and in line with its general approach on the issue of burden of proof. According to the court, the general rule on the burden of proof — i.e. the party taking advantage from a provision has to prove that its conditions are met — does not always lead to fair results. If the buyer proved that the irradiation had taken place prior to the delivery, then for reasons of fairness, the seller could be required to prove its lack of awareness of the fact, as the seller would have easier access to the evidence (principle of proof proximity), while there would be unreasonable difficulties for the buyer to collect evidence at the seller's place of business. Further to this discussion, the Supreme Court rejected the appeal and remanded the case to the Court of Appeal, as issues concerning the breach of contract had not yet been decided.