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Germany March 8, 1995 Bundesgerichtshof [Federal Supreme Court] (German case citations do not identify parties to proceedings) [translation available]

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Case Identification -

Date of Decision: March 8, 1995

Jurisdiction: Germany

Court: Bundesgerichtshof [Federal Supreme Court]

Case number / Docket number: VIII ZR 159/94

Case name: German case citations do not identify parties to proceedings

Case history: 1st instance LG Darmstadt 22 December 1992 (/cisg/case/germany-lg-aachen-lg-landgericht-district-court-german-case-citations-do-not-identify-39) [affirmed]; 2nd instance OLG Frankfurt 20 April 1994 (/cisg/case/germany-oberlandesgericht-hamburg-oberlandesgericht-olg-provincial-court-appeal-german-150) [affirmed] [Supreme Court opinion cited in U.S. DC ruling of 17 May 1999 (Medical Marketing International, Inc. v. Internazionale Medico Scientifica, S.r.l.) (/cisg/case/united-states-may-17-1999-district-court-medical-marketing-international-inc-v)

Seller(s)' country: Switzerland

Seller is the: Plaintiff

Buyer(s)' country: Germany

Buyer is the: Defendant

Goods involved: New Zealand mussels

Classification of Issues Present -

Application of CISG: Yes

Article 1(1)(a)

UNCITRAL thesaurus:
35B1 Fitness for purposes for goods of same description (art. 35(2)(a))
35B2 Fitness for particular purpose made known to seller (art. 35(2)(b))
35B4 Packaging to protect goods in usual manner for similar goods
39A Buyer must notify seller within reasonable time (art. 39(1))

Descriptors:
Conformity of goods (/cisg/search/cases?descriptors%5B%5D=8)
Lack of conformity notice, timeliness (/cisg/search/cases?descriptors%5B%5D=51)

Key provisions of CISG mentioned:
Article 35 (/cisg/page/annotated-text-cisg-article-35)
Article 39(1) (/cisg/page/annotated-text-cisg-article-39)

Other provisions of CISG mentioned:
Article 25 (/cisg/page/annotated-text-cisg-article-25)
Article 38 (/cisg/page/annotated-text-cisg-article-38)

Article 49 (/cisg/page/annotated-text-cisg-article-49)
Article 53 (/cisg/page/annotated-text-cisg-article-53)
Article 58 (/cisg/page/annotated-text-cisg-article-58)
Article 60(b) (/cisg/page/annotated-text-cisg-article-60)

Editorial Remarks -

Peter
Schlechtriem

Excerpt from *Uniform Sales Law in the Decisions of the Bundesgerichtshof* [*]

Conformity of goods. "The treatment of conformity to the contract within the meaning of Art. 35 CISG is clearly based on the subjective understanding of a defect [*subjektiver Fehlerbegriff*]. Art. 35(1) CISG defers to the agreement of the parties and Art. 35(2) CISG supplies helping rules for when the parties' agreements are incomplete.[82]

"The question whether deviations in the goods from public law regulations are to be considered a lack of conformity, and especially, which public law regulations are controlling, e.g., those of the seller's place of business or those of the buyer's place of business, is not expressly settled. The so-called 'mussel case'[83] brought some clarity to both these questions, or at least induced some clarity. This case concerned the sale of New Zealand mussels by a Swiss company to a German importer. The German buyer claimed that a certain level of cadmium in the mussels violated German food regulations. This cadmium level was, however, acceptable under Swiss regulations. The buyer declared the contract avoided due to lack of conformity of the goods while the seller sued for the sales price. The Court found that the goods conformed to the contract. The starting point of the decision was that food regulations, to the extent that they should even have been applicable here, could be decisive for the determination of the quality of the goods required by the contract, and that their violation is a defect in quality and not a defect in title. It is true that public law regulations, just as technical standards, cultural traditions or religious convictions, are circumstances that influence the ability to use goods. As this author has elsewhere explained in greater detail,[84] these circumstances interact with each other; for instance, ideological and other convictions are often converted into governmental rules and prohibitions. On the other hand, the violation of government regulations concerning the use of goods must not necessarily represent a defect in quality because the relevant commercial sphere can perhaps disregard such governmental regulations -- for instance, in environmental law -- and still readily consume and trade goods that violate a prohibition. Since such regulations, whether they stem from public law, ideological convictions, or traditional rules of conduct, can differ from country to country (and often greatly differ), the principle point to be decided was whether the public law regulations of the seller's place of business or the buyer's place of business controlled. The *Bundesgerichtshof* decided for the seller's place of business and brought to bear an impressive list of authorities for its position. In the Court's reasoning, public law regulations in the importing country are only important when they correspond to those of the exporting country, or when the buyer refers the seller to them. Certainly, the *Bundesgerichtshof's* decision is important not only for the application and interpretation of the CISG, but also for cases to be decided under the BGB/HGB, and soon, under the provisions for consumer sales.[85] However, as explained elsewhere,[86] one must nonetheless hope that this decision is not yet the final word on this question. Arbitration tribunals and courts of other jurisdictions have decided otherwise and applied the regulations of the buyer's place of business as a matter of course.[87] It is, of course, first of all up to the parties to consider such factors that influence the use of the goods at the time of fixing the quality required by the contract under Art. 35(1) CISG. Thereby, they should clearly allocate the risk associated with the observance of public law regulations in the contract. According to the experience of the author, this is done in many export-import contracts. The view espoused here, that public law regulations, ideological, and cultural or traditional conditions upon the use of goods are to be treated equally, makes it in my opinion clear that the just solution for these cases, where no clear party agreement can be discerned, should be developed from Art. 35(2)(b) CISG. Decisive is the particular purpose for the goods; thus, first of all whether the goods are to be used or resold in the importing country or whether they are to be further exported to a third country. If the seller knows where the goods are intended to be used, then he will usually be expected to have taken the factors that influence the possibility of their use in that country into consideration. If one exports foodstuffs containing pork or beef to countries in which, due to religious reasons, the consumption or resale for consumption of pork or beef violates legal or religious ordinances, he cannot claim that in Germany other rules and customs prevail. Such regulations in the broadest sense do not differ from technical or economic framework conditions for using goods in a certain country: Electric appliances delivered to the USA must be suitable for the voltage tension there [88] regardless of whether this tension is ordained by law or eventually became the standard during the electrification process.

"Of course, one must consider that exporters, especially smaller enterprises, cannot know all such regulations for the use of goods in the intended country. They can, however, be expected in such cases to define and qualify in the contract the quality and characteristics of the goods they are to deliver. Finally, the exceptions in Art. 35(2)(b) CISG should particularly help smaller companies if the buyer did not rely, or if it was unreasonable for him to rely, on his supplier's skill and judgment regarding the regulations that

influence the use of the goods in the intended country. In an uncertain legal situation in his own country -- such as that in the 'mussel case' regarding the applicability of the regulations for the mussels -- the buyer can also not trust that the seller has clear knowledge of the public law regulations (how should he considering the uncertain legal situation!) and that he is respecting them. In such a situation, the buyer must insist on a clear and unambiguous delimitation of the agreement. The blurred borderline between Art. 35(2)(a) and (b) CISG, noted in this context by the *Bundesgerichtshof*,[89] is for the question treated here perhaps easier to distinguish than feared: (only) where the same regulations exist in the seller's and buyer's country is Art. 35(2)(a) CISG the starting point for the determination of the quality required by the contract. Unlike under subparagraph (b), the seller cannot in these cases claim that the buyer could not rely on his (the seller's) skill and judgment.

"The decision of the *Bundesgerichtshof*, which deviates from the understanding of arbitration tribunals and foreign courts,[90] is nevertheless of considerable importance. Notable is first of all its consideration of a broad spectrum of German and foreign authorities. Particularly, however, a question is brought to the fore that, as mentioned above,[91] can also be decisive in international cases in which the German Civil Code (BGB) or the EU directive on consumer sales is applied and the *Bundesgerichtshof* deserves credit for having provoked this important discussion. Moreover, the decision seems to have been correctly decided in its treatment of the legal issue: In view of the uncertain legal situation in Germany, the buyer could not assume the seller to have clear knowledge and corresponding competence in this respect."

82. Dogmatically more precise is Art. 2(2) of the EU directive on the sale of consumer goods (*see supra* note 53). Art 2(2) of the directive closely follows the CISG in this respect, in that its corresponding helping rules are presumptions of that upon which the parties would have agreed had they thought it necessary to make agreements concerning the conformity of the goods. On this point, *see* Faber, *Zur Richtlinie bezüglich Verbrauchgüterkauf und Garantien für Verbrauchsgüter*, öst. JB1 1999, 413; Schmidt-Räntsch, *Zum Stand der Kaufrechtsrichtlinie*, ZIP 1998, 849, 850 f. sub II. 2.; Staudenmayer, *Die EG-Richtlinie über den Verbrauchsgüterkauf*, NJW 1999, 2393, 2394 sub III.
83. BGH of 8 March 1995, BGHZ 129, 75 ff.
84. *See* Schlechtriem, *Vertragsgemäßigkeit der Ware als Frage der Beschaffenheitsvereinbarung*, IPRax 1996, 12, 13 sub II.
85. For the determination of the quality required by the contract pursuant to § 459(1) BGB in an export contract under German law, one must examine whether such regulations "abrogate or diminish the use envisaged by the contract" in the buyer's land or place where he intends to use them. As mentioned above (*supra* note 82), Art. 2 of the directive on consumer sales closely follows the corresponding provisions of Art. 35(2) CISG.
86. *See* Schlechtriem, *supra* note 84.
87. *See* Medical Marketing Int'l, Inc. v. Internazionale Medico Scientifica, S.r.l., *supra* note 39, where an arbitration tribunal and an American district court unquestioningly presupposed the applicability of the importing country's (USA) safety regulations; Cour d'Appel Grenoble, CLOUT 15/1998, case 202 = TranspR-IHR 1999, 7. For the importation of red wine into France, the French Supreme Court, as well as the former instance, naturally used the provisions concerning the authorized sweetening of red wine in the importing country (France) as the legal standard. *See also* on this case, Witz, *supra* note 54; Witz/Wolter, *supra* note 54, at 281, who point out, however, that the over-sweetening was also not permitted under the law of the exporting country (Italy). *See also* the Argentine decision of the Cámera Nacional de Apelaciones en lo Comercial Sala C of 31 October 1995, Bedial, S. A. v. Paul Müggenburg & Co. GmbH, UNILEX = CLOUT No. 191.
88. *See* BGH of 5 July 1989, NJW 1989, 3097 f., concerning Art. 40 ULIS.
89. BGH of 8 March 1995, *supra* note 83, at sub bb) para. 3 (Uncertainty in judging whether the question is one concerning the examination of the ordinary purposes for which such goods are used, or rather that the goods are fit for a particular purpose, is also caused by the blurred distinction between subparagraph (a) and (b)).
90. *See* cases cited *supra* note 87.
91. *See supra* note 82.

[*] Peter Schlechtriem, Commentary on CISG issues considered by the BGH, presented in "50 Years of the Bundesgerichtshof [Federal Supreme Court of Germany]: A Celebration Anthology from the Academic Community" (/cisg/bibliography/schlechtriem-peter-germany-109).

Citations to case abstracts, texts, and commentaries -

UNCITRAL CLOUT
abstract number: 123

UNCITRAL ABSTRACT

The German Supreme Court confirmed the decision of the Oberlandesgericht Frankfurt a.M. (see CLOUT Case No. 84). It held that a Swiss seller, who delivered to the German buyer New Zealand mussels containing a cadmium concentration exceeding the limit recommended by the German health authority, was not in breach of contract. The cadmium concentration itself constituted, in the court's opinion, no lack of conformity since the mussels were still eatable. Furthermore, the Supreme Court held that article 35(2)(a) and (b) CISG does not place an obligation on the seller to supply goods, which conform to all statutory or other public provisions in force in the import State, unless the same provisions exist in the export State as well, or the buyer informed the seller about such provisions relying on the seller's expert knowledge, or the seller had knowledge of the provisions due to special circumstances.

The Supreme Court further held that the [buyer] had lost the right to rely on the lack of conformity and to declare the contract avoided in the ground of faulty packaging, since the [buyer] had waited more than a month before it notified the [seller] about the non-conformity and thus had not acted within the reasonable time required by article 39(1) CISG. According to the court, in this case one

month after delivery would be a "generous" period of time but obviously acceptable as "reasonable time" for the purpose of notification.

ABSTRACT

English: [1996] 3 European Current Law, Monthly Digest (Euro CL) No. 84 [72-73] and [1996] Euro CL No. 97 [118] = [1996] Euro CL No. 1081 [490] and No. 1084 [491]; Forum des Internationalen Rechts /The International Legal Forum [English Language Edition] 1 (1996) 15.

German: Schweizerische Zeitschrift für Internationales und Europäisches Rechts (SZIER) / Revue suisse de droit international et de droit européen (1996), 43-44; Wirtschaftsrechtliche Beratung (WiB) 1995, 799-800 [cited as 8 May 1995]; Entscheidungen zum Wirtschaftsrecht (EWiR) 1995, 569; Neue Juristische Wochenschrift - Rechtsprechungs-Report (NJW-BB) 1995, 1135; Juristische Schulung (JuS) 1996, 175.

Italian: Diritto del Commercio Internazionale (1995) 463-464 (tel:(1995) 463-464) No. 86.

Polish: Hermanowski/Jastrzebski, Konwencja Narodow Zjednoczonych o umowach miedzynarodowej sprzedazy towarow (Konwencja wiedenska) - Komentarz (1997) 268

Citations to comments on decision:

English: Smythe, Clearing The Clouds On The CISG'S Warranty Of Title (2016) (https://iicl.law.pace.edu/cisg/bibliography/clearing-clouds-cisgs-warranty-title-1); Honnold, Uniform Law for International Sales (1999) 257 [Art. 35]; Karollus, Cornell Review of the CISG (1995) 51 (/cisg/bibliography/review-convention-contracts-international-sale-goods-cisg-kluwer-law-internation-0) [67-68]; [comment on conformity-of-the-goods ruling in this case]; Ferrari, International Legal Forum (4/1998) 138-255 [229 n.827, 230 n.830, 231 n.846, 238 n.912, n.916 (notice of lack of conformity)]; Ferrari, 15 Journal of Law and Commerce (1995) 99-116 (/cisg/bibliography/ferrari-franco-italy-83) [comments on notice issues, citing this case and other cases]; Flechtner, 17 Journal of Law and Commerce (1998) 209-210 (/cisg/bibliography/flechtner-harry-m-us-14) [referring to the lower court ruling on conformity as a "misuse of the uniformity principle"]; Honka, Market Change (1996) 7 [89-91] = 11 Tulane European & Civil Law Forum (1996) 111 [177-179]; Lookofsky, Understanding the CISG in the USA [CISG/USA] (1995) 47; Lookofsky, CISG/Scandinavia (1996) 23 n.77, 58; Bernstein/Lookofsky, CISG/Europe (1997) 20 n.67, 60; T.S. [Simons], Forum des Internationalen Rechts / The International Legal Forum (München) [English Language Edition] 1 (1996) 16-17; for a survey of close to 100 judicial and arbitral rulings on Article 39(1), go to the 1998 Pace online commentary by Camilla Baasch Andersen (/cisg/bibliography/review-convention-contracts-international-sale-goods-cisg-1998); Koch, Pace Review of Convention on Contracts for International Sale of Goods (1998) 241-242 n.218 (/cisg/bibliography/review-convention-contracts-international-sale-goods-cisg-1998) [fundamental breach: frustration of purpose of contract]; for analysis of the remedy of avoidance citing this and other cases, go to Kazimierska, Pace Review of the Convention on Contracts for the International Sale of Goods (1999-2000) n.187 (/cisg/bibliography/kazimierska-anna-poland); Spanogle/Winship, International Sales Law: A Problem Oriented Coursebook (West 2000) [conformity of the goods 187-203 (this case at 196-197)]; Witz, ICC International Court of Arbitration Bulletin, Vol. 11/No. 2 (Fall 2000) 20 n.41 [Article 39 issues]; Schlechtriem, in: Uniform Sales Law in the Decisions of the Bundesgerichtshof (2001), at n.89 (/cisg/bibliography/schlechtriem-peter-germany-109); Bernstein & Lookofsky, Understanding the CISG in Europe, 2d ed., Kluwer (2003) § 2-8 n. 113; § 4-7 n.94; Graffi, Case Law on the Concept of "Fundamental Breach" in the Vienna Sales Convention, Revue de droit des affaires internationales / International Business Law Journal, No. 3 (2003) 338-349 at nn.65 (/cisg/bibliography/graffi-leonardo-5), 74; Teija Poikela, Conformity of Goods in the 1980 United Nations Convention on Contracts for the International Sale of Goods, Nordic Journal of Commercial Law, Issue 2003 # 1, nn.176, 219-220 (/cisg/bibliography/poikela-teija-finland); René Henschel, Conformity of Goods in International Sales Governed by CISG, pdf access at (http://iicl.law.pace.edu/cisg/bibliography/henschel-ren%C3%A9-franz-denmark-0)Nordic Journal of Commercial Law, Issue 2004 #1 p. 7-9 (http://www.njcl.utu.fi/) [citing endorsements of the principle of this case by courts of Austria, France and the United States, Henschel refers to it as having been accorded "ipso facto stare decises"]; Larry A. DiMatteo et al., 24 Northwestern Journal of International Law & Business (Winter 2004) 299-440 at n.590 (/cisg/bibliography/dimatteo-larry-0); [2004] S.A. Kruisinga, (Non-)conformity in the 1980 UN Convention on Contracts for the International Sale of Goods: a uniform concept?, Intersentia at 44, 45, 46, 81, 174; [2005] Schlechtriem & Schwenzer ed., Commentary on UN Convention on International Sale of Goods, 2d (English) ed., Oxford University Press, Art. 35 paras. 17, 49 Art. 39 para. 17 Art. 49 para. 32 Art. 79 paras. 37, 53; Henschel, The Conformity of Goods in International Sales, Forlaget Thomson (2005) 20, 61, 73, 103 et

seq., 163, 167 et seq., 190, 198, 201 et seq., 208, 216, 225, 303 et seq.; Schlechtriem, Case commentary BGH 2 March 2005 (December 2005) (/cisg/bibliography/schlechtriem-peter-germany-92); Schwenzer & Fountoulakis ed., International Sales Law, Routledge-Cavendish (2007) at pp. 257, 279, 306; Spaic, Analysis of Fundamental Breach under the CISG (December 2006) nn.297-298; Harry M. Flechtner, Conformity of Goods, Third Party Claims, and Buyer's Notice of Breach under the CISG ... University of Pittsburgh School of Law Working Paper Series. Working Paper 64 (August 2007) (https://law.bepress.com/cgi/viewcontent.cgi?article=1065&context=pittlwps), (http://law.bepress.com/pittlwps/art64/) Section IIA (https://law.bepress.com/cgi/viewcontent.cgi?article=1065&context=pittlwps); Alastair Mullis, in: Huber & Mullis, "The CISG: A new textbook for students and practitioners", Sellier European Law Publishers (2007) 136; Harry M. Flechtner, Funky Mussels, a Stolen Car and Decrepit Used Shoes: Non-Conforming Goods and Notice thereof under the United Nations Sales Convention ("CISG"), Boston University International Law Journal (Spring 2008) 1-28 (/cisg/bibliography/flechtner-harry-m-us-16).

Finnish: Huber/Sundström, Defensor Legis (1997) 747 [756-757, 758 n.54].

French: Witz, Receuil Dalloz (1997) 217-218 (tel:(1997) 217-218); Witz, Tilburg Lectures (1998) 159 [168 n.30, 169 n.34].

German: Daun, Neue Juristische Wochenschrift (NJW) 1996, 29-30 criticized by Gitzinger, Vorstudien (1999) 275-284 (tel:(1999) 275-284); Hohloch, Juristische Schulung (JuS) 1996, 175-176; Karollus, Juristische Rundschau (JR), 1996, 27-28; Magnus, Lindenmaier-Möhring, Nachschlagewerk des Bundesgerichtshof zum CISG (LM CISG) H.9/1995 CISG No. 2; Piltz, Europäische Zeitschrift für Wirtschaftsrecht (EuZW) 1995, 450-451 and [1999] Transportrecht, Beilage "Internationales Handelsrecht" (TranspR-IHR) 13 [16, 17 n.46]; Schlechtriem, Entscheidungen zum Wirtschaftsrecht (EWiR) Art. 35 CISG 1/95, 569-570; Schlechtriem, Praxis des internationalen Privat- und Verfahrensrechts (IPRax) 1996, 12-16; Schlechtriem, Internationales UN-Kaufrecht (1996) 81 n.49, 83 n.51, 150 n.234; T.S. [Simons], Forum des Internationalen Rechts / The International Legal Forum 1 (1996) 16-17; Wolf, [1998] Wertpapier-Mitteilungen (WM) No. 47 Special Suppl. 1998/2, 41 [42-43]; Zoberbier, Wirtschaftsrechtliche Beratung (WiB) 1995, 800.

Hungarian: Vida, Gazdaság és Jog (1996) No. 2, 25-26

Citation to text of decision:

Original language (German): BGHR CISG Art. 25, 35, 35(1), 35(2), 39, 39(1); Entscheidungen des Bundesgerichtshofs in Zivilsachen (BGHZ) 129, 75-86; Wertpapier-Mitteilungen (WM) 1995, 932-935; Bedrijfsjuridische berichten (BB) 1995, 942; Lindenmaier-Möhring, Nachschlagewerk des Bundesgerichtshof zum CISG (LM CISG) H.9/1995 CISG No. 2; Neue Juristische Wochenschrift (NJW) 1995, 2099-2101 (tel:2099-2101); Recht der Internationalen Wirtschaft (RIW) 1995, 595-597; Europäische Zeitschrift für Wirtschaftsrecht (EuZW) 1995, 447-450; Entscheidungen zum Wirtschaftsrecht (EWiR) 1995, 569; Juristische Rundschau (JR) 1996, 23-28; Neue Juristische Wochenschrift (NJW) 1995, 2099-2101 (tel:2099-2101); [1996] Sammlung lebensmittelrechtlicher Entscheidungen (LRE) 32, 13-21; Der Betrieb (DB) 1995, 1957-1958; Monatsschrift für Deutsches Recht (MDR) 1995, 997; Wirtschaftsrechtliche Beratung (WiB) 1995, 799-800; Praxis des internationalen Privat- und Verfahrensrechts (IPRax) 1996, 29-31; Zeitschrift für die Anwaltspraxis (ZAP EN-Nr. 479/96).

Translation (Italian): Foro italiano (1996-IV) 140-144.

Case Text -

Supreme Court (Bundesgerichtshof) 8 March 1995

Translation [*] by *Alston & Bird LL.P.*

Editors: William M. Barron, Esq.; Birgit Kurtz, Esq.
Coordinator: Thomas Carlé (Referendar); *Translators* (Referendars): Thomas Carlé; Nicola Heraeus; Carmela Schmelzer; Ulrich Springer

Facts

Defendant [buyer], who runs a fish import business in D., bought 1,750 kilograms (kg) New Zealand mussels for U.S. $3.70 per kg from Plaintiff [seller], who resides in Switzerland. [Seller] delivered the goods, as agreed, in January 1992 to a storage facility belonging to [buyer] and located at Company F. in G.G., and invoiced [buyer] on January 15, 1992 in the amount of U.S. $6,475

payable within 14 days.

At the end of January 1992, Company F. informed [buyer] that the federal veterinary agency of G.G. had taken samples of the goods for examination purposes. After the veterinary agency confirmed at the end of January/beginning of February 1992, upon [buyer's] request, that an increased cadmium content was discovered in the mussels and that further examinations by the responsible veterinary examination agency of Southern Hesse were necessary, [buyer] informed [seller] of these facts by facsimile dated February 7, 1992. According to the report by the veterinary examination agency of Southern Hesse, which was received by [buyer] on February 26, 1992 and forwarded to [seller] by [buyer], cadmium contents of between 0.5 and 1.0 milligram per kg (mg/kg) were ascertained in four of the examined bags of mussels; these contents did not yet exceed twice the amount of the 1990 standard of the federal public health agency, but further examinations by the importer were found necessary. An examination commissioned by [seller] and conducted by the federal agency for veterinary matters in Liebefeld-Bern determined a cadmium content of 0.875 mg/kg.

By facsimile dated March 3, 1992, [buyer]) announced to [seller] that she was going to send the mussels back at [seller's] expense since the veterinary agency had declared them "not harmless" due to their high cadmium content; simultaneously, she complained that the goods were "no longer in their original packaging as required" and that, furthermore, the packaging was unsuitable for frozen food. Thereafter, [seller] informed [buyer] by telephone that she would not accept the goods. Consequently, [buyer] did not return the goods. According to a report of the chemical examination laboratory of Dr. B. dated March 31, 1992, which had been commissioned by [buyer] for further examination, three samples revealed 1 mg of cadmium per kg; a doubling of the federal public health agency standards could not be "tolerated," and at least 20 additional samples of the entire delivery had to be examined.

[Buyer] requested that [seller] cover, among other things, the future expenses of the examination; [seller] did not reply.

In the complaint, [seller] demands payment of the purchase price of U.S. $6,475 plus interest. She claimed that the mussels were suitable for consumption because their cadmium content did not exceed the permitted limit; furthermore, [buyer] had not given timely notice of the defects. [Buyer], on the other hand, declared the contract avoided due to a fundamental breach of contract because the mussels were defective and had been complained of by the responsible authorities. Thus, the mussels were not permitted to be delivered out of the storage facility. And by now, the "expiration date of 12/92," affixed to the merchandise by [seller], had come and gone anyway.

The Trial Court (here the "*Landgericht*") obtained an expert opinion from the federal public health agency. With respect to the question whether the mussels were suitable for consumption having the reported cadmium content, the federal public health agency elaborates that the ZEBS (central registration and evaluation office of the federal public health agency for environmental chemicals) standards are guidelines indicating an unwanted concentration of harmful substances in food for purposes of preventative consumer health protection. Occasionally exceeding the individual standard which are not toxicologically explainable, usually does not lead to harmful effects on one's health, even if the measured concentration reaches twice the amount of the standard. If twice the amount of the standard is exceeded, the responsible state control authorities usually declare that, analogous to the procedure legally required for enforcement of the meat hygiene regulations (*FleischhygieneVerordnung*), the relevant food can no longer be considered suitable for consumption according to the foodstuffs and consumer goods law ("*Lebensmittel- und Bedarfsgegenständegesetz*" or "LMBG") § 17(1)(Nr.1).

The Trial Court ruled against [buyer] in accordance with [seller's] petition [*see* LG Darmstadt 22 December 1992 (http://cisgw3.law.pace.edu/cases/921222g1.html)]. On appeal, buyer claimed, as a precaution and with offer of proof, that the cadmium content of the mussels was even higher than 1 mg/kg. The Court of Appeals (*Oberlandesgericht*) dismissed [buyer's] appeal [*see* OLG Frankfurt 20 April 1994 (http://cisgw3.law.pace.edu/cases/940420g1.html)]. In the appeal to this Court, [buyer] continues to move for a dismissal, whereas [seller] pleads for a dismissal of the appeal.

Opinion

The appeal is unsuccessful.

I. The Court of Appeals has explained:

The U.N. Convention on Contracts for the International Sale of Goods dated April 11, 1980 (CISG) applies to the legal relationship between the parties. According to CISG Art. 53, [seller] is entitled to the purchase price. [Buyer] can only declare the contract avoided pursuant to CISG Art. 49(1)(a) in case of a fundamental breach of contract by seller. It is true that a delivery of goods that do not conform with the contract can be a fundamental breach of contract within the meaning of CISG Art. 25; in case of a lack of express agreement, CISG Art. 35(2) governs the question whether the goods conform with the contract. The question whether only goods of average quality are suitable for ordinary use (CISG Art. 35(2)(a)) or whether it is sufficient that the goods are "marketable" may be left open. The delivered mussels are not of inferior quality even if their cadmium content exceeds the examination results known so far. The reason for this is that the standard for cadmium content in fish, in contrast to the standard for meat, does not have a legally binding character but only an administratively guiding character. Even if the standard is exceeded by more than 100%, one cannot

assume that the food is no longer suitable for consumption, because mussels, contrary to basic food, are usually not consumed in large quantities within a short period of time and, therefore, even "peaks of contamination" are not harmful to one's health. That is why it is no longer relevant whether the public law provisions of those countries, to which an export was possible at the time of conclusion of the contract, have no influence on the conformity of the goods with the contract according to CISG Art. 35(2)(a).

The fact that the standard was exceeded is similarly not relevant to the elements of CISG Art. 35(2)(b) (fitness for a particular purpose). There is no evidence that the parties implicitly agreed to comply with the ZEBS-standards. Even if [seller] knew that [buyer] wanted to market the goods in Germany, one cannot make such an assumption, especially since the standards do not have legal character.

The demand to declare the contract avoided is also not legally founded based on [buyer's] allegation that the goods were not packaged properly. [Buyer's] pleadings in this respect are not substantiated and can, therefore, not be accepted. In any event, the statement to declare the contract avoided is statute-barred by CISG Art. 49(2). This is so because on March 3, 1992, Defendant (buyer) gave notice for the first time that the packaging of the goods delivered in the beginning of January did not conform with the contract; therefore, she did not give notice within a reasonably short time.

II. These elaborations hold up against a legal re-examination with respect to the result.

1. The application of the CISG provisions to the contract between the parties is expressly no longer questioned and is also correct (CISG Art. 1(1)(a)). The prerequisite to [buyer's] right to declare the contract avoided pursuant to CISG Art. 49(1)(a) due to the cadmium contamination of the delivered mussels is, therefore, a fundamental breach of contract by [seller] within the meaning of CISG Art. 25. This is the case when the purchaser essentially does not receive what he could have expected under the contract, and can be caused by a delivery of goods that do not conform with the contract (*see*, *e.g.*, Schlechtriem *in* von Caemmerer/Schlechtriem, *Kommentar zum Einheitlichen UN-Kaufrecht* (Commentary on the Uniform U.N. Law of Sales) Art. 25 6 20 (2d ed.) (with further citations)). Not even non-conformity with the contract within the meaning of CISG Art. 35 can, however, be determined.

a) In this respect, an agreement between the parties is primarily relevant (CISG Art. 35(1)). The Court of Appeals did not even find an implied agreement as to the consideration of the ZEBS-standards. [Buyer] did not argue against this finding, and it is not legally objectionable. The mere fact that the mussels should be delivered to the storage facility in G.G. does not necessarily constitute an agreement regarding the resalability of the goods, especially in Germany, and it definitely does not constitute an agreement regarding the compliance with certain public law provisions on which the resalability may depend.

b) Where the parties have not agreed on anything, the goods do not conform with the contract if they are unsuitable for the ordinary use or for a specific purpose expressly or impliedly made known to the seller (CISG Art. 35(2)(a) and (b)). The cadmium contamination of the mussels, that has been reported or, above that, alleged by [buyer], does not allow us to assume that the goods, under this rule, do not conform with the contract.

aa) In the examination of whether the goods were suitable for ordinary use, the Court of Appeals rightly left open the question -- controversial in the legal literature -- whether this requires generic goods of average quality or whether merely "marketable" goods are sufficient (*see*, *e.g.*, Schwenzer *in* von Caemmerer/Schlechtriem, *supra*, Art. 35 6 15 (with further citations)). Even if on appeal, goods of average quality were found to be required, [buyer] has still not argued that the delivered mussels contain a higher cadmium contamination than New Zealand mussels of average quality. It is true that, according to the report from the examination laboratory of Dr. B., submitted by [buyer] to the trial court, and the contents of which is thereby alleged, "there are also other imported New Zealand mussels on the market . . . that do not show a comparable cadmium contamination." It does not follow, however, that average New Zealand mussels on the market contain a smaller amount of cadmium than the mussels delivered to [buyer].

The appeal wrongly requests that [seller] submit a statement that New Zealand mussels usually have such a high cadmium contamination. After taking delivery without giving notice of the lack of conformity, the buyer must allege and prove that the goods do not conform with the contract and the seller does not have to allege and prove that they do conform with the contract (*see, e.g.*, Herber/Czerwenka, *Internationales Kaufrecht* (International Law of Sales) Art. 35 6 9 (1991); Piltz, *Internationales Kaufrecht* (International Law of Sales) § 5 6 21 (1993); Schwenzer, *supra*, 6 49 (with further citations)). Contrary to [buyer's] contention at trial, she accepted the mussels by physically taking delivery (CISG Art. 60(b)) at the place of destination in G.G., and she did not give notice of the lack of conformity of the goods at that time.

bb) Admittedly, from the point of view of salability and, therefore, resalability of the mussels and contrary to the Court of Appeals' opinion, even if twice the amount of the ZEBS-standard is exceeded, as [buyer] alleged, this would not change anything regarding the suitability of the mussels for consumption pursuant to LMBG § 17(1)(1), and, considering the report from the federal public health agency and the documented administrative practice of the state health agencies, there would be reservations, if the public law provisions of the Federal Republic of Germany were relevant. This, however, is not the case. According to the absolutely prevailing opinion in the legal literature, which this Court follows, the compliance with specialized public law provisions of the buyer's country or

the country of use cannot be expected (Schwenzer, *supra*, Art. 35 6 16 *et seq.*; Stumpf *in* von Caemmerer/Schlechtriem, *supra*, Art. 35 6 26 *et seq.* (1st ed.); Staudinger/Magnus, *BGB* (German civil code), CISG Art. 35 6 22 (13th ed.); Herber/Czerwenka, *supra*, Art. 35 66 4, 5; Piltz, *supra*, § 5 66 35, 41; Enderlein *in* Enderlein/Maskow/Stargardt, *Konvention der Vereinten Nationen über Verträge über den internationalen Warenkauf, Kommentar* (The U.N. Convention on Contracts for the International Sale of Goods, Commentary) Art. 35 6 4 (1985); the same in Enderlein/Maskow/Strohbach, *Internationales Kaufrecht* (International Law of Sales) Art. 35 6 8 (1991); Bianca *in* Bianca/Bonell, *Commentary on the international sales law* Art. 35 6 2.5.1, p. 274 *et seq.*, 6 3.2, p. 282 *et seq.* (1987); Audit, *La vente internationale de marchandises* (The International Sale of Goods) 6 98, p. 96 (1990); Heuzé, *La vente internationale de marchandises* (The International Sale of Goods) 6 290 (1993); Neumayer/Ming, *Convention de Vienne sur les contrats de vente internationale de marchandises* (The Vienna Convention on Contracts for the International Sale of Goods), Art. 35 6 7 (1993); *probably also* Hutter, *Die Haftung des Verkäufers für Nichtlieferung bzw. Lieferung vertragswidriger Ware nach dem Wiener UNCITRAL-Übereinkommen über internationale Warenkaufverträge vom 11. April 1980* (The Liability of the Seller for Non-delivery or Delivery of Goods Not Conforming with the Contract pursuant to the Vienna UNCITRAL-Convention on the International Sale of Goods dated April 11, 1980) at 46 *et seq.* (doctoral thesis 1988); Otto, MDR [*] 1992, 533, 534; *probably different* Schlechtriem *in International Sales* §§ 6.03, 6.21 (Galston/Smit 1984); *not clear* Soergel/Lüderitz, *BGB* (German civil code), CISG Art. 35 6 11 (12th ed.); *inconsistent* Heilmann, *Mängelgewährleistung im UN-Kaufrecht* (Guaranty with Respect to Non-Conformity with a Contract pursuant to the U.N. Law of Sales), *compare* p. 184 *with* p. 185 (1994); *concerning the legal situation pursuant to the EKG*,[*] *compare*, *e.g.*, Dölle/Stumpf, *Kommentar zum Einheitlichen Kaufrecht* (Commentary on the Uniform Law of Sales) Art. 33 6 18 (1976) (with further citations) *with* Mertens/Rehbinder, *Internationales Kaufrecht* (International Law of Sales), Art. 33 6 16, 19).

Some uncertainties, noticeable in the discussions in the legal literature and probably partly caused by the not very precise distinction between subsections (a) and (b) of CISG Art. 35(2), do not require clarification in the evaluation of whether this question must be integrated into the examination of the ordinary use of the goods or the examination of the fitness for a particular purpose. There is, therefore, no need to finally decide whether, within the scope of CISG Art. 35(2)(a), as most argue, the standards of the seller's country always have to be taken into account (*see, e.g.*, Bianca, *supra*, 6 2.5.1; Piltz, *supra*, 6 41; Enderlein *in* Enderlein/Maskow/Strohbach, *supra*; Aue, *Mängelgewährleistung im UN-Kaufrecht unter besonderer Berücksichtigung stillschweigender Zusicherungen* (Guaranty with Respect to Non-conformity with a Contract pursuant to the U.N. Law of Sales under Special Consideration of Implied Promises), at 75 (doctoral thesis 1989); *probably different* Schlechtriem, *supra*; Hutter, *supra*, at 40), so that it is not important for the purposes of subsection (a) whether the use of the goods conflicts with public law provisions of the import country (*see*, *e.g.*, Herber/Czerwenka, *supra*, 6 4). In any event, certain standards in the buyer's country can only be taken into account if they exist in the seller's country as well (*see*, *e.g.*, Stumpf *in* von Caemmerer/Schlechtriem, *supra*, 6 26; Schwenzer, *supra*, 6 16; Bianca, *supra*, 6 3.2) or if, and this should possibly be examined within the scope of CISG Art. 35(2)(b), the buyer has pointed them out to the seller (*see*, *e.g.*, Schwenzer, *supra*, 66 16, 17; Enderlein, *supra*) and, thereby, relied on and was allowed to rely on the seller's expertise or, maybe, if the relevant provisions in the anticipated export country are known or should be known to the seller due to the particular circumstances of the case (*see*, *e.g.*, Piltz, *supra*, 6 35; Bianca, *supra*). None of these possibilities can be assumed in this case:

aaa) [Buyer], who bears the burden of proof, did not allege that there are any Swiss public law provisions concerning the contamination of mussels with toxic metals. The appeal similarly does not mention anything in this respect.

bbb) The agreement regarding the place of delivery and place of destination is in itself, even if it could be viewed as an indication by [buyer] of the anticipated marketing in Germany, neither under subsection (a) nor under subsection (b) of CISG 35(2) sufficient to judge whether the mussels conform with the contract pursuant to certain cadmium standards used in Germany (*compare*, *e.g.*, Stumpf, *supra*, 6 27; Schwenzer, *supra*, 6 17; Piltz, Enderlein and Bianca, each *supra*). Decisive is that a foreign seller can simply not be required to know the not easily determinable public law provisions and/or administrative practices of the country to which he exports, and that the purchaser, therefore, cannot rationally rely upon such knowledge of the seller, but rather, the buyer can be expected to have such expert knowledge of the conditions in his own country or in the place of destination, as determined by him, and, therefore, he can be expected to inform the seller accordingly. This applies even more in a case like this, where, as the reply to the appeal rightly points out, there are no statutes regulating the permissible cadmium contamination and where, instead, the public health agencies apply the provisions, that are only valid as to the meat trade (*compare* No. 3 of Exh. 6 to the regulation for meat hygiene dated Oct. 30, 1986, BGBl.[*] I 1678, as modified by the regulation dated Nov. 7, 1991, BGBl. I 2066)), "analogously" and, seemingly, not uniformly in all the German *Länder* (federal states) (*compare* the announcements of the federal public health agency in *Bundesgesundhbl.*[*] 1990, 224 *et seq.*; 1991, 226, 227; 1993, 210, 211) to the exceeding of standards in the fish and mussels trade and where the legal bases for measures of the administrative authorities do not seem completely certain (*compare*, in a different context, *e.g.*, BVerwGE [*] 77, 102, specifically 122).

ccc) This Court need not decide whether the situation changes if the seller knows the public law provisions in the country of destination or if the purchaser can assume that the seller knows these provisions because, for instance, he has a branch in that country (*see*, *e.g.*, Neumayer/Ming, *supra*), because he has already had a business connection with the buyer for some time (*see*,

e.g., Schwenzer, *supra*, 6 17), because he often exports into the buyer's country (*see*, *e.g.*, Hutter, *supra*, at 47) or because he has promoted his products in that country (*see*, *e.g.*, Otto MDR 1992, 533, 534). [Buyer] did not allege any such facts.

ddd) Finally, the appeal argues unsuccessfully that the mussels could not be sold due to the "official seizure" and were, therefore, not "tradable." There is no need to go into great detail with respect to the question whether [buyer] has even alleged a seizure of the goods and whether she could have reasonably and with a chance of success attacked such a measure. In any event, a seizure would have been based on German public law provisions which, as set forth above, cannot be applied in order to determine whether the goods conformed with the contract (*supra*, specifically II(1)(b)(bb)(bbb)).

2. The Court of Appeals also correctly denied the [buyer's] right to declare the contract avoided because of the improper packaging of the goods. The question whether [buyer's] allegations were sufficient for a conclusive statement of a fundamental breach of contract (CISG Art. 25) or of any lack of conformity with the contract at all (CISG Art. 35(2)(e) [sic]) may remain unanswered. In any event, Defendant (buyer) lost her rights that might have resulted from these allegations due to untimeliness. This does not, however, result from the "untimeliness" of the declaration to avoid the contract pursuant to CISG Art. 49(2)(b)(i), but from the untimeliness of the notice of the lack of conformity required by CISG Art. 39(1), which must be considered first (*compare* Huber *in* von Caemmerer/Schlechtriem, *supra*, Art. 49 66 45 *et seq.* (2d ed.)).

In that respect, it does not make any difference whether the mussels were delivered "in the beginning" of January 1992, as the Court of Appeals assumed, or not until January 16, 1992, as the appeal alleges pointing to the "Betreff" ("Re.") section of [buyer's] facsimile dated February 7, 1992. The first notice of the lack of conformity of the packaging in the facsimile dated March 3, 1992 was untimely even if the latter date of delivery was decisive. [Buyer] had to examine the goods or had to have them examined within as short a period after they arrive at the place of destination as practicable under the circumstances (CISG Art. 38(2) in connection with subsection (1)). At least during the working week from January 20 to 24, 1992, [buyer] could have easily done this, whether by herself at the storage facility not far from her place of business or by a person employed by company F. and designated by [buyer]. The allegedly improper packaging could have easily been ascertained in an external examination. The time limit for the notice of the lack of conformity, which starts at that moment (CISG Art. 39(1)), as well as the time limit to declare the contract avoided pursuant to CISG Art. 49(2) (*compare judgment by this Court dated Feb. 15, 1995, VIII ZR 18/94* at II(3)(b), intended for publication) should not be calculated too long in the interest of clarifying the legal relationship of the parties as quickly as possible. Even if this Court were to apply a very generous "rough average" of about one month, taking into account different national legal traditions (*see* Schwenzer, *supra*, Art. 39 6 17 (with further citations); *stricter*, *e.g.*, Herber/Czerwenka, *supra*, Art. 39 6 9; Piltz, *supra*, § 5 6 59; Reinhard, *UN-Kaufrecht* (U.N. law of sales) Art. 39 6 5 (1991)), the time limit for the notice of the lack of conformity with the contract had expired before March 3, 1992.

The appeal's reference to an examination of the mussels already carried out by the public health agency as well as [buyer's] earlier notice of the increased cadmium content do not affect the assumption that the notice of lack of conformity was untimely. If the goods do not conform with the contract in various aspects, it is necessary to state all defects individually and describe them (*see*, *e.g.*, Schwenzer, *supra*, Art. 39 6 10; Herber/Czerwenka, *supra*, Art. 39 6 8). The buyer cannot claim those defects, of which he gave untimely notice.

Judgments of the Lower Courts: OLG [*] Frankfurt, April 20, 1994, Index No. 13 U 51/93; LG [*] Darmstadt, December 22, 1992, Index No. 14 O 165/92.

Footnotes

* All translations should be verified by cross-checking against the original text. For purposes of this translation, the Plaintiff of Switzerland is referred to as [seller]; the Defendant of Germany is referred to as [buyer]. Translator's note on abbreviations: BGBl. = Bundesgesetzblatt [Federal Law Gazette]; Bundesgesundhbl. = Bundesgesundheitsblatt [Federal Health Gazette]; BVerwGE = Bundesverwaltungsgerichtsentscheidungen [Official Reporter of cases decided by Germany's highest Federal Administrative Law Court]; EKG = Einheitliches Gesetz über den internationalen Kauf beweglicher Sachen [ULIS: 1964 Hague Convention, Uniform Law on the International Sale of Goods]; LG = Landgericht [District (trial) Court]; MDR = Monatsschrift für Deutsches Recht [monthly law journal]; OLG = Oberlandesgericht [Regional Court of Appeals].

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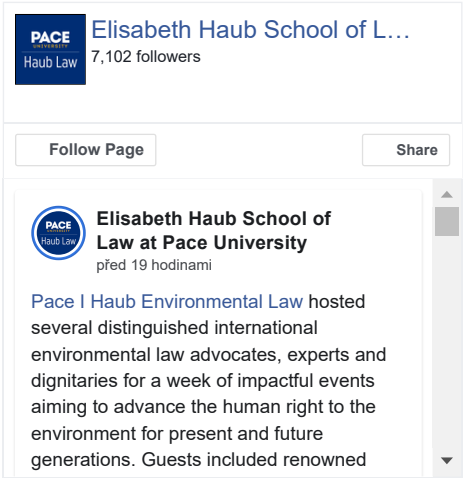

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For matters related with the CISG database, please contact, Dr. Gizem Alper, Esq. galper_tmp@pace.edu (mailto:galper_tmp@pace.edu)