

# Supreme Court of Austria (*Oberster Gerichtshof*)

8 May 2008 [3 Ob79/08a]

Translation [\*] by Institut für ausländisches und internationales  
Privat- und Wirtschaftsrecht der Universität Heidelberg  
Daniel Nagel [\*\*]

## DECISION

The extraordinary appeal (*außerordentliche Revision*) of the [Buyer] is rejected as the requirements of § 502 Section 1 ZPO [\*] are not met.

## FACTS

The [Buyer] bought 30 tons of poppy seed from the [Seller] and resold it to an Austrian company. The latter gave notice of a contamination of the poppy seed with caraway. The [Buyer] informed the [Seller] about this. In fact, the poppy seed were contaminated with feverfew. The delivered goods did not correspond to the contract, as it had been stipulated that the delivered goods had to match a sample.

The Court of First Instance applied the Convention on Contracts for the International Sale of Goods. It held that the [Buyer] had given a timely notice and that the [Seller] would be entitled to claim 90 % of the purchase price. This amount would either represent the sum which could have been received if the goods had been sold in the East or the full amount reduced by the costs for the cleaning of the poppy seed.

The Court of Appeal affirmed the judgment of the Court of First Instance and solely eliminated the possibility to pay the price in EUR. It held that the [Buyer] had failed to give notice according to Article 39 CISG, as it had alleged that the poppy seed had been contaminated with caraway. It would not be admissible to change the notice in respect to the actual lack of conformity (contamination with feverfew) afterwards.

## REASONING

The extraordinary appeal (*außerordentliche Revision*) of the [Buyer] is inadmissible due to a lack of fundamental questions of law.

It is true that the Court of Appeal has misinterpreted the facts as established by the Court of First Instance, namely, by assuming that the parties had agreed that a contamination with caraway should not exceed 0.06% and that the contamination should in general not exceed 0.4% -- such an agreement has only been reached between the [Buyer] and its Austrian customer. Nevertheless, this does not support the position of the [Buyer], who requests that the whole claim be dismissed (even though the [Buyer] received the purchase price from its customer). If a Court of Appeal fails to correctly repeat the facts as established by a Court of First Instance, an incorrectness of the report is present. This can be healed by the Supreme Court if the actual facts are used as the basis for its judgment (RIS-Justiz RS0110055; RS0116014).

The incorrectness of the report is irrelevant in the present case as the reasoning of the Court of Appeal -- the negation of a notice of non-conformity according to the rules -- does not constitute a fact which can be challenged by an extraordinary remedy as it is clear in the present case that the notice had in fact been specified (*cf.* in this respect: RIS-Justiz RS0116099) but the description of the defect was wrong (the notice stated that there had been a contamination with caraway whereas the actual contamination had been due to feverfew). Hence, the legal assessment leads to the same conclusion irrespective whether it is based on the facts as established by the Court of First Instance

(non-conformity of the goods due to the difference between the delivered goods and the sample) or on the facts as interpreted by the Court of Appeal.

There is no need for a further justification of this decision (§ 510 Section 3 ZPO [\*], namely in respect to Article 39 CISG)

---

## FOOTNOTES

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

Translator's note on other abbreviations: **ZPO** = *Zivilprozessordnung* [Austrian Code on Civil Procedure].

\*\* Ph.D. candidate Daniel Nagel has studied law at the University of Heidelberg and at the University of Leeds.