Federal Supreme Court of Austria (*Oberster Gerichtshof*)

4 July 2007 [2 Ob95/06 v]

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JUDGMENT

1. The appeal *(Revision)* is dismissed
2. The recourse is partially allowed. The partial judgment of the Court of Appeal is affirmed (dismissal of the claim for payment of further EUR 3,000 plus 4 % interest since 21 May 2003); The resolution on revocation however is only confirmed in respect to the claim for payment of 11,000 EUR plus 4 % interest since 21 May 2003. The remainder of the decision is revoked and the partial judgment (including the dismissal of the further claim according to para. 2 of the judgment of the Court of First Instance) changed to:

   > "The [Seller] is liable to pay EUR 12,353 to the [Buyer] plus 4 % interest since 21 May 2003, including EUR 11,353 conditional upon restitution of the vehicle '*Citroen C5*' automobile, vehicle no. VFDERHZB76275536.
   >
   > The claim for the payment of further EUR 4.000 plus 4 % interest since 8 March 2003 and 4 % interest on EUR 26,353 from 8 March 2003 to 20 May 2003 is dismissed."

3. The decision on costs is subject to the final decision.

FACTS

By virtue of a sales contract of 12 March 2003, the [Buyer] bought from the [Seller] a virgin *Citroen HDI 100* automobile, model BK 8 X with supplementary equipment at a price of EUR 22,353, excluding VAT and NoVA [*]. The [Buyer] purchased the vehicle for professional use as an authorized expert. This purpose was known to the [Seller] before and after the conclusion of the sales contract.

[Buyer]'s action

The [Buyer] brought an action on 14 May 2003; the [Buyer] sought to have the [Seller] pay EUR 27,353 due to "avoidance and dissolution" of this contract. The [Buyer] additionally claimed further EUR 1,000 (lump sum) as additional costs (phone calls, traveling costs, lost profit) and increased petrol costs due to the poor performance of the engine (12 to 14 litre fuel consumption per 100 kilometres for more than one year). The [Buyer] furthermore claimed EUR 4,000 alleging that the [Seller] had promised to provide free servicing for the first three years as well as to replace wearing parts for free. This promise had a value of EUR 4,000, which he could not realize due to the avoidance of the contract.

The [Buyer] alleged that he was entitled to avoid the contract as the [Seller] had failed to repair the -partially substantial (§ 932(4) ABGB [*]) defects within one year, which prevented the contractually agreed usability of the car. The [Seller] had been in default concerning successful repairs and had refused a replacement delivery of a car of the same model, as these defects had apparently been present in every *Citroen HDI 100*. The [Seller] hence would no longer be entitled to offer a replacement or repairs.

During the proceedings in the Court of Appeal, the [Buyer] alleged that Austrian law was to be

applied in respect to the sales contract. The CISG had been excluded. The contract provided in para. XI. for the applicability of the HGB. Even if the CISG was to be applied, the [Buyer] alleged that he had effectively avoided the contract and, according to Art. 81(2) CISG, would be entitled to claim restitution of the purchase price from the [Seller]. He would be willing to hand over the car conditional upon the restitution of the payment. As the [Seller] had not fulfilled its contractual obligation to deliver a car without defects and as the defects that had occurred would amount to a fundamental breach of contract, the [Buyer] would be entitled to declare the contract avoided according to Art. 49 CISG. Alternatively he would also be entitled to claim damages: The car had been that defective that it was of no use to the [Buyer]. It would be impossible to resell it. He would hence be entitled to claim the full purchase price as the [Seller] had sold a defective car and had failed to repair it, which constituted a fundamental breach of contract. The [Seller] had refused from the beginning to reimburse the [Buyer] or to replace the car. The [Buyer], alternatively, relied on a reduction in price. He alleged that the car had already been useless at the time of delivery. The defects had been non-recoverable and would amount to a severe security risk.

Position of the [Seller]

The [Seller] requested the dismissal of the appeal. It stated that after the delivery on 18 June 2002 the [Buyer] had directly given notice to the joint defendant. He subsequently had continued to give notice about further defects. All notices had been addressed to the joint defendant. The latter had been asked to replace the car with a Citroën C 5 BK 2.2 HDI SX (a more expensive model). The [Buyer] had given notice of more defects after this was denied. Even though all "legitimate" defects had been repaired between 18 September 2002 and 28 October2002 as well as that a sworn expert had inspected the car, the [Buyer] had still given notice of further defects at the time of taking it over. Following a meeting with the [Buyer] on 12 November 2002, the [Seller] had asked the [Buyer] to have the additionally alleged defects corrected in a garage of his choice, as the joint defendant was convinced that there were no more "legitimate" defects present. The [Buyer] had claimed dissolution of the contract in a letter dated 3 October 2003 after it had already used the car for 45.000 km and, in the alternative, had asked for a new 2,2 litre car without additional charge.

The [Seller] and the joint defendant refused to fulfill this request. They were convinced that all defects had been repaired by different garages as far as they had been "legitimate". Many of the [Buyer]'s allegations could not be accepted as defects.

The joint defendant argued during the proceedings in the Court of Appeal that even if Austrian law was applicable, the claim would not be legitimate as the guarantee only lasted for "six months". According to the provisions of the HGB [*], the [Buyer] had failed to give notice without undue delay. If the CISG was applicable, it had to be noted that the [Buyer] had continued to use the car even though he was aware of the defects, which amounted to a forfeiture of rights. Even if the [Buyer] was entitled to avoid the contract, 'the value of the use of the car had to be considered."

The [Seller] argued additionally that most of the notices had not been given to it but to different garages which had been contacted by the [Buyer] as the joint defendant had issued a guarantee for all over Austria. Such notices would not reach the [Seller].

Judgment of the Court of Appeal (Part 1)

The Court of Appeal held that the [Seller] was obliged to pay EUR 26,323 (including EUR 22,353 matching with the handing over of the car"). The claim for further EUR 1,000 and the claim for the payment of interest from 8 March 2003 to 20 May 2003 was dismissed.

The Court of Appeal ascertained the facts as follows:

The [Buyer] needed the car and navigation system bought from the [Seller] in order to practice his occupation. The built-in navigation system was important to find places which he had to visit. The

[Buyer] mainly used the car -- which he received in May 2002 -- for practicing his job as a certified expert and hence did not have to pay turnover tax or NOVA [*].

Because of the ever-occurring defects, the [Buyer] decided to deregister the car in September 2003 and has refrained from using it since then. At the time of deregistration, the car had been used for about 112,000 km.

The [Buyer] had accepted the standard terms of delivery and sale of the [Seller] in the form of their inclusion into the sales contract form. The disputing parties have not negotiated about the application of any certain law. Therefore, no specific set of law was to be excluded. In particular, they did not exclude the application of the CISG

Apart from provisions regarding contractual performance, transfer, purchase price, avoidance, substitute delivery in case of default of acceptance by the buyer, retention of title, the agreed standard terms of delivery and sale of the [Seller] contained under item XI the following provisions on contractual warranty:

> *1.) The seller grants any buyer that acts as a consumer in terms of the Consumer Protection Act a warranty under the relevant statutory provisions. For businessmen, the warranty provisions of the HGB [*] will be applied.*
>
> 2.) In all cases of warranty according to para. 1, the seller can release itself from any of buyer's remedy to avoid the contract or to reduce the price by substitution of the defective goods with goods that are free of defects within a reasonable time. In case of a right to a reduction in price, the seller may appropriately cure the lack within a reasonable time or effect supplementary delivery. In case of redhibitory action by the buyer and the following return of the vehicle, the buyer must pay a reasonable compensation for depreciation to the seller.

Moreover, [Seller]'s standard terms of delivery and sale contain under item XIII 'guarantee' the following provisions on guarantee:

> *1.) The seller grants a guarantee without mileage limitation during 12 months after initial registration.*
>
> [...]
>
> *4.) In order to realize the guarantee, the buyer may turn to any authorized workshop of C.*
>
> *5.) Performance of the guarantee comprises -- at the discretion of its debtor -- restoration or replacement of the parts that are considered as damaged as well as the labor time required for these jobs. The buyer shall not be entitled to any further claims. In particular, claims for redhibitory action or a reduction of the purchase price are excluded.*
>
> *6.) All performances under the guarantee must be effected by an official and authorized workshop of C.*
>
> [...]
>
> *8.) The replacement of parts or their restoration under the guarantee does not extend the guarantee period, neither for the vehicle nor for any parts.*
>
> [...]

In respect to item XIV) "Guarantee for hydro-pneumatic suspension" the following can be found:

> *XIV) Guarantee for hydro-pneumatic suspension*
> *1.) Additionally and with respect to vehicles equipped with hydro-pneumatic suspension, the seller promises a two year-guarantee within the maximum limit of 100,000 km concerning all hydraulic parts which form part of the hydro-pneumatic suspension. These are front and rear suspension bowls, main pressure storage, high pressure pump, level adjustment,*

suspension cylinder, pressure control.

The [Seller]'s standard terms of delivery and sale contain under item XVIII the agreement that

> [...] *in respect to a buyer, who cannot be seen as a consumer according to the consumer protection act, the court of jurisdiction is the court that has the* ratione materiae *jurisdiction in the district where the [Seller] is domiciled*

At the time of purchase of the car, the [Buyer] concluded a service contract with the [Seller]. The [Seller] was obliged to perform service and to replace worn parts without charge for two years after delivery without any mileage limitations. Furthermore, the parties agreed that a substitute car had to be made available to the [Buyer] for the time of service. Until deregistration of the vehicle in September 2003, the [Buyer] engaged the services pursuant to the service contract on five occasions. Such service caused average costs of EUR 400.

Shortly after the delivery of the car to the [Buyer], an unbalance of the wheels emerged and the remote control for the radio did not work. The [Buyer] informed the [Seller] who replaced the remote control. The wheel's unbalance was fixed by a third-party workshop on the instruction of the [Buyer]. Since an unbalance did actually exist, the [Seller] bore the costs.

At about mid-June 2002, the gearbox had started to emit a loud noise, the speed control partially failed to work, the doors could not be opened from time to time, the radio could not be turned off, there were rattling noises from the passenger compartment, the vehicle vibrated at high speeds and the electronic circuits of the speedometer partially stopped working. The [Buyer] notified the joint defendant of all of these defects at about mid-June 2002 by way of telephone calls. An inspection took place together with the [Buyer] at the end of June. After this inspection, the radio was sent to the manufacturer's works for replacement. Electronic defects should be fixed by the [Seller], just as the rattling noises from the inside.

As defects had been emerging constantly during the use of the car, the [Buyer] visited other authorized workshops of C. -- in addition to the garage of the [Seller] -- within Austria in order to have the various defects fixed. Due to these ever-emerging defects which were all notified by the [Buyer], the joint defendant ordered that the car be subjected to a fundamental inspection and a permanent rectification of defects at one of C.'s workshops in September 2002. Between 18 September 2002 and 28 October 2002, the car was inspected, fixed as far as it was necessary and then examined by the sworn and judicially certified expert for motor vehicles Martin F. on 28 October 2002. The examination took place due to the defects that had been given notice of by the [Buyer]. Martin F. ascertained the following:

> *The front door on the left hand side is lower than the rear door. The doors on the left and on the right of the B-pillar are different. This cannot be changed as the doors cannot be adjusted in this respect.*
>
> *The distances between the headlights and the wings are different. This cannot be changed. The distances between the wings and the A-Pillars are different. This cannot be changed.*
>
> *The hood cannot be changed but is still tolerable.*
>
> *The trunk is tilted and cannot be changed but is still tolerable.*
>
> *The sunroof is uneven but is still tolerable.*
>
> *The wings on the right hand side are uneven in respect to the front door. This cannot be changed.*
>
> *The lock of the front door on the right hand side has been changed and the linkage has been adjusted. Therefore, the function of this door is all right at the moment.*
>
> *The noise emitted by the armrest or the back door on the left hand side respectively will be stopped.*

The water in the back and front doors has been removed according to the garage.

There is no break pressure in the morning -- the car cannot be stopped without the engine running and the parking brake. The car starts to roll if the clutch is disengaged. In case the car is parked at a slope and the engine is stopped, there is - after a few minutes - also no pressure of the brake. This is due to the car's specific construction and cannot be changed.

The seat-belt tensioner does not work correctly. This is a structural defect and cannot be changed.

The screen of the navigation system flickers from time to time.

The telephone switches off deliberately. The hands-free kit resounds. The memory of the radio is deliberately erased.

The remote control and the volume of the radio do not work from time to time.

The navigation system occasionally loses target and its speech function.

The navigation system, the telephone and the radio occasionally do not switch off after the ignition key is removed.

The pilot lamps do not work from time to time.

There are regular dysfunctions of different electric devices, which will not be named separately.

The mirrors cannot be adjusted.

The cruise control occasionally stops working if the car accelerates -- corrected by the last software update?

The passenger seat wobbles -- some flexibility has to be present -- this is not unusual.

The pale plastic is very dirty -- has not been touched / no smoker.

Sun shields - no comment.

The navigation system cuts off the connectivity while telephone is in use -- cf. software update.

Dead sound of the car radio (price range) -- cf. software update.

Expert Martin F. ascertained in his report of 28 October 2002 furthermore that many defects had been corrected on behalf of the joint defendant. The car was handed back to the [Buyer] on 30 October 2002 after this survey had been carried out. The following was noted down in a completion certificate, which has been signed by the [Buyer] and an employee of the joint defendant:

1.) Inside of driver's door -- slight grindings caused by assembly
2.) Engine hood, at rear cover -- slight grindings caused by assembly
3.) Passenger door, near side window -- water drops at the inside of the window
4.) Loose faceplate at rear door handle
5.) Navigation system tends to lose track of the car's position
6.) Radiophone has been replaced -- but not tested,

The defects stated at item 1 and 2 will be rectified on account of C.Ö., Vienna. Items 3 to 5 will be examined and rectified under guarantee. According to a test drive, item 6 is deemed to be well-working (customer's telephone card was not available).

These defects discovered on 30 October 2002 had actually existed and were therefore recorded in the completion certificate.

In winter 2002-2003, both front doors suffered from cracks at the edges where the glass frame passes into the other parts of the door leaf. Corrosion had started to emerge at these spots in the

following. It is not typical for a car that is not even two-years old that tearing occurs at both door leafs.

Soon after delivery of the car to the [Buyer] in May 2002, the headlights had started to flicker. This defects appears in a way that the light -- if turned on -- gets weaker for a short time, approx. one second, whenever another current consumer is being turned on. During longer journeys, it can happen that the light gets weaker for about one second and about 40 times per minute, until it meets its full lighting power once again. This defect has not yet been rectified and does still appear. The flickering of the light impairs safety during night-time journeys, because the fluctuating lighting power results in less illumination of the area in front of the vehicle. Moreover, it is distracting for the driver as it occurs irregularly.

On the occasion of the findings of fall 2003 by the authorized expert D.H. -- who had been appointed by the court -- the joint defendant stated that the problem of the flickering light had been known and promised that a rectification of the defect would be effected shortly after.

Until the car had been deregistered, another defect was that it could not be held in position by using the footbrake if parked at slopes and during launch of the engine when the clutch must be pedaled. In that case, [Buyer]'s vehicle could only be held in position by using the parking brake. However, using the parking brake requires a lot more physical power.

For the car in question, it is due to its construction that both the footbrake and the parking brake are operated by the integrated hydro-pneumatic system. The negative pressure in the brake booster cannot be maintained in cases of a long-lasting halt, which also applies to other vehicles for construction reasons. [Buyer]'s car, however, requires much more physical power in order to lock the parking brake because of the lack of support by the brake booster after a longer halt. This drawback can only be compensated if the parking brake is locked already at the time of halting the car. On the other hand, it is generally advisable during wintertime not to lock the parking brake. Under these circumstances, it would be necessary to secure the position of the car by other means if parked at slopes.

The car also -- again and again -- showed the problem that during journeys the hydro-pneumatic suspension would suddenly become stiff, upon which Company F. of Salzburg replaced the suspension bowls and the rear level correction unit. Despite that, the car's suspension continues to become stiff from time to time until today. This may affect driving safety, particularly track stability, if curves are being traveled that have an uneven surface.

Already during the first summer after delivery of the car to the [Buyer], both front doors could not be opened at various occasions in cases of higher temperatures of about 25 to 30 degrees Celsius. In these cases, the [Buyer] had to exit via the rear doors. This defect was not notified to the [Seller] but to other Citroen dealers. In the first place, there had been no solution for the problem. It was only in the following course of events that it was attempted to fix the defect by installation of support parts. It is impossible to determine whether or not this installation has successfully rectified the defect with the doors.

The car's electronic system suffered a total breakdown for four or five times while used by the [Buyer], meaning that no electronic displays could be read anymore. At the same time with the electronic system, the vehicles lighting breaks down as well. The corresponding malfunctions occur particularly during damp weather conditions.

If the electronic system suffers total breakdowns and if additionally the inner as well as the outer lighting breaks down while the car is used, a severe security risk is present. Following such an electronic breakdown, all displays had to be re-initialized. Apart from the radio, the navigation system and further electronic parts are affected. Re-initializing requires the software of the manufacturer and is hence connected with a visit to the nearest garage.

The car is electronically controlled via a central control unit (data bus). This means that whenever a

single current consumer breaks down which is connected to the data bus, all other connected units break down as well or at least indicate error messages. The data bus has already been replaced twice due to corresponding malfunctions.

The [Seller] is aware that the car in question regularly suffers from a weaker display of the navigation system or from the circumstance that it loses its destination meaning so that the route has to be recalculated. Apparently, this defect is caused by fluctuations in the electric current. Moreover, this circumstance can result in the necessity to visit the official workshop in order to re-program the navigation system. It is undeterminable whether or not this defect has already been successfully rectified.

In order to have the 60,000 km-service effected, the [Buyer] visited the workshop of C.F. in Salzburg in fall 2002. Apart from the usual service, the car suffered various defects at that time. However, C.F. was unable to cure all of the defects because it would have been necessary to leave the car at the workshop for one week. This was impossible because the [Buyer] would have needed a substitution car with navigation system in order to practice his profession. However, such a car was not available. The [Buyer] visited C.F. in Salzburg about 10 to 15 times and called attention to defects at every occasion.

On 20 October 2003, the judicially appointed expert D.H. identified the following circumstances with respect to the [Buyer]'s car:

> *Door crevices at the A-, B- and C-pillars are practically identical. The doors can be shut using relatively usual power. There are no apparent major differences in each of the door crevices.*
>
> *The front right headlight marginally juts along the flank of the right wing. Such jutting of the headlight is not identifiable with respect to comparable vehicles. This defect could have been cured only with disproportional efforts.*
>
> *All four side window frames suffered from condensation water between the windows and its sealing.*
>
> *The transition from the wing towards the A-pillar (vertical windshield frame) is uneven left and right. However, this unevenness is also present on all other vehicles of the first series. Clearances of the engine hood towards both wings are not completely identical. However, the differences are hardly visible.*
>
> *The clearance of the trunk cover at the lower left corner is smaller than on the other edges; it is especially smaller than in the lower right corner. Still, this uneven clearance also appears in other vehicles of the first series.*
>
> *The cover of the sunroof does not match the level of the roof at all places. Particularly at the front right part, the sunroof is placed slightly lower than at other places. The rectification of this defect is economically unjustifiable.*
>
> *During the 30-minutes test drive conducted on 20 October 2003, no creaking or crackling noises were identifiable in the passenger compartment of the car. However, during freeway journeys and at higher speed, there have been wind noises within the vehicle. However, this can be identified at other vehicles of the same type as well.*
>
> *While driving without full acceleration, the vehicle emits a slight oscillating noise. It could not be determined whether it was caused by the gearbox. The noise itself does not constitute any mechanical defect. The sound emitted by the engine of the vehicle under scrutiny appeared a bit louder than the sound emitted from a similar car.*
>
> *On the occasion of the inspection, the plastic engine cover had been provisionally fastened with four screws.*
>
> *The cover of the license plate lighting slightly overlapped the edges; it did not exactly match*

the rear cover.

The side covers, which are supposed to lock the left and right depositories within the trunk, slightly overlap the interior enclosure at their top. Therefore, they are not entirely flush on the upper rear corner of the depository. It cannot be determined whether or not this defect had already been present at the time of delivery. Just as little can it be determined at what time the rubber gasket of the trunk cover commenced to no longer enclose both interior linings between the trunk cover and the rear side window. As a result, the edge of the linings overlaps both trunk cover gaskets from the side.

The fact that the seat belts roll up rather slowly is apparently due to the particular construction.

The cover strip at the navigation system cover bears on its right side a hardly visible larger clearance than on the left.

In order to have the defects rectified, the [Buyer] visited the [Seller]'s workshop five to six times. It had been necessary in each case that a service date had to be appointed first and the distance to the workshop was considerably long. Consequently, the [Buyer] then decided to turn to other workshops for the rectification of defects.

By letter dated 3 January 2004 (typing error in original judgment) , the attorney of the [Buyer] requested C.Ö. to refund the purchase price with additional frustrated costs for the service contract and litigation costs and to take back the vehicle hinting towards the right for a redhibitory action.

By letter dated 14 January 2004, the attorney of the [Buyer] requested the attorney of the [Seller] to cure all of the car's defects within a period of fourteen days in accordance with the contractual warranty and the service contract. Otherwise, it had to be assumed that rectification of defects was impossible, meaning that the redhibitory action was justified. Thereupon, the attorney of the [Seller] requested the attorney of the [Buyer] by letter of 20 January 2004 to give specific notice of the claimed defects and to extend the period to four weeks. By letter dated 21 January 2004, the attorney of the [Buyer] denied the request for a time extension.

The [Buyer] has suffered expenses in form of travel expenses and telephone costs which originated in the context of countless visits to the workshops of C. for attempts to rectify the defects.

The [Buyer] has already offered in the course of the first apparent defects to have the car replaced by one of the same model. This was refused by the [Seller]. The [Buyer] has additionally been interested in obtaining a more powerful car with xenon lights, as to his knowledge this version did not suffer from as many defects as the car in dispute. However, the [Seller] refused this as well without negotiating about additional charges.

Judgment of the Court of First Instance

The Court of First Instance has stated in respect to the issue of applicable law that the sales contract was generally governed by the CISG, which is applicable in Austria and Germany. However, its application could be excluded through agreement by the parties according to Art. 6 CISG, e.g., through valid standard terms of sale. An implied exclusion is possible as well. The choice of a law different from the CISG was to be considered as such an implied exclusion; the same applied in cases where standard terms of sale had been introduced into the contract if they were apparently based on a certain domestic law. Moreover, the agreement on singular provisions of a domestic jurisdiction could be interpreted as an explicit intent to waive the CISG, in particular where main obligations are concerned. Finally, even the choice of a forum might constitute a waiver of the CISG.

Despite having its place of business in Germany, the [Buyer] based its request on provisions of Austrian law (without the CISG) and alleged that the application of the CISG had been excluded on

the basis that item XI of the [Seller]'s standard terms of sale provided for the application of the HGB [*]. This had been contested by the [Seller] and the joint defendant but without substantiation and merely formally.

Apart from this procedural argument, the same waiver of the CISG resulted from the [Seller]'s standard terms of delivery and sale. The statement of the [Seller] that the application of the CISG had not been excluded solely meant that there was no express waiver, which was undisputed in any case. The [Seller]'s standard terms of delivery and sale clearly pointed to the applicability of Austrian law without the CISG because the contractual warranty was individually regulated in main points. The reference to the Consumer Protection Act and to provisions of the HGB geared to a specific domestic law apart from the CISG, being Austrian law. Even the comprehensive provisions on guarantee and the choice of forum would hint at a waiver. Finally, it had to be considered that the CISG could also be partially waived, which generally applied in respect to a reference to accepted standard terms. Therefore, in any case, the parties had impliedly waived application of the CISG with respect to obligations arising from contractual warranty in the present case. Consequently, these obligations were governed by the provisions on contractual warranty laid down in the ABGB [*], in force since 1 January 2002, and the HGB, respectively, the provisions contained in the standard terms of delivery and sale of the [Seller]. The [Buyer] was entitled to exercise a redhibitory action based on the provisions of the new § 932 ABGB. The [Seller] had neither corrected the defects nor had it replaced any defective parts within reasonable time. Additionally some defects -- according to the present expertise -- could not be changed at all. Many problems still existed in respect to the flickering headlights and meter lighting as well as with respect to the electronic breakdowns. Moreover, the suspension was becoming stiff for no reason. If the [Seller] -- despite sufficient notifications of the defects -- was unable to rectify the defects within one and a half years, it could be reasonably assumed that a rectification was impossible. The present defects were significant and the [Seller] had denied replacement of the vehicle as a whole. Hence, the [Buyer] was entitled to a redhibitory action.

The [Seller] was obliged to perform concurrently with the return of the car, as the [Buyer] had offered -- without any defense put forward in this respect by the [Seller] -- to return the car conditional upon being refunded.

Additionally, the [Buyer] would be entitled to claim damages according to § 933a ABGB. As a conclusion to the fact that the vehicle was still defective, it could be inferred that the [Seller] had not performed its obligations pursuant to the sales contract. It was for the [Seller] to demonstrate that it had acted without fault. However, the [Seller] had not even attempted to argue that its performance was in agreement with the contractual obligation.

The [Buyer] had suffered damages through travel and telephone expenses which were necessary in order to arrange the various visits to the workshops. These costs were to be assessed under § 273 ZPO [*] at EUR 1,000.

Due to the [Buyer]'s redhibitory action regarding the sales contract, he had even suffered damages in respect to the fact that he was hindered from relying on performance of the services that were contractually promised for the period of two years. If one takes into account that with increasing mileage and age of the car, the required services increased in complexity, the damage from loss of services amounted to EUR 3,000 in accordance with § 273 ZPO [*] (NB which is EUR 1,000 less than claimed).

This resulted in a total claim of EUR 26,353. As the [Seller] had not put forward any defenses in respect to the loss of use this could not be taken into account. The joint defendant was not entitled to put forward defenses, which appertained to the [Seller].

Judgment of the Court of Appeal (Part 2)

The Court of Appeal allowed the appeal of the [Seller] and the joint defendant, which obviously were directed against that part of the judgment of the Court of First Instance which favored the position of the [Buyer].

The Court of Appeal changed the judgment of the Court of First Instance (award of the amount of EUR 3,000 plus 4% interest since 21 May 2003) to:

"The claim that the [Seller] was liable to pay [Buyer] EUR 4,000 plus 4% interest since 8 March 2003 and 4% interest from EUR 26,353 between 8 March and 20 May 2003 is dismissed. The remainder is revoked and referred back to the Court of First Instance"

The Court of Appeal held that the alleged wrongful fact-finding was correct and hence based its decision on the facts as ascertained by the Court of First Instance.

The Court of Appeal held in respect to the application of law:

It has not been contested during the appellate proceedings that the sales contract at hand fulfils the objective requirements for application of the CISG. While the [Buyer] still argued that the CISG has been waived, both the [Seller] and the joint defendant contested the assessment made by the Court of First Instance that the parties waived the applicability of the CISG at least insofar as the [Seller]'s contractual warranty was concerned. They jointly stated that for the question of an implied CISG waiver, one had to consider the real and not the hypothetic intent of the parties. Such an intent could not be concluded from rudimental warranty provisions contained in the [Seller]'s standard terms. Instead, it was in the nature of things that standard terms of delivery and sale of an Austrian [Seller] would be primarily based on Austrian law.

The standard terms did not provide for the exceptional case that the buyer was domiciled outside Austria. There was no sufficient indication to conclude that the [Seller] would not have intended to apply the CISG to sales with non-Austrians. By way of item XI of the sales contract, warranty provisions of the HGB [*] were to be applied for businessmen. Even though the [Buyer] -- as an authorized expert on vehicles -- was an entrepreneur in terms of § 1 KSchG [*], he was no businessman under the HGB. Guarantee promises were possible both under the CISG and under the ABGB [*]. Therefore, the comprehensive guarantee provisions -- which constituted a standard in the practice of vehicle sales -- could not serve as an indication towards a general intent to waive applicability of the CISG.

As the CISG was not even applicable for sales contracts with consumers, this provision could only be relevant for the question of the CISG's applicability insofar as it states that sales contracts with businessmen are governed by "warranty provisions laid down in the HGB [*]". It cannot be established that there had been a common intent by both parties to apply this provisions also to contracts with entrepreneurs not being businessmen in terms of the HGB [*] -- as e.g., the [Buyer] as there had been no negotiations at all concerning an exclusion of a certain law between the [Buyer] and the [Seller] and as the wording of the clause clearly excluded such an assumption.

Even an interpretation under objective standards prohibits an understanding in the way as sought by the [Buyer]. The clear wording of the contract item prohibits that any reasonable buyer could have understood it in a way that warranty provisions of the HGB [*] should be applied to non-businessmen. Moreover, there were no indications in order to extend the scope of the clause also towards foreign contracting partners, because it has not even been clarified which domestic law should apply in that case. The parties had not effectively excluded the application of the CISG. Therefore, the CISG applied to the present dispute.

The [Buyer] primarily relies on avoidance of the contract. In the alternative, the [Buyer] asserted that he was entitled to damages and to reduce the purchase price. These claims were not covered by the contractual guarantee that has been promised by the [Seller], because it only provided for a right to have the vehicle fixed or parts replaced. The guarantee itself would not support the [Buyer]'s claims.

Hence the [Seller] was only liable under Art. 36(1) CISG for those lacks of conformity that had already been in existence at the time of the passing of the risk. According to Art. 69 CISG, the risk passes to the buyer when he takes over the goods. In the present case, the goods were handed over to the [Buyer] in May 2002. Consequently, the [Buyer] did not have valid claims concerning the tearing of the front doors. This damage only came about in wintertime 2002-2003. i.e., only after the passing of the risk to the buyer.

In respect to the defect which caused that it was impossible during high temperature to open the doors as well as concerning all further defects that had been notified to the joint defendant in mid-June 2002, all claims failed because the notice of non-conformity had not been given to the [Seller]. Moreover, the [Buyer] had not attempted to argue that the joint defendant or any other dealers of C. -- to which a notice had been given -- were competent for the receipt of notices of non-conformity. The [Buyer] bore the burden to prove that proper notice had been given. Therefore, the purported claims discussed above had conclusively to be denied.

With respect to the flickering of headlights, the irregular stiffness of the hydro-pneumatic suspension and the total breakdowns of electronic units it had to be assumed that they at least latently existed because it was only shortly after delivery of the car that they emerged.

This also applied in respect to the defects which the appointed expert D.H. identified during his inspection on 20 October 2003. It is true that the Court of First Instance did not expressly determine the time of their occurrence. However, this circumstance is negligible in order to determine a fundamental breach of contract as the defects at issue were insignificant in their entirety (generally only blemishes), which thus do not justify an avoidance of the contract.

With respect to the further apparent defects, it was to be assumed that they constituted an objective detriment of the interests of the [Buyer]. These defects negatively affected driving safety for all passengers. Moreover, it could not be expected to have the car resold with these severe safety risks in order to prevent an avoidance of the contract. Therefore, it was to be concluded that these defects formed a fundamental breach of contract which -- if the further prerequisites are fulfilled as well -- entitled the buyer to avoid the contract according to Art. 49 CISG.

The joint defendant, who had already asserted during the proceedings in the Court of First Instance that [Buyer] had forfeited his purported claims because he had continued to use the car being aware of the defects, attempted to counteract the avoidance by relying on Art. 82 CISG, which prohibited the avoidance of a contract if the car was used despite being aware of the defects.

With respect to the defects which constitute a fundamental breach of contract, it had to be concluded that they had been detected by the [Buyer] shortly after the receipt of the vehicle in May 2002. According to the factual findings, defects of electronic parts had been notified in mid-June 2002. The flickering of the headlights had occurred soon after the receipt of the car, as well. Issues concerned with the hydro-pneumatic suspension as well as the other two defects had been mentioned by the [Buyer] in his letter of 18 September 2002. Therefore, the [Buyer] had definitely been aware of these other defects already during the first few months after the receipt of the car. Despite that, he continued using the car.

The [Buyer] had effectively declared the contract avoided by bringing the present action on 20 May 2003. Even though the exact mileage of the car at that time had not been determined, it could be assumed that the relevant defects had occurred soon after the delivery of the car and had furthermore been identified and notified by the [Buyer]. In September 2003, the car had indicated a mileage of 112,000 km. It would therefore be unquestionable that the [Buyer] continued using the car in the time between the identification of defects and the bringing of the legal action. The exception of Art. 82(2) CISG, i.e., the restitution of the goods substantially in the condition in which they had been received, thus did not apply in favor of the [Buyer] as the [Buyer] could no longer return the car in the same mint condition in which he had received it, he had -- notwithstanding the fundamental nature of the breach -- forfeited any possible right to effectively

declare the contract avoided.

Furthermore, the [Buyer] relied on a claim for damages. If the seller failed to perform any of his obligations under the contract or the CISG, Art. 45(1)(b) CISG granted the aggrieved party the right to claim damages according to Arts. 74 to 77 CISG. In cases where the contract was upheld and the seller delivers defective goods, the buyer was entitled to claim the reduction in value as a non-performance loss.

Consequently, the [Seller] was liable for damages with respect to the reduction in value of the car insofar as it was caused by the still-existent defects. The same liability for damages applied to the expenses of EUR 1,000 for telephone calls and traveling in the context of the countless attempts to have the car fixed at C.'s workshops -- as held by the Court of First Instance. The amount of the sum had remained uncontested. However, a claim for damages presupposed just as well that the [Buyer] had given proper notice of non-conformity in terms of Art. 39 CISG.

However, the [Seller] had argued during the proceedings in the Court of First Instance that the [Buyer] had given notice of non-conformity, to other workshops of C., which had been visited by the [Buyer] in the context of the guarantee promised by C. within Austria but not to the [Seller]. It was impossible to determine from the judgment of the Court of First Instance whether this had actually been the case and to which defects the notice had actually referred which leadsw to the repeal of this judgment.

Concerning those defects which the appointed expert D.H. identified during his inspection of 20 October 2003, it could not be definitely determined whether or not they were still in existence. Therefore, the judgment of the Court of First Instance once more lacked a sufficiently established factual basis which would have to be cured in the further course of proceedings.

The [Buyer] was not entitled to claim the sum of EUR 3,000 which has been awarded by the Court of First Instance for loss of service performances as a result of the [Buyer]'s redhibitory action -- based on the assumption that the Court of Appeal denied an effective avoidance of the contract. The judgment of the Court of First Instance therefore had to be amended in that respect.

As the Supreme Court had not yet made legal assessments of the relevant question of the restitution of goods under Art. 82 CISG, recourse to the Austrian Federal Supreme Court as well as regular appeal (Revision) was admissible.

REASONING

Position of the parties

The [Buyer] directed its appeal (Revision) and recourse against the partial judgment and the part of the judgment of the Court of Appeal which repeals the judgment of the Court of First Instance based on defective legal assessment and seeks to dismiss the appealed parts and to fully allow his claim or to repeal the judgment of the Court of Appeal alternatively.

The [Seller] seeks the dismissal of the appeal (*Revision*) and the recourse. This is -- *in eventu* -- also requested by the joint defendant, which however primarily seeks that the remedies of the [Buyer] not be admitted.

Reasoning

Both the appeal (*Revision*) as well as the recourse are admissible and partially justified.

The [Buyer] primarily contests that the Court of Appeal has based its decision on Art. 82 CISG as well as that it has denied an effective avoidance of the contract (based on this provision).

The argument that the [Buyer] had lost its right to avoid the contract, as the requirements of Art. 82 CISG had been fulfilled, has not been put forward by the joint defendant until the appellate

proceedings which constituted a breach of the prohibition to bring forward new defenses. During the proceedings in the Court of First Instance, it had solely stated that 'in case that the CISG was applicable it had to be assessed that the [Buyer] had continued to use the car despite his knowledge of the defects and had hence forfeited any rights under the CISG'. Hence, Art. 82 CISG could not be taken into account.

These arguments are justified in the end as the provisions of the CISG are not applicable in respect to the guarantee as regards the sale of a new car as in the present case.

It is possible to impliedly exclude the application of the CISG -- as the Court of Appeal itself states -- if such an intent is clearly visible. This can be assumed -- as both the Court of Appeal and the Court of First Instance correctly held -- if the parties choose the applicability of the law of one Contracting State and thereby denominate the applicable law of property (e.g., the BGB [= German Civil Code] or Codice civile [= Italian Civil Code]) or if the parties choose the applicability of the law of one Contracting State insofar as it differs from the law of a different Contracting State. (*Siehr*, in: *H. Honsell*, Kommentar zum UN-K Art 6 Rn. 6). The issue whether the CISG has been excluded or not is hence dependent on the fact whether the parties chose the applicability of the law of one Contracting State. The reference to such law (e.g., "the contract is based on the sales law of the BGB") can be seen as the exclusion of the CISG. (*Ferrari,* in *Schlechtriem/Schwenzer*, Kommentar zum Einheitlichen UN-K [2004], Art 6 Rn 21 w.f.r. to jurisdiction).

Such an exclusion of the CISG, which generally also can be effected via the standard terms of business, if these have been effectively included in the contract -- as in the present case -- (*Schlechtriem*, Internationales UN-K3 [2005] Rn 21 f) can be seen in item XI. 1. of the standard terms of sale and delivery of the [Seller] -- which have been accepted by the [Buyer] -- which refers to Austrian law. This clause expressly states that in respect to consumers in terms of the Consumer Protection Act the "according provisions" have to be applied and that in respect to businessmen the "provisions of the HGB [*]" have to be applied. It hence refers to the Austrian law of property.

The contrary assumption of the Court of Appeal which concurs with the position of the [Seller], that there was no indication that (at least) the [Seller] did not want the CISG to be applied to contracts with non-Austrians, as it had not been clarified the law of property of which Contracting State was to be applied, hence cannot be upheld.

Even if one assumed that the cited clause would necessarily lead to the conclusion that contracts as in the present case had not been thought of (the buyer of the car is neither a businessman nor a consumer, but a freelance entrepreneur) -- as the Court of Appeal states -- (*cf*. the now effective inclusion of freelance workers [with the entry into force of the HaRÄG on 1. January 2007] into the notion businessman under § 1 UGB [*Dehn*, in *Krejci*, Reform-Kommentar UGB/ABGB, § 1 UGB Rz 40 und 61]), the clause had to be interpreted by its wording in the sense of the interpretation of the Court of First Instance.

The latter has rightfully stated that a reference to the Consumer Protection Act and to the HGB [*] would hint to a specific national law, namely Austrian law (without the CISG), which has -- as stated above -- to be seen as an exclusion of the CISG (at least in respect to the guarantee).

The claims of the [Buyer] hence have to be assessed on the basis of Austrian law of guarantee in the version of the GewRÄG (BGBl I 2001/48), as the contract has been concluded after 31 December 2001.

Thus the [Buyer] is entitled to dismiss the "primary" remedies (namely the correction or replacement) and to claim the "secondary" ones, namely reduction of the purchase price or - if there is not just a minor defect present (§ 932 (4) ABGB) -- redhibitory action, if the [Seller] refuses the correction or replacement or fails to effect such relieves within reasonable time. This does not apply in case these relieves entail fundamental inconveniences or if they are unacceptable due to solid reasons, arising from the conduct of the [Buyer].

The Supreme Court of Austria has already decided in respect to a redhibitory action as regards the sale of automobiles, as sought in the present case, that the assessment whether the absence of a certain feature constitutes a fundamental defect should not neglect the interest of a buyer which the seller could have been aware of in case a buyer is particularly interested in a certain feature of the car (e.g., the functioning of the navigation system of the car of the [Buyer] in the present case).

Such a defect cannot be seen as being minor in the sense of § 932 ABGB, but entitles a buyer to a redhibitory action if a seller has not delivered a car in conformity with the contractual provisions and has failed to correct the defects several times -- as in the present case. (7 Ob 239/05f = JBl 2006, 585 mwN = ecolex 2006, 562 [*Wilhelm*], RIS-Jusitz RS0018718; *P. Bydlinski* in KBB² § 932 ABGB Rz 19 w.f.r. to jurisdiction).

The fact that the [Buyer] at first requested the [Seller] on several occasions to correct the defects does not necessarily lead to the conclusion that an avoidance of the contract is no longer possible due to the disadvantages of such an avoidance for the [Seller]. (7 Ob 194/05p [in respect to the purchase of a new car]).

Preceding judgments of the Supreme Court of Austria rather suggest that, in case of a redhibitory action, according to § 932 (4) only the loss of value, which emerged until the point in time where the [Buyer] requested redhibitory action due to the refusal of "primary" remedies (replacement, correction), can be taken into account. It is not possible for a seller, who refuses to effect a replacement or correction, which leads to a redhibitory action (which in turn leads to lengthy proceedings), to rely on the additional loss of value, incurred after the claim for redhibitory action had been filed. (8 Ob 63/05f [also in respect to the purchase of a new car]; affirmative: *Bollenberger*, Erste Judikatur zur „neuen Gewährleistung" - geringfügige Mängel beim Autokauf, Zak 2005, 23 [25]).

The Supreme Court of Austria has additionally already decided (in proceedings in respect to a collective action [§ 28 KSchG]) that this assumption also applies in respect to a claimed charge for use and that hence a clause in standard terms which entitles the seller to claim charges for the use of the purchased object until it is handed back (and not only until the claim for redhibitory action is filed) is invalid (2 Ob 142/06f = JBl 2007, 385).

The [Seller] denied in the present case to effect a replacement as soon as the [Buyer] offered, after he had detected the first defects (i.e., "soon" after the delivery of the car in May 2002, when, despite several attempts to correct the defect, the flickering of the headlights remained present), to have his car replaced with a car of the same type, without being willing to negotiate (about an additional charge for a more powerful engine, which purportedly was not defective). The [Seller] denied the replacement even though it was aware of the fact that the navigation system of car in dispute -- probably due to fluctuations in the electric current -- flickers and loses the place of destination, which entails the necessity to recalculate the place of destination, which can lead to the necessity to visit a garage to have the navigation system reinstalled.

Furthermore the following defects were -- according to the factual basis which cannot be contested in these proceedings -- still present at the time the oral proceedings before the Court of First Instance had been finished (despite several attempts of the [Seller], the joint defendant and other officially authorized workshops of *C.* to correct these defects), which emerged very soon after the car had been handed over to the [Buyer] and hence have to be qualified as present at the time of the passing of the risk: flickering of headlights, the irregular stiffness of the hydro-pneumatic suspension and the defect which still leads to the total breakdown of electronic units, the correction of which has been negatively affirmed.

These defects occurred repeatedly and suddenly, which not only renders the car unreliable but also infringes the security of the passengers.

According to the basic principles mentioned above and based on these facts there can be no doubt that the [Buyer] is entitled to claim redhibitory action and thus repayment of the purchase price -- as

the Court of First Instance has already held -- due to the present defects, which cannot be qualified as being minor ones, and the refusal of the [Seller] to replace the car.

A forfeiture of the right to a redhibitory action cannot be assumed in contrast to the [Seller]'s allegations: The continued use of an object despite the claim for redhibitory action does not amount to a forfeiture of this right (RIS-Justiz RS0014252). The assessment whether a party has forfeited its right to a redhibitory action has to be based on § 863 ABGB [*] (RIS-Justiz RS0014263). An implied waiver can only be assumed according to this provision if in due consideration of all circumstances the conduct of a party does not give rise to any doubt that the party intended to waive its right. Hence a strict criterion has to be applied and caution has to be exercised. Especially in the case that an object is free of charge (*cf*. § 915 ABGB), particular circumstances have to be present for the assumption that a legal consequence was seriously intended. (*Bollenberger* in KBB², § 863 ABGB, Rz 7; *Rummel*, in: *Rummel*³ § 863 ABGB Rz 14 each w.f.r. ; RIS-Justiz RS0014190; RS0014245; 4 Ob 124/06y).

Such particular circumstances are not given in the present case as the [Buyer] stated from the very beginning that he wanted to get rid of the car.

Section 933a (1) ABGB [*], which precedes as *lex specialis* the §§ 1295 foll. ABGB [*], now -- after the jurisdiction has acknowledged it as a basic principle -- expressly states that there is a concurrence between guarantee and damages; this clarifies that the buyer is also entitled to claim damages due to defects which can be attributed to the seller -- i.e., defects that have not been corrected before the actual handing over of the car (*Welser/Jud*, Die neue Gewährleistung, § 933a ABGB Rz 6; *Faber*, Handbuch zum neuen Gewährleistungsrecht, 176; P. *Bydlinski* in KBB² § 933a ABGB Rz 1 f).

It is hence possible to claim damages in addition to a redhibitory action. (*Faber* loco citato, 185; *Welser*, Schadenersatz statt Gewährleistung, 40 f [in respect to redhibitory action based on the -- insofar unchanged -- former state of law]).

The [Buyer] is thus not only entitled to claim the repayment of the purchase price due to unjust enrichment (due to the retroactive lapse of the contract under the law of obligations as a consequence of the redhibitory action) (*Welser/Jud*, loco citato § 932 ABGB Rz 42; § 1435 ABGB; RIS-Justiz RS0086350; *Faber,* loco citato, 147) but also to claim damages incurred due to the defects and (not affected by § 933 a (2) ABGB [*P. Bydlinski,* loco citato, § 933a Rz 10]) due to the consequences of these defects (*Faber*, loco citato, 185 [who expressly states that the loss of profit was an example for damages which could be claimed in addition to a redhibitory action]).

The amount of EUR 1,000, which is claimed as a lump sum by the [Buyer] as additional damages due to the costs incurred as a consequence of the failed attempts to correct the defects (phone calls, traveling costs, lost profit) and increased petrol costs due to the poor performance of the engine (12 to 14 litre fuel consumption per 100 kilometres for more than one year) has been fixed by the Court of First Instance (and has neither been contested by the [Seller] nor by the joint defendant during the appellate proceedings) according to § 273 ZPO [*]. The Court of First Instance has rightfully stated that the [Seller] has failed to prove that this positive breach of contract, which forms the basis for the claim for damages (*Koziol/Welser*13 II 87 f) could not be attributed to it. It is sufficient in this context that a defective performance is ascertained, whereby § 924 ABGB [*] is to be applied (*P. Bydlinski*, loco citato § 933a Rz 14 w.f.r.)

In contrast, the requirements for a claim for damages in addition to the redhibitory action are not fulfilled in respect to the -- after the partial dismissal by the Court of First Instance -- remaining amount of EUR 3,000, which is claimed by the [Buyer] as he agreed with the [Seller] on the fact that the first "three" (after the factual findings "two") years of service are free of charge and to replace worn parts without charge, which amounted to a value of EUR 4,000 (in his original claim), which he lost as a consequence of the redhibitory action:

The performances under the servicing contract (which obliges the [Seller] to provide car service

free of charge and to replace worn parts without charge without a restriction based on mileage) which has been concluded in addition to and at the same time of the contract of sale has in the end been paid with the purchase price.

However, the repayment of the purchase price based on unjust enrichment due to the redhibitory action thus covers the service guarantee which has not been used so far. The claim for additional damages therefore contradicts the principle of unjust enrichment.

The claim for EUR 1,000 is to be affirmed in the sense of a partial restoration of the judgment of the Court of First Instance; the partial dismissal of the claim for further damages by the Court of Appeal (EUR 4,000 including the legally effective partial dismissal by the Court of First Instance) is, however, also to be affirmed.

The defense, which has already been put forward during the proceedings in the Court of First Instance -- even if only effected by the joint defendant -- that the "value of the use of the car had to be charged" if the redhibitory action of the [Buyer] was successful.

If the buyer of a defective object continues to use it until he requests guarantee rights and hence profits to a certain extend (which in the present case cannot be excluded as the [Buyer] undisputedly used the car for 112.000 kilometres), the question arises whether he can be charged for it. The GewRÄG has not commented on this question; neither do the materials contain any hint. The case of a redhibitory action is not problematic in the sense of the regulation for the sale of consumer products according to *Faber* (Handbuch zum neuen Gewährleistungsrecht, 149): the contract is subject to a retroactive revocation under the law of obligations; both the contractual performances and the additional advantages have to be equalized on the basis of the law of unjust enrichment. The buyer has hence to pay a charge for the value of the use, alternatively the regulation provides for the possibility to equalize a potential loss of value. (*Faber*, loco citato w.f.r. for FN 235).

The Supreme Court of Austria has already decided in this respect that the party who succeeds in a redhibitory action has to restore everything according to § 877 ABGB [*], which it has received to its advantage and that the legal consequences have to be assessed according to the law of unjust enrichment. (*Rummel*, in: *Rummel*³ § 877 ABGB Rz 5 w.f.r.; RIS-Justiz RS0016328). The buyer has to pay a reasonable charge for the use of the object (RIS-Justiz RS0019850) and thus for every advantage, which arouse according to his subjective circumstances (RIS-Justiz RS0019883 [T10]; RS0020150 [T1]; in general:4 Ob 286/04v).

Decision 5 Ob 575/85 = SZ 58/138 (reverse transaction of a car purchase) has already commented on the calculation of the amount of the charge: the expense, which the buyer would have incurred in order to buy and resell a comparable car and not the customary rent has to be taken into account. This view has been affirmed (3 Ob 550/95 = SZ 68/116) in respect to the reverse transaction of a wheel loader purchase (9 Ob 712/91 = JBl 1992, 247) and the reverse transaction of a riding horse purchase after a successful appeal based on mistake (1 Ob 516/92 = JBl 1992, 456).

The Supreme Court of Austria stated in respect to the wheel loader that the advantages of its use would depend on the estimated service life, but took into account that if one bought and resold a wheel loader one had to pay for the relatively high interest on capital.

In respect to the riding horse the Supreme Court followed the doctrine of *Honsell* (in: *Schwimann*³ § 1437 ABGB Rz 12), which states that a buyer, who cannot be held responsible for the reverse transaction, does not have to pay a charge for the loss of value which the object incurs due to the loss of being new. The question whether there really is an advantage hence requires particular scrutiny.

This led to the decision that the buyer, who had a second riding horse, which would have been sold if she did not have to initiate the proceedings, only had an subjective advantage (use) for a short period of time. She was awarded 50% of the keeping costs.

The 3rd Senate expressly affirmed the latter decision and stated, that if the enrichment was

calculated on the basis of the loss of value, the property loss of the seller, who acted in breach of the contract, would be equalized but not the advantage the buyer had following the possibility to use the object (3 Ob 550/95 = SZ 68/116 = ecolex 1996, 14 [Wilhelm]).

Koziol affirms this view (in KBB² § 1437 ABGB Rz 4) and adds that if the enriched party used his own object the advantage had to be seen in the fact that there is no wear and tear of its property. General costs or profits, which are regularly charged by landlords, thus could not be taken into account. The advantage could also be calculated in respect to the actual use of a party according to 4 Ob 286/04v. One, however, would have to take the contribution of the enriched party into account (*Koziol* loco citato w.f.r.).

Even the joint defendant did not put forward any arguments in respect to the amount to be deducted in the present case. It only presented a price list for used cars "as proof for a deduction in the amount of EUR 11.000" and stated that this document did not refer to the actual state of the car in dispute, but to a car without defects and a mileage of 112,000 kilometres.

The [Buyer] has contested this document as it neither took the special features nor the actual state of the car into account.

The [Seller] and the joint defendant hence did not claim that more than EUR 11,000 should be deducted from the purchase price (EUR 22,353) as a charge. Hence the [Seller] is obliged to refund EUR 11,353 conditional upon the handing over of the car. The judgment of the Court of First Instance is thus to be restored in this respect.

For the remainder, the dismissal is justified. A final calculation of the deduction in favor of the [Seller] as a payment in lieu for the use is not possible at the moment, as this issue and the clause in item XI.2 of the standard terms of sale and delivery of the [Seller] that is applicable in this respect has not been sufficiently discussed. The Court of First Instance will have to amend its factual findings in this respect.

The decision on costs is based on § 52 ZPO [*].

FOOTNOTES

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

Translator's note on other abbreviations: **ABGB** = *Allgemeines Bürgerliches Gesetzbuch [Austrian Civil Code];* **EVÜ** = Convention on the Law Applicable to Contractual Obligations (Rome 1980); **HGB** = *Handelsgesetzbuch* [Austrian Commercial Code]; **IPRG** = *Bundesgesetz über das Internationale Privatrecht* [Austrian Federal Act on International Private Law]; **NoVA** = *Normverbrauchsabgabe* [Austrian surcharge to Value Added Tax]; **ZPO** = *Zivilprozessordnung* [Austrian Code of Civil Procedure].

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