Supreme Court (*Oberster Gerichtshof*)

17 April 2002 [7 Ob 54/02w]

Translation [*] by Veit Konrad [**]

Edited by Institut für ausländisches und Internationales Privat- und Wirtshaftsrecht der Universität Heidelberg Daniel Nagel, editor [***]

JUDGMENT

The extraordinary appeal (*Revision*) does not comply with the provisions of § 502(1) of the Austrian Code of Civil Procedure (*Zivilprozeßordnung; ZPO*) and thus has to be dismissed according to § 508a(2) of the Austrian Code of Civil Procedure (*Zivilprozeßordnung; ZPO*) (§ 510(3) of the Austrian Code of Civil Procedure (*Zivilprozeßordnung; ZPO*)).

REASONING

In its appeal Plaintiff-Appellant [Buyer] claims the judgment of the Court of Appeal (*Berufungsgericht*) (see: Court of Appeal (*Oberlandesgericht*) Vienna, Judgment of 5 December 2001, GZ 2 R 41/01s-27) ruling that [Buyer] had forfeited its right for damages as it had failed to bring its complaint about deficient delivery within reasonable time as required by Art. 39(1) CISG, to stand in contradiction to Supreme Court jurisdiction concerning Art. 44 CISG according to which the buyer of delivered goods keeps its rights for damages - or alternatively may reduce the purchase price according to Art. 50 CISG - notwithstanding Art. 39(1) CISG, if it has a reasonable excuse for its failure to give notice. A reasonable excuse in the sense of Art. 44 CISG may be that the seller of the goods has explicitly or impliedly communicated that it was not interested in the buyer's notification within reasonable time. Further, as [Buyer] argued, the Court of Appeal (*Berufungsgericht*) diverged from Supreme Court jurisprudence insofar as it ignored an agreement of the parties suspending the discretionary provisions of Art. 39 CISG as concerns their contract. [Buyer] maintains that through a guarantee agreement of 13 February 1989 the parties implicitly abandoned the requirements of Art. 39(1) CISG because this agreement did not expressly demand notification within reasonable time. Accordingly, during their long business relation [Seller] had never insisted on notification within reasonable time as regards damages for deficient deliveries. Due to the principle of good faith [Seller] might not justly rely on Art. 39(1) CISG. In any event, [Buyer] argues, following Supreme Court jurisprudence (Supreme Court (*Oberster Gerichtshof*), 2 Ob 191/98x) the guarantee agreement and the common practice of the parties would constitute a reasonable excuse in the sense of Art. 44 CISG - hence the diverging decision of the Court of Appeal is subject to further appeal.

RATIO DECIDENDI

[Buyer] cannot substantiate that its appeal (*Revision*) concerns either a legal question of fundamental significance as required by § 502(1) of the Austrian Code of Civil Procedure (*Zivilprozeßordnung; ZPO*) or diverging from Supreme Court rulings touches upon the unity of jurisdiction.

According to Supreme Court jurisprudence (see: judgment 2 Ob 191/98x; RIS-Justiz RS0111003), it may constitute a reasonable excuse under Art. 44 CISG if the buyer fails to bring its complaint for proper reasons which may excuse an ordinary man under the principle of good faith, and if it was not foreseeable for the buyer that the seller expects notification. Whether a case falls under this very narrow exception depends on the particular circumstances. It is only open to a second appeal (*Revision*) if the Court of First Appeal (*Berufungsgericht*) has grossly misinterpreted the facts of a case. However, this is not the case here. The guarantee clause dated 13 February 1989 does not expressly suspend the requirements of Art. 39(1) CISG. As it does not provide for notification

within reasonable time at all, there is need for further evidence indicating that the clause was meant to exclude the CISG provisions for the contract (see RIS-Justiz RS0014190). In any event this would never constitute a legal issue of fundamental significance as required by § 502(1) of the Austrian Code of Civil Procedure (*Zivilprozeßordnung; ZPO*) (see RIS-Justiz RS0107199) for extraordinary appeals. Moreover [Buyer] cannot sustain that the ruling of the Court of Appeal (*Berufungsgericht*) diverges from Supreme Court jurisprudence (on the cited cases 2 Ob 191/98x in ecolex 1999/98 and 1 Ob 223/99x in ecolex 2000, 565). Therefore the appeal is not admissible.

[...]

FOOTNOTES

* All translations should be verified by cross-checking against the original text. For purposes of this translation, the Plaintiff-Appellant is referred to as [Buyer]; Defendant-Appellee is referred to as [Seller].

** Veit Konrad has studied law at Humboldt University, Berlin since 1999. During 2001-2002 he spent a year at Queen Mary College, University of London, as an Erasmus student.

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