Austrian Supreme Court (*Oberster Gerichtshof*)

19 April 2007 [6Ob56/07i]

Translation [*] by Veit Konrad [**]

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JUDGMENT

As the requirements of § 502(1) of the Austrian Code of Civil Procedure (*Zivilprozessordnung; ZPO*) were not met, the extraordinary appeal (*außerordentliche Revision*) is dismissed in accordance with § 508a(2) of the Austrian Code of Civil Procedure (*Zivilprozessordnung; ZPO*) (§ 510(3) of the Austrian Code of Civil Procedure (*Zivilprozessordnung; ZPO*).

REASONING

In 2002, the parties concluded a framework agreement for the delivery of steel scaffolding decks. Pursuant to its obligations under this contract, Defendant-Appellant [Seller], a French company specializing in the development and manufacturing of these products, delivered to the Plaintiff-Appellee [Buyer] scaffolding decks plus the hooks for them which are used to attach the decks to the scaffolding. This delivery is governed by the United Nations Convention on Contracts for the International Sale of Goods (hereafter referred to as CISG).

[Buyer]'s position

[Buyer] claims damages for breach of contract.

[Buyer] alleges that the hooks that were delivered did not have the agreed stability; that they did not conform to the HD 1000 standard (*harmonization document 1000*), which was applicable throughout Europe, and that they were not fit for the purpose to ensure stable and securely fixed scaffolds for the people who work on them.

[Seller]'s position

[Seller], on the other hand, insists that the delivered goods, i.e., the scaffolding decks and the hooks, altogether complied to the HD 1000 standard, including the French amendments NF P 93-501, 502 and DTU P 22-701. Generally, the standard of the country of origin, not that of the country of destination, should apply in cases like that. For that reason, [Buyer] was not entitled not rely on the Austrian B 4600 standard.

RATIO DECIDENDI

1.1 According to Art. 35(1) CISG, the seller must deliver goods which are of the quantity, quality and description required by the contract and which are contained or packaged in the manner required by the contract. If the parties have not sufficiently specified the quantity, quality and description required under their agreement, Art. 35(2) CISG provides some objective criteria to define the performance due under the contract. In this respect, the purpose for which the goods are meant to be used is of vital importance. Whether or not the seller complies with his duty to perform under the contract depends on whether the delivered goods:

- Are fit for the purposes for which goods of this kind would ordinarily be used (Art. 35(2)(a) CISG),

- Are fit for the particular purpose expressly or impliedly stipulated in the contract (Art. 35(2)(b) CISG),

- Possess the quality of goods which the seller has held out to the buyer as sample or model (Art. 35 (2)(c) CISG), or

- Are contained or packaged in the manner usual for such goods, or in an manner adequate to preserve and protect the goods (Art. 35(2)(d) CISG).

(See the judgment of the Austrian Supreme Court [2 Ob 100/00w] = SZ 73/70; Posch in: Schwimann, ABGB, 2006, Art. 35 UN-Kaufrecht, note 7.)

1.2 In adherence to the Supreme Court's practice (see judgments of the Austrian Supreme Court [2 Ob 100/00w] = SZ 73/70, [2 Ob 48/02a], [7 Ob 302/05w]), which [Seller]'s extraordinary appeal relies upon, the suitability of the goods for usual purposes is generally determined by the standards applicable in the country where the seller has his place of business. As a general principle, health and safety standards as well as the national rules of composition, labeling and indication applicable in the country of destination, are not incorporated into the contract through the provisions of Art. 35(2) CISG, because the seller shall not be responsible to make himself familiar with all the relevant national law of the country of the buyer's place of business. Equally, the mere fact that the buyer has notified the seller of the final destination of the delivered goods does not oblige the seller to keep to the public legal standards applicable in that country. It clearly falls within the buyer's responsibility to ensure that all legal standards of the country of destination are met by incorporating these regulations into the contract. However, this question is irrelevant to the decision at issue.

1.3 Considering the fact finding conducted in previous instances, the Court must conclude that the negotiations between the parties have not only been essentially based upon a prospectus of [Seller]'s, which expressly guarantees that [Seller]'s products would all meet the requirements of the European HD 1000 standard, but the [Buyer] also positively knew at the time the contract had been concluded that the scaffolding decks and the hooks (type "ECO") that were ordered were designated to build scaffolds with other parts that had been produced and sold by [Seller]. However, the goods that were delivered were unfit for this purpose. When used in the construction of scaffolds, they bent, as they could not stand the weight lasting upon them. Thus the hooks (type "ECO") were unfit for the particular purpose stipulated in the contract between the parties in the sense required under Art. 35(2)(b) CISG. A seller is obligated to deliver goods complying with the buyer's specifications of which the seller knew or ought to have known, irrespective of whether the parties have expressly incorporated these specifications into the contract (see Posch, ibidem, note 10).

2. In its appeal, [Seller] claims that the previous instances' decisions violated Art. 28 of the Treaty establishing the European Community (*Vertrag zur Gründung der Europäischen Gemeinschaft; EGV*) which prohibits quantitative restrictions and measures having equivalent effect on imports within Member States of the European Community. This treaty, according to [Seller], establishes the principle that within its scope the trade of goods shall be governed by the regulations of the country of origin. Thus, [Seller] argues that the French regulations NF P 93501, 502 or DTU P 22-701 would apply to the case at issue, not the Austrian B 4600 standard regulating steel works and engineering.

However, considering that [Seller] knew at the time of the conclusion of the contract that the delivered hooks (type "ECO") were designated to be used to join scaffolding modules that were actually produced and sold by [Seller], the Court concurs with the Court of Second Instance's finding that, if the hooks deformed when used in this way, they would not comply with the national

standards of the country of [Seller]'s place of business, either.

3. Referring to § 482 of the Austrian Code of Civil Procedure (*Zivilprozessordung; ZPO*), which precludes a party from introducing new claims or new sets of fact into the appellate proceedings, the Court of Second Instance rejected [Seller]'s submission that [Buyer] had failed to comply with its duties under Art. 38 CISG to examine the delivered hooks within as short a period as it was practicable in the circumstances and, consequently, has failed to give specified notice of the presumably defective goods within reasonable time. Within the current appellate proceedings, [Seller] argues that its previous submission to the Court of First Instance that "[Buyer] did not substantiate the claimed defects" did actually entail the allegation that [Buyer] had not properly examined the goods as required under CISG provisions.

Yet, contrary to this, [Seller] has relied on the assumption that the delivery of goods did actually conform to the parties' agreement throughout the proceedings in all previous instances. The allegation that [Buyer] failed to examine the goods and therefore failed to give specified and timely notice according to the CISG presumes that the delivered hooks had been defective and thus did indeed not comply with the contract. Given these contradictory statements, the Court of Second Instance correctly found that [Seller] was unrightfully trying to introduce a new set of facts to the trial.

4. [Seller]'s extraordinary appeal (*außerordentliche Revision*) also concerns the dismissal of its two other appeals (*Berufungen*), each of which has been brought as a reaction to the Court of First Instance's findings. However, [Seller] fails to substantiate, that these appeals would have been successful or more successful than its first ordinary appeal (*Berufung*). Instead of bringing a specified pleading, [Seller] merely refers to the "standardized unity" of all of its three previous appeals. With the dismissal of [Seller]'s extraordinary appeal (*außerordentliche Revision*), all of these problems become irrelevant.

[...]

FOOTNOTES

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

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