

Austrian Supreme Court (*Oberster Gerichtshof*)

30 November 2006 [6 Ob 257/06x]

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JUDGMENT

1. The appeal (*Revision*) is dismissed.
2. Appellant [Seller] is liable to compensate Appellee [Buyer] for costs of the appellate proceedings in the amount of EUR 866.68 (including EUR 144.44 VAT) within fourteen days.

FACTS AND CASE HISTORY

[Seller] sold and delivered to [Buyer] a water-jet cutting machine. However, contrary to the offer, [Seller] did not integrate a "num-control" feature, but provided a different one which had been developed by [Seller] on its own. In previous instances, the courts dismissed [Seller]'s claim for payment of the purchase price, the rental fee for a substitute machine,³ and transport costs.

The dispute between [Seller] and [Buyer] was governed by the CISG. In accordance with Art. 40 CISG, the seller is not entitled to rely on the provisions of Arts. 38 and 39 CISG if the lack of conformity relates to facts of which he knew or could not have been unaware and which he did not disclose to the buyer. In that respect, both exceeding the time limits of Arts. 38 and 39 CISG and the expiration of the two-year term under Art. 39(2) CISG were irrelevant. The assembly of a control feature different from the agreed "num-control" amounted to a breach of contract and [Seller] was undoubtedly aware of this. The CISG embodied the principle of simultaneous performance of both parties' main obligations (*Zug-um-Zug Prinzip*) and therefore allowed a debtor to raise the defense of non-performance and to retain its own performance until the time that the other party was willing to perform its obligations (see 4 Ob 179/05k).

Upon [Seller]'s request, the Appellate Court allowed ordinary appeal *ex post* in accordance with § 508 ZPO [*]. The interpretation of Art. 40 CISG was not clear and unambiguous enough so that the interpretation adopted by the Appellate Court could be seriously considered as the only correct one and that no doubts could arise.

Contrary to the judgment by the Appellate Court -- which does not legally bind the Austrian Supreme Court -- the present appellate proceedings are not admissible.

REASONING OF THE COURT

1. Pursuant to Art. 40 CISG, the seller is not entitled to rely on the provisions of Arts. 38 and 39 CISG if the lack of conformity relates to facts of which he knew or could not have been unaware and which he did not disclose to the buyer. This provision relieves the buyer from its duty to examine the goods and give notice under Arts. 38 and 39 CISG, if the seller knew or could not have been unaware of the lack of conformity but nevertheless failed to disclose this. It would be unjust and unnecessary formalism in such cases to oblige the buyer to inform the seller about any non-conformities when the latter has already been aware or could not have been unaware of them (*Honsell*, Kommentar zum UN-Kaufrecht, Art. 40 para. 1). However, Art. 40 CISG does not relieve the buyer from its obligation to give notice of a lack of conformity if the seller has disclosed them

to the buyer within due time. However, this disclosure must be made prior to or at the time of the handing over of the goods at the latest according to the leading doctrine (*Honsell*, Art. 40 para. 8; *Staudinger/Magnus*, CISG, Art. 40 para. 10; *Karollus*, UN-Kaufrecht, p. 128 footnote 91). In case of disclosure prior to the conclusion of the contract Art. 35(3) CISG would in any event exempt the seller from liability (*Honsell*, Art. 40 paras. 8 and 10; *Schlechtriem/Schwenzer/Schwenzer*, Kommentar zum Einheitlichen UN-Kaufrecht, Art. 40 para. 7). *Schwenzer* (see reference above) seems to presuppose that the seller must disclose a lack of conformity by the time of the handing over of the goods at the latest, as well. This follows unequivocally from her subsequent statements, namely that in case of disclosure the buyer will usually either reject or accept the goods. However, rejection of goods is only possible until the point in time when the buyer has taken them over from the seller. Any argument that subsequent knowledge or subsequent possibility of knowing of a lack of conformity on the part of the buyer triggered a duty to notify the defect to the seller while the latter (as in the present case) has even been positively aware of the defect has never been raised by any legal scholar and would clearly run contrary to the idea expressed in Art. 40 CISG - being a provision which seeks not to protect a seller acting in bad faith.

2. The courts in the previous instances have positively found that [Buyer] (*translator's note: The correct reference here should have been to [Seller]*) had acted in bad faith, with the result that the burden of proof does not have to be addressed in this case (*cf. Tobias Malte Müller*, Die Beweislastverteilung für die Bösgläubigkeit des Verkäufers im Rahmen des Art. 40 CISG, IHR [*] 2005, 16).

3. The courts in the previous instances have stated that a limitation of statutory warranty to a certain number of hours in operation would not amount to a waiver of the CISG. There is no impropriety in their legal assessment which would require the issue to be addressed in a judgment by the Austrian Supreme Court. The same applies to the legal opinion expressed in the judgment in previous instances that the buyer had not subsequently declared his acceptance of the goods.

4. According to preceding jurisprudence (4 Ob 179/05k; 10 Ob 122/05x; RIS-Justiz [*] RS0120302), the principle of simultaneous performance of both parties' main obligations (*Zug-um-Zug Prinzip*) is applicable under the CISG. It allows a debtor to raise the defense of non-performance and to withhold his own performance until the other party is willing to perform.

5. Therefore, the adjudication of the present dispute does not depend on questions of law having the quality required by § 502(1) ZPO [*]. Hence, the appeal has to be dismissed.

6. The decision on costs of the appellate proceedings is based on §§ 41, 50 ZPO.

FOOTNOTES

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

Translator's note on other abbreviations: **IHR** = *Internationales Handelsrecht* [German journal on international commercial law]; **RIS-Justiz** = *Rechtsinformationssystem des Bundes* [Austrian Federal Database on Law]; **ZPO** = *Zivilprozessordnung* [Austrian Code on Civil Procedure].

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