CISG-online 524	
Jurisdiction	Austria
Tribunal	Oberster Gerichtshof (Austrian Supreme Court)
Date of the decision	11 March 1999
Case no./docket no.	2 Ob 163/97b
Case name	*Mountain bike frames case*

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Edited by Daniel Nagel[***]

The Supreme Court (Oberster Gerichtshof) as final appellate court [...] ruled: the appeal is successful.

The challenged judgment is reversed apart from the partial dismissal of the interest claim and the claim for payment of 20% turnover tax on the interest; the litigation is referred back to the Court of Appeal for new judicial hearing and decision. The costs of the present proceedings are further costs of the appellate proceedings.

Reasons for the decision:

The Plaintiff [Buyer] demands to have the Defendant [Seller] ordered to pay back the Schilling-equivalent of U.S.$ 23,540 which the [Buyer] had paid on account for the purchase order of mountain bikes invoiced at U.S.$ 68,540. The purchase order and the conclusion of the contract were based on mountain bikes, respectively, mountain-bike frames, which the [Seller] had recommended, expressly emphasizing weight advantages due to usage of «specially milled» frames. The [Buyer], however, in May 1994 learned from another customer of the [Seller] that the [Seller] actually did not use specially milled frames. The [Buyer] forthwith gave notice to the [Seller] that only bicycles with specially milled frames would be accepted as the goods ordered, otherwise the [Buyer] would declare the contract avoided and reclaim the

[*] All translations should be verified by cross-checking against the original text. For purposes of this translation, the Plaintiff-Appellant of Germany is referred to as [buyer]; the Defendant-Appellee of Austria is referred to as [seller]. Amounts in US-American currency are indicated as [U.S.$]. Amounts in German currency (Deutsche Mark) are indicated as [DM]. Translator's note on other abbreviations: ZPO = Zivilprozessordnung [German Code of Civil Procedure].

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payment on account. In reply, the [Seller] merely stated that no mountain-bikes with specially milled frames had been ordered and that the ordered delivery will soon be at the [Buyer]'s disposal. As a result, the [Buyer] gave notice of cancellation of the contract.

The [Seller] requests the dismissal of the [Buyer]'s claim. [Seller] alleges that the specially milled frames, which were also presented to the [Buyer], had only been promoted by the [Seller] in order to test the market. Frames of that kind had never been subject to the [Buyer]'s order at issue; that could also be inferred from «specification lists» on which the order was based. The content of the order had been known to the [Buyer], an expert company represented by a competent manager. The [Seller] was not overdue with respect to the delivery of goods in conformity with the contract. On the contrary, for default in taking delivery, respectively, for unjustified rescission of contract, the [Buyer] could not reclaim the agreed payment on account from the [Seller] willing to perform. However, should the claim be regarded as legally justified, the [Seller] would plead the right of set-off with counterclaims (arising from a bill of exchange amounting to U.S.$ 45,000 along with extra charges and an open invoice amounting to 18,620 Deutsche Mark [DM] which was not discharged) exceeding the claim.

The court of first instance dismissed the claim. Essentially, the court stated that the [Seller] had approached the [Buyer]'s general manager in 1993 and had offered a new «super light» mountain bike with particular components. The [Seller] had emphasized the «special frame» which was especially lightweight as it was milled like a barrel. Subsequent to a first meeting in K., a first presentation of the mountain bike at issue took place in H. in August 1993. At that time, the [Seller] had described the bicycle as the «lightest bike on earth». It was supposed to weigh only 6.88 kg. In the presence of sales representatives, it had been discussed whether this new type of mountain bike could be distributed successfully.

At the occasion of that presentation, the [Seller] had not promised that all the bicycles to be delivered were specially milled. On the contrary, it had been debated how such a product could be distributed on the German market and whether that product would be accepted by sales representatives. At that point in time, the [Seller] had not had this new kind of bike in production yet. The [Seller] rather distributed bicycles with «triple-butted» or «double-butted» frames. Those frames were welded together in a special manner, yet they were not specially milled. Moreover, the bicycles distributed by the [Seller] could be distinguished with respect to different material as well as gearshift and brake systems («STX», «LX» and «XT»). At the presentation in H., merely a conventional mountain bike had been presented, with the weight of 8.2 kg which did not show a specially milled frame. Yet, the representatives, respectively, the [Buyer], had been shown a specially milled pipe. In order to illustrate the new product, a milled frame which was cut open was presented as shown in a brochure. At this occasion, it had been mentioned that such a newly milled frame was not suitable for «down hill» tours. The [Buyer] had not placed an order on the occasion of that presentation.

On 1 October 1993, the daughter of the [Seller] had sent a specification list, which had been necessary in order to be able to place a detailed order. The list allegedly contained three different types of bikes, namely XT, LX and STX. Each type had been described in respect to the frame, the wheel fork, the headset, the handlebars, the stem, the derailleur, the rear derailleur, the chain ring, the sprocket, the pedals, the chain, the inner bearing, the rim, the hub,

the tires, the saddle, the seat post, the bar end, the size of the frame, the color and the weight. A specially milled frame had not been mentioned in this list. The [Seller] had never promised to deliver «Steinbach-bikes» with specially milled frames. The [Seller] had wanted to introduce this product even before production, which would not be unusual in this or other branches. [Seller] hence presented its «spirale-tubed» frame in Friedrichshafen during the Euro-Bike fair.

The [Buyer] had placed an order on the basis of «specification lists». An order on the basis of such lists was usual and made possible to get an overview of the order. The term «specially milled» used by the [Seller] had been created for the [Seller] by the producer of the brochure. The [Seller] had not used that term in a single document for the order. In February 1994, the first order of bicycles had been placed by the [Buyer]. On 21 February 1994, the [Buyer] confirmed by signature that the [Buyer] had examined 50 mountain-bike construction kits «STX» as to completeness, type and quality and had accepted them. On 28 February 1994, the [Seller] had invoiced further mountain-bikes ordered by the [Buyer] amounting to U.S.$ 68,540. Since the [Buyer] had problems concerning the financing, the parties had agreed upon the following stipulation on 28 March 1994:

[....]

«The invoice of 28 February 1994 concerning MTB (mountain-bike) XT, LX and frame sets amounting to U.S.$ 68,540 will be shipped and dispatched in Taiwan not later than 14 days after receipt of payment on account amounting to U.S.$ 23,540 along with the remaining U.S.$ 45,000 in the form of a bill of exchange to be discounted by Bank Austria. Christian S. guarantees that the goods will arrive at B.C.S. not later than 20 May 1994. This date can only be kept to if Bank Austria places the U.S.$ 68,540 at the disposal for a transaction to Taiwan. On condition that the bank places the U.S.$ 68,540 at the disposal, Christian S. binds himself by contract to pay back the payment on account amounting to U.S.$ 23,540 and to return the bill of exchange to company B.C.S. in case of delayed delivery.»

In May 1994, the [Buyer]'s manager had learned from Alois M. (general manager of another purchaser of mountain-bikes from the [Seller]) that the bicycles delivered by the [Seller] did not have specially milled frames as expected. By fax of 11 and 16 May 1994, the [Buyer]'s manager had inquired whether the outstanding frames of the bicycle delivery (according to the invoice of 28 February 1994) had milled frames. Moreover, the manager had announced in the fax of 16 May 1994 that the [Buyer] would at any rate refuse to take delivery of the outstanding delivery should the mountain-bikes not arrive at the [Buyer]'s premises until 20 May 1994 at the latest as mentioned in the confirmation of delivery. In a subsequent telephone conversation, the [Seller] had explained that the ordered bicycles would be in conformity with the «specification list», yet would not have milled frames. Furthermore, he had told the [Buyer] that the ordered goods were ready for collection at the [Seller]'s open customs warehouse. The goods provided had been in conformity with the order of the [Buyer] based on the corresponding specifications. In the following time, the [Buyer] had refused to accept delivery. According to the agreement of 28 March 1994, the [Buyer] had drawn up a bill of exchange and given a check to the [Seller] amounting to U.S.$ 23,540.

The Court of First Instance stated that the [Seller] had neither explicitly nor tacitly promised that all the bicycles to be delivered had specially milled frames. The [Buyer]'s manager had insofar misunderstood the presentation of the bikes with specially milled frames. This error had not been caused by the [Seller] as the [Buyer]'s manager had never expressly pointed to his request as regards specially milled frames until May 1994. Therefore, the [Seller] could rely on the assumption that the [Buyer] actually wanted exactly the products which had been ordered expressly in writing. The [Buyer]'s manager had known the terms used in the «specification lists». Only under these circumstances had a contract been concluded between the parties. The [Buyer] was responsible for the error.

The Court of Second Instance essentially allowed the claim (apart from the undisputed partial dismissal of an interest claim and a claim for 20% turnover tax thereon). The court, however, ruled that the counterclaims pleaded by the [Seller] were not legally justified and therefore allowed the appeal. Upon completion of evidence within the appellate procedure, the court determined the content of the enclosures (E and G). The court inferred that the order at issue had related to the sample which was presented (frame with specially milled pipe) and that the [seller] must have known that: the presentation in August 1993 referred to the «lightest bike in the world» illustrated by a specially milled pipe cut open. It additionally inferred that the order had also related to an article in the bike journal, volume 10/93 according to enclosure E («The 6,88 kg bike is the lightest aluminium bike on the fair. Christian S., the designer, manages to save weight by using a specially milled frame. He, who has formerly produced hanggliders, combines the 1280g frame with Shimano components and cheap light material») as well as to the brochure according to enclosure G, which emphasizes the positive effect of the specially milled frame for the overall weight of the bike and relates to the sample presented.

The court of second instance ruled that the United Nations Convention on International Sale of Goods of (hereinafter CISG) which entered into force on 1 January 1991 in Germany and on 1 January 1989 in Austria, was applicable to the agreement between the litigant parties as both had their places of business in Contracting States. The UN Sales Convention merely governs a uniform term of «violation of contract» comprising any possible non-fulfillment of any kind of contractual duties. Only fundamental breaches of contract are being emphasized: in general, Art. 25 CISG requires that one party is being deprived of what it was entitled to expect under the contract, regardless of the kind of violation. At any rate, the buyer is entitled to declare the contract avoided. A breach can only be regarded as fundamental, if the buyer had not concluded the contract had he foreseen the violation at the time of the conclusion of the contract. Also the [Seller]'s liability was to be assessed according to the UN Sales Convention: CISG governs a liability under guarantee regardless of fault with the possibility of limited exculpatory evidence. It only requires that the seller somehow has violated the contract, especially by delivery of goods not in conformity with the contract. According to Art. 35(2)(c) CISG, the goods must possess the qualities of the sample except where the parties have agreed otherwise.

A business partner could have inferred from the [Seller]'s presentation that all the bicycles produced by the [Seller] had the new kind of frame. The specification lists on which the order was based did not conflict with such an assumption as they were in so far neutral. In any event, the court of first instance had stated (in accordance with the outcome of the evidence), that

the [Buyer] assumed to order mountain bikes with specially milled frames. As that corresponded objectively with the legally relevant declaration of will, the contract was concluded thereon. With respect to the [Buyer]'s orders of 30 September 1993 and the subsequent ones based on the specification lists, the [Seller] must to have known that these orders referred to the presented sample, namely to specially milled frames. As a result, the goods delivered by the [Seller] did not correspond with the order. The [Buyer] had objected to that without delay. Consequently, the [Buyer] was entitled to refuse to accept the delivery of the outstanding goods and to repudiate the contract. In case of rescission, each party must restore what has been obtained. There- fore, the [Seller] must repay the payment on account to the [Buyer].

The counterclaims put forward were not legally justified.

The appeal on issues of law regarding the judgment of second instance is justified

However, the fact that the court did not elaborate on the application of the UN Sales Convention does not constitute a procedural error as criticized:

It could not have been surprising for the parties that the contract at issue kept to the regulations of CISG as the conditions for its application according to Art. 1 CISG are definitely fulfilled (comp. ZVR 1974, p. 110).

Consequently, the conclusion and the content of the contract at issue keep to the regulations of the UN Sales Convention:

The interpretation of statements and conduct is regulated in Art. 8 CISG as follows:

«(1) For the purposes of this Convention statements made by and other conduct of a party are to be interpreted according to his intent where the other party knew or could not have been unaware what that intent was.

« 2) If (1) is not applicable, statements made by and other conduct of a party are to be interpreted according to the understanding that a reasonable person of the same kind as the other party would have had in the same circumstances.

«(3) In determining the intent of a party or the understanding a reasonable person would have had, due consideration is to be given to all relevant circumstances of the case including the negotiations, any practices which the parties have established between themselves, usages and any subsequent conduct of the parties.»

[...]

It is not possible yet to elaborate on the legal positions in detail since the facts to be examined according to CISG are not certain as pointed out during the appellate proceedings. On the contrary, even according to the findings of the Court of Second Instance, contradictions to the findings of the Court of First Instance remain, especially with respect to the [Buyer]'s rebuke as to evidence regarding the determination of the content of the contract at issue which had

not been settled. The Court of Appeal was not entitled to ascertain facts which were completely contradictory to the findings of the Court of First Instance which were assessed on the basis of immediate taking of evidence. It cannot be inferred from the minutes of the appellate proceedings, that the court had complied with § 488(4) ZPO. Yet, contrary to the opinion of the Court of Appeal, the findings of the Court of First Instance (regarding statements and conduct and the content of the contract), which were criticized by the [Buyer], are important since they are to be examined according to the UN Sales Convention, especially according to Art. 8(1) CISG.

These considerations call for the reversal of the judgment of the court of second instance and the referral to the Court of Appeal.

The decision on costs follows from § 52(1) s. 2 ZPO.