CISG-online 1377	
Jurisdiction	Austria
Tribunal	Oberlandesgericht Linz (Court of Appeal Linz)
Date of the decision	23 January 2006
Case no./docket no.	6 R 160/05z
Case name	*Citroen Type C 5 case*

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Edited by Institut für ausländisches und Internationales Privat- und Wirtschaftsrecht der Universität Heidelberg

Daniel Nagel, editor[***]

Facts of the case:

By virtue of a sales contract of 12 March 2003, [Buyer] bought from [Seller] a new Citroen HDI 100 automobile, model BK 8 X with supplementary equipment at a price of EUR 22,353, excluding VAT and NoVA. [Buyer] purchased the vehicle for professional use as an authorized expert. This purpose was known to [Seller] before and after the conclusion of the sales contract. 1

[Buyer's action:]

[Buyer] brought an action on 14 May 2003, seeking to have the [Seller] pay EUR 27,353. [Buyer] alleged that the car had been defective from the beginning. [Buyer] alleged the existence of about fifty defects and that, despite eight attempts, [Seller] had not been able to cure the defects. 2

The severest defects were that:

- Without any reason, the suspension became stiff during driving;
- There was no brake pressure in the morning;

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[*] All translations should be verified by cross-checking against the original text. For purposes of this translation, Plaintiff of Germany is referred to as [Buyer] and Defendant of Austria is referred to as [Seller]. Amounts in the uniform European currency (*Euro*) are indicated as EUR.
Translator's note on other abbreviations: ABGB = *Allgemeines Bürgerliches Gesetzbuch* [Austrian Civil Code]; HGB = *Handelsgesetzbuch* [Austrian Commercial Code]; KSchG = *Konsumentenschutzgesetz* [Austrian Consumer Protection Act]; NoVA = Normverbrauchsabgabe [Austrian surcharge to Value Added Tax]; RIS-Justiz = *Rechtsinformationssystem des Bundes* [Austrian Federal Legal Database]; ZPO = *Zivilprozessordnung* [Austrian Code of Civil Procedure].

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- The headlights flickered during journeys;
- The front doors could not be opened from the inside if it was hot outside;
- Water leaked in through the doors;
- The left and right doors were torn at the window frame; and
- The car suffered excessive corrosion.

In his letter of 15 September 2003, [Buyer] put forth that severe defects had accrued once again. Besides other defects, it was asserted that the suspension still became stiff for no reason and despite the replacement of various suspension parts. Multiple attempts to repair had remained unsuccessful. The additional defects present had caused [Buyer] to refrain from driving the car and to exchange it for another one for safety reasons. 3

As [Seller] had either been in default concerning successful repairs or had refused repairs, [Buyer] alleged that he was entitled to a reduction in price or to avoid the contract. He relied on avoidance of the contract and claimed restitution of the purchase price. He was willing to return the car conditional upon restitution of the purchase price. 4

[Buyer] alleged that he had suffered substantial costs due to the defective car and the unsuccessful attempts to repair (transportation costs, loss of profit, telephone calls and so forth), for which [Buyer] claimed a lump sum of EUR 1,000. [Buyer] had also suffered higher fuel costs because the engine had only worked at a performance of 80% over one year. [Buyer] alleged that this in itself justified the award of the requested lump sum. 5

[Buyer]'s agreement with [Seller] had provided that during the first three years all service would be free of charge and that worn parts would be replaced free of charge. This amounted to a value for [Buyer] of EUR 4,000, which he would lose in case of avoidance. This sum was therefore also requested from [Seller]. 6

[Seller's position:]

[Seller] has contested [Buyer]'s allegations and requested dismissal of the [Buyer]'s claims. [Seller] alleged that after delivery of the car [Buyer] had given notice of defects by telephone call on 18 June 2002 to C[...] Ö[...], the *Citroen* distributor for Austria. Most of the defects asserted by [Buyer] had not been present at the date of inspection, being 26 June 2002. Subsequently, the radio had been sent to the workshop for an examination, respectively for replacement. Electronic defects and rattling sounds should have been resolved at the dealer's workshop. [Buyer] had continued to submit more and more complaints, they had been constantly communicating with [Buyer] during June and October 2002. 7

The distributor for Austria, C[...] Ö[...], had been involved in all issues. [Buyer] had filed its request with C[...] Ö[...] to replace the car with a *Citroen C5 BK 2.2 HDI SX*. After this request had been denied, even more defects had been communicated. Between 18 September and 28 October 2002, the C[...]-works (south) had resolved all «justified» defects and had the car approved by the certified expert M[...] F[…]. On 30 October 2002, [Buyer] had received the car 8

once again. At the same time, various further defects had been notified. On 12 November 2002 there had been another meeting between [Buyer] and C[...] Ö[...] [Buyer] had been asked to have all purported defects cured at a workshop of its choice. In the view of C[...] Ö[...], there had been no more «justified» defects. By letter dated 3 January 2003 – after the car had run for 45,000 km – [Buyer] had relied on avoidance of the contract and proposed the offer of a new car with a 2.2 liter engine. [Seller] and C[...] Ö[...] had not been willing to comply with this. All justified defects on which [Buyer] had relied, had already been cured at various workshops. [Seller] added that many aspects of [Buyer]'s complaint could not even be regarded as defects.

[Seller] stated that C[...] Ö[...] was involved in the dispute and requested it to enter into the proceedings as Intervener. [Seller] brought forth that C[...] Ö[...] had been involved in the curing of defects and had even warranted the cure to [Buyer]. If C[...] Ö[...] had not cured all defects (contrary to the warranty), [Seller] would be entitled to recourse claims against C[...] Ö[...]. 9

The Court of First Instance ordered [Seller] to pay EUR 26,353, among them EUR 22,353 conditional upon restitution of the purchased Citroen C5 vehicle. The [Buyer]'s additional claim for payment of EUR 1,000 was dismissed. The Court – which applied Austrian law – held that not only the claim for damages of EUR 4,000 was justified, but also the request for redhibitory action and the accompanying claim for restitution of the purchase price. 10

Following [Buyer]'s and C[...] Ö[...] [Intervenor]'s appeal, the Court of Appeal repealed the judgment (case docket 6 R 140/04g) and remanded the case to the Court of First Instance for a hearing and rendition of a judgment. Considering the present factual basis and its international character, the Court of First Instance was advised to resolve the question whether the CISG had to be applied to the present dispute. 11

During the continued proceedings, [Buyer] argued that Austrian law (ABGB, HGB) would be applicable to the sales contract at hand and that the CISG had been excluded because Clause XI of the sales contract of 12 March 2002 provided for the application of the HGB. 12

Moreover, it was [Buyer]'s position that, even if the CISG was applicable, [Buyer] would have effectively declared the contract avoided and would consequently be entitled to claim restitution of what it had already paid pursuant to Art. 81(2) CISG. [Buyer] was willing to hand the car over conditional upon restitution of the purchase price. [Buyer] alleged that, under Art. 49 CISG, he was entitled to avoid the contract because [Seller] had not complied with its contractual obligation to deliver a car without defects which constituted a fundamental breach of contract due to the number of severe defects. [Buyer] alleged that he had no alternative but to declare the contract avoided since [Seller] had undertaken many unsuccessful attempts to cure the defects and finally even refused to cure the severe ones. 13

In the alternative, [Buyer] alleged that he was furthermore entitled to the said claims as damages under Part II of the CISG. The car was defective in such a way that it was worthless. Such a car did not have any market price as it was basically unmarketable. Therefore, [Buyer] had a right to claim the whole purchase price as damages; [Seller] had faultily breached its contractual obligations. The car had been deficient at the time of the conclusion of the contract 14

and was still deficient at the current date. Until the final avoidance of contract, [Seller]'s conduct had only delayed a settlement. [Buyer] was forced to grant [Seller] the contractual and statutory right to cure the lack of conformity, although [Seller] must have been well aware and had been aware that there were severe, incurable defects. Nevertheless, it had concealed this from [Buyer] and fraudulently misled the latter through its many attempts to cure the defects. [Buyer] had thus been forced to use the car. The fact that the car had meanwhile run 112,000 km could not be attributed to any misconduct of [Buyer]. There had not been any possibility for him to appropriately acquire a substitute vehicle. From the beginning on, [Seller] had refused to take back the car or exchange it for another one without defects.

Alternatively, [Buyer]'s claim was based on a reduction in price. Already by the time of delivery, one could not assign any value to the car since it had been affected by the defects. These defects were incurable and established severe safety risks. Right from the start, it was prohibited by law to run the very car. Therefore, a price reduction to zero had to be applied. **15**

These allegations were contested by [Seller] and [Intervenor] who argued that even under Austrian law the claim would not exist. The warranty period had expired after six months. «Pursuant to HGB provisions», [Buyer] had failed to give immediate notice of non-conformity concerning possible defects, which also hindered any claim of [Buyer]. **16**

Under application of the CISG, it had to be considered that [Buyer] went on to use the car, being aware of the defects. Claims under the CISG were thus forfeited. Even if there was an existing claim from redhibitory action, [Buyer] had to accept a crediting of the car's actual use. In order to substantiate the creditable amount of EUR 11,000, [Intervenor] submitted an assessment of second-hand cars. The calculation was not based on the actual condition of this car (which it did not know), but on a well-working car with a mileage of 112,000. **17**

In addition to this, [Seller] alleged that the majority of defects had not been claimed against it, but against other persons, particularly against other workshops which [Buyer] had engaged in the course of warranty granted by [Intervenor]. Any corresponding notices of non-conformity «had not reached [Seller]». **18**

By way of the judgment of 26 April 2005, the Court of First Instance affirmed [Buyer]'s request according to the initial judgment. This is subject to the present appellate proceedings. **19**

From the findings of the Court of First Instance (pp. 6 to 20 of the judgment), the following must be emphasized: **20**

- [Buyer] needed the car and navigation system bought from [Seller] in order to practice his occupation. The built-in navigation system was important to find places which he had to visit. [Buyer] mainly used the car – which he received in May 2002 – for practicing his job as a certified expert.

- [Buyer] had accepted the standard terms of delivery of [Seller] in the form of their inclusion into the sales contract form. The disputing parties have not negotiated about the

application of a 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 [Seller] contained under Clause XI the following provisions on contractual warranty: **21**

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 the seller a reasonable compensation for depreciation.

Moreover, [Seller]'s standard terms of delivery and sale contain the following provisions on guarantee: **22**

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.

...

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.

Concerning all buyers that are not consumers in terms of the Consumer Protection Act, Clause 18 of the standard terms of delivery and sale of [Seller] provides for jurisdiction of the court competent for the district of the seller's place of business. **23**

Shortly after the delivery of the car to [Buyer], there emerged an unbalance of the wheels and the remote control for the radio did not work. [Buyer] informed [Seller] who replaced the remote control. The wheel's unbalance was fixed by a third-party workshop on the instruction of [Buyer]. Since an unbalance did actually exist, [Seller] bore the costs. **24**

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 [Intervenor] of all of these defects at about mid-June 2002 by way of telephone calls. Inspection took place together with [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 [Seller], just as the rattling noises from the inside. **25**

As defects had been emerging constantly during the use of the car, [Buyer] visited other authorized workshops of C[...] – apart from [Seller]'s within Austria in order to have the various defects fixed. Due to these ever-emerging defects which were all notified by [Buyer], [Intervenor] 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 official and judicially certified expert for motor vehicles M[...] F[…] on 28 October 2002. **26**

After the compilation of his expert opinion, in which M[...] F[…] refers to the defects mentioned on pp. 11 and 12 of the initial judgment, the car was once again handed over to [Buyer] on 30 October 2002. The following was recorded in the protocol of delivery, signed by [Buyer] and [Intervenor]'s employee W[...] B[...]: **27**

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 Clause 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, Clause 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 protocol of delivery.

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 time. 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 [Buyer] in May 2002, the headlights had started to flicker. This defect appears in a way that the light – if turned on – gets weaker for a short time 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. 28

On the occasion of the findings of fall 2003 by the authorized expert D[...] H[...] – who had been appointed by the court – [Intervenor] 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, which is very difficult for weaker persons. 29

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. 30

[Buyer]'s 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. 31

Already during the first summer after delivery of the car to [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, [Buyer] had to exit via the rear doors. This defect was not notified to [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 32

by installation of support parts. It is impossible to determine whether or not this installation has successfully rectified the defect with the doors.

During the use of the car by [Buyer], it appeared four or five times that the car's electronic system suffered a total breakdown, meaning that no electronic displays could be read anymore. 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. At the same time with the electronic system, the vehicles lighting breaks down as well. The corresponding malfunctions occur particularly during damp weather conditions. 33

[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 calculated once again. 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. 34

[Buyer]'s 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. 35

In order to have the 60,000 km-service effected, [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 [Buyer] would have needed a substitution car with navigation system in order to practice his profession. However, such a car was not available. [Buyer] visited C[...] F[...] in Salzburg about 10 to 15 times and called attention to defects at every occasion. 36

On 20 October 2003, the judicially appointed expert D[...] H[...] identified the following circumstances with respect to [Buyer]'s car: 37

> *«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 fender. Such jutting of the headlight is not identifiable at 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 fender 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 fenders 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 vehicles 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 [Buyer]'s vehicle 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.»

Because of the ever-occurring defects, [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 run for about 112,000 km. **38**

At the time of purchase of the car, [Buyer] concluded a service contract with [Seller]. [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 [Buyer] for the time of service. Until deregistration of the vehicle in September 2003, [Buyer] engaged the services pursuant to the service contract on five occasions. Such service caused average costs of EUR 400. **39**

In order to have defects rectified, [Buyer] visited [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 **40**

the workshop was considerably long. Consequently, [Buyer] then decided to turn to other workshops for the rectification of defects.

By letter dated 3 January 2004, [Buyer]'s attorney requested C[...] Ö[...] with hint towards the right for a redhibitory action to refund the purchase price with additional frustrated costs for the service contract and litigation costs and to take back the vehicle. 41

By letter dated 14 January 2004, [Buyer]'s attorney requested [Seller]'s attorney to cure all of the car's defects within a period of 14 days in accordance with contractual warranty and the service contract. Otherwise, it was assumed that rectification of defects was impossible, meaning that the redhibitory action was justified. Thereupon, [Seller]'s attorney requested [Buyer]'s attorney 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, [Buyer]'s attorney denied the request for a time extension. 42

[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. 43

[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 [Seller]. 44

[Ruling of the Court of First Instance:]

The Court of First Instance has stated in response 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 in accordance with 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. 45

Despite having its place of business in Germany, [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 Clause XI of [Seller]'s standard terms of sale provided for the application of the HGB. This had been contested by [Seller] and [Intervenor] but without substantiation and merely formally. 46

Apart from this procedural argument, the same waiver of the CISG resulted from [Seller]'s delivery and sales conditions. [Seller]'s statement that the application of the CISG had not been excluded merely declared that there was no express waiver, which was undisputed in any case. [Seller]'s standard terms of delivery and sale pointed clearly to 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 47

guarantee and the choice of forum pointed towards a waiver. Finally, it had to be considered that the CISG could also be partially waived, which generally applied to a reference to accepted standard terms. Therefore, in any case, the parties had impliedly excluded the CISG's application 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 since 1 January 2002 and the HGB, respectively, the provisions contained in [Seller]'s standard terms of delivery and sale. [Buyer] was entitled to exercise a redhibitory action based on the provisions of the new § 932 ABGB. There had still been problems at that time with the flickering headlights and meter lighting as well as with electronic breakdowns. Moreover, the suspension was becoming stiff for no reason. If [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. [Seller] had denied replacement of the vehicle as a whole. Conclusively, the redhibitory action was well-founded. 48

Additionally, [Buyer] was entitled under § 933a ABGB to claim damages. From the circumstance that the vehicle was still defective, it could be inferred that [Seller] had not performed its obligations pursuant to the sales contract. It was for [Seller] to demonstrate that he had acted without fault. However, [Seller] did not even attempt to argue that there was no fault on its side. 49

[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. 50

Due to [Buyer]'s redhibitory action regarding the sales contract, he even suffered damages in a way that he was hindered from relying on performance of the services that were promised over 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, damage from loss of services amounted to EUR 3,000 in accordance with § 273 ZPO. 51

This resulted in a total claim of EUR 26,353 in favor of [Buyer], which [Seller] was obliged to pay conditional upon the return of the car. [Buyer] himself offered the performance conditional upon counter-performance. 52

[Seller] had not brought any counterclaims concerning an apportionment of employment costs, which means that such costs could not be taken into account. [Intervenor] was not entitled to bring counterclaims on behalf of [Seller]. 53

[Position of the parties on appeal:]

[Position of Seller and Intervenor:]

Seller]'s and [Intervenor]'s joint appeal is aimed against the part of this judgment of the Court of First Instance, which affirmed [Buyer]'s claim. The appeal was justified because of incorrect and incomplete factual findings, incorrect taking of evidence, incorrect evaluation of evidence 54

and incorrect legal assessment. Both appealing parties request to amend the judgment of the Court of First Instance in a way that the claim filed by [Buyer] is dismissed. In the alternative, [Seller] and [Intervenor] submitted a request to abrogate the judgment and to remand the dispute.

[Position of Buyer:]

Against both appeals, [Buyer] submitted an appellate response, requesting their dismissal. **55**

[Reasoning of the Court of Appeal:]

The appeals of the [Seller] and [Intervenor] are justified. **56**

Since both appeals refer to essentially the same issues, they are settled jointly for reasons of judicial convenience.

1. As to the appeal concerning factual findings and evaluation of evidence:

1.1. *[No defects of the braking system]* **57**

Both appellants contest the «factual finding» that it constituted a defect of the car if it could not be halted by the mere use of the footbrake during engine launch if parked at slopes, but only by employing the parking brake.

1.2. **58**
Based on the findings of the Court of First Instance, this particular characteristic and the fact that more physical power is necessary to operate the parking brake has been caused by reasons of construction. Both footbrake and parking brake are operated via the integrated hydropneumatic unit. In case of a longer downtime of the car, it is impossible to maintain the negative pressure at the brake booster. Generally, this applies to other car types as well, but appears to be a less severe issue for cars with a mechanical parking brake. It has not been established during the evaluation of evidence that this circumstance would amount to a defect of the car. Moreover, the particular car type has been officially permitted for use, which is also undisputed. Consequently, a defect of the car at its braking system cannot be assumed. The Court of Appeal does not follow the Court of First Instance which had held that a defect existed. In accordance with the appellants' submission, the braking system was not defective.

1.3. *[Defect of the suspension system]* **59**

[Intervenor] contests the finding of the Court of First Instance that the suspension was still becoming stiff for no particular reason. This alleged defect is also contested by [Seller], submitting that the judgment of the Court of First Instance had not made express determinations on this issue. Both appellants request the Court to declare that there was no corresponding malfunction.

1.4. 60
The Court of First Instance had found – contrary to [Buyer]'s appellate argument – that the suspension was still becoming stiff (p. 15 of the judgment). This was the case even though suspension bowls and the rear level correction unit had been replaced. [Buyer] affirmed this circumstance during the hearing before the court. The appellate submissions do not successfully challenge the accuracy of his statement:

Witness J[...] L[...] stated that he did not know whether the suspension became stiff at that time. It cannot be readily inferred from his statement that the defect no longer exists. On the other hand, he confirmed that the defect «as described by [Buyer]» had existed in any case because he had experienced the stiffness himself during a journey (yet, before the effected attempts to repair). Based on the fact that attempts to cure defects of the car in question have not been successful in all cases, the suspension defect supposedly still exists. Due to the fact that the stiffness of the suspension occurs suddenly and irregularly, it is also possible that the defect is still in existence, even though it has not been noticed by the appointed experts. Therefore, it cannot be readily inferred that the defect has been successfully rectified. 61

1.5. *[No liability of Seller for defects in the doors]* 62

Based on the findings of the Court of First Instance, [Buyer] has not notified [Seller], but merely other dealers of C[...] of the circumstance that the doors could not be opened both from the inside and the outside (p. 14 of the judgment of the Court of First Instance). Any claim of [Buyer] based on this defect fails because no proper notice of non-conformity was given to [Seller] – as will be further demonstrated below.

1.6. *[Electronic defects]* 63

[Intervenor] contests the factual determination that the central control unit (data bus) caused total breakdowns or at least singular malfunctions of electronic parts if one current consumer failed to operate. This finding is not put into question by statements made by the appointed expert D[...] H[...] that car manufacturers were generally tending to install data bus systems similar to the one of [Buyer]'s vehicle. The expert opinion is not able to challenge the statements of the Court of First Instance.

Not only did [Buyer] assert that there had been problems with the data bus, but this can also be inferred from statements made by witness L[…] and K[…]. Furthermore, it is undisputed that the data bus has been replaced twice due to existing malfunctions (p. 15 of the judgment of the Court of First Instance). Therefore, [Intervenor] cannot successfully invoke that there existed no defects at all concerning the data bus and corresponding electronic breakdowns. 64

1.7. *[Number of workshop visits]* 65

[Intervenor] further contests that [Buyer] had visited the workshop of [Seller] for the rectification of defects at five or six occasions. Instead, it is argued that there was only one visit. However, [Intervenor] neither argues nor is it otherwise apparent in what way the requested factual finding could lead to a different legal assessment. Therefore, the challenge of evidence is not admissible in this respect.

1.8. *[Flickering of headlights]* 66

Based on testimony of witness K[...], it is unquestionable that the flickering of the headlights occurs at cars of type Citroen C5. It is further confirmed by the court's unchallenged determination concerning a statement made by an agent of [Intervenor] during the inspection conducted by expert D[...] H[...] on 20 October 2003 (p. 19 of the judgment of the Court of First Instance). [Intervenor] wrongly cites the appointed expert D[...] H[...] when it alleges that he did not determine a corresponding defect. On the contrary, the defect is described by D[...] H[...] in his written report at Clause 18 and refers to the notice made by [Intervenor] concerning an intended resolution of the problem, which has been determined by the Court of First Instance. The mere fact that expert F[...] – who made an inspection prior to the one made by expert D[...] H[...] – reported that the flickering might have been successfully cured by the installation of the most recent software it cannot be put in question that a flickering might still occur. In any case, [Seller]'s attorney has stated in his letter of 14 April 2004 to [Buyer]'s attorney that there was nothing new to report concerning this defect (para. 18 of expert opinion by D[...] H[...]; exhibit 7).

It can be further inferred from expert D[...] H[...]'s statements that the headlight flickering may constitute an issue of safety impairment during journeys. Thus, the determination requested by the appellants cannot be made. 67

1.9. 68
All in all, the factual and evidentiary contest raised by both appellants is not justified. As far as necessary for legal assessment, the Court of Appeal bases its judgment on the findings of the judgment of the Court of First Instance.

2. As to the appeal concerning the applicable law:

2.1. *[Applicability of the CISG]* 69

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 [Buyer] argues that the CISG has been waived, both [Seller] and [Intervenor] contest the assessment made by the Court of First Instance that the parties waived the applicability of the CISG insofar as [Seller]'s contractual warranty was concerned. They jointly propose that for the question of an implied CISG waiver, one has to consider the real and not the hypothetic intent of the parties. Such an intent cannot be concluded from rudimental warranty provisions contained in [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 geared to Austrian law. The standard terms did not govern the exceptional case that the buyer was from another country. There was no sufficient indication to conclude that [Seller] would not have intended to apply the CISG in sales of international character.

By way of Clause XI of the sales contract, warranty provisions of the HGB were to be applied for businessmen. Even though [Buyer] – as an authorized expert on vehicles – was an entrepreneur in terms of § 1 KSchG, he was no businessman under the HGB. Guarantee promises 70

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 – did not serve as an indication towards a general intent to waive applicability of the CISG.

2.2. **71**
The parties are permitted under Art. 6 CISG to exclude the application of the CISG entirely or in part. Party autonomy is restricted only by way of Art. 12 CISG on the reservation of written form. Application of the CISG can only be excluded in its entirety through unequivocal declaration by both parties. The parties can also exclude the CISG impliedly if their common intent is expressed unequivocally (Siehr, in: Honsell (ed.), *Kommentar zum UN-Kaufrecht [Commentary on the CISG]*, Art. 6 para. 6).

A mere hypothetic intent of the parties is not sufficient. Instead, a real intent needs to be determined. The CISG itself provides for the requirements of a real intent. Consequently, statements and conduct by either party in that respect are to be interpreted pursuant to the standard laid down in Art. 8 CISG. Under that provision, 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. If the subjective intent cannot be determined, the understanding that a reasonable person of the same kind as the other party would have had in the same circumstances applies. **72**

The existence of the parties' intent to waive the CISG must be determined on the basis of each individual case. Still, it is possible to establish case patterns in which an implied waiver is suggested (Ferrari, in: Schlechtriem (ed.), *Kommentar zum Einheitlichen UN-Kaufrecht – CISG – [Commentary on the CISG],* 3rd ed. 2000, Art. 6, paras. 18 *et seq*.). *E.g.*, this can be the case when the parties: **73**

- designate the law of a non-Contracting State;

- designate the law of a Contracting State and determine the applicable domestic substantive law;

- designate the law of a Contracting State insofar as it derogates from the law of another Contracting State;

- designate in their sales contract a forum within a non-Contracting State.

On the other hand, there is generally no sufficiently expressed waiver of the CISG if the parties: **74**

- designate the law of a Contracting State without mentioning that they referred to the domestic, non-unified law;

- designate jurisdiction of a state court or arbitral tribunal of a Contracting State as the forum for dispute settlement, because these courts apply the CISG as lex fori;

- jointly refer to domestic law without being aware of their subsequent choice of law;

- refer to the «applicable law» as common principles of law applicable in the involved Contracting States, because it is the CISG that has been enacted as the common legal standards for these countries;

- have not been aware of the applicability of the CISG, since the CISG applies (just as any objective law) independently from the intent of the parties involved (Siehr, in: Honsell, *ibid.*, Art. 6 paras. 6 *et seq.*; see also Ferrari, in: Schlechtriem, *ibid.,* Art. 6 paras. 20, 21, 22, 31 and 34).

The party relying on an exclusion of the CISG's applicability bears the burden of proof (Ferrari, in: Schlechtriem, *ibid.,* Art. 6 para. 38). **75**

2.3. **76**
[Buyer] based the purported waiver of applicability of the CISG on Clause XI of [Seller]'s standard terms of delivery and sale, which provided for the application of the HGB. Item XI of [Seller]'s standard terms of delivery and sale (accepted by [Buyer]) contains provisions on contractual warranty.

Pursuant to the relevant sub-clause 1, the seller will perform warranty services according to the relevant statutory provisions for buyers that are consumers in terms of the Consumer Protection Act. For businessmen, the provisions of the HGB on warranty will apply. In any event, the CISG is not even applicable for sales contracts with consumers. Therefore, this provision is only 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». **77**

It cannot be established that there had been a common intent by both parties to apply this provision also to contracts with entrepreneurs not being businessmen in terms of the HGB (as is [Buyer]). Instead, there had been no negotiations at all concerning an exclusion of a certain law between [Buyer] and [Seller]. Even an interpretation under objective standards prohibits an understanding in the way sought by [Buyer]. The clear wording of the contract clause prohibits that any reasonable buyer could have understood it in a way that warranty provisions of the HGB should further be applied to non-businessmen. **78**

After it has been established that there had been no talks about the application of a certain law between the parties, an interpretation must be focused on the written contract clause, which strongly suggests that the present constellation (buyer is entrepreneur, but not businessmen in terms of the HGB) was not considered. Moreover, there are 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 have not effectively excluded the application of the CISG. Therefore, the CISG applies to the present dispute. **79**

3. *[Relevant provisions under CISG]*

3.1 **80**
[Buyer] alleges that the vehicle purchased from [Seller] was not in conformity with the contract.

3.2. **81**
Pursuant to Art. 35 CISG, the seller must deliver goods which are of the quantity, quality and description required by the contract. Failing any such agreement, the goods must comply with the requirements laid down in Art. 35(2) CISG. If the goods do not so comply, the seller is liable for breach of contract unless the buyer knew or could not have been unaware of such lack of conformity at the time of the conclusion of the contract (Art. 35(3) CISG) or unless the buyer failed to give proper notice of the non-conformity. Under the CISG, every deviation of the delivered goods from the requirements imposed by the contract constitutes a breach of contract without further need to look at the nature of the deviation (Piltz, *Internationales Kaufrecht: Das UN-Kaufrecht (Wiener Übereinkommen von 1980) in praxisorientierter Darstellung,* § 5 para. 27).

3.3. **82**
According to Art. 36(1) CISG, the seller is liable for any lack of conformity which exists at the time when the risk passes to the buyer, even though the lack of conformity becomes apparent only after that time. This provision refers to a lack of conformity which must be in existence at the time of the passing of the risk but which does not need to be apparent at that time. It is sufficient if an existing cause for a lack of conformity has an effect on the goods only at a later point in time («hidden defect»). This is to be assumed if the original defect turns into effect only later – e.g., during use. Furthermore, a hidden defect exists if only a small defect existed at the time of the passing of the risk and emerges in full only at a later time (Magnus, in: Honsell, *ibid.*, Art. 36 para. 7; Schwenzer, in: Schlechtriem, *ibid.,* Art. 36 paras. 3 *et seq*.).

Pursuant to Art. 36(2) CISG, the seller is also liable for any lack of conformity which occurs after the time of the passing of the risk if he has promised a guarantee for a specific quality of the goods for a period of time. A guarantee requires a corresponding intent by the seller to take responsibility for any lacks of conformity, which can be declared expressly or impliedly, unilaterally or by mutual agreement (Magnus, in: Honsell, *ibid.*, Art. 36 para. 11). **83**

3.4. **84**
Under Art. 38 CISG, the buyer must examine the goods within as short a period as is practicable in the circumstances. According to Art. 39 CISG, the buyer can only rely on a lack of conformity of the goods if he gives proper notice of the non-conformity to the seller within a reasonable time, at the latest within a period of two years from the date on which the goods were actually handed over to the buyer, unless this time-limit is inconsistent with a contractual period of guarantee. The buyer must sufficiently specify the nature of the lack of conformity in order to enable the seller to take reasonable counter-measures. Each lack of conformity must be individually specified. A notice specifying a certain non-conformity does not comply with the duty to give notice in respect of further existent or future defects. These defects must be notified once again for themselves.

The notice of non-conformity does not require a particular form and can be given by telephone. The notice must be directed to the seller itself or to any competent recipient. If lacks of conformity have not been properly notified, the buyer generally loses its rights under Art. 45 *et seq*. CISG to rely on the lack of conformity. The effect of Art. 39 CISG can be subject to the exceptions laid down in Arts. 40, 44 CISG. The buyer itself must demonstrate that he had given a proper notice (Magnus, in: Honsell, *ibid.*, Art. 39 paras. 9, 12, 24, 26 to 28 and 37). 85

3.5. 86
Under Art. 45(1) CISG the buyer may, if the seller fails to perform any of his obligations under the contract or this Convention

a) exercise the rights provided in articles 46 to 52;

b) claim damages as provided in articles 74 to 77.

3.6. 87
Under Art. 49(1) CISG, the buyer may declare the contract avoided in case of non-performance of the seller's obligations. In general, this remedy can be exercised only if the failure by the seller to perform any of his obligations under the contract or the CISG amounts to a fundamental breach of contract (Art. 49(1)(a) CISG).

3.7. 88
Art. 25 CISG provides that a breach of contract is fundamental if it results in such detriment to the other party as substantially to deprive him of what he is entitled to expect under the contract, unless the party in breach did not foresee and a reasonable person of the same kind in the same circumstances would not have foreseen such a result. Basically, Art. 25 CISG must be extensively interpreted: It does not presuppose an actual or impending pecuniary damage. Instead, Art. 25 CISG also applies to other kinds of damage, e.g., an impediment of commercial disposal or a detriment to the reputation of the well-performing party. The detriment must be of an extent that it can substantially deprive the other party «of what he is entitled to expect under the contract». In that respect, it must not be geared back to the hypothetic intent of contract conclusion of the properly-performing party, but consideration must be given to the present interests, which has received an objective outline by the phrase «what he is entitled to expect under the contract». Art. 25 CISG therefore requires an objective detriment of the interests of the properly-performing party. It must be assessed from an ex-post perspective.

The contract itself serves as the primary basis for standards. It must be considered which expectations are justified under the contract. In a second step, the contract must be interpreted in order to determine the standard applied to the assessment of the breach of contract and to determine the detriments on the side of the creditor. Consideration must be given not only to the wording of the contract but to all surrounding circumstances until the time of the conclusion of contract, e.g., talks between the parties during negotiations and commercial disposals of the creditor which could have been recognized by the debtor. In that respect, the exact time of contract conclusion is of critical relevance. 89

First, it must be examined which relevance both parties attached to the contractual obligation at issue. Furthermore, it must be assessed which interests of the aggrieved party should be protected under the contract. Therefore, the very purpose of the contract in the understanding of that party is to be determined. In cases of a breach of the obligation to effect delivery of the goods, the intended use of the goods will regularly be affected. In cases of doubt as to the specific intended use, reference is to be made to generally recognized and expected uses. In contrast, particular purposes of the goods will be considered only if they have been mentioned in the course of negotiations. Both criteria – an objective detriment to justified interests as well as an evaluation of the obligations and interests introduced by the contract – must be given consideration within a comprehensive appreciation of interests (Karollus, in: Honsell, *ibid.*, Art. 25 paras. 14 to 22). **90**

4. *[Legal inferences in the case]*

On the legal basis as presented above the following can be inferred: **91**

4.1. *[No claims from contractual guarantee]* **92**

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

4.2. *[No claims for damages at front doors]* **93**

Hence [Seller] is only liable under Art. 36(1) CISG for those lacks of conformity that already were 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 [Buyer] in May 2002. Consequently, [Buyer] does 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.

4.3. *[Exclusion of other claims due to [Buyer]'s failure to give proper notice of lack of conformity]* **94**

With respect to the defect which caused opening the doors to be impossible during high temperature as well as concerning all further defects that had been notified to [Intervenor] in mid-June 2002 (see findings on p. 10 of the First Instance Judgment), such purported claims fail because the notice of non-conformity had not been given to [Seller]. Moreover, [Buyer] has not attempted to argue that [Intervenor] or any other dealers of C[...] – to which a notice had been given – were competent for the receipt of notices of non-conformity. [Buyer] bears the burden to prove that proper notice has been given.

4.4. **95**
Therefore, the purported claims discussed above (4.2. and 4.1.) are conclusively denied.

5. ***[Defects determined]***

5.1. **96**
The existence of the following defects after the various attempts of rectification has been positively determined at the time of closing of the oral hearings at the Court of First Instance:

1) Flickering of headlights;

2) Irregular stiffness of the hydro-pneumatic suspension;

3) Total breakdowns of electronic units.

With respect to these defects, it must be assumed that they at least latently existed because it was only shortly after delivery of the car that they emerged.

5.2. **97**
Concerning defects which the appointed expert D[...] H[...] identified during his inspection on 20 October 2003 (pp. 17 and 18 of the judgment of the Court of First Instance), the Court of First Instance did not expressly determine the time of their occurrence. However, the nature of the defects strongly indicates that they had been in existence from the very beginning (production defects). Therefore, it can be readily concluded that these defects had already existed at the time of passing of the risk.

5.3. **98**
Yet, the findings of the Court of First Instance do not allow any reliable determination as to whether these defects were still in existence at the closing of the oral hearing in the Court of First Instance. However, this circumstance is negligible in order to determine a fundamental breach of contract as the defects at issue were insignificant in their entirety. These defects do not justify an avoidance of the contract.

5.4. **99**
With respect to the further apparent defects (see above 5.1.), it is to be assumed that they constitute an objective detriment of [Buyer]'s interests. The defects occur irregularly, thus rendering the vehicle unreliable. Particularly for an authorized expert for vehicles who is strongly dependent on the usability of the vehicle, it means a harsh drawback. Furthermore, the defects negatively affect driving safety. Therefore, [Buyer] suffered not only detriments concerning his commercial disposals, but also concerning his personal safety. Furthermore, [Seller], [Intervenor] and other official workshops of C[...] cumulatively failed to rectify the apparent defects over a period of more than one year. Even assuming that rectification of the defects was not absolutely impossible, at least they have not been cured over an inappropriately long term. Especially in the light of the safety issues at stake, it cannot be reasonably expected that the vehicle is used in the future. Moreover, it cannot be expected to have the car resold with these severe safety issues in order to prevent an avoidance of the contract. Therefore, it is to be concluded that these defects form a fundamental breach of contract which – if the further prerequisites are fulfilled as well – entitle the buyer to avoid the contract in accordance with Art. 49 CISG (*cf.* Piltz, *ibid.*, § 5 paras. 247 and 249).

6. *[Waiver or forfeiture of rights]* 100

[Intervenor], which had already asserted during the proceedings in the Court of First Instance that [Buyer] had forfeited his purported claims because he continued using the car being aware of the defects, attempts to counteract the avoidance by relying on Art. 82 CISG.

6.1. 101
Under Art. 82(1) CISG, the buyer loses the right to declare the contract avoided if it is impossible for him to make restitution of the goods substantially in the condition in which he received them. Art. 82(2) CISG provides for exceptions from this principle.

According to Art. 82(2)(c) CISG, the preceding paragraph (1) does not apply if the goods or part of the goods have been sold in the normal course of business or have been consumed or transformed by the buyer in the course of normal use before he discovered or ought to have discovered the lack of conformity. This exception can only apply until the time of identification of a defect, i.e., the time at which the buyer becomes aware of his right to avoid the contract. From that point in time onwards, the aggrieved party has the duty to return the goods (Art. 82(1) CISG). Any act of disposal of the goods infringes this duty (Weber, in: Honsell, *ibid.*, Art. 82 para. 24). From the time of becoming aware of the possibility to return the goods, a potential duty to return is imposed on the buyer; any further unlimited legal disposal of the goods is not compatible with this duty. From this point in time, Art. 82(1) CISG prohibits any such disposal. An avoidance of contract is inadmissible in cases of legal disposal, transformation, consumption or use (Leser & Hornung, in: Schlechtriem, *ibid.,* Art. 82 para. 27; Karollus, *UN-Kaufrecht: Eine systematische Darstellung für Studium und Praxis*, 151). 102

6.2. 103
With respect to the defects which – according to the above no. 5.4. – form a fundamental breach of contract, it must be concluded that they were detected by [Buyer] shortly after his receipt of the vehicle in May 2002. According to the factual findings, defects of electronic parts were notified in mid-June 2002.

The flickering of the headlights occurred soon after receipt of the car, as well. Issues concerned with the hydro-pneumatic suspension as well as the other two defects were mentioned by [Buyer] in his letter to *Mr. L.* of 18 September 2002, exhibit 1. This may be regarded as a fact without infringing the immediacy principle (see RIS-Justiz RS0042533; RS0118509; 1 Ob 189/03f). Therefore, [Buyer] was definitely aware of these other defects already during the first few months after his receipt of the car. Despite that, he continued using the car, which is sufficiently indicated by the fact that he engaged the 60,000 km-service already in fall 2002. When [Buyer] ceased using the car in September 2003, the car showed a mileage of finally 112,000 km. Consequently, [Buyer] used the car – at any rate – until the time that he declared the contract avoided against [Seller]. 104

This declaration must be directed towards the contracting partner. As notices towards a third party, of which the contracting partner becomes aware merely indirectly and by chance, are insufficient (Karollus, in: Honsell, *ibid.*, Art. 26 para. 14), the letter from [Buyer]'s attorney of 3 January 2003 to [Intervenor] does not qualify as a proper declaration of avoidance. Because avoidance of contracts can be declared under the CISG also by bringing a legal action (RIS- 105

Justiz RS0113572), [Buyer] finally declared the contract avoided by bringing the present action on 20 May 2003. Even though the exact mileage of the car at that time has not been determined, it can be assumed that the relevant defects occurred soon after the delivery of the car and were furthermore identified and notified by [Buyer]. In September 2003, the car indicated a mileage of 112,000 km. Therefore, it is unquestionable that [Buyer] continued using the car in the time between his identification of defects and the bringing of the legal action. The exception of Art. 82(2) CISG does not apply in favor of [Buyer]. Consequently, as [Buyer] can no longer return the car in the same mint condition in which it had received it, he forfeited any possible right to effectively declare the contract avoided, notwithstanding the fundamental nature of the breach.

7. *[Claim for damages]* **106**

Furthermore, [Buyer] relies on a claim for damages.

7.1. **107**
If the seller fails to perform any of his obligations under the contract or the CISG, Art. 45(1)(b) CISG grants the aggrieved party the right to claim damages according to Art. 74 to 77 CISG. The claim for damages constitutes a general remedy applicable for breaches of contractual obligations. Art. 45(2) CISG provides for concurrence of the right to claim damages and the contractual remedies under Art. 46 to 52 CISG. The party aggrieved by a breach may choose to employ such contractual remedy, to claim damages or even to exercise both rights cumulatively.

The seller's liability is triggered by his objective breach of a contractual obligation. He is liable for the breach, irrespective of any subjective requirement of fault. In contrast to the Austrian law of obligations – where a breach of a specific duty of care forms the basis for liability – the CISG merely requires the non-performance of contractual obligations. Pursuant to Art. 74 CISG, damages for breach of contract by one party consist of a sum equal to the loss, including loss of profit, suffered by the other party as a consequence of the breach. It is irrelevant for the duty to effect compensation whether the breach of contract causes a direct or indirect pecuniary loss. It is only required that the party in breach foresaw the loss or ought to have foreseen it at the time of the conclusion of the contract. **108**

Damages under the CISG must be effected in monetary payment. In cases where the contract is upheld and the seller delivers defective goods, the buyer is entitled to claim the reduction in value as a non-performance loss. The reduction in value is formed by the difference between the value of the goods in a condition that would conform to the contract and the actual value of the delivered defective goods (Karollus, *ibid.*, pp. 205 *et seq.*, 213 *et seq.*, 223; Schönle, in: Honsell, *ibid.*, Art. 74 paras. 10, 13, 18 and 31). **109**

7.2. **110**
Consequently, [Seller] is 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 applies 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. The amount of the sum remained uncontested. However, a claim for damages presupposes just as well that [Buyer] had given proper notice of non-conformity in terms of Art. 39 CISG.

7.3. 111
[Intervenor] relied on a delayed notice of non-conformity during the proceedings in the Court of First Instance only «under HGB provisions». The defense of a delayed notice of non-conformity – also in respect to a possible applicability of the CISG – was only raised during appellate proceedings. Therefore, as it is prohibited to bring further, new legal submissions during an appeal, this later defense by [Intervenor] is not to be considered.

7.4. 112
However, [Seller] argued during the proceedings in the Court of First Instance that [Buyer] had given notice of non-conformity to other workshops of C[...], which had been visited by [Buyer] in the context of the guarantee promised by C[...] within Austria, but not to the [Seller]. It is impossible to determine from the judgment of the Court of First Instance whether this was the case and to which defects the notice actually referred; there are no such factual findings. Consequently, the judgment of the Court of First Instance is lacking a sufficiently established factual basis to be taken up by the Court of Appeal and which leads to the repeal of the judgment of the Court of First Instance.

7.5. 113
Concerning those defects which the appointed expert D[...] H[...] identified during his inspection of 20 October 2003, it cannot be definitely determined whether or not they are still in existence. Furthermore, it remains undetermined if [Seller] was properly notified of any of these defects. Therefore, the judgment of the Court of First Instance once more lacks a sufficiently established factual basis. This will have to be cured in the further course of proceedings.

8. 114
In the course of further proceedings, the factual basis will have to be amended by findings concerning the issues raised at items 7.4. and 7.5. If it then turned out that [Buyer]'s claims fail because a notice of non-conformity was not directed to the proper addressee, [Buyer]'s request is to be dismissed in its entirety. Otherwise, the reduction in value of the car on the basis of the still-existing defects would need to be determined. This sum would have to be added with [Buyer]'s additional expenses of EUR 1,000 in the context of his attempts to have defects rectified.

9. 115
[Buyer] is not entitled to 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 [Buyer]'s redhibitory action. This is the result of the legal assessment by the Court of First Instance which denied an effective avoidance of the contract. The judgment of the Court of First Instance is therefore amended in that respect.

10. *[Admissibility of appeal to the Austrian Supreme Court and reservation on costs and expenses]*

10.1. **116**
Recourse to the Austrian Supreme Court as well as regular appeal is admissible. The Supreme Court has not yet made legal assessments of the relevant question of the restitution of goods under Art. 82 CISG.

10.2. **117**
The reservation on costs and expenses is based on § 52 ZPO.