CISG-online 1889	
Jurisdiction	Austria
Tribunal	Oberster Gerichtshof (Austrian Supreme Court)
Date of the decision	02 April 2009
Case no./docket no.	8 Ob 125/08b
Case name	*Boiler case*

Translation[*] by Daniel Nagel[**]

Judgement

The appeal is allowed

The judgment of the Court of Appeal is revoked and the judgment of the Court of First Instance is upheld. The [Buyer] has to pay to the [Seller] EUR 1,454.40 (including EUR 242.40 turnover tax) for the costs of the appellate proceedings and EUR 2,214.88 (including 174.48 turnover tax and EUR 1,168.00 cash expenses) for the costs of the present proceedings within fourteen days.

Facts

The [Buyer], a German plumber, ordered from the [Seller], an Austrian manufacturer of boilers, a boiler plus several applications, (in particular, a pellet heating system) according to an order confirmation of 13 August 2002. The parties had agreed that the boiler should heat automatically. The contract was based on the background that the plumber had a business relationship with a customer who needed a heating system for two new buildings and wanted to use pellets, bricks and woodchips of his carpenter's shop as fuel for the boilers. The [Buyer] inquired of an independent agent who worked for the [Seller] whether an wooden parts and wood shavings of a carpenter's shop could be put into the boiler.

[*] All translations should be verified by cross-checking against the original text. For purposes of this translation, the Plaintiff-Appellee of the Germany is referred to as [Buyer] and the Defendant-Appellant 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]; EVÜ = Convention on the Law Applicable to Contractual Obligations (Rome 1980); HGB = Handelsgesetzbuch [Austrian Commercial Code]; IPR = Internationales Privatrecht [Code on the Conflict of Laws]; ZPO = Zivilprozessordnung [Austrian Code on Civil Procedure].

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The [Seller] sent its standard terms of purchase and a price list to the [Buyer] before the order was placed. These standard terms contained, inter alia, the following:

«6. Notification. The buyer is obliged to give notice of a lack of conformity within one week. If the lack of conformity was not detectable, the buyer has to give notice thereof within one week after the detection.»

«8. Warranty. If the buyer is not entitled to conversion (Wandlung), a warranty is provided by repairing the defective part free of charge within the time limit. If it is impossible to repair the defective part or if the repair would entail unreasonable costs, the parts will be reasonably replaced.»

«9. Damages. The seller is solely liable for deliberately caused damages to goods of the buyer that have been handed over in the course of the transaction in order to execute the contract. Further claims of the buyer, in particular claims for further damages including consequential damages are excluded, except for the fact that the seller acted in gross negligence or intentionally.

[...]

«12. Legal Venue. Steyr is the legal venue for any claims. All claims are subject to Austrian law, excluding the rules on the conflict of laws, and the CISG.

[«12. Gerichtsstand. Gerichtsstand für alle Streitigkeiten ist Steyr. Für alle unsere Streitigkeiten gilt ausschliesslich österreichisches Recht, ausgenommen IPR, und UN-Kaufrecht.]

«13. Warranty Claims. Warranty claims in respect to deliveries via specialist shops (plumbers, wholesalers, etc.) are limited to a delivery of substitute goods free of charge without the costs for replacement.»

The [Buyer] installed the boiler on 10 October 2002 following the delivery in September. An employee of the [Seller] was present during the installation. This employee pointed out that it would be necessary to supervise the boiler visually as it would be fit for pellets, however, not for the wood shavings which were mainly used at the initial putting into service. The employee additionally explained to the customer of the [Buyer] that the boiler would not function in the best possible way if wood shavings were used. The [Buyer] invoiced the installation at EUR 1,749.63. Additional costs for the electrical connection accrued in the amount of EUR 978.52.

The boiler did not work properly from the very beginning, in particular, in respect to the automatic heating and the filling. The customer of the [Buyer] informed the [Buyer] thereof. The [Buyer], however, failed to give notice to the [Seller]. The [Seller] was directly informed by the [Buyer]'s customer in the middle of February 2003 for the first time when the latter gave notice that the heating system would not start automatically. The Court of First Instance established that the customer of the [Buyer] subsequently sent several letters to the [Seller], specifying the defects of the heating system. Following a letter of the [Buyer]'s customer of 23 February 2003, an employee of the [Seller] directly visited the customer in order to remedy

the defects. This employee detected that the pellets got caught on the filling level sensor. Hence, he replaced the sensor. He pointed out that the wood shavings which had been used were too long.

However, the automatic starter still did not function properly. In response to a further letter of the [Buyer]'s customer, dated 8 January 2004, which stated various defects, the [Seller] sent another employee, who replaced several parts.

The [Seller] granted an extension of the warranty period to the [Buyer]'s customer on 29 March 2004 until October 2005.

The boiler continued not working properly; the [Buyer]'s customer gave notice thereof via letter on 21 November 2004, whereupon the boiler was readjusted and the control modified at the end of November 2004.

The [Buyer]'s customer gave to the [Seller] further notice of defects on 8 January 2005. The [Seller] thereupon offered to take the boiler back and reimburse the [Buyer]'s customer deducting a certain amount due to the fact that the latter had used the boiler (The [Buyer]'s customer disagreed with the deduction). In addition, the [Seller] noted that the boiler had been heated with very fine material, however, not with pellets.

The [Buyer]'s customer sent a letter to the [Buyer] declaring the contract avoided on 7 March 2005. The [Buyer] sold a new heating system to the customer. The old boiler was not dismantled properly. In addition, it was stored without any protection at the premises of the [Buyer]'s customer until the end of 2005.

In general, an operating period of fifteen to twenty years can be assumed. The operating period of a motor, working parts, conveyors and filling systems usually amounts to ten years. The defects which have been given notice of by the [Buyer]'s customer can be attributed to both defects on behalf of the electric control, the measuring device, as well as the control and the fact that unsuitable and oversized heating fuel has been used. This led to a blockage and the standstill of the system as well as to damages. The defects had already been present at the time of the delivery and installation of the system. However, the modifications of the parameter setting additionally led to a dysfunction of the system.

The [Buyer] failed to carry out a proper examination of the boiler on both 10 October 2002 and 14 November 2002, at which time the defects could have been detected.

The [Buyer] filed a suit on 26 August 2005. It claims avoidance of the contract and repayment of the purchase price as well as compensation for the installation of a new heating system. [Buyer] additionally requested the court to declare that the [Seller] is liable for the dismantling of the boiler and the respective equipment.

Positions of the Parties

Position of the [Buyer]

The [Buyer] alleged that the boiler had been defective and that it had given timely notice thereof in mutual agreement with its customer in the sense of § 377 HGB [*]. The heating system would still be defective. It would, in particular, fail to start properly and to produce sufficient warmth. This could be attributed to a poor design by the [Seller]. The customer of the [Buyer] had declared avoidance of the contract on 7 March 2005, whereupon the [Buyer] had declared conversion (Wandlung). Hence, the [Seller] would be liable to repay the purchase price and to compensate the [Buyer] for the costs of the installation of the heating system. The [Buyer] would be entitled to the requested declaratory judgment as the costs for the modification of the heating system for the end-user could not yet be established.

The [Buyer] additionally alleged that it had thoroughly examined the goods without delay. The defects would in particular be fundamental in respect to the electric control. This defect could not have been detected at the time of the delivery. In addition, the dysfunction could not be attributed to the heating fuel but to the poor design of the heating system. The extension of the warranty period had been effected due to an update of the electric control. The storage of the heating system following the dismantling would not have led to a deterioration of the boiler. The [Buyer] would no longer be liable for this heating system. The standard terms of the [Seller] were not effectively included into the contract.

Position of the [Seller]

The [Seller] requested the dismissal of the [Buyer]'s claim.

The [Seller] argued that the [Buyer] had failed to effect a timely examination and to give a timely notice in the sense of § 377 HGB [*]. It had already been obvious at the time of the installation of the heating system in October 2002 that the [Buyer] intended to sell the boiler to a carpenter, who intended to use wood shavings and other wooden waste material. The [Seller] had explicitly pointed out that the boiler would neither be designed nor suitable for such material. The customer of the [Buyer] had also explicitly been informed. The dysfunction could mainly be attributed to the wrong handling of the boiler by the [Buyer]'s customer, who used both long wood shavings and wooden waste material of his carpenter's shop. The customer of the [Buyer] had not given notice of any defects until 23 February 2003. The notice of non-conformity would be «time barred and elapsed.» In addition, a conversion (Wandlung) would solely be possible contemporaneously with the return of the complete heating system. Furthermore, the [Buyer] would have to deduct the advantage due to the use of the heating system by its customer. Moreover, a conversion would be barred on the basis of the standard terms, as there was no gross negligence of the [Seller]. According to these standard terms, a notice of non-conformity had to be given within a period of one week. In addition, the heating system had been poorly assembled which had led to a loss in value. Hence, the [Buyer] would be liable for damages in the amount of EUR 9,368.18. This amount would be claimed in addition to a claim for compensation for use during three heating periods in the amount of EUR

4,022.64 as a counterclaim. The new heating system of the [Buyer] would dispose of a wattage, wherefore it could be assumed that the [Buyer]'s customer had been given wrong information by the [Buyer].

Judgement of the Court of First Instance

The Court of First Instance dismissed the [Buyer]'s claim. It assumed -- on the basis of the aforementioned facts -- that Austrian law would be applicable according to § 4 EVÜ [*]. It had been agreed between the parties that the boiler would heat and refill material automatically, which had not been the case at the time of the installation. This agreed (dys)function would constitute a lack of conformity in the sense of § 922 ABGB [*]. According to § 377 HGB [*] this lack of conformity should have been given notice of at the time of the conclusion of the contract in 2002, as both parties were entrepreneurs. The [Buyer] had failed to effect a timely examination, which would have been possible on 14 November 2002 at the latest, and had failed to give a timely notice of a lack of conformity even though it had been informed thereof by its customer. Thus, the goods could be seen as accepted due to a lack of a timely notice in the sense of § 377 HGB, wherefore the [Buyer] had forfeited its rights to claim subsequent performance or damages, including the recourse according to § 933d ABGB.

Judgement of the Court of Appeal

The Court of Appeal partially allowed the claim of the [Buyer]. It partially revoked the judgement of the Court of First instance; it established the avoidance of the contract, but confirmed the dismissal of the claim for a declaratory judgment. It revoked the remainder and referred the judgment back to the Court of First Instance in order to have the procedure amended and the judgment reconsidered.

The Court of Appeal held that § 377 HGB [*] would not be applicable to the case but the United Nation Convention on Contracts for the International Sale of Goods according to Art 21 EVÜ [*]. This Convention applies to contracts of sale of goods between parties whose places of business are in different States. This requirement is fulfilled in the present case. If the parties wanted to exclude the CISG, they had to tacitly or explicitly agree on an exclusion of the application of this Convention. The parties had neither alleged an exclusion of the CISG nor could this be derived from clause 12 of the standard terms.

According to Article 38 CISG, the buyer must examine the goods, or cause them to be examined, within as short a period as is practicable in the circumstances. According to Article 39 CISG, the buyer loses the right to rely on a lack of conformity of the goods if he does not give notice to the seller specifying the nature of the lack of conformity within a reasonable time after he has discovered it or ought to have discovered it. In any event, there was a fixed period of two years from the date on which the goods were actually handed over. A period of fourteen days would be reasonable in order to examine the goods and give notice due to the lack of special circumstances.

Article 38 CISG could be excluded. In addition, Article 39 CISG could be excluded as well. According to the standard terms, which would be decisive in the present case, a lack of conformity should be given notice of within a period of one week after the goods have been handed

over and a hidden defect should be given notice of within a period of one week after its initial detection. The buyer would be obliged to reasonably examine the goods in respect to its type, its amount, its packaging and in respect to any further circumstances. The [Buyer] had failed to effect a thorough examination both on the day of the putting into service of the heating system, namely, on 10 October 2002 and following the installation of the electric filling level sensor. It would have been possible to detect the lack of conformity of the control on these dates. The [Buyer] had even failed to inform the [Seller] after it had been informed of the defects by its customer. The [Buyer]'s customer had given notice of defects for the first time in the middle of the year 2003.

It was true that this notice of non-conformity could be attributed to the [Buyer], however, it had neither been given within a reasonable time nor within the period stipulated in the standard terms. Hence, it could generally be assumed that the [Buyer] had lost its rights according to Articles 45 et seq. CISG. This legal consequence would not apply if the seller had renounced the requirement of giving a timely notice or if a defense based on the expiration of the period would be contrary to good faith. Such a renouncement could be assumed if the seller accepted a belated or unsubstantiated notice and offered subsequent performance. This would apply to both Article 39 CISG and § 377 HGB [*]. This could be assumed in the present case as the [Seller] had attempted several times to improve the heating system following the notice of non-conformity. This could be interpreted on the principle of good faith as a waiver of the plea that the notice of non-conformity would be time-barred. The attempts could not be interpreted as a performance based on a mere warranty.

A fundamental breach of contract would be present as the heating system would not heat automatically, wherefore the contract could be avoided according to Article 49 CISG [Translator's note: Typing error in the original text as it refers to «Article 39 CISG.»] The additional defects which had not been sufficiently substantiated, however, would not entitle the [Buyer] to declare the contract avoided. The [Buyer] had declared the conversion (Wandlung) referring to the fundamental defect in due time after the remedy of defects had failed. The claims would not be statute-barred as they had to be raised within two months after the initiation of the performance under the warranty obligation according to § 933 e ABGB [*] [Translator's note: Typing error in the original text as it refers to «933dABGB.»] The [Buyer] had fulfilled the warranty claim of its customer on 7 December 2005 at the earliest. Hence, the action which had been brought on 26 August 2005 was not time-barred. Thus it had to be established that the [Buyer] had effectively avoided the contract. This, however, would not change the fact that the [Seller] was entitled to claim damages due to an improper dismantling and storage. According to Article 82 CISG, the buyer was obliged to make restitution of the goods substantially in the condition in which he received them. A breach of the duty to properly store the goods which could be derived from Article 81 CISG after the contract has been avoided would entitle to a claim for damages. The restitution had to be effected concurrently. According to Article 84(2) CISG, the buyer must account to the seller for all benefits which he has derived from the goods or part of them.

Following the avoidance of a contract the special provisions of Articles 74 et seq. CISG would apply. As a conclusion to this, the [Buyer] would be entitled to demand refund of the purchase price and compensation for futile expenses as regards the assembling of the heating system

at the place of its customer. On the other hand, the [Buyer] had to account to the [Seller] for all benefits which it had derived from the goods and to compensate for the losses due to the improper dismantling and storage of the heating system. However, there would be a lack of facts in this respect, wherefore the case had to be referred back to the Court of First Instance for an amended taking of evidence and a new judgment.

The Court of Appeal held that ordinary appeal would be admissible as regards the reversal of the judgment, as there would not be any jurisdiction of the Supreme Court as regards the question whether Article 82 CISG could be applied to the period following the avoidance of the contract as well as which criteria had to be considered in an assessment of an adjustment of damages according to Article 84 CISG.

The [Seller] appealed against this judgment of the Court of Appeal as well as against the decision to reverse the judgment. The [Seller] claims that there had been both an erroneous legal assessment and insufficient proceedings.

The [Buyer] requests the dismissal of the [Seller]'s appeal as inadmissible or unjustified, respectively.

Reasoning

The [Seller]'s appeal is admissible on the basis of the reasons as laid out by the Court of Appeal and -- on the basis of different reasons -- justified.

The [Seller] alleges erroneous proceedings on the basis that the [Buyer] had referred to §§ 932 et seq. ABGB [*] and that the [Seller] had argued that Austrian law would exclusively be applicable. This could additionally be seen from the standard terms which had been submitted, even if the secretary had mistakenly entered a comma before the word «and» as it would be «generally known that people do rarely know how to correctly use commas». The [Buyer] had never relied on the CISG and this had never been an issue in the course of the proceedings. Furthermore, the Court of First Instance had not considered the CISG as the applicable law. Thus, everybody had assumed that the ABGB would be applicable. The Court of Appeal had infringed the duty to consider the submissions of the parties according to § 182a ZPO [*] as it had based its judgment on the assumption that the CISG would be applicable, even though this had obviously been overlooked or neglected by the parties.

This can generally be confirmed as in fact neither party has relied on the provisions of the CISG in the course of the proceedings. In contrast, both the [Seller] and the [Buyer] have based their arguments on § 377 HGB [*]. According to § 182 a ZPO [*] the court has to consider the submissions of the parties and is solely allowed to base its decision upon facts which have obviously been overlooked or neglected by the parties, if it has discussed this with the parties and given them the opportunity to comment thereon. It is true that this prohibition of «surprise judgments» (cf. in general Fucik, in Rechberger, ZPO, § 182 margin number 1; RIS-Justiz RS0037300 with further references) has been infringed by the Court of Appeal. However this procedural error has to be relevant and thus suitable in the abstract to lead to an incorrect

judgment of the Court of Appeal. (cf. RIS-Justiz RS0043027 and RS0043049 with further references). This, however, cannot be assumed in the present case (in respect to the question whether the notice has been given in due time) as will be shown in the following.

The assessment whether the CISG is applicable has to be based on the general principles. According thereto the CISG forms part of the Austrian legal system. This also applies in respect to a choice of law. Parties, who want to exclude the application of the CISG have to do so via an explicit or tacit agreement as regards the exclusion (RIS-Justiz RS0115967, 2 Ob 95/06v; similar RS-Justiz RS 0113574; cf. Lurger, Die neuere Rechtsprechungsentwicklung zum UN-Kaufrechtsübereinkommen, JBl 2002, p. 750 et seq.).

According to Article 6 CISG, the parties may exclude the application of the Convention. This can be effected tacitly, e.g., by choosing the national law of a Contracting State and determining the applicable substantive law, or by choosing the law of a contracting state insofar as it differs from the law of the national law of another Contracting State. Ultimately, it is decisive in respect to an exclusion of the CISG whether the parties relied on the non-uniform law of a State (OGH, 2 Ob 95/06v, JBl 2008, p.191; Siehr, in Honsell, Kommentar zum UN-Kaufrecht, Art. 6 margin number 6; Ferrari, in Schlechtriem/Schwenzer, Kommentar zum Einheitlichen UN-Kaufrecht, Art. 6 margin number 18 et seq.). Solely referring to the national law of a Contracting State does not constitute an exclusion of the CISG. In the absence of stating points to the contrary -- in particular a reference to the substantive law (cf. 2 Ob 95/06v) -- the application of Austrian law includes the CISG. In the present case, a particular reference would not have been necessary in order to apply the CISG as both Germany and Austria are Contracting States (Honsell, loco citato, pp. 1089 et seq.) to the Convention, wherefore the requirements of Art. 1 CSG have been met. If the contractual agreement is assessed on this basis, the statement of the [Buyer] can be confirmed that from a strict grammatical and lexical point of view the «exception for the IPR [*]» within the standard terms can be seen as a mere insertion and thus even an explicit agreement on the application of the CISG due to the allegedly mistakenly entered comma. As the CISG is -- according to the aforementioned assumption -- applicable anyway due to the reference to Austrian law, this would only make sense if the CISG should be applied in cases where it could not be applied according to general rules. However, it would be difficult to understand insofar why the parties highlighted the fact that Austrian law should be «exclusively» applied. Rather, the parties would have agreed on the primary application of the CISG. Thus, it can be assumed that not only the exclusion of the application of the IPR but also the exclusion of the application of the CISG had been intended. It can be seen from the fact that both parties referred to § 377 HGB [*] and thus to substantive Austrian law that they both assumed that the application of the CISG had been excluded. This is, however, irrelevant in the end as the Court of Appeal -- insofar undisputedly -- held that the notice had been belated both according to § 377 HGB and Art 39(1) CISG («reasonable time») in the present case (cf. in respect to the general period of fourteen days RIS-Justiz RS0111001 with further references; Magnus, in Honsell, loco citato, Art. 39, margin number 22).

Thus, it is in the end decisive to what extent the [Seller] has waived its right to rely on the fact that the notice has not been given in due time. In addition, it is decisive whether such a waiver can be derived -- according to the view of the Court of Appeal -- from the willingness of the [Seller] to accept the remedy of defects (on the basis of the principle of good faith within

business dealings). The [Seller] alleges an infringement of the duty to legally discuss this issue by the Court of Appeal. Hence, it has to be asked first what the [Buyer] has submitted in this respect.

The [Buyer] alleged in the course of the appellate proceedings for the first time that the subsequent performance constituted a waiver of the right to rely on the fact that the notice has not been given in due time (rp 46).

According to the principle of good faith, a waiver of the right to rely on the fact that the notice has not been given in due time had to be assumed if the seller travelled to the buyer in order to correct the defects without stating that the notice had been untimely. As the [Buyer] had failed to submit that the subsequent performance constituted a waiver of the right to rely on the fact that the notice has not been given in due time in the course of the proceedings before the Court of First Instance, the question whether a breach of the principle of preclusion of new submissions (Neuerungsverbot) is present arises.

The Supreme Court assumes that a breach of the principle of preclusion of new submissions (Neuerungsverbot) which entails an incorrect legal assessment cannot only be claimed in the course of an appeal against an arrest of judgment but also as a ground for appeal in the sense of § 503 ZPO [*] (cf. RIS-Justiz RS0112215 with further references; OGH, 5 Ob 43/06v). New claims or pleas that are not considered ex officio have to be present (cf. OGH 5 Ob 43/06v).

Thus the further question arises, whether a waiver of the right to rely on the fact that the notice has not been given in due time can be considered ex officio or whether a explicit objection is necessary in this respect.

The Supreme Court has continuously held in respect to the former § 377 HGB [*] that the promise of subsequent performance or the subsequent performance itself would constitute a tacit waiver of the right to rely on the fact that a notice has not been given in due time. (cf. RIS-Justiz RS0014264 with further references, OGH, 6 Ob 302/01g; similarily in respect to Article 38 CISG Magnus, loco citato, margin number 35, Salger in Witz/Salger/Lorenz, International Einheitliches Kaufrecht, Art. 39 margin numbers 11,12). The assertion of such a tacit waiver, however, has at least to be effected via a respective submission of facts (cf. RIS-Justiz RS0018246). The [Buyer], on the other hand, solely responded to the allegation of an untimely notice by stating that it had not breached its duty to examine the goods and that the defect could not have been detected. It solely referred to the attempts to correct the defects in respect to the claim of non-conformity. It, however, referred to the guarantee in this respect as well. In particular as regards this reference to a guarantee, which can only be considered independent of statutory warranty claims, a (sufficient) submission of facts with respect to a waiver of the right to rely on the fact that the notice has not been given in due time cannot be established. Thus, the breach of the duty to give notice in due time bars statutory warranty claims of the [Buyer].

Hence, it does not have to be considered that this claim would probably be statute-barred according to § 933 ABGB [*]. According to this provision, the period of limitation for the initiation of legal procedures (in the present case on 26 August 2005) in respect to defects of

movable goods is two years after the goods have been handed over (cf. in respect to a maximum period according to Art. 39(2) CISG RIS-Jusiz RS0122995). The [Seller] has not been obliged to install the boiler which was sold to the [Buyer] and which could be removed. Thus, the boiler can be qualified as moveable in the sense of § 933 ABGB [*] (cf. Reinschauer in Rummel, ABGB § 933, margin number 4; Ofner in Schwimann, ABGB, § 933, margin number 7; P.Bydlinski in KBB, § 933, margin number 2). Hence, the limitation period of two years would have elapsed a long time ago.

The requirements of a recourse of an entrepreneur against the supplying entrepreneur, if the former has provided subsequent performance on the basis of a claim for subsequent performance by a consumer, have neither been alleged nor proven. In particular, as regards the notion «consumer» (cf. in this respect Ofner, loco citato, § 933b, margin number 4), there are neither established facts nor submissions. In contrast, the defects in the present case can be attributed to the fact that the customer of the [Buyer] used wood shavings and wooden waste material to heat the boiler.

As a conclusion to this, the claims of the [Buyer] cannot be seen as justified, wherefore it is not necessary to consider the claims of the [Seller] which have been raised as a potential set-off.

The Supreme Court is entitled to decide in case of both an admissible appeal on the basis of § 519 ZPO [*] and a ripeness for a court decision (cf. Kodek in Rechberger, ZPO, § 519, margin number 24; RIS-Justiz RS0043853 with further references). Hence, the claim has to be dismissed on the basis of the aforementioned assumptions and the judgment of the Court of First Instance upheld.

The decision on costs is based on §§ 50 and 41 ZPO.