

### CISG-online 2663

Jurisdiction	Austria
Tribunal	Oberster Gerichtshof (Austrian Supreme Court)
Date of the decision	16 December 2015
Case no./docket no.	3 Ob 194/15y
Case name	<i>Andy Warhol "New Coke 1985" hand screen print case</i>

*Translation by Lukas Petschning\**

#### **Dispositif:**

The Supreme Court, as the competent court for final appeals, has – by a decision of Chamber President Dr. Hoch as the Presiding Judge, Vice President Dr. Lovrek and the Justices Dr. Jensik, Dr. Roch and Dr. Kodek as additional judges – rendered the following judgment in the case of the claimant/[buyer] W[...] GmbH, [...], represented by Kopp-Wittek Rechtsanwälte GmbH in Salzburg, against the respondent/[seller], S[...], represented by Dr. Brigitte Heamann-Dunn, attorney at law in Vienna, for a claim of EUR 70.205,87 and interest, on the final appeal of the respondent against the judgment of the Vienna Court of Appeal as the appellate court from 26 June 2015, case number 13 R 54/15d-45 [CISG-online 2995], by which the judgment of the Vienna Regional Court for Civil Matters from 11 December 2014, case number 24 Cg 110/13t-30 [CISG-online 2994] was partially modified:

The final appeal is dismissed.

The [seller] is ordered to reimburse the [buyer] the costs for its response to the final appeal, which are determined to be EUR 2,053.08 (including VAT in the amount of EUR 342.18) within 14 days.

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## Reasoning:

### [Facts and Procedural History:]

#### *[Facts of the case:]*

In August 2011, the claimant bought the artwork “New Coke 1985” by Andy Warhol, a unique hand screen print, from the gallery of the respondent for EUR 70,000. At the time, the artwork was framed and kept behind acrylic glass. Before the conclusion of the sales contract, the condition of the artwork or any possible damage were not discussed. Likewise, the frame was not removed for the purpose of inspecting the artwork. Such an inspection was neither suggested by the employee of the seller nor requested by the managing director of the [buyer].

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After the purchase, the print was displayed on the premises of the [buyer] in the condition in which it was acquired. In February 2013, the [buyer] intended to arrange for the print to be reframed as its managing director had noticed something curl up slightly. He had assumed this to be the glass. He took the print – which was still framed as at the time of purchase – to a specialist gallery in Munich, which commissioned a master gilder with the reframing. Upon removing the frame, the gilder identified the following significant defects: Kinks on the upper and lower left of the cardboard, visible both in grazing as well as frontal light – in three cases, these kinks also resulted in an interruption of the color surface; signs of creasing on the lower right; fine scratches in the color surface throughout the entire sheet; a blurred cutting edge along the right; damage in nearly a dozen spots throughout the back of the cardboard surface and tears to paper layers as a result of an improper removal of mounting aids. On 27 February 2013, the gilder brought these flaws to the attention of his client, the specialist gallery. Until this point in time, the defects were not known to the managing director of the [buyer]. This knowledge of the defects led him to consider the print – subjectively – worthless.

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On 8 March 2013, the [buyer] forwarded the status report to the [seller] by email and suggested that the condition of the back of the sheet was «catastrophic». The [buyer] demanded that an appointment be made for the pick-up of the artwork and that «the money» be returned. However, the [seller] rejected the avoidance of the contract intended by the [buyer].

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The present defects of the artwork are only visible if the frame is removed. The creasing and the fine scratches, too, are not visible behind the acrylic glass, unless one specifically looked for them. It would have required no special knowledge to remove the painting from the frame before the purchase by the [buyer]. However, the necessary effort to do so would have been significant on account of the many wooden pegs which had been shot into the wood. Likewise, the cardboard protector, the passe-partout, as well as the fact that protective plastic corners had been used in the mounting, were obstacles which complicated an inspection of the condition by a layperson. It is not customary for private buyers of such pieces (modern graphic artwork, mounted, museum-quality frame) to remove the frame and the mounting assembly from the framed piece in order to determine its condition.

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In the reputable printed artworks business, a customer may reasonably expect that the condition of an artwork matches its age. If this is not the case, it is customary to inform the customer of the respective defects. Regarding an Andy Warhol print from 1985, one cannot expect a fresh-off-the-press condition, but nonetheless one which does not exhibit any flaws.

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In graphic art, intactness is an important valuation criterion, especially when the respective artwork was reproducible and flawless specimens exist. While the specimen purchased by the [buyer] was a unique hand screen print, the same printing template was used to fabricate a multitude of other specimens, although they vary in color composition and size. There are offerings of flawless prints of the artwork “New Coke 1985” on the art market (differing in color combination and partially also in size). Against this background, the condition of the print purchased by the [buyer] deviated from the expected condition by approximately 35%.

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***[Motions of the parties before the Court of First Instance:]***

The [buyer] sought, relying on non-conformity, repayment of the purchase price in the amount of EUR 70,000, as well as reimbursement of EUR 205.87 in frustrated expenses for the reframing, concurrently with the return of the artwork. Alternatively, it sought – relying on a reduction of the price – the amount of EUR 24,705.87 including interest.

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The [seller] objected that the notice of non-conformity, given 20 months after delivery of the goods, was significantly delayed. Furthermore, the [seller] argued that no significant breach of contract had occurred.

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***[The decisions rendered by the Court of First Instance:]***

The court of first instance granted the [buyer’s] main claim. It held that the present contract is subject to the UN Convention on Contracts for the International Sale of Goods (CISG). In its opinion, the screen print exhibited damage to such a degree that the [buyer’s] managing director no longer had any interest in the artwork. The court regarded this as objectively understandable on account of the extent of the non-conformity (deviation of the condition from the expected quality by 35%). The defects therefore constituted a fundamental breach of contract within the meaning of Art 25 CISG, according to the court. Moreover, the court held that the [buyer] had no duty to closely inspect the painting after purchase (by removing it from the frame) as it was entitled to trust that the seller would inform it of defects as serious as those which were present. The critical period for the notice of non-conformity therefore only started upon detecting the defects during the reframing.

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***[The decisions rendered by the Appellate Court:]***

The appellate court granted the appeal of the [seller] only partially, with regard to a part of the [seller’s] obligation to pay interest. It held that the print purchased by the [buyer] had significant defects which are partially irreparable and resulted in a significant reduction in value. Overall, a fundamental breach of contract within the meaning of Art 25 CISG could

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therefore be assumed. Additionally, the evidence on record suggested that the [seller's] attempts – initiated during the proceedings – to sell the artwork had failed on multiple occasions, which militated for a decrease in its marketability. The court regarded it as natural and therefore foreseeable that the buyer of a valuable artwork which unexpectedly exhibited damage would no longer have interest in it. The [buyer], which neither trades in artworks nor – judging by the object of its business – engages employees with relevant training, did not have a duty to conduct a detailed inspection of the print which would have revealed the existing flaws.

The appellate court permitted an ordinary final appeal, as it regarded Supreme Court jurisprudence on the required degree of examination of a purchased artwork (or other specific obligations), and on the appropriate timeframe for such examination, to be lacking.

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***[Motions of the parties before the Supreme Court:]***

In its final appeal, the [seller] reiterated its position that no fundamental breach had occurred, and that the [buyer] had failed to give timely notice of non-conformity as the flaws of the artwork would have been recognizable during an inspection of the artwork, which was incumbent on the [buyer].

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In its response to the final appeal, the [buyer] sought for the final appeal to be dismissed as inadmissible, in the alternative for the arguments to be rejected.

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The final appeal is admissible for the purpose of clarifying the legal situation. It is, however, unjustified.

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## **Legal Considerations**

***[Fundamental breach pursuant to Art 25 CISG:]***

1.1.

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Pursuant to Art 49(1)(a) CISG, the buyer may declare the avoidance of the contract if the failure by the seller to perform any of his obligations under the contract or the Convention amounts to a fundamental breach of contract. The avoidance leads to a complete elimination of both parties' original obligations. The purpose of this provision is to provide the buyer with an opportunity to avoid the contract only as a legal remedy of last resort. Avoidance is therefore only justified if an especially grave breach of contract has occurred (4 Ob 159/11b [CISG-online 2239] with additional citations = RIS-Justiz RS0127288 [T1]).

1.2.

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A breach of contract by one of the parties is fundamental, pursuant to Art 25 CISG, 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.

1.3.

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Usually, whether a breach of contract is fundamental is to be determined based on an overall assessment of all circumstances of the individual case, guided by objective criteria. The necessary balance of interests must not only consider the manner and degree of breach and the consequences for the observant party, but also the possibility of repair or the delivery of substitute goods within an appropriate timeframe, as well as the costs of such course of action and the reasonableness for the buyer (4 Ob 159/11b [CISG-online 2239] with additional citations; RIS-Justiz RS0127288). In the present case, a repair of the artwork is *a priori* out of the question due to the partial irreparability of the defects.

1.4.

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The lower courts were therefore correct to hold that it is natural and foreseeable that the purchaser of an expensive artwork, such as the managing director of the [buyer] in this case, would have the justified expectation that the artwork exhibits no flaws; and that he would therefore lose any interest in the purchased goods upon finding out that it exhibits partially irreparable defects which lead to a reduction in value by 35%.

1.5.1.

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The German Federal Court of Justice assessed the fundamentality of a breach of contract in its opinion of 3 April 1996, VIII ZR 51/95 [CISG-online 135]. In that opinion, the Court assigned importance to the question whether delivered goods which did not conform to contractually-agreed standards (the delivered cobalt sulphate did not have the agreed quality) could be processed otherwise or sold during the regular course of business – if only at a reduced price – without disproportionate effort (cf also *Achilles*, Kommentar zum UN-Kaufrechtsübereinkommen, Art 25 paragraph 4).

1.5.2.

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In that regard, the fundamentality of the breach also would have had to be denied in the present case, had the [buyer] been able to (re-)sell the artwork without particular effort.

1.5.3.

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However, in this context, the appellate court has correctly pointed out that attempts to sell the print throughout these proceedings have failed: In the hearing of 18 September 2013 (case file no. 11), the parties agreed to suspend the proceedings to enable an out-of-court settlement. It was agreed that the [seller] was to attempt a sale of the artwork within the next eight months (until 18 May 2014) and that the [seller] would reimburse the [buyer] EUR 65,000 for the print in case of success. After this time period had elapsed, the [buyer] submitted (in its motion to resume proceedings, case file no. 12) that no sale had been achieved and not even a single inspection by a prospective buyer had taken place. Subsequently, the [buyer] additionally argued that, likewise, an auction on 31 May 2014 had not led to a sale, due to a lack of bids. According to the [buyer], this shows that the print is unmarketable in its damaged state (case file no. 13). **[Note for the following:** Austrian civil procedure] As the [seller] did not dispute this argument (in a substantiated way), it was permissible for the appellate court to

base its legal evaluation on this (therefore undisputed) lack of success in attempting an onward sale. Contrary to the arguments of the [seller], this did not constitute a violation of the principle of immediacy.

#### 1.5.4.

If one considers that even the [seller] – a gallerist – was unable to find a prospective buyer for the artwork within eight months, it is apparent that the [buyer], which is not active in this business segment, certainly could not have resold the painting without particular effort.

#### 1.6.

The lower courts therefore correctly affirmed the existence of a fundamental breach within the meaning of Art 25 CISG.

### ***[Duty to examine under Art 38(1) CISG:]***

#### 2.1.

Pursuant to Art 38(1) CISG, the buyer must examine the goods, or cause for them to be examined, within as short a period as is practicable in the circumstances. Under Art 39(1) 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.

#### 2.2.

Relevant circumstances to be considered to determine the appropriate timeframe for examination are the size of the buyer's business, the type of goods to be examined, their complexity, perishability or whether they are seasonal, furthermore the kinds of likely non-conformity, and the requisite intensity of the examination, among other factors. (RIS-Justiz RS0110999; Posch in Schwimann/Kodek, ABGB<sup>4</sup>, Art 38 CISG paragraph 6). Due to the differing legal traditions of the Contracting States, an examination and notice period of 14 days in total is to be considered appropriate unless special circumstances necessitate a shortening or extension of this period (RIS-Justiz RS0111001).

#### 2.3.

It is undisputed that the [buyer] gave notice of the non-conformity long after 14 days had elapsed since the delivery of the artwork, yet within 14 days of actual awareness. For undiscoverable concealed non-conformity, the critical period to give a notice of non-conformity starts at the point in time at which they become apparent (Posch, *ibid*, Art 39 CISG paragraph 4).

#### 2.4.

The [seller] does not dispute that the non-conformity was undiscoverable without removing the artwork from its frame. However, it argues that the damage should not be categorized as «undiscoverably concealed» since an inspection – which would not have required a significant financial undertaking – would have revealed it. Furthermore, the [seller] argued that the [buyer] is to be regarded as an international commercial entity, not a «private individual».

2.5.

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The [seller] is correct in pointing out that, pursuant to Art 38(1) CISG, it is incumbent on the buyer to examine the goods for non-conformity in a sufficient fashion. For this reason, the two-year limitation period may only be exhausted whenever the buyer could not examine the goods earlier, or could not determine the non-conformity earlier despite examination, or could not give notice of the non-conformity earlier despite having already determined it (9 Ob 75/07f [CISG-online 1628] = RIS-Justiz RS0111004 (T1))

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Had the [buyer] purchased the artwork in pursuit of its regular business, Art 38(1) CISG arguably would have required a comprehensive examination – that is to say, particularly a removal of the frame. In fact, the [buyer] (active in the plant construction sector) purchased the artwork purely for decorative purposes, namely, to display it on its premises – as was known to the [seller] from the outset. The appellate court therefore correctly treated the [buyer] as a «private individual» for the purpose of ascertaining the extent of its duty to examine; and the facts of the case as determined by the lower courts [**Note:** which the Supreme Court was procedurally barred from reviewing] state that it would have been unreasonable to expect such a person to remove the artwork from its frame.

2.7.

Contrary to what the [seller] argues, this interpretation is not in conflict with decision 8 Ob 43/12z [CISG-online 2569], as it had rested on completely different facts. That case was concerned with the duty of a commercial entity to examine in the context of a longstanding business relationship with a seller from the same business segment and which could reasonably trust the latter as a proven supplier. For this reason, the assessment [**Note:** by lower courts] that spot checks had been sufficient in that case was judged as tenable by the Supreme Court.

**[Summary:]**

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The final appeal was therefore unsuccessful.

The decision on costs is based on Sec 40, 50 of the [Austrian] Code of Civil Procedure.