

Austrian Supreme Court (*Oberster Gerichtshof*)

19 December 2007 [9 Ob 75/07f]

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JUDGMENT

- (1) The further appeal (*Revision*) is dismissed.
- (2) The [Buyer] has to reimburse the costs of the proceedings in the amount of EUR 2,839.70 (including EUR 473.28 turnover taxes) within fourteen days.

FACTS

The [Seller] of Austria manufactures laminated glass. The manufacturing process involves the laminating of two standard glass panes (float glass panes) with sound-absorbing casting resin.

The [Seller] has been ordering and still orders this glass from the German company K.

At first a two-component casting resin had been used, wherefore the laminated glass could only be further processed or packed after three hours -- i.e., after the end of the hardening process of the two-component casting resin.

Starting in 1998 the [Seller] additionally used a UV-hardening casting resin, which hardens after a twenty minute exposure to UV-radiation on a wheel table - where it is continuously moved. This enables the manufacturer to achieve an increased output

within a constant time frame. The [Seller] additionally still continues -- to a smaller extent -- the production with the two-component casting resin. In order to prevent the leaking of the casting resin, different sealing tapes -- depending on the respective casting resin -- are permanently fixed to the frame of the laminated glass.

The [Buyer] is a holding company of several Swiss subsidiaries. The [Seller] delivered laminated glass to these subsidiaries, which then further processed the laminated glass to insulating glass according to their customers' request. In the course of this process, the laminated glass is glued to a light metal frame. Another glass pane -- sometimes laminated glass -- is fixed to the other side of this frame. As the frame is a little bit smaller than the glass panes, the mortises are filled with padding material ("secondary sealing").

In the course of their longstanding business relationship, the parties never informed their respective contractual partners about the chemical composition of the material they used (i.e., the casting resin and secondary sealing, respectively).

At the time the [Seller] changed its manufacturing process and started to use UV hardening casting resin -- at the end of 1997 -- it informed its customers about this, namely, the subsidiaries of the [Buyer].

Following this change, defects emerged in the course of the production of insulating glass, as the casting resin layer of the laminated glass started to show so-called "wormholes" (= partial detachment of the casting resin from the glass). The [Buyer] failed to give notice of these defects within two years after the delivery -- insofar as the delivery in dispute is concerned.

POSITION OF THE PARTIES

[Buyer]'s position

The subsidiaries of the [Buyer] assigned their claims to the [Buyer], who then claimed damages due to the fact that the subsidiaries had to remove and replace the defective glass panes on behalf of the ultimate buyers. The [Buyer] alleged that the [Seller] had used incompatible casting resin which had caused the defects. These defects had not emerged until two years after the delivery, hence, the [Buyer] had not been able to give timely notice. It furthermore stated that as far as the defects emerged due to a chemical reaction of the secondary sealing and the casting resin and not due to an incompatible casting resin, the [Seller] had breached its duty to warn, as it had not informed the subsidiaries of the [Buyer] of the change of the formula of the casting resin. The [Seller] would hence be liable for the damages. A declaration of the liability of the [Seller] in respect to future appearances of "wormholes" in laminated glass panes also would be necessary as the [Buyer] had to anticipate further complaints of ultimate buyers.

[Seller]'s position

The [Seller] requested the dismissal of the [Buyer]'s claim. The [Seller] alleged that the laminated glass or the components which have been used to manufacture it, respectively, had been flawless. It had not changed the chemical formula of the casting resin but only the hardening process. The subsidiaries of the [Buyer] had already known in 1995, and thus at a time when only two-component casting resin had been used, that problems could emerge if the secondary sealing chemically reacted with the casting resin. Hence, it had been the duty of the subsidiaries to use a secondary jointing compound compatible with the casting resin.

JUDGMENT OF THE COURT OF FIRST INSTANCE

The Court of First Instance dismissed both the claim for damages and the declaratory action.

It held that -- in addition to the aforementioned facts -- the detachment of the resin had not been due to an incompatible casting resin, but to the fact that the secondary sealing which had been attached by the subsidiaries of the [Buyer] had not only been filled into the mortises but had also been attached to the whole surface which, in turn, had at first led to a bridging and then to a chemical reaction with the casting resin layers, which had finally caused the "wormholes".

It held that the Convention on Contracts for the International Sale of Goods (CISG) had to be applied to the present contract for work and materials. The customers of the [Seller] had failed to give a timely notice of the defects, wherefore they had not been entitled to claim damages for consequential losses. In addition, the [Seller] had not breached its duty to warn.

JUDGMENT OF THE APPELATE COURT

The Court of Appeal revoked the judgment of the Court of First Instance in respect to the decision on the defects but dismissed the appeal for the remainder.

According to Article 39(2) CISG, a buyer loses the right to rely on a lack of conformity of the goods or to claim consequential damages in any event, if he does not give the seller notice thereof at the latest within a period of two years from the date on which the goods were actually handed over to the buyer. As the customers of the [Seller] had failed to do so and as a contractual period of guarantee had not been agreed on, the time-limit of Article 39(2) would bar any claims. The Court of Appeal held that further appeal (*Revision*) was admissible as the OGH had not yet decided whether the time limit of Art 39(2) CISG is unexceptionally applicable in respect to claims for damages based on contractual relationships and in respect to hidden defects.

The [Buyer] directs its further appeal against this decision. It states that the appellate judgment was based on erroneous legal assessment and requests the repeal of the judgment. In event, it requests that the partial judgment be changed and the claim for EUR 254,064.30 as well as the declaratory action be allowed.

REASONING OF THE FEDERAL SUPREME COURT

Further appeal (*Revision*) is admissible, but not justified.

The [Buyer] argues that the [Seller] would not be entitled to rely on Article 39 CISG due to Article 40 CISG, as it had been aware or could not have been unaware of the fact that the formula of the casting resin had been in breach of contract.

According to Article 40 CISG the seller is not entitled to rely on the provisions of articles 38 and 39 if the lack of conformity relates to facts of which he knew or could not have been unaware and which he did not disclose to the buyer.

It is true that the [Buyer] has relied on a lack of conformity of the goods. However, it failed to allege that the [Seller] knew or could not have been unaware of this lack of conformity. It solely alleged that the [Seller] had failed to warn that the change of the casting resin could entail the need for a change of the secondary sealing. This represents a claim based on a secondary duty, which has not been upheld in the further appeal.

Therefore, the objection based on Article 40 CISG can be neglected. Thus, it has to be assessed whether the [Seller] is entitled to rely on Article 39(2) CISG. Reference is made to the correct reasoning of the Court of Appeal in this respect (§ 510(3) ZPO [\[*\]](#)).

In addition, it has to be stated that the leading doctrine and preceding jurisdiction agree in respect to the issue whether claims based on hidden defects, i.e., defects which cannot be detected in due time, are barred according to Article 39(2) CISG after the expiry of the two-year period:

The period as set out in Article 39(2) CISG can only be fully exploited if the buyer had not been able to examine the goods at a prior point in time or if he was unable to detect the lack of conformity despite a timely examination or if he had been unable to give timely notice despite a timely detection of the lack of conformity (2 Ob 191 (98x, 9 Ob 13/99y w.f.r.).

The leading doctrine as well emphasizes the fact that the two-year period of Article 39(2) CISG applies to both obvious and hidden defects (Magnus, in: J. Staudinger, Kommentar zum BGB mit EG und Nebengesetzen, Wiener UN-Kaufrecht [CISG] Article 39, margin number 63) and is absolute (Schlechtriem/Schwenzer, Kommentar zum einheitlichen UN-Kaufrecht, Article 39, margin number 23; Honsell, Kommentar zum UN-Kaufrecht, Article 39, margin number 29;

Karollus, UN-Kaufrecht, 129; Posch, in:Schwimann, ABGB Praxiskommentar IV3 Article 39 CISG, margin number 8).

This period was a highly controversial issue at the diplomatic conference. It was classified as unreasonable by many representatives of industrial countries. Nevertheless, it finally became part of the compromise on the notification of a lack of conformity and was intended to strengthen the position of the seller in respect to the fact that after the expiry of a certain period of time he would no longer have to reckon with complaints and could thus finally conclude the transaction. (Schlechtriem/Schwenzer, *loco citato*, margin number 22).

Therefore, there is no unintended regulatory gap, which has to be filled by the courts, as alleged by the [Buyer]. As a marginal note, it has to be taken into account that due to the dispositive character of the majority of the stipulations of the CISG -- such as Article 39(2) CISG -- the parties would have had the possibility to extend or shorten the two-year period. (Magnus, *loco citato*, margin numbers 66 and 68; Schlechtriem/Schwenzer, *loco citato*, margin number 26; Honsell, *loco citato*, margin number 33; Posch, *loco citato*, margin number 10; Karollus, *loco citato*, margin number 129).

Due to the failure to give timely notice of the lack of conformity, the [Buyer] forfeits all of the legal remedies which he could rely on according to Article 45 CISG, and thus the right to claim damages. (Schlechtriem/Schwenzer, *loco citato*, margin number 30; Honsell, *loco citato*, margin number 27; Magnus, *loco citato*, margin number 58; Posch, *loco citato*, margin number 2; Karollus, *loco citato*, margin number 127).

The Court adheres to this leading doctrine, which cannot be questioned on the basis of the allegations of the [Buyer].

Hence, the further appeal (*Revision*) has to be dismissed.

The decision on costs is based on §§ 41, 52(1) ZPO [*]. It has to be taken into account in this respect that the [Seller], who is successful in the present proceedings, obviously fails to base the calculation of its attorney fees on the value of the further appeal (*Revision*), which, however, has to be the basis for the decision on costs.