



The Hinge Factor case study

French issues

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Where we are

- 2 distinct contracts
 - exclusive license with Hopeful Hinge BV
 - exclusive supply contract with Hopeful Hinge AG
- Issue of non conformity of the hinges
 - Specifications provided with a vital measure missing
- Problem solved quickly but heavy damages
- No information available as to the content of the supply contract
 - Nature of the obligation to supply (best effort vs performance)?
 - Liability clause?

Who could bring an action and on what ground?

- The claimant?
 - Hopeful Hinge AG (Switzerland) is the only contractor of Hobson's Choice as regards the supply contract.
 - Hopeful Hinge AG is the party suffering damage.
 - Hopeful Hinge AG is therefore the party entitled to bring an action against Hobson's Choice.
- The grounds?
 - Two foreseeable grounds of action
 - non conformity with the contract
 - Hidden defect
 - These 2 grounds are mutually exclusive
 - Non conformity = a breach of the specifications that were part of the contract + hidden nature of the defect questionable
 - => Action based on « classical » contractual liability
 - Proof of the breach depends on the nature of the obligation
 - According to case law, Hobson's Choice bound by a performance obligation
 - => Liable except in case of force majeure or third party action

Attributable damages and risk of recourse against Hopeful Hinge BV

- Attributable damages
 - Unless otherwise stated, only direct and certain damages attributable
 - Cost for the replacement of defective hinges: € 1.5 million?
 - Obligation to mitigate?
 - Claims from distributors: € 500.000?
 - Loss of reputation?
 - Internal technical and administrative costs?
- Risk of recourse
 - Hobson's Choice could try to trigger Hopeful Hinge BV's liability
 - Breach of contract: incomplete specifications for Hopeful Hinge BV
 - Should Hobson's Choice have detected and corrected the mistake?
 - Shared liability?

What should have been done?

- Define the precise scope of the mission and qualify the regime of performance
- Include detailed provisions related to the use of specifications
- Make references to norms and industry standards
- Include a test procedure on a product sample
- Include detailed provisions on liability
 - Damages covered
 - Liquidated damages
 - Etc.

Thank you for your attention

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