

Case 1958: CISG 7(1); 71(2); 71(3)

Norway: Høyesterett

HR-2019-231-A

Genfoot Inc. v. SCHENKERocean Ltd.

6 February 2019

Original in Norwegian

Published in: <https://www.domstol.no/enkelt-domstol/hoyesterett/avgjorelser/2019/hoyesterett-sivil/krav/>

English translation provided by the Supreme Court:

<https://www.domstol.no/globalassets/upload/hret/decisions-in-english-translation/hr-2019-231-a.pdf>

This case deals primarily with the carrier's duty to carry out the seller's instruction to exercise stoppage in transit under article 71(2) CISG when the buyer already holds the transport documents and demands delivery of the goods. It also deals with the legal effects of not giving notice of stoppage in transit under article 71(3) CISG.

In June 2014, the seller – a Canadian company – bought shoes from two factories in China, which were sold FOB to a Norwegian buyer. The parties were under a long-term distribution agreement, and the buyer could buy the shoes on credit. The buyer organized for the shoes to be sent in containers from Xiamen, China to Oslo, Norway. Shortly after obtaining the bills of lading from the Chinese manufacturer, the seller endorsed them in blank to the carrier's Canadian agent and instructed them to send them directly to the buyer, who in turn passed them on to the carrier's Norwegian agent. When the containers arrived at the port of Oslo, the seller instructed the carrier to release the containers. However, on the same day, the buyer's bank terminated the overdraft facility with the buyer, who consequently could no longer pay the seller. The buyer notified the seller of the bank's termination, which prompted the seller to order the carrier to retain the containers until further notice. However, the carrier's Norwegian agent replied that ownership had already passed to the buyer since the buyer had passed the bills of lading over to them, and that the seller no longer had the power to retain the goods. Nevertheless, as the containers had not yet been delivered, the seller made repeated attempts to prevent the goods from being handed over to the buyer. In the meantime, the carrier pressed the buyer for outstanding claims for duty, VAT, port rent and warehouse rent, including for previously unpaid deliveries, threatening to sell the containers. Upon payment of an agreed sum, the carrier's Norwegian agent delivered the containers to the buyer, who became subject to bankruptcy proceedings one week later.

The seller brought an action against the carrier for not complying with the stoppage instructions. The case was eventually appealed in front of the Supreme Court (Høyesterett). The suit required determining both whether the seller could validly exercise stoppage in transit against the buyer and whether the carrier had to comply with the stoppage order. As for the former, the distribution agreement between the buyer and the seller was governed by Quebec law, and since the CISG applied both as state legislation in Quebec and as national legislation in Canada, the Court concluded that the conditions for exercising stoppage in transit would be governed by article 71(2) CISG.

The carrier made several objections against the seller's alleged right of stoppage.

The first objection was that the seller was already aware of the buyer's financial difficulties before the goods were shipped from China, which prevented effecting stoppage in transit under article 71(1)(a) and (2) CISG. However, the Supreme Court found that the buyer's inability to pay became apparent to the seller only when it received news of the bank's termination.

Secondly, the carrier claimed that the goods had already been delivered to the buyer before the seller made its stoppage order because the carrier's Norwegian agent had acted as a forwarding agent representing the buyer from the moment when the buyer presented them with the bills of lading. While the Supreme Court agreed that an agent for the carrier at some point could become a representative of the buyer, it added that it was important that this point in time could be clearly determined since it affected the seller's right of stoppage. In this case, there was no documentation suggesting that such a representation had been agreed, and the carrier's Norwegian agent had also exercised its right of retention against the buyer. Consequently, the Court concluded that there had been no delivery to the buyer before the stoppage order.

Thirdly, the carrier suggested that the right of stoppage had been lost because no stoppage notice had been given to the buyer under article 71(3) CISG. On this issue, the Supreme Court observed that article 71(3) CISG did not specify the effects of not giving notice and that the words "immediately give notice" suggested that a seller was not required to provide notice earlier than immediately after stoppage had already been completed. Moreover, the fact that the notice requirement was placed separately in the third paragraph suggested that giving notice was not a requirement for exercising stoppage in transit under article 71(2) CISG. With reference to the need for uniform interpretation under article 7(1) CISG, the Court further observed that the foreign judgments presented before it were not conclusive on whether the right of stoppage was lost if the buyer was not notified, noting that these judgments were in any case judgments from lower courts rather than from supreme courts. In addition, the Court noted that the legal literature had expressed different views on this issue.

The Court explained that the purpose of the duty to give notice was to give the buyer a chance to adjust to the stoppage order and mitigate any loss as a result. The Court concluded that article 71(3) CISG did not make notice to the buyer a requirement for exercising the right of stoppage in transit under article 71(2) CISG but failure to do so could lead to a claim in damages from the buyer.

Having concluded that the seller had validly exercised its right of stoppage, the Court turned to the question whether the carrier was obliged to comply with the seller's stoppage order. It indicated that this was not a matter governed by the CISG as the Convention did not regulate this relationship between the seller and the carrier due to the last sentence of article 71(2) CISG, and that it was an issue of duty of care and tort governed by Norwegian tort law since the loss had been sustained in Norway.