Case 1907: CISG 1; 7; 35; 79

Italy: Tribunale di Trieste, Sezione Civile
Case No. R.G. 2640/2016
Alak Art Ipar Es Kepzomuveszeti Korlaton Felelossegu Tarsasag v. Pizzul s.r.l. 17 June 2019
Original in Italian

Abstract prepared by Anna Veneziano, National Correspondent

A Hungarian company specialized in the sector of ornamental and building stones concluded a contract with an Italian company for the purchase of 252 short basalt pillars of the type "absolute black", to be used as bollards. The buyer specified how the stone should be cut and the exact measurements of the pillars, as well as the dimensions of a hole to be drilled in the centre of each pillar. The buyer accepted delivery of the pillars and resold them to another company. After receiving complaints from its customer on the defectiveness of the materials, the buyer filed a suit against the seller to obtain damages, claiming that the pillars had cracked after the insertion of a metallic pole to fix them to the ground and were, therefore, not fit for their intended use.

The Tribunal held that the CISG was applicable to the contract as, at the time of its conclusion, both parties had their places of business in Contracting States (Hungary and Italy – art. 1(1)(a) CISG), and as the parties did not expressly or impliedly exclude it.

With regard to the merits of the case, the Tribunal rejected the plaintiff's claim, relying for each issue on a number of decisions already rendered by Italian and foreign courts in application of the CISG. First of all, it decided that the goods were "fit for the purposes for which goods of the same description would ordinarily be used" (art. 35(a) CISG), and "for any particular purpose expressly or impliedly made known to the seller at the time of the conclusion of the contract" (art. 35(b) CISG), as the stones were fit to be used for outdoor constructions. The Tribunal determined that the expert analysis conducted during the proceedings had found a minor defect in the basalt stones, but had identified in the insertion of the metallic pole and the use of glue by the buyer's customer the prevailing cause of the subsequent cracking. The buyer had not satisfied the burden of proving that the seller was aware of the type and size of pole to be inserted in the stones, nor of the procedure for their insertion. Moreover, the buyer, as a company professionally active in the sector and at least as knowledgeable as the seller, could not invoke reliance on the seller's expertise.

On the question of the burden of proving the lack of conformity of the goods, the Tribunal, following a precedent decision, held that the burden of proof is a matter governed by but not expressly settled in the CISG, and, as such, has to be settled in conformity with the general principles underlying the CISG (art. 7(2) CISG). The Tribunal identified as a general principle that the claimant should bring evidence in favour of its cause of action. Such principle may be derived inter alia from article 79(1) CISG, which expressly states that the non-performing party must prove the circumstances exempting it from liability for its failure to perform, thereby implicitly confirming that it is up to the other party to prove the fact of the failure to perform.

In the case at hand, the buyer had failed to satisfy such burden. According to the Tribunal, the subsequent processing of the stones by the customer had been the "conditio sine qua non" of the damages incurred, even if the stones did have a minor defect that had contributed to the end result. According to article 79 CISG, the damage was thus caused by an impediment beyond the seller's control excluding the seller's liability for it.