CISG-online 5184	
Jurisdiction	Italy
Tribunal	Tribunale di Trieste (District Court Trieste)
Date of the decision	17 June 2019
Case no./docket no.	2640/2016
Case name	*ALAKart Kft. v. Pizzul S.r.l.*

Translation by Caterina Luzzi Conti, Yasmina Abu Sharar, Erik Poleis, Alessandra Fadel, Gioia Codognotto, Danilo Devetak

The Judge Arturo Picciotto, in the matter enrolled as 2640/2016 between

ALAK ART IPAR ES KEPZOMUVESZETI KORLATON FELELOSSEGU TARSASAG […] – the Plaintiff

and

PIZZUL S.R.L. […] – the Defendant

issued the following decision on an action for breach of an international sale contract

ALAK ART IPAR ES KEPZOMUVESTI KORLATON FELELOSSEGU TARSASAG (from now on Alak), a company operating under the Hungarian law in the natural stone trade sector, summoned on 26 July 2016 the Italian company Pizzul S.r.l. (from now on Pizzul) Alak exposed that it entered into an international contract of sale with Pizzul, by means of e-mails exchanged between September and November 2013, for the purchase of 252 precious stone columns called «Nero assoluto» («Absolute Black»), for the consideration of € 56.673,00, with agreed delivery of 80 days «EX WORKS». 1

Alak stated that it purchased the goods specifically to re-sell them as bollards for an ornamental road to a Hungarian customer, to whom the goods were actually resold on 21 October 2013. The Hungarian customer intended to install the goods in a square facing the Budapest Parliament. Alak pointed out that, precisely because of the specific use to which the bollards were to be put, of which Pizzul s.r.l. was aware, it agreed with the defendant the works to be carried out on the material, forwarding to the defendant the specifications relating to the dimensions of bollards and the shape that the blocks of stone had to assume in accordance with the characteristics required by Alak's client. The plaintiff added that, in consideration of the climatic conditions of the intended place of use of the bollards, it requested via e-mail to Pizzul to be reassured about the reliability and quality of the material. It received such reassurance by e-mail, from an employee of Pizzul, Mr Giovanni Giorgi, who communicated that

the material offered «in terms of price and quality [wa]s the best possible solution for an absolute black».

The plaintiff stated that the goods were delivered well beyond the contractual deadline and that in any case the columns were intact when the goods arrived in Hungary at the place of assembly.

Alak then pointed out that, about two months after the delivery of the material and exactly on June 11, 2014, the end customer complained about the quality and the functionality of the installed material, denouncing in particular about formation of cracks on the surface of all the stone bollards.

The plaintiff, therefore, hired an expert who confirmed that the goods were not conforming to the type and quality agreed with Pizzul, and that, given their characteristics and structure, they were not suitable for the use to which they were destined. The expert highlighted that the stones did not resist to solar irradiation and that their exposure to sun caused splits and crumbling. On the basis of such expertise, Alak, by e-mail of June 19, 2014, reported the defects to Pizzul, requesting the replacement of the goods.

Alak stated that initially the seller, through an appointee present at an on-site inspection on July 2014, recognized the defects of the material itself. But, according to Alak, after July 2014 the seller changed radically his attitude, denying any responsibility.

After the failure of any attempt to mediate, Alak sued Pizzul asking the court to have the contract terminated for a fundamental breach on the part of the defendant who sold goods which were unfit for purpose, in addition to a price refund and compensation for damage.

2

Pizzul appeared in court accepting the Italian jurisdiction and the application of the Vienna Convention, complemented, for the non-regulated parts, by the Italian civil code. Pizzul first of all denied that the material sold was a precious stone, as it was made up of simple basaltic stone, highlighting that the name «Nero assoluto» was not relative to a material type but only to its shade of color. Pizzul first pointed out that the stones were not provided for a specific use and that the choice of the stones took place on the basis of the features described in the form sent by Alak (consisting of the measures, the material and the color of the stone blocks). Pizzul therefore claimed that the material it delivered was absolutely in conformity with Alak's requests, namely, columns 50 × 50 × 60 of absolute black basalt with three flamed sides and a polished, sawn bottom, provided with the required holes. Pizzul also emphasized that the buyer Alak was an experienced operator in the sector, rather than a simple consumer, and that it bought and then resold the goods with specific knowledge of their technical features. Pizzul also confirmed that it knew that the columns were to be positioned outdoor on a square as road bollards, the basalt being a typical outdoor stone, able to withstand atmospheric agents. Pizzul reiterated that it was only asked to supply the material with a hole 10 cm in diameter at the bottom of the columns. Pizzul further specified that only later, and only for the part of material that was yet to be worked, it was required to increase the hole to 11 cm due to a modification in the specifications provided by the end customer.

Pizzul also pointed out that the material was delivered and accepted as intact by Alak at the final destination, and that the material underwent further processing by a third party in Hungary. Pizzul suggested that the causes for breaking the bollards might be traced in the use by the said third party of a steel tube in the hole in the stone or in the insertion of glue or other material in the hole, with the consequent increase in pressure inside the columns.

Pizzul denied it ever recognized any defect and asked for the rejection of the claim. […]

[…] **3-8**

In the first place, it must be considered that both parties accepted the Italian jurisdiction. **9**

It is undisputed that the contract subject matter of the present proceedings is an international sale contract, since the two parties have their seats in two different EU States (the seller in Italy and the buyer in Hungary). In order to determine which Court has jurisdiction one must rely on Regulation (EU) No 1215/2012, whose general rule grounds jurisdiction in the courts of the state where the defendant is domiciled or has its seat. Moreover, pursuant to art. 7 co 1 lett. B) of the above-mentioned Regulation, in case of the sale of goods, jurisdiction is determined by the place of the delivery, unless otherwise agreed by the parties. Thus, since the legal seat of the defendant is in Trieste and the delivery was executed in the same place, in the absence of a different parties' choice agreements, jurisdiction belongs to this Court.

Having established this Court's jurisdiction, it is necessary, in light of the nature of the parties' relationship, to consider the question of the law applicable to the dispute. **10**

There is no doubt over the international character of the relationship between the parties: the parties are, respectively, a corporation operating under Hungarian law and a corporation operating under Italian law. They electronically entered into a contract concerning the sale and delivery of goods. Moreover, the countries in which both parties have their seats are contracting states of the CISG at the time of the contract. Under similar circumstances, the prevailing case law (Trib. Pavia, 29 December 1999, in Corr. Giur., 2000, 932 ff.; Trib. Vigevano, 12 July 2000, in Giur. It., 2001, 280 ff; Trib. Padova, 25 February 2004, in Giur. It., 2004, 1405 ff.; Trib. Padova, 11 January 2005, in Riv. dir. int. priv. e proc., 2005, 791 ff.) mandates the application of the rules of the CISG […].

The CISG, as is well known, covers all contracts of international sales and replaces national laws, prevailing over the Rome Convention (Cass. Sez. Unite, decision n. 22239/2009). The parties did not exclude the application of CISG, although, as often affirmed by both Italian and foreign case law, they could have done it, expressly or tacitly.

In light of all the above, the CISG applies to the present case. For issues not covered by the Convention, Italian law will apply.

Being that said, and moving on to the substance of the case, the facts must first be established. 11

To determine the obligations under the contract, it should be underlined that at first, exactly on the first days of September 2013, Alak consulted Pizzul to get a quote for the purchase of plates measuring 100 x 50 x 15 cm for the paving of a square located in Budapest, indicating '*nero assoluto*' as shade of color. On that occasion, Pizzul proposed basalt as the best material and sent to Alak a swatch. It was only a few days later, in particular on the. 8 September 2013, that Alak, having received from its end customer the request of buying bollards rather than plates for paving, asked Pizzul a quote for the delivery of 252 '*nero assoluto*' bollards/small columns measuring 60 x 60 x 50 cm, sending (as an attachment to the email of 8 September 2013) a statement containing the requirements of the columns, meaning the exact measures for the columns and the diameter of the hole they were required to have in the middle, as well as the words «*Anyag: Granit*». In an e-mail of 11 September 2013, at 13.08, with the subject «*Request information PT1 small column nero assoluto*», Pizzul wrote (in Italian): «*There is a problem: Imre said that she does not want to use basalt and I have to understand why, considering that in terms of price and quality basalt is the best solution for nero assoluto. We completed a lot of good projects with this material and customers were always satisfied*». Alak replied on the same day at 15.15 stating (in English): «*I did not talk about the type of material because I know that nero assoluto is usually basalt and not granite. This way, I understood why Imre thought that I did not accept basalt in this project».*

This exchange of emails shows that at the beginning, due to a mere misunderstanding, Alak requested a quote for *«nero assoluto»* bollards in granite. However, the parties then reached an agreement about the type of material to provide, which was *«nero assoluto»* basalt, a material that Pizzul guaranteed was a success in previous deliveries. The statement of Alak must be construed as such: the material selected by Alak could only be basalt, and not granite.

It is relevant for the decision to check if the merchandise provided by the seller was suitable for the use that merchandise of the same type is usually expected to serve (Art. 35(a) CISG). 12

The expert nominated by this Tribunal has stated in his expert report (only belatedly and improperly contested by the buyer, that never participated to the expert operations through his own expert) that *«The basaltic rock object of the agreement is suitable for constructions in outdoor environments».*

In addition, the material provided was also suitable for the special use explicitly or tacitly brought to the attention of the seller when the parties entered into the contract (Art. 35(b) CISG). Indeed, the judge-appointed expert answered to the specific question as follows: *«The basalt provided, after the processings of sawing, core and transport, could be suitable for outdoor use".*

The circumstance that the seller was aware of the kind of pole in which the material had to be stacked, of its diameter and of other features, has never been proven, although it was upon the buyer to prove it (in this way, Schweizerisches Bundesgericht, 13 January 2004).

Under the circumstances, there is no reason to think that the buyer trusted the competence and/or the evaluation of the seller, as it emerges from the exchange of emails mentioned above. After the directions received by email, the buyer proposed exclusively basalt, rather than granite (see the exchange of emails mentioned under 11). According to case-law on the CISG, the buyer does not have to reasonably rely on the capabilities and on the experience of the counterparty if the buyer himself is an expert in the reference field (see High Court of New Zealand, 30 July 2010; confirmed by Court of Appeal of New Zealand, 22 July 2011; Landgericht Coburg, 12 December 2006).

In the uniform application of the Convention, the existence of the buyer's reasonable reliance of sellers' competence and/or evaluation shall be excluded whenever the buyer has skills and knowledge at least equal to those of the seller (see Landgericht Coburg, 12 December 2006), or when the buyer participated in the choice of the products or provided specific directions for their production, as in this case.

So one should conclude that the delivered material possessed *the qualities of goods which the seller has held out to the buyer as a sample or odel*, as provided by Art. 35(c) CISG.

However, the delivered material had a specific feature, defined as follows:

«The considered basalt was not suitable to be locked by a fixed pole due to the presence in the glassing phase of grids of fractures caused by cooling. This was pointed out by the petrographic study carried out by prof. Angelo De Min from Department of Mathematics and Geosciences (University of Trieste). The basalt was not suitable because the voltage disturbance within the block after driving engaged the domino effect of concatenating of microfractures of voltage...».

In simple terms: the different degree of dilatation of the two materials, together with the presence of the glue put by the buyer, resulted in the stone getting damaged inside. The damage was caused either by the temperature range and the excessive grip between the stone and the metal or by the chemical compound used for the gluing. Due to the heat and the absence of enough space between the two internal surfaces (metal and stone), the pressure of the expanding metal caused the process of fragmentation. This process was only partially facilitated by the *presence in the glassing phase of grids of fractures caused by cooling*. Furthermore, the presence of the above-mentioned grids of fractures was observable only through rigorous technical checks.

In this respect, it is important to emphasize that the buyer was a professional trader, as the seller was. The buyer did not disclose exactly how the blocks were to be installed, namely in structures of which material, in which way, with which diameter. The buyer just requested the seller to drill holes in the stone with a diameter of 10 cm. Then the buyer asked the seller to extend the diameter to 11 cm, which was done only for the last part of the blocks that were still without the holes.

Only if the seller was aware of all the above-mentioned elements, the buyer might claim the application of Art. 35(b) CISG.

In the end, one has to conclude that Pizzul S.r.l. was not in default.

13 With regard to the burden of proving the existence of the defects complained by the buyer, reference is made to the well-known sentence of Court of Vigevano of 12 July 2000 (published in Giur. It., 2001, 2). The decision, stating on a partly similar matter, held that the CISG, while not listing the allocation of the burden of proof among the matter expressly covered by the Convention, nevertheless regulates it, with the result that the issue does not represent an «external gap» in the Convention. Moreover, Art. 79(1) CISG, in the matter of breach, expressly mentions the burden of proof, indicating that «a party is not liable for a failure to perform any of his obligations if he proves that the failure was due to an impediment beyond his control and that he could not reasonably be expected to have taken the impediment into account at the time of the conclusion of the contract or to have avoided or overcome it, or its consequences». The question about the allocation of the burden of proof must therefore be solved in accordance with the general principles laid down by the Convention, as set out in its Art. 7(2) CISG. A majority opinion holds that the applicable general rule is *ei incumbit probatio qui dicit, non qui negat*: the party who claims a right should prove the circumstances on which her claim is based. As clarified by the above-mentioned decision, this rule «is confirmed by the provisions of the aforementioned Art. 79 CISG, which, by charging the party in breach with the burden of proving that the non-fulfilment was attributable to a cause unrelated to its sphere of control, implicitly acknowledges that, vice versa, the proof of the breach, that is, the proof of the defective or irregular performance of the service, lies upon her the counterparty, i.e. the contractor who received the defective or irregular performance». A corollary of the principle is that circumstances giving rise to defenses must be proved by the party who raises them.

The way in which this proof can be given, as well as, more generally, the evaluation of the evidence by the judge, is entirely governed by the applicable domestic law.

Since the suitability of the material is a highly technical matter, its proof could only be offered by resorting to an expert opinion.

However, not even the results of the expert opinion confirmed the claim of the buyer that the material was unsuitable for the agreed use, as described and disclosed or otherwise known by the supplier.

By contrast, the expert opinion made it clear that the specific works that the buyer carried out on the material, namely, the insertion of basalt blocks in poles of a material (metal) and a diameter freely chosen by the buyer and not previously communicated to the seller, as well as the use of adhesives or cements, caused the damage to the basalt and their thermal expansion.

Therefore, under the circumstances, and from the seller's perspective, the damage «*was due to an impediment beyond his control*», that is, beyond the control of the seller, who could neither reasonably foresee such an impediment when the contract was signed, nor avoid or overcome its consequences. As a matter of fact, the seller had a professional experience that was equal to the buyer's one, who then sold the goods to a third party and took care of their installation. However, the buyer did not communicate to the seller the way in which he would have laid and fixed the basalt slabs. 14

Pursuant to Art. 79 CISG *(«A party is not liable for a failure to perform any of his obligations if he proves that the failure was due to an impediment beyond his control and that he could not reasonably be expected to have taken the impediment into account at the time of the conclusion of the contract or to have avoided or overcome it, or its consequences»)*, the compensation principles are those of full compensation and recoverability of foreseeable losses. Oversimplifying, the "but for" rule adopted by the CISG largely corresponds with what is domestically known as the causation test of *condicio sine qua non*.

Moreover, the preponderant the legal scholarship on the issue holds that Art. 79 CISG would apply not only to cases in which the failure to perform is due to force majeure and/or impossibility, but also to cases in which force majeure and/or impossibility is not the exclusive reason that made the performance impossible, even if the force majeure and/or impossibility is subsequent to the breach of the debtor.

In observance to this causal rule, interpreted in accordance with the above-mentioned legal doctrine, the behavior of the buyer (with regard to the specific dimensions and quality of the poles in which the material had been inserted by the buyer and in the methodology for laying and gluing, unknown to the buyer itself) might constitute a «*significant proximate cause*», that is to say, a cause that is in itself sufficient to produce the event. Such a cause – it is worth noting in the comparative perspective, as the assessment of causation in this case is managed exclusively by CISG rules – would interrupt the causal link between the breach and the buyer's loss also according to Italian law, and in particular according to Art. 41, second paragraph of the Criminal code and Art. 1221 of the Civil Code.

In accordance with the above rules and with the outcome of the expert opinion, the seller should not be considered in breach. 15

Even if one considers the modest lack of conformity of the sold goods as a breach of the seller, that breach did not cause the final damage.

An additional reason leading to this conclusion is the circumstance that the basalt, despite lying outdoor for years, did not suffer any damage (other than the one herein complained by the buyer). As a matter of fact, in presence of the tribunal-appointed expert (who is a public officer), Alak's legal representative explicitly declared this. The confessional statement of Alak's legal representative constitute definite and final proof of the facts he stated, that cannot be rebutted by any other form of evidence (including those belatedly provided by the

plaintiff) and that can only be challenged through an action for forgery according to art. 221 and following of the Civil Procedure Code.

Since such a minor lack of conformity is not the cause of the damages, which were caused by a factor that was neither known nor foreseeable by the seller (the specific dimensions and quality of the poles in which the material was to be inserted by the buyer and in the methodology for their laying and gluing were unknown to the buyer himself), the claim for compensation should be rejected.

In conclusion the claim should be rejected. […] **16**

Trieste, June 17, 2019