CISG-online 5370	
Jurisdiction	Spain
Tribunal	Tribunal Supremo (Spanish Supreme Court)
Date of the decision	06 July 2020
Case no./docket no.	3133/2017 / 398/2020
Case name	*Intraval S.L. v. Econ Industries GmbH*

Translation[*] *by Juan Pablo Gómez-Moreno*[**]

This court has reviewed the extraordinary appeal for procedural infringement and the cassation appeal filed by the company Engineering and Treatment of Valorization SL (hereinafter, the «Buyer»), represented by the attorney Mr. Francisco Velasco Muñoz-Cuellar under the legal direction of Ms. Gloria María Viñales Gabañac, against the judgment No. 228/2017 of 1 June issued by the 19th Section of the Provincial Court of Barcelona in the appeal No. 859/2015 arising from ordinary proceedings No. 1222/2013 of the Court of First Instance No. 29 of Barcelona, on contractual avoidance and claim for damages. The respondent has been Econ Industries GmbH (hereinafter, the «Seller»), represented by the attorney Ms. Cayetana Zulueta Luchsinger and under the legal direction of Mr. Sönke Lund and Pepe Giménez Alcover. 1

Presented by Hon. Justice Mrs. M.ª Ángeles Parra Lucán.

[*] All translations should be verified by cross-checking against the original text. For purposes of this translation, the Claimant is referred to as [Buyer], and the Respondent is referred to as [Seller]. Additional abbreviations are incorporated within the translation.

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Factual Background

First.- *First instance*

1. 2
The Buyer filed an ordinary lawsuit against the Seller in which it requested to issue a judgment by which:

> «a) It is declared that the contract and addendum dated 20 May 2008 and 20 February 2009, respectively, signed between the parties were avoided due to non-compliance by the Seller.
>
> «b) As a result of said avoidance, the Seller is ordered to reimburse the full amount of the paid price equivalent to TWO MILLION, THREE HUNDRED THIRTY-THREE THOUSAND NINE HUNDRED THIRTY-ONE EUROS AND SEVENTY CENTS (€ 2,333,931.70).
>
> «c) The Seller is ordered to compensate the Buyer for damages caused by the breach of the contract quantified in TWO MILLION ONE HUNDRED SIXTY THOUSAND EUROS (2,160,000 €).
>
> «d) The Seller is ordered to pay the Buyer interest on the price of € 2,333,931.70 in accordance with the provisions of Art. 84 of the United Nations Convention on Contracts for the International Sale of Goods (hereinafter, the «CISG»).
>
> «e) The Seller is ordered to pay interest for the damages that the breach of the contract caused and which has been estimated at € 2,160,000 to be fixed by judicial intervention.
>
> «f) The Seller is ordered to bear the procedural costs.

2. 3
The claim was filed on 18 October 2013 and assigned to the Court of First Instance No. 29 of Barcelona. It was registered under No. 1222/2013. Once the claim was admitted, the Seller was summoned.

3. 4
The Seller responded to the claim in writing requesting its dismissal.

4. 5
The judge of the Court of First Instance No. 29 of Barcelona issued a judgment dated as of 30 April 2015, with the following provisions:

> «That considering the claim filed by Medioambiental Intraval SA Consultoría Medioambiental SA against Econ Industries GmbH, I must declare the avoidance of the contract dated May 20, 2008 and its addendum of February 20, 2009, respectively, signed between the parties, and consequently I order the Seller to reimburse the total price paid

being a total of 2,333,931.70 euros plus interest as provided in Article 84 of the CISG and to compensate the Buyer for damages for non-compliance in the amount of 2,160,000,00 euros plus interest on this amount and the procedural costs».

5. 6
The Seller requested clarification of the previous judgment, which was denied by a court order dated as of 25 May 2015.

Second.- ***Second instance***

1. 7
The judgment of first instance was appealed.

2. 8
The judgement of this appeal was issued by the 19th section of the Provincial Court of Barcelona, which processed the case under the reference 859/2015, on 1 June 2017. The decision provides:

«WE DECIDE: That we must uphold and we do uphold the appeal filed by the Seller against the decision issued on 30 April 2015 by the Court of First Instance No. 29 of Barcelona, which is revoked hereby in its entirety, dismissing the lawsuit filed by the Buyer, thus ordering the Buyer to pay the procedural costs of the proceedings of first instance.»

Third.- ***Appeal for procedural infringement and cassation appeal***

1. 9
The Buyer filed an extraordinary appeal for procedural infringement and cassation appeal.

The grounds for the appeal were the following:

«First.- An infringement due to improper application of Article 39(2) of the CISG. 10

«Second.- In the alternative, an infringement by improper application of Article 39(2) of the CISG because a literal interpretation of said provision was not applied. 11

«Third.- In the alternative, an infringement due to improper application of Article 39(2) of the CISG, because applicable international jurisprudence on the matter was disregarded. 12

«Fourth.- An infringement because Article 40 of the CISG was not applied. 13

«Fifth.- An infringement because Article 10 in its sections 1, 2 and 2, 1 of the UNIDROIT principles on international commercial contracts (hereinafter, «UPICC») was not applied. 14

«Sixth.- In addition to the previous reasons, an infringement because of the undue application and erroneous interpretation of Article 39(2) of the CISG as it is a prescription period and not a limitation period under Article 1964 of the Spanish Civil Code». 15

2. 16
The case was assigned to this chamber, and the parties were summoned to appear before it. Then, an order dated 27 November 2019 was issued, which reads as follows:

«THE CHAMBER AGREES TO:

«1st) Reject the extraordinary appeal for procedural infringement filed by the Buyer against the decision dated 1 June 2017 by the Provincial Court of Barcelona (19th Section), with reference No. 859/2015, arising from ordinary proceedings No. 1222/2013 of the Court of First Instance No. 29 of Barcelona.

«2nd) Admit the cassation appeal filed by the Buyer against said judgment».

3. 17
The Seller submitted a letter requesting clarification and complement thereof as despite the rejection of the extraordinary appeal for procedural infringement no pronouncement was made on the procedural costs.

4. 18
The clarification order dated 17 December 2019 reads as follows:

«THE CHAMBER AGREES TO:

«Amend the partial admission order dated 27 November 2019, in the following terms:

«1st) Add another legal basis that will appear as follows: «Once the process of disclosure set forth in Art. 473(2) of the Spanish Civil Procedure Code (hereinafter, «LEC») was initiated and the Seller presented its claims in written form, the court proceeds to impose procedural costs of the appeal that was rejected on the Buyer».

«2nd) Section 1 of the admission order is amended as follows: «Reject the extraordinary appeal for procedural infringement filed by the Buyer against the decision dated 1 June 2017 by the Provincial Court of Barcelona (19th Section), with reference No. 859/2015, arising from ordinary proceedings No. 1222/2013 of the Court of First Instance No. 29 of Barcelona, with loss of the deposit constituted for the legal proceedings and with the imposition of procedural costs on the Buyer».

5. 19
The Seller was requested to formalize its response, which he did by submitting the corresponding brief.

6. 20
Since a public hearing was not requested by all parties, the case was referenced for voting and ruling on 30 June 2020, when the audience took place through the videoconference system enabled by the Ministry of Justice.

Substantive Part

First.- *Background*

In this dispute, the interpretation of the CISG is raised as a legal issue, which imposes to the Buyer the burden to notify to the Seller in a reasonable time both the non-conformity and the declaration of avoidance of the contract. 21

1. 22
In accordance with the provisions of the decisions under appeal, the following facts must be considered:

> «The Buyer, with the intention to start up a waste treatment plant in Dinnington (United Kingdom), for which it had to acquire a thermal desorption unit (TDU), began a procurement of potential suppliers. As selection criteria it was important to determine the volume of waste that could be processed or treated per hour, as well as the temperature to which the waste could be heated. After contacting the Seller, a preliminary phase of examination of the technology was carried out, so that the Seller provided three samples of different types of waste, oily sludge, earth contaminated with hydrocarbons and paint sludge. 23
>
> Satisfied with the results of said essays, the contract was concluded on 20 May 2008 for the supply of material/machinery and assistance for the installation of the thermal desorption unit in Dinnington (United Kingdom). In the contract the results of the previous tests were set as the mandatory performance capacity of the TDU. The payment of the agreed price was divided in several installments and subject to several conditions, and among them they agreed that after the start-up procedure and during five days a Function Test Procedure (PTP) should be carried out, which should yield certain performance results, specified in the contract. In the event that the results were not satisfactory, it was agreed that this had to be certified by a third party certificate, which had to be issued by an independent certification company mutually agreed upon. 24

«Once the commissioned TDU was built, on 5 June 2009 the «satisfactory inspection certificate» was issued, by which the Buyer states «that today, 5 June 2009, the definitive inspection of the scope of the supply to be delivered by the Seller in relation to the aforementioned contract has taken place and was definitively carried out. We also declare that the corresponding relevant CE and ATEX certificates have been delivered and approved and accepted by us.» According to the Buyer in its complaint, the TDU arrived at the Dinnington facilities between the end of May and 4 June 2009. 25

«During the assembly period of the TDU there were several incidents (cost of spare parts, delay due to the failure of welds, failures in the power screws, problems with the software, etc.). At this point, each party holds the other party responsible for the reasons that caused those incidents and the consequent delays. After various difficulties, between 19 and 25 May 2010 a first functional test or PTP was carried out, as agreed in the contract, with the planned intervention of an independent certification company, with both parties choosing the entity FICHTNER CONSULTING ENGINEERS LIMITED (hereinafter, FICHTNER). According to the report, a series of problems at the plant caused that it was not operating continuously during the test. The function / performance tests did not produce the expected results, and the primary objective of operating continuously with a throughput of not less than two tons/hour was not achieved. Although eight lots of waste were analyzed, only two were considered representative and fully analyzed, considering that there were a large number of factors that contributed to the malfunction of the unit, not all of them attributable to the volume of supply of the Seller, also verifying that the material of the test was variable and was sometimes quite different from that of the raw material of the contract. Be that as it may, the report concludes that «the test has not been passed.» 26

«In view of the conclusions of the aforementioned report, which were not conclusive given the circumstances, after intense negotiations on how to perform a second PTP, with serious divergences on the types of waste to be processed (to be provided by the Buyer), and despite Seller's reluctance (especially regarding the samples to be processed), a second PTP was performed between 9 and 13 May 2011, with the participation of FICHTNER. The Seller was not present during the test. FICHTNER developed a protocol in advance of the tests based on several meetings between the parties, a protocol that was agreed upon by the Buyer and that was never formally accepted by the Seller. The detailed FICHTNER report certifies that, based on the documents and criteria of the functioning/performance trial, the TDU did not pass the functioning/performance trial successfully.» 27

«As stated in the expert opinion provided by the Buyer, after the second PTP, the waste treatment plant was operational until at least August of 2011, although with a less than expected performance. Finally, as a relevant milestone for the purposes that are of interest here, on 18 December 2012 the Buyer sent the Seller a letter in which, under the provisions of Art. 39 of the CISG, it «formally notified the absolute non-conformity with the goods supplied by the Seller», warning it of the filing of legal actions if the 28

TDU did not conform to the operating parameters contractually agreed. As these requests were not met, the claim was finally filed on 18 November 2013».

2. 29
The lawsuit is filed by the Buyer against the Seller and requests, in short, that the contract and addendum executed on 20 May 2008 and 20 February 2009 respectively by the parties be declared avoided due to breach of the Seller. It also requests the restitution of the price and compensation for damages.

We must note that the lawsuit was filed on 18 October 2013, as the Buyer now points out, compared to the erroneous dates cited by the courts (which refer to 28 November 2013 and 18 November 2013). Although, as we will see, the error in the transcription of both judgments is not relevant for the decision on the cassation appeal. 30

3. 31
The first instance upheld the claim and declared the contract avoided, ordered the Seller to reimburse the price and pay the expenses of the Buyer.

For the purposes of this appeal, before entering the merits of the matter, the court responded to the question posed by the Buyer on whether the Buyer reported the non-conformity as required by the CISG and if the time period under the statute of limitations for the action had elapsed, depending on the agreed and the applicable law. 32

The court concluded that there was neither prescription nor expiry of the limitation period. The reasoning was as follows: 33

«In this sense, and entering into the analysis of the alleged limitation, to say that the CISG does not include the limitation period in international commercial contracts (being necessary to refer to the UPICC, which establish the rules applicable to such contracts, providing in article 10.2 that «The general limitation period is three years beginning on the day after the day the obligee knows or ought to know the facts as a result of which the obligee's right can be exercised»; hence, the limitation period for the legal action raised in the present case had already expired. 34

However, in Article 38(1) of the CISG, it says that «The buyer must examine the goods, or cause them to be examined, within as short a period as is practicable in the circumstances.» Article 39 adds in its first subsection that «The buyer loses the right to rely on a lack of conformity of the goods if he does not give notice to the seller specifying the nature of the lack of conformity within a reasonable time after he has discovered it or ought to have discovered it», and continues to say in its second number that «In any event, the buyer loses the right to rely on a lack of conformity of the goods 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, unless this time-limit is inconsistent with a contractual period of guarantee.» 35

«With this in mind, the fundamental question is to determine whether the limitation date or the alleged prescription is applicable, being two concepts of different legal nature. This is examined pursuant to Art. 326 LEC and taking into account the considerations that follow. 36

«According to the allegations in the response it is evident that what is being claimed is the expiration of the Buyer's right to raise the «non-conformity» of the goods because the TDU is considered unfit for the purpose for which it was acquired. And this is the main argument that emerges from the response of the Seller, although the same argument is also presented as a «prescription». 37

«Well, said two-year period regulated in the CISG corresponds to the notion of expiration and is the one that must be considered applicable given that the contract guarantee period – clause 11 provides for a term of less than one year since the «facilities started operating», with a maximum limit of 18 months from the date of availability of the TDU for shipment. 38

«Due to the duration of said periods and what they protect, namely, the possible right of the buyer to claim due to defects in design, materials, performance and assistance, it should be understood as a limitation period and not a prescription. The contract itself in the eleventh clause, invoked by the Seller as a limitation period agreed by the parties under the German Civil Code (hereinafter, the «BGB»), regulates the guarantee period and this is expressly mentioned as «GUARANTEES AND PENALTIES FOR NON-COMPLIANCE». Therefore, since the Seller bases the argument of prescription on said clause, and considering that said clause is intended to give a deadline to report the non-conformity of the party regarding the content of the contract, what must be concluded is that the argument of prescription, as it was presented, must be rejected. 39

«Therefore, in view of the content of the contract and allegations, the court considers the application of the two-year period to notify set forth in the CISG in order to assess the non-conformity expressed by the Buyer (Article 39(2) CISG). Given that the contract of 20 May 2008 incorporates as one of the main obligations to «start up the installation» of the TDU, it is evident that the 24-month period of the CISG already referred to in the application has not elapsed yet, as the Buyer expressed the goods' non-conformity on 18 December 2012 after knowing that they did not meet the contract specifications. Even considering that the applicable term is the guarantee period provided in clause 11 of the contract of 20 May 2008 (1 year or 18 months), the expiration of the right to declare the contract avoided should also be ruled out because the TDU never got to function in the agreed manner, which means that clause 11 cannot be applied because agreed PTPs were not passed. 40

«From the documents provided together with the response, it can be concluded without any doubt that the Buyer's dissatisfaction with the operation of the TDU in view of the results of the PTPs and after them, was expressed and the Seller was notified on 18 December 2012 by letter. From its content it is noteworthy that the expression of non-conformity was made pursuant to the provisions of Article 39 of the CISG. 41

«The foregoing must be related to the nature of the obligations of the parties assumed in the contract of 20 May 2008. From its covenants and content, as has already been said, it follows that the obligations assumed by the Seller were not circumscribed to the delivery of the TDU but were more complex. Thus, in the first clause, and as «PURPOSE» it is stated that «The purpose of this document is to establish the standards for the supply of a thermal desorption unit with 8 modules and 1 additional part that will be delivered at the plant of Advanced Waste Solutions located at Todwick Road Industrial Est, Bookers Way, Dinnington Sheffield. S25 3SH. United Kingdom». 42

«It is also established that the Seller is interested in «providing assistance for its installation in Dinnington (United Kingdom), in accordance with the expected and agreed performance». Therefore, as the Seller's obligation is not solely delivering the TDU, its thesis in the response to apply the «dies a quo» for the count of the «prescription» (18 months) taking as reference the date of receipt of the machine by Tradebé – 5 June 2009 – cannot be accepted, since said delivery only fulfills in part one of the contractual obligations of the Seller under the contract of 20 May 2008. 43

«For all the above, there has been no expiration of the limitation period or prescription of the expression of non-conformity in light of the two-year period incorporated in the CISG (Article 39) calculating said term since the dates of the second PTP 13 May 2011 in which it is stated that the TDU does not comply with the contractual requirements and until Buyer's expression of non-conformity on 18 December 2012. Neither from that date and until the filing of the claim (28 November 2013) two years have passed. For all the above, the defense of the Seller must be dismissed.» 44

4. 45
The Seller appeals and the Provincial Court upholds the appeal, totally revokes the judgment of the court and dismisses the claim.

After stating that the contract is subject to the CISG, it begins to analyze the issue regarding the «expiration or prescription» of the initial claim and concludes that the term has effectively expired. The reasoning is as follows. 46

«Regarding this legal concept [Article 39 of the CISG], the doctrine concludes that the buyer must notify the non-conformity specifying the nature of it, so that generic statements of the type «non-conforming goods» or simple requests for technical assistance are not sufficient. And, secondly, in accordance with Article 27 of the CISG the communication of the defect of conformity takes effect from the moment it is issued, regardless of whether or not it reaches its destination or the moment when it arrives. 47

According to the first section of Article 39 CISG, the complaint must be made within a «reasonable period», and this period according to the majority doctrine is expiration, so that it does not admit interruption. In the cases dealt with by the jurisprudence, short periods of time have been chosen when it comes to perishable goods or apparent quantity or quality defects, the period ranging from four to six days. And when the non-conformity is not apparent, the terms that are considered reasonable are two or three months. The various resolutions can be consulted on the website of the United Nations Commission for the Unification of International Trade Law (www.uncitral.org). Regarding the dies a quo of these terms, it is the one in which the non-conformity was discovered, which in the case of hidden defects will be from the point in time when the buyer starts to make use of the goods.

«After this «reasonable period», as a closing provision of the term system, Article 39(2) CISG establishes a maximum time limit of two years, which in this case begins to count as soon as the goods are delivered, without an interruption of the time period being possible. As the doctrine observes, this period is an exception to the general principle of examination of the goods by the buyer, who must detect deficiencies in the shortest possible time, and is particularly applicable in the sale of industrial products or machinery. And precisely for the greater security of the parties in these cases, as legal deadlines may be amended by mutual consent of the parties, like all of the CISG, the parties can lengthen or shorten them, and this is why Article 39(2) CISG, after setting this period of two years, concludes that «unless this time-limit is inconsistent with a contractual period of guarantee». **48**

«Well, in accordance with this provision, expressly invoked by the Buyer in its non-conformity letter, the first thing to be analyzed is whether that non-conformity was expressed properly and within a reasonable period of time, as well as since when should the period of time be counted. The dies a quo of this period cannot, of course, be counted from 5 June 2009, the date on which the so called «satisfactory inspection certificate» was issued. As previously stated, the delivery of the TDU and effective start-up was conditioned to the performance of some functioning and performance tests or Functional Test Procedure (PTP), precisely to verify that the supplied TDU conformed to the contractual specifications. Therefore, the moment in which the non-conformity was discovered or should have been discovered is that in which the Buyer concludes or considers that the goods supplied are not in accordance with that contractually intended, and this moment cannot be other than that of when the second PTP was carried out, which ended on 13 May 2011. We have already seen that after this PTP, the letter of non-conformity is sent on 18 December 2012, that is, one year, seven months and five days from the 2nd PTP, and lawsuit from which these proceedings arise was filed on 18 November 2013, two years, six months and five days from the 2nd PTP, and eleven months from the letter of non-conformity. At this point, it must be noted that being the expiration period, the complaint of non-conformity must be made and the corresponding claim brought before the Courts within it or before its expiration. **49**

And as we observed, waiting two years, six months and five days from the 2nd PTP to file the claim, after allowing a year, seven months and five days to send the letter of non-conformity, it seems to us that it far exceeds any reasonable period, and even exceeds the maximum limit of two years provided for in Article 39(2) CISG (and in this case even understanding that the date on which the goods were effectively placed in the possession of the buyer was the date of the 2nd PTP). Therefore, contrary to what was decided by the Court of first instance, we conclude that the right to present the claim has expired.» 50

5. 51
The Buyer files an appeal for procedural infringement, which was rejected, and a cassation appeal.

The Seller alleges Art. 485 LEC causes the inadmissibility of the appeal based on the fact that it is based on different or unproven facts and raises new issues.

Second.- *Cassation Appeal. Admissibility*

1. Delimitation of the legal issue raised

As delimited by the courts of the lower instances, the issue concerns whether the expression of non-conformity by the Buyer was presented within the time limit and whether the claim for contractual avoidance is admissible. 52

Summarized, the first instance, citing Article 39 of the CISG, declared that there was not any expiration nor prescription because two years had not passed since the second performance test (PTP) until the non-conformity was notified and from that moment until the lawsuit was filed. 53

The second instance, on the other hand, considered that sending the letter informing of the non-conformity one year, seven months and five days after the end of the second PTP exceeded any reasonable period (Article 39(1) of the CISG). Also, since the claim was also filed for two years, six months and five days (it would really be one month less, as we have warned about the filing date of the claim) from the second PTP, even if it was understood that the merchandise was actually placed in the possession of the buyer on the date of the second PTP, the maximum limit of two years provided for in Article 39(2) of the CISG would have been exceeded and the action filed would be expired. 54

Faced with this judgment, the cassation appeal is filed by reason of the amount (Art. 477.2.2.º LEC) and is based on the six motives transcribed in the factual precedents of this judgment. In essence, it is aimed at challenging the interpretation and application that the second instance has made of Article 39 of the CISG and to defend with different arguments that it should have been incorporated in the merits of the matter because the claim had not expired or prescribed and confirm the judgment of the first instance. 55

2. Admissibility of the cassation appeal

We must therefore reject the objection of inadmissibility raised, in accordance with the doctrine of this chamber that distinguishes between absolute causes and relative causes of inadmissibility and that allows us to analyze the legal issue raised when the infringed rule is clearly identified, the problem raised is individualized and the alleged infringement is substantiated. This is what happens in the case in which the cassation appeal, filed by reason of the amount, raises as a legal question whether the merits of the matter should have been analyzed because the action brought was filed in time, in accordance with Article 39 of the CISG, which has allowed the Seller to address the cassation appeal, knowing which are the relevant issues were, and that the court has been able to address the legal issues raised. This is without prejudice to the decision on the merits. 56

Third.- *Applicable law and legal regime*

1. Application of the CISG

The parties are a company established in Spain and a company established in Germany that entered into a contract on 20 May 2008 (with an addendum of 20 February 2009) aimed at manufacturing, installation and commissioning by the Seller of a High Temperature Thermal Desorption Unit (TDU) in exchange for a price. 57

The parties agreed to submit the controversies that arise to the courts of Barcelona, which is possible under the provisions of Article 23(1) of Council Regulation (EC) n° 44/2001, of December 22, 2000, relating to judicial competence, the recognition and enforcement of judicial decisions in civil and commercial matters, in force at the time the contract is concluded [currently, Article 25 of Regulation (EU) 1215/2012 of the European Parliament and of the Council of 12 December 2012]. 58

However, the parties did not foresee what would be the law applicable to the contract and, based on what is said below, it must be concluded that the CISG is applicable: 59

i) 60
The contract is international because the parties have their establishments in different States (Article 1 of the CISG) and the CISG is applicable because both States (Spain and Germany) were contracting States [Article 1(1)(a) of the CISG] at the time of the conclusion of the contract (Article 100 CISG). The CISG entered into force in Germany on 1 January 1991 and in Spain on 1 August 1991.

The parties have not excluded the application of the CISG (Article 6 of the CISG). 61

It is irrelevant that the TDU was intended to be installed in the UK. 62

ii) 63
Both parties have assumed, and this is the judgment under appeal, that the assembly and functioning services were accessory in respect to the «main part» of the obligations of the Seller of manufacturing and supplying the TDU. Therefore, the contract is within the scope of the CISG, in accordance with the provisions of its Article 3, which includes sales contracts regarding goods to be manufactured or produced, as well as contracts by virtue of which the seller undertakes to also supply labor or services, and only excludes them when such services constitute the main part of the obligations of the party providing the goods.

It is also convenient to clarify that the CISG prevails over the Convention on the law applicable to contractual obligations opened for signature in Rome on 19 June 1980 (hereinafter, the «Rome Convention»). Indeed, according to Article 21 of the Rome Convention, it «will not affect the application of international conventions to which a Contracting State is or becomes a party», and that is the case of the CISG, as we have seen. It should be noted that for the two States concerned the Rome Convention was replaced by Regulation (EC) No. 593/2008 of the European Parliament and of the Council, of 17 June 2008, on the law applicable to contractual obligations (Rome I Regulation), in accordance with the provisions of its Article 24, but this Regulation – which, moreover, leaves international conventions unaffected to which a Contracting State is or becomes a party by the time the Regulation was adopted – is only applicable to contracts executed after 17 December 2009. 64

Finally, it must be borne in mind that, in accordance with the provisions of Article 7(1) of the CISG, in the interpretation of the CISG «regard is to be had to its international character and to the need to promote uniformity in its application and the observance of good faith in international trade». 65

Article 7(2) of the CISG adds that «questions concerning matters governed by this Convention which are not expressly settled in it are to be settled in conformity with the general principles on which it is based or, in the absence of such principles, in conformity with the law applicable by virtue of the rules of private international law.» 66

This means that for matters governed by the CISG (including the rights and obligations of the seller and the buyer arising from the contract, in accordance with Article 4 of the CISG) but that the CISG does not expressly resolve, recourse must be made, first of all, to the general principles of the same CISG and only secondarily to the applicable domestic law. For matters not governed by the CISG, it will be necessary to resort to the applicable domestic law in accordance with what is determined by private international law. The CISG does not contain conflict rules. For what has already been explained, considering the date of the contract, the provisions of Article 4 of the Rome Convention must be taken into account, according to which the law of the country to which the contract has a closest relation will regulate it, being presumed that the contract is more closely linked to the country where the party that must perform the characteristic obligation has its headquarters, residency or place of management, or 67

the where the establishment of that party where that obligation must be fulfilled is located, in case it is different to its main establishment.

Since the initial claim and the response to it, it has not been disputed that the most characteristic service was that of the Seller, a company established in Germany and which had to manufacture the TDU in Germany. 68

In accordance with the foregoing, the two parties have invoked the application of the CISG and, additionally, of German law (although the Buyer did so to reinforce its claim for damages and profit, and the Seller to argue the prescription of the action). 69

2. Communication of the non-conformity and declaration of avoidance of the contract

2.1. 70
Art. 35 of the CISG establishes the duty of the seller to «deliver goods which are of the quantity, quality and description required by the contract and which are contained or packaged in the manner required by the contract.» The assessment of conformity will result from the provisions of the contract itself and, alternatively, from the criteria provided in Article 35(2) of the CISG. In Articles 45 et seq. of the CISG, the rights and remedies that are available to the buyer in case of breach of the duties of the seller, including the delivery of the goods in conformity, are established.

2.2. 71
In order to exercise the rights and actions that derive from the non-conformity, the buyer must have notified the seller of the non-conformity within certain deadlines (Article 39).

Thus, the buyer, «who must examine or have the goods examined in the shortest possible time given the circumstances» (Article 38 of the CISG), loses the right to invoke the non-conformity «if he does not give notice to the seller specifying the nature of the lack of conformity within a reasonable time after he has discovered it or ought to have discovered it» (Article 39(1) of the CISG). The buyer, however, according to Article 44 of the CISG, may reduce the price or demand compensation for damages, except loss of profits, if it can present a reasonable excuse for which it omitted the communication required by Article 39(1) of the CISG. The same Article 39 establishes in its subsection 2 for the notification of the non-conformity a maximum period of two years, after which the buyer loses its right to rely on a non-conformity even if it had not discovered it before. This means that the buyer does not always have a period of two years to communicate the non-conformity. The buyer must examine the merchandise (Article 38) and notify the seller of its non-conformity within a reasonable period of time, from when it discovered it or should have. In this sense, the two year period applies only when the buyer is unable to discover the defects that amount to non-conformities because such defects were not apparent at the time of examination. 72

This two-year period is available, and the parties can modify it through the contractual guarantee that they agree on. Thus, Article 39(2) of the CISG establishes that: «In any event, the buyer loses the right to rely on a lack of conformity of the goods 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, unless this time-limit is inconsistent with a contractual period of guarantee.» 73

However, in accordance with Article 40 of the Convention, the seller may not invoke the provisions of Articles 38 and 39 if the non-conformity refers to facts that it knew or could not ignore and that it had not disclosed to the buyer. 74

2.3. 75
For what matters in view of the claims of the Buyer in this litigation, and the allegations presented in the cassation appeal, between the rights and actions that the CISG recognizes to the buyer in case of breach by the seller of any of its obligations is the requirement of compensation to remedy the non-conformity by repair, but such request «must be made either in conjunction with notice given under Article 39 or within a reasonable time thereafter» (Articles 45 and 46(3) of the CISG).

2.4. 76
The buyer may also declare the contract avoided if «if the failure by the seller to perform any of his obligations under the contract or this Convention amounts to a fundamental breach of contract» (Article 49(1)). According to Article 25, the breach of the contract by one of the parties will be fundamental «if it results in such detriment to the other party as substantially to deprive him of what he is entitled to expect under the contract, unless the party in breach did not foresee and a reasonable person of the same kind in the same circumstances would not have foreseen such a result.»

Article 26 establishes that «A declaration of avoidance of the contract is effective only if made by notice to the other party.» In accordance with the provisions of Article 49(2) of the CISG, in cases where the seller has delivered the goods and the breach does not consist in late delivery, the buyer will lose the right to declare the contract avoided if it does not do so «within a reasonable time»: i) after it had or should have had knowledge of the breach, or ii) after the expiration of the additional period fixed by the buyer for the fulfillment by the seller of its obligations or after the seller has declared that it will not perform with the period fixed (Article 47). 77

2.5. 78
The terms established by Articles 39 and 49 to notify the non-conformity or the declaration of avoidance are different from the terms to exercise judicial action before courts, on which the CISG lacks regulation.

There is a Convention on the Limitation Period in the International Sale of Goods prepared by the United Nations Commission for International Trade Law (New York, 1974, amended by a Protocol of 1980, hereinafter the «CLP») and, according to which, the limitation period for actions derived from the non-conformity prescribes four years since the delivery of the goods (Articles 8 and 10(2)). 79

But its application is relevant, according to its Article 3: a) when, at the time of the conclusion of the contract, the establishments of the parties to a contract for the international sale of goods are located in Contracting States; or b) when, by virtue of the rules of private international law, the law of a Contracting State is applicable to the sales contract. 80

Since the CLP has not been ratified by either Spain or Germany, it is not applicable to the case. 81

Consequently, in accordance with the foregoing, as this is an issue not resolved by the CISG, regarding the term for exercising an action before courts, the rules of German law must be applied, which, as we have advised, is the subsidiary applicable law in the present case. 82

Starting from this regulatory framework, we begin to analyze the reasons for the cassation appeal. 83

Fourth.- *Chamber decision. Dismissal of the appeal*

1. First ground

The first ground claims the infringement of Article 39(2) of the CISG. 84

The Buyer argues that this provision is not applicable to the case since it, and in general the entire CISG, refers to a type of goods that are mainly movable or corporal or of those that are manufactured in series without differentiating one from another, and in the case the result matters, this is, that the TDU is correctly installed and achieves the results agreed by the parties, so the framework set forth in the provisions of the CISG is insufficient. 85

It also claims that if the specific result agreed in the contract is not reached, as it considers to be the case, the delivery cannot be considered to have been completed, so the contract has not been performed. For this reason, it suggests that Article 39(2) of the CISG is not applicable, since it establishes that in any case the buyer loses the right to invoke the non-conformity if it does not notify the seller of said non-conformity within two years from the date when the goods were «effectively in the possession of the buyer» and in the present case such notification never took place. 86

The reason is dismissed for the reasons stated below. 87

2. Rejection of the first ground

The claim is rejected because the Buyer cannot state for the first time, and in the cassation appeal, that, given the need for the machinery to obtain a result, the CISG in its entirety is not applicable, as it seems that it now argues in a somewhat ambiguous manner. 88

It was the Buyer itself who, in the communication sent by letter to the Seller, declared its non-conformity under the provisions of Article 39 of the CISG, and based its claim for declaring the contract avoided on the breach by the Seller of its obligations under Articles 35 and 45 of the CISG. This, moreover, is consistent with the usual interpretation of the doctrine on mixed sales and machinery installment contracts which, in accordance with the provisions of Article 3 of the CISG, are subject to this provision. 89

Since the CISG is available to the parties, who can exclude its application or establish exceptions to any of its provisions or modify its effects (Article 6 of the CISG), and they did not do so, we must start from its application to the present contract. 90

A different matter is that in view of the content of the contract and its provisions, the performance of the TDU could be relevant when assessing whether there was a breach attributable to the Seller and whether this breach was fundamental and allowed the Buyer to declare the contract avoided. 91

But to this end, it is necessary that the Buyer fulfilled its burden to notify in a reasonable time both the non-conformity and the declaration that the contract was avoided. The scope of the agreed services may also be a relevant factor when assessing whether the communication of the non-conformity and the declaration that the contract was avoided were made in a reasonable time, a matter that will be analyzed when deciding on the second and third grounds of the appeal. 92

Neither can be accepted the Buyer's argument that since the TDU did not reach the expected performance for reasons attributable to the Seller (which, moreover, is not a proven fact of the case), it was not effectively delivered and thus Article 39(2) of the CISG is not applicable. In the appeal, it is stated that since the TDU never performed, «the dies a quo» never began to count. 93

The argument is rejected because it disregards the provisions of the CISG on the lack of conformity and the rights and remedies of the buyer. In particular, as two different hypotheses, Article 49 distinguishes between contractual avoidance in case of non-delivery of the goods (hypothesis for which it is inferred that there is no deadline for the corresponding declaration) and contractual avoidance in which the seller has delivered the goods but has incurred in breach of any of its obligations, therefore including the delivery of non-conforming goods (which is what the Buyer argues). In this case, the exercise of rights and actions requires the communication of the non-conformity (Article 39) within a reasonable time since the buyer knew or should have known that such non-conformity constituted a fundamental breach. This 94

issue is the subject matter of the following decision on the second and third grounds of the appeal.

The first ground is therefore rejected. 95

3. Second and third grounds

The second and third reasons are presented as complementary, so they will be analyzed together. 96

In the alternative to the first ground, the second ground claims a violation of Article 39(2) of the CISG for disregarding a literal interpretation of the provision. According to the Buyer, the appealed decision, by requiring that the claim be filed within two years, misinterprets Article 39(2), because this provision does not establish an expiration or prescription period for the exercise of legal action before courts, but only a burden to send the communication of non-conformity to the other party, which the Buyer did through the submission of a notarial minute to the Seller. 97

Regarding the third ground, which is also presented in the alternative to the first, and complementary to the second, the Buyer alleges that it also declared that Article 39 of the CISG does not refer to legal actions. The international jurisprudence has dealt with this issue as it appears in the Compendium of jurisprudence on the CISG, which must be taken into account for the sake of a uniform interpretation of the same (Article 7 of the CISG). Both grounds are dismissed for the reasons stated below. 98

4. Rejection of the second and third ground

The Buyer is right to observe that the appealed decision does not include with due clarity the distinction between the period for reporting the non-conformity and the period for exercising legal action. In this sense, the statement, quoting Article 39(2) of the CISG, that legal action would be preempted because it was brought before the courts after more than two years from the date when the goods were delivered to the buyer is inaccurate (with the warning that this would be the case even if it was understood that the goods were effectively placed in the buyer's possession on the date of the second PTP). But before this statement, the appealed decision also stated that the letter of non-conformity was not sent to the seller within a reasonable time since the second test of operation of the TDU was carried out, in accordance with Article 39(1) of the CISG, and such is the ground of the decision. 99

The grounds are rejected because this chamber considers that the Buyer lost the right to declare the contract avoided, which is the claim that has been raised. Therefore, although the arguments used by the appealed decision call for clarifications, the reasons for the dismissal of the claim are the same, which justifies that due to lack of *effet utile* the cassation appeal should not be upheld. The specification of what constitutes a «reasonable time» to achieve a balance in each case between the seller's interest in promptly clarifying claims relating to a contract already fulfilled and the buyer's interest in exercising their rights in the event of lack 100

of compliance by the seller must take into account the concurrent circumstances. Among the factors that judicial decisions and arbitral awards applying the CISG have taken into account are the nature of the goods (perishable or not, for example), how evident the non-conformity is and any usages existing between the parties (http://www.unilex.info, https://www.uncitral.org/pdf/english/clout/CISG_Digest_2016.pdf, https://uncitral.un.org/es/case_law).

According to the proven facts, the delivery of the commissioned TDU took place on 5 June 2009, with the issuance of a satisfactory inspection certificate by the Buyer. As this is a machine from which a functional result is expected, the non-conformity that consists in the achievement of the agreed performance could not be discovered immediately with the delivery, since in a first examination only the obvious and apparent defects could be identified. But after the first test provided in the contract, which ended on 25 May 2010 in an unsatisfactory manner for the Buyer, a second functional test was carried out, during which the Seller was not present, and which ended on 13 May 2011. In this sense, it would be reasonable to assume that, prior to the second test, the Buyer would have expressed its complaints to the Seller. **101**

It can even be accepted that the Seller waived the contractually envisaged limitation, which only obliged it to respond until 5 December 2010. But there is no doubt that, if not before, at least from the end of the second test (13 May 2011) the Buyer not only knew the characteristics of the TDU that had been delivered and the scope of the non-conformity that it now criticizes, so it was also able to assess whether the alleged deficiencies constituted a fundamental breach and whether it wanted to declare the contract avoided. However, until 18 December 2012, it did not communicate its absolute non-conformity and announced that, if it was not corrected within fifteen days, it would proceed to claim the refund of the price paid and the damages caused before the courts. **102**

This is, the Buyer allowed more than one year and seven months to elapse before requesting a compensation and communicating that otherwise it would declare the contract avoided, despite the fact that the review by an independent expert and the performance of operational tests on the machinery that was delivered justified the requirement that it had expressed its will to declare the contract avoided due to the non-conformity of the goods within a short period of time. **103**

Both the notification of non-conformity and request for compensation and the notice that the contract would be declared avoided were made beyond any reasonable period of time. Regarding the avoidance of the contract, it should even be stressed that this is the case if it is understood that the letter of 18 December 2018 was not properly a communication of contractual avoidance and that it did not occur until the presentation of the claim. Besides, it has also been proven that the plant was in operation until at least August 2011 and within the CISG the avoidance of the contract is considered as the last remedy available to the buyer in cases of non-compliance, including those arising from non-conformity. Therefore, deciding in the opposite would be contrary to the good faith that must be observed in international trade, in accordance with Article 7 of the CISG. **104**

Consequently, these grounds are rejected. 105

5. Fourth ground

The fourth ground refers to the violation of Article 40 of the CISG, which expressly excludes the application of Article 39 in those cases in which the non-conformity relates to facts that the seller already knew, as it happens in the present case, according to the Buyer, because the Seller was perfectly aware of the impossibility of meeting the required results under the PTP agreed between the parties. 106

The Buyer points out that, according to the many arbitration awards and judgments that it presents, Article 40 expresses a principle of fair trade that protects the buyer's rights to compensation for non-compliance in cases where the seller is fully aware of its own breach. 107

This ground is dismissed for the reasons stated below. 108

6. Rejection of the fourth ground

The Buyer refers for the first time in the entire procedure to Article 40 of the CISG and its application is based on a new fact that has not been proven in the case, which is the Seller's knowledge of the defect, so it cannot be considered by this chamber. 109

7. Fifth ground

The fifth reason refers to an infringement due to non-application of Article 10 sections 1.2 and 2.1 of the UPICC. 110

The Buyer argues that the CISG does not regulate the limitation period and that to fill in this gap it is necessary to resort to the UPICC (as the first instance did as «obiter dictum», although with an estimation error), as it is provided in Article 7 of the CISG, which refers to the general principles on which the CISG is based, among which the UPICC are included (which establish in Article 10 a term of three years that would be met by the Buyer even if the term is counted after the practice of the failed second PTP). Besides, as part of its fifth ground, the Buyer also considers as relevant context Article 8 of the CLP, which establishes a limitation period of four years. 111

This ground is dismissed for the reasons stated below. 112

8. Rejection of the fifth ground

This ground is dismissed for two types of reasons. 113

In the first place, and fundamentally, because in order to reject the Buyer's claim, and now the cassation appeal, it was enough to appreciate that, after verifying the defects and clarifying the performance of the machine through the performance tests, the Buyer failed to comply with the burden imposed by the CISG to notify within a reasonable time that it considered the non-conformity sufficiently important to declare the contract avoided. By not doing so, the Buyer lost its rights. It is not adequate to assess the prescription. 114

In addition, even if it would be necessary to analyze whether the time to present the claim had elapsed, the CLP which, as we have already explained, is not applicable, nor the UPICC should be applied. It should be taken into account that the UPICC do not contain binding norms and their application proceeds only when the parties to a contract or a decision-making body choose to apply them and if said choice is recognized or admitted in the relevant legal framework. As we have explained, for matters not regulated by the CISG, such as the statute of limitations, the applicable domestic law must be used, which in the case, as has been said, is German law. 115

9. Sixth ground

In the sixth reason, which is presented in the alternative to the previous ones, the Buyer alleges the violation of Article 39(2) of the CISG, insofar as the time contemplated in it is a statute of limitations and not an expiration period for the exercise of any legal action, as it seems that the contested judgment contemplates. 116

It argues that even in the event that it is considered that the time under Article 39(2) of the CISG is a period for the exercise of legal action, this period should be interpreted as a time of prescription, according to Article 1964 of the Spanish Civil Code. 117

It alleges that, being a limitation period, the time under Article 39(2) CISG can be interrupted and in the present case the period was interrupted by the different emails that mediated between the parties after the second PTP and, in any case, by the notarial request dated 5 December 2012, which would have interrupted the statute of limitations during the period granted to the Seller to respond and during which the Buyer could not file a claim by mandate of Article 47(2) of the CISG. 118

It adds that, due to the date when the claim was filed, the statute of limitations for the contract would be 15 years and not 5, as currently established in Article 1964 of the Spanish Civil Code. It also mentions that in Catalonia the time to bring personal legal actions is 10 years and ends by saying that in the case the term would have been suspended during the negotiations and would have been interrupted by notarial request. 119

The reason is dismissed for the reasons stated below. 120

10. Rejection of the sixth ground

We have already indicated that the term of Article 39(2) of the CISG is not a statute of limitations. We have also warned that it is not even a period that applies in all cases of non-conformity, since if the non-conformity is discovered or should have been discovered, the buyer is obliged to notify the seller within a reasonable time (Article 39(1) of the CISG). 121

In accordance with what we have stated, if the limitation period had to be analyzed, it would not be according to Spanish law but rather according to German law, which does not contemplate the out-of-court claim as a cause of interruption of the limitation period (§ 212 of the German Civil Code). 122

Moreover, in accordance with this law, as explained by the Seller in its response to the appeal, reiterating the arguments asserted since the response to the claim in first instance, which have not been discussed by the Buyer before, the limitation period to raise a claim for avoidance would be expired. 123

From the delivery on 5 June 2009 until the filing of the claim on 18 October 2013, more than two years would have elapsed, which would be the applicable statute of limitations, in accordance with § 438(1) No. 3 of the German Civil Code. This would hold true even if we were to understand that the period of time during which the parties held negotiations should not be counted in the statute of limitations, in virtue of the suspension provided under German law. This remains the case irrespective of whether the letters and mails exchanged after the second PTP until 28 October 2011 are taken into account, as the appellant claims in the background to her appeal, or whether the time between the two performance tests (§§ 203 and 209 of the German Civil Code) is taken into account, as the appellant pointed out. 124

The dismissal of all the grounds implies the dismissal of the cassation appeal and the confirmation of the ruling in the appealed judgment. 125

Fifth.- *Procedural costs*

The dismissal of the appeal entails the imposition of the procedural costs of this cassation appeal on the Buyer. 126

Decision

For all the above, in the name of the King and by virtue of the authority conferred by the Constitution, this chamber has decided to 127

1.º- Dismiss the cassation appeal filed by the Buyer the decision issued on 1 June 2017 by the Provincial Court of Barcelona (19th Section), with reference No. 859/2015, whose judgement we confirm.

2.º- Impose on the Buyer the procedural costs of this cassation appeal and declare the loss of the deposit constituted for its filing.

It is so agreed and signed.