

Case 1902: CISG 13; 20; 32(1); 38(2); 39; 40; 36(1); 40

Egypt: Court of Cassation

Challenge No. 2490, Judicial Year No. 81

The Australian Wheat Board v. General Company for Silos & Storage SAE 23 June 2020

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This case mainly deals with the reasonable time for the notification of non-conformity of goods under the CISG and the effects of such notification on the buyer's right to seek remedies for non-conformity.

The Australian Wheat Board (the seller) entered into a contract on 19 April 1994 with the General Company for Silos & Storage SAE, an Egyptian public-sector company (the buyer) for the sale of Australian wheat. The seller shipped 63,000 tons of wheat to the buyer based on a sea waybill dated 16 March 2000. Upon arrival in Egypt, the shipment was examined and was withheld from entering Egypt on 18 April 2000 due to non-conformity with Egyptian standards with respect to excessive amount of Saponaria seeds. The buyer filed a lawsuit to claim damages for non-conformity of the goods. The court rejected the claim and the first-instance decision was appealed before the Cairo Court of Appeal.

On appeal, the court reversed the decision indicating that the amount claimed had to be paid in order to make the goods fit for human consumption. The appellate decision did not discuss the seller's defence that it had not been properly notified of the non-conformity of the goods, despite the notification allegedly made by the buyer on 10 December 2001.

Subsequently, the seller challenged the appellate decision before the Court of Cassation.

The Court of Cassation based its judgment upon the fact that the parties' transaction was governed by the CISG and that the object of the transaction was the sale of goods (wheat).

The court noted that, under article 38(2) CISG, if delivery is made in instances where it is not suitable to examine the goods except at the time of arrival (i.e., at customs), it is permitted to examine the goods at the point of arrival, even if the delivery to the buyer was made by handing the goods over to the first carrier according to article 31(a) CISG.

Furthermore, the court noted that article 39 CISG obliges the buyer to notify the seller of the lack of conformity of the goods within a "reasonable time" from the date of discovery of the defect, or the date it ought to have been discovered, in order for the seller to be appraised of and cure such defect. The court also noted that the buyer lost its right to "rely on a lack of conformity of the goods" if the buyer did not notify the seller of such defect within two years as the buyer who did not examine the goods and notify their lack of conformity was either negligent or had accepted the goods as delivered. The court further noted that if the non-conformity, however, was related to matters that the seller knew or ought to have known, the seller may not rely on the provisions of articles 38 and 39 CISG in application of article 40 CISG.

The court indicated that means for notification were not limited to telephone or telex, as per article 13 CISG, but extended to any other effective means of instant communication according to article 20 CISG including electronic communications. In that respect, the court deemed the United Nations Convention on the Use of Electronic Communications in International Contracts supplementary to the CISG with regard to the use of electronic communications.

The court noted that the notion of "reasonable time" under article 39(1) CISG, as interpreted by international case law, starts at "any time after the day of delivery of goods or the detection of the defect" and may last any period of time not exceeding two years. The duration of this period of time is subject to the appreciation of the judge in each lawsuit in light of the circumstances of the agreement, type of goods, whether the defect was patent or latent, and the level of proficiency and the experience of the buyer. The court also indicated that the interpretation of the term "reasonable time" should be in line with the applicable customs of each type of trade. Accordingly, the court said that article 39(1) CISG set flexible time standards according to the circumstances, as opposed to the two-year standard specified under article 39(2) CISG, which was very strict except in case of contractual warranty period.

As a result, the two-year period applied only when the time period specified in article 39(1) was longer than two years. Nevertheless, the parties could also agree to a longer or shorter period under article 6 CISG.

The court further noted that article 39(2) CISG set a lapse period and not a statute of limitation. Hence, this lapse period may not be subject to a stay or discontinuation and was not affected by the provisions of the Convention on the Limitation Period in the International Sale of Good, New York 1974, and its amending 1980 Vienna Protocol.

In conclusion, the Court of Cassation indicated that the Court of Appeal did not examine whether the buyer's alleged notification on 10 December 2001 had been properly communicated to the seller, and that the seller's defence arguing that the buyer's notice had not been properly communicated constituted an essential defence that could have changed the outcome of this case. Accordingly, the Court of Cassation found that the appellate decision was erroneous and remanded the case.