

CISG-online 5708

Jurisdiction	Egypt
Tribunal	Court of Cassation (Egyptian Supreme Court)
Date of the decision	23 June 2020
Case no./docket no.	Case No. 2490 of Judicial Year 81
Case name	<i>AWB v. General Company for Silos and Storage</i>

*Translation by Omnia Taher Gadalla**

I. Factual & Procedural Background

General Company for Granaries and Preserving Co. (the Egyptian company, appellee) filed case No. 1924/2003 Commercial – South Cairo Court suing the Australian Wheat Board (AWB, appellant) claiming contractual payments of 264.600 Egyptian Pound and legal interest (5%) per annum in return for buying Australian wheat (subject matter of the dispute). Upon arrival at Safaga Port on 18 April 2000, the shipment was found to contain poisonous Saponaria seeds and was therefore deemed inedible. Thus, it was denied entry by the Egyptian Authorities for non-compliance with the Egyptian standard specifications. To release the shipment, the percentage of seeds had to be reduced below the maximum permissible levels set by the Egyptian standard specifications, as per the requirements of Egypt's Health Authorities. Accordingly, the Egyptian Company took all the needed corrective actions to make the shipment compatible with the specifications, and thereupon the Egyptian Company filed a case to claim the costs of these actions. The case was dismissed by The Court of First Instance. The Egyptian Company challenged such ruling before The Court of Appeal («**Appeal No. 617 of Judicial Year 121 – Cairo**»). The Court of Appeal appointed an expert who subsequently submitted his report. On 05 January 2011, The Court of Appeal, considering the expert's report, rendered its judgement annulling the ruling of The Court of First Instance and ordering AWB to pay to the Egyptian Company an amount of EGP 189,000.00, as well as

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interest at the rate of 5% per annum as of 30 April 2003. AWB challenged the judgment of the Court of Appeal before the Court of Cassation. A memorandum was submitted by the Public Prosecution, expressing its opinion that such challenge must be dismissed. This challenge was referred to the Council Chamber of the Court of Cassation, and thereupon, a date was set to hear the challenge.

II. Grounds for the Challenge

The Appellant argues that the contested judgement is vitiated by an error of law and a lack of reasoning. In such regard, the Appellant submits that it maintained its position during the two levels of litigation (before both trial courts) that the Appellee has lost its right in the case for the following reasons: The Appellant was not served any notice with respect to the non-conformity as per Articles 38 and 39 of the United Nations Convention on Contracts for the International Sale of Goods («CISG»); and The Appellant was not notified of the notice dated 10 December 2001, by virtue of which the Appellee alleged objecting to the shipment as it contained poisonous Saponaria seeds and therefore was deemed inedible. The Appellant asserts that the Court of Appeal rejected the raised defence arguments and issued an erroneous judgment in favour of the Appellee on the basis that the cost for remedying the goods was essential to make the wheat fit for human consumption. Accordingly, the Appellant is of the view that the Judgment is erroneous and must therefore be annulled. 2

III. Findings and Conclusions by The Court of Cassation

The Court of Cassation concurs with the submissions made by the Appellant in view of the following considerations. Whereas a contract for the international sale of goods often involves carriage of goods, the delivery in such case takes place upon receipt of the goods by a transporter. Hence, the risk is transferred at that point in time of delivery. Nevertheless, the buyer may not be able to examine the goods until after the goods have arrived at their destination. At that point, a defect (if any) is discovered by the buyer, either by the port's competent authorities responsible for examination prior to the release of imported goods or by the buyer itself after receiving and examining the goods. Thus, Article 38(2) CISG (the convention that has been adopted by virtue of the presidential decree No. 471/1982 and entered into force in Egypt on 01/01/1988) provides that: «If the contract involves carriage of the goods, examination may be deferred until after the goods have arrived at their destination.» Hence, the place for examining of goods, according to CISG, can be the place of destination rather than the place of delivery, even if the delivery has already taken place and risks have been transferred to the buyer upon receipt of the goods by the transporter as per Article 31(1) CISG. Article 39 CISG provides that: «(1) 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. (2) 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.» Consequently, if the examination 3

of goods reveals the lack of conformity thereof, then the buyer is obliged to give notice to the seller specifying the nature of the lack of conformity, so that the latter is prepared to remedy the lack of conformity by repair or discusses such matter with the buyer to prove the conformity of the goods; provided, however, that such notice is served within a reasonable time as of the date on which the lack of conformity has been discovered or ought to have been discovered. The reasonable time during which the notice shall be served should be determined on a case-by-case basis taking into consideration the circumstances of the case. As per Article 39(2) CISG, the buyer loses the right to rely on a lack of conformity of the goods (apparent or latent) if it 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. Nonetheless, the seller, as per Article 40 CISG, is not entitled to rely on Articles 38 and 39 if the lack of conformity relates to matters that the seller is aware of or ought to be aware of and which it does not disclose to the buyer. The reason behind the forfeiture of such right is that a buyer, who fails to examine the received goods or serve a notice of the non-conformities, is deemed to be either an inattentive buyer and hence unworthy of protection or a buyer who accepted goods despite being non-conforming. It is worth noting that notices are not limited to telegram and telex as stipulated under Article 13 CISG, but also include all other means stipulated under Article 20 CISG, such as phone, fax, e-mail or any electronic communication retrievable in perceivable form which enables the buyer to notify the seller of the lack of conformity. This includes – as enshrined in the updated explanatory memo of the convention – electronic communications. With regards to the use of electronic communications, the United Nations Convention on the Use of Electronic Communication in the International contracts (New York, 2005) is considered as supplementary convention to the CISG.

It is well-established in comparative jurisprudence that on the implementation of CISG, the «Reasonable Time» within which a notice of the lack of conformity of the goods is given as stated under Article 39(1) CISG shall commence at any time after the goods are received and a defect is discovered, whether it is twenty-four hours, a few days, weeks, or months, at the latest within a period of two years. Such «Reasonable Time» shall be estimated by the trial judge on a case-by-case basis, taking into account the contractual circumstances, the nature of the goods, the nature of the lack of conformity (apparent or latent), as well as the professionalism and experience levels of the buyer. «Reasonable Time» shall also be interpreted by the trial judge according to the proper business practices involved in the particular trade concerned, given that the actual practice, in such regard, adopts diverse non-fixed solutions. Article 39(1) CISG provides for flexible and diverse time limits given the circumstances, in contrast to the fixed two-year period set forth in Article 39(2) CISG (apart from the exclusion set-out in case of inconsistency of the said time limit with a contractual period of guarantee). The maximum two-year cut-off period applies unless the time stipulated in Article 39(1) is longer than two years. Nevertheless, the parties may agree, as per Article 6 of CISG, to amend the two-year period (to become either a longer or shorter time). The two-year cut-off period is not a period of limitation, and it is therefore not subject to suspension or discontinuation. Failure to notify the seller of the lack of conformity of the goods shall trigger the loss of the buyer's rights arising in such case, including, for instance, the right to

demand the seller to correct defects in or replace non-conforming goods; the right to claim damages; the right to demand a reduction of the purchase price; or the right to terminate the contract. Meanwhile, the buyer may commence any other legal proceedings related to the contract, but not based on the non-conformity of the goods. Articles 8¹ of the Convention on the Limitation Period in the International Sale of Goods «**New York Convention, 1974**» & the Protocol amending that Convention «**Vienna Amending Protocol, 1980**» [Both were entered into force throughout the world on August 1, 1988; and were adopted in the A.R.E. by virtue of the presidential decree No. 461/1982 and entered into force therein on August 1, 1988] provide that limitation period is 4 years. Article 10(2)² provides that the claim based on defects or one of the non-conformity forms starts on the date of actual handing the goods to the buyer or on the date the buyer rejects receiving it, so long as the buyer failed to notify of a non-conformity defect within the aforementioned periods, whether such failure was due to the buyer's negligence or satisfaction with the goods. This is contrary to all other cases stipulated in the Convention in which a buyer, under a contract for international sale of goods, may commence various legal proceedings against a seller to assert a claim arising from the contract or relating to its breach, termination or validity, or based on a fraud committed before or at the conclusion of the contract or in the context of its implementation, or otherwise.

Therefore, and since, the Egyptian Government represented by the General Authority for Supply Commodities and the Egyptian Holding Company for the Marketing of Wheat and Wheat Products (the «**Egyptian Company**» or the «**Appellee**») entered into a sale of goods contract with the Australian Wheat Board («**AWB**» or the «**Appellant**») on 19 April 1994 for supplying Australian White Wheat («**AWW**») to the Egyptian Company on several shipments, where each respective shipment delivered thereunder ought to have been regarded as a separate and independent contract. Under a bill of lading issued by AWB / Appellant to the Egyptian Company on 16 March 2000 - 63,000 tonnes of AWW was shipped aboard the vessel «**MV CAMPA**». On 18 April 2000, the said shipment was found to contain poisonous Saponaria seeds and thus deemed inedible. Thus, it was denied entry by the Egyptian Authorities for non-compliance with the Egyptian standard specifications. To release the shipment, the percentage of seeds had to be reduced below the maximum permissible levels set by the Egyptian standard specifications, as per the requirements of Egypt's Health Authorities. The date on which the lack of conformity was discovered is deemed the date on which the shipment was rejected by the Egyptian Authorities (i.e., 18 April 2000). That said, the reasonable time and the two-year cut-off period for giving notice of lack of conformity started to run on that date. Consequently, the Appellee should have served the notice of lack of conformity by no later than 17 April 2002. It is worth noting that the date on which the goods were handed over to the Appellee at the port of loading is irrelevant in this case, considering that the contract involved carriage of goods. To recall – the Appellant, before the Court of Appeal, maintained that the Appellee lost its right to rely on the lack of conformity, given that:

¹ Article 8 of «New York Convention, 1974» reads as follows: «The limitation period shall be four years.»

² Article 10 (2) of the same convention reads as follows: «A claim arising from a defect or other lack of conformity shall accrue on the date on which the goods are actually handed over to, or their tender is refused by, the buyer.»

(1) the appellant was not duly notified of the lack of conformity within the period of time prescribed by law; and (2) the Appellant was not notified of the notice dated 10 December 2001, by virtue of which the Appellee alleged objecting to the shipment. Nonetheless, the contested judgement did not properly consider: (1) the incident of notifying the Appellant by the Appellee with respect to the non-conformity of the goods; and (2) whether such notice was duly given, despite the matter of fact that giving notice in the said manner is an essential element of due process of law that shall be followed prior to commencing the legal proceedings to become admissible. The Court of Appeal disregarded the Appellant's arguments, which, if taken into consideration, shall lead the Court to change its position in this case. Instead of addressing the arguments raised by the Appellant, the contested judgement addressed the subject-matter of the case, stating that the claimed remedy cost was essential to make the wheat valid for human use. Accordingly, the contested judgement is vitiated by an error of law, breaching the rights of defence and a lack of reasoning, which makes it erroneous and must therefore be annulled.

Based on the foregoing

The court decided to: Annul the challenged judgment; as well as order the Appellee to pay the expenses and EGP 200 as Attorney's fee, and transferred the case to the Cairo Court of Appeal to be reviewed again by a different tribunal. **6**