CISG-online 6730	
Jurisdiction	USA
Tribunal	Circuit Court of the 11th Judicial Circuit (Miami-Dade County) of the State of Florida
Date of the decision	18 March 2019
Case no./docket no.	2014-CA-018348
Case name	*Realturf Systems, S.L. v. Eurograss, Inc.*

Findings of Fact, Conclusions of Law, and Final Judgment

This matter was tried before this Court during a four-day bench trial. This Court, having considered the documentary evidence, witness testimony, and counsel's arguments, enters its findings of fact, conclusions of law, and final judgment as follows:

Introduction

The following terms and expressions shall be used in this Order:

- «Plaintiff» shall refer to Plaintiff/Counter-Defendant, Realturf Systems, S.L. a foreign company.

- «Defendant» shall refer to Defendant/Counter-Plaintiff, Eurograss, Inc., a Florida corporation.

- (JPS, ¶ _____, L. _____) shall refer to the Joint Pre-Trial Stipulation filed with this Court, followed by the page number, and/or a paragraph number («¶»), and/or a line number («L.»), if applicable.*

- (TTR., Pg. _____, L. _____) shall refer to the Trial Transcript filed with this Court, followed by the page number, and/or a paragraph number («Pg.»), and/or a line number («L.»), if applicable.

- (Pl.'s Ex. _____) shall refer to trial exhibits entered into evidence during the trial that were identified as Plaintiff's Exhibit, followed by the exhibit number.

- (Def.'s Ex. _____) shall refer to trial exhibits entered into evidence during the trial that were identified as Defendant's Exhibit, followed by the exhibit letter.

* Editor's note: In the present case presentation, references to the Joint Pre-Trial Stipulation, to the Trial Transcript and to the Plaintiff's or the Defendant's Exhibits have been omitted.

This case arises from a business relationship between the parties involving the sale and resale, consignment, installation and maintenance of artificial turf. The seller of the artificial turf was Plaintiff, and the purchaser of the artificial turf was Defendant. Plaintiff alleges that the Defendant failed to pay for goods requested per several purchase orders, delivered to and accepted by Defendant. Defendant counterclaims and seeks setoff for damages Defendant claims were incurred from the delivery of defective or below-specification goods and other claims.

Plaintiff has brought a cause of action against Defendant for breach of contract which has been stipulated to fall under the CISG. Defendant filed a counterclaim under the CISG with causes of action for breach of contract, breach of express warranty, breach of warranty of fitness for a particular purpose, and breach of merchantability. Defendant also filed a cause of action for common law indemnification.

Findings of Fact

1. **1**
Plaintiff avails itself of this Court's jurisdiction pursuant to the underlying case against Defendant. Plaintiff is a Spanish company that distributes artificial turf. Defendant is a Florida corporation with its principal place of business in Miami-Dade County, Florida.

2. **2**
This is an action for damages over $15,000.00 exclusive of interest, costs, and attorney's fees and therefore within the jurisdictional amount of this court.

3. **3**
The conversion rate between the Euro and the Dollar on the following dates, as per Plaintiff's Request for Judicial Notice related to the currency exchange rate as published by the Federal Reserve that was filed with this Court on September 4, 2018, Filing #77408098, is as follows:

Date	***U.S. Dollar ($)***	***Euro (€)***
April 3, 2013	1.2847	1
February 17, 2012	1.3149	1
December 20, 2012	1.3224	1
December 31, 2012	1.3186	1

4. 4
The conversion rate between the Euro and the Dollar on November 17, 2015, as per Defendant's Request for Judicial Notice that was filed with this Court on September 20, 2018, Filing # 78191679, related to currency exchange rates as published by the Federal Reserve, is

Date	***U.S. Dollar ($)***	***Euro (€)***
November 17, 2015	1.0634	1

5. 5
The Court took judicial notice relating to the lawsuit pending in the Circuit Court of the Eleventh Judicial Circuit in and for Miami-Dade County, Florida, styled *US Soccer 5, LLC and Constructive Group, LLC v. Eurograss, Inc.*, Case No. 15-027138-CA-01, and its filings, with particular attention given to the Corrected Amended Complaint, Answer, the Joint Stipulation of Settlement and Dismissal with Prejudice, and Settlement Agreement entered into in relation thereto, pursuant to Plaintiff's Request for Judicial Notice that was filed with this Court on September 4, 2018, Filing # 77408098..

6. 6
The conversion rate for the units of measurement of force from pound-force to newtons, pursuant to Defendant's Request for Judicial Notice that was filed with this Court on September 20, 2018, Filing # 78196927, was taken as being the following:

Pound-Force	***Newtons***
1	4.44822

The conversion rate for the units of measurement of force from newtons to pound-force, pursuant to Defendant's Request for Judicial Notice that was filed with this Court on September 20, 2018, Filing # 78196927, was taken as being the following:

Newtons	***Pound-Force***
1	0.224809

Transactions between Merchants

7. 7
Defendant is a Florida corporation that is in the business of selling, installing and maintaining artificial turf in the Americas.

8. 8
Plaintiff is a distributor of artificial turf with the requisite skill and judgment to select or furnish artificial turf. Plaintiff is run and managed by principals Juan Rodriguez («Rodriguez») and Antonio Candela.

9. 9
Defendant is a reseller, distributor, installer, and merchant of artificial turf with the requisite skill and judgment to select or furnish artificial turf. Defendant is managed by principal Luis Del Rio («Del Rio»).

Agreement between the Parties

10. 10
In 2012, Plaintiff and Defendant commenced a business relationship, pursuant to which Defendant would seek to purchase artificial turf products distributed by Plaintiff, or sell such products on consignment.

11. 11
In accordance with the United Nations Convention on Contracts for International Sale of Goods («CISG»), Defendant, a corporate citizen of Florida, and Plaintiff, a foreign corporation headquartered in Spain, entered into an agreement where Plaintiff sold and Defendant purchased artificial turf.

12. 12
Plaintiff entered into various commercial transactions with Defendant for the sale or consignment of artificial turf and related products.

13. 13
There was no written agreement between the parties as to those transactions or their business relationship.

14. 14
In certain instances, the artificial turf products were sent by Plaintiff to Defendant on consignment in order to stock Defendant's inventory, allowing Defendant to sell at the retail level. At other times, artificial turf products were sold by Plaintiff to order for projects obtained by Defendant.

15. 15
Plaintiff distributed and sold two types of artificial turf products to Defendant: products classified as «landscaping» and products classified as «sports,» the specific products for which categories were selected by Defendant.

16. 16
With regard to the «landscaping products», the parties' business terms were that Plaintiff would send Defendant «landscaping products» on consignment. Plaintiff would send the specific product in the specific quantity selected by Defendant, and at the end of each month Defendant would pay Plaintiff for the «landscaping products» that it had sold.

17. 17
If the «landscaping products» provided by Plaintiff to Defendant on consignment were not sold, the parties' business terms permitted Defendant to return the «landscaping product» to Plaintiff.

18. 18
Defendant also agreed to the purchase and sale of «sports products» whereby Plaintiff agreed to distribute to Defendant the «sports products» requested by Defendant and Defendant agreed to pay Plaintiff the amounts owed for the «sports products».

19. 19
With regard to the «sports products» distributed to Defendant by Plaintiff, the business terms were that Plaintiff would send Defendant «sports products» in the quantity and of the specific product selected by Defendant, payment for which would be made by Defendant to Plaintiff upon being invoiced and no later than Defendant having received payment from its customer.

20. 20
Defendant was responsible for the shipping costs, taxes and customs fees of the products sent to it by Plaintiff, as well as for the warehousing and storage costs for same once the products arrived in Florida.

21. 21
Plaintiff entered into several commercial transactions with Defendant for the distribution and sale of both «landscaping products» and «sports products» on February 17, 2012, December 20, 2012, December 31, 2012, and March 4, 2013. All sales were separately evidenced by invoices (hereinafter, the «Invoices») sent to Defendant in the ordinary course of business.

Invoices & Delivery

22. 22
Plaintiff delivered the products to Defendant in various shipments on or about the dates referenced on the Invoices throughout 2012 and 2013.

23. 23
Defendant agreed to pay Plaintiff: a) $70,970.41 (53,974.00 €) for the products delivered in accordance with the February 17, 2012 invoice; b) $32,390.40 for the products delivered in accordance with the December 20, 2012 invoice; c) $115,376.00 for the products delivered in accordance with the December 31, 2012 invoice; and d) $642.35 (500.00 €) for the products delivered in accordance with the April 3, 2013 invoice, for a total amount of $219,379.16.

24. 24
Defendant has only made partial payments on the Invoices.

25. 25
Of the $70,970.41 (53,974.00 €) owed to Plaintiff for products delivered to Defendant in accordance with the February 17, 2012 invoice, once credits[1], if any, and any payments made

[1] Credits provided in the respective Invoices are inclusive of certain commissions for the sale of products by Defendant to third parties and agreed to between the parties on a transaction-by-transaction basis.

by Defendant have been applied, there is a balance remaining to be paid on that invoice of $12,701.62.

26. **26**
Of the $32,390.40 owed to Plaintiff for the products delivered to Defendant in accordance with the December 20, 2012 invoice, once credits, if any, and any payments made by Defendant have been applied, there is a balance remaining to be paid on that invoice of $26,305.40.

27. **27**
Of the $115,376.00 owed to Plaintiff for the products delivered to Defendant in accordance with the December 31, 2012 invoice, once credits, if any, and any payments made by Defendant have been applied, there is a balance remaining to be paid on that invoice of $69,856.00.

28. **28**
Of the $642.35 (500.00 €) owed to Plaintiff for the products delivered to Defendant in accordance with the March 4, 2013 invoice, Defendant has made no payment and there is a balance remaining to be paid on that invoice of $642.35.

29. **29**
Upon application of all of the above-referenced payments and credits (if any) made to Plaintiff by Defendant towards the Invoices, the total amount which remains due and owing by Defendant to Plaintiff on the Invoices is: $109,505.37 («Total Claim Sum»). The Court finds that Plaintiff did in fact deliver goods to Defendant, and that the total sales price of such goods equals the Total Claim Sum.

30. **30**
Defendant failed to pay the total amount due on the Invoices to Plaintiff in due course as per the Parties' agreement.

31. **31**
Despite payment to Defendant by its customers for its purchase and installation of the «sports products» provided to it by Plaintiff, Defendant has failed to make payment to Plaintiff on the Invoice of December 31, 2012.

32. **32**
Further, Plaintiff inquired as to whether Defendant wanted to return the «landscaping products» and «sports products» delivered to it per the Invoices, but Defendant kept the products.

33. **33**
Since Defendant has only provided partial payments on the Invoices, Defendant owes Plaintiff an outstanding total amount of $109,505.37 thereupon.

Tropical Parl & Davie Park

34. 34
With regards to the December 31, 2012 Invoice, Defendant entered into a commercial transaction with Plaintiff in which, in part, it agreed to purchase 8416 square meters of «sports product».

35. 35
Defendant specified and requested «sports product» with a 12,000 stitch rate in order to install the product on soccer fields at Tropical Park and in Davie.

36. 36
Defendant also mentioned «sports product» specifications related to tuft lock.

37. 37
Pursuant to the December 31, 2012 commercial transaction, Defendant, in part, requested «sports product» having a 12,000 stitch rate.

38. 38
On February 25, 2013, Defendant communicated to Plaintiff its concern that the fibers of the «sports product» received per the December 31, 2012 Invoice dislodged at a higher rate than normal. No other claims or issues were specified by Defendant at that time.

39. 39
At the time and thereafter, Plaintiff, on the basis of Defendant's representations, offered to accept the return of product provided by it to Defendant, provide Defendant with substitute product, or provide it with a reduction in price.

40. 40
In response, Defendant knowingly accepted substitute «sports product» and installed it in Davie.

41. 41
Defendant accepted the «sports product» described in the December 31, 2012 Invoice delivered to it by Plaintiff within specifications and qualities with a reduced price on the substitute product thereafter provided for the installation in Davie.

42. 42
Despite its claims, and its receipt of a price reduction and substitute «sports product», Defendant did not notify or inform its customer for whom it had utilized and installed the «sports product» at Tropical Park of any nonconformity. Defendant thereafter installed the same product in another location for the same customer.

43. 43
Approximately eleven months after the installation at Tropical Park, Defendant was requested by its customer to install the same «sports product» with the same specifications at

Amelia Earhart Park as had been installed at Tropical Park. Defendant installed the same «sports product» at Amelia Earhart Park that was installed at Tropical Park.

Lack of Payment

44. **44**
Defendant agreed to make payment to Plaintiff for the product.

45. **45**
Plaintiff remitted the Invoices to Defendant for payment and on multiple occasions requested payment be made by Defendant. However, Defendant failed to make such payment.

46. **46**
Plaintiff offered to accept the return of the product provided by it to Defendant and/or to retrieve same from Defendant, provide Defendant with substitute product, or provide it with a reduction in price. In response, Defendant knowingly accepted substitute product and installed it in Davie.

47. **47**
Defendant has retained all monies paid to it by its customer for the product while at the same time failing to make payment to Plaintiff of the monies owed for same.

48. **48**
Plaintiff on more than one occasion provided Defendant with the opportunity of returning any product it deemed nonconforming or that Defendant was unable to sell to a third party.

49. **49**
Further, Plaintiff offered to retrieve such product from Defendant's facility and resell such product to other customers in the U.S. or South America.

50. **50**
Defendant affirmatively elected to retain the product for use and/or resale, rather than allowing Plaintiff to take back the product upon Plaintiff's offer to do so.

51. **51**
Rodriguez testified consistently throughout the trial that Defendant never sent back any product to Plaintiff.

Products, Installation & Maintenance

52. **52**
The «Tuft withdrawal force (N)» from the site sample from Tropical Park tested by the expert of the product is shown via test method ISO4919 to be 42 N. Both the Product Declaration and noted FIFA Quality requirement reflected a >30 N baseline for the product's «Tuft withdrawal force,» and 42 N is well above the tuft lock discussed between the parties.

53. **53**
Further, the testimony by Plaintiff's expert provided that the Tropical Park product's mass per unit area, pile length above backing, pile mass unit area, and the product's individual blade weight, all indicated that the site sample was within the industry acceptable variance standard and thus the turf taken from the site sample matched the product declaration for Nature Memory 50, which was the product requested and supplied by Plaintiff to Defendant.

54. **54**
Moreover, Plaintiff's expert indicated that the deterioration of the product at Tropical Park was the result of its poor maintenance, inclusive of the low level of infill.

55. **55**
The testing completed by Plaintiff's expert specifically indicates that the Tropical Park field in which the product had been installed had a low level of infill, that the infill level used with the product was deficient, and that the low infill levels contributed to the deterioration of the product.

56. **56**
Plaintiff also testified that infill and the maintenance of the Tropical Park field, inclusive of the level of infill, are critical to combat the deterioration of the product installed in a commercial sports field.

57. **57**
The Summary portion of the Report authored by Plaintiff's expert further established that «[i]f proper maintenance and repairs were carried out during the life of the playing surface, then the turf system may not be in the condition it is presently.»

58. **58**
Defendant established that additional factors not associated with the qualities of the product installed at Tropical Park may likely have contributed to the issues with the product alleged by Defendant; namely, the construction of the base of the fields.

59. **59**
Defendant's principal testified that Defendant was unable to apply the amount of infill necessary for the product.

60. **60**
Defendant's principal further established through testimony that the operator of the Tropical Park fields, the party who contracted the Defendant for their purchase and installation and thereafter sued Defendant with regard to same, claimed that there was a lack of maintenance on the fields.

61. **61**
Defendant provided no expert testimony attributing the causation of the deterioration of the Tropical Park field to a defective product versus the maintenance, infill and base construction issues.

Conclusions of Law

62. 62
The Court has personal jurisdiction over Plaintiff and Defendant and subject matter jurisdiction of the issues and matters raised in the pleadings.

63. 63
The United Nations Convention on Contracts for International Sale of Goods («CISG»), applies to certain claims in this case.

64. 64
The CISG is a self-executing treaty that preempts contrary provisions of Article 2 of the UCC and other state contract law to the extent that those causes of action fall within the scope of the CISG. U.S. Const., Art. VI*; Medellin v. Texas*, 552 U.S. 491, 504–05, 128 S. Ct. 1346, 170 L. Ed. 2d 190 (2008). *See American Mint LLC v. GOSoftware, Inc.*, No. 1:05-cv-650, 2005 U.S. Dist. LEXIS 45003, 2005 WL 2021248, at *2–3 (M.D. Pa. Aug. 16, 2005) (noting that «if the CISG applies to the contract at issue, it will pre-empt domestic sales laws that otherwise would govern the contract.»). Accordingly, the CISG preempts the Uniform Commercial Code, and Chapter 672 of the Florida Statutes is inapplicable to this case. To the extent that causes of action brought in this matter under common law or pursuant to the U.C.C. fall under provisions of the CISG, the CISG preempts those causes of action. *See Beth Schiffer Fine Photographic Arts, Inc. v. Colex Imaging, Inc.*, 2012 U.S. Dist. LEXIS 36695 18–19, 2012 WL 924380 (D.N.J. March 19, 2012).

65. 65
Counts VII through IX of Defendant's Counterclaim were withdrawn and are not at issue.

66. 66
The CISG preempts and subsumes Defendant's breach of warranty claims. *See Electrocraft Arkansas, Inc. v. Super Elec. Motors, Ltd.*, 2009 US Dist LEXIS 120183 (E.D. Ark. 2009) («[W]arrantly claims under Article 2 of the Arkansas UCC … are preempted and subsumed by the CISG. Electrocraft may, however, assert consistent with its complaint, all rights and remedies under the CISG … including warranty provisions under the CISG Article 35»).

67. 67
Moreover, «although the CISG does not specifically include the implied warranties of fitness and merchantability, CISG article 35 may properly be read to suggest them.» *U.S. Nonwovens Corp. v. Pack Line Corp.*, 48 Misc. 3d 211, 215, 2015 N.Y. Misc. LEXIS 718 (S.Ct. N.Y. 2015). See also *Norfolk S. Ry. Co. v. Power Source Supply, Inc.*, 2008 U. S. Dist. LEXIS 56942 (W.D. Pa. 2008); *Electrocraft Arkansas, Inc. v. Super Elec. Motors, Ltd.*, 2009 US Dist LEXIS 120183 (E.D. Ark. 2009).

68. 68
Matters not otherwise contained in and which are outside of the scope of the CISG must be determined according to the law of the forum. *See Thyssenkrupp Metallurgical Prods. GmbH v. Energy Coal, S.p.A.*, 2015 N.Y. Misc. LEXIS 3741 (S.Ct. NY 2015); *Beth Schiffer Fine*

Photographic Arts, Inc. v. Colex Imaging, Inc., 2012 U.S. Dist. LEXIS 36695 18–19, 2012 WL 924380 (D.N.J. March 19, 2012).

69. **69**
Pursuant to Plaintiff's Request for Judicial Notice concerning the CISG filed with this Court on September 4, 2018, Filing #77408098, the Court took judicial notice relating to the CISG and its provisions.

Analysis

Breach of Contract – CISG

«Under the Convention [CISG]…the components essential to a cause of action for breach of contract are (1) the existence of a valid and enforceable contract containing both definite and certain terms, (2) performance by plaintiff, (3) breach by defendant and (4) resultant injury to plaintiff.» *Magellan Int'l Corp. v. Salzgitter Handel GmbH*, 1999 U.S. Dist. LEXIS 19386, (N. Dist. Ill. 1999). **70**

The parties had a valid enforceable contract. **71**

Article 35 (1) of the CISG provides as follows: **72**

> «(1) the seller must 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.»

Plaintiff satisfied its obligation for performance to deliver goods that were of the quantity, quality and description required by the parties' contract, which were fit for the purposes for which goods of the same description would ordinarily be used, and which were fit for the purpose made known to Plaintiff. **73**

Article 53 of the CISG provides that «the buyer, must pay the price for the goods and take delivery of them as required by the contract and this Convention.» Further, Article 59 of the CISG provides that «the buyer must pay the price on the date fixed by or determinable from the contract and this Convention without the need for any request or compliance with any formality on the party of the seller.» **74**

Defendant breached its obligations to pay the full price for the goods delivered to it by Plaintiff, as required by the parties' contract and pursuant to the terms of the CISG. The «performance obligation as the buyer is simple: payment of the price for the goods.» *Magellan Int'l Corp. v. Salzgitter Handel GmbH*, 1999 U.S. Dist. LEXIS 19386, (N. Dist. Ill. 1999). **75**

Article 25 of the CISG provides that «a breach of contract by one of the parties is 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.» **76**

Defendant's breach amounted to a fundamental breach of its obligations under the parties' contract because Defendant paid Plaintiff only a portion of the total amount due pursuant to the parties' contract and failed to pay the balance, substantially depriving Plaintiff of what it was entitled to expect under the contract. *See Doolim v. R. Doll, LLC*, 2009 U.S. Dist. LEXIS 45366 (S.D.N.Y. 2009) (U.S. District Judge confirmed and adopted a Magistrate's Report and Recommendation, the Conclusions of Law of which provided that the defendant had fundamentally breached its obligation to pay the purchase price for goods received by it where it had only paid a small fraction – less than 20% – of the purchase price, substantially depriving the plaintiff of the performance that it had a right to expect from the defendant). **77**

CISG, Article 36 provides that: **78**

(1) The seller is liable in accordance with the contract and this Convention for any lack of conformity which exists at the time when the risk passes to the buyer, even though the lack of conformity becomes apparent only after that time.

(2) The seller is also liable for any lack of conformity which occurs after the time indicated in the preceding paragraph and which is due to a breach of any of his obligations, including a breach of any guarantee that for a period of time the goods will remain fit for their ordinary purpose or for some particular purpose or will retain specified qualities or characteristics.

Further, Article 35(1) and (2) of the CISG provide as follows: **79**

(1) «the seller must 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.

(2) Except where the parties have agreed otherwise, the goods do not conform with the contract unless they: (a) are fit for the purposes for which goods of the same description would ordinarily be used; (b) are fit for any particular purpose expressly or impliedly made known to the seller at the time of the conclusion of the contract, except where the circumstances show that the buyer did not rely, or that it was unreasonable for him to rely on the seller's skill and judgment; (c) possess the qualities of goods which the seller has held out to the buyer as a sample or model; (d) where the goods are packaged in a manner usual for such goods or, where there is no such manner, in a manner adequate to preserve and protect the goods.»

«Additionally, although the CISG does not specifically include the implied warranties of fitness and merchantability, CISG article 35 may properly be read to suggest them…» *Nonwovens Corp. v Pack Line Corp.*, 48 Misc. 3d 211, 215, 4 N.Y.S.3d 868 (S.Ct. N.Y. 2015). **80**

With regard to both express and implied warranties of fitness for a particular purpose and merchantability, Defendant had the burden of showing that the goods Plaintiff delivered did not conform to the terms of the parties' contract. *Norfolk S. Ry. Co. v. Power Source Supply, Inc.*, 2008 U.S. Dist. LEXIS 56942 (W.D. Penn., July 25, 2008); *Chicago Prime Packers, Inc. v. Northam Food Trading Co.*, 408 F. 3d 894, 897–98 (7th Cir. 2005). However, Defendant failed to meet its burden. *Id.* The evidence and testimony presented by Plaintiff as well as **81**

Defendant's retention, installation and/or sale of the products, reflect that the products conformed to and were accepted per the parties' agreement.

As to the implied warranty claim under Article 35(2)(b), both Plaintiff and Defendant are experienced businessmen in the sale and installation of artificial turf. Even were the Court to assume *arguendo* that Defendant relied on the Plaintiff's skill and judgment, in the absence of expert testimony regarding the product's alleged unfitness for a particular use for which it was expressly warranted—installation in a commercial field—Defendant must show that even when the product was properly used for the purpose warranted, the results were shoddy. See *Schmitz-Werke Gmbh & Co. v. Rockland Indus., Inc.*, 37 Fed. Appx. 687, 693; 2002 U.S. App. LEXIS 12336 (4th Cir. 2002) («Schmitz still must prove that the transfer printing process was ordinary and competently performed, and still must prove that the fabric was defective…»). **82**

However, Defendant failed to prove that the product was nonetheless defective despite the fact that the product's installation, maintenance and use was ordinary and competently performed. See *Schmitz-Werke Gmbh & Co., supra.* The evidence and testimony presented by both Plaintiff and Defendant reflect that Defendant failed to meet this burden of proof for several reasons; namely, the lack of maintenance of the product once installed, and Defendant's testimony regarding the poor construction of the base of the field where the product was installed. **83**

The evidence and testimony presented reflect that Plaintiff has been injured by Defendant's breach in failing to remit payment in full of the amounts due to Plaintiff pursuant to the Invoices because Plaintiff has been deprived of the amounts due to it pursuant to the parties' contractual terms. **84**

In a nutshell, Defendant does not contest that Plaintiff did in fact deliver goods to Defendant, and that the total sales price of such goods equals the Total Claim Sum. However, Defendant claims that the Total Claim Sum is subject to set-off by Defendant for damages caused to it by Plaintiff. **85**

Counterclaim for Common Law Indemnification

While Defendant defended a lawsuit brought by its customer related to «sports product» installed in both Tropical Park and Amelia Earhart Park, Defendant's counterclaim against Plaintiff for indemnification seeks indemnification only for issues at Tropical Park. However, Defendant has commingled its claim for damages for both parks. **86**

Defendant entered into a Settlement Agreement with its customer. As a part of the Settlement Agreement, Defendant agreed to pay its customer $15,000.00 for issues related to **both** Tropical Park and Amelia Earhart Park. Defendant presented no testimony or evidence breaking down the percentage of the $15,000 settlement attributable to the damages claimed for Tropical Park and the percentage of the $15,000 settlement attributable to the damages claimed for Amelia Earhart Park. **87**

Additionally, the Settlement Agreement provided that Defendant's customer prepare a proper base for the corresponding fields, and that it pay Defendant a discounted price per square foot to replace the «sports product» installed at both parks. 88

Testimony by the principal of Defendant's customer established that Defendant has not conducted any work pursuant to the Settlement Agreement and that it has no expectation that Defendant will conduct any work pursuant to the Settlement Agreement. 89

Further, testimony by Defendant's customer established that it is not certain whether it will seek to enforce its right to get a replacement field at a discounted price, pursuant to the terms of the Settlement Agreement executed by and between it and Defendant. 90

Lastly, the terms of the Settlement Agreement provide that Defendant's obligation to install «sports product» pursuant to the Settlement Agreement shall be discharged if Defendant's customer or its general contractor delay commencement of any portion of the work beyond 18 months from the date of the Settlement Agreement. 91

The date of the Settlement Agreement is October 19, 2016. Eighteen months have lapsed since the date of the execution of the Settlement Agreement and there has been no work at the fields at Tropical Park or Amelia Earhart Park per the terms of the Settlement Agreement. As such, the only indemnification claim that is even ripe is the claim for that portion of the $15,000 settlement payment attributable to Tropical Park, which was not addressed at the trial. 92

Defendant also claims that Plaintiff should indemnify it for the attorney's fees and costs of defense it incurred in defending the suit brought by Defendant's client regarding the Tropical Park project. «Indemnity is a right which inures to one who discharges a duty owed by him, but which, as between himself and another, should have been discharged by the other and is allowable only where the Whole fault is in the one against whom indemnity is sought». *Houdaille Industries, Inc., V. Edwards*, 374 So.2d 490, 492–93 (Fla 1979). Given that there were claims in the suit against Defendant for improper maintenance of the Tropical Park field, among others, it cannot be said that Defendant was wholly without fault or was not responsible for the costs of its defense and attorney's fees. 93

Counterclaims for Breach of Express, Merchantability and Fitness for Particular Purpose Warranties

In Rodriguez's email of August 20, 2013 in reference to the «sports product» installed at Tropical Park, he states, «as we talked about it in its day. [sic] If in the warranty period which is 8 years, the field has any turf [sic] lock problem we will assume responsibility 100% not Eurograss.» This e-mail was sent after Defendant purchased the sports product from Plaintiff. 94

The parties stipulate that there is no written warranty between the parties, but Defendant contends that the foregoing e-mail language constitutes a warranty. Even were the Court to interpret that e-mail as setting forth a warranty for the «sports product», it is clear that the warranty would cover tuft lock problems. No expert witness attributed the problems at the 95

Tropical Park field specifically to tuft lock. Here, Defendant has failed to carry its burden of proof on its counterclaim.

Even assuming that Defendant had specified that the «sports product» tuft lock had to be 35 N, the only sample which was tested which came directly from the product installed at the Tropical Park field tested at 42 N, which was above the specification. 96

Further, witnesses testified at trial that problems at the Tropical Field were due to lack of maintenance attributable to Defendant. Tests performed of the field indicated a lack of infill and depth of infill lower than desired levels. Two witnesses, Rodriguez and Kirin O'Donnell, testified that synthetic sports surfaces need weekly maintenance. However, Defendant concedes that in June of 2014, it conducted the first maintenance operation at the fields in Tropical Park. Mr. Scott Georgeson, president of US Soccer, testified that this maintenance occurred approximately four to six months after the soccer fields were open to the public. 97

Defendant's Claim to Sales Commissions

On a case-by-case basis, Plaintiff offered to pay Defendant a commission for sale of product to third parties that would be separately negotiated per transaction. The commissions agreed to by Plaintiff have either been paid or are reflected as credits against monies owed by Defendant per the Invoices. Moreover, Plaintiff reserved the right to decline a transaction proposed by Defendant. 98

While an agreement for commissions between the parties was contemplated with regard to a particular transaction to a third party, Espacios Deportivos in 2012, the transaction that had been contemplated was never consummated. Plaintiff's position that future transactions did take place through a different salesman is supported by Plaintiff's answers to Defendant's interrogatories outlining transactions that took place in 2015, three years after Plaintiff's and Defendant's discussions. There is no record evidence that the terms of those transactions were for the same products, prices or quantities as what Plaintiff and Defendant had initially discussed in 2012 or that a commission was based on just the introduction by Defendant to Plaintiff of a potential customer. 99

Other than as provided by the foregoing, the parties did not have any meeting of the minds as to any additional or other sales commissions. 100

Plaintiff's Damages

Article 61 of the CISG sets forth that «(1) if the buyer fails to perform any of his obligations under the contract or this Convention, the seller may … (b) claim damages as provided in articles 74 to 77. (2) The seller is not deprived of any right he may have to claim damages by exercising his right to other remedies. (3) No period of grace may be granted to the buyer by a court of arbitral tribunal when the seller resorts to a remedy for breach of contract.» 101

Article 74 of the CISG provides that «damages for breach of contract by one party consist of a sum equal to the loss, including loss of profit, suffered by the other party as a consequence of the breach. Such damage may not exceed the loss which the party in breach foresaw or ought 102

to have foreseen at the time of the conclusion of the contract, in light of the facts and matters of which he then knew or ought to have known, as a possible consequence of the breach of contract.»

CISG, Article 46 provides that: **103**

(1) The buyer may require performance by the seller of his obligations unless the buyer has resorted to a remedy which is inconsistent with this requirement.

(2) If the goods do not conform with the contract, the buyer may require delivery of substitute goods only if the lack of conformity constitutes a fundamental breach of contract and a request for substitute goods is made either in conjunction with notice given under article 39 or within a reasonable time thereafter.

(3) If the goods do not conform with the contract, the buyer may require the seller to remedy the lack of conformity by repair, unless this is unreasonable having regard to all the circumstances.

(4) A request for repair must be made either in conjunction with notice given under article 39 or within a reasonable time thereafter.

The products delivered by Plaintiff did not constitute a fundamental breach of the Parties' agreement. Plaintiff provided substitute goods per Defendant's claim that the goods did not conform. As to other goods, Defendant sold, disposed of, or installed the products without providing any request for repair to Plaintiff. **104**

Pursuant to Article 39 of the CISG, Defendant lost the right to rely on a lack of conformity of the goods because he did not give Plaintiff notice specifying the nature of the nonconformity until months after receipt of the goods, and well after the installation of the product. In any event, notice was not given within a reasonable time after Defendant discovered the nonconformity or ought to have discovered it. *Chicago Prime Packers, Inc. v. Northam Food Trading Co.*, 408 F. 3d 894, 898 (7th Cir. 2005). **105**

Article 50 of the CISG provides that «[i]f the goods do not conform with the contract and whether or not the price has already been paid, the buyer may reduce the price in the same proportion as the value that the goods actually delivered had at the time of the delivery bears to the value that conforming goods would have had at that time. However, if the seller remedies any failure to perform his obligations in accordance with article 37 or article 48 or if the buyer refuses to accept performance by the seller in accordance with those articles, the buyer may not reduce the price.» **106**

In the instant matter, Defendant, as buyer, requested a price reduction and Plaintiff obliged upon Defendant's unverified claim that there was an issue with the «sport product». **107**

A party claiming damages generally bears the burden of proving both the existence and amount of the damages, as well as their causal relation to the breach of contract. *See Ajax Tool Works, Inc. v. Can-Eng Mfg. Ltd.*, 2003 U.S. Dist. LEXIS 1306, 2003 WL 223187 (N.D. Ill. 2003). **108**

Article 77 of the CISG provides that «a party who relies on a breach of contract must take such measures as are reasonable in the circumstances to mitigate the loss, including loss of profit, resulting from the breach. If he fails to take such measures, the party in breach may claim a reduction in the damages in the amount by which the loss should have been mitigated.» Given the circumstances, Plaintiff took reasonable measures to mitigate its damages. 109

Prejudgment Interest

Pursuant to Article 78 of the CISG, «if a party fails to pay the price or any other sum that is in arrears, the other party is entitled to interest on it, without prejudice to any claim for damages recoverable under Article 74.» 110

There is no CISG guidance as to the applicable rate of interest, or how the rate should be determined. Although the CISG does not provide for a specific rate of interest, Article 7(2) states that «questions concerning matters governed by the Convention [CISG] 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.» 111

In *Chicago Prime Packers, Inc. v. Northam Food Trading Co., et al.*, 320 F. Supp. 2d 702 (N.D. Ill. 2004), there was no choice of law provision in a contract governed by the CISG where performance took place in Illinois and the products were delivered in Illinois. The Court awarded pre-judgment interest based on rates in accordance with the state law where the action was decided. The court stated that «the result of applying Illinois choice of law rules in this case is to apply the law of Illinois, the forum state. Using the forum's interest rate is a common choice in CISG cases.» *Id.* at 716. 112

In accordance with *Chicago Prime Packers*, the U.S. District Court for the Southern District of Florida has also held that «[w]here, as here, the CISG expressly provides for pre-judgment interest and Florida law authorizes pre-judgment interest on damages for breach of contract, the plaintiff is entitled to an award of pre-judgment interest.» *Zhejiang Shaoxing Yongli Printing & Dyeing Co. v. Microflock Textile Group Corp.*, 2008 U.S. Dist. LEXIS 129426 (S.D. Fla. 2008). 113

The Florida legislature has established a statutory interest rate which controls prejudgment interest in cases without a special contract for the rate thereof. §687.01 and §55.03(1), Fla. Stat. The statutory rate in effect from the date of the loss until the entry of judgment was and is as follows: 114

Year	*Rate Per Annum*	*Daily Rate as a Percentage*	*Daily Rate as a Decimal*
2012[2]	4.75%	.019781%	.000129781
2013	4.75%	.0130137%	.000130137

[2] Note: The daily rate for quarters beginning in 2012 considers that 2012 is a leap year, and is calculated by dividing the annual rate by 366 days.

2014	4.75%	.0130137%	.000130137
2015	4.75%	.0130137%	.000130137
01/01/16 – 03/30/16	4.75%	.0129781%	.000129781
04/01/01 BF 06/30/16	4.78%	.01306011%	.0001306011
07/01/16 BF 09/30/16	4.84%	.01322404%	.0001322404
10/01/16 BF 12/31/16	4.91%	.01341530%	.0001341530
01/01/17 BF 03/30/17	4.97%	.01361644%	.0001361644
04/01/17 BF 06/30/17	5.05%	.01383562%	.0001383562
07/01/17 BF 09/30/17	5.17%	.01416438%	.0001416438
10/01/17 BF 12/31/17	5.35%	.0146575%	.000146575
01/01/18 BF 03/30/18	5.53%	.0151507%	.00015107
04/01/18 BF 06/30/18	5.72%	.0156712%	.000156712
07/01/18 BF 09/30/18	5.97%	.0163562%	.000163562
10/01/18	6.09%	.0166849%	.000166849

Final Judgment

The Court **orders and adjudges** that a final judgment is hereby entered in favor of Plaintiff/Counter-Defendant, Realturf Systems, S.L., a foreign company, whose address is Avd. Antigua Peseta, 131 Pol. Ind. Atalayas 03114 Alicante, Spain and against Defendant/Counter-Plaintiff, Eurograss, Inc., a Florida corporation, whose address is: 7950 NW 53rd Street, Suite No. 337, Miami, FL 33166 in the total amount stated below, including interest accruing at the statutory rate, for which let execution issue forthwith. **115**

Judgment Amount:	$109,505.37
plus Prejudgment Interest[3]:	$23,796.03
TOTAL:	$133,301.40

that shall bear interest at the statutory rate of interest, 6.09% per annum, as adjusted pursuant to §55.03 Fla. Stat.

[3] Interest has been calculated by Plaintiff as of the date of the Complaint, July 14, 2014. Interest is calculated on the Judgment through October 31, 2018.

It is further **ordered and adjudged** that Defendant/Counter-Plaintiff, Eurograss, Inc., a Florida corporation, shall complete, under oath, Florida Rule of Civil Procedure 1.977 (Fact Information Sheet), including all required attachments, and serve it on Plaintiff, Realturf Systems, S.L., a foreign company's counsel within 45 days from the date of this final judgment, unless the final judgment is satisfied or post-judgment discovery is stayed.

The Court retains jurisdiction, including to hear motions for attorney's fees and costs, and to enter further orders that are proper to compel Defendant/Counter-Plaintiff, Eurograss, Inc., a Florida corporation, to complete form 1.977, including all required attachments, and serve it on Plaintiff's counsel.

Done and ordered in Chambers at Miami-Dade County, Florida, on 03/18/19.