

CISG-online 113	
Jurisdiction	U.S.A.
Tribunal	U.S. District Court for the Northern District of New York
Date of the decision	07 September 1994
Case no./docket no.	88-CV-1078
Case name	<i>Delchi Carrier S.p.A. v. Rotorex Corp.</i>

## Memorandum – Decision and Order

On May 23 through May 27, 1994 this court at the United States Courthouse in Syracuse, New York presided over a non-jury trial in the above-captioned case. Plaintiff's Post-Trial Memorandum of Law and Proposed Findings of Fact and Conclusions of Law were filed on June 10, 1994. Defendant's Post-Trial Memorandum of Law and Proposed Findings of Fact and Conclusions of Law were filed on June 14, 1994. This Memorandum – Decision and Order constitutes the court's findings of fact and conclusions of law. See Fed. R. Civ. P. 52.

### I. Findings of Fact

1. 1  
Plaintiff Delchi Carrier, SpA («Delchi») is an Italian corporation with its principal place of business located in Villasanta, Italy.
2. 2  
Defendant Rotorex Corporation («Rotorex») is a New York corporation with its principal place of business located in Frederick, Maryland.
3. 3  
In January 1988, Delchi and Rotorex entered into a contract under which Rotorex agreed to sell 10,800 Rotorex model K39A593A compressors, to be delivered in three installments by May 15, 1988.
4. 4  
Delchi informed Rotorex that Delchi was ordering the Rotorex compressors for use in the production of Delchi's «Ariele» line of portable room air conditioners to be sold in the summer of 1988.
5. 5  
In preparation for producing Arieles using Rotorex compressors, Delchi spent 39,000,000 lire for special tooling.

6. 6  
Delchi also spent 27,129,822 lire to acquire special insulation materials and tubing for use in Arieles to be produced with Rotorex compressors.
7. 7  
On March 26, 1988, Rotorex sent a first sea shipment of 2,438 compressors to Delchi, and shortly thereafter received \$188,923.46 in the form of letters of credit from Delchi in payment for the shipment.
8. 8  
Rotorex's first shipment of compressors reached Delchi's facility in Villasanta, Italy on April 20, 1988.
9. 9  
Delchi incurred expenses in the amount of 18,877,520 lire related to customs and inland shipment of the first lot of 2,438 Rotorex compressors from the port of entry at Genoa, Italy to Delchi's Villasanta, Italy factory.
10. 10  
On or about May 9, 1988 Rotorex shipped a second installment of 1,680 compressors to Delchi, and shortly thereafter received from Delchi \$ 129,985.60 in the form of letters of credit for the second shipment.
11. 11  
While Rotorex's second installment of compressors was en route to Italy, Delchi discovered that the Rotorex compressors from the first lot were nonconforming, and therefore rejected the compressors and cancelled the contract.
12. 12  
In an attempt to cure the defect in Rotorex's compressors, Delchi spent 1,790,991 lire to ship substitute Rotorex grommets to its Villasanta plant, of which 1,309,851 lire was unreimbursed.
13. 13  
Delchi workers spent 790.5 man hours inserting special Rotorex grommets for Rotorex compressors from May 3 to May 10, 1988, at a cost of 15,874,030 lire (20,081 lire/hour).
14. 14  
In a further attempt to cure the defect, Delchi paid for shipment of additional Rotorex connectors, at a net cost of 183,170 lire.
15. 15  
In its efforts to cure the defect in the Rotorex compressors, Delchi spent 11,687,142 lire for inspection and testing of Rotorex compressors above what normally was expected (582 additional hours at 20,081 lire/hour).

16. 16  
After abandoning its unsuccessful attempts to cure the defective Rotorex compressors, Delchi incurred expenses of 11,096,400 lire storing the rejected compressors contained in Rotorex's first shipment.
17. 17  
When Rotorex's second installment of compressors arrived in Genoa in May 1988, Delchi held the second installment in storage, thereby incurring expenses. Although Delchi failed to establish the precise cost of storage of the second shipment of Rotorex compressors, 2,103,683 lire is a reasonable estimate of Delchi's expense. That figure represents the difference between the total cost of shipping, customs and incidental expenses attributable to the first shipment of Rotorex compressors, and the total expenses of the second shipment, including shipping, customs, incidental expenses, and storage.
18. 18  
Because it had no compressors with which to manufacture Arieles, Delchi's assembly line shut down from May 16 to May 19, 1988, costing Delchi 22,144,322 in unproductive assembly worker wages (1,102.75 hours at 20,081 lire/hour).
19. 19  
Delchi was unable to obtain substitute compressors from other sources in time for the 1988 selling season for Arieles, and thus suffered a loss in the volume of Arieles it was able to manufacture for the 1988 selling season.
20. 20  
Delchi was able to expedite shipment of previously ordered Sanyo compressors, thereby filling part of the void left by Rotorex's breach. Delchi paid 519,845,665 lire for accelerated air shipment of previously ordered Sanyo compressors.
21. 21  
Sea shipment of the Sanyo compressors would have cost 15,540,000 lire.
22. 22  
Delchi spent 2,016,000 lire to modify the electrical panels of Arieles for use with the substitute Sanyo compressors.
23. 23  
Delchi sold 22,999 Ariele units in 1988.
24. 24  
As of April 12, 1988, Delchi reasonably could have planned for delivery of 17,536 Sanyo compressors by August 1, 1988 (7,936 already shipped plus 9,600 ordered for sea shipment by June 30, 1988). Additionally, Delchi expected 10,800 compressors from Rotorex before August 1, 1988, and therefore expected a total of 27,616 compressors by August 1, 1988.

25. 25  
Delchi received only 19,216 compressors by August 1, 1988, 8,400 fewer than it reasonably expected.

26. 26  
Delchi's 1988 cost to manufacture one Ariele unit with a Rotorex compressor was 478,783 lire.

27. 27  
Delchi's average 1988 gross unit sales price to Carrier-affiliated companies in European countries other than Italy was 654,644 lire. Delchi paid no commission on orders from Carrier affiliates throughout Europe. Sierra Testimony. Thus Delchi's expected profit on a sale of one Ariele unit to a Carrier-affiliated European company was 175,861 lire (654,644 lire average sale price minus 478,783 lire manufacturing cost).

28. 28  
As a result of Rotorex's breach of contract, Delchi was unable to fill orders for 2,395 units from Carrier-affiliated companies throughout Europe, representing 421,187,095 lire in lost profit. The unfilled orders represented by each country are as follows:

- a) Spanish affiliate, 1,450 units.
- b) German affiliate, 30 units.
- c) French affiliate, 325 units.
- d) Dutch affiliate, 40 units.
- e) Swedish affiliates, 200 units.
- f) British affiliate, 250 units.
- g) Swiss affiliate, 100 units.

The total number of lost sales to Carrier's Swiss affiliate was documented to be 450. However, not all of the unfilled orders to the Swiss affiliate are attributable to Rotorex's breach. On April 29, 1988, the Swiss affiliate cancelled its order of 300 units because of a cancellation by one of its customers. Further, when Delchi cancelled shipment of 50 units to its Swiss affiliate on May 4, 1988, it had not yet discovered that Rotorex's compressors were nonconforming. Thus the loss of the sale of those 50 units has not been shown to have resulted from Rotorex's breach.

However, Rotorex's claims that it is not responsible for the loss by Delchi of sales of 250 units to Delchi's Great Britain affiliate is unfounded. Although the British affiliate cancelled an order for 250 units on August 9, 1988 due to a general lack of sales of Arieles in Britain, those units would have been already shipped by Delchi in July but for the Rotorex breach. Thus the lost sales to the British affiliate were a direct result of Rotorex's breach.

29. 29  
Delchi's average 1988 gross unit sales price to White-Westinghouse, a German company unaffiliated with Carrier, was 799,876 lire. Delchi paid White-Westinghouse a royalty of 799 lire per unit on its 1988 sales. Thus Delchi's expected profit on a sale of one Ariele unit to

White-Westinghouse was 313,102 lire (799,876 sale price minus 478,783 lire manufacturing cost, minus 7,991 royalty).

30.

30

As a result of Rotorex's breach of contract, Delchi was unable to fill orders for 100 units from White-Westinghouse, representing 31,310,200 lire in lost profit. Although White-Westinghouse originally ordered 500 units, of which only 250 units were delivered, Rotorex was not responsible for 150 of the unfilled orders, as Delchi had cancelled those orders before discovering Rotorex's breach.

31.

31

Delchi's average 1988 gross unit sales price for White-Westinghouse brand Ariele units in Italy was 1,033,769 lire per unit. The average commission paid by Delchi on the sale of one White-Westinghouse unit in Italy was 93,039 lire, and the average commercial and financial costs associated with the sale of one White-Westinghouse brand unit was 23,260 lire. In addition, Delchi paid royalties on 1988 sales of White-Westinghouse brand units of 9,407 lire per unit. Thus Delchi's average profit on a sale of one White-Westinghouse brand Ariele unit in Italy was 429,280 lire (1,033,769 sale price minus 478,783 manufacturing cost, minus 93,039 average commission, minus 23,260 commercial/financial cost, minus 9,407 royalty).

32.

32

Delchi's average 1988 gross unit sales price for Delchi brand Ariele units in Italy was 1,035,814 lire. The average commission paid by Delchi on the sale of one Delchi brand unit was 93,230 lire, and the average commercial and financial costs associated with the sale of one Delchi brand unit was 23,308 lire. Thus Delchi's average profit on a sale of one Delchi brand Ariele unit in Italy was 440,493 lire (1,035,814 sale price minus 478,783 manufacturing cost, minus 93,230 average commission, minus 23,308 average commercial/financial cost).

33.

33

As a result of Rotorex's breach of contract, Delchi was unable to fill orders for 1,257 orders from Italian agents. Of those orders, 604 were for Delchi brand Arieles, representing 266,057,772 lire in lost profit, and 653 were for White-Westinghouse brand Arieles, representing 280,319,840 lire in lost profit. The 1,257 lost sales represent 546,377,612 lire in lost profit.

34.

34

The exchange rate on April 20, 1988 was 1,238 lire per one dollar.

## II. Conclusions of Law

1.

35

The court has jurisdiction over this action pursuant to 28 U.S.C. § 1332.

2.

36

The governing law of the instant case is the United Nations Convention on Contracts for the International Sales of Goods («UNCCISG»), UN Doc. A/Conf./97/18 Annex I (Apr. 10, 1980),

GAOR, 33d Session, Supp. 35 (A/35/35) at 217; 52 Fed. Reg. 40, 6262–6280 (Mar. 2, 1987), article 1(1)(a); codified at 15 U.S.C. Appendix (West Supp. 1991); *Filanto, S.p.A v. Chilewich Int'l Corp.*, 789 F. Supp. 1229, 1237 (S.D.N.Y. 1992); *Orbisphere Corp. v. United States*, 13 C.I.T. 866, 726 F. Supp. 1344, 1355 n. 7 (Ct. Int'l Trade 1989).

3.

Rotorex breached its contract with Delchi by failing to supply 10,800 conforming compressors.

37

4.

Under UNCCISG, Delchi is entitled to collect monetary damages for Rotorex's breach in «a sum equal to the loss, including loss of profit,» although not in excess of the amount reasonably envisioned by the parties. UNCCISG, art. 74. This provision seeks to provide the injured party with the benefit of the bargain, including both its expectation interest and its reliance expenditures. See Jeffrey S. Sutton, 'Measuring Damages Under the United Nations Convention on the International Sale of Goods', 50 *Ohio St. L.J.* 737, 742–43 (1989) (analyzing intent of Convention drafters).

38

## **A. Consequential Damages**

### ***i. Plaintiff's Attempts to Remedy Nonconformity***

5.

Delchi is entitled to recover damages incurred as a result of its attempts to remedy the nonconformity of Rotorex's compressors. These were not anticipated costs of production, but were costs that would not have been incurred without Rotorex's breach. Further, such damages were a foreseeable result of Rotorex's breach. Hence Delchi is entitled to recover:

39

- a) 183,170 lire for unreimbursed expenses relating to the shipment of connectors;
- b) 1,309,851 lire for unreimbursed expenses relating to the shipment of substitute Rotorex grommets;
- c) 15,874,030 lire for labor costs relating to replacing original, problematic grommets with substitutes;
- d) 11,687,142 lire for extraordinary reinspection and testing of units after installation of the substitute grommets and connectors.

### ***ii. Expected Shipment of Sanyo Compressors***

6.

Once Delchi's attempts to remedy the nonconformity failed, it was entitled to expedite shipment of previously ordered Sanyo compressors to mitigate its damages. Indeed, UNCCISG requires such mitigation. UNCCISG, article 77 («A party who relies on a breach of contract must take such measures as are reasonable in the circumstances to mitigate the loss.»). The shipment of previously ordered Sanyo compressors did not constitute cover under UNCCISG article 75, because the Sanyo units were previously ordered, and hence cannot be said to have

40

replaced the nonconforming Rotorex compressors. Nonetheless, Delchi's action in expediting shipment of Sanyo compressors was both commercially reasonable and reasonably foreseeable, and therefore Delchi is entitled to recover 504,305,665 lire as the net cost of early delivery of Sanyo compressors (519,845,665 lire for air shipment less 15,540,000 lire expected cost for ocean shipment).

### **iii. Handling and Storage of Rejected Compressors**

7.

Delchi is further entitled to collect costs incurred for handling and storage of nonconforming compressors, including 11,096,400 lire related to Rotorex's first shipment. Further, although Delchi failed to establish the precise cost of storage of second shipment of Rotorex compressors, the court holds that Delchi is entitled to 2,103,683 lire as a reasonable expense for that purpose. Thus, Delchi is entitled to recover 13,200,083 lire for expenses incurred for handling and storage of Rotorex's nonconforming compressors.

41

### **iv. Lost Profit**

8.

UNCCISG permits recovery of lost profit resulting from a diminished volume of sales. John Honnold, *Uniform Law for International Sales* § 415 (2d ed. 1991); Sutton, *supra*, at 747–48.

42

9.

In conformity with the common law, see *Restatement (Second) of Contracts* § 331; 5 Arthur Corbin, *Corbin on Contracts* § 1020 (1951), and with the law of New York, see *Merlite Indus., Inc. v. Valassis Inserts, Inc.*, 12 F.3d 373, 376 (2d Cir. 1993), to recover a claim for lost profit under UNCCISG, a party must provide the finder of fact with sufficient evidence to estimate the amount of damages with reasonable certainty.

43

10.

Delchi proved with sufficient certainty that it incurred, as a foreseeable and direct result of Rotorex's breach, the following lost profit damages:

44

- a) 421,187,095 lire from lost sales of 2,395 Arieles to Carrier-affiliated companies throughout Europe;
- b) 31,310,200 lire from lost sales of 100 Arieles to White-Westinghouse Company;
- c) 266,057,772 from lost sales of 604 Delchi Brand Arieles in Italy, and 280,319,840 from lost sales of 653 White-Westinghouse brand Arieles in Italy, for a total of 546,377,612 lire in lost profit from lost sales in Italy.

11.

Delchi did not prove with sufficient certainty any lost sales from «indicated orders» in Italy. Delchi's claim of 4,000 additional lost sales in Italy is supported only by the speculative testimony of Italian sales agents Renato Comolla, Georgia Viale, Luigi DiBlase, and

45

Angelo Calaciura, who averred that they would have ordered more Arieles had they been available. The number of additional units they might have ordered, although specified in Delchi's Post-Trial Brief, is not in evidence, as the court sustained Rotorex's timely objections to the speculative nature of such testimony. Delchi provides no documentation of additional lost sales in Italy, and no evidence that if any such lost sales did exist, that Delchi's inability to fill those orders was directly attributable to Rotorex's breach. Delchi cannot recover on its claim for additional lost profits in Italy because the amount of damages, if any, cannot be established with reasonable certainty.

## **B. Cost of Production**

12.

Delchi is not entitled to recover expenses related to the anticipated cost of production of Ariele units with Rotorex compressors, because those costs are accounted for in Delchi's recovery on its lost profits claim. Those fixed costs for which Delchi may not recover include:

- a) 18,877,520 lire claimed for expenses incurred by Delchi in shipping, customs and incidentals relating to the first shipment of Rotorex compressors;
- b) The cost of shipping, customs, and incidentals relating to the second shipment of Rotorex compressors;
- c) 22,144,322 lire for production line employees, down time from May 16–19, 1988;
- d) 27,129,822 lire for obsolete insulation materials and tubing purchased for use with only Rotorex compressors;
- e) 39,000,000 lire for obsolete tooling purchased exclusively for production of units with Rotorex compressors.

13.

Delchi is not entitled to recover 2,016,000 lire for modification of electrical panels for use with substitute Sanyo compressors. Delchi failed to prove that this cost was directly attributable to Rotorex's breach, and that the cost was not part of the regular cost of production of units with Sanyo compressors.

## **C. Pre-Judgment Interest**

14.

Delchi is entitled to prejudgment interest pursuant to UNCCISG Article 78. Because Article 78 does not specify the rate of interest to be applied, the court in its discretion awards Delchi prejudgment interest at the United States Treasury Bill rate as set forth in 28 U.S.C. § 1961(a).

## **D. Conversion to Dollars**

15.

The parties do not dispute that the exchange rate in effect on April 20, 1988 is appropriate for converting damages from lire to dollars. This is in conformity with the New York «breach-day

46

47

48

49



rule,» under which damages sustained in foreign currencies are converted as the rate of exchange prevailing on the date of breach. *Middle East Banking v. State Street Bank Int'l*, 821 F.2d 897, 902–03 (2d Cir. 1987). Thus damages shall be converted at the rate of 1,238 lire per one dollar. Plaintiff's total compensable damages equal 1,545,434,848 lire, or 1,248,331.87 dollars in principal, plus interest.

### III. Conclusion

In consideration of the testimony and exhibits presented in this case on May 23 through May 27, 1994, and in consideration of plaintiff's and Rotorex's post-trial memoranda, defendant Rotorex Corporation is liable to plaintiff Delchi Carrier SpA in the amount of \$ 1,248,331.87 in principal, in satisfaction of Rotorex's breach of contract. In addition, defendant Rotorex Corporation must pay plaintiff prejudgment interest at the United States Treasury Bill rate, as set forth in 28 U.S.C. § 1961(a). The parties are directed to submit to the court within fifteen days of their receipt of this Memorandum-Decision and Order documentation setting forth the proper calculation of prejudgment interest. Upon receipt of that documentation, the court will direct that judgment be entered.

**It is So Ordered.**

50