

**Case 651: CISG 6; 7; 25**

Italy, Tribunale di Padova

Ostroznik Savo (Vzerja Kuncev) e Eurotrafic s.r.l. vs. La Faraona soc. coop. a r. l.

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also available at <<http://cisgw3.law.pace.edu/cisg/wais/db/cases2/050111i3.html>>.

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The case concerns a contract for the supply of goods (rabbits) between a Slovenian company (supplier) and an Italian company (buyer). While the contract was being performed, the buyer, unsatisfied with the quality of the goods, suggested that the supplier would adopt a new genetic type of rabbits (called “Grimaud”), after selling the remaining rabbits and providing for a “sanitary clearing” of the farm. The supplier proceeded with the sale below cost of the remaining rabbits, but was then unable to obtain from the breeder of the genetic type “Grimaud” the new rabbits for its farm and was therefore unable to fulfil the supply contract to the buyer. As a result, the buyer terminated the agreement alleging the supplier’s non performance.

The supplier commenced an action before an Italian Court of First Instance alleging that the inability to perform was due to the conduct of the buyer, who had requested the change of the genetic type of rabbits but had failed to cooperate to obtain the delivery of the new type of rabbits. The supplier claimed damages for the sale below cost of the first set of rabbits and for the termination of the agreement. The buyer objected that the quality of the first type of rabbits was defective, that the decision to adopt the Grimaud type had been freely taken by the supplier, and finally that the breeder of the Grimaud rabbits had refused to give its rabbits to the supplier because this latter had failed to reach a satisfactory level of “sanitary clearing”.

The Italian Court concluded that the supplier had committed a fundamental breach of contract according to art. 25 CISG since it had failed to supply the goods as a result of its failure to provide the “sanitary clearing”. Before deciding the merit of the case, the court examined some preliminary issues regarding the applicable law. In their supply contract, the parties had agreed that the contract «shall be governed by the laws and regulation of the International Chamber of Commerce of Paris, France», thus making it appear as if they wanted to exclude the application of Italian or Slovenian law, as well as the CISG. The Court argued that in the matter under dispute the substantive uniform law (i.e. the CISG) should prevail over a conflict of law approach, that would be the traditional way of assessing an international contract: resort to the substantive uniform law conventions shall prevail over resort to private international law rules and the judge should favour insofar as possible the application of the substantive rules contained in the uniform law convention. The Court also addressed the issue of implicit exclusion of the CISG on the basis of the agreement (in light of the opt-out clause of art. 6 CISG). Arguing that what stated in the contract should not be considered either an explicit or an implicit exclusion of the CISG, the Court stated that the reference to law or regulation of the ICC could not be intended as “choice of law” according to private international law rules.