CISG-online 967	
Jurisdiction	Italy
Tribunal	Tribunale di Padova (District Court Padova)
Date of the decision	11 January 2005
Case name	*Ostroznik Savo et al. v. La Faraona soc. coop. a.r.l. et al.*

Translation[*] by Paolo Esposito[**]

The Proceedings

By service of process received 21 March 2001, Plaintiffs Ostroznik Savo, legal representative of Vzerja Kuncev (with registered office in Celje, Slovenian Republic), and Eurotrafic S.r.l. (with registered office in Feltre, Belluno, Italy) sued Defendants La Faraona soc. coop. A.r.l. (with registered office in Montagnana, Padova, Italy) and Banca di Credito Cooperativo di Roveredo di Guà (with registered office in Verona, Italy) alleging that: 1

- Since 1999, Eurotrafic S.r.l., Italian repository of the French Hyla genetic for the reproduction of rabbits, has supplied female-breeder animals to the Slovenian company;

- On 7 July 1998, the two plaintiffs entered into a contract under which Eurotrafic S.r.l. bargained to purchase the rabbits' production of the Slovenian farm, creation of the Hyla genetic strain;

- Eurotrafic S.r.l. sold the imported animals to the cooperative La Faraona;

- On 3 May 1999, a new contract was entered into; it provided for Ostroznik Savo (hereinafter: [seller]) to sell the rabbits directly to the cooperative La Faraona (hereinafter: [buyer]) which was then obliged to pay Eurotrafic a 100 Italian lire commission per each kilogram of alive meat imported from [seller];

- On 14 May 1999, the defendant bank (hereinafter: [guarantor of buyer's obligations]) became guarantor of [buyer] in favor of [seller] up to an amount of 35,000,000 Italian lire;

[*] For purposes of the present translation, co-claimant Ostroznik Savo of Slovenia is referred to as [seller]. Co-defendant La Faraona soc. coop. a.r.l. of Italy is referred to as [buyer], and co-defendant Banca di Credito Cooperativo di Roveredo di Guà of Italy is referred to as [guarantor of buyer's obligations].

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- The commercial relationship went on regularly and the representative of [buyer] also visited [seller]'s farm for suggesting the requisite «sanitary vacuum» (*vuoto sanitario*) and to replace the genetic line of the female-breeds;

- [Seller], relying on the promises of the representative of [buyer], agreed to undertake the «sanitary vacuum», at that time selling the rabbits at the farm under the market price, and to adopt the genetic line of the company Grimaud Italia;

- With no explanation, Grimaud Italia did not make available the rabbits of the selected genetic line. Therefore, [seller] was unable to supply the animals to [buyer];

- [Buyer], by letter of 6 July 2000, unilaterally brought the contract to an end because of the inability of [seller] to supply the rabbits;

- The inability to continue the supply was attributed to [buyer] which, on the one hand, required the «sanitary vacuum» and, on the other, did not make anything for letting Grimaud deliver the female breeds;

- The unjustified termination of the contract caused serious damages to [seller], which had to sell the Hyla's female breeds for the price of slaughtered meat and consequently no longer had productive farming;

- [Seller] did not succeed in claiming under the surety contract;

- [Buyer], by breaching its obligation entered into at the time of the assignment of the contract and causing [seller] to replace its genetic line, also caused damages to Eurotrafic, consisting of the loss of its commission.

[Seller] and Eurotrafic S.r.l. requested the Court to declare [buyer] responsible for the breach of the contract and, consequently, held liable to compensate damages to the plaintiffs. Additionally, [seller] requested the Court to order [guarantor of buyer's obligations] to pay the amount of 35,000,000 Italian lire under the contract of surety. **2**

[Buyer] filed its defense, stating that: **3**

- By contract dated 7 July 1998, [buyer] effectively agreed to pay Eurotrafic S.r.l. a commission;

- By a subsequent agreement of 3 May 1999, entered into by all of the parties, the 1998 contract was replaced by a new one setting up a [buyer]'s obligation to buy all the rabbit production of [seller], provided the animals had no disease or congenital defects (as they have subsequently to be grown up and butchered in the cooperative's members' factories);

- It was agreed that the contract would be regulated by the laws and regulations of the International Chamber of Commerce of Paris;

- Since the beginning of the supply, [buyer] observed that the rabbits were not of the agreed quantity, and were affected by sanitary problems and serious «fattening problems» so that they remained underweight, although raised according to the technical specifications;

- In order to solve that problem, [seller] spontaneously decided to replace the female-breeds and to buy the ones of the Grimaud Italia S.r.l. (Italian branch of a French company well known in the business);

- Grimaud, knowing only [buyer], agreed to the supply under condition that [buyer] retain an amount out of the money to pay to [seller] for the animals and to pay directly to Grimaud that retained amount, so that the latter company did not have to require payments to [seller];

- Before delivery of the female breeds, [seller] had to undertake a «sanitary vacuum» for cleaning up the farm and so avoid contamination of the new female breeds by any pre-existing disease;

- At the time Grimaud should have delivered the animals, the farm was not yet purified (previous manure and dirt was still present all over). For that reason, Grimaud refused to deliver its breeds;

- Consequently, [seller] was unable to supply rabbits to [buyer] which thereupon decided to bring the contract at an end by letters dated 6 July 2000;

- The contract of guarantee was not finally executed because of [seller]'s failure to deliver the animals of the quality and quantity bargained for;

- Eurotrafic was not entitled to any amount of money because the contract of 3 May 1999 did not recognize any commission and because the contract was ended as a result of [seller]'s breach;

- The said contract contained an arbitration clause that, by referring to the laws and regulation of the International Chamber of Commerce of Paris, provided for ICC institutional arbitration so that the national court has no jurisdiction.

For the aforementioned reasons, [buyer] requested the court: **4**

- Preliminarily, to rule that the national court has no jurisdiction and to refer the parties to arbitration under the ICC in Paris;

- As to the merits, to reject the plaintiffs' requests for relief, declare the contract entered into on 3 May 1999 at an end as a result of [seller]'s breach and order [seller] to compensate damages (to be quantified in another proceedings).

[Guarantor of buyer's obligations] filed a defense and stated that: 5

- The surety's contract has been discharged in advance;

- Because the supply contract has ended, the guarantee had no more effect. In fact, the guarantee only pertained the payment of the invoices issued after delivery of weaned rabbits had been affected; thus, the guarantee did not result in any form of compensation.

For the aforementioned reasons, [guarantor of buyer's obligations] requested the court: 6

- Preliminarily, to reject [seller]'s request to order [guarantor of buyer's obligations] to pay;

- In its counterclaim, to order [buyer] to secure payment instead of [guarantor of buyer's obligations] in the event the court should enter judgment against [guarantor of buyer's obligations].

The judge gathered the oral evidence of Mrs. De Carli Gianni, Hrastnik Uros, Carlo Orlando, Candeo Tonino and Fruscalzo Giovanni. At the hearing of 22 September 2004, the parties' counsel delivered their final speeches and the judge reserved rendering his decision until after the parties had filed their final submissions and replies. 7

Reasoning of the Court

[Jurisdiction]

Preliminarily, the Court needs to examine the procedural objections raised by [buyer]. 8

The text of Art. 5 of the contract states that «in the event of a dispute arising between the parties concerning the quality of the product at the time of delivery, the final decision shall be arbitrated at the Official Italian-Slovenian International Chamber of Commerce in Milan (Italy) or at any other Official Inspection Agency mutually agreed on.» Article 7 states instead that the contract «shall be governed by the laws and regulations of the International Chamber of Commerce of Paris (France).» 9

The first article is not applicable because – if it is true that defendant objects in its statement of defense, the rabbits lacking the agreed quality – that lack of quality is not the alleged reason for the termination of the contract; that is, instead, [seller] having ceased to supply [buyer] for its own fault. 10

Thus, the dispute does not relate to the quality of one or more installments of rabbits, which, according to the parties' agreement, would have required the inspection of the animals by an expert commission (identified in the contract as «Inspection Agency»). For this reason, the present dispute does not fall within the scope of the arbitration clause, whose applicability has been expressly limited to the resolution of disputes concerning the «quality of the product at the time of delivery» (it has to be added that [buyer] did not provide any proof as to the existence of an Official Italian-Slovenian International Chamber of Commerce in Milan and, because its very existence is not a notorious fact, the Court has serious doubts about the validity of the clause). 11

[Law applicable to the merits of the dispute:]

The Court needs to focus more on the second article, by which apparently the parties intended to regulate their relations under the «law of the International Chamber of Commerce of Paris» and to so exclude the applicability of the Italian and Slovenian national laws as well as of the United Nation Convention on the International Sale of Goods 1980. 12

It has to be initially pointed out that the present dispute has an international character. From that premise, it follows the necessity to identify the applicable substantive law. 13

If it might be argued that such an identification should be made according to the rules of private international law, as this is their proper function. Nonetheless, the Court opts for a different solution that favors, as far as possible, the application of rules of uniform substantive law, such as the United Nation Convention on the International Sale of Goods 1980 [CISG], ratified [by the Italian Republic] by Law of 11 December 1985 n. 765, which entered into force on 1 January 1988. *See* Trib. Pavia, 29 December 1999 in *Corriere giuridico* 2000, 932 s.; Trib. Vigevano, 12 July 2000, in *Giur. it*. 2001, 280 *et seq*.; Trib. Rimini, 26 November 2002, in *Giur. It.* 2003, 896 *et seq*.; Trib. Padova, 25 February 2004, in *Giur. it*. 2004, 1405 *et seq*.; Trib. Padova, 31 March 2004, in *Giur. merito* 2004, 1065 *et seq*. 14

The prevailing force of the CISG (that is a convention on uniform substantive law, and not of international private law as is sometime erroneously said) over the rules of private international law lies in the fact that the Convention is *lex specialis* because its sphere of application is more limited than that of the rules of private international law. The Vienna Convention only governs sales contracts, whose international character depends on the different national places of business of the contracting parties, as opposed to the rules of private international law which refer to all kind of contracts, without any sort of limitation. 15

According to this Court's opinion, the specificity – and thus prevalence – of the uniform substantive rules is also based on an additional consideration pertaining their content. The substantive rules have to be considered specific because they «directly» address the issues in dispute and so avoid the double step necessary for the application of the rules of private international law, which is to say, the investigation of the applicable law based on the connections' criteria and then its application. 16

[Applicability of the CISG:]

Having said that, the applicability of the CISG requires several conditions to be met. 17

As to the objective standpoint, there has to be a sales contract, of which the Convention provides no definition. The absence of such a definition still does not justify the adoption of a definition provided for by the municipal law, *e.g.* as that provided in Art. 1470 of the Italian Civil Code. The concept of «sale» in the CISG has to be extrapolated autonomously, as is the case with the majority of other concepts (among them, «place of business», «habitual residence», «goods», but not the one of «private international law» that corresponds to the definition of the *forum* where the dispute is heard), in other words, without referring to specific notions of a particular national legislation. 18

In that regard, attention must be paid to Arts. 30 and 53 CISG (*see* Trib. Padova, 25 February 2004, *supra*; Trib. Padova, 25 February 2004, *supra*; Trib. Rimini, 26 November 2002, in *Giur. It.* 2003, 896 *et seq*.; Tribunal cantonal de Vaud, 11 March 1996, n. 01 93 1061, published at […]) according to which, under the Convention, a sales contract is a contract by which the seller is obliged to deliver goods, transfer the property in the goods and, in case, hand over all the documents relating the goods, while the buyer is obliged to pay the price and take delivery of the goods. 19

It has now to be determined if the contract in dispute – that under Italian law is qualified as a supply contract – falls within the application *ratione materiae* of the Convention. 20

An affirmative answer is a consequence of the consideration that the CISG's scope is to set up the substantive discipline for international contracts providing for delivery of movable goods, transfer of their property and payment of the price, regardless of the legal qualification that the described economic activity may have under municipal laws. This orientation is also confirmed by foreign jurisprudence (which has to be taken into account according to Art. 7(1) CISG), that has always considered a supply contract as falling within the scope of the Convention, *see*: Cour d'appel de Colmar, 12 June 2001, available at […]; LG Ellwangen, 21 August 1995, CISG-online 279. 21

This affirmative solution is also confirmed by the wording of the Convention: Art. 73 CISG provides for its application to all «contracts for the delivery of goods by installments» which is to say the «*contrats à livraisons successives*» [expression translated in the unofficial Italian text as «contract with subsequent deliveries»]. Relying on that, Italian scholars considered that a sale performed by means of subsequent deliveries is disciplined by the uniform law, as that sale is surely «*contrats à livraisons successives*.» 22

Because it is not possible to ascertain from the CISG whether the several *livraisons* only attain the modality of performing the delivery, while the moment of transfer of property in the goods has to be fixed at the time of execution of the contract (that is what happens in the event of contract for the sale of goods with subsequent deliveries), the Court agrees with the opinion of scholars in considering the CISG applicable to supply contracts, under which the passing of property only take place at the time each installment is delivered. 23

Additionally, the goods that are the object of the contract (and of the supply contract as well) have to be movable and tangible (for that requirement, *see*: Cour d'appel de Grenoble, 26 April 1995; OLG Köln, 26 August 1994, in Neue Juristische Wochenschrift Rechtsprechungs-Report 1995, 246, available at […]). The CISG is applicable to our case because all the above-mentioned conditions are met (and animals are considered movable goods under the Convention). 24

For the CISG to be applicable, the contract also has to be international. The Convention, similar to the vast majority of conventions on substantive uniform law, defines this aspect. In that regard, it is necessary that the contracting parties have their place of business in different States at the time the contract was entered into (it is not relevant the eventual change of this requisite at a later stage). Place of business has to be considered the place where a business activity having the character of duration, stability and autonomy is set, *see*: Trib. Rimini, 26 November 2002, in *Giur. It.* 2003, 896 *et seq*.; Trib. Padova, 25 February 2004, supra; OLG Stuttgart, 28 February 2000, in Internationales Handelsrecht 2000, 66. 25

The contract in dispute has this international character because the seller has its place of business in the Slovenian Republic and the buyer in Italy. Further, as to the requirement of Art. 1(2) CISG, this international character was clear to the parties at the time the contract was entered into. 26

In our case, it is worth mentioning that the Convention has entered into force both in Slovenia and in Italy before the date the contract was entered into. Accordingly, the Convention is applicable *ex* Art. 1(1)(a) CISG. 27

[No exclusion of the CISG's application by the parties:]

Additionally, it has to be pointed out that parties did not excluded the application of the Convention, even if they could still have done so also tacitly, as often pointed out by the Italian courts (*see supra*: Trib. Vigevano, 12 July 2000, in *Giur. it*. 2001, 280 *et seq*.; Trib. Rimini, 26 November 2002, in *Giur. It.* 2003, 896 *et seq*.; Trib. Padova, 25 February 2004; Cour de cassation, 25 October 2005, available at […]) and foreign jurisprudence (*e.g., see*: Oberster Gerichtshof, 22 October 2001, available at […]; Cour de Cassation, 26 [June] 2001, available at […]; OLG München, 9 July 1997, in *International Legal Forum*, 1997, 159 s.). 28

In fact, the parties' selection in Art. 7 of the contract of the choice of the «laws and regulation of the International Chamber of Commerce of Paris, France» does not constitute either an express or a tacit exclusion of the CISG (an implied or tacit exclusion, *e.g.*, operates when the parties opt for the application of the law of a non-Contracting State or when they opt for the law of a Contracting State but merely refer to the «internal» law, as happens when they choose to apply the «non-uniform Italian law» or «the Italian Civil Code»). 29

The Court consider it proper to stress that the reference to the laws and regulation of the International Chamber of Commerce of Paris cannot be considered a «choice of law» according to the rules of international private law that – at least under the Italian perspective – do not admit the selection of a non-national set of rules (as is clearly stated in Art. 2(1) of the 30

1955 Convention on the Law Applicable to the International Sale of Movable Properties, ratified [by the Italian Republic] by Law of 4 February 1958 n. 50, which entered into force on 1 September 1964, and in articles 3 and 4 of the Convention on the Law Applicable to Contractual Obligations, ratified [by the Italian Republic] by Law of 11 December 1985 n. 765, which entered into force on 1 January 1988). Which is to say that Art. 7 of the contract is not a choice of law under the rules of international private law, and so it is not capable of having the selected rules prevail over the mandatory rules otherwise applicable (the same would have happened if the parties opted for the *lex mercatoria*, the Unidroit Principles or for the CISG in the event it would have not been applicable). For the said reasons, the parties' choice does not amount to an implied exclusion of the CISG.

Nonetheless, the previous considerations do not exclude that the selection of a non-national set of rules might have some effect. It might be argued that that selection affects the contractual stipulation *per relationem*, offering an internal regulation of the contractual relation. In other words, the parties – by opting for non-national rules and by referring to them as contractual clauses – might derogate from the non-mandatory rules of the applicable law, and the CISG as well (the latter, even though has to be applied by the judge *ex officio*, *see*: Cour d'appel de Paris, 6 November 2001; Cour de cassation, 26 June 2001, in *Dalloz* 2001, *Jurisprudence* 3607) has no mandatory character, apart from Arts. 12, 28 and 89–101 CISG). In our case, the parties' choice does not offer the opportunity to identify precisely the rules of the contractual relationship, because the reference to the «laws and regulations» of the International Chamber of Commerce in Paris is too vague and imprecise. **31**

For the sake of completeness, it has to be added that the selection made by the parties cannot even interpreted as excluding each and every national law (which, abstractly, might impede the application of the CISG as law assimilated by the Contracting States) because the Italian international private law, although admitting a negative choice of law, does not permit the exclusion of each and every national law. **32**

Based on the aforementioned considerations, the applicability of the CISG to the contract *de quo* is affirmed. **33**

[Substantive issues:]

As to the subject matter, the Court judges the plaintiffs' requests unsubstantiated and has to reject them. **34**

[Seller's breach of the contract:]

The evidence gathered demonstrated that [seller] did not perform its obligations. In fact, once it agreed to replace the rabbits of the Hyla's genetic strain with animals of Grimaud's genetic strain, it did not prepare the farm for the new female breeds and, consequently, it was unable to continue the supply of animals to [buyer]. **35**

Even if [buyer] suggested replacing the genetic female breeds, after intensive cleaning up of the farm, because of several diseases in the rabbits previously delivered (such diseases have also been inspected and reported by the public sanitary service; *see* witnesses' reports of **36**

dott. Orlando Carlo, veterinary surgeon of the Local Sanitary Service no. 17, and Candeo Tonino), [seller] agreed on the proposal and then had personal contacts with Grimaud Italia for the purchase of 1,300 female rabbit breeds (*see* plaintiff's exhibit no. 14).

The witness Fruscalzo Giovanni, director of Grimaud Italia, said he was personally at the Slovenian farm to check its condition. Grimaud was interested in ascertaining that, before delivery of its animals, the farm had no sanitary problems. Mr. Fruscalzo reported the farm was not clean and that it had plenty of stools. In other words, even if there were no more animals in the farm, no «sanitary vacuum» (sterilization of the farming structure) had been done. 37

Consequently, Grimaud refused to deliver its rabbits. Mr. Fruscalzo declared that Grimaud Italia autonomously decided not to supply the animals to [seller], because of the sanitary and hygienic problems. Mr. Fruscalzo (who has no particular interest in the present dispute) is a credible witness, more than Mr. Hrastnik Uros (employee of the plaintiff) who said the farm was clean and that they were «waiting for the communication of the delivery date before proceeding with the sterilization.» 38

The Court sees no reason why [seller] had to wait before completing the «sanitary vacuum», because Grimaud's director went to Slovenia for the sole reason of inspecting the farm's condition for the purpose of taking the rabbits, and because the delivery has been contracted two months earlier. Thus, it is the Court's understanding that Grimaud Italia, having ascertained that the farm had not been adequately cleaned and sterilized, did not dare to deliver its animals because of the material risk that rabbits generated there (and to be imported on the Italian market) could be infected. That would have also caused serious damages (not only to the reputation) to the patentee of the Grimaud genetic strain. 39

Thus, it was not [buyer]'s fault that the plaintiff did not receive the female rabbit breeds of Grimaud's genetic strain. 40

There is no proof that [buyer] did not want to buy rabbits anymore from [seller]'s farm (if that would have been its intention, it was easier to contract out by giving notice according to the contract). 41

It was instead [seller] that was in breach, by not performing the so-called sanitary vacuum, *i.e.,* by not cleaning and sterilizing the farm for the taking of rabbits to raise. It is the plaintiff's fault if the rabbits of the Grimaud genetic strain were not delivered and if, consequently, it has not been able to supply the animals to [buyer]. 42

[Fundamental breach of contract; buyer's right to avoid the contract:]

Having not received any more deliveries of the animals (and – even before – having known of the unsatisfactory sanitary conditions of the farm), [buyer] legitimately reacted by bringing the contract to an end on 6 July 2000. In fact, the contract provided for weekly delivery of some thousands of animals. Having ascertained that the seller was not able to deliver the rabbits, the buyer correctly decided to bring the contract to an end, because to wait further would have been detrimental. 43

Under Art. 25 CISG, [seller]'s breach has to be considered «fundamental», that is, essential (the Court considers the meaning of «fundamental» in Art. 25 CISG as corresponding to «non irrelevant» in Art. 1455 of the Italian Civil Code), that allows the termination of contracts with obligation on both parties. Both previsions reflect a need for proportionality between the relevance of the breach and the remedies available to the non-breaching part: termination of the contract has to be considered the *ultima ratio*, and has to be used only when the non-performance is so serious as to deprive the party not in breach of the benefit expected under the contract. 44

When the main performance (in our case, the periodical delivery of rabbits) is discontinued – and it is not reasonable to expect its resumption – the breach has to be considered as fundamental. 45

Article 49 CISG, stating the circumstances in which the buyer can terminate the contract, seems to provide a distinction between fundamental breach (by referring to Art. 25 CISG) and non-delivery (on that respect, it has to be stressed the inadequacy of some unofficial Italian translations of Art. 49(1)(b) CISG – like the one in Nuove Leggi Civili Commentate 1989, p. 222 – that, by typing a semicolon after the wording «in case of non-delivery», let the reader infer the legal provision to contemplate two different circumstances: the non-delivery and the non-delivery within an additional period of time fixed by the buyer). There is no doubt that a non-delivery always amounts to fundamental breach, because it excludes *a priori* the possibility of the buyer getting any benefit from the contract (*see*: Cour d'appel de Grenoble, 21 October 1999, CLOUT case n. 313; Oberlandesgericht Celle, Germany, 24 May 1995, CLOUT case n. 136). The same consideration applies to a supply contract with no expiry date, in the event the seller discontinues the deliveries so preventing the buyer from enjoying any further benefit from the contract. 46

The point is to actually establish, time by time, how long the buyer should wait after the expiry of the date for delivery (or after the discontinuation of delivery) before considering the seller's non-performance definitive and thus the breach as fundamental – in the event the parties did not expressly state in their contract that time of delivery is of essence and that, if not met (as well as if deliveries are discontinued), the buyer would be entitled to declare the contract at an end. On one hand, a too short time before bringing the contract at an end can lead to objection as to the seriousness of the delay by the seller (who might claim that he was ready to deliver at the time he received the notice of termination of the contract). On the other hand, too long a time – although that can help considering the seller's breach definitive – may cause financial prejudice to the buyer because of the uncertainty about the performance of the contract (the buyer cannot rely on the goods being delivered nor surely exclude that it might happen and so seek other suppliers). Thus, Art. 49(1)(b) CISG is an instrument offering the buyer (who is suffering the consequences of the other party's breach) the opportunity to bring the contract at an end in a reasonable time and avoiding objections concerning the fundamentality of the breach. Once the additional time fixed by the buyer has expired, the sale contract is at an end (the seller's sole objection being that the additional term was inadequate *ex* Art. 47(1) CISG). 47

In our case, there is no evidence that the buyer fixed an additional time within which the seller could have resumed the delivery of rabbits under penalty of the contract being brought at an end. It has still to be pointed out that [buyer] was reasonably thinking that [seller] was not able anymore to affect subsequent deliveries of rabbits in the following months on the assumption that the farm was in bad sanitary condition, that the seller did not undertake the «sanitary vacuum» and that consequently Grimaud Italia refused to deliver the new female breeds. 48

[Seller] itself affirms in its submission that «the physiological time necessary for setting up again a farming capable of producing saleable grown animals» is «at least six months.» That would have still been possible on the premise that the «sanitary vacuum» was undertaken. 49

Orlando Carlo, veterinary surgeon of the Local Sanitary Service no. 17, stressed that the said cleaning operations need take approximately twenty days, if properly conducted. During this period, it is not possible to have animals in the farm. Only once the «sanitary vacuum» had been properly undertaken, would the plaintiff have been able to invite the technical personnel of Grimaud Italia to convince them that the farm was now capable of receiving delivery of their female breeds. 50

Additionally, on 6 July 2000 – at the time [buyer] communicated its intention to bring the contract to an end – the deliveries were already some months late. In fact, the agreement between [seller] and Grimaud Italia was entered into in early May 2000 (*see* Grimaud Italia's letter dated 11 May 2000, plaintiff's exhibit no. 14), so that [seller] should have undertaken the «sanitary vacuum» before the summer period to have the farm ready to receive the new female breeds. Instead, in July 2000 (*see* Mr. Fruscalzo's witness' report) the «sanitary vacuum» had not yet been undertaken and the farm was in really bad sanitary condition. 51

At that point, it was not reasonable to expect [buyer] to wait any longer, bearing the economic risk for a longer time and hoping that the seller could remedy its breach. Even because [seller] did not express to [buyer] or to Grimaud its intention to quickly remedy the situation and prepare its farm to receive the animals, after it was ascertained [seller] did not undertake the «sanitary vacuum» and the farming-structure had plenty of stool. An additional longer waiting would have caused economical prejudice to [buyer], who needed weekly delivery of rabbits. 52

The Court consequently concludes that, in July 2000, [seller]'s breach was «fundamental» and so [buyer] was legitimately entitled to immediately bring the contract to an end under Art. 26 CISG. 53

[Eurotrafic's payment claim:]

As to Eurotrafic's request, it has to be noted that the sole obligation [buyer] entered into related to the payment of a commission of 100 Italian lire per «kilo of alive meat» bought from [seller]. [Buyer] has not promised to continue its commercial relation with [seller], nor to require rabbits of the sole Hyla's genetic strain. 54

If the commercial relationship between [buyer] and [seller] would have ended for whatever reason, Eurotrafic S.r.l. would have had no opportunity to claim anything; in the same way, it 55

would have not been able to prevent [seller] from replacing the genetic strain of the female breeds.

The plaintiff would merely be entitled to compensation if (and to the extent that) the supply of alive rabbits of the Hyla's type would have continued (as it seems Eurotrafic had exclusive patentee's right over Hyla's genetic strain in Italy). Consequently, Eurotrafic S.r.l.'s request for compensation is unsubstantiated: [Buyer] did legitimately require [seller] to modify the genetic strain of the rabbits to improve their quality; [buyer] was in no way obliged towards Eurotrafic S.r.l. to continue purchasing rabbits of the Hyla's genetic strain. 56

[Counterclaims:] 57

The Court, having rejected the plaintiffs' requests, has no need to consider [guarantor of buyer's obligations]'s counterclaim. [Buyer]'s counterclaim has to be rejected as well, because it did not prove the existence of any economical prejudice having been caused [seller]'s breach. It has to be supposed that, after the breakdown of commercial relations with the Slovenian company, [buyer] bought the rabbits from other sellers.

[Buyer] did not offer any documental proof of higher costs of the replacement goods. Absent any proof of the existence of economic damage, the request of compensation for damages cannot be upheld, not even for a declaration of liability (with quantification to be assessed in a separate proceedings). 58

[Costs of the litigation:]

Because [seller] and Eurotrafic S.r.l. initiated the present proceedings in which they lost, they shall bear the costs of litigation in the amount determined in the dispositive part. 59

For these Reasons

Dr. Alessandro Rizzieri, of the District Court of Padova, division of Este, sitting as sole judge, renders final judgment in the civil proceedings filed as n. 40287/2001 between Ostroznik Savo, legal representative of the Slovenian company Vzerja Kuncev, and Eurotrafic S.r.l. (plaintiffs) against La Faraona and Banca di Credito Cooperativo di Roveredo di Guà (defendants). 60

The court: 61

1) Rejects the preliminary procedural objection raised by [buyer];

2) Rejects all of [seller]'s requests;

3) Rejects [buyer]'s counterclaim;

4) Declares the plaintiffs jointly obliged to reimburse [buyer] for litigation costs in the amount of Euro 3,070, of which Euro 2,700 for attorneys' fees [...], plus VAT and CAN;

5) Declares the plaintiffs jointly obliged to reimburse Banca di Credito Cooperativo di Roveredo di Guà (VR) for litigation costs in the amount of Euro 2,850, of which Euro 2,500 for attorneys' fees [...], plus VAT and CAN.

So decided in Este on 11 January 2005