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Jurisdiction	Italy
Tribunal	Tribunale di Forlì (District Court Forlì)
Date of the decision	16 February 2009
Case no./docket no.	Unavailable
Case name	*Officine Maraldi S.p.A. v. Intesa BCI S.p.A. et al.*

Translation[*] *by Paolo Esposito*[**]

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THE PROCEEDINGS

By means of an application for urgent relief ex article 700 Italian Code of Civil Procedure, Officine Maraldi S.p.A. (then merged into Finaziaria Saccarifera Italo Iberica S.p.A.) [Seller] requested the District Court of Forlì to prevent the banks Intesa BCI and National Bank of Egypt [Guarantors] from paying US $93,200 to H.U. Gas Filling Plant Aswan-Usama Abdallah and Co. [Buyer] (a company incorporated under Egyptian law - [guaranteed/creditor]) in execution of a contract of guarantee.

The judge rendered inaudita altera parte decree, followed and confirmed by an order in which he granted the [Seller]'s request and ordered the banks not to pay any amount of money, and ordered the [Buyer] to discontinue its payment requests [to the banks].

Within the time-limit determined in the order, [Seller] filed the present proceeding requesting the Court to:

- Ascertain the non-existence of the [Buyer]'s credit (credit allegedly based upon defects in the items supplied and upon delayed delivery); and, in any event, declare the action as time barred;

[*] All translations should be verified by cross-checking against the original text. For purposes of this translation, Plaintiff Officine Maraldi S.p.A. of Italy is referred to as [Seller] and Defendant H.U. Gas Filling Plant Aswan of Egypt is referred to as [Buyer] and Defendants Intesa BCI S.p.A. and National Bank of Egypt are referred to as [Guarantors].

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- As a consequence, declare the [guarantee] payment not due; and

- Affirm the order rendered [in the preliminary summary judgment ex art. 700 Italian Code of Civil Procedure] and inhibit the banks, in their capacity of guarantors, from making any payment.

As neither the [Buyer] nor either of the [Guarantors] participated in the proceedings, the judge gathered the evidence and fixed the final hearing for 30 September 2005. However, having subsequently ascertained the lack of proof with reference to the proper notification of the present action to the defendants seated abroad that had been offered, the judge, by order dated 7 February 2006, then reopened the trial.

The proceeding has consequently suffered some delay, also because of the judge's order to provide a proper notification to the defendant [Buyer]. By decree dated 26 September 2006, the President of the District Court then transferred the proceeding to the undersigned judge. The judge, at the final hearing, verified the regularity of the notification and the defendants' knowledge of the proceedings (as they were still in default). The judge then reserved time for rendering his decision until after having heard the plaintiff [Seller]'s conclusive speech.

REASONING OF THE COURT

[Jurisdiction]

1.
Preliminarily, the court needs to stress a point about the regularity of the notification in the present case.

The former judge reopened the trial once he considered the service of process to have been defectively made to the defendant [Buyer]. This decision was taken after the evidence had already been gathered and that, as consequence, should have been re-gathered.

The proceeding was then transferred to the undersigned judge who, having previously determined that the renewed service of process was correctly made, decided not to re-hear witnesses again because -- for the reasons explained infra -- the documents disclosed fully permitted the proper decision of the dispute.

2.
As the dispute concerns a contractual relation characterized by international elements, it is necessary to find out whether the Italian judge has jurisdiction over the present case and what is the applicable law.

2.1
With reference to the jurisdiction, there is no issue as to the defendant [Guarantor] Intesa

BCI; the latter being an Italian bank, the Italian judge surely has competence with respect to that party.

2.2
In relation to the defendants [Buyer] and National Bank of Egypt [Guarantor], absent a convention on the matter between Italy and Egypt, the jurisdictional issue has to be determined according to the general rules of Italian private international law.

Article 3 of the Law 31 May 1995, no. 218 (Italian Private International Law) establishes the main criterion of connection -- the domicile or residence of the defendant -- and then sets two rules of renvoi to other rules establishing the judge's competence, distinguishing between subject matters falling or not within the application of the Brussels Convention 1968, executed in Italy by Law 21 June 1971, no. 804.

As to the former, the special rules on jurisdiction provided by the Convention apply even if the defendant has no domicile in one of the Signatory States; as to the latter, instead, the jurisdiction has to be determined according to the rule concerning territorial competence contained in articles 18 to 27 of the Italian Code of Civil Procedure.

It follows that, unless the application of the Brussels Convention has to be excluded because of the subject matter (capacity and status of physical person, financial agreements pursuant to marriage, wills and inheritance; bankruptcy proceedings; social security; arbitration), in order to establish the jurisdiction of the Italian judge over a defendant neither domiciled nor resident in Italy, it is necessary to apply the criteria established in sections 2, 3 and 4 of title 2 of the Convention, even if the defendant has no domicile in one of the Signatory States because these general criteria apply beyond the strict applicability of the Convention rationae personae (see Corte di Cassazione [Italy], plenary session, 11 February 2003 no. 2060).

Article 6 of the Brussels Convention sets forth criteria of special competence of which the plaintiff can benefit in preference to the rule in article 2. Specifically, article 6(1) states that, in the event of more defendants being sued in the same proceeding, the defendant domiciled in the territory of a Signatory State can be sued in the place where any one of the defendants is domiciled.

This rule refers to a multiparty proceeding, for which article 33 of the Italian Code of Civil Procedure allows actions against multiple defendants -- which according to articles 18 and 19 of the same code should be taken in different Courts -- to be filed in the Court of the place where any of the parties is domiciled or resident, but only if there is a substantive connection among the causes of action against the defendants for the purpose of being decided in the same proceeding (see Corte di Cassazione [Italy], plenary session, 24 July 2003 no. 11526).

The fact that the adjudication of those causes of action implies the investigation of additional causae petendi (which are not substantively or apparently connected) is not relevant in so far as the adjudication of the dispute involves the preliminary investigation and decision of the

causa petendi that determined the substantive connection and thus required the dispute to be decided in the same proceeding (Corte di Cassazione [Italy], plenary session, 6 August 1990 no. 7935).

The European Court of Justice (see ECJ, decision C-189/87 dated 27 September 1988) clarified that the criterion in the rule de quo applies if the several causes of action activated by the same plaintiff against multiple defendants are so deeply connected among themselves as it is appropriate to deal with and decide them in a sole proceeding in order to avoid conflicting decisions, in the event of multiple proceedings.

In our case, such connection exists.

The causes of action the [Seller] activated against the [Buyer and the two banks] are all aimed at the same scope; indeed they lead to the Court upholding the content of its previous order and, specifically, preventing [Guarantor bank] Intesa BCI from paying [Buyer] and National Bank of Egypt, and in any case to declare non-existent the alleged monetary obligation of the [Seller] in favor of the [Buyer and the Guarantors] because of the correct performance (by the Seller) of the contract and because of the Egyptians defendant's fraudulent behavior.

The jurisdiction of the Italian judge over both [Guarantor bank] Intesa BCI and over the [Buyer and the Egyptian bank] is conclusively affirmed because of the connection of the causes of action.

[Applicable law]

3.
The contractual relationship has an international character.

The main contract between the [Seller] and the [Buyer] was a sales contract. Prima facie, the United Nation Convention on the International Sale of Goods 1980, ratified [by the Italian Republic] by Law of 11 December 1985 n. 765, which entered into force on 1 January 1988, is thus applicable.

3.1
Italian jurisprudence has been consistently oriented in favor of affirming the prevailing force of this Convention -- that is, of uniform substantive law -- over the rules of private international law. See:

- Trib. Vigevano [Italy] [(Rheinland Vertsicherungen v. Atlarex)], 12 July 2000, in Giur. it. 2001, 280 et seq.
- Trib. Padova [Italy] [(Agricultural products case)], 25 February 2004, in Giur. it. 2004, 1405 et seq.
- Trib. Padova [Italy] [(Pizza boxes case)], 31 March 2004, in Giur. merito 2004, 1065 et seq.

- Trib. Rimini [Italy] [(Porcelain tableware case)], 26 November 2002, in Giur. It. 2003, 896 et seq.

This orientation is based on the prevalence of the lex specialis. Conventions on uniform substantive law have a special sphere of application, more limited than that of the rules of private international law.

Furthermore, 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.

Moreover, and most importantly, the specificity -- and thus prevalence -- of the uniform substantive rules is based on the mechanism they offer for settling the substantive issues at stake. The substantive rules have to be considered specific because they directly address those issues 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. See supra:

- Trib. Vigevano [Italy] [(Rheinland Vertsicherungen v. Atlarex)], 12 July 2000, in Giur. it. 2001, 280 et seq.
- Trib. Rimini [Italy] [(Porcelain tableware case)], 26 November 2002, in Giur. It. 2003, 896 et seq.

3.2
It has now to be ascertained whether the prerequisites for the applicability of the Vienna Convention are met.

As to the objective standpoint, there has to be a sales contract.

There is no definition of what constitutes a sales contract in the Convention; it is thus necessary to identify the substantive contractual relation according to the parameters set up by the applicable law. In this connection, it is incorrect to refer to the definition provided for by the domestic law (Italian law) (see supra:

- Trib. Padova [Italy] [(Ostorznik Sano v. La Farrona)], 11 January 2005;
- Trib. Padova [Italy] [(Agricultural products case)], 25 February 2004;

and especially to the definition provided in article 1470 of the Italian Civil Code. The concept of «sale» in the Convention has to be autonomously determined (see supra:

- Trib. Padova [Italy] [(Agricultural products case)], 25 February 2004)

without referring to specific notions of a particular national legislation.

The absence of an explicit definition does not preclude extrapolating the concept from the Convention itself. In that regard, attention must be paid to articles 30 and 53 of the Convention (as pointed out in the case law already cited supra): according to the aforementioned articles, 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 eventually hand over all the documents relating the goods, while the buyer is obliged to pay the price and take delivery of the goods. See:

- Juzgado de primera instancia e instrucción no. 3 de Tudela [Spain] [(Machine for rectification of bricks case)], 29 March 2005;
- Tribunal Cantonal du Jura [Switzerland] [(Sand and gravel case)], 3 November 2004;
- Tribunal Cantonal du Valais [Switzerland] [(Clothing, household linen case)], 19 August 2003;
- Kantonsgericht Schaffhausen [Switzerland] [(Machinery case)], 25 February 2002;
- Cour d'appel de Colmar [France] [(Polyurethane case)], 12 June 2001;
- Cour d'appel de Paris [France] [(Dataprocessing material case)], 12 October 2000;
- Audiencia Provincial de Navarra [Spain] [(Electrical goods case)], 27 March 2000;

3.3
Additionally, the goods that are the object of the contract have to be, at the time of delivery (on the point, see:

- OLG Köln [Germany] [(Market study case)], 26 August 1994;

movable and tangible (for that requirement, see:

- KG Zug [Switzerland] [(PVC case)], 21 October 1999;
- OLG Köln [Germany] [(Used car case)], 21 May 1996;

regardless of the shape of the goods, and of the fact that the items are new[ly manufactured] or resold (see also:

- OLG Köln [Germany] [(Used car case)], 21 May 1996;
- LG Köln [Germany] [(Used car case)], 16 November 1995;

alive or inanimate (see:

- LG Flensburg [Germany] [(Live sheep case)], 19 January 2001;
- Cour d'appel Paris [France] [(Two elephants case)], 14 January 1998;

Our case matches the framework above delineated because the [Seller]'s obligation consisted in the supply and delivery of four cisterns and relative accessories (see exhibit no. 1), and the assistance of a technician for the assembly (see clause no. 2 of the contract). Accordingly, it has to be excluded that there is a preponderant relevance of the labor over the supply of goods (Vienna Convention, article 3(2)) and consequently the Convention seems to be applicable.

According to the above provision, the Convention shall not apply if the value of the goods to be delivered is lower than that of the labor (and/or services), that is to say, when the value of manpower or other services amounts to more than 50% of the value of the goods. See:

- Hof van Beroep Antwerpen [Belgium] [(Machines case)], 3 January 2005;
- Hof van Beroep Gent [Belgium] [(Computer hardware and software case)], 24 November 2004;
- Hof van Beroep Gent [Belgium] [(Cooling installation case)], 29 October 2003;
- Handelsgericht Zürich [Switzerland] [(Turnkey plant case)], 9 July 2002;
- Rechtbank van Koophandel Hasselt [Belgium] [(Vehicle repairs case)], 31 October 2001;

3.4
As to the contract in dispute, it is patent that the international requisite also exists, the parties having their places of business in different countries, all signatories. This international character was clear to the parties at the time the contract was entered into, so that article 1(2) of the Convention is not irrelevant.

3.5
For mere completeness, it also has to be pointed out that parties did not exclude the application of the Convention, even if they could still have done so tacitly, as often pointed out by Italian and foreign jurisprudence Among the several cases, see:

- Cour de cassation [France] [(Weed killer case)], 25 October 2005;

Based on the aforementioned considerations, the applicability of the United Nation Convention to the contract de quo is affirmed.

Substantive issues

[The factual background]

4.
As to the subject matter, the main contractual relation has to be preliminarily investigated.

That is because, if the [Buyer]'s objections alleging [Seller]'s incorrect performance of the contractual obligation are immaterial, the order rendered in the preliminary phase [under

article 700 Italian Code of Civil Procedure] should be affirmed for the reason that the right to enforce the contract of guarantee does not exist.

The factual background is straightforward: [Seller] alleges that it delivered the goods bargained for in the contract; that delivery has been completed within the agreed dates and that the goods, on delivery, have been inspected by Lloyd's personnel, as agreed in the contract. Consequently, it is [Seller]'s position (as already asserted before the proceedings, see exhibit no. 9) that the [Buyer]'s complaints do not have any material foundation.

Specifically, the [Buyer]'s objections (see [Seller]'s exhibit no. 8) relate to:

- Delay in the delivery of two installments (in particular, three months delay for the first installment and four months for the second one), so that the buyer sought to enforce a right to reduce the price as a penalty;
- Goods allegedly not delivered, or delivered in a non-conforming way;
- Deliveries not carried out in accordance to the contractual agreement and, thus, causing problems in the overall installation of the items.

[Time of delivery]

4.1
These issues have to be jointly examined.

As to the first objection, the [Buyer] expressly complained that the first delivery was made in December 1999 and not by the end of the previous September and that the second was made on 29 February 2000 «with four months delay.»

It is well known that, on the point, the Convention (article 33(1)(a)) states that the seller has to deliver «if a date is fixed by or determinable from the contract, on that date.»

The investigation of the contractual documents is not really helpful in that respect. The dates bargained in the original written document (dated 15 September 1997) were determined to start from the date of the letter of credit the buyer should have obtained; such letter of credit had been obtained a long time after and with subsequent renewals (see exhibits no. 3, 4 and 5); from the date of the last one, it can effectively be inferred that the dates of the first and second delivery had been fixed at 30 September 1999 and 29 February 2000.

As to the [Buyer]'s second objection, the defects objected to relate to lack of conformity of the goods. On this point, the [Seller] objects, citing the absence of prompt notice in addition to the fact that parties contractually agreed that the goods would be inspected on arrival by an independent agency (Lloyds Register of Shipping).

The Court points out that, on the basis of the disclosed documents and the parties' allegation, both issues can be decided in favor of the [Seller].

4.2
As to the timeliness of delivery, article 46 of the Convention states that 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. The documents exhibited made clear that, after both deliveries had been already made, on 9 May 2000 (see exhibit no. 7) the [Seller] extended, upon [Buyer]'s request, the validity of the contract of guarantee (entered into in the event of [Seller]'s default).

Independently from any consideration about the materiality of the objected late delivery, the abovementioned circumstance proves that the [Buyer] decided to keep the contract alive without raising objections as to the delay in the deliveries. Such behavior has a preclusive effect on the objection relating to late delivery.

[Lack of conformity]

4.3
As to the defects of the goods, the discipline concerning the lack of conformity is contained in articles 35 et seq. of the Vienna Convention.

4.3.1
Specifically, article 35 obliges the seller to deliver goods that are of the quantity, quality and description required by the buyer and which are contained or packaged in the manner required by the contract. It has again to be underlined that the concept has to be autonomously determined without referring to specific notions of a particular national legislation. The «lack of conformity» in article 35(1) occurs when:

- The goods do not possess the qualities bargained for in the contract (see KG Schaffhausen [Switzerland] [(Model locomotives case)], 27 January 2004
- The delivered goods are of higher or lower quantity compared to the ones agreed on (see OLG Koblenz [Germany] [(Acrylic blankets case)], 31 January 1997.

If the parties did not negotiate specific qualities or did not expressly and clearly specify them and it is not possible to ascertain the requisite quality by referring to usages or practice established between the parties (according to article 9 of the Convention), reference has to be made to article 35(2) [in order to determine the characteristics the goods must possess].

This latter provision -- which is of a subsidiary nature and application -- sets up the minimum objective standards the purchased goods must possess. See:

- KG Schaffhausen [Switzerland] [(Model locomotives case)], 27 January 2004.

Thus, the goods have to be considered non-conforming:

- If they are not fit for the purpose for which goods of the same type would ordinarily be used;
- If they are not fit for the particular purpose for which the buyer intended to use them, but only if the Buyer made the Seller aware of his intention;
- If they do not possess the qualities of goods which the seller has shown to the buyer as a sample or model; and, finally,
- If they are not contained or packaged in the manner usual for such goods or, where there is no such manner, in a manner adequate to preserve and protect the goods.

[Notice of lack of conformity]

4.3.2
In the event the goods lack conformity, in order not to lose the right to rely on such non-conformity, the buyer must give notice to the seller of the alleged non-conformity and specify in so far as possible the nature of the defects within a «reasonable time» after he has discovered them or ought to have discovered them (article 39(1)) in order to immediately ascertain whether a breach did occur. According to the prevailing opinion, the concept of «reasonable» time is a «general clause» (see supra:

- Trib. Vigevano [Italy] [(Rheinland Vertsicherungen v. Atlarex)], 12 July 2000, in Giur. it. 2001, 280 et seq.
- Trib. Rimini [Italy] [(Porcelain tablewear case)], 26 November 2002, in Giur. It. 2003, 896 et seq.

requiring the judge to take into account all the circumstances of the specific case. See:

- Oberster Gerichtshof [Austria] [(Wood case)], 15 October 1998.
- OLG Düsseldorf [Germany] [(Shirts case)], 10 February 1994.
- OLG Düsseldorf [Germany] [(Clothing case)], 12 March 1993.
- Rechtbank Roermond [Netherlands] [(Cheese case)], 19 December 1991.

4.3.3
In our case, it is necessary to determine whether the alleged defects fall within the category of «lack of conformity» delineated above. But it is necessary to first determine whether the buyer's notice had been sent within a «reasonable time» because, if not, the buyer has lost his right to rely on the non-conformity. The moment from which the «reasonable time» starts running has to be ascertained in order to determine whether the buyer has lost the right to rely on the non-conformity of the goods.

On this point, the [Seller] has made no express reference to the Convention; nonetheless, since from the very beginning the [Seller] objected that the [Buyer] has lost the right to benefit from the remedies available for the lack of conformity of the goods, although [Seller] argued

such objection under Italian law (see page 5 of the [Seller]'s submission). The Court has the competence to investigate the timeliness of the notice.

As [Buyer] itself affirmed (see exhibit no. 8 at page 1(c)), the goods had been completely delivered on 31 March 2000. The «as soon as practicable» term of article 38 starts running from that day, even because the parties bargained for inspection to be made on the arrival of the goods by an independent agency (Lloyds Register of Shipping) and such circumstance makes clear that the alleged non-conformity should have been discovered at that time.

Instead, it has not been disclosed that there has been any notice that pre-dated the one in the referenced exhibit no. 8, which the [Seller] received on 7 May 2001. Thus, more than thirteen months elapsed from delivery until notice was served. Such a term cannot be considered timely.

It is true that the goods were not perishable and an excessively narrow interpretation should not be adopted. Nonetheless, Italian and foreign jurisprudence (not binding but considered as guidance) agrees on such term being excessively long. Case law affirms that a notice sent some months after the delivery cannot be considered timely. See:

- Trib. Vigevano [Italy] [(Rheinland Vertsicherungen v. Atlarex)], 12 July 2000, in Giur. it. 2001, 280 et seq.
- LG Berlin [Germany] [(Children's shoes case)], 16 September 1992;
- OLG Düsseldorf [Germany] [(Shirts case)], 10 February 1994, (three and half months);
- Recht der internationalen Wirtschaft, 1995, 53 et seq. (only two months)).

Despite the length of time in itself, the time elapsed goes beyond the time necessary for the buyer to acquire knowledge (and not merely suspicion) of the defects, to arrange for the technical inspection to be undertaken, and to promptly take steps for the performance of the contract.

It has therefore to be declared that the [Buyer] has lost the right to rely on the lack of conformity of the purchased goods; accordingly, it is superfluous to consider the additional duty of the buyer (still applicable in the present case) to inspect the goods upon delivery as stated in article 38 of the Convention.

For these reasons, the relief the [Seller] requested has to be granted.

4.4
For the sake of comprehensiveness, it has to be stressed that the contract did not provide for any penalty in favor of the non-performing party, as it has instead been wrongly claimed by the [Buyer] (see notice at point A, where the right to enforce a penalty is claimed based on a not-well-identified «tradition»).

5.
[Buyer]'s objections about [Seller's breach of contract thus have no foundation and judgment has to be entered against the [Buyer and the banks], as required by the [Seller]. Accordingly, the order rendered in the preliminary phase [under article 700 Italian Code of Civil Procedure] has to be upheld because the right to enforce the contract of guarantee does not exist.

The defendant [Buyer] shall bear the costs of litigation in the amount determined in the dispositive part; in awarding costs it has been taken into account that the [Buyer] has been correctly and legally sued after the oral part of the trial.

FOR THESE REASONS

The Court renders final judgment in the civil proceedings filed as n. 155/2001 between [Seller] and [Buyer and the Guarantors] (in default).

The Court:

- In granting the [Seller]'s request for relief, declares that -- in relation to the objection raised by [Buyer] in the document dated 7 May 2001 -- no breach of the contract entered into on 15 November 1997 has been committed by the [Seller];
- For the same reason, inhibits [Buyer] from executing the contract of guarantee, and the defendant banks from making any payment under that contract;
- Orders [Buyer] to reimburse [Seller] for litigation costs in the amount of Euro 9,000, of which Euro 8,400 for attorneys' fees [...], plus VAT, CNA and an additional 12.5% for general expenditures.

So decided in Forlì on 30 December 2008 (decision published on 16 February 2009).

The judge: Dr. Francesco Cortesi.