CA 7833/06

Pamesa Ceramica

v.

1. Yisrael Mendelson Engineering Technical Supply Ltd

2. Yaakov and Tovi Eisenberger Building and Public Works Co. Ltd

CA 8125/06

Yisrael Mendelson Engineering Technical Supply Ltd

v.

1. Yaakov and Tovi Eisenberger Building and Public Works Co. Ltd

2. Pamesa Ceramica

CA 8495/06

Yaakov and Tovi Eisenberger Building and Public Works Co. Ltd

v.

1. Yisrael Mendelson Engineering Technical Supply Ltd

2. Pamesa Ceramica

The Supreme Court sitting as the Court of Civil Appeals

[17 March 2009]

Before Vice-President E. Rivlin and Justices A. Grunis, E. Rubinstein

Appeals of the judgment of the Haifa District Court in CC 137/01, which was given on 20 August 2006 by Justice Y. Cohen.

Facts: Pamesa Ceramica ('Pamesa'), a Spanish company, manufactured floor tiles that were imported into Israel by companies later acquired by Yisrael Mendelson Engineering Technical Supply Ltd ('Mendelson'). These were subsequently bought by a construction company, Yaakov and Tovi Eisenberger Building and Public Works Co. Ltd ('Eisenberger'), and used in the construction of a residential building in Kiryat Motzkin.

After the buildings became inhabited, a defect was found in the tiles. Eisenberger replaced the tiles and sued Mendelson for reimbursement of the price of the tiles and the work involved in replacing them, and for compensation for damage to its reputation (in a total amount of NIS 1,173,100). Mendelson

sent a third party notice to Pamesa claiming Pamesa was liable for any amount that it would be found liable to pay to Eisenberger.

The District Court found the importer to be fully liable for the defective tiles. It also upheld the third party notice, rejecting Pamesa's claim it was not notified of the defect in the products within a period of two years and therefore the third party notice was prescribed under the Sale (International Sale of Goods) Law, 5731-1971. The District Court held that Pamesa had been aware that the tiles were problematic, and that the prescription period of two years in the Sale (International Sale of Goods) Law, 5731-1971, only applied to contractual claims, but not to claims in tort, and Pamesa had been negligent in the manufacture of the tiles.

All three parties appealed the judgment of the District Court to the Supreme Court. Eisenberger appealed solely on the question of quantum of damages for the damage to its goodwill. Mendelson appealed the finding that it was liable to Eisenberger. Pamesa appealed the finding that it was liable to Mendelson.

The main question in the appeal was whether the prescription period of two years in the Sale (International Sale of Goods) Law can be circumvented by a buyer who does not give notice of a defect in goods by raising a claim against the seller (manufacturer) in tort.

Held: The Supreme Court allowed Pamesa's appeal. Even if Pamesa had been aware that the tiles were problematic, this was insufficient. Article 40 of the Hague Convention relating to a Uniform Law on the Formation of Contracts for the International Sale of Goods of 1964 provides that the prescription period of two years for international sales of goods will not apply if the seller knew of the defect, but the buyer needs to prove that the seller knew of the specific defect being alleged. Awareness of 'problems' in a certain product is insufficient. Mendelson should have given Pamesa notice within two years of receiving the goods, and since it did not do so, the action was prescribed under the Sale (International Sale of Goods) Law.

The Supreme Court held that the District Court was essentially correct when it held that a buyer may sue a seller (manufacturer) for negligence in an international sale of goods after the two year prescription period has expired. But after the two year prescription period has expired, the seller no longer has strict liability under the Sale (International Sale of Goods) Law, and the buyer is required to prove negligence. The Supreme Court held that Mendelson had not discharged the burden of proving that Pamesa had in fact been negligent.

Mendelson's appeal was allowed solely on the question of deducting Value Added Tax from the amount awarded, a question that Eisenberger did not address in its arguments.

Appeal CA 7833/06 allowed. Appeal CA 8125/06 allowed in part. Appeal CA 8495/06 denied.

Legislation cited:

Contracting Contract Law, 5734-1974, s. 3(b)(1).
Lease and Loan Law, 5731-1971, s. 6(2).
Sale Law, 5728-1968, ss. 11, 14, 15, 16.
Sale (Apartments) Law, 5733-1973, s. 4A.
Sale (Formation of Contracts for International Sale of Goods) Law, 5738-1978.
Sale (International Sale of Goods) Law, 5731-1971, schedule, arts. 33(a)(5), 34, 38, 39, 39(1), 40.
Sale (International Sale of Goods) Law, 5760-1999, s. 6.
Torts Ordinance [New Version].
Value Added Tax Law, 5736-1976, s. 38.

Israeli Supreme Court cases cited:

[1] CA 306/85 *Datalab Management Pty. Ltd v. Pollak International Ltd* [1989] IsrSC 43(2) 309.
[2] CA 465/80 *S. Solondz Ltd v. Hatehof Iron Industry Ltd* [1984] IsrSC 38(3) 630.
[3] FH 20/82 *Adders Building Materials Ltd v. Harlow and Jones* [1988] IsrSC 42(1) 221.
[4] CA 3912/90 *Eximin SA v. Itel Style Ferarri Textile and Shoes Ltd* [1993] IsrSC 47(4) 64; **[1992-4] IsrLR 129**.
[5] FH 36/84 *Teichner v. Air France Airlines* [1987] IsrSC 41(1) 589.
[6] CA 132/85 *Ameropa AG v. H.S.Y. HaMegader Steel Industries Ltd* [1987] IsrSC 41(4) 477.
[7] CA 508/86 *Bromberg v. Vardi* [1989] IsrSC 43(3) 555.
[8] CA 3552/01 *Banco Exterior (Suiza) SA v. Jacob Caspi Ltd* [2005] IsrSC 59(4) 941.
[9] CA 4836/06 *Estate of Hamud v. Harab* (unreported).
[10] CA 1432/03 *Yinon Food Products Manufacture and Marketing Ltd v. Kara'an* [2005] IsrSC 59(1) 345.
[11] LCA 4060/03 *Palestinian Authority v. Dayan* (unreported).
[12] LCA 2752/03 *Metallurgique de Gerzat S.A. v. Wilensky* [2003] IsrSC 57(6) 145.
[13] FH 1558/94 *Nafisi v. Nafisi* [1996] IsrSC 50(3) 573.
[14] LCA 2561/99 *Globes Publisher Itonut 1983 Ltd v. Weinstock* (unreported).
[15] CA 1227/97 *Salit HaAdumim Quarrying and Factory for Stone Works Ltd v. Eli* [1999] IsrSC 53(3) 247.

[16] LCA 1272/05 *Carmi v. Sabag* (unreported).
[17] CA 145/80 *Vaknin v. Beit Shemesh Local Council* [1983] IsrSC 37(1) 113.
[18] LCA 4224/04 *Beit Sasson Ltd v. Workers' Housing and Investments Ltd* [2005] IsrSC 59(6) 625.
[19] CA 8301/04 *Assessment Officer for Large Enterprises v. Pi Gelilot Fuel Depots and Pipes Ltd* (not yet reported).
[20] CA 140/82 *Bromine Compounds Ltd v. Parod Kibbutz* [1986] IsrSC 40(1) 763.
[21] CA 487/82 *Nadler v. Sadeh* [1984] IsrSC 38(4) 21.
[22] CA 778/83 *Estate of Sarah Saidi v. Poor* [1986] IsrSC 40(4) 628.
[23] CA 2245/91 *Bernstein v. Atiya* [1995] IsrSC 49(3) 709.

Israel District Court cases cited:
[24] CA (Jer) 30/92 *Workers' Housing Ltd v. Tal* (unreported).
[25] CC (TA) 1171/92 *Cor-Serve Ltd v. Argal Galit Packaging Ltd* (unreported).
[26] CA (Jer) 30/92 *Workers' Housing Ltd v. Tal* (unreported).
[27] CApp (Jer) 1712/06 *Landwirtsckammer Schleswig-Holstein v. Heinz Remedia Ltd* (unreported).
[28] CApp (Naz) 1856/05 *Philip Morris USA Inc v. Jarris* (unreported).

Israel Magistrates Court cases cited:
[29] CC (Jer) 21785/97 *Cohen v. Penthouse Building and Investment Co. Ltd* (unreported).
[30] CC (Jer) 22771/97 *Adika v. Mitzpeh Yerushalayim Ltd* (unreported).
[31] CC (TA) 52678/97 *Israel Universal Travel Ltd v. Kedoshim* (unreported).
[32] CC (Hrz) 1452/00 *Mono Electronics Ltd v. Dan Aviv Investments Ltd* (unreported).
[33] CApp (Jer) 9109/04 *Oved Levy Stone and Building Industries Ltd v. Ben-Hiun* (unreported).
[34] CC (BS) 3457/02 *Amit v. G. Kimchi Trade (1978) Ltd* (unreported).
[35] CC (Hf) 22667/04 *Kovlanko v. Israel Housing and Development Ltd* (unreported).
[36] CC (Jer) 4534/86 *Tak v. Workers' Housing Ltd* (unreported).
[37] CC (TA) 65741/04 *Zaguri v. Amit* (unreported).
[38] CC (TA) 167265/02 *HaDiklaim Israel Date Growers' Cooperative Ltd v. Eliyahu Insurance Co. Ltd* (unreported).
[39] CC (TA) 127508/98 *Nadar v. Rosenblatt* (unreported).

American cases cited:

[40] *Viva Vino Import Corp. v. Farnese Vini S.r.l.*, Civ. No. 99-6384, 2000 U.S. Dist. LEXIS 12347 (E.D. Pa. Aug. 29, 2000).

[41] *Geneva Pharms. Tech. Corp. v. Barr Labs., Inc.*, 201 F. Supp. 2d 236 (S.D.N.Y. 2002).

[42] *Sky Cast, Inc. v. Global Direct Distrib., LLC*, Civ. No. 07-161-JBT, 2008 U.S. Dist. LEXIS 21121 (E.D. Ky. Mar. 18, 2008).

[43] *Teevee Toons, Inc. v. Schubert GMBH*, Civ. No. 5189, 2006 U.S. Dist. LEXIS 59455 (S.D.N.Y. Aug. 22, 2006).

[44] *Miami Valley Paper, LLC v. Lebbing Engineering & Consulting GmbH*, case no. 1:05-CV-00702, 2006 U.S. Dist. LEXIS 76748 (S.D. Ohio Oct. 10, 2006).

Australian cases cited:

[45] *Ginza Pte Ltd v. Vista Corporation Pty Ltd* [2003] WASC 11 (Sup. Ct. W. Austl.).

Belgian cases cited:

[46] *S.r.l. R.C. v. B.V. B.A. R.T.*, Antwerp Appellate Court, 27 June 2001, Case no. 1997/AR/1554.

[47] *Deforche NV v. Prins Gebroeders Bouwstoffenhandel BV*, Ghent Appellate Court, 4 October 2004, Case no. 2003/AR/2763.

[48] *Dat-Schaub International a/s v. Kipco-Damaco N.V.*, Ghent Appellate Court, 16 May 2007, Case no. 2006/AR/47.

[49] *ING Insurance v. BVBA HVA Koeling*, Antwerp Appellate Court, 14 April 2004, Case no. 2002/AR902.

Canadian cases cited:

[50] *Shane v. JCB Belgium N.V.* [2003] O.J. 4497 (Super. Ct. Justice Ont.).

German cases cited:

[51] Schleswig Appellate Court, 22 August 2002, Case no. 11 U 40/01.

[52] Federal Court of Justice, 30 June 2004, Case no. 2004 BGH 1645.

[53] Munich District Court, 20 March 1995, Case no. 10 HKO 23750/94.

[54] Erfurt District Court, 29 July 1998, Case no. 3 HKO 43/98.

[55] Thüringen [Jena] Provincial Court of Appeal, 26 May 1998, 8 U 1667/97.

Swedish cases cited:

[56] *Beijing Light Automobile Co. Ltd v. Connell Limited Partnership* (Arbitration Inst. Stockholm Chamber of Commerce, 5 June 1998).

Swiss cases cited:

[57] Swiss Federal Court, 7 July 2004, 4C.144/2004/1ma.

Jewish law sources cited:

[58] M. Elon, Jewish Law — History, Sources, Principles (vol. 2, 1973).

[59] N. Rakover, *Commerce in Jewish Law* (1988).

For the appellant in CA 7833/06 (the second respondent in CA 8125/06 and CA 8495/06) — R. Chait.

For the appellant in CA 8125/06 (the first respondent in CA 7833/06 and CA 8495/06) — D. Or

For the appellant in CA 8495/06 (the second respondent in CA 7833/06 and the first respondent in CA 8125/06) — E. Soref.

JUDGMENT

Justice E. Rubinstein

1. We have before us three appeals against the judgment of the Haifa District Court (Justice Cohen) of 20 August 2006 in CC 137/01, which concern a dispute regarding responsibility and liability on account of defects in ceramic tiles. The parties are the contracting firm that built the building where the tiles were installed, a company that acquired the importer and sellers of the tiles (subject to the dispute set out below) and the manufacturer of the tiles (a Spanish company).

Background

2. Yaakov and Tovi Eisenberger Building and Public Works Co. Ltd (hereafter: Eisenberger) built a residential building in Kiryat Motzkin. For the purpose of tiling the floors of the apartments and the common areas, in 1996 Eisenberger bought tiles manufactured by a Spanish firm called Pamesa Ceramica (hereafter: Pamesa), which were imported into Israel by Gafni Sadeh Building Products Import and Marketing Co. Ltd (hereafter: Gafni Sadeh). 23% of the tiles were bought directly from Gafni Sadeh and 77% of the tiles were bought from Avnei Gazit Sanitary Installations Co. Ltd (hereafter: Avnei Gazit). Moreover, in 1995 a certain transaction took place between Gafni Sadeh and Avnei Gazit (the nature of which is the subject of a dispute between the parties), and

later Gafni Sadeh was acquired by Yisrael Mendelson Engineering Technical Supply Ltd (hereafter: Mendelson).

3. After the building became inhabited, a defect (which was not noticed by the Standards Institute at the time of import) was discovered in the tiles, and a demand was made to replace them. Initially, Mendelson contributed to replacing them, but later it became clear that all the tiles in the building needed to be replaced and Mendelson refused to accept liability, while Eisenberger gave an undertaking to the residents to do this. In 2001 Eisenberger filed a claim against Mendelson, in which it asked the court to find Mendelson liable to reimburse it for the price of the tiles and the cost of replacing them, and to pay compensation for damage to its reputation (in a total amount of NIS 1,173,100). Mendelson sent a third party notice to Pamesa, in which it asked the court to find Pamesa liable for any amount that it would be required to pay to Eisenberger.

The judgment in the trial court

4. On 20 August 2006 the District Court upheld the claim and the third party notice. It began by considering the factors that imposed liability on Mendelson. *First*, it held that Gafni Sadeh (which imported 100% of the tiles) was liable as *importer* for all of the damage (para. 10), and since it was acquired by Mendelson, Mendelson was fully liable. The court emphasized that the importer should be regarded as strictly liable, even without proof of fault. *Second*, it held that even if an importer should not be held liable in that capacity, it was clear that Gafni Sadeh and Avnei Gazit, as the *sellers* of the tiles, were each liable proportionately for non-conformity (under s. 11 of the Sale Law, 5728-1968) and it held that Gafni Sadeh had been shown to have taken upon itself the undertakings of Avnei Gazit, and it had subsequently been acquired by Mendelson. The argument raised by Mendelson — that Eisenberger did not report the defect within the period of four years stipulated in s. 15 of the Sale Law (Eisenberger bought the ceramics in 1995-1996) — was rejected. The court held that one of the residents had complained within the period (in 1998) and that additional claims had been filed in 1999. In the circumstances, the court held:

> 'A notice of non-conformity… is valid for all the defects that will be discovered in the tiles manufactured by that manufacturer in that building, even if other defects are

> discovered in other apartments and at a later stage' (para. 14).

Third, the court held that even without considering the legal basis for imposing liability, it is sufficient that when the defects were discovered Mendelson recognized its liability and replaced the floor in one of the apartments (para. 12). *Fourth*, the court held, on the basis of the testimony of Moshe Topolsky, the director of a company that was in the business of importing floor tiles (hereafter: Topolsky), that the defects in the Pamesa tiles were known to importers in that field, and therefore the conduct of Avnei Gazit and Gafni Sadeh fell short of what was to be expected of a reasonable seller, so that they could be liable for negligence. With regard to the quantum of damages, the court held that the damage to goodwill was NIS 75,000 (and not NIS 600,000 as claimed), and the cost of replacing the tiles was NIS 461,120.

5. With regard to the third party notice, Pamesa's main argument was that under arts. 38-39 of the schedule to the Sale (International Sale of Goods) Law, 5731-1971 (which continues to apply to transactions that were made before 5 February 2000; see below) (hereafter: the International Sale Law), the claim was prescribed, since art. 39(1) provides:

> 'The buyer shall lose the right to rely on a lack of conformity of the goods if he has not given the seller notice thereof *promptly after he discovered the lack of conformity or ought to have discovered it*. If a defect which could not have been revealed by the examination of the goods provided for in Article 38 is found later, the buyer may nonetheless rely on that defect, provided that he gives the seller notice thereof promptly after its discovery. *In any event, the buyer shall lose the right to rely on a lack of conformity of the goods if he has not given notice thereof to the seller within a period of two years* from the date on which the goods were handed over, unless the lack of conformity constituted a breach of a guarantee covering a longer period.'

It was claimed that the tiles were bought from Pamesa no later than 1996, and that the third party notice was only sent in 2001. This claim was rejected for two reasons. *First*, it was held that Topolsky testified that Pamesa was also aware of the defects in its products, and therefore art. 40 of the schedule to the International Sale Law applies. This article

provides that 'The seller shall not be entitled to rely on the provisions of Articles 38 and 39 if the lack of conformity relates to facts of which he knew, or of which he could not have been unaware, and which he did not disclose.' *Second*, the court accepted Mendelson's argument that the prescription period in art. 39 applies 'only to remedies in the contractual sphere, whereas the third party notice was also filed on the basis of causes of action arising from the law of torts and the law of unjust enrichment' (para. 18), and the court held that Pamesa had been negligent in the manufacture of the tiles.

The three appeals — introduction

6. As stated above, there are three appeals before us: Eisenberger is appealing only the quantum of damage for the damage to goodwill; Mendelson's appeal is wider in scope, but it declared during the hearing before us (following what was stated in the closing arguments in reply that it filed on 8 October 2007), that should Pamesa's appeal be denied, it would retract its appeal; Pamesa argues in its appeal that the third party notice should not have been upheld — *inter alia* it argued that the possibility of filing it was prescribed under art. 38 of the schedule to the International Sale Law, that this article also applies to claims outside the contractual sphere and that even should this interpretation not be accepted, it had not been proved that it was negligent. Since if Pamesa's appeal is denied there will be no need to consider Mendelson's appeal, I think that Pamesa's appeal should be considered first.

Pamesa's appeal (CA 7833/06)

7. It was alleged that Pamesa sent Gafni Sadeh four consignments of tiles (between November 1995 and September 1996), which were examined and approved by the Standards Institute, and later these were sold to Eisenberger and installed in the building. It was argued that Mendelson (originally Gafni Sadeh) breached its obligation under art. 38 of the schedule to the International Sale Law to examine the goods, and therefore lost 'the right to rely on a lack of conformity of the goods' (as stated in the last sentence of art. 39(a)). It was mentioned that in CA 306/85 *Datalab Management Pty. Ltd v. Pollak International Ltd* [1]) the court accepted a claim of prescription because of a delay of only four months in examining the products that had been supplied. It was also argued — and this would appear to be the main argument — that even though Mendelson knew of the defects in the tiles on 23 December 1998 (when it made a visit to the apartment of the Abutbul family), it did not

tell Pamesa of the defects until 20 March 2001 (when the notice was sent), and therefore the provision at the end of art. 39(1) ('In any event, the buyer shall lose the right to rely on a lack of conformity of the goods if he has not given notice thereof to the seller within a period of two years from the date on which the goods were handed over, unless the lack of conformity constituted a breach of a guarantee covering a longer period') applies.

8. With regard to the determination of the court that the provision of art. 40 ('The seller shall not be entitled to rely on the provisions of Articles 38 and 39 if the lack of conformity relates to facts of which he knew, or of which he could not have been unaware, and which he did not disclose') is applicable, it was argued that the court erred in deducing from Topolsky's testimony that Pamesa was aware of the defects in the tiles, for the following reasons. *First*, Topolsky's testimony was vague and did not relate to types of ceramics, production dates or specific types of defect. *Second*, in his cross-examination, Topolsky contradicted himself and testified that he had no personal knowledge of companies that had stopped working with Pamesa, or of defects in its products. *Third*, the CEO of Gafni Sadeh (hereafter: Shelomo Sadeh) testified that he had not encountered any defects in Pamesa's products, and this testimony should be regarded as an 'admission by a party.'

9. It was further argued that even if the claim that there was knowledge of previous defects is accepted, it does not establish constructive knowledge under art. 40. It was mentioned that in *Datalab Management Pty. Ltd v. Pollak International Ltd* [1] defective products had been discovered previously, and the court adopted the opposite approach, that knowledge of defects placed a greater duty on the buyer under art. 38 to examine the goods thoroughly, and it did not constitute knowledge under art. 40:

> 'The appellant knew that the quality of the merchandise was not perfect, and in the light of previous experience it should have discovered the defect immediately, if it wanted to rely on it' (at p. 303, *per* Justice Malz).

It was also argued that Mendelson had sued Eisenberger in the past for a cheque that was not honoured, and in its defence Eisenberger had raised claims with regard to defects in the tiles, but even at this stage Mendelson did not inform Pamesa.

10. With regard to the finding of the court that the prescription arrangements in the International Sale Law apply solely to contractual claims, it was argued that this makes the prescription arrangements meaningless, since it is of no consequence to the manufacturer abroad (whose reliance is supposed to be protected by the arrangements) whether he is sued in a contractual claim or in any other claim. It was also argued that this finding contradicts the determination of this court in CA 465/80 *S. Solondz Ltd v. Hatehof Iron Industry Ltd* [2] with regard to prescription under the International Sale Law:

> 'When the buyer does not comply with the obligations imposed on him under the Sale Law, he cannot avail himself of the Contracts (Remedies for Breach of Contract) Law… The reason for this is that if you say otherwise, what did the Sale Law achieve when it imposed duties on the buyer. He can always fail to comply with these and sue under the Contracts (Remedies for Breach of Contract) Law. This is precisely how the late learned Prof. Z. Zeltner interpreted s. 27… The author wrote that such an outcome of using the Contracts Law, when the obligations under the Sale Law have not been fulfilled, is undesirable and cannot be reconciled with the intention of the legislature' (*S. Solondz Ltd v. Hatehof Iron Industry Ltd* [2], at p. 634, *per* Justice Sheinbaum).

Later in that judgment Vice-President Ben-Porat said:

> 'I agree in this matter with my honourable colleague, Justice Sheinbaum, that when the buyer has missed the time to give notice to the seller of the non-conformity of the goods under the Sale Law (which is the substantive law), he cannot rely any longer on the non-conformity so that he will be entitled to compensation under the Remedies Law… Any other interpretation will make the provisions of ss. 13-16 meaningless… *The same line of thinking that I have followed with regard to the relationship between the Sale Law and the Remedies Law is also valid with regard to the relationship between the Sale Law and the Torts Ordinance [New Version]*…' (pp. 637-638; emphasis added).

11. Finally it was argued that even if the position that the prescription barrier in the International Sale Law does not apply to a negligence

claim is upheld, no negligence by Pamesa had been proved. *First*, it was argued that Mendelson did not present an opinion proving negligence, but only an opinion from Eisenberger stating that there are aesthetic defects in the tiles. It was argued that the court erred in holding that the fact that the tiles were defective was sufficient to prove negligence, since causation is merely one of the elements of the tort of negligence, and it is insufficient to establish fault in tort.

12. *Second*, it was stated that the tiles were approved by the Israel Standards Institute, which also did not notice the defects. *Third*, it was stated that the CEO of Mendelson testified that the cause of the defects was improper use (tiling public areas instead of only private apartments), and the deputy CEO of Mendelson testified that the cause of the defects (at least in Abutbul's apartment) was bad work by the floor tile worker who laid them, so how could Mendelson claim negligence on the part of Pamesa? *Fourth*, it was stated that Mendelson's CEO testified that examinations that were carried out did not discover any defect in the tiles, and that the defects appeared only after several months of use. *Fifth*, it was argued that the court erred in ignoring Mendelson's contributory negligence in breaching its duty to examine the tiles when they arrived in Israel.

Mendelson's response to Pamesa's arguments

13. First, Mendelson said that the defects in the tiles only appeared after use, and it is therefore obvious that Mendelson could not have given notice that they existed immediately after they arrived in Israel. It was emphasized that Eisenberger did indeed file a claim in 1999 in the Magistrates Court (CC 13410/99), but that claim referred (mistakenly) to tiles that were bought in 1998; only when an amended statement of claim was filed in the District Court (in 2001) was it stated that the tiles were bought in 1996, and therefore it was only at this stage that Mendelson notified Pamesa of the defects that had been discovered. It was also argued that the conditions of art. 40 were satisfied, and that the trial court had been correct to give weight to Topolsky's evidence in which he said that he was personally compensated by Pamesa. It was emphasized that this testimony was consistent with the testimony of Shelomo Sadeh, and that if Pamesa had any reservations regarding the details of the defects mentioned in Topolsky's testimony, it should have cross-examined him on this matter.

14. In the legal sphere it was argued that the restrictions in the International Sale Law do not apply to unjust enrichment claims or tort claims, and that the remarks of Vice-President Ben-Porat in *S. Solondz Ltd v. Hatehof Iron Industry Ltd* [2] — which were described by the District Court as having been said *in obiter* (CA (Jer) 30/92 *Workers' Housing Ltd v. Tal* [24]) — do not constitute case law. It was argued that in FH 20/82 *Adders Building Materials Ltd v. Harlow and Jones* [3] an unjust enrichment claim was upheld, even though the transaction was governed by the International Sale Law, which precluded a claim for a breach. It was argued that this position is implied by the wording of the law ('This law only regulates the obligations of the seller and the buyer *that derive from the sale contract*' (s. 8; emphasis added)), it has been expressed in the past by the District Court (CC (TA) 1171/92 *Cor-Serve Ltd v. Argal Galit Packaging Ltd* [25]), and it is consistent with case law that has held that the existence of a contractual cause of action does not preclude other causes of action. It was emphasized that scholars have also written with regard to prescription provisions similar to ss. 14-15 of the Sale Law that they do not preclude a claim in tort or for unjust enrichment (referring to E. Zamir, *The Principle of Conformity in the Performance of Contracts* (1990), at pp. 306-307; E. Zamir, *The Sale Law, 5728-1968* (1987), at pp. 313-314, 327; E. Zamir, A.M. Rabello, G. Shalev, *A Brief Commentary on Private Law Statutes* (1996), at p. 407), and it was mentioned that criticism has been directed at the remarks of Vice-President Ben-Porat cited above (D. Friedmann, N. Cohen, *Contracts* (vol. 1, 1991), at p. 564, note 207).

15. It was argued that if the assumption that the International Sale Law does not preclude claims in tort or for unjust enrichment is accepted (and, as stated above, it was accepted by the trial court), then Pamesa was negligent, made a false representation and unjustly enriched itself. It was *negligent* because it sold defective tiles that a reasonable person would not have sold, in breach of the duty of care to the consumer (it was also claimed that the burden of proof lay with Pamesa under s. 41 of the Torts Ordinance [New Version] (hereafter — the Torts Ordinance); it *made a false representation* because it represented the tiles to be 'grade A,' when it was already aware of the various defects in them; and it *unjustly enriched itself*, because it would be unjust if Pamesa were not to compensate Mendelson for expenses that Mendelson incurred as a result of defective products that Pamesa manufactured.

Pamesa's appeal — outline for deliberations

16. In order to decide the Pamesa appeal, we need to address two parallel tracks. The first track is the *claim for non-conformity under the International Sale Law*. In this regard, Pamesa's claim that it was not given notice within two years from the time the transaction was performed (as required by art. 39) cannot be disputed, and the question is whether art. 40, which allows Mendelson to sue even though it did not give the notice, applies. The other track is the *claim in torts or for unjust enrichment*. In this regard we need to decide a legal question, which is whether the applicability of the International Sale Law precludes a concurrent claim, and a factual question, which is whether in the circumstances the elements of such a claim were proved. We shall begin by analyzing the International Sale Law, since the application of arts. 38-40 of the schedule to that law are the basis for considering both tracks. Indeed, it cannot be denied that intuition leads to the conclusion that Pamesa is liable, since it is the manufacturer, whereas the other 'players' are middle-men at various levels; but does this feeling really reflect the legal position? As we shall see below, I think that the answer is no.

17. Let us first say that the International Sale Law of 1971, which is based on the Hague Convention relating to a Uniform Law on the Formation of Contracts for the International Sale of Goods of 1964 that was made by Unidroit (hereafter: the Hague Convention), was replaced on 5 November 1999 by the Sale (International Sale of Goods) Law, 5760-1999, which is based on the United Nations Convention on Contracts for the International Sale of Goods (known as CISG), which was signed in Vienna in 1980 (hereafter: the Vienna Convention). The Vienna Convention (which was promoted by the United Nations Commission on International Trade Law – UNCITRAL), was included in the schedule to the law of 1999, and it replaced (as of 5 February 2000) both the International Sale Law and the Sale (Formation of Contracts for International Sale of Goods) Law, 5738-1978. Under s. 6 of the 1999 law, 'Contracts for international sale of goods that were made before the commencement of this law shall be governed by the previous law,' and therefore the 1999 law does not apply to the case before us.

18. However, a consideration of the provisions of the International Sale Law has general importance even after its replacement, both because very similar provisions are included in the new law, and because

of the historical effect of the Hague Convention of 1964 on domestic law (the Sale Law, 5728-1968):

> 'In April 1964 an international conference took place at the Hague, with Israel's participation, at which a proposal was adopted for a uniform law regarding international sales of goods. This proposed law was the result of strenuous efforts since 1929 on the part of outstanding jurists from most of the commercial countries of the world. It is therefore natural that the proposed law [the Sale Law, 5728-1968] derives most of its provisions from the aforesaid proposal and also has the same structure…' (the draft Sale Law, 5725-1965, *Draft Laws* 5725, 279, at p. 280).

Indeed, in *S. Solondz Ltd v. Hatehof Iron Industry Ltd* [2] (a judgment given in 1984), use was made of the definitions in the schedule to the International Sale Law for the purpose of interpreting similar terms in the Sale Law (see also CA 3912/90 *Eximin SA v. Itel Style Ferarri Textile and Shoes Ltd* [4]). This is evident from the subject-matter. There are fields of law of a 'local' and unique nature, where the benefit of comparative law is very limited. There are fields in which, even if they have a certain local aspect, there is a benefit, and even considerable benefit, in consulting comparative law. And there are fields, such as the one that we are considering, in which their international aspect is innate, and it is continually increasing with the spread of globalization.

On international commercial legislation

19. The Hague Convention was adopted in 1964 (at the end of a process that began in 1930) in order to meet a need for certainty in international transactions by means of a uniform law, which allows the parties to an international transaction to know from the outset which legal arrangements will apply to the transaction (for a survey, see A. Reich, 'The Sale (International Sale of Goods) Law, 5731-1971: "Replacing Old with New",' 14 *Bar-Ilan Law Studies (Mehkarei Mishpat)* 127 (1998); A. Reich, 'Globalization and Law: The Effect of International Law on Commercial Law in Israel in the Next Fifty Years,' 17 *Bar-Ilan Law Studies (Mehkarei Mishpat)* 17 (2002), at p. 33; see also the introduction to André Tunc's commentary on the convention: A. Tunc, *Commentary on the Hague Conventions of the 1st of July 1964 on International Sale of Goods and on the Formation of the Contract of Sale*

(1966); J. Honnold, 'The 1964 Hague Conventions and Uniform Laws on the International Sale of Goods,' 13 *Am. J. Comp. L.* 451 (1964)).

20. No one can deny the importance of the approach embodied in these conventions, which increases with the spread of globalization. In tribute to our predecessors, I should point out that Justice Netanyahu already made remarks to this effect in 1987:

> 'When transport and commercial links are strengthened between many different countries around the world, between peoples that are separated by language, culture, tradition, habits and ways of thinking, concepts of justice and morality and legal systems, the importance of uniform commercial laws becomes greater; otherwise "… one hundred and twenty-seven states, each state with its own writing, and each people with its own language" (Esther 8, 9) will each speak in its own language, "… so that no one will understand another's language" (Genesis 11, 7)' (FH 36/84 *Teichner v. Air France Airlines* [5], at p. 640).

21. With regard to earlier generations, we should point out in brief that the need for enacting a 'uniform law' that traverses legal systems of different countries (especially in the commercial sphere) arose and was implemented in various contexts in Jewish law. The fact that for hundreds of years Jewish law developed in community contexts necessitated the creation of 'uniform legislation,' which would allow interaction between communities that adopted different legal approaches in their domestic law and were subject to various external legal systems. In this context, historical Jewish law created formal legislation mechanisms that went beyond individual communities, such as the legislation of the 'Council of Four Lands' (in East Europe, between 1580 and 1764; see also M. Elon, *Jewish Law — History, Sources, Principles* (vol. 2, 1973), at pp. 661-662), as well as informal ones, such as the legislation that was made at 'fairs,' international gatherings that were mainly commercial, at which Jewish law experts from various communities met. Thus we find with regard to legislation that was adopted at a fair:

> 'And these things [the enactments adopted at the fair concerning usury] should not be treated lightly and rejected by the reader… because we have thoroughly considered them, and heads of rabbinical academies that were here with

> us at the fair have agreed to them, but they went on their way after agreement was reached, and I (Rabbi Yehoshua Falk Katz, the author of *Meirat Einayim*, a commentary on the *Shulhan Aruch* (the *Hoshen Mishpat* section), Poland, 16th-17th centuries) alone have remained, and I put these matters in writing at the command of the heads of the states' (conclusion to the *Meirat Einayim* booklet, cited by N. Rakover, *Commerce in Jewish Law* (1988), at p. 213).

22. As in modern law, in the history of Jewish law consensus was not always achieved between all the communities, and there were communities that chose not to adopt certain legislation. This, for example, occurred with regard to the enactment of the Council of the Four Lands concerning the principle of equality between creditors — a principle that is now regarded as a cornerstone of bankruptcy law; the debtor's ability to go from one community to another, and thereby to prefer creditors or conceal assets completely required uniform legislation for all communities. Thus we find:

> 'Immediately after there is a report that someone has absconded, the court of that district is obliged to declare and warn everyone not to take any money from him, and if someone takes anything he does not acquire any right and must return it, so that every creditor, whether from that city or from another city or from another country *will all be equal under the law*, and it will be held by the court until the next fair' (from the enactment of the Council of the Four Lands, cited by Y. Shepansky, *HaTakanot BeYisrael* (vol. 4, 1993) 418-421; emphasis added).

But as often occurs in international law, the important community in Lithuania did not adopt this enactment, and therefore it was expressly stated in certain enactments that they did not apply to the members of that community (*ibid*., at p. 421).

The prescription provisions in articles 38-40 of the Hague Convention

23. Articles 38-40 of the Hague Convention (which are found in the schedule to the International Sale Law) include the prescription arrangements that are relevant to our case:

> '*Article 38*
>
> 1. The buyer shall examine the goods, or cause them to be examined, promptly…

> *Article 39*
>
> 1. The buyer shall lose the right to rely on a lack of conformity of the goods if he has not given the seller notice thereof promptly after he discovered the lack of conformity or ought to have discovered it. If a defect which could not have been revealed by the examination of the goods provided for in Article 38 is found later, the buyer may nonetheless rely on that defect, provided that he gives the seller notice thereof promptly after its discovery. In any event, the buyer shall lose the right to rely on a lack of conformity of the goods if he has not given notice thereof to the seller within a period of two years from the date on which the goods were handed over, unless the lack of conformity constituted a breach of a guarantee covering a longer period…
>
> *Article 40*
>
> The seller shall not be entitled to rely on the provisions of Articles 38 and 39 if the lack of conformity relates to facts of which he knew, or of which he could not have been unaware, and which he did not disclose.'

These articles apply to the case before us, but we should point out that the text of art. 40 of the schedule to the Sale (International Sale of Goods) Law, 5760-1999 (the Vienna Convention) — and the persons who drafted the convention should be praised for not changing the numbers of the relevant articles — is as follows:

> 'The seller is not entitled to rely on the provisions of articles 38 and 39 if the lack of conformity relates to facts of which he knew or could not have been unaware and which he did not disclose to the buyer.'

Thus we see that in substance there is no change in the provisions of the article between the Hague Convention and the Vienna Convention, and the Vienna Convention restated the same provisions (see also F. Ferrari, 'Recent Developments: CISG - Specific Topics of the CISG in the Light of Judicial Application and Scholarly Writing,' 15 *J.L. & Com.* 1, 113 (1995); C.M. Bianca *et al*., *Commentary on the International Sales Law: The 1980 Vienna Sales Convention* (1987), at p. 314; P. Schlechtriem, *Commentary on the UN Convention on the International Sale of Goods (CISG)* (Geoffrey Thomas trans., 2d English ed., 2005), at

p. 477). In its theoretical basis and in the field of comparative research it is therefore possible without any difficulty to draw a line linking the two versions, and we shall do this below.

24. In the case before us, the tiles were examined by the Standards Institute immediately upon their arrival in Israel, and they were not found to be defective. Thus Mendelson (and at that time, Gafni Sadeh) complied with its obligation under art. 38. But Mendelson did not satisfy the requirements of art. 39, *first*, because even though it already knew of the defects in 1998, it did not give Pamesa 'notice thereof promptly after its discovery,' and, *second*, because in any case no notice was given 'within a period of two years from the date on which the goods were handed over.'

25. In the past this court has addressed the purpose and importance of the prescription provisions in the schedule to the International Sale Law, and it has even held that this prescription is *substantive* rather than procedural:

> 'The International Sale Law concerns international transactions in which legal certainty is of great importance. The enactment of the law was intended to create legal certainty by creating uniformity and preventing the application of the domestic laws of different states. International transactions sometimes reflect many transfers of the product from one country to another until it reaches the consumer. A quick determination of the legal position is essential in order to create certainty with regard to the respective rights of all the parties that are involved in the transaction. The determination of a prescription period of one year [under art. 49 of the convention] is not required for the main reason that usually underlies prescription, which is the keeping of evidence, but for a quick determination of the legal position between the parties to the transaction. In order to achieve this purpose, this provision should be regarded as reflecting prescription that causes the actual right to expire' (CA 132/85 *Ameropa AG v. H.S.Y. HaMegader Steel Industries Ltd* [6], at p. 487, *per* President Shamgar; see also CA 508/86 *Bromberg v. Vardi* [7], at p. 560; CA 3552/01 *Banco Exterior (Suiza) SA v. Jacob Caspi Ltd* [8]).

Elsewhere, in *S. Solondz Ltd v. Hatehof Iron Industry Ltd* [2], it was said:

> 'Indeed, it is possible to question why the legislature sought to protect the seller… It is possible to answer this question with reference to the needs of the commercial world. It is merely that the legislature sought to ensure an environment of certainty, so that a sale transaction that was made and performed should come to an end and no longer be subject to any challenge. In this way the seller may continue his economic activity, free from the concern that the buyer will raise complaints at a later date with regard to a defect that was found in the goods' (*S. Solondz Ltd v. Hatehof Iron Industry Ltd* [2], at pp. 636-637, *per* Vice-President Ben-Porat).

26. But there is another side to the prescription provisions, which is art. 40: 'The seller shall not be entitled to rely on the provisions of Articles 38 and 39 if the lack of conformity relates to facts of which he knew, or of which he could not have been unaware, and which he did not disclose.' Mendelson's position, which was upheld in the trial court, is that the fact that Pamesa was aware of defects that had been discovered in other goods that it marketed to other importers in Israel is sufficient to satisfy the requirements of the article. According to Pamesa, this is an unreasonable interpretation of the section. Let us therefore turn to consider the purpose and scope of art. 40.

Article 40 and the principle of good faith

27. Article 40 of the Hague Convention mainly concerns the application of the principle of good faith. This was stated in Tunc's Commentary as follows:

> 'Article 40 does no more than sanction a rule of good faith.'

The same is found in Graveson's commentary on the convention: 'The seller cannot rely on the previous Articles if he acted in *bad faith*' (R.H. Graveson et al., *The Uniform Laws on International Sales Act 1967: A Commentary* (1968), at p. 77; emphasis added). The assumption is that if the seller in bad faith concealed the goods' non-conformity, and this was discovered only after the prescription period ended, he does not *deserve* the protection of s. 39.

28. Similar and extensive remarks have been written with regard to art. 40 of the Vienna Convention, whose wording, as we have said, is very

similar and whose substance is identical to art. 40 of the Hague convention (we discussed the fundamental similarity above in paragraph 23):

> 'At first glance Art. 40 looks like a rule of *not protecting the seller in bad faith*, and it reflects a principle in the CISG which has been taken to be a general one... namely that of good faith and not protecting the fraudulent or ill-faithed party' (C.B. Andersen, 'Exceptions to the Notification Rule – Are they Uniformly Interpreted?' 9 *Vindobona J. Int'l Com. L. & Arb.* 17 (2005), at p. 26; emphasis added).

Similarly, Enderlein and Maskow's commentary on the Vienna Convention states: 'The seller has thus an obligation to disclose defects, which is based on the principle of *good faith*" (F. Enderlein & D. Maskow, *International Sales Law: United Nations Convention on Contracts for the International Sale of Goods* (1992), at p. 163; emphasis added).

29. Decisions of national courts have followed the same approach. In Belgian law it has been held, *inter alia*, that art. 40 merely applies the principle of good faith (*S.r.l. R.C. v. B.V. B.A. R.T.* [46]), and it is intended for cases in which *the seller has breached his duty* to disclose defects of which he was aware (*Deforche NV v. Prins Gebroeders Bouwstoffenhandel BV* [47]; see also Larry A. DiMatteo *et al*., 'The Interpretive Turn in International Sales Law: An Analysis of Fifteen Years of CISG Jurisprudence,' 24 *Nw. J. Int'l L. & Bus.* 299 (2004), at p. 401). In a German judgment it was held that the provisions of the article are merely a specific case of a breach of the duty of good faith (Schleswig Appellate Court, 22 August 2002, Case no. 11 U 40/01 [51]). This principle was also clearly stated in a judgment of the Arbitration Institute of the Stockholm Chamber of Commerce [SCC]:

> 'It should be noted that the provision of Article 40 is intended to be a "safety valve" for preserving the buyer's remedies for non-conformity in cases *where the seller has himself forfeited the right of protection*, granted by provisions on the buyer's timely examination and notice, against claims for such remedies… Thus, the Article 40 is an *expression of the principles of fair trading*' (*Beijing Light Automobile Co. Ltd v. Connell Limited Partnership* [56]).

30. It is therefore clear that art. 40 was intended for cases of bad faith, the extent of which is related to the interpretation of the vague expression 'which he knew, *or of which he could not have been unaware*,' which we shall consider later. But it is clear that the article was not intended for cases where the seller did not disclose defects of which *he was unaware in good faith*. Before we turn to examine the mental element in art. 40, let us consider an additional rationale of this article, and the fact that we are dealing with an exceptional provision that should be interpreted narrowly.

Second rationale — article 40 as a circumstance in which a notice under article 39 is unnecessary

31. In addition to the principle of good faith, it has been proposed that art. 40 has an additional rationale, which combines a practical and a normative argument. Article 39 provides that a buyer shall lose the right to rely on a lack of conformity if he has not given notice within a period of two years (at most) from the date on which the goods were handed over. This provision allows a seller to assume with certainty that if the buyer has not given notice of a lack of conformity within two years, the goods were found to be suitable and he is not longer exposed to any claims (which is also related to probative considerations). According to this approach, it is clear that if the seller is aware of the lack of conformity (as in art. 40), *he does not need notice from the buyer* of the lack of conformity, since in any case he is aware of it:

> '… if the seller could not have been unaware of the defects, he cannot use the excuse that he did not know of the defects' (F. Enderlein, 'Rights and Obligations of the Seller under the UN Convention on Contracts for the International Sale of Goods,' in *International Sale of Goods: Dubrovnik Lectures* 133 (P. Šarčević & P. Volken eds., 1985), at p. 175).

This explanation is also given by Ferrari ('Recent Developments: CISG - Specific Topics of the CISG in the Light of Judicial Application and Scholarly Writing,' *supra*) and by DiMatteo *et al.*:

> 'If the seller knows of the non-conformity and fails to reveal it, he cannot fall back upon the buyer's failure to *tell him what he already knew*' (DiMatteo *et al*., 'The Interpretive Turn in International Sales Law: An Analysis of Fifteen Years of CISG Jurisprudence,' *supra*, at p. 401).

This was also mentioned in a judgment of the Austrian Supreme Court (30 November 2006, case no. 6 Ob 257/06x), and by Bianca *et al.*:

> 'In such situations, the seller has no reasonable basis for requiring the buyer to notify him of these facts' (Bianca *et al.*, *Commentary on the International Sales Law: The 1980 Vienna Sales Convention*, *supra*, at p. 314).

32. This rationale for the provision — that the seller cannot rely on the failure to give notice of facts that he in any case knew — also appears in the writings of Israeli legal scholars in similar commercial contexts relating to Israeli domestic law, such as with regard to s. 16 of the Sale Law (which, as we have already said, was based to a large extent on the Hague Convention):

> 'The main reasons for the requirement of the prompt notice… were explained above: to allow the seller to repair or replace the goods, to notify the seller that the transaction involves a problem that requires his attention, and to promote commercial certainty and the seller's peace of mind… When the seller knows of the non-conformity, or should have known of it [this is the wording of the provision in the Sale Law], there is no basis for these reasons, and therefore there is a justification for exempting the buyer from the obligation defined in ss. 13 to 15, at least for the most part… He [the seller] *cannot have a reasonable expectation of "peace of mind" when he knows, or should have known, that he breached his contractual obligations*' (E. Zamir, *The Sale Law*, at pp. 332-333; emphasis added; see also Z. Zeltner, *The Sale Law, 5728-1968* (in G. Tedeschi ed., *Commentary on the Laws of Contract*, 1972), at p. 92).

Elsewhere, with regard to the duty of giving notice in s. 4A of the Sale (Apartments) Law, 5733-1973:

> 'The aforesaid objective justification gives rise to the legitimate limits of the obligations of giving notice and examining the goods… There is no reason to impose these burdens where the party in breach *de facto* knows of the non-conformity in the object that he supplied… *The supplier has no legitimate interest in benefiting because the party that received the goods did not give notice of something that he in any case knew or should have known*. In other legal systems…

> in conventions concerning the international sale of goods… this consideration led to the obvious conclusion that the buyer should be exempt… from the burden of giving notice of a non-conformity of which the seller, the landlord or the contractor was aware' (E. Zamir, 'The 1990 Amendment to the Sale (Apartments) Law: Winding Steps in the Right Direction,' 18 *Tel-Aviv University Law Review (Iyyunei Mishpat)* 201 (1994), at p. 219; emphasis added).

33. Following this approach, in cases where the seller is not aware of the non-conformity in the goods that he supplied, there is no reason to exempt the buyer from the duty to give notice.

Article 40 as an exception to the rule in articles 38-39

34. Articles 38-39 require the buyer to examine whether the goods conform to his requirements, and to give notice of any case of non-conformity. In view of the character of sale transactions, and especially international sales, these provisions, which contain a degree of inflexibility, were intended to guarantee to the seller that any non-conformity will be brought to his attention promptly upon its discovery, and no later than two years after the transaction is performed. Article 40 constitutes an exception to these provisions; as such, foreign case law and literature state that it should be interpreted *narrowly*. Some authorities are of the opinion that the article should be restricted to special circumstances only or to exceptional circumstances; these were the majority and minority opinions in the arbitration award mentioned in para. 29. The accepted approach has also been summarized as follows:

> 'Because the buyer's duty to examine the goods is so basic and fundamental, there is agreement in court decisions and scholarly doctrine that only in very limited, exceptional, and even "unusual" circumstances should sellers be precluded from relying on the buyer's failure to meet its examination/notice obligations. How "exceptional" should those circumstances be is, of course, a matter of degree' (A.M. Garro, 'The Buyer's "Safety Valve" Under Article 40: What Is the Seller Supposed to Know and When?' 25 *J.L. & Com.* 253 (2005-2006), at p. 255).

35. This makes sense in view of the importance that the convention attaches to the factor of certainty, and the desire to induce buyers who have discovered a lack of conformity in goods to bring it to the attention

of the seller promptly. It should be noted that in domestic law, the Israeli legislature adopted a position that is more *favourable to the seller*, and it stipulated in s. 16 of the Sale Law a requirement that does not exist in the convention:

> 'If the non-conformity derives from facts that the seller knew or should have known when the contract was made and he did not disclose them to the buyer, the buyer is entitled to rely on it despite what is stated in ss. 14 and 15 or in any agreement, *provided that he gave the seller notice of it immediately after he discovered it*' (emphasis added).

The provision in the last part of the section provides that even if the conditions of art. 40 of the convention (which appear in the first part of the section) are satisfied, the buyer cannot rely on this indefinitely, and he is required to give the seller notice promptly. As stated above, this stipulation does not exist in art. 40 of the convention, and therefore a narrow interpretation is implied, which will limit the cases in which a buyer may raise a claim of non-conformity years after the transaction (we will say more below on the buyer's duty to make use of the right in good faith). In the case before us, it will be recalled that Mendelson knew of the non-conformity for *almost three years* before it gave notice to Pamesa.

The mental element in article 40 — what ought the seller to know?

36. Article 40 of the Hague Convention (the schedule to the International Sale Law) has the following wording:

> 'The seller shall not be entitled to rely on the provisions of Articles 38 and 39 if the lack of conformity relates to facts *of which he knew, or of which he could not have been unaware*, and which he did not disclose' (emphasis added; article 40 of the Vienna Convention was cited above in para. 23).

Here, too, interpretation is required. It would appear that the main question is whether the expression 'of which he could not have been unaware' should be interpreted as a requirement of *de facto* awareness (or the equivalent), or whether it should be interpreted as a *normative* requirement, which includes awareness of the facts of which *a reasonable seller should have* been aware.

37. *Prima facie*, the wording of the article does not support 'normative' awareness (negligence) but requires *de facto* awareness:

> 'With the wording of the provision being what it is, then it is certainly safe to assume that once the degree of awareness

> slows down to a "should have known" or bonus pater-assessment, then Art. 40 has lost its relevance. Linguistically, the concept of reasonableness — and what the seller could or should have been required to know — does not encompass the same situation as that where the seller could not have been unaware. Courts and tribunals do not, on the face of things, seem to be able to rightfully invoke Art. 40 where knowledge reasonably should have been present, but only where knowledge reasonably can be inferred (if not proven), and it is at inference that the line should be drawn' (Andersen, 'Exceptions to the Notification Rule – Are they Uniformly Interpreted?' *supra*, at p. 27).

It would appear that the Israeli legislature also thought that the language of the Hague Convention does not require negligence, and therefore it adopted a different language in the Sale Law (which admittedly preceded the International Sale Law, but was based as aforesaid on the text of the convention): 'If the non-conformity derives from facts that the seller knew *or should have known*' (emphasis added). This change was analysed by the scholars Zamir (*The Sale Law*, at p. 333; 'The 1990 Amendment to the Sale (Apartments) Law: Winding Steps in the Right Direction,' *supra*, at pp. 219-220) and Zeltner:

> 'The Uniform Law [the Hague Convention] limits the application of this exception [art. 40] to those cases where the seller knew or "could not have been unaware" of the facts giving rise to the non-conformity, *whereas our law extends also to cases of negligence* on the part of the seller, by adopting the wording "or should have known"' (Zeltner, *The Sale Law, 5728-1968*, *supra*, at p. 92; emphasis added).

38. Despite the textual restrictions, scholars and various courts have adopted an interpretation that art. 40 also applies in cases where the seller is not *de facto* aware of the non-conformity in the goods. In their book (in 1992), Enderlein & Maskow summarize the opinions of scholars in descending order from the strictest to the most lenient:

> 'The wording "could not have been unaware" is defined by Huber (482) as being a little bit less than cunning and a little bit more than gross negligence; others treat it is as being equivalent to gross negligence (Schlechtriem, 60; Welser/Doralt, 113)... The wording of the CISG itself would,

> in our view, include simple negligence, which could also be described as a violation of the customary care in trade' (p. 164).

In other words, the spectrum of views ranges from 'almost fraud' to negligence that constitutes a violation of 'customary care in trade.' Ferrari (in his article of 1995) was of the opinion that the clause requires gross negligence on the part of the seller, and this is also the view of Graveson *et al*. in their commentary on the Hague Convention (at p. 77). Enderlein & Maskow admittedly say that Schlechtriem requires gross negligence, but it would appear that he is referring to a stricter requirement of 'more than gross negligence' (1998 edition, at pp. 321-322; 2005 edition, at p. 478). Garro (in his 2005-2006 article 'The Buyer's "Safety Valve" Under Article 40: What Is the Seller Supposed to Know and When?' *supra*) says that 'Everything seems to indicate, however, that the defects leading to the lack of conformity must have been *rather obvious* for Article 40 to apply' (at p. 257).

39. These approaches rely — and later influence — the case law of national courts. In one case the Federal Court of Justice in Germany (Der Bundesgerichtshof [BGH]) held that in the absence of actual knowledge, gross negligence is sufficient (Federal Court of Justice, 30 June 2004, Case no. 2004 BGH 1645 [52]). The courts in Belgium have discussed bad faith or 'severe negligence' on the part of the seller (*Dat-Schaub International a/s v. Kipco-Damaco N.V.* [48]) and the breach of an obligation by him (*Deforche NV v. Prins Gebroeders Bouwstoffenhandel BV* [47]).

40. In the arbitration award of the Arbitration Institute of the Stockholm Chamber of Commerce [SCC] (which is mentioned in para. 29), the question of the mental element was discussed at length. It was said that there was no doubt that in order not to negate the provisions of arts. 38-39 of the convention in their entirety, a general awareness on the part of the seller that the goods that he sold 'are not of the best quality or leave something to be desired' is insufficient. On the other hand, it was held that fraud and similar cases of bad faith on the part of the seller undoubtedly satisfy the requirements of the article, and it may be assumed that the seller had knowledge when the non-conformity is one that can easily be seen. The arbitrators held conflicting opinions in the case where there is no evidence that the seller was actually aware of the non-conformity. The majority opinion was that art. 40 refers to a seller

who 'consciously disregarded facts which were of relevance to the non-conformity.' The minority opinion held that in addition to this a higher degree of subjective blameworthiness is required:

> 'The arbitrators agree… that Article 40 shall only be applied in special circumstances. I would be inclined to use the words "exceptional circumstances" as I consider it a principle of fundamental importance from the point of view of predictability that a manufacturer shall normally be able to rely upon the expiry of an agreed guarantee time to represent the end point of his liability for defects (non-conformity). My reading of the requirement for the seller's awareness is therefore more restrictive. The test of awareness or "conscious disregard" on the part of the seller requires in my opinion a higher degree of subjective blameworthiness than the one demonstrated by [seller] in this instance…'

41. As will be explained later, the case before us does not require a precise determination on the question of the mental element in the absence of actual awareness; it is therefore sufficient to hold that even according to the opinions that give the broadest interpretation, art. 40 requires *at least* negligence that constitutes a breach of the customary care in trade (and it should be remembered that we are speaking of negligence that relates to unawareness of a non-conformity of which a reasonable seller would have been aware, and not negligence in production, carriage, etc.; for a summary of the main issues concerning art. 40 of the Vienna Convention, see also C.B. Andersen, *Uniform Application of the International Sales Law* (2007), at pp. 197-225).

From the general to the specific — the application of article 40 in the circumstances before us

42. In view of the aforesaid, it would seem correct to hold that the case before us does not fall within the scope of the *exceptional cases* to which art. 40 applies. There are several reasons for this proposition. No one denies that at the time when the tiles were delivered (1995-1996) Pamesa did not actually know of a defect *in the specific consignment*, and no one claims that it was actually aware of it until the third party notice was sent in 2001 (it is not superfluous to mention once again that when the tiles arrived in Israel, they were examined and approved by the Standards Institute). The finding of the trial court that art. 40 applies in

the circumstances was based on the testimony of Mr Topolsky (the director of a similar company that was in the business of importing and selling tiles), from which it emerged that 'during the relevant period the Pamesa company knew that the ceramic tiles manufactured by it had various defects' (para. 17 of the judgment).

43. I doubt whether this testimony is sufficient to satisfy the requirements of art. 40. In his affidavit (of 5 May 2002), Mr Topolsky said that in the years 1995-1996 the company of which he was a director bought tiles from the Pamesa company, and that as a result of defects that were discovered in them after they were used for a certain period of time, his company terminated the transaction with Pamesa (in 1997), and even received a certain amount of compensation. In his testimony in the court he said that 'the defects were not discovered immediately. Each case was discovered at a different stage, after people had lived for a while in the apartments' (p. 48), and he even *retracted what he said in his affidavit* that he knew that additional companies had stopped working with the Pamesa company (p. 49).

44. In other words, Mr Topolsky did not testify that he made a complaint to Pamesa *before the transaction was made* with Mendelson, and therefore it cannot be regarded as having bad faith at that time (with regard to the decisive dates for the purpose of art. 40, see Garro, at p. 256; Schlechtriem (2005 edition), at pp. 479-480; but see also s. 16 of the Israeli Sale Law). In view of the fact that Mr Topolsky was discussing tiles that he ordered in 1996 and defects that were discovered only after residents moved into the apartments, it would appear that his complaint to Pamesa was made after the transaction was made with Mendelson (or at least there is no proof to the contrary).

45. Moreover — and this in my opinion is the main point — Mr Topolsky did not speak of a certain type of tiles and of a certain type of defects, and as was stated above, no one disputes that a general awareness of a seller that some of his products are not of the best quality does not satisfy the requirements of art. 40. The expert on behalf of Eisenberger made some pertinent remarks on the subject of the tiles that are the subject of the claim:

> 'It could have been a defect that was limited to a certain consignment. It could have been that there was a manufacturing defect in this particular consignment of tiles, or something contaminated the glazing mixture, or it could

> have been something else that created air pockets. The company manufactures millions of square metres; it happens that in a certain consignment there is a problem' (p. 80).

Even if we assume that awareness of defects in the past amounts to actual knowledge, and even if we accept that the approach that regards art. 40 as containing an element of negligence, in order to succeed in an argument based on art. 40 the buyer must *at least* prove that in the past the seller discovered defects *of the kind being alleged* (see Garro, at p. 257), in the same type of products, in such a way that it should have given rise to a real concern. When we are speaking of a manufacturer who manufactures large quantities of products, it is possible that the awareness should be confined to a certain production line or consignment. Moreover, *giving a general notice* about 'problems' in goods does not satisfy the requirement of giving notice in art. 39: thus, for example, it was held in a German judgment that a notice of someone who bought meat that it 'stank' was not sufficiently specific (Munich District Court, 20 March 1995, Case no. 10 HKO 23750/94 [53]); in another German case it was held that notice that soles that were delivered were unusable because of bad quality was not sufficiently specific because it did not give the seller enough information for him to decide what to do (Erfurt District Court, 29 July 1998, Case no. 3 HKO 43/98 [54]). It would appear to follow *a fortiori* that a *general awareness* of 'problems' that were discovered in the past, without any specific notice being given by a buyer with regard to specific goods, does not satisfy the requirements of art. 40.

46. Another reason why art. 40 does not apply is that the second rationale does not exist, since Mendelson cannot claim that Pamesa should have foreseen that it would make a claim. It will be remembered that when the tiles came to Israel they were examined and found to be in good condition. It was also not alleged that any other tiles of that consignment were known to have defects, and therefore it is doubtful whether we are speaking of a case where the manufacturer should have, or could have, expected a claim. In view of the volume of its production and the type of defects, even if Pamesa was aware of problems that arose in the past in Israel, it is difficult to say that we are speaking of facts that did not need to be brought to its attention. Another indication (although, in the circumstances, not a decisive one) that art. 40 does not apply, which has also been mentioned in foreign case law and literature, concerns the fact that Mendelson (in practice, Gafni Sadeh) resold the

tiles. In these circumstances, Mendelson has the burden of showing that it sold the goods itself in good faith, but that they were sold to it in bad faith, which is a heavier burden that the one imposed on an end user (see Munich Provincial Court of Appeal, 11 March 1998, Case no. 7 U 4427/97). If, according to Mendelson's approach (which, as stated, I do not think should be accepted in its entirety), Pamesa acquired a bad reputation in Israel during the relevant period, why did it not refrain from selling the tiles on?

What about the buyer's obligations?

47. Finally, I am of the opinion that the case before us gives rise to an additional consideration, within the scope of legal policy. As scholars have pointed out, art. 40 is intended to soften the inflexible provisions of art. 39, which carry a serious sanction of substantive prescription (it is therefore not surprising that it has been described as a 'safety valve' — see Garro, at p. 253, and Andersen, at p. 17). I think that in cases of the kind before us, in which the buyer has been aware for years of the non-conformity, but he does not notify the seller until a claim is filed against him, the court will be reluctant to rule in his favour.

48. It is to be expected that a buyer who discovers a latent non-conformity should bring it to the attention of the seller immediately (as the Israeli legislature has expressly provided in s. 16 of the Sale Law: 'provided that he gave the seller notice of it immediately after he discovered it'). There are cases in which the application of art. 40 is questionable (i.e., where it is doubtful whether the seller is indeed actually aware of the defects); there are also cases in which the seller's ignorance can be regarded as negligent, but he is not actually aware of the defects, and in such cases it is clear that the purchaser should be required to give notice immediately. It is also possible to look at this consideration from the viewpoint of good faith: even if we say that art. 40 is based on the seller's bad faith, the buyer's right to make use of the article should also be done in good faith. Just as it is difficult to accept a situation where a seller in bad faith is aware that the goods that he sold expose the buyer to third party claims, so too it is difficult to accept a situation in which the buyer knows that the seller will be sued (by him or by a third party), but lets him think that he is protected under art. 39 (on the balance between the duties of good faith of parties who have not exactly acted in good faith, see recently CA 4836/06 *Estate of Hamud v. Harab* [9]).

49. This approach finds clear support in the wording of the Hague Convention. Article 39 of the buyer's duty to give notice 'promptly after its discovery,' and in any case no later than a period of two years from the date on which the goods were handed over. Article 40 *does not provide an exemption from giving notice* in cases where it may be assumed that the seller is aware of the non-conformity; it provides an *estoppel*, which prevents the *seller* from relying on the failure to give notice:

> 'The seller shall not be entitled to rely on the provisions of Articles 38 and 39…'

In other words, within the context of both the wording and purpose, the buyer should give notice when he discovers the non-conformity, and in certain cases, which we have discussed, a seller who has acted in bad faith may not use the failure to give notice as a way of avoiding liability.

Was there really a non-conformity?

50. In concluding this matter, before we consider the possibility of suing in torts, I should point out that it could have been asked whether in the case before us *it has been proved* that there was any non-conformity at all. As we said above, Mendelson claimed against Eisenberger that incorrect use of the tiles is what caused the defects (use of the tiles in public areas when they were not intended for these areas; unprofessional laying of the tiles by the person who laid them). I should point out at this point that this gives rise to a question of judicial estoppel against Mendelson with regard to positions that it adopted, and I shall return to this later. In these circumstances, it is not clear at all that the products that Pamesa supplied to Mendelson suffered from any non-conformity — and this depends *inter alia* on the question whether Mendelson made clear to Pamesa that the tiles were intended for the use that Eisenberger made of them (see art. 33(a)(5) of the schedule to the International Sale Law). This question also has ramifications on art. 40, since in order for a buyer to rely on this article, he needs to show that the seller was aware of the specific use for which the tiles were intended, and in so far as more than one use is possible (in our case, floor or wall tiling, private areas and public areas), the buyer needs to prove that the seller was aware that the goods were intended for the specific use for which they were found to be unsuited (*Deforche NV v. Prins Gebroeders Bouwstoffenhandel BV* [47]; Schleswig Appellate Court, 22 August 2002, 11 U 40/01 [51]).

Non-applicability of article 40 — conclusion

51. In conclusion, I suggest to my colleagues that in the case before us the *exceptional* circumstances in which a buyer can rely on the provisions of art. 40 of the schedule to the International Sale Law are not satisfied, and it therefore follows that art. 39 applies, and Mendelson's ability to sue *for non-conformity* is barred by prescription.

However, the trial court held that even if the claim under art. 40 was not upheld, Mendelson could sue Pamesa in tort; we shall therefore now turn to this.

Concurrent application — introduction

52. Now that we have determined that Mendelson cannot rely on the provisions of the schedule to the International Sale Law that concern non-conformity, we should examine the second finding of the trial court, that:

> 'The International Sale Law applies only to remedies in the contractual sphere, whereas the third party notice was also filed for causes of action that are based on the law of torts and the law of unjust enrichment' (pp. 118-119).

Does the time limit in the last part of art. 39 of the schedule to the International Sale Law really only preclude contractual remedies, or does this interpretation, as Pamesa claims, frustrate the purpose of the provision, since what difference does it make to the foreign seller if he is sued in contracts or in torts? This question derives from a more general question, which involves defining the scope of the convention. Does the convention, with the uniform law that it created, intend to replace only the domestic *sale and contract* laws? Or did it seek also to apply to claims *in tort*, and *any other legal claim* arising from an international sale contract?

53.This question is, first and foremost, a question of interpreting the convention itself:

> 'The question whether the ground of liability in question falls within the scope of the Convention must be clarified by interpretation and, since the Convention defines its own scope, it is the Convention itself which must be interpreted' (Schlechtriem (1998), at p. 371).

The limits of the convention's application can be deduced from negative provisions (such as art. 5, which provides, *inter alia*, types of goods to

which the convention does not apply), but mainly from positive provisions, and especially from art. 8:

> 'The present Law shall govern only the obligations of the seller and the buyer *arising from a contract of sale*. In particular, the present Law shall not, except as otherwise expressly provided therein, be concerned with the formation of the contract, nor with the effect which the contract may have on the property in the goods sold, nor with the validity of the contract or of any of its provisions or of any usage' (emphasis added).

This provision determines a limited, even narrow, scope of application (Graveson *et al*., at p. 53). Similarly art. 4 of the Vienna Convention provides: 'This Convention governs only the formation of the contract of sale and the rights and obligations of the seller and the buyer *arising from such a contract.*' Admittedly the Vienna Convention extends the scope of application in certain matters ('the formation of the contract of sale'), but for our purposes we are dealing with a similar application ('… only… arising from such a contract'). It is only matters that are not governed by the convention that will be subject to domestic law.

Concurrent application — commentators on the convention

54.*Prima facie*, the convention does not apply to obligations in tort law — since these ostensibly do not 'arise from a contract of sale.' But it is clear that the purpose of the convention — the creation of a uniform international law — will be frustrated if it is possible to circumvent its provisions in every case by means of tortious claims under domestic law. Let us assume, for example, that art. 40 of the convention (which was discussed above) requires the seller to have *actual knowledge*. Can an Israeli buyer sue a seller on the basis of the provisions of the domestic Sale Law, which do not require actual knowledge? I think that no one would deny that such a claim is impossible. It would appear that this is also the case with regard to a claim of a mistake in the contract, which has its basis in a non-conformity regarding the quantity or quality of the goods (see Schlechtriem (2005 edition), at p. 431). And what is the position regarding a claim in tort in which it is alleged that the seller did not act as a reasonable seller would have acted, because he did not properly examine the goods that he sold? Does placing the word 'tort' at the top of the claim release the buyer from the inspection and notice obligations, and does it deprive the seller of the defences that the

convention provides (below we shall discuss an identical question that exists within domestic law)?

55. On the question of whether it is possible to file a claim in tort when the sale contract is governed by the *Vienna convention* there are two main approaches in international academic literature. According to the narrow approach, in so far as the elements of the claim under domestic law are closely related to the elements of the claim under the convention, the domestic law does not apply:

> 'Domestic rules that turn on substantially the same facts as the rules of the Convention must be displaced by the Convention; any other result would destroy the Convention's basic function to establish uniform rules' (John O. Honnold, *Uniform Law for International Sales Under the 1980 United Nations Convention* (second edition, 1991), at p. 122).

According to this approach, since Pamesa supplied tiles 'that do not have the qualities required for their normal or commercial use,' the claim is based — whether it relies upon a contractual cause of action or a tortious one — on non-conformity, and since this is subject to the obligation of giving notice, it will not be possible to circumvent that obligation by defining the claim as a tortious claim based on a departure from what is expected of a reasonable seller. Indeed, from a legal point of view, it is possible to say that a tortious claim has different elements — particularly proving a breach of a duty of care — but Prof. Honnold says that: 'proof of the seller's lack of due care does not change the essential character of the claim, and access to domestic law based on such proof would make it possible to circumvent the uniform international rules established by the Convention' (Honnold, *ibid*., at pp. 122-123).

56. The broad approach is more tolerant to concurrent tort claims. In an article in 1988 (P. Schlechtriem, 'The Borderland of Tort and Contract — Opening a New Frontier?' 21 *Cornell Int'l L. J.* 467 (1988)), the author presents an analytical distinction between a claim that is intended to protect *contractual interests that were created by the parties* within the framework of the sale agreement that they made (especially the duty to supply a certain quantity and quality of a product for a certain sum of money), and a claim based on tortious causes of action that are intended to protect *interests that are not dependent on the*

existence of a contract, such as public health and safety interests. His approach is:

> '… a tort action for property damages caused by defective and non-conforming goods should not be barred by an omission to give notice within reasonable time under Article 39 of CISG… Even if the goods themselves were destroyed by a defect giving rise to a tort action based on strict liability, the interest protected is basically an extra-contractual one…' (p. 474).

With regard to claims for misrepresentation or fraud on the part of the seller, he goes on to say:

> 'The duty not to defraud or intentionally harm other people exists independently of an agreement of the parties, and the respective interests are not only created by contract' (*ibid*.).

57. In his book (1995 edition, at pp. 370-371; 2005 edition, briefly at p. 531), Schlechtriem discusses three conditions that should be satisfied by a claim under domestic law:

> 'A buyer's concurrent remedy based on domestic law is admissible only under three conditions: the grounds upon which the remedy is based cannot fall within the scope proper of Uniform Sales Law; the remedy cannot be in conflict with the regulatory goals of Uniform Sales Law; and the domestic law itself must permit concurrent assertion of the remedy' (Schlechtriem (2005), at p. 531).

A lenient approach will be adopted especially when we are dealing with property damage caused by the damaged goods (such as the cost of replacing the tiles that were laid in the building in the case before us), and not merely damages for the low value of the goods in the market, because the connection of the former to the sale contract is weaker (2005 edition, at p. 75). In an article in 2005 (P. Schlechtriem, 'Requirements of Application and Sphere of Applicability of the CISG,' 36 *Victoria U. Wellington L. Rev.* 781 (2005), the author makes the simple statement:

> 'I advocate the opinion that concurrent actions are not excluded by the convention' (at p. 793).

(For a discussion of Schlechtriem's arguments, see Honnold, at p. 123; for additional German scholars who disagree with Schlechtriem, see his 2005 article, note 45; for a survey of the opinions of European scholars,

see also H. Bernstein & J.M. Lookofsky, *Understanding the CISG in Europe* (1997), at pp. 56-59).

58. Ultimately we are dealing with a complex issue, both because of the protected interests, and because of the desire to protect the international uniformity underlying the convention. This creates a spectrum of possible balancing points. The choice between the possible balancing points is affected to a large extent by the question of the approach of domestic law on the distinction between tort claims and contract claims: are we dealing with two different and concurrent fields, different fields that are not concurrent (*non-cumul*), or a single field ('contorts' or obligations law; see, *inter alia*, J.M. Lookofsky, 'Loose Ends and Contorts in International Sales: Problems in the Harmonization of Private Law Rules,' 39 *Am. J. Comp. L.* 403 (1991)). See also the article of R. Sanilevitz and D. Ronen, 'Competition between the Contractual Cause of Action and the Tortious Cause of Action in a Compensation Claim,' *Shamgar Book* (vol. 3, 2003), at p. 93), which ends with the following:

> 'The recognition of the right to choose between the causes of action does not mean that the existence and content of the contract should be ignored. Since Israeli law recognizes both the right to choose between causes of action and their concurrence, the plaintiff has the best of both worlds. In our opinion, our law should also recognize the effect that the existence of the contract has on the tortious cause of action and give proper weight to the terms of the contract when considering the tortious cause of action. Therefore the defendant should be recognized as having a corresponding right to raise defence claims from the field of contract law in a tort action. This is required by a respect for the binding force of the contract and the principle of equality between the parties in the judicial proceeding, and it allows the court to consider which provisions are most pertinent to the specific case and to prevent a manipulative use of tort law in order to avoid the terms of the contract' (at p. 143).

Concurrent application — foreign case law

59. European case law on this question is relatively meagre. In one case the court of appeal in Germany held that a buyer of fish who did not give prompt notice (under art. 39 of the Vienna Convention) of an

infection from which the fish suffered could not sue the seller for negligent carriage that allegedly caused the infection, even though the fish that were supplied caused serious damage to the buyer's stock of fish (Thüringen [Jena] Provincial Court of Appeal, 26 May 1998, 8 U 1667/97 [55]). On the other hand, the court of appeal in Belgium held (in the same vein as Schlechtriem's aforesaid article of 1988), that in a case where notice was not given promptly under art. 39, the seller can be heard in a tort action only if the alleged fault relates to a breach of a general duty of care, and not to a duty that the parties created in the contract (*ING Insurance v. BVBA HVA Koeling* [49]). With regard to claims for unjust enrichment, the Supreme Court in Switzerland has held that the convention does not apply to such claims (Swiss Federal Court, 7 July 2004, 4C.144/2004/1ma [56]); see also Schlechtriem, in his book (1998 edition), at p. 453).

60. By contrast, extensive and consistent American case law has, since the beginning of the twenty-first century, adopted a liberal line that permits claims based on extra-contractual causes of actions: 'The CISG does not apply to tort claims' (*Viva Vino Import Corp. v. Farnese Vini S.r.l.* [40]); and elsewhere: 'The CISG clearly does not preempt the claims sounding in tort' (*Geneva Pharms. Tech. Corp. v. Barr Labs., Inc.* [41]); for a summary as of 2004, see E.D. Lauzon, 'Annotation, Construction and Application of United Nations Convention on Contracts for the International Sale of Goods (CISG),' 200 *A.L.R. Fed.* 541 (2005)). There has also been similar case law in recent years: *Sky Cast, Inc. v. Global Direct Distrib., LLC* [42]; *Teevee Toons, Inc. v. Schubert GMBH* [43]; *Miami Valley Paper, LLC v. Lebbing Engineering & Consulting GmbH* [44].

61. There is also similar case law in the lower courts in Canada: *Shane v. JCB Belgium N.V.* [50]; Rajeev Sharma, 'The United Nations Convention on Contracts for the International Sale of Goods: The Canadian Experience,' 36 *Victoria U. Wellington L. Rev.* 847 (2005); and in Australia: *Ginza Pte Ltd v. Vista Corporation Pty Ltd* [44], even though the matter was not expressly considered.

Article 34 of the Hague Convention

62. We have so far considered the question of the concurrent application of domestic law alongside the Vienna Convention, relying on the similarity between art. 8 of the Hague convention and art. 4 of the Vienna Convention. However, the 'uniform law' that is appended to the

Hague Convention, which governs the case before us, also includes an article that has no parallel in the Vienna Convention:

'Article 34

> In the cases to which Article 33 relates [cases of non-conformity], the rights conferred on the buyer by the present Law exclude all other remedies based on lack of conformity of the goods.'

Did the Convention intend to deny the possibility of suing for tortious remedies based on non-conformity? Do we have before us an express determination on the question of the concurrent application of domestic law? It would seem that this interpretation has been ruled out by commentators on the convention.

63. Thus, for example, Tunc says in his commentary on art. 34:

> 'In stating that, in the cases to which Article 33 relates, the rights conferred on the buyer by the Uniform Law exclude all other remedies based on lack of conformity of the goods Article 34 is not merely intended to preclude recourse to theories of warranty against defects in the goods: such recourse was prevented by the simple substitution of the Uniform Law for the municipal law. It is in particular intended to preclude the possibility of a party who has acquired goods relying on a general theory of nullity based on mistake as to the substance of the goods. Article 8, in limiting the field of the Uniform Law, would otherwise have allowed a person acquiring goods to avail himself of this doctrine, if Article 34 did not prevent it.'

In other words, the article was intended in particular to rule out any claim *in the contractual sphere* that the contract is void because of a mistake in its formation (Graveson *et al*. also say the same, at pp. 73-74). The determination in art. 8 of the convention, '…In particular, the present Law shall not… be concerned with the formation of the contract…', makes it possible to raise a claim of contractual misrepresentation (which is based on non-conformity) and thereby to argue that there were defects in the formation of the contract, and art. 34 was intended to prevent such a claim. It would appear that Zeltner also adopted this approach of restricting art. 34 to contractual claims in his aforesaid commentary on the Sale Law:

> 'Article 34 of the Uniform Law provides… in adopting this language the Uniform Law is mainly directed at three outcomes of preventing the buyer from going beyond the framework of the remedies allocated to him in the body of the law… In other words, the buyer is precluded from accessing all those laws that the *general law of contracts* has developed as aids in situations where there is a basis for such claims' (p. 42; emphasis added).

64. In so far as we relate to art. 34 as a basis for interpreting the scope of the convention's application, it is possible to arrive at a *positive* conclusion that it seeks to preclude contractual remedies only, and at a *negative* conclusion that it does not seek to intervene in extra-contractual remedies that may derive from the sale transaction.

Concurrent application — Israeli law

65. A similar question, concerning the relationship between a specific sale law and extra-contractual causes of action, also exists in Israeli domestic law with regard to the Sale Law. Let us take, for example, s. 14 that was mentioned above:

'Notice of non-conformity

> 14. (a) The buyer should give the seller notice of a non-conformity immediately after the date of the examination under section 13(a) or (b) or immediately after he discovers it, whichever is the earlier.
>
> (b) If the seller does not give notice of the non-conformity as stated in sub-section (a), he is not entitled to rely on it.'

This gives rise to the question whether ruling out the possibility of relying on the non-conformity applies solely to contractual claims under the Sale Law, or whether it also rules out the possibility of suing in tort (a similar question also arises with regard to ss. 15-16 of the Sale Law, and also with regard to other laws: s. 4A of the Sale (Apartments) Law, 5733-1973; s. 6(2) of the Lease and Loan Law, 5731-1971, s. 3(b)(1) of the Contracting Contract Law, 5734-1974).

66. The question arises particularly in cases of apartment buyers who have not given notice of a non-conformity within the time prescribed in the Sale (Apartments) Law, and wish to file claims in tort. Various courts have differed on this question. A large school of thought has adopted the

approach that 'there is no basis for allowing plaintiffs to enter the courthouse through the window, when the main door is closed to them' (in the words of Justice Milanov in CC (Jer) 21785/97 *Cohen v. Penthouse Building and Investment Co. Ltd* [29]; it should be noted that subsequently Justice Milanov reversed this approach, see CC (Jer) 22771/97 *Adika v. Mitzpeh Yerushalayim Ltd* [30]. Additional judgments that have ruled out a claim in tort are, *inter alia*, CC (TA) 52678/97 *Israel Universal Travel Ltd v. Kedoshim* [31]; CC (Hrz) 1452/00 *Mono Electronics Ltd v. Dan Aviv Investments Ltd* [32]; CApp (Jer) 9109/04 *Oved Levy Stone and Building Industries Ltd v. Ben-Hiun* [33]).

67. Another school of thought holds that the aforementioned provisions do not prevent a claim based on extra-contractual causes of action (see, *inter alia*, CC (BS) 3457/02 *Amit v. G. Kimchi Trade (1978) Ltd* [34]; CC (Hf) 22667/04 *Kovlanko v. Israel Housing and Development Ltd* [35]; CC (Jer) 4534/86 *Tak v. Workers' Housing Ltd* [36], a judgment that was approved by the District Court: CA (Jer) 30/92 *Workers' Housing Ltd v. Tal* [26]). As we mentioned above (para. 14), in the past the District Court has considered tortious causes of action in addition to the provisions of the International Sale Law: 'With regard to these causes of action, the prescription period of two years that is stipulated in the aforementioned law certainly does not apply' (*Cor-Serve Ltd v. Argal Galit Packaging Ltd* [25]).

68. In so far as the case law of this court is concerned, we have discussed the ruling in *S. Solondz Ltd v. Hatehof Iron Industry Ltd* [2] above. In that case, Justice Sheinbaum held that:

> 'The Sale Law is specific… the buyer cannot ignore what is stated in the Sale Law when he sues for his remedy. The reason for this is that if you say otherwise, what did the Sale Law achieve when it imposed duties on the buyer? He can always fail to comply with these and sue under the Contracts (Remedies for Breach of Contract) Law' (at p. 634).

Later in that judgment Vice-President Ben-Porat said:

> '… when the buyer has missed the time to give notice to the seller of the non-conformity of the goods under the Sale Law (which is the substantive law), he cannot rely any longer on the non-conformity so that he will be entitled to compensation under the Remedies Law… Any other interpretation will make the provisions of ss. 13-16

> meaningless… The same line of thinking that I have followed with regard to the relationship between the Sale Law and the Remedies Law is also valid with regard to the relationship between the Sale Law and the Torts Ordinance [New Version]…' (pp. 637-638).

These remarks, and especially the position of the Vice-President, have been the subject of academic criticism:

> 'In *S. Solondz Ltd v. Hatehof Iron Industry Ltd* [2] it was admittedly held that non-compliance with the duty to give notice will preclude even reliance by the buyer (the injured party) on a tortious cause of action, but it would seem that this case law is not consistent with accepted principles in our legal system concerning the relationship between the various causes of action. The rejection of one cause of action, for one reason or another, does not necessarily lead to the rejection of the other cause of action. Therefore the remedies and reliefs under one law should not be made conditional upon the reservations and requirements in another law' (E. Zamir, *The Principle of Conformity*, at p. 306).

(See also E. Zamir, *The Sale Law*, at pp. 314, 555-556; Friedmann & Cohen, *Contracts*, at p. 564, note 207; M. Deutch, *Interpretation of the Civil Code* (vol. 1, 2005), at pp. 74-75).

69. The gulf between the judgment in *S. Solondz Ltd v. Hatehof Iron Industry Ltd* [2] and the scholarly positions that criticize it testifies to the spectrum of possible approaches when attempting to preserve the effectiveness of the special arrangements provided in the various acts of legislation on the one hand, and the substantive rights of injured parties on the other. From this viewpoint, domestic law does not contain a clearer determination that the one that exists in international law, and in any case, in so far as interpretation of the convention is concerned, it would appear that significant weight should be attached to international uniformity and a desire for harmony with outcomes that are reached in foreign countries. In view of this, Pamesa will not necessarily be saved by its reliance on the judgment in *S. Solondz Ltd v. Hatehof Iron Industry Ltd* [2], as it tried to do.

Concurrent application — in the circumstances of this case

70. It seems to me, on the basis of what has been said above, that in the circumstances before us *it might have been* proper, in principle, to allow Mendelson to make its claim in tort that Pamesa was negligent in the manufacture of the tiles. My conclusion is based on several premises, which in my opinion support the proposition that the interests which Mendelson is struggling to protect are not identical to the interests which the uniform law of the convention seeks to protect, a distinction which I think should be given weight when making the decision as to whether to allow a claim in tort to be heard alongside the arrangements in the convention.

71. First, as has been mentioned above, there is a basis for distinguishing between rights that were created by the parties to the contract, whose protection we should restrict solely to the scope of the convention, and general interests that the law of torts was intended to protect, which make it possible to sue for damage under domestic law.

> 'The international sales contract thus has the character of private legislation, made by and for the parties in privity; this in contrast with delictual obligation and the law of tort' (Lookofsky (1991), at p. 405).

(For a comparison of the basic obligations in contracts and torts, see G. Tedeschi (ed.), I. Englard, A. Barak, M. Cheshin, *Law of Torts — General Theory of Torts* (1977), art. 10 – I. Englard). If we assume that a seller was negligent in that he did not examine the quantity of the goods that he packed, admittedly this was negligent conduct (a departure from the standard of conduct of a reasonable seller), but this negligence relates to the manner of complying with a contractual obligation, a duty that was provided in the agreement between the parties, and it is governed by the convention. By contrast, if we assume that the seller was negligent in that he shipped goods in a manner contrary to the Sanitation Regulations, the interest that was injured does not arise from the agreement between the parties, and as such it is possible that it should receive protection outside the scope of the convention. In the case before us, the *claim* is that Pamesa was negligent in manufacturing the tiles and it shipped a product that a reasonable manufacturer would not have marketed. If Pamesa was indeed negligent in this way, this is not a negligent performance of an obligation under the contract, but a negligent performance of a general duty of care of manufacturers that

does not derive from the agreement between the parties. Therefore *prima facie* there should not be an absolute bar against such a claim.

72. We should also point out that in the case before us, where Pamesa is simultaneously both the manufacturer and the seller of the tiles, we also need to address the distinction between a manufacturer and a seller. The convention, which concerns sales contracts, refers to sellers and buyers and their rights and obligations. Negligent performance of an *obligation of the seller* under the contract will usually be considered within the framework of the convention, whereas the right to claim for negligent manufacture does not arise from the sale contract, but from a breach of the *manufacturer's duty*, and therefore it may exist independently even without a contractual relationship. It is usually possible to sue for a breach of a manufacturer's duties of care even without any direct contractual relationship between the injured party and the manufacturer, and therefore it may be assumed that it is not subject to the convention that governs only sale contracts.

> 'An important reason for arriving at this conclusion is that a tort action against the manufacturer is… always available when the manufacturer did not sell the product directly to the injured party. If that is so, it is arguable that the same result should prevail if the seller and the manufacturer are identical' (Bernstein & Lookofsky, at p. 59).

As stated above, the fact that Pamesa 'wears two hats' as both manufacturer and seller does not mean that a claim against it should satisfy the minimum requirements of both of its roles concurrently.

73. Ultimately I am of the opinion that the trial court was essentially correct when it agreed to consider the claim that Pamesa was negligent in manufacturing the tiles in a manner that caused the various building contractors that used its products serious damage, even though it did not comply with the provisions of the convention. I will confess that I have not reached this conclusion lightly. This is because it can be argued that the convention and the uniform law are intended to regulate the relationship between the parties *in its entirety*. But life creates complex situations that cannot easily be fitted into a predefined framework, and this leads to the aforesaid attempt to distinguish between the different types of negligence. This distinction is not an easy one, and there is a concern that it will lead to a slippery slope. Notwithstanding, it should be adopted, so that justice may be done in appropriate cases.

Was negligence on the part of Pamesa proved?

74. Let us assume therefore that a failure to comply with the requirement of notice in art. 39 of the convention cannot prevent Mendelson from suing Pamesa in torts. But was the alleged negligence proved? On this issue the remarks of the trial court were very brief:

> 'I accept the claim that the Pamesa company was negligent in manufacturing the tiles. The negligence of the Pamesa company can be seen from the fact that the tiles had a defect, while the Pamesa company brought no evidence to refute the claim that the Pamesa company was negligent in manufacturing them.'

In these remarks the court upheld the claim of negligence, and at the very least it found that Pamesa did not discharge the burden that was passed to it. With respect, even though I am prepared in principle to hear tort-based claims raised by Mendelson, I recommend to my colleagues that we allow Pamesa's appeal on this point, and hold that no negligence on its part was proved. It should be recalled that according to the approach of the trial court, which was of the opinion that the aforesaid art. 40 should be applied, these brief remarks were uttered needlessly, and that was why they are brief. But in the circumstances we cannot avoid considering them within the context of our review on appeal.

Proving negligence — conflict of laws

75. The first question that arises concerns the choice of law that will govern the tortious cause of action. The alleged negligence occurred, according to Mendelson, in Spain. Even though there are exceptions, we accept that 'the law that governs the tort is the law of the place where it was committed' (CA 1432/03 *Yinon Food Products Manufacture and Marketing Ltd v. Kara'an* [10], at p. 377; R. Schuz, 'A New Conflict of Law Rule in Torts: The Good and the Bad,' 5 *Mozenei Mishpat (Netanya Law Review)* 491 (2006); see also LCA 4060/03 *Palestinian Authority v. Dayan* [11]). It is therefore possible, even though I do not wish to decide the matter (but see CApp (Jer) 1712/06 *Landwirtsckammer Schleswig-Holstein v. Heinz Remedia Ltd* [27], at para. 17; CApp (Naz) 1856/05 *Philip Morris USA Inc v. Jarris* [28], at para. 3; also cf. the principles in LCA 2752/03 *Metallurgique de Gerzat S.A. v. Wilensky* [12]), that the applicable law is Spanish law, and Mendelson did not prove that under this law Pamesa was liable to compensate it (for the question of the

burden of proving foreign law, but also the results of not raising an argument in this regard, see FH 1558/94 *Nafisi v. Nafisi* [13], at p. 585; LCA 2561/99 *Globes Publisher Itonut 1983 Ltd v. Weinstock* [14]; CA 1227/97 *Salit HaAdumim Quarrying and Factory for Stone Works Ltd v. Eli* [15]).

Proof of negligence — is it really sufficient to prove causation?

76. But even if we assume that in the circumstances the case may be tried under Israeli law (especially since Pamesa conducted its defence in accordance with this law), I doubt whether the finding 'The negligence of the Pamesa company can be seen from the fact that the tiles had a defect' can give rise to liability, no matter how attractive such a finding is. Even if we adopt the assumption that the tiles that were supplied contained latent defects, and even if we assume that these were a result of a production defect, this is insufficient to impose liability in torts. As a rule, it is well known that causation in itself is not a sufficient basis for liability in torts (LCA 1272/05 *Carmi v. Sabag* [16], at para. 39; for the elements of the tort of negligence, see CA 145/80 *Vaknin v. Beit Shemesh Local Council* [17]). In Pamesa's words, '"causation" is a necessary, but not a sufficient, requirement for liability in tort on the ground of negligence' (para. 13 of its closing arguments).

77. In view of the scale of production, the type of defects and the nature of the risk that they are likely to cause, it is not self-evident that the existence of a defect retrospectively proves negligence and a breach of a duty of care. Production without defects is not always possible, and therefore defects do not always indicate negligence; in certain cases it has even been held that the circumstances impose a greater burden on the buyer to examine the goods (as in *Datalab Management Pty. Ltd v. Pollak International Ltd* [1], which was cited by Pamesa). We should also recall that when they arrived in Israel, the tiles were examined by the Standards Institute and were found to be of a proper standard, and at least in this respect it is not possible to accuse Pamesa of negligence in not examining its products. This is no small matter, even though a question may always arise with regard to the date when the defects appeared.

Proving negligence — alternative explanations raised by Mendelson

78. Finally, in the substantive and procedural circumstances of the case before us, it is hard to accept Mendelson's assumption that the existence of latent defects in the tiles necessarily proves negligence in

their manufacture. It will be recalled that Mendelson claimed against Eisenberger that it was improper use that caused the defects, or at least some of them, to appear. Thus the affidavit of Mendelson's CEO (of 17 April 2005) says:

> '16. All of the aforesaid four consignments were examined by the Israel Standards Institute and the ceramics in them were found to be compatible with the Israeli standard…
>
> 19. According to the explanations that were given to us… Eisenberger's people did not tell them that some of the ceramics were intended for tiling the floors of public areas, and the floors of public areas should not be tiled with ceramics of that kind. This is because the hardness level of the ceramics is not good enough for public areas, which are used by many people.'

79. In view of these remarks, and other remarks of Mendelson's deputy CEO about the quality of the floor works in Abutbul's apartment (p. 88 of the transcript), it is hard to accept Mendelson's claim that the appearance of defects at a late date sufficiently proves negligence in the production process, at least with regard to the public areas and one of the apartments. The raising of these claims by Mendelson can in my opinion indicate that there could be additional explanations for the defects, and at least that it is not possible to 'skip over' the ordinary elements of the tort of negligence and conclude without evidence and scrutiny that there was negligence. Judicial estoppel also exists to a large extent, since it is hard to allow a litigant to make conflicting arguments in the same legal proceeding to suit his own convenience (see LCA 4224/04 *Beit Sasson Ltd v. Workers' Housing and Investments Ltd* [18]), and in the case before us Mendelson attributes to Pamesa 100% of the damage. In another context I had the opportunity of saying, in a similar situation, about the appellant in another case:

> 'She can therefore be compared to someone who wishes to rent an apartment on HaYarkon Street in Tel-Aviv and asks the landlord whether the apartment has a sea breeze in the summer. The landlord says: certainly, the house is next to the sea. Then the tenant asks whether there is damp from the sea in the winter. And the landlord replies: of course not, the house is nowhere near the sea. Thus the appellant is trying to have the best of both worlds and is making conflicting claims

> in various places. In other words, we are dealing with judicial estoppel in the classic sense of the term' (CA 8301/04 *Assessment Officer for Large Enterprises v. Pi Gelilot Fuel Depots and Pipes Ltd* [19]).

Pamesa's appeal — conclusion

80. According to the provisions of the International Sale Law, Mendelson should have given notice of the non-conformity immediately after the defects were discovered, and no later than two years from the date of performing the transaction. No one denies that Mendelson did not comply with this requirement. In order to overcome this obstacle, Mendelson sought — and its position was accepted by the trial court — to rely on art. 40 of the schedule to the International Sale Law. In view of our study of the principles and purpose of the article (paras. 27-41), I am of the opinion that this claim cannot be upheld. The second way in which Mendelson contended with the non-compliance with the provisions of the International Sale Law was to raise an argument based on tort. I believe (paras. 70-73) that even if we assume that in the circumstances the convention does not preclude the filing of a negligence claim (and I am inclined to think that this assumption is correct), Mendelson did not discharge the burden of proving that Pamesa was in fact negligent (paras. 74-79).

81. Ultimately we are speaking of a simple case. Mendelson should have notified Pamesa of the non-conformity in the goods that it sent. Had it done so at the proper time, it would not have been liable to prove negligence, and Pamesa would have been liable to pay for the damage that its products (ostensibly) caused. But Mendelson did not comply with this obligation. Even when Mendelson knew of the defects that were discovered in Abutbul's apartment (towards the end of 1998, and possibly even within the period of time in art. 39 of the schedule to the International Sale Law), it did not report them promptly to Pamesa. The International Sale Law balances between the rights of the buyer and the seller: the buyer is entitled to sue for non-conformity even without proving negligence on the part of the seller; but on the other hand the seller is entitled to assume that if no notice of non-conformity is given within two years, he need not be concerned about such a claim (subject to the principle of good faith, which is expressed *inter alia* in art. 40). This is a balanced arrangement, and I have found no reason in the circumstances to depart from it. Had Mendelson given notice of the

defects at the proper time, it would have benefited from the advantages of strict liability in the article, but when it failed to do so (whether it was its own fault or because the defects were discovered only after the period ended), it must suffer the disadvantages (from its viewpoint) of the article. The result is perhaps unsatisfactory in the respect that the defective products were nonetheless manufactured by Pamesa; but we are dealing with law, and anyone who does not comply with the terms of the law must suffer the consequences.

82. In conclusion, I shall propose to my colleagues that we allow Pamesa's appeal, and this means that we deny the third party notice sent by Mendelson.

Mendelson's appeal (CA 8125/06)

83. If my opinion is accepted and Pamesa's appeal is allowed, we cannot avoid considering Mendelson's appeal. In this appeal, Mendelson challenges both the finding that it is liable for the damage that was caused to Eisenberger and the amount of the damages awarded. Let us begin with the appeal against liability.

84. Mendelson claims that its liability was determined on the basis of two alternative grounds: *first*, a sweeping determination that an importer should have strict liability for its products, even without it being at fault; *second*, an alternative determination that it was proved that Mendelson was negligent, because according to the testimony of Mr Topolsky, a reasonable importer would have stopped importing Pamesa's products. Against the *first ground*, it was argued that there was no legal source that imposes strict liability on an importer with regard to property damage (as opposed to personal injury). With regard to the *second ground*, it was argued that Mendelson was not aware of the defects in Pamesa's products. It was also argued that Mendelson relied on Pamesa's good reputation and on the examination of the Standards Institute that found the tiles to be fit for marketing. It was mentioned that the brief discussion of the tort of negligence in the trial court was uttered *in obiter*, and it was argued that Mendelson was not negligent at all.

85. With regard to the *scope of the liability*, it was argued that Mendelson only bought the Gafni Sadeh company, which admittedly imported the tiles, but sold only 23% of them to Eisenberger; it did not buy the Avnei Gazit company that sold the remainder of the tiles. Therefore, if the claim that Mendelson should be found liable as importer is accepted, it can only be found liable for 23% of the damage.

It was argued that the court erred when it determined that within the framework of an agreement in 1995 Gafni Sadeh took upon itself the undertakings of Avnei Gazit, since this is a partial and fragmented document, preconditions for it coming into effect were not fulfilled, and in any case it was not signed by Gafni Sadeh. It was argued that later shares in Avnei Gazit were bought by the main shareholder in Gafni Sadeh (Mr Shelomo Sadeh), who testified that he did not sell the shares to Mendelson. It was argued that in the absence of any connection (ownership or management) between Gafni Sadeh and Avnei Gazit, there was no reason to find Mendelson liable for all of the damage.

86. It was also argued that since Eisenberger did not give Mendelson a notice of non-conformity within four years from the delivery of the tiles, it is precluded from claiming under s. 15 of the Sale Law. It was emphasized that the complaints of the Abutbul family that were reported to Mendelson (or to Gafni Sadeh) did not concern the quality of the ceramics but the quality of the work carried out by Eisenberger, and that the statement of claim that was filed in 1999 spoke (mistakenly) of tiles that were bought in 1998, and therefore until an amended statement of claim was filed in 2001, Mendelson did not receive a notice concerning the specific goods in which the defects were discovered.

87. Finally, arguments were presented about the manner of calculating the damage. It was argued that Eisenberger knew that the tiles were not suitable for public areas, and therefore it could not sue for those areas; in any case the condition of the tiles in those areas was good, and they did not need to be replaced. It was argued that the court erred in accepting Eisenberger's calculation of the damage, which included VAT that could be deducted, and in ignoring the fact that Mendelson had already replaced some of the tiles at its expense. It was also argued that Eisenberger had not properly proved its damage. It was emphasized that Eisenberger was compensated for the flooring in all of the apartments, but in practice the opinion that was filed only related to three apartments, and even according to Eisenberger tiles were only replaced in five apartments (and compensation was paid to the owner of one additional apartment). It was argued that no evidence was produced that the other residents in the building complained, or that any undertaking was given to replace the tiles in their apartments.

Eisenberger's response to Mendelson's arguments

88. On the question of liability, Eisenberger argued that the court was right to hold that an importer should have strict liability. It was also argued that, on the basis of Topolsky's evidence, the elements of the tort of negligence were also satisfied. With regard to the division of liability between Gafni Sadeh and Avnei Gazit, it was argued that the document from 1995 expressly stated that the former would be liable for the latter's undertakings. It was admitted that the document was fragmented and unclear, but the complete document was in Mendelson's possession and therefore it could not rely on the quality of the document produced by Eisenberger.

89. In the closing arguments in reply filed by Mendelson, it was argued that Eisenberger did not refer to source for the approach of the trial court that imposes strict liability on importers, and it was emphasized that it had not been proved that Mendelson knew at the time of the transaction of any damage to Pamesa's reputation. With regard to the division of liability between Gafni Sadeh and Avnei Gazit, it was argued that the document from 1995 did not become a binding contract, and that the document was not in Mendelson's possession and it should not be blamed for not submitting a complete version.

Decision

90. The trial court based Mendelson's liability mainly on a thesis that strict liability should be imposed on importers, even without proving fault in tort:

> 'The question is therefore whether in the case before me an identical law [to the Liability for Defective Products Law] should be applied, i.e., whether the liability for the defects that were discovered in the tiles should be imposed on the defendant [Mendelson] *merely because they were imported into Israel* by the Gafni Sadeh company that was bought by the defendant. In my opinion, the answer to this question should be yes…' (para. 10; emphasis added).

This thesis, which is attractive, makes it unnecessary to examine the relationship between Avnei Gazit and Gafni Sadeh, since no one denies that Gafni Sadeh imported all of the tiles. But I think that this is not an easy thesis to defend, since Mendelson's position is based (*inter alia*) on the explanatory notes to the draft Liability for Defective Products Law, 5739-1978, which state that 'This law shall apply solely to personal injury,

and any claim for compensation for damage of any other kind should be filed under other laws' (*Draft Laws*, 5739, 30), i.e., the liability of importers for property damage should be proved in the same way as the regular tortious causes of action are proved (see also CA 140/82 *Bromine Compounds Ltd v. Parod Kibbutz* [20], at pp. 769-770; D. More, 'The Draft Liability for Defective Products Law, 5739-1978,' 7 *Tel-Aviv University Law Review (Iyyunei Mishpat)* 114 (1979), at pp. 151-152; I. Gilead, 'Strict Liability for Products,' 8 *Bar-Ilan Law Studies (Mehkarei Mishpat)* 179 (1990)). The question of Mendelson's liability should therefore be examined under the Sale Law.

Liability under the Sale Law

91. Indeed, it would appear that for our purposes it is sufficient to consider the alternative reasoning of the District Court in order to deny Mendelson's appeal. There are two elements in the alternative reasoning — a claim for non-conformity under the Sale Law and a negligence claim under the Torts Ordinance. The first element is sufficient, since a claim for non-conformity (which is fundamentally a claim in contract) does not require proof of negligence (see *Eximin SA v. Itel Style Ferarri Textile and Shoes Ltd* [4]; CC (TA) 65741/04 *Zaguri v. Amit* [37]). I think that no one would deny that ultimately the tiles supplied by Avnei Gazit and Gafni Sadeh to Eisenberger were found to suffer from non-conformity in accordance with one of the following subsections in the Sale Law:

'Non-conformity

11. …

…

(3) Goods that do not have the quality or the features that are required for ordinary or commercial use or for a special purpose that is implied by the agreement…

…

(5) Goods that do not conform in another way with what was agreed between the parties.'

92. I also accept the determination of the court (in para. 14), with its reasoning, that Mendelson was given notice of the non-conformity within the period prescribed in s. 15 of the Sale Law. Mendelson admittedly

claims that until 2001 it was not expressly told that the notice referred to the tiles that were bought in 1998, but I think that in the circumstances this fact is of no significance. The complaints that were made to Mendelson came from specific residents in specific apartments, and Mendelson was well aware of the tiles to which they related (it need not be said that this claim of Mendelson, which should not be accepted on its merits — is almost identical to Pamesa's line of defence, which Mendelson attacked most forcefully, and we have already discussed (in para. 79) the question of judicial estoppel).

93. It is also my opinion that we cannot accept the claim that Mendelson did not buy Avnei Gazit and therefore it is only liable for 23% of the compensation. Eisenberger submitted to the court a signed memorandum in which Gafni Sadeh undertook Avnei Gazit's liabilities. Admittedly, the document is fragmented, but Mr Shelomo Sadeh, who signed the document, testified on behalf of Mendelson. Counsel for Mendelson admittedly asked the witness if he had in his possession 'the full document' and the witness answered that he did not (p. 63 of the transcript), but I think that this question was insufficient. Once the partial document that clearly goes against Mendelson was attached to Shelomo Eisenberger's affidavit, Mendelson should have located it, and in any case the burden in this regard rested with Mendelson. Admittedly, Mendelson claims that, in his testimony, Shelomo Sadeh said that the agreement was not implemented, but Sadeh's testimony in this regard is unclear (*ibid*., at pp. 66-68). In the circumstances I am of the opinion that there is no basis for intervening in the determination of the trial court, which is also based on the fact that initially, before the extent of the damage became clear, Mendelson took 100% liability for the tiles that were supplied and the damage caused by them (see p. 113, at para. 12); admittedly, I would not regard this last point as central, since it may also be possible to make a commercial marketing decision to repair damage even when others are responsible for it, but the other reasons are sufficient.

The extent of the damage

94. With regard to the mistakes that it is alleged were made in the manner of calculating the damage, a distinction should be made between several claims that were all raised in the trial court, but were not directly addressed in the judgment. *First*, with regard to Topolsky's testimony that 'in public areas… the levels of wear and tear and strength… should be

greater' (p. 47 of the transcript), Mendelson argued that Eisenberger should not have made use of the tiles in public areas, and therefore it is not entitled to compensation for such use. I am of the opinion that we should not accept this claim, since these general remarks are insufficient for proving that the specific tiles are indeed not of a suitable type for public areas and that this fact was communicated to Eisenberger. It is not superfluous to point out that at the same time Mendelson claims that no defects have been discovered in the public areas, and this is capable of showing that we are not dealing with tiles that cannot reasonably be laid in public areas. *Second*, it was mentioned that Mendelson replaced some of the tiles at its expense, and this amount should be deducted from the amount of tiles for which Eisenberger claims compensation on the ground that they were replaced. My opinion is that also in this regard there is no ground for intervention. It is sufficient to point out that there is a difference, which was not explained, between the amount of the tiles that Eisenberger claimed (2,605 sq. m. in the statement of claim) and the amount that was taken into account when calculating the compensation (2,096 sq. m.).

Deduction of VAT

95. Another of Mendelson's claims is that VAT should be deducted from the amount of compensation that was claimed for the replacement of the tiles (which is comprised of the cost of replacement tiles and the cost of labour). According to Mendelson, the sums claimed by Eisenberger included VAT, which it can deduct as a business (under s. 38 of the Value Added Tax Law, 5736-1976). Mendelson refers to the testimony of Mr Eisenberger (at pp. 34-35 of the transcript), in which he confirmed that at least some of the amounts in his calculations included VAT.

96. I think that in this regard Mendelson is correct, at least for probative and procedural reasons. Eisenberger's calculation of the damage was set out in the affidavit of Shelomo Eisenberger (plaintiff's exhibit 2), and it was accepted in full by the trial court. In so far as the cost of replacing the tiles is concerned, the calculation is based on a price quote (appendix G of the affidavit) of NIS 150 per square metre (which together with VAT amounts to NIS 175.5 per square metre). No proper calculation was submitted as a basis for the cost of the tiles themselves (NIS 45 per square metre). In these circumstances, it is clear that at least the element of labour (which is the main one) includes VAT, and it is

possible that this is also the case with regard to the cost of the tiles (no one denies that in the table setting out the costs of the works that had already been carried out (appendix E), at least some of the items relating to the cost of the tiles included VAT).

97. In these circumstances there is merit to Mendelson's claim that since Eisenberger is able to deduct the VAT, the present calculation (NIS 170 per square metre for the work; NIS 45 per square metre for the tiles) overcompensates it (see A. Yoran, *Tax Considerations in Tort Compensation* (1988), at pp. 78-79; CC (TA) 167265/02 *HaDiklaim Israel Date Growers' Cooperative Ltd v. Eliyahu Insurance Co. Ltd* [38], *per* Justice Fligelman; for the duty of reducing the damage by deducting VAT, see CC (TA) 127508/98 *Nadar v. Rosenblatt* [39], per Justice Ettedgui). I am not considering general questions that this claim may raise. In my opinion it is sufficient that Mendelson raised a claim that has merit and Eisenberger, which has the burden of proof, *did not trouble to address it* in the trial court or the appeal court. In these circumstances, I am of the opinion that Mendelson's position should be accepted in these matters.

98. With regard to the general claims that the damage was not properly proved, since even now all the tiles have not been replaced and not all the residents have complained, these matters are subject to the discretion of the trial court, and there is no basis for intervening in them.

Eisenberger's appeal

99. Eisenberger's appeal is directed solely at the rejection of its expert's opinion on the question of the damage to its reputation. According to it, the damage amounted to NIS 600,000. By contrast, in the opinion of Mendelson's expert, the damage was assessed at more than six thousand US dollars. The court held that the opinion on behalf of Eisenberger was 'excessive,' but also that Mendelson's expert 'to some extent underestimated the damage' (para. 15). Finally the court awarded compensation for this head of damage in the sum of NIS 75,000.

100. In its appeal, Eisenberger raises three different arguments: *first*, the court did not give proper weight to its special characteristics, including the fact that it is a small company that builds in a limited area; the percentage of its sales that results from the recommendation of former customers (11%) is higher than what is usually found in companies that work throughout the country, and in the building that is the subject of the appeal, this percentage is even higher (22%); that its

reputation is related to the fact that it has never been sued. *Second*, it was argued against Mendelson's expert that he relied on a report that was not filed in the court, and which he had also not examined personally; it was also claimed that there were contradictions between the testimony and the opinion with regard to the period of the damage to its reputation. *Third*, it was argued that the court erred in finding that the damage to reputation should be paid as of the date when the judgment was given, whereas the damage was caused years earlier. It was therefore argued that interest and linkage differentials should be awarded on the amount of damage (NIS 75,000) from the date of the first complaint (23 December 1998). In the alternative, it proposed a different calculation (NIS 300,700).

Mendelson's reply

101. In its reply, Mendelson claims that the court heard the lengthy cross-examination of the two experts and expressed its opinion with regard to them in the judgment, and therefore there is no basis for the intervention of the appeal court. It was also mentioned that since the burden of proof rests with the plaintiff, and since it was held that its expert opinion was 'excessive,' it did not satisfy the rule of the burden of proof. It also submitted lengthy arguments against the calculation method of Eisenberger's expert, *inter alia* because of his assumption that the harm to reputation would result in the apartments not being sold at all, an argument that is unrealistic since in practice Eisenberger admitted that all the apartments that it built since the defects were discovered had been sold. It was also argued that Eisenberger's opinion does not include any reference to relevant factors (such as the change in the directors of the company), and it relies on erroneous information. In conclusion it was argued that no ground had been shown for intervention in the judgment of the trial court.

Decision

102. After consideration, I have reached the conclusion that the law in this matter supports Mendelson:

> 'It is established case law that the court of appeal does not tend to intervene in the trial court's assessment of the injured party's damage, and it will not replace the trial judge's assessment with its own assessment, unless the amount of compensation that was awarded is unreasonable and unrealistic' (CA 487/82 *Nadler v. Sadeh* [21], at p. 25, per

Justice Bach; CA 778/83 *Estate of Sarah Saidi v. Poor* [22]; CA 2245/91 *Bernstein v. Atiya* [23]).

A consideration of the parties' claims, and the opinions themselves, shows, I suspect, that Eisenberger's calculation does not make sense in the circumstances, and that the decision of the court considered this calculation together with the principles and objections raised by Mendelson. There is no basis for intervention in this head of damage.

Conclusion

103. I propose to my colleagues that, as stated above, we allow Pamesa's appeal (CA 7833/06) in full, and Mendelson's appeal (CA 8125/06) on the question of the deduction of VAT only, so that 17% is deducted (the amount of VAT in the price quote for the work that was submitted) from the amount of the compensation for replacement of the tiles (NIS 461,120). I also propose that we deny the other parts of Mendelson's appeal, as well as Eisenberger's appeal (CA 8495/06). In the circumstances, Mendelson shall pay Pamesa its costs and legal fees in a sum of NIS 25,000. Eisenberger shall pay Mendelson costs in a sum of NIS 15,000.

Vice-President E. Rivlin

I agree.

Justice A. Grunis

I agree.

Appeal CA 7833/06 allowed. Appeal CA 8125/06 allowed in part. Appeal CA 8495/06 denied.

23 Tevet 5769.

19 January 2009.