

CISG-online 2004	
Jurisdiction	France
Tribunal	Cour de Cassation (French Supreme Court)
Date of the decision	03 November 2009
Case no./docket no.	T 08-12.399
Case name	<i>Tonnellerie Ludonnaise SA v. Anthon GmbH & Co. Maschinenfabrik</i>

*Translation * by Andrea Vincze ***

[The Court considered] Art. 3 of the Civil Code and Art. 6 CISG.

1

According to the appealed judgment and the submissions, Company Tonnellerie Ludonnaise (hereinafter [Buyer]) concluded a lease-purchase contract with Company Loxxia Bail, subject to which Company Loxxia Bail is proceeding, in order to finance a machine manufactured by Company Anthon GmbH & Co. (hereinafter: [Seller]) that is registered in Germany.

2

When [Buyer] experienced difficulties in using the machine, it requested retroactive termination of the sales contract concluded between Company Loxxia Bail and [Seller], and termination for the future of the lease-purchase contract concluded between [Buyer] and Company Loxxia Bail.

3

Regarding the [admissibility] of [Buyer]'s claims and [the requests] to order [Seller] to reimburse to Company Tonnellerie Ludonnaise a sum of EUR 135,679, to order [Buyer] to return the machine subject to the sale, and to order [Seller] to pay to [Buyer] the sum of EUR 270,580 as damages and interest, the judgment of the Court of Appeals held that, although [Seller] had cited the provisions of the CISG, it did not request application of the CISG in the present case, and therefore, the litigating parties acknowledged the application of the French Civil Code.

4

* All translations should be cross-checked against the original text. For purposes of this translation, Anthon GmbH of Germany is referred to as [Seller], and SA Tonnellerie Ludonnais of France is referred to as [Buyer]. Amounts in European currency (*Euro*) are indicated as [EUR].

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In so ruling, although the pleading invoked the provisions of both the Civil Code and the CISG, and because [the Court] could not find thereupon that the parties voluntarily excluded application of the CISG, the Court of Appeal violated the above laws.

5

For the Above Reasons

6

[The Supreme Court] **reverses** and **annuls** in its entirety the judgment rendered by the Court of Appeal of Bordeaux on 15 October 2007 regarding the [above-mentioned] parties. [The Supreme Court] orders the cause of action and the parties to be reinstated in the position where they were prior to the above-mentioned judgment, and in the interest of justice, orders the Court of Appeal of Bordeaux to hold a new trial before a new tribunal.

[The Supreme Court] orders [Buyer] to pay the costs.

Regarding Art. 700 of the New Code of Civil Procedure, [the Supreme Court] dismisses the claim of Company Tonnellerie Ludonnaise.

[The Supreme Court] rules that, regarding the request of the attorney general before the Supreme Court, the present judgment shall be forwarded for transcribing on the margin or after the reversed judgment.

The judgment of the Commercial, Financial and Economic Chamber of the Supreme Court is rendered and announced by the President at the public hearing on 3 November 2009.

Alternative argument to the present judgment

Argument submitted by SCP Thomas-Raquin et Bénabent, attorneys, representing [Seller].

It contains a complaint against the appealed judgment that ordered retroactive termination of the sales contract concluded between [Seller] and Company Loxxia Bail, termination for the future of the lease-purchase contract concluded between the latter and [Buyer], and consequently ordered [Seller] to reimburse to [Buyer] a sum of EUR 135,679, and to return the machine subject to the sale. [The judgment] further ordered [Seller] to pay to [Buyer] a sum of EUR 270,580 as damages and interest.

M 1

[Objection based on Court of Appeals erroneous application of the French Civil Code rather than the CISG]

«Although [Seller] cited the provisions of the CISG, ratified by Germany on 21 December 1989 and by France on 6 August 1982, the Court of Appeals stated that it did not request application thereof in the present case and that, hence, the litigating parties acknowledged the application of the French Civil Code.»

M 2

[Objection based on the facts of the case]

«Regarding the existence of a latent defect, the Appellate Court ruled that the expert examined the respective machines at the University of Bordeaux I under two different sets of measurement, and the second set of measurement was performed in response to the objection raised by [Seller] regarding the time period between collection of the samples and their measurement.

The expert only used the second set of measurement.

M 3

The expert determined based on the staves manufactured by another user of an identical machine of the [Seller]'s brand, that there is a problem with the compass level of the machinery, that is a specific problem with the machine subject to the dispute but also an unpredictable problem that is caused by uncontrolled mechanical processes. This problem causes a material deviation from the angularity of staves manufactured with high gradient, thereby causing contact defects between the staves and thus the joints opening to the outside.

M 4

The expert specified that the defect concerning maintenance of the depressor does not affect the defect discovered concerning the angle of the joining. The expert added that the latter defect existed when the machine was commissioned on 2 May 2000 but it might have worsened during five-year use of the machine.

M 5

The expert also discovered that the CE marking was not displayed on the equipment, as well as a design defect of the machine that generated the risk of crushing and feeding problems on the feeding station, and that there was no protection on the output unit.

M 6

The expert responded to various statements of the parties, in particular, regarding the referenced statements: each cooper considers himself as holder of a trade secret regarding manufacturing, the coopers agreed to submit samples of the goods manufactured only under the condition that their secrecy is guaranteed, and before the problem raised by [Seller], the expert made new measurements with a cooper who agreed to be named and who admitted that he carved staves in contradictory way.

M 7

The expert submitted a report after the expert opinion was requested by the court, he answered all questions raised and there is no evidence that he committed any mistake during the performance of his assignment, hence, the parties are bound by this report.

M 8

The expert report shows that starting from the delivery of the machine, SA Tonnellerie Ludonnaise complained of problems regarding the angularity of the staves cut. The expert added that the latter defect aggravated because the machine had been used for five years and to an extent that he was not able to quantify.

M 9

The expert specified that this geometrical defect could not be detected without a special examination which a cooper is not able to perform, and had such defect been known, the appellant would not have purchased the machine. **M 10**

Therefore, as a result of a latent defect discovered upon delivery, the jointing machine was not unsuitable for the purpose it was supposed to serve but it considerably decreased the use to the extent that SA Tonnellerie Ludonnaise would not have purchased the machine if it had known of existence of [the latent defect]. **M 11**

As the owner of the machine SA Tonnellerie Ludonnaise is entitled to claim retroactive termination of the contract and reimbursement of the purchase price of EUR 135,679 in exchange for the return of the machine. **M 12**

Based upon the Above

First, the judge is to decide the dispute in accordance with provisions of the applicable law. The CISG forms part of the substantive law, provided that the respective sale has an international character. **M 13**

The Court rules that the parties could have chosen to exclude the CISG and stick to application of the French Civil Code, however, that is complemented by implementation of legal provisions applicable to a contract for the international sale of goods concluded between a German seller and a French buyer, therefore, the Court of Appeal made a mistake and violated Art. 12 of the Code of Civil Procedure. **M 14**

Second, in its submissions on appeal, [Seller] stated that «the sale is subject to the CISG because the seller and the buyer have their respective places of business in Contracting States» (*cf.* arguments, p. 5 para 7). **M 15**

It was expressly argued that that pursuant to Art. 82 CISG, Company Tonnellerie Ludonnaise had lost its right to declare the contract avoided because it failed to return the machine to [Seller] and continued to use it, whereby it also became impossible to return it «in a substantially similar condition» to that at the time of receipt of the goods (*cf.* arguments, p. 5 *et seq.* and p. 14 para 3). **M 16**

The Court rules that [Seller] did not request application of the CISG, and that the Court of Appeal misinterpreted the written submission of [Seller], violating Art. 4 of the Code of Civil Procedure. **M 17**

Finally, pursuant to Art. 82 CISG, the buyer loses the right to declare the contract avoided «if it is impossible for him to make restitution of the goods substantially in the condition in which he received them.» **M 18**

The Court of Appeal ruled that the alleged defect of the machine was «aggravated because of the fact that it was used for five years».

M 19

However, as [the Court of Appeal] failed to consider, as it should have, that the fact that [Buyer] had used the machine for five years might have put it in a position that «makes it impossible for a [Buyer] to return the machine in the condition in which it received it» (*cf.* arguments of [Seller], p. 5 *et seq.* and p. 14 para 3), the Court of Appeal made its decision on a wrong legal basis concerning Art. 82 CISG.

M 20