Abstract by:
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Case name: *Portuguese chestnuts case*
Jurisdiction: Portugal
Court: Tribunal da Relação do Porto (Court of Appeal Porto)

The parties concluded a contract for the sale of chestnuts for a total price of EUR 45,800.00. The seller (a Portuguese company) brought an action claiming that the buyer (a German company) had received the chestnuts without making any complaint, but only paid an amount of EUR 27,825.50. The seller claimed that the buyer should be ordered to pay the amount of EUR 17,974.50 (plus interest).

The buyer argued that the seller had failed to comply with the buyer's instructions regarding the packaging of the goods. As a result, the goods did not reach their destination in good condition, they were damp and moldy, and the pallets were dented and turned over. The buyer had to separate and choose the chestnuts, re-package them, and sell them at a lower price. The buyer had to pay its employees for their extra work and had suffered a loss of profit made from the sale of the chestnuts.

The buyer accordingly filed a counterclaim requesting the seller to pay compensation for the loss it had suffered because of the seller's non-performance. The buyer calculated its loss based on the emerging damage and the loss of profits (total amount of EUR 12,260 plus interest).

The Court of First Instance dismissed the seller's claim and ordered the seller to pay the buyer the sum of EUR 9,580.00 as compensation for the loss suffered by the buyer because of the seller's non-performance based on fault liability (plus interests). The Court found that, in the first order, the chestnuts arrived at the destination (Germany) with mold and worms and that, in the second order, the pallets reached their destination dented, turned, and damaged. The Court found that part of the chestnuts could not be consumed, and that the buyer had had to sell the rest at a lower price than the purchase price. The pallets had to be disassembled and the chestnut bags had to be opened to separate the ones that could be marketed from the ones that were damaged (this work was done by the buyer's employees).

The Court of Appeal confirmed the facts that the Court of First Instance had considered to be proven.

The Court of Appeal held that Regulation (EC) No 593/2008 of the European Parliament and of the Council of 17 June 2008 on the Law Applicable to Contractual Obligations (Rome I) could not be applied. This Regulation only applies to contracts concluded after 17 December 2009 and, in this case, the sale had already been concluded on 18 November 2004.

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The Court of Appeal held that instead the Convention on the Law Applicable to Contractual Obligations signed at Rome on 19 June 1980 (known as the «Rome Convention») was applicable, because Germany and Portugal were State Parties.

According to Art. 3(1) of the Rome Convention, the contract is governed by the law chosen by the parties, which must be expressed or be clearly determined by the provisions of the contract or the circumstances of the case and which may relate to all or only part of the contract. In this case, nothing was alleged or demonstrated to suggest that the parties, when concluding the contract, had a particular law in mind.

In court proceedings in the Court of First Instance, the parties had relied exclusively on Portuguese law, and the Court of First Instance had accepted this as a tacit agreement on the applicable law. The Court of Appeal held that according to Art. 3(2) of the Rome Convention «the parties may at any time agree to subject the contract to a law other than that which previously governed it, whether as a result of an earlier choice under this Article or of other provisions of this Convention», and accordingly Portuguese law applied in the present case.

Although the seller claimed that the CISG should be applied, the Court of Appeal found that this Convention had been ratified by Germany, but not by Portugal[1]. The Court of Appeal therefore ruled that the CISG could not be applied.

The Court of Appeal amended the decision of the Court of First Instance, stating that according to Article 471 of the Portuguese Commercial Code, the buyer must notify the seller about the lack of quality of the goods within 8 days if he does not examine the goods when they are delivered. If this time limit has lapsed, the fact that the buyer has not complained about the quality of the purchased item means that the rights which normally derive from the seller's non-performance lapse. The CISG, referred to by the seller, stipulates in Art. 38(1) regarding the time limit for inspection of the goods: «The buyer must examine the goods, or cause them to be examined, within as short a period as is practicable in the circumstances.» As regards the time limit for lodging complaints, Art. 39(1) CISG states: «The buyer loses the right to rely on a lack of conformity of the goods if he does not give notice to the seller specifying the nature of the lack of conformity within a reasonable time after he has discovered it or ought to have discovered it.»

Against this background, the Court of Appeal held that the eight-day period laid down in Art. 471 of the Portuguese Commercial Code cannot be considered excessive in a contract for the sale between trade professionals (B2B contract), provided that this provision is

[1] Portugal acceded to this Convention on 23 September 2020, and it will enter into force for the Portugal on 1 October 2021.

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interpreted as that the time-limit only starting from the date on which the buyer discovers the «vice» (non-conformity) of the purchased goods, or in which he would have discovered it if he acted with due diligence for commercial transactions (being the majority understanding under Portuguese case law). With the above interpretation, Art. 471 of the Portuguese Commercial Code is therefore compatible with the concept of «reasonable time» laid down in Art. 39(1) CISG.

Under Portuguese law, the buyer bears the burden of proving that the notice was given (Art. 342(1) of the Portuguese Civil Code), and the seller bears the burden of proving the expiration of the time limit for the buyer to notify the lack of conformity and of the time limit for bringing an action after such notification. In the present case, the buyer did not prove that he notified the seller about the defects in the chestnuts, and when he did by filing his counterclaim, the eight-day period of Art. 471 of the Portuguese Commercial Code had expired.

The Court of Appeal finally held that the *exceptio non adimpleti contractus* can only be validly exercised if the buyer still has the right to repair or replace the goods; however, as mentioned above, that right and the right to price reduction had lapsed in the present case. The seller was therefore entitled to claim payment of the outstanding price, in addition to interest (according to the interest rates for claims held by commercial companies).