

Ruling no 100 of 3 February 2021 (19-13.260) - Cour de cassation (*Court of Cassation*) - Commercial Chamber - ECLI:FR:CCASS:2021:CO00100

Only the French version is authentic

Partial quashing

Summary:

Pursuant to Article 39 of the United Nations Convention on Contracts for the International Sale of Goods of 11 April 1980 (the CISG), A buyer loses the right to rely on a lack on conformity of the goods if he does not give the seller notice thereof at the latest within a period of two years from the date on which the goods were actually handed over to the buyer.

The cour d'appel (*Court of Appeal*), to which the final seller brought a recourse action against his own seller, infringed this provision by refusing to apply it, when ruling that Article 39 does not apply to such an action, which finds its cause not in the lack of conformity itself, but in the action taken by the consumer against the final seller.

Appellant(s): Ceramiche Marca Corona Spa

Respondent(s): Bois et matériaux, simplified joint-stock company

Facts and procedure

1. According to the ruling under appeal (Poitiers, 13 March 2018), delivered on remand after quashing (Commercial Chamber, 2 November 2016, appeal no 14-22.114), on 18 April 2003, the Italian company, *Ceramiche Marca Corona (CMC)*, a manufacturer and marketer of tiling, sold products to *Malet matériaux*, whose rights were transferred to *Bois et matériaux* (the seller), who resold the products on 9 May 2003 in France to Mr and Mrs O... (the buyers).

2. Claiming that the tiling had micro-scratches, the latter parties initiated legal proceedings for compensation against their seller, who called CMC (the supplier) as guarantor.

Reviewing pleas

On the second part of the first plea, appended hereafter

3. Pursuant to Article 1014, paragraph 2 of the Civil Procedure Code, there is no need to rule by a specially reasoned decision on this plea, which is clearly not of a nature to lead to quashing.

On the first part of the first plea

Statement of plea

4. *CMC* criticises the ruling for declaring admissible the legal proceedings brought against *CMC* by *Bois et matériaux*, whereas "Directive 1999/44/EC of the European Parliament and of the Council of 25 May 1999, on certain aspects of the sale of consumer goods and associated guarantees, serves to protect the consumer purchasing goods in a member state other than where the consumer resides. He claims that the cour d'appel (*Court of Appeal*) infringed Directive 1999/44/EC of the European Parliament and of the Council of 25 May 1999 by declaring admissible the legal proceedings brought by *Bois et matériaux* against *Ceramiche*, a manufacturer, on the ground that *Bois et matériaux* is entitled to the provision of the Directive all the while stating that *Bois et matériaux* is a professional seller and not a consumer according to the meaning of the directive.

Court's

response

5. Under the terms of Article 4 of Directive 1999/44/EC of the European Parliament and of the Council of 25 May 1999 on certain aspects of the sale of consumer goods and associated guarantees, when the final seller is liable to the consumer because of a lack of conformity resulting from an act or an omission by the producer, a previous seller found in the same chain of contracts, or any other intermediary, the final seller shall be entitled to pursue remedies against the person or persons liable in the contractual chain. The person or person liable against whom the final seller may pursue remedies, together with the relevant actions and conditions of exercise, shall be determined by national law.

6. Having noted that by a ruling of 29 September 2009 *Bois et matériaux* was ordered to compensate the damage caused to Mr and Mrs O... because of the lack of conformity of the tiling that they were sold, then held that *CMC* was a previous seller in the contractual chain, the cour d'appel (*Court of Appeal*) exactly deduced from this that the recourse action initiated by *Bois et matériaux* (the final seller) against *CMC* (its supplier) was admissible.

7. The plea is therefore unfounded.

On the third part of the first plea

8. CMC criticises the ruling for declaring the proceedings initiated by *Bois et matériaux* as admissible, whereas "Article 4 of the directive provides that, "where the final seller is liable to the consumer because of a lack of conformity resulting from an act or omission by the producer, a previous seller in the same contractual chain or any other intermediary, the final seller shall be entitled to pursue remedies against the person or persons liable in the contractual chain. The person or persons liable against whom the final seller may pursue remedies, together with the relevant actions and conditions of exercise, shall be determined by national law" is limited to acting so that this recourse action is referred to national law, in this case Italian law.

CMC claims that by deducing from Article 4 of the directive that the applicable Italian provisions in consideration of the European directive "are the provisions of the Italian Consumer Code (Article 131 et seq.) taken pursuant to said directive," the cour d'appel (*Court of Appeal*) which did not refer to the law designated by the rules of conflict as it did not examine if, according to Italian law, the professional seller can make a claim against the manufacturer based on Italian consumer law, did not legally justify its decision, and as such infringed Article 4 of Directive 1999/44/EC of the European Parliament and of the Council of 25 May 1999."

Court's response

9. Having set aside the application of provisions of the Italian Civil Code due to lack of relevance, when there is a recourse action by the final seller against a previous seller, then held that Article 131 of the Italian Consumer Code allowed the final seller deemed liable to the consumer for a lack of conformity to carry out legal action against any person liable in the same distributional chain, the cour d'appel (*Court of Appeal*), therefore, carried out the research that was claimed to have been omitted.
10. The plea is therefore unfounded.

On the first part of the second plea

Statement of plea

11. CMC criticises the ruling for ordering it to guarantee *Bois et matériaux* for all of the claims against it in favour of Mr and Mrs O..., whereas "according to Article 39 of the Vienna Convention, "1. 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. 2. In any event, the buyer loses the right to rely on a lack of conformity of the goods if he does not give the seller notice thereof at the latest within a period of two years from the date on which the goods were actually handed over to the buyer, unless this time limit is inconsistent with a contractual period of guarantee." He claims that by setting aside the cited time limit in this case

on the ground that the convention provides rules for contractual relations between the seller and the buyer, including for lack of conformity in the instance, for example, of a difficulty that occurred prior to resale to a consumer according to the meaning of the directive and does not resolve the recourse action of the final seller against their own seller, the cour d'appel (*Court of Appeal*) infringed Article 39 of the Vienna Convention of 11 April 1980."

Court's response

In view of Article 39 of the United Nations Convention on Contracts for the International Sale of Goods of 11 April 1980 (the *CISG*):

12. According to this text, a buyer loses the right to rely on a lack of conformity of the goods if he does not give the seller notice thereof at the latest within a period of two years from the date on which the goods were actually handed over to the buyer.

13. To order *CMC* to guarantee *Bois et matériaux*, the ruling holds, firstly that the recourse action of the final seller is founded not in the lack of conformity itself, but in the legal action taken against this final seller by the consumer, secondly, that the *CISG* governs contractual relations between the seller and the buyer and does not apply to such a recourse.

As such it infers that the debate on the application of Articles 39 and 40 of the *CISG* is irrelevant.

14. In so ruling, the cour d'appel (*Court of Appeal*) infringed the aforementioned provision by refusing to apply it.

ON THESE GROUNDS, and without it being necessary to rule on the last plea, the Court:

QUASHES AND SETS ASIDE, except in so far it declares admissible the legal action brought on elements it declares admissible concerning the legal action taken by *Bois et matériaux* against *Ceramiche Marca Corona*, the ruling issued on 13 March 2018, between the parties, by the cour d'appel (*Court of Appeal*) of Poitiers;

RETURNS the case and the parties, except on this point, to the status existing prior to the said ruling and refers them to the cour d'appel (*Court of Appeal*) of Bourges;

ORDERS *Bois et matériaux* to pay the costs;

President: Mrs Mouillard,

Reporting Judge: Mrs Fontaine, Judge

Advocate-General: Mr Lecaroz

Lawyer(s): SCP Ricard, Bendel-Vasseur, Ghnassia - SCP Piwnica et Molinié

Ruling no 366 of 14 April 2021 (17-25.822) - Cour de cassation (*Court of Cassation*) - Commercial Chamber - ECLI:FR:CCASS:2021:CO00366

Only the French version is authentic

Partial quashing

Appellant(s): Syndicat interprofessionnel de défense du fromage Morbier

Respondent(s): Fromagère du Livradois, simplified joint-stock company

Facts and procedure

1. According to the ruling under appeal (Paris, 16 June 2017), the Syndicat interprofessionnel de défense du fromage Morbier (the *Syndicat*) is an entity that defends the interests and manages protective measures for Morbier, a type of cheese from the Jura region that, since the adoption of the decree of 22 December 2000, has enjoyed *appellation d'origine contrôlée* (AOC) (registered designation of origin) status, and as of 10 July 2002, entered the register of *appellations d'origine protégée* (AOP) (protected designations of origin).
2. Fromagère du Livradois, established in Puy-de-Dôme, produces and markets cheeses. Having produced since 1979 a cheese under the name "Morbier", it was authorised, within the framework of the transitional period provided for in the decree of 22 December 2000 for undertakings situated outside that geographical reference area, to use this name, without the "AOC" indication, until 11 July 2007, date after which it replaced that name with "Montboissier du Haut-Livradois."
3. On 5 October 2001, Fromagère du Livradois filed an application in the United States for the American trademark "Morbier du Haut-Livradois, which it renewed in 2008, for ten years, before cancelling the registration in 2013 and, on 5 November 2004, it filed an application for the French trademark, "Montboissier" for Class 29 products.
4. On 22 August 2013, accusing Fromagère du Livradois of infringing the protected designation "Morbier" and committing acts of unfair and parasitic competition by producing and marketing a cheese that has the visual appearance of the product protected by this AOP in order to create confusion with that product and to benefit from the renown of this designation of origin without having to comply with its specifications, the *Syndicat* brought proceedings against Fromagère du Livradois, requesting that it be ordered to cease any practice infringing the protected designation "Morbier", and to compensate it for the damage suffered.
5. Fromagère du Livradois counterclaimed damages for abusive proceedings.
6. In a ruling of 19 June 2019, the Cour de cassation (*Court of Cassation*) referred a question for a preliminary ruling concerning the interpretation of Article 13, paragraph 1 of Regulation (EC) No 510/2006 of the Council, of 20 March 2006, on the protection of geographical indications and designations of origin for agricultural products and foodstuffs, and Regulation (EU) No 1151/2012 of

the European Parliament and of the Council of 21 November 2012 on quality schemes for agricultural products and foodstuffs.

7. The CJEU responded to the question referred for a preliminary ruling with a ruling on 17 December 2020, to the Syndicat interprofessionnel de défense du fromage Morbier (C-490/19).

Reviewing pleas

Considering the third, sixth, seventh, and eighth parts of the first plea, appended hereafter

8. Pursuant to Article 1014, paragraph 2 of the Civil Procedure Code, there is no need to rule by a specially reasoned decision on this plea which is clearly not of a nature to lead to quashing.

On the first and second parts of the first plea

Statement of plea

9. The *Syndicat* criticises the ruling for dismissing its requests, whereas:

"1°/ the decree of 22 December 2000 on the "Morbier" protected designation of origin only recognised the right for undertakings not located in the designated geographical area to "continue to use this name under current conditions"; The Syndicat submits that the cour d'appel (Court of Appeal) noted that in October 2001, Fromagère du Livradois had filed an application in the United States, for a new trademark including the name "Morbier" and used it after the publication of the decree, and that, as a result, far from continuing to use the "Morbier" name "under current conditions", Fromagère du Livradois had sought to develop its use of the name "Morbier" starting in 2001. Therefore, the Syndicat claims that in ruling that Fromagère du Livradois did not commit any fault by filing an application for the trademark in 2001 and by operating the brand afterwards. In so ruling, the cour d'appel (Court of Appeal) infringed Article 8 of the decree of 22 December 2000 on the "Morbier" protected designation of origin, which at that time was applicable;

2°/ the designation of origin is protected from any use by a competing symbol, whether this competing symbol is operated or not. The syndicat submits that by ruling that filing a new application for the trademark "Morbier du Haut Livradois" in 2008 and maintaining it up to the cancelling of its registration in 2013 did not constitute misconduct, once Fromagère du Livradois stated that it was no longer operating that trademark starting in 2007, the cour d'appel (Court of Appeal) infringed Article 13 of Regulation (EC) No 510/2006 of the Council of 20 March 2006, and Article 13 of the Regulation (EU) No 1152/2012 of the European Parliament and of the Council of 21 November 2012. "

Court's response

10. On the one hand, the cour d'appel (*Court of Appeal*) having ruled that the acts posterior to 22 August 2008 were not time-barred, so that the action for damages due to the violations committed by Fromagère du Livradois by filling an application in the United States, in October 2001, for the trademark "Morbier du Haut-Livradois" and by operating it until 2007, was time-barred, the plea is without effect.

11. On the other hand, Article 13 of Regulation (EC) No 510/2006 then Article 13 of Regulation (EU) No 1152/2012 giving protection to protected designation of origin (*appellation d'origine contrôlée*, AOC) only in Member States, the plea alleging an infringement of the "Morbier" protected designation of origin (*appellation d'origine protégée*, AOP) committed outside of the European Union territory by simple renewal of the registration of a trademark in the United States, without a risk of evocation in the mind of European consumers, is without effect.

12. Consequently, the plea is not founded.

But on the fourth and fifth parts of the first plea

Statement of plea

13. The *Syndicat* takes issue with the cour d'appel (*Court of Appeal*) for dismissing its requests, whereas:

"4°/ a designation of origin is protected against any practice that is likely to mislead the consumer as to the true origin of the product. The Syndicat submits that by ruling that only the use of the name of the protected designation of origin is prohibited, the cour d'appel (Court of Appeal) infringed Article 13 of Regulation (EC) No 510-2006 of the Council of 20 March 2006, and Article 13 of Regulation (EU) No 1152/2012 of the European Parliament and of the Council of 21 November 2012.

5°/ a designation of origin is protected against any practice that is likely to mislead the consumer as to the true origin of the product. Consequently, it limits itself on the one hand to the characteristics stated by the Syndicat that concern a historical tradition and are not founded on investments made by the Syndicat and its members. On the other hand, the "Montboissié" cheese marketed since 2007 by Fromagère du Livradois was different from "Morbier" cheese, and it did not investigate, as it was requested to do, if the practices of Fromagère du Livradois (copy of the "line of ashes" that is a characteristic of Morbier cheese and the other characteristics of the cheese, specifically) were not likely to deceive the consumer as to the true origin of the product. In so ruling, the cour d'appel (Court of Appeal) departed from the legal basis under Article 13 of Regulation (EC) No 510/2006 of 20 March 2006 and Article 13 of Regulation (EU) No 1152/2012 of the European Parliament and of the Council of 21 November 2012."

Court's response

In view of Article 13, paragraph 1 of Regulation (EC) No 510/2006 of the Council, of 20 March 2006, on the protection of geographical indications and designations of origin for agricultural products and foodstuffs, and Regulation (EU) No 1152/2012 of the European Parliament and of the Council of 21 November 2012 on quality schemes for agricultural products and foodstuffs:

14. Under these texts, "Registered names shall be protected against:

a) any direct or indirect commercial use of a registered name in respect of products not covered by the registration in so far as those products are comparable to the products registered under that name or in so far as using the name exploits the reputation of the protected name;

b) any misuse, imitation or evocation, even if the true origin of the product is indicated or if the protected name is translated or accompanied by an expression such as 'style', 'type', 'method', 'as produced in', 'imitation' or similar;

c) any other false or misleading indication as to the provenance, origin, nature or essential qualities of the product, on the inner or outer packaging, advertising material or documents relating to the product concerned, and the packing of the product in a container liable to convey a false impression as to its origin;

d) any other practice liable to mislead the consumer as to the true origin of the product. "

15. In response to the aforementioned question referred for a preliminary ruling, the CJEU, after holding that the AOPs are protected as they designate a product that has certain qualities or characteristics and that the AOP and the product covered are closely linked (point 37) ruled that:

"Article 13 (1), of Council Regulation (EC) No 510/2006 of the Council, of 20 March 2006, on the protection of geographical indications and designations of origin for agricultural products and foodstuffs, and Article 13 (1) of Regulation (EU) No 1151/2012 of the European Parliament and of the Council of 21 November 2012 on quality schemes for agricultural products and foodstuffs, must be interpreted as meaning that they do not prohibit solely the use by a third party of a registered name.

Articles 13 (1) (d), of Regulation No 510/2006 and Article 13 (1) (d) of Regulation No 1151/2012 must be interpreted as prohibiting the reproduction of the shape or appearance characterising a product covered by a registered name where that reproduction is liable to lead the consumer to believe that the product in question is covered by that registered name. It is necessary to assess whether such reproduction may mislead the European consumer, who is normally informed and reasonably observant and circumspect, taking into account all relevant factors in the case."

16. To dismiss the requests of the *Syndicat*, the ruling holds that the AOP legislation does not aim to protect the appearance of a product or its features as described in the specifications, but its name, so that it does not prohibit a product being made using the same techniques as those set out in the standards applicable to the geographical indication, and that in absence of an exclusive right, reproducing the appearance of a product is not a misconduct, and falls within the scope of freedom of trade and free competition. The court stated that the features relied on by the *Syndicat* relate to a historical tradition and implemented by Fromagère du Livradois in 1979, even before the AOP "Morbier" was obtained, and that they are not built on features developed by the *Syndicat* or its members. Moreover the court stated that the blue horizontal line is an ancestral technique that can be found in other cheeses. It holds that the two cheeses could not be likened as a result of the use of vegetable carbon as several years ago. Fromagère du Livradois replaced it with grape polyphenol and that there are other differences, relating, inter alia, to the use of pasteurised milk in the Montboissié cheese and raw milk in the Morbier cheese, an essential feature considering that the Montboissié cheeses intended for consumption in canteens and hospital. It deduced that the *Syndicat* was seeking to extend the protection of the AOP "Morbier" for commercial interests, which was unlawful and contrary to the principle of free competition.

17. In so ruling, while a AOP is not solely protected against the use by a third party of the registered name, but also against the reproduction of the shape or the appearance characterising a product covered by the registered name where that reproduction is liable to lead the consumer to believe that the product in question is covered by that registered name, the cour d'appel (*Court of Appeal*), which did not investigate whether the blue horizontal line constituted a referential characteristic that was unique to the "Morbier" cheese and, if whether, its reproduction, combined with all of the relevant

factors in the case, was not liable to mislead the consumer as to the true origin of the product being marketed under the name "Montboissié", deprived its decision of a legal basis.

On the first part of the second plea,

Statement of plea

18. The *Syndicat* criticises the ruling for ordering it to pay a certain sum to Fromagère du Livradois for abusive proceedings, where "a litigant cannot be ordered to pay compensation for abusive proceedings when his claims were founded. The previous plea demonstrated that the claims of the Syndicat interprofessionnel de défense du fromage Morbier were wrongly dismissed. Consequently, the quashing intervening based on the former justifies the quashing of the decision of the ruling being appealed by the present plea, by application of Article 624 of the Civil Procedure Code."

Court's response

In view of Article 624 of the Civil Procedure Code:

19. According to this text, the scope of the quashing extends to all of the provisions of the ruling being quashed that have a link of indivisibility or necessary dependence.

20. The quashing pronounced on the first plea leads to the consequential quashing on account of the operative part of the ruling related to the claim for compensation for abusive proceedings, which is connected by a link of necessary dependence.

ON THESE GROUNDS, and without it being necessary to rule on the other pleas, the Court:

QUASHES AND SETS ASIDE, except where, according to the ruling, it sets aside the three sets of proceedings carried out on 5 March 2013 in Fournols, Tauves, and Allanches by the court bailiff as part of decisions in ex parte proceedings obtained based on Article 145 of the Civil Procedure Code, the ruling of 16 June 2017, between the parties, by the cour d'appel (*Court of Appeal*) of Paris;

RETURNS, except on these points, the case and the parties to the status existing prior to the said ruling and refers them to the cour d'appel (*Court of Appeal*) of Paris, otherwise composed;

ORDERS Fromagère du Livradois to pay the costs;

Pursuant to Article 700 of the Civil Procedure Code, dismisses the request formulated by Fromagère du Livradois and orders it to pay the sum of 3,000 euros to the Syndicat interprofessionnel de défense du fromage Morbier;

DECLARES that according to the procedures of the chief public prosecutor at the Cour de cassation (*Court of Cassation*), this ruling will be transmitted to be noted in the margin or at the end of the partially quashed ruling;

Thus deliberated and ruled by the Cour de cassation (*Court of Cassation*), Commercial Chamber, and pronounced by the president at the public hearing of the fourteenth of April, two thousand twenty one. PLEAS APPENDED to this ruling

President: Mrs Mouillard,

Reporting Judge: Mrs Lebras, Judge Referee

Advocate-General: Mr Debacq

Lawyer(s): SCP Gatineau, Fattaccini et Rebeyrol - SCP Piwnica et Molinié