Pamesa v. Mendelson, decided by the Supreme Court of Israel on 17 March 2009, involved an international sales dispute regarding responsibility and liability due to defects in ceramic tiles.

Pamesa Ceramica (a Spanish company) manufactured and then sold a large quantity of ceramic tiles to Mendelson (an Israeli company). Mendelson then sold the tiles to Eisenberger (an Israeli contractor) who installed them in a housing complex. Later, a latent defect in the tiles was discovered. Eisenberger replaced the tiles and then sued Mendelson for their price, the work involved in replacing them and compensation for loss of goodwill. Mendelson, in turn, sought to hold Pamesa liable for any compensation it might be held to owe Eisenberger.

The focus of the present CISG Case Commentary is the controversial issue of whether courts should interpret the CISG so as to allow “concurrent remedies” (for “competing” causes of action), in particular, whether Mendelson should be allowed to pursue a delictual (negligence-based) cause of action against Pamesa under domestic tort law, even if Mendelson’s CISG (contract-based) claim against Pamesa was held to be time-barred. Fortunately, Justice Rubenstein’s impressive 55-page opinion represents a most well-organized and well-reasoned example of CISG case law, so I can draw nearly all that I need for this brief Commentary from the Supreme Court’s opinion itself.

In the first instance, the District Court found Mendelson liable to Eisenberger. It also held Pamesa liable to Mendelson, thus rejecting Pamesa’s claim that Mendelson could not rely on the defect. All three parties appealed the judgment of the District Court to the Supreme Court.

---

2 Pamesa Ceramica v. Yisrael Mendelson Ltd., Israeli Law Reports 27 (Supreme Court of Israel 2009).
4 That includes the more detailed material I have tucked into the footnotes (with citations indicating original locations).
5 With the Supreme Court sitting, in this case, as the Court of Civil Appeals. Mendelson appealed the finding that it was liable to Eisenberger. Mendelson appealed the finding that it was liable to Mendelson, the key question being whether the cut-off period of two years in the Sale Law can be “circumvented” by a buyer who does not give the requisite notice of a defect in goods and who then raises a claim against the seller/manufacturer in tort. Eisenberger appealed solely on the quantum of damages for loss of goodwill.
The Supreme Court considered Pamesa’s appeal first. Pamesa argued, inter alia, that Mendelson’s claim was time-barred under Articles 38 and 39 of the schedule to the 1971 Israeli International Sale Law – a rule-set based on the 1964 (Hague) Uniform Law on Contracts for the International Sale of Goods (ULIS). But since the relevant ULIS rules are virtually identical to the corresponding rules in the CISG – a rule-set also ratified by Israel – the Supreme Court treated CISG case law and scholarly opinion as (highly) relevant for resolution of the Pamesa dispute.9

Pamesa’s time-bar argument was based on ULIS Article 39(1) – a provision which (for Pamesa-purposes) matches CISG Article 39. According to the ULIS version:

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.10

Because the tiles in question were examined by the Israeli Standards Institute immediately upon their arrival in Israel (in 1996) and not found to be defective, Mendelson had complied with its obligation under Article 38. Still, the Supreme Court held, Mendelson did not satisfy the requirements of Article 39.11

But Mendelson argued that the ULIS (like the CISG) governs only the obligations of the seller and the buyer that derive from the sale contract, and that the time-bar restrictions therefore do not apply

---

8 If Pamesa’s appeal were denied, there would be no need to consider Mendelson’s appeal.
9 Since Israel ratified the CISG on 22 January 2002, the Israeli courts incurred a treaty-based obligation to apply the Convention to contracts made on or after 1 February 2003. In fact, three years before that, the CISG was incorporated into internal Israeli law by the Sales Law (International Sale of Goods), which came into effect on 5 February 2000. See http://www.cisg.law.pace.edu/cisg/countries/cntries-Israel.html. Still, it was the 1971 (Hague-based) Israeli sales law which found direct application in Pamesa, because the relevant contract between the seller (Pamesa) and the buyer (Mendelson) was made in 1996.
10 Unless the lack of conformity constituted a breach of a guarantee covering a longer period (a modification not relevant in Pamesa).
11 First, because even though Mendelson knew of the defects in 1998, it did not give Pamesa notice thereof promptly after its discovery, and, second, because no notice was given within the absolute cut-off period of two years from the date on which the goods were handed over to the buyer, Mendelson, in 1996. In this connection the Supreme Court also emphasised “another side” to the Hague (and CISG) prescription provisions, which is 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.” Mendelson’s position, upheld by the District Court in the first instance, was 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 (an arbitration award of the Arbitration Institute of the Stockholm Chamber of Commerce – Beijing Light Automobile Co. Ltd v. Connell Limited Partnership – has held that Article 40 refers to a seller who “consciously disregarded facts which were of relevance to the nonconformity”). These complexities notwithstanding, the Supreme Court found it “sufficient” to hold that Article 40 requires at least negligence that constitutes a breach of the customary care in trade, since even judging by this standard, Pamesa did not fall within the scope of the exceptional cases to which Article 40 applies. Regarding Mendelson’s failure to prove the corresponding negligence-element of its tort-based liability claim against Pamesa, see text infra with note 33.
to tort-based claims. Following this line of reasoning, Mendelson argued that Pamesa had been negligent because it sold defective tiles that a reasonable person would not have sold, that Pamesa under Israeli domestic law was in breach of the duty of care to the consumers who later bought the apartments in question (with the defective tiles installed) and that Pamesa had made a false representation, representing (despite its awareness of defects) that the tiles were “grade A.”

Having determined that it was “too late” for Mendelson to rely on the provisions of the International Sale Law that concern non-conformity, the Court proceeded to re-examine the trial court’s ruling that the Sale Law applies only to remedies in the contractual sphere. This question derives from the more general “preemption” question, which involves defining the scope of the Hague (and the CISG) Convention: Does the Convention intend to replace only the domestic sale and contract laws? Or did it seek also to apply to claims in tort? As already noted, the Israeli sales statute directly applicable in Pamesa was based on the 1964 Hague Convention (ULIS), but the Supreme Court emphasized the very similar content – and even similar numbering – of the corresponding rules in the CISG (Vienna) Convention. It was, said the Court, possible without any difficulty to draw a comparative line linking the two versions.

As Professor Schlechtriem has noted, “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.” The limits of the Hague Convention’s application can be deduced especially from its Article 8, a provision which, the Court notes, determines a limited, even narrow, scope of application. Similarly, Article 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.”

Prima facie, the Court continues, the Convention does not apply to obligations in tort law — since these ostensibly do not “arise from a contract of sale.” On the question of whether it is possible to file a claim in tort when the sale contract is governed by the Vienna Convention, the Supreme Court observes, there are two main approaches in international academic literature.

Under the first of these approaches to CISG interpretation (advanced by John Honnold, among others), domestic rules that turn on “substantially the same facts” as the rules of the Convention must be displaced by the Convention. According to this view, Mendelson cannot “circumvent” the Convention obligation to notify by defining its claim as a tortious claim based on a departure from what is expected of a reasonable seller.

---

12 CISG Article 4.
13 If the Court decided that such a tort were not precluded, it would of course then need to decide the factual question of whether the elements of such a tort claim were proved in this case. See text infra with note 33.
14 Pamesa Ceramica at 59 (citing Schlechtriem (1998) at 371).
15 “The present Law shall govern only the obligations of the seller and the buyer arising from a contract of sale.”
16 See Pamesa Ceramica at 61, somewhat paradoxically referring to this as the “narrow approach” – presumably because it reduces the applicability of potentially “competing” domestic rules.
18 Ibid. In this connection, the Court cites Honnold for the proposition 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.” But actually, the Israeli Court observes, it is possible to say that a tortious claim has different elements: see also text infra with notes 21 and 29.
The second approach is more tolerant to concurrent tort claims. Among the proponents of this position, the Court cites an article which Professor Schlechtriem wrote in 1988, presenting 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.

Ultimately, the Court tells us, 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 what the Court describes as 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 (applicable) domestic law on the distinction between tort claims and contract claims. Are we, asks the Court, dealing with two different and concurrent fields, different fields that are not concurrent (non-cumul), or a single field: the law of obligations (“contorts”)?

European case law on this question, the Supreme Court tells us, is relatively meagre. In one case, a Court of Appeal in Germany held that a buyer of fish who did not give prompt notice (under Article 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. The Israeli court also cites a decision by a Court of Appeal in Belgium where notice was not given promptly under Article 39, holding that the seller could only be heard in a tort action 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.

By contrast, the Court notes, 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. There is also similar case law in Canada, and in Australia.

---

19 Focusing again on the scope of domestic law, the Israeli Court calls the “broad approach.” See also supra note 16.
21 *Pamesa Ceramica* at 62, citing P. Schlechtriem, ‘Requirements of Application and Sphere of Applicability of the CISG,’ 36 *Victoria U. Wellington L. Rev.* 781 (2005) at 793: “I advocate the opinion that concurrent actions are not excluded by the Convention.”
23 *Pamesa Ceramica* at 64, citing Thüringen [Jena] Provincial Court of Appeal, 26 May 1998, 8 U 1667/97.
24 Ibid., citing ING Insurance v. BVBA HVA Koelng.
25 Ibid., citing sources which indicate that the CISG does “not apply to tort claims” (Viva Vino Import Corp. v. Farnese Vini S.r.l.); that the CISG “clearly does not preempt the claims sounding in tort” (Geneva Pharmas. Tech. Corp. v. Barr Labs., Inc.) and noting “similar case law in recent years,” including Sky Cast, Inc. v. Global Direct Distrib., LLC; Teevee Toons, Inc. v. Schubert GMBH; Miami Valley Paper, LLC v. Lebbing Engineering & Consulting GmbH.
27 Ibid., citing Ginza Pte Ltd v. Vista Corporation Pty Ltd, even though the matter was not expressly considered.
Having summarized the authorities cited on both sides of this difficult question, the Israeli Supreme Court decided to allow Mendelson to make its claim in tort that Pamesa was negligent in the manufacture of the tiles. Judge Rubenstein’s conclusion is based on several cogent premises, including the highly persuasive proposition that the interests which the plaintiff (Mendelson) is struggling to protect are not identical to the interests which the Convention seeks to protect. There is, in other words, 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.”

In this case, Mendelson claimed that Pamesa was negligent in manufacturing the tiles and it that 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 a CISG contractual obligation, but rather — under Israeli domestic tort law — a negligent performance of a general duty of care of manufacturers that does not derive from the agreement between the parties. Prima facie, there should not be an absolute (CISG) bar against such a claim.

Since Pamesa was both the manufacturer and the seller of the tiles, the Supreme Court also saw reason 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 duty 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.” So, 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.

Ultimately, Justice Rubenstein concludes:

---

28 In this connection Supreme Court notes (Ibid. at 64-65) that Article 34 of the Hague Convention, which governed Pamesa, has no parallel in the Vienna Convention: “In the [non-conformity] cases to which [ULIS] Article 33 relates, the rights conferred on the buyer by the present Law exclude all other remedies based on lack of conformity of the goods.” Did the Hague Convention intend to deny the possibility of suing for tortious remedies based on nonconformity? Was this an express determination on the question of the concurrent application of domestic law? No, the Israeli Court concludes: “this interpretation has been ruled out by commentators on the Hague Convention.”


30 Pamesa Ceramica at 70.

31 Ibid., quoting (the 1st edition of) Bernstein, H. and J. Lookofsky, Understanding the CISG in Europe, at 59.

32 Pamesa Ceramica at 70.
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 have not reached this conclusion lightly … 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 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.

For this reason:

_The Supreme Court of Israel 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._

So, Mendelson’s failure to comply with the requirement of notice in Article 39 of the Convention could not prevent him from suing Pamesa for negligence. _But was the alleged negligence proved?_ Unfortunately for Mendelson, it was not – at least not in the Supreme Court, which reversed the ruling of the District Court on this point.33 (Had Mendelson given notice of the defects at the proper time, it would have benefited from the advantages of strict CISG liability, but when it failed to do so, it must suffer the disadvantages. That result, Justice Rubenstein noted, is perhaps unsatisfactory, since the defective products were 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.)34

---

33 Ibid. at 72: “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. 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. 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. 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.”

34 Ibid. at 75.