NADORCOTT CASE: JUDGEMENT OF THE SPANISH SUPREME COURT Nº 282/2020 PUBLISHED ON JUNE THE 11TH, 2020 FOLLOWS THE JUDGEMENT OF THE CJEU ON DECEMBER THE19th, 2019, AND REDUCE THE PROTECCION SCOPE OF PLANT VARIETIES RIGHTS FIXED BY THE SECOND INSTANCE COURTS

The judgment of the Spanish Supreme Court Nº 282/2020 published on June the 11th, 2020 (http://www.poderjudicial.es/search/AN/openCDocument/f9caf3b37c84304410b129baa45c19bf3ca133c733d13e9b), follows the judgment of the CJEU published on December the 19th, 2019 (http://curia.europa.eu/juris/document/document.jsf?text=&docid=221803&pageIndex=0&doclang=EN&mode=lst&dir=&occ=first&part=1&cid=550576).

Following an application lodged by Nadorcott Protection SARL, on 22 August 1995, with the Community Plant Variety Office ('CPVO'), the latter granted it a Community plant variety right in respect of the mandarin tree variety 'Nadorcott' on 4 October 2004. An appeal with suspensive effect was brought against that decision but was dismissed on 8 November 2005 by a decision published in the Official Gazette of the CPVO on 15 February 2006. Between 22 August 1995 and 15 February 2006, Mr Martínez Sanchís purchased, from a nursery that was open to the public, plants of the Nadorcott variety, some of which were planted in the spring of 2005 and others in the spring of 2006. After 15 February 2006, he replaced a number of plants of that variety with new plants that he purchased from that same nursery.

CVVP, which was appointed to bring infringement proceedings concerning the Nadorcott variety, brought a claim against Mr Martínez Sanchís on the ground that he had infringed the rights of the holder of the Community plant variety right relating to that plant variety. CVVP has thus brought, on the one hand, proceedings for 'provisional protection' in respect of the acts undertaken by Mr Martínez Sanchís prior to the granting of that protection, namely on 15 February 2006, and, on the other hand, infringement proceedings in respect of acts undertaken after that date. CVVP seeks cessation of all those acts, including marketing of the fruit obtained from the trees of that variety, and compensation for the damage allegedly suffered as a result of the acts undertaken by Mr Martínez Sanchís both during and after the provisional protection period.

As a consequence, in relation to the litigation centered on the variety of mandarin "Nadorcott", the Spanish Supreme Court ask the following preliminary ruling:

(1)When a farmer has purchased some plants belonging to a plant variety from a nursery (establishment owned by a third party) and planted them before the grant of the variety right has come into effect, in order for the subsequent activity of that farmer of collecting the successive harvests to be covered by the "ius prohibendi" in Article 13(2) of Regulation [No 2100/94], must the requirements under Article 13(3) be satisfied for

Article 13(2) to be interpreted as relating to "harvested material"? Or must Article 13(2) be interpreted as meaning that the activity of harvesting is an act of production or reproduction of the variety which results in "harvested material", whose prohibition by the holder of the plant variety does not require the conditions in Article 13(3) to be satisfied?

(2) Is an interpretation to the effect that the cumulative protection scheme covers all of the acts listed in Article 13(2) [of Regulation No 2100/94] that refer to "harvested material" and also the harvest itself, or that it covers only acts subsequent to the collection of that harvested material, whether the storage or marketing of that material, compatible with Article 13(3) of [that regulation]?

(3) In applying the scheme for extending the cumulative protection to "harvested material", provided for in Article 13(3) of Regulation [No 2100/94], in order for the first condition to be satisfied, is it necessary for the purchase of the plants to have taken place after the holder obtained Community protection for the plant variety, or is it sufficient that at that time the plant variety enjoyed provisional protection, as the purchase took place in the period between publication of the application and the grant of the plant variety right coming into effect?. The Court (Seventh Chamber) hereby rules:

1. Article 13(2)(a) and (3) of Council Regulation (EC) Nº 2100/94 of 27 July 1994 on Community plant variety rights must be interpreted as meaning that the activity of planting a protected variety and harvesting the fruit thereof, which is not likely to be used as propagating material, requires the authorisation of the holder of the Community plant variety right relating to that plant variety where the conditions laid down in Article 13(3) of that regulation are fulfilled.

2. Article 13(3) of Regulation Nº 2100/94 must be interpreted as meaning that the fruit of a plant variety, which is not likely to be used as propagating material, may not be regarded as having been obtained through the 'unauthorised use of variety constituents' of that plant variety, within the meaning of that provision, where those variety constituents were propagated and sold to a farmer by a nursery in the period between the publication of the application for a Community plant variety right in relation to that plant variety and the grant thereof. Where, after such protection has been granted, those variety constituents were propagated and sold without the authorisation of the right holder, the latter may assert his or her right under Article 13(2)(a) and (3) of that regulation in respect of that fruit, unless he or she had reasonable opportunity to exercise his or her right in relation to those variety constituents.

For concluding this article, it is essential to remark that the CJUE will have to answer another preliminary ruling related with this case about plant variety rights.