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INTRODUCTION

This compilation of abstracts forms part of the system for collecting and disseminating information on court decisions and arbitral awards relating to Conventions and Model Laws that emanate from the work of the United Nations Commission on International Trade Law (UNCITRAL). The purpose is to facilitate the uniform interpretation of these legal texts by reference to international norms, which are consistent with the international character of the texts, as opposed to strictly domestic legal concepts and tradition. More complete information about the features of the system and its use is provided in the User Guide (A/CN.9/SER.C/GUIDE/1/Rev.1). CLOUT documents are available on the UNCITRAL website: (http://www.uncitral.org/clout/showSearchDocument.do).

Each CLOUT issue includes a table of contents on the first page that lists the full citations to each case contained in this set of abstracts, along with the individual articles of each text which are interpreted or referred to by the court or arbitral tribunal. The Internet address (URL) of the full text of the decisions in their original language is included, along with Internet addresses of translations in official United Nations language(s), where available, in the heading to each case (please note that references to websites other than official United Nations websites do not constitute an endorsement of that website by the United Nations or by UNCITRAL; furthermore, websites change frequently; all Internet addresses contained in this document are functional as of the date of submission of this document). Abstracts on cases interpreting the UNCITRAL Model Arbitration Law include keyword references which are consistent with those contained in the Thesaurus on the UNCITRAL Model Law on International Commercial Arbitration, prepared by the UNCITRAL Secretariat in consultation with National Correspondents. Abstracts on cases interpreting the UNCITRAL Model Law on Cross-Border Insolvency also include keyword references. The abstracts are searchable on the database available through the UNCITRAL website by reference to all key identifying features, i.e. country, legislative text, CLOUT case number, CLOUT issue number, decision date or a combination of any of these.

The abstracts are prepared by National Correspondents designated by their Governments, or by individual contributors; exceptionally they might be prepared by the UNCITRAL Secretariat itself. It should be noted that neither the National Correspondents nor anyone else directly or indirectly involved in the operation of the system assumes any responsibility for any error or omission or other deficiency.

Cases Relating to the United Nations Convention on Contracts for the International Sale of Goods (CISG)

Case 827: CISG 1; 8; 9; 14; 18; 19
The Netherlands: Court of Appeals of's-Hertogenbosch
No. C0501069
29-05-2007
Belgian company v First Dutch company
Available in Dutch: LJN: BA6976
Abstract prepared by Jan Smits, National Correspondent, and Bas Megens

A Belgian company sold and delivered a machine to a Dutch company. The invoice sent by the seller indicated that "the goods remain our property until complete payment has been received". The seller utilized general conditions which also indicated that "delivered goods remain the property of the seller until full payment has been received, meaning in particular that the buyer cannot resell the goods or give them as collateral". The Dutch buyer, however, did not pay the entire purchase price and sold the machine to a third company, leasing the machine back from that company. The Belgian seller claimed that the Dutch buyer had acted tortiously towards it by selling the machine to a third party without first paying the entire purchasing price, thus violating the property reservation.

The Court of First Instance determined that the buyer – by not protesting against the provision on the invoice reserving property to the Belgian company – implicitly accepted the reservation of property on the basis of articles 18 (3), 8 and 9 CISG. The court also determined that the buyer did commit a tort, but that it could not be determined that there existed a causal link between the damage suffered by the Belgian seller and the tortious act, and thus dismissed the claim. On appeal, the Belgian company argued this determination to be incorrect. On incidental appeal, the Dutch company argued that it did not implicitly accept the reservation of property by the Belgian company in the first place.

The Court of Appeals determined that according to article 1 CISG, the CISG applied and that the question whether a party has consented to the coming into existence of an agreement and to the applicability of related general terms and conditions falls within the ambit of the CISG.[1] Therefore, the question whether the seller and the buyer had agreed on a reservation of property and/or whether the general terms and conditions of the Belgian company and therewith the reservation of property enshrined therein are applicable, must be answered by reference to article 14 and 19 CISG regarding offer and acceptance and to article 8 and 9 CISG regarding the interpretation of the Convention.

It was clear that both companies were in business with each other on a regular basis. It was also clear that the fronts of the invoices sent by the Belgian company to the Dutch company had always indicated that sales were subject to a reservation of property subject to payment of the full purchase price. However, the purchasing contract nowhere indicated that the purchase was subject to such a reservation of property. Article 18 (1) CISG provides that neither silence nor failure to respond to an offer constitutes an acceptance as such. The seller argued that the reservation of property was not agreed on silently, but was explicitly referred to on the invoices.

[1] Supreme Court decision of 28-01-2005, CLOUT Case 831.

The question thus is whether the Belgian company can invoke the reservation of property against the buyer, despite article 18 CISG, on the basis that they have conducted business with each other multiple times before. In light of the provisions of the CISG, this question must be answered negatively.

Since there was no evidence that the reservation of property was an established practice or usage by which the Dutch company would be bound and since the Dutch company could only have become aware of the reservation of property after receiving the invoice (regardless of whether the reference to the reservation of property was made on the front or the back thereof), it cannot be held that under articles 18, 8 and 9 CISG the buyer had consented to and thus accepted the reservation of property. Therefore, it was never agreed that the machine would be delivered subject to a reservation of property by the seller, and there is no basis for the claim of the Belgian company that the Dutch company acted tortiously towards it. Neither the use of a sale-and-lease-back construction, which is not unusual, nor the refusal by the second company to use the money obtained from the third company to reimburse the first selling company can give rise to a tort. The Court of Appeals therefore sustained the incidental appeal of the Dutch company (making a discussion of the original appeal by the Belgian Company superfluous) and confirmed the Court of First Instance's judgment, correcting the points of law concerned.

Case 828: CISG 1; 6; 7; 8; 11; 35; 38; 39; 53-60; 74; 78
The Netherlands: Court of Appeals of's-Hertogenbosch
No. C0500427
02-01-2007
Dutch person v Carstenfelder Baumschulen Pflanzenhandel GmbH
Available in Dutch: LJN: AZ6352
Abstract prepared by Jan Smits, National Correspondent, and Bas Megens

The appellant (a Dutch person) entered into a contract with the respondent, a German company, for the sale and delivery of trees. The respondent, however, did not pay the entire purchasing price, claiming non-conformity of the goods, and it also claimed back a certain amount as compensation. The appellant claimed payment of the unpaid amount by the respondent.

The Court of First Instance rejected the claim on the grounds that it was not the appellant himself but his company, which he represented, that entered into the contract with the respondent. On appeal, raised by the appellant, the Court of Appeals determined that the CISG was applicable to the contract, pursuant to article 1 (1) (a). The Court of First Instance had stated that the parties had agreed on applicability of Dutch law, but had left undecided the question whether this should entail application of communal Dutch law or of the CISG. However, both parties resided in contracting states of the CISG, the contract fell within the formal and material ambit of the CISG, and the sale concerned movable goods not excluded from the scope of the Convention. The Court of Appeals stated that the argument of the appellant that the parties had explicitly agreed upon application of communal Dutch law had to be rejected. According to article 6 CISG, the exclusion of the application of the CISG is only possible if parties so agree. Since the respondent did not appear before the Court of Appeals, the application of the CISG could not be excluded.

On the substance, the appellant argued that the contract was concluded with him in person, not with his company. The Court first noted that pursuant to article 11 CISG, a contract of sale need not be concluded in or evidenced by writing and that the response to the appellant's argument depended on the statements made by and other conduct of the parties, according to article 8 CISG. Furthermore, due consideration was to be given to all relevant circumstances of the case including the negotiations, practices between the parties, usages and any subsequent conduct of the parties.

The facts of the case seem to indicate that the appellant concluded the contract with the buyer on behalf of his company. The buyer ordered the trees from the catalogue of the appellant's company through the telephone number mentioned on the catalogue; the cargo letters usually indicated the appellant's company as the sender and the accompanying letters usually indicated the name of the appellant's company. On the other hand, however, the trees delivered were not invoiced to the buyer by the appellant's company, but by other companies. Moreover, the buyer had always transferred payment to the appellant's private bank account. The appellant also argued that the buyer paid some of the invoices by writing out cheques to the appellant and that the buyer knew that for tax related reasons the appellant's company never exported its products abroad. Therefore all transactions had been concluded with the appellant himself. The Court noted that the buyer might have been confused by the names of different companies used by the applicant in contracting with the buyer. This was also evident as the buyer claimed compensation for non-conformity of the delivered goods from both the appellant and his company. Nevertheless, since it appears that the buyer did not object to the names appearing on the invoices and transferred the payments to the appellant in person, the Court decided that, subject to proof of the contrary, which could not be delivered since the buyer did not appear before the Court, the buyer considered the appellant to be the contracting party and had concluded the contract with the appellant in person.

With regard to the issue of which transactions had been paid by the respondent, the court stated that the question had to be answered in conformity with the law applicable by virtue of the rules of private international law, pursuant to article 7 (2) CISG, since the CISG is silent on this issue. According to article 4 (1) (2) of the Rome Convention on the Law applicable to Contractual Obligations (1980), Dutch law should be applied, since the obligations under the contract were most closely connected with the Netherlands. Under Dutch law, in the circumstances of this case, the oldest transactions must be deemed to have been paid. Therefore the argument of the respondent that on the transactions which had not been paid the statute of limitations had expired could not be upheld.

With regard to the buyer's claim of compensation for the non-conformity of the delivered goods, the Court stated that the general terms and conditions of the respondent were irrelevant. These general terms and conditions were in fact applicable to contracts of sale between the respondent and its customers. Since in the case at hand the respondent was not a seller, but a buyer itself, there could be no battle of forms between its terms and conditions and those of the appellant, simply because the respondent conditions would not apply. The question whether the respondent had consented to the application of the seller general terms and conditions and to the short time periods specified therein, had to be answered with reference to article 8 CISG. The Court disregarded the question as to the

applicability of general terms and conditions, since in the circumstances of the case the answer to the question whether the respondent had complained in time and in the correct way led, under application of articles 38 and 39 CISG, to the same conclusion. According to the Court, it was clear that trees can only be inspected immediately upon delivery, since at any point after that there is a risk that they get mixed with those received from other suppliers. Therefore the reasonable time referred to by article 39 CISG commences at that point. The length of the reasonable time depends on the circumstances of the case and the nature of the delivered goods. In the case at hand, the Court believed six days, as referred to by the general terms and conditions of the appellant, to be a reasonable period of time to discover the non-conformity of the goods. The inspection, as per article 35 CISG, should concern all aspects of conformity of the goods and be such as to reveal all non-conformities that a buyer should discover. Even though the respondent argued that the non-conformity of the trees could have only been discovered after the six day period, this argument could only be accepted if it were supported by evidence, which the respondent could not submit, since it did not appear before the Court.

As to the question whether the respondent gave notice to the appellant in time, a complaint filed on 18 December 1996 regarding trees delivered on 18 November 1996 constituted, according to the Court, an unacceptable violation of the reasonable period of article 39 CISG.

With regard to the appellant's claims of compensation for extrajudicial costs, though these costs can be compensated, under article 74 CISG, they were not incurred in the present case. The appellant also claimed payment of legal interest on the non-paid part of the main sum. Under article 78 CISG these can be compensated, but that article does not fix an interest rate. This latter must be determined by reference to the law which is applicable under article 7 (2) CISG, i.e. Dutch law. The Court of Appeals thus overturned the Court of First Instance's judgment and ordered the respondent to pay the rest of the original sum plus additional costs and interest.

Case 829: CISG 31
The Netherlands: Court of Appeals of The Hague
No. 05/818
29-09-2006
All Trade BV v CM Supplies (UK) Ltd.
Published in Dutch: SES 2007/45
Abstract prepared by Jan Smits, National Correspondent, and Bas Megens

A Dutch company sold and delivered a consignment of candies to a UK company. The goods were transported by lorry to the port, where the CMR documents were drawn up. The seller sent several invoices and the CMR documents to the buyer, but did not receive payment.

The Court of First Instance determined it had no jurisdiction over the case, since the goods were delivered in the UK and therefore a UK court should have jurisdiction over it. On appeal, the seller disputed this decision. The Court of Appeals considered that since the seller claimed that it entered into a contract of sales with the buyer, regard must be had to article 5 (1) of the Brussels Convention on jurisdiction and enforcement of judgments in civil and commercial matters, 27 September 1968 (hereinafter the "Brussels Convention"), according to which in contracts of sale of movables the court of the place in a Member State where the

goods were delivered, or should have been delivered according to the contract, has jurisdiction. The delivery clearly took place in the present case; the question is however in which state – the UK or the Netherlands – it took place and whether parties had made any agreement in this regard.

The invoices sent by the seller to the buyer indicated a delivery address of the buyer in the UK. The shipments were in fact brought to that location by the seller's transporter and handed over to the buyer at that location. The factual handing over of the goods therefore took place in the UK. The buyer argued that in the past the goods were always purchased by it (albeit not from the seller but from a third company) on a "UK delivered basis". The buyer referred in its argument to the Supreme Court decision of 26 September 1997[2] and claimed that the contract of sale included the transmission to the buyer, as referred to in article 31 (a) of the CISG, and that therefore the predetermined delivery address only referred to the obligation of transmission and not to the separate delivery obligation stemming from the contract of sale. The seller contended that no agreements were made regarding this delivery, which is why article 31 (a) of the CISG must locate the place of delivery in the Netherlands where the goods were handed over to the transporter.

The Court of Appeals rejected the seller's view. If a contract for the sale of movable goods to which the CISG applies indicates an address at which the goods must be delivered to the buyer, then this address must be considered as the place where delivery must take place according to the contract (pursuant to article 5 (1) Brussels Convention), even if the seller itself does not carry out transport to the place of delivery, but uses a transporter for transmission and entrusts the goods to this transporter. The arguments put forward by the seller did not indicate that in the present case the address for delivery had a different or more restrictive meaning or that this address did not coincide with the place where delivery must take place according to the contract. Even article 31 (a) CISG – if applicable in the first place – does not necessitate such a distinction. This provision concerns the situation in which no specific place for delivery is predetermined; a situation which did not occur in the present case, since the parties apparently agreed that the goods had to be handed over at a given address in the UK. The invoices sent by the seller, and referred to by it, specifically indicated the address for delivery. On appeal the seller had not sufficiently substantiated its claim that a distinction exists between its delivery as the seller and the delivery of its transporter at the delivery address. It was not likely, in the opinion of the Court, that the indication of the delivery address encompasses more than the address at which the transporter should deliver the goods, first and foremost because the invoices were addressed to the buyer and were apparently sent to the buyer in advance.

The Court did examine the provisions at the end of the invoices. Nevertheless, those provisions cannot be seen as a confirmation or indication of any agreement between the parties as to the factual or legal delivery in the Netherlands; they seem to concern delivery of the goods to the border by the third company. Moreover, it was neither claimed nor proved that the parties agreed that payment should take place in the Netherlands. The invoices did not indicate any such agreement either; they only contained a request that payment be made into a Dutch bank account and a request is quite simply something different from an agreement. Since no agreement as to the

[2] See CLOUT Case 834.

place of payment was made, no recourse could be made to article 5 (1) Brussels Convention. The place of delivery must therefore determine the competence of the Court. The Court of Appeals thus confirmed the Court of First Instance's judgment.

Case 830: CISG 2
The Netherlands: Court of Appeals of Arnhem
No. 2000/605
12-09-2006
Dutch party v German party 1 and German party 2
Available in Dutch: LJN: AY9479
Abstract prepared by Jan Smits, National Correspondent, and Bas Megens

The appellant and the two defendants entered into negotiations for the sale of a yacht co-owned by the defendants. Parties drew up a document arranging for the yacht to be sold to the appellant, which was signed by the appellant and both defendants. One day later the defendants sold the yacht to a third party for a higher price. The first defendant informed the appellant of the rescission of the contract stating it was not authorized by the second owner to sell the yacht for the price agreed. Subsequently the appellant requested the seizure of the vessel to ensure it would be delivered to it. The appellant then commenced proceedings before the Court of First Instance, claiming several forms of damages resulting from the breach of contract. The Court of First Instance rejected the claim.

The appellant appealed that decision. In the proceedings the CISG was argued to be applicable to the case. In this regard, the Court of Appeals simply considered that the case concerned the sale of a yacht, or at least a preliminary agreement regarding the sale thereof, and that according to article 2 (d) CISG [it may be presumed the Court intended to refer to article 2 (e) CISG] for this reason alone the CISG could not be applicable. The Court thus requested further enquiries and reserved the decision, albeit on other grounds.

Case 831: CISG 7 (2)
The Netherlands: Supreme Court of the Netherlands
No. C03/290HR
28-01-2005
Grootscholten v Vergo
Published in Dutch: NJ 2006/517
Abstract prepared by Jan Smits, National Correspondent, and Bas Megens

A Dutch company sold tomato plants to a Belgian company, which – as was later confirmed by a Belgian expert – were infected with "Coryna bacterial withering disease". The buyer claimed compensation for damages suffered due to fact that the entire crop failed as a result of using the infected plants. Upon delivery of the plants the buyer had signed a receipt, which indicated that the General Terms and Conditions of the Dutch Plant-Breeders Society, as printed on the back of the receipt, were applicable to the transaction. These Terms and Conditions indicated that liability for substandard plants by the seller could not exceed the purchase price. The seller argued that the buyer was bound by this clause. The buyer argued that its consent as to applicability of these Terms and Conditions did not include a consent to this exoneration clause.

The Supreme Court determined that the Court of Appeal was correct in determining that the CISG applies to the case. The Court then determined that, under article 7 (2)

CISG, questions which fall within the ambit of the Convention but which are not expressly provided for in the Convention, must be settled by reference to the general principles on which the Convention is founded or, in the absence of such principles, by reference to the law which is applicable according to the rules of private international law. The question whether a party has consented to the coming into existence of an agreement and to the applicability of related general terms and conditions falls within the ambit of the Convention. On the law, the Supreme Court thus decided that the question whether the buyer consented to the application of the seller's General Terms and Conditions, including the disputed exoneration clause, must therefore be settled by reference to the rules of the Convention, pursuant to article 7 (2) of CISG and not by reference to any system of law that would be applicable under rules of private international law.

Case 832: CISG 31
The Netherlands: Supreme Court of the Netherlands
No. C97/301HR
21-05-1999
La Metallifera SPA v Bressers Metaal BV
Published in Dutch: NJ 2000/507
Abstract prepared by Jan Smits, National Correspondent, and Bas Megens

A Dutch company bought a batch of welded pipes from an Italian company. A confirmation of the order was sent by the seller and contained the provision "Delivery to VTI Horst in (…) Horst [NL]". The buyer subsequently rescinded the contract on the basis that the pipes did not meet the required standard, and summoned the seller before the Court of First Instance of Breda (in the Netherlands), claiming repayment of the purchase price and compensation for future damages. The seller claimed the Court of Breda had no jurisdiction.

The Court decided that the Court of First Instance of Roermond (also in the Netherlands) should be designated the competent court in the present case. The Court of Appeal confirmed this decision on the basis that the confirmation of the order of purchase contained an explicitly determined place for delivery, being an address in Horst, in the jurisdiction of Roermond, and that therefore the condition as provided for by article 31 of the CISG (that parties must have agreed upon a place of delivery) had been met, making the court of Roermond the competent court under article 5 of the Brussels Convention on jurisdiction and enforcement of judgments in civil and commercial matters, 27 September 1968.

The seller appealed this decision to the Supreme Court, arguing that the Court of Appeal had failed to recognize that since the pipes had always been handed over to the party transporting the pipes from Barghe (in Italy) to Horst in Barghe, article 31 (a) CISG should be interpreted as designating Barghe as the place of delivery (notwithstanding the wording of the confirmation of the order of purchase) and Horst as merely the address for shipment. The seller also argued that the mentioning on the confirmation of the order of purchase of Horst as the place for delivery does not entail a legal obligation for the seller under article 31 CISG to deliver in that place. The Supreme Court rejected the appeal on the basis that it was the prerogative of the Court of Appeal to interpret any agreement made between parties as to the place of delivery and that since the pipes had in fact been delivered in Horst the Court's designation of that place as the place of delivery was sufficiently motivated.

Case 833: CISG 38; 39
The Netherlands: Supreme Court of the Netherlands
No. C96/260
20-02-1998
Bronneberg v Ceramica Belvédère SPA
Published in Dutch: NJ 1998/480
Abstract prepared by Jan Smits, National Correspondent, and Bas Megens

An Italian company sold a batch of tiles to a Dutch buyer and delivered them immediately. The buyer did not pay the invoice, claiming that the seller had breached the contract on the ground that the tiles were not of the quality required by the contract (since the glazing of the tiles had already worn off) and that upon sale of these tiles to a third party, this latter had suffered damages. Italian law applied to the contract, meaning that the dispute had to be adjudicated by reference to the CISG.

Both the Court of First Instance and the Court of Appeal determined that since the buyer was informed by its customer that they did not conform to the contract in July 1991, but did not inform the seller of their lack of conformity until November of that year, it had failed to give notice to the seller of the lack of conformity of the tiles within a reasonable time of discovery, as required by article 39 (1) CISG. Its claim must thus be denied. On appeal to the Supreme Court, the buyer argued that the "reasonable period" as referred to in article 39 (1) CISG should only commence at that point in time at which it was capable of ascertaining the lack of conformity of the delivered goods itself. This was not in July, but when it had an opportunity to ascertain whether or not the lack of conformity complained of by its customer actually existed.

The Supreme Court rejected the appeal, pursuant to article 38 (1) CISG which determines that "[t]he buyer must examine the goods, or cause them to be examined, within as short a period as is practicable in the circumstances". In that sense the Court of Appeals did not err in determining that the buyer should not have postponed the inspection of the tiles after being made aware of their lack of conformity by its customer. The Court of Appeals did not err even in affirming that the buyer should not have postponed informing the seller of the alleged lack of conformity, if necessary accompanied by a statement conveying its own doubts about the existence of the defects. The Supreme Court also confirmed the Court of Appeals' reasoning that a period of time of "not even four months" did not constitute a "reasonable period" in the sense of article 39 (1) CISG to give notice of the lack of conformity in question (the wearing off of the glazing of the tiles), notwithstanding the buyer's argument that the existence of such a lack of conformity could only be determined after a certain period of time.

Case 834: CISG 31
The Netherlands: Supreme Court of the Netherlands
No. 16253
26-09-1997
Foppen v Tissage Impression Mécanique TIM SA
Published in Dutch: NJ 1998/691
Abstract prepared by Jan Smits, National Correspondent, and Bas Megens

In July 1993, a Dutch entrepreneur bought fabric from a French company to be used in its company. The seller confirmed the order and delivered the fabric to the buyer in August 1993. This latter subsequently discovered that the fabric did not conform to the contract, since it lacked sufficient elasticity. The buyer thus filed a claim with the Court of First Instance of Maastricht (NL) arguing that the seller had committed a breach of contract.

The Supreme Court concurred with the Court of Appeals that the CISG applied to the case. Before the Court of First Instance of Maastricht, the seller had argued that that Court lacked jurisdiction over the case, invoking articles 5 (1) and 17 of the Brussels Convention on jurisdiction and enforcement of judgments in civil and commercial matters, 27 September 1968 (hereinafter "the Brussels Convention"), but the Court decided it did have jurisdiction. On appeal, the Court of Appeals overturned the Court of First Instance's decision, stating, first, that it was evident from the contract of sale that the seller was under an obligation to deliver the fabric to the place of business of the buyer in the Netherlands and that therefore the contract of sale included the transport of the fabrics. Second, in that case the obligation of the seller according to article 31 (a) CISG consisted of handing the goods over to the first carrier for transmission to the buyer. Third, since the fabric was handed over to the carrier at the seller's place of business in Lyon (in France), Lyon was the place where the contract had been performed and, fourth, as a result, the Court of First Instance of Maastricht could not have jurisdiction under article 5 (1) Brussels Convention, since in a case like the one at issue the place of performance of a contractual obligation must be the place where the contractual obligation which was not performed should have been performed.

On appeal to the Supreme Court, the buyer argued that article 31 (a) CISG does not apply to the present case, since the Court of Appeal's reasoning indicates that the seller was under an obligation to deliver the fabric to the buyer's place of business in Maastricht, while article 31 (a) CISG covers only the situation in which the seller is not under an obligation to deliver the goods to any other predetermined place. The Supreme Court rejected the appeal on the grounds that it was clear from the Court of Appeal's reasoning that that Court – notwithstanding its use of the terms "deliver the fabric to the place of business" – did not consider the present case as one to which the first sentence of art. 31 CISG in which the seller is under an obligation to deliver the goods to any other predetermined place, could be referred to. The case at hand was merely a case as referred to in 31 (a) CISG in which the contract of sale includes the transmission of the goods in question.