

Court of First Instance Breda (Emergency Proceedings)

16 January 2009 [197586/KG ZA 08-659]

Translation [*] by Maarten Draye [**]

PARTIES

[PLAINTIFF], having his residence in Lechaina, Ilias, Greece, (...), Plaintiff on the main claim, Respondent on the counterclaim [Seller]

vs

[...]

ED FRUIT & VEGETABLES BV, [a company under Dutch law], having its legal seat in Tilburg [the Netherlands] (...). Defendant on the main claim, Claimant on the counterclaim [Buyer].

[...]

1. PROCEDURAL ASPECTS

[...]

2. THE DISPUTE

Main claim:

2.1 In summary, [Seller] seeks to obtain a judgment, provisionally executable, ordering [Buyer] to pay a sum of € 51,327 as well as, in subsidiary order, to pay a sum of € 20,000, to be increased with interest and costs.

Counterclaim:

2.2 In summary, [Buyer] seeks to obtain a judgment, provisionally executable, ordering [Seller] to pay a sum of € 53,481.41, or at least a prepayment for this sum in the amount of € 45,000, or at least an amount to be determined in good justice, as well as the legal costs.

[...]

3. ASSESSMENT

On the main claim and counterclaim:

3.1 The Judge in Emergency Proceedings is of the opinion that, given their close connection, the main and counterclaim allow for a simultaneous treatment.

3.2 On the basis of the not disputed, or not sufficiently disputed, statements as well as the exhibits brought forward, the following facts are presumed:

- The parties concluded an oral agreement relating to the sale of watermelons by [Seller] to

[Buyer], whereby the transport of these goods would take place for the account and at the risk of [Buyer].

- In the period of June, July and August 2008, [Seller] sold and delivered batches of watermelons to [Buyer], for which [Seller] invoiced [Buyer] a total amount of € 128,327.
- [Buyer] has paid these invoices for a total amount of € 77,000, while leaving the remaining € 51,327 unpaid.

[POSITION OF THE PARTIES]

[- SELLER'S POSITION]

3.3 [Seller] bases his claim on the sales agreement concluded between the parties, and submits that [Buyer] is on that ground under the obligation to fulfill payment of the remaining amounts invoiced for a total of € 51,327. In subsidiary order, [Seller] states that [Buyer] has acknowledged that it owed [Seller] an amount of € 20,000. Furthermore, [Seller] submits that his claims require urgent treatment. According to [Seller], there were no quality problems with the watermelons delivered. [Seller] submits that [Buyer] did not inspect the watermelons, either before, or following the transport. Furthermore, [Seller] claims that [Buyer] never complained about the quality of the watermelons, either orally or in writing, until the moment that [Buyer] was summoned to pay. Consequently, [Seller] submits that the [Buyer]'s counterclaim should be dismissed.

[- BUYER'S POSITION]

3.4 [Buyer] denies that it is under the obligation to fulfill payment on the remaining amounts invoiced. In this regard, [Buyer] submits that the quality of the watermelons was insufficient, and that it had complained about this issue orally since the beginning. Furthermore, [Buyer] disputes the urgent character of [Seller]'s claims.

[Buyer] states that it has paid costs for transport for a total amount of € 53,484.41 that should be remunerated by [Seller]. By means of a counterclaim, [Buyer] therefore requests that [Seller] be ordered to compensate these costs.

[RULING OF THE COURT]

[- JURISDICTION]

3.5 As [Seller], who has his residence in Greece, operates a business that is carried on there, the claim has an international character. As a result, the first question to be answered is whether a Dutch judge has jurisdiction to assess this claim. The Judge in Emergency Proceedings affirms that this is the case on the basis of article 2 of Council Regulation EC 44/2001 of 22 December 2000 on Jurisdiction and the Recognition and Enforcement of Judgments in Civil and Commercial Matters, which is applicable as [Buyer] has its legal seat in the Netherlands.

3.6 The claims relate to the payment of an amount of money. Claims in emergency proceedings can only be awarded if the existence and the amount of the claims are to a great extent plausible, while, in addition, an immediate decision is required for reasons of acute emergency and the risk that a party cannot repay, assessed while weighing the parties' interests, does not preclude an order to pay.

3.7 In the opinion of the Judge in Emergency Proceedings, [Seller] has demonstrated the urgent nature of his claim. Among others, one of the reasons is that [Seller] has demonstrated that he runs a one-man business and that for the continuity of his business activities and the need to provide in the means of existence for himself and his family, an immediate decision is for reasons of urgency needed.

[- APPLICABLE LAW]

3.8 The Judge in Emergency Proceedings agrees with [Seller] that the [CISG] applies in this case. It is indeed clear that [Seller] has his residence in Greece, while [Buyer] has its legal seat in the Netherlands. As both parties have their places of business in different States where the CISG had entered into force at the moment of conclusion of the sales agreement, and the sales agreement relates to moveable goods (watermelons), which have not been excluded from its scope, the present agreement is, pursuant to article 1(1)(a) of the CISG, governed by this unified law on sales. The unmotivated submission by [Buyer] that the CISG would not apply in the case at hand, cannot be accepted, as [Buyer] did not state, nor did it appear in any other way, that the parties have (tacitly) agreed to exclude the application of the CISG pursuant to article 6 CISG, nor that they have wanted to deviate from the CISG (or its consequences). Furthermore, the fact that the parties in the present case concluded their agreement orally, does not prevent the application of the CISG, as article 11 CISG stipulates that a contract of sale need not be concluded in or evidenced by writing.

[- SUBSTANTIVE ISSUES]

3.9 Article 35(1) CISG provides - in short - that a seller must deliver goods in conformity with the contract of sale. Article 36(1) CISG states that a seller is liable if goods do not conform with the sales agreement at the time when the risk passes to the buyer. In the present case, it is clear that the transport of the goods was to be organized and paid for by [Buyer]. As a result, any damage occurring after the charging the fruit is to be borne by [Buyer], unless the damage was caused by circumstances not due to [Buyer] and was present prior to the charging of the goods. [Buyer] submits that this exception occurred in the present case, as the non-conformity of the watermelons occurred before the transport as they were of inferior quality. [Seller] disputes that the watermelons showed signs of lack of quality (prior to the transport).

3.10 Article 38 of the CISG requires a buyer to examine the goods (or cause them to be examined) within as short a period as is practicable in the circumstances. Furthermore, article 39 CISG stipulates that a 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 discovered it or ought to have discovered it. The notice period starts at the moment on which the buyer discovered or should have discovered the non-conformity. As the present sales contract did not cover transport and the goods covered are perishable and sensitive, [Buyer] was, pursuant to article 38 CISG, under the obligation to inspect the fruit (or have it inspected) *before* transport to the Netherlands. It was neither submitted nor proven that the alleged non-conformity could not have been discovered during an inspection prior to the transport. Considering the foregoing, the notice period started on the moment that [Buyer] should have undertaken this inspection, i.e., prior to the transport to the Netherlands, when the alleged non-conformity could have been discovered. [Buyer]'s statement that it concerned a large batch of watermelons that was delivered at various points in time in different parts or delivered elsewhere and that in some cases an inspection takes place at the place of destination, does not change this finding. As determined in article 38(2) CISG, the inspection can only be postponed until after the delivery at the place of destination in those cases in which the contract of sale also involves the transport of the goods. As this is not the case here, the notice period started for each separate delivery *prior to* the transport to the Netherlands.

3.11 Next, the question must be answered as to whether [Buyer] informed [Seller] on time of the alleged non-conformity. The burden of proof that the buyer has fulfilled the duty to give notice timely and correctly lies with the buyer [...].

The duration of the notice period in article 39 CISG depends on the circumstances of the case, especially the nature of the delivered goods. The Judge in Emergency Proceedings agrees with [Seller] that the present circumstances demand a very short notice period, whereby [Buyer] should have complained either immediately, or at least a few days following delivery of the watermelons. One of the reasons for this is that the goods in question are watermelons, which are subject to decay, and such decay can be expedited if such goods are not being transported under the correct conditions. In addition, [Buyer] has stated itself that (a part of) the watermelons were (immediately) upon arrival in the Netherlands delivered further to (foreign) customers. These further transports could have (a further) negative influence on the quality of the watermelons at issue. Moreover, it should be taken into account that article 39 CISG envisages *inter alia* to allow the seller to investigate complaints and gather proof relating to an alleged non-conformity. A short notice period for complaints is therefore all the more necessary in the present circumstances, given the fact that a lack thereof would hinder the bringing of (counter-) proof relating to the alleged non-conformity or the lack of a causal link.

3.12 While [Buyer] states that it has complained about the inferior quality of the delivered watermelons orally from the very beginning, this statement has been rebutted expressly and motivated by [Seller]. Considering the short notice period within which a complaint is to be brought and the motivated challenge by [Seller] that this would have been done (timely), [Buyer] could have been expected to indicate exactly at which points in time it would have complained to [Seller] and to which deliveries such complaints related. As [Buyer] has failed to do so, its statement that it has orally complained to [Seller] from the beginning will be ignored. In any case, the e-mail message sent by [Buyer] to [Seller]'s counsel on 30 December 2008, in which "problematic deliveries" were mentioned, must be considered as exceeding the reasonable time in article 39 of the CISG. Apart from that, it was neither stated nor proven that [Buyer] complained to [Seller] about the alleged non-conformity within a reasonable time, in the sense of article 39 CISG. Nor did [Buyer] invoke that [Seller] knew or could not have been unaware about the non-conformity (article 40 CISG), which may prevent a buyer's reliance on article 39 CISG. Neither did [Buyer] invoke a reasonable excuse for not (timely) giving the required notification, which would have left its possibility to reduce the price as well as the possibility to claim for damages (except for loss of profit) intact (art 44 CISG). Considering the foregoing, it must be concluded that - even if non-conformity would have occurred - [Buyer] has lost the right to rely on the non-conformity of the goods.

3.13 Considering the foregoing, [Buyer] must pay the remaining invoiced amounts to [Seller]. Contrary to [Buyer]'s submission, the foregoing has as a consequence that the existence as well as the amount of the main claim are highly likely to be correct. The sum of 51,237 € claimed will therefore be awarded. The alleged risk of restitution invoked by [Buyer] does not prevent the sustaining of the main claim, since the complete absence of any risk of restitution is not required and it is only required that the risk of restitution stays within reasonable limits. When an amount of money has been awarded in emergency proceedings, a chance of a different decision in subsequent proceedings [in depth] remains. As it has been established, however, that the existence and the amount of the main claim are highly likely, the chance is minimal that such restitution of the awarded amount will ever be necessary.

3.14 [Seller] claims for legal interest on the invoiced amounts in arrears. On the basis of article 78 CISG, [Seller] is entitled to interest on the invoiced amounts in arrears. Since the CISG does not specify the interest rate and it has neither been stated nor proven that a rate has been agreed between

the parties, the interest rate must be settled in conformity with the law applicable by virtue of the rules of private international law, pursuant to article 7(2) CISG. Given the absence of a choice of applicable law by the parties, this is in the present case Greek law, as Greece is the country with which the contract of sale is most closely connected (article 4(1) of the 1980 Rome Convention on the Law Applicable to Contractual Obligations, hereinafter Rome Convention). Pursuant to article 4(2) Rome Convention, it is indeed presumed that the contract is most closely connected with the country where the party who is to effect the performance which is characteristic of the contract has, at the time of conclusion of the contract, his habitual residence. Plaintiff, who has his residence in Greece, has, as a seller, effected the performance which is characteristic to the contract, being the delivery of watermelons. No circumstances that would indicate a closer connection with another country, have been demonstrated or been proven. [Buyer] did not dispute the fact that interest was due. [Buyer] has, however, submitted that it is common practice in the industry to settle payment at the end of the season and that such was agreed between the parties in the present case. As this has been challenged by [Seller] and as it has not been motivated by [Buyer], this submission will be ignored. It will be considered that the interest is due from the expiration date of the invoices, being 30 days after transmission, as submitted by [Seller]. Consequently, the interest will be awarded in accordance with Greek law from the expiration date of the invoices onwards (30 days after their transmission) on the invoiced amounts that are overdue.

3.15 Furthermore, [Seller] claims for remuneration for the extrajudicial collection costs incurred in the amount of 1,500 €. Pursuant to article 74 CISG, [Seller] is entitled to claim for the remuneration of extrajudicial collection costs. As [Buyer] did not dispute the fact that the requested extrajudicial collection costs were due and these costs were made within reasonable limits, this part of the claim will be awarded as well.

3.16 [Buyer] brings a counterclaim for a total of 53,484.41 € relating to transport costs incurred for melons of inferior quality and that it, because of these issues of quality, has had to credit its clients or has had to have the batch(es) in question destroyed. Without taking into consideration the fact that [Buyer] has failed to demonstrate the required urgency to bring its counterclaim, the above considered results in the fact that [Buyer] did not complain to [Seller] within the reasonable delay in the sense of article 39 of the CISG about the alleged non-conformity. As a result, [Buyer] has lost its right to claim for damages and the counterclaim is to be dismissed for this reason.

[...]