

CISG-online 5289	
Jurisdiction	Netherlands
Tribunal	Gerechtshof Arnhem-Leeuwarden (Court of Appeal Arnhem-Leeuwarden)
Date of the decision	02 June 2020
Case no./docket no.	200.274.098/01
Case name	<i>Top Mark B.V. v. Orchestra-Prémaman Belgium S.A.</i>

Translation by Tom J. Vennmanns***

1 The proceedings at first instance (Interim Injunction Judge)

For the proceedings in the first instance, the Court of Appeal refers to the contents of the judgment of 19 December 2019 rendered by the Interim Injunction Judge of the District Court of Midden-Nederland, location Lelystad.

2 The proceedings at Court of Appeal

2.1

The course of the procedure is evidenced by

- the summons to appeal dated 15 January 2020;
- the statement of grievances (including documents of evidence) of 17 March 2020.

Top Mark B.V. [of the Netherlands; in the following: Seller] then submitted the documents for the delivery of judgment, and the Court issued its judgment.

3 The established facts

The Court of Appeal bases its judgement on the following facts.

3.1

[Seller] operates, among other things, a wholesale trade in toys and baby articles.

3.2

Orchestra-Prémaman Belgium S.A. [of Belgium; in the following: Buyer] is a subsidiary of the

* For purposes of this translation, Claimant-Appellant Top Mark B.V. of the Netherlands is referred to as [Seller] and Respondent-Appellee Orchestra-Prémaman Belgium S.A. of Belgium is referred to as [Buyer]. [Buyer]'s parent company, Orchestra-Prémaman S.A. of France, is referred to as OPSA.

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French Orchestra-Prémaman S.A. (further: OPSA), a company which focuses on the sale of baby and children's articles and operates a large number of stores for that purpose.

3.3

[Buyer] has purchased various children's items from [Seller]. [Seller] applies general terms and conditions. These terms and conditions are stated on the back of its invoices. [Seller] sent these to [Buyer] on 17 June 2015. [Buyer] has retained them without comment and has continued to place various orders.

3.4

The general terms and conditions of [Seller] include a provision that delivered items shall remain the property of [Seller] until the invoices have been paid in full. Items delivered subject to retention of title may only be resold by the customer in the ordinary course of business. Furthermore, these terms and conditions contain a choice of forum for the Dutch court (District Court of Midden-Nederland, location Lelystad) and a choice of law for Dutch law.

3.5

Between May and September 2019 [Seller] invoiced various goods to [Buyer] up to a total amount of € 329,233.60 in total. [Buyer] has not paid these invoices, even after remittance.

3.6.

[Seller] has delivered the goods covered by these invoices to OPSA's distribution center in St-Laurent-Blangy (near Arras, France).

3.7

By letter of 8 October 2019 to [Buyer], (the lawyer of) [Seller] claimed payment of the outstanding invoices, invoked its retention of title and thereby prohibited the further sale of the goods. In the alternative, [Seller] has invoked the *recht van reclame* of Article 7:39 of the Dutch Civil Code (*Burgerlijk Wetboek*).

3.8

On 23 October 2019, [Buyer] (via its lawyer) has announced that it rejects the reliance on the retention of title.

3.9

OPSA and [Buyer] are both in financial difficulties. OPSA was admitted to judicial reorganization proceedings in France on 24 September 2019 (*procédure de sauvegarde*, Article L620 of the French Code du commerce). [Buyer] was admitted to the judicial reorganization by a judgment of the court in Brussels, with a view to obtaining creditors' agreement on a reorganization plan (Article XX.65 et seq. of the Belgian Code of Economic Law (BWER)).

3.10

Subsequently, on 1 April 2020, due to deteriorating circumstances, OPSA requested the conversion of the *sauvegarde* procedure into a *procédure redressement judiciaire*, whereas on 11 March 2020, the Brussels court declared [Buyer] to be subject to the procedure of transfer under the judicial authority of the company (Article XX.84 et seq. of the Belgian Code of Economic Law).

4. The dispute and the decision in first instance

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In summary, [Seller] claimed in the first instance that the Interim Injunction Judge should order [Buyer] to surrender all the goods to which the unpaid invoices relate within five working days after submission of the judgement on [Seller], on forfeiture of a penalty of € 5,000 per day with a maximum of € 500,000.

4.2

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[Buyer] raised in the first instance procedure that the court does not have jurisdiction and contested the claim.

4.3

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The Interim Injunction Judge has ruled that it has jurisdiction to take cognizance of the dispute because of a valid choice of forum. The dispute shall be governed by Dutch law, and therefore by the CISG. The Interim Injunction Judge ordered the proceedings to be sufficiently urgent, but upheld [Buyer]'s defense that it has passed on the goods in question to OPSA and that it is in fact not in a position to return the goods to [Seller]. For that reason, he rejected the claim.

5 The jurisdiction of the Court of Appeal to take cognizance of the dispute

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The dispute has an international character. If necessary, the Court of Appeal must determine ex officio whether the Dutch court has jurisdiction. Contrary to [Seller]'s arguments, the Court of Appeal is not bound by the court's judgment.

5.2

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The Dutch court will only have jurisdiction in this dispute – where the defendant is domiciled in Belgium – if a valid choice of forum as referred to in Article 25 Brussels *Ibis* Regulation (Regulation (EU) No 1215/2012) applies.

5.3

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The CJEU has consistently held that the conditions of Article 25 Brussels *Ibis* Regulation must be interpreted strictly, since that article excludes both the jurisdiction of the courts of the defendant's domicile under the general principle set out in Article 4 of that Regulation and the special jurisdiction set out in Articles 7 to 9 of that Regulation.¹ It is for the court seized to determine whether the choice of forum clause was actually the subject of an agreement of intent between the parties, which must be expressed clearly and precisely. A choice of forum clause governed by general conditions is valid if the text itself of the agreement signed by both parties expressly refers to general conditions containing that clause,² whereas Article 25(1)(b) and (c) Brussels *Ibis* Regulation provides that a forum choice clause may also be entered into in a form which is permitted by the practices which have become customary between the

¹ ECJ 8 June 2017, *Leventis en Vafeias*, C-436/16, EU:C:2017:497 para 39.

² ECJ 7 July 2016, *Hőszig*, C-222/15, EU:C:2016:525 para. 39.

parties or in a form which corresponds to a customary practice of which the parties are or ought to have been aware.³

5.4

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The Court of Appeal agrees with the opinion of the Interim Injunction Judge that the general conditions of [Seller] apply. The Interim Injunction Judge correctly assessed the situation in light of the CISG and the CISG Advisory Council Opinion no. 13. These general terms and conditions apply to a series of agreements between the parties, declared applicable by [Seller] for several years, printed on its invoices and sent to [Buyer] at its request in 2015. [Buyer] has not objected to these terms and conditions and the choice of forum clause contained therein.

The Court of Appeal agreed with the Interim Injunction Judge that although in this case there are no contracts signed by both parties that refer to these general terms and conditions, there is a choice of forum in accordance with the conduct that has become customary between the parties.

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The fact that [Buyer] in Belgium has been declared subject to the judicial reorganization does not make this any different. The judicial reorganization (both by collective or amicable agreement and by transfer under judicial authority) is listed in Annex A to the EU Insolvency Regulation (Regulation (EU) No 2015/848). [Seller]’s claim, based on the retention of title, is an autonomous claim, which is not based on the law relating to the insolvency proceedings declared applicable to [Buyer]. The judicial reorganization proceedings do not require the intervention of an insolvency officer in this respect, so that the claim brought by [Seller] does not arise directly from those insolvency proceedings. Therefore, Articles 6 and 32 of the EU Insolvency Regulation do not preclude the jurisdiction of the Dutch courts as stated previously. Nor does the Court follow [Buyer]’s view that only the French court would have jurisdiction on the basis of Article 10 of the EU Insolvency Regulation because the goods are located in France. Article 10 of the EU Insolvency Regulation is a substantive provision intended to protect the seller in respect of assets located outside the Member State in which insolvency proceedings are opened, not a provision regarding jurisdiction.⁴

6 Applicable law

6.1

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The CISG is applicable to this dispute, as Interim Injunction Judge rightly ruled. This follows directly from Article 1 of that Convention. The legal remedies available to [Seller] in the event of non-payment by [Buyer] are listed exhaustively in Part III of this Convention, namely in Articles 61 et seq. The consequence of this is that the Interim Injunction Judge has rightly not also examined whether the conditions for invoking the right to complain of Section 7:37 of the Dutch Civil Code have been met. To the extent that grievance I complains about this, this is wrong.

³ ECJ 8 March 2018 ECLI:EU:C:2018:173 para. 31.

⁴ ECJ 10 September 2009, C-292/08, ECLI:EU:C:2009:544.

6.2

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The retention of title as such falls outside the scope of the CISG (Article 4(b) CISG). However, the CISG does apply to the question of whether a retention of title clause has been agreed. On the other hand, by virtue of Article 10:128 of the Dutch Civil Code, the consequences under property law of a validly agreed retention of title are governed by the law of the State on whose territory the property is located at the time of delivery, and therefore, in this case, by French law.

7 The assessment of the grievances and the claim

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[Seller] claims that the Court of Appeal, setting aside the judgment in first instance, orders [Buyer], within five working days after service of this judgment, to forfeit to [Seller] all the goods listed on the invoices referred to in the writ of summons in first instance, subject to a penalty of € 5,000.00 per day with a maximum of € 500,000.00. It further claims that [Buyer] be ordered to pay the costs of the proceedings of both instances (including follow-up costs and statutory interest).

7.2

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The Court of Appeal must first determine whether there is a sufficient urgent interest. Other than [Seller] argues, the Court of Appeal must assess ex officio whether there is a sufficiently urgent interest according to the situation as it was at the time of the decision on appeal.

7.3

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[Seller] has an undeniable interest in the restitution of goods delivered by it under retention of title. However, the Court of Appeal shall have to assess whether it has an urgent need for the order requested by [Seller]. As [Seller] itself already argued in the first instance, a right of recovery cannot be implemented during the suspension period linked to the Belgian reorganization procedure (Article XX.50 Belgian Code of Economic Law), while the period of suspension by the court – also in the case of proceedings for transfer under judicial authority – may in exceptional circumstances amount to a maximum of 18 months (Article XX.59 Belgian Code of Economic Law). [Seller] therefore actually asks for an interim injunction that can only be enforced after the period of suspension has ended. At the very least, this is at odds with the requirement of a sufficiently urgent interest.

7.4

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[Seller] has argued that if its retention of title is established in court, it can – in case of an agreement of creditors – be considered as an extraordinary creditor and then possibly be entitled to a higher percentage than the minimum of 20% that follows from Article XX.73 Belgian Code of Economic Law. The Court of Appeal considered that – notwithstanding the fact that the collective agreement procedure has meanwhile ceased to be an issue for [Buyer] – the Court of Appeal in preliminary relief proceedings cannot make a declaratory judgment about the existence of the retention of title, however plausible it may be that the transaction was concluded under such retention of title. The same applies to the subsidiary claim for declaring the contract avoided made by [Seller]. Pursuant to Article 64 CISG [Seller] has the possibility

to declare the contract avoided by [Buyer] because of the non-payment. In the Belgian reorganization procedure, the same applies to the restitution obligation on the basis of an annulled agreement as to the claim based on the retention of title.

7.5

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In addition to the foregoing, in the opinion of the Court of Appeal the Interim Injunction Judge also rightly rejected the application because [Buyer] is in the factual impossibility to return the goods that have been sold. After all, the goods were delivered in France to OPSA's distribution center. Insofar as they are still there, the goods are not under [Buyer]'s control and [Buyer] cannot return them. [Seller] states that, in so far as [Buyer] has delivered the goods to OPSA, this would be contrary to the retention of title. Even if this is so, this does not change the factual impossibility of [Buyer]. [Seller] may also be able to invoke its retention of title against OPSA – this must be assessed under French law – but that is irrelevant in this case since OPSA is not a party to these proceedings.

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Grievance I opposing the dismissal of the claim by the Interim Injunction Judge has been presented in vain. Grievance II which opposes the order for costs, has an independent interest and shares in this lot.

Conclusion

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The grievances fail, so that the court will uphold the contested judgment. [Seller] shall bear its own costs of this appeal.

8 The decision

The court, on appeal:

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Affirms the judgment of the Interim Injunction Judge of location Lelystad of the District Court of Midden-Nederland dated 19 December 2019;

provides that [Seller] shall bear its own costs;

rejects the more or otherwise claimed.

This judgment was rendered by J.H. Kuiper, I. Tubben and J.G. Knot and was pronounced publicly on 2 June 2020 by the roll-call judge in the presence of the Registrar.