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Arbitral Tribunal	Nederlands Arbitrage Instituut (Netherlands Arbitration Institute)
Date of the decision	29 August 2024
Case no./docket no.	NAI 5164 (Final Arbitral Award)
Case name	*Dutch-Thai sales contract case*

[…]

The following Award is rendered pursuant to the Arbitration Rules of the Netherlands Arbitration Institute (the «NAI»), in force as of 1 January 2015 (the «Rules»).

I. Introduction

A. [Claimant]

1. 1
[Claimant] in these arbitral proceedings is:

> [CLAIMANT) («[Claimant]»)
>
> a private limited company (besloten vennootschap met beperkte aansprakelijkheid) incorporated and existing under the laws of the Netherlands, having its registered office in [...] the Netherlands, and its principal place of business at [...] the Netherlands.

2. 2
[Claimant] is represented in these arbitral proceedings by:

> [Claimant]s' representatives
>
> Mr. […]
>
> Mr. […]
>
> […]
>
> The Netherlands

B. [Respondent]

3. 3
[Respondent] in these arbitral proceedings is:

> [Respondent] («[Respondent]»)

a limited liability company incorporated and existing under the laws of Thailand, having its registered office and its principal place of business at [...], Thailand.

4. 4
[Respondent] is not represented in these arbitral proceedings by legal counsel.

5. 5
In this Award, [Claimant] and [Respondent] may also be referred to as «Party» or collectively as «Parties», where appropriate.

C. Dispute

6. 6
The dispute relates to the sale by [Claimant] of […] (the «[Goods]») to [Respondent]. The purchase price for the [Goods] amounted to EUR 258,370. [Claimant] delivered the [Goods] to [Respondent] on or around 20 April 2023.

7. 7
The Parties agreed that the purchase price was to be paid in three instalments. [Respondent] paid the first and third instalment to [Claimant]. The question that divides the Parties is whether [Respondent] is required to pay the second instalment.

[…] 8–20

IV. [Respondent]'s Limited Participation in these Proceedings

21. 21
The procedural history of this case, as set out in Chapter III, shows that [Respondent] filed a Short Answer but did not further participate in these proceedings. In its Short Answer, [Respondent] stated in this respect that it refused to participate in the trial. Before the Tribunal can proceed to decide the merits of this case, it will first ascertain whether the Tribunal has the jurisdiction to decide this case (Chapter V) and whether [Respondent], in short, was duly informed about and has been afforded the opportunity to present its case in these proceedings (Chapter VI).

V. Decision on Jurisdiction of the Tribunal

22. 22
[Respondent] wrote in its Short Answer that it «would like to refuse to participate in the trial» and that «[Respondent] [...] will only sue in the Thai court which is the origin of the case.» The Tribunal views this statement as a challenge to its jurisdiction.

23. 23
[Claimant] argues that the Parties' agreement regarding the sale and purchase of the [Goods] (the «SPA») was set out in an order confirmation dated 3 November 2022 (the «Order Confirmation»). This Order Confirmation contains the following reference:

> All our transactions are subject to our general conditions of safe, delivery and payment. The conditions are attached and can be found on our website www.[Claimant].com (General conditions).

24. **24**
Article 18(1) of [Claimant]'s general conditions of sale, delivery and payment (the «GTCs») states:

> The present agreement and all resulting agreements shall be exclusive governed by Dutch law. Furthermore, any dispute which may arise from the present agreement or of other resulting agreements, shall be submitted to the Netherlands Arbitration Institute (Nederlands Arbitrage Instituut), in accordance with the rules (Arbitragereglement) of the Netherlands Arbitration Institute. The place of arbitration shall be [...]. For claims over € 75,000 in total the arbitral tribunal shall be composed of three arbitrators. For claims under € 75,000 one arbitrator shall suffice. The judgement of the arbitration board shall be open to appeal.

25. **25**
[Claimant] argues that the Tribunal has jurisdiction on the basis of this provision.

26. **26**
[Respondent] makes two arguments in its Short Answer that relate to the issue of jurisdiction of the Tribunal. [Respondent] firstly argues that the agreement between the Parties is illegal. This argument however relates to the Non-exclusive Distribution Agreement dated 25 November 2019 that was submitted by [Respondent] as Exhibit J. This agreement is distinct from the SPA. It was concluded between different parties, being [Respondent] and [Party A], and expired before the conclusion of the SPA. As such, it cannot be entertained as a valid jurisdictional defence.

27. **27**
[Respondent] also argues that it «would like to refuse to participate in the trial», since it «never knew, signed the document or acknowledged the [Claimant]'s general condition of safe delivery that was quoted as various articles.»[1] While [Respondent] does not elaborate on its argument, the Tribunal understands that [Respondent] denies the applicability of the GTCs and that these therefore cannot provide a basis for the Tribunal's jurisdiction.

28. **28**
In order to decide the issue of applicability of the arbitration clause contained in the GTCs, the Tribunal will first determine the applicable law for this issue. Article 10:166 of the Dutch Civil Code («DCC») provides that the arbitration agreement is materially valid if it is valid on the basis of the law chosen by the parties, the law of the seat of the arbitration or, if the parties did not make a choice of law, the law applicable to the legal relationship to which the arbitration agreement relates. In this case, the seat of the arbitration is [place in the

[1] Short Answer, p. 1.

Netherland]. Consequently, the Tribunal will determine the validity of the arbitration agreement on the basis of Dutch law.

29. **29**
[Respondent]'s objection centers on the way in which the GTCs were made available to it.

30. **30**
The Order Confirmation specifies that the GTCs «are attached». However, [Claimant] does not assert that the GTCs were, in fact, attached to the Order Confirmation. As such, the Tribunal is unable to confirm that the GTCs were received by [Respondent] in this manner.

31. **31**
The Order Confirmation also states that the GTCs «can be found on our website [...] (General conditions).» Similar language is included in the quotation [...] of 21 October 2022 that preceded the Order Confirmation («You can find the conditions on our website www.[Claimant].com»). [Claimant] asserts that the GTCs were made available to [Respondent] through this weblink.[2] [Respondent] does not dispute this. The question is whether such weblink suffices for the application of the GTCs to the SPA.

32. **32**
Under Dutch Law the United Nations Convention on Contracts for the International Sale of Goods (the «CISG») is applicable to the SPA, since the Netherlands is a contracting state to the CISG (Article 1(b) of the CISG). The CISG does not explicitly address the applicability of general terms and conditions. However, the CISG Advisory Council has adopted Opinion No. 13 Inclusion of Standard Terms («Opinion 13»), which is generally considered authoritative on this matter and is frequently cited in case law.[3] It states (to the extent relevant):

> 1. The inclusion of standard terms under the CISG is determined according to the rules for the formation and interpretation of contracts under the CISG.
> 2. Standard terms are included in the contract where the parties have expressly or impliedly agreed to their inclusion at the time of the formation of the contract and the other party had a reasonable opportunity to take notice of the terms.
> 3. Amongst others, a party is deemed to have had a reasonable opportunity to take notice of the standard terms:
> 3.1. Where the terms are attached to a document used in connection with the formation of the contract or printed on the reverse side of that document;
>
> [...]

[2] SoC, para. 2.2.
[3] Recent examples in Dutch case law include Court of Appeal The Hague, 8 August 2023 ECLI:NL:GHDHA:2023:1527, para. 5.6; District Court Rotterdam, 17 May 2023, ECLI:NL:RBROT:2023:9592, para. 4.11; District Court Zeeland-West-Brabant, 19 April 2023, ECLI:NL:RBZWB:2023:2671, para. 4.6.

3.3. Where, in electronic communications, the terms are made available to and retrievable electronically by that party and are accessible to that party at the time of negotiating the contract [...].

33. **33**
The Tribunal considers that these provisions provide a fair reflection of the more general rules of the CISG and that it is appropriate to apply such provisions to the case at hand.

34. **34**
The Tribunal finds that the Parties have «agreed to the inclusion» of the GTCs in the SPA. As noted above, the terms of the Order Confirmation subjects the SPA to the GTCs. The Tribunal also finds that [Respondent] had «a reasonable opportunity to take notice» of the GTCs. The GTCs were made available to and retrievable electronically by [Respondent] from [Claimant]'s website as stated on the Order Confirmation. As far as the Tribunal is aware, the GTCs were accessible to [Respondent] at the time of negotiating the SPA. Therefore, the Tribunal finds that the GTCs are included in the SPA.

35. **35**
Accordingly, the Tribunal bases its jurisdiction on the arbitration clause contained in the GTCs. Pursuant to Article 18(1) of the GTCs, the Tribunal determines that:

a.
The dispute between the Parties shall be settled by arbitration under the auspices of the NAI pursuant to the Rules;

b.
The place of arbitration is [...], the Netherlands; and

c.
The Tribunal is composed of three arbitrators, as the claim in dispute amounts to more than EUR 75,000.

36. **36**
Since the Parties chose [...], the Netherlands, as the place of arbitration, the provisions regarding arbitration in Book IV of the Dutch Code of Civil Procedure[4] apply to these arbitral proceedings. Article 1054(1) of the Dutch Code of Civil Procedure and Article 42 of the Rules provide that the Tribunal shall decide in accordance with the rules of law.

37. **37**
The GTCs do not specify the language of the arbitration. In its Request for Arbitration, [Claimant] indicated a preference for English. [Respondent] did not explicitly indicate any preference, but submitted its Short Answer in English as well. The Tribunal therefore confirmed in its PO1 that the arbitration is conducted in English (Article 5(1) of the Rules).

[4] Also known as the Dutch Arbitration Act.

VI. Governing Law and Applicability of the GTCs

38. **38**
Having determined its jurisdiction, the Tribunal must determine the law applicable to the SPA. Article 18(1) of the GTCs provides that the SPA shall be governed by Dutch law. As [Respondent] denies the applicability of the GTCs, the Tribunal must determine the applicability of the GTCs and the applicable law for this issue. For this purpose, the Tribunal is unable to rely on Article 10:166 DCC regarding the validity of the arbitration agreement (see para. 28 above). Instead, it will have to determine the applicable law on the basis of the rules of private international law regarding contracts in general in particular general terms and conditions.

39. **39**
The Tribunal notes that there is not a single source that contains these rules of private international law. Therefore, it needs to determine which source is most appropriate. In this case, the Tribunal adopts the widely accepted doctrine of the characteristic performance. This principle is enshrined in Regulation (EC) No 593/2008 of the European Parliament and of the Council of 17 June 2008 on the law applicable to contractual obligations («Rome I»). Article 4(1)(a) of Rome I, to the extent relevant, provides that:

> a contract for the sale of goods shall be governed by the law of the country where the seller has his habitual residence.

40. **40**
As [Claimant] has its habitual residence in the Netherlands, the SPA is governed by Dutch law.

41. **41**
For the sake of completeness, the Tribunal notes that it would have arrived at the same conclusion if it had adopted another widely accepted doctrine, i.e. the law that has the closest and most real connection with the SPA. The SPA specifies that the seller is based in the Netherlands, the product has to be shipped from the Netherlands, the purchase price is in euros, and payment has to be made to a Dutch bank account. Moreover, the SPA refers to the GTCs, which specify that the SPA is governed by Dutch law. In the Tribunal's view, the mere fact that the invoice and shipping address are in Thailand is insufficient to find that the SPA has a closer connection to Thai law. As such, the Tribunal would therefore also have found that the SPA is governed by Dutch law.

42. **42**
Consequently, the applicability of the GTCs, also apart from the arbitration clause, has to be determined on the basis of Dutch law. The analysis under Dutch law has already been conducted above. For the reasons set out in paras. 29–34 above, the Tribunal finds that the GTCs are included in the SPA. As a further consequence, the SPA is governed by Dutch law (see Article 18(1) of the GTC (see para. 38 above) and Article 42(2) of the Rules).

VII. [Respondent] was Duly Informed of and has been Afforded the Opportunity to Present its Case in these Proceedings

43. 43
Article 36 of the Rules relates to the situation that a [Respondent] does not submit a statement of defence. Article 36(1)–(3) of the Rules states the following:

1. If the [Respondent], without showing good cause, fails to submit within the period of time set by the arbitral tribunal a statement of defence as referred to in Article 24, the arbitral tribunal may render an award forthwith.
2. The award shall be rendered in favour of the [Claimant] unless the arbitral tribunal considers the claim to be unlawful or unfounded. Before rendering the award, the arbitral tribunal may require the [Claimant] to produce evidence in support of one or more of his contentions.
3. Paragraphs (1) and (2) shall apply accordingly if a hearing takes place, whether or not preceded by an exchange of memorials, and the [Respondent], although duly notified, fails to appear without showing good case.

44. 44
Pursuant to Article 36(1) of the Rules no hearing on the merits has been held in this case.

45. 45
Before the Tribunal can proceed with rendering an award on the basis of Article 36(2) of the Rules, it must determine whether [Respondent] was duly informed about and has been afforded the opportunity to present its case in these proceedings.

46. 46
As evidenced by the submission of the Short Answer by [Respondent], [Respondent] was duly informed about the commencement of these proceedings. The Tribunal is also confident that [Respondent] was made aware of the progress of this arbitration and was informed of the steps it would have to take to defend itself against the [Claimant]'s claims. In particular, the following steps have been taken:

a.
The NAI notified [Respondent] of the Request for Arbitration and invited [Respondent] to submit its Short Answer on 10 November 2023. It sent [Respondent] another message on 28 November 2023. [Respondent] replied to this message, expressly acknowledging receipt of the courier delivery, and submitted its Short Answer on 12 December 2023.

b.
Throughout these proceedings, the Tribunal used the same physical and email address of [Respondent] as the NAI. In its Short Answer, [Respondent] itself also included this physical and email address.

c.
In addition to corresponding by email, the following documents were sent to [Respondent] by registered mail. The Tribunal has received confirmations of delivery for each of these:

i.
On 26 January 2024, the NAI sent [Respondent] the confirmation of the appointment of the co-arbitrators. On 1 February 2024, it sent the confirmation of the appointment of the chair.

ii.
On 28 February 2024, the Tribunal sent [Respondent] an invitation to participate in the Case Management Conference.

iii.
On 8 April 2024, the Tribunal sent [Respondent] PO1, specifically drawing its attention to Article 34 of the Rules (Default of a party).

iv.
On or around 15 May 2024, [Claimant] sent its SoC to [Respondent].

v.
On 15 July 2024, [Claimant] sent the Tribunal's request of 12 July 2024 and its cost specification to [Respondent].

47. **47**
Since the [Respondent] failed to present a Statement of Defence within the time limit determined by the Tribunal (or at any time thereafter) and has not provided well-founded reasons for its failure, the Tribunal will proceed with rendering this award based on Article 34(2) of the Rules. In accordance with this article, the Tribunal shall wholly or partially award the claim, unless it appears to be unlawful or unfounded. In determining whether the claim appears to be unlawful or unfounded, the Tribunal will take into account the objections put forward by [Respondent] in its Short Answer.

[…]