

Case 720: CISG 6;7; 8; 9; 35 (2); 39 (1); 40; 46; 50; 71; 73; 74; 75; 77; 78; 85

The Netherlands: Nederlands Arbitrage Instituut/Netherlands Arbitration Institute (NAI)

Case No. 2319

15 October 2002

Published in English in: *Tijdschrift voor Arbitrage*, 2003, 22. <http://cisgw3.law.pace.edu/cases/021015n1.html>

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The core part of the case concerns the interpretation of whether the goods conformed to the contract as being fit for the purposes for which goods of the same description would ordinarily be used. The Arbitral Tribunal also discussed the notice of non-conformity and its addressee and the possibility of refusal and suspension of delivery.

The claimants in this case, several Dutch companies, hereafter referred to as 'the sellers', were active in the exploration of offshore gas fields in The Netherlands' continental shelf. The buyer, an English company, was a major international player in the field of exploration, production and refining of crude oil and distribution of oil products and gas. In 1993 and 1994, the parties concluded twelve contracts concerning condensate, a crude oil mix referred to as 'Rijn Blend'. On June 11, 1998, the buyer informed the sellers that it would not accept the next delivery of Rijn Blend, because, due to high levels of mercury therein, further processing or sales were impossible. On June 16, 1998, the buyer notified the sellers that it would suspend taking delivery until a solution for the mercury problems was found. No solution was found however; therefore, the buyer let some contracts expire and terminated the other contracts. In the meanwhile, the sellers sold the Rijn Blend that was not taken by the buyer to third parties at an alleged loss compared to the contract price.

In May 2000, the sellers initiated arbitration proceedings against the buyer at the NAI (Netherlands Arbitration Institute). The sellers argued that the Rijn Blend, even with increased levels of mercury, was in conformity with the contract since no specific quality requirements were agreed upon. Thus the buyer breached the contract in not taking delivery and suspending its contractual obligations. The sellers claimed damages. The buyer on the other hand declined any liability and stated that the goods were not in conformity with the contract because the sellers knew or should have known that, since Rijn Blend is used in the refinery business, Rijn Blend with such high levels of mercury might cause damages downstream. Because of this non-conformity, the buyer maintained that it was entitled to refuse delivery and suspend its obligations under the contracts.

Because the contract contained no quality specifications, the Arbitral Tribunal found that the issue of conformity should be decided based on Article 35 (2)(a) CISG, which requires that the goods are fit for the purposes for which goods of the same description would ordinarily be used. The Arbitral Tribunal explained that three possible interpretations in this respect exist. The first interpretation requires the goods to be of a merchantable quality. In this view, which is favoured in English common law legal systems, goods are in conformity with the contract if a reasonable buyer would have concluded contracts for the goods at similar prices if the buyer had known the quality of the goods. A second line of thought, derived from civil law, calls for goods of average quality. A third interpretation rejects the merchantable and average quality standard, stating those do not fit in the CISG system, and suggests a reasonable quality criterion.

Interpretations based on the merchantable and average quality norms led to different conclusions in this case. Therefore, the Arbitral Tribunal decided that Article 35 (2)(a) CISG should be interpreted according to the reasonable quality criterion. The Arbitral Tribunal found that that the reasonable quality test met the terms of Article 7 (1) CISG since it did not rely immediately on domestic notions. It also was consistent with Article 7 (2) CISG, allowing general principles of CISG as gap fillers. The reasonable quality standard furthermore was compatible with the preparatory works of CISG. Moreover, if Dutch law would be applied in this case, the reasonable quality interpretation would prevail.

The Arbitral Tribunal decided that the Rijn Blend did not meet the reasonable quality norm, because the price the parties agreed upon would not be paid for condensate with increased levels of mercury. Also, no quality issues occurred in the first years after the contracts were closed and buyer could therefore expect a constant quality level of Rijn Blend. Thus the Arbitral Tribunal found that the buyer was entitled to suspend future deliveries according to Article 73 (1) CISG, since the contracts were instalment contracts.

However, the Arbitral Tribunal held that the buyer, concerning the June instalment, had not complied with Article 71 (3) CISG, which requires an immediate notification of the suspension of delivery. The buyer had spoken to a third party about its intentions to suspend delivery, but this third party had solely been given authority in certain commercial matters. The third party could not be considered an express nor implied agent of the sellers and therefore discussing the issue with this third party did not constitute a notice as required by Article 71 (3) CISG. Consequently, the Arbitral Tribunal confirmed the annulment of the contract with regard to future deliveries, but awarded damages the sellers had sustained with respect to the June instalment.

