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Jurisdiction	Belgium
Tribunal	Hof van Beroep [Appellate Court] Ghent
Date of the decision	24 November 2004
Case no./docket no.	1998/AR/2613
Case name	*Orintix S.r.l. v. Fabelta Ninove NV*

Translation by Kristof Cox***

[...]

[PRELIMINARY:]

1.
On 11 June 1993, the parties conclude a contract for the delivery by [Seller] of color computer equipment (hardware and software), with programs for quality control, calculation of color recipes and correction program for the application of the dyeing of yarn in large volumes ("Color Matching System").

[Buyer] complains that the system has never properly functioned and that [Seller] has not found a solution for the problems. Therefore, [Buyer] serves a writ in summary proceedings on 21 April 1995, requesting the appointment of an expert. On 14 June 1995, the President of the Commercial Court of Dendermonde appointed Mr. Van der Oudera with the task of giving advice on the computer configuration and the programs.

By means of its writ of 30 August 1995, [Buyer] claims the avoidance of the contract concluded with [Seller] on 11 June 1993 and requests that [Seller] be ordered to immediately take back what was delivered according to the agreement of 14 July 1993. Further, [Buyer] claims repayment of what it already paid, being 136,157,000 Italian lira, plus provisional damges of 1,000,000 Belgian francs (= 24,789.35 €).

[Seller] disputes that the writ is legally valid (lacking translation) and that the Belgian judge has jurisdiction. As to the merits, [Seller] is of the opinion that the problems [Buyer] complains about are not attributable to [Seller] and, by way of counterclaim, [Seller] claims payment of the balance in the amount of 13,589,375 Italian lira, plus interest from the date of the invoice.

2.
In the first judgment under appeal of 25 March 1997, the Court of First Instance declares that

* All translations should be verified by cross-checking against the original text. For purposes of this translation, Plaintiff of Belgium is referred to as [Buyer] and Defendant of Italy is referred to as [Seller].

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it has jurisdiction on the basis of the EEX-Convention and it finds that translation of the writ is not sanctioned by nullity, so that there is no ground to declare the writ null for lack of translation.

Further, the Court of First Instance has found that the relation between the parties is governed by Italian law, and it re-opened the debates in order to hear the parties on the interpretation of the agreement according to Italian law and to allow them to present translations of all exhibits.

In its judgment of 1 September 1998, the Court of First Instance ruled that the contract between the parties should be qualified as a service contract (and not as a mere contract of sale), since it was also part of the [Seller]'s task to make the software operational.

Referring to the report of the expert which lists several defects, the Court of First Instance concluded that the hardware and software delivered by [Seller] was not fit for the purpose for which it was ordered, namely quality control, calculation of color recipes and correction program for the dyeing of yarn in big volumes. The Court found that the [Buyer]'s claim for avoidance of the contract was well founded, but that [Buyer] did not prove its damage.

On these grounds, the contract of 11 June 1993 is avoided on the account of [Seller], who is ordered to take back the goods delivered according to the contract of 14 July 1993 immediately, and to repay 136,157,000 Italian lira.

The other claims of [Buyer] as well as the counterclaim of [Seller] are denied as being unfounded.

3.
In its appeal, [Seller] repeats that the [Buyer]'s claim is unacceptable, alleging that the writ is null for lack of translation.

[Seller] also disputes that the contract between the parties should be qualified as a service contract. In [Seller]'s opinion, it is an (international) sale of goods, falling under the CISG.

As to the merits, [Seller] is of the opinion that it is not proven that the software was defective, so that there was no reason to avoid the contract.

[Seller] concludes that that [Buyer]'s claim should be declined and [Seller] reformulates its counterclaim.

4.
[Buyer] pleads that the appeal should be declined. While [Buyer] claims integral confirmation of the judgments under appeal in its first and third memorandum, it appears from [Buyer]'s second memorandum that it files an incidental appeal as to the rejection of its claim for payment of damages and, in that regard, [Buyer] reformulates its claim for payment of the provisional sum of 24,789.35 €.

[DISCUSSION:]

1.
The jurisdiction of the Belgian Courts and the applicability of Italian law is no longer in dispute.

The current discussion concerns:

- The validity of the service of the writ;
- The qualification of the contract between the parties;
- The alleged contractual breach by [Seller];
- The sanctions.

2.
The Court of First Instance correctly rejected the exception of nullity, founded on the lack of translation of the service of writ.

The service took place according to Article 40 of the Judicial Code and Article 10.a of the Service Convention of 15 November 1965.

Italy has made no reservations as to the provision in that Convention that service is allowed by directly sending the pieces by mail. Said provisions do not require that a translation of the pieces be attached, let alone with a penalty of nullity.

Moreover, the Court of First Instance correctly referred to Articles 861 et seq. of the Judicial Code. The procedure is governed by Belgian Judicial law and [Seller], which has appeared at the hearing after the service of the writ and which has stated its defense without any further restriction, has not proved that its interests would be affected in any way.

3.
The contract, concluded between the parties by the confirmation of order of 11 June 1993, is for the delivery of a Color Matching system, consisting of hardware (Spectrofotometers Macbeth) and software (special versions for the measurement in transmission and or dyeing of fibers in large volumes).

We do not agree with the [Seller]'s opinion that it delivered a standard software package, that was written beforehand and was of use for several companies, so that the contract must be qualified as a contract of sale.

Among other things, it appears from the note dated 14 May 1993 that, before the order, the parties negotiated on the specific requirements to which the installation for [Buyer] should comply. The obligation to make sure that the programs met these special requirements exceeds the fine tuning of an existing program, to which [Seller] refers.

Moreover, the nature of the complaints of [Buyer] and of the problems that gave rise to the intervention of [Seller], as they appear from the correspondence and the report of the expert,

indicate the very specific nature of the software that should allow [Buyer] to reach specifically determined results.

The Court of First Instance decided correctly that the circumstance that the price of the delivered hardware was higher than the price of the software is not determinative in the case at hand.

The will of the parties was that [Seller] would create a system for [Buyer] and make it operational (which required that [Seller] repeatedly adjust the software - either at the place of [Buyer] or elsewhere) so that the said goals would be reached.

The services are determinative in the task of [Seller], so that the CISG cannot be applied, since Article 3(2) of this Convention provides that the Convention is not applicable to contracts in which the preponderant part of the obligations of the party who furnishes the goods consists in the supply of labor or other services.

4.
[Seller] mistakenly alleges that in the opinion of the expert there would only be "classic software problems," that can be fixed by it.

The report of the expert must be read in its entirety. Thus, the expert continues that it is not certain that [Seller] can find a solution within a reasonable time due to the fact that its software executes the mono-pigment decomposition in a faulty manner, so that [Buyer] would better turn to another supplier for this.

Moreover, one must not forget that, despite the fact that the expert is of the opinion that most problems can be solved, during the expertise defects were found -- such as described in the final conclusions on page 29 of the report (i.a. blocking at printer and insufficient printing facilities, confusion between the measuring with black and white print, several bugs in the software, insufficient capacity for measuring dark colors and no good reproduction capacity of measurements in general) -- for which [Seller] still had not found a solution at the time of the expertise, namely two years after the installation.

In his answer to the question of technical responsibility, the expert exclusively mentions the defects of the Orintex system, which is solely responsible for the faulty functioning of the system. There is no indication whatsoever that [Buyer] itself would be the cause of some problems.

[Seller] engaged in an obligation to reach a certain result. Now that the findings of the expert make clear that that result was not reached, it must be concluded that [Seller] has not met its contractual obligations.

5.
The configuration [Buyer] ordered from [Seller] is a combination of hardware and software, designed to be used for a certain purpose.

From the findings of the expert, it must be derived that the system, as [Seller] delivered it to [Buyer], even after several interventions and adjustments, could not be used for the purpose for which it was meant.

The system is one whole and this is not altered by the fact that certain parts can be used.

Therefore, the Court of First Instance correctly avoided the contract to the account of [Seller], referring to the applicable Italian legislation, so that the equipment is returned to the [Seller] and [Buyer] is entitled to reimbursement of the price. In these circumstances, [Buyer] logically does not have to pay the balance of the price.

The [Seller]'s appeal is unfounded.

6.
On the one hand, [Buyer] still claims, by way of incidental appeal, provisional damages, while, on the other hand, [Buyer] refers to a calculation of the costs which should show that its damage amounts to 1,077,264 Belgian francs (= 26,704.68 €).

This unilateral calculation of [Buyer], which was not submitted to the advice of an expert, cannot be accepted, so that the Court of First Instance concluded correctly that the alleged damage is not proven.

The [Buyer]'s incidental appeal is also unfounded.

FOR THOSE REASONS,

THE COURT,

[...]