

Hof van Beroep [Court of Appeals] Antwerp

NV Carta Mundi [Buyer] v. Index Syndicate Ltd. [Seller]

14 February 2002 [2001/AR/551]

*Translation * by Kristof Cox***

[...]

1. FACTS AND CLAIMS

1.1 WOTC [Buyers' customer] asked [Buyer] to deliver a large quantity of Pokemon games, consisting of playing cards and glass pebbles, called «gems». [Buyer] ordered these «gems» from [Seller] (who delivered them in sets composed according to the order, packed in plastic bags) and passed the filling of the cardboard boxes (that had to contain the cards and the sets of «gems») on to the Koningin Fabioladorp no. 1 in Ohain, Belgium.

1.2 On 13 March 2000, [Seller] filed suit against [Buyer] before the Commercial Court of Turnhout. [Seller] claimed that US\$ 43,874.34 was due for invoices for the delivery of these «gems». In its memorandum of 17 May 2000, [Buyer] stated that the pebbles were defective. [Buyer] claimed nullity or avoidance of the contract by application of Article 1648 of the Belgian Civil Code and Article 1184 of the Belgian Civil Code, respectively, and sought:

- (1) Reimbursement of the sums already paid, US \$ 42,131.65 in total;
- (2) Credit notes for the invoices;
- (3) Damages amounting to 11,873.46 EUR and 6,941.02 EUR;
- (4) Coverage of all external damage, amounting to 74,497.36 EUR and coverage of the storage costs, amounting to 557.76 EUR, 743.68 EUR and a monthly sum of 446.21 EUR.

Alternatively, [Buyer] requested the hearing of witnesses and an expert investigation.

1.3 In the judgment under appeal of 18 January 2001, the Court of First Instance decided that the CISG is applicable. That Court decided that [Buyer] had not made known his complaints within a reasonable time and concluded on that ground to grant the [Seller]'s claim.

1.4 On 23 February 2001 [Buyer] filed an appeal. [Buyer] argues that [Seller]'s claim is inadmissible, at least unfounded. [Buyer] requests that its claim before the Court of First Instance be granted. [Seller], in turn, argues that the [Buyer]'s appeal is unfounded.

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

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2. DISCUSSION

The basis for the respective claims was explained in the preceding procedural briefs. The court refers to those.

2.1 The admissibility of [Seller]'s claim

At the hearing, [Buyer] declared that it no longer contested the admissibility of the [Seller]'s claim.

2.2 The admissibility of [Buyer]'s claim and its defense

2.2.1 Art. 38(1) CISG obliges the buyer to examine the goods, or cause them to be examined, within as short a period as practicable in the circumstances. According to Article 39(1) CISG, the 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 has discovered it or ought to have discovered it.

2.2.2 Exhibits 4 and 6 of the [Buyer] show that [Seller] was informed about the broken pebbles on Friday, 29 October 1999. In fact, it was [Buyer's customer] who sent this notice. However, this notice should be equated with a notice of [Buyer], since [Buyer's customer] asked [Seller] to perform a quality control inspection at the expense of [Seller] and the notice clearly contained a complaint about the goods the [Seller] delivered to the [Buyer].

Moreover, [Seller] accepted the notice as such, as on 31 October 1999 it asked a number of questions about the defects and further went to [Buyer] on 4 November 1999 to examine the defects there.

Since it was only on 4 November 1999 that [Seller] was offered a complete picture of the complaints (the complaint was more detailed than the fact that there were broken «gems» and also concerned the delivery of half «gems» and faulty contents of the plastic bags), the Court considers this date on which [Buyer] gave notice to [Seller] specifying the nature of the lack of conformity.

2.2.3 There is no evidence presented by third persons that shows on which date the goods were delivered to [Buyer]. The [Buyer] itself states that the dates of delivery were 2 October 1999, 19 October 1999, 20 October 1999 and 9 November 1999. [Seller] fails to prove other dates of delivery, and the dates mentioned by [Buyer] match with the contents of the report that it prepared after its visit on 19 October 1999 to the workshop in Ohain «launch packing Pokemon» and which states:

«Some people were waiting for the 'gems' that were not in place to be able to start the lines. The delivery was expected from the airport of Zaventem and had to be released by the Customs. Around 10:30 the gems arrived in the workshop. Afterwards, however, it seemed that there were 3,000 'gem bags' (6 boxes of 500 pieces) in the workshop, delivered from C. Turnhout, with the other components.»

If it is not proven that [Buyer] had previously examined the gems that were delivered on 2 October 1999. The reports of 19 October 1999, 22 October 1999 and 26 October 1999 show that the examinations were performed when the workshops in Ohain were inspected: on 19

October 1999. a bag with one broken gem was already discovered and a bag with too many gems.

Taking into account that the order of 28 July 1999 was delivered in parts and that the delivery of 2 October 1999 was insufficient to start the production in Ohain, [Buyer] acted correctly under the circumstances by examining the goods when the Pokemon games were packed.

The inspection reports to the workshop in Ohain are detailed and make clear that all inspections were thorough. The fact that the notice of serious problems with the gems was only sent on 28 October 1999 must lead to the conclusion that there was nothing problematic to be found except the one bag with the broken gem and the bag with too many gems.

For the sake of completeness the Court, adds that the inspection reports show that the defects were found in Ohain in the presence of a representative of [Buyer's customer], so that [Seller] incorrectly alleges that the complaint was only made when the games had already arrived in the United States.

[Seller] has met its obligation to inform the seller within a reasonable period after it discovered the non-conformity or ought to have discovered it. Thus, it is not precluded from its right to rely on the non-conformity.

2.3 The merits of the case

[Buyer] has not proven that [Seller] acknowledged its liability. The report of the meeting on 4 November 1999 is merely one-sided and was not even made known to [Seller].

Since [Buyer] refused the gems that were delivered after the non-conformity was discovered and these are in warehouses, it is still possible that an expert examination can determine whether or not the delivered goods conformed to the order.

Thus, the court grants the evidentiary measure requested by [Buyer] and allows it to prove the merits of its complaint with this examination.

In as much as is alleged that [Buyer] replaced the gems by plastic pebbles, the examination should also look into which measures should have been taken and what would have been the cost of replacing the broken or half pebbles by new glass pebbles. [Seller] is not responsible for the fact that [Buyer's customer] and/or [Buyer] had originally opted for glass pebbles.

FOR THOSE REASONS:

THE COURT

[...]