Rechtbank van Koophandel [Commercial Court] Tongeren
Scafom International BV & Orion Metal BVBA v. Exma CPI SA

25 January 2005 [A.R. A/04/01960]

Translation[*] *by Thorsten Tepasse*[**]

Edited by Kristof Cox[***]

SCAFOM INTERNATIONAL BV [hereinafter referred to as Buyer], Ltd. company under Dutch law, inscribed in the Chamber of Commerce Eindhoven under No. ..., with seat of the company: 6021 PZ Budel (Netherlands) ...; and *ORION METAL BVBA* [hereinafter referred to as Buyer's processor], Ltd. company under Belgian law, inscribed in the commercial register of Tongeren under No. ..., with companynumber ..., with seat of the company in 3950 Bocholt (Belgium); *Claimants in main claim, Defendants in counterclaim*, represented by Mr. T. Ickmans, lawyer in 3960 Bree (Belgium)

v.

EXMA CPI SA [hereinafter referred to as Seller], Inc. company under French law, inscribed in the commercial register of Thionville under No. ..., with seat of the company in 57 971 Yutz (France); *Defendant in main claim, Claimant in counterclaim*, represented by Mr. J. Verlinden, lawyer 1000 Brussels (Belgium).

The assertions of the parties have been determined. The claim was raised in due time and form. The jurisdiction and competence of the Court have not been challenged. There is no dispute concerning the applicable law. [Seller] requests dismissal of the main claim as inadmissible or that it be declared unfounded. There is no reason for this court to declare the claim *ex officio* inadmissible. The evidence has been taken. The decision was handed down in the Dutch language.

1. Antecedents

(a) The Plaintiff *BV Scafom* of The Netherlands [Buyer] concluded a number of sales contracts with Defendant *SA Exma* of France [Seller] for the delivery of warm-rolled steel tubes for the production of scaffolds, in relation to which both the price, the date of delivery and the place of delivery [in Belgium] (the seat of *BVBA Orion*) were determined in writing.

[Buyer] had the purchased steel tubes processed in the plant of *BVBA Orion* [Buyer's processor].

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[*] All translations should be verified by cross-checking against the original text. For purposes of this translation, Plaintiff of Netherlands is referred to as [Buyer]; Plaintiff of Belgium is referred to as [Buyer's processor]; and Defendant of France is referred to as [Seller].
Translator's note on abbreviations: **BV** = *Besloten Vennootschap* [Limited liability company under Dutch law]; **BVBA** = *Besloten Vennootschap met Beperkte Aansprakelijkheid* [Limited liability company under Belgian law]; **BW** = *Burgerlijk Wetboek* [Belgian Civil Code]; **GerW** = *Gerechtelijk Wetboek* [Belgian Civil Procedure Code]; **SA** = *Société Anonyme* [Incorporated company under French law].

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The following modus operandi was to apply for the execution of the contracts:

- [Buyer] would send a so-called „purchase order“ to [Seller], mentioning the number, amount, delivery period, price and description of the quality to which the steel had to comply, with request to return this document signed and with the corporate stamp of [Seller];

- [Seller] would write its order number on this document, and send the document (by fax) to the [Buyer];

- Afterward, the [Buyer] would enter these orders in periodical listings, in which the agreed dates for delivery and amounts were mentioned. These listings would be sent to [Seller].

On 18 March 2004 [Seller] gave notice by fax that:

- It was forced to recalculate the agreed prices because of the increase of the price of steel and the unpredictable developments associated with this;

- [Seller] would therefore not accept any claims from [Buyer] because of delays or shortages in delivered amounts; and that

- [Seller] was recasting its pricing for all deliveries that should have taken place between 1 April 2004 and 30 April 2004.

[Buyer] calls attention to the fact that in this letter (and in the other letters that were written by [Seller] before the start of these proceedings), [Seller] did not refer to [Seller]'s general conditions, from which [Buyer] means to be able to conclude that [Seller] did not deem these conditions to be applicable (rightfully according to [Buyer]).

On 19 March 2004, [Buyer] gave written notice to [Seller] of the (already ordered) deliveries that were still due, with the request that [Seller] deliver these items as soon as possible, in compliance with the contractually agreed terms.

On 23 March 2004, [Seller] gave notice of its new prices, and asked for acceptance of these new prices by [Buyer].

After failed negotiations between the parties on 24 March 2004 on the adjustment of the prices, [Seller] stated in a registered letter of 25 March 2004 that it would not process any more steel deliveries unless [Buyer] would accept without reservation the price increase mentioned in [Seller]'s letter of 25 March 2004.

On 29 March 2004, [Buyer]'s attorneys notified [Seller] that the [Buyer] did not accept this, and that it would consider the contract to be breached by [Seller] as far as [Seller] would not deliver the steel as contracted for on the agreed date and place.

(b) On 31 March 2004, [Buyer] summoned [Seller] to appear before the Commercial Court of Tongeren in summary procedure, since [Seller] did not comply with the [Buyer]'s notice of 29 March 2004.

On 27 April 2004, the judge of that court in an interim injunction:

> „*Ordered* [*Seller*] *to deliver the steel products that are the object of the sale agreements between* [*Seller*] *and* [*Buyer*] *... against payment of the agreed price, according to the agreed terms for payment, and against payment of one-half of the extra price that was claimed by* [*Seller*] *in its fax of 23 March 2004;*
>
> *Ordered* [*Seller*] *to pay to* [*Buyer*] *a penalty of € 25,000 for each day of delay, for the deliveries of which the date of delivery has passed if the delivery does not take place within 20 days from the service of this order;*
>
> *Ordered* [*Seller*] *to pay to* [*Buyer*] *a penalty of € 5,000 for each day of delay, for deliveries not yet due if the deliveries do not take place within 20 days after the date agreed upon, meaning that this penalty is only due if the 20-day period has expired.*"

By application of 10 June 2004, [Seller] appealed this order in summary procedure. The appeal is still pending.

(c) By application of 13 May 2004, [Buyer] petitions the court on the merits:

> „*To confirm that* [*Seller*] *is obliged to perform the deliveries that result from the sale contracts* [...] *at the price agreed and determined in the written contracts, and in compliance with the judgment handed down by the Commercial Court of Tongeren on 27 April 2004;*
>
> *To rule that* [*Seller*] *is liable for the damage suffered by* [*Buyer*] *due to* [*Seller*]*'s breach of contract, which at this point, under reservation of increase or lowering during the procedure, is calculated at € 50,000, plus compensating interest at the legal interest rate from 25 March 2004, and the judicial interest;*
>
> *To direct* [*Seller*] *to pay this sum to* [*Buyer*]*, plus the judicial interest on the sum of € 50,000;*
>
> *To rule that* [*Seller*] *is also liable to the* [*Buyer's processor*]*, for the damage caused by* [*Seller*]*'s breach of contract, which at this stage, under reservation of increase or lowering during the procedure, is calculated at € 250,000, plus compensating interest at the legal interest rate from 29 April 2004 and the judicial interest; and*
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> *To order* [*Seller*] *to pay this sum to* [*Buyer's processor*];
>
> *To reserve the right to* [*Buyer*] *and* [*Buyer's processor*] *to bring all other factual and legal arguments during the procedure...*"

2. On the merits

(a) Preliminary

An attempt to reconcile the parties at the hearing of 4 January 2005 failed.

(b) The applicable law

The CISG is applicable to this case. [Seller] claims payment of the price as a result of (a series of) international sales of movable goods. According to Article 1(1)(a) CISG, this Convention is applicable to contracts for the sale of goods between parties whose places of business are in different States when those states are Contracting States. In this way, the CISG directly defines its own territorial criteria of application without the need to resort the rules of private international law (*cf. J. Meeusen,* „Belgisch internationaal contractenrecht in Europees perspectief, in X., „Overeenkomstenrecht", Verslagboek van de XXVIste postuniversitaire cyclus Willy Delva, 1999-2000, p. 379 e.s., especially no. 490, p. 388).

Both Belgium and France are parties to the CISG. This Convention has been in force in Belgium since 1 November 1997. And the disputed sale contracts date from after the moment on which the CISG entered into force in both countries, so that on this point the condition in Article 100(2) of the Convention is also fulfilled. Thus it is clear that this case has to be decided with regard to the rules of the CISG, especially seeing as article 4 of the CISG states that the Convention - besides the formation of the contract of sale - determines the rights and obligations of seller and buyer (including the sanctions in case of breach by the parties - see *H. Van Houtte et al.,* „Het Weens Koopverdrag", Intersentia 1997, p. 44, no. 1.51).

There is no indication that the parties would have excluded the applicability of the CISG by agreement; moreover, the parties agree that the CISG is applicable to this case.

(c) Is the price increase of steel proven?

The discussion between the parties has arisen due to the alleged severe increase of the purchase prices for steel, because of which [Seller] alleges that it was not possible to maintain the prior sale prices towards [Buyer].

The fact of this price increase was duly proven by [Seller] forwarding evidence - i.e., price sheets, press articles - to support the position that such an increase was not foreseeable. However, this should not have prevented [Seller] from negotiating a price adjustment clause, moreover, as such a clause was provided for in its general conditions.

(d) The formation of the contract and its exact content

There was no written framework agreement between the parties in which the conditions were determined, against which the parties would further collaborate for the separate orders that followed.

As mentioned earlier, the several subsequent contracts between the parties were formed as follows:

- [Buyer] would send to [Seller] a so-called „purchase order“, mentioning the number, quantity, delivery period, price and description of the quality to which the steel had to comply, with the request to return this document signed, and with the corporate stamp of [Seller];

- [Seller] would write its order number on this document, and send the document (by fax) to the [Buyer].

- Afterward, the [Buyer] would enter these orders in periodical listings, in which the agreed dates for delivery and amounts were mentioned. These listings would be sent to [Seller].

- Afterward, the [Seller] would also send a confirmation of order to [Buyer], to which it attached - and this is not disputed - its general conditions, both in French and in German. In these conditions, a price adjustment clause was provided for in case the [Seller]'s purchase prices would increase significantly.

Thus, the questions are:

- When were the contracts formed?

- What was the precise contents of the contracts?

- Whether the general conditions of [Seller] were or were not part of the agreement between the parties.

* * *

The so-called „purchase orders“ that [Buyer] sent to [Seller] should be considered as an offer in the sense of the CISG, which was accepted by [Seller].

The CISG does not require specific formal requirements for a contract of sale. It can be implied in a formal contract that is signed by both parties; it can consist of an exchange of an order and acceptance; it can come to an order form that is performed, or to a confirmation of order that was not contradicted. The contract does not even require a writing; an oral transaction is sufficient. (Art. 11 CISG; H. Van Houtte, Algemene bepalingen en interpretatie, in: H. Van Houtte, J. Erauw, P. Wautelet, eds., Het Weens Koopverdrag, Intersentia, 1997, blz. 66, no. 2.22).

A proposal for concluding a contract is in principle only a valid „offer“ if three conditions are met:

- The proposal is addressed to one or more specific persons;

- The proposal is sufficiently definite: the goods are indicated, the quantity and price are clearly determined, or it is possible to determine them (Art. 14(1) CISG);

- The intent to be bound in case of acceptance is clear from the proposal (see also Art. 23 CISG). (*cf.* J. MEEUSEN, Totstandkoming van de overeenkomst, in: H. Van Houtte, J. Erauw, P. Wautelet, eds., het Weens Koopverdrag, Intersentia, 1997, p. 72 e.s., no. 3.4 e.s.)

An offer becomes effective when it reaches the offeree (Art. 15(1) CISG, receipt theory). Until that moment, it can still be withdrawn without special formal requirements (Art. 15(2) CISG), and then it can no longer be accepted. (*cf.* J. MEEUSEN, Totstandkoming van de overeenkomst, in: H. Van Houtte, J. Erauw, P. Wautelet, eds., het Weens Koopverdrag, Intersentia, 1997, p. 78., no. 3.18)

Art. 18(1) CISG defines an acceptance as a statement made by or other conduct of the offeree indicating assent to an offer. The CISG does not require special formal requirements.

When determining whether statements or other conduct count as an acceptance, Arts. 8 and 9 CISG should be taken into account. Generally, this is conduct that implies the performance of the contract, or that prepares the performance, i.e., payment, acceptance of the goods without protest (possibly followed by processing) by the buyer, the start of production, or the sending of (part of) the goods by the seller.

The statement or conduct of the other party must indicate assent to the offer. The mere confirmation of receipt of the offer, or the indication of the other party that this interested him, is not sufficient. (*cf.* J. MEEUSEN, Totstandkoming van de overeenkomst, in: H. Van Houtte, J. Erauw, P. Wautelet, eds., het Weens Koopverdrag, Intersentia, 1997, p. 781, no. 3.29 e.s.)

In principle, the acceptance becomes effective when it reaches the offeror - whether it happens through a statement or another conduct (receipt theory; Arts. 18, 20 CISG).

The notice does not have to mention explicitly that it is an acceptance: it is sufficient that the mentioned conduct shows the assent to the offer. (*cf.* J. MEEUSEN, Totstandkoming van de overeenkomst, in: H. Van Houtte, J. Erauw, P. Wautelet, eds., het Weens Koopverdrag, Intersentia, 1997, p. 83, no. 3.34)

From the fact that the purchase orders, which contained detailed specifications, were sent back by [Seller], stamped and with the [Seller]'s own number, under which the order was catalogued by the [Seller], it has to be assumed that the purchase orders were accepted by [Seller] in a legal sense. As a result, the parties concluded their contracts according to the conditions provided in the purchase orders.

In these circumstances, the re-sending cannot be seen merely as a confirmation of receipt of the offer.

It should be noted that nothing prevented [Seller] from making its acceptance depend upon the acceptance by [Buyer] of [Seller]'s general conditions, as an extra element which -- in turn -- could or could not be accepted by [Buyer].

* * *

The question arises whether the later forwarding of the general conditions of [Seller] applied either because the parties did not contract just once, but several times, or because such conditions are an international usage.

In the CISG, Art. 6 underlines the principle of party autonomy (the parties can exclude the application, derogate from or vary the effect of any provision), while Art. 9 lifts practices and trade usages to a source of contractual obligations that is just as important as the clauses that the parties have explicitly agreed on.

These are (1) usages to which the parties have agreed, (2) practices they have established between themselves and (3) usages of which the parties knew or ought to have known and which in international trade are widely known to, and regularly observed by, parties to contracts of the type involved in the particular trade concerned.

In contrast, Art. 19 CISG provides that strict rules have to be applied for offer, acceptance and modifications, while in any case full consent of the parties is needed before the contract materializes. Silence alone thus cannot be seen as an acceptance (J. MEEUSEN, „Totstandkoming van de overeenkomst“ in H. VAN HOUTE *et al.*, Het Weens Koopverdrag, Intersentia 1997, nos. 3.56, 3.58 en 3.60, pp. 91-94; Kh Hasselt 28 April 1999, onuitgeg., unpublished AR. 456/99. Kh Ieper, 18 February 2002, onuitgeg., unpublished AR 318/00).

The provisions of the Convention can, of course, also be excluded tacitly, but in this case it must be obvious that this was the conjoint will of the parties (K. NEUMAYER en C. MING, Convention de Vienne sur les contrats de vente internationale de marchandises, Commentaire, Lausanne, Cedidac, 1993.85; Kh Hasselt, 18 October 1995, RW 1995-1996, 1378).

In this case, it should be noted that [Seller] contends that a serious price increase in the steel sector, as occurred in this case, is exceptional and thus that there was no need to insert a price adjustment clause on the resending of the purchase-orders because in the past this had not proven to be necessary. However, and this is not disputed, in the past the prices applied by [Seller] toward [Buyer] were not adjusted either, even though there were fluctuations in the purchase prices up to 10%. In these circumstances, it is hard to uphold that a clause of price adjustment in the steel sector was either a usage applied or accepted by the parties, or an international usage or practice.

The argument of [Seller] that other customers accepted the price increase -- in so far as this contention can be accepted (it is only proven by a statement of the consultant of [Seller]) -- cannot succeed since it is not shown which agreements were concluded with these customers and, more precisely, it is not proven that these customers had not agreed to a price adjustment clause.

Further, it must be noted that a clause which provides for price adjustment, cannot be considered to be a customary or current clause, so that the acceptance and applicability of such a clause should be considered with care, all the more since, as mentioned earlier, the CISG does not accept silent acceptance, unless the common intention of the parties can be derived from it.

Finally, it should be noted that [Buyer] alleges that -- after it was assured that it had fixed price agreements with [Seller] - it, in turn, made fixed and non-revisable price agreements with its customers, be it that this contention is not proven.

* * *

Conclusion: The general conditions of [Seller] are not applicable to the relations between the parties.

(e) Theory of hardship (Art. 79 CISG)

[Seller] alleges that, in as far as the applicability of its general conditions would not be accepted, one can refer to Art. 79 CISG. In this regard, [Seller] refers, on the one hand, to the circumstance of the serious price increase and, on the other hand, to the fact that, due to the market situation in the steel sector, the supplies of its suppliers had strongly decreased and turned out to be insufficient to meet the demand.

* * *

The CISG

According to Art. 79 CISG, a party is not liable for a failure to perform any of his obligations if he proves that the failure was due to an impediment beyond his control and that he could not reasonably be expected to have taken the impediment into account at the time of the conclusion of the contract or to have avoided or overcome it or its consequences.

According to J. HERBOTS, this is the definition the Supreme Court gives to 'force majeure'. The adjustment can be found in the term „reasonableness" (J. HERBOTS, De transnationale verkoopovereenkomst, Het Weens Koopverdrag van 1980, ACCO 1991, p. 59). In other words, the obligor remains liable if, at the time the contract was formed, he should have reasonably foreseen the circumstances that caused his failure -- even if they were outside of his influence. The obligor's liability is not excluded if the impediment was already known or could have been known at the time the contract was formed (M. CLAEYS, De bijzondere rechtsmiddelen van de partijen, in: H. VAN HOUTTE, J. ERAUW, P. WAUTELET, ed., Het Weens Koopverdrag, Intersentia, 1997, p. 266, no. 7.104). The question whether a certain impediment was foreseeable should be considered on an objective basis, according to the criterion of the „*bonus pater familias*".

There is a real ground for non-admissibility, close to *estoppel*, when the failure to perform is due to an act or omission of the obligee himself (Art. 80; J. HERBOTS, o.c., p. 59).

Often the performance of a contract is rendered much more difficult due to certain circumstances, even though one cannot speak of force majeure which renders the performance impossible. The question then arises whether the parties or the judge have the possibility to modify the contract (theory of *imprévision* or hardship). This issue is not expressly settled in Article 79 CISG, or in any other Article of the CISG. TALLON is of the opinion that a uniform application of Art. 79 is not reconcilable with the application in a Contracting State of the theory of changed circumstances. (M. CLAEYS, De bijzondere rechtsmiddelen van partijen, in: H. VAN HOUTTE, J. ERAUW, P. WAUTELET, ed., Het Weens Koopverdrag, Intersentia, 1997, p. 264, no. 7.100).

The Commercial Court of Hasselt has ruled that changes in prices are foreseeable and do not exempt the parties from performance of their obligations. The court stated, moreover, that the performance of the obligation in such a case would imply a financial loss, but that this did not prevent the performance of the agreement. The conclusion of a contract that is not lucrative or that is even a losing proposition, is part of the risks that belong to commercial activities. (Kh

Hasselt, 2 May 1995, AR 1849/94, unpublished, mentioned in: R. PEETERS, Overzicht van rechtspraak van het Weens Koopverdrag in België, T.B.H. 2003, p. 127, no. 6.4.).

The seller bears the risk of price increases of goods that he buys from his supplier (M. CLAEYS, De bijzondere rechtsmiddelen van partijen, in: H. VAN HOUTTE, J. ERAUW, P. WAUTELET, ed., Het Weens Koopverdrag, Intersentia, 1997, p.265, no. 7.102).

This theory is different from force majeure and coincidence (events which happen outside any possible human influence), because the circumstances that are relied on do not make the performance of the obligation impossible. This is not a defect of will either, since the new situation was not present at the time the contract was concluded.

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***For comparison and illustration: the Belgian law on the theory of imprévision* [*or hardship*]**

For the sake of completeness it should be noted that, according to Belgian law, the Supreme Court has systematically rejected the theory of *imprévision* [or hardship] (Cass. 19 May 1921, Pas. 1921, I, 380; Cass 20 October 1924, B.I. 1925, 297; Cass. 14 April 1994, R.W. 1994-1995, 434; Cass. 7 February 1994, R.W. 1994-1995, 121). In clear wording, it is stated in these judgments that the rule of good faith in contracts does not prevent the obligee from claiming performance of the obligation, even though new and for the parties unforeseeable events make the performance of the obligation more difficult for the obligor.

Support for the rejection of the theory of *imprévision* [or hardship] is reflected in the jurisprudence of the Courts of Appeal (Brussels 22 June 1984, J.T. 1986, 164; Antwerp 21 January 1986, R.W. 1986-1987, 1488, with case note D. DELI; Antwerp 6 May 1987, T.B.B.R. 1990, 299, with note D. PHILIPPE; Liège 27 June 1995, J.L.M.B. 1996, 100, with note P. WERY) and lower courts (Court of First Instance Brussels 3 December 1985, T. Vred. 1986, 121; Court of First Instance Liège 7 May 1986, J.L. 1986, 482, with not J.H.; Court of First Instance Brussels 8 December 1993, J.L.M.B. 1994, 358).

The major rationale for this rejection in Belgian law is that the acceptance for reasons of equity of the theory of *imprévision* [or hardship] - an unwritten rule - would undermine legal certainty, which is strived for by the principle of *pacta sunt servanda* which is laid down in the Civil Code (Art. 1134 BW; L. CORNELIS, Algemene theorie van de verbintenis, Intersentia 2000, p. 663, no. 527; L. VAEL, Enkele beschouwingen betreffende het leerstuk van de onvoorziene omstandigheden (imprevisieleer): omtrent de lotsverbondenheid van de contractspartijen bij een gewijzigd contractueel verhoudingskader, in: J. SMITS and S. STIJNS, ed., Remedies in het Belgisch en het Nederlands contractenrecht, Antwerp, Intersentia, 2000, 180).

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The possibility of modifying or amending the contract

It should not be forgotten that the parties can always modify the conditions of a contract and deviate from the rules of the Convention. The will of the parties will prevail when it is expressed in clear and unambiguous words. (R. PEETERS, Overzicht van rechtspraak van het Weens Koopverdrag in België, T.B.H. 2003, p. 127, no. 6.4.).

Belgian law also refers to this possibility: To avoid the problems in case of changed circumstances during the performance of the contract, parties can always insert a clause in their agreement, by which they agree to modify their original agreement when this is necessitated by the circumstances.

Such clauses are generally valid.

Such clauses do not play a prominent role in domestic trade, however, they are common in international trade (L. VAEL, Enkele beschouwingen betreffende het leerstuk van de onvoorziene omstandigheden (imprevisieleer): omtrent de lotsverbondenheid van de contractspartijen bij een gewijzigd contractueel verhoudingskader, in: J. SMITS and S. STIJNS, ed., Remedies in het Belgisch en het Nederlands contractenrecht, Antwerp, Intersentia, 2000, 180; Bestendig Handboek Verbintenissenrecht, Kluwer; looseleaf, p. 11.4-165, no. 1791).

According to the majority opinion in Belgian jurisprudence and doctrine, the parties have to abide by the consequences of the realization of subsequent circumstances if they do not insert such a clause in their contract.

This reasoning can also be applied as to cases governed by the CISG: [Seller] had the possibility to insert a price adjustment clause in the contract between the parties, in relation to which it should be noted that [Seller] could and should have reasonably foreseen a price increase. The fact that such a clause is part of its general conditions proves that the circumstances of a price increase were not unforeseeable for [Seller].

The same counts for the circumstances of shortages of goods, in as far as these are proven, because this situation could also have been reasonably foreseen by [Seller] at the time the contract was formed and, in any event, it is clear that a limited stock did not give [Seller] the right to stop all deliveries.

Also with regard to limited stocks, there is an (exoneration) clause in the general conditions of [Seller].

In this regard, it should be noted that [Seller] even refused delivery of the orders that it had already accepted, even though it should have had sufficient stocks; at least, in view of the contractual obligation, should purchase sufficient stock.

If [Seller] could not succeed in this, it should bear the risk itself.

Interpretation of art. 79

The meaning of Art. 79 CISG cannot be that it lends a helping hand to a party that, because of its own negligence, did not provide for this situation in its contracts.

* * *

Conclusion: Art. 79 CISG cannot be invoked by [Seller], given that the circumstances it relies on could and should have been reasonably foreseen, and could have been perfectly inserted by it in the agreements between the parties.

(f) Conclusion

In these circumstances, it should be decided that [Seller] unrightfully stopped its obligations flowing from the contract of sale, such that the decision in summary procedure, by which [Seller] was ordered to perform, should be confirmed.

However, it should be noted that [Seller] continued deliveries under constraint, because of the order in summary procedure, so that the original price agreements cannot be maintained, and it should be ordered that deliveries, both those performed after the order and the future ones, can be charged at the price as determined in summary procedure, being the original price plus one-half of the extra price. An exception should be made for the orders that should have been delivered before the decision on summary procedure: these should be charged according to the original price agreements, without increase.

[...]

This solution is also compatible with equity. Equity is, according to Article 1135 BW, a source of supplementary law for contracts: one can rely on equity to determine the contents of a contract, namely to determine which obligations the parties have based on their agreement and the supplementation thereof.

[...]