CISG-online 1447	
Jurisdiction	Germany
Tribunal	Landgericht Coburg (District Court Coburg)
Date of the decision	12 December 2006
Case no./docket no.	22 O 38/06
Case name	*Dutch plants case I*

Translation[*] *by Florian Arensmann*[**]

Translation edited by Veit Konrad[***]

Facts of the case:

The dispute involves claims for deliveries of plants. 1

The parties have a long-time business relationship. [Buyer] ordered plants from [Seller], which the latter delivered to building sites of [Buyer] in Upper Franconia (*Oberfranken*) and South Thuringia (*Südthüringen*), Germany. [Seller] charged [Buyer] for the plants in an invoice (No. 50057) dated 29 October 2004 in the amount of 5.811,13 € and in an invoice (No. 50147) dated 19 November 2004 in the amount of 6.691,87 €. [Seller] also charged «interest till 1 March 2005» in an invoice (No. 50395) dated 8 March 2005 amounting to 297.50 €. Concerning the invoice dated 29 October 2004, [Buyer] has paid 1.790,00 €. 2

[Buyer] has declared as an offset counterclaims for costs for removal of defects and mitigation. [Seller] disagrees with this offset, alleging that it properly delivered the plants ordered by [Buyer]. 3

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[*] For purposes of this translation, Claimant of the Netherlands is referred to as [Seller], and Respondant of Germany is referred to as [Buyer].
Translator's note on other abbreviations: BDB = *Bund deutscher Baumschulen* [Union of tree nurseries in Germany]; BGB = *Bürgerliches Gesetzbuch* [German Civil Code]; Brussels I Regulation = European Union Council Regulation (EC) No 44/2001 of 22 December 2000 on jurisdiction and the recognition and enforcement of judgments in civil and commercial matters]; ECB = *European Central Bank*; EGBGB = *Einführungsgesetz zum Bürgerlichen Gesetzbuche* [German Code on Private International Law]; IPRax = *Praxis des Internationalen Privat- und Verfahrensrechts* [German law journal]; LG = *Landgericht* [German regional court]; RVG = *Rechtsanwaltsvergütungsgesetz* [German statute on the allowance for attorneys' fees]; ZPO = *Zivilprozessordnung* [German Civil Procedure Code].

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[Position of the parties:]

[Seller's claim:]

[Seller] requests the Court to order [Buyer] to pay to [Seller]: **4**

- 4,021.13 € plus interest in the amount of 8 percentage points above the base rate since 30 November 2004;
- 6.691.87 € plus interest in the amount of 8 percentage points above the base rate since 20 December 2004;
- 297.50 € plus interest in the amount of 8 percentage points above the base rate since 9 April 2005;
- 15.00 € for pre-trial dunning costs;
- 1.00 € for pre-printed form expenses; and
- 361.90 € for pre-trial expenses incurred in asserting legal rights.

[Buyer's position:]

[Buyer] requests the Court to dismiss [Seller]'s claim. [Buyer] alleges that [Seller] had not properly delivered the plants. [Buyer] further alleges that the plants had been defective. Buyer alleges that: **5**

- There was a partial shortage in the quantity of plants delivered;
- Many of the plants were of poor quality; and
- Some plants were not fit for the climate prevailing at the [Buyer]'s locations and, in the spring of 2005, did not prosper.

[Buyer] alleges that, in this field of trade, it is customary for the supplier to be responsible for plants prospering in the climate at the location to which the supplier delivers the plants. **6**

Additionally, [Buyer] asserts that it exchanged the defective plants in large part resulting in expenses for removal of defects and accordingly in claims for mitigation in the amount of 14,029.12 €. **7**

[Seller] asserts that [Buyer] did not give notice of the particular lack of conformity of the goods in an appropriate period of time. Therefore, according to Art. 39 CISG, [Buyer]'s counterclaims are precluded. Moreover, based on the sales terms and delivery conditions in effect for products of tree nurseries in Germany, [Seller] would not be liable for the failures of the plants to prosper. **8**

For further details, reference is directed to the parties' submissions together with enclosures and records of meetings of 16 May 2006 and 12 December 2006.

The Court has also entered evidence by obtaining a written expertise of the expert witness Dipl. Ing. (FH) […]. For the results of this, reference is directed to the expertise of 17 October 2006.

Reasons for the decision:

The [Seller]'s claim is admissible and is largely justified. 9

I. 10
The District Court of Coburg has jurisdiction as [Buyer] has its principal office in the sector of the District Court of Coburg, §§ 12, 17 ZPO, Art. 2(1), Art. 5 No. 1 Brussels I Regulation.

II. 11
The claim is largely justified. [Seller] is entitled to collect the purchase price in the amount of 10,713.00 € from [Buyer] according to Art. 53 CISG.

As the parties have not agreed on the applicable law, this dispute will be judged according to the rules of the CISG. 12

The CISG is applicable according to Art. 1(1)(a) CISG as the parties have their places of business in different Contracting States. The substantive scope of application is present as well according to Art. 4 CISG as the matters in dispute are claims out of a contract for the sale of goods.

1. 13
[Seller] is entitled to the purchase price from [Buyer] for plants delivered in the total amount of 10,713.00 €.

However, the [Seller]'s claim for payment of another 297.50 € according to the invoice dated 8 March 2005 is not justified. The subject of that invoice is not deliveries of plants but interest till 1 March 2005. [Seller] has not demonstrated either the source of this claim or its entitlement to it. 14

2. 15
[Seller]'s entitlement to the purchase price in the amount of 10,713.00 € is not extinguished by [Buyer]'s claims for mitigation according to Arts. 45(1)(a), 50 CISG or by the offset that [Buyer] claims for damages for defective goods according to Art. 45(1)(b) and Art. 74 *et seq.* CISG.

For such claims to succeed, a breach of contract by the [Seller] would be required. The breach could be based on defects in the goods delivered. Art. 35 CISG requires the seller to deliver goods which are of the quantity, quality and description required by the contract and which are contained or packaged in the manner required by the contract. 16

a) 17
[Buyer] alleges that only four of the nine *Pyrus calleryana chanticleer* plants delivered on 28 October 2004 were of the size agreed upon. According to [Buyer]'s undisputed submission, five pieces were delivered only with the size of 16 to 18 mdB. However, [Buyer] has not supported its claims for damages or for mitigation from this breach of contract.

Further, [Buyer] asserts that two of the *Pyrus calleryana chanticleer* plants delivered were 18
defective as they did not prosper in the spring of 2005. [Buyer] alleges as the reason for this that the plants were unfit for the climate in Erlangen, Germany. However, based on the expertise of expert witness […], dated 17 October 2006, the Court is convinced that these plants were fit for the location of Erlangen. Moreover, [Buyer] cannot derive a claim for lack of conformity based on the fact that these plants did not prosper, as [Seller] did not guarantee that they would. On the contrary, the sale was according to condition H.9. of the general sales terms and delivery conditions for products of tree nurseries in Germany. These general terms and conditions were effectively implicated in the parties' contractual relationship.

The CISG does not make special demands on the implication of general (standardized) terms 19
and conditions into the contract. The necessary rules are to be derived from Art. 8 CISG. For this reason, terms and conditions of one party can be regarded as a part of the offer due to the negotiations between the parties or due to usages between them, Art. 8(3) CISG. The rule is that a reference to terms and conditions which are not attached to the offer has to be sufficiently clear that a reasonable party understands it (*cf*. OLG Zweibrücken, 31 March 1998 – 8 U 46/97, Juris).

There is no express implication in this case. 20

An implication by conclusive conduct requires that the user noticeably refers to his general 21
terms and conditions and that the contractual partner does not object to their validity. The reference has to identify the set of clauses clearly and unambiguously to enable the other party to obtain knowledge of the content of the general terms and conditions. The reference has to be carried out during the negotiations for the concrete contract. However, it is acknowledged that general terms and conditions can become part of a contract by way of repeated, also for the hasty reader recognizable, notices in invoices or similar documents if the parties have a permanent business relationship which requires a certain frequency of contracts (*cf*. OLG Zweibrücken, 31 March 1998, AZ 8 U 46/97, Juris).

This is true in the case at hand. According to [Seller]'s undisputed submission, the parties have 22
had a long-term business relationship. There is a reference on the invoices that the «KBGBB-conditions» will apply to all contracts. Further, there is a notice that these are the general terms and conditions which will be transmitted on request.

Therefore, [Buyer] is not entitled to set off against [Seller] compensation in the amount of 23
2,796.00 € for expenses for a cover-purchase, for exchange and for related maintenance of two of the plants.

b) 24
[Buyer] also has objections to the five *Robinia pseudoacacia* plants delivered on 28 October 2004, alleging that they were of poor quality, did not comply with the standards of growing of the BDB, and that the top of the plants was very thin, disproportionate and askew. [Buyer] therefore claims a reduction of the price for these plants in the amount of 250.00 € according to Art. 50 CISG.

However, [Buyer]'s right to a reduction according to Arts. 45(1)(b), 50 CISG is precluded by Art. 39(1) CISG. According to this provision, 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. Art. 39 CISG is not mandatory. In the alternative, the parties can specify themselves the nature of the obligation to give notice with regard to the period of time or the form of the notice. It is appropriate for the parties to set a time limit for the notice after the discovery of a lack of conformity. The determination of the form (e.g., in writing) of the notice is also not objectionable (*cf*. Staudinger/Magnus, 2005, Art. 39 CISG para. 66 f.). 25

According to conditions H.5. and 6. of the general terms and conditions presented as an attachment, the goods delivered have to be examined for damages in transit, for wrong delivery and/or shortages in quantity immediately after receipt. Notices of defect concerning these matters have to be noted on the delivery order [...] and notices of defect have to specify the reasons. Notices for obvious defects have to be given in writing to the seller within eight days after receipt or acceptance of the goods, notice for hidden defects at the latest within eight days after their discovery. 26

The defects given notice of in the case at hand were obvious. However, [Buyer] has not demonstrated that it has given notice of these defects to the [Seller] at all. The raising of these defects in this proceeding is late in any case. 27

c) 28
In addition, [Buyer] alleges that the Common box plants (*Buxus sempervirens kegel*) plants delivered on 18 November 2004 were of poor quality and that [Buyer] complained about that by letter of 22 November 2004 (Attachment B3). [Seller] has placed the charged price to [Buyer]'s credit. Thereby, possible claims for defects are already fulfilled.

However, it is noted in passing that although the [Buyer]'s objection in the letter of 22 November 2004 was indeed timely, it did not comply with the requirement of Art. 39 CISG and of the general terms and conditions that the nature of the lack of conformity be sufficiently specified. Particularly, discrepancies in quality have to be specified precisely. A mere reference to inferior or poor quality is not sufficient (*cf*. Piltz, *Internationales Kaufrecht,* § 5 para.67). 29

d) 30
And [Buyer] alleges that the Box honeysuckle (*Lonicera nit. maigrün*) plants delivered on 18 November 2004 were not fit for the climate in Rödental and that these plants did not prosper.

Insofar, it is again to be noted that [Seller] according to its general terms and conditions did not issue a guarantee for growing. Due to the obtained expertise, the Court is convinced that 31

the plants being not fit for the climate does not lead to defectiveness as well. The expert witness has declared that it is basically possible to plant this species in Rödental.

e) 32
And [Buyer] alleges that the size of the six *Amelanchier lamarckii* plants delivered on 18 November 2004 had only been 80/100 instead of 125/150 as ordered. [Buyer] also alleges that they were not fit for the climate in Eisfeld.

However, the expert witness has asserted their general fitness for the climate prevailing in Eisfeld. 33

Concerning the allegation that the size was too small, [Buyer] has lost its rights derived Art. 45 CISG as it did not duly object to this defect in accordance with Art. 39 CISG read in conjunction with condition H.6. of the general terms and conditions. The plants were delivered on 18 November 2004. However, the objection was presented only on 6 December 2004, eighteen days after delivery. According to the stipulated general terms and conditions, [Buyer] should have raised the objection within eight days as the non-conforming size of the plants was readily noticeable on delivery. 34

f) 35–37
[Buyer] further asserts that three other kinds of plants delivered on 18 November 2004 were neither of the size agreed upon nor fit for the particular local climate. Concerning the latter contention, the expert witness has again convincingly set out the opposite. Other claims for non-conformity of the goods are precluded since these defects were already noticeable on delivery and therefore, [Buyer]'s objection on 6 December 2004 was not timely.

g) 38
According to [Buyer]'s further contention, the *Prunus l. herbigii* delivered on 18 November 2004 had the same defects. The objection concerning the size has again not been raised duly.

However, in this case, the expert witness agrees that the plants were not fit for the local climate envisaged. 39

Even so, this does not constitute a lack of conformity in terms of Art. 35 CISG. If the parties -- as in the case at hand -- accept the determination of the kind and quantity but have not stipulated particular agreements concerning the characteristics of the goods, especially their winterproofness, Art. 35(2) CISG prescribes which requirements goods have to meet to conform to the contract. 40

According to Art. 35(2)(a), the goods have to be fit for the purposes for which goods of the same description would ordinarily be used. With regard to quality, the goods have to comply with the expectations of an average user (*cf*. Staudinger/Magnus, 2005, Art. 35 CISG para. 18). According to the prevailing opinion, delivered plants in any case must basically be able to prosper. It is not apparent that the *Prunus I. herbigii* plants delivered do not generally comply with that requirement. 41

According to the demonstrations of the expert witness […], while they are unfit for the concrete location, they are merely unfit for that particular purpose. In this case, there is only a lack of conformity according to Art. 35(2)(b) CISG if that particular purpose has been expressly or impliedly made known to the [Seller] at the time of the conclusion of the contract. This requirement can be considered to be fulfilled as [Seller] had to deliver the plants directly to the site. By this, it was sufficiently made known to [Seller] that the plants had to be fit for the particular purpose at the location «Am Anger» in Erlangen. However, the one-sided expectation for usage of the [Seller] is only secured if the circumstances do not show that the [Buyer] neither relied on the [Seller]'s skill and judgment nor that it was reasonable for him to do so. The double negative indicates that, in case of doubt, the buyer may rely on the seller's skill except where particular circumstances deem this reliance unjustified (*cf*. Staudinger/Magnus, 2005, Art. 35 CISG para. 31). **42**

It is disputed whether equal skill of both parties constitutes a fact which invalidates the reliance or if Art. 35(2)(b) is only to be applied where there is a «technological gap» between the parties, which would mean in this case that the seller is more skilled than the buyer. The predominant opinion to which this Court attaches itself considers the [Seller] only to be liable if he is more skilled (*cf.* Staudinger/Magnus, 2005, Art. 35 CISG para. 32). The buyer's reliance on the seller's skill seems not to be protectable if the buyer is able to estimate the usability of the goods in the same way. **43**

[Buyer] specializes in gardening and landscaping. It operates especially in the local area and is therefore at least equally or even better acquainted with the peculiarities of the particular locations than [Seller]. It is not apparent to which extent [Seller] is more skilled than [Buyer]. Facing this, the circumstances show that it was unreasonable for [Buyer] to rely on [Seller]'s skill and judgment. **44**

Therefore, with regard to the [Buyer]'s *Prunus I. herbigii* allegation, there is no lack of conformity. **45**

h) – i) **46–48**
[Buyer] further asserts short deliveries, lacking quality and unfitness of other particular plants for a local climate. However, [Buyer] did not provide evidence for these contentions and, in any case, these objections had not been duly raised.

j) **49**
According to [Buyer]'s contention, the red *Boskoop Malus sylvestris* does not meet the ordered size, quality and fitness for the climate in Haßfurt.

[Buyer] documented the lack of conformity on the delivery note of 18 November 2004 and thus, duly did so. However, the expert witness has determined that the plant is fit for the climate in Haßfurt. Accordingly, [Buyer] does not derive claims for reduction of price or for damages out of these alleged defects. **50**

3. 51
For lack of adequate counterclaims by [Buyer], [Seller]'s claim is justified in the amount of 10,713.00 €.

Pursuant to Art. 78 CISG, [Seller] is entitled to interest from [Buyer] as the latter failed to pay the purchase price. 52

According to the invoice, the purchase price had to be paid within 30 days after issuing the bill. This results in the invoice of 29 October 2004 becoming due on 28 November 2004 and the invoice of 19 November 2004 becoming due on 20 December 2004. Insofar interest can only be claimed since 21 December 2004 on 6,691.87 €.

As the CISG does not rule on the rate of interest and the parties have not reached a prior agreement on this, the rate of interest is to be determined in another way. The predominant opinion in the German and international jurisprudence and legal literature to which this Court attaches itself is to determine the rate of interest rate pursuant to Art. 7(2) (alternate two) CISG, following the provisions of international private law (*cf*. Bonsau/Feuerriegel, IPRax 2003, p. 421). Therefore, the otherwise applicable law of the contract has to be determined for the purpose of determining the rate of interest. Since there has not been a choice of law according to Art. 27(1)(1) EGBGB, the contract is, pursuant to Art. 28(1) EGBGB, subject to the law of the State to which the contract has the closest connection. In accord with the presumption of Art. 28(2)(1, 2) EGBGB concerning a sales contract, this is regularly the seller's place of business as the seller is performing the characteristic part of the contract instead of the buyer who is only obliged to payment and acceptance. In the case at hand, this is [Seller]. The rate of interest is therefore to be determined according to Dutch law. Pursuant to Art. 6: 120 Burgerlijk Wetboek with Staatsblatt Nos. 545 and 561 of 14 November 2002 and of 22 November 2002, the interest rate is 7% above the interest rate of the ECB which is rounded off to 0.5 %. A higher interest rate based upon §§ 286, 288(1) BGB is not justified as German law is not applicable. 53

4. 54
Considering the [Buyer]'s breach of contract by failure to pay the purchase price due, [Seller] is entitled to compensation for its extrajudicial, non-refundable attorneys' fees in the amount of 361.90 €, Art. 74 CISG. Basically, those expenses which a party has to spend for adequate and justified prosecution of law constitute foreseeable and reimbursable items of damages (Staudinger/Magnus, 2005, Art. 74 CISG para. 51). The kind and extent of the breach of contract and [Buyer]'s behavior gave [Seller] sufficient reason for the appointment of attorneys.

Thus, [Buyer] has to pay [Seller] for the extrajudicial activity of [Seller]'s attorneys out of a value of the matter of 10,713.00 € an expense charge in the amount of 0.65 pursuant to the RVG which is not chargeable to the costs of proceeding plus a lump sum for expenses of 20 €, in total amounting to 361.90 €. 55

However, [Seller] is not entitled to collect from [Buyer] 15 € for pre-trial dunning costs and 1.00 € pre-printed form expenses as [Seller] has failed to provide sufficient evidence to support this. 56

III. 57

The court order as to the costs results from § 92(2) No.1 ZPO as [Seller]'s excess-claim was marginal and has not caused further costs. The decision concerning the preliminary enforceability results from §§ 709(1, 2) ZPO.