

Case 1189: CISG 7; 8; 18; 19

Italy: Tribunale di Rovereto n. 914/2006

Takap B.V. v. EUROPLAY S.r.l

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Original in Italian

Full text available in Iurisdata (database)

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The case concerned a commercial relation between an Italian company, the seller, and a Dutch company, the buyer, for the sale of mirrors. Since the Dutch company had failed to make some payments, the seller sued it before the Italian Court of Rovereto. The Court concluded that the contract was avoided and issued an order of payment in favour of the Italian company.

The defendant objected to the order claiming that the Italian judge did not have the authority to decide the issue at stake, since the forum selection clause in favour of the Dutch Courts, contained in the standard terms incorporated into the contract, applied. The Court dismissed the defendant's argument stating that the parties had not validly agreed upon a forum selection clause, since none of the criteria set out in Art. 23 lit. (a) and (b) of European Council Regulation n. 44/2001 were met. The Court noted that the clause had never been accepted by the seller in writing, nor was it possible to consider the clause as accepted only on the ground that the seller had executed the buyer's order (Art. 18 CISG). As a matter of fact, the seller provided evidence that it used to send a written statement confirming the orders received and including its own standard terms, which the other party had to sign and return. According to the Court, this implied that the contract between the parties had been concluded by exchange of written statements and not by the seller's performance of the order.

Besides, the Court found that the standard terms of the Dutch company were not part of the contract (in particular the forum selection clause). Referring to Arts. 7 and 8 CISG, the Court reasoned that in order to consider the standard terms validly incorporated into a contract, the addressee of the proposal (i.e. the Italian seller) should have been aware of such terms. In the Court's opinion since there was no proof that the Italian company had knowledge of the buyer's standard terms, the forum selection clause in favour of the Dutch Courts could not apply. Furthermore, even if the buyer could demonstrate the opposite, the buyer's signature on the confirmation statement sent to it by the seller (and including the seller's terms) amounted to an acceptance of a counter offer (Art. 19 CISG) and was binding upon the parties.

For these reasons, the Court confirmed its jurisdiction over the case.