Published at *Yearbook Comm. Arb'n XXXII,* Albert Jan van den Berg, ed. (Kluwer 2007) 93-106.

Netherlands Arbitration Institute
Interim Award of 10 February 2005

Parties:	Plaintiff: Seller (Netherlands) Defendant: Buyer (Italy)
Place of arbitration:	Rotterdam, The Netherlands
Subject matter:	- incorporation of standard condition - applicable law to contract - arbitration clause incorporated by reference - sales confirmation - 1980 UN Sales Convention (CISG) - Principles of European Contract Law (PECL) - arbitration agreement in writing - applicable law as to arbitration agreement

Facts

Between 5 June 2002 and 25 March 2003, the Dutch seller and the Italian buyer entered into seven contracts for the sale of certain goods through confirmations of order followed by an invoice after delivery of the goods. The standard confirmation of order, which was sent in all cases both by fax and regular mail to the buyer, contained on the front page a reference to seller's General Conditions of Contract printed on the reverse. A reference to the General Conditions was also included on the invoice. The General Conditions of Contract provided for the application of Dutch law and arbitration of disputes in Rotterdam, The Netherlands, in accordance with the rules of the Netherlands Arbitration Institute *(Nederlands Arbitrage lnstituut* -- NAI). **[page 93]**

A dispute arose between the parties when the buyer refused to pay under the last three contracts (contracts no. 5, no. 6 and no. 7), alleging defects in the goods. NAI arbitration proceedings ensued before a sole arbitrator.

By the present interim award on jurisdiction, the sole arbitrator held that he had jurisdiction over the dispute based on the arbitration clause in the seller's General Conditions of Contract. He reserved decision on all other issues.

The sole arbitrator first examined the law applicable to the disputed contracts. He reasoned that the United Nations Convention on Contracts for the International Sale of Goods of 11 April 1980 (CISG) applied since the contracts were international contracts for the sale of good concluded between parties from Italy and The Netherlands, that is, between two CISG member states. According to the CISG, questions concerning matters governed by the CISG that are not specifically answered by the CISG itself are to be settled in conformity with the general principles on which the CISG is based or, in the absence of such principles, in conformity with the law applicable by virtue of the rules of private international law, that is, in this case, the EEC Convention on Contractual Obligations (Rome, 1980) [the EC

Convention]. The EC Convention provides that the existence and validity of a contract or contractual provision is to be determined according to the law which would govern it under the EC Convention if it were valid.

In the present case, the law which would govern the arbitration clauses in the disputed contracts if they were valid was Dutch law, which was both the law indicated in the General Conditions and the law of the place of the contracts' characteristic performance.

The sole arbitrator therefore concluded that it would apply the provisions of the CISG and its governing principles -- and, subsidiarily, Dutch law -- to the issue whether the seller's General Conditions applied to the disputed contracts.

The arbitrator reasoned that under the CISG offers must indicate the offeror's intention to be bound in case of acceptance and an offeree may accept an offer by either statement or conduct. In either case, it should be ascertained whether the offeree could reasonably be aware of the offeror's intent.

The arbitrator also referred to the Principle of European Contract Law (PECL) on the formation of contracts, according to which contract terms which have not been individually negotiated may be invoked against a party only if the party relying on them took reasonable steps to bring them to the other party's attention before or when the contract was concluded.

Based on the above principles, the sole arbitrator concluded that the Dutch seller's General Conditions of Contract were validly incorporated into the disputed contracts. **[page 94]**

The seller's intention to apply the General Condition was evident from the confirmations and invoices. Since the confirmations for the first three of the seven contracts were also sent to the buyer by regular mail, it could be assumed that the buyer was aware of the General Conditions printed on the reverse side, even if the faxes by which the confirmations were also sent did not include the General Conditions.

By failing to express its disagreement with the General Conditions or to deviate from its practice of returning a signed copy of the faxed confirmation, the buyer impliedly accepted them and the seller was allowed under the principle of good faith to rely on the buyer's acceptance.

Also, the seller complied with the PECL requirement that it take reasonable steps to inform the buyer of the content of the General Conditions before or upon entering into the disputed contracts, since it sent the confirmations containing the General Conditions by regular mail as well as by fax.

The sole arbitrator rejected the buyer's claim that it is "a generally approved principle" in EU legal systems that arbitration clauses must be specifically and separately agreed to in writing. The arbitrator noted that, while this "may be a rule" of Italian law, several other European legal systems including Dutch law, do not contain this requirement.

The sole arbitrator finally considered that Dutch procedural law, being the law of the seat of the arbitration, provides that arbitration agreements be proven by "an instrument in writing". A written document referring to standard conditions providing for arbitration is such an instrument in writing, provided that it is expressly or impliedly accepted by the other party. In

the present case, the confirmations and invoices were instruments in writing the Italian buyer (impliedly) accepted them in respect of the disputed contract.

Excerpt

[1] "The preliminary issue to be determined by the sole arbitrator is the question whether the Arbitral Tribunal has jurisdiction over the dispute brought before it. In view thereof the following is considered."

I. CLAIMS AND DEFENCES OF THE PARTIES

[2] " As appears from the Short Answer the buyer claims as a preliminary defence that the Arbitral Tribunal lacks jurisdiction: **[page 95]**

> 'So, we refuse the NAI Rules and any Arbitrator for the solution of the dispute, because we believe that the place of jurisdiction for any possible legal action must be the [court of first instance of X, in Italy] because the business relationship was entered [there], and also the agreements dated 28 January 2003 and 25 March 2003 [contracts no. 6 and no. 7, see below] have been concluded in our site.'

The buyer has elaborated on this defence in its Statement of Defense, in which it asserts:

> '(a) the buyer has never approved neither signed any arbitration clause;
> (b) has never accepted to let an arbitral tribunal solve the contention with the seller;
> (c) the adverse thesis is completely unfounded ... [that is, the thesis that] the buyer is bound to an arbitration clause in virtue of the general conditions of contract predisposed unilaterally by the seller.
>
> It is a generally approved principle in all EU legislations that the contractual clauses which contain submitting to court of justice of the rising contestations between parties must be approved specifically in writing for two times (see Art. 1341(2) Italian Civil Code; Arts. 807-808 Italian Code of Civil Procedure). In the case in point, neither the general conditions nor the presumed arbitration clause have been approved neither verbally nor in writing by the buyer.
>
> Premised so, it must be declared the defect of jurisdiction of the international Tribunal of jurisdiction resorted.'

[3] "In paragraph 5 of the Request for Arbitration the seller has claimed that the Arbitral Tribunal has jurisdiction:

> 'In the period of September 2002 until March 2003 the Claimant as seller on the one side and the Defendant as buyer on the other side, entered into several agreements concerning the purchase and sale of [the goods]. The general conditions of Claimant are applicable on all these agreements. The general conditions contain an arbitration clause.'

In paragraphs 6 and 10 of the Statementof Claim the seller added to this assertion: **[page 96]**

[Para. 6]: 'All the contracts of the seller state among other things the following: "We herewith confirm having sold to you, subject to our general sales conditions which are printed on the back of this contract the following goods ...".'

[Para. 10]: 'The buyer and the seller had done business before. At these previous occasions, the seller has also stipulated the applicability of its General Sales Conditions, which were accepted by the buyer. The buyer therefore was fully familiar with the General Sales Conditions of the seller including the arbitration clause. All the deliveries were subject to the General Sales Conditions of the seller. These General Sales Conditions were printed on the back of each contract and on each invoice the seller refers to these conditions'."

II. BUSINESS PRACTICE BETWEEN THE PARTIES

[4] "For the assessment of the dispute, the following facts, as stated on the one hand, and not or not sufficiently disputed on the other hand, can be taken into account."

1. In General

[5] "The general course of business between parties was as follows. The buyer placed an order for the goods with the seller by fax. The seller confirmed the order by sending a confirmation to the buyer. The conformation states under the heading 'Contract': 'We herewith confirm having sold to you, subject to our general sales conditions which are printed on the back of this contract, the following: ....' Subsequently, the goods ordered were delivered and the seller sent an invoice to the buyer. At the bottom of the invoice it says: 'Our offers, contracts and operations are subject to our general terms and conditions ... containing inter alia an arbitration clause, latest edition filed with the Chambers of Commerce in ... and .... The [seller's general conditions] will be forwarded free of charge on first request.

[6] "The general sales conditions of the seller are in Dutch as well as in English. Art. 1.4 of the General Conditions provides the following: 'Dutch law shall apply to all agreements concluded by the seller and to these Terms and Conditions'. Art. 10.1 of the General Conditions reads as follows: 'All disputes between the seller and the buyer shall be settled accordance with the arbitration regulation of the Netherlands Arbitration Institute. **[page 97]**

2. The Disputed Contracts

[7] "The actual course of business, more specifically with respect to the contested contracts, was as follows.

[*Contract no. 1*:] On June 2002 the buyer placed an order by fax with the seller. The seller confirmed this order by means of a fax dated 6 June 2002 with a reference to its general conditions as quoted [at [5]] above. On the same date it also sent a confirmation ... to the buyer by fax and by regular mail. The buyer returned the signed contract by fax on 6 June 2002. On 10 June 2002 the seller sent the corresponding invoice to the buyer by regular mail.

[*Contract no. 2*:] On 19 June 2002 the seller sent a confirmation ... by fax and regular mail, which the buyer returned with its signature (i.e. a signature on behalf of the buyer) on the same day. On 3 August 2002 the seller sent the corresponding invoice to the buyer by regular mail.

[*Contract no. 3*:] On 26 June 2002 the seller drafted a confirmation ... which was sent to the buyer by fax and by regular mail on 18 July 2002. The buyer returned the faxed confirmation with its signature on the same day. The invoice was sent to the buyer on 4 October 2002 by regular mail.

[8] "The buyer has not raised any complaints with the seller about the quality or price of the goods delivered pursuant to the contracts mentioned above. Furthermore, it has not raised any objections against the applicability of the general sales conditions of the seller as referred to in the confirmations and the invoices, which general conditions were printed on the back of each Confirmation.

[9] "[*Contract no. 4*:] On 26 June 2002 the seller sent a confirmation ... by regular mail to the buyer. This confirmation was faxed to the buyer on 2 August 2002. The buyer returned the fax the next day to the seller with its signature on it. This contract -- no. 4 -- was replaced by the contract confirmed in the confirmation dated 27 August 2002 (*Contract no. 5*). This replacement took place due to a change in price and origin. This confirmation was sent to the buyer by fax. The buyer returned a signed copy of this confirmation by fax on 30 August 2002. The invoice in respect of *Contract no. 5* was sent to the buyer by regular mail on 30 November 2002.

[10] "The seller delivered the goods sold on the basis of *Contract no. 5* in September and December 2002. By letter of 14 October 2002 the buyer informed the seller of defects in the goods deliver to date pursuant to this contract. Parties continued to discuss the quality of the goods and payment thereof during the rest of 2002.

[11] "By letter of 8 January 2003 the buyer requested delivery of another truckload of goods as substitution for the defective goods under *Contract no. 5*. **[page 98]** On 28 January 2003 the seller and the buyer concluded an agreement for another truckload of goods. This agreement was laid down in a confirmation (*Contract no. 6*), which was sent to the buyer by fax and regular mail on 27 February 2003 and returned by the buyer with its signature on it on the same day. The invoice was sent on 21 March 2003 by regular mail.

[12] "Since the goods delivered pursuant to *Contract no. 6* showed again defects, the seller and the buyer entered into another agreement on 25 March 2003. This agreement was laid down in a confirmation (*Contract no. 7*) dated 27 March 2003. The confirmation was sent to the buyer by regular mail on 27 March 20903 and by fax on 1 April 2003. The buyer returned a signed copy of this fax on the same day. The invoice was sent by regular mail on 24 April 2003.

[13] "The buyer has not paid the invoices in relation to *Contracts no. 5, no. 6 and no. 7* (the disputed contracts)."

III. APPLICABLE LAW

[14] "The answer to the question whether or not the Arbitral Tribunal has jurisdiction over the dispute between parties, lies in the assessment of the question whether or not the General Conditions apply to disputed Contracts since the General Conditions contain, in Art. 10.1, an arbitration clause. This question must be answered in accordance with the substantive law applicable to the contracts between the seller and the buyer (the contracts). In that respect the Arbitral Tribunal considers the following.

[15] "All the contracts, including the disputed contracts, are international contracts for the sale of goods. The parties are established in The Netherlands and Italy, which countries are both party to the United Nations Contracts for the International Sale of Goods of 11 April 1980 (CISG). The CISG applies to the contracts pursuant to Art. 1(1) CISG.[1] According to Art. 22 of the EEC Convention on the Law Applicable to Contractual Obligations, [done at **[page 99]** Rome on] 19 June 1980 (Pb EG 1980, L 266/1-19 Convention on Contracts) the CISG prevails over the EC Convention on Contracts.

[16] "It is a matter of interpretation of the CISG to answer the question how and when the buyer should have been informed about the General Conditions. Art. 7(1) CISG reads as follows: 'In the interpretation of the CISG, regard is to be had to its international character and to the need to promote uniformity in its application and the observance of good faith in international trade.' If the CISG governs a matter but its provisions do not directly answer a particular question, Art. 7(2) CISG provides the following: 'Questions concerning matters governed by this Convention which are not expressly settled in it are to be settled in conformity with the general principles on which it is based or, in the absence of such principles, in conformity with the law applicable by virtue of the rules of private international law.'

[17] "The private international law referred to in the last part of Art. 7(2) CISG is the EC Convention on Contracts, which Convention is applicable to Italy and The Netherlands as per 1 April 1991 and 1 September 1991 respectively. Art. 8(1) of the EC Convention on Contracts reads as follow:

> 'The existence and validity of a contract, or of any term of a contract, shall be determined by the law which would govern it under this Convention if the contract or term were valid.'

[18] "The law that governs the contracts under the EC Convention on Contracts is Dutch law on the basis of either Art. 3(1) (Choice of law) or Art. 4 (Applicable law in the absence of choice). Art. 3(1) of the EC Convention on Contracts reads as follows:

> 'A contract shall be governed by the law chosen by the parties. The choice must be express or demonstrated with reasonable certainty by the terms of the contract or the circumstances of the case. By their choice the parties can select the law applicable to the whole or a part only of the contract.'

[19] "The seller has stipulated Dutch law as the applicable law in all the offers it made to the buyer. In that respect the seller referred to the applicability of Art. 1.4 of the General Conditions in each confirmation and subsequent invoices. The buyer has accepted those offers unconditionally -- and therefore the applicability of Dutch law -- by returning signed copies of the respective confirmations to the seller. **[page 100]**

[20] "Even if the Arbitral Tribunal disregards the explicit choice of Dutch law made by the parties, Dutch law is still the applicable substantive law due to the fact that the performance of the seller is characteristic of the contract pursuant to Art. 4(1)-(2) of the EC Convention on Contracts.[2]

[21] "Thus, the question whether or not the General Conditions apply must, if all other possibilities fail, be answered with the aid of Dutch law, either as the chosen law in accordance with Art. 3 EC Convention on Contracts or the law of the country in which the

party who has to effect the characteristic performance pursuant to Art. 4(2) of the EC Convention on Contracts.

[22] "In view of the above, the Arbitral Tribunal will assess the question whether or not the General Conditions apply to -- at least -- the Disputed Contracts on the basis of the provisions of the CISG and in conformity with the general principles on which the CISG is based. In the absence of such provisions and principles it will decide pursuant to Dutch law."

IV. CISG AND UNIDROIT PRINCIPLES

[23] "The main provisions, in so far as relevant for this matter, of the CISG are the following. The starting point is Art. 14(1) CISG which reads as follows:

> 'A proposal for concluding a contract addressed to persons constitutes an offer if it is sufficiently definite and indicates the intention of the offeror to be bound in case of acceptance. A proposal is **[page 101]** sufficiently definite if it indicates the goods and expressly or implicitly fixes or makes provision for determining the quantity and the price.'

[24] "Pursuant to Art. 15(1) CISG an offer becomes effective when it reaches the offeree. Art. 18(1) CISG determines that a statement made by or other conduct of the offeree indicating assent to an offer is an acceptance. Silence or inactivity does not in itself constitute acceptance. According to Art. 8 of CISG in a specific situation these provisions must be understood by explanation:

> '(1) For the purposes of this Convention statements made by and other conduct of a party are to be interpreted according to its intent where the other party knew or could not have been unaware what the intent was.
>
> (2) If the preceding paragraph is not applicable, statements made by and other conduct of a party are to be interpreted according to the understanding that a reasonable person of the same kind as the other party would have had in the same circumstances.
>
> (3) In determining the intent of a party to the understanding a reasonable person would have had, due consideration is to be given to all relevant circumstances of the case including negotiations, any practices which the parties have established between themselves, usages and any subsequent conduct of parties.'

[25] "The above leads to the result that in order to incorporate general conditions into a contract it is known to the recipient of the offer that the offeror wishes to do so, i.e. incorporate these general conditions into the contract. In connection herewith it is decisive how a reasonable person of the same kind as the other party would have interpreted the offer. Moreover, practices between parties can also be relevant. In view thereof, Art. 9 of CISG is of importance. This Article determines:

> '(1) The parties are bound by any usage to which they have agreed and by any practices which they have established between themselves.
>
> (2) The parties are considered, unless otherwise agreed, to have impliedly made applicable to their contract and its formation a usage of which parties knew or ought to have known and which in international trade is widely known to, and regularly

observed by, parties to contracts of the type involved in the particular trade concerned.' **[page 102]**

[26] "The Unidroit Principles of International Commercial Contracts (the Principles) also give limited guidance on the issue of general conditions. The Principles are principles in the sense of Art. 7(2) CISG.

[27] "Art. 2.19 of the Principles determines that where one party uses standard terms in concluding a contract, the general rules on formation of the contract apply. According to the explanatory notes standard terms contained in a contract document itself are binding upon the mere signature unless they are on the reverse side and not referred to in the contract document itself. Standard terms in a separate document have to be expressly referred to. Pursuant to Art. 2.20 of the Principles no term contained in standard terms which is of such a character that the other party could not have reasonably expected it, is effective unless it has been expressly accepted by that party.

[28] "The Principles only answer the question whether explicit acceptance of a certain clause is necessary and not whether the accepting party had a reasonable possibility to know the content of the conditions and whether good faith entails that the user of the general conditions takes the initiative to offer such a possibility to the accepting party. In order to answer this question support may be found in the Principles of European Contract Law (PECL) prepared by the Commission on European Contract Law of the European Union, which commission included lawyers from The Netherlands and Italy.

[29] "Chapter 2 of the PECL deals with the formation of contracts. Contract terms which have not been individually negotiated may be invoked against a party who did not know of them only if the party invoking them took reasonable steps to bring them to the other party's attention before or when the contract was concluded (Art. 2:104(1) PECL). Art. 2:104(2) PECL adds that terms are not brought appropriately to a party's attention by a mere reference to them in a contract document, even if that party signs the document."

V. THE TRIBUNAL'S FINDINGS

[30] "In view of the above, the Arbitral Tribunal assesses the question on the applicability of the General Conditions as follows.

[31] "On 6 June 2002 the seller confirmed for the first time an order to the buyer. In both its fax and the confirmation (*Contract no. 1*) reference was made to the applicability of the General Conditions. Moreover, the fax itself contained a notice that the General Conditions contained an arbitration clause. The buyer accepted the confirmation by return fax. In its return fax it has not rejected the applicability of the General Conditions. Pursuant to the CISG parties concluded **[page 103]** *Contract no. 1*. The same applies to the other contracts as the same manner of trade was repeated with each transaction.

[32] "The next question is whether by signing the faxed confirmation with respect to *Contract no. 1* and not stating that it rejected the General Conditions, the buyer also accepted the application of the General Conditions. It has been established that this confirmation contained a mere reference to the General Conditions and was faxed first and only the faxed copy was signed by the buyer. It can be assumed that the faxed copy excluded the reverse side of the confirmation setting out the General Conditions. As a result the buyer could not have been aware of the full content of the General Conditions.

[33] "It can be derived from the Principles and the PECL that a mere reference only to general conditions does not suffice, but that the general conditions must somehow be attached to or incorporated into the contract. It has been established above this was not the case with respect to *Contract no. 1*. In principle, this leads to the conclusion that General Conditions did not apply to *Contract no. 1*. The Arbitral Tribunal will now consider whether the same can be concluded for the disputed contracts. In view of the CISG, regard is to be had to the intent of the buyer to agree to these General Conditions. As set out above this is a matter of interpretation and regard is to be had to the international character, a uniform application and good faith.

[34] "The Arbitral Tribunal considers that in principle the proposal of the seller to apply the General Conditions was clear from the confirmations. Moreover, the invoices of the contracts concluded before the disputed contracts contained a clear reference to the existence of an arbitration clause in the General Conditions. As a result, it must be held that the buyer knew or could not have been unaware of the intent of the seller to apply these conditions to the disputed contracts. Moreover, since the seller repeated its statement on the application on each confirmation, a reasonable person acting in international trade would have understood the intention of the seller.

[35] "It is also considered that, although the buyer was not aware of the content of the General Conditions when it entered into *Contract no. 1*, it was aware of its content when it entered into the disputed contracts. As set out above the seller has sent the confirmations for *Contracts no. 1, no. 2 and no. 3* by regular mail. From the facts stated above it can be derived, or at least assumed, that by the time the buyer entered into the disputed contracts, it had received the confirmations of these contracts, or at least a few of them, and was thus aware or could have been aware of the content of the General Conditions. The seller had thus expressly referred to the General Conditions and provided a copy thereof. **[page 104]**

[36] "Nevertheless, the buyer continued with the practice developed between it and the seller to sign the faxed copy of the confirmation. Pursuant to Art. 9(1) CISG regard is to be had to such practices developed between parties and such practices are binding. The buyer has not deviated from this practice once nor has it informed the seller after receipt of the General Conditions that it did not wish the application of these conditions or wished to apply its own general conditions, if any. By not informing the seller that it did not accept the General Conditions, the buyer created in any case the expectation that it agreed to the application of the General Conditions. In view of this conduct of buyer the principle of good faith entails that the seller may have relied on the signature of the buyer on the confirmations to include acceptance of the General Conditions.

[37] "Considering the above, the Arbitral Tribunal concludes that pursuant to the CISG the General Conditions apply to the dispute contracts.

[38] "The buyer claims that notwithstanding the fact that it signed the Confirmations, it is a generally approved principle. In EU law systems that contractual clauses like an arbitration clause must be approved specifically in writing twice, which the buyer has not and consequently it is not bound by the arbitration clause. This assertion is incorrect. It could be that this may be a rule of Italian law, but this rule is not found in several other European law systems, including Dutch law. It also follows from the provisions of the CISG and the principles set out above that this assertion is not correct. As a result this defence cannot be awarded.

[39] "In addition, the Arbitral Tribunal considers that the seller has complied with Art. 2:104 PECL. It has been established that the seller sent each confirmation not only by fax, but also by regular mail. As a result the Arbitral Tribunal holds that the seller has taken reasonable steps to inform the buyer of the content of the General Conditions before or upon entering into the disputed contracts. Consequently, when taking the PECL into account the buyer is also bound by the arbitration clause in the General Conditions.

[40] "In view of the above, the Arbitral Tribunal concludes that the arbitration of clause is applicable to the disputed contracts. This conclusion is not changed by the assertion of the buyer that the business relationship was entered into in Italy and that the agreements of 28 January 2003 and 25 March 2003 were concluded at the offices of the buyer [in Italy].

[41] "In so far as the buyer with this defence claims that in this case jurisdiction is based on the place of the characteristic performance pursuant to Art. 4 of the EC Convention on Contracts and this place was in Italy, this claim fails. As set out above the EC Convention on Contracts does not apply directly, but only if the CISG and the principles do not provide an answer. Moreover, any referral **[page 105]** to this Article is incorrect since Art. 8 of the EC Convention on Contracts applies.

[42] "The conclusion is that the General Conditions apply to the disputed contracts entered into by the seller and the buyer. Consequently, the arbitration clause therein applies. Pursuant to Art. 10.2 of the General Conditions the Arbitral Tribunal shall consist of one arbitrator. The place of arbitration shall be Rotterdam and the Arbitral Tribunal shall decide like good men in an equitable fashion.

[43] "Rotterdam being the place of arbitration, Book 4 of the Dutch Code of Civil Procedure [CCP] is applicable. Book 4 CCP contains The Netherlands Arbitration Act 1986, Arts. 1020-1076 CCP. The first two sentences of Art. 1021 CCP read as follows:

> 'The arbitration agreement shall be proven by an instrument in writing. For this purpose an instrument in writing which provides for arbitration or which refers to standard conditions providing for arbitration is sufficient, provided that this instrument is expressly impliedly accepted by or on behalf of the other party.'

[44] "The respective confirmations and invoice are instruments in writing in the sense of Art. 1021 CCP. They both refer to the General Conditions. The General Conditions provide for arbitration in Art. 10.1. The buyer accepted -- at least impliedly -- the confirmations and invoices in respect of the disputed contracts. Therefore, the seller has proven the existence of an arbitration agreement in accordance with Art. 1021 CCP means of an instrument in writing.

[45] "As a result of the foregoing the Arbitral Tribunal concludes that the motion of the buyer contesting jurisdiction has been wrongly made. Decision on all other issues is reserved, as is the decision with respect to this phase of the proceedings." **[page 106]**

FOOTNOTES

1. Art. 1(1) of the United Nations Convention on Contracts for the International Sale of Goods, done at Vienna on 11 April 1980 (CISG) reads:

"(1) This Convention applies to contracts of sale of goods between parties whose places of business are in different States:

(a) when the States are Contracting States; or
(b) when the rules of private international law lead to the application the law of a Contracting State."

2. Art. 4(1)-(2) of the EEC Convention on the Law Applicable to Contractual Obligations (Rome 1980) reads:

"1. To the extent that the law applicable to the contract has not been chosen in accordance with Art. 3, the contract shall be governed by the law of the country with which it is most closely connected. Nevertheless, a severable part of the contract which has a closer connection with another country may by way of exception be governed by the law of that other country.

2. Subject to the provisions of paragraph 5 of this Article, it shall be presumed that the contract is most closely connected with the country where the party who is to effect the performance which is characteristic of the contract has, at the time of conclusion of the contract, his habitual residence, or in the case of a body corporate or unincorporated, its central administration. However, if the contract is entered into in the course of that party's trade or profession, that country shall be the country in which the principal place of business is situated or, where under the terms of the contract the performance is to be effected trough a place of business other than the principal place of business, the country in which that other place of business is situated."