

### Case 829: CISG 31

The Netherlands: Court of Appeals of The Hague

No. 05/818

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All Trade BV v CM Supplies (UK) Ltd.

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A Dutch company sold and delivered a consignment of candies to a UK company. The goods were transported by lorry to the port, where the CMR documents were drawn up. The seller sent several invoices and the CMR documents to the buyer, but did not receive payment.

The Court of First Instance determined it had no jurisdiction over the case, since the goods were delivered in the UK and therefore a UK court should have jurisdiction over it. On appeal, the seller disputed this decision. The Court of Appeals considered that since the seller claimed that it entered into a contract of sales with the buyer, regard must be had to article 5 (1) of the Brussels Convention on jurisdiction and enforcement of judgments in civil and commercial matters, 27 September 1968 (hereinafter the “Brussels Convention”), according to which in contracts of sale of movables the court of the place in a Member State where the goods were delivered, or should have been delivered according to the contract, has jurisdiction. The delivery clearly took place in the present case; the question is however in which state – the UK or the Netherlands – it took place and whether parties had made any agreement in this regard.

The invoices sent by the seller to the buyer indicated a delivery address of the buyer in the UK. The shipments were in fact brought to that location by the seller’s transporter and handed over to the buyer at that location. The factual handing over of the goods therefore took place in the UK. The buyer argued that in the past the goods were always purchased by it (albeit not from the seller but from a third company) on a “UK delivered basis”. The buyer referred in its argument to the Supreme Court decision of 26 September 1997<sup>2</sup> and claimed that the contract of sale included the transmission to the buyer, as referred to in article 31 (a) of the CISG, and that therefore the predetermined delivery address only referred to the obligation of transmission and not to the separate delivery obligation stemming from the contract of sale. The seller contended that no agreements were made regarding this delivery, which is why article 31 (a) of the CISG must locate the place of delivery in the Netherlands where the goods were handed over to the transporter.

The Court of Appeals rejected the seller’s view. If a contract for the sale of movable goods to which the CISG applies indicates an address at which the goods must be delivered to the buyer, then this address must be considered as the place where delivery must take place according to the contract (pursuant to article 5 (1) Brussels Convention), even if the seller itself does not carry out transport to the place of delivery, but uses a transporter for transmission and entrusts the goods to this transporter. The arguments put forward by the seller did not indicate that in the present case the address for delivery had a different or more restrictive meaning or that this address did not coincide with the place where delivery must take place according to the contract. Even article 31 (a) CISG – if applicable in the first place – does not necessitate such a distinction. This provision concerns the situation in which no specific place for delivery is predetermined; a situation which did not occur in the present case, since the parties apparently agreed that the goods had to be handed over at a given address in the UK. The invoices sent by the seller, and referred to by it, specifically indicated the address for delivery. On appeal the seller had not sufficiently substantiated its claim that a distinction exists between its delivery as the seller and the delivery of its transporter at the delivery address. It was not likely, in the opinion of the Court, that the indication of the delivery address encompasses more than the address at which the transporter should deliver the goods, first and foremost because the invoices were addressed to the buyer and were apparently sent to the buyer in advance.

The Court did examine the provisions at the end of the invoices. Nevertheless, those provisions cannot be seen as a confirmation or indication of any agreement between the parties as to the factual or legal delivery in the Netherlands; they seem to concern delivery of the goods to the border by the third company. Moreover, it was neither claimed nor proved that the parties agreed that payment should take place in the Netherlands. The invoices did not indicate any such agreement either; they only contained a request that payment be made into a Dutch bank account and a request is quite simply something different from an agreement. Since no agreement as to the place of payment was made, no recourse could be made to article 5 (1) Brussels Convention. The place of delivery must therefore determine the competence of the Court. The Court of Appeals thus confirmed the Court of First Instance’s judgment.

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<sup>2</sup> See CLOUT Case 834.