CISG-online 1963	
Jurisdiction	Belgium
Tribunal	Hof van Cassatie van België/Cour de cassation de Belgique (Belgian Supreme Court)
Date of the decision	19 June 2009
Case no./docket no.	C.07.0289.N
Case name	*Scafom International BV v. Lorraine Tubes S.A.S.*

Translation[*] by Kristof Cox[**]

I. Proceedings in the Supreme Court

The plea in cassation is directed against the judgments rendered by the Court of Appeal of Antwerp on 29 June 2006 and on 15 February 2007.

Counsel Beatrijs Deconinck has reported.

Advocate General Christian Vandewal has made submissions.

II. Facts

From the contested judgments it appears that:

- Scafom International [of Netherlands] (hereinafter referred to as «[Buyer]») concluded with SA Exma [of France], the predecessor of Lorraine Tubes S.A.S. (hereinafter «[Seller]»), a number of contracts of sale for the delivery of steel tubes.

- After the contracts had been concluded, the price of steel has unforeseeably increased by 70%.

- There was no clause for price adaptation in the contracts.

III. Plea in cassation

[Buyer] submits an appeal to the Supreme Court (*Hof van Cassatie*).

[*] All translations should be verified by cross-checking against the original text. For purposes of this translation, Plaintiff of the Netherlands is referred to as [Buyer] and Defendant of France is referred to as [Seller].
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Statutory provisions (provisions of the CISG) at issue

Articles 4, 7(1) and (2), 23, 29(1), 53 to 60 (incl.), 71 and 79.

[Earlier proceedings:]

- Initial Court of Appeal ruling [ruling of 29 June 2006]
- Further Court of Appeal ruling [ruling of 15 February 2007]
- Basis for Appellate ruling of 29 June 2006
- Basis for further Appellate ruling of 15 February 2007

Court of Appeal judgments under appeal

In its interim judgment of 29 June 2006, the Court of Appeal ruled that:

- The Court of First Instance had correctly described the factual situation in which [Buyer] found itself and the consequences which it wants to attach to that, as an application of the «theory of *imprévision*»; and that the CISG does not settle the situation addressed by the theory of *imprévision*;
- However, the Court of First Instance incorrectly rejected the application of a price revision on the ground of the so-called theory of *imprévision*. The basis for this rejection was a mere finding that this was not settled in the CISG. Also, this application was rejected without examining which law was applicable on the basis of the rules of pri-Further Court of Appeal ruling

After re-opening the debates to allow the parties to make their arguments on the applicable law, in its final judgment of 15 February 2007 – the judgment that is now under appeal – the Court of Appeal:

- Ruled that French law should be applied, which does not know the theory of *imprévision* as an autonomous source, but nevertheless allows renegotiation as an application of good faith;
- Declared the [Buyer]'s appeal unjustified and the [Seller]'s incidental appeal partially justified and changed the judgment under appeal accordingly, within the limits of the appeal;
- Declared the claims of the [Buyer] unjustified and declared the counterclaim of the [Seller] justified within the limits of the appeals;
- Ordered the [Buyer] to pay 450,000 Euro, plus interest at the legal interest rate from 11 October 2004 and judicial interest; and
- Confirmed the judgment under appeal in as far as [Seller] was ordered to pay 912.46 Euro, plus judicial interest from 11 October 2004.

[Basis for the interim appellate ruling of 29 June 2006:]

The interim judgment the Court of Appeal handed down on 29 June 2006 was based on the following grounds:

> 6.
> The Court of First Instance had correctly described the factual situation in which [Seller] found itself because of the price increase and the consequences [Seller] wishes to attach to that situation (claim for adaptation of the agreed prices) as an application of the theory of *imprévision* . The Court of Appeal agreed with this reasoning of the Court of First Instance.
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> 7.
> The Court of First Instance correctly ruled that the CISG does not settle the situation covered by the theory of *imprévision*.
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> 8.
> According to Article 7(2) CISG:
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> > «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.»
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> 9.
> The Court of First Instance did not find that any of the general principles on which the CISG is based implies the exclusion of the theory of *imprévision*. The Court of First Instance concluded that:
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> - The exclusion of the theory of *imprévision* may not be derived from the grounds used to exclude the application of Article 79 of the Convention in the case at hand;
>
> - None of the provisions of the CISG seems to exclude the possibility that one of the parties may invoke the theory of *imprévision*.
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> To the contrary, the interim appellate ruling of 29 June 2006 held that:
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> - The Court of First Instance correctly remarked that, completely in accordance with the Convention, the parties could have agreed to the possibility of an adaptation of the price in accordance with the evolution of the market price of the raw materials from which the goods were made (in this case steel tubes for scaffolding); and that
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> - Such a clause would not be in breach of the Convention or the principles on which the Convention is based.

- The explicit rule in the Convention on exemptions based on force majeure does not imply that the Convention excludes the possibility of price adaptation because of unforeseen changed market conditions.

- Since situations of force majeure are essentially different than situations of unforeseen changed market conditions, it may not be derived from the explicit rule in the Convention on force majeure that the Convention excludes the possibility of price adaptation based on the theory of *imprévision* as if it were in breach of the principles on which the Convention is based.

Therefore, in its interim ruling of 29 June 2006, the Court of Appeal ruled that the Court of First Instance has incorrectly excluded the application of price adaptation in accordance with the so-called theory of *imprévision* based on the mere finding that this is not settled in the CISG and without examining which law was applicable under the rules of private international law and whether this applicable law excluded the adaptation of the price.

And the Court of Appeal pointed out that, even though the Court of First Instance referred to the Belgian law on the theory of *imprévision* on page 11 of the judgment, the Court of First Instance had explicitly stated that this was merely «for the sake of comparison and illustration.»

10.
The parties have only indirectly referred to domestic law and this exclusively with regard to the applicability of general conditions.

The parties have not concluded on the applicability of national law in accordance with Article 7(2) CISG with regard to the possibility of price adaption in view of the so-called theory of *imprévision*. The determination of the applicable law (French, Belgian or Dutch law) is probably not unimportant for the resolution of this dispute. Therefore, the debates are re-opened to allow the parties to take positions on these matters.

The Court of First Instance had reasoned, *inter alia*:

> «Often the performance of a contract is impeded enormously due to certain circumstances, while there is no force majeure which renders performance impossible. Then the question arises whether the parties or the judge have the possibility to adapt the contract (the theory of *imprévision*). This matter is not explicitly settled by Article 79 CISG, nor by any other provision of the CISG. Tallon is of the opinion that the uniform application of Article 79 CISG is incompatible with the application in a Member 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, nr. 7.100).»

[Basis for the further Court of Appeal ruling of 15 February 2007:]

The further Court of Appeal judgment of 15 February 2007 was based on the following grounds:

> The court first reminded that in its interim judgment of 29 June 2006, the Court of Appeal:
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> - 2) Found that the applicable CISG contains no rules on the adaptation of the price for unforeseen abnormal situations during the performance of the contract;
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> - 3) Ruled that the eventual price adaptation is not in breach of the principles on which Convention is based;
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> - 4) Decided that, under Article 7(2) CISG, the dispute must be determined in conformity with the law applicable by virtue of the rules of private international law;
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> - 5) Re-opened the debates to allow the parties to take a position on the applicable law» and decided that French law applies to the matter.
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> In its ruling of 15 February 2007, the Court of Appeal then stated that:
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> 7. The [Seller] recognizes in memoranda that in the French private law the theory of *imprévision* does not exist as an autonomous source for the adaptation of contractual terms. However, the [Seller] alleges that under current French law, as a matter of performance of the agreement in good faith (Article 1134 Civil Code), the contracting parties are obliged to renegotiate the contract conditions in case of unforeseeable changed economic circumstances which render further performance of the agreement unwarranted under the applicable contract conditions.
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> 8. The [Seller] refers to the correspondence which took place between the parties regarding the increased steel prices and [Seller]'s request to adapt the price and its suggestions in that regard. [Seller] alleges that the [Buyer] has committed a contractual breach by rejecting these suggestions and by demanding the further performance of the contracts at the price determined by the contract. [Seller] claims payment of the price suggested by [Seller] as compensation for the damage caused by this contractual breach.
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> 9. The [Buyer] denies having committed any contractual breach and refers to (1) the meeting between the parties which took place on 24 March 2004; and (2) the fact that part of the goods that was to be delivered was already in stock.
>
> 10. As a justification for refusing to adapt the price, the [Buyer] can only partially invoke the circumstance that the [Buyer] had already purchased part of the goods to be delivered and that [Buyer] had these goods in stock at the moment that the price increase became fully manifest. Economic reality and good businessmanship require that the current market prices be taken into account, since it is at those prices that the

trader will have to replenish his stocks. The purchase price paid is just one factor for the determination of the sales price.

11. From the evidence, it appears that from 18 March 2004 onwards the [Seller] has pointed to the sudden and unforeseeable increase of the price of steel «which forced [Seller] to review the prices.» [Seller] attached to this fax the price list «for deliveries for the period of 1 to 20 April 2004.»

In the next fax, dated 23 March 2004, [Seller] refers to a telephone conversation and lists the new price for each order. [Seller] requests the [Buyer]'s agreement to the new prices and adds that, in case of a negative answer, [Seller] will have to cancel the order.

Next there was a meeting between the parties to which a letter from [Seller] dated 25 March 2004 refers. This letter reiterates the unforeseeable price increases in the steel market and the [Seller] repeats that it is necessary to adapt the prices for the deliveries in April 2004, in accordance with the price lists in [Seller]'s attachment.

12. It is certain that the parties failed to reach an agreement because the [Buyer] has rejected every adaptation of the price. This was confirmed in a letter from the counsel of the [Buyer] dated 29 March 2004 in which he urges that the agreement must be performed as it was concluded and threatens to apply for the adoption of an interim injunction for the forced performance of the contract. Such interim injunction proceedings were indeed conducted. The [Seller] was ordered by injunction of 27 April 2004 to deliver, against the agreed price and against consignment, half of the claimed surplus.

13. The object of the [Buyer]'s claim proves that the [Buyer]'s position as to price adaptation is unaltered.

14. Under French law the good faith with which contracts must be performed requires re-negotiation of the contractual conditions in certain situations. This is, *inter alia*, the case if, after the conclusion of the contract unforeseeable circumstances occur, which create a serious unbalance between the obligations, such that the further performance of the contract becomes excessively onerous for one of the parties.

15. According to the undisputed clarifications of the [Seller], the prices for HRC-steel had increased by 70% in the period after the conclusion of the contract. This unforeseeable price increase suffices for the reasons mentioned above to lead to the conclusion that the [Buyer] must renegotiate the contract.

16. According to the equally undisputed clarifications of the [Seller], the suggested price increase amounted to 47.99% on average.

Even though the cited letters from the [Seller] did not formally provide for re-negotiation (they only left the choice between acceptation of the price or annulment of the contract), it seems that there has been a meeting with regard to said matters in the offices of [Buyer] on 24 March 2004.

It follows from the firm point of view of the [Buyer], as it appears in the evidence, that:

- The [Buyer] has refused every price adaptation (nor has [Buyer] made a counter-offer either); and that

- The [Buyer] simply wanted to hold [Seller] to the performance of the existing contractual provisions, which is supported by the interim injunction procedures.

This is a breach of the good faith with which contracts must be performed. And this contractual breach of the [Buyer] is proven.

17. From these reasons it follows that the [Seller] has not committed a breach by refusing to deliver without a reasonable adaptation of the price. The [Seller] gave the [Buyer] the opportunity to re-negotiate and the fact that [Seller] refused to deliver further was only due to the fault of the [Buyer].

18. The [Seller] would be forced to continue delivering according to the requirements of the interim injunction. This, the [Seller] had clearly indicated it was no longer willing to do unless the price was adapted. [Seller] has suggested a price at which it had been willing to deliver in the month of April 2004.

Taking the concrete market situation into account, that offer of the [Seller] was not unreasonable and it provided a sound basis for re-negotiation. Thus, the [Seller] proved that it has suffered damage. Given the fact that the eventual result that would have come out of re-negotiations is uncertain, the exact figure of this damage cannot be correctly calculated.

Taking the factual elements into account, the damage is determined in equity to the amount of 450.000 Euro above the price the [Seller] has already received. Therefore, the amount of 332,576.05 Euro that was already consigned after the interim injunction can be applied. If necessary, the other amounts that were already paid must be taken into account (to which the [Seller] refers).

19. From said reasons, it follows that the [Buyer]'s claim for performance of several deliveries is not justified. For these reasons, the [Buyer]'s appeal is not justified.

20. For the same reasons, the [Seller]'s incidental appeal is partially justified.

- The [Seller]'s claim for payment of an addition to the price is justified up to the amount of 450,000.00 Euro;

- Given the fact that these are damages, interest is due at the legal interest rate from 11 October 2004, the date on which all extra deliveries were performed in line with the interim injunction (final memorandum of [Seller] under no. 17) and the date which [Buyer] itself suggests.

> 21. There is no evidence of a contractual breach by the [Seller]; therefore, the claims of [Buyer] ... for damages are not justified.

Grounds for the rulings of the Court of Appeal

According to Article 4 of the CISG, this Convention explicitly deals with the formation of contracts of sale and the rights and obligations of seller and buyer which flow from such a contract.

Article 7(1) CISG states that:

> In the interpretation of this Convention, 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.»

Further, Article 7(2) states that:

> «Questions concerning matters governed by the 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.»

From these provisions, it is apparent that the drafters of the CISG wanted to create a uniform system for the conclusion of contracts that fall under the Convention and for the rights and obligations of seller and buyer which flow from such a contract, which implies that an interpretation which furthers uniformity should be preferred.

Article 23 CISG states that:

> «A contract is concluded on the moment at which the acceptance of an offer becomes operative according to the provisions of this Convention.»

From that moment onward, each party must perform that which was agreed between the parties. Neither party has the power to force unilateral modifications of the contract conditions. This follows a contrario from Article 29(1) CISG which explicitly states that:

> «A contract may be modified or terminated by the mere agreement of the parties.»

This is a confirmation of the rule of pacta sunt servanda.

Thus, it follows from the Convention that the buyer is obliged to pay the price (Article 53 to 59 CISG) and to receive the goods (Articles 53 and 60).

With regard to the price, Article 55 CISG states:

> «Where a contract has been validly concluded but does not expressly or implicitly fix or make provision for determining the price, the parties are considered, in the absence

> of any indication to the contrary, to have impliedly made reference to the price generally charged at the time of the conclusion of the contract for such goods sold under comparable circumstances in the trade concerned.»

This Article confirms that the price is that determined or applicable at the time of the conclusion of the contract. The buyer cannot be required to re-negotiate the price, nor to accept an adaptation of the price.

Further, the Convention determines the circumstances in which a party cannot be held liable for a failure to perform.

Moreover, it appears from Article 71(1) CISG that a party may only suspend the performance of its obligations if, after the conclusion of the contract, it becomes apparent that the other party will not perform a substantial part of his obligations as a result of:

> a) a serious deficiency in his ability to perform or in his creditworthiness; or
>
> b) his conduct in preparing to perform or in performing the contract.

From Article 79(1) CISG it appears that:

> «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.»

Further Article 79(2) states that:

> «If the party's failure is due to the failure of a third person whom he has engaged to perform the whole or part of the contract, that party is exempt from liability only if:
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> (a) he is exempt under the preceding paragraph; and
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> (b) the person whom he has so engaged would be so exempt if the provisions of that paragraph were applied to him.»

Article 79(3) specifies that the exemption «has effect for the period during which the impediment exists.»

A contrario, it follows from this provision, which lists the exemptions in a restrictive manner, that other grounds, such as the theory of *imprévision* or the refusal of the other party to accept an adaptation of the originally agreed contract conditions because of changed circumstances is excluded by the Convention. Moreover, the uniform regulation the Convention strives for (Article 7(1)) is incompatible with deviations by reference to domestic law.

Therefore, a party will only be excused for the non-performance of his obligations if the other party breached a substantial part of his obligations, as they follow from the Convention, or if the party can be excused as described in Article 79 of the Convention.

Court of Appeal conclusions

In the Court of Appeal's interim judgment of 29 June 2006 that was re-evaluated on 15 February 2007, the Court of Appeal stated that none of the provisions of the CISG seems to exclude the possibility that one of the parties can invoke the theory of *imprévision*, taking into account that, by application of Article 7(2) CISG, the national law which is applicable to the agreement must be applied.

In its further judgment of 15 February 2007, the Court of Appeal stated that [Buyer], by application of French law, which is applicable to the agreement in this case, may be obliged to re-negotiate the conditions of the contract in cases in which unforeseeable changed economic conditions occurred which would imply that further performance of the contract under the current contract conditions would no longer be warranted and thus placed national law over the Convention.

This conclusion was reached taking into account that:

- Recourse to national law may only be had with regard to questions that are not expressly settled by the Convention (violation of Article 7(1) and (2) of the CISG);

- After the formation of the contract, its binding force can only be altered with the consent of both parties (as provided in Articles 4, 7(1), 23, 29(1) and 55 of the CISG);

- The court must rule on violations of the obligations of the seller as they are determined by the CISG (violations of Articles 4, 53 to 60 of the CISG); and

- The Court could not legally decide that the Convention does not prevent the application of the theory of *imprévision* or an obligation of re-negotiation of the previously determined price, being a veiled application the theory of *imprévision*,

Having interpreted the rejection by the [Buyer] of the offer to review the price as a contractual breach by the Buyer which entitled the Seller to refrain from performing its own obligations and entitled the Seller to damages which take the adaptation of the original price into account (violation of Articles 7(1), 71 and 79 of the CISG), the Court of Appeal, in its ruling of 29 June 2006, should not have concluded that national law was applicable (violation of Article 7(2) of the CISG).

Finally, on the basis of the findings, which do not indicate that the Buyer breached a substantial part of his obligations, the Court of Appeal, in its ruling of 29 June 2006, should not have concluded that the Seller did not commit a breach by refusing to deliver without a reasonable adaptation of the price (violation of Article 71(1) CISG).

IV. Decision of the Supreme Court

Evaluation

1.
Under Article 79(1) [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.»

Changed circumstances that were not reasonably foreseeable at the time of the conclusion of the contract and that are unequivocally of a nature to increase the burden of performance of the contract in a disproportionate manner, can, under circumstances, form an impediment in the sense of this provision of the Convention.

2.
Article 7(1) states that:

> «In the interpretation of this Convention, 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.»

Article 7(2) states that:

> «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.»

Thus, to fill the gaps in a uniform manner adhesion, should be sought with the general principles which govern the law of international trade.

Under these principles, as incorporated *inter alia* in the Unidroit Principles of International Commercial Contracts, the party who invokes changed circumstances that fundamentally disturb the contractual balance, as mentioned in paragraph 1, is also entitled to claim the renegotiation of the contract.

3.
The judgment finds that:

- [Buyer] concluded with ... [Seller], a number of contracts of sale for the delivery of steel tubes;

- After the contracts had been concluded, the price of steel has unforeseeably increased by 70%;

- There was no clause in the contracts for price adaptation.

The judges on appeal found that these unforeseen increases in the price gave rise to a serious imbalance which rendered the further performance of the contracts under unchanged conditions exceptionally detrimental for [Seller].

4.
The Court of Appeal judgment could, on the basis of these findings, without violation of the statutory provisions indicated in the plea, decide that [Buyer] must renegotiate the contractual conditions.

The [Buyer]'s appeal from that judgment cannot be accepted. The Supreme Court rejects the [Buyer]'s plea in cassation.

[...]