

Case 2146: CISG 10(a); 39; 74

The Netherlands: Rechtbank Rotterdam (District Court)

POWERGEN S.R.L (Seller) v. Buyer

28 November 2012

Available in Dutch at: rechtspraak.nl (ECLI:NL:RBROT:2012:BY5298)

Abstract prepared by Jan Smits, National Correspondent, and Steven Debie

This case involves defects in chargers delivered by the Seller, most notably an explosion of a charger upon first use, leading to various claims for damages by the Buyer. The primary discussion revolved around the applicable law and jurisdiction. The court affirmed its jurisdiction based on Article 2(1) of the Brussels I Regulation in conjunction with Article 99 of the Dutch Code of Civil Procedure.

The CISG, since the parties were based in contracting States and had not excluded its applicability in their agreement, was determined to be the governing law. According to article 10(a) CISG, the place of establishment shall be considered the place that is most closely related to the contract and its performance, taking into account the circumstances known to the parties or considered by them at any time before or at the contracts' conclusion. The Buyer argued that Mr. [A]'s (his contact) business established in the Netherlands should be considered a branch of the Seller, closely involved in the contract and its execution. However, the Buyer failed to provide enough evidence to justify this claim. For a business to be recognized as a branch under the CISG, it must engage significantly and independently in the entity's economic and commercial activities. The longstanding business relationship, initial contacts with the Italian headquarters, and the consistent handling of orders and manufacturing by the headquarters underscored that the focal point of operations and contract execution was in Italy. The Buyer's dealings with Mr. [A] and his designation as "Sales Director Benelux" were insufficient to qualify his business as a branch under CISG, lacking the necessary commercial and economic autonomy.

For issues not covered by the CISG, the Rome I Regulation was invoked to determine the governing law of the contracts between the parties. With no specific contractual choice of law, Italian law was applied as the main rule, in line with the Seller's principal office in Italy, which managed the execution of the purchase agreements. The court saw no compelling reason to deviate from this standard. Consequently, Italian jurisdiction, including the CISG, was deemed applicable by the court.

The court then addressed the claims of non-conformity of the chargers but noted that the Buyer did not file its complaints within a reasonable time as necessitated by Article 39 CISG (the Buyer expressed its concerns at first when filing this lawsuit). Therefore, the court ruled that the Buyer had forfeited his rights to claim non-conformity. The Buyer sought to offset their counterclaim against any dues in the main claim. This matter, not covered by the CISG, was assessed under Italian law. Although the Seller contested the counterclaim, the court found that a portion of the Buyer's claim was apparent and payable, permitting a set-off for the portion deemed appropriate.

The Buyer claimed a loss for some of the chargers, which the Seller acknowledged as mislabelled, thus accepting liability and allowing this loss to be considered for set-off. Regarding the explosive charger, the Buyer sought compensation for additional labour and transportation costs, plus a stock of unsellable batteries, and a significant loss in profits allegedly due to losing a major client following the charger's explosion upon first use. The explosion's cause was contested: the Buyer cited a manufacturing defect, while the Seller attributed it to a loose component during transport. The court

determined non-conformity attributable to the Seller since the charger lacked the necessary properties for normal use at delivery. However, the court noted the Buyer's insufficient explanation and proof of the causal link between the defect and the claimed damages regarding the major client's loss and the stock of unsellable batteries. The court found it could not conclude that this loss was a foreseeable consequence for the Seller as stated in article 74 CISG. Finally, the Buyer sought damages for nine additional chargers but failed to clarify which chargers and their specific defects. Consequently, the court could not grant any damages for these chargers.

In conclusion, the court awarded the Buyer a minor portion of their claimed damages to offset against the Seller's main claim for unpaid invoices, ruling that the Buyer must pay the remaining amount to the Seller.