CISG-online 2515	
Jurisdiction	Netherlands
Tribunal	Gerechtshof Den Haag (Court of Appeal The Hague)
Date of the decision	22 April 2014
Case no./docket no.	200.127.516-01
Case name	*Feinbäckerei Otten GmbH & Co. KG v. Rhumveld Winter & Konijn B.V.*

Translation[*] *by Tanja Schasfoort*[**]

The Proceedings

By writ dated 17 May 2013, [Buyer] and [Buyer's Insurer] together filed an appeal against a decision dated 20 March 2013 passed by the District Court of Rotterdam. In a statement of claim on appeal (containing a request for relief and exhibits) [Buyer] and [Buyer's Insurer] brought forward their complaints, which [Seller] contested in its statement of defence. Finally, the parties submitted their documents for judgment. 1

Reasoning by the Court of Appeal

1. 2
The facts of the case are as follows.

a. 3
[Seller] is a Dutch company, seated in The Netherlands, that deals with the sale and purchase of nuts, dried fruits and seeds. [Buyer] is a producer of chocolate products, seated in Germany.

b. 4
In February 2011, [Seller] and [Buyer] entered into an agreement, hereinafter [the Agreement], on the basis of which [Seller] was bound to deliver 12,000 apple rings to [Buyer]. The applicable law to the agreement is the Vienna Convention on the International Sale of Goods (CISG).

[*] All translations should be verified by cross-checking against the original text. For purposes of this case translation, Plaintiff from Germany is referred to as [Buyer] and Defendant of the Netherlands is referred to as [Seller].
[**] Tanja Schasfoort is a lawyer at Stek Advocaten in Amsterdam (the Netherlands), and participated in the 21st Willem C. Vis East Moot.

c. 5
On 5 September 2011 [Buyer] complained to [Seller] that (part of) the apple rings that had been delivered contained germs of mites, making them unsuitable for human consumption.

d. 6
Prior to the conclusion of the Agreement, the parties had entered into seven similar agreements, of which the first was dated 4 September 2007. In all prior confirmations and invoices [Seller] referred to the conditions of the Netherlands Association for the Trade in Dried Fruit, Spices and Allied Products (NZV). All such documentation had been drafted in the English language. There was also a reference on the confirmation of the Agreement. The text of this reference read:

> «*Conditions According to the conditions of the Netherlands Association for the Trade in Dried Fruit, Spices and Allied Products registered at the Chamber of Commerce Haaglanden under number 40341013. The conditions are available for perusal in our office and upon request will be sent to you free of charge.*»

e. 7
Article 11(1) of the NZV-conditions reads:

> «*Disputes*
>
> *1. All disputes arising from or in connection with contracts made on N.Z.V. conditions and relating to the trade in products as referred to in Article 1, or arising from or in connection with any agreement subsequent or supplementary to such contracts, shall be settled by arbitration in accordance with the N.V.Z. Arbitration Rules which are considered to be part of these Conditions*.»

f. 8
[Buyer] has not made use of the general conditions in transactions entered into with [Seller].

2. 9
In the first proceedings, [Buyer] claimed [Seller] was liable for damages in the amount of € 250.000 plus interest for [Seller]'s delivery of apple rings that were partially contaminated with germs of mites. [Buyer's Insurer] partly compensated [Buyer] for damages it suffered – that part being the total amount of damages minus [Buyer]'s deductible of € 250.000. For the amount paid of € 107.440,65, [Buyer's Insurer] claimed to be subrogated to the rights of [Buyer] with respect to [Seller] and claimed [Seller] was liable for this amount of money, as well as interest.

3. 10
[Seller] subsequently claimed the lack of jurisdiction of the court. [Seller] argued that the NZV-conditions are applicable to the Agreement. As the conditions include an arbitration clause, a legally valid agreement to arbitrate has come into existence between the parties. Following that conclusion, [Seller] states that it follows from Article 1022(1) of the Dutch Code of Civil Procedure that the District Court of Rotterdam lacks jurisdiction to determine this case.

4. 11
In the disputed judgment, the District Court decided in favour of the [Seller]'s motion challenging the court's jurisdiction and declared itself incompetent to decide the case. [Buyer] and [Buyer's Insurer] have contested that decision on six grounds.

5. 12
The core of [Buyer]'s complaint is that the District Court has assumed that the NZV-conditions (and the arbitration clause therein) became applicable to the agreement. [Buyer] and [Buyer's Insurer] contend that the District Court failed to appreciate the fact that [Seller] had not given [Buyer] a reasonable opportunity to take notice of the content of the NZV-conditions, which is necessary for the applicability of the conditions. The grounds will be dealt with jointly.

6. 13
If the CISG is the applicable law to an agreement, the question whether or not a party has validly entered into that sales agreement and the standard terms that make part of that agreement shall be governed by the CISG (Dutch Supreme Court, 28 January 2005, NJ 2006, 517). The Court of Appeal argues that the answer to the question whether or not standard terms are applicable can be found in some of the articles of the CISG and that the Court should interpret these with observance to Art. 7(1) CISG. Currently, this is the prevalent approach taken by courts (see U.G. Schroeter in I. Schwenzer (red.), Schlechtriem & Schwenzer, Commentary on the UN Convention on the International Sale of Goods, New York: OUP, 2010, art. 14, para. 33) and this point of view has also been adopted by the CISG Advisory Council in its «CISG-AC Opinion No. 13 Inclusion of Standard Terms under the CISG» (see below at 1.4), on whose Opinion this Court will return later.

7. 14
Art. 7(1) CISG states that in the interpretation of the Convention, regard is to be had to its international character and to the need to promote conformity in its application. Given the lack of a supranational court that can guarantee the uniformity of law within its sphere, the judge that has to interpret the CISG should take into consideration decisions of courts and arbitral tribunals in other countries, as far as these rulings have *persuasive authority*. To facilitate that – besides the numerous initiatives to increase the accessibility of these rulings – the so-called CISG Advisory Council was set up in 2001. This Advisory Council, which has been created by a private initiative and is comprised of leading experts in the field of international commercial law, sets its purpose to promote the uniform interpretation of the CISG. In that respect, the Advisory Council provides (inter alia) authoritative opinions on the uniform application and interpretation of the treaty. On 20 January 2013, the Advisory Council adopted the «CISG-AC Opinion No. 13 Inclusion of Standard Terms under the CISG», which deals with the applicability of the validity of standard terms. This Opinion consists of ten so-called *black letter rules* with explanations thereof, which are based on the evaluation of doctrine and jurisprudence coming from all member states. The Court of Appeal will base its decision on this Opinion.

8. 15
The position of [Buyer] and [Buyer's Insurer] finds its most authoritative source in a decision of the German Bundesgerichtshof of 31 October 2001 (VIII ZR 60/01). In this case, the Bundesgerichtshof held that it may be expected under the uniform sales law that the provider of standard terms directly transmit or otherwise makes available the content of these conditions to the other party to whom he addresses his proposal to conclude the contract.

9. 16
However, [Seller] argues that (in the current case) the requirement of «directly transmitting or otherwise making available» is not fixed. In this regard, [Seller] relies on jurisprudence of the Oberster Gerichtshof of Austria (6 February 1006, 10 Ob 518/95 and 17 December 2003, 7 Ob 275/03x), the Belgian Commercial Court Nivelles (19 September 1995, R.G. 1707/93) and the Court of Appeal Gent (4 October 2004, 2003/AR/2763), in which, according to [Seller], the requirement given above for the applicability of general terms and conditions by the German Bundesgerichtshof is not fixed. Moreover, both parties have further substantiated their cases by referring to doctrine and Dutch case law, in which one or more of the aforementioned jurisprudence has been mentioned. The Court considers as following.

10. 17
Whether or not standard terms have become part of the agreement will be determined within the scope of the CISG, following the rules that determine the formation and interpretation of contracts. Besides which is determined in Articles 8 and 9 concerning statements and usages, the provisions of Part II (Formation of the contract) are relevant in this respect, of which the core is formed by Articles 14 (offer) and 18 (acceptance). The Court of Appeal rules that it follows from this interplay of rules that standard terms will be part of the agreement if the parties at the time of the formation of the contract expressly or implicitly agreed to the incorporation of those standard terms into the agreement and the other party has had a reasonable opportunity to take notice of these standard terms. The Court thus follows the reasoning of the abovementioned German Bundesgerichtshof decision of 31 October 2001:

> 2. *Es ist deshalb durch Auslegung gemäß Art. 8 CISG zu ermitteln, ob die Allgemeinen Geschäftsbedingungen Bestandteil des Angebots sind, was sich schon aufgrund der Verhandlungen zwischen den Parteien, der zwischen ihnen bestehenden Gepflogenheiten oder der internationalen Gebräuche ergeben kann (Art. 8 Abs. 3 CISG). Im Übrigen ist darauf abzustellen, wie eine «vernünftige Person der gleichen Art wie die andere Partei» das Angebot aufgefaßt hätte (Art. 8 Abs. 2 CISG).*
>
> *Übereinstimmend wird gefordert, daß der Empfänger eines Vertragsangebots, dem Allgemeine Geschäftsbedingungen zugrunde gelegt werden sollen, die Möglichkeit haben muß, von diesen, in zumutbarer Weise Kenntnis zu nehmen (...). Eine wirksame Einbeziehung von Allgemeinen Geschäftsbedingungen setzt deshalb zunächst voraus, daß für den Empfänger des Angebots der Wille des Anbietenden erkennbar ist, dieser wolle seine Bedingungen in den Vertrag einbeziehen. Darüber hinaus ist, wie das Berufungsgericht zu Recht annimmt, im Einheitskaufrecht vom Verwender Allgemeiner Geschäftsbedingungen zu fordern, daß er dem Erklärungsgegner deren Text übersendet*

oder anderweitig zugänglich macht (underlining by the Appellate Court) (...). [Court quoted the German text]

11. 18
The Bundesgerichtshof considers the requirement to directly transmit or otherwise making available the standard terms on three grounds. First, the other party to the contract can usually not oversee what text it agrees to in a specific situation for there are significant differences between domestic legal systems and practices, while revising the content of the standard terms is not always guaranteed under the relevant domestic law. Second, seeking information from the provider of the standard terms by the other party may result in a delay in the formation of the contract, which is not in the interest of either party. Finally, it is relatively easy for the provider of standard terms, which are generally beneficial to that party, to add them to the offer. Therefore, it would be, according to the Bundesgerichtshof, contrary to the principle of good faith in international trade (Art. 7(1) CISG) and to the general obligation of cooperation and providing information of the parties to impose upon the other party a duty to inquire with respect to the clauses that were not sent and to burden that other party with the risk and disadvantages of the unknown standard terms.

12. 19
The CISG Advisory Council considers in the aforementioned Opinion concerning the inclusion of general terms and conditions (sub 2.3 and 2.4) that this approach of the Bundesgerichtshof is not uncontroversial, but that it seems to be the majority view that it is desirable that a party makes the standard terms available at the time of the conclusion of the contract. This approach should take priority, according to the Council, over any other approach that had been taken into consideration, including the approach of the Austrian Oberster Gerichtshof, 6 February 1996, 10 Ob 518/95 (the approach that [Seller] referred to in this case), for the German approach is more in line than the other approaches with the principles underlying the CISG and the requirements of international trade. The Court deems these grounds convincing and follows that in order for standard terms to be applicable, the other party must have had a reasonable opportunity to take notice of them, as considered above.

13. 20
Next, the question is when the requirement of the reasonable opportunity to take notice of the standard term was met. The requirement postulated by some lower courts in Germany and the Netherlands, that general terms and conditions should be directly transmitted or sent to the other party at the time parties enter into the agreement is, according to the Advisory Council, based upon a too strict interpretation of the decision of the Bundesgerichtshof. The Advisory Council summarizes a (non-exhaustive) list of circumstances in which a party may have been considered to have had a reasonable opportunity to take notice of the standard terms:

3.1 Where the terms are attached to a document used in connection with the formation of the contract or printed on the reverse side of that document;

3.2 Where the terms are available to the parties in the presence of each other at the time of negotiating the contract;

3.3 Where, in electronic communications, the terms are made available to and retrievable electronically by that party and are accessible to that party at the time of negotiating the contract;

3.4 Where the parties have had prior agreements subject to the same standard terms.

14. 21
The Court also follows this advice. That entails the following for the present case.

15. 22
[Seller] has not contested (sufficiently supported by reasons) that it never sent the standard terms to [Buyer]. The sole possibility for [Buyer] to take notice of the standard terms which [Seller] mentions in its documents, is that they were on the internet, on the website of NZV, and [Buyer] could have consulted them there. However, this is – in the light of the foregoing – as there was no clear reference to such a possibility to take notice of the standard terms, insufficient to assume that these standard terms and conditions became part of the agreement.

16. 23
The fact that, as [Seller] pointed out, the parties had already entered into seven prior agreements, on which occasions [Seller] always referred to the NZV-terms and conditions on its confirmations as well as on its invoices, also does not help it, as it has not stated nor proved that [Buyer] actually had a reasonable opportunity to take notice of the standard terms and conditions on those prior occasions and it can thus not be assumed that the standard terms were in fact applicable to these prior agreements. Moreover, the fact that [Buyer] on those prior occasions never felt the need to ask [Seller] to clarify the meaning of the reference , did not – under the CISG – give rise to a legitimate expectation that it agreed to the applicability of the NZV-conditions.

17. 24
Also the fact that [Buyer] knew or should have been aware that the NZV-conditions contained an arbitration clause, does not change the above, as this does not affect the requirement of a reasonable opportunity to take notice.

18. 25
[Seller] has not presented any submissions that – if proven – might lead to a different decision. Unlike [Seller] seems to believe, the obligation to furnish facts and the burden of proof with respect to the facts of which yield legal effect (lack of jurisdiction of the civil court) is not on [Buyer] or [Buyer's Insurer], but on [Seller].

19. 26
The abovementioned leads to the conclusion that an agreement to arbitrate has not come into existence between the parties and that the District Court has wrongly declared itself incompetent. This implies that the Appellate Court should set aside the decision on the procedural issue, to which this appeal serves and – in view of the judgment of the Dutch Supreme Court of 2009, NJ 2010, 581 – refer the case back to the District Court, so that litigation can proceed in the main proceedings. Being the party against whom judgment was given in the

procedural issue, [Seller] should bear the costs of the procedural issue in both instances. The fixed court fee that [Buyer] paid in first instance is not part of the costs, as these will be part of the decision on costs in the main proceedings.

The judgment 27

The Appellate Court:

sets aside the ruling of the District Court whereof appeal and in a new judgment:

dismisses the motion contesting jurisdiction;

refers the case back to the District Court of Rotterdam for further proceedings, where [Buyer] and [Buyer's Insurer] should initiate proceedings on the merits in which the [Seller] should lodge a statement of defence;

orders [Seller] to refund [Buyer] and [Buyer's Insurer] for all amounts that [Buyer] and [Buyer's Insurer] have already paid in performance of the contested decision, to be increased with the statutory interest beginning the day of payment;

orders [Seller] to pay the costs of the proceedings of the procedural issue in first instance, which will be on the side of [Buyer] and [Buyer's Insurer] until the decision of 20 March 2013 estimated at € 452,-- for attorney fees;

orders [Seller] to pay the costs of the proceedings on appeal, which will be on the side of [Buyer] and [Buyer's Insurer] until the day of this decision estimated at € 775,82 in advances and € 894,-- for attorney fees;

declares the judgment to have immediate effect.

This judgment is pronounced by E.J. van Sandick LLM, A.R. van de Veen LLM and C.J.J.C. van Nispen LLM, in a public hearing on 22 April 2014, in the presence of the clerk of the court.