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CASE LAW ON UNCITRAL TEXTS (CLOUT)

United Nations Convention on Contracts for the International Sale of Goods (CISG)

Case 2210: CISG 7(1); 7(2); 38(1); 39(1); 79(1)

Belgium: Hof van Cassatie van België

Case No. C.23.0431.N

Frigera NV v. D.E.C. Srl

6 June 2024

Original in Dutch

Available at: https://juportal.be/JUPORTAwork/ECLI:BE:CASS:2024:ARR.20240606.1N.8_NL.pdf

The case addresses the burden of proof under the United Nations Convention on Contracts for the International Sale of Goods (CISG), in particular regarding articles 38 and 39 CISG.

Frigera NV, a Belgian producer and distributor of pet food, had purchased large quantities of ham bones from the Italian company D.E.C. Srl on behalf of a customer. The goods were delivered directly to the customer on 16 and 18 January 2019 and invoices were sent to Frigera NV in four separate instalments. On 8 February 2019, the customer complained that the ham bones were non-conforming due to mould, prompting Frigera NV to notify D.E.C. Srl of the alleged non-conformity on 11 February 2019.

The Antwerp Commercial Court partially satisfied Frigera NV's claim. On appeal, the Antwerp Court of Appeal held that Frigera NV had neither examined the goods upon their delivery, as required by articles 38(1) and 39(1) CISG, nor demonstrated that the lack of conformity was invisible at that time, thereby forfeiting its right to claim non-conformity.

Frigera NV subsequently appealed to the Court of Cassation, arguing that the mould was not visible at the time of delivery and that the notification period under article 39(1) CISG should not run from when the goods ought to have been examined pursuant to article 38(1) CISG, but rather from when a reasonably diligent buyer would have discovered the defect. It further contended that D.E.C. Srl should bear the burden of proving that the lack of conformity was visible at the time of delivery in order to argue that the reasonable notice period under article 39(1) CISG began to run from that time.

The Court of Cassation first referred to articles 7(1), 7(2) and 79(1) CISG, stating that issues not explicitly covered by the CISG should be resolved in accordance with its



underlying general principles to ensure uniform application. Consequently, the Court affirmed that, whilst the CISG did not provide a comprehensive regime for the allocation of the burden of proof, the question of the burden of proof fell within the scope of the Convention and it placed the burden of proof on the party making the allegation.

Applying this principle to articles 38(1) and 39(1) CISG, the Court outlined the distribution of the burden of proof. It clarified that the buyer must prove the existence of the defect or non-conformity; while the seller, if arguing that the buyer failed to notify in a timely manner, must demonstrate when the buyer knew or ought to have known of the defect and whether it was visible at delivery. However, where the buyer has failed to examine the goods in accordance with article 38(1) CISG, the burden is on the buyer to prove that the defect or non-conformity was not visible at the time of delivery.

In line with these principles, the Court of Cassation concluded that the Court of Appeal had rightly assigned the burden to Frigera NV to prove that the defect was not visible at the time of delivery and dismissed Frigera NV's appeal.

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