

Ruling in the case of Corn. Van Dijk

Parties

1. Secretariat for the Dutch Agreement on Sustainable Garments and Textile;
Claimant
and
2. Corn. Van Dijk B.V., with its registered office in Amersfoort; Respondent

Proceedings

On 14 December 2018, the Complaints and Disputes Committee for the Dutch Agreement on Sustainable Garments and Textile ('the CDC') received a dispute submitted by the Secretariat of the Dutch Agreement on Sustainable Garments and Textile ('the AGT Secretariat'), which concerns the efforts and progress of the AGT participant Corn. Van Dijk B.V. ('the Company').

On 23 February 2019, the Company submitted a written response.

The dispute was considered during a hearing held on 22 March 2019, with both parties explaining their views on the matter. The AGT Coordinator Mr J. Wintermans attended the hearing on behalf of the AGT Secretariat. A letter from the Chairman of the Steering Committee was read aloud explaining the Steering Committee's decision to refer the company's substandard efforts and progress to the CDC. Ms J. van Dijk attended the hearing on behalf of the Company.

Facts

The Company has participated in the AGT since 20 April 2017.

The Company has consistently failed to comply with the obligations incumbent on participants in the AGT.

The Company has expressed its wish to discontinue its participation in the AGT.

Dispute

On 18 October 2018, the Steering Committee resolved to refer the Company's substandard efforts and progress and the AGT Secretariat's opinion on this matter to the CDC. The Steering Committee states that the Company joined the AGT voluntarily but that it appears to have growing doubts – and a growing number of questions – as to whether the requirements identified by AGT Secretariat reasonably apply or should

reasonably apply to the Company. The AGT Secretariat does not impose any other requirements on the Company than it does on other participants. The AGT Secretariat is of the opinion that the Company has not done enough to comply with the best-effort obligation under the Agreement.

Ruling

The dispute is admissible. Its admissibility has not been disputed and there is no reason to arrive at a different opinion in that respect.

The Company's explanation can be summarised as follows.

The Company regrets that the situation has come to this pass. There is no dispute, but rather a difference of opinion about the AGT's performance and, above all else, erroneous expectations. The Company thought the solution lay in withdrawing from the AGT, not realising that there would be consequences, including communication about its withdrawal and publication of the CDC's ruling. The Company is not happy about this.

The Company acceded to the AGT in 2017 under pressure from a customer and after being informed about the agreement by the industry association. The Company assumed that the AGT related to products, their production and their origins. It has complied the initial obligations under the AGT by submitting a list of production sites and a list of raw materials and products. The Company acknowledges that, due to various circumstances, it has repeatedly failed to meet deadlines for completing these lists and appreciates the way in which the AGT Secretariat has responded. While discussing the following steps under the AGT – i.e. the due diligence process and the Action Plan – with the AGT Secretariat, it became clear to the Company which direction its involvement would take in future, and it indicated almost immediately that it did not want to go in this direction and wished to withdraw from the agreement. A series of telephone conversations with the AGT Secretariat about subsequent steps made clear that they would involve addressing a growing number of politically tinged issues. These were political issues – such as work by (illegal) refugees – about which the Company was expected to take a stand against production sites or concerning which collective action could be taken on behalf of the AGT participants against the political regime in a production country. The Company has no desire to be associated with any form of political activism, however, and wishes to distance itself from any political pressure exerted – in part on its behalf – on governments.

The Company is committed to improving the well-being of people, animals and the environment, but its leverage and power to change matters regulated by a government are limited. That is the work of politicians, not the Company. If the Company were to interfere in matters regulated by the government of a country, it would be engaging in political activity. The respondent feels that this would cross a line, because there may be repercussions for its business. The Company attaches great importance to its relationships in production countries and does not wish to have political pressure exerted on governments in its name in an attempt to change certain circumstances. The Company has difficulty accepting that, under the AGT, it is obliged to challenge matters that the government of a certain country regulates in a particular manner that does not meet Western standards. The Company prefers to respect a country's customs and traditions. That is otherwise for matters that are disapproved of in the country itself and therefore illegal. In that situation, the Company would not want to outsource its production there.

In time, it thus became apparent that the Company did not agree with certain requirements and issues addressed in the AGT. The Company had underestimated this beforehand and the Respondent does not know whether it could have avoided doing so.

The fact of the matter is that the Company does not agree with the substance of various requirements and questions. The Respondent feels that there is a certain degree of activism underpinning the AGT and wants to distance itself from that. That is why the Company wishes to withdraw from the AGT.

The explanation provided by the Steering Committee and the AGT Secretariat can be summarised as follows.

The Company consistently fails to meet the requirements under the AGT. It has not submitted the due diligence questionnaire and it has also not submitted an Action Plan, despite several deadline extensions and despite explicit reminders over a period of more than six months. In the end, the Company stated that it considers IRBC to be important but that the AGT asks too much of companies, in its view. In the opinion of the Secretariat, this Company is not subject to any other requirements than the other participants.

The AGT Secretariat met with the Company within the context of the due diligence questionnaire. The Company was informed that (illegal) refugees were known to be working in adverse conditions in one of the countries in which the Company had production sites. To make companies aware of risks at the production sites to which they outsource work, AGT participants must investigate whether such situations have arisen at their production sites in that country and must communicate about their findings. The Company informed the AGT Secretariat that this was an unrealistic demand and that it was unwilling to deal with its business contacts in the relevant production country in this way. In the AGT Secretariat's view, this is precisely what the AGT is all about. If, due to circumstances, a company is *unable* to comply with the obligation to investigate and inform, the AGT Secretariat can allow it to comply in some other way. But it is a different story if a participant is *unwilling* to comply with these obligations, as in the present case.

In view of the above, the AGT Secretariat believes that the Company has not made the necessary effort to comply with its obligations under the AGT. To the extent that special circumstances were involved, the Secretariat, acting on the principle of reasonableness and fairness, nevertheless gave the Company the necessary leeway to comply with its obligations.

In response to the CDC's asking whether compliance with the AGT required companies to put pressure on the authorities of certain countries if certain matters proved unsatisfactory, the AGT Secretariat stated the following. The AGT Secretariat plays a dual role. On the one hand, the Secretariat must support companies in performing their due diligence; on the other hand, it must check whether companies comply with their obligations under the AGT. It is not up to the Secretariat to tell companies what to do; at most, it can assert that a company is not making enough of an effort. The AGT Secretariat assesses whether the company's management is sufficiently committed to complying with the AGT and whether the company is prepared to take part in initiatives to improve circumstances in certain countries, whether or not as part of a group. The AGT Secretariat finds it worrying when a company has a production site in a country where refugees are known to be employed in adverse conditions and does not consider that this might also be happening at the production sites to which it outsources work. If the company's risk prioritisation has been properly argued, the AGT Secretariat must determine whether it has made a reasonable assessment in this regard.

On the basis of the information exchanged in writing and the explanations given at the hearing, the CDC has concluded the following.

The CDC notes that the Company is not prepared to comply further, due to a significant difference of opinion as to what constitutes performance of the AGT's obligations.

The Company initially complied with its obligations under the AGT, but as time went on it ceased to do so despite repeated urging by the AGT Secretariat between February and October 2018. The Company submitted the lists of production sites and raw materials and products. It did not submit the due diligence questionnaire or the Action Plan.

An AGT participant is required to perform a due diligence within one year of signing the *Declaration by Enterprises concerning the Dutch Agreement on Sustainable Garments and Textile* ('the Declaration'). In this instance, the AGT Secretariat asked the Company to perform its due diligence and, in addition, to investigate certain risks, including the risk of (illegal) refugees working under adverse conditions at production sites in a country with which the Company has business dealings. The AGT Secretariat made this request because the production country in question is known to have (illegal) refugees working in adverse conditions. The Company is of the opinion that a demand of this kind goes too far. It regards this as a political question and has no wish to enter into political discussions, which it believes could be detrimental to its business relationships.

The CDC agrees with the AGT Secretariat that due diligence must be performed as stipulated in the AGT. Investigating risks is part of this due diligence process. The *Guide to Due Diligence and Purchasing Practice* (AGT Appendix 3) states that it is important for companies to identify where, in their own management system or in the production or supply chain, adverse impacts are likely to arise for stakeholders, for example workers at production sites. It is then important to verify the adverse impacts (or the risk of such impacts) so identified with internal and external stakeholders.

The CDC is thus of the opinion that the Company consistently fails to meet the requirements under the AGT. The dispute is valid.

The written submissions and proceedings during the hearing make clear to the CDC that less than two years after its accession to the AGT, the Company is no longer prepared to comply with its obligations and that it wishes to withdraw from the agreement. The Company has explained that it did not properly anticipate what the AGT entails and what it obliges participants to do, that it does not agree with the substance of a number of the requirements and questions arising from the AGT, and that it wishes to withdraw from the AGT for these reasons.

Pursuant to the AGT, a company that has acceded to the AGT may withdraw only after a minimum period of two years has elapsed since it signed the Declaration. It must notify the AGT Steering Committee of its intention to withdraw, stating its reasons. The company continues to be bound by the Declaration for one year after its withdrawal. The Steering Committee makes the withdrawal public. The CDC would advise the Steering Committee to add a provision to the AGT to the effect that a public announcement of withdrawal may further state:

1. that the withdrawing party has failed to comply with obligations under the AGT, and
2. the underlying reason for this non-compliance.

With a view to achieving the intended transition to sustainability in the textile sector, the CDC considers it advisable for companies that accede to the AGT to do so after due consideration and for a longer period of time. However, the CDC believes it is ill-advised for companies to remain in the AGT when they are clearly unwilling (or no longer willing) to comply with its obligations. It would ask the Steering Committee to examine the AGT more closely on the issue of withdrawal in such situations and suggests that provision be made in the AGT for removing a company from the list of AGT participants in these cases.

During the hearing, it became apparent to the CDC that the Company had acceded to the AGT under pressure from a customer, that it had received information in advance from industry association Modint, but that it had not been fully informed by the AGT Secretariat. The Company claims that it had erroneous expectations. The CDC considers that new participants should always be informed by the AGT Secretariat and not only by an industry association.

Decision

The CDC:

- finds the dispute to be valid.

Recommendation

The CDC recommends that the Steering Committee should:

- consider examining the AGT more closely with regard to withdrawal in situations where the adhering company is clearly not complying with its obligations but does not withdraw from the agreement;
- consider making provision in the AGT for the premature removal from the list of AGT participants of a company that has acceded to the agreement if that company is clearly unwilling to comply with the obligations under the AGT, and – once such a provision is made – applying it in the present case, not least because the Company itself has expressed its wish to withdraw from the AGT;
- consider adding a provision to the AGT to the effect that when issuing a public announcement of a company's withdrawal, the Steering Committee may further state:
 1. that the withdrawing party has failed to comply with obligations under the AGT, and
 2. the underlying reason for this non-compliance,and – once this provision has been added – applying it in the present case when making the Company's withdrawal public by stating that the Company had failed to comply with its obligations under the AGT and was unwilling to do so.

This ruling was issued by M. Scheltema, P. Brust, H. van der Kolk, assisted by S. Geelkerken.