Seznam judikatury – PMO

Vznik smlouvy

1. Case 579: CISG 1 (1) (a); 4 (a); 7 (1); 9; 11; 14 (1); 16 (2) (b); 18 (3); 60 (a)

United States: U.S. [Federal] District Court, Southern District of New York;
Nos. 98CIV861 (RWS), 99CIV3607 (RWS)
10 May 2002; 16 August 2002 (opinion on rehearing)
10 May 2002; 16 August 2002 (opinion on rehearing)
Geneva Pharmaceuticals Technology Corp. v. Barr Laboratories, Inc. et al. The issues before the court included whether the plaintiff's claims of breach of contract, promissory estoppel, negligence and negligent misrepresentation should be dismissed on the ground that there was no genuine issue as to material fact and the alleged seller was entitled to judgment as a matter of law. The plaintiff, a New Jersey corporation with its place of business in the United States, sought to develop, manufacture and distribute a generic anti-coagulant drug to treat blood clots. To develop the drug, the plaintiff obtained sample amounts of clathrate from defendant, a company with its place of business in Ontario, Canada. The defendant also supplied a reference letter in support of the plaintiff's application to the Federal Drug Administration for approval to manufacture and distribute the anti-coagulant drug. Prior to FDA approval, the defendant concluded an exclusive purchase agreement with a third party. Following FDA approval, plaintiff sent a purchase order to defendant for 750 kg. of clathrate. The defendant did not accept the plaintiff's order and denied that it was obligated to sell calthrate to the plaintiff. The plaintiff sued the defendant, alleging, among other claims, that the defendant had breached a contract, was estopped from rejecting the order, had been negligent and had made negligent misrepresentations. The defendant moved for summary judgment on these claims. The court concluded that the Convention governed the breach of contract claim***. The court found that the plaintiff had alleged facts, including an industry usage that buyers could rely on implied supply commitments, that would support a finding that the plaintiff's initial proposal was an offer (art. 14(1) CISG). Noting that the plaintiff alleged an industry usage that the provision of a reference letter is an acceptance, the court also found that there were sufficient facts to support a finding that the defendant had accepted the offer based on art. 18(3) CISG.*** The court also found that there was consideration to support the alleged contract and that the contract was therefore not invalid under applicable domestic law pursuant to art. 4(a) CISG. Under the ***alleged "implied-in-fact" contract***, defendant was obligated to supply calthrate if the plaintiff gave it commercially reasonable notice of an order. The court declined to render summary judgment on this claim because there were material facts in dispute.
With respect to the plaintiff's claim under domestic law that it had relied on defendant's promise so that the promise was binding as if it were a contract, the court concluded that this claim was not preempted by the Convention. The court distinguished plaintiff's claim from claims specifically addressed by the Convention (art. 16(2)(b) CISG). The court declined to render summary judgment on this claim because there were material facts in dispute. With respect to the claims of negligence and negligent misrepresentation, the court concluded that the claims were outside the scope of the Convention. Applying domestic law, the court rendered summary judgment for the defendant on these claims.

Case 330: CISG 11; 14(1)

Switzerland: Handelsgericht des Kantons St. Gallen; HG 45/1994
5 December 1995
A German seller, plaintiff, sued a Swiss buyer, defendant, for payment of the purchase price of equipment. The buyer denied having actually become party to the purchase contract; instead, the buyer contended that the seller had concluded the contract with its German sister company. ***The court found that the unsigned buyer's fax ordering the equipment constituted a propsal for concluding a contract with the seller, as it was sufficiently definite (article 14(1) CISG).*** Although it did not contain all the elements of a contract, it clearly expressed the buyer's binding intention to purchase the equipment. A signature was not necessary because a sales contract is not subject to any requirement as to form (Article 11 CISG). The court interpreted all relevant circumstances in connection with the conclusion of the contract, and held that the seller unequivocally supposed that the buyer and not the buyer's German sister company, was its contractual counterpart, and thus it was liable to pay the purchase price.¨

2. Case 334: CISG [4]; 8; 14

Switzerland: Obergericht des Kantons Thurgau; ZB 95 22
19 December 1995

A Swiss plaintiff, distributor of an Austrian manufacturer, sued a Swiss buyer, defendant, for payment - goods supplied by the manufacturer. The buyer sought to set-off this claim with a claim for damages which allegedly arose from later supplies that had no longer been forthcoming after the manufacturer had been declared insolvent. The buyer challenged the plaintiff's right to sue as a proper party since the sales agreement had been concluded with the manufacturer. Offer and acceptance were exchanged between the buyer and the manufacturer, while use was made of the letterhead of the manufacturer. The court held that the CISG does not contain rules on agency agreements. However, with a view to establishing the contracting parties to the specific sales agreement -in accordance with art 14 CISG, which deals with the offer- the agency issue could be ignored. ***The court interpreted the declarations of the parties upon conclusion of the sales agreement (article 8 CISG), having regard to all relevant circumstances. The court found that the manufacturer's behaviour demonstrated clearly that the manufacturer was meant to become party to the sales agreement, and not the plaintiff (article 14 CISG).*** However, the plaintiff was entitled to claim the payment of the purchase price, as it had assigned its claims to the manufacturer. The court determined that assignment of claims does not fall within the scope of the CISG. Therefore, the validity of the assignment was held to be governed by Austrian domestic law as applicable under international private law provisions.

3. Case 490: CISG 4; 9(1); 14(1); 15; 18(1)

France: Court of Appeal of Paris
10 September 2003
Société H GmbH & Co. v. SARL M

This case involved a German seller of textiles and a French buyer. In the normal course of their commercial relationship, the seller's sales representative visited the buyer's headquarters on 9 September 1998. During this visit, the seller's representative showed the buyer a new Lycra-type fabric and offered it to the Bayer for sale. On 28 September 1998, the seller sent the buyer a letter in German, Hradec "Confirmation of order", regarding the sale of 100,000 metres of fabric at a cost of 11.4 French francs per metre. The letter stated that the fabric would be delivered, at the buyer's request, in 25,000-metre batches between November 1998 and February 1999. This procedure for confirming an order made orally had already been followed with previous orders by the buyer. The buyer subsequently requested a first delivery of 1,718 metres. This delivery was the subject of an invoice issued on 15 March 1999, which referred to the balance of 98,772 metres remaining to be delivered. The buyer paid the invoice without expressing any reservations but made no further request for delivery of the outstanding amount of fabric. The seller claimed that a sales contract to supply 100,000 metres of fabric had been concluded between itself and the buyer at the time of the representative's visit. The seller therefore on 7 September 1999 issued a writ against the buyer before the Commercial Court of Paris seeking an order requiring the buyer (1) to pay 330,480 francs, corresponding to the balance of the unclaimed fabric after a deduction for stock sold on to third parties, (2) to take delivery of the outstanding amount of fabric and (3) to pay 242,315 francs in damages to compensate for losses resulting from the resale to third parties at a lower price. In its judgement of 13 September 2001, the Court dismissed the seller's claim. The Court of Appeal of Paris, hearing the seller's appeal, upheld the first instance decision on the grounds that there was no contractual relationship between the parties which would substantiate the seller's claim. The Court noted first that, under article 1315 of the French Civil Code, it was for the seller to prove the claimed obligation. The Court further noted that the sale concerned parties based in two different States that were Contracting States of CISG, article 4 of which provided that CISG governed only the formation of the contract of sale and the rights and obligations of the seller and the buyer arising from such a contract. The Court began by considering whether a sales contract could have been formed orally during the visit by the seller's representative to the buyer. It ruled that, in view of the buyer's categorical denial of the formation of a contract, the seller had failed to provide the proof required to establish that a contract had been formed. The Court further ruled that a contract had also not been formed in accordance with the usage established between the parties, even though the same procedure, whereby an order was made orally by the buyer and confirmed in writing by the seller, had been followed before. ***The Court held that the existence of such usage did not absolve the parties of their obligations arising out of article 14(1) and article 18(1), which provided, respectively, that an offer should be sufficiently definite and that silence on the part of the offeree did not in itself amount to acceptance***. The Court concluded that, in the case in point, the seller, who wished to supply the buyer with a new kind of fabric, very different from the fabrics sold previously, could therefore not rely on the previous usage developed by the parties for transactions concerning standard fabrics. Since the usage was immaterial, the "confirmation of order" should be regarded as an offer of goods to buy which the buyer had not accepted. In addition, the Court considered that the buyer, not knowing German, was entitled not to have understood the meaning of the "confirmation of order", which was drawn up in German only. Lastly, the Court held that the delivery of 1,718 metres of fabric did not constitute partial fulfilment of a presumed total sale of 100,000 metres.

Case 722: CISG 3, 4, 18, 19 (3)

Germany: Oberlandesgericht Frankfurt a. M.
26 Sch 28/05
26 June 2006

Following an application for enforceability of an arbitral award, the Higher Regional Court of Frankfurt had to decide ***whether an arbitration clause becomes a legally effective part of the contract, if the arbitration clause means an additional term to the offer by the replying party***. The applicant, a Dutch company, and the opponent, a customer from Germany, entered into a contract for the production and delivery of printed matters for the packaging of CDs. The opponent sent two written orders by fax to the applicant containing the specific notice that only its own general terms and conditions were applicable. The applicant confirmed the placing of orders by fax, with the reply pointing out that the provisions of the Graphics Industry of the Netherlands, containing an arbitration clause in its article 21, were part of the contracts. Since the respondent did not pay the invoice after the applicant's performance, the applicant instituted arbitration proceedings, with the court of arbitration ordering the respondent to pay the remunerations pursuant to the contracts plus interest and costs. The Higher Regional Court dismissed the application for enforceability denying the recognition of the arbitral award. The court found that according to article II (2) of the United Nations Convention on the Recognition and Enforcement of Foreign Arbitral Awards of New York, 10 June 1958 (New York Convention), which is to apply under § 1061 (1) German Code on Civil Procedure (ZPO) to foreign arbitral awards, the arbitration clause had not become a legally effective part of the contract, since article II (2) New York Convention requires a written agreement of the parties. Therefore the one-sided sending of order confirmations did not establish an arbitration agreement. The court also discussed whether, notwithstanding article II (2) New York Convention, an arbitration agreement had been reached by the one-sided reference to the standard provisions of the Graphics Industry of the Netherlands pursuant to § 1031 ZPO. Under § 1031 (1) and (3) ZPO an arbitration agreement may be reached by reference to general terms and conditions in case of business transactions. The court argued, that the specific emphasis to the exclusive validity of general terms and conditions excludes different or additional terms of the other party, and that the resulting discrepancy between the terms of the parties however does not frustrace the validity of the contract itself provided that the contract has been performed amicably. ***Furthermore, holding that according to article 3 (1) CISG the case is subject to CISG, the court stated that the validity of the arbitration clause cannot be derived from article 19 (2) CISG. An arbitration clause, as provision concerning the settlement of disputes, is always considered to alter the offer materially under article 19 (3) CISG, thus the silence of the respondent can not be considered as acceptance of the applicant's general terms and conditions.***

Přechod nebezpečí

1. Case 340: CISG 1(1); 4; 8; 25; 46; 47; 49 (2) (b); 53; 66; 69 (2)

A/CN.9/SER.C/ABSTRACTS/31
22 September 1998

A Norwegian seller, plaintiff, sold raw salmon to a Danish Company (the "Company"), whichafter processing it, sold smoked salmon to a German buyer, defendant. When the Company got into fin.difficulties, the seller sent a confirmation order to the buyer. Pursuant thereto, the seller had to deliver the raw salmon to a specified delivery address, which was other than the Company's place of business, under the incoterm DDP. Upon receipt of the confirmation order, the buyer signed and returned such order to the seller through the Company. Thereafter, the seller delivered the raw salmon to the Company and sent the invoices to the buyer. The invoices indicated the Company's place of business as the delivery address. As a result of the bankruptcy of the Company, the Bayer did not receive the raw salmon and as such, refused to pay the purchase price. Then, the seller sued the buyer. The first instance court allowed the claim. The buyer appealed declaring the avoidance of the contract. The appellate court upheld the decision of the first instance court. The court determined that the CISG was applicable under articles 1 (1) CISG and 4 CISG. The court held that the seller's confirmation order constituted an offer for the delivery of raw salmon and that the request for prompt confirmation clearly showed the seller's intention to conclude a purchase agreement with the buyer. The buyer accepted the offer by signing the confirmation order and as such, the parties concluded a purchase agreement. The court found that no additional interpretation of the confirmation order under article 8 CISG was necessary, and that the receipt of the signed confirmation order by the seller, through the Company, was of no particular relevance. The court further held that the seller discharged its delivery obligation, although delivery occurred at a place other than the place stipulated by the contract and the incoterm DDP. This was insignificant, as the buyer was indicated as recipient of the raw salmon in the delivery note.

The court found that the seller was not in fundamental breach of contract under article 25.Despite the financial difficulties of the Company and the delivery of the salmon at the Company's place of business, the fulfilment of the contract was not jeopardized. The court further found that, even if there had been a breach of contract, the

buyer had failed to declare the avoidance of the contract within a reasonable period of time as provided by article 49 (2) (b) CISG. Moreover, the buyer failed to require delivery at the stipulated place pursuant to articles 46 and 47 CISG and this was interpreted as the buyer's agreement to the delivery at the Company's address. ***The court concluded that the seller complied with its obligations and that the risk had passed to the buyer (article 69 (2) CISG). Hence, the buyer was obliged to pay the purchase price (article 66 CISG), even if it did not receive the raw salmon.***

2. Case 283: CISG 1(1); 58(1); 61(1); 62; 67(1)

Germany: Oberlandesgericht Köln; 2 U 175/95
9 July 1997

A Spanish seller, defendent, concluded a dealer agreement with a German buyer, a copany in which the plaintiff was a shareholder. As part of its security for payment, the seller held a mortage on land owned by the plaintiff. According to the agreement, the seller was obliged to deliver goods at "list price ex works". The buyer denied having received one of the shipments that was to have been made under the agreement, which consisted of some hundred video cameras and equipment, and refused payment. The matter came before the court as an action to oppose the seller's foreclosure of this mortgage. Noting that the parties had agreed that German law would govern, the court held that the CISG was applicable, even though the parties had concluded the dealer agreement in 1988 and the CISG only became part of German law in 1991. The court found that the material time for the determination of the law applicable to the purchase money claim was not the conclusion of the dealer agreement, but rather, the moment of the purchase order in 1992. A choice of law clause in a contract, which governs future trading relations between two parties, must be construed in such a way so as to refer to the national law at the time of the conclusion of the contract and to all relevant changes in the law during the period of time that is governed by the contract. The court described this as a "dynamic reference" to a national law, as opposed to a "static reference" (article 1(1) CISG). The court stated that, unless the parties had agreed upon another time, the seller can require the buyer to pay the price only after the goods or the documents controlling disposition of the goods are placed at the buyer's disposal (articles 58(1) and 62 CISG). According to the seller's interpretation, "list price ex works" meant that delivery and the passage of risk took place in Japan, at the production factory of the goods. According to the buyer, the terms were to be interpreted as referring only to the price and not to passage of risk. ***The court found that there was no inconsistency between the terms and the provisions of article 67(1) of the CISG, according to which the risk passes to the buyer when the goods are handed over to the first carrier. It found that the seller had been unable to discharge its burden of proof that delivery to the first carrier had been made.*** A bill of lading which indicated thata container said to contain the specified brand name and number of goods had been delivered to a freight forwarder, but which did not indicate the name of the buyer as recipient, was not sufficient proof of delivery (article 67(1) CISG). The court held that, as the seller had no right to claim payment of the purchase price under article 61(1) of the CISG, it had no right to foreclose on the mortgage against the land.

3. United States: U.S. [Federal] District Court for the Southern District of New York,

No. 00 CIV. 9344(SHS)
St. Paul Guardian Insurance Co. & Travelers Insurance Co. v. Neuromed Medical Systems & Support, GmbH
26 March 2002

A German company, defendant, sold a mobile magnetic resonance imaging systém to a United States company. The delivery term provided "CIF New York Seaport, the buyer will arrange and pay for customs clearance as well as transport to Calmut City [the ultimate destination in the United States]." Preceding the payment term was a handwritten note stating that "acceptance subject to inspection" followed by the initials of a representative of the buyer. The seller and buyer agreed that the equipment was in good working order when loaded at the port of shipment but was damaged when it arrived at its ultimate destination. Two United States insurance companies reimbursed the buyer and brought suit against the defendant as subrogees to the buyer's claim. The court granted the defendant's motion to dismiss the suit for failure to state a cause of action. The parties' contract designated German law as the applicable law. The court applied the CISG as the relevant German law. The parties had their places of business in two different Contracting States and had not agreed to exclude application of the CISG. The court noted that on similar facts German courts apply the Convention as applicable German law. The court concluded that the risk of loss passed to the buyer upon delivery to the port of shipment by virtue of the CIF delivery term. The court found that the International Chamber of Commerce's 1990 CIF incoterm governed by virtue of article 9(2) CISG. The court also noted that German courts apply the incoterm as a commercial practice

with the force of law**.** The court rejected plaintiffs' argument that the risk of loss could not have passed because the seller had retained title to the equipment. ***Citing articles 4(b) and 67(1) CISG, the court stated that the Convention distinguished between the risk of loss, which it deals with in chapter IV of part III, and the transfer of title, which is beyond the scope of the Convention.*** The court also rejected arguments based on the typed and handwritten terms of the contract. A clause allocating the responsibility for customs clearance deals with a matter not addressed by the CIF incoterm. A clause providing for a final payment after the equipment arrives at its destination is not inconsistent with the passing of the risk of loss. Moreover, a reasonable recipient would understand the handwritten term to mean that receipt of the equipment was not to be construed as an admission that the equipment was free of defects and performed according to contract specifications.

4. Case 338 : CISG 1(1); 30; 31; 53; 66; 69(2); 71(1); 71(3)

Germany: Oberlandesgericht Hamm; 19 U 127/97
23 June 1998

Two Austrian sellers and a German buyer, defendant, concluded agreements for the delivery of furniture manufactured and stored in a warehouse in Hungary. When the goods were placed in the warehouse, the sellers issued storage invoices, which were subsequently sent to the buyer. Under the agreements, the buyer was entitled to order partial deliveries of the furniture, which had to be handed over by the sellers at the warehouse and loaded either on wagons or on the buyer's lorries for transmission to the buyer. Upon delivery, the buyer had to pay the purchase price on the basis of a delivery invoice. After having issued several storage invoices, the sellers assigned their rights to a third party, plaintiff. The buyer, upon receipt of the third party's notice of the assignment, accepted it in writing. However, as the buyer had not received the furniture listed in the storage invoices, it did not pay the purchase price. The Hungarian warehouse firm declared bankruptcy and the furniture disappeared from the warehouse. Subsequently, the plaintiff sued the buyer for the alleged outstanding purchase price on the basis of the storage invoices. The appellate court upheld the decision of the lower court, which had dismissed the claim. The court held the CISG to be applicable, as both parties had their places of business in different Contracting States of the CISG and had not excluded the application thereof under article 6 CISG. The court rejected the plaintiff's assertion that the buyer's consent to the assignment amounted to an acknowledgement of the assigned claims. In the absence of a CISG provision dealing with the issue of acknowledgement, the court applied the rules of private international law of Germany, which led to the application of Austrian law. Pursuant to such law, the written acceptance of the assignment did not constitute an acknowledgement of the claims and as such, had to be denied. The court held that the plaintiff was not entitled to claim the purchase price under article 53 CISG, as it had become apparent that the sellers would not be able to perform the delivery of the furniture, which constituted a substantial part of their obligations (article 30 CISG). Therefore, the buyer was allowed to suspend the performance of its obligations according to article 71(1)(a) CISG. The court interpreted the refusal of the buyer to pay the storage invoices as the required notice of suspension of performance under article 71(3) CISG. ***The court found that the buyer was not obliged to pay the purchase price according to article 66 CISG, because the plaintiff did not prove that the goods were lost after the risk had passed to the buyer. In the case at hand, the passing of the risk had to be determined according to article 69(2) CISG, as under the parties' agreements, the buyer was bound to take over the goods at a place other than the seller's place of business. However, the conditions for the passing of risk pursuant to artikle 69(2) CISG, namely due delivery and the buyer's awareness that the goods were placed at its disposal, had not been fulfilled***. Under the parties' agreements, delivery was due at the buyer's demand (article 33(a) CISG), which had not been made, and the sellers had failed to place the furniture at the buyer's disposal (article 31(b) CISG).