CASE LAW ON ARTICLE 7 OF CISG

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METHODS FOR FILLING IN GAPS

Date: **16. 10. 2002**
Country: **Netherlands**
Court: **Hof 'S-Hertogenbosch**

Key words

INTERPRETATION OF U.N.CONVENTION ON INTERNATIONAL SALES CONTRACTS (CISG) – REGARD TO INTERNATIONAL ORIGIN OF CONVENTION AND NEED OF ITS UNIFORM APPLICATION (ARTICLE 7 CISG) – REGARD TO COMMON PRINCIPLES OF CONTRACTING STATES – REFERENCE TO UNIDROIT

PRINCIPLES AND TO PRINCIPLES OF EUROPEAN CONTRACT LAW APPLICABILITY OF SELLER'S STANDARD TERMS – TRADE USAGE (ARTICLE 9(2) CISG))

INCORPORATION OF SELLER'S STANDARD TERMS INTO CONTRACT - APPLICATION OF GENERAL RULES ON OFFER AND ACCEPTANCE (ARTICLE 18 CISG) - REFERENCE TO STANDARD TERMS IN OFFER NECESSARY

QUESTION AS TO WHETHER BEFORE OR AT TIME OF CONCLUSION OF CONTRACT BUYER MUST BE GIVEN OPPORTUNITY TO KNOW CONTENT OF SELLER'S STANDARD TERMS NOT EXPRESSLY REGULATED IN CISG - QUESTION LEFT OPEN IN UNIDROIT PRINCIPLES (CF. COMMENTS TO ARTICLE 2.20) – AFFIRMATIVE SOLUTION ADOPTED BY PRINCIPLES OF EUROPEAN CONTRACT LAW (ARTICLE 2.104) – SAME SOLUTION TO BE ADOPTED UNDER CISG AS IT PROMOTES GOOD FAITH IN INTERNATIONAL TRADE AND REFLECTS DOMESTIC LAW OF BOTH SELLER'S AND BUYER'S COUNTRIES (FRANCE AND THE NETHERLANDS)

Abstract

A Dutch company purchased plants from a French company. After delivery of the goods buyer paid only part of the price. Seller brought an action claiming not only the payment of the outstanding amount of the price but also the payment of the penalty for delay as provided for in its standard terms which it asserted formed part of the contract of sale. Buyer rejected both claims. As to its obligation to pay the outstanding amount of the price, it set it off against seller's obligation to pay damages for defects of the goods delivered, while the payment of the penalty was not due at all, since seller's standard terms were not incorporated into the contract.

The court of first instance decided in favour of seller.

The contract was governed by CISG, since the two parties were situated in two different contracting States (Art. 1 (1)(a)). According to the court, while set-off was outside the scope of the Convention with the consequence

that the question as to whether buyer was entitled to set-off its obligation to pay the remaining part of the price against the alleged obligation of seller to pay damages for defects of the goods had to be decided in accordance with the otherwise applicable domestic law (in the case at hand, French law as the law of the seller's country – cf. Art. 4 of the 1980 Rome Convention on the Law Applicable to Contractual Obligations), the question as to whether or not seller's standard terms had been incorportaed in the contract had to be decided according to CISG. The court held that, although in the case at hand the application of seller's standard terms had not expressly been agreed upon by the parties, the standard terms nevertheless were incorporated into the contract. It is true that the invoice, on the back of which the standard terms were allegedly reproduced, was sent to buyer only upon delivery of the goods. However, buyer not only knew from previous transactions with seller that seller was used to contracting on the basis of its own standard terms, but it is well known (and buyer should have known it) that in international trade in general, and in the flower and plants trade in particular, standard terms are commonly used. According to the court the applicability of seller's standard terms could be regarded as a usage according to Art. 9.2 CISG with the consequence that the standard terms formed part of the contract of sale concluded between the parties. Nor was it relevant that seller's standard terms were written in French: buyer never asked for a Dutch translation nor had it asked seller's representative for explanations.

The Court of Appeal reversed the decision of the court of first instance.

Also according to the Court of Appeal the question as to whether seller's standard terms formed part of the contract of sale was to be decided according to CISG. However, since CISG does not have any special provisions concerning standard terms the general rules on contract formation applied with the consequence that under the Convention standard terms are binding only in so far as their applicability is stipulated by seller in its offer and accepted by buyer. What still remained to be seen was whether in order for them to be validly incorporated into the contract they have to be made available to the adhering party before or at the time of the conclusion of the contract or the adhering party has otherwise the opportunity to know their content. This posed a problem of interpretation of the Convention, which according to Art. 7 must be solved having regard to the international nature of the Convention and the need to promote its uniform application and the observance of good faith in international trade. According to the Court this implied that special attention had to be paid to how the interpretative question is dealt with in the laws of the contracting States and what may be considered common principles of those legal systems.

In this context the Court expressly referred, first of all, to the UNIDROIT Principles of International Commercial Contracts (which, it stated, expressly provide that they may assist in interpreting the Convention) and in particular to the Comments to Art. 2.20. According to the Court these Comments address the question as to whether the adhering party must know the content of the standard terms, but do not not address the other question as to whether the adhering party should have a reasonable opportunity of becoming acquainted with the content of the standard terms, and whether the principle of good faith requires that the other party take the necessary steps to make sure that the adhering party has such an opportunity, e.g. by sending it the text of the standard terms before or at the time of concluding the contract. On its part, Art. 2.104 of the Principles of European Contract Law in paragraph 1 states that "[c]ontract terms which are not individually negotiated may be invoked against a party which did not know them only if the party invoking them took reasonable steps to bring them to the other party's attention before or when the contract was concluded", and in paragraph 2 adds that "[t]erms are not brought appropriately to a party's attention by a mere reference to them in a contract document, even if that party signs the document". According to the Court this rule not only largely coincides with Dutch and French law on standard terms and hence with the law of the two countries to which the parties belong, but also promotes the observance of good faith in international trade. The Court therefore decided to apply this rule also in interpreting CISG and held that in the case at hand seller's standard terms were not binding upon buyer since seller had not informed buyer of its standard terms in good time, i.e. before concluding the contract, so that buyer could not be said to have accepted seller's standard terms. As to the argument initially put forward by seller that upon delivery of the goods buyer had received the invoice with seller's standard terms printed on the back and that the invoice was also intended to be a confirmation of order to which buyer did not object at all, the Court noted that when buyer objected that it had received the original invoice with the seller's standard terms printed on the back only about a fortnight after the delivery of the plants, whereas upon delivery of the plant it had received only a photocopy of the front page, seller did not deny these facts. Nor was seller's further allegation that it had sent buyer already on occasion of previous transactions invoices with its standard terms reproduced on the back supported by sufficient evidence.

As to the question wheter buyer was entitled to set off its obligation to pay the remaining part of the price against seller's alleged obligation to pay damages for defects of the goods, the Court of appeal confirmed that, since CISG does not regulate set-off, the question had to be decided in accordance with the law of the country where

the party rendering the most characteristic performance is situated, i.e. French law (cf. Art. 4 of the Rome Convention). According to Art. 1291 French C.C. set-off can only be asserted if both obligations are “liquide”, i.e. ascertained as to both their existence and amount. The Court found that since seller had rejected buyer’s claim for damages for seller’s breach of the contract, this condition was not fulfilled in the case at hand and therefore the seller was entitled to the payment of the outstanding amount of the price.

METHODS FOR FILLING IN GAPS

Date: **20.05.2003**
Country: **Belarus**
Court: **Supreme Economic Court of the Republic of Belarus**

Key words

APPLICATION OF CISG - CHOICE OF LAW OF CONTRACTING STATE - CISG APPLICABLE (ART. 1(1)(A) CISG)

NON-PAYMENT OF THE PRICE - SELLER ENTITLED TO INTEREST (ART. 78 CISG) - RATE OF INTEREST DETERMINED ACCORDING TO ART. 7.4.9(2) OF THE UNIDROIT PRINCIPLES

Abstract

A U.S. trading company entered into a sales contract (No. 8-5/2003) with a state-owned enterprise of Belarus. The goods were delivered but the Belarus enterprise failed to pay the price, prompting the U.S. company to bring an action for payment.

The contract contained a choice of law clause in favor of the law of Belarus and indicated the Supreme Economic Court of the Republic of Belarus as the competent forum for the settlement of any disputes.

The Court held that CISG was applicable since it has been ratified by both the United States and the Republic of Belarus (Art. 1(1)(a) CISG).

As to the merits, the Court decided that the U.S. company was entitled to the payment of the agreed price plus interest according to Art. 78 of CISG. With no further explanation the Court held that “the rate of such interest is determined pursuant to Article 7.4.9 UNIDROIT Principles and is the average bank short-term lending rate to prime borrowers prevailing for the currency of payment at the place for payment or where no such rate exists at that place, the same rate in the state of the currency of payment”. It awarded interest at a rate of 13.4% which according to the National Bank of the Republic of Belarus was the rate in U.S. dollars in March 2003.

GAPS IN CONVENTION – MATTERS GOVERNED BUT NOT EXPRESSLY SETTLED BY CONVENTION

Date: **06.11.2001**
Country: **France**
Court: **Cour d'Appel de Paris**

Key words

APPLICATION OF CISG – IMPLIED EXCLUSION (ART. 6 CISG) – BURDEN OF PROOF ON PARTY RELYING ON IT

APPLICATION OF CISG - IMPLIED EXCLUSION - UNILATERAL REFERENCE ON COMMERCIAL DOCUMENTS TO DOMESTIC LAW AS LAW APPLICABLE TO DISPUTES - ACCEPTANCE OF NATIONAL COURT'S JURISDICTION TO HEAR THE CASE – CONTRACTUAL MENTION OF NATIONAL QUALITY STANDARDS - NOT AMOUNTING PER SE TO AN EXCLUSION OF CISG - CISG APPLICABLE EX OFFICIO BY JUDGE AS PART OF SUBSTANTIVE DOMESTIC LAW GOVERNING INTERNATIONAL SALES

LIMITATION OF ACTION (PRESCRIPTION) – MATTER GOVERNED BUT NOT EXPRESSLY SETTLED BY CISG (ART. 7(2)CISG) – DOMESTIC LAW APPLICABLE

NOTICE OF LACK OF CONFORMITY - TIME OF NOTICE - WITHIN A REASONABLE TIME AFTER DISCOVERY - TWO MONTHS AFTER LACK OF CONFORMITY SHOULD HAVE BEEN DISCOVERED BY BUYER NOT TIMELY (ARTS. 38(1) AND 39(1) CISG)

Abstract

A French buyer and a German seller concluded a contract for the sale of lift cables to be resold by the buyer to another French company charged of the maintenance of the Tour Eiffel elevators. The buyer's orders contained a printed jurisdiction and choice of law clause in favor of French jurisdiction and French law. The cables were delivered by the seller on January 9th, 1995. As they appeared to be rolled up on non conforming size spools, the buyer had to unwind and rewind each cable on a smaller spool at his premises, on January 17, 1995, before delivering them to its customer. Nevertheless the buyer did not send any notice to the seller of lack of conformity of goods. In the course of installation by the maintenance Company, a cable turned out to be defective and had to be replaced. The buyer, informed by its customer of the replacement of the defective cable, gave notice to the seller by telefax on March 16th, 1995.
Requested by the Tour Eiffel Company to pay damages, the maintenance Company complied with the demand and after several months it commenced a legal action against the buyer before a French Court, in order to recover the sum paid. The buyer, on its part, called on the seller to intervene in the proceedings, in order to disclaim its own liability.

The Tribunal of First Instance condemned the buyer to pay damages, rejecting its claim for the intervention of the seller in the proceedings on the ground that the buyer had failed to give notice of the lack of conformity within a reasonable time (Art. 39(1) CISG).
The Court of Appeal confirmed the first instance decision but based its judgement, in part, on a different reasoning.

First of all, the Court confirmed that the contract was governed by CISG. In doing so, the Court observed that the burden of proving the parties' common intention to rule out the application of CISG lies on the party which alleges the exclusion of the Convention. In the case at hand, the reference on the buyer's commercial documents to French law as applicable to disputes that could have arisen from the contract was not considered sufficient to exclude the application of CISG. Furthermore, neither the mention that the goods delivered had to satisfy French

quality standards, nor the mere fact that French Courts had jurisdiction to hear the case could be "per se" sufficient to exclude CISG, since CISG is part of substantive French law governing international sale of goods and therefore has to be applied ex officio by the judge.

Moreover the Court, observing that CISG does not provide any rule on limitation of action (prescription) in Art. 39(2) CISG, found that the limitation of action is a matter governed but non expressly settled by CISG (Art. 7(2) CISG), to be decided according to the applicable domestic law (i.e. German law). Since German domestic law provides for a period of six months to bring an action for non-conformity in international sales of goods, running from the notice of lack of conformity to be given within the time laid down by Art. 39 CISG, the buyer's claim for the intervention of the seller as guarantor was time-barred. In fact, it was put forward eighteen months after the buyer had actually become aware of the defects of the cables.

Finally, the Court stated that in any case the buyer's claim for intervention would be prevented by untimely notice of lack of conformity (Art. 39(1) CISG). The Court considered unreasonable, in the case at hand, the fact that the buyer informed the seller of the lack of conformity only after receiving its customer's complaint, i.e. two months after the buyer's ispection of the cables, instead of giving immediate notice after having had the possibility of thoroughly examining the cables during the unwinding and rewinding operations personally carried out after delivery, all the more so being the defects clearly recognizable.

GAPS IN CONVENTION, SCOPE OF CISG (ART. 7/2)

Date: **19.11.2002**
Country: **USA**
Court: **U.S. Circuit of Appeals (7th Cir.)**

Key words

SCOPE OF CISG (ART. 7(2) CISG) - DAMAGES (ART. 74 CISG)- ATTORNEYS' FEES - MATTER NOT GOVERNED BY CISG BEING PART OF PROCEDURAL RATHER THAN SUBSTANTIVE LAW - DOMESTIC LAW APPLICABLE

Abstract

A Mexican seller and a buyer from the United States entered into a contract for the sale of cookie tins. A dispute arose between the parties and the seller commenced a legal action.

The first instance court held that the contract was governed by CISG as both US and Mexico are contracting States. As to the merits, the court awarded damages to the seller for breach of contract, and ordered the buyer to pay the attorneys' fees, basing this order both on article 74 CISG, and on "the inherent authority of the courts to punish the conduct in litigation in bad faith".

Buyer appealed, arguing that in a US Court the "American rule" should apply, i.e. the winner must bear its own litigation expenses, rather than the rule set forth in an international convention.

The appellate court reversed the lower's court decision, holding that according to Art. 74 and Art. 7(2) CISG, there is no suggestion in the background of these provisions that "loss" is intended to include attorneys' fees as well. According to the court, legal expenses are not usually governed by substantive law such as CISG but normally by procedural law. Therefore they are not covered by the provisions of article 7(2) CISG relating to "matters which are not expressly settled" by CISG. The court held that since art. 74 does not include attorneys' fees, this issue should be be settled according to the otherwise applicable domestic law (in the case at hand, the law of Illinois).

METHODS FOR FILLING THE GAPS - RECOURSE TO GENERAL PRINCIPLES OF CONVENTION

Key words

Date: **14.01.1998**
Country: **France**
Court: **Cour d'Appel de Paris, 1ére chambre, section D**

AVOIDANCE - SELLER'S DUTY TO REFUND THE PRICE PAID AND PAY INTEREST (ARTS. 81(2) AND 84 CISG)

JURISDICTION - 1968 BRUSSELS CONVENTION - JURISDICTION OF COURT FOR PLACE OF PERFORMANCE OF THE OBLIGATION TO REFUND THE PRICE PAID (ART. 81 CISG)

PLACE OF PERFORMANCE FOR THE OBLIGATION TO REFUND THE PRICE PAID - MATTER GOVERNED BUT NOT EXPRESSLY SETTLED BY CISG (ART. 7(2) CISG) - IMPOSSIBILITY TO INFER A GENERAL PRINCIPLE ON PLACE OF PAYMENT FROM ART. 57 CISG - APPLICATION OF DOMESTIC LAW

Abstract

A Spanish seller and a French buyer concluded a contract for the sale of two elephants to be used in a circus show. The buyer paid the full contract price on a seller's bank account at a French bank. When the French authorities refused the permission to import the elephants, the buyer avoided the contract and the seller refunded a part of the price paid. The buyer commenced a legal action before the Tribunal de Commerce de Paris claiming the refund of the balance of the price paid and damages for lost profit. The first instance court declined its jurisdiction in favor of the Spanish court of the seller's place of business (Tribunal de Commerce de Paris, 08-07-1997). The buyer appealed.

The Court of Appeals held that the contract was governed by CISG (Art. 1(1)(a) CISG) and stated that the spontaneous restitution by the seller of a large part of the contract price confirmed that the contract had been avoided, so that, according to Arts. 81(2) and 84 CISG relating to the effects of avoidance, the buyer was undoubtedly entitled to be refunded the entire price paid and to be awarded interest accruing from the date of payment.

As to the matter of jurisdiction, the Court applied Art.5(1) of the EC Convention on Jurisdiction and the Enforcement of Judgments in Civil and Commercial Matters (Brussels, 1968), which states that a person domiciled in a Contracting State may be sued in the Court for the place of performance of the obligation in question (in the case at hand: the obligation to refund the price paid as the prevailing obligation in question), to be ascertained according to the substantive law governing the contract (in the case at hand: CISG).

The Court noted that CISG does not contain any specific provision on the place of performance of the seller's obligation to refund the price paid in case of avoidance of the contract, so that the question was to be settled by applying the interpretation provisions in Art. 7(2) CISG, which, in the case of a mere lacunae of the Convention, requires the court to decide in conformity with the general principles on which CISG is based.

Thus the Court referred to Art. 57(1) CISG, according to which if the buyer is not bound to pay the price at any other particular place, it must pay it at the seller's place of business or, if the payment is to be made against the handing over of the goods or of documents, at the place where the handing over takes place. The Court held that this provision does not express a general principle on the place of payment, because in the cases it governs the seller and the creditor coincide. Therefore the obligation to pay at the seller's place of business may well correspond both to the principle of payment at the seller's place of business and to the principle of payment at the creditor's place of business.

Therefore the question had to be settled in conformity with the law applicable to the contract by virtue of the rules of private international law, which the Court, applying Art. 3 of the 1955 Hague Convention on the law applicable to the sale of goods, found to be Spanish law according to which the place of payment was in Spain. The Court therefore held that the Spanish Courts had jurisdiction.