Čl. 74 Vídeňské úmluvy

Date: 23.08.2006
Country: USA
Number: 00 Civ. 5189 (RCC)
Court: U.S. District Court, Southern District of New York
Parties: TeeVee Toons, Inc. & Steve Gottlieb, Inc. v. Gerhard Schubert GmbH

Abstrakt:[1]

In early 1990, a US company ("the buyer") invented and patented "Biobox", an environmentally friendly box for packaging cassettes. The buyer then entered into a written contract with a German company ("the seller") for it to build a production system for the box. The seller encountered delays that set the project back by two years. Moreover, once the system was finally finished, it often malfunctioned and the seller had little success trying to fix it. The buyer then commenced an action claiming damages and lost profits; the seller moved for summary judgment, which was granted in part.
First of all, the Court confirmed that the contract was governed by CISG as both U.S. and Germany are Contracting States (Art. 1(1)(a) CISG) and none of the exceptions set out in Arts. 2, 3, 5 or 6 CISG applied.

The Court then addressed whether the buyer's arguments that the system was not fit for its ordinary and particular purpose (Art. 35(2)(a)-(b) CISG) were well-founded. In doing so, the Court first found the two-month time interval between the seller's delivery of the system and the buyer's notification of the system's non-conformity to be reasonable as required by Art. 39(1) CISG.

In arguing for the dismissal of the claims, the seller relied on the standard terms and conditions attached to the parties' contract, which included both a disclaimer from warranties provided by Art. 35 CISG and a merger clause. On its part, the buyer claimed that there was an express oral understanding between the parties that these and other onerous provisions in the terms and conditions would not apply to the agreement. The Court pointed that, unlike US law, CISG contains neither a Statute of Frauds nor the parol-evidence rule, and that in assessing what is the content of the contract, Art. 8 CISG requires consideration of any statements or conduct by parties that might contradict the written documentation. The court also emphasised that the present case was made more complex due to the presence of a merger clause in the contract, aiming at extinguishing all prior oral agreements. The issue therefore became whether an oral agreement to disregard terms and conditions that include a merger clause supersede the written merger clause itself. After stating that US federal case-law applying relevant CISG matters is "scant", the Court relied on the text of the Convention as construed by the CISG Advisory Council, namely Opinion no. 3 (Oct. 23, 2004), viz: "extrinsic evidence should not be excluded unless the parties actually intended the merger clause to have this effect", and "Art. 8 requires an examination of all relevant facts and circumstances when deciding whether the merger clause represents the parties' intent".

[1] Text celého rozhodnutí je k dispozici na adrese:
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Thus, the court found that, as there was a genuine issue of material fact as to whether the parties shared the intent to be bound by the terms and conditions attached to the contract or its merger clause, summary judgment could not be granted.

When examining the claims for damages under Art. 74 CISG, the Court noted that Art. 74's foreseeability requirement was identical to that provided by US law, thus US caselaw on the matter could be used as a guide. The court then granted summary judgment in favour of the seller with respect to the claims of damages for the loss of funds that the buyer spent on a facility for housing the machine (held to be a fixed cost, which would have been incurred regardless of whether the breach had occurred) and money that the buyer will have to spend to replace the facility (because the seller could not have foreseen at the time of contract conclusion that the buyer would have to look for an entirely new facility in the event of a seller's system malfunction).

However, the Court denied summary judgment with respect to all other damages sought by the buyer, given that these other claims (including lost profits) were clearly foreseeable and capable of calculation.

As to the claims brought by the buyer under Arts. 35(2)(c) and 36(2) CISG, i.e. that the goods failed to conform to sample or model and the seller was liable for any lack of conformity resulting from a breach of any of his obligations, the Court stated that the facts showed that the system failed to produce boxes of the proper quality and that the reasonableness requirement of Art. 39(1) CISG was satisfied. Summary judgment with respect to both breach and damages was therefore granted and denied to the same extent that summary judgment on Art. 35(2)(a)-(b) was denied and granted, respectively.

As they fall out the scope of CISG (art. 4 CISG), negligence and fraud claims brought against the seller were assessed under the otherwise applicable law (i.e. the law of the State of New York).

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Date: 14.01.2002
Country: Austria
Number: 7 Ob 301/01t
Court: Oberster Gerichtshof
Parties: unknown

Abstrakt:[2]

A German seller and an Austrian buyer concluded a contract for the sale of a cooling system to be specifically manufactured by the seller. According to the contract the system was to be delivered to the buyer's premises in Austria for testing, but was meant to be eventually installed in a yet to be built water plant in Germany. It was an intermediary acting on behalf of the owner of that plant which had requested the buyer to deliver and install the cooling system, and the contract between the buyer and the intermediary of the ultimate customer provided for a specific date of delivery and, in case of delay, for the payment of a substantial penalty. In its offer, the seller expressly referred to its standard terms printed on the back of its invoices. According to these standard terms, which the buyer already knew from previous dealings with the seller, the buyer was obliged to examine the goods immediately after delivery and to give written notice to the seller of any manifest non-conformity within 8 days after delivery; it was up to the seller to remedy any non-conformity by repair of the goods or by delivering substitute goods; the limitation period was 12 months; consequential damages were excluded; place of performance and place of settlement of possible disputes were at the seller's place of business; the applicable law was Germany law.

As the seller failed to meet the date for delivery, the cooling system had eventually to be delivered directly to the construction site in Germany, where the buyer was able to perform only a cursory examination. Notwithstanding that some manifest defects (corrosion, poor finish) were discovered and immediately notified to the seller. The buyer nevertheless installed the system in order to avoid the penalty provided by its contract with the intermediary. Subsequently additional technical defects appeared (lower capacity, noise level too high, and others) of which the buyer gave notice to the seller as soon as they were discovered. The seller not only did not object to such late notice, but agreed to repair the defects. When the attempts to repair proved to be unsuccessful, the buyer and the intermediary asked for the delivery of a substitute system, but the seller refused to do so.

After another unsuccessful attempt to repair the system, the buyer and the constructor agreed to install temporarily the defective on the understanding that the buyer would later provide a substitute system. The seller was not involved in, nor informed about, this agreement. At the agreed date the system was remolded by the buyer and newly installed. Since than it has functioned properly.

When the seller brought an action for the payment by the buyer of the invoices relating to other transactions between the two parties, the buyer refused to pay and set-off against the

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[2] Text celého rozhodnutí je k dispozici na adrese:
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obligation to pay those invoices the seller´s obligation of reimbursement of the losses the buyer had suffered as a consequence of the delivery of the defective cooling system.

In accordance with the appellate court the Supreme Court held that the sales contract concerning the coolin system was governed by CISG, as both parties were situated in different contracting States (Art. 1(1)(a) CISG) and the contract was a contract for the supply of goods to be manufactured (Art. 3 (1) CISG). The reference to "German law" as the applicable law did not amount to a tacit exclusion of CISG in accordance with Art.6 CISG, since CISG is part of German law. The Supreme Court also held that the seller's standard terms were binding upon the byuer, sine the seller had expressly referred to them in its offer and the buyer already knew them from previous dealings with the seller. The court further noted that the choice of the law of a contracting state does not in itself amount to an implied exclusion of CISG as part of the domestic law of the contracting States (Art. 6 CISG).

As to the merits of the case, the Supreme Court held that the buyer's counter claim aganst the seller, deriving from the purchase of the cooling system was valid, though with certain limitations as to the amount of the damages claimed.

As the objection by the seller that the buyer had not timely given notice of the various defects discovered, the Court held that, with respect to the defects the buyer could discover upon examniation of the goods immediately after delivery, notice was given within the required time limit of 8 days, while with respect to all latent defects which could be discovered only later the time limit for notice was a "reasonable time" after discovery in accordance with Arts. 38 and 39 CISG. In the view of the Court what is a "reasonable time" depends on the circumstances of each given case, with regard in particular to the size and structure of the buyer's firm, the characteristic features and quantity of the goods to be examined, the efforts necessary for their examination, the type of the legal remedy selected, etc. Yet even if in the case at hand the buyer should have given notice too late, the seller is prevented from invoking such defence since it has by its own conduct shown after receiving the notice - in particular by not raising the defence immediately and by expressly declaring its willingness to cure the defects - waived that right.

The Court also rejected the objection by the seller that the notices given by the buyer did not always sufficiently descibe the kind of defects discovered. According to the Court, although non-conformities of the goods have to be described specifically to allow the seller to react in an appropriate way (Art. 39(2) CISG), the requirements in this regard should not be exaggerated and in any case they depend on the circumstances of each given case, with special regard to the conditions in which the buyer is able to examine the goods.

As to the amount of damages claimed by the buyer, the Court held that, according to Art. 74 CISG, the aggrieved party is entiled to full compensation of the losses suffered as a result of the other party´s non-performance, including loss of profit, provided that the losses were foreseeable at the time of the conclusion of the contract. However, in the case at hand the seller´s standard terms expressly excluded the compensability of the so-called consequential damages. As a consequence the buyer was entitled to recover the expenses it had incurred in repairing the goods, but not the other losses it had suffered in its relationship with its costumer as a consequence of the seller´s non-performance.

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Date: 12.12.2007
Country: Arbitral Award
Number: 50181T 0036406
Court: American Arbitration Association
Parties: Macromex Srl. v. Globex International Inc.

Abstrakt:[3]

A US seller and a Romanian buyer entered into several contracts for the sale of chicken leg quarters. The contracts provided that the chicken would be delivered no later than May 29, 2006. An avian flu outbreak prompted the Romanian government to bar all chicken imports not certified as of June 7, 2006. The seller was late to ship, and failed to certify all of the chicken on time. The buyer suggested that the seller ship the balance to a port outside Romania, but the seller refused, arguing that the Romanian government's ban constituted a force majeure event which rendered the contract void. Ultimately, the seller sold the undelivered goods to another buyer at a substantial profit.

In the interim award, the sole Arbitrator found that the initial delay in delivery did not amount to fundamental breach under Art. 49 CISG. This was so because both the parties' prior course of dealing and industry practice tolerated some flexibility in delivery, and the parties seemed to have agreed on modifying the contracts with respect to the delivery date (art. 29 CISG). In fact, the buyer tolerated a shipment delay for some time, despite having pressured the seller to deliver the goods as soon as possible.

However, the sole Arbitrator found that the seller's ultimate refusal to deliver the goods amounted to fundamental breach. In determining whether such a failure to perform by seller could be exempted under Art. 79 CISG, the Arbitrator found that the Romanian government's decision was beyond the seller's control and that it could not have been reasonably contemplated at the time of conclusion of the contract. Moreover, the Arbitrator found that the seller could have reasonably avoided the ban by shipping to the alternative port proposed by the buyer. For this reason, the Arbitrator concluded that the seller could not rely on Art. 79 CISG and that the buyer was entitled to damages. In reaching this conclusion, the Arbitrator looked to UCC provisions on excuse as a means for interpreting the notion of "commercially reasonable substitute" under Art. 79 CISG, since the UCC and CISG contain similar provisions in this respect.

Finally, the Arbitrator held the buyer entitled to lost profits caused by the seller's breach that were foreseeable at the time of contract conclusion (Art. 74 CISG).

In the final award, the Arbitrator incorporated the interim award in its entirety and applied

[3] Text celého rozhodnutí je k dispozici na adrese:
http://www.unilex.info/case.cfm?pid=1&do=case&id=1346&step=FullText . V tomto případě srovnej také http://www.unilex.info/case.cfm?pid=1&do=case&id=1303&step=FullText, kde se nachází rozhodnutí státních soudů (U.S. District Court, Southern District of New York) ve stejné věci.

domestic law in granting the buyer post award interest under Art. 78 CISG.

http://www.unilex.info/case.cfm?pid=1&do=case&id=1346&step=Abstract

Čl. 75 Vídeňské úmluvy

Date: 24.04.2006
Country: Belgium
Number: 2002/AR/2087
Court: Hof van Beroep, Antwerpen
Parties: GmbH Lothringer Gunther Grosshandelsgesellschaft für Bauelemente und Holzwerkstoffe v. NV Fepco International

Abstrakt:[4]

A Belgian seller and a German buyer entered into a contract for the supply of construction materials. The contract was exclusively regulated by the seller's standard terms. According to those terms, the goods should have been delivered in "November, December 1999 and January 2000". The contract also provided for payment "cash against documents (B/L)". Since the buyer accepted and paid only for some of the shipments, the seller announced to the buyer that it would resell the goods within seven days but failed to do so. Nearly six months later, after granting the buyer a final period of time in which to perform, the seller invoked avoidance of part of the contract according to Art. 64(1)(b) CISG, entered into a cover sale and claimed damages. On its part, the buyer invoked breach of contract by the seller in many respects.

The First Instance Court decided in favor of the seller, but denied it part of the damages it had claimed. Then the buyer appealed and the seller brought an incidental appeal to recover all the damages sought.

The Second Instance Court confirmed the lower Court's decision.

As to the applicable law, the Second Instance Court held that CISG had to be applied, since the seller's standard terms, which had been accepted by the buyer, designated the law of a Contracting State (i.e. Belgian law) as the one governing the contract.

As to the merits, the Court found that the buyer was not entitled to consider the contract avoided on the basis of Art. 49(1)(a) CISG, since no contractual breach by the seller was proven. First of all, regarding late delivery, the Court found that no period of time for delivery had been agreed upon by the parties, "November, December 1999 and January 2000" merely being expected dates for shipment. Consequently, contrary to what the buyer argued, Art. 33(b) CISG could not be deemed violated.

The Court also excluded that partial delivery by the seller amounted to a breach of Art. 35 CISG, since partial deliveries were not only allowed under the contract, but had also been accepted by the buyer, who had made no complaints in that connection.

With respect to delivery without original documents, the Court affirmed that Art. 34 CISG

[4] Text celého rozhodnutí je k dispozici na adrese:
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had not been breached since the buyer had paid for several deliveries without objecting to the fact that documents had not been handed over. Furthermore, since the buyer had requested to take delivery of only part of the goods, the seller could do nothing else but hand over a delivery order instead of the bill of lading (B/L), as provided for by the contract.

Finally, lacking any evidence thereof, the Court rejected the buyer's claim that the goods were not of the quality contractually agreed upon (Art. 35(1) CISG).

As to the seller's claim for damages, the Court found that the seller had failed to meet his duty to mitigate damages under Art. 77 CISG. Although the seller had notified the buyer of its intention to enter into a cover sale in April, the resale did not take place within a reasonable time thereafter (in the opinion of the Court, three months) but only six months later. Nevertheless, the Court held the seller entitled to recover the difference between the unpaid invoices and the income from the resale (Art. 75 CISG), the buyer having failed to demonstrate that a higher price could have been obtained if the resale had been timely.

In the opinion of the Court, the seller also had the right to recover insurance fees and costs for storage under Art. 85 CISG, but not for the period exceeding the three months within which the cover sale should have been concluded.

Furthermore, according to Art. 78 CISG, the seller was awarded interest in the amount provided for in the seller's standard terms (i.e. 9%) starting from the date of payment of the resale.

Finally, the Court rejected the seller's claim both for complementary damages (e.g. administrative and management costs) and for compound interest. In doing so, the Court pointed out that under CISG complementary damages can only be recovered if the party demonstrates that damages are higher than the interest accorded, while compound interest can only be awarded if the party gives evidence of being entitled to it (e.g. because it had to pay extra interest on account of the fact that it had not received the sums owed to it).

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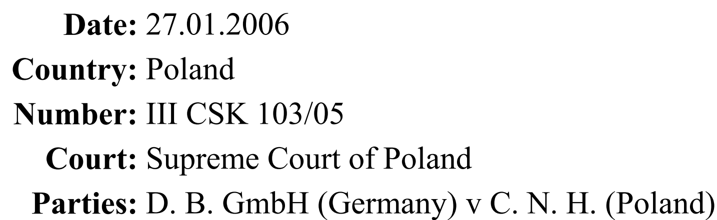
Date: 27.01.2006
Country: Poland
Number: III CSK 103/05
Court: Supreme Court of Poland
Parties: D. B. GmbH (Germany) v C. N. H. (Poland)

Abstrakt:[5]

A Polish seller and a German buyer entered into a long-term framework contract for supply of metallurgical sand, an ingredient to be used in the production of roofing tiles according to a newly invented method. The goods were partially delivered when the seller notified the buyer that it would not be able to fulfill the rest of its obligations under the contract. As a result, the buyer was forced to return to a less cost-effective method of production involving cement as a substitute for metallurgical sand. Subsequently, it brought an action against the seller claiming for damages.

The Court of first instance applied Articles 74 and 75 of the CISG and held that the buyer was entitled to recover damages for the amount of lost profits resulting from the sale of tiles, produced according to the more expensive method. The Court dismissed the claim, however, because buyer had not provided evidence establishing actual loss.

The Appellate Court of Krakow held that Art. 75 CISG was not applicable in the case at hand because the contract had not been effectively avoided. However, by applying Art. 74 CISG, the Court awarded the buyer damages calculated on the basis of: the quantity of cement bought in replacement, and the difference between the Polish market price for one ton of cement and the Polish market price for the same amount of metallurgical sand. In doing so, the Court found that damages ought to have been foreseen by the seller at the time of contract conclusion. Both parties appealed to the Supreme Court.

The Supreme Court firstly found that, despite the fact that it was a long-term framework contract, the contract at hand was within the scope of the CISG because it required a specification of goods to be delivered in parts. In reaching this conclusion, the Court found Article 14 to be not relevant, since it only applies to offers and does not refer to the scope of the Convention itself.

The Supreme Court went on to support the Appellate Court's judgment that Art. 75 CISG should not have been applied at all because the contract had not been avoided. The Supreme Court further held that, pursuant to Art. 74 CISG, damages should have been determined according to the loss that the seller foresaw, or ought to have foreseen, resulting from its breach, and that the Appellate Court had improperly awarded damages under the Article 75 standard, despite having stated that Article 75 was not applicable. The Supreme Court also added that, since the contract between the parties had been fulfilled in part, loss suffered by the buyer could only be connected with the necessity of buying the rest of the goods.

[5] Text celého rozhodnutí je k dispozici na adrese:
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Finally, the Supreme Court held that the buyer had fulfilled its obligation to mitigate damages pursuant to Art. 77 CISG, as the buyer's decision to turn back to the previously used method was completely justified.

http://www.unilex.info/case.cfm?pid=1&do=case&id=1129&step=Abstract

Čl. 77 Vídeňské úmluvy

Date: 12.09.2006
Country: USA
Number: 05-13995
Court: U.S. Court of Appeals (11th Circuit)
Parties: Treibacher Industrie, A.G. v. Allegheny Technologies, Inc.

Abstact:[6]

By way of two contracts, an Austrian vendor of hard metals ("the seller"), agreed to sell a hard metal powder to the Alabama-based company ("the buyer") for delivery to "consignment". The buyer planned to use the powder in its manufacturing. After it had received some of the powder, the buyer refused to take delivery of the amount remaining according to the contract. It wrote a letter to the seller in which it denied having a binding obligation to either take delivery of, or pay for any, powder it did not wish to use. Unknown to the seller, the buyer had in fact purchased the powder from another vendor for a lower price. The seller sued to recover the amount that it would have received had the buyer paid for all of the powder.

Both parties disputed the meaning of the term "consignment" contained in the contracts. The buyer contended that, under the industry's customary usage of the term "consignment", no sale occurred unless it actually used the powder. On the contrary the seller put forward that, during the parties' dealings over a period of seven years, the term "consignment" had been understood to mean that the buyer had a binding obligation to pay for all the powder specified in the contract, while the seller would delay billing the buyer until the powder had actually been used. By applying CISG pursuant to its Art. 1(1)(a), the Court of first instance ruled in favor of the seller and held it entitled to recover damages plus interest. The buyer appealed.

The Appellate court upheld the lower Court decision. In doing so, it rejected the buyer's argument that the meaning of the term "consignment" under its common usage in the industry should prevail over the meaning as understood from the practices established between the parties. Contrary to what was argued by the buyer, Art. 9(2) CISG ("parties are considered, unless otherwise agreed, to have impliedly made applicable to their contract or its formation a usage of which the parties knew or ought to have known …") can not be understood to mean that, unless the parties expressly agree to the meaning of a term, the customary trade usage applies. Nor can such an interpretation be supported, as again contended by the buyer, from the fact that Art. 9(1) CISG separates the phrase "any usage to which they have agreed" (thus meaning express agreement) from the phrase "any practices which they have established" (thus meaning an implicit agreement deriving from the course of dealing). In reaching such a conclusion, the Court pointed out that the buyer's construction of Art. 9 CISG would render meaningless the reference in Art. 8(3) CISG to any practices established between the parties. Furthermore, such an approach would cause paragraph 1 of Art. 9 CISG to be void, since the parties could no longer be bound by the practices established between themselves but instead,

[6] Text celého rozhodnutí je k dispozici na adrese:
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absent an express agreement on the meaning of the term, they would be bound by the term's customary usage even if they had established a contrary usage in their course of dealing.

The court also noted that the facts confirmed that the meaning of "consigment" was indeed the one argued by the seller. The buyer kept the powder it received from the seller separate from powder it received from others, and sent usage reports to the seller, after which the seller would invoice the buyer. The buyer once expressed its desire to return some powder, but was told by the seller that it could not, as it was contractually obliged to purchase the powder. The buyer subsequently kept the powder, used it and sent a usage report; this instance in particular proved to the court that the buyer had agreed with the seller's interpretation.

The court also upheld the district court's decision in relation to damages, viz. that the seller reasonably mitigated its losses (art 77 CISG). The buyer, as the party in breach, needed to show that the seller did not take reasonable steps to mitigate its losses. However, not only did the buyer fail to present any such evidence, but the court also found, through evidence provided by the seller, that the seller had both sought to reduce its losses as soon as possible (its first sale of the powder occurred only 17 days after receiving the buyer's letter of denial) and had also sold the powder at the highest prices possible.

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