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(CLOUT)

Contents

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Introduction

This compilation of abstracts forms part of the system for collecting and disseminating information on Court decisions and arbitral awards relating to Conventions and Model Laws that emanate from the work of the United Nations Commission on International Trade Law (UNCITRAL). The purpose is to facilitate the uniform interpretation of these legal texts by reference to international norms, which are consistent with the international character of the texts, as opposed to strictly domestic legal concepts and tradition. More complete information about the features of the system and its use is provided in the User Guide (A/CN.9/SER.C/GUIDE/1/REV.3). CLOUT documents are available on the UNCITRAL website: (https://uncitral.un.org/en/case_law).

Each CLOUT issue includes a table of contents on the first page that lists the full citation of each case contained in this set of abstracts, along with the individual articles of each text which are interpreted or referred to by the Court or arbitral tribunal. The Internet address (URL) of the full text of a decision in its original language is included in the heading to each case, along with the Internet addresses, where available, of translations in official United Nations language(s) (please note that references to websites other than official United Nations websites do not constitute an endorsement of that website by the United Nations or by UNCITRAL; furthermore, websites change frequently; all Internet addresses contained in this document are functional as of the date of submission of this document). Abstracts on cases interpreting the UNCITRAL Model Arbitration Law include keyword references which are consistent with those contained in the Thesaurus on the UNCITRAL Model Law on International Commercial Arbitration, prepared by the UNCITRAL Secretariat in consultation with National Correspondents. Abstracts on cases interpreting the UNCITRAL Model Law on Cross-Border Insolvency also include keyword references. The abstracts are searchable on the database available on the UNCITRAL website by reference to all key identifying features, i.e. country, legislative text, CLOUT case number, CLOUT issue number, decision date or a combination of any of these.

The abstracts are prepared by National Correspondents designated by their Governments, or by individual contributors; exceptionally they might be prepared by the UNCITRAL Secretariat itself. It should be noted that neither the National Correspondents nor anyone else directly or indirectly involved in the operation of the system assumes any responsibility for any error or omission or other deficiency.

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

Case 1824: CISG 2(b); 2(c); 4(a); 6
Switzerland: Bundesgericht (Federal Supreme Court)
No. 4A_543/2018
28 May 2019
Original in German
Published in German: Internationales Handelsrecht (2019), Swiss Federal Supreme Court database (www.bger.ch); CISG-online database (www.cisg-online.ch) No. 4463.

Abstract prepared by Ulrich G. Schroeter, National Correspondent

The buyer is a Swiss state-owned entity organized under Swiss public law. In 2003, it conducted a public tender asking for bids to deliver electricity meters that were to be installed in private households in a canton in Switzerland. The buyer's general conditions of purchase provided for the application of Swiss law. The successful bidder was a Slovene company (seller no. 1) that soon began to deliver electricity meters. Seller no. 1 subsequently established a subsidiary in Switzerland (seller no. 2) that was involved in the later deliveries of electricity meters. It remained a point of dispute whether, under the latter sales contracts with the buyer, seller no. 2 was the only seller, whether seller no. 1 and seller no. 2 were jointly involved as sellers or whether seller no. 2 subsequently became a contracting party by way of a contract modification. Between 2004 and 2009, approximately 35,000 electricity meters were delivered and installed in the homes of the buyer's customers, before it was discovered that all meters suffered from a design defect (so-called "whiskers" problem) resulting in measurement errors.

The buyer initiated court proceedings against seller no. 1 and seller no. 2 in the Court of First Instance Basel-Stadt, claiming repayment of the entire contract price as well as damages. The sellers inter alia pointed out that the buyer had only given notice of non-conformity in 2012, well after the two-year cut-off period of Art. 39(2) CISG had passed. The Court of First Instance nevertheless granted the buyer's claim, holding that the buyer had a right to rescind the contract in accordance with Swiss domestic law (Art. 24(1) No. 4 Swiss Code of Obligations) because it had been in error about the electricity meters' quality when concluding the contract.[1] Upon the sellers' appeal, the Court of Appeal Basel-Stadt reversed the judgment in a carefully reasoned decision and dismissed the claim.[2] The buyer appealed to the Swiss Federal Supreme Court.

Affirming the Court of Appeal's decision, the Swiss Federal Supreme Court took the opportunity to clarify a number of interpretative issues under CISG. In doing so, the Supreme Court stressed the importance of aiming for an internationally uniform interpretation of the Convention in accordance with Art. 7(1) CISG. Throughout its decision, the Supreme Court made ample references to foreign CISG case law, citing an overall number of 21 foreign (i.e. non-Swiss) court decisions from seven different countries (Austria, Belgium, France, Germany, Israel, Italy, United States of America), as well as a CISG Advisory Council Opinion.

With respect to the CISG's applicability, the Swiss Supreme Court clarified that the Convention also applies to multi-party sales contracts involving more than one buyer or/and more than one seller. The CISG's applicability to the entire multi-party sales contract remains unaffected even if only one of two parties on one "side" of the contract (here: the Slovene seller no. 1) has its place of business in a different State than the opposing party (here: the Swiss buyer) as required by Art. 1(1) CISG, because

[1] Zivilgericht Basel-Stadt, 26 October 2016 – K5.2015.2, CISG-online No. 3904.

[2] Appellationsgericht des Kantons Basel-Stadt, 24 August 2018 – ZB.2017.20 (AG.2018.557), CISG-online No. 3906; Internationales Handelsrecht (2019), 101–116; Schweizerische Juristen-Zeitung (2019), 158–160. Commented upon by Schroeter, Internationales Handelsrecht (2019), 133-136.

any other approach would be impractical and result in the splitting-up of a coherent legal transaction.

The Swiss Supreme Court furthermore stressed that the carve-outs from the Convention's applicability listed in Art. 2 CISG are exhaustive. Accordingly, the Convention also applies to sales contracts initiated by way of a public tender (because these are not covered by Art. 2(b) CISG) as well as to sales contracts involving state-owned entities or entities acting as buyers/sellers in exercise of a public function (because these cannot be equated to the constellations covered by Art. 2(c) CISG). Where the Convention applies, it implicitly also governs the burden of proof in accordance with the principle *actori incumbit probatio*.

The Supreme Court then extensively discussed the prerequisites for an exclusion of the Convention's application by the parties (Art. 6). It confirmed that the contractual choice of the law of a CISG Contracting State (as e.g. "Swiss law") does generally not amount to an exclusion of CISG. This can only be different in presence of "clear and unambiguous" indications that both parties intended to exclude the Convention. The burden of proof lies with the party relying on an exclusion. The fact that the buyer's general conditions of purchase in the present case used a number of legal terms not found in the CISG was held to be insufficient in this regard. The Supreme Court then discussed whether it could amount to an implicit exclusion of the Convention that both parties had based their legal arguments in the court of first instance exclusively on Swiss domestic law. The Supreme Court stressed that the evidentiary standard for an intent to exclude is the same at the contractual and at the post-contractual stage, resulting in an equally high threshold applying to exclusions during court proceedings. Accordingly, restraint should be exercised before deducting an intent to exclude from a party's mere reference to a domestic law (usually the lex fori), which can only indicate such an intent if there is proof that both parties were positively aware of the CISG's applicability and nevertheless had reached an agreement to exclude its application. In the present case, the Supreme Court found that no exclusion of the Convention in accordance with Art. 6 CISG had been made.

Regarding a CISG buyer's right to rely on domestic law provisions that allow a contract to be rescinded if the buyer's intent was affected by an error (mistake) during contract formation, the Swiss Supreme Court affirmed the Court of Appeal's position that no such reliance is admissible whenever the buyer's error related to the quality of the goods. The Supreme Court held that, in such a case, domestic law rules about error (mistake) are pre-empted by Arts. 35 et seq. CISG, because these CISG provisions together with the CISG provisions on buyers' remedies provide an exhaustive regulation of the issue. If recourse to domestic law was allowed, the Convention's inherent limitations to the buyer's rights – as inter alia the notice requirement and cut-off period under Art. 39 CISG, as well as the "fundamental breach" threshold under Art. 49(1)(a) CISG – could be circumvented, thus threatening the international uniformity of the Convention's application. Citing Art. 7(1) CISG, the Swiss Supreme Court thereby adopted an interpretation under CISG that decisively differs from the prevailing position under Swiss domestic law, where the Supreme Court is traditionally allowing buyers to rely on provisions about error (mistake) in such cases. For the sake of clarification, the Supreme Court pointed out that the Convention's pre-emptive effect is limited to errors that relate to issues governed by the Convention (as notably the quality of the goods sold), but does not extend to errors relating to other issues as e.g. the contracting partner's identity.

Case 1825: CISG 1
United States of America: U.S. District Court, Southern District of New York
No. 18-cv-2714
Smarter Tools Inc. v. Chongqing SENCI Import & Export Trade Co., Ltd. et al.
26 March 2019

This case provides insight on the review on an arbitral award on grounds related to insufficient reasoning on the application of the CISG. It indicates that failure to apply

the CISG properly is not grounds for setting aside an arbitral award. It does not deal per se with the interpretation and application of the CISG.

A company based in the United States ("buyer") concluded a contract for the purchase of gas-powered generators with a company based in China ("seller"). The buyer stopped importing the generators because they were not compliant with state and federal environmental regulations.

The seller started arbitral proceedings against the buyer for payment of the price of some of the generators it had delivered. In turn, the buyer filed a counterclaim for recovery of costs due to the impossibility to resell the generators, lost profit, damage to goodwill and fines received due to non-compliance of the generators.

The sole arbitrator issued an award in favour of seller. The buyer filed a case before the Southern District of New York asking the court to vacate the award on the grounds that the arbitrator had exceeded his authority by failing to issue a reasoned award and that the arbitrator had manifestly disregarded the law by failing to apply the CISG.[3] Seller filed a cross-petition for confirmation of the award.

The court found that, since the parties had agreed on a reasoned award, the arbitrator had exceeded his authority in issuing an award that was not sufficiently reasoned. For that reason, the court remanded the award to the arbitrator for clarification of the findings.

With respect to the argument relating on the failure to apply CISG, the court noted that there was no indication that the arbitrator had reached his results through application of law other than CISG to his factual findings regarding the parties' contractual relationship. It further noted that the buyer had not demonstrated that the arbitrator had refused to apply CISG to the dispute, adding that the buyer was really objecting to the way in which CISG had been applied, which was a matter beyond the jurisdiction of the court.

Case 1826: CISG 1; 4; 7
France: Court of Cassation, Commercial Division
Appeal No. 17-21477
Edilfibro SpA v. Arbre Construction and others
16 January 2019
Original in French
Available in French from the digital bulletin of judgments of the Court of Cassation: www.courdecassation.fr; Légifrance: www.legifrance.gouv.fr; CISG-France Database: www.cisg-France.org
Commentary in French: Cyril Nourissat, Actualité Juridique Contrat 2019, No. 139; Laurent Leveneur, Contrats, concurrence, consommation 2019, No. 61; Yann Heyraud, JCP 2019, E, 2019, 1153

Abstract prepared by Claude Witz, National Correspondent

In March 2003, company A, a reforestation business, hired company B to carry out carpentry work on a storage building. Company B sourced wooden roof panels from company C, a distributor of materials. The three companies were based in France. Company C had acquired the panels from company D, based in Italy, under a contract governed by the United Nations Convention on Contracts for the International Sale of Goods. The wooden panels were delivered to company A in December 2003. Several years later, company A complained that water was leaking into the building owing to defects in the panels and, in July 2015, filed a claim for damages against companies B, C and D. Through a judgment of 24 February 2016, the Commercial Court of Limoges ordered company B to, inter alia, compensate company A primarily in the amount it had paid for the building to be repaired and dismissed the claim that company A had brought directly against company D, on the basis that a subpurchaser

[3] The case was filed pursuant to Section 10(a) of the Federal Arbitration Act, which is not an enactment of an UNCITRAL text.

cannot, pursuant to article 4 of the Convention, initiate legal proceedings directly against a "seller subject to that Convention" in the absence of a contractual relationship between them.

In the second instance, the Court of Appeal of Limoges ruled only on the warranty claim brought by company B against company C and Italian company D (judgment of 21 February 2017). The court granted the claim brought by company B against company C on the basis of the sales contract between them, the seller being liable for latent defects rendering the goods unfit for use (art. 1641 of the Civil Code) and the proceedings not being time-barred since they were initiated within two years of discovery of the defects (art. 1648 of the Civil Code). The Court of Appeal also found that the claim brought by company B against the Italian company was admissible on the grounds that the Convention did not preclude the application of French law or the initiation by a subpurchaser of proceedings directly against a seller; therefore, company B was entitled to bring proceedings directly against Italian company D.

A main appeal by Italian company D and an additional appeal by company C were brought before the Court of Cassation. In the second ground of the main appeal, company D argued that whereas the direct claim brought against it by company B had been declared by the Court of Appeal to be admissible, the Convention 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 judgment of that Court had therefore infringed articles 1 and 4 of the Convention. The Court of Cassation rejected that argument on the basis of article 7, paragraph 2, of the Convention and recalled the comment by the Court of Appeal that the Convention governed only the formation of the contract of sale between the seller and the buyer, noting that "the Court of Appeal rightly inferred therefrom that French law, the application of which was not in dispute and which governs proceedings brought by a subpurchaser directly against a seller, should apply. Therefore, company B was entitled to initiate proceedings directly against company D". On the basis of article 7, paragraph 2, the Court of Cassation implicitly accepted that direct claims concerned a matter governed by the Convention but not expressly settled in it and that French law should apply in the absence of a general principle on which the Convention was based.

The Court of Cassation had not previously had the opportunity to take a clear position on claims brought by a subpurchaser directly against a seller bound to the buyer by a contract governed by the Convention.[4]

In its combined response to the first ground of the main appeal by the Italian company and the single ground of the additional appeal by company C, the Court of Cassation ruled on the limitation period applicable to the two claims brought against the companies as a result of the latent defects in the wooden roof panels sold. According to the Court of Cassation and the Court of Appeal of Limoges, that period was two years from the discovery of the defects (art. 1648 of the Civil Code). However, according to the Court of Cassation, that two-year period must fall within the five-year limitation period established in article L.110-4 of the Commercial Code. Therefore, claims brought after that time as a result of the belated discovery of a defect were inadmissible. As the judgment of the Court of Appeal of Limoges did not take into account the five-year period on the basis of which the two claims would have been inadmissible, the Court of Cassation partially annulled the judgment and referred the parties to the Court of Appeal of Poitiers.

[4] The Court of Cassation had ruled on a similar case involving a contractual guarantee given to a subpurchaser by a seller when the initial sale was governed by the Convention (Civil Chamber No. 1, 5 January 1999, CLOUT 241; see overturned judgment, CA Grenoble, 15 May 1996, CLOUT 204.

Case 1827: CISG 10; 93
France: Paris Court of Appeal, Department 5, Division 1
General register No. 16/21302
Splash Toys SAS v. Zuru
3 July 2018
Original in French
Available in French from the CISG-France Database: www.cisg-france.org, No. 289; and from Juris-Data (LexisNexis)

Abstract prepared by Claude Witz, National Correspondent, and Björn Schümann

A company based in France, Splash Toys, was the exclusive distributor of robotic plastic fish for home aquariums for a manufacturer based in Hong Kong, Zuru. The Paris Court of First Instance, in a judgment of 15 September 2016, ruled that Splash Toys had committed acts of infringement against a natural person holding intellectual property rights under a European patent and a company to which the patent was licensed. The third-party complaint brought by Splash Toys against Zuru was rejected by the Paris Court of First Instance because Splash Toys was unable to produce in court the contract between it and Zuru. The Court noted that Hong Kong was not a party to the United Nations Convention on Contracts for the International Sale of Goods, referring in that regard to the judgment of 2 April 2008 of the Court of Cassation concerning Hong Kong and the interpretation of article 93 of the Convention.[5]

Splash Toys filed an appeal against the decision of the Paris Court of First Instance with the Paris Court of Appeal. In its judgment, which was limited to consideration of the third-party complaint brought by Splash Toys against Zuru,[6] the Paris Court of Appeal reviewed the question of whether the contract between Splash Toys and Zuru was governed by the Convention. Splash Toys claimed that Zuru had a place of business in Shenzhen (China), to which the contract and its performance were most closely related, that place of business having been the factory where the allegedly counterfeit goods had been manufactured and from which they had been shipped. Zuru argued that its registered office was in Hong Kong, which was not a party to the Convention. The Court of Appeal considered various pieces of evidence to determine the seller's place of business for the purposes of article 1 of the Convention, without, however, referring to article 10 of the Convention. That evidence included emails referring to the different places of business, including the one in Hong Kong, which appeared first, "as a result of which it is reasonable to assume that it is the main place of business", as well as invoices issued by Zuru, "showing the place of dispatch or loading as Shenzhen or Yantian in China, but containing the Zuru letterhead with an address in Hong Kong". The Court of Appeal concluded that "these pieces of evidence, when viewed as a whole, appear to indicate that the registered office of Zuru is in Hong Kong, not China".[7] In so doing, the Court referred to the concept of "registered office" rather than that of "place of business".

The Court of Appeal further confirmed that Hong Kong was not a party to the Convention, "as China has not submitted a declaration to the United Nations in relation to the Hong Kong region pursuant to article 93 of the Convention".[8]

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[5] CLOUT 1030; see UNCITRAL Digest of Case Law on the United Nations Convention on Contracts for the International Sale of Goods, art. 93, No. 8, note 8.

[6] The judgment of the Paris Court of First Instance involved multiple parties and various claims. The Court of Appeal separated the cases into two judgments, addressing the possible liability of Zuru in the decision referred to above. The main decision was issued on the same date, 3 July 2018 (see general register No. 16/20760), but did not concern the application of the Convention.

[7] See UNCITRAL Digest of Case Law on the United Nations Convention on Contracts for the International Sale of Goods, art. 10.

[8] Opinion on this issue is divided in international case law. Some courts take the same position as the Paris Court of Appeal, while others take a contrary view; see UNCITRAL Digest of Case Law on the United Nations Convention on Contracts for the International Sale of Goods, art. 93, Nos. 7 and 8. According to the Digest, the Convention applies to Hong Kong in the absence of a declaration by China; see Digest, No. 8 (see end).

On the basis of the European Regulation of 17 June 2008 on the law applicable to contractual obligations (Rome I), the Court of Appeal found that the law applicable to third-party complaints was the law of Hong Kong. As Splash Toys could not demonstrate that Zuru was liable under the law of Hong Kong, the Court of Appeal dismissed the claim brought by Splash Toys and, accordingly, upheld the judgment of the Paris Court of First Instance.

Case 1828: CISG 8
Denmark: Eastern High Court of Appeal (Østre Landsret)
No. B-424-17, 21st Dept.
A A/S v. Teoplyy dom LRS
27 June 2018
Original in Danish
Published in Ugeskrift for Retsvæsen 2018 p. 3405 et seq.

Abstract prepared by Joseph Lookofsky, national correspondent

In 2011, a Russian buyer (B) concluded a CISG contract for B's purchase of a production line manufactured by a Danish seller (S) and guaranteed to produce a minimum of 1,200 kg of cellulose products per hour. The equally authentic English and Russian language versions of the contract each contained an arbitration clause (see details below).

Following delivery of the production line, B claimed the line could not meet the guaranteed production level, and after unsuccessful attempts to cure, B cancelled the contract, demanding S refund the purchase price (in exchange for B's return of the goods).

When S refused B's demand, B made inquiries regarding the Arbitration Court at the Danish Chamber of Commerce (Dansk Erhverv). Advised that the Danish Chamber did not have its own court of arbitration and that the Danish Institute of Arbitration was the relevant body, B nonetheless commenced arbitration proceedings in the Russian Federation at the International Commercial Arbitration Court at the Chamber of Commerce of the Russian Federation (ICAC). Refusing to participate in these proceedings, S advised B that the dispute should be settled in accordance with the law of arbitration applicable in Denmark.

In 2014 ICAC rendered an award in B's favour of 4.5 million DKK, and B sought recognition and enforcement of that award in Denmark. Resisting enforcement in a Sherriff's Court (Fogedret), S maintained the parties had not agreed to arbitrate in the Russian Federation in a situation such as this. Whereas the Russian language version of the sales contract provided solely for dispute settlement at ICAC, the English version also provided for dispute settlement "by the Arbitration Court at the Chamber of Commerce of the country of the respondent."

The Sherriff's Court (Fogedret) held in favour of B, but S appealed that decision to the Danish Eastern High Court of Appeal (Østre Landsret) which ultimately held in favour of S. The main grounds of this decision to refuse enforcement of the ICAC award were as follows:

1. The contract between the parties contains an arbitration clause. The dispute, which concerns the jurisdiction of ICAC, arose because the arbitration clause in the Russian and English versions of the contract is not the same.

2. The contract between the parties is subject to the 1980 Vienna Sales Convention (CISG), and pursuant to CISG article 8, the arbitration clause must be interpreted, to the extent possible, in accordance with the parties' mutual intent (hensigt).

3. Since neither party understood the other's native language, the contractual negotiations were conducted in English. For this reason, the English version of the contract should be afforded special weight.

4. During the negotiations, the parties intended to reach a compromise on the issue of jurisdiction, under which an arbitral proceeding should be instituted in the domicile of the respondent. Thus, a case brought by S against B would be instituted in the Russian Federation, whereas a case by B against S would be instituted in Denmark. The sentence of the arbitration clause in the English language version, which S during the negotiations had underlined, set in brackets, and labelled "OK", reflects this compromise, and the failure by B to delete the sentence providing for ICAC arbitration for all disputes must represent a mistake by B.

5. In 2010, i.e. prior to conclusion of the parties' sales contract in 2011, the Danish Chamber of Commerce ceased to administer arbitration cases and transferred all of its arbitration activities to the Danish Institute of Arbitration (Voldgiftsinstituttet). In this connection, the court held that B had received sufficient information to initiate its action at that Danish Institute.

6. By commencing a proceeding against S at ICAC, the court held that B had acted in contravention of the parties' arbitration agreement. For this reason, ICAC was not competent to decide the dispute in question, and the ICAC award was not enforceable in Denmark.[9]

Case 1829: CISG 74; 75; 76; 79
Poland: Appellate Court in Katowice
V ACa 204/12
T.K.M.E. GmbH v. P.K. S.A.
26 November 2013
Original in Polish
Published in Polish: http://orzeczenia.ms.gov.pl

The case concerned a dispute between a Polish coke fuel producer and seller and a German buyer. The dispute was already brought before the Polish Supreme Court (compare V CSK 63/08; CLOUT case No. 1306, V CSK 91/11; CLOUT case No. 1302). The factual background of the case is the same.

The parties concluded a contract for the sale of coke fuel in 2003. In 2004 the defendant (seller) refused to perform the contract because of a significant change in the market price. The claimant (buyer) declared the contract avoided with respect to its remaining instalments and sued for damages. The dispute reached the Appellate Court for the fourth time as the previous judgment was reversed by the Supreme Court.

The earlier judgment of the Supreme Court specified that the defendant is liable for foreseeable damages. The Appellate Court in the present case was tasked with the assessment of the quantum of damages taking into account their foreseeability. The Appellate Court appointed an expert to supplement the expert opinion given in earlier judgments on the extent to which a change in the market price could be foreseen.

The Appellate Court, taking into consideration the new expert opinion and the one given previously, recognized that a variety of global economic factors contributed to the unprecedented increase in the price of coke fuel.[10] However, the Appellate Court decided that the liability of the seller could not be exempted under article 79 CISG as the seller had the financial possibility to purchase the coke fuel for delivery to the buyer. The Appellate Court also noted that the parties had not agreed on a hardship clause in the contract or on the possibility to renegotiate the price of the goods in case of significant price change. It further indicated that price fluctuations are possible and should be taken into account in the contract.

The Appellate Court stated that the defendant was only in position to foresee a 20 per cent increase in price and that accordingly it should only be liable for

[9] For further details on this point, see the CLOUT abstract on the same case to be published as a decision applying the UNCITRAL Model Arbitration Law.

[10] In the relevant time period, the price of the coke fuel had increased by over 100 per cent.

20 per cent of the loss to the buyer. To determine the loss, the Appellate Court first calculated the difference between the price fixed in the contract and the market price at the time of avoidance in accordance with article 76 CISG. The Appellate Court then calculated 20 per cent of that amount to determine the foreseeable damage that the defendant was ordered to compensate.

Case 1830: CISG 74; 75; 76; 79
Poland: Supreme Court
V CSK 254/14
T.K.M.E. GmbH v. P.K. S.A.
20 January 2015
Original in Polish
Published in Polish: http://www.sn.pl

The case concerned a dispute between a Polish coke fuel producer and seller and a German buyer. The dispute was already brought before the Polish Supreme Court (compare V CSK 63/08; CLOUT abstract No. 1306, V CSK 91/11; CLOUT abstract No. 1302). The case was subsequently brought before the Appellate Court of Katowice for the assessment of damages (see CLOUT case No. 1829).

Both parties appealed the judgment of the Appellate Court to the Supreme Court. The main ground for appeal was that the Appellate Court did not apply all of the expert's calculations directly, especially those concerning the calculation of the "foreseeable price" of the coke fuel. The expert estimated the foreseeable damage to be 120 per cent of the base market price and determined the amount of the compensation due accordingly. It was argued that the Appellate Court did not consider this calculation as the correct determination of the foreseeable damage but instead assessed on its own the loss.

According to the Supreme Court, the Appellate Court was correct in not applying directly the expert's calculations concerning the "foreseeable damage" as the expert had neither sufficient legal knowledge nor the authority to calculate it. The Appellate Court was also correct in setting the limit of foreseeable damage at 20 per cent of the agreed price based on the calculations presented by the expert. The Supreme Court therefore indicated that the foreseeability test under article 74 CISG is not just a "mathematical" calculation based on gathering and applying empirical data.

The Supreme Court stated that the foreseeability requirement applies regardless of whether the breach of contract is wilful or not. It further stated that an objective foreseeability test is of utmost relevance regardless of the parties' fault. The Supreme Court also explained that the seller was relieved of liability for 80 per cent of the damage claimed by the buyer not because the contract had ceased to be profitable for the seller but rather because, after the contract had been concluded, the market price had increased significantly above the reasonably acceptable limit of contractual risk.

Case relating to the Convention on the Limitation Period in the International Sale of Goods (1980, amended text) (Limitation Convention)

Case 1831: Limitation Convention (1980, amended text): 1; 4; 17; 24
Poland: Court of Appeal in Wrocław
I ACa 397/15
Przedsiębiorstwa Budowlano (...), A. B. Sp. J v. L. H.(...) KG
13 May 2015
Original in Polish
Published in Polish: https://www.saos.org.pl

A contract for the international sale of goods was concluded in 2004. The buyer did not pay the price for the goods, which was due in 2004. The seller became insolvent. In 2006, the bankruptcy receiver filed a suit against the buyer of the goods for payment of the price.

The seller's enterprise became insolvent and was sold as a whole. Thus, the buyer of the enterprise became the assignee of the credit for the unpaid goods. The assignee applied to join the proceedings commenced by the receiver. The buyer of the goods opposed the application. The court declared on 30 April 2009 the cessation of the case on the grounds that the receiver was no longer entitled to represent the enterprise and the buyer of the enterprise had failed to join the proceedings.

The assignee commenced fresh proceedings against the buyer for payment of the price on 9 September 2011. The buyer invoked the expiration of the limitation period. The court of first instance decided that the claim was time-barred. The decision was appealed.

The court of appeal stated that the credit was assigned with the sale of the enterprise (see art. 1(3)(a) Limitation Convention). It therefore dismissed the argument that purchase of the enterprise from the receiver meant that the sale in relation to which the claim arose could fall under the exceptions to the application of the Limitation Convention listed in article 4(c) of the Convention, relating to sales by authority of law.

Secondly, the court of appeal indicated that the Limitation Convention's provisions applied because they were applicable at the time of the conclusion of the contract for sale of goods between the defendant and the original seller.

Moreover, the court indicated that the fact that the buyer pleaded the defence of limitation based on the provisions of the Polish civil law and without reference to the Limitation Convention as the substantive law of the limitation period was sufficient for the purposes of the application of the Convention (see art. 24 Limitation Convention), noting that it was the task of the court to determine the existence and admissibility of that defence.

The court decided that the suit filed by the receiver in 2006 did not have the effect that the limitation period ceased to run, as those legal proceedings ended without a decision binding on the merits of the claim (art. 17 Limitation Convention). It noted that the assignee had failed to join those proceedings and was not a party to it in any phase, and that it had also failed to start new proceedings within one year after discontinuation of the first proceedings as provided for in art. 17(2) Limitation Convention.

Accordingly, the court of appeal upheld the decision of the court of first instance that declared the claim time-barred.

Case relating to the United Nations Convention on the Use of Electronic Communications in International Contracts (2005) (ECC)

Case 1832: ECC 9(3)
Australia: Supreme Court of Western Australia
No. CIV 1108 of 2015
Claremont 24-7 Pty Ltd v. Invox Pty Ltd (No. 2)
17 June 2015
Published in English: [2015] WASC 220
Available online: http://www.austlii.edu.au

Plaintiff started negotiations for the lease of commercial premises with defendant and the managing agent of defendant. The parties exchanged a number of communications in oral, written and electronic form, including an offer to lease. In particular, defendant sent its managing agent an email, copied to plaintiff, attaching an offer to lease that had been received from plaintiff and stating that the terms in the offer were "acceptable to both parties".

Before the court, defendant argued, among other things, that the lease agreement was unenforceable because defendant had not signed the offer to lease, and therefore that the agreement did not comply with section 4 of the Statute of Frauds 1677 of England (Statute of Frauds), as applied in Western Australia and amended by the Law Reform

(Statute of Frauds) Act 1962 of Western Australia and/or section 34 of the Property Law Act 1969 of Western Australia.

In response, plaintiff indicated that the email from defendant to the managing agent, copied to plaintiff, was signed by defendant at law by virtue of section 10 of the Electronic Transactions Act 2011 of Western Australia.

Section 10 of the Electronic Transactions Act 2011 is an enactment of the rule in article 9(3) Electronic Communications Convention. Like other electronic transactions legislation enacting this rule in Australia, section 10(1)(c) of the Electronic Transactions Act 2011 explicitly requires the person to whom the signature is given to consent to the method used to identify the person and to indicate the person's intention in respect of the information communicated.

In his consideration of the argument of defendant, the judge started by finding that section 4 of Statute of Frauds (as applied and amended) and section 34 of the Property Law Act 1969 were both laws that provided consequences for the absence of a signature and were thus laws that "required" a signature for the purposes of section 10 of the Electronic Transactions Act 2011 (referring to section 10(3) of that Act). The judge then found that the signature block of the director of defendant in the email under the word "sincerely" identified him and indicated his intention in respect of the information communicated (in that case, the intention to adopt the information in the email). The judge was also satisfied that the method used to sign was as reliable as appropriate for the purpose for which the email was communicated in light of all the circumstances. As for the additional requirement in section 10(1)(c) of the Act, the judge found that the practice between the parties of adopting email as the method of communication was evidence that plaintiff had consented to the use of the email as a method to meet the signature requirement.

Ultimately, the judge rejected the argument of defendant that the agreement was unenforceable, and decided that plaintiff and defendant had concluded a binding lease agreement.

Case relating to the UNCITRAL Model Law on Electronic Signatures (2001) (MLES)

Case 1833: MLES 2(a)

United States of America: Texas: Court of Appeals, 1st Dist.
No. 01-16-00006-CV
Khoury v. Tomlinson
30 March 2017
Published in English: 518 S.W.3d 568 (2017)

An investor and a president of a company entered into an oral agreement relating to the repayment of money invested in the company. One week after the conclusion of the agreement, the investor sent an email to the president listing the terms of their agreement and requesting confirmation of those terms. The president replied with an email writing "We are in agreement". The name of the president did not appear in the body of that email, but it appeared in the "from" field.

As the repayments were not made, the investor sued the president of the company for violations of the Securities Act, common law fraud and breach of contract due to the failure to repay the loan pursuant to the terms of the e-mail exchange between the parties.

The first instance decision was partially favourable to the president of the company. The investor appealed.

The Statute of Frauds, enacted in the Business and Commerce Code of Texas, requires a promise to answer for a debt to be signed by the debtor in order to be enforceable. The Court of Appeal had to decide whether the name or email address in the "from" field constitutes a signature for purposes of the Statute of Frauds.

The Court identified the Texas Uniform Electronic Transactions Act, which is an enactment of the Uniform Electronic Transactions Act ("UETA"), as the law applicable to the case. UETA is a piece of uniform legislation influenced by the UNCITRAL Model Law on Electronic Commerce ("MLEC") and the principles on which it is based.

The Court made reference to the general principle of non-discrimination against the use of electronic means contained in the Texas UETA (§ 322.007(a) of the Business and Commerce Code of Texas, similar to art. 5 MLEC). The Court also made reference to the definition of electronic signature as "an electronic sound, symbol, or process attached to or logically associated with a record and executed or adopted by a person with the intent to sign the record" (§ 322.002(8) of the Business and Commerce Code of Texas; compare art. 2(a) MLES).

The court explained that a name or email address in a "from" field is a symbol logically associated with the email. Moreover, the Court noted that emails were a common and legitimate practice for exchanging commercial documents, including settlements. It concluded that a "from" field performed the same authenticating function as a signature block in an email and that both signature methods satisfied the requirement of a signature under the Texas UETA.

After additional consideration of the fact that, by sending the email with the "from" field, the sender intended to authenticate the email, the Court concluded that the evidence was sufficient to establish that the president of the company had signed the email and that the signed email satisfied the Statute of Frauds.