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CASE LAW ON UNCITRAL TEXTS
(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 at: 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 Law on International Commercial Arbitration include keyword references which are consistent with those contained in the Thesaurus on the Model Law, 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, by individual contributors, or 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.

Printed in Austria

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

Case 2046: CISG 1(1)(a); 35(1); 35(2); 45(1); 50; 51(1); 74
Australia: Supreme Court of Western Australia
CIV 1647 of 1998 & CIV 1423 of 2000
Ginza Pte Ltd v. Vista Corporation Pty Ltd
17 January 2003
Published in: [2003] WASC 11
Available at: https://www.austlii.edu.au/cgi-bin/viewdoc/au/cases/wa/WASC/2003/11.html

Abstract prepared by Lisa Spagnolo, National Correspondent

The case involved a Singaporean company Ginza and an Australian defendant Vista with a second, consolidated proceeding between Ginza and an Australian claimant Kontack. Ginza sought the price from Vista, while Kontack claimed (and Vista counter-claimed) for damages in contract and tort. Both Kontack and Vista argued contact lens solutions were supplied in breach of express contractual terms that they would be sterile and meet Australian Therapeutic Goods Administration (TGA) requirements, and in breach of implied terms of merchantable quality and fitness for purpose.

Ginza denied breach of contract, but asserted that if any contractual liability arose, it did so pursuant only to the CISG rather than the domestic *Sale of Goods Act 1895 (WA)*, and that the CISG limited Ginza's liability. The Court agreed that the CISG applied to the exclusion of the domestic *Sale of Goods Act*, since the CISG was given force of law within Western Australia by the *Sale of Goods (Vienna Convention) Act 1986 (WA)* section 5 and prevailed over any other law in force to the extent of any inconsistency.

The Court found the CISG applicable to the contract between Ginza and Vista since article 1(1)(a) CISG was satisfied given this was a contract of sale of goods between parties whose places of business are in different CISG Contracting States. In the current case, the implementing legislation was interpreted to give effect to the legislative intention that the CISG applied exclusively to matters within its scope and therefore displaced domestic law dealing with matters that were dealt with by the CISG. This interpretation of the implementing legislation differs from that of *Playcorp Pty Ltd v Taiyo Kogyo Ltd* [2003] VSC 108 and *Attorney General of Botswana v Aussie Diamond Products Pty Ltd (No 3)*.[1]

The Court considered article 35(1) CISG, pointing out that it required delivery of goods of the quantity, quality and description required by the contract and which are packaged as required by the contract. It noted this was similar to *Sale of Goods Act* section 14. The Court set out articles 35(2) and 45(1) CISG. The Court set forth the test for damages within article 74 CISG, and the remedy of proportional price reduction in article 50 CISG, the latter proportion being calculated on the value of goods delivered as opposed to the value of conforming goods at time of delivery. It noted that article 51(1) CISG permitted price reduction for conforming but partial delivery. The Court also noted that buyers could claim both price reduction and damages under article 45(2) CISG.

The Court found that Ginza was aware it was required to meet TGA standards, had assisted in providing product information to the TGA, and understood the regulatory system including manufacturing audit requirements. TGA sample tests in 1997 showed sterility failure and bacterial contamination. Subsequently, TGA manufacturing plant audit requirements were not satisfied, and product recalls were issued. It was found that the express term requiring TGA compliance had been breached.

[1] Reported in CLOUT, see Case No. 1135.

On the express term requiring sterility, the Court grappled with the fact that not every solution bottle, or indeed every batch had been tested. Rather than CISG cases, the Court referred to English case law about sufficiency of sample testing for contamination and determined that sample sizes were sufficient to conclude that all solution recalled was not sterile. The Court also held that the CISG implied terms requiring fitness for purpose, although it did not expressly reach any conclusion about whether article 35(2) CISG had been breached. Nonetheless it found Vista was entitled to damages for breach of express contractual terms.

The Court rejected Ginza's argument that articles 50 and 51(1) CISG only entitled Vista to reduce the price on batches that had been sampled. The Court stated that article 50 CISG provides for price reduction where goods do not conform. As it had found that none of the goods were conforming, the price should be reduced to zero. Thus, Ginza's claim for the price was rejected.

The Court concluded that no contract had ever been formed between Ginza and Kontack but arrived at that conclusion without reference to the CISG. It concluded that Ginza was still liable to Kontack in tort.

The Court held that damages for Vista would be the same quantum whether measured by the test in article 74 CISG or in tort. It held all heads of damages claimed by Vista ought to have been foreseen by Ginza at the time of the contract and awarded Vista AUD 307,998 for: (1) price of recalled goods; (2) lost profit margin on resale of goods to retailers; and (3) direct costs of recall; but nil for (4) lost reputation, goodwill and future sales, given lack of evidence. In tort, Kontack was awarded AUD 140,155 for losses in relation to heads (1) and (2).

Case 2047: CISG 14; 18; 19; 23; 24
Australia: Supreme Court of Victoria
No. 3576 of 2010 (on appeal from S CI 2010 3576)
Castel Electronics Pty Ltd v. TCL Airconditioner (Zhongshan) Co Ltd
7 March 2013
Published in: [2013] VSC 92 (7 March 2013) (on appeal from [2012] VSC 548 (17 December 2012))
Available at: http://www.austlii.edu.au/cgi-bin/viewdoc/au/cases/vic/VSC/2013/92.html

Abstract prepared by Lisa Spagnolo, National Correspondent

This case involved an application to set aside service of court documents in a foreign jurisdiction.

An Australian buyer and a Chinese seller concluded a contract of sale of air-conditioning products manufactured by the seller. The buyer had served court documents claiming breach of contract by the seller for failure to ship goods at agreed times and for supplying goods that did not conform to the contract. Fundamental to addressing the question at stake was the determination of the place where the contract was formed. The seller argued that the contracts were formed in China, whereas the buyer argued they were formed in the Australian state of Victoria.

The Court held that, since no choice of law clause was agreed by parties, the law governing the contracts should be determined by considering the system of law with which the contracts have the closest connection, and it was strongly arguable that this was the law of Victoria.

It was not disputed that the CISG applied to the contracts because the sales contracts were between parties whose respective places of business were in States party to the Convention and the parties to the contract did not opt out of the Convention.

The Court held that orders were settled between the parties before invoices were issued in respect of model, quantity, and cost. It therefore concluded that the orders constituted offers pursuant to article 14(1) CISG and the issuing of the pro forma invoices constituted acceptances pursuant to articles 18, 23 and 24 CISG. In arriving

at this decision, the Court quoted at length from these provisions of the CISG. It contemplated whether the orders were "sufficiently definite" about key aspects of the orders. It also concluded that there was a strong arguable case the invoices were not counteroffers. As a result, the Court held that there was a strong arguable case that the contracts were made in Victoria.

Case 2048: CISG 64
Italy: Corte di Cassazione, Sezione II Civile
Case No. 21834/2020
Valente S.r.l. v. Impulscommerce D.O.O.
14 February 2020
Original in Italian

A company with place of business in Italy (seller) concluded a contract for the sale of vineyard posts with a company with place of business in Croatia (buyer). Under the terms of the contract, the posts were to be delivered in three instalments, and payment was to take place before each instalment. The seller agreed to provide a bank guarantee (namely, an advance payment bond) against the receipt of each payment. The contract made explicit reference to the application of the CISG.

Despite delivery, the seller did not receive payment for the first instalment. The seller sent a notice to the buyer requesting payment of the price within a certain period of time. As no payment was received by the due date, the seller declared the contract avoided and sued the buyer for recovery of the outstanding sum and compensation for damages. The buyer responded by arguing that the seller had breached the contract by not providing the bank guarantee in a timely manner and that the delivered posts did not conform with the contract.

The court of first instance confirmed that the contract had been correctly declared avoided for fundamental breach, entered judgment in favour of the seller, and ordered the buyer to pay a sum of money in damages.

The buyer appealed the decision, which was reversed by the Court of Appeal. In particular, the Court of Appeal found that the seller sent the notice requesting payment before providing the bank guarantee, and therefore that the request could not be used as grounds for declaring the contract avoided.

The seller appealed the decision of the Court of Appeal before the Court of Cassation arguing that, while the Court of Appeal had qualified the failure to pay as a serious and permanent breach of contract, it did not draw the conclusion that the contract had been correctly declared avoided.

The Court of Cassation explained that non-payment was a fundamental breach of the contract and that therefore the seller, after having fixed an additional period for payment according to article 63 CISG, was entitled to declare the contract avoided according to article 64 CISG. It added that, the seller having declared the contract avoided in accordance with article 26 CISG, the Court of Appeal should have upheld the declaration of avoidance. Accordingly, the Court of Cassation referred the case back to the Court of Appeal for decision on the merits.

Case 2049: CISG 35(2)
Italy: Corte di Cassazione, Sezione II Civile
Case No. 36144/2022
Salzgitter Flachstahl GmBH v. Riveco Generalsider S.p.A.
13 July 2022
Original in Italian

A company with place of business in Germany (seller) and a company with place of business in Italy (buyer) concluded a contract for the sale of steel. The seller sued the buyer for non-payment of two invoices. The buyer responded by alleging that the seller had previously delivered non-conform steel, which had been paid for in full,

and that the debt to the seller should be offset against the debt to the buyer for damages arising from the processing of the non-conform steel.

The court of first instance agreed to offset part of the debt owed by the buyer, while finding no non-conformity with the steel. In particular, the court noted that the steel had a percentage of silicon lower than average, but that issues with its processing arose only when the buyer changed the size and thickness of the pipes that it produced with the steel without informing the seller.

The buyer appealed the decision. Acknowledging that the CISG applied, the Court of Appeal recalled that, according to article 35(2)(a) CISG, the goods should be "fit for the purposes for which goods of the same description would ordinarily be used" and that the peculiar composition of the steel, although not in itself making the steel defective, prevented its use for purposes for which it would ordinarily be used. As a result, the Court of Appeal significantly increased the offset amount.

The seller appealed the decision of the Court of Appeal before the Court of Cassation. The seller argued that article 35(2)(a) CISG applied only in the absence of an agreement of the parties, and that the parties had agreed in the contract that the quantity of silicon contained in the steel should not exceed a specified maximum percentage, without indicating a minimum percentage. The parties therefore agreed that the steel with a lower percentage of silicon was conform to the contract.

The Court of Cassation, citing precedents (CLOUT Case No. 867), explained that article 35(2)(a) CISG applied only in the absence of an agreement of the parties, and found that the parties had agreed on a maximum percentage of silicon to be contained in the steel. The Court of Cassation found, however, that the parties did not agree on a minimum percentage of silicon to be contained in the steel, and that the lower-than-average percentage of silicon in the steel delivered under the contract made it unfit for further processing according to ordinary use. It therefore concluded that the parties were bound by article 35(2)(a) CISG unless they agreed otherwise and referred to the UNCITRAL Digest of Case Law on the CISG (2016 ed., p. 141) as supporting this conclusion. Accordingly, the Court of Cassation upheld the decision of the Court of Appeal.

Case 2050: CISG 25; 53; 63(1); 64; 81
New Zealand: High Court – Auckland Registry
National Plant and Equipment Pty Ltd v. P Mundy Heavy Equipment Ltd
3 June 2017
Original in English
Published in: [2020] NZHC 1201

Abstract prepared by Petra Butler, National Correspondent

National Plant and Equipment Pty Ltd (National Plant) is an Australian company that provides heavy earthmoving equipment for mining and civil construction businesses. Mundy Heavy Equipment is a New Zealand company that sources heavy equipment for prospective purchasers around the world. U&M is a Brazilian mining company, which in 2019 had six surplus dump trucks it wished to sell. U&M asked Mundy Heavy Equipment to obtain purchasers for the dump trucks. National Plant was one of the potential purchasers and negotiated via email and telephone toward an agreement with Mundy Heavy Equipment. In September 2019, National Plant sent Mundy Heavy Equipment a purchase order for the trucks for USD 13.2m. Ten per cent of the sum was payable immediately, and National Plant did not make immediate payment. U&M had other interested purchasers, and on 25 September told National Plant it would offer the trucks to others. When National Plant acquired finance, it paid the USD 1.32m, to Mundy Heavy Equipment to pay to U&M. In the meantime, U&M had sold the trucks to another purchaser. National Plant asked Mundy Heavy Equipment to repay the USD 1.32m. Mundy Heavy Equipment did not do so and used the funds to clear overdrafts and pay other expenses.

National Plant alleged that the USD 1.32m was recoverable in restitution or by virtue of a dishonest breach of trust by Mr. Mundy. The claim rested on whether its agreement to buy the dump trucks was terminated by U&M on 25 September 2019. The agreement was between a Brazilian seller and a Queensland buyer. The Court held that since both Australia and Brazil were parties to the CISG, the CISG would apply.

The Court stated that under article 53 CISG, the buyer must pay the price of the goods and take delivery of them as required by the contract and the convention. Article 64 CISG gives the seller the right to avoid the contract when (a) if the buyer's failure to perform its obligations amounts to a fundamental breach of contract or (b) if the buyer does not within the time extended under article 63(1) CISG pay the price or take delivery or declare that he will do so within the extended time. "Fundamental breach" is defined in article 25 CISG as one that "results in such detriment to the other party as substantially to deprive him of what he is entitled to expect under the contract…".

The Court held that National Plant breached the agreement when it did not pay 10 per cent of the price immediately, but that mere delay did not amount to a fundamental breach under article 25 CISG. Instead, it held that the alternative ground under article 64(1)(b) CISG was available, and when National Plant failed to meet the payment deadline, U&M was entitled to avoid the contract. Ultimately, it was held that Mundy Heavy equipment was required to repay the USD 1.32m when National Plant requested it.

Case relating to the United Nations Convention on Contracts for the International Sale of Goods (CISG), the Model Law on International Commercial Arbitration (MAL) and the "New York Convention" (NYC)

Case 2051: CISG 4(1); 8(2); 19(3); 81(1); MAL 8(1); NYC: II(2); V(1)(a); VII(1)
Germany: Bundesgerichtshofs
Case No. I ZR 245/19
German Buyer v. Dutch Seller of Spice
26 November 2020
Original: German
Available at: https://juris.bundesgerichtshof.de/

Published in German in: BeckRS 2020, 35147; RdTW 2021, 61; SchiedsVZ 2021, 97 with note *Masser/Harraschain*

Abstract prepared by Stefan Kröll, National Correspondent

[**keywords:** *arbitration agreement, formal validity, conclusion of arbitration agreement, applicability of CISG to arbitration agreement*]

This case deals primarily with the form requirements for the conclusion of an arbitration agreement and the application of the CISG to arbitration clauses contained in sales contracts governed by the CISG.

The dispute arose out of a contract for the delivery of mace flower between a seller from the Netherlands and a buyer from Germany. The buyer had placed orders with the seller on three separate occasions between April and June 2012. The commercial terms of all three contracts had been negotiated orally. These oral agreements were then for every order confirmed by the seller with a document entitled Sales Contract ("Verkaufskontrakt"). The confirmation letters – all identical in the parts relevant for the case – referred in the line defining the contractual terms ("Kontrakbedingungen") to the terms of the Nederlandse Vereniging voor de Specerijhandel (Netherlands Spice Trade Association; hereinafter "NVS-conditions") which in turn contained in article 16 an arbitration clause providing for arbitration proceedings under the Arbitrage Reglement (Arbitration Rules) of the Nederlandse Vereniging voor de Specerijhandel in Amsterdam. Pursuant to articles 17 and 18 of the NVS-conditions the contract was to be governed by Dutch law excluding the CISG. In addition, the footer of the letters provided that all sales and contracts are governed by the seller's general terms which included a forum selection clause in favour of the courts at the

seller's place of business. The confirmation letters were signed by the seller and contained a line for the signature of the buyer. The buyer had, however, only signed the last confirmation letter and returned it to the seller.

After it had turned out that the mace flower delivered under the first or second order had been contaminated with gluten, resulting in the payment of damages from the buyer to its customers, the buyer's insurer wanted to recover that amount from the seller.

When the insurer started the action in the German courts, the seller initially did not react, and a default judgment was rendered. After an objection by the seller, the first instance court in the ensuing proceedings denied jurisdiction if the parties had validly included the arbitration clause in the NVS-conditions into the contract.

The second instance reversed the decision[2] and assumed jurisdiction, finding that the parties never entered into a valid arbitration agreement. The Supreme Court rejected the challenge against the decision.

The Supreme Court held that while the objection to the court's jurisdiction had been raised in time, it was not justified as the parties had not validly included the arbitration agreement into their contract.

Concerning the timeliness of the objection the court confirmed its previous jurisprudence that in light of the clear wording of section 1032(1) ZPO (Civil Procedure Code),[3] it is sufficient that the objection of an existing arbitration agreement is raised at the outset of the oral hearing. Earlier time limits set by the court are not relevant.

The arbitration agreement, however, did neither comply with the form requirements of article II(2) NYC nor with those of either the more lenient German arbitration law contained in the ZPO, or the law determined by the German conflict of laws rules.

There was neither a signed contract nor an exchange of documents containing the arbitration clause as required by article II(2) NYC. The Supreme Court confirmed its consistent case law that article VII(1) NYC also applies at the referral stage of article II NYC requiring it to look not only the substantive German arbitration law but also at the form requirements of other laws determined by the German conflict of law's provisions.

In relation to the form requirements under the German arbitration law, the Supreme Court held that while the seller's reply constituted a confirmation letter in the sense of section 1031(2) ZPO the reference to the NVS-condition contained therein did not fulfil the requirements to be regarded as part of the contract in the sense of section 1031(3) ZPO.

The requirements to validly include the NVG-conditions into the contract and thus make the arbitration clause in their article 16 part of the contract are determined by German law. The Supreme Court, discussing various views,[4] held that in the context of a sales contract governed by the CISG the German law determining this issue of incorporation also includes the CISG. While there are special rules concerning the form of such clauses in national arbitration laws, the provisions on contract conclusion, i.e., articles 14–24 CISG, would be applicable to arbitration clauses at least in those cases where no other rules on contract formation are contained in international instruments. According to the Supreme Court that can be deduced, first, from articles 19(3) and 81(1) second sentence CISG, which show that article 4(1) CISG cannot be considered to exclude arbitration clauses from the scope of application of the CISG. Second, arbitration clauses must be part of the common will

[2] Higher Regional Court Bremen (Oberlandesgericht Bremen) 8.2.2019 – 2 U 37/17, BeckRS 2019, 51634.

[3] Section 1032(1) ZPO enacts article 8 MAL but sets a different deadline for the respondent to raise the objection.

[4] See for example, Higher Regional Court of Frankfurt am Main (Oberlandesgericht Frankfurt am Main) 28.9.2020 – 26 SchH 3/20 at III 4.

of both parties to enter into a contract. The separability of the arbitration agreement, which is recognized in article 81(1) CISG, is, according to the Supreme Court not an obstacle to such view. That the arbitration *may* be submitted to a different law does not mean that it *has to* be submitted to such a law. The Supreme Court furthermore distinguished the case from an earlier decision concerning a choice of forum clause falling within the scope of the Brussels I Regulation[5] by the fact that the latter also contained provisions relating to the conclusion of such clauses which prevailed over the provisions of the CISG. Regarding the fulfilment of the form requirement of section 1031(3) ZPO, the Supreme Court considered it irrelevant that the parties to the contract wanted to exclude the CISG in the NVG-conditions.

The Supreme Court held that under articles 8, 14, 18 CISG, the NVS-conditions were not validly included into the contract. As the CISG does not contain special rules relating to the inclusion of general conditions, it has to be determined under article 8 CISG whether the parties intended the general conditions to become part of the contract. As there was no special practice between the parties or a usage, the various declarations had to be interpreted according to article 8(2) CISG. The Court held that a "reasonable person of the same kind as the other party" would not have understood the offer in a way that the NVS-conditions were part of the offer as they were not transmitted or were made otherwise available. According to the Supreme Court, the understanding in international transactions differs from that in purely domestic transactions where the general conditions to be included are often known. In the latter situation good faith would require the other party to ask specifically for the general conditions.

The arbitration clause in the NVS-conditions also did not comply with the form requirements of the law governing the arbitration agreement, i.e., Dutch law, which was a relevant law according to article 11(2) of the Introductory Act to the Civil Code (Einführungsgesetz zum Bürgerlichen Gesetzbuch, EGBGB), i.e., the German conflict of laws rule relating to form requirements for contracts.

The Supreme Court held that the law governing the arbitration agreement is determined according to article V(1)(a) NYC. In the absence of any other directly applicable conflict of laws rule determining the law applicable to the arbitration agreement at the referral stage, the Supreme Court considered article V(1)(a) NYC to be applicable by analogy. Notwithstanding that it regulates directly only the law applicable to the arbitration agreement in recognition and enforcement proceedings, the Court was of the view that applying a different conflict rule at the referral stage entails the danger of conflicting decisions.

Applying article V(1)(a) NYC, the Supreme Court considered Dutch law including the CISG to be the law governing the conclusion and validity of the arbitration agreement. The Court explicitly left unanswered whether the choice of law for the main contract in articles 17 and 18 of the NVS-conditions extended to the arbitration agreement as those provisions had not become part of the contract. The requirements for the inclusion of the NVS-conditions under the CISG were not met. Whether general conditions which lead to an exclusion of the CISG are validly included into a contract governed by the CISG is determined by the CISG.

In the absence of a choice by the parties, Dutch law as the law of the place of arbitration became applicable. To what extent the form requirements of Dutch law were complied with was left open as the arbitration clause had not been validly included into the contract.

[5] German Supreme Court 25.3.2015 – VIII ZR 125/14, NJW 2015, 2584 para. 56.

Cases relating to the UNCITRAL Model Law on Electronic Commerce (MLEC)

Case 2052: MLEC 1; 9(1)(a)
Grenada: Eastern Caribbean Supreme Court in the Court of Appeal
Case No. GDAHCVAP2015/0035
B.B. Inc v. Lewis Hamilton
7 April 2017
Original in English
Published in [2017] ECSC J0407-2
Available at: https://www.eccourts.org/b-b-inc-v-lewis-hamilton-2/

Abstract prepared by Tira Greene

In a contract for the sale of land, the claimant, owning land in Grenada, agreed to sell subdivided lots of its property for the construction of villas to the defendant. The claimant stated that it had entered into an agreement for purchase by a series of emails exchanged with the defendant and that the defendant breached the agreement and was liable to pay damages for the breach.

In the first instance proceedings,[6] the defendant argued that it was not in breach of contract as it had not entered into any agreement as defined by the provisions of section 4 of the Real and Personal Property (Special Provisions) Act, Cap 273 ("Act"). Conversely, the claimant relied on the provisions of the Electronic Evidence Act, Act No. 13 of 2013 ("EEA"), arguing that there was a concluded agreement between the parties evidenced by emails. Section 5 of the EEA corresponds to article 9(1)(a) MLEC.

The two issues for consideration before the High Court were (1) whether an electronic signature contained in an email satisfied the requirement in section 4 of the Act that a contract be "signed", and (2) whether the documents relied on by the claimant contained all the essential terms of the contract.

In deciding the first issue, the High Court determined that the word "signed" was not defined in the Act, nor was it contemplated by the legislature in its drafting of the Act to include electronic signatures.

The High Court noted that the issue was not the position at common law with regard to electronic signatures and their efficacy for conclusion of contracts, but rather what could be considered as proof of a contract for the sale of land. It acknowledged that Grenada enacted legislation on electronic signatures by way of the Electronic Transactions, Act No. 21 of 2013 ("ETA"), which is an enactment of the MLEC, and the EEA. The High Court also noted that according to its section 4 the ETA did not apply to "any written law requiring writing, signatures or original documents for […] – (b) the conveyance of real or personal property or the transfer of any interest in real or personal property." It concluded that the ETA therefore did not bring electronic signatures within the meaning of "signed" as used in section 4 of the Act and that section 4 of the Act set out specific requirements for bringing claims for contracts related to the sale of lands.

As a result, the High Court determined that the claimant did not have a real prospect of succeeding on the claim because it relied solely on email correspondence that was not "signed". The High Court therefore granted summary judgment on that basis.

The claimant filed an appeal before the Grenada Court of Appeal. The Court of Appeal reviewed both issues under consideration for summary judgment and in doing so found that the lower court erred in applying a very restricted approach and literal interpretation of the word "signed".

[6] Grenada, Eastern Caribbean Supreme Court in the High Court of Justice, *B.B Inc v. Lewis Hamilton*, Claim No. GDAHCV2014/0451 delivered on 30 November 2015, available at https://www.eccourts.org/b-b-inc-v-lewis-hamilton/.

The Court of Appeal stated that, while section 4 ETA expressly excludes from its application any law which requires writing, signatures or original documents for conveyance or transfer of an interest in real or personal property, the effect of that provision was not that electronic documents could not satisfy the requirements of section 4 of the Act as the ETA did not prohibit electronic documents and signatures from being a "writing" or "signature" within the meaning of section 4 of the Act. The Court of Appeal explained that the effect of the ETA was that, in relation to the use of electronic transactions when conveyancing and transferring any interest in real or personal property, the well-established rules of statutory interpretation would apply. It added that such conclusion was supported by the broad definition of "writing" in the Interpretation Act, Cap 153, and that it would fulfil the goal pursued by section 4 of the Act, i.e., the prevention of fraud. It also noted that such conclusion was in line with case law from Singapore,[7] a jurisdiction whose legislation in the relevant part was in the same terms as that of Grenada.

The Court of Appeal, however, argued that summary judgment should have been granted on the second issue under review. It in fact found that the emails exchanged between parties showed that negotiations were ongoing and, as such, did not represent a binding contract as defined in section 4 of the Act. On that basis, the Court of Appeal dismissed the appeal.

Case 2053: MLEC 15(2)
New Zealand: High Court – Auckland Registry
Case no: CIV-2021-404-979
Dempsey Wood Civil Ltd v. Concrete Structures (NZ) Ltd
17 February 2022
Original in English
Published in: [2022] NZHC 168

Abstract prepared by Petra Butler, National Correspondent

Dempsey Wood Civil Limited (Dempsey Wood) was a civil works contractor and engaged Concrete Structures Limited as a subcontractor on a project to construct a bridge in Auckland. This decision involved a substantial dispute as to whether the amount set out in the demand was owing.

The first eight progress payment claims were sent by Concrete Structures to the email of Dempsey Wood's accounts department each month from February to October 2020. The ninth payment claim for $1,954,853 was sent only to one of the project manager's accounts, that of Mr Dale Pickard, on 29 January 2021. Mr Pickard did not see the email until 1 April 2021. Subsequently, Mr Pickard issued a payment schedule certifying that payment of only $135,599 to Concrete Structures. Concrete Structures sued Dempsey Wood for payment of the remainder of the amount in reliance on section 23 of the Construction Contracts Act 2002. Dempsey Wood applied for the statutory demand to be set aside on the basis that the ninth payment claim was not served in accordance with the contract and the Construction Contracts Act. To be successful in its application, Dempsey Wood needed only to establish it was reasonably arguable that there was no debt owing.

The Court held that there was a reasonable argument that the payment claim could not be deemed to be received until it came to the attention of Mr Pickard on 1 April 2021. Accordingly, the provision of the payment schedule on 7 April 2021 was held to have been made in time. The Court relied on regulation 9(3) of the Construction Contracts Regulations, which specified that a notice sent by electronic communication would be deemed to be received where it has entered a designated information system. In any other case, regulation (3)(b) specified that the communication would be regarded as received when it comes to the attention of the addressee.

[7] *Joseph Mathew and Another v. Singh Chiranjeev and Another*, [2009] SGCA 51.

The Court noted that the wording of regulation 9(3) was similar to that within section 214 of the Contract and Commercial Law Act, which repeated the language of section 11 of the Electronic Transactions Act 2002. The Court stated that section 11 of the Electronic Transactions Act was based on article 15(2) MLEC, which provides that "designated information systems" are those expressly designated by a party. Referring to paragraph 102 of the Guide to Enactment of the Model Law, the Court stated that the wording of article 15(2) MLEC supported an argument that where consent to service is inferred it may not amount to the designation of an information system.

Accordingly, the Court held it was reasonably arguable that the email address of Dempsey Wood's accounts department was the designated information system consented to, not that of Mr Pickard. Service was held to have only been affected when the email came to Mr Pickard's attention, and since the payment schedule was issued in time, no statutory demand ought to have been served pursuant to section 23 of the Construction Contracts Act. The statutory demand was therefore set aside.

Cases relating to the UNCITRAL Model Law on Electronic Commerce (MLEC) and the UNCITRAL Model Law on Electronic Signatures (MLES)

Case 2054: MLEC 9(1)(a); MLES 3
Italy: Tribunale di Milano – Quinta Sezione
Case No. 11402/2016
Graficad S.a.s. in Liq. v. Marcello Salvadori
16 October 2016

Original in Italian

The parties concluded an oral contract for the provision of design and computer services. The service provider ("creditor") was not paid, as evidenced in invoices, and eventually obtained an injunction for recovery of the outstanding debt. The client company ("debtor") objected to the injunction.

Among other evidence relating to the contract, the creditor produced an email sent to the debtor requesting the payment of invoices and an email response from a partner of the client company acknowledging the debt. The debtor argued that the emails could not be used in evidence as they were not signed with a qualified electronic signature as required by the eIDAS Regulation.[8]

The judge noted that article 25 of the eIDAS Regulation, which corresponds to article 3 MLES, provides that "[a]n electronic signature shall not be denied legal effect and admissibility as evidence in legal proceedings solely on the grounds that it is in an electronic form or that it does not meet the requirements for qualified electronic signatures." He also noted that article 46 of the eIDAS Regulation, which corresponds to article 9(1)(a) MLEC, states that "[a]n electronic document shall not be denied legal effect and admissibility as evidence in legal proceedings solely on the grounds that it is in electronic form."

The judge indicated that, while there was no assurance of integrity of the emails, there was also no specific allegation that their content may have been altered, and that their content had been confirmed by witness evidence.

On that basis, the judge concluded that the emails could be used in evidence. On the merits, the judge upheld the injunction.

[8] Regulation (EU) No 910/2014 of the European Parliament and of the Council of 23 July 2014 on electronic identification and trust services for electronic transactions in the internal market and repealing Directive 1999/93/EC, OJ L 257, 28.8.2014, p. 73–114.