Case 1980: CISG 2(b); 2(c); 4(a); 6

Switzerland: Bundesgericht (Federal Supreme Court)
No. 4A_543/2018
28 May 2019
Original in German
Published: BGE 145 III 383–391; Internationales Handelsrecht (2019), 236–244; Swiss Federal Supreme Court database (www.bger.ch)
Available at: CISG-online database (www.cisg-online.org), case No. 4463

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The buyer is a Swiss State-owned entity incorporated under Swiss public law. In 2003, it conducted a public tender process calling 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 A) that soon began to deliver electricity meters. Seller A subsequently established a subsidiary in Switzerland (seller B) that was involved in the later deliveries of electricity meters. It remained a point of dispute whether, under the later sales contracts with the buyer, seller B was the only seller, whether seller A and seller B were jointly involved as sellers or whether seller B 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 A and seller B 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 article 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 (article 24(1) No. 4 Swiss Code of Obligations) because it had been in error about the electricity meters' quality when concluding the contract.[2] Upon the sellers' appeal, the Court of Appeal Basel-Stadt reversed the judgment in a carefully reasoned decision and dismissed the claim.[3] 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 the CISG. In doing so,

[2] Zivilgericht Basel-Stadt, 26 October 2016 – K5.2015.2, CISG-online case No. 3904.
[3] Appellationsgericht des Kantons Basel-Stadt, 24 August 2018 – ZB.2017.20 (AG.2018.557), CISG-online case No. 3906 = Internationales Handelsrecht (2019), 101–116 = Schweizerische Juristen-Zeitung (2019), 158–160. Commented on by Schroeter, Internationales Handelsrecht (2019), 133–136.

the Supreme Court stressed the importance of aiming for an internationally uniform interpretation of the Convention in accordance with article 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 7 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 A) has his place of business in a different State than the opposing party (here: the Swiss buyer) as required by article 1(1) CISG, because 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 article 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 article 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 article 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 (article 6 CISG). 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 the 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 article 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 articles 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 article 39 CISG, as well as the "fundamental breach" threshold under article 49(1)(a) CISG – could be circumvented, thus threatening the international uniformity of the Convention's application. Citing article 7(1) CISG, the Swiss Supreme Court thereby adopted an interpretation under the 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 such as the contracting partner's identity.