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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, all Internet addresses contained in this document were functional as of the date of submission of this document, but websites do change frequently). 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.

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Printed in Austria

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

Case 1904; CISG 1(1)(a); 53
Bosnia and Herzegovina: Viši privredni sud u Banjaluci
Case No. 57 0 Ps 123777 19 Pž
LS v. JS
28 January 2020
Original in Bosnian

Abstract prepared by Boris Praštalo

This case deals with the failure of the buyer to pay the full purchase price to the seller. A subsidiary issue in the case is the application of the CISG as the law governing the contract.

A company with place of business in Serbia ("seller") had an ongoing business relationship with a company with place of business in Bosnia and Herzegovina ("buyer"). The main obligation of the seller under this business relationship was to deliver men's shirts to the buyer in exchange for the payment of the corresponding price. The buyer failed to make the necessary payments. The parties then proceeded to conclude an agreement (characterized by the court of first instance as a contract for settling accounts) in which they jointly determined the amount owed by the buyer to the seller. The agreement provided that the buyer was to repay the debt in instalments. However, the buyer failed to pay on time and the seller filed a case in court.

The court of first instance, after hearing an expert testimony, determined the remaining amount owed by the buyer to the seller. The buyer decided to appeal the decision of the court of first instance before the Viši privredni sud u Banjaluci (High Commercial Court of Banja Luka).

The High Commercial Court affirmed the first instance judgment by noting that the court of first instance correctly relied on the determination of the amount made by the expert, which had been carried out by observing the relevant rules of professional conduct. It was also deemed relevant that the buyer did not dispute the amount in the first instance proceedings or object to the expert's findings. At that stage, the buyer was merely emphasizing its inability to pay.

The High Commercial Court noted that the CISG was the law applicable to the contract of sale of goods according to its article 1(1)(a) as both buyer and seller had their place of business in CISG contracting States. It further noted that this finding did not have any bearing on the correctness of the judgment rendered by the lower court since the basic obligation of a buyer to pay the price was also enshrined in the domestic Law on Obligations.[1]

Case 1905: CISG 1; 76
Czech Republic: Nejvyšší soud České republiky
Case No. 32 Cdo 2978/2016; ECLI:CZ:NS:2018:32.CDO.2978.2016.1
Solarpower GmbH v. Servis FVE a. s. and M. B.
18 April 2018
Original in Czech
Published in Czech: https://www.nsoud.cz/

Abstract prepared by Veronika Kubíková, National Correspondent

This case deals primarily with liability for damage as a consequence of the termination of the sales contract due to non-performance.

The seller (Solarpower GmbH, a company with place of business in Germany) and the buyer (Servis FVE a. s., a company with place of business in the Czech Republic)

[1] Presumably, the first instance court applied the provisions of the domestic Law on Obligations instead of applying those of the CISG.

concluded on 11 November 2011 a contract for sale of photovoltaic panels. The payment of the first instalment of the price and the establishment of a lien on the shares of the buyer were conditions for the delivery of the goods. A third party (M.B., a Czech individual) agreed to guarantee that the buyer would fulfil its contractual obligations.

Despite several requests by the seller, the buyer did not pay in a timely fashion the first instalment of the price. The seller subsequently declared the sales contract terminated for breach of contractual obligations by the buyer with a letter dated 20 April 2012. The seller then sued the buyer and the third party seeking compensation for loss of profit.

According to the Court of First Instance, the buyer breached its obligations under the sales contract, thus giving the seller the right to terminate the contract. Therefore, the buyer was liable for damages pursuant to articles 74–77 CISG. The Court of First Instance referred to article 76 CISG as the basis for calculating the damages for loss of profit by comparing the agreed purchase price and the market price, as determined by an expert, and further deducting an amount corresponding to the costs incurred by the seller for comparable business. Moreover, the Court of First Instance noted that the CISG did not deal with guarantees and did not consider the guarantor obliged under Czech law in light of the terms of its declaration. The Court further noted that, even if the declaration of the third party could be characterized as a guarantee, it would refer to the payment of the price and not to compensation of damages for loss of profit. Therefore, the Court indicated that the third party was not liable for the damages resulting from the breach of contract by the buyer.

The case was appealed in front of the Court of Appeal, which indicated that the CISG did not contain general provisions on liability for damage and dealt only with certain aspects and types of damages. It also indicated that presumptions of liability for damage must be assessed in accordance with applicable Czech law. It stated that, although the buyer had breached its contractual obligation, the damage had been caused by the seller's termination of the contract and concluded that, absent a claim against the buyer, there was no action against the third party.

The case was further appealed in front of the Supreme Court. Firstly, the Supreme Court confirmed that, although the parties had agreed that the sales contract would be governed by Czech law, this did not exclude the application of the CISG, which was also part of the Czech legal system.

The Supreme Court then considered incorrect the conclusions of the Court of Appeal on the need to assess liability for damage according to Czech law. It noted that a number of CISG provisions addressed several aspects of liability, including its constitutive elements such as causation (arts. 45(1)(a), 61(1)(b), 74–77, 79 and 80 CISG).

Furthermore, the Supreme Court indicated that compensation for damages was available under the CISG not only for direct damages but also for indirect ones, subject to their foreseeability. It recalled that it was always necessary to examine whether the damage would have occurred in the absence of the relevant action of the party in breach.

Accordingly, the Supreme Court set aside the appellate judgment and remanded the case to the Court of Appeal for review in light of the Supreme Court's statement.

Case 1906: CISG 2(e)
Greece: Efeteio Peiraios
Case No. 520/2008
X v. Y.
2008
Original in Greek

Abstract prepared by Soterios Loizou

A contract was concluded between a French seller and a Greek buyer for the sale of a sailing yacht for the price of EUR 204,916.39. The contract was concluded on 15 December 2003 with the submission of a purchase order form by the buyer together with the simultaneous payment of a EUR 30,000 deposit. The yacht had been selected based on its advertised features and, particularly, its weight, as these elements would allow the buyer to participate in sailing races and to accumulate funding and other sponsorships. Because the weight of the yacht was grossly misrepresented by the seller, being in fact approximately 1,300 kg heavier, the buyer sought compensation from both the seller and its agent in Greece for the price paid, as well as for other damages incurred as a result of the breach.

In resolving the dispute, the Piraeus Court of Appeal discussed both jurisdictional and applicable law issues. Although the General Export Sales Conditions of the seller, which were printed on the back of the order confirmation (dated 7 January 2004), the pro forma invoice (dated 1 July 2004), the final invoice (dated 1 July 2004), and the credit note contained an exclusive choice-of-court agreement in favour of French courts in Paris, the Court found that there was no express agreement between the parties as the buyer had not signed any of these documents. For that reason, the Court established its international jurisdiction under articles 3, 5 and 6 of the Brussels I Regulation (EU Reg. No. 44/2001).

Then, the Court proceeded to determine the law applicable to the contract for international sale of goods. To that purpose, it looked into the applicability of the CISG by focusing on article 2(e) CISG and noted that the Convention excludes from its scope of application, among others, the sale of vessels and boats. As a result, the CISG was not applicable to the contractual dispute at hand. Further, absent a choice of law agreement, the Court sought to determine the applicable law under the characteristic performance test of article 4 of the 1980 Rome Convention and found that French law applied.

Case 1907: CISG 1; 7; 35; 79
Italy: Tribunale di Trieste, Sezione Civile
Case No. R.G. 2640/2016
Alak Art Ipar Es Kepzomuveszeti Korlaton Felelossegu Tarsasag v. Pizzul s.r.l.
17 June 2019
Original in Italian

Abstract prepared by Anna Veneziano, National Correspondent

A Hungarian company specialized in the sector of ornamental and building stones concluded a contract with an Italian company for the purchase of 252 short basalt pillars of the type “absolute black”, to be used as bollards. The buyer specified how the stone should be cut and the exact measurements of the pillars, as well as the dimensions of a hole to be drilled in the centre of each pillar. The buyer accepted delivery of the pillars and resold them to another company. After receiving complaints from its customer on the defectiveness of the materials, the buyer filed a suit against the seller to obtain damages, claiming that the pillars had cracked after the insertion of a metallic pole to fix them to the ground and were, therefore, not fit for their intended use.

The Tribunal held that the CISG was applicable to the contract as, at the time of its conclusion, both parties had their places of business in Contracting States (Hungary and Italy – art. 1(1)(a) CISG), and as the parties did not expressly or impliedly exclude it.

With regard to the merits of the case, the Tribunal rejected the plaintiff's claim, relying for each issue on a number of decisions already rendered by Italian and foreign courts in application of the CISG. First of all, it decided that the goods were "fit for the purposes for which goods of the same description would ordinarily be used" (art. 35(a) CISG), and "for any particular purpose expressly or impliedly made known to the seller at the time of the conclusion of the contract" (art. 35(b) CISG), as the stones were fit to be used for outdoor constructions. The Tribunal determined that the expert analysis conducted during the proceedings had found a minor defect in the basalt stones, but had identified in the insertion of the metallic pole and the use of glue by the buyer's customer the prevailing cause of the subsequent cracking. The buyer had not satisfied the burden of proving that the seller was aware of the type and size of pole to be inserted in the stones, nor of the procedure for their insertion. Moreover, the buyer, as a company professionally active in the sector and at least as knowledgeable as the seller, could not invoke reliance on the seller's expertise.

On the question of the burden of proving the lack of conformity of the goods, the Tribunal, following a precedent decision, held that the burden of proof is a matter governed by but not expressly settled in the CISG, and, as such, has to be settled in conformity with the general principles underlying the CISG (art. 7(2) CISG). The Tribunal identified as a general principle that the claimant should bring evidence in favour of its cause of action. Such principle may be derived inter alia from article 79(1) CISG, which expressly states that the non-performing party must prove the circumstances exempting it from liability for its failure to perform, thereby implicitly confirming that it is up to the other party to prove the fact of the failure to perform.

In the case at hand, the buyer had failed to satisfy such burden. According to the Tribunal, the subsequent processing of the stones by the customer had been the "conditio sine qua non" of the damages incurred, even if the stones did have a minor defect that had contributed to the end result. According to article 79 CISG, the damage was thus caused by an impediment beyond the seller's control excluding the seller's liability for it.

Case 1908: CISG 1(1)(a); 3; 7; 38; 39; 49
Spain: Supreme Court (Civil Division)
Case No. 398/2020
INTRAVAL S.L. v. ECOM Industries GmbH
6 July 2020
Original in Spanish
Published in Spanish: http://www.poderjudicial.es/

Abstract prepared by Maria del Pilar Perales Viscasillas, National Correspondent

The dispute involved a Spanish company (the seller) and a German company (the buyer) and related to a contract for the sale of a thermal desorption unit, which was to be installed at a waste treatment plant in the United Kingdom. The contract included the manufacture of the unit and assistance with its installation and established that any disputes should be submitted to the courts of Barcelona, but did not specify the law applicable to the contract.

The contract set out detailed technical requirements, including pre-operational tests, start-up tests and operating tests that must produce certain results. If those results were not achieved, certification by an independent third party would be necessary. Several incidents occurred during assembly of the unit (including costs incurred for replacement parts, delays owing to welding defects, feed screw defects and software problems). At that point, each party blamed the other for those incidents and the resulting delays. After various vicissitudes, two operational tests were carried out and certificates were issued by an independent certification company, which concluded that "the testing was not a success" and that the unit "did not pass its operating/performance test". Finally, the buyer sent to the seller, through a notary, a letter in which, pursuant to article 39 of the CISG, it gave formal notice of the

complete lack of conformity of the goods supplied and warned that it would initiate legal action if the unit was not adjusted to meet the contractually agreed operating criteria. As those requirements were not met, the buyer filed a claim in which it sought declaration of the avoidance of the contract and its addenda, reimbursement of the price and compensation for damages.

The court of first instance declared the contract avoided and ordered the respondent to reimburse the price and pay certain costs incurred by the claimant. The court, referring to article 39 of the CISG, found that no determination could be made with respect to expiration or limitation because both the period between the date of the second operating test and the date on which notice of the lack of conformity had been given and the period between the latter date and the date on which the claim had been submitted were of less than two years. On appeal, the court's decision was overturned and the claim was dismissed on the grounds that the conditions set out in article 39 of the CISG had not been met since the notice given had been deficient and the article in question established a limitation period that could not be suspended. The appeal court found that the period of one year, seven months and five days counted from the time of completion of the second operating test to the sending of the letter giving notice of the lack of conformity exceeded a reasonable time as referred to in article 39(1) of the CISG. The court also found that, since the claim had been submitted two years, six months and five days after the second operating test, although it was understood that the goods had been placed at the buyer's disposal on the date of the second test, the two-year limit provided for in article 39(2) of the CISG had been exceeded and the action brought was time-barred.

Several matters were examined by the Supreme Court, which reached a number of preliminary conclusions with respect to the application of the Convention to the case, dismissing the appeal lodged by the buyer.

Firstly, and with regard to the scope of application, the Supreme Court found that the contract was international because the parties had their places of business in different States that were parties to the Convention (art. 1(1)(a) of the CISG) and the parties had not excluded the application of the Convention (art. 6 of the CISG). The fact that the unit was intended to be installed in the United Kingdom was irrelevant. The Court further noted that the Sales Convention took precedence over the Convention on the Law Applicable to Contractual Obligations, opened for signature in Rome on 19 June 1980 (Rome Convention), and over the Rome I Regulation. Furthermore, it found that the contract (a mixed contract for the sale of machinery and assistance with its installation) fell within the scope of application of article 3(1) and (2) of the CISG. In that regard, it should be noted that both parties had assumed, and it had been determined in the judgment under appeal, that the assembly and start-up services were ancillary to "the main part" of the obligations to manufacture and supply the unit. Moreover, the Court found that the domestic law applicable in the absence of general principles in the Convention (art. 7(2)) was German law, in accordance with the rules of private international law (art. 4 of the Rome Convention) and as invoked by both parties.

Secondly, and with regard to matters of substance, the Supreme Court was of the view that the time limits set out in articles 39 and 49 of the CISG for giving notice of a lack of conformity or avoidance of the contract were different from the time limits for bringing legal proceedings before the courts, a matter in relation to which the Convention did not establish any rules. The Limitation Convention was not applicable as it had been ratified neither by Spain nor by Germany. Consequently, since the matter could not be settled by the Sales Convention, the rules on limitation in German law must be applied in respect of the time limit for bringing an action. The International Institute for the Unification of Private Law (Unidroit) Principles of International Commercial Contracts did not apply either, despite the pronouncement of the court of first instance to the contrary, since they "do not contain binding rules and their application is appropriate only where the parties to a contract or a decision-making body choose to apply them and where that choice is recognized or permitted within the relevant legal framework". Thus, for matters not covered by the

Convention, such as the limitation period, the applicable domestic law, which was German law in the case in question, must be applied.

The Supreme Court considered that a distinction must be made between the time limit for giving notice of a lack of conformity and the time limit for bringing an action, a distinction that was not made clear in the appeal court's judgment, although the Supreme Court agreed with the appeal court's finding – which was the reason for the court's decision – that the letter giving notice of the lack of conformity had not been sent to the seller within a reasonable time, as provided for in article 39(1) of the CISG, after the second operating test performed on the unit. The Supreme Court therefore found that the buyer had lost the right to avoid the contract.

The Supreme Court also noted that "the determination of what is a 'reasonable time' in order to strike a balance in each case between the seller's interest in the prompt settlement of claims relating to a contract that has already been performed and the buyer's interest in exercising its rights in the event of a lack of conformity must take account of the circumstances involved. Among the factors taken into account in court decisions and awards rendered on the basis of application of the Sales Convention are the nature of the goods (perishable or non-perishable goods, for example), the obviousness of the lack of conformity, whether the defect is apparent or hidden and the trade practices and usages between the parties", referring expressly to the Unilex database and the UNCITRAL 2016 Digest of Case Law on the CISG.

The Supreme Court went on to analyse in detail the facts of the case in order to determine whether the notice of the lack of conformity and avoidance of the contract had been given within a reasonable time frame. It found the following:

> "The unit that had been ordered was delivered on 5 June 2009 and a certificate of satisfactory inspection was issued by the buyer. As the machine was expected to perform at a certain level, the lack of conformity consisting in its inability to achieve the agreed performance level could not be detected immediately upon delivery, since only obvious and apparent defects could have been identified on initial examination. However, following the first test provided for in the contract, which was completed on 25 May 2010 and with which the buyer was dissatisfied, a second operating test was carried out in the absence of the seller and was completed on 13 May 2011. It may be accepted that, prior to the second test, the buyer voiced its complaints to the seller. It may even be accepted that the seller waived the contractually established limitation period, which made it liable only until 5 December 2010. What is certain is that at least from the time of completion of the second test (13 May 2011), if not before, the buyer was not only aware of the performance level of the unit and the extent of the lack of conformity it is now reporting, but was also able to assess whether the alleged defects constituted a breach of contract that justified avoidance and whether it wished to declare the contract avoided on that basis. Nevertheless, it was not until 18 December 2012 that the buyer gave the seller notice of the complete lack of conformity and warned that it would initiate legal action for reimbursement of the money paid and damage caused if that lack of conformity was not remedied within 15 days. In other words, the buyer allowed more than one year and seven months to pass before requesting compensation and informing the seller that it would otherwise avoid the contract, despite the fact that the examination by the independent expert and the performance of operating tests on the supplied unit would have justified the buyer's announcing within a short period of time its intention to avoid the contract on the grounds of a lack of conformity. Neither the notice of the lack of conformity, accompanied by the request for compensation, nor the notice that the contract would be declared avoided was given within a reasonable time.
>
> "The same is true of avoidance of the contract, all the more so if one considers that the letter of 18 December 2018 was not proper notice of avoidance and that it was not produced until the claim was filed. To understand otherwise, given that it has been proven that the unit was in operation at least until August 2011 and that the right to declare avoidance of the contract was exercised, which is regarded in

> the Convention as the last remedy available to the buyer in the event of breach of contract, including breach resulting from a lack of conformity, would be contrary to the good faith that should be observed in international trade, in accordance with article 7 of the Convention."

With regard to the question of whether the action was time-barred, in addition to the conclusions already reached concerning the applicable legal framework, the Supreme Court found that it was not necessary to consider the limitation period since, in order to dismiss the buyer's claim and its appeal in cassation, it was sufficient to assess whether or not the buyer had lost its rights under article 39 of the CISG, which, the Court pointed out, did not establish a limitation period. The limitation period should be analysed on the basis of German law rather than Spanish law; the former does not recognize extrajudicial claims as a ground for the recommencement of the limitation period (sect. 212 of the German Civil Code). In accordance with German law, the request for avoidance would be time-barred.

Case 1909: CISG 1(1)(a)
United States: U.S. [Federal] District Court for the Northern District of Illinois
Case No. 19 CV 03769
Perkins Manufacturing Company v. Haul-All Equipment Ltd.
7 May 2020
Original in English

Abstract prepared by Brandy Cheng

The issues before the court were whether the buyer's counterclaim for fraud and misrepresentation under state law should be dismissed before trial for CISG pre-emption, and whether the tortious interference claim should be dismissed for failure to state a claim.

The seller, a corporation from Illinois, United States, agreed to sell automated "sideloaders", which are a type of mechanical arm used on waste-management trucks, to the buyer, a Canadian corporation. The buyer intended to use the sideloaders on waste-management trucks it had contracted to sell to two cities. Allegedly, the seller was aware of the buyer's intent. The buyer asserted the seller's representations included that Finite Element Analysis ("FEA") testing was used on the seller's products, the seller had been manufacturing sideloaders for eleven years, and the seller used jigs in manufacturing.

After the first delivery of sideloaders, the seller's plant manager revealed that the seller had not performed the required FEA testing, had not been manufacturing the sideloaders for eleven years, and was not using jigs in manufacturing the sideloaders delivered. The cities experienced continued problems with the sideloaders. Both cities eventually refused to continue doing business with the buyer. The seller brought suit against the buyer for breach of contract. The buyer filed counterclaims, alleging, among others, state law fraud and misrepresentation and tortious interference with a business relationship. The seller moved for motion to dismiss.

The court found that the CISG pre-empted state law in the buyer's fraud and misrepresentation claim because the cause of action was contractual in nature. The court also found that the buyer's state law claim stemmed from the seller's representation made in the parties' agreement, which related to a breach of the seller's promise. The court also referred to the request of the buyer to compensate reliance damages and concluded that the claim was contractual. The Court stated that, as a treaty to which the United States was a signatory, the CISG was federal law, pre-empting inconsistent Illinois contract law. The court accordingly granted the seller's motion to dismiss the state law claim.

The court further concluded that the buyer's claim for tortious interference with a business relationship, in contrast, was not pre-empted by the CISG. The court found the buyer's pleading proper and thorough. The seller's motion to dismiss the buyer's claim for tortious interference was therefore denied.

Cases relating to the CISG and the United Nations Convention on the Limitation Period in the International Sale of Goods (Limitation Convention)

Case 1910: CISG 1(1); 3(1); 6; 12; 58; 59; Limitation Convention (as amended) 4; 9(1); 10(1); 17(1); 19; 20(1); 23
Uruguay: Second Rota Civil Court of Appeal
Case No. IUE 431-622/2018, judgment 33/2020
Búfalo S.A. v. Mazzilli, Alberto
26 February 2020
Published in Spanish: http://bjn.poderjudicial.gub.uy

Abstract prepared by Gabriel Valentín

In 2012, Búfalo S.A., based in Santa Fe Province, Argentina, undertook to sell a number of agricultural machines to Mazzilli, based in Soriano Department, Uruguay. The claimant alleged that the respondent had partially breached its obligation to pay the agreed price and requested that it be ordered to pay the amount owed plus interest. The respondent acknowledged that contracts had been concluded for the sale of agricultural machinery and that it had only partially performed its obligation; however, it claimed that under domestic law (article 1020 of the Commercial Code of Uruguay), the limitation period applicable to the claim for payment had expired. The court of first instance dismissed that defence and ordered the respondent to pay the amount owed plus interest. The court of appeal overturned the decision of the court of first instance, qualified the relationship as an international sale of goods, declared the CISG and the Limitation Convention (as amended) applicable to the case and ruled that the obligation to pay was subject to the limitation period.

The court of appeal found that at the time the sales contracts had been concluded, the parties had been based in different countries (Argentina and Uruguay), which had adopted the CISG and the Limitation Convention (as amended). Since the parties had not excluded the application of those conventions (CISG, arts. 6 and 12), the court ruled that the conventions were applicable to the case (CISG, arts. 1(1) and 3(1)).

In particular, the court found that articles 4, 9(1) and 10(1) of the Limitation Convention (as amended) were applicable and thus ruled that the four-year limitation period should be regarded as having commenced on the date on which the buyer breached its obligation to pay the balance of the price. The court also found that, in accordance with articles 58 and 59 of the CISG, since specific dates for payment of the price had not been fixed in the contracts, the buyer must pay when the seller placed either the goods or documents controlling their disposition at the buyer's disposal, i.e., from August and November 2012. The court determined that the buyer had acknowledged its obligation to pay the price in writing (documents dated 16 October 2012, 20 March 2013, 14 November 2013 and 14 May 2014) while the four-year limitation period had still been running. Therefore, pursuant to article 20(1) of the Limitation Convention (as amended), a new four-year period had commenced on 14 May 2014 and expired on 14 May 2018. As the claim had been submitted on 21 June 2018, without any of the acts interrupting the limitation period set out in article 19 of the Limitation Convention (as amended) having been verified before that date, the court accepted the limitation period defence and rejected the claim.

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

Case 1911: ECC 8(1); 9(1)
Australia: Supreme Court of Western Australia
Case No. CIV 3054 of 2019
Tomich v. Crosstown Holdings Pty Ltd
11 June 2020
Original in English
Published: [2020] WASC 212
Available at: http://www.austlii.edu.au

Abstract prepared by Alan Davidson, National Correspondent

The case deals with the question whether an email can be considered as notice "in writing" as required for a notice under a lease; and whether consent to use an electronic communication was given.

In December 2018, the plaintiff entered into a lease of a property. Clause 26 of the lease agreement provided that all "notices, requests, demands, consents, approvals, agreements or other communications" by the parties must be in writing, signed and could be physically served "in person or by post", or "made by facsimile". The email addresses of the parties were set out in the lease, but no facsimile addresses were in the lease. The parties communicated by email and not by facsimile.

The lease agreement contained an option to renew the lease, to be exercised between 1 July 2019 and 30 September 2019. On 30 September 2019, the plaintiff purported to exercise the option by sending an email to the defendant. The email was received by the defendant, however, the defendant disputed the validity of the exercise of the option. The defendant claimed that the option had to be exercised in writing or by facsimile.

The Court quoted from the Electronic Transactions Act 2011 (WA) (ETA), namely Section 8(1) ETA, which is based on article 5 of the UNCITRAL Model Law of Electronic Commence (MLEC) and article 8(1) ECC, and section 9(1) ETA, which is based on article 6 MLEC and article 9(1) ECC.

The Court referred to several cases to determine "whether the terms upon which the option could be exercised should be construed 'strictly' or 'liberally'". The plaintiff submitted that the lease mandates only that a notice must be in writing in one of two methods, letter or facsimile. However, the Court stated that the clause does not say that service "must be either by post or by facsimile", noting that the clause does not preclude communication by email.

In relation to "consent", the plaintiff submitted that consent to give notice by email may be implied, as the parties had communicated on 79 occasions by email, and that the defendant had not objected. In addition, the email addresses of both parties appeared in the lease. The defendant submitted that the email communications related to matters "of no real significance", and that the inclusion of an email address did not amount to consent to notices being served by email. The Court accepted the plaintiff's submission.

The Court regarded as "important" the intention of the contracting parties that the plaintiff should "give the defendant notice at least three months before the expiry of the lease that it intended to exercise the option". The Court stated that the email "clearly and unequivocally showed the plaintiff intended to exercise the option" and that email was received by the defendant the day it was sent. The very purpose of the option clause had been served. Requiring strict adherence to the option agreement and claiming that there was no consent "would fly in the face of commercial reality".

The Court ordered that there be a declaration that the plaintiff validly exercised the option by email.

Case 1912: ECC 8(1); 9(1)
Australia: Supreme Court of South Australia
Wärtsilä Australia Pty Ltd v. Primero Group Ltd
2 September 2020
Original in English
Published: [2020] SASC 162
Available at http://www.austlii.edu.au

Abstract prepared by Alan Davidson, National Correspondent

The case deals with the question whether an email containing a hyperlink to a server holding documents is within the meaning of "electronic communication" in legislation dealing with functional equivalence of "writing" and "production of documents". The case also deals with the time of receipt of the information in the documents.

The Electronic Communications Act 2000 (SA) (EC Act) was incorporated in 2000 and based on the Model Law of Electronic Commerce (MLEC) and amended in 2012 to incorporate the provisions of the ECC.

Wärtsilä engaged Primero under a subcontract to perform civil, mechanical and electrical works and to supply tanks for the construction of a power station. The action before the Court was in the nature of a writ of certiorari to quash an adjudication award of $A 15,269,674.30 under the Building and Construction Industry Security of Payment Act 2009 (SA) (the Act). At issue was whether Primero had "provided" Manufacturer's Data Reports (MDRs) to Wärtsilä to be "available for inspection", pursuant to the contract and the Act by 28 February 2020. If not, then the adjudication did not have jurisdiction.

On 28 February 2020 Primero had sent Wärtsilä an email which included a hyperlink that allowed access to MDRs stored on a "OneDrive server" maintained by Microsoft. The MDRs comprised more than 100,000 pages. Clause 40 of the parties' contract stated that the provision of documents must be in writing and signed, and must be given in one of three forms. The first two were by hardcopy and the third, by email. It was "regarded as … received" when the "email (including any attachments) comes to the attention of the recipient". Clause 40.3 provided that a notice "must not be given by electronic means of communication, other than email".

Section 8 EC Act reflects article 6 MLEC and article 9(2) ECC; that "at the time the information was given, it was reasonable to expect that the information would be readily accessible so as to be useable for subsequent reference". Section 10 EC Act provides for a method to produce documents, namely that "the method of generating the electronic form of the document provided a reliable means of assuring the maintenance of the integrity of the information contained in the document" and "at the time the communication was sent, it was reasonable to expect that the information contained in the electronic form of the document would be readily accessible so as to be useable for subsequent reference". However, for sections 8 and 10 to apply, the person to whom the information is required to be given or produced must "consent" to the giving of the information or the production, by means of an electronic communication. The consent requirement reflects article 8(2) ECC.

The Court found that Wärtsilä was unable to download completely the MDRs on 28 February. It found that the inclusion of a hyperlink in the email did not amount to "provision" of the documents, because the hyperlink merely provided a means by which Wärtsilä was permitted to download documents. Until downloaded, those documents had not been "provided" nor "available for inspection".

The Court found "support for this construction" in the judgment of McMurdo J in Conveyor & General Engineering v Basetec Services [2014] QSC 30. In that case, the Court considered whether two files which were stored on "Dropbox" had been served. Dropbox is a service similar to OneDrive. McMurdo J held that the documents in the Dropbox file had not been "left at" nor "sent" until the recipient went to the Dropbox site and opened the file and "probably not until its contents had been downloaded to

a computer". Separately McMurdo J held that information in the Dropbox file was not part of the electronic communication, that is, the email. His Honour's rationale was that none of the data, text or images within the documents on the Dropbox server were communicated "by guided or unguided electromagnetic energy", rather, the electronic communication was of the means by which other information in an electronic form could be found at, read and downloaded from the Dropbox website.

Similarly, the Court in the present case held that the MDRs in OneDrive were not "provided" nor "available for inspection" to Wärtsilä on 28 February 2020 because they were not capable of being fully accessed, read and downloaded by Wärtsilä on that date. The "obligation was not satisfied by sending an email which included a hyperlink by which this information could be accessed by the recipient."

The Court found: "it was not reasonable to expect that, at the time the hyperlink was sent to Wärtsilä on 28 February 2020, the documents … would be readily accessible so as to be useable for subsequent reference" (para. 118). Second, the Court found insufficient evidence to enable it to determine whether Wärtsilä consented.

The Court decided that there was "a more fundamental answer", that the EC Act does not apply to an email containing a hyperlink, as it is not an "electronic communication" of the information in the hyperlinks.

The Court considered section 13A EC Act, dealing with the time of receipt of electronic communications, that the time of receipt is the time when the electronic communication "becomes capable of being retrieved by the addressee at an electronic address designated by the addressee". Primero contended that the documents were capable of being retrieved at Wärtsilä's email address once the email containing the hyperlink was received by Wärtsilä. The court rejected that submission, stating that it failed because the evidence demonstrated all the documents were not capable of being retrieved until 2 March 2020. The Court noted that it is not the email containing the hyperlink that was the relevant electronic communication, it was the MDRs in the server. That is, the email was capable of being retrieved and thus having a deemed time of receipt, but the MDRs were not.

The Court made an order in the nature of certiorari quashing the adjudication determination.

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

Case 1913: MLEC 13(3)

Republic of Korea: Supreme Court
Case No. 2014Da11161
29 October 2015
Original in Korean

The plaintiff entered into a contract with the defendant, a Korean telecommunications company, regarding the purchase of a cellular phone to be paid in instalments. The contract had been signed with an electronic signature. Subsequently, the plaintiff claimed that, due to identity theft, a third party had signed the electronic contract, which was therefore null and void.

The Supreme Court recalled that, according to art. 7(2)(2) of the Framework Act on Electronic Documents and Transactions (enacting art. 13(3) MLEC), the addressee of an electronic document may regard that electronic document as being that of the originator if the electronic document received had been sent by a person who is deemed by the addressee to have sent such electronic document according to the intent of the originator or its agent, in view of its relationship with the originator or its agent.

The Supreme Court noted that the defendant had verified that the plaintiff's identity had been authenticated in the intended manner and in accordance with the Digital Signature Act, and indicated that the defendant was not required to further verify the plaintiff's identity using additional means, such as by phone or in a face-to-face

meeting. The Supreme Court also noted that the contract should be regarded as concluded by the plaintiff or by a third party acting on its behalf unless there were specific circumstances indicating otherwise, of which no evidence had been provided.