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

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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.