

CISG-online 297

Jurisdiction	USA
Tribunal	U.S. District Court for the Southern District of New York
Date of the decision	21 July 1997
Case no./docket no.	97-8072A, M-47 (DLC)
Case name	<i>Helen Kaminski Pty. Ltd. v. Marketing Australian Products, Inc.</i>

Memorandum Opinion and Order

Appellant Helen Kaminski Pty. Ltd. («Helen Kaminski») moves for leave to appeal an interlocutory order issued by the Bankruptcy Court for the Southern District of New York on March 3, 1997. Appellee Marketing Australian Products («MAP») opposes this motion. For the reasons set forth below, the motion is denied.

Background

Helen Kaminski is an Australian corporation with its principal place of business in Australia. It manufactures fashion accessories such as hats and bags. MAP is incorporated in Colorado, with its principal place of business in New York, and it distributes fashion accessories. Helen Kaminski and MAP negotiated an agreement in Australia in January 1996 whereby MAP had the exclusive rights to distribute Helen Kaminski goods in North America (the «Distributor Agreement»). The Distributor Agreement specified the terms on which the parties would do business, including methods of payment, warranty, delivery, etc., and anticipated that MAP would purchase a total of U.S. \$ 2 million worth of products from February 1, 1996 to January 31, 1997. The parties amended the Distributor Agreement in February 1996 to address the sale of specified goods already in the United States.

MAP issued purchase orders for additional products and Helen Kaminski sent notice in October and November 1996 to MAP that the products were ready for shipment. Pursuant to the Distributor Agreement, MAP was to open a letter of credit seven days prior to shipment. When MAP failed to do so, on November 1, 1996, Helen Kaminski sent a Notice to Rectify within thirty days. On November 22, 1996, Helen Kaminski sent a notice of default requiring MAP to cure the defects under the Distributor Agreement. When MAP still did not cure, Helen Kaminski sent a notice of termination dated December 2, 1996 and commenced an action in Australia seeking a declaration that the Distributor Agreement was invalid and terminated.

MAP filed for bankruptcy in the Southern District of New York on November 29, 1996. On January 28, 1997, MAP commenced an action against Helen Kaminski seeking a declaration that Helen Kaminski was subject to the automatic stay under Section 362, Title 11, United States Code, and an order extending MAP's time to cure the defaults under the Distributor Agreement, pursuant to Section 108(b), Title 11, United States Code. Helen Kaminski then moved to dismiss this Complaint contending, among other arguments, that (1) the Convention

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on the International Sale of Goods («CISG») superseded the Bankruptcy Code and therefore MAP could not have additional time to cure under Section 108(b), and (2) the automatic stay under Section 362 should not have an extra-territorial effect.

On March 3, 1997, the Bankruptcy Court issued an Order («March 3rd Order») which denied Helen Kaminski's motion to dismiss and determined that (1) Helen Kaminski was subject to the automatic stay and thus could not proceed with the action in Australia, and (2) extended MAP's time to cure the defaults pursuant to Section 108(b). Although the March 3rd Order does not state so explicitly, the parties agree that the bankruptcy court found that the CISG does not apply to the Distributor Agreement as it was not a contract for the sale of goods. Helen Kaminski now wishes to appeal this interlocutory order.

Standard

A party may appeal from an interlocutory order issued by a bankruptcy court pursuant to Section 158(c)(2), Title 28, United States Code, on the same basis as an appeal from a District Court to the Court of Appeals under Section 1292(b), Title 28, United States Code. Section 1292(b) states, in relevant part, that an interlocutory order may be taken on appeal when that order involves a controlling question of law as to which there is substantial ground for difference of opinion and that an immediate appeal from the order may materially advance the ultimate termination of the litigation. 28 U.S.C. § 1292(b). [...] The Second Circuit has held that certification is a «rare exception to the final judgment rule that generally prohibits piecemeal appeals.» *Koehler v. Bank of Bermuda Ltd.*, 101 F.3d 863, 865–66 (2d Cir. 1996). See also *Westwood Pharmaceuticals, Inc. v. National Fuel Gas Dist. Corp.*, 964 F.2d 85, 89 (2d Cir. 1992).

Discussion

Although Helen Kaminski presents four issues it wishes to appeal,¹ this Court will reformulate these questions into the questions it believes are presented in Helen Kaminski's papers. Those questions are (1) whether the CISG applies to the Distributor Agreement, and if so, does the CISG supersede inconsistent provisions in the Bankruptcy Code, such that the bankruptcy court erred in giving MAP additional time to cure its default, and (2) if the CISG does not apply, whether the bankruptcy court erred in giving extra territorial effect to Section 362. I will discuss each issue in turn to ascertain whether either of these questions should be appealed on an interlocutory basis.

¹ As described by Helen Kaminski, the issues on appeal are as follows: (1) whether the CISG supersedes the Bankruptcy Code and thus the bankruptcy court did not have the authority to allow MAP an extension of time to cure its default under the Distributor Agreement; (2) whether the bankruptcy court erred in enjoining Helen Kaminski from proceeding with its action in Australia; (3) whether the bankruptcy court erred in giving extra-territorial effect to Section 362 and thus applying that automatic stay provision to Helen Kaminski, and (4) whether the bankruptcy court erred in finding that the Distributor Agreement is not a contract for the international sale of goods.

A. The CISG and the Distributor Agreement

The CISG is an international agreement that applies to sales of goods between parties in signatory nations, unless the parties expressly contract to be bound by another source of law. *Delchi Carrier SpA v. Rotorex Corp.*, 71 F.3d 1024, 1027–28 n. 1 (2d Cir. 1995). There is no dispute that both the United States and Australia are signatories to the CISG.

If the CISG applies to the Distributor Agreement, as soon as MAP was in fundamental breach of the contract – and there does not appear to be a dispute that the failure to produce letters of credit was a fundamental breach – Helen Kaminski could declare the contract void and after it started an action for a breach of the contract, no court could extend MAP’s time to cure the defect. CISG, Article 61(3), reprinted in 15 U.S.C. Appendix.

Thus, the dispositive issue is whether the CISG applies to the Distributor Agreement. Helen Kaminski maintains that it does, since the agreement, in addition to laying out the terms for the parties’ commercial relationship, also governed the disposition of identified goods. Although it does not say so explicitly, it appears that Helen Kaminski is referring to the amendment in February 1996 which addressed specified goods already in the United States. MAP maintains that the Distributor Agreement is merely a «framework agreement» and that such agreements are not covered by the CISG. The Distributor Agreement requires MAP to purchase a minimum quantity of total goods, but does not identify the goods to be sold by type, date or price. In contrast, the CISG requires an enforceable contract to have definite terms regarding quantity and price.

While both sides cite various secondary sources, there appears to be no judicial authority determining the reach of the CISG and, in particular, whether it applies to distributor agreements. The parties do agree, however, that whether or not the CISG applies turns on whether the Distributor Agreement can be characterized as a contract for the sale of goods – that is, that it contained definite terms for specified goods. In this respect, the only contract for a specified set of goods to which Helen Kaminski points is the February 1996 amendment. As MAP correctly notes, however, these goods were not the subject of the breach. Rather, Helen Kaminski is claiming a breach for goods ordered but not shipped. Helen Kaminski makes no claim that these goods were identified in the Distributor Agreement.

For this reason, although I find that there is little to no case law on the CISG in general, and none determining whether a distributor agreement falls within the ambit of the CISG, Helen Kaminski’s rationale for why the CISG applies to the debate about the breach for goods ordered but not shipped is not supported by the facts of the case. The identification in the Distributor Agreement of certain goods – about which there is no claim of breach – is insufficient to bring the Distributor Agreement within coverage of the CISG when the dispute concerns goods not specifically identified in the Distributor Agreement. Thus, while the question does present a controlling issue of law over which there may be substantial disagreement, it does not appear that a determination of the issue would materially advance the litigation as Helen Kaminski does not maintain that the general Distributor Agreement – absent the February

amendment which does not concern the goods at issue – is definite enough to constitute a contract for the sale of goods.²

B. Extra-territorial Effect of Section 362

Helen Kaminski cites no authority for its contention that Section 362 of the Bankruptcy Code should not have extra-territorial effect, other than an argument that such a stay is superseded by the CISG. Since I have held that, in the circumstances of this case at least, the CISG does not apply, I need not reach this second issue. I note, however, that it is a general principle that all claims against a debtor should be handled in a single proceeding to insure equitable and orderly distribution of debtor's property. *Allstate Life Insurance v. Linter Group Ltd.*, 994 F.2d 996 (2d Cir. 1993) (comity supported stay of U.S. litigation in favor of Australian bankruptcy proceeding); *Victrix Steamship Co., S.A. v. Salen Dry Cargo A.B.*, 825 F.2d 709 (2d Cir. 1987).

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Conclusion

For the reasons given above, it is hereby

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ORDERED that Helen Kaminski's motion for leave to appeal the March 3rd Order of the Bankruptcy Court is denied.

SO ORDERED.

² Since I find that Helen Kaminski may not appeal the question as to whether the CISG applies to the Distributor Agreement, I need not reach the second question of whether the CISG supersedes conflicting provisions of the Bankruptcy Code.