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Jurisdiction	USA
Tribunal	U.S. District Court for the Northern District of Illinois
Date of the decision	07 December 1999
Case no./docket no.	99 C 5153
Case name	*Magellan Int'l Corporation v. Salzgitter Handel GmbH*

Opinion: Memorandum and Order

Salzgitter Handel GmbH («Salzgitter») has filed a motion pursuant to Fed.R.Civ.P. («Rule») 12(b)(6) («Motion»), seeking to dismiss this action brought against it by Magellan International Corporation («Magellan»). Because the allegations in Complaint Counts I and II state claims that are sufficient under Rule 8(a), Salzgitter's Motion must be and is denied as to those claims. Count III, however, is deficient and is therefore dismissed without prejudice.

Facts

In considering a Rule 12(b)(6) motion to dismiss for failure to state a claim, this Court accepts all of Magellan's well-pleaded factual allegations as true, as well as drawing all reasonable inferences from those facts in Magellan's favor (*Travel All Over the World, Inc. v. Kingdom of Saudi Arabia,* 73 F.3d 1423, 1429 (7th Cir. 1996)). What follows is the version of events set out in the Complaint, when read in that light.

Offers, Counter-offers and Acceptance

Magellan is an Illinois-based distributor of steel products. Salzgitter is a steel trader that is headquartered in Düsseldorf, Germany and maintains an Illinois sales office. In January 1999[1] Magellan's Robert Arthur («Arthur») and Salzgitter's Thomas Riess («Riess») commenced negotiations on a potential deal under which Salzgitter would begin to act as middleman in Magellan's purchase of steel bars – manufactured according to Magellan's specifications – from a Ukrainian steel mill, Dneprospetsstal of Ukraine («DSS»). By letter dated January 28, Magellan provided Salzgitter with written specifications for 5,585 metric tons of steel bars, with proposed pricing, and with an agreement to issue a letter of credit («LC») to Salzgitter as Magellan's method of payment. Salzgitter responded two weeks later (on February 12 and 13) by proposing prices $ 5 to $ 20 per ton higher than those Magellan had specified.

On February 15 Magellan accepted Salzgitter's price increases, agreed on 4,000 tons as the quantity being purchased, and added $ 5 per ton over Salzgitter's numbers to effect shipping from Magellan's preferred port (Ventspills, Latvia). Magellan memorialized those terms, as

[1] Because all the relevant events took place this year, all further date references will omit «1999».

well as the other material terms previously discussed by the parties,[2] in two February 15 purchase orders. Salzgitter then responded on February 17, apparently accepting Magellan's memorialized terms except for two «amendments» as to prices. Riess asked for Magellan's «acceptance» of those two price increases by return fax and promised to send its already-drawn-up order confirmations as soon as they were countersigned by DSS. Arthur consented, signing and returning the approved price amendments to Riess the same day.

On February 19 Salzgitter sent its pro forma order confirmations to Magellan. But the general terms and conditions that were attached to those confirmations differed in some respects from those that had been attached to Magellan's purchase orders, mainly with respect to vessel loading conditions, dispute resolution and choice of law.

Contemplating an ongoing business relationship, Magellan and Salzgitter continued to negotiate in an effort to resolve the remaining conflicts between their respective forms. While those fine-tuning negotiations were under way, Salzgitter began to press Magellan to open its LC for the transaction in Salzgitter's favor. On March 4 Magellan sent Salzgitter a draft LC for review.[3] Salzgitter wrote back on March 8 proposing minor amendments to the LC and stating that «all other terms are acceptable.» Although Magellan preferred to wait until all of the minor details (the remaining conflicting terms) were ironed out before issuing the LC, Salzgitter continued to press for its immediate issuance.

On March 22 Salzgitter sent amended order confirmations to Magellan. Riess visited Arthur four days later on March 26 and threatened to cancel the steel orders if Magellan did not open the LC in Salzgitter's favor that day. They then came to agreement as to the remaining contractual issues.[4] Accordingly, relying on Riess's assurances that all remaining details of the deal were settled, Arthur had the $ 1.2 million LC issued later that same day.

Post-Acceptance Events

Three days later (on March 29) Arthur and Riess engaged in an extended game of «fax tag» initiated by the latter. Essentially Salzgitter demanded that the LC be amended to permit the unconditional substitution of FCRs for bills of lading – even for partial orders – and Magellan refused to amend the LC, also pointing out the need to conform Salzgitter's March 22 amended order confirmations to the terms of the parties' ultimate March 26 agreement. At the same time, Magellan requested minor modifications in some of the steel specifications. Salzgitter replied that it was too late to modify the specifications: DSS had already manufactured 60% of the order, and the rest was under production.

Perhaps unsurprisingly in light of what has been recited up to now, on the very next day (March 30) Magellan's and Salzgitter's friendly fine-tuning went flat. Salzgitter screeched an

[2] Price, quantity, delivery date, delivery method and payment method had all been negotiated and agreed to by the parties.

[3] One of the LC terms -- also included in Magellan's purchase orders -- required ocean bills of lading to be presented as a condition precedent to Salzgitter's right to draw on the LC. But Salzgitter was permitted to substitute forwarder's Certificates of Receipt («FCR») for bills of lading as to the full order if Magellan were to be more than 20 days late in providing a vessel for shipment.

[4] For example, the parties agreed that the contract would be governed by the United Nations Convention on the International Sale of Goods (the «Convention»).

ultimatum to Magellan: Amend the LC by noon the following day or Salzgitter would «no longer feel obligated» to perform and would «sell the material elsewhere.» On April 1 Magellan requested that the LC be canceled because of what it considered to be Saltzgitter's breach. Salzgitter returned the LC and has since been attempting to sell the manufactured steel to Magellan's customers in the United States.

Magellan's Claims

Complaint Count I posits that – pursuant to the Convention – a valid contract existed between Magellan and Salzgitter before Salzgitter's March 30 ultimatum. Hence that attempted ukase is said to have amounted to an anticipatory repudiation of that contract, entitling Magellan to relief for its breach.

Count II seeks specific performance of the contract or replevin of the manufactured steel. That relief is invoked under the Illinois version of the Uniform Commercial Code («UCC,» specifically 810 ILCS 5/2-716)[5] because Magellan is «unable to 'cover' its delivery commitments to its customers without unreasonable delay» (Complaint p. 42).

Finally, Count III asserts that specifications given to Salzgitter for transmittal to DSS constitute «trade secrets» pursuant to the Illinois Trade Secrets Act («Secrets Act», which defines the term «trade secret» at 765 ILCS 1065/2(d)). Salzgitter is charged with misappropriation of those trade secrets in attempting to sell the manufactured steel embodying those secrets to Magellan's customers (Complaint pp. 9, 45-47). Magellan relatedly claims that the threat of future disclosure and use of those asserted trade secrets by Salzgitter causes Magellan irreparable harm (Complaint p. 49).

[...]

Count I: Breach of Contract

Choice of Law

As stated earlier, Magellan first claims entitlement to relief for breach of contract. Because the transaction involves the sale and purchase of steel – «goods» – the parties acknowledge that the governing law is either the Convention[9] or the UCC.[10] Under the facts alleged by Magellan, the parties agreed that Convention law would apply to the transaction, and Salzgitter

[5] Although Magellan's contention that Illinois law governs its specific performance claim seems at odds with the framing of its breach of contract claim under the Convention, any presumed conflict in that regard would not pose a problem, because Rule 8(e) expressly permits inconsistency in pleading. But as it turns out, in light of the appropriate analysis of the Convention's terms discussed below, Magellan's contention is on the mark anyway.

[9] 15 U.S.C.A. App. (West 1998) includes the text of the Convention and various related materials. As Convention Art. 1 provides, it applies where Magellan and Salzgitter constitute «parties whose places of business are in different States» and where they did not opt out of Convention application under its Art. 6.

[10] Salzgitter seeks to rely upon several cases decided pursuant to the Illinois common law of contracts. As Magellan correctly points out, such reliance is misplaced in sales-of-goods cases such as this one. Instead the UCC would apply if the Convention did not and if Illinois choice of law rules pointed to the application of Illinois law (*Klaxon Co. v. Stentor Elec. Mfg. Co.,* 313 U.S. 487, 491, 85 L. Ed. 1477, 61 S. Ct. 1020 (1941)).

does not now dispute that contention. That being the case, this opinion looks to Convention law.[11]

Pleading Requirements

As n. 11 reflects, the specification of the pleading requirements to state a claim for breach of contract under the Convention truly poses a question of first impression. Despite that clean slate, even a brief glance at the Convention's structure confirms what common sense (and the common law) dictate as the universal elements of any such action: formation, performance, breach and damages. Hence under the Convention, as under Illinois law (or the common law generally), the components essential to a cause of action for breach of contract are (1) the existence of a valid and enforceable contract containing both definite and certain terms, (2) performance by plaintiff, (3) breach by defendant and (4) resultant injury to plaintiff.[12] In those terms it is equally clear that Magellan's allegations provide adequate notice to Salzgitter that such an action is being asserted (Complaint pp. 7–15).

Formation of a contract under either UCC or the Convention requires an offer followed by an acceptance (see Convention Pt. II). Although analysis of offer and acceptance typically involves complicated factual issues of intent – issues not appropriately addressed on a motion to dismiss – this Court need not engage in such mental gymnastics here. It is enough that Magellan has alleged facts that a factfinder could call an offer on the one hand and an acceptance on the other.

Under Convention Art. 14(1) a «proposal for concluding a contract addressed to one or more specific persons constitutes an offer if it is sufficiently definite and indicates the intention of the offeror to be bound in case of acceptance.» So, if the indications of the proposer are sufficiently definite and justify the addressee in understanding that its acceptance will form a contract, the proposal constitutes an offer (id. Art. 8(2)). For that purpose «[a] proposal is

[11] As of the date of this opinion, only seven United States courts' opinions available in published opinions or via Westlaw have interpreted substantive provisions of the Convention, and none of those opinions has addressed the pleading requirements for a breach of contract action. See *MCC-Marble Ceramic Ctr, Inc., v. Ceramica Nuova d' Agostino,* S.p.A., 144 F.3d 1384 (11th Cir. 1998), holding the parol evidence rule inapplicable under the Convention; *Delchi Carrier SpA v. Rotorex Corp.*, 71 F.3d 1024 (2d Cir. 1995), calculating the damages available to a buyer under the Convention when the seller delivered nonconforming goods; *Medical Marketing Int'l, Inc. v. Internazionale Medico Scientifica, S.R.L.*, 1999 U.S. Dist. LEXIS 7380, No. CIV. A. 99-0380, 1999 WL 311945 (E.D. La. May 17), interpreting the Convention's Art. 35 public laws and regulations provision; *Mitchell Aircraft Spares, Inc. v. European Aircraft Serv. AB,* 23 F. Supp.. 2d 915 (N.D. Ill. 1998), following *MCC-Marble; Calzaturificio Claudia s.n.c. v. Olivieri Footwear Ltd.*, 1998 U.S. Dist. LEXIS 4586, No. 96 Civ. 8052 (HB) (THK), 1998 WL 164824 (S.D.N.Y. Apr. 7), applying the Convention rules eliminating statute of frauds and the parol evidence rule; *Helen Kaminski Pty. Ltd. v. Marketing Australian Prods., Inc.,* 1997 U.S. Dist. LEXIS 10630, Nos. M-47 (DLC), 96 B46519, 97- 8072 A, 1997 WL 414137 (S.D.N.Y. July 23), holding that the Convention's scope did not extend to a distributorship agreement; *Filanto, S.p.A. v. Chilewich Int'l Corp.,* 789 F. Supp.. 1229 (S.D.N.Y. 1992), interpreting the battle-of-forms provision of Convention Art. 19 and noting the Convention's lack of statute of frauds and parol evidence rules.

[12] See, e.g., Convention Pt. II (formation of contract) and Pt. III (performance, breach and injury); *Stedman v. Hoogendoorn, Talbot, Davids, Godfrey & Milligan, P.C.*, 843 F. Supp.. 1512, 1517 (N.D. Ill. 1994), vacated by unpublished order (reported in table at 61 F.3d 906 (7th Cir. 1995)) on other grounds.

sufficiently definite if it indicates the goods and expressly or implicitly makes provision for determining the quantity and the price» (id. Art. 14(1)).[13]

In this instance Magellan alleges that it sent purchase orders to Salzgitter on February 15 that contained the material terms upon which the parties had agreed. Those terms included identification of the goods, quantity and price. Certainly an offer could be found consistently with those facts.

But Convention Art. 19(1) goes on to state that «[a] reply to an offer which purports to be an acceptance but contains additions, limitations or other modifications is a rejection of the offer and constitutes a counter-offer.» That provision reflects[14] the common law's «mirror image» rule that the UCC has rejected (see *Filanto,* 789 F. Supp. at 1238). And Salzgitter's February 17 response to the purchase orders did propose price changes. Hence that response can be seen as a counter-offer that justified Magellan's belief that its acceptance of those new prices would form a contract.

Although that expectation was then frustrated by the later events in February and then in March, which in contract terms equated to further offers and counter-offers, the requisite contractual joiner could reasonably be viewed by a factfinder as having jelled on March 26. In that respect Convention Art. 18(a) requires an indication of assent to an offer (or counter-offer) to constitute its acceptance. Such an «indication» may occur through «a statement made by or other conduct of the offeree» (id.). And at the very least, a jury could find consistently with Magellan's allegations that the required indication of complete (mirrored) assent occurred when Magellan issued its LC on March 26. So much, then, for the first element of a contract: offer and acceptance.

Next, the second pleading requirement for a breach of contract claim – performance by plaintiff – was not only specifically addressed by Magellan (Complaint p.39) but can also be inferred from the facts alleged in Complaint p. 43 and from Magellan's prayer for specific performance. Magellan's performance obligation as the buyer is simple: payment of the price for the goods. Magellan issued its LC in satisfaction of that obligation, later requesting the LC's cancellation only after Salzgitter's alleged breach (Complaint pp. 24, 31). Moreover, Magellan's request for specific performance implicitly confirms that it remains ready and willing to pay the price if such relief were granted.

As for the third pleading element – Salzgitter's breach – Complaint p. 38 alleges:

> «Salzgitter's March 30 letter (Exhibit G) demanding that the bill of lading provision be removed from the letter of credit and threatening to cancel the contract constitutes an anticipatory repudiation and fundamental breach of the contract.»

It would be difficult to imagine an allegation that more clearly fulfills the notice function of pleading.

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[13] See generally John E. Murray, Jr., Essay on the Formation of Contracts and Related Matters under the United Nations Convention on Contracts for the International Sale of Goods, 8 *J.L. & Com.* 11, 13-26 (offer), 27-38 (acceptance), 38-44 (battle of forms), 48-50 (modifications) (1988).

[14] Bad pun intended.

Convention Art. 72 addresses the concept of anticipatory breach:

> «(1) If prior to the date for performance of the contract it is clear that one of the parties will commit a fundamental breach of contract, the other party may declare the contract avoided.
>
> (2) If time allows, the party intending to declare the contract avoided must give reasonable notice to the other party in order to permit him to provide adequate assurance of his performance.
>
> (3) The requirements of the preceding paragraph do not apply if the other party has declared that he will not perform his obligations.»

And Convention Art. 25 states in relevant part:

> «A breach of contract committed by one of the parties is fundamental if it results in such detriment to the other party as substantially to deprive him of what he is entitled to expect under the contract . . .»

That plain language reveals that under the Convention an anticipatory repudiation pleader need simply allege (1) that the defendant intended to breach the contract before the contract's performance date and (2) that such breach was fundamental. Here Magellan has pleaded that Salzgitter's March 29 letter indicated its pre-performance intention not to perform the contract, coupled with Magellan's allegation that the bill of lading requirement was an essential part of the parties' bargain. That being the case, Salzgitter's insistence upon an amendment of that requirement would indeed be a fundamental breach.

Lastly, Magellan has easily jumped the fourth pleading hurdle – resultant injury. Complaint p. 40 alleges that the breach «has caused damages to Magellan.»

Count II: Specific Performance or Replevin

Convention Art. 46(1) provides that a buyer may require the seller to perform its obligations unless the buyer has resorted to a remedy inconsistent with that requirement. As such, that provision would appear to make specific performance routinely available under the Convention. But Convention Art. 28 conditions the availability of specific performance:[15]

> «If, in accordance with the provisions of this Convention, one party is entitled to require performance of any obligation by the other party, a court is not bound to enter judgment for specific performance unless the court would do so under its own law in respect of similar contracts of sale not governed by this Convention.»

[15] See generally Steven Walt, For specific Performance Under the United Nations Sales Convention, 26 *Tex. Int'l L. J.* 211 (1991), which takes the position that given the Convention's documentary history and given domestic caselaw, specific performance should be routinely available under the Convention.

Simply put, that looks to the availability of such relief under the UCC. And in pleading terms, any complaint adequate to provide notice under the UCC is equally sufficient under the Convention.

Under UCC § 2-716(1) a court may decree specific performance «where the goods are unique or in other proper circumstances.»[16] That provision's Official Commentary instructs that inability to cover should be considered «strong evidence» of «other proper circumstances.» UCC § 2-716 was designed to liberalize the common law, which rarely allowed specific performance (see, e.g., 4A Ronald A. Anderson, *Uniform Commercial Code* § 2-716: 11 (3d ed. 1997)). Basically courts now determine whether goods are replaceable as a practical matter – for example, whether it would be difficult to obtain similar goods on the open market (see generally Andrea G. Nadel, Annotation, Specific Performance of Sale of Goods Under UCC § 2-716, 26 *A.L.R. 4th* 294 (1983)).

Given the centrality of the replaceability issue in determining the availability of specific relief under the UCC, a pleader need allege only the difficulty of cover to state a claim under that section. Magellan has done that (Complaint p. 42).

[...]

[16] Because the Convention does not have a replevin provision similar to UCC § 2-716(3), Convention Art. 28 renders such relief unavailable under Complaint Count II.