Case 1639: CISG 9(2)
United States: Bankruptcy Court for the Eastern District of Pennsylvania (decision affirmed by the U.S. District Court for the Eastern District of Pennsylvania, United States, 19 January 2016 (2016 WL 215229))
511 B.R. 738 (Bankr. E.D. Pa., 18 June 2014)
In re World Imports, Ltd.
18 June 2014
Original in English

Abstract prepared by Harry M. Flechtner, National Correspondent

Sellers in transactions governed by the CISG shipped goods to a United States buyer, who took over the goods and then initiated bankruptcy proceedings under United States federal bankruptcy law without having paid the price. The sellers filed claims for the goods' value in the buyer's bankruptcy proceedings, and argued that their claims were entitled to enhanced "administrative expense" priority over other creditor claims. The sellers' argument was based on a provision of the United States federal Bankruptcy Code that grants administrative expense priority to claims for the value of goods that were sold to a debtor-buyer in the ordinary course of its business, provided the goods were "received" by the buyer within 20 days before bankruptcy proceedings were initiated. The sellers' sales were conceded to be "ordinary course"; the issue was whether the buyer "received" the goods for purposes of the Bankruptcy Code provision within 20 days of initiating bankruptcy proceedings. United States federal Bankruptcy Code does not expressly address when a buyer is deemed to have "received" goods.

The sellers had delivered the goods to carriers in their home country more than 20 days before the buyer filed for bankruptcy, but the buyer took possession of the goods from the carrier in the United States within 20 days of the buyer 's bankruptcy petition. The bankruptcy court for the Eastern District of Pennsylvania, the court of first instance for the sellers' claims, noted that, in transactions governed by generally-prevailing United States domestic sales law (Article 2 of the Uniform Commercial Code ("UCC")[9]), the time when a buyer "receives" goods for purposes of the federal Bankruptcy Code could be determined by reference to the definition in UCC § 2-103(1)(c), which provides that a buyer receives goods when it takes "physical possession" of them. Under this approach, the buyer would be deemed to have received the goods when it received possession from the carrier within 20 days of initiating bankruptcy proceedings, and the sellers' claims would be entitled to priority as administrative expenses.

The debtor and the representative of non-priority unsecured creditors, however, pointed out that the sales transactions at issue were governed by the CISG rather than the UCC. The CISG does not define when a buyer "receives" goods, but the bankruptcy court noted that the parties' sales contract provided for delivery "FOB" port of origin; although the parties had not expressly incorporated the INCOTERMS rules on the meaning of their FOB term, the court found that those rules are incorporated into the CISG under Article 9(2) as internationally-accepted trade usages. The INCOTERMS 2010 rules for the term "FOB" also do not provide a definition of when a buyer "receives" goods, but the bankruptcy court noted that those rules provide that "once the seller delivers the goods, the risk of loss or damage passes to the buyer "; "[o]nce delivered [to the carrier]," the court concluded, "the goods are perforce constructively received by the Debtor." The court therefore ruled that the buyer "received" the goods, for purposes of the United States domestic federal bankruptcy rule, when the goods were "delivered" at the port of origin; thus the buyer had "received" the goods more than 20 days before it initiated bankruptcy proceedings, and the sellers' claims were not entitled to administrative expense priority.

The apparent result of this decision is that sellers whose claims would be entitled to administrative expense priority if United States domestic sales law governed their transactions may not be so entitled if the CISG is the applicable law. On the facts of the World Import decision, for example, a change in the law governing the sales — with no other change in facts — would produce different results.[10]

The sellers appealed the bankruptcy court decision to the federal district court for the Eastern District of Pennsylvania — normally a trial court but, in this bankruptcy context, functioning as an appeals court. The district court adopted the reasoning of the bankruptcy court, and affirmed the decision.

[9] UCC Article 2 is the statute governing sales of goods in all United States states except Louisiana.