

CASE 1714: CISG 4; 7(1)

Brazil: Rio Grande do Sul Court of Justice, 12th Commercial Division

Appeal No. 70072090608 (CNJ 0419254-25.2016.8.21.7000)

Voges Metalurgia LTDA. v. Inversiones Metalmeccanicas I.C.A. — IMETAL I.C.A.

30 March 2017 Original in Portuguese Available at: tjrs.jus.br

Abstract prepared by Orlando José Guterres Costa Júnior

A Venezuelan buyer bought 16 engines from a Brazilian manufacturer, the buyer was requested payment in advance, but due to Venezuela's controls on currency exchange for import purposes, the agreed amount had to be paid again when the goods reached the port of delivery. The parties negotiated that the second payment had to be returned to the buyer, however the seller never performed the deal, and the buyer filed a collection claim in Brazilian courts. The seller argued that Brazilian courts had no jurisdiction to hear the claim, that the buyer did not prove that the payment was made twice and that the deal should be declared null, as it was performed as a fraud to Venezuelan law. The lower court found for the buyer and the seller filed an appeal to the Rio Grande do Sul Court of Justice.

With regard to the applicable law, as it was not clear if the agreement had been signed in Brazil or in Venezuela, the Court of Justice referred to the principle of closest relationship of the contract to reject the application of Venezuelan law to the dispute and stated that the CISG and Unidroit Principles were instead applicable. The Court noted that the CISG and the Principles are relevant sources of customary international law and they are particularly relevant in the Brazilian context since they provide a modern legal framework to deal with disputes arising out of international transactions.

The Court stated that as the CISG does not apply to the validity of contracts, pursuant to its article 4, the buyer's claim on this matter shall be decided based on the Unidroit Principles, as a subsidiary norm, which should prevail over the application of domestic law. The Court considered that since the Convention is to be interpreted in accordance with its international character, according to its article 7(1), the Court should not apply domestic laws, but provisions of the "new *lex mercatoria*" and uniform law relevant to disputes of international character. The Court emphasized that precedence of those provisions over domestic norms to fill "external gaps" of the Convention was also due to the fact that the legal remedies based on the Convention must be acceptable in different legal systems and traditions, which may interpret matters of international contract law differently and treat them differently.

The Court further noted that articles 3.3.1 and 3.3.2 of the Unidroit Principles state that where contract performance infringes a mandatory rule, whether of national, international or supranational origin, restitution may be granted where this would be reasonable according to the circumstances. However, the Court argued that the seller did not sufficiently prove that Venezuelan law on currency exchange for import purposes is an imperative norm. Moreover, even if Venezuela's legislation could be classified as mandatory, under the terms of which the parties stipulated the mode of payment of the contracted goods, the buyer would still be entitled to restitution by the seller. The Court considered the purpose of Venezuela's norms that were infringed (they mainly aim to ensure State intervention in import and export operations) and the seriousness of the infringement (which was deemed irrelevant, since the parties merely agreed on an advance payment while, under Venezuelan legislation, payment could only occur when the goods were delivered to customs) and held that those were reasonable circumstances, pursuant to the articles of the Unidroit Principles, to allow for refunding of the buyer.

Further, the Court noted that although the CISG does not concern the validity of contracts, article 7(1) CISG sets forth a duty of good faith as a fundamental legal standard for international trade, which shall not be neglected by the parties. Therefore, the seller has no right under the Convention to claim avoidance of the contract and argue that the buyer has no right to be refunded of the paid amount. The Court also noted that the Convention, aiming to create uniform rules applicable to international trade relationships, defines the concept of contract on the basis of two fundamental pillars, namely private autonomy and good faith, and that in conformity with these principles, parties have a duty to act fairly in negotiations and international sale contracts must be understood as a cooperative relation between the parties. Keeping up with this reasoning, the Court held that the allegations of the seller should be rejected because they were contrary to the principles on which the Convention is based and that rule contracts of international trade. The Court concluded that there was enough evidence regarding the duplicate payment made by the buyer and consequently upheld the decision of the lower courts and ordered the seller to refund the buyer of the amount paid in excess.