CISG-online 2819	
Jurisdiction	Brazil
Tribunal	Tribunal de Justiça do Estado do Rio Grande do Sul - TJRS (Court of Appeal of the State of Rio Grande do Sul)
Date of the decision	30 March 2017
Case no./docket no.	70072090608
Case name	*Voges Metalurgia Ltda. v. Inversiones Metalmecanicas I.C.A. – Imetal I.C.A.*

Translation[*] *by Gustavo Becker*[**]

[...]

REPORT

Initially, in order to avoid unnecessary tautology, I transcribe the report of the appealed decision prepared by the judge of the 4th Judicial Court of Caxias do Sul, Claudia Rosa Brugger: 1

> *INVERSIONES METALMECANICAS I.C.A. – IMETAL I.C.A (IMETAL, C.A.), whose information is provided in the initial claim, filed a suit against VOGES METALÚRGICA LTDA., stating that it imported goods from the respondent (16 electric motors) costing a total amount of US$ 73,996.44. Due to the fact that Venezuela's import market allows the purchase of US dollars through CADIVI (the government's agency for foreign exchange and import control) only when the goods arrive at the port, the mentioned amount was paid in advance in order to make the operation viable. However, in order to comply with the rules of its country, with strict exchange control, the Claimant proceeded with the payment once again to the Respondent once the goods arrived at the port, since the parties agreed about the reimbursement of the payment, which did not happen. The Claimant requests the Respondent to pay the amount of R$ 150,908.33, under the exchange rate as of January 23, 2013. Documents were attached to the claim.*

[*] All translations should be verified by cross-checking against the original text.

[**] Gustavo is admitted to practice law in Brazil and currently pursues a Master's degree in Globalization and Law at the University of Maastricht. He holds a Bachelor's degree in Law and a Master's degree by research (M.Sc.) in International Law from the Federal University of Santa Catarina (UFSC) in Brazil with a visiting scholar period undertaken at the *Università degli Studi di Milano*. Gustavo is a Researcher for the UFSC Jean Monnet Module on European Private International Law.

The defendant presented counter-claim (pages 51/67), arguing preliminarily absolute lack of jurisdiction of the Brazilian Judiciary to judge of the case and the need of translation of the documents attached in a foreign language. On the merits, it argued that the Claimant did not discharge its burden of demonstrating the alleged 'bis in idem' of the payments and that it only legally received the amount corresponding to the transaction between the parties that was in accordance with the rules of the Venezuelan Financial System. It emphasized the impossibility of reimbursement of the amounts requested by the Claimant since they are the result of an illegal act committed in its country by applying not following the rules once the payments were made through an US bank, which was also not proved. It also defended the nullity of the legal connection between both parties, requesting the dismissal of the claims. Evidences attached to the counter-claim. There was a response from the Claimant (pages 83/92) The parties were notified about their interest in producing evidence. The Claimant requested an official letter to the Central Bank to inform about the deposits made in benefit of the Respondent and the production of oral evidence. The Respondent notified the granting of its request for bankruptcy recovery plan, ratifying the preliminary arguments (pages 93/99). The Respondent claimed the benefit of 'AJG' (pages 111/117). Through a procedural order (page 123), the preliminary argument of absolute lack of jurisdiction, as well as the request for oral evidence production were rejected. The allegation of lack of translated documents attached by the author was rejected, since it was seen as based on easy interpretation. The request for official letter to 'Banco do Brasil' was granted. The Respondent filed an appeal against such procedural order, which was dismissed (pages 173/184). The Public Prosecution had access to the files, saying that there was no reason for its intervention (page 120). Access to the case was given to the Judicial Administrator (related to the bankruptcy recovery plan), who was for the continuation of the proceedings (page 122). The Respondent's request for 'AJG' was rejected (page 154). An appeal has been filled, which was denied (pages 204/206). There was a response for the notification (pages 196/202), access was given to the parties. After their manifestations, the suit was submitted for final decision.

The final decision states as follows: **2**

THEREFORE, I DECIDE TO GRANT THE REQUEST ordering the Respondent to pay the debt to the Claimant in the amount of R$ 150. 908, 33, to be monetarily updated by the IGP - M (FGV) from 23/01/2013 plus interest of 1% per month. The Respondent will bear the payment of legal costs and the Claimant's attorney's fees, which is set at 10% of the updated total value of the case, pursuant § 2 of art. 85 of the Code of Civil Procedure/2015.

Voges Metalurgia Ltda. appealed. Voges Metalurgia Ltda. (acting as Claimant) claimed the absence of evidence in the case file regarding the double payment as alleged by the Respondent (Inversiones Metalmecanicas I.C.A. – Imetal I.C.A.), in the initial claim, thus referring to art. 373, I, of the Code of Civil Procedure/2015, and requesting the reform of the decision in order to grant its requests. It stated that the Claimant did not fulfill its burden of proof to provide **3**

the constitutive facts of its requests. Also, it added that, even if the burden of proof related to the Claimant's arguments is satisfied, its claims must be rejected given the nullity of the legal connection between the parties, pursuant art. 166, II, of the Civil Code, in light of the regulations of the Venezuelan financial system. Finally, it requested for the lowering of the legal costs, contesting the alleged arbitrary percentage of 10% of the updated total costs of the case, claiming for proportionality and reasonableness. Thus, it stated that the appeal should be upheld (pages 224/236).

Upon submission of the appeal, suspending the effects of the decision from first instance until judgement of the appeal, the Respondent filed counterarguments, through which it stated the preliminary invalidity of the appeal based on lack of specific counter arguments towards the argument presented by the judgment of first instance (pages 251/259). Subsequently, the files were sent to this Court and distributed to me, for prevention, pursuant art. 146, V of the Rules of Procedure of the 'TJRS' (Court of Appeal of the State of Rio Grande do Sul)[1]. Upon receipt of the appeal, I decided as follows (page 260). **4**

> *From the analysis of the files, arises doubts as to the legal system applicable to the merits of the dispute: although, based on the evidence, the case deals with an international sale of goods, the evidence contained in the files is not sufficient to find the manner and place of the contract execution. Thus, based on the rules of connection applicable to contracts with a foreign element between parties, pursuant art. 9º "caput" and §2 of the Act of Introduction to the Brazilian Law, the parties shall clarify as to the place and/or manner of execution of the contract within 10 (ten) days in order to enable the identification of the applicable law. Afterwards, the files shall return to the Reporter for the timely inclusion of the appeal in the court's judgment agenda.*

As a response, the Respondent stated that the agreement was signed in Venezuela and that "the rules of that country should be applied in this case while requiring "recognition of the absolute lack of jurisdiction of Brazilian Judiciary to decide the case pursuant art. 9 "caput", of LINDB (*Act of Introduction to the Brazilian Law*), as well as art. 100, IV, "d" of the 1973 Code of Civil Procedure (page 265). The Claimant stated that the contract was executed in Brazil, although, not mentioning the preliminary lack of Brazilian jurisdiction or the law applicable to the merits (pages 270/271). **5**

It is the report.

[1] The distribution by prevention was due to the judgments given, under my report in the Procedural Order Appeal no. 70065345423, in which this Court rejected the argument of the Respondent based on lack of Brazilian jurisdiction for this case, as well as in the Appeal no. 70066307596, in which the defendant was denied the benefit of no judicial costs.

VOTES

JUSTICE UMBERTO GUASPARI SUDBRACK (REPORTER)

Preliminary issues

Admission of the civil appeal

The analysis of the appeal from the Claimant, Voges Metalurgia Ltda., shows that, based on the arguments addressed to this Court, the Claimant does contest the grounds of the judgment. The first instance judge considered that there was sufficient evidence of the financial transaction between the parties, a conclusion directly opposed by the Claimant while raising art. 373, I, of the Code of Civil Procedure/2015. In addition, the judgment also decided in favour of full validity of the legal connection between the parties, which the Claimant intends to contest through art. 166, II, of the Civil Code. There is no doubt, therefore, that the Claimant fully followed the principle of dialecticism and specifically challenged the 'thema decidendum', which leads to the rejection of the Respondent's arguments on the Claimant's arguments of lack of admission criteria. 6

Lack of Brazilian jurisdiction

The preliminary argument put forward by the Respondent also should not be upheld, once, contrary to its claims, the dispute does not go beyond the limits of the Brazilian jurisdiction. The hiring of a lawyer in Brazil by the foreign company and the subsequent filing of this lawsuit is fully supported by Brazilian law pursuant art. 88, I, of the Civil Procedure Code of 1973, which was applicable at the time of the filing, as well as of art. 12, “caput”, of LINDB. In summary, the dispute arising from the international contract under consideration may be brought before the Brazilian Judiciary because the Claimant, Voges Metalurgia Ltda., is domiciled in Brazil. 7

Private International Law establishes, for procedural matters, the principle of territoriality, by virtue of which it is the “lex fori”, that is, the law of the State in which the lawsuit is being brought, which determines “the matters to be dealt by the judge and parties, the organization of the judiciary and the process and procedure involved”[2]. Precisely for this reason, the 1928 Havana Convention on Private International Law (the “Bustamante Code”)[3] establishes, in its 8

[2] BASSO, Maristela. Curso de direito internacional privado. – 4. ed. – São Paulo: Atlas, 2014, p. 181.

[3] The so-called Bustamante Code has been part of the Brazilian legal system since the promulgation of Presidential Decree No. 18,871 of August 13, 1929, a presidential act that concluded the rite of incorporation of the treaty in question into the Brazilian legal system, thus endowing it with effectiveness and enabling its judicial application, including irrespective of the evocation by the parties. In this Chamber, it should be emphasized, the recourse to the Bustamante Code is already precedent: in the Civil Appeal No. 70070573506 of my Rapporteur, this Court made use of the rule of art. 399 of the Bustamante Code to examine, on the basis of Argentine procedural law, the extrinsic regularity of the evidence produced therein in relation to facts occurring in Argentine territory; and, in Civil Appeal No. 70061035572, also of my Rapporteur, this Board referred to the norm of art. 401 of the Bustamante Code to assess, based on the rules of burden of proof given by Brazilian Law, the

art. 314, that “the law of each Contracting State shall determine the jurisdiction of the courts, as well as their organization, the manner in which they are enforced, the enforcement of judgments and the appeals against their decisions”. This is the reason why, for purposes of examining the fulfilment of the hypothesis of Brazilian jurisdiction given by art. 88, I, of the Code of Civil Procedure/73 and by art. 12, “caput”, of the LINDB, the defendant's domicile must be verified based on the Brazilian legal system. In other words, due to the principle of territoriality of Private International Law, it is based on the Brazilian Law that the judge should inquire whether the defendant has domicile in Brazil[4]. Therefore, the assessment of the preliminary arguments in this case involves application of art. 75, IV, of the Civil Code, the wording of which defines the domicile of the legal entity as “the place where the respective executive officers and administrations operate, or where they elect special domicile in their bylaws or articles of incorporation”. Therefore, considering that the articles of incorporation of the Claimant, attached to the counterclaim, provides that the Claimant has its registered office and legal domicile in the Municipality of Caxias do Sul/RS (Clause Two, page 70), it is clear that, under art. 75, IV, of the Civil Code, the Claimant is a legal entity domiciled in Brazil, which characterizes, by itself, the reasoning of the art. 88, I, of the Code of Civil Procedure/73, and art. 12, “caput” by LINDB.

I say that the Claimant's registered office in Brazilian territory characterizes, by itself, the Brazilian jurisdiction since, as I already had the opportunity to decide - based on a different doctrine on this subject[5] as for the judgment of the Civil Appeal no. 70070573506, on 27 / 10/2016 - the list of legal possibilities to decide for Brazilian jurisdiction is not cumulative in nature. That is, it is sufficient that one of the scenarios listed by the art. 88, I, of the Code of Civil Procedure/73 is fulfilled. Therefore, in this case, the Brazilian judge has jurisdiction. As a result, the rejection of the preliminary argument does not require that Brazil is the place of fulfilment of the obligation (item II, art. 88 of the Code of Civil Procedure/73) or if the dispute arises from an act or fact that took place in Brazil (item III of article 88 of the Code of Civil Procedure/73). The Brazilian jurisdiction is simply characterized by the location of the defendant's domicile in the national territory, which is why, in the final analysis, the rejection of the preliminary argument is based on the simple application of the domicile criterion, which I have already used both in Civil Appeal No. 70061035572, judged on April 23, 2015, and in the Appeal No. 70065345423, on 09/10/2015. 9

sufficiency of the evidential elements produced in relation to the facts occurred in Uruguayan territory, also supported by the provisions of art. 13 of the LINDB.

[4] VALLADÃO, Haroldo. Domicílio e residência no direito internacional privado. Revista dos Tribunais, n.o 372, out./1966, p. 7-21.

[5] MOREIRA, José Carlos Barbosa. Problemas relativos a litígios internacionais. – Doutrinas essenciais de direito internacional. – São Paulo: Editora Revista dos Tribunais, Vol. 04, p. 1237-1261, 2012.

On the other hand, it should be noted - even to avoid potential appeals by the Respondent, based on art. 489, IV, of the Code of Civil Procedure / 2015 - that neither the content of the Respondent's statement in response to the order of this Reporter of conversion of the suit into diligence, allows the reception of the preliminary argument. In no way does the Respondent's claim that the signature and execution of the contract took place in Venezuela, based on which it not only required the application of Venezuelan law, but also argued that the "absolute lack of jurisdiction of Brazilian Judiciary, pursuant to art. 9 "caput" of LINDB and of art. 100, IV, "d", of the Code of Civil Procedure/1973 "(pages 265/265). However, it is evident the inaccuracy through which the Respondent addresses the concepts of competent jurisdiction, which concerns the preliminary issue and applicable law, which is not to be confused and will be analyzed in the following section. In addition, art. 100 of the Code of Civil Procedure/1973 provided for criteria of *internal jurisdiction*, that is, it stipulated internal rules of the judicial organization, whose incidence is, therefore, temporarily ahead of the analysis of existence of Brazilian jurisdiction[6]. For this reason, there is no room to accept the defensive thesis that the present case should have been filed in Venezuela, on the ground that the Claimant foreign company requires the fulfilment of an obligation allegedly not followed, pursuant art. 100, IV, "d" of the Code of Civil Procedure / 73. **10**

In short, as I stated in the Reporter vote I provided in the aforementioned Appeal No 70065345423: **11**

> [...] art. 12, "caput" of LINDB and art. 88, I of the Code of Civil Procedure (1973) are examples of normative delimitation towards the "international competence". These are the territorial limits of the Brazilian judicial authority, an issue that precedes the limitation of the internal competence pursuant art. 100 of the Code of Civil Procedure. Therefore, these are norms whose fields of application do not overlap, because they are not confused, and whose implications take place over time, successively.

Accordingly, I dismiss the preliminary argument towards the lack of Brazilian jurisdiction to decide the case, thus, rejecting the request for extinction of this suit based on the lack of merits, pursuant art. 485, IV of the Code of Civil Procedure/2015 (which corresponded to article 267, IV of the Code of Civil Procedure/73), mentioned by the Claimant. **12**

Applicable Law to the Merits of the Dispute

The controversy over the place and manner of the contract execution is fundamental to the correct assessment of the merits once the legal system applicable to the matter may vary, depending on whether the parties were present or absent - or, in the latter case, depending on which party has been the proponent. After all, it is well known that, when establishing the list of connecting elements of the Brazilian Private International Law, the LINDB establishes the rule "locus regit actum" or "ius loci celebrationis", i.e., the law of the place of execution **13**

[6] TIBURCIO, Carmen, MENDES, Aluisio Gonçalves de Castro. Jurisdição e competência para o julgamento de ilícitos cíveis com elementos de estraneidade segundo o direito brasileiro. Revista de Processo, vol. 231, mai./2014, p. 39-54.63.

for contractual obligations pursuant art. 9. Precisely because of this reason, the parties' divergence in that regard may be qualified, under civil procedural law, as a detrimental issue since, unlike the preliminary issues, it does not preclude the examination of the merits, but rather seeks to condition it, which influences how it will be judged[7]:

Therefore, I analyse the topic under consideration in this section apart from the preliminary ones, and I immediately point out that the conversion to diligence, which I applied with the purpose of identifying the law applicable to the resolution of the merits, is in full compliance with the national legislation. On the one hand, because this allowed the parties to exercise the right to counterargument according to art. 10 of the Code of Civil Procedure/2015, through which "the judge may not rule in any jurisdiction on any grounds on which the parties have not been given an opportunity to respond, even in issues to be decided 'ex officio'". On the other hand, because the academia in Brazilian Private International Law tends to, if it is not unanimous, to the sense that the judge must inquire as to the application of foreign Law, and eventually apply it, even ex officio, that is, independently from request by the parties. In case this is not complied with, the judge risks failing to comply with the LINDB that stipulate the elements of internationality or connection that should be applied by the national judge[8].[9] 14

[7] WAMBIER, Teresa Arruda Alvim, CONCEIÇÃO, Maria Lúcia Lins, RIBEIRO, Leonardo Ferres da Silva, MELLO, Rogério Licastro Torres de. Primeiros comentários ao novo código de processo civil: artigo por artigo. – 1. ed. – São Paulo: Editora Revista dos Tribunais, 2015, p. 503.

[8] BAPTISTA, Luiz Olavo. Aplicação do direito estrangeiro pelo juiz nacional. Revista dos Tribunais, vol. 794, jun./1999, p.33-45; BASSO, Maristela. Curso de direito internacional privado. – 4. ed. – São Paulo: Atlas, 2014, p. 296; COSTA, Luiz Antonio Severo Da. Da aplicação do direito estrangeiro pelo juiz nacional. Rio de Janeiro: Freitas Bastos, 1968, p. 25; DOLINGER, Jacob. Direito internacional privado: parte geral. – 11. ed. – Rio de Janeiro: Forense, 2014, p. 284- 285; ESPÍNDOLA, Eduardo, ESPÍNDOLA FILHO, Eduardo. Lei de introdução ao Código Civil comentada. Vol. III. Rio de Janeiro: Freitas Bastos, 1944, p. 387; RECHSTEINER, Beat Walter. Direito internacional privado: teoria e prática. – 15. ed. rev. e atual. – São Paulo: Saraiva, 2012, p. 260-261; SERPA LOPES, Miguel Maria De. Comentário teórico e prático da Lei de Introdução ao Código Civil. Rio de Janeiro: Jacintho, 1943, Vol. 03, p. 308; TENÓRIO, Oscar. Lei de Introdução ao Código Civil Brasileiro. – 2. ed. – Rio de Janeiro: Borsoi, 1955, p. 410; VALLADÃO, Haroldo. Direito internacional privado. – 3. ed. – Rio de Janeiro: Freitas Bastos, 1980, Vol. 1, p. 464.

[9] BAPTISTA, Luiz Olavo. Aplicação do direito estrangeiro pelo juiz nacional. Revista dos Tribunais, vol. 794, jun./1999, p.33-45; BASSO, Maristela. Curso de direito internacional privado. – 4. ed. – São Paulo: Atlas, 2014, p. 296; COSTA, Luiz Antonio Severo Da. Da aplicação do direito estrangeiro pelo juiz nacional. Rio de Janeiro: Freitas Bastos, 1968, p. 25; DOLINGER, Jacob. Direito internacional privado: parte geral. – 11. ed. – Rio de Janeiro: Forense, 2014, p. 284- 285; ESPÍNDOLA, Eduardo, ESPÍNDOLA FILHO, Eduardo. Lei de introdução ao Código Civil comentada. Vol. III. Rio de Janeiro: Freitas Bastos, 1944, p. 387; RECHSTEINER, Beat Walter. Direito internacional privado: teoria e prática. – 15. ed. rev. e atual. – São Paulo: Saraiva, 2012, p. 260-261; SERPA LOPES, Miguel Maria De. Comentário teórico e prático da Lei de Introdução ao Código Civil. Rio de Janeiro: Jacintho, 1943, Vol. 03, p. 308; TENÓRIO, Oscar. Lei de Introdução ao Código Civil Brasileiro. – 2. ed. – Rio de Janeiro: Borsoi, 1955, p. 410; VALLADÃO, Haroldo. Direito internacional privado. – 3. ed. – Rio de Janeiro: Freitas Bastos, 1980, Vol. 1, p. 464.

Well, the Claimant stated that the agreement was signed in Venezuela and that “the rules of that country should be applied for the purpose of solving the controversies presented in this case” (page 265), while the Respondent argued that Brazil was the place of execution of the contract without mentioning the applicable law (pages 270/271). Therefore, it is certain that the argument of both parties to the notification of page 260 does not clarify to this Court whether the assessment of the merits should be based on Brazilian law, pursuant to the "caput" of art. 9 of the LINDB or, instead, based on Venezuelan Law pursuant to §2 of the same art. 9 of the Introduction Act. To state it differently, considering the content of the Claimant and the Respondent's arguments and the absence of any evidence concerning them, the new production of evidence has not changed the inconclusive nature of the evidences brought by the parties before the court regarding the connection element and the applicable Law. After all, the invoices, proofs of transactions and copies of e-mails (pages 21/36) prove nothing in this regard, as well as the documents attached on pages 196/202 or on pages 210/214. All the evidence brought to the case relates only to the payment of the amounts related to the contract, but they do not contain any information as to the manner or place of its execution. **15**

Technically, therefore, there is no support to accept the Claimant’s argument on the applicability of Venezuelan Law since it was not proved that the contract execution took place in the territory of that State, either among those present (art. 9, “caput ”, LINDB), or absent with the Claimant as the proponent (art. 9, paragraph 2, LINDB). At the same time, however, it cannot be stated from the content of the case that the contract was executed in Brazil. In short, the manner and place of the contract execution are uncertain, which has a direct relation with the identification of the legal framework that supports merits. Therefore, this is a specific case in which the identification of the applicable law requires the use of the principle of proximity (“most significant relationship rule”), on which Jacob Dolinger states[10]: **16**

> The most relevant principle of modern private international law is the principle of proximity, which states that legal relations must be governed by the law of the country with the closest and most direct connection with the case. This criterion, much more flexible than the rules of connection, stems from the progressive abandonment of technical approaches and greater attention to the social and economic realities that underlie the legal phenomenon. The closest law is the one closest to the parties and/or the legal relationship - it is the most tailored and most appropriate law for the case. Therefore, the most suitable. Proximity is in the sense of adequacy. [...] Authors recall that when Savigny used to speak about seeking the seat of the legal relationship, he was launching the idea of proximity.

[10] DOLINGER, Jacob. Direito internacional privado: parte geral. – 11. ed. – Rio de Janeiro: Forense, 2014, p. 356.

This Court has already resorted to the principle of proximity, for example in the Civil Appeal No 70070973771, judged on 27/10/2016. In that precedent, the principle was applied setting aside the application of the California Civil Code, thus, applying the Brazilian Law – i.e., the Civil Code and the Consumer Protection Code - to deal with the merits of the dispute. This case dealt with the breach of a contract related to transport that, notwithstanding execution in the US state of California, had its effects taking place in Brazil, which is the State where it the largest number of legal effects happened, especially since the consumers had experienced different consequences as a result of the agreement in Brazil when it comes to the failure to provide the contracted services. 17

Moreover, in the recent judgment of the Civil Appeal No 70072362940, judged on 14/02/2017, in which I also acted as Reporter, the principle of proximity was used setting aside the application of the Danish law (which in principle would fall within the application of Article 9, § 2 of LINDB) in order to determine as the applicable legal framework to the merits the Unidroit Principles on International Trade Contracts and the United Nations Convention on the Contracts for the International Sale of Goods (the "Vienna Convention of 1980"). My vote shows that - considering the fact that the dispute concerned an international contract for the sale of goods simultaneously connected with Denmark, Brazil and China - it was identified as the applicable legal framework the 1980 Vienna Convention and the Unidroit, since I considered them to be more appropriate for dealing with disputes arising from the field of international trade. On the one hand, this judgment was based, on the one hand, on the recognition of the Convention and the Principles as examples of the usages and customs prevailing in international trade, and, on the other, on the fact that its preponderance gains special importance in the Brazilian context considering the insufficient and obsolete nature of the connection elements regime applied by art. 9 LINDB. In this regard, I refer again to the work of Professor Maristela Basso: 18

> [...] the rules of connection for determining the law applicable to contracts, as exemplified by the normative content of art. 9 of the Act of Introduction to the Brazilian Law (here a reference to the classical method of conflicts of law), does not fit the dynamics and practices of negotiations that were emerging in the field of international trade, especially in the post-war period and the interstate economic relations. This is why the adoption of the rules of the new 'lex mercatoria' takes place - in its will of doctrinal and jurisprudential validity - as an attempt to overcome the main problems that arise from the application of the classic rules of connection of private international law to contracts executed among the actors of international trade.[11]

[11] BASSO, Maristela. Curso de direito internacional privado. – 4. ed. – São Paulo: Editora Atlas, 2014, p. 256.

In short, I am rejecting the argument raised by the Claimant towards the application of Venezuelan law, based on art. 9 of the LINDB, and deciding that the merits of this case must be governed by the provisions of the 1980 Vienna Convention and the Unidroit Principles. Therefore, I refer – as reasons of my decision - to my vote in the aforementioned Civil Appeal 70072362940, judged on 14/02/2017, whose grounds are equally applicable to the present decision. 19

However, I note that the defensive arguments concerning the nullity of the contract is not subject to the 1980 Vienna Convention, since it expressly stipulates that the "The validity of the contract or of any of its provisions or of any usage and the effect which the contract may have on the property in the goods sold", under its art. 4. This aspect of the merits will be decided solely on the basis of Chapter III of the Unidroit Principles since I believe that, in order to fill the gaps of the 1980 Vienna Convention, the judge who applies the Convention must refer first to the other norms of the "new lex mercatoria" as well as uniform law on disputes arising from international trade rather than refer to domestic law. After all, the international character of the Convention, envisaged in its art. 7 (1), supports that legal conclusions based on the Convention "must be acceptable in different legal systems with different legal traditions and cultures, which may interpret matters in the field of sales of goods differently and treat them also differently".[12] Based on this I conclude the better suitability of uniform law, which precedes domestic law, to fill the gaps of the Vienna Convention[13]. 20

Merits

In order to dismiss the condemnation, the Claimant stated the nullity of the contract signed by the parties stating that the contract was executed without following the applicable regulations in the Republic of Venezuela for foreign exchange and import operations. The Claimant counter-claim – as Respondent before the court of first instance (pages 51/67) - and in the appeal addressed to this Court (pages 224/236) argues in such sense. In summary, considering the obligation to use US dollars for imports payments only when the cargo arrives at the Venezuelan customs centers, the buyer (Respondent) (company with headquarters and acting in that country, as well as presumably aware of the legislation to which it is submitted) could not have paid the cargo value in advance expecting for later reimbursement. Therefore, following the arguments, it would not be entitled to the refund. However, within the framework of Chapter III of the Unidroit Principles of International Commercial Contracts, there is no room to accept these arguments of nullity. 21

[12] SCHLECHTRIEM, Peter, SCHWENZER, Ingeborg. Comentários à Convenção das Nações Unidas sobre Contratos de Compra e Venda Internacional de Mercadorias / Peter Schlechtriem, Ingeborg Schwenzer; coordenação de tradução Eduardo Grebler, Vera Fradera, César Guimarães Pereira. – São Paulo: Editora Revista dos Tribunais, 2014, p. 205/206.

[13] GAMA JÚNIOR, Lauro. A sinergia entre a Convenção de Viena e os Princípios Unidroit relativos aos contratos comerciais internacionais. In: MOSER, Luiz Gustavo Meira (Org.), PIGNATTA, Francisco (Org.). *Comentários à Convenção de Viena sobre Contratos de Compra e Venda Internacional de Mercadorias (CISG)*: visão geral e aspectos pontuais. – São Paulo: Atlas, 2015, p. 205-243.

I hereby transcribe the rule provided by Section 3 of Chapter III of the Unidroit Principles: 22

> Article 3.3.1 (Contracts infringing mandatory rules)
>
> (1) Where a contract infringes a mandatory rule, whether of national, international or supranational origin, applicable under Article 1.4 of these Principles, the effects of that infringement upon the contract are the effects, if any, expressly prescribed by that mandatory rule.
>
> (2) Where the mandatory rule does not expressly prescribe the effects of an infringement upon a contract, the parties have the right to exercise such remedies under the contract as in the circumstances are reasonable.
>
> (3) In determining what is reasonable regard is to be had in particular to: (a) the purpose of the rule which has been infringed; (b) the category of persons for whose protection the rule exists; (c) any sanction that may be imposed under the rule infringed; (d) the seriousness of the infringement; (e) whether one or both parties knew or ought to have known of the infringement; (f) whether the performance of the contract necessitates the infringement; and (g) the parties' reasonable expectations.
>
> Article 3.3.2 (Restitution)
>
> (1) Where there has been performance under a contract infringing a mandatory rule under Article 3.3.1, restitution may be granted where this would be reasonable in the circumstances.
>
> (2) In determining what is reasonable, regard is to be had, with the appropriate adaptations, to the criteria referred to in Article 3.3.1(3).
>
> (3) If restitution is granted, the rules set out in Article 3.2.15 apply with appropriate adaptations.

Moreover, I note that the official comments to the Unidroit Principles - available for download on the website - do not properly define the concept of mandatory national rules, but merely mention that they are those issued by the states autonomously and sovereignly regarding, for example, specific assumptions for certain types of contract, the nullity of criminal clauses, operation requirements, environmental regulations etc.[14] Considering these comments, it is possible to state that the norm of national origin potential qualifies as imperative is related, based on its very nature, to the notion of public order. In other words, it is necessary that the national law allegedly breached under the contract "sub judice" has significant relevance and materiality, on its own terms, qualifying as cogent. This does not mean merely as supplementary norms, rendering the parties' wishes represented by the contract without legal effect. An 23

[14] International Institute for the Unification of Private Law (Unidroit), Rome. Unidroit principles of international commercial contracts 2010, p. 12 e p. 124-127.

example of this is the fact that, by enumerating international imperative norms, the comments to the Principles mention multilateral treaties such as the Unidroit Convention on Stolen or Illegally Exported Cultural Objects and the United Nations Convention against Corruption, as well as instruments of soft law, such as the Universal Declaration of Human Rights.

Therefore, I consider that, in the present case, there is no evidence that the Venezuelan regulation on the purchase of dollars for import purposes - which the Claimant stated to have been in breach of contract execution - could qualify as imperative in order to give rise to the annulment of the contract. In fact, there is no proof in this regard as there is no argumentative effort to prove so since the argument of contractual nullity was vague and imprecise, not to say generic and abstract. Therefore, I understand that the Claimant, as a debtor, held the burden of proof and therefore was the one interested in proving the invalidity of the contract. Thus, since it has not complied with its obligations to provide evidence, there is no room for the alleged declaration of invalidity of the contract, also because the imperative nature of the Venezuelan regulation on exchange and import cannot be applied by this Court without the party providing any elements in this sense. **24**

On the other hand, even if the domestic Venezuelan legislation is applicable to this case as the law under which the parties stipulated the method of payment of the contract, the right of the buyer to be refunded would prevail. About this matter, I point out that, under the aforementioned art. 3.3.2 of the Unidroit Principles, "where there has been performance under a contract infringing a mandatory rule under Article 3.3.1, restitution may be granted where this would be reasonable in the circumstances." Indeed, considering the role of art. 3.3.1 (3) of the Principles, particularly the purpose of the breached rule (which has no scope other than to ensure state intervention via intermediation in import and export operations) and the intensity of the violation (absolutely meaningless, considering that the adjustment of the parties was merely an advance payment, which under Venezuelan domestic law could only take place upon delivery of the goods to customs), this case entails a positive judgment on the reasonableness of the circumstances, allowing for the restitution claimed by the Respondent, even if admittedly “ad argumentandum tantum” that the violated Venezuelan norm is qualified as imperative. **25**

If the specific rule on contractual illegality given by Chapter III of the Unidroit Principles does not support the defendant's Claimant’s argument, neither do the general clauses given by the 1980 Vienna Convention. **26**

Although the CISG does not regulate the issue of contractual invalidity, as already stated, the Unidroit Principles certainly stipulates that the duty of good faith is a fundamental structuring piece to regulate cross-border flow of goods together with references to its international char- **27**

acter and the need to promote its uniform application, pursuant art. 7 (1). Regarding the combination of good faith in international trade with the other grounds mentioned above, I refer to the enlightening wordings of Paulo Nalin and Renata Steiner[15]

> The two ideas referred by the Convention under art. 7 (1) CISG are the international character and the uniform application, and they should be as imperative content, which is the sense extracted from the wording "[...] regard is to be had [...]".
>
> This is a fundamental provision of the CISG, whose compliance must be strict as it takes into account both, its public and international nature as its own raison d'être, which comes to be promoting good practice in international trade based on knowledge of common legal rules among contracting States - one of the main objectives of CISG as well as of the UNCITRAL.

Therefore, also regarding this point of view, there is an obstacle to accept the defensive argument of contractual nullity. As I mentioned in the Raporters's vote in the Civil Appeal 70072362940, judged on February 14, 2017, "the 1980 Vienna Convention is an expression of the most widespread practice in international trade of goods", and it may be qualified as a custom, both under Public International Law and under the Brazilian Civil Law, which is why it is applicable by national judges, according to art. 113 of the Civil Code of 2002. If the 1980 Vienna Convention is defined as the ultimate expression of the practice of international trade and if such practice encompasses the greater need for respect of good faith, then it is true that the Claimant has no right under the Convention to be granted the nullity of the contract. The argument of nullity of the contract is does not follow the duty of good faith of business relations in international trade, which art. 7 (1) CISG mirrors. After all, it is reasonable to assume that the Venezuelan company (Respondent) only prepaid the value of the goods because, if it had not done so, the Brazilian company (Claimant) would most likely not have shipped them once it would be concerned of only receiving the payment upon arrival of goods at the customs center in Venezuelan territory. It is customary, after all, that the payment precedes its delivery, not the other way around. It therefore seems self-evident, through my perspective, that the allegation of contractual nullity characterizes an offense to the duty of good faith: the defendant ultimately seeks to excuse the obligation to repay the double amount received on the basis of an argument about the instrument established between the contracting parties, precisely performed in order to make the business safer, which came to their advantage, not to their detriment, so that it eventually received twice the amount actually due. **28**

[15] NALIN, Paulo, STEINER, Renata. Compra e venda internacional de mercadorias: a Convenção das Nações Unidas sobre compra e venda internacional de mercadorias (CISG) / Paulo Nalin, Renata C. Steiner. – Belo Horizonte: Fórum, 2016, p. 162.

Concerning the meaning and extent of objective good faith, I refer to the wording of Ruy Rosado de Aguiar Júnior: 29

> [...] it requests from all that participate in an intersubjective relationship a loyal and solidary conduct. Through the contract, it must be followed over the prior negotiation, the execution and even after the contract fulfillment. It is a source of duties and obligations. It is the limit for the exercise of rights: which means, even if there is a rule granting or recognizing a certain right, it can only be exercised within the limits of good faith.[16]

As I mentioned in judgment of the Appeal No 70072362940 on 14/02/2017, mentioned above, it is well known that, in order to create a uniformity of rules for the treatment of international trade, the 1980 Vienna Convention established the notion of a contract based on two fundamental pillars, namely private autonomy and objective good faith. From these pillars, it can be derived, among others, the duty of the parties to act on the basis of loyalty, requiring the contracting parties to understand that the contract for the international sale of goods must be understood as a cooperative relationship between the parties. If the rules of the 1980 Convention essentially provide the duty of good faith underlying the international trade relations, there is no doubt that the Claimants' argument should be rejected because it is completely incompatible with the facts when it comes to a contract qualified as international. 30

If this argument is taken under consideration, it would end up causing unjust enrichment for the benefit of the seller/Claimant, which is an unacceptable legal result not only from the perspective of International Trade Law, but also the Unidroit Principles and the 1980 Vienna Convention discussed above. The outcome intended by the Claimant would, summarily, contradict the idea that the implementation of the law consists in giving to each party what is entitled to. 31

Therefore, having the seller/Claimant received twice the amount to which it was actually entitled, it must proceed with the reimbursement claimed in the initial claim. This is because, contrary to what is also claimed by the Claimant, the case file does contain proof of double payment: the attachment of the letter issued by the Bank of Brazil's Manager of the Caxias do Sul branch, attached on page 196, together with the proofs of the international transaction on pages 197/202. To be added to these exhibits, it should be emphasized, there is the content of the e-mails between the parties, which are attached to pages 89/90, in which the seller/Claimant expressly mentioned that it would refund the amount received in advance. 32

Once the decision from the first instance is therefore upheld in full, there is no room to accept the request from the Claimant to lower the fees related to the costs of the case. The judge of first instance decided for the amount of 10% based on the updated total value of the case. This percentage follows the minimum amount provided by art. 85, §2, of the New Code of Civil 33

[16] AGUIAR Jr, Ruy Rosado de. O direito das obrigações na contemporxaneidade. Revista de Direito do Consumidor, Editora Revista dos Tribunais, vol. 96, nov./dez. 2014, p. 13/20.

Procedure. It should be emphasized that the updated value of the case is not exorbitant. This possibility is provided by the aforementioned art. 85 of the procedural legislation.

Decision

THEREFORE, I vote for: (i) Reject the preliminaries on the lack of Brazilian jurisdiction for the process and judgment of the dispute; (ii) Reject the issue referred by the Claimant, Voges Metalurgia SA, as for to apply Venezuelan law to the merits of the case; and (iii) as for the substance, the dismissal of the appeal and ratifying in full the decision from the first instance following the initial claims made by the Respondent foreign company, Inversiones Metal-mecánicas ICA, in respect of the Claimant's payment of R$ 150,908.33, with interest as of 1% per month since the first procedural notification plus monetary update, according to the IGP-M, since 23/01/2013, and, in relation to the fees, in the ratio of 10% based on the updated total value of the case. 34

JUDGE LUCIA CARVALHO PINTO VIEIRA - In accordance with the Reporter.

JUDGE GUINTHER SPODE (CHAIRMAN) - In accordance with the Reporter.

JUDGE GUINTHER SPODE - President - Civil Appeal 70072090608, Caxias do Sul: "PRELIMINARY REJECTED. CIVIL APPEAL DISMISSED."

1st Instance Judge: CLAUDIA ROSA BRUGGER