war, deren unklare Rückforderungsregelung vom OLG erschwerend berücksichtigt wurde.

Für die Praxis bedeutet das, dass gerichtliche Entscheidungen zur Wirksamkeit von an die Kündigung geknüpften Rückzahlungsansprüchen bezüglich gewährter Provisionsvorschüsse schlecht vorhergesehen werden und zudem von Umständen abhängen können, die erst während des Vertragslaufs erkennbar werden (z.B. der Umfang der nicht ins Verdienen gebrachten Vorschüsse).

b) OLG Hamm, Urt. v. 21.4.2016 – 18 U 33/15 (zitiert nach juris)

Leitsatz:

1. Ein Vertriebspartnervertrag in einem Strukturvertrieb (hier: Vertrieb von Reinigungsprodukten) ist regelmäßig nicht mit einem Handelsvertretervertrag vergleichbar. Deshalb sind auch die entsprechenden gesetzlichen Regelungen zum Recht des Handelsvertreters nicht auf das Rechtsverhältnis der Vertriebspartner anwendbar, jedenfalls soweit im Vertriebsvertrag für den Vertriebsdienstleister nicht auch eine Absatzförderungspflicht geregelt bzw. durch sonstige Umstände der Vertragsbeziehung enthalten ist. Dabei ist eine gestaffelte Provisionszahlung noch nicht als Absatzförderungspflicht anzusehen.

2. Eine formularmäßige Kündigungsklausel in einem Vertriebspartnervertrag in einem Strukturvertrieb, die eine Kündigungsfrist für den Verwender von nur drei Monaten vorsieht, ist als Allgemeine Geschäftsbedingung wegen unangemessener Benachteiligung jedenfalls dann unwirksam, wenn der Vertragspartner seinen Geschäftsbetrieb aufgrund der vertraglichen Regelungen im Wesentlichen auf das Vertriebsinteresse des Verwenders ausgerichtet hat. Denn insoweit ist die Frist nicht ausreichend, um nach erklärter Kündigung sein bisher an dem Vertragspartner ausgerichtetes Geschäftsfeld umstellen zu können. Angemessen ist in einem solchen Fall jedenfalls bei einem auf mehr als fünf Jahre angelegten Dauerschuldverhältnis eine Kündigungsfrist von mindestens sechs Monaten.

Das OLG Hamm hatte sich mit der Frage zu beschäftigen, mit welcher Kündigungsfrist der vorliegende Vertriebspartnervertrag (im Strukturvertrieb) zu kündigen war, in dem eine 3-monatige Kündigungsfirst vorgesehen war.

Das OLG beschäftigt sich zunächst ausführlich mit der Frage, ob hier die Regelung des § 89 HGB entsprechend angewendet werden kann. Dazu ist nach Auffassung des OLG insbesondere die Statuierung der handelsvertretertypischen Absatzförderungspflicht von Bedeutung, wofür nach Ansicht des OLG aber weder das vereinbarte gestaffelte Bonussystem noch mittelbarer Druck durch eine Statusverschlechterung bei Nichterreichen von Vertriebszielen ausreichten. Letztlich lässt das OLG die Frage aber offen und kommt zur Unwirksamkeit der vereinbarten Kündigungsfrist von 3 Monaten über § 307 Abs. 1 BGB. Es sieht in der kurzen Kündigungsfrist eine unangemessene Benachteiligung des Vertriebspartners im Sinne dieser Norm. Zwar kann das OLG nun auch bei dieser Frage nicht auf die Wertung des § 89 HGB zurückgreifen, hält aber die Anwendung einer längeren Kündigungsfrist (einer Entscheidung des OLG Köln[38] folgend) dann für geboten, wenn dies aufgrund von Besonderheiten der beteiligten Kreise ausnahmsweise zum Schutz eines Beteiligten erforderlich sei. Das sei insbesondere dann anzunehmen, wenn der Vertriebspartner nach den konkreten Umständen der vertraglichen Situation eine Umstellungsfrist benötige, um eine Tätigkeit für einen anderen Unternehmer aufzunehmen oder um sein Geschäftsfeld umzustellen, weil er dieses weitgehend auf das Vertriebskonzept des Vertriebspartners abgestellt hatte.

Ob statt den danach unwirksam vereinbarten Kündigungsfristen, die nach § 306 Abs. 2 BGB durch die gesetzlichen Regelungen zu ersetzen sind, diese nunmehr den Vorschriften der §§ 624 oder 723 BGB zu entnehmen oder die Lücke durch ergänzende Vertragsauslegung zu schließen ist, lässt das OLG offen, da jedenfalls bei Dauerschuldverhältnissen mit einer Laufzeit von mehr als 5 Jahren die Kündigungsfrist mit mindestens 6 Monaten zu bemessen sei. Letztlich kommt das OLG somit im Ergebnis zu den Kündigungsfristen des § 89 HGB, ohne die Vorschrift auf das vorliegende Vertragsverhältnis allerdings entsprechend anzuwenden.

[38] Urt. v. 21.9.2012 – 19 U 113/11, IHR 2013, 168.

First CISG decision in Brazil: Brazilian courts take the first steps towards application of the CISG

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I. Introduction

1. It has been three years since the 1980 United Nations Convention on the International Sale of Goods ("CISG" or the "Convention") came into force in Brazil, and the first signs of direct application of the Convention by Brazilian courts could finally be seen last year.

2. Although the CISG could have been applied to Brazilian parties when electing CISG itself as governing law, or by using Article 1.1(b) of CISG when the parties chose the law of a member country, only in February 2017 did Brazilian courts take the step of interpreting a sales contract based on the Convention.

3. CISG-based decisions by Brazilian courts have long been awaited by the local CISG community. In 2016, the CISG and

Arbitration Study Group of the CBar – Brazilian Arbitration Committee carried out a thorough research of Brazilian court decisions on the CISG application in Brazil since 2014, when CISG came into force in the country.[1] Out of 81 selected cases mentioning the CISG, none of them directly applied the Convention to a sale of goods contract. Some CISG provisions have been used, however, as a support argument for cases not covered by the Convention, which demonstrates that the Convention already has an influence on Brazilian law.

4. The decision in point was rendered on 14 February 2017 by the Rio Grande do sul Court of Appeals (the "Decision")[2, 3] and it deserves accolade for its step forward in applying the CISG in an international contract. Questions, however, remain as to the way the CISG was viewed as applicable law and its ultimate interpretation in relation to the specific contract. The most interesting aspects of the Decision will be examined in this article.[4]

II. The first CISG Brazilian case – The „chicken legs" case

1. Background

5. On 1 June 2014, Noridane Foods S. A. ("Noridane" or "Buyer"), a Danish company, contracted with Anexo Comercial Importação e Distribuição Ltda. EPP ("Anexo" or "Seller"), a Brazilian company, the supply of 135 tons of frozen chicken feet (Grade A) against a payment of USD 700 per ton, in a total amount of USD 117,450.00 (the "Agreement"). On 8 June 2014, Noridane paid USD 79,000.00 for initial delivery of four containers of the goods in Hong Kong.

6. After more than eight months since the first partial payment and with no information about when shipment would be made, Noridane repeatedly tried to contact Anexo and demand performance of the Agreement.

7. Noridane terminated the Agreement and shortly after moved the courts for confirmation of termination (declaratory relief) coupled with a request for restitution of about BRL 249,336.36. Anexo recognised receipt of initial payment, but firstly argued that the Agreement had been executed with Brazilian company Vilson Gobaato M.E. instead and the said payment has been transferred to the latter for purchase and delivery of the goods.

8. The Lower Civil Court of Estância Velha confirmed termination and awarded Noridane's entitlement to restitution at USD 79,650.00 plus adjustment for inflation and interest rate at 1% accruing from the date of summons, as provided in Brazilian law. No information was available as to the law applied in the trial judgement.

9. In February 2017, the Rio Grande do Sul Court of Appeals denied Anexo's appeal and affirmed the trial judgement.

2. Comments

10. The long-awaited CISG application by Brazilian courts was welcomed in this first case, which is viewed as a positive initial step towards greater use of CISG by Brazilian parties and courts alike.[5] A few remarks are worth making about the way CISG was applied in this specific decision, though, considering three aspects: (a) the CISG enforceability in Brazil on 1 June 2014, when the Agreement was executed; (b) CISG as governing law to the Agreement; and (c) the application of CISG to the Agreement and to the dispute between the parties.

(a) The CISG enforceability in Brazil on 1 June 2014, when the Agreement was executed

11. Questions have arisen about the date in which the CISG came into force in Brazil. This is due to a double-step requirement for approval of treaties – firstly by Congress and then, arguably, by the Brazilian President –, as addressed in a previous article by this author.[6]

12. In the specific case of CISG, after its review by the Foreign Relations Committee (a procedure necessary for accession to any treaty/convention), CISG was cleared by the House of Representatives and sent over to the Senate for approval. Congressional approval for the text was given on 16 October 2012, in the form of *Decreto Legislativo* n. 538 (the "Legislative Decree"),[7] which also authorised the deposit of the Letter of Accession to the Convention, in March 2013. After the waiting period prescribed by the Convention itself, CISG could enter into force in Brazil in April 2014.

13. Brazilian scholars have been split on the need for a further presidential decree for incorporation of conventions and treaties into the Brazilian legislative system, though. The Brazilian President eventually issued *Decreto* n. 8.327/2014, but only on 16 October 2014 (the "Presidential Decree").[8]

14. A school of thought advocates that the CISG process for incorporation was completed by enactment of the Legislative Decree authorising the deposit of the Letter of Accession with the UN, which would allow the Convention to come into force on 1 April 2014. Others contend, however, that only after the Presidential Decree would the Convention be actually in force. This latter stand is backed by rulings of the Brazilian Supreme Court

1 Research by the CISG and Arbitration Study Group of the CBar – Brazilian Arbitration Committee (of which this author is a member): http://cbar.org.br/site/wp-content/uploads/2017/03/Relatorio-Pesquisa-Juris-CISG-2016_versao-consolidada-e-revisada_FINAL.pdf.

2 Rio Grande do Sul Court of Appeals – Case reference TJ-RS n° 70072362940, 14 February 2017, 2nd Private Law Chamber of the Rio Grande do Sul Court of Appeals, Reporting Judge Umberto Guaspari Sudbrack.

3 Full version of the decision can be downloaded, using the case reference number, from the Rio Grande do Sul Court of Appeals website: http://www.tjrs.jus.br/busca/?tb=jurisnova&partialfields=tribunal%3ATribunal%2520de%2520Justi%25C3%25A7a%2520do%2520RS.(TipoDecisao%3Aac%25C3%25B3rd%25C3%25A3o|TipoDecisao%3Amonocr%25C3%25A1tica|TipoDecisao:null)&t=s&pesq=juris.#main_res_juris.

4 Only the Rio Grande do Sul Court of Appeals decisions have been made available. Comments in this article will only consider information, facts and arguments found in that decision.

5 Several procedural arguments regarding standing to sue and posting of bond for filing a suit have been discussed, but the comments here will be limited to the merits of the case, more specifically to the CISG issues.

6 *Beneti, Ana Carolina,* Brazil and the CISG: A Question of Legal Certainty, in IHR – Internationales Handelsrecht, 3/2015, June 2015, pp. 98/101.

7 See: http://www2.camara.leg.br/legin/fed/decleg/2012/decretolegislativo-538-18-outubro-2012-774414-convencao-137911-pl.htm.

8 See: https://www.planalto.gov.br/ccivil_03/_ato2011-2014/2014/decreto/d8327.htm.

and of the Superior Court of Justice – the Brazilian highest courts with jurisdiction over constitutional and statutory matters, respectively – on incorporation of conventions and treaties executed by Brazil.

15. The Decision expressly addresses this issue and sides with the higher courts findings that the CISG came into force in Brazil (internal sphere) only after issuance of the Presidential Decree. As the Agreement was executed on 1 June 2014, CISG did not serve as governing law.[9, 10]

16. Nevertheless, without positively indicating which law should then govern the Agreement – presumably Brazilian law[11] and, in this case, the Brazilian Civil Code –, the Decision establishes that CISG should be used "as legal reference" in that "the Convention is an expression of the most widespread practice in international trade in goods," also noting that article 113 of the Brazilian Civil Code authorises the interpretation of legal transactions according to customs of the trade.[12]

17. Therefore, on the matter of applicability of the Convention before issuance of the Presidential Decree, the Decision bluntly takes the stand of Brazilian higher courts in establishing that the CISG became enforceable in Brazil only on 16 October 2014.

(b) The CISG as governing law to the Agreement

18. As mentioned, the Rio Grande do Sul Court of Appeals ruled for applicability of CISG based on the "international nature of the agreement" and on the fact that the CISG (and also the UNIDROIT Principles) reflects the widespread practice in international trade of goods.

19. The Decision also explains why Danish law – after the test of Brazilian private international law rules, which would ultimately authorise the application of Danish law –, is not to be adopted in this case.

20. The Decision initially recognises that Danish law would be applicable, based on article 9, paragraph 2 of the Law of Introduction to the Rules of Brazilian Law ("LINDB", in Portuguese), which sets forth the rule of *lex loci celebrationis.* It further states that the principle of proximity should be used, and which then leads to applicability of the CISG as part of the new *lex mercatoria.*[13]

21. The path taken by the Decision should not go without criticism.

22. It is true this would be a simple case for application of the CISG based on ist Article 1, which establishes that the Convention should govern contracts for sale of goods between parties whose places of business are in different states when the States are Contracting States; or when the rules of private international law lead to employment of the law of a Contracting State (Article 1.1 (b), CISG).

23. In this specific case – considering the stand taken in the Decision that the CISG was not in force in Brazil when the Agreement was executed (1 June 2014) –, Brazilian the courts could have resorted to the Brazilian conflict of law rules under the LINDB, applied Danish substantive law to the case which, ultimately, would lead to the conclusion that CISG should govern the Agreement.

(c) Application of CISG to the Agreement and to the dispute between the parties

24. Two aspects of the Decision should be highlighted: (1) recognition of execution of non-written contract; and (2) the time given by the Buyer to the Seller to perform the Agreement, and the fundamental breach concept applied by the Decision.

(1) Recognition of execution of non-written contract

25. The Decision correctly recognises the application of the principle of freedom from requirements as to form in executing the Agreement, as provided by Article 11 of CISG.[14]

26. The possibility of proving the existence of a contract by other means than a written form imposes changes into the Brazilian contractual legal provisions. The Brazilian Civil Code reads that "oral evidence is admissible as subsidiary or complementary to written evidence" (Article 22, sole paragraph), stressing the subsidiary nature of evidence.[15]

27. The Decision disregarded the need of a written formal contract, recognizing the possibility of an agreement evidenced by witnesses, also opting to expressly apply Article 11 of CISG by accepting other forms (such as invoices and E-Mail exchanges) as evidence of execution of the Agreement, in clear deference to CISG (and UNIDROIT Principles) provisions.

(2) The time given by the Buyer to the Seller to perform the Agreement, and the fundamental breach concept applied by the Decision

28. According to the Decision, the Seller alleged its contractual performance but failed to demonstrate actual delivery of the goods.[16] Upon such non-performance by the Seller in violation of Article 30 of the Convention, the Buyer then had the right to terminate the Agreement based on Article 49.1(b) of CISG. This argument is explained as follows:

"After all, in default on its obligation to deliver, the Seller was given an additional period to arrange for delivery. Or, in other words, the repeated attempts by the Claimant [B] to contact the Defendant [S] and obtain clarification on the delivery date and to

9 At p. 20, Decision.

10 See *Beneti,* supra note 20, at p. 100.

11 In clear contradiction to the conclusions mentioned in item 20 of this article.

12 At p. 21, Decision.

13 At p. 27, Decision.

14 „Both Article 11 of the 1980 Vienna Convention and Article 1.2 of the UNIDROIT Principles establish the principle of freedom in the form of a contract of sale, which requires no written instrument or its being subject to specific requirements of form; the existence of any such contract may be proven by any means, including testimonial evidence. The negotiating relationship between the parties under the Vienna Convention of 1980 and the UNIDROIT Principles is therefore characterised in this case, since, as stated above, pp. 22/23 demonstrate the agreement between the plaintiff and the defendant concerning the acquisition and delivery of the specified quantities of frozen chicken legs against payment of the total amount of US$ 117,450.00." (at p. 29, Decision).

15 Brazil has not made the Art. 96 declaration, having adhered to the CISG's full text and provisions, while maintaining in this aspect the enforceability of Article 11.

16 The Decision mentioned that documents provided by the Seller, which supposedly demonstrated shipment of the goods to Hong Kong, indicated different buyers and do not serve as evidence of delivery (at p. 31, Decision).

finally succeed in the implementation of the Agreement, in practice constituted an additional term granted in favour of the Defendant [S], exactly as provided by Article 47.1 of the Convention, since the Claimant [B] initiated this court action only in light of the considerable period of time (eight months) during which the Defendant [S] refused to respond to the E-Mails sent by the Claimant [B]." (Decision, at p. 32 – translated by the author)

29. In short, termination of the Agreement under Article 49.1 (b) of CISG has relied on the fact that time had elapsed without any signs that the Seller was likely to honour its contractual obligations and deliver the goods. The Decision, however, does not indicate the existence of any notice by which the Buyer set an additional time for performance, or a final notice of termination before the court action was filed.

30. A few comments are worth making on this matter. Although the Decision was grounded on the CISG, it seems clear that the CISG methodology has not been strictly taken into consideration while examining the possibility of early termination.

31. Firstly, the fundamental breach preconditions required under the CISG for termination by the Buyer and its confirmation by the courts were not considered. The case does not explore whether the breach was substantial or foreseeable, as required by Article 25 of the CISG, having instead emphasised only the lack of partial performance and a non-specified time of delivery.

32. The Decision has, on the other hand, correctly verified the possible existence of a case of *Nachfrist* provided in Article 49.1 (b) of the Convention, according to which a party may grant the non-performing party additional time to cure its breach. This remedy is allowed for cases of non-delivery and aims at preventing the avoidance of the contract.

33. Nevertheless, the Decision has not explored the formal notice requirements for *Nachfrist,* as determined in Article 49.1 (b) and, more importantly, in Article 47 of the Convention.

34. There is no report of a formal notice in that regard, but solely of E-Mail messages requiring delivery (at p. 32 of the Decision, making reference to the case records at pp. 32/49). To the Decision, the mere lapse of time and the frustrated attempt to contact Seller would characterise *Nachfrist* and suffice for termination. It holds true that the Buyer could not wait indefinitely for performance of the Agreement and would be suffering losses from non-delivery, but the steps required by the CISG and consolidated by the Convention under international practice should have been taken into consideration.

35. In addition, no reference is made to the existence of adequate termination notice supporting a suit for declaratory judgement on termination of the Agreement. On notices in avoidance cases under CISG, Joseph Lookofsky teaches as follows:

"Assuming that a given breach is fundamental, Article 49(1) (a) entitles the buyer to 'declare' the contract avoided. In this connection the buyer must provide the seller with an avoidance 'declaration', thus making it clear that she (the buyer) no longer intends to perform. (As we shall see, the same kind of notice is required when the buyer's right to avoid is based on the seller's failure to comply with a *Nachfrist* notice). If a buyer faced with a fundamental breach first elects to avoid after the goods have been delivered, she must as regards late delivery, make her avoidance declaration within a reasonable time after learning that delivery has been made; in other cases, the avoidance notice must be given within a reasonable time after B learns of the breach or after the expiration of an additional performance period fixed in accordance with Article 47(1) or 48(1)."[17]

36. It seems that the courts decided to apply the CISG to this case but using concepts and principles from the Brazilian civil law. That is, however, a common mistake since the CISG was created using unique principles and concepts. In this sense, it is widely known that an interpretation or application of the Convention based on domestic law of the Contracting state adversely affects the CISG system, especially its internationality and uniformity. In the words of *Ingeborg Schwenzer,* explaining that principle vis-à-vis the concept of fundamental breach:

"(…) it is of paramount importance to remember that domestic law was not employed in drafting Article 25, which was exclusively developed on the basis of ULIS. It would therefore be a grave mistake and a violation of both Article 25 of the CISG's general principles of interpretation (Article 7(1)) to rely on this 'false friends' *(faux amis)* from domestic law in construing the Convention, and it is also strictly inadmissible to use domestic law as a 'guide' in addressing questions of fundamental breach of contract in the CISG. (…) Guidance should instead be taken from Article 25's wording, its legal history and its past interpretation by courts and commentators (…)."[18]

III. Conclusions

37. The Decision, albeit the necessary adjustments, applies CISG to a clear case of international sales agreement, and this should be heralded. The fact that the Brazilian courts are aware of introduction of the new international law into the Brazilian legislation with clear differences deserves strong praise.

38. Brazil is definitely taking its first steps towards application of the CISG and, just like it has happen with many new adhering countries, there will be probably a period of time for better acquaintance with the Convention principles and system. This seems to be, nevertheless, a normal and even expected process.

39. It is important to point out that the courts of appeal in Brazilian states will most likely side with the higher courts on the need of a Presidential Decree for the CISG enforceability in Brazil. A shift from this stand, as discussed, could only originate from the higher courts.

40. Also, it should be highlighted that the Decision has been appealed at the Brazilian Supreme Court and at the Superior Court of Justice, in Brasilia, and a more accurate application of CISG might then take place there.[19]

[17] *Lookofsky, Joseph,* Understanding the CISG, 4th edition, Wolters Kluwer, Netherlands, 2012 (at p. 114).

[18] *Schlechtriem, Peter/Schwenzer, Ingeborg,* Schlechtriem & Schwenzer, Commentary on the UN Convention on International Sale of Goods, 4th Edition, Oxford University Press, 2016, at p. 423.

[19] Special Appeal was filed on March 10, 2017.