CISG CASES

Olivaylle Pty Ltd v Flottweg GmbH & Co KGAA (No 4) [2009] FCA 522

Editorial by Lisa Spagnolo
(extracted from The Last Outpost: Automatic *CISG* Opt Outs, Misapplications And The Costs Of Ignoring The *Vienna Sales Convention* For Australian Lawyers)

In the most recent decision by the Federal Court, the contract involved the supply of production line equipment for olive oil production. Logan J determined that the *CISG* was excluded by the words 'Australian law applicable under exclusion of UNCITRAL law'. The case is almost chameleon-like in its approach to the *CISG*.

The Court reasoned that, although the *CISG* was 'part of the relevant Australian law', reference to exclusion of UNCITRAL law was sufficient to evince an intention to exclude the *CISG*. The buyer contended that the exclusion related only to property issues, since the exclusion followed a sentence amounting to a retention of title clause. Logan J correctly pointed out, with reference to *Roder Zelt*, that such a construction was unlikely to have been intended, given that the *CISG* does not deal with property issues anyway, pursuant to art 4(b). Unfortunately, no reference to other *CISG* cases was made.

The Court analysed the formation and interpretation of the choice of law clause by reference to domestic law concepts alone. By doing so, it acted as though the *CISG* did not have a priori application. In this sense, the Court fell into the same error as did the Court in *Vetreria*. Had application of the *CISG* to the questions of formation and construction resulted in a conclusion that the *CISG* was excluded, then resort to domestic law on formation and interpretation would have been entirely appropriate. But if the same process had led to the conclusion that the *CISG* was *not* properly excluded, recourse to domestic law would have been prohibited. The Court could only ever be in a position to know the right course of action by proper application of the *CISG*, at least up to the point at which exclusion was determined.

In fact, Logan J's application of domestic interpretive rules was rather liberal. Prior communications were examined, as well as the written 'contract', and his Honour thus determined that the parties placed a high level of importance upon the written terms. The *CISG* also deems such communications relevant, but would additionally deem subsequent communications of relevance in relation to interpretation of the parties' contractual intent.

Logan J took into account of the nature of the contract, the fact that the seller was known to trade internationally, and the position and context of the clause within the document. These would also be relevant under a *CISG* approach. The biggest difference in construction would be the imperative to take an internationalist approach. The Court in *Olivaylle* should have looked at decisions on *CISG* exclusion clauses from around the world, and scholarly material on the issue. The need to look at such material is obvious when one considers that, in determining the question of exclusion, one is effectively interpreting art 6 of the *CISG*. Therefore, language that is dispositive under domestic law 'acquires a different meaning under the Convention'.

Obviously, the Court appreciated that a choice of Australian law would not have excluded the *CISG*. Express exclusion is clearly permissible pursuant to art 6. Legislative history indicates, and most cases have held, that implicit exclusion is also possible, but it requires

‘clear’ indications of ‘real’ rather than ‘theoretical’ intent. For example, a choice of ‘American law as laid down in the UCC’ would suffice.

Although clumsy, the words in question in *Olivaylle* under a *CISG* construction would probably amount to implicit, if not express exclusion. Yet, without further analysis, one cannot be certain that the sloppily chosen words even formed part of the contract, at least in *CISG* terms.

The exclusion clause was contained within the seller’s quotation of 8 February 2005. Logan J conducted a purely common law analysis of formation. His Honour concluded that after the buyer’s handwritten alterations to the seller’s document of 1 October 2004, there were further discussions, and then the seller’s quotation of 8 February 2005, which ‘took up such of [the buyer’s] alterations as [the seller] was prepared to adopt’. The Court then considered various common law characterisations of formation. However, for the purposes of determining exclusion pursuant to art 6, formation should be analysed, at least initially, according to the *CISG*. There would need to be a ‘sufficiently definite’ offer.

As for the final document containing only some of the buyer’s alterations, the *CISG* would have had no difficulty classifying this as an acceptance if the terms omitted by the seller were immaterial, provided that the buyer did not object to the modification.

Alternatively, if they were material omissions, it would amount to a counteroffer accepted by the buyer’s subsequent conduct, a conclusion similar to Logan J’s less preferred construction. Further, if, as suggested by Logan J, an earlier contract existed, possibly in October 2004, then subsequent modification by agreement would have been permissible under art 29. On a *CISG* analysis, the clause would have been incorporated and the *CISG* excluded. Ultimately, the Court applied the correct law, although navigation to that conclusion might have been through much safer waters.

However, perhaps the Court’s sensitivity to the *CISG* had been heightened, because later in the judgment, Logan J returned to the *CISG* as an aid to interpretation of certain contractual provisions. The welcome chameleon-like change in approach was driven by contractual provisions containing the ‘civil law’ concepts of ‘reasonable period of grace’ and ‘reduction in price’. Logan J sensibly returned to the *CISG* as a guide to construction, and drew upon arts 46, 47, 48 and 50. Admirably, the Court looked at the concept of *Nachfrist* and some English scholarship on the *CISG*. Had the Court looked beyond English scholars to other scholars and cases decided on the relevant *CISG* provisions, it would have found much greater guidance still. The usefulness of the *CISG* also prompts the question: why did the parties exclude the *CISG* in the first place?

Beside *Hannaford*, *Olivaylle* flickers intermittently. Through the darkness, it now appears that the Federal Court is willing and prepared to take the next step, should a case to which the *CISG* directly applies come before it.