

CISG CASES

[*Vetreria Etrusca Srl v Kingston Estate Wines Pty Ltd* \[2008\] SASC 75](#)

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](#))

Vetreria does not awaken new hope. This case involved the supply of wine bottles from an Italian manufacturer to an Australian company. The bottles allegedly broke repeatedly during bottling processes. The seller claimed the price and damages for breach in an Italian court. The buyer sought damages for contractual breach on the basis the bottles were not fit for purpose and did not match the sample in an Australian court.

The seller sought interlocutory orders to stay the Australian proceedings on the basis of a clause purporting to grant an Italian court exclusive jurisdiction. At trial, the parties did not dispute that the *CISG* was the governing law. The Supreme Court upheld the refusal to stay on appeal. Despite the undisputed fact that the *CISG* governed the contract, seller's counsel argued that 'Australian' law should be used to construe the choice of forum clause. This led the Supreme Court, like the Court below, to ignore the *CISG*. The law of contract — the *CISG* — was not applied on appeal. Worse still, it was not mentioned in the judgment at all.

At trial in the South Australian District Court the choice of forum was considered ambiguous. It covered disputes arising from 'interpretation, execution or application' of the contract, but Muecke J determined that this did not include performance. The judge further declined exercise of the discretion to stay proceedings due to the location of witnesses, experts and physical evidence.

The *CISG* applies to contractual formation and therefore the predominant view is that the *CISG* governs incorporation of choice of forum (jurisdiction) clauses.

It is true that special local prerequisites to validity of forum clauses are not within the *CISG*'s scope.

Likewise, international treaties on jurisdiction will prevail over the *CISG*.

Nevertheless, the *CISG* often resolves questions raised by such treaties, such as place of performance, or prima facie incorporation.

The better view is that the *CISG* not only determines formation and incorporation, but also the meaning and content of forum clauses, subject to local validity laws or superimposed treaty requirements. This view is indicated by the approach taken in most *CISG* cases and is consistent with mention of dispute resolution clauses in certain *CISG* provisions.

Admittedly, issues surrounding the *CISG*'s scope regarding choice of forum clauses are not simple. However, to ignore the *CISG* cases and commentary on the issue amounts to placing one's head in the sand. As the *CISG* governed the contract, the question should have been confronted.

The Court could have taken its lead from *Roder Zelt*. The disputed clause there involved an issue falling outside the *CISG*, that is, property in the goods. As the *CISG* governed the

contract, formation and interpretation of content and meaning of the contract were determined by the *C/SG*.

Once the existence and meaning of the clause are established, its effect can be determined in accord with the law applicable to the external issue on the basis of conflicts rules.

In *Roder Zelt*, this was Australian property law. In *Vetreteria*, the existence of the choice of forum clause and its construction should have been determined pursuant to the *C/SG* as the first step. The clause should then have been subject to the secondary step of Australian procedural principles concerning stay of proceedings.

The Court itself identified that its first task was to 'determine the agreement of the parties as to jurisdiction'. Since the *C/SG* applied, its proper application required exclusive use of its own interpretive provisions and methodology for this task. In particular, the Court needed to heed arts 7, 8 and 9. An examination of *C/SG* cases on choice of forum clauses would therefore be necessary, in order to interpret the *C/SG*'s terms internationally and uniformly.

The contract needed to be construed in light of all relevant circumstances, including pre-contractual negotiations and post-contractual conduct in accordance with art 8(3), a stance quite contrary to ordinary Australian principles of contractual construction.

Article 8(1) and (2) directs the Court in construing statements and conduct of parties, and art 9 controls the impact on construction of international usages and practices between the parties.

The parol evidence rule is not applicable.

Article 7 precludes resort to domestic methods of interpretation and construction, to the extent of the *C/SG*'s scope.

Unfortunately, the Court was diverted from the task of construing the clause in accordance with the (undisputed) law of the contract by the unanimous preference of counsel for an inapplicable law.

What might have happened had the Court applied the *C/SG*? Arguably, the result might have been the same. The Court might have still maintained that the clause would be viewed as deliberately limited in scope, and that 'execution' is a term that a 'reasonable person' under art 8(2) would take to mean the signing of the contract rather than its performance. The idea that an ambiguous standard clause should be construed against its author (*contra proferentem*) might have been relevant.

However, the *C/SG*'s application might have encouraged a more generous construction of the words 'interpretation, execution or application'. In interpreting the *C/SG* to promote good faith, the Court might have concluded that a reasonable person would give more holistic weight to the preceding words 'any disputes, none excluded' as indicative that this was an absolute choice of forum, rather than one limited on technical grounds relating to common law definitions of the single word 'execution'. A reasonable business person rather than a lawyer might have understood a dispute over performance to involve 'application' and/or 'interpretation' of the contract. Notably, under the *C/SG*, the parol evidence rule does not apply and the court is directed to construe contractual intent in light of both prior and subsequent conduct of the parties.

The court would need to construct the clause in light of any international usages that should have been known to both parties or past practices developed between them.

It should be of no comfort that the recent Canadian decision of *Linamar* upheld a similar error. The decision immediately attracted criticism. The Canadian Court determined the point of formation of the contract without any reference to the *CISG*, applying common law principles rather than the *CISG*'s own rules regarding the 'battle of the forms'.

It consequently determined that forum clauses had not been incorporated, but on the basis of the wrong law. The decision was upheld on appeal, with similar disregard for the *CISG*.

In the Canadian decision, the party attempting to uphold the forum clauses was Italian, and, of the various forum clauses dealt with in that case, one bore an uncanny resemblance to the clause in *Vetreteria*. As it held that the clause was not incorporated, the Court did not deal with its construction. Strangely, there was no mention of any alternative argument that performance was not encompassed by 'interpretation and execution', despite the fact that the underlying dispute related to performance, and the clause was arguably less emphatic than the one in *Vetreteria*. If such wording is prevalent in trade with Italian counterparties, an interesting argument could be run regarding the objective understanding of such clauses by parties frequently importing or exporting from Italy.

Had the Court in *Vetreteria* adopted a more liberal interpretation of the clause pursuant to the *CISG*, it could still have declined to stay Australian proceedings. The discretion is exercised according to Australian procedural principles, which, in situations where a choice of forum clause exists, dictate an inclination to hold parties to their bargain, unless there is sufficient cause not to do so. In this case, all physical evidence, relevant experts and witnesses were located in Australia.

Exercise of the discretion to order or refuse a stay is a matter for domestic procedural law. Conversely, if there is a choice of forum clause in a contract governed by the *CISG*, then construction of the bargain upon which the discretion rests is a matter for the *CISG*. The discretion cannot be properly exercised without preliminary interpretation of the bargain in accordance with applicable law. While it might not have ultimately altered the outcome, *Vetreteria* stands as another example of counsel steering the bench away from that course.

The sole good news from *Vetreteria* was that the original statement of claim actually referred to the *CISG*. This points to early awareness of the *CISG*, a rarity by Australian standards.