Spain: The Interplay between the Formation of an Arbitration Agreement and the Formation of an Underlying International Sales Contract under the CISG

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This post analyzes the problem stemming from the different form requirements established by the 1958 New York Convention on the Recognition and Enforcement of Foreign Arbitral Awards ("NYC") and the 1980 United Nations Convention on Contracts for the International Sale of Goods ("CISG") with respect to the formation of the agreements the two Conventions regulate. Being a problem whose ultimate solution lies within the national courts, this analysis limits its scope to Spain's jurisprudence. Although the findings are limited to Spain's jurisdiction, they may have a comparative value to sway or inform courts in other countries.

The (Problematic) Interaction between the NYC and the CISG

International commercial arbitration goes hand in hand with international trade.

Knowing beforehand the competent tribunal, the possibility of appointing experts as its members, fast procedures and the straightforward enforceability of an arbitral award almost everywhere in the world – thanks to the NYC – are among the advantages to opt for international arbitration as the dispute resolution framework in international trade.

Similarly, the CISG offers a practical, uniform and well-balanced substantive framework for sellers and buyers in international transactions around the globe, making the CISG a sensible regime not to derogate from or opt out. Consequently, it is fair to submit that the NYC and the CISG work harmoniously together towards the same goal of removing international trade barriers.

However, a few problems may originate from the interaction between the two Conventions due to their different form requirements. The NYC dictates indeed stricter formal requirements for an arbitration agreement than the CISG does for an international sales contract. Pursuant to Article II of the NYC, an arbitration agreement must be in writing, either in a contract or an arbitration agreement, signed by the parties or contained in an exchange of letters or telegrams (or emails, according to the non-binding – yet authoritative – 2006 UNCITRAL Recommendation interpreting the means of communication in Article II(2) as non-exhaustive). Instead, Article 11 of the CISG professes the freedom of form for the formation of an international sales contract, which needs not be in writing. Under the CISG, parties may indeed enter into a contract orally or by virtue of their mutual conduct according to Article 18. This means that while it may be indisputable that a seller and a buyer have entered into an international sales contract, the same cannot be stated about their arbitration agreement, every time the parties have perfected the underlying sales contract through their conclusive conduct.[fn]For a thorough study on this issue please read the very intriguing article by Professor Morten Midtgaard Fogt, *The Interaction and Distinction between the Sales and Arbitration Regimes*, ARIA Columbia, Vol 26, No. 3 (2015), 365 ff.[/fn]

Often in an international sale of goods, the seller may ship the goods upon receiving the counteroffer containing the terms of the buyer or the buyer may make provision for payment or take delivery of the goods after receiving the offer stating the standard terms of the seller without actually signing any contract. If the offer's or counteroffer's terms – or simply the seller's proforma invoice – refer to arbitration as a dispute settlement mechanism, would that arbitration agreement

be validly formed, despite not being subscribed or confirmed in writing by the other party? According to the NYC's formal written requisite, this could be doubtful, whilst based on the CISG this could very well happen.

Additionally, under the CISG, sellers and buyers are bound by the existing practice they have established between themselves as per its Article 9(1). In this respect, another common scenario in international trade is that the seller and the buyer draft and sign a written contract for the first transaction (containing all relevant terms, including an arbitration agreement) and then they keep on performing the following transactions based on the original terms agreed upon in the first contract, but without formalizing them into other following contracts. Could the arbitration agreement contained in the first contract concerning the first transaction be applicable to a dispute arising out the fifth transaction? The answer to this question is in the affirmative according to the CISG because of its Article 9, though, based on the NYC it could well be in the negative due to the formal requirement to be in writing.

Ultimately, it is up to the domestic court – both of the country where the arbitration is held and the country where enforcement is sought – to provide a definitive answer to the questions just posed.

How Have the Spanish Courts Grappled with This Issue?

So far, Spain's Supreme Court ("SC") has addressed this matter three times (to the author's knowledge), all in the same year (1998), yet not in a consistent manner.

All three cases concerned an application for the exequatur of a foreign award whose enforcement debtor opposed based on the lack of a written arbitration agreement by relying on Article V(1)(a) of the NY Convention and the consequent enforcement creditor's failure to supply the written arbitration agreement as per Article IV(1)(b).

The first case (ATS 1332/1998 on February 17th) is about an award of the Court of Arbitration of the Hamburg Commodity Exchange (HCE). The enforcement creditor supplied the correspondence between the parties, an invoice of the underlying transaction and a sale confirmation letter containing an HCE arbitration agreement not signed by either party. The SC maintained that although such documentation

was sufficient to accredit the existence of an international sale agreement pursuant to Articles 18 and 19 of the CISG, it was not sufficient to prove the existence of an arbitration agreement under the NYC, therefore it dismissed the exequatur application.

The second case (ATS 1451/1998, on the same day as the previous one) is about an award of the International Chamber of Commerce (ICC) of Paris. The enforcement creditor supplied the correspondence between the parties, a sale confirmation letter containing an ICC arbitration agreement and a telefax sent by the enforcement debtor complementing as well as agreeing in general with the terms of the confirmation letter. Surprisingly, in this instance, the SC took a different approach as it held that the communications between the parties were enough not only to ascertain the existence of an international sales contract, but also the existence of an arbitration agreement. Accordingly, the SC confirmed the exequatur application. Interestingly and (maybe) rightly so, the SC interpreted Article V(1)(a) of the NYC as a conflict of law provision (*"the [arbitration] agreement is not valid under the law to which the parties have subjected it"*) remitting not to the Spanish domestic arbitration law, but to the substantive law applicable to the contract (the CISG) in order to establish the valid formation of the arbitration agreement. Since the CISG – as international substantive law – envisages the freedom of form to enter into an international sales contract, then the same applies for an arbitration agreement that is part of such an informal contract.

The third case (ATS 370/1998 on May 26th) concerns an award of the International Arbitration Chamber for Fruits and Vegetables ("CAIFL"). The enforcement creditor supplied the correspondence between the parties, an invoice of the transaction underlying the dispute, a delivery note of a previous transaction (hinting at an existing practice between the seller and the buyer), and a sale confirmation letter containing a CAIFL arbitration agreement. Surprisingly, this time the SC changed its stance and reverted to the approach adopted in the first case. The SC concluded that the communications exchanged between the parties were sufficient to accredit the existence of an international sale agreement pursuant to Articles 18 and 19 of the CISG. Nevertheless, they were not sufficient to prove the existence of an arbitration agreement pursuant to the NYC. Consequently, the SC rejected the exequatur application.

NYC Safety Valve

It is noteworthy that Article VII(1) of the NYC may curb the strict formal requirement of Article II of the same instrument, as it allows a party seeking enforcement of an award to rely on more favorable law or treaties of the country where enforcement is sought. Accordingly, the CISG can be regarded as the more favorable domestic law or treaty which the enforcement creditor could rely upon, thus circumventing the written requirement of the arbitration agreement as per Article II. However, Article 90 of the CISG may hinder this interpretation as it places the CISG at the bottom of any hierarchy of sources regulating matters governed also by the CISG, so it remains a conundrum which Convention should take precedence over the other.

Importantly, the non-alignment of the form requirement should not be a problem where the applicable version of the CISG is the one of a Contracting State that made a "form" reservation under Article 96, thus making operative Article 12 which requires *ad substantiam* the written form for an international sales contract.

Conclusion

Arguably, the telefax sent by the enforcement debtor in reply to the sales confirmation letter could be presumed as the decisive piece of communication in determining the common intention of the parties to arbitrate (in the cases concerning the German awards no written communication was sent by the other party to accept the other party's terms). However, this would be an ill-founded assumption that ignores the SC's reasoning. In the French award case, the SC reaches the conclusion on the valid formation of an agreement on the ground that it expressly considered the less formalist CISG as the legal backdrop regulating not only the international sales contract, but also the arbitration agreement. It is therefore unclear why in the third case the SC did not keep the same line of reasoning to confirm also the CAIFL award.

As in the three cases, the SC follows two different approaches (a stricter one with the German awards and a more flexible with the French award), unfortunately, it is not possible to deduct clearly how and if the SC would reconcile Article II of the

NYC with Article 11 of the CISG in the future. Of course, the preferable approach is the flexible one (adopted with the French award) according to which the CISG displaces the NYC and the domestic *lex arbitri* to favor the uniform worldwide interpretation and application of the CISG in relation with the formation of arbitration. Given the international nature of the transactions governed by the CISG, there should be a presumption for a neutral forum, hence, for a *favor arbitralis*.

Eventually, the factual circumstances of each case will determine its outcome, yet it is useful to know of such interplay between the two Conventions, the diverging paths national courts can take, and which precedent to invoke to take one path or the other.