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Still Not Ready to Cast the Dice: German and Italian Courts Tread Lightly on the Issue of CISG and Arbitration Agreements

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On 26 November 2020, the German Federal Supreme Court (*Bundesgerichtshof*—**BGH**) intervened in the "disputed" question of the applicability of the CISG to arbitration agreements (I ZR 245/19, para. 28). The Decision—based on the specific factual circumstances of the case and the most-favorable-law provision (Article VII) of the New York Convention on the Recognition and Enforcement of Foreign Arbitral Awards (**NYC**)— falls short of providing the conclusive answer in the heated debate.

Quite the opposite, the Decision adds fuel to the controversy as to which law governs the arbitration agreement in the absence of an express agreement by the parties, and includes valuable pointers on the incorporation by reference of a party's general terms and conditions. Apart from comparing German and Italian case-law on these topics, this contribution ponders whether state courts are rightly exercising restraint in favor of arbitral tribunals.

I. BGH Decision

The dispute arose out of the delivery of allegedly contaminated goods to a German purchaser, who subrogated its rights to its insurance policy holder (**Claimant**). The delivery was made by a Dutch vendor (**Respondent**, jointly with Claimant, the **Parties**). In its confirmation letters (named "sales contract") to Claimant's orders, Respondent referred to both (1) the Netherlands Spice Trade Association (*Nederlandse Vereniging voor de Specerijhandel* or **NVS**) conditions and (2) its own "general conditions of sale and delivery". The NVS conditions identified Dutch law, with the exclusion of the 1980 United Nations Convention on Contracts for the International Sale of Goods (**CISG**), as the law applicable to the parties' contractual agreement (Articles 17-18) and provided for arbitration seated in the Netherlands (Article 16). The second set of conditions contained a choice-of-forum clause in favor of the competent courts of the purchaser's registered office. Respondent signed all the confirmation letters; Claimant none of those regarding the disputed delivery.

The dispute reached the BGH upon Claimant's request for revision of the Bremen Court of Appeal's decision that found that the Parties' contract did not validly incorporate the arbitration agreement in the NVS conditions. So held the BGH, too. After finding that the Parties had not validly concluded an arbitration "agreement in writing" under Article II(2) NYC (paras. 14-16), the

BGH applied German law as the most-favorable-law under Article VII NYC that it had previously considered applicable to both exequatur and declaration of enforceability proceedings (Article V NYC) and arbitration objections (Article II NYC, *cf.* paras. 17-19; BGH 30.09.2010 III ZB 69/09; see also Tarawali/Gerardy, 19/4 SchiedsVZ (2021) p. 213).

The BGH found that the Parties' agreement lacked formal validity and the NVS conditions were not validly incorporated by reference under German substantive law (§1031(1)-(3) German Code of Civil Procedure, *Zivilprozessordnung*—**ZPO**). And since German law includes the CISG, the BGH considered the scholarship on (i) the principle of separability of the arbitration agreement and (ii) Article 4 CISG on the convention's limited scope of application to the formation of the contract and the parties' respective rights and obligations. However, the BGH ended up endorsing the applicability of the CISG to arbitration agreements based on Articles 19(3) and 81(1) CISG (on the consequences of (a) an alteration of the terms during negotiations or (b) the avoidance of the contract on a dispute resolution clause, *cf.* paras. 30-33). (For both schools of thought, *see* Flecke-Giammarco/Grimm, CISG and Arbitration Agreements, pp. 45, 49; Schwenzer/Jaeger, The CISG in International Arbitration, pp. 318-320; Koch, Surprising Terms in Standard Contracts under the CISG, pp. 598-599). It found that the meeting of the minds concerned the contract-law dimension of the agreement (Articles 14-24 CISG) and excluded the application of the freedom of form principle (Article 11 CISG, *cf.* paras. 33, 36, 53). In the absence of specific rules on incorporation of standard conditions in the CISG, the BGH applied Article 8 CISG on contract interpretation. Because of Respondent's additional reference to its own conditions electing domestic courts and the circumstance that the NVS conditions were not "sent or made otherwise available" to the opposing party, the BGH excluded that based on any trade usage or a reasonable person's interpretation (Article 8(2)-(3) CISG, *cf.* paras. 36-39) the NVS conditions were validly incorporated into the contract (Kröll, 19/3 SchiedsVZ, pp. 128-129/NJW 2021, p. 832).

In the end, the BGH considered German conflict-of-law rules, which led in that case to the application of Dutch law. However, the BGH did not assess Dutch law, because this includes the CISG and the BGH had already excluded a valid incorporation of the NVS conditions into the contract under the CISG (paras. 40-49, 56).

II. Italian Case-Law

Due to the limited scope of application of the BGH Decision (the most-favorable-law provision), a comparison with case-law of other jurisdictions is difficult. Nevertheless, it is interesting to see, from a comparative analysis, how other state courts have pronounced to identify decision patterns. One example is the Italian Cassation Court. This court has so far excluded the applicability of the CISG to forum selection clauses, but has not yet pronounced on arbitration agreements.

Most decisions of the Cassation Court concerned recognition and enforcement proceedings, and for this purpose it found sufficient the meeting of the parties' minds on the arbitration agreement under the applicable law: leaving any evaluation regarding the formal requirements to the arbitral tribunal (21/01/2000, n. 671, referring to 2448/1980, 4392/1988, 1269/75, 1877/76, 6055/82). For instance, it recognized an arbitral award based on what was considered a valid arbitration agreement under the applicable law: an arbitration clause in the purchase orders referred to in the invoices that the seller delivered to the buyer along with the shipment (15/04/1980, n. 2448).

The Cassation Court's case-law further recognizes the conclusion of international contracts through so-called *facta concludentia* when in conformity with international trade usages in the specific economic sector (17/01/2005, n. 731). The Cassation Court applied this case-law to the dispute resolution clause between the parties to an international sales contract (although in that case the corresponding requirements were lacking, *cf.* 5/10/2009, n. 21191, para. 2). Besides, in several decisions the Cassation Court held that the special formal requirements of Italian law for contractual clauses as choices-of-law or courts do not apply in case of incorporation of a party's terms and conditions (*relatio perfecta*, *cf.* n. 9863/2021, p. 10, 18041/2012, 7403/2016, 3479/2007).

The Cassation Court also found that the CISG only regulates the parties' substantive obligations but dictates no jurisdictional rule (in case of forum selection clauses, *cf.* 26/02/2016, n. 3802, para. 3.3, referring to 5/10/2009, n. 21191, para. 8). (Interestingly in 25.03.2015 VIII ZR 125/14 also the BGH found applicable to forum selection clauses the *lex fori* and not the CISG under Article 4 CISG, but in its latest Decision it took distance from that ruling excluding the application of any autonomous law under Article VII NYC , *cf.* para. 34). The Cassation Court further held that once the parties' agreement refers to general terms and conditions, as per their usage, the objecting party bears the burden of proving any different agreement between the parties (good faith principle, *cf.* 15/04/2021, n. 9863.)

III. Arbitral Tribunals' Case-Law (Brief Comparison)

A common position is that arbitral tribunals enjoy greater leeway in the (non-)application of the CISG: differently from domestic courts, they do not belong to a specific jurisdiction (*See* Flecke-Giammarco/Grimm, CISG and Arbitration Agreements, pp. 46-47). Yet there are instances where arbitral tribunals applied the CISG based on party autonomy, on a comparative analysis or as a most-favorable standard (*Ibid*, pp. 51-53; Schwenzer/Jaeger, The CISG in International Arbitration, p. 325). However, there are tendencies to interpret broadly the "written requirement" of Article II through Article VII NYC among national courts, too (*See* Praštalo, Uniformity in the Application of the CISG, p. 197, fn 1084 referring to UNCITRAL Guide; Schwenzer/Tebel, The Word is not Enough–Arbitration, Choice of Forum and Choice of Law Clauses Under the CISG, pp. 742-743; and in 21/09/2005 III ZB 18/05 the BGH—though based on the old German private international law that was in the meantime replaced by the EU Regulation 593/2008 that does not apply to arbitration and forum agreements—set aside the regional court's decision and referred the matter back to it with the instruction to consider Dutch law's more permissive form requirements (under Article VII NYC)—allowing for references on invoices or letterheads in long-standing professional relations, *cf.* pp. 307-308.)

IV. Conclusion

Does the BGH Decision signal enduring caution? The Decision has been applauded but also criticized for bringing only partial clarity on several questions: (1) Why did the BGH apply §1031 ZPO to the formal requirements? (2) What would happen outside the analogous application of Article V or of Article VII NYC? (3) Would different courts decide according to different laws depending on whether a clause is mutually agreed or not? (Masser/Harraschain, 19/2 SchiedsVZ, p.

104; BeckOK BGB, Hau/Poseck, CISG Art. 4, para. 19) Besides, considering technological advances, shouldn't formal and substantive validity requirements be applied more broadly?

Most importantly, to what extent should national courts finally decide on this issue, given that most national laws endorse the *Kompetenz-Kompetenz* principle, the NYC embodies the *favor arbitratus*tenet, and arbitral tribunals enjoy greater leeway in the (non-)application of the CISG? For now, what is clear is that the dice have not been cast yet.

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