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COSTLY MISTAKES

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The following case comment concerns a recent decision from the Italian *Corte di Cassazione a Sezioni Unite* ("Supreme Court")[1] affirming a decision from the Corte di Appello di Napoli, which applied Article 3(2) of the United Nations Convention on the International Sale of Goods ("CISG"). This Comment includes a description of the pertinent factual and procedural information and subsequent analysis of the decision.

An Italian company, CO.DA.P., entered into a contract with a French company, SERAC S.A.S., in which SERAC agreed to deliver and install machinery for filling metallic tanks with cream in CO.DA.P.'s plant in Marcianise, Italy. The agreement between the parties was formalized in a forty-one-page document, which consisted of a Summary (i.e., a table of contents listing the chapters) followed by eight chapters that included, among other items, the contract and the general terms and conditions of sale (hereinafter "Chapter I"). The general terms and conditions of sale comprised the final chapter of the agreement. The parties did not sign the general terms and conditions of sale chapter but did sign the contract.

The forum/choice of law clause on the last page of Chapter I provided:

> Any dispute arising from the interpretation or execution of a sales contract or relating thereto, which cannot be settled amicably, shall be submitted [to] the Court of our Head Office [located in France]. The agreements are governed by the

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[1] Cass. Civ., Sez. Un., 10 gennaio 2023, n. 361, Giur. it. 2023, 1 (It.). Available at: https://www.ilcaso.it/giurisprudenza/archivio/28615.pdf.

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> law of France. The general terms and condition of sales in French language is the sole authentic text.[2]

There was no signature at the end of the Chapter I or next to the forum/choice clause itself.

From the time of installation and first uses, the plant was plagued with malfunctions and defects, requiring numerous service calls, and resulting in production delays and loss of merchandise. Eventually, CO.DA.P. sued SERAC before the court of first instance (Tribunale) in Santa Maria di Capua Vetere, Italy, seeking damages for breach of contract. SERAC filed a response averring that a French court had to decide the dispute pursuant to the choice of law/forum clause, and that the Tribunale lacked jurisdiction over the dispute, and opposing CO.DA.P.'s damages request on the merits. The trial court rejected SERAC's lack of jurisdiction claim and granted CO.DA.P.'s damages request, albeit for a smaller amount. SERAC appealed to the Corte di Appello di Napoli, challenging the trial court's conclusions. Specifically, SERAC argued that the agreement called for the sale of goods, that the goods were delivered in France, and that the forum/law choice clause required a French court, applying French law, to decide the dispute.[3]

The Corte di Appello di Napoli disagreed with SERAC. The court first ruled that the forum/choice of law clause was not valid because it failed to comply with the requirements of the 1968 Brussel Convention (and subsequent regulations).[4] In particular, the Corte di Appello found that the clause *tamquam non esset* (that is, invalid) because it was included in a chapter not signed by the parties, the chapter was independent from the contract at issue here, and the clause was not referenced to or otherwise linked to the contract itself.

The court reasoned that, absent a valid forum/choice of law clause, the question of jurisdiction could be answered by determining the nature of the contract. Relying on Article 3 of the CISG, the Corte di Appello concluded that the labor/service component of the contract prevailed over the sale

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[2] *Id.* at 11 (quoting Article 15 of the General Terms and Conditions of Sales).

[3] *Id.* at 6-7.

[4] *See* 1968 Brussels Convention on jurisdiction and the enforcement of judgments in civil and commercial matters /* Consolidated version CF 498Y0126(01) */, 1972 O.J. (L 299) 32. Available at: https://eur-lex.europa.eu/legal-content/EN/TXT/HTML/?uri=CELEX:41968A0927(01); *see also* Council Regulation (EC) No 44/2001, 2001 O.J. (L 12) 1. Available at https://eur-lex.europa.eu/legal-content/en/TXT/?uri=CELEX%3A32012R1215.I.

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component of the agreement. Accordingly, it treated the contract as a service contract, not as a sales contract. Under Article 5 of the Brussel Convention, in matters relating to a contract, "a person domiciled in a Contracting Sate may, in another Contracting State, be sued."[5] Similarly, Article 7 of Regulation (UE) 1215/2012 states that a "person domiciled in a Member State may be sued in another Member State . . . where, under the contract, the services were provided or should have been provided."[6] Essentially, because the services were provided or should have been provided in Marcianise, Italy, SERAC was properly sued in Italy.

SERAC appealed to the Supreme Court of Italy, challenging the Corte di Appello's decision on three alternative grounds: (i) the Corte di Appello erroneously concluded that SERAC's jurisdiction clause was invalid; (ii) the Corte di Appello misconstrued Article 3 of the CISG; and (iii) the conclusion that Italian law applies to the transaction violated Article 3 of the 1980 Rome Convention.[7]

The Supreme Court noted that the 1968 Brussel Convention on jurisdiction and the enforcement of judgments in civil and commercial matters, and subsequent amendments, governs the instant dispute. In particular, the issue of jurisdiction derogation (as attempted by SERAC here), is governed by Article 17 of the 1968 Brussel Convention and Article 25 of Regulation (EU) 1215/2012.[8]

In relevant part, Article 17 of the 1968 Convention reads as follows:

> If the Parties, one or more of whom is domiciled in a Contracting State, have, by agreement in writing or by an oral agreement evidenced in writing, agreed that a court or the courts of a Contracting State are to have jurisdiction to settle any disputes which have arisen or which may arise in connection with a particular legal relationship, that court or those courts shall have exclusive jurisdiction.[9]

Article 25(1) of Regulation (EU) 1215/2012 reads as follows:

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[5] *Id.* at 33–34.

[6] *See* Regulation (EU) No 1215/2012 of the European Parliament and of the Council of 12 December 2012 on jurisdiction and the recognition and enforcement of judgments in civil and commercial matters (recast), 2012 O.J. (L 351) 1, 7.

[7] *See* 1980 Rome Convention on the law applicable to contractual obligations (consolidated version), 1998 O.J. (C 27) 34, 37.

[8] The Supreme Court also discussed Regulation (EC) 44/2001. Since this regulation has been replaced by Regulation (EU) 1215/2012, I will focus on Regulation (EU) 1215/2012 alone.

[9] *See* 1968 Brussels Convention, *supra* note 4, at 35–36.

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> If the parties, regardless of their domicile, have agreed that a court or the courts of a Member State are to have jurisdiction to settle any disputes which have arisen or which may arise in connection with a particular legal relationship, that court or those courts shall have jurisdiction, unless the agreement is null and void as to its substantive validity under the law of that Member State. Such jurisdiction shall be exclusive unless the parties have agreed otherwise. The agreement conferring jurisdiction shall be either:
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> (a) in writing or evidenced in writing;
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> (b) in a form which accords with practices which the parties have established between themselves; or
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> (c) in international trade or commerce, in a form which accords with a usage of which the parties are or ought to have been aware and which in such trade or commerce is widely known to, and regularly observed by, parties to contracts of the type involved in the particular trade or commerce concerned.[10]

Thus, both the Convention and a subsequent Regulation allow parties to a contract to derogate from an otherwise applicable rule on jurisdiction. In order to do so, however, both the Convention and the Regulation impose on "the court before which the matter is brought the duty of examining, first, whether the clause conferring jurisdiction upon it was in fact the subject of consensus between the parties, which must be clearly and precisely demonstrated[.]"[11]

The Supreme Court noted that the same principle has been reiterated recently by CJEU, in which the CJEU stated that "where a jurisdiction clause is stipulated in the general conditions, the [CJEU] has already held that such a clause is lawful where the text of the contract signed by both parties itself contains an express reference to general conditions which include a

[10] *See supra* note 9.

[11] Supreme Court, *supra* note 1, at 14 (citing Mainschiffahrts-Genossenschaft eG (MSG) v. Les Gravières Rhénanes SARL, C-106/95, par. 15, https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=CELEX:61995CJ0106). The Court of Justice of the European Union (CJEU) used the above language referring to the 1968 Brussels Convention and noted that the principles developed under the 1968 Brussels Convention are equally applicable to Regulations 44/2001 and 1215/2012, citing Refcomp SpA v Axa Corporate Solutions Assurance SA and Others, Case C-543-10, https://eur-lex.europa.eu/ legal-content/en/TXT/?uri=CELEX:62010CJ0543.

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jurisdiction clause."[12] The Supreme Court observed this very same principle has been reiterated in its decisional law on numerous occasions.[13]

Agreeing with findings and conclusions of the Corte di Appello, the Supreme Court concluded that the clause at issue here was included in a separate and autonomous chapter, independent from the contract, that the clause was not referenced to in the contract, and that a mere reference to the general conditions of the contract placed in the table of contents was not sufficient to conclude that the jurisdiction clause was agreed upon in a clear and precise fashion.[14] Thus, the clause was not part of the contract between the parties.

Because the parties did not effectively prorogate jurisdiction under Article 17 of the Brussels Convention, the general rules of the Convention came into play, namely Article 5 of the 1968 Convention. Under this Article, a party to a contract may be sued in the courts for the place of performance of the obligation in question.[15] The identification of the court "for the place of performance of the obligation in question" will be done by the court in which the dispute was brought, applying its own rules of international private law. In the instant case, the dispute was pending before an Italian court. The Italian court, applying its own rules of private international law, identified Italy as the proper place to bring suit, given that Italy had the closest relation to the contract.[16]

Next, SERAC challenged the findings and conclusions of the Corte di Appello regarding the nature of the transaction at issue here.[17] Specifically, SERAC argued that (1) the transaction at issue here was an international sale of goods; (2) to the extent there was a service component, it was not sufficient

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[12] *See id.* at 14 (quoting Saey Home & Garden NV/SA v Lusavouga-Máquinas e Acessórios Industriais SA, C64/17, par. 27 (Mar. 8, 2018), https://eur-lex.europa.eu/search.html?scope=EURLEX&text=62017cj0064&lang=en&type=quick&qid=1698433759041,) for the proposition that "where a jurisdiction clause is stipulated in the general conditions, the [CJEU] has already held that such a clause is lawful where the text of the contract signed by both parties itself contains an express reference to general conditions which include a jurisdiction clause" (citations omitted).

[13] *See* Cass, S.U. n. 9210/1987 (It.), Cass., S.U., n. 3693/2012 (It.), Cass., S.U., n. 8895/2017 (It.), and more recently in Cass., S.U., n. 13594/2022 (It.).

[14] *See* Supreme Court, *supra* note 1, at 11–12.

[15] 1968 Brussels Convention, *supra* note 4, art. 5.

[16] *See* Supreme Court, *supra* note 1, at 12–13.

[17] *See* Supreme Court, *supra* note 1, at 5–7. As noted above, the Corte di Appello, relying on article 3 of the CISG, concluded that the transaction at issue here was not a sale of goods.

to change the transaction from a sale contract into a service contract; and (3) pursuant to Article 5 of the 1968 Brussels Convention, the dispute had to be brought before a French court, given that SERAC's headquarters were located in France, and the contract provided that the place of performance of the obligation was SERAC's headquarters.[18]

The Supreme Court agreed with the Corte di Appello that the language of the contract and the conduct of the parties demonstrated their intent to create a contract for the supply of goods, labor and services, because labor and services comprised the preponderant part of SERAC's obligations, and SERAC had to perform this labor and service at the Marcianise plant.[19] Consequently, the Italian court had jurisdiction to hear the dispute.[20]

The Supreme Court further observed that contract interpretation is within the province of lower courts, and challenges to said interpretations are limited.[21] Here, the Supreme Court noted that SERAC did not meaningfully challenge the lower court's characterization of the contractual relationship between the parties.[22]

Without referring to the CISG, the Supreme Court noted that for purposes of determining the nature of the contract, it is important to consider not only the value of services vs. goods but also other factors, such as the parties' intent as well as the objective nature of the transaction.[23] Weighing

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[18] *See supra* note 5.

[19] *See* Supreme Court, *supra* note 1, at 9.

[20] *Id.* at 10.

[21] *Id.*

[22] *Id.*

[23] Not only did the Supreme Court omit mention of the CISG in its decision, but it applied Italian Law instead, citing only its decision in another case, Cass., 12 marzo 2018, n. 5935 (It.). Nonetheless, the approach taken by the Supreme Court is consistent with the CISG, and in line with well-reasoned decisions. For more commentary on this subject. see PETER SCHLECHTRIEM, COMMENTARY ON THE UN CONVENTIONS ON THE INTERNATIONAL SALE OF GOODS (CISG) 60 (Peter Schlechtriem & Ingeborg Schwenzer eds., 2d ed. 2005) ("The prevailing opinion compares economic value of the goods on the one hand and of the services on the other hand on the basis of the prices . . . , but some commentators advocate taking these criteria [only] as a starting point to be supplemented or even revised by the weight the parties themselves have attributed to each obligaton."); *Steel bars case V*, Decision (Oberlandesgericht Innsbruck, 1 R 273/07t, Dec. 18, 2007) Supreme Court, *supra* note 1, at 9. English translation available at https://cisg-online.org/files/cases/7653/translationFile/1735_43269920.pdf ("The quantitative balance does not constitute the sole requirement in respect to the question whether the supply of services is predominant. In addition, further components have to be taken into account in each case such as in particular the interest of the parties as regards the remaining performances"); Oberster Gerichtshof, Austria, November 8, 2005, English translation available at https://cisg-online.org/files/cases/7080/translationFile/1156_20988088 .pdf (referring to the intentions of the parties as an element to be taken into account when determining

these factors collectively, the Supreme Court concluded that the dispute was properly brought before the Italian court.

Finally, SERAC argued that the lower courts erred in applying Italian law instead of Article 3(1) of the 1980 Rome Convention on the Law Applicable to Contractual Obligations.[24] Under Article 3 of the 1980 Rome Convention. Article 3(1) reads as follows:

> A contract shall be governed by the law chosen by the parties. The choice must be expressed or demonstrated with reasonable certainty by the terms of the contract or the circumstances of the case. By their choice the parties can select the law applicable to the whole or a part only of the contract.[25]

Here, according to SERAC, the parties made a choice (French Law), and this choice was binding on the parties and the courts.

The Supreme Court disagreed. Because the jurisdiction clause was invalid, any choice of law was not effective, and the proper law had to be identified pursuant to Article 57 of Law n. 218/1995.[26] Under this Article, in contractual matters, when no choice has been made, the law of the state with which the contract is most closely connected is to be applied, which in this case was Italy.

While not addressed in the Supreme Court's decision, to the extent the contract between the parties was indeed an international sale of goods, the choice of law/forum clause completely failed to achieve SERAC's purpose of requiring application of French law. Although this clause purported to select the law of France as the "govern[ing] law," France is a CISG Contracting State, which means that a reference to the Law of France *includes* the CISG.[27] In other words, "a reference to the law of a Contracting

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whether the contracts falls into the sphere of application of the Convention). *See also* Francesco G. Mazzotta, *in* A PRACTITIONER'S GUIDE TO THE CISG (2d ed. 2018), § 1.2.3.(b), at 45 ("While determining the economic value of the service(s) and good is important, that should not be the end of the analysis. The intention of the parties should also be considered.").

[24] *See* https://eur-lex.europa.eu/legal-content/EN/TXT/HTML/?uri=CELEX:41980A0934.

[25] *Id.* art. 3(1).

[26] For more information, see https://e-justice.europa.eu/340/EN/which_country_s_law_applies ?ITALY.

[27] *See, e.g.*, Peter Schlechtriem, *in* COMMENTARY ON THE UN CONVENTION ON THE INTERNATIONAL SALE OF GOODS (CISG), Second (English) Edition, at 90 (Peter Schlechtriem & Ingeborg Schwenzer eds.) (2005); JOHN O. HONNOLD, UNIFORM LAW FOR INTERNATIONAL SALES UNDER THE 1980 UNITED NATIONS CONVENTION (4th ed.) (Edited and updated by Harry M. Flechtner), at 104–10; UNCITRAL Digest of Case Law on the United Nations Convention on Contracts for the International Sale of Goods (2016) at 34. *See also* Mazzotta, *supra* note 23, § 1.2.6(a), at 66–67:

State *in itself* does not amount to an exclusion of the CISG[.]" In short, the choice of law/forum clause did not preclude application of Italian law.

Since the law about the validity of jurisdiction clauses included in general conditions governed by the 1968 Brussels Convention (and subsequent Regulations) is well-established, and since the law concerning the exclusion of CISG is well-established as well, SERAC clearly could have dealt with these issues more effectively prior to litigation. While French law or French courts might have resolved the underlying breach issue in a similar way, I have little doubt that poor drafting caused a great deal of damage to SERAC in the form of time-consuming litigation and considerable expenditure of time and money.

> A trickier question arises when parties make reference to the law of a Contracting State. Does that operate to exclude the applicability of the CISG to the transaction? Usually, it does not. Several courts, for example, have held that mere reference to national law does not operate to exclude the CISG. In other words, if a French seller and an Italian buyer concluded a contract for the sale of goods and their contract states that French Law or Italian Law governs the sale, since both France and Italy are Contracting States, reference to French Law or Italian law operates to include the CISG.

Id. (citing U.S. District Court, S.D. California, U.S.A., Asante Technologies v. PMC-Sierra, C 01-20230 JW, July 27, 2001, and Oberlandesgericht Stuttgart, Germany, 6 U 220/07, March 31, 2008.

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