Assessing the CISG and Other International Endeavors to Unify International Contract Law

The Interpretation in Mexico of the United Nations Convention on Contracts for the International Sale of Goods

January 18, 2013
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INTRODUCTION

The CISG has been in force in Mexico since January 1, 1989

- Very few CISG cases have been reported
- Nine cases, 26 decisions (trial, appellate, Circuit Court)
- There are more out there... but ....
In Mexico, Courts generally have no obligation to publish court decisions. It is difficult to gain access to concluded cases.
Court decisions in Mexico that do apply the CISG are deficient.
ASSESSING THE QUALITY OF THE CISG DECISIONS

Mexican Judges do not understand the CISG’s scope of application

- They apply the CISG alongside provisions from Mexican Commercial and Civil Codes
- They apply the CISG to some issues, but exclude it from others
- Little regard to CISG article 7 (what little there is, it is typically to the observance of good faith rule)
A SAMPLING OF MEXICAN CISG CASES

Contract formation
Kolmar Petrochemicals Americas, Inc. vs Grupo Idesa, S.A. de C.V.

Remedies, damages and interest
Agrofrut Rengo, S.A. vs Levadura Azteca, S.A. de C.V.
Kolmar Petrochemicals Americas, Inc.  
Vs  
Grupo Idesa, S.A. de C.V.
29 Nov 2002 Agent for Kolmar negotiated with a sales representative for Idesa over the phone

Kolmar’s agent sends Idesa an e-mail that same day confirming what he believed they had agreed to:

- Sale of 3,000 tons of MEG
- Price of $392.50 FOB/ Seller’s terminal at Coatzacoalcos, delivery January 2003
- Payment, 30 days from the date on bill of lading
KOLMAR VS IDESA

- Idesa’s agent e-mailed confirming receipt, but stated that it would check if its terminal was available.

- 2 Dec- Kolmar e-mailed to ask what Idesa meant regarding the availability of the terminal. Seller did not respond.

- 19 Dec -Kolmar sent an e-mail nominating the ship that would pick-up the goods. Seller did not respond.

- 10 Jan 2003- Idesa emailed Kolmar, advising that it was fighting to save the contract, was under pressure to increase the price, that it understood it could cause problems with Kolmar, but that it still had reserved Kolmar’s MEG.
Kolmar viewed Idesa’s attempt to increase the price as a breach of contract, and filed a lawsuit for damages. Idesa defended, claiming that no contract had been concluded.
Decision:
Trial court qualified Kolmar’s e-mail as an offer, not a confirmation. Judge did not analyze CISG article 14.

Judge found that Idesa’s e-mail was a counter-offer, per CISG article 19(3), because:

- It did not accept all of Kolmar’s proposed terms
- Idesa proposed to increase the price, and to possibly change the place of delivery
Article 7 considerations:

- Citation to Mexican Law (more so by Kolmar’s attorney, than by the judge), use of the expression *aceptación lisa y llana*, civilian expression, contrary to international character of the CISG

- No case law was cited

- No promotion of the observance of good faith
Kolmar appealed to the Mexico City Superior Court

- Superior Court parroted the trial court’s decision
- Interpreted CISG article 19(3) to read as a check-list of terms to which parties must agree
Agrofrut Rengo, S.A.
Vs
Levadura Azteca, S.A. de C.V.
Rengo (Chile) sold to Azteca (Mexico) eighty containers of canned peaches (each container carrying 900 boxes)

- Eleven containers per month, during the first six months.
- A final shipment of fourteen containers

- Seller delivered eleven containers on February 28, and a second shipment on April 17. Claiming that the second delivery had been late, Buyer cancelled the remaining shipments.

- Buyer refused to pay for the twenty-two containers it received.
Seller filed suit demanding payment for the twenty-two containers it had delivered, plus interest, and loss of profit damages for the cancelled shipments. Buyer defended on the grounds that there no place and date for payment had been fixed (formal demand was required). Buyer also counterclaimed for specific performance for the remaining fifty-eight containers.
**Decision:**

- Court ordered buyer to pay seller the price and interest for the containers buyer received. The issue was disposed of based on Commerce Code art. 375. (Buyer’s acceptance of a late delivery, made the sale final). Judge made no reference to CISG articles 61 and 62.

- Buyer’s defense, dismissed the “no date or place to pay” defense. Judge ruled for seller, based on CISG articles 57 and 58 of the CISG.
Court did not grant Rengo loss of profit damages:

- The order that Azteca pay the price, plus interest was tantamount to damages

- Court blatantly ignored CISG article’s 74 and 78
Court denied Azteca specific performance for the balance of the containers. Decision was based on Federal Civil Code article 1949. (A party who has performed his obligation under a contract, may demand from a breaching party either performance of his obligation or rescission of the contract). Because Azteca had not paid, it was not entitled to the rest of the containers.

An apparently sound result, but the court should have looked at CISG articles 72 and 81 the applicable law.
RENGO VS AZTECA

Rengo appeals

Claims violations to Civil Code (not CISG) for not getting its loss of profit damages. Azteca also appealed for being ordered to pay Rengo, claiming that Rengo had not performed the contract in full.
RENGO VS AZTECA

Decision:

Superior Court made a grandiose announcement that it would apply the CISG ....and it didn’t... (save for CISG arts. 57 and 58)

Loss of profit damages were denied because trial court had already granted them as interest (CISG art. 78 distinguishes between damages and interest. Interest does not prejudice damages!)
RENGO VS AZTECA

Decision:

“The Seller needed to show that the breach caused the alleged damages and that these were immediately and proximately cause by it” (Civil Code art. 2110). (CISG has a possible consequence standard, subject to a foreseeability limitation (CISG art. 74)

Even if Superior Court had granted damages per Civil Code, these could have been less than what the CISG would allow.
“Seller did not prove it had bought additional machinery to perform the contract.” (This was never claimed by Seller, and the CISG’s article 74 expressly provides for loss of profit damages)
Decision (continued):

“Seller failed to prove it had produced the goods”

After it was clear that the other party would not perform (CISG art. 72), seller was relieved from obligations pending performance under the contract (CISG art. 81)

Under CISG art. 76, damages would be still attainable even if no substitute transaction had been entered into

Under CISG art. 77, a non-breaching party is under a duty to mitigate his damages, including his loss of profits
Superior Court’s disposition of Azteca’s issues on appeal:

Court reasoned that per article 1949 of the Federal Civil Code, Azteca could not demand specific performance if it had not performed its own obligations.

The CISG governed this issue!
Azteca’s issues on appeal.

Superior Court failed to analyze:

If Rengo’s late delivery amounted to a fundamental breach (CISG art. 25), if so, whether Azteca’s notice of termination was timely (CISG art. 49).

Also, court should have discussed that Azteca’s right to avoid was incompatible with its request for specific performance (CISG art. 46).
After 24 years, judges in Mexico do not understand (or are not aware of) the CISG

- They do not understand its scope of application
- They do not understand its method of interpretation
- Their decisions are not uniform
THE MISAPPLICATION OF THE CISG IN MEXICO

Attorneys are not arguing the CISG (and other uniform laws) properly.
THE MISAPPLICATION OF THE CISG IN MEXICO

Non-uniform interpretation of other Uniform Laws

Supreme Court’s Kompetenz-Kompetenz case
(UNCITRAL Model Law on International Commercial Arbitration)

Mexican legislation on E-Commerce (influenced by UNCITRAL’s Model Law on E Commerce), still hard to prove contract made by electronic means
THE MISAPPLICATION OF THE CISG IN MEXICO

Is there hope?

YES THERE IS!
Amendments to the Mexican Constitution in 2011, incorporated human rights treaties by reference, in addition to the fundamental rights that already existed in the Constitution’s provisions.
More lawyers and judges are being trained in human rights law and treaties

More lawyers argue international treaties, and are beginning to cite decisions from human rights tribunals

More openness to foreign decisions!
THE MISAPPLICAION OF THE CISG IN MEXICO

How to replicate this in the international commercial (and uniform) law field?

- Training judges in the use of Uniform Laws (CISG, Unidroit Principles, etc.)

- Prepare training manual’s or Practical Handbooks for Judges and Practitioners

- Work in conjunction with UNIDROIT, The Hague Conference on Private International Law, the International Trade Centre
Thank you....

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