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ADVOKATSKA KANCELARIJA

TSD NEWSLETTER

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55th UIA CONGRESS

Miami, Fl. / United States
October 31 – November 4, 2011

Union Internationale des Avocats

INTERNATIONAL SALE OF GOODS
Date of the session: Thursday, November 3, 2011

NEGOTIATING THE CONTRACT FOR INTERNATIONAL SALE

MAIN PROBLEMS RELATED TO DIFFERENT CULTURAL AND LEGAL TRADITIONS

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1. INTRODUCTION

The difference between a conversation (*la conversation -Fr., das Gespräch- Ger., разговор- Rus.*) and contract invokes a disparity between the law and non-law. [1]
However, does the same apply to the difference between negotiations (*les négociations -Fr., die Verhandlungen-Ger., переговоры- Rus.*) and a contract (*le contrat- Fr., der Vertrag- Ger., договор – Rus.)*.
If not – when is a conversation a conversation, and when negotiations? Furthermore, what may be the legal significance of negotiations, bearing in mind that negotiations are destined to cease altogether either when an agreement is concluded or when the parties, at their own option, choose to desist from further negotiations.
Different cultural and legal traditions have offered different replies to the above questions throughout history, and they continue to do so today, as far as the comparative law is concerned.
This paper desires to confront these replies and to create an opportunity to find a modern, integrated road to understanding the legal significance of negotiations for international sales of goods.

2. NEGOTIATIONS

2.1 Negotiations- Concept and Open Issues

Concept and Features

Very broadly speaking, negotiations may be defined as a process where two sides, starting from distant positions, seek to discover common ground and come to an agreement. Whether or not the goal pursued by the parties will be accomplished is irrelevant for the idea of negotiations, it is the endeavor to achieve results that matters. [2]
All negotiations bear three essential features:

1. contradictory nature: negotiating parties are conflicting poles looking for common interest as the pole of cooperation);

2. uncertainty of outcome: whether a contract will be concluded or negotiations will be broken off, and

3. temporariness: all negotiations are destined to end regardless of their outcome (breaking off or contract)[3].

Open issues

Bearing in mind the above features, we may ask what the legal significance of negotiations is when they are broken off and the legal significance of negotiations when they result in a contract?
In other words (i) is there any legal liability of negotiating parties *during the negotiations themselves and for breaking off* the negotiations and furthermore, (ii) whether or not *pre-contractual negotiations have any significance for the existing contract*?
The above questions relating to the legal effects of negotiations have only recently become current[4], as a number of topics (technical, financial, legal) considered

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[1] „So long as conversation is made, we find ourselves in a territory not governed by the rule of law. The moment, however, we enter into an agreement, we enter into an area of complete rule of law. The fact that conversation, just like some other social relations (such as love, friendship, etc.) is not governed by the law, shows that the law does not enter into every part of human life, although it seems that its field of application is ever growing..." for details see Miodrag Orlic "Zaključenje ugovora" /Concluding Contracts/, Institute of Comparative Law, Belgrade 1993, pp. 5-7

[2] Ibid, p.13

[3] Ibid, p. 13,14, confer further with M. Orlic, C.Dupont "La négotiation", Conduite, théorie, applications, Paris, 1990, p. 11 and further

[4] Classical legal theories did not devote much attention to the concept of negotiations. The indisputable rule used to be that a conversation is a conversation , and the contract shall be the law unto the parties - *contractus contrahentibus lex esto.*

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during negotiations for a contract became increasingly complicated and the period of negotiations themselves increased (lasting in some cases even several months). This gave even rise to *sui generis* contracts concluded during the negotiation process (*Letter of Intent, Memorandum of Understanding etc.)* whose legal nature shall also be discussed herein.
Depending on their legal tradition, different legal cultures have laid different emphasis on the elements of negotiations described above, adapting them to their respective legal milieus.
On the whole, one may argue that " there are huge differences in the comparative law in respect of the rules of negotiations and liability for breaking off negotiations, which is largely a consequence of different notions of the importance conferred on the principle of good faith and fair dealing during the negotiation process".[5]

2.2. Continental Law

2.2.1 Liability for conducting and breaking off negotiations

Continental Law System strives to provide legal protection for the whole period of negotiations, which derives from consistent application of the principle of good faith and fair dealing (finding its origin in the German legal tradition as the principle of *Treu und Glauben*). The principle of good faith and fair dealing, as the supreme legal and ethical principle which implies conduct in good faith on every occasion, should govern the conduct of the parties not only during the performance of the contract, but even earlier - during the process of negotiations and concluding the agreement.
In the Continental Law System, this principle of good faith and fair dealing is applicable to negotiation either a.) based on the legal principle itself- on jurisprudence, *i.e.* application by the courts of this general legal principle without having concrete legal provisions regulating negotiations; or b.) based on the source of law – the legal provisions of law are regulating the legal concept of negotiations.
Bearing in mind that the interest shown by lawyers (and the law itself) in legal aspects of negotiations is of a fairly recent date, it is understandable that the earlier codifications of the civil law do not contain explicit legal provisions governing negotiations (therefore the application falling under a), unlike the more recent ones (therefore the application falling under b).

a. Court Practice based on Jurisprudence

Civil law codifications in some European countries (for example France, Germany, Switzerland) do not provide for rules of negotiations. Hence it is the court practice that governs the legal consequences of negotiations through application of the supreme principle – that of good faith and fair dealing.

French Law and the laws of the countries influenced by the French Civil Code, such as Belgium and Luxembourg, invoke *delictual* liability in case of *fautive* breaking off of negotiations, which is a breaking off attributable to a fault of one of the parties.[6] A negotiating party must act in accordance with the principle of good faith and fair dealing - loyally, ethically, and in good faith even during the negotiations. Thus, if the negotiations should break off through once fault, this party shall be held liable for the damage under the rules on non-contractual delictual liability.

Court practice in Germany, Austria, Switzerland on the other hand, imposes *culpa in contrahendo – pre-contractual liability* of the party conducting negotiations contrary to the principle of good faith and fair dealing, as well as the obligation of that party to compensate the other party for the negative interest, which is the complete loss incurred in reliance on the pre-contractual negotiations. This liability has roots in the doctrine established by Rudolf von Ihering as early in 19 Century

[5] Jelena Perovic " Negotiations for Concluding the Contract in International Commercial Law", Review "Pravo I privreda" / "Law and Economy", Udruzenje pravnika u privredi Srbije, No 1-4, 2009 p.508
[6] Jelena Perovic " Negotiations for Concluding the Contract in International Commercial Law", Review "Pravo I privreda" / "Law and Economy", Udruzenje pravnika u privredi Srbije, No 1-4, 2009 p.508

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while examining the legal consequences of void contracts and liabilities related thereto[7].

In summary, in court practice of all these countries, the principle of good faith and fair dealing has been applied even to the pre-contractual stage – the stage of negotiations. Thus, for example, the Swiss courts have defined certain duties of the parties related to the negotiation process itself[8] :

1. **Duty of serious negotiations** – if a party enters into negotiations without any intention of concluding a contract or continues to negotiate with the other party without intending to conclude a contract, although it may originally have had such intention, such party shall be liable to the other party for damages.[9]

   For example, a contract needs to be certified by a court or notary to be valid and binding. Negotiating parties have agreed on the text of the contract, but one party, without justified cause, refuses to sign and have the contract certified by a court/notary.

2. **Duty to refrain from fraud** – each party must act loyally and fairly during negotiations. Negotiating parties must refrain from any fraud.

   For example, it is contrary to the principle of good faith and fair dealing when representatives of a legal entity conduct negotiations without having authorizations to do so, and fail to inform the other party about that, and after lengthy negotiations no contract is concluded as a consequence of that (because for example the Board of Directors did not approve conclusion of the contract)[10].

3. **Duty to inform**

   Negotiating parties have the duty to inform one another of any circumstances relevant to continuing negotiations and concluding an agreement[11]. The question is, to what extent? There is naturally no general obligation to provide information about *all* elements of a contract, because each party looks after its own interests during negotiations and ought to acquaint itself with all relevant circumstances. However, when one party to negotiations declares that there are certain *conditions* under which it will be prepared to conclude an agreement, and the other party has knowledge that such conditions cannot be met – it has the duty to inform such party of that.
   For example, a buyer wishes to buy a plant whose characteristics would make it suitable for operations in the European Union, and the seller, knowing that its products do not meet such requirements, continues negotiations without informing potential buyer – party to negotiations, of that important fact and the plant characteristics.

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[7] Rudolf von Ihering, "Culpa in contrahendo oder Schadenersatz bei nichtigen oder nicht zur Perfektion gelangten Verträgen", Jahrbuecher fuer die Dogmatik des heutigen roemischen und deutschen Privatrechts, 1861, from M. Orlic, ibid, p. 37

[8] see for more details Miodrag Orlic "Zaključenje ugovora" /Concluding Contracts/, Institute of Comparative Law, Belgrade 1993, p. 29-31

[9] Decision of the Supreme Court of Switzerland ATF 77-1951 II 136 (Arrêt du Tribunal F é d é ral), cited from M. Orlic "Zaključenje ugovora", Institute of Comparative Law, Belgrade 1993

[10] Decision, Switzerland ATF 105/1979 II 80. cited from M. Orlic, ibid

[11] Decision, Switzerland ATF 102/1976 II 84. cited from M. Orlic, ibid

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4. Duty to provide advice

This duty stems from the above duty to inform. A negotiating party (in our case the seller) has the duty to provide advice to the other party using its best knowledge and ability, particularly when negotiating parties have unequal expert knowledge.

b. Codifications as Source of Law

There are Continental Law Systems, mostly those with more recent civil law codifications, where negotiations as a term are explicitly regulated by law (such as Greece, Italy, Serbia).

Greece

Greece was one of the first countries to adopt legal provisions governing this matter[12]. It is considered in legal theory that the Greek Civil Code offered historically important, original and elegant legal solution which shows "supple balance between the general principle and the rule on the liability for breaking off negotiations and introduces the delictual liability for breaking off negotiations ".[13]

Italy

It is regarded that the Italian Civil Code offers a model legislative solution for negotiations. The Italian law gives explicitly grounds for the expanded application of the general principle of good faith to negotiations: "In the course of the negotiation and formation of a contract, the parties must act in good faith".[14]

Serbia

Already in 1978, Serbian Obligations Act provided a modern solution in line with subsequently accepted solutions of the comparative law and uniform law. Serbian lawgivers firstly provided for the principle of freedom of negotiations. Then, as an exemption from such freedoms, they provided for the rules on liability for conducting and breaking off negotiations.

''(1) Negotiations preceding the entering into a contract shall not be binding and each party may break off such negotiations at any moment.

(2) However, a party which has negotiated without any intention of concluding a contract shall be liable for the damage caused by conducting such negotiations.

(3) A party negotiating with the intention to conclude a contract, but afterwards abandoning such intention without a justified cause, thus causing damage to the other party, shall be equally liable for damage.

(4) Unless agreed otherwise, each party shall bear its expenses in connection with any preparations to enter into a contract, and any joint expenses shall be covered by parties in equal shares.''[15]

2.2.2 Interpretation of contracts and pre-contractual negotiations

To interpret a contract means essentially to inquire into the sense and substance of the issue on which the concurrence of wills had been reached at the time of concluding the contract, but which has become contentious between the parties [16]at the time of contract performance[17].

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[12] Art 197 and 198 of the Greek Civil Code: In the course of negotiations for the conclusion of a contract the parties shall be reciprocally bound to adopt the conduct which is dictated by good faith and business practices. A person, who in the course of negotiations for the conclusions of a contract has through his or her own fault caused damage to the other party, shall be liable for compensation even if the contract has not been concluded.

[13] M. Orlic, "Zaključenje ugovora", Institute of Comparative Law, Belgrade 1993, p.33

[14] Article 1337 of the Italian Civil Code: Duties in pre-contractual bargaining - In the course of the negotiation and formation of a contract, the parties must act in good faith.

[15] Obligations Act of the Republic of Serbia, Article 30

[16] Further details in M. Orlic, "Zaključenje ugovora", Institute of Comparative Law, Belgrade 1993, pp.20-21

[17] "In interpreting controversial provisions one should not follow the literal meaning of the terms employed, but inquire instead into the joint intention of contracting parties, so that the provision should be understood so as to be in accordance with principles of the law of obligations, as determined by the present Law". "Obligations Act of the Republic of Serbia", Art 99 Para 2

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It is considered in the countries following the continental legal tradition that pre-contractual negotiations may be of importance for interpretation of the contract concluded as a result of such negotiations. In such legal systems, the court not only has the power to interpret the terms contained in the contract, but also to fill in the legal gaps in the contract the parties have concluded.

The courts in the continental legal systems consider the pre-contractual negotiations in addition to other relevant circumstances (such as past practices between the parties, usage, etc.) when interpreting and filling in the legal gaps in contracts – in other words, when inquiring into the joint intentions of the parties![18]

Thus, in Serbian law, if the parties have come to an agreement on essential elements of the contract while leaving some secondary issues to be decided upon at a later time, the contract is considered concluded, while such secondary issues – should parties themselves fail to reach agreement thereof – are to be governed by the court, which shall fill in the legal gaps by taking into account pre-contractual negotiations, established practice between the parties, and usage.[19]

In conclusion, the courts stand in for the parties whose negotiations have failed and they even complete on their behalf what they were unable to do in the absence of an written agreement. It is regarded that an agreement on essential elements carries more weight than the lack of agreement on issues of secondary importance, and the contract is considered concluded. That is why it is deemed justified for the court to "complete the contract in respect of non-essential issues"[20].

The legal concepts described above differ greatly from those inherent to the common law system, which we shall consider in the following chapter.

2.3 Common Law

In the common law countries, the emphasis is laid on the freedom to negotiate until a contract is concluded. It is considered, due to aleatory character of negotiations (uncertainty of outcome), and due to the assumption that the parties' positions during negotiations are farthest away as compared to the moment of conclusion of the contract, there should be no rules relating to legal protection (liability) during negotiations or relating to subsequent interpretations of the contract in accordance with negotiations.

2.3.1. Course of negotiations

It is deemed that an obligation to act in accordance with the principle good faith and fair dealing during negotiations might have undesirable effects and discourage the parties from entering into and continuing negotiations or might even induce them to conclude an agreement to soon;[21] therefore no legal protection is afforded to the negotiating parties if negotiations are broken off. A number of legal authors consider this limitation of the legal protection during negotiations as a guaranty to the later contractual parties related to their legal certainty in the frames of the contract.

However, the stands on this issue are not absolute. The uniform law stands closer to the continental concept of negotiations, and this certainly has affected[22] the common law system. Negligent misrepresentation imposes legal liability in English law. In the case of *Hedley Byrne Co., Ltd.* v. *Heller & Partners, Ltd.* [23] the House of Lords extended the rule on liability for tort damage to a case of negotiations where one party, relying on the statement made by the other party, and bearing

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[18] This solution is also accepted in CISG, Art 8 Para 3, see Chapter 2.4. below for more details

[19] Obligations Act of the Republic of Serbia, Art. 32 Para. 2

[20] See further in M. Orlic, "Zaključenje ugovora", Institute of Comparative Law, Belgrade 1993, pp.23-24

[21] See further in E.A. Farnsworth, Pre-contractual Liability and Preliminary Agreements, 87 Columbia Law Review no 2 – 1987. p. 243, cited from M. Orlic, ibid., p.28

[22] Principles of European Contract Law (PECL), UNIDROIT Principles of International Commercial Contracts (UNIDROIT Principles), CISG.

[23] Law reports, Appeal case (1964), 465 u Anson's *Law of Contract*, Ed. by A.G.Guest, Claredndon Press, Oxford, 1979, p. 246., cited from Jelena Perovic " Negotiations for Concluding the Contract in International Commercial Law", Review "Pravo I privreda" / "Law and Economy", Udruzenje pravnika u privredi Srbije, No 1-4, 2009 p. 511

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in mind the special relationship that existed between the parties, erroneously believed that a contract would be concluded and thus suffered damage.[24]

2.3.2. Interpretation of contracts and pre-contractual negotiations

With regard to interpretation of contracts, Parol Evidence Rule inherent to the common law system stands in stark opposition to the principles of the continental system. As distinct from the continental law, under the common law, no evidence from pre-contractual negotiations may be introduced when interpreting contractual provisions, but only such evidence based on clarification of the wording of the text of the contract. Hence, the common law countries have long-form contracts with lengthy "definitions" sections, seeking to exclude any ambiguity in interpretation of contracts, and pre-contractual negotiations do not come at all within the spectrum of admissible evidence.

Parol Evidence Rule is a huge stumbling block for the common law judges when applying the CISG rules, as described in detail in the following chapter.

2.4 Convention on International Sale of Goods (CISG)

Rules

The question of pre-contractual negotiations between parties (duration, substance, effectiveness, termination, liability in case of termination, compensation and other) is not the subject matter of the Convention.

CISG treats negotiations only in terms of the contract interpretation - as one of the relevant matters in regards to interpretation of the contract itself.

According to Article 8 of the CISG, statements and conducts made by a party related to the contract on international sales of goods should be interpreted:

(i) according to this party's intent, where other party knew the intent or could not have been unaware what that intent was (Article 8 paragraph 1 - subjective intent of the party criteria) or, if not applicable

(ii) according to the understanding that a reasonable person of the same kind as the other party would have had in the same circumstances (article 8, paragraph 2 - objective criteria)[25].

In order to determine the intent of a party and/or understanding of a reasonable person, according to the CISG, all relevant circumstances of the case should be taken into consideration, including *negotiations*, as well as practices established usages and any subsequent conduct of the parties[26].

Applying the CISG, the courts have to apply the criteria set in Article 8 of the CISG to interpret statements and conducts of parties relating to the process of formation of the contract. First of all, the subjective criteria – the subjective meaning of a statement or a conduct of a party (actual intent), if this can be identified by relevant indicating factors, and the objective ones, if it is not possible to apply the subjective criteria – understandings of a reasonable person of the same kind in the same circumstances (parties' interest, purpose of the contract, objective circumstances at the time of the conclusion of the contract).

Having in mind that Article 7 of the CISG proclaims *the principle of good faith* in interpretation of the Convention itself as the basic principle of the Convention, both criteria – subjective and objective should be applied in the light of the principle of good faith by interpreting the statements and conducts of the parties.

According to Article 8 Paragraph 3 of the CISG, by applying criteria from Paragraphs 1 and 2, the court should take all relevant circumstances of the case into consideration, specifically *negotiations* and practices established between parties, usages and even any subsequent conduct of the parties.

Court Practice

Courts from both legal systems – continental and common law systems – in general, apply the rule of the CISG which promotes negotiations of parties as an element which has to be taken into the consideration when interpreting their statements and conducts.

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[24] The same principle also applies to the case *Caparo Industries plc* v. *Dickman and Others* (1990), 1 All England Law Reports, 568. V, u P.Richards, ibid, p.173., cited from Jelena Perovic " Negotiations for Concluding the Contract in International Commercial Law", Review "Pravo i privreda" / "Law and Economy", Udruzenje pravnika u privredi Srbije, No 1-4, 2009 p. 511

[25] See futher in UNCITRAL Digest of Case Law on the United Nationas Convention on the Intenational Sale of Goods, p.34

[26] Article 8 Paragraph 3 of the CISG.

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Advokatska kancelarija TOMIC STEVIC DULIC informiše o aktuelnostima u radu Kancelarije i u zakonodavnom reljefu RS / Die Rechtsanwaltskanzlei TOMIC STEVIC DULIC informiert über aktuelle Themen der Kanzlei und über den Rechtsrahmen der RS / The TOMIC STEVIC DULIC Law Office is informing about the actual activities of the Law office and the Law frame in RS/ Юридическая контора TOMIC STEVIC DULIC информирует о самых актуельных событиях, о работе конторы и законодательном релефе РС / Glavni urednik/ Chefredakteur / Editor-in-Chief / Главный редактор: Ljubica Tomić /Lektor/Lektor/Proof reader/Лектор: Ivana Radović, Vojislava Katić, Nevena Maksimović, Magda Braun / **Br. 34a/11**

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Continental Law

Continental lawyers do not have any difficulties in the application of the CISG, since the described CISG interpretation rule is inherent for the continental law system. Court cases have been reported where crucial contract issues have been solved by reviewing the pre-contractual negotiations, such as: implementation of general terms and conditions between the contractual parties[27] or even the ultimate legal nature of a contract concluded between the parties[28].

Common Law

Although, the CISG rules on interpretation should be applied, some common law court decisions had difficulties in the application of these CISG interpretation rules and even gave the priority to so called "Parol Evidence Rule" instead of the described subjective "intent criteria" proclaimed by the CISG (rule which is indeed inherent to the common law system).[29]

The Parol Evidence Rule (PER) gives legal effect only to such intention of a party if it is adopted in a written agreement as a final expression of the agreement of parties. Parol Evidence Rule prohibits contractual parties from introducing evidence from prior or past agreements or negotiations, that would contradict or add additional terms to the term which was already determined in written in the final agreement between parties. If such elements are left out of the final written contract, the assumption is that parties have decided to ultimately leave them out of the final agreement, so such elements should not be considered when interpreting.

The Federal Court of Appeals of the Fifth Circuit (USA) took position: "the court states expressly that the parol evidence rule *applies regardless* of whether CISG applies or not."[30] According to this, the PER rule is stronger than the interpretation rule under Article 8 of the CISG - so even if the CISG would be applied, it would not have any relevance to the case related to interpretation of the contract.

On the other hand, there are many court decisions from the common law system which took different position, stating that PER is neither applicable nor viable in CISG cases due to a fact that Article 8 expressively directs courts to take into consideration all circumstances of the case, to determine the intent of parties i.e. to interpret their statements and conducts, according to certain circumstances *including negotiations*[31]. Another court decision states that "contracts governed by the CISG are not under limits set by PER and that the courts have wider spectrum of admissible evidence to consider in construing the terms of the parties' agreement"[32].

The conclusion obviously is that PER has not been incorporated into the CISG, so that related to CISG governed contracts, all competent courts (even in common law systems) have to apply interpretation rules set by CISG in Article 8, which includes the relevance of pre-contractual negotiations for interpretation of the contract.

The Plain Meaning Rule which prevents a court from considering evidence other than written evidence for purposes of interpretation also doesn't apply under the CISG.

According to the Plain Meaning Rule, evidence from prior negotiations may be admitted for purposes of clarification only in case the term from the written contract in dispute is not clear enough, the language is not sufficiently clear or the term is deemed ambiguous.

The Merger of Entire Agreement Clause (so called Merger Clause).

The parties may wish to assure themselves that reliance will not be placed on representation made prior to the execution of the contract in writing, all in accordance with Article 6 of the CISG which gives the right to parties to exclude the application of the CISG in whole, or any of its particular rule or its legal effect (except as set in article 12).

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[27] Appellate Court Munich / Oberlandesgericht München, Metal ceiling materials case, 14 January 2009, cit. http://cisgw3.law.pace.edu/cases/090114g l.html

[28] Commercial Court Aargau / Handelsgericht Aargau , Fruit and vegetables case, cit. http://cisgw3.law.pace.edu/cases/081126sl.html

[29] CLOUT case No. 24, Federal Court of Appeals for the Fifth Circuit, USA, June 15th, 1993.

[30] CLOUT case 24, as in UNCITRAL 4.Nov.1993, p. 3

[31] CLOUT case No. 222, MCC-Marble Ceramic Center, Inc.v. Ceramica nuova D'Agostino S.p.A Federal Court of Appeals for the Eleventh Circuit, USA, June 29th, 1998; and others

[32] Federal District Court, Southern District of New York, USA, April 6th, 1998. CLOUT case No. 413, as in UNCITRAL Digest of Case Law on UN CISG, p.36

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The Merger Clause in a written agreement has been developed to achieve certainty and provide that the writing contains the entire agreement of parties and that neither party may rely on representations made outside writing. Such clause extinguishes all prior agreements and understandings of parties not expressed in writing[33].

3. AGREEMENTS WHILE NEGOTIATING

The practice shows that Letters of Intent or Memorandum of Understanding are often signed during negotiations so that the negotiating parties would come to an agreement about the further course of negotiations. These are innominate contracts which mainly provide for the process of negotiations, exclusivity of the negotiating parties (exclusivity clause), confidentiality obligation (confidentiality clause)[34]. These contracts typically contain a *subject to contract clause* which excludes any legal effects of the concluded contract, with the exception of those provisions (usually exclusivity clause, confidentiality clause and governing law) which the parties determine to be legally binding.[35]

How are these contracts (LoI, MoU) relevant to the issue of legal effects of negotiations on negotiating parties?

Relevance for Conducting and Breaking Off Negotiations

The course of negotiations of the parties as well as their liability for breaking off negotiations, is internationally governed by the material law governing the relationship of the negotiating parties (a law which is determined by the rules of the international private law related to conflict of laws).

When during negotiations an agreement such as LoI or MoU is concluded and this agreement provides for the governing law applicable to the course of the negotiations this law shall be applicable to the liability of the negotiating parties for breaking off the negotiations.

Relevance for Interpretation of Contract

If a contract is concluded following a LoI or MoU, i.e. if negotiations bore fruit and a contract was concluded – the rules for interpreting the contract itself are those of the material law governing the contract itself and not of the material law governing the LoI / MoU.

4. CONCLUSIONS FOR NEGOTIATING THE CONTRACT FOR INTERNATIONAL SALES

When negotiating the contract for international sales, one must be aware of the consequences negotiations may have under different jurisdictions in respect of the following:

1. Legal rules related to conducting and breaking off negotiations for the Contract for International Sales

The law of the place of jurisdiction and its conflict-of-law rules[36] lead to the governing material law which shall apply to the liability of the

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[33] CISG Advisory Council Opinion No. 3, Parol Evidence Rule, Plain Meaning Rule, Contractual Merger Clause and the CISG, 23 October 2004. Rapporteur: Professor Richard Hyland, Rutgers Law School, Camden, NJ, USA.

[34] For more details on legal effects and scope of the exclusivity clause and confidentiality clause in comparative law see Jelena Perovic " Negotiations for Concluding the Contract in International Commercial Law", Review "Pravo I privreda" / "Law and Economy", Udruzenje pravnika u privredi Srbije, No 1-4, 2009 p.517-518

[35] For more details see, Jelena Perovic " Negotiations for Concluding the Contract in International Commercial Law", Review "Pravo I privreda" / "Law and Economy", Udruzenje pravnika u privredi Srbije, No 1-4, 2009 p.512-519

[36] For example, conflict-of-law rules that would apply in the Republic of Serbia would relate to non-contractual (delictual) liability for damage. "The law applicable to non-contractual liability for damage, unless otherwise provided for specific cases, shall be the law of the place where the action took place or the place where the consequence occurred, depending on which law is more favorable to the person who has sustained damage." Article 28 Paragraph 1 of the LAW ON RESOLVING CONFLICT OF LAWS WITH REGULATIONS OF OTHER COUNTRIES of the Rep. of Serbia.

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negotiating parties for entering, conducting and breaking off negotiations.

Alternatively, if the negotiating parties provide in the LoI or MoU for the material law applicable to the course of negotiations, such law provided for in the LoI or MoU shall apply to the liability of negotiating parties for any breaking off of negotiations (as described in more details in Section 3 above).

2. Legal Rules related to Interpretation of the Contract for International Sales

The CISG rules on interpretation of contracts apply to contracts of sale of goods between parties whose places of business are in different states (a) when such states are CISG contracting states; or (b) when the rules of private international law lead to the application of the law of a CISG contracting state, and the parties have not excluded the application of the CISG (rules as described in Section 2.4)

In cases when the CISG does not apply, the applicable law shall be (a) either the law which is agreed between the parties to be the governing law or (b) the governing law determined by the rules of private international law. Hence, one of the material laws classified above and described in sections 2.2 and 2.3 above shall apply.

3. Conclusion

At any time during negotiations for contracts for international sales, the parties and their legal consultants should be fully aware that negotiations in certain jurisdictions might have legal effects.

The potential effects depend on the governing law. The governing laws are determined as described in 4.1.1 and 4.1.2 above. The implementation will lead to one of the systems described in this paper (above in 2.2, 2.3, 2.4)

In order to lessen complexities of the conflict of law in an already complex legal topic of regulating the issue of negotiations, it would be advisable for parties involved in lengthy negotiations related to international sales of goods to provide for the applicable material law in the LoI / MoU, thus providing for the law applicable to the negotiating process (breaking off of negotiations). Furthermore, parties ought to be aware that the choice of law governing a contract means the choice of law governing interpretations of the contract, which may (in some legal systems) consider even pre-contractual negotiations as a relevant circumstance.