"Show Me the Goods First: Securing International Trade Transactions"

International Commercial Transactions, Franchising and Distribution Committee of the American Bar Association, Section of International Law

together with

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National Report of France

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1. **THE SALES CONTRACT**

1.1 The United Nations Convention on Contracts for the International Sale of Goods (CISG)

1.1.1 The ratification of the CISG in France


1.1.2 The case law relating to the CISG

The CISG was incorporated into French legislation without any amendments by a decree of December, 22nd 1987. Since the ratification of the convention, the rules laid out in it stand as the French substantive law regulating international sales contract and have been applied as such by the domestic courts. The case law relating to the CISG is therefore abundant.

Lately, the major points of dispute have been the denunciation of the lack of conformity and the appreciation of the notion of "fundamental breach of contract".

Here are recent decisions that have proven of particular interest:

- Even though the CISG is regarded as the French substantive law regulating international sales contract, it only applies under the condition that the parties haven't agreed to exclude its application. This exclusion can be express or implied. Thus, the Supreme Court confirmed a lower court's decision that was based solely on French law although perfectly aware of the international character of the sales contract, holding that the parties had in fact referred in their pleadings and during the proceedings only to the relevant provisions of French law. As a result, the parties were considered as having implicitly excluded the application of the Convention to their contract (Art. 6 CISG).\(^1\)

- In the same realm, the court held that when the parties refer in their pleadings to the Convention as well as provisions of the French civil code, it cannot be inferred that the parties have intended to exclude the application of the CISG.\(^2\)

- Another decision dated of February 20th, 2007, relating to an exclusive distributorship agreement between a French seller and a Venezuelan buyer that was not submitted to the CISG. Ruling on matters regarding the performance of the sale contracts the distributorship agreement had given rise to. The Supreme Court held CISG applicable since the parties had chosen French law as the law governing the contract and, although the distributorship contract as such was not covered by CISG, the Convention was nonetheless applicable to the individual sales contracts executed under it.\(^3\)

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1 Supreme court, first civil division, October 25, 2005, n° 99-12.879
2 Supreme court, commercial division, November 3, 2009, n° 08-12.399
3 Supreme court, first civil division, 20 february 2007, n° 05-14.082
Another decision related to the applicability of the CISG to Hong Kong. The plaintiff, a French buyer, wanted the CISG to apply to its contract with a Hong Kong based seller. According to him, CISG should apply to his case since Hong Kong, though administratively autonomous, is not independent from China and China is a contracting state to the CISG. Both the Court of Appeal and the Supreme court held that the law of Hong Kong was applicable. It was pointed out that Art. 93 CISG provides Contracting States which have two or more territorial units in which different systems of law are applicable with the opportunity to declare that CISG is to extend to these territorial units or to one or more of them. During the proceedings, it was established that China, in 1997, made a declaration to the UN in which international conventions that should apply to Hong Kong were indicated; such declaration, which had never been amended, did not include the CISG. Considering that declaration as amounting to a declaration within the meaning of Art. 93 CISG, the Court ruled in favour of the seller, confirming the Court of Appeal's decision as to non-applicability of the Convention.

The last decision worth mentioning is a court of appeal decision ruling, among other things, on the application of article 75 and 77 CISG. The court gave a rather strict application of these two articles. As regard article 75 that provides the injured party with the possibility to recover from the party in breach the expenses he has had to incur in order to enter into a new contract in substitution, the court denied this right to the injured party saying that the price of the substituted contract was too high. Therefore, the injured party was said not to have acted in a reasonable manner as required by article 75. As regard the duty to mitigate, the court held that the fact that the buyer, after denouncing a lack of conformity in the product he used to produce his swimming costumes, took three days to take action in order to get the production chain in Tunisia stopped was a breach of his duty to mitigate and therefore allowed the other party to claim a reduction in the damages.

1.2 UNIDROIT Principles of International Commercial Contracts 2004 (UniP)

1.2.1 The implementation of UniP in French law

The continual efforts of nations towards the unification of private law have led the International Institute for the Unification of Private Law (UNIDROIT) to draft the UNIDROIT Principles of International Commercial Contracts (UniP) which first edition was published in 1994.

Contrary to the CISG, the UniP were not intended to be a supranational binding instrument but simply "a balanced set of rules designed for use throughout the world irrespective of the legal traditions (...) of the countries in which they are to be applied", which reflects "international customs" or "international principals of contract law".

France, which had taken part to the drafting of these principles, has obviously implemented them in its legal system. But only a very few court decisions directly relate to UniP. As a matter of fact, to date, only three Court of Appeal's decisions clearly refer to UniP.
1.2.2 The case law relating to UniP

- The first case dates back to January 24th 1996. An article of the standard terms of a US carrier provided that "[the carrier] undertakes to guarantee and compensate [the client] for any loss […] owing to any defective performance of the obligations stipulated in the present contract". But, it also stated that "[t]he client accepts that under no circumstances will compensation be payable by [the carrier] for any damage, loss or delay caused by negligence on the part of [the carrier] exceeding the sum of US$ 50 per shipment […]."

After pointing out that this latter provision ran counter to the principle of acceptance of full liability spelled out in the contract, the Court stated that "there was a principle in international trade law that 'in case of conflict between a standard term and a term which is not a standard term the latter prevails' (UNIDROIT Principles, Art. 2.21 [Art. 2.1.21 of the 2004 edition]) and that 'if contract terms supplied by one party are unclear, an interpretation against that party is preferred' (UNIDROIT Principles, Art. 4.6)" (translation from French original). Consequently, the Court decided that the reference made in the contract to the carrier's standard terms was invalid.6

- The second case was simply about the enforcement of the CISG, and particularly article 57(1) (a) pursuant to which the price must be paid at the seller's place of business. The parties in the case at hand were either French or German and both of their domestic legislation provided the opposite solution as to the place of payment of the price. The Court referred to UniP as a mean to justify the appropriateness of article 57(1) (a) which, although was contrary to French and German legislation, reflected a general principle of international trade as stated in article 6.1.6 of UniP.7

- The last decision relates to an appeal of an arbitral award. Challenging the award, the plaintiff claimed that the Arbitrator, in applying international trade usages and the UNIDROIT Principles without being requested by the parties to do so, had violated the principle according to which the arbitral tribunal has a duty not to exceed the terms of the submission to arbitration.

The Court of Appeal rejected the objection on the ground that according to both Article 13(5) of the ICC Rules of Arbitration and Article 1496 of the French Code of Civil Procedure the arbitral tribunal is entitled to base its decision on the rules of law it considers most appropriate and to refer to trade usages. In the case at hand the reference to the latter was all the more so justified as the law chosen by the parties as the applicable law did not provide a clear answer to the issue at stake. Nor did the Arbitrator exceed the terms of the submission to arbitration by referring to the UNIDROIT Principles as the reference to them had no direct impact on the decision.8

As a set of non-binding principles, one doesn't really expect UniP to be referred to in courts decisions. They are more widely used in arbitral awards.

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1.3 **Principles of European Contract Law (PECL)**

No court decision in France has ever referred to the Principles of European Contract Law (PECL). They are often used as comparative instrument, a reference in terms of general practise when considering a reform in the law.

1.4 **Other Contract Principles: The Lex Mercatoria**

1.4.1 **Definition**

The "lex mercatoria" is another set of contract principles that is aimed at governing international contractual relations. It can be defined as a set of transnational legal rules comprising imperative principles common to the community of merchants.

Under French law, the theory of the lex mercatoria as an autonomous legal order is highly controversial. Many have criticised its existence putting forward different arguments. The main idea behind these criticisms is that the lex mercatoria is a mere collection of rules, incomplete and disorganised and, therefore, unable to constitute "a body of rules that are accessible and definite enough to allow an efficient management of commercial transactions".

The fact remains that article 1496 of the French civil procedure code allows parties to an international agreement to subject the latter to the legal rules of their choice, but only in the context of international arbitration. The case law of arbitral courts shows how much the reference to the lex mercatoria is widespread. Despite the controversy, it is indisputably an important source of substantive rules.

1.4.2 **Content**

Many authors have drawn clearly identified rules from the arbitral courts case law. One of them, Professor Eric Loquin, has organised them according to their objectives:

1) **Insuring the legal certainty of transactions are**:
   - Presumption of international trade operators 'competence
   - Efficiency of arbitration clauses
   - Non-invocability of "lack of authority" of the contract's negotiator
   - Estoppel principle

2) **Insuring the mutability of conventions**:
   - Presumption of assent to the acts performed by a party even if different to what is provided in the contract
   - Obligation to renegotiate in case of substantial change in the economic situation

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10 M. Mustill, préc.
11 Eric Loquin, La réalité des usages du commerce international / M. Mustill, préc./ F. Osman, Les principes de la lex mercatoria, LGDJ, 1992
3) **Insuring the cooperation of the parties:**
- Mitigation rule
- Fair sharing of vagaries costs
- Obligation to reveal everything

4) **Insuring the loyalty:**
- Non-invocability of corruption contracts

1.5 **National legislation**

The decree of Decembre, 22nd 1987 that incorporated the CISG into French legislation is the only national piece of legislation relating to international sale of goods.

2. **TITLE AND RISK**

2.1 **The transfer of ownership**

The question of transfer of ownership is not dealt with in the CISG. Therefore, in a situation involving a buyer and a seller located in two separate jurisdictions and relating to the sale of tangible goods, French ordinary contract law will apply (i.e. the Civil Code).

Article 1583 of French Civil Code states that "ownership is acquired as of right by the buyer with respect to the seller, as soon as the good and the price have been agreed upon, although the good has not yet been delivered or the price paid". The buyer thus immediately becomes owner of the goods sold, as soon as an agreement on the goods and the price has been reached.

2.2 **Retention of title**

2.2.1 **The enforcement of a retention of title clause face to a bankruptcy situation of the purchaser**

According to article 2367 of the French Civil Code, "ownership of a property may be retained as security through a retention of title clause which suspends the transferring effect of a contract until full payment of the obligation which compensates for it". Although such clause can produce its effects in every circumstance where the buyer doesn't pay the price, it is all the more useful in a case of bankruptcy of the buyer since it preserves the goods sold from the buyer's creditors.

In a bankruptcy situation, the validity and enforceability of the retention of title clause is dealt with in articles L. 624-9 to L. 624-18 of French Commercial Code. These articles apply to retention of title clauses as construed under French bankruptcy law, that is, a clause that subordinates the transfer of ownership of a good to the complete payment of the price thereof, and that comply with the requirements of article L. 624-16 of the Commercial Code.
Conditions as to the validity and enforcement of the clause:

Article L. 624-16 sets several criteria as to the form of the clause and the condition of the goods that the seller wants to recover.

As to the form of the clause:

Article L. 624-16 al. 2 provides that "this clause must have been agreed upon in writing at the latest at the time of delivery. It may appear in a document governing a number of commercial operations entered into by the parties ". Courts have drawn from this provision that the clause, not only must be in writing, but also, in a very apparent, legible and unambiguous way to ensure an informed consent of the buyer. Consequently, a clause stated at the back of an ordering form or an invoice among other standard terms of sales in a non distinctive manner is not valid. In the context of an international contract, the use of a foreign language, especially English, when the seller is of foreign origin is expectable. The French buyer cannot therefore claim that the clause is invalid. The consent of the buyer, either expressed (signature) or implied (performance of the contract with full knowledge of the facts and without protest), must be established.

The clause must be communicated in writing at the latest at the time of delivery. This is the reason why the clause stated in an invoice is presumably invalid because of the uncertainty of the date at which it was drafted and communicated to the buyer. In such a case, the seller will have to bring evidence that the invoice was delivered to the buyer at the latest, at the time of delivery. The validity of this clause is not subject to any registration formalities.

As to the condition of the goods:

According to article L. 624-16 al. 2, to be able to claim restitution, the good must still exist in kind at the time of the claim. Indeed, the good must be identifiable and distinctive to be able to demonstrate that the good delivered is the same that the one found in the hand of the buyer. Consequently, goods that have gone through a process of transformation cannot be recovered. For instance clothes to which linings have been added by the buyer cannot be claimed back.

However, article L. 624-16 al. 3 provides that certain goods in kind that have been incorporated to other goods can, under certain conditions, be claimed back. It states that "the recovery claim in kind may be brought (...) with respect to movable assets incorporated in another asset where they may be removed without damaging them". Therefore, if the retrieving of the good doesn't cause any damages to the good itself or the good to which it has been incorporated, the recovery claim is receivable.

Conditions as to the procedure to claim restitution of the goods:

If the retention clause is found to be valid and the good sold is still in a condition that allow its restitution, the seller can begin a recovery claim ("action en revendication") under article L. 624-9 of the French Commercial code. It provides that "a recovery claim against movable property may be filed only within a three-month period from the date of publication of the order commencing the bankruptcy proceedings. For assets governed by an executory contract at the commencement of the proceedings, this period shall run as of the termination or expiry of the contract ".

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The claim is addressed by recorded mail to the court appointed administrator ("administrateur") or, in the absence of an administrator, to the debtor himself. In the absence of an agreement to the claim within a month or in case of contest, the request will be filed with the supervisory judge ("juge commissaire") who will rule upon the fate of the contract based on the views of the creditor, the debtor and the court administrator.

For the record, let's note that no registration formalities of the contract are required for the retention of title clause to be enforceable. However, when a sale contract has been publicised, the owner of the goods sold is exempted of bringing a recovery claim: he may claim restitution ("demande en restitution") straight away to the court appointed administrator. No time limit is imposed.

*The effects of a recovery claim:*

If successful, the claim allows the owner of the good to retrieve it (a recovery claim stands for a restitution claim as of right) and doesn't have to face a competition with the buyer's other creditors.

If the good was sold by the buyer, the price paid by the sub-purchaser can be retrieve by the owner under the condition that it was paid after the order commencing the proceedings.

2.2.2 *The enforcement of a retention of title clause outside a bankruptcy situation*

Outside of a bankruptcy situation, a valid retention of title clause is enforceable without any particular formalities. If the seller is unable to retrieve the goods after amicable procedures, he may start emergency interim proceedings before the judge of urgent matters ("juge des référés") to claim ownership and restitution of the good.

2.3 *The passing of risk*

In an international sale of good situation, the Vienna convention normally applies as the French substantive law regulating international sales contract, unless the parties have agreed differently (for example by reference to Incoterms). Therefore, to identify the point at which the passing of risk has occurred, one must refer to articles 67 to 69 of the CISG.

If however the parties have specifically intended the CISG not to apply in their contractual relationship and have subjected their contract to French domestic law, the passing of risk will follow the transfer of ownership (*res perit domino*).

Indeed, under French law, when the parties have agreed upon the good and its price, the buyer instantly becomes owner of the good and creditor of the seller's obligation to deliver the good. Thus, article 1138 of the French Civil Code provides that "an obligation of delivering a thing is complete by the sole consent of the contracting parties. It makes the creditor (the buyer) the owner and places the thing at his risks from the time when it should have been delivered, although the handing over has not been made, unless the debtor has been given notice to deliver; in which case, the thing remains at the risk of the latter."
3. MANAGING FINANCIAL RISK

3.1 Demand guarantees

Demand guarantees appeared in French law in the seventies on the occasion of major calls for tender and international contracts to guarantee importers from the risk of non-performance by exporters of their obligations.

When the ICC issued their Uniform Rules on Demand Guarantees in december 1991, french case law on demand guarantees was already substantial and well established mainly at the occasion of many disputes arising with purchasers from Iran, Libya and Iraq in the seventies. In many respect, the ICC URDG repeat the principles established by French case law on the subject.

The ICC URGD have been through a deep revision and a new version has been adopted in december 2009 (n°758) and shall come into force on 1st July 2010. The main contribution of these new Rules is the full integration of the counter-guarantees which were only partially taken into account in the 1992 version.

Until today, the law on demand guaranties results from case law. Only one article of the French civil code relates to demand guaranties.

3.1.1 The ICC Uniform Rules on Demand Guarantees ("URDG")

a) Legislation or case law which directly contradicts any provision in URDG:

There are two major contradictions between the provisions in URDG and French case law. The first one relates to the existence of an obligation for the bank to inform the principal of a demand before making payment.

Article 17 of URDG clearly states that "in the event of a demand, the guarantor must without delay inform the principal".

Scholars in France have had opposing views on the subject, some of them saying that the acknowledgement of such an obligation is detrimental to the principle of instant payment that governs demand guarantees.

Case law has followed this point of view, ruling against the existence of such an obligation12. "Paribas Suisse s'est engagée personnellement à payer à première demande nonobstant toute forme de contestation de la part du vendeur, ou de nous même, ou de la part de n'importe quelle autre partie, qu'elle était donc tenue d'honorer son engagement sans avoir à solliciter l'accord de son client".

The second major contradiction relates to article 20(b) of URGD. It provides that the guarantor must support its demand under the counter-guarantee by a written statement stating that the guarantor has received a demand for payment under the guarantee in accordance with its terms and with sub-Article 20(a).

French case law has taken the exact opposite position and retains that the counter-guarantor needs no proof from the guarantor of the existence of a demand before making payment13.

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12 Court of Appeal, Paris, 22nd June 1978 / Court of Appeal, Paris, 30th March 1990
13 Supreme Court, 27th November 1984, Supreme Court, 3rd July 1986

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b) Legislation or case law which indicates that the provision of URDG shall be considered to constitute established international trade practice in relation to demand guarantees and therefore shall be applied analogously even in cases where it has not been agreed between the parties:
No caselaw found.

c) Case law dealing with the interpretation or application of URDG in your jurisdiction
No caselaw found.

3.1.2 National legislation on demand guarantees
French legislation on demand guarantees is not extensive since the essential of the rules relating to this subject were laid by abundant case law.

Article 2321 of the French Civil code is the only law provision dealing with demand guarantees. It is mere definition of what a demand guarantee is and it lays three basic principles relating to the regime of demand guarantees:

Firstly, the guarantor is not bound in case of manifest abuse or fraud of the beneficiary or collusion between him and the principal. Secondly, the guarantor cannot put forward objections relating to the underlying commercial contract. Finally, the guarantee doesn't follow the underlying commercial contract. In other words, it doesn't hang on the principal claim and stands or fall according to the existence of the principal claim, unless the parties so agree.

3.2 Further means to secure / document commercial transactions
No

3.3 Is there anything else which needs to be considered in your jurisdiction on this topic, which is not covered by the above?
No