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Titelzeile
Aufrechnung in einem Polnisch-Schwedischen Liefervertrag

Leitsatz

1. Das CISG regelt Fragen der Aufrechnung nicht ausdrücklich und im Übereinkommen finden sich auch keine allgemeinen Grundsätze zur Aufrechnung. Geldforderungen nach dem CISG, gleichgültig, ob sie aus demselben Vertrag resultieren oder nicht, können jedoch von beiden Parteien nach den allgemeinen Grundsätzen des CISG aufgerechnet werden.

2. Sollte sich herausstellen, dass eine Aufrechnungsfrage nicht in den Anwendungsbereich des CISG fällt, bestimmt sich das auf diese anwendbare Recht nach den einschlägigen Regeln des Internationalen Privatrechts.

3. Aus Sicht des schwedischen Rechts bedeutet dies, dass das anwendbare Recht entweder durch das Haager Übereinkommen vom 15.6.1955 bzw. das schwedische IKL von 1964 oder die Rom I-VO bestimmt wird. Da das Haager Übereinkommen bzw. das IKL keine Aufrechnungsregeln enthält, gilt die Rom I-VO.

4. Art. 17 Rom I-VO sieht vor, dass die Aufrechnung dem Recht der Forderung, gegen die aufgerechnet wird, unterliegt, wenn die Parteien nicht etwas anderes vereinbaren.

Factual background – Tatbestand

1. On 9 June 2010, the Swedish company CeDe entered into a supply agreement with the Polish company PPUB Janson Sp J. (hereinafter PPUB). According to the agreement, PPUB undertook to supply CeDe with goods. The agreement regulated issues such as delayed deliveries and defects in the goods. The contract also contained a choice of law clause designating Swedish law for the interpretation of the contract.

2. After PPUB was declared bankrupt in Poland, its bankruptcy estate applied in July 2011 to the Enforcement Authority for a European order for payment. The case was subsequently transferred to the District Court. The bankruptcy estate requested CeDe to pay more than SEK 1.5 million for goods delivered by PPUB.

3. CeDe contested the claim and objected that it had a counterclaim which would exceed by far the amount claimed by PPUB's bankruptcy administration and would therefore fully set-off PPUB's claim.

4. According to CeDe, the counterclaim amounted to more than SEK 3,9 million and concerned damages for non-delivery as well as for defects found in the goods delivered in the context of the same contractual relationship. According to CeDe, the counterclaim had arisen before the bankruptcy.

5. The District Court decided to address the issue of the law applicable to CeDe's set-off in an interlocutory judgment.

6. Relying on the European Insolvency Regulation 1346/2000[1], the bankruptcy estate submitted that the right to set-off should be governed by Polish law, as the claimant after the bankruptcy was no longer the same legal entity as in the underlying original contract. Therefore, the choice of law operated by the original contracting parties would not be binding upon the bankrupt's estate.

7. Relying on the Rome I Regulation, CeDe objected that the right to set-off should be governed by Swedish law, as the bankruptcy estate's action related to a claim arising from the original agreement between CeDe and PPUB which contained a choice of law clause in favour of Swedish law.

8. The District Court held that Polish law should be applied to CeDe's set-off objection, in accordance with the mechanisms of the 2000 Insolvency Regulation[2].

9. During the proceedings before the Court of Appeals, the bankruptcy estate assigned the claim to a third party, named KAN, which took over the place of the bankruptcy estate in the proceedings. Eventually, the Court of Appeals upheld the District Court's judgment, on the basis of the provisions of the 2000 Insolvency Regulation, which – in the opinion of the Court of Appeals – both parties would have referred to for the issue of the law applicable to CeDe's set-off objection. The case was then referred to the Swedish Supreme Court.

Legal Findings – Rechtliche Beurteilung

10. The Swedish Supreme Court requested a preliminary ruling from the European Court of Justice as to whether the conflict-of-law rules in Article 4 of the 2000 Insolvency Regulation apply to the bankrupt's estate's claim for payment of a claim which arose before the bankruptcy. In its judgment of 21 November 2019[3], the Court of Justice of the European Union found in substance that the law applicable to CeDe's set-off is not to be determined under Article 4 of the 2000 Insolvency Regulation. No further indication, however, was given as to the law or the conflict-of-law rules to be applied instead, which were therefore to be decided by the Supreme Court, which made in substance the following findings.

11. In Sweden, conflict-of-law rules for contractual obligations relating to the sale of goods are to be found in the Rome I Regulation, the Swedish Act of 1964 on the Law Applicable to In-

ternational Sales of Goods[4] ("IKL" in Swedish) and the 1987 Swedish Act on International Sales.

12. [The IKL, which is based on the 1955 Hague Convention[5], has been found by the Supreme Court to be not applicable].

13. The 1987 Swedish International Sales Act implements the United Nations Convention of 11 April 1980 on Contracts for the International Sale of Goods (CISG) as Swedish law as of 1989. Many countries around the world, including Poland, have adhered to the CISG. The Convention contains mainly substantive provisions, but it also contains a provision on when the Convention applies (Article 1(1)). The CISG is based on the possibility for the parties themselves to determine the law applicable to the contractual relationship (Article 6).

14. The supply contract in question contains a choice of law clause which reads as follows: "*In the event of a dispute concerning the interpretation of this Agreement Swedish law shall apply*".

15. The clause provides that Swedish law is to be applied in the interpretation of the contract. Although narrowly drafted, the clause may be regarded as designating Swedish law as the law applicable to the issues which may arise from the supply contract and the purchases made thereunder. However, the Supreme Court did not find that the choice-of-law clause could be regarded as addressing also the issue of the law applicable to the right of set-off.

16. A reference to the law of a CISG-Contracting State typically includes the Convention, since it is part of the national law of that State. This means that the Convention becomes applicable to the contract of sale, and national law otherwise supplements it in matters falling outside the scope of the Convention.

17. In order to assess which country's law applies to the right of set-off, it is necessary to start by considering which legal system is basically applicable to the contractual relationship.

18. This case concerns the purchase of goods in an international business relationship, in which, as a matter of a principle under the various legal instruments previously mentioned, the parties have the possibility to agree on the applicable law.

19. The CISG applies directly to contracts for the sale of goods between parties whose places of business are in different Contracting States (Article 1(1)(a)). Where only one or neither of the States is a Contracting State, the CISG may nevertheless be applicable, provided that the rules of private international law led to the application of the law of a Contracting State (Article 1.1 b).

20. The next question is how the CISG relates to the Rome I Regulation.

21. The Rome I Regulation does not affect the application of international conventions to which one or more Member States of the Union are parties at the time of its adoption and which lay down conflict-of-law rules relating to contractual obligations (Article 25(1)).

22. Since the CISG was adhered to before the adoption of the Rome I Regulation, the CISG should therefore have precedence, provided that the Convention can be regarded as laying down conflict-of-law rules for contractual obligations.

23. In this respect, it has been submitted that the CISG would not contain conflict-of-laws rules and would therefore not be covered by Article 25 of the Rome I Regulation, while other voices advocate that Article 25 of the Rome I Regulation would also refer to private international law rules such as those in Article 1 of the CISG (see e.g. Gralf-Peter Calliess (ed.), Rome Regulations, 2nd ed., 2015, p. 432 f.; Franco Ferrari (ed.), Rome I Regulation, 2015, p. 507; *Ramberg* and *Herre*, op. cit. p. 596 f.,

all with further references). This issue however is of no relevance. Indeed, if the CISG is considered to regulate only substantive matters, it does not compete at all with the Rome I Regulation. On the other hand, if the CISG is considered to contain rules determining the applicable law, the CISG will be have precedence over the Rome I Regulation. Therefore, in both cases, the CISG applies.

24. Article 4 of the CISG states that the Convention governs only the conclusion of a contract of sale and the rights and obligations of the seller and the buyer arising out of such a contract. The relationship with a new holder of a claim under the contract is thus not regulated by the Convention.

25. The Swedish Supreme Court holds in substance that the question of whether a choice-of-law clause would be binding upon the bankrupt estate or the transferee of a contract party is to be determined by the Rome I Regulation. According to Article 14(2) of the Rome I Regulation, the law applicable to the assigned claim governs the assignability of the claim, the relationship between the assignee and the debtor, the conditions under which the assignment may be enforced against the debtor and whether performance by the debtor releases him from his obligations. The aim is to protect the debtor, who generally cannot influence the creditor's right to assign the claim. Therefore, issues relating to the status of the debtor after the assignment should be assessed under the same law as the one applicable to the claim.

26. Does the CISG regulate the right of set-off?

25. Article 7(2) of the CISG provides that substantive issues governed by the Convention, but not expressly resolved in it, are to be determined in accordance with the general principles on which the Convention is based. Only in the absence of such principles is guidance to be sought from the law applicable under the rules of private international law.

26. The CISG does not explicitly regulate questions of set-off, and no general principles on set-off can be found in the Convention either. On this basis, national practice and legal literature have traditionally considered that the Convention would not regulate set-off issues. Recently, however, there has been a change to the issue in the highest courts of certain CISG member states. So for instance the German BGH, which adhered in the past to the traditional approach, tends now to hold that the CISG would regulate set-off where both the principal claim and the set-off claim arise from the same contractual relationship (BGH, decision of 24 September 2014 – VIII ZR 394/12, p. 53

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et seq., CISG- online 2545, with references to similar cases from the Supreme Courts of Austria and Switzerland).

27. The CISG Advisory Council has also taken the position that monetary claims governed by the CISG, whether they arise out of the same contract or not, may be set off by either party in conformity with the general principles underlying the CISG (CISG Advisory Council, Opinion No. 18.)

28. Should it be found that a question of set-off falls outside the scope of the CISG, the law applicable to the matter will be determined in accordance with the relevant rules of private international law. From the perspective of Swedish law, this means that the law applicable to the matter is then deter-

mined either by the IKL or the Rome I Regulation. Since the Hague Convention does not contain any rules on set-off, the Rome I Regulation applies.

29. Article 17 of the Rome I Regulation provides that where the right to set-off is not agreed by the parties, set-off shall be governed by the law applicable to the claim against which the right to set-off is asserted.

30. In the present case, the claim against which the right to set-off is asserted is the claim of PPUB's bankruptcy estate against CeDe for the payment of goods supplied by PPUB to CeDe under the contract of supply. This claim has then been assigned to KAN.

31. In respect of that claim, the original parties had agreed that Swedish law would be applicable, which is also to be applied for the determination of KAN's rights against CeDe.

32. The original parties' agreement does not include any choice of law regarding the right of set-off. In such a situation, Swedish law is applicable, either under Article 17 of the Rome I Regulation or under the CISG, if that Convention becomes applicable in the present case.

33. The conclusion is therefore that the issues at stake in the present case relating to CeDe's right to set off its claim for damages against the claim for payment must be decided in accordance with Swedish law.

For his part, Justice Councilor Johnny Herre added the following comments:

34. The Supreme Court states that Swedish law applies to the right to set-off. The Court also states that Swedish law applies to the contractual relationship between the parties and that the CISG forms part of that regime. This ruling raises a number of issues.

35. A **first question** is how to characterize the supply contract concluded by the parties and how that contract relates to the individual purchase agreements which the parties concluded by reference to, and incorporation of, the terms of that supply contract. Under the contract which the original parties had concluded – which is designated as "Purchase Agreement" – the supplier PPUB undertook to supply goods to its counterpart CeDe. The supply agreement addressed issues such as the prices to be applied, the payment terms, the consequences of certain delivery delays and defects in delivered goods, delivery terms, invoicing, quality requirements, the supplier's obligation to manufacture the goods (where appropriate) to the counterparty's specifications, the warranties, certain issues of intellectual property, the applicable law and dispute resolution.

36. The supply agreement was thus typically a framework agreement, in which the parties regulated important elements of the future purchase contracts which they intended to conclude from time to time. The supply agreement allowed the buyer to place an order with the seller, who would in turn undertake to supply the goods, with the effect that most of the aspects of their contractual relationship pursuant to that order would be governed by the rules of the framework agreement. However, the contract lacked a commitment by the supplier to sell a certain number/quantity of goods of certain specified types, as well as an obligation of the other party to purchase goods of a certain quantity. It therefore follows from the wording of the supply contract that that contract was not a contract for the purchase of goods within the meaning of Article 1 of the CISG, which requires, in order to be applicable, a contract for the sale of goods. In other words, the Convention requires that the parties have entered, or claim to have entered, into a contract for the transfer of movable property for a consideration in money. The supply contract itself does not appear to meet these requirements.

37. As to the individual contracts concluded under the supply contract, the investigation has shown that they were for the international purchase of goods. The rules of the supply contract would then supplement the parties' individual contracts and become part of them. As regards these individual sales contracts, it is clear, as the Supreme Court has stated, that the CISG is applicable. This means that, inter alia, the question of the interpretation of the sales contracts is determined by the rules of interpretation of the Convention and thus primarily by Article 8.

38. The contracts on which PPUB based its claim are thus governed by the CISG. The same applies to the contracts on which CeDe based its counterclaim.

39. A **second question** concerns the application of the CISG in the individual case.

40. Both Poland and Sweden are member States of the CISG. The Convention was in force in both countries when the agreements were concluded in 2010. However, at the time of the conclusion of the agreements, a reservation under Article 92 was in force for Sweden. Sweden, like Denmark, Finland, and Norway, had declared upon accession to the Convention that Sweden would not be bound by Part II of the Convention on the conclusion of agreements. This meant that Sweden was not to be regarded as a Contracting State within the meaning of Article 1(1) (see Article 92(2)). A change in this respect occurred only in 2011, when Sweden made use of the possibility in Article 97 to withdraw its reservation. The corresponding change in the law entered into force on 1 December 2012, pursuant to the Order (2012:602) on the entry into force of the Act (2011:852) amending the International Sales Act (1987:822).

41. The application of Article 1(1) of the Convention – without having regard to the choice of law actually made by the parties – had the consequence, because of Sweden's reservation, that Part I of the Convention, containing the introductory provisions, Part III on the sale of goods and Part IV on the final provisions ("final provisions") were to be applied by virtue of Arti-

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cle 1(1)(a), since both Poland and Sweden were to be regarded as Contracting States in these respects. However, the reservation meant that Sweden was not considered a Contracting State in respect of Part II. Article 1(1)(a) could not therefore be applied. Instead, the CISG could apply if private international law rules led to the application of the law of a Contracting State. For a dispute in Sweden, this meant that the rules of the IKL would determine the applicable law in that part. Notwithstanding a choice of law made by the parties, the law of the seller's country would typically apply (see Article 4 IKL). Poland was and is a Contracting State which has not made a reservation under Article 92, which would have meant that Part II of the CISG on the conclusion of contracts would have been applicable.

42. However, the parties' choice of law meant that Swedish law would apply to the rights and obligations of the parties under the purchase agreements they concluded. Since Sweden was not considered a Contracting State for the purposes of Part II of the Convention, the choice of law meant that Part II of the CISG did not apply; instead, the usual rules on the conclusion of contracts in the Swedish Contract Act as well as the Swedish general legal principles became applicable to any questions concerning the conclusion of contracts.

43. In the present case, the conclusion of the contract was not an issue. Nonetheless, the findings of the previous section may have some bearing on the determination of the rules applicable to the set-off issue. Article 7(2) of the CISG provides that matters governed by the Convention, but not expressly settled therein, "are to be settled in conformity with the general principles on which it is based". These principles can typically be found through an analysis of all the provisions of the Convention. This means that Part II of the Convention forms part of the basis for identifying/interpreting the general principles which may fill out the Convention in those parts where it does not expressly address a question. However, in the present contractual relationship, the rules in Part II cannot constitute such interpretative data, because that part of the Convention did not form part of the legal background chosen by the parties' agreement.

44. As the Supreme Court indicates, there is currently some reported case law in which the CISG has been held to govern the right of set-off where the seller had a claim against the buyer and the buyer had a counterclaim against the seller within the same contract of sale (see in particular German Supreme Court decision BGH of 24 September 2014, CISG-online 2545, and in addition CISG Advisory Council Opinion No. 18. See also *Ingeborg Schwenzer* and *Pascal Hachem*, in Ingeborg Schwenzer (ed.), Commentary on the UN Convention on the International Sale of Goods (CISG), 4th ed. 2016, Article 4 para. 28, *Christiana Fountoulakis* in Schwenzer, op. cit, Article 81(23) and *Florian Mohs* in Schwenzer, cited above, Article 61(19)). An example of such a deduction arising directly from the Convention is found in Article 88(3), which provides that a party who has maintained the goods and subsequently sold them under Article 88(1) or (2) is entitled to retain from the proceeds of the sale an amount to cover the reasonable expenses of maintaining the goods and of selling them. Furthermore, the surplus from the sale may be used and set off against the buyer's claim in respect of the costs of care and sale.

45. This being said, the legal literature and the CISG Advisory Council have not addressed in detail the significance of the non-applicability of Part II of the CISG for the question whether the right and the way to set-off should be regarded as governed by the Convention in an individual case.

46. Thus, the CISG regulates set-off to the extent that such issues can be said to be based on the general principles on which the Convention is founded. Whether this is the case must be determined in light of the type of set-off situation at issue in the individual case.

Mitgeteilt und aus dem Schwedischen übersetzt von Prof. Dr. iur. Jean-Paul Vulliéty, Rechtsanwalt in Genf.

https://www.domstol.se/globalassets/filer/domstol/hogstadomstolen/avgoranden/2020/t-6032-16.pdf

Fußnoten

1) Council Regulation (EC) No 1346/2000 of 29 May 2000 on insolvency proceedings, now replaced by Regulation (EU) 2015/848 of the European Parliament and of the Council of 20 May 2015 on insolvency proceedings.

2) This refers very likely to Art. 4 (1) and (2) (d).

3) CeDe Group, C-198/18, ECLI:EU:C:2019:1001 .

4) „Lag (1964:528) om tillämplig lag beträffande internationella köp av lösa saker", das auf dem Haager Übereinkommen von 1955 basiert.

5)

Übereinkommen von 1955 betreffend das auf internationale Kaufverträge über bewegliche körperliche Sachen anzuwendende Recht.