

Court of Appeal of Ljubljana and implied consent to application of Slovenian law by not- contesting the application of Slovenian law in first and in appellate instance

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In judgment of 25 October 2017 in case I Cpg 1084/2016 (ECLI:SI:VSLJ:2017:I.CPG.1084.2016) published on 31 January 2018 the Slovenian Appellate Court ruled on a question of implied consent to application of Slovenian law.

Unfortunately the underlying facts are not described with the necessary precision. It would appear that there was a three-person contractual chain between an Austrian, an Italian and a Slovenian commercial company. Apparently the Italian company was the seller, the roles of both the Austrian and Slovenian company are not very clearly described. The underlying transaction that led to the dispute was a contract for the sale of goods concluded under the CISG. The ruling does not state where the seller had the habitual residence, yet the condemnation to perform the payment can only be construed in such a way that the Italian plaintiff was the seller.

The court of first instance condemned the defendant (a Slovenian commercial company) to payment of the sum of 52.497,28 EUR to the Italian claimant (Italian commercial company) and dismissed the Slovenian defendant's defense of set-off (*exceptio compensationis*) in the sum of 50.000,00 EUR.

The condemnation was based upon a sales contract for goods concluded under the application of the CISG. The Slovenian defendant contended that the Italian claimant did not sign the double order / mandate addressed to the Austrian third person (named the client or the orderer) who had been instructed to perform the payment to the Italian company. The Austrian client later withheld the

performance of payment due to a non signed double order / mandate (double order/mandate is a figure where a principal gives the first mandate to the agent to perform an obligation to a third person (recipient) and the second mandate to the third person (recipient) to accept the performance of such an obligation, see Art. 1035 Slovenian Code of Obligations: Through an instruction one person, the principal, authorizes a second person, the agent, to perform an obligation for the latter's account to a certain third person, the recipient (the beneficiary), and authorizes the third person to accept performance in the third person's name. The Slovenian legislative provision corresponds to § 1400 Austrian ABGB, § 784 German BGB and Art. 468 Swiss Code of Obligations). The defendant claimed in his defense of set-off that there was an extra-contractual obligation (a delict) due to lack of performance of the Austrian agent that was caused by the Italian company.

One of the pleas in appeal was that Italian and in the alternative the Austrian substantive law should be applied for assessing the existence of the obligation to be set-off. The Court of Appeal dismissed such a plea. The Slovenian defendant alleged an allegedly mature and liquid non-contractual obligation to be set-off. The assessment of facts narrated by the Slovenian company i.e. the damages set-off due to non signature of an order given to the Austrian company shows that there is in essence a defense of breach of the claimant's obligation in accepting the performance based on the same facts as the claimant's claim to payment. The Appellate Court expressly avoided the characterization of the said breached obligation as contractual or as non-contractual. There was only a precision that the facts underlying both the contractual obligation to perform a payment and the allegedly breached obligation are identical.

According to the Appellate Court in Ljubljana the court of first instance found that there was an implied consent to apply the Slovenian law, neither party contested the application of Slovenian law in the first and also in the appellate instance. The law applicable to the obligation that was claimed in set - off is therefore Slovenian law. Even if such an obligation were non - contractual, Slovenian law would have to be applied under Art. 4(1) and (3) in connection with Art. 15 Regulation (EC) No 864/2007 (Rome II).

The ruling does not contain any explicit connecting factor. The issue is not Art. 17 Rome I Regulation (Regulation (EC) No 593/2008). One can assume that under Art. 1(1) CISG the applicable law is the CISG as Austria, Italy and Slovenia are

contracting parties to the said UN convention. However, the interesting part is the reference to the implied consent to the application Slovenian substantive law. Under Art. 4(1)(a) Rome I Regulation (Regulation (EC) No 593/2008) “a contract for the sale of goods shall be governed by the law of the country where the seller has his habitual residence”. This should prima facie be the Italian law, as the Italian company applied for payment after having performed the specific performance under the sales contract. However, not contesting the application of Slovenian substantive law in judicial proceedings in first and also in the appellate instance was then construed as “implied consent” to Slovenian substantive law (Art. 3(2) Regulation Rome I). Seen in pragmatic perspective, in order to avoid a uneasy *modus vivendi* or fine tuning of Art. 3 and 15 of the Regulation Rome II with Art. 17 Regulation Rome I the Slovenian Appellate Court preferred to refer to Slovenian law even if under conditions that do not easily fit in Art. 3(2) and 10 Rome I Regulation.