
Chilean high courts evidence a lack of familiarity with the CISG by neglecting its application in an international sale of goods case

Ernesto Vargas Weil*

Abstract

Chile is well known for its openness to international trade and has been a contracting State to the Convention on Contracts for the International Sale of Goods (CISG) since 1991. However, extremely few Chilean decisions applying the CISG have been reported, and all of them have received negative commentaries. On June 2015, the Chilean Supreme Court upheld a second instance ruling rendered in a case involving a seller of goods with a seat in Argentina and a buyer with a seat in Chile. This case offers a good chance to evaluate whether there has been any progress in the application of the CISG in this jurisdiction and compare such development with a similar and relevant country (Argentina). The three different holdings issued in this case evidence that Chilean domestic courts still have an extremely unfamiliar relationship with the CISG. The first instance ruling has important problems justifying its applicability to the case and evidences a poor understating of its substantive content. The Court of Appeal and the Supreme Court completely have neglected the CISG, despite not reversing the references made by the first instance holding to it, evidencing a clear homeward trend in favour of the application of domestic law. This homeward trend seems to be a result of a general lack of familiarity with the Convention in the Chilean legal community. Hence, it seems that parties involved in international trade can hardly rely on a sound application of the CISG in Chile. This contrasts with the situation in Argentina, a country less favourable to economic integration but with a legal community apparently more interested in uniform law. This stresses the necessity that legal enactments in the field of uniform law should be accompanied by a correlative change in the relevant legal culture and hints that this could still remain a pending issue in many contracting States, especially among developing countries.

* Ordinary Assistant, Private Law Department, University of Chile. Av. Santa María 076, 3rd floor, Providencia, Santiago 7520405, Chile. Tel: (562)22282013. E-mail: vargasweil@u.uchile.cl. I am thankful for the contribution made to this article by Paulo Montt and by an anonymous reviewer.

I. Introduction

On 24 June 2015 the Chilean Supreme Court upheld the second instance ruling rendered by the Santiago Court of Appeals in *AMS Foods International S.A. c Servicios de Marketing Allmarket Group Ltd.*¹ The holding by the Court of Appeals² had previously reversed a first instance holding,³ which decided a case with reference to the UN Convention on Contracts for the International Sales of Goods (CISG).⁴ There are extremely few reported rulings by Chilean courts applying the CISG,⁵ and all of them have received negative commentaries.⁶ This is striking because Chile has been a contracting State to the CISG since 1991 and is well known for having pursued a successful development strategy that gives a central role to international economic integration, including a remarkable openness to international trade and foreign investment. In this context, the recent ruling of the Chilean Supreme Court in *AMS Foods* constitutes an opportunity to consider whether there have been any improvements in the application of the CISG in Chile. It also serves to compare this development with a relevant and similar jurisdiction (Argentina), offering an interesting example on how a middle-income developing country, open to international trade, deals with the application of uniform commercial law in practice in a region that has been traditionally characterized as evidencing an important distance between law in action and law in books.⁷

II. The case

According to the first instance ruling of *AMS Foods*, a company incorporated under the laws of Argentina and with its domicile and seat in Buenos Aires,

¹ C. Suprema, 24 Junio 2015. N° de Ingreso 6228-2015, available at Legal Publishing: CL/JUR/3642/2015; 96978.

² C. Santiago, 17 Marzo 2015. N° de Ingreso 6257-2014, available at Legal Publishing: CL/JUR/1463/2015; 89437.

³ 26° J. Civil Santiago, 4 Julio 2014. Causa Rol N° C-18237-2012.

⁴ Convention on Contracts for the International Sale of Goods 1489 UNTS 3 (1980) (CISG).

⁵ The only cases reported in international data bases are *Automotores Gildemeister SA c Agrícola Gildemeister SA* (C Suprema, 10 Agosto 2005. N° de Ingreso 3528-2003 <<http://cisgw3.law.pace.edu/cases/050810ch.html>> accessed 29 January 2016; and *Industrias Magromer Cueros y Pieles, SA c Sociedad Agrícola Sacor, Ltda* (C Suprema, 22 Septiembre 2008, N° de Ingreso 1782-2007 <<http://cisgw3.law.pace.edu/cases/080922ch.html>> accessed 29 January 2016).

⁶ See Christina Kottke, *Das UN-Kaufrecht im Spiegel der spanischsprachigen Länder*, Beiträge zum UN-Kaufrecht 11 (Perter Lang GmbH 2011) 505–6; Jorge Oviedo-Albán, 'Exclusión tácita de la ley aplicable e indemnización de perjuicios por incumplimiento de un contrato de compraventa internacional (a propósito de reciente jurisprudencia chilena)' (2009) 14 *Revista Colombiana de Derecho Internacional* 191, 194–5; Francisco José Grob Duhalde, 'La reserva de Chile a la "Convención de Viena" de 1980' (2011) 36 *Revista de Derecho de la Pontificia Universidad Católica de Valparaíso* 37, 60–2.

⁷ Alejandro M Garro, 'On Some Practical Implications of Diversity of Legal Cultures for Lawyering in the Americas' (1995) 64 *Revista Jurídica Universidad de Puerto Rico* 461, 477. Note that '[the colonial] proverbial *la ley se acata pero no se cumple* (the law is acknowledged but not given effect) is still used today to describe the legal reality in Latin America'. Jan Kleinheisterkamp, 'Latin America, Influence of European Private Law' in Jürgen Basedow, Klaus J. Hopt and Reinhard Zimmermann (eds), *The Max Planck Encyclopedia of European Private Law*, volume 2 (Oxford University Press 2012) 1032.

Argentina (the Seller) sued a company with its domicile in Santiago, Chile (the Buyer). The Seller claimed that it entered into three different agreements with the Buyer for the sale of organic food; that it had duly delivered the relevant goods to the Buyer, and that the Buyer had not paid the price. The Buyer denied that such agreements qualified as sale agreements and claimed it had received the goods as a consignee, being only obliged to give the Seller the prices eventually obtained from the sale of such goods in the Chilean market, with the deduction of a commission of 10 per cent.

III. The holdings

The first instance court (26° Civil Court of Santiago) rejected the Seller's claim, holding that, under Article 11 of CISG, *onus probandi* is borne by the plaintiff and that, in the case at hand, the plaintiff (the Seller) had failed to prove that the parties had entered into the relevant sale agreements. The Court of Appeal of Santiago overruled such a holding based on a matter of fact. Without reversing the motive of the first instance ruling which applied Article 11 of the CISG, the Court of Appeal agreed with the first instance court that the plaintiff had the burden of proving the alleged agreements, but it based such opinion exclusively on the provision of the Chilean Civil Code on *onus probandi*.⁸ However, contrary to the first instance court, the Court of Appeal held that the plaintiff had rendered sufficient evidence regarding the existence of such contracts and qualified them as sales agreements under the relevant provision of the Chilean Civil Code.⁹ The Supreme Court upheld the ruling by the Court of Appeal, holding that the existence of the contract was a matter of fact and, thus, not subject to the control of the Supreme Court¹⁰ and that none of the arguments made by the defendant in its appeal implied that the Court of Appeal had incurred a mistake as a matter of law.

IV. On the applicability of the CISG to the case

Resort to the CISG by the first instance court required it to justify, at least, why the Convention could be applicable to the case. Among other requirements, '[t]he CISG applies to contracts for the sale of goods between parties whose places of business are in different State: (a) when the States are Contracting States; or (b) when the rules of private international law lead to the application of the law of a Contracting State'.¹¹ However, the first instance court neglected any analysis on this regard. Despite a reference to the seat of the plaintiff in Buenos Aires, no reference was made to the internationality of the contracts or the existence of

⁸ Chilean Civil Code (ChCC), art 1698.

⁹ Ibid art 1793.

¹⁰ The Chilean Supreme Court is essentially a Cour de Cassation. As such, the scope of its revision is limited to 'matters of law' (that is, wrongful application or interpretation of the law), and it is not allowed to revise the facts set forth by the trier of facts (that is, the first instance court and the court of appeals).

¹¹ CISG (n 4) art 1(1).

factors connecting to a contracting State. Thus, it is only possible to speculate that the Convention was autonomously applicable under Article 1(1)(a) of the CISG because, at the time of the conclusion of the contract,¹² the parties, apparently, had their place of business in different contracting States (Chile and Argentina) and did not agree to exclude its application.¹³

V. On the applicability of Article 11 of the CISG in Chile

A more problematic issue is the resort of the first instance ruling to Article 11 of the CISG,¹⁴ an argument not reversed by the Court of Appeal nor the Supreme Court. Omitting all reference to a ruling on this issue upheld by the Chilean Supreme Court in 2005,¹⁵ the first instance court failed to note that, at the moment of acceding to the Convention, Chile (and also Argentina) filed a reservation excluding the applicability of Article 11 of the CISG in such jurisdiction.¹⁶ Thus, unless the court had somehow grounded the applicability of the CISG over Article 1(1)(b) as an applicable foreign law of a non-reservatory contracting State (that is, a third country), Article 11 of the CISG could not possibly be applicable to the case.

VI. *Onus probandi* in the CISG

In addition, the first instance holding also evidences a weak understanding of the issue of burden of proof in the CISG. The court failed to acknowledge that whether *onus probandi* is a matter governed by the CISG is subject to an important controversy among scholars. Even if, as of today, the prevailing position is that such an issue is within the scope of the Convention, the arguments sustaining this position are not based on Article 11 of the CISG. Scholars and courts holding that *onus probandi* is within the scope of the Convention argue that the rule of Article 79 of the CISG, imposing the burden of proof on the party claiming relief due to an unexpected impediment beyond its control, reflects a general principle of the Convention.¹⁷ According to such a principle, under the CISG, each party has to

¹² Ibid art 100.

¹³ Ibid art 6.

¹⁴ On how to understand the Chilean reservation to art 11 of the CISG, see Grob Duhalde (n 6).

¹⁵ In *Automotores Gildemeister SA c Agrícola Gildemeister SA*, the San Miguel Court of Appeal explicitly referred to the reservation made by Chile to art 11 of the CISG.

¹⁶ 'This State declared, in accordance with articles 12 and 96 of the Convention, that any provision of article 11, article 29 or Part II of the Convention that allowed a contract of sale or its modification or termination by agreement or any offer, acceptance or other indication of intention to be made in any form other than in writing, would not apply where any party had his place of business in its territory'. UNCITRAL <http://www.uncitral.org/uncitral/en/uncitral_texts/sale_goods/1980CISG_status.html> accessed 29 January 2016.

¹⁷ CISG (n 4) art 7(2).

prove the facts on which its claims, right, or defence are based, and the party relying on an exception must prove such an exception.¹⁸

VII. The undue application of domestic law by the Court of Appeals and its upholding by the Supreme Court

Finally, the extensive application of domestic law by the Santiago Court of Appeal and the Chilean Supreme Court provides inexplicable results. None of these courts reversed the part of the first instance holding that declared Article 11 of the CISG to be applicable. Thus, it is reasonable to understand that both courts understood the Convention to be applicable to the case. However, despite holding that the contracts at stake were ‘international sales’, the reasoning (the issues of burden of proof and the legal qualification of the agreements) of both tribunals was completely based on the provisions of the Chilean Civil and Commercial Codes, omitting all references to the CISG. This is a clear contradiction and evidences a strong homeward trend of these courts to neglect the CISG in order to apply its (better known) domestic law.¹⁹ This result is especially striking, considering that the Supreme Court was unable to notice this problem in the second instance holding under its revision. Instead of raising the presence of international factors in the contracts and addressing the issue of the law applicable to it (that is, a matter of law within the scope of its revision), the Supreme Court preferred to directly confirm the application of the Chilean domestic law by the Court of Appeals.

VIII. Possible causes for the weak application of the CISG by Chilean courts

Considering that the CISG has been in force for almost 25 years in Chile and that this country is an active player in international trade, the weakness in the application of the Convention in *AMS Foods* is striking. The different courts involved seem to be clear victims of a certain ‘natural tendency’ to pursue homeward trends leading to a reading of the Convention in a domestic manner (‘domestic interpretation’) or to directly avoiding it in order to apply its better known domestic law (‘*lex forism*’).²⁰ Most likely and similarly to what happens in the rest of

¹⁸ Ingeborg Schwenzer (ed), *Schlechtriem and Schwenzer: Commentary on the UN Convention on the International Sale of Goods (CISG)* (Oxford University Press 2010) 85–6; Franco Ferrari and Marco Torsello, *International Sales Law: CISG in a Nutshell* (West Academic Publishing 2014) 23–4.

¹⁹ On homeward trends in the application of uniform substantive law (that is, ‘domestic reading of uniform law’ and ‘*lex forism*’), see Franco Ferrari, ‘Homeward Trend: What, Why and Why Not’ (2009) 8 *Internationales Handelsrecht* 8.

²⁰ *Ibid* 12–14, 17. According to critics of the CISG, this is an inevitable result of national judges who follow (conscious or not) homeward trends that may lead them to ‘ignore [the CISG mandate of] autonomous-international interpretation in favor of interpretation permeated with national gloss’, as explained in Larry Di Matteo and others, ‘The Interpretive Turn in International Sales

Latin America,²¹ the main cause for such homewards trends is probably a general lack of familiarity with the CISG among Chilean judges and legal practitioners.²² This stresses the truism that legal enactments in the field of uniform law that are not accompanied by a correlative change in the attitude of the relevant legal community tend to lose effectiveness.²³

IX. A comparison with the recent developments on the CISG in Argentina

AMS Foods contrasts highly with the recent experience of Argentine tribunals applying the CISG. This comparison is not only relevant due to the fact that the plaintiff in *AMS Foods* had its seat in Buenos Aires but also because Argentina has been a contracting State to the Convention for a long time,²⁴ it has a level of economic development similar to Chile,²⁵ and, despite its sometimes hostile policies towards economic integration, it is the Latin American jurisdiction that exhibits the richest and most developed doctrine and case law on the CISG.²⁶ Different to *AMS Foods*, the Argentinean courts seem to generally identify

Law: An Analysis of Fifteen Year of CISG Jurisprudence' (2004) 24(2) Northwestern Journal International of International Law and Business 299, 302–3.

²¹ For all, see Kottke (n 6) 571–3.

²² Grob Duhalde (n 6) 38.

²³ José Antonio Moreno Rodríguez, 'Contracts and Non-State Law in Latin America' (2011) 16 Uniform Law Review 877, 877.

²⁴ The CISG was acceded by Argentina in 1983, and it is in force in such jurisdiction since 1988 (<http://www.uncitral.org/uncitral/en/uncitral_texts/sale_goods/1980CISG_status.html> accessed 29 January 2016).

²⁵ Eg, the International Monetary Fund estimated the 2015 gross domestic product per capita (PPP) for Argentina as US \$22,458 and that of Chile as US \$23,556 (<[²⁶ Ernesto Vargas Weil, 'The Application of the CISG in Latin America: Autonomous Interpretation, Uniform Interpretation and Gap Filling' \(2015\) 15 Internationales Handelsrecht, 238, 245, 246. Note that scholars have suggested that the quantity and quality of case law in the region is strongly correlated with the development of local academic literature on the CISG. Kottke \(n 6\) 572.](http://www.imf.org/external/pubs/ft/weo/2015/01/weodata/weorept.aspx?pr.x=70&pr.y=4&ssy=2015&esy=2015&scsm=1&ssd=1&sort=country&ds=-.&br=1&c=512%2C668%2C914%2C672%2C612%2C946%2C614%2C137%2C311%2C962%2C213%2C674%2C911%2C676%2C193%2C548%2C122%2C556%2C912%2C678%2C313%2C181%2C419%2C867%2C513%2C682%2C316%2C684%2C913%2C273%2C124%2C868%2C339%2C921%2C638%2C948%2C514%2C943%2C218%2C686%2C963%2C688%2C616%2C518%2C223%2C728%2C516%2C558%2C918%2C138%2C748%2C196%2C618%2C278%2C624%2C692%2C522%2C694%2C622%2C142%2C156%2C449%2C626%2C564%2C628%2C565%2C228%2C283%2C924%2C853%2C233%2C288%2C632%2C293%2C636%2C566%2C634%2C964%2C238%2C182%2C662%2C453%2C960%2C968%2C423%2C922%2C935%2C714%2C128%2C862%2C611%2C135%2C321%2C716%2C243%2C456%2C248%2C722%2C469%2C942%2C253%2C718%2C642%2C724%2C643%2C576%2C939%2C936%2C644%2C961%2C819%2C813%2C172%2C199%2C132%2C733%2C646%2C184%2C648%2C524%2C915%2C361%2C134%2C362%2C652%2C364%2C174%2C732%2C328%2C366%2C258%2C734%2C656%2C144%2C654%2C146%2C336%2C463%2C263%2C528%2C268%2C923%2C532%2C738%2C944%2C578%2C176%2C537%2C534%2C742%2C536%2C866%2C429%2C369%2C433%2C744%2C178%2C186%2C436%2C925%2C136%2C869%2C343%2C746%2C158%2C926%2C439%2C466%2C916%2C112%2C664%2C111%2C826%2C298%2C542%2C927%2C967%2C846%2C443%2C299%2C917%2C582%2C544%2C474%2C941%2C754%2C446%2C698%2C666&s=PPPPC&grp=0&a=> accessed 29 January 2016).</p>
</div>
<div data-bbox=)

the CISG as the default law applicable to international sales and make explicit efforts (even though they are not always well developed) to justify its application in specific cases.²⁷ Over the last years, these justifications have become increasingly sophisticated. For example, in a relatively recent case, an Appellate Court of Buenos Aires addressed the issue of the applicability of the CISG by a refined reasoning that clearly distinguished the internationality of the contract from its link to a contracting State and decided on the first matter by resorting to a well-grounded autonomous and uniform interpretation of the 'place of business' concept contained in Article 1 of the CISG.²⁸

However, even if Argentina's decisions applying the Convention have also frequently shown homeward trends,²⁹ they normally do not neglect the CISG as a whole, as the Chilean High Courts did on *AMS Foods*. Nonetheless, similar to *AMS Foods*, Argentina's decisions have also had troubles with *onus probandi*. For example, in the aforementioned decision by the Appellate Court of Buenos Aires, the tribunal failed to identify that the applicability of the CISG to *onus probandi* is a matter subject to an important controversy among scholars³⁰ and simply held that it is a matter of procedural law outside the scope of the Convention and decided the issue by resorting to its domestic law.

X. Concluding remarks

AMS Foods evidences that, despite the strong commitment of the Chilean economic model to international trade and the fact that the CISG has been in force for a long time in this jurisdiction, domestic courts are still very unfamiliar with the Convention. The Chilean courts seem to barely identify the CISG as the default law governing the international sales of goods, and when they do, they have had trouble establishing its applicability and demonstrate a poor understanding of its content. This case suggests that, unless an explicit valid choice of law is made, parties to international sales agreements litigating before Chilean domestic courts are exposed to an important level of uncertainty regarding the

²⁷ Eg, see *Cervecería y Maltería Paysandú SA v Cervecería Argentina SA* (Cámara Nacional de Apelaciones en lo Comercial de Buenos Aires, 21 Julio 2002 <<http://cisgw3.law.pace.edu/cases/020721a1.htm>> accessed 29 January 2016; *Autoservicio Mayorista La Loma SA v Quiebra v Incidente de Verificación* (Juzgado Comercial N° 26 de Buenos Aires, Abril 2003 <<http://cisgw3.law.pace.edu/cases/030400a1.html>> accessed 29 January 2016; *Sr Carlos Manuel del Corazón de Jesús Bravo Barros v Salvador Martínez Gares* (Cámara Nacional de Apelaciones en lo Comercial de Buenos Aires, 31 Mayo 2007 <<http://cisgw3.law.pace.edu/cases/070531a1.html>> accessed 29 January 2016; *Amaravathi Textiles c Cencosud SA s ordinario* (Cámara Nacional de Apelaciones en lo Comercial de Buenos Aires, 30 Diciembre 2009 <<http://fallos.diprargentina.com/2010/07/amaravathi-textiles-c-cencosud-2.htm>> accessed 29 January 2016; *Ecotune (India) Private Ltd v Cencosud S* (Cámara Nacional de Apelaciones en lo Comercial de Buenos Aires, 7 Octubre 2010 <<http://cisgw3.law.pace.edu/cases/101007a1.html>> accessed 29 January 2016.

²⁸ *Sanovo Internacional SA v Ovoprot Internacional SA S / Ordinario* (Cámara Nacional de Apelaciones en lo Comercial de Buenos Aires, 24 Junio 2010 <<http://www.cisgspanish.com/wp-content/uploads/2013/02/SENTENCIASanovoOvoprot.pdf>> accessed 29 January 2016.

²⁹ Eg, *Amaravathi Textiles c Cencosud SA s ordinario* and *Sr Carlos Manuel del Corazón de Jesús Bravo Barros v Salvador Martínez Gares* seem to understand the good faith provision of the Convention (art 7(1) of the CISG) by reference to the domestic understanding of such concept.

³⁰ See section VI of this article.

law that will govern their relation and the way it will be applied. Hence, it seems that parties involved in international trade can hardly rely on a sound autonomous and uniform application of the CISG in Chile, and, as a result, they have been deprived, in practice, from the benefits that uniform law aims to provide to transnational commerce where it is in force. This contrasts with the situation of the CISG in Argentina, a country similar to Chile, but with a political attitude less favourable to economic integration and a legal community more interested in uniform law. The examination in this article suggests that the weak application of the CISG by Chilean courts is probably the result of a general unfamiliarity of the local legal community with the Convention and not of a lack of interest in economic integration. This situation means that, notwithstanding the importance of the political attitudes favourable to economic integration, legal enactments in the field of uniform law (as in any other) need, overall, to be accompanied by a correlative change in the relevant legal culture in order to be successful. It is probable that this could remain a pending issue in many contracting States to the CISG, including middle-income developing countries with strong international commercial networks, such as Chile.