

Unofficial English Translation

Mazzetta Company, I.I.c. c. Dégust-Mer inc.

2011 QCCA 717

COURT OF APPEAL

CANADA
PROVINCE OF QUEBEC
REGISTRY OF QUEBEC

No.: 200-09-007265-116
(110-17-000481-102)

DATE: April 12, 2011

**CORAM: THE HONOURABLE FRANCE THIBAULT, J.A.
PAUL VÉZINA, J.A.
NICOLE DUVAL HESLER, J.A.**

MAZZETTA COMPANY LLC
APPELLANT – Defendant

v.

DÉGUST-MER INC.
RESPONDENT – Plaintiff

JUDGMENT

[1] The appellant appeals from a judgment rendered on December 10, 2010, by the Superior Court, District of Gaspé (the Honourable Mr. Justice Jean-Roch Landry), that dismissed the appellant's motion for declinatory exception concerning the lack of jurisdiction of the Quebec courts.

[2] For the reasons of Vézina J.A., with which Thibault and Duval Hesler JJ.A. agree:

[3] DISMISSES the appeal, without costs.

FRANCE THIBAUT, J.A.

PAUL VÉZINA, J.A.

NICOLE DUVAL HESLER, J.A.

Mtre Dominique Vallières and
Mtre Jean-Yves Simard
Lavery, de Billy
For the Appellant

Mtre Daniel Dumais
Heenan, Blaikie
For the respondent

Date of hearing: March 23, 2011

REASONS OF VÉZINA, J.A.

[4] The appellant is an American company without any establishments in Quebec. The respondent operates a seafood processing plant in Gaspésie.

[5] In 2008, the respondent sold frozen lobster to the appellant and delivered it to the United States, as agreed.

[6] Having failed to receive payment, the respondent sued the appellant in Quebec. The appellant disputed the Quebec court's jurisdiction over this international dispute. The impugned judgment dismissed the challenge, hence the present appeal.

[7] All parties were in agreement that the issue would be determined pursuant to the rule in the *Civil Code of Québec* found under the title "International Jurisdiction of Québec Authorities" and in the section entitled "Personal Actions of a Patrimonial Nature", set out in the following article:

3148. In personal actions of a patrimonial nature, a Québec authority has jurisdiction where:

- (1) the defendant has his domicile or his residence in Québec;
- (2) the defendant is a legal person, is not domiciled in Québec but has an establishment in Québec, and the dispute relates to its activities in Québec;
- (3) a fault was committed in Québec, damage was suffered in Québec, an injurious act occurred in Québec or one of the obligations arising from a contract was to be performed in Québec; (emphasis added)
- (4) the parties have by agreement submitted to it all existing or future disputes between themselves arising out of a specified legal relationship;
- (5) the defendant submits to its jurisdiction.

However, a Québec authority has no jurisdiction where the parties, by agreement, have chosen to submit all existing or future disputes between themselves relating to a specified legal relationship to a foreign authority or to an arbitrator, unless the defendant submits to the jurisdiction of the Québec authority.

[8] More specifically, the issue here is whether one of the obligations arising from the contract was to be performed in Quebec. It is the only connection that may ground the jurisdiction of the Quebec authorities in this case.

[9] This leads us to an analysis of the contract to establish the parties' respective obligations and the place of their performance.

[10] Because of an entirely understandable civilian reflex, the parties performed this analysis under the *Civil Code*. Thus, the appellant maintained that, seeing as the debts were payable at the payor's place of business, not the payee's,¹ the payment was due in the United States, even though in prior sales the appellant's payment had been made in the Gaspé region.

[11] This analysis is valid under the *Civil Code*. But the parties have forgotten to consider a preliminary issue: whether or not the *Civil Code* applies to this contract and, more generally, what law governs this contract.

[12] According to Professor Prujiner² this is a common error. Commenting on another international sales matter between Quebec and the United States, he writes:

[TRANSLATION]

Yet, everybody has unthinkingly applied Quebec law to this contract.

...

But the law applicable to the formation of this contract is not automatically Quebec law.

[13] And he indicates the approach to take:³

[TRANSLATION]

They should in fact have begun by checking the result of applying Quebec private international law to the contract, because a Quebec judge must use it to determine the law applicable to this case ...

...

... the fact that this international sale was entered into by two *Vienna Convention*⁴ member countries should have been taken into account, as well as the fact that the *Convention* is therefore automatically applicable pursuant to its article 1.1(a).

[14] The formula also applies to our case.

[15] The United States of America is a signatory of the *Vienna Convention*, which has been in effect there since 1986.⁵

¹ That is, that the creditor must go claim the debt at the debtor's address.

² Alain Prujiner, *Les conflits de clauses types et la jurisprudence québécoise*, in Générosa Bras Miranda & Benoît Moore, *Mélanges Adrian Popovici : Les couleurs du droit* (Montreal: Thémis, 2010) 527-550 at 547.

³ *Ibid.* at 548.

⁴ *The Vienna Convention: United Nations Convention on Contracts for the International Sale of Goods* (CISG).

⁵ Website: http://www.uncitral.org/uncitral/en/uncitral_texts/sale_goods/1980CISG.html

[16] Canada acceded to the *Convention* in 1992, and Quebec incorporated it into domestic law through *An Act respecting the United Nations Convention on Contracts for the International Sale of Goods*,⁶ which has been in effect since May 1, 1992.

[17] The first chapter of the *Convention* establishes its sphere of application:

Article 1

(1) This Convention applies to contracts of sale of goods between parties whose places of business are in different States:

(a) when the States are Contracting States (emphasis added); or

(b) when the rules of private international law lead to the application of the law of a Contracting State.

(2) The fact that the parties have their places of business in different States is to be disregarded whenever this fact does not appear either from the contract or from any dealings between, or from information disclosed by, the parties at any time before or at the conclusion of the contract.

(3) Neither the nationality of the parties nor the civil or commercial character of the parties or of the contract is to be taken into consideration in determining the application of this Convention.

[18] Where is the place of payment according to the applicable law, namely, the CISG? Two provisions point to the same result – the Gaspé region.

[19] First, it is noteworthy that the contract was verbal. The only document is an invoice submitted by the respondent in which the products sold are described: "Frozen Raw Lobster Tails IQF" of various sizes and quantities, the "Sale price", and the "Total sales".

[20] It is indeed a sales contract, as confirmed by the opening allegations of the respondent's proceeding:

[TRANSLATION]

1. The plaintiff sold and delivered to the defendant frozen lobster meat as appears from invoices bearing numbers 3220 and 3240 filed in support hereof as exhibit P-1;
2. The goods that were sold and delivered were received by the defendant months ago, and the defendant has defaulted on payment without any justification;

[21] The first relevant provision from the CISG is:

Article 8

⁶ RSQ, c C-67.01 where the CISG is reproduced *in extenso* in an appendix.

(1) For the purposes of this Convention statements made by and other conduct of a party are to be interpreted according to his intent where the other party knew or could not have been unaware what that intent was.

(2) If the preceding paragraph is not applicable, statements made by and other conduct of a party are to be interpreted according to the understanding that a reasonable person of the same kind as the other party would have had in the same circumstances.

(3) In determining the intent of a party or the understanding a reasonable person would have had, due consideration is to be given to all relevant circumstances of the case including the negotiations, any practices which the parties have established between themselves, usages and any subsequent conduct of the parties. (Emphasis added.)

[22] We may find that the parties had established a "practice" between themselves due to the fact that in past sales, payment was made in the Gaspé region.

[23] The second provision is the following:

Article 57

(1) If the buyer is not bound to pay the price at any other particular place, he must pay it to the seller:

(a) at the seller's place of business [emphasis added]; or

(b) if the payment is to be made against the handing over of the goods or of documents, at the place where the handing over takes place.

(2) The seller must bear any increase in the expenses incidental to payment which is caused by a change in his place of business subsequent to the conclusion of the contract.

[24] In this case, clearly the price was not due on delivery and the parties had not decided on a place of payment, except that the purchaser's behaviour – with the vendor's full knowledge – had established a practice, as discussed above.

[25] One must conclude that under the applicable law, the CISG, payment was due at the respondent's place of business, in the Gaspé region.

[26] Consequently, one of the buyer's obligations was to be performed in Quebec (art 3148(3) CCQ). This confers jurisdiction on the Quebec authorities.

[27] For these reasons, I would dismiss the appeal, without costs since the CISG was not raised by the parties.

PAUL VÉZINA, J.A.