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Abstract

In 2011, U.S. courts analyzed the scope, formation, and remedies provisions of the United Nations Convention on Contracts for the International Sale of Goods (“CISG”). Although the number of cases arising under the CISG is relatively small compared with those under the Uniform Commercial Code (U.C.C.), the cases discussed in this survey remind us that U.S. courts are comfortable in applying the CISG. A comprehensive survey setting forth legal developments in the United States during the past nine years involving the CISG follows the Uniform Commercial Code Survey in this issue of *The Business Lawyer*. That survey illustrates that the comfort of the U.S. courts with the CISG in the last calendar year was no aberration.

Keywords

CISG, International Sale of Goods, United Nations Convention, UCC, Uniform Commercial Code

Disciplines

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International Sale of Goods

By Gregory M. Duhl*

INTRODUCTION

In 2011, U.S. courts analyzed the scope, formation, and remedies provisions of the United Nations Convention on Contracts for the International Sale of Goods (“CISG”).¹ Although the number of cases arising under the CISG is relatively small compared to those under the Uniform Commercial Code (“U.C.C.”), the cases discussed in this survey remind us that U.S. courts are comfortable in applying the CISG. A comprehensive survey setting forth legal developments in the United States during the past nine years involving the CISG follows the Uniform Commercial Code Survey in this issue of *The Business Lawyer*.² That survey illustrates that the comfort of the U.S. courts with the CISG in the last calendar year was no aberration.

SCOPE

The CISG generally applies to non-consumer contracts for the sale of goods where the parties are in different contracting States.³ Two common questions that arise with regard to the CISG are whether it covers distributorships and how parties opt out of the CISG for a contract otherwise within its scope.⁴

* Associate Professor, William Mitchell College of Law, St. Paul, Minnesota. I thank Joseph Dunham and Chelsea Sommers for their excellent research and editorial assistance.

1. United Nations Convention on Contracts for the International Sale of Goods, Apr. 11, 1980, 1489 U.N.T.S. 3, 19 I.L.M. 671, available at <http://www.cisg.law.pace.edu/cisg/text/treaty.html> [hereinafter CISG].

2. Ann Morales Olazábal, Robert W. Emerson, Karen D. Turner & René Sacasas, *Global Sales Law: An Analysis of Recent CISG Precedents in U.S. Courts 2004–2012*, 67 Bus. Law. ___ (2012).

3. CISG, *supra* note 1, arts. 1(1)(a), 2(a).

4. Three inconsequential scope cases were decided in 2011: two dealt with the non-application of the CISG between two U.S. parties. See *Gibraltar Trading Corp. v. PMC Specialties Grp., Inc.*, No. 10 CV 3966(SJ)(MDG), 2011 WL 3625332 (E.D.N.Y. Aug. 16, 2011) (granting motion to remand the case to New York state court, as both parties were U.S. companies and therefore the CISG did not apply and there was no federal diversity jurisdiction); *Gibraltar Trading Corp. v. PMC Specialties Grp., Inc.*, No. CV 2010-3966(SJ)(MDG), 2011 WL 3625363 (E.D.N.Y. May 12, 2011) (according preclusive effect to determination that federal district court in Ohio could not apply the CISG and recommending transfer of case to that court). In the third case, the court held that an aggressive prayer for relief in a CISG action was not a ground for dismissal on a Fed. R. Civ. P. 12(b)(6) motion. See *Dingxi Longhai Dairy, Ltd. v. Becwood Tech. Grp. L.L.C.*, 635 F.3d 1106, 1109 (8th Cir. 2011) (holding that, even though the plaintiff was unlikely to recover the full contract price, the lower

DISTRIBUTORSHIP AGREEMENTS

In *Gruppo Essenziero Italiano, S.p.A. v. Aromi D'Italia, Inc.*,⁵ the U.S. District Court for the District of Maryland decided that the CISG does not apply to a distributorship agreement. Gruppo Essenziero Italiano, S.p.A. ("G.E.I."), an Italian corporation, and Aromi D'Italia, Inc. ("A.D.I."), a Maryland corporation, entered into a distributorship agreement under which A.D.I. was the exclusive distributor of G.E.I.'s gelato in the United States (the "Agreement").⁶ The Agreement allowed G.E.I. to terminate the Agreement without notice if A.D.I. did not pay invoices when due.⁷ A.D.I. failed to pay numerous invoices.⁸ However, G.E.I. did not exercise its termination right under the Agreement.⁹ Instead, the parties tried to negotiate a resolution to the unpaid invoices, while G.E.I. allowed A.D.I. to continue as its exclusive U.S. distributor.¹⁰ The negotiations failed, and G.E.I. eventually terminated the Agreement.¹¹ G.E.I. then sued A.D.I. for, *inter alia*, breach of the Agreement.¹²

The court noted that the CISG applies to "contracts of sale of goods between parties whose places of business are in different States."¹³ The issue was whether the Agreement was a contract for the sale of goods under the CISG. Under the U.C.C., distributorship agreements are typically contracts for the sale of goods.¹⁴ However, the courts that have considered this issue under the CISG have concluded that a distributorship agreement is not within the CISG's scope.¹⁵ This court agreed and supported its reasoning with reference to Article 14 of the CISG.¹⁶ Article 14 states that a proposal for a contract is not an offer unless it contains sufficiently definite terms for determining the price and quantity of the goods.¹⁷ Since the Agreement did not contain price and quantity terms, it was not a sufficiently definite contract under the CISG.¹⁸

court should not have dismissed because plaintiff "[was] almost certain to be entitled to *some* monetary relief").

5. Civil No. CCB-08-65, 2011 WL 3207555 (D. Md. July 27, 2011).

6. *Id.* at *1.

7. *Id.*

8. *Id.*

9. *Id.*

10. *Id.* at *1-2.

11. *Id.* at *2.

12. *Id.* at *1.

13. *Id.* at *3 (quoting CISG, *supra* note 1, art. 1(1)(a)) (emphasis omitted).

14. *Id.* (citing U.C.C. § 2-106(1) (2011); Kirby v. Chrysler Corp., 554 F. Supp. 743, 749-50 (D. Md. 1982); Cavalier Mobile Homes, Inc. v. Liberty Homes, Inc., 454 A.2d 367, 376 (Md. Ct. Spec. App. 1983)); see also Santa Fe Custom Shutters & Doors, Inc. v. Home Depot U.S.A., Inc., 113 P.3d 347, 358 (N.M. Ct. App. 2005) ("The facts that the contract imposed [on] SFCS a duty to maintain sufficient capacity to meet Home Depot's needs and imposed on Home Depot a duty to market SFCS's goods and services to Home Depot's customers does not take the contract out of Article 2.").

15. *Gruppo Essenziero Italiano, S.p.A.*, 2011 WL 3207555, at *3 (citing Amco Ukrservice v. Am. Meter Co., 312 F. Supp. 2d 681, 686-87 (E.D. Pa. 2004)).

16. *Id.*

17. *Id.* (citing CISG, *supra* note 1, art. 14(1)).

18. *Id.*

DISCLAIMING APPLICATION OF THE CISG

In *Cedar Petrochemicals, Inc. v. Dongbu Hannong Chemical Co.*,¹⁹ the U.S. District Court for the Southern District of New York considered whether the parties' agreement had displaced provisions of the CISG. Cedar Petrochemicals, Inc. ("Cedar"), a New York-based petrochemicals trader, alleged that Dongbu Hannong Chemical Company, Ltd. ("Dongbu"), a South Korean company in the same business, delivered non-conforming liquid phenol, in violation of written and oral contracts, and in contravention of its duties under the CISG.²⁰ On cross-motions for summary judgment, the parties put forward the following arguments: Dongbu argued that the parties' contract displaced the provisions of the CISG under which Cedar brought its action.²¹ Cedar countered that the phenol was corrupted prior to delivery, and Dongbu violated its obligations under the CISG.²² The court denied both motions.²³

The parties' contract required Dongbu to deliver a load of phenol to the Port of Ulsan, South Korea, where Cedar would take possession.²⁴ The delivery term was F.O.B. Ulsan, South Korea.²⁵ The contract provided for an independent inspection of the phenol that was to be binding on both parties.²⁶ Finally, it provided that the phenol's color specification was not to exceed ten Hazen units.²⁷ When the phenol arrived, multiple samples were drawn for testing.²⁸ One set was drawn for contemporaneous testing (the "First Set") and one was retained for later testing, should quality issues arise (the "Second Set").²⁹ The First Set was on-specification, and Cedar accepted the shipment.³⁰ However, when the phenol arrived at its destination, tests revealed that it was widely off-specification, at 500 Hazen units.³¹ This led to a test of the Second Set, which was also off-specification.³²

Cedar alleged breaches of two separate CISG articles. First, Cedar argued, Dongbu breached Article 35, which requires goods be fit for their ordinary purpose and any particular purpose "expressly or impliedly made known to the seller."³³ Second, it argued that Article 36 imposes liability on a seller for defects present before the risk transfers to the buyer, "even though the lack of conformity becomes apparent only after that time."³⁴ Dongbu countered by arguing

19. No. 06 Civ. 3972(LTS)(JCF), 2011 WL 4494602 (S.D.N.Y. Sept. 28, 2011).

20. *Id.* at *1.

21. *Id.*

22. *Id.*

23. *Id.*

24. *Id.*

25. *Id.*

26. *Id.*

27. *Id.* This is a scientific measure based on the Platinum-Cobalt Scale. *Id.*

28. *Id.* at *2, *5.

29. *Id.*

30. *Id.* at *2.

31. *Id.*

32. *Id.*

33. *Id.* (quoting CISG, *supra* note 1, art. 35).

34. *Id.* (quoting CISG, *supra* note 1, art. 36).

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that, because the terms of the contract had displaced the duties imposed by the CISG, it only had to provide phenol that was conforming at the time of delivery.³⁵

Dongbu's argument was based on three contractual terms: (1) the F.O.B. term, (2) the term providing for independent inspection, and (3) a merger clause.³⁶ The court correctly held that none of these clauses expressly disclaimed application of the CISG.³⁷ As to the F.O.B. term, the court reasoned that, because the CISG expressly incorporates Incoterms, and because F.O.B. is an Incoterm, an F.O.B. term does not displace the CISG.³⁸ Moreover, the court noted that F.O.B. is compatible with Article 36.³⁹ Article 36 confirms that the decisive question is which party bore the risk of loss when the injury occurred, and not when it manifested itself.⁴⁰

Dongbu did not provide an explanation for its second argument, and the court rejected it.⁴¹ Finally, Dongbu argued that the merger clause prevented Cedar from introducing two pieces of extrinsic evidence: (1) that the color specification was a material term because Dongbu knew that Cedar's downstream customer required phenol with a twenty Hazen maximum; and (2) that the ordinary trade usage of phenol would support the contract's Hazen requirement.⁴² The court rejected both contentions, noting that Article 8 "commands courts to consider extrinsic evidence that illuminates the parties' intent."⁴³ Moreover, Article 9, which permits the introduction of evidence of common international trade practices, would have allowed the introduction of evidence that Dongbu knew or should have known that, under international trade practices, phenol is unfit for ordinary usage if it degrades before reaching its final destination.⁴⁴ This is because a merger clause only covers the agreements and understandings of parties in regard to a particular contract, and not trade usages.⁴⁵ Therefore, the court denied Dongbu's summary judgment motion, noting Cedar could introduce extrinsic evidence concerning the parties' intent and trade usage.⁴⁶ The court, however, could have addressed the issues raised by Dongbu's motion more directly, noting that the parties did not explicitly opt out of the CISG through a well-drafted choice-of-law clause, and therefore the CISG applied.⁴⁷

35. *Id.*

36. *Id.* at *3.

37. *See id.*

38. *Id.* at *4. The International Chamber of Commerce periodically provides a glossary of international commerce terms (Incoterms) that parties frequently incorporate into their international sales contracts. *See id.* at *3.

39. *Id.* at *4.

40. *Id.*

41. *Id.*

42. *Id.* at *5.

43. *Id.*

44. *Id.*

45. *Id.*

46. *Id.*

47. *See, e.g., Asante Techs., Inc. v. PMC-Sierra, Inc.*, 164 F. Supp. 2d 1142, 1149–50 (N.D. Cal. 2001) ("Defendant asserts that merely choosing the law of a jurisdiction is insufficient to opt out of the CISG, absent express exclusion of the CISG. The Court finds that the particular choice of

The court also denied Cedar's summary judgment motion, but on purely factual grounds.⁴⁸ Cedar argued that the evidence conclusively established that the phenol was damaged prior to being loaded onto the ship at the Port of Ulsan.⁴⁹ Dongbu disputed this vigorously, presenting conflicting evidence and arguments.⁵⁰ Therefore, because neither party could conclusively establish when the phenol was damaged, such a determination was inappropriate on summary judgment.⁵¹

FORMATION AND RESERVATION UNDER THE CISG

Two recent cases addressed problems of contract formation and reservation that arose after the parties formed and executed a number of contracts.

*CSS Antenna, Inc. v. Amphenol-Tuchel Electronics, GmbH*⁵² is a classic "battle of the forms" case, decided by the U.S. District Court for the District of Maryland. CSS Antenna, Inc. ("CSS"), a Maryland corporation, and Amphenol-Tuchel Electronics, GmbH ("A.T.E."), a German corporation, entered into a series of contracts for A.T.E. to supply CSS with cables and accessories for CSS's cellular towers.⁵³ In late 2004, CSS began sending successive purchase orders to A.T.E. for cell-tower components.⁵⁴ A.T.E. would respond to each purchase order with a confirmation form sent to CSS's billing department.⁵⁵ The parties would then perform.⁵⁶ In April 2005, the parties entered into an Inventory and Supply Agreement.⁵⁷ Despite the new agreement, the parties continued to conduct business under the old pattern: purchase order, purchase confirmation, and performance.⁵⁸

When A.T.E.'s components began malfunctioning, CSS filed suit in the U.S. District Court for the District of Maryland.⁵⁹ CSS alleged breach of various contractual and implied warranties.⁶⁰ A.T.E. moved to dismiss, arguing that a forum selection clause, contained in its General Conditions for the Supply of Products and Services of the Electrical and Electronics Industry (the "General Conditions"), required the dispute to be brought in the district of A.T.E.'s place of

law provisions in the 'Terms and Conditions' of both parties are inadequate to effectuate an opt out of the CISG."); Thomas J. Drago & Alan F. Zoccolillo, *Be Explicit: Drafting Choice of Law Clauses in International Sale of Goods Contracts*, METROPOLITAN CORP. COUNS., May 2002, at 9, available at <http://cisgw3.law.pace.edu/cisg/biblio/zoccolillo1.html#18>.

48. *Cedar Petrochemicals*, 2011 WL 4494602, at *5-6.

49. *Id.* at *5.

50. *Id.*

51. *Id.* at *6.

52. 764 F. Supp. 2d 745 (D. Md. 2011).

53. *Id.* at 747-48.

54. *Id.* at 747.

55. *Id.* at 747-48.

56. *See id.* at 748.

57. *Id.*

58. *Id.*

59. *Id.*

60. *Id.* at 747-48.

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business.⁶¹ Although these General Conditions were not included in the purchase confirmations that A.T.E. sent CSS, A.T.E. argued that they were still part of the contract because the purchase confirmations made general reference to them.⁶² CSS countered that it did not know about the General Conditions and never agreed to any of the terms therein, including the forum selection clause.⁶³

The court first laid out the general CISG principles: Under the CISG, “[a] reply to an offer which purports to be an acceptance but contains additions, limitations or other modifications is a rejection of the offer and constitutes a counter-offer.”⁶⁴ If, however, the additional or different terms in the purported acceptance do not materially alter the offer, and if the offeror fails to object without undue delay, a contract is formed that includes the additional or different terms.⁶⁵ The CISG provides examples of terms that materially alter an offer: price, payment, quality and quantity, place and time of delivery, extent of one party’s liability, and the *settlement of disputes*.⁶⁶

The court held that A.T.E.’s purchase confirmation materially altered CSS’s purchase order.⁶⁷ This is because it referenced the General Conditions, which contained the forum selection clause, a term concerning the “settlement of disputes.”⁶⁸ Thus, the purchase confirmation became a counteroffer. A.T.E. argued that CSS accepted its counteroffer, and thus its forum selection clause, by performing under the contract.⁶⁹ CSS cited two cases⁷⁰ for the proposition that the forum selection clause did not become part of the contract because CSS did not affirmatively assent to it.⁷¹ Both cases had similar circumstances—a purchase order followed by a purchase confirmation with additional or different terms.⁷² The court distinguished those two cases from the present case, however, because in those two cases, prior to the purchase order, the parties had formed an oral contract.⁷³ Thus, when the sellers sent a purchase confirmation with additional or different terms, it was an offer to modify the oral contract, which under the CISG requires the affirmative assent of the other party.⁷⁴ In this case, A.T.E.’s purchase order was deemed to be a counteroffer, not a proposal to modify.⁷⁵ However, the court added, “[w]hether the language in ATE’s pur-

61. *Id.* at 751.

62. *Id.* at 752.

63. *Id.*

64. *Id.* (quoting CISG, *supra* note 1, art. 19(1)).

65. *Id.* (citing CISG, *supra* note 1, art. 19(2)).

66. *Id.* (citing CISG, *supra* note 1, art. 19(3)).

67. *Id.*

68. *Id.*

69. *Id.* at 752–53.

70. *Chateau des Charmes Wines Ltd. v. Sabaté USA Inc.*, 328 F.3d 528, 531 (9th Cir. 2003); *Solae, LLC v. Hershey Can., Inc.*, 557 F. Supp. 2d 452, 457–58 (D. Del. 2008).

71. *CSS Antenna*, 764 F. Supp. 2d at 753.

72. *Id.*

73. *Id.*

74. *Id.* (citing CISG, *supra* note 1, art. 29(1)).

75. *Id.*

chase confirmation form was sufficient to put CSS on notice that ATE intended the General Conditions to apply . . . is a separate question.”⁷⁶

Ultimately, under the CISG, whether the forum selection clause was part of the contract hinged on the parties’ intent. Article 8 states: “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.”⁷⁷ A party’s statements are to be interpreted according to the understanding of a reasonable person, and “[i]n determining the intent of a party or the understanding a reasonable person would have had, due consideration is 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.”⁷⁸

Two facts convinced the court that CSS did not know, and could not have known, that A.T.E. intended the General Conditions to apply to the contract. First, the purchase confirmation merely stated: “may we point out” that the General Conditions also applied.⁷⁹ This was ambiguous at best.⁸⁰ A more explicit reference to the General Conditions was required to provide CSS with notice that A.T.E. intended for them to be included.⁸¹ Second, the court held that CSS did not have actual knowledge of the General Conditions.⁸² This is because the purchase confirmation was sent to CSS’s billing department, where there was no one with the authority to enter into, modify, or otherwise accept contracts.⁸³ Therefore, because CSS did not know, and could not have known, of A.T.E.’s intent to have the General Conditions become a part of the contract, they were not included, and the forum selection clause could not prevent CSS from filing suit in the District of Maryland.⁸⁴

Hanwha Corp. v. Cedar Petrochemicals, Inc.,⁸⁵ decided by the U.S. District Court for the Southern District of New York, is similar to *CSS Antenna, Inc.* in that numerous, distinct contracts were entered into with purchase orders and confirmations. From January 2003 to April 2009, Cedar Petrochemicals, Inc. (“Cedar”), a New York corporation, and Hanwha Corporation (“Hanwha”), a Korean corporation, entered into twenty discrete transactions for the purchase and sale of various petrochemicals.⁸⁶ First, Hanwha would submit a bid to Cedar for a given petrochemical at a given quantity and price.⁸⁷ Cedar would accept, forming what the parties said was a “firm bid.”⁸⁸ Cedar would then

76. *Id.*

77. *Id.* (quoting CISG, *supra* note 1, art. 8(1)).

78. *Id.* (quoting CISG, *supra* note 1, art. 8(2)–(3)).

79. *Id.* at 754.

80. *Id.*

81. *Id.*

82. *Id.*

83. *Id.*

84. *Id.*

85. 760 F. Supp. 2d 426 (S.D.N.Y. 2011).

86. *Id.* at 428.

87. *Id.*

88. *Id.*

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send various contract documents to finalize the terms of the contract.⁸⁹ Those documents always contained two items: (1) a “contract sheet” that embodied the terms of the “firm bid” and a choice of law to govern the contract; and (2) a set of “standard” terms and conditions, incorporated by reference into the contract sheet.⁹⁰ The choice of law was always New York law, the U.C.C., and Incoterms 2000.⁹¹ Hanwha would usually sign and return those documents.⁹² On three occasions, Hanwha modified the choice of law before sending the documents back.⁹³ Cedar did not object to any of those modifications.⁹⁴

What precipitated the litigation was an attempt at a twenty-first contract. Hanwha sent a bid that Cedar accepted, e-mailing its usual contract documents to Hanwha.⁹⁵ Cedar’s documents, as usual, stated that New York law, the U.C.C., and Incoterms 2000 governed the contract.⁹⁶ Hanwha responded by signing the documents, albeit with a revision that replaced Cedar’s choice of law with Singapore law and Incoterms 2000.⁹⁷ Hanwha then sent the signed, modified documents via e-mail, expressly stating that no contract would “enter into force” unless Cedar countersigned Hanwha’s revised contract.⁹⁸ Cedar refused to accept the revisions, and insisted that a contract would be formed only if Hanwha accepted Cedar’s original terms.⁹⁹ Neither party relented, and Cedar never delivered the petrochemicals.¹⁰⁰ Hanwha sued for breach of contract.¹⁰¹

The first issue requiring a decision was the choice of law that governed the dispute. The court held that the CISG governed because, while each party attempted to contract out of the CISG, the parties could not agree on the alternative applicable law.¹⁰² Additionally, the parties could not opt out of the CISG without explicitly indicating that the CISG did not apply.¹⁰³

The next issue was whether Hanwha made a binding offer when it sent its initial bid to Cedar. The court held that the bid was a “sufficiently definite” offer under CISG Article 14(1) because it contained details regarding a specific product, price, and quantity.¹⁰⁴ Despite this binding offer, no contract was ever formed because Article 14 requires that the parties intend to be bound, and Hanwha did not intend to be bound by the “firm bid.”¹⁰⁵ In the course of their deal-

89. *Id.*

90. *Id.*

91. *Id.*

92. *Id.*

93. *Id.*

94. *Id.* at 428–29.

95. *Id.* at 429.

96. *Id.*

97. *Id.*

98. *Id.*

99. *Id.*

100. *Id.*

101. *Id.* at 429–30.

102. *Id.* at 431.

103. *See id.*; *see also supra* note 47.

104. *Hanwha Corp.*, 760 F. Supp. 2d at 432.

105. *Id.*

ings, neither party intended to be bound until the contract documents Cedar sent to Hanwha were finalized.¹⁰⁶

Because the parties did not intend to be bound by the bid and bid acceptance, the court next discussed the parties' exchanges relating to the final contract documents.¹⁰⁷ Here, the court held that the parties never intended to form a contract.¹⁰⁸ This is because Hanwha's response, striking Cedar's choice of law in favor of its own, expressly stated that Cedar had to assent affirmatively in order to form a contract.¹⁰⁹ Plus, Cedar rejected Hanwha's change outright, further indicating that neither party intended to be bound.¹¹⁰ Therefore, Cedar was not in breach of contract when it chose not to deliver the petrochemicals.¹¹¹

REMEDIES

In the past year, remedies cases under the CISG involved damages for contract avoidance, a limitations-of-remedies clause, lost profits, recovery of prejudgment interest, and unjust enrichment.

CONTRACT AVOIDANCE

In *Semi-Materials Co. v. MEMC Electronic Materials, Inc.*,¹¹² the U.S. District Court for the Eastern District of Missouri interpreted CISG damages provisions. Semi-Materials Co., Ltd. ("Semi-Materials") alleged that certain actions of MEMC Electronic Materials, Inc. and MEMC Pasadena, Inc. (collectively, "MEMC") constituted fraud and breach of contract, for which compensatory and punitive damages were owed.¹¹³ Semi-Materials sought to introduce expert testimony for calculating damages.¹¹⁴ MEMC moved to exclude the testimony, arguing that it was legally impermissible, based on the expert's application of CISG Article 76 instead of CISG Article 74.¹¹⁵

Under the CISG, "[i]f the seller fails to perform any of his obligations under the contract or this Convention, the buyer may . . . claim damages as provided in articles 74 to 77."¹¹⁶ Article 74 provides for the measure of damages for breach of contract:

Damages for breach of contract by one party consist of a sum equal to the loss, including loss of profit, suffered by the other party as a consequence of the breach. Such damages may not exceed the loss which the party in breach foresaw or

106. *Id.*

107. *See id.*

108. *Id.*

109. *Id.* at 433.

110. *Id.*

111. *Id.*

112. No. 4:06CV1426 FRB, 2011 WL 134078 (E.D. Mo. Jan. 10, 2011).

113. *Id.* at *1.

114. *Id.*

115. *Id.* at *2.

116. *Id.* (quoting CISG, *supra* note 1, art. 45(1)(b)).

ought to have foreseen at the time of the conclusion of the contract, in the light of the facts and matters of which he then knew or ought to have known, as a possible consequence of the breach of contract.¹¹⁷

Alternatively, Articles 75 and 76 deal with the measure of damages when a contract is avoided.¹¹⁸ Which article applies often depends on whether the non-breaching party covers.¹¹⁹ Article 75 provides:

If the contract is avoided and if, in a reasonable manner and within a reasonable time after avoidance, the buyer has bought goods in replacement or the seller has resold the goods, the party claiming damages may recover the difference between the contract price and the price in the substitute transaction as well as any further damages recoverable under article 74.¹²⁰

By contrast Article 76 provides:

If the contract is avoided and there is a current price for the goods, the party claiming damages may, if he has not made a purchase or resale under article 75, recover the difference between the price fixed by the contract and the current price at the time of avoidance as well as any further damages recoverable under article 74.¹²¹

The court stated that, if only a breach of contract is alleged, Article 74 is the sole measure of damages.¹²² But where there is alleged avoidance, the CISG allows for recovery under Articles 75 and 76, "as well as any further damages recoverable under article 74."¹²³ Semi-Materials alleged avoidance of the contract by MEMC.¹²⁴ Therefore, the court held that its expert should be allowed to present evidence to support damages under both Article 74 and Article 76.¹²⁵

LIMITATION-OF-REMEDIES CLAUSES

*MSS, Inc. v. Maser Corp.*¹²⁶ concerned a limitation-of-remedies clause in a contract between MSS, Inc. ("MSS"), a Tennessee corporation, and Maser Corp. ("Maser"), a Delaware subsidiary of a Canadian corporation.¹²⁷ MSS sued Maser for breach of contract.¹²⁸ Maser counterclaimed for breach of contract, seeking consequential damages in the form of lost profits.¹²⁹ MSS responded to the counterclaim with a Fed. R. Civ. P. 12(b)(6) motion on the issue of con-

117. *Id.* (quoting CISG, *supra* note 1, art. 74).

118. *Id.* at *3.

119. *Id.*

120. *Id.* (quoting CISG, *supra* note 1, art. 75).

121. *Id.* (quoting CISG, *supra* note 1, art. 76(1)).

122. *Id.* (citing *Macromex SRL v. Globex Int'l, Inc.*, No. 08 Civ. 114 (SAS), 2008 WL 1752530, at *4 (S.D.N.Y. Apr. 16, 2008)).

123. *Id.* (quoting CISG, *supra* note 1, arts. 75, 76).

124. *Id.*

125. *Id.* at *4.

126. No. 3:09-cv-00601, 2011 WL 2938424 (M.D. Tenn. July 18, 2011).

127. *Id.* at *1. The clause provided that MSS would not be responsible for consequential damages arising out of the use or performance of recycle sorting machines that it sold to Maser. *Id.*

128. *Id.* at *2.

129. *Id.*

sequential damages.¹³⁰ At the crux of its Rule 12(b)(6) argument, MSS argued that the parties' damages clause prohibited recovery of consequential damages.¹³¹

The parties vigorously disputed whether the CISG or U.S. law applied.¹³² The U.S. District Court for the Middle District of Tennessee found the CISG inapplicable because the CISG "governs only the formation of the contract of sale and the rights and obligations of the seller and buyer arising from such a contract."¹³³ The "validity of the contract or of any of its provisions" is specifically excluded from the CISG.¹³⁴ Thus, the court held that the validity and enforceability of contract provisions, such as damages limitations, is decided under domestic law.¹³⁵ The court held that the U.C.C. allows parties to prohibit recovery of consequential damages.¹³⁶

LOST PROFITS

In *Al Hewar Environmental & Public Health Establishment v. Southeast Ranch, LLC*,¹³⁷ the U.S. District Court for the Southern District of Florida addressed a lost profits claim. Al Hewar Environmental and Public Health Establishment ("Al Hewar") was a United Arab Emirates entity that supplied the U.A.E. with agricultural products.¹³⁸ Southeast Ranch, LLC ("Southeast") was a U.S. ranching and farming entity.¹³⁹ Al Hewar contracted to purchase 5,000 tons of hay from Southeast.¹⁴⁰ At the same time, it contracted to sell the hay to the government of Abu Dubai.¹⁴¹ The Abu Dubai contract required Al Hewar to arrange a performance bond.¹⁴²

Southeast failed to perform at all, causing Al Hewar to breach its contract with Abu Dubai.¹⁴³ Al Hewar thus lost its performance bond and the profits on the Abu Dubai contract.¹⁴⁴ It sued Southeast to recover for both.¹⁴⁵ The court looked to Article 74 of the CISG, which states:

130. *Id.*

131. *Id.* at *3.

132. *Id.*

133. *Id.* (quoting CISG, *supra* note 1, art. 4).

134. *Id.* (quoting CISG, *supra* note 1, art. 4); see generally Jack Graves, *Penalty Clauses and the CISG*, 30 J.L. & COM. (forthcoming 2012) (discussing that the validity of liquidated damages clauses is not within the scope of the CISG).

135. *Maser Corp.*, 2011 WL 2938424, at *3.

136. *Id.* at *6-7. Under the U.C.C., consequential damages "may be limited or excluded unless the limitation or exclusion is unconscionable." *Id.* at *6 (quoting U.C.C. § 2-719(3) (2011)). Maser was unable to convince the court that this limitation was unconscionable under the U.C.C. *Id.* at *6-7. MSS's Fed. R. Civ. P. 12(b)(6) motion was therefore granted. *Id.* at *7.

137. No. 10-80851-CV, 2011 WL 7191744 (S.D. Fla. Nov. 8, 2011).

138. *Id.* at *1.

139. *Id.*

140. *Id.*

141. *Id.*

142. *Id.*

143. *Id.*

144. *Id.*

145. *Id.*

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Damages for breach of contract by one party consist of a sum equal to the loss, including loss of profit, suffered by the other party as a consequence of the breach. Such damages may not exceed the loss which the party in breach foresaw or ought to have foreseen at the time of the conclusion of the contract, in the light of the facts and matters of which he then knew or ought to have known, as a possible consequence of the breach of the contract.¹⁴⁶

The court held that, at the time of contract formation, Southeast should have foreseen that Al Hewar would resell the hay at a profit.¹⁴⁷ Thus, an award of Al Hewar's lost profits was appropriate. It also held (but without explanation) that a performance bond on the resale contract was foreseeable, and Al Hewar could recover for the loss of the performance bond as well.¹⁴⁸

PREJUDGMENT INTEREST

In *ECEM European Chemical Marketing, B.V. v. Purolite Co.*,¹⁴⁹ the U.S. Court of Appeals for the Third Circuit upheld an award of prejudgment interest in a CISG case.¹⁵⁰ *ECEM European Chemical Marketing, B.V.* argued that Article 78 of the CISG prevented an award of prejudgment interest or, alternatively, that Pennsylvania law precluded an award under the circumstances.¹⁵¹ The Purolite Company countered that the CISG does not expressly preclude prejudgment interest and application of Pennsylvania law allowed for such an award.¹⁵² Ultimately, it did not matter whether Pennsylvania law or the CISG applied. If Pennsylvania law applied, it provided for prejudgment interest.¹⁵³ If the CISG applied, then the dispute became a federal question.¹⁵⁴ In such federal cases, district courts are allowed broad discretion in determining whether prejudgment interest should be awarded.¹⁵⁵ Thus, the court held that prejudgment interest was available.¹⁵⁶

UNJUST ENRICHMENT

In *Semi-Materials Co. v. MEMC Electronic Materials, Inc.*,¹⁵⁷ the U.S. District Court for the Eastern District of Missouri dealt with the applicability of equitable

146. *Id.* (quoting CISG, *supra* note 1, art. 74).

147. *Id.* at *2.

148. *Id.* at *2-3. The court also stated in dicta that the damages would have been the same under Florida law (i.e., the U.C.C.). *Id.* at *3.

149. 451 F. App'x 73 (3d Cir. 2011).

150. *Cf.* Gregory M. Duhl, *International Sale of Goods*, 65 *BUS. LAW.* 1313, 1323 (2010) ("Courts have split over whether parties can earn prejudgment interest from the time of an arbitral award to the time of judgment under the CISG, but it is undisputed that the CISG provides that in the event of non-payment or delayed payment in a breach of contract action, the other party is entitled to prejudgment interest." (citations omitted)).

151. *ECEM*, 451 F. App'x at 78-79.

152. *Id.* at 79.

153. *Id.* (citing *Fernandez v. Levin*, 548 A.2d 1191, 1193 (Pa. 1988)).

154. *Id.*

155. *Id.* (citing *Ambromovage v. United Mine Workers of Am.*, 726 F.2d 972, 981-82 (3d Cir. 1984)).

156. *Id.* at 80.

157. No. 4:06CV1426 FRB, 2011 WL 65919 (E.D. Mo. Jan. 10, 2011).

relief in CISG breach of contract actions. Semi-Materials Company, Ltd. (“Semi-Materials”) sued MEMC Electronic Materials, Inc. (“MEMC”) for, *inter alia*, restitution based on unjust enrichment.¹⁵⁸ MEMC moved for summary judgment, arguing equitable relief was not available under the CISG for breach of contract.¹⁵⁹ The court agreed, stating that the CISG provides exclusive remedies for breach of contract.¹⁶⁰ Thus, where the action is for breach of contract, equitable relief is not available.¹⁶¹ However, the court held that, because MEMC affirmatively denied the existence of at least three of the contracts on which Semi-Materials sued, the CISG did not preempt the unjust enrichment claims in relation to those three “contracts.”¹⁶² Therefore, the court denied the defendant’s summary judgment motion.¹⁶³

158. *Id.* at *1.

159. *Id.* at *3.

160. *Id.*

161. *Id.* (citing *Electrocraft Ark., Inc. v. Super Elec. Motors, Ltd.*, No. 4:09CV00318 SWW, 2009 WL 5181854, at *7 (E.D. Ark. Dec. 23, 2009)).

162. *Id.*

163. *Id.*

