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Abstract

This is a survey of key cases decided by U.S. courts in 2009 interpreting the United Nations Convention on Contracts for the International Sale of Goods ("CISG"). Courts interpreted the scope, formation, warranty, avoidance, and remedies provisions of the CISG.

Keywords

CISG, Contract Avoidance, Contract Formation, Contracts, Forum Non-Conveniens, International Sale of Goods, Warranties

Disciplines

International Trade Law

International Sale of Goods

By Gregory M. Duhl*

INTRODUCTION

In 2009, U.S. courts analyzed the scope, formation, warranty, avoidance, 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 arising under the Uniform Commercial Code (“U.C.C.”), one court reminded us that U.S. courts are comfortable applying the CISG.²

U.S. COURTS APPLYING THE CISG

SCOPE

Two U.S. courts split in 2009 over whether Hong Kong is a signatory to the CISG. In a breach of contract action brought by a Hong Kong corporation against two Georgia corporations and two of their individual owners and officers, the court in *Innotex Precision Ltd. v. Horei Image Products, Inc.*³ found that the CISG did not apply to the parties’ dispute because Hong Kong is not a signatory to the CISG.⁴ While the court granted the defendants’ motion to dismiss the plaintiff’s claims arising under the CISG, the court denied the defendants’ motion to the extent that the plaintiff could seek relief under “other applicable law.”⁵

As discussed by the *Innotex Precision* court, the only circumstance in which the CISG can apply in the United States is if the contracting parties are from different Contracting States,⁶ because the United States has not adopted CISG article 1(1)(b),⁷ which would make the CISG applicable to “parties from non-Contracting States if

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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. See *infra* notes 92–93 and accompanying text.

3. 679 F. Supp. 2d 1356 (N.D. Ga. 2009).

4. *Id.* at 1359.

5. *Id.* at 1359–60.

6. See *id.* at 1358; see also CISG, *supra* note 1, art. 1(1)(a).

7. 132 CONG. REC. S15882-04 (daily ed. Oct. 10, 1986). The U.S. ratification was accompanied by a declaration that the United States is not bound by article 1(1)(b).

conflict-of-law rules lead to the application of the law of a Contracting State.”⁸ In 1997, Hong Kong became a Special Administrative Region of the People’s Republic of China, and China is a Contracting State. Article 93(1) of the CISG “allows a Contracting State consisting of more than one territorial unit to ‘declare that this Convention is to extend to all its territorial units or only to one . . . of them.’”⁹ While China has not declared under article 93 that the CISG does *not* apply to Hong Kong, the CISG was not included among the treaties to which China was a party that should apply to Hong Kong in a written declaration that China submitted to the Secretary General of the United Nations in 1997.¹⁰ Based on this omission, the *Innotex Precision* court concluded “that the Chinese government did not intend to extend the CISG to Hong Kong,” that Hong Kong was not a Contracting State, and thus the CISG did not apply to the parties’ dispute.¹¹

However, another court decided differently in 2009. In *Electrocraft Arkansas, Inc. v. Super Electric Motors, Ltd.*,¹² the court stated (without giving any rationale) that Hong Kong was a signatory to the CISG.¹³ The seller-defendant had its manufacturing facilities in China, but was organized under the laws of Hong Kong; the plaintiff-buyer was a Delaware corporation doing business in Arkansas. The court failed to discuss a key issue: the location of the defendant’s principal place of business. If it was in China, the CISG did in fact govern, because the parties had their places of business in different Contracting States; if it was in Hong Kong, then the CISG should not have governed at all if Hong Kong was not a Contracting State, consistent with the sound reasoning of the *Innotex Precision* court.¹⁴ Instead, the *Electrocraft Arkansas* court simply stated, “[T]he People’s [sic] Republic of China ratified the CISG in 1986 and Hong Kong is a Contracting State under the CISG.”¹⁵ Subsequent to this decision, the court learned of the holding in *Innotex Precision* and invited the parties to brief the issue in connection with summary judgment motions before the court.¹⁶

The court in *Electrocraft Arkansas*, after finding that the CISG applied to the parties’ dispute, also concluded that the breach of contract and warranty claims were rooted in the CISG and, therefore, preempted breach of contract and warranty claims under the U.C.C.¹⁷ The court noted that it was a much more difficult

8. *Innotex Precision*, 679 F. Supp. 2d at 1358 (citing *Impuls I.D. Internacional, S.L. v. Psion-Teklogix Inc.*, 234 F. Supp. 2d 1267, 1272 (S.D. Fla. 2002)).

9. *Id.* (quoting CISG, *supra* note 1, art. 93(1)).

10. *Id.* at 1358–59.

11. *Id.* at 1359. The court found that this conclusion was consistent with the position of the Hong Kong government, the Supreme Court of France (the only foreign court to address this issue), as well as the majority of academic scholarship on this issue. *See id.* at 1358–59.

12. No. 4:09cv00318 SWW, 2009 WL 5181854 (E.D. Ark. Dec. 23, 2009).

13. *Id.* at *3.

14. *See supra* notes 9–11 and accompanying text.

15. *Electrocraft Ark.*, 2009 WL 5181854, at *3.

16. *Electrocraft Ark., Inc. v. Super Elec. Motors, Ltd.*, No. 4:09cv00318 SWW, 2010 WL 1381950, at *2 (E.D. Ark. Apr. 2, 2010).

17. *Electrocraft Ark.*, 2009 WL 5181854, at *4.

question whether the buyer's negligence and strict liability claims were preempted by the CISG.¹⁸ The critical question was whether the plaintiff was suing upon a right based in tort law for breach of a non-contractual duty or whether the plaintiff's claim was simply a "breach-of-contract claim in masquerade."¹⁹ The court concluded that the plaintiff's strict liability and negligence claims were preempted by the CISG because they arose from the same facts as the plaintiff's breach of contract and warranty claims: the defendant's breach of its duty to provide conforming goods and the plaintiff's damages arising from that breach.²⁰ Apparently, following the court's reasoning, if the claim was for negligent misrepresentation and had related to the pre-contractual negotiations of the parties, the claim would not have been preempted by the CISG.²¹ Further, the court found that the plaintiff's unjust enrichment and restitution claims were also preempted by the CISG, especially as restitution is a remedy under the CISG.²²

On the other hand, the court found that the plaintiff's claim under the Arkansas Deceptive Trade Practices Act was not preempted by the CISG, "as the CISG does not preempt claims for 'misrepresentation, fraud, betrayal and intentional harm to economic interests.'"²³ The court additionally found that the CISG did not preempt the plaintiff's tortious interference with business expectancy claim because "a tort claim alleging intentional harm to economic interests" is not preempted by the CISG, "which only concerns the sales of goods between merchants in different countries."²⁴ The court got it right; allegations of intentional torts are generally not preempted by the CISG.

Another court also interpreted the scope of the CISG in 2009. In *Construcciones E Instalaciones Electromecanicas S.A. v. Hi-Vac Corp.*,²⁵ the court, upon stipulation by the parties, dismissed the buyer's state law breach of contract and breach of warranty claims arising out of the contract between the Uruguayan buyer and the American seller because the claims were preempted by the CISG.²⁶ The buyer's claims for negligent and intentional misrepresentation were not preempted, but the court found in the seller's favor on those claims on summary judgment because the buyer could not provide evidence that it justifiably relied on the pre-contractual misrepresentations.²⁷ As to the buyer's claims regarding the

18. *Id.* at *5.

19. *Id.* (quoting defendant's brief).

20. *See id.* at *6.

21. *See infra* note 23 and accompanying text.

22. *Electrocraft Ark.*, 2009 WL 5181854, at *7. The CISG provides, "A party who has performed the contract either wholly or in part may claim restitution from the other party of whatever the first party has supplied or paid under the contract. If both parties are bound to make restitution, they must do so concurrently." CISG, *supra* note 1, art. 81(2).

23. *Electrocraft Ark.*, 2009 WL 5181854, at *7 (citation omitted).

24. *Id.* at *8 (citing *Viva Vino Import Corp. v. Farnese Vini s.r.l.*, Civ. A. No. 99-6384, 2000 WL 1224903, at *1 (E.D. Pa. Aug. 29, 2000); Peter Schlechtriem, *The Borderland of Tort and Contract: Opening a New Frontier?*, 21 CORNELL INT'L L.J. 467, 474 (1988)).

25. No. C2-07-234, 2009 WL 2252314 (S.D. Ohio July 24, 2009).

26. *Id.* at *1 & n.1, *2 & n.3.

27. *See id.* at *6.

post-delivery misrepresentations, the court held that they did not arise separately from the buyer's causes of action for breach of contract, and thus were also preempted by the CISG.²⁸

It is well-established that the CISG does not govern the validity of a contract provision. This was further demonstrated in *Rice Corp. v. Grain Board of Iraq*,²⁹ where the defendant moved to dismiss the plaintiff's complaint for improper venue because there was a dispute resolution clause in the parties' contract designating Iraq as the only forum for litigation. The plaintiff argued that the clause was unreasonable and unenforceable, and also that the contract was subject to the CISG. In finding the clause enforceable, the court found that the CISG was not relevant to the dispute.³⁰ The court correctly noted that the CISG "concerns the formation of contracts and does not explicitly address 'the validity of the contract or any of its provisions.'"³¹

CONTRACT FORMATION

The enforceability of a forum selection clause under the CISG also arose in the contract formation context. In *Golden Valley Grape Juice & Wine, LLC v. Centrisys Corp.*,³² the court acknowledged that "[h]ow a contract is 'formed' under the applicable Uniform Commercial Code is different than under the [CISG]."³³ The defendant, Centrisys Corp. ("Centrisys"), and third-party defendant, Separator Technology Solutions PTY Ltd. ("Separator"), disputed whether they had agreed to a forum selection clause requiring litigation of their dispute in Australia. The court was correct that international non-consumer sales contracts, where the parties have places of business in different countries that are both signatories to the CISG, are governed by the CISG.³⁴ In this case, Separator was an Australian

28. *Id.*

29. No. 2:06-cv-01516, 2009 WL 3489916 (E.D. Cal. Oct. 26, 2009).

30. *Id.* at *3.

31. *Id.* (quoting CISG, *supra* note 1, art. 4(a)). In another case involving the enforceability of a forum selection clause in which the court referenced the CISG, the court did not find persuasive the plaintiff's argument that the forum selection clause was written in a foreign language. The court stated:

We find it nothing short of astounding that an individual, purportedly experienced in commercial matters, would sign a contract in a foreign language and expect not to be bound simply because he could not comprehend its terms. We find nothing in the CISG that might counsel this type of reckless behavior and nothing that signals any retreat from the proposition that parties who sign contracts will be bound by them regardless of whether they have read them or understood them.

Israeli v. Dott. Gallina S.R.L., 632 F Supp. 2d 866, 871 (W.D. Wis. 2009) (quoting *MCC-Marble Ceramic Ctr., Inc. v. Ceramica Nuova d'Agostino*, 144 F.3d 1384, 1387 n.9 (11th Cir. 1998)).

32. No. CV F 09-1424 LJO GSA, 2009 WL 4828743 (E.D. Cal. Dec. 9, 2009).

33. *Id.* at *10.

34. *See id.* The CISG states, "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; or (b) when the rules of private international law lead to the application of the law of a Contracting State." CISG, *supra* note 1, art. 1.

company and Centrisys was an American company. However, because the parties did not indicate in their briefs whether the CISG or the U.C.C. applied, the court continued Centrisys's motion for change of venue and asked for supplemental briefing on that issue as well as on whether the forum selection clause was part of their contract under the applicable body of law.³⁵ Following the supplemental briefing, the court determined that the CISG governed,³⁶ that the forum selection clause was part of the contract,³⁷ and rejected recognized policy arguments for not enforcing the clause.³⁸ The court granted Separator's motion to dismiss based on the forum selection clause.³⁹

The court in *Miami Valley Paper, LLC v. Lebbing Engineering & Consulting GmbH*⁴⁰ provided a good reminder of the three differences between the U.C.C. and the CISG as to contract formation: (i) the CISG applies the mirror-image rule to terms in the acceptance that "materially alter" the terms of the offer, and the U.C.C. does not;⁴¹ (ii) the CISG does not have a statute of frauds;⁴² and (iii) the CISG does not have a parol evidence rule, but allows the court "to consider statements or conduct of a contracting party to establish, modify, or alter the terms of a contract."⁴³ The CISG governed the contract in this case between the American plaintiff-buyer and the German defendant-seller of a paper winding machine ("winder").

The buyer argued that the seller was in breach of the contract because the parties' writings established that the winder the buyer purchased should have been simplex and shaftless, when in fact the winder received was duplex and shafted. The buyer also argued that pre-contractual discussions between the parties were not relevant to the actual terms of the contract. The court denied the buyer's motion for summary judgment on this breach of contract issue. First, although the buyer argued that its purchase order and the seller's subsequent correspondence

35. *Golden Valley Grape Juice*, 2009 WL 4828743, at *10–11.

36. *Golden Valley Grape Juice & Wine, LLC v. Centrisys Corp.*, No. CV F 09-1424 LJO GSA, 2010 WL 347897, at *3 (E.D. Cal. Jan. 22, 2010) (the parties agreed that the CISG governed).

37. *Id.* at *4.

38. *Id.* at *6.

39. *Id.* at *8.

40. No. 1:05-CV-00702, 2009 WL 818618 (S.D. Ohio Mar. 26, 2009).

41. *Id.* at *4 (citing CISG, *supra* note 1, art. 19). Article 19 states:

- (1) 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.
- (2) However, a reply to an offer which purports to be an acceptance but contains additional or different terms which do not materially alter the terms of the offer constitutes an acceptance, unless the offeror, without undue delay, objects orally to the discrepancy or dispatches a notice to that effect. If he does not so object, the terms of the contract are the terms of the offer with the modifications contained in the acceptance.
- (3) Additional or different terms relating, among other things, to the price, payment, quality and quantity of the goods, place and time of delivery, extent of one party's liability to the other or the settlement of disputes are considered to alter the terms of the offer materially.

CISG, *supra* note 1, art. 19.

42. *Miami Valley Paper*, 2009 WL 818618, at *5 (citing CISG, *supra* note 1, art. 11).

43. *Id.* (citing CISG, *supra* note 1, art. 8(2)).

formed a contract,⁴⁴ the seller put forward a persuasive argument that, under the mirror-image rule, each of the documents modified earlier ones and were therefore rejections under the CISG.⁴⁵ The court found that witness testimony could be relevant to determining the terms of a contract under both articles 8 and 11 of the CISG, where the testimony of the parties did not clarify the written terms, but “set[] forth conflicting allegations,” i.e., that both parties knew the winder purchased was to be shafted and duplex.⁴⁶ Thus, the witness testimony in this case “present[ed] issues of fact which must be determined at trial,” and the court denied the buyer’s motion for summary judgment on the contract formation issue under the CISG.⁴⁷

WARRANTIES

For a buyer to recover for breach of an implied warranty under the CISG, the buyer must show both that the defect existed at the time the buyer received the goods and that the defect was the proximate cause of the buyer’s damages.⁴⁸ In *Barbara Berry, S.A. de C.V. v. Ken M. Spooner Farms, Inc.*,⁴⁹ because the plaintiff-buyer, Barbara Berry, S.A. de C.V. (“Berry”), could show neither, the court granted summary judgment in favor of the defendant-seller, Ken M. Spooner Farms, Inc. (“Spooner Farms”), on Berry’s breach of implied warranty claim.

In 2003, Spooner Farms sold 3,150 pounds of certified root stock for commercial production of raspberries to Berry, a grower in Mexico. Berry intended to use this root to plant seventy-four acres, but because the stock purchased provided only enough root to plant eleven acres, Berry propagated the root stock using a method known as “etiolation.” Berry argued that propagating the root stock was “industry standard” because the process was commonly used in Mexico. The propagated root stock produced plants with fruit that Berry asserted was “malformed and crumbly.”⁵⁰

In response to Berry’s implied warranty claim, Spooner Farms moved for summary judgment, asserting that Berry did not use its root stock to produce the

44. The buyer argued in its reply in support of its motion for summary judgment that the contract was formed on June 23, 2003, when it sent the seller a letter accepting the modifications proposed by the seller on June 17, 2003. In its original motion, it had argued that the contract was formed instead on June 24, 2003, when the seller sent it a letter on that date accepting the buyer’s purchase order, with modifications. It appears that the court and the seller focused on the allegations in the buyer’s original motion.

45. *See id.* at *6.

46. *See id.* at *7. The seller also argued that what it deemed its June 24, 2003, counteroffer (what the buyer deemed an acceptance) was properly modified under CISG article 16 on June 25, 2003, when it proposed to add a crane to the deal. According to the seller, the contract was not formed until July 2003 when the buyer agreed to the sale of the winder with a crane.

47. *Id.* at *7, *13.

48. *Barbara Berry, S.A. de C.V. v. Ken M. Spooner Farms, Inc.*, No. C05-5538FDB, 2009 WL 927704, at *7 (W.D. Wash. Apr. 3, 2009). CISG 35(2)(a) says, “(2) Except where the parties have agreed otherwise, the goods do not conform with the contract unless they: (a) are fit for the purposes for which goods of the same description would ordinarily be used; . . .” CISG, *supra* note 1, art. 35(2)(a).

49. 2009 WL 927704, at *7–8.

50. *Id.* at *1.

malformed fruit; rather, it used the “root stock to produce a new generation of raspberry plants contrary to the standards of the industry.”⁵¹ Spooner Farms argued that it was these “new plants” that led to the malformed fruit and not the root originally provided.⁵²

The court granted the motion of Spooner Farms. It found that no implied warranties attached to the new plants that Berry generated from the Spooner Farms root stock and, in addition, Berry did not produce any evidence that the root stock it received from Spooner Farms was defective upon receipt.⁵³ The court is correct that under the CISG, as under the U.C.C.,⁵⁴ a defect must exist at the time of delivery for breach of the implied warranty to be actionable. Further, in making its decision to grant summary judgment to Spooner Farms, the court pointed to the absence of any explanation for how the root stock of Spooner Farms caused the crumbly fruit. This reinforces the fact that, without a showing of proximate causation, a breach of implied warranty claim will be unsuccessful.⁵⁵

In *Miami Valley Paper v. Lebbling Engineering & Consulting GmbH*,⁵⁶ discussed above, the court also provided a good reminder that the buyer’s knowledge of nonconformity in the goods at the time of contracting is a defense against an action for breach of the implied warranty of fitness for particular purpose.⁵⁷ The seller argued that the buyer knew that the winder was duplex and shafted when the contract was made, and thus the court should preclude the plaintiff’s breach of warranty claim on summary judgment. The court found that there was a question of fact on that issue and denied the defendant’s motion for summary judgment.⁵⁸

51. *Id.*

52. The express terms of the contract do not apply to these “new plants” because the terms do not extend to any product that Spooner did not manufacture. *Id.*

53. *See id.* at *7.

54. *See* *Vision Graphics, Inc. v. E.I. du Pont de Nemours & Co.*, 41 F. Supp. 2d 93, 99 (D. Mass. 1999) (“Some evidence of the existence of a defect at the time of delivery is an essential element of a cause of action for breach of the implied warranty of merchantability.” (citing *Dilenno v. Libbey Glass Div., Owens-Ill., Inc.*, 668 F. Supp. 373, 377 (D. Del. 1987))).

55. *See* *Barbara Berry*, 2009 WL 927704, at *7.

56. No. 1:05-CV-00702, 2009 WL 818618 (S.D. Ohio Mar. 26, 2009).

57. *Id.* at *10–11 (citing CISG, *supra* note 1, art. 35). Article 35 says, in part:

(2) Except where the parties have agreed otherwise, the goods do not conform with the contract unless they:

....

(b) are fit for any particular purpose expressly or impliedly made known to the seller at the time of the conclusion of the contract, except where the circumstances show that the buyer did not rely, or that it was unreasonable for him to rely, on the seller’s skill and judgment;

....

(3) The seller is not liable under subparagraphs (a) to (d) of the preceding paragraph for any lack of conformity of the goods if at the time of the conclusion of the contract the buyer knew or could not have been unaware of such lack of conformity.

CISG, *supra* note 1, art. 35(2)–(3).

58. *Miami Valley Paper*, 2009 WL 818618, at *11. The plaintiff also argued that the crane purchased with the winder was non-conforming because it took more than one person to operate the crane and

CONTRACT AVOIDANCE

In *Banks Hardwoods Florida, LLC v. Maderas Iglesias, S.A.*,⁵⁹ the court refused to avoid a timber contract on a motion for summary judgment where there was a dispute as to whether the timber that was delivered conformed to the contract. Under the CISG, a buyer can avoid a contract if there is a fundamental breach.⁶⁰ A fundamental breach under article 25 of the CISG is one that “results in such detriment to the other party as substantially to deprive him of what he is entitled to expect under the contract, unless the party in breach did not foresee and a reasonable person of the same kind in the same circumstances would not have foreseen such a result.”⁶¹

The defendant-seller argued that there was a fundamental breach and “summary judgment [was] proper because the CISG does not permit [the buyer] to avoid the contracts where [the buyer] accepted and sold significant portions of the lumber, made partial payment to [the seller], and where [the buyer’s] own experts concede that approximately seventy percent of the inspected wood conformed to the contracts.”⁶² The court said there was a question of fact as to whether there was a fundamental breach for two reasons. First, while the seller classified the breach as “slight,” there was a dispute as to the meaning of “slight” under the contracts and whether the problems resulted in the timber being nonconforming.⁶³ Second, as to the one-third of the timber for which the buyer contracted that was not delivered or defective, there was a dispute of material fact as to whether that breach was fundamental.⁶⁴ While the court was correct in denying the defendant-seller’s motion for summary judgment because of outstanding issues of fact,⁶⁵ it does appear that the buyer has a difficult obstacle to overcome in avoiding the contract, as it did accept and sell a significant amount of conforming timber. Of course, the buyer should get an offset against the contract price for the timber that was undelivered or defective.

*Miami Valley Paper, LLC v. Lebbing Engineering & Consulting GmbH*⁶⁶ also raised the issue of “fundamental breach” under the CISG. In that case, the plaintiff sought to avoid a contract because it received a winder that was shafted and duplex, when it argued that it had contracted for one that was shaftless and simplex. The

it did not fit in the plaintiff’s space. The court found that a fact issue existed as to the plaintiff’s breach of warranty claim on the crane. *Id.*

59. No. 08-23497-CIV, 2009 WL 3618011 (S.D. Fla. Oct. 29, 2009).

60. *Id.* at *2. The CISG states, “(1) The buyer may declare the contract avoided: (a) if the failure by the seller to perform any of his obligations under the contract or this Convention amounts to a fundamental breach of contract. . . .” CISG, *supra* note 1, art. 49.

61. CISG, *supra* note 1, art. 25.

62. *Banks Hardwoods Fla.*, 2009 WL 3618011, at *1.

63. *Id.* at *2.

64. *Id.*

65. In a separate order that same day, the court denied the plaintiff-buyer’s motion for summary judgment on similar grounds. See *Banks Hardwoods Fla., LLC v. Maderas Iglesias, S.A.*, No. 08-23497-CIV, 2009 WL 3618119, at *1–2 (S.D. Fla. Oct. 29, 2009).

66. No. 1:05-CV-00702, 2009 WL 818618 (S.D. Ohio Mar. 26, 2009).

defendant-seller argued that it could not avoid the contract because (i) the buyer did not notify it promptly when it believed it received a non-conforming winder; (ii) the buyer made partial payments on the winder; and (iii) the breach was not “fundamental” under CISG article 25 and the buyer was not “deprived of all rights expected under the contract” because it expected to receive a winder that was shaftless and simplex, the parties’ written communications notwithstanding.⁶⁷ This last issue—what type of winder the plaintiff intended to purchase—is a fact issue, and therefore, as is often the case, the issue of whether the defendant’s breach was “fundamental” was an issue left for the jury.⁶⁸

The seller also argued the buyer did not give notice within a reasonable time as required by CISG article 39.⁶⁹ While the “approximately two months” that the plaintiff waited seems a bit long, the court said the issue of whether the plaintiff gave timely notice was a fact issue to be determined by a jury.⁷⁰

REMEDIES

In *Doolim Corp. v. R Doll, LLC*,⁷¹ the court issued a default judgment adopting the report and recommendation of the magistrate judge. It found that a Korean manufacturer reasonably avoided its contract with its U.S. distributor and could choose between resale and market price damages under the CISG.⁷²

Doolim is a South Korean corporation engaged in the manufacture of women’s clothing, with its principal place of business in Seoul, South Korea. Doll is a New York limited liability company engaged in the business of manufacturing and distributing apparel under the registered trademarks “RDOLL” and “RUBBER DOLL.” In 2007, Doolim and Doll entered into a series of contracts pursuant to which Doolim was to manufacture in Vietnam and ship to the United States women’s clothing, pursuant to Doll’s specifications. According to the terms of Doll’s purchase orders, Doll had an obligation to pay Doolim within fifteen days of Doll’s receipt of the garments.

By December 2007, Doll had not paid for all of the garments that Doolim had shipped on its behalf in a timely manner. On December 8, the parties modified their agreement. Doll promised to pay and Doolim promised to accept \$931,000 in satisfaction of all open invoices received through December 7 (a reduced price and different pay schedule than the parties had originally agreed to). By mid-January, Doll had not made any of the scheduled installment payments and had not provided

67. *Id.* at *6 (citing CISG, *supra* note 1, art. 49).

68. *See id.* at *8.

69. *Id.* at *7 (quoting CISG, *supra* note 1, art. 39). Article 39 provides, “[B]uyer loses the right to rely on a lack of conformity . . . if he does not give notice to the seller . . . within a reasonable time after he has discovered [the defect] or ought to have discovered it.” CISG, *supra* note 1, art. 39.

70. *Miami Valley Paper*, 2009 WL 818618, at *8. The plaintiff distinguished the case relied on by the defendant, where the court imposed a deadline of days upon the buyer of fresh meat to notify the seller of the non-conformity. *See Chi. Prime Packers, Inc. v. Northam Food Trading Co.*, 320 F. Supp. 2d 702 (N.D. Ill. 2004), *aff’d*, 408 F.3d 894 (7th Cir. 2005).

71. No. 08 Civ. 1587(BSJ)(HBP), 2009 WL 1514913 (S.D.N.Y. May 29, 2009).

72. *Id.* at *7.

Doolim with a letter of credit securing payment, a course of action it had promised. As a result, Doolim suspended all further deliveries to Doll. It had not finished manufacturing some of the undelivered garments, but it completed manufacture of those garments with “minimal [additional] effort.”⁷³ In early 2008, Doll told Doolim that Doll was “insolvent” and “the brand was finished”; after that time, the parties had no further communication.⁷⁴

Doolim first sought damages under the CISG for the garments that it had delivered to Doll. The court awarded Doolim its expectation interest—the difference between the total contract price for the garments and the amount paid.⁷⁵ Doolim also sought damages for the garments that it manufactured but did not deliver. The court held that under CISG article 71(1),⁷⁶ Doolim permissibly withheld delivery of the garments because it became apparent that Doll would not be able to make any payments for those garments and Doolim only resumed manufacture and shipment of the garments because Doll promised to secure a letter of credit for the bulk of the garments and to pay according to their modified payment schedule.⁷⁷ Therefore, when Doll failed to either make a payment according to that schedule or secure a letter of credit, “it was apparent that Doll would be, at the very least, seriously deficient in its performance of its remaining contractual obligations,” and Doolim was entitled to damages for the undelivered garments.⁷⁸

The court also held that Doolim permissibly cancelled the contract and permanently withheld delivery because Doll’s continual failure to pay demonstrated that it was unwilling or unable to pay for the garments.⁷⁹ Doolim’s reasonable avoidance of its contract permitted it to choose between two CISG remedies:

- (1) resale of the Garments within a reasonable time and in a reasonable manner, coupled with recovery from Doll of the difference between the resale price and the contract price (in addition to any foreseeable consequential losses) or (2) recovery of

73. *Id.* at *4 (quoting Doolim official).

74. *Id.*

75. *See id.* at *6 (citing CISG, *supra* note 1, art. 74). Article 74 says:

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 contract.

CISG, *supra* note 1, art. 74.

76. CISG article 71(1) says:

A party may suspend the performance of his obligations if, after the conclusion of the contract, it becomes apparent that the other party will not perform a substantial part of his obligations as a result of: (a) a serious deficiency in his ability to perform or in his creditworthiness; or (b) his conduct in preparing to perform or in performing the contract.

CISG, *supra* note 1, art. 71(1).

77. *Doolim Corp.*, 2009 WL 1514913, at *6.

78. *Id.*

79. *Id.* at *7 (citing CISG, *supra* note 1, art. 72). The CISG says, “(1) If prior to the date for performance of the contract it is clear that one of the parties will commit a fundamental breach of contract, the other party may declare the contract avoided.” CISG, *supra* note 1, art. 72.

the difference between the current price and the contract price as damages, with the current price usually defined as the price at the place of the delivery.⁸⁰

The two provisions cited by the court, CISG articles 75 and 76, are the provisions analogous to sections 2-706 and 2-708 of the U.C.C. dealing with remedies.⁸¹ The *Doolim* case, therefore, provided a good review of the remedies available to a party that successfully avoids a contract under the CISG.

Remedies under the CISG were also at issue in *Miami Valley Paper, LLC v. Leb-bing Engineering & Consulting GmbH*.⁸² Despite identifying only one other case as authority, the court determined that the CISG recognizes the remedy of reformation in the case of mutual mistake, but found a fact issue on mutual mistake and therefore did not grant summary judgment on that issue.⁸³

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,⁸⁴ 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.⁸⁵ In a case between an Italian exporter and an American importer, the court found that the CISG is “silent as to the specific rate of prejudgment interest to be used or how that rate should be calculated.”⁸⁶ The court turned to private international law and decided, because it had federal question and not diversity jurisdiction, that it had broad discretion to set the prejudgment interest rate and did so “in accordance with the yield on the U.S. Treasury bill from the applicable time period.”⁸⁷ The court also found that the CISG was silent as to whether the prevailing party could receive attorney’s fees and, applying federal common law choice of law rules, chose U.S. law, consistent with the justified expectations of the parties.⁸⁸ Consequently, the prevailing exporter was responsible for paying its own attorney’s fees.⁸⁹

80. *Id.* at *7 (citing CISG, *supra* note 1, arts. 75–76).

81. See U.C.C. §§ 2-706, 2-708 (2002).

82. No. 1:05-CV-00702, 2009 WL 818618 (S.D. Ohio Mar. 26, 2009).

83. *Id.* at *9 (citing *Mitchell Aircraft Spares, Inc. v. European Aircraft Serv. AB*, 23 F Supp. 2d 915, 922 (N.D. Ill. 1998)).

84. Compare *Guang Dong Light Headgear Factory Co. v. ACI Int’l, Inc.*, No. 03-4165-JAR, 2008 WL 1924948, at *3 (D. Kan. Apr. 28, 2008) (failing to award prejudgment interest from time of arbitral award would impede U.S. policy of favoring arbitration in international commerce, which is a goal promoted by the CISG), with *Zhejiang Shaoxing Yongli Printing & Dyeing Co. v. Microflock Textile Group Corp.*, No. 06-22608-CIV, 2008 WL 2098062, at *5 (S.D. Fla. May 19, 2008) (applying the law of the forum state Florida in refusing to award prejudgment interest following arbitral award). For more on these cases, see Gregory M. Duhl, *International Sale of Goods*, 64 *Bus. Law.* 1281, 1291–93 (2009).

85. See *San Lucio, s.r.l. v. Import & Storage Servs., LLC*, No. 07-3031 (WJM), 2009 WL 1010981, at *3 (D.N.J. Apr. 20, 2009) (citing CISG, *supra* note 1, art. 78). The CISG says, “If a party fails to pay the price or any other sum that is in arrears, the other party is entitled to interest on it, without prejudice to any claim for damages recoverable under article 74.” CISG, *supra* note 1, art. 78.

86. *San Lucio*, 2009 WL 1010981, at *1. The Italian exporter wanted Italian law to apply purportedly because prejudgment interest rates are higher under Italian law than U.S. law.

87. *Id.* at *3.

88. *Id.*

89. *Id.* at *4.

THE EFFECT OF THE CISG ON THE EXERCISE OF JURISDICTION BY U.S. COURTS

FORUM NON COVENIENS

The court in *Taub v. Marchesi Di Barolo, S.p.A.*⁹⁰ found the fact that the CISG might be the governing law between the parties did not weigh in favor of dismissing the suit from a U.S. jurisdiction for forum non conveniens. The plaintiffs, officers of Palm Bay International, Inc. (“Palm Bay”), sued defendant Marchesi Di Barolo, S.p.A. (“Marchesi”) in the U.S. District Court for the Eastern District of New York for breach of the parties’ agency agreement arising from Marchesi’s distribution of defective wine. Marchesi filed an action against Palm Bay in an Italian court alleging that the defective wine was caused by a third party and that Palm Bay’s claim was baseless. Marchesi sought dismissal of the U.S. complaint for forum non conveniens and “in deference to the pending Italian litigation.”⁹¹

In arguing for its motion, Marchesi tried to convince the court that the CISG, and not New York law, governed the parties’ dispute. The court noted that the implication of that argument was that “this Court will have some difficulty in interpreting and applying the CISG.”⁹² The court dismissed Marchesi’s argument, as well as its motion, noting that even if the CISG applies, the federal courts, including the court hearing the case, have a lot of experience in interpreting the CISG.⁹³ The court was, of course, correct, although there are only a small number of reported decisions—seventeen in 2009—involving the CISG.⁹⁴

90. No. 09-CV-599 (ADS)(ETB), 2009 WL 4910590 (E.D.N.Y. Dec. 10, 2009).

91. *Id.* at *2.

92. *Id.* at *4.

93. *Id.* The same argument was made by Marchesi in a lawsuit brought by the New York wine distributor Palm Bay International concerning the same defective wine. The same judge responded in the same way. See *Palm Bay Int’l, Inc. v. Marchesi Di Barolo S.p.A.*, 659 F Supp. 2d 407, 412 (E.D.N.Y. 2009).

94. In addition, “[t]he case law interpreting and applying the CISG is sparse.” See *Miami Valley Paper*, 2009 WL 818618, at *9 (quoting *Calzaturificio Claudia s.n.c. v. Olivieri Footwear Ltd.*, No. 96 Civ. 8052(HB)(THK), 1998 WL 164824, at *4 (S.D.N.Y. Apr. 7, 1998)).