International Sale of Goods

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Choice of Law and Application of the C.I.S.G.: Waiving Application of the C.I.S.G.

In the Fall 2015 Survey,[1] we reported on the case of *Rienzi & Sons, Inc. v. Puglisi*.[2] In that case, the court held the parties had waived application of the C.I.S.G. because neither party had raised the potential applicability of the C.I.S.G. until more than three years after suit had been filed.[3] The United States Court of Appeals for the Second Circuit affirmed this decision and, in doing so, has clarified the issue of waiver.[4] Specifically, the Second Circuit held that it is not quite correct to say that the C.I.S.G. "is 'incorporated into' or 'a part of' [state] law."[5] Instead, the court held, because the C.I.S.G. is a self-executing treaty between the United States and the other signatories, it is more appropriate to characterize the C.I.S.G. as "'incorporated federal law,' which applies 'so long as the parties have not elected to exclude its application.'"[6]

A second case this year also addresses the issue of waiver. In *Shaoxing Aceco Blanket Co. v. Aceco, Inc.*,[7] a case between Chinese manufacturers of textile products for home use and New York-based importers, the court rejected the New York parties' attempt to rely on the C.I.S.G. for the first time on appeal for its treatment of course of dealings.[8] The case arose from alleged nonconformities in the textiles the Chinese manufacturers had delivered to the New York parties. Specifically, the New York parties argued that they communicated complaints to the manufacturer by phone. They conceded that they did not provide written notice. Such notice, they argued, should be considered sufficient based on the parties' course of dealing.

1. Kristen David Adams & Candace M. Zierdt, *International Sales of Goods*, 70 Bus. Law. 1269, 1271 (2015).
2. No. 08-CV-2540 (DLI)(JMA), 2014 WL 1276513 (E.D.N.Y. Mar. 27, 2014).
3. *Id.* at *2.
4. Rienzi & Sons v. Puglisi, No. 15-791-cv, 2016 WL 520107, at *89–90 (2d Cir. Feb. 10, 2016).
5. *Id.* at *89 n.2 (quoting Rienzi's pleadings).
6. *Id.* (quoting BP Oil Int'l Ltd. v. Empresa Estatal Petroleos de Ecuador, 332 F.3d 333, 337 (5th Cir. 2003)) (internal quotations omitted).
7. No. CV 13-4937 (LDW) (GRB), 2015 WL 12659923 (E.D.N.Y. Oct. 1, 2015).
8. *Id.* at *5.

In rejecting this argument, the court noted that the C.I.S.G. was not raised prior to trial or even during trial.[9] The court also noted that the Uniform Commercial Code ("U.C.C."), which it held governed the transaction,[10] would allow course-of-dealing evidence,[11] although it went on to hold that the New York parties had failed to prove any such course of dealing.[12] Finally, the court also held that, even assuming the C.I.S.G. applied, the New York parties had failed to produce evidence showing they gave notice "specifying the nature of the lack of conformity," as C.I.S.G. article 39 would require.[13]

Choice of Law and Application of the C.I.S.G.: Parties' Places of Business

In *Asia Telco Technologies v. Brightstar International Corp.*,[14] the court considered at the dismissal phase whether the C.I.S.G. applied to the sale of wireless USB modems between Asia Telco Technologies ("Asia Telco"), a seller with its principal place of business in China, and Brightstar International Corporation ("Brightstar"), a buyer with its principal place of business in Florida. At first blush, this would seem an easy analysis, since the C.I.S.G. "applies to contracts of sale of goods between parties whose places of business are in different States . . . when the States are Contracting States."[15] To complicate the matter, Brightstar sent its purchase order to Asia Telco's Brazil address. At the time of contract, Brazil was not a Contracting State.[16]

When a party has more than one place of business, article 10(a) provides that "the place of business is that which has the closest relationship to the contract and its performance, having regard to the circumstances known to or contemplated by the parties at any time before or at the conclusion of the contract."[17] Instead of arguing that the C.I.S.G. did not apply based on article 10(a), however, Brightstar argued that the matter fell outside the C.I.S.G. based on article 1(2), which provides that "[t]he 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."[18] The only evidence Brightstar identified in support of this assertion was the fact that it sent the purchase

9. *Id.*
10. *Id.* at *3.
11. *Id.* at *5 (citing U.C.C. § 1-303).
12. *Id.*
13. United Nations Convention on Contracts for the International Sale of Goods art. 39(1), Apr. 11, 1980, 489 U.N.T.S. 3, 19 I.L.M. 668, 671, http://www.cisg.law.pace.edu/cisg/text/treaty.html [hereinafter C.I.S.G.] ("The buyer loses the right to rely on a lack of conformity of the goods if he does not give notice to the seller specifying the nature of the lack of conformity within a reasonable time after he has discovered it or ought to have discovered it.").
14. No. 15-20608-Civ-Scola, 2015 WL 10853904 (S.D. Fla. Aug. 20, 2015).
15. C.I.S.G., *supra* note 13, art. 1.
16. Brazil became a signatory to the C.I.S.G. on April 3, 2013, and the C.I.S.G. entered into force for Brazil on January 4, 2014.
17. C.I.S.G., *supra* note 13, art. 10.
18. *Id.* art. 1(2).

order to Asia Telco's address in Brazil. The court found this argument insufficient for dismissal, noting other evidence, such as the Letter of Credit listing an address for Asia Telco in China, militating in the other direction.[19]

Preemption: State Law Claim for Breach of Oral Contract

The court also considered Asia Telco's claim that Brightstar had breached an oral contract. Rather than bringing this claim under the C.I.S.G., which would have made sense because article 11 expressly recognizes oral contracts,[20] Asia Telco proceeded under state law, citing a 2011 case permitting an unjust enrichment claim to go forward as not being preempted by the C.I.S.G.[21] The court dismissed this claim, noting that, unlike unjust enrichment, which presupposes that a contract does not exist, a claim for breach of an oral contract lies only when a contract exists.[22] Any claim sounding in contract would be governed by the C.I.S.G.[23]

Preemption: State Law Claim for Promissory Estoppel

Asia Telco also asserted a state-law claim for promissory estoppel. The court acknowledged differing opinions among courts and scholars as to whether C.I.S.G. article 16[24] was meant to preempt such a claim.[25] Ultimately, the court allowed the claim to proceed past dismissal as an alternative means of recovery if Asia Telco could not prove the existence of a contract.[26] In so holding, the court noted courts' historical reluctance to find federal preemption of an area traditionally addressed by state law and the fact that it could locate no reported decisions finding preemption of such a claim by the C.I.S.G.[27]

19. *Asia Telco*, 2015 WL 10853904, at *3.

20. C.I.S.G., *supra* note 13, art. 11 ("A contract of sale need not be concluded in or evidenced by writing and is not subject to any other requirement as to form. It may be proved by any means, including witnesses.").

21. Semi-Materials Co. v. MEMC Elec. Materials, Inc., No. 4:06CV1426 FRB, 2011 WL 65919 (E.D. Mo. Jan. 10, 2011).

22. *Asia Telco*, 2015 WL 10853904, at *4.

23. *Id.*

24. C.I.S.G., *supra* note 13, art. 16(2) ("[A]n offer cannot be revoked . . . if it was reasonable for the offeree to rely on the offer as being irrevocable and the offeree has acted in reliance on the offer.").

25. *Asia Telco*, 2015 WL 10853904, at *4–5 (citing Caterpillar, Inc. v. Unisor Industeel, 393 F. Supp. 2d 659, 676 (N.D. Ill. 2005); Geneva Pharm. Tech. Corp. v. Barr Lab., Inc., 201 F. Supp. 2d 236, 287 (S.D.N.Y. 2002), *aff'd in part, rev'd in part on other grounds & remanded*, 386 F.3d 485 (2d Cir. 2004); Asante Tech., Inc. v. PMC-Sierra, Inc., 164 F. Supp. 2d 1142, 1151 (N.D. Cal. 2001); CSX Transp., Inc. v. Easterwood, 507 U.S. 658, 664 (1993)).

26. *Id.* at *5.

27. *Id.* Similarly, in a one-sentence analysis in the footnotes, the United States District Court for the Southern District of Texas has found that a state-law claim for unjust enrichment is not preempted by the C.I.S.G., for purposes of a motion to dismiss, where the parties dispute the existence of a contract. Yosemite Auto (Shanghai) Co. v. J.R.S. Metals, Inc., No. 4:15-CV-1641, 2016 WL 4441543, at *7 n.8 (S.D. Tex. Aug. 23, 2016).

Performance of the Contract: Timely Inspection and Notice

MCF Liquidation, LLC v. International Suntrade, Inc.[28] involved a contract for the sale of apple juice concentrate ("AJC") that ended up being adulterated with isomaltose. The AJC had been delivered on April 19, 2011. Mrs. Clark's Foods, L.C. ("Mrs. Clark's"), the buyer and predecessor in interest to MCF Liquidation, LLC, sued sellers International Suntrade, Inc. ("Suntrade") and Miller & Smith Foods, Inc. ("Miller & Smith") (collectively, "Sellers") on several theories, including breach of warranty and breach of contract.

The parties agreed that the C.I.S.G. governed their dispute, but disputed whether Mrs. Clark's had made timely inspection of the goods pursuant to article 38 and provided timely notice of nonconformities as required by article 39. The following facts were not in dispute: First, Mrs. Clark's Standard Operating Procedures ("SOPs") provided for testing the first lot from any supplier for authenticity. For existing suppliers, testing would be done randomly. Second, Mrs. Clark's used external sources to complete its authenticity testing, although it performed certain other tests in house. Third, Mrs. Clark's had its outside source complete authenticity testing on Suntrade's AJC on November 19, 2011, after obtaining test results for AJC from another Chinese supplier showing inauthenticity. Fourth, Mrs. Clark's had already incorporated the AJC into products it had produced and distributed. Fifth, the testing revealed adulteration, then Mrs. Clark's issued a recall, and Mrs. Clark's notified Miller & Smith on December 1, 2011.

Sellers claimed that Mrs. Clark's seven-month delay in inspection was not only *per se* unreasonable, but also a violation of Mrs. Clark's own SOPs since Sellers were new suppliers. Sellers further claimed that Mrs. Clark's notice of nonconformity was unreasonable as a matter of law because it was given only after Mrs. Clark's had used and repackaged the AJC into other products. Mrs. Clark's, in response, emphasized the fact-specific nature of the notice inquiry and pointed out that the C.I.S.G. provides an outside limit of two years for notice,[29] thus making it clear that relatively long periods for inspection and notice are sometimes to be expected.

In allowing the breach-of-contract claim to proceed past summary judgment, the court noted questions of fact as to whether Sellers were new suppliers.[30] The court also noted conflicting expert testimony regarding the appropriateness of Mrs. Clark's inspection protocols.[31] Finally, the court found insufficient evidence to make a determination as a matter of law whether notice given only after the goods were repackaged and used was legally insufficient.[32]

28. No. 4:13-CV-00514-HCA, 2015 WL 12670169 (S.D. Iowa Nov. 16, 2015).

29. C.I.S.G., *supra* note 13, art. 39(2) ("In any event, the buyer loses the right to rely on a lack of conformity of the goods if he does not give the seller notice thereof at the latest within a period of two years from the date on which the goods were actually handed over to the buyer, unless this time-limit is inconsistent with a contractual period of guarantee.").

30. *MCF Liquidation*, 2015 WL 12670169.

31. *Id.*

32. *Id.*

Performance of the Contract: Conformity

Insofar as Mrs. Clark's breach-of-warranty claim was concerned, the parties disputed Sellers' level of knowledge regarding Mrs. Clark's intended use for the goods, as well as the representations made to Mrs. Clark's. Specifically, the parties disputed whether Sellers knew that Mrs. Clark's required 100 percent AJC. Although the parties' transaction documents did not include a reference to 100 percent AJC, Mrs. Clark's supplied other evidence, including testimony and e-mails stating that Sellers had been given Mrs. Clark's specifications referencing 100 percent AJC, to suggest that Sellers were aware of Mrs. Clark's requirements. Noting that the C.I.S.G. contains no parol evidence rule[33] and that all of this evidence would thus be relevant to its determination on the merits, the court denied summary judgment as to this claim, as well.[34]

Incoterms as Trade Usages

In *In re World Imports, Ltd.*,[35] a bankruptcy case, the C.I.S.G. was applied only for the purpose of determining when buyer World Imports, Ltd. ("World"), the debtor, had received a shipment of goods from sellers Fujian Zhangzhou Foreign Trade Co., Ltd. ("Fujian") and Haining Wansheng Sofa Co., Ltd. ("Haining"). The purpose of this inquiry was to determine whether Fujian and Haining qualified for an administrative expense priority pursuant to 11 U.S.C. § 503(b)(9). As Fujian and Haining have their principal place of business in China, World had its principal place of business in the United States, and the subject matter of the contract was within the scope of the C.I.S.G., the court rejected Fujian and Haining's contention that the U.C.C. should supply the operative definition.[36] Instead, noting that there was no evidence that the parties had excluded application of the C.I.S.G., the court looked to the treaty for guidance on the matter.[37]

Because the C.I.S.G. does not supply a definition of "receipt," unlike the U.C.C.,[38] the court looked to the Incoterms rules promulgated by the International Chamber of Commerce as a means of gap filling as directed by C.I.S.G. article 7(2).[39] As the court noted, the Incoterms rules are considered trade usages pursuant to C.I.S.G. article 8(3).[40] In this case, the parties had used the "Free on Board" ("FOB") Incoterms rule. Noting that the seller makes delivery of goods, in an FOB contract, on

33. C.I.S.G., *supra* note 13, art. 8(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.").

34. *MCF Liquidation*, 2015 WL 12670169.

35. 549 B.R. 820 (Bankr. E.D. Pa. 2016).

36. *Id.* at 823.

37. *Id.*

38. The relevant U.C.C. definition is found in section 2-103(1)(c).

39. C.I.S.G., *supra* note 13, art. 7(2) ("Questions concerning matters governed by this Convention which are not expressly settled in it are to be settled in conformity with the general principles on which it is based or, in the absence of such principles, in conformity with the law applicable by virtue of the rules of private international law."); *In re World Imports*, 59 B.R. at 824.

40. C.I.S.G., *supra* note 13, art. 8(3); *In re World Imports*, 59 B.R. at 824.

board the vessel at the named port of shipment, the court held that the buyer had received the goods at that point, for purposes of 11 U.S.C. § 503(b)(9).[41] Because this date fell outside the twenty-day period prescribed by the statute, the court held that Fujian and Haining did not qualify for the administrative expense priority.[42]

Although the court was correct in applying the C.I.S.G. rather than the U.C.C., applying the F.O.B. term from the U.C.C. would have yielded the same result. The U.C.C. includes the F.O.B. term in U.C.C. section 2-319(1), which defines when delivery takes place.

Hybrid Contract and Breach

Syral, a business located in Belgium, contracted with US Ingredients ("USI"), a Delaware corporation with its principal place of business in Pennsylvania, to sell wheat gluten. In *Syral Belgium N.V. v. I.s. Ingredients Inc.*,[43] Syral sued for breach of contract and USI filed a counterclaim. After Syral filed a motion to dismiss the counterclaim, USI amended its counterclaim alleging that Syral sent shipments that were oversized and too large to handle, and that this violated trade usage in the industry. USI also claimed that the parties had modified their contract and Syral breached the modification by refusing to compensate USI for the expenses caused by the oversupply ("reimbursement breach"). Additionally, USI claimed that Syral failed to deliver the amount of wheat gluten required by the contract ("termination breach").

Although the parties agreed that the C.I.S.G. applied to the original oral contract,[44] Syral argued that the subsequent modification was not governed by the C.I.S.G. because it related to a service—the payment of storage costs.[45] The court cited C.I.S.G. article 3(2)[46] when it determined that the C.I.S.G. covered the whole contract because the "preponderant part" of the entire obligation was for the sale of goods and not services.[47]

Reimbursement Breach

After determining that the C.I.S.G. governed the contract, the court considered the two breaches claimed by USI: 1) reimbursement breach and 2) termination breach. In terms of the reimbursement breach, where USI claimed Syral failed to pay as required by the modification,[48] the court held that the allegations contained in USI's pleading were insufficient because they did not identify the spe-

41. *In re World Imports*, 59 B.R. at 824.
42. *Id.*
43. No. 15-1172-LPS, 2016 WL 4728101 (D. Del. Sept. 9, 2016).
44. *Id.* at *2–3.
45. *Id.* at *3.
46. C.I.S.G., *supra* note 13, art. 3(2) ("This Convention does not apply to contracts in which the preponderant part of the obligations of the party who furnishes the goods consists in the supply of labour or other services.").
47. *Syral*, 2016 WL 4728101, at *3.
48. *Id.* at *4.

cific trade usage or how such usage was breached.[49] Further, USI did not provide adequate notice about the specifics of the alleged breach, so Syral had no way to calculate how much it allegedly owed USI for reimbursement costs.[50] As a result, the court found that USI failed to state a claim for relief on its amended counterclaim for reimbursement as required by the modification.[51]

Termination Breach

Next, the court considered USI's claim that Syral wrongfully terminated the contract. This too failed because USI did not plead that it had paid for any of the wheat gluten or what amount of wheat gluten had been delivered.[52] The court noted both C.I.S.G. article 71,[53] which permits a party to suspend its performance if it appears that the other party will breach because the other party either does not have the ability to perform or conduct indicates it will not perform, and C.I.S.G. article 64,[54] which permits termination of the contract for a failure to perform.[55] With those articles in mind, the court found that USI's claim failed because it did not provide any facts showing that Syral's termination was unjustified under those articles.[56] USI did not make any detailed allegations, such as attaching invoices to show it was substantially performing its obligations.[57] Consequently, the claim by USI that Syral breached by terminating the contract was dismissed.[58]

Contract Formation and Prejudgment Interest

In the case of *Shantou Real Lingerie Manufacturing Co., Ltd. v. Native Group International, Ltd.*,[59] Shantou Real Lingerie ("Shantou"), with its principal place of business in China, manufactured and exported intimate wear garments to Native Group ("Native"), a New York corporation. Native placed dozens of orders to Shantou during a six-month time period in 2012. After each order, Shantou sent Native a confirmation stating the cost, quantity, and type of goods ordered and a representative from Native signed them. Shantou manufactured and delivered the goods in five separate shipments. Accompanying each shipment was an invoice that stated the price, quantity, and type of good shipped. Although Native accepted the shipments and made no claims against Shantou prior to this lawsuit, it had an unpaid balance of $272,040.

49. *Id.*
50. *Id.*
51. *Id.*
52. *Id.*
53. C.I.S.G., *supra* note 13, art. 71.
54. C.I.S.G., *supra* note 13, art. 64.
55. *Syral*, 2016 WL 4728101, at *4.
56. *Id.*
57. *Id.*
58. *Id.*
59. No. 14CV10246-FM, 2016 WL 4532911 (S.D.N.Y. Aug. 23, 2016).

Contract Formation and Notice

Shantou incorrectly referenced the U.C.C. when it filed its suit; however, the court applied the C.I.S.G. to the contract because the parties both had businesses in different countries that were signatories to the C.I.S.G. and did not explicitly exclude the C.I.S.G.[60] When determining whether a contract had been formed, the court noted that the C.I.S.G. has no statute of frauds and, consequently, the contract does not have to be written.[61] It then reviewed the purchase orders, sales confirmations, and conduct of the parties to determine whether a contract had been formed. It first looked to C.I.S.G. article 14, which states that a proposal may constitute an offer as long as it shows the offeror intended to be bound and the proposal contained the quantity and price for the goods.[62] Further, Article 18 adds that conduct may be an acceptance if it indicates an intent to be bound.[63] Applying those two articles, the court indicated that the sales confirmations appeared to be acceptances and, as such, closed the deal.[64] Alternatively, the court reasoned that even if the confirmations were mere acknowledgments of an offer and not acceptances, Shantou's later conduct of shipping the goods was clearly an acceptance.[65] Thus, the record shows that the parties contracted for the sale of garments, Shantou sent conforming goods, and Native failed to pay the full balance due, giving Shantou the right to recover.[66]

Native claimed that Shantou caused Native damages when it breached because it failed to ship the goods in a timely manner.[67] Unfortunately, the evidence as to the delivery dates on the confirmations either conflicted or contained no delivery date, so the court could not conclude that any shipments were late.[68] Even if Native had been able to show the shipments were late, Native still would have lost its counterclaim for failure to notify Shantou within a reasonable amount of time of the non-conformity as required by C.I.S.G. article 39.[69] Native would have known of any breach of late delivery when it received the goods, and it waited one year before notifying Shantou.[70] The court found one year to be an unreasonable amount of time and, as a result, Native waived any right to a claim for late deliveries and the ability to avoid paying Shantou.[71]

60. *Id.* at *2.
61. C.I.S.G., *supra* note 13, art. 11 ("A contract of sale need not be concluded in or evidenced by writing and is not subject to any other requirement as to form.").
62. C.I.S.G., *supra* note 13, art. 14; *Shantou Real Lingerie*, 2016 WL 4532911, at *3.
63. C.I.S.G., *supra* note 13, art. 18.
64. *Shantou Real Lingerie*, 2016 WL 4532911, at *3.
65. *Id.*
66. *Id.*
67. *Id.*
68. *Id.*
69. *See* C.I.S.G., *supra* note 13, art. 39(1) ("The buyer loses the right to rely on a lack of conformity of the goods if he does not give notice to the seller specifying the nature of the lack of conformity within a reasonable time after he has discovered it or ought to have discovered it."); *Shantou Real Lingerie*, 2016 WL 4532911, at *4.
70. *Shantou Real Lingerie*, 2016 WL 4532911, at *4.
71. *Id.*

Prejudgment Interest

Shantou then claimed and was granted prejudgment interest on the unpaid balance.[72] The C.I.S.G. clearly permits a claim for prejudgment interest,[73] but it does not indicate what interest rate should be charged and courts have varied in their approach to this problem.[74] A court has discretion when setting the interest rate for this award.[75] The court determined that the C.I.S.G. uses a standard of reasonableness throughout the law, so it should find a reasonable interest rate to use for the prejudgment interest award.[76] The court noted that both *Profi-Parkiet Sp. Zoo v. Seneca Hardwoods LLC*[77] and *Delchi Carrier, SpA v. Rotorex Corp.*[78] used the U.S. Treasury Bill rate, but the New York statute allows a prejudgment interest rate of 9 percent per annum.[79] The problem with those two rates is that the Treasury Bill rate is so low that it would not appropriately compensate Shantou for its damages and the New York rate seems too high.[80] Using the reasonableness standard of the C.I.S.G., the court decided an appropriate rate would be in between those two extremes.[81] Additionally, the court wanted to account for the fact that the damages accrued over time.[82] The court considered the rate used in trademark cases and noted that it was the same rate that taxpayers must pay when they underpay their taxes.[83] The court determined that the trademark rate was reasonable and fell in between the other two extreme rates.[84]

Lack of Written Contract

GPS Granite Ltd. v. Ultimate Granite, Inc.[85] involved a Brazilian corporation that created and sold granite to various businesses in the United States and Canada, including the defendant Ultimate Granite, a Florida corporation. After creating the granite, GPS delivered the granite and an invoice to Ultimate at a Brazilian port. Ultimate was supposed to pay for the granite after reviewing

72. *Id.* at *5.

73. C.I.S.G., *supra* note 13, art. 78; *Shantou Real Lingerie*, 2016 WL 4532911, at *4 (citing Profi-Parkiet Sp. Zoo v. Seneca Hardwoods LLC, No. 13 CV 4358 (PKC) (LB), 2014 WL 2169796, at *9 (E.D.N.Y. May 23, 2014)).

74. *Shantou Real Lingerie*, 2016 WL 4532911, at *4 (citing *Profi-Parkiet Sp. Zoo*, 2014 WL 2169796, at *9).

75. *Id.* (citing Delchi Carrier, SpA v. Rotorex Corp., No. 88-CV-1078, 1994 WL 495787, at *7 (N.D.N.Y. Sept. 9, 1994), *rev'd in part on other grounds*, 71 F.3d 1024 (2d Cir. 1995)).

76. *Shantou Real Lingerie*, 2016 WL 4532911, at *4–5.

77. No. 13 CV 4358 (PKC) (LB), 2014 WL 2169796, at *9 (E.D.N.Y. May 23, 2014).

78. No. 88-CV-1078, 1994 WL 495787, at *7 (N.D.N.Y. Sept. 9, 1994), *rev'd in part on other grounds*, 71 F.3d 1024 (2d Cir. 1995).

79. McKinney's C.P.L.R. § 504 (West, WestlawNext through L. 2017, chapters 1–23, 25–34, 50–59).

80. When *Shantou* was decided in 2016, the Treasury Bill rate was at one-half of one percent. *Shantou Real Lingerie*, 2016 WL 4532911, at *5.

81. *Id.*

82. *Id.*

83. *Id.* (referencing 15 U.S.C. § 1117(b)).

84. *Id.*

85. No. 8:16-CV-755-T-30AAS, 2016 WL 5816051 (M.D. Fla. Oct. 5, 2016).

the invoice, inspecting the granite, and taking possession of it in Brazil. Ultimate failed to pay for a number of the granite deliveries and GPS instituted this action for breach-of-contract.

The C.I.S.G. applies to the transactions between the parties because both Brazil and the United States have ratified it and the contract had no choice-of-law clause eliminating the C.I.S.G. and choosing another law to replace it.[86] The court seemed troubled by Ultimate's motion to dismiss because it was "a barely three-page motion, citing 100-year-old California state-court opinions and repeatedly arguing that Plaintiff's allegations are 'inherently' or 'patently repugnant' to the claims raised."[87] The court made it clear that the claims were not repugnant and would not be dismissed.[88]

Ultimate argued, in support of its motion to dismiss the breach-of-contract claim, that GPS did not attach a signed written contract to the complaint or make any allegations that Ultimate had executed the contract. Because the C.I.S.G. contains no statute of frauds, a contract governed by the treaty does not have to be in writing.[89] Further, the C.I.S.G. states that once an acceptance of an offer becomes effective a contract is formed,[90] and under article 9 parties are bound by any usages they have agreed to or established between themselves.[91] GPS's claim, which is taken as true in a motion to dismiss, established a contract because it alleged that each invoice constituted an offer since it contained a description of the goods, the price, when payment was due, how to object to non-conforming goods, and penalties for a late payment.[92] When Granite took the granite after inspection and without objection, it accepted the goods.[93] The court noted that the C.I.S.G. allows this type of contract because it does not require a writing.[94] Ultimate's motion was dismissed because GPS pled enough facts to allege a contract had been formed under the C.I.S.G.[95]

Growing Influence of the C.I.S.G.

In *In re Colin*,[96] a bankruptcy case involving a separation agreement in a domestic relations case, the court used the C.I.S.G. by analogy when determining whether the parol evidence rule applied in section 523(a)(5) of the Bankruptcy Code.[97] The issue revolved around whether the parties intended a payment by the ex-husband (Colin) to the wife (Edwards) to be a domestic support obliga-

86. *GPS Granite*, 2016 WL 5816051, at *2.
87. *Id.*
88. *Id.*
89. *Id.*
90. C.I.S.G., *supra* note 13, art. 23.
91. *Id.* art. 9.
92. *GPS Granite*, 2016 WL 5816051, at *1.
93. *Id.*
94. *Id.* at *2.
95. *Id.*
96. *In re* Colin, 546 B.R. 455 (Bankr. M.D. Ala. 2016), *aff'd*, 556 B.R. 520 (M.D. Ala. 2016).
97. *Id.* at 462.

tion that is non-dischargeable in a bankruptcy case or a property settlement. The settlement agreement contained a merger clause and Colin claimed that the parol evidence rule precluded the court from considering extrinsic evidence to interpret the intent of the parties. Although that would be accurate under Alabama contract law, this court held that the parol evidence rule would not apply.[98]

It found support for this ruling in the C.I.S.G. and the *MCC-Marble Ceramic* case.[99] Unlike state law, the C.I.S.G. does not contain the parol evidence rule. Instead, it instructs the courts to consider all relevant evidence that may shed light on the parties' intent.[100] The court also cited to *MCC-Marble Ceramic* in dicta to note that the parol evidence rule is a substantive rule of law, not an evidence rule, so the court may not apply the parol evidence rule as a procedural matter.[101] Although neither case involved an international commercial transaction, it shows that the C.I.S.G. is gaining more recognition from the courts, as well as having a growing influence in the law.

Other Cases Mentioning the C.I.S.G.

Several other cases mention the C.I.S.G. briefly. In *CLDN Cobelfret Pte Ltd. v. ING Bank N.V.*,[102] a maritime case, the court cited the parties' agreement excluding the C.I.S.G. and thus had no further analysis of the Convention.[103] In *Cooperativa Agraria Industrial Naranjillo Ltd. v. Transmar Commodity Group Ltd.*,[104] the court ignored the Peruvian seller's contention that the cocoa butter contracts in suit were governed by the C.I.S.G., citing the well-worn language from *Delchi Carrier SpA v. Rotorex Corp.*,[105] on which we reported previously,[106] that "case-law interpreting the C.I.S.G. is relatively sparse" and applied New York domestic law instead.[107] A breach-of-contract case involving parties from the United States and Italy that had been filed in both South Carolina and Italy, *Custom Polymers PET, LLC v. Gamma Meccanica SpA*,[108] focused mainly on whether the South Carolina or Italian court should proceed to decide the case. It also addressed a choice-of-law clause in the contract that had chosen South Carolina law to govern. The court determined that the choice-of-law clause, picking South Carolina law, did not properly opt out of the C.I.S.G. because it did not specifically state the parties' intent to opt out of the Convention in the contract.[109] So, the C.I.S.G.

98. *Id.* at 463.
99. *Id.* at 462–63 (citing MCC-Marble Ceramic Ctr., Inc. v. Ceramica Nuova d'Agnostino, S.p.A., 144 F.3d 184 (11th Cir. 1998)).
100. C.I.S.G., *supra* note 13, art. (8)(3).
101. *In re Colin*, 546 B.R. at 462.
102. No. 16-CV-4312, 2016 WL 6670996 (S.D.N.Y. June 13, 2016).
103. *Id.* at *2.
104. 16 Civ. 3356 (LLS), 2016 WL 5334984 (S.D.N.Y. Sept. 21, 2016).
105. 71 F.3d 1024, 1028 (2d Cir. 1995).
106. Kristen David Adams & Candace Zierdt, *International Sales of Goods*, 71 Bus. Law. 1345, 1351 (2016).
107. *CLDN Cobelfret*, 2016 WL 5334984, at *4.
108. No. 6:15-04882-MGL, 2016 WL 2354599 (D.S.C. May 3, 2016).
109. *Id.* at *6.

applied and South Carolina law would fill any gaps not covered by the C.I.S.G.[110] Finally, in *PATS Aircraft, LLC v. Vedder Munich GmbH*,[111] the court determined that whether the C.I.S.G. or Delaware law applied to an aircraft contract was not relevant to the choice-of-forum issue raised in the case.[112]

110. *Id.* at *8–9.
111. No. 15-1182-RGA, 2016 WL 3875971 (D. Del. July 14, 2016).
112. *Id.* at *9.