C.I.S.G.

*By Kristen David Adams and Candace M. Zierdt**

Scope

In *Mado Holdings, LLC v. Wu*,[1] plaintiff Mado Holdings, LLC ("Mado") brought suit against defendants Jinming Wu ("Wu") and others to collect certain accounts that the defendants owed to JuXian Ju de Plastic Co. ("JuXian"), for which Mado was the assignee. Mado based its action against three of the defendants on several state-law contract causes of action and based its action against the others on their relationships with other defendants. According to the complaint, Mado, Wu, and the other defendants are all either residents of the State of Georgia or are Georgia corporations.

Mado brought suit initially in the Superior Court of Dekalb County. Wu and the other defendants removed the case to the U.S. District Court for the Northern District of Georgia, citing federal question jurisdiction. Specifically, Wu and the other defendants claimed that, because JuXian is a Chinese corporation, Mado's claims were covered by the C.I.S.G.[2] As a treaty of the United States, the C.I.S.G. would be a basis for the federal court to exercise its original jurisdiction pursuant to 28 U.S.C. § 1331, if the C.I.S.G. applied to the case in suit.

Wu and the other defendants also asserted counterclaims against Mado based on state law, requesting that the court exercise its supplemental jurisdiction under 28 U.S.C. § 1367(a) to consider those claims. Mado, in response, sought remand of the case, on the theory that its claims were based upon state-law causes of action for collection of accounts receivable, which is outside the scope of the C.I.S.G.

In accepting Mado's theory and granting Mado's motion to remand, the court held, as a preliminary matter, that Wu and the other defendants, as the removing parties, had the burden to prove the existence of federal question jurisdiction.[3] The court also cited C.I.S.G. article 4, which provides as follows:

> This Convention governs only the formation of the contract of sale and the rights and obligations of the *seller and the buyer* arising from such a contract. In particular, except as otherwise expressly provided in this Convention, it is not concerned with:

* Professors of Law, Stetson University College of Law.

1. No. 1:17-CV-1358-MHC, 2017 WL 7660407 (N.D. Ga. Sept. 22, 2017).

2. United Nations Convention on Contracts for the International Sale of Goods, Apr. 11, 1980, S. Treaty Doc. No. 98-9, 1489 U.N.T.S. 3, 19 I.L.M. 668 [hereinafter C.I.S.G.].

3. *Mado Holdings, LLC*, 2017 WL 7660407, at *2–3.

(a) the validity of the contract or of any of its provisions or of any usage;

(b) the effect which the contract may have on the property in the goods sold.[4]

Because the claims before the court were not between buyers and sellers, but related instead to the payment of accounts receivable that may have resulted from a sale of goods, the court held that the C.I.S.G. did not apply.[5] Even if the case in suit had involved the actual parties to the sale, the court noted, the C.I.S.G. likely would not have applied. "Although [Wu and the other] Defendants correctly assert that only the complaint, and not their counterclaim, determines removability," the court held, "the counterclaim in fact alleges that the invoices that involve [Mado's] allegations relate to contracts between two Chinese companies, not two Contracting States under the C.I.S.G."[6] Thus, it appears that even the original contract would have fallen outside the jurisdiction of the C.I.S.G., as defined in article 1(a), which provides that 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."[7]

In the fall 2017 survey,[8] we briefly mentioned *Cooperativa Agraria Industrial Naranjillo Ltda. v. Transmar Commodity Group Ltd.*[9] because the district court ignored the Peruvian seller's claim that the C.I.S.G. governed its contracts with Transmar. In doing so, the district court applied "New York law." The appellate court vacated the district court's determination that the C.I.S.G. did not apply to the cocoa contracts.[10] In vacating the district court's finding, the appellate court discussed significant differences between the C.I.S.G. and New York law.

The district court vacated an arbitration decision by the Cocoa Merchants' Association of America, Inc. in favor of Transmar, the buyer, based on a finding that the parties had not actually agreed to arbitration.[11] In making that decision, the district court applied New York law, which uses the restrictive "four corners" rule that prohibits parol evidence unless a contract is ambiguous or is partially integrated.[12] It made this determination based on the four corners of the document without considering extrinsic evidence.[13]

The appellate court determined that the C.I.S.G. applied because the parties were located in Peru and the United States.[14] Both countries are signatories to

4. *Id.* at *2; C.I.S.G., *supra* note 2, art. 4 (emphasis added).
5. *Mado Holdings, LLC*, 2017 WL 7660407, at *3.
6. *Id.* at *3 n.2.
7. C.I.S.G., *supra* note 2, art. 1(a).
8. Kristen David Adams & Candace M. Zierdt, *International Sale of Goods*, 72 BUS. LAW. 1165, 1175 (2017).
9. Cooperativa Agraria Indus. Naranjillo Ltda. v. Transmar Commodity Grp. Ltd., No. 16 Civ. 3356 (LLS), 2016 WL 5334984 (S.D.N.Y. Sept. 22, 2016), *vacated*, 721 F. App'x 88 (2d Cir. 2018).
10. Transmar Commodity Grp. Ltd. v. Cooperativa Agraria Indus. Naranjillo Ltda., 721 F. App'x 88 (2d Cir. 2018).
11. *Id.* at 89.
12. *Id.* at 90 (quoting Kass v. Kass, 696 N.E.2d 174, 180 (N.Y. 1998)).
13. *Id.*
14. *Id.* at 89.

the C.I.S.G.[15] The appellate court noted the district court's reasoning that case law on the C.I.S.G. was relatively sparse, even if true, does not permit a court to apply New York law instead of the C.I.S.G.[16] As recognized by the appellate court, because the C.I.S.G. does not contain a parol evidence rule and specifically requires courts to consider extrinsic evidence, including evidence of the parties' subjective intent, the law differs significantly from New York's strict rule prohibiting extrinsic evidence in many cases.[17] Instead of relying on the face of the contract, the appellate court concluded that the district court should have applied the C.I.S.G. and considered extrinsic evidence concerning whether the parties agreed to arbitrate their disputes.[18] On remand, the district court should permit the parties to use discovery or hold a hearing on all relevant extrinsic evidence pertaining to the matter.[19]

Interpretation; Duties of Buyers and Sellers; Damages; Prejudgment Interest

In *Jae Yeon Textile, Inc. v. AKM Textile, Inc.*,[20] the court considered a motion for default judgment in a breach of contract action by plaintiff-seller Jae Yeon Textile, Inc. ("Jae Yeon") against defendants-buyers, including AKM Textile, Inc. ("AKM"), in a matter involving the sale of textiles and fabrics. As part of its analysis of the motion, which it ultimately granted, the court considered the merits of Jae Yeon's substantive claims and the sufficiency of its complaint.[21]

As a preliminary matter, the court held that the C.I.S.G. applied to Jae Yeon's breach-of-contract claims pursuant to C.I.S.G. article 1(a).[22] Jae Yeon is located in the Republic of Korea and AKM and the other defendants are located in the United States, and both the Republic of Korea and the United States are signatories to the C.I.S.G.[23]

The court went on to consider the legal sufficiency of Jae Yeon's breach-of-contract claims.[24] C.I.S.G. article 4 provides that the Convention addresses "the formation of [a] contract of sale and the rights and obligations of the seller and the buyer arising from such a contract,"[25] which would include a cause of action for breach of contract. Even so, as the court held, the C.I.S.G. does not provide the elements of a breach-of-contract action.[26] For guidance on how to

15. *Id.*; *see Status, United Nations Convention on Contracts for the International Sale of Goods*, United Nations Treaty Collection, https://treaties.un.org/Pages/ViewDetails.aspx?src=TREATY&mtdsg_no=X-10&chapter=10&lang=en (last visited May 21, 2019) [hereinafter *Status*].
16. *Transmar Commodity Grp. Ltd.*, 721 F. App'x at 90.
17. *Id.*; *see* C.I.S.G., *supra* note 2, art. 8(3) (permitting use of extrinsic evidence).
18. *Transmar Commodity Grp. Ltd.*, 721 F. App'x at 90.
19. *Id.*
20. No. CV 16-05349 SJO (JEMx), 2017 WL 7156244 (C.D. Cal. Nov. 27, 2017).
21. *Id.* at *3–4.
22. *Id.* at *3.
23. *Id.*; *Status*, *supra* note 15.
24. *Jae Yeon Textile, Inc.*, 2017 WL 7156244, at *3.
25. C.I.S.G., *supra* note 2, art. 4.
26. *Jae Yeon Textile, Inc.*, 2017 WL 7156244, at *3.

proceed in the absence of such elements, the court looked to C.I.S.G. article 7(2), which provides as follows:

> 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.[27]

Applying this language, the court held that "the 'universal elements of [a breach-of-contract] action: formation, performance, breach, and damages' apply under the C.I.S.G."[28] C.I.S.G. articles 30 and 53 set forth pertinent rules with respect to the performance obligations of both buyers and sellers.[29] Under article 30, "[t]he seller must deliver the goods, hand over any documents relating to them, and transfer the property in the goods."[30] The court held that Jae Yeon "provided exhaustive exhibits of purchase orders, packing lists, invoices, and proofs of delivery that demonstrate both that a valid contract was formed and that [Jae Yeon] performed its duties under the contract."[31] Article 53 provides that "[t]he buyer must pay the price for the goods and take delivery of them as required by the contract and this Convention."[32] Although AKM took delivery of the goods and retained possession of them, Jae Yeon alleged that it had not received payment for the goods. Thus, the court held, Jae Yon had sufficiently pled a cause of action for breach of contract.[33]

Turning next to the question of damages, the court quoted C.I.S.G. articles 61 and 62 for the language that, "[i]f the buyer fails to perform any of his obligations under the contract or this Convention, the seller may . . . require the buyer to pay the price."[34] In its motion for default judgment, Jae Yeon sought to recover the contract price of $752,442.27, plus prejudgment interest calculated at 10 percent per annum, totaling $116,268.60. The court granted both amounts to Jae Yeon.[35] Under C.I.S.G. article 74, Jae Yeon was entitled to the contract price because it represented "the loss . . . suffered by [Jae Yeon] as a consequence of the breach."[36] In addition, C.I.S.G. article 78 provides for the recovery of prejudgment interest, although it does not specify the interest rate to be applied.[37] The court, therefore, exercised its discretion to apply an interest rate of 10 percent, the amount Jae Yon had sought.[38] By way of reasoning, the court noted the

27. *Id.*; C.I.S.G., *supra* note 2, art. 7(2).
28. *Jae Yeon Textile, Inc.*, 2017 WL 7156244, at *3 (quoting Dingxi Longhai Dairy, Ltd. v. Beckwood Tech. Grp. LLC, 635 F.3d 1106, 1108 (8th Cir. 2011)).
29. C.I.S.G., *supra* note 2, arts. 30, 53.
30. *Id.* art. 30.
31. *Jae Yeon Textile, Inc.*, 2017 WL 7156244, at *4.
32. C.I.S.G., *supra* note 2, art. 53.
33. *Jae Yeon Textile, Inc.*, 2017 WL 7156244, at *4.
34. *Id.* at *3; C.I.S.G., *supra* note 2, arts. 61–62.
35. *Jae Yeon Textile, Inc.*, 2017 WL 7156244, at *6.
36. *Id.*; C.I.S.G., *supra* note 2, art. 74.
37. C.I.S.G., *supra* note 2, art. 78.
38. *Jae Yeon Textile, Inc.*, 2017 WL 7156244, at *6.

defendants' California residency and the fact that 10 percent is the default rate of interest in California.[39]

Forum Selection; Opt-Out

In *Marine Pro Dock Systems, LLC v. Polietilen Mamulleri San. Tic. Ltd. Sti.*,[40] the court considered a motion to dismiss the complaint of plaintiff Marine Pro Dock Systems, LLC ("Marine Pro") brought by defendant Polietilen Mamulleri San. Tic. Ltd. Sti. ("PMS"). One of the grounds for the motion to dismiss was improper venue.

In considering this ground for dismissal, the court interpreted the following language in the parties' distribution agreement, which included a mandatory forum-selection clause designating the Izmir Commercial Courts, located in Turkey:

> Execution of this Agreement shall be governed and construed by the Turkish Law. In this context, the Parties expressly opt out of the United Nations Contract on the International Sale of Goods. . . . In the event of disputes in the execution of this Agreement, Turkish law shall be applied and Izmir Commercial Courts shall be entitled.[41]

In defending against the motion to dismiss on the ground of improper venue, Marine Pro argued that the references to "execution of this agreement" were intended to distinguish disputes arising from the signing of the agreement, which would be covered by the forum-selection clause, from those relating to performance of the agreement, which would not.

The court rejected this argument, on several bases.[42] First, the court noted that the dictionary definition of "execution" includes, as part of the definition, the word "performance," thus tending to suggest that no distinction can be drawn between the two.[43] Second, the court found it illogical that the parties would "bother to negotiate choice of law and forum selection terms that addressed only *some* of the disputes that could foreseeably arise in relation to the contract."[44] Third, if Marine Pro's interpretation were accepted, one would expect that the agreement would specify the choice-of-law and forum-selection provisions to be applied to a dispute in the performance of the contract, and it does not do so.[45] Fourth, the court declined to hold that the parties had opted out of the C.I.S.G. only with respect to disputes arising from the execution of the agreement, but not its performance.[46] As C.I.S.G. article 4 provides, the Conven-

39. *Id.* (citing Cal. Civ. Code § 3289).
40. No. 18-14006-CIV-MIDDLEBROOKS/MAYNARD, 2018 WL 3112170 (S.D. Fla. Mar. 28, 2018).
41. *Id.* at *5 (quoting the distribution agreement).
42. *Id.* at *4–7.
43. *Id.* at *5 (citing Merriam-Webster Dictionary, https://www.merriam-webster.com/dictionary/execution).
44. *Id.*
45. *Id.* at *6.
46. *Id.*

tion applies to both "the formation of the contract of sale and the rights and obligations of the seller and the buyer arising from such a contract."[47] Fifth and finally, the court noted that the agreement had been prepared in both English and Turkish language versions, and that the parties had agreed that the Turkish version would prevail in the event of any conflict in language.[48] Although the Turkish language version was never signed, the court nevertheless noted that the word "execution" had been translated "uygulamasinda" in Turkish, which means "implement" in English.[49] This, the court held, was further proof that the parties intended the "carrying out," and "not just the rote process of signing or entering into the Agreement," to fall within the forum-selection clause.[50]

Motion in Limine Inappropriate as a Vehicle for Interpreting the C.I.S.G.

Buhler Versatile Inc. v. GVM, Inc.[51] involved a dispute about the sale of agricultural equipment. Buhler, a Canadian seller, contracted to sell twenty-four custom-made cabs to GVM, a buyer located in Pennsylvania. The contract allowed the deliveries to be made in three separate shipments. GVM sent communications to Buhler a number of times attempting to revise the delivery schedule and eventually canceling the delivery of six cabs that it no longer needed. The dispute revolves around whether Buhler accepted the cancellation, a claim it denies. Additionally, GVM claims Buhler breached first because it did not deliver the last installment of cabs by September 13, 2013, the date stated in the revised purchase agreement.[52]

Although this case does not involve a direct application of the C.I.S.G., the court considered whether a motion in limine was the appropriate vehicle for a party to limit evidence presented to its interpretation of the C.I.S.G.[53] GVM wanted the court to adopt its interpretation of the C.I.S.G. and only allow evidence pertaining to Buhler's failure to deliver the cabs by September 13, 2013. The court applied the Federal Rules of Evidence, which do not allow the resolution of factual disputes by a motion in limine.[54] The court found that a motion in limine is not the appropriate vehicle for asking the court to agree with a party's interpretation of the C.I.S.G.[55]

47. C.I.S.G., *supra* note 2, art. 4.
48. *Marine Pro Dock Sys., LLC*, 2018 WL 3112170, at *6.
49. *Id.*
50. *Id.*
51. No. 1:17-CV-00217, 2018 WL 6062307 (M.D. Pa. Nov. 20, 2018).
52. *Id.* at *2.
53. *Id.* at *5.
54. *Id.* (interpreting Fed. R. Evid. 403).
55. *Id.* at *6.

Place of Business

Target Corp. v. JJS Developments Ltd o/a ERS International[56] concerned a contract where JJS Developments Ltd o/a ERS International ("ERS") purchased assets owned by Target for recycling or other disposition. Target is a U.S. corporation and ERS's principal place of business is Canada. The issue for the court was whether the C.I.S.G. applied to the transaction.[57] Although the C.I.S.G. applies to contracts where the parties' places of business are in different states that have ratified the C.I.S.G.,[58] it also states that, when a party has more than one place of business, the place of business that has the closest relationship to the contract—while taking into account what the parties knew or contemplated at (or before) the time that they made the contract—is the party's place of business.[59] The court determined that the C.I.S.G. did not apply, even though the contract used ERS's Canadian address, because when it partnered with Target, ERS opened an Indianapolis facility to accommodate the volume of goods in the Target contract.[60] Consequently, the court concluded that ERS's place of business in this contract was in the United States, and the C.I.S.G. did not apply.[61]

56. No. 16-cv-1184, 2018 WL 809587 (D. Minn. Feb. 9, 2018).
57. *Id.* at *3.
58. C.I.S.G., *supra* note 2, art. 1.
59. *Id.* art. 10.
60. *Target Corp.*, 2018 WL 809587, at *4.
61. *Id.*