

International Sale of Goods

By Gregory M. Duhl*

INTRODUCTION

The U.S. Supreme Court's decision in *Medellin v. Texas*¹ raised questions about the effect of the United Nations Convention on Contracts for the International Sale of Goods ("CISG")² in the United States. An international treaty, such as the CISG, is only enforceable in U.S. courts as domestic law if it is self-executing or ratified by Congress.³ Congress never ratified the CISG, so it is enforceable as domestic law only if it is self-executing. In *Medellin*, the Court held that in order to be self-executing, a treaty must "itself convey[] an intention that it be 'self-executing.'"⁴ The Court stated that this does not require that the "treaty provide for self-execution in so many talismanic words,"⁵ but rather requires "courts to decide whether a treaty's terms reflect a determination by the President who negotiated it and the Senate that confirmed it that the treaty has domestic effect."⁶ While it is likely the CISG was self-executing,⁷ *Medellin* raises at least a lingering question of whether the CISG is enforceable as a matter of domestic law.⁸

Putting that question aside, in 2008, U.S. courts interpreted the scope, formation, modification, excuse, notice, and remedies provisions of the CISG. The critical decisions and their relevance are discussed below.

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1. 128 S. Ct. 1346 (2008).

2. 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].

3. *Medellin*, 128 S. Ct. at 1351.

4. *Id.* at 1356.

5. *Id.* at 1366.

6. *Id.*

7. See, e.g., *Delchi Carrier SpA v. Rotorex Corp.*, 71 F.3d 1024, 1027 (2d Cir. 1995) (noting the CISG is a self-executing treaty).

8. See Posting of Jeremy Tallman to Contracts Prof Blog, http://lawprofessors.typepad.com/contractsprof_blog/2008/03/medellin-and-th.html (Mar. 28, 2008, 05:57 EST) ("*Medellin* and the CISG"); see also Mark Cantora, *The CISG After Medellin v. Texas: Do U.S. Businesses Have It? Do They Want It?*, 8 J. INT'L BUS. & L. 111, 113–20 (2009) (discussing whether the CISG is self-executing after *Medellin*).

SCOPE

In *Novelis Corp. v. Anheuser-Busch, Inc.*,⁹ the U.S. District Court for the Northern District of Ohio found that the CISG did not apply where the seller's predecessor (the original party to the contract) and the buyer both had places of business in the United States at the time the contract was formed. For purposes of determining whether the CISG is applicable to a contract, a critical factor is where a party has its place of business at the time of contract formation, not at the time of the dispute. In *Novelis*, the court found that, despite references to the seller's predecessor as a Canadian company, it was a Texas corporation and therefore the CISG did not apply.¹⁰

In *Sky Cast, Inc. v. Global Direct Distribution, LLC*,¹¹ the court recognized that a claim of negligent misrepresentation must be decided under state law because negligent misrepresentation is outside the scope of the CISG. According to the court:

[N]egligent misrepresentation is a tort claim completely different from a claim for breach of contract. Being a tort claim, the court concludes that it is not controlled by the CISG, which only concerns the sales of goods between merchants in different countries, and that since this action is a diversity action, Global's claim for negligent misrepresentation is controlled by state law.¹²

In *Valeo Sistemas Electricos S.A. de C.V. v. CIF Licensing, LLC*,¹³ the U.S. District Court for the District of Delaware addressed the issue of what happens if application of the CISG is uncertain when ruling on a motion to dismiss. *Valeo* arose out of a dispute between a Mexican company, Valeo C.V., and a U.S. company, Stmicroelectronics, Inc. ("STM"). Valeo C.V. alleged that STM was required to indemnify it in a patent infringement suit. The parties' contract contained four provisions that could possibly have governed the indemnification issue (one of which was the default provisions of the CISG).¹⁴ Which provision applied was a question of contract interpretation that the court could not resolve on a motion to dismiss.¹⁵ Therefore, the court found that as long as Valeo C.V. could allege its claim under at least one of the four possible provisions, it would deny STM's motion to dismiss.¹⁶ The court ultimately held that Valeo was able to allege its claim under Valeo's General Terms so it denied the motion to dismiss.¹⁷

9. 559 F Supp. 2d 877, 882 n.4 (N.D. Ohio 2008).

10. See *id.* The parties in this case agreed that New York law applied, so even if *Novelis* was found to have been a Canadian corporation, the CISG still would not have applied because the parties decided to opt out pursuant to article 6. See *id.* at 882. See also CISG, *supra* note 2, art. 6 (permitting parties to "exclude application of this Convention").

11. No. 07-161-JBT, 2008 WL 754734, at *1, *6-11 (E.D. Ky. Mar. 18, 2008).

12. *Id.* at *7. The court went on to deny Global's motion for summary judgment on the misrepresentation issue, finding the facts did not support its claim. *Id.* at *7-9.

13. No. 06-627-GMS-LPS, 2008 WL 2736819, at *4 (D. Del. July 18, 2008).

14. *Id.* The four provisions were "(1) Valeo's General Terms; (ii) STM's Terms and Conditions of Sale; (iii) the default contractual provisions of the [U.C.C.]; and/or (iv) the default provisions of the [CISG]." *Id.*

15. See *id.* at *4.

16. *Id.* at *4-6.

17. *Id.*

FORMATION AND RESERVATION UNDER THE CISG

In *Norfolk Southern Ry. Co. v. Power Source Supply, Inc.*,¹⁸ the court had to decide if the purchase order or bills of sale were the operative version of a contract for the sale of locomotives. Because the bills of sale materially altered the terms of the purchase order, the bills of sale, when executed by the parties, became their final agreement under CISG article 19.¹⁹

On February 9, 2008, the plaintiff, Power Source, a Canadian corporation with its principal place of business in Canada, faxed the defendant, Norfolk, a U.S. company, a final purchase order. The locomotives were delivered and the defendant executed the plaintiff's bills of sale on February 14, 2008. The bills of sale contained disclaimers of implied warranties, which the purchase order did not. The court found that CISG article 19 applied, and found that because the disclaimer in the bills of sale related to both the quality of the goods and Norfolk's liability to Power Source, the bills of sale materially altered the terms of the purchase order and therefore constituted a counteroffer by Norfolk that Power Source accepted by its execution of the bills of sale.²⁰ Therefore, the final agreement included no implied warranties.²¹

Further, under article 74, the court awarded the plaintiff the outstanding \$784,315 balance on the contract, and noted that Norfolk could not collect attorney's fees under article 75 or any other article of the CISG.²²

The court then had to calculate prejudgment interest. According to the court, Article 78 entitled Norfolk to prejudgment interest, but the CISG does not specify how that rate is to be determined.²³ Because the dispute was a federal question, the court calculated the interest rate pursuant to federal statute, 28 U.S.C. § 1961(a),²⁴ under which interest accrues at a rate equal to the weekly average one-year constant maturity Treasury yield.²⁵

*Key Safety Systems, Inc. v. Invista, S.A.R.L., L.L.C.*²⁶ provides a good illustration of circularity between the battle-of-the-forms provisions in the CISG and the

18. No. 06-58 J, 2008 WL 2884102, at *6-7 (W.D. Pa. July 25, 2008).

19. *See id.* at *7. *See also* CISG, *supra* note 2, art. 19 (providing reply to offer constitutes counteroffer if reply contains additions, limitations, or other modifications that materially alter terms of offer and terms relating to quality of goods and extent of party's liability materially alter terms of offer).

20. *Norfolk S.*, 2008 WL 2884102, at *6-7.

21. *Id.* at *7. Although the CISG does not specifically include the implied warranties of merchantability and fitness for a particular purpose, article 35 can be read to suggest that such warranties exist. *See id.* at *5. Article 35 also allows for their disclaimer, which is what the parties did in this case. *See id.* Although article 35 permits disclaimer by agreement, it does not provide the standard by which the validity of the disclaimer should be judged. *See* CISG, *supra* note 2, art. 4(a) (providing that the CISG does not address the validity of contract provisions). The court turned to the law of Alberta, Canada (the relevant province) and the Commonwealth of Pennsylvania (the relevant U.S. state) to determine the disclaimer's validity. Finding that the provision was conspicuous and mentioned "merchantability" so as to satisfy the U.C.C. as applicable in Pennsylvania and indicated express agreement as required by Alberta law, the disclaimer was effective regardless of whether Pennsylvania or Alberta law governed. *See Norfolk S.*, 2008 WL 2884102, at *5-6.

22. *Norfolk S.*, 2008 WL 2884102, at *7.

23. *See id.* *See also infra* notes 89-90 and accompanying text.

24. 28 U.S.C. § 1961(a) (2006).

25. *Norfolk S.*, 2008 WL 2884102, at *8.

26. No. 08-CV-10558, 2008 WL 4279358 (E.D. Mich. Sept. 16, 2008).

Uniform Commercial Code (U.C.C.). The case arose out of a contract dispute between Key Safety Systems, Inc. (“KSS”), a Delaware corporation, and Invista, a Luxembourg corporation. KSS claimed there was a requirements contract between it and Invista for the supply of specially manufactured yarn. Although no written contract was ever signed, KSS alleged the contract provided for acceptance by performance. KSS claimed Invista agreed to the contract when it shipped the yarn. Invista, on the other hand, argued that it never accepted the requirements contract, and that it made a counteroffer each time it shipped the yarn with terms and conditions, which KSS agreed to when it accepted the yarn. The sole question before the court was whether it should grant injunctive relief to KSS while the issue of whether there was a requirements contract was litigated. The court ultimately granted the injunction in part and denied it in part, holding that Invista would have to continue to supply yarn, but KSS would have to pay Invista’s last quoted price.²⁷

What is interesting about this case (in relation to the CISG) is Invista’s secondary argument, which was that if its counteroffers were not valid (and the requirements contract was formed when it shipped the yarn), then the choice-of-law provision in its Terms and Conditions opting out of the CISG would likewise not be valid under U.C.C. section 2-207(3).²⁸ By default, the CISG would control and, under the CISG, formation of a requirements contract might not have been possible in this case.²⁹ If the parties did not have a requirements contract, the fact that Invista’s terms materially altered the terms of KSS’s purchase order would make Invista’s terms control under CISG article 19,³⁰ and Invista opted out of the CISG. The U.C.C. would apply. The reasoning is circular. The court never addressed this issue, but it is worth highlighting.

In *Forestal Guarani, S.A. v. Daros International, Inc.*,³¹ the court asked the parties to brief the relevance and application of the CISG to their dispute and ultimately held that the seller could not show that a contract existed because of Argentina’s reservation to the CISG, which necessitates that all contracts governed by the CISG be in writing where one of the parties has its place of business in Argentina.

The case involves an Argentinean corporation, Forestal Guarani (“Forestal”), and a New Jersey corporation, Daros International (“Daros”). Daros is an import-export corporation, and Forestal manufactures lumber products, including wooden finger joints. Around 1999, the parties entered into a verbal agreement under which Daros agreed to sell Forestal’s finger joints to various third-party purchasers in the United States. When a dispute arose as to part of the purchase price that the seller alleged it did not receive, the court directed the parties to submit a supplemental briefing addressing five points of law regarding the CISG:

27. *Key Safety Sys.*, 2008 WL 4279358, at *13–14.

28. See U.C.C. § 2-207(3) (2002).

29. See *Key Safety Sys.*, 2008 WL 4279358, at *9 n.2. The court never actually reached the issue of whether the CISG would bar a requirements contract. See *id.*

30. See CISG, *supra* note 2, art. 19.

31. No. 03-4821 (JAG), 2008 WL 4560701, at *1–2, *5 (D.N.J. Oct. 8, 2008).

(1) Does the [CISG] govern this dispute?; (2) Are any of the exceptions contained in the CISG applicable to the instant action?; (3) What effect does the application of the CISG Treaty have on this dispute?; (4) Does the Treaty preempt State law causes of action?; and (5) Does the CISG provide the exclusive remedy to Forestal in this dispute?³²

If a non-consumer contract is silent as to choice of law, the CISG applies to the agreement if the parties have places of business in different signatory states.³³ The court noted that article 11 of the CISG provides that parties to contracts governed by the CISG are not required to memorialize their agreements in writing and may enforce oral contracts.³⁴ However, CISG article 12 allows the signatories to the CISG to opt out of article 11 and require written contracts.³⁵ Argentina chose to exercise its reservation option pursuant to article 96, and therefore, under the CISG as ratified by Argentina, a contract must be in writing to be enforceable.³⁶

The court found that where only one party is from a state that has made an article 96 reservation to article 11, the contract must be in writing.³⁷ The court must respect the policy of that member state not to bind its citizens to oral contracts with citizens of other member states despite the goal of the CISG to facilitate international commerce.³⁸ Because the plaintiff did not allege that there was a written contract between the parties, and there was no written evidence of any contract, the plaintiff's breach of contract claim failed.³⁹

The same issue arose in *Zhejiang Shaoxing Yongli Printing & Dyeing Co., Ltd. v. Microflock Textile Group Corp.*⁴⁰ The parties had an ongoing business relationship between 2002 and 2004. The plaintiff, a Chinese company, filed an action against the defendant, a U.S. company, for failing to make full payment on goods delivered and accepted. There were eight separate orders and shipments and therefore eight contracts; for each one, the defendant sent a purchase order and the plaintiff accepted the order when it sent the plaintiff a packing list and invoice with the filled order. The defendant argued that its obligation to pay the plaintiff the total amount due on the eight invoices was modified.

However, because the defendant produced no evidence of a written modification, the court denied its claim.⁴¹ China has made a declaration under article 96 requiring contracts to be in writing, just as Argentina has.⁴² Because one contracting party was from China, the court would not consider whether there was a modification without a writing.⁴³

32. *Id.* at *1–2.

33. *See id.* at *3.

34. *See id.*

35. *Id.*

36. *Id.*

37. *See id.* at *4. *See also infra* note 43 and accompanying text.

38. *Forestal Guarani*, 2008 WL 4560701, at *4.

39. *See id.*

40. No. 06-22608, 2008 WL 2098062, at *3 (S.D. Fla. May 19, 2008).

41. *See id.* at *5.

42. *See id.* at *3. *See also supra* note 36 and accompanying text.

43. *See Zhejiang Shaoxing*, 2008 WL 2098062, at *4–5.

MODIFICATION

Two CISG cases in 2008 required courts to consider whether a forum selection clause in a seller's terms of sale was a modification to a contract, with the courts coming out differently but agreeing that the critical factor was whether the buyer agreed to the modification. In *Solae, LLC v. Hershey Canada, Inc.*,⁴⁴ the seller's terms of sale did not modify a contract between the parties because the buyer did not assent to the terms.

For several years, Solae, LLC ("Solae"), had supplied soy lecithin to Hershey Canada, Inc. ("Hershey"), a Canadian corporation. In late 2005, Solae and Hershey negotiated a contract for 2006. The parties did not mention the seller's Conditions of Sale during their negotiations but the buyer was allegedly familiar with them from past dealings. Pursuant to the agreement, the buyer faxed the seller a purchase order on June 21, 2006, and the seller sent an order confirmation before delivery that referred to its Conditions of Sale but did not contain them. The seller sent the buyer an invoice after shipment that contained its Conditions of Sale, including a forum selection clause giving Delaware exclusive jurisdiction over any dispute arising under the agreement.

The court first found that the parties had reached an agreement as to the quantity and price of the soy lecithin Solae sold Hershey in 2006 sufficient to create a contract under the CISG.⁴⁵ The contract negotiated by the parties did not contain a forum selection clause, and there was no evidence that the buyer agreed to a modification of the contract, beyond receipt of the Conditions of Sale.⁴⁶ Without a forum selection clause, the court analyzed whether it had personal jurisdiction over the defendant, and concluded that it did not and dismissed the complaint.⁴⁷

In *BTC-USA Corp. v. Novacare*,⁴⁸ the court found that when the buyer initialed the seller's general conditions of sale adjacent to a forum selection clause, the parties modified their contract under CISG article 29 and agreed to litigate their disputes in France. The court therefore found that venue in the U.S. District Court was improper and dismissed the plaintiff's complaint.⁴⁹

The seller Mougeot-Copy ("M-C"), a subsidiary of Novacare, entered into an oral contract in March 2004 with the buyer, BTC-USA Corp. ("BTC"), to supply paper. Before filling BTC's order, M-C required that BTC confirm its agreement to the seller's terms on a pro forma invoice, and BTC's vice president signed the seller's invoice and initialed the general conditions of sale adjacent to the forum selection clause. The issue is whether the parties modified their oral agreement to include the forum selection clause under CISG article 29.

44. 557 F Supp. 2d 452, 458 (D. Del. 2008).

45. See *id.* at 457.

46. See *id.* at 458. The court relied on the decision of the U.S. Court of Appeals for the Ninth Circuit in *Chateau Des Charmes Wines Ltd. v. Sabate USA Inc.*, 328 F3d 528 (9th Cir.), *cert. denied*, 540 U.S. 1049 (2003). See *id.* See also *infra* note 50 and accompanying text.

47. See *Solae*, 557 F Supp. 2d at 458–61.

48. No. 07-3998 ADM/JSM, 2008 WL 2465814, at *4–5 (D. Minn. June 16, 2008).

49. See *id.* at *5.

The court found that when the buyer initialed the general conditions of sale, it assented to the forum selection clause.⁵⁰ Even though the modification was a material alteration, parties may materially alter their contracts under article 29.⁵¹ While the buyer argued that the court should not enforce the forum selection clause “because doing so would result in hardship and surprise,” the court found that “hardship and surprise” is relevant under U.C.C. section 2-207,⁵² but not to whether parties assent to a modification under the CISG.⁵³

The buyer also argued that the vice president did not read or understand the forum selection clause, but the court properly acknowledged that failing to read or understand terms generally does not render contracts avoidable.⁵⁴ The buyer contended that the forum selection clause was unreasonable because it was inconvenient and would impose a financial hardship. The court responded that “BTC has not alleged that it is incapable of litigating in France because of the economic expense and there is no support for the proposition that financial hardship by itself warrants a finding that the forum selection clause is unreasonable.”⁵⁵ The court ultimately found the forum selection clause enforceable and dismissed the plaintiff’s complaint under Federal Rule of Civil Procedure 12(b)(3).⁵⁶

IMPRACTICABILITY

In *Hilaturas Miel, S.L. v. Republic of Iraq*,⁵⁷ the U.S. District Court for the Southern District of New York used the commercial impracticability doctrine from the U.C.C. to interpret the CISG in a case without any American parties. In a dispute revolving around the inability to perform a contract in light of the threat and commencement of the Iraq War in 2003, the court noted that while the commercial impracticability doctrine can relieve a seller from performance, it does not require the buyer to pay for goods it never received.⁵⁸

The plaintiff *Hilaturas Miel, S.L.* (“Hilaturas”), is a Spanish company, and the Republic of Iraq (the “Republic”) is a foreign state under 28 U.S.C. § 1603(a).⁵⁹ In 1995, the U.N. Security Council adopted the Oil for Food Programme (the “OFFP”), which directed the U.N. Secretary-General to establish an escrow account to be funded by the sale of Iraqi petroleum and to be used for Iraqi civilian needs.

50. See *id.* at *4. Compare *id.*, with *Chateau Des Charmes Wines Ltd. v. Sabate USA Inc.*, 328 F.3d 528, 531 (9th Cir.) (holding buyer’s failure to object to forum selection clause in invoices did not constitute assent to the clause), *cert. denied*, 540 U.S. 1049 (2003).

51. *BTC USA*, 2008 WL 2465814, at *4.

52. See U.C.C. § 2-207(2) (2002) (providing additional term in acceptance does not become part of contract between merchants if term materially alters contract); *id.* cmt. 4 (providing term that results in surprise or undue hardship materially alters contract for purposes of section 2-207).

53. *BTC USA*, 2008 WL 2465814, at *4.

54. See *id.*

55. *Id.* at *5.

56. See *id.*

57. 573 F. Supp. 2d 781, 785, 799–80 (S.D.N.Y. 2008).

58. See *id.* at 800.

59. 28 U.S.C. § 1603(a) (2006).

Hilaturas was substituted for another party to a contract with the State Company for Shopping Centers, an Iraqi state-owned enterprise, to provide acrylic yarn in 2002, and the plaintiff made partial shipment and received partial payments from an account in the United States pursuant to a letter of credit.

In March 2003, the U.N. Secretary-General announced, with the prospect of war with Iraq looming, that he could not guarantee secure delivery of OFFP shipments. Part of the yarn supplied by the plaintiff and destined for Iraq never reached Iraq. On March 17, 2003, the OFFP inspectors were removed from Iraq; those inspectors were necessary to issue the credit-conform documents to allow the plaintiff to be paid on its letter of credit. Two days later, on March 19, hostilities with Iraq began. Coalition Forces invaded Baghdad on April 9, 2003, state-owned enterprises were looted, and the Government of Iraq soon ceased to exist. In June 2004, the U.N. Security Council adopted a resolution providing for the interim government of Iraq to assume responsibility for all obligations relating to the OFFP. The parties do not dispute that the CISG governs the contract at issue, which the plaintiff alleges that the Republic breached in not performing its obligation to pay for the goods (that it never received) under the OFFP contract.

The court first explained that the Republic was not responsible for performance under CISG article 79.⁶⁰ Under that article, “[a] party is not liable for failure to perform on any of his obligations if he proves that the failure was due to an impediment beyond his control and that he could not reasonably be expected to have taken the impediment into account at the time of the conclusion of the contract or to have avoided or overcome it.”⁶¹ Because Iraqi inspectors were withdrawn, the plaintiff could neither deliver its goods nor obtain credit-conform documents, the latter of which was a condition precedent to payment on the letter of credit and an express requirement of the contract.⁶²

While the plaintiff alleged that the Republic had to accept alternative performance once it became clear that the credit-conform documents could not be obtained, the court stated it was unaware of any such duty.⁶³ While the plaintiff cited CISG article 54, the court noted that article 54 does not address whether the buyer is required to accept alternative performance when the seller cannot perform its obligations under a contract, but rather, it discusses the buyer’s performance.⁶⁴

The court next noted that CISG article 46(2) addresses substitute goods and not substitute performance, but could still be used to determine the appropriate rule for substitute performance because the CISG is silent on this issue.⁶⁵ Article 46(2) states, “If the goods do not conform with the contract, the buyer may require delivery of substitute goods only if the lack of conformity constitutes a fundamental breach of contract and a request for substitute goods is made either in conjunc-

60. See *Hilaturas*, 781 F. Supp. 2d at 798.

61. *Id.* (quoting CISG, *supra* note 2, art. 79(1)).

62. See *id.* at 799–800.

63. See *id.* at 799.

64. See *id.*

65. See *id.*

tion with notice given under article 39 or within a reasonable time thereafter.’”⁶⁶ Further, as did the court in *Macromex SRL v. Global International, Inc.*,⁶⁷ the court looked at U.C.C. section 2-614 to determine the extent to which substitute performance should be required under the CISG.⁶⁸ The court also found that the concept of “fundamental breach” under the CISG is comparable to terms that go to the “essence of the agreement” under official comment 1 to U.C.C. section 2-614; thus, section 2-614 could be used to address the issue of substitute performance under the CISG.⁶⁹

The court concluded that the plaintiff “failed to allege that it ever tendered reasonable substitute performance, nor does [i]t describe any method of substitute performance that was available.”⁷⁰ Further, inspection in Iraq was an “essential term” of the plaintiff’s contract. While the plaintiff argued that the Republic had the obligation to provide substitute performance under the contract, that “turn[ed] the doctrine of impossibility on its head,” because it was the plaintiff and not the Republic that could not perform because of the war and the withdrawal of the inspectors.⁷¹ The court was correct in not requiring the Republic to pay for goods that were never delivered because of circumstances unforeseen by and outside the control of the contracting parties.

NOTICE OF NON-CONFORMITY

In *Sky Cast, Inc. v. Global Direct Distribution, LLC*,⁷² the court denied motions of both the buyer and seller for summary judgment on the buyer’s counterclaims for breach of contract,⁷³ but found that the buyer gave timely notice of its breach of contract counterclaim under CISG article 39.

For almost three years prior to the lawsuit, Sky Cast, a Canadian manufacturer of concrete light poles, and Global, an American buyer of these light poles for construction projects in the United States, had established a course of dealing between them. On April 20, 2006, consistent with the pattern of performance that had arisen between the two parties, Global sent a purchase order to Sky Cast, and despite some problems with the production of the light poles and the timing of deliveries, Sky Cast ultimately shipped the light poles and Global accepted them. Sky Cast sued Global for breach of contract, fraud, negligent misrepresentation, and unjust enrichment, and Global filed a breach of contract counterclaim against

66. *Id.* (quoting CISG, *supra* note 2, art. 46(2)).

67. No. 08 Civ. 114 (SAS), 2008 WL 1752530 (S.D.N.Y. Apr. 16, 2008). For more on this case, see *infra* notes 81–85 and accompanying text.

68. See *Hilaturas*, 781 F. Supp. 2d at 800.

69. See *id.* (citing U.C.C. § 2-614 cmt. 1(2002)).

70. *Id.*

71. *Id.*

72. 65 U.C.C. Rep. Serv. 2d (West) 589, 595–96 (E.D. Ky. 2008).

73. The court did find the seller was entitled to summary judgment on its breach of contract claim seeking payment for unpaid goods accepted under the contract. *Id.* at 594. The only issue remaining was the amount of damages to which the seller was entitled, which required consideration of the buyer’s counterclaim for breach of contract due to delay in shipment.

Sky Cast for the damages it suffered from the delays in delivery. Sky Cast argued that U.C.C. section 2-607⁷⁴ precluded Global from recovering on its counterclaim as the buyer did not give notice within a reasonable time after the purported breach.

The court found that because the CISG and not the U.C.C. governed the transaction between the parties, the applicable provision was CISG article 39.⁷⁵ The court quoted CISG article 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.

(2) In any event, the buyer loses the right to rely on a lack of conformity of the goods if he does not give 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.⁷⁶

The court found that, in essence, the non-conformity that Global alleged was a delay in the shipments. The court construed CISG article 39 to permit Global a full two years to notify Sky Cast that the goods were non-conforming.⁷⁷ In other words, the court cast aside what seemed to be, at least as stated in CISG article 39, a “reasonable time” requirement with a cap of two years⁷⁸ in favor of a two-year statute of limitations.⁷⁹ Thus, according to this erroneous construction, two years is the *minimum* (and maximum) time allotted under the CISG, and no matter what the product or the defect is, the buyer has two years to inform the seller of the non-conformity. In this case, the court found that because it was indisputable that Global filed its counterclaim within two years from the time of the purported breach by Sky Cast, it had given Sky Cast adequate notice.⁸⁰

REMEDIES

LOST PROFITS

In *Macromex SRL v. Globex International, Inc.*,⁸¹ the court found that lost profits calculated under CISG article 74 should be based on the market value of the goods at their intended place of sale. Globex, an American company, sells food products to foreign countries. Globex contracted to sell Macromex, a Romanian company, 112 containers of chicken parts and deliver them to Romania. The CISG governed the contract.

74. See U.C.C. § 2-607 (2002) (requiring buyer to give notice within reasonable time from when buyer discovered or should have discovered seller's breach or lose all remedy for that breach).

75. See *Sky Cast*, 655 U.C.C. Rep. Serv. 2d (West) at 595.

76. *Id.* (quoting CISG, *supra* note 2, at. 39).

77. *Id.*

78. CISG, *supra* note 2, art. 39(1).

79. See *Sky Cast*, 655 U.C.C. Rep. Serv. 2d (West) at 595.

80. See *id.*

81. No. 08 Civ. 114 (SAS), 2008 WL 1752530, at *4 (S.D.N.Y. Apr. 16, 2008).

The contract required that Globex make final shipment by May 29, 2006; however, by June 2, 2006, Globex had failed to ship sixty-two of the containers. On June 2, 2006, the Romanian government declared that, as of June 7, 2006, no chicken could be imported into the country unless it was certified by that later date. Between June 2 and June 7, Globex shipped twenty of the remaining sixty-two containers that it had contracted to sell. As of June 7, the remaining forty-two containers could not be shipped to Romania because Globex had failed to satisfy the certification requirement. Macromex brought arbitration proceedings against Globex for breach of contract and won.

In court challenging the arbitral award, Globex argued that damages calculated under CISG article 74 should not reflect the market price of chicken in Romania, but rather reflect the price in Georgia (where Macromex proposed that Globex ship the chickens in light of the impossibility of performing in Romania). “Globex reason[ed] that if it breached, it did so by failing to complete the substituted performance (shipping to Georgia), not by failing to ship to Romania, which was impossible.”⁸² Because the arbitrator rejected Globex’s force majeure defense (finding that Globex could have provided substitute performance and shipped to Macromex in Georgia),⁸³ the contract was breached and article 74 applied.⁸⁴ However, under CISG article 74, lost profits are calculated as the amount foreseeable at the time the contract is executed, and therefore the arbitrator correctly found that they should be based on the market value of chickens in Romania at the time of performance.⁸⁵

PREJUDGMENT INTEREST

Two courts in 2008 reached opposite results as to whether a party could earn prejudgment interest running from the time of an arbitral confirmation to a judgment, an issue on which the CISG is silent. In *Guang Dong Light Headgear Factory Co., Ltd. v. ACI International, Inc.*,⁸⁶ the court, citing to a U.S. District Court for the Southern District of New York case,⁸⁷ found that not awarding prejudgment interest from the time of an arbitral award would impede U.S. policy of favoring arbitration in international commerce, which is a purpose of the CISG to promote.

In 2003, Chinese plaintiff Guang Dong brought an action against American defendant ACI, asking the court to confirm and enforce an arbitration award made

82. *Id.*

83. *See id.* at *2. The court relied on U.C.C. section 2-614 in interpreting the CISG. *See id.* at *3–4 (citing U.C.C. § 2-614 (2002)). The court distinguished between “surmountable impediments,” in which case a seller has to provide substitute performance if reasonable, and “insurmountable impediments,” in which case performance can be excused without substitution. *See id.* at *4. Macromex was closer to the first case, so the court found that the seller was obligated to provide delivery to the buyer at another port when delivery at the port specified in the contract became impracticable. *See id.*

84. *See id.* at *4.

85. *See id.* at *5. *See also* CISG, *supra* note 2, art. 74 (providing that damages may not exceed loss breaching party ought to have foreseen at the time the contract was formed).

86. No. 03-4165-JAR, 2008 WL 1924948, at *3 (D. Kan. Apr. 28, 2008).

87. Sarhank Group v. Oracle Corp., No. 01 Civ. 1285 (DAB), 2004 WL 324881, at *2 (Feb. 19, 2004), *vacated*, 404 F3d 657 (2d Cir. 2005).

by the China International Economic and Trade Arbitration Commission. In an amended complaint filed on August 1, 2006, Guang Dong requested prejudgment interest. The parties tried ACI's counterclaims, and they agreed to offset Guang Dong's liability on the counterclaims by the amount of the arbitral award but were in dispute over whether interest accruing on that arbitral award should be included in the offset.

The court first found that the plaintiff did not waive the right to receive prejudgment interest by not requesting it in its pretrial order.⁸⁸ As to whether the plaintiff should receive prejudgment interest, the court noted that the arbitral award itself provided Guang Dong interest under CISG article 78, which reads, "[I]f 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."⁸⁹ The court found that "failing to award prejudgment interest would impede the purpose of the CISG, which is to further the federal policy of favoring arbitration as a means to resolve disputes by promoting the enforcement of arbitral agreements in international commerce."⁹⁰

Last, the court had to decide what interest rate to apply. The CISG itself is silent on the rate of interest to be applied;⁹¹ the plaintiff wanted the interest rate under state law consistent with the rule for domestic arbitration awards, while ACI wanted the federal postjudgment interest rate. The court chose the federal rate because it believed the higher state rate would overcompensate the plaintiff, reward the plaintiff for its delay from incomplete discovery responses, and undermine the goal of certainty and stability in international transactions.⁹²

In *Zhejiang Shaoxing Yongli Printing & Dyeing Co., Ltd. v. Microflock Textile Group Corp.*,⁹³ the court reached the opposite result under the CISG and refused to award any prejudgment interest arising from an arbitral award. The court agreed with the *Guang Dong* court that the CISG is silent on this question, but found that law in the forum state (Florida), rather than federal substantive law, controlled, and that the plaintiff was not entitled to prejudgment interest under Florida law.⁹⁴ The court cited *AIG Baker Sterling Heights, LLC v. American Multi-Cinema, Inc.*,⁹⁵ an Eleventh Circuit case, for the proposition that state law applies when determining the availability of prejudgment interest.⁹⁶ What the court in *Zhejiang Shaoxing*

88. See *Guang Dong*, 2008 WL 1924949, at *3 (noting authority split on whether failure to request prejudgment interest in pretrial order constituted waiver).

89. *Id.* (quoting CISG, *supra* note 2, art. 78 (alteration in original)).

90. *Id.*

91. *Id.* at *4.

92. See *id.* The court's decision is consistent with the two other U.S. decisions on the appropriate rate for prejudgment interest on a foreign arbitration award. See *Sarhank Group v. Oracle Corp.*, No. 01 Civ. 1285 (DAB), 2004 WL 324881, at *2 (Feb. 19, 2004), *vacated*, 404 F.3d 657 (2d Cir. 2005); *P.M.I. Trading Ltd. v. Farstad Oil, Inc.*, No. 00 Civ. 7120 (RLC), 2001 WL 38282, at *3 (S.D.N.Y. Jan. 16, 2001).

93. No. 06-22608-CIV, 2008 WL 2098062, at *5 (S.D. Fla. May 19, 2008).

94. See *id.*

95. 508 F.3d 995, 1001-02 (11th Cir. 2007).

96. *Zhejiang Shaoxing*, 2008 WL 2098062, at *5.

ignores, however, is the statement of the *AIG Baker* court: “An exception to this general rule exists when affirmative countervailing federal interests are at stake that warrant application of federal law.”⁹⁷ The *Zhejiang* court did not consider countervailing federal interests. Indeed, the court’s approach is at odds with the purpose of the CISG as it subjects plaintiffs in international arbitrations to potentially conflicting state rules on prejudgment interest rather than to a uniform approach that federal law would provide.

97. See *AIG Baker*, 508 F3d at 1001–02 (internal quotation marks omitted).