International Sales of Goods

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

Introduction

This survey includes cases from 2015 addressing the United Nations Convention on Contracts for the International Sales of Goods ("C.I.S.G.").[1] These cases discuss scope, parol evidence, pleading and practice, choice of law, contract formation, and damages.

Scope of the C.I.S.G.: The Concept of an International Contract

In *Luvata Grenada, LLC v. Danfoss, LLC*,[2] the court considered when, applying C.I.S.G. article 1(1), a contract arises "between parties who maintain their places of business in different countries that have ratified the [C.I.S.G.]."[3] A materials manager for Luvata Juárez S. de R.L. de C.V. ("Luvata Mexico") contacted a regional account manager for Danfoss, LLC ("Danfoss U.S."), seeking to purchase a new kind of refrigerant distributor. Danfoss Industries S.A. de C.V. ("Danfoss Mexico") then manufactured and delivered several prototypes to Luvata Mexico without charge.

A series of orders followed. The orders were on letterhead for Luvata Grenada LLC ("Luvata Grenada"), but named as buyers employees of Luvata Mexico. Danfoss Mexico manufactured and delivered the goods to Luvata Mexico, but mailed invoices to Luvata Grenada, which remitted payment. After receiving complaints from its customers as to the quality of the goods, Luvata Grenada sued Danfoss Mexico and Danfoss U.S. for breach of contract and other claims. In seeking dismissal, Danfoss Mexico and Danfoss U.S. contended that the subject-matter jurisdictional requirements of C.I.S.G. article 1(1)(a) were not met because, while both the United States and Mexico have ratified the C.I.S.G., the only contracts in this case were between Mexican corporations.

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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. 668, 671, http://www.cisg.law.pace.e du/cisg/text/treaty.html [hereinafter C.I.S.G.].

2. No. 4:14-CV-00074-SA-JMV, 2015 WL 3484679 (N.D. Miss. June 2, 2015).

3. *Id.* at *2. *See also* C.I.S.G., *supra* note 1, art. 21.

The court declined to resolve the issue at dismissal, finding that whether Luvata Grenada was a party to the contracts was not a jurisdictional question, but instead "an element of relief" that it must prove.[4] "Because federal law unquestionably creates the causes of action asserted under the C.I.S.G., the Court possesses the jurisdiction to determine whether such claims are meritorious."[5] Accordingly, the court denied the motion to dismiss on this ground.[6] Although the court dismissed Danfoss Mexico on personal-jurisdiction grounds, finding that Luvata Grenada failed to make a *prima facie* showing that Danfoss Mexico possessed "minimum contacts" with the forum state, Luvata Grenada had also alleged that Danfoss U.S., the remaining defendant, was liable.[7] The court held that, "[t]o the extent that Luvata Grenada may have failed to allege or may be unable to prove facts that support recovery under the [C.I.S.G.] as to the remaining Defendant Danfoss U.S., these questions are not jurisdictional, but are instead appropriately reserved for the merits portion of the litigation."[8]

Scope of the C.I.S.G.: Parol Evidence

The C.I.S.G. is far more permissive with extrinsic evidence than the U.C.C. because the C.I.S.G. has no parol evidence rule. In *Korea Trade Insurance Corp. v. Oved Apparel Corp.*,[9] the court considered a contract for nineteen shipments of sportswear between Samjin Weaver Co., Ltd. ("Samjin") and defendant buyer Oved Apparel Corp. ("Oved"). The parties conceded that an agreement existed, but they disputed the payment terms. Oved sent payment for fourteen shipments to Samjin's bank in Korea and for three shipments to the bank account of a New Jersey entity, Samjin Weaver U.S.A., Inc., with which Samjin contended it had no affiliation. Claiming confusion as to who was to receive payment, Oved still had not paid for two shipments by the time suit was filed. The balance for these five shipments (the three sent to the unaffiliated company and the two outstanding) exceeded $200,000. Samjin assigned its right to payment for these shipments to Korea Trade Insurance Corp., which sued Oved.

The court rejected Oved's argument that, because its purchase orders indicated payment was to be made by wire transfer to Samjin, it could not present evidence of payment instructions given by Samjin's representative.[10] The invoices Oved received indicated that Oved was to be a notifying party, a party named Baek Hyang Textiles Inc. ("Baek") was to be the consignee, and Samjin was to be the beneficiary. Samjin contended that the invoices showed conclusively that Oved was to make payment to it. In disputing Samjin's contention, Oved produced evidence, which Samjin did not dispute, that Baek representative Steven Park provided alternative payment instructions to Oved for certain

4. *Luvata*, 2015 WL 3484679, at *3.
5. *Id.*
6. *Id.*
7. *Id.* at *3–6.
8. *Id.* at *6 n.6.
9. No. 13-CV-07918 (DAB), 2015 WL 1345812 (S.D.N.Y. Mar. 23, 2015).
10. *Id.* at *2.

shipments. In holding that such representations could be part of the agreement between Oved and Samjin, the court cited C.I.S.G. article 11 for the proposition that "the [C.I.S.G.] does not adopt the parol-evidence rule of American law, and instead 'allows all relevant information into evidence even if it contradicts the written documentation.'"[11]

Pleading and Practice: Failure to Cite the C.I.S.G.

Because litigants in U.S. courts (and, to some extent, the courts themselves) are less familiar with the C.I.S.G. than with domestic substantive law, it is not uncommon for parties to initially plead a case within the scope of the C.I.S.G. as a U.C.C. case. *U.S. Nonwovens Corp. v. Pack Line Corp.*[12] demonstrates the leniency normally expected at the dismissal phase when such an error is made. The case involved contracts by which U.S. Nonwovens Corp. ("Nonwovens") agreed to purchase a custom automatic filling and sealing machine (the "Auto Tubber") from Pack Line Corp. ("Pack Line") and Nuspark Engineering Corp. ("Nuspark"). Nonwovens sued for breach of contract, the implied covenant of good faith and fair dealing, express and implied warranties of quality, and for unjust enrichment, claiming that the Auto Tubber was defective and that Pack Line and Nuspark failed to respond adequately to Nonwovens' complaints. Nuspark moved for dismissal, noting that Nonwovens cited New York law and the U.C.C. in its complaint, rather than the C.I.S.G., which governed the parties' contract.

The court held that the elements of breach of contract under the C.I.S.G. were: "(1) the existence of a valid and enforceable contract containing both definite and certain terms, (2) performance by plaintiff, (3) breach by defendant, and (4) resultant injury to plaintiff."[13] The court found these elements to be the same as under the U.C.C., and held that C.I.S.G. article 35 "may properly be read to suggest" an action for implied warranties of fitness and merchantability, even though the C.I.S.G. does not specifically include such language.[14] Accordingly, the court denied Nuspark's motion to dismiss insofar as the breach of contract, express warranty, and implied warranty claims were concerned.[15] The court, however, granted Nuspark's motion regarding unjust enrichment, finding that the C.I.S.G. preempted such a claim because there was an express contract between Nuspark and Nonwovens.[16] In addition, the court found Nonwovens' claim for breach of the implied covenant of good faith and fair dealing to be du-

11. *Id.* (quoting TeeVee Toons, Inc. v. Gerhard Schubert GmbH, No. 00-CIV-5189 (RCC), 2006 WL 2463537, at *7 (S.D.N.Y. Aug. 23, 2006)); *see* C.I.S.G., *supra* note 1, 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.").

12. 4 N.Y.S.3d 868 (Sup. Ct. 2015).

13. *Id.* at 871–72 (quoting Maxxsonics USA, Inc. v. Fengshun Peiying Electro Acoustic Co., No. 10-C-1174, 2012 WL 962698, at *4 (N.D. Ill. Mar. 21, 2012)).

14. *Id.* at 872.

15. *Id.*

16. *Id.*

plicative of its breach-of-contract claim and therefore granted the motion to dismiss that claim.[17]

Pleading and Practice: Dismissal and Summary Judgment Standards

The 2013 and 2015 opinions of the U.S. District Court for the Middle District of Pennsylvania in *It's Intoxicating, Inc. v. Maritim Hotelgesellschaft mbH*[18] demonstrate the respective pleading standards at the dismissal and summary judgment phases. In that case, which involved a contract for the sale of toiletries for use in hotels, It's Intoxicating, Inc. ("Intoxicating"), the plaintiff-seller, made claims against two different defendants—Maritim Hotelgesellschaft mbH ("Maritim") and Daniela Zimmer ("Zimmer")—under the same alleged contract.[19] Maritim is a German company that owns and operates hotels throughout Germany, and Zimmer is an employee of Maritim.

Intoxicating alleged, among other claims, breach of contract by Maritim and Zimmer, which both moved to dismiss.[20] Zimmer contended that no binding contract existed. In a 2013 opinion denying the motion, the court cited C.I.S.G. article 14 for the proposition that "a party must allege an offer and an acceptance of the essential terms of a sale, including the goods, quantity, and price."[21] Although Intoxicating did not quote any specific contract language establishing these elements, Intoxicating did allege as follows:

> Zimmer made an order on behalf of Maritim, in response to which plaintiff shipped 441 cartons of beauty products on eight skids. Plaintiff also sent an invoice for $181,547.80 and, when the products and invoice arrived, defendant "accepted" them and inquired two weeks later about "the production of a new line of in-room amenity products for the 38 Maritim hotels."[22]

The court held that the plaintiff had thus raised a "plausible inference" that the parties had entered into a contract for 441 cartons of toiletry items for a total price of $181,547.80.[23] Thus, even though there may have been uncertainty as to some of the contract terms or when the contract was completed, the court's 2013 opinion held that the complaint was sufficient to withstand a motion to dismiss.[24] The court held that, although the complaint arguably presented a more compelling case against Maritim as compared with Zimmer, the case

17. *Id.*

18. It's Intoxicating, Inc. v. Maritim Hotelgesellschaft mbH, No. 11-CV-2379, 2013 WL 3973975 (M.D. Pa. July 31, 2013); It's Intoxicating, Inc. v. Maritim Hotelgesellschaft mbH, No. 3:CV-11-2379, 2015 WL 365681 (M.D. Pa. Jan. 27, 2015), *reconsideration denied*, No. 3:11-2379, 2015 WL 1275348 (M.D. Pa. Mar. 19, 2015).

19. *It's Intoxicating, Inc.*, 2015 WL 365681, at *1.

20. *It's Intoxicating, Inc.*, 2013 WL 3973975, at *1.

21. *Id.* at *17; *see* C.I.S.G., *supra* note 1, art. 14.

22. *It's Intoxicating, Inc.*, 2013 WL 3973975, at *18 (internal citations omitted).

23. *Id.*

24. *Id.*

against both could proceed because the complaint had met the threshold requirement of "rais[ing] a plausible inference of liability."[25]

In a January 2015 opinion, the same court found the following evidence sufficient to withstand Maritim's motion for summary judgment:

(1) Placement of an order and shipment of 441 cartons of toiletries on 8 skids directly to one of Maritim's hotels;

(2) an e-mail from Intoxicating with invoices for the products that had been sent directly to the hotel, totaling $181,547.80;

(3) Maritim's receipt and acceptance of the shipment; and

(4) an e-mail from Intoxicating requesting payment and including instructions as to how to transmit payment for the shipment.[26]

This evidence, the court held, was sufficient for summary judgment purposes to show the existence of a contract for 441 cartons of toiletries at a contract price of $181,547.80.[27]

Pleading and Practice: Recognition and Enforcement of Foreign Judgments

Global Material Technologies, Inc. ("GMT"), an Illinois-based seller, sued Dazheng Metal Fibre Co. Ltd. ("DNZ") in different jurisdictions, alleging that it received rusty steel wool products from DNZ.[28] GMT first sought to litigate its claim by suing DNZ in China for breach of contract. Two days later, GMT filed suit in the United States, claiming, among other things, violations of trade secrets and the C.I.S.G. Both lawsuits proceeded. The Chinese court rendered judgment first, finding both parties at fault and ordering them to pay damages, although GMT had to pay more.[29] Both parties appealed and the Chinese appellate court essentially affirmed the lower court's judgment.[30]

DNZ asked the U.S. court to recognize the Chinese court's judgment. GMT argued that, although the Chinese court had personal and subject-matter jurisdiction, the U.S. court should not recognize the judgment because it was not fair and impartial. The U.S. court seemed bothered by the fact that GMT asked for a "'retail' inspection" of the Chinese court's decision—an approach generally disfavored by the courts.[31] The U.S. court voiced concern that GMT had instigated the action in China, yet then argued against recognizing the judgment because it disliked the Chinese court's conclusion.[32] The U.S. court appeared particularly

25. *Id.* at *20.
26. *It's Intoxicating, Inc.*, 2015 WL 365681, at *14.
27. *Id.*
28. Glob. Material Techs., Inc. v. Dazheng Metal Fibre Co., No. 12 CV 1851, 2015 WL 1977527, at *1 (N.D. Ill. May 1, 2015).
29. *Id.*
30. *Id.*
31. *Id.* at *8.
32. *Id.*

troubled by the fact that GMT would have tried to enforce the Chinese court's judgment in U.S. court if GMT had obtained a more favorable result.[33] Although GMT did not win all that it requested, it did receive a judgment for more than $200,000 from the Chinese court.[34] The U.S. court found the Chinese judgment enforceable.[35]

Even though the U.S. court upheld the Chinese court's ruling, GMT still tried to pursue its case, claiming that its case concerned additional parties and that the action in China was a breach of contract action, whereas the U.S. case involved contravention of a treaty—the C.I.S.G.[36] Because the C.I.S.G. claim used the same facts as the Chinese case—including the allegation that DNZ was responsible for the defective goods—the U.S. court refused to permit GMT's C.I.S.G. claim to go forward.[37] The U.S. court would not allow a party to litigate a C.I.S.G. claim in a foreign court and then litigate it again in a U.S. court because the foreign decision was unfavorable.[38]

Pleading and Practice: Federal Jurisdiction

The court, in *Honey Holdings I, Ltd. v. Alfred L. Wolff, Inc.*,[39] addressed numerous issues related to a notice to remove a Texas state court case to federal court and whether the federal court should remand it to state court. Among the issues was whether the case involved C.I.S.G. matters requiring a federal court decision. One of the arguments defendant Bees Brothers, LLC ("Bees Brothers") made against remand was that the honey supplied in this dispute came from countries that had ratified the C.I.S.G. The court noted that, although the federal courts have subject matter jurisdiction over cases arising under a treaty, the mere existence of a treaty is not sufficient to "make a lawsuit one 'arising under' a treaty of the United States for purposes of 28 U.S.C. § 1331."[40] However, the C.I.S.G. is federal law that displaces the U.C.C. as state law when it applies to a contract. Although parties may opt out of the C.I.S.G.,[41] if they want to select U.S. domestic law they must "'affirmatively opt-out of the [C.I.S.G.]' and show a 'clear intent' to do so."[42] It is not sufficient to simply designate a body of law different from the C.I.S.G.[43]

33. *Id.*
34. *Id.*
35. *Id.*
36. *Id.* at *9.
37. *Id.* at *10.
38. *Id.*
39. 81 F. Supp. 3d 543 (S.D. Tex. 2015).
40. *Id.* at 551 (quoting 28 U.S.C. § 1331 (2012) ("arising under")) (citing El Paso Cty. Water Improvement Dist. No. 1 v. Int'l Boundary & Water Comm'n, 701 F. Supp. 121, 124 (W.D. Tex. 1988)).
41. C.I.S.G., *supra* note 1, art. 6 ("The parties may exclude the application of this Convention or, subject to article 12, derogate from or vary the effect of any of its provisions.").
42. *Honey Holdings*, 81 F. Supp. at 552 (quoting BP Oil Int'l, Ltd. v. Empresa Estatal Petroleos de Ecuador, 332 F.3d 333, 337 (5th Cir. 2003)).
43. *Id.*

Honey Holdings I, Ltd. ("Honey Holdings") argued that the case was not brought under federal law, and the only issue for the court was whether to apply the Texas Declaratory Judgment Act. Further, it argued that the case did not involve a substantial federal question or even a breach of contract; it was simply a request for a declaratory judgment. Bees Brothers argued that the case involved the C.I.S.G. because honey is a good covered by the C.I.S.G., the seller was from India, and the buyer was from the United States, both signatories to the C.I.S.G. Bees Brothers argued that the agreement had a clause choosing Texas law and that required the court to apply the C.I.S.G. because Texas is a state of the United States, which ratified the C.I.S.G. Additionally, Bees Brothers argued that the case involved breach of warranty, material breach, and cure, and all of these required application of the C.I.S.G. The court decided that "there is no federal right asserted on the face of the Original Petition, which seeks only a declaration requiring the [c]ourt to construe a contract. . . . [So] construction of a purchase order between private parties is a matter of state law, and the various P.O.s state that construction 'will be in accordance with the laws of the [S]tate of Texas.'"[44] The court further stated that the different purchase orders contained a choice of law clause expressly selecting Texas law, the other parties never objected to the choice of law clause, Honey Holdings claimed to be a citizen of Texas, and the honey was supposed to be delivered to and paid for in Texas.[45] Finally, the court found that the C.I.S.G. did not preempt the state law claims because, even if it applied, it would apply to state claims in a different case filed in another court and not to a declaratory judgment regarding the purchase orders at issue.[46] The court granted Honey Holdings' motion for remand to the state court.[47]

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

Notwithstanding C.I.S.G. article 7(1)'s admonition that, "[i]n the interpretation of this Convention, regard is to be had to its international character and to the need to promote uniformity in its application . . . ,"[48] U.S. courts commonly use U.C.C. provisions to interpret the C.I.S.G. For example, in *Eldesouky v. Aziz*,[49] the court applied U.C.C. provisions with respect to general, incidental, and consequential damages, as well as domestic law with respect to interest and attorney's fees. The court did so even while acknowledging that "the [C.I.S.G.] would seem to apply to the contract at issue in this dispute since [plaintiffs Tasneem Company ("Tasneem") and Al-Yasmin Company ("Al-Yasmin")] are Egyp-

44. *Id.* at 565 (quoting exhibit to Honey Holdings' motion).
45. *Id.* at 566.
46. *Id.*
47. *Id.*
48. C.I.S.G., *supra* note 1, art. 7.
49. No. 11-CV-6986 (JLC), 2015 WL 1573319, at *2 (S.D.N.Y. Apr. 8, 2015) (holding that whether the U.C.C. or the C.I.S.G. was applied to the case was "likely immaterial").

tian companies while [defendants General Trade Corporation, Inc. ("General Trade") and Pyramid Grain International, Inc.] are American."[50]

The case involved a contract for Tasneem and Al-Yasmin to buy flaxseed from General Trade. Tasneem and Al-Yasmin sued for breach of contract, contending that they did not receive the goods and that General Trade failed to deliver monies paid by Tasneem and Al-Yasmin to a third party that subsequently agreed to sell flaxseed directly to them. According to C.I.S.G. article 1(1)(a) and article 6, the C.I.S.G. would apply to the parties' contract because the contract involved a sale of goods between parties with places of business in different Contracting States and neither party opted out of its coverage.[51]

The court cited two reasons for its decision to rely upon the U.C.C. First, the court held that, because the C.I.S.G.'s applicability had been raised only in the plaintiffs' application for damages, the parties had waived the potential applicability of the Convention.[52] This holding is consistent with other cases in which courts held that the applicability of the C.I.S.G. was waived when not raised early in the litigation process.

Second, the court cited the well-worn language of *Delchi Carrier SpA v. Rotorex Corp.*[53] and *Macromex SRL v. Globex International, Inc.*,[54] in holding that courts have often looked to U.C.C. Article 2 for guidance in interpreting the C.I.S.G., even though the U.C.C. is not "*per se* applicable" to the C.I.S.G.[55] Thus, the court held, "whether the [U.C.C.] or the [C.I.S.G.] governs is likely immaterial."[56] The court also applied the U.C.C. with respect to general, incidental, and consequential damages, as well as domestic law with respect to interest and attorney's fees.[57] This approach is not supported by the text of article 7(2), which emphasizes the need to interpret the Convention in light of its international character, a directive that is undermined by application of the U.C.C. The relevant C.I.S.G. provisions would have been as follows: for general damages, consequential damages, and incidental damages (a term not used by the C.I.S.G.), article 74; for interest, articles 78 and 84(1). For attorney's fees, there is a dispute as to whether article 74 provides for their award. Otherwise,

50. *Id.*

51. *See* C.I.S.G., *supra* note 1, arts. 1, 6.

52. *Eldesouky*, 2015 WL 1573319, at *2.

53. 71 F.3d 1024, 1027–28 (2d Cir. 1995) ("Because there is virtually no [case law] under the Convention, we look to its language and to 'the general principles' upon which it is based. . . . [Case law] interpreting analogous provisions of Article 2 of the [U.C.C.] may also inform a court where the language of the relevant [C.I.S.G.] provisions tracks that of the [U.C.C.]").

54. No. 08 CIV. 114 (SAS), 2008 WL 1752530, at *1–2 (S.D.N.Y. Apr. 16, 2008) (citing C.I.S.G. article 7(2) for the proposition that the C.I.S.G. itself supports use of either C.I.S.G. commentary and case law, or case law and commentary interpreting the U.C.C.), *aff'd*, 330 F. App'x 241 (2d Cir. 2009).

55. *Eldesouky*, 2015 WL 1573319, at *2 (quoting *Delchi Carrier, SpA*, 71 F.3d at 1028); *see* C.I.S.G., *supra* note 1, art. 2 (identifying sales to which the C.I.S.G. does not apply, but some of which the U.C.C. covers).

56. *Eldesouky*, 2015 WL 1573319, at *2.

57. *Id.* at *3–8.

a court may award attorney's fees if the parties' contract so provides or if there is a state statute on point.

Contract Formation: Choice of Law Clause and Counteroffers

Orica Australia Pty. Ltd. ("Orica") brought two lawsuits against Aston Evaporative Services, LLC ("Aston") for selling allegedly defective goods.[58] Both cases dealt with summary judgment, but they involve different issues and an additional party in the latter case.[59] Orica is an Australian company that does business in the mining industry. It wanted to supply technology that assists with eliminating wastewater to an Australian coal mine, the Oaky Creek mine. Orica identified Aston, a Colorado company, as a business that sells the technology that Orica wanted to supply to the Australian coal mine and agreed in two separate contracts to buy four water evaporation units.

The earlier case involved contract formation issues governed by the C.I.S.G.[60] The first contract was for one evaporation unit; it involved an offer, a counteroffer, and a counteroffer to that offer. Additionally, there was confusion about when the product was contracted for and ordered due to some delay submitting the purchase order. The second contract was for three additional units. The Australian mine rented the units from Orica and Orica claimed that, as long as they operated correctly, the mine company intended to buy all of the units. Orica expected a profit from the sale. Because all four units had many problems, Orica demanded a refund of the purchase price and for Aston to pay return postage to the United States. The contract contained a choice of law clause selecting Australian law, but the court applied the C.I.S.G., determining that Orica wanted the C.I.S.G. to apply.[61] Simply selecting a particular forum's law does not avoid the C.I.S.G if the forum has ratified the C.I.S.G., as Australia has done.[62]

Because the C.I.S.G. governed the contract, the court needed to decide when the contract was formed and whether it included the seller's "terms sheet" or the buyer's "Conditions of Purchase" because they contained different terms.[63] The court rejected Aston's argument that, under U.C.C. section 2-207, the parties formed the contract informally by exchanging e-mails and that its "terms sheet" was included in the first e-mail message when they began negotiations.[64] Orica's purchase order arrived ten days after Aston's "terms sheet" e-mail and included the Purchase Conditions. Aston argued the Purchase Conditions fall

58. Orica Austl. Pty. Ltd. v. Aston Evaporative Servs., LLC, No. 14-CV-0412-WJM-CBS, 2015 WL 4538534 (D. Colo. July 28, 2015); Orica Austl. Pty. Ltd. v. Aston Evaporative Servs., LLC, No. 14-CV-0412-WJM-CBS, 2015 WL 6172147 (D. Colo. Oct. 21, 2015).

59. The latter *Orica* opinion addressed a motion for summary judgment by UE Manufacturing, LLC, a Colorado company and a third-party defendant/counterclaimant. *Orica*, 2015 WL 6172147, at *1.

60. *Orica*, 2015 WL 4538534, at *4–6.

61. *Id.* at *4 n.4.

62. *Id.*

63. *Id.* at *4–6.

64. *Id.* at *4.

within section 2-207(2)(b) and are not part of the contract because they materially alter the contract. While this may be true for the U.C.C., unfortunately for Aston, the C.I.S.G governed this contract. The C.I.S.G.'s rules on contract formation and terms are not the same as U.C.C. section 2-207, but rather are closer to the common law mirror image rule. The court distinguished between article 19 of the C.I.S.G. and U.C.C. section 2-207, pointing out that the parties could have formed a contract under U.C.C. section 2-207 without the Purchase Conditions if they materially altered the agreement; however, article 19 of the C.I.S.G. considers materially different terms to be a rejection and a counteroffer—not an acceptance.[65] Orica argued persuasively that Aston accepted its counteroffer (the purchase order that included the Conditions of Purchase) through performance, pursuant to C.I.S.G. article 18(3), by supplying the product and accepting payment.[66] The court refused to grant Aston summary judgment on the issue that the contract included the terms sheet.

Contract Formation: Acceptance, Revocation, and a Note on Lost Profits

Orica also addressed whether a purported acceptance, over a month after the deadline expired, closed the deal. The court noted that article 21(1) permits an offeror (Aston) to ratify a late acceptance only if it informed or notified the offeree (Orica).[67] The court cited John Honnold for the point that it is critical for the offeror to make clear that this type of communication is an acceptance of an offer that has already expired.[68] Due to conflicting evidence, some ambiguity in the e-mail correspondence, and the court's uncertainty that it had all of the necessary evidence to decide when the first contract was concluded, the court denied summary judgment to Aston.[69]

Additionally, Aston argued that Orica had no right to a refund or to return the goods under the C.I.S.G. because (1) Orica knew that the product would not meet the Australian mining standard known as MDG 41, (2) Orica's revocation was untimely, and (3) Orica lost the ability to revoke due to the deterioration of the product's condition. The court addressed each of these claims.

Knowledge of Non-conformity

The court cited C.I.S.G. article 35(3) stating that, if a buyer knew or must have been aware of a defect, a seller will not be liable for its failure to conform to ex-

65. *Id.* at *5; *see* C.I.S.G., *supra* note 1, art. 19.
66. *Orica*, 2015 WL 4538534, at *5; *see* C.I.S.G., *supra* note 1, art. 18.
67. *Orica*, 2015 WL 4538534, at *5; *see* C.I.S.G., *supra* note 1, art. 21.
68. *Orica*, 2015 WL 4538534, at *5 (quoting John O. Honnold, Uniform Law for International Sales Under the 1980 United Nations Convention § 174, at 195–96 (3rd ed. 1999)).
69. *Id.* at *5–6. Aston did not move for summary judgment on the other contract. *Id.* at *6.

pectations.[70] Article 35 is not precisely on point, but the court presumed Aston could claim that Orica waived any objection to the product's non-compliance with the mining standard, as long as Orica knew of the non-compliance before accepting the units.[71] The court denied summary judgment because there was a material dispute about these facts.[72]

Timeliness of Revocation

The court noted that article 39(1) requires the buyer to give notice of the defect, including identifying the nature of the problem, within a reasonable time after he has discovered or should have discovered it.[73] The court denied summary judgment, even though Aston claimed that Orica did not give notice for almost a year, because Orica claimed it was permitting Aston to try to remedy the non-conformity during that time.[74]

Deterioration

Orica could lose the right to avoid the contract under C.I.S.G. article 82(1) and (2)(a) if the goods deteriorated to the point that it could not return the goods in substantially the same condition as when they were received, unless the deterioration was not caused by Orica. Aston claimed the goods deteriorated because they were not properly maintained and Orica claimed any deterioration was caused by the product's own defects. Consequently, the court determined this issue was not ripe for summary judgment.[75]

Lost Profits

Orica claimed lost profits because it was unable to complete the sale to the Australian mine company, as it had planned, due to the defects. Aston cited Colorado common law for its argument against Orica's claim; however, the court pointed out that the C.I.S.G., not Colorado common law, governs damages in this case.[76] Nevertheless, the court determined that it should use the Colorado lost profits rules because it assumed that Colorado's rules apply equally well

70. *Id.* at *7; *see* C.I.S.G., *supra* note 1, art. 35(3) ("The seller is not liable . . . 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.").

71. The court stated that article 35 did not "conform precisely to the situation presented here because both parties agree that 'the conclusion of the contract' was in May 2012 and the inspection (which supposedly revealed lack of MDG 41 compliance) took place later. Nonetheless, the court is comfortable presuming that the same principle applies." *Orica*, 2015 WL 4538534, at *7.

72. *Id.*

73. *Id.*; *see* C.I.S.G., *supra* note 1, art. 39(1).

74. *Orica*, 2015 WL 4538534, at *7.

75. *Id.* at *8; *see* C.I.S.G., *supra* note 1, art. 82.

76. *Orica*, 2015 WL 4538534, at *8.

to the C.I.S.G.[77] Again, due to conflicting evidence presented by both sides, the court denied summary judgment.[78]

Damages: Consequential Damages and Lost Profits

The later case, brought by third-party defendant UE Manufacturing (UEM), dealt with a summary judgment motion against consequential damages and lost profits.[79] Although the terms of the contract between the two parties did not seem clear, the parties agreed that UEM built three of the units that were the subject matter of this contract. As in the previous case, the evaporation units had numerous problems after being placed into service at Oaky Creek mine. UEM thought that Aston attempted to revoke acceptance due to these problems. Consequently, the issues are framed around acceptance and revocation. The court applied the U.C.C. and denied summary judgment.[80]

As to damages, Aston requested that UEM pay any lost profits that it may have owed to Orica for the lost sale. Although the court previously held that the C.I.S.G. applies to the contract between Aston and Orica, and that the C.I.S.G. and Colorado standards for lost profits are essentially the same,[81] not all scholars would agree.[82] The court stated that the main hurdle for Orica in its recovery of lost profits was the foreseeability requirement.[83] To prevail, Orica must prove that Aston knew or should have known when they entered the contract that Orica planned to resell the equipment to the Australian mine company and Aston would have to prove that UEM could have reasonably foreseen that Orica would lose the opportunity with the sale to the mine buyer.[84] The court granted summary judgment for UEM on damages but allowed the rest of the case to go forward.[85]

77. *Id.*
78. *Id.*
79. Orica Austl. Pty. Ltd. v. Aston Evaporative Servs., LLC, No. 14-CV-0412-WJM-CBS, 2015 WL 6172147 (D. Colo. Oct. 21, 2015).
80. *Id.* at *4.
81. *Id.* at *5.
82. *See* Harry M. Flechtner, *Remedies Under the New International Sales Convention: The Perspective from Article 2 of the U.C.C.*, 8 J.L. & Com. 53, 96–102 (1988).
83. *Orica*, 2015 WL 6172147, at *5–6.
84. *Id.* at *5. "Aston concede[d] that it [was] not seeking its own lost profits." *Id.* at *5 n.5.
85. *Id.* at *5–7.