International Sales of Goods

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

Introduction

Because the 2014 Uniform Commercial Code Survey did not include cases addressing the United Nations Convention on International Sales of Goods ("C.I.S.G."),[1] this survey includes cases from 2013 and 2014. Some of the more significant cases from this period address the following topics: scope, especially with respect to consignment and distributorship agreements; pleading and practice, including whether a party must mention the C.I.S.G. in its complaint where it would otherwise apply; choice of law and opting out of the C.I.S.G.; contract formation and the battle of the forms; contract interpretation and the role of Incoterms; and attorney's fees as an element of damages.

Scope: Consignment and Distributorship Agreements

Two recent cases demonstrate that consignment and distributorship agreements remain outside the scope of the C.I.S.G. In one such case, *Adonia Holding GmbH v. Adonia Organics LLC*,[2] Adonia Holding GmbH ("Holding"), an Austrian corporation, claimed that it had an exclusive contract with Adonia Organics LLC ("Organics"), an Arizona limited liability company, to distribute Holding's products in Eastern Europe. The agreement required Holding to make efforts to achieve product registration in the countries where it planned to do business within ninety days. Additionally, the agreement mandated that Holding order a specific number of products from Organics, after it completed the product registration in three countries.

Upon learning that another Adonia products reseller was competing with it in Eastern Europe, Holding contacted Organics and requested assistance with this problem. When Organics did not provide sufficient help and the competing reseller did not cease its actions, Holding sued for breach of contract, among other claims. Organics claimed that the C.I.S.G. governed the parties' agreement. The

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1. United Nations Convention on Contracts for the International Sale of Goods, Apr. 11, 1980, 1489 U.N.T.S. 3, 19 I.L.M. 671 [hereinafter C.I.S.G.], *available at* http://www.cisg.law.pace.edu/cisg/text/treaty.html.

2. No. 14-01223-PHX-GMS, 2014 WL 7178389 (D. Ariz. Dec. 16, 2014).

court noted that "[t]he C.I.S.G. provides applicable law for contracts for the 'sale of goods . . . between parties whose places are in different states.'"[3] Because Holding and Organics are members of different states to the treaty (Austria and United States), that requirement was met.[4]

Even so, a question remained as to whether the subject matter of the contract fell within the scope of the C.I.S.G. The court recognized that the small number of courts that had previously dealt with the issue had unanimously "held or suggested that the [C.I.S.G.] does not govern distributorship agreements, which entail much more than the simple sale of goods."[5] The court found that the cases at a minimum "stand for the proposition that an agreement must specify the price or types of goods to be sold before the C.I.S.G. will apply."[6] Because the court found no cases to the contrary, it accepted the reasoning of the majority of cases.[7] The fact that the agreement between Holding and Organics required a minimum quantity to be purchased did not bring this agreement within the C.I.S.G., because it did not specify the type or price of the goods to be sold.[8] Therefore, the agreement was not a contract for the sale of goods, so the C.I.S.G. did not apply.[9] Instead, the court applied the Uniform Commercial Code ("U.C.C.") because the agreement specified that the law of Arizona would apply, and the Ninth Circuit has held "that Arizona would follow the majority of states and apply the [U.C.C.]" to distributorship agreements.[10]

In *Martini e Ricci Iamino S.P.A.—Consortile Societa Agricola v. Western Fresh Marketing Services, Inc.*,[11] the court examined whether the C.I.S.G. applied to the provision of kiwi fruit on an open consignment basis to Western Fresh Marketing Services, Inc. ("Western") where Western had the authority to set the price based on the kind and quality of the shipments, as well as the prevailing market conditions. Western claimed that it could not import five shipments into the United States because they did not meet the minimum standards required for importation. Upon Western's motion for summary judgment, Western argued that the C.I.S.G. applies only to the sale of goods and does not cover consignments. Martini e Ricci Iamino S.P.A.—Consortile Societa Agricola ("Martini") made the contrary argument, arguing that, "[b]ecause the transactions between M & R and Western are certainly matters of international trade, and application of the [C.I.S.G.] to this case would promote uniformity of expectations, the [C.I.S.G.] applies to this transaction."[12]

3. *Adonia*, 2014 WL 7178389, at *2 (quoting C.I.S.G., *supra* note 1, art. 1).
4. *Id.*
5. *Id.* at *3; *see* Amco Ukrservice v. Am. Meter Co., 312 F. Supp. 2d 681, 686 (E.D. Pa. 2004); Viva Vino Imp. Corp. v. Farnese Vini S.r.l., Civ. A. No. 99-6384, 2000 WL 1224903, at *2 (E.D. Pa. Aug. 29, 2000); Helen Kaminski Pty., Ltd. v. Mktg. Austl. Prods., Inc., No. 96B46519, 1997 WL 414137, at *3 (S.D.N.Y. July 23, 1997).
6. *Adonia*, 2014 WL 7178389, at *3 (citing *Helen Kaminski*, 1997 WL 414137, at *3).
7. *Id.*
8. *Id.*
9. *Id.*
10. *Id.* (quoting Hibco Supply, Inc. v. Marvin Windows, Inc., 213 F.3d 642, 642 (9th Cir. 2000)).
11. No. 1:13-CV-0097 AWI BAM, 2014 WL 4661149 (E.D. Cal. Sept. 18, 2014).
12. *Id.* at *5.

As a preliminary matter, the court found that, although the complaint claimed the agreement was for the direct sale of kiwis, "the evidence clearly show[ed] that the agreement was a consignment."[13] Even though Martini claimed "a minimum price expectation," the court held that this would not "change the nature of the agreement."[14] "True consignments 'create an agency pursuant to which goods are delivered to a dealer for the purpose of resale . . . .'"[15] After the court determined that the parties' agreement was a consignment, it held that the C.I.S.G. did not apply.[16] Referring to an earlier case involving Martini, the court held that, based "on the nature of a consignment, the language of the [C.I.S.G.], the structure and provisions of the Uniform Commercial Code art. 2, and the policies underlying the [C.I.S.G.], . . . the [C.I.S.G.] does not apply to true consignments."[17]

Pleading and Practice: Failure to Cite C.I.S.G. Prior to Summary Judgment Phase

In some cases, the parties proceed initially under a domestic body of law (typically the U.C.C.), and then one party raises the applicability of the C.I.S.G. The question in such cases is whether the parties have waived application of the C.I.S.G. by doing so. In *Rienzi & Sons, Inc. v. N. Puglisi & F. Industria Paste Alimentari S.P.A.*,[18] the court considered the waiver issue in the context of the plaintiff importer/distributor's motion for reconsideration following summary judgment in favor of the defendant manufacturer. The case involved a contract for the sale of pasta products that were allegedly spoiled, and one basis for the motion was the plaintiff's contention that the court should have applied the C.I.S.G. to the parties' dispute. Notably, this matter fell within the scope of C.I.S.G. article 1(1)(a) since the parties were each from contracting states, the subject matter was within the scope of the C.I.S.G., and the parties did not opt out of the C.I.S.G.[19]

In denying the motion, the court held that the C.I.S.G.'s applicability was irrelevant because neither party, in the six-year history of the litigation, had raised the C.I.S.G. until the summary judgment phase.[20] The court held that to consider the C.I.S.G. at this point would be prejudicial to the defendants because the C.I.S.G. does not have a parol evidence rule or a statute of frauds, both of which were pertinent to this case.[21]

13. *Id.*
14. *Id.*
15. *Id.* (citing Glenshaw Glass Co. v. Ontario Grape Growers' Mktg. Bd., 67 F.3d 470, 475 (3d Cir. 1995)).
16. *Id.* at *6.
17. *Id.*
18. No. 08-CV-2540 DLI JMA, 2014 WL 1276513 (E.D.N.Y. Mar. 27, 2014).
19. C.I.S.G., *supra* note 1, art. 1(1)(a) ("This Convention applies to contracts of sale between parties whose places of business are in different States: (a) when the States are Contracting States . . . .").
20. *Rienzi*, 2014 WL 1276513, at *2.
21. *Id.*

Citgo Petroleum Corp. v. Odfjell Seachem[22] illustrates the more common approach. That case involved a contract for the sale of cyclohexane. The buyer, Citgo Petroleum Corporation, sued the seller, Odjfell Seachem, and both moved for summary judgment. The seller argued that the buyer should be bound by its pleadings and that, because its complaint did not mention the C.I.S.G., the court should dismiss the contract claim. The court rejected this argument, holding that the plaintiff had sufficiently alleged breach of contract and that, since the C.I.S.G. is merely the body of law that governs the breach-of-contract claim, there was no need to have mentioned it by name in the complaint.[23] The court also noted that the parties apparently did not dispute applicability of the C.I.S.G., which may be a ground on which to distinguish this from the *Rienzi & Sons* case.[24]

Pleading and Practice: Choice of Law

In *It's Intoxicating, Inc. v. Maritim HotelGesellschaft mbH*,[25] in the context of a motion to dismiss, the court considered whether the C.I.S.G. preempted Pennsylvania law even though the agreement specified that Pennsylvania law would govern the agreement.[26] Consistent with *Roser Technologies, Inc. v. Carl Schreiber GmbH*[27] discussed below, the court found that the choice-of-law clause was ineffective to exclude the C.I.S.G. because it did not affirmatively state that the C.I.S.G. would not apply.[28] Because the parties had their places of business in different countries that had ratified the C.I.S.G. and the parties knew they were dealing with foreign entities, the court found that the C.I.S.G. applied.[29]

After determining that the C.I.S.G. applied, the court next considered the pleading requirements for a contracts cause of action under the C.I.S.G.[30] The court held that the C.I.S.G. requires pleadings to "allege an offer and an acceptance of the essential terms of a sale, including the goods, quantity, and price."[31] Additionally, "[a]n offer must be 'sufficiently definite and indicate[ ] the intention of the offeror to be bound in case of acceptance.'"[32] Finally, the court observed that the C.I.S.G. also provides that, although silence or mere inactivity will not be an acceptance, an affirmative action may indicate acceptance of an offer.[33]

22. No. H-07-2950, 2013 WL 2289951 (S.D. Tex. May 23, 2013).
23. *Id.* at *5.
24. *Id.*
25. No. 11-CV-2379, 2013 WL 3973975 (M.D. Pa. July 31, 2013).
26. *Id.* at *16–17.
27. No. 11CV302 ERIE, 2013 WL 4852314 (W.D. Pa. Sept. 10, 2013); *see infra* notes 68–74 and accompanying text.
28. *It's Intoxicating*, 2013 WL 3973975, at *17.
29. *Id.*
30. *Id.*
31. *Id.* (citing C.I.S.G., *supra* note 1, art. 14(1)).
32. *Id.*
33. *Id.* (quoting C.I.S.G., *supra* note 1, art. 18).

Later, on a summary judgment motion, the court considered whether the record supplied sufficient facts for the breach of contract claim against Maritim Hotelgesellschaft mbH ("Maritim") to proceed.[34] After reiterating the findings from the 2013 case as to the C.I.S.G.'s pleading requirements,[35] the court found the facts in the affidavit sufficient to allege a contract and breach where the facts stated in one of the affidavits showed that It's Intoxicating, Inc. received an order for beauty products for Maritim's hotels, that 441 cartons of the product were shipped, and that the seller had not been fully paid despite numerous requests.[36] While Maritim disputed liability on any such contract, the court found disputed facts as to a possible agency relationship between Maritim and another defendant, and it subsequently denied Maritim's motion.[37]

Choice of Law: Opting Out of the C.I.S.G.

C.I.S.G. article 6 permits parties to opt out of the C.I.S.G. where it would otherwise govern their contract, and a substantial body of case law has developed discussing when the parties have exercised this right effectively.[38] Raising this issue was *Roser Technologies, Inc. v. Carl Schreiber GmbH*,[39] which involved an alleged breach of a contract for the manufacture and sale of copper molding plates. The buyer's place of business was in the United States and the seller's was in Germany, such that the C.I.S.G. would normally apply pursuant to C.I.S.G. article 1(a),[40] unless excluded pursuant to article 6.[41]

The contractual language was as follows:

> Supplies and benefits shall exclusively be governed by German law. The application of laws on international sales of moveable objects and on international purchase contracts on moveable objects is excluded.[42]

In holding that the contract had not effectively excluded application of the C.I.S.G., the court noted that the exclusionary language in question "does not explicitly reference the C.I.S.G.," and nor does the C.I.S.G. use the term "'moveable objects.'"[43] Finally, the court noted that the parties' conduct during litigation showed that they did not believe the C.I.S.G. had been excluded in favor of German law: one party argued for application of the U.C.C., while the other argued for application of the C.I.S.G.[44]

34. It's Intoxicating, Inc. v. Maritim Hotelgesellschaft mbH, No. 3:CV-11-2379, 2015 WL 365681 (M.D. Pa. Jan. 27, 2015).
35. *Id.* at *13–14.
36. *Id.* at *14.
37. *Id.*
38. C.I.S.G., *supra* note 1, art. 6 ("The parties may exclude the application of this Convention . . . .").
39. No. 11CV302, 2013 WL 4852314 (W.D. Pa. Sept. 10, 2013).
40. *See supra* note 3.
41. *See supra* note 14.
42. *Roser*, 2013 WL 4852314, at *1.
43. *Id.* at *7.
44. *Id.*

Another case examining the parties' attempt to opt out of the C.I.S.G.'s coverage is *Centro de Recaudación de Ingresos Municipales v. Infor (US), Inc.*[45] In that case, which involved a license agreement for tax software, the court found the following language to be equivalent, insofar as choice of law was concerned:

> ***Choice of Law; Severability.*** This [. . .] agreement will be governed by and constructed under the laws of Puerto Rico, as applicable to agreements executed and wholly performed therein, but without regard to the choice of law provisions thereof. . . . The United Nations Convention on the International Sale of Goods (C.I.S.G.) shall not apply to the interpretation or enforcement of this Agreement.[46]

> ***GOVERNING LAW.*** This Agreement shall be governed and construed in accordance with the laws of the Commonwealth of Puerto Rico. . . .[47]

The first language was found in two contracts between the parties—the Software Services Agreement and the Software License Agreement—while the second language was part of the Software Support Agreement between the parties. The court held that both paragraphs "included a choice of law clause that provided that the agreements would be governed by and constructed under the laws of Puerto Rico."[48] Assuming that the court was referring to the *domestic* laws of Puerto Rico, this analysis is inconsistent with the courts' holdings in a number of cases.[49] Applying the holding of any of these cases would have compelled the conclusion that the *Choice of Law* clause excluded the C.I.S.G. while the *Governing Law* clause did not. Because these two paragraphs were from separate contracts affecting the same transaction, such a result would have required the court to determine how to address conflicting choice-of-law provisions.

Contract Formation: Acceptance or Counteroffer

When contracts involve the exchange of nonidentical forms, there is often later litigation centered on the question of which party's standard terms and

45. 951 F. Supp. 2d 296 (D.P.R. 2013), *appeal dismissed*, No. 13-1930 (1st Cir. Apr. 30, 2014).
46. *Id.* at 299 (quoting The Support Agreement (Docket Nos. 21-5 and 22-5) at 4).
47. *Id.*
48. *Id.* at 302.
49. *See, e.g.*, BP Oil Int'l, Ltd. v. Empresa Estatal Petroleos de Ecuador, 332 F.3d 333, 337 (5th Cir. 2003) ("[A] choice of law provision designating Ecuadorian law merely confirms that the [C.I.S.G.] governs the transaction."); It's Intoxicating, Inc. v. Maritim Hotelgesellschaft mbH, No. 11-CV-2379, 2013 WL 3973975, at *17 (M.D. Pa. July 31, 2013) ("[T]he laws of the state of Pennsylvania" do not exclude the C.I.S.G.); Microgem Corp. v. Homecast Co., No. 10 Civ. 3330 (RJS), 2012 WL 1608709, at *3 (S.D.N.Y. Apr. 27, 2012) ("New York law would apply the C.I.S.G."); Remy, Inc. v. Tecnomatic, S.P.A., No. 1:08-cv-1227-SEBWGH, 2010 WL 4174594, at *1 (S.D. Ind. Oct. 18, 2010) ("Indiana law" includes the C.I.S.G.); Easom Automation Sys., Inc. v. Thyssenkrupp Fabco Corp., No. 06-14553, 2007 WL 2875256 (E.D. Mich. Sept. 28, 2007), *reconsideration granted*, Easom Automation Sys., Inc. v. Thyssenkrupp Fabco Corp., No. 06-14553, 2008 WL 1901236, at *3 (E.D. Mich. Apr. 25, 2008) ("the law of Canada" includes the C.I.S.G.); Travelers Prop. Cas. Co. of Am. v. Saint-Gobain Technical Fabrics Can. Ltd., 474 F. Supp. 2d 1075, 1081 (D. Minn. 2007) ("Minnesota law" does not exclude the C.I.S.G.); Am. Mint LLC v. Gosoftware, Inc., Civ. A. No. 1:05-CV-650, 2006 WL 42090, at *3 (M.D. Pa. Jan. 6, 2006) (selecting "Georgia law" did not exclude the C.I.S.G. because the C.I.S.G. is the (international) law of Georgia).

conditions govern the parties' transaction. Such was the case in *Allied Dynamics Corp. v. Kennametal, Inc.*,[50] which involved a contract for the sale of gas turbine blade parts, where the court examined whether the seller's confirmation served as an acceptance of the order contained in the buyer's purchase order, or was instead a rejection and counteroffer. This issue arose in the context of the defendant seller's motion to dismiss for improper venue and failure to state a claim upon which relief may be granted.

The court found that it was the seller's practice to send an order confirmation shortly after receiving a purchase order and found no credible evidence that the seller began manufacturing the goods before sending the confirmation and allowing the objection period to expire.[51] These confirmations included General Terms and Conditions of Supply printed in Italian on the back side of each page, along with the following language:

> Please send back copy of the present document signed for acceptance of our sale's terms and conditions printed overleaf. After 15 days from receipt of the present we consider our conditions accepted.[52]

It was undisputed that the buyer did not object to the terms and conditions.[53] The court found that, because the General Terms and Conditions included a forum selection clause, which would constitute a material alteration of the contract terms under C.I.S.G. article 19, the confirmation did not serve as an acceptance of the offer contained in the purchase orders, but instead was a rejection and counteroffer, which the buyer accepted when it failed to object.[54] In reaching this decision, the court also applied C.I.S.G. article 8 and concluded that a reasonable person in the buyer's position would have been aware of the General Terms and Conditions and that the buyer had reasonable notice of the seller's intent to include these in the contract.[55] The court found it irrelevant, "especially given [the buyer's] sophistication," that the General Terms and Conditions were in Italian.[56] The court also held that it did not matter that the parties had not discussed the General Terms and Conditions, since they were neither ambiguous nor difficult to locate and because the buyer was plainly aware of the confirmations and the fact that they contained General Terms and Conditions.[57] Because the General Terms and Conditions included a forum selection clause mandating litigation in Milan, Italy, the court granted the defendant's motion to dismiss for improper venue.[58]

50. No. 12-CV-5904 (JFB) (AKT), 2014 WL 3845244 (E.D.N.Y. Aug. 5, 2014).
51. *Id.* at *5.
52. *Id.* at *4.
53. *Id.* at *6.
54. *Id.* at *12 (citing C.I.S.G., *supra* note 1, art. 19).
55. *Id.* at *10–11 (citing C.I.S.G., *supra* note 1, art. 8).
56. *Id.* at *11.
57. *Id.*
58. *Id.* at *13.

Contract Formation: Battle of the Forms

In *Roser Technologies, Inc. v. Carl Schreiber GmbH*,[59] the court explored the differences between the C.I.S.G. and the U.C.C. with respect to the battle of the forms in a transaction involving the manufacture and sale of copper molding plates.[60] Roser Technologies, Inc. ("Roser"), the buyer, alleged breach of a supply contract by Carl Schreiber GmbH ("Schreiber"), the seller.[61]

The course of contract formation between the parties was as follows: Schreiber would provide a quotation, Roser would send a purchase order, and then Schreiber would send an order confirmation. Both Schreiber's quotations and order confirmations referenced standard conditions of sale and included the company's website, where the conditions could be found. These conditions included choice-of-law language. The parties disputed whether this language was part of their contract. Separately, the parties disputed whether certain payment-target language was part of the contract.

The court applied C.I.S.G. article 19, and it also indicated how the matter would have been analyzed under U.C.C. section 2-207.[62] Roser contended that there was no difference in how the two bodies of law would address the issue, while the court found that the two differed in significant ways.[63] Under U.C.C. section 2-207, the key inquiry would be whether incorporating the conditions of sale would produce any surprise or hardship, presumably because there had been no objection on the part of Roser.[64] Under the C.I.S.G., the court held, it would be required to apply a "mirror image" rule.[65] In applying article 19, the court looked for evidence of Roser's receipt and actual knowledge of Schreiber's standard conditions, as well as any evidence, such as initials appearing next to the standard conditions, that they had been read.[66] More generally, the court sought evidence that Roser had the opportunity to become aware of the standard conditions in a reasonable manner, since Roser apparently did not object to them.[67]

Schreiber contended that the purchase orders were Roser's offer, which Schreiber rejected with its confirmation, substituting the confirmation as a counteroffer, which Roser then accepted. Alternatively, Schreiber argued that, if its confirmations were acceptances, then Roser's offer incorporated Schreiber's general conditions in the quotations by reference. Roser, by contrast, argued that its purchase orders were offers that were accepted by Schreiber's confirmations.

The court turned first to the argument that Roser's purchase orders incorporated Schreiber's general conditions by reference. In so doing, the court considered

59. No. 11CV302 ERIE, 2013 WL 4852314 (W.D. Pa. Sept. 10, 2013).
60. *Id.* at *1–2.
61. *Id.*
62. *Id.* at *3–11.
63. *Id.* at *5.
64. *Id.* at *3.
65. *Id.* at *4.
66. *Id.* at *9.
67. *Id.*

Roser's subjective intent, as the preferred approach under the C.I.S.G.[68] The court held that Roser did not intend the general conditions to be part of the contract, noting that Roser's purchase orders included different delivery and payment terms from Schreiber's general conditions.[69]

Next, the court considered whether Schreiber's confirmations constituted an acceptance of the offer Roser made in its purchase orders, or a rejection and counteroffer. The key determination was whether the general conditions had been incorporated into Schreiber's confirmation documents. If they had, the court held, the confirmation would be a counteroffer; if not, the confirmation would function as an acceptance.[70]

In holding that the general conditions were not incorporated into Schreiber's confirmations, the court noted that the reference to the website where the general conditions could be found was "ambiguous at best," as it "merely directs the other party to a website which needs to be navigated in order for the standard conditions to be located."[71] The court also found no evidence of Roser's actual knowledge or receipt of the general conditions and no evidence that the parties discussed them or that any Roser employee had read them.[72]

The court reached a different decision with respect to certain payment-target language that was added to each of Schreiber's order confirmations. The language was as follows:

> If we have offered a payment target, a sufficient coverage by our credit insurance company is assumed. In case this cannot [be] obtained we have to ask for equivalent guarantees or payment in advance.[73]

In holding that this language was incorporated into the confirmations, the court noted that it appeared in regular print on the face of both confirmations and did not require the reader to reference any other document.[74] Thus, the payment-target language was itself independently an additional term under C.I.S.G. article 19.[75] The court also found this addition to be material within the language of article 19(3) because it related to payment for goods.[76] The court rejected Roser's contention that the "ask" language imposed no duty on Roser, finding that this terminology could fairly be equated with "expect or demand" and should thus be considered mandatory.[77] Because Schreiber had incorporated this additional term into its confirmations, the court held the confirmations to be a counteroffer that Roser must then accept.[78]

68. *Id.* at *8.
69. *Id.*
70. *Id.* at *9.
71. *Id.*
72. *Id.*
73. *Id.*
74. *Id.* at *10.
75. *Id.* (citing C.I.S.G., *supra* note 1, art. 19).
76. *Id.*
77. *Id.*
78. *Id.*

Schreiber contended Roser had accepted its counteroffer through e-mails between the parties subsequent to receipt of the confirmations. In holding that Roser had accepted the counteroffer with respect to the first of the two confirmations, the court cited C.I.S.G. article 18(1) and found that Roser's e-mail showed assent to the counteroffer and that Roser had registered no objection and made no attempt to alter its terms.[79] Specifically, Roser indicated it had reviewed Schreiber's confirmation and Schreiber could "proceed with the manufacture of these plates."[80] The court held that Roser had also accepted the second confirmation, albeit not as explicitly as the first.[81] Roser accepted by sending drawings to Schreiber, making no objection to the confirmation, and permitting Schreiber to proceed with the order.[82] Thus, for both confirmations, the contract consisted of Schreiber's confirmation, including the payment target language, but not the general conditions.[83]

Contract Interpretation: Incoterms and the C.I.S.G.

The case of *In re World Imports, Ltd.*[84] involved administrative expense claims by two sellers, both unsecured creditors, who had sold goods to debtor World Imports, Ltd. ("World Imports"). The court noted that federal bankruptcy law permits an administrative claim "provided the claimant establishes: (1) the vendor sold 'goods' to the debtor; (2) the goods were *received by the debtor* within twenty days prior to filing; and (3) the goods were sold to the debtor in the ordinary course of business."[85] The issue was whether World Imports "received the goods" twenty days prior to filing for bankruptcy. Thus, this case required the court to interpret the terms "receipt" or "receive."

As a preliminary matter, the court was required to determine whether to apply the U.C.C. or the C.I.S.G. World Imports successfully argued that, although the U.C.C. defines the term "receipt,"[86] the court should apply the C.I.S.G., which contains an exception to the U.C.C. definition of receipt.[87] After determining that the C.I.S.G. applied to the dispute because the two sellers had their principal places of business in China, China had ratified the C.I.S.G., and the parties had not opted out of the treaty,[88] the court looked to the C.I.S.G. for guidance on how to interpret the term "receive" as used in the Bankruptcy Code.

Although the C.I.S.G. does not define the term "receipt," it provides instruction for a court to fill a gap in this situation through usages that are widely known and regularly observed in international trade for the particular trade

79. *Id.* at *11.
80. *Id.*
81. *Id.*
82. *Id.*
83. *Id.*
84. 511 B.R. 738 (Bankr. E.D. Pa. 2014).
85. *Id.* at 740 (citing *In re* Goody's Family Clothing, Inc., 401 B.R. 131, 133 (Bankr. D. Del. 2009)).
86. *See* U.C.C. § 2-103(1)(c) (2011) ("'receipt' of goods means taking physical possession of them").
87. *In re World Imports*, 511 B.R. at 741.
88. *Id.* at 743.

involved, which would include the Incoterms developed by the International Chamber of Commerce.[89] Although the Incoterms do not contain a definition of "receive" or "receipt," the Incoterms' definition of FOB,[90] which the parties used in their contract, nevertheless assisted the court in interpreting those terms. Applying this definition, the court held that the goods were received in China more than twenty days before the buyer filed bankruptcy, and the sellers were thus denied priority status.[91]

Damages: Attorney's Fees

Whether attorney's fees may be awarded under C.I.S.G. article 74 is a contested question, with most courts holding that such fees are not part of the "sum equal to the loss . . . suffered by the [nonbreaching] party as a consequence of the breach."[92] Where an arbitrator has awarded attorney's fees, however, *Stemcor USA, Inc. v. Miracero, S.A. de C.V.*[93] suggests that the award is not necessarily improper. When the importer sought to confirm the award, the seller asserted that the arbitrators had acted in manifest disregard for the law by entering an award of attorney's fees and costs in favor of the importer. The tribunal had cited article 31 of the International Centre for Dispute Resolution's rules ("ICDR Rules") in making the award of attorney's fees.[94] The importer argued that, although the ICDR Rules provided the procedural framework for the arbitration, the C.I.S.G., which provided the substantive law, would trump the ICDR Rules in this respect. Further, the importer argued, attorney's fees are not available under C.I.S.G. article 74.

In rejecting both arguments, the court held as an initial matter that "choice-of-law provisions do not override arbitrators' ability to award fees, both in general and under ICDR article 31 in particular."[95] In addition, the court held that C.I.S.G. article 74 "does not unambiguously bar recovery of fees and costs."[96]

89. *Id.* at 744 (citing C.I.S.G., *supra* note 1, arts. 7(2), 9(2)). Incoterms are three letter terms commonly used in international sales contracts and are specifically incorporated into the C.I.S.G. *Id.* at 744 n.6 (citing C.I.S.G., *supra* note 1, art. 9(2)).

90. *Id.* at 745 (citing Int'l Chamber of Commerce, *Incoterms 2010*). The Incoterms provide that FOB "[m]eans that the *seller delivers* the goods on board the vessel nominated by the buyer at the named port of shipment or procures the goods already so delivered. The *risk of loss of or damage to the goods passes* when the goods are on board the vessel, and the buyer bears all costs from that moment onwards" *Id.* (emphasis added). Further, the buyer is required to take delivery of the goods as long as they have been properly delivered. *Id.*

91. *Id.* at 745–46.

92. A well-known case standing for this proposition is *Zapata Hermanoes Sucesores, S.A. v. Hearthside Baking Co.*, 313 F.3d 385, 388 (7th Cir. 2002). *But see* Granjas Aquanova S.A. de C.V. v. House Mfg. Co., No. 3:07-CV-00168-BSM, 2010 WL 4809342 (E.D. Ark. Nov. 19, 2010) (attorney's fees are governed by the law of the forum state and noting criticism of *Zapata*).

93. No. 14-cv-00921 (LAK), 2014 WL 5005041 (S.D.N.Y. Sept. 30, 2014).

94. Am. Arbitration Ass'n, International Dispute Resolution Procedures art. 31, at 35–36 (June 1, 2009), *available at* https://www.adr.org/aaa/ShowProperty?nodeId=/UCM/ADRSTG_002037. Article 31 provides that "the tribunal shall fix the costs of arbitration in its award" and "may apportion such costs among the parties if it determines that such apportionment is reasonable." *Id.*

95. *Stemcor*, 2014 WL 5005041, at *5.

96. *Id.*

Although the court acknowledged the existence of the influential Seventh Circuit case of *Zapata Hermanoes Sucesores, S.A. v. Hearthside Baking Co.*,[97] providing that attorney's fees are not recoverable under article 74, it also noted that the question of whether attorney's fees may be recovered under the C.I.S.G. remained open in the Second Circuit, in which the court was located.[98] Thus, the arbitral panel was free to resolve this ambiguity in the law in favor of the importer, and the court declined to disturb the award.[99]

97. 313 F.3d 385, 389 (7th Cir. 2002).
98. *Stemcor*, 2014 WL 5005041, at *5.
99. *Id.*