

CISG

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SCOPE OF APPLICATION OF THE CISG: SUBJECT MATTER

Article 1 of the Contracts for the International Sale of Goods (“CISG”) provides its scope: “This Convention applies to contracts of sale of goods between parties whose places of business are in different States.”¹ Although it is more common for the parties not to raise the CISG where it applies, in some cases a party has tried to invoke the CISG where it does not apply. In *Intown Consulting Grp., LLC v. Anderson-Grayson*,² the defendants, appearing *pro se*, sought removal of the eviction proceeding against them to federal court, asserting federal-question jurisdiction. In support of their petition, the defendants claimed the dispute was governed by the CISG. If this were accurate, federal-question jurisdiction would be appropriate because the CISG is a United States treaty. The court correctly rejected this claim; landlord-tenant matters are outside the scope of the CISG.³

SCOPE OF APPLICATION OF THE CISG: CONSUMER TRANSACTIONS EXCLUDED

CISG Article 2(a) excludes sales transactions for goods “bought for personal, family, or household use, unless the seller, at any time before or at the conclusion of the contract, neither knew nor ought to have known that the goods were bought for any such use.”⁴

In *MDC S.p.A. v. Shuman*,⁵ the court applied the language of Article 2(a) to a contract for the sale of eleven works of art from the plaintiff, an art gallery based in Milan, to the defendant, a private investor and art collector who lives in New York. Both Italy and the United States are parties to the CISG, and works of art can be goods within the meaning of the CISG, so the contract would initially seem to fall within the CISG based on Article 1(a).

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1. United Nations Convention on Contracts for the International Sale of Goods art. 1, Apr. 11, 1980, S. Treaty Doc. No. 98-9 (1983), 1489 U.N.T.S. [hereinafter CISG].

2. No. 1:21-CV-30, 2021 WL 2557212 (N.D. Ga. Jan. 22, 2021).

3. See *id.* at *2 (citing *Round Valley Indian Hous. Auth. v. Hunter*, 907 F. Supp. 1343, 1348 (N.D. Cal. 1995)).

4. *Id.*

5. No. 19 Civ. 07159, 2021 WL 2689403 (S.D.N.Y. June 30, 2021).

Even so, the court held the CISG did not apply to this transaction.⁶ Although the defendant is “an experienced and sophisticated collector of modern art, who serves on the board of the Solomon R. Guggenheim Foundation, which runs the Guggenheim family of museums,” and purchased about 106 paintings from the plaintiff at a total cost of over \$10 million, the court held the sales in question were consumer transactions that fall outside the scope of the CISG.⁷ The court noted the defendant was not an art dealer, the works were purchased for his homes and personal use, and the plaintiff was aware that the purchases were for his personal use.

SCOPE OF APPLICATION OF THE CISG: VALIDITY OF THE CONTRACT EXCLUDED

Article 4 specifically excludes from the CISG any issues relating to the validity of the contract.⁸ This provision was applied in *Jiangsu Beier Decoration Materials Co. v. Angle World LLC*,⁹ in which the court considered whether the parties had a valid arbitration agreement. The petitioner brought a petition to confirm arbitration award, and the respondent filed a motion to dismiss for lack of jurisdiction. The court granted dismissal, finding the parties lacked a valid agreement to arbitrate under the provisions of the Convention on the Recognition and Enforcement of Foreign Arbitral Awards because the agreement to arbitrate had not been signed by both parties.¹⁰ The court rejected the petitioner’s argument that the court should defer to both the arbitral tribunal in China, which found that it had jurisdiction, and the Chinese court that affirmed the tribunal’s award.¹¹ The court’s reasoning was that “the arbitration tribunal and Chinese court were following Chinese law and [the] United Nations convention on the International Sale of Goods (‘CISG’)”¹² and “[w]hether the agreement is valid under Chinese law and [the] CISG is a different question from the one before the court today: whether the agreement is valid under the Convention.”¹³ Because the arbitration clause is a provision of the parties’ contract, Article 4(a) makes it clear that questions regarding the validity of an arbitration clause are outside the scope of the CISG.

PLEADING AND PRACTICE: CONTRACT FORMATION

At the dismissal phase of a CISG case where the defendant alleges the plaintiff has failed to prove a contract, the court will examine the complaint for facts that

6. *Id.*

7. *Id.* at *3.

8. CISG, *supra* note 1, art. 4.

9. No. CV 21-2845, 2021 WL 5003337 (E.D. Pa. Oct. 28, 2021).

10. *Id.* at *2.

11. *Id.* (citing *China Minmetals Materials Imp. & Exp. Co. v. Chi Mei Corp.*, 334 F.3d 274, 286 (3d Cir. 2003)).

12. *Id.*

13. *Id.*

a jury could reasonably conclude to have established the existence of an offer and an acceptance.¹⁴

Article 14 provides the basic standard for the sufficiency of an offer under the CISG:

(1) A proposal for concluding a contract addressed to one or more specific persons constitutes an offer if it is sufficiently definite and indicates the intention of the offeror to be bound in case of acceptance. A proposal is sufficiently definite if it indicates the goods and expressly or implicitly fixes or makes provision for determining the quantity and the price.¹⁵

Under Article 8(3), to determine intent, “[D]ue consideration is to be given to all relevant circumstances of the case including the negotiations, any practices which the parties have established between themselves, usages and any subsequent conduct of the parties.”¹⁶

Article 16 states as follows with respect to acceptance “(1) A statement made by or other conduct of the offeree indicating assent to an offer is an acceptance”¹⁷

These principles were applied in *AGB Contemporary A.G. v. Artemundi LLC*.¹⁸ This case involved the alleged breach of a contract to fund the purchase of Pablo Picasso’s 1964 oil painting entitled “Fille au beret” for resale.¹⁹ The alleged contract for funding was between a Delaware funding company and a Swiss art dealer. The transaction was within the jurisdiction of Article 1(a) since both the United States and Switzerland are parties to the CISG and works of art are “goods” within the meaning of the CISG and not subject to any exception.²⁰

Although the court granted the defendant’s motion to dismiss based on *forum non conveniens* due to a forum-selection clause in the escrow agreement requiring all claims to be litigated in Switzerland,²¹ the court held that the plaintiff sufficiently alleged offer and acceptance.²²

With respect to the offer, the key question was whether an e-mail from the plaintiff to the defendant had sufficiently definite terms to qualify as an offer within the meaning of Article 14 and demonstrated an intent to be bound by its terms. The e-mail in question, which came on July 6, 2020, after over a month of communication between the parties, was as follows:

14. KRISTEN DAVID ADAMS & CANDACE M. ZIERDT, *CISG BASICS: A GUIDE TO INTERNATIONAL SALES LAW* 181 (2016).

15. CISG, *supra* note 1, art. 14.

16. CISG, *supra* note 1, art. 8(3).

17. CISG, *supra* note 1, art. 16.

18. No. CV 20-1689, 2021 WL 1929356 (D. Del. May 13, 2021).

19. *Id.* at *1.

20. *Id.* at *4.

21. *Id.* at *9, *10.

22. *Id.* at *4, *10.

Dear Javier,

I confirm our deal for your Picasso at \$3,300,000 USD net to you.

As discussed, the attorney Mrs. Sylvie Horowitz, copied on this email, will contact you tomorrow with a pro-format [sic] invoice proposition; it should be very simple so hopefully we will be able to finalise this very quickly.

Kind regards, Alain²³

The prior communications between the parties included the plaintiff's confirmation that the defendant would cover certain shipping expenses for the painting. The plaintiff had shipped the painting to Geneva where a pre-sale viewing was to take place. The e-mail set forth above followed the viewing in Geneva.

The court found the e-mail sufficient to allege the existence of an offer because it indicates the goods, the price, and the quantity.²⁴ The court also held the e-mail demonstrates the intent to be bound in the case of acceptance, in light of the prior communications.²⁵

With respect to the acceptance, the court analyzed two communications. On July 6, 2020, the defendant responded to the plaintiff's e-mail thanking the plaintiff and indicating that he looked forward to hearing from the attorney. A few days later, the defendant left a voicemail for the plaintiff, confirming the deal and thanking the plaintiff.

The defendant claimed these communications were insufficient for acceptance for three reasons: (1) the defendant had not used the words "I accept," (2) the defendant had not told the plaintiff to proceed with a wire transfer, and (3) the defendant had not assured the plaintiff the painting would belong to them upon payment of the purchase price. The court rejected these reasons, agreeing with the plaintiff that "there is no magic formula for assent"²⁶ and that the totality of the defendant's communications following the July 6 e-mail established acceptance.²⁷ The court noted several prior CISG cases in which an e-mail constituted acceptance.²⁸

The court also rejected the defendant's argument that its continued negotiation of the terms of the escrow agreement for matters such as delivery showed the parties had not yet reached an agreement on the sale of the painting.²⁹ Because the escrow agreement was only for the purpose of executing the sale agreement, the court found that continued negotiation of the escrow agreement did not disprove the existence of a contract for the sale of the painting.³⁰

23. *Id.* at *5.

24. *See id.* at *6 (citing *Hanwha Corp. v. Cedar Petrochemicals, Inc.*, 760 F. Supp. 2d 426, 432 (S.D.N.Y. 2011)).

25. *See Artemundi LLC*, 2021 WL 1929356, at *6.

26. *Id.*

27. *See id.*

28. *See id.* (citing *VLM Food Trading Int'l, Inc. v. Ill. Trading Co.*, 811 F.3d 247, 250 (7th Cir. 2016); *Roser Techs., Inc. v. Carl Schreiber GmbH*, No. 11CV302, 2013 WL 4852314, at *1, *11 (W.D. Pa. Sept. 10, 2013)).

29. *See Artemundi LLC*, 2021 WL 1929356, at *7.

30. *See id.*

DAMAGES: GENERAL MEASURE OF DAMAGES AND COSTS & ATTORNEYS' FEES

Article 74 provides in relevant part as follows regarding damages under the CISG: “Damages for breach of contract by one party consist of a sum equal to the loss, including loss of profit, suffered by the other party as a consequence of the breach[.]”³¹ U.S. courts have generally not considered “loss” within the meaning of Article 74 to include attorneys’ fees, although they have sometimes allowed attorneys’ fees pursuant to a provision in the parties’ contract or a state statute expressly providing for the award of attorneys’ fees.³²

In *Minh Dung Aluminum Co. v. Aluminum Alloys MFG LLC*,³³ the court applied Article 74 to a transaction in which a defendant seller shipped hazardous waste instead of aluminum ingots to the plaintiff buyer. Because the defendant failed to respond to the complaint, the matter was before the court on a motion for entry of default judgment.³⁴ The plaintiff provided evidence that the defendant had acknowledged its failure to deliver conforming goods and had promised to re-fund payment for the goods but failed to do so.

The CISG applied to this transaction because the plaintiff’s principal place of business is in Vietnam and the defendant’s principal place of business is in Pennsylvania, both the United States and Vietnam are parties to the CISG, and aluminum ingots are goods within the scope of the CISG that do not fall within any exclusion. The parties’ contract did not contain a choice-of-law clause, so the possibility of an Article 6 opt-out clause did not come into play.

Although the plaintiff sought punitive damages and pre- and post-judgment interest in its complaint, the plaintiff did not pursue these in its motion for default judgment, so the court did not address those items.³⁵ Instead, the plaintiff sought—and the court awarded—damages representing the amount it paid for the ingots, the amount it was required to pay to store the hazardous waste at the port of arrival because Vietnamese Customs did not permit the hazardous waste to be re-exported, and lost profit associated with a planned resale of the ingots that it could not complete due to the defendant’s failure to deliver the goods.³⁶ Each of these items falls within the enumerated categories of losses covered by Article 74.³⁷

The court did not, however, allow the plaintiff to recover its \$400 filing fee, \$225 for legal research, or \$100 for service of process.³⁸ The court analogized these to attorneys’ fees and noted the parties’ contract did not provide for the

31. CISG, *supra* note 1, art. 74.

32. See ADAMS & ZIERDT, *supra* note 13, at 243–45.

33. No. 1:20-CV-01764, 2021 WL 3290686 (M.D. Pa. Aug. 2, 2021).

34. See *id.* at *1.

35. See *id.* at *1 n.2.

36. See *id.* at *3–4.

37. See *id.*; CISG, *supra* note 1, art. 74.

38. *Minh Dung Aluminum Company, LTD.*, 2021 WL 3290686, at *3.

recovery of attorneys' fees.³⁹ This approach is consistent with the way other courts have addressed the issue, as mentioned above.⁴⁰

SCOPE OF THE CISG: CONTRACTING PARTIES

Pulse Electronics, Inc. v. U.D. Electronic Corp. (UDE)⁴¹ is a complicated patent infringement case containing several CISG issues instituted by a Delaware corporation (Pulse) against a corporation (UDE) based in Taiwan. Pulse claimed that UDE directly and indirectly infringed on several of its U.S. Patents.⁴² The court granted summary judgment for the defendant.⁴³

UDE manufactures and supplies communications equipment—specifically integrated connector modules. Its headquarters is in Taiwan, and it has two factories in China. According to the defendant, it typically receives a purchase order at its headquarters in Taiwan, manufactures the products in China, and ships them to purchasers outside of the United States. Pulse claims that, even if the products are sold outside of the United States, it still infringes on their patents because UDE knows that integrated connector modules will be incorporated into products that eventually arrive in the United States. Pulse did not produce any evidence that showed infringement actions by UDE that occurred in the United States.⁴⁴

Pulse claimed there was circumstantial evidence that showed UDE infringed on its patents in the United States. UDE typically received a purchase order for a product at its headquarters in Taiwan. After manufacturing the product, UDE shipped it to the buyer outside of the United States, usually in Asia. UDE said it had no knowledge or control over where the products went after they were shipped.⁴⁵ Part of the infringement, according to Pulse, occurred when the products made their way to the United States because UDE allegedly knew and hoped its infringing products would be incorporated into products that eventually came to the United States.⁴⁶ Pulse claimed that UDE used the infringing products in the United States for sales through a number of activities.

Part of Pulse's infringement claim rested on an issue related to the invoices issued by UDE after receiving an order for a product because some invoices showed a billing address in the United States and a shipping address outside the United States.⁴⁷ The court needed to determine what law applied to the invoices (the U.C.C., CISG, Taiwanese law, or some other international law) and

39. See *id.* (citing *Zapata Hermanos Sucesores, S.A. v. Hearthside Baking Co.*, 313 F.3d 385 (7th Cir. 2002); *Profi-Parkiet Sp. Zoo v. Seneca Hardwoods LLC*, No. 13 CV 4358, 2014 WL 2169769, at *1, *10 (E.D.N.Y. May 23, 2014)).

40. See *Intown Consulting Grp.*, 2021 WL 2557212, at *2.

41. *Pulse Elecs., Inc. v. U.D. Elec. Corp.*, 530 F. Supp. 3d 988 (S.D. Cal. 2021) [hereinafter *Pulse*].

42. See *id.*

43. See *id.* at 989.

44. See *id.* at 999.

45. See *id.* at 994.

46. See *id.*

47. See *id.*

then apply that law to decide where the sales actually took place.⁴⁸ If the sales took place outside of the United States they would not infringe on Pulse's patents because the Patent Act only applies to acts occurring within the United States.⁴⁹ UDE argued that the CISG applied and under the CISG all sales and offers for sale occurred outside of the United States.

The court noted that neither party argued that the CISG did not apply to this case, and CISG Article 3(1) has applied to contracts for the sale of electronic things.⁵⁰ Neither party argued that the type of transaction should exclude it from the CISG, so the court considered that point waived.⁵¹ In determining whether the CISG applied to this case, the court had to deal with the fact that UDE's headquarters are in Taiwan. CISG Article 1 states that the CISG applies when the parties are in different states and both states ratified the CISG.⁵² Both the United States and the People's Republic of China (PRC) are Contracting Parties to the CISG.⁵³ However, Taiwan and Hong Kong are not Contracting Parties and the contracts at issue are between corporations located in Taiwan and Delaware and goods are shipped from, to, and made in Hong Kong.⁵⁴

Pulse never addressed the issue of what law should apply, so the court determined it waived an argument that another law should apply.⁵⁵ UDE argued that the CISG should apply and that, under the CISG, the place of sale was outside the United States. When dealing with international contracts that involve Taiwan and Hong Kong, courts have not been consistent in determining whether the CISG applies. Although China has not governed Taiwan since the late 1940s, the PRC considers it part of its territory. The relationship between Hong Kong and the PRC is even more complex with some major political differences. It is considered a special region that is controlled by the PRC, although it has some limited autonomy.

UDE argued that, even though Taiwan is not a Contracting State for CISG purposes, it cannot sign on to the CISG because it has no legal capacity to do so, since the majority of countries do not even recognize Taiwan as a state.⁵⁶ The court determined that the CISG should apply to this case despite the confusing nature of Taiwan's and Hong Kong's legal status.⁵⁷ UDE argued that CISG Article 93 supported a decision to apply the CISG to this case. Article 93(1) allows a Contracting State that has two or more territorial units to extend the CISG to one or all of its territories.⁵⁸ However, (4) states that if no declaration is made

48. *See id.*

49. *See id.* at 1009 (citing *Microsoft Corp. v. AT&T Corp.*, 550 U.S. 437, 441 (2007)).

50. *See id.* at 1002.

51. *See id.* at 1003.

52. *See* CISG, *supra* note 1, art. 1.

53. *Pulse*, 530 F. Supp. 3d at 1003.

54. *See id.*

55. *See id.*

56. *See id.* at 1004–05.

57. *See id.* at 1005.

58. *See* CISG, *supra* note 1, art. 93(1).

under (1), the CISG extends to all the territorial units of that State.⁵⁹ Further, UDE argued that there were policy reasons for applying the CISG to this dispute.

In determining that the CISG applied to this case, the court noted that the CISG aimed to provide worldwide uniformity in international sales and Pulse never argued that the CISG should not apply.⁶⁰ Further, the court noted that a case referred to as the “*Chemical cleaning product equipment case*”⁶¹ applied the CISG where the seller was from Taiwan and the buyer from the PRC suggesting that applying the CISG does not directly contravene the desires of Taiwan or China.⁶² Additionally, all the invoices relied on by Pulse involved entities which are Contracting States, so the CISG applies to the invoices.⁶³ The court agreed with UDE that the CISG applied to Taiwan for policy reasons and because it is part of China.⁶⁴ Additionally, Pulse never produced any direct evidence to show that any of the sales took place in the United States. Although both parties agreed that UDE manufactured products in China and that it sold some products in the United States, there were no facts that showed that UDE sold the infringing products in the United States.⁶⁵

The only remaining issue was whether UDE sold or offered to sell the infringing products in the United States and the court considered where title passed in determining that issue.⁶⁶ Title passes from the seller when the risk of loss passes to the buyer.⁶⁷ The court considered the differences between a shipment contract⁶⁸ and a destination contract.⁶⁹ Although the shipping invoices did not clearly indicate whether they involved a shipping or destination contract, the court noted that the U.C.C. and the CISG assume a shipment contract if it is not clearly indicated on the invoice or other documents.⁷⁰ So, the invoices that stated FOB Hong Kong and indicated the place of shipment and sale in Hong Kong were considered shipment contracts and that meant title and the risk of loss passed in Hong Kong.⁷¹ Pulse argued that UDE used a freight forwarder in the United States but the court determined that goods passing through the United States would not qualify as sales.⁷²

Ultimately, the court held that a “Bill to” address in the United States was not sufficient to show that UDE sold infringing products in the United States⁷³

59. See CISG, *supra* note 1, art. 4.

60. See *Pulse*, 530 F. Supp. 3d at 1006.

61. See *id.* at 1006 (quoting Fan Yang, *CISG in China and Beyond*, 40 UCC L.J. 373, 377 (2008)).

62. See *Pulse*, 530 F. Supp. 3d at 1006.

63. See *id.* at 1007.

64. See *id.*

65. See *id.* at 1009.

66. See *id.* at 1012.

67. See CISG, *supra* note 1, arts. 53, 66.

68. In a shipment contract, title and risk of loss passes when the goods are delivered to the carrier. CISG, *supra* note 1, art. 67(1).

69. In a destination contract, the risk of loss does not pass until the goods are delivered to the buyer. *Id.*

70. See *Pulse*, 530 F. Supp. 3d at 1013–14.

71. See *id.* at 1014.

72. See *id.*

73. See *id.* at 1017–18.

Additionally, even if UDE's customers in the United States sold infringing products, that did not establish liability against UDE.⁷⁴ The court granted summary judgment for UDE and dismissed the plaintiff's infringement claims with prejudice.⁷⁵

*Habas Sinai Ve Tibbi Gazlar Istihsal A.S. v. International Technology & Knowledge Co.*⁷⁶ involved a motion to compel the plaintiff, Habas Sinai Ve Tibbi Gazlar Istihsal A.S. ("Habas"), to answer certain interrogatories and requests for production of documents. The defendant, International Technology & Knowledge Company, Inc., had requested that Habas produce all sales contracts between Habas and any third parties formed through pro forma invoices and emails relating to industrial goods and steel. Although there was no discussion of whether the CISG applied to this dispute, presumably it did because the argument by the defendant was based on the CISG. When the plaintiff objected to the request being overly broad, the defendant responded by stating the discovery was relevant to contract formation under the CISG and arguing that parol evidence and trade usage were more admissible under the CISG than the U.C.C.⁷⁷ Because there was no documentation of a contract between the plaintiff and the defendant, evidence of the parties' intent is relevant under the CISG.⁷⁸ The defendant sought to discover all sales contracts, without a time limitation, between the plaintiff and third parties dealing with sales or purchases of a material volume of goods.⁷⁹ The court denied the defendant's motion to compel as being overly broad and stated that the only relevant evidence was the interaction between the parties and the documents produced by the parties.⁸⁰

FUNDAMENTAL BREACH

Article 25 indicates when a breach is fundamental. It requires a foreseeable loss that is so detrimental to the other party that it deprives the injured party of what "he is entitled to expect under the contract."⁸¹ A fundamental breach empowers the injured party to avoid the contract.⁸² In *Hefei Ziking Steel Pipe Co. v. Meever & Meever and Meever USA and Russell Marine, LLC*⁸³ the seller, Hefei Ziking Steel Pipe Co., Ltd. ("Ziking"), sued for a number of claims including damages from a breach of contract with Meever & Meever, Meever USA, Inc. (together "Meever") for steel products, and alternatively that Russell Marine contracted to purchase the steel pipe in Meever's place. Meever claimed that Ziking

74. See *id.* at 1016.

75. See *id.* at 1032.

76. No. 2:19-cv-608, 2021 WL 4710905 (W.D. Pa. Oct. 8, 2021).

77. See *id.* at *1; see ADAMS & ZIERDT, *supra* note 13, at 74–75 (stating that all relevant information is permitted into evidence to prove the existence of a contract).

78. See *Habas*, 2021 WL 4710905, at *1; ADAMS & ZIERDT, *supra* note 13, at 74–75.

79. See *Habas*, 2021 WL 4710905, at *2.

80. See *id.*

81. CISG, *supra* note 1, art. 25.

82. See CISG, *supra* note 1, arts. 49, 64.

83. No. 4:20-CV-00425, 2021 WL 4267162 (S.D. Tex. Sept. 20, 2021).

breached first, so the first issue was which party committed the first fundamental breach.⁸⁴

The CISG applied because Ziking is based in the People's Republic of China, Meever and Meever are located in the Netherlands, Meever USA is based in the United States, and Russell Marine is located in Channelview, Texas.⁸⁵ Meever USA contracted with Ziking to buy custom ordered structural steel pillars and to pay by two letters of credit or payment guarantees.⁸⁶ Before shipping the pillars, a representative from Meever inspected the steel pillars and issued a "Certificate of Approval" stating that the products were conforming. After Ziking shipped the pillars, it sent the appropriate documents to its bank and those were forwarded to the payer bank, Rabobank. Rabobank refused to pay because the documents did not conform to the letters of credit in a number of ways. Although Ziking claimed the documents were conforming, Meever refused to accept the documents.⁸⁷

Ziking alleged that Meever USA committed a fundamental breach by refusing to take delivery of the goods and refusing to pay.⁸⁸ Article 64(1)(b) allows a seller to avoid a contract if the buyer refuses to pay or take delivery of the goods.⁸⁹ Meever alleged that Ziking committed the first fundamental breach by failing to submit the appropriate documents and shipping non-conforming goods.⁹⁰

The court determined that the document discrepancies did not amount to a fundamental breach.⁹¹ It reasoned that the Letters of Credit provided a small fee of 50 Euros for discrepancies in the document showing that discrepancies did not amount to a fundamental breach, and that the contract did not excuse Meever USA from performing for non-conforming documents, although the buyer retained the right to sue for damages caused by the discrepancy in the documents.⁹²

Meever USA also claimed that Ziking breached by shipping non-conforming goods.⁹³ The court noted that the goods were shipped CIF which required Ziking to pay for shipping and insurance but risk of loss transferred to Meever USA once the goods "pass the ship's rail."⁹⁴ Ziking is, however, liable for any non-conformity in the goods that existed when the risk of loss passed to the buyer.⁹⁵ Still, Meever USA had the burden of proving any non-conformity in the goods.⁹⁶ The court held that Meever waived the right to claim that the

84. See *id.* at *6.

85. See *id.* at *4.

86. See *id.* at *2.

87. See *id.* at *3.

88. See *id.* at *5.

89. See CISG, *supra* note 1, art. 64(1).

90. See *Ziking*, 2021 WL 4267162, at *5.

91. See *id.*

92. See *id.*; see CISG, *supra* note 1, art. 34.

93. See *Ziking*, 2021 WL 4267162, at *5.

94. *Id.*

95. See *id.*; CISG, *supra* note 1, arts. 36, 40.

96. See *Ziking*, 2021 WL 4267162, at *6.

goods were non-conforming because it refused to accept the goods even though it had certified approval of the goods.⁹⁷ Further, it failed to establish any non-conformity in the goods at the time of shipment.⁹⁸ Since it never accepted the goods, it could not determine whether any non-conformities existed.⁹⁹

INDEMNITY AGREEMENT, ATTORNEYS' FEES, AND DAMAGES

Representatives from Meever USA, Meever, Russell Marine, and Ziking met in March to discuss a proposal that Russell Marine purchase the pillars intended for Meever USA from Ziking, although they never agreed to the sale.¹⁰⁰ The following day a representative from Ziking signed an Indemnity and Hold Harmless Agreement that purported to release Meever from any claims by Ziking.¹⁰¹ Meever claimed that the document barred any claims by Ziking and sought attorneys' fees because Ziking breached the indemnity agreement.¹⁰² Ziking claimed the document was unenforceable because Ziking's representative had no authority to sign the document and the agreement lacked consideration.¹⁰³ The court held that the indemnity contract lacked consideration and therefore was unenforceable.¹⁰⁴

Because Ziking was the prevailing party it was entitled to damages under the CISG.¹⁰⁵ Ziking claimed incidental and consequential damages in addition to actual damages and attorneys' fees. The court looked to the U.C.C. for guidance on these damages and found that Ziking prevailed.¹⁰⁶ The court noted that courts generally apply the law of the forum state when determining whether a party in a CISG case may recover attorneys' fees, so the court looked to Texas law.¹⁰⁷ Because Texas law allows recovery of attorneys' fees and costs, Ziking was entitled to recoup those costs.¹⁰⁸ Additionally, Ziking sought prejudgment and post judgment interest.¹⁰⁹ The court cited Article 78 and granted the request for interest at the federal rate.¹¹⁰

CISG PREEMPTION OF STATE CLAIMS

In *Strategy Enterprises Ltd. v. Zigi USA, LLC*,¹¹¹ the plaintiff, a Chinese company, claimed the defendant, a company based in Florida, breached a contract

97. See *id.*

98. See *id.*

99. See *id.*

100. See *id.* at *4.

101. See *id.*

102. See *id.* at *6.

103. See *Ziking*, 2021 WL 4267162, at *7.

104. See *id.* at *7, *8.

105. See *id.* at *8; CISG, *supra* note 1, art. 34.

106. See *Ziking*, 2021 WL 4267162, at *8.

107. See *id.*

108. See *id.*

109. See *id.* at *9.

110. See *id.*; CISG, *supra* note 1, art. 78.

111. No. 21-23965-CIV, 2021 U.S. Dist. LEXIS 247530 (S.D. Fla. Dec. 29, 2021).

between the parties for a sale of goods. The first count was for breach of contract under the CISG and the second claim was a breach of contract under Florida law.¹¹² Defendant moved to dismiss the contract claim based on Florida law stating that it was preempted by the CISG.¹¹³ The parties agreed that the CISG applied and had not been excluded.¹¹⁴ The court, citing *Asia Telco Technologies*,¹¹⁵ held that the CISG preempts the alternative state claim for breach of contract.¹¹⁶

CASES TO WATCH

Two Florida cases involved courts applying state law to contracts even though the CISG appeared to govern the contract. In *Esprit Stones Private Ltd. v. Rio Stone Group Inc.*, Esprit Stones Private Limited, a company with its principal place of business in India, sued Rio Stone Group, a buyer based in the United States, over a disagreement about payment for quartz that it sold to the defendant.¹¹⁷ The plaintiff filed two breach of contract claims including one based on the CISG. However, the court's order did not consider whether the state claim for breach of contract was preempted by the CISG. Instead, it applied Florida law to determine whether a contract existed between the two international parties.¹¹⁸ The court denied the plaintiff's summary judgment motion finding that there are issues of fact that still must be resolved.¹¹⁹

Another Florida case involved the sale of ammunition by a Turkish seller to a Florida corporation. In *Atesci Ltd. v. Sarac Distributors LLC*,¹²⁰ the plaintiff claimed Sarac breached a contract governed by the CISG. However, the court applied the Florida statute of frauds when determining whether an agreement existed.¹²¹ The CISG differs from the U.C.C. and the common law because it does not contain a statute of frauds. Article 11 states that a contract does not require any type of writing or form.¹²² Further, Article 29 allows contract modifications and terminations without a writing.¹²³ Ultimately, the court determined that the statute of frauds would not bar a claim because the agreements were in writing.¹²⁴

112. *See id.* at *1.

113. *See id.* at *3.

114. *See id.* at *4–5.

115. *Id.* at *5 (citing *Asia Telco Techs. v. Brightstar Int'l Corp.*, 15-20608-CIV, 2015 WL 10853904 (S.D. Fla. Aug. 21, 2015)).

116. *See id.* at *6.

117. No. 6:19-cv-637, 2021 WL 4935648 (M.D. Fla. Aug. 28, 2021).

118. *See id.* at *6.

119. *See id.* at *7.

120. No. 2:20-cv-00037, 2020 WL 9551849 (M.D. Fla. Sept. 2, 2020).

121. *See id.* at *3–4.

122. *See* CISG, *supra* note 1, art. 11.

123. *See* CISG, *supra* note 1, art. 29.

124. *See Atesci*, 2020 WL 9551849, at *4.