

**Case 579: CISG 1 (1) (a); 4 (a); 7 (1); 9; 11; 14 (1); 16 (2) (b); 18 (3); 60 (a)**

United States: U.S. [Federal] District Court, Southern District of New York;

Nos. 98CIV861 (RWS), 99CIV3607 (RWS)

10 May 2002; 16 August 2002 (opinion on rehearing)

Geneva Pharmaceuticals Technology Corp. v. Barr Laboratories, Inc. et al.

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(1) Federal Supplement (Second Series) 201, 236

(2) Opinion on rehearing: 2003 U.S. Dist. LEXIS 15442, 2002 Westlaw 1933881,  
<http://www.cisg.law.pace.edu/cisg/wais/db/cases2/020821u1.html>

Abstract prepared by Peter Winship, National Correspondent

The issues before the court included whether the plaintiff's claims of breach of contract, promissory estoppel, negligence and negligent misrepresentation should be dismissed on the ground that there was no genuine issue as to material fact and the alleged seller was entitled to judgment as a matter of law.

The plaintiff, a New Jersey corporation with its place of business in the United States, sought to develop, manufacture and distribute a generic anti-coagulant drug to treat blood clots. To develop the drug, the plaintiff obtained sample amounts of clathrate from defendant, a company with its place of business in Ontario, Canada. The defendant also supplied a reference letter in support of the plaintiff's application to the Federal Drug Administration for approval to manufacture and distribute the anti-coagulant drug. Prior to FDA approval, the defendant concluded an exclusive purchase agreement with a third party. Following FDA approval, plaintiff sent a purchase order to defendant for 750 kg. of clathrate. The defendant did not accept the plaintiff's order and denied that it was obligated to sell clathrate to the plaintiff. The plaintiff sued the defendant, alleging, among other claims, that the defendant had breached a contract, was estopped from rejecting the order, had been negligent and had made negligent misrepresentations. The defendant moved for summary judgment on these claims.

The court concluded that the Convention governed the breach of contract claim. The court found that the plaintiff had alleged facts, including an industry usage that buyers could rely on implied supply commitments, that would support a finding that the plaintiff's initial proposal was an offer (art. 14(1) CISG). Noting that the plaintiff alleged an industry usage that the provision of a reference letter is an acceptance, the court also found that there were sufficient facts to support a finding that the defendant had accepted the offer based on art. 18(3) CISG. The court also found that there was consideration to support the alleged contract and that the contract was therefore not invalid under applicable domestic law pursuant to art. 4(a) CISG. Under the alleged "implied-in-fact" contract, defendant was obligated to supply clathrate if the plaintiff gave it commercially reasonable notice of an order. The court declined to render summary judgment on this claim because there were material facts in dispute.

With respect to the plaintiff's claim under domestic law that it had relied on defendant's promise so that the promise was binding as if it were a contract, the court concluded that this claim was not preempted by the Convention. The court distinguished plaintiff's claim from claims specifically addressed by the Convention (art. 16(2)(b) CISG). The court declined to render summary judgment on this claim because there were material facts in dispute.

With respect to the claims of negligence and negligent misrepresentation, the court concluded that the claims were outside the scope of the Convention. Applying domestic law, the court rendered summary judgment for the defendant on these claims.