CISG-online 2793	
Jurisdiction	USA
Tribunal	Supreme Court of the State of New York, New York County
Date of the decision	14 October 2015
Case no./docket no.	653938/14
Case name	*ThyssenKrupp Metallurgical Prods. GmbH v. Energy Coal, S.p.A.*

Memorandum Decision

Defendant Energy Coal, S.p.A. (Energy) moves to dismiss the complaint, pursuant to CPLR 3211. 1

Plaintiff Thyssenkrupp Metallurgical Products, GmbH (TKME) is a German company; Energy is an Italian company. TKME is a trader in raw materials, and Energy is in the business of mining and selling carbon products. Energy sold TKME a cargo of 25,000 metric tons of petroleum coke (petcoke). The parties' contract, dated April 14, 2008, states that it is governed by New York law and provides for a New York forum. The contract contains Energy's express warranty that the product will meet certain physical and chemical specifications, provides that Energy will nominate an independent company to test the product, and that the results of the test are final and binding. 2

Around the time that TKME and Energy entered into the contract, TKME entered into a separate contract to sell the petcoke to nonparty Sinochem International (Overseas) Pte. (Sinochem), a Singaporean company. The Sinochem contract and the contract between TKME and Energy contain identical specifications for the product. 3

The petcoke was loaded onto a ship in California on August 9 and 10, 2008, and the tester drew a sample of the petcoke for analysis. The petcoke was analyzed after the vessel left California. The vessel arrived in Nanjing, China, on September 8, 2008, where Sinochem took delivery of the petcoke. 4

In October 2008, Sinochem complained to TKME that the test showed that the petcoke did not conform to the specifications. The contracts provide that the petcoke must have an HGI (Hardgrove Grindability Index) of «36–46 typ.» The parties explain that typ. stands for typical, and that the lower the HGI, the harder the petcoke is to grind and process. According to the analysis, the petcoke had an HGI of 32. 5

TKME notified Energy of Sinochem's objections in an email dated October 15, 2008, asking if Energy could explain how the HGI affected the usage of the petcoke. TKME states that, unlike Energy, it had little experience with petcoke. Energy informed TKME that the lower the HGI value, the harder the product, and requested that TKME find out the end use of the petcoke, so that Energy could evaluate the effect of the HGI value. TKME learned that Sinochem 6

planned to use the petcoke to make glass, and that the HGI of 32 meant that the product was «hard and very difficult to crush» (Tiburski affidavit, ¶ 17).

In June 2009, Sinochem sued TKME in China. On July 6, 2009, pursuant to the procedure set forth in UCC § 2-607, TKME issued a vouching-in notice to Energy, inviting it to defend TKME in the Chinese action or be bound by the result. Energy declined to become involved in the Chinese action. TKME alleges that it kept Energy informed with respect to the developments in the Chinese action and that they even discussed settlement. 7

The Chinese court determined that TKME breached the contract with Sinochem by delivering nonconforming product. On June 30, 2014, the Chinese court affirmed a final judgment in Sinochem's favor, awarding it $1.7 million in damages, $286,000 in interest, and $59,000 in court costs. The damages represent the difference between what Sinochem paid TKME for the petcoke and what Sinochem received by selling the petcoke. 8

It is alleged that one month after Sinochem took delivery of the petcoke, the price dropped sharply. TKME says that it paid the judgment amounts and an additional $551,000 for legal fees, expert fees, and other costs related to the Chinese case. 9

On August 8, 2012, TKME filed an action against Energy in the New York State Supreme Court. On October 17, 2013, the parties entered into a stipulation, dismissing the action without prejudice and tolling the statute of limitations for TKME's claims as of the filing date. In the instant action, commenced on December 23, 2014, TKME seeks to recoup what it paid in the Chinese action. The total amount sought from Energy is $2,605,736.51. 10

TKME's complaint is based on the petcoke not having the HGI specified in the contract. TKME asserts claims for contractual indemnity, breach of contract, breach of express and implied warranty, common-law indemnity, contribution, and breach of the vouching-in notice. 11

Discussion

On a motion to dismiss, the «court must accept as true the facts alleged in the complaint as well as all reasonable inferences that may be gleaned from those facts» *(Skillgames, LLC v Brody,* 1 AD3d 247, 250 [1st Dept 2003]; *see Amaro v Gani Realty Corp.,* 60 AD3d 491, 492 [1st Dept 2009]). Under CPLR 3211(a)(1), a dismissal is warranted only if the documentary evidence «conclusively establishes a defense to the asserted claims as a matter of law» *(Leon v Martinez,* 84 NY2d 83, 88 [1994]). Under CPLR 3211(a)(7), dismissal is warranted only if the pleading entirely fails to manifest any cause of action cognizable at law (see *SPRE Realty, Ltd. v Dienst,* 119 AD3d 93, 101 [1st Dept 2014]). Evidentiary material may be considered on a motion to dismiss in order to remedy defects in a complaint (*Leon,* 84 NY2d at 88). On this motion, affidavits and copies of emails are considered. 12

In support of its motion to dismiss, Energy argues that the causes of action for breaches of contract and warranty are time-barred under Germany's statute of limitations. According to Energy, as TKME is a German company, its claims accrued in Germany and, as the parties' 13

contract is governed by New York law, CPLR 202 requires the application of Germany's three-year statute of limitations.

In opposition to Energy's motion, TKME contends that the United Nations Convention on Contracts for the International Sale of Goods (CISG)[1] governs the parties' contract and hence this action. According to TKME, the CISG requires that the Court apply New York's statute of limitations for the sale of goods, UCC § 2-275. Under that four-year limitations period, the contract and warranty claims are timely. TKME further argues that, even if Germany's statute of limitations applied, German law would toll it. 14

As a threshold matter, the Court must determine whether the CISG applies to this case. 15

When a transaction involves a sale of goods between parties whose places of business are in different countries and those countries are parties to the CISG, the transaction will automatically be governed by the CISG (CISG § 1[1][a]; *Saint Tropez Inc. v Ningbo Maywood Indus.* & *Trade Co., Ltd.,* 2014 WL 3512807, *8, 2014 US Dist LEXIS 96840, *24–25 [SD NY, July 6, 2014, No. 13-Civ-5230 (NRB)]). The parties agree that their respective nations, Italy and Germany, are signatories to the CISG. 16

The CISG is a self-executing treaty; unless parties explicitly opt out of it, it is binding on them *(id.; Delchi Carrier SpA v Rotorex Corp.,* 71 F3d 1024, 1027–1028 [2d Cir 1995]; *Hanwha Corp. v Cedar Petrochemicals, Inc.,* 760 F Supp 2d 426, 430–431 [SD NY 2011]). If parties do not want the CISG to govern their transaction, they must clearly and unequivocally say so in their contract *(Microgem Corp., Inc. v Homecast* Co., *Ltd.,* 2012 WL 1608709, *3, 2012 US Dist LEXIS 65166, *8–9 [SD NY, Apr. 27, 2012, No. 10-Civ-3330 (RJS)]; *Cedar Petrochemicals, Inc. v Dongbu Hannong Chem. Co., Ltd.,* 2011 WL 4494602, *3, 2011 US Dist LEXIS 110716, *10 [SD NY, Sept. 28, 2011, No. 06-Civ-3972 (LTS) (JCF)]; *see also Delchi,* 71 F3d at 1027). 17

«Stating only that a contract will be governed by a particular jurisdiction's laws is generally insufficient to opt-out of the CISG when the CISG has been incorporated into that jurisdiction's laws» *(Microgem,* 2012 WL 1608709, *3, 2012 US Dist LEXIS 65166, *7–8; *St. Paul Guardian Ins. Co. v Neuromed Med. Sys.* & *Support, GmbH,* 2002 WL 465312, *3, 2002 US Dist LEXIS 5096, *7 [SD NY, Mar. 26, 2002, No. 00-CIV-9344 (SHS)], *affd* 53 Fed Appx 173 [2d Cir 2002] [the CISG applied where the contract designated German law because the parties did not affirmatively disclaim the CISG and the CISG was part of German law]; *see also BP Oil Intl., Ltd. v Empresa Estatal Petroleos de Ecuador,* 332 F3d 333, 337 [5th Cir 2003] [the same result when the contract chose Ecuadorian law]; *Asante Techs., Inc. v FMC-Sierra, Inc.,* 164 F Supp 2d 1142, 1150 [ND Cal 2001] [the same result when the contract chose the law of British Columbia]). 18

As a treaty, the CISG is incorporated into United States federal law and, thus, is a part of New York law (*Microgem,* 2012 WL 1608709, *3, 2012 US Dist LEXIS 65166, *8; *Hanwha,* 760 F Supp 2d at 430). While the contract in this case calls for New York law to apply, such provision does not exclude the CISG. It is noted that the Chinese court applied the CISG to the action 19

[1] Opened for signature April 11, 1980; found at 52 FR 6262, 1489 UNTS 3, 19 ILM 668. Information on the CISG is located at the CISG Database at Pace Law School, Institute of International Commercial Law: http://www.cisg.law.pace.edu/cisg/text/cisg-toc.html (accessed on September 30, 2015).

between TKME and Sinochem, although their contract also stated that it was governed by New York law, premised on the assumption that the CISG is New York law.

For these reasons, the CISG governs TKME's claims. As federal law, the CISG preempts the domestic law that otherwise would govern the contract, to the extent that the causes of action fall within the scope of the CISG (see *U.S. Nonwovens Corp. v Pack Line* Corp., 48 Misc 3d 211, 214 [Sup Ct, Suffolk County 2015]). «The CISG does not preempt a private contract between parties; instead, it provides a statutory authority from which contract provisions are interpreted, fills gaps in contract language, and governs issues not addressed by the contract» (*Ajax Tool Works, Inc. v Can-Eng Mfg. Ltd.,* 2003 WL 223187 *3, 2003 US Dist LEXIS 1306, *9 [ND Il, Jan. 30, 2003, No. 01-C-5938]). Parties may agree to «derogate from or vary the effect of any of [the CISG's] provisions» (CISG § 6). **20**

Courts interpreting the CISG must pay «regard ... to its international character and to the need to promote uniformity in its application and the observance of good faith in international trade» (CISG § 7[1]). If the CISG's text fails to expressly settle an issue, parties and tribunals should resolve it «in conformity with the general principles on which it is based or, in the absence of such principles, in conformity with the law applicable by virtue of the rules of private international law» (CISG § 7[2]; *see Delchi,* 71 F3d at 1027–1028; *Profi-Parkiet Sp. Zoo v Seneca Hardwoods LLC,* 2014 WL 2169769, *4, 2014 US Dist LEXIS 71289, *14–15 [ED NY, May 23, 2014, No. 13-CV-4358 (PKC) (LB)], citing *Hanwha,* 760 F Supp 2d at 430). **21**

The 2012 United Nations Commission on International Trade Law Digest of Case Law on the United Nations Convention on the International Sale of Goods (UNCITRAL Case Law Digest), Digest of Article 7 case law provides that good faith is one of its general principles (UNCITRAL Case Law Digest, Digest of Article 7, ¶ 13).[2] In articles 8, 18, 25, 34, 38, and many others, the CISG employs the words «reasonable» and «unreasonable» to qualify persons, time, opportunity, and expense. Reasonableness may thus be regarded as a general principle. **22**

«Only where no such general principles can be identified does article 7 (2) permit reference to the applicable national law to solve those questions, an approach to be resorted to only as a last resort» (UNCITRAL Case Law Digest, Digest of Article 7, ¶ 10 [footnote numbers and internal quotation marks omitted]).[3] Matters not governed at all by the CISG «are resolved on the basis of the domestic law applicable pursuant to the rules of private international law of the forum, or, where applicable, other uniform law conventions» *(id.).* **23**

Courts in the United States customarily «look to Article 2 of the [UCC] for guidance, even though the UCC is not 'per se applicable' to the CISG» *(Eldesouky v Aziz,* 2015 WL 1573319, *2, 2015 US Dist LEXIS 45990, *7–8 [SD NY, Apr. 8, 2015, No. 11-CV-6986 (JLC)]; *see Delchi,* 71 F3d at 1028; *Hilaturas Miel, S.L. v Republic of Iraq,* 573 F Supp 2d 781, 799 [SD NY 2008]; *U.S. Nonwovens,* 48 Misc 3d at 215). Case law interpreting analogous provisions of Article 2 of the UCC may inform a court where the language of the relevant CISG provisions track that of the **24**

[2] UNCITRAL Case Law Digest: http://cisgw3.law.pace.edu/cisg/text/digest-2012-07.html#e, follow link on «General Principles of the Convention» to find section 13 (accessed on September 30, 2015).
[3] Follow link on «Gap-filling» to find section 10 (accessed on September 30, 2015).

UCC *(Delchi,* 71 F3d at 1028; *Hanwha,* 760 F Supp 2d at 430; *Genpharm Inc. v Pliva-Lachema A.S.,* 361 F Supp 2d 49, 55 [ED NY 2005]).

The CISG and the UCC measure a breach of contract claim by the same rules (*U.S. Nonwovens,* 49 Misc 3d at 215, citing *Maxxsonics USA, Inc. v Fengshun Peiying Electro Acoustic* Co., *Ltd.,* 2012 WL 962698, *4, 2012 US Dist LEXIS 37938, *9 [ND Il, Mar. 21, 2012, No. 10-C-1174]). «Additionally, although the CISG does not specifically include the implied warranties of fitness and merchantability, CISG Article 35 may properly be read to suggest them» *(U.S. Nonwovens,* 49 Misc 3d at 215). 25

Courts also apply the law of the forum or the law chosen by the parties where the CISG does not address an issue (see *San Lucio, S.r.l. v Import* & *Storage Srvs., LLC,* 2009 WL 1010981, *3–4, 2009 US Dist LEXIS 31681, *7–8 [D NJ 2009, No. 07-3031 (WJM)] [as the CISG made no provision for a specific rate of interest or attorneys' fees, the court applied the law of the United States to those issues]; *Ajax,* 2003 WL 223187 *4–5, 2003 US Dist LEXIS 1306, *8–9 [the CISG did not address the issue of waiver, so Ontario law would govern that question, as the law chosen in the parties' contract]). 26

As the CISG does not contain a statute of limitations, the question of when an action must be brought must be determined according to the law of the forum (10B Hawkland UCC Series § 10:64, United Nations Convention on the International Sale of Goods; *U.S. Nonwovens,* 48 Misc 3d at 214). Other jurisdictions follow the same rule (Switzerland 26 September 2008 Appellate Court Basel-Stadt; Germany 10 December 2003 Appellate Court Karlsruhe; ICC Arbitration Case No. 11333 of 2002 [France]; Case No. 406/1998 of 6 June 2000 of the Arbitration Tribunal of Russian Federation Chamber of Commerce and Industry).[4] 27

The UNCITRAL Case Law Digest, Digest of Article 4 case law, entitled «Other issues not dealt with by the Convention,» provides that statutes of limitations, the validity of choice of forum provisions, and procedural law are beyond the scope of the CISG (UNCITRAL Case Law Digest, Digest of Article 4, ¶ 14).[5] 28

Therefore, New York law applies the issue of statute of limitations. Under New York law, when a claim accrues outside New York and the plaintiff is a nonresident, CPLR 202 measures the timeliness of the claim according to the statute of limitations of the place where the claim arose, if shorter than New York's. 29

The parties agree that August 9, 2008, when the petcoke was loaded, is when the limitations period started running. A contract claim accrues when liability for the wrong has arisen, even if the wronged party does not yet know that it has been wronged *(ACE Sec. Corp., Home Equity Loan Trust, Series 2006-SL2 v DB Structured Prods., Inc.,* 25 NY3d 581, 594 [2015]), and even if 30

[4] http://cisgw3.law.pace.edu/cases/080926s1.html Switzerland; http://cisgw3.law.pace.edu/cases/031210g1.html Germany; http://cisgw3.law.pace.edu/cases/021333i1.html France; and http://cisgw3.law.pace.edu/cases/000606rl.html Russia (accessed on September 30, 2015).

[5] http://cisqw3.law.pace.edu/cisg/text/digest-20l2-04.html#ot (accessed on September 30, 2015).

no damage occurs until later *(Chelsea Piers L.P. v Hudson Riv. Park Trust,* 106 AD3d 410, 412 [1st Dept 2013]).

The parties do not agree where the limitations period accrued. A breach of contract claim accrues where the claimant is injured which, in the case of purely economic injury, is the place where the plaintiff has its principal place of business or the place of its incorporation *(Global Fin. Corp. v Triarc Corp.,* 93 NY2d 525, 528–529 [1999]; *Oxbow Calcining USA Inc. v American Indus. Partners,* 96 AD3d 646, 651 [1 st Dept 2012]). These include the places where the plaintiff sustains the economic impact of the breach, or first has the right to demand payment under the contract and to bring a cause of action for breach *(Global,* 93 NY2d at 528; *Swift v New York Med. Coll.,* 25 AD3d 686, 687 [2d Dept 2006]). **31**

TKME argues that German law does not apply because it was not injured in Germany but in California, where the petcoke was delivered and loaded. According to TKME, California, which has a four-year statute of limitations period, is where the claims accrued and where TKME was injured. **32**

The Court disagrees. The claim accrued in Germany, as TKME's place of incorporation and its principal place of business. It is there that TKME suffered its purely economic injury. Thus, the German statute of limitations governs. Sources of German law are the Code of Civil Procedure (Zivilprozessordnung (ZPO)), and the German Civil Code (Burgerliches Gesetzbuch (BGB)).[6] **33**

BGB § 195 provides that the statute of limitations is three years. The period starts running at the end of the year in which the claim arises (BGB § 199). The petcoke was loaded on April 9 and 10, 2008, and thus, the period began running on December 31, 2008 and ran out on December 31, 2011. In TKME's previous action, the parties stipulated to toll the statute of limitations as of August 8, 2012, as of which date, TKME's claims were untimely under German law. **34**

Energy's initial moving papers do not include the statement of an expert in German law. TKME's opposition includes such a statement by a lawyer practicing in Germany, Gregor Harbs. Energy's reply includes such a statement by Martin Burianski, a lawyer practicing in Germany. **35**

Energy's German law expert, Burianski, states that the parties' contract is actually governed by BGB § 438[3]), under which, in the case of a sales agreement where the product is defective, the limitations period is two years and starts running when the goods are delivered. Here, that would mean that the prescription period started in August 2008 and ended in August 2010. **36**

TKME was not afforded the opportunity to respond to Energy's reply. Thus, the Court will assume that the three-year statute of limitations proffered in Energy's initial papers applies. **37**

TKME states that its claims were tolled under German law. When determining, pursuant to CPLR 202, whether the out-of-state claim of a nonresident plaintiff is timely under the law of **38**

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[6] English translations of ZPO: http://www.gesetze-im-internet.de/englisch_zpo/index.html#gl_p0017; of BGB: http://www.gesetze-im-internet.de/englisch_bgb/index.html#gl_p0022 (accessed September 30, 2015).

the place of accrual, the court must take into account whatever tolls or extensions are applicable under the accrual state's limitations law (*Norex Petroleum Ltd. v Blavatnik,* 23 NY3d 665, 676 [2014]); *Matter of Smith Barney, Harris Upham* & *Co. v Luckie,* 85 NY2d 193, 207 [1995]).

TKME's expert, Harbs, states that, under German law the vouching-in notice and the parties' negotiations tolled the limitations period. Harbs asserts that the vouching-in notice is equivalent to a third-party notice under German law, service of which halts the running of the limitations period (BGB § 204[1][6]). German law provides in pertinent part: **39**

> «Any party believing that it will be able to assert a warranty claim or a claim to indemnification against a third party should the legal dispute's outcome not be in its favor, or any party concerned that such a claim may be brought against it by a third party, may file third-party notice to that third party with the court until a final and binding judgment has been handed down in the legal dispute»
>
> (ZPO § 72[1]).

Purportedly, the service of the vouching-in notice suspended the limitations period until six months after the final conclusion of the Chinese proceeding. From July 6, 2009, the date of the vouching-in notice (when the causes of action were still timely) to December 30, 2014, six months after the final decision was issued in China on June 30, 2014, the limitations period was tolled. It started anew on January 1, 2015. Thus, when the first New York suit was filed in August 2012, the causes of action were timely. **40**

In a German proceeding, one of the parties in an already commenced action sends a «formal writ to the court» notifying a third party that the action has commenced «and that there might be a recourse action in case the ... action is lost» (Harbs, ¶ 25). Harbs advises that the third party is requested to join the proceedings in support of the notifying party. Harbs does not state that the party already in the proceeding sends the notice to the third party. **41**

ZPO § 72 provides that notice must be filed with the court. Burianski, Energy's expert, states that it is the court that serves such notice on the third party. Burianski alleges that in Germany there are no instances when a letter written by one party to a third party can toll the limitations period, and that a German court would not accept that the prescription period was tolled under section 204 of the BGB. **42**

Citing ZPO § 68, Harbs states that regardless of whether the third party to whom notice has been sent joins the action, as of the service of the notice, the facts determined in the action are binding on the third party in a «recourse action» (Harbs, ¶ 25). **43**

The UCC vouching-in notice has the same effect (UCC 2-607; *Hartford Acc.* & *Indem.* Co. *v First Natl. Bank* & Trust Co., 281 NY 162, 167–168 [1939]; *La Maina v Nathan's Famous, Inc,* 25 AD3d 588, 589 [2d Dept 2006]). However, the vouching-in notice is not sent out by the court, but by a party. Despite having preclusive effect, it is an «informal» document *(Urbach v City of New York,* 46 Misc 2d 503, 504 [Sup Ct, Kings County 1965]), and it does not serve to toll the statute of limitations (see *Liberty Mut. Ins.* Co. *v Sheila-Lynn, Inc.,* 185 Misc 689, 694 [App **44**

Term, 1st Dept 1945], *affd* 270 AD 835 [1st Dept 1946]). Thus, a vouching-in notice is not equivalent to a German third-party notice.

However, whether the vouching-in notice that TKME served on Energy is effective in binding Energy to the decision of the Chinese court is something that need not be determined at this time. 45

In regard to negotiations tolling the statute of limitations, German law provides, 46

> «If negotiations between the obligor and the obligee are in progress in respect of the claim or the circumstances giving rise to the claim, the limitation period is suspended until one party or the other refuses to continue the negotiations. The claim is statute-barred at the earliest three months after the end of the suspension» (BGB § 203).

Harbs says that German courts apply a broad interpretation of this law and place low demands on the required negotiations. As long as the parties manage to discuss the claims even though in dispute, the obligee is not forced to litigate in order to prevent the limitations period from expiring. To this end, a constant or regular flow of communication between the parties suffices. The tolling effect ceases when the obliger explicitly rejects any further negotiations. 47

Harbs explains that three elements are needed for tolling to occur. First, the obligee must bring the claim unequivocally to the obliger's attention. Second, the obliger must not have refused to negotiate. Third, the obligee must actively promote negotiations. 48

From October 2008, when TKME informed Energy about Sinochem's objections, until October 31, 2014, when Energy advised TKME that it was not interested in participating in any more discussions or paying to settle Sinochem's claims, the parties' communications constitute the type of exchange contemplated and encompassed by BGB § 203. Energy did not unmistakably reject any negotiations pertaining to the claims. Only on October 31, 2014, when Energy rejected any liability and refused further negotiations, did communication clearly cease. The limitations period thus began to run on February 1, 2015. 49

Burianski, Energy's expert, agrees with Harbs that every serious exchange of views on the claim or its merits is sufficient to suspend the limitation period unless the obliger immediately and unequivocally rejects the claims. However, Burianski contends that none of the parties' communications amounted to a serious exchange of views. 50

Whether negotiations were substantial enough to toll the statute of limitations is a question of fact. On a CPLR 3211 motion, the court is not permitted to assess the merits of the complaint or any of its factual allegations *(Skillgames,* 1 AD3d at 250; *P.T. Bank Cent. Asia v ABN AMRO Bank N.V.,* 301 AD2d 373, 376 [1st Dept 2003]). 51

TKME asserts legally cognizable causes of action for breach of contract and warranty. The effect of Germany's statute of limitations on these claims must await a summary judgment motion or trial. 52

Energy contends that the sixth cause of action for contribution must be dismissed because it is not available as a remedy for solely economic harm. The CISG does not include a provision for contribution, and the CISG does not apply to tort claims *(see Dingxi Longhai Dairy, Ltd. v Becwood Tech. Grp., L.L.C.,* 718 F Supp 2d 1019, 1024 [D Minn 2010]; 10B Hawkland UCC Series § 10:46, United Nations Convention on the International Sale of Goods). Some form of tort liability is a prerequisite for obtaining contribution *(Board of Educ. of Hudson City School Dist. v Sargent, Webster, Crenshaw* & *Folley,* 71 NY2d 21, 27–28 [1987]). **53**

Since economic loss resulting from breach of contract does not constitute injury to property within the meaning of CPLR 1401, a claim for contribution cannot be sustained *(id.* at 26; *15 E. 11th Apt. Corp. v Elghanayan,* 220 AD2d 295, 297 [1 st Dept 1995]). TKME does not oppose this portion of the motion. The sixth cause of action is dismissed. **54**

Energy argues that the claim for common-law indemnity must be dismissed because it is not available when there is a contract with a contractual indemnity clause. Common law and contractual indemnification may coexist *(Felker v Corning Inc.* 90 NY2d 219, 226 [1997); *Constructamax, Inc. v Dodge Chamberlin Luzine Weber, Assoc. Architects, LLP,* 109 AD3d 574, 575 [2d Dept 2013]). **55**

Contractual indemnification is an express promise in an agreement *(Canela v TLH 140 Perry St., LLC,* 47 AD3d 743, 744 [2d Dept 2008]). Common-law indemnification arises where a purchaser is held liable for selling a nonconforming product to a third party, the purchaser is free from affirmative fault in regard to the third party, and the purchaser seeks to hold the seller responsible for the purchaser's liability to the third party *(see Community Steel Corp. v Terra Marine Dredging Corp.,* 176 AD2d 1196, 1197 (4th Dept 1991]). Common-law indemnity requires vicarious liability *(TOV Mfg., Inc. v Jaco Import Corp.,* 123 AD3d 477, 478 [1st Dept 2014]), which TKME cannot plead because the Chinese court decided that TKME breached its contract with Sinochem. TKME's liability is direct, not vicarious, and thus, the fifth cause of action is dismissed. **56**

Energy argues that the plain language of the contract shows that the parties did not contemplate indemnification for a «slight» breach of the kind here. Section 12.3 of the contract provides that either «party agrees to indemnify and hold harmless the other party from and against all costs which that party incurs or suffers as a consequence of a direct or indirect breach or negligent performance or failure in performance by the other party of the terms of this Contract.» The claim is sufficiently stated and will not be dismissed. The magnitude of the alleged breach and the effect of the indemnification clause cannot be decided now. **57**

Indemnification is permitted under the CISG. Sellers have been made to compensate buyers for costs incurred by the buyers when they sold or were unable to sell nonconforming goods to «sub-buyer(s)» *(see* UNCITRAL Digest of Case Law,[7] section II of part III, chapter V, Damages, at 347, section 22; page 348, section 23; page 349, sections 29 and 32). **58**

[7] https://www.uncitral.org/pdf/english/clout/CISG-digest-2012 or go to the Pace CISG Database, follow link on UNCITRAL Case Law Digest, follow link on 2012 UNCITRAL Digest, and follow link on <http://www.uncitral.org/pdf/english/clout/CISG-digest-2012-e.pdf> (accessed September 30, 2015).

Energy argues that TKME waived any breach of contract claim by accepting the goods. Such a waiver is possible under the CISG *(see Orica Australia Pty Ltd. v Aston Evaporative Srvs.,* 2015 WL 4538534, *7; 2015 U.S. Dist. LEXIS 98248, *19–20 [D Co, July 28, 2015, No. 14-cv-0412 (WJM-CBS)]). «The buyer loses the right to rely on a lack of conformity of the goods if he does not give notice to the seller specifying the nature of the lack of conformity within a reasonable time after he has discovered it or ought to have discovered it» (CISG 39 [1]). The determination of reasonableness is factual and cannot be decided on this motion *(ElectroCraft Ark., Inc. v Super Elec. Motors, Ltd.,* 2010 WL 3307461, *7, 2010 US Dist LEXIS 85610, *22 [ED Ark, Aug. 19, 2010, No. 4 09-cv-00318 (SWW)); 10B Hawkland UCC Series § 10:46, United Nations Convention on the International Sale of Goods). **59**

Energy argues other factual issues, such as whether the notice of nonconformity was adequate. The initial communication from TKME stated that the «Certificate of Analysis» showed an «HGI of 32 which is a significant deviation to the typ. values of 36–46» (October 15, 2008 email). This is enough to sustain the causes of action at this juncture. **60**

Energy argues that breach of the vouching-in notice is not a cause of action. The Court agrees and thus, is dismissed. **61**

In conclusion, it is **62**

ORDERED that the motion by defendant Energy Coal S.p.A. to dismiss the complaint is granted to the extent that the fifth cause of action for common-law indemnification, the sixth cause of action for contribution, and the seventh cause of action for breach of the vouching-in notice are dismissed and the motion is otherwise denied; and it is further

ORDERED that defendant shall answer the complaint within 20 days of service of a copy of this order with notice of entry.