

CISG

By Wayne Barnes*

CHOICE OF LAW—CISG APPLICABILITY

Under Article 1 section 1(a), the CISG “applies to contracts of sale of goods between parties whose places of business are in different States . . . when the States are Contracting States.”¹ *Busrel Inc. v. Dotton*² involved a Canadian company (“Busrel”) with its primary place of business in Montreal.³ Busrel contracted with KRP Holdings, LLC (“KRP”), a New York limited liability company, in April 2020, for the purchase of large quantities of PPE, consisting of two million N95 masks and ten million three-ply masks.⁴ Busrel agreed to pay \$8.2 million for the masks, which Busrel planned to provide to provinces of the Canadian government during the ongoing COVID-19 pandemic.⁵ The president of KRP made numerous false representations to Busrel in order to induce Busrel to enter into the contract, and further insisted on a pre-payment method before agreeing to ship any product.⁶ Unfortunately, as the court initially observed, all of the president’s representations were “false and were part of a scheme to induce [Busrel] to enter into a multi-million-dollar contract to purchase PPE, which [the president] could not deliver and never intended to deliver.”⁷ Although Busrel wired payment of the \$8.2 million in full, KRP never shipped any masks.⁸ Instead, the president of KRP made a series of attempts to modify the agreement, before eventually instead agreeing to cancel the transaction and refund the entirety of money paid by Busrel.⁹ After months of efforts to forestall legal action by Busrel, including a refund of \$250,000, KRP paid no additional refunds and Busrel filed suit in federal court in the Western District of New York.¹⁰

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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. 59, 60 [hereinafter CISG].

2. No. 20-cv-01767, 2022 WL 16559446 (W.D.N.Y. Nov. 1, 2022).

3. *Id.* at *1.

4. *Id.* at *2.

5. *Id.* at *1–2.

6. *Id.* at *2.

7. *Id.*

8. *Id.* at *9.

9. *Id.*

10. *Id.*

When the defendants did not appear, Busrel proceeded to request default judgment, pursuant to which the court analyzed the merits of its pleaded claims.¹¹

Given that Busrel was a Canadian company and KRP was a New York (United States) company—and that Canada and the United States are both signatories under the CISG—the CISG was presumptively applicable.¹² Though the parties agreed to a choice-of-law provision that designated New York law as controlling,¹³ the CISG applied under principles of supremacy, unless specifically excluded by the parties by contract.¹⁴ Given that the choice-of-law clause was general and made no specific mention of the intent to opt out of the CISG, the court found that the CISG was fully applicable as agreed to by the parties.¹⁵

ARTICLE 4—APPLICABILITY OF CISG TO CONTRACT PARTIES

Article 4 of the CISG provides that it “governs *only* the formation of the contract of sale and the rights and obligations of the *seller and the buyer* arising from such a contract.”¹⁶ In *Dongguan Jianqun Co. v. Consolidated Shoe Co.*,¹⁷ Dongguan Jianqun Co., a Chinese company, agreed to sell shoes to a group of buyers.¹⁸ Some of the buyers were organized in Virginia, and some were organized in China.¹⁹ The Chinese seller brought suit for nonpayment in federal district court, alleging that a Virginia entity was the contractual buyer pursuant to the purchase orders, and thus the CISG applied based on the contract being between two entities, each of which was located in a CISG Contracting State.²⁰ The seller claimed subject matter jurisdiction based on both diversity and federal question jurisdiction, and the defendants filed a motion to dismiss.²¹

With respect to the federal question issue, the court noted that, “[u]nder 28 U.S.C. § 1331, ‘[d]istrict courts have “original jurisdiction of all civil actions arising under the Constitution, laws or *treaties* of the United States.”’”²² Thus, the CISG, if applicable, provides federal question jurisdiction, as a treaty falls within the statutory definition of federal question.²³ The Chinese plaintiff-seller claimed

11. *Id.* at *11.

12. *Id.* at *8.

13. *Id.* (noting that the contract was to be “construed in accordance with and governed by the laws of the State of New York”).

14. *Id.* (“[U]nder any state’s law, ‘the CISG is applicable to contracts where the contracting parties are from different countries that have adopted the CISG.’” (quoting *Asante Techs., Inc. v. PMC-Sierra, Inc.*, 164 F. Supp. 2d 1142, 1150 (N.D. Cal. 2001))).

15. *Id.* (noting that the plaintiff’s fraud and unjust enrichment claims would be governed by non-CISG New York law, under *Erie* principles).

16. CISG, *supra* note 1, art. 4 (emphases added).

17. No. 21-cv-00048, 2022 WL 4593098 (W.D. Va. Sept. 29, 2022).

18. *Id.* at *1–2.

19. *Id.*

20. *Id.* at *4–5.

21. The court found that diversity of jurisdiction did not properly apply because some of the defendants were Chinese (as was the plaintiff), and thus complete diversity of citizenship was lacking. *Id.* at *3–4 (citing 28 U.S.C. § 1332).

22. *Id.* at *3 (emphasis added) (quoting *N.C. ex rel. Stein v. Eonsmoke LLC*, 423 F. Supp. 3d 162, 167 (M.D.N.C. 2019) (quoting 28 U.S.C. § 1331)).

23. *Id.* at *4.

the CISG applied, because the purchase orders indicated that the actual contracting buyer was a Virginia entity.²⁴ The defendants, however, claimed that one of the Chinese defendants actually undertook full responsibility for payment of the shoe contract balances, which would render the CISG inapplicable as the dispute was ultimately between two Chinese entities.²⁵

The court reinforced that Article 4 of the CISG “limits its application to claims between buyers and sellers.”²⁶ The court denied the motion to dismiss, and observed that “the orders indicate offer and acceptance between [the Virginia defendant] and [the Chinese plaintiff], supporting that the two parties—whose principal places of business are in different nations, both of which are signatories to the CISG—are parties to the alleged contract.”²⁷ As such, “the orders indicate that the Treaty governs contracts for the sale of goods between these parties.”²⁸ The court further emphasized, even if one of the Chinese defendants may have also undertaken liability for payment of the contract balances, that fact did not change the conclusion that the Chinese seller and Virginia buyer were parties to the contract, thus necessitating a finding of CISG applicability and resultant federal question jurisdiction.²⁹

PLEADING REQUIREMENTS—CISG APPLICABILITY

Pleading requirements in a CISG action will generally be governed by the rules of procedure applicable to the court in which the action is brought. Many CISG cases in the United States are brought in federal court. Therefore, the general notice pleading standards of the Federal Rules of Civil Procedure typically will apply.³⁰ In *Goodman Food Products, Inc. v. Sunrise Foods International Inc.*,³¹ after an action by an aggrieved buyer of sunflower seeds had been removed to federal court, the seller moved for summary judgment, in part, because the buyer’s pleading made no mention of the CISG, merely alleging a cause of action for “Breach of Contract.”³² The federal district court rejected this claim, as standards of federal notice pleading require only general statements of “*claims for relief*, not causes of action, statutes, or legal theories”;³³ moreover, the court noted that prior decisions had rejected motions to dismiss based specifically on allegations

24. *Id.*

25. *Id.* at *5.

26. *Id.* at *4 (quoting *Caterpillar, Inc. v. Usinor Industeel*, 393 F. Supp. 2d 659, 674 (N.D. Ill. 2005)).

27. *Id.* at *5.

28. *Id.*

29. *Id.*

30. See FED. R. CIV. P. 8(a) (“A pleading that states a claim for relief must contain: (1) a short and plain statement of the grounds for the court’s jurisdiction, unless the court already has jurisdiction and the claim needs no new jurisdictional support; (2) a short and plain statement of the claim showing that the pleader is entitled to relief; and (3) a demand for the relief sought, which may include relief in the alternative or different types of relief.”).

31. No. 21-cv-06518, 2022 WL 2784396 (C.D. Cal. June 1, 2022).

32. *Id.* at *6.

33. *Id.* (quoting *Alvarez v. Hill*, 518 F.3d 1152, 1157 (9th Cir. 2008)).

that the complaint failed to mention the CISG.³⁴ The court, therefore, determined that the seller was not entitled to summary judgment on this basis.³⁵

In *Nantong Sanhai Garment Co. v. Fab Mill Inc.*,³⁶ the seller-defendant argued that the buyer-plaintiff failed to adequately allege a CISG claim because the buyer's complaint did not specifically allege that the contract was subject to the CISG.³⁷ The court, however, rejected this argument.³⁸ It noted that the buyer's complaint "does allege that the parties are domiciled in countries that are signatories to the UN CISG and that the agreements at issue are contracts for the sale of goods Those allegations are sufficient to establish the potential applicability of the UN CISG."³⁹

CHOICE OF LAW

Because "the CISG is self-executing, . . . if the agreement is 'silent as to the choice of law, the [CISG] applies if both parties are located in signatory nations.'"⁴⁰ In *KRAPE, S.A. v. LIK Supply, Corp.*, the plaintiff was an aggrieved buyer who had paid for medical supplies, but the seller never delivered them.⁴¹ Given that the aggrieved buyer was a Spanish entity, and the breaching seller was a New York corporation, and further given that the parties' contracts were silent on the choice of law, the court readily found that the CISG applied to buyer's breach of contract action.⁴²

FORMATION AND CHOICE OF VENUE

The CISG governs formation of the contract for the sale of goods, which will correspondingly affect what terms are included in the formed contract.⁴³ One such term that may hinge on the point of formation is any choice-of-venue clause alleged to be agreed to by the parties. Such was the case in *New Excelsior, Inc. v. Amut Dolci Bielloni Srl*,⁴⁴ where a dispute arose between an Italian seller of a printing machine and a North Carolina buyer.⁴⁵ The seller, in the "general sales conditions" sent to the buyer in advance of finalization of their deal, included a forum-selection clause requiring any litigation to be conducted in Italian courts.⁴⁶ The seller contended that this forum-selection clause ultimately was accepted and was included in the binding terms of the contract between the

34. *Id.* (collecting cases).

35. *Id.*

36. No. 21 Civ. 859, 2022 WL 540756 (S.D.N.Y. Feb. 23, 2022).

37. *Id.* at *2.

38. *Id.*

39. *Id.*

40. *KRAPE, S.A. v. LIK Supply, Corp.*, No. 21-CV-03742, 2022 WL 16754743, at *2 (E.D.N.Y. Sept. 15, 2022) (quoting *Delchi Carrier SpA v. Rotorex Corp.*, 71 F.3d 1024, 1027 n.1 (2d Cir. 1995)).

41. *Id.* at *1.

42. *Id.* at *3.

43. See CISG, *supra* note 1, arts. 14–24 ("Formation of the Contract").

44. No. 21-cv-193, 2022 WL 17095194 (W.D.N.C. Nov. 21, 2022).

45. *Id.* at *1.

46. *Id.*

parties.⁴⁷ The court noted that, “[i]n situations where a forum-selection clause was imposed before a contract formed under the CISG (i.e., as a part of an offer or counteroffer that later was accepted), courts have deemed the forum selection clause to be a part of the parties’ consented to agreement.”⁴⁸

On the other hand, under Article 19 of the CISG, an alleged acceptance sent with terms that differ from that of the offer is deemed a rejection and a counteroffer.⁴⁹ In *New Excelsior*, the issue of the inclusion of the Italian forum-selection clause came down to the moment of contract formation.⁵⁰ Under the seller’s theory of the case, the buyer accepted the seller’s offer (which included the forum-selection clause) when the buyer made a down payment on the printing machine.⁵¹ The buyer, on the other hand, claimed that the contract was not formed until two months later, when a formal contract was signed, which did not include the forum-selection clause.⁵² The court found that the parties did not intend to be bound until the formal contract was signed—which did not include the clause—and therefore held that it was not part of the parties’ agreement.⁵³ The court suggested that, even if CISG Article 19 was implicated—which addresses the effect that “material” terms suggested in a purported acceptance can have on formation—the facts sufficiently established that the parties agreed to modify the contract to eliminate the forum-selection clause; the court also noted that “[t]he CISG does not state whether a venue clause satisfies this materiality requirement.”⁵⁴

GOOD FAITH AND FAIR DEALING

Article 7(1) of the CISG provides: “In the interpretation of this Convention, regard is to be had to its international character and to the need to promote uniformity in its application and the observance of good faith in international trade.”⁵⁵ In *Busrel, Inc. v. Dotton*,⁵⁶ discussed earlier in this Survey, the court noted that “[f]ederal courts have interpreted Article 7(1) as providing a cause of action for breach of the implied covenant of good faith and fair dealing.”⁵⁷ The court noted that the CISG provides little guidance in how a good-faith-and-fair-dealing claim is to be construed under the CISG.⁵⁸ However, in such absence, and guided by New York law “applicable by virtue of the rules of private international law,”⁵⁹ the court observed that it is not properly used to impose obligations “beyond those agreed upon and stated in the express language

47. *Id.* at *1, *3.

48. *Id.* at *3 (collecting cases).

49. CISG, *supra* note 1, art. 19(1); *see also New Excelsior*, 2022 WL 17095194, at *3.

50. *New Excelsior*, 2022 WL 17095194, at *3.

51. *Id.*

52. *Id.*

53. *Id.* at *4.

54. *Id.* at *5.

55. CISG, *supra* note 1, art. 7(1).

56. No. 20-cv-01767, 2022 WL 16559446 (W.D.N.Y. Nov. 1, 2022).

57. *Id.* at *11 (collecting cases).

58. *Id.*

59. *Id.* (quoting CISG, *supra* note 1, art. 7(2)).

of the contract.”⁶⁰ Further, because the plaintiff’s breach of contract claims and good-faith claims were based on the “same underlying facts,” the good-faith claims were properly dismissed as duplicative.⁶¹

CONFORMITY OF GOODS

Article 35(1) of the CISG provides that “[t]he seller must deliver goods which are of the quantity, quality, and description required by the contract and which are contained or packaged in the manner required by the contract.”⁶² This requirement relates to the parties’ contractual agreement. Subsection (2) of Article 35 provides further that, *inter alia*, goods will be fit for the purposes for which they are ordinarily used.⁶³ This provision is analogous to the implied warranty of merchantability contained in U.C.C. section 2-314.⁶⁴ In *Trinity Metals LLC v. Shred-Tech North America*,⁶⁵ a dispute arose regarding an industrial shredding machine sold by a Canadian distributor to an Indiana buyer.⁶⁶ The machine was purchased for the purpose of, and represented by the seller to be capable of, shredding a high volume of aluminum scrap.⁶⁷ Specifically, the contract itself provided that the goods sold were to be a “2000 XL Transportable shredder system for high volume primary metals reduction’ and described the ‘feed material’ for the machine under the contract as ‘aluminum scrap.’”⁶⁸ The contract also contained a purported warranty disclaimer, wherein the seller “assume[d] no liability for ‘technical advice, operational data or performance parameters.’”⁶⁹ When the machine proved incapable of shredding aluminum scrap material, the buyer brought suit for breach of contract and other claims.⁷⁰ The seller moved to dismiss the claims, in part based on the warranty disclaimer.⁷¹

The court observed that “[t]he issue . . . turns on whether the CISG allows parties to disclaim the conformity of goods requirement under Article 35(1).”⁷² The court held that the Article 35(1) requirement was not disclaimable.⁷³ Unlike Article 35(2), relating to the requirement that goods be fit for their ordinary uses, Article 35(1) does not authorize disclaimers; the court noted that this made sense as a policy matter, given that the goods-conformity requirement was the primary express contractual obligation of the seller, and the court found that allowing it to be disclaimed would render the seller’s obligation illusory.⁷⁴ Thus,

60. *Id.* at *12 (quoting *Wolff v. Rare Medium, Inc.*, 171 F. Supp. 2d 354, 359 (S.D.N.Y. 2001)).

61. *Id.*

62. CISG, *supra* note 1, art. 35(1).

63. *Id.* art. 35(2)(a).

64. U.C.C. § 2-314 (AM. L. INST. & UNIF. L. COMM’N 2022).

65. No. 21-cv-02876, 2022 WL 18540483 (S.D. Ind. Sept. 6, 2022).

66. *Id.* at *1.

67. *Id.*

68. *Id.* at *6 (quoting the contract).

69. *Id.* at *1 (quoting the contract).

70. *Id.* at *2.

71. *Id.*

72. *Id.* at *5.

73. *Id.*

74. *Id.* at *5–6.

as the court concluded, “where a seller agrees to provide a shredder that can shred aluminum, the party has an obligation that cannot be disclaimed to provide a shredder that can shred aluminum.”⁷⁵ The court further rejected the seller’s integration clause–based arguments for warranty exclusion, noting that: (1) the goods conformity requirement came from the four corners of the contract itself and so could not be barred by the integration clause, and (2) CISG Article 8(3) “rejects traditional limitations on the interpretation of contracts—limitations such as integration clauses and the parol evidence rule—and instead requires a free-ranging inquiry into the subjective intent of the parties that gives ‘due consideration . . . to all relevant circumstances . . . including the negotiations.’”⁷⁶

BREACH OF CONTRACT

Although the CISG does not define the elements of a breach of contract claim, American courts applying the CISG often follow applicable state law. In *Congelados del Cibao v. 3 Kids Corp.*,⁷⁷ the federal district court for the Southern District of New York noted that the elements of a claim for breach of contract under the CISG were “the same elements as those under New York State law.”⁷⁸ These elements included: “(1) the existence of a valid and enforceable contract containing both definite and certain terms, (2) performance by plaintiff, (3) breach by defendant, and (4) resultant injury to plaintiff.”⁷⁹ In *3 Kids*, the plaintiff was a Dominican Republic seller, which contracted to sell large quantities of lobster tails to buyer, a U.S. company doing business in New York.⁸⁰ Seller moved for summary judgment on its contract claim, and the court found little dispute of the existence of a contract between the parties, the performance by seller in delivering the required lobster, and the failure of buyer to pay the full amount owed (\$1+ million), therefore finding summary judgment in favor of seller appropriate.⁸¹

BUYER’S REMEDY FOR SELLER’S BREACH

Under the CISG, the seller is obligated to deliver the goods required by the contract and is liable for any non-conformity.⁸² Further, if the seller’s breach rises to the level of a “fundamental” breach, the buyer is entitled to demand replacement of goods or to declare the contract void.⁸³ “However, ‘in cases where the seller has delivered the goods, the buyer loses the right to declare the contract void unless he does so . . . within a reasonable time,’ meaning ‘(i) after

75. *Id.* at *6.

76. *Id.* (quoting CISG, *supra* note 1, art. 8(3)).

77. No. 19-cv-7596, 2022 WL 1321397 (S.D.N.Y. May 3, 2022).

78. *Id.* at *5 (quoting *Ningbo Yang Voyage Textiles Co. v. Sault Trading*, No. 18-CV-1961, 2019 WL 5399973, at *3 (E.D.N.Y. Sept. 10, 2019)).

79. *Id.* (quoting *Ningbo Yang Voyage Textiles Co.*, 2019 WL 5399973, at *3).

80. *Id.* at *1.

81. *Id.* at *8.

82. CISG, *supra* note 1, arts. 35, 36.

83. *3 Kids*, 2022 WL 1321397, at *8 (citing CISG, *supra* note 1, arts. 46, 49).

he knew or ought to have known of the breach; (ii) after the expiration of any additional period of time fixed by the buyer in accordance with paragraph (1) of article 47; or (iii) after the expiration of any additional period of time indicated by the seller in accordance with paragraph (2) of article 48, or after the buyer has declared that he will not accept performance.”⁸⁴ In *3 Kids*, the buyer opposed summary judgment in favor of the seller for buyer’s nonpayment of amounts owed for goods delivered, by claiming the quality of the lobster tails delivered was not as agreed.⁸⁵ The court, although skeptical of buyer’s claim regarding the goods’ inferior quality in the absence of a contractually specified standard of quality, held that the seller was “still entitled to summary judgment on its breach of contract claim because the record is devoid of any evidence that [the buyer] demanded substitute goods or sought to void the contract within any reasonable time—indeed, until this litigation arose.”⁸⁶ Having failed to give notice as required by Article 49 of the CISG, the buyer’s claim failed.⁸⁷

DAMAGES—GENERAL, LOST PROFITS, AND REPUTATIONAL HARM

Article 74 of the CISG provides that “[d]amages 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. Such damages may not exceed the loss which the party in breach foresaw or ought to have foreseen at the time of the conclusion of the contract, in the light of the facts and matters of which he then knew or ought to have known, as a possible consequence of the breach of contract.”⁸⁸ This provision of the CISG is designed to award the aggrieved party’s expectation interest, that is, “to place the aggrieved party in as good a position as if the other party had properly performed the contract.”⁸⁹ In *KRAPE, S.A. v. LIK Supply, Corp.*, discussed earlier in this Survey, the damage award was comprised of a refund of \$661,510.10 (which represented the amount the buyer paid upfront, less certain credits and refunds), plus \$257,742, which constituted the lost profits suffered by the buyer.⁹⁰ The court determined that the lost profit damages were recoverable because of their foreseeability as required by Article 74, noting that, “[b]ased upon the facts alleged here, where plaintiff is in the business of purchasing and reselling medical products, it was foreseeable that the gloves ordered from defendant were expected to be resold to consumers at the time of contract formation, entitling plaintiff to lost profits.”⁹¹ The court, though properly citing CISG Article 74 as the basis for the foreseeability requirement, noted that the principle was

84. *Id.* (quoting CISG, *supra* note 1, art. 49).

85. *Id.* at *7.

86. *Id.* at *8.

87. *Id.* at *10.

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

89. *KRAPE, S.A. v. LIK Supply, Corp.*, No. 21-CV-03742, 2022 WL 16754743, at *4 (E.D.N.Y. Sept. 15, 2022) (quoting *Delchi Carrier SpA v. Rotorex Corp.*, 71 F.3d 1024, 1029 (2d Cir. 1995)).

90. *Id.* at *4–5.

91. *Id.* at *5.

established, at least for common law courts, on the “familiar principle of foreseeability established in *Hadley v. Baxendale*.”⁹²

Although not specifically mentioned in the CISG, “[t]he CISG Advisory Council states in its published opinions on Article 74 that ‘[t]he aggrieved party is entitled to damage for loss of goodwill as a consequence of the breach.’”⁹³ In *Goodman Food*, discussed earlier, the seller argued that summary judgment was warranted on buyer’s claim for reputational harm, based on the fact that the buyer had not yet disclosed its calculations of such harm nor identified an expert witness who would opine on this issue.⁹⁴ However, the court denied this motion as a premature basis for judgment against buyer, given that the seller had been on notice of buyer’s claim of such damages since the onset of the litigation.⁹⁵ Presumably, the court reasoned that there was yet time for the buyer to make any necessary disclosures prior to trial.

Under CISG Article 74, the damages recoverable “may not exceed the loss which the party in breach foresaw or ought to have foreseen at the time of the conclusion of the contract, in the light of the facts and matters of which he then knew or ought to have known, as a possible consequence of the breach of contract.”⁹⁶ Thus, Article 74 is designed to protect the expectation interest of the aggrieved party, within the limits of foreseeability.⁹⁷ In the *Busrel* case, discussed earlier, given that the seller never delivered the contracted goods, and then further never paid \$7,950,000 of the agreed refund amount, the court had little trouble concluding that the \$7,950,000 was the appropriate compensatory damages amount under Article 74.⁹⁸

ATTORNEY’S FEES

The CISG does not mention recovery of attorney’s fees. In *Goodman Food*, discussed earlier, the aggrieved buyer of sunflower seeds (claiming defects and non-conformities) requested recovery of attorney’s fees in its complaint.⁹⁹ The request was made on two bases. The first was Article 74 of the CISG, which provides that “[d]amages 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.”¹⁰⁰ The court rejected Article 74 as a basis for the recovery of attorney’s fees based on multiple prior holdings to this effect.¹⁰¹ The court noted

92. *Id.* (citing *Hadley v. Baxendale* [1854] 156 Eng. Rep. 145).

93. *Goodman Food Prods., Inc. v. Sunrise Food Int’l Inc.*, No. 21-cv-06518, 2022 WL 2784396, at *8 (C.D. Cal. June 1, 2022) (quoting CISG ADVISORY COUNCIL, OPINION NO. 6: CALCULATION OF DAMAGES UNDER CISG ARTICLE 74 (2006)).

94. *Id.*

95. *Id.*

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

97. *Busrel Inc. v. Dotton*, No. 20-cv-01767, 2022 WL 16559446, at *10 (W.D.N.Y. Nov. 1, 2022).

98. *Id.*

99. *Goodman Food*, 2022 WL 2784396, at *1.

100. *Id.* at *6 (quoting CISG, *supra* note 1, art. 74).

101. *Id.* at *7 (collecting cases).

that the only circuit court to opine on the issue (the 7th Circuit) had concluded that, notwithstanding Article 74's silence on the issue, "context and policy indicate it does not cover [attorney's fees.]"¹⁰² Thus, the court concluded that "Article 74 does not itself provide for an award of attorney's fees."¹⁰³

The other basis for attorney's fees claimed by the aggrieved buyer in *Goodman Food* was the presence of an indemnity provision in the contracts which referenced attorney's fees: "[Seller] hereby agrees to protect, indemnify, defend [buyer] and its employees, officers, directors and customers from any and all losses of any type suffered as a result of [seller's] product, *including attorneys' fees and court costs*, as well as any and all claims, charges, actions and proceedings brought regarding any alleged adulteration, misbranding or other legal violations."¹⁰⁴ The court observed that, when applying the CISG, courts have applied the forum state's law to the issue because the CISG does not specifically authorize attorney's fees.¹⁰⁵ Under the applicable state law for the case, which was California law, the court noted that "the general rule is that an indemnity provision does not allow recovery of attorney's fees for a first-party breach of contract claim, although such fees may be awarded if the parties intended to allow them."¹⁰⁶ Given the lack of a relevant third-party action having been asserted against the buyer on the basis of seller's product, the court found that the indemnity provision did not authorize the recovery of attorney's fees against the seller in the CISG action.¹⁰⁷

PREJUDGMENT INTEREST

Article 78 of the CISG provides: "If a party fails to pay the price or any other sum that is in arrears, the other party is entitled to interest on it, without prejudice to any claim for damages recoverable under article 74."¹⁰⁸ Article 78, while providing for interest, does not specify the applicable interest rate. In the *Busrel* case, discussed in this Survey, the court observed that "courts have varied widely in their approach to selecting an appropriate interest rate under the CISG."¹⁰⁹ Although the court noted that some federal courts in the Second Circuit had applied the federal U.S. Treasury bill rate, the *Busrel* court concluded that it was appropriate to award prejudgment interest in accordance with New York state law, which was statutorily set at 9 percent annually.¹¹⁰

The results do indeed vary widely within individual court decisions, as is borne out by the handful of opinions on this issue during this Survey period

102. *Id.* (citing *Zapata Hermanos Sucesores, S.A. v. Hearthside Baking Co.*, 313 F.3d 385, 388–89 (7th Cir. 2002)).

103. *Id.*

104. *Id.* (emphasis added) (quoting identical indemnity provisions of purchase orders).

105. *Id.*

106. *Id.* (citing *Zalkind v. Ceradyne, Inc.*, 124 Cal. Rptr. 3d 105, 113–14 (Ct. App. 2011)).

107. *Id.*

108. CISG, *supra* note 1, art. 78.

109. *Busrel Inc. v. Dotton*, No. 20-cv-01767, 2022 WL 16559446, at *10 (W.D.N.Y. Nov. 1, 2022) (collecting cases).

110. *Id.* at *11 (citing N.Y. C.P.L.R. Law §§ 5001, 5004).

that utilized various approaches in resolving the issue.¹¹¹ Although some courts award prejudgment interest at the applicable state law rate, federal district courts in the Second Circuit—including the federal district courts located in New York—“uniformly have applied a federal interest rate, most commonly based on the average rate of return on one-year Treasury bills [] for . . . the relevant time period between the time plaintiff’s claims arose . . . until the entry of judgment.”¹¹² Accordingly, in the *KRAPE* case, discussed earlier, the New York federal district court awarded prejudgment interest to the aggrieved buyer at the Treasury bill rate, compounded annually.¹¹³

In yet another case addressing the prejudgment interest issue under the CISG, one court collected at least nine distinct methods of selecting the applicable rate.¹¹⁴ In federal district courts, where CISG cases in the United States are often litigated, the approaches often resort to applying either the local state law prejudgment rate or an applicable federal law rate.¹¹⁵ In *Shenzen Synergy Digital Co. v. Mingtel, Inc.*, the federal district court for the Eastern District of Texas addressed the issue and concluded that, “like most [federal] courts that have considered the issue, because the parties’ dispute arises out of the CISG, prejudgment interest should be determined according to federal law.”¹¹⁶ Although the court noted that some federal courts have looked to the Treasury bill rate, as provided by 28 U.S.C. § 1961(a), in *Shenzen Synergy*, the court decided that federal law was ultimately silent on the issue and thus held it was within its discretion to apply—as a matter of federal law—the applicable state law prejudgment interest rate, which, per the Texas code, was the prime rate established by the Federal Reserve.¹¹⁷

111. See *KRAPE S.A. v. LIK Supply, Corp.*, No. 21-CV-03742, 2022 WL 16754743, at *6 (E.D.N.Y. Sept. 15, 2022).

112. *Id.* (quoting *Liberty Media Corp. v. Vivendi Universal, S.A.*, No. 03 Civ. 2175, 2013 WL 105776, at *4 (S.D.N.Y. Jan. 9, 2013)).

113. *Id.*

114. *Shenzen Synergy Digital Co. v. Mingtel, Inc.*, No. 19-cv-00216, 2022 WL 2252583, at *2 (E.D. Tex. June 22, 2022) (citing *Chi. Prime Packers, Inc. v. Northam Food Trading Co.*, 320 F. Supp. 2d 702, 716 (N.D. Ill. 2004), *aff’d*, 408 F.3d 894 (7th Cir. 2005)).

115. *Id.* at *2–3.

116. *Id.* at *3 (collecting cases).

117. *Id.* at *3–4 (citing TEX. FIN. CODE § 304.003(c)(1)).