

CISG

By Wayne Barnes*

CHOICE OF LAW—CISG APPLICABILITY

Under CISG Article 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 *Brands International Corp. v. Reach Companies, LLC*² involved a contract between a Canadian hand sanitizer manufacturer and a Minnesota company that distributed various types of consumer goods. After delivery of several lots of hand sanitizer, the Minnesota purchaser failed to pay the outstanding invoices, and the manufacturer brought suit in Minnesota federal court.³ Although the manufacturer asserted applicability of the CISG, the Minnesota purchaser argued that the CISG should apply because it “constitute[d] an impermissible new theory of liability at the summary judgment stage.”⁴ The court disagreed, holding instead that the CISG was applicable: “[t]he CISG applies to international sales contracts between parties that are in signatory [countries] unless the parties unambiguously disclaim the CISG’s applicability.”⁵ The court, noting that both the United States and Canada were CISG signatories and further noting that there was no evidence of any express disclaimer of the CISG’s applicability, held that the CISG governed the contract dispute.⁶ The court rejected the “impermissible new theory” argument, concluding that the CISG was not a new theory of liability but “merely identifies the applicable law governing this dispute.”⁷

In *Gramercy Holdings I, LLC v. Matec S.R.L.*,⁸ the contract involved both a sale of goods (filter presses) and service components (design, manufacture, installation, and testing of the presses). The court concluded that the service component did not prevent applicability of the CISG.⁹ First, the court noted that Article 3(1)

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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. Civil No. 21-1026 (JRT/JFD), 2023 WL 2898592 (D. Minn. Apr. 11, 2023).

3. *Id.* at *3.

4. *Id.* at *4.

5. *Id.* (citing *Caterpillar, Inc. v. Usinor Industeel*, 393 F. Supp. 2d 659, 673 (N.D. Ill. 2005)).

6. *Id.*

7. *Id.*

8. 20 Civ. 3937 (JPC), 20 Civ. 4136 (JPC), 2023 WL 5917624 (S.D.N.Y. Sept. 11, 2023).

9. *Id.* at *16.

provides that the CISG applies to “[c]ontracts for the supply of goods to be manufactured or produced . . . unless the party who orders the goods undertakes to supply a substantial part of the materials necessary for such manufacture or production,” and that the buyer did not supply materials for manufacturing so as to change the conclusion as to the CISG’s applicability.¹⁰ Second, the court considered the “preponderant part” test of Article 3(2), whereby sales contracts with a service component are excluded from CISG applicability only if they are “contracts in which the preponderant part of the obligations of the party who furnishes the goods consists in the supply of labour or other services.”¹¹ Based on the small dollar amount for the services component for installation as a proportion of the entire contract price—“\$113,000 out of \$2,808,175”—the court reinforced its conclusion that the CISG applied.¹²

Another applicability argument was made in the *Gramercy* case, insofar as an express choice-of-clause provided simply that “New York law” applied, without an express disclaimer of the CISG.¹³ The court noted that a choice-of-law clause, by itself, does not preclude the applicability of the CISG, since, as a federal treaty, it is applicable in all fifty states as part of the generally applicable law.¹⁴ The court observed, “merely electing New York law to govern a contract does not clearly express the intent not to be bound by the federal treaty that, thanks to the Supremacy Clause, governs New York contracts for the sale of international goods.”¹⁵ Nevertheless, in *Gramercy* the buyer contested this conclusion, relying on dicta in a Second Circuit opinion that arguably rejected “the contention that the CISG is ‘incorporated into’ or ‘a part of’ New York law.”¹⁶ The *Gramercy* court disagreed that this dicta or that a clause generally providing that “New York law” applied to the contract required the exclusion of the CISG.¹⁷ The court found that even if the CISG is “federal” law and not state “New York” law, a clause providing “New York law” applies does not refer narrowly to “New York statutes or New York common law,” but rather refers “simply to the law applicable in courts in New York, [in which case] the CISG, which applies in New York, is not excluded.”¹⁸ Hence, the contract did not exclude the CISG, which remained applicable.¹⁹

Like other legal issues, the applicability of the CISG can be waived in appropriate circumstances if not sufficiently preserved before the court. In *Ningbo S-Chande Import & Export Co. v. Allied Technology Inc.*,²⁰ a Chinese auto parts

10. *Id.* at *15 (quoting CISG art. 3(1)).

11. *Id.* (quoting CISG art. 3(2)).

12. *Id.*

13. *Id.* at *16.

14. *Id.*

15. *Id.* (citing *Microgem Corp. v. Homecast Co.*, No. 10 Civ. 3330 (RJS), 2012 WL 1608709, at *3 (S.D.N.Y. 2012)).

16. *Id.* at *17 (quoting *Rienzi & Sons, Inc. v. Puglisi*, 638 F. App’x 87, 89 n.2 (2d Cir. 2016)).

17. *Id.*

18. *Id.*

19. *Id.* at *17–18.

20. Case No. 20-10190, 2023 WL 6369584 (E.D. Mich. Sept. 30, 2023).

supplier sued a Michigan auto parts retailer for breach of contract. As an initial matter, the court sought to determine whether the CISG or Michigan law was applicable.²¹ The parties conceded that the applicable contract did not disclaim the CISG and that it would be applicable to the dispute.²² However, the court ultimately concluded “that the parties waived application of the CISG by failing to substantively raise the issue in their initial summary judgment briefing and instead relying exclusively on Michigan law.”²³

PREEMPTION OF TORT CLAIMS

The CISG applies to contracts for the sale of goods under Article 1.²⁴ Tort claims, therefore, are generally not governed by the CISG, and are thus not preempted by the CISG. On the other hand, the *Gramercy* case discussed above also clarified that the parties’ “label” of a claim does not control preemption by the CISG.²⁵ “Thus, a party cannot avoid the CISG simply by calling its breach of contract claim a claim for fraud—say, by claiming the defendant committed fraud by making contractual promises it intended to violate.”²⁶ Thus, the court noted that if a party’s tort allegations merely claim violation of contractual obligations, the CISG would not be preempted; whereas, if a “separate obligation” was claimed to be violated, state tort law would govern.²⁷ Ultimately, in the case at issue, the court found many issues premature for resolution by summary judgment.²⁸

FORMATION

The CISG governs formation of the contract for the sale of goods generally.²⁹ In *Forsell v. Squirrels, LLC*,³⁰ a Singapore buyer of cryptocurrency mining computer equipment brought suit against two American companies who allegedly agreed to sell the equipment. Because of supply chain issues, however, the buyer decided to give notification of cancellation of his orders—these requests were acknowledged and accepted, and requests for how to refund buyer’s money were made.³¹ Nevertheless, one of the alleged sellers subsequently failed to refund most of the money, and further contended that it was not a party to any contracts with the buyer.³² The court, after deciding the CISG applied,

21. *Id.* at *3.

22. *Id.* at *4.

23. *Id.*

24. CISG art. 1.

25. *Gramercy*, 2023 WL 5917624, at *18 (quoting *Geneva Pharms. Tech. Corp. v. Barr Labs., Inc.*, 201 F. Supp. 2d 236, 286 n.30 (S.D.N.Y. 2002), *rev’d in part on other grounds*, 386 F.3d 485 (2d Cir. 2004)).

26. *Id.* at *18.

27. *Id.*

28. *Id.*

29. See CISG pt. II (arts. 14–24 governing formation).

30. Case No. 5:22-cv-1454, 2023 WL 4085302 (N.D. Ohio June 20, 2023).

31. *Id.* at *1.

32. *Id.*

noted that CISG Article 18 provides that “[a] statement made by or other conduct of the offeree indicating assent to an offer is an acceptance.”³³ Given that it was uncontested that buyer had sent purchase orders, and the defendant seller had sent numerous confirmations/acknowledgments, the court rejected the defendant’s claim and held there was a contract.³⁴ Thus the court denied the defendant’s motion to dismiss.³⁵

Another recent case determined CISG formation issues at the summary judgment phase. In *Fertilizantes Tocantins S.A. v. TGO Agriculture (USA) Inc.*,³⁶ a dispute arose as to whether a Chinese-owned American seller and a Brazilian buyer formed a contract for the sale and purchase of ammonium sulfate. Informal discussions occurred regarding possible contract terms, including messages over WhatsApp, but the parties did not sign a formal contract, the seller ultimately concluded no contract was reached, and the buyer brought suit.³⁷ Both sides moved for summary judgment.³⁸ The seller argued that industry custom and practice, as well as the seller’s own policies, resulted in no formation of contract until the parties signed a formal contract (among other issues).³⁹ In contrast, the buyer claimed there was no such custom or practice binding in this instance and the contract could be found to have been formed more informally.⁴⁰

The court provided analysis of both formation under the CISG and the effect of practices and usages on the formation issue:

Under the CISG, “[a] contract of sale need not be concluded in or evidenced by writing and is not subject to any other requirement as to form. It may be proved by any means, including witnesses.” . . . (quoting CISG, art. 11). However, “[t]he parties are bound by any usage to which they have agreed and any practices which they have established between themselves.” CISG, art. 9(1). . . .

Under the CISG, a “contract is concluded at the moment when an acceptance of an offer becomes effective.” CISG, art. 23. A proposal is an offer if it is “sufficiently definite and indicates the intention of the offeror to be bound in case of acceptance.” CISG art. 14(1). Article 14(1) further states that “[a] proposal is sufficiently definite if it indicates the goods and expressly or implicitly fixes or makes provisions for determining the quantity and the price.” *Supercase Enter. Co. v. Marware, Inc.*, No. 14-61158-CIV, 2014 WL 12495261, at *4 (S.D. Fla. Nov. 24, 2014) (quoting CISG, art. 14(1)). After an offer, a statement made by or other conduct of the offeree indicating assent to the offer is an acceptance. CISG, art. 18(1).

33. *Id.* at *3 (quoting CISG art. 18).

34. *Id.*

35. *Id.* at *4. The court also noted that once the contract was voided, the buyer was entitled to restitution of the monies paid under CISG art. 81. *Id.* at *3 (quoting CISG art. 81) (“Avoidance of the contract releases both parties from their obligations under it[.] . . . A party who has performed the contract either wholly or in part may claim restitution from the other party of whatever the first party has supplied or paid under the contract.”).

36. Case No. 8:21-cv-2884-VMC-JSS, 2023 WL 1781561 (M.D. Fla. 2023).

37. *Id.* at *1–2.

38. *Id.* at *9.

39. *Id.* at *6.

40. *Id.*

[Finally] [w]hen “determining the intent of a party or the understanding a reasonable person would have had,” courts should give “due consideration . . . to all relevant circumstances of the case including negotiations, any practices which the parties have established between themselves, usages and any subsequent conduct of the parties.” CISG, art. 8(3).⁴¹

Ultimately, the court concluded that conflicting evidence on both sides prevented summary judgment for either litigant.⁴²

Formation issues under the CISG are considered by the courts as a threshold matter, before considering the interpretation of the contract. As the court in *N.F. Smith & Associates, L.P. v. Karl Kruse GMBH & Co. KG*⁴³ observed, “[t]he CISG specifically ‘governs issues of contract formation that are antecedent to determining the validity of and enforcing forum selection clauses.’”⁴⁴ In *N.F. Smith*, it was the appropriate forum selection clause that was at issue, where the German-based seller had provided for application of Swiss law in its initial offer to sell and the Texas buyer provided for Texas law in its corresponding offer to buy.⁴⁵ Both clauses also expressly excluded application of the CISG.⁴⁶ Notwithstanding the CISG exclusions, the court reiterated that “[t]he CISG’s rules on formation ‘extend[] to the question of whether standard contract terms are incorporated into a contract, including whether [forum selection] clauses contained in standard terms are incorporated into the contract.’”⁴⁷ Citing Article 8 of the CISG regarding formation, the court found that the German seller’s offer had expired before acceptance, and it was rather the Texas buyer’s offer that the seller accepted by its performance under CISG formation principles.⁴⁸ Accordingly, the court held that the Texas forum selection clause was effective and controlled.⁴⁹ The court then interpreted the clause under Texas law, found it to be valid and binding, and thereby granted the Texas buyer’s motion to remand to Texas state court.⁵⁰

NO FORMAL WRITING REQUIREMENT

Unlike the UCC, there is no statute of frauds writing requirement under the CISG. Article 11 provides: “A contract of sale need not be concluded in or evidenced by writing and is not subject to any other requirement as to form. It may be proved by any means, including witnesses.”⁵¹ Hence, in *Texmont Design Ltd.*

41. *Id.* at *7–8 (citations omitted).

42. *Id.* at *9.

43. Civil Action No. 4:22-CV-3877, 2023 WL 7474046 (S.D. Tex. Oct. 10, 2023).

44. *Id.* at *3 (quoting *Chateau des Charmes Wines Ltd. v. Sabate USA Inc.*, 328 F.3d 528, 530 (9th Cir. 2003)).

45. *Id.* at *1–2.

46. *Id.*

47. *Id.* at *5 (quoting *FRANCO FERRARI & MARCO TORSSELLO, INTERNATIONAL SALES LAW—CISG IN A NUTSHELL* 224–25 (3d ed. 2022)).

48. *Id.*

49. *Id.*

50. *Id.* at *6–7.

51. CISG art. 11.

v. Halston Operating Co.,⁵² a defendant purchaser raised a statute of frauds affirmative defense in response to a lawsuit filed against it for breach of contract. In response, the seller filed by a Hong Kong-based seller a motion in limine seeking to exclude all evidence on the statute of frauds defense as irrelevant, give the applicability of the CISG.⁵³ The court, citing CISG article 11, agreed, observing that “‘there is no statute of frauds requiring that all materials contract terms be in writing’ under the CISG.”⁵⁴

INTERPRETATION OF CONTRACTS

Under the CISG, all relevant context is generally admissible when interpreting contract provisions, and the issue is particularly “sensitive as to questions of fact.”⁵⁵ Thus, “statements made by . . . a party are to be interpreted according to his intent where the other party knew or could not have been unaware of what that intent was,’ otherwise, they ‘are to be interpreted according to the understanding that a reasonable person of the same kind as the other party would have had in the same circumstances.”⁵⁶ In determining the party’s intent, “due 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.”⁵⁷ Further, any applicable usages of trade are always relevant as well, under Article 9.⁵⁸ In *Gramercy*, these issues arose with respect to the disputed interpretation of a clause in a contract for the installation and sale of certain machinery, as to whether the machines would be commissioned by a specific date.⁵⁹ The court, citing the above principles, noted that the issue was not ripe for resolution as a matter of law at the summary judgment level.⁶⁰

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.”⁶¹ This requirement relates to what was contractually agreed to between the parties. Subsection (2) of Article 35 provides further that, *inter alia*, goods will be fit for

52. Case No.: CV 18-10164-CJC (GS)jx, 2023 WL 4843078 (C.D. Cal. June 21, 2023).

53. *Id.* at *1.

54. *Id.* (citing *Urlica, Inc. v. Pharmaplast S.A.E.*, No. CV 11-02476 MMM RZX, 2014 WL 3893372, at *11 (C.D. Cal. Aug. 8, 2014), *aff’d sub nom. Urlica, Inc. v. Medline Indus., Inc.*, 669 F. App’x 421 (9th Cir. 2016)). The court also noted that the CISG rejects the parol evidence rule as well. *Id.* (citing *Filanto, S.p.A. v. Chilewich Int’l Corp.*, 789 F. Supp. 1229, 1238 n.7 (S.D.N.Y. 1992)).

55. *Gramercy*, 2023 WL 5917624, at *30.

56. *Id.* (quoting CISG art. 8).

57. *Id.* (quoting CISG art. 8(3)).

58. CISG art. 9.

59. *Gramercy*, 2023 WL 5917624, at *31.

60. *Id.*

61. CISG art. 35(1).

the ordinary purposes for which they are ordinarily used.⁶² This provision is analogous to the implied warranty of merchantability contained in U.C.C. section 2-314.⁶³ In *Shenzen Synergy Digital Co. v. Mingtel, Inc.*,⁶⁴ a Chinese computer tablet contracted to sell “Tier 2” (low end) tablets to a Texas electronics importer, who then forward-contracted them to the Home Shopping Network. The Texas federal district court had found that the tablets were conforming, against the Texas importer’s claims otherwise.⁶⁵ On appeal, the U.S. Court of Appeals for the Fifth Circuit affirmed, finding that the district court’s findings were not clear error, based especially on the fact that the claimed problems largely stemmed from WiFi and network issues, and not the tablet hardware itself.⁶⁶ Moreover, the Texas importer’s president had directly emailed the Home Shopping Network that the tablets were conforming and acceptable. Thus, the Fifth Circuit upheld the finding that the seller had not breached the contract by providing nonconforming goods.⁶⁷

NOTICE OF NONCONFORMITY

If the seller delivers nonconforming goods, the buyer has a potential breach of contract action. However, as under the Uniform Commercial Code, the buyer is required to give notice to the seller as a prerequisite for bringing suit. Specifically, Article 39 of the CISG provides that a “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.”⁶⁸ Moreover, under Article 38 of the CISG a buyer is required to “examine the goods, or cause them to be examined, within as short a period as is practicable in the circumstances.”⁶⁹ In *Shenzen Synergy*, discussed above, the Texas importer of computer tablets from a Chinese manufacturer did not properly inspect the tablets upon their arrival in the United States—although they *had* inspected them in China before shipment, the Wi-Fi and network features were U.S.-only and were not tested in either China or the United States.⁷⁰ As such, the court found that the lack of proper inspection and notice was an additional reason that the Chinese manufacturer

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

63. U.C.C. § 2-314 (2022).

64. 74 F.4th 343 (5th Cir. 2023). The *Shenzen* litigation was cited in last year’s survey, for the federal district court’s opinion on prejudgment interest recoverable under the CISG. See Wayne Barnes, *CISG*, 78 BUS. LAW. 1295, 1305 (2023) (citing *Shenzen Synergy Digit. Co. v. Mingtel, Inc.*, No. 4:19-cv-00216, 2022 U.S. Dist. LEXIS 110689 (E.D. Tex. June 22, 2022)).

65. *Shenzen Synergy*, 74 F.4th at 345.

66. *Id.* at 347.

67. *Id.*

68. CISG art. 39(1).

69. *Id.* art. 38(1).

70. *Shenzen Synergy*, 74 F.4th at 347.

was not liable for breach of contract and that the Texas purchaser was instead liable for nonpayment.⁷¹

BREACH OF CONTRACT

Although the CISG does not define the elements of a breach of contract claim, American courts applying the CISG often equate it to the same elements as under applicable state law. In *Fometal S.R.L. v. Kelli Trading LLC*,⁷² the federal district court for the Southern District of New York noted that the CISG “provides for damages where there is a breach of contract involving the sale of goods.”⁷³ In *Fometal*, the plaintiff asserted breach of contract actions under the CISG and the common law of New York—the court noted, however, that both theories implicated “the same legal analysis.”⁷⁴ The court explained that “[t]o state a claim for breach of contract, a plaintiff must allege four elements: ‘[i] the existence of a contract, [ii] performance of the contract by the plaintiff, [iii] breach by the defendant, and [iv] damages suffered as a result of the breach.’”⁷⁵

In *Fometal*, an Italian supplier of aluminum steel received orders for steel from a Washington-based broker, on behalf of several customers, including a Massachusetts-based importer of aluminum steel.⁷⁶ Although the broker signed the purchaser orders, the importer was listed as a consignee.⁷⁷ After the supplier shipped the steel, it went unpaid and the supplier brought suit in federal district court in New York.⁷⁸ The supplier asserted numerous theories in addition to breach of contract.⁷⁹ After disposing of other alleged purchasers on jurisdictional grounds, the court considered the supplier’s substantive breach of contract claims against the importer in the context of the importer’s Rule 12(b)(6) motion to dismiss.⁸⁰ The court addressed the claim under New York law: “[b]ecause caselaw interpreting the CISG is relatively sparse,’ courts are ‘authorized to interpret it in accordance with its general principles.’”⁸¹ The primary basis for the importer’s defense was that it was not a party or signatory to the contract with the supplier, but rather only the broker signed on behalf of any purchasers.⁸² The court agreed with the supplier that the broker had actual or at least apparent authority to act on behalf of the importer based on a number of facts, including that the importer admitted it wanted to purchase steel, the broker held itself out as the importer’s broker, the importer was listed as consignee on the order, and that

71. *Id.* at 346–47.

72. 22 Civ. 1928 (KPF), 2024 WL 307976 (S.D.N.Y. Jan. 26, 2024).

73. *Id.* at *10 (citing CISG art. 74).

74. *Id.*

75. *Id.* (citing *Ebomwonyi v. Sea Shipping Line*, 473 F. Supp. 3d 338, 347 (S.D.N.Y. 2020), *aff’d*, No. 20-3344, 2022 WL 274507 (2d Cir. Jan. 31, 2022)).

76. *Id.* at *2.

77. *Id.*

78. *Id.*

79. *Id.*

80. *Id.* at *10–11.

81. *Id.* at *10.

82. *Id.*

the importer actually accepted delivery of the steel.⁸³ Ultimately, the court concluded that the supplier had sufficiently alleged the importer's liability for breach of contract for the nonpayment, "under both CISG and common-law contract theories," and thus denied the importer's motion to dismiss.⁸⁴

In the *Brands International* case discussed above,⁸⁵ a Canadian hand sanitizer manufacturer brought a breach of contract action against a Minnesota purchaser for nonpayment of deliveries, claiming that the nonpayment constituted a "fundamental breach" under Article 25.⁸⁶ After finding that the formation of the contract was uncontested,⁸⁷ the court considered the contested claims of non-performance and which party initially breached the contract.⁸⁸ The purchaser claimed its non-payment was not a breach because its payment obligation was conditioned on the manufacturer first issuing an invoice.⁸⁹ The court rejected this theory, however, finding that there was no express contract language making an invoice a condition precedent to the purchaser's payment obligation.⁹⁰ In fact, the purchaser's president testified in his deposition that the agreement was basically understood to be payment upon delivery—essentially, C.O.D. Once this determination was made, it followed that the purchaser was in breach for nonpayment after delivery had been made.⁹¹ Moreover, the court concluded that the purchaser was similarly liable to the extent the parties' agreement constituted an "installment contract" under the CISG, which grants remedial rights to a seller when a buyer fails to perform in such a way that "gives the other party good grounds to conclude that a fundamental breach of contract will occur with respect to future instalments."⁹²

Another breach of contract action was *THI Medical, S.A.C. v. Filmore Management Trading, LLC*,⁹³ which involved a contract between a Peruvian purchaser and a Florida seller of N95 masks. The contract specified that the masks were to be authentic 3M-manufactured masks. When the masks arrived, 3M representatives determined that the masks were counterfeit and the purchaser filed suit

83. *Id.* at *10–11.

84. *Id.* at *11.

85. See *Brands International*, 2023 WL 2898592.

86. See *id.* at *5 (quoting CISG art. 25) ("Under the CISG, a breach of contract is fundamental 'if it results in such detriment to the other party as substantially to deprive [them] of what [they are] entitled to expect under the contract.'").

87. The court cited the CISG articles on offer and acceptance, which are analogous to the American common law principles. See *id.* (citing CISG arts. 14 (offer), 18 (acceptance), 23 ("A contract is formed as soon as the offer is accepted.")).

88. *Id.* at *5.

89. *Id.*

90. *Id.*

91. *Id.* at *6–7 (citing art. 33 (seller obliged to deliver goods), arts. 54, 59 (buyer obliged to pay, and no formal request is required by seller), art. 64 (buyer's nonperformance gives seller remedial rights)).

92. *Id.* at *7 (quoting CISG art. 73(2)).

93. Case No. 21-21632-Civ-GAYLES/TORRES, 2023 WL 6049299 (S.D. Fla. Aug. 23, 2023), *re- port & recommendation adopted in part, rejected in part*, No. 21-CV-21632, 2023 WL 6037463 (S.D. Fla. Sept. 15, 2023).

claiming breach of the contract under the CISG and other claims.⁹⁴ The court cited Article 45 of the CISG for the proposition that “[i]f the seller fails to perform any of his obligations under the contract or this Convention, the buyer may: (a) exercise the rights [of avoidance] provided in articles 46 to 52; (b) claim damages as provided in articles 74 to 77.”⁹⁵ The court observed that the purchaser likely suffered damages as a result of the nonconforming performance.⁹⁶ However, the sales contract provided that the Peruvian purchases was contractually required to obtain verification of the conformity of the masks by hiring a third party to inspect prior to shipment.⁹⁷ The purchaser did so, and its designated third party inspector asserted the masks were authentic prior to shipment.⁹⁸ The court found that the purchaser was bound by the findings of its third party inspector; as a corollary, the court further found that insofar as the terms of the agreement provided, seller had effectively fulfilled its CISG obligations.⁹⁹ Accordingly, the purchaser could not maintain an action against the seller and the court granted summary judgment to the seller on the CISG claim.¹⁰⁰ The court noted, of course, that an action by the purchaser might lie against the apparently negligent inspector.¹⁰¹

ATTORNEY’S FEES

The CISG does not mention recovery of attorney’s fees. In the *Brands International* case¹⁰² discussed earlier, a Canadian hand sanitizer manufacturer sought recovery of attorney’s fees after a court determined it was entitled to recover in breach of contract for a Minnesota purchaser’s nonpayment. The Minnesota federal district court observed that the issue of whether the CISG authorized attorney’s fees was one of first impression in the Eighth Circuit.¹⁰³ The opinion noted that a Seventh Circuit opinion, *Zapata Hermanos Sucesores, SA v. Hearthside Baking Co.*, had held that attorney’s fees were not recoverable, as “[t]here is no suggestion in the background of the Convention or the cases under it that ‘loss’ was intended to include attorneys’ fees, but no suggestion to the contrary either.”¹⁰⁴ As such, the Seventh Circuit opinion had left the issue to domestic

94. *Id.* at *1–2.

95. *Id.* at *3 (quoting CISG art. 45).

96. *Id.*

97. *Id.* at *4.

98. *Id.*

99. *Id.* The court further referred to Article 65 of the CISG, which provides: “If under the contract the buyer is to specify the form, measurement or other features of the goods and he fails to make such specification either on the date agreed upon or within a reasonable time after receipt of a request from the seller, the seller may, without prejudice to any other rights he may have, make the specification himself in accordance with the requirements of the buyer that may be known to him.” *Id.* (quoting CISG art. 65).

100. *Id.*

101. *Id.*

102. *Brands Int’l*, 2023 WL 2898592.

103. *Id.* at *8.

104. *Id.* (quoting *Zapata Hermanos Sucesores, SA v. Hearthside Baking Co.*, 313 F.3d 385, 388 (7th Cir. 2002)).

law, resulting in the attorney's fees not being recoverable (as is the standard "American Rule").¹⁰⁵ The court in *Brands International* declined to follow the *Zapata* opinion, and held that attorney's fees were recoverable in a proper breach of contract case under the CISG.¹⁰⁶ In its reasoning, the court turned to Article 74 of the CISG, which provides in pertinent part 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."¹⁰⁷ The court further noted that the CISG requires that damages be foreseeable.¹⁰⁸ Contrary to the *Zapata* rationale that the text of the CISG was silent on the attorney fees issue, the *Brands International* case noted that the "vast majority" of CISG nations adhered to the "English rule" that the loser pays.¹⁰⁹ The court reasoned that "it follows that the CISG would reflect the dominant approach to attorney's fees;" moreover, it found that allowing attorney's fees furthered the policy goal of the CISG for uniformity and "the observance of good faith in international trade," as required by Article 7.¹¹⁰

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."¹¹¹ Article 78, while providing for interest, does not specify the applicable interest rate. As discussed in last year's survey, the courts have followed a variety of approaches in choosing the applicable interest rate in CISG cases, including approaches adopting either federal or state law rates.¹¹² In the *Brands International* case discussed earlier, the court concluded that pre-judgment interest was appropriate under CISG Article 78, in a case finding that a Canadian hand sanitizer manufacturer was entitled to recover for breach of contract against the nonpaying Minnesota purchaser.¹¹³ Because the CISG does not specify an interest rate, the court observed that it "must consider what a 'fair and reasonable' rate would be."¹¹⁴ The court, noting that the matter was within its sound discretion, followed a previous Minnesota fed-

105. *Id.* See 20 AM. JUR. 2D *Costs* § 48 ("There are two basic attorney's fee schemes: the English rule ('loser pays') and the American rule ('every man for himself'). Many states generally follow the 'American Rule,' which provides that absent statutory authority or a contractual agreement between the parties, each party to litigation must bear its own attorney's fees and may not recover those fees from an adversary.").

106. *Brands Int'l*, 2023 WL 2898592, at *9.

107. *Id.* at *8 (quoting CISG art. 74).

108. *Id.* (citing CISG art. 71).

109. *Id.* at *9.

110. *Id.* (quoting CISG art. 7(1)). The court, in a subsequent opinion on the motion to recover attorney's fees, awarded them after a slight reduction under the "lodestar" method. See *Brands Int'l Corp. v. Reach Cos.* Civil No. 21-1026 (JRT/DLM), 2023 WL 6391830 (D. Minn. Oct. 2., 2023).

111. CISG art. 78.

112. See Barnes, *supra* note 64, at 1304-05.

113. See *Brands Int'l*, 2023 WL 6391830, at *8.

114. *Id.* at *6 (*Cargill, Inc. v. Taylor Towing Serv., Inc.*, 642 F.2d 239, 242 n.6 (8th Cir. 1981)).

eral district court opinion that had applied the Minnesota state prejudgment interest rate to federal claims (which statutory rate was 6 percent).¹¹⁵

Another case involving prejudgment interest was *Vanport International, Inc. v. DFC Wood Products Pty Ltd.*¹¹⁶ In *Vanport*, an Oregon company contracted to sell over 6,500 cubic meters of lumber to an Australian discretionary trading trust.¹¹⁷ After delivery, the Australian buyer rejected the lumber.¹¹⁸ However, after some discussion between the parties about a resolution, the Australian buyer sold the lumber, without discussion and without any payment to the seller.¹¹⁹ The Oregon seller sued in Oregon state court, but the matter was removed to federal court.¹²⁰ After the court granted a request to withdraw as counsel filed by the Australian entity's law firm (based on a lack of communication), the court granted a default judgment in favor of the Oregon seller.¹²¹ However, the court denied the seller's request for 9 percent prejudgment interest based on Oregon state law, noting that since the matter was governed by federal law (due to application of the CISG), and ordered the seller to prepare new calculations using the federal rate.¹²²

115. *Id.* at *6–7 (citing MVP Logistics, LLC v. FDG Express, LLC, No. 22-0686, 2022 WL 7420182, at *3–4 (D. Minn. Oct. 13, 2022); MINN. STAT. § 334.01).

116. No. 3:22-cv-01041-HZ, 2024 WL 261753 (D. Or. Jan. 24, 2024).

117. *Id.* at *1.

118. *Id.* at *3.

119. *Id.*

120. *Id.* at *1.

121. *Id.* at *4–5.

122. *Id.*