International Sale of Goods

*By Candace Zierdt and Kristen Adams**

NOTICE

GO Traders, S.A. v. Intertext Miami, LLC,[1] involved the sale of denim textiles between the plaintiff buyer, incorporated under the laws of Peru, and the defendant seller, a dissolved limited liability company organized under the laws of Florida.[2] Before the plaintiff brought this action, there were previous proceedings before the Supreme Court of Peru.[3]

The case centered on the plaintiff's contention that the defendant had breached the parties' contract by failing to offer proof that the textiles in question originated in the United States.[4] Defendants moved to dismiss the plaintiff's complaint on two grounds: (1) expiration of the statute of limitations and (2) failure of the plaintiff to provide notice of lack of conformity to the defendant pursuant to CISG Article 39.[5] In denying the motion to dismiss, the court noted as a preliminary matter that Article 39 requires a plaintiff buyer to provide "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."[6] Although Article 39 provides no definition of "reasonable time," and neither party had provided evidence of the relevant filing or hearing dates in Peru, the court held that, "[r]eading the Complaint in light most favorable to the Plaintiff, it is plausible that Defendants had knowledge of the lack of conformity by nature of the proceedings in Peru."[7] Thus, the court denied the motion to dismiss.[8]

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1. No. 1:18-CV-21372-KMM, 2018 WL 7287151 (S.D. Fla. Oct. 24, 2018).
2. *Id.* at *1.
3. *Id.*
4. *Id.*
5. *Id.* at *2.
6. *Id.* (quoting United Nations Convention on Contracts for the International Sale of Goods art. 39, Apr. 11, 1980, S. Treaty Doc. No. 98-9 (1983), 1489 U.N.T.S. 3 [hereinafter CISG] (the United States Senate ratified the CISG in 1986 giving it the force of federal law when the Convention came into effect on January 1, 1988)).
7. *Id.* at *2 (*see* CISG, *supra* note 6, art. 39).
8. *Id.* The court denied defendant's motion to dismiss on grounds of statute of limitations, noting lack of specificity in the pleadings as to when the breach occurred. *Id.*

Scope: Distributorship

In *Reecon North America, LLC v. Du-Hope International Group*,[9] the court considered the exercise of subject-matter jurisdiction over a matter arising from the sale of space heaters. The key question was whether the addition of Du-Hope International, a Chinese corporation, as a party created federal question jurisdiction such that removal to federal court was proper, by application of the CISG.[10] Ultimately, the court held that removal was not proper and remanded the matter to state court.[11] In so holding, the court found that the contracts in suit did not fall within the scope of the CISG.[12] Instead, the court held that the Membership Agreement and Cooperation Agreement, pursuant to which suit was filed, involved distributorship arrangements outside the scope of the CISG.[13] In reaching this conclusion, the court held that "[n]either agreement identifies specific goods or specific prices and quantities."[14] Instead, the agreements set up the framework for the parties' relationship.[15] The claims being made went to the structure and implementation of the relationship and were not "simple buyer-seller disagreements."[16] The court rejected the argument that the arrangement was nevertheless within the scope of the CISG, since it involved the purchase and shipment of goods.[17] In so holding, the court cited a series of cases that, like the case at bar, involved the purchase and shipment of goods, but were ultimately held to be distributorship contracts outside the scope of the CISG.[18] The court also distinguished this case from *Gruppo Essenziero Italiano, S.p.A.* v. *Aromi D'Italia, Inc.*,[19] in which the District Court for the District of Maryland had applied the CISG.[20] In that case, although a distributorship agreement existed, the only disputes that were relevant to the litigation involved unpaid invoices.[21] In addition, that case differed from the case at bar because subject-matter jurisdiction had not been disputed.[22] This case thus provides a clear rule that "[t]he CISG does not apply to distributorship arrangements, even where products were exchanged."[23]

9. No. 2:18-CV-00234-JFC, 2019 WL 2542536 (W.D. Pa. June 20, 2019).
10. *Id.* at *8.
11. *Id.* at *21.
12. *Id.* at *12.
13. *Id.*
14. *Id.*
15. *Id.*
16. *Id.*
17. *Id.*
18. *Id.* at *13 (citing Perfumerias Unidas, S.A. v. Coty Prestige Travel Retail & Exp., LLC, No. 06-CIV-23116, 2007 WL 9709776, at *6 (S.D. Fla. Aug. 7, 2007); Adonia Holding GmbH v. Adonia Organics LLC, No. 14-1223, 2014 WL 7178389, at *3 (D. Ariz. 2014); Viva Vino Import Corp. v. Farnese Vini S.r.l., No. 99–6384, 2000 WL 1224903, at *1–2 (E.D. Pa. Aug. 29, 2000)).
19. No. CIV. CCB-08-65, 2011 WL 3207555 (D. Md. July 27, 2011).
20. *Reecon N. Am., LLC*, 2019 WL 2542536, at *13.
21. *Gruppo Essenziero Italiano, S.p.A.*, 2011 WL 3207555, at *1.
22. *Reecon N. Am., LLC*, 2019 WL 2542536, at *13. *Cf. Gruppo Essenziero Italiano, S.p.A.*, 2011 WL 3207555, at *1.
23. *Reecon N. Am., LLC*, 2019 WL 2542536, at *14.

Pleading and Practice; Applicability of the CISG; Sufficiency of Pleading

The United States District Court for the Eastern District of California issued two opinions this year bearing the name *Hellenic Petroleum LLC v. Elbow River Marketing Ltd.*[24] Both cases arose from a dispute involving the purchase of propane.[25] Plaintiff Hellenic Petroleum LLC ("Hellenic") and defendant Elbow River Marketing Ltd. ("Elbow") executed several written agreements regarding Hellenic's purchase of propane from Elbow.[26] These agreements included forum selection clauses.[27] Hellenic alleged, however, that it also had an oral agreement with Elbow limiting Elbow's deliveries to "a monetary value not exceeding $1 million."[28] Hellenic further alleged that Elbow had breached this agreement by delivering propane worth $2.2 million without Hellenic's knowledge or consent.[29] Elbow, in turn, asked the court to dismiss the matter pursuant to the parties' forum-selection clause or, as an alternative, to dismiss the complaint for failure to allege sufficient facts.[30]

In the first of the two opinions, the court directed the parties to brief whether the CISG applies.[31] In issuing this opinion, the court noted that Hellenic had its principal place of business in Florida and was organized under Florida law, while Elbow was organized under the laws of Alberta, Canada, and had its principal place of business in Alberta as well.[32] Thus, the matter would fall within the CISG's purview pursuant to Article 1.[33] Even so, the parties had cited and applied the domestic contract law of California and had not addressed the applicability of the CISG.[34]

In the second opinion, the court held that the CISG governed the transaction and requested further briefing on the issue of whether the plaintiff had sufficiently pled breach of contract.[35] In so holding, the court quoted CISG Articles 14, 15, and 18 with respect to the standard for a legally sufficient offer, when such an offer becomes effective, and when an offer is accepted, respectively.[36] Article 14(1) of the CISG states that "[a] proposal for concluding a contract addressed to one or more specific persons constitutes an offer if it is sufficiently definite and indicates the intention of the offeror to be bound

24. *See* Hellenic Petroleum LLC v. Elbow River Mktg. Ltd., No. 119CV00483LJOSKO, 2019 WL 3035530 (E.D. Cal. July 11, 2019) [hereinafter *Hellenic I*]; *see also* Hellenic Petroleum LLC v. Elbow River Mktg. Ltd., No. 119CV00483LJOSKO, 2019 WL 6114892 (E.D. Cal. Nov. 18, 2019) [hereinafter *Hellenic II*].

25. *Hellenic I*, 2019 WL 3035530, at *1; *Hellenic II*, 2019 WL 6114892, at *1.

26. *Hellenic I*, 2019 WL 3035530, at *1; *Hellenic II*, 2019 WL 6114892, at *1.

27. *Hellenic I*, 2019 WL 3035530, at *1; *Hellenic II*, 2019 WL 6114892, at *1.

28. *Hellenic II*, 2019 WL 6114892, at *1.

29. *Id.*

30. *Id.*

31. *Hellenic I*, 2019 WL 3035530, at *1.

32. *Id.*

33. *Id.* (*see* CISG, *supra* note 6, art. 1).

34. *Id.* at *1.

35. *Hellenic II*, 2019 WL 6114892, at *1.

36. *Id.* at *3 (citing CISG, *supra* note 6, arts. 14–15, 18).

in case of acceptance."[37] Article 15(1) states that "[a]n offer becomes effective when it reaches the offeree."[38] Article 18 states that "[a]n acceptance of an offer becomes effective at the moment the indication of assent reaches the offeror."[39] Applying these standards to the plaintiff's complaint, the court characterized the plaintiff's allegation as "conclusory."[40] Indeed, the plaintiff had alleged only that "the essential terms of this agreement [were] that the limit on the account would not exceed $1 million dollars."[41] Thus, the complaint had failed to allege the existence of a legally sufficient offer, much less acceptance of the offer.[42]

After correctly holding that the CISG does not address whether consideration is required, the court cited the language in *Delchi Carrier S.p.A. v. Rotorex Corp.*, which many courts have used to justify using U.C.C. Article 2 to interpret Article 2.[43] Looking to Article 2 for guidance, the court held incorrectly that the CISG imposes a consideration requirement and found the plaintiff's complaint insufficient for failing to allege consideration.[44]

The court also found the plaintiff's allegations of breach of oral contract insufficient.[45] In so holding, the court cited CISG Article 52(2) and found that the plaintiff's complaint appeared to support acceptance of the defendant's delivery of excess goods, such that the plaintiff would be obligated to pay for the delivery at the contract price.[46] Under Article 52(2), "[i]f the seller delivers a quantity of goods greater than that provided for in the contract, the buyer may take delivery or refuse to take delivery of the excess quantity. If the buyer takes delivery of all or part of the excess quantity, he must pay for it at the contract rate."[47] Hellenic had alleged damages including storage and transportation costs due to Elbow's alleged unauthorized delivery, but was obligated to pay for the goods under Article 52 because it accepted delivery of the excess quantity.[48] Thus, Hellenic had failed to make a sufficient allegation of breach of oral contract.[49]

37. *Id.* (quoting CISG, *supra* note 6, art. 14(1)).
38. *Id.* (quoting CISG, *supra* note 6, art. 15(1)).
39. *Id.* (quoting CISG, *supra* note 6, art. 18(1)–(2)).
40. *Id.*
41. *Id.* (internal citations omitted).
42. *Id.*
43. *See id.* (quoting Delchi Carrier S.p.A. v. Rotorex Corp., 71 F.3d 1024, 1028 (2d Cir. 1995) (stating that "caselaw interpreting analogous provisions of Article 2 of the Uniform Commercial Code ('UCC') may inform a court where the language of the relevant CISG provisions tracks that of the UCC") (internal punctuation omitted)).
44. *Id.* at *3 (citing Hanwha Corp. v. Cedar Petrochemicals, Inc., 760 F. Supp. 2d 426, 430 (S.D.N.Y. 2011); Delchi Carrier S.p.A. v. Rotorex Corp., 71 F.3d 1024, 1028 (2d Cir. 1995)); *see also* Martini E Ricci Iamino S.p.A.—Consortile Societa Agricola v. Trinity Fruit Sales Co., 30 F. Supp. 3d 954, 965 (E.D. Cal. 2014).
45. *Hellenic II*, 2019 WL 6114892, at *3.
46. *Id.*
47. *Id.* (quoting CISG, *supra* note 6, art. 52(2)).
48. *Id.*
49. *Id.* at *4.

The court expressed skepticism that these defects in pleading could be cured, but granted leave to cure.[50] However, on December 12, 2019, Hellenic filed notice of voluntary dismissal.[51]

Pleading and Practice; Sufficiency of Pleading

Legal sufficiency was also the central theme of *Ningbo Yang Voyage Textiles Co. Ltd. v. Sault Trading*.[52] Plaintiff Ningbo Yang ("Ningbo"), a Chinese company and manufacturer of silk products, sued defendant Sault Trading ("Sault"), a New York corporation, to recover the unpaid balance of a contract for the sale of silk polyester curtain products.[53] In July 2017, Ningbo completed a shipment to Sault, but never received payment and filed suit.[54] The defendant did not timely answer, and the court entered default.[55]

As a preliminary matter, the court held that the CISG applied.[56] In so holding, the court noted that plaintiff Ningbo is a Chinese company, Defendant Sault Trading is a U.S. company, and the parties had not included a choice-of-law provision in their contract.[57]

Two issues were before the court: liability and damages. The court quoted *Magellan International Corp. v. Salzgitter Handel GmbH* for the proposition that the plaintiff was required to establish "(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."[58] The court held the plaintiff had submitted "scant documentation" establishing the existence of a contract, consisting only of an an invoice, a copy of a bill of lading, and an affirmation signed by its attorney, who did not allege personal knowledge of any of the information contained therein.[59] Even so, and finding no signature on the invoice and no evidence that any deposit was paid to the plaintiff, the court found the allegations sufficient to establish both the existence of a contract of sale and breach of the contract.[60] In so holding, the court noted that because the defendant had defaulted, it conceded all of the plaintiff's factual allegations with respect to liability.[61] In addition, there was no evidence in the record suggesting the defendant disagreed with the terms of the invoice, which the court held were "unambiguous."[62]

50. *See id.*
51. Notice of Voluntary Dismissal by Hellenic Petroleum LLC, Hellenic Petroleum LLC v. Elbow River Mktg. Ltd., No. 119CV00483LJOSKO, 2019 WL 6114892 (E.D. Cal. Dec. 2, 2019).
52. No. 18CV1961ARRST, 2019 WL 5399973 (E.D.N.Y. Sept. 10, 2019), *report & recommendation adopted by* No. 118CV1961ARRST, 2019 WL 5394568 (E.D.N.Y. Oct. 22, 2019).
53. *Id.* at *1.
54. *Id.*
55. *Id.* at *2.
56. *Id.*
57. *Id.*
58. *Id.* at *3 (quoting Magellan Int'l Corp. v. Salzgitter Handel GmbH, 76 F. Supp. 2d 919, 924 (N.D. Ill. 1999)); *see* CISG, *supra* note 6, art. 74.
59. *Id.* at *4.
60. *Id.* at *4–5.
61. *Id.* at *5.
62. *Id.*

With respect to damages, the court held that it had a "separate obligation to assess whether damages are appropriate and, if so, to calculate the correct amount of damages," and would not assume that the plaintiff's allegations were true.[63] The court also found the plaintiff's affidavit to be legally insufficient because counsel did not allege personal knowledge of the matters contained therein.[64] The magistrate in this case thus found for the plaintiff on liability but recommended denial of the request for damages, with leave to amend.[65]

Arbitration: Manifest Disregard for the Law

Smarter Tools Inc. v. Chongqing SENCI Import & Export Trade Co., Ltd.,[66] involved the manufacture and sale of gas-powered generators between Smarter Tools, Inc., the buyer, a Virginia corporation, and Chongqing SENCI Import & Export Trade Co. Ltd., the seller, a Chinese entity. The parties' dispute involved nonpayment, cancellation of orders, and allegations of nonconformities.[67] The parties' contract included an arbitration clause and, after the seller commenced arbitration, the arbitrator rendered an award for the seller.[68] The buyer filed suit before the United States District Court for the Southern District of New York, seeking vacatur on two grounds: (1) manifest disregard for the law and (2) that the arbitrator had exceeded its authority by failing to render a reasoned award.[69]

The court held for the buyer on the second ground.[70] Because the parties had agreed the arbitrator was to render "a reasoned award," the arbitrator exceeded its contractual authority by declining to provide reasons for the award.[71] On the first ground, the court held for the seller, citing the two-pronged test found in *D.H. Blair & Co., Inc. v. Gottdiener*: the party seeking vacatur must prove "(1) the arbitrator knew of a governing legal principle yet refused to apply it or ignored it altogether, and (2) the law ignored by the arbitrator was well defined, explicit, and clearly applicable to the case."[72] The court found no evidence that the arbitrator had failed to apply the CISG.[73] Instead, the court found that the buyer's argument was merely "an objection to the way the law was applied."[74] In rejecting this argument, the court held, "[i]t is not this Court's place to review the arbitrator's evidentiary determinations nor to second guess his application of relevant law."[75]

63. *Id.*
64. *Id.* at *6.
65. *Id.* at *7.
66. No. 18-CV-2714 (AJN), 2019 WL 1349527 (S.D.N.Y. Mar. 26, 2019).
67. *Id.* at *1.
68. *Id.* at *1–2.
69. *Id.* at *2–3.
70. *Id.* at *3.
71. *Id.* at *4.
72. *Id.* (quoting D.H. Blair & Co. v. Gottdiener, 462 F.3d 95, 110, 111 (2d Cir. 2006) (internal citations omitted)).
73. *Id.*
74. *Id.*
75. *Id.*

Contract Formation

Nucap Industries, Inc. v. Robert Bosch LLC[76] is an update to a case first reported in the 2018 survey where the parties brought cross motions for partial summary judgement.[77] The dispute involved a sale of brake components incorporated into aftermarket brake pads.[78] Nucap Industries, Inc. and Nucap U.S. Inc. (collectively, "Nucap") claimed that Robert Bosch LLC, Bosch Brake Components LLC, and Robert Bosch GmbH (collectively, "Bosch") were given access to proprietary drawings as part of their relationship and that Bosch misused these drawings after the parties' contractual relationship ended.[79]

After the 2018 decision, the parties conducted discovery and renewed their cross-summary judgment motions on a number of issues.[80] The parties agreed that the CISG[81] governed the transaction.[82] They never executed a formal supply agreement.[83] Instead, their transactions were based on purchase orders from Bosch and acknowledgments and shipment of the goods by Nucap that began approximately in 2009.[84] During their relationship, Nucap gave Bosch access to its proprietary drawings for the parts Bosch purchased.[85] In February 2010, Nucap received a letter from Bosch stating that it expected their "suppliers to understand and comply with the requirements in the Bosch Supplier Manual" and how to access that manual.[86] In fall 2010, Bosch's purchase orders added language referring to an online set of terms and conditions (the "POTCs").[87] The POTCs included terms that precluded Nucap from suing Bosch over the misuse of Nucap's intellectual property, including the component part drawings.[88]

In 2011, Bosch and Nucap discussed agreements sent by Bosch that included the POTCs.[89] They were never signed and Nucap objected to blindly accepting the POTCs.[90] In August 2014, Nucap drafted another supply agreement that contained the POTCs and confidentiality obligations for both parties.[91] It, too, was never signed.[92] By November 2014, the relationship between the parties deteriorated and Nucap stopped filling Bosch's purchase orders.[93] The parties

76. No. 15 C 02207, 2019 WL 4242499 (N.D. Ill. Sept. 7, 2019).
77. Kristen David Adams & Candace M. Zierdt, *International Sale of Goods*, 73 Bus. Law. 1243, 1246 (2018) (citing Nucap Indus., Inc. v. Robert Bosch LLC, 273 F. Supp. 3d 986 (N.D. Ill. 2017)).
78. *Nucap Indus., Inc.*, 2019 WL 4242499, at *1.
79. *Id.*
80. *Id.* at *5.
81. CISG, *supra* note 6, art. 74.
82. *Nucap Indus., Inc.*, 2019 WL 4242499, at *7.
83. *Id.* at *2–4.
84. *Id.* at *2 (noting the parties' dispute regarding the exact date their relationship began).
85. *Id.*
86. *Id.*
87. *Id.*
88. *Id.*
89. *Id.*
90. *Id.* at *3.
91. *Id.* at *4.
92. *Id.*
93. *Id.*

dispute whether Bosch misappropriated Nucap's proprietary information while trying to find new suppliers for the parts that Nucap refused to provide.[94]

Ultimately, the court decided the contract formation issue was not appropriate for summary judgment and denied the motions by both sides.[95] Although the court mistakenly states that the CISG applies a mirror image rule,[96] it acknowledged that only purported acceptances that contain material alterations will be rejections and counteroffers.[97] Nucap argued that the terms it sent in its acknowledgment were material, so its acknowledgment was a rejection of the terms of the purchase order and a counteroffer.[98] The terms related to quantity discrepancies and calculations of interest on overdue balances.[99] The court determined that a reasonable jury could find these terms were material because they related to price and quantity.[100] Alternatively, a reasonable jury also could find that the terms were not material because they just tied up loose ends.[101]

Nucap further argued that the CISG excludes the terms in the POTCs because they were "surprising and unusual."[102] The court found that a reasonable juror would not find the terms to be "surprising or unusual" because Nucap had actual notice of the terms.[103] It granted Bosch's summary judgment motion on this issue.[104] Bosch also argued that Nucap's claim relating to tortious interference with contract should be dismissed because it violated the statute of frauds.[105] However that was not a valid argument because the CISG does not contain a statute of frauds.[106]

Resale of Goods by Seller

Eastern Concrete Materials, Inc. v. Jamer Materials Limited[107] involved a claim of unauthorized resale of goods by a seller.[108] Eastern Concrete Materials ("Eastern") is a New Jersey corporation owned by U.S. Concrete, Inc. ("U.S. Concrete") that supplies companies with concrete and aggregate materials.[109] Jamer Materials Limited ("Jamer") is a Canadian corporation that operates a granite quarry

94. *Id.* at *5.
95. *Id.* at *15.
96. *Id.* at *7. Rather, the CISG uses a modified mirror image rule because Article 19 states that non-material additional terms may become part of a contract.
97. *Id.*
98. *Id.*
99. *Id.*
100. *Id.*
101. *Id.*
102. *Id.* at *8 (quoting CISG-AC Opinion No. 13).
103. *Id.*
104. *Id.* at *15.
105. *Id.* at *13.
106. *Id.* at *14.
107. No. CV199032SDWLDW, 2019 WL 6734511 (D.N.J. Oct. 25, 2019), *report & recommendation adopted by* No. 19-9032 (SDW) (LDW), 2019 WL 6726476 (D.N.J. Dec. 10, 2019).
108. *Id.* at *1.
109. *Id.*

where it manufactures aggregate materials.[110] Both Canada and the United States ratified the CISG; thus, it governs this contract.[111] While U.S. Concrete discussed the possibility of purchasing Jamer's quarry, it contracted to buy a quantity of aggregates from Jamer.[112] Jamer produced the required quantity of aggregates and sent invoices to Eastern.[113] Eastern alleged it paid the invoices and owned the aggregate materials.[114] After U.S. Concrete decided not to acquire Jamer, the aggregate materials remained in Jamer's quarry.[115] Eastern claims Jamer consented to leaving the product at the quarry while the parties either tried to find a buyer or work out another arrangement to dispose of the aggregate material.[116] It alleged that Jamer breached the contract and the implied covenant of good faith and fair dealing when it sold much of the material without Eastern's consent or knowledge and kept all of the money for itself.[117]

Jamer filed a motion to dismiss plaintiff's claims.[118] It argued that CISG Article 88 permitted it to resell the goods and preempted any other claims by Eastern based on the resale of the aggregate.[119] The court noted that CISG Article 85 requires a seller to take reasonable steps to preserve the goods when the buyer delays taking delivery.[120] Article 88 allows a seller to resell goods after an unreasonable delay by the buyer to take control of the goods and the seller gives the buyer reasonable notice of the intent to resell.[121] However, it does not allow the seller to keep all of the proceeds; it only permits the seller to retain reasonable expenses for selling and preserving the goods.[122] Even though Eastern permitted the goods to sit at the quarry for two years, it claimed that there was an agreement with Jamer, Jamer never asked Eastern to move the goods, and both parties were working together to find someone to buy the aggregate. Because the issues of delay and notice depend on the facts and are critical to the resolution of the case, the court denied Jamer's motion to dismiss.[123]

Additionally, Jamer argued that the CISG preempted any other claims in tort or quasi contract, so all of those claims against Jamer should be dismissed.[124] The court found that the CISG only preempts U.C.C. Article 2 and other state contract law to the extent it conflicts with the CISG.[125]

110. *Id.*
111. *Id.* at *6.
112. *Id.* at *1.
113. *Id.*
114. *Id.*
115. *Id.*
116. *Id.*
117. *Id.* at *5.
118. *Id.* at *1.
119. *Id.* at *5.
120. *Id.* at *6 (quoting CISG, *supra* note 6, art. 85).
121. *Id.* (quoting CISG, *supra* note 6, art. 88(1)).
122. *Id.*
123. *Id.*
124. *Id.* at *7.
125. *Id.*

Damages Under the CISG

Sunrise Foods International Inc. v. Ryan Hinton Inc.[126] involved a motion for summary judgment by Sunrise Foods International Inc. ("Sunrise"), a Canadian corporation, against Ryan Hinton, Inc. ("Hinton"), an Idaho corporation, for his failure to take corn as agreed under their contract.[127] The contract required Hinton to buy 6,000 tons of organic corn from Sunrise.[128] Hinton planned to sell it to organic dairy farmers.[129] The farmers intended to use the corn as cattle feed; therefore the contract specified a certain vomitoxin[130] level for the corn.[131] When Sunrise informed Hinton of the vomitoxin level in the corn, he delayed pick up, visited the facility, picked up four loads in January, and ultimately stopped picking up corn on January 19, 2016.[132]

The court applied the CISG to the contract.[133] The court determined that Hinton wrongfully rejected the corn because, although the corn contained vomitoxin, Sunrise offered to provide three conforming deliveries of corn that contained acceptable vomitoxin levels.[134] Rejecting the corn was a fundamental breach under CISG Articles 49 and 25.[135] The court noted that CISG Article 37 permits a seller to cure a non-conforming delivery as long as it does not impose an unreasonable expense or inconvenience for the buyer.[136]

As to damages, because Sunrise resold the goods, the court applied CISG Article 75.[137] Article 75 provides that a seller may claim the difference between the contract price and the resale price, in addition to any damages permitted under Article 74.[138] Sunrise claimed it also should receive an award of lost profits because it expected to receive a profit of $30.00 for every short ton it sold.[139] The court did not award lost profit damages to Sunrise because it received them under contract resale damages.[140]

Place of Business and Attorneys' Fees

Zodiac Seats US LLC v. Synergy Aerospace Corp. involves three cases, all decided in 2019.[141] The cases concern contracts for the purchase of commercial airline

126. No. 1:17-CV-00457-CWD, 2019 WL 3755499 (D. Idaho Aug. 8, 2019).
127. *Id.* at *1.
128. *Id.*
129. *Id.*
130. *Id.* at *1 n.4 ("Vomitoxin is a type of mold present in almost all grain products." (internal citations omitted)).
131. *Id.* at *1.
132. *Id.* at *2.
133. *Id.* at *4.
134. *Id.* at *5.
135. *Id.* (citing CISG, *supra* note 6, arts. 25, 49).
136. *Id.* (citing CISG, *supra* note 6, art. 37).
137. *Id.* at *6.
138. *Id.* (citing CISG, *supra* note 6, arts. 74–75).
139. *Id.* at *7.
140. *Id.*
141. *See* Zodiac Seats US LLC v. Synergy Aerospace Corp., No. 417CV00410ALMKPJ, 2019 WL 1552501 (E.D. Tex. Feb. 5, 2019), *report & recommendation adopted by* 2019 WL 1219116 (E.D. Tex.

seats between Zodiac Seats US LLC ("Zodiac"), with its principal place of business in Texas, and Synergy Aerospace Corporation ("Synergy"), a company that has business in Colombia, Panama, and Brazil.[142] Zodiac claimed it performed the contract and has not been paid. Synergy countered that the airline seats it received had quality issues and some were delivered late.[143] Synergy filed for partial summary judgment, arguing that the CISG applied instead of Texas contract law and that Zodiac was not entitled to attorneys' fees under the CISG.[144]

The first case required the court to consider the place of business of each party.[145] Zodiac is based in Texas and the United States is a signatory of the CISG.[146] Synergy claimed its base is in Colombia, a country that has ratified the CISG.[147] Zodiac, however, argued that Synergy's principal place of business was either Brazil or Panama.[148] Panama has not ratified the CISG and Brazil did not sign on to the treaty until after the parties contracted, so the CISG applied if Synergy's principal place of business is in Colombia.[149] The court determined that it was unclear where Synergy had its principal place of business; so, it was an issue of fact.[150] Accordingly, the court denied Synergy's summary judgment motion.[151] In the second case, the U.S. District Court reviewed the February opinion and adopted the findings and conclusions by the Magistrate Judge.[152]

In the third case involving Zodiac and Synergy,[153] the Magistrate Judge reviewed the updated briefs and exhibits before determining whether the CISG governed the contracts and, if it did, whether it precluded the recovery of attorneys' fees by Zodiac.[154] The parties agreed that they did not opt out of the CISG.[155] The court explained that Article 10 provides "[i]f a party has more than one place of business, the place of business is that which has the closest relationship to the contract, having regard to the circumstances known to or

Mar. 15, 2019) [hereinafter *Zodiac I*]; Zodiac Seats US LLC v. Synergy Aerospace Corp., No. 417CV00410ALMKPJ, 2019 WL 1219116 (E.D. Tex. Mar. 15, 2019) [hereinafter *Zodiac II*]; Zodiac Seats US LLC v. Synergy Aerospace Corp., No. 417CV00410ALMKPJ, 2019 WL 1776960 (E.D. Tex. Apr. 23, 2019) [hereinafter *Zodiac III*].

142. *Zodiac I*, 2019 WL 1552501, at *1.

143. *Id.* at *1–2.

144. *Id.* at *4.

145. *Id.*

146. *Id.*

147. *Id.*

148. *Id.*

149. *Id.*

150. *Id.* at *5.

151. *Id.* Even though the court could not determine whether the CISG applied to the contracts in this case, it proceeded to consider Zodiac's motion for summary judgment and applied the U.C.C. It denied the motion for summary judgment on Zodiac's claims of breach of express warranty and implied warranty of merchantability and sustained the claim for breach of the implied warranty of fitness for a particular purpose.

152. *Zodiac II*, 2019 WL 1219116, at *1.

153. *See Zodiac III*, 2019 WL 1776960, at *1.

154. *Id.*

155. *Id.* at *2.

contemplated by the parties at any time or at the conclusion of the contract."[156] The court stated that the issue revolved around where and when communications were sent; and that turns on which location has the closest relationship to the formation of the contract and its performance.[157] Although the parties met once in Brazil and they considered tax consequences in Brazil, Synergy's principal place of business was Colombia because Synergy's chief operating officer who worked on the Zodiac contracts resided and worked in Colombia; the parties exchanged e-mails that emanated from Colombia; and the parties held a number of meetings in Colombia.[158] Consequently, Synergy's business in Colombia had the "closest relationship to the contract and its performance," so the CISG governs the claims.[159]

The court also considered whether a party may claim attorneys' fees under Texas law, or if the CISG prevents the prevailing party in the dispute from recovering attorneys' fees.[160] Although the court acknowledged that *Zapata Hermanos Sucesores, S.A. v. Hearthside Baking Co.*[161] held that CISG Article 74 does not allow attorneys' fees as damages, it concluded that *Zapata* did not apply because the claim for attorneys' fees was made under Texas law and not the CISG.[162] Although the CISG preempts inconsistent state law when it applies, it does not preempt a state statute permitting the recovery of attorneys' fees unless the claim is made through the CISG.[163] The court also looked to the conflict of laws rules; but held that, since both Texas and Colombia laws permitted the recovery of attorneys' fees, the parties could make out a claim for fees.[164]

156. *Id.* at *3 (citing CISG, *supra* note 6, art. 10).
157. *Id.* (internal citations omitted).
158. *Id.* at *3–4.
159. *Id.* at *4.
160. *Id.*
161. *Id.* at *3–5 (citing Zapata Hermanos Sucesores, S.A. v. Hearthside Baking Co., 313 F.3d 385, 388 (7th Cir. 2002)).
162. *Id.* at *5; *Contra Zapata*, 313 F.3d at 389.
163. 2019 WL 1776960, at *5.
164. *Id.* at *6–7.