

Update on United States Court Decisions Concerning the CISG (cases decided in 2007 and 2008)¹

I. Formation of Contract.

Eason Automation Systems, Inc., Plaintiff v. Thyssenkrupp Fabco, Corp., Defendant.
2007 U.S. Dist. LEXIS 72461 (E.D.Mich. Aug. 2007) and
2008 U.S. Dist. LEXIS 34086 (E.D.Mich. Apr. 2008)

Seller in Michigan provided written quotations to buyer in Canada for equipment to be installed in Canada and used there to create roll bars for Daimler Chrysler vehicles. The quotations did not include a choice of law or forum, but did provide:

“Any terms of buyer’s orders which are inconsistent with, additional or different from the terms and provision of this order acknowledgement are rejected, will not be binding on the seller nor considered applicable to the sale or shipment referred to herein. Unless buyer shall notify seller in writing within fifteen (15) days after receipt of this order acknowledgment by buyer, acceptance of the terms and conditions hereof by buyer shall be indicated, and in the absence of such notification, the sale and shipment by the seller of the products covered hereby shall be conclusively deemed to be subject to the terms and conditions hereof. No waiver, alteration, or modification of the provisions hereof shall be binding on the seller unless agreed to in writing by as duly authorized official of seller at its headquarters office(s)...”

Buyer verbally instructed the seller to begin constructing the machinery, then followed up six weeks later with a Purchase Order that contained a choice of Canadian law and forum. The court analyzed the formation of the contract as having commenced with the plaintiff seller’s quotation, accepted by the verbal instruction to begin building the equipment, without regard to the later written Purchase Order. Neither the quotation nor the Purchase Order expressly excluded the CISG, but the court cited the choice of Canadian law in the Purchase Order as supporting the application of the CISG, as the law of Canada. In the second opinion cited above, the court determined that Michigan law applies to those aspects of the contract not governed by the CISG. The Canadian choice of forum and law stated in the Purchase Order did not become part of the contract, which was formed by the earlier verbal instruction.

Barbara Berry, S.A. de C.V. v. Ken M. Spooner Farms
254 Fed. Appx. 646; 2007 U.S. App. LEXIS 26990 (9th Cir. 2007)

When we noted this case last year, the trial court had essentially ignored the CISG, finding that a clause excluding any warranty and all liability regarding the viability and performance of the nursery stock delivered to the Mexican buyer was effective, even though the clause was first presented to the buyer on the invoices of the U.S. seller (in advance of the arrival of the berry stock), and on the top of each box containing the raspberry roots.

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The trial court rejected the buyer's argument that an oral contract which did not include such a clause had previously been formed by the parties under the CISG, citing to a Swiss decision to support its conclusion that "placement of oral orders for goods followed by invoices with sales terms is commonplace, and while every term of the contract is not usually part of the oral discussion, subsequent written confirmation containing additional terms are binding unless timely objected to." On that basis, the trial court granted summary judgment in favor of the seller.

On appeal, the summary judgment was reversed. The Court of Appeals held that the CISG governed the formation of contracts for the sale of goods between the parties, whose places of business were located in contracting states. The trial court had therefore erred in failing to first analyze the formation of the contract under the CISG, which would determine what terms were included in the contract, and whether those terms had been modified by the receipt of the invoices or the boxes containing the goods.

Norfolk Southern Railway Co. v. Power Source Supply, Inc.
2008 U.S. Dist. LEXIS 56942 (W.D. Pa. 2008)

The U.S. seller of railroad locomotives brought suit against the Canadian buyer for failure to pay the full purchase price. The defense was based in part on alleged breaches of warranty, including implied warranties of fitness for a particular purpose and of merchantability. The parties had exchanged a series of communications, with the defendant's final document labeled "Purchase Order, Final Revision," but no signed contract. Seller delivered the locomotives, and the defendant's President signed the seller's Bill of Sale, which conspicuously disclaimed all warranties.

The court held that the Purchase Order Final Revision was an offer that the plaintiff responded to with its Bill of Sale, thereby making a counteroffer under CISG Article 19, since the disclaimer of warranties was an additional or different term relating both to the quality of the goods and the liability of seller to buyer. The buyer accepted the counteroffer by signing the Bill of Sale, and the provisions of that document therefore prevailed. Summary judgment was entered in favor of the plaintiff seller.

II. Effect of a Party's intention Under Article 8.

Guang Dong Light Headgear Factory Co., Ltd., Plaintiff v. ACI Int'l, Inc., Defendant.
513 F.Supp.2d 1153 (D.Kansas 2007)

Buyer in Kansas originally did business with an intermediary in China which sourced production of hats. Over an extended period of time, the dealings became more direct, and the buyer began signing documents designated "Sales Contracts" in which it was named as the buyer and Guang Dong was named as the seller. The buyer continued to send Purchase Orders to the intermediary, and received invoices from it. The prices stated in the "Sales Contracts" included the intermediary's commission, but it is unclear whether the buyer made payments to the intermediary or to Guang Dong.

The buyer and Guang Dong had direct contact over late payments, with many communications in which the buyer promised to make payment, and at times Guang Dong withheld shipment of new products until payment was received. Guang Dong eventually filed a

claim in arbitration in China under a provision in the “Sales Contracts” and obtained an arbitration award. In proceedings to confirm the award in the U.S., the buyer opposed confirmation on the basis that it had not intended to enter into contracts directly with Guang Dong, and only signed the “Sales Contracts” in order to assure Guang Dong that the orders the intermediary was placing with the factory were genuine.

The court evaluated the conduct of the parties under CISG Article 8, noting that their statements and conduct are evaluated on an objective standard (Art. 8(2)), unless a party can prove that its subjective intent was known to the other party or could not have remained unknown (Art. 8(1)). The court found insufficient evidence of knowledge on the part of Guang Dong concerning the buyer’s alleged intent to execute the “Sales Contracts” solely as confirmations of the orders that it was placing through the intermediary, and no objective basis for holding that the contracts had not been entered into according to their terms, directly between Guang Dong and the buyer. The arbitration award was confirmed.

III. Requirement of a Writing Under CISG Article 12

Zhejiang Shaoxing Yongli Printing and Dyeing Co., Ltd., Plaintiff v. Microflock Textile Group Corporation, Defendant.

2008 U.S. Dist. LEXIS 40418 (S.D.Fla. 2008)

Microflock, the U.S. buyer, provided by fax or email eight purchase orders for polyester fabric which were accepted by Zhejiang, the Chinese seller. Microflock received the goods and made partial payments on the orders. Zhejiang sued to recover the remaining balance, plus interest. Microflock attempted to defend on the basis that it had partially withheld payment due to defective goods, but failed to produce evidence, and summary judgment was granted in favor of Zhejiang for the balance remaining on the invoices.

Microflock attempted to argue that the parties had agreed to a modification of the contract, but again failed to produce any evidence, and the court held such evidence would have to be in the form of writings, due to the reservation China made under Article 96 when ratifying the CISG. Article

Note: Article 96 reads:

“A Contracting State whose legislation requires contracts of sale to be concluded in or evidenced by writing may at any time make a declaration in accordance with article 12 that any provision of article 11, article 29, or Part II of this Convention, that allows a contract of sale or its modification or termination by agreement or any offer, acceptance, or other indication of intention to be made in any form other than in writing, does not apply where any party has his place of business in that State.”

The court did not analyze the language of the Article 96 reservation made by China: “The People’s Republic of China does not consider itself bound by...article 11, nor the provisions in the Convention relating to the content of article 11.” Article 11 addresses formation, while Article 29 addresses modification of a contract. Contrary to the court’s ruling, it is not clear that China’s reservation results in any specific requirement of a writing applied to purported modifications.

IV. Force majeure and Substituted Performance

Macromex s.r.l. v. Globex International, Inc.

2008 U.S. Dist. LEXIS 31442 (S.D.N.Y. 2008)

Romanian buyer purchased 112 containers of chicken parts from U.S. seller, for delivery in Romania. Without warning, the Romanian government prohibited imports of chicken, and 42 containers remained undelivered. The buyer proposed to have the shipments delivered to a port in Georgia, but seller refused. The buyer proceeded through arbitration successfully, and brought an action in New York to confirm the award.

The defendant seller argued that the arbitrator had erred in holding that its failure to deliver the remaining containers was not excused under CISG Article 79. The court held, however, that the arbitrator's determination that the seller could have "avoided or overcome" the consequences of the change in Romanian government policy by delivering the goods to a port in Georgia, as requested by the buyer, was correct.

V. Damages

Dingxi Longhai Dairy, Ltd. v. Becwood Technology Group, L.L.C

2008 U.S. Dist. LEXIS 51066 (D. Minn. 2008)

Dingxi Longhai, a Chinese supplier, agreed to ship 612 metric tons of organic kosher Inulin to Becwood, a distributor in the U.S. Dingxi shipped the Inulin in four separate shipments. Becwood received shipment 1 and paid for it in full, but after determining that it was contaminated with mold, Becwood informed Dingxi that it was avoiding the contract. Shipment 2 apparently arrived on schedule, but Dingxi recalled shipments 3 and 4 before they reached their destination port (apparently exercising the right recognized by CISG Article 71(2)). Dingxi then sued for recovery of the full price for shipments 2, 3 and 4 with interest and attorney's fees.

The trial court held that the contract for delivery of goods in installments had been avoided by Becwood under Article 73, and that Dingxi's recovery as to the two shipments which it had recalled was governed by Article 76, which provides for recovery of the difference between the current price of the goods and the price fixed by the contract, unless the seller has resold the goods. Since Dingxi had sought recovery of the full value of the two shipments, and had not alleged in its complaint the current price at the time of the avoidance, the court dismissed the claim.

Note: (1) the court recited Article 76, which also provides for recovery of "any further damages recoverable under article 74," but apparently determined that no such damages could be claimed, because Article 74 speaks of damages for "breach of contract," not avoidance. This would prevent the seller (Dingxi) from recovering the costs incurred in recalling the shipment, and is questionable. (2) Under the Federal Rules of Civil Procedure, Dingxi is entitled to amend its complaint to allege the current price for the goods, and the case can be expected to continue.

Macromex s.r.l. v. Globex International, Inc.

2008 U.S. Dist. LEXIS 31442 (S.D.N.Y. 2008)

(*See Section IV., above*). Seller argued that the lost profits buyer could claim should be based on the market price of chicken in Georgia, the place of substituted performance requested by the buyer once it became impossible to import the chicken into Romania. The court however

confirmed the arbitrator's award, holding that lost profits under CISG Article 74 are defined as the amount of damages foreseeable at the time the contract is concluded, and at that time delivery was expected to be in Romania.

VI. Calculation of Interest

Guang Dong Light Headgear Factory Co., Ltd., Plaintiff v. ACI Int'l, Inc., Defendant.
2008 U.S. Dist. LEXIS 35392 (D.Kansas, 2008)

(See Section II., above.) Seller sought enforcement of an arbitration award it had won against buyer from the China International Economic and Trade Arbitration Commission. The arbitration award included interest under CISG Article 78, and the seller claimed interest should continue to accrue until the date that judgment confirming the award was entered.

The court found the decision on this issue to be within its discretion, and determined that "failing to award prejudgment interest would impede the purpose of the CISG." The rate of interest the court selected was one provided in federal law, and lower than the 10% rate found in the state law of the buyer.

Zhejiang Shaoxing Yongli Printing and Dyeing Co., Ltd., Plaintiff v. Microflock Textile Group Corporation, Defendant
2008 U.S. Dist. LEXIS 40418 (S.D.Fla. 2008)

(See Section III., above.) The court denied any recovery of interest to Zhejiang, stating "The CISG is silent on the issue of interest. Because the substantive domestic law does not apply, the plaintiff is not entitled to any interest."

Note: The court is wrong on two counts with respect to its ruling denying interest to the plaintiff: (1) Article 78 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"; and (2) If the subject actually were not addressed by the CISG, then the court should have looked to the applicable law under Article 7(2).