Update on United States Court Decisions Concerning the CISG (cases decided from January 2010 through September 2013)[1]

I. Formation of Contract

Hanwha Corporation v. Cedar Petrochemicals, Inc.
760 F. Supp. 2d 426 (S.D.N.Y. 2011)

"A contract is a contract, except when a court says it is not."

Hanwha, a Korean buyer, sued Cedar, an American petrochemical trader, for breach of contract. Hanwha had submitted a bid for 1,000 metric tons of toluene at the then-current market price. Cedar accepted Hanwha's bid, forming what the parties described as a "firm bid." Cedar then sent signed documentation to Hanwha, including a clause selecting New York law, the UCC, and INCOTERMS 2000. The parties started preparing a bill of lading and nominated a vessel for the ocean carriage. One week later, Hanwha returned the contract documents in modified form, specifying that Singapore law and INCOTERMS 2000 should govern. In the email transmitting the amended documents, Hanwha provided that no contract would "enter into force" unless Cedar countersigned Hanwha's proposed version of the contract documents. Although Cedar refused and insisted that the contract would be finalized only if Hanwha accepted Cedar's original terms, the parties prepared a letter of credit together.

This was similar to their course of dealings in 20 previous transactions: Hanwha would submit a bid to Cedar for a specified quantity of a petrochemical at a stated price, Cedar would accept Hanwha's bid, and then transmit a package of signed contract documents to Hanwha, including a provision which identified the laws Cedar chose to govern the contract, and incorporating Cedar's standard terms and conditions by reference. On three of those occasions, Hanwha had modified the contract documents by providing its own choice of law. Each time, Cedar neither objected to the changes nor countersigned Hanwha's version and both parties thereafter performed their obligations under the contract. In the case at hand however, Cedar denied that a contract of sale had been validly concluded, during a period of rising prices for toluene.

The court found that Hanwha made, and Cedar accepted, a "sufficiently definite" offer within the meaning of Article 14(1) CISG, but that Hanwha did not have the requisite intent to be bound when it made the bid.

The court reasoned:

> *"In the twenty prior transactions, these parties had engaged in a familiar two-step process, whereby they first formed their firm bid and then negotiated the final terms and conditions of the contracts. On each of these twenty prior occasions, the parties did not perform until after they had achieved agreement, explicit or implicit, on all the final terms of the contract."*

[1] Prepared for the International Bar Association 2013 Annual Meeting (Boston), by Barton S. Selden, attorney in San Francisco, California, and a partner at Gartenberg Gelfand Hayton & Selden, LLP.

The court based its conclusion on two grounds. First, that the contract documents prepared by Cedar reflect this intention by stating "[The] [f]ollowing sets forth the entire agreement of the parties." According to the court, this provision makes clear that the parties did not enter into a final contract until they agreed to the final terms embodied in the contract documents. Secondly, the court accepted that Cedar's immediate objection to the modification proposed by Hanwha, for the application of Singapore law, indicated that this was a material term under Article 19(2).

Note: This case presents an unusual contracting process which is a challenge to analyze under any applicable law. The court's conclusion that the parties' conduct in the earlier transactions indicates they did not intend to be bound by what they referred to as a "firm bid" composed of Hanwha's bid and Cedar's acceptance of that bid is difficult to support from the evidence recited in the decision. No matter whether Hanwha agreed to Cedar's contract documents or modified them, and regardless of the fact that Cedar never accepted those modifications on the three previous occasions when they were made, the parties had always performed according to the agreed-upon "firm bid." The parties' course of dealings therefore rather suggests that the "firm bid" constituted a binding contract.

In its second argument, the court misapplies Art. 19 CISG. This provision deals with the question of whether a reply to an offer constitutes acceptance or a rejection and therefore a counter-offer. In this case, however, there is no "battle of the forms" problem pursuant to Article 19 CISG. The parties did not include their standard terms during the offer and acceptance process that resulted in the "firm bid." Cedar's reply to Hanwha's bid did not contain any additional or different terms, and at that point, a contract was formed under Art. 23 CISG. Cedar sent its standard terms afterwards. After a binding contract has already been formed, a disagreement over whether or not additional terms should be added cannot render the contract invalid even if both parties deem the term in dispute to be "material." *See,* CISG Advisory Council Opinion No. 13, Inclusion of Standard Terms under the CISG, Rule 4. (http://www.cisg.law.pace.edu/cisg/CISG-AC-op13.html#54)

Golden Valley Grape Juice and Wine, LLC v. Centrisys Corporation
2010 U.S. Dist. Lexis 11884 (E.D. Cal., January 22, 2010).

"Acceptance can be found through conduct directed toward a third party."

STS, an Australian company, manufactures centrifuges and sells them to its U.S. distributor, Centrisys. In this case, Golden Valley alleged it had purchased from Centrisys an STS centrifuge, which did not perform to specifications. When Golden Valley sued Centrisys, the distributor filed a third party complaint against STS, which moved for change of venue pursuant to a forum selection clause, arguing that STS and Centrisys had agreed in their contract to resolve any dispute in Australia.

STS had sent an email with a sales quote for the sale of the centrifuge to Centrisys. STS' General Conditions, which provide for forum selection in Victoria, Australia, were attached to the same email. Centrisys then incorporated STS' quote into its presentation to Golden Valley, which ultimately purchased the centrifuge from Centrisys.

Centrisys argued that it did not "accept" the General Conditions because it did not affirmatively agree to them. The court rejected this based on Artt. 18 and 23 CISG, finding that acceptance was effective at the moment that Centrisys incorporated the terms of the STS sales quote in its own presentation to Golden Valley.

Note: Conduct between the buyer under the international sales contract and the ultimate purchaser may demonstrate the buyer's acceptance of an offer under the CISG, but the ultimate purchaser cannot rely on remedies under the CISG against the initial seller. *See, Beth Schiffer Fine Photographic Arts, Inc. v. Colex Imaging, Inc.,* 2012 U.S. Dist. LEXIS 36695 (D.N.J. March 19, 2012) [under Article 4 CISG, only the immediate buyer and seller have rights enforceable under the CISG. A U.S. purchaser of a photographic printing machine from a U.S. seller therefore had no rights under the CISG against the Italian manufacturer of the machine, but the CISG did not pre-empt any rights the buyer may have against the manufacturer under U.S. state or federal law.]

Forestal Guarani S.A. v. Daros International, Inc.
613 F.3d 395(3rd Cir. 2010)

"The viability of the writing requirement is not clear when enforcement is sought in a country that did not make that reservation."

Guarani, an Argentina-based manufacturer of lumber products, entered into an oral agreement with Daros, a New Jersey corporation, for the distribution of wooden finger-joints in the United States. Guarani delivered the goods as agreed and Daros made a payment. After Daros claimed that it did not owe any additional money, Guarani sued for breach of contract. While Daros did not deny that it had a contract with Guarani, Daros argued that the parties did not have a written contract and that, under the CISG, the absence of a writing precludes Guarami's claim.

Under Art. 11 CISG, a contract of sale need not be concluded in or evidenced by writing. However, Art. 96 GISG authorizes signatory states to make a declaration opting out of Art. 11 and related provisions. The United States has not made such a declaration; but Argentina has. The District Court concluded that Argentina's declaration imposed a writing requirement, and that the absence of a written contract in this case precluded the plaintiff's claim. The Court of Appeals reversed. It concluded that where one party's country of incorporation has made an Art. 96 declaration, while the other's has not, a court must first decide, based on the forum state's choice-of-law rules, which country's law applies. The court based this view on Art. 7(2) CISG, which says that "[q]uestions concerning matters governed by this Convention which are not expressly settled in it are to be settled in conformity with the general principles on which it is based or, in the

absence of such principles, in conformity with the law applicable by virtue of the rules of private international law".

II. Incorporation of General Terms and Conditions

ECEM European Chemical Marketing B.V. v. The Purolite Co.,
2010 U.S. Dist. LEXIS 7373 (E.D.Pa. January 29, 2010)

"Next time, try including an integration clause."

This case arose from Purolite's failure to pay for five shipments of styrene under a 2004 contract. The parties had previously engaged in a series of agreements beginning in 2002 through which ECEM, a buyer and seller of industrial products based in the Netherlands, supplied Purolite, based in the United States, with styrene.. Purolite sought to prevent ECEM from offering at trial a document entitled "General Terms and Conditions of Sale" ("GTCS") on the basis that it was extrinsic parol evidence, not part of the 2004 contract.

ECEM submitted that Purolite's practice before the 2004 contract was to approve each invoice in writing, and during the three-year relationship between the parties, Purolite consistently accepted the goods and invoices, each of which contained a reference to the GTCS. ECEM argued that Art. 8(1) CISG requires consideration of the communications and negotiations of the parties when determining their intent and the terms of the agreement. Purolite claimed that the court should consider objective, not subjective evidence, based on the reasonable person standard of Art. 8(2) CISG, because Purolite was objectively unaware of ECEM's intent to incorporate the GTCS into the 2004 contract.

The Court held that the CISG allows all evidence of the parties' intent to be admitted to interpret the terms of the agreement, regardless whether Art. 8(1) or 8(2) was applicable to the matter. Accordingly, the Court refused to preclude extratextual evidence of negotiations or agreements, such as the GTCS and e-mail communications made prior to the 2004 contract, in determining the scope of the parties' rights and obligations under it.

Allied Dynamics Corp., v. Kennametal, Inc.
2013 U.S. Dist. LEXIS 126140 (E.D.N.Y. September 4, 2013)

"Poor contract formation processes have expensive consequences."

Allied, a U.S. turbine parts manufacturer, issued purchase orders to buy gas turbine assembly blades from MFS, an Italian company, which allegedly failed to provide goods of the quantity and quality desired. Allied sued MFS and its parent Kennametal, for breach of contract. The defendants argued that the case should be dismissed for improper venue because a forum selection clause contained in the contracts between Allied and MFS made the courts of Milan, Italy the exclusive forum for any disputes. MFS claimed that, upon receipt of each purchase order from Allied, MFS issued a written order confirmation, which constituted its acceptance of the order and contained MFS's General Terms and Conditions of Supply, including the mandatory forum selection clause. Allied

maintained, however, that MFS's practice was to call Allied and confirm each of the purchase orders via telephone and that MFS sent written confirmations only in "some cases," and when it did so, only several months after it had received the purchase orders. Allied also claimed that, in certain instances, the written confirmations were sent via email and were not accompanied by any terms and conditions.

Given the disputed issues of fact, concerning whether MFS's General Terms and Conditions of Supply were included in each order confirmation, the court deferred any decision until after it could hold an evidentiary hearing.

III. Applicability of CISG

Simar Shipping Limited v. Global Fishing, Inc.
2013 U.S. App. LEXIS 18724 (9th Cir. September 9, 2013)

"An appellate court applies a favorite rule: No harm, no foul."

Simar, a Cyrpus company, appealed from the District Court's entry of judgment in favor of Global, a U.S. company, in a dispute over a shipment of crab, arguing that the court committed reversible legal error in "not apply[ing] or even mention[ing]" the CISG in the course of determining that no contract existed between the parties. The District Court had applied the legal principle that "[a] valid contract requires a meeting of the minds on essential terms." The appellate court found that this was a proposition finding ample support in Art. 14(1) and 18(1) CISG and at common law, and affirmed the judgment.

It's Intoxicating, Inc., v. Maritim Hotelgesellschaft Mbh
2013 U.S. Dist. LEXIS 107149 (M.D.Pa. July 31, 2013)

"It's not only U.S. companies that think there's no contract unless it's in writing."

Intoxicating brought a breach of contract claim against Maritim, which denied that the parties had entered into a contract. As a preliminary matter, the court confirmed once again that a choice of law clause selecting the law of a state (in this case "this agreement will be governed by and construed in accordance with the laws of the state of Pennsylvania") does not exclude the application of the CISG.

The court also found that the parties had entered into a binding agreement under the CISG, based on acceptance of the goods, partial payment, a request for credit for damaged goods, and discussions of additional orders, despite the lack of any formal acceptance or written agreement. The forum selection clause in the offer was therefore enforced.

Is Hong Kong a Contracting Party to CISG?

1. "Yes."
Electrocraft Arkansas, Inc. v. Super Electric Motors, Ltd, 2009 U.S. Dist. LEXIS 120183, 70 U.C.C. Rep. Serv. 2d (Callaghan) 716 (E.D.Ark. December 23, 2009): [No analysis other than that Hong Kong SAR is "part of China."]

2. "No."
Innotex Precision Limited v. Horei Image Products, Inc., 679 F. Supp. 2d 1356 (N.D.Ga. 2009): [Determining Hong Kong is not a Contracting Party, in fully-reasoned opinion.]

3. "Oops."
Electrocraft Arkansas, Inc. v. Super Electric Motors, Ltd., 2010 U.S. Dist. LEXIS 45855 (E.D.Ark. April 2, 2010): [Court informs parties of *Innotex* decision and alerts them to possibility Hong Kong is not a Contracting Party.]

Pasta Zara S.p.A. v. United States, American Italian Pasta Company, et al.
2010 Ct. Intl Trade LEXIS 35 (CIT April 7, 2010) 2010 WL 1347215 (CIT);

"What is the CISG doing in a U.S. Court of International Trade decision?"

Hoping for more favorable treatment under the U.S. antidumping provisions, Pasta Zara S.p.A., an Italian pasta producer, argued that it contracted for the sale of pasta directly with U.S. purchasers that were not its affiliates, rather than with Pasta Zara's affiliate, Zara-USA, Inc. Pasta Zara argued that it accepted each order when it began producing pasta, upon receipt of purchase orders from its U.S. customers.

Pasta Zara argued that any activities of Zara-USA should be ignored, because they took place after a binding agreement between Pasta Zara and its unaffitiliated customer was established under the CISG. However, Zara-USA was the importer of record, and invoiced the customers. The customers also paid the purchase price to Zara-USA, which then paid Pasta Zara at a lower price, keeping the difference as its gross profit..

The court found that the Department of Commerce's factual findings were more than adequate to support the conclusion that the sales to the purchasers were made by Zara-USA, after importation, and therefore a "constructed export price" was appropriate.