Update on United States Court Decisions Concerning the CISG (cases decided in 2006 and 2007)[1]

I. "Opting Out" of the CISG and Use of Choice of Law Clauses.

While the clear trend of cases decided in U.S. courts confirms that reference to the law of a U.S. state to govern a contract for the sale of goods that would otherwise be subject to the CISG is *not* sufficient to exclude application of the CISG, there are some exceptional cases. The best advice is still for the parties to state specifically in a choice of law clause whether they intend for their contract to be governed by the CISG, in addition to designating the state (or country) whose law will govern.

Travelers Prop. Cas. Co. of Am. v. Saint-Gobain Tech. Fabrics
474 F. Supp. 2d 1075 (D. Minn. 2007)

TEC, a Minnesota corporation, purchased reinforcing mesh from Saint-Gobain, an Ontario, Canada corporation, to be used as part of a laminated exterior cladding for a multi-purpose arena being built in Denver, Colorado. The general terms and conditions on the back of TEC's purchase order specified that "the validity, interpretation, and performance of the terms and conditions and all rights and obligations of the parties shall be governed by the laws of the State of Minnesota." Saint-Gobain shipped the reinforcing mesh, and later the same day, sent an invoice to TEC containing Saint-Gobain's general terms and conditions, however Saint-Gobain did not dispute that the choice of law clause in TEC's purchase order controlled over any conflicting term in Saint-Gobain's invoice.

Saint-Gobain argued that the choice of law clause should be interpreted to refer only to the UCC as adopted in Minnesota, but the court held that reference to a particular state's law is not effective to opt out of the CISG, because the state law would include the CISG, due to the Supremacy Clause of the U.S. federal constitution. Thus, an express statement that the CISG does not apply is required in order to opt out of the CISG under Article 6.

See also "Matters not Governed by the CISG", below

Am. Biophysics Corp. v. Dubois Marine Specialties
411 F. Supp. 2d 61 (D. Rhode Island 2006)

American Biophysics Corporation ("ABC"), a Delaware corporation with its principal place of business in Rhode Island, entered into a Non-Exclusive Distributorship Agreement with Dubois Marine Specialties, a Canadian corporation with its principal place of business in Manitoba, for the purchase and resale of Mosquito Magnet pest control devices manufactured by ABC. The Agreement provided that it "shall be construed and enforced in accordance with the laws of the state of Rhode Island." In an action by ABC to collect on unpaid invoices, the court held this provision was sufficient to exclude application of the CISG.

Note: The court did not address the issue of whether the CISG should be applied to a distribution agreement.

[1] Prepared for the International Bar Association 2007 Annual Meeting (Singapore), by Barton S. Selden, attorney in San Francisco, California, and a partner at Gartenberg Gelfand Wasson & Selden, LLP.

II. Application of CISG Article 1(1)(a)

Use of a local subsidiary corporation to conclude a contract will prevent application of the CISG, even where the goods are delivered to the parent corporation in another signatory country.

Am. Mint LLC v. GOSoftware, Inc.
2006 U.S. Dist. LEXIS 1569 (M.D. Pa. 2006)

Goede Beteiligungsgesellschaft, a German corporation, and its subsidiary American Mint LLC, a Pennsylvania limited liability company, purchased credit card processing software from GOSoftware, Inc. a Georgia corporation, to be installed and used by Goede in Germany, for processing credit card purchases by consumers of Goede's collectible coins, including sales made by American Mint. The parties named in the contract were American Mint and GOSoftware, but the software was shipped to Goede in Germany and installed there.

When the software did not function properly, in part because of different conventions regarding the display of currency observed in the U.S. and in Germany (*i.e.*, $1,524.00 versus €1.524,00), GOSoftware provided additional software which apparently solved the problem, but according to plaintiff's allegations, only masked the fact that errors were being made in the amounts charged to customers' credit cards. Plaintiffs claimed that the purchase contract was governed by the CISG, but the court held that it had not been entered into between parties with places of business in different Contracting States of the CISG, since the contract was addressed to American Mint, which paid for the software by check.

Note: (1) The court ultimately granted the defendant's motion to dismiss for lack of subject matter jurisdiction, because the contract limited GOSoftware's liability to the purchase price ($10,995), well below the $75,000 amount required for a case brought in federal court under diversity jurisdiction. In *dicta*, the court stated that this provision would be enforceable even if the CISG had applied to the contract, as a derogation by the parties under Article 6. Given that the plaintiff claimed actual damages of approximately $928,000, roughly ninety times higher than the contract limitation, the result in a case where this issue is clearly relevant to the decision could be different.

Note: (2) The contract apparently was a purchase of software. The court did not indicate that any party contended the transaction was actually a license.

Multi-Juice, S.A. v. Snapple Bev. Corp.
2006 U.S. Dist. LEXIS 35928 (S.D.N.Y. 2006)

Multi-Juice, a Greek corporation, sought damages against Snapple, a New York corporation, for breach of an oral distribution agreement and of a settlement agreement from a prior action between the parties, which provided that the parties would negotiate a distribution agreement. Multi-Juice contended that the oral distribution agreement would be enforceable under the CISG, but the court held that the scope of the CISG defined in Article 1 ("contracts of sale of goods") does not include a distribution agreement, and therefore applied New York law, as designated in all drafts of the (unsigned) distribution agreement exchanged between the parties, as well as in the settlement agreement

III. Application of CISG Article 1(1)(b)

Prime Start Ltd. v. Maher Forest Prods., Ltd.
442 F. Supp. 2d 1113 (W.D. WA. 2006)

Prime Start, a British Virgin Islands corporation, entered into a contract with Maher Forest Products, a Washington corporation, to supply construction materials directly to Russia, for use on a job site. The contract did not contain a choice of law clause. In the course of responding to a motion for summary judgment filed by the defendants, Prime Start argued for application of the CISG, on the basis that the applicable law would be that of Canada, the United States, or Russia, all of which are parties to the CISG (the British Virgin Islands are not). The court rejected this argument, finding that the reservation by the United States to Article 1(1)(b) precluded it from applying the CISG.

IV. Limitation of Liability under Articles 4(a) and 19

Barbara Berry, S.A. de C.V. v. Ken M. Spooner Farms
59 U.C.C. Rep. Serv. 2d (Callaghan) 443, 2006 U.S. Dist. LEXIS 31262 (W.D. Wa. 2006)

Barbara Berry, a Mexican corporation, purchased raspberry roots from Spooner Farms, a Washington corporation, for delivery in Mexico. Berry filed suit alleging that Spooner's product was defective. Spooner moved for summary judgment based on a written clause excluding any warranty and all liability regarding the viability and performance of the nursery stock delivered to Berry. This clause was printed on the invoices which Spooner delivered to Berry in advance of the arrival of the berry stock, and on the top of each box containing the raspberry roots.

The court granted summary judgment in favor of Spooner and dismissed Berry's complaint on the basis of the exclusionary clause, concluding it was valid under Washington law. Berry argued that an oral contract had been formed by the parties under the CISG which did not include such a clause, but the court cited 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." The court noted that the validity of the exclusionary clause was not governed by the CISG in any event, under Article 4(a).

Note: the court's discussion of the acceptance of the exclusionary clause as an additional term, done under Article 18, rather than Article 19, seems misplaced.

V. Contract Modification

Valero Mktg. & Supply Co. v. Greeni Oy
2007 U.S. App. LEXIS 17282 (3d Cir. 2007) [*not binding as precedent*]

Valero agreed to purchase naptha from a seller based in Finland, Greeni Oy, for delivery to Valero's tanks in New Jersey by a certain date. The agreement was negotiated by a middleman and confirmed in writing. The vessel used to transport the naptha to Valero's tanks was required to be approved by Valero. Greeni was unable to locate a vessel which Valero would accept, and eventually shipped the naptha on an unapproved vessel, which would not reach its destination by the deadline set in the agreement.

Upon being informed of the delay, and that the naptha was being shipped on a vessel which Valero would not allow to deliver product directly to its tanks, Valero proposed a modification to the contract: (i) an extension of the deadline; (ii) Greeni would have to contract with a barge operator to deliver the naptha to Valero's tanks; and (iii) a reduction in price due to the delay. Greeni agreed to the modification, but later complained it felt it had had no choice. The vessel arrived in time to have delivered the naptha directly to Valero's tanks withint he extended deadline, but not in time to have it delivered by barge.

The trial court held the requirement to deliver by barge was invalid under Article 47, which allows the buyer to set an additional period of time for delivery, but prohibits the buyer from seeking any other remedy for the seller's breach during that additional time period. The appellate court reversed, holding that the modification was valid under Article 29, which states "a contract may be modified or terminated by the mere agreement of the parties."

VI. Interpretation of Contract Terms

Treibacher Industrie, A.G. v. Allegheny Techs., Inc.
464 F.3d 1235 (11th Cir. 2006)

Treibacher, an Austrian vendor of hard metal powders, agreed to sell tantalum carbide for delivery on "consignment" to TDY, a California subsidiary of Allegheny Technologies, a Pennsylvania corporation. After taking delivery of a portion of the amount of tantalum carbide called for in the contract, TDY refused to take delivery of the remainder. TDY argued that the customary usage of "consignment" means the buyer is only obligated to pay for the amount of material it actually uses. Treibacher maintained that the term indicated TDY was not required to pay for the material until it actually used the tantalum carbide, but that TDY was contractually obligated to eventually purchase all amounts called for under the agreement.

The court rejected TDY's argument that only the parties' express agreement to a particular usage could overcome the incorporation of an implied term under Article 9(2) in the form of customary usage. The court held that evidence of the parties' practices in the course of performing prior contracts over a period of seven years controlled over the term's customary usage, without determining the customary meaning of the word "consignment." TDY was liable for breach of contract for failing to take delivery of, and pay for, the entire amount of tantalum carbide.

TeeVee Toons, Inc. v. Schubert
2006 U.S. Dist. LEXIS 59455 (S.D.N.Y. 2006).

TeeVee Toons, Inc., a New York corporation, alleged that Schubert, a German firm, breached a contract to supply a system for manufacturing cassette packaging. Schubert moved for summary judgment, arguing that provisions in the Terms and Conditions attached to its Quotation Contract effectively disclaimed the relevant warranties of fitness for ordinary and particular purpose under Article 35. TVT countered that "there was an express oral understanding reached between TVT and Schubert's agent that the onerous boilerplate language of the Terms and Conditions would not apply."

The court concluded that there were factual issues which prevented it from granting summary judgment to Schubert, even though Schubert's standard terms and conditions contained

a “merger clause” stating: “the above provisions entirely supersede any prior correspondence, quotation or agreement. There are no agreements between us in respect of the product quoted herein except as set forth in writing and expressly made a part of this quotation.” According to the court, the intent of both parties would be relevant to interpreting the effect of the merger clause, and on this point, there was a conflict in the evidence which could not be resolved on summary judgment.

VII. Matters not Governed by the CISG

Miami Valley Paper, LLC v. Lebbing Eng’g & Consulting
2006 U.S. Dist. LEXIS 49590 (S.D. Ohio 2006).

Miami Valley Paper (“MVP”), having its principal place of business in Ohio, contracted to purchase a used paper winder from Lebbing, a German company. MVP made partial payments, but made no further payments once the paper winder arrived, finding that the equipment was defective. MVP then brought suit for breach of warranty, negligent misrepresentation and fraudulent inducement. Lebbing sought to have the tort causes of action dismissed, asserting that they were pre-empted by the CISG. The court held, however, that the CISG does not prevent a plaintiff from pleading negligent misrepresentation and fraudulent inducement as alternatives to its contract claims.

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The court held that claims for breach of contract and warranty which arose from delamination of the cladding allegedly caused by interaction of the reinforcing mesh with other elements of the cladding were governed by Minnesota law (including the CISG). Claims for contribution brought in the same action by subcontractors and designers, who had settled lawsuits brought by the owner and the general contractor in Colorado, and who were not parties to the sales contract for the reinforcing mesh, were governed by Colorado law