CISG

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Introduction

This survey includes issues relating to attorneys' fees, the use of the CISG in a bankruptcy case, contract formation, choice of law, and agreements to arbitrate.

Attorneys' Fees

In *Victory Foodservice Distributors Corp. v. N. Chr. Laitsos & Co. Ltd, d/b/a Flegga*,[1] Victory Foodservice Distributors Corp. ("Victory") purchased cheese products from N. Chr. Laitsos & Co. Ltd, d/b/a Flegga ("Flegga"), which Flegga allegedly failed to store properly, rendering them unsaleable. In a prior order, the court partially granted Victory's motion for default judgment, allowing Victory to prove additional damages. In response, Victory made two submissions. The first was an invoice for shipping and related costs. These were permitted except insofar as they were accounted for in the court's prior order.[2] The second was correspondence between Victory's attorney and an attorney in Greece, describing what the Greek attorney expected would be the costs of enforcing the judgment against Flegga in Greece.

In considering these submissions, the court began by examining CISG article 74, which provides in 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."[3] Setting aside the "added layer of complexity"[4] involved in seeking prospective, estimated attorneys' fees, the court noted that the few courts that had addressed recovery of attorneys' fees under article 74 had held that they were not the kind of "loss" contemplated by article 74.[5] Instead, whether attorneys' fees can be recovered is a matter governed by domestic

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1. No. 17cv2227, 2017 WL 5256762 (S.D.N.Y. Nov. 13, 2017).

2. *Id.* at *1.

3. United States Convention on Contracts for the International Sale of Goods art. 74, Apr. 11, 1980, 1489 U.N.T.S. 3, 19 I.L.M. 668, 671 [hereinafter CISG].

4. *Victory Foodservice Distribs. Corp.*, 2017 WL 5256762, at *1.

5. *Id.* at *2.

law under the relevant choice-of-law rules.[6] The court thus looked to the law of New York, as the forum state.[7]

Applying New York law, the court denied Victory's request.[8] The court found no applicable statute or contract provision to support an award of attorneys' fees.[9] In addition, this matter did not fall within a narrow exception for attorneys' fees relating to prior litigation against a third party caused by the party against whom the claim for fees is made.[10] Thus, as is the general rule in New York, each party would bear its own attorneys' fees and other costs.[11]

Incoterms/Definition of "Receipt"/Use of CISG in Bankruptcy Case

In *In re World Imports Ltd.*,[12] the court considered when goods are "received by the debtor" for purposes of 11 U.S.C. § 503(b)(9), which permits a creditor to recover the value of goods sold to the debtor in the ordinary course of business, when they have been "received by the debtor within 20 days before"[13] filing a bankruptcy petition, as a priority administrative expense. The definition of "received" was important in this case because both creditors sold the goods to the debtor "FOB at the port of origin."[14] Because the goods were shipped from Shanghai and Xiamen, China, respectively, to the United States, the risk of loss passed to the debtor in China. The dates of each shipment were more than twenty days before the debtor filed its bankruptcy petition. The debtor took possession of the goods, however, within the twenty-day period prior to filing its Chapter 11 petition.

Because the Bankruptcy Code does not define the term "received," the lower court looked to the CISG, as another source of federal law, to fill what it perceived as a gap in the Code.[15] The CISG incorporates the International Chamber of Commerce's Incoterms by application of CISG article 9(2). Because the parties had employed the FOB Incoterm, under which delivery occurs when the goods are delivered to a common carrier, the lower court held that the goods were "constructively received" in China when delivery was effectuated.[16]

In rejecting this approach, the Third Circuit began with the ordinary meaning of "received."[17] Looking to *Black's Law Dictionary* and the *Oxford English Dictionary*, the court held that both definitions required physical possession.[18] Next,

6. *Id.*
7. *Id.*
8. *Id.*
9. *Id.*
10. *Id.*
11. *Id.*
12. 862 F.3d 338 (3d Cir. 2017).
13. *Id.* at 340.
14. *Id.*
15. *Id.*
16. *Id.* at 341.
17. *Id.* at 342.
18. *Id.*

the court noted that the dictionary definitions of "received" were consistent with U.C.C. section 2-103(1)(c).[19] In applying the U.C.C. definition, the court noted the history and structure of this portion of the Bankruptcy Code.[20] First, 11 U.S.C. § 503(b)(9) is one of two sections within the heading, "Reclamation," and the Third Circuit had previously held that "Congress essentially borrowed [the reclamation provision] from the U.C.C."[21] Second, in that same case, the Third Circuit considered the definition of "receipt" for the other reclamation section, 11 U.S.C. § 546(c), and applied the U.C.C. definition.[22] Because the terms were "'functionally equivalent' and used in the same context," the court held, the same definition should be applied to both.[23]

Definition of "Goods"/Use of CISG in Bankruptcy Case

The issue was also supplied by 11 U.S.C. § 503(b)(9) in *In re Escalera Resources Co.*[24] This time, the definition of "goods" was at issue. PacifiCorp d/b/a Rocky Mountain Power ("PacifiCorp") had supplied electricity in the ordinary course of business to Escalera Resources Co. ("Escalera") within the days before Escalera filed its Chapter 11 petition. Post-petition, PacifiCorp filed a proof of claim and, later, a motion seeking to recover the value of that electricity as a priority administrative expense. In opposing the motion, Escalera argued that electricity was not a "good" under 11 U.S.C. § 503(b)(9) or the U.C.C.

Like the *In re World Imports* court, this court began by looking to the Bankruptcy Code.[25] Because the Bankruptcy Code does not define "goods," the court, like the Third Circuit, examined the meaning of the word as found in various dictionaries.[26] Applying the language from *Black's Law Dictionary* defining goods as "things that have value, whether tangible or not,"[27] the court held that "[e]lectrical energy most definitely is a 'thing'" and "obviously has value."[28] The court also noted that 11 U.S.C. § 503 "was designed to provide additional redress for creditors" by "expand[ing] the category of administrative expense claims to include the value of 'goods' received by the Debtor shortly before the bankruptcy filing."[29]

The *In re Escalera* court turned next to legal definitions and usage,[30] holding that the U.C.C. supplied "a very important analog" and was "the principal legal definition to be used for purposes of [s]ection 503(b)(9)."[31] Within the bank-

19. *Id.*
20. *Id.* at 342–43.
21. *Id.* at 343 (internal quotations omitted).
22. *Id.*
23. *Id.* (quoting Gomez-Perez v. Potter, 553 U.S. 474, 481 (2008)).
24. 563 B.R. 336 (D. Colo. 2017).
25. *Id.* at 346.
26. *Id.*
27. *Id.* at 349 (internal quotations omitted).
28. *Id.*
29. *Id.* at 346.
30. *Id.* at 349.
31. *Id.* at 350.

ruptcy context, all courts have used the U.C.C. definition of "goods" as "all things . . . which are movable at the time of identification to the contract for sale . . . [,]"[32] but are divided on whether electricity is a good. The creditor advocated for the approach followed by a majority of courts outside the bankruptcy context, which have held that electricity is a good; the debtor advocated for the opposing minority approach.[33] Adopting the majority approach, the court noted that most of those non-bankruptcy cases involved injury caused by an individual coming into contact with high-voltage electrical wires prior to the delivery of the electricity.[34]

The court also considered how electricity was treated in other legal sources.[35] After examining "[f]ederal antitrust law, federal labor law, federal energy regulatory law, state tort law, [and] state tax law,"[36] the court turned to international treaties and sources, including the North American Free Trade Agreement, the World Trade Organization Secretariat, and the CISG.[37] To be clear, because both the debtor and creditor were United States entities, this matter does not fall within the jurisdiction of the CISG.[38]

In reviewing the CISG, the court began by noting that the treaty does not define the word "goods,"[39] but does define its scope in article 1(1) as "contracts of sale of goods between parties whose places of business are in different states."[40] It also identifies certain exclusions, within article 2.[41] Most relevant, article 2 provides that "[t]his Convention does not apply to sales . . . (f) of electricity."[42] In construing this language, the court noted that "[t]he express exclusion of electricity in the [ ]CISG suggests that electrical energy is a 'good.'"[43] Simply stated, the court's point is that it would not have been necessary to exclude electricity from the CISG if it were not otherwise within the treaty's scope.[44] The court also quoted commentary from the Secretariat that electricity was excluded due to "the nature of the goods"[45]

Opting Out; Contract Formation

Nucap Industries, Inc. v. Robert Bosch LLC[46] involved a sale of brake components incorporated into aftermarket brake pads. Nucap Industries, Inc. and Nucap U.S., Inc. (collectively, "Nucap") claimed that Robert Bosch LLC, Bosch

32. U.C.C. § 2-105 (2011).
33. *In re Escalera Res. Co.*, 563 B.R. at 351–53.
34. *Id.* at 352.
35. *Id.* at 360.
36. *Id.* at 369.
37. *Id.* at 367–70.
38. CISG, *supra* note 3, art. 1(1).
39. *Id.* at 368.
40. *Id.*; CISG, *supra* note 3, art. 1(1).
41. *In re Escalera Res. Co.*, 563 B.R. at 368.
42. *Id.*; CISG, *supra* note 3, art. 2.
43. *In re Escalera Res. Co.*, 563 B.R. at 368.
44. *Id.*
45. *Id.*
46. 273 F. Supp. 3d 986 (N.D. Ill. 2017).

Brake Components, LLC, and Robert Bosch GmbH (collectively, "Bosch") misused drawings of brake components from Nucap's proprietary database after the parties' relationship ended. The database consisted of more than 12,000 drawings and was, according to Nucap, the company's "crown jewel" and its "core competitive asset."[47] Both parties moved for summary judgment on the issue of contract formation, among others. To decide the motions, the court was tasked with discerning the terms of the parties' agreement. There was no "global supply agreement"[48] or other document comprising a general agreement between the parties. The parties circulated a draft nondisclosure agreement, but did not execute it. Each time an order was placed, Bosch issued a purchase order, and Nucap shipped the parts with a packing slip and followed up with an invoice. Nucap contended that it reviewed the purchase orders only for "price, quantity, and shipping address."[49]

After ordering parts from Nucap since 2008, in September 2010, Bosch changed its purchase order terms to include the following language, of which it did not notify Nucap:

> THE TERMS AND CONDITIONS OF PURCHASE ARE AVAILABLE AT WWW.BOSCHNASUPPLIERS.COM AND INCORPORATED HEREIN BY REFERENCE, SHALL BECOME A BINDING AGREEMENT UPON SELLER COMMENCING PERFORMANCE OF THIS PURCHASE ORDER, OR UPON SELLER OTHERWISE ACKNOWLEDGING ACCEPTANCE, WHICHEVER OCCURS FIRST.[50]

Bosch relied on this language to claim its use of the drawings was permitted, while Nucap contended that correspondence between the parties established a confidentiality agreement.[51]

In considering these motions, the court first had to determine whether the CISG applied.[52] Nucap Industries, Inc., has its principal place of business in Toronto and is incorporated in Ontario, Canada, while Robert Bosch LLC and Bosch Brake Components LLC have their principal place of business in Illinois and are incorporated in Delaware. Thus, the contracting parties have their "places of business in different [Contracting] States," within the meaning of CISG article 1(1)'s scope provision.[53] Bosch contended that the parties had opted out of the CISG by language in its Purchase Order Terms and Conditions ("POTCs") providing that "the provisions of the [CISG], and any conflict-of-law provisions that would require application of another choice of law, are excluded."[54] This language excludes the CISG, so long as the POTCs are part of the parties' contract.[55]

47. *Id.* at 992.
48. *Id.* at 993.
49. *Id.* at 995.
50. *Id.* (internal quotations omitted).
51. *Id.* at 993.
52. *Id.* at 1005.
53. CISG, *supra* note 3, art. 1(1).
54. *Nucap Indus., Inc.*, 273 F. Supp. 3d at 1005.
55. *Id.*

Holding that "the Supremacy Clause makes the CISG the law of Illinois on formation here," the court held that "the CISG, therefore, governs the parties' battle over what terms were incorporated into Bosch and Nucap's purchase orders."[56] The court noted the CISG rule regarding the sufficiency of an offer, as well as the requirement that acceptance consists of "words or conduct," not merely "silence or inactivity."[57]

Acknowledging Bosch's contention that "there were over 8,000 separate offers and acceptances incorporating the POTCs by reference," the court noted that "the CISG makes the question of whether Bosch 'knew or could not have been [un]aware' of Nucap's subjective intent regarding the POTCs material."[58] In this case, the court found evidence in both directions.[59] On one hand, Nucap "undisputedly continued to ship parts to Bosch for years after it was chargeable with knowledge of the POTCs' contents."[60] In addition, the court found that a jury might view the efforts by Nucap to negotiate a confidentiality agreement as recognition on Nucap's part that it was bound by the POTCs.[61] On the other hand, the pre-2009 purchase orders included no language regarding intellectual property.[62] Given the significance of this additional language, the court held, "a reasonable jury could find that Bosch 'knew or could not have been unaware' that Nucap would wish to negotiate the new terms had higher-level Nucap personnel been aware of it."[63] The court also noted evidence that "higher-level Nucap personnel told Bosch they could not accept the POTCs' terms blindly when they became aware of them."[64] Given the competing evidence regarding Nucap's subjective intent with respect to the POTCs, the court denied both motions for summary judgment as to contract formation.[65]

Later in the year, the parties litigated the issue of subjective intent in the context of privilege.[66] Bosch sought to compel Nucap to produce un-redacted versions of certain documents it had designated as privileged, which addressed Nucap's subjective intent regarding Bosch's POTCs. Bosch argued that Nucap had put its subjective intent affirmatively at issue, "thereby waiving attorney-client privilege as to communications with in-house counsel"[67] that would illuminate Nucap's intentions with respect to the POTCs. In making this argument, Bosch pointed specifically to Nucap's May 17, 2011, email, in which it indicated it would not "have any blind acceptance of Bosch standard terms and condi-

56. *Id.* at 1006.
57. *Id.* at 1007; CISG, *supra* note 3, art. 18(2).
58. *Nucap Indus., Inc.*, 273 F. Supp. 3d at 1007 (quoting CISG art. 8(1)).
59. *Id.* at 1008–09.
60. *Id.* at 1009.
61. *Id.*
62. *Id.*
63. *Id.* at 1008.
64. *Id.*
65. *Id.* at 1012.
66. Nucap Indus., Inc. v. Robert Bosch LLC, No. 15-cv-2207, 2017 WL 3624084 (N.D. Ill. Aug. 23, 2017).
67. *Id.* at *1.

tions."[68] Bosch also argued that these communications did not involve legal advice, but instead addressed business matters.[69] The court rejected Bosch's argument, accepting Nucap's response that it had not waived its privilege with respect to these documents because it had not claimed to rely on its counsel, or these communications, in formulating its understanding as to the POTCs.[70] In so holding, the court noted that the central email on which Bosch relies in making its argument was sent to a Bosch employee by a Nucap employee and "does not implicate attorney-client communication at all."[71]

Contract Formation, Choice of Law, and Agreement to Arbitrate

Meduri Farms, Inc. ("Meduri"), an Oregon producer of dried fruits, sued Dutchtecsource B.V. ("DTS"), a Dutch manufacturer of food processing equipment, for breach of contract and breach of warranty.[72] Meduri purchased a new processing system and three auxiliary parts for its equipment in separate transactions. After paying 90 percent of the purchase price of the processing equipment, Meduri sued DTS, claiming that the system never worked properly.

The main issue was whether the operable contract between the parties contained a mandatory arbitration clause.[73] However, before deciding the main controversy, the court considered the appropriate choice of law for the dispute.[74]

Choice of Law

As to the initial choice of law inquiry, the court determined it did not have to resolve the choice of law dispute because the result would be the same, regardless of the law used.[75] It is unclear whether the parties addressed the choice of law in any of their communications or the resulting contract because the opinion simply stated that DTS argued Oregon law applied, while Meduri claimed the CISG applied.[76] A review of the complaint did not reveal a choice of law clause.[77] If there was no

68. *Id.* at *5.
69. *Id.*
70. *Id.*
71. *Id.*
72. Meduri Farms, Inc. v. Dutchtecsource B.V., No. 3:17-cv-906-SI, 2017 WL 6029606 (D. Or. Dec. 5, 2017). An appeal was filed with the Ninth Circuit on December 29, 2017.
73. *Id.* at *3. DTS refers to a clause called the "Orgalime Conditions" to support its theory of mandatory arbitration. It asserted that the contracts included the "Orgalime Conditions." These conditions contained an arbitration clause that required the parties to submit all disputes to arbitration. *Id.*
74. *Id.* at *6.
75. *Id.*
76. *Id.*
77. Complaint at para. 5, Meduri Farms, Inc. v. Dutchtecsource B.V., No. 3:17-cv-906-SI, 2017 WL 6029606 (Apr. 14, 2017), ECF No. 17CV15534.

choice of law clause,[78] then the CISG should apply and not the U.C.C. because federal law supersedes the Oregon U.C.C.[79]

Although the CISG and the U.C.C. differ in analysis in many places, the court decided the result using either analysis would be the same in this case.[80] It reasoned that both laws require only the essential terms of the contract and not all of the material terms.[81] While this conclusion may be true, it appears the court used the wrong section of the U.C.C. to support its conclusion. Instead of referring to the contract formation sections of the U.C.C.,[82] the court used Oregon's statute of frauds to determine the enforceability of the contract, specifically the merchant's exception and comment 1.[83] The court noted that the statute of frauds only requires a quantity term, proof that a contract was for the sale of goods, and that the appropriate party signed it.[84] However, the statute of frauds does not establish the existence or terms of a contract; instead, it operates as a gatekeeper to enforceability. The actual proof of a contract and terms generally require a court to apply the U.C.C. sections pertaining to contract formation and terms.[85]

Arbitration Term

Whether the parties included the arbitration term in their contract depended on what documents established the contract. On July 24, Meduri sent a letter that expressed its intent to purchase the system, requested changes to the design, and stated they were "still in the early stages of this process and there is a lot to do."[86] On August 24, DTS sent a detailed letter that explained and described the new proposed system.[87] This twenty-three-page document included a delivery date, payment terms, and that "Orgalime Conditions" applied.[88] DTS stated that the Orgalime Conditions included a provision requiring arbitration.

Four days later on August 28, DTS emailed Meduri a new letter with some changes and different terms. It also said, "[i]f we come together to an agreement our engineer will visit you.[89] Meduri eventually decided to purchase only one processing unit instead of two and asked DTS for a new price. In response,

78. Nothing in the pleadings or the case indicates that parties included a choice of law clause in their documents. *See id.*; *Meduri Farms, Inc.*, 2017 WL 6029606.

79. *See* Kristen David Adams & Candace Zierdt, CISG Basics: A Guide to International Sales Law 62 (2016) (explaining that the majority of cases require precise language when opting out of the CISG and merely stating that "state law applies" is inadequate because federal law takes precedence over state law).

80. *Meduri Farms, Inc.*, 2017 WL 6029606, at *7.

81. *Id.* at *6.

82. U.C.C. §§ 2-204, 2-205, 2-206 & 2-207 (2011).

83. *Meduri Farms, Inc.*, 2017 WL 6029606, at *7; U.C.C. § 2-201(2) (2011).

84. *Meduri Farms, Inc.*, 2017 WL 6029606, at *7.

85. *See supra* note 82.

86. *Meduri Farms, Inc.*, 2017 WL 6029606, at *2.

87. The court refers to this document as the "332 document." *Id.* at *3.

88. Orgalime is a European Association that publishes general conditions and terms for mechanical, electrical, and other industries. *Id.* at *2 n.1.

89. *Id.* at *3.

DTS sent a one-page document on September 15 stating the price and describing the product.[90] It stated that the Orgalime Conditions applied. Meduri responded on September 19 by email stating that he was excited about the system and that he would send the 10 percent deposit.

Meduri also ordered three auxiliary parts—a test flume, clamps, and a pressure transmitter. The confirmation for the test flume stated that the Orgalime Conditions applied, but the invoices did not reference it. The other various communications about the order for the clamps did not contain or reference the Orgalime Conditions. Finally, the communications pertaining to the order for the pressure transmitter did not specifically reference the Orgalime Conditions, although DTS attached a pdf of them.

The first issue was whether the court or the arbitrator should decide the arbitrability issue, and that turned on when the parties formed the contract.[91] The court ultimately determined that, unless the parties "*clearly and unmistakably*" agreed to delegate the matter of arbitrability, the district court should decide this issue.[92] The court found that it must decide when a contract existed before it could determine whether the issue of arbitrability had been delegated because if the agreement did not contain an arbitration clause, then the matter of arbitration was moot.[93]

Contract Formation

After considering the many communications between the parties, the court determined that the parties formed the contract when Meduri decided to buy one unit instead of two, DTS responded with a price and description of the good being purchased,[94] and Meduri accepted the deal in its email on September 19.[95] Both parties agreed that Meduri accepted DTS' offer by the September 19 email.[96]

After the court used the statute of frauds to determine that the September 19 email concluded an enforceable agreement, it looked to the CISG to see if it would reach the same conclusion.[97] The CISG does not incorporate a statute of frauds,[98] so the court applied the contract formation sections of the CISG.[99] The court found that the CISG reached the same conclusion because there was a valid offer under article 14 when DTS responded to Meduri's desire to change its order to one unit instead of two.[100] It was sufficiently definite to be an offer

90. The court called this part of the correspondence the "355 document." *Id.*
91. *Id.* at *6.
92. *Id.*
93. *Id.*
94. *Id.* at *3.
95. *Id.* at *7.
96. *Id.*
97. *Id.*
98. Adams & Zierdt, *supra* note 79, at 116–18 (discussing the lack of a statute of the frauds in the CISG and a country's ability to reject this section and keep its jurisdiction's requirement that a contract must be in writing).
99. *Meduri Farms, Inc.*, 2017 WL 6029606, at *7.
100. *Id.*

because it contained the good, price, and quantity, thus complying with CISG article 14.[101] Meduri's September 19 message stating that he was excited about getting the new system indicated assent as required by CISG article 18(1).[102]

The remaining issue for the court was whether the previous communications had included an arbitration clause that became part of the agreement formed on September 19.[103] DTS argued that a prior communication on August 24 contained the arbitration clause that was incorporated in the agreement. Further, DTS argued that the agreement had to incorporate the August 24 document because without it Meduri did not know what it was buying. The court rejected this argument, reasoning that both the CISG and the U.C.C. provide that communications between parties can evidence their understanding of the material terms of the contract, and other communications included the specifics of the system Meduri purchased.[104] The court also determined that the August 24 document could not be the offer because later communications changed several material terms, and those material changes preclude acceptance of the August 24 offer.[105] One of the most important communications that showed the parties were still negotiating was a letter sent by Meduri to DTS on August 28.[106] That letter "expressly state[d] 'If we come to an agreement' then a DTS engineer will visit Meduri."[107]

The court noted that both the U.C.C. and CISG preclude an acceptance of the August 24 letter.[108] CISG article 19 provides that material changes and alterations to an offer are a rejection, not an acceptance.[109] Although the U.C.C. allows a communication with different or additional terms that materially change an offer to be an acceptance,[110] the court found that irrelevant because none of Meduri's documents definitely or seasonably accepted the August 24 offer that contained the arbitration clause.[111] The court found the argument that there were no payment terms in the August 24 letter to be unpersuasive because both the U.C.C. and the CISG provide that parties may form a contract even if they have an open price term.[112] The court pointed to a letter sent by DTS on November 12 that requested Meduri to set up a payment plan, which would not have been necessary if the agreement already incorporated a payment plan.[113] The court ultimately determined that DTS needed to be more explicit in its agreement if it

101. *Id.*
102. *Id.*
103. *Id.* at *8.
104. *Id.*
105. *Id.*
106. *Id.*
107. *Id.*
108. *Id.*
109. CISG, *supra* note 3, art. 19.
110. U.C.C. § 2-207(1)–(2) (2011).
111. *Meduri Farms, Inc.*, 2017 WL 6029606, at *8.
112. *Id.* at *9.
113. *Id.*

wanted to include an arbitration term and it did not do this in the current contract.[114]

Purchase of Auxiliary Parts

DTS next asserted that even if the contract to purchase the processing system did not include an arbitration clause, the purchase of the three auxiliary parts did.[115] DTS attached the Orgalime Conditions that contained the arbitration clause to the quotations it sent to Meduri for two of the parts—the clamps and a pressure transmitter. However, the court found that they were never incorporated into the quotation, so the arbitration term was not included in those two contracts.[116]

The purchase of the third auxiliary part, the test flume, had to be analyzed differently because DTS' order confirmation stated that the Orgalime Conditions applied.[117] The court again looked to the U.C.C. and the CISG and determined that neither law would include the arbitration clause in the purchase agreement.[118] The court applied U.C.C. section 2-207 and found that the written confirmation contained an additional term, so it applied section 2-207(2) to determine that the additional arbitration term was not included because it would materially alter the contract.[119] That knocked out the arbitration clause.[120] Additionally, DTS could not prove any trade usage or course of dealing that showed that arbitration was common in their industry.[121]

The court then applied CISG article 19(3), which provides that terms relating to the settlement of disputes materially alter the terms of a contract.[122] Therefore, the court determined that the CISG would yield the same result.[123] The problem with this analysis is that CISG article 19 differs from U.C.C. section 2-207 in several significant ways. While section 2-207 allows a party to close a contract even if its order confirmation includes different or additional terms that materially alter the agreement, the CISG does not.[124] CISG article 19 states that terms in a reply to an offer that materially alter the contract will not be a valid acceptance.[125] Instead, it is a rejection and becomes a counteroffer that includes the term that materially altered the original offer.[126] Therefore the next step that should occur in a CISG analysis asks whether the party, in this case, Meduri, accepted the counteroffer. If the answer is yes, the term that had materially altered

114. *Id.* at *10.
115. *Id.*
116. *Id.* at *12.
117. *Id.* at *10.
118. *Id.* at *11–12.
119. *Id.*
120. *Id.* at *12.
121. *Id.* at *11–12.
122. *Id.* at *12.
123. *Id.*
124. *See* U.C.C. § 2-207 (2011); CISG, *supra* note 3, art. 19.
125. CISG, *supra* note 3, art. 19(1).
126. *Id.*

the deal becomes part of the contract.[127] For this case, that would mean that the arbitration clause would be included in the contract. The court did not finish the last step of the analysis. Instead, it stated that because an arbitration term is one relating to the settlement of disputes, it would be a material alteration and would not be included in the contract.[128]

127. *Id.*
128. *Id.* at *12.