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## *Chapter 9* JURISDICTIONAL AND PROCEDURAL CONSIDERATIONS

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### §9.01 INTRODUCTION

Procedural matters are commonly invoked in CISG matters. This chapter explores those civil procedure matters that are frequently asserted in CISG litigation; however, counsel is encouraged to fully explore other relevant procedural issues. A general understanding of jurisdictional basics provides guidelines not only for proper pleading but also for procedural challenges. See §§9.02–9.02[C]. Convenience of the parties as well as adherence to a forum selection clause may also determine the proper location of the court. See §§9.02[C][1]–9.04. The limitations of the CISG to contractual matters may also serve as a limitation of the court. See §9.05. See also §2.05. A discussion of procedural matters includes consideration of a motion to dismiss under Rule 12(b) Federal Rule of Civil Procedure. See §9.06. If a party does not come from a country that has adopted the United Nations Convention on the Limitation Period in the International Sale of Goods, Concluded at New York on June 14, 1974, as amended by the Protocol of April 11, 1980, then the limitation period will most likely be governed by the substantive law of the state. See §9.07. See also Appendix A-4 and Appendix A-5.

### §9.02 JURISDICTION

"Jurisdiction is [the] power to declare the law, and when it ceases to exist, the only function remaining to the court is that of announcing the fact and dismissing the cause."<sup>1</sup> The U.S. Constitution permits federal courts to have jurisdiction over cases "arising under this Constitution, the laws of the United States, and treaties, made, or which shall be made under their authority."<sup>2</sup> As the CISG is a treaty, federal subject matter can be established by a party.<sup>3</sup> In the instance of the CISG, "[e]ven where federal law completely

<sup>1</sup>*Ex parte McCardle*, 74 U.S. (7 Wall.) 506, 514, 19 L. Ed. 264 (1868).

<sup>2</sup>U.S. Const., Article III, §2 (emphasis added).

<sup>3</sup>The CISG is a treaty that was *opened for signature* April 11, 1980, S. Treaty Doc. No. 9, 98th Cong., 1st Sess. 22 (1983), 19 I L.M. 671, reprinted at, 15 U.S.C. app. 52 (1997), reprinted at 15 U.S.C. app. 52 (1997).

preempts state law, state courts may have concurrent jurisdiction over the federal claim if the defendant does not remove the case to federal court.”<sup>4</sup> In addition to subject matter jurisdiction, a federal court must have jurisdiction over the person(s) involved in the suit—personal jurisdiction. This often invokes analysis as to whether the cause of action is related to a defendant's contacts with a forum state or whether the cause of action is not related to the defendant's forum state contacts.<sup>5</sup> Hence, “[j]urisdiction to resolve cases on the merits requires both authority over the category of claim in suit (subject-matter jurisdiction) and authority over the parties (personal jurisdiction), so that a federal court's decision will bind them.”<sup>6</sup> If jurisdictional matters are resolved, venue is then determined by the court. In federal courts, the issue of venue is what federal district will hear the matter.<sup>7</sup>

## [A] Subject Matter Jurisdiction

Jurisdiction over the subject matter in CISG cases exists pursuant to 28 U.S.C. §1331 in that the action arises under treaties of the United States.<sup>8</sup> Federal courts have acknowledged this jurisdiction,<sup>9</sup> although some have accepted jurisdiction on a diversity basis. *See discussion infra*. However, the CISG applies only if all parties to the action are Contracting States under the CISG. Article 100 specifically finds that “[t]his convention applies to the formation of a contract only when the proposal for concluding the contract is made on or after the date when the Convention enters into force in respect of the Contracting States referred to in subparagraph (1)(a) of the Contracting State referred to in subparagraph (1)(b) of article 1. Failure of a party to be a Contracting State precludes jurisdiction under 28 U.S.C. §1331.<sup>10</sup> Additionally, a Non-Contracting country would not qualify under a federal question because the United States, pursuant to Article 95, ratified the CISG so it would not be bound by subparagraph (1)(b) of Article 1. *See also* §2.03[E].

Some courts when reviewing CISG cases assert jurisdiction under U.S.C. §1332(a)(2)—diversity jurisdiction for CISG cases.<sup>11</sup> Under Article III of the U.S. Constitution, the judicial power of the United States extends to Controversies ... between a State or the Citizens thereof, and foreign States, Citizens or Subjects” and the amount in controversy exceeds \$75,000.00.<sup>12</sup> Diversity as applied to CISG cases requires complete diversity.<sup>13</sup> It would appear that basing jurisdiction under federal question is easier to plead and

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<sup>4</sup>*See* *Teamsters v. Lucas Flour Co.*, 369 U.S. 95, 103-04, 82 S. Ct. 571, 7 L. Ed. 2d 593 (1962).

<sup>5</sup>Notably, there is no problem with the plaintiff with regard to personal jurisdiction as it is assumed that he or she has submitted to the court's jurisdiction by filing the action.

<sup>6</sup>*Ruhrigas AG v. Marathon Oil Co.*, 526 U.S. 574, 577, 119 S. Ct. 1563, 143 L. Ed. 2d 760 (1999).

<sup>7</sup>In state courts, the issue is generally what county or district is the appropriate place for the matter.

<sup>8</sup>CISG, *supra* note 3.

<sup>9</sup>*See, e.g.*, *Asante Technologies, Inc. v. PMC-Sierra, Inc.*, 164 F. Supp. 2d 1142, 1145 (N.D. Cal. 2001), also available at <http://cisgw3.law.pace.edu/cases/010727u1.html>; *MCC-Marble Ceramic Center, Inc. v. Ceramica Nuova d'Agostino, S.p.A.*, 144 F.3d 1384 (11th Cir. 1998), also available at <http://cisgw3.law.pace.edu/cases/980629u1.html>; *BP Oil Int'l, Ltd. v. Empresa Estatal Petroleos De Ecuador*, 332 F.3d 333 (5th Cir. 2003), also available at <http://cisgw3.law.pace.edu/cases/030611u1.html>; *Impuls I.D. Internacional, S.L. v. Psion-Teklogix Inc.*, 234 F. Supp. 2d 1267 (S.D. Fla. 2002), also available at <http://cisgw3.law.pace.edu/cases/021122u1.html>; *Wausau Tile, Inc. v. Navigators Insurance Company et al.*, 2006 WL 278856 (W.D. Wis.); 2006 U.S. Dist. LEXIS 4507, also available at <http://cisgw3.law.pace.edu/cases/060202u1.html>.

<sup>10</sup>*Impuls I.D. Internacional, S.L. v. Psion-Teklogix Inc.*, 234 F. Supp. 2d 1267 (S.D. Fla. 2002), also available at <http://cisgw3.law.pace.edu/cases/021122u1.html> (holding jurisdiction under both federal question and diversity). *See also* *American Mint LLC v. GOSoftware, Inc.*, 2006 WL 42090 (M.D. Pa.); 2006 U.S. Dist. LEXIS 1569, also available at <http://cisgw3.law.pace.edu/cases/060106u1.html> (federal court did not have jurisdiction over case involving two domestic companies).

<sup>11</sup>*Id.* *See also* *Valero Marketing v. Green*, 2006 WL 891196 (D.N.J.), also available at <http://cisgw3.law.pace.edu/cases/060404u1.html>.

<sup>12</sup>28 U.S.C. §1332(a)(2) and U.S. Const., Article. III, §2.

<sup>13</sup>*Chicago Prime Packers, Inc. v. Northam Food Trading Co.*, 2004 WL 1166628 (N.D. Ill. 2004), also available at <http://www.cisgw3.law.pace.edu/cases/cisg/wais/cases2/040521u1.html>; *Saadeh v. Farouki*, 107 F.3d 52, 54 (D.C. Cir. 1997); *Mitchell Aircraft Spares, Inc. v. European Aircraft Service, AB*, 23 F.

prove. As one court noted, application of diversity jurisdiction is correct; however, the lower court “overlooked its concurrent federal question that makes a conflict of laws analysis unnecessary.”<sup>14</sup> Moreover, diversity jurisdiction opens possible error in court application of domestic contract law.

**Practical Application:** Challenges to subject matter jurisdiction can be made pursuant to Rule 12 of the Federal Rules of Civil Procedure. *See* §9.06.

## [1] Removal from State Court to Federal

The removal of cases from state to federal courts is not referenced in the U.S. Constitution, and is purely statutory in nature. The right to remove a case from state to federal court is vested exclusively in “... the defendant or the defendants...”<sup>15</sup> A defendant has the burden of establishing that removal to federal court is proper.<sup>16</sup> Even if state and federal claims are asserted jointly in a complaint, a case originally filed in a state court that contains separate and independent federal and state law claims may be removed to federal court.<sup>17</sup> The determination of whether an action arises under federal law is guided by the “well-pleaded complaint” rule.<sup>18</sup> This rule makes the plaintiff the master of the claim, which means, absent diversity, a case is removable only if a federal question is presented on the face of the plaintiff’s complaint.<sup>19</sup> Notably, a plaintiff can prevent removal by ignoring the federal claim and alleging only state law claims—“artful pleading.”<sup>20</sup> However, if the only claim involved arises under federal law, the federal court will “recharacterize” the complaint to uphold removal.<sup>21</sup> In certain limited cases, such as the CISG, the preemptive force of federal law displaces any state law cause of action, and leaves room only for a federal claim for purposes of the “well pleaded complaint” rule.<sup>22</sup> The CISG preempts U.C.C. claims or other claims provided as they fall within the scope of the CISG and the parties have not expressly opted out

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Supp.2d 915 (N.D. Ill. 1998), also available at <http://www.cisgw3.law.pace.edu/cases/cisg/wais/db/cases2/981027u1.html>; *Medical Marketing v. Internazionale Medico Scientifica*, 199 U.S. Dist. LEXIS 7380, 1999 WL 311945 (E.D. La), also available at <http://cisgw3.law.pace.edu/cases/990517u1.html> (also holding jurisdiction under the Federal Arbitration Act pursuant to 9 U.S.C. §9.); *Delchi Carrier v. Rotorex*, 1994 WL 495787 (N.D.N.Y. Sept. 9, 1994), also available at <http://cisgw3.law.pace.edu/cases/951206u1.html>; *Stawski Distributing Co. Inc. v. Zywiec Breweries PLC*, 2003 WL 22290412 (N.D. Ill. 2003), also available at <http://cisgw3.law.pace.edu/cases/031006u1.html>; *Usinor Industeel v. Leeco Steel Products, Inc.*, 209 F. Supp. 2d 880 (N.D. Ill. 2002), also available at <http://cisgw3.law.pace.edu/cases/020328u1.html>; *Teeve Toons, Inc. v. Gerhard Schubert GMBH*, 2002 WL 498627 (S.D.N.Y.), also available at <http://cisgw3.law.pace.edu/cases/020329u1.html>; *American Mint LLC v. GOSoftware, Inc.*, 2006 WL 42090 (M.D. Pa.), 2006 U.S. Dist. LEXIS 1569, also available at <http://cisgw3.law.pace.edu/cases/060106u1.html>.

<sup>14</sup>*See, e.g.*, *BP Oil Int’l, Ltd.*, 332 F.3d 333 (5th Cir. 2003), also available at <http://www.cisg3.law.pace.edu/cases/wais/db/cases2/030611u1.html>.

<sup>15</sup>28 U.S.C. §1441(a); 28 U.S.C. §1446(a). *See also* *Shamrock Oil & Gas Corp. v. Sheets*, 313 U.S.100, 61 S. Ct. 868 (1941); *Caterpillar, Inc. v. Williams*, 482 U.S. 386, 107 S. Ct. 2425, 96 L. Ed. 2d 318 (1987).

<sup>16</sup>*Gaus v. Miles, Inc.*, 980 F.2d 564 (9th Cir. 1992).

<sup>17</sup>28 U.S.C. §1441(c).

<sup>18</sup>*Franchise Tax Bd. v. Construction Laborers Vacation Trust*, 463 U.S. 1, 10, 103 S. Ct. 2841, 77 L. Ed. 2d 420 (1983).

<sup>19</sup>*Caterpillar Inc.*, 482 U.S. 386, 392, fn. 7; *Franchise Tax Board*, 463 U.S. 1, 9.

<sup>20</sup>*Rains v. Criterion Sys., Inc.*, 80 F.3d 339, 344 (9th Cir. 1996); *Carpenter v. Wichita Falls Indpt. School Dist.*, 44 F.3d 362, 366 (5th Cir. 1995).

<sup>21</sup>*Rivet v. Regions Bank of Louisiana*, 522 U.S. 470, 475, 118 S. Ct. 921, 925 (1998); *Schroeder v. Trans World Airlines, Inc.*, 702 F.2d 189, 191 (9th Cir. 1983).

<sup>22</sup>*Asante Technologies, Inc. v. PMC Sierra Inc.*, 164 F. Supp. 2d 1142, 1146, *citing* *Franchise Tax Bd. v. Construction Laborers Vacation Trust*, 463 U.S. 1, 10; *Metropolitan Life Ins., Co. v. Taylor*, 481 U.S. 58, 107 S. Ct. 1542, 95 L. Ed. 2d 55 (1987); *Wausau Tile, Inc. v. Navigators Insurance Company et al.*, 2006 WL 278856 (W.D. Wis.); 2006 U.S. Dist. LEXIS 4507, also available at <http://cisgw3.law.pace.edu/cases/060202u1.html> (case removed to federal court).

of its application.<sup>23</sup> Hence, the CISG will orderly preempt U.C.C. claims or other claims only if such action falls outside the scope of the CISG.<sup>24</sup> If, at any time prior to judgment, a district court determines that a case was removed from state court improvidently and without jurisdiction, the district court must remand the case.<sup>25</sup> Under the CISG, courts will invoke Article 1(1)(a) and Article 10 to determine subject matter jurisdiction.<sup>26</sup> See Appendix B, Form B-6.

**Practical Application:** If during the course of the action it comes to the attention of an attorney that the action is governed by the CISG, counsel has an ethical duty to inform the client, opposing counsel, and the court or tribunal.<sup>27</sup> If the client desires to keep the action in state court, counsel should then withdraw from the action in accordance with the Rules of Professional Responsibility. **Counsel is strongly advised to refer to state professional rules for licensed attorneys in his or her state or consult his or her state bar association for further guidance.**

## [B] Personal Jurisdiction

Personal jurisdiction is the authority of a court to adjudicate the personal legal rights of parties properly brought before it. Due process of law requires appearance or service of process before the defendant can be personally bound by any judgment. In general, a court can obtain personal jurisdiction by defendant's (1) presence, (2) domicile, (3) consent, or (4) minimum contacts with the state. The physical presence of a defendant in the forum is a sufficient basis for acquiring jurisdiction over him, no matter how brief his stay might be within the forum; however, the plaintiff bears the burden of establishing that personal jurisdiction exists but, where the court relies only on affidavits and discovery materials without an evidentiary hearing, uncontraverted allegations in the complaint must be taken as true and conflicts between the affidavits must be resolved in the plaintiff's favor without the plaintiff relying on the bare allegation in its complaint.<sup>28</sup> *Domicile* (residence) for corporation, the state of incorporation, is also a basis for exercising jurisdiction over an absent domiciliary.<sup>29</sup> A defendant who has not been personally served in the jurisdiction can nevertheless voluntarily appear and submit himself to jurisdiction even if not expressing consent, provided notice is given.<sup>30</sup>

In an action brought under the court's federal question jurisdiction, the court will look to the Due

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<sup>23</sup>See, e.g., *Franchise Tax Bd., v. Construction Laborers Vacation Trust*, 463 U.S. 1, 23 (holding ERISA did not preempt state law cause of action that falls outside scope of §502(a)); see also *Ramirez v. Fox Television Station, Inc.*, 998 F.2d 743 (9th Cir. 1993), 28 U.S.C. §1441(c) (emphasis added). Section 1441(c) provides removal based on the following: (1) several claims are joined in the state law complaint; (2) one or more of those claims is otherwise non-removable (i.e., no diversity and no "arising under" federal law); and (3) one or more claims is a federal claim that is "separate and independent" from the non-removable claims. Claims are not "separate and independent" simply because they are asserted in different causes of action or derived from different "primary rights." Rather, the claims must arise from different sets of acts and different wrongs inflicted upon the plaintiff. See *American Fire & Cas. Co. v. Finn*, 341 U.S. 6, 13, 71 S. Ct. 534, 539-540 (1951); *Emrich v. Touche Ross & Co.*, 846 F.2d 1190 (9th Cir. 1988); *In re City of Mobile*, 75 F.3d 605, 608 (11th Cir. 1996); *Caterpillar v. Usinor Industeel*, 2005 WL 736550 (N.D. Ill.), also available at <http://cisgw3.law.pace.edu/cases/050330u1.html>.

<sup>24</sup>*Asante Technologies, Inc.*, 164 F. Supp. 2d 1142, 1152; see also *Caterpillar v. Usinor Industeel*, 209 F. Supp. 2d 880 (N.D. Ill. 2002).

<sup>25</sup>28 U.S.C. §1447 (c).

<sup>26</sup>For example of application, see *Asante Technologies, Inc.*, 164 F. Supp. 2d 1142, 1146-1147.

<sup>27</sup>See, e.g., Florida Bar Staff Opinion 26554 (February 9, 2006).

<sup>28</sup>*Bettappo Inc. v. Rich Xiberta, S.A.*, 2006 WL 314338 (W.D. Wash.), also available at <http://cisgw3.law.pace.edu/cases/060207u2.html>, citing *Ochoa v. J.B. Martin and Sons Farms, Inc.*, 287 F. 3d 1182, 1187 (9th Cir. 2002); *Schwarzenegger v. Fred Martin Motor Co.*, 374 F. 3d 797, 800 (9th Cir. 2004); *Pennoyer v. Neff*, 95 U.S. (5 Otto) 714, 24 L. Ed. 565 (1877).

<sup>29</sup>*Milliken v. Meyer*, 311 U.S. 457, 61 S. Ct. 339, 85 L. Ed. 278 (1940).

<sup>30</sup>*Hess v. Palowski*, 274 U.S. 352, 47 S. Ct. 632, 71 L. Ed. 1091 (1927).

Process Clause of the Fifth Amendment of the U.S. Constitution in deciding whether to exercise personal jurisdiction over a nonresident defendant. When parties in two states are involved, the court will consider state law or the states' long-arm statute when deciding whether to exercise personal jurisdiction over a nonresident defendant. The *minimum contacts* requirements with a forum state are such that compelling him or her to appear and defend in the forum does not offend traditional notions of fair play and substantial justice.<sup>31</sup> Under *International Shoe*, personal jurisdiction is permissible when the defendant's activity in the forum is continuous and systematic and the cause of action is related to that activity. Sporadic or casual activity of the defendant in the forum does not justify assertion of jurisdiction on a cause of action unrelated to that forum activity. The Supreme Court has noted that states exercise two broad types of personal jurisdiction: specific jurisdiction and general jurisdiction.<sup>32</sup> Specific jurisdiction refers to jurisdiction over causes of action that "arise out of" or "relate to" a defendant's activities within a state; CISG matters often fall under specific jurisdiction.<sup>33</sup> General jurisdiction, "on the other hand, refers to the power of a state to adjudicate any cause of action involving a particular defendant, regardless of where the cause of action arose."<sup>34</sup> In general.

**Practical Application:** Challenges to personal jurisdiction can be made pursuant to Rule 12 of the Federal Rules of Civil Procedure. See §9.06.

## [C] Venue Jurisdiction

Venue is the appropriate place for trial of an action over which numerous courts could exercise jurisdiction.<sup>35</sup> Venue "is primarily a matter of convenience of litigants and witnesses."<sup>36</sup> The focus of venue is to prevent inconveniences for a defendant(s) that he or she might be subjected to if they were compelled to answer in any district or wherever found.<sup>37</sup> A party must object to venue at his earliest opportunity or else the objection will be waived.<sup>38</sup> In general, venue in either a diversity or federal question case is proper in any district in which either:

- (1) A defendant resides, if all of the defendants reside in the same state, or
- (2) A "substantial" part of the events or property that constitute the basis of the claim took place or can be found, respectively.<sup>39</sup>

### [1] *Forum Non Conveniens*

The doctrine of *forum non conveniens* is another federal procedure that may apply to a contractual

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<sup>31</sup>*International Shoe Co. v. Washington*, 326 U.S. 310, 66 S. Ct. 154, 90 L. Ed. 95 (1945).

<sup>32</sup>*Helicopteros Nacionales de Colombia, S.A. v. Hall*, 466 U.S. 408, 414 nn.8-9, 104 S. Ct. 1868, 80 L. Ed. 2d 404 (1984).

<sup>33</sup>*Burger King Corp. v. Rudzewicz*, 471 U.S. 462, 472, 105 S. Ct. 2174, 85 L. Ed. 2d 528 (1985); *Metropolitan Life Ins. v. Robertson-Ceco Corp.*, 84 F.3d 560, 568 (2d Cir. 1996), *citing* *Asahi Metal Indus. Co. v. Superior Court*, 480 U.S. 102, 107 (1987). For application of personal jurisdiction with relation to the CISG, *see* *Beltappo Inc. v. Rich Xiberta, S.A.*, 2006 WL 314338 (W.D. Wash.), also available at <http://cisg3.law.pace.edu/cases/060207u2.html>.

<sup>34</sup>*Sondergard v. Miles, Inc.*, 985 F.2d 1389, 1392 (8th Cir. 1993); *see also* *Helicopteros Nacionales de Colombia, S.A. v. Hall*, 466 U.S. 408, 414 & n. 9, 104 S. Ct. 1868; *State ex rel. Newport v. Wiesman*, 627 S.W.2d 874, 876 (Mo. 1982).

<sup>35</sup>28 U.S.C. §1391.

<sup>36</sup>*See* *Denver & R. G. W. R. Co. v. Brotherhood of R.R. Trainmen*, 387 U.S. 556, 560 (1967); *accord* *Leroy v. Great Western United Corp.*, 443 U.S. 173, 180 (1979).

<sup>37</sup>*See* *Neirbo Co. v. Bethlehem Shipbuilding Corp.*, 308 U.S. 165, 168 (1939), *quoting* *General Inv. Co. v. Lake Shore & M.S. Ry. Co.*, 260 U.S. 261, 275 (1922); *Hoiness v. United States*, 335 U.S. 297, 302 (1948).

<sup>38</sup>Fed.R.Civ. P. 12(h).

<sup>39</sup>*See generally* 28 U.S.C. §1391. In federal question cases, venue is also proper in any district "in which any defendant may be found," but only "if there is no district in which the action may be otherwise brought."

matter.<sup>40</sup> A motion to dismiss based on *forum non conveniens* is not the same as a motion to dismiss for improper venue.<sup>41</sup> “[E]ven if jurisdiction and proper venue are established,” a party can still file a motion to dismiss based on *forum non conveniens*.<sup>42</sup> This is because the doctrine of *forum non conveniens* is based on the inconvenience of the chosen venue, not the impropriety of venue under the federal venue statutes.<sup>43</sup> “Indeed the doctrine of *forum non conveniens* can never apply if there is ... a mistake of venue.”<sup>44</sup>

The doctrine of *forum non conveniens* permits a court to dismiss a case if there is another forum which is more convenient for the parties and the courts. When reviewing a motion to dismiss for *forum non conveniens* courts have commenced their analysis with the assumption that the plaintiff's choice of forum will stand unless the defendant can demonstrate that the trial in the chosen forum would be unnecessarily burdensome for the defendant or the court.<sup>45</sup> A party seeking to dismiss for *forum non conveniens* must file within a reasonable time<sup>46</sup> and also bears the burden of demonstrating (1) the existence of an adequate alternative forum<sup>47</sup> and (2) that the balance of relevant private and public interest factors favors dismissal.<sup>48</sup>

## §9.03 FORUM SELECTION CLAUSES

The U.S. Supreme Court has held that forum selection clauses are prima facie valid and should be enforced unless enforcement is shown to be unreasonable under the circumstances.<sup>49</sup> Hence, parties will be bound by a forum selection clause unless it is clearly shown that “enforcement would be unreasonable and unjust, or that the clause was invalid for such reasons as fraud or overreaching” or “if enforcement would

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<sup>40</sup>See *Chateau des Charmes Wines Ltd. v. Sabaté USA, Sabaté S.A.*, 328 F.3d 528 (N.D. Cal. 2003), also available at <http://cisgw3.law.pace.edu/cases/030505u1.html>. A party may plead as an alternative to dismissal for lack of personal jurisdiction. See *Beltappo Inc. v. Rich Xiberta, S.A.*, 2006 WL 314338 (W.D. Wash.), also available at <http://cisgw3.law.pace.edu/cases/060207u2.html> (denying motion for dismissal under *forum non conveniens* doctrine).

<sup>41</sup>*Id.*

<sup>42</sup>*American Dredging Co. v. Miller*, 510 U.S. 443, 446, 114 S. Ct. 981, 127 L. Ed. 2d 285 (1994).

<sup>43</sup>*Id.* at 448-49.

<sup>44</sup>*Gulf Oil Corp. v. Gilbert*, 330 U.S. 501, 504, 67 S. Ct. 839, 91 L. Ed. 1055 (1947); see also *Timberlane Lumber Co. v. Bank of Am. Nat'l Trust and Sav. Ass'n*, 549 F.2d 597, 616 (9th Cir. 1976).

<sup>45</sup>*Iragorri v. United Techs. Corp.*, 274 F.3d 65, 71 (2d Cir. 2001) (en banc), citing *Piper Aircraft Co. v. Reyno*, 454 U.S. 235, 256 n. 23 (1981). See also *Teeve Toons, Inc. v. Gerhard Schubert GMBH*, 2002 WL 498627 (S.D.N.Y.), also available at <http://cisgw3.law.pace.edu/cases/020329u1.html>.

<sup>46</sup>*Chateau Charmes Wines Ltd.*, *supra*, note 40, quoting *Trivelloni-Lorenzi v. Pan Am. Airways, Inc. (In re Air Crash Disaster Near New Orleans, Louisiana on July 9, 1982)*, 821 F.2d 1147, 1165 (5th Cir. 1987). However, one court noted that “[t]here appears to be ‘no time limit on when a motion to dismiss on the ground of forum non conveniens can be made.’” *Genpharm Inc. v. Pliva-Lachema A.S.*, 361 F. Supp. 2d 49 (E.D.N.Y. 2005), also available at <http://cisgw3.law.pace.edu/cases/050319u1.html>, citing 15 Charles Alan Wright, Arthur R. Miller, & Edward H. Cooper Fed. Prac. & Proc. §3828 (2d ed. 2004); see *Jacobs v. Felix Bloch Erben Verlag fur Buhne Film und Funk KG*, 160 F. Supp. 2d 722, 742 (S.D.N.Y. 2001); *Breindel & Ferstendig v. Faber*, No. 95-7905, 1996 WL 413727, at \*3 n. 1, (S.D.N.Y. July 22, 1996). “However, the defendant's delay in bringing a forum non conveniens motion is a factor to be considered in the Court's evaluation of whether the forum was convenient.” *Id.*

<sup>47</sup>See *Piper Aircraft v. Reyno*, 454 U.S. 235, 254; *Contact Lumber Co. v. P.T. Moges Shipping Co. Ltd.*, 918 F.2d 1446, 1449 (9th Cir. 1990); *Satz v. McDonnell Douglas Corp.*, 244 F.3d 1279, 1283, n.3 (11th Cir. 2001) and *Veba-Chemie A.G. v. M.V. Getaflix*, 711 F.2d 1243, 1248 (5th Cir. 1983) (holding alternate forum need be available only at time of the dismissal, not at the time suit was filed).

<sup>48</sup>See *Creative Technology, Ltd. v. Aztech System, PTE Ltd.*, 61 F.3d 696, 698 (9th Cir. 1995); *Dole Food Co., Inc. v. Watts*, 303 F.3d 1104 (9th Cir. 2002); *Gonzalez v. Chrysler Corp.*, 301 F.3d 377, 379 (5th Cir. 2002); *Gulf Oil Corp. v. Gilbert*, 330 U.S. 501, 504, 67 S. Ct. 839, 91 L. Ed. 1055 (1947); see also *Timberlane Lumber Co. v. Bank of Am. Nat'l Trust and Sav. Ass'n*, 549 F.2d 597, 616 (9th Cir. 1976); *Beltappo Inc. v. Rich Xiberta, S.A.*, 2006 WL 314338 (W.D. Wash.), also available at <http://cisgw3.law.pace.edu/cases/060207u2.html>.

<sup>49</sup>*M/S Bremen v. Zapata Off-Shore Co.*, 407 U.S. 1, 92 S. Ct. 1907, 32 L. Ed. 2d 513 (1972).

contravene a strong public policy of the forum in which the suit is brought.”<sup>50</sup> Notably, the enforcement of the clause may also turn on whether the clause is mandatory or permissive, with the burden resting on the party that “it is effectively deprived of its day in court.”<sup>51</sup> Courts will also hold firm on a party's agreement to arbitrate. “Arbitration is a matter of contract and a party cannot be required to submit to arbitration any dispute which he has not agreed so to submit.”<sup>51.1</sup> Accordingly, “whether or not [a party is] bound to arbitrate, as well as what issues it must arbitrate, is a matter to be determined by the Court on the basis of the contract entered into by the parties.”<sup>51.2</sup> Notably, if a party fails to adhere to an arbitration provision in an agreement and obtains a foreign judgment in contrast to the provision, the provisions of the United Nations Convention on the Recognition and Enforcement of Foreign Arbitral Awards (“CREFAA”)<sup>51.3</sup> should be considered by counsel. The CREFAA reinforces a strong federal policy in favor of arbitration over litigation.<sup>51.4</sup> “This policy applies with special force in the field of international commerce.”<sup>51.5</sup> Therefore, where a dispute arises from an international commercial agreement, a court must address the following four factors to determine whether the arbitration agreement falls under CREFAA:

- (1) Is there an agreement in writing to arbitrate the subject of the dispute?<sup>51.6</sup>
- (2) Does the agreement provide for arbitration in the territory of a signatory of the Convention?
- (3) Does the agreement arise out of a legal relationship, whether contractual or not, which is considered commercial?
- (4) Is a party to the agreement not an American citizen, or does the commercial relationship have some reasonable relation with one or more foreign states?<sup>51.7</sup>

“If the answers are all in the affirmative, the court must order arbitration unless it determines the agreement is null and void.”<sup>51.8</sup> Failure to arbitrate in accordance to an agreement has resulted in a court not enforcing a foreign court default judgment.<sup>51.9</sup> See §2.02[D] for further discussion. See Appendix A-8 for full text of the UN Convention on the Recognition and Enforcement of Foreign Arbitral Awards and

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<sup>50</sup>*Id.*

<sup>51</sup>*Fireman's Fund Am. Ins. Cos. v. Puerto Rican Forwarding Co.*, 492 F.2d 1294, 1297 (1st Cir. 1974); *Carnival Cruise Lines v. Shute*, 499 U.S. 585, 111 S. Ct. 1522, 113 L. Ed. 2d 622 (1991) (clause valid even if not negotiated); *Vimar Seguros, S.A. v M/V Sky Reefer*, 515 U.S. 528, 115 S. Ct. 2322, 2329 (1996) (arbitration clause did not violate Carriage of Goods by Sea Act); *Keaty v. Freeport Indonesia, Inc.*, 503 F.2d 955, 957 (5th Cir. 1974); *Hunt Wesson Foods, Inc. v. Supreme Oil Co.*, 817 F.2d 75, 77 (9th Cir. 1987); *Wai v. Rainbow Holdings*, 315 F. Supp. 2d 1261, 1272 (S.D. Fla. 2004); *St. Paul Guardian Ins. Co. v. Neuromed Med. Sys. & Support*, 2002 WL 465312 (S.D.N.Y.) (holding forum selection clause did not mandate that the action proceed in Germany); *Beltappo Inc. v. Rich Xiberta, S.A.*, 2006 WL 314338 (W.D. Wash.), also available at <http://cisgw3.law.pace.edu/cases/060207u2.html>; *American Biophysics v. Dubois Marine Specialties*, 411 F. Supp. 2d 61, 2006 WL 225778 (D.R.I.); 2006 U.S. Dist. LEXIS 3908, also available at <http://cisgwe.law.pace.edu/cases/060130u1.html>.

<sup>51.1</sup>*AT & T Technologies, Inc. v. Communications Workers of America*, 475 U.S. 643, 648 (1986), quoting *United Steelworkers of America v. Warrior & Gulf Navigation Co.*, 363 U.S. 574, 582 (1960).

<sup>51.2</sup>*Id.* at 649, quoting *John Wiley & Sons, Inc. v. Livingston*, 376 U.S. 543, 547 (1964).

<sup>51.3</sup>9 U.S.C. §§201-208.

<sup>51.4</sup>*Standard Bent Glass Corp. v. Glassrobots Oy*, 333 F.3d 440, 447 (3d Cir. 2003).

<sup>51.5</sup>*Id.*; *Mitsubishi Motors Corp. v. Soler Chrysler Plymouth, Inc.*, 473 U.S. 614, 631 (1985).

<sup>51.6</sup>*Germany 26 June 2006 Appellate Court Frankfurt (Printed goods case)*, available at <http://cisgw3.law.pace.edu/cases/060626g1.html> (the arbitral award was not sufficiently authorized by an “agreement in writing” in terms of Art. II(2) New York Convention (Art. III(1), Art. V(1)(a) New York Convention).

<sup>51.7</sup>*Id.*

<sup>51.8</sup>*Id.*

<sup>51.9</sup>*Tyco Valves & Controls Distribution GmbH v. Tippins, Inc.*, 2006 WL 2924814 (W.D. Pa.), see also <http://cisgw3.law.pace.edu/cases/061010u2.html> (granting summary judgment for buyer holding that arbitration clause would bar recognition and enforcement of the German default judgment in favor of seller).

## §9.04 INTERNATIONAL ABSTENTION

A motion to stay or dismiss may be based on the principle of international abstention. The international abstention principle allows a court to stay or dismiss an action where parallel proceedings are pending in the court of a foreign nation.<sup>52</sup> International abstention is rooted in concerns of international comity, judicial efficiency, and fairness to litigants.<sup>53</sup> In essence, the principle allows a court to abstain from hearing an action if there is a first-filed foreign proceeding elsewhere.<sup>54</sup> The principle has been expressly adopted by the Seventh and Eleventh Circuits.<sup>55</sup> One court has discussed possible application in a CISG matter but applied another law for resolution.<sup>56</sup>

## §9.05 OTHER DOMESTIC ACTIONS

The CISG's preemption is limited to contract actions and therefore does not preempt claims for misrepresentation, fraud, betrayal, and intentional harm to economic interests.<sup>57</sup> Nor does the CISG preempt claims sounding in tort.<sup>58</sup> However, a mere labeling of a cause of action as a "tort" does not automatically mean that it is not preempted by the CISG. A tort that is in actuality a contract claim or that bridges the gap between contract and tort law may very well not be preempted by the CISG.<sup>59</sup> Mixed authority exists as to whether promissory estoppel is preempted based on the language in Article 16(2)(b).<sup>60</sup> In the event of insolvency, the CISG does not override the rights of creditors, purchasers, and other third persons granted by domestic law as Article 4 only governs the rights of buyers and sellers.<sup>61</sup> See §2.04 for further limitations. Additionally, a contract between a U.S. company and another business in a Contracting State of the CISG will not necessarily mean that the contract is governed by the CISG. When a business within a Contracting State facilitates a subsidiary or agent, the CISG will apply only if the business in the Contracting State was not *the closest relationship to the contract and its performance*.<sup>62</sup> See §2.02[C].

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<sup>52</sup>See Schwarzer et al., *Federal Civil Procedure Before Trial*, P 2:1326.4 (2000).

<sup>53</sup>*Id.*

<sup>54</sup>*Id.*

<sup>55</sup>See *Turner Entertainment Co. v. Degeto Film GmbH*, 25 F.3d 1512, 1523 (11th Cir. 1994); *Finova Capital Corp. v. Ryan Helicopters, U.S.A. Inc.*, 180 F.3d 896, 900-901 (7th Cir. 1999).

<sup>56</sup>See *Supermicro Computer v. Digitechnic*, 2001 U.S. Dist. LEXIS 7620 (N.D. Ca. 2001), also available at <http://cisgw3.law.pace.edu/cases/010130u1.html>.

<sup>57</sup>*Viva Vino Import Corp. v. Farnese Vini S.r.l.*, 2000 WL 1224903 at \*1 (E.D. Pa. 2000), also available at <http://cisgw3.law.pace.edu/cases/000829u1.html>; *Miami Valley Paper, LLC v. Lebbing Engineering & Consulting GmbH*, 2006 WL 2924779 (S.D. Ohio), also available at <http://cisgw3.law.pace.edu/cases/061010u1.html>.

<sup>58</sup>*Id.*

<sup>59</sup>Peter Schlechtriem, *The Borderland of Tort and Contract: Opening a New Frontier?*, 21 Cornell Int'l L.J. 467, 473-74 (1988). See *Wausau Tile, Inc. v. Navigators Ins. Co.*, 2006 WL 278856 (W.D. Wash.), 2006 U.S. Dist. LEXIS 4507, also available at <http://cisgw3.law.pace.edu/cases/060202u1.html> (denying motion to dismiss based on contract allegations insufficient but discussing relevancy for motion for summary judgment).

<sup>60</sup>See Henry Mathr, *Firm Offers Under the UCC and the CISG*, 105 Dick.L.Rev. 31, 48 (Fall 2000); but see *Geneva Pharm. Tech. v. Barr Lab.*, 201 F. Supp. 2d 236 (S.D.N.Y. 2002), also available at <http://cisgw3.law.pace.edu/cases/020510u.html>.

<sup>61</sup>See John Honnold, *Uniform Law for International Sales* §444 (3d ed. 1999); *Usinor Industrie v. Leeco Steel Product, Inc.*, 209 F. Supp. 2d 880 (N.D. Ill. 2002), also available at <http://cisgw3.law.pace.edu/cases/050330u1.html>.

<sup>62</sup>*Vision Systems, Inc. v. EMC Corp.*, 19 Mass L. Rptr 139 (Mass. Super. 2005), also available at <http://www.cisg.law.pace.edu/wais/db/cases2/050228u1.html>.

Failure to assert CISG as applicable law may be waived if not timely filed.<sup>63</sup>

## §9.06 FEDERAL PROCEDURE RULES

### [A] Motion to Dismiss—Rule 12(B)

In addition to affirmative defenses, counsel for defendant may want to review the substance of Rule 12 of the Federal Rules of Civil Procedure, which provides that a party can file a motion to dismiss based on the following:

- Lack of jurisdiction over the subject matter;
- Lack of jurisdiction over the person;
- Improper venue;
- Insufficiency of process;
- Insufficiency of service of process;
- Failure to state a claim upon which relief can be granted;<sup>64</sup> and
- Failure to join a party under Rule 19.

A motion to dismiss made on any of the above-referenced grounds must be made before pleading, if a further pleading is permitted.<sup>65</sup> There is mixed opinion as to this time period and as such counsel is advised to check appropriate authority. Some courts rationalize that since pleadings are due within twenty (20) days after service of the summons and complaint, the motion to dismiss must be filed and served within that 20-day time period.<sup>66</sup> In contrast, other courts prescribe any time before the answer or other responsive pleading is filed.<sup>67</sup> Nevertheless, counsel can seek an extension of time to respond by pre-answer motion.<sup>68</sup> Moreover, these defenses are non-waivable through trial and therefore denial of a previous motion to dismiss does not bar a defendant from raising them again prior to judgment.<sup>69</sup> However, certain limitations, such as appeal or other discretionary reasons, may preclude re-argument.<sup>70</sup>

### [B] Judgment on the Pleadings—Rule 12(C)

A motion to dismiss pursuant to Fed. R. Civ. P. 12(b)(6) requires the Court to determine whether a cognizable claim has been pleaded in the complaint. The basic federal pleading requirement is contained in

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<sup>63</sup>GPL Treatment Ltd. v. Louisiana Pacific Corp., 133 Or. App. 633, 894 P.2d 470, also available at <http://cisgw3.law.pace.edu/cases/950412u1.html>.

<sup>64</sup>Teeve Toons, Inc. v. Gerhard Schubert GMBH, 2002 WL 498627 (S.D.N.Y.), also available at <http://cisgw3.law.pace.edu/cases/020329u1.html>; Caterpillar v. Usinor Industrie, 2005 WL 736550 (N.D. Ill.), also available at <http://cisgw3.law.pace.edu/cases/050330u1.html>; Atla-Medine v. Crompton, 2001 WL 170666 (S.D.N.Y.), also available at <http://cisgw3.law.pace.edu/cases/011107u1.html>; St. Paul Guardian Ins. Co. v. Neuromed Med. Sys. & Support, 2002 WL 465312 (S.D.N.Y.), also available at <http://cisgw3.law.pace.edu/cases/020326u1.html>; Wausau Tile, Inc. v. Navigators Ins. Co., 2006 WL 278856 (W.D. Wash.), 2006 U.S. Dist. LEXIS 4507, also available at <http://cisgwe.law.pace.edu/cases/060202u1.html> (denied motion citing vagueness of complaint).

<sup>65</sup>Philippine Airlines, Inc. v. National Mediation Bd., 430 F. Supp. 426, 427 (N.D. Cal. 1977).

<sup>66</sup>See, e.g., Farmers Elevator Mut. Ins. Co. v. Carl J. Austad & Sons, Inc., 343 F.2d 7, 12 (8th Cir. 1965).

<sup>67</sup>See, e.g., Aetna Life Ins. Co. v. Alla Med. Services, Inc., 855 F.2d 1470, 1474 (9th Cir. 1988).

<sup>68</sup>Id.

<sup>69</sup>Save Our Wetlands, Inc. (SOWL) v. Rush, 424 F. Supp. 354 (E.D. La. 1976); Van Voorhis v. District of Columbia, 240 F. Supp. 822, 824 (D. D.C. 1965).

<sup>70</sup>See, e.g., Aetna Life Ins. Co. v. Alla Med. Services, Inc., 855 F.2d 1470, 1476-1477; Fed. R. Civ. P. Rule 11.

Fed. R. Civ. P. 8(a), which states that, a pleading “shall contain ... a short and plain statement of the claim showing that the pleader is entitled to relief.”<sup>70.1</sup> In its scrutiny of the complaint, a court must construe all well-pleaded facts liberally in favor of the party opposing the motion.<sup>70.2</sup> Rule 8(a)(2) operates to provide the defendant with “fair notice of what plaintiff’s claim is and the grounds upon which it rests.”<sup>70.3</sup> The standard of review applicable to a motion for judgment on the pleadings under Rule 12(c) is the same *de novo* standard that is applicable to a motion to dismiss under Rule 12(b)(6).<sup>70.4</sup> In reviewing a dismissal under Rule 12(b)(6), the court must accept as true all factual allegations in the complaint.<sup>70.5</sup> The motion to dismiss must be denied unless it appears beyond doubt that the plaintiff can prove no set of facts in support of the claim which would entitle her to relief.<sup>70.6</sup> The admonishment to liberally construe a plaintiff’s claim when evaluating a Rule 12(b)(6) dismissal does not relieve a plaintiff of his obligation to satisfy federal notice pleading requirements and allege more than bare assertions of legal conclusions.<sup>70.7</sup> “In practice, a complaint ... must contain either direct or inferential allegations respecting all of the material elements [in order] to sustain a recovery under some viable legal theory.”<sup>70.8</sup>

In the case of *Miami Valley Paper, LLC v. Lebbing Engineering & Consulting GmbH*,<sup>70.9</sup> a federal court in Ohio specifically addressed a judgment on the pleadings in a matter involving a sale of used paper winder from a German seller to a U.S. buyer. The buyer filed a Second Amended Complaint, alleging six causes of action: 1) breach of contract; 2) breach of express warranty; 3) breach of warranty of fitness for a particular purpose; 4) unjust enrichment; 5) fraudulent inducement; and 6) negligent misrepresentation (doc. 23). The seller moved for partial judgment on the pleadings on unjust enrichment, fraudulent inducement and negligent misrepresentation. With regard to the unjust enrichment claim, the court acknowledged that an express contract as the facts set forth eliminated any substantive basis to plead quasi-contract or tort claims that allege breach of that contract’s terms but held that plaintiff procedurally could plead unjust enrichment as an alternative theory of recovery and declined to dismiss Plaintiff’s claim for unjust enrichment. The court further declined to dismiss Plaintiff’s claims for negligent misrepresentation and fraudulent inducement finding that the CISG only preempts state contract law claims, and then only to the extent that such claims fall within the scope of the treaty.<sup>70.10</sup> Having reviewed the case law, the Court found the CISG drafters made no attempt ... to prescribe the legal effect of ... a seller’s negligent or fraudulent misrepresentation.<sup>70.11</sup>

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<sup>70.1</sup>Westlake v. Lucas, 537 F.2d 857, 858 (6th Cir. 1976).

<sup>70.2</sup>Scheuer v. Rhodes, 416 U.S. 232, 236, 94 S. Ct. 1683, 1687 (1974).

<sup>70.3</sup>Conley v. Gibson, 355 U.S. 41, 47, 78 S. Ct. 99 (1957).

<sup>70.4</sup>United Food and Commercial Workers Local 1099 v. City of Sidney, 364 F.3d 738, 745 (6th Cir. 2004) (citing Ziegler v. IBP Hog Mkt., 249 F.3d 509, 11-12 (6th Cir. 2001)).

<sup>70.5</sup>Windsor v. The Tennessean, 719 F.2d 155, 158 (6th Cir. 1983), cert. denied, 469 U.S. 826 (1984).

<sup>70.6</sup>Conley v. Gibson, 355 U.S. 41 (1957). Jones, 824 F.2d at 1103; see also Scheid v. Fanny Farmer Candy Shops, Inc., 859 F.2d 434, 437 (6th Cir. 1988).

<sup>70.7</sup>Wright, Miller & Cooper, *Federal Practice and Procedure*: §1357 at 596 (1969).

<sup>70.8</sup>Car Carriers, Inc. v. Ford Motor Co., 745 F.2d 1101, 1106 (7th Cir. 1984), cert. denied, 470 U.S. 1054 (1985) (quoting In Re: Plywood Antitrust Litigation, 655 F.2d 627, 641 (5th Cir. 1981), cert. dismissed, 462 U.S. 1125 (1983)); see also Sutcliffe, Inc. v. Donovan Companies, Inc., 727 F.2d 648, 654 (7th Cir. 1984); Wright, Miller & Cooper, *Federal Practice and Procedure*: §1216 at 121-23 (1969)).

<sup>70.9</sup>2006 WL 2924779 (S.D. Ohio), also available at <http://cisgw3.law.pace.edu/cases/061010u1.html>.

<sup>70.10</sup>*Id.* citing *Asante Technologies, Inc. v. PMC-Serra, Inc.*, 164 F. Supp. 2d 1142, 1151-1152 (N.D. Cal. 2001), *Valero Marketing & Supply Co. v. Greeni Oy & Greeni Trading Oy*, 373 F. Supp. 2d 475, 480 (D.N.J. 2005).

<sup>70.11</sup>*Id.* citing Joseph Lookofsky, *In Dubio Pro Conventione? Some Thoughts about Opt-outs, Computer Programs and Preemption under the 1980 Vienna Sales Convention (CISG)*, 13 Duke J. Comp. & Int’l L. 263, 280 (2003). The court ruled that under Ohio law that economic loss rule does not preclude a claim of fraudulent inducement. See also *Onyx Environmental Services, LLC v. Maison*, 407 F. Supp. 2d 874, 879 (N.D. Ohio 2005). *HDM Flugservice GMBH v. Parker Hannifin Corp.*, 332 F.3d 1025, 1032 (6th Cir. 2003).

## §9.07 STATUTE OF LIMITATIONS

The CISG does not address limitation periods; however, the parties can agree as to a limitation period by means of Article 22(1)(3).<sup>71</sup> In general, the domestic law of a country determines the applicable statute of limitations.<sup>71.1</sup> Under certain circumstances, the United Nations Convention on Limitation Period in the International Sale of Goods (Limitation Convention) may apply. *See* Appendix A-2 for full text of treaty. The United States is signatory to the Limitation Convention. *See* Appendix A-4, Table 2. Originally adopted in 1974, the Limitation Convention provides a concrete set of uniform rules governing the period within which a party to a contract must commence legal proceedings against the other party in order to assert a claim under a contract—an international statute of limitations.<sup>72</sup> In 1980, the Limitation Convention was amended by a Protocol in anticipation of the adoption of the CISG. Both the original and the amended versions of the Limitation Convention entered into force on August 1, 1988.<sup>73</sup>

Although relatively few countries have adopted the Limitation Convention in comparison to the CISG,<sup>74</sup> scholars had anticipated an increase in recognition and adoption based in part upon the ratification by the United States of the Limitation Convention in 1994.<sup>75</sup> The United States' adoption of the Limitation Convention provides that it is the applicable procedural law for international transactions, while the CISG provides the substantive law of international transactions unless the parties have “opted out,” or a party comes from a country that is a non-signatory to both conventions.

The ratification of the Limitation Convention by the United States establishes federal law and therefore preempts state law under certain circumstances. However, if a party is from a non-signatory state to the Limitation Convention, private international law would govern this issue, as procedural matters fall outside the scope of the CISG.<sup>76</sup> Hence, under U.S. federal law, the substantive law of the state in which the action resides, including its choice of law, would apply.<sup>77</sup>

The Limitation Convention applies to claims between a buyer and a seller arising from a *contract of*

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<sup>71</sup>*See also* Article 6 CISG.

<sup>71.1</sup>Oberlandesgericht Köln (Germany), 13.02.2006, [www.unilex.info](http://www.unilex.info) (Italian statute of limitations applied in dispute between German buyer and Italian textile seller).

<sup>72</sup>Kazuaki Sono, *The Limitation Convention: The Forerunner to Establish UNCITRAL Creditability*, available at <http://www.cisg.law.pace.edu/cisg/biblio/sono3.html>.

<sup>73</sup>The text of the Limitation Convention appears in A/CONF.63/15, reproduced in Official Records of the United Nations Conference on Prescription (Limitation) in the International Sale of Goods, New York, 20 May-14 June, part one (A/CONF.63/16, United Nations publication, Sales No. E.74.V.8), in Yearbook of the United Nations Commission on International Trade Law, vol. V: 1974, part three, chap. I, sect. B, and in UNCITRAL: The United Nations Commission on International Trade Law (United Nations publications, Sales No. E.86.V.8), Annex II.A.

<sup>74</sup>For current signatures, *see*

<http://untreaty.un.org/English/bible/englishinternetbible/partI/chapterX/treaty20.asp>.

<sup>75</sup>President Clinton transmitted the Limitation Convention to the Senate on August 6, 1993. S. Treaty Doc. No. 10, 103rd Cong., 1st Sess. (1993). The Senate Committee on Foreign Relations held hearings on October 26, 1993. The Committee agreed to report favorably on November 18, 1993. S. Exec. Rep. 103-16, 103d Cong., 1st Sess. (1993). The full Senate gave its consent on November 20, 1993. 139 Cong. Rec. S16, 213 (daily ed. Nov. 20, 1993). *See* Katherina Boele-Woelki, *The Limitation of Actions in the International Sale of Goods*, Uniform Law Review, issue 3 (1999) for analysis of U.S. adoption of Limitation Convention.

<sup>76</sup>Switzerland 11 July 2000 Federal Supreme Court (Gutta-Werke AG v. Dörken AG), available at <http://cisgw3.law.pace.edu/cases/000711sl.html> (procedural matters are not governed by the CISG); Zapata Hermanos Sucesores, S.A. v. Hearthside Baking Co., Inc., 313 F.3d 385 (7th Cir. 2002) (attorney fee issue was procedural issue outside realm of CISG).

<sup>77</sup>*Land v. Yamaha Motor Corp.*, U.S.A., 272 F.3d 514, 516 (7th Cir. 2001), *citing* *Erie R.R. Co. v. Tompkins*, 304 U.S. 64, 58 S. Ct. 817, 82 L. Ed. 1188 (1938); *Allen & O'Hara, Inc. v. Barrett Wrecking, Inc.*, 964 F.2d 964, 695 n.3 (7th Cir. 1992). Under U.C.C. §2-725, which is the form adopted by most jurisdictions, a four-year statute of limitations applies to contracts. *See* *Wood v. Wilkenson*, 425 So. 2d 1062 (Ala. 1982).

*international sale of goods or relating to its breach, termination, or invalidity.*<sup>78</sup> Therefore, it is necessary to determine whether the Limitation Convention is applicable. The Limitation Convention applies if the contract is an international contract. Under Article 3(1), the Limitation Convention applies when both parties in an international sale of goods have their place of business in different contracting *signatory states*,<sup>79</sup> or when the rules of private international law point to the law of a signatory state. Similar to the CISG, signatory states can opt out of the application of these provisions.<sup>80</sup> Where a party to a contract of sale of goods has places of business in more than one State, the place of business for purposes of the Limitation Convention is the State that has the closest relationship to the contract and its performance, taking into account the circumstances known to or contemplated by the parties at the time of conclusion of the contract.<sup>81</sup> Where a party does not have a place of business, reference shall be made to his habitual residence.<sup>82</sup> Neither the nationality of the parties nor the civil or commercial character of the parties or of the contract shall be taken into consideration.<sup>83</sup> The Limitation Convention defines goods through omission. The term “goods” does not include items bought for personal, family, or household use, unless the seller, at any time before or at the conclusion of the contract, neither knew nor ought to have known that the goods were bought for any such use by auction, on execution, or otherwise by authority of law.<sup>84</sup> Stocks, shares, investment securities, negotiable instruments, and money are also excluded from the definition, along with ships, vessels, hovercraft, and aircraft, and the sale of electricity.<sup>85</sup> The Limitation Convention does not apply to claims based upon the death of, or personal injury to, any person.<sup>86</sup> The Limitation Convention does cover claims of invalidity based on incapacity of a party, duress, fraud, unconscionability, and illegality, provided that these claims do not arise independent of the contract under the Limitation Convention.<sup>87</sup> Actions not covered under the Limitation Convention are those based on nuclear damage caused by the goods sold; a lien, a mortgage, or other security interest in property; a bill of exchange; a judgment or award made in legal proceedings; and a document on which there is direct enforcement, execution, or otherwise, by authority of law.<sup>88</sup> The Limitation Convention does not apply to contracts in which the preponderant part of the obligation of the seller consists in the supply of labor or other services.<sup>89</sup> Contracts for the supply of goods to be manufactured or produced are considered to be sales, unless the party who orders the goods undertakes to supply a substantial part of the materials necessary for such manufacture or production.<sup>90</sup>

The Limitation Convention defines a limitation period of four years within which a party to a contract for the international sale of goods must commence legal proceedings in order to assert a claim arising from a contract or relating to its breach, termination, or invalidity.<sup>91</sup> Under some circumstances, the limitation period may be extended beyond four years, but in no case will the period run for more than ten years after a claim accrues.<sup>92</sup> A debtor may, at any time during the running of the limitation period, extend the period by a declaration in writing to the creditor.<sup>93</sup> Articles 9 through 12 of the Limitation Convention subscribe

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<sup>78</sup> Article 1.

<sup>79</sup> Article 3 (2).

<sup>80</sup> *Id.*

<sup>81</sup> Article 2 (c).

<sup>82</sup> Article 2 (d).

<sup>83</sup> Article 2 (e).

<sup>84</sup> Article 4.

<sup>85</sup> *Id.*

<sup>86</sup> Article 5.

<sup>87</sup> Article 1. See generally Allison E. Butler, *The International Contract Knowing When, Why, and How to “Opt Out” of the United Nations Convention on Contracts for the International Sale of Goods*, Fla. Bar Journal, Vol. LXXVI, No. 5 (May 2002) at 28–30.

<sup>88</sup> Article 4.

<sup>89</sup> Article 6.

<sup>90</sup> *Id.*

<sup>91</sup> Articles 1 and 8.

<sup>92</sup> Article 23.

<sup>93</sup> Article 22(2). A “debtor” is defined to mean a party against whom a creditor asserts a claim. Article 1(c). A “creditor” is defined to mean a party who asserts a claim, whether or not such a claim is for a sum of money. Article 1(b). A writing includes telegrams and telex. Article 1(g).

commencement periods for the running of the period for claims based on breach of contract, defects, or nonconformity of the goods.<sup>94</sup> A limitation period ceases to run when a creditor performs an action that serves to institute judicial proceedings,<sup>95</sup> or when arbitral proceedings begin, provided the parties agree to arbitration.<sup>96</sup> Additional cessation rules are set forth in Articles 15 through 21.<sup>97</sup>

## §9.08 SUMMARY JUDGMENT

A motion for summary judgment should be considered by a party when there is no genuine issue as to any material fact and a party is entitled to a judgment as a matter of law. The consequence of a motion for summary judgment being granted is that the case will not proceed to trial and a judgment will be granted in favor of the moving party. As a secondary consequence of a motion for summary, a court has the authority to make an order specifying the facts that appear to be without substantial controversy, including the extent to which the amount of damages or other relief is not in controversy, and directing such further proceedings in the action as are just. Upon the trial of the action the facts so specified shall be deemed established, and the trial shall be conducted accordingly.<sup>98</sup> In essence, the denial of a motion of summary judgment can streamline the factual issues for trial.

Rule 56 of the Federal Rules of Civil Procedure governs summary judgment motions and “mandates the entry of summary judgment, after adequate time for discovery and upon motion, against a party who fails to make a showing sufficient to establish the existence of an element essential to that party's case, and

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<sup>94</sup>Subject to the provisions of Articles 10, 11, and 12, the limitation period commences on the date on which the claim accrues. Commencement of the limitation period is not postponed by notice requirements or a provision in an arbitration agreement that no right shall arise until an arbitration award has been made. Article 9. A breach of contract claim accrues on the date on which such breach occurs. A defect or other lack of conformity accrues on the date on which the goods are actually handed over to, or their tender is refused by, the buyer. A claim based on fraud committed before or at the time of the conclusion of the contract or during its performance accrues on the date on which the fraud was or reasonably could have been discovered. Article 10. If the seller has given an express undertaking relating to the goods which is stated to have effect for a certain period of time, whether expressed in terms of a specific period of time or otherwise, the limitation period in respect of any claim arising from the undertaking commences on the date on which the buyer notifies the seller of the fact on which the claim is based, but not later than on the date of the expiration of the period of the undertaking. Article 11. If a party is entitled to declare the contract terminated before the time for performance is due, and exercises this right, the limitation period in respect of a claim based on any such circumstances commences on the date on which the declaration is made to the other party. If the contract is not declared to be terminated before performance becomes due, the limitation period shall commence on the date on which performance is due. The limitation period for installment contracts commences on the date on which the particular breach occurs; however, if party is entitled to declare the contract terminated by reason of such breach, and exercises this right, the limitation period in respect of all relevant installments commences on the date on which the declaration is made to the other party. Article 12.

<sup>95</sup>Article 13. However, if legal proceedings have ended without a decision binding on the merits of the claim, the limitation period continues to run. Article 17(1). If, at the time such legal proceedings ended, the limitation period has expired or has less than one year to run, the creditor shall be entitled to a period of one year from the date on which the legal proceedings ended. Article 17(2).

<sup>96</sup>Article 14 (1). In the absence of any such provision, arbitral proceedings shall be deemed to commence on the date on which a request that the claim in dispute be referred to arbitration is delivered to the habitual residence or place of business of the other party or, if he has no such residence or place of business, then at his last known residence or place of business. Article 14 (2).

<sup>97</sup>Article 15 (bankruptcy, death or incapacity, corporate, partnership or company dissolution); Article 16 (counterclaims); Article 17 (no binding decisions); Article 18 (joint and several liability, proceedings by subpurchaser); Article 19 (act to recommence limitation period); Article 20 (debtor's acknowledgement); Article 21 (commencement prevented by *force majeure*).

<sup>98</sup>Fed. R. Civ. P. 56(d).

on which that party will bear the burden of proof at trial.”<sup>99</sup> Procedurally, a claimant seeking to recover upon a claim, counterclaim, or cross-claim or to obtain a declaratory judgment may, at any time after the expiration of 20 days from the commencement of the action or after service of a motion for summary judgment by the adverse party, move with or without supporting affidavits for a summary judgment in the party's favor upon all or any part thereof.<sup>100</sup> A defending party against whom a claim, counterclaim, or cross-claim is asserted or a declaratory judgment is sought may, *at any time*, move with or without supporting affidavits for a summary judgment in the party's favor as to all or any part thereof.<sup>101</sup> The moving party bears the burden of showing that there is no evidence which supports an element essential to the non-movant's claim.<sup>102</sup> Once the movant has met this burden, the non-moving party then must show that there is in fact a genuine issue for trial.<sup>103</sup> Summary judgment may be granted if, drawing all inferences in favor of the non-moving party,<sup>104</sup> “the pleadings, depositions, answers to interrogatories and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law.”<sup>105</sup>

To defeat summary judgment, the non-moving party cannot rest on the pleadings, but rather must go beyond the pleadings and present “specific facts showing that there is a genuine issue for trial.”<sup>106</sup> Notably, the non-moving party has the burden of producing evidence to establish each element of her claim.<sup>107</sup> Evidence, such as affidavits, must set forth facts “as would be admissible in evidence.”<sup>108</sup> Therefore, supporting and opposing affidavits must be made on personal knowledge and must show affirmatively that the affiant is competent to testify to the matters stated therein.<sup>109</sup> Sworn or certified copies of all papers or parts thereof referred to in an affidavit must be attached to the pleadings.<sup>110</sup> A court has the discretion to permit affidavits to be supplemented or opposed by depositions, answers to interrogatories, or further

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<sup>99</sup>Celotex Corporation v. Catrett, 477 U.S. 317, 323, 91 L. Ed. 2d 265, 106 S. Ct. 2548 (1986).

<sup>100</sup>Fed. R. Civ. P. 56(a).

<sup>101</sup>Fed. R. Civ. P. 56(b) (emphasis added).

<sup>102</sup>Celotex Corp. v. Catrett, 477 U.S. 317, 322 (1986).

<sup>103</sup>Anderson v. Liberty Lobby Inc., 477 U.S. 242, 250. *See, e.g.*, MCC-Marble Ceramic Center v. Ceramica Nuova D'Agostino, 144 F.3d 1384; 1998 U.S. App. LEXIS 14782; 1998 WL 343335 (11th Cir. (Fla.)) also available at <http://cisgw3.law.pace.edu/cases/980629u1.html> (holding that CISG precluded summary judgment in this case because [buyer] has raised an issue of material fact concerning the parties' subjective intent to be bound by the terms on the reverse of the pre-printed contract); BP Oil International v. Empresa Estatal Petroleos de Ecuador, 332 F.3d 333 (5th Cir. (Tex.)), also available at <http://cisgw3.law.pace.edu/cases/030611u1.html> (fact at issue as to whether [seller] knowingly provided gasoline with an excessive gum content thereby precluding summary judgment); Calzaturificio Claudia v. Olivieri Footwear, 1998 U.S. Dist. LEXIS 4586, also available at <http://cisgw3.law.pace.edu/cases/980406u1.html> (disputed issues of material fact precluded summary judgment); Mitchell Aircraft Spares v. European Aircraft Service, 23 F. Supp. 2d 915; 1998 U.S. Dist. LEXIS 17030; 1998 WL 754801, also available at <http://cisgw3.law.pace.edu/cases/981027u1.html> (unresolved issues of material fact precluded court from granting either of the motions for summary judgment); Ajax Tool Works, Inc. v. Can-Eng Manufacturing Ltd., 2003 U.S. Dist. LEXIS 1306; 2003 Westlaw 223187 (N.D. Ill., Jan. 30, 2003), also available at <http://cisgw3.law.pace.edu/cases/030129u1.html> (court declined to grant summary judgment with respect to the buyer's claim that the seller had breached its obligations to deliver a furnace fit for its ordinary use and fit for the buyer's particular use (art. 35(2)(a), (2)(b) CISG); however, summary judgment was granted with respect to the buyer's claims for damages for consequential losses).

<sup>104</sup>Anderson v. Liberty Lobby, Inc., 477 U.S. 242, 248-50 (1986); Bagdadi v. Nazar, 84 F.3d 1194, 1197 (9th Cir. 1996); Reid v. State Farm Mut. Auto Ins. Co., 784 F.2d 577, 578 (5th Cir. 1986) (all inferences favorable to the non-movant).

<sup>105</sup>Fed. R. Civ. P. 56(c).

<sup>106</sup>Fed. R. Civ. P. 56(e). *See e.g.* Beijing Metals v. American Business Center, 993 F.2d 1178 (5th Cir. 1993), also available at <http://cisgw3.law.pace.edu/cases/930615u1.html>.

<sup>107</sup>Celotex, Celotex Corp. v. Catrett, 477 U.S. 317, 325 (1986).

<sup>108</sup>Fed. R. Civ. P. 56(e).

<sup>109</sup>Fed. R. Civ. P. 56(e).

<sup>110</sup>*Id.*

affidavits. However, if it appears from the affidavits of a party opposing the motion that the party cannot for reasons stated present by affidavit facts essential to justify the party's opposition, the court may refuse the application for judgment or may order a continuance to permit affidavits to be obtained or depositions to be taken or discovery to be had or may make such other order as is just.<sup>111</sup>

**Practical Application:** Counsel may challenge any affidavit if he or she believes that an affidavit is presented in bad faith or solely for the purposes of delay. Any said concern should be brought to the attention of the court, which has the authority to rule on the matter. If a court concludes that an affidavit was presented pursuant to Rule 65 in bad faith or solely for the purpose of delay, then a court must order the party employing them to pay to the other party the amount of the reasonable expenses which the filing of the affidavits caused the other party to incur, including reasonable attorney's fees, and any offending party or attorney may be adjudged guilty of contempt.<sup>112</sup>

The mere existence of some factual dispute between the parties will not defeat an otherwise properly supported motion for summary judgment. A dispute over those facts that might affect the outcome of the suit under the governing substantive law, *i.e.*, the material facts, however, will preclude the entry of summary judgment.<sup>113</sup> Summary judgment is improper so long as the dispute over the material facts is genuine.<sup>114</sup> A genuine issue of material fact exists where there is sufficient evidence for a reasonable fact-finder to find for the non-moving party.<sup>115</sup> In determining whether the dispute is genuine, the court's function is not to weigh the evidence or to determine the truth of the matter, but only to determine whether the evidence of record is such that a reasonable jury could return a verdict for the non-moving party.<sup>116</sup> Hence, "whether the evidence presents a sufficient disagreement to require submission to a jury or whether it is so one-sided that one party must prevail is a matter of law."<sup>117</sup> Under these standards, the non-moving party must do more than show there is "some metaphysical doubt" as to the material facts.<sup>118</sup> The non-movant must show more than "[t]he mere existence of a scintilla of evidence" for elements on which she bears the burden of production.<sup>119</sup> Although inferences must be drawn in favor of the non-moving party,<sup>120</sup> "an inference based upon speculation or conjecture does not create a material factual dispute sufficient to defeat entry of summary judgment."<sup>121</sup> Thus, "[w]here the record taken as a whole could not lead a rational trier of fact to find for the non-moving party, there is no 'genuine issue for trial.'" <sup>122</sup> Similarly, the non-moving party cannot rely on unsupported assertions, conclusory allegations, or mere suspicions in

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<sup>111</sup>Fed. R. Civ. P. 56(f).

<sup>112</sup>Fed. R. Civ. P. 56(g).

<sup>113</sup>*Anderson*, 477 U.S. 242, 248 (1986).

<sup>114</sup>*Id.*

<sup>115</sup>*Anderson*, 477 U.S. 242, 248. *Amoco Prod. Co. v. Tex. Meridian Res. Exploration, Inc.*, 180 F.3d 664, 669 (5th Cir. 1999) (holding only when there is a choice of reasonable interpretation of the contract is there a material fact issue concerning the parties' intent that would preclude summary judgment); *Graves v. Chilewich*, 1994 U.S. Dist. LEXIS 13393, also available at <http://cisgw3.law.pace.edu/cases/940922u1.html> (summary judgment was not appropriate finding that the content of the agency agreement between the defendant and the plaintiffs was disputed).

<sup>116</sup>*Id.* at 248-49. *See e.g.*, *Tyco Valves & Controls Distribution GmbH v. Tippins, Inc.*, 2006 WL 2924814 (W.D. Pa.), also available at <http://cisgw3.law.pace.edu/cases/061010u2.html> (sufficient evidence to prove that parties agreed to arbitration and therefore defendant entitled to summary judgment in action by Plaintiff to enforce court judgment); *Delchi Carrier v. Rotorex*, 71 F.3d 1024 (1995) also available at <http://cisgw3.law.pace.edu/cases/951206u1.html> (evidence established that there was fundamental breach of contract under the CISG).

<sup>117</sup>*Id.* at 251-52.

<sup>118</sup>*Matsushita Elec. Indus. Co., Ltd. v. Zenith Radio Corp.*, 475 U.S. 574, 586 (1986).

<sup>119</sup>*Anderson v. Liberty Lobby Inc.*, 477 U.S. 242, 252 (1986).

<sup>120</sup>*Id.* at 248-50; *Bagdadi v. Nazar*, 84 F.3d 1194, 1197 (9th Cir. 1996); *Reid v. State Farm Mut. Auto Ins. Co.*, 784 F.2d 577, 578 (5th Cir. 1986) (all inferences favorable to the non-movant).

<sup>121</sup>*Robertson v. Allied Signal, Inc.*, 914 F.2d 360, 382 n.12 (3d Cir. 1990).

<sup>122</sup>*Matsushita Elec. Indus. Co., Ltd. v. Zenith Radio Corp.*, 475 U.S. 574, 587 (1986).

attempting to survive a summary judgment motion.<sup>123</sup>

If a non-moving party fails to produce evidence of a genuine issue of material fact then the motion should be granted.<sup>124</sup> Furthermore, a court can grant the motion if the non-movant does not so respond to a motion for summary judgment.<sup>125</sup> If summary judgment is not rendered upon the whole case or for all the relief asked and a trial is warranted, a court at the hearing of the motion, by examining the pleadings and the evidence before it and by interrogating counsel, must if practicable ascertain what material facts exist without substantial controversy and what material facts are actually and in good faith controverted. Thereafter, a court must make an order specifying the facts that appear without substantial controversy, including the extent to which the amount of damages or other relief is not in controversy, and directing such further proceedings in the action as are just. Upon the trial of the action the facts so specified shall be deemed established, and the trial shall be conducted accordingly.<sup>126</sup> An appellate court's review of summary judgment motion is de novo.<sup>127</sup>

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<sup>123</sup>*Williams v. Borough of W. Chester*, 891 F.2d 458, 460 (3d Cir. 1989) (*citing Celotex Corp. v. Catrett*, 477 U.S. 317, 325 (1986)); *see also Lujan v. National Wildlife Fed.*, 497 U.S. 871, 888 (1990) (“The object of [Rule 56(e)] is not to replace conclusory allegations of the complaint ... with conclusory allegations of an affidavit”); *see also Salas v. Carpenter*, 980 F.2d 299, 305 (5th Cir. 1992).

<sup>124</sup>*Fercus v. Mario Palazzo et al.*, U.S. Dist. LEXIS 11086; 2000 Westlaw 1118925, available at <http://cisgw3.law.pace.edu/cases/000808u1.html> (no issue of fact entitled defendant to summary judgment); *Barbara Berry, S.A. de C.V. v. Ken M. Spooner Farms, Inc.*, 2006 WL 1009299 (W.D. Wash.) also available at <http://cisgw3.law.pace.edu/cases/060413u1.html> (exclusionary clause in contract is valid and precludes Plaintiff's breach of contract claim and summary judgment was granted).

<sup>125</sup>Fed. R. Civ. P. 56(e).

<sup>126</sup>Fed. R. Civ. P. 56(d).

<sup>127</sup>*Burgos v. Hopkins*, 14 F.3d 787, 789 (2d Cir. 1994); *Topalian v. Ehrman*, 954 F.2d 1125, 1131 (5th Cir. 1992), *cert. denied*,—U.S.—, 113 S. Ct. 82 (1992); *see Harris v. H&W Contracting Co.*, 102 F.3d 516, 518 (11th Cir. 1996); *Walton v. Alexander*, 44 F.3d 1297, 1301 (5th Cir. 1995) (en banc).