

Third Circuit Addresses Effect of Article 96 Declaration Under the CISG

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The *United Nations Convention on Contracts for the International Sale of Goods* ("CISG")¹ allows private actors from different CISG Contracting States² to transact business without having to reduce their agreements to writing.³ This "freedom from form" has been described as a bedrock principle of international commercial law.⁴ However, this freedom from the requirement of a written contract is not absolute. The CISG also allows Contracting States to require that contracts for the sale of goods be in writing.⁵ But what happens when one party to a contract is from a Contracting State that requires a written contract, and another party is from a Contracting State that allows non-written contracts? Recently, the Third Circuit Court of Appeals was forced to address this question in *Forestal Gurani S.A. v. Daros International, Inc.*⁶

The case concerned the sale of softwood lumber products by Forestal Guarani (an Argentine company) and Daros International (a New Jersey-based importer). Forestal alleged that in 1999, it entered into an oral

agreement with Daros to sell wooden finger joints valued at US\$1.8 million. Daros subsequently paid Forestal US\$1.4 million. Forestal brought an action in New Jersey Superior Court seeking the balance it claimed was owed under the contract. That action was subsequently removed to the District Court for the District of New Jersey.

Before the District Court, the parties agreed that the transaction was governed by the CISG.⁷ Daros claimed that because Forestal was an Argentine company, and Argentina had filed a reservation under article 96 of the CISG (thereby requiring that all contracts be in writing), Forestal could not prevail because there was no written contract between Daros and Forestal. The District Court agreed with Daros, and Forestal appealed to the Third Circuit.⁸

Only one previous US case (at the district court level) had addressed a situation where only one party to a contract under the CISG is from a Contracting State that requires written contracts.⁹ Foreign courts have



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1. Apr. 11, 1980, S. Treaty Doc. No.98-9 (1984), 19 I.L.M. 671 (1980) [hereinafter CISG], *codified at* 15 USC App. (1998).

2. A list of those countries that have joined the CISG is maintained at: http://www.uncitral.org/uncitral/en/uncitral_texts/sale_goods/1980CISG_status.html.

3. CISG, *supra* note 1, art. 11 (stating "A contract of sale need not be concluded in or evidenced by writing and is not subject to any other requirement as to form. It may be proved by any means, including witnesses.")

4. See Henry Mather, "Choice of Law for International Sales Issues Not Resolved by the CISG," 20 J.L. & Com. 155, 158 (2000-2001).

5. Article 96 of the CISG allows states to exclude the effect of article 11, or other CISG provisions that allow a contract to be formed or modified without a written document:

A Contracting State whose legislation requires contracts of sale to be concluded in or evidenced by writing may at any time make a declaration in

accordance with article 12 that any provision of article 11, article 29, or Part II of this Convention, that allows a contract of sale or its modification or termination by agreement or any offer, acceptance, or other indication of intention to be made in any form other than in writing, does not apply where any party has his place of business in that State.

6. No. 08-4488 (3d Circuit, filed July 21, 2010).

7. *Forestal Gurani S.A. v. Daros International, Inc.*, Civ. Action No. 03-4821, 2008 WL 4560701, at *4 (D. N.J. Oct. 7, 2008).

8. Daros did not participate in the proceedings before the Third Circuit.

9. See *Zhejiang ShaoxingYongli Printing & Dyeing Co., v. Microfleck Textile Group Corp.*, 2008 WL 2098062 (S.D. Fla. May 19, 2008) (Holding that China's article 96 declaration created the effect that all contracts under the CISG between a Chinese and US company must be in writing).

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split on the issue, with some adopting the position that where one party is from a Contracting State requiring written contracts, that requirement should prevail.¹⁰ Scholars on the subject have also split, though the majority view is that the writing requirement of one Contracting State need not necessarily prevail over the absence of such a requirement in another Contracting State when dealing with a dispute under the CISG.¹¹

The Third Circuit reversed the finding of the District Court, siding with the “majority view” with respect to article 96 of the CISG. That Argentina requires a written contract under the CISG does not mean that the Forestal-Daros contract is unenforceable. In reaching this conclusion, the Third Circuit found that Argentina’s reservation under article 96 of the CISG simply meant that the issue of whether a written contract is required is not “settled” under the CISG.¹² The Third Circuit then turned to article 7(2) of the CISG, which states:

Questions concerning matters governed by this Convention which are not expressly settled in it are to be settled in conformity with the general principles on which it is based or, in the absence of such principles, in conformity with the law applicable by virtue of the rules of private international law.

The court found that the “general principles” of the CISG did not resolve the dispute over whether an enforceable contract existed, and that a private international law (conflict of law) analysis of whose law (Argentina or the United States) applies would be needed to resolve the dispute.¹³ Ultimately, the Third Circuit remanded the matter to the District Court to perform the conflict of law analysis to determine whether a written contract is required in order for Forestal to recover.

Key Considerations Going Forward

- A number of Contracting States have excluded the effect of article 11 of the CISG, including Argentina, China, Chile, Hungary, Lithuania, Paraguay, Russia and Ukraine. US companies entering into contracts governed by the CISG with parties from these countries should take steps to properly document their contracts in the event disputes arise.

- In the event of a dispute over an unwritten contract governed by the CISG with a company from a country that has an article 96 reservation, the contract may still be enforceable in US court. This will depend on a choice of law analysis, and may include factors such as the place of contracting; the place of performance of the contract; the location of the subject matter of the contract, and the nationalities of the parties.
- Parties contracting under the CISG may wish to include a choice of law clause that references a jurisdiction favorable to nonwritten contracts or contract amendments, especially if, in practice, the contract may be subject to such nonwritten changes.

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10. See Louis F. Del. Duca, “Implementation of Contract Formation Statute of Frauds, Parol Evidence, and Battle of the Forms CISG Provisions in Civil and Common Law Countries,” 25 J.L. & Com. 133 138-39 (2005) (citing decisions by courts in Russia and Belgium).

11. See Mather, *supra* note 4, at 167-68.

12. Forestal, *supra* note 1, at 13.

13. *Id.* This conclusion by the Third Circuit was interesting given the contention by some that the freedom from the needs of a written contract is a key principle governing the interpretation of the CISG: see Mather, *supra* note 4, at 158 (“... some of the most important principles underlying the CISG are adjudicative standards that encourage tribunals to decide cases in ways that facilitate trade. Commentators have identified a number of such principles... international sales contracts should not be subject to writing requirements or other formal requirements ...”).