



UNITED STATES DISTRICT COURT  
SOUTHERN DISTRICT OF NEW YORK

-----X  
CEDAR PETROCHEMICALS, INC.,  
Plaintiff,

-v-

DONGBU HANNONG CHEMICAL CO., LTD.,  
Defendant.  
-----X

06 Civ. 03972 (AJN)

OPINION

ALISON J. NATHAN, District Judge:

Plaintiff Cedar Petrochemicals, Inc. (“Cedar”), brought this breach of contract action against Defendant Dongbu Hannong Chemical Co., Ltd. (“Dongbu”), alleging that Dongbu had delivered non-conforming liquid phenol, in violation of the parties’ written and oral contracts and in contravention of its obligations under the Convention on Contracts for the International Sale of Goods, Apr. 11, 1980, S, Treaty Doc. No. 98–9 (1983), 19 I.L.M. 671 (1980), reprinted at 15 U.S.C. App. (1998) (“CISG” or the “Convention”). A nonjury trial was held in this action on September 30, October 1, and October 2, 2013.

Pursuant to this Court’s procedures for nonjury trials, the parties submitted the direct testimony of their witnesses by affidavit and their documentary evidence with the joint pretrial order. The Court received direct examination declarations from seven Plaintiff witnesses: Martin East (“East”), J.N.A. van de Giesen (“van de Giesen”), Fernando Irisarri Gonzalez (“Irisarri”), Salim Harfouche (“Harfouche”), John Minton (“Minton”), Charlene Silva (“Silva”), and Cho Yong (“Yong”). Of these declarant witnesses, Minton testified as an expert witness and East testified as both a fact and expert witness. The Court also received deposition designations for two Plaintiff witnesses: Gry Berg-Nilsen (“Berg-Nilsen”) and Stig Egeland (“Egeland”). Finally, the Court received a direct examination declaration from the single Defense witness,

Haolin Chu (“Chu”). Of these witnesses, only East, Irisarri, Harfouche, and Minton were cross-examined live at trial. This opinion represents the Court’s findings of fact and conclusions of law for purposes of Rule 52 of the Federal Rules of Civil Procedure. *See* Fed. R. Civ. P. 52. The findings of fact appear principally in the “Findings of Fact” section, but also appear in the remaining sections of the opinion.

In short, the parties’ dispute relates to a 2005 maritime shipment of the liquid petrochemical phenol. The phenol at issue (“the Phenol”) was transported from its on-shore storage tank in Yusoo, Korea, to Defendant’s ship, the Green Pioneer, which carried it to Ulsan Anchorage, Korea. Once there, the Phenol was transferred from the Green Pioneer to Plaintiff’s ship, the Bow Flora, which carried it to port at Rotterdam, The Netherlands. On arrival at Rotterdam, it was determined that the Phenol was damaged. The parties agree that, in order to demonstrate liability, Plaintiff must prove by a preponderance of the evidence that the Phenol was injured before it passed the rail of the Bow Flora. Plaintiff conceded that, for it to make the requisite showing under the facts of this case, the Court must be persuaded by its experts’ theory regarding “seeding,” which they argue explains the delay between the alleged injury to the Phenol and the manifestation of the damage to the Phenol, i.e., its discoloration. On this factual point, the Court was unpersuaded. Accordingly, judgment will be entered in favor of Defendant.

## **I. FINDINGS OF FACT**

After a protracted discovery period, all discovery in this matter closed on April 30, 2013. The parties’ Joint Proposed Pretrial Order (“JPTO”), proposed findings of fact and conclusions of law, and other pretrial materials were submitted on July 17, 2013. The Court also received amended proposed findings of fact and conclusions of law and post-trial briefing on October 9, 2013. Based on the evidence presented at trial, the facts stipulated to in the JPTO and the

Court's assessment of the credibility and demeanor of the witnesses and the inferences reasonably to be drawn there from, the Court makes the following findings of facts. Cites to the JPTO signify stipulated facts.

**A. The Parties and Jurisdiction**

Cedar is a corporation engaged in the business of buying and selling liquid petrochemical products, including phenol, and is organized and exists under and by virtue of the laws of the State of New York, with its principal place of business in New York, New York. JPTO ¶¶ 1, 2. Dongbu is a corporation engaged in the business of manufacturing and selling petrochemical products, and is organized and exists under and by virtue of the laws of Korea, with its principal place of business in Seoul, Korea. JPTO ¶¶ 3, 4. Based on the parties' diversity of citizenship, and with a statutorily sufficient amount in controversy, the Court has jurisdiction over this matter under 28 U.S.C. § 1332. *See also Cedar Petrochemicals, Inc. v. Dongbu Hannong Chem. Co., Ltd.*, No. 06 Civ. 3972 (LTS), 2011 WL 4494602, at \*1 (S.D.N.Y. Sept. 28, 2011).

**B. Phenol**

The liquid petrochemical at issue in this dispute is the polymer phenol (hydroxybenzene, C<sub>6</sub>H<sub>5</sub>OH). Pure phenol is a white, crystalline solid at room temperature, which liquefies at around 41°C. JPTO ¶ 11. In its liquid or "molten" form -- which is the form in which it is generally transported -- pure phenol is a clear, colorless liquid. Phenol is susceptible to discoloration in both its liquid and solid states. Phenol discoloration is measured using the Hazen units ("HU") on the Platinum-Cobalt Scale ("Pt/Co Scale"). Silva Decl. ¶ 12; Yong Decl. ¶ 10; Exhibits 2-3. Commercially, phenol discoloration is problematic because most of the applications for phenol, e.g., compact discs, airplane windows, and car optics, require the phenol to be colorless, or under 10 HU. PX 68 App'x 4.3; Minton Decl. ¶ 19.

The universe of causes of color change in phenol is not defined, but it is accepted that among such causes are manufacturing defects, contamination, and exposure to heat. JPTO ¶ 12, 13; Tr. 300; DX FF. Neither party contends that there was a manufacturing defect in this case. Phenol discoloration through contamination can occur as a result of the presence of impurities in the phenol; “discoloration is promoted by the action of water, light, air, and catalysts, e.g., traces of iron and copper.” JPTO ¶¶ 12, 13; DX FF. Liquid phenol may also discolor as a result of exposure to heat, though there is some disagreement in the petrochemical industry and the scientific community as to the precise temperature at which heat exposure can or will result in such discoloration. Additionally, “[w]hen stored as a solid in the original drum or in nickel, glass-lined, or tanks lined with baked phenolic resin, phenol remains colorless for a number of weeks,” JPTO ¶ 14; DX FF, but “may acquire a yellow, pink, or brown discoloration.” JPTO ¶ 15; DX FF.

To avoid discoloration, experts in the field recommend that phenol be transported and stored in its liquid form. The generally recommended temperature ranges vary from 50°C to 60°C, JPTO ¶¶ 16, 17, 18, and Minton testified that “[i]n the petrochemical industry, phenol is stored and shipped as a bulk liquid at temperatures ranging from 50°C C to 60°C.” Minton Decl. ¶ 20. Here, however, the parties’ agreement (discussed below) called for the Phenol to be shipped at a temperature between 50°C and 55°C. Tr. 57-58; DX TT. On cross examination, Minton claimed that storage at any point within this range would not generally cause discoloration and that storage anywhere within the 50°C to 55°C range was equally acceptable. Tr. 300-301. This testimony contradicted his prior testimony at his deposition, where he stated both that phenol could only be “heat[ed] to 60°C for a very short time without a problem,” Minton Decl. 84:19-21, and that “in general, the lower the temperature in the 50°C to 55°C range

the better.” *Id.* at 86:21-22. Overall, the testimony established that phenol discoloration is neither a well understood or fully established topic. Minton acknowledged that phenol color change is generally “a very poorly understood subject,” Tr. 299:5-8, both “by [himself] and others,” 299: 10-13, and that this is true “even with a great deal of research,” Tr. 299:5-8. And East acknowledged that “the cause of color degradation in Phenol has been a contentious issue for over 100 years.” Tr. 60:13-17.

### C. The Contract

Unless otherwise noted, the parties have stipulated to the following facts with regard to the contract. In May 2005, a representative from Kumho -- a phenol manufacturer that arranges sales via export agents, including Dongbu -- and a representative from Cedar’s local agent in Korea, H.V. Co., Ltd., met at a restaurant in Seoul. JPTO ¶¶ 6, 7, 8. At that meeting, Kumho proposed that Dongbu and Cedar be principal parties to a proposed sale of 2,000 metric tons (“mt”) of phenol. JPTO ¶ 9. Dongbu agreed that it would enter into a contract with Cedar by which it would sell 2,000 mt +/- 5% of liquid phenol conforming to Kumho’s Standard Guaranteed Sales Specifications (“Specs”) delivered FOB Ulsan Anchorage, in exchange for \$950/mt. Shortly thereafter, on May 17, 2005, Cedar faxed to Dongbu Contract No. T250-P1-0505NYC (the “Written Contract”) which called for the purchase and sale of “2,000 MTS +/- 5% Seller’s Option.” This contract was drafted by Cedar, and signed and stamped by Dongbu. JPTO ¶¶ 20, 21.

Among other things, the Written Contract provided: (1) that the agreement would be governed by “Incoterms 2000 as amended to date,” (“Incoterms”); (2) that “[the] agreement [would be] subject to [Plaintiff’s] standard terms and conditions,” which were attached and incorporated by reference; (3) that “[i]n the event of a conflict between the terms of th[e]

# Explore Litigation Insights

Docket Alarm provides insights to develop a more informed litigation strategy and the peace of mind of knowing you're on top of things.

## Real-Time Litigation Alerts



Keep your litigation team up-to-date with **real-time alerts** and advanced team management tools built for the enterprise, all while greatly reducing PACER spend.

Our comprehensive service means we can handle Federal, State, and Administrative courts across the country.

## Advanced Docket Research



With over 230 million records, Docket Alarm's cloud-native docket research platform finds what other services can't. Coverage includes Federal, State, plus PTAB, TTAB, ITC and NLRB decisions, all in one place.

Identify arguments that have been successful in the past with full text, pinpoint searching. Link to case law cited within any court document via Fastcase.

## Analytics At Your Fingertips



Learn what happened the last time a particular judge, opposing counsel or company faced cases similar to yours.

Advanced out-of-the-box PTAB and TTAB analytics are always at your fingertips.

## API

Docket Alarm offers a powerful API (application programming interface) to developers that want to integrate case filings into their apps.

## LAW FIRMS

Build custom dashboards for your attorneys and clients with live data direct from the court.

Automate many repetitive legal tasks like conflict checks, document management, and marketing.

## FINANCIAL INSTITUTIONS

Litigation and bankruptcy checks for companies and debtors.

## E-DISCOVERY AND LEGAL VENDORS

Sync your system to PACER to automate legal marketing.