

sued the Health Center for breach of warranty. Does the claim involve the sale of goods or services? [*Brandt v. Boston Scientific Corp.*, 792 N.E.2d 296 (Ill. 2003).]

- 8.2** Joseph Boud visited Wasatch Marine, a Salt Lake City retailer run by SDNCO, Inc., which sells yachts manufactured by Cruisers Yachts. During the visit, Wasatch gave Boud a copy of Cruisers' sales brochure, which included a photograph of Cruisers' 3375 Esprit model apparently moving at a high rate of speed. The photograph had the following caption:

Offering the best performance and cruising accommodations in its class, the 3375 Esprit offers a choice of either stern drive or inboard power, superb handling and sleeping accommodations for six.

Based in part on the photo and caption, Boud took a test-drive and signed a contract to purchase a 3375 Esprit model yacht for more than \$150,000. During the test-drive and a subsequent test-drive a week later, the yacht manifested several electrical and mechanical problems. Pursuant to a limited warranty in its sales contract, Wasatch serviced the yacht and attempted to fix the problems. After the problems persisted during a third test-drive, Boud sought to cancel the sales contract. Cruisers responded by offering to repair or replace the defective parts in accordance with its limited warranty. Boud filed a lawsuit seeking rescission on the basis that the photograph and caption were themselves an express warranty and that Cruisers and Wasatch had breached this warranty.

How will Wasatch respond? Will the court find in favor of Boud or the defendant? On what basis? [*Boud v. SDNCO, Inc.*, 54 P.3d 1131 (Utah 2002).]

- 8.3** Hardie-Tynes Manufacturing Company subcontracted with Hunger United States Special Hydraulic Cylinders Corporation to manufacture two hydraulic cylinders to be used in construction of the Jordanelle Dam in Utah. Hardie-Tynes requested quotations for Hunger's best price for the two cylinders, and Hunger responded with a letter providing specific quantity, price, delivery, and payment terms. Both parties agreed that this constituted an offer to contract. A copy of Hunger's standard terms and conditions, which included a provision purporting to specify a mode of acceptance and limiting acceptance to Hunger's terms, accompanied the offer. None of the terms related to payment of attorneys' fees in the event of a contract dispute.

Hardie-Tynes accepted Hunger's offer by sending a purchase order, which required payment of attorneys' fees in the event that Hardie-Tynes commenced litigation upon Hunger's default. Like Hunger, Hardie-Tynes limited the agreement to its own terms.

The cylinders manufactured by Hunger did not comply with government standards. Hardie-Tynes sued Hunger for breach of contract and claimed that it was entitled to recover attorneys' fees.

Did Hunger and Hardie-Tynes enter into a contract? If so, what were its terms? Would your answer differ if

the transaction were governed by CISG? [*Hunger United States Special Hydraulic Cylinders Corp. v. Hardie-Tynes Manufacturing Co.*, 41 U.C.C. Rep. Serv. 2d 165 (10th Cir. 2000).]

- 8.4** Aquila, a public utility that produces electrical power, contracted with C.W. Mining for C.W. to provide Aquila with 1,550,000 tons of coal during the years 2004–2006. The contract contained a force majeure clause, which provided:

The term "force majeure" as used herein shall mean any and all causes beyond the reasonable control of the party failing to perform, including but not limited to Acts of God; . . . labor disputes; boycotts; lockouts; labor and material shortages; . . . breakdowns of or damage to plants, equipment, or facilities; . . . or other causes of a similar nature which wholly or partly prevent or make unreasonably costly (i) the mining, delivering, or loading of the coal by Seller; or (ii) the receiving, transporting, accepting or utilizing of the coal by Buyer at the station. To be considered unreasonable such increased costs must be substantial and sustained so that mining is no longer possible. This section shall not be construed to require either party to prevent, settle or otherwise avoid or terminate a strike, work slowdown, or similar labor action.

The provision also required that written notice of the force majeure be given.

Less than a week after signing the contract, C.W. was hit by a labor strike that continued for two years. In addition, C.W. suffered several roof collapses, necessitating the closure of two of its mines. C.W. notified Aquila that it considered the strike a force majeure event and that its coal shipments would be reduced as a result; however, C.W. never notified Aquila that it considered the geological issues that led to the collapse of the roofs in the mines to be a force majeure event. Aquila accepted the coal that C.W. was able to deliver and purchased the remainder of the coal it required on the spot market, but it sent C.W. a letter stating that it did not excuse C.W. from its obligations under the contract. Almost a year later, C.W. informed Aquila of its intent to cancel the contract entirely, citing the force majeure provision. After the cancellation, Aquila entered into a long-term contract with Consolidated Coal under terms that were less favorable to Aquila, including higher prices for coal with higher sulfur content. Aquila sued C.W. for damages incurred as a result of C.W.'s nonperformance under the contract. How should C.W. respond? What will be the result? [*Aquila, Inc. v. C.W. Mining*, 545 F.3d 1258 (10th Cir. 2008).]

- 8.5** In 1991, Brian Yarusso catapulted over the handlebars of his off-road motorcycle while traveling over a series of dirt moguls at a dirt motocross track in Newark, Delaware. He landed on his head, flipped over, and came to rest face down in the dirt. As a result of the accident, Yarusso suffered quadriplegia. Yarusso was wearing a full complement of safety equipment, including a Bell Moto-5 helmet, a full-face motocross helmet designed for off-road