



Global Business & Development Law Journal

Volume 7

Issue 1 Symposium: *Doing Business in Central and Eastern Europe*

Article 11

1-1-1994

Filanto S.p.A. v. Chilewich Int'l Corp.: Sounds of Silence Bellow Forth under the CISG's International Battle of the Forms

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Recommended Citation

Gary K. Nakata, *Filanto S.p.A. v. Chilewich Int'l Corp.: Sounds of Silence Bellow Forth under the CISG's International Battle of the Forms*, 7 *TRANSNAT'L LAW* 141 (1994).

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***Filanto S.p.A. v. Chilewich Int'l Corp.:*
Sounds of Silence Bellow Forth Under the
CISG's International Battle of the Forms**

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I. INTRODUCTION

In fall 1993, an agreement and a crucial tariff reduction opened the market for export of Washington State apples to China.¹ This will be the first U.S. com-

1. Joe Haberstroh, *Ripe for the Exporting—State Industry Eyes a Possibly Fruitful China Market with Growing Anticipation, Caution*, SEATTLE TIMES, Feb. 6, 1994, at D1. China represents a market of 1.2 billion people. *Id.*

mercial fruit shipment to China since 1949.² Overnight, Washington State apple growers became international commodity exporters.³ While the growers were figuring out what grade and shade of apples the Chinese liked, their accountants and bankers were no doubt arranging financing and credit. Can the lawyers be far behind? If they are not, growers may suffer the same fate as Filanto, S.p.A. (Filanto), an Italian shoe manufacturer, which recently lost an action in New York involving the U.N. Convention on the International Sale of Goods (CISG).⁴

*Filanto S.p.A. v. Chilewich Int'l Corp.*⁵ is the first U.S. judicial interpretation of the CISG, and demonstrates that not understanding the nuances of the CISG can cause major misinterpretations and affect the outcome of any case involving the convention. In the case, Filanto brought suit for breach of contract against Chilewich International Corporation (Chilewich), a New York international trading firm.⁶ The key issue presented was whether an agreement to arbitrate existed between the parties.⁷ The court, applying the CISG, held that such an agreement did exist.⁸ Why has the CISG suddenly been thrust into the forefront of international law? This article proposes a reason, then explains the convention's background before analyzing the case.

The world economic community is changing at a pace faster than ever before. New technology in transportation and communication spurs the growth of commerce on a global scale.⁹ In 1992, world imports and exports totaled over \$7533 billion.¹⁰ The interdependent structure of the world economy suggests the need

2. *Id.*

3. *Id.*

4. *The United Nations Convention on Contracts for the International Sale of Goods*, U.N. Doc. A/CONF.97/18, Annex 1 [hereinafter CISG], in *United Nations Conference on Contracts for the International Sale of Goods: Documents of the Conference and Summary Records of the Plenary Meetings and of the Meetings of the Main Committee*, Official Records, U.N. Doc. A/CONF.97/19, U.N. Sales No. E.81.IV.3 (1981). CISG signatories include Argentina, Australia, Austria, Bulgaria, Belarus, Canada, Chile, China, Czechoslovakia, Denmark, Ecuador, Egypt, Finland, France, Germany, Ghana, Guinea, Hungary, Iraq, Italy, Lesotho, Mexico, the Netherlands, Norway, Poland, Romania, the Russian Federation, Singapore, Spain, Sweden, Switzerland, the Syrian Arab Republic, Uganda, Ukraine, the United States, Venezuela, Yugoslavia, and Zambia. *Multinational Treaties Deposited with the Secretary General as of 31 December 1992*, at 364, U.N. Doc. ST/LEG/SER.E/11 (1993).

5. *Filanto, S.p.A. v. Chilewich Int'l Corp.*, 789 F. Supp. 1229 (S.D.N.Y. 1992), *appeal dismissed*, 984 F.2d 58 (2d Cir. 1993).

6. *Filanto*, 789 F. Supp. at 1230.

7. *Id.* at 1235.

8. *Id.* at 1239.

9. Arthur Rosett, *Critical Reflections on the United Nations Convention on Contracts for the International Sale of Goods*, 45 OHIO ST. L.J. 265, 266 (1984) (discussing advantages of global unification of international sales law).

10. DIRECTION OF TRADE STATISTICS YEARBOOK 2, 3 (1993) (International Monetary Fund). In 1992, world imports were valued at U.S.\$3846 billion, representing one-year growth of 8% and five-year growth of 60%. *Id.* At the same time, world exports were valued at U.S.\$3687 billion, representing one-year growth of 7% and five-year growth of 57%. *Id.* U.S. imports for the same period amounted to \$553 billion, representing one-year growth of 9% and five-year growth of 30%. *Id.* Meanwhile, U.S. exports amounted to \$447 billion, representing one-year growth of 6% and five-year growth of 77%. *Id.* The International Monetary Fund

for a unified set of legal rules to govern transactions in goods all over the world.¹¹ While international traders share many of the same difficulties with domestic traders, problems with delivery, party rights and obligations, and choice of law are magnified due to differences in culture, language, and distance between parties.¹² Due to the risk of misunderstanding, and the need for predictability in determining legal costs, considerable emphasis and time is often allocated to choice of law concerns during negotiations between multinational traders of goods.

In the typical international business deal, choice of law and other legal issues are decided after the crux of the bargain is negotiated.¹³ While the parties celebrate their new found business, their lawyers are left to work out the details.¹⁴ Due to an unfamiliarity with foreign law, as well as other self-interested reasons, each side rejects the other side's law and demands its own law.¹⁵ The usual compromise is the law of some neutral third country.¹⁶

Absent an agreement on the choice of law, international sales are governed by the law of the state that has the most significant contact with the transaction, such as the place where the contract was formed.¹⁷ The problem is that domestic conflict of law rules may fail to clearly indicate which body of national law should be applied. This may result in each state applying a different set of rules

Yearbook did not differentiate between sales of goods and services. *Id.*

11. Rosett, *supra* note 9, at 267.

12. Jack G. Stern, *Note: A Practitioner's Guide to the United Nations Convention on Contracts for the International Sale of Goods*, 16 N.Y.U. J. INT'L L. & POL. 81, 83 (1983) (comparing differences between the CISG and the UCC).

13. B. Blair Crawford, *Drafting Considerations Under the 1980 United Nations Convention on Contracts for the International Sale of Goods*, 8 J.L. & COM. 187, 189 (1988) (reviewing various contract drafting techniques for use when the CISG is involved).

14. *Id.*

15. *Id.*

16. *Id.*

17. James E. Joseph, *Contract Formation Under the United Nations Convention on Contracts for the International Sale of Goods and the Uniform Commercial Code*, 3 DICK. J. INT'L L. 107, 108 (1984) (promoting uniformity in international sales law). Other factors that can be used to decide which state has the most contact with the transaction are the place where contract negotiation occurred; the place where the contract is to be performed; the place where the subject matter of the contract is located; and the parties' domicile, residence, nationality, place of incorporation, and place of business. *See* RESTATEMENT (SECOND) OF CONFLICT OF LAWS § 188 (1969). Section 188 provides:

In the absence of an effective choice of law by the parties, the contacts to be taken into account . . . include:

- (a) the place of contracting,
- (b) the place of negotiation of the contract,
- (c) the place of performance,
- (d) the location of the subject matter of the contract, and
- (e) the domicile, residence, nationality, place of incorporation and place of business of the parties.

Id.

under identical circumstances.¹⁸ Consequently, the transnational practitioner risks litigation involving an unfamiliar area of law.¹⁹ The CISG provides international traders with a ready compromise on choice of law, allowing predictability as well as reducing the time and costs of negotiating the choice of law.²⁰ Given the advantages, and continued growth in international trade, it is no wonder that the CISG has enjoyed increasing popularity.²¹

This article reviews *Filanto S.p.A. v. Chilewich Int'l Corp.*,²² the first U.S. judicial interpretation of the CISG, and demonstrate that failing to understand the nuances of the international treaty can cause major misinterpretations and affect the outcome of any case involving the convention. To lay a foundation, part II explores the CISG's history and scope.²³ Part III compares the battle of the forms doctrine under the common law, the Uniform Commercial Code (UCC), and the CISG.²⁴ Part IV then details the facts of *Filanto* and the court's reasoning and interpretation of the CISG.²⁵ Next, part V critiques the court's opinion and offers alternative resolutions.²⁶ Finally, part VI concludes with some thoughts on CISG interpretation.²⁷

II. THE CISG

A. History of the CISG

The development of the CISG began over fifty years ago in Europe with the goal of drafting a generally acceptable uniform law on international sales.²⁸ The project's genesis was provided by Benito Mussolini, then dictator of Italy, who offered the League of Nations the necessary backing for an institution in Rome that would work on the unification of the law.²⁹ In 1930, the United Nations International Institute for the Unification of Private Law (UNIDROIT) formed a committee of experts to prepare a draft of uniform law on the international sale

18. Joseph, *supra* note 17, at 108.

19. *Id.*

20. Stern, *supra* note 12, at 83.

21. Joseph, *supra* note 17, at 107-08; V. Suzanne Cook, *The Need for Uniform Interpretation of the 1980 United Nations Convention on Contracts for the International Sale of Goods*, 50 U. PITT. L. REV. 197, 198 (1988) (promoting uniform interpretation of the CISG).

22. *Filanto*, 789 F. Supp. at 1237.

23. See *infra* notes 28-68 and accompanying text.

24. See *infra* notes 69-97 and accompanying text.

25. See *infra* notes 98-143 and accompanying text.

26. See *infra* notes 144-88 and accompanying text.

27. See *infra* notes 189-98 and accompanying text.

28. JOHN O. HONNOLD, UNIFORM LAW FOR INTERNATIONAL SALES UNDER THE 1980 UNITED NATIONS CONVENTION 49 (1982); Peter Winship, *The Scope of the Vienna Convention on International Sales Contracts*, in INTERNATIONAL SALES: THE UNITED NATIONS CONVENTION ON CONTRACTS FOR THE INTERNATIONAL SALE OF GOODS 1-2, 1-4 (Nina M. Galston & Hans Smit eds., 1984).

29. Joseph, *supra* note 17, at 109.

of goods.³⁰ The experts came from France, Germany, England, and Scandinavia, and represented four principal systems of law found in the world: the Anglo-American, Latin, Germanic, and Scandinavian systems.³¹ Preliminary drafts of uniform law for the international sale of goods were produced in 1935 and 1939.³² Meanwhile in 1934, the UNIDROIT formed another committee, made up of representatives from Austria, France, Great Britain, Italy, Peru, and Sweden, to draft international law on the formation of contracts.³³ This committee produced a draft outlining international law on the formation of contracts in 1936.³⁴

The work of both committees came to a halt with the advent of World War II, but not without making significant contributions to what one day would be the CISG.³⁵ For example, rather than modifying or piecing together rules from then-existing sales law, the drafters decided to write a whole new text.³⁶ Secondly, the drafters restricted the uniform law to international sales only; feeling that extending the law to domestic sales would make it more difficult for states to adopt the text.³⁷ Lastly, the drafters recognized the principle of party autonomy, whereby parties to a contract are expressly allowed to exclude application of the uniform law, or derogate from any of its provisions, even if the contract fell within the scope of the uniform law.³⁸

After World War II, and throughout the 1950s and early 1960s, work continued on both texts.³⁹ In 1964, the government of the Netherlands sponsored an international conference of twenty-eight nations to meet at the Hague.⁴⁰ While the United States and several Eastern European countries participated, most of the delegates were from Western Europe.⁴¹ After three tension-filled weeks, the conference adopted two conventions, the Uniform Law on the International Sale of Goods (ULIS) and the Uniform Law on the Formation of Contracts (ULF).⁴² These conventions formally went into effect in 1972 after ratification by five nations.⁴³

30. Winship, *supra* note 28, at 1-4; HONNOLD, *supra* note 28, at 49.

31. Winship, *supra* note 28, at 1-5.

32. *Id.*; HONNOLD, *supra* note 28, at 49.

33. Winship, *supra* note 28, at 1-6.

34. *Id.* at 1-6 n.8 (citing the 1936 text on formation: Preliminary Draft of a Uniform Law on International Contracts Made by Correspondence, reprinted in UNIDROIT, *Unification of Law: 1948*, at 160-67 (1948)).

35. Winship, *supra* note 28 at 1-6.

36. *Id.*

37. *Id.* at 1-6 to 1-7.

38. *Id.* at 1-7.

39. *Id.* at 1-8 to 1-9; HONNOLD, *supra* note 28, at 49.

40. Winship, *supra* note 28, at 1-9; HONNOLD, *supra* note 28, at 49.

41. Winship, *supra* note 28, at 1-9.

42. *Id.*; HONNOLD, *supra* note 28, at 49.

43. Winship, *supra* note 28, at 1-13; HONNOLD, *supra* note 28, at 49. The ULIS was ratified by Belgium, Gambia, Germany, Israel, Italy, the Netherlands, San Marino, and the United Kingdom. Winship, *supra* note 28, at 1-13 n.25. The ULF was ratified by the same countries with the exception of Israel. *Id.*

Meanwhile in 1968, the United Nations Commission on International Trade Law (UNCITRAL) surveyed world governments as to whether widespread adoption of the ULIS and ULF was feasible.⁴⁴ The response was negative.⁴⁵ As one commentator noted:

Not only were there complaints about the sphere of application but there was criticism of the abstractness of several key concepts and the failure to take into account the interests of many third world and socialist countries which had not participated in the 1964 Conference [that led to the development of the ULIS and ULF].⁴⁶

Based on the above, the UNCITRAL concluded that widespread adoption of the ULIS and ULF was not possible, and assembled a working group comprised of a cross section of fourteen world members to prepare a new text.⁴⁷

Over the course of nine meetings between 1970 and 1978, the group revised the concepts underlying the ULIS and ULF, and combined the results into a new text dealing with both contract formation and parties' rights.⁴⁸ Thereafter, the UNCITRAL presented the text to the United Nations General Assembly with a recommendation that a diplomatic conference be assembled to consider the text.⁴⁹ The General Assembly accepted the recommendation and called a convention in Vienna during the spring of 1980.⁵⁰ On April 11, 1980, after considerable debate and several amendments, delegates from sixty-two countries and eight international organizations adopted the UNCITRAL text, later called the CISG.⁵¹ Thereafter, the CISG entered into force on January 1, 1988.⁵²

44. Winship, *supra* note 28, at 1-13; HONNOLD, *supra* note 28, at 53. The UNCITRAL, created in 1966 to unify international trade law, conducted the survey in anticipation that the two conventions would not meet with worldwide acceptance. *Id.*

45. Honnold, *supra* note 28, at 53.

46. Winship, *supra* note 28, at 1-12.

47. *Id.* at 1-13. This new text was based on the ULIS and ULF, but went further by incorporating the concerns of countries with different legal, social, and economic systems, in the hope of assuring widespread adoption. *Id.*; HONNOLD, *supra* note 28, at 53. The initial members of the working group were Brazil, France, Ghana, Hungary, India, Iran, Japan, Kenya, Mexico, Norway, Tunisia, the Soviet Union, the United Kingdom, and the United States. *Id.* at 54 n.9.

48. Winship, *supra* note 28, at 1-14; HONNOLD, *supra* note 28, at 53. Combining the concepts of contract formation and parties' rights into one text was due to the group's goal of wide international acceptance of the new text. John Honnold, *The Draft Convention on Contracts for the International Sale of Goods: An Overview*, 27 AM. J. COMP. L. 223, 226 (1979) (discussing the CISG draft).

49. Winship, *supra* note 28, at 1-14.

50. *Id.*

51. *Id.*

52. Maureen T. Murphy, *United Nations Convention on Contracts for the International Sale of Goods: Creating Uniformity in International Sales Law*, 12 FORDHAM INT'L L.J. 727, 727 n.3 (1989) (promoting uniform ratification of the CISG). The CISG entered into force 13 months after the deposit with the United Nations of instruments of ratification from 11 of the contracting states. *Id.* The ratification of at least 10 states were required for the CISG to enter into force. *Id.* The original signatories were Argentina, China, Egypt, France,

B. Scope of the CISG

Several basic requirements are necessary for the CISG to apply. First, the contract must be executed on or after January 1, 1988. Second, the parties' places of business must be in different countries.⁵³ The countries must also be signatories to the CISG.⁵⁴ For example, if X Inc., with a place of business in France, decides to sell widgets to Y Ltd., with a place of business in Germany, this requirement is met since France and Germany are both signatories to the CISG.

If one of the countries where the business is located is not a signatory, the rules of private international law may still lead to the application of the CISG.⁵⁵ For example, if X Inc. decides to sell to Z Corp., with its place of business in Japan, the CISG may not necessarily apply. This is because Japan is not a signatory and thus does not meet the requirement that both countries be signatories. However, if the choice of law clause in the contract specifies the national law of a country that is a signatory, and if treaties in that country are given greater effect than national law, then the CISG will apply.⁵⁶ For example, in the X-to-Z sale, if the choice of law clause specified French law, and treaties are given greater weight than French national law, then the CISG will apply because France is a signatory.

While the CISG generally states that it covers the sale of goods,⁵⁷ articles 2 and 3 exclude certain items from the definition of goods.⁵⁸ Article 2 excludes

Hungary, Italy, Lesotho, Syria, the United States, Yugoslavia, and Zambia. *Id.* The CISG is a self-executing treaty, meaning that after its ratification in 1986 by the U.S. Senate, the CISG became part of U.S. law merely by virtue of its entering into force on January 1, 1988. *See* CISG, *supra* note 4, art. 99.

53. *See* CISG, *supra* note 4, art. 1(1).

54. *Id.* art. 1(1)(a).

55. *Id.* art. 1(1)(b). A full discussion on the rules of private international law is beyond the scope of this article. For a thorough analysis, see Kenneth C. Randall & John E. Norris, *A New Paradigm for International Business Transactions*, 71 WASH. U. L. Q. 599 (1993). *See also* PETER NORTH, *PRIVATE INTERNATIONAL LAW PROBLEMS IN COMMON LAW JURISDICTIONS* (1993).

56. *See* CISG, *supra* note 4, art. 1(1)(b). Article 1(1)(b) provides that "[t]his convention applies to contracts of sale of goods between parties whose places of business are in different States . . . when the rules of private international law lead to the application of the law of a Contracting State." *Id.*

57. *See* CISG, *supra* note 4, art. 1(1). Because of technicalities associated with diverse translations of the word by different countries and cultures, the CISG provides Rules for borderline cases rather than one general definition of "globe." Winship, *supra* note 28, at 1-25.

58. CISG, *supra* note 4, arts. 2, 3. Article 2 of the CISG provides:

This Convention does not apply to sales:

- (a) of goods 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;
- (b) by auction;
- (c) on execution or otherwise by authority of law;
- (d) of stocks, shares, investment securities, negotiable instruments or money;
- (e) of ships, vessels, hovercraft or aircraft;
- (f) of electricity.

from the CISG's definition of goods those items bought for personal, family, or household use.⁵⁹ This is designed to exclude consumer sales transactions because in some countries, protective rules are narrowly constructed based on the principles of consumer protection, and therefore conflict in principle with the CISG's intentionally broad language.⁶⁰ Article 2 also excludes sales by auction,⁶¹ sales of stock or other negotiable instruments,⁶² sea vessels and aircraft,⁶³ and electricity.⁶⁴ Meanwhile, article 3 excludes mixed contracts in which greater than half of the contract value is for services.⁶⁵ Thus, because the CISG's definition of goods is narrow, one of the transnational practitioner's first steps is to assess the nature of the "goods" involved.

The CISG primarily focuses on contract formation and the parties' rights and obligations.⁶⁶ It does not, however, cover the validity of the contract and issues such as fraud, duress, illegality, and mistake.⁶⁷ Thus, the validity of a contract under the CISG is apt to cause more uncertainty and litigation than any other portion of the contract. Consequently, practitioners who choose the CISG as governing law may want to incorporate express provisions governing contract validity.⁶⁸

Id. art. 2. Article 3 of the CISG provides:

- (1) Contracts for the supply of goods to be manufactured or produced are to be considered sales unless the party who orders the goods undertakes to supply a substantial part of the materials necessary for such manufacture or production.
- (2) This Convention does not apply to contracts in which the preponderant part of the obligations of the party who furnishes the goods consists in the supply of labor or other services.

Id. art. 3.

59. *Id.* art. 2(a).

60. Warren Khoo, *Exclusions from Convention*, in COMMENTARY ON THE INTERNATIONAL SALES LAW 34, 37 (Michael J. Bonnell ed., 1987) (discussing matters which are expressly excluded under the CISG).

61. See CISG, *supra* note 4, art. 2(b). The CISG drafters excluded auctions because they felt auctions were a type of sales transaction that was only of marginal importance in international transactions. Khoo, *supra* note 60, at 37. At an auction, the seller does not know who the successful bidder is until the hammer is down and therefore does not know whether the sale is governed by the CISG. *Id.* If the CISG is exercised in this situation, it would apply in a random fashion, which drafters felt undesirable. *Id.*

62. See CISG, *supra* note 4, art. 2(d). Sales of stock and other negotiable instruments were excluded to accommodate the thinking of legal systems which do not regard commercial paper and money as "goods" and therefore find it unacceptable that such items would be covered by the CISG. Khoo, *supra* note 60, at 38.

63. See CISG, *supra* note 4, art. 2(e). Sea vessels and aircraft were excluded because the sales law of some countries do not include ships, vessels, aircraft, and hovercraft as "goods." Khoo, *supra* note 60, at 38.

64. See CISG, *supra* note 4, art. 2(f). Electricity is not considered a "good" in some legal systems since there are difficulties in attributing to it all the legal qualities of a physical object. Khoo, *supra* note 60, at 38-39.

65. See CISG, *supra* note 4, art. 3(b). Under a mixed contract, a preponderant part of the obligations is the supply of labor and services, with the remainder of the contract for the supply of goods. Khoo, *supra* note 60, at 42. In such a contract, the CISG would be applicable only to that part of the contract pertaining to the supply of goods. *Id.* at 43.

66. Paul C. Blodgett, *The U.N. Convention on the Sale of Goods and the "Battle of the Forms,"* 18 COLO. LAW. 421, 422 (1989) (reviewing the effect of the CISG on the international battle of the forms).

67. *Id.* at 422; Stern, *supra* note 12, at 88.

68. Blodgett, *supra* note 66, at 428.

III. BATTLE OF THE FORMS

For the purposes of this article, and because *Filanto* involved a situation depicting a “battle of the forms,” the following discussion will center on the difference between the CISG and the UCC treatment of the battle of the forms.⁶⁹

The “battle of the forms” is a phrase used by U.S. courts to describe an exchange of forms between two parties which contain different written proposals but are used to memorialize the same transaction.⁷⁰ The battle of the forms occurs both domestically and in the international arena.⁷¹ As one commentator noted:

Parties to international contracts commonly exchange preprinted general conditions forms or standard contracts during contract formation. General conditions forms contain terms often supplied by international trade organizations, to which the parties attach importance. Similarly, standard contracts also refer to internationally recognized trade terms. Both have achieved major importance in international trade.⁷²

When terms on preprinted forms conflict, the problem of determining which term controls the transaction arises. For example, *A* sends *B* a purchase order for 100 widgets, in effect offering to buy 100 widgets. On the back of the purchase order form is fine print stipulating that the law of *A*'s country controls the transaction. Subsequently, *B* agrees to the deal by sending a sales agreement for 100 widgets. On the back of the agreement of sale is also fine print stating that the law governing the transaction is that of *B*'s country. The foregoing example presents many questions, chief among them being whether a contract was even formed, and what law governs the contract if it was formed. As the following sections demonstrate, the common law found in a majority of the United States, the UCC, and the CISG treat the situation differently.

69. Compare U.C.C. § 2-207 (1993) with CISG, *supra* note 4, art. 19(3). UCC § 2-207 prevents parties from using conflicting choice of law clauses to deny the formation of a contract. See Blodgett, *supra* note 66, at 424. Meanwhile, the CISG article 19(3) specifically provides that a difference in choice of law clauses materially affects and prevents the formation of a contract. See CISG, *supra* note 4, art. 19(3).

70. E. ALLAN FARNSWORTH, *CONTRACTS* 170-71 (2d ed. 1990).

71. See Christine Moccia, Comment, *The U.N. Convention on Contracts for the International Sale of Goods and the “Battle of the Forms,”* 13 *FORDHAM INT’L L.J.* 649, 658 (1990) (promoting the use of CISG principles in resolving any international battle of the forms).

72. *Id.*

A. Under the Common Law

Under the common law, to validly accept an offer and create a contract, the acceptance of an offer had to match the offer exactly.⁷³ In other words, the acceptance had to be the “mirror image” of the offer in order to form a contract.⁷⁴ An acceptance that varied from the terms of the offer was not a valid acceptance, and turned the offeree’s response into a counteroffer.⁷⁵ One benefit of the mirror-image rule is that both parties know exactly the terms of the contract.⁷⁶ However, the mirror-image rule is practical only when the transaction is memorialized by one document.⁷⁷ When the sale of goods is completed by the exchange of form contracts, the mirror-image rule becomes an impractical restriction.⁷⁸ In *Poel v. Brunswick-Balke-Collender Co.*,⁷⁹ the buyer added a term to his acceptance of the seller’s offer.⁸⁰ The buyer found the contract contrary to his interests and refused to perform.⁸¹ On appeal, the buyer argued the mirror-image rule, and was allowed to back out of the transaction.⁸² The buyer claimed that one of the terms in his acceptance varied from the terms in the offer, and was allowed to claim there was no contract even though that term did not detract from the substance of the deal.⁸³ *Poel* became a rallying cry for those opposed to the application of the mirror-image rule in contract law.⁸⁴ The opponents of the rule felt it unfair to allow parties to withdraw from unfavorable transactions based on legal technicalities.⁸⁵ As the following section demonstrates, the drafters of the UCC addressed this problem in the UCC article 2, section 2-207.

73. FARNSWORTH, *supra* note 70, at 170.

74. *Id.*

75. *Id.*

76. Blodgett, *supra* note 66, at 424.

77. *Id.*

78. *Id.*

79. *Poel v. Brunswick-Balke-Collender Co.*, 110 N.E. 619 (N.Y. 1915). In the case, plaintiff Poel was attempting to sell rubber to defendant Brunswick. *Id.* at 621-22. Poel sent an offer and Brunswick purportedly accepted with a standard memo form that contained an extra term requiring immediate delivery by Poel. *Id.* at 622. Brunswick then contended that the purported acceptance was actually an offer because it differed from the terms of Poel’s original offer, and thus no contract was formed. *Id.* The court in its opinion agreed with Brunswick and allowed Brunswick to back out of the transaction. *Id.* at 623.

80. *Poel*, 110 N.E. at 623.

81. *Id.*

82. *Id.*

83. *Id.*

84. Robert M. Rosh, *Note: Demilitarizing the Battle of the Forms: A Peace Proposal*, 1990 COLUM. BUS. L. REV. 553, 556 (1990).

85. *Id.*

B. Under the UCC

With a few exceptions, the UCC is a codification of case law which pertains to the rules of U.S. contract law relating to the sale of goods.⁸⁶ The UCC is divided into eleven substantive articles which deal with different areas of commercial law.⁸⁷ Article 2 is of primary concern because it applies to all transactions in goods and is generally the UCC counterpart of the CISG.⁸⁸

UCC article 2, section 2-207(1) states:

A definite and seasonable expression of acceptance or a written confirmation which is sent within a reasonable time operates as an acceptance even though it states terms additional to or different from those offered or agreed upon, unless acceptance is expressly made conditional on assent to the additional or different terms.⁸⁹

This essentially means that a contract is formed even if the acceptance varies materially with the terms of the offer.⁹⁰ The drafters of the UCC skillfully worded the section to prevent parties from using a modified acceptance to deny the formation of a contract.⁹¹ Thus, when two parties have conflicting choice of law clauses, it will not prevent the formation of a contract.⁹² However, as shown below, a different outcome arises under the CISG.

C. Under the CISG

Rather than adopting the approach of the UCC, the drafters of the CISG chose instead to apply a modified mirror-image rule.⁹³ Like the UCC, an acceptance

86. FARNSWORTH, *supra* note 70, at 31. While CISG article 2 defines "goods" by stating what they are not, the UCC defines "goods" by defining what they are. See U.C.C. § 2-105(1) (1993). UCC § 2-105(1) provides that "[a] 'good' means all things (including specially manufactured goods) which are movable at the time of identification to the contract." *Id.*

87. FARNSWORTH, *supra* note 70, at 30. The UCC is divided into 11 substantive articles: Art. 1, General Provisions; Art. 2, Sales; Art. 2A, Leases; Art. 3, Commercial Paper; Art. 4, Bank Deposits and Collections; Art. 4A, Funds Transfers; Art. 5, Letters of Credit; Art. 6, Bulk Transfers; Art. 7, Warehouse Receipts, Bills of Lading and Other Documents of Title; Art. 8, Investment Securities; Art. 9, Secured Transactions; Sales of Accounts and Chattel Paper. *Id.*

88. *Id.* at 30 n.2.

89. U.C.C. § 2-207(1) (1993).

90. FARNSWORTH, *supra* note 70, at 173. The portion of the acceptance which materially affects the offer is left out of the contract. *Id.*

91. Blodgett, *supra* note 66, at 424.

92. See FARNSWORTH, *supra* note 70, at 173.

93. See CISG, *supra* note 4, art. 19(1). Article 19(1) provides that "[a] reply to an offer which purports to be an acceptance but contains additions, limitations or other modifications is a rejection of the offer and constitutes a counter offer." *Id.* The drafters believed that this would encourage the parties to carefully negotiate and agree on all terms prior to performance. Blodgett, *supra* note 66, at 425.

under the CISG which differs from the terms of the offer will still constitute an acceptance if it does not materially affect the substance of the offer, and if the offeror does not promptly reject the alteration.⁹⁴ However, unlike the UCC, an acceptance under the CISG which differs *materially* from the terms of the offer will not result in a contract.⁹⁵ To prevent any confusion, the CISG lists those items considered to materially affect the substance of the offer.⁹⁶ For example, an arbitration clause is considered to be a material item.⁹⁷ Thus, under the CISG, there is less uncertainty as to what constitutes an agreement when the acceptance varies the offeror's terms.

IV. FIRST U.S. CASE TO INTERPRET THE CISG

A. Facts

Filanto, an Italian shoe manufacturer, brought suit for breach of contract against Chilewich, a New York international trading firm.⁹⁸ The key issue presented was whether an agreement to arbitrate existed between the parties.⁹⁹

In February 1989, Byerly Johnson, Ltd., an agent of Chilewich operating in the United Kingdom, signed an agreement (the Russian Contract) with Raznoexport, the Soviet Foreign Economic Association.¹⁰⁰ The Russian Contract obligated Byerly to supply footwear to Raznoexport and also contained an arbitration clause (the Russian arbitration clause) stating that disputes were to be settled in what is now the Republic of Russia (Russia).¹⁰¹ Five months later, Chilewich and Filanto exchanged their first correspondence.¹⁰² Chilewich's

94. See CISG, *supra* note 4, art. 19(2). Article 19(2) provides:

[A] reply to an offer which purports to be an acceptance but contains additional or different terms which do not materially alter the terms of the offer constitutes an acceptance, unless the offeror, without undue delay, objects orally to the discrepancy or dispatches a notice to that effect. If he does not object, the terms of the contract are the terms of the offer with the modifications contained in the acceptance.

Id.

95. *Id.*

96. See CISG, *supra* note 4, art. 19(3). Article 19(3) provides that "[a]dditional or different terms relating to the price, payment, quality and quantity of goods, place and time of delivery, extent of one party's liability to the other or the settlement of disputes are considered to alter the terms of the offer materially." *Id.*

97. *Id.* In contrast with the CISG, the UCC does not explicitly state what a material item is; rather the UCC opts to provide examples only. U.C.C. § 2-207 cmt. 4 (1993).

98. *Filanto, S.p.A. v. Chilewich Int'l Corp.*, 789 F. Supp. 1229 (S.D.N.Y. 1992), *appeal dismissed*, 984 F.2d 58 (2d Cir. 1993).

99. *Filanto*, 789 F. Supp. at 1235.

100. *Id.* at 1230-31.

101. *Id.* The Russian arbitration clause stated in pertinent part, "All disputes or differences which may arise out of or in connection with the present Contract are to be settled, jurisdiction of ordinary courts being excluded, by the Arbitration at the USSR Chamber of Commerce and Industry, Moscow, in accordance with the Regulations of the said Arbitration." *Id.*

102. *Id.* at 1231.

initial letter to Filanto referred to Chilewich and Byerly's visit to Filanto's factories in Italy to negotiate the purchase of shoes to fulfill the Russian Contract.¹⁰³ Along with the letter, Chilewich sent another contract to cover the purchase of shoes and a copy of the Russian Contract, the terms of which Chilewich explained governed the purchase of Filanto's shoes.¹⁰⁴ Two months later in September 1989, Filanto wrote to Chilewich regarding another purchase contract that stipulated terms of the Russian Contract.¹⁰⁵ Filanto stated that it would accept only some of the Russian terms, effectively excluding the Russian arbitration clause.¹⁰⁶ This fact, if undisputed, would show Filanto's intention not to be bound by the Russian arbitration clause. Chilewich denied ever receiving this letter.¹⁰⁷

In March 1990, Chilewich sent Filanto a standard merchant's memo, for signature by both parties and already signed by Chilewich, to confirm terms of delivery and performance.¹⁰⁸ Both Filanto and Chilewich agreed that this constituted an offer.¹⁰⁹ The merchant's memo also provided that it was understood between Filanto and Chilewich that the terms of the Russian Contract governed, including the Russian arbitration clause.¹¹⁰ Two months later, Filanto still had not replied to the March 1990 letter. However, Chilewich proceeded to open a letter of credit in favor of Filanto.¹¹¹

Filanto answered Chilewich's March memo in August 1990, returning it to Chilewich signed, but attached a cover letter effectively excluding the Russian arbitration clause.¹¹² On the same day and in response, Chilewich telexed Byerly stating that it would not open the second letter of credit without receiving from Filanto a signed copy of the contract without exclusions.¹¹³ Several weeks later in September 1990, Byerly sent a fax to Filanto asking Filanto to accept all terms of the Russian Contract.¹¹⁴

The remainder of the facts presented during the trial were highly disputed. Chilewich claimed that over a course of meetings, Filanto agreed to the terms of

103. *Filanto*, 789 F. Supp. at 1231.

104. *Id.*

105. *Id.*

106. *Id.*

107. *Id.*

108. *Filanto*, 789 F. Supp. at 1231-32.

109. *Id.* at 1238.

110. *Id.* at 1231. The terms stipulated by the memorandum agreement were as follows: Filanto would deliver 100,000 pairs of boots to Chilewich at the Italy-Yugoslavia border on September 15, 1990; Filanto would deliver a balance of 150,000 pairs of boots on November 1, 1990; Chilewich would open one letter of credit in Filanto's favor prior to the September 15, 1990 delivery; and Chilewich would open a second letter of credit in Filanto's favor prior to the November 1, 1990 delivery. *Id.*

111. *Filanto*, 789 F.Supp. at 1232.

112. *Id.* Filanto's cover letter excluded all but three conditions of the Russian contract. *Id.*

113. *Id.*

114. *Id.*

the Russian Contract.¹¹⁵ Filanto claimed just the opposite.¹¹⁶ Ultimately, while Chilewich bought and paid for 60,000 pairs of boots in January 1991, it did not order and pay for the remaining 90,000 pairs called for by Chilewich's original order.¹¹⁷ It is Chilewich's failure to buy the second allotment that formed the basis for Filanto's breach of contract action against Chilewich.¹¹⁸

B. Procedural History

Filanto initially brought action in the U.S. District Court for the Southern District of New York for breach of contract against Chilewich.¹¹⁹ Subsequently, on July 24, 1991, Chilewich moved to stay this action, arguing that the matter should be arbitrated in Russia first.¹²⁰ One year later, Filanto moved to enjoin arbitration or, in the alternative, for an order directing arbitration in New York rather than Moscow due to the unsettled political conditions in Russia.¹²¹ It is against this background that the dispute came before Chief Judge Brient of the district court.

C. The Opinion

Filanto first stated that the CISG applied in this case, presumably because it was between two international parties.¹²² Citing article 19(1) of the CISG,¹²³ Filanto argued that its letter to Chilewich on August 7, 1990, which partially rejected the Russian arbitration clause, was a counteroffer.¹²⁴ Furthermore, Filanto argued that Chilewich accepted the terms of the counteroffer in a letter dated September 27, 1990.¹²⁵ Thus, Filanto argued that there was no agreement to arbitrate in Russia, and as such, its breach of contract claim should be continued in New York.¹²⁶

Chilewich made no mention of the CISG. Instead, it argued that Filanto's silence after Chilewich opened a letter of credit was an acceptance of the terms of the March 13, 1990 offer.¹²⁷ Chilewich believed that Filanto's August 7,

115. *Id.* at 1233.

116. *Id.*

117. *Filanto*, 789 F. Supp. at 1233.

118. *Id.*

119. *Id.* at 1229.

120. *Id.* at 1234.

121. *Id.*

122. *Filanto*, 789 F. Supp. at 1238.

123. See CISG, *supra* note 4, art. 19(1). Article 19 states, "A reply to an offer which purports to be an acceptance but contains . . . modifications is a rejection of the offer and constitutes a counteroffer." *Id.*

124. *Filanto*, 789 F. Supp. at 1238.

125. *Id.*

126. *Id.*

127. *Id.*

1990 letter rejecting the Russian arbitration clause was a modification proposal, which Chilewich promptly rejected.¹²⁸ Thus, Chilewich argued, the original offer was left intact and accepted, opening the way to stay Filanto's breach of contract action pending arbitration in Russia.¹²⁹

The District Court for the Southern District of New York held that (1) the question of whether Filanto and Chilewich agreed to arbitrate was governed by federal law; (2) general principles of contract law such as the UCC did not apply here, but rather, the federal law of contracts to apply was found in the CISG; (3) Filanto and Chilewich did agree to arbitrate in Russia; and (4) arbitration in Russia would be ordered in the interests of justice.¹³⁰

The court justified its application of the CISG by explaining that the CISG was ratified by the U.S. Senate in 1986,¹³¹ and entered into force between the United States and other signatories, including Italy, as of January 1, 1988.¹³² Citing article 1(1)(a) of the CISG, the court stated that "absent a choice of law provision, the CISG governs *all* contracts between parties with places of business in different nations, so long as both nations are signatories to the [CISG]."¹³³ In so holding, the court observed that Filanto had its factories in Italy and Chilewich's principal place of business was located in White Plains, New York.¹³⁴ Thus, the court applied the rules of the CISG to the facts presented.

The court narrowed its focus to determining the sole issue of whether a written agreement to arbitrate existed between the parties.¹³⁵ The court reasoned that other issues pertaining to the existence of a contract were best left to arbitrators.¹³⁶ The court further justified its approach by citing article 81(1) of the CISG, and concluding that the contract and the arbitration clauses included therein were severable.¹³⁷

The court determined that an agreement existed based on Filanto's failure to object to the arbitration clause in a timely fashion.¹³⁸ The court pointed out that "an offeree who, knowing that the offeror has commenced performance, fails to notify the offeror of its objection . . . will . . . be deemed to have assented to

128. *Id.*

129. *Filanto*, 789 F. Supp. at 1238.

130. *Id.* at 1236-37, 1239-40.

131. *Id.* at 1237.

132. *Id.*

133. *Id.* (emphasis added).

134. *Filanto*, 789 F. Supp. at 1230.

135. *Id.* at 1239.

136. *Id.* The court felt it lacked the authority to resolve all issues presented by the case because once an agreement to arbitrate was validated, it was the arbitrator named in the contract, having derived his or her power from the contract, who had the authority to decide on the validity of the remaining issues. *Id.*

137. *Id.* Article 81(1) of the CISG states in part, "Avoidance [of the contract] does not affect any provision of the contract for the settlement of disputes." See CISG, *supra* note 4, art. 81(1).

138. *Filanto*, 789 F. Supp. at 1240.

[such] terms [of the offeror].”¹³⁹ Then the court cited the first part of CISG article 18(1) which reads, “A statement made by or other conduct of the offeree indicating assent to an offer is an acceptance.”¹⁴⁰ Relying on CISG article 8(3),¹⁴¹ the court stated that “[i]n light of the extensive [course of] prior dealing between [the] parties, Filanto was certainly under a duty to alert Chilewich in timely fashion to its objections.”¹⁴² Consequently, the court interpreted the phrase “other conduct” to encompass Filanto’s silence, and thus ruled that Filanto accepted the offer by its silence.¹⁴³

V. LEGAL ANALYSIS

A. Critique of the Court’s Opinion

There are four discrepancies in the court’s opinion: (1) the court’s reasoning in applying the CISG was questionable, (2) Chilewich’s offer may have lapsed, (3) Chilewich may not have commenced performance by opening the letter of credit, and (4) Filanto may not have had a duty to alert Chilewich of its objections.

While the court was correct in applying the CISG, its reason for doing so was questionable. The District Court for the Southern District of New York concluded

139. *Id.* The court based its ruling on § 69 of the *Restatement (Second) of Contracts*. *Id.* Paragraph 1 of § 69 provides:

- (1) Where an offeree fails to reply to an offer, his silence and inaction operate as an acceptance in the following cases only:
 - (a) Where an offeree takes the benefit of offered services with reasonable opportunity to reject them and reason to know that they were offered with the expectation of compensation.
 - (b) Where the offeror has stated or given the offeree reason to understand that assent may be manifested by silence or inaction, and the offeree in remaining silent and inactive intends to accept the offer.
 - (c) Where because of previous dealings or otherwise, it is reasonable that the offeree should notify the offeror if he does not intend to accept.

RESTATEMENT (SECOND) OF CONTRACTS § 69 (1981). The court also based its ruling on case law. *Filanto*, 789 F. Supp. at 1240 (citing *Graniteville v. Star Knits of California, Inc.*, 680 F. Supp. 587, 589-90 (S.D.N.Y. 1988) (holding that a party who failed timely to object to a sales note containing an arbitration clause was deemed to have accepted its terms); *Imptex Int’l Corp. v. Lorprint, Inc.*, 625 F. Supp. 1572, 1572 (S.D.N.Y. 1986) (finding that a party who failed to object to the inclusion of an arbitration clause in a sale confirmation agreement was bound to arbitrate)).

140. *Filanto*, 789 F. Supp. at 1240.

141. See CISG, *supra* note 4, art. 8(3). Article 8(3) of the CISG states:

In determining the intent of a party or the understanding a reasonable person would have had, due consideration is to be given to all relevant circumstances of the case including the negotiations, any practices which the parties have established between themselves, usages and any subsequent conduct of the parties.

Id.

142. *Filanto*, 789 F. Supp. at 1240.

143. *Id.*

that the CISG was applicable because Italy and the United States are signatories of the Convention.¹⁴⁴ Article 1 states that the CISG governs all contracts between parties with places of business in different nations.¹⁴⁵ In doing so, the court noted that Chilewich's "principal" place of business is located in White Plains, New York.¹⁴⁶ However, this approach is erroneous because article 1 does not state "principal" place of business.¹⁴⁷ Rather, it merely states "place of business" and thus indicates that a party may have more than one place of business.¹⁴⁸ In fact, article 10 of the CISG provides for selecting the relevant place of business when there is more than one.¹⁴⁹ Within the context of article 10, the drafters of the CISG originally considered the use of the phrase "principal" place of business," to connote the *relevant* place of business.¹⁵⁰ However, the drafters found the term "principal" place of business" to be too rigid and substituted "the place of business . . . which has the closest relationship to the contract and its performance" to promote flexibility in interpretation.¹⁵¹

Chilewich has more than one place of business. While incorporated in New York, Chilewich also has an agent in the United Kingdom, Byerly Johnson, Ltd.¹⁵² Therefore, the United Kingdom could be considered another "place of business."¹⁵³ Further, article 10 of the CISG states that where the party has more than one place of business, the place of business is *that which has the*

144. *Id.* at 1237.

145. *Id.*

146. *Id.* at 1230.

147. *See* CISG, *supra* note 4, art. 1.

148. *Id.* Article 1 provides:

This Convention applies to contracts of sale of goods between parties whose places of business are in different States:

- (a) when the States are Contracting States; or
- (b) when the rules of private international law lead to the application of the law of a Contracting State.

Id.

149. *Id.* art. 10(a). Article 10(a) states that "[f]or purposes of [the CISG], if a party has more than one place of business, the place of business is that which has the closest relationship to the contract and its performance." *Id.*

150. Gyula Eorsi, *General Provisions, in* INTERNATIONAL SALES: THE UNITED NATIONS CONVENTION ON CONTRACTS FOR THE INTERNATIONAL SALE OF GOODS 2-1, 2-27 to 2-29 (Nina M. Galston & Hans Smit eds., 1984).

151. *Id.*

152. *Filanto*, 789 F. Supp. at 1230. Byerly Johnson Ltd. represented and transacted business for Chilewich in negotiations with Raznoexport, a Soviet economic association that desired to import shoes. *Id.*

153. Some commentators have expressed that an agency does not reflect a place of business. HONNOLD, *supra* note 28, at 150; Eorsi, *supra* note 150, at 2-27. However, the agent referred to by these authors is the transitory, traveling agent who conducts negotiations without establishing any permanent place of business. HONNOLD, *supra* note 28, at 150. Byerly Johnson, Ltd. is a British corporation and can hardly be called a transitory person.

*closest relationship to the contract and its performance.*¹⁵⁴ The contract between Filanto and Chilewich called for the delivery of boots by Filanto to Chilewich at the border between Italy and Yugoslavia.¹⁵⁵ These facts support the proposition that the United Kingdom may alternatively be considered Chilewich's place of business as defined under article 10 of the CISG. First, Chilewich's agent in the United Kingdom negotiated the original transaction to sell shoes to Russia. Second, performance of the contract calls for delivery of boots to the Italian-Yugoslav border. The United Kingdom is geographically closer to that border than New York, and therefore is the place of business that has the closest relationship to the contract and its performance for purposes of CISG interpretation. The practical problem is that the United Kingdom is not a signatory to the convention.¹⁵⁶ Thus, rather than applying the CISG, the court could have applied private international law, which may have resulted in the application of English contract law and provided a different outcome.

Under English common law, an acceptance must be unqualified and exactly match the terms of the offer.¹⁵⁷ If an acceptance varies from the terms of the offer, it is classified as a counteroffer.¹⁵⁸ Thus, under English common law, Filanto's modified acceptance on August 7, 1990, would have been classified as a counteroffer, precluding contract formation since the modified acceptance was promptly rejected by Chilewich.¹⁵⁹

Another item overlooked by the court is that Chilewich's offer to Filanto may have lapsed. Chilewich's offer to Filanto was made on March 13, 1990.¹⁶⁰ Filanto did not reply until August 7, 1990, nearly five months later.¹⁶¹ CISG article 18(2) states in part, "An acceptance is not effective if the indication of assent does not reach the offeror within the time he has fixed, or if no time is fixed, within a reasonable time."¹⁶² If the trade usage¹⁶³ shows that five

154. See CISG, *supra* note 4, art. 10(a). Article 10(a) provides:

If a party has more than one place of business, the place of business is that which has the closest relationship to the contract and its performance, having regard to the circumstances known to or contemplated by the parties at any time before or at the conclusion of the contract.

Id.

155. *Filanto*, 789 F. Supp. at 1231.

156. See *supra* note 4 and accompanying text (listing the signatories to the CISG).

157. See G.H. TREITEL, *THE LAW OF CONTRACT* 18 (8th ed. 1991); T. ANTONY DOWNES, *A TEXTBOOK ON CONTRACT* 64 (2d ed. 1991).

158. TREITEL, *supra* note 157, at 19.

159. *Filanto*, 789 F. Supp. at 1232. In response to Filanto's modified acceptance, Chilewich informed Filanto through an intermediary that Chilewich would not open a second letter of credit unless Filanto agreed to the original terms of the offer. *Id.*

160. *Id.* at 1231.

161. *Id.* at 1232.

162. CISG, *supra* note 4, art. 18(2).

163. "Trade usage" is the usage or custom commonly observed by persons conversant in, or connected with, a particular trade. BLACK'S LAW DICTIONARY 1495 (6th ed. 1990). An example of such a trade is the importation or exportation of goods.

months is not a reasonable time for reply, a court could have found that the March 13, 1990 offer had lapsed, thus making the August 7, 1990 letter an offer in itself. This would support Filanto's argument,¹⁶⁴ which, however, did not persuade the court.¹⁶⁵

Another possible oversight is that Chilewich may not have commenced performance by opening the letter of credit. Typically, the advising bank would notify the exporter, in this case, Filanto, of the availability of a letter of credit on which to draw.¹⁶⁶ Nonetheless, Chilewich may have needed to do more than open an international letter of credit to commence performance since the opening of a letter of credit does not equate to payment.¹⁶⁷ The court did not address this, nor did it justify its assumption that Chilewich's opening of a letter of credit indicated commencement of performance.

Finally, Filanto may not have had a duty to alert Chilewich of its objections. The court stated that "[i]n light of the extensive [course of] prior dealing between [the] parties, Filanto was certainly under a duty to alert Chilewich in a timely fashion to its objections."¹⁶⁸ In doing so, the court interpreted Filanto's silence as an objection to the proposition that Filanto had a "duty" to relay to Chilewich.¹⁶⁹ For support, the court cited the first part of CISG article 18(1), which reads, "A statement made by or other conduct of the offeree indicating assent to an offer is an acceptance."¹⁷⁰ The court interpreted "other conduct" in CISG article 18(1) to encompass Filanto's silence, and thus ruled that Filanto accepted the offer by its silence.¹⁷¹ This contradicts the second sentence of CISG article 18(1) which reads, "Silence or inactivity does not in itself amount to acceptance."¹⁷² The court addressed this by referring to CISG article 8(3), which the court stated allowed it to consider past relations between the parties to assess whether a party's conduct is an acceptance.¹⁷³

164. *Filanto*, 789 F. Supp. at 1238.

165. *Id.* at 1239-40.

166. M.A. DAVIS, *THE DOCUMENTARY CREDITS HANDBOOK* 4 (3d ed. 1990).

167. FRANS P. DEROOY, *DOCUMENTARY CREDITS* 69 (1984). The author points out that "[t]he documentary credit is not a payment; [rather] it provides a *possibility* of obtaining payment." *Id.* (emphasis added).

168. *Filanto*, 789 F. Supp. at 1240.

169. *Id.*

170. See CISG, *supra* note 4, art. 18(1).

171. *Filanto*, 789 F. Supp. at 1240.

172. See CISG, *supra* note 4, art. 18(1).

173. *Id.* CISG article 8(3) states:

In determining the intent of a party or the understanding a reasonable person would have had, due consideration is to be given to all relevant circumstances of the case including the negotiations, any practices which the parties have established between themselves, usages and any subsequent conduct of the parties.

Id. art. 8(3). The court used this article in conjunction with article 11, which states that a contract "may be proved by any means, including witnesses." *Filanto*, 789 F. Supp. at 1240. See also CISG, *supra* note 4, art. 11 (providing that a contract may be proved by any means, including witnesses).

Here, the court used its own interpretation of one article of the CISG to offset an express provision of another article of the CISG. The court reasoned that article 8(3) of the CISG allowed the court to consider the parties' prior relations to assess whether Filanto's inactivity was an acceptance.¹⁷⁴ This is contrary to the CISG's express statement that "mere inactivity does not constitute acceptance."¹⁷⁵ The court's application of article 8(3) illustrates an extreme example of judicial fiction, primarily because the facts do not state or describe the prior dealings between the parties.

B. Alternative Arguments that Could Have Been Raised in the Case

As a general assumption, both Chilewich and Filanto stipulated that the March 13, 1990 memorandum agreement was an offer.¹⁷⁶ The question is whether Filanto accepted the terms of the March 13, 1990 memorandum agreement by signing it, attaching a cover letter with exclusions, and returning it some five months later.¹⁷⁷ The answer essentially depends on how the facts are characterized.

One point Chilewich asserted is that even if Filanto did not accept by way of returning the March 13, 1990 memo on August 7, 1990, Filanto nevertheless had already accepted the terms of the memorandum by silence. If this is the case, Filanto's signed and returned memorandum agreement amounted to either a new offer or a modification proposal, both of which Chilewich promptly rejected via Byerly Johnson on August 29, 1990.¹⁷⁸

Although this argument has merit, it would fail under the CISG because articles 18(1) and 8(3) suggest that silence does not constitute acceptance unless established by the parties' prior conduct.¹⁷⁹ Here, the facts do not state any prior conduct of the parties where silence was intended as an acceptance. Thus Filanto, by its silence, did not accept the terms of the March 13, 1990 memorandum agreement.

A second argument is that Filanto did not accept by way of returning the March 13, 1990 memo on August 7, 1990 because the offer reflected by the memo had lapsed by August 7, 1990. Article 18(2) of the CISG states in part, "An acceptance is not effective if the indication of assent does not reach the offeror within the time he has fixed, or if no time is fixed, within a reasonable

174. *Filanto*, 789 F. Supp. at 1240.

175. *See* CISG, *supra* note 4, art. 18(1).

176. *Filanto*, 789 F. Supp. at 1238.

177. *Id.* at 1231-32.

178. *Id.* at 1232.

179. *See* CISG, *supra* note 4, arts. 18(1), 8(3). Article 18(1) states the main proposition, "Silence or inactivity does not in itself amount to acceptance," while article 8(3) provides the exception by stating, "[In] determining the intent of [the] part[ies] . . . due consideration is to be given to . . . any practices which the parties have established between themselves." *Id.*

time.”¹⁸⁰ If trade usage shows that five months is not a reasonable time for reply, a court could find that the March 13, 1990 offer lapsed. If so, Filanto’s signed and returned memorandum agreement amounted to either a new offer or an attempt to accept the original offer after renewing it. If it is a new offer, there is no contract because Chilewich promptly rejected via Byerly Johnson on August 29, 1990. The argument that it was an attempt to renew the original offer contained in the March 13, 1990 memo would fail because the offeror is the master of the offer and only the offeror can renew the offer after it has lapsed.¹⁸¹ Thus, under the latter assumption, there is no contract.

Finally, Filanto could have argued that it did not accept by way of returning the March 13, 1990 memo on August 7, 1990, because while purporting to be an acceptance, attachment of the cover letter excluding the arbitration clause from the Russian Contract amounted to a material modification. Under article 19 of the CISG, “A reply to an offer which purports to be an acceptance but contains . . . [a material] modification is a rejection of the offer and constitutes a counteroffer.”¹⁸² Under the same article, an arbitration clause would be considered a material term.¹⁸³ Thus, Filanto’s return of Chilewich’s memo amounted to a counteroffer which Chilewich rejected.

The above arguments aside, Chilewich’s rejection via Byerly Johnson on August 29, 1990, can also be characterized as a counteroffer,¹⁸⁴ which would have been accepted by conduct. Chilewich bought and paid for 60,000 pairs of shoes, which Filanto delivered.¹⁸⁵ The question is whether the arbitration clause was incorporated into the contract. The answer depends on whose oral testimony one believes. Filanto said that on the weekend of September 2, 1990, Chilewich agreed that the contract would not incorporate the arbitration clause.¹⁸⁶ Chilewich said that on the weekend of September 14, 1990, Filanto agreed to the

180. *Id.* art. 18(2).

181. FARNSWORTH, *supra* note 70, at 144.

182. CISG, *supra* note 4, art. 19. Article 19 provides:

- (1) A reply to an offer which purports to be an acceptance but contains additions, limitations or other modifications is a rejection of the offer and constitutes a counteroffer.
- (2) However, a reply to an offer which purports to be an acceptance but contains additional or different terms which do not materially alter the terms of the offer constitutes an acceptance, unless the offeror, without undue delay, objects orally to the discrepancy or dispatches a notice to that effect. If he does not so object, the terms of the contract are the terms of the offer with the modifications contained in the acceptance.
- (3) Additional or different terms relating, among other things, to the price, payment, quality and quantity of the goods, place and time of delivery, extent of one party’s liability to the other or the settlement of disputes are considered to alter the terms of the offer materially.

Id.

183. *Id.* art. 19(3). See *supra* notes 95-97 (comparing the CISG and the UCC on this point).

184. *Filanto*, 789 F. Supp. at 1232.

185. *Id.* at 1233.

186. *Id.*

arbitration clause.¹⁸⁷ If both are believed by the fact finder, then the contract incorporates the arbitration clause and the matter would be arbitrated in Russia. This is because Filanto's agreement with the arbitration clause on September 14, 1990 was the last interaction between the parties recognized by the court.¹⁸⁸ If only Filanto is believed, the contract does not incorporate the arbitration clause and the matter may be heard in New York. Alternatively, if only Chilewich is believed, the contract incorporates the arbitration clause and the matter would be heard in Russia.

VI. CONCLUSION

Filanto reflects a changing attitude, by at least the federal judiciary in New York, that the CISG has a place in U.S. business transactions. With potential widespread use, it is important for an attorney to understand the hidden complexities of the CISG; complexities which may lead to serious error.¹⁸⁹ Undoubtedly, case law will further define the terms of the CISG and unravel a few of the complexities that exist. Until then, the transnational practitioner must be aware of varying interpretations, to which even leading authorities on the CISG fall prey.¹⁹⁰

Varying interpretations aside, the transnational practitioner can take comfort in that CISG articles 7 and 8 provide for the interpretation of the convention's articles,¹⁹¹ as well as the interpretation of the contracting parties' statements and

187. *Id.*

188. *Id.*

189. Ronald A. Brand & Harry M. Flechtner, *Arbitration and Contract Formation in International Trade: First Interpretations of the U.N. Sales Convention*, 12 J.L. & COM. 239, 249 (1993).

190. See John E. Murray, Jr., *An Essay on the Formation of Contracts and Related Matters Under the United Nations Convention on Contracts for the International Sale of Goods*, 8 J.L. & COM. 11, 15 (1988) (discussing formation of contracts under the CISG). One should note that Professors John Honnold and E. Allan Farnsworth, two leading authorities on the CISG, disagree as to whether the CISG provides a solution when the price is missing from the contract terms. While Professor Farnsworth believes the problem remains unsolved, Professor Honnold suggests that article 55 of the CISG addresses a missing price term adequately. *Id.* Article 55 of the CISG states that "[w]here a contract has been validly concluded but does not expressly or implicitly fix or make provision for determining the price, the parties are considered, in the absence of any indication to the contrary, to have impliedly made reference to price generally charged at the time of the conclusion of the contract for such goods sold under comparable circumstances in the trade concerned." CISG, *supra* note 4, art. 55.

191. CISG, *supra* note 4, art. 7. Article 7 provides:

- (1) In the interpretation of this Convention, regard is to be had to its international character and to the need to promote uniformity in its application and the observance of good faith in international trade.
- (2) 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.

Id.

conduct.¹⁹² Noted treatises provide further guidance as to how articles 7 and 8 are to be applied.¹⁹³ Additionally, the CISG is rich in legislative history that spans over three decades.¹⁹⁴ If the practitioner traces the provision backwards from the final draft in 1980 through preceding numeral and content changes, the practitioner can grasp a sense of the policy behind the provision and use this to argue a case.¹⁹⁵ Until further case law is developed, scholarly writings and the legislative history of each provision may be the only guidance available to the practitioner.¹⁹⁶

For now, in the District Court for the Southern District of New York, the CISG has been held to allow acceptance by silence if this is the parties' prior course of dealing.¹⁹⁷ This article sought to prove that the court failed to factually support the conclusion that the parties had been conducting themselves as such.¹⁹⁸ Depending on the facts, this article then provided several alternative conclusions. This was possible despite the lack of case law because of the earlier mentioned availability of noted scholars' opinions, their writings, and the legislative history of the CISG.

The CISG has come full circle from theory to practice, from a convention of noted scholars to interpretation in a U.S. court. It is gaining acceptance in the international community. Today and in the future, the transnational practitioner faced with CISG interpretation must be prepared and knowledgeable, or else run the risk of losing to a more knowledgeable opponent, or as in this case, to the whims of an opposite, but not necessarily correct, viewpoint of the trier of fact.

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192. *Id.* art. 8. Article 8 provides:

- (1) For the purposes of this Convention statements made by and other conduct of a party are to be interpreted according to his intent where the other party knew or could not have been unaware what that intent was.
- (2) If the preceding paragraph is not applicable, statements made by and other conduct of a party are to be interpreted according to the understanding that a reasonable person of the same kind as the other party would have had in the same circumstances.
- (3) In determining the intent of a party or the understand a reasonable person would have had, due consideration is to be given to all relevant circumstances of the case including the negotiations, any practices which the parties have established between themselves, usages and any subsequent conduct of the parties.

Id.

193. See generally HONNOLD, *supra* note 28, at 113-43; Eorsi, *supra* note 150, at 2-1 to 2-20; Michael J. Bonell, *Interpretation of Convention*, in COMMENTARY ON THE INTERNATIONAL SALES LAW, *supra* note 60, at 65, 65-94; E. Allan Farnsworth, *Interpretation of Contract*, in COMMENTARY ON THE INTERNATIONAL SALES LAW, *supra* note 60, at 95, 95-102.

194. HONNOLD, *supra* note 28, at 115.

195. *Id.* at 37. Professor Honnold provides a detailed methodology on how to trace the history of a CISG provision. *Id.* at 37-43.

196. *Id.* at 114-15.

197. *Filanto*, 789 F. Supp. at 1240.

198. See *supra* notes 165-73 and accompanying text.

