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CHAPTER 1:  
THE FOUNDATIONS OF THE CISG

Harry M. Flechtner,  

The United Nations Convention on Contracts for the International Sale of Goods (CISG) has been recognized as the most successful attempt to unify a broad area of commercial law at the international level. The self-executing treaty aims to reduce obstacles to international trade, particularly those associated with choice of law issues, by creating even-handed and modern substantive rules governing the rights and obligations of parties to international sales contracts. At the time this is written (February 2009), the CISG has attracted more than 70 Contracting States that account for well over two thirds of international trade in goods, and that represent extraordinary economic, geographic and cultural diversity.

The CISG is a project of the United Nations Commission on International Trade Law (UNCITRAL), which in the early 1970s undertook to create a successor to two substantive international sales treaties – Convention relating to a Uniform Law on the Formation of Contracts for the International Sale of Goods (ULF) and the Convention relating to a Uniform Law for the International Sale of Goods (ULIS) – both of which were sponsored by the International Institute for the Unification of Private Law (UNIDROIT). The goal of UNCITRAL was to create a Convention that would attract increased participation in uniform international sales rules. The text of the CISG was finalized and approved in the six official languages of the United Nations at the United Nations Conference on Contracts for the International Sale of Goods, held in 1980, in Vienna. The CISG entered into force in eleven initial Contracting States on 1 January 1988, and since that time has steadily and continuously attracted a diverse group of adherents.

The CISG governs international sales contracts if (1) both parties are located in Contracting States, or (2) private international law leads to the application of the law of a Contracting State (although, as permitted by the CISG (article 95), several Contracting States have declared that they are not bound by the latter ground). The autonomy of the parties to international sales contracts is a fundamental theme of the Convention: the parties can, by agreement, derogate
from virtually any CISG rule, or can exclude the applicability of the CISG entirely in favor of other law. When the Convention applies, it does not govern every issue that can arise from an international sales contract: for example, issues concerning the validity of the contract or the effect of the contract on the property in (ownership of) the goods sold are, as expressly provided in the CISG, beyond the scope of the Convention, and are left to the law applicable by virtue of the rules of private international law (article 4). Questions concerning matters governed by the Convention but that are not expressly addressed therein are to be settled in conformity with the general principles of the CISG or, in the absence of such principles, by reference to the law applicable under the rules of private international law.

Among the many significant provisions of the CISG are those addressing the following matters:

– Interpretation of the parties’ agreement;
– The role of practices established between the parties, and of international usages;
– The features, duration and revocability of offers;
– The manner, timing and effectiveness of acceptances of offers;
– The effect of attempts to add or change terms in an acceptance;
– Modifications to international sales contracts;
– The seller’s obligations with respect to the quality of the goods as well as the time and place for delivery;
– The place and date for payment;
– The buyer’s obligations to take delivery, to examine delivered goods, and to give notice of any claimed lack of conformity;
– The buyer’s remedies for breach of contract by the seller, including rights to demand delivery, to require repair or replacement of non-conforming goods, to avoid the contract, to recover damages, and to reduce the price for non-conforming goods;
– The seller’s remedies for breach of contract by the buyer, including rights to require the buyer to take delivery and/or pay the price, to avoid the contract, and to recover damages;
– Passing of risk in the goods sold;
– Anticipatory breach of contract;
– Recovery of interest on sums in arrears;
– Exemption from liability for failure to perform, including force majeure;
– Obligations to preserve goods that are to be sent or returned to the other party.
The CISG also includes a provision eliminating written-form requirements for international sales contracts within its scope – although the Convention authorizes Contracting States to reserve out of this provision, and a number have done so. The CISG also includes “Final Provisions” addressing such matters as ratification, acceptance, approval and accession; the interplay between the CISG and other overlapping international agreements; declarations and reservations; entry-into-force dates; and denunciation of the Convention.

Several other UNCITRAL projects are designed to work in tandem with the CISG. For example, the United Nations Convention on the Limitation Period in the International Sale of Goods contains rules governing the limitation period for claims arising under international sales contracts. The Limitations Convention was originally promulgated in 1974, but was amended in 1980 by a Protocol adopted by the Diplomatic Conference that approved the CISG in order to harmonize the two Conventions. At the time this is written, the amended Limitations Convention is in force in 20 Contracting States. In 2005, the General Assembly adopted the United Nations Convention on the Use of Electronic Communications in International Contracts to address various issues arising when electronic communications methods are employed in connection with international contracts, including international sales contracts. Issues addressed in the Electronic Communications Convention include contract formation by automated communications, the time and place that electronic communications are deemed dispatched and received, determination of the location of parties employing electronic communications, and criteria for establishing functional equivalence between electronic and hard copy communication and authentication. At the time this is written, 18 States have signed the Electronic Communications Convention, although it has not yet been ratified or acceded to by any State and it has not yet entered into force.

No special tribunals were created for the CISG; it is applied and interpreted by the national courts and arbitration panels that have jurisdiction in disputes over transactions governed by the Convention. To achieve its fundamental purpose of providing uniform rules for international sales, the Convention itself requires that it be interpreted with a view to maintaining its international character and uniformity. To that end, special research resources, often consisting of databases available free of charge through the Internet, provide access to materials designed to foster uniform international understanding of the rules of the CISG. These resources, including several developed and maintained by UNCITRAL in the six official languages of the United Nations, allow access to court and arbitral decisions applying the CISG from around the world, the travaux préparatoires of the CISG, and commentary on the Convention by a global community of scholars.

Article 6

The parties may exclude the application of this Convention or . . . derogate from or vary the effect of any of its provisions.

Article 7

(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.

* * *

Article 101

(1) A Contracting State may denounce this Convention, or Part II or Part III of the Convention, by a formal notification in writing addressed to the depositary.

(2) The denunciation takes effect on the first day of the month following the expiration of twelve months after the notification is received by the depositary. Where a longer period for the denunciation to take effect is specified in the notification, the denunciation takes effect upon the expiration of such longer period after the notification is received by the depositary.
CHAPTER 2: SPHERE OF APPLICATION


Article 1

(1) 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.

(2) The fact that the parties have their places of business in different States is to be disregarded whenever this fact does not appear either from the contract or from any dealings between, or from information disclosed by, the parties at any time before or at the conclusion of the contract.

(3) Neither the nationality of the parties nor the civil or commercial character of the parties or of the contract is to be taken into consideration in determining the application of this Convention.

Article 2

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.

Article 3

(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 labour or other services.

Article 4

This Convention governs only the formation of the contract of sale and the rights and obligations of the seller and the buyer arising from such a contract. In particular, except as otherwise expressly provided in this Convention, it is not concerned with:

(a) the validity of the contract or of any of its provisions or of any usage;

(b) the effect which the contract may have on the property in the goods sold.

Article 5

This Convention does not apply to the liability of the seller for death or personal injury caused by the goods to any person.

Article 6

The parties may exclude the application of this Convention or . . . derogate from or vary the effect of any of its provisions.
Article 10

For the purposes of this Convention:

(a) 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;

(b) if a party does not have a place of business, reference is to be made to his habitual residence.

Asante Technologies, Inc. v. PMC-Sierra, Inc.,
164 F.Supp.2d 1142 (N.D.Cal. 2001)

WARE, District Judge.

I. INTRODUCTION


II. BACKGROUND

The Complaint in this action alleges claims based in tort and contract. Plaintiff contends that Defendant failed to provide it with electronic components meeting certain designated technical specifications. Defendant timely removed the action to this Court on March 16, 2001.

Plaintiff is a Delaware corporation having its primary place of business in Santa Clara County, California. Plaintiff produces network switchers, a type of electronic component used to connect multiple computers to one another and to the Internet. Plaintiff purchases component parts from a number of manufacturers. In particular, Plaintiff purchases application-specific integrated circuits (“ASICs”), which are considered the control center of its network switchers, from Defendant.
Defendant is also a Delaware corporation. Defendant asserts that, at all relevant times, its corporate headquarters, inside sales and marketing office, public relations department, principal warehouse, and most design and engineering functions were located in Burnaby, British Columbia, Canada. Defendant also maintains an office in Portland, Oregon, where many of its engineers are based. Defendant's products are sold in California through Unique Technologies, which is an authorized distributor of Defendant's products in North America. It is undisputed that Defendant directed Plaintiff to purchase Defendant's products through Unique, and that Defendant honored purchase orders solicited by Unique. Unique is located in California. Determining Defendant's “place of business” with respect to its contract with Plaintiff is critical to the question of whether the Court has jurisdiction in this case.

Plaintiff's Complaint focuses on five purchase orders. Four of the five purchase orders were submitted to Defendant through Unique as directed by Defendant. However, Plaintiff does not dispute that one of the purchase orders, dated January 28, 2000, was sent by fax directly to Defendant in British Columbia, and that Defendant processed the order in British Columbia. Defendant shipped all orders to Plaintiff's headquarters in California. Upon delivery of the goods, Unique sent invoices to Plaintiff, at which time Plaintiff tendered payment to Unique either in California or in Nevada.

The Parties do not identify any single contract embodying the agreement pertaining to the sale. Instead, Plaintiff asserts that acceptance of each of its purchase orders was expressly conditioned upon acceptance by Defendant of Plaintiff's “Terms and Conditions,” which were included with each Purchase Order. Paragraph 20 of Plaintiff's Terms and Conditions provides “APPLICABLE LAW. The validity [and] performance of this [purchase] order shall be governed by the laws of the state shown on Buyer's address on this order.” (Contos Decl., Exh. H, ¶ 16.) The buyer's address as shown on each of the Purchase Orders is in San Jose, California. Alternatively, Defendant suggests that the terms of shipment are governed by a document entitled “PMC–Sierra TERMS AND CONDITIONS OF SALE.” Paragraph 19 of Defendant's Terms and Conditions provides “APPLICABLE LAW: The contract between the parties is made, governed by, and shall be construed in accordance with the laws of the Province of British Columbia and the laws of Canada applicable therein, which shall be deemed to be the proper law hereof ....” (Wechsler Decl., Exh. D, ¶ 6.)

Plaintiff's Complaint alleges that Defendant promised in writing that the chips would meet certain technical specifications. (Compl. ¶¶ 13, 14, 15, 17, 18, 22, 23, & 25.) Defendant asserts that the following documents upon which
Plaintiff relies emanated from Defendant's office in British Columbia: (1) Defendant's August 24, 1998 press release that it would be making chips available for general sampling (Doucette Decl. ¶ 13); (2) Defendant's periodic updates of technical specifications (Doucette Decl., Exh. H); and (3) correspondence from Defendant to Plaintiff, including a letter dated October 25, 1999. It is furthermore undisputed that the Prototype Product Limited Warranty Agreements relating to some or all of Plaintiff's purchases were executed with Defendant's British Columbia facility. (Doucette Decl., Exhs. B & C.)

Defendant does not deny that Plaintiff maintained extensive contacts with Defendant's facilities in Portland Oregon during the “development and engineering” of the ASICs. (Amended Supplemental Decl. of Anthony Contos, ¶ 3.) These contacts included daily email and telephone correspondences and frequent in-person collaborations between Plaintiff's engineers and Defendant's engineers in Portland. (Id.) Plaintiff contends that this litigation concerns the inability of Defendant's engineers in Portland to develop an ASIC meeting the agreed-upon specifications. (Id.)

Plaintiff now requests this Court to remand this action back to the Superior Court of the County of Santa Clara pursuant to 28 U.S.C. section 1447(c), asserting lack of subject matter jurisdiction. In addition, Plaintiff requests award of attorneys fees and costs for the expense of bringing this motion.

III. STANDARDS

A defendant may remove to federal court any civil action brought in a state court that originally could have been filed in federal court. 28 U.S.C. § 1441(a); Caterpillar, Inc. v. Williams, 482 U.S. 386, 107 S.Ct. 2425, 96 L.Ed.2d 318 (1987). When a case originally filed in state court contains separate and independent federal and state law claims, the entire case may be removed to federal court. 28 U.S.C. 1441(c). . . . If, at any time before judgment, the district court determines that the case was removed from state court improvidently and without jurisdiction, the district court must remand the case. 28 U.S.C. § 1447(c).

The CISG applies “to contracts of sale of goods between parties whose places of business are in different States ... when the States are Contracting States.” 15 U.S.C.App., Art. 1(1)(a). Article 10 of the CISG provides that “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.” 15 U.S.C.App. Art. 10.

IV. DISCUSSION

Defendant asserts that this Court has jurisdiction to hear this case pursuant to 28 U.S.C. section 1331, which dictates that the “district courts shall have original jurisdiction of all civil actions arising under the Constitution, laws, or treaties of the United States.” Specifically, Defendant contends that the contract claims at issue necessarily implicate the CISG, because the contract is between parties having their places of business in two nations which have adopted the CISG treaty. The Court concludes that Defendant's place of business for the purposes of the contract at issue and its performance is Burnaby, British Columbia, Canada. Accordingly, the CISG applies. Moreover, the parties did not effectuate an “opt out” of application of the CISG.

A. Federal Jurisdiction Attaches to Claims Governed By the CISG

Although the general federal question statute, 28 U.S.C. § 1331(a), gives district courts original jurisdiction over every civil action that “arises under the . . . treaties of the United States,” an individual may only enforce a treaty's provisions when the treaty is self-executing, that is, when it expressly or impliedly creates a private right of action. . . . The parties do not dispute that the CISG properly creates a private right of action. . . . Therefore, if the CISG properly applies to this action, federal jurisdiction exists.

B. The Contract In Question Is Between Parties From Two Different Contracting States

The CISG only applies when a contract is “between parties whose places of business are in different States.” 15 U.S.C.App., Art. 1(1)(a). If this requirement is not satisfied, Defendant cannot claim jurisdiction under the CISG. It is undisputed that Plaintiff's place of business is Santa Clara County, California, U.S.A. It is further undisputed that during the relevant time period, Defendant's corporate headquarters, inside sales and marketing office, public relations department, principal warehouse, and most of its design and engineering functions were located in Burnaby, British Columbia, Canada. However, Plaintiff contends that, pursuant to Article 10 of the CISG, Defendant's “place of
business” having the closest relationship to the contract at issue is the United States.¹

The Complaint asserts inter alia two claims for breach of contract and a claim for breach of express warranty based on the failure of the delivered ASICS to conform to the agreed upon technical specifications. (Compl.¶¶ 40–53.) In support of these claims, Plaintiff relies on multiple representations allegedly made by Defendant regarding the technical specifications of the ASICS products at issue. Among the representations are: (1) an August 24, 1998 press release (Id., ¶ 13); (2) “materials” released by Defendant in September, 1998 (Id., ¶ 14); (3) “revised materials” released by Defendant in November 1998 (Id., ¶ 15); (4) “revised materials” released by Defendant in January, 1999 (Id., ¶ 17); (5) “revised materials” released by Defendant in April, 1999 (Id., ¶ 18); (6) a September, 1999 statement by Defendant which included revised specifications indicating that its ASICS would comply with 802.1q VLAN specifications (Id., ¶ 22); (7) a statement made by Defendant's President and Chief Executive Officer on October 25, 1999 (Id., ¶ 23); (8) a communication of December, 1999 (Id., ¶ 24); and (9) “revised materials” released by Defendant in January, 2000 (Id., ¶ 25). It appears undisputed that each of these alleged representations regarding the technical specifications of the product was issued from Defendant's headquarters in British Columbia, Canada. (See Opposition Brief at 3.)

Rather than challenge the Canadian source of these documents, Plaintiff shifts its emphasis to the purchase orders submitted by Plaintiff to Unique Technologies, a nonexclusive distributor of Defendant's products. Plaintiff asserts that Unique acted in the United States as an agent of Defendant, and that Plaintiff's contacts with Unique establish Defendant's place of business in the U.S. for the purposes of this contract.

Plaintiff has failed to persuade the Court that Unique acted as the agent of Defendant. Plaintiff provides no legal support for this proposition. To the contrary, a distributor of goods for resale is normally not treated as an agent of the manufacturer. Restatement of the Law of Agency, 2d § 14J (1957) (“One who receives goods from another for resale to a third person is not thereby the other's agent in the transaction.”); Stansifer v. Chrysler Motors Corp., 487 F.2d 59, 64–65 (9th Cir.1973) (holding that nonexclusive distributor was not agent of

¹ Article 10 of the CISG states inter alia:
  For the purposes of this Convention:
    (a) 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.
manufacturer where distributorship agreement expressly stated “distributor is not an agent”). Agency results “from the manifestation of consent by one person to another that the other shall act on his behalf and subject to his control, and consent by the other so to act.” Restatement of the Law of Agency, 2d, § 1 (1957). Plaintiff has produced no evidence of consent by Defendant to be bound by the acts of Unique. To the contrary, Defendant cites the distributorship agreement with Unique, which expressly states that the contract does not “allow Distributor to create or assume any obligation on behalf of [Defendant] for any purpose whatsoever.” (Doucette Decl. Exh. M, ¶ 1.6(b).) Furthermore, while Unique may distribute Defendant's products, Plaintiff does not allege that Unique made any representations regarding technical specifications on behalf of Defendant. Indeed, Unique is not even mentioned in the Complaint. To the extent that representations were made regarding the technical specifications of the ASICs, and those specifications were not satisfied by the delivered goods, the relevant agreement is that between Plaintiff and Defendant. Accordingly, the Court finds that Unique is not an agent of Defendant in this dispute. Plaintiff's dealings with Unique do not establish Defendant's place of business in the United States.

Plaintiff's claims concern breaches of representations made by Defendant from Canada. Moreover, the products in question are manufactured in Canada, and Plaintiff knew that Defendant was Canadian, having sent one purchase order directly to Defendant in Canada by fax. Plaintiff supports its position with the declaration of Anthony Contos, Plaintiff's Vice President of Finance and Administration, who states that Plaintiff's primary contact with Defendant “during the development and engineering of the ASICs at issue ... was with [Defendant's] facilities in Portland, Oregon.” (Contos Amended Supplemental Decl. ¶ 3.) The Court concludes that these contacts are not sufficient to override the fact that most or all of Defendant's alleged representations regarding the technical specifications of the products emanated from Canada. (See supra at 7:1–12.) Moreover, Plaintiff directly corresponded with Defendant at Defendant's Canadian address. (See Doucette Decl. ¶ 15.) Plaintiff relies on all of these alleged representations at length in its Complaint. (See supra at 7:1–12.) In contrast, Plaintiff has not identified any specific representation or correspondence emanating from Defendant's Oregon branch. For these reasons, the Court finds that Defendant's place of business that has the closest relationship to the contract and its performance is British Columbia, Canada. Consequently, the contract at issue in this litigation is between parties from two different Contracting States, Canada and the United States. This contract therefore implicates the CISG.
C. The Effect of the Choice of Law Clauses

Plaintiff next argues that, even if the Parties are from two nations that have adopted the CISG, the choice of law provisions in the “Terms and Conditions” set forth by both Parties reflect the Parties' intent to “opt out” of application of the treaty. Article 6 of the CISG provides that “[t]he parties may exclude the application of the Convention or, subject to Article 12, derogate from or vary the effect of any of its provisions.” 15 U.S.C.App., Art. 6. Defendant asserts that merely choosing the law of a jurisdiction is insufficient to opt out of the CISG, absent express exclusion of the CISG. The Court finds that the particular choice of law provisions in the “Terms and Conditions” of both parties are inadequate to effectuate an opt out of the CISG.

Although selection of a particular choice of law, such as “the California Commercial Code” or the “Uniform Commercial Code” could amount to implied exclusion of the CISG, the choice of law clauses at issue here do not evince a clear intent to opt out of the CISG. For example, Defendant's choice of applicable law adopts the law of British Columbia, and it is undisputed that the CISG is the law of British Columbia. (International Sale of Goods Act ch. 236, 1996 S.B.C. 1 et seq. (B.C.).) Furthermore, even Plaintiff's choice of applicable law generally adopts the “laws of” the State of California, and California is bound by the Supremacy Clause to the treaties of the United States. U.S. Const. art. VI, cl. 2 (“This Constitution, and the laws of the United States which shall be made in pursuance thereof; and all treaties made, or which shall be made, under the authority of the United States, shall be the supreme law of the land.”) Thus, under general California law, the CISG is applicable to contracts where the contracting parties are from different countries that have adopted the CISG. In the absence of clear language indicating that both contracting parties intended to opt out of the CISG, and in view of Defendant's Terms and Conditions which would apply the CISG, the Court rejects Plaintiff's contention that the choice of law provisions preclude the applicability of the CISG.

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2 Plaintiff's Terms and Conditions provides “APPLICABLE LAW. The validity [and] performance of this [purchase] order shall be governed by the laws of the state shown on Buyer's address on this order.” (Contos Decl. ¶ 16, Exh. H.) The buyer's address as shown on each of the Purchase Orders is San Jose, California. (Contos Decl. ¶¶ 6, 7, 8, 9, 10; Exhs. A, B, C, D, E.) Defendant's Terms and Conditions provides “APPLICABLE LAW: The contract between the parties is made, governed by, and shall be construed in accordance with the laws of the Province of British Columbia and the laws of Canada applicable therein, which shall be deemed to be the proper law hereof ....” (Wechsler Decl. ¶ 6, Exh. D.) It is undisputed that British Columbia has adopted the CISG.

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V. CONCLUSION

For the foregoing reasons, Plaintiff's Motion to Remand is DENIED. Accordingly, the Request for Attorney's Fees is also DENIED.
CHAPTER 3:
CONTRACT FORMATION AND MODIFICATION


Article 14

(1) A proposal for concluding a contract addressed to one or more specific persons constitutes an offer if it is sufficiently definite and indicates the intention of the offeror to be bound in case of acceptance. A proposal is sufficiently definite if it indicates the goods and expressly or implicitly fixes or makes provision for determining the quantity and the price.

(2) A proposal other than one addressed to one or more specific persons is to be considered merely as an invitation to make offers, unless the contrary is clearly indicated by the person making the proposal.

Article 15

(1) An offer becomes effective when it reaches the offeree.

(2) An offer, even if it is irrevocable, may be withdrawn if the withdrawal reaches the offeree before or at the same time as the offer.

Article 16

(1) Until a contract is concluded an offer may be revoked if the revocation reaches the offeree before he has dispatched an acceptance.

(2) However, an offer cannot be revoked:

(a) if it indicates, whether by stating a fixed time for acceptance or otherwise, that it is irrevocable; or

(b) if it was reasonable for the offeree to rely on the offer as being irrevocable and the offeree has acted in reliance on the offer.
Article 17

An offer, even if it is irrevocable, is terminated when a rejection reaches the offeror.

Article 18

(1) A statement made by or other conduct of the offeree indicating assent to an offer is an acceptance. Silence or inactivity does not in itself amount to acceptance.

(2) An acceptance of an offer becomes effective at the moment the indication of assent reaches the offeror. 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, due account being taken of the circumstances of the transaction, including the rapidity of the means of communication employed by the offeror. An oral offer must be accepted immediately unless the circumstances indicate otherwise.

(3) However, if, by virtue of the offer or as a result of practices which the parties have established between themselves or of usage, the offeree may indicate assent by performing an act, such as one relating to the dispatch of the goods or payment of the price, without notice to the offeror, the acceptance is effective at the moment the act is performed, provided that the act is performed within the period of time laid down in the preceding paragraph.

Article 19

(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 counter-offer.

(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.

Article 20

(1) A period of time for acceptance fixed by the offeror in a telegram or a letter begins to run from the moment the telegram is handed in for dispatch or from the date shown on the letter or, if no such date is shown, from the date shown on the envelope. A period of time for acceptance fixed by the offeror by telephone, telex or other means of instantaneous communication, begins to run from the moment that the offer reaches the offeree.

(2) Official holidays or non-business days occurring during the period for acceptance are included in calculating the period. However, if a notice of acceptance cannot be delivered at the address of the offeror on the last day of the period because that day falls on an official holiday or a non-business day at the place of business of the offeror, the period is extended until the first business day which follows.

Article 21

(1) A late acceptance is nevertheless effective as an acceptance if without delay the offeror orally so informs the offeree or dispatches a notice to that effect.

(2) If a letter or other writing containing a late acceptance shows that it has been sent in such circumstances that if its transmission had been normal it would have reached the offeror in due time, the late acceptance is effective as an acceptance unless, without delay, the offeror orally informs the offeree that he considers his offer as having lapsed or dispatches a notice to that effect.

Article 22

An acceptance may be withdrawn if the withdrawal reaches the offeror before or at the same time as the acceptance would have become effective.

Article 23

A contract is concluded at the moment when an acceptance of an offer becomes effective in accordance with the provisions of this Convention.
Article 24

For the purposes of this Part of the Convention, an offer, declaration of acceptance or any other indication of intention "reaches" the addressee when it is made orally to him or delivered by any other means to him personally, to his place of business or mailing address or, if he does not have a place of business or mailing address, to his habitual residence.

Magellan Intern. Corp. v. Salzgitter Handel GmbH
76 F.Supp.2d 919 (N.D.Ill. 1999)

SHADUR, Senior District Judge.

Salzgitter Handel GmbH ("Salzgitter") has filed a motion pursuant to Fed.R.Civ.P. ("Rule") 12(b)(6) ("Motion"), seeking to dismiss this action brought against it by Magellan International Corporation ("Magellan"). . . .

Facts

In considering a Rule 12(b)(6) motion to dismiss for failure to state a claim, this Court accepts all of Magellan's well-pleaded factual allegations as true, as well as drawing all reasonable inferences from those facts in Magellan's favor (Travel All Over the World, Inc. v. Kingdom of Saudi Arabia, 73 F.3d 1423, 1429 (7th Cir.1996)). What follows is the version of events set out in the Complaint, when read in that light.

Offers, Counteroffers and Acceptance

Magellan is an Illinois-based distributor of steel products. Salzgitter is a steel trader that is headquartered in Dusseldorf, Germany and maintains an Illinois sales office. In January 1999, Magellan's Robert Arthur ("Arthur") and Salzgitter's Thomas Riess ("Riess") commenced negotiations on a potential deal under which Salzgitter would begin to act as middleman in Magellan's purchase of steel bars—manufactured according to Magellan's specifications—from a Ukrainian steel mill, Dneprospetsstal of Ukraine ("DSS").

By letter dated January 28, Magellan provided Salzgitter with written specifications for 5,585 metric tons of steel bars, with proposed pricing, and with an agreement to issue a letter of credit ("LC") to Salzgitter as Magellan's method of payment. Salzgitter responded two weeks later (on February 12 and 13) by proposing prices $5 to $20 per ton higher than those Magellan had specified.
On February 15 Magellan accepted Salzgitter’s price increases, agreed on 4,000 tons as the quantity being purchased, and added $5 per ton over Salzgitter’s numbers to effect shipping from Magellan's preferred port (Ventspills, Latvia). Magellan memorialized those terms, as well as the other material terms previously discussed by the parties, in two February 15 purchase orders. Salzgitter then responded on February 17, apparently accepting Magellan's memorialized terms except for two “amendments” as to prices. Riess asked for Magellan's “acceptance” of those two price increases by return fax and promised to send its already-drawn-up order confirmations as soon as they were countersigned by DSS. Arthur consented, signing and returning the approved price amendments to Riess the same day.

On February 19 Salzgitter sent its pro forma order confirmations to Magellan. But the general terms and conditions that were attached to those confirmations differed in some respects from those that had been attached to Magellan's purchase orders, mainly with respect to vessel loading conditions, dispute resolution and choice of law.

Contemplating an ongoing business relationship, Magellan and Salzgitter continued to negotiate in an effort to resolve the remaining conflicts between their respective forms. While those fine-tuning negotiations were under way, Salzgitter began to press Magellan to open its LC for the transaction in Salzgitter's favor. On March 4 Magellan sent Salzgitter a draft LC for review. Salzgitter wrote back on March 8 proposing minor amendments to the LC and stating that “all other terms are acceptable.” Although Magellan preferred to wait until all of the minor details (the remaining conflicting terms) were ironed out before issuing the LC, Salzgitter continued to press for its immediate issuance.

On March 22 Salzgitter sent amended order confirmations to Magellan. Riess visited Arthur four days later on March 26 and threatened to cancel the steel orders if Magellan did not open the LC in Salzgitter's favor that day. They then came to agreement as to the remaining contractual issues. Accordingly, relying on Riess's assurances that all remaining details of the deal were settled, Arthur had the $1.2 million LC issued later that same day.

Post-Acceptance Events

Three days later (on March 29) Arthur and Riess engaged in an extended game of “fax tag” initiated by the latter. Essentially Salzgitter demanded that the LC be amended to permit the unconditional substitution of FCRs for bills of lading—even for partial orders—and Magellan refused to amend the LC, also
pointing out the need to conform Salzgitter's March 22 amended order confirmations to the terms of the parties' ultimate March 26 agreement. At the same time, Magellan requested minor modifications in some of the steel specifications. Salzgitter replied that it was too late to modify the specifications: DSS had already manufactured 60% of the order, and the rest was under production.

Perhaps unsurprisingly in light of what has been recited up to now, on the very next day (March 30) Magellan's and Salzgitter's friendly fine-tuning went flat. Salzgitter screeched an ultimatum to Magellan: Amend the LC by noon the following day or Salzgitter would “no longer feel obligated” to perform and would “sell the material elsewhere.” On April 1 Magellan requested that the LC be canceled because of what it considered to be Saltzgitter's breach. Salzgitter returned the LC and has since been attempting to sell the manufactured steel to Magellan's customers in the United States.

Magellan's Claims

Complaint Count I posits that—pursuant to the Convention—a valid contract existed between Magellan and Salzgitter before Salzgitter's March 30 ultimatum. Hence that attempted ukase is said to have amounted to an anticipatory repudiation of that contract, entitling Magellan to relief for its breach.

Because the transaction involves the sale and purchase of steel—“goods”—the parties acknowledge that the governing law is either the Convention or the UCC. Under the facts alleged by Magellan, the parties agreed that Convention law would apply to the transaction, and Salzgitter does not now dispute that contention. That being the case, this opinion looks to Convention law.

Formation of a contract under either UCC or the Convention requires an offer followed by an acceptance (see Convention Pt. II). Although analysis of offer and acceptance typically involves complicated factual issues of intent—issues not appropriately addressed on a motion to dismiss—this Court need not engage in such mental gymnastics here. It is enough that Magellan has alleged facts that a factfinder could call an offer on the one hand and an acceptance on the other.

Under Convention Art. 14(1) a “proposal for concluding a contract addressed to one or more specific persons constitutes an offer if it is sufficiently definite and indicates the intention of the offeror to be bound in case of
acceptance.” So, if the indications of the proposer are sufficiently definite and justify the addressee in understanding that its acceptance will form a contract, the proposal constitutes an offer (id. Art. 8(2)). For that purpose “[a] proposal is sufficiently definite if it indicates the goods and expressly or implicitly makes provision for determining the quantity and the price” (id. Art. 14(1)).

In this instance Magellan alleges that it sent purchase orders to Salzgitter on February 15 that contained the material terms upon which the parties had agreed. Those terms included identification of the goods, quantity and price. Certainly an offer could be found consistently with those facts.

But Convention Art. 19(1) goes on to state 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.” That provision reflects the common law’s “mirror image” rule that the UCC has rejected (see Filanto, 789 F.Supp. at 1238). And Salzgitter’s February 17 response to the purchase orders did propose price changes. Hence that response can be seen as a counteroffer that justified Magellan’s belief that its acceptance of those new prices would form a contract.

Although that expectation was then frustrated by the later events in February and then in March, which in contract terms equated to further offers and counteroffers, the requisite contractual joinder could reasonably be viewed by a factfinder as having jelled on March 26. In that respect Convention Art. 18(a) requires an indication of assent to an offer (or counteroffer) to constitute its acceptance. Such an “indication” may occur through “a statement made by or other conduct of the offeree” (id.). And at the very least, a jury could find consistently with Magellan’s allegations that the required indication of complete (mirrored) assent occurred when Magellan issued its LC on March 26. So much, then, for the first element of a contract: offer and acceptance.

Next, the second pleading requirement for a breach of contract claim—performance by plaintiff—was not only specifically addressed by Magellan (Complaint ¶ 39) but can also be inferred from the facts alleged in Complaint ¶ 43 and from Magellan’s prayer for specific performance. Magellan’s performance obligation as the buyer is simple: payment of the price for the goods. Magellan issued its LC in satisfaction of that obligation, later requesting the LC’s cancellation only after Salzgitter’s alleged breach (Complaint ¶¶ 24, 31). Moreover, Magellan’s request for specific performance implicitly confirms that it remains ready and willing to pay the price if such relief were granted.

As for the third pleading element—Salzgitter's breach—Complaint ¶ 38 alleges:
Salzgitter's March 30 letter (Exhibit G) demanding that the bill of lading provision be removed from the letter of credit and threatening to cancel the contract constitutes an anticipatory repudiation and fundamental breach of the contract.

It would be difficult to imagine an allegation that more clearly fulfills the notice function of pleading.

Convention Art. 72 addresses the concept of anticipatory breach:

(1) If prior to the date for performance of the contract it is clear that one of the parties will commit a fundamental breach of contract, the other party may declare the contract avoided.

(2) If time allows, the party intending to declare the contract avoided must give reasonable notice to the other party in order to permit him to provide adequate assurance of his performance.

(3) The requirements of the preceding paragraph do not apply if the other party has declared that he will not perform his obligations.

And Convention Art. 25 states in relevant part:

A breach of contract committed by one of the parties is fundamental if it results in such detriment to the other party as substantially to deprive him of what he is entitled to expect under the contract....

That plain language reveals that under the Convention an anticipatory repudiation pleader need simply allege (1) that the defendant intended to breach the contract before the contract's performance date and (2) that such breach was fundamental. Here Magellan has pleaded that Salzgitter's March 29 letter indicated its pre-performance intention not to perform the contract, coupled with Magellan's allegation that the bill of lading requirement was an essential part of the parties' bargain. That being the case, Saltzgitter's insistence upon an amendment of that requirement would indeed be a fundamental breach.

Lastly, Magellan has easily jumped the fourth pleading hurdle—resultant injury. Complaint ¶ 40 alleges that the breach “has caused damages to Magellan.”
Conclusion

It may perhaps be that when the facts are further fleshed out through discovery, Magellan’s claims against Salzgitter will indeed succumb either for lack of proof or as the consequence of some legal deficiency. But in the current Rule 12(b)(6) context, Salzgitter’s motion as to Counts I . . . is denied, and it is ordered to file its Answer to the Complaint on or before December 20, 1999. . . .


Article 29

(1) A contract may be modified or terminated by the mere agreement of the parties.

(2) A contract in writing which contains a provision requiring any modification or termination by agreement to be in writing may not be otherwise modified or terminated by agreement. However, a party may be precluded by his conduct from asserting such a provision to the extent that the other party has relied on that conduct.

Chateau des Charmes Wines Ltd. v. Sabate USA Inc.
328 F.3d 528 (9th Cir. 2003).

PER CURIAM.

Chateau des Charmes Wines, Ltd. (“Chateau des Charmes”), a Canadian company, appeals the dismissal of its action for breach of contract and related claims arising out of its purchase of wine corks from Sabaté, S.A. (“Sabaté France”), a French company, and Sabaté USA, Inc. (“Sabaté USA”), a wholly owned California subsidiary. The district court held that forum selection clauses in the invoices that Sabaté France sent to Chateau des Charmes were part of the contract between the parties and dismissed the case in favor of adjudication in France. Because we conclude that the forum selection clauses in question were not part of any agreement between the parties, we reverse.
FACTUAL BACKGROUND AND PROCEDURAL HISTORY

The material facts pertinent to this appeal are not disputed. Sabaté France manufactures and sells special wine corks that it claims will not cause wines to be spoiled by “cork taint,” a distasteful flavor that some corks produce. It sells these corks through a wholly owned California subsidiary, Sabaté USA.

In February 2000, after some preliminary discussions about the characteristics of Sabaté's corks, Chateau des Charmes, a winery from Ontario, Canada, agreed by telephone with Sabaté USA to purchase a certain number of corks at a specific price. The parties agreed on payment and shipping terms. No other terms were discussed, nor did the parties have any history of prior dealings. Later that year, Chateau des Charmes placed a second telephone order for corks on the same terms. In total, Chateau des Charmes ordered 1.2 million corks.

Sabaté France shipped the corks to Canada in eleven shipments. For each shipment, Sabaté France also sent an invoice. Some of the invoices arrived before the shipments, some with the shipments, and some after the shipments. On the face of each invoice was a paragraph in French that specified that “Any dispute arising under the present contract is under the sole jurisdiction of the Court of Commerce of the City of Perpignan.” On the back of each invoice a number of provisions were printed in French, including a clause that specified that “any disputes arising out of this agreement shall be brought before the court with jurisdiction to try the matter in the judicial district where Seller's registered office is located.” Chateau des Charmes duly took delivery and paid for each shipment of corks. The corks were then used to bottle Chateau des Charmes' wines.

Chateau des Charmes claims that, in 2001, it noticed that the wine bottled with Sabaté's corks was tainted by cork flavors. Chateau des Charmes filed suit in federal district court in California against Sabaté France and Sabaté USA alleging claims for breach of contract, strict liability, breach of warranty, false advertising, and unfair competition. Sabaté France and Sabaté USA filed a motion to dismiss based on the forum selection clauses. The district court held that the forum selection clauses were valid and enforceable and dismissed the action. This appeal ensued.

DISCUSSION

I.

... The question before us is whether the forum selection clauses in Sabaté France's invoices were part of any agreement between the parties. The

Our conclusion that the C.I.S.G. governs the issues in this appeal is not in conflict with authority from our sister circuits that have applied state law. Both the Second Circuit and the First Circuit have confronted the question of what law governs issues of contract formation that are antecedent to determining the validity of and enforcing forum selection clauses. In Evolution Online Sys. Inc. v. Koninklijke PTT Nederland N.V., KPN, 145 F.3d 505, 509 (2d Cir.1998), the Second Circuit applied New York law to a dispute between a Dutch company and a New York corporation regarding the production of computer software and the provision of technical services presumably because the Convention does not apply "to contracts in 5904 which the preponderant part of the obligations of the party who furnishes the goods consists in the supply of labor or other services." C.I.S.G., art. 3(2). The First Circuit's decision in Lambert v. Kysar, 983 F.2d 1110, 1119 (1st Cir.1993), involved the resolution of an interstate dispute that had no international dimension.

II.

Under the C.I.S.G., it is plain that the forum selection clauses were not part of any agreement between the parties. The Convention sets out a clear regime for analyzing international contracts for the sale of goods: "A contract of sale need not be concluded in or evidenced by writing and is not subject to any other requirement as to form." C.I.S.G., art. 11. A proposal is an offer if it is sufficiently definite to "indicate[ ] the goods and expressly or implicitly fix[ ] or
make provision for determining the quantity and the price,” id., art. 14, and it demonstrates an intention by the offeror to be bound if the proposal is accepted. Id. In turn, an offer is accepted if the offeree makes a “statement ... or other conduct ... indicating assent to an offer.” Id., art. 18. Further, “A contract is concluded at the moment when an acceptance of an offer becomes effective.” Id., art. 23. Within such a framework, the oral agreements between Sabaté USA and Chateau des Charmes as to the kind of cork, the quantity, and the price were sufficient to create complete and binding contracts.

The terms of those agreements did not include any forum selection clause. Indeed, Sabaté France and Sabaté USA do not contend that a forum selection clause was part of their oral agreements, but merely that the clauses in the invoices became part of a binding agreement. The logic of this contention is defective. Under the Convention, a “contract may be modified or terminated by the mere agreement of the parties.” Id., art. 29(1). However, the Convention clearly states that “[a]dditional or different terms relating, among other things, to ... the settlement of disputes are considered to alter the terms of the offer materially.” Id., art. 19(3). There is no indication that Chateau des Charmes conducted itself in a manner that evidenced any affirmative assent to the forum selection clauses in the invoices. Rather, Chateau des Charmes merely performed its obligations under the oral contract.

Nothing in the Convention suggests that the failure to object to a party's unilateral attempt to alter materially the terms of an otherwise valid agreement is an “agreement” within the terms of Article 29. Cf. C.I.S.G., art. 8(3) (“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.”). Here, no circumstances exist to conclude that Chateau des Charmes's conduct evidenced an “agreement.” We reject the contention that because Sabaté France sent multiple invoices it created an agreement as to the proper forum with Chateau des Charmes. The parties agreed in two telephone calls to a purchase of corks to be shipped in eleven batches. In such circumstances, a party's multiple attempts to alter an agreement unilaterally do not so effect. See In re CFLC, Inc., 166 F.3d 1012, 1019 (9th Cir.1999).

CONCLUSION

Because the contract for the sale of corks did not contain the forum selection clauses in Sabaté France's invoices, there was nothing for the district
court to enforce, and its dismissal of this action was an abuse of discretion. The action is reinstated.

REVERSED and REMANDED.


**Article 11**

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.

***

**Article 29**

(1) A contract may be modified or terminated by the mere agreement of the parties.

(2) A contract in writing which contains a provision requiring any modification or termination by agreement to be in writing may not be otherwise modified or terminated by agreement. However, a party may be precluded by his conduct from asserting such a provision to the extent that the other party has relied on that conduct.

***

**Article 96**

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.
KATZ, Magistrate J.

Plaintiff, Calzaturificio Claudia s.n.c. (“Claudia”) brought this action against defendant Olivieri Footwear Ltd. (“Olivieri”), to recover payment for shoes manufactured by plaintiff and delivered to defendant. Defendant counterclaimed for breach of contract, claiming that plaintiff failed to deliver certain goods, and that the goods that were delivered were either late or nonconforming. The parties consented to trial before a United States Magistrate Judge, pursuant to 28 U.S.C. § 636(c) and Rule 73 of the Federal Rules of Civil Procedure. Currently before the Court is plaintiff's Motion for Summary Judgment based on its breach of contract claim. For the reasons that follow, the motion is denied.

BACKGROUND

Plaintiff is a shoe manufacturer organized under the laws of the Republic of Italy, with its principal place of business in Italy. See Plaintiff's Complaint, dated October 16, 1996 (“Compl.”), at ¶ 1. Defendant is a corporation organized under the laws of the State of New York, with its principal place of business in New York. Id. at ¶¶ 1–2; Defendant's Answer, dated December 13, 1996 (“Answer”), at ¶ 2. Plaintiff contends that its business relationship with Olivieri first began in the Spring of 1993, when defendant approached plaintiff to negotiate the purchase of shoes. See Declaration of Francesco Zamboni in Support of Claudia's Motion for Summary Judgment, dated June 26, 1997 (“Zamboni Decl. 1”), at ¶ 3. During the course of the parties' relationship, Claudia alleges that it engaged in thirteen transactions with Olivieri, in which plaintiff manufactured and delivered shoes to Olivieri in accordance with the terms set forth in the respective invoices detailing each order. Id. at ¶¶ 4–5, 7. The present dispute arises from Olivieri's failure to pay for the goods reflected in four invoices. Claudia claims that it is entitled to payment in the approximate amount of LIT (Italian Lira) 131,597,820 ($80,000), plus interest, for the shoes identified in the four unpaid invoices and the value added tax (“V.A.T.”) on certain of the goods.

It is undisputed that there is no formal written contract defining the terms of the four disputed transactions that gave rise to this litigation. Rather, plaintiff relies upon its invoices as evidencing the terms of Claudia and Olivieri's agreement. See Plaintiff's Memorandum of Law in Support of its Motion for Summary Judgment, dated June 26, 1997 (“Pl.Mem.”), at 7–8. Plaintiff contends
that the shipments covered by the invoices were made available to Olivieri in accordance with the delivery terms reflected in the invoices, were picked up by Olivieri's agents at Claudia's factory, and were accepted by Olivieri. (Zamboni Decl. 1 at ¶¶ 5, 8.) Plaintiff thus contends that Olivieri's failure to pay for the invoiced goods constitutes a breach of their contractual agreement.

In support of its breach of contract claim, plaintiff submitted the following four invoices: (1) no. 336, dated November 16, 1993, for shoes valued at LIT 38,250,000; (2) no. 372, dated December 14, 1993, for shoes valued at LIT 14,364,000; (3) no. 383, dated December 29, 1993, for shoes valued at LIT 77,418,000; and (4) no. 5, dated January 14, 1994, for shoes valued at LIT 36,696,000. See Exs. A, B, C, E, attached to Compl. Each of these invoices was marked “Merce Resa Ex Factory,” which is literally translated as “Merchandise delivery ex works (or ex factory).” (Zamboni Decl. 1 at ¶ 6.) “Ex works” or “ex factory” means that the seller's delivery obligation is merely to deliver the goods to the buyer at the seller's factory. See Appendix A at 18, attached to Pl. Mem.

Claudia argues that the inclusion of the term “ex works” in the invoices demonstrates that its obligations to Olivieri ended when Claudia made the shipments of shoes available for pick-up at its factory, and that Olivieri bore the responsibility for shipping the shoes. (Zamboni Decl. 1, at ¶¶ 5–6, 7; Compl. at 2.) Moreover, plaintiff asserts that the shippers to whom delivery was made were agents of Olivieri, and that it, Claudia, bore no responsibility for any late or incomplete deliveries. In support of this proposition, and in response to the Court's inquiry at oral argument, plaintiff submitted an affidavit attesting that defendant “always ... paid the shipper for its services, and the shipper always acted as Olivieri's agent in the transactions.” Zamboni Declaration, attached to Reply Declarations in Further Support of Claudia's Motion for Summary Judgment, dated February 5, 1998 (“Zamboni Decl. 2”), at ¶ 2; see Zamboni Decl. 1, at ¶ 8.

As evidence of plaintiff's performance, and in response to defendant's counterclaim that defendant never received the goods at issue, plaintiff submitted bills of lading which allegedly demonstrate that a shipper accepted and picked up each disputed invoice shipment. Each invoice references a corresponding bill of lading by number, and each referenced bill of lading bears the name and signature of the shipper, the exact time and date of pick-up, and a customs stamp, indicating that the shipment left Italy. See Exs. A, B, C, E, attached to Compl.; Exs. A, C, E, F, attached to Reply Declarations in Further Support of Claudia's Motion for Summary Judgment, dated September 25, 1997 (“Pl.Reply”). The bills of lading bear the same date as the corresponding invoices. Further, plaintiff has submitted a letter from the shipper Matricardi stating that it delivered the

Defendant does not dispute that the term “ex works” appears on all of the contested invoices, nor does it dispute that “ex works” means “delivery at seller's factory.” Nevertheless, defendant opposes this summary judgment motion, claiming that there remain disputed issues of material fact. Specifically, Olivieri contests (1) the existence of a contractual relationship with Claudia; (2) that it agreed to delivery “ex works;” and (3) that it received the goods at issue. It further argues that any goods received were either late or nonconforming, thus resulting in a breach by plaintiff. See Defendant's Memorandum of Law in Opposition to Motion for Summary Judgment, dated August 6, 1997 (“Def.Mem.”), at 2–3, 6, 8.

In support of its position, defendant submitted several facsimiles (“faxes”), all of which plaintiff contends are not authentic and were never received by plaintiff. In a fax dated November 29, 1993, defendant complained of plaintiff's marking all invoices with “Franco Fabrica” (“ex works”) because it was not consistent with the “original agreement,” which instead allegedly provided defendant with an opportunity to inspect and accept the merchandise first. See Ex. A, attached to Response to Plaintiff's Motion for Summary Judgment, dated August 6, 1997 (“Def.Response”). Defendant also reminded plaintiff in that fax that the parties had agreed not to use the shipper Matricardi, because defendant did not want to be responsible for that shipper's unreliability. Id.

In another fax, dated November 26, 1993, which specifically addressed invoice no. 336, defendant emphasized that its agent must inspect the goods and approve them prior to shipping. See Ex. B, attached to Def. Response. Defendant further demanded a bill of lading to document plaintiff's “release of goods.” Id.

In faxes dated December 24, 1993 and January 10, 1994, defendant demanded proof of delivery for the goods listed in invoice no. 372. See Exs. C, D, attached to Def. Response. In a fax dated January 11, 1994, defendant demanded proof of delivery for the goods listed in invoice no. 383, claiming that the delivery was late. See Ex. E, attached to Def. Response. Defendant further stated that it only accepted merchandise totaling LIT 10,764,000 and not LIT 77,418,000, as indicated in invoice no. 383. Id.

Finally, in a fax dated June 28, 1994, defendant objected to plaintiff's inclusion of the term “Franco Fabrica” on invoice no. 5. See Ex. F, attached to Def. Response. Defendant stated in the fax that it did not agree to that term and that the “agreement was that instead of sitting on this (sic) shoes in your
warehouse you use our services to sell them here in [the] states.” Id. Defendant also asserted that it rejected 528 pairs of shoes, valued at LIT 12,936,000, that were reflected in invoice no. 5. See Ex. F, attached to Def. Response. Plaintiff's bill of lading, bearing the name and signature of the shipper, noted defendant's rejection of 528 pairs of shoes. See Ex. F, attached to Pl. Reply. Plaintiff does not dispute that these goods were rejected and points to the credit in invoice no. 13 for that exact amount. See Ex. F, attached to Compl.; Compl. at ¶¶ 25–26.

In addition, defendant submitted an affidavit of Michail Litvin, the principal owner of Olivieri, contesting factual allegations made by plaintiff. See Affirmation of Michail Litvin in Opposition to Plaintiff's Motion for Summary Judgment, dated August 6, 1997 (“Litvin Aff.”) at ¶ 1, attached to Def. Response. In his affidavit, Litvin denies that any agreement existed between Olivieri and Claudia. (Litvin Aff. at ¶ 6.) Litvin also states that Olivieri did not receive any of the goods at issue and that the “ex works” provision on the contested invoices was not agreed to by Olivieri. Id. at ¶¶ 9–11. Litvin further claims that Olivieri's faxes requesting proof of delivery serve as evidence of nondelivery of the goods at issue. Id. at ¶ 13.

Defendant thus argues that its faxes and affidavit place in dispute material issues of fact and that summary judgment should be denied. (Def. Mem. at 7–8.)

DISCUSSION

I. . . . Legal Principles Governing the Construction of the Parties' Agreement

The transactions in the instant case are governed by the United Nations Convention on Contracts for the International Sale of Goods (“CISG”), codified at 15 U.S.C.A. Appendix (West 1998). When two foreign nations are signatories to this Convention, as are the United States and Italy, the Convention governs contracts for the sale of goods between parties whose places of business are in these different nations, absent a choice-of-law provision to the contrary. See CISG, Article 1(1)(a); see also Delchi Carrier SpA v. Rotorex Corp., 71 F.3d 1024, 1027–28 (2d Cir.1995) (applying CISG in contract dispute between Italian manufacturer and a New York corporation); Filanto, S.p.A. v. Chilewich Int'l Corp., 789 F.Supp. 1229, 1237 (S.D.N.Y.1992) (applying CISG in a contract dispute between an Italian footwear manufacturer and New York export-import company), appeal dismissed, 984 F.2d 58, 61 (2d Cir.1993); Helen Kaminski Pty., Ltd. v. Marketing Australian Products, Nos. M–47 (DLC), 96B46519–97–8072A, 1997 WL 414137, at *2 (S.D.N.Y. July 23, 1997). As the contractual relationship between plaintiff Claudia, an Italian shoe manufacturer, and
defendant Olivieri, a United States corporation, did not provide for a choice of law, the CISG controls.

The caselaw interpreting and applying the CISG is sparse. See, e.g., Helen Kaminski Pty., Ltd., 1997 WL 414137, at *3 (stating that there is “little to no case law on the CISG in general”); Filanto, S.p.A., 789 F.Supp. at 1237 (acknowledging that there is virtually no United States caselaw interpreting the CISG). Thus, the Court must “look to its language and ‘to the general principles' upon which it is based.” Delchi Carrier SpA, 71 F.3d at 1027 (citing CISG Art. 7(2)). Caselaw interpreting Article 2 of the Uniform Commercial Code (“UCC”) may also be used to interpret the CISG where the provisions in each statute contain similar language. See Delchi Carrier SpA, 71 F.3d at 1027. However, the Second Circuit has cautioned that caselaw interpreting UCC provisions is not “per se applicable.” Id.; see also Orbisphere Corp. v. United States, 726 F.Supp. 1344, 1355 n. 7 (Ct. Int'l Trade 1989). Although the CISG is similar to the UCC with respect to certain provisions, it differs from the UCC with respect to others, including the UCC’s writing requirement for a transaction for the sale of goods and parol evidence rule. Where controlling provisions are inconsistent, it would be inappropriate to apply UCC caselaw in construing contracts under the CISG.

In the instant case, there is no formal written contract and there are no purchase orders setting forth the terms of the parties' sales transactions. While an oral agreement may be enforceable under the CISG, see infra pp. 13–14, neither party has offered any evidence regarding their oral communications, although it is apparent that the parties had oral communications regarding the purchase and sale of shoes between August 1993 and March 1994, the time period relevant to the disputed invoices. Plaintiff relies on its invoices and bills of lading as evidence of the agreement between Claudia and Olivieri. Plaintiff argues that the invoices are unambiguous, that they constituted the final expression of the parties' agreement, and that the parol evidence rule bars the Court from considering any extrinsic evidence (i.e., the faxes and prior oral communications) regarding the parties' intentions or understanding. (Pl. Mem. at 9.)

Under certain circumstances, invoices may be viewed as contracts and, in such cases, under the UCC, the parol evidence rule prohibits evidence of contradictory oral agreements that were made prior to the receipt of the invoice. See Polygram, S.A., v. Enterprises, Inc., 697 F.Supp. 132, 135 (E.D.N.Y.1988) (holding that invoices containing express “terms of sale” provisions were the final expression of the parties' agreement and could not be contradicted by evidence of a prior agreement); Battista v. Radesi, 112 A.D.2d 42, 491 N.Y.S.2d 81, 81 (4th Dep't 1985) (holding that an invoice including names and addresses of the parties, the date and payment terms, a description, and the price for the
goods, was intended to be the final expression of the parties' agreement and could not be contradicted by evidence of a prior oral agreement); Matthew Bender, & Co., Inc. v. Jaiswal, 93 A.D.2d 969, 463 N.Y.S.2d 78, 78 (3rd Dep't 1983) (holding that invoices containing names and addresses of the parties, the date, payment and refund terms, and the price and description of goods, represented a final written expression of the parties' agreement and could not be contradicted by evidence of a prior agreement). But see Getz v. Eichner, No. 96 Civ. 8304(LBS) (AGS), 1997 WL 362318, at *3–4 (S.D.N.Y. July 1, 1997) (summary judgment denied on breach of contract claim where only written evidence of oral agreement was an unsigned invoice, which defendant denied receiving and which contained disputed terms). Accordingly, in cases governed by the UCC, where written documents evidencing the parties' agreement are unambiguous, summary judgment may be appropriate. See L.B. Foster Co. v. America Piles, Inc., et al., 138 F.3d 81, 1998 WL 88873, at *6 (2d Cir. Feb.26, 1998); Schiavone v. Pearce, 79 F.3d 248, 252 (2d Cir.1996) (summary judgment appropriate only where language of the contract is "wholly unambiguous"); accord John Hancock Mut. Life Ins. Co. v. Amerford Int'l Corp., 22 F.3d 458, 461 (2d Cir.1994).

Unlike the UCC, under the CISG a contract need not be evidenced by a writing. See CISG, Art. 11 (“A contract of sale need not be ... evidenced by a writing and is not subject to any other requirement as to form.”). According to the CISG, a contract “may be proved by any means ...” and “any evidence that may bear on the issue of formation is admissible.” Id. Such evidence may include oral statements made prior to a writing. Larry A. Dimatteo, An International Contract Law Formula: The Informality of International Business Transactions Plus the Internationalization of Contract Law Equals Unexpected Contractual Liability, 23 Syracuse J. Int'l L. & Com. 67, at *103 (1997). Under the CISG, “prior oral representations regarding the quality and performance would be enforceable.” Id. Thus, contracts governed by the CISG are freed from the limits of the parol evidence rule and there is a wider spectrum of admissible evidence to consider in construing the terms of the parties' agreement. Larry A. Dimatteo, The CISG and the Presumption of Enforceability: Unintended Contractual Liability in International Business Dealings, 22 Yale J. Int'l L. 111, at *127 (1997). The CISG's “lack of a writing requirement allows all relevant information into evidence even if it contradicts the written documentation.” Id. at *108. Under the CISG, “any relevant statement made in negotiations prior to the signing of the contract are [sic] admissible into evidence.” Id. at *103 citing John

3 The UCC requires that a sale of goods must be evidenced by a writing sufficient to indicate that a contract of sale has been made and must be signed by the party against whom enforcement is sought. UCC § 2–201(1). The writing may be a one-sided instrument, however, under the written confirmation rule. According to this rule, a merchant may legally confirm an oral agreement in writing. If the receiving party fails to object within a reasonable time, then she has waived her statute of frauds defense.
Consequently, the standard UCC inquiry regarding whether a writing is fully or partially integrated has little meaning under the CISG and courts are therefore less constrained by the “four corners” of the instrument in construing the terms of the contract. 23 Syracuse J. Int’l L. & Com. 67, at *108. Evidence concerning any negotiations, agreements, or statements made prior to the issuance of the invoices in issue may be considered in determining the scope of the parties' agreement. Further, Article 9 of the CISG provides that “the parties are bound by any usage to which they have agreed and by any practices which they have established.” CISG, Article 9(1).

II. Disputed Issues

Plaintiff argues that the invoice terms are unambiguous. At first glance, that appears to be true in that they provide the names and addresses of the parties, the date, a description of the items, the price for the goods, the terms for payment, and a method of delivery. Nevertheless, any inquiry regarding ambiguous/unambiguous contractual language is not very instructive in this case, where (1) there is no formal written contract, (2) plaintiff relies on invoices which it prepared unilaterally and which do not contain language evidencing, either explicitly or implicitly, that the invoices reflect the parties' final agreement, and (3) the CISG allows for the use of extrinsic evidence in determining the parties' agreement and intent. The record also contains faxes from the defendant disavowing certain provisions in the invoices and/or questioning whether there was proper performance under the parties' agreement. This case is therefore distinguishable from others in which invoices were found to be unambiguous, binding contracts. Compare Data Research Assocs., Inc. v. Computer Center, Inc., No. 84 Civ. 8334(JFK), 1988 WL 140864, at *3 (S.D.N.Y. Dec.21, 1988) (parties' intent to be bound by invoice terms was evidenced by invoice provision specifically stating that the invoice “will be forwarded to an attorney for collection” if goods not paid for in accordance with invoice terms); Polygram, S.A., 697 F.Supp. at 133 (defendant failed to make any written or oral objection to the terms of sale explicitly stated in the invoice until after the action was commenced); Community Bank v. Newmark & Lewis, Inc., 534 F.Supp. 456, 458–59 (E.D.N.Y.1982) (invoices stated “acceptance of merchandise covered by this invoice represents buyer's agreement to meet the current terms and conditions of sale under which the order was entered. Title passes from buyer to seller upon seller's delivery to carrier ...”); defendant admitted that it received the invoiced goods; and defendant did not produce any evidence that it proposed
different terms or that it timely objected to the terms set forth in the invoices); Orbisphere Corp., 726 F.Supp. at 1345 (invoice contained express provisions stating that “title and risk of loss passes (sic) from the seller to the buyer on delivery of the merchandise to the carrier at the F.O.B. point indicated in the invoice”; “All prices are F.O.B. Haworth, N.J.”; and “Orders are subject to acceptance only at seller's office in Haworth, N.J.”); Battista, 491 N.Y.S.2d at 81 (defendant signed the invoice containing the payment terms and did not dispute that it received the invoiced goods); General Motors Acceptance Corp. v. Fairway Dodge Sales, Inc., 80 A.D.2d 740, 437 N.Y.S.2d 171, 173 (sales contract explicitly stated that the writing “comprised the complete and exclusive statement of the terms of the agreement.”)

CONCLUSION

Given the factual disputes as to whether “ex works” was an agreed upon term of the contract, whether the parties' agreement was accurately reflected in the invoices, whether delivery was satisfactorily performed, and whether the shippers were in all cases defendant's agents, summary judgment is inappropriate and plaintiff's motion is denied. This ruling is obviously not intended to suggest that plaintiff's claims lack merit. Indeed, a number of the assertions made in defendant's motion papers are highly dubious and there has been a strong suggestion that evidence offered by defendant has been contrived. These issues can only be resolved at trial.

The parties are directed to submit a Joint Pretrial Order by May 8, 1998.

SO ORDERED.
CHAPTER 4: CONTRACT INTERPRETATION


Article 8

(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 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.

Article 9

(1) The parties are bound by any usage to which they have agreed and by any practices which they have established between themselves.

* * *

Article 11

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.

* * *
Article 29

(1) A contract may be modified or terminated by the mere agreement of the parties.

(2) A contract in writing which contains a provision requiring any modification or termination by agreement to be in writing may not be otherwise modified or terminated by agreement. However, a party may be precluded by his conduct from asserting such a provision to the extent that the other party has relied on that conduct.

* * *

Article 96

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.

MCC-Marble Ceramic Center, Inc. v. d’Agostino, S.p.A.
144 F.3d 1384 (11th Cir. 1998)

BIRCH, Circuit Judge:

This case requires us to determine whether a court must consider parol evidence in a contract dispute governed by the United Nations Convention on Contracts for the International Sale of Goods (“CISG”). . . .

BACKGROUND

The plaintiff-appellant, MCC-Marble Ceramic, Inc. (“MCC”), is a Florida corporation engaged in the retail sale of tiles, and the defendant-appellee, Ceramica Nuova d'Agostino S.p.A. (“D'Agostino”) is an Italian corporation engaged in the manufacture of ceramic tiles. In October 1990, MCC's president, Juan Carlos Mozon, met representatives of D'Agostino at a trade fair in Bologna, Italy and negotiated an agreement to purchase ceramic tiles from D'Agostino based on samples he examined at the trade fair. Monzon, who spoke no Italian,
communicated with Gianni Silingardi, then D'Agostino's commercial director, through a translator, Gianfranco Copelli, who was himself an agent of D'Agostino. The parties apparently arrived at an oral agreement on the crucial terms of price, quality, quantity, delivery and payment. The parties then recorded these terms on one of D'Agostino's standard, pre-printed order forms and Monzon signed the contract on MCC's behalf. According to MCC, the parties also entered into a requirements contract in February 1991, subject to which D'Agostino agreed to supply MCC with high grade ceramic tile at specific discounts as long as MCC purchased sufficient quantities of tile. MCC completed a number of additional order forms requesting tile deliveries pursuant to that agreement.

MCC brought suit against D'Agostino claiming a breach of the February 1991 requirements contract when D'Agostino failed to satisfy orders in April, May, and August of 1991. In addition to other defenses, D'Agostino responded that it was under no obligation to fill MCC's orders because MCC had defaulted on payment for previous shipments. In support of its position, D'Agostino relied on the pre-printed terms of the contracts that MCC had executed. The executed forms were printed in Italian and contained terms and conditions on both the front and reverse. According to an English translation of the October 1990 contract, the front of the order form contained the following language directly beneath Monzon's signature:

[T]he buyer hereby states that he is aware of the sales conditions stated on the reverse and that he expressly approves of them with special reference to those numbered 1-2-3-4-5-6-7-8.

R2-126, Exh. 3 ¶ 5 (“Maselli Aff.”). Clause 6(b), printed on the back of the form states:

[D]efault or delay in payment within the time agreed upon gives D'Agostino the right to ... suspend or cancel the contract itself and to cancel possible other pending contracts and the buyer does not have the right to indemnification or damages.

Id. ¶ 6.

D'Agostino also brought a number of counterclaims against MCC, seeking damages for MCC's alleged nonpayment for deliveries of tile that D'Agostino had made between February 28, 1991 and July 4, 1991. MCC responded that the tile it had received was of a lower quality than contracted for, and that, pursuant to the CISG, MCC was entitled to reduce payment in
proportion to the defects. D'Agostino, however, noted that clause 4 on the reverse of the contract states, in pertinent part:

Possible complaints for defects of the merchandise must be made in writing by means of a certified letter within and not later than 10 days after receipt of the merchandise....

Maselli Aff. ¶ 6. Although there is evidence to support MCC's claims that it complained about the quality of the deliveries it received, MCC never submitted any written complaints.

MCC did not dispute these underlying facts before the district court, but argued that the parties never intended the terms and conditions printed on the reverse of the order form to apply to their agreements. As evidence for this assertion, MCC submitted Monzon's affidavit, which claims that MCC had no subjective intent to be bound by those terms and that D'Agostino was aware of this intent. MCC also filed affidavits from Silingardi and Copelli, D'Agostino's representatives at the trade fair, which support Monzon's claim that the parties subjectively intended not to be bound by the terms on the reverse of the order form. The magistrate judge held that the affidavits, even if true, did not raise an issue of material fact regarding the interpretation or applicability of the terms of the written contracts and the district court accepted his recommendation to award summary judgment in D'Agostino's favor. MCC then filed this timely appeal.

DISCUSSION

. . . The parties to this case agree that the CISG governs their dispute because the United States, where MCC has its place of business, and Italy, where D'Agostino has its place of business, are both States Party to the Convention. See CISG, art. 1. Article 8 of the CISG governs the interpretation of international contracts for the sale of goods and forms the basis of MCC's appeal from the district court's grant of summary judgment in D'Agostino's favor. MCC argues

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4 Article 50 of the CISG permits a buyer to reduce payment for nonconforming goods in proportion to the nonconformity under certain conditions. See CISG, art. 50.

5 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 conduct of a party are to be interpreted according to the understanding 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 understanding a reasonable person would have had, due consideration is to be given to all relevant circumstances of the case including the negotiations,
that the magistrate judge and the district court improperly ignored evidence that MCC submitted regarding the parties' subjective intent when they memorialized the terms of their agreement on D'Agostino's pre-printed form contract, and that the magistrate judge erred by applying the parol evidence rule in derogation of the CISG.

I. Subjective Intent Under the CISG

Contrary to what is familiar practice in United States courts, the CISG appears to permit a substantial inquiry into the parties' subjective intent, even if the parties did not engage in any objectively ascertainable means of registering this intent. Article 8(1) of the CISG instructs courts to interpret the “statements ... and other conduct of a party ... according to his intent” as long as the other party “knew or could not have been unaware” of that intent. The plain language of the Convention, therefore, requires an inquiry into a party's subjective intent as long as the other party to the contract was aware of that intent.

In this case, MCC has submitted three affidavits that discuss the purported subjective intent of the parties to the initial agreement concluded between MCC and D'Agostino in October 1990. All three affidavits discuss the preliminary negotiations and report that the parties arrived at an oral agreement for D'Agostino to supply quantities of a specific grade of ceramic tile to MCC at an agreed upon price. The affidavits state that the “oral agreement established the essential terms of quality, quantity, description of goods, delivery, price and payment.” See R3-133 ¶ 9 ("Silingardi Aff."); R1-51 ¶ 7 ("Copelli Aff."); R1-47 ¶ 7 ("Monzon Aff."). The affidavits also note that the parties memorialized the terms of their oral agreement on a standard D'Agostino order form, but all three affiants contend that the parties subjectively intended not to be bound by the terms on the reverse of that form despite a provision directly below the signature line that expressly and specifically incorporated those terms.

The terms on the reverse of the contract give D'Agostino the right to suspend or cancel all contracts in the event of a buyer's non-payment and require a buyer to make a written report of all defects within ten days. As the magistrate judge's report and recommendation makes clear, if these terms applied to the agreements between MCC and D'Agostino, summary judgment would be appropriate because MCC failed to make any written complaints about the

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any practices which the parties have established between themselves, usages and any subsequent conduct of the parties.

CISG, art. 8.
quality of tile it received and D'Agostino has established MCC's non-payment of a number of invoices amounting to $108,389.40 and 102,053,846.00 Italian lira.

Article 8(1) of the CISG requires a court to consider this evidence of the parties' subjective intent. Contrary to the magistrate judge's report, which the district court endorsed and adopted, article 8(1) does not focus on interpreting the parties' statements alone. Although we agree with the magistrate judge's conclusion that no “interpretation” of the contract's terms could support MCC's position, article 8(1) also requires a court to consider subjective intent while interpreting the conduct of the parties. The CISG's language, therefore, requires courts to consider evidence of a party's subjective intent when signing a contract if the other party to the contract was aware of that intent at the time. This is precisely the type of evidence that MCC has provided through the Silingardi, Copelli, and Monzon affidavits, which discuss not only Monzon's intent as MCC's representative but also discuss the intent of D'Agostino's representatives and their knowledge that Monzon did not intend to agree to the terms on the reverse of the form contract. This acknowledgment that D'Agostino's representatives were aware of Monzon's subjective intent puts this case squarely within article 8(1) of the CISG, and therefore requires the court to consider MCC's evidence as it interprets the parties' conduct. 6

II. Parol Evidence and the CISG

Given our determination that the magistrate judge and the district court should have considered MCC's affidavits regarding the parties' subjective intentions, we must address a question of first impression in this circuit: whether the parol evidence rule, which bars evidence of an earlier oral contract that contradicts or varies the terms of a subsequent or contemporaneous written contract, plays any role in cases involving the CISG. 7 We begin by observing that

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6 Without this crucial acknowledgment, we would interpret the contract and the parties' actions according to article 8(2), which directs courts to rely on objective evidence of the parties' intent. On the facts of this case it seems readily apparent that MCC's affidavits provide no evidence that Monzon's actions would have made his alleged subjective intent not to be bound by the terms of the contract known to “the understanding that a reasonable person ... would have had in the same circumstances.” CISG, art 8(2).

7 The Uniform Commercial Code includes a version of the parol evidence rule applicable to contracts for the sale of goods in most states:

Terms with respect to which the confirmatory memoranda of the parties agree or which are otherwise set forth in a writing intended by the parties as a final expression of their agreement with respect to such terms as are included therein may not be contradicted by evidence of any prior agreement or of a contemporaneous oral agreement but may be explained or supplemented

(a) by course of dealing or usage of trade ... or by course of performance ...; and

(b) by evidence of consistent additional terms unless the court finds the writing to have been intended also as a complete and exclusive statement of the terms of the agreement.
the parol evidence rule, contrary to its title, is a substantive rule of law, not a rule of evidence. See II E. Allen Farnsworth, Farnsworth on Contracts, § 7.2 at 194 (1990). The rule does not purport to exclude a particular type of evidence as an “untrustworthy or undesirable” way of proving a fact, but prevents a litigant from attempting to show “the fact itself—the fact that the terms of the agreement are other than those in the writing.” Id. As such, a federal district court cannot simply apply the parol evidence rule as a procedural matter—as it might if excluding a particular type of evidence under the Federal Rules of Evidence, which apply in federal court regardless of the source of the substantive rule of decision. Cf. id. § 7.2 at 196.

The CISG itself contains no express statement on the role of parol evidence. See Honnold, Uniform Law § 110 at 170. It is clear, however, that the drafters of the CISG were comfortable with the concept of permitting parties to rely on oral contracts because they eschewed any statutes of fraud provision and expressly provided for the enforcement of oral contracts. Compare CISG, art. 11 (a contract of sale need not be concluded or evidenced in writing) with U.C.C. § 2-201 (precluding the enforcement of oral contracts for the sale of goods involving more than $500). Moreover, article 8(3) of the CISG expressly directs courts to give “due consideration ... to all relevant circumstances of the case including the negotiations ...” to determine the intent of the parties. Given article 8(1)'s directive to use the intent of the parties to interpret their statements and conduct, article 8(3) is a clear instruction to admit and consider parol evidence regarding the negotiations to the extent they reveal the parties' subjective intent.

Despite the CISG's broad scope, surprisingly few cases have applied the Convention in the United States, see Delchi Carrier SpA v. Rotorex Corp., 71 F.3d 1024, 1027-28 (2d Cir.1995) (observing that “there is virtually no case law under the Convention”), and only two reported decisions touch upon the parol evidence rule, both in dicta. One court has concluded, much as we have above, that the parol evidence rule is not viable in CISG cases in light of article 8 of the Convention. In Filanto, a district court addressed the differences between the UCC and the CISG on the issues of offer and acceptance and the battle of the forms. See 789 F.Supp. at 1238. After engaging in a thorough analysis of how the CISG applied to the dispute before it, the district court tangentially observed that article 8(3) “essentially rejects ... the parol evidence rule.” Id. at 1238 n. 7. Another court, however, appears to have arrived at a contrary conclusion. In Beijing Metals & Minerals Import/Export Corp. v. American Bus. Ctr., Inc., 993 F.2d 1178 (5th Cir.1993), a defendant sought to avoid summary judgment on a contract claim by relying on evidence of contemporaneously negotiated oral

terms that the parties had not included in their written agreement. The plaintiff, a Chinese corporation, relied on Texas law in its complaint while the defendant, apparently a Texas corporation, asserted that the CISG governed the dispute. Id. at 1183 n. 9. Without resolving the choice of law question, the Fifth Circuit cited Filanto for the proposition that there have been very few reported cases applying the CISG in the United States, and stated that the parol evidence rule would apply regardless of whether Texas law or the CISG governed the dispute. Beijing Metals, 993 F.2d at 1183 n. 9. The opinion does not acknowledge Filanto's more applicable dictum that the parol evidence rule does not apply to CISG cases nor does it conduct any analysis of the Convention to support its conclusion. In fact, the Fifth Circuit did not undertake to interpret the CISG in a manner that would arrive at a result consistent with the parol evidence rule but instead explained that it would apply the rule as developed at Texas common law. See id. at 1183 n. 10. As persuasive authority for this court, the Beijing Metals opinion is not particularly persuasive on this point.

Our reading of article 8(3) as a rejection of the parol evidence rule, however, is in accordance with the great weight of academic commentary on the issue. As one scholar has explained:

[T]he language of Article 8(3) that “due consideration is to be given to all relevant circumstances of the case” seems adequate to override any domestic rule that would bar a tribunal from considering the relevance of other agreements.... Article 8(3) relieves tribunals from domestic rules that might bar them from “considering” any evidence between the parties that is relevant. This added flexibility for interpretation is consistent with a growing body of opinion that the “parol evidence rule” has been an embarrassment for the administration of modern transactions.

Honnnold, Uniform Law § 110 at 170-71. Indeed, only one commentator has made any serious attempt to reconcile the parol evidence rule with the CISG. See David H. Moore, Note, The Parol Evidence Rule and the United Nations Convention on Contracts for the International Sale of Goods: Justifying Beijing Metals & Minerals Import/Export Corp. v. American Business Center, Inc., 1995 BYU L.Rev. 1347. Moore argues that the parol evidence rule often permits the admission of evidence discussed in article 8(3), and that the rule could be an appropriate way to discern what consideration is “due” under article 8(3) to evidence of a parol nature. Id. at 1361-63. He also argues that the parol evidence rule, by limiting the incentive for perjury and pleading prior understandings in bad faith, promotes good faith and uniformity in the interpretation of contracts and therefore is in harmony with the principles of the CISG, as expressed in
article 7.\textsuperscript{8} Id. at 1366-70. The answer to both these arguments, however, is the same: although jurisdictions in the United States have found the parol evidence rule helpful to promote good faith and uniformity in contract, as well as an appropriate answer to the question of how much consideration to give parol evidence, a wide number of other States Party to the CISG have rejected the rule in their domestic jurisdictions. One of the primary factors motivating the negotiation and adoption of the CISG was to provide parties to international contracts for the sale of goods with some degree of certainty as to the principles of law that would govern potential disputes and remove the previous doubt regarding which party's legal system might otherwise apply. See Letter of Transmittal from Ronald Reagan, President of the United States, to the United States Senate, reprinted at 15 U.S.C. app. 70, 71 (1997). Courts applying the CISG cannot, therefore, upset the parties' reliance on the Convention by substituting familiar principles of domestic law when the Convention requires a different result. We may only achieve the directives of good faith and uniformity in contracts under the CISG by interpreting and applying the plain language of article 8(3) as written and obeying its directive to consider this type of parol evidence.

This is not to say that parties to an international contract for the sale of goods cannot depend on written contracts or that parol evidence regarding subjective contractual intent need always prevent a party relying on a written agreement from securing summary judgment. To the contrary, most cases will not present a situation (as exists in this case) in which both parties to the contract acknowledge a subjective intent not to be bound by the terms of a pre-printed writing. In most cases, therefore, article 8(2) of the CISG will apply, and objective evidence will provide the basis for the court's decision. See Honnold, Uniform Law § 107 at 164-65. Consequently, a party to a contract governed by the CISG will not be able to avoid the terms of a contract and force a jury trial simply by submitting an affidavit which states that he or she did not have the subjective intent to be bound by the contract's terms. Cf. Klopfenstein v. Pargeter, 597 F.2d 150, 152 (9th Cir.1979) (affirming summary judgment despite the appellant's submission of his own affidavit regarding his subjective intent: "Undisclosed, subjective intentions are immaterial in [a] commercial transaction,

\textsuperscript{8} Article 7 of the CISG provides in pertinent part:

\begin{quote}
(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.
\end{quote}

CISG, art. 7.
especially when contradicted by objective conduct. Thus, the affidavit has no legal effect even if its averments are accepted as wholly truthful.

Moreover, to the extent parties wish to avoid parol evidence problems they can do so by including a merger clause in their agreement that extinguishes any and all prior agreements and understandings not expressed in the writing.

Considering MCC's affidavits in this case, however, we conclude that the magistrate judge and the district court improperly granted summary judgment in favor of D'Agostino. Although the affidavits are, as D'Agostino observes, relatively conclusory and unsupported by facts that would objectively establish MCC's intent not to be bound by the conditions on the reverse of the form, article 8(1) requires a court to consider evidence of a party's subjective intent when the other party was aware of it, and the Silingardi and Copelli affidavits provide that evidence. This is not to say that the affidavits are conclusive proof of what the parties intended. A reasonable finder of fact, for example, could disregard testimony that purportedly sophisticated international merchants signed a contract without intending to be bound as simply too incredible to believe and hold MCC to the conditions printed on the reverse of the contract. Nevertheless, the affidavits raise an issue of material fact regarding the parties' intent to incorporate the provisions on the reverse of the form contract. If the finder of fact determines that the parties did not intend to rely on those provisions, then the more general provisions of the CISG will govern the outcome of the dispute.

CONCLUSION

MCC asks us to reverse the district court's grant of summary judgment in favor of D'Agostino. The district court's decision rests on pre-printed contractual terms and conditions incorporated on the reverse of a standard order form that MCC's president signed on the company's behalf. Nevertheless, we conclude that the CISG, which governs international contracts for the sale of goods, precludes summary judgment in this case because MCC has raised an issue of material fact concerning the parties' subjective intent to be bound by the terms on the reverse of the pre-printed contract. The CISG also precludes the application of the parol evidence rule, which would otherwise bar the consideration of evidence

9 Article 50, which permits a buyer to reduce payment to a seller who delivers nonconforming goods, and article 39, which deprives the buyer of that right if the buyer fails to give the seller notice specifying the defect in the goods delivered within a reasonable time, will be of primary importance. Although we may affirm a district court's grant of summary judgment if it is correct for any reason, even if not relied upon below, see United States v. $121,100.00 in United States Currency, 999 F.2d 1503, 1507 (11th Cir. 1993), and the parties have touched upon these articles in their briefs, they have not provided us with sufficient information to resolve their dispute under the CISG. MCC's affidavits indicate that MCC may have complained about the quality of the tile D'Agostino delivered, but they have provided no authority regarding what constitutes a reasonable time for such a complaint in this context. Accordingly, we decline to affirm the district court's grant of summary judgment on this basis.
concerning a prior or contemporaneously negotiated oral agreement. Accordingly, we REVERSE the district court's grant of summary judgment and REMAND this case for further proceedings consistent with this opinion.
CHAPTER 5: PERFORMANCE AND BREACH


Article 25
A breach of contract committed by one of the parties is fundamental if it results in such detriment to the other party as substantially to deprive him of what he is entitled to expect under the contract, unless the party in breach did not foresee and a reasonable person of the same kind in the same circumstances would not have foreseen such a result.

Article 26
A declaration of avoidance of the contract is effective only if made by notice to the other party.

* * *

Article 30
The seller must deliver the goods, hand over any documents relating to them and transfer the property in the goods, as required by the contract and this Convention.

Article 31
If the seller is not bound to deliver the goods at any other particular place, his obligation to deliver consists:

(a) if the contract of sale involves carriage of the goods - in handing the goods over to the first carrier for transmission to the buyer;

(b) if, in cases not within the preceding subparagraph, the contract relates to specific goods, or unidentified goods to be drawn from a specific stock or to be manufactured or produced, and at the time of the conclusion of the contract the parties knew that the goods were at, or were to be
manufactured or produced at, a particular place - in placing the goods at the buyer's disposal at that place;

(c) in other cases - in placing the goods at the buyer's disposal at the place where the seller had his place of business at the time of the conclusion of the contract.

Article 32

(1) If the seller, in accordance with the contract or this Convention, hands the goods over to a carrier and if the goods are not clearly identified to the contract by markings on the goods, by shipping documents or otherwise, the seller must give the buyer notice of the consignment specifying the goods.

(2) If the seller is bound to arrange for carriage of the goods, he must make such contracts as are necessary for carriage to the place fixed by means of transportation appropriate in the circumstances and according to the usual terms for such transportation.

(3) If the seller is not bound to effect insurance in respect of the carriage of the goods, he must, at the buyer's request, provide him with all available information necessary to enable him to effect such insurance.

Article 33

The seller must deliver the goods:

(a) if a date is fixed by or determinable from the contract, on that date;

(b) if a period of time is fixed by or determinable from the contract, at any time within that period unless circumstances indicate that the buyer is to choose a date; or

(c) in any other case, within a reasonable time after the conclusion of the contract.

Article 34

If the seller is bound to hand over documents relating to the goods, he must hand them over at the time and place and in the form required by the contract. If the seller has handed over documents before that time, he may, up to that time, cure any lack of conformity in the documents, if the exercise of this right does not
cause the buyer unreasonable inconvenience or unreasonable expense. However, the buyer retains any right to claim damages as provided for in this Convention.

Article 35

(1) The seller must deliver goods which are of the quantity, quality and description required by the contract and which are contained or packaged in the manner required by the contract.

(2) Except where the parties have agreed otherwise, the goods do not conform with the contract unless they:

   (a) are fit for the purposes for which goods of the same description would ordinarily be used;

   (b) are fit for any particular purpose expressly or impliedly made known to the seller at the time of the conclusion of the contract, except where the circumstances show that the buyer did not rely, or that it was unreasonable for him to rely, on the seller's skill and judgement;

   (c) possess the qualities of goods which the seller has held out to the buyer as a sample or model;

   (d) are contained or packaged in the manner usual for such goods or, where there is no such manner, in a manner adequate to preserve and protect the goods.

(3) The seller is not liable under subparagraphs (a) to (d) of the preceding paragraph for any lack of conformity of the goods if at the time of the conclusion of the contract the buyer knew or could not have been unaware of such lack of conformity.

Article 36

(1) The seller is liable in accordance with the contract and this Convention for any lack of conformity which exists at the time when the risk passes to the buyer, even though the lack of conformity becomes apparent only after that time.

(2) The seller is also liable for any lack of conformity which occurs after the time indicated in the preceding paragraph and which is due to a breach of any of his obligations, including a breach of any guarantee that for a period of time the
goods will remain fit for their ordinary purpose or for some particular purpose or will retain specified qualities or characteristics.

Article 37

If the seller has delivered goods before the date for delivery, he may, up to that date, deliver any missing part or make up any deficiency in the quantity of the goods delivered, or deliver goods in replacement of any non-conforming goods delivered or remedy any lack of conformity in the goods delivered, provided that the exercise of this right does not cause the buyer unreasonable inconvenience or unreasonable expense. However, the buyer retains any right to claim damages as provided for in this Convention.

Article 38

(1) The buyer must examine the goods, or cause them to be examined, within as short a period as is practicable in the circumstances.

(2) If the contract involves carriage of the goods, examination may be deferred until after the goods have arrived at their destination.

(3) If the goods are redirected in transit or redispached by the buyer without a reasonable opportunity for examination by him and at the time of the conclusion of the contract the seller knew or ought to have known of the possibility of such redirection or redispach, examination may be deferred until after the goods have arrived at the new destination.

Article 39

(1) The buyer loses the right to rely on a lack of conformity of the goods if he does not give notice to the seller specifying the nature of the lack of conformity within a reasonable time after he has discovered it or ought to have discovered it.

(2) In any event, the buyer loses the right to rely on a lack of conformity of the goods if he does not give the seller notice thereof at the latest within a period of two years from the date on which the goods were actually handed over to the buyer, unless this time-limit is inconsistent with a contractual period of guarantee.
Article 40
The seller is not entitled to rely on the provisions of articles 38 and 39 if the lack of conformity relates to facts of which he knew or could not have been unaware and which he did not disclose to the buyer.

Article 41
The seller must deliver goods which are free from any right or claim of a third party, unless the buyer agreed to take the goods subject to that right or claim. However, if such right or claim is based on industrial property or other intellectual property, the seller's obligation is governed by article 42.

Article 42
(1) The seller must deliver goods which are free from any right or claim of a third party based on industrial property or other intellectual property, of which at the time of the conclusion of the contract the seller knew or could not have been unaware, provided that the right or claim is based on industrial property or other intellectual property:

(a) under the law of the State where the goods will be resold or otherwise used, if it was contemplated by the parties at the time of the conclusion of the contract that the goods would be resold or otherwise used in that State; or

(b) in any other case, under the law of the State where the buyer has his place of business.

(2) The obligation of the seller under the preceding paragraph does not extend to cases where:

(a) at the time of the conclusion of the contract the buyer knew or could not have been unaware of the right or claim; or

(b) the right or claim results from the seller's compliance with technical drawings, designs, formulae or other such specifications furnished by the buyer.

Article 43
(1) The buyer loses the right to rely on the provisions of article 41 or article 42 if he does not give notice to the seller specifying the nature of the right or claim of
the third party within a reasonable time after he has become aware or ought to have become aware of the right or claim.

(2) The seller is not entitled to rely on the provisions of the preceding paragraph if he knew of the right or claim of the third party and the nature of it.

Article 44

Notwithstanding the provisions of paragraph (1) of article 39 and paragraph (1) of article 43, the buyer may reduce the price in accordance with article 50 or claim damages, except for loss of profit, if he has a reasonable excuse for his failure to give the required notice.

* * *

Article 53

The buyer must pay the price for the goods and take delivery of them as required by the contract and this Convention.

Article 54

The buyer's obligation to pay the price includes taking such steps and complying with such formalities as may be required under the contract or any laws and regulations to enable payment to be made.

Article 55

Where 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 the price generally charged at the time of the conclusion of the contract for such goods sold under comparable circumstances in the trade concerned.

Article 56

If the price is fixed according to the weight of the goods, in case of doubt it is to be determined by the net weight.
Article 57

(1) If the buyer is not bound to pay the price at any other particular place, he must pay it to the seller:

(a) at the seller's place of business; or

(b) if the payment is to be made against the handing over of the goods or of documents, at the place where the handing over takes place.

(2) The seller must bear any increases in the expenses incidental to payment which is caused by a change in his place of business subsequent to the conclusion of the contract.

Article 58

(1) If the buyer is not bound to pay the price at any other specific time, he must pay it when the seller places either the goods or documents controlling their disposition at the buyer's disposal in accordance with the contract and this Convention. The seller may make such payment a condition for handing over the goods or documents.

(2) If the contract involves carriage of the goods, the seller may dispatch the goods on terms whereby the goods, or documents controlling their disposition, will not be handed over to the buyer except against payment of the price.

(3) The buyer is not bound to pay the price until he has had an opportunity to examine the goods, unless the procedures for delivery or payment agreed upon by the parties are inconsistent with his having such an opportunity.

Article 59

The buyer must pay the price on the date fixed by or determinable from the contract and this Convention without the need for any request or compliance with any formality on the part of the seller.
Article 60

The buyer's obligation to take delivery consists:

(a) in doing all the acts which could reasonably be expected of him in order to enable the seller to make delivery; and

(b) in taking over the goods.

Article 66

Loss of or damage to the goods after the risk has passed to the buyer does not discharge him from his obligation to pay the price, unless the loss or damage is due to an act or omission of the seller.

Article 67

(1) If the contract of sale involves carriage of the goods and the seller is not bound to hand them over at a particular place, the risk passes to the buyer when the goods are handed over to the first carrier for transmission to the buyer in accordance with the contract of sale. If the seller is bound to hand the goods over to a carrier at a particular place, the risk does not pass to the buyer until the goods are handed over to the carrier at that place. The fact that the seller is authorized to retain documents controlling the disposition of the goods does not affect the passage of the risk.

(2) Nevertheless, the risk does not pass to the buyer until the goods are clearly identified to the contract, whether by markings on the goods, by shipping documents, by notice given to the buyer or otherwise.

Article 68

The risk in respect of goods sold in transit passes to the buyer from the time of the conclusion of the contract. However, if the circumstances so indicate, the risk is assumed by the buyer from the time the goods were handed over to the carrier who issued the documents embodying the contract of carriage. Nevertheless, if at the time of the conclusion of the contract of sale the seller knew or ought to have known that the goods had been lost or damaged and did not disclose this to the buyer, the loss or damage is at the risk of the seller.
Article 69

(1) In cases not within articles 67 and 68, the risk passes to the buyer when he takes over the goods or, if he does not do so in due time, from the time when the goods are placed at his disposal and he commits a breach of contract by failing to take delivery.

(2) However, if the buyer is bound to take over the goods at a place other than a place of business of the seller, the risk passes when delivery is due and the buyer is aware of the fact that the goods are placed at his disposal at that place.

(3) If the contract relates to goods not then identified, the goods are considered not to be placed at the disposal of the buyer until they are clearly identified to the contract.

Article 70

If the seller has committed a fundamental breach of contract, articles 67, 68 and 69 do not impair the remedies available to the buyer on account of the breach.

Article 71

(1) A party may suspend the performance of his obligations if, after the conclusion of the contract, it becomes apparent that the other party will not perform a substantial part of his obligations as a result of:

(a) a serious deficiency in his ability to perform or in his creditworthiness; or

(b) his conduct in preparing to perform or in performing the contract.

(2) If the seller has already dispatched the goods before the grounds described in the preceding paragraph become evident, he may prevent the handing over of the goods to the buyer even though the buyer holds a document which entitles him to obtain them. The present paragraph relates only to the rights in the goods as between the buyer and the seller.

(3) A party suspending performance, whether before or after dispatch of the goods, must immediately give notice of the suspension to the other party and must continue with performance if the other party provides adequate assurance of his performance.
Article 72

(1) If prior to the date for performance of the contract it is clear that one of the parties will commit a fundamental breach of contract, the other party may declare the contract avoided.

(2) If time allows, the party intending to declare the contract avoided must give reasonable notice to the other party in order to permit him to provide adequate assurance of his performance.

(3) The requirements of the preceding paragraph do not apply if the other party has declared that he will not perform his obligations.

Article 73

(1) In the case of a contract for delivery of goods by instalments, if the failure of one party to perform any of his obligations in respect of any instalment constitutes a fundamental breach of contract with respect to that instalment, the other party may declare the contract avoided with respect to that instalment.

(2) If one party's failure to perform any of his obligations in respect of any instalment gives the other party good grounds to conclude that a fundamental breach of contract will occur with respect to future instalments, he may declare the contract avoided for the future, provided that he does so within a reasonable time.

(3) A buyer who declares the contract avoided in respect of any delivery may, at the same time, declare it avoided in respect of deliveries already made or of future deliveries if, by reason of their interdependence, those deliveries could not be used for the purpose contemplated by the parties at the time of the conclusion of the contract.

* * *

Article 81

(1) Avoidance of the contract releases both parties from their obligations under it, subject to any damages which may be due. Avoidance does not affect any provision of the contract for the settlement of disputes or any other provision of the contract governing the rights and obligations of the parties consequent upon the avoidance of the contract.
(2) A party who has performed the contract either wholly or in part may claim restitution from the other party of whatever the first party has supplied or paid under the contract. If both parties are bound to make restitution, they must do so concurrently.

Article 82

(1) The buyer loses the right to declare the contract avoided or to require the seller to deliver substitute goods if it is impossible for him to make restitution of the goods substantially in the condition in which he received them.

(2) The preceding paragraph does not apply:

(a) if the impossibility of making restitution of the goods or of making restitution of the goods substantially in the condition in which the buyer received them is not due to his act or omission;

(b) if the goods or part of the goods have perished or deteriorated as a result of the examination provided for in article 38; or

(c) if the goods or part of the goods have been sold in the normal course of business or have been consumed or transformed by the buyer in the course of normal use before he discovered or ought to have discovered the lack of conformity.

Article 83

A buyer who has lost the right to declare the contract avoided or to require the seller to deliver substitute goods in accordance with article 82 retains all other remedies under the contract and this Convention.

Article 84

(1) If the seller is bound to refund the price, he must also pay interest on it, from the date on which the price was paid.

(2) The buyer must account to the seller for all benefits which he has derived from the goods or part of them:

(a) if he must make restitution of the goods or part of them; or
(b) if it is impossible for him to make restitution of all or part of the goods or to make restitution of all or part of the goods substantially in the condition in which he received them, but he has nevertheless declared the contract avoided or required the seller to deliver substitute goods.

**Article 85**

If the buyer is in delay in taking delivery of the goods or, where payment of the price and delivery of the goods are to be made concurrently, if he fails to pay the price, and the seller is either in possession of the goods or otherwise able to control their disposition, the seller must take such steps as are reasonable in the circumstances to preserve them. He is entitled to retain them until he has been reimbursed his reasonable expenses by the buyer.

**Article 86**

(1) If the buyer has received the goods and intends to exercise any right under the contract or this Convention to reject them, he must take such steps to preserve them as are reasonable in the circumstances. He is entitled to retain them until he has been reimbursed his reasonable expenses by the seller.

(2) If goods dispatched to the buyer have been placed at his disposal at their destination and he exercises the right to reject them, he must take possession of them on behalf of the seller, provided that this can be done without payment of the price and without unreasonable inconvenience or unreasonable expense. This provision does not apply if the seller or a person authorized to take charge of the goods on his behalf is present at the destination. If the buyer takes possession of the goods under this paragraph, his rights and obligations are governed by the preceding paragraph.

**Article 87**

A party who is bound to take steps to preserve the goods may deposit them in a warehouse of a third person at the expense of the other party provided that the expense incurred is not unreasonable.

**Article 88**

(1) A party who is bound to preserve the goods in accordance with article 85 or 86 may sell them by any appropriate means if there has been an unreasonable delay by the other party in taking possession of the goods or in taking them back.
or in paying the price or the cost of preservation, provided that reasonable notice of the intention to sell has been given to the other party.

(2) If the goods are subject to rapid deterioration or their preservation would involve unreasonable expense, a party who is bound to preserve the goods in accordance with article 85 or 86 must take reasonable measures to sell them. To the extent possible he must give notice to the other party of his intention to sell.

(3) A party selling the goods has the right to retain out of the proceeds of sale an amount equal to the reasonable expenses of preserving the goods and of selling them. He must account to the other party for the balance.
CHAPTER 6:
REMEDIES

United Nations Convention on Contracts for

Article 28

If, in accordance with the provisions of this Convention, one party is entitled to
require performance of any obligation by the other party, a court is not bound to
enter a judgement for specific performance unless the court would do so under its
own law in respect of similar contracts of sale not governed by this Convention.

* * *

Article 45

(1) If the seller fails to perform any of his obligations under the contract or this
Convention, the buyer may:

(a) exercise the rights provided in articles 46 to 52;

(b) claim damages as provided in articles 74 to 77.

(2) The buyer is not deprived of any right he may have to claim damages by
exercising his right to other remedies.

(3) No period of grace may be granted to the seller by a court or arbitral tribunal
when the buyer resorts to a remedy for breach of contract.

Article 46

(1) The buyer may require performance by the seller of his obligations unless the
buyer has resorted to a remedy which is inconsistent with this requirement.

(2) If the goods do not conform with the contract, the buyer may require delivery
of substitute goods only if the lack of conformity constitutes a fundamental
breach of contract and a request for substitute goods is made either in
conjunction with notice given under article 39 or within a reasonable time
thereafter.
(3) If the goods do not conform with the contract, the buyer may require the seller to remedy the lack of conformity by repair, unless this is unreasonable having regard to all the circumstances. A request for repair must be made either in conjunction with notice given under article 39 or within a reasonable time thereafter.

Article 47

(1) The buyer may fix an additional period of time of reasonable length for performance by the seller of his obligations.

(2) Unless the buyer has received notice from the seller that he will not perform within the period so fixed, the buyer may not, during that period, resort to any remedy for breach of contract. However, the buyer is not deprived thereby of any right he may have to claim damages for delay in performance.

Article 48

(1) Subject to article 49, the seller may, even after the date for delivery, remedy at his own expense any failure to perform his obligations, if he can do so without unreasonable delay and without causing the buyer unreasonable inconvenience or uncertainty of reimbursement by the seller of expenses advanced by the buyer. However, the buyer retains any right to claim damages as provided for in this Convention.

(2) If the seller requests the buyer to make known whether he will accept performance and the buyer does not comply with the request within a reasonable time, the seller may perform within the time indicated in his request. The buyer may not, during that period of time, resort to any remedy which is inconsistent with performance by the seller.

(3) A notice by the seller that he will perform within a specified period of time is assumed to include a request, under the preceding paragraph, that the buyer make known his decision.

(4) A request or notice by the seller under paragraph (2) or (3) of this article is not effective unless received by the buyer.
Article 49

(1) The buyer may declare the contract avoided:

(a) if the failure by the seller to perform any of his obligations under the contract or this Convention amounts to a fundamental breach of contract; or

(b) in case of non-delivery, if the seller does not deliver the goods within the additional period of time fixed by the buyer in accordance with paragraph (1) of article 47 or declares that he will not deliver within the period so fixed.

(2) However, in cases where the seller has delivered the goods, the buyer loses the right to declare the contract avoided unless he does so:

(a) in respect of late delivery, within a reasonable time after he has become aware that delivery has been made;

(b) in respect of any breach other than late delivery, within a reasonable time:

(i) after he knew or ought to have known of the breach;

(ii) after the expiration of any additional period of time fixed by the buyer in accordance with paragraph (1) of article 47, or after the seller has declared that he will not perform his obligations within such an additional period; or

(iii) after the expiration of any additional period of time indicated by the seller in accordance with paragraph (2) of article 48, or after the buyer has declared that he will not accept performance.

Article 50

If the goods do not conform with the contract and whether or not the price has already been paid, the buyer may reduce the price in the same proportion as the value that the goods actually delivered had at the time of the delivery bears to the value that conforming goods would have had at that time. However, if the seller remedies any failure to perform his obligations in accordance with article 37 or
article 48 or if the buyer refuses to accept performance by the seller in accordance with those articles, the buyer may not reduce the price.

Article 51

(1) If the seller delivers only a part of the goods or if only a part of the goods delivered is in conformity with the contract, articles 46 to 50 apply in respect of the part which is missing or which does not conform.

(2) The buyer may declare the contract avoided in its entirety only if the failure to make delivery completely or in conformity with the contract amounts to a fundamental breach of the contract.

Article 52

(1) If the seller delivers the goods before the date fixed, the buyer may take delivery or refuse to take delivery.

(2) If the seller delivers a quantity of goods greater than that provided for in the contract, the buyer may take delivery or refuse to take delivery of the excess quantity. If the buyer takes delivery of all or part of the excess quantity, he must pay for it at the contract rate.

* * *

Article 61

(1) If the buyer fails to perform any of his obligations under the contract or this Convention, the seller may:

(a) exercise the rights provided in articles 62 to 65;

(b) claim damages as provided in articles 74 to 77.

(2) The seller is not deprived of any right he may have to claim damages by exercising his right to other remedies.

(3) No period of grace may be granted to the buyer by a court or arbitral tribunal when the seller resorts to a remedy for breach of contract.
Article 62

The seller may require the buyer to pay the price, take delivery or perform his other obligations, unless the seller has resorted to a remedy which is inconsistent with this requirement.

Article 63

(1) The seller may fix an additional period of time of reasonable length for performance by the buyer of his obligations.

(2) Unless the seller has received notice from the buyer that he will not perform within the period so fixed, the seller may not, during that period, resort to any remedy for breach of contract. However, the seller is not deprived thereby of any right he may have to claim damages for delay in performance.

Article 64

(1) The seller may declare the contract avoided:

(a) if the failure by the buyer to perform any of his obligations under the contract or this Convention amounts to a fundamental breach of contract; or

(b) if the buyer does not, within the additional period of time fixed by the seller in accordance with paragraph (1) of article 63, perform his obligation to pay the price or take delivery of the goods, or if he declares that he will not do so within the period so fixed.

(2) However, in cases where the buyer has paid the price, the seller loses the right to declare the contract avoided unless he does so:

(a) in respect of late performance by the buyer, before the seller has become aware that performance has been rendered; or

(b) in respect of any breach other than late performance by the buyer, within a reasonable time:

(i) after the seller knew or ought to have known of the breach; or

(ii) after the expiration of any additional period of time fixed by the seller in accordance with paragraph (1) of article 63, or after
the buyer has declared that he will not perform his obligations within such an additional period.

Article 65

(1) If under the contract the buyer is to specify the form, measurement or other features of the goods and he fails to make such specification either on the date agreed upon or within a reasonable time after receipt of a request from the seller, the seller may, without prejudice to any other rights he may have, make the specification himself in accordance with the requirements of the buyer that may be known to him.

(2) If the seller makes the specification himself, he must inform the buyer of the details thereof and must fix a reasonable time within which the buyer may make a different specification. If, after receipt of such a communication, the buyer fails to do so within the time so fixed, the specification made by the seller is binding.

* * *

Article 74

Damages for breach of contract by one party consist of a sum equal to the loss, including loss of profit, suffered by the other party as a consequence of the breach. Such damages may not exceed the loss which the party in breach foresaw or ought to have foreseen at the time of the conclusion of the contract, in the light of the facts and matters of which he then knew or ought to have known, as a possible consequence of the breach of contract.

Article 75

If the contract is avoided and if, in a reasonable manner and within a reasonable time after avoidance, the buyer has bought goods in replacement or the seller has resold the goods, the party claiming damages may recover the difference between the contract price and the price in the substitute transaction as well as any further damages recoverable under article 74.

Article 76

(1) If the contract is avoided and there is a current price for the goods, the party claiming damages may, if he has not made a purchase or resale under article 75, recover the difference between the price fixed by the contract and the current price at the time of avoidance as well as any further damages recoverable under
article 74. If, however, the party claiming damages has avoided the contract after taking over the goods, the current price at the time of such taking over shall be applied instead of the current price at the time of avoidance.

(2) For the purposes of the preceding paragraph, the current price is the price prevailing at the place where delivery of the goods should have been made or, if there is no current price at that place, the price at such other place as serves as a reasonable substitute, making due allowance for differences in the cost of transporting the goods.

Article 77

A party who relies on a breach of contract must take such measures as are reasonable in the circumstances to mitigate the loss, including loss of profit, resulting from the breach. If he fails to take such measures, the party in breach may claim a reduction in the damages in the amount by which the loss should have been mitigated.

Article 78

If a party fails to pay the price or any other sum that is in arrears, the other party is entitled to interest on it, without prejudice to any claim for damages recoverable under article 74.

Article 79

(1) A party is not liable for a failure to perform any of his obligations if he proves that the failure was due to an impediment beyond his control and that he could not reasonably be expected to have taken the impediment into account at the time of the conclusion of the contract or to have avoided or overcome it or its consequences.

(2) If the party's failure is due to the failure by a third person whom he has engaged to perform the whole or a part of the contract, that party is exempt from liability only if:

(a) he is exempt under the preceding paragraph; and

(b) the person whom he has so engaged would be so exempt if the provisions of that paragraph were applied to him.
(3) The exemption provided by this article has effect for the period during which the impediment exists.

(4) The party who fails to perform must give notice to the other party of the impediment and its effect on his ability to perform. If the notice is not received by the other party within a reasonable time after the party who fails to perform knew or ought to have known of the impediment, he is liable for damages resulting from such non-receipt.

(5) Nothing in this article prevents either party from exercising any right other than to claim damages under this Convention.

Article 80

A party may not rely on a failure of the other party to perform, to the extent that such failure was caused by the first party's act or omission.

Delchi Carrier SpA v. Rotorex Corp.
71 F.3d 1024 (2d Cir. 1995).

WINTER, Circuit Judge:

Rotorex Corporation, a New York corporation, appeals from a judgment of $1,785,772.44 in damages for lost profits and other consequential damages awarded to Delchi Carrier SpA following a bench trial before Judge Munson. The basis for the award was Rotorex's delivery of nonconforming compressors to Delchi, an Italian manufacturer of air conditioners. Delchi cross-appeals from the denial of certain incidental and consequential damages. We affirm the award of damages; we reverse in part on Delchi's cross-appeal and remand for further proceedings.

BACKGROUND

In January 1988, Rotorex agreed to sell 10,800 compressors to Delchi for use in Delchi's “Ariele” line of portable room air conditioners. The air conditioners were scheduled to go on sale in the spring and summer of 1988. Prior to executing the contract, Rotorex sent Delchi a sample compressor and accompanying written performance specifications. The compressors were scheduled to be delivered in three shipments before May 15, 1988.
Rotorex sent the first shipment by sea on March 26. Delchi paid for this shipment, which arrived at its Italian factory on April 20, by letter of credit. Rotorex sent a second shipment of compressors on or about May 9. Delchi also remitted payment for this shipment by letter of credit. While the second shipment was en route, Delchi discovered that the first lot of compressors did not conform to the sample model and accompanying specifications. On May 13, after a Rotorex representative visited the Delchi factory in Italy, Delchi informed Rotorex that 93 percent of the compressors were rejected in quality control checks because they had lower cooling capacity and consumed more power than the sample model and specifications. After several unsuccessful attempts to cure the defects in the compressors, Delchi asked Rotorex to supply new compressors conforming to the original sample and specifications. Rotorex refused, claiming that the performance specifications were “inadvertently communicated” to Delchi.

In a faxed letter dated May 23, 1988, Delchi cancelled the contract. Although it was able to expedite a previously planned order of suitable compressors from Sanyo, another supplier, Delchi was unable to obtain in a timely fashion substitute compressors from other sources and thus suffered a loss in its sales volume of Arieles during the 1988 selling season. Delchi filed the instant action under the United Nations Convention on Contracts for the International Sale of Goods (“CISG” or “the Convention”) for breach of contract and failure to deliver conforming goods. On January 10, 1991, Judge Cholakis granted Delchi's motion for partial summary judgment, holding Rotorex liable for breach of contract.

After three years of discovery and a bench trial on the issue of damages, Judge Munson, to whom the case had been transferred, held Rotorex liable to Delchi for $1,248,331.87. This amount included consequential damages for: (i) lost profits resulting from a diminished sales level of Ariele units, (ii) expenses that Delchi incurred in attempting to remedy the nonconformity of the compressors, (iii) the cost of expediting shipment of previously ordered Sanyo compressors after Delchi rejected the Rotorex compressors, and (iv) costs of handling and storing the rejected compressors. The district court also awarded prejudgment interest under CISG art. 78.

The court denied Delchi's claim for damages based on other expenses, including: (i) shipping, customs, and incidental costs relating to the two shipments of Rotorex compressors; (ii) the cost of obsolete insulation and tubing that Delchi purchased only for use with Rotorex compressors; (iii) the cost of obsolete tooling purchased only for production of units with Rotorex compressors; and (iv) labor costs for four days when Delchi's production line was idle because it
had no compressors to install in the air conditioning units. The court denied an award for these items on the ground that it would lead to a double recovery because “those costs are accounted for in Delchi's recovery on its lost profits claim.” It also denied an award for the cost of modification of electrical panels for use with substitute Sanyo compressors on the ground that the cost was not attributable to the breach. Finally, the court denied recovery on Delchi's claim of 4000 additional lost sales in Italy.

On appeal, Rotorex argues that it did not breach the agreement, that Delchi is not entitled to lost profits because it maintained inventory levels in excess of the maximum number of possible lost sales, that the calculation of the number of lost sales was improper, and that the district court improperly excluded fixed costs and depreciation from the manufacturing cost in calculating lost profits. Delchi cross-appeals, claiming that it is entitled to the additional out-of-pocket expenses and the lost profits on additional sales denied by Judge Munson.

DISCUSSION

The district court held, and the parties agree, that the instant matter is governed by the CISG, reprinted at 15 U.S.C.A. Appendix (West Supp.1995), a self-executing agreement between the United States and other signatories, including Italy. Because there is virtually no caselaw under the Convention, we look to its language and to “the general principles” upon which it is based. See CISG art. 7(2). The Convention directs that its interpretation be informed by its “international character and ... the need to promote uniformity in its application and the observance of good faith in international trade.” See CISG art. 7(1); see generally John Honnold, Uniform Law for International Sales Under the 1980 United Nations Convention 60-62 (2d ed. 1991) (addressing principles for interpretation of CISG). Caselaw interpreting analogous provisions of Article 2 of the Uniform Commercial Code (“UCC”), may also inform a court where the language of the relevant CISG provisions tracks that of the UCC. However, UCC caselaw “is not per se applicable.” Orbisphere Corp. v. United States, 726 F.Supp. 1344, 1355 (Ct.Int'l Trade 1989).

We first address the liability issue. We review a grant of summary judgment de novo. Burgos v. Hopkins, 14 F.3d 787, 789 (2d Cir.1994). Summary judgment is appropriate if “there is no genuine issue as to any material fact” regarding Rotorex's liability for breach of contract. See Fed.R.Civ.P. 56(c).

Under the CISG, “[t]he seller must deliver goods which are of the quantity, quality and description required by the contract,” and “the goods do not
conform with the contract unless they ... possess the qualities of goods which the seller has held out to the buyer as a sample or model.” CISG art. 35. The CISG further states that “[t]he seller is liable in accordance with the contract and this Convention for any lack of conformity.” CISG art. 36.

Judge Cholakis held that “there is no question that [Rotorex's] compressors did not conform to the terms of the contract between the parties” and noted that “[t]here are ample admissions [by Rotorex] to that effect.” We agree. The agreement between Delchi and Rotorex was based upon a sample compressor supplied by Rotorex and upon written specifications regarding cooling capacity and power consumption. After the problems were discovered, Rotorex's engineering representative, Ernest Gamache, admitted in a May 13, 1988 letter that the specification sheet was “in error” and that the compressors would actually generate less cooling power and consume more energy than the specifications indicated. Gamache also testified in a deposition that at least some of the compressors were nonconforming. The president of Rotorex, John McFee, conceded in a May 17, 1988 letter to Delchi that the compressors supplied were less efficient than the sample and did not meet the specifications provided by Rotorex. Finally, in its answer to Delchi's complaint, Rotorex admitted “that some of the compressors ... did not conform to the nominal performance information.” There was thus no genuine issue of material fact regarding liability, and summary judgment was proper. See Perma Research & Dev. Co. v. Singer Co., 410 F.2d 572, 577-78 (2d Cir.1969) (affirming grant of summary judgment based upon admissions and deposition testimony by nonmoving party).

Under the CISG, if the breach is “fundamental” the buyer may either require delivery of substitute goods, CISG art. 46, or declare the contract void, CISG art. 49, and seek damages. With regard to what kind of breach is fundamental, Article 25 provides:

A breach of contract committed by one of the parties is fundamental if it results in such detriment to the other party as substantially to deprive him of what he is entitled to expect under the contract, unless the party in breach did not foresee and a reasonable person of the same kind in the same circumstances would not have foreseen such a result.

CISG art. 25. In granting summary judgment, the district court held that “[t]here appears to be no question that [Delchi] did not substantially receive that which [it] was entitled to expect” and that “any reasonable person could foresee that shipping non-conforming goods to a buyer would result in the buyer not receiving that which he expected and was entitled to receive.” Because the cooling power and energy consumption of an air conditioner compressor are
important determinants of the product's value, the district court's conclusion that Rotorex was liable for a fundamental breach of contract under the Convention was proper.

We turn now to the district court's award of damages following the bench trial. A reviewing court must defer to the trial judge's findings of fact unless they are clearly erroneous. Anderson v. City of Bessemer, 470 U.S. 564, 575, 105 S.Ct. 1504, 1512, 84 L.Ed.2d 518 (1985); Allied Chem. Int'l Corp. v. Companhia de Navegacao Lloyd Brasileiro, 775 F.2d 476, 481 (2d Cir.1985), cert. denied, 475 U.S. 1099, 106 S.Ct. 1502, 89 L.Ed.2d 903 (1986). However, we review questions of law, including the measure of damages upon which the factual computation is based,” de novo. Wolff & Munier, Inc. v. Whiting-Turner Contracting Co., 946 F.2d 1003, 1009 (2d Cir.1991) (internal quotation marks and citation omitted); see also Travellers Int'l, A.G. v. Trans World Airlines, 41 F.3d 1570, 1574-75 (2d Cir.1994).

The CISG provides:

Damages for breach of contract by one party consist of a sum equal to the loss, including loss of profit, suffered by the other party as a consequence of the breach. Such damages may not exceed the loss which the party in breach foresaw or ought to have foreseen at the time of the conclusion of the contract, in the light of the facts and matters of which he then knew or ought to have known, as a possible consequence of the breach of contract.

CISG art. 74. This provision is “designed to place the aggrieved party in as good a position as if the other party had properly performed the contract.” Honnold, supra, at 503.

Rotorex argues that Delchi is not entitled to lost profits because it was able to maintain inventory levels of Ariele air conditioning units in excess of the maximum number of possible lost sales. In Rotorex's view, therefore, there was no actual shortfall of Ariele units available for sale because of Rotorex's delivery of nonconforming compressors. Rotorex's argument goes as follows. The end of the air conditioner selling season is August 1. If one totals the number of units available to Delchi from March to August 1, the sum is enough to fill all sales. We may assume that the evidence in the record supports the factual premise. Nevertheless, the argument is fallacious. Because of Rotorex's breach, Delchi had to shut down its manufacturing operation for a few days in May, and the date on which particular units were available for sale was substantially delayed. For example, units available in late July could not be used to meet orders in the
spring. As a result, Delchi lost sales in the spring and early summer. We therefore conclude that the district court's findings regarding lost sales are not clearly erroneous. A detailed discussion of the precise number of lost sales is unnecessary because the district court's findings were, if anything, conservative.

Rotorex contends, in the alternative, that the district court improperly awarded lost profits for unfilled orders from Delchi affiliates in Europe and from sales agents within Italy. We disagree. The CISG requires that damages be limited by the familiar principle of foreseeability established in Hadley v. Baxendale, 156 Eng.Rep. 145 (1854). CISG art. 74. However, it was objectively foreseeable that Delchi would take orders for Ariele sales based on the number of compressors it had ordered and expected to have ready for the season. The district court was entitled to rely upon the documents and testimony regarding these lost sales and was well within its authority in deciding which orders were proven with sufficient certainty.

Rotorex also challenges the district court's exclusion of fixed costs and depreciation from the manufacturing cost used to calculate lost profits. The trial judge calculated lost profits by subtracting the 478,783 lire “manufacturing cost”—the total variable cost—of an Ariele unit from the 654,644 lire average sale price. The CISG does not explicitly state whether only variable expenses, or both fixed and variable expenses, should be subtracted from sales revenue in calculating lost profits. However, courts generally do not include fixed costs in the calculation of lost profits. See Indu Craft, Inc. v. Bank of Baroda, 47 F.3d 490, 495 (2d Cir.1995) (only when the breach ends an ongoing business should fixed costs be subtracted along with variable costs); Adams v. Lindblad Travel, Inc., 730 F.2d 89, 92-93 (2d Cir.1984) (fixed costs should not be included in lost profits equation when the plaintiff is an ongoing business whose fixed costs are not affected by the breach). This is, of course, because the fixed costs would have been encountered whether or not the breach occurred. In the absence of a specific provision in the CISG for calculating lost profits, the district court was correct to use the standard formula employed by most American courts and to deduct only variable costs from sales revenue to arrive at a figure for lost profits.

In its cross-appeal, Delchi challenges the district court's denial of various consequential and incidental damages, including reimbursement for: (i) shipping, customs, and incidentals relating to the first and second shipments—rejected and returned—of Rotorex compressors; (ii) obsolete insulation materials and tubing purchased for use only with Rotorex compressors; (iii) obsolete tooling purchased exclusively for production of units with Rotorex compressors; and (iv) labor costs for the period of May 16-19, 1988, when the Delchi production line was idle due to a lack of compressors to install in Ariele air conditioning units.
The district court denied damages for these items on the ground that they “are accounted for in Delchi's recovery on its lost profits claim,” and, therefore, an award would constitute a double recovery for Delchi. We disagree.

The Convention provides that a contract plaintiff may collect damages to compensate for the full loss. This includes, but is not limited to, lost profits, subject only to the familiar limitation that the breaching party must have foreseen, or should have foreseen, the loss as a probable consequence. CISG art. 74; see Hadley v. Baxendale, supra.

An award for lost profits will not compensate Delchi for the expenses in question. Delchi's lost profits are determined by calculating the hypothetical revenues to be derived from unmade sales less the hypothetical variable costs that would have been, but were not, incurred. This figure, however, does not compensate for costs actually incurred that led to no sales. Thus, to award damages for costs actually incurred in no way creates a double recovery and instead furthers the purpose of giving the injured party damages “equal to the loss.” CISG art. 74.

The only remaining inquiries, therefore, are whether the expenses were reasonably foreseeable and legitimate incidental or consequential damages. The expenses incurred by Delchi for shipping, customs, and related matters for the two returned shipments of Rotorex compressors, including storage expenses for the second shipment at Genoa, were clearly foreseeable and recoverable incidental expenses. These are up-front expenses that had to be paid to get the goods to the manufacturing plant for inspection and were thus incurred largely before the nonconformities were detected. To deny reimbursement to Delchi for these incidental damages would effectively cut into the lost profits award. The same is true of unreimbursed tooling expenses and the cost of the useless insulation and tubing materials. These are legitimate consequential damages that in no way duplicate lost profits damages.

The labor expense incurred as a result of the production line shutdown of May 16-19, 1988 is also a reasonably foreseeable result of delivering nonconforming compressors for installation in air conditioners. However, Rotorex argues that the labor costs in question were fixed costs that would have
been incurred whether or not there was a breach. The district court labeled the labor costs “fixed costs,” but did not explore whether Delchi would have paid these wages regardless of how much it produced. Variable costs are generally those costs that “fluctuate with a firm's output,” and typically include labor (but not management) costs. Northeastern Tel. Co. v. AT & T, 651 F.2d 76, 86 (2d Cir.1981). Whether Delchi's labor costs during this four-day period are variable or fixed costs is in large measure a fact question that we cannot answer because we lack factual findings by the district court. We therefore remand to the district court on this issue.

The district court also denied an award for the modification of electrical panels for use with substitute Sanyo compressors. It denied damages on the ground that Delchi failed to show that the modifications were not part of the regular cost of production of units with Sanyo compressors and were therefore attributable to Rotorex's breach. This appears to have been a credibility determination that was within the court's authority to make. We therefore affirm on the ground that this finding is not clearly erroneous.

Finally, Delchi cross-appeals from the denial of its claimed 4000 additional lost sales in Italy. The district court held that Delchi did not prove these orders with sufficient certainty. The trial court was in the best position to evaluate the testimony of the Italian sales agents who stated that they would have ordered more Arieles if they had been available. It found the agents' claims to be too speculative, and this conclusion is not clearly erroneous.

CONCLUSION

We affirm the award of damages. We reverse in part the denial of incidental and consequential damages. We remand for further proceedings in accord with this opinion.


SHADUR, Senior District J.

After having prevailed in principal part before the jury that heard the litigants' major commercial dispute, Zapata Hermanos Sucesores, S.A. (“Zapata”) has moved for an award of attorneys' fees on three alternative grounds, two of them advanced against defendant Hearthside Banking Co., Inc., d/b/a Maurice
Lenell Cooky Co. ("Lenell") and the third advanced against Lenell's litigation counsel, Gordon & Centracchio, L.L.C. ("Law Firm"). This Court's August 22, 2001 memorandum opinion and order dealt with Zapata's motion against the Law Firm. Now the issues as between Zapata and Lenell have become fully briefed, and this memorandum opinion and order resolves that claim in favor of Zapata and against Lenell.

In an unsuccessful effort to “make the worse appear the better reason,”¹¹ Lenell's counsel lay heavy stress on the facts that Zapata has sued Lenell in a United States court and that the well-known “American Rule” calls for litigants to bear their own legal expense. But in so doing, Lenell's counsel present their arguments in a way that impermissibly seeks to draw attention away from an exception that is built into the American Rule itself—an exception that their Mem. 2 itself quotes from F. D. Rich Co. v. United States t/u/o Industrial Lumber Co., 417 U.S. 116, 126 (1974) (internal quotation marks and citation omitted, but with appropriate emphasis added):

The so-called “American Rule” governing the award of attorneys' fees in litigation in the federal courts is that attorneys' fees are not ordinarily recoverable in the absence of a statute or enforceable contract providing therefor.

Accord, such cases as Alyeska Pipeline Serv. Co. v. Wilderness Soc'y, 421 U.S. 240, 257 (1975).

There is a reason of course that the doctrine on which Lenell seeks to rely is called the American Rule: This country is in the minority of commercial jurisdictions that do not make prevailing parties truly whole by saddling their adversaries with the winners' legal expenses—an omission that does not (as does the vast majority of other jurisdictions' fee-shifting approach) put the winners in contract disputes into the same economic position as if the breaching parties had performed their required obligations under the contracts (see John Gotanda, Awarding Costs and Attorneys' Fees in International Commercial Arbitrations, 21 Mich. J. Int'l Law 1, 6–7 & nn. 20, 27 (1999) (reviewing identical principles applicable to litigation as well as arbitration); John Gotanda, Supplemental Damages in Private International Law 146–73 (1998) (confirming those principles applicable in litigation)). In this instance two stipulations in which Lenell has joined bury its efforts to escape liability via the American Rule:

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¹¹ John Milton, Paradise Lost, bk. II, ll. 113–14, likely drawn from Diogenes Laertius, Socrates 5.
1. Both sides have agreed all along that their claims and counterclaims are governed by a treaty to which the United States is a signatory, the Convention on the International Sale of Goods ("Convention"). And here is the controlling provision of Convention Art. 74 ("Article 74") (emphasis added):

Damages for breach of contract by one party consist of a sum equal to the loss, including loss of profit, suffered by the other party as a consequence of the breach. Such damages may not exceed the loss which the party in breach foresaw or ought to have foreseen at the time of the conclusion of the contract, in light of the facts and matters of which he then knew or ought to have known, as a possible consequence of the breach of contract.

2. Before trial the litigants entered into a June 8, 2001 Stipulation that provided in relevant part (again with emphasis added):

1. As of the dates when Lenell issued its purchase orders for the tins described in the invoices attached as Group Exhibit A to Zapata's Complaint in this case, Lenell foresaw or should have foreseen that if Lenell failed to pay for the tins that it ordered, received and accepted, Zapata would incur litigation costs including attorneys fees, to seek payment of the invoices for said tins.

2. The Court shall determine if attorney's fees are recoverable as a matter of law.

3. The amount of litigation costs, including attorneys' fees, to be assessed as consequential damages in this case, if any, will be for the Court to determine on a fee petition, rather than for the jury to decide.

There is no room to question the source of law to which this Court is to look to make the determination called for by the last-quoted Stipulation. With the Convention—a treaty—controlling the relationship between Mexican seller Zapata and United States purchaser Lenell, this Court has been called upon to exercise subject matter jurisdiction over Zapata's successful substantive claim in federal question terms. That of course calls into play federal choice-of-law principles rather than those of any state such as Illinois (see, e.g., RTC v. Chapman, 29 F.3d 1120, 1124 (7th Cir.1994), citing the seminal decision in Klaxon Co. v. Stentor Elec. Mfg. Co., 318 U.S. 487 (1941)). And relatedly,
before trial Zapata dropped its alternative state law account-stated claim, which could perhaps have called diversity or supplemental jurisdiction (and thus local choice-of-law principles) into play as to that claim.

In that respect the existence or nonexistence of a fee-shifting rule is one of substantive policy (Alyeska Pipeline, 421 U.S. at 259 n.31; contrast Midwest Grain Prods. of Ill., Inc. v. Productization, Inc., 228 F.3d 784, 787 (7th Cir.2000), a diversity case on which Lenell unpersuasively seeks to rely). And a treaty, occupying international scope as it does and (as in this case) defining the relationships between nationals of different signatory countries, calls for uniformity of construction. Although written about a different provision of the Convention, the analysis in MCC–Marble Ceramic Ctr., Inc. v. Ceramica Nuova D'Agostino, S.F. A., 144 F.3d 1384, 1391 (11th Cir.1998) applies with equal force to mandate universality rather than a purely home-town rule as to the awardability of attorneys' fees under the Convention:

One of the primary factors motivating the negotiation and adoption of the CISG was to provide parties to international contracts for the sale of goods with some degree of certainty as to the principles of law that would govern potential disputes and remove the previous doubt regarding which party's legal system might otherwise apply. See Letter of Transmittal from Ronald Reagan, President of the United States, to the United States Senate, reprinted at 15 U.S.C. app. 70, 71 (1997). Courts applying the CISG cannot, therefore, upset the parties' reliance on the Convention by substituting familiar principles of domestic law when the Convention requires a different result. We may only achieve the directives of good faith and uniformity in contracts under the CISG by interpreting and applying the plain language of article 8(3) as written and obeying its directive to consider this type of parol evidence.

It is therefore wholly misleading for Lenell to contend as it does for the parochial application of the American Rule (as by attempting to call Midwest Grain to its aid). Although the norm in our own judicial system is for each litigant in a purely United–States–based dispute to bear the burden of its own legal expense, that does not at all equate to the notion that public policy (or anything else) forbids a federal court's judicial enforcement of a different rule that is appropriately brought into play—indeed, the earlier-quoted language from F.D. Rich expressly contemplates such enforcement where there is a statute (and a treaty calls for an a fortiori application of that notion) that instead establishes a “loser pays” regime.

It surely cannot be said that Zapata opted for the application of Illinois substantive law (or for the American Rule as such) just by having sued Lenell in
a jurisdiction that did not pose serious problems of the nature that would have been generated by an attempt to sue at Zapata's own home base in Mexico—that is, by selecting a forum where Lenell could not assert any otherwise available challenge to in personam jurisdiction and where a favorable judgment for Zapata would be directly enforceable and capable of execution. And when purely parochial considerations are put aside (quite properly so), it cannot be gainsaid that the normal unstrained reading of Article 74 coupled with the above-quoted Stipulation calls for Zapata's recovery of its attorneys' fees as foreseen consequential damages.

When the searchlight of analysis is thus properly focused on the language of the Convention without any inappropriate overlay from the American Rule, the question becomes a simple one. As n.2 has said, it truly smacks of a shell game for Lenell to have entered into the commitments to which it has stipulated and yet to urge that Zapata's admittedly foreseeable legal expense ("which the party in breach [Lenell] foresaw or ought to have foreseen," in the language of Article 74) was not "suffered by the other party [Zapata] as a consequence of the breach" (again the language of Article 74). It is totally unpersuasive for Lenell's counsel to contend instead that those commitments and Lenell's admissions do not equate to saying that attorneys' fees are "consequential damages" recoverable under the Convention.

That distorted reading of the language is clearly refuted by the decisions cited at Zapata Mem. 4 from other countries' courts and arbitral tribunals. Obviously unable to counter directly, Lenell attempts to draw an inference from cases that decide the applicable interest rate under the Convention—not the right to the payment of interest, which the Convention admittedly calls for—under local law. But that effort to equate those issues really misses its mark, for the following explanation demonstrates that such interest-rate-related rulings really support Zapata's position rather than Lenell's.

Look at the situation of the injured seller of goods and what is required to make it whole. There is of course no near-universal rate of interest on unpaid obligations, and the drafters of the Convention took note of the fact that some sellers injured by nonpayment for their goods would be made whole by applying the interest rates at their homes, while others would need prejudgment interest to be paid at the rate applicable at their buyers' locales to provide full relief (see Peter Schlechtriem, Uniform Sales Law—The UN–Convention on Contracts for the International Sale of Goods 98–99 (Manz, Vienna 1986). For that reason the Convention's drafters called for the payment of prejudgment interest (which every unpaid seller needs for full recovery), but compromised by leaving the interest rate open for decision on a case-by-case basis (id.)—so that the injured
seller's make-whole expectations are met by compensating it for its own cost of delayed payment as well as recovering the payment itself.

Now look at the situation of the same injured seller in terms of the other component of being made whole. Exactly as with prejudgment interest, that result is assured only by freeing its damages recovery from the burden of attorneys' fees. Little wonder, then, that the award of such fees is nearly universal among commercial nations (see the two Gotanda publications cited earlier). And surely in this instance, the make-whole expectations of the injured seller—a Mexican company—are best met by conforming to Mexico's own adherence to that nearly universal rule.

In sum, the award of attorneys' fees has really been agreed to, although Lenell does not now acknowledge it, by the combination of Lenell's stipulation and Article 74. Because the amount of the fee award remains to be resolved, a status hearing is set for 9 a.m. September 5, 2001, to discuss the procedure and timing for that purpose.

12 Lenell has studiously sought to avoid the fact that its own Amended Counterclaim filed January 3, 2000 (comprising a whole set of claims arising out of asserted late deliveries and other alleged nonperformance by Zapata) sought not only compensatory damages of some $225,000 but also, as part of its requested judgment on that counterclaim (emphasis added):

In favor of Lenell and against Envases, awarding LENELL its interest, costs, disbursements, consequential damages, attorneys fees and other and further relief as this Court deems just and proper.

But now that the shoe is on the other foot, Lenell's position has mysteriously become that the attorneys' fees that it specifically sought under the Convention are somehow nonrecoverable by Zapata because of the American Rule. Leaving aside the level of hypocrisy (or perhaps even estoppel or "mend the hold" principles) raised by Lenell's stance, it need scarcely be added that whether under the Convention or otherwise, the case for attorneys' fees sought by a prevailing party from Mexico (where local law awards them) necessarily has to be stronger, if anything, than a like claim by an Illinois party (where local law does not).