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# ARBITRATION AND CONTRACT FORMATION IN INTERNATIONAL TRADE: FIRST INTERPRETATIONS OF THE U.N. SALES CONVENTION

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## I. INTRODUCTION

The United Nations Convention on Contracts for the International Sale of Goods ("CISG" or the "Sales Convention")<sup>1</sup> has been ratified, approved or acceded to by 34 states.<sup>2</sup> It is rapidly becoming one of the most successful multilateral treaties ever in the field of agreements designed to unify rules traditionally addressed only in domestic legal systems.<sup>3</sup> The acceptance of the rules of CISG by nations with widely-differing domestic legal systems located on every inhabited continent holds the promise of a quantum jump in the uniformity of legal rules governing sales transactions, with significant benefits for international trade.

There are, however, serious obstacles to achieving the uniform international sales regime at which CISG aims. One of the largest is that the tribunals applying the Convention will be local courts and arbitration panels. There is no single court of final appeal to interpret its provisions. The judicial system of each country that has ratified CISG will

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1. U.N. Conference on Contracts for the International Sale of Goods, Final Act (April 10, 1980), U.N. DOC. A/CONF. 97/18 reprinted in S. Treaty Doc. No. 98-9, 98th Cong., 1st Sess. and 17 INT'L LEGAL MAT. 668 (1980) [hereinafter "CISG" or "Convention"].

2. See *Journal of Law & Commerce* CISG Contracting States and Declarations Table, 12 J.L. & COM. 283 (1993) for an updated list of Contracting States to the Convention.

3. Article 1(1) of the Sales Convention provides that:

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.

U.S. ratification of the Convention was accompanied by a declaration that the U.S. would not be bound by Article 1(1)(b).

have authority to construe and apply the rules of the Convention, with no further review by an international body.

The Convention itself affords only limited guidance to a court faced with the interpretation of its rules. Article 7(1) provides: "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."<sup>4</sup> Unfortunately, this somewhat vague provision is likely to give little direction to the court faced with a CISG issue of first impression within its own jurisdiction. To achieve uniformity in construing the Convention's provisions, therefore, it will be vital that courts in each country look to the cases and arbitral awards already rendered in other contracting states.<sup>5</sup>

This article and the translated German cases following it are intended to highlight the importance of bringing a transnational perspective to interpreting CISG, and to make it easier for English-speaking courts and attorneys to achieve that perspective. This article focuses on the first U.S. case to pay significant attention to the Convention, *Filanto, S.p.A. v. Chilewich International Corp.*<sup>6</sup> The first part of the article examines the substantive commercial law aspects of *Filanto*, considering its significance for future decisions by U.S. courts applying the Convention. The second part emphasizes transactional considerations, assessing the implications of *Filanto* and similar decisions from foreign courts and arbitral tribunals for the planning of transnational contract provisions relating to dispute resolution. As a whole, the theme of this article is the importance of informed judicial understanding of the Convention—especially in early decisions, which tend to have the

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4. CISG art. 7(1). Identical language was contained in Article 6 of the 1978 Draft of the Convention, to which the following commentary was appended:

National rules on the law of sales of goods are subject to sharp divergences in approach and concept. Thus, it is especially important to avoid differing constructions of the provisions of this Convention by national courts, each dependent upon the concepts used in the legal system of the country of the forum. To this end, Article 6 emphasizes the importance, in the interpretation and application of the provisions of the Convention, of having due regard for the international character of the Convention and for the need to promote uniformity.

*Commentary on the Draft Convention on Contracts for the International Sale of Goods, Prepared by the Secretariat*, art. 6, ¶ 1, U.N. Doc. A/Conf.97/5 (1979), reprinted in JOHN HONNOLD, DOCUMENTARY HISTORY OF THE UNIFORM LAW FOR INTERNATIONAL SALES 404, 407-08 (1989).

5. For a discussion concluding that, in regard to CISG, "foreign decisions on point must be accorded considerable weight in United States courts," see V. Susanne Cook, Note, *The Need for Uniform Interpretation of the 1980 United Nations Convention on Contracts for the International Sale of Goods*, 50 U. PITT. L. REV. 197, 226 (1988).

6. 789 F. Supp. 1229 (S.D.N.Y. 1992), *appeal dismissed*, 984 F.2d 58 (2d Cir. 1993).

longest impact and in which the courts are least likely to start with a clear grasp of CISG.

This article draws several conclusions. First, although the Convention contains many terms and concepts that appear similar to ones in domestic U.S. law, the apparent similarity can be misleading. It is easy to distort the unfamiliar by forcing it into a pattern we already know. Judges and lawyers in contracting states with different legal traditions, however, are unlikely to be influenced by parallels to U.S. law. Fulfilling the mandate for uniformity in CISG Article 7 will require an understanding of the Convention that transcends the perspective of a single domestic legal system. Close attention to the text, recognition that one's domestic legal ideology can have a distorting effect, and diligent pursuit of a transnational perspective are the only answers.

A second conclusion is that courts interpreting CISG should take particular care to avoid generalizing about the Convention in a manner unnecessary to the decision at hand. Ignoring this conclusion risks institutionalizing errors arising from inadequate consideration of the issues at stake—an especially dangerous possibility given the international background to CISG. A broad dictum may seem intuitively obvious to a court because it is consistent with the court's domestic sales law, but that does not mean it is a proper interpretation of the Convention. CISG necessarily developed out of compromise and coordination of the interests of numerous sovereign legal systems. It takes hard work and careful thought to escape a parochial view of the resulting text. Interpretations made without benefit of well-developed arguments concerning a specific situation are unlikely to achieve the necessary international perspective.

A more general conclusion relates to the context in which Convention rules are likely to be applied in the future. For a number of reasons, modern transnational transactions often include a choice of forum clause calling for arbitration of any disputes arising out of the transaction. The drafting of such a clause requires a clear understanding of the law of forum selection when arbitration is chosen, the manner in which the law relating to forum selection is affected by or otherwise relates to the Convention, and the general manner in which competence for issues of contract formation have been and will be allocated between courts and arbitral tribunals.

Finally (and perhaps most importantly), this article concludes that the uniformity contemplated by CISG Article 7 will be attained only if courts are aware of the way in which the Convention is interpreted in

other contracting states. Communication of decisions from throughout the world is essential. To this end, this article is followed by an English translation of important cases construing CISG from the courts of the Federal Republic of Germany. These cases represent a first installment of what is planned to be a continuing effort by the *Journal of Law and Commerce* to keep its readers informed of important decisions on CISG by foreign courts.

## II. *FILANTO* AND THE SUBSTANTIVE RULES OF CISG: FORMATION, SCOPE, STATUTE OF FRAUDS AND PAROL EVIDENCE

The first U.S. case raising significant issues under CISG is *Filanto, S.p.A v. Chilewich International Corp.*<sup>7</sup> In that case the defendant Chilewich was an American trading company that had contracted to supply footwear to a buyer in the then Soviet Union. To meet its obligations under this contract (the "Russian Contract"), Chilewich entered into a series of transactions with the plaintiff Filanto, an Italian maker of footwear. The particular transaction at issue in *Filanto* began when Chilewich prepared, signed and transmitted to Filanto a document entitled "Memorandum Agreement" dated March 13, 1990 covering the purchase of 250,000 pairs of boots from Filanto for delivery in installments on September 15 and November 1, 1990. The document provided that the buyer Chilewich would open letters of credit for the purchase price of each installment before the delivery dates. The Memorandum Agreement also contained a term incorporating by reference provisions of the Russian contract, specifically including an arbitration provision in that agreement.

Filanto did not immediately sign the Memorandum Agreement. On May 7, 1990, nevertheless, Chilewich opened a letter of credit in the amount of \$2,595,600 to cover the first installment of boots. Filanto finally returned a signed copy of the Memorandum Agreement on August 7, 1990, almost five months after Chilewich had sent the document and three months after the buyer had procured the letter of credit. A cover letter accompanying the agreement asserted that Filanto was bound only by a few provisions of the Russian contract relating to the manner of shipping the goods. In other words, Filanto's letter implied it was not bound by the arbitration term in the Russian Contract—a position the seller had earlier taken with regard to other transactions with Chilewich. The parties then met to resolve the issue of

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7. *Id.*

incorporating the Russian Contract terms, but at trial each side's account of the meetings differed.

At any rate, both proceeded to perform the first installment. When the time for the second installment arrived, however, Chilewich indicated it had encountered difficulties with its Russian buyers and it accepted only a portion of the boots. Filanto sued for breach of contract. Chilewich then moved to stay the action pending arbitration pursuant to the arbitration term in the Russian Contract, which Chilewich argued had been incorporated into its agreement with Filanto. The District Court's opinion dealt with this motion and Filanto's counter-motion to enjoin arbitration.

The substantive issue in *Filanto* was whether the parties had an "agreement in writing" to arbitrate, a requirement of the applicable Convention on the Recognition and Enforcement of Foreign Arbitral Awards (the "Arbitration Convention").<sup>8</sup> After examining conflicting authority on the source of the rules governing the issue, the court concluded that federal (as opposed to state) law of contract formation applied.<sup>9</sup> The applicable federal law, the court noted, would normally consist of "generally accepted principles of contract law, including the Uniform Commercial Code,"<sup>10</sup> but for the transaction before it contract formation was governed by CISG rather than the U.C.C. The reason was that the transaction was an international sale of goods between parties who were both located in "Contracting States"—*i.e.*, countries that had ratified CISG—thus satisfying the requirements for applying the Sales Convention under Article 1(1)(a). Because the contract arose after January 1, 1988, the effective date of CISG for both Italy and the United States, the Sales Convention applied.<sup>11</sup>

The contract formation provisions of CISG diverge significantly from those in U.C.C. Article 2.<sup>12</sup> In particular, CISG and the U.C.C.

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8. 330 U.N.T.S. 38 (1959), No. 4739, 21 U.S.T. 2517, T.I.A.S. No. 6997, done at New York June 10, 1958. The Convention was implemented in the United States through Pub. L. 91-368, 84 Stat. 692, 9 U.S.C. § 201 (1970). The text of the Convention appears in 9 U.S.C.A. (West 1970 & Supp. 1992) immediately following § 201.

9. In the end, the court decided that the applicable federal law—CISG—was part of every state's law. 789 F. Supp. at 1237 n.5. It is thus unclear whether the decision to apply a federal rather than state law of contract formation had any effect on the outcome of the case or even whether this discussion is properly considered part of the holding.

10. *Id.* at 1237. The UNIFORM COMMERCIAL CODE, U.C.C. § 1-101 *et seq.* (1987), 1-3A U.L.A. 3 ff. (1990) [hereinafter "U.C.C."].

11. For a critique of this aspect of the court's reasoning see *infra* text accompanying note 39.

12. For a more extensive treatment of this subject see John E. Murray, Jr., *An Essay on the Formation of Contracts and Related Matters Under the United Nations Convention on Contracts for the International Sale of Goods*, 8 J.L. & COM. 11 (1988).

have fundamentally different approaches to the so-called "battle of the forms"—*i.e.*, situations in which an offer (usually a potential buyer's purchase order form) elicits a response (typically on the seller's "acknowledgement" form) which indicates acceptance but which contains terms that add to or vary the terms of the offer. The U.C.C. treatment of this issue itself represents a significant departure from the pre-Code "mirror image rule," under which a purported acceptance that did not precisely match the terms of the offer operated instead as a rejection and counter-offer.<sup>13</sup> Under the mirror image rule, the resulting counter-offer, including all its variant terms, was deemed accepted if the original offeror thereafter performed or accepted the other's performance.

Under U.C.C. § 2-207(1), in contrast, a response containing terms not in the offer will nevertheless "operate as an acceptance," provided the response is an "expression of acceptance" and provided it does not expressly make acceptance "conditional on assent to the additional or different terms." The question whether additional terms in the response become a part of the contract thus formed is governed by section 2-207(2), which excludes (*inter alia*) terms that materially alter the contract.<sup>14</sup> If no contract is formed under section 2-207(1) because acceptance was expressly conditioned on assent to the variant terms, the parties may nevertheless form a contract "by conduct" under section 2-207(3) if the seller ships and the buyer accepts the goods.<sup>15</sup> The terms of such a contract by conduct are not those of either the offer or the response. Instead, the contract comprises "those terms on which the writings of the parties agree, together with any supplementary terms incorporated under any other provisions of this Act."<sup>16</sup>

Article 19 of the Convention, in contrast, returns almost entirely to the mirror-image approach.<sup>17</sup> Indeed, the first subsection sounds a

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13. Perhaps the most infamous example of the mirror-image rule in perverse action is *Poel v. Brunswick-Balke-Collender Co.*, 110 N.E. 619 (N.Y. 1915) (holding that a response to an offer which matched the offer precisely except for a printed clause requiring the offeror to acknowledge that the response was not an acceptance—no contract formed). Applying the mirror-image rule to transactions in which the parties exchanged printed forms with differing boilerplate clauses (clauses which invariably remain unread by the recipient) yields results with no connection to the parties' expectations or to commercial reality. See *Murray*, *supra* note 12, at 38-39. Even under the mirror-image rule, however, courts retained some flexibility. For instance, a response which merely "suggested" a different or additional term, but did not make it a *condition* to the creation of a contract, could operate as an acceptance. *E.g.*, *Rucker v. Sanders*, 109 S.E. 857 (N.C. 1921).

14. Such materially altering terms will become part of the contract, however, if the original offeror specifically assents to them.

15. *E.g.*, *C. Itoh & Co. v. Jordan Int'l Co.*, 552 F.2d 1228 (1977).

16. U.C.C. § 2-207(3).

17. *Murray*, *supra* note 12, at 40-44.

ringing retreat: "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." Article 19(2) prevents a complete relapse into the mirror-image world by providing that a reply containing only *immaterial* additional or different terms "constitutes an acceptance."<sup>18</sup> Even in that case, however, the original offeror can prevent contract formation by promptly objecting to the immaterial variances.<sup>19</sup> Article 19(3) provides that additional or different terms are material if they relate "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. . . ." This extremely broad list assures that the vast majority of non-matching responses will contain materially-altering terms that, under CISG Article 19, will block formation of a contract.<sup>20</sup>

Thus the applicability of CISG (rather than Article 2 of the U.C.C.) to the transaction in *Filanto* might have had a decisive effect on the outcome of the case. Indeed, in resisting the motion to stay pending arbitration, the plaintiff-seller relied heavily on CISG. Both parties agreed that the Memorandum Agreement which the defendant-buyer had sent to the plaintiff on March 13 and which incorporated by reference the arbitration provision of the Russian contract constituted an offer. The seller eventually replied on August 7 by returning a signed copy of the Agreement with a cover letter objecting to arbitration. If section 2-207 of the U.C.C. applied, the buyer pointed out, the seller's August 7 communication "would be viewed as an acceptance with a proposal for a material modification. . . ."<sup>21</sup> In other words, the seller's communication would have formed a contract under section 2-

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18. Contrast U.C.C. § 2-207, under which the existence of a material variant term in a response to an offer does not by itself prevent contract formation, although materiality will prevent an additional term from automatically becoming part of a contract between merchants under subsection (2)(b). *But see* *Roto-Lith, Ltd. v. F.P. Bartlett & Co.*, 297 F.2d 497 (1st Cir. 1962) (holding that a response which contained material alterations to the offer was, for that reason, not an acceptance but a counter-offer).

19. Under U.C.C. § 2-207, in contrast, an offeror's objection to immaterial variances in the offeree's response will not prevent the response from "operating as an acceptance" (*i.e.*, forming a contract), although if both parties are merchants the objection will prevent the offeree's term from automatically becoming part of their contract under § 2-207(2)(c). The approach in CISG may allow an offeror to escape or enforce a contract at its option, thus facilitating speculation at the offeree's expense. Murray, *supra* note 12, at 42-43.

20. See Allan Farnsworth, *Formation of Contract*, in *INTERNATIONAL SALES: THE UNITED NATIONS CONVENTION ON CONTRACTS FOR THE INTERNATIONAL SALE OF GOODS* § 3.04, at 3-16 (Nina M. Galston & Hans Smit eds., 1984).

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



207(1), and the provision in the seller's form eliminating arbitration, if subject to section 2-207(2), would likely be excluded from this contract as a material alteration.<sup>22</sup>

Because CISG applied, however, the seller could argue that its response on August 7 did not form a contract. The seller's reply included a variant term (no arbitration) relating to a topic that Article 19(3) identifies as material (dispute resolution). According to Article 19(1), therefore, the response was a rejection of the buyer's proposal and a counter-offer for an agreement that would exclude arbitration. The seller Filanto contended that the buyer then accepted this counter-offer by acknowledging contractual obligations in a subsequent letter, and thus became bound to the term eliminating arbitration. The court rather grumpily acknowledged that the seller's argument accurately reflected the CISG battle-of-the-forms provision.<sup>23</sup>

The court nevertheless found for the buyer on the basis of facts not accounted for in the seller's argument. The buyer had contended that the seller accepted its original offer (including the incorporation of an arbitration term) by silence or inaction—*i.e.*, by retaining the offer for almost five months before responding, and by waiting to raise its objections until after buyer had provided the initial letter of credit required under the agreement.<sup>24</sup> The court criticized this argument *and* the seller's analysis as going "beyond the narrow scope of the inquiry required by the Arbitration Convention."<sup>25</sup> Citing *Prima Paint v. Flood & Conklin Mfg. Co.*<sup>26</sup> and *Republic of Nicaragua v. Standard*

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22. See, e.g., *Marlene Indus. v. Carnac Textiles*, 380 N.E.2d 239 (N.Y. 1978) (addition of an arbitration clause in response to an offer was a material alteration). The result under the U.C.C. might change if the seller's exclusion of arbitration were considered a "different term" not subject to § 2-207(2). See JAMES J. WHITE & ROBERT S. SUMMERS, *UNIFORM COMMERCIAL CODE* § 1-3 at 31-35 (3d ed. 1988). *Contra* JOHN E. MURRAY, JR., *MURRAY ON CONTRACTS* § 50D (3d ed. 1990).

23. The court stated:

[T]he Uniform Commercial Code . . . does not apply to this case, because the State Department undertook to fix something that was not broken by helping to create the Sale of Goods Convention which varies from the Uniform Commercial Code in many significant ways. Instead, under this analysis, Article 19(1) of the Sale of Goods Convention would apply. That section, as the Commentary to the Sale of Goods Convention notes, reverses the rule of Uniform Commercial Code § 2-207, and reverts to the common law rule. . . . The August 7 letter, therefore, was a counteroffer. . . .

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

24. Although the buyer argued that this conduct "estops [the seller] from denying its acceptance of the contract," the court noted that "this contention is better viewed as an acceptance by conduct argument." *Id.* at 1238.

25. *Id.* at 1238-39.

26. 388 U.S. 395 (1967).

*Fruit Co.*<sup>27</sup> the court distinguished the issue of overall contract formation, on which the parties had focused, from the question of whether an agreement to arbitrate had been formed. Because it was dealing with a motion to stay pending arbitration, the court opined, only the latter was before it. If it found an agreement to arbitrate, all further issues—including the question of whether the parties had formed a contract of sale—would be for the arbitrators. In other words, the court contemplated the possibility that it might find a valid agreement to arbitrate even though the contract of which it was a part might later be found not to exist. In support, the court cited a Ninth Circuit case, *Teledyne, Inc. v. Kone Corp.*<sup>28</sup>

The court then decided that the parties had indeed formed a sufficient agreement to arbitrate. The decision was based in part on the buyer's acceptance-by-silence argument, and in part on the fact that the seller itself had at one point taken the position that the agreement incorporated terms of the Russian contract. In determining the existence of an agreement to arbitrate, as opposed to the formation of the overall contract, CISG played only a secondary role in the court's analysis. For example, in deciding that *Filanto's* silence bound it to *Chilewich's* arbitration term, the court's primary citations were to section 69 of the Restatement (Second) of Contracts and to cases applying U.S. domestic law. The court referred to CISG Article 18 only as an afterthought.<sup>29</sup> In describing its analytical method, furthermore, the court treated CISG not as governing law but merely as one source of principles.<sup>30</sup>

Although strictly speaking *Filanto* did not apply CISG to the issue before it, the Sales Convention nevertheless played a prominent role in the court's analysis and it was central to the seller's argument. The appearance of the case therefore carries several important lessons for the commercial lawyer. Foremost among them is a reminder of the significance of CISG. The Convention is the law potentially applicable to

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27. 937 F.2d 469 (9th Cir. 1991), *cert. denied*, 112 S. Ct. 1294 (1992).

28. 892 F.2d 1404 (9th Cir. 1990).

29. After invoking the Restatement and cases applying domestic contract law on acceptance by silence, the court merely added that "[t]he Sale of Goods Convention itself recognizes this rule" (citing Article 18(1)). *Filanto*, 789 F. Supp. at 1240. The court also cited CISG Article 8(3) in arguing that *Filanto's* post-contract formation conduct recognizing the applicability of other terms of the Russian Agreement had bound it to the arbitration term. *Id.* at 1240-41.

30. "[T]he Court will interpret the 'agreement in writing' requirement of the Arbitration Convention in light of, and with reference to, the substantive international law of contract embodied in the Sale of Goods Convention." *Id.* at 1237.

a huge number of international transactions.<sup>31</sup> Unless the parties agree otherwise, sales of goods between a U.S. party and a party located in any other ratifying country are governed by CISG, provided the contract (or the offer from which it grew) arose after the effective date of the Convention for both countries.<sup>32</sup> As of this writing 34 countries had ratified CISG, including all the major trading nations of North America, most of the major Western European commercial countries, and a diverse array of other nations.<sup>33</sup> Although the list of ratifiers has some significant omissions (Japan, for instance), it already includes states with an impressive portion of world trade, and it continues to grow. Clearly a very substantial part of U.S. foreign trade is already subject to CISG (unless the parties choose to displace the Convention<sup>34</sup>), and that proportion will only increase with time.

Another lesson to glean from *Filanto* is that, although American lawyers dealing with CISG generally will find themselves among familiar concepts and principles, the Convention works some substantial changes from U.S. domestic sales law. The contract formation rules highlighted in *Filanto* are just one example.<sup>35</sup> CISG also works substantial change in the area of remedies, where the Convention's provisions range from the very familiar (e.g., cover or resale damages under Article 75; market price damages under Article 76) to the completely foreign (e.g., the reduction-in-price remedy in Article 50, derived from

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31. The *Filanto* court itself noted this point: "Although there is as yet virtually no U.S. case law interpreting the Sale of Goods Convention, it may safely be predicted that this will change." *Id.* (citation omitted).

32. See CISG arts. 1(1)(a) and 100. CISG went into force with respect to the United States on January 1, 1988.

Under Article 1(1)(b) CISG also applies to an international sale if "the rules of private international law [*i.e.*, choice of law rules] lead to the application of the law of a Contracting State"—even if one or both parties are located in a country that has not ratified. Article 95 of the Sales Convention, however, permits a ratifying country to declare that it is not bound by Article 1(1)(b). The United States declared an Article 95 reservation. As a result, a sale between a U.S. party and a party located in a country that has not ratified CISG will not be governed by the Sales Convention, even if conflict rules point to U.S. law. Instead, U.S. domestic sales law—almost certainly Article 2 of the U.C.C.—will apply.

33. See *Journal of Law & Commerce* CISG Contracting States and Declarations Table, 12 J.L. & COM. 283 (1993) for an updated list of Contracting States to the Convention.

34. CISG Article 6 permits the parties "to exclude the application of this Convention or, subject to Article 12, derogate from or vary the effect of any of its provisions." Article 12 preserves the right of ratifying countries to require written evidence of a contract.

35. In addition to the changes in battle-of-the-forms analysis highlighted in *Filanto*, CISG departs from U.S. domestic law with respect to the circumstances in which offers are irrevocable, the effect of an acceptance lost or delayed in transmission, and several other contract formation issues. For a detailed comparison of these aspects of CISG and the U.C.C. see Murray, *supra* note 12.

the Roman law *actio quanti minoris*<sup>36</sup>). CISG's remedy rules also illustrate the hidden complexity of the Convention and the need for care in construing the document. For example, Article 46 appears to grant an aggrieved buyer a virtually unqualified right to demand specific performance by the seller. This would mark a substantial change from U.C.C. Article 2, which continues the common law tradition of authorizing specific performance (or the functionally-similar remedy of replevin) only in very limited circumstances.<sup>37</sup> The change wrought by CISG, however, is substantially tempered by Article 28, which provides that a court need order specific performance only if it "would do so under its own law in respect of similar contracts of sale not governed by this Convention." Thus despite Article 46, a U.S. court remains free to impose U.S. domestic law restrictions on the availability of specific performance.<sup>38</sup>

Indeed, the most important lesson of *Filanto* may be that CISG contains hidden complexities which can easily lead to errors. For example, the court stated that the Sales Convention applied to the transaction between Chilewich and *Filanto* because "the contract alleged in this case most certainly was formed, if at all, after January 1, 1988."<sup>39</sup> January 1, 1988 was the date the Sales Convention became effective for both countries where the parties were located (Italy and the U.S.). Thus the court was clearly referring to the rule in Article 100(2) that CISG "applies . . . to contracts concluded on or after the date when the Convention enters into force." Given the issues before the *Filanto* court, however, its reference to the date when the contract was formed is incorrect. Article 100 distinguishes issues relating to contract formation (the kind at stake in *Filanto*) from other kinds of issues. Article 100(1) governs the former, and it provides: "This Convention applies to the formation of a contract only when the proposal for concluding the contract is made on or after the date when the Convention enters into force. . . ." Thus it is the date of the "proposal for concluding the

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36. See JOHN HONNOLD, UNIFORM LAW FOR INTERNATIONAL SALES UNDER THE 1980 UNITED NATIONS CONVENTION §§ 309-13 (copyright reprint 1987).

37. See U.C.C. § 2-716(1) (specific performance available only if "the goods are unique or in other proper circumstances") and U.C.C. § 2-716(3) (replevin for goods not yet shipped available only if they have been identified to the contract and "after reasonable effort [the buyer] is unable to effect cover for such goods or the circumstances reasonably indicate that such effort will be unavailing").

38. HONNOLD, *supra* note 36, § 195. For a more detailed comparison of the remedies under U.C.C. Article 2 and CISG see Harry M. Flechtner, *Remedies Under the New International Sales Convention: The Perspective From Article 2 of the U.C.C.*, 8 J.L. & COM. 53 (1988).

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

contract" (i.e., the offer—see Article 14), not the date of contract formation (the date of the acceptance) which dictates whether CISG governs the contract formation questions at issue in *Filanto*. Because the offer in *Filanto* was in fact made after January 1, 1988, the court's error was harmless. This episode nevertheless illustrates how easily CISG's provisions can be misconstrued.

There are other errors in *Filanto*. In a footnote the court states that "the Convention essentially rejects both the Statute of Frauds and the parol evidence rule," citing Articles 11 and 8(3).<sup>40</sup> The dicta concerning the Statute of Frauds is inaccurate in some circumstances. It is true that Article 11 eliminates any writing requirement for contracts governed by CISG. In addition, Article 29 makes it clear that, absent a "no oral modification" clause in an agreement, a contract governed by the Convention can be modified without a writing. Article 96, however, permits ratifying nations to make a declaration opting out of the provisions that validate oral agreements, provided the country's own law "requires contracts of sale to be concluded in or evidenced by writing." Argentina, Chile, China, Hungary and the Ukraine (but not the United States) have made reservations under Article 96.<sup>41</sup> Article 11 and the other CISG provisions upholding nonwritten agreements "do not apply where *any* party has his place of business in a Contracting State which has made a declaration under Article 96."<sup>42</sup> In that case, municipal law will step in to fill the void concerning the formal requirements for an enforceable contract.

Thus if one party to a contract governed by CISG is located in a country that has made an Article 96 reservation, the domestic law applicable under choice of law principles will determine whether a contract must be evidenced by a writing in order to be enforceable.<sup>43</sup> Suppose an oral sales contract was allegedly formed between parties located in the United States and Argentina. Because Argentina has made a declaration under Article 96, the Article 11 rule eliminating any requirement of a writing would not apply. If the forum's choice of law principles led to the application of U.S. law, domestic U.S. statute of frauds provisions—including, most likely, § 2-201 of the U.C.C.—would apply to the contract, even though the United States

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40. *Id.* at 1238 n.7.

41. See *Journal of Law & Commerce* CISG Contracting States and Declarations Table, 12 J.L. & COM. 283 (1993) for an updated list of Contracting States to the Convention.

42. CISG art. 12 (emphasis added).

43. HONNOLD, *supra* note 36, § 129.

has not made an Article 96 reservation. Argentinean formal requirements would apply if the forum's conflicts rules led to the application of the law of Argentina.

The *Filanto* court's statement concerning the rejection of the parol evidence rule in CISG may also be misleading. Article 8(3) of the Convention states:

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

By requiring consideration of "all relevant circumstances"—including "negotiations"—without excepting situations where the parties embodied their agreement in a writing, this provision does overrule certain traditional applications of the parol evidence rule.<sup>44</sup> On the other hand, it is quite uncertain whether Article 8(3) has any effect on more enlightened approaches to parol evidence questions. For one thing, Article 8 is concerned with *interpretation* of an agreement. According to modern authorities, the parol evidence rule does not bar evidence that relates to interpreting existing terms of a writing, as opposed to evidence going to the existence of terms not found in the writing.<sup>45</sup>

Even to the extent Article 8(3) allows in evidence of negotiations concerning distinct additional terms omitted from the written contract, it does not necessarily contradict modern interpretations of the parol evidence rule. At bottom, the parol evidence rule is merely a particular application of the fundamental "intent principle" of contract law: i.e., if the parties so intend, they can discharge terms to which they previously agreed by excluding them from a subsequent or even contemporaneous "integration."<sup>46</sup> Far from invalidating such a rule, CISG Article 8(3) emphasizes the importance of the parties' intent—although clearly the Convention does not adopt the somewhat bizarre and abstruse methods for determining intent associated with the parol evidence rule. Thus in deciding whether to admit evidence of negotiations indicating that the parties had agreed to a term not reflected in a subsequent

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44. *Id.* § 110.

45. RESTATEMENT (SECOND) OF CONTRACTS § 214(c) & cmt. b (1981); MURRAY, *supra* note 22, § 82A. See also U.C.C. § 2-202(a) and cmt. 2 thereto (U.C.C. parol evidence rule allows in evidence of course of dealing or usage of trade because, "[u]nless carefully negated they have become an element of the meaning of the words used").

46. MURRAY, *supra* note 22, § 82A, B.

written contract, a court is not authorized by Article 8(3) to ignore the effect of a "merger clause" stating that the writing is intended to be a final and complete statement of the agreement. Indeed, absent evidence that the merger clause was invalid (*e.g.*, unconscionable), the principles of interpretation adopted in sections (1) and (2) of Article 8 would probably require the court to exclude the proffered evidence.<sup>47</sup>

In short, while the rather impenetrable applications of the parol evidence rule in our domestic law tradition should have little or no precedential value for contracts governed by CISG, the basic principles behind the rule remain viable under the Convention. Evidence of prior negotiations going to the interpretation of a written contract is admissible under CISG just as it is under the parol evidence rule. Furthermore, the *Filanto* court's dicta to the contrary notwithstanding, the parties can discharge agreed terms by leaving them out of a written contract if they manifest their intention in a properly drafted merger clause.

### III. APPLICATION OF THE CONVENTION: PREPARATION FOR THE TRANSNATIONAL TRANSACTION

*Filanto* demonstrates clearly that parties contemplating an arbitration provision in a transnational contract must consider the formation issue in two contexts: the substantive formation rules applicable to the contract itself, and the rules applicable in determining whether there exists an agreement to arbitrate. The *Filanto* court made clear that it was dealing only with the agreement to arbitrate and leaving other formation issues for determination by the arbitrators if that should become necessary.<sup>48</sup> This allocation of competence requires that the transactional lawyer be aware not only of the substantive rules of the Sales Convention, but also of the rules applicable to agreements to arbitrate. The *Filanto* decision was influenced heavily by the prevailing policy favoring agreements to arbitrate.

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47. From another perspective, the parol evidence rule seems primarily a rule of procedure—*i.e.*, it requires the judge rather than the jury to make the factual determination whether the parties intended to discharge prior or contemporaneous agreements that were not included in a writing. See *id.* § 82B at 376-77. Clearly nothing in Article 8(3) or the rest of the Convention overrules this procedural aspect of the parol evidence rule.

48. "[T]he entire controversy between these parties is subject to and will be resolved by arbitration. Accordingly, it is appropriate that a final judgment issue here containing a mandatory injunction to arbitrate in accordance with the [New York Arbitration] Convention and what this Court finds to be the agreement of the parties." *Filanto*, 789 F. Supp. at 1242.

### A. *The Policy Favoring Enforcement of Arbitration Agreements*<sup>49</sup>

"An agreement to arbitrate before a specified tribunal is, in effect, a specialized kind of forum-selection clause. . . ." <sup>50</sup> When the chosen forum is arbitration, there is a significantly greater certainty that the chosen forum will be respected than when the forum is a court. <sup>51</sup> This is the result of both domestic legislation and international convention.

The United States Arbitration Act, <sup>52</sup> adopted in 1947, "revers[ed] centuries of judicial hostility to arbitration agreements, [and] was designed to allow parties to avoid 'the costliness and delays of litigation,' and to place arbitration agreements 'upon the same footing as other contracts . . . .'" <sup>53</sup> Section 2 of the Act provides that a written agreement to arbitrate a commercial dispute, "shall be valid, irrevocable, and enforceable. . . ." <sup>54</sup> Section 3 of the Act provides for a stay of proceedings in a case where the issue before a court is arbitrable under the agreement, and section 4 directs the federal courts to order parties to arbitrate if there has been a "failure, neglect, or refusal" of a party to honor an agreement to arbitrate. <sup>55</sup> The Act demonstrates a clear policy in favor of enforcing agreements to arbitrate.

The goals of the United States Arbitration Act were expanded to the international setting with the 1958 United Nations Convention on the Recognition and Enforcement of Foreign Arbitral Awards (the New York Convention), which entered into force in the United States on December 29, 1970. <sup>56</sup> Article II of the Convention obligates the courts in each contracting state to "recognize an agreement in writing under which the parties undertake to submit to arbitration all or any

49. Portions of this section are taken from Ronald A. Brand, *Nonconvention Issues in the Preparation of Transnational Sales Contracts*, 8 J.L. & COM. 145, 158-64 (1988).

50. *Scherk v. Alberto-Culver Co.*, 417 U.S. 506, 519 (1974).

51. While the modern trend is to enforce choice of forum clauses generally, "it appears that at least four states explicitly reject the modern trend and hold all such clauses invalid per se, while the case law in several others is unclear." Michael E. Solimine, *Forum—Selection Clauses and the Privatization of Procedure*, 25 CORNELL INT'L L.J. 51, 63 (1992).

52. Ch. 392, 61 Stat. (1947) (codified at 9 U.S.C. §§ 1-14).

53. *Scherk*, 417 U.S. at 510-11, quoting H.R. REP. NO. 96, 68th Cong., 1st Sess., 1, 2 (1924).

54. United States Arbitration Act, 9 U.S.C. § 2 (1947). The entire section reads:

A written provision in any maritime transaction or a contract evidencing a transaction involving commerce to settle by arbitration a controversy thereafter arising out of such contract or transaction, or the refusal to perform the whole or any part thereof, or an agreement in writing to submit to arbitration an existing controversy arising out of such a contract, transaction, or refusal, shall be valid, irrevocable, and enforceable, save upon such grounds as exist at law or in equity for the revocation of any contract.

55. *Id.* §§ 3, 4.

56. New York Convention, *supra* note 8.



differences which have arisen or which may arise between them in respect of a defined legal relationship, whether contractual or not, concerning a subject matter capable of settlement by arbitration."<sup>57</sup> Once an award is rendered, the Convention goes on to require that each contracting state recognize an award granted in another contracting state as binding and enforce the award just as if it had been rendered domestically.<sup>58</sup>

Although uncertainty has existed in the past as to the extent to which "public law" matters such as securities law violations and anti-trust claims may be the subject of arbitration pursuant to general arbitration clauses,<sup>59</sup> this issue was largely put to rest by the Supreme Court in *Mitsubishi Motors Corp. v. Soler Chrysler-Plymouth, Inc.*<sup>60</sup> Soler had entered into a distributorship agreement for the sale of Mitsubishi-manufactured vehicles within a designated area. The agreement contained the following clause:

All disputes, controversies or differences which may arise between [Mitsubishi] and [Soler] out of or in relation to Articles I-B through V of this Agreement or for the breach thereof, shall be finally settled by arbitration in Japan in accordance with the rules and regulations of the Japan Commercial Arbitration Association.<sup>61</sup>

When Mitsubishi brought an action in U.S. District Court in Puerto Rico to compel arbitration under the Arbitration Act and the New York Convention, Soler responded with a defense of antitrust violations on the part of Mitsubishi and claimed that such matters could not be submitted to arbitration.<sup>62</sup>

Despite the Court's recognition that U.S. Courts of Appeals "uniformly had held that the rights conferred by the antitrust laws were 'of a character inappropriate for enforcement by arbitration,'"<sup>63</sup> it con-

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57. New York Convention art. II(1) *appears in* 21 United States Treaties and Other International Agreements 2560 (1970). Article II(2) defines the term "agreement to arbitrate" to include "an arbitral clause in a contract or an arbitration agreement, signed by the parties or contained in an exchange of letters or telegrams."

58. *Id.* Art. III.

59. See, e.g., Thomas E. Johnson, *International Antitrust Litigation and Arbitration Clauses*, 3 J.L. & COM. 91 (1983); Francis J. Higgins et al., *Pitfalls in International Commercial Arbitration*, 35 BUS. LAW. 1035 (1980).

60. 473 U.S. 614 (1985).

61. *Id.* at 617.

62. *Id.* at 619.

63. *Id.* at 621 (quoting App. to Pet. for Cert. in No. 83-1569, p. B9, which quoted *Wilko v. Swan*, 201 F.439, 444 (2d Cir. 1953), *rev'd*, 346 U.S. 427 (1953)). See *American Safety Equipment Corp. v. J. P. Maguire & Co.*, 392 F.2d 821 (2d Cir. 1968).

cluded "that concerns of international comity, respect for the capacities of foreign and transnational tribunals, and sensitivity to the need of the international commercial system for predictability in the resolution of disputes require that we enforce the parties' agreement, even assuming that a contrary result would be forthcoming in a domestic context."<sup>64</sup> The Court reiterated its earlier position that refusal to enforce an international arbitration agreement would "damage the fabric of international commerce and trade, and imperil the willingness and ability of businessmen to enter into international commercial agreements."<sup>65</sup>

In the commercial law setting, this policy favoring arbitration is supplemented by decisions on the relationship between arbitration clauses and contract terms generally. The most significant case in this area is perhaps the Supreme Court's *Prima Paint*<sup>66</sup> decision relied upon by the *Filanto* court. In a contract for consulting services, one party alleged fraud in the inducement of the contract generally, seeking to enjoin arbitration in accordance with the contract. The Court held that an application for a stay under the Arbitration Act allowed consideration only of "issues relating to the making and performance of the agreement to arbitrate."<sup>67</sup> Other issues, such as fraud in the inducement of the contract generally, are separable and the policy favoring arbitration may operate to preclude judicial consideration even of important issues of contract formation.

### *B. Agreements to Arbitrate and Contract Formation: The Relationship Between the New York Arbitration Convention and the U.N. Sales Convention*

In determining whether there existed an agreement to arbitrate, the *Filanto* court applied federal law (the Federal Arbitration Act and the New York Arbitration Convention) in conducting a "four-part inquiry." It asked the following questions:<sup>68</sup>

- 1) Is there an agreement in writing to arbitrate the subject of the dispute? Convention, Articles II(1), II(2).
- 2) Does the agreement provide for arbitration in the territory of a signatory country? Convention, Articles I(1), I(3); 9 U.S.C. § 206;

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64. 473 U.S. at 629.

65. *Id.* at 631 (quoting *Scherk v. Alberto-Culver*, 417 U.S. 506; 516-17 (1974)).

66. *Prima Paint Corp. v. Flood & Conklin Mfg.*, 388 U.S. 395 (1967).

67. *Id.* at 404.

68. These questions were taken from a direct quote to *Ledee v. Ceramiche Ragno*, 684 F.2d 184, 186-87 (1st Cir. 1982), *in Filanto*, 789 F. Supp. at 1236.

Declaration of the United States Upon Accession, reprinted at 9 U.S.C.A. § 201, Note 43 (1990 Supp.).

- 3) Does the agreement arise out of a legal relationship, whether contractual or not, which is considered as commercial? Convention, Article I(3); 9 U.S.C. § 202.
- 4) Is a party to the contract not an American citizen, or does the commercial relationship have some reasonable relation with one or more foreign states? 9 U.S.C. § 202.<sup>69</sup>

Finding that a positive answer to all four questions would require an order to arbitrate, the court determined quickly that the second, third and fourth criteria were "clearly satisfied, as the purported agreement provides for arbitration in Moscow, the Chilewich-Filanto relationship is a 'commercial' relationship, and Filanto is an Italian corporation."<sup>70</sup> Thus, the issue before the court was "whether the correspondence between the parties, viewed in light of their business relationship, constitutes an 'agreement in writing.'"<sup>71</sup> In determining whether there existed an agreement to arbitrate, the court began and ended at the Federal Arbitration Act and the New York Arbitration Convention. On the way, however, the court made a visit to the provisions of the Sales Convention.

Keeping within sight the Arbitration Convention's "narrow scope,"<sup>72</sup> the *Filanto* court noted that the Sales Convention adopts a position consistent with the rule that "contracts and the arbitration clauses included therein are considered to be 'severable.'"<sup>73</sup> Thus, the court drew a distinction "between a challenge to the validity of the contract itself and a challenge to the validity of the arbitration clause," with "the former . . . a question for the arbitrators, while the latter [is] a question for the court."<sup>74</sup> The court then confined itself to the question of whether an agreement to arbitrate existed.<sup>75</sup> It found "objective conduct evidencing an intent to be bound with respect to the arbitra-

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69. *Id.*

70. 789 F. Supp. at 1237.

71. *Id.*

72. *Id.* at 1238-39.

73. *Id.* at 1239.

74. *Id.* (quoting *Prima Paint*, *supra* note 66, at 404, and *Republic of Nicaragua v. Standard Fruit Co.*, 937 F.2d 469, 476 n.9 (9th Cir. 1991), *cert. denied*, 60 U.S.L.W. 3615 (1992)).

75. The choice of the term validity is perhaps unfortunate in light of the CISG art. 4(a) rule that the Sales Convention "is not concerned with . . . the validity of the contract or of any of its provisions. . . ." The court was appropriately dealing not with an issue of validity, but rather with the issue of formation, which—as to the contract—is governed by Part II of the Sales Convention.

tion provision,"<sup>76</sup> noting that "[t]here is simply no satisfactory explanation as to why Filanto failed to object to the incorporation by reference of the Russian Contract in a timely fashion."<sup>77</sup>

Despite its consideration of only the arbitration issue, the court justified its conclusion by reliance on Articles 8 and 18 of the Sales Convention, which generally deal with the interpretation of party conduct in contract formation. Chilewich had in fact commenced performance of the agreement without notifying Filanto of its objection to the incorporation by reference of the arbitration clause. The *Filanto* court applied the Convention to this conduct:

The Sale of Goods Convention itself recognizes this rule: Article 18(1) provides that "A statement made by or other conduct of the offeree indicating assent to an offer is an acceptance". Although mere "silence or inactivity" does not constitute acceptance, Sale of Goods Convention Article 18(1), the Court may consider previous relations between the parties in assessing whether a party's conduct constituted acceptance, Sale of Goods Convention Article 8(3). In this case, in light of the extensive course of prior dealing between these parties, Filanto was certainly under a duty to alert Chilewich in timely fashion to its objections to the terms of the March 13 Memorandum Agreement—particularly since Chilewich had repeatedly referred it [sic] to the Russian Contract and Filanto had had a copy of that document for some time.<sup>78</sup>

The court went on to note that Filanto had otherwise acknowledged the existence of the contract with Chilewich (1) in its own complaint, where it sued on that contract, (2) by signing the March 13 Memorandum Agreement which "specifically referred to the incorporation by reference of the arbitration provision in the Russian Contract," and (3) in a June 21, 1991 letter which "explicitly stated that '[t]he April Shipment and the September shipment are governed by the Master Purchase Contract of February 28, 1989 [the Russian Contract].'"<sup>79</sup> After noting these conditions, the court clouded its own final analysis by stating: "In light of these factors, and heeding the presumption in favor of arbitration, . . . which is even stronger in the context of international commercial transactions, . . . the Court holds that Filanto is bound by the terms of the March 13 Memorandum Agreement, and

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76. 789 F. Supp. at 1239 (quoting *Matterhorn v. NCR Corp.*, 763 F.2d 866, 871-73 (7th Cir. 1985) (Posner, J.) (discussing cases), and *Teledyne, Inc. v. Kone Corp.*, 892 F.2d 1404, 1410 (9th Cir. 1990) (arbitration clause enforceable despite later finding by arbitrator that contract itself was invalid)).

77. 789 F. Supp. at 1240. See *supra* notes 22-28 and accompanying text.

78. *Id.*

79. *Id.*

so must arbitrate its dispute in Moscow.”<sup>80</sup> Thus, as already acknowledged in the first part of this article,<sup>81</sup> the court ends without a clear statement as to the importance of the Sales Convention to its holding. What is clear is that the court relies explicitly on the well-established policy favoring arbitration—flowing from the Federal Arbitration Act, the New York Convention, and case law.

Despite the ambiguity regarding reliance on the Sales Convention in *Filanto*, certain important lessons can be drawn from the decision, especially when it is considered in conjunction with other recent decisions of arbitral tribunals and foreign courts. One of the more interesting of those decisions is International Chamber of Commerce (ICC) Case No. 5713 of 1989.<sup>82</sup> In that case the parties had concluded three contracts for the sale of a product according to certain contract specifications. After the buyer made 90% payment in exchange for documents, a dispute arose over the conformity of the second shipment. The seller instituted arbitration proceedings to recover the 10% balance and the buyer counterclaimed alleging set off for the buyer's loss upon resale of the nonconforming goods.

The contract contained an arbitration clause, but no provision regarding the choice of substantive law. Thus, under Article 13(3) of the ICC rules, the arbitrators were to “apply the law designated as the proper law by the rule of conflicts which they deem appropriate.”<sup>83</sup> Article 13, *inter alia*, instructs the arbitrators to take into account “relevant trade usages.” Despite the fact that neither party to the contract was appropriately connected with a contracting party to the Sales Convention, the tribunal found “that there is no better source to determine the prevailing trade usages” than the terms of the Sales Convention.<sup>84</sup> Looking to Articles 38 through 40 of the Convention, the tribunal held that the Convention “may be fairly taken to reflect the generally recognized usages regarding the matter of the nonconformity of goods in international sales.”<sup>85</sup>

Thus, ICC Award No. 5713 has dual lessons in regard to the Sales Convention. First, where a contract providing for arbitration fails to contain a substantive choice of law clause, the international nature of a transaction may be enough in itself to lead arbitrators to the rules of

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80. *Id.* at 1241.

81. *Supra* note 29 and accompanying text.

82. ICC Case No. 5713, *reprinted in* 15 Y.B. COMM. ARB. 70 (1990).

83. *Id.* at 71.

84. *Id.* at 72.

85. *Id.*

the Convention, even if CISG technically does not apply to the contract. Second, where the choice of law rules applied by arbitrators to determine the applicable substantive rules include reference to "usages of trade," the provisions of the Convention may be applied, not as controlling substantive law, but rather as the best available evidence of international usage of trade in sale of goods transactions. Either lesson is a natural and logical conclusion for arbitrators faced with a transnational transaction gone bad. The two taken together indicate possibilities for dramatic expansion of the application of the Convention's rules beyond its own Article 1 scope provision.

In looking to the Sales Convention for applicable law, even though neither party was from a contracting state, the ICC tribunal demonstrates the potential of the Convention to take on a life of its own. If this decision is an indication of the future, the combination of a policy favoring arbitration—the policy the *Filanto* court relied upon in finding an agreement to arbitrate despite claimed inconsistent terms and conduct—and the inclination of arbitrators to look to the Sales Convention even when the parties are from countries not party to the Convention and have not explicitly directed its application in a choice of law clause, increase dramatically the number of contracts likely to be governed by the Convention.<sup>86</sup>

Arbitration carries with it the benefits of enforceability of the resulting award in the over ninety contracting states to the New York Arbitration Convention. It is thus the forum of choice in an increasingly large number of transnational contracts. If the absence of a choice of law clause in a contract containing an arbitration provision will lead to the application of the Sales Convention regardless of the place of business of the parties to the contract,<sup>87</sup> judicial inclination to find an agreement to arbitrate on disputed terms creates the potential for applying CISG to a significant portion of transnational trade, even if the parties to the transactions had never considered that possibility.<sup>88</sup>

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86. See, e.g., ICC Case No. 6281, reprinted in 15 Y.B. COMM. ARB. 96 (1990), in which the tribunal, though basing its decision on other law, "remarked in passing that the outcome would have been the same if [the relevant provisions of] the Vienna Sales Convention had been considered." *Id.* at 100.

87. Art. 1(1)(a) provides that the Sales Convention applies to contracts for the sale of goods between parties whose place of business are in different Contracting States. *Supra* note 3.

88. The inclination of arbitrators to look to the Sales Convention for the rules governing a transnational sales transaction is paralleled by the fact that in Contracting States, the Convention prevails over conflicting provisions of domestic law. This results in the United States from Article VI, Clause 2 of the Constitution, which makes treaties the "supreme law of the land." Thus, as federal law, the Convention provisions prevail over conflicting state law, which would ordinarily pro-

#### IV. CONCLUSION

The *Filanto* case and the ICC arbitrations discussed in this article, along with the translated German cases that follow, signal the arrival of the Sales Convention as a law of immediate, practical and far-reaching significance for the international commercial law community, and for U.S. lawyers in particular. *Filanto* confirms the inclination of U.S. courts not only to enforce the arbitration provisions that are increasingly common in international agreements, but also to find valid agreements to arbitrate among otherwise disputed terms. At the same time, ICC Award 5713 indicates the likelihood that arbitrators will look to the Sales Convention even when that treaty would not apply by its own terms. This combination greatly expands the number of transactions to which CISG may apply, highlighting the critical importance of a clear understanding of the Sales Convention to any commercial lawyer dealing with a transaction that crosses national borders.

*Filanto* also demonstrates the importance of measured and cautious interpretation of the Convention by courts. Careless and unnecessarily broad discussion of CISG can result in erroneous and misleading precedent. Tribunals with responsibility for early decisions construing the Convention must proceed with special care and thoroughness, since their decisions will set the course of future developments. In dealing with CISG, all courts should remember that they are part of a *de facto* international judiciary charged with developing a uniform law of international sales.

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vide the source for contract rules. The same has been determined by case law in at least one other Contracting State. *Oshevire v. British Caledonian Airways Ltd.* (Court of Appeal, Kaduna Judicial Division, Nov. 15, 1990), reprinted in 1990 UNIFORM L. REV. 424.