

Filanto, S.p.A. v. Chilewich International Corp.
789 F. Supp. 1229 (S.D.N.Y. 1992)

BRIEANT, Chief Judge.

By motion fully submitted on December 11, 1991, defendant Chilewich International Corp. moves to stay this action pending arbitration in Moscow. Plaintiff Filanto has moved to enjoin arbitration or to order arbitration in this federal district.

This case is a striking example of how a lawsuit involving a relatively straightforward international commercial transaction can raise an array of complex questions. Accordingly, the Court will recount the factual background of the case, derived from both parties' memoranda of law and supporting affidavits, in some detail.

Plaintiff Filanto is an Italian corporation engaged in the manufacture and sale of footwear. Defendant Chilewich is an export – import firm incorporated in the state of New York with its principal place of business in White Plains. On February 28, 1989, Chilewich's agent in the United Kingdom, Byerly Johnson, Ltd., signed a contract with Raznoexport, the Soviet Foreign Economic Association, which obligated Byerly Johnson to supply footwear to Raznoexport. Section 10 of this contract – the “Russian Contract” – is an arbitration clause, which reads in pertinent part as follows:

All disputes or differences which may arise out of or in connection with the present Contract are to be settled, jurisdiction of ordinary courts being excluded, by the Arbitration at the USSR Chamber of Commerce and Industry, Moscow, in accordance with the Regulations of the said Arbitration. [sic] . . .

The first exchange of correspondence between the parties to this lawsuit is a letter dated July 27, 1989 from Mr. Melvin Chilewich of Chilewich International to Mr. Antonio Filograna, chief executive officer of Filanto. This letter refers to a recent visit by Chilewich and Byerly Johnson personnel to Filanto's factories in Italy, presumably to negotiate a purchase to fulfill the Russian Contract, and then states as follows:

Attached please find our contract to cover our purchase from you. Same is governed by the conditions which are enumerated in the standard contract in effect with the Soviet buyers [the Russian contract], copy of which is also enclosed. . . .

The next item in the record is a letter from Filanto to Chilewich dated September 2, 1989. . . . This letter refers to a letter from Chilewich to Filanto of August 11, 1989, which “you [Chilewich] sent me with the contracts n 10001-10002-10003.” These numbers do not correspond to the contract sued on here, but refer instead to other, similar contracts

between the parties.² None of these contracts, or their terms, are in the record, both parties having been afforded ample opportunity to submit whatever they wished.

The last paragraph of the September 2, 1989 letter from Filanto to Chilewich states as follows:

Returning back the enclosed contracts n 10001-10002-10003 signed for acceptance, we communicate, if we do not misunderstood, the Soviet's contract that you sent us together with your above mentioned contract, that of this contract we have to respect only the following points of it:

- n 5 Packing and marking
- n 6 Way of Shipment
- n 7 Delivery—Acceptance of Goods

We ask for your acceptance by return of post. [SIC] . . .

The intent of this paragraph, clearly, was to exclude from incorporation by reference *inter alia* section 10 of the Russian contract, which provides for arbitration. Chilewich, for its part, claims never to have received this September 2 letter. In any event, it relates only to prior course of conduct.

It is apparent from the record that further negotiations occurred in early 1990, but the content of these negotiations is unclear; it is, however, clear that deliveries of boots from Filanto to Chilewich were occurring at this time, pursuant to other contracts, since there is a reference to a shipment occurring between April 23, 1990 and June 11, 1990. . . .

The next document in this case, and the focal point of the parties' dispute regarding whether an arbitration agreement exists, is a Memorandum Agreement dated March 13, 1990. This Memorandum Agreement, number 9003002, is a standard merchant's memo prepared by Chilewich for signature by both parties confirming that Filanto will deliver 100,000 pairs of boots to Chilewich at the Italian/Yugoslav border on September 15, 1990, with the balance of 150,000 pairs to be delivered on November 1, 1990. Chilewich's obligations were to open a Letter of Credit in Filanto's favor prior to the September 15 delivery, and another letter prior to the November delivery. This Memorandum includes the following provision:

It is understood between Buyer and Seller that USSR Contract No. 32-03/93085 [the Russian Contract] is hereby incorporated in this contract as far as practicable, and specifically that any arbitration shall be in accordance with that Contract.

. . . Chilewich signed this Memorandum Agreement, and sent it to Filanto. Filanto at that time did not sign or return the document. Nevertheless, on May 7, 1990, Chilewich

² In his affidavit dated October 29, 1991, Mr. Filograna states that there were actually six contracts between the parties. . . .

opened a Letter of Credit in Filanto's favor in the sum of \$2,595,600.00. The Letter of Credit itself mentions the Russian Contract, but only insofar as concerns packing and labeling. . . .

Again, on July 23, 1990, Filanto sent another letter to Chilewich, . . . which reads in relevant part as follows:

We refer to Point 3, Special Conditions, to point out that: returning back the above-mentioned contract, signed for acceptance, from Soviet Contract 32-03/93085 we have to respect only the following points of it:

- No. 5-Packing and Marking
- No. 6-Way of Shipment
- No. 7-Delivery-Acceptance of Goods

It should be noted that the contract referred to in this letter is apparently another contract between the parties, as the letter refers to "Sub. Contract No. 32-03/03122", while the contract sued on in the present action is No. 32-03/03123.

This letter caused some concern on the part of Chilewich and its agents: a July 30, 1990 fax from Byerly Johnson, Chilewich's agent, to Chilewich, mentions Filanto's July 23 letter, asserts that it "very neatly dodges" certain issues, other than arbitration, covered by the Russian Contract, and states that Johnson would "take it up" with Filanto during a visit to Filanto's offices the next week. . . .

Then, on August 7, 1990, Filanto returned the Memorandum Agreement, sued on here, that Chilewich had signed and sent to it in March; though Filanto had signed the Memorandum Agreement, it . . . appended a covering letter, purporting to exclude all but three sections of the Russian Contract. . . .

There is also in the record an August 7, 1990 telex from Chilewich to Byerly Johnson, stating that Chilewich would not open the second Letter of Credit unless it received from Filanto a signed copy of the contract without any exclusions. . . . In order to resolve this issue, Byerly Johnson on August 29, 1990 sent a fax to Italian Trading SRL, an intermediary, reading in relevant part:

We have checked back through our records for last year, and can find no exclusions by Filanto from the Soviet Master Contract and, in the event, we do not believe that this has caused any difficulties between us. We would, therefore, ask you to . . . accept all points of the Soviet Master Contract . . . as far as practicable. . . .

Filanto later confirmed to Italian Trading that it received this fax. . . .

As the date specified in the Memorandum Agreement for delivery of the first shipment of boots – September 15, 1990 – was approaching, the parties evidently decided to make further efforts to resolve this issue: what actually happened, though, is a matter

of some dispute. Mr. Filograna, the CEO of Filanto, asserts that [Simon Chilewich agreed that the Filanto-Chilewich Contract would incorporate only the packing, shipment and delivery terms of the Russian Contract]. Mr. Simon Chilewich [stated Mr. Filograna agreed to Chilewich's position].

On September 27, 1990, Mr. Filograna faxed a letter to Chilewich. This letter . . . complains that Chilewich had not yet opened the second Letter of Credit for the second delivery, which it had supposedly promised to do by September 25. . . . Mr. Chilewich responded by fax on the same day; his fax states that he is "totally cognizant of the contractual obligations which exist," but goes on to say that Chilewich had encountered difficulties with the Russian buyers, that Chilewich needed to "reduce the rate of shipments", and denies that Chilewich promised to open the Letter of Credit by September 25. . . .

According to the Complaint, what ultimately happened was that Chilewich bought and paid for 60,000 pairs of boots in January 1991, but never purchased the 90,000 pairs of boots that comprise the balance of Chilewich's original order. . . . It is Chilewich's failure to do so that forms the basis of this lawsuit, commenced by Filanto on May 14, 1991. . . .

There is in the record, however, one document that post-dates the filing of the Complaint: a letter from Filanto to Chilewich dated June 21, 1991. This letter is in response to claims by Byerly Johnson that some of the boots that had been supplied by Filanto were defective. The letter expressly relies on a section of the Russian contract which Filanto had earlier purported to exclude – Section 9 regarding claims procedures . . .

This letter must be regarded as an admission in law by Filanto, the party to be charged. A litigant may not blow hot and cold in a lawsuit. The letter of June 21, 1991 clearly shows that when Filanto thought it desirable to do so, it recognized that it was bound by the incorporation by reference of portions of the Russian Contract, which, prior to the Paris meeting, it had purported to exclude. This letter shows that Filanto regarded itself as the beneficiary of the claims adjustment provisions of the Russian Contract. This legal position is entirely inconsistent with the position which Filanto had professed prior to the Paris meeting, and is inconsistent with its present position. Consistent with the position of the defendant in this action, Filanto admits that the other relevant clauses of the Russian Contract were incorporated by agreement of the parties, and made a part of the bargain. Of necessity, this must include the agreement to arbitrate in Moscow. In the June 21, 1991 letter, Mr. Filograna writes:

The April Shipment and the September Shipment are governed by the Master Purchase Contract of February 28, 1989 N. 32-03-93085 (the "Master Purchase Contract") The Master Purchase Contract provides that claims for inferior quality must be made within six months of the arrival of the goods at the USSR port. . . .

Against this background based almost entirely on documents, defendant Chilewich on July 24, 1991 moved to stay this action pending arbitration, while plaintiff Filanto on August 22, 1992 moved to enjoin arbitration, or, alternatively, for an order directing that arbitration be held in the Southern District of New York rather than Moscow, because of unsettled political conditions in Russia. . . .

. . . The United States, Italy and the USSR are all signatories to [the New York Convention on the Recognition and Enforcement of Foreign Arbitral Awards] and its implementing legislation makes clear that the Arbitration Convention governs disputes regarding arbitration agreements between parties to international commercial transactions The Arbitration Convention specifically requires courts to recognize any “agreement in writing under which the parties undertake to submit to arbitration. . . .” The term “agreement in writing” is defined as “an arbitral clause in a contract or an arbitration agreement, signed by the parties or contained in an exchange of letters or telegrams”

Courts interpreting this “agreement in writing” requirement have generally started their analysis with the plain language of the Convention, which requires “an arbitral clause in a contract or an arbitration agreement, signed by the parties or contained in an exchange of letters or telegrams” . . . and have then applied that language in light of federal law, which consists of generally accepted principles of contract law, including the Uniform Commercial Code. . . .

However, as plaintiff correctly notes, the “general principles of contract law” relevant to this action, do *not* include the Uniform Commercial Code; rather, the “federal law of contracts” to be applied in this case is found in the United Nations Convention on Contracts for the International Sale of Goods (the “Sale of Goods Convention”), codified at 15 U.S.C. Appendix (West Supp.1991).⁵ This Convention, ratified by the Senate in 1986, is a self-executing agreement which entered into force between the United States and other signatories, including Italy, on January 1, 1988. . . . 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: absent a choice-of-law provision, and with certain exclusions not here relevant, the Convention governs all contracts between parties with places of business in different nations, so long as both nations are signatories to the Convention. Sale of Goods Convention Article 1(1)(a). Since the contract alleged in this case most certainly was formed, if at all, after January 1, 1988, and since both the United States and Italy are signatories to the Convention, the Court will interpret the “agreement in writing” requirement of the Arbitration Convention in light of, and with reference to, the substantive international law of contracts embodied in the Sale of Goods Convention.

⁵ Of course, as with the Arbitration Convention, the Sale of Goods Convention is also “state law”. U.S. Const. art. VI cl. 2; *Hauenstein v. Lynham*, 100 U.S. 483, 490, 25 L.Ed. 628 (1880) (“[T]he Constitution, laws, and treaties of the United States are as much a part of the law of every state as its own local laws and Constitution”).

Not surprisingly, the parties offer varying interpretations of the numerous letters and documents exchanged between them. The Court will briefly summarize their respective contentions. Defendant Chilewich contends that the Memorandum Agreement dated March 13 which it signed and sent to Filanto was an offer. It then argues that Filanto's retention of the letter, along with its subsequent acceptance of Chilewich's performance under the Agreement – the furnishing of the May 11 letter of credit – estops it from denying its acceptance of the contract. Although phrased as an estoppel argument, this contention is better viewed as an acceptance by conduct argument, e.g., that in light of the parties' course of dealing, Filanto had a duty timely to inform Chilewich that it objected to the incorporation by reference of all the terms of the Russian contract. Under this view, the return of the Memorandum Agreement, signed by Filanto, on August 7, 1990, along with the covering letter purporting to exclude parts of the Russian Contract, was ineffective as a matter of law as a rejection of the March 13 offer, because this occurred some five months after Filanto received the Memorandum Agreement and two months after Chilewich furnished the Letter of Credit. Instead, in Chilewich's view, this action was a proposal for modification of the March 13 Agreement. Chilewich rejected this proposal, by its letter of August 7 to Byerly Johnson, and the August 29 fax by Johnson to Italian Trading SRL, which communication Filanto acknowledges receiving. Accordingly, Filanto under this interpretation is bound by the written terms of the March 13 Memorandum Agreement; since that agreement incorporates by reference the Russian Contract containing the arbitration provision, Filanto is bound to arbitrate.

Plaintiff Filanto's interpretation of the evidence is rather different. While Filanto apparently agrees that the March 13 Memorandum Agreement was indeed an offer, it characterizes its August 7 return of the signed Memorandum Agreement with the covering letter as a counteroffer. While defendant contends that under Uniform Commercial Code § 2-207 this action would be viewed as an acceptance with a proposal for a material modification, the Uniform Commercial Code, as previously noted 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 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". Sale of Goods Convention Article 19(1). Although the Convention, like the Uniform Commercial Code, does state that non-material terms do become part of the contract unless objected to, Sale of Goods Convention Article 19(2), the Convention treats inclusion (or deletion) of an arbitration provision as "material", Sale of Goods Convention Article 19(3). The August 7 letter, therefore, was a counteroffer which, according to Filanto, Chilewich accepted by its letter dated September 27, 1990. Though that letter refers to and acknowledges the "contractual obligations" between the parties, it is doubtful whether it can be characterized as an acceptance.

More generally, both parties seem to have lost sight of the narrow scope of the inquiry required by the Arbitration Convention. . . . All that this Court need do is to determine if a sufficient “agreement in writing” to arbitrate disputes exists between these parties. . . .

The Court is satisfied on this record that there *was* indeed an agreement to arbitrate between these parties.

There 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. As noted above, Chilewich had in the meantime commenced its performance under the Agreement, and the Letter of Credit it furnished Filanto on May 11 itself mentioned the Russian Contract. An offeree who, knowing that the offeror has commenced performance, fails to notify the offeror of its objection to the terms of the contract within a reasonable time will, under certain circumstances, be deemed to have assented to those terms. Restatement (Second) of Contracts § 69 (1981) 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 to the Russian Contract and Filanto had had a copy of that document for some time. . . .

There [is another] convincing manifestation[] of Filanto’s true understanding of the terms of this agreement. Filanto, in a letter to Byerly Johnson dated June 21, 1991, 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]” Furthermore, the letter, which responds to claims by Johnson that some of the boots that were supplied were defective, expressly relies on section 9 of the Russian Contract – another section which Filanto had in its earlier correspondence purported to exclude. The Sale of Goods Convention specifically directs that “[i]n determining the intent of a party . . . due consideration is to be given to . . . any subsequent conduct of the parties,” Sale of Goods Convention Article 8(3). In this case, as the letter post-dates the partial performance of the contract, it is particularly strong evidence that Filanto recognized itself to be bound by all the terms of the Russian Contract.

In light of these factors, and heeding the presumption in favor of arbitration, *Moses H. Cone, supra*, at 24-26, 103 S. Ct. at 941-42, which is even stronger in the context of international commercial transactions, *Mitsubishi Motors Corp. v. Soler Chrysler-Plymouth, Inc.*, 473 U.S. 614, 631, 105 S. Ct. 3346, 3356, 87 L.Ed.2d 444 (1985), the Court holds that Filanto is bound by the terms of the March 13 Memorandum Agreement, and so must arbitrate its dispute in Moscow.