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Jurisdiction	USA
Tribunal	U.S. District Court for the Southern District of New York
Date of the decision	06 April 1998
Case no./docket no.	96 Civ. 8052(HB)(THK)
Case name	*Calzaturificio Claudia s.n.c. v. Olivieri Footwear Ltd.*

Memorandum Opinion

Theodore H. Katz, United States Magistrate Judge

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. (In the Complaint, plaintiff also asserts claims for account stated, goods sold and delivered, and unjust enrichment.) For the reasons that follow, the motion is denied. 1

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 p. 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 pp. 1–2; Defendant's Answer, dated December 13, 1996 («Answer»), at p. 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 p. 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 pp. 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. 2

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 evidenc- 3

ing 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 pp. 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 p. 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. («Ex works» assigns a minimum obligation to the seller. See Incoterms 1990, an International Chamber of Commerce publication, identified as Appendix A attached to Pl. Mem. («Appendix A»), at 19. «Ex works» indicates that «the seller fulfils his obligation to deliver when he has made the goods available at his premises (i.e. works, factory, warehouse, etc.) to the buyer. […] The buyer bears all costs and risks involved in taking the goods from the seller's premises to the desired destination.» Id. At 18.). See Appendix A at 18, attached to Pl. Mem. 4

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 pp. 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 p. 2; see Zamboni Decl. 1, at p. 8. 5

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 goods reflected in invoice nos. 383 and 5 to Olivieri in New York. See Ex. G, attached to Pl. Reply. 6

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. 7

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. 8

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. 9

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. 10

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 pp. 25–26. 11

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 p. 1, attached to Def. Response. In his affidavit, Litvin denies that any agreement existed between 12

Olivieri and Claudia. (Litvin Aff. at p. 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 pp. 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 p. 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.) 13

Discussion

I. Summary Judgment Standards

Plaintiff moved for summary judgment pursuant to Rule 56(c) of the Federal Rules of Civil Procedure. Rule 56(c) provides that summary judgment «shall be rendered forthwith if the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to judgment as a matter of law.» See *Celotex Corp. v. Catrett,* 477 U.S. 317, 322–23, 106 S. Ct. 2548, 2552–53, 91 L. Ed. 2d 265 (1986); *Anderson v. Liberty Lobby, Inc.,* 477 U.S. 242, 247, 106 S. Ct. 2505, 2510, 91 L. Ed. 2d 202 (1986); *Aldrich v. Randolph Cent. School Dist.,* 963 F.2d 520, 523 (2d Cir.), cert. denied, 506 U.S. 965, 113 S. Ct. 440, 121 L. Ed. 2d 359 (1992). While the Court must draw all reasonable inferences against the moving party in assessing whether a genuine issue of fact exists, the party opposing the motion may not simply rest on the allegations in its pleadings, but must present «specific facts,» based upon personal knowledge or evidence that is otherwise admissible, showing that there is a genuine issue for trial. See Fed. R. Civ. P. 56(e); *Anderson,* 477 U.S. at 248, 106 S. Ct. at 2510; *Gnazzo v. G.D. Searle & Co.,* 973 F.2d 136, 138 (2d Cir. 1992). In deciding the motion, the Court may consider only that evidence that would be admissible at trial. *Azrielli v. Cohen Law Offices,* 21 F.3d 512, 517 (2d Cir. 1994); *Tamarin v. Adam Caterers, Inc.,* 13 F.3d 51, 53 (2d Cir. 1993); *International Knitwear Co. v. M/V Zim Canada,* 1996 U.S. Dist. LEXIS 4488, No. 92 Civ. 7508 (PKL), 1996 WL 169360, at 1 (S.D.N.Y. Apr. 11, 1996). «Credibility determinations, the weighing of the evidence, and the drawing of legitimate inferences from the facts are jury functions, not those of a judge [when] he is ruling on a motion for summary judgment.» *Anderson,* 477 U.S. at 255, 106 S. Ct. at 2513. However, «where the record taken as a whole could not lead a rational trier of fact to find for the nonmoving party, there is 'no genuine issue for trial,'» *Matsushita Elec. Indus. Co. v. Zenith Radio Corp.,* 475 U.S. 574, 587, 106 S. Ct. 1348, 1356, 89 L. Ed. 2d 538 (1986) (quoting *First Nat'l Bank v. Cities Serv. Co.,* 391 U.S. 253, 289, 88 S. Ct. 1575, 1592, 20 L. Ed. 2d 569 (1968)), and summary judgment is appropriate. 14

In order to prevail on this motion, plaintiff must demonstrate that there are no genuine issues of material fact as to the terms of the parties' agreement, whether the parties agreed to be bound by the terms of the invoices, and whether plaintiff fulfilled all of its obligations under the parties' agreement. 15

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

16 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,* 1997 U.S. Dist. LEXIS 10630, 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.

17 The caselaw interpreting and applying the CISG is sparse. See, e.g., *Helen Kaminski Pty., Ltd.,* 1997 U.S. Dist. LEXIS 10630, 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,* 13 C.I.T. 866, 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.

18 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. (Defendant argues that the absence of purchase orders demonstrates that defendant never entered into any agreement for the purchase of shoes manufactured by plaintiff. (Def. Mem. at 2.) There is no basis in law for this contention and defendant cites none. Indeed, it is undisputed that the plaintiff and defendant had agreed upon and conducted several successful transactions for the sale of shoes, none of which are at issue in this suit, without the use of purchase orders. 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.)

19 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 (3d 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,* 1997 U.S. Dist. LEXIS 9267, 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.,* 1998 U.S. App. LEXIS 3086, – F.3d –, 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).

20 Unlike the UCC, under the CISG a contract need not be evidenced by a writing. (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.). 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 E. Murray, Jr., Different Laws Might Apply to Foreign Buys Under the UN Convention for the International Sale of Goods, 119 *Purchasing* 30 (Oct. 19, 1995).

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). **21**

III. 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 **22**

that the writing «comprised the complete and exclusive statement of the terms of the agreement.»).

A. Whether the parties agreed to delivery «ex works»

Plaintiff claims that «the parties agreed, and the invoices reflect, the place of delivery for all sales to Olivieri was … Claudia's factory.» (P1. Mem. at 2.) Plaintiff claims that according to the delivery term «ex works,» explicitly set forth in each of the invoices, it never assumed any responsibility for shipping the shoes and that defendant Olivieri «bore all risk of loss or damage in moving the goods from Claudia's factory to defendant's chosen destination.» (Pl. Mem. at 2; Zamboni Decl. 1 at p. 5.) Plaintiff further contends that the sales invoices reflect the amount due for shoes that were «delivered to Olivieri, picked up by its agents at the Claudia factory, and accepted.» (P1. Mem. At 3; Zamboni Decl. 1 at p. 8.) Moreover, Claudia contends that it never received any communication or complaint from defendant objecting to the delivery terms. (Zamboni Decl. 1 at pp. 10–11.) **23**

Defendant denies that the place of delivery was Claudia's factory and that Claudia never assumed responsibility for shipping. (Litvin Aff. at p. 10.) Defendant further disputes that the phrase «ex works,» which is contained in each of the invoices at issue, represented any agreement to accept delivery of goods at Claudia's factory. (Litvin Aff. at p. 11.) In support of its contention, defendant submitted a fax, dated November 29, 1993, in which defendant timely objected to the invoice term «Franco Fabrica» (translated as Merchandise Delivery Ex Factory) and requested that the invoices be marked in accordance with «the way we agreed.» (Ex. A, attached to Def. Response.) According to defendant, the parties' agreement was that the goods were to be inspected and accepted by defendant prior to shipment and that plaintiff was to comply with delivery dates. (Defendant's fax states that plaintiff failed to comply with the terms of their «original October agreement» by (1) using Matricardi to ship defendant's purchased goods, and (2) marking the invoices «Franco Fabrica.» Thus, defendant acknowledges an earlier purchase and sale agreement between the parties. However, there is no evidence in the record regarding the terms of this October agreement. The Court further notes that defendant has never explicitly stated its understanding of the parties' agreement as to which party bore the responsibility for delivery and shipment of the goods.), Id.; Litvin Aff. at p. 12. Defendant submitted another fax dated June 28, 1994, in which defendant again objected to the term «Franco Fabrica,» stating «it was not our agreement.» (Ex. F. attached to Def. Response.) While it does not appear to the Court that the defendant's characterization of its «agreement» with plaintiff is necessarily inconsistent with the delivery term «ex works,» on their face the faxes explicitly object to the inclusion of such terms in the invoices. (Plaintiff has argued that the faxes were fabricated and that defendant's objection to «ex works» delivery and complaints about late deliveries and nonconforming goods were never communicated to Claudia. (Zamboni Decl. 2 at p. 4.) In light of the arguments set forth by plaintiff, the Court seriously questions the validity of the faxes. Nevertheless, it is not for the Court to weigh credibility on a summary judgment motion and the resolution of this issue must await trial.) Because defendant objected to the delivery terms, for purposes of the instant motion plaintiff's invoices alone cannot be viewed as the unambiguous embodiment of the agreement between the parties. (We do not know what the terms of the oral offer and acceptance were or whether plaintiff's invoices modified the terms orally agreed upon. Under the CISG, «all **24**

material terms of [an] acceptance should mirror the offer.» 23 *Syracuse J. Int'l L. & Com.* at 108. Article 19 of the CISG provides that «a reply to an offer which purports to be an acceptance but contains additions …. or other modifications is a rejection of the offer and constitutes a counter-offer» if the modification materially alters the terms of the offer. CISG, Article 19(1). Material modifications, including the alteration of delivery terms, often occur in «the routine exchange of the buyer's printed purchase order and the seller's printed acknowledgment of sale form.» See *Legal Analysis of the United Nations Convention on Contracts for the International Sale of Goods*, (1980), commentary on Article 19, «Acceptance with Modifications,» attached to the CISG. Under the CISG, «no contract results from such an exchange if the purported acceptance contains additional or different terms that materially alter the offer.» Id.).

Moreover, any inquiry into the parties' intentions must be reserved for trial. See *Ronan Assocs., Inc. v. Local 94-94A-94B, Int'l Union of Operating Eng'rs,* 24 F.3d 447, 449 (2d Cir. 1994) («Under traditional principles of contract law, questions as to what the parties said, what they intended, and how a statement by one party was understood by the other are questions of fact … »). 25

Viewing the record in a light most favorable to the defendant, the non-moving party, the Court is unable to conclude as a matter of law that defendant agreed to or intended to be bound by the invoice terms. See CISG, Art. 8(3) («In determining the intent of a party … due consideration is to be given to all relevant circumstances of the case … »). 26

B. Whether the terms of the parties' agreement can be gleaned from their prior practices

Plaintiff also asserts that it had an ongoing contractual relationship with defendant whereby Claudia would deliver goods «ex works» and defendant would pick them up at Claudia's factory. Plaintiff contends that between August 1993 and March 1994, Olivieri placed thirteen orders with Claudia, only four of which are in dispute in this action. (Zamboni Decl. 1 at p. 4.) In each of the non-disputed transactions between Claudia and Olivieri, Claudia asserts that «Olivieri contracted for [shipping] services separately and paid Claudia only to manufacture the shoes.» (Zamboni Decl. 1 at p. 7.) 27

In support of its assertion, plaintiff submitted invoice no. 236, which reflected the first order Olivieri placed with Claudia. Invoice no. 236, which was paid in full and is not contested in this action, contained the term «ex works.» Plaintiff notes that defendant performed without objection according to this term, i.e., defendant picked up the goods at Claudia's factory and paid the invoice price in full. Plaintiff points out that all of the subsequent sales invoices, with the exception of one invoice which was silent as to delivery, contained the same delivery term: merchandise delivery ex works (or ex factory). Id. Claudia argues that this delivery term, which was established at the time of Olivieri's initial order and was explicitly contained in the invoices thereafter, continued to govern the parties' future dealings. Id.; Pl. Mem. at 1. Thus, plaintiff argues that Olivieri should be bound by the terms established in the parties' successful transactions. (Pl. Reply at 8.) 28

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Although Claudia alleges that it engaged in nine successful transactions with Olivieri, where goods were delivered «ex works,» plaintiff has provided virtually no documentation with regard to the terms of these other transactions and defendant disputes that these transactions occurred. See Litvin Aff. at p. 6. The only evidence submitted by Claudia in support of its course of dealing argument is invoice no. 236. Plaintiff failed to submit evidence as to the other «successful» transactions that Olivieri and Claudia allegedly engaged in between August 1993 and March 1994. Thus, even if defendant accepted the terms of invoice no. 236, it is questionable whether this one transaction is enough to establish a course of dealing. Plaintiff has simply not submitted sufficient evidence to demonstrate conclusively the parties' prior practices, and questions of fact remain as to the agreed upon terms of their earlier transactions.

C. Whether Olivieri communicated its dissatisfaction with the goods to Claudia

Defendant disputes plaintiff's contention that defendant (1) never communicated to plaintiff that the invoiced goods were either not delivered or were delivered late, and (2) never indicated that it was dissatisfied with the quality of the invoiced goods. (Zamboni's statements, in his affidavit, that Olivieri (1) never complained that any goods were not delivered, (2) never complained about the quality of any goods, and (3) never attempted to return any goods, Zamboni Decl. 1 at p. 11, are inconsistent with plaintiff's acknowledgment that Olivieri rejected and returned certain goods reflected in invoice no. 5. (Reply at 9.)). (Litvin Aff. at p. 14.) In support of its contention, defendant submitted several faxes, allegedly sent to plaintiff, that complained of the plaintiff's failure to provide defendant with proof of delivery for the invoiced goods. See Exs. C, D, E, attached to Def. Response. Moreover, three faxes indicated that the invoiced goods were late and at least one fax complained that the merchandise was of «inferior quality and contained obvious damages.» (Ex. F. attached to Def. Response.) There is no evidence in the record regarding the time frame agreed upon for the delivery of goods. Thus, the Court cannot determine, as a matter of law, whether Claudia's delivery of goods was timely under the parties' agreements. **30**

D. Conflicting evidence regarding goods «delivered» in invoice nos. 383 and 5

Reviewing the record, the Court finds that there remain genuine issues of fact with regard to whether defendant received all of the goods in question and whether defendant took delivery «ex works» of the goods reflected in invoice nos. 383 and 5. Plaintiff's conflicting submissions call into question the facts surrounding the delivery of goods. **31**

Plaintiff claims that goods valued at LIT 77,418,000, reflected in invoice no. 383, were delivered to and accepted by Olivieri. (According to plaintiff, LIT 43,470,000 remain due and unpaid out of LIT 77,418,000. (Compl. at pp. 16, 18.) (Compl. at p. 15.) Nevertheless, the record is unclear with regard to what portion of the goods reflected in invoice no. 383 were actually delivered and accepted by Olivieri. Plaintiff alleged in its Complaint that it properly «sold and delivered» the invoiced goods to Olivieri, but that Olivieri, «failed to remove» goods valued at LIT 66,654,000 from Claudia's factory. (Plaintiff also submitted invoice no. 75 to recover LIT 8,665,020, reflecting the V.A.T. on LIT 66,654,000, for the shoes on invoice no. 383. Plaintiff claims that defendant left these shoes in Claudia's factory. (Compl. at p. 19, and Ex. D attached thereto.)). (Compl. at p. 19.) **32**

Olivieri argues that, with respect to the goods identified on invoice no. 383, it only received and accepted goods valued at LIT 10,764,000. (Litvin Aff. at p. 17.) In support of its position, Olivieri submitted a fax dated December 29, 1993, in which it explicitly stated: «We have accepted merchandise only for lire 10,764,000 but you are billing us for lire 77,418,000.» Ex. E, attached to Def. Response. In this fax, Olivieri specifically requested proof of delivery for the «full amount of goods.» Id. As of August 1997, the date of Mr. Litvin's affidavit, Olivieri claimed that it had not been furnished with such proof of delivery. (Litvin Aff. at p. 17.) Further, plaintiff submitted a letter by the shipper Matricardi, which could be viewed as casting doubt on plaintiff's allegation that Olivieri, or its agent, was responsible for failing to remove the goods from plaintiff's factory. The shipper's letter stated that the goods «given to us have been sent to … Olivieri … in New York.» (Ex. G. attached to Pl. Reply.) Based on this letter, it appears that the shipper delivered the goods that it received from Claudia. Thus, if any goods remained in Claudia's factory, a trier of fact could infer that Claudia failed to deliver these goods. The Matricardi letter seemingly contradicts Claudia's assertion that it delivered the full amount of the invoiced goods to Olivieri, but that Olivieri «failed to remove» the majority of the goods from the factory. (Although plaintiff submitted invoice no. 383 and bill of lading no. 17947, evidencing that goods valued at LIT 10,764,000 left the country, Exs. D, E, attached to Zamboni Decl. 2, neither document sheds any light on whether the non-exported goods that remained in plaintiff's factory were made available to the defendant for pick up.) **33**

Based upon the record as it now stands, the Court is unable to determine exactly what happened with regard to this shipment. Thus, genuine issues of material fact exist with regard to the delivery and acceptance of the invoiced goods. **34**

Issues of fact exist with respect to other invoices as well. Plaintiff asserts that on approximately January 14, 1994, plaintiff and defendant entered into an agreement for the purchase by Olivieri of 1,056 pairs of shoes manufactured by plaintiff. (Compl. at p. 22.) Plaintiff claims that the terms of the parties' agreement are reflected in plaintiff's invoice no. 5, which was delivered to defendant. (Compl. at p. 22.) According to the invoice, the price of the shoes was LIT 36,696,000, due within 30 days from the end of January. (Ex. E, attached to Compl.) Defendant rejected certain shoes covered by invoice no. 5 and plaintiff accepted the return of such shoes. (Compl. at p. 25.) Plaintiff thereafter issued defendant a credit in the amount of LIT 12,936,000, which represented the price of the rejected and returned shoes. Id. Plaintiff contends that LIT 23,760,000, reflecting the difference between the total amount of goods on invoice no. 5 and the returned goods, remains due and unpaid. Id. at p. 27. **35**

In addition, plaintiff contends that it delivered to defendant invoice no. 97, which reflected a 13% V.A.T. imposed on shoes valued at LIT 23,760,000, which were sold and delivered to Olivieri, but which defendant «has failed to remove from the Claudia factory.» Id. at p. 28; Ex. G attached to Compl. Invoice no. 97 states «non-exported goods [of] our invoice no. 5 … subject to value added tax.» (Ex. G, attached to Compl.) **36**

Plaintiff's allegations and evidence offered in support of its claims on invoice no. 5 are at times inconsistent, and raise issues of fact concerning delivery and acceptance. For example, plaintiff notes that invoice no. 5 «bears the Customs stamp of the City of Milan, as well as the shipper's agent's receipt for the goods.» (Zamboni Decl. 2 at p. 13.) According to plaintiff, the **37**

invoice evidences that the goods in question were picked up at Claudia's factory by defendant's shipper and delivered outside of Italy. In addition, plaintiff notes that invoice no. 5 references bill of lading 17994, dated January 14, 1994. (Zamboni Decl. 2 at p. 13.) Plaintiff further notes that bill of lading no. 17994 contains the signature of shipper Matricardi and the date and time that the shipper picked up the shoes reflected in invoice no. 5 from Claudia's factory. Id. Nevertheless, the invoice and bill of lading, which presumably demonstrate that the goods left Italy, contradict plaintiff's assertion that the goods remained in plaintiff's factory and were subject to a value added tax, itemized in invoice no. 97. Again, Matricardi's letter, discussed above, also noted that it delivered all of the goods «given to us» as reflected in invoice no. 5. (Ex. G attached to Zamboni Decl. 2) The letter casts doubt on plaintiff's assertion that defendant failed to remove goods from plaintiff's factory.

The evidence is thus ambiguous with regard to whether all of the goods covered by invoice no. 5 were picked up from Claudia's factory and were delivered to New York. There are genuine issues of material fact regarding the acceptance and delivery of this specific shipment, the meaning to be afforded to the shipper's letter, the significance and interpretation of the shipper's signature and customs stamp on the invoice, the meaning and interpretation of the shipper's signature on the bill of lading, and whether the terms of the parties' agreement were complied with. The resolution of these factual issues must be reserved for trial. **38**

E. Whether the shipper was defendant's agent

There is a genuine issue of material fact as to whether the shipper was, at all times, the agent of the defendant. Claudia argues that Olivieri was responsible for shipping the goods, and that the bills of lading, signed by various shippers, demonstrate that Olivieri, through its agents (the shippers), accepted the goods at Claudia's factory and was responsible for delivering them to their destinations. Although plaintiff provides bills of lading which purport to show that various shippers picked up the goods, there is equivocal evidence as to whether the shippers were defendant's agents. In support of its position, plaintiff submitted an affidavit from Francesco Zamboni, who stated that «Claudia was never responsible for paying the shipment of the goods from our factory to Olivieri's designated destination» and that «the shipper acted as Olivieri's agent in the transactions.» (Zamboni Decl. 2 at p. 2.) **39**

Defendant, in its affidavit, denies that plaintiff «never assumed responsibility for shipping.» (Litvin Aff. at p. 10.) During oral argument on the motion, defense counsel stated that «it was the responsibility of Claudia to ship.» See Oral Argument Transcript, dated January 22, 1998 («Tr.»), at 3. Defendant's faxes raise questions with respect to which party was ultimately responsible for the shipment of goods. In the November 29, 1993 fax, defendant stated: «As per our agreement you have promised not to use Matricardi to ship our products. We find their services to be very unreliable and we do not want to be responsible for their mistakes.» (Ex. A, attached to Def. Response.) In its November 26, 1993 fax, defendant stated, «we do not know how and where did you ship these shoes.» (The defendant itself has made contradictory statements. In its June 26, 1994 fax, defendant stated that because the goods were nonconforming it wanted a refund for the expense of duty and freight, thus implying that defendant paid for the shipping services. Olivieri also stated in that fax that its agreement was to have Claudia «use our services to sell [the goods].» Ex. F. attached to Def. Response.). (Ex. B. attached to **40**

Def. Response.) Moreover, at the oral argument on the motion, plaintiff's counsel acknowledged that plaintiff may have had some responsibility for the selection of the shippers. (Tr. at 19.) No affidavits or deposition testimony of the shippers, or any documentary evidence on the shippers' responsibilities, have been submitted on this issue.

Viewing the evidence in the light most favorable to the defendant, we are unable to conclude, on this record, that it bore entire responsibility for shipping the goods and that the shippers were solely its agents. These factual issues must be resolved at trial. See *O'Connell Machinery Co., Inc. v. MV «Americana»,* 797 F.2d 1130, 1137 (2d Cir. 1986) (court found no evidence that buyer controlled or supervised the party responsible for forwarding the goods (the «forwarder») or any other indicia of agency, thus, despite «ex works» provision in the invoice, shipping company failed to meet its burden of showing that forwarder was buyer's agent; holding that it was unclear whether the forwarder acted as an agent of the buyer, as opposed to an independent contractor); compare *Graves Import Co., Ltd. v. Chilewich Int'l Corp.,* 1994 U.S. Dist. LEXIS 13393, No. 92 Civ. 3655 (JFK), 1994 WL 519996 (S.D.N.Y. September 22, 1994) (contract contained explicit provision stating «Sellers to allow Buyer's representatives access to production facilities to inspect quality … » and specifying that «Graves Import Company … will act as agents in this transaction.»). 41

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. 42

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

So ordered.