Article 29

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

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

OVERVIEW: MEANING AND PURPOSE OF THE PROVISION

1. Article 29 addresses modification (which includes an addition to)[1] and termination of an already concluded contract by agreement of the parties. According to article 29 (1), the mere consent of the parties is sufficient to effect such a modification or termination. If, however, the parties have agreed in writing that a modification or termination of their contract must be done in writing, paragraph 2 provides that the contract cannot be otherwise modified or terminated—although a party's conduct may preclude it from asserting such a provision to the extent that the other party has relied on that conduct.

2. Article 29 (1) is intended to abolish the common law doctrine of "consideration" as a requirement for modification or termination of contracts governed by the Convention.[2]

3. The application of article 29 is subject to the reservation provided for in article 96. Where a state (e.g. the Russian Federation) has made this reservation, the modification or termination of the contract may need to be in writing (see article 12).[3]

MODIFICATION OR TERMINATION BY MERE AGREEMENT

4. In order to modify a contract provision or terminate their contract, the parties must reach agreement. The existence of such an agreement is determined on the basis of the provisions in Part II (articles 14-24) of the Convention.[4] Article 29 provides that a contract can be modified or terminated "by the mere agreement of the parties". In line with article 18 (1), it has been stated that silence of one party in response to a proposal by the other to modify a contract does not in itself constitute acceptance of such proposal;[5] it has also been stated, however, that there was agreement to terminate a contract where a buyer refused to pay due to alleged non-conformities in the goods, the seller subsequently offered to market the goods itself, and the buyer failed to reply to the offer.[6] One court stated that, although article 29 provides that a contract can be modified purely by agreement of the parties, modification of the purchase price did not result merely from the general mood of a meeting.[7] The acceptance without comment of a bill of exchange as payment has, however, been regarded as implied consent to postponement of the date for payment until the maturity of the bill.[8] It was held that a termination of the contract occurs where the buyer declares avoidance and the seller accepts it.[9]

5. Interpretation of the parties' agreement to modify or terminate a contract is governed by the Convention's rules on construction—in particular article 8. It has been held that the consequences of an agreement to terminate the contract are those provided for by article 81 (1) unless the parties agreed otherwise.[10]

6. The agreement of both parties is all that is required in order to modify or terminate their contract.[11] No form requirements need be met[12] unless the reservation concerning form applies (articles 11, 12, 96)[13] or the parties have agreed otherwise. According to one decision, when a State's article 96 reservation comes into play, modifications agreed upon only orally are invalid.[14] In all other cases it follows from article 11, which evidences a general principle of informality in the Convention, that the parties are free to modify or terminate their contract in any form, whether in writing, orally, or in any other form. Even an implied termination of the contract has been held possible;[15] it has also been held that a written contract may be orally changed.[16] A court has held that the party that relies on a modifying agreement must prove the modification.[17]

FORM AGREEMENTS

7. According to article 29 (2), if a written contract contains a provision requiring modification or termination of the contract to be in writing (a "no oral modification" clause or "written modification" clause), then the parties cannot modify or terminate the contract in a different manner.[18] An oral amendment is ineffective in such a case unless the second sentence of article 29 (2) were to apply.[19]

8. A so-called merger clause, according to which all prior negotiations have been merged into the contract document, has been treated like a "no oral modification"-clause, so that no evidence of oral agreements prior to the written contract could be adduced in order to modify or terminate that contract.[20]

ABUSE OF "NO ORAL MODIFICATION" CLAUSE

9. Article 29 (2) also provides that a party may be precluded by its conduct from invoking a "no oral modification" clause "to the extent that the other party has relied on that conduct". It has been stated that the provision is an expression of the general good faith principle that governs the Convention (article 7 (1)).[21]

Notes

[1] See CLOUT case No. 86 [U.S. District Court, Southern District of New York, United States, 22 September 1994] (see full text of the decision).

[2] See Secretariat Commentary to (then) article 27 ("overcoming the common law rule that 'consideration' is required"), Commentary on the Draft Convention on Contracts for the International Sale of Goods, A/CONF.97/5, reproduced in United Nations Conference on Contracts for the International Sale of Goods: Official Records, at p. 28, paragraphs 2-3.

[3] Tribunal of International Commercial Arbitration at the Russian Federation Chamber of Commerce and Industry, Russian Federation, 25 March 1997, *Internationales Handelsrecht* 2006, 92 (modifications must be in writing due to article 96 where a party based in the Russian Federation is involved).

[4] CLOUT case No. 120 [Oberlandesgericht Köln, Germany, 22 February 1994]. To the same effect see CLOUT case No. 153 [Cour d'appel, Grenoble, France, 29 March 1995], and CLOUT case No. 332 [Obergericht des Kantons, Basel-Landschaft Switzerland 11 June 1999]; Amtsgericht Sursee, Switzerland, 12 September 2008, *Internationales Handelsrecht* 2009, 63. See also CLOUT case No. 614 [California [state] Court of Appeal, United States, 13 December 2002] (questioning modification of oral contract by forum selection clause on later invoices); CLOUT case No. 696 [U.S. District Court, Northern District of Illinois, United States, 7 July 2004] (oral agreement sufficient); see also CLOUT case No. 846 [U.S. Court of Appeals (3rd Circuit), 19 July 2007] (mere allegation that modification was a "take it or leave it" proposition does not undermine agreement).

[5] CLOUT case No. 120 [Oberlandesgericht Köln Germany 22 February 1994]; CLOUT case No. 332 [Obergericht des Kantons Basel-Landschaft, Switzerland, 11 June 1999]. However, silence combined with a certain behaviour can amount to consent and bring about an agreement: CLOUT case No. 1017 [Hof van Beroep Gent, Belgium, 15 May 2002].

[6] CLOUT case No. 120 [Oberlandesgericht Köln, Germany, 22 February 1994].

[7] CLOUT case No. 153 [Cour d'appel, Grenoble, France, 29 March 1995].

[8] CLOUT case No. 5 [Landgericht Hamburg, Germany, 26 September 1990] (see full text of the decision).

[9] CLOUT case No. 990 [China International Economic and Trade Arbtiration Commission, People's Republic of China, 19 December 1997].

[10] CLOUT case No. 592 [Oberlandesgericht Düsseldorf, Germany, 28 May 2004]; Amtsgericht Sursee, Switzerland, 12 September 2008, *Internationales Handelsrecht* 2009, 63.

[11] CLOUT case No. 176 [Oberster Gerichtshof, Austria, 6 February 1996]; CLOUT case No. 990 [China International Economic and Trade Arbitration Commission, People's Republic of China, 19 December 1997]; CLOUT case No. 635 [Oberlandesgericht Karlsruhe, Germany, 10 December 2003] and the cases cited in fn. 4.

[12] CLOUT case No. 413 [U.S. District Court, Southern District of New York, United States, 6 April 1998] (see full text of the decision); CLOUT case No. 422 [Oberster Gerichtshof, Austria, 29 June 1999], *Zeitschrift für Rechtsvergleichung* 2000, 33; CLOUT case No. 696 [U.S. District Court, Northern District of Illinois, United States, 7 July 2004].

[13] For a similar case see Rechtbank van Koophandel, Hasselt, Belgium, 2 May 1995, available on the Internet at www.law.kuleuven.be.

[14] Information Letter No. 29 of the High Arbitration Court of the Russian Federation, Russian Federation, 16 February 1998, Unilex.

[15] CLOUT case No. 422 [Oberster Gerichtshof, Austria, 29 June 1999], *Zeitschrift für Rechtsvergleichung* 2000, 33.

[16] CLOUT case No. 176 [Oberster Gerichtshof, Austria, 6 February 1996] (see full text of the decision). See also CLOUT case No. 696 [U.S. District Court, Northern District of Illinois, United States, 7 July 2004] (oral agreement sufficient).

[17] Amtsgericht Sursee, Switzerland, 12 September 2008, *Internationales Handelsrecht* 2009, 63.

[18] Court of Arbitration of the International Chamber of Commerce, Switzerland, March 1998, *ICC International Court of Arbitration Bulletin*, 2000, 83. The reservation under article 96 can have the same effect: Tribunal of International Commercial Arbitration at the Russian Federation Chamber of Commerce and Industry, Russian Federation, 25 March 1997, *Internationales Handelsrecht* 2006, 92.

[19] CLOUT case No. 86 [U.S. District Court, Southern District of New York, United States, 22 September 1994].

[20] Court of Arbitration of the International Chamber of Commerce, Switzerland, March 1998, I*CC International Court of Arbitration Bulletin*, 2000, 83.

[21] CLOUT case No. 94 [Internationales Schiedsgericht der Bundeskammer der gewerblichen Wirtschaft–Wien, Austria, 15 June 1994].