

MODIFICATION AND TERMINATION OF THE CONTRACT (ART. 29 CISG)

*M^a del Pilar Perales Viscasillas**

I. INTRODUCTION

Uniform and international interpretation of the United Nations Convention on Contracts for the International Sale of Goods of 1980 (CISG), and of all the substantive uniform law instruments prepared by the United Nations Commission on International Trade Law (UNCITRAL) in general, is certainly an ideal goal. This ideal goal, however, is difficult to achieve for many reasons, particularly because there is not a unique court with superpowers over the states to dictate how that uniform interpretation of any of the single provisions of a Convention or a Model Law should be. That is why the method chosen by UNCITRAL, comparative judicial interpretation by compiling decisions of the UNCITRAL texts in a digest, seems to be one of the key elements to the future success of the legal texts drafted by UNCITRAL.¹

In 1988, UNCITRAL chose the method of compiling decisions under the name of CLOUT (Case Law on UNCITRAL Texts),² a system by which the abstract of the court's reasoning is provided in the six official languages of the United Nations (UN). The CLOUT system has proven to be very successful, particularly with regard to the CISG, which is the text that has the highest number of decisions rendered by courts and arbitral tribunals. More importantly, the courts are becoming aware of its utility and are using the CLOUT system as an important tool in their reasoning.

* Commercial Law Professor, University Carlos III of Madrid.

1. See Albert Jan van den Berg, *The New York Convention: Its Intended Effects, Its Interpretation, Salient Problem Areas*, in ASA SPECIAL SERIES NO. 9 at 26 (1996). This publication is a collection of reports and materials delivered at the Swiss Arbitration Association (ASA) Conference held in Zürich on February 2, 1996. Van den Berg states, in relation to the New York Convention, that the "method of comparative judicial interpretation is one of the keys to the Convention's success in practice."

2. The work on the sale of goods began earlier than the work on arbitration, which began at the 35th Session of UNCITRAL in 2002. See also *Uniform Interpretation of UNCITRAL Texts: Sample Digest of Case Law on the UNCITRAL Model Law on International Commercial Arbitration (1985)*, UNCITRAL, 37th Sess., U.N. Doc. A/CN.9/563 (2004).

Since the origins of CLOUT, the system has also been reinforced by other means.

First, by providing the full text of the decision in its original language something that is being done precisely for the first time with regard to the 1985 UNCITRAL Model Law on International Commercial Arbitration (MAL), and has not yet been undertaken in the field of the Sale of Goods Convention, probably because this job is being done quite successfully by the autonomous network on the CISG.³ This is a very important development of the system because at times, to rely solely on the abstract is not sufficient for the reader to form a better understanding of the facts and the legal reasoning made by the courts. The ideal outcome of this system, which is not at all practicable due to budgetary reasons, would be to have the decisions translated into the official languages of the UN.

Second, the CLOUT system has been significantly reinforced by the elaboration of the Digest. The Digest on the CISG has already been published,⁴ and UNCITRAL is preparing to launch the Digest on the Model Law on International Commercial Arbitration in the near future.⁵

The Digest is the perfect couple for CLOUT. As the number of cases compiled in CLOUT was increasing, the system was becoming more complex and difficult to handle, so the idea of a compilation like the Digest presented several advantages—mainly, that it is an organization, method or system of cases that will help courts and arbitrators to identify issues and the decisions

3. See Electronic Library on International Trade Law and the CISG, at <http://www.cisg.law.pace.edu>. The efforts of Professor Albert H. Kritzer of the Institute of International Commercial Law of the Pace University School of Law have to be recognized.

4. UNCITRAL Digest of Case Law on the United Nations Convention on the International Sale of Goods, U.N. Doc. A/CN.9/SER.C/Digest/CISG (2004), available at http://www.uncitral.org/uncitral/en/case_law/digests/cisg.html [hereinafter Digest on the CISG]. See also *Introduction to the Digest of Case Law on the United Nations Sales Convention*, UNCITRAL, 37th Sess., U.N. Doc. A/CN.9/562 (2004) (providing information about the structure and purpose of the Digest on the CISG). From the mentioned document, it is clear that UNCITRAL desires to update the digest periodically. In this way, the system would be flexible, updated and workable.

5. So far, the Digest on the MAL is in the form of a draft. The draft has been officially presented to the public at a conference in Cologne, Germany held March 3-4, 2005, entitled, *Conference Officially Presenting the Draft Digest on the UNCITRAL Model Law on International Commercial Arbitration*. The conference was organized by The Law Centre for European and International Cooperation (R.I.Z.), in conjunction with UNCITRAL and the German Institution of Arbitration (DIS). The section on "Recognition and Enforcement" was chaired by Dr. Pierre Karrer (Rapporteur) and Miss Corinne Montineri from UNCITRAL (Discussant). A program of this Conference can be found at <http://master.fs.jura.uni-koeln.de/gerdtest/riz/webserver/php/module.php/veranstaltungsdownload.php?id=125>.

Thanks go out to the organizers for the invitation and for the initiative to analyze and discuss this splendid work of UNCITRAL. Also, the effort of UNCITRAL to achieve the maximum uniformity of its texts should be recognized.

made by other courts or arbitral tribunals around the world. This will help to harmonize the results achieved by other courts or arbitral tribunals, or to be more poetic, “to see the light in a field full of trees.”

One of the most important features of the Digest is its neutral presentation of the reasoning of the courts without taking a position in favor of or against it. The Digest should remain this way, mainly for the role and nature of UNCITRAL. Other initiatives, such as those that would provide a solution when a controversy among courts or arbitral tribunals is detected, should be left to other institutions.⁶

Article 29 of the Digest cites a total of twelve decisions: eight CLOUT decisions (CLOUT Case Nos. 5, 86, 94, 120, 153, 176, 332, and 413)⁷ and four other decisions not yet included in CLOUT at the time the Digest was published.⁸

II. ARTICLE 29: MODIFICATION OF THE CONTRACT

Article 29(1) states the general rule that, “[a] contract may be modified or terminated by the mere agreement of the parties.”⁹ Therefore, neither the common law requirement of the need for consideration in order for the contract to be modified,¹⁰ nor the *cause* requirement derived from civil law

6. In this regard, I should mention the project of the Institute of International Commercial Law of the Pace University School of Law to complete the Digest on the CISG, not only in the way already mentioned, but also by referring to the *status quo* of the issues among scholars. This author would like to thank Professors Albert H. Kritzer and Sieg Eiselen for providing a copy of the draft of Article 29 of the Digest of the CISG. See also Digest on the CISG, *supra* note 4, at art. 29, available at <http://www.cisg.law.pace.edu/cisg/text/anno-art-29.html#ucd>.

7. *Id.*

8. *Id.*

9. CISG art. 29(1). See also UNIDROIT Principles on International Commercial Contracts art. 3.2 (2004) (“[a] contract is concluded, modified or terminated by the mere agreement of the parties, without any further requirement”) [hereinafter UNIDROIT Principles]; U.C.C. § 2-209(1) (1998). But see THE ICC MODEL INTERNATIONAL SALE CONTRACT: MANUFACTURED GOODS INTENDED FOR RESALE (ICC Doc. 470-9/16, 1997), whose Article 1.5 states that any modification of the contract must be in writing. However, it also states the estoppel principle as an exception in a similar fashion to Article 29(2) of the CISG.

That the modification and termination of the contract is governed by the CISG is so clear that it is difficult to understand the decision in CLOUT Case No. 279 [Oberlandesgericht Hamburg, Germany, 5 Oct. 1998], available at <http://cisgw3.law.pace.edu/cases/981005g1.html>, which states that the purported agreement to modify the contract and its subsequent annulment is a question of validity governed by German domestic law, citing Article 4(a) of the CISG.

10. See Digest on the CISG, *supra* note 4, at art. 29 (citing the Secretariat Commentary on Article 27 of the 1978 Draft Convention on CISG). See also UNIDROIT Principles, *supra* note 9, at cmt. 1; JOHN O. HONNOLD, UNIFORM LAW FOR INTERNATIONAL SALES UNDER THE 1980 UNITED NATIONS CONVENTION

systems, are required under CISG.¹¹ The general rule coordinates with the provision of Article 11.¹²

Article 29(2) deals with the existence in the written contract of what are referred to under common law systems as “No Oral Modification” clauses (NOM clauses), which do not allow for the modification of the contract unless that modification is made in writing.¹³ However, the second sentence of Article 29(2) states that the NOM clause is ineffective if a party, by his conduct, has not acted in accordance with that clause and the other party has relied on his conduct.¹⁴ Article 29(2) states:

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.¹⁵

III. ARTICLE 29(1) CISG: MODIFICATION BY THE MERE AGREEMENT OF THE PARTIES

Article 29 applies to both modification (i.e., variations or alterations in the contracts) and termination of the contract (i.e., avoidance of the contract).¹⁶

In applying Article 29, the CISG is indifferent as to whether one party obtains an advantage over the other as the result of the contract modification (e.g., a better price without a modification of the quantity and vice versa,¹⁷ an

(3d ed. 1999); Alejandro Garro, *Reconciliation of Legal Traditions in the U.N. Convention on Contracts for the International Sale of Goods*, 23 INT'L LAW. 450 (1989).

In the case law, it is worth mentioning that the Digest does not cite any case to this purpose, although several cases have referred to it. *See, e.g.*, CLOUT Case No. 303 [Court of Arbitration of the International Chamber of Commerce, Case No. 7331, 1994], available at <http://cisgw3.law.pace.edu/cases/947331i1.html>; Court of Arbitration of the International Chamber of Commerce, Case No. 9947, 1999, available at <http://www.cisgw3.law.pace.edu/cases/999474i1.html> (citing also U.C.C. § 2-209 and *Shuttle Packaging Sys. v. Tsonakis*, No. 1:01-CV-691, 2001 U.S. Dist. LEXIS 21630 (W.D. Mich. Dec. 17, 2001)).

11. *See also* UNIDROIT Principles, *supra* note 9, at cmt. 2.

12. Digest on the CISG, *supra* note 4, at art. 11, available at <http://www.cisg.law.pace.edu/cisg/text/e-text-11.html>. CISG art. 11.

13. Digest on the CISG, *supra* note 4, at art. 29.

14. *Id.* CISG art. 29(2).

15. *Id.*

16. CLOUT Case No. 422 [Oberster Gerichtshof, Austria, 29 June 1999], available at <http://cisgw3.law.pace.edu/cases/990629a3.html>.

17. *See* Secretariat Commentary on Article 27 of the 1978 Draft [draft counterpart to CISG Article 29], No. 3, available at <http://www.cisg.law.pace.edu/cisg/text/secomm/secomm-29.html> [hereinafter

agreement as to a respite in payment,¹⁸ or an agreement regarding the outstanding claims¹⁹). Also, it is indifferent as to whether the modification is made in the same contract or in a different instrument that complements it (e.g., the giving of a bill of exchange by which the due date for paying the purchase price was postponed until the maturity date of the bill of exchange,²⁰ or by concluding a “New Agreement” that constitutes the modification of the payments under the contract of sale²¹).

As previously stated, it is enough under the Convention for a modification or termination of the contract to have the mere agreement of the parties,²² either orally, in writing, by acts, or even by silence or inaction.²³ Therefore, the rules on consent of the CISG (offer and acceptance rules, Articles 14-24) apply to the modification and termination of the contract.²⁴ Also, the general

Secretariat Commentary]. “Even if such modifications of the contract may increase the costs of one party, or decrease the value of the contract to the other, the parties may agree that there will be no change in the price. Such agreements according to article 27(1) are effective, thereby overcoming the common law rule that ‘consideration’ is required.” See also PETER SCHLECHTRIEM, *UNIFORM SALES LAW: THE UN CONVENTION ON CONTRACTS FOR THE INTERNATIONAL SALE OF GOODS* 62 (1986).

Specifically, CLOUT Case No. 153 [Cour d’appel de Grenoble, France, 29 Mar. 1995], available at <http://cisgw3.law.pace.edu/cases/950329f1.html>, where one of the parties claimed a modification of the contract in regard to the price without the corresponding reduction of the quantity agreed to in the contract. In the case, there was an international sale of goods contract for maize to use for the feeding of animals at the end of 1991 between a French seller and a Spanish buyer (10,000 tons). The buyer did not pay the price and the seller sued him. The buyer alleged that the contract was modified in regard to the price. Although the buyer presented two witnesses—a farmer and a veterinarian—the Court did not consider the contract modified, since the modification of the price could not result from the general mood of a meeting, and the seller sent the invoices after the meeting but the buyer never complained. Furthermore, when the seller claimed the price the buyer never complained about the price.

18. CLOUT Case No. 331 [Handelsgericht des Kantons Zürich, Switzerland, 10 Feb. 1999], available at <http://cisgw3.law.pace.edu/cases/990210s1.html>. Although it does not refer to Article 29 of the CISG, it held that, “[t]he agreement of a respite in payment and its effects are governed by the CISG.” *Id.* § IV(2)(d).

19. Bezirksgericht Sissach, Switzerland, 5 Nov. 1998, available at <http://cisgw3.law.pace.edu/cases/981105s1.html>.

20. CLOUT Case No. 5 [Landgericht Hamburg, Germany, 26 Sept. 1990], available at <http://cisgw3.law.pace.edu/cases/900926g1.html>.

21. Oberlandesgericht Karlsruhe, Germany, 10 Dec. 2003, available at <http://cisgw3.law.pace.edu/cases/031210g1.html>.

22. Raw Materials Inc. v. Manfred Forberich GmbH & Co., No. 03 C 1154, 2004 U.S. Dist. LEXIS 12510 (N.D. Ill. July 6, 2004); Tribunale di Padova, Italy, 31 Mar. 2004, available at <http://cisgw3.law.pace.edu/cases/040331i3.html>; Bezirksgericht Sissach, *supra* note 19.

23. CLOUT Case No. 422 [Oberster Gerichtshof, Austria, 29 June 1999], available at <http://cisgw3.law.pace.edu/cases/990629a3.html>.

24. See Digest on the CISG, *supra* note 4, at No. 3 & n.3 (citing CLOUT Case Nos. 120, 153 and 332). See also MARIA DEL PILAR PERALES VISCASILLAS, *LA FORMACIÓN DEL CONTRATO DE COMPRAVENTA INTERNACIONAL DE MERCADERÍAS* (Tirant Lo Blanch ed., 1996). See also CLOUT Case No. 5, *supra* note 20; CLOUT Case No. 310 [Oberlandesgericht Düsseldorf, Germany, 12 Mar. 1993], available at <http://>

rules on interpretation of the contract apply to the modification and termination (Article 8),²⁵ as well as the rules as regard to the form (Articles 11, 12 and 96).²⁶

The same rules under the formation of the contract apply (Article 18(1)) to the application of silence or inaction as acceptance. Therefore, mere silence or inaction does not by itself amount to an acceptance.²⁷ As an exception, in certain circumstances the silence or inaction of the addressee of an offer to modify or terminate the contract would amount to an acceptance.²⁸

cisgw3.law.pace.edu/cases/930312g1.html; CLOUT Case No. 133 [Oberlandesgericht Munchen, Germany, 8 Feb. 1995], available at <http://cisgw3.law.pace.edu/cases/950208g1.html>; CLOUT Case No. 422, *supra* note 23.

25. See Digest on the CISG, *supra* note 4, at No. 4.

26. See Digest on the CISG, *supra* note 4, at No. 5; Larry A. DiMatteo et al., *The Interpretive Turn in International Sales Law: An Analysis of Fifteen Years of CISG Jurisprudence*, 34 NW. J. INT'L L. & BUS. 299, 331 (2004).

See Arrondissementsrechtbank Rotterdam, Netherlands, 12 July 2001, available at <http://cisgw3.law.pace.edu/cases/010712n1.html>. The contract of sale between a buyer (Netherlands) and a seller (Argentina) was concluded orally and documented in a letter of credit. The buyer contends that this was modified orally, or in a fax sent after the conclusion of the contract in which a schedule delivery was organized. The Court considered the form reservation of Article 96 CISG and held that the question of whether the contract has been validly concluded should be answered by the applicable law.

See also High Arbitration Court, Russian Federation, 25 Mar. 1997, available at <http://cisgw3.law.pace.edu/cases/970325r2.html>. The parties in an international sale of onions contract (Polish seller and Russian buyer) modified the price during the delivery, by deducting the cost of freight from the price of goods. The Arbitration Court of Moscow held that the parties can modify the contract orally or in writing. The High Court reversed that decision and stated that the written form reservation made by Russia applied (Articles 12 and 96 CISG). Since the contract was changed in the written form, the Court accepted the modification.

27. See CLOUT Case No. 395 [Tribunal Supremo, Spain, 28 Jan. 2000], available at <http://cisgw3.law.pace.edu/cases/000128s4.html> (after the conclusion of the contract, one of the parties tried to modify the price, but that offer to modify the contract was never accepted, and thus the Court concluded that no modification was agreed upon by the parties); CLOUT Case No. 332 [Obergericht des Kantons Basel-Landschaft, Switzerland, 5 Oct. 1999], available at <http://cisgw3.law.pace.edu/cases/991005s1.html> (where the Court was unable to find that the parties agreed on the modification of the contract and did not consider that the seller's silence amounted to an acceptance).

See RAFAEL ILLESCAS & MARIA DEL PILAR PERALES VISCASILLAS, *DERECHO MERCANTIL INTERNACIONAL: EL DERECHO UNIFORME 168* (Centro de Estudios Ramón Areces 2003) (considering that silence and inaction applies more restrictively in regards to contract modifications).

28. See CLOUT Case No. 193 [Handelsgericht des Kantons Zürich, Switzerland, 10 July 1996], available at <http://cisgw3.law.pace.edu/cases/960710s1.html>; CLOUT Case No. 120 [Oberlandesgericht Köln, Germany, 22 Feb. 1994], available at <http://cisgw3.law.pace.edu/cases/940222g1.html>:

An offer to cancel can, therefore, pursuant to CISG Art. 18(1), not be accepted by silence or inactivity of the other party; together with other circumstances, however, silence can indeed be important and may be interpreted as the acceptance of an offer of cancellation. Such circumstances exist here, because [buyer] not only remained silent but also refrained from further fulfillment of the agreement, specifically from insisting on the delivery of replacement goods or from asserting other warranty claims.

There is abundant case law with regard to the practice of sending letters of confirmation,²⁹ either when a contract has been orally concluded and it is later confirmed by the so-called letter of confirmation,³⁰ or when there is an oral modification which is confirmed by a letter.³¹ However, the Digest does not refer to this issue in Article 29, but mainly in Article 9. It is thus advisable that there is a cross reference to the provisions of the Digest in which the letters of confirmation are dealt with. Perhaps more preferable, since letters of confirmation involve other provisions of the CISG such as Article 7, is that the Digest on Article 29 contain an explanation of this issue. The case law shows that silence or inaction is considered an acceptance when a letter of confirmation,³² which contains modifications, is sent after an oral conclusion or an oral modification of the contract. In these kinds of situations, it has been found that a duty to object exists by an application of the good faith principle,³³ or that a usage exists between the parties.

Hof van Beroep Gent, Belgium, 15 May 2002, *available at* <http://cisgw3.law.pace.edu/cases/020515b1.html>, considered that the contract might be modified in any form, and stated:

In order to make a smooth (international) trade possible, a trader is undoubtedly obliged to protest immediately, or within a reasonable period of time, if he receives a letter/communication to which he cannot agree. This obligation simply is the consequence of the positive meaning attached in trade to silence when receiving all kinds of documents, correspondence and so on.

See also Arrondissementsrechtbank Rotterdam, *supra* note 26. The Court stated:

If it will be shown that the parties had agreed beforehand on a delivery schedule to be drafted by the [Buyer], this must be regarded as one of these additional factors which entails that the [Seller] is bound to the delivery schedule which was sent later in time, unless the [Seller] has objected to (the contents of) this schedule.

29. In the author's opinion, there is no gap in the CISG, and thus the effect of a letter of confirmation upon contract formation or modification is governed by the CISG. *See also* Martin Schmidt-Kessel, *in* COMMENTARY ON THE UN CONVENTION ON THE INTERNATIONAL SALE OF GOODS (CISG) art. 9, No. 22 (Peter Schlechtriem & Ingeborg Schwenzer eds., 2005) [hereinafter COMMENTARY].

30. *But see* Primer Tribunal Colegiado en Materia Civil del Primer Circuito, Mexico, 10 Mar. 2005, *available at* <http://www.uc3m.es/uc3m/dpto/PR/dppr03/cisg/mexic5.htm>. In the author's opinion, this decision is erroneous, where the Court did not acknowledge the oral conclusion of the contract which was later confirmed, but considered the letter of confirmation to be an offer which was rejected and thus no contract was deemed to be concluded.

31. *See* Bezirksgericht Sissach, *supra* note 19.

32. *See* UNIDROIT Principles, *supra* note 9, art. 2.1.12; PRINCIPLES OF EUROPEAN CONTRACT LAW, PARTS I AND II art. 2.210 (Hugh Beale & Ole Lando eds., 2000). *See also* Maria del Pilar Perales Viscasillas, *Tratamiento Jurídico de las Cartas de Confirmación en la Convención de Viena de 1980 Sobre Compraventa Internacional de Mercaderías*, 13 REVISTA JURÍDICA DEL PERÚ 241-62 (1997).

33. *See* Bezirksgericht Sissach, *supra* note 19. In a contract for the sale of textiles between a buyer (Switzerland) and a seller (Germany), the Court considered that the oral modification of the contract, a payment agreement regarding the outstanding claims, that was followed by a letter was accepted by the seller's silence in an application of the good faith principle. Implied in Hof van Beroep Gent, *supra* note 28.

See also Filanto S.p.A. v. Chilewich Int'l Corp., 789 F. Supp. 1229 (S.D.N.Y. 1992), CLOUT Case

Regarding the usage of trade, the courts refer to the German, Swiss and Austrian commercial letters of confirmation usage³⁴ whereby between businessmen, the silence or inaction of the recipient of a commercial letter of confirmation (*Kaufmanisches Bestätigungsschreiben*), which contains modifications of a previous oral contract, is deemed to be an acceptance. As it is clear from the case law, the usage only applies if the conditions of Article 9(2) are met, specifically, when both parties belong to a legal system in which that trade usage is recognized.³⁵

As an exception from the above, the introduction of modifications on forum selection clauses in invoices have been considered to require express assent.³⁶ This seems to be in accordance with the Secretariat Commentary on Article 27 of the 1978 CISG Draft:

No. 23 (for the acceptance of an offer by silence during the formation of the contract).

34. It also exists in Denmark and Poland according to Schmidt-Kessel, *in* COMMENTARY, *supra* note 29, art. 9 n.24, who also expressed doubts about the existence of such a usage in Austria.

35. See CLOUT Case No. 95 [Zivilgericht Basel-Stadt, Switzerland, 21 Dec. 1992]. In the case, the seller was from Austria and the buyer from Switzerland. The Court considered the value of the commercial letters of confirmation under Article 9 CISG. It recognized that both in Austria and Switzerland the silence to a letter of confirmation means acceptance and that this is considered to be a usage (Article 9(2)). It furthermore held that a practice established between the parties was considered to exist (Article 9(1) CISG). See also CLOUT Case No. 276 [Oberlandesgericht Frankfurt am Main, Germany, 5 July 1995] considering that in the case at hand no usage of trade existed because it was only known in the buyer's country (Germany) but not in the seller's country. However, the Court considered the letter of confirmation as evidence and applying other means of evidence held in favour of the seller. See also CLOUT Case No. 120 [Oberlandesgericht Köln, Germany, 22 Feb. 1994]. A contract for the sale of wood between a seller (Nigeria) and a buyer (Germany) was not considered to be modified by a confirmation letter, and therefore the court expressly stated that "there is no room for a reference to the German Conflict of Laws provisions regarding the conclusion of a contract by silence as an acceptance of a commercial letter of confirmation." It further held that "[n]evertheless, the importance of the commercial letter of confirmation as evidence for the formation of the contract remains unaffected."

But see Oberlandesgericht Saarbrücken, Germany, 5 Mar. 1999 (a contract of sale of windows and doors between an Italian seller and a German buyer). The buyer sent two letters of confirmation establishing a special discount of 14%. The Court considered that, according to the application of a commercial trade usage, silence to a letter of confirmation means acceptance.

See also Digest on the CISG, *supra* note 4, arts. 9, 18.

36. *Chateau des Charmes Wines Ltd. v. Sabaté USA Inc.*, 328 F.3d 528 (9th Cir. 2003). In this case, the Court considered a case in which a Canadian winery buyer agreed orally with a U.S. seller the purchase of 1.2 million corks. The corks were sent by the related company in France. The invoices contained a forum selection clause in favour of the French tribunals. The buyer found that the corks were tainted and sued the sellers for breach of contract in the District Court of California. The District Court considered that the forum selection clauses were part of the Contract. In appellation, it was reversed. The Federal Appellate Court held that the attempt to modify the contract through the invoices was a material alteration. According to the Court "nothing in the Convention suggests that the failure to object to a party's unilateral attempt to alter materially the terms of an otherwise valid agreement is an 'agreement' within the terms of Article 29." *Id.* at 531. It also held, relying on Article 8(3) CISG, that there was no indication that the buyer conducted itself in a manner that evidenced an "agreement" to the forum selection clauses in the invoices.

A proposal to modify the terms of an existing contract by including additional or different terms in a confirmation or invoice should be distinguished from a reply to an offer which purports to be an acceptance but which contains additional or different terms. This latter situation is governed by article 17.³⁷

The Digest does not refer to the issue of whether Article 29 covers situations in which the contract of sale is terminated and it is followed by a new contract (novation). Article 29 deals with both the modification and termination of the contract. This means that it deals with the variation of one or some of the elements of the contract without implying the total termination of the contract, but rather a mere modification of its content, and also with the total termination of the contract, being indifferent as to whether this termination implies the extinction of the contract or the conclusion of a new contract.³⁸ In the latter situation, the CISG would not apply if the conditions for its applicability are not met. For example, if there is a change in the object or in the parties, that falls out of the field of the application of the CISG.³⁹

The termination of the contract followed by the conclusion of a new one has been considered by one case, however, as a matter not governed by the CISG, and thus the domestic law conditions of consent apply to determine whether the novation of the contract is valid.⁴⁰

With regard to the consequences of the termination of the contract, Article 81 is applicable by analogy.⁴¹

The decision of the U.S. District Court in *Shuttle Packaging System v. Tsonakis*⁴² is interesting, as it interprets a non-competition agreement included

37. Secretariat Commentary, *supra* note 17.

38. *Novación modificativa* and *novación extintiva* under Código Civil (C.C.) art. 1224 (Spain).

39. See CLOUT Case No. 47 [Landericht Aachen, Germany, 14 May 1993] (applied the CISG even though the parties reached a *settlement agreement*). See also Schlectriem, in COMMENTARY, *supra* note 29, art. 29 n.3.

40. CLOUT Case No. 303 [Court of Arbitration of the International Chamber of Commerce, Case No. 7331, 1994], published in 6 ICC INTERNATIONAL COURT OF ARBITRATION BULLETIN 73-76 (1995), also published in 122 JOURNAL DU DROIT INTERNATIONAL 1001-09 (1995) (note of Dominique Hascher).

To be distinguished from a mere amendment to a prior contract is the doctrine of novation. Under the laws of all three national jurisdictions which the tribunal deems potentially relevant (France, Italy and Yugoslavia), novation cannot be presumed and requires the proof by the party alleging the existence of a novation that the original parties to the contract shared an *animus novandi*. Dominique Hascher, *Commenting on ICC Award 7331/1992*, 122 JOURNAL DU DROIT INTERNATIONAL 1001 (1995).

41. See also CLOUT Case No. 422 [Oberster Gerichtshof, Austria, 29 June 1999] (resorting to CISG Article 7(2)); Oberlandesgericht Düsseldorf, Austria, 28 May 2004 (considering the application by analogy of CISG Art. 81(2)); among the scholars, see Schlectriem, in COMMENTARY, *supra* note 29, art. 29 n.4.

42. *Shuttle Packaging*, 2001 U.S. Dist. LEXIS 21630, at *1.

in a contract of sale, that was further developed in an independent agreement, in accordance with the rules of interpretation of the Convention (Article 8, rejecting the application of the parol evidence rule) and modification of the contract (Article 29, considering that there is no need for a consideration).⁴³

IV. ARTICLE 29(2) CISG: RESTRICTIONS TO THE MODIFICATION OF THE CONTRACT

Article 29(2) of the CISG recognizes the will of the parties to agree on the possibility of having the written contract modified or terminated exclusively in written form. The provision also limits the scope of that requirement by the application of the principle of estoppel, or *venire contra factum proprium*. Although this provision refers to situations in which the parties agree on a written form for the modification or termination of the contract, it also applies to situations in which the parties agree on further formalities such as a signature or the presence of a witness.⁴⁴

NOM clauses are found typically in common law countries, and “operates as a private statute of frauds.”⁴⁵ An example of a NOM clause is found in *Graves Import Co. Ltd. and Italian Trading Company v. Chilewich Int’l Corp.*⁴⁶ which states “[n]o amendments and additions to the present contract shall be valid unless the same are in writing and signed by duly authorized representatives of both parties.”⁴⁷

Both the UNIDROIT Principles (Article 2(18))⁴⁸ and the European Principles (Article 2:106 PDCE)⁴⁹ have similar provisions to Article 29(2) of

43. *Id.*

44. Sieg Eiselen, Remarks on the manner in which the UNIDROIT Principles of International Commercial Contracts may be used to interpret or supplement Article 29 of the CISG, available at <http://www.cisg.law.pace.edu/cisg/principles/uni29.html#ed>.

45. Robert A. Hillman, *Article 29(2) of the United Nations Convention on Contracts for the International Sale of Goods: A New Effort at Clarifying the Legal Effect of “No Oral Modification” Clauses*, 21 CORNELL INT’L L.J. 450 (1988). “Parties include such a clause to protect themselves from an inadvertent or unwise oral adjustment and to prevent fraudulent or mistaken claims of modification of a written agreement.” *Id.*

46. *Graves Import Co. v. Chilewich International Corp.*, 92 Civ. 3655 (JFK), 1994 U.S. Dist. LEXIS 13393, *1 (S.D.N.Y. Sept. 21, 1994). See also U.C.C. §§ 2-209, 2-208.

47. *Graves Import*, 1994 U.S. Dist. LEXIS 13393, at *13.

48. UNIDROIT Principles, *supra* note 9, art. 2.18 (Written modification clause):

A contract in writing which contains a clause requiring any modification or termination by agreement to be in writing may not be otherwise modified or terminated. However, a party may be precluded by its conduct from asserting such a clause to the extent that the other party has acted in reliance on that conduct.

49. See PRINCIPLES OF EUROPEAN CONTRACT LAW, *supra* note 32, art. 2:106 (Written modification

the CISG. Those texts also deal with the so-called merger clauses.⁵⁰ A case in which an arbitral tribunal considered both kinds of clauses is found in ICC 9117/1998,⁵¹ which deals with an international sale of goods contract between a Russian seller and a Canadian buyer that contains both a NOM clause and a merger clause. It seems that the seller breached the contract since the seller delivered the goods after the expiration of the license to import the goods granted by the U.S. authorities. It is derived from the case that the seller argued that the contract was orally modified. The tribunal applied Article 29(2) (it also cited Article 2(18) of the UNIDROIT Principles) and stated that no oral modification of the contract was concluded. It also pointed out that the meaning of those clauses is reflected in the UNIDROIT Principles, which although they are not applicable to the case, “express a *communis opinio* and consensus.”⁵²

A certain guide for considering whether the reliance of one party on the conduct of the other party renders the NOM clause ineffective is found in Articles 8, 16(2)(b) and 80 of the CISG, which adopt the principle of estoppel, or *venire contra factum proprium*. This principle has been recognized as a general principle applicable within the Convention and has been used to solve other issues under the Convention.⁵³

only):

(1) A clause in a written contract requiring any modification or ending by agreement to be made in writing establishes only a presumption that an agreement to modify or end the contract is not intended to be legally binding unless it is in writing. (2) A party may by its statements or conduct be precluded from asserting such a clause to the extent that the other party has reasonably relied on them.

It has to be noted that the provision states that the NOM clause only creates a presumption, which means that requires less onerous conditions in regard to the evidence to be provided.

50. UNIDROIT Principles, *supra* note 9, art. 217 (Merger clause) states that:

A contract in writing which contains a clause indicating that the writing completely embodies the terms on which the parties have agreed cannot be contradicted or supplemented by evidence of prior statements or agreements. However, such statements or agreements may be used to interpret the writing.

See also PRINCIPLES OF EUROPEAN CONTRACT LAW, *supra* note 32, art. 2:105.

The merger clause, more than dealing with aspects of the modification or termination of the contract, deals with issues of interpretation and evidence and therefore the appropriate comments should be found in the part of the Digest devoted to Article 8 CISG. *See also* Eiselen, *supra* note 44, § g. Also pertinent for the merger clause, see CISG-AC Opinion no 3, Parol Evidence Rule, Plain Meaning Rule, Contractual Merger Clause and the CISG, 23 October 2004. Rapporteur: Professor Richard Hyland, Rutgers Law School, Camden, NJ, USA, available at <http://www.cisg.law.pace.edu/cisg/CISG-AC-op3.html>. Adopted by the CISG-AC on its 7th meeting in Madrid with no dissent.

51. Court of Arbitration of the International Chamber of Commerce, Case No. 9117, Mar. 1998.

52. *Id.*

53. For example, to solve the question of a possible forfeiture of the defence of late notice, see

An interesting issue, which is not dealt with so far by the case law and therefore not mentioned in the Digest, is whether *statements* made by a party and the other party's reliance on such statements suffices to apply Article 29(2). Both the CISG and the UNIDROIT Principles refer only to conduct, while the European Principles (Article 2:106) also mention the possibility of the reliance on the statements made by a party. It is our opinion that statements are also within the scope of Article 29 in so far as the other party relied on those statements. In this regard, the term "conduct" has been interpreted in a flexible way.⁵⁴

Another controversial issue is whether Article 29(2)'s second sentence prevails in situations in which Articles 12 and 96 apply. In other words, is it possible to consider the contract modified by something other than a writing when the written form reservation applies? Some scholars have considered that Article 29(2) should prevail,⁵⁵ but others state the contrary.⁵⁶ So far the case law seems to support the latter position.

Arbitral Tribunal—Vienna, Austria, 15 June 1994, which expressly states, citing CISG Articles 7, 16(2)(b) and 29(2), that the principle of estoppel or, to use another expression, the *prohibition of venire contra factum proprium*, represents a special application of the general principle of good faith. References to the good faith principle are made in PRINCIPLES OF EUROPEAN CONTRACT LAW, *supra* note 32, art. 2:106 cmt. A:

It would be contrary to good faith to let the parties' agreement to use writing bind them to that form when later they have clearly made up their minds to use another form (. . .) This applies even if in an individually negotiated clause in their contract they provided that they would not give effect to an oral agreement to disregard the "no oral modification" clause.

Or to preclude one party from relying on a written form for the conclusion of a contract if he did not inform the other; *see* CLOUT Case No. 176 [Oberster Gerichtshof, Austria, 6 Feb. 1996] (citing CISG Article 29(2)); CLOUT Case No. 230 [Oberlandesgericht Karlsruhe, Germany, 25 June 1997] (relying on CISG Articles 7.1 (good faith principle) and 80); Tribunal of International Commercial Arbitration at the Russian Federation Chamber of Commerce and Industry, Russian Federation, 27 July 1999 (citing the good faith principle under Article 7(1) and considering also estoppel as a principle of the *lex mercatoria*); Tribunal di Rimini, Italy, 26 Nov. 2002 (*obiter dicta*, without referring to any particular article of the Convention). *But see* Arrondissementsrechtbank Amsterdam, Netherlands, 5 Oct. 1994 (considering estoppel under German Law); *Ajax Tool Works, Inc. v. Can-Eng Manufacturing Ltd.*, No. 01 C 5938, 2003 U.S. Dist. LEXIS 1306, *1 (N.D. Ill. Jan. 29, 2003) (where the Court held that the question of waiver (whether the seller has waived its right to enforce the limited warranty) in accordance with Article 7(2) has to be solved under the rules of private international law, so it seems that the Court was not able to find any general principles nor case law to apply).

54. *See* John E. Murray, *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 n.175 (1988) (relying also on Example 27A in Secretariat Commentary, *supra* note 17, at 27-28 (where the contract is orally modified)).

55. Siegfried Eiselen, Remarks on the manner in which the Principles of European Contract Law may be used to interpret or supplement Article 29 of the CISG (k), *available at* <http://www.cisg.law.pace.edu/cisg/text/peclcomp29.html>.

56. *See* SCHLECHTRIEM, *supra* note 17, at 44-46, 62-63 (1986); Hillman, *supra* note 45, at 460-61.

Some comments also deserve the relationship between Articles 6 and 29(2). In other words, is it possible for the parties to derogate the reliance principle in second half of Article 29(2) either expressly or impliedly? We agree with Professor Hillman⁵⁷ in that it is not possible. “Article 29(2) is itself a limitation on the parties’ article 6 freedom of contract; otherwise, Article 6 completely subverts Article 29(2)’s reliance exception.”⁵⁸

With regard to the consequences of the application of the reliance doctrine upon a written contract that contains a NOM Clause, the Secretariat Commentary on Article 27 of the 1978 Draft on CISG (Article 29) provides an interesting example. The parties concluded a contract for the sale of goods to be manufactured or produced which had a NOM clause. After the first transaction, the parties agreed on a modification of the design of the goods. The next five monthly deliveries were accepted by the buyer, but the sixth was rejected for not conforming. According to the Secretariat Commentary, the seller must accept all goods manufactured according to the modified design, but the seller must reinstate the original design for the remainder of the contract.

The Secretariat Commentary, thus, considers that the modification is only effective in so far as the parties are in agreement as to the modification, but if one of them objects, the written clause reinstate its effects.⁵⁹ We do, however, have some doubts on that position, and we think it is better to give prevalence to the parties’ freedom to contract, and thus to modify it. Therefore, the written contract should be understood to have been modified by the acts of performance made by the parties.⁶⁰

57. Hillman, *supra* note 45, at 461. *But see* Peter Schlechtriem, *in* COMMENTARY ON THE UN CONVENTION ON THE INTERNATIONAL SALE OF GOODS, art. 29 n.10a, considering the application of the domestic rules on validity if the clause excluding a defence of abuse of rights is a standard term, but if the clause was agreed upon by the parties expressly then Article 6 permits such a derogation from Article 29(2)’s second sentence.

58. *Id.*

59. Also in agreement, see Schlechtriem, *in* COMMENTARY, *supra* note 57, at art. 29 n.10.

60. Certain doubts are also expressed also by Kazuaki Sono, who states:

However, each time the buyer receives the goods in the modified design without objection, the more the buyer loses his justification to object to the change in design without a written confirmation. In the above example, whether X must reinstate the original design for the future deliveries under the remainder of the contract would depend upon the extent of the modification of the design which has already been made and the expenses and inconveniences which the seller would bear if the original design were to be restored. It is clear that this is a matter which should be discussed by the parties in advance of the seventh delivery.

Kazuaki Sono, *Formation of International Contracts under the Vienna Convention: A Shift above the Comparative Law*, *in* INTERNATIONAL SALE OF GOODS: DUBROVNIK LECTURE 130-31 (Petar Sarcevic & Paul Volken eds., 1986).