

Article 18

(1) A statement made by or other conduct of the offeree indicating assent to an offer is an acceptance. Silence or inactivity does not in itself amount to acceptance.

(2) An acceptance of an offer becomes effective at the moment the indication of assent reaches the offeror. An acceptance is not effective if the indication of assent does not reach the offeror within the time he has fixed or, if no time is fixed, within a reasonable time, due account being taken of the circumstances of the transaction, including the rapidity of the means of communication employed by the offeror. An oral offer must be accepted immediately unless the circumstances indicate otherwise.

(3) However, if, by virtue of the offer or as a result of practices which the parties have established between themselves or of usage, the offeree may indicate assent by performing an act, such as one relating to the dispatch of the goods or payment of the price, without notice to the offeror, the acceptance is effective at the moment the act is performed, provided that the act is performed within the period of time laid down in the preceding paragraph.

OVERVIEW

1. Article 18 is the first of five articles that deal with the acceptance of an offer. Paragraph (1) of article 18 addresses what constitutes the acceptance of an offer, while paragraphs (2) and (3) determine when an acceptance is effective. Article 19 qualifies article 18 by providing rules for when a purported acceptance so modifies an offer that the reply is a counter-offer.

2. Decisions have applied article 18 not only to offers to conclude a contract but also to acceptance of counter-offers,¹ proposals to modify the contract² and proposals to terminate the contract.³ The provisions of article 18 have also been applied to matters not covered by the Sales Convention.⁴

INDICATION OF ASSENT TO AN OFFER

3. Pursuant to article 18 (1), an offeree accepts an offer by a statement or other conduct indicating assent. Whether or not the statement or conduct indicates assent is subject to interpretation in accordance with the rules of paragraphs (1) and (2) of article 8.⁵ All the circumstances, including negotiations prior to conclusion of the contract and the course of performance after conclusion, are to be taken into account in accordance with paragraph (3) of article 8.⁶ If a statement or conduct indicating assent to an offer cannot be found, there is no contract under Part II of the CISG.⁷

4. Only the offeree of a proposal to conclude a contract is entitled to accept the offer.⁸ A party who negotiates or accepts an offer in a foreign language must bear the risk of understanding the intricacies of the meaning of the foreign language (article 8).⁹

5. Whether an offeree's reply indicating assent to an offer but modifying that offer is an acceptance or a counter-offer is determined by article 19.¹⁰ Whether a counter-offer is accepted is then determined by article 18.¹¹

6. An indication of assent may be made by an oral or written statement¹² or by conduct.¹³ The following conduct has been found to indicate assent: buyer's acceptance of goods;¹⁴ buyer's payment for the goods;¹⁵ a third party's taking delivery of goods;¹⁶ delivery of the goods by the seller;¹⁷ seller's acceptance of a bank guarantee, and the start-up of production of the goods;¹⁸ issuance of letter of credit;¹⁹ signing invoices to be sent to a financial institution with a request that it finance the purchase;²⁰ sending a reference letter to an administrative agency;²¹ drawing up and issuing a pro forma invoice;²² sending invoices and packing lists;²³ a handshake by the representatives of the parties;²⁴ sealing and sending back the purchase order;²⁵ issuing a bank transfer as an advance payment;²⁶ cashing a cheque;²⁷ holding on to seller's confirmation of the order and continuously requesting the seller to effect an expeditious delivery.²⁸

SILENCE OR INACTIVITY AS ASSENT TO AN OFFER

7. In the absence of other evidence indicating assent to an offer, an offeree's silence or inactivity on receiving an offer does not amount to an acceptance.²⁹ By virtue of article 9 (1), however, parties are bound by practices established between themselves and these practices may indicate assent to an offer notwithstanding the silence or inactivity of the addressee.³⁰ Parties are also bound by usages as provided in paragraphs (1) and (2) of article 9, and these usages may give rise to acceptance of an offer notwithstanding the addressee's silence or inactivity.³¹ One court stated that a course of dealing between the parties required an offeree to object

promptly to an offer, and that the party's delay in objecting constituted acceptance of the offer.³² A buyer's failure to exercise any remedy under the Convention in response to the seller's proposal that the buyer examine the delivered goods and resell them was construed as acceptance of an offer to terminate the contract.³³ One court has asserted that, in its treatment of silence, article 18 represents the principle of good faith, which is also one of the general principles of the CISG.³⁴ A good faith obligation to provide a response to a proposal has also been suggested in some decisions, provided certain circumstances are met.³⁵ Furthermore, a court has considered invalid a statement of an offeror deeming the addressee's silence as acceptance.³⁶

EFFECTIVENESS—TIME LIMITS FOR ACCEPTANCE

8. Paragraph (2) of article 18 provides that, except in the circumstances set out in paragraph (3), an acceptance becomes effective at the moment the indication of assent reaches the offeror provided it does so within the time limit for acceptance. The acceptance "reaches" the offeror when article 24 is satisfied. By virtue of article 23, a contract is concluded when the acceptance becomes effective.³⁷

9. To be effective, however, the acceptance must reach the offeror within the time limits set by paragraph (2) of article 18 as modified by article 21 on late acceptance. Article 20 provides rules of interpretation for determining the time limits for acceptance. As provided in article 21, an offer cannot

be accepted after the time limit expires unless the offeror informs the offeree without delay that the acceptance is effective.³⁸

10. Article 18 (2) provides a special rule for oral offers: an oral offer must be accepted immediately unless the circumstances indicate otherwise.³⁹ One court has indicated that oral offers include conversations face-to-face, by telephone, or by any other technical or electronic means of communication that allows immediate oral contact; but not statements captured in a material medium such as, notably, a fax.⁴⁰

EFFECTIVENESS BY PERFORMANCE OF ACT

11. An acceptance is effective at the moment the offeree performs an act indicating assent to the offer, provided the offeree is authorized, by virtue of the offer or as a result of practices which the parties have established between themselves or of usage, to indicate its acceptance of the offer by an act without notice to the offeror.⁴¹ Several decisions have cited paragraph (3) rather than paragraph (1) for the proposition that a contract may be concluded by the performance of an act by the offeree.⁴² In one case the court recognized the receipt of the goods by the buyer as an effective acceptance which meant the conclusion of the contract.⁴³ In another case, a Supreme Court has held that a sales contract was concluded at the moment at which the offeree who denied having accepted the offer used the delivered goods for construction work.⁴⁴ Receipt of a notice of this kind of acceptance was unnecessary under the circumstances.

Notes

¹ CLOUT case No. 291 [Oberlandesgericht Frankfurt a.M., Germany, 23 May 1995], English translation available on the Internet at www.cisg.law.pace.edu (delivery of 2,700 pairs of shoes in response to order of 3,400 pairs was a counter-offer accepted by buyer when it took delivery).

² CLOUT case No. 251 [Handelsgericht des Kantons Zürich, Switzerland, 30 November 1998] (no acceptance in communications regarding modification) (see full text of the decision); CLOUT case No. 347 [Oberlandesgericht Dresden, Germany, 9 July 1998], English translation available on the Internet at www.cisg.law.pace.edu (proposal to modify in commercial letter of confirmation not accepted) (see full text of the decision); CLOUT case No. 193 [Handelsgericht des Kantons Zürich, Switzerland, 10 July 1996] (proposal to modify not accepted by silence of addressee); CLOUT case No. 133 [Oberlandesgericht München, Germany, 8 February 1995] (proposal to modify time of delivery not accepted) (see full text of the decision); CLOUT case No. 203 [Cour d'appel, Paris, France, 13 December 1995] (proposal to modify in letter of confirmation not accepted).

³ CLOUT case No. 120 [Oberlandesgericht Köln, Germany, 22 February 1994] (acceptance of proposal to terminate contract); China International Economic and Trade Arbitration Commission, People's Republic of China, 1 April 1993, Unilex (acceptance of proposal to terminate), also available on the Internet at www.cisg.law.pace.edu.

⁴ CLOUT case No. 308 [Federal Court of Australia, Australia, 28 April 1995] (applying article 18 to determine whether retention of title clause was accepted).

⁵ CLOUT case No. 429 [Oberlandesgericht Frankfurt a.M., Germany, 30 August 2000], English translation available on the Internet at www.cisg.law.pace.edu (sending of promissory note interpreted as not an acceptance).

⁶ See, for example, CLOUT case No. 1193 [Comisión para la Protección del Comercio Exterior de México, Mexico, 29 April 1996] (alleged seller's letter in reply to offer, letter of credit naming it as payee, and subsequent conduct of the parties evidenced conclusion of contract); CLOUT case No. 23 [U.S. District Court, Southern District of New York, United States, 14 April 1992] (course of dealing created duty to respond to offer).

⁷ CLOUT case No. 173 [Fovárosi Biróság, Hungary, 17 June 1997], English translation available on the Internet at www.cisg.law.pace.edu (no clear agreement to extend distribution contract); CLOUT case No. 135 [Oberlandesgericht Frankfurt a.M., Germany, 31 March 1995], English translation available on the Internet at www.cisg.law.pace.edu (correspondence did not reach agreement on quality of glass ordered).

⁸ CLOUT case No. 239 [Oberster Gerichtshof, Austria, 18 June 1997] (remand to determine whether the offer was made to a mercantile agent).

⁹ Landgericht Kassel, Germany, 15 February 1996, English translation available on the Internet at www.cisg.law.pace.edu (stating that, if the offeree is uncertain of the meaning of an offer in a foreign language, the offeree must raise objections in order to get sufficient certainty, make further inquiries, or use a professional translation).

¹⁰ CLOUT case No. 242 [Cour de cassation, France, 16 July 1998], English translation available on the Internet at www.cisg.law.pace.edu (reply with different jurisdiction clause was a material modification under article 19 and therefore a counter-offer); CLOUT case No. 227 [Oberlandesgericht Hamm, Germany, 22 September 1992] (reply with reference to “unwrapped” bacon was a counter-offer under article 19 and not an acceptance under article 18).

¹¹ CLOUT case No. 232 [Oberlandesgericht München, Germany, 11 March 1998] (buyer, by performing contract, accepted seller’s standard terms that modified buyer’s offer) (see full text of the decision); CLOUT case No. 227 [Oberlandesgericht Hamm, Germany, 22 September 1992] (buyer accepted counter-offer when its reply did not object to counter-offer).

¹² CLOUT case No. 395 [Tribunal Supremo, Spain, 28 January 2000] (faxed unconditional acceptance); CLOUT case No. 308 [Federal Court of Australia, Australia, 8 April 1995] (statement in offeree’s letter interpreted as an acceptance) (see full text of the decision); CLOUT case No. 845 [U.S. District Court, Michigan, United States, 28 September 2007 (Easom Automation Systems, Inc. v. Thyssenkrupp Fabco, Corp.)], available on the Internet at www.cisg.law.pace.edu (oral acceptance of the offer).

¹³ CLOUT case No. 429 [Oberlandesgericht Frankfurt a.M., Germany, 30 August 2000], English translation available on the Internet at www.cisg.law.pace.edu (sending fax and promissory note could be acts indicating acceptance, but interpretation of documents showed no such acceptance); CLOUT case No. 291 [Oberlandesgericht Frankfurt a.M., Germany, 23 May 1995] (seller’s delivery of fewer pairs of shoes than ordered was a counter-offer accepted by buyer taking delivery).

¹⁴ CLOUT case No. 292 [Oberlandesgericht Saarbrücken, Germany, 13 January 1993] (buyer’s acceptance of goods indicated assent to offer, including standard terms in letter of confirmation) (see full text of the decision).

¹⁵ CLOUT case No. 1502 [Cour de cassation, France, 27 May 2014] (order of 761.60 square metres of paving stones followed by a delivery of 800 square metres of paving stones and partial payment); Rechtbank Breda, the Netherlands, 27 February 2008, Unilex (holding that an invoice that contained general terms and conditions was accepted when the buyer paid in accordance with article 18 (1)); Supreme Court, Ukraine, 11 December 2007, English translation available on the Internet at www.cisg.law.pace.edu; Tribunal de grande instance de Strasbourg, France, 22 December 2006, English translation available on the Internet at www.cisg.law.pace.edu.

¹⁶ CLOUT case No. 193 [Handelsgericht des Kantons Zürich, Switzerland, 10 July 1996] (third party taking delivery for third party was act accepting increased quantity of goods sent by seller) (see full text of the decision).

¹⁷ CLOUT case No. 1502 [Cour de cassation, France, 27 May 2014] (order of 761.60 square metres of paving stones followed by a delivery of 800 square metres of paving stones and partial payment); Landgericht Bamberg, Germany, 13 April 2005, English Translation available on the Internet at www.cisg.law.pace.edu; CLOUT Case No. 1029 [Cour d’appel de Rennes, France, 27 May 2008], English translation available on the Internet at www.cisg.law.pace.edu.

¹⁸ Court of Arbitration of the International Chamber of Commerce, December 1998 (Arbitral award No. 8908), available on the Internet at www.unilex.info (tacit acceptance of the ordered pipes).

¹⁹ CLOUT case No. 417 [U.S. District Court, Northern District of Illinois, United States, 7 December 1999], available on the Internet at www.cisg.law.pace.edu (pleading stated a cause of action by alleging facts showing parties concluded contract of sale); CLOUT case No. 1193 [Comisión para la protección del comercio exterior de Mexico (Compromex), Mexico, 29 April 1996], English translation available on the Internet at www.cisg.law.pace.edu (letter of credit proved that the contract had been concluded).

²⁰ Cámara Nacional de Apelaciones en lo Comercial, Argentina, 14 October 1993, Unilex.

²¹ CLOUT case No. 579 [U.S. District Court, Southern District of New York, United States, 10 May 2002], 201 *Federal Supplement (2nd Series)* 236 ff.

²² District Court in Nitra, Slovakia, 27 February 2006, English translation available on the Internet at www.cisg.law.pace.edu.

²³ U.S. District Court, Southern District of Florida, United States 19 May 2008, (Zhejiang Shaoxing Yongli Printing and Dyeing Co., Ltd v. Microflock Textile Group Corporation), available on the Internet at www.cisg.law.pace.edu.

²⁴ Oberlandesgericht Innsbruck, Austria, 18 December 2007, English translation available on the Internet at www.cisg.law.pace.edu.

²⁵ CLOUT case No. 1119 [China International Economic and Trade Arbitration Commission, People’s Republic of China, 9 November 2005] (DVD machines case), English translation available on the Internet at www.cisg.law.pace.edu; Commercial Court Tongeren, Belgium, 25 January 2005, English Translation available on the Internet at www.cisg.law.pace.edu.

²⁶ Handelsgericht St. Gallen, Switzerland, 29 April 2004, English translation available on the Internet at www.cisg.law.pace.edu; CLOUT case No. 1033 [Audiencia Provincial de Murcia, Spain, 15 July 2010], English translation available on the Internet at <http://www.cisgspanish.com>.

²⁷ Landgericht Kassel, Germany, 15 February 1996, English translation available on the Internet at www.cisg.law.pace.edu (citing article 18(3)).

²⁸ Landgericht München, Germany, 6 April 2000, English translation available on the Internet at www.cisg.law.pace.edu (stating that the buyer therefore had concurrently implicitly accepted the seller’s offer).

²⁹ CLOUT case No. 309 [Østre Landsret Denmark, 23 April 1998] (parties had no prior dealings); CLOUT case No. 224 [Cour de cassation, France, 27 January 1998], English translation available on the Internet at www.cisg.law.pace.edu (without citation of the Sales Convention, court of cassation finds that court of appeal did not ignore rule that silence does not amount to an acceptance); CLOUT case No. 193 [Handelsgericht des Kantons Zürich, Switzerland, 10 July 1996] (no acceptance where addressee was silent and there was no other evidence of assent).

³⁰ CLOUT case No. 313 [Cour d’appel, Grenoble, France, 21 October 1999], English translation available on the Internet at www.cisg.law.pace.edu (in prior transactions seller had filled buyer’s without notifying the buyer); CLOUT case No. 23 [Federal District Court, Southern District of New York United States 14 April 1992] (course of dealing created duty to respond to offer); Finally, a contract cannot be assumed on the basis of silence to a letter of acknowledgement—as the Court cannot establish such a practice at the seat of the [Buyer] and as the [Seller] neither alleged nor proved such a practice at the seat of the [Buyer]—as the [Seller] failed to prove that there had been such a practice between the parties; Landgericht Gera, Germany, 29 June 2006, English translation available on the Internet at www.cisg.law.pace.edu (silence to a letter of acknowledgement does not amount to an acceptance of the contract unless practice exists at the seat of the addressee or such a practice between the parties exists); Rechtbank van Koophandel Veurne, Belgium, 19 March 2003, English

translation available on the Internet at www.cisg.law.pace.edu (silence amounts as acceptance whether an agreement of the parties, practices or a usage exist).

³¹ Gerechtshof 's-Hertogenbosch, Netherlands, 24 April 1996, Unilex; CLOUT case No. 347 [Oberlandesgericht Dresden, Germany 9 July 1998], English translation available on the Internet at www.cisg.law.pace.edu (buyer who sent commercial letter of confirmation did not establish existence of international usage by which silence constitutes assent); Rechtbank van Koophandel Veurne, Belgium, 19 March 2003, English translation available on the Internet at www.cisg.law.pace.edu (silence amounts as acceptance whether an agreement of the parties, practices or a usage exist); Bezirksgericht Sissach, Switzerland, 5 November 1998, English translation available on the Internet at www.cisg.law.pace.edu (also considering the effect of silence as an acceptance if an agreement exists). See also Opinion of Advocate General Tesauro, *EC Reports*, 1997, I-911 ff. (commercial letter of confirmation enforceable notwithstanding recipient's silence if international usage established).

³² CLOUT case No. 23 [U.S. District Court, Southern District of New York, United States, 14 April 1992]. See also CLOUT case No. 313 [Cour d'appel, Grenoble, France 21 October 1999] (seller with manufacturing samples and original material in its possession should have questioned buyer about absence of order from buyer).

³³ CLOUT case No. 120 [Oberlandesgericht Köln, Germany, 22 February 1994].

³⁴ Bezirksgericht Sissach, Switzerland, 5 November 1998, English translation available on the Internet at www.cisg.law.pace.edu (considering silence as an acceptance of a letter of confirmation by application of the good faith principle, taking into account that the seller's accepted an attached check and did not object to the letter of confirmation within a reasonable time).

³⁵ CLOUT case No. 1017 [Hof van Beroep Gent, 15 May 2002], English translation available on the Internet at www.cisg.law.pace.edu (stating, in regard to the annulment of an order, that "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").

³⁶ Rechtbank van Koophandel Veurne, Belgium, 19 March 2003, English translation available on the Internet at www.cisg.law.pace.edu ("if we do not receive a reply within seven days from today's date we shall assume that you agree with the content of the purchase agreement").

³⁷ CLOUT case No. 203 [Cour d'appel, Paris, France, 13 December 1995] (contract concluded before receipt of letter of confirmation so no acceptance of the standard terms referred to in letter).

³⁸ Arbitration Court of the International Chamber of Commerce, 1994 (Arbitral award No. 7844), *The ICC International Court of Arbitration Bulletin* (Nov. 1995) 72 73.

³⁹ Cour de Justice de Genève, Switzerland, 13 September 2002, English translation available on the Internet at www.cisg.law.pace.edu (stating, in the case of an oral offer, that CISG provides that the offer does not survive a telephone conversation).

⁴⁰ Cour de Justice de Genève, Switzerland, 13 September 2002, English translation available on the Internet at www.cisg.law.pace.edu.

⁴¹ U.S. Court of International Trade, United States, 7 April 2010 (*Pasta Zara S.p.A. v. United States, American Italian Pasta Company, et al.*), available on the Internet at www.cisg.law.pace.edu (indicating that the production of goods against the purchase orders might create binding agreements to sell, but such a course of dealing ought to be proven by evidence revealing the entire circumstances in which the parties, in practice, arranged the transactions); U.S. District Court, Eastern District of California, 21 January 2010 (*Golden Valley Grape Juice and Wine, LLC v. Centrisys Corporation et al.*), available on the Internet at www.cisg.law.pace.edu (the terms of the offer were accepted when the buyer resold the goods to a third party). CLOUT Case No. 715 [China International Economic & Trade Arbitration Commission, People's Republic of China, 15 December 1997], English translation available on the Internet at www.cisg.law.pace.edu (indicating that, in a sales transaction between Chinese and Korean parties, pursuant to article 18 (3) CISG loading the goods could have in fact meant acceptance, provided two requirements were met: (1) a notification of acceptance is sent to the buyer in writing since, when signing CISG, China had made a reservation preserving its writing requirements (article 96 CISG); and (2) such notification of acceptance is sent within a reasonable time. The Arbitration Tribunal concluded that neither the seller's shipping activity, nor the shipping notice it sent five days after shipment constituted a valid acceptance).

⁴² CLOUT case No. 416 [Minnesota [State] District Court, United States, 9 March 1999] (if Convention was applicable, party accepted by performance under article 18 (3)) (see full text of the decision); CLOUT case No. 193 [Handelsgericht des Kantons Zürich, Switzerland, 10 July 1996] (third party taking delivery of greater number of goods than had been contracted for was an acceptance under article 18 (3), but not acceptance of seller's proposal to modify price); CLOUT case No. 291 [Oberlandesgericht Frankfurt a.M., Germany, 23 May 1995] (delivery of goods could constitute an acceptance of an order under article 18 (3), but because the delivered quantity differed materially from the order the acceptance was a counter-offer under article 19); CLOUT case No. 1452 [Supreme Court, Czech Republic, 29 March 2006], English translation available on the Internet at www.cisg.law.pace.edu; Landgericht Kassel, Germany, 15 February 1996, English translation available on the Internet at www.cisg.law.pace.edu (citing article 18(3)).

⁴³ See CLOUT case No. 1107 [Highest Arbitrazh Court of the Russian Federation No. VAS-9900/10, 2 November 2010].

⁴⁴ CLOUT case No. 1516 [Oberster Gerichtshof, Austria, 13 December 2012], *Internationales Handelsrecht* 2013.