

# COMMERCIAL LETTERS OF CONFIRMATION IN INTERNATIONAL TRADE: AUSTRIAN, FRENCH, GERMAN AND SWISS LAW AND UNIFORM LAW UNDER THE 1980 SALES CONVENTION

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## I. INTRODUCTION

On April 11, 1980 the Vienna Conference of the United Nations Commission on International Trade Law (UNCITRAL) adopted the "United Nations Convention on Contracts for the International Sale of Goods"<sup>1</sup> (hereinafter referred to as the Vienna Convention, or the Convention). The Vienna Convention applies to contracts between parties of the member states involving the international sale of goods, and thus supersedes domestic law. On January 1, 1988 the Convention came into effect for the United States and ten other countries.<sup>2</sup> By August 1, 1989, the Convention will enter into effect for six other countries which ratified the Convention during 1988.<sup>3</sup> The Vienna Convention is already more successful than its predecessors; the 1964 Hague Conventions were ratified by only nine countries.<sup>4</sup>

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<sup>1</sup> UN Doc. A/Conf/97/18 Annex I (Apr. 10, 1980), GAOR, 33d Session, Supp. 35 (A/33/35) at 217; 52 Fed. Reg. 40, 6262-6280 (Mar. 2, 1987); *reprinted in* 18 I.L.M. 639-66 (1980) [hereinafter Convention, Vienna Convention, or 1980 Convention].

<sup>2</sup> Argentina, China, Egypt, France, Hungary, Italy, Lesotho, Syria, Yugoslavia and Zambia. *See* UNCITRAL Doc. UN A CN.9/304/1988 at 4.

<sup>3</sup> Austria, Finland, Mexico and Sweden (all Jan. 1, 1989); Australia (Apr. 1, 1989); Norway (Aug. 1, 1989). *See* UNCITRAL Doc., *supra* note 2, at 4 and ST-LEG-Series E 6 and 7 U.N. Treaty Section. The most recent ratifications are those by Denmark (Feb. 4, 1989) and German Democratic Republic (Feb. 22, 1989); for these two countries the Convention will enter into force on March 1, 1990.

<sup>4</sup> Convention Relating to a Uniform Law on the Formation of Contracts for the International Sale of Goods, July 1, 1964, 834 U.N.T.S. 169, [hereinafter 1964 Formation Convention] and Convention Relating to a Uniform Law on the International Sale of Goods, July 1, 1964, 834 U.N.T.S. 107 [hereinafter 1964 Sales Convention].

The commercial letter of confirmation has been widely known and used in Central Europe for more than a century. Generally speaking, a commercial letter of confirmation is a written repetition of contract terms, or a summary of contract terms, sent by one party to another about a contract which has already been concluded verbally or which has not yet been concluded.<sup>5</sup> Confirmation letters are typically employed where the parties negotiate in different ways, for example, when they exchange letters, negotiate on the telephone, send telexes and fail to reduce their final agreement to writing. One party may then issue a confirmation letter restating the agreement and, in some cases, introducing new terms or its own standard terms. Generally, the receiver's silence upon receipt of such a confirmation letter constitutes acceptance of the terms stated in the letter.

In Europe, an impressive case law has been developed on commercial letters of confirmation. This article will first compare the law on confirmation letters in the Austrian, French, German and Swiss legal systems.<sup>6</sup> Austria and France have already ratified the Convention; West Germany's ratification can be expected soon.<sup>7</sup> In its second part, this article will discuss the relationship between the domestic concepts of commercial letters of confirmation and the uniform law under the 1980 Vienna Convention. With respect to the "new" Convention, the question arises whether the "old" concept of commercial letters of confirmation marks a gap in the uniform system or whether this concept has been superseded by the Convention. This article does not favor any solution *requiring* either a "gap" or "superseding" interpretation. Rather, it proposes a framework for analyzing the confirmation letter within the Convention itself, in short, the concept of commercial letters of confirmation is applicable under the Convention, provided a respective usage of trade can be established. The framework for the application as usage of trade can be found in Article 9 (1) and (2) of the Convention. In addition, Article 19(2) of the Convention can be applied by analogy to the concept of confirmation letter, regardless of whether the concept is known in

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<sup>5</sup> K. LARENZ, ALLGEMEINER TEIL DES BÜRGERLICHEN RECHTS 663 (6th ed. 1983).

<sup>6</sup> The concept of the confirmation letter is also known in Belgium, *see generally* Ebenroth *Das kaufmännische Bestätigungsschreiben im internationalen Handelsverkehr*, 77 ZVglRWiss 162, 175, 177, (1977); Denmark, *see* Beckmann in O. SANDROCK,, 1 HANDBUCH DER INTERNATIONALEN VERTRAGSGESTALTUNG 323 (1980); Luxembourg, *see id.* at 301; and the Netherlands, *see id.* at 309. On the other hand, Italy does not recognize the concept, *see id.* at 309.

<sup>7</sup> *Bonn ratifiziert UN Kaufrecht* Handelsblatt, Aug. 5-6, 1988, at 10 (Nr. 149).

the countries where the parties are located. In this respect, even though the concept of commercial letters of confirmation is not known to American law, American merchants and lawyers would be well advised to be aware of the concept.

## II. COMMERCIAL LETTERS OF CONFIRMATION IN GERMAN, AUSTRIAN, SWISS AND FRENCH LAW

### A. German Law

#### 1. Introduction

Under German law, one party's silence in most situations signifies neither acceptance nor refusal of an offer.<sup>8</sup> In commercial transactions, however, an important exception to this basic rule is that silence after receiving a commercial letter of confirmation in many circumstances will have legal effect as an acceptance.<sup>9</sup> This exception is not codified either in the Civil Code (BGB) or in the Commercial Code (HGB).<sup>10</sup> The final content of the parties' agreement is determined by the confirmation letter unless the receiving party objects to it immediately.<sup>11</sup>

In German law, two different types of situations can be distinguished in which confirmation letters are used. This distinction is useful for the purposes of the discussion of the other three legal systems, and the situations will be referred to as situation I and situation II. In the first situation, the negotiations between the two parties lead to an agreement, concluded orally or by telephone, telex or cable. The letter of confirmation merely repeats and summarizes the agreement.<sup>12</sup> In this case, the letter serves as a clarification of what the parties previously agreed upon (situation I).<sup>13</sup>

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<sup>8</sup> BGHZ 1,353,355 (1951); D. MEDICUS, *BÜRGERLICHES RECHT* § 52 (13th ed. 1987).

<sup>9</sup> ROHG 1,76,81 (1870); RGZ 54,176,180/181 (1903); 95,48,50 (1919); BGHZ 11,1,3 (1953); *see also* text at note 46.

<sup>10</sup> A different statutory exception exists in § 362 Handelsgesetzbuch [HGB], the West German commercial code, *see* B. RÜSTER, *BUSINESS TRANSACTIONS IN GERMANY (FRG)* § 10.02(1)(1986). However, this section deals only with merchants conducting business for others, *e.g.* brokers. Since the Convention is exclusively for "contracts of sales of goods", Art. 1(1) CISG, § 362 HGB is not elaborated upon in this paper.

<sup>11</sup> K. SCHMIDT, *HANDELSRECHT*, 496-97 (3d ed. 1987); K. CAPELLE & C. CANARIS, *HANDELSRECHT* 183 (20th ed. 1985).

<sup>12</sup> MEDICUS, *supra* note 8, § 60.

<sup>13</sup> W. FLUME, *ALLGEMEINER TEIL DES BÜRGERLICHEN RECHTS* 663 (3d ed. 1979); K. LARENZ, *supra* note 5, at 633.

In the second type of situation, no final agreement has been reached, but the parties regard the contract as almost concluded ("abschlussreif"); or the content of the oral agreement is not clear; or the confirmation letter changes or contains additional clauses to the oral agreement. In these situations, the confirmation letter establishes *that* a contract was concluded and *what* its exact content is, unless the receiver objects to it.<sup>14</sup> The receiver's silence is considered as acceptance of the letter. The not yet concluded agreement is thus concluded<sup>15</sup> and the contract has the content of the confirmation letter, even if the letter differs from what was actually agreed upon orally (situation II).<sup>16</sup>

A decision of the Bundesgerichtshof (Federal Supreme Court) illustrates the impact of the second situation.<sup>17</sup> After the conclusion of the contract, one party issued a commercial letter of confirmation. In this letter, the sender only made reference to his own standard terms which were not even included in the letter or known by the receiver. These standard terms contained an arbitration clause excluding regular litigation. The receiver did not reply. Although the terms were not part of the negotiations nor of the final oral agreement, the court regarded the receiver's silence as an acceptance of the terms in the letter and held the receiver bound to it. The court held that the receiver was obliged to either object prophylactically to these terms or ask for further explanation.<sup>18</sup> Thus, under this decision, the receiver must study carefully the terms and conditions stated in the confirmation letter.

## 2. Prerequisites

In order to regard the receiver's silence as acceptance of the confirmation letter's terms, German jurisprudence requires that certain conditions be fulfilled. They will be discussed briefly.<sup>19</sup>

a. There have to be serious negotiations between the parties, leading to an agreement or almost to an agreement. In most cases, these

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<sup>14</sup> LARENZ, *supra* note 5, at 633; FLUME, *supra* note 13, at 663.

<sup>15</sup> BGHZ 7,187, 189 (1952); BGH in 23 NJW 2104 (1970).

<sup>16</sup> BGHZ 7, 187, 189; A. BAUMBACH, K. DUDEN & K. HOPT, *HANDELSGESTZBUCH* § 346(3)(A)(b) (27th ed. 1987).

<sup>17</sup> BGHZ 7, 189, 190 (1952); *see also* BGH in 23 NJW 2021 (1970); BGHZ 61,282,283 (1973).

<sup>18</sup> BGHZ 7, 187, 190-91.

<sup>19</sup> For a more comprehensive discussion, *see* BAUMBACH, DUDEN & HOPT, *supra* note 16, § 346(3)(C)(a-c) and SCHMIDT, *supra* note 11, at 510.

negotiations are in oral form, by telephone, telex or cable, and there exists no final draft of the contract.<sup>20</sup> The letter then refers to the negotiations and restates the results as a final conclusion.<sup>21</sup>

b. Since the doctrine is only applicable in commercial transactions, the *receiver* of the letter must be a merchant.<sup>22</sup>

The *sender* need not be a merchant; it is sufficient if he is involved in transactions like a merchant.<sup>23</sup>

c. To avoid being bound by the confirmation letter, the receiver must object to it or reject it immediately.<sup>24</sup> German courts are very strict with respect to the amount of time the receiver has in which to react. One week is always regarded as too late, and in one instance even a three-day delay was sufficient to bind the receiver.<sup>25</sup>

d. The sender of the letter has to act in good faith. This condition is especially important in the situations where the agreement has not yet been concluded or where the letter contains terms different from the oral agreement (situation II).

The Bundesgerichtshof held in several cases that a confirmation letter cannot change the content of the oral contract if it deviates from the original agreement to such an extent that the sender could not have reasonably expected the other party's approval.<sup>26</sup> The same is true where the contract has not yet been concluded. The sender must believe in good faith that the agreement has been concluded, except for minor points.<sup>27</sup> The receiver's silence has no effect if the negotiations did not reach the final stage ("*noch nicht abschlussreif*").<sup>28</sup> Accordingly, the requirement of good faith is used by the courts to prevent the sender from changing the contract fundamentally or deviating fundamentally from the negotiations. In almost every

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<sup>20</sup> Oberlandesgericht Düsseldorf in 1982 Der Betrieb (DB) 592; MEDICUS, *supra* note 8, § 60; BAUMBACH, DUDEN & HOPT, *supra* note 16, at § 346(3)(C)(a).

<sup>21</sup> BGH in 23 NJW 820, 820 (1972). There is, of course, no room for a confirmation letter in case the contract was concluded in written form.

<sup>22</sup> Subject to certain conditions and exceptions, see BGHZ 11,1,3 (1953).

<sup>23</sup> *Id.*; BGHZ 40,42,44 (1963).

<sup>24</sup> The legal definition of "immediately" is contained in § 121 BGB: ". . . without culpable delay (immediately) . . ." (Translation in I. FORRESTER, THE GERMAN CIVIL CODE, 1975).

<sup>25</sup> BGH in 15 NJW 246, 247 (1962); see BAUMBACH, DUDEN & HOPT, *supra* note 16, § 346(3)(C)(c).

<sup>26</sup> BGHZ 40,42,45 (1963); BGHZ 61,282,286 (1973); BGH in 38 NJW 1333, 1333 (1985).

<sup>27</sup> BGHZ 61,282,285 (1973); BAUMBACH, DUDEN & HOPT, *supra* note 16, § 346(3)(C)(a); CAPELLE & CANARIS, *supra* note 11, at 185.

<sup>28</sup> SCHMIDT, *supra* note 11, at 514.

case, however, the sender was able to introduce clauses by referring to his own standard terms such as an arbitration clause or a damage waiver.

### 3. *Legal Effect of the Confirmation Letters*

#### a. *Distinction From Other Commercial Instruments*

The commercial letter of confirmation needs to be distinguished from the other commercial instrument, the so-called order confirmation. The order confirmation, or "*Auftragsbestätigung*", is merely an acceptance of an offer or, in case it does not conform with the offer, a refusal combined with a new offer.<sup>29</sup> The order confirmation does not summarize any negotiations; rather, it is an offer or an acceptance of an offer, labeled as a "confirmation".<sup>30</sup> In this case, the sender knows that the contract has not yet been concluded and the order confirmation letter should serve to reach an agreement.<sup>31</sup>

However, it is difficult to draw a clear line of distinction between a confirmation letter and an order confirmation.<sup>32</sup> The distinction for the receiver is nonetheless crucial: his subsequent silence to the order confirmation does not constitute an acceptance but, rather, is a refusal of the offer.<sup>33</sup>

#### b. *Concept of the Confirmation Letter*

Under German jurisprudence, confirmation letters have different legal consequences, "*deklaratorische Bedeutung*" in situation I and "*konstitutive Bedeutung*" in situation II, which can be understood as "evidentiary effect" and "decisive effect", respectively.<sup>34</sup> A letter that merely repeats an oral agreement (situation I) has only evidentiary effect. The letter has no impact on the agreement, as it only functions as evidence of the formation and the content of the contract.<sup>35</sup> As

<sup>29</sup> § 150 II BGB; see RÜSTER, *supra* note 10, § 10.02(1); BAUMBACH, DUDEN & HOPT, *supra* note 16, § 346(3)(A)(a); SCHMIDT, *supra* note 11, at 508-09; c.f. Art. 19(1) CISG.

<sup>30</sup> BGH in 27 NJW 991,992 (1974) citing BGHZ 18,212,215 (1955); SCHMIDT, *supra* note 11, at 509.

<sup>31</sup> BGHZ 61,282,285 (1973).

<sup>32</sup> BGHZ 18,212,212 (1955); BGH in 27 NJW 991,992 (1974).

<sup>33</sup> BGHZ 18,212,215 (1955); 61,282,285-86 (1973); RÜSTER, *supra* note 10, § 10.02 (1).

<sup>34</sup> See FLUME, *supra* note 13, at 663; SCHMIDT, *supra* note 11, at 518 (with a different meaning of the two effects); Hefermehl in SCHLEGELBERGER, *HANDELSGESETZBUCH*, 5.A. 1976, § 346, 107.

<sup>35</sup> BGHZ 61,282,285 (1973); FLUME, *supra* note 13, at 663.

the *Bundesgerichtshof* expressly stated, the letter and the subsequent silence do not form a new contract; rather, it is presumed (*"fingiert"*) that a contract was formed having the content of the confirmation letter.<sup>36</sup> Thus, the confirmation letter restates and clarifies what the parties have agreed upon. Consequently, any errors or ambiguities that occurred during the negotiation process are eliminated. The confirmation letter prevents future litigation about the contract itself.<sup>37</sup> However, the court's presumption that the contract contains the contents stated in the letter does not exclude the presentation of any evidence to the contrary; the letter merely serves as a presumption which can be rebutted. The silent receiver bears the legal and evidentiary burden of showing that the letter is incorrect.

Where the parties have not reached a final agreement or where the content of the letter is different from the oral contract (situation II), the confirmation letter has decisive effect. The content of the confirmation letter constitutes the contract and supersedes any prior agreement.<sup>38</sup> The effect in German contract law is that the letter and the subsequent silence conclude or change the contract. The receiving party can not be heard to argue that the contract had not yet been concluded or had a different content.<sup>39</sup> Since substantive law determines the burden of proof, the receiver has to show that he is not bound by the terms in the letter. To avoid being bound, the receiver can only allege and prove that the sender did not act in good faith or that the letter deviated from the original agreement to an impermissible extent.<sup>40</sup> The receiver may also allege and prove that the parties agreed on certain terms which are not covered by the confirmation letter and which are not inconsistent with the letter's terms.<sup>41</sup>

Thus, in German law there exist three different ways of forming a contract: express offer and acceptance; performing an act indicating acceptance and making similar declarations;<sup>42</sup> and finally, silence to

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<sup>36</sup> BGHZ 40,42,46 (1963); see also SCHMIDT, *supra* note 11, at 518.

<sup>37</sup> LARENZ, *supra* note 5, at 633.

<sup>38</sup> RGZ 54,176,179 (1903); FLUME, *supra* note 13, at 663.

<sup>39</sup> SCHMIDT, *supra* note 11, at 520; von Caemmerer, *Die Ergebnisse der Konferenz hinsichtlich der Vereinheitlichung der Rechts des Abschlusses von Kaufverträgen*, 29 RABELSZ 101, 125 (1965).

<sup>40</sup> BGHZ 61,282,285 (1973); SCHMIDT, *supra* note 11, at 520.

<sup>41</sup> BGH in 1986 BETRIEBSBERATER (BB) 225,226.

<sup>42</sup> E.g. signing a contract at the same time or by performing an act indicating the acceptance (konkludentes Handeln). This can be compared to Art. 18 I,III CISG; R. HERBER, DAS WIENER UNCITRAL ÜBEREINKOMMEN 17 (1983).

a confirmation letter.<sup>43</sup> In commerce, the confirmation letter doctrine clearly serves to obviate a time-consuming drafting process. In contrast to an exchange of several documents, the issuance of one letter is sufficient to form a contract, thus saving time and costs for merchants.

There is, however, criticism of this extensive application of the decisive effect of confirmation letters. The decisive effect is open to misuse by a sender who introduces standard terms favorable for himself after the contract is concluded.<sup>44</sup> Therefore, some commentators posit that parties should not have the power by confirmation letters either to conclude or to change an agreement. These commentators suggest that confirmation letters be given only evidentiary effect.<sup>45</sup> In practical terms, the letter's effect is in any event important if produced as evidence. Whether the letter merely repeats the already-concluded contract, or itself concludes or modifies a contract, it can be and is produced as evidence of contractual terms in courts.

*c. Source of the concept: Usage of trade or rule of law?*

There is disagreement over whether the doctrine of confirmation letters results from usage of trade or is instead a substantive rule of law.<sup>46</sup> To avoid confusion over terminology, usage of trade, for purposes of this article, has legal effect only when it is established as a question of fact in the individual case.<sup>47</sup> The usage might be different, depending upon the particular trade concerned. In contrast, a rule of law applies without regard to the current practices proven for the particular case.

The *Bundesoberhandelsgericht* and its successor, the *Reichsoberhandelsgericht*,<sup>48</sup> based the concept of the confirmation letter on usage

<sup>43</sup> U. Huber, *Der UNCITRAL Entwurf eines Übereinkommens über internationale Warenkaufverträge* 43 RABELSZ 413, 449 (1979).

<sup>44</sup> SCHMIDT, *supra* note 11, at 507; CAPELLE & CANARIS, *supra* note 11, at 182; K. Batsch, *Abschied vom sogenannten kaufmännischen Bestätigungsschreiben?*, 33 NJW 1731, (1980), would restrict the decisive effect, especially with regard to a modification of the contract through an extensive interpretation and application of § 4 AGBG (Standard Terms Act).

<sup>45</sup> Kramer in *Münchener Kommentar zum Bürgerlichen Gesetzbuch*, vol. I, *Allgemeiner Teil*, (2d. ed. 1984), § 151, 20; A. Oßwald, *Der sogenannte Vertragsschluß durch kaufmännisches Bestätigungsschreiben*, Diss. Bonn 1972, S.271 ff.

<sup>46</sup> See Huber, *supra* note 43, at 448; FLUME, *supra* note 13, at 666; SCHMIDT, *supra* note 11, at 497 (questioning the distinction between usage of trade and customary law).

<sup>47</sup> Junge in H. DÖLLE, *KOMMENTAR ZUM EINHEITLICHEN KAUFRECHT* 1976, Art. 9, 23 describing that this approach is adopted in almost every major legal system.

<sup>48</sup> The *Bundesoberhandelsgericht* (BOHG) was founded in June 12, 1869 and



of trade.<sup>49</sup> The *Reichsoberhandelsgericht* readily developed the concept as a matter of case law.<sup>50</sup> Its successor, the *Reichsgericht*, referred to the usage of trade under Section 346 of the Commercial Code and to the decisions of the *Reichsoberhandelsgericht*.<sup>51</sup> Under the *Reichsgericht* case law, silence upon receiving a confirmation letter had legal effect.<sup>52</sup> The *Bundesgerichtshof* refers only to the "principle developed by jurisprudence and scholars"<sup>53</sup> as the basis for stating the rule that silence upon a confirmation letter constitutes acceptance.

The concept today is a rule of law which was developed by the jurisprudence of the courts.<sup>54</sup> The concept no longer depends in each case on proof of actual usage. Rather it is a rule of substantive law ("*objektives Recht*") that binds the silent receiver of a confirmation letter to its terms.<sup>55</sup>

### B. Austrian Law

In Austria, too, neither the Civil Code (ABGB) nor the Commercial Code (HGB) codified the effect of silence after receiving a confirmation letter. For a long time, the Austrian jurisprudence followed the German doctrine of the confirmation letter.

In commercial matters, Austrian courts regarded the receiver's silence to a confirmation letter as an acceptance in cases where no agreement had been reached or where the letter modified the contract.<sup>56</sup> Austrian law accepted - to use the German category - the

located in Leipzig. It had jurisdiction for, inter alia, commercial transactions under the 1862 Commercial Code (ADHGB). In 1871, after the foundation of the Deutsches Reich, the BOHG was renamed *Reichsoberhandelsgericht* (ROHG). The ROHG itself was dissolved in 1879 into the *Reichsgericht* (RG). See generally 1 ERLER, 2 HANDWÖRTERBUCH ZUR DEUTSCHEN RECHTSGESCHICHTE 536, 537 (1971); *id.* at 714, 715 (1986).

<sup>49</sup> ROHG 1,76,80 *et seq.* (1870).

<sup>50</sup> ROHG 1,76,81 (1870); 15,94,96 (1874); see RGZ 54,176,180 (1903) with reference to holdings of ROHG 15,94,97; 16,41 *et seq.*; 22,130 *et seq.*

<sup>51</sup> RGZ 54,176,180 (1903); § 346 HGB: "Among merchants, due consideration shall be given to prevailing customs and usages concerning the significance and effect of actions and omissions." (Translation in Rüster, *supra* note 10, App. 2-72)

<sup>52</sup> RGZ 95,46,51 (1919); 103,401,405 (1922); see also SCHMIDT, *supra* note 11, at 497.

<sup>53</sup> BGHZ 40,42,45 (1963).

<sup>54</sup> SCHMIDT, *supra* note 11, at 497; Hefermehl, *supra* note 34, § 346, para. 107; FLUME, *supra* note 13, at 665-66.

<sup>55</sup> SCHMIDT, *supra* note 11, at 497.

<sup>56</sup> Rummel in P. RUMMEL, KOMMENTAR ZUM ABGB § 861, para. 13 (1983); § 861,13; B. Pfister, *Rechtswirkungen des kaufmännischen Bestätigungsschreibens nach österreichischem Recht*, 1977 RIW 530, 531.

decisive effect of the confirmation letter.<sup>57</sup> In 1970, the *Oberste Gerichtshof*, the highest civil court, bound the receiver to the contents of a confirmation letter modifying the earlier agreement because the receiver had not objected to the letter. The court held that the letter had decisive effect (“*rechtserzeugende Wirkung*”)<sup>58</sup> and therefore superseded any oral agreement.<sup>59</sup> This decision was in line with the court’s holdings over sixty years.<sup>60</sup>

In 1974, however, the *Oberste Gerichtshof* bowed to criticism of the Austrian doctrine and overruled its traditional jurisprudence.<sup>61</sup> In this case, the sender tried to introduce a clause after the contract had been concluded orally. The clause, which was not discussed during the negotiations, imposed a penalty on the receiver in the event he was in delay. The court held that the parties’ oral agreement, and not the confirmation letter issued unilaterally by one party, constituted the contract. The court expressly declined to give any decisive effect to the confirmation letter. It held that if the confirmation letter differs from the oral agreement and itself concludes the contract or by adding a clause to the contract, then the receiver’s silence is not regarded as acceptance and he is not bound by the contents of the letter.<sup>62</sup> In light of this landmark 1974 decision, Austrian law differs in this significant respect from German law. The court left unresolved the question of whether the confirmation letter has any effect if it is not contradictory to the oral agreement.

In 1977, the court reaffirmed its 1974 decision. In this 1977 case a buyer tried to include a clause enabling him to reduce the price by a certain amount for each day the seller delayed. The court refused

<sup>57</sup> F. Bydlinski, *Das allgemeine Vertragsrecht* in *DAS UNCITRAL KAUFRECHT IM VERGLEICH ZUM ÖSTERREICHISCHEN RECHT: SYMPOSIUM IN BADEN BEI WIEN 1983*, 57, 82 (P. Doralt ed. 1985) [hereinafter *BADEN-SYMPOSIUM*].

<sup>58</sup> This is the Austrian equivalent of the “*konstitutive Bedeutung*” or decisive effect.

<sup>59</sup> OGH in 92 JBL 478,479 (1970)

<sup>60</sup> H. Hämmerle, *Kaufmännische Bestätigungsschreiben* in *REFORMEN DES RECHTS, FESTSCHRIFT DER UNIVERSITÄT GRAZ*, 291-99, at 294-96 (1979), listing the court’s decisions; Pfister, *supra* note 56, at 531.

<sup>61</sup> OGH in 97 JBL 89,90 (1975), (citing F. BYDLINSKI, *PRIVATAUTONOMIE UND OBJEKTIVE GRUNDLAGEN DES VERPFLICHTENDEN RECHTSGESCHÄFTES* 167 *et seq.* (1967) [hereinafter *PRIVATAUTONOMIE*]; F. Bydlinski, *Anmerkung zum Urteil OGH in 92 JBL 478(1970)*, 92 JBL 478 (1970); and Wahle in H. Klang, *Kommentar zum Allgemeinen Bürgerlichen Gesetzbuch*, vol. IV 2 (2d ed. 1978) (Lfg. 1965) at 39 *et seq.*).

<sup>62</sup> OGH in 97 JBL 89,91 (1975). The situations the court pointed out are those described in situation II.

to regard this clause as a part of the contract even though the seller did not object to it.<sup>63</sup>

Although the court might have reached the same result under the traditional rule,<sup>64</sup> the court repeated its 1974 statement that the security and efficacy of commercial transactions require that an oral agreement cannot be modified by a confirmation letter that is the act of only one party.<sup>65</sup> The Austrian commentators accepted the new jurisprudence and adopted the shift.<sup>66</sup> A letter of confirmation followed by the receiver's silence no longer has decisive effect.<sup>67</sup> Questions about whether the sender acts in good faith or whether the modification is of major or minor importance are no longer determinative. The crucial inquiry is whether the modification is contradictory to the oral agreement.<sup>68</sup> As an additional consequence, the confirmation letter no longer has the effect of concluding a contract.<sup>69</sup>

The *Oberste Gerichtshof* has not answered the question of whether the confirmation letter followed by silence has any effect when it is not contradictory to the agreement. It has been suggested that in this situation the silence should be treated as an acceptance.<sup>70</sup> Some commentators have attempted to limit the application of this exception to only those cases where the letter interprets contractual conditions. The parties must have discussed the conditions and must have either left the interpretation open or left it to the discretion of one party. In this exceptional case, the receiver's obligation to respond derives from usage of trade (Section 346 HGB), and in case of his silence he is bound to the interpretation in the letter.<sup>71</sup>

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<sup>63</sup> OGH in 99 JBL 593,594 (1977).

<sup>64</sup> Ebenroth, *supra* note 6, at 163; Beckmann, *supra* note 6, at 327.

<sup>65</sup> OGH in 99 JBL 593,594 (1977).

<sup>66</sup> Bydlinski, *Die Entmythologisierung des "kaufmännischen Bestätigungsschreibens" im österreichischen Recht* in Festschrift für Werner Flume zum 70 Geburtstag (H-H Jakobs ed. 1978) 335-57, at 340 *et seq.*; *Baden-Symposium*, *supra* note 57, at 82; Hämmerle, *supra* note 60, at 298; Rummel in Rummel, *supra* note 56, § 861, para. 13; H. HÄMMERLE & H. WÜNSCH, *HANDELSRECHT*, vol. 3, (3d ed. 1979), at 35 *et seq.*; H. KOZIOL & R. WELSER, *GRUNDRISS DES BÜRGERLICHEN RECHTS* vol. 1, 83 (7th ed. 1985).

<sup>67</sup> HÄMMERLE & WÜNSCH, *supra* note 66, at 36; *PRIVATAUTONOMIE*, *supra* note 61, at 202.

<sup>68</sup> OGH in 97 JBL 89, 91 (1975); Hämmerle, *supra* note 60, at 299; *PRIVATAUTONOMIE*, *supra* note 61, at 202.

<sup>69</sup> *PRIVATAUTONOMIE*, *supra* note 61, at 202.

<sup>70</sup> *PRIVATAUTONOMIE*, *supra* note 61, at 203; Wahle, *supra* note 61, at 42; HÄMMERLE & WÜNSCH, *supra* note 66, at 36.

<sup>71</sup> *PRIVATAUTONOMIE*, *supra* note 61, at 207.

Only the decisive effect has been eliminated in Austrian law. The confirmation letter still has evidentiary character: an orally concluded contract can be restated in the confirmation letter. The letter then serves as evidence of the content of the contract, without excluding the right to produce evidence to the contrary.<sup>72</sup>

### C. *Swiss Law*

Due to the strong influence of German jurisprudence, Swiss law treats similarly to German law a person's silence upon receipt of a confirmation letter.<sup>73</sup> The Swiss recognition of the letter's effect is based upon an analogy with Article 6 OR<sup>74</sup> or on Article 6 OR in conjunction with the principle of good faith.<sup>75</sup>

However, there are differences between German and Swiss law which can be demonstrated through the two situations identified above. Swiss law accepts the evidentiary effect when a confirmation letter only repeats the oral agreement (situation I).<sup>76</sup> The subsequent silence has no legal effect since the letter serves only as evidence of the sender's opinion of what the parties agreed upon.<sup>77</sup> The receiver, in order to avoid being bound to the letter's terms, may present contrary evidence showing that the letter does not correctly restate the oral contract.<sup>78</sup>

In 1945, the *Schweizerische Bundesgericht*, the highest civil court, considered the situation in which a confirmation letter varied from the oral agreement.<sup>79</sup> The court held that in this situation the con-

<sup>72</sup> Bydlinski, *BADEN-SYMPOSIUM*, *supra* note 57, at 82; Hämmerle, *supra* note 60, at 298.

<sup>73</sup> *Picard Frères v. Hofmehl*, BGE 30 II 298 (1904) referring to ROHG 1,76 (1871); *Habegger v. Kuhn*, BGE 71 II 223,223 (1945); Ebenroth, *supra* note 6, at 177; Beckmann, *supra* note 6, at 325.

<sup>74</sup> See *Hartley & Martin Etablissement v. Eschler*, BGE 100 II 18,22 (1974); 1 P. VON TUHR, *ALLGEMEINER TEIL DES SCHWEIZERISCHEN OBLIGATIONENRECHTS*, 189 (3d ed. 1980); *Art.6 OR*: "Where, due to the particular nature of the transaction, or due to the circumstances, express acceptance is not to be expected, the contract is deemed to be concluded if the offer is not declined within reasonable time." (translation in Swiss - American Chamber of Commerce, *Swiss Contract Law*, 1977).

<sup>75</sup> T. GUHL, H. MERZ & M. KUMMER, *DAS SCHWEIZERISCHE OBLIGATIONENRECHT* 98 (1980).

<sup>76</sup> Guinand, *L'offre et l'acceptation*, in *Premières journées juridiques yougoslavo - suisses*, 197-207 at 204/205 (1984); E. BUCHER, *SCHWEIZERISCHES OBLIGATIONENRECHT, ALLGEMEINER TEIL OHNE DELIKTSRECHT* 122 (1979).

<sup>77</sup> Guinand, *supra* note 76, at 205.

<sup>78</sup> GUHL, MERZ & KUMMER, *supra* note 75, at 98; BUCHER, *supra* note 76, at 122.

<sup>79</sup> *Habegger*, BGE 71 II 223,223 (1945). Compare situation II.

firmation letter has not only evidentiary but also decisive effect. The court regarded the letter as an offer and the subsequent silence as the acceptance.<sup>80</sup> As in German law, the sender must act in good faith. If he changes the contract knowingly, or knowingly states an agreement which was not concluded, then he is not acting in good faith and the receiver's silence has no effect.<sup>81</sup>

Although the *Habegger* decision has not been overruled, Swiss commentators are very critical of giving decisive effect to the recipient's silence when the confirmation letter changes an oral contract. This criticism is based on an *obiter dictum* of the *Bundesgericht* itself in *Hartley & Martin Etablissement*.<sup>82</sup> In this case, the *Bundesgericht* addressed the issue of whether a confirmation letter could conclude by "confirmation" a contract which had not yet been concluded. The court held that the letter did not have this effect because in this particular situation the usage of trade required a written contract.<sup>83</sup> However, the court said in *obiter dictum* that even in commercial transactions it doubted that the receiver's silence could be regarded as acceptance where only negotiations had taken place.<sup>84</sup>

The Swiss commentators base their criticism of decisive effect on Article 6 OR, which has to be interpreted in the light of the principle of good faith.<sup>85</sup> Thus, it is argued, any clause or condition introduced for the first time in the confirmation letter is not part of the contract, and the letter does not conclude the contract even if the receiver does not object.<sup>86</sup> The silence only shows the receiver's opinion that the confirmation letter reflects the concluded contract correctly. Hence, he is bound to the terms of the letter and bears the burden to disprove them.<sup>87</sup>

Thus, recent commentaries would abolish any decisive effect; a confirmation letter and subsequent silence should not change a prior

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<sup>80</sup> *Id.*

<sup>81</sup> *Id.*; GUHL, MERZ & KUMMER, *supra* note 75, at 98; H. OTTO, ALLGEMEINE GESCHÄFTSBEDINGUNGEN UND INTERNATIONALES PRIVATRECHT 8 (1984); Guinand, *supra* note 76, at 205.

<sup>82</sup> GUHL, MERZ & KUMMER, *supra* note 75, at 98; Guinand, *supra* note 76, at 206; Stoffel, *Formation du contract in THE 1980 VIENNA CONVENTION ON THE INTERNATIONAL SALE OF GOODS, LAUSANNE COLLOQUIUM OF 1984*, 55, 67, 68 (1985); *see also*, Bydlinski, BADEN SYMPOSIUM, *supra* note 57, in n.76.

<sup>83</sup> *Hartley & Martin Etablissement*, BGE 100 II 18,22/23 (1974).

<sup>84</sup> *Id.*; *see* Ebenroth, *supra* note 6, at 179; Guinand, *supra* note 76, at 205.

<sup>85</sup> GUHL, MERZ & KUMMER, *supra* note 75, at 98.

<sup>86</sup> *Id.*; Stoffel, *supra* note 82, at 68.

<sup>87</sup> GUHL, MERZ & KUMMER, *supra* note 75, at 98.

agreement.<sup>88</sup> This strong opposition to *Habegger*, and the *obiter dictum* in *Hartley & Martin Etablissement* indicate that *Habegger* will probably be overruled in the future.

#### D. French Law<sup>89</sup>

Under French law an acceptance cannot, as a general rule, be based on the party's silence following an offer.<sup>90</sup> In 1870, the *Cour de Cassation*, the highest civil court, held that mere silence is not sufficient to bind a party; that silence can be regarded as an acceptance only if certain circumstances are fulfilled.<sup>91</sup> It is often held, under this so called *silence circonstancié* theory<sup>92</sup> that silence equals acceptance in commercial transactions.<sup>93</sup>

Although French law does not recognize a specific doctrine of commercial letters of confirmation, one party's failure to respond to a letter of another party is treated under the *silence circonstancié* theory. The silence constitutes acceptance of the terms contained in the letter because the receiver has an obligation to respond to a confirmation letter ("*lettre de confirmation*").<sup>94</sup> The obligation derives from usage between the parties or usage of trade ("*coutume commerciale*").<sup>95</sup>

However, French Courts draw a distinction between letters which only interpret an already-concluded contract ("*lettre interprétative*")

<sup>88</sup> *Id.*; Stoffel, *supra* note 82, at 68; Guinand, *supra* note 76, at 206.

<sup>89</sup> The law in Belgium and Luxembourg is identical to French law with respect to confirmation letters. See Beckmann, *supra* note 6, at 299, 301.

<sup>90</sup> Breton in ENCYCLOPEDIE DALLOZ, DROIT CIVIL FRANCAIS, "consentement" no.39; B. STARK, H. ROLAND & L. BOYER, DROIT CIVIL, OBLIGATIONS 2, CONTRACT ET QUASI - CONTRACT, (2d ed. 1986) § 136; H. MAZEAUD, L. MAZEAUD & M. JUGLART, LECONS DE DROIT CIVIL, vol. II-1, LES OBLIGATIONS (5th ed. 1973) § 137.

<sup>91</sup> Cass. civ., 25.5.1870, Dalloz 1870,1,p.257: "... le silence de celui qu'on pretend obligé, ne peut suffire en l'absence de toute autre circonstance pour faire preuve contre lui de l'obligation alléguée."; see also Barfuss, *Die Einbeziehung Allgemeiner Geschäftsbedingungen in den Vertrag nach französischem Recht*, 1975 RIW/AWD 319-328, at 322.

<sup>92</sup> Breton, *supra* note 90, at no. 40; 1 M. FERID, DAS FRANZÖSISCHE ZIVILRECHT 261, 272 (1971); Ebenroth, *supra* note 6, at 173; H. SONNENBERGER, FRANZÖSISCHES HANDELS- UND WIRTSCHAFTSRECHT, No. 12 (1975).

<sup>93</sup> Breton, *supra* note 90, at no. 43; SCHMIDT & Niggemann, *Die Vereinbarung von Allgemeinen Geschäftsbedingungen durch stillschweigende Vereinbarung nach französischem Recht*, 1974 RIW/AWD 309, at 310.

<sup>94</sup> Breton, *supra* note 90, at no. 44; STARK, ROLAND & BOYER, *supra* note 90, § 143; OTTO, *supra* note 81, at 29; Beckmann, *supra* note 6, at 298.

<sup>95</sup> E.g. Cass. com. 9.1.1956, 1956 Bull. Civ. III no.17, p.14; STARCK, ROLAND, BOYER, *supra* note 90, § 143; Beckmann, *supra* note 6, at 298; Barfuss, *supra* note 91, at 323.

and those which make an important modification to a contract (“*lettre modificative*”).<sup>96</sup> What constitutes a *modification importante* is not generally defined, but is determined case by case. The legal effect of the distinction is quite important: only silence upon receiving a *lettre interpretative* constitutes acceptance. An important modification cannot be achieved by a confirmation letter.<sup>97</sup>

The French case law on the subject demonstrates that there is no consistent doctrine in French law. In 1961, the *Cour de Cassation* held that an arbitration clause was binding for the silent party, although it was introduced for the first time in a confirmation letter after the contract was concluded, and was not a product of the negotiation process.<sup>98</sup> Likewise, in 1966 a party was held bound to standard terms which were introduced by the sender of a letter after the contract was concluded.<sup>99</sup> In the same line is a decision of the *Cour d’Appel de Paris* which bound the silent party to an arbitration clause included in the seller’s bill.<sup>100</sup>

On the other hand, the *Cour de Cassation* held in 1972 that the receiver’s silence after receiving a letter which introduced a jurisdiction clause does not modify the agreement.<sup>101</sup> In contrast to the decisions in 1962 and 1966, the court regarded the clause as an important modification so that the silence did not have any legal effect. Similarly, in 1973 the court found a party not bound by a jurisdiction clause that was introduced after the contract was concluded.<sup>102</sup> Although the parties were not involved in commercial transactions, the commentators extended the holding to commercial papers and argued that the holding would prevent any attempts to bind the other party to a jurisdiction clause which had been introduced after the conclusion of the contract.<sup>103</sup> These cases, which are more restrictive than those

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<sup>96</sup> OTTO, *supra* note 81, at 30; Beckmann, *supra* note 6, at 298.

<sup>97</sup> OTTO, *supra* note 81, at 30; Beckmann, *supra* note 6, at 298.

<sup>98</sup> Cass. com., 17.10.1961, Recueil Dalloz Sirey 1962 p.106; it is interesting to note that the court was concerned with the same facts as the German Bundesgerichtshof in 1952 (BGHZ 7,187 (1952)). In both cases, the courts held the receiver bound to the clauses in the letter.

<sup>99</sup> Cass. Com., 6.6.1966, 1966 Bull. Civ. II no. 737 p. 519, 520; Breton, *supra* note 90, at no. 44.

<sup>100</sup> Cour d’Appel de Paris, 14.1.75, holding in: 1976 RIW/AWD 304.

<sup>101</sup> This clause was a “clause d’attributive de jurisdiction au tribunal de commerce.” Cass. com., 7.2.1972, 1972 Bull. Civ. IV no. 48, p.47 *et seq*; see also Rouen, 1.4.1971, Recueil Dalloz Sirey 1971, Somm. p. 126.

<sup>102</sup> Cass. Civ., 5.12.1973, Recueil Dalloz 1974, p.398, 399.

<sup>103</sup> H. Solus & R. Perrot in Recueil Dalloz 1974, p.399, 400.

from 1962 and 1966, are cited by commentators to demonstrate the negative attitude of the French courts to regarding silence to a confirmation letter as an acceptance.<sup>104</sup>

Thus, within the limitation of the important modification, French law recognizes the decisive effect of confirmation letters. However, there is disagreement between the courts about whether some types of clauses fall into one category or the other. While some courts regarded arbitration and jurisdiction clauses as an important modification, other courts did not.

### III. THE RELATIONSHIP BETWEEN THE VIENNA CONVENTION AND THE COMMERCIAL LETTER OF CONFIRMATION

So far, the concept of the commercial letter of confirmation has been elaborated without drawing any distinction between national and international transactions. But, of course, merchants use confirmation letters in international trade, too.

Under the Vienna Convention, the question arises whether the respective domestic law applicable to a contract governs the effect of silence upon a confirmation letter or whether the Convention itself is solely applicable. To answer this question, it is necessary to explore the Convention and its relationship to domestic concepts of the confirmation letter.

The Convention itself contains guidelines for its interpretation. According to Article 7(1) CISG, three considerations must guide the interpretation of the Convention: (1) the Convention's international character; (2) the need to promote uniformity in its application; and (3) the observance of good faith in international trade. The courts are directed by Article 7(1) CISG to settle any question "in conformity with the general principles" on which the Convention is based. This article examines the relationship between the Convention, as an international treaty, and domestic law. Therefore, the analysis is also governed by customary international law as it is now codified in the Vienna Convention of the Law of the Treaties of May 1969.<sup>105</sup>

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<sup>104</sup> SONNENBERGER, *supra* note 93, at 12; Mezger, *Gerichtsstands- und andere Klauseln im Geschäftsverkehr mit Frankreich*, 1974 RIW/AWD 377, at 378 n.12.

<sup>105</sup> The Vienna Convention on the Law of the Treaties of 1969, 1155 U.N.T.S. 331, entered into force Jan. 27, 1980. See J. HONNOLD, *UNIFORM LAW FOR INTERNATIONAL SALES* § 103 (1982), as to the relationship between the 1969 Treaty Convention and Art. 7 CISG. See A. VERDROSS & B. SIMMA, *UNIVERSELLES VÖLKERRECHT* § 775 (1985), as to the relationship between customary international law and the Vienna Treaty Convention.



### A. *Wording of the Sales Convention*

Part II of the Convention deals with the formation of contracts. Article 18 (1) CISG, which deals with the effect of silence, expressly provides that "silence or inactivity does not in itself amount to acceptance." Although Articles 18 (3) and 19 CISG constitute exceptions to this general rule, the commercial confirmation letter is not addressed in either of these Articles.

Unlike the preparatory work<sup>106</sup> to the 1964 Sales and Formation Conventions<sup>107</sup>, the *travaux préparatoires* to the Vienna Convention address the confirmation letter only briefly.<sup>108</sup> The issue was mentioned in the context of Article 7(2) - former Article 6 of the 1978 Draft Convention - and served only as an example. The Italian representative used it as a demonstration of a 'gap' in the Convention where domestic law applies. In his view, the applicable domestic law would be the law of the seller's place of business.<sup>109</sup> The argument could therefore be made that the Vienna Conference agreed that in the case a failure to reply to a confirmation letter, domestic law should govern the formation of the contract rather than the regime of the Convention. However, since this interpretation is not clear, a positive conclusion cannot be drawn. Thus, under the general rule stated in Article 18 (1) CISG, silence upon a confirmation letter has no effect.

### B. *The Controversy*

The Convention neither expressly regulates silence upon receiving a letter of confirmation nor excludes it from its regulatory scheme. Since 1978, there has been a widespread controversy about whether or not the confirmation letter is covered by the context of the Convention.<sup>110</sup>

#### 1. *Ulrich Huber's approach*

Huber,<sup>111</sup> in examining the 1978 Draft Convention, concentrated on the question of whether the rules in the Convention on the

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<sup>106</sup> For the relevance of the *travaux préparatoires* see Art. 32 of the Vienna Treaties Convention, and VERDROSS & SIMMA, *supra* note 105 at § 779.

<sup>107</sup> Schlechtriem in DÖLLE, *supra* note 47, Art. 6 EAG, 36; von Caemmerer, *supra* note 39, at 125 *et seq.*

<sup>108</sup> A/Conf.97/C.1/SR.5 sub.18(=O.R.p.256)

<sup>109</sup> *Id.*

<sup>110</sup> See Arts. 31 (1), (2) of the Vienna Law of the Treaties Convention on the importance of the context of an international treaty.

<sup>111</sup> Professor of Law, University of Bonn, West Germany.

formation of contracts are comprehensive or whether gaps exist requiring the application of domestic law. If the Convention is comprehensive, then it alone should govern the effect of a failure to respond to a confirmation letter. A gap in application must be bridged by applicable domestic law.<sup>112</sup>

Huber denies that the confirmation letter is an offer under Article 14 CISG, and he does not regard the letter as a usage of trade. He assumes the existing German concept<sup>113</sup> of forming a contract through silence upon a confirmation letter to be a rule of law which might be superseded by the Convention.<sup>114</sup>

However, Huber denies the exclusive applicability of the Convention's rules. As support for the nonexclusivity of the Convention, Huber compares the methods of contract formation under the Convention with corresponding rules in German law. German law recognizes three different forms of concluding a contract.<sup>115</sup> The Convention, however, regulates only formation of a contract through offer and acceptance (Article 23 CISG). Huber concludes that the formation rules of the Convention are not comprehensive. In addition, a unification of law with respect to contract formation through silence upon receipt of a confirmation letter was not chosen. Therefore, neither should some countries abolish the concept nor should others be forced to adopt it.<sup>116</sup>

Huber suggests that this existing gap in the Convention should be bridged by domestic law and not by uniform rules. The applicable domestic law should be the silent party's law. This approach would be fair and, in addition, favor the foreign party.<sup>117</sup>

## 2. *Peter Schlechtriem's Approach*

Slechtriem<sup>118</sup> regards Huber's solution as a fragmentation of the law governing contract formation, which fragmentation is prohibited

<sup>112</sup> Huber, *supra* note 43, at 447.

<sup>113</sup> See *supra* note 36 and accompanying text.

<sup>114</sup> *Id.* at 448; see HERBER, *supra* note 42, at 18.

<sup>115</sup> See *supra* note 36.

<sup>116</sup> Huber, *supra* note 43, at 449; see also Dilger, *Das Zustandekommen von Kaufverträgen im Aussenhandel nach internationalem Einheitsrecht und nationalem Sonderrecht*, 45 RABELSZ 169, 181 (1981).

<sup>117</sup> Huber, *supra* note 43, at 449; Dilger, *supra* note 116, at 181; on the question of the applicable law in the case of confirmation letters, (the law of the silent party) see BGH in IPR Rspr. 1970 Nr. 133; BGHZ 57,72,77 (1971); Lüderitz in H. SOERGEL & W. SIEBERT, *BÜRGERLICHES GESETZBUCH, EINFÜHRUNGSGESETZ* Art. 7, no. 280 (11th ed. 1984); Beckmann *supra* note 6, at 269, 270.

<sup>118</sup> Professor of Law, University of Freiburg, West Germany.

by the unification purpose of Article 7(1) CISG.<sup>119</sup> According to Schlechtriem, the entire process of contract formation is governed by the Convention. He bases his solution on whether and to what extent the confirmation letter has effect under Article 9(2).<sup>120</sup> He compares Article 9 CISG with the 1964 Convention on the Formation of the Contracts (ULF) under which the German concept of the confirmation letter has effect as usage of trade in the sense of Articles 2,6,13 ULF.<sup>121</sup> Unlike Article 2 ULF, the Convention limits the effect of the confirmation letter in Article 9(2) CISG<sup>122</sup> to situations where “. . . the relevant business customs exist *between the parties* of that *particular branch of trade* . . .”.<sup>123</sup> Thus, Schlechtriem would give effect to the receiver's silence only within the the limits of Article 9(2) CISG, an approach accepted by many commentators.<sup>124</sup>

### 3. *Franz Bydlinski's and W.A. Stoffel's approach*

In contrast to Huber, Bydlinski<sup>125</sup> and Stoffel<sup>126</sup> regard the Convention's rules on the formation of the contract (part II) as exhaustive, with the result that the conclusion of the contract is limited to offer and acceptance as Article 23 CISG provides.<sup>127</sup>

Bydlinski and Stoffel propose a twofold solution. First, both would give legal effect to silence upon receiving a confirmation letter within the strict limitations of either Article 9(1)<sup>128</sup> or Article 9(2) CISG<sup>129</sup>.

<sup>119</sup> P. SCHLECHTRIEM, *UNIFORM SALES LAW* 57 (1986).

<sup>120</sup> *Id.*

<sup>121</sup> *Id.* at 57. On the 1964 Formation Convention, see *infra* text accompanying note 135; Schlechtriem in DÖLLE, *supra* note 47, at 36; and von Caemmerer, *supra* note 39, at 125.

<sup>122</sup> As to Art. 9 CISG as a compromise between different approaches to usage of trade, see SCHLECHTRIEM, *supra* note 119, at 41; HONNOLD, *supra* note 105, §§ 114, 118, 121; F. ENDERLEIN, D. MASKOW & M. STARGARDT, *KAUFRECHTSKONVENTION DER UNO (MIT VERJÄHRUNGSKONVENTION), KOMMENTAR* 54, 55 (1985) (point of view of the socialist countries); M. Bonell, *Die Bedeutung der Handelsbräuche im Wiener Kaufrechtsübereinkommen von 1980*, 103 JBL 385 (1985); Bonell, in M. BIANCA & M. BONELL COMMENTARY ON THE INTERNATIONAL SALES LAW. THE 1980 VIENNA SALES CONVENTION, 103-15, at 105,110 (1987).

<sup>123</sup> SCHLECHTRIEM, *supra* note 119, at 57 (emphasis added).

<sup>124</sup> Bydlinski, BADEN-SYMPOSIUM, *supra* note 57, at 80; HERBER, *supra* note 42, at 18; OTTO, *supra* note 81, at 141; Stoffel, *supra* note 82, at 68; Bonell, *supra* note 122, at 390.

<sup>125</sup> Professor of Law, University of Vienna, Austria.

<sup>126</sup> Vice-Directeur de l'Institut Suisse de Droit Comparé, Lausanne, Switzerland.

<sup>127</sup> Stoffel, *supra* note 82, at 67, 68; see also Bydlinski, BADEN-SYMPOSIUM, *supra* note 57, at 79.

<sup>128</sup> Stoffel, *supra* note 82, at 68.

<sup>129</sup> Bydlinski, BADEN-SYMPOSIUM, *supra* note 57, at 79-80.

In this respect, they follow Schlechtriem and emphasize that the particular branch of trade must use confirmation letters and must accept that silence means acceptance.<sup>130</sup> Moreover, Bydlinski points out that a confirmation letter followed by silence might be treated as a modification of an already existing contract. The formation rules as well as Article 19(2) CISG should govern this modification. Article 19(2) CISG should limit the possibility of modifying the contract through the confirmation letter, because it allows the reply only to vary minimally from the offer.<sup>131</sup> Second, both commentators would treat the confirmation letter and the subsequent silence under the Convention as a declaration serving as evidence of the conclusion and content of the contract, without precluding, however, the production of evidence to the contrary.<sup>132</sup>

#### 4. *Treatment of the confirmation letter under the 1964 Convention*

The 1964 Formation Convention (ULF), like the Vienna Convention, relied on the principle that a contract is concluded by offer and acceptance. Article 6(1) ULF defines an acceptance as "a declaration communicated whatsoever to the offeror." This wording excludes mere silence, in the sense of inactivity, as acceptance.<sup>133</sup> According to Article 2(2) ULF the offeror cannot himself stipulate that silence means acceptance. Thus, neither the 1980 Convention (in Article 18(1)(2)) nor the 1964 Convention regard silence as acceptance.

The German delegation to the Hague Conference proposed a third section to Article 6 ULF stating that silence may be regarded as an acceptance if such a usage exists.<sup>134</sup> The Conference did not amend this section because it was felt that the German proposal was covered by Article 2(2) ULF.<sup>135</sup>

The comparison of the provisions of the 1964 and the 1980 Conventions dealing with the usage of trade reveals the broader approach of the 1964 Convention. Article 2(1) ULF refers to "practice" es-

<sup>130</sup> *Id.*

<sup>131</sup> *Id.* at 81-82. Art 19(2) CISG: "... do[es] not materially alter the terms of the offer. . ."; See also Bonell, *supra* note 122, at 390.

<sup>132</sup> Bydlinski, BADEN-SYMPOSIUM, *supra* note 57, at 81; Stoffel, *supra* note 82, at 68.

<sup>133</sup> *But see* Art.6 (2) ULF.

<sup>134</sup> See von Caemmerer, *supra* note 39, at 125.

<sup>135</sup> HERBER, *supra* note 42; Art. 2 EAG, 8, 10; Schlechtriem in DÖLLE, *supra* note 47, Art. 6 EAG, 36, 37.

tablished between the parties and to "usage". Article 13(1) ULF defines usage as what "reasonable persons in the same situation as the parties usually consider to be applicable", and Article 13(2) ULF refers to the "trade concerned".

In 1980, a German appellate court was concerned with the introduction of standard terms referred to in a confirmation letter.<sup>136</sup> The court stated that the letter confirming an already-concluded contract was not covered by Article 6 or Article 7 ULF. It held that the German domestic concept of silence upon receipt of a confirmation letter can be regarded as usage of trade, and that the concept thus supersedes the formation rules of the 1964 Convention as provided in Article 2(1) ULF.<sup>137</sup>

In sum, under the 1964 Convention, the German concept regarding silence to a confirmation letter as acceptance supersedes as usage of trade the 1964 Convention's rules.<sup>138</sup>

## II. CONFIRMATION LETTERS IN THE CONTEXT OF THE CONVENTION - THE ANALYSIS

The categories of decisive effect and evidentiary effect from the German law of commercial letters of confirmation are also a useful tool in discussing and analyzing the effect to be given letters of confirmation under the Convention. It should be remembered that the objective and purpose of the Convention expressed in its Article 7(1) is promotion of uniformity and the observance of good faith in international law.

### 1. *The Decisive Effect*

#### A. *Separate way of forming a contract*

Silence after receiving a confirmation letter can have the effect of forming a contract whereby silence is treated as acceptance and the confirmation letter is presumed to embody the final contract. This mode of forming a contract is not directly addressed in the Convention. The crucial question is whether this non-regulation can be

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<sup>136</sup> Hanseatisches Oberlandesgericht in: 1981 RIW/AWD 262 *et seq.*; (with comment of Kronke, *id.*, 264-66).

<sup>137</sup> *Id.* at 263.

<sup>138</sup> von Caemmerer, *supra* note 39, at 126; Schlechtriem in DÖLLE, *supra* note 47, at 2, 39; Dilger, *supra* note 116, at 181; Ebenroth, *supra* note 6, at 182; OTTO, *supra* note 81, at 113.

regarded as a gap in the Convention's formation scheme making domestic law applicable, or whether a solution to bridge the gap is to be found within the Convention's system.

No provision of the Vienna Convention expressly states that the system of regulation established in Part II is exclusive. Article 4 only restricts the regime of the Convention; it does not provide that any formation has to be ruled by the Convention.

The formation of the contract is regulated in Articles 14-24 CISG. The contract is formed through offer and acceptance, and Article 23 CISG acknowledges that even in extensive negotiations offer and acceptance can be identified. Although the Convention addresses only the traditional concept of contract formation, it sets out this system of formation in some detail. It contains minimum criteria for an offer (Article 14), and for withdrawal (Article 15), revocation (Article 16) or termination of an offer (Article 17). Articles 18 to 22 CISG deal with acceptances. Articles 23 and 24 CISG relate to the time at which a contract is considered to be concluded.<sup>139</sup>

The principal rule on the above question can be found in Article 18(1) CISG which provides that silence does not amount to an acceptance. Article 19(2) CISG provides an exception to this general rule for situations in which the parties exchange inconsistent forms which are not an acceptance in the strict sense of Article 18 CISG.<sup>140</sup> Article 19(2) is discussed below in more detail. In addition to article 19(2), Article 18(3) CISG governs another form of acceptance. Generally speaking, Article 18(3) CISG provides for assent by performing an act rather than by verbally accepting if such a practice between the parties or usage of trade can be established.<sup>141</sup>

Part II of the Convention does not cover all forms of concluding a contract that are theoretically possible or that might be known in various legal systems.<sup>142</sup> However, the scheme in Articles 14-24 is a sound and closed system which entails rules and exceptions. This factor can be regarded as a very strong indicator of an exclusive system which does not allow any interference from domestic concepts.<sup>143</sup>

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<sup>139</sup> HONNOLD, *supra* note 105, § 132.

<sup>140</sup> *Id.* at § 165.

<sup>141</sup> *Id.* at § 163.

<sup>142</sup> SCHLECHTRIEM, *supra* note 119, at 57.

<sup>143</sup> See Stoffel, *supra* note 82, at 67; SCHLECHTRIEM, *supra* note 119, at 57; Wang, *Das Wiener Übereinkommen über internationale Warenkaufverträge vom 11. April 1980*, 87 ZVglRWiss, 184 at 191 (1988).

Against this interpretation of a comprehensive and exclusive system in Part II, Huber argues that the domestic concept of decisive effect could not have been unified by the Convention, and that the concept is therefore still applicable outside the Convention. Thus, he regards Part II as not comprehensive ("*fragmentarisch*").<sup>144</sup> This argument fails to respect the general principle upon which the Convention is based: the promotion "of unification in its application" (Article 7 (1)) and the "adoption of uniform rules which govern contracts" (Preamble).

On its face, Huber's argument considers the unification purpose. He concludes that a unification was not reachable, and thus, domestic law of the silent party should apply. However, unification in international trade law does not necessarily mean that every national concept be included in the international Convention. Rather, unification means that some domestic legal concepts are not applicable where the Convention governs the contract. Whether or not the applicability of domestic law is advantageous for one party is not a decisive consideration for the promotion of the unification of international trade law. There might even be a "disharmony" between domestic law and international uniform law.<sup>145</sup> This is -as Bydlinski correctly states - the price judges and merchants have to pay for the benefit of unification.<sup>146</sup>

In sum, the provisions in Part II of the Convention create a comprehensive structure and scheme for forming contracts under the Convention. Any deviating domestic concept such as the decisive effect of confirmation letters, is superseded by the Convention. A solution with regard to the effect of confirmation letters can only be found within the Convention.

### *B. Decisive Effect in the Framework of the Convention*

The result is not necessarily that the decisive effect of the confirmation letter is abolished for all transactions. It is only in transactions governed by the Convention that the legal effect of one party's silence upon receiving a confirmation letter is necessarily determined by the Convention.

#### *(i) Article 6 CISG*

Article 6 CISG covers a situation which is not very common in the context of confirmation letters but which should be mentioned.

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<sup>144</sup> Huber, *supra* note 43, at 449; Dilger, *supra* note 116, at 181.

<sup>145</sup> Bydlinski, BADEN SYMPOSIUM, *supra* note 57, at 93.

<sup>146</sup> *Id.*

The parties may agree during their negotiations that a confirmation letter might be issued, and that the other party's subsequent silence to the letter shall be treated as an assent. According to Article 6 CISG such an agreement replaces the application of the Convention's formation provisions.<sup>147</sup> Thus, the confirmation letter has the decisive effect of concluding or modifying an agreement through the parties' stipulation. Article 6 does not require an explicit agreement; there may also be an implied agreement to treat the letter of confirmation followed by silence as assent. In the case of implied agreement, however, there should be a clear indication of the parties' intent to exclude the Convention.<sup>148</sup>

(ii) *Article 9 CISG*

Each of the two sections of Article 9 provides a different framework for the concept of the confirmation letter. Article 9(1) CISG holds the parties bound by "any usage to which they have agreed" and by "any practices which they have established between themselves". The agreement to apply a particular usage need not be explicit; it may be implied. The phrase "any usage" indicates that the parties may agree on a usage that is only a local usage, or on a usage of another trade. They are not confined to usages respected only in their particular trade.

The practical importance of Article 9(1) CISG lies in the words "any practices established between themselves." This phrase can be explained as a course of dealing adopted by the individual parties.<sup>149</sup> It is necessary that the two parties to the transaction establish the practice between themselves.<sup>150</sup> The course of dealing may relate to minor points or may affect the entire contract. The practice in the sense of Article 9(1) CISG can include the effect of silence to a confirmation letter as assent to a conclusion or modification of the contract included in the letter.

A remaining question is when the course of dealing can be regarded as "established" between the two parties. Section 1 - 205 (1) of the U.S. Uniform Commercial Code is almost identical to Article 9 (1) CISG. Section 1-205(1) defines a course of dealing as "a sequence

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<sup>147</sup> HONNOLD, *supra* note 105, § 74.

<sup>148</sup> Maskow in ENDERLEIN, *supra* note 122, at 44. In this respect, Art. 8(1) and (2) govern the interpretation of a statement, conduct or an implied agreement.

<sup>149</sup> Bonell in BIANCA & BONELL, *supra* note 122, at 106.

<sup>150</sup> HONNOLD, *supra* note 105, §§ 115, 116; Maskow in ENDERLEIN, *supra* note 122, at 54.



of previous conduct between the parties to a particular transaction which is fairly to be regarded as establishing a common basis . . . .” More precisely, it has been suggested that the “minimum contact . . . is established if the controversial transaction is preceded by at least three other transactions between the parties.”<sup>151</sup> A German appellate court, concerned with a Dutch-German transaction held that standard terms were effectively introduced to the contract by a confirmation letter where the seller had been incorporating his standard terms in regular, frequent transactions between the parties for five years.<sup>152</sup> As under Article 6 CISG, the established practice and usage of the parties under Article 9(1) CISG supersedes the Convention’s provisions. Consequently, such practice or usage can include the decisive effect of a confirmation letter in forming or modifying a contract.

Article 9(2) CISG provides a different framework for the confirmation letter’s decisive effect. Generally, it binds the parties by “their” usage of trade. More specifically, Article 9(2) presumes an agreement on usage which

- the parties knew or ought to have known of, *and*
- is widely known in international trade, *and*
- is observed by the parties in the particular trade concerned.

(emphasis added)

Article 9(2) CISG presumes an intention of the parties to be bound by a usage if the three criteria set forth in this provision are met.<sup>153</sup> The first criterion, requiring knowledge or constructive knowledge, is the link between the parties’ intentions and the application of a particular usage; the second requirement of knowledge or observation of the particular usage in international trade is the objective criterion.<sup>154</sup>

The very significant language of Article 9(2) CISG indicates that this Article is more restrictive than Article 13 of the 1964 Formation Convention or Article 9(2) of the 1964 Sales Convention.<sup>155</sup> Unlike under the 1964 Convention, the concept of the confirmation letter

<sup>151</sup> Drobniq, *Standard Forms and General Conditions in International Trade: Dutch, German and Uniform Law*, in C. VOSKUIL & J.A. WADE, HAGUE ZAGREB ESSAYS 4 ON THE LAW OF INTERNATIONAL TRADE 118, 123 (1983).

<sup>152</sup> Oberlandesgericht München 12 August 1977 in 1977 Wertpapiermitteilung (WM) 1361 (incomplete publication also in 1977 IPRspr. no. 20 and 31 NJW 499 (1978)).

<sup>153</sup> Bonell, in BIANCA & BONELL, *supra* note 122, at 108.

<sup>154</sup> *Id.*

<sup>155</sup> SCHLECHTRIEM, *supra* note 119, at 41.

is not covered solely because it is known in the country, but rather, only if the parties involved also knew of the usage or ought to have known of it. Moreover, Article 9(2) CISG requires that the usage be widely known and observed in international trade and that it be known in the particular trade concerned.

An example may serve to summarize the requirements of Article 9(2) CISG. A usage prevails if it is respected in the international grain trade and followed by parties who buy and sell grain on the international market. Any usage known in a domestic grain trade is irrelevant, even if such a usage is so widely known within that country that the foreign party either knew or should have known of the usage. It is also irrelevant if the practice is known "internationally" outside grain-trade circles.<sup>156</sup>

Thus, the Convention grants domestic usages a very limited effect. In the context of confirmation letters, such a letter has decisive effect only if (i) confirmation letters are used in the particular trade concerned; *and* (ii) the decisive effect is regularly observed by other parties; *and* (iii) the two parties to the present transaction knew or ought to have known of the effect.<sup>157</sup> This interpretation is based upon a strict construction of Article 9(2) CISG. A strict construction prevents the unilateral applicability of a domestic usage, such as the one of the silent party's principal place of business, solely because it is advantageous for the silent party.<sup>158</sup> More liberal interpretations would indirectly reintroduce conflict of laws rules and destroy the uniformity of the law.<sup>159</sup> Thus, the confirmation letter does not have decisive effect merely because such effect is a usage known and respected at the silent party's place of business.<sup>160</sup> According to the wording of Article 9(2), it is crucial that such an effect be recognized in the particular trade concerned, as well as in international trade.

Huber argues that the German rule of law with respect to the effect of confirmation letters would be superseded by the Convention.

<sup>156</sup> See SCHLECHTRIEM, *supra* note 119, at 41; Bonell, in BIANCA & BONELL, *supra* note 122, at 109.

<sup>157</sup> See SCHLECHTRIEM, *supra* note 119, at 29; Bydliniski, BADEN-SYMPOSIUM, *supra* note 57, at 81; OTTO, *supra* note 81, at 141; HERBER, *supra* note 42, at 18; Bonell, *supra* note 122, at 390.

<sup>158</sup> *But see* Ebenroth, *Internationale Vertragsgestaltung im Spannungsverhältnis zwischen AGBG, IPR-Gesetz und UN Kaufrecht*, 1986 JBL 681, 688.

<sup>159</sup> Compare Drobniq, *supra* note 151, at 124.

<sup>160</sup> Rehbinder, *Vertragsschluß nach UN Kaufrecht im Vergleich zu AGB und BGB*, in EINHEITLICHES KAUFRECHT UND NATIONALES OBLIGATIONENRECHT, FACHTAGUNG EINHEITLICHES KAUFRECHT AM 16./17.2.1987, 149, 170 (P. Schlechtriem ed. 1987).

He posits, however, that if a usage of trade in Germany could be established, this usage could be covered by Article 9.<sup>161</sup>

Huber's argument, to some extent, may find support in the *travaux préparatoires*. The United States delegation to the Vienna Conference reasoned that Article 9 (2) CISG should be extended to the formation of a contract in cases where silence is treated as acceptance.<sup>162</sup> This statement, as well as one of the Italian delegation,<sup>163</sup> may lend credence to the view that the German concept of the confirmation letter should be treated as a usage of trade under Article 9(2) CISG.

The flaw in this reasoning is its inconsistency with the language and purpose of Article 9(2) CISG. Compared to Article 6 of the 1964 Sales Convention, the requirement that the respective usage has to be "widely known to parties in international trade" is an additional one. The purpose of this requirement is clearly to avoid the application to transactions with foreign parties of usages which are known and accepted only in internal trade.<sup>164</sup> The article's wording does not automatically exclude any usage that is of local origin.<sup>165</sup> The Convention used the term "a usage", or "*Handelsbräuche*", or "*tout usage*", in the broadest possible sense so as to exclude the possibility that any domestic category or label is relevant under the Convention.<sup>166</sup> Article 9(2) CISG defines the requirements which any qualifyig usage must meet. If these requirements are fulfilled, the particular usage supersedes the Convention's rules, regardless of whether the label in domestic law is usage or rule of law. Thus, the discussion on the source of the concept found in German law is irrelevant under the Convention's regime.

Any other interpretation of Article 9(2) CISG disregards the sensitive compromise reached in this Article between the different countries.<sup>167</sup> Developing and socialist countries were particularly concerned

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<sup>161</sup> See Huber, *supra* note 43, at 448.

<sup>162</sup> A/Conf.97/C.1/SR.6 § 88.

<sup>163</sup> See *supra* note 92 and accompanying text.

<sup>164</sup> Bonell in BIANCA & BONELL, *supra* note 122, at 109; Schlechtriem, *supra* note 119, at 41.

<sup>165</sup> HONNOLD, *supra* note 105, § 121; see also Bonell in BIANCA & BONELL, *supra* note 122, at 109.

<sup>166</sup> Bonell in BIANCA & BONELL, *supra* note 122, at 111; Bonell, *supra* note 122, at 386.

<sup>167</sup> See remark by the Russian Delegation to the Vienna Conference that the final version represents a compromise on one of the most controversial issues; A/Conf.97/C.1/SR.7 at 4 § 19 (= O.R. 266 ). See also Maskow in ENDERLEIN, *supra* note 122, at 55, 56; Bonell in BIANCA & BONELL, *supra* note 122, at 109.

that an extensive application of usages would be detrimental to the weaker party in transactions governed by the Convention.<sup>168</sup> Consequently, any decisive effect of confirmation letters can only be permitted if the requirements of Articles 9(1) or 9(2) CISG are fulfilled. Article 9(2), in particular, provides that the confirmation letter has to be used in the particular trade or business involved; that it must be generally acknowledged in the trade that silence means assent; and that the parties knew or ought to have known of this effect.<sup>169</sup>

With respect to the practical application of this solution, at least in the major legal systems, the party claiming the applicability of the particular usage must prove both the existence and the content of the usage. The judge then decides as a question of law under Article 9(2) CISG whether the usage is applicable to the particular contract.<sup>170</sup> Thus, confirmation letters still have decisive effect under the regime of the Convention if the requirements of Article 9(1) or (2) CISG are fulfilled.

*(iii) Article 8 CISG*

Article 8 deals with the interpretation of statements of the parties and with the "conduct of a party" in general,<sup>171</sup> while Article 18 covers the specific case of silence as inactivity. Article 18(1) expressly denies any effect as acceptance to a party's mere silence upon receipt of a confirmation letter. Article 18 is thus applicable as *lex specialis*, and Article 8 is not relevant in the present analysis.

*(iv.) Article 19(2) CISG*

Article 19(2) CISG, as an exception to the general rule of Article 18(1), deals with the situation in which a reply to an offer includes additional terms and thus cannot be regarded as an acceptance in the sense of Article 18. Article 19(2) CISG provides that if the terms added by the offeree are not materially different from those in the original offer or the offeror does not voice his objections, then the offeree's response constitutes the acceptance.<sup>172</sup> The content of the

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<sup>168</sup> Bonell, *supra* note 122, at 389; SCHLECHTRIEM, *supra* note 119, at 41.

<sup>169</sup> SCHLECHTRIEM, *supra* note 119, at 57; Bydlinski, BADEN-SYMPOSIUM, *supra* note 57, at 81; OTTO, *supra* note 81, at 141; HERBER, *supra* note 42, at 18; Bonell, *supra* note 122, at 390.

<sup>170</sup> See Bonell in BIANCA & BONELL, *supra* note 122, at 111.

<sup>171</sup> HONNOLD, *supra* note 105, § 104 (emphasis in original).

<sup>172</sup> If the terms are materially different, then the response constitutes a counter-offer as provided by Article 19 (1) CISG.

contract under Article 19(2) is the one included in the original offer plus the additional terms contained in the reply. This provision is clearly a contribution to the method of negotiating and concluding a contract through prepared pre-printed forms.<sup>173</sup> The Convention acknowledges the needs of commercial transactions in which an agreement has been negotiated and the shipment of the goods is the parties' central interest. Thus, the Convention provides in this situation that a modification is achieved by the act of one party.

The concept offered by Article 19(2) CISG is probably inconsistent with traditional doctrines in many legal systems,<sup>174</sup> but is very close to the German concept of the confirmation letter. Thus, Article 19(2) CISG should be applied by analogy to commercial letters of confirmation. This application of a specific provision by analogy is for civil law lawyers a well-known technique to fill a gap in a code.<sup>175</sup>

The Convention, representing a codification of existing law on international sales, is similar to the commercial codes in the civil law countries. Article 7(2) CISG is clearly modelled on similar provisions in the codes of the civil law systems.<sup>176</sup> It provides that any gap should be filled within the system of the Convention which can be done either by analogous application of certain provisions or by applying general principles underlying the uniform system as a whole.<sup>177</sup> Since an analogical application is only permissible if certain requirements are fulfilled, the continued uniformity of a statutory scheme is more likely than in the case where the gap is filled by common law, which differs from one jurisdiction to the next.

As discussed earlier, neither the Convention itself nor the *travaux préparatoires* expressly provide for the effect to be given a confirmation letter under the Convention. In order to fill this gap by analogous application, it must also be considered "whether the case(s) expressly regulated by it [the specific provision] and the cases at hand are so analogous that it would be inherently unjust not to adopt the same solution for them [the cases]" ("argumentum per analo-

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<sup>173</sup> HONNOLD, *supra* note 105, § 165.

<sup>174</sup> *Id.* § 167; see also MASCOW in ENDERLEIN, *supra* note 122, at 68 with reference to the parallel provision in the Foreign Trade Law of East Germany in § 31(2) and 31(3) GIW.

<sup>175</sup> See e.g. K. LARENZ, *METHODENLEHRE DER RECHTSWISSENSCHAFT* 358 (4th ed. 1979) *et seq.*; see for the Vienna Convention Bonell in BIANCA & BONELL, *supra* note 122, at 78.

<sup>176</sup> Bonell, *supra* note 122, at 78.

<sup>177</sup> *Id.*

giam'')'.<sup>178</sup> The cases expressly regulated by Article 19(2) CISG are indeed very similar to those dealing with the question whether decisive effect is to be given to a confirmation letter followed by silence. In both cases, one party issues a letter - a reply or a confirmation letter, respectively - and the other party will be bound to the terms in this letter unless he objects to them. Both concepts reflect the commercial need to simplify and speed up the process of concluding a contract.

Article 7(2) CISG supports this application of Article 19(2) CISG by analogy to the confirmation letter situation. While good faith might require that, on the one hand, a material alteration cannot be introduced unilaterally, good faith would also prescribe that the recipient party has an obligation to object to a non-material alteration.<sup>179</sup> Moreover, Article 29 CISG provides that a contract may be modified by "mere agreement." These factors suggest that Article 19(2) CISG can be applied by analogy to the confirmation letter.<sup>180</sup>

Nonetheless, a major difference between the domestic concepts of the confirmation letter and the concept resulting from an analogous application of Article 19(2) CISG must be noted. The decisive effect of the confirmation letter, as accepted in West Germany and Switzerland, can occur in two situations: the letter and the subsequent silence may conclude a contract, or a concluded contract may be modified by the letter and subsequent silence. In the former situation, although the negotiations led almost to a conclusion, no party expressed a binding intent. By contrast, the situation covered by Article 19(2) CISG is that in which one party had already made an offer and the other party replied in the way of an acceptance. In this case, unlike the former situation in which the contract is concluded by the confirmation letter, both parties have expressed an intent to bind themselves to the contract.<sup>181</sup>

Consequently, the analogy to Article 19(2) CISG cannot be extended to the former situation, and only the modifying effect of the con-

<sup>178</sup> *Id.* at 79.

<sup>179</sup> Kramer in BADEN-SYMPOSIUM, *supra* note 57, at 95; Herber in *id.* at 102.

<sup>180</sup> Bonell, *supra* note 122, at 390-91 n.32; Reh binder, *supra* note 160, at 170; Kramer in BADEN-SYMPOSIUM, *supra* note 57, at 95; Wey, *Der Vertragsschluß beim internationalen Warenkauf nach UNCITRAL und Schweizerischem Recht* (Diss Basel 1984), at § § 253, 255.

<sup>181</sup> Or, as it has been described: "an offer is . . . a unilateral authorization to the offeree to create such a powerful device . . ." as a contract. Sono, *Formation of International Contracts under the Vienna Convention: A Shift above Comparative Law*, in: *International Sales of Goods: Dubrovnik Lectures* 111-32, at 111 (P. Sarcevic and P. Volken ed., 1986).

firmation letter is covered by the analogy with Article 19(2) CISG. According to Article 19(2) CISG by analogy, the non-objecting receiver is bound by the terms of the confirmation letter sent after the contract was concluded.

The situations in which this case can occur, however, are limited by Article 19(3) CISG, which provides that a contract cannot be modified materially, and contains a non-exclusive list of material alterations.<sup>182</sup> The catalogue in Article 19(3) CISG seems so comprehensive that it is more difficult to think of clauses that are not covered than those which are.<sup>183</sup> A clause found very often in confirmation letters is the arbitration clause excluding the jurisdiction of regular courts. This clause, for instance, would fall under "settlement of disputes" and would therefore not have binding effect when included in a confirmation letter under the Convention.

A document prepared by the International Institute for the Unification of Private Law in Rome (UNIDROIT)<sup>184</sup> may demonstrate the correctness of both the analogous application of Article 19(2) CISG, generally, and the exclusion of the analogy to confirmation letters concluding a contract. In its most recent draft on "Principles for International Commercial Contracts",<sup>185</sup> UNIDROIT presented, in addition to its Article 10 which is identical to Article 19(2) CISG, its Article 11 which contains the following:

If a writing which is sent within a reasonable time after the conclusion of a contract and which purports to be a confirmation of the contract contains additional or different terms, such terms will become part of the contract, unless they materially alter the contract or the recipient, without undue delay, orally objects to the discrepancy or dispatches a notice to that effect.

UNIDROIT's Article 11 seems to be drafted precisely in regard to the doctrine of confirmation letters. The wording of the UNIDROIT

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<sup>182</sup> HONNOLD, *supra* note 105, § 169; see for further detail, Farnsworth in *BLANCA & BONELL*, *supra* note 122, at 182 *et seq.*

<sup>183</sup> Farnsworth in *BLANCA & BONELL*, *supra* note 122, at 180.

<sup>184</sup> UNIDROIT Statute of March 15, 1940, at 15 U.S.T. 2494; T.I.A.S. 5743. For a brief summary of the organization's background, mandate, and membership, see, *United States Department of State*, 32d Annual Report, United States Contributions to International Organizations, Report to the Congress for Fiscal Year 1983, 100-101.

<sup>185</sup> UNIDROIT, Study L—Doc. 40 Rev. 2, *Principles for international commercial contracts*, (Rome, Jan. 1989); see also UNIDROIT, Governing Council at its 66th session (Rome, 10 to 12 September 1987): *Item 5(b) on the Agenda - Principles for international commercial contracts*, C.D. 66 - Doc. 6, Art. 8.

provision exactly reflects the proposed concept of this article that the confirmation letter has only modifying effect; *i.e.* if it is sent after the conclusion of the contract. Under both the UNIDROIT provision and the application of Article 19(2) CISG by analogy, the receiver of the letter is not bound by it if the letter contains material alterations or if the receiver objects to it.<sup>186</sup> This concept should be applied within the framework of the Vienna Convention.

This solution probably would have more impact on Austrian and Swiss law than on German law. The Austrian and probably Swiss legal systems seem to have abolished the modifying effect of the confirmation letter. By contrast, the German concept is almost the same as that in Article 19(2) CISG. For example, if a confirmation letter which modifies the verbally concluded contract is sent from Germany to Austria, the solution in German and Austrian domestic international private law would be that the law of the silent party is applicable,<sup>187</sup> *i.e.* Austrian law. Austrian law abolished the decisive effect of modifying the contract.<sup>188</sup> Thus, the modification would not become part of the contract. By contrast, under the regime of the Convention, the confirmation letter may have this effect by analogy with Article 19(2) CISG unless the modification falls under Article 19(3) CISG.

Under this solution, the aforementioned case of the German appellate court<sup>189</sup> would have the following result: If the contract has not yet been concluded verbally, a conclusion through the mere silence upon the confirmation letter is not governed by an analogy to Article 19(2) and (3) CISG. Hence, the letter has the decisive effect only if the requirements of Article 9(1) or 9(2) CISG are fulfilled. Indeed, in this case, the parties had used confirmation letters in their prior transactions.

If the contract was already concluded, the introduction of the standard term is governed by the analogy of Article 19 (2) and (3) CISG. Therefore it has to be considered whether or not the term is a material alteration. If it is not, then the standard term is part of the contract. However, the incorporation does not automatically mean

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<sup>186</sup> As can be seen from the above analysis, the "and" in the UNIDROIT "unless"-clause must be a drafting mistake and should rather be "or". [I appreciate receiving this remark by Professor John Honnold.]

<sup>187</sup> Lüderitz in SOERGEL & SIEBERT, *supra* note 117, vor Art.7, 279, 280, 284; Beckmann *supra* note 6, at 269, 270; Huber, *supra* note 43, at 449.

<sup>188</sup> See *supra* note 57 and accompanying text.

<sup>189</sup> Hanseatisches Oberlandesgericht, *supra* note 136.



that the clause is valid.<sup>190</sup> The validity, as Article 4 (a) CISG states, is governed by applicable domestic law.<sup>191</sup>

### C. Result

The confirmation letter cannot be regarded as a form of concluding a contract in addition to the methods in the Convention, because the entire process of forming the contract with all of its terms is governed by the Convention.

However, the letter and the subsequent silence may still have decisive effect within the given framework of the Convention. If the requirements of Article 9(1) or 9(2) CISG are fulfilled, the silent party is bound by the terms of the letter. In addition, a verbally concluded contract can be modified by a confirmation letter by analogy with Article 19(2) CISG unless the other party objects or the modification is a material one in the sense of Article 19(3) CISG.

#### 2. The evidentiary effect

Confirmation letters have evidentiary effect where they restate the verbally concluded agreement (situation I). Although the treatment is not the same in every legal system, the four analyzed legal systems treat the "evidentiary letter" as evidence of the conclusion and contents of the contract.

Under the Convention's rules, the contract is concluded through offer and acceptance (Article 23). Whether confirmation letters are regarded as evidence in the domestic courts is not a matter which the Convention could regulate since it applies only to the substantive law of sales and not to procedural questions. The treatment of a confirmation letter as evidence is a procedural question and is governed by *lex fori*.<sup>192</sup> Thus, the forum state's rules determine whether or not a confirmation letter will be accepted as evidence, and what its procedural effect is.<sup>193</sup> In sum, the evidentiary effect is not affected by the Convention and is governed by *lex fori*.

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<sup>190</sup> Kronke, *supra* note 136, at 265.

<sup>191</sup> An interesting question is whether, in case the particular standard term fulfills the requirements of Art. 9 (1) and (2) CISG the term is valid without consideration of domestic law: See Kronke, *supra* note 137 at 266 as to the 1964 Convention. He concludes from Art 9(2) ULIS that the international usage is the crucial factor. The usage would have to be proved - according to German procedural rules - by the sender of the letter.

<sup>192</sup> See e.g. R. SCHÜTZE, DEUTSCHES INTERNATIONALES ZIVILPROZESSRECHT (1985) 83; E. SCOLES & P. HAY, CONFLICT OF LAWS § 12.10 (1982).

<sup>193</sup> This fact raises a different issue, beyond the scope of this Article, regarding

## IV. RESULT

The four analyzed legal systems grant different effects to silence upon a commercial letter of confirmation. The effects can be summarized as evidentiary effect, decisive effect of forming a contract, and decisive effect of modifying a contract.

The Convention's scheme with regard to formation of a contract is exclusive so that the entire process of forming a contract is governed by the Convention. Under the regime of the Convention, confirmation letters and subsequent silence have decisive effect within the strict limitations of Article 9 CISG. In addition, under Article 19(2) CISG by analogy, the confirmation letter still has the decisive effect of modifying a contract. The evidentiary effect of a confirmation letter is not affected by the Convention but is governed by *lex fori* of the domestic court.

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the relationship between the Convention as substantive law and domestic evidentiary rules. The evidentiary effect is an example of such a rule of rebuttable presumption or prima facie evidence about the correctness of the letter. But there is certainly a point where such 'prima facie' rules reflecting domestic policies interfere with the Convention's own policies. Although still procedural rules and, as such, governed by *lex fori*, these rules might be regarded as inconsistent with the Convention's policies, and therefore be rejected.