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### **UNCITRAL Digest of case law on the United Nations Convention on the International Sale of Goods\***

#### *Article 29*

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

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

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\* The present digest was prepared using the full text of the decisions cited in the Case Law on UNCITRAL Texts (CLOUT) abstracts and other citations listed in the footnotes. The abstracts are intended to serve only as summaries of the underlying decisions and may not reflect all the points made in the digest. Readers are advised to consult the full texts of the listed court and arbitral decisions rather than relying solely on the CLOUT abstracts.

## Meaning and Purpose of the Provision

1. The provision concerns the modification (which includes additions)<sup>1</sup> and termination of an already concluded contract through agreement of the parties. According to article 29(1), the mere consent of the parties is sufficient to effect any variation of the contract. If the parties have, however, agreed in writing on a written form for a modification or termination of their contract paragraph 2 provides that the contract then cannot be modified or terminated otherwise unless and to the extent that it would be inequitable to invoke the form requirement.
2. The provision does, and is intended to,<sup>2</sup> abolish the doctrine of “consideration” of the common law as far as the Convention applies.

## Modification or Termination by Mere Agreement

3. An agreement is needed in order for the parties to be able to change a contract provision or to terminate their contract. The existence of such an agreement is determined on the basis of the provisions to be found in Part II (articles 14 – 24) of the Convention.<sup>3</sup> Article 29 provides that a contract can be modified purely by the agreement of the parties. In line with article 18(1), it was stated that mere silence of one party to proposals of the other to modify does not in itself amount to acceptance<sup>4</sup>, however it has also been stated that there was agreement as to the termination of a contract where a buyer refused to pay due to alleged non-conformity and subsequently the seller offered to market the goods itself, an offer to which the buyer did not reply.<sup>5</sup> One court stated that, although on the basis of article 29 CISG a contract could be modified purely by agreement of the parties, the modification of the purchase price could not result merely from the general mood of a meeting.<sup>6</sup> The acceptance without comment of a bill of exchange as payment has, however, been regarded as implied consent to a postponement of the date for payment provided for in the contract until the maturity of the bill.<sup>7</sup>
4. The interpretation of the parties’ agreement as to the modification or termination of the contract is based on the Convention’s rules on construction (in particular article 8).

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

<sup>2</sup> See Secretariat Commentary to (then) article 27 (“overcoming the common law rule that “consideration” is required”) Commentary on the draft Convention on Contracts for the International Sale of Goods, A/CONF.97/5, reproduced in United Nations Conference on Contracts for the International Sale of Goods: Official Records, at p. 28, paras. 2-3.

<sup>3</sup> CLOUT case No. 120 [Oberlandesgericht Köln, Germany, 22 February 1994]; to the same effect see CLOUT case No. 153 [Cour d’appel, Grenoble, France, 29 March 1995], and CLOUT case No. 332 [Obergericht des Kantons, Basel-Landschaft Switzerland 11 June 1999].

<sup>4</sup> CLOUT case No. 120 [Oberlandesgericht Köln Germany 22 February 1994]; CLOUT case No. 332 [Obergericht des Kantons Basel-Landschaft, Switzerland, 11 June 1999].

<sup>5</sup> CLOUT case No. 120 [Oberlandesgericht Köln, Germany, 22 February 1994].

<sup>6</sup> CLOUT case No. 153 [Cour d’appel, Grenoble, France, 29 March 1995].

<sup>7</sup> CLOUT case No. 5 [Landgericht Hamburg, Germany, 26 September 1990] (see full text of the decision).

5. The agreement of both parties is all that is required in order to modify or terminate their contract.<sup>8</sup> No form requirements must be met<sup>9</sup> unless the reservation concerning form applies (arts. 11, 12, 96)<sup>10</sup> or unless the parties have agreed otherwise. When article 96 applies, modifications agreed upon only orally are invalid.<sup>11</sup> For all other cases it follows from article 11 as a general principle of the Convention that the parties are free to modify or terminate their contract in any form be it either in writing or orally or in any other form. Even an implied termination of the contract has been held possible<sup>12</sup>; furthermore, it has been held that a written contract may be orally changed.<sup>13</sup>

## Form Agreements

6. According to article 29(2), a written or oral contract may generally be modified or terminated orally or in writing. If, however, a written contract contains a provision that any modification or termination of the contract must be in writing (“no oral modification”-clause or “written modification”-clause) then the parties cannot modify or terminate the contract in a different way.<sup>14</sup> An oral variation would be ineffective if invoked by one party in such a case unless article 29(2)(2) were to apply.<sup>15</sup>

7. A so-called merger clause according to which the complete contents of prior negotiations is merged in the contract document has been treated like a “no oral modification”-clause.<sup>16</sup> Therefore no evidence of oral agreements prior to the written contract could be adduced in order to modify or terminate that contract.

## Abuse of “No Oral Modification”-Clause

8. Article 29(2)(2) provides that a “no oral modification”-clause cannot be invoked by a party who by its conduct aroused the impression not to rely on the clause while, and to the extent that, the other party relied upon that conduct. It was stated that the provision is an expression of the general good faith principle that governs the Convention (art. 7(1)).<sup>17</sup>

<sup>8</sup> CLOUT case No. 176 [Oberster Gerichtshof, Austria, 6 February 1996].

<sup>9</sup> CLOUT case No. 413 [Federal District Court, Southern District of New York, United States, 6 April 1998] (see full text of the decision); Oberster Gerichtshof, Austria, 29 June 1999, *Zeitschrift für Rechtsvergleichung* 2000, 33.

<sup>10</sup> For a similar case see Rechtbank van Koophandel, Hasselt, Belgium, 2 May 1995, available on the Internet at (<http://www.law.kuleuven.ac.be/int/tradelaw/WK/1995-05-02.htm>).

<sup>11</sup> High Court of Arbitration of the Russian Federation, 16 February 1998, Unilex (abstract).

<sup>12</sup> Oberster Gerichtshof, Austria, 29 June 1999, *Zeitschrift für Rechtsvergleichung* 2000, 33.

<sup>13</sup> CLOUT case No. 176 [Oberster Gerichtshof, Austria, 6 February 1996] (see full text of the decision).

<sup>14</sup> ICC Court of Arbitration, Switzerland, March 1998, *ICC International Court of Arbitration Bulletin*, 2000, 83.

<sup>15</sup> CLOUT case No. 86 [Federal District Court, Southern District of New York, United States, 22 September 1994].

<sup>16</sup> ICC Court of Arbitration, Switzerland, March 1998, *ICC International Court of Arbitration Bulletin*, 2000, 83.

<sup>17</sup> Compare also CLOUT case No. 94 [Arbitration-Internationales Schiedsgericht der Bundeskammer der gewerblichen Wirtschaft—Wien, 15 June 1994].