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

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[...]

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

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

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

As an exception from the above, the introduction of modifications on forum selection clauses in invoices have been considered to require express assent. This seems to be in accordance with the Secretariat Commentary on Article 27 of the 1978 CISG Draft:
A proposal to modify the terms of an existing contract by including additional or different terms in a confirmation or invoice should be distinguished from a reply to an offer which purports to be an acceptance but which contains additional or different terms. This latter situation is governed by article 17.37

See CLOUT Case No. 395 [Tribunal Supremo, Spain, 28 Jan. 2000], available at http://cisgw3.law.pace.edu/cases/000128s4.html (after the conclusion of the contract, one of the parties tried to modify the price, but that offer to modify the contract was never accepted, and thus the Court concluded that no modification was agreed upon by the parties); CLOUT Case No. 332 [Obergericht des Kantons Basel-Landschaft, Switzerland, 5 Oct. 1999], available at http://cisgw3.law.pace.edu/cases/991005s1.html (where the Court was unable to find that the parties agreed on the modification of the contract and did not consider that the seller’s silence amounted to an acceptance). See RAFAEL ILLESCAS & MARIA DEL PILAR PERALES VISCASILLAS, DERECHO MERCANTIL INTERNACIONAL: EL DERECHO UNIFORME 168 (Centro de Estudios Ramón Areces 2003) (considering that silence and inaction applies more restrictively in regards to contract modifications).

See CLOUT Case No. 193 [Handelsgericht des Kantons Zürich, Switzerland, 10 July 1996], available at http://cisgw3.law.pace.edu/cases/960710s1.html; CLOUT Case No. 120 [Oberlandesgericht Köln, Germany, 22 Feb. 1994], available at http://cisgw3.law.pace.edu/cases/940222g1.html: An offer to cancel can, therefore, pursuant to CISG Art. 18(1), not be accepted by silence or inactivity of the other party; together with other circumstances, however, silence can indeed be important and may be interpreted as the acceptance of an offer of cancellation. Such circumstances exist here, because [buyer] not only remained silent but also refrained from further fulfillment of the agreement, specifically from insisting on the delivery of replacement goods or from asserting other warranty claims. Hof van Beroep Gent, Belgium, 15 May 2002, available at http://cisgw3.law.pace.edu/cases/020515b1.html, considered that the contract might be modified in any form, and stated: In order to make a smooth (international) trade possible, a trader is undoubtedly obliged to protest immediately, or within a reasonable period of time, if he receives a letter/communication to which he cannot agree. This obligation simply is the consequence of the positive meaning attached in trade to silence when receiving all kinds of documents, correspondence and so on. See also Arrondissementsrechtbank Rotterdam, supra note 26. The Court stated: If it will be shown that the parties had agreed beforehand on a delivery schedule to be drafted by the [Buyer], this must be regarded as one of these additional factors which entails that the [Seller] is bound to the delivery schedule which was sent later in time, unless the [Seller] has objected to (the contents of) this schedule.

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

But see Primer Tribunal Colegiado en Materia Civil del Primer Circuito, Mexico, 10 Mar. 2005, available at http://www.uc3m.es/uc3m/dpto/PR/dpper03/cisg/mexic5.htm. In the author’s opinion, this decision is erroneous, where the Court did not acknowledge the oral conclusion of the contract which was later confirmed, but considered the letter of confirmation to be an offer which was rejected and thus no contract was deemed to be concluded.


See Bezirksgericht Sissach, supra note 19. In a contract for the sale of textiles between a buyer (Switzerland) and a seller (Germany), the Court considered that the oral modification of the contract, a payment agreement regarding the outstanding claims, that was followed by a letter was accepted by the seller’s silence in an application of the good faith principle. Implied in Hof van Beroep Gent, supra note 28. See also Filanto S.p.A. v. Chilewich Int’l Corp., 789 F. Supp. 1229 (S.D.N.Y. 1992), CLOUT Case No. 23 (for the acceptance of an offer by silence during the formation of the contract).

It also exists in Denmark and Poland according to Schmidt-Kessel, in COMMENTARY, supra note 29, art. 9 n.24, who also expressed doubts about the existence of such a usage in Austria.
See CLOUT Case No. 95 [Zivilgericht Basel-Stadt, Switzerland, 21 Dec. 1992]. In the case, the seller was from Austria and the buyer from Switzerland. The Court considered the value of the commercial letters of confirmation under Article 9 CISG. It recognized that both in Austria and Switzerland the silence to a letter of confirmation means acceptance and that this is considered to be a usage (Article 9(2)). It furthermore held that a practice established between the parties was considered to exist (Article 9(1) CISG). See also CLOUT Case No. 276 [Oberlandesgericht Frankfurt am Main, Germany, 5 July 1995] considering that in the case at hand no usage of trade existed because it was only known in the buyer’s country (Germany) but not in the seller’s country. However, the Court considered the letter of confirmation as evidence and applying other means of evidence held in favour of the seller. See also CLOUT Case No. 120 [Oberlandesgericht Köln, Germany, 22 Feb. 1994]. A contract for the sale of wood between a seller (Nigeria) and a buyer (Germany) was not considered to be modified by a confirmation letter, and therefore the court expressly stated that “there is no room for a reference to the German Conflict of Laws provisions regarding the conclusion of a contract by silence as an acceptance of a commercial letter of confirmation.” It further held that “[n]evertheless, the importance of the commercial letter of confirmation as evidence for the formation of the contract remains unaffected.” But see Oberlandesgericht Saarbrücken, Germany, 5 Mar. 1999 (a contract of sale of windows and doors between an Italian seller and a German buyer). The buyer sent two letters of confirmation establishing a special discount of 14%. The Court considered that, according to the application of a commercial trade usage, silence to a letter of confirmation means acceptance. See also Digest on the CISG, supra note 4, arts. 9, 18.

ChateaudesCharmesWinesLtd.v.SabatéUSAInc., 328F.3d528(9thCir.2003). In this case, the Court considered a case in which a Canadian winery buyer agreed orally with a U.S. seller the purchase of 1.2 million corks. The corks were sent by the related company in France. The invoices contained a forum selection clause in favour of the French tribunals. The buyer found that the corks were tainted and sued the sellers for breach of contract in the District Court of California. The District Court considered that the forum selection clauses were part of the Contract. In appellation, it was reversed. The Federal Appellate Court held that the attempt to modify the contract through the invoices was a material alteration. According to the Court “nothing in the Convention suggests that the failure to object to a party’s unilateral attempt to alter materially the terms of an otherwise valid agreement is an ‘agreement’ within the terms of Article 29.” Id. at 531. It also held, relying on Article 8(3) CISG, that there was no indication that the buyer conducted itself in a manner that evidenced an “agreement” to the forum selection clauses in the invoices.

Secretariat Commentary, supra note 17.

Referring Principles:

IV.2.7 - Writings in confirmation