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EDITORIAL REMARKS

REMARKS ON THE MANNER IN WHICH THE UNIDROIT PRINCIPLES OF INTERNATIONAL COMMERCIAL CONTRACTS MAY BE USED TO INTERPRET OR SUPPLEMENT ARTICLE 29 OF THE CISG

Sieg Eiselen*

a. Article 29 of the United Nations Convention on Contracts for the International Sale of Goods (CISG)¹ deals with the requirements for the modification and termination of contracts. It further encompasses the principles of party autonomy, freedom of contract, and freedom from formalities contained in Article 11 of the CISG.² These principles also form the foundation of the International Institute for the Unification of Private Law (UNIDROIT) Principles of International Commercial Con-

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¹ United Nations Convention on Contracts for the International Sale of Goods, U.N. Doc. A/CONF.97/18, *reprinted in* [1980] XI UNCITRAL Yearbook 149, available at <http://untreaty.un.org/ENGLISH/bible/englishinternetbible/partI/chapterX/treaty17.asp> [hereinafter CISG].

² See Franco Ferrari, *Art 7*, in KOMMENTAR ZUM EINHEITLICHEN UNKAUFRECHT – CISG Rn 48, at 133 (Peter Schlechtriem ed., 2000). See also Ulrich Magnus, *Art 7*, in KOMMENTAR ZUM BURGERLICHEN GESETZBUCH MIT EINFUHRUNGSGESETZ UND NEBENGESETZEN: WIENER KAUFRECHT (CISG) Rn 42 (Michael Martinek ed., 1999); Ulrich Magnus, *Art 29*, in KOMMENTAR ZUM BURGERLICHEN GESETZBUCH MIT EINFUHRUNGSGESETZ UND NEBENGESETZEN: WIENER KAUFRECHT (CISG) Rn 1, 2, 9; Fabian Burkhardt, *Interpretatives Zusammenwirken von CISG und UNIDROIT Principles* 194 (2000); Martin Karollus, *Art 29*, in KOMMENTAR ZUM UN-KAUFRECHT Rn 8-10, at 315 (Heinreich Honsell ed., 1997); Hanns-Christian Salger, *Art 29*, in INTERNATIONAL EINHEITLICHES KAUFRECHT Rn 8, at 231 (Wolfgang Witz, et al. eds., 2000); Albert H. Kritzer, *Guide to the Practical Applications of the United Nations Convention on Contracts for the International Sale of Goods* 114 (1989).

tracts,³ as expressed in Articles 1.1, 1.5, and 2.18, and therefore should form the governing principles in the interpretation of any contract as well as its modification or termination.⁴

b. Article 2.18 of the UNIDROIT Principles in itself sheds little light on the interpretation or augmentation of Article 29 of the CISG, as both articles are formulated in almost exactly the same words, with one insignificant exception. Where Article 2.18 of the UNIDROIT Principles addresses the abuse of the written modification clause, it prohibits the reliance on such clause "to the extent that the other party has acted in reliance on that conduct."⁵ The CISG merely refers to the extent that the other party has "relied on that conduct."⁶ It is submitted that nothing turns on this divergence, as reliance in itself implies some action or failure to act on the part of that party.

c. In interpreting the scope of Article 2.18 of the UNIDROIT Principles, regard also should be given to the provisions of Article 3.2 that address freedom of form and formalities. In the comments to the UNIDROIT Principles, it is stated that mere agreement between the parties is sufficient for the valid conclusion, modification, and termination of agreements without any further requirements to be found in domestic law.⁷ Specific reference is made to the fact that the requirement of consideration, which may be applicable in common law legal systems, is excluded.⁸ This is in conformity with the approach taken in the CISG.⁹

d. The first objective of both Article 29 of the CISG and Article 2.18 of the UNIDROIT Principles is to reinforce the principle that any agreed modification or termination will be valid in whatever form it is made or contained, unless the contract has a

³ International Institute for the Unification of Private Law, Principles of International Commercial Contracts (Rome 1994), available at <http://www.unidroit.org/english/principles/chapter-1.htm> [hereinafter UNIDROIT Principles].

⁴ See *id.* See also T. PETZ, DIE UNIDROIT PRINZIPIEN FÜR INTERNATIONALE HANDELSVERTGRÄGE 56-57 (2001); Michael Joachim Bonell, *The Unidroit Principles of International Commercial Contracts: Why? What? How?*, 69 TUL. L. REV. 1121, 1134-35 (1995).

⁵ UNIDROIT Principles, *supra* note 3, art 2.18.

⁶ CISG, *supra* note 1, art 29(2).

⁷ See UNIDROIT Principles, *supra* note 3, art. 3.2.

⁸ See *id.*

⁹ See analysis *infra* paragraph d for clarification.

provision requiring additional formalities for modification.¹⁰ The second objective is to eliminate an important difference in approach between civil and common law; specifically, clearly establishing that consideration is not necessary for any amendment to be valid.¹¹ However, it also addresses the time-honored principle that where parties have, by agreement, voluntarily restricted their ability to modify or terminate a contract by requiring formalities for such actions, that agreement will be valid and enforceable.¹²

¹⁰ See FRITZ ENDERLEIN & DIETRICH MASKOW, INTERNATIONAL SALES LAW-UNITED NATIONS CONVENTION ON CONTRACTS FOR THE INTERNATIONAL SALE OF GOODS 123-25 (1992), <http://www.cisg.law.pace.edu/cisg/biblio/enderlein.html>. See also Salger, *supra* note 2, Rn 13, at 232; Karollus, *supra* note 2, Rn 1, at 312, Rn 8, at 315; Peter Schlechtriem, *Art 29, in KOMMENTAR ZUM EINHEITLICHEN UNKAUFRECHT – CISG* Rn 3, at 305 (Peter Schlechtriem ed., 2000); Magus, *supra* note 2, at Rn 7, Rn 9; Graves Import Co. Ltd. v. Chilewich Int'l. Corp., No. 92 Civ. 3655, 1994 U.S. Dist. LEXIS 13393 *13 n.2 (S.D.N.Y. Sept. 22, 1994), <http://www.cisg.law.pace.edu/cisg/wais/db/cases2/940922u1.html>; Oberlandesgericht [OLG][Provincial Court of Appeal] 22 Feb. 1994 (F.R.G.), <http://cisg.law.pace.edu/cisg/wais/db/cases2/940222g1.html>. (In this German case, the court held that although a termination could not be construed from silence or inaction in itself, silence or inaction in conjunction with other factors may provide sufficient evidence of an acceptance of an offer of termination. It is suggested that this also holds true for modifications.); Obergericht [OG] [Canton Appellate Court] 5 Oct. 1999 (Switz.), <http://cisg.law.pace.edu/cases/991005s1.html> (The principle was discussed but the court found that on the facts an amendment had not been proven.); N.V.A.R. v. N.V.I., [Hof van Beroep, Gent] [Appellate Court] 17 May 2002 (Belg.), <http://cisg.law.pace.edu/cisg/wais/db/cases2/020517b1.html>, also available at <http://www.law.kuleuven.ac.be/int/tradelaw/WK/2002-05-17.htm> (where failure of the one party to respond to the letter of another was interpreted as constituting an acceptance of the amendment offered by the other party).

¹¹ See *Secretariat Commentary on the 1978 Draft of the UNCITRAL Art. 27*, [1978], U.N. Doc.A/CONF.97/5, reprinted in JOHN O. HONNOLD, DOCUMENTARY HISTORY OF THE UNIFORM LAW FOR INTERNATIONAL SALES 418 (1989), available at <http://www.cisg.law.pace.edu/cisg/text/secomm/secomm-29.html>. See also John E. Murray, Jr., *An Essay on the Formation of Contracts and Related Matters under the United Nations Convention on Contracts for the International Sale of Goods*, 8 J.L. & Com. 11 (1988), <http://www.cisg.law.pace.edu/cisg/text/murray29.html> (excerpt of the article); Shuttle Packaging Sys. L.L.C., v. Tosnakis, No. 1:01-CV-691, 2001 U.S. Dist. LEXIS 21630, at *21 (W.D. Mich. Dec. 17, 2001), <http://cisg.law.pace.edu/cisg/wais/db/cases2/011217u1.html>; Hides Case (Yugoslavia v. Italy), Int'l Comm. Arb. 7331 (ICC 1994), <http://cisg.law.pace.edu/cisg/wais/db/cases2/947331i1.html>.

¹² See Karollus, *supra* note 2, Rn 1, at 312, Rn 9, at 315, Rn 11, at 316. See also Salger, *supra* note 2, Rn 13-14, at 232; Magnus, *supra* note 2, Rn 7, Rn 9; Graves Import Co. Ltd., 1994 U.S. Dist. LEXIS 13393, at *13 n2 (Chilewich's argument that parties had orally agreed to modify is without merit because paragraph 13 of the USSR contract No.32-03/93085 required amendments and additions to

e. The commentary to Article 2.18 of the UNIDROIT Principles makes it clear that the second objective of the article is generally to render oral modifications or terminations void where parties have prescribed formalities, thereby rejecting the idea that such modification or termination may be viewed as an implied abrogation of the written modification or termination clause.¹³ This approach confirms the same interpretative conclusion reached by Schlechtriem regarding Article 29 of the CISG.¹⁴

f. Both Article 29 of the CISG and Article 2.18 of the UNIDROIT Principles seem to apply only where the modification or restriction clause is contained in a "written agreement."¹⁵ In interpreting what constitutes a "written agreement," the UNIDROIT Principles may be helpful since Article 13 of the CISG only extends the concept of writing to telegrams and telexes. Article 1.10 of the UNIDROIT Principles extends the meaning of "written" to "any mode of communication that preserves a record of the information contained therein and is capable of being reproduced in tangible form."¹⁶ It generally is recognized that Article 13 of the CISG contains a gap since it only refers to older forms of technology and does not provide for more modern forms of electronic communications such as e-mail, fax, or internet communications.¹⁷ It is suggested that the meaning of "written" should be extended to include these forms of communications in accordance with the definition contained in Article 1.10 of the UNIDROIT Principles.¹⁸ Extending the definition has the advantage of being

the previous contract to be in writing and the CISG respects the parties' express intent to require modifications in writing).

¹³ See UNIDROIT Principles, *supra* note 3, art. 2.18.

¹⁴ See Schlechtriem, *supra* note 10, Rn 5, at 307. See also Salger, *supra* note 2, Rn 5, at 230; Karollus, *supra* note 2, Rn 15, at 317-18; Magnus, *supra* note 2, Rn 12.

¹⁵ See Schlechtriem, *supra* note 10, Rn 9, at 308. See also Karollus, *supra* note 2, Rn 12, at 316.

¹⁶ UNIDROIT Principles, *supra* note 3, art. 1.10.

¹⁷ See generally Siegfried Eiselen, *Electronic Commerce and the UN Convention on Contracts for The International Sale of Goods (CISG) 1980*, 6 EDI L. REV 21, 21-46 (1999), <http://www.cisg.law.pace.edu/cisg/biblio/eiselen1.html>. See also Peter Schlechtriem, *Art 13, in KOMMENTAR ZUM EINHEITLICHEN UN-KAUFRECHT – CISG Rn 2*, at 166 (Peter Schlechtriem ed., 2000); Magnus *supra* note 2, Rn 13.

¹⁸ See JOHN O. HONNOLD, *UNIFORM LAW FOR INTERNATIONAL SALES UNDER THE 1980 UNITED NATIONS CONVENTION* 141 (3d ed., 1999). See also Eiselen, *supra* note

clear, practical, and technologically neutral, without losing sight of the object of the written formality, namely preserving an objective reproducible record of the communication between the parties.

g. Merger clauses are not addressed within these remarks as they more appropriately are covered under Article 8 of the CISG, which addresses the interpretation and proof of agreements.¹⁹

h. The exception created in Article 29(2) of the CISG is one area where the application of Article 29 may lead to interpretational difficulties.²⁰ The rule is based on principles contained in the so-called "*Mißbrauchseinwand*" of German law, the "*nemo suum venire contra factum proprium*" principle of Roman law, or the doctrine of waiver and estoppel of Anglo-American law.²¹

17, at 21. *But see* Schlechtriem, *supra* note 17, Rn 2, at 166 (offering a contrary view on electronic communications). *See also* Ulrich G. Schroeter, *Editorial Remarks on the Manner in Which the Principles of European Contract Law may be used to Interpret or Supplement CISG Article 13*, at <http://cisg.law.pace.edu/cisg/text/peclcom13.html#er> (providing additional relevant discussion on Article 13 of the CISG).

¹⁹ *See* Joseph M. Perillo, *Editorial Remarks on CISG Article 8*, at <http://www.cisg.law.pace.edu/cisg/principles/uni8.html#edrem>.

²⁰ *See* Karollus, *supra* note 2, Rn 17, at 318, Rn 18-19, at 319, Rn 20, at 320, Rn 21-23, at 321 (discussing the exception created in Article 29(2) of the CISG). *See also* Robert A. Hillman, *Article 29(2) of the United States Convention on Contracts for the International Sale of Goods: A New Effort at Clarifying the Legal Effect of "No Oral Modification" Clauses*, 21 CORNELL INT'L L.J. 449, 458, 460, 465 (1988), <http://www.cisg.law.pace.edu/cisg/biblio/hillman2.html>. In the case law, the exception has been mentioned but denied in cases where there was a lack of any evidence showing reliance. *See* *Vital Berry Mktg. v. Dira-Frost* [Rechtbank van koophandel Hasselt][District Court] 2 May 1995 (Belg.), <http://www.cisg.law.pace.edu/cisg/wais/db/cases2/950502b1.html>. *But see* *FOB Rostock Case* (Aus. v. F.R.G.) Internationales Schiedsgericht der Bundeskammer der gewerblichen Wirtschaft SCH 4318 (Vienna Arb. Trib. 1994), <http://cisgw3.law.pace.edu/cisg/wais/db/cases2/940615a4.html> (the arbitrator did apply the exception relying on the principle of estoppel).

²¹ *See* Schlechtriem, *supra* note 10, Rn 10 and n. 40, at 308. *See also* HONNOLD, *supra* note 18, at 231 n.6; Salger, *supra* note 2, Rn 16, at 233; KRITZER, *supra* note 2, at 222; Karollus, *supra* note 2, Rn 18-19, at 319; ENDERLEIN & MASKOW, *supra* note 10, at 125; *FOB Rostock Case* (Aus. v. F.R.G.) Internationales Schiedsgericht der Bundeskammer der gewerblichen Wirtschaft SCH 4318 (Vienna Arb. Trib. 1994), <http://cisgw3.law.pace.edu/cisg/wais/db/cases2/940615a4.html>, ¶ 5.4. These principles are also supported by the principle of *bona fides* contained in Article 7 of the CISG. *See* *Dulces Luisi S.A. de C.V. v. Seoul Int'l. Co. Ltd.*, (Mex. v. S. Korea) *Compromex M/115/97* (Mex Comm'n for the Protection of Foreign Trade 30 Nov. 1998), <http://cisgw3.law.pace.edu/cisg/wais/db/cases2/981130m1.html>.

- i. The illustrations contained in the comments to Article 2.18 of the UNIDROIT Principles may be helpful in the interpretation of Article 29 of the CISG.²² However, it may be asked whether the comments call for a further requirement not contained in Article 2.18 of the UNIDROIT Principles; specifically, whether the reliance must be *reasonable* under the circumstances.²³ It would seem that this requirement is justified, especially when viewed in the light of the principle of good faith. Where reliance is not reasonable under the circumstances, a party should not be allowed to use the defense contained in Article 29(2).²⁴
- j. Neither the CISG nor the UNIDROIT Principles makes provision for the case where the parties have agreed to further formalities such as signature or witnesses for an amendment or termination.²⁵ Therefore, the abuse exception contained in Article 29(2) of the CISG and Article 2.18 of the UNIDROIT Principles would be in accordance with the provisions of Article 29 of the CISG and Article 2.18 of the UNIDROIT Principles, if the parties were bound to the formalities and terminations or modifications that are non-complying.²⁶

²² See Schlechtriem, *supra* note 10, Rn 10, at 309. For further clarification, see the examples mentioned by Schlechtriem. See also HONNOLD, *supra* note 18, at 231 (discussing and providing examples of interpretations of Article 20 of the CISG); Salger, *supra* note 2, Rn 16, at 233, Rn 18, at 234; Karollus, *supra* note 2, Rn 18-19, at 319.

²³ See Landgericht Mönchengladbach [LG] [District Court] 22 May 1992 (F.R.G.), <http://cisgw3.law.pace.edu/cisg/wais/db/cases2/920522g1.html>. The court states that when receiving a document such as an expert's opinion rendered on behalf of the other party, the latter should be held bound to that document as a declaration of will if the party receiving it should have understood it as such and in fact understood it as such, looking at it objectively. *Id.*

²⁴ See Magnus, *supra* note 2, Rn 17. See also Karollus, *supra* note 2, Rn 20, at 320; Salger, *supra* note 2, Rn 17, at 233 (discussing the necessity of applying the exception with flexibility); Albert H. Kritzer ed., *Reasonableness*, at <http://www.cisg.law.pace.edu/cisg/text/reason.html>.

²⁵ See Karollus, *supra* note 2, Rn 14, at 317.

²⁶ See ENDERLEIN & MASKOW, *supra* note 10, at 124. See HONNOLD, *supra* note 18, at 230. But see Karollus, *supra* note 2, Rn 14, at 317 (explaining a contrary view in which the author argues that, unless there is a clear indication that the parties indeed insisted on stricter formalities, there should be no presumption that the parties required such strict compliance).