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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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tracts, 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.

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.” The CISG merely refers to the extent that the other party has “relied on that conduct.” 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. Specific reference is made to the fact that the requirement of consideration, which may be applicable in common law legal systems, is excluded. This is in conformity with the approach taken in the CISG.

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

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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. 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. 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.

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 UN- Kaufrechte – CISG Rn 3, at 305 (Peter Schlechtriem ed., 2000); Magnus, 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).


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.\footnote{See UNIDROIT Principles, supra note 3, art. 2.18.} This approach confirms the same interpretative conclusion reached by Schlechtriem regarding Article 29 of the CISG.\footnote{See Schlechtriem, supra note 10, Rn 5, at 307. See also Salger, supra note 2, Rn 5, at 290; Karollus, supra note 2, Rn 15, at 317-18; Magnus, supra note 2, Rn 12.}

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.”\footnote{See Schlechtriem, supra note 10, Rn 9, at 308. See also Karollus, supra note 2, Rn 12, at 316.} 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.”\footnote{UNIDROIT Principles, supra note 3, art. 1.10.}

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.\footnote{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.} 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.\footnote{See JOHN O. HONNOLD, UNIFORM LAW FOR INTERNATIONAL SALES UNDER THE 1980 UNITED NATIONS CONVENTION 141 (3d ed., 1999). See also Eiselen, supra note 3, art. 1.10.} 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).
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 “Mißbrauchseinzwand” 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

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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).


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.\textsuperscript{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 \textit{reasonable} under the circumstances.\textsuperscript{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).\textsuperscript{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.\textsuperscript{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.\textsuperscript{26}

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

\textsuperscript{23} See Landgericht Mönchengladbach [LG] [District Court] 22 May 1992 (F.R.G.), http://cisgw3.law.pace.edu/cisgwais/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. \textit{Id.}

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

\textsuperscript{25} See Karollus, \textit{supra} note 2, Rn 14, at 317.

\textsuperscript{26} See ENDERLEIN & MASKOW, \textit{supra} note 10, at 124. \textit{See also} HONNOLD, \textit{supra} note 18, at 230. \textit{But see} Karollus, \textit{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).