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INTERNATIONAL INSTITUTE FOR THE UNIFICATION OF PRIVATE LAW

WORKING GROUP FOR THE PREPARATION OF
PRINCIPLES FOR INTERNATIONAL COMMERCIAL CONTRACTS

Chapter II

FORMATION

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NOTE

This consultative document is circulated for comment only. It does not represent the final views of the Institute.

CHAPTER II

FORMATION

Article 1
(Requirement as to form)

(1) Unless the applicable law [or these Principles] otherwise provide, a contract need not be concluded in or evidenced by writing and is not subject to any other requirement as to form.

(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.

COMMENTS

a. Contracts as a rule not subject to formal requirements

This article lays down the principle that as a rule the conclusion of the contract as well as its subsequent modification or termination by agreement are not subject to any requirement as to form. This means that neither the existence nor the enforcement of a contract are dependent on its being made in a particular form, such as writing, with or without sealing or authentication by a public authority etc. The principle, which may be found in many legal systems, at least with respect to contracts between merchants, seems particularly appropriate in the context of international trade relationships where, thanks to modern means of communication, most transactions are concluded at great speed and without any particular formalities.

b. Possible exceptions under the applicable law

The rule of the absence of any requirements as to form is made subject to possible exceptions.

One is that the Principles themselves require a special form for a particular category of contracts or single statements or communications; however, as the draft does not as yet contain any provision of this kind, the reference to

the Principles is placed in square brackets.

Another exception may derive from mandatory provisions to be found in the applicable law. There are legal systems which require written form for all foreign trade contracts (e.g. Arts. 14 and 125 of the Fundamental Principles of the Civil Law of the U.S.S.R. and Art.7 of the Foreign Economic Contract Law of the People's Republic of China), while others require a writing for a wide variety of transactions, although only for evidentiary purposes (see in particular the Statutes of Fraud in the common law systems; but see also Art. 1341 of the French Civil Code and similar provisions to be found in other civil law systems); in addition there are certain categories of contracts whose validity is almost everywhere dependent upon their being made in a specific form (e.g. real estate transactions; certain forms of securities; bills of exchange etc.). These national provisions will prevail over the principle of the absence of any formal requirement as laid down in this article, provided that they are applicable according to the relevant rules of private international law.

Finally, there may be cases where an exception to the general principle occurs with reference not to the contract as a whole, but to a specific term contained therein. Suffice it to recall arbitration agreements and jurisdiction clauses which, according to most national laws as well as to the relevant international conventions, require written form (cf. Art. II para. 2 of the 1958 New York Convention on the Recognition and Enforcement of Foreign Arbitral Awards; Art. 17 of the 1968 Brussels Convention on Jurisdiction and the Enforcement of Judgments in Civil and Commercial Matters, which in contracts between merchants admits, however, that the election of the competent forum may be made "in a form which accords with practices in that trade or commerce of which the parties are or ought to have been aware.").

c. Special provisions as to the form contained in the contract itself

Even where there is no requirement as to form imposed by law, the parties may conclude their contract in writing, and provide that any subsequent modification or termination by agreement is not to be effective unless made in the same form. In these cases the problem arises of the effectiveness of a modification or termination which the parties, notwithstanding the presence of a specific provision in their contract requiring written form, have agreed upon orally. For these cases paragraph 2 of the present article states that as a rule the form clause will

prevail, with the result that such oral agreements will have no effect. The same paragraph, however, also provides for an important exception to this rule by specifying that a party may be precluded by his conduct from relying on the form clause in order to defeat the oral agreement, to the extent that the other party has relied on that conduct.

Illustration 1

A contract for the construction of industrial works between Contractor C and Purchaser P indicates A as one of the sub-contractors to be appointed by C. Notwithstanding a clause in the contract according to which all modifications have to be made in writing, C and P orally agree to choose as sub-contractor B instead of A. Later on C nevertheless nominates A, invoking his original designation in the contract and the ineffectiveness of the subsequent oral designation of B. P must accept C's choice because the mere fact that the parties orally agreed to modify a written contractual term is not sufficient to set aside the provision contained in the same contract, according to which any modification must be in writing.

Illustration 2

The same situation as in Illustration 1, with the difference that, in accordance with the oral agreement with P, C appoints B and not A as his sub-contractor. P later on changes his mind, and insists on the appointment of A as originally agreed. Yet again, he must accept C's choice, i.e. he is prevented from invoking the clause of the contract according to which any modification must be in writing, since C's appointment of B instead of A was clearly made in reliance on the conduct of P when orally agreeing to the modification of the original contract term.

CROSS REFERENCES

Chapter I Art. 4

NOTES

Paragraph 1 of the article is modelled on provisions to be found in a number of recent conventions relating to international trade transactions (cf. e.g. Arts. 11, 12 and 96 CISG; Arts. 10, 11 and 27 of the 1983 Geneva Convention on Agency in International Sale of Goods). Paragraph 2 corresponds literally to paragraph 2 of Art. 29 CISG.

LITERATURE

SCHLECHTRIEM, Einheitliches UN-Kaufrecht, Tübingen, 1981, pp. 30 et seq. and 52.
HONNOLD, Uniform Law for International Sales Under the 1980 United Nations Convention, Deventer/Netherlands, 1982, pp. 152 et seq. and 229 et seq.
ENDERLEIN/MASKOW/STARGARDT, Kaufrechtskonvention der UNO (mit Verjährungskonvention) Kommentar, Berlin, 1985, pp. 57 et seq. and 77 et seq.
DATE-BAH in BIANCA/BONELL, Commentary on the International Sales Law - The 1980 Vienna Sales Convention, Milan, 1987, pp. 240 et seq.
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REINHART in DÖLLE, Kommentar zum Einheitlichen Kaufrecht, München, 1976, pp. 85 et seq. and 675 et seq.
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SCHLESINGER (ed), Formation of Contracts, Dobbs Ferry, 1968, pp. 177 et seq. and 1621 et seq.
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FARNSWORTH, Contracts, Boston/Toronto, 1982, pp. 369 et seq., 447 et seq. and 474 et seq.
GHESTIN, Les Obligations - Le Contrat, Paris, 1980, pp. 202 et seq. and 247 et seq.
FORSCHLER in MÜNCHENER KOMMENTAR zum Bürgerlichen Gesetzbuch, Band 1: Allgemeiner Teil, München, 1978, pp. 741 et seq.
SACCO, Il Contratto, Turin, 1975, pp. 420 et seq.

Article 2
(Definition of offer)

(1) A proposal for concluding a contract addressed to one or more specific persons constitutes an offer if it is sufficiently definite and indicates the intention of the offeror to be bound in case of acceptance.

(2) A proposal other than one addressed to one or more specific persons is to be considered merely as an invitation to make offers, unless the contrary is clearly indicated by the person making the proposal.

COMMENTS

In an attempt to define the notion of an offer as distinguished from a generic proposal to conclude a contract or from any other communication which a party may make in the course of negotiations initiated with a view to concluding a contract, this article lays down three requirements: the proposal must (i) be addressed to one or more specific persons; (ii) be sufficiently definite to permit the conclusion of the contract by mere acceptance; (iii) indicate the intention of the offeror to be bound in case of acceptance.

a. Proposal addressed to one or more specific persons

An offer is normally made to a particular addressee and this because as a rule the offeror will formulate the terms on which he is prepared to conclude the contract only after coming to know the person with whom he is going to conclude that particular contract. It may, however, happen that an offer is submitted to more than one addressee on the assumption that they are all of them eligible to become partners to a particular transaction. While expressly admitting such a possibility, paragraph 1 of the present article requires that for the offer still to be considered as such, it must be addressed to "specific" persons. In other words, what matters is not the number of addressees, but that they may be deemed to constitute a restricted category of persons. Obviously, the greater the number of the persons involved, the harder it becomes to distinguish this case from a so-called "offer to the public" as dealt with in paragraph 2.

Illustration 1

Company A wishes to replace costly machinery used in its plant. After establishing the value of the machinery it formulates the precise terms on which it is prepared to sell the machinery and sends that proposal to the ten companies in the region which it knows might be interested in buying it. The proposal meets the requirement of being addressed to "specific" persons and therefore constitutes a veritable offer.

b. Public offer

According to paragraph 2 of the present article, a proposal to conclude a contract addressed to an unspecified number of persons normally constitutes a mere invitation to make offers. Proposals of this kind usually take the form either of a display of goods in a shop window, vending

machine or the like, or of advertisements or calls for bids directed to the public at large. Exceptionally, however, they may amount to true offers: this is the case when the person making the proposal "clearly indicates" that he considers it to be an offer, and the proposal also meets all the other criteria to be regarded as an offer under the terms of paragraph 1. The indication in question need not be explicit: it may also be inferred from other statements made by the offeror.

Illustration 2

Travel agency A offers a number of package tours in an advertisement in a newspaper. Even though the advertisement also contains an indication as to the price of each of the tours, it still cannot be considered as a veritable offer, since there is no clear indication to this effect by the travel agency.

Illustration 3

The same situation as in Illustration 2, with the difference that the advertisement is qualified by language such as "only ten places left", "subject to available places" etc. The advertisement amounts to a veritable offer since it is made clear that, in the event of acceptance, the agency intends to be bound by its offer provided that the acceptances come within the given limits.

c. Definiteness of the offer

As to the requirement of the offer being "sufficiently definite", it is justified by the fact that, since a contract is concluded by the mere acceptance of an offer, the terms of the future agreement must already be indicated with sufficient definiteness in the offer. Whether a single offer meets this requirement cannot be established in general terms. Even essential terms of the agreement, such as the precise qualification of the goods or the services to be delivered or rendered, the price to be paid for them, the time or place of performance, etc., may be left undetermined in the offer without necessarily rendering it insufficiently definite: all depends on whether or not the offeror by making his offer, and the offeree by accepting it, intended to enter into a binding agreement, and whether or not the missing terms can be determined by reference to a course of dealing established between the parties, to any conduct of the parties subsequent to the conclusion of the contract, or to usages, as well as by reference to specific rules to be found elsewhere in these Principles (e.g. Art. 10 of Chapter V, on price determination). On the other hand, the

proponent may well declare that he considers the conclusion of the contract to be dependent on reaching an agreement on some minor points left open in his proposal: in such a case the missing terms obviously cannot be determined by implication and the proposal is thus not sufficiently definite to permit the conclusion of the contract by mere acceptance (cf. in this respect also Art. 12 of this Chapter).

d. Intention to be bound

The basic criterion for determining whether a party makes a veritable offer for the conclusion of a contract, or merely opens negotiations, is his intention to be bound in the event of acceptance. Since such an intention will rarely be declared expressly, it has to be inferred from the circumstances of each single case. In general, the more detailed and definite a proposal is, the more likely it is to be construed as an offer (see supra, lit. (c)). Of importance is the fact that the proposal is addressed to one or more "specific" persons and not to the public at large (see supra, lit. (a) and (b)), and how the proponent presents his proposal (e.g. by expressly defining it as an "offer" or as a mere "declaration of intent"). The statements made by the proponent obviously have to be interpreted in their full context, including "any preliminary negotiations between the parties, any practices which they have established between themselves, usages and any conduct of the parties subsequent to the conclusion of the contract" (see Art. 3 of Chapter III): as a result a declared "offer" may in a given case well prove to be a mere invitation to make an offer, while a "declaration of intent" may exceptionally amount to a binding proposal to conclude a contract.

Illustration 4

Buyer A contacts Seller B for the purchase of grain. In his reply B specifies the material conditions (time and place of delivery; price and mode of payment) at which he is willing to sell the requested quantity and quality of grain. He adds that, should A agree, he will send him "the Contract". A immediately informs B of his acceptance, but B, who in the meantime has changed his mind, never sends "the Contract". A contract is nonetheless concluded between A and B, as B's first reply, which contained all the elements of the agreement, amounted to a veritable offer which was accepted by A, while the subsequent formalisation of the agreement in a written "Contract" was never intended to be a condition for its coming into

existence.

Illustration 5

After lengthy negotiations the Executive Directors of Companies A and B are in a position to lay down the precise conditions on which B will acquire 51% of the shares of Company C which is totally owned by A. The "Memorandum of Agreement" which the two negotiators sign contains a final clause stating that the terms of the agreement have to be submitted for approval to the Board of Directors of Company A. Before such approval by the Board there is no contract since, when signing the Memorandum of Agreement, the Executive Director of A made it clear that the offer to sell C's shares subject to the condition specified therein was not yet binding.

CROSS REFERENCES

Chapter II Arts. 12 and 13
Chapter III Art. 3
Chapter V Arts. 3, 4, 7, 10 and 11

NOTES

This article corresponds literally to Art. 14 CISG, with the sole omission of the last sentence of paragraph 1. It is noteworthy that the model for Art. 14(2) CISG was the provision dealing with offers to the public contained in one of the earlier drafts of these Principles.

LITERATURE

SCHLECHTRIEM, Einheitliches UN-Kaufrecht, pp. 36 et seq.
HONNOLD, Uniform Law, pp. 160 et seq.
ENDERLEIN/MASKOW/STARGARDT, Kaufrechtskonvention, pp.61 et seq.
EORSI in BIANCA/BONELL, Commentary, pp. 132 et seq.
SCHLECHTRIEM in DOLLE, Einheitliches Kaufrecht, pp. 687 et seq.
ZWEIGERT/KOTZ, Einführung, pp. 41 et seq.
SCHLESINGER (ed), Formation, pp. 77 et seq., 325 et seq. and 645 et seq.
CHESHIRE FIFOOT & FURMSTON'S Law of Contract, pp. 28 et seq.
FARNSWORTH, Contracts, pp. 108 et seq. and 124 et seq.
GHESTIN, Le Contrat, pp. 155 et seq.
KRAMER in MÜNCHENER KOMMENTAR, Band 1, pp. 914 et seq.
SACCO, Il Contratto, pp. 185 et seq. and 705 et seq.

Article 3
(Withdrawal of offer)

(1) An offer becomes effective when it reaches the offeree.

(2) An offer, even if it is irrevocable, may be withdrawn if the withdrawal reaches the offeree before or at the same time as the offer.

COMMENTS

a. When an offer becomes effective

Paragraph 1 of the present article provides that an offer becomes effective when it reaches the offeree, i.e. when it is made orally to him, or is delivered by any other means at his place of business or mailing address (see Chapter I Art. 4). The time at which the offer becomes effective is of importance as it indicates the precise moment as from which the offeree may accept it, thus definitely binding the offeror to the proposed contract.

b. Withdrawal of an offer

There is, however, a further reason why it may in practice be important to determine the moment at which the offer becomes effective. Indeed, up to this moment the offeror is free to change his mind, in the sense that he may decide not to enter into the agreement at all, or replace the original offer by a new one, irrespective of whether or not the original offer was intended to be irrevocable, on the sole condition of the offeree being informed of the offeror's new intentions before or at the same time as he is informed of the original offer. By expressly stating this, paragraph 2 of the present article makes it clear that a distinction has to be made between "withdrawal" and "revocation" of an offer: before an offer becomes effective it may always be withdrawn whereas the question of whether or not it may be revoked (see Art. 4) arises only after that moment.

c. Abrupt and unjustified breaking off of negotiations

The rule according to which the offeror is entirely free to change his mind up to the moment his offer becomes effective is subject to exceptions deriving from the general principle of the duty to observe good faith in the course of the formation of a contract (see Chapter I Art. 3). Indeed, a possible application of this principle is that a party may

not break off negotiations abruptly and without justification. When such a point of no return is reached depends of course on the circumstances of the case, in particular on the number of issues relating to the future contract on which the parties have already reached agreement, and on the extent to which a party, as a result of the behaviour of the other party, had reason to rely on the coming into existence of the contract. As to the consequences which may arise from an abrupt and unjustified breaking off of negotiations, see the comments on Chapter I Art. 3.

CROSS REFERENCES

Chapter I Arts. 3 and 4
Chapter II Art. 4

NOTES

The article is taken literally from Art. 15 CISG.

LITERATURE

SCHLECHTRIEM, Einheitliches UN-Kaufrecht, pp. 36 et seq.
HONNOLD, Uniform Law, pp. 165 et seq.
ENDERLEIN/MASKOW/STARGARDT, Kaufrechtskonvention, pp. 63 et seq.
EORSI in BIANCA/BONELL, Commentary, pp. 145 et seq.
SZASZ, The CMEA Uniform Law, pp. 135 et seq.
ZWEIGERT/KOTZ, Einführung, pp. 44 et seq.
SCHLESINGER (ed), Formation, pp. 711 et seq.
CHESHIRE FIFOOT & FURMSTON'S Law of Contract, pp. 55 et seq.
FARNSWORTH, Contracts, pp. 148 et seq.
GHESTIN, Le Contrat, pp. 160 et seq.
FORSCHLER in MUNCHENER KOMMENTAR, Band 1, pp. 760 et seq.
SACCO, Il Contratto, pp. 192 et seq.

Article 4
(Revocation of offer)

(1) Until a contract is concluded an offer may be revoked if the revocation reaches the offeree before he has dispatched an acceptance.

(2) However, an offer cannot be revoked:

(a) if it indicates, whether by stating a fixed time for acceptance or otherwise, that it is irrevocable; or

(b) if it was reasonable for the offeree to rely on the offer as being irrevocable

and the offeree has acted in reliance on the offer.

COMMENTS

The problem of the revocability or irrevocability of the offer is traditionally one of the most controversial issues in the context of the formation of contracts. Since there is no chance of reconciling the two basic approaches followed in this respect by the different legal systems, i.e. the common law approach according to which an offer is as a rule revocable, and the opposite approach followed by the majority of civil law systems, the only remaining possibilty is that of selecting one approach as the main rule, and the other as the exception.

a. Offers as a rule revocable

Paragraph 1 of the present article states that until the contract is concluded offers are as a rule revocable. The same paragraph, however, subjects the revocation of an offer to the condition that it reaches the offeree before he has dispatched his acceptance. It is thus only when the offeree orally accepts the offer, or when the offeree may indicate assent by performing an act without giving notice to the offeror (see Art. 6(3) of this Chapter), that the offeror's right to revoke the offer exists until the moment the contract is concluded. On the contrary, when the offer is accepted by a written indication of assent, so that the contract is concluded when the acceptance reaches the offeror (see Art. 6(2) of this Chapter), the offeror's right to revoke the offer terminates at an earlier time, i.e. at the moment the offeree dispatches the acceptance. Such a solution may cause some inconvenience to the offeror who will not always know whether or not he is still entitled to revoke his offer. It is, however, justified in consideration of the legitimate interest of the offeree to curtail the time available for revocation.

b. Irrevocable offers

Paragraph 2 provides for two important exceptions to the general rule as to revocability of offers: (i) if the offer contains an indication that it is irrevocable; (ii) if the offeree, having other good reasons to rely on the offer as being irrevocable, has acted in reliance on that offer.

The indication that the offer is irrevocable may be made in different ways. The most direct and clear way is an

express statement to this effect by the offeror (e.g. "This is a firm offer"; "We shall stand by our offer until we get your answer"). It may, however, also simply be inferred from other statements by, or conduct of, the offeror. The indication of a fixed time for acceptance by itself may, but need not necessarily, amount to an implicit indication of an irrevocable offer. The answer must be found in each case by means of a proper interpretation of the terms of the offer in accordance with the different criteria laid down in the general rules on interpretation in Chapter III.

Illustration 1

Purchaser A invites Contractor B to submit a written offer of the terms on which he is prepared to construct a building. B presents a detailed offer containing the statement "Price and other conditions are good until 1 September". The statement should be understood as an indication that the offer is irrevocable until the indicated date.

Illustration 2

A travel agency informs a client of a cruise in programme for the coming Christmas holidays. It urges the client to book within the next three days, adding that after that date there will probably be no more places left. The statement by itself can hardly be considered to indicate implicitly that the offer is irrevocable during the first three days.

As to the second exception to the general rule of the revocability of offers, concerning those cases where "it was reasonable for the offeree to rely on the offer as being irrevocable", and "the offeree has acted in reliance on the offer", it may be seen as an application of the reliance doctrine or of the principle of good faith and fair dealing in the formation of contracts. The reliance of the offeree may have been induced either by the behaviour of the offeror, or by the nature of the offer itself (e.g. an offer the acceptance of which requires extensive and costly investigation on the part of the offeree; an offer made with a view to permitting the offeree in turn to make an offer to a third party). As to the act(s) which the offeree must have performed in reliance on the offer, it (they) may consist of preparation for production, buying or hiring of materials or equipment, incurring expenses etc., provided that such act(s) could have been regarded as normal in the trade concerned, or should otherwise have been foreseen by or known to the offeror.

Illustration 3

Antiquary A asks Painter P to restore ten paintings on the condition that the work is done within three months and that the price does not exceed a fixed amount. P informs A that, in order to know whether or not he can accept the offer, he must begin work on one painting and that he will give a definite answer within five days. A agrees, and P, relying on A's offer, begins work immediately. A may not revoke his offer during the five days.

Illustration 4

Buyer B solicits an offer from Seller S stating that it is intended to permit him to make a bid on a project to be assigned within a stated time. S submits his offer and B relies on it when calculating the price of his bid. Before the expiry of the date, but after B has made his bid, S informs B that he is no longer willing to stand by his offer. S must keep his offer firm until the stated date since B made his bid relying on S's offer being irrevocable during that period of time.

CROSS REFERENCES

Chapter II Art. 6
Chapter III

NOTES

This article corresponds literally to Art. 16 CISG.

LITERATURE

SCHLECHTRIEM, Einheitliches UN-Kaufrecht, pp. 39 et seq.
HONNOLD, Uniform Law, pp. 167 et seq..
ENDERLEIN/MASKOW/STARGARDT, Kaufrechtskonvention, pp. 64 et seq.
EORSI in BIANCA/BONELL, Commentary, pp. 150 et seq.
SCHLECHTRIEM in DOLLE, Einheitliches Kaufrecht, pp. 699 et seq.
SZASZ, The CMEA Uniform Law, pp. 135.
ZWEIGERT/KOTZ, Einführung, pp. 44 et seq.
SCHLESINGER (ed), Formation, pp. 109 et seq., 112 et seq., 114 et seq., 745 et seq., 793 et seq. and 837 et seq.
CHESHIRE FIFOOT & FURMSTON'S Law of Contract, pp. 55 et seq.
FARNSWORTH, Contracts, pp. 148 et seq., 166 et seq. and 171 et seq.
GHESTIN, Le Contrat, pp. 160 et seq.
KRAMER in MÜNCHENER KOMMENTAR, Band 1, pp. 914 et seq.

SACCO, Il Contratto, pp. 204 et seq. and 221 et seq.

Article 5
(Rejection of offer)

Any offer is terminated when a rejection reaches the offeror.

COMMENTS

a. Rejection only one of the causes of termination of an offer

Rejection on the part of the offeree is only one of the causes of termination of an offer. Other causes are dealt with in Arts. 4(1) (revocation of offer) and 8(1) (expiry of the time of acceptance of the offer) of this Chapter.

b. Rejection may be express or implied

Rejection of an offer need not be made expressly, but may also result by implication. A frequent case of implied rejection is a reply to an offer which purports to be an acceptance but contains additions, limitations or other modifications (cf. Art. 7(1) of this Chapter).

In the absence of an express rejection the statements by, or the conduct of, the offeree must in any event be such as to justify the belief of the offeror that the offeree has no intention to accept the offer. A reply on the part of the offeree in which he merely asks whether there would be possibilities for an alternative to be considered (e.g. "Is there any chance of having the price reduced somewhat?"; "Could you deliver a couple of days earlier?") would normally not be sufficient to justify such a conclusion.

c. "Any offer" terminated by rejection

By stating that "any offer" is terminated by rejection, this provision makes it clear that if the offeree expressly or impliedly rejects the offer, that offer lapses irrespective of whether it was revocable or irrevocable according to the criteria laid down in Art. 4 of this Chapter.

Illustration 1

Buyer B receives an offer from Seller S stating that

it will be firm for two weeks. B replies by return of post asking for partially different conditions which S does not accept. B may no longer rely on the original offer by claiming that there are still several days left before the expiry of the two weeks: by making a counter-offer he implicitly rejected the original offer.

CROSS REFERENCES

Chapter II Arts. 4, 7(1) and 8(1).

NOTES

The provision corresponds in substance to Art. 17 CISG.

LITERATURE

SCHLECHTRIEM, Einheitliches UN-Kaufrecht, pp. 40 et seq.
HONNOLD, Uniform Law, pp. 177 et seq..
ENDERLEIN/MASKOW/STARGARDT, Kaufrechtskonvention, pp. 65 et seq.
EORSIin BIANCA/BONELL, Commentary, pp. 161 et seq.
ZWEIGERT/KOTZ, Einführung, pp. 41 et seq.
SCHLESINGER (ed), Formation, pp. 127 et seq. and 1003 et seq.
CHESHIRE FIFOOT & FURMSTON'S Law of Contract, pp. 36 et seq.
FARNSWORTH, Contracts, pp. 156 et seq.
KRAMER in MUNCHENER KOMMENTAR, Band 1, pp. 921 et seq.
SACCO, Il Contratto, pp. 216 et seq.

Article 6
(Mode of acceptance.
Time of acceptance)

(1) A statement made by or other conduct of the offeree indicating assent to an offer is an acceptance. Silence or inactivity does not in itself amount to acceptance.

(2) An acceptance of an offer becomes effective at the moment the indication of assent reaches the offeror. An acceptance is not effective if the indication of assent does not reach the offeror within the time he has fixed or, if no time is fixed, within a reasonable time, due account being taken of the circumstances of the transaction, including the rapidity of the means of communication employed

by the offeror. An oral offer must be accepted immediately unless the circumstances indicate otherwise.

(3) However, if, by virtue of the offer or as a result of practices which the parties have established between themselves or of usage, the offeree may indicate assent by performing an act without notice to the offeror, the acceptance is effective at the moment the act is performed, provided that the act is performed within the period of time laid down in the preceding paragraph.

COMMENTS

a. Nature of acceptance

This article makes it clear first of all that for there to be an acceptance the offeree must in one way or another indicate "assent" to the offer. The mere acknowledgment of receipt of the offer, or an expression of interest in it, is not sufficient. Furthermore, such indication of assent must be unconditional, i.e. it cannot be made dependent on some further step to be taken by either the offeror (e.g. "Our acceptance is subject to your final approval") or the offeree (e.g. "We hereby accept the terms of the contract as set forth in your Memorandum and undertake to submit the contract to our Board for approval within the next two weeks"). Finally, the purported acceptance must not contain any variation of the terms of the offer or at least none which materially alters them: see on this point infra Art. 7 of this Chapter.

b. Mode of acceptance

Provided that the offer does not impose any particular mode of acceptance, the indication of assent may either be made by an express statement or be inferred from the conduct of the offeree. Paragraph 1 of this article does not specify what form such a conduct should take: most often it will consist of acts of performance, such as the payment of an advance of the price, the shipment of the goods or the commencement of works at the site, etc.

c. Silence or inactivity

By stating that "Silence or inactivity does not in itself amount to acceptance", paragraph 1 makes it clear that as a rule mere silence or inactivity on the part of the offeree

does not permit the inference that the offeree assents to the offer. The situation is different if the parties themselves agree that silence shall amount to acceptance, or if there exists a course of dealing or usage to this effect. In no case, however, is it sufficient for the offeror to state unilaterally in his offer that the offer will be deemed to have been accepted in the absence of any reply on the part of the offeree. Since it is the offeror who takes the initiative to propose the conclusion of the contract, the offeree is free not only to accept or not to accept the offer, but also simply to ignore it: any attempt on the part of the former to impose on the latter any sort of positive behaviour would be against the general principles of good faith and fair dealing.

Illustration 1

Purchaser P requests Supplier S to set forth the conditions for the renewal of the contract for the supply of beer, due to expire on 31 December. In his offer S includes a provision stating that "If we have not heard from you at the latest by the end of November, we will assume that you have accepted to renew the contract on the conditions as indicated above". P finds the proposed conditions absolutely unacceptable and does not even reply. The old contract expires on the fixed date without there being any new contract agreed between the parties.

Illustration 2

Under a long-term agreement for the supply of beer Supplier S used to meet Purchser P's orders without expressly confirming his acceptance. On 15 November P orders a large stock for Christmas. S does not reply, nor does he deliver at the requested time. P may sue him for breach of contract on the ground that according to a course of dealing established between them S's silence in regard to his order amounted to acceptance.

d. When an acceptance becomes effective

Paragraph 2 lays down the principle according to which "[a]n acceptance (...) becomes effective at the moment the indication of assent reaches the offeror". Thus, contrary to the approach traditionally followed in the common law systems but in conformity with that of most civil law systems, preference is given to the so called "receipt" theory, i.e. the statement of acceptance is effective not on its dispatch but only on its receipt. The reason is that the risk of transmission is better placed on the offeree

than on the offeror, since not only is the latter unaware of the conclusion of the contract until such time as he is informed of the acceptance, but the former is also the one to know whether the means of communication he employs is subject to special perils or delays.

A further implication of the opening sentence of paragraph 2 is that also an acceptance by means of mere conduct as a rule becomes effective only when notice thereof reaches the offeror. It should be noted, however, that special notice to this effect by the offeree will be necessary only in cases where the conduct will not of itself give notice of acceptance to the offeror within a reasonable period of time. In all other cases, e.g. where the conduct consists of the payment of the price, or the shipment of the goods by air or by some other rapid mode of transportation, the same effect may well be achieved simply by the bank or the carrier informing the offeror of the funds transfer or of the consignment of the goods.

The general rule of paragraph 2 finds an exception in the cases envisaged in paragraph 3, i.e. where "by virtue of the offer or as a result of practices which the parties have established between themselves or of usage, the offeree may indicate assent by performing an act without notice to the offeror". In such cases the acceptance is effective the moment the act is performed, irrespective of whether or not the offeror is promptly informed thereof.

Illustration 3

Customer C asks Programmer P to write a special programme for the setting up of a data bank. Without notifying C of his intention to accept, P begins to write the programme and, after its completion, insists on being paid for it in accordance with the terms set forth in C's offer. C, who in the meantime has bought a programme answering his needs from another supplier, may refuse to pay since P's purported acceptance of C's offer never became effective.

Illustration 4

The same situation as in Illustration 3, with the only difference that in his offer C informs P that he will be absent for the following two weeks, and that if he intends to accept the offer P should start writing the programme immediately in order to save time. The contract is concluded on the commencement of its performance on the part of P, even if P fails to inform C thereof either immediately or at a later stage.

e. Time of acceptance

The question of the time within which an offer must be accepted is addressed by the second and third sentences of paragraph 2. In this respect a first distinction is drawn between oral and written offers, in the sense that the former, unless the circumstances indicate otherwise, must be accepted immediately. As to the latter, it depends on whether or not the offer has indicated a fixed time for acceptance: in the first case it must be accepted within that time, while in all other cases the indication of assent must reach the offeror "within a reasonable time, due account being taken of the circumstances of the transaction, including the rapidity of the means of communication employed by the offeror".

It is important to note that paragraph 3 expressly extends these rules to cases where the offeree may indicate assent by performing an act without notice to the offeror, in the sense that in these cases it is the act of performance which has to be done within the respective periods of time.

As to the determination of the exact commencement of the period of time fixed by the offeror, and the calculation of holidays occurring during that period of time, see infra Art. 8 of this Chapter, while Art. 9 deals with the cases of late acceptance and of delay in transmission.

CROSS REFERENCES

Chapter II Arts. 8 and 9

NOTES

This article corresponds literally to Art. 18 CISG.

LITERATURE

SCHLECHTRIEM, Einheitliches UN-Kaufrecht, pp. 40 et seq.
HONNOLD, Uniform Law, pp. 180 et seq..
ENDERLEIN/MASKOW/STARGARDT, Kaufrechtskonvention, pp. 66 et seq.
FARNSWORTH in BIANCA/BONELL, Commentary, pp.163 et seq.
SCHLECHTRIEM in DOLLE, Einheitliches Kaufrecht, pp. 711 et seq.
ZWEIGERT/KOTZ, Einführung, pp. 41 et seq.
SCHLESINGER (ed), Formation, pp.131 et seq. and 1071 et seq
CHESHIRE FIFOOT & FURMSTON'S Law of Contract, pp. 35 et seq.
FARNSWORTH, Contracts, pp. 136 et seq.

GHESTIN, Le Contrat, pp. 173 et seq. and 226 et seq.
KRAMER in MÜNCHENER KOMMENTAR, Band 1, pp.932 et seq.
SACCO, Il Contratto, pp. 50 et seq.

Article 7
(Modified acceptance)

(1) A reply to an offer which purports to be an acceptance but contains additions, limitations or other modifications is a rejection of the offer and constitutes a counter-offer.

(2) However, a reply to an offer which purports to be an acceptance but contains additional or different terms which do not materially alter the terms of the offer constitutes an acceptance, unless the offeror, without undue delay, objects orally to the discrepancy or dispatches a notice to that effect. If he does not so object, the terms of the contract are the terms of the offer with the modifications contained in the acceptance.

(3) Additional or different terms relating, among other things, to the price, payment, place and time of performance, extent of one party's liability to the other or the settlement of disputes are considered to alter the terms of the offer materially.

COMMENTS

a. Acceptance with modifications normally to be considered as a counter-offer

In commercial dealings it often occurs that the offeree, while declaring to the offeror his intention to accept the offer, nevertheless includes in the written document he sends the to offeror for that purpose ("acknowledgment of order") terms additional to or different from those of the offer. In conformity with the solution adopted in almost all legal systems, paragraph 1 of the present article provides that such a purported acceptance is as a rule to be considered as a rejection of the offer and amounts to a veritable counter-offer on the part of the offeree.

b. Modifications which do not alter the nature of the acceptance

The principle according to which the acceptance must be the mirror image of the offer may lead to undesirable results whenever the offeree adds the modifying terms on the assumption that, because of their minor importance or their correspondence to a course of dealing between the parties or a usage, the offeror will have no difficulty in accepting them. In fact, in such a case, if the offeror does not immediately object to the additions or modifications contained in the acceptance, then why should either party at a later stage be entitled to deny that a contract was ever concluded simply because formally the terms of the offer and of the acceptance did not entirely coincide?

In order to avoid such a result paragraph 2 provides for an exception to the general rule laid down in paragraph 1, by stating that if the additional or different terms contained in the acceptance do not "materially" alter the terms of the offer, the contract is concluded with these modifications, unless the offeror objects without undue delay.

An indication of what will normally amount to a "material" modification is given by paragraph 3 which expressly mentions those relating to the price, payment, place and time of performance, the extent of one party's liability to the other or the settlement of disputes. A definite answer to the question of whether or not the modifications contained in the acceptance are material will, however, depend on the circumstances of each single case. Thus, while it is quite possible that this is the case also for additional or different terms relating to other issues, on the other hand it cannot be excluded that even a modification relating to one of the issues expressly mentioned may in practice not "materially" alter the offer. This is the case whenever the terms in question reflect a course of dealing or a usage and thus, far from adding anything new to the terms of the offer, merely render explicit what is already implicit in both the offer and the acceptance.

Illustration 1

Buyer B orders a machine from Seller S. In his acknowledgment of order S declares that he accepts the terms of the offer, but adds that as far as the testing of the machine on B's premises is concerned, he wants to be present. The additional term can hardly be considered as a "material" modification of

the offer and will therefore become part of the contract unless B objects "without undue delay".

Illustration 2

Buyer B orders a machine from Seller S. In his acknowledgment of order S declares that he accepts the terms of the offer, but adds that the competent forum should be that of his place of business. The addition relates to "the settlement of disputes" and as such "materially" alters the terms of the offer, thus transforming the purported acceptance into a counter-offer.

Illustration 3

Charterer C submits an offer for the conclusion of a charterparty to Shipowner S. In his reply S declares that he accepts the terms of the offer, but adds that payment has to be made in U.S. dollars. Such a mode of payment is customary for all charterparties concluded at that place, and therefore its express mention in S's reply does not add anything to what in any event would have been implicit in both the offer and the acceptance.

CROSS REFERENCES

Chapter II Art. 11

NOTES

The article corresponds literally to Art. 19 CISG.

LITERATURE

SCHLECHTRIEM, Einheitliches UN-Kaufrecht, pp. 42 et seq.
HONNOLD, Uniform Law, pp. 188 et seq..
ENDERLEIN/MASKOW/STARGARDT, Kaufrechtskonvention, pp. 67 et seq.
FARNSWORTH in BIANCA/BONELL, Commentary, pp. 175 et seq.
SCHLECHTRIEM in DOLLE, Einheitliches Kaufrecht, pp. 721 et seq.
SZASZ, The CMEA Uniform Law, pp. 135 et seq.
SCHLESINGER (ed), Formation, pp. 125 et seq.and 953 et seq.
CHESHIRE FIFOOT & FURMSTON'S Law of Contract, pp. et seq.
FARNSWORTH, Contracts, pp. 138, 157 et seq.
GHESTIN, Le Contrat, pp. 224 et seq.
KRAMER in MUNCHENER KOMMENTAR, Band 1, pp. 928 et seq.
SACCO, Il Contratto, pp. 230 et seq.

Article 8
(Acceptance within a fixed period of time)

(1) A period of time for acceptance fixed by the offeror in a telegram or a letter begins to run from the moment the telegram is handed in for dispatch or from the date shown on the letter or, if no such date is shown, from the date shown on the envelope. A period of time for acceptance fixed by the offeror by telephone, telex or other means of instantaneous communication, begins to run from the moment that the offer reaches the offeree.

(2) Official holidays or non-business days occurring during the period for acceptance are included in calculating the period. However, if a notice of acceptance cannot be delivered at the address of the offeror on the last day of the period because that day falls on an official holiday or a non-business day at the place of business of the offeror, the period is extended until the first business day which follows.

COMMENTS

The offeror may fix a deadline within which the offeree must accept the offer. As long as this is done by indicating a precise date (e.g. "In case you intend to accept my offer, please do so no later than 1 March"), no special problems arise. On the contrary, if the offeror merely indicates a period of time (e.g. "You have ten days to accept this offer"), the problem may arise as to when the period starts to run as well as as to the effect of holidays occurring during or at the expiry of that period. The present article is intended to provide an answer to these two questions where nothing is said in the offer itself.

CROSS REFERENCES

Chapter II Art. 6(2)

NOTES

This article corresponds literally to Art. 20 CISG.

LITERATURE

SCHLECHTRIEM, Einheitliches UN-Kaufrecht, p. 42.
HONNOLD, Uniform Law, pp. 197 et seq..

ENDERLEIN/MASKOW/STARGARDT, Kaufrechtskonvention, pp. 69 et seq.
FARNSWORTH in BIANCA/BONELL, Commentary, pp. 185 et seq.
SCHLECHTRIEM in DOLLE, Einheitliches Kaufrecht, pp. 729 et seq.
SZASZ, The CMEA Uniform Law, pp. 136 et seq.
SCHLESINGER (ed), Formation, pp. 166 et seq. and 1495 et seq.
BIANCA, Il contratto, Milano, 1984, pp. 218 et seq.
FARNSWORTH, Contracts, pp. 152 et seq.
KRAMER in MÜNCHENER KOMMENTAR, Band 1, pp. 922 et seq.

Article 9
(Late acceptance.
Delay in transmission)

(1) A late acceptance is nevertheless effective as an acceptance if without delay the offeror orally so informs the offeree or dispatches a notice to that effect.

(2) If a letter or other writing containing a late acceptance shows that it has been sent in such circumstances that if its transmission had been normal it would have reached the offeror in due time, the late acceptance is effective as an acceptance unless, without delay, the offeror orally informs the offeree that he considers his offer as having lapsed or dispatches a notice to that effect.

COMMENTS

a. Late acceptance normally to be considered ineffective

According to the principle laid down in Art. 6(2) of this Chapter, for an acceptance to be effective it must reach the offeror within the time fixed by the latter or, if no time is fixed, within a reasonable time. In other words, since an offer lapses after the expiry of the deadline fixed by the offeror for its acceptance or, if no such deadline has been fixed, after a reasonable period of time, any acceptance which reaches the offeror after the offer has lapsed may be disregarded by the latter, thus remaining without any effect.

b. Nevertheless offeror may "accept" late acceptance

Paragraph 1 of the present article states that, notwithstanding the general rule of Art. 6(2), the offeror may consider the late acceptance as having arrived in time and thus render it effective, provided he "without delay (...) orally so informs the offeree or dispatches a notice to that effect". It should be noted that if the offeror avails himself of this possibility, the contract is concluded at the time of the dispatch of the notice of the "acceptance" on his part of the late acceptance, and not when that notice reaches the offeree as would be the case if, in application of the general rule of Art. 6(2), the late acceptance were to be considered a counter-offer.

Illustration 1

Offeror A indicates 31 March as the deadline for the acceptance of his offer. The acceptance on the part of Offeree B reaches A on 3 April. A, who is still interested in the contract, intends to "accept" B's late acceptance, and immediately dispatches a notice to this effect. Notwithstanding the fact that this notice reaches B only on 5 April the contract is concluded as from 3 April.

b. Acceptance late because of a delay in transmission

As long as the acceptance is late because the offeree did not send it in time, it is only fair to consider it to have no effect unless the offeror expressly indicates otherwise. The situation clearly changes whenever the offeree has replied in time, but his acceptance reaches the offeror late because of an unexpected delay in transmission. In such a case the reliance of the offeree on his acceptance having arrived in time should be protected, with the result that the late acceptance should nevertheless be considered effective unless the offeror objects without undue delay. Paragraph 2 of the present article expressly provides for such a solution, the only condition being that the "letter or [the] other writing containing [the] late acceptance shows that it has been sent in such circumstances that, if its transmission had been normal, it would have reached the offeror in due time".

Illustration 2

The same situation as in Illustration 1, with the difference that B, knowing that the normal time of transmission of letters by mail to A's place is three days, sends his letter of acceptance on 25 March. Due to a strike of the postal service in A's country the

letter, which shows the date of its mailing on the envelope, arrives only on 3 April. B's acceptance, though being late, is nevertheless effective unless A objects without undue delay.

CROSS REFERENCES

Chapter II Arts. 6(2) and 8

NOTES

This article literally corresponds to Art. 21 CISG.

LITERATURE

SCHLECHTRIEM, Einheitliches UN-Kaufrecht, p. 42.
HONNOLD, Uniform Law, pp. 199 et seq..
ENDERLEIN/MASKOW/STARGARDT, Kaufrechtskonvention, pp. 70 et seq.
FARNSWORTH in BIANCA/BONELL, Commentary, pp. 189 et seq.
SCHLECHTRIEM in DOLLE, Einheitliches Kaufrecht, pp. 735 et seq.
SZASZ, The CMEA Uniform Law, p. 136.
SCHLESINGER (ed), Formation, pp. 169 et seq. and 1547 et seq.
BIANCA, Il contratto, pp. 220 et seq.
CHESHIRE FIFOOT & FURMSTON'S Law of Contract, pp et seq.
FARNSWORTH, Contracts, pp. 155 et seq.
KRAMER in MÜNCHENER KOMMENTAR, Band 1, pp. 926 et seq.

Article 10
(Withdrawal of acceptance)

An acceptance may be withdrawn if the withdrawal reaches the offeror before or at the same time as the acceptance would have become effective.

COMMENTS

With respect to the withdrawal of an acceptance this article lays down the same principle as that contained in Art. 3(2) of this Chapter concerning the withdrawal of an offer, i.e. that the offeree may change his mind and withdraw his acceptance provided that his withdrawal reaches the offeror before or at the same time as his acceptance. It should be noted that while the offeror is bound by his offer

and may no longer change his mind once the offeree has dispatched his acceptance (see Art. 4(1) of this Chapter), the offeree looses his freedom of choice only at a later stage, i.e. when his acceptance reaches the offeror.

CROSS REFERENCES

Chapter II Arts. 3(2) and 4(1)

NOTES

This article corresponds literally to Art. 22 CISG.

LITERATURE

SCHLECHTRIEM, Einheitliches UN-Kaufrecht, p. 41.
HONNOLD, Uniform Law, p. 204.
ENDERLEIN/MASKOW/STARGARDT, Kaufrechtskonvention, p. 71.
FARNSWORTH in BIANCA/BONELL, Commentary, pp. 195 et seq.
SCHLECHTRIEM in DOLLE, Einheitliches Kaufrecht, pp. 743 et seq.
SCHLESINGER (ed), Formation, pp. 156 et seq. and 1391 et seq.
CHESHIRE FIFOOT & FURMSTON'S Law of Contract, pp. 52 et seq.
FORSCHLER in MUNCHENER KOMMENTAR, Band 1, pp. 760 et seq.
SACCO, Il Contratto, pp. 204 et seq.

Article 11
(Letter of confirmation)

(1) Where within a reasonable time after the conclusion of a contract, one party sends the other a document which is intended to be a written confirmation of their agreement but which contains terms that add to or vary those of that agreement, these terms will become part of the contract, unless they materially alter the terms of the contract and the recipient without undue delay objects as provided in Article 7(2).

(2) Paragraph 1 of this article applies also where the additional or varying terms are contained in an invoice.

COMMENTS

a. Letter of confirmation as distinguished from acknowledgment of order

The first situation dealt with in the present article is that where a contract has already been concluded either orally or by informal correspondence, and one party sends to the other a document ("letter of confirmation"), the purpose of which is simply to confirm in writing what has already been agreed upon, but which may sometimes also contain terms as yet not discussed by the parties. In theory this situation clearly differs from that envisaged in Art. 7, where a contract has not yet been concluded and the modifying terms are contained in the offeree's purported acceptance. In practice, however, it might be very difficult, if not impossible, to distinguish between the two, all depending as to whether or not, prior to the sending of the document laying down the terms of the contract, there has already been a binding agreement between the parties.

It is for this reason that the solution adopted in this article with respect to modifying terms contained in a letter of confirmation corresponds to that envisaged in Art. 7. In fact, just as for the variants contained in an acknowledgment of order, it is provided that terms additional to or different from those of the previous agreement contained in a letter of confirmation become part of the contract, provided that they do not "materially" alter the agreement and that the recipient of the document does not object to them without undue delay.

It goes without saying that also in the context of letters of confirmation the question which of the new terms "materially" alter the terms of the previous agreement can be answered definitely only in the light of the circumstances of each single case. In other words, while a term concerning an issue which is normally of minor importance may well in a given case represent a "material" modification of the agreement, the reverse also may be true, i.e. that even additional terms relating to important issues, such as place and time of performance, the liability regime or the settlement of disputes, do not "materially" alter the agreement previously reached between the parties as they must be considered to have been already implicitly included in the agreement because of their correspondence to a course of dealing between the parties or a usage.

Illustration 1

Buyer B orders by telephone a machine from Seller S, and S accepts. The following day S sends a letter to B in which he confirms the terms of their oral agreement, adding that he wishes to be present at the testing of the machine on B's premises. The additional term can hardly be considered to be a "material" modification of the agreement, and will therefore become part of the contract unless B objects "without undue delay".

Illustration 2

The same situation as in Illustration 1, with the difference that in his letter of confirmation S adds that the competent forum should be that of his place of business. The addition will normally have to be considered as a "material" modification of the agreement, and will therefore not bind B even if he remains silent.

Illustration 3

The same situation as in Illustration 1, with the difference that in his letter of confirmation S includes his printed general conditions, which B has already accepted on the occasion of previous contracts of the same kind concluded with S. Although the conditions contain terms concerning important issues, such as S's liability for defects in the machine or delay in delivery, they should become part of the contract because their incorporation into the agreement corresponds to a course of dealing between B and S.

b. Letter of confirmation to be sent within a reasonable time after the conclusion of the contract

A document by which one of the parties intends to confirm in writing the terms of an agreement previously concluded has by its very nature to be sent shortly thereafter. At least, in no case should silence on the part of the recipient be considered as an acceptance of the content of the document, whenever the latter is sent after a period of time which, in the light of the circumstances, appears to be unreasonably long.

Illustration 4

The same situation as in Illustration 1, with the difference that S sends his letter three months after the conclusion of the contract, when the machine has already been delivered, and B is ready to test it by

himself. If B, without expressly objecting to S's request to be present, goes ahead, S may not complain since by suggesting such an addition to the original agreement at such a late stage he must accept that B simply disregarded it.

b. Invoices

It may happen that, after an oral agreement between the parties, one of them lays down the conditions of the contract in more detail in the invoice or in another similar document relating to performance. In such a case also the question arises of whether or not silence on the part of the recipient shall be considered as an acceptance of these conditions, even if they are, at least in part, additional to or different from those previously agreed upon. Paragraph 2 of the present article, which expressly extends to invoices the rule laid down in paragraph 1 for letters of confirmation, should be read so as to permit such an extension only in those cases where it is customary to use the invoice for a purpose similar to that of a letter of confirmation.

Illustration 5

The same situation as in Illustration 3, with the difference that B and S belong to countries and/or trade sectors where it is customary for the general conditions of sale to be attached to the invoice sent by the seller shortly after the conclusion of the contract. Unless B objects without undue delay, S's general conditions become part of the contract.

CROSS REFERENCES

Chapter II Arts. 7 and 16

NOTES

There is no precedent for this provision in international instruments. For a similar provision at a national level, see § 2-207(2) UCC. In general, national laws vary considerably with respect to the issues which are under consideration here. In fact, as regards the so-called letter of confirmation, only the German and, to a certain extent, the Austrian and Swiss legal writings and caselaw seem to accept that the silence of the recipient amounts to a tacit acceptance by him ("Schweigen auf Bestätigungsschreiben bedeutet Annahme"), whilst for invoices a similar rule would seem to be admitted only in France and Belgium ("facture acceptée"). In most other legal systems silence

on the part of the recipient is traditionally considered to be acceptance of the terms or conditions at issue only in exceptional circumstances, e.g. if they have been inserted in prior contracts or are commonly used in similar transactions and consequently correspond to a course of dealing between the parties or to a veritable usage in the particular sector of trade concerned.

LITERATURE

SCHLECHTRIEM in DOLLE, Einheitliches Kaufrecht, pp. 717 et seq.
SCHLESINGER (ed), Formation, pp. 130 et seq., 1047 et seq.
BIANCA, Il contratto, pp. 217 et seq.
FARNSWORTH, Contracts, pp. 165 et seq.
GHESTIN, Le Contrat, pp. 240 et seq.
KRAMER in MÜNCHENER KOMMENTAR, Band 1, pp. 937 et seq.

Article 12
(Time of conclusion of contract)

Where according to the intention expressed by one of the parties in the course of negotiations the conclusion of the contract is dependent on the agreement on specific terms, the contract shall be deemed to be concluded only where the parties have reached such an agreement.

COMMENTS

a. Time of conclusion of a contract in general

A contract is normally concluded when the acceptance of an offer becomes effective, or when mutual assent is manifested in some other way, e.g. by simultaneously signing a document. As to the content of the agreement, it is sufficient if the terms essential to the type of transaction involved are covered: minor terms which the parties have failed to consider in advance may well subsequently be implied either in fact or in law.

Illustration 1

Principal P agrees with Agent A on all the terms which are essential to their intended contract for the distribution of P's goods in country C. However, neither party raised during the negotiations the question of who should bear the costs of the publicity

campaign to be organized in country C, so that the contract is silent on this point. Being told later on by P that he should bear the cost, A may not object that, owing to their failure to reach an agreement on this point, no contract has come into existence between them: the missing term, not being essential to the type of transaction in question, will be implied in fact or by law.

b. Conclusion of a contract step by step

Businessmen, when negotiating a contract, may well consider particular terms to be of such an importance that they do not intend to enter into a binding agreement unless these terms are settled in a satisfactory manner. As long as the terms in question are essential to the type of transaction involved no special problems will arise as an agreement between the parties on these terms is, normally at least, necessary for the contract to be concluded even in the absence of a special declaration to this effect. It is when a party declares a minor term to be of essential importance to him that the question arises of the precise moment at which the contract shall be considered to be concluded. Of the two possible solutions, i.e. the contract is concluded only when this minor term has also been settled, or alternatively the contract is already concluded when the parties have reached agreement on its essential terms, the only consequence of their subsequent failure to agree on the minor term being that the term will be implied by law, the present article definitely chooses the first solution. It follows that as long as one or more terms of the contract is under discussion between the parties, the contract as such does not come into existence, irrespective of whether or not the terms in question are normally considered to be essential, or of the parties declaring at a certain moment of their negotiations that they consider the terms so far agreed to be definitive. What is decisive is that both parties, or even one of them only, have manifested right from the beginning or at a later stage their intention, either expressly or impliedly, to make the conclusion of the contract dependent on the settlement of the specific terms in question.

Illustration 2

The same situation as in Illustration 1, with the difference that during the negotiations A repeatedly raises the issue of who should bear the cost of the publicity campaign without receiving any satisfactory answer from P. Although there is a usage according to which in transactions of this kind the costs have to

be borne by the agent, P, after having reached an agreement with A on all the essential terms, may not invoke this usage in order to justify his request for A to pay for the publicity: in fact, no contract has come into existence since A has made it clear that he intended to make the conclusion of the contract dependent on an agreement on that specific term.

c. Intention not to be bound until later writing

In commercial practice, particularly if transactions of considerable complexity are involved (e.g. the acquisition of a majority participation in a company or a contract for a joint venture), it is quite frequent that after prolonged negotiations the parties sign an informal document called "Preliminary Agreement", "Memorandum of Understanding", "Letter of Intent" or the like, containing the terms of the agreement so far reached, but at the same time declare their intention to provide for the execution of a formal document at a later stage ("Subject to Contract", "Formal Agreement to follow"). Whether or not in such a case both parties, or even only one of them, intended to postpone the conclusion of the contract until the execution of the formal document, depends on the circumstances of each case. In general, if there is no clear statement in one sense or in the other, ("This commitment shall constitute a contract"; "Not binding until final agreement is executed"), the more detailed and carefully drafted the terms of the preliminary writing, the more likely it is that the contract has already been concluded and that the parties consider the execution of the formal document only as a confirmation of their already complete agreement.

Illustration 3

Party A and Party B sign after prolonged negotiations a "Memorandum of Understanding" containing the terms of an agreement for a joint venture for the exploration and exploitation of the continental shelf of Country C. In the document A and B state that, within two month's time, they will draw up the agreement in formal documents to be signed and exchanged at a public ceremony. In view of the fact that the first writing already contains an exhaustive regulation of the contract, and that the new documents are intended merely to permit the agreement to be properly presented to the public, it may be concluded that the contract was already concluded when the first writing was signed.

Illustration 4

The same situation as in Illustration 3, with the difference that the "Memorandum of Understanding" mainly deals with the technical aspects of the intended exploration and exploitation, and that it is understood by the parties that the formal documents will be executed only after their lawyers have settled the legal aspects of the transaction. Unless there is strong evidence to the contrary, it may be concluded that there is no binding contract until the signing and the exchange of the formal documents.

CROSS REFERENCES

Chapter II Arts. 2, 6 and 7

NOTES

There is no precedent for this provision in existing international instruments. The principle laid down in this article is, however, well established at national level. For an express provision similar to that contained in the present article, see, among others, § 154 of the Civil Code of the Federal Republic of Germany and § 30(2) of the International Economic Contract Law of the German Democratic Republic. See also Restatement, Second, Contracts § 27.

LITERATURE

SCHLESINGER (ed), Formation, pp. 173 et seq. and 1581 et seq.
BIANCA, Il contratto, pp. 232 et seq.
FARNSWORTH, Contracts, pp. 119 et seq.
GHESTIN, Le Contrat, pp. 172 et seq.
KRAMER in MUNCHENER KOMMENTAR, Band 1, pp. 964 et seq.

Article 13
(Contract with terms deliberately left open)

(1) When the parties have left a term of the contract to be agreed upon in further negotiations or to be determined by a third person, they should provide in what manner such term shall be rendered definite in the event of their failure to reach an agreement or of the third person not having made the determination.

(2) The fact that no agreement is reached or the manner in which, failing such an agreement,

the term shall be rendered definite has not been provided or the third person has not determined the term, does not in itself prevent a contract from having come into existence.

COMMENTS

a. Contract with terms deliberately left open

A contract may be silent on one or more points because during the negotiations the parties simply did not think of them. In such a case, no difficulties arise: provided that the content of the agreement is "sufficiently definite" in accordance with the rule laid down in Art. 2(1), the fact that a contract has been concluded cannot be questioned, and the missing terms will be implied in fact or by law. Quite different is the case dealt with in the present article: here the parties deliberately leave one or more terms open because they are unable or unwilling to determine them at the time of the conclusion of the contract, and refer for their determination to an agreement to be made by them at a later stage, or to a third person.

This latter case, which is especially frequent in, although not limited to, long-term transactions, in essence give rise to two problems: whether there is a valid contract notwithstanding the terms left open and, if so, who should eventually determine the missing term where the parties fail to reach an agreement or the third person fails to make his determination.

b. Open terms not in themselves an impediment to the valid conclusion of a contract

The fact that, when entering into a contract, the parties deliberately refer the determination of one or more terms to a later agreement to be reached between them or to a third person is not in itself an impediment to the valid conclusion of the contract. This clearly follows from paragraph 1 of the present article which, by recommending the parties to provide the manner in which the terms left open shall be rendered definite in the event of their failure to reach an agreement or of the third person not having made the determination, implicitly affirms the possibility of entering into binding agreements with one or more terms deliberately left open. Moreover, paragraph 2 states that not even the subsequent failure of the parties or of the third person to determine the missing terms is in itself sufficient to deny that a contract has come into

existence.

c. Parties' intention decisive

The decisive factor in order to determine whether or not an agreement with one or more terms deliberately left open represents a binding contract, is the intention of the parties. If the parties make it clear that they intend to be bound by the agreement even in the event of their subsequently failing to agree on the missing terms, or of the failure of the third person to determine them, there is a binding contract from the very beginning, with the consequence that, if necessary, the missing terms will have to be determined otherwise; on the contrary, if the parties had not expressed such an intention, there will be no contract unless they subsequently succeed in agreeing on the missing terms or the third person determines them.

The best way for the parties to make their intention clear is for them to follow the recommendation expressed in paragraph 1 and expressly to provide in the contract for the manner in which the open terms shall be rendered definite in the event of their failure to reach an agreement or of the third person not having made the determination (e.g. by providing, in the first case, for the intervention of a third person or, in the second case, for the replacement of the person originally nominated). Yet even in the absence of such a provision the parties' intention to be bound by their agreement notwithstanding its open terms may be inferred from other circumstances, such as the non-essential character of the terms in question, the degree of definiteness of the agreement as a whole, the fact that the open terms relate to items which by their very nature can be determined only at a later stage, the indication of the criteria to be followed by the parties or the third person when making the determination, the fact that the agreement has already been partially executed, etc.

Illustration 1

Shipping Line S enters into an agreement with Terminal Operator T for the exclusive use of T's container terminal for discharging and loading operations in Port P. The agreement, which is intended to cover a five year period, fixes the minimum volume of containers to be discharged or loaded per year and the fees to be payed therefor only for the first triennium, while providing that the terms have to be renegotiated between the parties at the end of the third year and that, should the parties fail to reach an agreement, an independent expert should be

entrusted with determining them. Subsequently S and T are not able to reach an agreement on the terms of their contract for the last two years, and S, who in the meantime has received a more advantageous offer from another terminal operator, claims that with such essential terms still open, the contract will necessarily have come to an end. T rightly objects that when concluding the contract his and S's intention was clearly that of entering into a binding agreement for a period of five years as is shown, inter alia, by the fact that the contract provides for the manner in which the terms in question should be determined in the event of their failing to reach agreement.

d. Failure of mechanism provided for by parties for determination of open terms

For those cases where the parties are unable to reach an agreement on the open terms and no alternative mechanism is provided for in the contract, or where such an alternative mechanism fails, paragraph 2 of the present article states that this does not in itself prevent a contract from having come into existence. Thus, provided the parties' intention actually was to enter into a binding agreement, the problem arises of how to overcome the deadlock. The only way out is recourse to a judge or an arbitrator, bearing in mind however that there are legal systems where judges or arbitrators are not allowed "to make a contract for the parties". As to the criteria to be followed by the single judge or arbitrator in determining the open terms, they may vary depending on the circumstances of the case: the basic test should, however, always be that of reasonableness.

Illustration 2

The same situation as in Illustration 1, with the difference that the expert appointed by the parties dies and they cannot agree on the name of a new expert. Requested by T to determine the missing terms, a judge or arbitrator will do so in accordance with the reasonableness test, i.e. in this case by taking into account, apart from the volume of containers which T has taken in charge for S during the first three years of their agreement and the amount of fees paid by S, the average volume of containers loaded and discharged by a single shipping line in the same port or in those nearby and the average fees charged by other terminal operators.

CROSS REFERENCES

Chapter II Arts. 2(1), 12

NOTES

There is no precedent for this article in any international instrument. National laws differ widely with respect to the question of the validity of agreements with one or more terms deliberately left open for subsequent determination by the parties themselves or by a third person designated by them. There are legal systems which are traditionally rather hostile to such a possibility, while others make the solution dependent on whether or not the missing terms are of vital importance (e.g. Art. 2 Swiss Code of Obligations; Art. 65 Algerian Civil Code). The most recent tendencies, however, seem in general to be increasingly more favourable to the kinds of agreement in question, provided that the parties actually intended to be bound by them: for an explicit statement to this effect, see Art. 1349 Italian Civil Code, § 41 GDR Law on International Economic Contracts (with respect only to reference for the determination of open terms to third persons); §§ 2-305 and 2-309 UCC, Art. 26 of Book V of the Québec Draft Civil Code.

LITERATURE

SZASZ, The CMEA Uniform Law, pp. 132 et seq.
SCHLESINGER (ed), Formation, pp. 88 et seq. and 431 et seq.
CHESHIRE FIFOOT & FURMSTON'S Law of Contract, pp. 44 et seq.
FARNSWORTH, Contracts, pp. 202 et seq.
GHESTIN, Le Contrat, pp. 189 et seq.
SACCO, Il Contratto, pp. 559 et seq.

Article 14
(Duty of confidentiality)

If information is given as confidential by one party in the course of negotiations, such information shall not be disclosed by the other party who is otherwise liable in damages whether or not a contract is subsequently concluded.

COMMENTS

a. Parties in general not under duty of confidentiality

Just as there exists no general duty of disclosure, so parties, when entering into negotiations for the conclusion of a contract, are in general under no obligation to treat the information they have exchanged as confidential. In other words, since a party is normally free to decide which facts relevant to the transaction under negotiation he wants to disclose, once he has given the other party certain information, such information is as a rule to be considered non-confidential, i.e. information which the other party may either disclose to third persons or use for purposes of his own should there be no contract.

Illustration 1

Constructor C invites A and B, who are producers of air-conditioning systems, to submit offers for the installation of an air-conditioning system in the airport he is constructing. In their offers A and B not only indicate the cost of and time required for the installation of their respective systems, but also give some technical details as to their functioning, with a view to enhancing the merits of their products. C decides to reject the offer made by A and to continue negotiations only with B. In these negotiations nothing prevents C from using the information contained in A's offer in order to induce B to formulate more favourable conditions.

b. Confidential information

However, a party may have an interest in not having certain information he has given the other party divulged or used for purposes other than those for which he has given it. As long as he expressly declares that particular information is to be considered confidential, no problems will arise: by receiving that information the other party implicitly agrees to treat it confidentially, and any breach of this obligation on his part will make him liabile in damages. Yet also in the absence of such an express declaration the receiving party may be under a duty of confidentiality: i.e. where, in view of the particular subject of the information and/or the professional qualifications of the parties, it would be contrary to the general principle of good faith and fair dealing during the formation of contracts for the receiving party to disclose it, or to use it for his own purposes after the breaking off of the negotiations.

Illustration 2

The same situation as in Illustration 1, with the difference that in his offer A expressly requests C not to divulge to third persons certain technical specifications contained therein. C may not use this information in his negotiations with B.

Illustration 3

Car manufacturer A is interested in entering into a joint venture agreement with any one of the three leading car manufacturers in Country X. Negotiations progress with one of them in particular, and A receives fairly detailed information from him relating to his plans for a new car design. Although there was no express request to treat this information as confidential, A has a duty not to disclose it to the two remaining competitors, nor should he be allowed to use those plans for his own production should the negotiations not lead to the conclusion of a contract.

c. Damages recoverable

The breach of the duty of confidentiality implies liability in damages. The amount of damages recoverable may vary, depending on whether or not the parties entered into a special agreement for the non-disclosure of the information. In any case the injured party is entitled to recover from the party in breach the benefit he received by disclosing the information to third persons or by using it for his own purposes.

CROSS REFERENCES

Chapter I Art. 3
Chapter VI Section 4

NOTES

There is no precedent for this article in any international instrument. Nor at national level is the rule laid down in the present article normally stated explicitly, although it is considered to be implicit in the general principle of good faith and fair dealing in the course of the formation of contracts.

LITERATURE

BIANCA, Il contratto, pp. 169 et seq.
FARNSWORTH, Precontractual Liability and Preliminary Agreements: Fair Dealing and Failed Negotiations, Columbia

Law Review, Vol. 87:217, (1987), p. 229.

Article 15
(Incorporation of general conditions)

(1) Notwithstanding the provisions of these Rules governing offer and acceptance, [general conditions] [standard terms] shall only be incorporated in a contract where one party has expressly referred to them and the other party has accepted them.

(2) In all other cases [general conditions] [standard terms] shall only be incorporated in a contract where they have been expressly agreed to in similar transactions between the parties or where their incorporation amounts to a usage.

COMMENTS

a. Contracting on the basis of standard terms

Transactions relating to mass produced goods or serially rendered services are normally concluded, at an international level no less than within the domestic sphere, in a standardised manner, i.e. on the basis of standard forms of contract regulating in a general manner most aspects of the type of transaction in question. Such standard forms may be prepared by individual enterprises, as is the case above all in the goods manufacture sector; they may, however, also be the product of particular professional associations and commodity exchanges, as is often the case in the raw materials and agricultural products sectors, or even of independent international organisations such as the United Nations Economic Commission for Europe, the Asian-African Legal Consultative Committee, the International Chamber of Commerce, etc. Constant features of standard forms are that they permit the parties to avoid lengthy negotiations on a number of issues relating to their transaction and that they ensure uniformity in the regulation of those aspects of the contract which do not depend on the contingencies of each single case. They may, however, also serve the purpose of favouring the party who has formulated them, and/or is using them, by imposing on the other party terms detrimental to him and to the benefit of the former.

b. Incorporation of standard terms in the contract normally dependent on express agreement between the parties

Standard contract terms may either be reproduced in a model contract form which the parties sign after having filled in what has been left blank, or else be contained in a separate document. In the first case, they are formally already an integral part of the contract, and the only problem which may arise relates to the extent to which a party, who for the first time is faced with such a contract form, can be considered to be bound also by those standard terms which he could not reasonably have expected it to contain (see infra Art. 17). On the contrary, in the second case the question first of all arises of the conditions under which the standard terms are incorporated in the particular contract. By way of derogation to the general rules governing offer and acceptance according to which the parties are bound not only by what they expressly declare, but also by what is implicit in their statements, paragraph 1 of this article as a rule requires for the incorporation of standard terms an express agreement between the parties. In other words, the party who intends to rely on such terms must make an express reference to them in his offer or statement of acceptance, and the other party must accept them, and this in order to avoid the risk that a party may be bound by standard contract terms which the other party intends to use in his own interest, without knowing nor having reason to know of their existence.

An express reference to the standard terms would seem to be necessary not only when they are contained in a separate document, but also when they appear on the reverse side of the writing signed by the parties. On the other hand, a mere reference to them is sufficient, i.e. the document containing them does not necessarily have to be attached: if the other party neither knows their content, nor is in a position otherwise to acquire knowledge thereof, it is up to him to request a copy of them, or to object to their application from the outset.

The acceptance of the proposed standard terms does not need to be express. Provided that they have been expressly referred to in the offer or the statement of acceptance, it is sufficient for the other party generally to accept such an offer or counter-offer without it being necessary for him specifically to indicate his assent to the application of the standard terms in question.

Illustration 1

Employer E intends to conclude a contract of insurance with Insurance Company I against the risk of liability for accidents at work of his employees. I requests E to fill in and to sign a model contract form. By virtue of his signature, E is bound not only by the terms which have been individually negotiated between him and I, but also by the General Conditions of the National Insurers' Association, which are printed on the form.

Illustration 2

Seller S normally concludes contracts with his customers on the basis of his own general conditions. In his offer to Buyer B he omits to make an express reference to them. B, who has never before concluded any contract with S, accepts the offer. S may not invoke the application of his general conditions by claiming that B should have known that he normally concludes his contracts only on the basis of these conditions.

Illustration 3

Buyer B orders goods from Seller S. In his reply S declares that he accepts the terms of the offer and makes no express reference to his general conditions printed in minute characters on the reverse side of the acknowledgement of order. S may not invoke the application of these conditions.

Illustration 4

The same situation as in Illustration 2, with the difference that in his offer S expressly refers to his general conditions. B is bound by them even if he does not specifically mention them in his declaration of acceptance, and/or even if he does not know what their content is.

c. Incorporation of standard terms by virtue of course of dealing or usage

Exceptionally, standard terms may become part of the contract even in the absence of an express agreement between the parties. According to paragraph 2 of this article, this is the case when their application corresponds to a course of dealing or to a veritable usage. These two exceptions to the general rule are justified by the fact that in both cases, even in the absence of an express reference to the standard terms by the party intending to rely on them, the other party knows, or at least has reason to know, of the

existence of the terms in question and of the first party's intention to rely on them: in the first case, because the terms have already been used by him and the first party in previous transactions of the same or a similar type and in the second because the adoption of the terms amounts to a usage of which he was aware or at least should have been aware.

"Usage" is to be understood also in this particular context in the sense of the general definition contained in Article 4 of Chapter I. It follows that for standard terms to be incorporated by virtue of a usage in accordance with paragraph 2 of the present article, it is not sufficient if they are used in the domestic sphere only: their adoption must be a "practice or method of dealing of which the parties knew or ought to have known and which in international trade is widely known to, and regularly observed by, parties to contracts of the type involved in the particular trade concerned".

Illustration 5

The same situation as in Illustration 2, with the difference that in previous transactions of the same type concluded with S, B has always accepted the application of S's general conditions. S may invoke the application of his general conditions: B should have understood S's offer as implicitly referring to his general conditions and, since B did not expressly object, the conditions may be considered to be incorporated by virtue of the course of dealing established between the parties.

Illustration 6

Manufacturer M, who intends to set up a plant for the production of his machines in foreign Country C, enters into a leasing contract with local Leasing Company L for the lease of the premises. In the absence of any express reference in the contract to the General Conditions of the National Association of Lessors of Country C, L may not invoke their application vis-à-vis M by claiming that M knew or at least should have known that all leasing companies of Country C normally contract only on the basis of the general conditions in question. The adoption of the said general conditions, although perhaps amounting to a veritable usage within Country C, can by no means be considered to be a widely known and regularly observed usage at international level .

Illustration 7

Importer I from Country C, intending to buy grain at one of the world's most important commodity markets, to this effect avails himself of the services of Broker B operating on that commodity market. In their contract, concluded by computer, no express reference is made to the standard terms which normally govern brokerage contracts concluded at the commodity market in question. The standard terms apply to the contract between I and B, and this even if I was unaware of their existence and/or their content: the said standard terms are regularly adopted in brokerage contracts concluded in the commodity market in question irrespective of the nationality of the parties, with the consequence that every customer availing himself of the services of brokers operating there ought to know of the existence of such usage.

CROSS REFERENCES

Chapter I Art. 4
Chapter II Arts. 16, 17 and 18

NOTES

There is no precedent for this provision in international instruments. The principle laid down in the present article is, however, in conformity with the position taken by the majority of domestic laws, all of which share the concern of avoiding the risk of the imposition of standard terms on a party who not only did not participate in their elaboration, but who at the time of the conclusion of the contract may well have been totally unaware of their existence. For a provision similar to this article, see, among others, § 33(1) of the 1976 Law on International Economic Contracts of the German Democratic Republic; § 2 of the 1977 Standard Contracts Act of the Federal Republic of Germany; Art. 25 of Book V of the draft Civil Code of Québec.

LITERATURE

ZWEIGERT/KOTZ, Einführung, pp. 11 et seq.
BIANCA, Il contratto, pp. 340 et seq. and 345.
CHESHIRE FIFOOT & FURMSTON'S Law of Contract, pp. 21 et seq. and 174.
FARNSWORTH, Contracts, pp. 293 et seq.
GHESTIN, Le Contrat, pp. 40 et seq. and 58.
KOTZ in MÜNCHENER KOMMENTAR, Band 1, pp. 1391 et seq. and 1405 et seq.

Article 16
(Battle of forms)

Notwithstanding the provisions of these Rules governing offer and acceptance, if both parties refer to different [general conditions]/[standard terms] with conflicting [terms]/[provisions], the contract shall be considered to have been concluded without the conflicting [terms]/[provisions] unless one party without undue delay informs the other that he does not intend to be bound by the contract.

COMMENTS

a. Parties referring to different standard terms

In commercial transactions it is quite frequent that both the offeror in his offer and the offeree in his statement of acceptance refer to their own standard terms. In the absence of an express acceptance by the offeror of the offeree's standard terms, the problem arises of which, if any, of the two conflicting sets of standard terms should prevail.

b. The "last shot" doctrine

One possibility would be to solve the problem by applying the general rules on offer and acceptance. This would mean that either the very existence of the contract could be questioned because of the lack of agreement between the parties on which standard terms should prevail; or, if one of the parties has begun performing his obligations without objecting to the other party's standard terms, the contract is to be considered concluded on the basis of those terms which were sent or referred to last.

c. The "knock-out" doctrine

The solution referred to in the preceding paragraph, known as the "last shot" doctrine, may be appropriate if the parties expressly declare that the adoption of their standard terms is an essential condition for the conclusion of the contract. The situation is different if they refer to their standard terms more or less automatically, e.g. by exchanging printed order and acknowledgement of order forms with the respective terms on the reverse side. In these cases the parties will normally not even be aware of the conflict between their respective standard terms, and it

would be against the principle of good faith to allow a party subsequently to question the very existence of a contract or, if performance has commenced, to insist on the application of the terms sent or referred to last. It is for this reason that the present article provides that, notwithstanding the general rules on offer and acceptance, if the parties refer to different standard terms with conflicting provisions, as a rule a contract exists, and that such a contract shall be considered to have been concluded without the conflicting provisions (the so-called "knock-out" doctrine).

Illustration 1

Importer I orders from Exporter E a certain amount of grain. The reverse side of his order form contains the text of his "General Conditions for Purchase". E accepts by sending I an acknowledgement of order form which contains on its reverse his "General Conditions for Sale". Upon receipt of E's acknowledgement of order I remains silent, and only at a later stage, when because of change in the market price he would like to get out of the contract, does he invoke the divergencies between the two sets of standard terms in order to deny the coming into existence of a binding agreement with E. E correctly objects that since after receiving the acknowledgement of order I has failed to inform him without undue delay of his intention not to be bound by the contract, then the contract is concluded to the exclusion of the conflicting terms.

Illustration 2

Buyer B orders a machine from Manufacturer M. The "General Conditions for Purchase", which are printed on the reverse side of his order, state, among other things, that "Seller shall indemnify buyer for any loss, including lost profit, caused by defects in the functioning of the machinery delivered". M confirms his acceptance by sending an acknowledgement of order form on the reverse side of which there are his "General Conditions for Sale", stating among other things, that "Defects in the functioning of the machinery must be notified without delay to seller, who will do his best to cure them at the earliest possible time. In no case shall seller be liable for any loss caused to buyer as a consequence of the malfunctioning of the machinery". B remains silent and accepts the machine once it is delivered. On discovering a defect in the functioning of the machine, B requests the immediate repair of the defect and claims

damages for lost profit, but M objects, relying on his standard terms which exclude any liability for damages on his part. In actual fact neither party is right, since the contract is to be considered as having been concluded without the two conflicting provisions, and the consequences of M's defective performance have to be determined in application of the general rules governing performance and non-performance.

Illustration 3

The same situation as in Illustration 2, with the difference that in sending his acknowledgement of order form, M expressly declares that he considers the adoption of his standard terms as an essential condition for the conclusion of the contract. B's acceptance of the machine amounts to an acceptance of M's counter-offer, and the contract is to be considered concluded on the basis of M's terms.

CROSS REFERENCES

Chapter II Arts. 6 and 7

NOTES

There is no precedent for this article in international instruments. The "knock-out" doctrine, however, as laid down in this article, has been gaining more and more support within domestic laws, and there are even some express provisions to this effect: see § 2-207(3) of the UCC.

LITERATURE

BIANCA, Il contratto, pp. 340 et seq.
CHESHIRE FIFOOT & FURMSTON'S Law of Contract, pp. 21 et seq.
FARNSWORTH, Contracts, pp. 157 et seq.
GHESTIN, Le Contrat, pp. 40 et seq. and 58.
KOTZ in MÜNCHENER KOMMENTAR, Band 1, pp. 1417 et seq.

Article 17
(Surprising [terms][provisions])

No [term][provision] contained in [general conditions][standard terms] which by virtue of its content, language or presentation is of such a character that the other party could not reasonably have expected it, shall be effective, unless it has been expressly accepted by that

party.

COMMENTS

a. Surprising provisions in standard terms not effective

A party accepting standard terms referred to by the other party, is in principle bound by them irrespective of whether or not he actually knows their content in detail and/or fully understands their implications. An important exception to this rule is, however, laid down in the present article which states that, notwithstanding his acceptance of the standard terms as a whole, the adhering party is not bound by those provisions which by virtue of their content, language or presentation are of such a character that he could not reasonably have expected them. This in order to avoid that the party using standard terms take undue advantage of his position by trying surreptitiously to impose provisions on the other party which that party would hardly have accepted had he known them. The provision is therefore closely related to other provisions equally intended to protect the adhering party, such as that on contract terms gross upsetting the contractual equilibrium (Chapter IV Art. 7) or the contra proferentem rule (Chapter III Art. 5(3)).

b. Provisions "suprising" by virtue of their content

A particular provision contained in standard terms may come as a surprise to the adhering party first of all by virtue of its content. This is the case whenever the content of the provision in question is such that a reasonable person of the same kind as the adhering party would not have expected it in the type of standard terms involved. In determining whether or not a provision is unusual, regard must be had, on the one hand, to the provisions which are commonly to be found in standard terms generally used in the trade sector concerned, and, on the other hand, to the individual negotiations between the parties. Thus, e.g. a provision excluding or limiting the contractual liability of the proponent may or may not be considered to be "surprising", and consequently ineffective in a particular case, depending on whether or not provisions of this kind are common in the trade sector concerned, and/or are consistent with the way in which the parties conducted their negotiations.

Illustration 1

Travel agency A offers package tours to a number of

attractive holiday resorts. The terms of the advertisement are such that they give the impression that A is acting as a tour operator who undertakes full liability for the different services envisaged in the package. Customer C books a tour on the basis of A's standard terms. Notwithstanding C's general acceptance of the terms, A may not rely on a provision contained therein whereby it claims that, with respect to the hotel accommodation, it acts merely as an agent for the hotelkeeper, and therefore declines any liability.

c. Provisions surprising by virtue of their language or presentation

Other reasons for a particular provision contained in standard terms being surprising to the adhering party, may be the language in which it is couched, or the way in which it is presented typographically. In practice it is likely that provisions which are unusual in content, are furthermore expressed in an obscure language and/or printed with minute type. However, it may well be that a provision, though not unusual in substance, may be considered surprising merely by virtue of its language or presentation. In order to determine whether or not this is the case, regard is to be had less to the formulation and presentation commonly used in the type of standard terms involved, and more to the professional skill of persons of the same kind as the adhering party. Thus, a particular wording may well be obscure and clear at the same time, depending on whether or not the adhering party belongs to the same professional category as the party using the standard terms.

In the context of international transactions the linguistic factor may also play an important role. If the standard terms are drafted in a foreign language, it cannot be excluded that some of its provisions, though fairly clear in themselves, turn out to be surprising for the adhering party who could not reasonably have been expected fully to appreciate all its implications.

Illustration 2

Insurance company I, operating in Country X, is an affiliate of Company C incorporated in Country Y. I's standard terms are composed of some 50 provisions printed in minute type. One of the provisions designates the law of Country Y as the applicable law. Unless this provision is placed at the very beginning or at the very end of the standard terms and/or is otherwise presented in such a way as to draw the

attention of the adhering party, it will be without effect because customers in Country X would not reasonably expect to find a choice of law clause designating a foreign law as the law governing their contracts in the standard terms of a company operating in their country.

Illustration 3

Seller S, a commodity dealer operating in Hamburg, uses in his contracts with his customers standard terms containing, among others, a provision stating "Hamburg - Freundschaftliche Arbitrage". In the local business circles this clause is normally understood as meaning that possible disputes are to be submitted to a special arbitration governed by particular rules of procedure of local origin. In contracts with foreign customers this clause is likely to be ineffective, notwithstanding the acceptance of the standard terms as a whole: a foreign businessman cannot reasonably be expected to understand its exact implications, and this irrespective of whether or not the clause has been translated into his own language.

d. Express acceptance of "surprising" provisions

The risk of the adhering party being taken by surprise by the kind of provisions so far discussed clearly no longer exists if in a particular case the other party draws his attention to them and he declares that he accepts them. As a consequence the present article provides that a party may no longer rely on the "surprising" nature of a provision in order to deny its effectiveness, once he has expressly accepted it.

CROSS REFERENCES

Chapter II Arts. 15 and 18
Chapter III Art. 5(3)
Chapter IV Art. 7

NOTES

There is no precedent for this article in international instruments. For similar provisions in national laws, see, among others, § 3 of the 1977 Standard Contracts Act of the Federal Republic of Germany; § 2-316(2) of the UCC, Art. 110 of the Algerian Civil Code and Restatement, Second, Contracts § 211(2).

LITERATURE

BIANCA, Il contratto, pp. 351 et seq.
CHESHIRE FIFOOT & FURMSTON'S Law of Contract, pp. 174 et seq.
FARNSWORTH, Contracts, pp. 298 et seq.
GHESTIN, Le Contrat, pp. 58 et seq.
KOTZ in MÜNCHENER KOMMENTAR, Band 1, pp. 1419 et seq.

Article 18
(Conflict between [general conditions]/[standard terms] and individual provisions)

A special provision agreed by the parties shall prevail over conflicting provisions of [general conditions]/[standard terms].

COMMENTS

It is in the very nature of standard terms that they are prepared in advance by one party or a third person and incorporated into the single contract without their content being discussed between the parties. It is therefore logical that whenever the parties individually negotiate and agree on particular provisions of their contract, such provisions shall prevail over conflicting provisions contained in the standard terms, as they directly reflect the intention of the parties in the given case.

The individually agreed modifications of the standard terms normally appear on the same document as the standard terms themselves, but may also be contained in a separate document. In the first case they may easily be recognized because of their being hand- or typewritten. In the second case it may be more difficult to identify them and/or to determine their exact position in the hierarchy of the different documents. To this effect the parties often include in their contract a provision expressly indicating the documents which form part of it and their respective weight.

Special problems may arise where the modifications to the standard terms have been agreed only orally, without the conflicting provisions contained in the standard terms being struck out. Thus, apart from the difficulties to prove both the existence and the precise content of the oral agreement, its validity may be questioned on the ground that the

writing signed by the parties is of an exclusive nature, i.e. it is intended to contain the whole of the agreement. Moreover, the standard terms themselves may contain a provision according to which any addition to or modification of their content must be in writing: in such a case, in accordance with the principle laid down in Art. 1 of the present chapter, any addition or modification which has been agreed upon orally will prevail only to the extent that the adhering party has acted in reliance on the oral agreement, thus precluding the other party from subsequently denying its validity on the basis of the provision on the written form.

Illustration 1

The standard terms used by Terminal Operator T provide that the restitution of goods stored takes place only during normal working hours. When entering into a contract with Customer C, T orally accepts C's request to hand over the goods, if necessary, also outside the normal working hours. This oral agreement prevails over the conflicting provision contained in the standard terms and no problem of validity should arise, since the standard terms were contained in a separate document which the parties never considered to be exclusive.

Illustration 2

Among the documents which form part of the contract for the construction of a chemical plant concluded between Purchaser P and Constructor C, are the "General Conditions for Engineering and Construction" prepared by the National Association of Engineers and Constructors. The main contract document contains a provision stating that the documents listed form the whole of the agreement between the parties. If P and C orally agree on a particular modification to the text of the General Conditions, the validity of this agreement may be questioned because of the exclusive character of the contractual documents.

CROSS REFERENCES

Chapter II Arts. 1, 15, 16 and 17
Chapter II Arts. 1, 5 and 6

NOTES

There is no precedent for this provision in international instruments. The principle laid down in the present article is, however, in conformity with the position taken by the

generality of domestic laws. For a provision similar to this article see, among others, Art. 1342 of the Italian Civil Code; Section 116 of the 1963 Czechoslovak International Trade Code; § 4 of the 1977 Standard Contracts Act of the Federal Republic of Germany; Art. 6.4.5.2(5) of the Netherlands New Civil Code; Art. 7 of the Portuguese Standard Contracts Law of 1985 (D.L. 446/85) and Restatement, Second, Contracts § 203(d).

LITERATURE

CHESHIRE FIFOOT & FURMSTON'S Law of Contract, pp. 117 et seq.
FARNSWORTH, Contracts, pp. 451 et seq.
KOTZ in MÜNCHENER KOMMENTAR, Band 1, pp. 1422 et seq.