United Nations A/CN.9/SER.C/DIGEST/CISG/14

General Assembly

Distr.: General
8 June 2004

Original: English

United Nations Commission on International Trade Law

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

Part II

Formation of the Contract

1. Part II of the Sales Convention sets out rules for the formation of an international sales contract. Under these rules, a contract is concluded when an acceptance of an offer becomes effective. CISG article 23. The first four articles of Part II (articles 14–17) deal with the offer, while the following five articles (articles 18–22) deal with the acceptance. The final two articles (articles 23–24) address the time when a contract is concluded and when a communication "reaches" the addressee, respectively. One court has described these provisions as embodying "a liberal approach to contract formation and interpretation, and a strong preference for enforcing obligations and representations customarily relied upon by others in the industry"[1].

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[1] [Federal] Southern District Court of New York, United States, 10 May 2002, *Federal Supplement (2nd Series)* 201, 236 at 283.

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

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2. A number of decisions have applied the offer-acceptance paradigm of Part II to proposals to modify a sales contract (article 29)[2] or to proposals to terminate the contract[3]. Several decisions have distinguished between the conclusion of the sales contract and an agreement to arbitrate disputes arising under that contract[4].

Permitted reservations by Contracting States

3. A Contracting State may declare that it is not bound by Part II of the Sales Convention. CISG article 92. Denmark, Finland, Iceland, Norway and Sweden have made this declaration. A majority of decisions apply the forum's rules of private international law to determine whether the parties have concluded a contract. The relevant national law may be either domestic contract law (which will be the case if the applicable national law is that of a declaring State)[5] or the Convention (which will be the case if the applicable national law is that of a Contracting State)[6]. Several decisions do not go through a private international law analysis. One decision expressly rejects a private international law analysis and instead applies the principles underlying Part II of the Convention[7]. Several decisions apply Part II, without analysis, to a contract between a party with a place of business in a Contracting State that has made a declaration and one that has a place of business in a Contracting State that has not done so[8]. In the absence of a dispute about whether a contract had been concluded, one court declined to analyse the effect of article92[9].

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[2] CLOUT case No. 251 [Handelsgericht des Kantons Zürich, Switzerland, 30 November 1998] (see full text of the decision); CLOUT case No. 347 [Oberlandesgericht Dresden, Germany, 9 July 1998]; CLOUT case No. 193 [Handelsgericht des Kantons Zürich, Switzerland, 10 July 1996]; CLOUT case No. 133 [Oberlandesgericht München, Germany, 8 February 1995] (see full text of the decision); CLOUT case No. 203 [Cour d'appel, Paris, France, 13 December 1995].

[3] CLOUT case No. 120 [Oberlandesgericht Köln, Germany, 22 February 1994]; CIETAC award No. 75, 1 April 1993, Unilex.

[4] Tribunal Supremo, Spain, 26 May 1998, available on the Internet at <http://www.uc3m.es/cisg/respan10.htm> (conclusion of sales contract established but not agreement to arbitrate); Tribunal Supremo, Spain, 17 February 1998, available on the Internet at <http://www.uc3m.es/cisg/respan8.htm> (conclusion of sales contract established under Sales Convention but agreement to arbitrate not established under 1958 New York Convention).

[5] Turku Hovioikeus (Court of Appeal), Finland, 12 April 2002, available on the Internet at <http://cisgw3.law.pace.edu/cases/020412f5.html> (transaction between Finnish seller and German buyer; Finnish law applicable); CLOUT case No. 143 [Fovárosi Biróság, Hungary 21 May 1996] (transaction between Swedish seller and Hungarian buyer; Swedish law applicable); CLOUT case No. 228 [Oberlandesgericht Rostock, Germany, 27 July 1995] (transaction between Danish seller and German buyers; Danish law applicable). *See also* CLOUT case No. 419 [Federal District Court, Northern District of Illinois, United States, 27 October 1998] (transaction between Swedish seller and US buyer; although US state law would apply to contract formation, the issue before the court was whether domestic parole evidence rule excluded testimony and art. 8 (3)—in Part I—preempted that rule).

[6] CLOUT case No. 309 [Østre Landsret Denmark, 23 April 1998] (transaction between Danish seller and French buyer; French law applicable); CLOUT case No. 301 [Arbitration—International Chamber of Commerce No. 7585 1992] (transaction between Italian seller and Finnish buyer; Italian law applicable).

[7] CLOUT case No. 134 [Oberlandesgericht München, Germany, 8 March 1995] (contract between Finnish seller and German buyer).

[8] CLOUT case No. 362 [Oberlandesgericht Naumburg, Germany, 27 April 1999] (contract between Danish seller and German buyer) (see full text of the decision); Chansha Intermediate

4. Two or more Contracting States that have the same or closely-related legal rules on the formation of a sales contract may declare that the Convention is not to apply to the formation of sales contracts where the parties have their places of business in these States. CISG article 94 (1). A Contracting State may also make such a declaration if it has the same or closely-related legal rules as those of a non-Contracting State. CISG article 94 (2). Such a non-Contracting State may, when it becomes a Contracting State, declare that the Convention shall continue to be inapplicable to the formation of sales contracts with persons in the earlier-declaring Contracting State. CISG article 94 (3). Denmark, Finland, Norway and Sweden made declarations with respect to each other and also with Iceland. When Iceland became a Contracting State it declared that it would continue this arrangement.

Exclusivity of Part II

5. Part II sets out rules for the conclusion of a contract. Part II does not state that compliance with its provisions is the exclusive way to conclude an enforceable contract governed by the Sales Convention. Article 55 in Part III of the Convention recognizes that a contract may be validly concluded even though it does not expressly or implicitly fix or make provision for determining the price. Several cases have examined the relation of article 55 to the requirement in article 14 that a proposal to conclude a contract must expressly or implicitly fix or make provision for determining the price. *See* Commentary on articles 14 and 55.

6. The parties' conduct may establish that they intended a mutually-binding arrangement even if Part II does not govern. One court, recognizing that Finland had made an article 92 declaration, nevertheless applied the principles underlying the Convention rather than national contract law and found that the conduct of a Finnish seller and a German buyer evidenced an enforceable contract[10].

7. Several decisions have recognized that one party's promise may be enforced under the applicable national law doctrine of promissory estoppel. One court found that a supplier would be bound by its promise to supply raw materials when in reliance on this promise the promisee sought and received administrative approval

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Peoples' Court Economic Chamber, China, 1995, Unilex (negotiations between Chinese seller and Swedish buyer); CLOUT case No. 121 [Oberlandesgericht Frankfurt a.M., Germany, 4 March 1994] (negotiations between German seller and Swedish buyer).

[9] CLOUT case No. 201 [Richteramt Laufen des Kantons Berne, Switzerland, 7 May 1993] (contract between Finnish seller and German buyer) (see full text of the decision). *See also* H˝ jesteret (Supreme Court), Denmark, 15 February 2001, available on the Internet at <http://www.cisg.dk/hd15022001danskversion.htm> (transaction between Italian seller and Danish buyer; issue of whether court had jurisdiction resolved by reference to art. 31).

10 CLOUT case No. 134 [Oberlandesgericht München, Germany, 8 March 1995].

to manufacture generic drugs[11]. Another court considered a similar claim but concluded that the party seeking to enforce a promise had not established its case[12].

Validity of contract; formal requirements

8. Part II governs the formation of the contract of sale but, except as otherwise expressly provided by the Convention, is not concerned with the validity of the contract or any of its provisions or of any usage. CISG article 4 (a). Consequently, domestic law applicable by virtue of the rules of private international law will govern issues of validity. See also Commentary on article 4.

9. The Convention expressly provides that a contract of sale need not be concluded in writing and is not subject to any other requirement as to form. CISG article 11. A Contracting State may declare that this rule does not apply where any party has his place of business in that State. CISG articles 12, 96. See also Commentary on articles 11 and 12.

10. Part II is silent on the need for "consideration" or a "causa". One case found, applying domestic law under article 4 (a) of the Convention, that a buyer seeking to enforce a contract had alleged sufficient facts to support a finding that there was "consideration" for an alleged contract[13].

Incorporating standard terms

11. The Convention does not include special rules addressing the legal issues raised by the use of standard contract terms prepared in advance for general and repeated use[14]. Some Contracting States have adopted special legal rules on the enforceability of standard terms[15]. Notwithstanding these special rules, a majority of courts apply the provisions of Part II of the Convention and its rules of interpretation in article 8 to determine whether the parties have agreed to incorporate standard terms into their contract[16]. Several of these decisions expressly

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[11] [Federal] Southern District Court of New York, United States, 21 August 2002, 2002 Westlaw 1933881, 2002 US Dist. LEXIS 15442 (accepting that claim stated an enforceable cause of action for promissory estoppel when it alleged breach of "(1) a clear and definite promise, (2) the promise is made with the expectation that the promisee will rely on it, (3) the promisee in fact reasonably relied on the promise, and (4) the promisee suffered a definite and substantial detriment as a result of the reliance").

[12] CLOUT case No. 173 [Fovárosi Bíróság,, Hungary, 17 June 1997] (considering and rejecting a claim that there had been a breach of promise that would be enforceable if the promise reasonably induced the other party to change its position in reliance on the promise).

[13] [Federal] Southern District Court of New York, United States, 10 May 2002, *Federal Supplement (2nd Series)* 201, 236 at 283 ff. (quoting definition of consideration as "bargained-for exchange of promises or performance").

[14] For a definition of "standard terms" see art. 2.19 (2) of the UNIDROIT Principles of International Commercial Contracts (1994).

[15] See, e.g., the German *Gesetz zur Regelung des Rechts der Allgemeinen Geschäftsbedingungen* (AGBG) [Unfair Contract Terms Act].

[16] Bundesgerichtshof, Germany, 31 October 2001, *Neue Juristische Wochenschrift,* 2001, 370 ff.; CLOUT case No. 362 [Oberlandesgericht Naumburg, Germany, 27 April 1999] (standard terms in purported acceptance); Rb 's-Hertogenbosch, Netherlands, 2 October 1998, Unilex (in ongoing relationship buyer not bound by seller's amended general conditions because seller

conclude that the Convention displaces recourse to national law on the issue of whether the parties have agreed to incorporate standard terms into their contract[17]. Nevertheless, several courts have applied the special national legal rules to determine the enforceability of standard terms in contracts otherwise governed by the Convention[18], while several others have noted that the standard terms would be enforceable under either national law or the Convention[19]. Several decisions recognize, however, that the Convention does not govern the substantive validity of a particular standard term—a matter left to applicable national law by virtue of article 4 (a)[20].

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failed to inform buyer of amendment); CLOUT case No. 222 [Federal Court of Appeals for the Eleventh Circuit, United States, 29 June 1998] (standard terms on back of seller's form not enforceable if both parties know buyer did not intend to incorporate them in contract) (see full text of the decision); CLOUT case No. 272 [Oberlandesgericht Zweibrücken, Germany, 31 March 1998] (applying art. 8 to determine whether standard terms incorporated in contract); CLOUT case No. 232 [Oberlandesgericht München, Germany, 11 March 1998] (buyer, by performing contract, accepted seller's standard terms that modified buyer's offer) (see full text of the decision); CLOUT case No. 345 [Landgericht Heilbronn, Germany, 15 September 1997]; CLOUT case No. 176 [Oberster Gerichtshof, Austria, 6 February 1996] (buyer did not agree to 'framework agreement' drafted by seller to govern subsequent sales); CLOUT case No. 203 [Cour d'appel, Paris, France, 13 December 1995] (standard term on back of form not binding on recipient); Tribunal Commercial Nivelles, Belgium, 19 September 1995, Unilex (buyer should have been aware that seller's offers incorporated standard terms); Cámara Nacional de Apelaciones en lo Comercial, Argentina, 14 October 1993, Unilex (standard terms on back of "pro forma" invoice accepted by other party when recipient objected to one part of invoice but not to standard terms). See also Rechtbank van Koophandel Hasselt, Belgium, 18 October 1995 (seller's standard terms in invoice sent with goods a unilateral act to which buyer had not consented). For analysis of the effect of conflicting terms when each party uses standard terms (the so-called "battle of the forms"), see the Commentary to article 19.

[17] Bundesgerichtshof, Germany, 31 October 2001, *Neue Juristische Wochenschrift,* 2001, 370 ff.; CLOUT case No. 345 [Landgericht Heilbronn, Germany, 15 September 1997].

[18] CLOUT case No. 318 [Oberlandesgericht Celle, Germany, 2 September 1998] (applying German law as the law applicable by virtue of the forum's rules of private international law) (see full text of the decision); Landgericht Duisburg, Germany, 17 April 1996, Unilex (applying Italian law as the law applicable by virtue of the forum's private international law rules); Landgericht München, Germany, 29 May 1995, Unilex (applying German law as the law applicable by virtue of the forum's rules of private international law); Rechtbank van Koophandel Hasselt, Belgium, 24 January 1995, Unilex (applying German law as the law applicable by virtue of the forum's private international law rules).

[19] CLOUT case No. 361 [Oberlandesgericht Braunschweig, Germany, 28 October 1999] (standard terms enforceable under both applicable domestic law and the Convention) (see full text of the decision); Gerechtshof 's-Hertogenbosch, Netherlands, 24 April 1996, Unilex (standard terms enforceable under both applicable domestic law and the Convention).

[20] Oberster Gerichtshof, Austria, 7 September 2000, Unilex (validity of standard terms determined by national law subject to condition that any derogation from Convention's fundamental principles ineffective even if valid under applicable national law); CLOUT case No. 272 [Oberlandesgericht Zweibrücken, Germany, 31 March 1998] (national law, rather than Convention, determines validity of exemption clause in standard terms); CLOUT case No. 345 [Landgericht Heilbronn, Germany, 15 September 1997] (national law governs validity of standard term limiting liability); Amtsgericht Nordhorn, Germany, 14 June 1994, Unilex (standard terms on back of form incorporated in contract but validity of terms to be determined under domestic law). See also CLOUT case No. 230 [Oberlandesgericht Karlsruhe, Germany, 25 June 1997] (citing both art. 4 and art. 14 ff., court leaves open issue of whether standard terms were enforceable).

12. Several decisions rely on the Convention's rules on interpretation to require the user of standard terms to send a copy of the terms to the other party or otherwise make them reasonably available[21]. One decision expressly rejects the proposal that a party has an obligation to search out standard terms referred to by the other party on the grounds that to do so would contradict the principle of good faith in international trade and the parties' general obligations to cooperate and to share information[22]. Another decision relies on article 24 to conclude that standard terms do not "reach" the addressee unless in a language agreed to by the parties, used by the parties in their prior dealings, or customary in the trade[23]. Several other decisions give no effect to standard terms when they are not translated into the language of the other party[24]. Another decision refers to the "general principle" that ambiguities in the standard terms are to be interpreted against the party relying upon them[25].

Commercial letters of confirmation

13. In a few Contracting States there is a recognized usage of trade that gives effect to a letter of confirmation sent by a merchant to another merchant notwithstanding the recipient's silence. The commercial letter of confirmation may conclude the contract or, if the contract had already been concluded, establish the terms of the contract in the absence of intentional misstatement by the sender or prompt objection to its terms. Courts have disagreed about the effect to be given to these usages when the transaction is governed by the Convention. Several decisions have refused to give effect to a local trade usage that would give effect to the letter of confirmation because the usage was not international[26]. However, one court found, without analysis of the scope of the trade usage, that the recipient was bound[27], and another court gave effect, under both paragraphs (1) and (2) of article 9

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[21] Bundesgerichtshof, Germany, 31 October 2001, *Neue Juristische Wochenschrift,* 2001, 370 ff.; Hof Arnhem, Netherlands, 27 April 1999, Unilex (deposit of standard terms in Dutch court did not bind non-Dutch party but standard terms printed in Dutch on back of invoice are binding); Rb 's-Hertogenbosch, Netherlands, 2 October 1998, Unilex (if numerous prior sales between parties have been subject to the general conditions of one party and that party amends those general conditions, that party must inform the other party of the changes).

[22] Bundesgerichtshof, Germany, 31 October 2001, Neue Juristische Wochenschrift, 2001, 370 ff.

[23] CLOUT case No. 132 [Oberlandesgericht Hamm, Germany, 8 February 1995] (discussion of "language risk" in light of art. 8).

[24] CLOUT case No. 345 [Landgericht Heilbronn, Germany, 15 September 1997] (in transaction between German seller and Italian buyer seller's standard terms in German language not incorporated in contract and validity of those in Italian language determined by German law as the as the law applicable by virtue of the forum's private international law rules); Amtsgericht Kehl, Germany, 6 October 1995, Unilex (standard terms in German language only sent by a German buyer to an Italian seller).

[25] CLOUT case No. 165 [Oberlandesgericht Oldenburg, Germany, 1 February 1995] (see full text of the decision).

[26] CLOUT case No. 347 [Oberlandesgericht Dresden, Germany, 9 July 1998]; CLOUT case No. 276 [Oberlandesgericht Frankfurt a.M., Germany, 5 July 1995]. See also Landgericht Duisburg, Germany, 17 April 1996, Unilex (doubts existence of international usage recognizing incorporation of standard terms into contract by letter of confirmation); Opinion of Advocate General Tesauro, *EC Reports*, 1997, I-911 ff. (adopting by analogy article 9 (2)'s standard for an 'international usage').

[27] Oberlandesgericht Saarbrücken, Germany, 14 February 2001, Unilex.

to the usage when the seller and buyer each had its place of business in a jurisdiction that recognized such a usage[28]. Another court applied the formation provisions to find that the recipient of the letter of confirmation had accepted its terms by accepting the goods[29]. Yet another court concluded that the Convention was silent on the effect of a confirmation letter that incorporated standard terms and therefore the court applied domestic law to determine whether the standard terms were applicable[30]. Even if a letter of confirmation is not given full effect it may be relevant for the evaluation of evidence of the parties' intent.[31]

Interpretation of statements or conduct

14. A person may make a proposal for concluding a contract or may accept such a proposal by a statement or by conduct. CISG articles 14 (1), 18 (1). Numerous cases apply the rules of article 8 to the interpretation of a party's statements or other conduct before the conclusion of a contract.[32]

15. Several courts have had to identify the party proposing to conclude a contract governed by the Convention. They have usually done so by interpreting the statements or conduct of the parties in accordance with article 8 of the Convention.[33]

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[28] CLOUT case No. 95 [Zivilgericht Basel-Stadt, Switzerland, 21 December 1992].

[29] CLOUT case No. 292 [Oberlandesgericht Saarbrücken, Germany. 13 January 1993] (citing art. 18 (1)) (see full text of the decision).

[30] Arrondissemenetsrechttbank Zutphen, Netherlands, 29 May 1997, Unilex. See also Rechtbank van Koophandel Hasselt, Belgium, 24 January 1995, Unilex (German law applicable to issue of whether standard terms referred to in letter of confirmation are effective).

[31] CLOUT case No. 276 [Oberlandesgericht Frankfurt a.M., Germany, 5 July 1995].

[32] See, e.g., CLOUT case No. 417 [Federal District Court, Northern District of Illinois, United States, 7 December 1999] (art. 8) (see full text of the decision); CLOUT case No. 306 [Oberster Gerichtshof, Austria, 11 March 1999] (citing art. 8 (1)); CLOUT case No. 413 [Federal District Court, Southern District of New York, United States, 6 April 1998] (art. 8 (3)) (see full text of the decision); Hoge Raad, Netherlands, 7 November 1997, Unilex (arts. 8 (1), (2)); CLOUT case No. 189 [Oberster Gerichtshof, Austria, 20 March 1997] (art. 8 (2)); Landgericht Oldenburg, Germany, 28 February 1996, Unilex (art. 8 (2)); CLOUT case No. 334 [Obergericht des Kantons Thurgau, Switzerland, 19 December 1995] (art. 8 (1), (2) and (3)); CLOUT case No. 308 [Federal Court of Australia, 28 April 1995] (arts. 8 (1), (2)) (see full text of the decision); CLOUT case No. 106 [Oberster Gerichtshof, Austria, 10 November 1994] (art. 8 (2), (3)); CLOUT case No. 23 [Federal District Court, Southern District of New York, United States, 14 April 1992] (art. 8 (3)); CLOUT case No. 227 [Oberlandesgericht Hamm Germany, 22 September 1992] (art. 8 (2)).

[33] Oberlandesgericht Frankfurt, Germany, 30 August 2000, Unilex (citing art. 8, court states that invoice intended by sender to be offer on its behalf rather than on behalf of its parent company with whom recipient had been dealing did not bind the recipient who was unaware of this intent and it was not established that a reasonable person in position of recipient would so understand the communication); Oberlandesgericht Stuttgart, Germany, 28 February 2000, available on the Internet at <http://www.cisg-online.ch/cisg/urteile/583.htm> (citing art. 8 (1) and (3), court states that negotiations and subsequent conduct of the parties indicated that buyer intended to conclude the contract with foreign company rather than local company with some same Board members); Hoge Raad, Netherlands, 7 November 1997, Unilex (citing arts. 8 (1) and (2)), court concludes no contract had been concluded when a person, intending to make an offer, made a payment to a seller who did not know and could not have been aware that the payor was making a payment on its own behalf rather than on behalf of a buyer with whom the seller had ongoing business relations and reasonable person in same circumstances would not so understand communication). See also Comisión para la Protección del Comercio Exterior de México,

The issue may also arise when an agent acts for a principal.[34] Whether a person is entitled to bring a legal action to enforce contractual obligations is a distinct issue.[35]

Mexico, 29 April 1996, Unilex (without express reference to art. 8, commission refers to surrounding circumstances to identify seller); CLOUT case No. 330 [Handelsgericht des Kantons St. Gallen, Switzerland, 5 December 1995] (citing art. 14 (1), court concludes that buyer's unsigned fax to seller clearly indicated an intent to purchase the equipment and that seller thought buyer rather than sister company was buyer); CLOUT case No. 276 [Oberlandesgericht Frankfurt a.M., Germany, 5 July 1995] (circumstances establish defendant and not unnamed third person was party to contract) (see full text of the decision); Landgericht Memmingen, Germany, 1 December 1993, Unilex (citing art. 11, court applies forum's rule on proof as to which company seller had contracted with); CLOUT case No. 95 [Zivilgericht Basel-Stadt, Switzerland, 21 December 1992] (defendant bound even if she was subject to control of another firm) (see full text of the decision).

[34] CLOUT case No. 239 [Oberster Gerichtshof, Austria, 18 June 1997] (remand to determine whether purported buyer was an agent); CLOUT case No. 416 [Minnesota [State] District Court, United States, 9 March 1999] (finding from documents and circumstances that defendant was a seller rather than an agent); CLOUT case No. 334 [Obergericht des KantonsThurgau, Switzerland, 19 December 1995] (citing art. 8, court concludes manufacturer rather than its distributor was party to contract); CLOUT case No. 5 [Landgericht Hamburg, Germany, 26 September 1990] (citing art. 8 (1), court states that seller did not know and could not have been aware of buyer's intent to refer to "AMG GmbH" when buyer referred to "AMG Import Export", a non-existent company; agent bound under applicable law of agency).

[35] See, e.g., CLOUT case No. 345 [Landgericht Heilbronn, Germany, 15 September 1997] (lessee, to whom the buyer/lessor assigned its rights as buyer, avoided contract); CLOUT case No. 334 [Obergericht des Kantons Thurgau, Switzerland, 19 December 1995] (although manufacturer rather than its distributor was original party to contract, distributor could enforce the contract because manufacturer had assigned its claim for breach to distributor); CLOUT case No. 132 [Oberlandesgericht Hamm, Germany, 8 February 1995] (assignee enforces seller's claim).

Article 14

(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. A proposal is sufficiently definite if it indicates the goods and expressly or implicitly fixes or makes provision for determining the quantity and the price.

(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.

1. Article 14 sets out the conditions on which a proposal to conclude a contract is an offer that, if accepted by the addressee, will lead to the conclusion of a contract under the Convention. This article has been applied to determine whether a statement or other conduct rejecting an offer (see article 19 (1)) constitutes a counter-offer[36]. The principles set out in this article—the person making the proposal must intend to be bound; a proposal must be sufficiently definite—have been applied, together with those in other articles of Part II, notwithstanding that Part II was not applicable by virtue of a declaration under article 92[37]. For discussion of whether Part II of the Convention provides the exclusive way to conclude a contract governed by the Convention, see the Introduction to Part II.

2. The identity of the person making a proposal or of the person to which the proposal is made may be uncertain. Decisions have applied article 14 and the rules of interpretation in article 8 to this issue[38].

Addressees of proposal

3 The first sentence of paragraph (1) provides that proposals are to be addressed to one or more specific persons. Under the applicable law of agency, the maker of

[36] CLOUT case No. 121 [Oberlandesgericht Frankfurt, Germany, 4 March 1994] (a buyer's purported acceptance that included both screws for which the seller had stated the price and additional screws for which the seller had not stated the price was a counter-proposal that was not sufficiently definite because the price of the latter screws were not fixed or determinable). See also CLOUT case No. 189 [Oberster Gerichtshof, Austria, 20 March 1997] (stating that a counter-offer must satisfy the conditions of article 14).

[37] CLOUT case No. 134 [Oberlandesgericht München, Germany, 8 March 1995] (applying the general principles of Part II rather than the national law applicable by virtue of private international law to transaction between Finnish seller and German buyer).

[38] Oberlandesgericht Frankfurt, Germany, 30 August 2000, Unilex; Oberlandesgericht Stuttgart, Germany, 28 February 2000, available on the Internet at <http://www.cisg-online.ch/cisg/urteile/583.htm>; Hoge Raad, Netherlands, 7 November 1997, Unilex; CLOUT case No. 334 [Obergericht des Kantons Thurgau, Switzerland, 19 December 1995]; CLOUT case No. 330 [Handelsgericht des Kantons St. Gallen, Switzerland, 5 December 1995]; CLOUT case No. 5 [Landgericht Hamburg, Germany, 26 September 1990]. See Commentary in introduction to Part II.

an offer addressed to an agent may be bound by the acceptance of the principal[39]. One decision states that article 14 (1) rather than the law of agency governs the issue of identifying whether a manufacturer or its distributor is party to the contract[40].

4. Paragraph (2) provides for proposals other than ones addressed to one or more specific persons. There are no reported decisions applying paragraph (2)

Indication of intent to be bound by acceptance

5. The first sentence of paragraph (1) provides that a proposal to conclude a contract must indicate the intention of the proponent to be bound if the addressee accepts the proposal. The intent may be shown by interpretation of a statement or act in accordance with paragraphs (1) or (2) of article 8[41]. By virtue of paragraph (3) of article 8, this intent may be established by all the relevant circumstances, including statements or other conduct during negotiations and the conduct of the parties after conclusion of the contract[42]. A buyer was found to have indicated its intent to be bound when it sent the seller an "order" that stated that "we order" and "immediate delivery"[43]. A communication in the English language sent by a French seller to a German buyer was interpreted by the court as expressing the seller's intent to be bound[44]. Where both parties had signed an order indicating a computer programme and its price, the buyer was unable to establish that the order merely indicated an intention to indicate details of a contract to be concluded at a later time rather than an intention to conclude the contract by the order[45]. Another buyer's order specifying two sets of cutlery and the time for delivery was likewise interpreted as indicating the intent to be bound in case of acceptance notwithstanding buyer's argument that it had merely proposed to conclude future purchases[46].

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[39] CLOUT case No. 239 [Oberster Gerichtshof, Austria, 18 June 1997] (if offeror knew that addressee was acting as agent, then offeror should expect proposal to be transmitted to the principal; if offeror did not know or was unaware that addressee was an agent, the offeror was not bound by principal's acceptance; case remanded to determine whether the addressee was agent and whether offeror knew of this).

[40] CLOUT case No. 334 [Obergericht des Kantons Thurgau, Switzerland, 19 December 1995] (interpreting the statements and acts of the parties in accordance with art. 8, manufacturer rather than its dealer was party to contract; manufacturer had, however, assigned its claim for breach to dealer).

[41] CLOUT case No. 215 [Bezirksgericht St. Gallen, Switzerland, 3 July 1997] (see full text of the decision).

[42] CLOUT case No. 215 [Bezirksgericht St. Gallen, Switzerland, 3 July 1997] (stressing the parties' conduct subsequent to conclusion of the contract).

[43] CLOUT case No. 330 [Handelsgericht des Kantons St. Gallen, Switzerland, 5 December 1995] (see full text of the decision).

[44] Oberlandesgericht Hamburg, Germany, 4 July 1997, Unilex ("We can only propose you"; "First truck could be delivered").

[45] CLOUT case No. 131 [Landgericht München, Germany, 8 February 1995].

[46] CLOUT case No. 217 [Handelsgericht des Kantons Aargau Switzerland 26 September 1997].

Definiteness of proposal

6. To be deemed an offer, a proposal to conclude a contract not only must indicate an intent to be bound by an acceptance but also must be sufficiently definite[47]. The second sentence of paragraph (1) provides that a proposal is sufficiently definite if it indicates the goods and expressly or implicitly fixes or makes provision for determining the quantity and the price. Practices established between the parties may supply the details of quality, quantity and price left unspecified in a proposal to conclude a contract[48]. Decisions have applied the rules of interpretation in article 8 to determine whether a communication or act is sufficiently definite. One court has concluded that, if the intent to be bound by an acceptance is established, a proposal is sufficiently definite notwithstanding the failure to specify the price[49].

7. Article 14 does not require that the proposal include all the terms of the proposed contract[50]. If, for example, the parties have not agreed on the place of delivery[51] or the mode of transportation[52] the Convention may fill the gap.

Indication of the goods

8. To be sufficiently definite under the second sentence of paragraph (1) a proposal must indicate the goods. There is no express requirement that the proposal indicate the quality of the goods. One court found that a proposal to buy “chinchilla pelts of middle or better quality” was sufficiently definite because a reasonable person in the same circumstances as the recipient of the proposal could perceive the description to be sufficiently definite[53]. Another court assumed that an offer to purchase monoammoniumphosphate with the specification “P 205 52% +/- 1%, min 51%” was a sufficiently definite indication of the quality of the goods ordered[54]. If, however, the parties are unable to agree on the quality of the goods ordered there is no contract[55].

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[47] CLOUT case No. 417 [Federal District Court, Northern District of Illinois, United States, 7 December 1999] (conditions satisfied).

[48] CLOUT case No. 52 [Fovárosi Biróság, Hungary, 24 March 1992] (citing art. 9 (1), court concludes that prior sales transactions between the parties supply unstated details in telephone order).

[49] CLOUT case No. 330 [Handelsgericht des Kantons St. Gallen, Switzerland, 5 December 1995] (fax “ordering” software devices sufficiently definite notwithstanding failure to mention price).

[50] See also CLOUT case No. 131 [Landgericht München, Germany, 8 February 1995] (contract for purchase of software enforceable even if parties intended further agreement with respect to use of software).

[51] CLOUT case No. 360 [Amtsgericht Duisburg, Germany, 13 April 2000] (art. 31 (a) applies when buyer unable to establish parties agreed on different place).

[52] CLOUT case No. 261[Bezirksgericht der Sanne, Switzerland, 20 February 1997] (seller authorized to arrange transportation under art. 32 (2) when buyer unable to establish parties agreed on transport by truck).

[53] CLOUT case No. 106 [Oberster Gerichtshof, Austria, 10 November 1994].

[54] CLOUT case No. 189 [Oberster Gerichtshof, Austria, 20 March 1997] (remanding to lower court, however, to determine whether an apparently contradictory response was sufficiently definite).

[55] CLOUT case No. 135 [Oberlandesgericht Frankfurt a.M., Germany 31 March 1995] (no

Fixing or determining the quantity

9. To be sufficiently definite under the second sentence of paragraph (1) a proposal must expressly or implicitly fix or make provision for determining the quantity. A proposal was found to be sufficiently definite in the following cases: a proposal that refers only to "700 to 800 tons" of natural gas because usage in the natural gas trade so provides[56]; "a greater number of Chinchilla furs" because the buyer accepted the furs tendered without objection[57]; "three truck loads of eggs" because the other party reasonably understood or ought to have understood that the trucks should be filled to their full capacity[58]; "20 truck loads of tinned tomato concentrate" because the parties understood the meaning of these terms and their understanding was consistent with the understanding of the trade[59]; "10,000 tons +/- 5%"[60]. A court has found that a buyer's proposal which specified no specific quantity was sufficiently definite because under an alleged customary usage the proposal would be construed as an offer to purchase the buyer's needs from the offeree.[61] Another court found that the seller's delivery of 2,700 pairs of shoes in response to the buyer's order of 3,400 pairs was a counter-offer accepted by the buyer when it took delivery and the contract was therefore concluded for only 2,700 pairs[62].

10. A distribution agreement specifying terms on which the parties would do business and obliging the buyer to order a specified amount was found not sufficiently definite because it did not state a specific quantity[63].

Fixing or determining the price

11. To be sufficiently definite under the second sentence of paragraph (1) a proposal must expressly or implicitly fix or make provision for determining not only the quantity but also the price. A proposal was found to be sufficiently definite in the following cases: a proposal to sell pelts of varying quality "at a price between 35 and 65 German Marks for furs of medium and superior quality" because the price could be calculated by multiplying the quantity of each quality by the relevant price[64]; the price for similar goods in a previous contract between the parties supplied the price for a transaction in which there was no specific agreement on

agreement on quality of test tubes).

[56] CLOUT case No. 176 [Oberster Gerichtshof, Austria, 6 February 1996] (see full text of the decision).

[57] CLOUT case No. 106 [Oberster Gerichtshof, Austria, 10 November 1994] (citing art. 8 (2), (3)) (see full text of the decision).

[58] Landgericht Oldenburg, Germany, 28 February 1996, Unilex (citing art. 8 (2)).

59 Oberlandesgericht Hamburg, Germany, 4 July 1997, Unilex.

[60] CLOUT case No. 189 [Oberster Gerichtshof, Austria, 20 March 1997] (remanding to lower court to determine whether other elements of acceptance were sufficiently definite).

[61] [Federal] Southern District Court of New York, United States, 10 May 2002, *Federal Supplement (2nd Series)* 201, 236 ff.

[62] CLOUT case No. 291 [Oberlandesgericht Frankfurt a.M., Germany, 23 May 1995].

[63] CLOUT case No. 187 [Federal District Court, Southern District of New York, United States, 23 July 1997] (see full text of the decision).

[64] CLOUT case No. 106 [Oberster Gerichtshof, Austria, 10 November 1994].

price because the parties had established a course of dealing[65]; a proposal that the prices are to be adjusted to reflect market prices[66]; agreement on a provisional price to be followed by the definitive price after the buyer resold the goods to exclusive final buyer because such an arrangement is regularly observed in the trade[67].

12. The following proposals were found to be insufficiently definite: a proposal that incorporated several alternatives but did not indicate a proposed price for some elements of the alternative proposals[68]; an agreement that the parties would agree on the price of additional goods ten days before the new year[69].

13. One court has concluded that if the intent to be bound by an acceptance is established a proposal is sufficiently definite notwithstanding the failure to specify the price[70].

Relevance of price formula in article 55

14. Article 14 states that a proposal to conclude a contract is sufficiently definite if it “fixes or makes provision for determining” the price. Article 55 provides a price formula. The price supplied by article 55 is “the price generally charged at the time of the conclusion of the contract for such goods sold under comparable circumstances in the trade concerned.”

15. Most decisions have declined to apply article 55[71]. Several have concluded that article 55 was not applicable because the parties had expressly or implicitly fixed or made provision for determining the price, thereby satisfying the definiteness requirement set out in article 14 (1)[72]. One tribunal found that where the parties had agreed to fix the price at a later time but had not done so, the proposal was not sufficiently definite under article 14 (1) and that article 55 was not applicable

[65] CLOUT case No. 52 [Fovárosi Biróság, Hungary, 24 March 1992] (citing art. 9 (1)).

[66] CLOUT case No. 155 [Cour de Cassation. France, 4 January 1995], *affirming*, CLOUT case No. 158 [Cour d’appel, Paris, France, 22 April 1992] (*“à revoir en function de la baisse du marché”*).

[67] ICC award No. 8324, 1995, Unilex.

[68] CLOUT case No. 53 [Legfelsóbb Biróság, Hungary, 25 September 1992] (see full text of the decision).

[69] CLOUT case No. 139 [Arbitration-Tribunal of International Commercial Arbitration at the Russian Federation Chamber of Commerce and Industry award, No. 309/1993, 3 March 1995]; Federation Chamber of Commerce and Industry award, No. 304/1993, Russia, 3 March 1995, published in *Rozenberg, Practika of Mejdunarodnogo Commercheskogo Arbitrajnogo Syda: Haychno-Practicheskiy Commentariy* 1997, No. 21 [46–54] (citing art. 8).

[70] CLOUT case No. 330 [Handelsgericht des Kantons St. Gallen, Switzerland, 5 December 1995] (fax “ordering” software devices sufficiently definite notwithstanding failure to mention price).

[71] See also Oberlandesgericht Frankfurt a.M., Germany, 15 March 1996, available on the Internet at <http://www.cisg-online.ch/cisg/urteile/284.htm> (citing articles 14 and 55 when expressing doubt parties had undertaken obligations), *affirmed*, Bundesgerichtshof, VIII ZR 134/96, 23 July 1997 (no citation to articles 14 or 55); CLOUT case No. 410 [Landgericht Alsfeld, Germany, 12 May 1995] (court indicates that buyer did not allege circumstances from which a lower price could be established in accordance with article 55) (see full text of the decision).

[72] CLOUT case No. 343 [Landgericht, Darmstadt, Germany 9 May 2000] (parties’ agreement as to price enforceable even if price different from that of the market); CLOUT case No. 106 [Oberster Gerichtshof, Austria, 10 November 1994] (transaction between a German seller and an Austrian buyer; parties had fixed the price in the contract concluded by offer and acceptance and therefore reversed an intermediate court’s application of article 55).

because of the parties' agreement to fix the price at a later time[73]. In another case where the proposal to conclude a contract failed to fix the price, the court declined to apply article 55 to fix the price because there was no market price for the airplane engines that the parties were negotiating about[74]. Another court also found that, to the extent the price formula of article 55 might be applicable, the parties had derogated from that formula by their agreement[75].

16. One court has looked to article 55 when it enforced the parties' agreement notwithstanding that they had not fixed the price in their original negotiations. In that case, the court stated that the price set out in a corrected invoice issued by the seller at the request of the buyer and to which the buyer did not object was to be interpreted as the price charged under comparable circumstances in the trade concerned as provided in the article 55 formula[76].

[73] CLOUT case No. 139 [Arbitration-Tribunal of International Commercial Arbitration at the Russian Federation Chamber of Commerce and Industry, award No. 309/1993 of 3 March 1995] (transaction between a Ukrainian seller and an Austrian buyer; buyer may have separate claim for failure of the seller to propose a price during the designated time).

[74] CLOUT case No. 53 [Legfelsóbb Biróság,, Hungary, 25 September 1992] (transaction between a US seller and a Hungarian buyer).

[75] CLOUT case No. 151 [Cour d'appel, Grenoble, France, 26 April 1995] (buyer had accepted invoices with higher than market prices).

[76] CLOUT case No. 215 [Bezirksgericht St. Gallen, Switzerland 3 July 1997] (transaction between a Dutch seller and Swiss buyer; buyer's subsequent conduct interpreted as establishing buyer's intent to conclude a contract).