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**United Nations Commission  
on International Trade Law**

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

*Article 8*

1. For the purposes of this Convention statements made by and other conduct of a party are to be interpreted according to his intent where the other party knew or could not have been unaware what that intent was.

2. If the preceding paragraph is not applicable, statements made by and other conduct of a party are to be interpreted according to the understanding that a reasonable person of the same kind as the other party would have had in the same circumstances.

3. In determining the intent of a party or the understanding a reasonable person would have had, due consideration is to be given to all relevant circumstances of the case including the negotiations, any practices which the parties have established between themselves, usages and any subsequent conduct of the parties.

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\* 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.



## Interpretation of the statements and conduct of a party and of the contract

1. Whereas article 7 concerns the interpretation and gap-filling of the Convention, article 8, which according to one arbitral tribunal states rules which correspond to principles generally accepted in international commerce,<sup>1</sup> relates to the interpretation of any statements or other conduct of a party, provided that those statements or conduct relate to a matter governed by the Convention, as expressly pointed out by the Supreme Court of one Contracting State.<sup>2</sup> Therefore, whenever the statement or the conduct to be interpreted relates to a matter governed by the Convention, the interpretative criteria set forth in article 8 are to be used in order to interpret those statements or conduct, whether those statements or conduct relate to Part II (on “Formation”) or Part III (on “Rights and Obligations of the Parties”). This view is supported by legislative history<sup>3</sup> and case law. Courts have resorted to the interpretative criteria set forth in article 8 to interpret both statements and other conduct concerning the process of formation of contract,<sup>4</sup> as well as statements and other conduct concerning the performance of the contract<sup>5</sup> and its avoidance.<sup>6</sup>
2. Where the provision is applicable, it precludes the applicability of domestic interpretative rules, since article 8 exhaustively deals with the issue of interpretation.<sup>7</sup>
3. Although article 8 appears to be applicable merely to the interpretation of unilateral acts of each party, according to both legislative history<sup>8</sup> and case law<sup>9</sup> it

<sup>1</sup> CLOUT case No. 303 [Arbitration-International Chamber of Commerce no. 7331 1994] (see full text of the decision).

<sup>2</sup> See Oberster Gerichtshof, 24 April 1997, published on the Internet at <[http://www.cisg.at/2\\_10997m.htm](http://www.cisg.at/2_10997m.htm)>.

<sup>3</sup> United Nations Conference on Contracts for the International Sale of Goods, Vienna, 10 March-11 April 1980, Official Records, Documents of the Conference and Summary Records of the Plenary Meetings and of the Meetings of the Main Committee, 1981, 18, stating that “Article [8] on interpretation furnishes the rules to be followed in interpreting the meaning of any statement or other conduct of a party which falls within the scope of application of this Convention. Interpretation of the statements or conduct of a party may be necessary to determine whether a contract has been concluded, the meaning of the contract, or the significance of a notice given or other act of a party in the performance of the contract or in respect of its termination”.

<sup>4</sup> Oberlandesgericht Frankfurt, Germany, 30 August 2000, published on the Internet at <<http://cisgw3.law.pace.edu/cisg/text/000830g1german.html>>; Oberster Gerichtshof, Austria, 9 March 2000, published on the Internet at <[http://www.cisg.at/6\\_31199z.htm](http://www.cisg.at/6_31199z.htm)>; Landgericht Zwickau, Germany, 19 March 1999, published on the Internet at <<http://www.jura.uni-freiburg.de/ipr1/cisg/urteile/text/519.htm>>; CLOUT case No. 189, Austria, 1997; CLOUT case No. 176 [Oberster Gerichtshof, Austria, 6 February 1996]; 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] (see full text of the decision); CLOUT case No. 106 [Oberster Gerichtshof, Austria, 10 November 1994].

<sup>5</sup> CLOUT case No. 270 [Bundesgerichtshof, Germany, 25 November 1998] (dealing with the issue of whether the offer to pay damages on the seller’s part constitutes a waiver of the seller’s right to rely on articles 38 and 39).

<sup>6</sup> CLOUT case No. 282 [Oberlandesgericht Koblenz, Germany, 31 January 1997] (dealing with the issue of whether a certain conduct amounted to avoidance of the contract) (see full text of the decision).

<sup>7</sup> CLOUT case No. 5 [Landgericht Hamburg, Germany, 26 September 1990] (see full text of the decision).

“is equally applicable to the interpretation of ‘the contract’, when the document is embodied in a single document”.<sup>10</sup>

### **Subjective intent of the party (article 8, paragraph 1)**

4. Paragraphs 1 and 2 of article 8 set forth two sets of criteria. According to one court,<sup>11</sup> article 8, paragraph 1 permits “a substantial inquiry into the parties’ subjective intent, even if the parties did not engage in any objectively ascertainable means of registering this intent”. Article 8, paragraph 1 instructs courts to interpret the ‘statements ... and other conduct of a party ... according to his intent’ as long as the other party ‘knew or could not have been unaware’ of that intent. The plain language of the Convention, therefore, requires an inquiry into a party’s subjective intent as long as the other party to the contract was aware of that intent<sup>12</sup> or could not have been unaware of it.<sup>13</sup>

5. The party that asserts that the other party did know or could not have been unaware of the former party’s intent has to prove that assertion.<sup>14</sup>

6. In order for the subjective intent of the party to be relevant at all, it must somehow have been manifested; this is the rationale behind the statement of one court according to which “the intent that one party secretly had, is irrelevant”.<sup>15</sup>

7. However, although courts have to first try to establish the meaning of a statement of other conduct by looking into the intent of the party making that statement or holding that conduct, as emphasized for instance by one arbitral tribunal,<sup>16</sup> “most cases will not present a situation in which both parties to the

<sup>8</sup> United Nations Conference on Contracts for the International Sale of Goods, Vienna, 10 March-11 April 1980, Official Records, Documents of the Conference and Summary Records of the Plenary Meetings and of the Meetings of the Main Committee, 1981, 18.

<sup>9</sup> CLOUT case No. 303 [Arbitration-International Chamber of Commerce no. 7331 1994] (see full text of the decision).

<sup>10</sup> United Nations Conference on Contracts for the International Sale of Goods, Vienna, 10 March-11 April 1980, Official Records, Documents of the Conference and Summary Records of the Plenary Meetings and of the Meetings of the Main Committee, 1981, 18; see Bundesgericht, Switzerland, 22 December 2000, published on the Internet at <<http://www.cisg.law.pace.edu/cisg/text/001222s1german.html>>.

<sup>11</sup> CLOUT case No. 222 [Federal Court of Appeals for the Eleventh Circuit, United States, 29 June 1998].

<sup>12</sup> CLOUT case No. 222 [Federal Court of Appeals for the Eleventh Circuit, United States, 29 June 1998] (internal citation in quoted material omitted) (see full text of the decision); for other cases in which the part of article 8, paragraph 1 referred to in the text was cited, see CLOUT case No. 313 [Cour d’appel Grenoble, France, 21 October 1999] (see full text of the decision); CLOUT case No. 268 [Bundesgerichtshof, Germany, 11 December 1996]. For an express reference to the “subjective” interpretation, see Oberlandesgericht Frankfurt, Germany, 30 August 2000, published on the Internet at <<http://cisgw3.law.pace.edu/cisg/text/000830g1german.html>>.

<sup>13</sup> For references to this part of article 8, paragraph 1, see CLOUT case No. 215 [Bezirksgericht St. Gallen, Switzerland, 3 July 1997] (see full text of the decision).

<sup>14</sup> CLOUT case No. 215 [Bezirksgericht St. Gallen, Switzerland, 3 July 1997] (see full text of the decision).

<sup>15</sup> CLOUT case No. 5 [Landgericht Hamburg, Germany, 26 September 1990] (see full text of the decision).

<sup>16</sup> ICC Court of Arbitration, award No. 8324, published on the Internet at <<http://www.unilex.info/case.cfm?pid=1&do=case&id=240&step=FullText>>.

contract acknowledge a subjective intent [...]. In most cases, therefore, article 8, paragraph 2 of the [Convention] will apply, and objective evidence will provide the basis for the court's decision."<sup>17</sup> According to one arbitral tribunal this is due to the fact that the application of article 8, paragraph 1 requires either that the parties have established practices between themselves and know each other well or that the statements are very clear.<sup>18</sup>

## Objective interpretation

8. Where in the interpretation of a statement or other conduct of a party it is not possible to rely on article 8, paragraph 1 (and, ultimately, on that party's intent), one has to resort to "a more objective analysis"<sup>19</sup> as provided for in article 8, paragraph 2.<sup>20</sup> According to this provision, statements and other conduct of a party are to be interpreted according to the understanding that a reasonable person of the same kind as the other party would have had in the same circumstances.<sup>21</sup> According to one court, the result of an interpretation based on the aforementioned criteria corresponds to the result of a "reasonable interpretation".<sup>22</sup>

<sup>17</sup> CLOUT case No. 222 [Federal Court of Appeals for the Eleventh Circuit United States, 29 June 1998] (see full text of the decision).

<sup>18</sup> ICC Court of Arbitration, award No. 8324, published on the Internet at <<http://www.unilex.info/case.cfm?pid=1&do=case&id=240&step=FullText>>.

<sup>19</sup> Id.; for other cases expressly referring to the need, absent the possibility of a subjective interpretation, to interpret statements or other conduct of the parties on a more "objective" basis, see Oberlandesgericht Köln, 16 July 2001, published on the Internet at <<http://www.cisg.law.pace.edu/cisg/text/010716g1german.html>>; Bundesgericht, Germany, 22 December 2000, published on the Internet at <<http://www.cisg.law.pace.edu/cisg/text/001222s1german.html>>; Oberlandesgericht Frankfurt, Germany, 30 August 2000, published on the Internet at <<http://cisgw3.law.pace.edu/cisg/text/000830g1german.html>>; CLOUT case No. 222 [Federal Court of Appeals for the Eleventh Circuit, United States, 29 June 1998] (see full text of the decision); Hoge Raad, Netherlands, 7 November 1997, published on the Internet at <<http://www.unilex.info/case.cfm?pid=1&do=case&id=333&step=FullText>>; Landgericht Kassel, Germany, 15 February 1996, published on the Internet at <<http://www.jura.uni-freiburg.de/ipr1/cisg/urteile/text/190.htm>>.

<sup>20</sup> It may well be that neither an interpretation based upon article 8, paragraph 1 nor one based upon article 8, paragraph 2 leads to the result wanted by the party, see Hoge Raad, Netherlands, 7 November 1997, published on the Internet at <<http://www.unilex.info/case.cfm?pid=1&do=case&id=333&step=FullText>>.

<sup>21</sup> Landgericht Zwickau, Germany, 19 March 1999, published on the Internet at <<http://www.jura.uni-freiburg.de/ipr1/cisg/urteile/text/519.htm>>; CLOUT case No. 189 [Oberster Gerichtshof, Austria, 20 March 1997]; Hoge Raad, Netherlands, 7 November 1997, published on the Internet at <<http://www.unilex.info/case.cfm?pid=1&do=case&id=333&step=FullText>>; CLOUT case No. 215 [Bezirksgericht St. Gallen Switzerland 3 July 1997] (see full text of the decision); CLOUT case No. 166 [Arbitration - Schiedsgericht der Handelskammer Hamburg, 21 March, 21 June 1996] (see full text of the decision); Arbitration Court of the Chamber of Commerce and Industry of Budapest, Arbitration, award No. Vb 94124, published on the Internet at <<http://www.unilex.info/case.cfm?pid=1&do=case&id=217&step=FullText>>; CLOUT case No. 308 [Federal Court of Australia 28 April 1995] (see full text of the decision); CLOUT case No. 106 [Oberster Gerichtshof, Austria, 10 November 1994].

<sup>22</sup> CLOUT case No. 273 [Oberlandesgericht München, Germany, 9 July 1997].

9. There are various examples in which courts relied upon article 8, paragraph 2. In one case, a court inferred the buyer's intention to be bound by its declaration and the possibility of determining the quantity of the goods by interpreting its statements and conduct according to the understanding of a reasonable person of the same kind as the other party in the same circumstances. The court found that, absent any relevant circumstance or practice between the parties at the time the contract was concluded, which have always to be taken into account, the buyer's intention to be bound could be evinced from the buyer's request to the seller to issue the invoice of the delivered textiles.<sup>23</sup>

10. After noting that according to article 14, paragraph 1 of the Convention a declaration must be sufficiently definite in order to constitute a proposal and that it is sufficiently definite where it indicates the goods and expressly or implicitly fixes or makes provision for determining the quantity and the price, one court stated that for the offer to be able to be accepted, "it suffices that the required minimum content can be understood as being sufficiently definite by 'a reasonable person of the same kind' as the other party (offeree) would have 'in the same circumstances'".<sup>24</sup>

11. In another case, when having to determine what qualities of the goods were agreed upon, one Supreme Court stated that, given that the parties had a different understanding of the meaning of the contract, the language of the contract had to be interpreted according to article 8, paragraph 2, i.e. "according to the understanding that a reasonable person of the same kind as the other party would have had in the same circumstances". The Court reasoned that since the buyer was an expert and knew that it was not offered a new machine, but one built fourteen years prior to the conclusion of the contract and which consequently did not conform to the latest technical expectations, it was without doubt consistent with article 8, paragraph 2 for the Court of First Instance to find that the seller was entitled to expect that the buyer concluded the contract in full knowledge of the technical limitations of the machinery and its equipment. For these reasons, the Supreme Court concurred with the Court of First Instance that the machine was offered to the buyer in conformity with the specifications of the contract.<sup>25</sup>

12. In another case, one court which was considering the interpretation of a letter, noted that article 8, paragraph 2 of the Convention is the primary source of interpretation and, in respect of the case to be decided by the court, showed "that the claim for the purchase price was due at the end of the agreed period for payment. Only within this period was the buyer allowed to propose a compensation transaction as provided in the contract. The offer would have given the [buyer] a respite in payment while the performance of the compensation transaction would have fulfilled the [buyer's] obligation to pay the purchase price. The parties' interests also point in favour of such an understanding of their agreement. While the [buyer] would have benefited from reciprocal shipments which allowed it to set-off its payment obligation against the [seller's], it was evidently important for the [seller] to receive a [monetary] equivalent for its goods no later than at the

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<sup>23</sup> CLOUT case No. 215 [Bezirksgericht St. Gallen, Switzerland, 3 July 1997] (see full text of the decision).

<sup>24</sup> CLOUT case No. 106 [Oberster Gerichtshof, Austria, 10 November 1994].

<sup>25</sup> Bundesgericht, Germany, 22 December 2000, published on the Internet at <<http://www.cisg.law.pace.edu/cisg/text/001222s1german.html>>.

expiration of the payment period. In particular, the [buyer] could not have been unaware that it would have been commercially unreasonable for the [seller] to grant a respite in payment beyond the agreed period only upon the [buyer's] announcement of a compensation transaction.”<sup>26</sup>

13. Article 8, paragraph 2 was also used in a dispute relating to the non-conformity of goods in order to determine whether the seller had implicitly waived, through its behaviour, its right to set up the defence that the notice of non-conformity was not timely.<sup>27</sup> More specifically, the court stated that the fact that a seller enters into negotiations over the lack of conformity of the goods need not necessarily be regarded as a waiver, but should be considered in conjunction with the circumstances of each case. Since in the case at hand, after its own inspection of the claimed defect, the seller “negotiated over the amount and manner of a settlement of damages for practically 15 months—[...] without expressly or at least discernibly reserving the objection to the delay” and even “offered through legal counsel to pay compensatory damages that amount to practically seven times the value of the goods”,<sup>28</sup> article 8, paragraph 2 and article 8, paragraph 3 led the court to state that “the [buyer] could only reasonably understand that the [seller] was seeking a settlement of the affair and would not later refer to the allegedly passed deadline as a defence to the [buyer's] reimbursement claim”, i.e. that the seller had waived its right to rely on the untimeliness of the notice. The issue of whether the seller had waived its right to raise the untimeliness of the buyer's notice of non-conformity was dealt with by another court as well.<sup>29</sup> According to that court, such a waiver cannot be assumed from the mere readiness of the seller to discuss the issue with the buyer. This results both from the need of certainty in commercial transactions, and from the principle of good faith, which is applicable also in the interpretation of the parties' statements or other conduct.

14. One court resorted to article 8, paragraph 2 to interpret the meaning of the clause “franco domicile” contained in a contract. The court found that this clause did not merely deal with the cost of the transport but also with the passing of the risk. In reaching this conclusion, the court interpreted the term “franco domicile” according to the understanding that a reasonable person would have had in the same circumstances. In the court's opinion, a buyer entitled to the delivery of goods “franco domicile” would not worry about transportation and insurance of the goods; furthermore, the court reasoned that the fact that the seller obtained transport insurance meant that it was prepared to take the risk of the transportation of the goods. The court observed that this clearly indicated the parties' intention to accept the passing of the risk at the buyer's place of business, and accordingly to deviate from article 31 (a) CISG.<sup>30</sup>

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<sup>26</sup> Oberlandesgericht Dresden, Germany, 27 December 1999, published on the Internet at <<http://www.jura.uni-freiburg.de/ipr1/cisg/urteile/text/511.htm>> (internal citations to Convention omitted).

<sup>27</sup> CLOUT case No. 270 [Bundesgerichtshof, Germany, 25 November 1998].

<sup>28</sup> *Id.* (internal citations to Convention omitted) (see full text of the decision).

<sup>29</sup> CLOUT case No. 251 [Handelsgericht des Kantons Zürich, Switzerland, 30 November 1998] (see full text of the decision).

<sup>30</sup> CLOUT case No. 317 [Oberlandesgericht Karlsruhe, Germany, 20 November 1992].

15. In a different case,<sup>31</sup> article 8, paragraph 2 was resorted to in order to determine whether the conduct of one party allowed the court to decide whether an agreement as to the purchase price had been reached by the parties. Because the buyer had taken delivery of the goods without contesting the price indicated by the seller and since such conduct was to be interpreted as acceptance of the price pursuant to article 8, paragraph 2, the court ordered the buyer to pay the price requested by the seller, as it considered that an agreement on the purchase price had been reached.

16. Article 8, paragraph 2 and the interpretive standards it refers to was also invoked in order to determine whether a loss which occurred was to be considered foreseeable under article 74 of the Convention.<sup>32</sup>

### **Elements to be taken into account in interpreting statements or other conduct of a party**

17. According to article 8, paragraph 3, in determining the intent of a party or the understanding a reasonable person would have had, due consideration is to be given to all relevant circumstances of the case<sup>33</sup> including the negotiations, any practices which the parties have established between themselves, usages, and any subsequent conduct of the parties.<sup>34</sup> As noted in several decisions,<sup>35</sup> these criteria have to be taken into account when interpreting a statement or other conduct in the light of both article 8, paragraph 1<sup>36</sup> and article 8, paragraph 2.<sup>37</sup>

18. The express reference in article 8, paragraph 3 to the negotiations as an element to be taken into account in interpreting statements or other conduct by the parties did not prevent one court from holding that the “parol evidence rule” applies even in relation to contracts governed by the Convention.<sup>38</sup> This rule, which notwithstanding its name applies indiscriminately to both parol and written evidence, seeks to give legal effect to the contracting parties’ final, and in certain instances, complete expressions of their agreement which they have reduced to writing. If the agreement is supposed to be a complete integration, the parol

<sup>31</sup> CLOUT case No. 151 [Cour d’appel Grenoble, France, 26 April 1995].

<sup>32</sup> Oberster Gerichtshof, Austria, 14 January 2002, published on the Internet at <<http://131.152.131.200/cisg/urteile/643.htm>>.

<sup>33</sup> According to the *Official Records of the United Nations Conference on Contracts for the International Sale of Goods, Vienna, 10 March-11 April 1980* (United Nations publication, Sales No. E.81.IV.3), 18, the list to be found in article 8, paragraph 3 is not an exhaustive list of elements to be taken into account in interpreting statements or other conduct by the parties.

<sup>34</sup> For references to article 8, paragraph 3, see CLOUT case No. 215 [Bezirksgericht St. Gallen, Switzerland, 3 July 1997]; CLOUT case No. 106 [Oberster Gerichtshof, Austria, 10 November 1994].

<sup>35</sup> In arbitration, see ICC Court of Arbitration, award No. 8324/1995, published on the Internet at <<http://www.unilex.info/case.cfm?pid=1&do=case&id=240&step=FullText>>.

<sup>36</sup> CLOUT case No. 268 [Bundesgerichtshof, Germany, 11 December 1996], expressly stating that the elements referred to in article 8, paragraph 3 have to be taken into account when interpreting a statement or other conduct by a party in the light of article 8, paragraph 1 (see full text of the decision).

<sup>37</sup> CLOUT case No. 106 [Oberster Gerichtshof, Austria, 10 November 1994].

<sup>38</sup> CLOUT case No. 24 [Federal Court of Appeals for the Fifth Circuit, United States, 15 June 1993].

evidence rule prohibits a party from introducing evidence of prior agreements or negotiations that are contradictory as well as consistent with the writing. This decision is in contrast with that of courts in other jurisdictions within that State.<sup>39</sup> One court<sup>40</sup> expressly stated that “the parol evidence rule is not viable in CISG cases in light of article 8 of the Convention”<sup>41</sup> since “article 8 (3) expressly directs courts to give ‘due consideration [...] to all relevant circumstances of the case including the negotiations’ to determine the intent of the parties. Given article 8 (1)’s directive to use the intent of the parties to interpret their statements and conduct, article 8 (3) is a clear instruction to admit and consider parol evidence regarding the negotiations to the extent they reveal the parties’ subjective intent”. According to another court, “article 8, paragraph 3 essentially rejects [...] the parol evidence rule”.<sup>42</sup> Yet another court stated that “contracts governed by the CISG are freed from the limits of the parol evidence rule and there is a wider spectrum of admissible evidence to consider in construing the terms of the parties’ agreement”.<sup>43</sup>

19. One court, after pointing out the problems that may arise under the Convention in respect of parol evidence, stated that to the extent parties wish to avoid parol evidence problems they can do so by including a merger clause in their agreement that extinguishes any and all prior agreements and understandings not expressed in the writing.<sup>44</sup>

20. As far as the subsequent conduct is concerned, it generally serves to show what intention existed at the time the statement was made, as stated by different courts.<sup>45</sup> In one case,<sup>46</sup> the court inferred the buyer’s intention to be bound and the possibility of determining the quantity of the goods by interpreting the buyer’s statements and conduct according to the understanding of a reasonable person of the same kind as the other party in the same circumstances. It held that, absent any relevant circumstance or practice between the parties, the intention to be bound had to be interpreted according to the subsequent conduct after the conclusion of the contract of the party that had made the statement. In particular, it held that the buyer’s request to the seller to issue the invoice of the delivered textiles to the embroiderer was sufficient evidence of the buyer’s intention to be bound at the time it made its proposal. Furthermore, the fact that the buyer complained about the quantity only two months after delivery to the embroiderer gave the court good

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<sup>39</sup> See, apart from the decisions referred to subsequently in the text, [Federal] Western District Court for Michigan, United States of America, 17 December 2001, 2001 Westlaw 34046276 (*Shuttle Packaging Systems v. Tsonakis*), published on the Internet at <<http://cisgw3.law.pace.edu/cases/011217u1.html>>; CLOUT case No. 419 [Federal District Court, Northern District of Illinois, United States, 27 October 1998].

<sup>40</sup> CLOUT case No. 222 [Federal Court of Appeals for the Eleventh Circuit, United States, 29 June 1998].

<sup>41</sup> *Id.* (see full text of the decision).

<sup>42</sup> CLOUT case No. 23 [Federal District Court, Southern District of New York, United States, 14 April 1992] (see full text of the decision).

<sup>43</sup> CLOUT case No. 413 [Federal District Court, Southern District of New York, United States, 6 April 1998] (see full text of the decision).

<sup>44</sup> CLOUT case No. 222 [Federal Court of Appeals for the Eleventh Circuit, United States, 29 June 1998] (see full text of the decision).

<sup>45</sup> CLOUT case No. 215 [Bezirksgericht St. Gallen, Switzerland, 3 July 1997]; CLOUT case No. 5 [Landgericht Hamburg, Germany, 26 September 1990] (see full text of the decision).

<sup>46</sup> CLOUT case No. 215 [Bezirksgericht St. Gallen, Switzerland, 3 July 1997] (see full text of the decision).



reason to believe that a valid contract had been concluded for the sale of the quantity of textiles actually delivered to the embroiderer.

21. It should be noted that according to one court, the circumstances referred to in article 8, paragraph 3 may lead to silence amounting to acceptance.<sup>47</sup>

22. Apart from the elements expressly listed in article 8, paragraph 3 as elements to be taken into account in the interpretation of statements or other conduct of the parties, according to one court, the good faith principle referred to in article 7, paragraph 1, in respect of the interpretation of the Convention, must also be taken into account in the interpretation of statements or other conduct of the parties.<sup>48</sup>

### **Standard contract terms and language of the statements**

23. Article 8 has also been invoked to solve the problem of whether and under what conditions standard contract terms proposed by one party become part of the contract. In one case,<sup>49</sup> the Supreme Court of a Contracting State held that the issue of the inclusion of such terms is to be solved on the basis of the Convention's rules on interpretation rather than of those of the applicable domestic law. On the grounds of the applicability of the interpretive criteria set forth in article 8, the court stated that whether the standard contract terms are part of the proposal must be analysed on the basis of how a "reasonable person of the same kind as the other party" would have understood the offer and that that means that "it is required that the recipient of a contract offer that is supposed to be based on general terms and conditions has the possibility to become aware of them in a reasonable manner" and that "an effective inclusion of general terms and conditions above all requires that the intention of the offeror that it wants to include its terms and conditions into the contract be apparent to the recipient of the offer". In addition, according to the court, "[...], the Convention requires the user of general terms and conditions to transmit the text or make it available to the other party".<sup>50</sup>

24. In a different case, another court<sup>51</sup> reached basically the same conclusions, but in doing so, it also dealt with the issue of the language in which the statements had to be made to be effective. According to that court, in the absence of an express provision in the Convention the inclusion of standard contract terms has to be decided on the basis of an interpretation of the contract in light of article 8. A reference by one party to its standard terms must be such as to put a reasonable person of the same kind as the other party in a position to understand it and to gain knowledge of the standard terms. According to the court, one of the circumstances to be taken into account is the language in which the standard terms are written. In the case at hand the seller's standard contract terms were not in the language of the

<sup>47</sup> CLOUT case No. 23 [Federal District Court, Southern District of New York, United States, 14 April 1992].

<sup>48</sup> CLOUT case No. 251 [Handelsgericht des Kantons Zürich, Switzerland, 30 November 1998] (see full text of the decision); Arbitral Tribunal of the Hamburg Chamber of Commerce, Arbitration, 21 June 1996, published on the Internet at <http://www.unilex.info/case.cfm?pid=1&do=case&id=196&step=FullText>.

<sup>49</sup> Bundesgerichtshof, Germany, 31 October 2001, published on the Internet at <http://www.unilex.info/case.cfm?pid=1&do=case&id=736&step=Abstract>.

<sup>50</sup> Id.

<sup>51</sup> See CLOUT case No. 345 [Landgericht Heilbronn, Germany, 15 September 1997].

contract; the seller should have sent a translation or at least a text both in the language of the contract and in the other language. Since, however, the seller had not done this, the standard contract terms had not become part of the contract. A similar solution was also adopted in a court of another country, which stated that the standard contract terms written in a language different from that of the contract cannot bind the other party.<sup>52</sup>

25. The language issue was dealt with in another decision as well.<sup>53</sup> On that occasion, the court held that whether a notice written in a language other than the language in which the contract was made or than the language of the addressee was effective was to be decided on a case-by-case basis and taking into account the understanding of a reasonable person, giving due consideration to usages and practices observed in international trade, according to article 8, paragraph 2 and article 8, paragraph 3. The mere fact that a notice was given in a language which was not that of the contract or that of the addressee was not an obstacle for the notice to be effective. The foreign language could be the language normally used in the respective trade sector, to which the parties may be considered to have agreed upon; and even when this was not the case, the notice would be effective if the debtor, as it was true in the case at hand, could have reasonably been expected to request from the sender of the notice explanations or a translation.

26. In yet another decision,<sup>54</sup> a court held that the party that accepts statements relating to the contract in a language different from the one used for the contract is bound by the contents of such statements, since it is up to that party to get acquainted with the contents of that statement.

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<sup>52</sup> Rechtbank Koophandel Hasselt, Belgium, 2 June 1999, published on the Internet at <<http://www.law.kuleuven.ac.be/int/tradelaw/WK/1999-06-02.htm>>.

<sup>53</sup> CLOUT case No. 132 [Oberlandesgericht Hamm, Germany, 8 February 1995].

<sup>54</sup> Landgericht Kassel, Germany, 15 February 1996, published on the Internet at <<http://www.jura.uni-freiburg.de/ipr1/cisg/urteile/text/190.htm>>.