

Article 19

(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, quality and quantity of the goods, place and time of delivery, extent of one party's liability to the other or the settlement of disputes are considered to alter the terms of the offer materially.

OVERVIEW

1. Article 19 qualifies article 18 by providing that a purported acceptance which modifies the offer is a rejection of the offer and is considered instead to be a counter-offer.¹ Paragraph (1) of article 19 states this basic proposition, while paragraph (2) makes an exception for immaterial modifications to which the offeror does not object. Paragraph (3) lists matters which are considered material.

MATERIAL MODIFICATIONS

2. Paragraph (1) provides that a reply to an offer that adds to, limits or otherwise modifies the offer is a rejection of the offer.² Several decisions have reviewed the parties' exchange of multiple communications and have concluded, without specifying the modifications, that at no point was there an acceptance of an offer.³

3. Paragraph (3) lists matters that, if they are the subject of a modification in a reply to an offer, render the modification material. Modifications relating to the following listed matters have been found to be material: price;⁴ payment;⁵ quality and quantity of the goods;⁶ place and time of delivery;⁷ settlement of disputes.⁸ One decision has stated, however, that modifications of matters listed in paragraph (3) are not material if the modifications are not considered material by the parties or in the light of usages.⁹ Another decision stated that article 19 (3) merely comprised a rebuttable presumption of material modification of the offer, of which rebutting evidence was adduced, the buyer in the relevant case not having reported the discrepancy between the order and the buyer's reply vis-à-vis the quantity of goods ordered, and the modified order having been executed.¹⁰ A matter not included in that list has also been considered a material alteration: a requirement that the buyer be accepted by the seller's credit insurance.¹¹ Thus the list in article 19 (3) has been considered non-exhaustive.¹²

IMMATERIAL MODIFICATIONS

4. Paragraph (2) provides that a reply with immaterial modifications of the offer constitutes an acceptance (and that the resulting contract includes the modified terms of the reply) unless the offeror notifies the offeree without undue delay that the offeror objects to the modifications.¹³ One court has stated that modifications that favour the addressee are not material and do not have to be accepted expressly by the other party.¹⁴ Modifications that are irrelevant to the addressee have also been considered immaterial. Small changes in the quantity of the goods indicated in the offeree's reply were found by the court to be immaterial since they followed from the specifics of the way the goods were contained and packaged.¹⁵

5. The following modifications have been found to be immaterial: language stating that the price would be modified by increases as well as decreases in the market price, and deferring delivery of one item;¹⁶ seller's standard term reserving the right to change the date of delivery;¹⁷ altering the shipping time but not the delivery time;¹⁸ a modification of the transport costs;¹⁹ an increase in the quantity of goods;²⁰ an adjustment of the quantity of the goods in each delivery without changing the total amount;²¹ a change in a bank guarantee;²² a request that buyer draft a formal termination agreement;²³ a request to treat the contract confidential until the parties make a joint public announcement;²⁴ a provision requiring that buyer reject delivered goods within a stated period;²⁵ deletion of a liability clause for contract violations.²⁶

CONFLICTING STANDARD TERMS

6. The Convention does not have special rules to address the issues raised when a potential seller and buyer both use standard contract terms prepared in advance for general and repeated use (the so-called "battle of the forms"). A conflict exists when the two sets of terms differ partially,

and also when one of the standard terms does not contain provisions on an issue expressly included in the other's set of standard terms.²⁷ Several decisions conclude that the parties' performance notwithstanding partial contradiction between their standard terms established an enforceable contract.²⁸ As for the terms of these contracts, several decisions would include those terms on which the parties substantially agreed, and replace those standard terms that (after appraisal of all the terms)²⁹ with the default rules of the Convention (knock-out rule); several other decisions

give effect to the standard terms of the last person to make an offer or counter-offer that is then deemed accepted by subsequent performance by the other party (last-shot rule).³⁰ Another decision refused to give effect to the standard terms of either party: the seller was not bound by the buyer's terms on the back of the order form in the absence of a reference to them on the front of the form, while the seller's terms—included in a confirmation letter sent after the contract was concluded—were not accepted by the buyer's silence.³¹

Notes

¹ But see CLOUT case No. 189 [Oberster Gerichtshof, Austria, 20 March 1997], English translation available on the Internet at www.cisg.law.pace.edu (the reply must satisfy the definiteness requirements of article 14 (1) in order to be a counter-offer). For discussion of the article 14 (1) definiteness requirement, see paragraphs 6 and 7 of the Digest for article 14. Hangzhou Intermediate People's Court, People's Republic of China, 2002, English abstract available on the Internet at www.cisg.law.pace.edu (a counteroffer was found under article 19(1) when the intention manifested was to continue negotiations, as indicated by a response such as, "We herein confirm the above provisions; details will be discussed on 11 June").

² U.S. District Court, Southern District of Ohio, United States, 26 March 2009 (Miami Valley Paper, LLC v. Lebbing Engineering & Consulting GmbH), available on the Internet at www.cisg.law.pace.edu (asserting in general that CISG follows the mirror image rule).

³ See, for example, CLOUT case No. 251 [Handelsgericht des Kantons Zürich, Switzerland, 30 November 1998] (no agreement on termination of contract) (see full text of the decision); CLOUT case No. 173 [Fovárosi Biróság, Hungary, 17 June 1997], English translation available on the Internet at www.cisg.law.pace.edu (no clear agreement to extend distribution contract).

⁴ CLOUT case No. 424 [Oberster Gerichtshof, Austria, 9 March 2000], available on the Internet at www.cisg.law.pace.edu; CLOUT case No. 417 [U.S. District Court, Northern District of Illinois, United States, 7 December 1999], available on the Internet at www.cisg.law.pace.edu (see full text of the decision); CLOUT case No. 193 [Handelsgericht des Kantons Zürich, Switzerland, 10 July 1996], English translation available on the Internet at www.cisg.law.pace.edu (see full text of the decision); CLOUT case No. 1029 [Cour d'appel de Rennes, France, 27 May 2008], English translation available on the Internet at www.cisg.law.pace.edu.

⁵ CLOUT case No. 176 [Oberster Gerichtshof, Austria, 6 February 1996] (time of payment) (see full text of the decision); Court of Arbitration of the International Chamber of Commerce, 2000 (Arbitral award No. 10329), *Yearbook Commercial Arbitration*, vol. 29, p.108 (2004), available on the Internet at www.cisg.law.pace.edu (the offer stipulated condition of payment was "by irrevocable L/C at 90 days B/L date". The acceptance included the hand-written payment condition "E. O. remissa diretta" [sic] (translation: "and/or directly payment 90 days"); the arbitrator considered this a material modification).

⁶ CLOUT case No. 291 [Oberlandesgericht Frankfurt a.M., Germany, 23 May 1995] English translation available on the Internet at www.cisg.law.pace.edu (delivery of fewer pairs of shoes than ordered); CLOUT case No. 135 [Oberlandesgericht Frankfurt a.M., Germany, 31 March 1995] English translation available on the Internet at www.cisg.law.pace.edu (difference in quality of glass test tubes); CLOUT case No. 121 [Oberlandesgericht Frankfurt a.M., Germany, 4 March 1994], English translation available on the Internet at www.cisg.law.pace.edu (acceptance ordering additional kinds of screws); CLOUT case No. 227 [Oberlandesgericht Hamm, Germany 22 September 1992], English translation available on the Internet at www.cisg.law.pace.edu (acceptance offering to sell "unwrapped" rather than wrapped bacon); Kantonsgericht Zug, Switzerland, 2 December 2004, English translation available on the Internet at www.cisg.law.pace.edu (counter-offering 15 tons instead of 5 tons of food dextrose); Hof van Beroep, Belgium, 8 November 2004, English translation available on the Internet at www.cisg.law.pace.edu (offer for fabric "Kabul" was counter-offered for fabric "Lima", which was not accepted by the buyer; confirming Rechtbank van Koophandel Oudenaarde, Belgium, 10 July 2001, English translation available on the Internet at www.cisg.law.pace.edu).

⁷ CLOUT case No. 413 [U.S. District Court, Southern District of New York, United States, 6 April 1998] (delivery terms), available on the Internet at www.cisg.law.pace.edu (see full text of the decision); CLOUT case No. 133 [Oberlandesgericht München, Germany, 8 February 1995], available on the Internet at www.cisg.law.pace.edu (time of delivery) (see full text of the decision); Landgericht München, Germany, 6 April 2000, English translation available on the Internet at www.cisg.law.pace.edu (delivery dates); Juzgado de Primera Instancia Mexico DF, Mexico, 5 October 2004 (change in time and place of delivery constituted a counter-offer which was not accepted and thus the contract was not concluded), affirmed by CLOUT case No. 1193 [Primer Tribunal Colegiado en Materia Civil del Primer Circuito. Amparo Directo Civil (127/2005), 10 March 2005], Mexico, English translation available on the Internet at www.cisg.law.pace.edu.

⁸ CLOUT case No. 242 [Cour de cassation, France, 16 July 1998], English translation available on the Internet at www.cisg.law.pace.edu (differing choice-of-forum clause); CLOUT case No. 23 [U.S. District Court, Southern District of New York, United States, 14 April 1992] (inclusion of arbitration clause) (see full text of the decision); U.S. District Court, Alabama, United States, 31 March 2010 (Belcher-Robinson, L.L.C. v. Linamar Corporation, et al.), available on the Internet at www.cisg.law.pace.edu (inclusion of a forum selection clause considered in a motion to dismiss because article 19 (3) does not clearly identify whether a forum-selection clause materially alters the offer; court suggests it is more reasonable to treat the clause as a material alteration); Oberlandesgericht Frankfurt, Germany, 26 June 2006, English translation available on the Internet at www.cisg.law.pace.edu (indicating that an arbitration clause is always a material alteration under article 19 (3)).

⁹ CLOUT case No. 189 [Oberster Gerichtshof, Austria, 20 March 1997].

¹⁰ CLOUT case No. 1502 [Cour de cassation, France, 27 May 2014] (order for 761.60 square metres of paving stones followed by a delivery of 800 square metres of paving stones and partial payment).

¹¹ CLOUT case No. 537 [Oberlandesgericht Graz, Austria, 7 March 2002], English translation available on the Internet at www.cisg.law.pace.edu (stating that a condition that was put forward by one party during the negotiations between the parties may be considered as a usage

under article 9 CISG impliedly applicable to the contract, provided the other party knew or could not have been unaware of that condition (article 8 (1) CISG); as a result of the non-fulfilment of the condition the contract was not considered to be concluded).

¹² U.S. District Court, Alabama, United States, 31 March 2010 (Belcher-Robinson, LLC v. Linamar Corporation, et al.), available on the Internet at www.cisg.law.pace.edu.

¹³ Tribunal Commercial de Nivelles, Belgium, 19 September 1995, English translation available on the Internet at www.cisg.law.pace.edu; China International Economic & Trade Arbitration Commission, People's Republic of China, 10 June 2002, English translation available on the Internet at www.cisg.law.pace.edu (indicating that an objection to a non-material modification made 5 days after the purported acceptance was not timely).

¹⁴ CLOUT case No. 189 [Oberster Gerichtshof, Austria, 20 March 1997].

¹⁵ China International Economic & Trade Arbitration Commission, People's Republic of China, 10 June 2002, English translation available on the Internet at www.cisg.law.pace.edu (the offer was modified by the buyer, who deleted the clause providing that "a ship with the age of above 20 years is not accepted", and changed the language "carriage paid" to "carriage is paid according to charter-party"; the alteration was considered non-material given the FOB character of the contract).

¹⁶ CLOUT case No. 158 [Cour d'appel, Paris, France 22 April 1992], *affirmed*, CLOUT case No. 155 [Cour de cassation, France, 4 January 1995], English translation available on the Internet at www.cisg.law.pace.edu (affirming with no specific reference to the Convention) (see full text of the decision).

¹⁷ CLOUT case No. 362 [Oberlandesgericht Naumburg, Germany, 27 April 1999], English translation available on the Internet at www.cisg.law.pace.edu (delivery clause interpreted in accordance with article 33 (c)).

¹⁸ CLOUT case No. 1122 [China International Economic and Trade Arbitration Commission, People's Republic of China, 17 September 2003], English translation available on the Internet at www.cisg.law.pace.edu (the shipping time in the offer—April, May, and June 2001—was changed to April, May, June, and July, also deleting "2001"; the Arbitral Tribunal held that the delivery time still began in April, and changing the delivery time from three deliveries to four deliveries did not necessarily mean a material alteration of the delivery time; with regard to the deletion of "year 2001," the Tribunal held that it should have been reasonably understood that the contract would be performed within 2001, because the buyer was still able to buy that year's goods from the seller).

¹⁹ Oberlandesgericht Koblenz, Germany, 4 October 2002, English translation available on the Internet at www.cisg.law.pace.edu (the general terms and conditions of the seller stated "transport was to cost DM 9 per square metre"; buyer's answer added the clause "conditions of delivery: free on building site").

²⁰ CLOUT case No. 1511 [Cour d'appel de Rennes, France, 9 May 2012], and on appeal: CLOUT case No. 1502 [Cour de cassation, France, 27 May 2014].

²¹ CLOUT case No. 1122 [China International Economic and Trade Arbitration Commission, People's Republic of China, 17 September 2003], English translation available on the Internet at www.cisg.law.pace.edu (change from three deliveries with 500 tons, 700 tons, and 800 tons in each delivery, to four deliveries with 500 tons in each delivery; modifications considered to be immaterial because there was no change in total quantity).

²² Arbitration Court of the International Chamber of Commerce, December 1998 (Arbitral award No. 8908), available on the Internet at www.unilex.info (one party issued a bank guarantee which was not mentioned in the contract, which constituted counter-offer, the other party's acceptance without reserve of the bank guarantee, and the alleged start-up of production of the ordered pipes amounted to a tacit acceptance).

²³ China International Economic & Trade Arbitration Commission, People's Republic of China, 1 April 1993 (Arbitral award No. 75), Unilex, also available on the Internet at www.cisg.law.pace.edu.

²⁴ Fováosi Biróság, Budapest, Hungary, 10 January 1992, English translation available on the Internet at www.cisg.law.pace.edu, *reversed on other grounds*, CLOUT case No. 53 [Legfelsőbb Biróság, Hungary, 25 September 1992].

²⁵ CLOUT case No. 50 [Landgericht Baden-Baden, Germany, 14 August 1991], English translation available on the Internet at www.cisg.law.pace.edu (see full text of the decision).

²⁶ CLOUT case No. 1122 [China International Economic and Trade Arbitration Commission, People's Republic of China, 17 September 2003], English translation available on the Internet at www.cisg.law.pace.edu (holding that the deleted clause was not equivalent to an alteration of the extent of one party's liability to the other, as listed in article 19 (3) CISG).

²⁷ Oberlandesgericht Linz, Austria, 23 March 2005, English translation available on the Internet at www.cisg.law.pace.edu.

²⁸ Bundesgerichtshof, Germany, 9 January 2002, English translation available on the Internet at www.cisg.law.pace.edu; Landgericht Kehl, Germany, 6 October 1995, Unilex (parties' performance established that parties either derogated from article 19 or waived enforcement of conflicting standard terms); CLOUT case No. 232 [Oberlandesgericht München, Germany, 11 March 1998], English translation available on the Internet at www.cisg.law.pace.edu (buyer accepted standard terms that differed from its offer by performing the contract) (see full text of the decision).

²⁹ Bundesgerichtshof, Germany, 9 January 2002, English translation available on the Internet at www.cisg.law.pace.edu; Landgericht Kehl, Germany, 6 October 1995, Unilex (enforcing only standard terms that the parties had in common); Oberlandesgericht Düsseldorf, Germany, 25 July 2003, English translation available on the Internet at www.cisg.law.pace.edu (reaching the same result by applying the last-shot rule).

³⁰ U.S. District Court, Western District of Pennsylvania, United States, 10 September 2013 (Roser Technologies, Inc. v. Carl Schreiber Inc. GmbH d/b/a CSN Metals), available on the Internet at www.cisg.law.pace.edu; CLOUT case No. 232 [Oberlandesgericht München, Germany, 11 March 1998], English translation available on the Internet at www.cisg.law.pace.edu (by performing, buyer accepted standard terms that differed from its offer); Arbitration Court of the International Chamber of Commerce, 1997 (Arbitral award No. 8611), Unilex (if standard terms were considered a counter-offer, recipient accepted those terms by taking delivery of goods along with an invoice to which the standard terms were attached). See also Hof 's-Hertogenbosch, the Netherlands, 19 November 1996, Unilex, (seller's acceptance stated that its standard terms applied only to the extent they did not conflict with buyer's standard terms); Oberlandesgericht Linz, Austria, 23 March

2005, English translation available on the Internet at www.cisg.law.pace.edu (after applying the last-shot rule, the Court stated that the buyer accepted the seller's offer, and thus the incorporation of its standard terms, by accepting the goods and paying part of the price); U.S. District Court, Western District of Pennsylvania, United States, 25 July 2008 (Norfolk Southern Railway Company v. Power Source Supply, Inc.), available on the Internet at www.cisg.law.pace.edu (battle of the forms under article 19); CLOUT Case No. 824, [Oberlandesgericht Köln, Germany, 24 May 2006], English translation available on the Internet at www.cisg.law.pace.edu (in a sale of goods between a seller from the Netherlands and a German buyer, where the two exchanged their general terms and conditions the court held that the interpretation of contracts with conflicting terms leads to the application of at least those provisions which do not differ; beyond this, the so-called "last-shot doctrine" applies, according to which the governing terms are those which were exchanged last; in this case, the two alternatives led to the same result since the choice of forum clause was the same.

³¹ CLOUT case No. 203 [Cour d'appel, Paris, France, 13 December 1995].