

*Article 27*

[Modificaton or abrogation of contract]

(1) A contract may be modified or abrogated by the mere agreement of the parties.

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(2) A written contract which contains a provision requiring any modification or abrogation to be in writing may not be otherwise modified or abrogated. However, a party may be precluded by his conduct from asserting such a provision to the extent that the other party has relied on that conduct.

PRIOR UNIFORM LAW

UNCITRAL Arbitration Rules, articles 1 and 30.

Commentary

1. This article governs the modification and abrogation of a contract.

*General rule, paragraph (1)*

2. Paragraph (1), which states the general rule that a contract may be modified or abrogated merely by agreement of the parties, is intended to eliminate an important difference between the civil law and the common law in respect of the modification of existing contracts. In the civil law an agreement between the parties to modify the contract is effective if there is sufficient *cause* even if the modification relates to the obligations of only one of the parties. In the common law a modification of the obligations of only one of the parties is in principle not effective because "consideration" is lacking.

3. Many of the modifications envisaged by this provision are technical modifications in specifications, delivery dates, or the like which frequently arise in the course of performance of commercial contracts. Even if such modifications of the contract may increase the costs of one party, or decrease the value of the contract to the other, the parties may agree that there will be no change in the price. Such agreements according to article 27 (1) are effective, thereby overcoming the common law rule that "consideration" is required.

4. In addition, article 27 (1) is applicable to the question as to whether the terms in a confirmation from or in an invoice sent by one party to the other after the conclusion of the contract modify the contract where those terms are additional or different from the terms of the contract as it was concluded. If it is found that the parties have agreed to the additional or different terms, article 27 (1) provides that they become part of the contract. As to whether the silence on the part of the recipient amounts to an agreement to the modification of the contract, see article 16 (1) and the commentary to that article.

5. A proposal to modify the terms of an existing contract by including additional or different terms in a confirmation or invoice should be distinguished from a reply to an offer which purports to be an acceptance but which contains additional or different terms. This latter situation is governed by article 17.

*Modification or abrogation of a written contract, paragraph (2)*

6. Although article 10 provides that a contract of sale need not be concluded in or evidenced by writing, the parties can reintroduce such a requirement. A similar problem is the extent to which a contract which specifically excludes modification or abrogation unless in writing, can be modified or abrogated orally.

7. In some legal systems a contract can be modified orally in spite of a provision to the contrary in the contract itself. It is possible that such a result would follow from article 10 which provides that a contract governed by this Convention need not be evidenced by writing. However, article 27 (2) provides that a written contract which excludes any modification or abrogation unless in writing cannot be otherwise modified or abrogated.

8. In some cases a party might act in such a way that it would not be appropriate to allow him to assert such a provision against the other party. Therefore, article 27 (2) goes on to state that to the extent the other party has relied on such conduct, the first party cannot assert the provision.

9. It should be noted that the party who wishes to assert the provision in the contract which requires any modification or abrogation to

be in writing is precluded from doing so only to the extent that the other party has relied on the conduct of the first party. This may mean in a given case that the terms of the original contract may be reinstated once the first party denies the validity of the non-written modification.

*Example 27 A:* A written contract for the sale to A over a two-year period of time of goods to be manufactured by B provided that all modifications or abrogations of the contract had to be in writing. Soon after B delivered the first shipment of goods to A, A's contracting officer told B to make a slight modification in the design of the goods. If this modification was not made, he would instruct his personnel to reject future shipment and not to pay for them. Even though B did not receive written confirmation of these instructions, he did modify the design as requested. The next five monthly deliveries were accepted by A but the sixth was rejected as not conforming to the written contract. In this case A must accept all goods manufactured according to the modified design but B must reinstate the original design for the remainder of the contract.