

Internationales Handelsrecht

International Commercial Law

Zeitschrift für das Recht des internationalen
Warenkaufs und -vertriebs

6/2006

6. Jahrgang S. 225-268 Dezember 2006

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Old Habits Die Hard: Traditional Contract Formation in a Modern World

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A. Introduction

Part II of the United Nations Convention on Contracts for the International Sale of Goods ("CISG" or "the Convention"), which consists of Articles 14 to 24, contains provisions regulating the formation of contract. Further provisions concerning contract formation are found in Articles 11 to 13 CISG concerning the principle of freedom from requirements as to form in commercial transactions and its limitations, as well as in Article 29 CISG, which regulates the possibility of modification or mutual termination of a contract. All these provisions, however, only set forth a scheme for determining the parties' objective agreement by means of offer and acceptance.

Important areas of contract formation are not dealt with in the CISG. One of these areas is the law of agency.¹ Another area which is outside the scope of the Convention concerns the validity of the contract or any of its terms, including standard terms (Article 4(a) CISG). Whether a contract is void or voidable by vitiated consent, misrepresentation, fraud, lack of or limited legal capacity, or illegality, or whether a certain term can be regarded as abusive, are all questions left to be answered by the applicable domestic law.² The UNIDROIT Principles of International Commercial Contracts (2004), however, address some of these questions³ and, most notably in international arbitration, may be used to complement the CISG in this regard.

A difficult question is whether precontractual duties fall within the scope of the CISG. At the Vienna Conference, a proposal by the former German Democratic Republic to include a general liability for *culpa in contrahendo* was explicitly rejected.⁴ Thus, in general, this complex issue is left to the applicable domestic law. Nevertheless, certain precontractual duties to provide the other party with information during the negotiation process, especially with respect to the conformity of the goods, can be derived from principles of the Convention itself.⁵ Moreover, the CISG addresses the problems of breaking off negotiations and preventing the formation of contract exhaustively.⁶

As the CISG was drafted in the 1970s, questions which nowadays dominate contract formation, namely the exchange of electronic communication, were simply not contemplated in the drafting process of the Convention. However, the rules of the Convention have proven flexible enough to encompass the modern forms of communication. Today, there are two international sets of rules which may complement the provisions of the CISG in this regard, namely the United Nations Convention on the Use of Electronic Communications in International Contracts,⁷ which is now open for signature, and the ICC eTerms 2004.⁸ In this paper, the questions raised by electronic contracting will be dealt with in conjunction with the relevant CISG provisions.

Due to historical reasons, the CISG follows the traditional nineteenth century approach⁹ to contract formation by two distinct declarations of intent, offer and acceptance. However, the reality of international sales contracts is rarely as simple as this. By contrast, the situation is often much more complex.

Negotiations usually take a long time and agreement is reached step by step. In such a situation, one cannot single out certain declarations as offer and acceptance. Nevertheless, the CISG still governs the process of contract formation in these situations, as the core principle of substantive consensus is able to generate appropriate solutions.¹⁰

The CISG also appears to be rather traditional in another respect. The rules are orientated towards simple sales contracts, a mere exchange of money for goods. However, international

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¹ An attempt to unify the law of agency has been made by Articles 2.2.1 to 2.2.10 UNIDROIT Principles of International Commercial Contracts 2004 (hereinafter "PICC") and, formerly, by the Geneva Convention on Agency in the International Sale of Goods of 17 February 1983, which has not yet entered into force. For both texts see <http://www.unidroit.org> (last accessed 8 August 2006).

² Schlechtriem in Schlechtriem/Schwenzer (eds) *Commentary on the UN Convention on the International Sale of Goods (CISG)* (Oxford University Press, Oxford, 2nd ed., 2005) Intro to Arts 14-24 para. 1, with further references.

³ See Articles 3.1 to 3.20 PICC, which deal with questions of validity, including mistake, fraud, threat, and gross disparity. The Principles, however, do not address lack of capacity, immorality, or illegality.

⁴ United Nations Conference on Contracts for the International Sale of Goods, Vienna, 10 March – 11 April 1980, Official Records, p. 294-5, reprinted in Honnold *Documentary History of the Uniform Law for International Sales* (Kluwer, Deventer, 1989).

⁵ For a detailed and instructive analysis see Schlechtriem (see above fn. 2) Intro to Arts 14-24 para. 6b.

⁶ Thereby preventing the parties to apply remedies under domestic law, except for fraud. See Schlechtriem (above fn. 2) Intro to Arts 14-24 para. 6; Art. 14 para. 13. By contrast, the PICC allow for damages in cases of bad faith, see Article 2.1.15(2).

⁷ Resolution of the United Nations General Assembly A/Res/60/21. A copy of the text and further information concerning the status of the Convention may be found at <http://www.uncitral.org> (last accessed 8 August 2006). The predecessors of this Convention were the UNCITRAL Model Law on Electronic Commerce of 1996 and the UNCITRAL Model Law on Electronic Signatures of 2001. Both texts may be found at <http://www.uncitral.org> (last accessed 8 August 2006).

⁸ A copy of the text and a guide to eContracting may be found at <http://www.iccwbo.org> (last accessed 8 August 2006).

⁹ Farnsworth "Negotiation of Contracts and Precontractual Liability: General Report" in Stoffel/Volken (eds) *Conflicts et harmonisation, Mélanges en l'honneur d'Alfred E. von Overbeck à l'occasion de son 65ème anniversaire* (Editions Universitaires Fribourg Suisse, 1990) 657: "But however suited these rules may have been to the measured cadence of contracting in the nineteenth century, they have little to say about the complex processes that lead to major deals in most countries today."

¹⁰ Schlechtriem (see above fn. 2) Intro to Arts 14-24 para. 5.

business requires complex contract structures, such as framework contracts, requirement contracts, distributorship agreements, and the like. As long as these contracts create obligations to deliver goods, they are governed by the CISG.¹¹

Having introduced all these open questions, the authors will now turn to the provisions of the CISG that govern the formation of contract in detail. For the purpose of introducing these provisions, the authors will follow the structure of the CISG and clearly distinguish between offer and acceptance.

B. Offer

According to Article 14(1) CISG, "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." The minimum requirements for an offer can be derived from this language, namely a sufficiently definite proposal and the intention to be bound.

I. Definiteness of the proposal

A proposal has to be sufficiently definite to constitute an offer. According to Article 14(1) second sentence CISG, this requires that the proposal "indicates the goods and expressly or implicitly fixes or makes provision for determining the quantity and the price." However, the quantity, the price, or features of the goods may be left open for future determination, either by one of the parties or by a third person.¹² Article 65(1) CISG expressly provides for such a specification of the goods by the buyer. Further elements of the *essentialia negotii* common to all legal systems, for example, the person of the offeror and whether it intends to sell or buy, are necessary requirements of an offer under the CISG as well.¹³ In determining the content of the proposal, regard is always to be had to Articles 8 and 9 CISG.¹⁴

The background to the difficult, often-discussed problems that arise in the context of open price contracts is that, at the Vienna Conference, the question of whether a sales contract could be concluded without explicitly providing for a price was still very controversial. In particular, the former socialist states of the Eastern Bloc, supported by France, insisted upon a *pretium certum* requirement as set out in the French Civil Code.¹⁵ Article 14(1) second sentence CISG seems to exclude the possibility of an offer which does not, at least implicitly, make provision for determining the price. By contrast, Article 55 CISG requires a validly concluded contract which does not expressly or implicitly fix or make provision for determining the price. In such a case, "the parties are considered (...) to have impliedly made reference to the price generally charged at the time of the conclusion of the contract for such goods sold under comparable circumstances in the trade concerned." Various approaches have been put forward to resolve the conflict between Article 14(1) second sentence CISG and Article 55(1) CISG, which, due to space restrictions, cannot be reproduced here.¹⁶

In the authors' opinion, there cannot be any doubt that a valid offer may still be presumed to exist if the price can be determined by taking into account all the surrounding circumstances.¹⁷ This view is nowadays further supported by the fact that even the French Supreme Court has virtually abandoned the principle of *pretium certum* not only under the CISG, but also under French domestic law.¹⁸

II. Intention to be bound

A further prerequisite for a proposal to constitute an offer is that it displays the offeror's intention to be bound. This distinguishes an offer from a mere invitation to make offers (*invitatio ad offerendum*). First and foremost, the offeror can negate its intention to be bound by using a certain language in its proposal, for example, the explicit reservation of "subject to contract" or "without obligation".¹⁹ In all other cases, recourse is to be had to general principles of interpretation.

Article 14(2) CISG deals with the problem of a proposal that is not one addressed to one or more specific persons. In general, such a proposal is "considered merely as an invitation to make offers, unless the contrary is clearly indicated by the person making the proposal." According to the prevailing view in doctrine – up to now there has been no case law on this point –, advertisements, price lists, catalogues, or websites are only invitations to

¹¹ Schlechtriem (see above fn. 2) Intro to Arts 14-24 para. 7.

¹² Schlechtriem (see above fn. 2) Art. 14 para. 6. There may be limitations to such powers of determination under the applicable domestic law, see Schlechtriem (see above fn. 2) Art. 14 para. 7.

¹³ OLG Frankfurt, 30 August 2000, CISG-online 594 (Internet database administered by Ingeborg Schwenzer at the University of Basel, available at <http://www.cisg-online.ch>), where the respondent did not know and could not have been aware that the claimant (offeror) acted for itself as the seller and not as an agent for a third party; OLG Stuttgart, 28 February 2000, CISG-online 583, where the respondent (offeree) knew that the claimant acted as the seller.

¹⁴ See *Geneva Pharmaceuticals Technology Corp. v. Barr Laboratories, Inc.* 201 F. Supp. 2d 236 (S.D.N.Y. 2002), CISG-online 653, where the Court held that, according to industry practice, the term "commercial amount" was sufficiently definite to determine the amount of goods and the price.

¹⁵ Article 1591 Code civil states: "Le prix de la vente doit être déterminé et désigné par les parties." For a detailed discussion see Wolfgang Witz in Witz/Salger/Lorenz (eds) *International Einheitliches Kaufrecht, Praktiker-Kommentar und Vertragsgestaltung zum CISG* (Verlag Recht und Wirtschaft, Heidelberg, 2000) Art. 14 paras 5 and 6.

¹⁶ For further references see Schlechtriem (see above fn. 2) Art. 14 para. 10; Magnus in *J. von Staudingers Kommentar zum Bürgerlichen Gesetzbuch mit Einführungsgesetz und Nebengesetzen, Wiener UN-Kaufrecht (CISG)* (Sellier/Walter de Gruyter, Berlin, 2005) Art. 14 paras 27 to 35; Witz (see above fn. 15) Art. 14 paras 8 to 16.

¹⁷ See Oberster Gerichtshof, 10 November 1994, CISG-online 117 ("chinchilla furs"). But see *Pratt & Whitney v. Malev Airlines* (Legfelsóbb Biróság, 25 September 1992), CISG-online 63, criticised by Paul Amato "U.N. Convention on Contracts for the International Sale of Goods – The Open Price Term and Uniform Application: An Early Interpretation by the Hungarian Courts" 13 *Journal of Law and Commerce* (1993) 1-29 (available at <http://www.cisgw3.law.pace.edu> (last accessed 8 August 2006)).

¹⁸ Cour de Cassation, 4 January 1995, CISG-online 138, with a case note by Claude Witz "The First Decision of France's Court of Cassation Applying the U.N. Convention on Contracts for the International Sale of Goods" 16 *Journal of Law and Commerce* (1997) 345-356 (available at <http://www.cisgw3.law.pace.edu> (last accessed 8 August 2006)).

¹⁹ Kantonsgericht des Kantons Zug, 2 December 2004, CISG-online 1194 (on the German term "freibleibend"); Bonell "Vertragsverhandlungen und culpa in contrahendo nach dem Wiener Kaufrechtsübereinkommen" *Recht der Internationalen Wirtschaft* 1990, 693, 696-7, according to whom an intention to be bound is, under normal circumstances, to be denied in cases of letters of intent or memorandums of understanding.

make offers.²⁰ In the case of websites, Article 11 of the UN Convention on Electronic Communications confirms this solution. In our view, however, a clear indication of an intention to be bound is present where a website displays how many goods remain in stock.²¹ In such a case, there is no reason why the proposal should not be regarded as an offer *ad incertas personas*.

III. Incorporation of Standard Terms

The question of whether standard terms are incorporated into a sales contract is clearly a question to be answered by the provisions of the CISG dealing with contract formation and contract interpretation, although, unlike the UNIDROIT Principles,²² the CISG contains no special rules on standard terms. However, general principles can be discerned from the interaction between Articles 14 and 8 CISG.

Firstly, the standard terms must be made available to the offeree in a manner that it can reasonably access them. The German Supreme Court held that it is not sufficient that the offer only contains a reference to the standard terms without them being sent to the offeree.²³ This, however, is valid only for "snail mail", but not for electronic communication. There, it must be sufficient that the standard terms are contained in an attachment to an email,²⁴ or can easily be retrieved from a website, be it via a link on the website where the offer is available, or via a link in the email that constitutes the offer. In other words, the offeree is not obliged to search for the standard terms of the offeror, for example, by finding the latter's homepage or the standard terms in the right language. The risk that the standard terms can be unilaterally modified by the user subsequent to the formation of the contract can be counteracted by printing them out at the time of conclusion of the contract.

Secondly, there is consensus that surprising clauses in standard terms will not be incorporated, even if the remaining terms become part of the contract.²⁵

Special problems arise in connection with standard terms printed in a language foreign to the addressee. Generally, such standard terms are only incorporated into the contract if they are printed in the contract language or in the negotiation language.²⁶ Furthermore, it seems to be sufficient that the standard terms are printed in a language that the offeree is able to understand or in a world language which, in the authors' view, should be restricted to English.²⁷ In addition, standard terms in a foreign language may become part of the contract by regular usage in accordance with Article 9(1) CISG.²⁸

IV. Effect and withdrawal of an offer

Common to all legal systems, the offer becomes effective when it reaches the offeree, Article 15(1) CISG. According to Article 24 CISG, an offer reaches the offeree when it is made orally to the offeree or delivered by any other means to the offeree personally, to its place of business or mailing address.

New problems have arisen in electronic contracting. The relevant question to be posed is: when does an electronic message reach the addressee? In recent times, a uniform solution seems to have emerged as is now evidenced in Article 10(2) United Nations Convention on Electronic Communications, as well as in Articles 2.1(b), 2.2 ICC eTerms 2004.²⁹ Decisive is the question of whether the addressee has designated a certain information system or not. If it has done so, the message is

received when it enters the information system and can be retrieved by the addressee.³⁰ If it has not done so, in addition, the addressee must have become aware of the message.³¹

The time when the offer becomes effective is of practical relevance to the question of whether it may be withdrawn. The Convention meticulously distinguishes between the withdrawal and the revocation of an offer. According to Article 15(2) CISG, an offer may be withdrawn if the withdrawal reaches the offeree before or at the same time as the offer. Thereby, the drafters of the Convention contemplated the traditional case of where the offer is sent by international mail, and the withdrawal takes place by fax or phone call. In times of electronic communication, things have changed: in the case of an offer by electronic message, a withdrawal would never be possible under the plain wording of Article 15(2) CISG because, technically, it always enters the information system and can be retrieved before the withdrawal reaches the addressee, and this fact can always be traced and proven. This does not correspond to the

²⁰ Schlechtriem (see above fn. 2) Art. 14 para. 13; Magnus (see above fn. 16) Art. 14 para. 37; Wulf *UN-Kaufrecht und eCommerce* (Peter Lang, Frankfurt am Main, 2003) 90 et seq.

²¹ Such a case appears to be a modern variation of the case of a public proposal "as long as stocks last". See Schlechtriem (see above fn. 2) Art. 14 para. 15; Magnus (see above fn. 16) Art. 14 para. 14. But see Herber/Czerwenka *Internationales Kaufrecht* (Beck, München, 1991) Art. 14 para. 9.

²² Articles 2.1.19 to 2.1.22 PICC. It has to be noted, however, that, according to Article 2.1.19(1) PICC, the general rules on formation apply to cases of standard terms, subject to specific provisions on surprising terms, the conflict between standard and non-standard terms, or contradicting standard terms.

²³ Bundesgerichtshof, 31 October 2001, CISG-online 617; followed by Landgericht Neubrandenburg, 3 August 2005, CISG-online 1190. See further Oberster Gerichtshof, 6 February 1996, CISG-online 224 and 13 September 2001, CISG-online 644, taking a broader view.

²⁴ Magnus (see above fn. 16) Art. 14 para. 41a.

²⁵ Schmidt-Kessel in Schlechtriem/Schwenzer (eds) *Commentary on the UN Convention on the International Sale of Goods (CISG)* (Oxford University Press, Oxford, 2nd ed., 2005) Art. 8 para. 57. See Article 2.1.20 PICC, comment 3.

²⁶ But see (obiter) Oberlandesgericht Köln, 24 May 2006, CISG-online 1232, with respect to Art. 23 Council Regulation (EC) No 44/2001 of 22 December 2000 on Jurisdiction and the Recognition and Enforcement of Judgments in Civil and Commercial Matters (available at <http://eur-lex.europa.eu>, last accessed 8 August 2006).

²⁷ But see Oberster Gerichtshof, 17 December 2003, CISG-online 828 and 31 August 2005, CISG-online 1093, according to which German and French are world languages. These decision can be reconciled with the authors' view on the basis that the contracting parties understood German.

²⁸ Oberster Gerichtshof, 31 August 2005, CISG-online 1093.

²⁹ See also CISG-AC Opinion no 1, Electronic Communications under CISG, 15 August 2003. Rapporteur: Professor Christina Ramberg, available at <http://www.cisg-online.ch> (last accessed 8 August 2006).

³⁰ Article 2.1(b) ICC eTerms 2004 and Article 10(2) UN Convention on Electronic Communications.

³¹ It has to be noted that the authors consciously adopted the language of Article 2.2 ICC eTerms 2004, which is different from and superior to the language of Article 10(2) second sentence UN Convention on Electronic Communications. Under the language of the latter provision, it is sufficient that the addressee becomes aware of the fact that the message has been sent.

ratio legis underlying Article 15(2) CISG. A withdrawal must be possible as long as the addressee acquires knowledge of the withdrawal no later than knowledge of the offer. If an offer is placed by email on Saturday and is withdrawn on Sunday, the offeree reading both messages on Monday morning deserves no protection. Thus, the messages must be deemed as reaching the offeree at the same time.

V. Revocation

After an offer becomes effective, it can no longer be withdrawn. However, under certain circumstances, the offer may be revoked. The CISG has thereby bridged the contradicting views of the Germanic legal system and the common law system. The former generally regards offers as being irrevocable,³² whereas the latter generally allows offers to be revoked at any time prior to the conclusion of the contract.³³

Article 16(1) CISG provides that the offer is revocable if the revocation reaches the offeree before he has dispatched an acceptance. Thereby, the Convention follows the Anglo-American approach concerning general revocability, but also embodies the so-called "Mailbox Rule",³⁴ which limits the time period for revocation. In times of electronic communication, however, these differences are no longer of any practical importance.³⁵

Article 16(2) CISG counterbalances the initial rule of general revocability by establishing two important exceptions to this principle. Firstly, an offer cannot be revoked if it indicates, whether by stating a fixed time for acceptance or otherwise, that it is irrevocable. The second exception corresponds to the common law notion of estoppel. Revocation is excluded if the offeree has reasonably relied on the irrevocability of the offer and acted accordingly.

Although much scholarly writing has focussed on this happy fusion of common law and civil law dogma, there have been no actual disputes in practice.

VI. Termination of the offer

The Convention expressly provides for termination of an offer in one case only, namely upon rejection of the offer, in Article 17 CISG. Whether the offer lapses after the expiry of a time period set for acceptance or after a reasonable time is not expressly dealt with by the Convention, but a solution can easily be derived from other Articles of the CISG.³⁶ Whether other grounds for termination, such as death, loss of legal capacity, or insolvency, are governed by the CISG,³⁷ or whether they have to be resolved by domestic law,³⁸ is disputed in doctrine.

C. Acceptance

The rules for acceptance are laid down in Articles 18 to 22 CISG.

I. Declaration of acceptance

According to Article 18(1) CISG, acceptance can be effectuated either by a statement or by other conduct indicating assent to the offer. In this respect, Articles 8 and 9 CISG are of

eminent importance, because industry customs may influence a finding on whether certain conduct amounts to acceptance.³⁹ Thus, the US District Court of the Northern District of Illinois decided that, after lengthy negotiations and submissions of alterations, the offeree accepted the offer by opening a letter of credit.⁴⁰ Other examples of such declaratory conduct are the buyer's acceptance of the goods,⁴¹ the seller's sending of a safety data sheet and specification analysis,⁴² the buyer's signing of invoices to present to financial institutions requesting financing of the purchase,⁴³ packaging the goods for dispatch to the buyer,⁴⁴ dispatch of the goods,⁴⁵ payment,⁴⁶ and, under certain circumstances, the preparation for performance.⁴⁷

As in most legal systems, silence or inactivity, in itself, does not amount to acceptance (Article 18(1) second sentence CISG). However, the contrary may be derived from usages or practices according to Article 9 CISG.⁴⁸ The mere existence of an ongoing business relationship will not suffice.⁴⁹ But the closer the parties have come during their negotiations, the more likely a court will find a duty on the other party to expressly reject, where it could otherwise have accepted by si-

³² See Articles 3 and 5 Swiss and Turkish Law of Obligations; § 145 Bürgerliches Gesetzbuch (German Civil Code).

³³ See Zweigert/Kötz *Einführung in die Rechtsvergleichung* (Mohr, Tübingen, 3rd ed., 1996) § 26 II. But see § 2-205 Uniform Commercial Code (USA). For a comparison of the UCC and the CISG approaches see McMahon „Primary Differences Between the UCC and the CISG“ *Review of the Convention on Contracts for the International Sale of Goods (CISG) 2003-2004*, 91, 95-6.

³⁴ See *Adams v Lindsell* (1818) 106 Eng Rep 250.

³⁵ Schlechtriem (see above fn. 2) Art. 16 para. 1.

³⁶ See Articles 18(2) second sentence, 20, 21 CISG.

³⁷ Magnus (see above fn. 16) Art. 17 para. 7.

³⁸ Schlechtriem (see above fn. 2) Art. 17 para. 6.

³⁹ *Geneva Pharmaceuticals Technology Corp. v. Barr Laboratories, Inc.* 201 F. Supp. 2d 236 (S.D.N.Y. 2002), CISG-online 653.

⁴⁰ *Magellan International Corp. v. Salzgitter Handel GmbH* 76 F. Supp. 2d 919 (N.D.Ill. 1998), CISG-online 439.

⁴¹ Oberlandesgericht Saarbrücken, 13 January 1992, CISG-online 83; Kantonsgericht des Kantons Zug, 2 December 2004, CISG-online 1194 (the buyer's taking of partial delivery constituted an acceptance of the seller's counter-offer to deliver the goods in three instalments). See also Handelsgericht des Kantons Zürich, 10 July 1996, CISG-online 227, para. III.4., where the buyer took delivery of excess quantity and passed the goods on to a customer. The Court held that, thereby, the buyer accepted to pay for the excess quantity. This decision could have been based on Article 55(2) second sentence CISG.

⁴² Bundesgericht, 5 April 2005, CISG-online 1012.

⁴³ Cámara Nacional de Apelaciones en lo Comercial, 14 October 1993, CISG-online 87.

⁴⁴ Heuzé *La vente internationale de marchandises – Droit uniforme* (L.G.D.J., Paris, 2000) note 184.

⁴⁵ Farnsworth in Bianca/Bonell (eds) *Commentary on the International Sales Law* (Giuffrè, Mailand, 1987) Art. 18 note 2.2.

⁴⁶ Farnsworth (see above fn. 45) Art. 18 note 2.2.

⁴⁷ Farnsworth (see above fn. 45) Art. 18 note 2.2. In the authors' view, a distinction has to be drawn between cases where the goods have to be manufactured or produced specifically for the buyer (in which case, production may indicate assent), and cases where the goods are, in any event, manufactured for selling in the market.

⁴⁸ Schlechtriem (see above fn. 2) Art. 18 para. 9.

⁴⁹ But see § 362(1) *Handelsgesetzbuch* (German Commercial Code) for German domestic law.

lence or inactivity.⁵⁰ In *Filanto v. Chilewich*, the US District Court of Southern District of New York held that the New York buyer's offer, which incorporated the Russian master agreement by reference, had been accepted by the Italian seller's failure to respond promptly because, under Article 8(3) CISG, the course of dealing between the parties had created a duty on the part of the seller to object promptly and that its delay in objecting constituted acceptance of the offer.⁵¹

II. Time for and effect of an acceptance

According to Article 18(2) first sentence CISG, an acceptance becomes effective at the moment that the indication of assent reaches the offeror. If, by virtue of the offer or as a result of practices or usages, the offeree may indicate assent by performing an act, such as one relating to dispatch of the goods or payment of the price, the acceptance is effected at the moment the act is performed (Article 18(3) CISG). For example, this could be the case where the buyer asks the seller to make immediate delivery when it receives the offer.

However, an acceptance can only be effected within certain time limits. First of all, it is up to the offeror to fix a period of time within which the offeree can accept. Article 20(1) CISG contains detailed rules as to when such a period of time begins to run. Official holidays or non-business days are included in calculating the period, Article 20(2) first sentence CISG, as the parties cannot be expected to know foreign holidays.⁵² However, as the offeror has knowledge of its own holidays, the period for acceptance is extended if a notice of acceptance cannot be delivered at the address of the offeror on the last day of the period, Article 20(2) second sentence CISG. If the offeror has not fixed a time limit for acceptance, it has to be made within a reasonable time. What a reasonable time is depends on the circumstances of the transaction, including the rapidity of the means of communications employed by the offeror (Article 18(2) second sentence CISG).

A late acceptance, in general, is not effective (Article 18(2) second sentence CISG). However, the offeror may treat an acceptance which has been sent too late as an effective acceptance if, without delay, it so informs the offeree (Article 21(1) CISG). In case of an acceptance which has been dispatched in time but arrives, due to transmission problems, too late, the acceptance is generally effective if the offeror does not promptly notify the offeree that it intends to treat the acceptance as ineffective.

An acceptance may be withdrawn under prerequisites equivalent to those for withdrawing an offer; namely, if the withdrawal reaches the offeror before or at the same time as the acceptance would have become effective (Article 22 CISG).

Once the acceptance becomes effective by reaching the offeror, the contract is concluded (Article 23 CISG). In this respect, the CISG differs from some civil law systems as well as from the common law, according to which the contract is deemed to be concluded at the time when the acceptance is dispatched.⁵³ By contrast, under the CISG, the dispatch of the acceptance only ends the general revocability of the offer. Once a contract is concluded, subsequent communications may be construed as proposals to modify the contract.⁵⁴

III. Alterations between offer and acceptance

Most of the case law concerning the formation of contract process addresses situations where the declaration by the offeree purports to be an acceptance but, in fact, alters the terms of the offer. From the outset, the CISG seems to follow the old "Mirror-image Rule", which constituted the basic approach in most domestic legal systems but has, nowadays, been limited significantly in its application.⁵⁵ According to Article 19(1) CISG, a reply to an offer containing additions, limitations, or other modifications does not constitute an acceptance, but is a rejection of the offer and constitutes a counter-offer that, in turn, has to be accepted by the initial offeror in order for a contract to come into existence.

However, according to Article 19(2) CISG, if the acceptance contains only immaterial alterations, they become part of the contract unless the initial offeror objects to the discrepancy. Thus, it is crucial to distinguish between material and immaterial alterations.

Article 19(3) CISG sets forth the alterations that are deemed to be material, namely alterations of 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.⁵⁶ However, it is the authors' opinion that, in a given case, this presumption is rebuttable.⁵⁷ On the other hand, the list in Article 19(3) CISG is not exhaustive. According to the circumstances of the individual case, other alterations can also be treated as material, such as a demand for security, a proposal for a contractual liquidated damages or penalty clause, proposed rights of withdrawal, revocation or termination, or proposed changes to the manner of packaging or dispatching the goods.⁵⁸ A good example is the decision of a German Regional Court where the German buyer bought bacon from an Italian seller. In its offer, the buyer asked for firmly packed bacon, whereas the purported acceptance stipulated unpacked bacon. The buyer did not object, but took over the first partial deliveries. The Court found the discrepancy between offer and acceptance as being material, and therefore treated the purported acceptance by the seller as a counter-offer that was, in turn, accepted by the buyer by taking delivery of the goods.⁵⁹ Whether a reference to stan-

⁵⁰ Witz (see above fn. 15) Art. 18 para. 12.

⁵¹ *Filanto S.p.A. v. Chilewich International Corp.* 789 F. Supp. 2d 118 (S.D.N.Y. 1997), CISG-online 45. Similarly, the Bundesgericht, 5 April 2005, CISG-online 1012, held that had the counter-offer contained unacceptable conditions, then, according to the principle of good faith, the (initial) offeror would have been under an obligation to indicate this to the (initial) offeree.

⁵² Schlechtriem *Internationales UN-Kaufrecht* (Mohr Siebeck, Tübingen, 3rd ed., 2005) para. 88.

⁵³ For the common law "mail box"-rule see above fn. 34. For Swiss law see Art. 10(1) OR (Swiss Code of Obligations).

⁵⁴ Flechtner in Ferrari/Flechtner/Brand (eds) *The Draft UNCITRAL Digest and Beyond* (Sellier. European Law Publishers/Sweet & Maxwell, München/London, 2004) Art. 23 para. 3.

⁵⁵ See only the "agreement on essential terms"-approach of § 2-207 Uniform Commercial Code. For a comparison of the UCC and the CISG approaches see McMahon (see above fn. 33) 91, 93-5.

⁵⁶ Schlechtriem (see above fn. 2) Art. 19 para. 8.

⁵⁷ Oberster Gerichtshof, 20 March 1997, CISG-online 269.

⁵⁸ Schlechtriem (see above fn. 2) Art. 19 para. 9.

⁵⁹ Oberlandesgericht Hamm, 22 September 1992, CISG-online 57.

standard terms is to be regarded as a material alteration, irrespective of whether or not the standard terms relate to matters listed in Article 19(3) CISG, is a controversial issue.⁶⁰

Although it appears difficult to imagine alterations which do not fall under the list of Article 19(3) CISG, there have been cases in which alterations have been considered immaterial. The Austrian Supreme Court has established a general rule that an alteration that is favourable to the offeror is always to be treated as immaterial.⁶¹ Similarly, a German Court of first instance has held that a clause in the seller's standard terms that gave the buyer 30 days to give notice of any non-conformity was an immaterial alteration only.⁶² The French Supreme Court found an immaterial alteration to be present even in a case where the buyer's offer included an open price term which allowed the price to be reduced according to market activity, although the seller's reply not only provided for price reductions but also price increases based on market activity.⁶³ In the authors' opinion, this decision contradicts Article 19(3) CISG and shows how whimsical the distinction between material and immaterial alterations can prove to be in practice.

Differences between a declaration of acceptance and an offer are nearly always the result of the incorporation of, or attempts to incorporate, standard terms.⁶⁴ Since the standard terms used by each party will hardly ever be common in substance, the use of such terms by both parties leads, almost unavoidably, to discrepancies between offer and acceptance.⁶⁵ This situation of conflicting standard business terms is commonly called the "battle of forms". Attempts at the Vienna Conference to deal with this problem were not successful.⁶⁶ Thus, it comes as no great surprise that this situation is one that is discussed very often in literature and has given rise to a number of court decisions. Two different approaches to dealing with this problem can be discerned.

Applying the plain language of Article 19 CISG leads to the so-called "last shot-doctrine". This means that the party who last makes reference to its standard terms has them incorporated into the contract. Under Article 19 CISG, a purported acceptance with reference to the offeree's own standard terms must be seen as a rejection of the initial offer and, at the same time, as a counter-offer. This might lead to an ongoing exchange of counter-offers, whereby the last one is ultimately accepted by the conduct of the other party. The last shot-doctrine thus provides for outcomes that may be predictable for the courts and tribunals, but merely coincidental for the parties.

This literal application of Article 19 CISG can, if at all, only be justified where the parties are still in the negotiation process and have not yet started to perform their respective contractual duties.⁶⁷ After performance of the contract has commenced, a different solution has to be found.

Modern views suggest the so-called "knock out-rule". The starting point is that often, in international business, parties do not concern themselves with conflicting standard terms. Instead, they simply regard their contract as validly concluded and perform their respective duties accordingly. In other words, the question of contract formation has to be separated from the question of its content.⁶⁸ As was stated by Lord Denning in an English case, right on point: "[t]here is a concluded contract but the forms vary."⁶⁹ Under the CISG, a solution can be based on Article 6 CISG, which gives priority to the parties' common intention and enables them to derogate from the provisions of the Convention, in this case, from Article 19 CISG.⁷⁰ If the parties have agreed on the *essentialia negotii*, the contract comes into existence. In defining its content, one has to turn

to the respective sets of standard terms. Insofar as they contain common clauses – most likely arbitration clauses⁷¹ – these clauses become binding on the parties. With respect to contradicting clauses, neither party prevails; instead, such clauses "knock out" one another. The conflicting terms are then replaced by the provisions of the CISG or any other applicable law. This is also the solution of Article 2.1.22 UNIDROIT Principles of International Commercial Contracts, as well as of Article 2:209 Principles of European Contract Law. The German Supreme Court, in a leading case on the battle of forms, leaned heavily towards the knock out-rule, although it stressed that, in *casu*, the last shot-rule would have yielded the same result.⁷²

D. Modification

Closely related to the issues surrounding formation of contract is the question of modification of an already existing contract. In the Convention, this question is dealt with by Article 29 CISG, which has wrongly been placed in Part III of the Convention. Nevertheless, the rules on offer and acceptance have to be applied to contract modification, which is, in turn, a contract in itself.⁷³ The parties can alter any term of the initial contract. Whatever can be agreed in the original contract can also be incorporated by way of modification. This especially applies to forum selection or arbitration clauses agreed on after the conclusion of the contract,⁷⁴ as well as, for example, to restrictions on competition clauses,⁷⁵ despite that there may be additional requirements concerning the validity or enforceability of such clauses under other applicable laws.⁷⁶

⁶⁰ Schlechtriem (see above fn. 2) Art. 19 para. 9, with further references.

⁶¹ Oberster Gerichtshof, 20 March 1997, CISG-online 269.

⁶² Landgericht Baden-Baden, 14 August 1991, CISG-online 24.

⁶³ Cour de Cassation, 4 January 1995, CISG-online 138, UNILEX (available at <http://www.unilex.info>, last accessed 8 August 2006).

⁶⁴ Schlechtriem (see above fn. 2) Art. 19 para. 19.

⁶⁵ Schlechtriem (see above fn. 2) Art. 19 para. 19.

⁶⁶ UNCITRAL Yearbook VIII (1977) 82 (note 105(2b)), reprinted in Honnold (see above fn. 4).

⁶⁷ See Witz (see above fn. 15) Art. 19 para. 15.

⁶⁸ Schlechtriem (see above fn. 2) Art. 19 para. 20.

⁶⁹ *Butler Machine Tool Co Ltd v Ex-Cell-O Corp (England) Ltd* [1979] 1 All ER 965, 968 Denning MR.

⁷⁰ Amtsgericht Kehl, 6 October 1995, CISG-online 162.

⁷¹ In the decision of the Oberlandesgericht Köln, 24 May 2006, CISG-online 1232, both parties used coextensive forum selection clauses.

⁷² Bundesgerichtshof, 9 January 2002, CISG-online 651 ("milk powder"-decision). The same approach was adopted by the Oberlandesgericht Köln, 24 May 2006, CISG-online 1232.

⁷³ Schlechtriem (see above fn. 2) Art. 29 para. 2.

⁷⁴ *Chateau Des Charmes Wines Ltd v. Sabate* (Ontario Superior Court of Justice, 28 October 2005), CISG-online 1139; *Chateau Des Charmes Wines Ltd v. Sabate* 328 F.3d 528 (9th Cir. 2003), CISG-online 767. Contrast Magnus (above fn. 16) Art. 29 para. 8.

⁷⁵ See *Shuttle Packaging Systems v. Tsonakis* 2001 U.S. Dist. LEXIS 21630 (W.D. Mich.), CISG-online 773.

⁷⁶ For uniform law instruments with regard to arbitration clauses see the 1958 New York Convention on the Recognition and Enforcement of Foreign Arbitral Awards (available at <http://www.uncitral.org>, last accessed 8 August 2006); with regard to forum selection clauses see Hague Convention of 30 June 2005 on Choice of Court Agreements (available at <http://www.hcch.net>, last accessed 8 August 2006); Council Regula-

Very often in international trade, one of the parties to a contract that has already been concluded orally sends out a so-called "letter of confirmation", whereby it restates what it believes has been orally agreed upon, and often adds additional terms, such as dispute settlement clauses. If the letter of confirmation differs from the initial contract or introduces additional terms, the question arises whether and, if so, to what extent they become part of the contract. In some countries,⁷⁷ such as Denmark, France,⁷⁸ Germany, Poland, Switzerland, and Turkey,⁷⁹ the terms of a letter of confirmation become part of the contract if they do not differ greatly from the negotiations and if the addressee does not object to them within a reasonable time after receipt. However, this view can only be transcribed to international trade if the parties have established such a practice between them or agreed upon such a usage (Article 9(1) CISG),⁸⁰ or if both parties have their respective place of business in states where the special consequences of a letter of confirmation are regarded as a usage of trade (Article 9(2) CISG).⁸¹ It has to be noted, however, that Article 2.1.12 UNIDROIT Principles of International Commercial Contracts contains an express provision, which is based on case law in the countries mentioned above.⁸² Therefore, in cases where the UNIDROIT Principles of International Commercial Contracts apply and supplement the CISG, the special consequences of letters of confirmation can be applied to a wider range of circumstances than under the CISG alone.⁸³

If the special consequences of a letter of confirmation mentioned above do not apply, the general rules on contract formation determine the relevance of such documents. This means that the letter of confirmation must be construed as an offer to modify the initial contract. This offer then needs to be accepted by the respective other party. One of the leading cases on the problems which arise in such a situation is *Chateau des Charmes v. Sabate*.⁸⁴ A Canadian buyer bought wine corks from a French seller, which negotiated through its wholly owned US-American subsidiary. After the contract had been concluded orally, the seller, in the documents and invoices accompanying the shipment of the goods, sought to introduce a forum selection clause in favour of French Courts. The Canadian Court held that there was no valid modification of the oral contract, as the buyer never conducted itself in a manner that evidenced any affirmative assent, although it took delivery of the goods and paid the price.⁸⁵

Modification allows the parties not only to alter special terms of the contract, such as delivery dates or features of the goods, but also to reduce the duties of one or both parties, or even terminate their initial contract.⁸⁶ For these cases, Article 29(1) CISG emphasises that there is no need for consideration, in contrast to the requirement in many common law systems.

No form requirements exist for a valid modification either. It follows that even a written sales contract can be modified orally by the parties at any time.⁸⁷ In times of electronic communication, this possibility becomes less important, as one has to presume that emails fulfil the requirement of "writing" in the sense of Article 13 CISG.⁸⁸

However, in their contract, the parties may include a so-called "no oral modification-clause", which expressly requires any modification or termination of the initial agreement to be in writing. This situation is governed by Article 29(2) first sentence CISG.⁸⁹ In such a case, modification or termination cannot be effected in any other way apart from in writing which, however, includes – in the authors' view – electronic communication.⁹⁰ Article 29(2) first sentence CISG can also be

applied in cases of so-called "entire contract" or "merger" clauses, which stipulate that the written contract contains the entire agreement of the parties and that neither party may rely on representations made externally.⁹¹ Thus, the People's Supreme

tion (EC) No 44/2001 of 22 December 2000 on Jurisdiction and the Recognition and Enforcement of Judgments in Civil and Commercial Matters (available at <http://eur-lex.europa.eu>, last accessed 8 August 2006); EC Convention on Jurisdiction and the Enforcement of Judgments in Civil and Commercial Matters of 7 September 1968 (available at <http://eur-lex.europa.eu>, last accessed 8 August 2006); Lugano Convention on Jurisdiction and the Enforcement of Judgments in Civil and Commercial Matters of 16 September 1988 (available at <http://eur-lex.europa.eu>, last accessed 8 August 2006).

⁷⁷ For references see Schmidt-Kessel (see above fn. 25) Art. 9 para. 24.

⁷⁸ See Landgericht Saarbrücken, 23 March 1993, CISG-online 60.

⁷⁹ Art. 23 Turkish Commercial Code.

⁸⁰ Schmidt-Kessel (see above fn. 25) Art. 9 para. 22.

⁸¹ Zivilgericht Basel-Stadt, 21 December 1992, CISG-online 55; Landgericht Saarbrücken, 23 March 1993, CISG-online 60; Schmidt-Kessel (see above fn. 25) Art. 9 para. 23, with further references; Schlechtriem (see above fn. 2) Intro to Arts 14-24 para. 4.

⁸² Article 2.1.12 PICC states: "If a writing which is sent within a reasonable time after the conclusion of the contract and which purports to be a confirmation of the contract contains additional or different terms, such terms become part of the contract, unless they materially alter the contract or the recipient, without undue delay, objects to the discrepancy."

⁸³ The relevant provision of the PICC may itself become an international trade usage in the future, see (doubtful) Schlechtriem (see above fn. 2) Intro to Arts 14-24 para. 4, with further references.

⁸⁴ *Chateau Des Charmes Wines Ltd v. Sabate* (Ontario Superior Court of Justice, 28 October 2005), CISG-online 1139. The plaintiff had failed in the litigation it had brought in the federal courts of California, USA.

⁸⁵ *Chateau Des Charmes Wines Ltd v. Sabate* (Ontario Superior Court of Justice, 28 October 2005), CISG-online 1139. The same conclusion was reached in the proceedings in the USA, see *Chateau Des Charmes Wines Ltd v. Sabate* 328 F3d 528 (9th Cir. 2003), CISG-online 767. Ultimately, the litigation in the USA was ended on the basis of forum non conveniens.

⁸⁶ Landgericht Hamburg, 26 September 1990, CISG-online 21 (deference of payment).

⁸⁷ Oberster Gerichtshof, 6 February 1996, CISG-online 224.

⁸⁸ CISG-AC Opinion No 1 (see above fn. 29), Opinion to Art. 13: "The term 'writing' in CISG also includes any electronic communication retrievable in perceivable form." See also Hill "The Future of Electronic Contracts in International Sales: Gaps and Natural Remedies under the United Nations Convention on Contracts for the International Sale of Goods" 2 *Northwestern Journal of Technology and Intellectual Property* (2003) 1 et seq. (available at <http://www.http://cisgw3.law.pace.edu>); Schlechtriem (see above fn. 2) Art. 13 para. 2a. Contrast Witz (see above fn. 15) Art. 13 para. 2. See also Article 9(2) UN Convention on the Use of Electronic Communications in International Contracts, which states that a writing requirement is met by an electronic communication if the information contained therein is accessible so as to be usable for subsequent reference.

⁸⁹ See Art. 2.1.18 PICC. See also ICC Court of Arbitration, 9117/1998, CISG-online 777.

⁹⁰ See Schlechtriem (see above fn. 2) Art. 29 para. 7.

⁹¹ See CISG-AC Opinion No 3, Parol Evidence Rule, Plain Meaning Rule, Contractual Merger Clause and the CISG, 23 October 2004. Rapporteur: Professor Richard Hyland, comment 1.4., available at <http://www.cisg-online.ch> (last accessed 8 August 2006). According to Art. 2.1.17

Court, Appeal Division in Ho Chi Minh City, held that a merger clause prevented the buyer from relying on a clause in its letter of credit, according to which it could change the date of shipment.⁹²

In exceptional cases, despite the existence of a term necessitating written modification, an oral modification may still be valid if relying on the invalidity would be unconscionable (Article 29(2) second sentence CISG). In order to establish such a defence, one party's conduct must have led the other party to reasonably rely on the validity of the modification, for example, by partial performance of the contract following an oral modification,⁹³ or manufacture of the goods to an orally amended specification.⁹⁴

E. Conclusion

The provisions on contract formation of the CISG, as a whole, give rise to the impression that they clearly reproduce the historical situation prevailing at the time when the Convention was drafted. Comparative discussions still centred around more or less purely theoretical questions arising from centuries old national legal dogmas, such as the French *pretium certum*, the Common Law consideration doctrine, the general revocability or irrevocability of offers and the related mail box-doctrine, and form requirements, thought indispensable by former Communist states. The CISG has found viable and appropriate compromises that deal with all these issues.

However, many questions that are of vital concern in the field of contract formation today have not been addressed by the CISG. On the one hand, questions that already existed at the time at which the Convention was drafted, such as those concerning standard terms, were not dealt with because the

time did not yet seem ripe to approach them on an international level; national legislators had only just begun to embark on these topics at a local level. On the other hand, many modern-day issues did not yet exist at this time at all, especially all related to electronic communication. Yet more questions continue to dimly appear on the horizon, such as the modern concept of precontractual duties to inform.⁹⁵

Nevertheless, as could be shown, the CISG has proven flexible enough to deal with all of these issues despite their lack of contemplation at the time of drafting. In addition, recourse may be had to other international instruments that may supplement the CISG, such as the UNIDROIT Principles of International Commercial Contracts or the United Nations Convention on the Use of Electronic Communications in International Contracts. All in all, despite all of the shortcomings elucidated above, the CISG is undoubtedly a great achievement and is the most successful piece of uniform law in force today. The progress that it has brought about for international trade cannot be underestimated, and the ever-increasing number of Contracting States is ample evidence of its great success.

PICC, merger clauses only exclude extrinsic evidence prior to contract formation, but not subsequent informal modifications.

⁹² People's Supreme Court, Appeal Division in Ho Chi Minh City, 5 April 1996, UNILEX (available at <http://www.unilex.info>, last accessed 8 August 2006).

⁹³ Secretariat's Commentary, Official Records, p. 28, Art. 27, para. 9, Example 27A (available at <http://www.cisg-online.ch/cisg/materials-commentary.html>, last accessed 8 August 2006).

⁹⁴ Honnold *Uniform Law for International Sales under the 1980 United Nations Convention* (Kluwer Law International, The Hague, 3rd ed., 1999) para. 204.

⁹⁵ Schlechtriem (see above fn. 2) Intro to Arts 14-24 paras 6 et seq.

CISG – Implementation in Norway, an approach not advisable

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I. The Norwegian transformation of the CISG

It is with somewhat mixed feelings that a Norwegian is writing about the United Nations Convention on Contracts for the International Sale of Goods (hereinafter referred to as the CISG). In their own view, Norwegians often imagine to be "best boys" where international cooperation and responsibilities is concerned. These local myths are at least sometimes not very well founded in reality. Norway's treatment of CISG after ratification is one telling example.

In a legal system such as the Norwegian, with a dualistic view of the relationship of international law to domestic law, there are two ways in which Conventions may be implemented: One is by so-called incorporation whereby the Convention is made directly applicable as law. To my knowledge, all other Contracting States have elected to implement CISG by incorporation. This is of course the most perfect way of meeting the obligations under international law. Furthermore, such incorporations facilitate to adhere to CISG Article 7 (1) which call on the courts that when interpreting the Convention, "regard is to be had to its international character and to the need to

promote uniformity in its application and the observance of good faith in international trade." The first two criteria of paragraph 1 aims at securing a uniform application of the Convention: Firstly, by implying that the Convention has to be interpreted autonomously, i.e. not in the light of domestic law, but in the context of the Convention itself.¹ The Convention's international character also implicates that national concepts cannot necessarily be applied on the Convention.² Secondly, by underlining the "need for promote uniformity in its application", the courts in the Contracting States should have no doubt as to their responsibility to consider interpretations of the CISG in other countries.³ By establishing the information system CLOUT (Case Law on UNCITRAL Texts), UNCITRAL

¹ Franco Ferrari, Harry Flechtner, Ronald A. Brand (ed.): *The Draft UNCITRAL Digest and Beyond*, München 2004, p. 140 ff.

² Peter Schlechtriem and Ingeborg Schwenzer (ed.): *Commentary on the UN Convention on the International Sale of Goods (CISG)*, 2nd (English) ed., Oxford 2005, p. 96 f.

³ John O. Honnold: *Uniform Law for International Sales under the 1980 United Nations Convention*, 3rd ed., The Hague 1999, p. 95.