

17 ACCEPTANCE OF AN OFFER UNDER THE CISG

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17.1 INTRODUCTION

On 1 April 2014, the United Nations Convention on Contracts for the International Sale of Goods (CISG) entered into force in Brazil.¹ Brazil's ratification of the CISG is expected to simplify contract negotiations and dispute resolution for companies entering into transactions with Brazilian businesses.² The CISG will now govern the international sale of goods between Brazil's major trading partners such as France, Germany, Russia, China, the US and Japan, as well as other South American states including Argentina, Chile and Peru.³ The UK and India remain the only countries in the top ten world economies that have not ratified the CISG.

The Internet facilitates international trade by reducing the cost of cross-border trade. It provides new sales, marketing, and automation opportunities while enabling businesses to reach a global target audience. E-commerce changed the way the world does business and it plays an important role in the economic growth of economies.⁴ In 2013, the Brazilian e-commerce market had registered sales of US\$13.01 billion (BRL 31.11 billion), up 29% from the year before.⁵ While still in a relatively early stage of e-commerce development,

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1 As of 13 June 2014, UNCITRAL reports that eighty-one States have adopted the CISG. A list of all member states is available at: <www.cisg.law.pace.edu/cisg/countries/cntries.html> accessed 11 August 2014.

2 Juana and Mustaqeem de Gama, 'Harmonisation of Sales Law: An International and Regional Perspective', (2006) 10 *Vindobona Journal of International Commercial Law & Arbitration*, pp. 15-26.

3 The CISG generally applies to non-consumer contracts for the sale of goods where the parties are in different contracting states. It regulates only but not the sale of goods bought for personal, family or household use. The CISG does not apply to contracts whose main part is the supply of labour or other services or the supply of (online) services. For that reason most cloud computing services 'purchased' via the Internet will not fall under the scope of the CISG.

4 A brief survey of case-law in the last ten years on the Pace CISG database under Art. 18 shows that most contracts were concluded by email.

5 'Brazilian e-commerce market hits USD 13.01 billion in 2013', 10 January 2014, *ThePaypers* available at: <www.thepayers.com/e-commerce/brazilian-e-commerce-market-hits-usd-13-01-billion-in-2013/753696-25> accessed 11 August 2014; 'Brazil's E-Commerce Is Booming: Record-Breaking Figures In 2011, growth of 26%, Earnings of \$11 bn' Ricardo Geromel, *Forbes*, 23 March 2012, available at:

these numbers place Brazil as the 10th largest market worldwide. Electronic commerce in and with Brazil continues to grow substantially, even in the current economic crisis. Growing Internet expansion and rising household income ensure that e-commerce will continue to grow.⁶

Modern forms of communication via electronic means raise interesting questions when considering mechanisms of contract formation. CISG was drafted in 1980 when it was inconceivable that the global E-commerce trade would reach a transaction value of US\$1.5 trillion in 2014.⁷ However, the CISG still achieves its aim of providing efficient and effective cross-border sales law.

This chapter will outline the CISG rules in regard to acceptance to an offer and discuss in particular the impact of communication via electronic means.

17.2 THE ACCEPTANCE OF THE OFFER

Without an acceptance, there is not contract. A valid acceptance is a necessary part of a legally binding contract. The acceptance must be the mirror image of the offer. However, that does not mean that the offeree is a non-active participant in the conclusion of a contract.

Upon receipt of an offer, the offeree has the following options: reject⁸ or accept the offer; reply with modified or additional terms,⁹ remain silent or inactive; request further information, or engage in a pre-contractual negotiation process (for example, negotiate the terms of the proposed contract).

Since without acceptance there is no contract, the following will discuss the nature of the acceptance required under the CISG necessary to conclude a valid contract.

This paper will set out core principles of acceptance first, before it then has particular regard to acceptance by electronic means, the time of acceptance, and to conflicts between offer and acceptance.¹⁰

<www.forbes.com/sites/ricardogomerol/2012/03/23/brazils-e-commerce-is-booming-record-breaking-figures-in-2011-growth-of-26-earnings-of-11-bi/> accessed 11 August 2014.

6 Despite the significance of e-commerce for Brazil's trade, it has to be noted that Brazil is neither signatory to the United Nations Convention on the Use of Electronic Communications in International Contracts nor has it incorporated the UNCITRAL Model Law on Electronic Commerce (1996).

7 'The G20 e-Trade Readiness Index – An Economist Intelligence Unit report' (2014) The Economist, available at: <www.economistinsights.com/sites/default/files/Laurel%20West%20-%20eBay%20-%20The%20Global%20e-trade%20Readiness%20Index%20Final%20V2_0.pdf> accessed 11 August 2014.

8 CISG, Art. 17.

9 CISG, Art. 19.

10 This chapter will not cover battle of the forms, see Peter Schlechtriem & Petra Butler, *UN Law on International Sales* (Springer, Berlin, 2009) ch. 3.4.

17.2.1 Core Principles

The rules regarding the acceptance of an offer for an international sale of goods are contained in Articles 18 to 22 CISG.¹¹ These provisions deal with how an offer can be accepted (Article 18), modifications to an offer (Article 19), the time limits for accepting an offer (Article 20), late acceptance (Article 21), and withdrawal of an acceptance (Article 22 CISG). Articles 18 to 22 are non-mandatory and the parties can exclude them or derogate from them.¹²

A contract is concluded when the offeree communicates a clear assent to the terms of the offer in a timely fashion.¹³

17.2.1.1 Indiction of Assent to an Offer

Acceptance is defined as an ‘indication of assent’.¹⁴ According to Article 18(1), every declaration or other act that expresses acceptance of an offer is deemed an acceptance. However, mere silence or inactivity alone, is not deemed acceptance unless such a practice existed between the parties (Articles 8 and 9(1), Articles 18(1) and (3)).¹⁵ Acceptance is the final and unqualified expression of assent by the offeree to the terms of the offer. Only the offeree of a proposed contract is entitled to accept the offer.¹⁶ To be effective, the acceptance must be communicated clearly and unequivocally to the offeror and it must reach the offeror in a timely fashion.

For there to be an acceptance, the offeree must in one way or another communicate ‘assent’ to the offer. Only the offeree of a proposal to conclude a contract is entitled to accept the offer.¹⁷ Provided that the offeror does not specify a particular mode of acceptance, the offer may be accepted by an oral or written statement¹⁸ or may be inferred from the

11 In the following all Articles referred to will be those of the CISG unless otherwise stated.

12 P. Mankowski, in F. Ferrari, E.-M. Kieninger, P. Mankowski, K. Otte, I. Saenger, G. Schulze & A. Staudinger (eds.), *Internationales Vertragsrecht* (2nd edn, Beck, Munich, 2012) Art. 14, CISG para. 47.

13 A. Farnsworth, in C. Bianca & M. Bonell (eds.), *Commentary on the International Sales Law* (Guiffre, Milan, 1987) Art. 18, para. 2.2; P. Mankowski, in F. Ferrari, E.-M. Kieninger, P. Mankowski, K. Otte, I. Saenger, G. Schulze & A. Staudinger (eds.), *Internationales Vertragsrecht* (2nd edn, Beck, Munich, 2012), Art. 18 para 6; U. Schroeter, in P. Schlechtriem & I. Schwenzer (eds.), *Kommentar zum Einheitlichen UN-Kaufrecht* (6th edn, Beck, Munich, 2013), Art. 18 para 4; F. Ferrari, in S. Kröll, L. Mistelis & P. Perales-Viscasillas (eds.), *UN-Convention on the International Sales of Goods (CISG)* (Beck/Hart/Nomos, Munich, 2011), Art. 18 para 8.

14 CISG, Art. 18(1).

15 See, for example, OLG Dresden (30 November 2010) (*Lingerie case*) <<http://cisgw3.law.pace.edu/cases/101130g2.html>> accessed 9 August 2014.

16 CLOUT case No. 239 Oberster Gerichtshof, Austria, 18 June 1997 (determination as to whether the offer was made to a mercantile agent).

17 See CLOUT case No 239 Oberster Gerichtshof, Austria (18 June 1997) (remand to determine whether the offer was made to a mercantile agent).

18 CLOUT case No. 395 Tribunal Supremo, Spain (28 January 2000) (faxed unconditional acceptance); CLOUT case No. 308 Federal Court of Australia, Australia (8 April 1995) (statement in offeree’s letter interpreted

offerree's conduct.¹⁹ A simple 'yes, I accept' is sufficient to qualify as an acceptance. It is, however, not necessary that the offeree uses these exact words.

Acceptance requires an unqualified intention to be bound by the proposed terms in the offer. Whether there is the requisite intention to be bound depends on whether the offeree expressly or impliedly showed a clear willingness to be contractually bound by the substantive terms proposed by the offeror.²⁰

Whether a purported acceptance that modifies the offer amounts to an acceptance or a counter-offer is determined by Article 19. A party who negotiates or accepts an offer in a foreign language must bear the risk of understanding the intricacies of the meaning in the foreign language.²¹

The mere acknowledgement of receipt of the offer or queries for clarification about the goods being offered is not an acceptance of the offer. Neither is an expression of interest in regard to an offer enough to conclude the contract.²²

Besides the intention to be bound, the acceptance must be unconditional. Since an acceptance is the final step in concluding the contract, it cannot depend on some further step to be taken by either the offeror or the offeree. For instance, an 'acceptance' cannot be made subject to final approval by the offeree's board of directors.²³

Whether a reply or conduct qualifies as an indication of assent will be determined in accordance with the interpretation rules set forth by Article 8 CISG and the rules around trade usages and customs set forth in Article 9 CISG.

Industry usages and customs may influence a finding on whether certain conduct amounts to acceptance.²⁴ The parties may establish trade practices between themselves that modify and take precedent over the CISG provision. Such agreed or implied practices

as an acceptance); CLOUT case No. 845 *Easom Automation Systems, Inc v ThyssenKrupp Fabco, Corp U.S.* District Court, Michigan, United States (28 September 2007).

19 CLOUT case No. 291 Oberlandesgericht Frankfurt aM Germany (23 May 1995) *Shoe Case* <<http://cisgw3.law.pace.edu/cases/950523g1.htm>> accessed 11 August 2014; CLOUT case No. 232 Oberlandesgericht München, Germany (11 March 1998) (buyer, by performing contract, accepted seller's standard terms that modified buyer's offer).

20 J. Pierre & V. Pierre, 'A Comparison of the Rules on Formation of Sales Contracts Under the Louisiana Civil Code and the United Nations Convention on Contracts for the International Sale of Goods: What Buyers and Sellers Should Know' (1993) 20 *Southern University Law Review* pp. 189, 192; A. Farnsworth, in, C. Bianca & M. Bonell (eds.), *Commentary on the International Sales Law* (Giuffrè, Milan, 1987), pp. 163-174.

21 See for example L. Kassel (15 February 1996) Case No: 11 O 4187/95 stating that, if the offeree is uncertain of the meaning of an offer in a foreign language, the offeree must raise objections in order to get sufficient certainty, make further inquiries, or use a professional translation.

22 P. Mankowski, in F. Ferrari, E.-M. Kieninger, P. Mankowski, K. Otte, I. Saenger, G. Schulze & A. Staudinger (eds.), *Internationales Vertragsrecht* (2nd edn, Beck, Munich, 2012), p. 501.

23 C. Carrara & J. Kuckenburg, 'Remarks on the manner in which the Principles of European Contract Law' in *Commentary on Article 17 and Article 18 of the CISG* (February 2003).

24 P. Ostendorf & P. Kluth, *Internationale Wirtschaftsverträge* (Beck, Munich, 2013), p. 576; P. Perales Viscasillas, in S. Kröll, L. Mistelis & P. Perales Viscasillas (eds.), *UN-Convention on the International Sales of Goods (CISG)* (Beck/Hart/Nomos, Munich, 2011), Art. 9, paras. 8-10.

may relate to the conclusion of the contract (for example, acceptance by certain conduct), acceptance of an offer without communicating it to the offeror (Article 18(3)), procedures for payment. If parties do not wish to be bound by the established trade usages or customs they need to expressly exclude them.²⁵

The primary aim of contractual interpretation is to determine the real mutual will of the parties (Article 8(1)).²⁶ If an actual ‘meeting of the minds’ cannot be established, it has to be determined based on the surrounding circumstances whether the actual will of one party was so easily recognisable by the other party that it could not have been unaware of it (Article 8(1)). If this is not the case, then, for the purposes of determining the probable will of the parties, the declarations of the parties have to be normatively interpreted in the way that they would have been understood by a reasonable person in the same position, taking account of their wording and context, as well as the entire circumstances (Article 8(2)).²⁷

17.2.2 Acceptance by Conduct

The offeree’s willingness to be contractually bound may be inferred from the offeree’s behaviour or conduct.²⁸ An acceptance of an offer can be made by conduct other than statements if the conduct indicates the assent of the offeree.²⁹ The offeree’s conduct may objectively indicate the intent to be bound by the offer.³⁰ Conduct amounting to acceptance may consist of acts that are in fact the actual performance of the contractual obligations, such as shipping the goods to the buyer, payment, starting to manufacture the goods or the offeror accepting delivery.³¹

25 P. Perales-Viscasillas, in S. Kröll, L. Mistelis & P. Perales-Viscasillas (eds.), *UN-Convention on the International Sales of Goods (CISG)* (Beck/Hart/Nomos, Munich, 2011) Art. 9, paras. 8-10.

26 W. Achilles, *Kommentar zum UN-Kaufrechtsübereinkommen (CISG)* (Luchterhand, Berlin 2014), Art 8, para 2; M. Schmidt-Kessel, in P. Schlechtriem & I. Schwenzer (eds), *Kommentar zum Einheitlichen UN-Kaufrecht* (6th edn, Beck, Munich, 2013), Art. 8, para. 22.

27 Swiss Federal Supreme Court (Bundesgericht) 5 April 2005 CLOUT No 931.

28 CISG, Art 18(1).

29 CLOUT case No. 291 Oberlandesgericht Frankfurt aM Germany (23 May 1995) (*Shoe case*) <<http://cisgw3.law.pace.edu/cases/950523g1.htm>> accessed 11 August 2014.

30 *It’s Intoxicating, Inc v Maritim Hotelgesellschaft mbH* 11-CV-2379 (31 July 2013) <http://cisgw3.law.pace.edu/cases/1307_31u1.html>; P. Ostendorf & P. Kluth, *Internationale Wirtschaftsverträge* (Beck, Munich, 2013), p. 576; U. Schroeter, in P. Schlechtriem & I. Schwenzer (eds.), *Kommentar zum Einheitlichen UN-Kaufrecht* (6th edn, Beck, Munich, 2013), Art. 24, para. 32.

31 See a good example of acceptance by conduct (processing of the goods after two to three months) Oberster Gerichtshof (Austria) (13 December 2012) 1 Ob 215/12t (*Insulating material case*); Supreme Arbitration Court (or Presidium of Supreme Arbitration Court) of the Russian Federation (2 Nov 2010). <<http://cisgw3.law.pace.edu/cases/101102r1.html>> accessed 11 August 2014. <<http://cisgw3.law.pace.edu/cases/121213a3.html>> accessed 9 August 2014.

Whether the conduct indicates an intention to be bound by the offer is determined in accordance with Article 8 and Article 9.³²

Other conducts that may indicate an intention to be bound are the opening of a letter of credit for the purchase price,³³ the dispatch of an invoice,³⁴ the cashing of a cheque sent with the offer,³⁵ or a letter of confirmation sent by the seller after buyer's taking delivery of the goods.³⁶ The UNCITRAL Digest³⁷ lists a summary of what conduct that has been held to amount to an acceptance, for example:³⁸ a third party's taking delivery of goods,³⁹ seller's acceptance of a bank guarantee and the start-up of production of the goods;⁴⁰ sending invoices and packing lists;⁴¹ signing invoices to be sent to a financial institution with a request that it finances the purchase;⁴² sending a reference letter to an administrative agency;⁴³ a handshake by the representatives of the parties;⁴⁴ or sealing and sending back the purchase order.⁴⁵

32 P. Mankowski, in F. Ferrari, E.-M. Kieninger, P. Mankowski, K. Otte, I. Saenger, G. Schulze & A. Staudinger (eds.), *Internationales Vertragsrecht*, (2nd edn, Beck, Munich), p. 501; Clout No. 429 Oberlandesgericht Frankfurt a M (30 August 2000).

33 *Geneva Pharmaceuticals Technology Corp v Barr Laboratories, Inc.* 201 E Supp. 2d 236 (S.D.N.Y. 2002), CISG-online 653; *Magellan International Corporation v Salzgitter Handel GmbH* US District Court (ND Illinois) (7 Dec 1999) 76 F Supp 2d 919 CISG-online 439.

34 *Cámara Nacional de Apelaciones en lo Comercial* (14 October 1993) CISG-online 87; *Magellan International Corp v Salzgitter Handel GmbH* 76 E Supp. 2d 919 (N.D. Ill. 1998), CISG-online 439.

35 District Court Kassel 11 O 4187/95 (15 February 1996) (*clothes case*). A cheque was accompanied by a note (in German) stating: "This check settles the account in total including late interest, expenses of any kind, etc. This is not an on account payment. Should you not be agreeable to this, we ask you to return the check."

36 Oberlandesgericht Saarbrücken 1 U 69/92 (13 January 1993) <www.unilex.info> available at: <<http://cisgw3.law.pace.edu/cases/930113g1.html>> accessed 11 August 2014.

37 UNCITRAL Digest on case law on the *United Nations Convention on the International Sale of Goods* (2012 edition) <www.uncitral.org/pdf/english/clout/CISG-digest-2012-e.pdf> accessed 8 August 2014. CLOUT case No. 292 LG Saarbrücken 23 March 1992 where buyer's acceptance of goods indicated assent to offer, including standard terms in letter of confirmation.

38 See also a list of examples in Ulrich Schroeter, in P. Schlechtriem & I. Schwenzer (eds.) *UN Convention on the International Sale of Goods* (2nd edn, Oxford University Press, Oxford 2005), Art. 18, para. 13.

39 CLOUT case No 193 Handelsgericht des Kantons Zürich, Switzerland (10 July 1996).

40 Court of Arbitration of the International Chamber of Commerce, December 1998 (arbitral award No 8908) <www.unilex.info/case.cfem?pid=1&do=case&id=401&step=FullText> accessed 11 August 2014.

41 *Zhejiang Shaoxing Yongli Printing and Dyeing Co. Ltd v Microflock Textile Group Corporation* U.S. District Court, Southern District of Florida, United States (19 May 2008) <<http://cisgw3.law.pace.edu/cases/080519u2.html>> accessed 11 August 2014.

42 CLOUT case No 417 US District Court, Northern District of Illinois, US (7 Dec 1999); *Comision para la proteccion del comercio exterior de Mexico (Compromex)* (29 April 1996).

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

44 Oberlandesgericht Innsbruck, Austria (18 December 2007) <<http://cisgw3.law.pace.edu/cases/071218a3.html>> accessed 8 August 2014.

45 China International Economic and Trade Arbitration Commission, People's Republic of China (9 November 2005) <<http://cisgw3.law.pace.edu/cases/051109c1.html>>; Commercial Court Tongeren, Belgium (25 Jan 2005) <<http://cisgw3.law.pace.edu/cases/050125b1.html>> accessed 8 August 2014.

In accordance with Article 18(3) an offer may also be accepted by performance of an act (*i.e.* conduct) if trade practices and usages permit this.⁴⁶ The provision states that:

if by virtue of the offer or as a result of practices which the parties have established between themselves or of usage, the offeree indicates assent by performing an act, such as one relating to the dispatch of goods or payment of the price.

In a sense, Article 18(3) CISG only repeats what Article 9(1) CISG already provides for: The parties are bound by any trade usages and customs that they have established between themselves (Article 9(1) CISG) and they take precedent over conflicting provisions in CISG.⁴⁷

17.2.3 Silence or Inactivity

Article 18(1) CISG sets some boundaries for conduct that can amount to acceptance by providing that “silence or inactivity does not in itself amount to acceptance.”⁴⁸ As a general rule, the offeree’s silence or inactivity alone does not denote the acceptance of the offer because silence or inactivity lack the objective manifestation that the offeree intends to be bound.

The offeror cannot deviate from this general rule by stipulating in the offer that silence will amount to consent so that the onus is on the offeree to refuse the offer. The offeror cannot impose on the offeree a duty to respond to the offer by stating for example: “If I don’t hear from you in three days, I’ll assume you’re buying the timber”. Even if the offeree remained silent in the face of such an offer, no contract would be concluded.⁴⁹ The sending of unsolicited goods will therefore also not conclude a contract.

There are, however, exceptional circumstances where silence may amount to an indication of assent. It is not unusual in business relationships to conclude a contract without

⁴⁶ CISG, Art. 9.

⁴⁷ P. Bout, *Trade Usages: Article 9 of the Convention on Contracts for the International Sale of Goods* (1998) available at: <www.cisg.law.pace.edu/cisg/biblio/bout.html> (last accessed 9 August 2014); C. Pamboukis, ‘The Concept and Function of Usages in the United Nations Convention on International Sale of Goods’ (2005-2006) 25 *Journal of Law and Commerce* p. 107; G. Walker, ‘Trade Usages and the CISG: Defending the Appropriateness of Incorporating Custom into International Commercial Contracts’ (2005) 24 *Journal of Law and Commerce* p. 263.

⁴⁸ P. Mankowski, in F. Ferrari, E.-M. Kieninger, P. Mankowski, K. Otte, I. Saenger, G. Schulze & A. Staudinger (eds.), *UN-Convention on the International Sales of Goods (CISG)* (Beck/Hart/Nomos, Munich, 2011), Art. 18, paras. 1, 4.

⁴⁹ A. Farnsworth, in C. Bianca & M. Bonell (eds.), *Commentary on the International Sales Law* (Giuffrè, Milan, 1987) pp. 163-174, para. 2.3; CLOUT 23, UNILEX D.1992-9; see R. Brand & H. Flechtner, ‘Recent Development: CISG: Arbitration And Contract Formation In International Trade: First Interpretations Of The U.N. Sales Convention’ (1993) 12 *JLC* p. 239; OLG Köln, 22 U 202/93 (22 February 1994).

the acceptance having been manifested in an express way, but rather tacitly by conduct. The rules of interpretation set out in Article 8 CISG are here of major importance to ascertain an 'acceptance by silence'.

The parties also may have established trade practices between themselves that silence is a valid acceptance.⁵⁰ As already explained, under Article 9(1), the parties are bound by any usages and customs which they have established between themselves. In *Filanto, S.p.A. v Chilewich Int'l Corp* the Court did not refer to Article 9(1) but interpreted the long standing dealings between the parties in accordance with Article 8(3). It found that not responding within a particular time frame amounted to acceptance.⁵¹

A New York enterprise agreed to sell shoes to a Russian enterprise pursuant to a master agreement that required disputes to be arbitrated in Moscow. To fulfil the agreement, the New York enterprise entered into multiple contracts with an Italian seller. Pursuant to one purported contract the Italian manufacturer supplied shoes but the New York buyer made only partial payment. The Italian seller sued in a New York court to recover the purchase price. The New York buyer sought a stay of proceedings to permit arbitration alleging that the contract incorporated the Russian master agreement by reference. The Court held construed Article II(1) of the Convention on the Recognition and Enforcement of Foreign Arbitral Awards to determine whether the parties had agreed in writing to arbitrate. Since the Court found the issue to be a federal law question, the Court referred to contract principles embodied in CISG. The Court 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. Although under Article 18(1) CISG silence is not usually acceptance, the Court interpreted the dealings between the parties in accordance with Article 8(3). The course of dealing between the parties created a duty on the part of the Italian seller to object promptly and that its delay in objecting constituted acceptance of the New York buyer's offer.

The rules governing the effect of silence following a commercial letter of confirmation are not usually considered to be usages under Article 9(1) which is why inactivity or silence after having received a commercial letter of confirmation will generally not amount to acceptance of the terms contained in the letter of confirmation.⁵² In the specific case it will

50 See, for example, CLOUT case No. 313 *Cour d'appel de Grenoble*, France (21 October 1999).

51 789 F. Supp 1229 (SDNY 1992) appeal dismissed 984 F2d 58 (2d Cir 1993). Regarding to the summary of judgment see <www.cisg.law.pace.edu/cases/920414u1.html> accessed 8 August 2014.

52 *Appellate Court Frankfurt* (5 July 1995) (*Chocolate Products Case*) available at: <<http://cisgw3.law.pace.edu/cases/950705g1.html>> accessed 6 August 2014.

be a matter which will have to be determined invoking Article 8. Where the confirmation refers to a contract which has already been concluded, the offeror must understand it as letter of confirmation (Article 8(2)) and not as acceptance. Whether the offeree is accepting the offer or only confirming its receipt will again have to be determined in accordance with Article 8(2).

17.3 FORM OF ACCEPTANCE

If the offeror, as the master of the offer, requested a particular manner of acceptance, the offeree must respond in this way for the acceptance to be valid. For instance, the offeror may require to receive the acceptance by registered post within twelve working days and that an oral statement is not sufficient (Articles 18 and 19). If the offeree deviates from the offeror's instructions in any significant way, no contract will be formed.

If, however, the offer does not require a particular manner of accepting the offer, then the offeree may accept it in a reasonable manner of communication within a reasonable time.

Generally, what is a reasonable manner of communication depends on the circumstances in which the offer was made. The reliability of the various modes of communication, the importance and urgency of the acceptance being delivered will be decisive in choosing a reasonable manner of communication. The nature of the proposed transaction will also determine reasonable manner of communication. For instance, are the goods involved subject to rapid price fluctuations or perishable? Another factor is whether the parties have established trade usages between them.⁵³

At the time the CISG was drafted, businesses generally communicated by letters, which were sent by 'snail mail'. Telex was the quick form of international correspondence while the fax was cutting-edge technology that had just entered commercial offices, and 'Internet' and 'email' were words and concept that were yet to be invented.

The question that therefore arises in this context is whether an international contract for the sale of goods can be accepted via electronic means.

Article 11 provides that "A contract of sale need not be concluded in or evidenced by writing and is not subject to any other form requirements."

Article 13 states that "for the purpose of this Convention 'writing' *includes* telegram and telex" [emphasis added]. This definition of writing, is sufficiently broad and flexible as the word 'includes' suggest to ensure that this requirement will be met when electronic

53 Cf. Art. 9 CISG.

media are used to conclude a contract. In fact, form requirements were deliberately excluded from the CISG as to give the parties greater flexibility in contracting with each other.⁵⁴

Freedom of form is a general principle that is embodied in Article 11. It is also a core principle of the UNIDROIT Principles. Article 1.11 of the Principles uses a functional approach to define ‘writing’ by stating that “*writing* means any mode of communication that preserves a record of the information contained therein and is capable of being reproduced in tangible form.” Thus, ‘writing’ can be extended to various different technologies and includes any mode of communication, including electronic communications that preserve a record and can be reproduced in tangible form. Though the UNIDROIT Principles of International Commercial Contracts do not constitute law it shows the different technological environments at the time of drafting.

The Principles have prompted the CISG Advisory Council to confirm that “the term ‘writing’ in CISG also includes any electronic communication retrievable in perceivable form” and that the CISG “enables parties to conclude contracts electronically”.⁵⁵

The parties are free to specify the precise time, place, and manner in which acceptance must be communicated (*i.e.* in writing, orally or electronically).

For an electronic acceptance to be appropriate the offeror must expressly or impliedly have consented to receiving electronic communications. The offeror’s consent to receive an acceptance via electronic means may be inferred from the offeror’s statements, conduct or from common trade practices established between the parties. The CISG therefore allows for international contracts for the sale to be concluded by way of tweeting, texting, internet chat, email, posting information on a websites or blog posts.

17.4 EFFECTIVENESS OF ACCEPTANCE

An acceptance of an offer becomes effective at the moment the indication of assent reaches the offeror. No matter what form of communication the offeree chooses, the acceptance must reach the offeror in order to bring about the legally binding contract (*see* however the exception contained in Article 18(3)).⁵⁶ It must be noted that the offeree may withdraw the acceptance if the withdrawal reaches the offeror before or at the same time the acceptance would have become effective (Article 22).

54 Note however, that declarations of intent such as offer (*e.g.* acceptance, withdrawal, or revocation) must comply with the validity requirements of the applicable domestic law including requirements concerning legal capacity, the absence of certain kinds of mistake, duress.

55 CISG-AC Opinion no 1, ‘Electronic Communications under CISG’, 15 August 2003. Rapporteur: Professor C. Ramberg, Gothenburg, Sweden. S. Eiselen, ‘Electronic Commerce and the U.N. Convention on Contracts for the International Sale of Goods (CISG)’ (1999) 6 *EDI Law Review* pp. 21-46

56 J. Pierre & V. Pierre, ‘A Comparison of the Rules on Formation of Sales Contracts Under the Louisiana Civil Code and the United Nations Convention on Contracts for the International Sale of Goods: What Buyers and Sellers Should Know’ (1993) 20 *Southern University Law Review* pp. 189, 192.

Since the receipt of an acceptance concludes the contract,⁵⁷ it is important to determine precisely when the communications in question ‘reaches’ the offeror.⁵⁸

Article 24 states that a declaration ‘reaches’ the offeree when it is made orally to him or delivered by other means to him personally, to his place of business or mailing address, or if he does not have a place of business or mailing address, to his habitual residence.

Article 24 embodies the reception theory. According to this theory, the acceptance reaches the offeror when it enters the offeror’s sphere of control in such a way that he or she is able to gain knowledge of its content.⁵⁹ The receipt of an acceptance under CISG does not require that the offeree takes notice of the acceptance. It is not necessary that the offeree gains actual knowledge of the content of the declaration. There is therefore no scope under CISG for the operation of the postal acceptance rule⁶⁰ or the information theory,⁶¹ unless the parties themselves agree otherwise (Article 6) or they have established trade usage or custom between themselves to that effect (Article 9).⁶²

Article 24 distinguishes between orally made acceptances and acceptances delivered by other means. The term ‘orally’ includes electronically transmitted sound and other communications in real time provided that the addressee expressly or impliedly has consented to receive electronic communications of that type, in that format, and to that address.⁶³

The question arises when an acceptance which is made using electronic means reaches the sphere of the offeror. An acceptance becomes effective when an electronic indication of assent has entered the offeror’s server, provided that the offeror has consented, expressly or impliedly, to receiving electronic communications of that type, in that format, and to that address.⁶⁴ That means that the offeror receives an email at the point the message enters

57 U. Schroeter, in P. Schlechtriem & I. Schwenzer (eds.), *Kommentar zum Einheitlichen UN-Kaufrecht* (6th edn, Beck, Munich, 2013), Art. 23, para. 1.

58 I. Schwenzer & F. Mohs, *Old Habits Die Hard: Traditional Contract Formation in a Modern World*, (Internationales Handelsrecht, 2006) pp. 239-246.

59 P. Schlechtriem & P. Butler, *UN Law on International Sales* (Springer, Berlin, 2009) para. 95; S. Eiselen, ‘Electronic Commerce and the U.N. Convention on Contracts for the International Sale of Goods (CISG)’ (1999) 6 *EDI Law Review*, p. 29.

60 The postal acceptance rule is an exception and stems from *Adams v Lindsell* (1818) 1 B & Ald 681, under it a contract is formed when a letter of acceptance is posted. *Henthorn v Fraser* [1892] 2 Ch. 27; *British & American Telegraph Co Ltd v Colson* (1871) LR 6 Exch 108, 112. See also S. Gardner, ‘Trashing with Trollope: A Deconstruction of the Postal Rules in Contract’ (1992) 12 *Oxford J. of Legal Studies* pp. 170, 175.

61 Under the Declaration Theory, the contract is concluded when the offeree writes his acceptance.

62 For a detailed discussion of the different theories see S. Eiselen, ‘Electronic Commerce and the U.N. Convention on Contracts for the International Sale of Goods (CISG)’ (1999) 6 *EDI Law Review*, pp. 21-46.

63 *Cour de Justice de Genève*, Switzerland (13 September 2002) <<http://cisgw3.law.pace.edu/cases/020913s1.html>> accessed 6 August 2014; CISG-AC Opinion no 1, *Electronic Communications under CISG* (15 August 2003), rapporteur: C. Ramberg, Art. 24.

64 F. Ferrari, in S. Kröll, L. Mistelis & P. Perales-Viscasillas (eds.), *UN Convention on Contracts for the International Sale of Goods* (Beck/Hart/Nomos, Munich, 2011) Art. 18 para. 4; B. Leete, ‘Contract Formation under

the offeror's Internet Service Provider's (ISP) server and can be downloaded.⁶⁵ This is in line with Article 15 of the UNCITRAL Model Law on Electronic Commerce which states that electronic data messages reach the offeror "at the time when the data message enters the designated information system".

Article 24 does not address whether an acceptance made in a language that is not usually used by the offeror 'reaches' the offeror. In accordance with Article 8 it will depend on the common understanding between the parties, their prior dealings, or trade customs whether the offeror has to accept an acceptance in a language that the offeror does not normally use.⁶⁶

17.4.1 *Acceptance without Notification*

Generally, the offeree must communicate the acceptance to the offeror.⁶⁷ Article 18(3) provides an exception to the general rule that an acceptance must reach the offeror to be effective. Communication of acceptance is not necessary, if the offer dispenses with the requirement. By merely performing an act, the offeree may render the acceptance effective, and thus conclude the contract without the acceptance reaching the offeror.⁶⁸ In such case, the acceptance is effective at the moment the act is performed.⁶⁹

The acceptance by performance must either be expressly authorized in the offer or it must be impliedly authorized "as a result of practices which the parties have established between themselves or of usage" (Article 18(3), Article 9).

Article 18(3) provides some guidance as to what kind of act is sufficient to conclude the contract without the need to notify the offeror. The CISG refers to 'the dispatch of the goods' or 'payment of the price' as examples. However, the conduct does not have to be directly linked to the performance of the contract and therefore include preparatory acts.⁷⁰

the United Nations Convention on Contracts for the International Sale of Goods and the Uniform Commercial Code: Pitfalls for the Unwary' (1992) 6 *Temple International and Comparative Law Journal* pp. 193, 207.

65 CISG-AC Opinion no 1, *Electronic Communications under CISG* (15 August 2003) rapporteur: C. Ramberg, Art. 24.

66 See CLOUT case No. 132, Oberlandesgericht Hamm, Germany (8 February 1995), <<http://cisgw3.law.pace.edu/cases/950208g3.html>> accessed 7 August 2014.

67 CISG, Art. 18.

68 C. Carrara & J. Kuckenburg, 'Remarks on the manner in which the Principles of European Contract Law may be used to interpret or supplement Article 18 of the CISG' in *Commentary on Article 17 and Article 18 of the CISG* (February 2003), para. 4.

69 I. Schwenzer & F. Mohs, 'Old Habits Die Hard: Traditional Contract Formation in a Modern World' (2006) *Internationales Handelsrecht* pp. 239-246.

70 P. Mankowski, in F. Ferrari, E.-M. Kieninger, P. Mankowski, K. Otte, I. Saenger, G. Schulze & A. Staudinger (eds.), *Internationales Vertragsrecht*, (2nd edn, Beck, Munich, 2012), Art. 18, para. 6.

17.5 TIME FOR ACCEPTANCE – LATE ACCEPTANCE

17.5.1 *Instantaneous Modes of Communication*

Article 18(2) states that “an oral offer must be accepted immediately unless the circumstances indicate otherwise.” The requirement that an oral offer must be accepted immediately indicates that oral offers are only binding during the immediate negotiations.⁷¹ A period of time fixed by the offeror by telephone, telex or other means of instantaneous communication begins to run from the moment the offer reaches the offeree.⁷²

The term ‘oral’ includes real-time communication through electronically transmitted sound in real time and electronic communications in real time. Real time communications via the Internet may for instance include phone calls via the Internet, tweeting or internet chat. The parties are both present at the same time and they may talk or write to each other just as if they were present in the same room. Such real time communications via the Internet are virtually instantaneous and are therefore treated as oral communications and must be accepted immediately, unless the circumstances suggest otherwise.⁷³

17.5.2 *Non-Instantaneous Modes of Communication*

According to Article 20, an offer must be accepted within the time the offeror has fixed or if no time is fixed, within a reasonable time having regard to the circumstances, including the rapidity of the means of communication employed by the offeror.⁷⁴ Therefore, an acceptance is only valid within certain time frames.

The offeror may stipulate a period of time within which the offeree must accept.⁷⁵ Article 20(1) contains the rules for non-instantaneous means of communications in cases where the offeror fixes a period of time for acceptance:

A period of time for acceptance fixed by the offeror in a telegram or a letter begins to run from the moment the telegram is handed in for dispatch or from

⁷¹ CISG-AC Opinion no 1, *Electronic Communications under CISG* (15 August 2003), rapporteur: Christina Ramberg, Art. 18(2).

⁷² CISG, Art. 20(1).

⁷³ CISG-AC Opinion no 1, *Electronic Communications under CISG* (15 August 2003), rapporteur: Christina Ramberg, Art. 18(2); S. Eiselen, ‘Electronic Commerce and the U.N. Convention on Article Contracts for the International Sale of Goods (CISG)’ (1999) 6 *EDI Law Review*, pp. 21-46.

⁷⁴ G. Giannini, ‘The Formation of the Contract in the UN Convention on the International Sale of Goods: A Comparative Analysis’ (2006) *Nordic Journal of Commercial Law*, <www.njcl.fi/1_2006/index.htm> accessed 9 August 2014, para. 5.

⁷⁵ CISG, Art. 18(2).

the date shown on the letter or, if no such date is shown, from the date shown on the envelope.

The preference for the time of dispatch in cases of non-instantaneous modes of communications is an exception to the general rule contained in Articles 23 and 18(1) CISG, that a declaration must reach the addressee in order to be effective.

Article 20(2) deals with the effect of official holidays and non-business days on the calculation of the time period. As a general rule, official holidays or non-business days are treated as working days.⁷⁶ However, if a notice of acceptance cannot be delivered at the offeror's address on the last day of the period because that day falls on an official holiday or a non-business day at that place, the period is extended until the next business day.⁷⁷

If the offeror has not fixed a time limit for acceptance, the acceptance has to reach the offeror 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.⁷⁸ A reasonable time is made up of three elements: the time taken by the offer to reach the offeree, the time required for the acceptance to reach the offeror, and a period for consideration.⁷⁹

A purported acceptance that reaches the offeree too late is not effective.⁸⁰ Article 21 contains two exceptions to this rule. First, the offeror may decide to treat a late reply as having arrived on time. If the offeror wishes to be bound by the late acceptance, he/she must notify the offeree without delay that the acceptance is effective.⁸¹ Second, if the acceptance has been dispatched in time but arrives late due to transmission problems, a contract is formed upon the arrival of the late acceptance unless the offeree notifies the offeror that he/she intends to treat the acceptance as ineffective.⁸²

17.6 RESOLVING CONFLICTS BETWEEN OFFER AND ACCEPTANCE

A purported acceptance which does not exactly match the terms of the offer is a rejection and constitutes a counter-offer.⁸³ Since the acceptance must be the mirror image of the

76 CISG, Art. 20(2).

77 CISG, Art. 20(2).

78 CISG, Art. 18(2).

79 P. Schlechtriem & P. Butler, *UN Law on International Sales* (Springer, Berlin, 2009), para. 88.

80 CISG, Art. 21, Art. 18(2).

81 CISG, Art 21(1). *See also*: Landgericht Hamburg, Germany, 21 December 2001.

82 CISG, Art 21(2).

83 CISG, Art 19(1); *see for example*: CLOUT case No. 232 Oberlandesgericht München (Germany, 11 March 1998) (buyer, by performing contract, accepted seller's standard terms that modified buyer's offer); CLOUT case No. 227 Oberlandesgericht Hamm (Germany, 22 September 1992) (buyer accepted counter-offer when its reply did not object to counter-offer). CLOUT case No. 251 Handelsgericht des Kantons Zürich,

offer, the purported acceptance cannot contain variation of the terms of the offer or at least none which materially alters them.⁸⁴ Attempts by the offeree to modify the terms of the offer or to add new terms to it are treated as counter-offers because they impliedly indicated an intent by the offeree to reject the offer instead of being bound by its terms.

An exception is given in Article 19(2) which states that “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.”⁸⁵ Article 19(2) seeks to relax the ‘mirror image rule’ by making a reply, which contains additional or different terms that do not materially alter the offer, a valid acceptance. Thus, it is crucial to distinguish between material and immaterial variations.⁸⁶ “The dividing line between a material and a non-material alteration can make or break an acceptance.”⁸⁷

This position is quite different from the common law which requires that the acceptance to be unconditional. At common law, any alteration to the terms specified, even a commercially insignificant one, will amount to be a counter-offer.⁸⁸

A non-exhaustive list of terms that are deemed to alter the offer materially is contained in Article 19(3), it includes additional or different terms relating to price, payment, quality and quantity of goods, place and time of delivery, extent of a party’s liability.⁸⁹ However, modifications listed in Article 19(3) may be treated as non-material modifications if the parties have established trade practices or usages between them in accordance with Article 9.⁹⁰

In the *Shoe* case, the Court held that the delivery of a different quantity of goods (2,700 pairs of shoes instead of 3,240 pairs as per the order) materially altered the terms of the

Switzerland (30 November 1998); CLOUT case No. 173 Fovárosi Biróság, Hungary (17 June 1997); CLOUT case No. 424 Oberster Gerichtshof, Austria (9 March 2000); CLOUT case No. 193 Handelsgericht des Kantons Zürich, Switzerland (10 July 1996); CLOUT case No. 291 Oberlandesgericht Frankfurt aM, Germany (23 May 1995).

84 CISG, Art 19(1).

85 Kantonsgericht St. Gallen (15 June 2010) (*Stencil Master Case*) <<http://cisgw3.law.pace.edu/cisg/wais/db/cases2/100615s1.html>> accessed 11 August 2014; CLOUT abstract no. 1340 Audiencia Provincial de Cantabria (9 July 2013) (*Steel Cable*).

86 I. Schwenzer & F. Mohs, in I. Schwenzer, P. Hachem & C. Kee, *Global Sales and Contract Law* (Oxford University Press, Oxford, 2012) p. 395. I. Schwenzer & F. Mohs, ‘Old Habits Die Hard: Traditional Contract Formation in a Modern World’ (2006) *Internationales Handelsrecht* pp. 239-246.

87 P. Perales-Viscasillas, ‘Contract Conclusion under CISG’, (1997) 16 *Journal of Law and Commerce* pp. 315-344.

88 P.C. Blodgett, ‘The U.N. Convention on the Sale of Goods and the “Battle of the Forms”’ (1989) 18 *Colorado Lawyer* pp. 423-430, <www.cisg.law.pace.edu/cisg/biblio/blodgett.html> last accessed 9 Aug 2014; J.E. Murray, ‘The Definitive “Battle of the Forms: Chaos Revisited”’ (2000) 20 *Journal of Law and Commerce* pp. 1-48 <www.cisg.law.pace.edu/cisg/biblio/murray2.html> accessed 9 Aug 2014.

89 CISG, Art. 19(3). See also OLG Köln 25 May 2012 (*Wafer Case*); *Cour de Justice de Genève* (15 January 2010); LG München (6 April 2000).

90 CLOUT case No. 189 Oberster Gerichtshof, Austria (20 March 1997).

offer under Article 19(3) CISG. Accordingly, the seller's delivery had to be interpreted as a rejection of the offer and amounted to a counter-offer under Article 19(1) CISG.⁹¹

Immaterial modifications to the offer will constitute an offer unless the offeror notifies the offeree without undue delay that the offeror objects to the immaterial modifications. If the offeror does not object, the contract is concluded with the modified terms proposed by the offeree.⁹²

Examples of immaterial modifications include: a request to treat the contract confidential;⁹³ a provision requiring that buyer reject delivered goods within a stated period;⁹⁴ a modification of the transport costs;⁹⁵ an adjustment of the quantity of the goods in each delivery without changing the total amount;⁹⁶ and deletion of a liability clause for contract violations.⁹⁷

17.7 CONCLUSION

As it becomes apparent having set out the rules pertaining to acceptance of an offer under the CISG, the rules are clear and have not led to great controversy. The commentaries and the UNCITRAL digest on the acceptance provisions are relatively brief. Case law is primarily concerned with factual enquiries, for example, what the practice between the parties in regard to silence to an offer was⁹⁸ or what conduct amounts to acceptance.⁹⁹

Electronic communication poses no problems in regard to the CISG. The acceptance rules set out in the CISG can be applied to modern electronic communication methods. With Brazil's access to the CISG, the conclusion and performance of electronic contracts will be based on the CISG and become an important tool to facilitate legal certainty with international trading partners. Despite the significance of e-commerce for its trade, it has

91 CLOUT case No. 291

92 CISG, Art. 19(2); *see also* China International Economic & Trade Arbitration Commission, People's Republic of China, 10 June 2002.

93 CLOUT case No. 53 Legfelsőbb Biróság, Hungary (25 September 1992).

94 CLOUT case No. 50 Landgericht Baden-Baden, Germany (14 August 1991).

95 Oberlandesgericht Koblenz (Germany, 4 October 2002).

96 China International Economic and Trade Arbitration Commission, People's Republic of China (17 September 2003) 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.

97 China International Economic and Trade Arbitration Commission, People's Republic of China (17 September 2003).

98 *See overview of case law in* F. Ferrari, in S. Kröll, L. Mistelis & P. Perales-Viscasillas (eds.), *UN Convention on Contracts for the International Sale of Goods* (Beck/Hart/Nomos, Munich, 2011), Art. 18, para. 11.

99 *See overview of case law in* F. Ferrari, in S. Kröll, L. Mistelis & P. Perales-Viscasillas (eds.), *UN Convention on Contracts for the International Sale of Goods* (Beck/Hart/Nomos, Munich, 2011), Art. 18, para. 8; U. Schroeter, in P. Schlechtriem & I. Schwenzer (eds.), *Kommentar zum Einheitlichen UN-Kaufrecht* (6th edn, Beck, Munich, 2013), Art. 18, para. 7a.

to be noted that Brazil is neither signatory to the United Nations Convention on the Use of Electronic Communications in International Contracts nor has it incorporated the UNCITRAL Model Law on Electronic Commerce (1996). Whereas the latter is aimed to unifying e-commerce through unified domestic laws, the former is aimed to assist in international, *inter alia*, sale contracts.¹⁰⁰ The Electronic Communications Convention sets out criteria for establishing the functional equivalence between electronic communications and paper documents, as well as between electronic authentication methods and handwritten signatures.¹⁰¹ Its provisions support the interpretations that have been afforded in regard to acceptance by electronic means under the CISG. For example, Article 10(2) of the Convention stipulates that an electronic communication ‘reaches’ the addressee when it becomes capable of being retrieved by the addressee at an electronic address designated by the addressee.¹⁰² Importantly, the Convention establishes the general principle that communications are not to be denied legal validity solely on the grounds that they were made in electronic form.¹⁰³ The Convention clarifies that a proposal to conclude a contract made through electronic means and not addressed to specific parties amounts to an invitation to deal, rather than an offer whose acceptance binds the offering party, in line with the corresponding provision of Article 11 CISG.

100 See a more comprehensive discussion in regard to the CISG and the Convention in Petra Butler, ‘The Electronic Communications Convention and the CISG Help or Window-Dressing?’ in Schwenger & Spagnolo (eds.) *Liability under the CISG* (Eleven International Publishing, Den Haag, 2012), p. 1; see also more general in regard to e-commerce I. Schwenger, P. Hachem & C. Kee, *Global Sales and Contract Law* (Oxford University Press, Oxford, 2012), paras. 11.01 *et seq.*

101 ECC, Art. 9.

102 See above in regard to electronic communications and Art. 24 CISG.

103 EEC, Art. 8.