PEER REVIEWED ARTICLE

Formation of Contract According to the CISG

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Abstract

Formation of contract is one of the crucial topics that have been governed uniformly by United Nations Convention on Contracts for the International Sale of Goods and even a compromise area between Common Law and Continental European Law (Civil Law) systems. The main focus of the work will be on commonly accepted offer-acceptance model through conceptual clarifications and even some comparisons between the German Approach and the Convention in terms of formation of contract.

Keywords: *Formation of Contract, Criteria of Offer, Irrevocability of Offer, Types of Acceptance, Standard Contracts Terms, Battle of Forms, Late Acceptance*

A. Introduction

Taking into consideration the importance and volume of international business, a uniform law to regulate the trade at the international level was an absolute must in the last quarter of the twentieth century. The attempts to reach a uniform law in the area of international business were successfully completed in 1980 with United Nations Convention on Contracts for the International Sale of Goods (hereinafter the CISG).

Today we see 78 contracting states that signed the CISG (including Turkey[1]) and it has been accepted as a considerably successful instrument that provides harmonization and unification in the regulation of international business.

In this work we will deal with the issue of contract formation, which is governed explicitly by the CISG and moreover it has a part that rules formation of international sales contracts and follows the traditional offer- acceptance model (only obviously accepted model) in terms of the conclusion of a contract.[2]

Although there is such an instrument for uniformity, it cannot be said that all issues related to a sales contract is governed explicitly by the CISG. For example, validity of contract is excluded from the application scope of the CISG[3] therefore we will not examine the issue of validity in this work.

As a second and important point, it has to be said that commercial letter of confirmation is also an issue stays out of the CISG, in other words there is no provision that rules it but there are scholarly approaches[4] to handle the issue under formation of contract. Thirdly and finally, e-commerce transactions is also handled by some scholars under the contract formation but we will not include these issues in the work and deal with the formation of contract through understanding terms offer and acceptance under the CISG in general and at some points in comparison with German Approach on the issues and additionally mention the problem of standard contract terms.

B. Offer

As is known, contract is a legal transaction that requires at least two persons and two corresponding declarations of intent. First one of these corresponding declarations is called offer, it has to receive the offeree in order to conclude an effective contract and has to include some special criteria. These special criteria will be treated in more detail in this part.

[1] Turkey ratified the CISG in 2010. Official Gazzette No.27545, 07 April 2010. But it entered into force on the 1st August 2011.

[2] P Schlechtriem/P Butler UN law International Sales, Springer- Verlag Berlin-Heidelberg, 2009, p.65.

[3] Acccording to Art.4 (a) "…Convention, it is not concerned with: the validity of the contract…"

[4] Schlectrim, supra n. 2, p. 83.

I. Criteria for an Offer

Each proposal does not mean an offer that is why according to the CISG, a proposal has to fulfill some requirements which are; a sufficient definiteness of the proposal, an intention to be bound in case of acceptance and the effectiveness of the offer, in order to be accepted as an offer[5].

1. Definiteness of Addressee and Public Offer

In the CISG, the proposal must firstly address one or more specific persons[6] or it is considered as an invitation to make an offer (invitatio ad offerendum) unless otherwise the proposal is indicated to one or more unspecific persons clearly as an offer by the offeror.[7]

When the proposal addresses to a definite person or persons there is no problem but a problem arises when the proposal is directed towards an unspecific group of persons (which is known as Public offer), here it strictly requires to show the difference between an offer which addresses to indefinite circle of people and invitation to make offer.

According to Art.14 of the CISG, it is generally accepted that a party can make an offer to an unspecific group of persons.[8] For instance, a seller may send some catalogues that include product descriptions and product price lists, to indefinite number or large number of people and that may be interpreted as public offer.[9] But according to Honnold, such an offer in cases of acceptance may cause some practical difficulties.[10] It is fair to say that by the reason of some vague situations when a proposal is communicated to an indefinite group, Art.14 (2) of the CISG requires a clear indication of whether it is an offer and furthermore unless such a clear indication is provided, that proposal will be just an invitation to make an offer.[11]

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[5] Schlechtriem, supra n. 2, p. 69.
P Huber/A Mullis The CISG: A New Text Book for Students and Practitioners, Sellier European Law Publication, 2007, p.70.

[6] Witz , in Witz/Salger/Lorenz, Art.14, para.20.

[7] Ibid, para.58.

[8] J Honnald, Uniform Law for international sales under the CISG, 3rd ed., Kluwer Law International, The Hague, 1999, p. 148.

[9] Ibid.

[10] "For example, sellers often give wide distribution to catalogues describing a line of goods and indicating prices. Some months may be required for the preparation, printing and distribution of the catalogue. During this period some of the goods may become unavailable because of heavy demand, shortage of materials or other production difficulties and cost increases may call for readjustment of prices." Ibid

[11] Ibid, p. 149.

2. Intention to Be Bound in case of Acceptance

Secondly, the CISG puts a subjective criterion, which is the intention of the offeror. Accordingly, a proposal requires being "binding" in order to be an effective offer[12] under the CISG[13] Therefore, it has to include the offeror`s intention which shows the readiness to be bound by offer in case of acceptance.

Such a criterion provides to an offer to be distinguished from a simple non-binding proposals.[14] Here also (as has been discussed above) "invitatio ad offerendum can be illustrated as a non-binding proposal which fails to have the "intention to be bound/animus contrahandi".[15]

In cases where the offeror wants to be bound by his offer, is a question of interpretation under national legal systems[16], and it is fair to say, that under the CISG it has to be handled in each case individually as well.[17]

Moreover, it should be mentioned here; "intention to be bound" and "to be bound by offer irrevocably" have to be distinguished[18]; whereas "intention to be bound is a criterion for an effective offer in Art.14 of the CISG, offer´s position of being bound by offer irrevocably is another issue[19] which we will handle in Art.16 of the CISG.

3. Sufficient Definiteness

Another important criterion for an offer is "sufficient definiteness of proposal".[20] What is understood under the sufficient definiteness of a proposal under the CISG is figured in the Art.14 (1) (2nds.).[21] Accordingly in a proposal; goods, quantity and price are considered essential elements (essentialia negotii) of a contract and therefore, they have to be determined sufficiently.[22]

It is obvious that if the essential terms of a contract are explicitly fixed, there will be no problem of determination.[23]

[12] K Ludwig, Der Vertragsschluß nach UN-Kaufrecht im Spannungsverhaltnis von Common Law und Civil Law, Diss. Heidelberg, p.37.
[13] "In cases of acceptance, offeror must indicate his intention to be bound by his offer." Gruber, in MünchKomm, CISG Art. 14, para.5.
[14] Ludwig, supra n. 12, p. 37.
[15] Dörner, in Schulze u.a. §145 para. 3.
[16] Under German Law according to §133 BGB, it is a problem of interpretation. Dörner, in Schulze u.a. §145, para. 3.
[17] Ferrari, in Kröll, Mistelis,Viscasillias, CISG (Commentary) Art. 14, para. 11.
[18] Magnus, in Staudingers, CISG Art.14, para. 12.
[19] Gruber, in MünchKomm, CISG Art.14, para. 5.
[20] Schlechtriem, in Schlechtriem/Schwenzer, CISG Art.14, para. 1; Gruber, in Münch-Komm, CISG Art.14, para. 13.
[21] Schlechtriem, in Schlechtriem/Schwenzer, CISG Art.14, para. 3.
[22] Ibid.
[23] Ludwig, supra n. 12, p. 296.

a) Indication of Nature and Quantity of Goods

Due to the fact that only an offer containing the fundamental elements of a sales contract can lead to the successful conclusion,[24] the elements such as nature and quantity of offered goods must be determined or at least determinable in the offer.[25] But hereby it is fair to say that the explicit description of the goods is not strictly required; even it may be impliedly according to Art.14 (1) (2nd s.) determined[26] so Schlechtriem accepts that there may be just a simple indication of the goods and their amounts but at least that indication must be interpretable.[27]It is clear that "silence" has no function to refer to the goods therefore an implicit determination of goods differs from "silence".[28]Moreover, besides written indications, a verbal indication is also acceptable to refer to the nature and quantity of goods.[29]

The question of whether "the indication of nature" includes the colour and equipment has to be asked and in response to that question, it can be said that the elements of the contract which are apart from the essential terms such as the colour and equipment, do not have to be shown, the description of the name of the goods for example, "saying the model of the car" is enough to accept a concluded contract.[30] Eventually, the colour and equipment of the good are the matters of the performance so that they don´t impact the conclusion of contract.[31]

b) Price Determination

Under the CISG, the term "price" is another element that has to be determined or at least determinable, i.e. a proposal has to include it either implicitly or explicitly.[32] If there is neither a determined price nor a determinable one, an effective offer does not exist pursuant to Art.14 (1) of the CISG[33] and a contract is not concluded effectively.[34]

It is fair to say that under the CISG, the contract does not have to include an explicit fixed price, for example; one party may want a late determination in order to take into consideration the market price or by the reason of necessity of more information. Here even such an uncertain determination fulfils the

[24] Schlechtriem, in Schlechtriem/Schwenzer, CISG Art.14, para. 3.
[25] Mullis, supra n. 5, p. 296.
[26] Schlechtriem, in Schlechtriem/Schwenzer, CISG Art.14,para. 8; Ferrari, in Kröll/Mistelis/Viscasillias, CISG (Commentary) Art.14, para. 21.
[27] Schlechtriem, in Schlechtriem/Schwenzer, CISG Art.14,para.8.
[28] Ibid.
[29] Ibid.
[30] CIETAC, 23.4.1997, CISG-online no: 1151.
[31] Ibid.
[32] Bundesgericht, 5 April 2005, (Switzerland) translatin available at: http://cisgw3.law.pace.edu/cases/050405s1.html (last visit: 15.10.2012).
[33] Ferrari, in Kröll/Mistelis/Viscasillias, CISG (Commentary) Art.14, para. 32.
[34] NJW 1990, pp. 3077-3079.

requirement of determinability of price under the criteria for offer.[35] Moreover, in cases a proposal refers to a price list or market price; it is adequate to accept a determination impliedly.[36]

c) The Relation between Articles 14 (1)and55 of the CISG

At the first instance Art.55 is seen in conflict with Art.14 of the CISG.

Whereas Art.14 (1) provides that an offer is only validly concluded if the parties have included the price impliedly or explicitly into their contract, Art.55 only applies if the contract has been validly concluded without determining the price.[37]Although (as has been mentioned above) this situation is seen as an inconsistency between two provisions of the CISG,[38] with the support of scholarly approaches it is easy to understand why both provisions do exist together.

According to Schlechtriem;

"If the parties have performed the contract despite no definite price having been agreed, or have in other way made clear that they wanted to perform the contract, the requirement of a sufficiently definite or determinable price can be seen as having been excluded by the parties. Accordingly, a valid contract has been concluded and the price has to be determined according to Art.55 CISG."[39]

As has been stated by Schlectriem, Art.55 of the CISG has an application scope in cases where the parties exclude any types of price determination (based on party autonomy acc. to Art.6 of the CISG) and conclude a valid contract.[40]

Art.55 of the CISG has a gap filling function in terms of open price contracts as well; because Schlechtriem and Mullis claim that the formation of contract is governed by usually national contract laws, if there is an existing reservation (based on the Art. 92 of the CISG) on the application[41] of Part II CISG (provisions on formation of contract btw. Art.14-24 of the CISG) or the absence of price determination arises from the usages or practices between the parties (acc. to Art. 9 CISG).[42]

II. Termination of Offer

1. Effectiveness and Withdrawal of an Offer

If there is an effective offer (assuming the criteria to be an offer are met) the

[35] Ludwig, supra n. 12, p.45.
[36] Gruber, in MünchKomm, CISG Art.14, para.19.
[37] Schlechtriem, supra n. 2, p.71.
[38] Mullis, supra n. 5, p.76.
[39] Schlechtriem, supra n. 2, p. 72.
[40] Mullis, supra n. 5, p. 76.
[41] Denmark, Finland, Norway and Sweden are the contracting states that have put a reservation. See Herre, in Kröll/Mistelis/Viscasillas, CISG (Commentary) Art.92, para.2.
[42] Schlechtriem, in Schlechtriem/Schwenzer, Art.14, para.20; Mullis supra n. 5, p.77.

next step stays as the determination of effectiveness of an offer.[43] Art. 15 of the CISG shows the rule as to whether and when an offer is effective and when it may be withdrawn[44] and its first sentence says "an offer becomes effective when it reaches[45] the offeree." (Art.15 (1))

Art.15 of the CISG follows the approach based upon "Receipt Theory" in terms of effectiveness of declarations (not only for offer but also for acceptance)[46] under contract formation.[47] Therefore, according to Art.15 of the CISG, for an effective offer, the offeree has to receive it so contrary to "Dispatch Theory", dispatching of proposal does not suffice to become an offer.[48]

Another consequence which arises from Art.15 of the CISG is related to the terms "withdrawal and revocability"[49] of an offer under the CISG.[50] However "withdrawal" and "revocation" are not differently daily used words, they have different meanings under the CISG.[51]

Also, the2nd sentence of Art.15 of the CISG provides that "an offer, even if it is irrevocable, may be withdrawn if the withdrawal reaches the offeree before or at the same time as the offer." Both two terms "revocability" and "withdrawal" are seen together here. Although the provision includes the "irrevocability", Art.15 of the CISG mainly governs the right to withdraw.[52]

Regarding Art.15, it is required to make a distinction between withdrawal and revocation, because their consequences in terms of the CISG are not corresponding.[53]To explain the differences, Eörsi claims that this distinction exists in different stages of contract formation.[54] At first stage, as has been written in Art.15 (1) of the CISG, an offer needs to reach the offeree in order to be effective.[55] Until an effective offer exists or at the time of effectiveness, it can be withdrawn by the offeror (Art. 15 (2) CISG) it means that withdrawal can be before or at the time when offer reaches the offeree.[56] Unless it

[43] J Lookofsky, Understanding the CISG, Kluwer Law International, 3rd (Worldwide) Ed.2008, p.52.
[44] Witz/Salger/Lorenz/Witz, Art.15, para.1.
[45] What is understood under "reaching" is regulated separately in Art.24 CISG.
[46] Eörsi, in Bianca-Bonell Commentary on the International Sales Law, Giuffrè, Milan (1987) 145-149 p.146 available at: http://cisgw3.law.pace.edu/cisg/biblio/eorsi-bb15.html (Last visit: 15.10.2012).
[47] Kindler P, Einführung in das neue IPR des Wirtschaftsverkehrs, Verlag Wirtschaft und Recht, Frankfurt a.M, 2009, p.93.
[48] Eörsi, supra n. 46, p.148.
[49] The term "Withdrawal" comes from Anglo Saxon Origin, the term "revocation is of Latin origin. See Eörsi, supra n. 46, p.147.
[50] Eörsi, supra n. 46, p.147.
[51] Ibid, p.147-148.
[52] Lookowsky, supra n. 43, p.52.
[53] Eörsi, supra n. 46, p.147.
[54] Ibid.
[55] Ibid.
[56] Kindler, supra n. 47, p. 95.

is withdrawn, it goes to the second stage and here it becomes already effective and under certain conditions may be revoked.[57]

It has to be noted here, the revocation of an offer under Art.16 of the CISG is separated from the term "withdrawal" under Art.15 (1) of the CISG.

2. Revocation of Offer

Whether an offeror is bound by his proposal is a question, which has different answers according to Common Law and Civil Law Systems. It has to be said that CISG has reached a compromise on revocation of offer between Common Law and German Law System.

a) Revocability of Offer under the CISG

Art.16 (1) of the CISG allows to the offeror to revoke his offer, until the offeree dispatches his acceptance[58] so Art.16 (1) shows the basic principle that an offer is revocable under CISG[59] after acceptance is dispatched by offeree, the offeror`s right to revoke drops.[60] If offeror enjoys his right to revoke, this revocation has to reach the offeree, before the offeree dispatches an acceptance in response to the effective offer.[61] Here this result is accepted as a remarkable consequence of "Common Law-Mailbox rule."[62]

Although, by Art.16 (1) of the CISG, the revocability of offer is provided, Art.16 (2) of the CISG sets an exception to revocability of offer.[63] Firstly Art.16 (2), lit a. shows the irrevocability of the offer, in cases if the offer fixes a time period for acceptance or it indicates itself that, it is irrevocable.[64] According to Giannini; this is a close approach of the CISG towards the provision of §145 BGB, which provides irrevocability in principle.[65]

According to Eörsi, under the CISG, fixing a time period for acceptance is not enough to make an exception to Art.16 (1) of the CISG and it requires

[57] Eörsi, supra n. 46, p. 147.
[58] Schlechtriem, supra n. 2, p.73.
[59] Mullis, supra n. 5, p.81.
[60] Ludwig, supra n. 12, p.313.
[61] A Garro, Reconciliation of Legal Traditions in the U.N. Convention on Contracts for the International Sale of Goods, 23 Int`L Law. (1989), pp. 443-483, p.455, available at: http://cisgw3.law.pace.edu/cisg/biblio/garro1.html (last visit: 15.10.2012)
[62] According to Common Law-Mailbox Rule, if the offeree dispatches an acceptance before the revocation reaches, the offer may not be revoked anymore.
[63] Saenger, in BeckOK, CISG Art.16, para.4.
[64] Eörsi, in Bianca-Bonell Commentary on the International Sales Law, Giuffrè: Milan (1987) pp. 150-160, p.157, available at: http://cisgw3.law.pace.edu/cisg/biblio/eorsi-bb16.html Last visit: 15.10.2012
[65] G Giannini, The Formation of the Contract in the UN Convention on the International Sale of Goods: A Comparative Analysis, Nordic Journal of Commercial Law, (2006/1), available at: http://www.cisg.law.pace.edu/cisg/biblio/giannini.html#iii (Last visit: 14.10.2012).

an indication of irrevocability as well[66] contrarily, Kindler[67] and Ludwig[68] accept that fixing a time period is enough to assent the irrevocability of offer under Art.16 (2) lit.a of the CISG.

Secondly according to Art.16 (2) lit.b, in cases if the offeree reasonably relies that offer is irrevocable and acts in reliance on it, the offer is not revocable.[69] As it is seen here; whereas Art.16 (1) of the CISG stays closely to the Common Law, Art.16 (2) of the CISG exists as an exception to that approach.[70]

In conclusion, it is fair to say that the "revocability of offer" under CISG is limited because, the offeror is bound by his offer; (has no right to revoke) between the dispatch time of acceptance and it`s arrival at the offeror.[71]

Art.16 of the CISG is considered as a compromise between the Civil Law and the Common Law understanding of revocation of an offer.[72] By that reason, in practice while conclusion of an international sales contract, an interpretation problem may arise in terms of irrevocability of offer between parties from different legal systems.[73]

b) Excursus: German Approach (Irrevocability of Offer)

As has been seen above "irrevocability of offer" is a significant difference, which hereby has to be handled between German legal system and the CISG.

"Any person who offers to another to enter into a contract is bound by the offer, unless he has excluded being bound by it." (§145 BGB)[74]

Although in the CISG, in principle an offer is revocable, according to German approach, offeror is bound by his proposal (Antrag)[75] at the time of delivery to the offeree (when it is effective acc. §130 BGB).[76]

By the reason of the binding effect of offer, according to §145 BGB, offer is in principle irrevocable,[77] unless the offeror indicates that he is not bound by his offer.[78] This approach shows that removal of that binding effect is possible through one-sided declaration of offeror.[79] For example, if the offeror, his offer as "freibleibend", "ohne obligo" or somehow not binding declares; there is an

[66] Eörsi, supra n. 64, p.157.
[67] Kindler, supra n. 47, p.97.
[68] Ludwig,supra n. 12, p.314.
[69] Eörsi, supra n. 64, p.157.
[70] Mankowski, in Ferrari, Internationales Vertragsrecht, Art.16, para.1.
[71] Ludwig, supran. 12, p.345.
[72] Ferrari, in Kröll/Mistelis/Viscasillas, CISG (Commentary) Art.16, para.1.
[73] Giannini, supra n. 65.
[74] BGB in English, Translation available at: http://www.gesetze-im-inter net.de/englisch_bgb/englisch_bgb.html#p0428 (Last visit: 14.10.2012)
[75] Busche, in MünchKomm, BGB §145, para.1.
[76] Eckert, in BeckOK, BGB § 145 para.31.
[77] NJW 199, pp. 311-312.
[78] Brox, AT, para.168.
[79] Jauerning, in Jauerning § 145,para.5; Brox, AT, para.170.

exclusion of "binding effect"[80] and the offer becomes revocable.

For the sending form of this one-sided declaration, it is fair to say that either the offer itself may include such a declaration or this declaration may be separately sent from the offer.[81]

3. Rejection of Offer and Expiry of Time Set for Acceptance

Under the CISG, "rejection" is the third termination ground apart from withdrawal (Art.15 CISG) and revocation of offer (Art.16 CISG).[82] Pursuant to Art.17 of the CISG an offer is terminated through rejection by offeree.[83]Accordingly, rejection of an offer must be either expressly or by an implication[84] but if it is an explicit rejection, it has to reach the offeror.[85] The receipt theory here applies to declaration of rejection as well.[86]

Offer may be rejected even after the offeree dispatches acceptance but this acceptance does not have to receive to the offeror.[87] It means that the rejection avoids the conclusion of a contract only if it reaches the offeror before or at the same time of the receipt of acceptance to the offeror.[88] The consequence of the receipt theory is seen here as well.

According to Schlechtriem, the rejection of an offer should be considered in the same way as the withdrawal of an acceptance.[89] If the rejection reaches the offeror before the acceptance, a contract is not concluded and it cannot be saved through applying Art.21[90] of the CISG.[91]

Art.17 of the CISG reveals the result of the rejection and states that, "the original offer can no longer be accepted, even if it is irrevocable."[92]

Besides the above-mentioned termination grounds, under the CISG there is no provision that indicates whether the expiry of time period (fixed by offeror)

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[80] Giannini, supra n. 65
[81] Brox, AT, para.170.
[82] Kindler,supra n. 47, p. 97.
[83] Gruber, in MünchKomm, CISG Art.17,para.1.
[84] Mankowski, in Ferrari Internationales Vertragsrecht, Art.17, para.6.
[85] Witz/Salger/Lorenz/Witz, Art.17, para.6.
[86] Ibid.
[87] Schlechtriem, in Schlechtriem/Schwenzer, Art.17, para. 3.
[88] Ibid.
[89] Schlechtriem, in Schlechtriem/Schwenzer, Art. 17, para.3.
[90] Art. 21 (1) CISG: A late acceptance is nevertheless effective as an acceptance if without delay the offeror orally so informs the offeree or dispatches a notice to that effect.
Art. 21 (2) CISG: If a letter or other writing containing a late acceptance shows that it has been sent in such circumstances that if its transmission had been normal it would have reached the offeror in due time, the late acceptance is effective as an acceptance unless, without delay, the offer or orally informs the offeree that he considers his offer as having lapsed or dispatches a notice to that effect.
[91] Schlechtriem, in Schlechtriem/Schwenzer, Art.17, para. 3.
[92] M Viscasillas, Cross-References and Editorial Analysis: Article 19, available at: http://cisgw3.law.pace.edu/cisg/text/cross/cross-19.html (Last visited: 15.10.2012).

for acceptance terminates the offer itself or not.[93] It should be noted that "expiration of time for acceptance" which has been written under Art.18 (2) (2nds.) does not terminate the offer itself.[94] According to Kindler, the time set for acceptance has a meaning that shows until when offeror is bound by his offer, which is governed under Art.16 (2) lit.a., it does not have a function to terminate offer after the time period expires.[95]

Moreover, it has to be noted that, the CISG does not govern the potential termination grounds like death or loss of capacity of the offeror.[96]

C. Acceptance

Acceptance is the second declaration of intent (in response to the offer), which has to reach the offeror[97] in order to conclude an effective contract.[98]

Articles 18-22 of the CISG are the provisions that are related to the subject of acceptance. In this part, acceptance under the CISG will be treated in detail.

I. Types of Acceptance

Under the CISG, firstly it has to be mentioned that the means of declaration are left optional to offeree and actually there is no necessity of a certain form for acceptance[99] but there are different types of the acceptance, which hereby will be handled.

1. Acceptance by Explicit Declaration

Acceptance by explicit declaration can be divided into two different types which are firstly acceptance by written declaration and secondly acceptance by oral statement. But here just the acceptance by written declaration will be mentioned briefly.

Acceptance by written declarations is preferred mostly[100] and made by any forms of written statements such as letter, fax, email etc. and requires reaching the offeror as a result of the receipt theory[101]and also, the declaration which addresses the offeror, must be given by the offeree himself/herself or his legal representative.[102]

[93] Kindler, supra n.47, p.97.
[94] Ibid.
[95] Ibid.
[96] Ibid, p.95.
[97] Ludwig, supra n. 12, p. 63.
[98] Ibid.
[99] Witz/Salger/Lorenz/Witz, Art.18, para.6.
[100] Viscasillias, Contract Conclusion under CISG, 16 Journal of Law and Commerce (Spring 1997), pp. 315-344, pp. 325-326, available at: http://cisgw3.law.pace.edu/cisg/biblio/perales5.html#iii (Last visit:15.10.2012)
[101] Ibid, p. 326.
[102] Witz/Salger/Lorenz/Witz, Art.18, para.6.

2. The Special Case of Silence

Firstly it is important to say that under the CISG the offeree is not charged with a duty to reply to the offeror.[103] It is fair to say that like under German Law System such a consequence comes from the negative function of principle freedom of contract and by that reason[104], silence or inactivity[105] is not enough to set up an acceptance in itself unless there is no indication of assent.[106]

Art.18 of the CISG, sets a rule that actually protects the offeree from the traps of the offeror, for example, if no reaction were enough to amount the acceptance in itself, through sending goods and sending a proposal that stipulates in cases of not sending unsolicited goods will constitute an acceptance, would mostly lead to unwelcome situations for the offeree.[107] It also needs to be noted that the offeror may not obviate this rule (Art. 18 (1) (1sts.)) by stating "silence will be regarded as offeree`s assent to accept".[108]

However silence or inactivity does not constitute an acceptance at first instance, this does include some exceptional situations.[109] The wording of Art.18 (1) (2nd s.)[110] provides the possibility for the silence to be considered exceptionally as acceptance. The cases in which silence is accepted as acceptance, requires taking into consideration the relevant circumstances that support silence especially trade usages and practices.[111]

In such cases in which silence is recognized as acceptance, it is advised to handle and interpret each case individually and not generalize.[112] When parties had several business transactions by now, national courts will, taking into consideration those relations, decide whether by silence there is a valid acceptance or not.[113]

3. Acceptance by Performance

Whereas in Art.18 (1) of the CISG not only explicit declaration but also an implied conduct that is equal to offerees' assent as a rule [114] must reach the offeror, Art. 18 (3) of the CISG has an exceptional approach that goes away

[103] Lookowsky, supran. 43, p.55.
[104] Ibid.
[105] In English terminology also used; "inaction" or "no action" instead of inactivity.
[106] Schlechtriem, supra n. 2;p. 78; Kindler, supra n. 47, p.97.
[107] Schlechtriem, supra n. 2, p.77.
[108] Lookowsky, supra n. 43, p.56.
[109] Schlechtriem, supra n. 2, p.78.
[110] Art.18 (1) (2nd s.)Silence or inactivity does not in itself amount to acceptance.
[111] Lookowsky, supra n. 43, p.55; Schlechtriem supra n. 2, p.77.
[112] Schlechtriem, supra n. 2, p.78.
[113] Ibid; See desicionsrelated : Grenoble 21 October 1999 (CLOUT) abstract no. 313, Unilex database: http://www.unilex.info/case.cfm?pid=1&do=case&id=415&step=FullText (Last visit: 15.10.2012); OLG-Rp Hamm (1993 27(L)), Unilex database: http://www.unilex.info/case.cfm?pid=1&do=case&id=52&step=FullText (Last visit: (15.10.2012).
[114] Art. 24 CISG.

from the receipt theory.[115] Through only performing an act, such as shipment of goods, payment of the price,[116] the offeree may communicate his acceptance effective, and conclude the contract even if the acceptance does not have to reach the offeror[117] and furthermore in cases if the offeree accepts an offer by performing an act, the notification is not required to conclude an effective contract[118] because the acceptance becomes effective when the performance begins.[119]

II. Derivation of Acceptance from the Offer

"A reply to an offer which purports to be an acceptance but contains additions, limitations or other modifications is a rejection of offer and constitutes a counter offer." (Art. 19 (1) of the CISG)

Accordingly, an acceptance must comply exactly with the offer[120] similarly in the traditional conception; the acceptance must be a response like the mirror image[121] of its offer.[122] On the contrary, acceptance does not require the same wording as used in the offer but a response, which aims to be an acceptance, constitutes (instead of an acceptance) rejection and a counter-offer, if it derives from the content of the offer.[123]

It is fair to say that the CISG takes into consideration the complexity of the international commercial practices and based on that consideration, we see an exception to the Mirror Image Rule under Art. 19 (2),[124] as has been stated below;

"However a reply to an offer which purports to be an acceptance but contains additional or different terms which do not materially alter the terms of the offer constitutes an acceptance, unless the offeror, without undue delay, objects orally to the discrepancy or dispatches notice to that effect. If he does not so object, the terms of the contract are the terms of the offer with the modifications

[115] Kindler, supra n. 47, p.97-98.
[116] Schlehctriem, supra n. 2, p. 77.
[117] Saenger, in BeckOK, CISG Art. 18(3), para.4.
[118] Ibid.
[119] Lookowsky, supra n. 43, p.57.
[120] Ibid.
[121] "This paragraph states the traditional principle known as the mirror image rule." See, Viscasillas, supra n. 92.
[122] Lookowsky, supra n. 43, p.57; Mullis, supra n. 5, p.89.
[123] Kindler, supra n. 47, p.98; Lookowsky, supra n. 43, p.57; Eckert, in BeckOK, BGB§150, para.14.
[124] Farnsworth, in Bianca-Bonell Commentary on the International Sales Law, Giuffrè: Milan (1987) pp. 175-184, p. 175, available at: http://cisgw3.law.pace.edu/cisg/biblio/farnsworth-bb19.html (Last visit: 15.10.2012); Mullis, supra n. 5, p.89; K Wildner, Art. 19 CISG: The German Approach to the Battle of the Forms in International Contract Law, The Decision of the Federal Supreme Court of Germany of 9 January 2002, 20 Pace Int´l L. Rev. 1 (2008), pp. 1-30, p.2, available at: http://digitalcommons.pace.edu/pilr/vol20/iss1/1/ (Last visit: 12.09.2012).

contained in the acceptance." (Art.19 (2) of the CISG)

In spite of the additions or modifications of the offer, if there is no material alteration, Art.19 (2) applies.

By the way it is important to remind that the qualification of the alteration (as non-material or material) has crucial importance[125] and here some difficulties arise while determining whether material or non-material modification exists.[126] Thanks to Art.19 (3) of the CISG, this determination is made easily, because a materiality test is provided under Art.19 (3) of the CISG. Accordingly,

"Price, payment, quantity and quality of the goods, place and time of delivery, the extent of liability of one party to the other or the settlement of disputes are accepted material."[127] This is a non-exhaustive list[128] and a change out of this list might be accepted material upon the individual case as well.[129]

Besides this non-exhaustive list, there are some cases in which material alterations under Art. 19 (3) of the CISG, were considered as immaterial by the courts; for instance the Austrian Supreme Court decided that an alteration in the quantity of the goods (in other elements of the contract is also possible) was a non-material one, because this alteration was in favour of the Offeror, so it did not constitute a counter offer.[130]

III. Standard Contract Terms and Battle of Forms

1. Inclusion of SCT into the Contract

Today it is accepted that, Standard Contract Terms (hereinafter SCT) provide facilitation to daily trade and practice. Though SCT have a crucial role in terms of formation of contract, the concept of SCT is not clearly provided under the CISG.

[125] I Schwenzer/ F Mohs, Old Habits Die Hard: Traditional Contract Formation in a Modern World, IHR 2006, pp. 239-246, p.243, available at: http://cisgw3.law.pace.edu/cisg/biblio/schwenzer-mohs.html (Last visit: 13.09.2012).

[126] F Vergne, The Battle of the Forms Under the 1980 United Nations Convention on Contracts for the International Sale of Goods, 33 American Journal of Comparative Law, 1985, pp. 233-258, p. 256.

[127] Kindler, supra n. 47, p.98; Mullis, supra n. 5, p.89.

[128] Kindler, supra n. 47, p.98.

[129] Ibid.

[130] In English translated case, it is stated that: "Even though Art. 19(3) CISG enumerates certain modifications and qualifies them as material; it may as well be that modifications to these points within the declaration of acceptance are to be considered not material to the agreement. This might be a result of the special circumstances of the case, previous negotiations or of usages in the particular business or between parties. Modifications in favor of the offeror, in particular, do not require a counter acceptance." Federal Supreme Court of Austria, 20.03.1997 available at: http://cisgw3.law.pace.edu/cases/970320a3.html (Last visit: 15.10.2012).

It is obvious that the standard terms will have effect when they are part of the contract.[131] Actually, in order to be a part, they have to be included into contract but here this raises the question of how the inclusion of SCT may happen.

As has been mentioned above, the inclusion of SCT is not an issue precisely governed by the CISG but the issue may be handled in respect of the Art.8, Art.14, Art.18[132] and Art.19 of the CISG.[133] But here we accept to deal with only Art.19 (2) of the CISG and the other articles mentioned above will not be examined in this work.

Pursuant to the Art.19 (2) of the CISG, while including the standard contract terms into contract, the parties` assent is necessary. As a consequence of the same article, as long as the standard terms have no material alterations (limitations as well) and where the other party does not oppose those terms, the SCT may become the part of the contract.[134]

Additionally, it has to be mentioned that as a result of receipt theory (which seems dominant in terms of contract formation under the CISG) the inclusion of standard terms has to receive the other party in order to be effective.[135]

2. Battle of Forms & the Theories for the Solution

Although, in many international sales cases, standard form documents (standard terms and conditions) are commonly used and have important roles in standardizing and accelerating the contract formation process;[136] until a dispute exists, the parties usually are not aware of those incorporated standard forms, which they communicate each other.[137]

Schlechtriem states that, "Differences between a declaration of acceptance and offer are nearly always the result of incorporation of, or attempts to incorporate standard terms of contract."[138] Therefore it is clear thatif the parties exchange standard terms, which are inconsistent with each other, a conflict occurs. That situation is especially called "battle of the forms" regarding the conflicting SCTs between the parties.

In cases such a conflict in the standard terms (a battle of the forms) exists,

[131] Ludwig,supra n. 12, p.79.
[132] S Eiselen, The Requirements for the Inclusion of Standard Terms in International Sales Contracts, Potchefstroom Electronic Law Journal, Vol. 14, No. 1, 2011, pp. 2-31, p. 4, available at SSR: http://ssrn.com/abstract=1838362 (Last visit:14.10.2012)
[133] Ludwig,supra note 12, p.336.
[134] Ibid.
[135] Ibid, p.337.
[136] Mullis, supra n. 5, p.91.
[137] U Magnus, Last Shot vs. Knock Out–Still Battle overthe Battle of Forms underthe CISG, in Commercial Law Challenges in the 21st Century, Jan Hellner in memoriam, Stockholm Centre for Commercial Law Juridiska instutionen, 2007, pp. 185-200, p.186. available at: http://www.cisg.law.pace.edu/cisg/biblio/magnus4.html (Last visit: 15.09.2011).
[138] Schlechtriem, in Schlechtriem/Schwenzer, Art. 19, para.19.

two questions have to be answered by the courts. Firstly was a valid contract formed? Secondly, if there is a formation of valid contract, which terms are the parts of the contract? The latter determination is seen mostly controversial.[139]

Indeed, the CISG has no special provision that governs the standard terms and to answer those two questions.[140]If there is the problem of conflicting standard terms in an international sales contract, there arethree approaches that treat the problem and reach the solutions in different ways.[141]

a) Approach of Domestic Law

According to that approach, CISG and its general principles do not include sufficient solution for the conflicting standard terms because the issue is related to the validity of contract,[142]which is not governed by the CISG and therefore the domestic law has to be applied.[143]But actually regarding the aim of the CISG (unification of international sales law) it is fair to say that this approach is not a way that the CISG wants to reach in terms of the standard contract terms and the contract formation.

Also, in contrast to Domestic Law Approach scholarly arguments have to be pointed here. Piltz accepts that, incorporation of standard terms is a matter of the contract formation which is explicitly ruled by the CISG and thereby the problem of standard terms has to be resolved under the CISG instead of domestic law and also, Moccia argues that the courts should consider separately as first whether a valid contract concluded and then as second step which terms are the parts of the contract have to be answered according to the general principles upon which the CISG is based instead of domestic law.[144]

[139] M Viscasillas, Battle of the Forms, Modification of Contract, Commercial Letters of Confirmation: Comparison of the United Nations Convention on Contracts for the International Sale of Goods (CISG) with the Principles of European Contract Law (PECL)" (2002). 14 Pace Int'l Law Review, pp. 153-161, p. 156, available at: http://digitalcommons.pace.edu/pilr/vol14/iss1/6 (Last visit: 15.10.2012)

[140] B Piltz, Standard Terms in UN-Contracts of Sale, VJ 2004 (8), pp. 233–244, available at: http://25.cisg.info/content/publikation.php?id=10 (Last visit: 15.10.2012)

[141] Schlechtriem, in Schlechtriem/Schwenzer, Art. 19, para. 21.

[142] According to Art.4 (a) "…Convention, it is not concerned with the validity of the contract".

[143] "Näher liegt die Folgerung, dass bei sich also um ein im Gesetz nicht geregeltes "Gültigkeitsproblem" im Sinn des Art. 4. S.2 lit. a handelt, zu dessen Lösung auf das Kollisionsrechtlich berufene nationale Reckt zurückzugreifen ist." U von Huber „Der UNCITRAL-Entwurf eines Übereinkommens über Internationale Warenkaufverträge." 43 Rabels Zeitschrifft, H. 3, p.445.

[144] C Moccia, The United Nations Convention on Contracts for the International Sale of Goods and the Battle of the Forms, Fordham International Law Journal (1989/1990), pp. 649-679, p. 674.

b) Last Shot Rule

This approach is considered as the most accepted one[145]and follows strictly the offer- acceptance rules.[146]

As has been discussed in Art.19 of the CISG, a response with material modifications is not an acceptance in addition to this it leads to a rejection and even a counter offer. In the same case if the other party turns with a reply that includes material alterations at that moment this also means a rejection and new counter-offer as well and this goes on like a ping pong game[147]through mutually sending by parties their own conditions until one party commence to performing.[148]If there is a performance by one party, it means that the last submitted offer is accepted through a performance, which indicates assent to the offer (Art.18 (1) of the CISG).[149] Accordingly, the last sent form is the part of the contract and the sender of the last form is the winner of the battle.[150]

Contrary to that approach, it is argued that this approach is not in accordance with commercial reality.[151]According to Magnus, this theory is unsatisfactory if the parties start the performance and still insist on their own terms[152] and Wilmer also claims that it is not always clear who is the sender of the last form; therefore some difficulties arise especially in terms of the determination of the contract elements.[153]

In conclusion, considering the real commercial law in which each party insists on their own conditions, we agree that this theory is not adequate to solve the problem of the battle of forms.

c) The Knock out Rule

Pursuant to this approach the problem of the battle of the forms, is accepted as a gap-filling problem, which has to be solved by the general principles of CISG.[154] Here under the Knock out Rule; Art.6 of the CISG, which stipulates the party autonomy, prevails and allows parties a deviation from Art.19 of the CISG.[155]

When the parties are content with the essential terms of the contract, under the Knock out Rule, it means that, parties agreed to exclude the conflicting

[145] Viscasillias, supra n. 139, p. 157.
[146] Wildner,supra n.124, p. 5;Mullis, supra n. 5, p. 93.
[147] Magnus, supra n. 137, p. 186.
[148] Ibid; Wildner, supra n. 124, p. 5.
[149] Wildner, supra n. 124, p. 5.
[150] Ibid, p. 6; Viscasillias, supra n. 139, p. 157.
[151] Mullis, supra n. 5, p. 94
[152] Magnus, supra n. 137, p. 192.
[153] Wildner, supra n. 124, p. 6.
[154] Viscasillias, supra n. 139, p.157.
[155] Ibid; Schlechtriem, supra n. 2, p. 82.

standard terms and enter into the contract with only essential terms.[156]Actually in other words, here the conflicting terms are knocking each other out, and the provisions of the CISG are taking the place of those conflicting terms.[157]

The German Courts also have followed different approaches, now the Knock out Rule is a very close approach to the German Supreme Court (BGH)[158] and in a decision in 2002 shows the BGH's approach, which obviously follows the Knock out Rule and states that;

"According to the (probably) prevailing opinion, partially diverging general terms and conditions become an integral part of a contract (only) insofar as they do not contradict each other; the statutory provisions apply to rest (so called "knock out"rule)."[159]

In conclusion as has been discussed above, there is no consensus on the best way to overcome the battle of forms neither in the literature[160] nor in the court decisions, but it is fair to say, like the German Supreme Court approach, when standard terms are contradicting with each other, then those terms may be excluded and therefore, the rest of the terms may still be part of the contract.

IV. The exact Moment of the Contract Conclusion

Art.23 of the CISG governs "the exact moment of the contract conclusion".[161]Accordingly, the time when the acceptance becomes effective, the contract is concluded.[162] Art.18 (2) of the CISG also shows the time when "acceptance" becomes effective.[163] Accordingly the acceptance has to reach the offeror to become effective and just the dispatch (sending) of the acceptance by the offeree does not suffice to get an effective acceptance and a concluded contract as well.

V. Late Acceptance

1. Under the CISG

Art.21 of the CISG governs the problem of the late acceptance[164] and states that even the late acceptance may lead to a contract conclusion.[165]

[156] Schlechtriem,supra n. 2, p.82; Mullis, supra n. 5, p. 94.
[157] Wildner,supra n. 124, p. 7.
[158] Schlechtriem,in Schlechtriem/Schwenzer, Art. 19, para.21.
[159] BGH, 9 January 2002,CISG-Online 651 see for English translation; Ingeborg S, Fountoulakis C, International Sales Law, Routledge-Cavendish, 2007, pp.166-168.
[160] M van Alstine, Fehlender Konsens beim Vertragsabschluss nach dem einheitlichen UN-Kaufrecht. Eine rechtsvergleichende Untersuchung auf der Grundlage des deutschen sowie des US-amerikanischen Rechts. 1st ed. Nomos. Baden-Baden, 1995, p. 214.
[161] Gruber, in MünchKomm, Art.23, para.1.
[162] Ludwig, supran. 12, p.347.
[163] Schlechtriem, in Schlechtriem/Schwanzer, Art. 18, para.11.
[164] Schlechtriem, in Schlechtrim/Schwanzer, Art.21,para.2.
[165] Ibid.

Art.21 of the CISG distinguishes the reasons of late acceptance.[166] Whereas Art.21 (1) of the CISG exists as general rule for late acceptance, Art.21 (2) of the CISG becomes an exception to that general rule.[167] Under Art.21 (1) of the CISG, there is a general rule for the effect of late acceptance and Art.21 (2) of the CISG examines the lateness because of delay in transmission and its results.

As the consequence ofArt.21 (1) and Art.21 (2) of the CISG, the offeror has right to choose to be bound in response to the late acceptance but in first situation (Art.21 (1)), the lateness arises from the offeree´s own behaviour according to Farnsworth, if the offeror wants to be bound to the contract, he has to send a notification to the offeree as soon as possible otherwise he does not have to send any notification.[168] On the contrary in the latter article, the reason of lateness is separated from the offeree`s behaviour, that reason arises from the delays in transmission.[169] Here the offeree has no fault in lateness and he has reliance and expectations on the formation of the contract, that is why the silence in response to that kind of late acceptance is of a binding legal consequence and accordingly unless there is no notification of offeror to the offeree, this means that, the contract is concluded with the late acceptance.[170]

As has been seen above, in case of the late acceptance under CISG, the offeror has the right to refuse the late acceptance[171] and for the cases under Art.21 (2) of the CISG, which covers the late acceptance on account of delay in transmission, offeror´s silence against late acceptance is deemed as an approval of offeree´s acceptance, but offeror still has the power to declare not to be bound to the contract.[172] These separated results of Art.21 (1) and Art.21 (2) show us the CISG tries to find a fair solution towards the problem of the late acceptance between the offeree and the offeror through distinguishing the lateness reasons and their consequences in a balanced way.

2. Excursus: Late Acceptance underBGB

Under German Law, there is a different approach from the CISG, in terms of the late acceptance.[173] According to §150 (1) BGB, an acceptance, which is dispatched by the offeree after the expiration of time or a reasonable time is a counter offer (Gegenangebot) and requires new acceptance from the offeror.[174]

[166] Ibid.
[167] Farnsworth,in Bianca-Bonell Commentary on the International Sales Law, Giuffrè: Milan (1987), pp. 189-194, p. 192, available at: http://www.cisg.law.pace.edu/cisg/biblio/farnsworth-bb21.html
[168] Ibid.
[169] Ibid, p. 188.
[170] Ibid, p. 189.
[171] Ibid, p. 191.
[172] Ibid, p. 192.
[173] Piltz, Beck sches Rechtsanwalts-Handbuch, § 16, para.15.
[174] Ludwig, supra n. 12, p.403.

Under § 149 BGB a late acceptance may be seen as an effective acceptance, unless the offeror informs the offeree forthwith that he does not approve the offeree`s acceptance and considers the offer as a lapsed offer.[175]

In conclusion, Art. 21 (2) CISG and § 149 BGB[176] have to be regarded as the match ups.[177] In order to apply the provision §149 BGB, the acceptance has to be dispatched by the offeree within a fixed or a reasonable time, but the offeror has to receive it lately in a concrete case.[178]

VI. Withdrawal of the Acceptance

According to the CISG, until the acceptance reaches the offeror, the offeree is the master of his acceptance[179] therefore the offeree may withdraw his acceptance (which is already dispatched) until it arrives to the offeror. This result comes from the receipt theory which has been mentioned above.

Withdrawal of the acceptance (Art.22 of the CISG) runs parallel with withdrawal of the offer (Art.15 of the CISG)[180] because under both provisions the withdrawal is only possible between the dispatch of the declarations and their arrival.

D. Conclusion

As has been evaluated that the formation of contract is also provided as a part under the CISG and the issue of the formation of the contract is dealt with the Part II of the CISG (Art.14-24).

The traditional offer-acceptance model is the only model that the CISG explicitly speaks about.

In terms of the effectiveness the offer and the acceptance, we have seen the dominated position of the receipt theory instead of the dispatch theory. Otherwise, if the dispatch theory was accepted under the Part.II of the CISG, the offer and the acceptance as well, would be effective after the dispatch of the offer by the offeror.

Considering the termination reasons of the offer under the CISG, we have dealt with firstly the withdrawal of the offer, which is acceptable only in between time of the dispatch of the offer and its reach the offeree.

Secondly, we have moved on the revocability of the offer and shown that under the CISG, the offer is in principle revocable unless there is no fixed time

[175] Eckert, in BeckOK, § 149, (intro) para. 1-12.
[176] "If a declaration of acceptance received late by the offeror was sent in such a way that it would have reached him in time if it had been forwarded in the usual way,.." (§ 149 BGB)
[177] Eckert, in Beck OK,§149 BGB, para. 12.
[178] Busche, in MünchKomm, §149 BGB, para.1.
[179] Ludwig, supra n. 12, p.345.
[180] Ibid.

for acceptance or there is no reliance by the offeree on the irrevocability of the offer. As a deviation from the principle of the receipt theory, we have mentioned briefly that Art.16 (1) of the CISG, follows the Common Law-Mailbox rule and therefore; the revocation has to reach the offeree before he dispatches an acceptance and thanks to the exceptions in Art.16 (2) of the CISG, it has been accepted that, there is a close approach to German understanding of the irrevocability of offer. It should be noted that, some practical misunderstandings may arise between the contract parties from different legal systems.

Finally, as the third reason of the termination of the offer, the rejection of the offer has been discussed.

In terms of the acceptance, the offeree is not charged with a reply in response to the offer and therefore in principle silence is not deemed as acceptance in itself.

Whereas the CISG requires material alterations to make the deviated offer turn into a counter offer and terminate the former one, BGB makes no materiality test and accepts each deviation from the offer as counter offer and termination reason for the former offer.

The problem of the inclusion of standard contract terms is not directly governed by the CISG and there is also no consensus on the solution of the battle of the forms under the CISG regime.

As the last important point, the late acceptance has been discussed through making comparison between the CISG and the German approach.

In conclusion, it is fair to say that for the unification of the formation of the contract The CISG has attempted to reach a compromise between civil law and common law systems and managed to uniform the issue of the formation of contract between the contracting states.

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