It should be noted however that there also are arbitral awards which have not (at least not explicitly) taken that view. Instead, the Tribunals appear to have relied on Art. 1(1) lit. (a) CISG (both parties from a Contracting State) without going into a private international law analysis first.[217] In the author's opinion, such a shortcut avoiding the relevant private international law rule and analysis should not be taken. It is submitted, however, that if both parties have their places of business in (different) Contracting States, the practical results between both approaches will often be the same as the applicable law will frequently be the law of one of the parties so that the CISG would then have to be applied even under the approach favoured here.

Chamber of Commerce and Industry Court of Arbitration, CISG-Online No. 163; Arbitral Award, CIETAC CISG/1999/20, CISG-Online No. 1244; but see also for example Arbitral Award, CIETAC CISG/1999/25, CISG-Online No. 1356. For more detail see *Ferrari*, in: Ferrari/Flechtner/Brand, The Draft UNCITRAL Digest and Beyond, p. 55 et seq.

[217] See for instance: Arbitral Award, ICC 7531/1994, CISG-Online No. 565; Arbitral Award, ICC 7153/1992, CISG-Online No. 35; possibly also Arbitral Award, Hungarian Chamber of Commerce and Industry Court of Arbitration, CISG-Online No. 500.

Part 3:

Formation of the contract

§ 4. Rules on formation of contract

I. Introduction

1. Traditional model of offer and acceptance

The Convention, in line with most legal systems,[218] adopts the traditional model of offer and acceptance in order to determine whether a contract has been concluded.[219] That is to say, there must be a definite offer made by one party that is clearly and unequivocally accepted by the other. The rules governing formation are set out in Part II of the Convention. Under these rules, a contract is said to be concluded when an acceptance of an offer becomes effective. The first four articles of Part II (Art. 14-17 CISG) deal with the offer, while the following five articles (Art. 18-22 CISG) deal with the acceptance. The final two articles (Art. 23-24 CISG) address the time when a contract is concluded and when a communication "reaches" the addressee, respectively.

2. Reservations against the application of Part II

Art. 92 CISG allows a contracting state to declare at the time of signature, ratification, acceptance, approval or accession that it will not be bound by Part II[220] of the Convention.[221] If a state does so, it is not considered a Contracting State within Art. 1(1) CISG in respect of matters governed by Part. II, i.e. in respect of Art. 14-24 CISG. It follows from this that if party A has its place of business in a Contracting State (C) and party B in a Reservation State (R),

[218] See *Schlesinger*, Formation of Contract, Vol. 2, p. 1584 et seq.

[219] As for other techniques of concluding the contract see below V.

[220] Or Part III which contains the rules on the sale of goods (Art. 25-88 CISG).

[221] As of May 2007 Denmark, Finland, Iceland, Norway and Sweden have made such a reservation with regard to Part. II. For an explanation of why these countries have taken this position see *Kai Krüger*, Norsk kjøpsrett (Norwegian Sales Law), Bergen (Alma Mater), 4th ed. 1999 (available at http://www.cisg.law.pace.edu/cisg/biblio/kruger.html). For the exact status of reservations see www.uncitral.org.

Art. 1(1) lit. (a) CISG of the Convention cannot apply because R will not be regarded as a Contracting State by virtue of Art. 92(2) CISG.[222] The provision of Art. 1(1) lit. (b) CISG will however remain applicable.[223] Thus if the private international law of the forum state leads to the application of the law of a Contracting State which has not made a reservation under Art. 92 CISG, Part II of the Convention (Art. 14-24 CISG) will be applicable as part of the law of that Contracting State.[224]

Under Art. 94 CISG, Contracting States which have the same or closely-related legal rules on the formation of a sales contract may declare that the Convention is not to apply to the formation of sales contracts where the parties have their places of business in these States. Thus far, only the Scandinavian states have made a reservation under this provision.[225]

II. The offer

Art. 14(1) CISG provides that: "A proposal for concluding a contract addressed to one or more specific persons constitutes an offer if it is sufficiently definite and indicates the intention of the offeror to be bound in the case of acceptance." For there to be an offer, therefore, three elements must come together: the offeror must intend to be bound in the event that his proposal is accepted, the proposal must be sufficiently definite and, the offer must become effective. So too, to be capable of acceptance the offer must not have been "terminated". These elements will be dealt with in turn.

[222] See for instance (German) Oberlandesgericht Rostock 27 July 1995, Transportrecht – Internationales Handelsrecht (TranspR-IHR) 1999, 23 = CISG-Online No. 209.

[223] Provided that no Reservation under Art. 95 CISG is declared; for more detail see p. 54 et seq..

[224] *Schlechtriem*, in: Schlechtriem/Schwenzer, Commentary, Art. 92 para. 3; *P. Huber*, in: Münchener Kommentar zum Bürgerlichen Gesetzbuch, Art. 92 CISG para. 2.

[225] Denmark, Finland, Norway and Sweden declared, pursuant to Art. 94(1) and (2) CISG, that the Convention would not apply to contracts of sale where the parties have their places of business in Denmark, Finland, Iceland, Sweden or Norway. In a notification effected on 12 March 2003, Iceland declared, pursuant to Art. 94(1) CISG, that the Convention would not apply to contracts of sale or to their formation where the parties had their places of business in Denmark, Finland, Iceland, Norway or Sweden. See www.uncitral.org.

I. Intention to be bound

An essential element of a valid offer is that the offeror indicate his willingness to be bound in the case of acceptance. In many cases, the language used by the offeror will make it clear that he intends to be bound in the case of acceptance. Thus, the use, in a commercial context, of phrases such as "we order for immediate delivery"[226] and "we offer for sale" should normally be regarded as indicating an intention to be bound in the event of acceptance by the offeree. Where, on the other hand, the offer is made "without obligation" there will normally be no intention to be bound.[227] Where the words used are less obvious in meaning, the intention of the offeror will often become clearer when, as is required by Art. 8 CISG, the proposal is interpreted in its full context. Thus, in one case the buyer's request, made after the goods had been delivered, to issue an invoice was treated as sufficient evidence of the buyer's intention to be bound at the time he made his proposal.[228]

As is the case in most national legal systems, the Convention draws a distinction between an offer and a communication intended only to invite the recipient to make an offer to the communicator ("invitatio ad offerendum"). This distinction is easy to describe in theory but sometimes rather difficult to draw in practice. Ultimately, the answer depends on the elusive criterion of the proposer's intention which must be assessed by reference to the rules on interpretation of statements made by the parties contained in Art. 8 CISG. Where the proposer is found to have intended to bind himself in case of acceptance then it is an offer, if not, then the proposal is merely an invitation to make offers.

Art. 14(2) CISG seeks to deal with the classification problem where the proposal is made other than to "one or more specific persons", i.e. to the public. It states that such a proposal is to be considered merely as an invitation to make offers, unless the contrary is indicated by the person making the proposal. It does not follow from Art. 14(2) CISG however that a proposal made to one or more *specific* persons will always be treated as an offer. A proposer may have no intention to be bound, notwithstanding that his proposal is

[226] (Swiss) Handelsgericht St. Gallen 5 December 1995, Internationales Handelsrecht (IHR) 2001, 44 = CISG-Online No. 245; see also (Swiss) Handelsgericht Aargau 26 September 1997, Transportrecht – Internationales Handeslrecht (TranspR-IHR) 1999, 11 = CISG-Online No. 329.

[227] See for more detail *Schlechtriem*, in: Schlechtriem/Schwenzer, Commentary, Art. 14 para. 14.

[228] (Swiss) Bezirksgericht St. Gallen 3 July 1997, Transportrecht – Internationales Handeslrecht (TranspR-IHR) 1999, 10 = CISG-Online No. 336.

communicated to a specific person, where, for example, his proposal is stated to require further clarification or it is made in circumstances where it is clear that essential details remain to be determined. Ultimately, as explained above, it will be a matter of interpretation under Art. 8 CISG.

2. Offer sufficiently definite

a) Necessary content

In order to constitute an offer under Art. 14(1) CISG, the proposal made by the offeror must be sufficiently definite. By this is meant that the essential terms of any future agreement ("essentialia negotii") must be contained in the offeror's proposal such that if the proposal is accepted a contract capable of enforcement comes into existence.[229]

What then is required to make the proposal sufficiently definite? The second sentence of Art. 14(1) CISG provides that a proposal is sufficiently definite, "if it indicates the goods and expressly or implicitly fixes or makes provision for determining the quantity and the price." The degree of specification required will depend upon the type of goods that are the subject matter of the proposal. Thus, a proposal that indicates only the general description of goods in the case of goods that are available in several sizes or qualities may be held not to indicate the goods with sufficient particularity even though there is no general requirement that the quality of the goods be indicated.[230]

While the second sentence might be read to imply that a proposal will be sufficiently definite if the goods are indicated and the price and quantity determined or determinable, it seems clear that there may be cases where meeting these requirements may not be sufficient to render the proposal sufficiently definite. Thus, an express agreement between the parties,[231] reference to trade usage or a previous course of dealings may indicate that the offer must specifically refer to certain additional matters (such as time and place of shipment) which must then be agreed. A proposal that fails to refer to those matters cannot constitute an offer.

229 U.S. Federal District Court, Northern District of Illinois, Magellan International Corp. v Salzgitter Handel GmbH, 7 December 1999, CISG-Online No. 439; *Schlechtriem*, in: Schlechtriem/Schwenzer, Commentary, Art. 14 para. 2; *Gruber*, in: Münchener Kommentar zum Bürgerlichen Gesetzbuch, Art. 14 para. 13.

230 See for example (German) Oberlandesgericht Frankfurt 31 March 1995, CISG-Online No. 137.

231 Such as a framework contract.

b) Implicit determination

The second sentence of Art. 14(1) CISG allows the offeror to implicitly fix the "essentialia".[232] When deciding whether such an implicit determination has been made, regard is to be had to all relevant circumstances of the case including the negotiations, any practices which the parties have established between themselves, usages and any subsequent conduct of the parties (Art. 8, 9 CISG).[233] In one Hungarian case which involved parties who had traded together over a lengthy period, it was held that the terms as to quality, quantity and price were impliedly fixed by the practices established between the parties.[234] So too, in another case, it was held that a proposal to purchase three 'truck loads' of eggs was sufficiently definite. While the precise quantity was not expressly stated, a person in the position of the seller could only reasonably have understood that the proposal referred to full trucks. In that sense therefore the precise quantity was implicitly stated – the number of eggs needed to fill three trucks so that each one was full.[235]

c) Determinability

Under the second sentence of Art. 14(1) CISG, a proposal can be sufficiently definite notwithstanding that the price, goods and quantity are neither expressly nor implicitly fixed if provision is made for their determination, i.e. if

232 Although the wording of the provision only refers to quantity and price it is submitted that the same is true with regard to the determination of the goods.

233 *Gruber*, in: Münchener Kommentar zum Bürgerlichen Gesetzbuch, Art. 14 para. 18; *Schlechtriem*, in: Schlechtriem/Schwenzer, Commentary, Art. 19 para. 3. See also (Austrian) Oberster Gerichtshof 10 November 1994, CISG-Online No. 117 (the Supreme court in reaching its conclusion that a proposal to buy "a larger amount of chinchilla pelts of medium or superior quality" was sufficiently definite took into consideration the behaviour of the Austrian buyer who accepted the delivered goods and sold them further without questioning their price, quality or quantity).

234 (Hungarian) Metropolitan Court, Adamfi Video v Alkotók Studiósa Kisszövetkezet, 24 March 1992, CISG-Online No. 61. See also (German) Oberlandesgericht Hamburg 4 July 1997, CISG-Online No. 1299; (Austrian) Oberster Gerichtshof 6 February 1996, CISG-Online No. 224 (the fact that the parties only agreed on a approximate quantity of gas to be delivered did not prevent the conclusion of a contract as such an indication consituted a usage regularly used in the natural gas trade). See also, (French) Cour de Cassation, Ste Fauba France FDIS GC Electronique v Ste Fujitsu Mikroelectronik GmbH, 4 January 1995, CISG-Online No. 138.

235 (German) Landgericht Oldenburg 28 February 1996, CISG-Online No. 189.

they are determinable.[236] By way of example, if a buyer places an order for 100 widgets described and priced per unit in a catalogue, the price for the order is sufficiently determinable.[237] Further, it has been held that a proposal that the prices are to be adjusted to reflect market prices was sufficiently definite,[238] as was a contract price that could only be finally determined by reference to the price obtained by the buyer on reselling the goods.[239]

d) Power of determination

Where minimum elements of the proposal are made determinable by reference to a market price or some other mechanical measure, there has been little disagreement among scholars or courts that such proposals are at least, in principle, sufficiently definite. Cases likely to give rise to more difficulty are those where one or more of the minimum elements are left open to be determined by one or both of the parties or are to be referred to a third person for determination. In the author's view such terms may satisfy the definiteness requirement. The requirement that the essential elements must be definite is satisfied where they are fixed, determined or determinable. A proposal that includes the term that one or more of the essential elements is to be determined by one of the parties or by a third party is determinable in that sense.[240]

However, a number of points should be noted. First, such case law as there is does not unequivocally support this position.[241] Secondly, there is a serious question whether a proposal containing a term leaving an essential term to be determined later *by agreement* evidences a sufficient intention to be bound. In many cases, the natural inference to be drawn from a proposal that the price or quantity was "to be agreed" at a later date may be that the offeror did not intend to be bound until the price or quantity was settled by future agreement. Thus, unless such an intention to be bound can be inferred by recourse to Art. 8 or 9 CISG, a term providing that one of the minimum elements is "to be agreed between the parties" is unlikely to constitute an offer because it insufficiently evidences an intention to be bound. The third problem concerns enforceability. Assume, for example, that the proposal contains a provision that the quantity is to be agreed by the parties at some future date, and this is subsequently accepted by the offeree, what is the position if the parties cannot later agree on the quantity? Is the offeror or offeree to be treated as being in breach of contract or, on the assumption that good faith efforts to reach agreement have been made, is neither party? If the parties make best endeavours to fix a price but fail, what should a court do?

The final problem worth highlighting is that in some jurisdictions a clause that gives one party the power to determine certain matters may be invalid.[242] Under the prevailing opinion those domestic invalidity rules would be applicable by virtue of Art. 4 lit. (a) CISG.[243]

e) Determination of the price under Art. 55 CISG?

As we have seen, in most cases the price will have been determined in the contract, be it expressly or implicitly. Where, however, the contract (has been validly concluded but) does not expressly or implicitly fix the price or provide for a mechanism to determine the price, Art. 55 CISG gives a default rule for determining the price. Thus, the parties are considered to have impliedly made reference to the price generally charged at the time of the conclusion of the contract for such goods sold under comparable circumstances in the trade concerned. In short, the price shall be the usual price for such goods. The CISG thus follows the Common Law example albeit that the measure chosen is different.[244] Despite the fact that Art 55 CISG has triggered a considerable amount of controversy, its practical importance is likely to be limited.

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236 *Schlechtriem*, in: Schlechtriem/Schwenzer, Commentary, Art. 14 para. 5; *Gruber*, in: Münchener Kommentar zum Bürgerlichen Gesetzbuch, Art. 14 para. 19.

237 For a further example see (Austrian) Oberster Gerichtshof 10. November 1994, CISG-Online No. 117.

238 (French) Cour de Cassation, Ste Fauba France FDIS GC Electronique v Ste Fujitsu Mikroelectronik GmbH, 4 January 1995, CISG-Online No. 138.

239 ICC Arbitration Case No. 8324 of 1995 (available at http://cisgw3.law.pace.edu/cases/958324i1.html).

240 *Schlechtriem*, in: Schlechtriem/Schwenzer, Commentary, Art. 14 para. 6 et seq.; *Gruber*, in: Münchener Kommentar zum Bürgerlichen Gesetzbuch, Art. 14 para. 20; see also U.S. Federal District Court, New York, Geneva Pharmaceuticals Tech. Corp. v Barr Labs. Inc, 10 May 2002, CISG-Online No. 653. But see for the opposite view *Schnyder/Straub*, in: Honsell, Kommentar, Art. 14 para. 32.

241 See for instance opposed to the view suggested here (Russian) Arbitral Award 309/1993, Tribunal of International Commercial Arbitration at the Russian Federation Chamber of Commerce 3 March 1995, CISG-Online No. 204; for a note on that case see *Rozenberg*, A Case from the Practice of the International Court of Commercial Arbitration at the Russian Federation Chamber of Commerce & Industry (available at http://www.cisg.law.pace.edu/cases/950303r2.html).

242 See for example with regard to the position of French law *Witz*, The First Decision of France's Court of Cassation Applying the UN Convention on Contracts for the International Sale of Goods, (1997) 16 Journal of Law and Commerce, 334

243 *Schlechtriem*, in: Schlechtriem/Schwenzer, Commentary, Art. 14 para. 7; *Magnus*, in: Staudinger Kommentar zum Bürgerlichen Gesetzbuch, Art. 14 para. 24.

244 Cf. Section 8(2) English Sale of Goods Act; § 2-305(2) UCC.

The reason for the controversy is that Art 55 CISG only applies if the contract has been validly concluded without determining the price. Art. 14 CISG however provides that the contract is only validly concluded if the parties have determined the price. At first sight, therefore, the provisions seem to be inconsistent with each other. This apparent inconsistency had been discussed during the negotiations on the Convention[245], but had not been entirely resolved. A considerable number of solutions have been suggested in legal writing.[246] In short, two basic approaches can be identified.

First, there are those who argue that Art. 55 CISG should take precedence over Art. 14 CISG.[247] If the parties intended to conclude a binding contract without determining the price, then Art. 55 should be applied irrespective of Art. 14 CISG. According to the second, and prevailing opinion, Art. 14 CISG should be given precedence.[248] Under this approach Art. 55 CISG can only be applied if the case is such that the parties have concluded a valid contract despite failing to determine the price. It is submitted that this is the correct view because Art. 55 CISG expressly requires that the contract has been validly concluded. The main task therefore is to identify those cases in which the contract is valid without the determination of the price. It is submitted that there will primarily be two groups of cases which lead to this result.

The first group consists of those cases in which the parties knew and agreed that they wanted to conclude the contract without (expressly or implicitly) determining the price. It is submitted that in doing so the parties have implicitly derogated from Art. 14(1) second sentence CISG (which is permissible, Art. 6 CISG) so that the contract was validly concluded and Art. 55 CISG can be applied to determine the price.[249]

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245 Cf. *Hager*, in: Schlechtriem/Schwenzer, Commentary, Art. 55 para. 2 et seq.; *Schwenzer/Mohs*, IHR 2006, 239, 240.

246 For a detailed discussion see *Schlechtriem*, in: Schlechtriem/Schwenzer, Commentary, Art. 14 para. 8 et seq.

247 *Eörsi*, in: Bianca/Bonell, Commentary, Art. 55 para. 2.2.2, 2.3.

248 Cf. *Hager*, in: Schlechtriem/Schwenzer, Commentary, Art. 55 para. 5 et seq.; *P. Huber*, in: Münchener Kommentar zum Bürgerlichen Gesetzbuch, Art. 55 para. 7 et seq.; *Schnyder/Straub*, in: Honsell, Kommentar, Art. 55 para. 8.

249 *Schlechtriem*, in: Schlechtriem/Schwenzer, Commentary, Art. 14 para. 11; *Hager*, in: Schlechtriem/Schwenzer, Commentary, Art. 55 para. 7; *P. Huber*, in: Münchener Kommentar zum Bürgerlichen Gesetzbuch, Art. 55 para. 9; *Bernstein/Lookofsky*, Understanding the CISG in Europe, p. 51; *Schnyder/Straub*, in: Honsell, Kommentar, Art. 55 para. 10. In fact the view which wants to give precedence to Art. 55 CISG over Art. 14 CISG (Fn. 247 above) would probably reach the same result.

The second group consists of those cases in which the sales contract is governed by the CISG with the exception of Art. 14-24 CISG.[250] This situation can for instance arise as a result of a reservation made by a Contracting State under Art. 92 CISG as the Scandinavian countries have done.[251] It will also arise if the parties have excluded the application of Art. 14-24 CISG (as they are entitled to under Art. 6 CISG) or if the application of Art. 14-24 CISG is excluded by usages or practices (Art. 9 CISG). In these cases the conclusion of the contract is not governed by the CISG but by the applicable contract law, usually a national law. If this legal system allows a contract to be validly concluded even if there is no determination of the price, Art. 55 CISG will apply to fill the gap.[252]

It is sometimes argued that there is a third group of cases in which Art. 55 CISG will apply, namely those cases in which the contract was not concluded by a clear-cut exchange of offer (with which Art. 14 CISG is solely concerned) and acceptance, but by a series of communications, by their conduct (delivery, acceptance) or by simply executing a contract of sale.[253] Indeed it seems to be arguable in theory that Art. 14 CISG which only deals with the offer does not really fit and should therefore not apply to such cases, so that Art. 55 CISG could be applied. In the author's opinion, however, it is doubtful whether there really is a need to create this third group of cases. In fact one could also assume in the cases mentioned above that the parties intended to conclude the contract without having determined the price thus derogating from Art. 14 CISG. These cases would therefore fall under the first group anyway.

Summing the issue up, it is suggested that it is rather unlikely that a court properly directing itself will conclude that a contract is invalid for failure to fix the price (Art.14 (1) CISG).[254] This is true in particular for those cases in which the parties have already performed the contract (and "discover" later that the validity may be questionable, possibly after some dispute has arisen with regard to the quality of the goods). In most cases there will be an implic-

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250 *Hager*, in: Schlechtriem/Schwenzer, Commentary, Art. 55 para. 6. See also *Nicholas*, The Vienna Sales Convention on International Sales Law (1989) 105 Law Quarterly Review 201, 213.

251 See p. 51 et seq., 69 et seq.

252 *Schlechtriem*, in: Schlechtriem/Schwenzer, Commentary, Art. 14 para. 12.

253 *Honnold*, para. 137.5 et seq.

254 But see for examples to the opposite the decision of the (Hungarian) Supreme Court 25 September 1992, CISG-Online No. 63; (Russian)Arbitral Award, Tribunal of International Commercial Arbitration at the Russian Federation Chamber of Commerce 3 March 1995, CISG-Online No. 204.

it agreement on the price.[255] If there is not, there will often be a (implicit) derogation of Art. 14(1) second sentence CISG so that Art. 55 CISG will apply.

3. "Effective" offer

For an offer to be capable of being accepted, Art. 15(1) CISG requires that it must have become "effective", and for this to happen the provision requires that the offer must have "reached" the offeree.

By Art. 24 CISG, an offer[256] "reaches" the addressee, when it is made orally to him or delivered by other means to him personally or 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). The provision draws a distinction between oral declarations and those made by other means. Oral declarations would undoubtedly include a spoken communication made by one party to another while in that other's presence. Also included are spoken declarations made by telephone.[257] Where a declaration is made in any other way, it should generally be treated as having been made "by other means". Thus, a declaration made by letter or fax would be treated as having been made "by other means", as would a declaration communicated by e-mail or teletext.[258] Given the wording of the provision, "real time" electronic communication should also be treated as having been made "by other means" even though such method of communications is in some respects akin to a spoken conversation.[259]

An oral communication reaches the offeree only when it is "made orally to him." It is a matter for debate whether this requires that the offeree actually

[255] See *Gruber*, in: Münchener Kommentar zum Bürgerlichen Gesetzbuch, Art. 14 para. 23; *P. Huber*, in: Münchener Kommentar zum Bürgerlichen Gesetzbuch, Art. 55 para. 10; *Schlechtriem*, in: Schlechtriem/Schwenzer, Commentary, Art. 14 para. 11.

[256] Or declaration of acceptance, or other indication of intention. Art. 24 CISG therefore also applies to the acceptance, see below p. 95..

[257] A declaration that is recorded (e.g., by a telephone recording machine) is, it is suggested, not an oral declaration; see *Schlechtriem*, in: Schlechtriem/Schwenzer, Commentary, Art. 24 para. 4.

[258] See in that direction *Schlechtriem*, in: Schlechtriem/Schwenzer, Commentary, Art. 24 para. 4.

[259] But see for a different view CISG-AC Opinion No 1 (*Ramberg*), Internationales Handelsrecht (IHR) 2003, 244, Comment to Art. 24 and Art. 18 CISG.

hears and understands the communication or whether it is sufficient if the communication is made in such a way that a reasonable person in the same position as the other person understands what is being communicated.[260] It is submitted that the latter view is correct.

A communication made by other means reaches the addressee when it is delivered to him personally[261] or "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." It is submitted that as a general rule it is sufficient if the communication enters the addressee's "sphere of control" and that it is not necessary that the addressee actually became aware of it.[262] Thus it would be enough that a declaration of acceptance is posted in the offeror's mailbox, recorded in an electronic mail box or received on the offeror's fax machine. An e-mail would reach the addressee when it enters his server, provided that the addressee has consented to receiving communications by e-mail and that he is able to retrieve it.[263] For reasons of legal certainty it is further submitted that as a general rule it does not matter whether the communication "reaches" the addressee outside his business hours.[264] Different solutions may however be appopriate in specific situations, in particular as a result of usages or trade practices, of the parties' agreements or of the principle of good faith (Art. 7(1) CISG).[265]

With regard to the language in which the communication is made it is submitted that one should rely on the general principle embodied in Art. 8 CISG. It will then essentially depend on whether a reasonable party in the shoes of the addressee would have understood the (language of the) communication. This will usually be the case where the communication is made in the language in which earlier negotiations took place or in the language of

[260] See for more detail *Schlechtriem*, in: Schlechtriem/Schwenzer, Commentary, Art. 24 para. 6 et seq. (with a further distinction between oral declaration "inter praesentes" and "inter absentes").

[261] It is submitted that this includes delivery to an agent who has the requisite authority (which would in turn depend on the applicable (domestic) law; see *Schlechtriem*, in: Schlechtriem/Schwenzer, Commentary, Art. 24 para. 12; *Farnsworth*, in: Bianca/Bonell, Commentary, Art. 24 para. 2.4; *Honnold*, para. 179.

[262] See *Schlechtriem*, in: Schlechtriem/Schwenzer, Commentary, Art. 24 para. 12.

[263] See *Schlechtriem*, in: Schlechtriem/Schwenzer, Commentary, Art. 24 para. 12; CISG-AC Opinion No 1 (*Ramberg*), Internationales Handelsrecht (IHR) 2003, 244, para 15.1 et seq.

[264] See *Schlechtriem*, in: Schlechtriem/Schwenzer, Commentary, Art. 24 para. 14.

[265] See *Schlechtriem*, in: Schlechtriem/Schwenzer, Commentary, Art. 24 para. 14.

the recipient.[266] Again, it will depend on the circumstances of the individual case whether other languages may be used.

4. Offer not terminated

In order to be able to be accepted by the offeree the offer must not have been terminated. A distinction is drawn under the Convention between a termination of the offer by the offeror made before or at the same time as the offer reaches the offeree, which is known as *withdrawal*, and termination after it reaches the offeree, which is known as *revocation*. The Convention places few restrictions on the right to "withdraw" the offer (Art. 15(2) CISG). However, the right to "revoke" the offer is limited in several important ways (Art. 16 CISG). Termination of the offer may also be brought about by rejection of the offer by the offeree (Art. 17 CISG) and a failure to accept within a period of time set for acceptance (Art. 18(2),(3), Art. 21 CISG).

a) Withdrawal (Art. 15(2) CISG)

Where a communication terminating an offer reaches the offeree before or at the same time as the offer, this is effective to withdraw the offer even where the offer is stated to be irrevocable (Art. 15(2) CISG). Until the offer is effective, it cannot be accepted and there is, as a result, no reason to prevent or limit the circumstances in which the offeror can withdraw his offer. It also seems commercially sensible in the circumstances to give precedence to the withdrawal as the offeree will not normally have acted in reliance on an offer that has not reached him.

As a general rule, there is no requirement that the notice (or other communication) of withdrawal take any particular form. However, where one of the parties to the contract has his place of business in a state that has made a reservation under Art. 96 CISG, and the law of that state applies to the contract, any form requirements of that state will apply to the withdrawal.[267] The wording of Art. 15(2) CISG makes clear that the notice of withdrawal must reach the offeree in order to be effective.

b) Revocation

One of the more difficult issues met during the drafting of the Convention was the question of whether an "effective" offer (i.e. one that has reached the offeree) was to be presumed irrevocable or revocable and if the latter,

[266] See *Schlechtriem*, in: Schlechtriem/Schwenzer, Commentary, Art. 24 para. 16.

[267] *Schlechtriem*, in: Schlechtriem/Schwenzer, Commentary, Art. 14 para. 4.

whether restrictions should be imposed upon the offeror's right to revoke his offer.[268] The problem was particularly acute because there was a sharp divide on the issue between, the common law and the civil law worlds (compare, by way of example, the English[269] and the German[270] position) albeit that there were also differences within both the common law and civil law worlds as to how to deal with the problem.[271] The provision finally agreed upon was an attempt to accommodate the different traditions and to a large extent it succeeds in doing so. However, where any attempt is made to accommodate two traditions that adopt diametrically opposed positions on key questions, it is almost inevitable that clarity will suffer and ambiguities remain.[272] That is certainly the case here though the paucity of case law on the subject may suggest that the issues raised are of more academic than practical interest.

aa) Principle of revocability

Art. 16(1) CISG sets out the basic principle that under the Convention offers are revocable: "Until a contract is concluded an offer may be revoked if the revocation reaches the offeree before he has dispatched an acceptance." As for the notice of revocation the same considerations apply as for the withdrawal (see above (b)).[273]

[268] Much has been written about Art. 16 CISG. See for instance: *Malik*, Offer: Revocable or Irrevocable. Will Art. 16 of the Convention on Contracts for the International Sale Ensure Uniformity? (1985) 25 Indian Journal of International Law 26-49; *Eörsi*, Problems of Unifying Law on the Formation of Contracts for the International Sale of Goods (1979) 27 American Journal of Comparative Law 311-323; *Murray*, An Essay on the Formation of Contracts and Related Matters under the United Nations Convention on Contracts for the International Sale of Goods (1988) 8 Journal of Law and Commerce 11-51; *Mather*, Firm Offers under the UCC and the CISG (2000) 105 Dickinson Law Review 31-56.

[269] For an English common lawyer, an offer is in principle always revocable, even if stated to be irrevocable, unless the offeree provides consideration for the offeror's undertaking to keep the offer open.

[270] Under which an offer was treated as irrevocable unless stated by the offeror to be revocable.

[271] For further discussion of the details of the various approaches, see: *Malik*, Offer: Revocable or Irrevocable. Will Art. 16 of the Convention on Contracts for the International Sale Ensure Uniformity? (1985) 25 Indian Journal of International Law 26-49; *Eörsi*, Problems of Unifying Law on the Formation of Contracts for the International Sale of Goods (1979) 27 American Journal of Comparative Law 311-323.

[272] See *Schlechtriem*, in: Schlechtriem/Schwenzer, Commentary, Art. 16 para. 1.

[273] See *Schlechtreim*, in: Schlechtriem/Schwenzer, Commentary, Art. 16 para. 3.

bb) Restrictions on revocability

There are however certain restrictions on the right to revoke the offer. First, Art. 16(1) CISG makes clear that the right to revoke will be lost once the acceptance has been dispatched (and not when the contract is concluded which will normally only occur when the acceptance has reached the offeror). The effect of dispatch of an acceptance is therefore to convert a revocable offer into an irrevocable one. Secondly, Art. 16(2)(a) CISG provides that an offer cannot be revoked if it indicates (whether by stating a fixed time for acceptance or otherwise) that it is irrevocable. Whether a particular statement or conduct indicates an intention on the part of the offeror that the offer is irrevocable has to be determined in accordance with Art. 8 CISG. While every case has to be considered on its facts, use of words such as "irrevocable", "binding" and "firm" would be strongly suggestive of an intention to make the offer irrevocable.[274] There is no need under the Convention, as there would be in English law, for the offeree to show that he provided something (i.e. consideration) in exchange for the offeror's promise not to revoke the offer. Any argument that this is a question of validity, and that by virtue of Art. 4 CISG the question of the binding nature of an irrevocable offer is to be decided by reference to the applicable domestic law should be rejected. The question of the binding nature of an offer stated to be irrevocable is dealt with expressly by the Convention so that the validity exception in Art. 4 lit. (a) CISG does not apply (see above p. 21 et seq.). Nor is there any need for the offer to be made in any particular form;[275] it is sufficient that the offeror intends his offer to be binding.

There was considerable debate about the question whether the mere fixing of a time for acceptance as such should qualify as a promise not to revoke the offer during this period.[276] The solution ultimately adopted in Art. 16(2)(a) CISG ("if it indicates, whether by stating a fixed time for acceptance or otherwise,") is not entirely free of ambiguity. As Nicholas has put it, 'The common lawyer can lay the stress on the need for an indication of irrevocability, the civil lawyer can treat the fixing of a time as providing such an indication.'[277] It is suggested that the better view, and the one most consistent with the history of the provision, is that the fixing of time for acceptance is not

[274] *Schlechtriem*, in: Schlechtriem/Schwenzer, Commentary, Art. 16 para. 8; *Bernstein/Lookofsky*, Understanding the CISG in Europe, p. 54 et seq.

[275] As is the case under Art. 2-205 of the UCC which requires that an offer be in writing in order to satisfy the "firm offer" provision.

[276] See for the history of this provision *Eörsi*, in: Bianca/Bonell, Commentary, Art. 16 para. 1.

[277] *Nicholas*, The Vienna Convention on International Sales Law (1989) 105 The Law Quarterly Review 201, 215.

conclusive but merely one factor indicating an intention to be bound. What Art. 16(2)(a) CISG makes clear is that an offer cannot be revoked where it indicates that it is irrevocable. Whether it does so is a question of interpreting the meaning of the language chosen by the offeror. In that process it may play a role from which legal background the parties come.[278] Where, for example, both parties are from common law jurisdictions, a "reasonable person of the same kind" as the offeree[279] is likely to understand the fixing of a period for acceptance as merely an indication that the offer lapses after the period specified, unless there are other indications to show that he ought reasonably to have understood that the offer was intended to be irrevocable. On the other hand, where the offeree is from a civil law jurisdiction, an offeror from a common law jurisdiction would be unwise to blithely assume that he can treat the fixing of a date for acceptance as merely an indication that the offer lapses after the fixed date. The simple solution of course is for business people to spell out what effect they intend the fixing of a time for acceptance to have.

Thirdly Art. 16(2)(b) CISG prevents an offeror revoking his offer where it was reasonable for the offeree to rely on the offer as being irrevocable and the offeree has acted in reliance on the offer. Both conditions must be satisfied for the provision to apply. Whether it is reasonable for the offeree to rely on the offer as being irrevocable is a question of fact to be decided in the light of all the circumstances of the case. An example where such reliance would be reasonable is offered in the Secretariat Commentary, namely, "where the offeree would have to engage in extensive investigation to determine whether he should accept the offer. Even if the offer does not indicate that it is irrevocable, it should be irrevocable for the period of time necessary for the offeree to make his determination."[280] The offeree must also show that he has acted[281] in reliance on the offer being irrevocable. Such an act or conduct may consist of entering into other contracts, preparation for production, incurring expenses, buying or hiring materials for production or perhaps even taking on new employees provided that the act or conduct was a result of reasonable reliance on the offeror's offer.[282]

[278] See *Schlechtriem*, in: Schlechtriem/Schwenzer, Commentary, Art. 16 para. 10.

[279] Art. 8(2) CISG.

[280] *Secretariat Commentary*, Art. 14 para. 8.

[281] "Act" may also include a failure to act. For example, a failure to solicit further offers. See *Schlechtriem*, in: Schlechtriem/Schwenzer, Commentary, Art. 16 para. 11.

[282] See *Schlechtriem*, in: Schlechtriem/Schwenzer, Commentary, Art. 16 para. 11.

c) Rejection of offer

Art. 17 CISG provides that an offer is terminated when a rejection reaches the offeror. A rejection has that effect even if the offer is stated to be irrevocable. A rejection can be declared expressly or impliedly. Under Art. 19 CISG a purported acceptance on new terms, not contained in the offer, may be treated as an implied rejection of original offer accompanied by a counter-offer. In order to be effective, the rejection must reach[283] the offeror. Until the rejection reaches the offeror it is of no effect and it can, therefore, be withdrawn.[284] An offeree who rejects an offer cannot later accept the original offer; the effect of a rejection is to terminate the offer.[285]

d) Lapse of time

In addition to being withdrawn or revoked, an offer may lapse and thereafter cease to be available for acceptance. These situations will be dealt with below p. 96 et seq.

III. Acceptance

1. General overview

By Art. 23 CISG the contract is concluded at the moment when an acceptance of an offer becomes effective in accordance with the provisions of the Convention. The rules concerning the acceptance are contained in Art. 18 to 22 CISG. Art. 18 CISG states what amounts to an acceptance and when an acceptance becomes effective. Art. 19 CISG deals with the problem of acceptances that contain modifications to the original offer. Art. 20 CISG provides rules on the calculation of relevant time periods. Art. 21 CISG deals with the issue of late acceptances. Art. 22 CISG specifies when an acceptance may be withdrawn.

As a general rule, three elements must be satisfied before a reply to an offer can constitute an acceptance. First, there must be an indication of assent to the offer. Secondly, the assent must be unqualified. Thirdly, the assent must be effective. Additionally, the assent should not have been withdrawn. These requirements will be dealt with in turn.

283 Art. 24 CISG.
284 Although Art. 22 CISG does not directly govern this situation, it is submitted that one may derive from Art. 15(2), 22 CISG a general principle (Art. 7(2) CISG) to that effect.
285 See *Schlechtriem*, in: Schlechtriem/Schwenzer, Commentary, Art. 17 para. 3.

2. Indication of assent

a) General rule

Art. 18(1) CISG states in its first sentence that a statement made by or other conduct of the offeree indicating assent to an offer is an acceptance. In most cases the indication of assent will of course be made clearly in writing or orally. Art. 18(1) CISG also makes clear that acceptance may be made by conduct. Examples of conduct satisfying this provision would include the supply, delivery or dispatch of goods[286] in response to an offer to buy. So too, payment of the price[287] and taking delivery of the offered goods may constitute assent to an offer and this may be so even if fewer goods are delivered than had originally been contracted for.[288] Other acts of a more preparatory nature may also amount to acceptance. Thus, the purchasing of the necessary raw materials, the commencement of production,[289] the packaging of goods for dispatch,[290] the conclusion of a contract to carry the goods to the buyer and the dispatch of an invoice or its signature by the buyer[291] may all in appropriate circumstances constitute acceptance.[292]

b) Acceptance by silence?

The second sentence of Art. 18(1) CISG states that "silence or inactivity does not in itself amount to acceptance." Put simply, this means that silence in response to an offer will not, without some additional evidence of the offeree's intention, amount to an acceptance.[293] The rule can be seen as one

286 "Dispatch of the goods" and "payment of the price" are expressly identified in Art. 18(3) CISG as a method by which the offeree may indicate assent. The provision states further that under certain circumstances such acceptance may be "effective" without notice to the offeror, see below p. 95 et seq.
287 See preceding footnote.
288 (German) Oberlandesgericht Frankfurt 23 May 1995, CISG-Online No. 185.
289 *Farnsworth*, in: Bianca/Bonell, Commentary, Art. 18 para. 2.2.
290 *Heuze*, La Vente Internationale de Marchandises – Droit Uniforme, at note 184.
291 See (Argentinian) Cámara Nacional de Apelaciones en lo Comercial, Inta SA v MCS Officina Meccanica SpA, 14 October 1993, CISG-Online No. 87 (where it was held that the buyer's signing of an invoice in order to submit it to his bank amounted to an implicit acceptance of the seller's jurisdiction clause contained in the invoice).
292 See for more detail *Schlechtriem*, in: Schlechtriem/Schwenzer, Commentary, Art. 18 para. 7.
293 See for example (Swiss) Handelsgericht Zürich 10 July 1996, CISG-Online No. 227 (Failure by buyer to respond to notification of increase in sales price was held not to constitute acceptance. There was no evidence, whether from statements or other conduct of the parties, from previous course of dealings or from

intended to protect an offeree from having to take action in response to an offer which he would otherwise prefer to ignore.[294] While it is clear that the offeror cannot impose silence as a condition of acceptance, it seems clear from the language of Art. 18(1) CISG ("in itself") and from the decisions interpreting the provision, that cases will arise in which silence on receipt of an offer may be treated as acceptance.[295] By way of example, if the parties have expressly agreed that a failure by the offeree to object to the terms of an offer within two weeks of receipt should be treated as an acceptance then the court should give effect to that agreement and treat the offeree's silence as capable of amounting to an acceptance.[296] A similar conclusion should be reached if such an agreement can be implied from the statements and/or conduct of the parties, from their previous course of dealings,[297] or even from a relevant trade usage.[298]

c) Cross offers

Art. 18 CISG provides that an acceptance is a statement or other conduct of the offeree "indicating assent to an offer". The Convention, thus, appears to require that there must be an offer followed by an indication of assent to the terms of the offer if a valid contract is to be concluded. Where there are two "offers" crossing each other, even if made in identical terms, that would

trade usage, from which it could be inferred that the failure by the buyer to respond amounted to an assent to the proposed contractual modification); See also (Danish) Østre Landsret 23 April 1998, CISG-Online No. 486.

294 See *Schlechtriem*, in: Schlechtriem/Schwenzer, Commentary, Art. 18 para. 9.

295 See in more detail *Schlechtriem*, in: Schlechtriem/Schwenzer, Commentary, Art. 18 para. 9.

296 See, for example U.S. Federal District Court, New York, Filanto v Chilewich 14 April 1992, CISG-Online No. 45.

297 See, for example (French) Cour d'Appel Grenoble 21 October 1999, CISG-Online No. 574. (in holding that silence constituted assent, the court referred, inter alia, to the practice of previous years, the seller having always fulfilled the French company's orders without expressing its acceptance); See also U.S. Federal District Court, New York, Filanto v Chilewich, 14 April 1992, CISG-Online No. 45 (Court held that the buyer's offer had been accepted by the seller's failure to respond promptly. The court noted that under Art. 18(1) CISG silence is not usually to be treated as acceptance, but nevertheless held that a course of dealing had been established between the parties creating a duty on the part of the seller to object promptly in the event that it did not wish to accept the buyer's offer. On the facts the seller's delay was held to amount to acceptance).

298 See, for example (Dutch) Gerechtshof Hertogenbosch, E.H.T.M. Peters v Kulmbacher Spinnerei & Co Produktions KG, 24 April 1996, CISG-Online No. 321.

not appear to satisfy the requirement in Art. 18 CISG because neither one indicates assent to the other. It should be noted however that it is possible for the parties, by virtue of Art. 6 CISG, to agree to derogate from the formation rules contained in Art. 14-24 CISG and to allow for the creation of a contract otherwise in accordance with the sequence of offer followed by acceptance to that offer.[299]

d) Commercial letters of confirmation

A specific issue that needs to be mentioned here arises because of the effect given in some jurisdictions to so-called "commercial letters of confirmation". Such "documents" are widely known and in common use in central Europe. Generally speaking, they amount to a written repetition of the contract terms, or a summary thereof, sent by one party to another about a contract that has either already been verbally concluded or which has not yet been concluded.[300] Although the matter was discussed extensively during the drafting of the Convention, neither the Convention, nor its "Travaux Preparatoires", indicate expressly what effect should be given to a failure to respond to a confirmation letter under the Convention. Moreover, courts applying the Convention have unfortunately not been consistent in their treatment of such "letters".[301]

Where a commercial letter of confirmation is intended merely to evidence a contract that has already been concluded, few problems arise as the letter will be treated merely as evidence of both formation and content of the contract. Where, however, a letter of confirmation is properly construed by a court as an offer or a proposed modification of an existing contract,[302] then it is argued that the following statements can be made about the effect of silence after receipt of the letter. First, there is nothing to stop the parties expressly or implicitly agreeing that failure to respond to a letter of confirmation sent by one of them will be treated as assent to the terms contained therein.[303] Should they do so, silence after receipt of the letter will bind the offeree. Secondly, if the parties have established a course of dealings between them-

299 *Schlechtriem*, in: Schlechtriem/Schwenzer, Commentary, Art. 18 para. 9.

300 *Esser*, Commercial Letters of Confirmation in International Trade: Austrian, French, German and Swiss Law and Uniform Law Under the 1980 Sales Convention (1988) Georgia Journal of International and Comparative Law 427.

301 For a brief and helpful summary of the different approaches taken see *UNCITRAL Digest*, Part II.

302 If, for example, it introduces new terms not present in the original offer that are materially different. See, for example, (German) Oberlandesgericht Saarbrücken 13 January 1993, CISG-Online No. 83.

303 See further (Swiss) Zivilgericht Basel 21 December 1992, CISG-Online No. 55.

selves whereby a failure to object in a timely manner to the terms of a letter of confirmation is treated as assent to the terms in the letter, then, by virtue of Art. 9(1) CISG, the parties are to be treated as bound. So too, where it is established that there is an "international" usage, which satisfies the requirements of Art. 9(2) CISG, to similar effect, the parties will be treated, in the absence of evidence to the contrary, as bound by the usage.[304] Finally, even if a letter of confirmation is not given full effect it may have evidentiary value when determining the parties' intent.[305]

3. Unqualified acceptance

a) The general rule

For a reply to an offer to constitute an acceptance, it must represent a final and unqualified expression of assent to the terms proposed by the offeror. Whether a reply evinces such an intention on behalf of the offeree is a matter of interpretation under Art. 8 CISG.[306]

b) Modified acceptance as new offer (Art. 19 CISG)

Where the offeree in his reply does not unqualifiedly accept the terms offered but instead seeks to introduce new terms or in some other way qualifies or modifies the original offer, he will not generally be treated as having accepted the offer. Instead the reply will be treated as a rejection of the original offer and as amounting to a counter-offer on the terms set out in the reply. This rule is contained in Art. 19(1) CISG. By way of example, in one German case, the court treated the seller's delivery of 2,700 pairs of shoes as a rejection of the buyer's offer to buy 3,240 pairs. However, the delivery of 2,700 constituted a counter-offer which was accepted by the buyer when he took

[304] Schwenzer/Mohs, IHR 2006, 239, 245. It should be noted that the majority of courts have treated trade usages that would give effect to the letter of confirmation as insufficiently "international" to satisfy the requirements of Art. 9(2) CISG. See, e.g., (German) Oberlandesgericht Dresden 9 July 1998, CISG-Online No. 559; (German) Oberlandesgericht Frankfurt 5 July 1995, CISG-Online No. 258. But see for a different approach (Swiss) Zivilgericht Basel 21 December 1992, CISG-Online No. 55.

[305] See *UNCITRAL Digest*, Part II para. 13; (German) Oberlandesgericht Frankfurt 5 July 1995, CISG-Online No. 258.

[306] 'Failure to achieve exact *verbal* correspondence between offer and acceptance will not necessarily mean that there is no concluded contract. See *Schlechtriem*, in: Schlechtriem/Schwenzer, Commentary, Art. 19 para. 5 et seq.

delivery.[307] A contract was therefore concluded for 2,700. Had the buyer in fact refused the seller's offer, it would not have been open to the seller subsequently to accept the 'original' offer by delivering 3,240 pairs since a reply that is characterised as a counter-offer rather than an acceptance has the effect of rejecting the original offer thus making it incapable of subsequent acceptance.[308]

While the general rule under the Convention is that the acceptance must "mirror" the offer, an exception is contained in Art. 19(2) CISG. The exception in paragraph (2) only applies if the additional or different terms contained in the purported acceptance do not materially alter the terms of the offer. It is not possible to lay down a clear rule for distinguishing between material and non-material alterations; what is material will depend upon the circumstances of each individual case. However, Art. 19(3) CISG provides a presumptive, though non-exclusive, list of terms that are considered to materially alter the terms of the offer. Included within the list are additional or different terms relating to "the price, payment, quality and quantity of the goods, place and time of delivery, extent of one party's liability to the other or the settlement of disputes." Thus, terms proposing an increase in the price of the goods,[309] a different time of payment,[310] and a change in the quality of the goods[311] have all been held to be material. So too, has a term relating to the time[312] and place[313] of delivery, and a term proposing a different place of

[307] (German) Oberlandesgericht Frankfurt 23 May 1995, CISG-Online No. 185. See also (French) Cour d'Appel, Paris, ISEA Industrie v Lu, 13 December 1995, CISG-Online No. 312; (German) Oberlandesgericht Frankfurt 4 March 1994, CISG-Online No. 110.

[308] See Art. 19(1) CISG and Art. 17 CISG.

[309] See e.g., (Austrian) Oberster Gerichtshof 9 March 2000, Internationales Handelsrecht (IHR) 2001, 39 = CISG-Online No. 573; (Swiss) Handelsgericht Zurich 10 July 1996, Transportrecht – Internationales Handeslrecht (TranspR-IHR) 1999, 54 = CISG-Online No. 227.

[310] (Austrian) Oberster Gerichtshof 6 February 1996, CISG-Online No. 224 (time of payment).

[311] See, e.g., (German) Oberlandesgericht Frankfurt 31 March 1995, CISG-Online No. 137 (difference in quality of test tubes); (German) Oberlandesgericht Hamm 22 September 1992, Transportrecht – Internationales Handeslrecht (TranspR-IHR) 1999, 24 = CISG-Online No. 57 (acceptance offering to sell "unwrapped" bacon rather than bacon).

[312] (German) Oberlandesgericht München 8 February 1995, CISG-Online No. 143.

[313] U.S. Federal District Court, New York, Calzaturificio Claudia v Olivieri Footwear, 6 April 1998, CISG-Online No. 440.

jurisdiction.[314] It may be possible to show that a change in a term presumed to be material according to Art. 19(3) CISG is not material on the facts of the individual case.[315] By way of example, it has been held that a modification of offer concerning the quantity of the goods which was exclusively favourable to the offeror was a non-material alteration.[316] It is suggested however that because of the width of the wording of Art. 19(3) CISG most alterations will be material and the exception in paragraph (2) will only rarely apply.[317] Alterations or additions that have been held to be non-material include a request to treat a letter confidentially until the parties make a joint public announcement[318] and, rather more controversially, a term indicating that notice of defects must be given within a specified time[319] and a term stating that the price would be modified by increases as well as decreases in the market price and deferring delivery of one item.[320] Both these latter decisions are with respect somewhat surprising and hard to reconcile with the language of Art. 19(2) and (3) CISG. The "modification of notice" term surely comes within the umbrella of events that impact the "extent of one party's liability to the other". And a term providing that the price may be increased or

314 (French) Cour de Cassation, Les Verreries de Saint Gobain v Martinswerk, 16 July 1998, Transportrecht – Internationales Handeslrecht (TranspR-IHR) 1999, 43 = CISG-Online No. 344.

315 *Schwenzer/Mohs*, Old Habits die hard: Traditional Contract Formation in a Modern World, Internationales Handelsrecht (IHR) 2006, 239, 243.

316 (Austrian) Oberster Gerichtshof 20 March 1997, Transportrecht–Internationales Handeslrecht (TranspR-IHR) 1999, 52 = CISG-Online No. 269.

317 *Farnsworth*, in: Bianca/Bonell, Commentary, Art. 19 para. 2.7.

318 (Hungarian) Fováosi Biróság Budapest, Malev Hungarian Airlines v United Technologies Inc. Pratt and Whitney Commercial Engine Business, 10 January 1992, CISG-Online No. 43. Reversed on a different point by the Supreme Court, (Hungarian) Legfelsóbb Biróság 25 September 1992, CISG-Online No. 63.

319 (German) Landgericht Baden-Baden 14 August 1991, CISG-Online No. 24. The decision has been criticised by a number of scholars. See, e.g., *Karollus*, Judicial Interpretation and Application of the CISG in Germany 1988-1994, Cornell Review of the CISG, 51-94; *DiMatteo*, The CISG and the Presumption of Enforceability: Unintended Contractual Liability in International Business Dealings, 22 Yale Journal of International Law (1997) 111, 154 (available at http://cisgw3.law.pace.edu/cisg/biblio/karollus.html).

320 (French) Cour d'appel Paris, Fauba v Fujitsu, 22 April 1992, CISG-Online No. 222, affirmed without reference to the Convention by the (French) Cour de Cassation 4 January 1995, CISG-Online No. 138. The decision is criticised by *Witz*, Case Commentary, The First Decision of France's Court of Cassation Applying the U.N. Convention on Contracts for the International Sale of Goods, (1995), available at http://cisgw3.law.pace.edu/cases/950104f1.html.

decreased would surely fall within the "price, payment" part of Art. 19(3) CISG. In neither case, is the reasoning of the court particularly convincing and it is suggested that the decisions should not be followed.[321]

Where a particular modification is, unusually, treated as non-material then, unless the offeror, "without undue delay, objects orally to the discrepancy or dispatches a notice to that effect", the reply to the offer constitutes an acceptance. If he does not object, the terms of the contract are the terms of the offer with the modifications contained in the acceptance. Such objection can be made by means of a notice to that effect or orally. The notice need not take any particular form, but whether made in writing or orally it must be communicated without delay.[322] As the wording of Art. 19(2) CISG makes clear ("dispatches") the risk of loss, or late arrival, of a notice of objection sent without undue delay falls, it is submittted, on the offeree who, after all, is responsible for creating the departure from the terms of the offer. [323]

Where a timely objection is made, the effect is that no contract has been concluded.[324]

c) The "battle of the forms"

aa) Setting of the problem

Standard form documents variously named "contracts", "purchase orders", "acceptances" and "confirmations" are in widespread commercial use and play an important role in standardising and speeding up the contracting process. The use of such documents, however, carries with it attendant problems, one of which has become known as the "battle of forms".[325] A "battle of forms"

321 See for more examples *Schlechtriem*, in: Schlechtriem/Schwenzer, Commentary, Art. 19 para. 13.

322 Although Art. 19(2) CISG could be read as meaning that only if the objection is made orally must it be made without undue delay, the history of the provision makes clear that the words 'without undue delay' apply to both oral objections and to those made by other means. See *Schlechtriem*, in: Schlechtriem/Schwenzer, Commentary, Art. 19 para. 17.

323 See *Schlechtriem*, in: Schlechtriem/Schwenzer, Commentary, Art. 19 para. 16.

324 *Schlechtriem*, in: Schlechtriem/Schwenzer, Commentary, Art. 19 para. 18.

325 There is a voluminous literature on battle of forms under the CISG. See e.g., *Viscasillas*, Battle of the Forms Under the 1980 United Nations Convention on Contracts for the International Sale of Goods: A Comparison with Section 2-207 UCC and the UNIDROIT Principles, 10 Pace International Law Review (1998), 97 (available at http://www.cisg.law.pace.edu/cisg/biblio/pperales.html); *Schlechtriem*, Battle of the Forms in International Contract Law: Evaluation of approaches in German law, UNIDROIT Principles, European Principles, CISG;

arises where both parties to the negotiations seek to introduce and rely on their own set of standard forms. Typically, for example, the buyer sends his printed purchase order form in response to a seller's catalogue or price list. The seller responds by sending his printed acceptance. The back of each form commonly contains a list of printed terms designed to protect each party's interest and not infrequently these sets of terms conflict. In the vast majority of cases where forms conflict the contract will be performed without incident and no issue will be raised.[326] However, a fall in the market price of the contract goods (prompting the buyer to look for a way out of the agreement) or some defect in the performance tendered may lead to arguments about two questions; first, whether a contract has in fact been concluded and, secondly, if so whether it is on the seller's or buyer's terms. The Convention does not contain any special rules on the battle of forms[327] and the question therefore

UCC approaches under consideration, in: Karl-Heinz Thume ed., Festschrift für Rolf Herber zum 70. Geburtstag, Neuwied: Luchterhand (1999), 36 (available at http://www.cisg.law.pace.edu/cisg/biblio/schlechtriem5.html); *Murray*, The Definitive Battle of Forms: Chaos Revisited, 20 Journal of Law and Commerce (2000), 1 (available at http://www.cisg.law.pace.edu/cisg/biblio/murray2.html); *Viscasillas*, Battle of Forms and the Burden of Proof: An analysis of BGH 9 January 2002, 6 Vindobono Journal of International Commercial Law and Arbitration (2002), 217 (available at http://www.cisg.law.pace.edu/cisg/biblio/perales2.html); *Schultz*, Rolling Contract Formation on Contracts for the International Sale of Goods, 35 Cornell International Law Journal (2001), 263 (available at http://www.cisg.law.pace.edu/cisg/biblio/schultz.html); *Van Alstine*, Consensus, Dissensus and Contractual Obligation Through the Prism of Uniform International Sales Law, 37 Virginia Journal of International Law (1996), 1 (available at http://www.cisg.law.pace.edu/cisg/biblio/alstine3.html); *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), 233 (available at http://www.cisg.law.pace.edu/cisg/biblio/vergne.html); *Di Matteo/Dhooge/Green/Maurer/Pagnattaro*, The Interpretive Turn in International Sales Law: An Analysis of Fifteen Years of CISG Jurisprudence, 34 Northwestern Journal of International Law and Business (2004), 299, 348 et seq.

326 See on this issue, and generally, *Viscasillas*, Battle of the Forms Under the 1980 United Nations Convention on Contracts for the International Sale of Goods: A Comparison with Section 2-207 UCC and the UNIDROIT Principles, 10 Pace International Law Review (1998), 97, at Fn. 23; *Farnsworth*, in: Bianca/Bonell, Commentary, Art. 19 para. 2.3.

327 The issue was discussed at Vienna but proposals to deal with it were rejected. See, *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), 233 (available at http://www.cisg.law.pace.edu/cisg/biblio/

arises how a court should deal with a dispute raising such an issue. Perhaps unsurprisingly, given the difficulty that many jurisdictions have encountered with this issue, no single solution has emerged and a number of different approaches can be identified in the case law and academic commentary. A broad and simplified overview of some of these solutions will be given under (bb)-(cc).

Before doing so it is appropriate to point out that the problem of the battle of the forms will only arise where both sets of standard terms fulfil the high standards that the CISG sets for the "technical" incorporation of standard terms. These standards have been described above p. 30 et seq.

bb) Solution 1: "last shot rule"

A view that has been adopted by a number of courts is the "last shot rule". This view involves a straightforward application of Art. 19(1) CISG. In essence it treats each subsequent form as a counter-offer rejecting the previous offer. The resulting contract, if there is one, will therefore be on the terms of the final form used without being objected to by the other party and thus being "accepted" by that party; typically such "acceptance" is evidenced by some form of performance by that party.[328] The following example illustrates this approach: B sends S a purchase order (including his standard terms of purchase which include a jurisdiction clause in favour of the German courts) for 100 widgits and S replies accepting the offer on the basis of his own standard terms of sale which include an arbitration clause. S subsequently ships the goods and B accepts them. Subsequently, B alleges that the widgits are defective but he refuses to submit the dispute to arbitration. Application of the "last shot" approach to these facts would mean that B is bound by the contract on S's terms and he must, therefore, arbitrate the dispute. B's purchase order was the original offer. S's acceptance was a rejection of that offer, because it contained a material alteration (cf. Art. 19 CISG), and a counter-offer including the arbitration clause. When B accepted the widgits, he accepted by his conduct the counter-offer and he is therefore bound by its terms including the arbitration clause.

vergne.html); *Schlechtriem*, in: Schlechtriem/Schwenzer, Commentary, Art. 19 para. 4, 19.

328 See *Farnsworth*, in: Bianca/Bonell, Commentary, Art. 19 para. 2.5.; *Enderlein/Maskow*, Commentary, Art. 19 para. 10; *Schnyder/Straub*, in: Honsell, Kommentar, Art. 19 para. 37 et seq.; *Viscasillas*, Battle of the Forms Under the 1980 United Nations Convention on Contracts for the International Sale of Goods: A Comparison with Section 2-207 UCC and the UNIDROIT Principles, 10 Pace International Law Review (1998), 97, 117 et seq, 144 et seq.; (German) Oberlandesgericht Hamm 22 September 1992, CISG-Online No. 57.

This approach, while perhaps according most clearly with the language of the Convention, is by no means satisfactory and it must be doubted whether it will in many cases accord with the parties' true intentions or with commercial reality. Consider what the position would be in our previous example, if instead of accepting the goods B had rejected them. The "last shot" principle would presumably lead to the conclusion that no contract had been made because B never accepted S's counter offer. It is difficult to see that such a solution accords with commercial reality.

cc) Solution 2: "knock out rule" (Restgültigkeitstheorie)

The difficulties to which in practice the "last shot" theory may give rise have led writers and courts to look for an alternative approach to the battle of forms problem which is both consistent with the Convention and which avoids recourse to the applicable domestic law. As a result the following analysis has been suggested which – in the author's opinion – is the best way to solve the problem.[329]

Where it can be established that the parties have agreed the essential terms of the contract and actually "want" the contract despite the conflict between their respective standard terms (because, for example, it has been performed) then it is suggested that it can be presumed that the parties have agreed to waive the application of their standard terms in so far as they are in conflict with each other. What is more, one can assume that by virtue of their party autonomy, Art. 6 CISG, they have departed from the Convention's rules on formation and in particular from Art. 19 CISG which would require one of the parties' terms to apply. The contract then takes effect as one including those parts of the respective standard terms that are not in conflict with each other. In so far as their respective standard terms are in conflict with each other, they will not apply. Remaining gaps are filled by the rules of the Convention.

[329] See, for example, *Schlechtriem*, in: Schlechtriem/Schwenzer, Commentary, Art. 19 para. 20; *Honnold*, para. 170.4; *Gruber*, in: Münchener Kommentar zum Bürgerlichen Gesetzbuch, Art. 19 para. 20. The knock out rule has been said by the (German) Bundesgerichtshof 9 January 2002, IHR 2002, 16 = CISG-Online No. 651 to be the prevailing opinion; the court did however not have to choose between the two solutions as it found that both would lead to the same result in the case at hand; see also (German) Landgericht Kehl 6 October 1995, CISG-Online No. 162.

4. Effective acceptance

a) General rule

As a general rule an acceptance is not effective until it is communicated to the offeror which, under the Convention, occurs when it reaches the offeror (Art. 18(2) CISG). Until that moment no contract is concluded. The term "reaches" is dealt with in Art. 24 CISG (see in more detail p. 78 et seq.).

The Convention does not prescribe any particular method by which an acceptance must be communicated. There is, for example, no requirement that an offer must be accepted by the same means used for the communication of the offer, nor need the acceptance have been communicated by the means usual or appropriate in the circumstances. However, the offeror can provide in the offer that it can only be accepted in a certain way. Where that is done, the offeror is not, in general, bound unless acceptance is made in that way. However, while an acceptance by a different means to that prescribed will not be effective, it may nevertheless still lead to the conclusion of a concluded contract if the purported acceptance can be regarded as a counter-offer and if that counter-offer is then accepted by the counter-offeree.

b) Exception: acceptance without communication reaching the offeror (Art. 18(3) CISG)

The general rule, that an indication of assent must reach the offeror in order to be effective, is subject to the exception contained in Art. 18(3) CISG which provides 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 may indicate assent by performing an act, such as one relating to the dispatch of the goods or payment of the price, without notice to the offeror, the acceptance is effective at the moment the act is performed", provided that the time limits in Art. 18(2) CISG are complied with. The same effect can of course be achieved where the parties agree, in accordance with the provisions of Art. 6 CISG, to derogate from the provisions of Art. 18(2) CISG.

The exception will, for example, apply if the offeror makes clear in his offer that assent can be indicated by performing an act without any notice to him. Commentators have suggested that wording such as "Ship immediately", "Procure for me without delay"[330] or "Rush shipment"[331] may be sufficient.

[330] The *Secretariat Commentary* provides that an offer might indicate that the offeree could accept by performing an act by the use of such a phrase as "Ship immediately" or "Procure for me without delay". Commentary to Art. 16(3), para. 11.

[331] See *Farnsworth*, in: Bianca/Bonell, Commentary, Art. 18 para. 3.4.

However, while such language certainly invites swift acceptance by performing an act, it must be questioned whether such wording, without more, invites the offeree to accept without giving notice. Unless, therefore, the offer also indicates that communication of completion of the act of acceptance is unnecessary, an offeree would be well advised to give notice if he intends to accept.

Performance of the act is effective to constitute the contract when the conditions set out in Art. 18(3) CISG are met.[332] It follows from this, that once the act is performed it cannot be withdrawn since the act has perfected the contract. Further, there is no necessity for the offeror to be made aware, by notice or otherwise, that the act has been performed.[333] Under Art. 18(3) CISG a contract is formed by conduct amounting to acceptance even where that has not been communicated to the offeror.

c) Time for acceptance

aa) Time fixed

Where an offer provides that it must be accepted within a fixed time, an acceptance received after that time is not effective (Art. 18(2) second sentence CISG). Exceptionally, however, a late acceptance may still be effective if either of the provisions contained in Art. 21 CISG are satisfied (see below bb). The time may be fixed as a particular date or in some other manner[334] (e.g., "reply within the next 10 days"; "reply by January 1"; "reply before the next meeting of the Board"). It may also be fixed by reference to less definite terms such as "reply immediately" or "reply within the usual period for consideration," the precise meaning then being a matter of interpretation.[335]

Art. 20 CISG sets out the basis on which a time period set for acceptance is to be calculated. The provision applies only to the situation where the offeror has fixed the time for acceptance by reference to a period of time as opposed to by reference to a particular date. Further, the rule set out in Art. 20(1) CISG is one of interpretation only and it must yield to evidence of a contrary intention. Where, therefore, it is possible to determine the date from which time begins to run by construing the offer itself, no recourse need be made

332 *Farnsworth*, in: Bianca/Bonell, Commentary, Art. 18 para. 2.8, 2.9; *Schlechtriem*, in: Schlechtriem/Schwenzer, Commentary, Art. 18 para. 22.

333 See *Schlechtriem*, in: Schlechtriem/Schwenzer, Commentary, Art. 18 para. 23 (also to the question of whether there is an ancillary duty to give notice). But see for a different view *Honnold*, para. 164(1).

334 *Schlechtriem*, in: Schlechtriem/Schwenzer, Commentary, Art. 18 para. 14.

335 See *Schlechtriem*, in: Schlechtriem/Schwenzer, Commentary, Art. 18 para. 14 (with examples at Fn. 53-56).

to Art. 20(1) CISG. Thus, a provision in an offer letter to the effect that the offer must be accepted within 10 days of its receipt would fix the commencement of the period of time to the receipt of the letter.

bb) Reasonable time

Where the offer makes no provision as to the time within which it must be accepted, Art. 18(2) CISG distinguishes between an oral offer and an offer by other means. According to the final sentence of Art. 18(2) CISG, to be effective an oral offer must be accepted immediately if no time for acceptance is fixed unless the circumstances indicate otherwise. Thus, where an oral offer is made face to face or even over the telephone, the offer generally will not survive the conversation so that an acceptance made after the conversation has finished will not be effective.[336]

Where an offer is made "by other means" without a fixed date or period for acceptance, the acceptance will only be effective where it reaches the offeror "within a reasonable time" (Art. 18(2) second sentence CISG). What is a reasonable time depends, according to this provision, on "the circumstances of the transaction, including the rapidity of the means of communication employed by the offeror." Other circumstances may, however, be relevant, such as the volatility of the market price of the goods, the stability or perishability of the goods, the means used by the offeror for communicating his offer and the means available to the offeree to make his reply. Thus, an offer to sell perishable goods for which the price is liable to sudden fluctuations would lapse after a short period of time. The same would, in general, be true of an offer made by fax or other instantaneous means of communication. By way of contrast, where a company offers to sell an expensive and complicated piece of machinery which will need installation and maintenance by third parties, account will have to be taken, in considering what amounts to a reasonable time, of the offeree's need to negotiate with those third parties and perhaps with their bankers before being able to accept the offer.

cc) Late acceptance

As a general rule, an acceptance that reaches the offeror after any period of time set for acceptance is not effective; no contract is, therefore, concluded and the offer lapses. However, that is not to say that the whole contracting process thereby comes to an end. In English law, for example, a late acceptance is likely to be treated as a counter-offer. Thus, an offeror who wanted to conclude a contract would have to do so by letting the offeree know that he was accepting the counter-offer.

336 *Farnsworth*, in: Bianca/Bonell, Commentary, Art. 18 para. 2.6.

Art. 21 CISG takes a different approach. It draws a distinction between two reasons for lateness; namely, obvious delay in transmission (Art. 21(2) CISG) and late acceptance for reasons other than obvious transmission delay, e.g., late dispatch of acceptance (Art. 21(1) CISG). In both cases, the Convention allows a contract to be formed by the late acceptance, albeit under different conditions. In the case of an obvious transmission delay, a late acceptace will be treated as effective and a contract concluded unless the offeror objects in a timely manner. Where, however, the acceptance is late for a reason other than an obvious transmission delay, a contract will only be concluded if the offeror gives notice to that effect.

(i) Obvious delay in transmission (Art. 21(2) CISG)

Art. 21(2) CISG applies where a letter or other writing[337] containing an acceptance is late because of obvious delay in transmission. In essence, it provides that where an acceptance is sent in such circumstances that it is apparent that had the transmission been normal the acceptance would have been timely, the acceptance shall be treated as effective unless "without delay, the offeror orally informs the offeree that he considers his offer as having lapsed or dispatches a notice to that effect." The effect of the provision is to protect the offeree's reliance interest (e.g., in a contract having been concluded), and to shift onto the offeror the burden of preventing the completion of a contract.[338] Thus, if an offeror wishes to prevent a contract coming into existence he must take positive steps to do so (i.e. orally inform the offeree that he considers his offer as having lapsed or dispatching a notice to that effect, cf. Art. 18(2) second sentence CISG). If he fails to do so the contract is treated as having been concluded at the moment when the late acceptance reached the offeror.[339]

The provision only applies 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 reason for the delay must have been one in "transmission" of the acceptance. It is submitted that, for the purposes of Art. 21(2) CISG, the word "transmission" refers only to transmission by a third party carrier and that, therefore, delays caused by either the offeror or the offeree should not be

337 It is submitted that the provision should be applied to electronic communications, too, provided that such form of communication has been accepted by the parties; see *Schlechtriem*, in: Schlechtriem/Schwenzer, Commentary, Art. 21 para. 16; CISG-AC Opinion No 1 (Ramberg), Internationales Handelsrecht (IHR) 2003, 244, para. 21.3.

338 *Schlechtriem*, in: Schlechtriem/Schwenzer, Commentary, Art. 21 para. 16.

339 *Schlechtriem*, in: Schlechtriem/Schwenzer, Commentary, Art. 21 para. 2.

treated as "transmission" delays.[340] Delays in transmission may occur for example because of matters relating to the particular communication (e.g., a letter that is lost in the post), or because of general disturbances (e.g., a postal strike).[341]

Art. 21(2) CISG requires that the letter or other writing must show that if its transmission had been normal it would have reached the offeror in time. In other words it must be apparent from the letter or other writing that it has been delayed. Despite the wording of the provision it is submitted that evidence from another source is sufficient (e.g., by a telephone call from the offeree stating that the letter was dispatched).[342]

(ii) Other reason for late acceptance (Art. 21(1) CISG)

Where an acceptance is late for reasons other than an obvious delay in transmission (e.g., late dispatch of the acceptance), the acceptance is nevertheless effective provided that the offeror "without delay (...) orally so informs the offeree or dispatches a notice to that effect" (Art. 21(1) CISG).

It is submitted that the giving of an oral or written notice has the effect of retrospectively validating the late acceptance. [343] Thus, the contract is treated as having been formed at the time the late acceptance reached the offeror.[344] Such a view is consistent with the language of Art. 21(1) CISG which begins, "A late acceptance is nevertheless effective as an acceptance ..." thereby implying that it is the late acceptance that is treated as concluding the contract and not the later notice.[345]

340 *Gruber*, in: Münchener Kommentar zum Bürgerlichen Gesetzbuch, Art. 22 para. 17.

341 *Schlechtriem*, in: Schlechtriem/Schwenzer, Commentary, Art. 21 para. 17.

342 *Schlechtriem*, in: Schlechtriem/Schwenzer, Commentary, Art. 21 para. 18.

343 See *Schlechtriem*, in: Schlechtriem/Schwenzer, Commentary, Art. 21 para. 10; *Secretariat Commentary*, Art. 19 para. 3.

344 This interpretation is supported by the *Secretariat Commentary* which provides that "it is the late acceptance which becomes the effective acceptance as of the moment of *its* receipt, even though it requires the subsequent notice to validate it" emphasis added).

345 *Secretariat Commentary*, Art. 19(1) para. 3.

5. Withdrawal of the acceptance

Under Art. 22 CISG, an acceptance may be withdrawn if the withdrawal reaches the offeror before or at the same time as the acceptance would have become effective.

IV. Conclusion of contract otherwise than by offer and acceptance

Although the Convention adopts the traditional offer and acceptance model of agreement, agreement in practice may be reached in circumstances which cannot easily be analysed into the form of offer and acceptance.[346] It is not unusual, for example, for parties to an international sales transaction to engage in point by point negotiation of individual clauses or lengthy exchange of communications[347] prior to final agreement. As the negotiations progress, each side may make concessions or new demands and in the end it may be very difficult to determine whether an agreement was ever concluded or if so, on what terms. Other methods of reaching agreement that do not fit easily within the traditional offer and acceptance model include the dispatch of identical cross offers and a failure to reply (i.e., silence) to a letter of confirmation.

At the Vienna Conference, a number of proposals were made seeking to bring such agreements within the scope of the Convention. However, these proposals were withdrawn largely, though not completely, because of the "extreme difficulties of formulating an acceptable text."[348]

The fact that the delegates at Vienna were unable to agree upon an acceptable text to govern such agreements should not lead to the conclusion that all such agreements fall outside the ambit of the Convention. Recourse to the applicable domestic law should if at all be made rarely for the following reasons. First, it is undoubtedly true that identifying an offer and acceptance from a lengthy series of negotiations may be an artificial process. However, this is a

346 Though it is probably true to say that courts are likely to apply the analysis even in relation to unpromising material: see, for example, U.S. Federal District Court, New York, Filanto v Chilewich, 14 April 1992, CISG-Online No. 45.

347 *Schlechtriem*, in: Schlechtriem/Schwenzer, Commentary, Intro to Arts 19-24 para. 2.

348 A/33/17, IX Yearbook (1978), para 104; *Honnold*, Doc.Hist., 373. See also *Schlechtriem*, in: Schlechtriem/Schwenzer, Commentary, Intro to Arts 14-24 para. 5.

process with which courts in most jurisdictions are familiar. Such evidence as exists from decided cases[349] suggests that courts applying the Convention have no more difficulty in finding an offer and acceptance, particularly where the agreed subject matter has been performed,[350] when they are minded to do so than courts applying their own domestic, non-Convention, law. There will, of course, be differences of opinion as to whether it is possible to identify from all the relevant circumstances whether either party intended to make an offer that was capable of acceptance. Such is inevitable in respect of what is in essence an interpretative exercise. However, there will be very few cases in which it is simply impossible for a court to apply the offer and acceptance model.[351]

Secondly, the parties can agree to depart from the traditional model of contract formation (Art. 6 CISG).[352] Such agreement may be express or implied by reference to usages to which they have agreed and by any practices which they have established between themselves.[353] If, for example, a practice exists between the parties that a failure to reply to a commercial letter of confirmation amounts to an acceptance on the terms contained in the letter, a court should treat a contract as having been concluded even if the Convention provisions on formation have not been satisfied.

If it is impossible in a given case to discern offer and acceptance it has been submitted in academic writing that recourse to the applicable domestic law is unnecessary. Instead, the court should apply the principle of consensus, which is a general principle on which the Convention is based (Art. 7(2) CISG), and should consider whether agreement has been established. If consensus is established and the minimum content required for a contract exists then a court should treat a contract as having been concluded.[354] While there

349 See e.g., U.S. Federal District Court, New York, Filanto v Chilewich, 14 April 1992, CISG-Online No. 45; (German) Oberlandesgericht Frankfurt 23 May 1995, CISG-Online No. 185.

350 Note that under Art. 18(3) CISG a contract may be concluded by "performing an act, such as one relating to the dispatch of goods or payment of the price."

351 See *Schlechtriem*, in: Schlechtriem/Schwenzer, Commentary, Intro to Arts 14-24 para. 5.

352 *Schlechtriem*, in: Schlechtriem/Schwenzer, Commentary, Intro to Arts 14-24 para. 5.

353 See Art. 8 CISG.

354 See (German) Oberlandesgericht München 8 March 1995, CISG-Online No. 145 where the court purported to apply principles underlying the Convention rather than national contract law and found that the conduct of a Finnish seller and a German buyer evidenced an enforceable contract.

is much to be said for this from a policy point of view, it is difficult to find much support for it in either the Convention or its "Trauvaux Preparatoires". The better view may, therefore, be that if a court concludes that it is wholly impossible to apply the offer and acceptance model and that the parties have not agreed, expressly or impliedly, to depart from this model, recourse to the applicable domestic law will be necessary in order to determine whether a contract has been concluded.

V. Modification of the contract

Art. 29(1) CISG states that a contract may be modified or terminated by the mere agreement of the parties.[355] This provision shows that a modification (or termination) of a sales contract that is governed by the CISG is not subject to any domestic requirements of "consideration".[356] Such rules should not be regarded as "validity" rules in the sense of Art. 4 lit. (a) CISG (which would lead to the application of domestic law). See for a discussion on this provision above p. 21 et seq. It is submitted that by virtue (and subject to the limitations) of Art. 11 CISG, the modification or termination need not take any particular form.[357]

Art. 29(2) first sentence CISG provides an exception to Art. 29(1) CISG: "A contract in writing which contains a provision requiring any modification or termination by agreement to be in writing may not be otherwise modified or terminated by agreement". The parties may thus agree that any modification of their written contract must be in the written form. By way of example, so-called "no oral modification"-clauses would fall under this provision.

There is however a counter-exception to Art. 29(2) first sentence CISG. The second sentence of this provision states that a party may be precluded by his conduct from asserting such a clause to the extent that the other party has relied on that conduct. This counter-exeption aims at preventing abuse.[358] The provision may apply, for example, where party A orally suggests a modification to the contract (which includes a "no oral modification"-clause),

[355] Although the provision is to be found in Part III of the Convention (entitled "Sale of Goods") it is closely related to the formation provisions in Part II; see (German) Oberlandesgericht Köln, 22 February 1994, CISG-Online No. 127.

[356] See *Schlechtriem*, in: Schlechtriem/Schwenzer, Commentary, Art. 29 para. 3.

[357] *Schlechtriem*, in: Schlechtriem/Schwenzer, Commentary, Art. 29 para.. 2

[358] *Schlechtriem*, in: Schlechtriem/Schwenzer, Commentary, Art. 29 para. 10.

which party B accepts by performing according to the suggested modification. In such a case party A will normally be precluded from relying on the "no oral modification"-clause in order to insist on the originally agreed performance rather than the modified performance.[359]

[359] See for further examples *Schlechtriem*, in: Schlechtriem/Schwenzer, Commentary, Art. 29 para. 10.