



Overview of the Contract Formation Regime under the CISG

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It is well-worthy to examine the contract formation regime under the CISG, where a middle way between the common and civil law traditions was sought in order to achieve a system that is acceptable, efficient and suitable for the Convention's beneficiaries, i.e. Parties to a contract which is governed by the CISG; taking into consideration the immensity, rapidity and at times complexity of international sales transactions in today's business world.

The prevailing method of contract formation is the "offer and acceptance", which is acknowledged in majority of legal systems¹ as well as in a number of prominent international legal texts, including the CISG.² That being said, still, contract formation is a subject which stimulates a great deal of interest for comparative law studies given that each jurisdiction has its own "flavor" when it comes to the specifics of the subject matter.

¹ PANNEBAKKER, E., "Offer and Acceptance and the Dynamics of Negotiations: Arguments for Contract Theory from Negotiation Studies", In *Erasmus Law Review*, No. 2, 2013, p. 131. Retrieved on 26 August 2015 from: <http://www.elevenjournals.com/tijdschrift/ELR/2013/2/ELR-D-13-00001>

² Such as: UNIDROIT Principles of International Commercial Contracts (hereinafter "PICC" or "UNIDROIT Principles"), the Principles of European Contract Law (hereinafter "PECL") and the Draft Common Frame of Reference (hereinafter DCFR").

It is important to examine how the CISG was structured within itself; in order to identify where the relevant rules on the formation of contracts are located and their interaction with other provisions of the Convention. In this respect, one should first realize that the CISG comprises of four parts which respectively deal with: the scope of application of the Convention and the general provisions; rules governing the formation of contracts for the international sale of goods; substantive rights and obligations of the buyer and seller arisen from the contract; the final clauses of the Convention regulating matters such as how and when the Convention shall come into force and the rules on possible reservations and declarations.³ As seen, the rules on formation of contracts are found under Part II of the Convention which deals with various issues in relation to the subject matter. That being said, provisions set out in other parts of the CISG also do have a significant impact on the contract formation regime stipulated under the Convention.

It goes without saying that “General Provisions” laid down in Part I, Chapter II of the Convention are highly relevant for all parts of the CISG, including the rules on the contract formation, as they are applicable throughout the Convention, as a whole. The General Provisions deal with the issues related to interpretation, trade usages and other general provisions with regards to the contractual form,⁴ which are often resorted when tackling issues related to contract formation.

Other than this, Part IV of the Convention is also relevant for it allows Signatory States to make certain reservations including the possibility to opt out from Part II or Part III of the Convention under the Article 92⁵. It is interesting how this Article was introduced upon the

³ Explanatory Note by the UNCITRAL Secretariat on the United Nations Convention on Contracts for the International Sale of Goods dated 1989. Retrieved on 11 October 2015 from:

<http://www.cisg.law.pace.edu/cisg/text/p23.html>

⁴ SCHLECHTRIEM, P. & BUTLER, P., *UN law on international sales the UN Convention on the International Sale of Goods*, Berlin: Springer, 2008, p. 4.

⁵Article 92 of the Convention: “(1)A Contracting State may declare at the time of signature, ratification, acceptance, approval or accession that it will not be bound by Part II of this Convention or that it will not be bound by Part III of this Convention.

(2) A Contracting State which makes a declaration in accordance with the preceding paragraph in respect of Part II or Part III of this Convention is not to be considered a Contracting State within

request of the Scandinavian States in order to allow them to ratify the Convention without the Part II, who later decided to withdraw their Article 92 reservations in order to avoid confusions between merchants which would potentially put the international trade in jeopardy.⁶ That being said, pursuant to the Article 94⁷, Denmark, Finland, Iceland, Norway and Sweden declared that both Part II and Part III of the Convention is inapplicable where the parties have their places of business in Denmark, Finland, Iceland, Norway or Sweden due to the fact that the Scandinavian countries have their own uniform Sale of Goods Acts. However, the effectiveness of this reservation is also a subject of inquiry⁸. On the other hand, Article 96⁹ has also significance over the contract formation regime as it allows States, whose legislation requires contracts of sale to be concluded in or evidenced by writing, make a reservation on the “freedom of form” principle stipulated under the

paragraph (1) of article 1 of this Convention in respect of matters governed by the Part to which the declaration applies.

⁶ CISG-AC Declaration No 2, Use of Reservations under the CISG. Rapporteur: Professor Dr. Ulrich G. Schroeter, University of Mannheim, Germany. Adopted by the CISG-AC following its 18th meeting, in Beijing, China, on 21 October 2013. Retrieved on October 11, 2015 from: <http://www.cisg.law.pace.edu/cisg/CISG-AC-dec2.html>

⁷ UNCITRAL webpage. Retrieved on 11 October 2015 from:

http://www.uncitral.org/uncitral/en/uncitral_texts/sale_goods/1980CISG_status.html

⁸ *“On other key respects, however, the Scandinavian CISG position has been marked by restraint. For one thing, Denmark, Finland, Norway and Sweden all chose to make Article 94 declarations (reservations) which serve to exclude inter-Scandinavian commerce from the CISG field. These declarations were based on the assumption that all four Scandinavian States would continue to have ‘the same or closely related legal rules.’ However, that assumption failed when Denmark refused to follow its northern neighbors in the adoption of a new ‘liability differentiation’ scheme for domestic sales. Now that the Scandinavian Sales Acts no longer seem ‘closely related’, it has been argued that the Article 94 declarations should all be withdrawn.”* Excerpt from:

LOOKOFSKY, J., “Alive and Well in Scandinavia: CISG Part II”, In *18 Journal of Law and Commerce*, 1999. Retrieved in 11 October 2015 from: <http://www.cisg.law.pace.edu/cisg/biblio/lookofsky1.html>

⁹Article 96 of the Convention: *“A Contracting State whose legislation requires contracts of sale to be concluded in or evidenced by writing may at any time make a declaration in accordance with article 12 that any provision of article 11, article 29, or Part II of this Convention, that allows a contract of sale or its modification or termination by agreement or any offer, acceptance, or other indication of intention to be made in any form other than in writing, does not apply where any party has his place of business in that State.”*

Convention. However; the relevance of this reservation is diminishing as the States no longer impose written agreements on international sales contracts in their domestic laws.¹⁰

Finally, due regard shall be given to the fact that the Convention does not govern some of the issues that are of significance for the contract formation area such as law of agency and validity of the contract or any of its terms. It is left for domestic laws to decide whether a contract is void or voidable as a result of misrepresentation, vitiated consent, fraud, lack of or limited legal capacity, illegality or abusive terms.¹¹

Should you have any questions on [international sales law](#) and the [CISG](#) or the contract formation regime under [Turkish law](#), please do not hesitate to contact me at fatmaesra@guzeloglu.legal

¹⁰ CISG-AC Declaration No 2, Supra Note 24.

¹¹ SCHWENZER, I., & MOHS, F. (2006).