



The CISG: Could the parties conclude a contract outside the scope of the traditional “offer and acceptance” model?

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All around the world, in most simple terms, a contract is defined as a legally binding agreement. There are various ways to conclude a legally binding agreement; the most common method is the “offer and acceptance” model which is also adopted by the CISG and Turkish Contract Law.

UNIDROIT Principles of International Commercial Contracts (“PICC”) embraces the offer and acceptance mechanism along with an alternative method which takes “parties conduct” as a basis. Article 2.1.1 of PICC propounds: “*A contract may be concluded either by the acceptance of an offer or by conduct of the parties that is sufficient to show agreement.*” Therefore the PICC, by explicitly stating that the conduct of the parties which sufficiently shows an agreement is also a way to conclude a contract, maximizes parties’ freedom to negotiate until they agree to contract on certain terms without any need to isolate a distinct offer and acceptance between the parties.¹

¹ VOGENAUER, S., *Commentary on the UNIDROIT Principles of International Commercial Contracts (PICC)*, 2nd ed., Oxford, Oxford University Press, 2015, p. 262.

As per the United Nations Convention on Contracts for the International Sale of Goods (“CISG”), at first sight, due to absence of an explicit provision facilitating a more flexible method for contract formation, like the one stipulated under the PICC, it may seem rather obsolescent; by neglecting other forms of reaching an agreement.² In fact, it is even criticized for following the traditional treatment of a contract conclusion which is claimed to be incapable of meeting “*the requirements of today’s world of business, especially when it comes to the conclusion of sales contracts covering major and technically complicated objects*”.³

However, it should be first stressed that the CISG defines offer as a “proposal” and not exclusively as a “statement”. Correspondingly, in the doctrine, it is asserted that under the CISG, a contract may be concluded based on the conduct of the parties where only an implicit intention exists; provided that such consensus is fit for proof. ⁴ In that regard, depending on the circumstances of the case, other means, such as dispatching of the goods, may constitute such a proposal. Hence, in such circumstance where there are no clearly distinguishable and corresponding declarations, but parties mutual intention is indicated by their conduct; a contract is deemed to be concluded under CISG without any need to resort to domestic law.⁵ On the other hand, for “acceptation”, the CISG explicitly sets forth that that it can be in the form of a conduct, rather than an actual statement.

Moreover, it would be inaccurate to conclude that the CISG acknowledges only offer-acceptance model, and ostracizes all other methods of contract formation. Article 6, itself, is sufficient to refrain from such deduction as it allows parties to derogate from or vary the

² As quoted Prof. Schlechtriem in:

FOGT, M., “Contract Formation under the CISG: The Need for a Reform”, In L. DiMatteo (Ed.), *International Sales Law: A Global Challenge*, New York, Cambridge University Press, 2014, p.182

³ ENDERLEIN, F., & MASKOW, D., *International sales law: United Nations Convention on Contracts for the International Sale of Goods: Convention on the Limitation Period in the International Sale of Goods: Commentary*, New York, Oceana, 1992, p .83.

⁴ SCHLECHTRIEM, P. & BUTLER, P., *UN law on international sales the UN Convention on the International Sale of Goods*, Berlin: Springer, 2008, p. 65.

⁵ *Ibid*, p. 66.

effect of any provision of the Convention. That said there are indeed other articles in the Convention which accommodate formation of a contract in the absence of a distinguishable offer and acceptance, without any need to invoke Article 6. As such, Article 8(3) provides that parties' intentions are to be determined in consideration of 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.

Furthermore, Article 9(1), as a manifestation of part autonomy principle, also stresses that the parties are bound by any usage to which they have agreed and by any practices which they have established between themselves. Second paragraph of the said article, as a default rule, deems trade usages as applicable to contract formation provided that such usages are acknowledged and widely observed by the parties to contracts of such type involved in the particular trade concerned. Therefore, it is seen that the CISG provides indispensable flexibility that is required to facilitate formation of contract; even in circumstances where it is difficult to isolate a distinct offer and acceptance⁶ such as agreements reached in point by point negotiations or prolonged exchange of correspondence.⁷

In summary, Part II of the CISG has to be read and interpreted in light of the provisions set forth under the Part I in order to give them a dynamic and up-to-date effect, together with the autonomous interpretation of the Convention.⁸

⁶ HONNOLD, J., & FLECHTNER, H., *Uniform Law for International Sales under the 1980 United Nations Convention*, 4th ed., The Hague, Kluwer Law International, 2009, pp. 197-198.

⁷ FERRARI, F., Introduction to Articles 14-24. "Article 14" In S. Kröll, L. Mistelis, & P. Viscasillas (Eds.), *UN Convention on Contracts for the International Sale of Goods (CISG): Commentary*, München, C.H. Beck, 2011p. 6.

⁸ "...The use of general principles allows the interpreter to build a bridge over the failing express rule or rules to regulate alternative means of contract formation. The combination of these provisions of Part I and II CISG are the means by which autonomous and dynamic interpretations can be made...The contract formation rules of the CISG merely reflect the model found in most national contract acts or codes of the nineteenth and twentieth centuries – a contract is formed by indication of assent in an acceptance to a definite offer. Fortunately, the general provision of the CISG Part I can supplement and, thus, mitigate some of the drawbacks of the traditional rules of Part II." Excerpt from: FOGT, M. (2014). pp. 183-185.

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