



## **Contract Formation under the CISG: Sufficient definiteness of an Offer**

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### **Definition of “Sufficient Definiteness”**

Comprising a “sufficient definiteness” is a condition that a proposal is to meet in order to constitute a binding offer under the United Nations Convention on Contracts for the International Sale of Goods (the “CISG” or the “Convention”) as stipulated under Article 14(1). Meaning, the essential terms of the future agreement, *essentialia negotii*, must have been introduced in the offeror’s proposal; such that, when that respective proposal is accepted, as it is, by the offeree; it must be capable of leading to conclusion of a valid and binding agreement.<sup>1</sup>

Second sentence of the aforementioned article provides a presumption on the sufficient definiteness of a proposal. Accordingly, a proposal which indicates the goods and expressly or implicitly fixes or makes provision for determining the quantity and the price is sufficiently definite. It is accepted that the description of the goods does not have to entail a great detail. Such that, a simple indication of the goods and their amounts suffice provided

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<sup>1</sup> HUBER, P., & MULLIS, A., *The CISG a new textbook for students and practitioners*, München, Sellier, 2007, p. 72.

that such indication is at least interpretable.<sup>2</sup> Yet, it is debated that, in practice, a proposal which only comprises of these terms is often incapable of giving rise to a valid offer where the time or place of delivery or even the type of packaging may be of significance for the subject matter agreement.<sup>3</sup> That said, one shall assume that, typically, an offeror would refrain from demonstrating an intention to be bound by its proposal where there are certain other *essentialia negotii* which are yet unspoken and, in converse, if the addressed offeree considers that certain essential points are missing in a given proposal, it shall bring them up within the meaning of Article 19 of the Convention.<sup>4</sup> However, in practice, the situation may not be as clear cut as assumed herein. In this respect, due consideration shall be given to, if any, express agreements between the parties, such as a framework agreement, trade usages or previous course of dealings between the parties when assessing whether a proposal lacks sufficient definiteness due to its failure to make reference to certain additional points which are yet to be agreed upon between the parties; such as place of delivery.<sup>5</sup> In this respect, Articles 8 and 9 shall play a significant role in assessing whether parties have agreed on the essential terms of the contract.

### **Interaction between Article 14 and 55 of the CISG**

On the other hand, Article 14 raised quite an academic debate in relation to its interaction with Article 55 of the Convention. The reason being, the Article 14 stipulates that only sufficiently definite proposals qualify to become an offer and in order to achieve that level of sufficiency the price and quantity of the specified goods should be determined or determinable in the proposal. Article 55, on the other hand, provides that where a contract has been validly concluded but does not expressly or implicitly fix or make provision for determining the price, the parties are considered to have impliedly made reference to the

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<sup>2</sup> VURAL, B., “Formation of Contract According to the CISG”, In *Ankara Bar Review* 2013/1, pp. 135-136. Retrieved on 13 October 2015 from: <http://www.ankarabarsu.org.tr/siteler/AnkaraBarReview/tekmakale/2013-1/5.pdf>

<sup>3</sup> SCHLECHTRIEM, P., *Commentary on the UN convention of the international sale of goods: (CISG)*, 2.nd ed., München, C. H. Beck, 1998, pp. 105-106.

<sup>4</sup> 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.84.

<sup>5</sup> HUBER, P., & MULLIS, A., *The CISG a new textbook for students and practitioners*, München, Sellier, 2007, p. 72.

price generally charged at the time of the conclusion of the contract for such goods sold under comparable circumstances in the trade concerned, unless the contrary is indicated.

The question is “*Under what circumstances could the Article 55 possibly be invoked since the CISG appears to exclude the possibility of an offer which does not, at least implicitly, make provision for determining the price in the first place?*”<sup>6</sup> This is also referred to as a “price paradox” within the Convention.<sup>7</sup> The reason underlying this conflict can be traced back to the drafting history where two positions were disputed between the states which approached the “open-price term” contracts with hostility in view that it puts the weaker party in disadvantage and those favored its adaptation.<sup>8</sup> In the end, the reconciliation was achieved by introducing two different rules under two different Parts of the CISG instead of amending the wording of the Article 14 because it was assumed that the jurisdictions in favor of open-price contracts could invoke Article 92(1) of the CISG in order to opt-out from the Part II of the Convention.<sup>9</sup> However, in consideration of the fact that none of the Contracting States currently have such a reservation under the Article 92 of the Convention<sup>10</sup>, there remains the question of how to handle this discrepancy.

The views diverge on the issue: some consider that it is impossible to conclude a contract without the price determined (except for when the Article 92 Reservation is made); others submit that the Article 55 is obviously introduced in order to give effect to open-price offers and is adequate to fill the gap concerning the price.<sup>11</sup> Some commentators also submit a

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<sup>6</sup> SCHWENZER, I., & MOHS, F., “Old Habits Die Hard: Traditional Contract Formation in a Modern World”, In *Internationales Handelsrecht* (6:2006) 239-246. Retrieved on 25 September 2015, from: <http://www.cisg.law.pace.edu/cisg/biblio/schwenzer-mohs.html>

<sup>7</sup> MEYER, O., “The CISG: Divergences between Success-Scarcity and Theory-Practice”, In L. DiMatteo (Ed.), *International Sales Law: A Global Challenge*, New York, Cambridge University Press, 2014, p. 29.

<sup>8</sup> GARRO, A., “Reconciliation of Legal Traditions in the U.N. Convention on Contracts for the International Sale of Goods”, In *23 International Lawyer*, 1989, pp. 443-483. Retrieved on 25 October 2015 from: <http://www.cisg.law.pace.edu/cisg/biblio/garro1.html>

<sup>9</sup> SCHWENZER, I., FOUNTOULAKIS, C. & DIMSEY, M., *International sales law: A guide to the CISG*, 2.nd ed., Oxford, Hart, 2012, p.98.

<sup>10</sup> UNCITRAL webpage. Retrieved in 11 October 2015 from: [http://www.uncitral.org/uncitral/en/uncitral\\_texts/sale\\_goods/1980CISG\\_status.html](http://www.uncitral.org/uncitral/en/uncitral_texts/sale_goods/1980CISG_status.html)

<sup>11</sup> VISCASILLAS, M., “The Formation of Contracts and the Principles of European Contract Law”, In *13 Pace International Law Review*, 2001, p. 371-397. Retrieved in 13 October 2015 from: <http://www.cisg.law.pace.edu/cisg/biblio/perales3.html>

different reading of the Article 14 according to which: “...*There are two sentences in Article 14. The first sentence states that an offer needs definiteness, but does not require a price term. The second sentence simply sets out a safe harbor which provides that if there is a price term and the goods are specified, then the offer will not fail for indefiniteness...*”<sup>12</sup> Whereas, another view gives precedence to parties’ intentions and invokes Article 8 to resolve the issue.<sup>13</sup> Accordingly, if it is the parties’ intention to be bound by a contract where the price of the goods remains undetermined, the contract should, nevertheless, be deemed concluded and Article 55 should be used for the price determination. The intention of the parties should be assessed in accordance with Article 8 of the Convention. In circumstances where the parties begin performing the contract, such intention is easy to detect<sup>14</sup>. Under two circumstances, however, an open-price contract cannot be deemed as concluded: first, where the agreement on the price is a condition to the formation of the contract and second, where it is impossible to determine a market price for the specified goods.<sup>15</sup> Hence, in very simple terms, as the Parties are given the power to derogate from or vary the effect of any of the provisions of the Convention pursuant to Article 6, it is up to them to decide whether or not they would like to conclude a contract without determining a contract price in prior. Where it is understood from the intention of the Parties that they have agreed on an open-price contract, as evaluated in accordance with the Article 8, then it is accepted that the Parties have derogated from the reign of Article 14, triggering the application of the rule stipulated under Article 55.

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<sup>12</sup> GABRIEL, H., “The Buyer’s Performance under the CISG: Articles 53-60 Trends in the Decisions”, In *Journal of Law and Commerce*, Vol. 25:273, 2005, p.276. Retrieved on 26 October 2015 from: <https://www.uncitral.org/pdf/english/CISG25/Gabriel.pdf>

<sup>13</sup> 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.189.

MURRAY, J., “An Essay on the Formation of Contracts and Related Matters under the United Nations Convention on Contracts for the International Sale of Goods”, In 8 *Journal of Law and Commerce*, 1988. pp.11-51. Retrieved on 24 October 2015 from: <http://www.cisg.law.pace.edu/cisg/biblio/murray.html>

VISCASILLAS, M., “The Formation of Contracts and the Principles of European Contract Law”, In 13 *Pace International Law Review*, 2001. Retrieved in 13 October 2015 from: <http://www.cisg.law.pace.edu/cisg/biblio/perales3.html>, p. 371-397.

<sup>14</sup> In a decision rendered by Slovakian Court, a contract which was begun to be performed by the Parties without prior determination of the contract price is deemed as concluded. “...*The court found that [Buyer] partially paid both invoices by payments made on 6 September 2006 and 21 October 2006. Since the parties did not agree upon a purchase price, [Buyer] was obliged to pay the price under article 55 of the Convention...*”

SLOVAK REPUBLIC, 29 October 2008, District Court in Nitra.

<sup>15</sup> FOGT, M. (2014), p. 189.

## **Under Turkish Law**

Under Turkish Law, although it is stipulated that parties have to agree on essential terms in order to conclude a contract; it does not specify what constitutes an essential term of a contract. However, the Article 207 of Turkish Code of Obligations (“TCO”) provide a specific definition for sale contracts under which it is stipulated that it is a contract where the seller undertakes to transfer the possession and ownership of the sold good and in turn the Buyer assumes the obligation to pay a price. Accordingly, it is clear that the price is an essential term of a sales contract. That being said, for particular contracts, the TCO provides rules on how to determine essential terms which are not, explicitly or implicitly, agreed by the parties. Article 207(3) provides that if the contract price is determinable in accordance with the facts and circumstances of the case, it is deemed as determined price. Moreover, Article 233(1) stipulates that where the buyer, without indicating a purchase price, explicitly states that it will purchase the goods in question, the sale contract is deemed as concluded on the average market price in the place and at the time of the performance. Hence, unless the parties intentionally leave the price of a sales contract to be agreed upon at a later stage of the negotiations (i.e. as a condition to conclude a contract), it is possible to conclude an agreement without explicitly or implicitly determining a contract price under Turkish Law.

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## **Under the PICC**

UNIDROIT Principles of International Commercial Contracts (the “PICC”), Article 2.1.2 provides that a proposal for concluding a contract constitutes an offer if it is sufficiently definite and indicates the intention of the offeror to be bound in case of acceptance. This provision is elucidated by the Official Comment of the PICC as<sup>17</sup>:

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<sup>16</sup> KOCAAĞA, K., “Sözleşmenin Kurulabilmesi İçin Tarafların İrade Beyanları Arasındaki Uygunluğun Kapsamında Yer Alması Gereken Noktalar”, In *TBB Dergisi*, Vol 79, 2008, pp.77-78. Retrieved on 26 October 2015 from: <http://tbbdergisi.barobirlik.org.tr/m2008-79-465>

<sup>17</sup> Unilex webpage. Retrieved on 26 October 2015 from: <http://www.unilex.info/instrument.cfm?pid=2&pos=15&do=comment>

*“...Even essential terms, such as the precise description of the goods or the services to be delivered or rendered, the price to be paid for them, the time or place of performance, etc., may be left undetermined in the offer without necessarily rendering it insufficiently definite: all depends on whether or not the offeror by making the offer, and the offeree by accepting it, intend to enter into a binding agreement, and whether or not the missing terms can be determined by interpreting the language of the agreement in accordance with Articles 4.1 et seq., or supplied in accordance with Articles 4.8 or 5.1.2. Indefiniteness may moreover be overcome by reference to practices established between the parties or to usages (see Article 1.9), as well as by reference to specific provisions to be found elsewhere in the Principles...”*

As seen, the solution of the PICC concerning the open-price contracts is identical the one achieved under the CISG by means of resorting Article 8 of the Convention.

Thank you for your interest. You may reach as at [info@guzeloglu.legal](mailto:info@guzeloglu.legal) for your questions in relation to international commercial law as well as Turkish law.