



## REVOCATION OF AN OFFER UNDER THE CISG IN A COMPARATIVE LAW PERSPECTIVE

By **Abdülkadir Güzeloğlu & Fatma Esra Güzeloğlu**

**30 June 2016**

The United Nations Convention on Contracts for the International Sale of Goods (“CISG”) makes a distinction between a withdrawal and a revocation. According to the said distinction, a withdrawal may only take place before the offer reaches the offeree whereas the revocation may be triggered after the offer reaches the offeree but before the latter has dispatch an acceptance. In this respect, it could be concluded that a withdrawal prevents an offer from becoming effective; while the revocation terminates an effective offer; both ultimately call off an offer’s capability of being accepted.

The issue of revocation is undoubtedly one of the subjects that the Drafters of the CISG tried to find a middle ground between common and civil law approach. In fact, under the common law, there is not a distinction between the terms “revocation” and “withdrawal”. According to common law point of view, an offer can be revoked at any time prior to an effective acceptance.<sup>1</sup>

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<sup>1</sup>ANDERSEN, C., MAZZOTTA, F., & ZELLER, B., *A Practitioner's Guide to the CISG*, Huntington, NY, Juris, 2010, p. 146.

So much that, even if the offeror specifically provides a particular time frame until which the offer shall be held valid; such offer, nevertheless, cannot be deemed as “irrevocable”. Therefore, the offeror would still be able to change its mind and revoke such offer at its convenience, subject to some exceptions which are generally found across common law jurisdictions; such as offers under seal and “option contracts”<sup>2</sup>. Together with this, an offeree who wishes to have the offeror be bound by its offer until the time when the former either rejects or accepts the offer, has to give what is called as a “consideration” to the latter. A consideration is “*a device which is required in common law jurisdictions to make an offer binding*”<sup>3</sup>.

Civil law jurisdictions, conversely and clearly embrace a different track with regards to the issue of revocation of an offer. Firstly and very distinguishably, the concept of “consideration” does not exist in the civil law tradition. For example, under Turkish Law<sup>4</sup>, as a civil law jurisdiction, it is established that an offeror shall continue to be bound by its offer until the fixed time set for a prospect acceptance elapses or in the absence of such fixed time, until a reasonable length of time passes after the offer was made. As for the offers conveyed in the presence of the offeree, the offeror is freed from being bound by its offer unless the offeree immediately accepts such offer. This position holds almost exactly the same for many other civil law jurisdictions as well.<sup>5</sup>

French Supreme Court, despite its constant reaffirmations that an offer, as a general principle, is revocable before it is accepted, however almost extinguishes that possibility by imposing

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<sup>2</sup> SCHWENZER, I., HACHEM, P., & KEE, C., *Global Sales and Contract Law*, Oxford, Oxford University Press, 2012, p. 141.

<sup>3</sup> FOUNTOULAKIS, C., & WERRO, F., “Are Offer and Acceptance Subject to the Form Requirements of the Future Contract? - Or, What We Can Learn from a Four-Hand Analysis Based on Dickinson v. Dodds”, In A. Buchler & M. Muller-Chen (Eds.), *Private law: National - global - comparative : Festschrift für Ingeborg Schwenger zum 60. Geburtstag*, Bern, Stämpfli, 2011, p. 515-530.

<sup>4</sup> Articles 3-5 of Turkish Code of Obligations.

<sup>5</sup> “...rules of the Germanic legal systems: they are the ones most at odds with the English rules in that they embrace the principle that the promise as such is binding, even if the beneficiary of the promise has not manifested his intention to accept it. Take § 145 of the German BGB, § 862 of the Austrian Allgemeines Bürgerliches Gesetzbuch, or Articles 3 para. 1 and 5 para.1 of the Swiss Code of Obligations. In all of them, you find the rule that, once an offer has been made, the offeror remains bound by the offer until the period fixed in the offer has elapsed or, if no such period was fixed, until a period of reasonable length has expired. If the offer is accepted while the period is still running, the contract is concluded without leaving the offeror the chance to reject the contract, except where he has made it clear that his offer would not be binding...” Excerpt from: FOUNTOULAKIS, C., & WERRO, F. (2011), p.518.

restrictions that may potentially apply for every case which is that an offer may not be revoked where it states a certain time for acceptance or, in the absence of such fixed period, for a reasonable period of time<sup>6</sup>, which essentially boils down to the same rule set under the Turkish Code of Obligations. As seen, under the common law approach, the default rule is the offer's "revocability", whereas under most of the civil law jurisdictions<sup>7</sup>, it is the other way around; an offer is deemed irrevocable once it reaches the offeree, at least, up to a certain point in time unless the offeror made clear that its offer is non-binding.<sup>8</sup> It is quite interesting to see that the rivalry between common and civil law approach towards the issue of revocability was such a hot topic during the drafting stage that, in the end, the Scandinavian States, who consider the final version of the provision "*unduly influenced by the corresponding Common law rules*" made a reservation under Article 92 in order to opt-out from Part II of the Convention grounding their decision on, *inter alia*, the aforementioned reason.<sup>9</sup>

Under the CISG, it is adopted that, in principle, an offer is revocable; which makes it seem as if the Convention has embraced a closer approach towards the common law method. That being said, the respective provision further expands the said rule by introducing certain restrictions where an offer is deemed as irrevocable which manifestly portrays the civil law influence. Some commentators have expressed that the fact that the rule on revocation encompasses characteristics from both common and civil law traditions should not be considered as being a compromise between these legal systems, but rather "*one that brings to light the common basis of the two*".<sup>10</sup>

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<sup>6</sup>SCHWENZER, I., HACHEM, P., & KEE, C. (2012), p.141.

<sup>7</sup> "In civil law systems, while an offer can be revoked (as it can at common law) the revocation might be more costly. In French law, for example, 'although revocation of an offer is permitted... the offeror is bound to indemnify the offeree or to pay damages in case of revocation'. In German law and in other civil law systems, 'an offer is binding unless the offeror stated that the offer was revocable.' In Italy, an offer can be revoked even after acceptance by offeree if revocation occurs before offeror knows of the acceptance. However, if the revocation occurs after the offeree has accepted and in good faith starts performing the contract, the offeree is entitled to damages for the expenses incurred and for any losses incurred." Excerpt from:

ANDERSEN, C., MAZZOTTA, F., & ZELLER, B. (2010), p. 147.

<sup>8</sup> FOUNTOULAKIS, C., & WERRO, F. (2011), p. 518.

<sup>9</sup> 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>

<sup>10</sup> ANDERSEN, C., MAZZOTTA, F., & ZELLER, B. (2010), p. 147.

# GÜZELOĞLU

attorneys-at-law | hukuk bürosu

Should you have any questions on [international sales law](#), the CISG or [Turkish law](#), please do not hesitate to contact us at [info@guzeloglu.legal](mailto:info@guzeloglu.legal)