



The CISG: What Differentiates a Valid and Binding Offer from a Mere Proposal?

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According to the offer and acceptance model of contract formation, an offer constitutes the starting point in the contract formation process.¹ Following the manifestation of an offer, a contract is concluded when it is reciprocated with an acceptance by the offeree. Although the general outline is as simple as that, there are certain vital questions that must be addressed in order to assess whether, when and in what scope a valid contract is concluded. One of these questions is “What differentiates a valid and binding offer from a mere proposal?”

Under CISG, there are certain criteria that a proposal must meet in order for it to constitute a valid and effective offer in the sense of the Convention. These criteria, which are laid down under Article 14 of the Convention, can be categorized under three points: firstly, the proposal must be addressed to one or more specific persons, secondly it must indicate the intention of the offeror to be bound by such proposal in case of acceptance and thirdly, it must be sufficiently definite.

¹ LOOKOFISKY, J., *Convention on Contracts for the International Sale of Goods (CISG)*, Alphen aan den Rijn, The Netherlands, Kluwer Law International, 2012, p. 65.

Definiteness of the addressee

Article 14(2)² of CISG establishes that a proposal is considered as a mere invitation to make offer if it is not addressed to one or more specific persons; unless the offeror clearly indicates otherwise. In other words, in principle, an offer must be addressed to a specific person or group of persons in order to hold a binding effect; otherwise such manifestation is considered only as “an invitation to make an offer” for the other party (*invitatio ad offerendum*). Hence, when the addressee of an offer is indefinite, the offer would *not* bind the offeror, unless otherwise is indicated by the offeror.³

Nevertheless, an offer which is addressed to an indefinite group of persons may still be binding upon the offeror if the offeror clearly demonstrates its intention to be bound by such offer⁴. Under **English law**, on the other hand, there is no such requirement that a proposal must be addressed to one or more specific persons⁵; rendering the public offers binding upon the offeror provided that the “consideration” requirement is fulfilled.⁶ Similarly, under Article 8 of **Turkish Code of Obligations**, exhibition of goods with their prices or delivery of tariffs, price lists or etc. is considered to be an offer unless otherwise is clearly and easily understood. Therefore, under both English and Turkish law, the approach adopted in relation to public offers differs from the one set out under the CISG.

² Article 14(2) of the Convention: “A proposal other than one addressed to one or more specific persons is to be considered merely as an invitation to make offers, unless the contrary is clearly indicated by the person making the proposal.”

³ LOOKOFSKY, J., *Understanding the CISG in the USA: A Compact guide to the 1980 United Nations Convention on Contracts for the International Sale of Goods*, 4th ed., The Hague, Kluwer Law International, 2012, p. 47.

⁴ Provided that the respective offer fulfills the “sufficiently definiteness” test, which shall be elaborated further in section 2.2.3.

⁵ ZIEGEL, J. & SAMSON, C., *Report to the Uniform Law Conference of Canada on Convention on Contracts for the International Sale of Goods*, 1981. Retrieved on 25 October 2015 from: <http://www.cisg.law.pace.edu/cisg/wais/db/articles/english2.htm>

⁶ UNITED KINGDOM, *Carlill v Carbolic Smoke Ball Co.*, 1893, 1 QB 256.

Intention to be bound in case of acceptance

According to Article 14(1), a party's intention to be bound in the event of acceptance, *animus contrahendi*, is one of the essential factors in determining whether subject matter proposal constitutes a binding offer, or not, in terms of the Convention. So much that; when a party lacks intention to be bound by its proposal which was directed to a specific person and comprised sufficient definiteness; in which case, still, there exists no binding offer due to absence of intention to conclude a binding agreement in the event of acceptance. This is because a proposal does not always aim at concluding a contract but may perhaps be aimed at taking up negotiations on a sale.⁷

Sufficient definiteness

Comprising a "sufficient definiteness" is the last condition that a proposal is to meet in order to constitute a binding offer under 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.⁸

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

⁷ 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.

⁸ 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.⁹ 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.¹⁰ 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.

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⁹ 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.ankarabarusu.org.tr/siteler/AnkaraBarReview/tekmakale/2013-1/5.pdf>

¹⁰ HUBER, P., & MULLIS, A., *The CISG a new textbook for students and practitioners*, München, Sellier, 2007, p. 72.