Chapter 3 FORMATION OF CONTRACT

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§3.01 INTRODUCTION

The formalities of the formation of a contract are deeply rooted in the common law tradition. Unlike civil law traditions, common law has adopted the statute of frauds, “bargain-for exchange” or consideration, and parol evidence rules to assure contract formation and enforceability. Although common law traditions have been modified under the U.C.C., the CISG provides an excellent example of compromise between the two legal traditions. This chapter explores the legal relationship between the parties by examining the formation of a contract—the offer, acceptance, and other related issues therein.

Practical Application: Counsel should consult Table 4—Commercial Transactions Comparative Chart in Appendix A.

§3.02 LEGAL RELATIONSHIP

The CISG “adheres to the ‘classical’ or ‘traditional’ conception of the manner in which private actors create contractual obligations.”1 “[C]ontractual obligations arise out of expressions of mutual agreement.”2

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1Michael P. Van Alstine, Consensus, Dissensus, and Contractual Obligation Through the Prism of Uniform International Sales Law, 37 Virginia Journal of International Law (Fall 1996) 1-105, also
A contract is concluded by concurrent statements of the parties' will. Therefore, "the CISG does not vitiate the need to prove concepts familiar to the common law, including offer, acceptance, validity and performance." The CISG also recognizes that a contract can be established "without following the two-step offer-acceptance pattern: Article 18 provides that a contract may be concluded by performing an act, by Filanto, S.p.A. v. Chilwich Int'l Corp., 789 F. Supp. 1229, 1237 (S.D.N.Y. 1992), also available at http://cissg.w3.pearce.edu/cases/920414ul.html and Article 8 provides that a statement (including terms of agreements) are to be interpreted to include trade usages and the parties' practices and also are to be construed in the light of 'any subsequent conduct of the parties.' See further discussion of intent and acceptance in §§3.03[B] and 3.07.

The challenge to common law trained attorneys under the CISG is that the elements of formation of a contract can be proven by any means since the statute of frauds applies only to the parol evidence rule under the CISG. Under Article 11, a contract of the sale of goods does not have to be concluded in writing, nor do any other requirements regarding form exist with the exception of countries who have declared an Article 92 reservation. See Appendix A-3, Table 1—Table of Contracting States to the CISG and Declarations.


See generally Article 11. Courts have declared that Article 8 displaces the U.S. parol evidence rule.

Hence, all documentation, correspondence, or action in accordance with the contract can be admissible to prove a contract. The usages and practices of the parties or the industry are automatically incorporated into any agreement governed by the CISG, unless expressly excluded by the parties. In addition, the CISG adopted the civil law approach by also eliminating the element of consideration.

Practical Application: The application of the CISG can literally change the outcome of a case due to its admissibility of all proof to establish a contract. This can work either way for a practitioner. The key to remember is to obtain all correspondence that exists between the parties, including, but not limited to, past and present written orders, facsimiles, electronic correspondence, or telephone messages. In addition, all individuals who had any contact with the transaction should be deposed or interviewed. However, one should not neglect that evidentiary rules will be observed by the courts except for those excluded under the CISG. Moreover, all documentation should be examined for authenticity. For example, facsimiles, in general, contain date, time, and location on them. If not, further inquiry should be made as to authenticity.

§3.03 OFFER

To establish an offer under the CISG, there must be evidence of the following:

(1) the offer was addressed to one or more specific persons;
(2) the intention of the offeror to be bound and
(3) it was “sufficiently definite” by:
   (a) Indicating the goods and
   (b) Expressly or implicitly fixes or makes provisions for determining the quantity and the price.

In the absence of any agreement in writing, in order to assess the valid conclusion of the contract, courts have examined whether all elements of the offer required under Article 14 were present based on application of Article 8. See further discussion in §3.05[B].

[A] Invitations for Offers

Proposals other than one addressed to one or more specific persons are not offers but are considered

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11 Atlade-Medine v. Crompton Corp., 2001 WL 170666, fn. 6 (S.D.N.Y.), also available at http://cisgw3.law.pace.edu/cases/011107u1.html (holding where applicable, the CISG may render enforceable agreements not evidenced by a writing and therefore subject to the Statute of Frauds; but here there is no agreement for the Court to enforce, written or otherwise ... )). See also China North Chemical Industries Corporation v. Beston Chemical Corporation, 2006 WL 295395 (S.D. Tex.), also available at http://cisg.law.pace.edu/cases/060207u1.html (granting partial summary judgment to seller based on evidence of faxes and e-mails).
"invitations for offers." Hence, inquiries, simple statements of intent, and mass distribution of a catalogue of merchandise or brochures ordinarily will not constitute an offer unless the person making the proposal clearly indicates an intention to make an offer under the CISG. This approach is similar to common law. However, a different outcome may arise under the CISG if a catalogue is addressed to a specific person rather than distributed to the public at large, provided the factual scenario establishes some form of a relationship. Notably, in some civil law countries even "a proposal to supply goods or services at a stated price which is made by a professional supplier in a public advertisement or catalogue, or by a display of goods, is presumed to be an offer to sell or supply at the price until the stock of goods, or the supplier's capacity to supply the service, is exhausted." 

Practical Application: Practitioner should be aware of the factual circumstances of a sale. The form of the publication or advertisement might be construed as an offer given the proper factual scenario. It would be best to advise clients that if they do plan on advertising in any medium, the Internet included, a conspicuous disclaimer should be provided such as the following:

The following advertisement does not constitute an offer but an invitation to negotiate with the seller.

[B] Intent

The CISG demands animus contractendi—the offeror (seller) expresses in his or her proposal the intention to give an option to the offeree (buyer). The elimination of the writing formalities of contract means that a contract can be established verbally or through writing (e.g., electronic communications, facsimiles), with the focus under the CISG being whether the offeror had the intention to be bound by its offer if accepted by the offeree. "Although Article 6 establishes the principle of the preeminence of the common intent of the parties, it does not prescribe how the intent is to be identified." This tool is found in Article 8, which "defines a clear order of priority in the interpretation of such declarations and conduct." The first priority is to establish intent by observing the statements or conduct of a party which "are to be interpreted according to his intent where the other party knew or could not have been unaware of what intent was." The focus of this provison is to establish the actual intent of the speaker or actor as this

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15Article 14 (2).
17There is no case law addressing this particular issue under the CISG; however, case law in the United States demonstrates this point. See, e.g., Lovett v. Frederick Loeser Co., 207 N.Y.S. 753, 755 (1924) (advertisement was not offer but an invitation to enter into negotiations); Craft v. Elder & Johnston Co., 38 N.E. 2d 416 (Ohio Ct. App. 1941) (no contract made by means of advertisement in newspaper absent consideration); see also Arthur L., Corbin on Contracts §11 at 25 (1963 & Supp. 1992) and U.C.C. §2-206.
18Leete, supra, note 16.
19See, e.g., Denmark, Lyngs Andersen 52 ff.; Germany, Münchener Lommentar (Kramer) §145 Rz 8; and Italy, Bianca, II contrato II 256. Art. 2:201(3) PECL. This is provided that an intention to be legally bound is established. See generally Predrag Cvetkovic, Editorial Remarks, Remarks on the manner in which the PECL may be used to interpret or supplement Article 14 CISG (January 2002), Comment and Notes: PECL Article 2:201: Offer, available at http://www.cisg.law.pace.edu/text/pecclcomp14.html#er.
20Van Alstine, supra, note 1.
21Id. See also Netherlands 7 November 1997 Supreme Court (J.T. Schuermans v. Boomsma Distilleerderij/Wijnkopcrij), available at http://cisgw3.law.pace.edu/cases/971107nl1.html (holding no contract after a complete analysis under Article 8).
22Article 8 (1).
achieves the "primary aim of contractual interpretation ... to determine the real mutual will of the parties." Interpretation of the parties' contractual statements define the agreed terms of the parties. For example, buyer who fails to contest either the invoice issued or the further writing of the Seller, which expressly referred to the fact that the Buyer had to pay the sales tax is obligated to pay the tax. If due to ambiguous statements or unclear conduct intent cannot be established, then Article 8(2) provides that intent of the party is to be "interpreted according to the understanding that a reasonable person of the same kind as the other party would have had in the same circumstances." In substance, the application of Article 8(1) is subjective whereas subsection (2) is considered to apply an "objective" standard. In conjunction with the actual intent or the reasonable person standards, consideration must be given to all relevant circumstances of the cases, including any practices which the parties established between themselves, trade usages and any subsequent conduct of the parties. Article 9 has also been employed to further define


24Oberlandesgericht Köln (Germany), 03.04.2006, www.unilex.info. However, only part of the amount claimed by the Seller was considered as unconditional; for the rest, the maturity of Seller's claim depended on the issuing of a correct modified invoice on Seller's part in accordance with the contractual agreement (Art. 58 CISG).


meaning and intent based on widely known and regularly observed usage of terms. See §3.08[B]. However, “the will of the parties (art. 8) and usages (art. 9) should only be applied if the contract does not contain a clear term.”

[C] Definiteness of Offer

An offer must not only contain a manifestation of the offeror’s intent but must be sufficiently definite by providing the goods and expressly or implicitly fix or make provisions for determining the quantity and price. Although more restrictive than the U.C.C., which provides contract formation absent price, it appears that courts have facilitated Article 8 to assist in contract formation issues under the CISG. Moreover, once the offeror’s intention to be bound is established in case of acceptance, courts have looked to other provisions within the CISG to provide absent terms—Article 55 as a means to incorporate a price when not provided for by the parties. See §3.03[D][2] for further discussion on price; Article 31 concerning how and where the goods are delivered; Article 33 concerning the time of delivery; Article 57 concerning place of payment; Article 58 concerning time of payment; and Article 65 concerning detailed specifications of the goods.

[D] Identifying Goods

The quantity of the goods must be identified. The issue that often surrounds this problem is the quality of the goods. Although quality is not directly addressed by Part II of the CISG, Article 35 has been used for the determination of the goods’ quality when not set forth within a contract. See Chapter 4 for further discussion. Close examination as to the parties’ conduct and the language of the contract have also been facilitated to resolve this issue. However, if one party during negotiations insists on a certain quality and there is no clear agreement as to the matter then there is no valid contract.

[1] Quantity of Goods

In order for an offer to be definite, Article 14 prescribes that quantity of goods must be ascertained within the offer. Similar to quality, courts and commentators have provided that the flexible principles of Article 8 governing contract interpretation are used in this matter while observing Article 7(1) to interpret

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32 Germany 31 March 1995 Appellate Court Frankfurt, available at http://cisgw3.law.pace.edu/cases/950331g1.html (holding seller’s delivery of a “Fiolax” quality test tube established that there was no valid contract where evidence established that the parties agreed to delivery of a test tube of “Duran” quality).
the CISG to promote "the observance of good faith in international trade." A "requirement contract," a promise to purchase all the buyer's requirements for particular goods from a particular seller, or an "output contract," a promise by a seller to sell his or her entire output to a particular buyer, is not specifically addressed by the CISG; however, these types of contracts or similar variations have been determined to be covered by the CISG. Therefore, a contract providing that for the "future supply of commercial quantities" or to purchase a "certain quantity for a number of years" was held to be sufficiently definite under Article 14. Moreover, "[A]rticle 14(1) should not be construed to nullify these important transactions on the ground that the quantity will not be fixed until the buyer's requirements or the seller's output become known." This also conforms with the comments to the draft of the CISG, which concludes that language in 'an offer to sell to the buyer 'all I have available' or an offer to buy form the seller 'all my requirements' during a certain time period would be sufficient to determine the quantity of goods to be delivered.'

[2] Price

Article 14 provides that the offer must either "expressly or implicitly fix or make a provision for determining ... price." The wording in this provision has caused much debate with regard to an open price contract. Resolution of this ambiguity has often been resolved by the courts by looking at the actions of the parties, which is consistent with Article 8. However, further ambiguities exist based on the language of Article 55, which provides the following:

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32Honnold, supra note 6. But see Article 65 and Chapter 7.
34Id. See also Supreme Court of Poland, 27.01.2006, www.unilex.info.
35CISG Draft, supra, note 2, Article 12, cmt. 12.
36Germany 4 March 1994 Appellate Court Frankfurt, available at http://cisgw3.law.pace.edu/cases/940304g1.html (disagreement as to price for some items failed to establish contract); but see Switzerland 26 September 1997 Commercial Court Aargau, available at http://cisgw3.law.pace.edu/cases/970926s1.html (contract was sufficiently definite).
38Austria 20 March 1997 Supreme Court, available at http://cisgw3.law.pace.edu/cases/970320a3.html (an offer would comply with the requirement of definiteness under Article 14 CISG whenever "a reasonable person of the same kind as the offeree in the same circumstances would understand the substance of the resulting agreement as sufficiently definite"); ICC Arbitration Case No. 8324 of 1995, available at http://cisgw3.law.pace.edu/cases/958324fl1.html (prior usage as to resale required payment at additional sum); Austria 10 November 1994, Supreme Court, available at http://cisgw3.law.pace.edu/cases/941110a3.html (range of prices based on quality of goods created; contract based on buyer's conduct following delivery); France 26 April 1995 Appellate Court Grenoble (Alain Veyron v. Ambrosio), available at http://cisgw3.law.pace.edu/cases/950426fl1.html (contract price established based on reasonable understanding); France 4 January 1995 Supreme Court (Fauba v. Fujitsu), available at http://cisgw3.law.pace.edu/cases/950104fl1.html (price to be modified based on market trends established contract).
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, in the absence of any indication to the contrary, to have impliedly made reference to the price generally charged at the time of the conclusion of the contract for such goods sold under comparable circumstances in the trade concerned (emphasis added).

The fact that Article 14 is located within Part II, Formation of the CISG, and Article 55 is located in the Buyer’s Obligation in Part III, Sale of Goods, has led to the conclusion that the articles should be applied separately. Hence, Article 55 should not be used as a gap-filler for Article 14 only upon establishing a valid contract. In contrast, others have argued that the two articles cannot be read together because the condition of a valid contract under Article 55 cannot be met if Article 14 is not satisfied. See §4.05[B] for further discussion on the amount of payment. The legislative history of both articles fails to resolve this matter and foreign case law varies on resolution. Nevertheless, it would be a fair prediction that a U.S. court would most likely resolve this issue by looking to the domestic resolution given the disparity in decisions and thereby apply analysis similar to U.C.C. §2-305, which establishes a contract is concluded if the parties have the requisite intent, “even though the price is not settled.” However, the court need not resort to domestic application; courts can still adhere to the international character and uniformity expressed in Article 7 by focusing on the “intention of the parties” via Article 8. As one scholar stated:

[A] sound starting point for courts and arbitrators would be to try and discern the intention of the parties ... so as to determine whether or not they themselves actually wanted their open-price-term agreement to bind.

This logic would be consistent with the overriding principle of Article 14, and would also adhere to the freedom of contract under Article 6. To establish intention, Article 8 would be utilized by the courts as discussed in §3.03[B]. This analysis is most logical and avoids any inconsistency of application of Article 55 while providing harmony with Article 7.

Practical Application: Practitioners should be conscious of the court in which they are arguing their case. A court’s prior application of the CISG should be observed as well as a court’s observance of established precedent whether domestic or foreign. While observing the international character of the CISG, however, a practitioner should be aware of the fact that courts reserve the right in their sole discretion to disregard foreign case law as well as scholarly opinion and solely rely on domestic analogy. Practitioners should cite to higher court rulings to strengthen their position for international uniformity if warranted.


Article 65 was designed to prevent a buyer from escaping from its obligations by refusing to supply missing specifications and provides the following:

(1) If under the contract the buyer is to specify the form, measurement or other features of the goods and he fails to make such specification either on the date agreed upon or within a reasonable time after receipt of a request from the seller, the seller may, without prejudice to any other rights he may have, make the specification himself in accordance

39Lookofsky, supra, note 37.
41Lookofsky, supra, note 37.
42Id.
with the requirements of the buyer that may be known to him.44

(2) If the seller makes the specification himself, he must inform the buyer of the details thereof and must fix a reasonable time within which the buyer may make a different specification. If, after receipt of such a communication, the buyer fails to do so within the time so fixed, the specification made by the seller is binding.45

Because Article 65 is located within the Remedies section of the CISG, its application in the formation of a contract is weakened.46 As such, specifications set forth in Article 65 become significant upon breach of the buyer because, once the goods are specified, the contract cannot be declared “void for vagueness” under Article 14 and a seller is entitled to the remedy of avoidance pursuant to Article 64, and will then be able to resell to another buyer and use the resale price as a means of calculating damages for breach.47 Moreover, Article 65 specifications become a legitimate supplement to the agreement pursuant to Article 29.48 See §6.05[B][3] for further discussion.

§3.04 EFFECTIVENESS OF OFFER

Under Article 15(1), an offer becomes effective when it reaches the offeree;49 Article 15(2) discusses revocability of offers, which is further examined in §3.07. According to Article 24, an offer “reaches” the addressee when the following occurs:

(1) the offer is made orally; or

(2) the offer is delivered by any other means to the offeree personally, or to its place of business or mailing address; or

(3) if the offeree does not have a place of business or mailing address, to its habitual residence.50

Notably, two provisions exist under the CISG which define “reaches” or receipt—Article 24 and Article 27. The former applies to formation issues, such as Article 15(1) (offer), 15(2) (withdrawal of offer), 16(1) (revocation of acceptance), 17 (rejection), 18(2) (acceptance), 20(1) (commencement of time period when instantaneous communication), 21(2) (late acceptance) and 23 (conclusion of contract), whereas Article 27 governs all communications after conclusion of the contract.51

It is only after the offer has been communicated to the offeree that there can be an acceptance. See also §3.07[A] for more on the time limitations for acceptance. Oral offers must be accepted immediately unless

44Article 65(1).
45Article 65(2).
50Article 24.
51[I]f any notice, request or other communication is given or made by party in accordance with this Part.” Article 27.
circumstances indicate otherwise. The notion of an oral offer, before being in principle accepted immediately, includes conversations face-to-face, by telephone, or by any other technical or electronic means of communications allowing immediate oral contract, but not statements captured in a material medium such as, notably, a fax. An offer transmitted by electronic means reaches the offeree when the electronic communication has entered the offeree’s server provided the offeree has consented to receive electronic communications of that type. Communication that is properly addressed is effective even if addressee changes address. If an offer is communicated in a language that the addressee is unable to understand, courts have facilitated Article 8 to resolve this issue, while other courts refused to enforce terms that were not translated into the language of the other party. The reliance on Article 8 to resolve this issue appears to be in conformity with the uniformity of Article 7.

§3.05 WITHDRAWAL OF OFFER

The CISG distinguishes between a “withdrawal of an offer” and a “revocation of an offer.” An offer, even if it is irrevocable, may be withdrawn provided the withdrawal reaches the offeror before or at the same time the acceptance reaches the offeror. See §3.06 for further discussion on irrevocable offers. However, after the offer reaches the offeree, the offeror may no longer withdraw the offer but may be entitled to revoke the offer in accordance with Article 16.

§3.06 REVOCATION OF OFFER

The CISG provides that an offer is presumed to be revocable at any time provided the revocation reaches the offeree before he has dispatched an acceptance. This approach is similar to common law doctrine; however, two exceptions exist under the CISG as part of compromise between the two legal systems.

[A] Article 16(2)(a)

Article 16(2)(a) provides that an offer is irrevocable where the offeror states that an acceptance must

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52. Article 18(2).
53. Article 21(1).
55. Netherlands 5 October 1994 District Court Amsterdam (Tuzzi Trend Tex Fashion v. Keijer-Somers), available at http://cisgw3.law.pace.edu/cases/941005n1.html (Dutch buyer’s allegation that it has never received German seller’s letter because it changed its address was irrelevant since the CISG provides that a declaration reaches the addressee when it is delivered to its place of business or mailing address).
59. Article 15 (2).
61. Although it might seem that subparagraphs (a) and (b) [of Article 16] provide two different exceptions, they express the same exception. Sub-paragraph (a) does it with civil law language and sub-paragraph (b) with common law language. The question presented is, when is it reasonable for the offeree to rely on the offer as being irrevocable? See Gyula Ébris, in Bianca-Bonell Commentary on the International Sales Law, Giuffrè: Milan (1987) 150-160, excerpt available at http://www.cisg.law.pace.edu/cisg/biblio/eorsi-bb16.html.
be made within a fixed time period. Considerable drafting issues can arise based on the language of Article 16(2)(a) due to the differences between common law and civil law approaches to the revocation of offers. For example, an offer is considered irrevocable in a civil law tradition if a time limit is stated or if the time period is not stated the offer remains irrevocable for a reasonable time period. Therefore, where both offeror and offeree are civil law persons, the parties will adhere to the language in Article 16. In contrast, an offer is considered revocable at any time before acceptance even if a time limit is stated unless consideration was given by the offeree in a common law country. To further complicate the matter, the U.C.C., which governs contracts for the sale of goods, provides that an “open offer” can be revoked before acceptance, but a “firm offer” cannot be revoked in a stated or reasonable period of time. Consequently, a transaction between two common law parties may cause no concern; however, if two parties are unaware of the CISG and come from different traditions—common versus civil—confusion can arise based on the language of Article 16(2)(a)\textsuperscript{62}; however, the language of Article 16(2)(a) when read in conjunction with the comments to earlier drafts as well as utilizing Article 8 should resolve all discrepancies.

**Practical Application:** Transactional attorneys, who represent clients that transact with companies from civil law traditions, should advise their clients to expressly indicate whether the offer is irrevocable. Additionally, in lieu of time limitation, specific dates should be inserted within the offer. For example:

- This offer will be irrevocable until [insert date] until [insert time limitation] at which time [insert company name] or its designated agent shall have the sole right to terminate this offer.

**[B] Article 16(2)(b)**

The other exception is found under Article 16(2)(b), which provides that an offer is irrevocable “if it was reasonable for the offeree to rely on the offer as being irrevocable, and the offeree has acted in reliance on the offer.” Again, legal traditions may affect drafting consideration. Under common law, this language reflects promissory estoppel.\textsuperscript{63} However, the CISG establishes a modified version of promissory estoppel that does not appear to require foreseeability or detriment, and one U.S. court found “that to apply an American or other version of promissory estoppel that does require those elements would contradict the CISG and stymie its goal of uniformity.”\textsuperscript{64} In contrast, a German court applied the estoppel principle based on other provisions of the CISG.\textsuperscript{65} Hence, it appears the presentation of the argument determines recognition under the CISG. An act or a conduct is necessary to establish reliance under Article 16(b)(2).

\textsuperscript{62}For example, a common law trained attorney would be inclined to read the civil law language in a common law way. *Id.*

\textsuperscript{63}See Henry Mather, *Firm Offers Under the UCC and the CISG*, 105 Dick. L.Rev. 31, 48 (Fall 2000), stating with reference to firm offers, “[p]aragraph 2(b) looks very much like American promissory estoppel doctrines, although it does not expressly require that the offeree’s reliance must have been foreseeable to the offeror and does not expressly require that the offeree’s reliance be detrimental. Despite these omissions, we can expect that many tribunals will apply paragraph 2(b) in much the same fashion as American courts have used promissory estoppel.”

\textsuperscript{64}Geneva Pharmaceuticals Technology v. Barr Laboratories, 201 F. Supp. 2d 236 (S.D.N.Y. 2002), also available at http://www.cisg.law.pace.edu/cisg/wais/db/cases2/020510n1.html (finding that Article 16(2)(b) did not require that the offeree’s reliance must have been foreseeable to the offeror and does not expressly require that the offeree’s reliance be detrimental, therefore not preempted by state law; however, court noted if argued in different way the CISG could preempt).

\textsuperscript{65}Austria 15 June 1994 Vienna Arbitration proceeding SCH-4318, available at http://cisgw3.law.pace.edu/cases/940615a4.html (finding that Austrian seller was stopped from raising noncomformity defense since its behavior led the German buyer to believe that the seller would not raise the defense (e.g., after receiving the notice the seller had continued to ask the buyer to provide information on the status of the complaints) and had pursued negotiations with a view to reach a settlement. The arbitrator continued by noting that, while estoppel was not expressly settled by CISG, it formed a general principle underlying CISG ("venire contra factum proprium"); Articles 7(2), 16(2) (b) and 29(2) CISG).
"[A]n act, such as one relating to the dispatch of goods or payment of the price," [and] "the acceptance is effective at the moment the act is performed, provided the act is performed either within the time fixed by the offeror, if no such time is fixed, within a reasonable time." In such circumstances, Article 8 is a valuable tool to assist in this determination.

§3.07 ACCEPTANCE

Article 18(1) provides that "[a] statement made by or other conduct of the offeree indicating assent to an offer is an acceptance."66 "Assent" is to be determined under the rules set forth in Article 8. See discussion under §3.03[B]. Assent to an offer can be in a verbal or written statement or by conduct. Notably, oral offers must be accepted immediately unless circumstances indicate otherwise.67 The notion of an oral offer, before being in principle accepted immediately, includes conversations face-to-face, by telephone, or by any other technical or electronic means of communications allowing immediate oral contract, but not statements captured in a material medium such as, notably, a fax.68 Electronic acceptance becomes effective when an electronic indication of assent has entered the offeror’s server provided the offeror has consented either expressly or implicitly to electronic communication.69 Conduct that otherwise would not have been taken but for the fact of assent to an offer has included buyer’s acceptance of goods,70 including request for modifications;71 issuance of letter of credit;72 confirmation of invoice;73 and execution and/or performance of conditions set forth in the offer or contract in general.74 Silence or inactivity does not

66 Id. at 282. Article 18(3).
68 Article 18(2).
69 Article 20.
75 Courts have relied on Article 18 (1) and (2) with regard to conduct. KSTP-FM v. Specialized Communications, unreported case, text available at Institute of International Commercial Law, Pace University School of Law, excerpt available at http://cisgw3.law.pace.edu/cases/990309ul.html; Switzerland 10 July 1996 Commercial Court Zürich, available at http://cisgw3.law.pace.edu/cases/960710s1.html (third party acceptance); Germany 23 May 1995 Appellate Court Frankfurt, available at http://cisgw3.law.pace.edu/cases/950523g1.html; Argentina 14 October 1993 Appellate Court (Inta v. Officina Meccanica) [case digest], available at http://cisgw3.law.pace.edu/cases/931014a1.html (invoices for financial institution); Geneva Pharmaceuticals Tech. Corp. v. Barr Labs, Inc., 201 F. Supp. 2d 236, also available at http://cisgw3.law.pace.edu/cases/020510ul.html (signing of reference letter); Switzerland 5 April 2005 Supreme Court, available at http://cisgw3.law.pace.edu/cases/050405s1.html (finding offer made by Swiss seller to German buyer who had been doing business for eleven years was insufficient for lack of price based on documentation; however, confirmation letter sent by seller was counteroffer and acceptance by offeror established contract).
in itself amount to acceptance.76 However, former usage to which parties have agreed and any practices which parties may have established in their past contractual relations may indicate assent to an offer.77

**Practical Application:** Scrutiny should be given to all actions—verbal, written, and conduct following an offer as these can be considered by the Court as not only acceptance of contract but as to acceptance of terms.

[A] Time Limitations for Acceptance

To be effective, an acceptance must be received in a timely manner or within the time limitation set forth in the offer or late acceptance in accordance with Article 21. If the acceptance is not received by the offeror, the offeree bears the risk of transmission.78 Hence, the CISG adopts the “receipt theory” of acceptance absent contrary agreement between the parties.79 The receipt theory is common in a civil law tradition and is based on the premise that “the sender has a greater opportunity to know whether the medium he uses is then subject to hazards or delays.80 See §3.09 for further discussion and application of the receipt rule.

The mode of communication determines the period of time for acceptance. A period of time for acceptance fixed by the offeror in a telegram or a letter begins to run from the moment the telegram is handed in for dispatch or from the date shown on the letter or, if no such date is shown, from the date shown on the envelope. A period of time for acceptance, fixed by the offeror by telephone, telex, or other means of instantaneous communication, begins to run from the moment that the offer reaches the offeree.81 Official holidays or non-business days occurring during the period for acceptance are included in calculating the period. However, if a notice of acceptance cannot be delivered at the address of the offeror on the last day of the period because that day falls on an official holiday or a non-business day at the place

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78 Article 18(2). See ICC Court of Arbitration, case No. 7844 of 1994, available at http://cisgw3.law.pace.edu/cases/947844i1.html (acceptance not effective if it does not reach offeror within the fixed time).


80 Id.

81 Article 20(1).
of business of the offeror, the period is extended until the first business day which follows.\textsuperscript{82}

A late acceptance is nevertheless effective as an acceptance if without delay the offeror orally so informs the offeree or dispatches a notice to that effect.\textsuperscript{83} If a letter or other writing containing a late acceptance shows that it has been sent in such circumstances that if its transmission had been normal it would have reached the offeror in due time, the late acceptance is effective as an acceptance unless, without delay, the offeror orally informs the offeree that he considers his offer as having lapsed or dispatches a notice to that effect.\textsuperscript{84}

\textbf{§3.08 ASSENT WITH MODIFICATION AND/OR ADDITIONS—
BATTLE OF THE FORMS}

A reply to an offer that contains additional terms or other modification is a rejection of the offer and constitutes a counteroffer provided that the modifications materially alter the original terms of the offer. Under Article 19(3) additional or different terms relating to the price,\textsuperscript{85} payment, quality of goods,\textsuperscript{86} place and item of delivery,\textsuperscript{87} liability of parties or settlement disputes\textsuperscript{88} are considered to alter terms of an offer materially. If the additional terms do not materially alter the terms of the offer then the terms of the contract are the terms of the offer with the modifications contained in the acceptance unless the offeror, without undue delay, objects orally to the discrepancy or dispatched a notice to that effect. See §3.09 for further discussion on “dispatch.”\textsuperscript{89} However, there is case law holding that change in quantity of goods was not a material modification unless circumstances of case, practices between the parties, negotiations or usages indicate otherwise.\textsuperscript{90} Overall, this approach appears to be similar to U.C.C. §2-207;\textsuperscript{91} however, it clearly

\textsuperscript{82}Article 20(2).
\textsuperscript{83}Article 21(1).
\textsuperscript{84}Article 21(2).
\textsuperscript{85}Switzerland 5 April 2005 Supreme Court, available at http://cisgw3.law.pace.edu/cases/050405sl1.html (finding offer made by Swiss seller to German buyer who had been doing business for eleven years was insufficient for lack of price based on documentation; however, confirmation letter sent by seller was counteroffer and acceptance by offeror established contract); Magellan Int’l v. Salzgitter Handel, 76 F. Supp. 2d 919 (N.D. Ill. 1999), also available at http://cisgw3.law.pace.edu/cisg/wais/db/cases2/991207u1.html; Austria 9 March 2000 Supreme Court, available at http://cisgw3.law.pace.edu/cases/000309a3.html (material modification of offer if related to price of goods). See also Hungary 10 January 1992 Metropolitan Court (Pratt & Whitney v. Malev), available at http://cisgw3.law.pace.edu/cases/920110h1.html; Germany 14 August 1991 District Court Baden-Baden, available at http://cisgw3.law.pace.edu/cases/910814g1.html; Germany 4 October 2002 Appellate Court Koblenz, available at http://cisgw3.law.pace.edu/cases/021004g1.html.
\textsuperscript{86}Germany 31 March 1995 Appellate Court Frankfurt, available at http://cisgw3.law.pace.edu/cases/950331g1.html (different term as to the quality of goods—material modification of offer—amounts to counteroffer).
\textsuperscript{87}Germany 8 February 1995 District Court München, available at http://cisgw3.law.pace.edu/cases/950208g4.html (acceptance with modification of time of delivery from four months to two months and a half amounts to counteroffer).
\textsuperscript{89}Article 19(3). Switzerland 5 April 2005 Supreme Court, available at http://cisgw3.law.pace.edu/cases/050405sl1.html (finding offer made by Swiss seller to German buyer who had been doing business for eleven years was insufficient for lack of price based on documentation; however, confirmation letter sent by seller was counteroffer and acceptance by offeror established contract); Magellan Int’l v. Salzgitter Handel, 76 F. Supp. 2d 919 (N.D. Ill. 1999), also available at http://cisgw3.law.pace.edu/cisg/wais/db/cases2/991207u1.html.
\textsuperscript{90}Austria 20 March 1997 Supreme Court, available at http://cisgw3.law.pace.edu/cases/970320a3.html.
\textsuperscript{91}Under U.C.C. §2-207, an acceptance that deviates from the offer still forms a contract unless (1) the offer limits acceptance to the terms of the offer; (2) the terms of materiality alter the offer; or (3) the offeror

takes an approach closer to the “mirror image rule” followed under traditional common law by its defining materiality. This in turn has resulted in various approaches to resolve the “battle of the forms” as illustrated in §§3.08[A] and [B].

[A] Standard User Terms

The CISG does not address the legal issues raised by the use of standard contract terms; however, a majority of courts apply the provisions of Part II of the CISG and in particular its rules found in Article 8 to determine whether the parties have agreed to incorporate standard terms into their contract while others review the particular terms to determine proper CISG application. Decisions relying on the CISG’s rules on interpretation have varied in their reasoning with courts requiring the user of standard terms to send a copy of the terms to the other party or otherwise make them reasonably available or requiring terms to be in agreeable language. If a country has adopted special rules, some courts have elected to adhere to those
timely notifies the offerer of objection to the additional terms. Unlike the CISG, “materiality” is not defined and therefore courts have exercised considerable flexibility in interpreting this section.

Under the common law, “the mirror image rule” requires the acceptance to be in the exact terms as the offer. If not, a counteroffer results. See also William S. Dodge, Teaching the CISG in Contracts, 50 Journal of Legal Education (March 2000) 72-94, also available at http://www.cisg.law.pace.edu/cisg/biblio/dodge.html.


Germany 31 October 2001 Supreme Court, also available at http://cisgw3.law.pace.edu/cases/011031g1.html (incorporation of standard terms determined by Articles 14 and 18 and 8); Germany 30 January 2004 Appellate Court Düsseldorf, available at http://cisgw3.law.pace.edu/cases/040130g1.html (incorporation of standard terms determined by Articles 14 and 18 and 8); Belgium 2 December 1998 District Court Hasselt, available at http://cisgw3.law.pace.edu/cases/981202b1.html (although Article 6 permits the parties to derogate from the provisions of the convention, modifications provided by one party’s standard terms were binding on the other party only if that party had actual knowledge thereof); Netherlands 2 October 1998 District Court’s-Hertogenbosch (Malaysia Dairy Industries v. Dairex Holland), available at http://cisgw3.law.pace.edu/cases/981002n1.html (prior sales between parties have been subject to the general conditions of one party and that party amends those general conditions, that party must inform the other party of the changes).

Germany 8 February 1995 Appellate Court Hamm, available at http://cisgw3.law.pace.edu/cases/950208g3.html (Article 8 employed to determine “language risk”); Germany 15 September 1997 District Court Heilbronn, available at http://cisgw3.law.pace.edu/cases/970915g1.html (in transaction between German seller and Italian buyer seller’s standard terms in German language not incorporated in contract and validity of those in Italian language determined by German law as the law applicable by virtue of the forum’s private international
laws instead of the CISG. Despite the language of the CISG, several courts have applied national legal rules to determine the enforceability of standard terms in contracts otherwise governed by the CISG.\textsuperscript{96} Nevertheless, court opinions have varied in application and reasoning.\textsuperscript{97} Article 4(a) has also been employed by the courts to govern a particular standard term under applicable national law.\textsuperscript{98}

[B] Letters of Confirmation

The purpose of a letter of confirmation is to establish in writing previously negotiated terms and proof of agreement and to eliminate or reduce doubts or errors that might arise by setting out the terms by which the contract is governed.\textsuperscript{99} Issues arise, however, when the letter of confirmation fails to adhere to the terms established between the parties. Contracting States that recognize a letter of confirmation have disagreed about the effect to be given to these additional terms. Courts have varied in opinion and reasoning based on the scope of trade usage and established practices found in Article 9.\textsuperscript{100} Some courts have rejected local usage under the pretense of Article 9 language finding that the usage was not international,\textsuperscript{101} while others

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\textsuperscript{96} Germany 2 September 1998 Appellate Court Celle available at http://cisgw3.law.pace.edu/cases/980902g1.html (applying German law based on contract and language of contract);

\textsuperscript{97} Germany 17 April 1996 District Court Duisburg, available at http://cisgw3.law.pace.edu/cases/960416g1.html; Germany 29 May 1995 District Court München, available at http://cisgw3.law.pace.edu/cases/950529g1.html (applying German law as the law applicable by virtue of the forum’s rules of private international law). Oberlandesgericht Köln (Germany), 24.05.2006, www.unilex.info (holding different terms irrelevant as both forms in Dutch Seller and Germany buyer's standard forms contained similar jurisdictional clauses and even if Article 19 applied, same result would occur as “last shot doctrine” the Seller's terms were last exchanged).

\textsuperscript{98} See Germany 2 September 1998 Appellate Court Celle available at http://cisgw3.law.pace.edu/cases/980902g1.html (German law applied by virtue of the forum’s rules of private international law); Belgium 24 January 1995 District Court Hasselt (C. GmbH v. I.), available at http://cisgw3.law.pace.edu/cases/950124b1.html (applying German law as the law applicable by virtue of the forum’s private international law rules).

\textsuperscript{99} Germany 25 June 1997 Appellate Court Karlsruhe, available at http://cisgw3.law.pace.edu/cases/970625g1.html (referencing both Article 4 and Article 14 but fails to address issue of enforceability of standard terms); Germany 14 June 1994 Lower Court Nordhorn, available at http://cisgw3.law.pace.edu/cases/940614g1.html (court invoked Article 4(a) and evaluated the validity of the seller’s general conditions on the basis of Italian law as the law governing the contract according to German rules of private international law). See also Anna Kazimierska, Pace Review of the Convention on Contracts for the International Sale of Goods (1999-2000) nn.164, 368, 433, also available at http://cisgw3.law.pace.edu/cas/biblio/kazimierska.html; Austria 7 September 2000 Supreme Court, available at http://cisgw3.law.pace.edu/cases/000907a3.html (holding the validity of agreements that amend the rights of the buyer according to Article 4(a) CISG is to be seen in the light of the applicable national law and is not subject to the CISG. Only provisions of national law which are contrary to the basic policy of the CISG are to be disregarded.); Germany 15 September 1997 District Court Heilbronn, available at http://cisgw3.law.pace.edu/cases/970915g1.html (the validity of an exculpatory clause contained in another set of standard terms invoked by the seller was a question not ruled by CISG but by the applicable German domestic law, under which the clause was invalid).


\textsuperscript{101} Calzaturificio Claudia v. Olivieri Footwear Ltd., 1998 WL 164624 (S.D.N.Y. 1998), also available at http://cisgw3.law.pace.edu/cases/980406a1.html (burden of proof is on the party invoking the practices).

\textsuperscript{102} Germany 9 July 1998 Appellate Court Dresden, available at http://cisgw3.law.pace.edu/cases/g90709g1.html; Germany 5 July 1995 Appellate Court Frankfurt, also available at http://cisgw3.law.pace.edu/cases/950705g1.html. See also Germany 17 April 1996 District Court Duisburg, also available at http://cisgw3.law.pace.edu/cases/960417g1.html (doubts existence of international usage.
focused on other language within the CISG.  

Practical Application: Practitioner should not hesitate to introduce a letter of confirmation to the court under the authority of Article 11. Even if the court rejects it as part of the contract, it may be relevant for the evaluation of evidence of the parties’ intent to contract as well as establish trade practices between the parties.  

§3.09 RECEIPT RULE

Under common law and the U.C.C., acceptances are effective only upon dispatch, even if they never reach the offeror. This is the dispatch rule. Article 18(2) of the CISG adopts a receipt rule: “An acceptance of an offer becomes effective at the moment the indication of assent reaches the offeror.” But this provision must be read in conjunction with Article 16(1), which says that “an offer may be revoked if the revocation reaches the offeree before he has dispatched an acceptance” (emphases added). In essence, once the offeree has dispatched an acceptance, the offeror may no longer revoke, but if the acceptance is lost in the mail there is no contract. Therefore, the offeree (seller) can withdraw that acceptance at any time up to the moment the acceptance is received by the other party. In fact, even if the acceptance and the withdrawal arrive simultaneously, the withdrawal is effective. In this case, the seller’s withdrawal of its acceptance is effective and no contract is formed. This application essentially gives the seller more flexibility than under the mailbox rule in common law.  

§3.10 LEGAL DEFENSES TO CONTRACT FORMATION

Article 6 provides contracting parties the freedom to abrogate from the CISG; however, some of these terms will not be controlled by the CISG since it does not address validity issues that arise under a  

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recognizing incorporation of standard terms into contract by letter of confirmation); Switzerland 21 December 1992 Civil Court Basel, also available at http://cisgw3.law.pace.edu/cases/9212211sl.html.

102 See Switzerland 5 April 205 Supreme Court, available at http://cisgw3.law.pace.edu/cases/050405s1.html (applying Article 8(3) to determine effect of confirmation letter); Germany 6 October 1995 Lower Court Kehl, available at http://cisgw3.law.pace.edu/cases/951006g1.html (choice-of-law provision contained in a German buyer’s standard conditions of purchase was disregarded and denied application of the traditional “last shot” approach to resolve the partial dissensus between them). See editorial remarks by Albert Kritzer preceding full text of case for further discussion. See also Michael P. Van Altstine, supra, note 1 at 92; Germany 14 February 2001 Appellate Court Saarbrücken, also available at http://cisgw3.law.pace.edu/cases/010214g1.html; Germany 13 January 1993 Appellate Court Saarbrücken, also available at http://cisgw3.law.pace.edu/cases/930113g1.html (citing art. 18(1)); Netherlands 19 November 1996 Appellate Court’s-Hertogenbosch (ICT v. Princen Automatisering Oss), available at http://cisgw3.law.pace.edu/cases/961119n1.html (German buyer reply to Dutch seller’s confirmation of verbal order controlled since seller had expressly excluded the applicability of its own standard terms with regard to “all terms” conflicting with the ones stated in the buyer’s confirmation).

103 Germany 5 July 1995 Appellate Court Frankfurt, also available at http://cisgw3.law.pace.edu/cases/950705g1.html.


105 For further examination of the receipt rule under civil law traditions, see Maria del Pilar Perales Viscasillas, The Formation of Contracts and the Principles of European Contract Law, 13 Pace International Law Review (Fall 2001) 371-397, also available at http://www.cisg.law.pace.edu/cisg/biblio/perales3.html#vi. Notably, this position is in contrast to the "mailbox rule" in common law countries. The mailbox rule was created to protect the offeree from the offeror’s revocation power and its function is to determine the moment of a contract’s conclusion. Id. at n. 106.
The validity of an alleged contract is decided under domestic law. The language in Article 4 stating “except as otherwise expressly provided in this Convention,” confirms that the CISG is not concerned with the validity of a contract or any of its provisions or of any usage or the effect that the contract may have on the property. “A sales contract is simply integrated in a network of civil law institutes, which need to be assessed under the applicable national law if they are not settled in the Convention [CISG].” By validity, CISG refers to any issue by which the “domestic law would render the contract void, voidable, or unenforceable.” Hence, contract formation issues, such as mutual mistake as to the existence of the subject matter of the contract, negligent or fraudulent misrepresentation, fraud and duress, capacity to contract, illegality, public policy, or unconscionability fall outside the scope of the CISG and would be governed by the domestic law. This being that “[t]he CISG was not designed to police international sales agreements for unfairness: the CISG drafters made no attempt whatsoever to prescribe the legal effect of these actions.” As such, the CISG is only concerned with the objective

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106 Article 4(a).
108 Austria 22 October 2001 Supreme Court [1 Ob 77/01g], available at http://cisgw3.law.pace.edu/cases/011022a3.html.
110 Switzerland 11 December 2000 Federal Supreme Court (Kromberg GmbH v. Ruth & Walter Ott), available at http://cisgw3.law.pace.edu/cases/001211s1.html (assuming that a valid contract was concluded, the Swiss buyers were entitled to set contract with Austrian seller aside on the ground of a mistake on their part in accordance with the domestic law governing defects of consent); but see Patrick C. Leyens, CISG and Mistake: Uniform Law vs. Domestic Law: The Interpretative Challenge of Mistake and the Validity Loophole, (October 2003), available at http://www.cisg.law.pace.edu/cisg/biblio/leyens.html#ii, for an in-depth analysis of selected types of mistakes under the CISG. See also generally writing by Honnold mandating review of the particular mistake to determine exemption of application of the CISG.
111 Geneva Pharmaceuticals Tech. Corp. v. Barr Labs. Inc., 201 F. Supp. 2d 236, also available at http://cisgw3.law.pace.edu/cases/020510u1.html (holding tort claims are generally not preempted by CISG, but a tort claim which is actually a contract claim, or that bridges the gap between contract and tort law, may be preempted).
112 Beijing Metals v. American Business Center, 993 F.2d 1178 (5th Cir. 1993), also available at http://cisgw3.law.pace.edu/cases/930615u1.html (holding fraud and duress are outside the scope of the CISG).
113 Germany 8 January 1993 Appellate Court Düsseldorf, available at http://cisgw3.law.pace.edu/cases/930108g1.html (legal capacity of corporations).
requirements for conclusion of a contract.\textsuperscript{117} This would include such issues as the qualities of the goods to be delivered\textsuperscript{118} or the solvency of the parties.\textsuperscript{119} Moreover, as noted in §2.05, the CISG does not control issues concerning creditors or other third parties' rights in contract or tort related issues.\textsuperscript{120}

\textsuperscript{117} Switzerland 21 December 1992 Civil Court Basel, available at http://cисgw3.law.pace.edu/cases/921221s1.html (utilizing Article 9 to conclude a contract).
\textsuperscript{118} Germany 14 May 1993 District Court Aachen, available at http://cисgw3.law.pace.edu/cases/930514g1.html (holding that the application of CISG precluded recourse to domestic law regarding mistake as to the quality of the goods as the matter is exhaustively covered by CISG).
\textsuperscript{120} France 19 March 2002 Supreme Court, available at http://cисgw3.law.pace.edu/cases/020319f1.html (obligations of the seller did not extend to delivering goods free from any intellectual property right under Article 42(2)(a)); KSTP-FM v. Specialized Communications, unreported case, available at http://www.cisgw3.law.pace.edu/cisgw/wais/db/cases2/990309u1.html (rights of parties that are not privity of contract not governed by CISG).