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## CRITICAL ISSUES IN THE FORMATION OF CONTRACTS UNDER THE CISG

*The depth of jurisprudence and scholarly commentary on the United Nations Convention on Contracts for the International Sale of Goods (CISG) has grown exponentially over the last few decades. One example has been the increase in CISG cases in the United States from only 16 cases from 1988 to 1999 to 92 additional cases from 2000 to the middle of 2010. This Article will draw from CISG jurisprudence, but will also provide some insights from a purely American common law perspective.<sup>1</sup>*

*In the area of contract formation relating to CISG Articles 14, 16, and 18, there is a growing jurisprudence. According to the Institute of International Commercial Law's CISG Database, the international jurisprudence includes 162 cases relating to Article 14; 13 cases related to Article 16; and 184 cases relating to Article 18. The battle of the forms scenario under Article 19 will not be discussed. However, the interconnection between Articles 18 and 19 will be discussed.*

*This article will examine the jurisprudence relating to Articles 14, 16, and 18. This examination will cover the topics of offer and acceptance, firm offers, and conduct as acceptance. From this review of the case law, and related scholarly commentary, the article analyzes the critical issues related to the application of these CISG Articles. The key insight offered is the interconnectedness of these CISG articles, along with articles 6, 8, 9, 29, and 55.*

Key words: *International sales law. Contracts. Contract formation. Firm offer rule. Written confirmations.*

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<sup>1</sup> Note that the American common law perspective used here includes use of Article 2 of the American Uniform Commercial Code. Article 2 of the Code relates to the sale of goods. It should also be noted that the Uniform Commercial Code is not comprehensive so, the general common law of contracts still is used to fill in the gaps in the Code.

## 1. INTRODUCTION

Part II of the CISG consists of Articles 14–24. These articles provide the offer-acceptance rules for the formation of contracts under the CISG. The thoughts that comprise this article stem from years of reading CISG cases, but more currently on a renewed focus on Articles 14, 16 and 18 performed in conjunction with the Advanced CISG Digest project spearheaded by Albert Kritzer and Sieg Eiselen.

## 2. INTERCONNECTEDNESS

In understanding the CISG and its surrounding jurisprudence, it is important not to focus on a given CISG Article in isolation to the CISG as a whole. For example, it is easier to view the battle of forms scenario under Article 19 as a singular group of cases. But, Article 19 can only be truly understood as a part of a template that includes Articles 8, 9, 14, 15, 16, 18, and 29, among others. The use of code provisions by analogy to understand other code provisions has a strong history in Civilian law.<sup>2</sup> In contrast, because of the common law's focus on case law that practice is not as evident, but has been used in relation to code-like enactments, such as the United States Uniform Commercial Code (UCC).<sup>3</sup> Part 2.1 provides some theoretical arguments for reading an independent CISG Article by analogy to other CISG Articles. Part 2.2 focuses on the practical application of the CISG given the interconnectedness of CISG Articles.

### 2.1. Theories of Interconnectedness

In Dworkinian terms, the integrity of law to provide, if not a right answer, then at least a correct answer, is based upon the entire structure of the law.<sup>4</sup> In our case, CISG rule application needs to be done within the entire structure of the CISG. A rule application that appears reasonable within the confines of a single CISG Article may actually be an im-

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<sup>2</sup> R. Youngs, *English, French and German Comparative Law*, Cavendish Publishing Limited, London 1998, 47–48; J. Gordley & A.T. von Mehren, *An Introduction to the Comparative Study of Private Law*, Cambridge University Press, New York 2006, 50–54, 61–63.

<sup>3</sup> The American Uniform Commercial Code began as a model law that has been enacted with variations in all fifty states. The one exception is the State of Louisiana which has not enacted Article 2 (Sales). It has elected to retain the French Napoleonic Code. See W. Schnader, "A Short History of the Preparation and Enactment of the Uniform Commercial Code", *University of Miami Law Review* 22/1967, 1.

<sup>4</sup> R. Dworkin, "Hard Cases", *Harvard Law Review* 88/1975, 1057; R. Dworkin, "Law as Interpretation", *Texas Law Review* 60/1981, 527.

proper application due to its inability to be harmonized with the CISG as a whole. A certain rule application can only be justified if it provides a proper fit relating to the specific CISG Article or Articles, as well as the CISG as a whole.<sup>5</sup> In applying the CISG contract formation Articles, due regard must be given to the interpretive template provided by Articles 8 and 9.

A similar proposition is found in the hermeneutic circle that asserts that the parts of something, in this case a body of sales law rules, cannot be understood without knowledge of the whole; in turn, the whole cannot be understood without knowledge of the parts. The CISG can be seen as a series of hermeneutic circles including one that interrelates Articles within a specific subject area (Articles 14–24, Formation of the Contract), one that interrelates a given Article or bunch of Articles with Articles from other areas (Article 19 with Article 29; Article 44 with Articles 39, 43, and 50), and finally one that interrelates one Article or group of Articles with the CISG as a whole (Articles 14–24, Formation with Articles 7–13, General Provisions).

Seemingly disconnected Articles can be mined under CISG interpretive methodology for rationales in the application of other Articles. Alternatively stated, it is important to note that some of the reasons used in the application of one Article may be useful in the interpretation of another Article. A simple example is the jurisprudence involving the requirement of an indication of intent in an offer would also be pertinent to determining intent to be bound in an acceptance.

A third means of viewing interconnectedness relating to the CISG is the recognition and application of meta-principles. The meta-principles of the CISG are generally recognized as the principle of good faith, its international character, and the need to promote uniformity in its application.<sup>6</sup> In the area of contract formation, the meta-principles most relevant are provided by Articles 8 and 9.

## 2.2. Interconnectedness within the CISG

The interconnectedness of CISG Articles in the area of contract formation is obvious in that many cases the issues of the enforceability of a contract or contractual terms implicate more than one of the offer-acceptance Articles. For example, the incorporation of general conditions or standard terms into a contract is an issue found in Articles 14, 15, 18, and 19, as well as Articles 8 (interpretation, intent) and 9 (interpretation, us-

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<sup>5</sup> *Ibid.* See also, L. DiMatteo, “A Theory of Interpretation in the Realm of Realism”, *DePaul Business & Commercial Law Journal* 5/2006, 17.

<sup>6</sup> See CISG Article 7(1). See also, L. DiMatteo, et al, *International Sales Law: A Critical Analysis of CISG Jurisprudence*, Cambridge University Press, New York 2005, 22 29.

age). This interrelationship was noted in a Belgium case.<sup>7</sup> The case involved the enforceability of a term that provided a limitation period for bringing claims. If decided strictly under Article 19 the term would likely have been considered a material alteration of the offer since it related to the “extent of one party’s liability to the other.” However, the court avoided the issue by holding that a contract had been formed without the incorporation of the limitation term. It held that “with regard to the conditions of sale on the backside of the invoice, [under Articles 18 and 19] it is determined that full agreement about these conditions is always required *before* the contract comes into existence and mere silence does not count as an acceptance.” Note that the court holds that all the conditions of sale— whether material or non-material — required “full agreement” in order to enter into the contract and that a party is not required to object to their inclusion. A few comments are in order here. The court neglects the fact that there is a duty to object in Article 19(2) regarding any non-material terms found in the purported acceptance. Thus, the requirement of full agreement is overbroad when it encompasses non-material terms in a battle of the forms situation. The over-inclusive nature of the decision is rendered moot since a limitation period term is a material term and therefore, there is no duty to object. Even when more than one Article is not implicated in a dispute, it is important to note that some of the reasons used in the application of one Article may be useful in the interpretation of another Article. These reasons are also vital in filling in gaps in areas within the scope of CISG’s coverage.<sup>8</sup>

Unfortunately, the clarity provided by the specialized offer-acceptance rules of Part II is often lost when they interact with each other or Articles outside of Part II. A few examples will illustrate this point more clearly. The first example implicates the appearance of conflict within Part II. Article 18(1) states that “silence or inactivity does not in itself amount to acceptance.” Compare that sentence with this sentence from Article 19(2); “additional terms which do not materially alter the terms of the offer constitutes an acceptance, unless the offeror, without undue delay, objects orally to the discrepancy or dispatches notice to that effect.” How does a judge or arbitrator reconcile Article 18’s no requirement to object or respond in order to prevent the creation of an effective acceptance with Article 19(2)’s requirement that a party must object to additional non-material terms in a purported acceptance. The lack of clarity is relatively easy to rectify with a thoughtful scholarly analysis, but such clarity may be more difficult for an arbitrator or judge to obtain. The result is sometimes a conflation of the purposes or meanings of different Articles.

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<sup>7</sup> Belgium 17 May 2004 Appellate Court Ghent (Noma B.V.B.A. v. Misa Sud Refrigerazione S.p.A.), <http://cisgw3.law.pace.edu/cases/040517b1.html>.

<sup>8</sup> L. DiMatteo (2005), 165 166

The easiest way to argue that there is no true conflict between Article 18 and 19 is to make the distinction that Article 18(1) is a general rule for acceptance, while Article 19(2) is a specialized rule pertaining to the battle of forms scenario. This is surely true, but the better way of viewing these Articles is to view Article 19(2) as an exception to Article 18(1). This view helps remove the bias in seeing these Articles as independent of one another.

The best epistemological means of understanding the rule-exception distinction—in this case, on the issue of silence or inactivity as a method of acceptance—is to acknowledge that they reference different fact scenarios. Article 18 refers to the more generic scenario where a party receives an offer. The focus is upon the offeree to determine if she intended to be bound to a contract. For there to be an acceptance that party must proactively make a statement or show conduct that evidences intent to be bound by the offer. A contract cannot be forced upon another party based upon that party's silence or inactivity.<sup>9</sup> In contrast, Article 19(2) focuses primarily on the perspective of the original offeror. Without Article 19(2), any additional terms in a purported acceptance would convert that instrument into a counter-offer. Under Article 18(1), silence or inactivity of the original offer could not result in a binding contract. Article 19(2) carves out an exception where the additional terms are deemed to be non-material. In that event, silence or inactivity results in the formation of a binding contract.

The meaningful differences between Article 18 and 19 are narrowed by the broad definition of materiality implied by Article 19(3). In essence, Article 18 and 19 act as one since the instances of additional, conflicting non-material terms are negligible. The overwhelming amount of the case law finds most terms, such as forum selection clauses,<sup>10</sup> arbitration clauses,<sup>11</sup> trade terms,<sup>12</sup> warranty and certification<sup>13</sup> to name a few, as material in nature. This can be attributed in some degree to the

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<sup>9</sup> The exception being that silence or inactivity was made a form of effective acceptance by the parties through an express agreement, course of dealings, or the implication of trade usage. See Article 18(3).

<sup>10</sup> See United States 31 March 2010 Federal District Court [Alabama] (Belcher Robinson, L.L.C. v. Linamar Corporation, et al.), <http://cisgw3.law.pace.edu/cases/100331u1.html>.

<sup>11</sup> See Germany 26 June 2006 Appellate Court Frankfurt (*Printed goods case*), <http://cisgw3.law.pace.edu/cases/060626g1.html>.

<sup>12</sup> See China 18 April 2003 CIETAC Arbitration proceeding (*Desulfurization reagent case*), <http://cisgw3.law.pace.edu/cases/030418c1.html>.

<sup>13</sup> See United States 25 July 2008 Federal District Court [Pennsylvania] (*Norfolk Southern Railway Company v. Power Source Supply, Inc.*), <http://cisgw3.law.pace.edu/cases/080725u1.html>.

behavioral phenomenon of hindsight bias.<sup>14</sup> A term that may have been considered non-material at the time of contract formation is likely to be viewed as material to all parties concerned if it is dispute-determining at the time of dispute.

In the end, the great equalizer in the finding or not finding an enforceable contract is the major premise that even though silence and inactivity (except under the narrow exception provided under Article 19 and as provided in Article 18(2)) may not be a ground for acceptance; activity or conduct is a ground for acceptance. A shortcoming in Article 19 is its failure to recognize this principle, as it is recognized in Article 18.

### 3. DEFINITENESS: ROLE OF EXPLICITLY AND IMPLICITLY

One theme that is consistent throughout the CISG is the role of implicit intent. The judge or arbitrator is free to imply intent or terms into a contract. This authority to imply is given expressly through such Articles as Article 8 (3) and Article 9 (usage and party practices), and Article 14(1) (“implicitly fixes” price or quantity). The power to imply is also given implicitly through the use of the term “reasonable” throughout the CISG. Nonetheless, the strongest probative evidence is evidence of the express intent of the parties. This leads to a bit of circular reasoning in that the more detail placed in a proposal the easier it is to imply an intent to be bound; the lesser the detail the less likelihood of finding the required intent. That said, Article 14 makes it clear that if there is clear intent (express words of intent or implied intent through course of dealings) to be bound, then the proposal need not contain much detail.

The definiteness requirement found in Article 14(1)—when there is a clear intent to be bound—is satisfied if the proposal (1) indicates (specifies) the goods, (2) a provision expressly or implicitly provides for determining the price, and (3) a provision expressly or implicitly provides for determining the quantity. These are issues of interpretation which will be discussed later and include: What is meant by “indicates the goods”? What is meant by “implicitly” fixing or making provision for determining the price and quantity?

#### 3.1. Price Term: Articles 14 and 55

There is a debate on the relationship between Article 14 which requires at least an implicit fixing of the price term and Article 55 which acts as a gap-filler to imply a price into an open price term. Some schol-

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<sup>14</sup> C. Sunstein, *Behavioral Law and Economics*, Cambridge University Press, New York 2000.

ars focus solely on Article 14 to determine if a contract has been formed. Under this analysis, unless the contract expressly or implicitly fixes a price, or expressly intends the price term to be open, there is no contract and therefore, no recourse to Article 55. Other scholars assert that if the offer does not fix the price, then Article 55 should be applied to fill in the gap.<sup>15</sup> This later approach expands the reach of Article 55 from filling in the gap of an express open price term to instances where no price term is provided. This expansion rests upon the dubious presumption that the parties implicitly agreed that Article 55 would apply to fix the price.

It has been noted that Article 14's notion of "implicitly" fixing the price term can be read broadly to include external factors not stated in the offer. This could include setting a price based upon "objective parameters agreed to by the parties previously or tacitly."<sup>16</sup>

Article 14 (1) does not state that a price need actually be fixed. The issue then becomes how the price is to be fixed post hoc. In contrast, Article 55 provides a default rule that allows a court or arbitral panel to imply a price without the guidance of the contract. It states that when a contract does not expressly or implicitly make provision for determining the price then a price may be implied by looking "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."

This dilemma is produced because Article 14 does not reference Article 55 as a means of fixing a price. On the surface, Article 14 states that an offer *must* fix the price expressly or implicitly while Article 55 only applies to a concluded contract. The interpretive choices are that Article 55 controls Article 14 on the issue of price or that the Articles deal with completely different subjects. The former view would use Article 55 to fix the price as long as there was a general intent to enter a contract. It would salvage the contract even though the acceptance was, in reality, a response to a faulty offer or non-offer. The majority view is that if the offer implicitly fixes or provides a mechanism to fix the price, then Article 55 is not available if the price becomes indeterminable.

If the parties do not implicitly or expressly fix a price or expressly agree to an open price, then the Article 14 analysis, as noted above, would recognize the proposal as a non-offer and therefore, no contract is formed. One argument around such a conclusion is that if the other party accepts the "non-offer" the parties are implicitly derogating from the rules of Ar-

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<sup>15</sup> Article 55 provides that the price is the price generally paid under comparable circumstances in the trade concerned at the conclusion of the contract.

<sup>16</sup> J. O. Albán, "Criteria for an offer," *An International Approach to the Interpretation of the United Nations Convention on Contracts for the International Sale of Goods (1980) as Uniform Sales Law* (ed. J. Felemgas), Cambridge University Press, New York 2007, 79.

ticle 14.<sup>17</sup> In this case, the derogation would be the elimination of Article 14's requirement that a price must be expressly or implicitly fixed in the offer. If the parties perform as if there was a contract despite the fact that none was consummated due to a lack of a price term, it would seem reasonable for a court to imply one using Article 55.

#### 4. TO CONFIRM OR NOT TO CONFIRM: THAT IS THE QUESTION?

A common practice in commercial sale of goods is for the parties to come to an oral agreement which is then confirmed in writing by one of the parties. Unfortunately, the CISG does not provide a written confirmation rule to deal directly with the effect of such instruments. The result, as stated by one commentator, has been that "courts applying the Convention have unfortunately not been consistent in their treatment of such 'letters.'"<sup>18</sup>

The written confirmation is used in two scenarios. First, the written confirmation can be used as an instrument of offer or acceptance. If used as an offer, then there is no duty of the offeree to respond. If used as an acceptance, its effectiveness is determined under Article 18 or by Article 19. The second scenario is when two parties orally agree to a contract and one party follows it up with a written confirmation. An issue becomes does the receiving party have any duty to respond or object to terms in the confirmation that were not a part of the original agreement? The answer appears to be that there is no duty to respond or object. The contract is the one that the parties previously entered. However, the written confirmation provides powerful evidence when there is conflicting testimony as to the contents of the oral agreement.<sup>19</sup> The burden of proof rests on the non-confirming party to show that a material term in the written confirmation is additional and not a part of the oral agreement

The terms of a written confirmation may be incorporated into the contract by way of course of dealings or usage. A Swiss court held that there was a trade usage in which a failure to respond to a written confirmation constitutes an acceptance of the terms in the confirmation.<sup>20</sup> A more conservative view holds that a trade usage pertaining to the effect of a written confirmation has to be international in scope.<sup>21</sup> Another court

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<sup>17</sup> P. Huber, A. Mullis, *The CISG: A New Textbook for Students and Practitioners*, Sellier, Europe 2007, 77.

<sup>18</sup> *Ibid.*, 87.

<sup>19</sup> *Ibid.*, 88.

<sup>20</sup> Switzerland 21 December 1992 Civil Court Basel (*Textiles case*), <http://cisgw3.law.pace.edu/cases/921221s1.html>.

<sup>21</sup> Germany 5 July 1995 Appellate Court Frankfurt (*Chocolate products case*), <http://cisgw3.law.pace.edu/cases/950705g1.html>.



incorporated the terms of the written confirmation into the contract based upon the duty of good faith.<sup>22</sup> In that case a check was attached to the confirmation. The court reasoned that by accepting the check it was accepting the terms of the confirmation. In addition, in the non-battle of the forms scenario, CISG Article 18 states that silence is generally not to be construed as an acceptance. However, some courts have construed subsequent performance or conduct following receipt of a confirmation as an acceptance of the terms in the confirmation.

## 5. RELIANCE AND FIRM OFFERS

Article 16 was the result of compromise between the different approaches to irrevocable offers found in the civil and common laws. In most civil law systems, it is implied that the offer will remain open for a reasonable period of time. In common law parlance, almost all offers under the civil law are considered as firm offers. In contrast, the irrevocability of offers is very limited in the common law. The common law holds fast to the rule that the offeror is the master of the offer and has the ability to revoke any offer at any time even if the offer expressly states that it is irrevocable.<sup>23</sup>

### 5.1. Offers and reliance

Despite, these profound differences between the civil and common law systems, the compromise structured in Article 16 has resulted in a surprising paucity of cases. This may be due to the fact that the broad firm offer rule found in Article 16(2)(b) is partially reconcilable with the common law's doctrine of promissory estoppel. Under promissory estoppel, courts may recognize that the offeree had a good reason to assume that an offer would remain open for a certain period of time. The classic example is in the invitation to make bids for a component of a larger contract. The company making the offer or bid understands that the bid will be used as part of a larger bid on a prime contract. If the offeror elects to rescind its bid after the primary bid has been submitted an injustice is recognized and the revoking offeror will be required to pay damages.

Before analyzing reliance theory as the underlying norm of Article 16(2)(b) and the common law's promissory estoppel doctrine, the issue of whether the fixing of time necessarily results in a firm offer needs to be

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<sup>22</sup> Switzerland 5 November 1998 District Court Sissach (*Summer cloth collection case*), <http://cisgw3.law.pace.edu/cases/981105s1.html>.

<sup>23</sup> See U.S. Uniform Commercial Code §2 205 (needs to be in writing, signed, and not extend beyond 90 days).

addressed? The answer is that the fixing of time may have been intended not as a firm offer, but as fixing the time upon which the offeree has to accept before the offer self-terminates. In the common law, the fixing of time, unless under the very narrow confines of the American UCC firm offer rule, does not result in irrevocability, but for self-termination of the offer. Such an intent would eliminate Article 16(2)(a)'s reach under a express or implicit derogation under Article 6.

The reliance concept as applied in Article 16(2)(b) holds that the general rule—in this case, the offeror's right to revoke an outstanding offer—is suspended in order to prevent an injustice upon the offeree. It would be an injustice if the offeror knew or should have known of the offeree's reliance upon an offer remaining open and revokes nonetheless. Reasonable reliance can be created by a communication by the offeree that it is relying on the offer to remain open, prior or course of dealings, or if there is a well-known and existing usage in the industry that such offers remain open unless expressly stated otherwise.

An Austrian court took up the issue of reliance in the broader context of the CISG and used Article 16(2)(b) as an example. In that case, a buyer asserted that the seller had waived its right to assert that the notice of non-conformity was not timely. The arbitral tribunal found that the "seller had repeatedly made statements to the buyer from which the latter could reasonably infer that the seller would not set up the defense of late notice and that, in reliance upon this, buyer refrained from taking legal action not only against its own customer, but also against seller."<sup>24</sup> Citing Articles 7(1) and 7(2) and, by analogy, the reliance concept expressed in Articles 16(2)(b) and 29(2), the tribunal invoked the principle of estoppel as a bar to seller's use of the defense of late notice. The tribunal based the use of estoppel on the general principle of good faith.

The determination of reasonable reliance in the case of an offer should be decided under the interpretive methodology of Article 8. First, the intent of the parties, if discernable, controls whether an offer is irrevocable or not. Second, if intent is not provable, then the reasonable person standard shall apply. The reasonable person is placed in the shoes of the offeree to determine if it was reasonable for the offeree to assume that the offer would remain open. The Secretariat Commentary on Article 14 provides an example where the offeree's reliance would be deemed reasonable. It states that "where the offeree would have to engage in extensive investigation to determine whether he should accept the offer . . . the offer . . . should be irrevocable for the period of time necessary for the offeree to make his determination."<sup>25</sup>

<sup>24</sup> Austria 15 June 1994 Vienna Arbitration proceeding SCH 4318 (*Rolled metal sheets case*), <http://cisgw3.law.pace.edu/cases/940615a4.html>.

<sup>25</sup> Secretariat Commentary, Article 14, paragraph 8, [http://cisgw3.law.pace.edu/cisg/text/secomm/secomm\\_14.html](http://cisgw3.law.pace.edu/cisg/text/secomm/secomm_14.html).

## 6. CONDUCT AS ACCEPTANCE

Article 18(3) provides that in certain situations an acceptance can be effective through the conduct of the offeree. The situations in which conduct and not oral or written communications can be a means of acceptance include: (1) the offer expressly states or authorizes an acceptance by conduct, (2) the parties through previous dealings have established a practice of acceptance by conduct; and (3) a trade usage recognizes such a means of acceptance. However, a German court held that a partial delivery may indicate consent, but is not an effective acceptance under Article 18(3).<sup>26</sup> The court held that the delivery of less than the full quantity ordered amounted to a counter-offer that the buyer was free to accept or reject.

The most recent reported case applying Article 18 focuses on the use of conduct as a method of acceptance.<sup>27</sup> In the case, the offeree-buyer incorporated the offeror-seller's sales quote into its quote to a third-party. The court held that the subsequent contract with the third-party was conduct of acceptance binding the original seller to a contract to supply the goods to the original offeree. In another case, the sending of an advanced payment was held to be an acceptance.<sup>28</sup>

It is important to note that the lack of a notice requirement in Article 18(3) doesn't apply to all acceptances by conduct. Article 18(3) only applies when the offer expressly authorizes acceptance by conduct ("send me the goods" or "send me the payment") or there is an existing course of dealing or usage. Otherwise, the offeree must notify or the offeror must have knowledge of the offeree's acceptance by conduct.<sup>29</sup> Acceptance by conduct without notification and acceptance by conduct with notification affects the type of conduct or performance needed to bind the contract. When conduct by performing an act is authorized by the offer, course of dealings or usage, then Article 18(3) can be read to mean that acceptance is only triggered by completion of the act. In contrast, where notification is required the notice of the beginning of the performance of an act may be sufficient.

The conduct without notice rule provides the opportunity for abuse by the offeror. This scenario would exist where the offeree begins per-

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<sup>26</sup> Germany 23 May 1995 Appellate Court Frankfurt (*Shoes case*), <http://cisgw3.law.pace.edu/cases/950523g1.html>.

<sup>27</sup> United States 21 January 2010 Federal District Court [California] (Golden Valley Grape Juice and Wine, LLC v. Centrisys Corporation et al.), <http://cisgw3.law.pace.edu/cases/100121u1.html>.

<sup>28</sup> See Switzerland 29 April 2004 Commercial Court St. Gallen (*Lenses case*), <http://cisgw3.law.pace.edu/cases/040429s1.html>.

<sup>29</sup> J. O. Albán, 103.

forming the act and before completion receives a revocation from the offeror. This possible scenario can be prevented under two interpretations of the CISG. First, Article 18(3) does not require complete performance to bind the contract. The language of “performing an act” does not necessarily mean completion of all the offeree’s duties under the contract. This is supported by the language that “performing an act” could be one “*relating to* the dispatch of goods or payment of the price.” The “relating to” language indicates that the beginning of performance satisfies the performing of an act requirement. The second method to prevent the injustice noted above is that the offeror has lost its ability to revoke under Article 16(2) since this would be a case of reasonable reliance.<sup>30</sup>

### 6.1. Articles 16(2) and 18(2)

A question to be answered is the conflict between the self-termination rule in Article 18(2) and the irrevocable offer rules of Article 16(2). As noted earlier, Article 16(2)(b) poses the question of whether an oral offer that the offeree reasonably relies upon to remain open and one in which the offeree acted in reliance is transformed into an irrevocable offer? If the offer is made orally, then the most plausible answer taken solely from the reading of the text of the CISG is that since there is a specific rule of self-termination of oral offers in Article 18(2), the offeree is precluded from relying on the offer remaining open.

Nonetheless, the expression that the offer would remain open after the termination of the oral communication would seem to trigger the firm offer rule found in Article 16(2). It could also be evidence of intent of the offeror to derogate from Article 18(2). Article 8 provides a meta-principle that underlies the interpretation of many of the Articles of the CISG. The parties intent, in this case the intent of the offeror—by expressly stating the offer will remain open or under the circumstances provided grounds for the offeree to reasonably rely on the offer remaining open—should determine whether the offer self-terminates through Article 18(2) or becomes a firm offer under Article 16(2).

## 7. GENERAL CONDITIONS AND STANDARD TERMS

The incorporation of standard terms into a contract involves a number of scenarios including when the terms are found in only one form, such as an offer, acceptance, or counteroffer; are being inserted by one of the parties subsequent to the formation of the contract; or where each party uses forms with differing or conflicting standard terms. The first

<sup>30</sup> P. Schlechtriem, P. Butler, *UN Law on International Sales*, Springer Verlag, Berlin 2009, 76–77.

two scenarios will be discussed here; the battle of the forms scenario is discussed in Professor Eiselen's article.

In response to the issue of whether the standard terms of one of the party's become part of the contract, two approaches can be offered. First, the terms enter the contract automatically unless the other party promptly objects to their inclusion. The second, and seemingly predominant approach, is that something more than failure to object is necessary for the inclusion of the standard terms. The receiving party—whether the offeror or the offeree—needs to be aware of the standard terms before they can be incorporated into the contract. The awareness may be actual or constructive. A German court states that “within the scope of the Convention, the effective inclusion of standard terms and conditions requires not only that the offeror's intention that he wants to include his standard terms and conditions into the contract be apparent to the recipient,” but also that the “recipient of a contract offer, which is supposed to be based on standard terms and conditions, must have the possibility to become aware of them in a reasonable manner.”<sup>31</sup>

The German court also dealt with the issue of the incorporation of standard terms by reference. It asserts that the principle of good faith found in Article 7(1) requires that the offering party not only reference the terms but also must provide or make available the terms to the other party. It notes that in the international arena some countries do not provide specific rules to regulate standard terms (such as in the United States). In addition, there are significant differences among those countries that have adopted standard terms regulations (such as Germany and France). The court concludes it is not the receiving party's duty to “enquire about the content of the standard terms and conditions.” The risk of non-incorporation of the standard terms is placed on the sending party.

Some courts have emphasized the importance of a lengthy history of course of dealings. In one case, the parties agreed by telephone to enter a long-term supply contract that provided for numerous shipments and payments. The seller would send an installment, along with an invoice, and the buyer took delivery and made payment. On the face of each invoice was a provision that stated in French that: “Any dispute arising under the present contract is under the sole jurisdiction of the Court of Commerce of the City of Perpignan.”<sup>32</sup> The court concluded that the forum selection clause was not part of any agreement between the parties. It provided the rationale that the contract was the one orally agreed to and

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<sup>31</sup> Germany 24 July 2009 Appellate Court Celle (*Broadcasters case*) <http://cisgw3.law.pace.edu/cases/090724g1.html>.

<sup>32</sup> United States 5 May 2003 Federal Appellate Court [9th Circuit] (*Chateau des Charmes Wines Ltd. v. Sabaté USA, Sabaté S.A.*), <http://cisgw3.law.pace.edu/cases/030505u1.html>.

the unilateral and subsequent insertion of terms were not incorporated into the contract.

A 2010 United States case addressed this issue as it relates to the formation of contracts through the exchange of e-mail communications.<sup>33</sup> The seller's general conditions which included a forum selection clause were provided as an e-mail attachment to its sales quote. The buyer argued that the clause was not a part of the contract because the buyer had never agreed to its inclusion. Even though the general conditions were available as an e-mail attachment, the buyer argued that it was unaware of their existence and even if they were aware they did not open the attachment and accept them as part of the contract. The court held that under article 14 the sales quote was an offer. But, did the quote incorporate the general conditions? The terms were available to the receiving party through the e-mail attachment. The court noted that the general conditions were not attached to just any correspondence but were provided contemporaneously with the sales quote and thus, were part of the contract. It is important to distinguish this case from those where a party tries to insert new terms or modify the contract subsequent to formation. This case deals directly with the formation of a contract and the determination of the terms of that contract.

Another scenario is the case where following an initial agreement one of the party's attempts to incorporate its standard terms through subsequent documents? Most courts have held that general terms and conditions that are first provided in an invoice or a purchase order, subsequent to the formation of the contract, are not incorporated into the contract without express acceptance. Under Article 8, in order for standard terms to be incorporated into a contract, they must be included in the proposal in a way that the other party under the given circumstances knew or could not have been reasonably unaware of the offeror's intent to incorporate the terms.<sup>34</sup>

The main issue in the most recent case involving Article 18 is whether the seller's general conditions in the offer which included a forum selection clause became part of the contract.<sup>35</sup> Buyer argues that the mere receipt of the general conditions is not enough to incorporate them into the contract. He further argued that he did not affirmatively agree to

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<sup>33</sup> United States 21 January 2010 Federal District Court [California] (*Golden Valley Grape Juice and Wine, LLC v. Centrisys Corporation et al.*), <http://cisgw3.law.pace.edu/cases/100121u1.html>.

<sup>34</sup> Austria 17 December 2003 Supreme Court (*Tantalum powder case*), <http://cisgw3.law.pace.edu/cases/031217a3.html>.

<sup>35</sup> United States 21 January 2010 Federal District Court [California] (*Golden Valley Grape Juice and Wine, LLC v. Centrisys Corporation et al.*), <http://cisgw3.law.pace.edu/cases/100121u1.html>.

the general conditions. The court held that the general condition terms of the offer were accepted when the buyer sold the product to a third-party. The court reasoned that since the general condition terms were part of the original offer they were not unilaterally incorporated into the contract.

In order to ensure the application of the general conditions, a Dutch court asserted that the seller should have offered the buyer a reasonable opportunity before or at the time of concluding the contract in order to become aware of their content.<sup>36</sup> The court concluded that the buyer did not have a reasonable opportunity to become aware of the general conditions and could not reasonably have understood that these general conditions were part of the seller's offer. In referencing the CISG, the court stated that the general conditions at hand can only become part of the contract if the application thereof was stipulated by the seller and accepted by the buyer pursuant to Article 14 et seq. of the CISG.

A recent German case<sup>37</sup> stated that the decisive factor is whether a reasonable person would have understood the confirmations (acceptances) as indicating an intention to incorporate the general conditions. The court's application of the reasonable person standard required that a certain threshold of communication was necessary before the general conditions could be deemed to be incorporated into the contract—at the minimum “the recipient . . . must be provided with the general conditions. CISG jurisprudence holds that there is no duty on the part of the receiving party to inquire about the content of the general conditions. That said, in the present case, the court indicated that there was an implicit duty if the incorporation of general conditions are set in a course of dealings between the parties. As to the intent requirement, the court noted that the buyer “knew from the negotiations that seller applied its general terms and conditions and intended to include them in the contract.”

## 8. SUBJECTIVE-OBJECTIVE TEMPLATE

The offer and acceptance rules of CISG Part II are applied through the interpretive template of mutual intent as provided in Article 8. Article 8(1) provides a first order rule that the subjective intent of the offeror to be bound or not bound controls. However, this is conditioned by the requirement that the other party “knew or could not have been unaware of what that intent was.” Failure to prove subjective intent of the sending party and knowledge or imputed knowledge of the receiving party results in the use of the second order rule—the reasonable person perspective.

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<sup>36</sup> Netherlands 21 January 2009 District Court Utrecht (*Sesame seed case*), <http://cisgw3.law.pace.edu/cases/090121n1.html>.

<sup>37</sup> Germany 14 January 2009 Appellate Court München (*Metal ceiling materials case*), <http://cisgw3.law.pace.edu/cases/090114g1.html>.

In the area of the incorporation of general conditions or standard terms into a contract, as noted earlier, most courts require some objective evidence of awareness, knowledge, and/or understanding of those conditions by the receiving party before finding consent. Failing such evidence, courts have often held that the general conditions are not incorporated into the contract. U.S. courts take a much narrower view of objective evidence.<sup>38</sup> This should be understood under the backdrop that standard terms are generally enforced in the United States without needing to prove awareness, knowledge or understanding. The exception is if a term is subsequently found to be unconscionable (grossly unfair). Such unconscionability findings are a rarity in commercial contract adjudication. American courts do not determine if a party had actual awareness, knowledge, or understanding of the standard terms. However, they do recognize the general rule that a party cannot unilaterally change the terms of an existing contract.<sup>39</sup>

In applying Article 8, there is a strong argument that the inclusion of general conditions in commercial invoices over a series of transactions can lead to their incorporation. In making the argument that the receiving party gave an implied consent to their incorporation, the subjective and objective approaches merge. The subjective approach in Article 8(1) states that a party is bound if she “knew or could not have been unaware” of the other party’s intent. The reasonable person standard of Article 8(2) could be used to support the argument that a reasonable person would have been aware of the general conditions and would have believed that they were intended by the other party to be part of the contract. The strength of this argument is dependent upon the course of dealings, whether the general conditions were discussed, and trade usage. But, in a given contextual setting this argument could overcome the facts that there was no express consent and that the document was subsequent to the formation of the contract.<sup>40</sup>

## 9. CONCLUDING REMARKS

The importance of recognizing the interconnectedness of CISG Articles is especially acute in Part II., “Formation of the Contract.” In many cases, numerous Articles of Part II are brought to bear in resolving a case. This article focused on the interconnectedness of Articles 14, 16, and 18

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<sup>38</sup> United States 16 June 2008 Federal District Court [Minnesota] (BTC USA Corporation v. Novacare et al.), <http://cisgw3.law.pace.edu/cases/080616u1.html>.

<sup>39</sup> *Ibid.*

<sup>40</sup> See OLG München 7 U 4427/97, Mar. 11, 1998 (F.R.G.), available at <http://cisgw3.law.pace.edu/cases/930113g1.html>.



as they relate to each other and to other CISG Articles, such as Articles 6, 8, 9, 19, and 55. This interconnectedness should be mined by practitioners in the fabrication of arguments and rationales on behalf of clients engaged in a dispute. It is also important to the transactional attorney in counseling its clients on the enforceability of contracts and contract terms. For example, in the area of incorporating standard terms or general conditions, it is best to expressly incorporate them into the contract. In incorporating standard terms, an attorney should advise her client to make sure the other party is aware of them, place a conspicuous reference to the terms on the face of the instrument, and provide a copy of the terms on the back of the form or attached to the form. Modification of long-term-supply contracts, such as an attempt of one of the parties to incorporate its general conditions, should be done with a greater deal of formality, such as an express agreement between the parties.