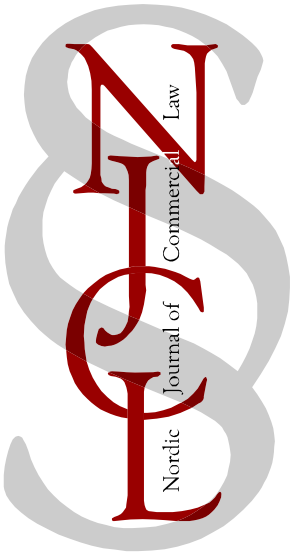

The Formation of the Contract in the UN Convention on the International Sale of Goods: A comparative analysis

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INTRODUCTION: THE CONSENT OF THE PARTIES

A contract is formed when parties express their agreement in congruent declarations, a prior offer and a consequence acceptance.

For a long time there was no practical need to force consent into the structure of offer and acceptance because parties always made their contracts face to face. In Rome, for example, contractual obligations were originally made by *stipulatio,* for which the parties needed to be physically present together, and even when this formality was dropped, contracts generally continued to be made in the presence of the parties, possibly represented by a slave or a son-in-power or even a free man appointed for that purpose. As a consequence the Roman jurists never came to think of two declarations named "offer" and "acceptance" as necessary for consent.[1]

The need for the agreement of the parties expressed in the offer and acceptance arose when a reliable postal service and contracting at a distance became possible; but even if no difficulties arise when the contract is concluded between parties who are in the same place or in immediate communication, when a contract is to be concluded *inter absentes*, and, after their declarations, it takes time for each of them to reach its addressee, several questions can arise.

In many cases in which a contract has unquestionably been formed, it is impossible, unrealistic or arbitrary to regard the conduct of one party as an offer and that of the other as an acceptance[2]; the *stipulatio* in a sale of land or the case of a customer who pays cash for a packet of cigarettes are situations in which it is difficult to say that one party is making an offer to the other who is declaring his acceptance. Another important situation is where an agreement is reached only after a long period of negotiation such as in a typical export sale where none of the letters exchanged may be defined as an offer or an acceptance.

Nevertheless there are other forms of reaching agreement (e.g., agreement reached in a point-by-point negotiations or with a performance) where the 'dissection' of individual statements as 'offer' and 'acceptance' would constitute an arbitrary legal operation as in the criticized decision of a US federal court in *Filanto S.p.A.* v. *Chilewich International Corp.*[3] in which the memorandum was considered as an offer and the seller's conduct as an acceptance in a possible but certainly not mandatory way.[4]

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[1] ZIMMERMANN, *The law of obligations, Roman Foundations of the civilian tradition,* Oxford, 1997, at 563
[2] KÖTZ, *European contract law,* Oxford, 1997, at 18.
[3] UNITED STATES *Filanto S.p.A.* v. *Chilewich International Corp.*, 789 F.Supp. 1229 (S.D.N.Y.), 14 April 1992, available online at <http://cisgw3.law.pace.edu/cases/920414u1.html>.
[4] SCHLECHTRIEM, *Commentary on the UN Convention on the International Sale of Goods*, Oxford, 1998, at 144.

This paper deals with this important requirement for the effective conclusion of a sale contract achieved by means of offer and acceptance. The starting point will be the Part Two of the UN Convention on the International Sales of Goods (CISG)[5] but each aspect of the latter objective agreement will be discussed in a comparative analysis with the three most important legal systems, namely the Anglo-Saxon legal family where the offeror is the least bound, the German system in which he is most strongly bound and the Romanistic one which adopts an intermediate position.

1. THE OFFER

The offer is the first step which leads to a contract because, if accepted, the latter is formed. The parties are then said to be '*ad idem*'.

It follows that an effective offer arises only if it presents two inner peculiarities, as art. 14 UN Sales Law states: if it 'indicates the intention of the offeror to be bound in case of acceptance' and if it is 'sufficiently definite'.

1.1. Intention to be bound

The 'intention to be bound' is the offeror's intention to be bound in the event of acceptance and it has nothing to do with the question of whether the offeror is bound by his offer or not. The 'intention to be bound', in fact, is a material feature of an offer which is not a matter for the autonomy of the parties[6].

It follows that when a contract arises through offer and acceptance, the offer must make it clear that, if accepted, the offeror intends to be bound otherwise there is in law no offer at all but just an invitation for the addressee to make an offer or to start bargaining (*invitatio ad offerendum*, invitation to treat, *offre de pourparlers*).[7]

The wording of the first sentence of Article 14(1) CISG makes it clear that it is the proposal's objective meaning which is significant and not the subjective one[8]. If doubts arise from the bare text of the parties' statements, they should first of all call for communication, as a consequence of a general principle of good faith (Article 7 CISG) which states that a party may not take advantage of ambiguity when an inquiry could readily remove the doubt.[9] Moreover if a party was unaware or could not have been aware that the subjective intention was different from the objective meaning, Article 8 CISG requires that the statements should be interpreted in their full context, 'according to the understanding that a reasonable person of the same kind would have had in the same circumstances', including the 'negotiations, any practices which the parties have established between themselves, usages and any subsequent conduct of the parties'.

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[5] Part Two of the Convention does not apply in States which have entered a reservation under Article 92 CISG, e.g., the Scandinavian States.
[6] SCHLECHTRIEM, supra note 4, at 110.
[7] KÖTZ, supra note 2, at 19.
[8] *Id.*
[9] HONNOLD, *Uniform Law for International Sales,* Kluwer, 1999, at 147.

As a consequence, the parties' understanding is a question of fact that is peculiar to each transaction and Article 14 CISG contains general guides for interpreting the parties' intent, playing just a subordinate and a supporting role.[10]

Relating to this problem a Court in Germany[11] held that 'it depends on the objective content of the statement whether the buyer must have understood the invoice as an offer' and if the seller answers, indicating all the 'necessary determinations' because he was told by the buyer to do so, there is no intention to be bound. In this case, circumstances show that the buyer could not understand the statement as an offer because the communication by which the buyer received the invoice said expressly that the seller acted because the buyer asked him to do so. Moreover a Court in Switzerland[12] held that, in the absence of any relevant circumstances or practices between the parties at the time the contract was concluded, the intention to be bound had to be interpreted according to the subsequent conduct of the parties after the conclusion of the contract. In particular, it held that the buyer's request to the seller to issue the invoice of the delivered textiles to the embroiderer was sufficient evidence of the buyer's intention to be bound at the time it made its proposal.

To distinguish an offer from an *invitatio offerendi* the proposal should describe itself either as a binding offer or else as *sans engagement, senza impegno, freibleibend,* without obligation or other words of the same effect; in absence of any such indications, Article 8 CISG pays attention on how the proposal would be understood by a reasonable person in the position of the addressee.[13]

Article 14(2) CISG incorporates the generally accepted premise that a party may make an offer to as large a group as it wishes[14] but 'a proposal other than one addressed to one or more specific person is to be considered merely as an invitation to make an offer, unless the contrary is clearly indicated by the person making the proposal'. There is no intention to be bound where a proposal is made to enter into negotiations, nor is there such an intention in particular in the case of an *invitatio ad offerendum:* Article 14 CISG presumes that in case of doubt proposals to an indefinite group of persons are invitations to treat. However, Article 14 CISG permits a proposal made to an indefinite group of persons to take effect as an offer, if that is clearly indicated by the offeror, indicating the 'intention of the offeror to be bound in case of acceptance' and if it contains the minimum elements required by Article 14(1), second sentence, except the case in which parties agreed to derogate from the latter requirement.[15]

[10] *Id.*
[11] GERMANY Oberlandesgericht Frankfurt, 30 August 2000, num. 9 U 13/00, translated text available online at <http://cisgw3.law.pace.edu/cases/000830g1.html>.
[12] SWITZERLAND Bezirksgericht St. Gallen, C. v. W, 3 July 1997, num. 3PZ 97/18, at www.unilex.info.
[13] SCHLECHTRIEM, supra note 4, at 112.
[14] SCHLESINGER, *Formation of contracts, a study of the common core of legal systems*, Oxford, 1968, 101.
[15] SCHLECHTRIEM, supra note 4, at 112

1.2. Definiteness of the offer

In order to constitute an offer, a proposal to conclude a contract must be sufficiently definite (*essentialia contractus)* that, if it is accepted, a contract is created with obligations which can be enforced into the Courts.[16]

Article 14(1) CISG, second sentence, states that the goods, their quantity and the price are the minimum elements; however they may still be insufficient[17] if other elements such as the time and the place of delivery may also be '*essentialia negotii*' in the particular case in which previous negotiations or practices of the parties show that an offer must specifically refer to such additional details.[18]

Goods are definite when they are expressly specified and they may be indicated either specifically or generally; Article 14(1) CISG, second sentence, moreover, allows the quantity and the price of them to be fixed 'implicitly'. Silence cannot in itself indicate the goods, their amount, or the price, if this does not refer to matters capable of being interpreted as an indication of a definite price, goods or amount, such as on the basis of the parties' practices or framework contracts which have already established the requirements for a valid offer. The Court of Appeal in Paris[19] held that 'in order for a contract to be concluded, the proposal must be sufficiently definite and that, even if acceptance may result from the behavior of the offeree, silence or inactivity does not in itself amount to acceptance'. The term 'implicitly' in the Article 14 CISG indicates also that it is sufficient that the prevision on these elements makes them determinable also when these relevant factors will come into existence or be established only at a latter date[20] such as in a future supply of commercial quantities as the U.S. District Court of New York states in *Geneva Pharmaceuticals Technology Corp.* v. *Barr Laboratories, Inc., et al.*[21] holding that 'not only were the goods involved clearly identified, but also the indication of a "commercial amount" was an appropriate criterion for determining the quantity and price, taking into account the industry usages automatically incorporated into the agreement'.

As many European Courts have held[22], an offer is also capable of acceptance if a 'reasonable person of the same kind' and 'in the same circumstances' as the recipient would have understood the necessary minimum content to have been expressed in sufficiently definite terms according to Article 8(2) CISG.[23]

The third element requested by the art. 14 CISG for the definiteness of an offer is the price: a proposal does not constitute an offer if it fails to fix a price, at least implicitly, or to make

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[16] BIANCA/BONELL, *Commentary on the international sales law,* Milan, 1987, art. 14 note 2.2.2
[17] SCHLECHTRIEM, supra note 4, at 106
[18] BIANCA/BONELL, supra note 16, art. 14 2.2.2
[19] FRANCE Cour d'Appel de Paris, 10 September 2003, num. 2002/02304, translated text available online at <http://cisgw3.law.pace.edu/030910f1.html>.
[20] BIANCA/BONELL, supra note 16, art. 14 note 2.2.4.2.
[21] UNITED STATES *Geneva Pharmaceuticals Technology Corp.* v. *Barr Laboratories, Inc., et al.,* 201 F.Supp. 236 (S.D.N.Y.), 21 August 2002, available online at <http://cisgw3.law.pace.edu/cases/02082u1.html>.
[22] AUSTRIA Oberster Gerichtshof, 20 March 1997, num. 2 Ob 58/97m; AUSTRIA Oberster Gerichtshof, 10 November 1994, num. 2 Ob 547/93, translated text available online at <http://cisgw3.law.pace.edu/cases/941110a3.html> ; SWITZERLAND Bezirksgericht St. Gallen, 3 July 1997, num. 3PZ 97/18, at www.unilexinfo.
[23] SCHLECHTRIEM, supra note 4, at 106.

provision, also in this case at least implicitly, for determining the price. The Austrian Supreme Court[24] held that a price is sufficiently definite if it's agreed on a range, the single price depending on the quality of the single good and the French Supreme Court[25] assumed a price to be determinable also if it could be revised according to market trends. A Hungarian Court, moreover, held that an offer is sufficiently definite if the quality, quantity and price of the goods are impliedly fixed by the practices established between the parties who have had a commercial relationship for a long time[26]. However, the latter case was completely distorted, in a criticized decision[27], by the Hungarian Supreme Court on 25 September 1992 which held that no effective contract had been concluded since the supplier's offer had not given a complete price for the entire system but only for a part of it and there was no market for price for such system, so that the price could therefore not be determined under Article 55 CISG either. Nevertheless, the definiteness of a contract can also be satisfied if the price is determined neither explicitly nor implicitly and Article 55 CISG does not apply if parties agree to determine the price of the goods in a future date[28].

During preparation of CISG there was a fierce dispute as to whether a contract should nevertheless come into existence if a price had not been fixed and as to which mechanism for fixing the price should be used to fill the gap. The Convention recognizes that contracts can be made without following the two-step-formula of offer and acceptance in the Article 18(3), which provides that a contract may be concluded "by performing an act" and in the Article 8(3) in which statements are to be interpreted to include trade usages and the parties' practices and are to be construed in the light of "any subsequent conduct of the parties". As a consequence, does Article 14 CISG deal not only with the peculiarities of an offer but also with the validity of a contract of sale which does not determine the price?

The answer to this question is not obvious and the solution takes place in the conflict between Article 14 and Article 55 CISG, the latter dealing with the mechanism for fixing the price. Some authors[29] assume that Article 55 basically takes priority, so that the requirement for a definite price in Article 14 is largely redundant[30] and others, in the same way, assume that a binding contract may come into effect irrespective of the requirements for a valid offer under Article 14 CISG[31]; these authors, in fact, sustain that in the face of Article 4 CISG, which states that "except as otherwise expressly provided in this Convention, it is not concerned with the validity of the contract or of its provisions", it is difficult to say that Article 14 deals with the validity of a contract of sale. Article 55 CISG is consequently applicable, overcoming Article 14 CISG, stating that when a contract "has been validly concluded", on the basis of the applicable national law, without any expressly or implicitly provision for determining the price, "the parties are considered to have impliedly made reference to the price generally charged ... for such goods sold under comparable circumstances". Some commentators assume that there is an obvious conflict, due to the

[24] AUSTRIA Oberster Gerichtshof, 10 November 1994, num. 2 Ob 547/93, supra note 22.
[25] FRANCE Cour de Cassation, *Sté Fauba France FIDIS GC Electronique* v. *Sté Fujitsu Mikroelectronik GmbH*, 4 January 1995, translated text available online at <http://cisgw3.law.pace.edu/cases/950104f1.html>.
[26] HUNGARY Metropolitan Court of Budapest, 24 March 1992, num. AZ 12.G.41.471/1991, at www.unilex.info.
[27] AMATO, (1993) 13 *The Journal of Law and Commerce* 1, at 16.
[28] RUSSIA Tribunal of Int'l Commercial Arbitration at the Russian Federation Chamber of Commerce, 3 March 1995, num. 309/1993, at www.unilex.info.
[29] HONNOLD, supra note 7, at 155; CORBISIER, *Rev. int. dr. comp.* 1988, 767, 828; JOSEPH, (1984) *3 Dick. J. Int. Law,* 122.
[30] SCHLECHTRIEM, supra note 4, at 109.
[31] BIANCA/BONELL, supra note 16, art. 55, note 2.2.2.

circumstances in which the Convention arose, which must be solved in various techniques according to specific cases[32]; so that Article 55 CISG is important where the CISG is to be applied without Part Two and the applicable domestic law permits a contract to be concluded without a price being determined or when no price has been indicated because it is determined implicitly and rules of interpretation should be applied; in many other cases a contract may still be considered to have been concluded by agreement because the parties implicitly derogate from Article 14(2) CISG, second sentence, or because the contract was validly concluded otherwise than the mechanism of offer and acceptance; only in the remaining rare cases in which an offer without a price is a vital component of the agreement and this can be determined neither 'expressly nor implicitly', it can be concluded that no contract was formed. Finally, other authors claim that Article 14(1) CISG, second sentence, takes absolutely priority[33].

1.3. A comparative analysis

Most of the Civil law systems follow the Article 14 CISG conception; an offer must be definite, that is, it must specify the essentials of the proposed deal with sufficient precision that a valid contract will be formed if the addressee announces that he accepts it[34]. In the French law, a contract is defined in Article 1101 of the Code Civil as "an agreement by which one or more persons promise one or more others to give, to do or not to do something". Moreover, Article 1108 sets out the four essential conditions for the validity of a contract: consent of the party who undertakes to perform the obligation, his or her capacity to contract, a predetermined *objet* or obligation and a lawful cause. Article 1129 says that "the obligation must have as its object a thing of a definite description. The amount thereof can be undetermined, provided it is ascertainable". Also Italian law specifies the requisites of the contract in Article 1325 Codice Civile, which are: agreement, object, *causa* and form, if the latter is required by the law in the single statements, adding in Article 1346 that the object of the contract must be possible, lawful and certain or ascertainable. In Italy, however, it is not necessary that all the details of a contract are decided, if the parties act as if bound by it, as stated by the Corte di Cassazione[35]. In Spain Article 1261 of the Civil Code says that a contract requires consent, definite subject matter, and a *causa* for obligation. Moreover, Article 1262 says that consent is shown by concurrence of offer and acceptance of the thing in issue and the *causa*, which together constitute the contract. An offer should be precise and complete and intended to be binding. A Spanish Supreme Court decision[36] held that "once the offer of contract of proposal, with all necessary elements for the future contract, has been made, the contract comes into being with the assent of the other party". Article 1273 states that a clear and certain subject matter is another contractual requirement but an uncertain quantity or sum is still acceptable if it can be determined without the need for a new agreement; an agreement on a contract of sale of a piece of land, in which the precise piece is not from among various holdings, is held void for uncertainty if it is left to be decided at a later date, as in an earlier Supreme Court decision[37].

[32] SCHLECHTRIEM, supra note 4, at 109.
[33] GHESTIN, *Revue de Droit des Affaires Internationales,* 1988, at 6.
[34] SCHMIDT, *Négotiation et conclusion de contrats,* Paris, 1982, at 72.
[35] ITALY Corte di Cassazione, 17 October 1992.
[36] SPAIN Tribunal Supremo, 10 October 1980.
[37] SPAIN Tribunal Supremo, 30 June 1972..

Nevertheless, in most of the Civil law countries, a valid contract of sale may even exist if the price is neither stated nor inferable from the surrounding circumstances but this will be so only if it emerges from the negotiations as a whole that the parties have agreed that the contract is to be valid notwithstanding that the price is to remain open for the time being.[38]

A different solution is given under Common Law, where judges wish to give an effect to disputed agreements, rather than nullify them by strict or literal interpretation. In *Hillas* v. *Arcos*[39], Lord Tomlin explained that "the problem of a court of construction must always be so to balance matters that, without violation of essential principles, the dealings of men may so far as possible be treated as effective and the law may not incur the reproach of being the destroyer of bargains". The same opinion can be found in the *British Coal* case of the Scottish Court of Session which held that "if parties have apparently intended to bind themselves, the court should be slow to abort that intention on the basis that there is some inadequacy on a particular aspect".

In American Common Law this principle is always followed but in *Lonergan* v. *Scolnick*[40], Court held that there can be no contract unless the parties have met and mutually agreed upon some specific things. In the same way, the Uniform Commercial Code differs from Article 14 CISG in determining whether an offer is sufficiently definite to be valid. Section 2-204(3) of the UCC does not specify which terms will affect the sufficiency of an offer so that UCC test is not "certainty as to what the parties were to do nor as to the exact amount of damages due to plaintiff ... If the parties intend to enter into a binding agreement, recognizes that agreement as valid in law, despite missing terms, if there is any reasonably certain basis for granting a remedy"[41]. UCC §§ 2-201(1) and 2-204 require that a contract for sale specify the quantity of goods but the latter need not be identified and a fixed price is not essential to a valid sales contract under UCC § 2-305 and when a UCC contract is silent about price, the assumption is that the parties intended the sale to be at a reasonable price at the time and place of delivery[42].

Like Article 14 CISG, the principle of the intention to be bound as a peculiar part of the offer and the presumption of a proposal to an indefinite group of persons as an *invitatio ad offerendum*, is peculiar to both Civil and Common Law countries. In France, the Supreme Court has held that an offer to contract is one which shows clearly the intention of the offeror to enter into a binding contract on the terms set out and which contains the essential elements of the contract[43] differing from a letter of intent or offer to start negotiating, which may create only an obligation to negotiate in good faith otherwise it can give raise to a quasi-delictual liability[44]. Just the proposal to an indefinite group of person as a non binding act could be subject to some exceptions, above all in France and Denmark and Switzerland: Courts in France have held that displaying goods with their prices usually constitutes an offer for sale[45] and where someone has advertised goods for sale in a newspaper, a contract is formed with the first person to fulfill the conditions of the

[38] KÖTZ, supra note 2, at 18.
[39] *Hillas* v. *Arcos*, (1932) 147 L.T. 503 (H.L.).
[40] UNITED STATES *Lonergan* v. *Scolnick*, 129 Cal.App.2d 179, Cal. App. 4 Dist., 23 November 1954.
[41] UCC § 2-204, Official Comment 3.
[42] GABRIEL, *Pratictioner's Guide to the Convention on Contracts for the International Sale of Goods and the Uniform Commercial Code*, New York, 1994, 44.
[43] FRANCE Cour de Cassation, 6 March 1990.
[44] FRANCE Cour de Cassation, 20 March 1972.
[45] FRANCE T.C. Seine, 28 May 1981.

offer[46], unless he lacks particular attributes which it is reasonable for the advertiser to insist on, such as solvency or reliability. Danish law recognizes the distinction between an offer and an invitation to treat, but nonetheless holds that a statement of price attached to goods generally constitutes a binding offer as in a Supreme Court judgment in 1985 (UfR 877). Also Article 7(3) of the Swiss Law of Obligations provides that the 'display of goods marked with the price is normally to be seen as an offer'.

In Germany and in Italy, on the other hand, the common distinction is adopted and goods displayed and priced in a shop window represent only an '*invitatio offerendi*. In England an offer differs from an invitation to treat because the latter is a stage before the former, being only an expression of a general willingness to bargain and as such of no legal effect. Most of the advertisement are in the 'intention to treat' category, above all when it concerns statements of price, whether or not attached to the goods in question, and even if given in response to a specific inquiry as Court held in *Harvey* v. *Facey*[47] and in *Scancarriers* v. *Aotearoa*[48]. A different solution is found in *Carlill* v. *Carbolic Smoke Ball Co.*[49] in which Court held that the advertisement in newspapers that £100 would be paid to any reader who contracted influenza after inhaling 'Carbolic Smoke Ball' was an offer, explaining the reason that these kinds of statements amount to an offer because they proposed or required particular responses from their readers. In the United States, the general rule is that an advertisement does not constitute an offer and it is merely an invitation for offer but in *Izadi* v. *Machado (Gus) Ford, Inc.*,[50] a Florida Court held that "a binding offer may be implied from the very fact that deliberately misleading advertising intentionally leads the reader to the conclusion that one exists". Like Article 14 CISG, the Uniform Commercial Code indicates that an offer need not specify all the terms to set forth and that the primary determination of an offer's sufficiency and validity will be the offeror's intent[51]. UCC under § 2-204 (1) expressly provides that formation can be made in any manner to show agreement, including offer and acceptance and conduct by both parties which recognizes the existence of a contract. However, because of the UCC silence on the intention to be bound, the matter is a question of Common Law contract[52]. Like in the CISG the objective theory is accepted today in Common Law contract: one is ordinarily bound or not bound by the reasonable interpretation of his words and actions. In *Ray* v. *William G. Eurice & Bros., Inc.*,[53] a Maryland Court says that "the law is clear, absent fraud, duress, or mutual mistake, that one having the capacity to understand a written document who reads and signs it, or without reading it or having it read to him, signs it, is bound by his signature in law ... it follows that the test of a true interpretation of an offer or acceptance is not what the party making it, thought it, meant or intended it to mean, but what a reasonable person in the position of the parties would have thought it meant".

[46] FRANCE Cour de Cassation, 13 June 1972.
[47] ENGLAND *Harvey* v. *Facey,* (1893), AC 552.
[48] ENGLAND *Scancarriers* v. *Aotearoa,* (1985) 135 N.L.J. 799.
[49] ENGLAND *Carlill* v. *Carbolic Smoke Ball Co.,* (1892), 2 QB 484.
[50] UNITED STATES *Izadi* v. *Machado (Gus) Ford, Inc.,* 550 So.2d 1135, Fla. App. 3 Dist., 1 August 1989.
[51] GABRIEL, supra note 42, at 42.
[52] UCC § 1-103(b).
[53] UNITED STATES *Ray* v. *William G. Eurice & Bros., Inc.,* 201 Md. 115, 93 A.2d 272, Md., 5 December 1952.

2. EFFECT OF THE OFFER

Article 15 CISG states that "an offer becomes effective only when it reaches the offeree". An offer reaches the offeree only if it has been sent with the consent of the offeror; consequently if an offer is drawn up and agreed by a competent body, but not dispatched, and comes into the possession of the addressee in an unauthorized manner, it has not 'reached' him and is therefore ineffective[54]. Moreover an offer cannot be accepted before it has become effective, even if the offeree is already aware of it[55].

The fact that an offer becomes effective only when it reaches the offeree means that it can be withdrawn by the offeror before or at the same time as it reaches the offeree, even if the offer is irrevocable. Withdrawal leads to the termination of the offer and a withdrawal cannot itself be withdrawn, consequently a new offer must be made instead. The reason supporting the effect of the offer in Article 15 is that the enforcement of contracts is designed to protect expectations and none arose before the offeree is reached by an offer not withdrawn.

The same principle of the effect of an offer just when it reaches the offeree is adopted both in Common Law[56] and in Civil law[57] systems as the principle that an offer is ineffective if notice of its withdrawal reaches the offeree before the offer or at the same time[58].

3. REVOCATION OF THE OFFER

Article 16(1) CISG states the principle that an offer is revocable; however, this principle is restricted by providing the statement that not only the conclusion of the contract but even the dispatch of acceptance rules out the revocation of an offer. Moreover, Article 16(2) CISG adds (a) a reference to the situation in which the offeror states a fixed time for acceptance, that could be understood, at first sight, as indicating an intention to be bound by his offer for this period, and (b) states that the offeror is also bound if the offeree has acted in reliance on the offer being irrevocable and it was reasonable for him to do so.

3.1. Revocability until acceptance

Like the withdrawal of an offer in Article 15, Article 16(1) CISG states that a revocation of an offer must be made by a declaratory act that reaches the addressee[59]. The offeree's knowledge, possibly gained from a third party, that the offeror intends to revoke his offer does not bring about revocation. Moreover, a revocation of a revocation is not generally possible and a new offer is

[54] SCHLESINGER, supra note 14, at 683.
[55] SCHLECHTRIEM, supra note 4, at 115.
[56] Second Restatement of Contracts §§ 23, 24, 28; UNITED STATES *Craft* v. *Elder & Johnson Co.*, (1941), 34 Ohio App. 2d 605.
[57] § 130 BGB; art. 167 Greek Civil Code; art. 224 Portuguese Civil Code; art. 1335 Italian Civil Code, according to which an offer is effective only if addressee has knowledge of it and this such knowledge is presumed as soon s it reaches the right address. The presumption can be rebutted by proof that the addressee was not blame for not learning of the offer, a proof which could be truly defined as a *probatio diabolica*.
[58] § 130 BGB; art. 230 Portuguese Civil Code; but in art. 9(1) Swiss Law of Obligation, an offer is considered to have been withdrawn if the addressee learns of the withdrawal before he learns of the offer itself, even though the withdrawal may have reached him after the offer.
[59] ENDERLEIN/MASKOW/STOHBACH, *International SalesLlaw,* New York, 1992, Art. 16, note 3.

necessary in the same way as in a revocation of an offer; nevertheless some authors[60] think that an exception could be when the addressee has not yet acted on reliance on it and, in particular, has not yet acquired knowledge of the first revocation; the party making the revocation bears the burden of proof.

Article 16(1) CISG provides that revocation is precluded by the dispatch of an acceptance, that is before the contract is concluded after an effective acceptance under Article 18(2) CISG. Consequently, a revocation after dispatch of an acceptance is ineffective even though the contract is not concluded until the acceptance reaches the offeror; there is a state of suspense until the acceptance reaches him[61]. Termination of the right to revoke upon the dispatch of an acceptance is not a mandatory rule, consequently the offeror can extend this time. The offeree bears the burden of proving that his acceptance was sent before the arrival of the revocation and on the other hand, the offeror must prove the time at which the revocation reached the offeree[62].

3.2. Offers indicated to be irrevocable

The offeror can make his offer irrevocable if his offer indicates that fact. This result reflects the approach of various Civil law system without the need, stated in Common Law, for 'consideration'[63] (e.g., an act of counter performance or a counter obligation) or the observance of particular forms (as in § 2-205 UCC) and without a time period being prescribed during which the offeror is bound by his offer (as in the same § 2-205 UCC). An intention to be bound can be expressed by unambiguous wording ('firm offer' or 'will be opened') or words understood in the particular trade to express an intention to be bound interpreted under rules stated in Article 8 CISG.

The significance of stating a fixed time was a matter of dispute at the Vienna Conference because of the different views Common Law and Civil law countries have on the argument of fixing a period for acceptance. While the drafts and relevant proposals in Vienna always intended that, irrespective of the offeror's intention to be bound, the stating of a fixed time for acceptance should mean that the offer was irrevocable until that time, the opposite view ultimately prevailed and the setting of a fixed time was only one factor indicating the intention to be bound and the words should be understood as setting a time limit beyond which the acceptance would be too late. Even after that formulation had been adopted, some delegations in Vienna still took the view that fixing a time for acceptance by itself indicated irrevocability. It is not easy to assess the outcome of this dispute, which may well appear to be a tempest in a teapot[64]; both decisions, however, should be accommodated by concluding that the fixing of a period for acceptance should be a presumption of an intention to be bound for that period, but the presumption can be rebutted by showing that the offer in its full setting was only intended to indicate that the offer would lapse after that time rather than a promise not to revoke[65].

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[60] SCHLECHTRIEM, supra note 4, at 119.
[61] *Id.*
[62] *Id.*
[63] RESTATEMENT SECOND OF CONTRACTS § 71 states that "to constitute consideration, a performance or a return promise must be bargained for; a performance or return promise is bargained for if it is sought by the promisor in exchange for his promise and is given by the promise in exchange for that promise".
[64] HONNOLD, supra note 7, at 163.
[65] SCHLECHTRIEM, supra note 4 , at 121; HONNOLD, supra note 7, at 163.

3.3. Reliance on the offer and responsibility

Article 16(2) CISG expresses the principle that a person should not act in a contradictory manner otherwise it causes the offeror to be bound by the reliance which he has induced[66]. Two conditions must be satisfied: there must be reliance, justified in the particular case (i.e., it must be 'reasonable') and there must be an act by the party relying on the offer. An act performed in reliance on the binding nature of the offer may be indicated by commencing production, acquiring materials or concluding contracts for those purposes[67], or under certain circumstances by taking on employees, provided always that such conduct was the result of 'reasonable' reliance, in the offeree's own particular situation; moreover act means not only a positive act, but also a failure to act. Moreover, in *Geneva Pharmaceuticals Technology Corp.* v. *Barr Laboratories, Inc., et al.* the US District Court of New York held that Article 16(2) CISG does not expressly require neither that the offeree's reliance must have been foreseeable to the offeror nor detrimental.

Where revocation is precluded, the legal consequence is that the offeror is bound by his offer and the offeree therefore has an opportunity to accept and create a contract. The CISG leaves no room for remedies under domestic law, consequently claims for damages under domestic law arising in *culpa in contrahendo* or on the basis of the general law of tort or delict must be excluded[68]. However, some authors think that since the Convention provides one remedy for wrongful revocation (namely the offeree can accept the offer in spite of revocation), when special circumstances make this remedy ineffective to the damages caused by a wrongful revocation, it would be reasonable for a tribunal to close the gap by domestic law under Article 7(2) CISG[69].

3.4. A comparative analysis

In English law revocation is in principle permitted: an offer may be revoked at any time until it has been accepted even if the offeror undertook to keep it open for a given period of time; in *Dickinson* v. *Dodds*[70] the Court said that the effect of stating a limit of time is to ensure that the offer lapses at the end of it, not that it may be not be revoked earlier and in *Byrne* v. *van Tien Hoven*[71] that "there is no doubt that an offer can be withdrawn before acceptance, and it is immaterial whether the offer is expressed to be open for acceptance for a given time or not". The reason why the Common Law imposes no obligation on the offeror is to be found in the doctrine of consideration, whereby in the absence of a formal deed or of an 'option', a promisor is only bound if the other party has rendered or promised a counterperformance[72]. Offers are normally made without any counterperformance by the addressee and they are hardly ever clothed in solemn form, so normally the offeror is not bound by the offer[73]. Even English commentators find unsatisfactory that the offeror's stated intention to keep the offer opened for a specific period does not bind him unless he has received 'consideration' because the revocation of the offer within the

[66] HONNOLD, supra note 7, at 164.
[67] BIANCA /BONELL, supra note 16, Art. 16 note 2.2.2.
[68] SCHLECHTRIEM, supra note 4, at 122.
[69] HONNOLD, supra note 7, at 168.
[70] ENGLAND *Dickinson* v. *Dodds*, (1875-76) L.R. 2Ch. D. 463.
[71] ENGLAND *Byrne* v. *van Tien Hoven*, (1879-80) L.R. 5 C.P.D. 344.
[72] KÖTZ, supra note 2, at 22.
[73] ZWEIGERT/KÖTZ, *An introduction to comparative law*, Oxford, 1992, at 383.

period allowed for acceptance may lead to inequitable results if the offeree has incurred expenditure in reliance on the promise, as in *Routledge* v. *Grant*[74] . English law does consider the interest of the offeree, like CISG, on the contrary, also if a really 'light' disposition, in the 'mail box' rule, whereby acceptance by letter or telegram, so the time limit to revoke, takes effect when offeree dispatched the acceptance by post rather than when it reaches the offeror.

The Uniform Commercial Code in § 2-205 provides that an offeror may withdraw or revoke the offer at any time prior to the offeree' s acceptance; a North Carolina Court states in *Normile* v. *Miller*[75] that "it's a fundamental tenet of the Common Law that an offer is generally freely revocable and can be countermanded by the offeror at any time before it has been accepted by the offeree" and that "generally, notice of the offeror's revocation must be communicated to the offeree to effectively terminate the offeree's power to accept the offer. It is enough that the offeree receives reliable information, even indirectly that the offeror had taken definite action inconsistent with an intention to make the contract". The Code, also consistent with general principles of Common Law contracts, restricts the revocability of offers[76] by an option contract[77] supported by consideration or by detrimental reliance[78]. The UCC, nevertheless, unlike the Common Law principle, in the same § 2-205 states that an offer is not revocable if a 'firm' or irrevocable offer was made. UCC defines a 'firm offer' as "an offer by a merchant to buy or sell goods in a signed writing which by its terms gives assurance that it will be held open and that it is not revocable, for lack of consideration, during the time stated or if no time is stated for a reasonable time, but in no event may such period of irrevocability exceed the three months". So, in UCC there is no definition of an offer and the Common Law definition applies but it states the concept of 'firm offer' as a dispensation to the general Common Law rule and specify a maximum length of period for the irrevocability which consist in a reasonable time of three months.

In French law, an offer has rather more binding force and although Courts state that notwithstanding an offer may be withdrawn at any time until it has been accepted by the offeree, revocation may be treated as illegitimate and as a *faute* leading to liability under art. 1382 Code Civil if it is abusive and frustrates the offeree's justified expectations when the offeror revokes his offer before the expiry of any time he himself fixed for acceptance[79] or, if no time was specified, he revokes it before a délai raisonnable inferable from the surrounding circumstances or trade usage. The Court of Appeal of Colmar[80] held that an offer is binding if it follows an express or silent agreement but *indiscutible* because it was formulated to be irrevocable for a certain period of time. Italian law follows the same principle stating in Article 1329 Codice Civile that an offer can be revoked at any time before acceptance but the offeree has a claim for damages for the loss caused to him by the withdrawal of the offer if, as art. 1328 Codice Civile states, "with no knowledge of the withdrawal of the offer he in good faith started to perform the contract".

Both in Italian and in French law, the quantity of claimed damages depends not only on the harm suffered by the offeree in reliance on the offer remaining open but also to the harm because he is

[74] ENGLAND *Routledge* v. *Grant*, (1828), 4 Bing 653.
[75] UNITED STATES*Normile* v. *Miller*, 313 N.C. 98, 103, 326 S.E.2d 11, N.C., 27 February 1985.
[76] RESTATEMENT SECOND OF CONTRACTS § 42.
[77] RESTATEMENT SECOND OF CONTRACTS § 37.
[78] RESTATEMENT SECOND OF CONTRACTS § 87.
[79] FRANCE Cour de Cassation, 10 March 1968.
[80] FRANCE Court of Appeal, Colmar, 4 February 1936.

not in the position he would have enjoyed if the contract had come into being; these losses are named by Italian courts as *lucro cessante*, that is the party's harm deriving indirectly from the failure of the contract and *danno emergente*, which is what the party suffered directly from the illegal revocation of the offer.

The greatest effect to the offer is given in German, Swiss and Austrian law. As soon as the offer reaches the offeree the offer is bound and revocation is impossible and ineffectual until the expiry of any period fixed in the offer or, if no period is fixed, then a reasonable period[81]. This binding effect can be excluded if the offeror describes his offer as *freibleibend* or not binding; with that formula the offeror is allowed to revoke even after acceptance has reached him and the contract formed. Moreover, the Court hold that this 'not binding offer' is not in law an offer at all, but only an invitation to treat[82].

What if offeror and offeree are from countries with two different legal systems? Article 16(2) CISG is a rule of interpretation and supplements Article 8 CISG in that respect[83]. Where the parties are from Civil law countries, it will be possible to assume that the offeror intended his offer to have a binding effect (Article 8(1) CISG) and that the offeree understood it as such. On the other hand, where the parties are from Common Law countries, Article 8(2) CISG, in conjunction with Article 16(2) CISG, will by themselves not always indicate that the offeror intended to be bound for that period unless other indications to that effect[84]. However, an offeror from a Common Law country making an offer to an offeree of a Civil law country may find himself bound for the period he has indicated, even though he did not intend his offer to have such effect, because of the rule in Article 16(2) CISG in conjunction with Article 8(2), the latter requiring regard to the recipient's understanding who, however, is not blindly advised to assume that fixing a period for acceptance in itself indicates that the offeror has bound himself for that period[85].

4. REJECTION REACHING THE OFFEROR

Article 17 CISG provides that an offer is terminated when the offeree's rejection reaches the offeror even if the offer is irrevocable; the rejection has that effect even if it is rejected during a period fixed for acceptance which has not yet expired. The procedure for concluding a contract can then be initiated only by making a new offer.

Rejection can be declared expressly or implicitly but in any case it must reach the offeror. Moreover, an offer to buy goods is not rejected by the sale of those goods by the offeree to a third party[86]. As inferred indirectly from Article 22 CISG in conjunction with Article 7(2) CISG, an offer may be rejected even after the dispatch of an acceptance if the rejection reaches the offeror before or at the same time as the acceptance.

[81] § 130 and § 145 BGB; art. 3 and 5 Swiss Law of Obligations; § 862 ABGB; art. 185 Greek Civil Code; art. 230 Portuguese Civil Code.
[82] GERMANY Bundesgerichtshof, 8 March 1984.
[83] HONNOLD, supra note 7, at 162.
[84] BIANCA/BONELL, supra note 16, Art. 16, note 2.2.1.
[85] SCHLECHTRIEM, supra note 4, at 122.
[86] SCHLECHTRIEM, supra note 4, at 124.

The CISG does not state whether death, loss of full legal capacity, institution of insolvency proceedings or similar proceedings affecting a party's powers cause an existing offer to be terminated; the effects of such events, therefore, are governed by domestic law[87].

4.1. Comparative analysis

Civil law countries adopt the same approach, therefore if an offer is rejected by the offeree, it expires then, and this is true even if the time fixed for acceptance is still running[88]. Also the Common Law approach leads to the same result found in the Convention and "an offeree's power of acceptance is terminated by his rejection of the offer, unless the offeror has manifested a contrary intention"[89].

Similarly to the CISG, the UCC provides that once an offeree has rejected an offer, the offer terminates; CISG and UCC, however, differ in what constitutes a rejection; unlike the Convention, the UCC § 2-207 does not treat an acceptance which modifies an original offer with additional or different terms as a rejected offer but, on the contrary, it allows an acceptance that states additional or different terms from the offer to be validly enforceable.

5. THE ACCEPTANCE

Article 18(1) CISG defines an acceptance as "a statement made by or other conduct of the offeree indicating assent to the offer is an acceptance. Silence or inactivity does not in itself amount to acceptance".

The statement of acceptance must express assent to the offer and to its terms and it does not have to adopt any specific wording; the acceptor, in fact, may restrict himself to a simple indication of assent or repeat the offer in whole or in part[90]. Mere confirmation of receipt of the offer, an expression of thanks for the offer, or an indication of interest does not express an intention to accept it[91]. Acceptance may in principle be indicated using any method of communication and the acceptor is not obliged to use the same means as the offeror; a written offer may be accepted orally, by telex or by any other mean of communication unless the offeror has prescribed a particular means of indicating acceptance[92].

Article 18(1) CISG, first sentence, also permits acceptance by 'other conduct' and except in so far as Article 18(3) applies, the declaration indicated by the conduct expressing acceptance must, in principle, reach the offeror because Article 18(2) CISG, providing that the 'indication of assent' becomes effective only when it reaches the offeror, makes it clear for both forms of assent indicated in Article 18(1) CISG. Examples of such declaratory conduct are the dispatch of the goods, even partial deliveries (in Germany Courts held that the dispatch of the goods by the

[87] *Id.*
[88] § 146 BGB; art. 187 Greek Civil Code; § 5 Swedish Contract Law.
[89] RESTATEMENT SECOND OF CONTRACT § 38.
[90] SCHLECHTRIEM, supra note 4, at 126.
[91] BIANCA/BONELL, supra note 16, Art. 18 note 2.1.
[92] *Id.*

seller[93] and buyer's taking delivery of the goods[94] constitute acceptance but in the latter situation, a Swiss Court held that "the buyer's taking delivery through a third party could not be considered as a conduct indicating assent to the modified acceptance in absence of a particular usage or practice established between the parties"[95]), packaging the goods for dispatch to the buyer or in accordance with his offer, acceptance or processing of the goods, payment, preparation for performance by concluding a cover transaction or by commencing production[96]. Moreover, also opening a letter of credit for the purchase price as the District Court of Illinois held in *Magellan International Corporation* v. *Salzgitter Handel GMBH*[97] and a letter of confirmation sent by the seller after buyer's taking delivery of the goods[98] constitute an implied acceptance.

Article 18(1) CISG indicates also that silence or inactivity can in principle also express an intention to accept and there is no question of its reaching the addressee. However the wording of the provision 'in itself' clearly shows that there must be additional factors associated with the silence or inactivity to indicate assent[99]. The possibility that silence may indicate assent does not mean that an offeror can insert a term to that effect in the offer as a way of binding the offeree if he fails to reply to the offer[100]. These other circumstances, which should be associated with silence or inactivity, could above all be the existence of an agreed usage and a usage deemed to be agreed by virtue of Article 9 (2) CISG. Nevertheless, a Court in Germany held that the usage must be international and the German usage to conclude a contract through a letter of confirmation ('*Kaufmännisches Bestätigungsschreiben*') is not international, since it was recognized only at the receiver's place of business (Germany), while in France, such a usage was not habitual"[101]. Other circumstances can be practices established between the parties by virtue of Article 8 (3) CISG as the Court of Appeal of Grenoble held in *Sté Calzados Magnanni* v. *Sarl Shoes General International - S.G.I.*, in which acceptance of the seller was not required accordingly to the practices previously established between the parties.[102] Moreover, in *Filanto S.p.A.* v. *Chilewich International Corp*, a U.S. Federal District Court held that in view of the extensive previous transactions between the parties the offeree ought to have objected the arbitration clause in the offer and his silence and certain other indications showed the seller's intention to be bound by the terms of the offer. Another circumstance, as an Argentinean Court held, could be the buyer's countersigning of the invoice forms and the consequently sending to a finance institution[103].

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[93] GERMANY Oberlandesgericht Frankfurt am Main, 23 May 1995, num. 5 U 209/94, translated text available online at <http://cisgw3.law.pace.edu/cases/950523g1.html>.
[94] GERMANY Oberlandesgericht Stuttgart, 5. Zivilsenat, 28 February 2000, num. 5 U 118/99, translated text available online at <http://cisgw3.law.pace.edu/cases/000228g1.html>.
[95] SWITZERLAND Handelsgericht des Kantons Zürich, 10 July 1996, num. HG 940513, translated text available online at <http://cisgw3.law.pace.edu/cases/960710s1.html>
[96] *Id.* note 2.2
[97] UNITED STATES *Magellan International Corporation* v. *Salzgitter Handel GMBH*,(1999), 76 F.Supp. 2d 919, N. D. Ill., 7 December 1999, available online at <http://cisgw3.law.pace.edu/cases/991207u1.html>.
[98] GERMANY Oberlandesgericht Saarbrücken, 13 January 1993, num. 1 U 69/92, at www.unilex.info
[99] SCHLECHTRIEM, supra note 4, at 130.
[100] BIANCA/BONELL, supra note 16, Art. 18 note 2.3.
[101] GERMANY Oberlandesgericht Frankfurt am Main, 5 July 1995, translated text available online at <http://cisgw3.law.pace.edu/cases/950705g1.html>.
[102] FRANCE Cour d'Appel de Grenoble, *Sté Calzados Magnanni* v. *Sarl Shoes General International - S.G.I.*, 21 October 1999, num. 96J/00101, translated text available online at <http://cisgw3.law.pace.edu/cases/991021f1.html>.
[103] ARGENTINA Cámara Nacional en lo Comercial, *Sala E, Inta S.A.* v. *MCS Officina Meccanica S.p.A*, 14 October 1993, num. 45626, available online at <http://cisgw3.law.pace.edu/cases/931014a1.html>.

5.1. Time limits for acceptance

Under Article 18(2) CISG, first sentence, an indication of assent becomes effective when it reaches the offeror both in case of an oral declaration of acceptance, as a U.S. Court held in *Chateau des Charmes Wines Ltd.* v. *Sabaté USA Inc., Sabaté S.A.*[104], and in case of an implicit indication of assent, therefore putting the risk of transmission on the offeree[105]. A declaration by implicit conduct does presuppose that such a declaration is capable of 'reaching' the offeror, otherwise (e.g., where the goods sent with the offer are consumed by the offeree) the contract can be only concluded under Article 18(3) CISG[106]. Acts of acceptance which make it possible for the assent thereby indicated to 'reach' the offeror (e.g., the dispatch of the goods) may be accompanied by communication and if the latter reaches the offeror before the assent indicated by dispatch of the goods, it probably causes the conclusion of the contract[107]. Even a communication by a third party (e.g., by a bank involved in the payment process or a carrier), is said to result in the assent indicated by the initiation of the payment procedures or by the dispatch of the goods 'reaching' the offeror[108].

If the offeror has fixed a time, then the acceptance must reach him within the time fixed, in so far as no other significance is to be attributed to that time, as the ICC Court of Arbitration in Paris held in 1994[109]; if no time has been fixed, or none that can be established by interpretation[110], then a 'reasonable time' applies as stated by Article 18(2) CISG. A reasonable time is made up of three elements: the time taken by the offer to reach the offeree, the time required for the acceptance to reach the offeror, and a period for consideration[111]. First of all, the time required for offer and acceptance to reach their respective addressees depends on the means of communication employed by the offeror (Article 18(2) CISG, second sentence); the consideration, on the other hand, is to be established taking into account the extent, subject-matter, and the nature of the transaction offered, such as the existence of fluctuating market prices, the stability or perishability of the goods, the need to obtain information, to negotiate with suppliers, sub-contractors or finance institutions and the purpose of the purchase[112].

In case of an oral offer, which is a declaration encompassing first of all words spoken *inter praesentes*[113], if the latter indicates a period for its acceptance, the offer must be accepted within that period but if the offer does not fix such a period, then Article 18(2) CISG, third sentence, states that it must be accepted immediately unless the circumstances, such as the negotiations of the parties or the necessity for the offeree to obtain information or consent, indicate otherwise[114].

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[104] UNITED STATES *Chateau des Charmes Wines Ltd.* v. *Sabaté USA Inc., Sabaté* S.A., 328 F. 3d 528, 9th Cir. (Cal.), 5 May 2003, available online at <http://cisgw3.law.pace.edu/cases/030505u1.html>.
[105] HONNOLD, supra note 7, at 175.
[106] SCHLECHTRIEM, supra note 4, at 132.
[107] BIANCA/BONELL, supra note 16, Art. 18, note 2.7.
[108] *Id.*
[109] ICC International Court of Arbitration – Paris, 1994, num. 7844/1994, at www.unilex.info
[110] SCHLECHTRIEM, supra note 4, at 133
[111] *Id.*
[112] SCHLECHTRIEM, supra note 4, at 133.
[113] *Id.* In the author's opinion, telephone is also an oral communication together with other electronic methods of communication equivalent to the telephone if they permit spoken declarations to be transmitted in a comprehensible form and a reply to be received by the same means. Communication via telex or by e-mail cannot be treated as 'oral' even though they render direct dialogue possible.
[114] *Id.*

Article 18(3) CISG permits also an effective indication of assent to be made without the need for it to reach the offeror and to be effective 'at the moment the act is performed', indicating that act as, for example, one relating the dispatch of goods or the payment of the price. There is a dispute, however, whether an indication of assent which does not need to reach the offeror under Article 18(3) CISG refers only to acts equivalent to acceptance or includes also written declarations; the latter view is objected on the basis that it would place the risk of the loss of the declaration of acceptance on the offeror, if the declaration had been dispatched on time but was late to reach him. Moreover, the word 'act' used and the examples given in Article 18(3) CISG (dispatch of goods or payment of the price) are intended to be the only permitted cases of acceptance without notice to the offeror[115].

According to some authors[116], however, in some cases a contract is not formed under Article 18(3) CISG. In particular, if the communication does not reach the offeror and the offeror states a time within which the act should be performed, if the act (e.g., the arrival of the goods to the offeror) reaches the offeror after the time stated in the contract, the contract is not concluded because the acceptance did not arrive on time; not the beginning of the act (e.g., the dispatch of the goods by the offeree) but the moment in which the act (arrival of the goods) reaches the offeror is important in such circumstances.

As a consequence of Article 6 CISG, parties are entitled to derogate from the rules on the contracting procedures and thus from the principle that a declaration must reach the addressee. An indication of assent which does not reach the offeror is possible and effective where the offeror has framed his offer in order to permit it. Silence or inactivity is to indicate acceptance if the parties exceptionally agree that, then silence after the offer has reached the offeree creates a contract, except in so far as the offeree indicates otherwise. Also practices between the parties, established through lengthy business relations, will often show not only that a particular conduct indicates acceptance but also that the need for the assent so expressed to reach the offeror is waived[117].

5.2. A comparative analysis

Most Civil legal systems[118], like Article 18(2) CISG, hold that an acceptance, like an offer, becomes effective when it reaches the offeror, that is, when it enters his zone of control and he is informed of it[119].

In France, acceptance must be of the offer as a whole, so that reservations or modifications of the terms of the offer constitute a counter-offer[120]. Like the CISG, silence does not generally constitute acceptance[121] and the latter may be implicit, as where the terms of the offer are fulfilled[122], or there is a continuing business tradition between the parties and also trade usages may indicate acceptance despite the absence of any response to an offer[123]. A problem much discussed concerns

[115] *Id.*
[116] HONNOLD, supra note 7, at 178; on the contrary, see SCHLECHTRIEM, supra note 4, at 136.
[117] *Id.*
[118] § 130 BGB; art. 167, 192 Greek Civil Code, § 2, 3 Swedish Contract law; art. 1335 Italian Civil Code.
[119] KÖTZ, supra note 2, at 24.
[120] FRANCE Cour de Cassation, 2 March 1962.
[121] FRANCE Cour de Cassation, 2 May 1870.
[122] FRANCE Cour de Cassation, 21 June 1983.
[123] FRANCE Cour de Cassation, 21 May 1951.

the place of formation of the contract rather than the time of it. In fact, some decisions of the Cour de Cassation turn the issue to the dispatch of acceptance (*théorie de l' expedition*) while others base it onto its arrival (*théorie de la reception*). A decision of the Court de Cassation[124] states, on the question of an acceptance dispatched in time but arriving late, that, unless otherwise specified by the offeror, it is enough that the acceptance is dispatched in time and that a contract is formed even though the contract is late in reaching the offeror or has been lost by the post not reaching him at all. Writers recognize, however, that the solution does not refer to an abstract analysis but it depends on the contrasting concrete interests[125]. In the same way, Italian law states that acceptance must reach the offeror within the time he has specified, or otherwise within a reasonable time. Article 1329 Codice Civile rules that if the offeror promises to keep his offer open for a certain period of time, his offer is irrevocable once it comes to the other's notice. Moreover, in Article 1333 Codice Civile, an offer in the form of an option, that is a promise binding the offeror but which the offeree may accept or refuse at his discretion, is likewise irrevocable for the period stated or determined as reasonable by the Courts. In Spain, acceptance must be clear and unequivocal, and directed to the offeror. It may be express or implied and acceptance can also be inferred from silence[126] but must show the intention to complete the proposed contract; but, while in ordinary 'civil' contracts the latter is concluded when acceptance comes to the notice of the offeror, as stated in Article 1262 of the Spanish Civil Code, Article 54 of the Commercial Code rules that a commercial contract by exchange of letters is complete when the acceptance has been posted.

In Common Law, unlike Civil law and the CISG, the 'mail box' rule is applied; 'Unless the offer provides otherwise, an acceptance made in a manner and by a medium invited by an offer is operative and completes the manifestation of mutual assent as soon as put out of the offeree's possession, without regard to whether it ever reaches the offeror'[127]. Although the UCC does not specify the 'mail box' rule, under UCC § 1-103 principles of Common Law contracts are applied if they are not supplanted or superseded by Code language. Parallel to Article 18 CISG, UCC § 2-206 permits acceptance by actions where appropriate, providing that unless unambiguously indicated by the language or circumstances, acceptance is permitted 'in any reasonable manner and by any medium reasonable under the circumstances' and taking, consequently, like CISG, a flexible approach in the offeree's mode of acceptance. UCC, moreover, recognizing under § 2-204 any manner of expression of agreement, oral, written or otherwise, as sufficient to establish it, states that acceptance of an offer may be inferred from the offeree's conduct. UCC § 2-206, like the CISG, provides that a promise to ship or actual shipment constitutes acceptance; however, UCC, unlike the CISG, requires that an unambiguous act of acceptance must be communicated to the offeror within a reasonable time, recognizing, consequently, the beginning of a performance as effective acceptance but only if the offeree gives notice of acceptance within a reasonable time

Like in the Convention and in Civil law, also Common Law countries have the general principle that mere silence does not by itself amount to acceptance to an offer, even if the offeror was bold enough to state in his offer that it is to do so except in some circumstances prescribed by statute[128].

[124] FRANCE Com. 7 January 1981, Bull. Cass. 1981 IV no. 11.
[125] GHESTIN, *Traité de droit civil, la formation du contract*, Paris, 1993, at 353.
[126] SPAIN Tribunal Supremo, 13 February 1978.
[127] REASTATEMENT SECOND OF CONTRACTS § 63.
[128] E.g., L-112-2 of the French *Code des assurances* and § 362 of the German Commercial Code.

6. QUALIFIED ACCEPTANCE

Article 19(1) CISG states the traditional and widely accepted 'mirror image' rule; that is, a reply which purports to accept an offer but which contains modifications 'is a rejection of the offer and constitutes a counter-offer'. An exception is given in Article 19(2) which states that 'additional or different 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 a notice to that effect'.

6.1. Material alterations

Material alterations are changes to terms of an offer which affect the significance of the offer under Article 8 CISG[129]. If there are discrepancies in the wording (as can occur in international transactions owing to inaccurate translation, insufficient command of a foreign language or even typing or transmission errors) some authors[130] think that if the parties agree in substance, then there are no different terms within the meaning of Article 19 CISG. Others[131] assume, on the other hand, that mere differences in the words used or grammatical or typographical changes are different terms, even though not material under Article 19 CISG.

Article 19(1) CISG also applies if the acceptance contains 'additions', that is, matters to which the offer does not refer and the same rule is applied when usage lead to an addition to the offer (e.g., arbitration clauses), so that any addition by the acceptor does not in fact amount to a different term[132].

It is not easy to distinguish between immaterial and material obligations but the list recited in Article 19(3) CISG lays down a clear line between them for the majority of contractual clauses: additional or different terms relating, among other things, to the price, payment, quality and quantity of the goods (e.g., a reduction in quantity), place and time of delivery (e.g., a change in time of delivery), extent of one party's liability to the other, settlement of disputes (e.g., a demand for arbitration clauses or jurisdiction clauses) are considered material alteration to the terms of the offer. Nevertheless, that does not rule out the possibility that even changes to those matters in the declaration of acceptance may be considered immaterial on account of the particular circumstances of the case, the practices of the parties, preliminary negotiations or usage, or the irrebuttable presumption that the parties want to intend the material matters listed under Article 19(3) CISG as immaterial[133]. Changes made to the advantage of the offeror should not require acceptance by him and should all be capable of forming part of the contract[134]. In the opinion of an Austrian court, in fact,

> "a modification concerning the elements listed in Art.19(3) CISG is to be considered material only if the circumstances of the case, the practices which the parties had established between

[129] SCHLECHTRIEM, supra note 4, at 139.
[130] *Id.*
[131] BIANCA/BONELL, supra note 16, Art. 19, note 2.8.
[132] *Id.*
[133] SCHLECHTRIEM, supra note 4, at 140; HONNOLD, supra note 7, at 187.
[134] SCHLECHTRIEM, supra note 4, at 141.

themselves, the negotiations or the usages do not indicate otherwise. In particular, a modification of the offer concerning the quantity of the goods which is exclusively favorable to the offeror would have to be considered non material. Given that the offeror did not object, the contract should be validly concluded as it results from the modified acceptance"[135].

A material alteration to the terms of the offer is considered to constitute a rejection of the offer and, as a consequence of Article 17, the rejection terminates the offer and the ineffective acceptance takes effect as a counter-offer to which Articles 14 to 17 CISG apply.

6.2. Immaterial terms

Immaterial terms are changes which do not affect the agreement in substance. These terms can be established *a contrario* from Article 19(3) CISG and an acceptance with such terms, unless the offeror objects, leads to the conclusion of the contract with the different or additional terms as part of it. It is possible to find same examples of immaterial modification in the decisions of the Courts; a German Court held that "a term contained in the acceptance indicating that notice of defects must be given within 30 days after the date of invoice could not be considered a material modification of the terms of the offer in accordance with Article 19(2) CISG"[136]. Moreover the partial conflict of the parties' standard terms could not lead to a failure of the entire contract, since the parties, in performing the contract, had shown that such a conflict was not to be considered a material modification of their agreement[137]. Another Court, also in Germany, held that also a change in transportation costs is not a material alteration of the contract, so that even if the buyer's order contains a "*frei Baustelle*", that is Free carrier named place, in response to a seller's condition of the clause "transport costs 9 DM per km", the contract is concluded[138]. Finally, it has also been held that the introduction of a mere request to treat the letter confidentially added by the buyer does not amount to a material modification of the offer and it is therefore to be considered as part of the agreement in accordance with Article 19(2) CISG[139].

However, by objecting to the discrepancy, the offeror can prevent the conclusion of the contract *a quo* but the objection must be made without undue delay and the offeree must bear the risk of the loss or late arrival of the offeror's objection and the risk of incurring obligations as a result of is reliance on the effective conclusion of a contract, because he created the anomaly which caused the risk[140]. The objection can be both oral and by other means but the words 'with undue delay' apply to both because it would be strange, if the condition would apply just to an oral objection, since the offeror could gain time by making a non-oral objection and so leave the contract in a suspended state[141].

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[135] AUSTRIA Oberster Gerichtshof, 20 March 1997, num. 2 Ob 58/97m, at www.unilex.info.
[136] GERMANY Landgericht Baden-Baden, 14 August 1991, num. 4 O 113/90, translated text available online at <http://cisgw3.law.pace.edu/cases/910514g1.html>.
[137] GERMANY Bundesgerichtshof, 9 January 2002, num. VIII ZR 304/00, translated text available online at <http://cisgw3.law.pace.edu/cases/020109g1.html>.
[138] GERMANY Oberlandesgericht Koblenz, 4 October 2002, num. 8 U 1909/01, translated text available online at <http://cisgw3.law.pace.edu/cases/011004g1.html>.
[139] HUNGARY Metropolitan Court of Budapest, in *MALEV Hungarian Airlines* v. *United Technologies International Inc. Pratt & Whitney Commercial Engine Business*, 10 January 1992, num. 3.G.50.289/1991/32, translated text available at <http://cisgw3.law.pace.edu/cases/920110h1.html>.
[140] SCHLECHTRIEM, supra note 4, at 143.
[141] BIANCA/BONELL, supra note 16, Art. 19, note 3.2.

6.3. The battle of forms

Differences between a declaration of acceptance and an offer are nearly always the result of the incorporation of or attempts to incorporate standards terms of contract. There is usually a conflict simply as a result of a clause in each party's terms which purports to make the incorporation of the party's terms into the contract an essential part of his offer or acceptance and expressly to override the other party's terms[142]. The CISG does not contain special rules on the 'battle of forms' but many solutions, based on Article 19 CISG, are proposed. It is always clear in these cases from the parties' conduct (e.g., the exchange of an offer and a purported acceptance, followed by shipment and acceptance of the goods) that the parties made a contract but what are the terms of the contract?

In this situation an interpretation under the CISG which gives effect to the contract is very important because it prevents one party from using divergent standard terms as a mean of escaping from a transaction which has become disadvantageous for him. That possibility to escape under the 'mirror image rule' has always been the subject of criticism[143].

One approach seeks a way to choose between the terms of the two conflicting communications in the sense that one communication gives effect to the last form in the sequence on grounds that further performance indicates agreements to its term[144]. This is the so called 'last shot rule' which can be regarded as an expression of the assent to the counter-offer for the purpose of Article 8(2) and Article 18(1) and 18(3) CISG[145].

It could be especially troubling to place the risk of a modification on the one who received a reply that purported to be an acceptance when both parties proceed with performance in the face of its ambiguity; a solution could be found in Article 8(2), which leads to the second approach: statements or conduct of one party 'are 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'. Consequently the general principle that doubt is to be resolved against the party who created the ambiguity, should be accepted. This approach also might discourage ambiguity by denying benefit to the party who created the ambiguity by sending an ambiguous acceptance[146].

Both theories are strongly criticized as casuistic and unfair[147].

If it can be established, in fact, that the parties agree on the *essentialia negotii* of the contract, it can then be presumed that they have waived the application of their conflicting terms and, by virtue of the autonomy of the parties under Article 6, have departed from the CISG procedure for the formation of a contract and from Article 19 CISG. Consequently the solution can be found in what it is called the "knock out" rule. Under this rule, the contract takes effect as one that

[142] SCHLECHTRIEM, supra note 4, at 145.
[143] SCLECHTRIEM, supra note 4, at 145; KÖTZ, supra note 2, at 32.
[144] HONNOLD, supra note 7, at 191.
[145] SCHLECHTRIEM, supra note 4, at 144.
[146] HONNOLD, supra note 7, at 192.
[147] SCHLECHTRIEM, supra note 4, at 144.

includes on the one hand the CISG rules at the place of the conflicting one and on the other hand any of the parties' terms which they agree in their forms[148].

German Courts follow the latter theory so that in a case[149] between a German buyer and an Italian seller who concluded a contract for a sale of fashion goods, in which their standard forms contained a different choice of the applicable law, the Court held that the choice of law of the Italian seller had not become part of the contract because the fact that the parties had started performance of the contract showed their intention to be bound by it and by the terms already agreed upon as well as by any standard terms which were common in substance, with the exclusion of the conflicting terms such as the choice of law clauses.

Consequently derogating from Article 19 CISG, the contract was validly concluded, but neither was the choice of law clause in favor of German law contained in the buyer's standard terms deemed valid, as the buyer failed to give evidence that it had sent its general conditions of purchase in a language other than German, which was not the language of the contract. Finally, Court held that the law is to be determined in compliance with German private international law rules which referred to Italian law. The latter "knock out" rule was confirmed also by the German Supreme Court[150], according to which conflicting standard terms simply do not become part of the contract; the evaluation of such a conflict must proceed, however, from a systematic interpretation of all the rules involved. In this case, in fact, a German seller and a Dutch buyer entered into several contracts for the sale of powdered milk but there were two different clauses on seller's liability for lack of conformity. In its decision, the Supreme Court of Germany held, first of all, that assuming that the partial conflict of the parties' standard terms (battle of the forms) could not lead to a failure of the entire contract, since the parties, in performing the contract, had shown that such a conflict was not to be considered a material modification of their agreement (Art. 19(1) and (3) CISG); then that the liability of the seller for lack of conformity was governed by the CISG. Thus, both buyer's and seller's standard terms were not applicable to the contract as far as non conformity was concerned.

6.4. A comparative analysis

Like the Convention, Civil law countries take the 'mirror image rule' in the sense that acceptance must express unqualified concurrence with the offer[151]. Like the CISG, moreover, in these countries if the acceptance differs markedly from the offer and is therefore to be regarded as a counter-offer, a contract is formed only if this counter-offer is accepted in its turn.

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[148] SCLECHTRIEM, supra note 4, at 145; HONNOLD, supra note 7, at 192. In the same way Art. 2.22 UNIDROIT Principles: 'where both parties use standard terms and reach agreement except on those terms, a contract is concluded on the basis of the agreed terms and of any standard terms which are common in substance unless one party clearly indicates in advance, or later and without undue delay informs the other party that it does not intend to be bound by such a contract'.

[149] GERMANY Amtsgericht Kehl, 6 October 1995, num. 3 C 925/93, translated text available online at <http://cisgw3.law.pace.edu/cases/951006g1.html>.

[150] GERMANY Bundesgerichtshof, 9 January 2002, num. VIII ZR 304/00, translated text available online at <http://cisgw3.law.pace.edu/cases/020109g1.html>.

[151] § 150(2) BGB; art. 191 Greek Civil Code; art. 1326 Italian Civil Code;§ 6(1) Swedish Contract Law; art. 233 Portuguese Civil Code.

Concerning the 'battle of forms' in most of these countries the battle would be won by the party that fired the last shot, that is, the one who insisted on his own terms of business just before the other party started to perform.

Italian law, in Article 1326 of the Codice Civile, on the battle of forms takes the strict view that if the parties do not expressly agree on exactly the same terms, there is no contract. Thus, a purported acceptance which does not conform exactly with the offer is seen as a counter-offer, although it may involve only minor modification of the offer. Mmoreover, the Italian Supreme Court stated that the Courts cannot make a contract for the parties out of whatever common ground may appear between them[152]. In the same way, the Spanish Supreme Court held that a purported acceptance which in fact modifies the offer or makes it subject to a new condition is only a counter-offer[153]. French Courts follow the principle that the judges infer the common intention of the parties on a case by case basis but if the forms cannot be reconciled, the relevant clause is deemed not agreed and the contract not formed as originally formed by the offeror[154].

A different solution in such a case, similar to the second approach we talk about, is given by art. 6:225(3) NBW (the new Netherlands Civil code) which provides that the conditions of the offeror take precedence unless expressly objected to in the acceptance, by what is called a 'defense clause'. Nevertheless, like the CISG, the best solution is given in Germany whose Courts have rejected the theory of the 'last shot' and hold that to the extent of any conflict between the parties' general terms neither of them becomes part of the contract, the resulting gap being filled by dispositive law or by terms implied by law[155].

Also the Common Law adopts the 'mirror image rule'[156], so a statement of acceptance is effective only if it is a mirror image of the offer and expresses unconditional assent to all of the terms and conditions imposed by the offeror as expressed by the Second Restatement § 59. Consequently if an offeree responds to an offer by proposing terms other than those contained in the original offer, he makes a counter-offer. The last shot rule is a consequence of this principle so that if a party impliedly assented to that thereby accepted a counter-offer by conduct indicating lack of objection to it. In *Princess Cruises, inc.* v. *General Electric Co*[157]., the Court held that 'having concluded that General Electric's response should be viewed as a counter-offer under the mirror image rule, the court than goes on to hold that Princess Cruises accepted that counter-offer by conduct: by not objecting to its terms; by accepting the services performed by General Electric; and by paying the price stated in General Electric's counter-offer'.

Also the English Common Law follows the mirror image rule, but the solution is not always so easy. In *Butler* v. *Ex-Cell-O*[158], Lord Denning explored this problem: "In most cases where there is a battle of forms there is a contract as soon as the last of the forms is sent and received without objection being taken to it. The difficulty is to decide which form, or which part of which form, is

[152] ITALY Corte di Cassazione, 7 January 1993.
[153] SPAIN Tribunal Supremo, 14 March 1973.
[154] FRANCE Cour de Cassation, 17 July 1967.
[155] GERMANY Bundesgerichtshof 26 September 1973; Oberlandesgericht Cologne 19 March 1980; GERMANY Bundesgerichtshof 20 March 1985.
[156] See UNITED STATES *Princess Cruises. Inc* v. *General Electric Co.*
[157] UNITED STATES *Princess Cruises, Inc.* v. *General Electric Co.,* 525 U.S. 982, U.S., 9 November 1998.
[158] ENGLAND *Butler* v. *Ex-Cell-O,* (1979), 1. W.L.R. 401 CA.

a term or condition of the contract." In this case the sellers quoted a price to the buyers and on the back of the quotation were various provisions including a price variation clause and the statement that "these terms shall prevail over any terms in the buyer's order". The buyers ordered the goods but in their terms there was no variation clause but a form requiring the seller to agree to their last terms. Finally, the seller signed and returned the form, but sent with it a letter saying they were fulfilling the order in accordance with their original quotation. In this case the sellers fired the first shot and they made clear the contract was to be made on their terms alone; for this reason the trial judge thought the sellers should win because they had made the price variation clause the basis of all subsequent dealings. The Court of Appeal reversed his decision and apart from Lord Denning, who was concerned with the overall effect of the negotiations. His Lordship thought the issue regarded just the decision of who made the offer and who accepted. In the case *a quo*, the sellers had offered but by returning the buyer's form had seemed to accept the buyer's counter-offer. The most important weakness of the 'last in time' principle is that it can obviously cause injustice because it would be too easy for one of the contracting parties to take advantage of the other by slipping in another clause at the very last stages in the negotiation and hoping it would not be noticed.

Under the original UCC § 2-207, unlike the mirror image rule and unlike the CISG, a varying response will not prevent contract formation where there is otherwise a demonstrated intent to deal[159]. UCC § 2-207(1) provides that an acceptance or confirmation that contains additional or different terms operates as a valid acceptance but three vital rules are to be respected. First, the offeror's original terms may make it clear that any subsequent amendment is of no effect (thus reaching the opposite conclusion to that in *Butler* case); second, if the new terms 'materially alter' (which unlike CISG, UCC does not define) those in the offer, that by itself ensures they are not binding; and third, the offeror's express objection, within a reasonable time of receiving the new terms likewise nullifies them. UCC in § 2-207(2) operates to determine, where a valid acceptance exists, what the exact terms of the bargain are, providing the offeree a limited power to unilaterally alter the terms of an agreement or proposed bargain. In the latter case offeree's responsive document constitutes the requisite 'definite and seasonable expression of acceptance' so that, if modifications are not material, the contract is concluded under his terms. The principle above incorporates the distinction between material terms which lead to the original contract condition, nullifying offeree's different or additional terms, and the immaterial ones which, on the other hand, make the offeree's terms prevail, following the so called 'last shot rule'. These rules were changed by the Court in the *Roto-Lith*[160] case in which the original Common Law was applied so that the offeree's modification of the terms of the contract, which, concerning warranties, should be considered as material, were seen as a counter-offer which the offeror accepted in his performance. A new solution to this problem is now given in the Revision of the Section 2-207 of the UCC in which it pays attention on the ambiguous conducts which cannot determine terms' agreement. Unlike the result under original § 2-207 the baseline for the terms will not be the offer. Instead, terms that appear in the records of both parties will become part of the contract and the remaining gaps will be filled by terms supplied or incorporated under the Code. In other words, only those terms which the parties actually agree upon will be part of the contract[161].

[159] GABRIEL, supra note 42, at 61.
[160] UNITED STATES *Texas Plastics, Inc.* v. *Roto Lith, Ltd.* 356 U.S. 957, U.S. Tex., 19 May 1958.
[161] GABRIEL, *Contracts for the sale of goods: a comparison between domestic and international law*, New York, 2004, at 82.

7. INTERPRETATION OF OFFEROR'S TIME LIMIT FOR ACCEPTANCE

Article 20 CISG sets the offeror's time limit for acceptance providing under Article 20(1) that any time provision in an offer begins to run from the date internal to the offer (the date of the letter or postmark), not from the date of the offer's effectiveness (when received by the offeree). Article 20(2) specifies that holidays or other nonbusiness days will operate to extend the offer only if their occurrence precludes delivery of the acceptance to the offeror on the last day for acceptance. The extension exists only when delivery of the acceptance is to be made at the offeror's place of business on an holiday or nonbusiness days. Therefore the extension does not apply if delivery of the acceptance is to the offeror's home[162].

The UCC does not address the issues raised in Article 20. The Common Law of contracts provides that an offer that has fixed time of acceptance lapses upon the stated time if the offer has not been accepted in the stated time. However UCC, taking a more flexible approach to contract formation, recognizes that 'an agreement sufficient to constitute a contract for sale may be found even though the moment of its making is undetermined'.

8. LATE ACCEPTANCE

Article 21 CISG extends and elaborates the basic rule of Article 18(2) CISG that an acceptance 'is not effective if the indication of assent does not reach the offeror within the time he has fixed or, if no time is fixed, within a reasonable time'. It distinguishes between two reasons for lateness: late dispatch of acceptance (Article 21(1) CISG) and discernible delay in transmission (Article 21(2) CISG), in both cases allowing a contract to be formed by the late acceptance.

Article 21(1) CISG governs the case of late acceptance, which under Article 18(2) CISG, second sentence, is invalid[163], but if an offer has already lapsed owing to the expiry of a period for its acceptance, the parties' substantive agreement should not found on the 'logical impossibility' of a valid acceptance of a lapsed offer[164]. The only point in issue is whether, if an offer has lapsed, an acceptance should be treated as a counter-offer or whether Article 21(1) should be applied.

A late acceptance can still give rise to a contract. Nevertheless, a first precondition is that it reaches the offeror, a second is that the offeree must have intended his declaration to constitute an acceptance. Otherwise, if he characterizes his answer as a counter-offer, then a contract arises only if the offeror accepts the counter-offer within a reasonable period[165]. If a contract is to be concluded despite a late acceptance, it is necessary for the offeror to inform the offeree without delay, that he is treating the acceptance as effective and his declaration, because it is a declaratory act, cures a late acceptance, even if his declaration is lost or arrives late[166].

The contract is not formed when the offeror gives notice of approval to the offeree, but retroactively at the time when the late declaration of acceptance reached the offeror; in the case of

[162] GABRIEL, supra note 42, at 65.
[163] See ICC Court of Arbitration – Paris, num. 7844/1994, at www.unilex.info.
[164] SCHLESINGER, supra note 14, at 1563.
[165] SCHLECHTRIEM, supra note 4, at 151.
[166] BIANCA/BONELL, supra note 16, Art. 21, note 2.2.

conduct equivalent to acceptance (Article 18(3) CISG), the contract is formed at the time when the conduct was performed. Consequently, the fact that the arrival of a late acceptance has led to the conclusion of an effective contract also means that it is then no longer possible for the offeree to withdraw his declaration of acceptance[167]. Some authors consider that this unduly favours the offeror, since he can, by making a declaration of approval, nullify a declaration of withdrawal received after a late acceptance[168]. Other authors would allow withdrawal to be made up until dispatch of the offeror's declaration of approval[169]. Moreover, article 21(1) CISG is dispositive so as a result of the parties' agreement or, exceptionally, relevant usages, silence may indicate approval of a late acceptance on the understanding that the late acceptor cannot validly include in his acceptance a term stipulating that the offeror's silence will automatically be deemed to indicate approval. The offeree can also set conditions for the necessary approval or make it easier for the offeror to give his approval[170].

Article 21(2) CISG is based on the principle that the offeree's chances of concluding a contract should not be impaired by a failure in the transmission system; if transmission had been normal the acceptance would have been on time and a contract concluded. On the one hand, the offeree relies on the conclusion of a contract and that reliance is protected. On the other hand, the offeror, who, after the expiry of the period for acceptance, no longer has to consider the possibility of an acceptance, is protected by the right to object to the delayed acceptance and thereby prevent the conclusion of a contract. If the offeror wishes to prevent the conclusion of a contract, he must protest 'without delay' by dispatching a written notice or orally informing the acceptor. Also Article 21(2) CISG is dispositive and could be derogated by parties' will.

8.1. A comparative analysis

Both in Civil and in Common Law we can find a similar approach. Nevertheless, a different solution is given in some cases by German law imposing a duty for the offeror to inform the offeree. Where the acceptance must arrive within a reasonable period (because no exact period has been fixed by the offeror) and the offeree might not know exactly how long that period was, where the delay was slight, and where the offeree could not know that the offeror's position was going to change when the period expired[171].

9. WITHDRAWAL OF ACCEPTANCE

Article 22 states that an acceptance may be withdrawn only before or at the same time as it would have become effective because once an acceptance is effective, under Article 18 CISG, the contract is concluded and the parties are bound.

As in Article 15 CISG this rule is both theoretically and practically correct[172].

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[167] SCHLECTHRIEM, supra note 4, at 152.
[168] BIANCA/BONELL, supra note 16, Art. 21, note 3.3.
[169] HONNOLD, supra note 7, at 196.
[170] SCHLECHTRIEM, supra note 4, at 153.
[171] § 149 BGB; § 862a sent. 2 ABGB; art. 5(3) Swiss Law of Obligations; art. 190 Greek Civil Code; art. 6:223(2) NBW.
[172] SCHLECHTRIEM, supra note 4, at 153.

It is theoretically correct because to have a binding agreement there must be assent by both parties at the same time. Since the act of acceptance (dispatch) may be at a different time than the effectiveness of the acceptance (receipt), it is simply assumed that the offeree still has the intent to be bound by the acceptance during the pending period between the act and the effectiveness of the acceptance. Otherwise Article 22 CISG provides a basis for the offeree to express this change of intent and thereby the true will of the parties[173].

The result is also practically correct because until the time the offeror received the acceptance, he has no basis for believing on the existence of the agreement and for acting in reliance of it.

9.1. A comparative analysis

Civil law countries have a similar approach to the CISG. On the contrary, in Common Law an acceptance is effective upon dispatch under Restatement Second of Contracts § 63 which states: 'Unless the offer provides otherwise, an acceptance is operative and completes the manifestation of mutual assent as soon as put out of the offeree's possession'. Consequently, in Common Law there is no basis to withdraw an acceptance once made.

10. TIME OF CONCLUSION OF CONTRACT

Article 23 CISG provides that a contract is concluded when the acceptance becomes effective. This rule is self-evident[174], since the time when the contract is concluded in the case of the traditional procedure is already fixed by Article 18(2) CISG, first sentence or by Article 18(3) CISG which states that a contract comes into existence when acceptance or an indication of assent reaches the offeror or, exceptionally, upon performance of conduct amounting to acceptance.

10.1. A comparative analysis

Civil law countries have a similar approach to the CISG. Under the UCC, on the contrary, which presupposes the application of Common Law principles, the acceptance becomes effective, and thereby as a consequence the contract is formed, as soon as the acceptance is put out of the offeree's possession, without regard of whether it ever reaches the offeror, unless the offer provides otherwise[175]. However the UCC expands the formalities of Common Law contract formation, and also provides under § 2-204(2) that 'an agreement sufficient to constitute a contract for sale may be found even though the moment of its making is undetermined'. Consequently, under the UCC, if the parties are operating under the assumption of a contract, the existence of the agreement will be recognized although the evidence is unclear as to when and if the parties had a mutual time of assent[176].

[173] *Id.*
[174] SCHLECHTRIEM, supra note 4, at 159.
[175] RESTATEMENT SECOND OF CONTRACTS, § 63(a).
[176] GABRIEL, supra note 161, at 87.

CONCLUSION

Articles 14 to 24 of the CISG lay down contract formation rules which, following the traditional ideas common to all legal systems[177], use 'offer' and 'acceptance' as the elements through which agreement between parties is created[178]. Nevertheless, there are other forms of reaching agreement, where the 'dissection' of individual statements into 'offer' and 'acceptance' would constitute an arbitrary legal operation (e.g., agreement reached in point-by-point negotiations or by exchange of correspondence)[179].

Two factors are the most discussed among the different legal systems concerning the formation of the contract: the binding concept of an offer and the moment in which the contract is concluded.

Regarding the first factor, the CISG does not adopt a clear solution of making an offer generally binding. Starting from the principle that offers may be withdrawn, some exceptions are made in Article 16(2) CISG, practically coming very close indeed to the German solution of § 145 BGB[180]. Thus an offer is irrevocable if it states a period for acceptance or that it is binding. Furthermore, an offer has the same effect if it was reasonable for the offeree to rely on the offer as being irrevocable and he is acted in reliance of the latter.

The comparative analysis has shown that the effect of an offer is different in the three legal systems. In the Common Law an offer has no binding force at all (due to the "consideration doctrine') and it is not even a ground for liability in damages. In the Romanistic legal system the premature withdrawal of an offer leads to liability in damages. In German law every offer is irrevocable and a purported withdrawal has no legal effect unless the offeror has excluded the binding effect of his proposal. Nevertheless, there is a clear trend in the United States legislation and, above all, in the Uniform Commercial Code towards making offers binding[181].

Important authors[182] think that the German system is the best because its results are practical and equitable; the offeree can act with assurance in the knowledge that his acceptance will conclude the contract and also, putting the risk of any changes in supplies and prices on the offeror, the allocation of the risk will be placed in the right part It is the offeror who takes the initiative and it is he who invokes the offeree's reliance and so it must be up to him to exclude or limit the binding nature of his offer, failing which is only fair to hold him bound[183].

Regarding the second factor, Article 16(1) CISG states that, if an offer may be revoked, the withdrawal must reach the offeree before he dispatched the acceptance. Thus, the Convention follows the English 'mailbox theory'[184], differentiating from the latter, however, in stating the moment in which the contract is concluded: posting the acceptance puts an end to the offer's revocability but it does not conclude the contract[185]. The comparative analysis has shown that

[177] SCHLESINGER, supra note 14, at 1584.
[178] SCHLECHTRIEM, supra note 4, at 99.
[179] *Id.*
[180] ZWEIGERT/KÖTZ, supra note 73, at 390.
[181] *Id.*, at 388.
[182] *Id.*
[183] *Id.*
[184] See ENGLAND *Adams* v. *Lindsell*, (1818) 1 B. & Ald. 681, 106 Eng. Rep. 250.
[185] ZWEIGERT/KÖTZ, supra note 73, at 390.

English 'pure mailbox theory' leads to unsatisfactory results because it means that a contract is concluded even if the acceptance is lost or is withdrawn by a telegram which the offeror receives earlier than the letter. The Romanistic system, on the other hand, requiring the addressee to have knowledge of the declaration, presents something which, turning into an internal event, a legal system should avoid because of difficulties of proof[186]. The German system, on the contrary, makes the question turn on the arrival, that is, the entry of the declaration into the addressee's zone of influence. Also in this case the German solution seems to be fair and equitable because it not only allocates the risk of transmission between sender and addressee in the right way but also makes the condition an ascertainable and provable event[187].

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[186] *Id.*, at 389.
[187] *Id.*