

Formation of International Sales Contracts: a Comparative Perspective



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A practical comparison of international sales contracts
between three legal regimes.

This article has been prepared for the benefit of busy international business law practitioners. Its purpose is to provide a comparative analysis of the rules and principles on the formation of international sales contracts in three different regimes:

- (1) English law (the common law of contract);
- (2) the Vienna Convention on Contracts for the International Sale of Goods 1980 (CISG); and
- (3) the Hague Uniform Law on the Formation of Contracts for the International Sale of Goods 1964 (ULF).

Besides the UK Uniform Laws on International Sales Act 1967 which incorporates the ULF in Schedule 2, the formation of international sales contracts in English law can also be based on common law rules and principles if the parties so wish. The English Sale of Goods Act 1979 barely deals with the formation aspect as English common law is self-sufficient in this regard. The ULF, a

separate Convention, deals with the matter in Articles 1-13 and the CISG in Articles 14-24 (Part II). As of 30 October 2001, 60 states, representing various geographical areas and major economic blocks such as the European Union and the North American Free Trade Agreement, as well as major trading nations of the world, are parties to the CISG, so the importance of this Convention cannot be overstated.

Appraising the CISG provisions on the formation of international sales contracts merits a comparison with the ULF provisions, since they are considered to lay the foundation for the former, and with English law, perhaps because in many international sales contracts, the parties from various common law countries traditionally tended to provide for the application of English law for its wider influence.

This article provides a comparative review of the rules and principles concerned in the three different regimes under various headings, highlights some points of compromise between the civil and common law traditions and concludes with some remarks on the recent trends in the area of law concerned.

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Form of contract

English law

The English Sale of Goods Act 1979 states, in section 4, that a contract of sale may be made:

- in writing (either with/or without seal);
- by word of mouth;
- partly in writing and partly by word of mouth; or
- by implication from the conduct of the parties.

CISG

Article 11 of the CISG, in a similar provision to that of Article 3 of the ULF, provides that a contract of sale:

- need not be concluded in or evidenced by writing;
- is not subject to any other requirement as to form;
- may be proved by any other means, including witness.

Article 13 of the CISG states that 'writing' includes 'telegram and telex' in the Convention provision but does not mention 'e-mail' which is no doubt to be included under 'writing' in keeping with the spirit of the Convention, although not perhaps widely envisaged as a method of communication in the 1960s and 1970s when the Convention was formulated.

Articles 12 and 96 of the CISG provide that some states may consider the requirement that contracts for the international sale of goods be in writing as a matter of important public policy even in the context of the relation between the parties. These Articles also provide a certain mechanism for a state to make a reservation in this regard when it ratifies or accedes to the Convention.

Offer

CISG

Article 14(1) of the CISG provides that:

- the proposal should be addressed to *one or more specific persons*;
- the proposal should be *sufficiently definite*;
- the proposal indicating *the intention* of the offeror should be bound in case of acceptance.

A proposal is *sufficiently definite* if it indicates the goods and expressly or implicitly fixes, or makes provision for, determining the quantity of the price.

Article 14(2) provides that a proposal addressed to one or more unspecified persons is an invitation to treat. There is a similar provision in Article 4 of the ULF.

English law

Under English law, there must be a *clear and unequivocal* offer by which the offeror expresses its willingness to be legally bound. There is no need to address the offer to a specific person or persons, it may be addressed to the public at large (*Carlill v Carbolic Smoke Ball Co* [1893] 1 QB 256, *per Bowen CJ*).

Offer versus invitation to treat

An invitation to treat is simply an expression of willingness to enter into negotiations which, it is hoped, will lead to the conclusion of a contract at a later date. The test is 'intention', ie the intention of the maker of the statement to be bound by an acceptance of his terms *without further negotiation*/ or whether his intention is that the statement he has made is part of the continuing negotiating process.

The following are normally examples of an invitation to treat, but if offer, subject to 'intention':

- display of goods for sale;
- advertisements;
- tenders;
- timetable and vending machines.

Formation of contract¹

Negotiations

Statements made in the course of negotiation are not contractual statements, like offer and acceptance, unless incorporated into the contract. False pre-contractual statements may be misrepresentation (UK Misrepresentation Act 1967), hence a legal remedy may be available. Information disclosed during the negotiations may have been of a confidential nature. Its misuse entails legal remedies.

Quotation

Whether a quotation is merely an invitation to contract or constitutes an offer depends on the intention of the parties, and especially on that of the person submitting the quotation. Normally, a quotation is only an 'invitation to contract or treat'. The addressee makes the offer and it is for the *sender* of the quotation to decide whether to accept or reject it.

A quotation may contain all the elements of an offer and may qualify in law as such – the intention of the person submitting the quotation is determinative.

Tenders

An invitation to submit a tender is generally an invitation to treat but may be an offer where the invitee binds himself to accept the best offer.

'Heads of agreement'

If the parties have agreed on all essential points but have left details to be settled later, a valid contract is concluded which is sometimes referred to as a 'heads of agreement'.

If the agreement of the parties does not extend to all terms which are necessary to make it enforceable, there is no 'contract' in the legal sense.

Offer: effectiveness of communication

CISG

Article 15(1) of the CISG provides that an offer becomes effective when it reaches the offeree.

ULF

Article 5(1) of the ULF provides that the offer shall not bind the offeror until it has been communicated to the offeree.

English common law

An offer is effective when it is communicated to the offeree. A person who, in ignorance of an offer, performs the act or acts requested by the offeror cannot be said to have made a contract.

The offer must have been present in the offeree's mind when he performed the act which constituted the acceptance (*R v Clarke* (1927) 40 CLR 227).

X offers £100 for the safe return of his missing dog. If Y, *being unaware of X's offer*, returns the dog, he is not held to have accepted X's offer, hence there is no contract in English law. The best approach to adopt is that knowledge of the offer is not necessary in the reward type of case but that knowledge should be required in the case of bilateral contracts.

Withdrawal and revocation of offer

Withdrawal and revocation of an offer must be distinguished in the ULF and the CISG. Revocation of an offer may take place *after* the offer has become effective.

According to Article 15(2) of the CISG, the offer may be withdrawn if the withdrawal reaches the offeree *before or at the same time as* the offer,

regardless of whether or not an offer is stated to be irrevocable. According to Article 5 of the ULF, the offer shall lapse if its withdrawal is communicated to the offeree *before or at the same time as* the offer.

Revocation of offer

There is a three-way split among the world's legal systems on the revocation of an offer:

- (1) In traditional common law systems, an offer is always revocable – even if it says that it is *firm* or *irrevocable* – unless at least something has been given as consideration for the offeror's promise not to revoke.
- (2) In US law (statutory), an offer is revocable unless the offer states that it is irrevocable – as is the case under the US Uniform Commercial Code, section 2-205, which empowers a merchant to make a firm offer by means of 'a signed writing which by its terms gives assurance that it will be held open'.
- (3) In some legal systems – notably the German and Dutch legal systems – an offer is irrevocable unless the offeror states that it is revocable.

Both the CISG and the ULF accept the general principle that an offer may be revoked at any time but do make an offer irrevocable in certain cases.

CISG

Article 16(1) of the CISG states that an offer may be revoked if the revocation reaches the offeree before he has dispatched an acceptance.

ULF

Article 5(4) of the ULF provides that the revocation of an offer shall only have effect if it has been communicated to the offeree:

- before he has dispatched his acceptance; or
- before he has performed any act treated as acceptance under paragraph (2) of Article 6 of the ULF (eg the dispatch of the goods or of the price or any other act bearing the intention to accept the offer)(*cf* Article 18(3) of the CISG).

Dispatch of acceptance versus revocation

The rationale is that once the acceptance has been dispatched, it is reasonable that the offeree should be protected for his expectation of contract and that revocation should no longer be permitted.

Irrevocability of offer: CISG and ULF

According to Article 16(2) of the CISG, an offer cannot be revoked if:

- it indicates that it is irrevocable, whether by stating a fixed time for acceptance or otherwise;
- it was reasonable for the offeree to rely on the offer as being irrevocable and the offeree has acted in reliance on the offer.

Under Article 5(2) and (3) of the ULF, an offer cannot be revoked if:

- the revocation is not made in good faith;
- the offer states a fixed time for acceptance; and
- there is some other indication that it is irrevocable which may result from the circumstances, preliminary negotiations, practices or usage.

In both the CISG and the ULF, the crucial test of the irrevocability of an offer is whether it 'indicates' expressly or by implication that it is irrevocable under the circumstances.

The 'fixed time for acceptance' (ULF, Article 5(2) and CISG, Article 16(2)(a)) in an offer would, in itself, not necessarily always make the offer irrevocable. (*Cf* relevance of the trade usage and the practices which the parties have established between themselves: Articles 8(3) and 9(1),(2) of the CISG.)

Civil law versus common law

By way of an example, an offer dated 1 November states 'If I do not receive your reply of acceptance by 15 November, this offer expires'. To lawyers operating in civil law countries, the offer is irrevocable until 15 November and lapses thereafter. To those in common law countries, the offer lapses after 15 November, but is not irrevocable before that.

To the civil and common law differences, Article 17 of the CISG provides a clear answer. It provides that 'An offer, even if it is irrevocable, is terminated when a rejection reaches the offeror'. In the stated case, the offeror is free to deal elsewhere if he received a rejection after three days, ie within the stated fixed period. Thus, Article 17 of the CISG clarifies the position beyond doubt, and the ULF has no equivalent provision on the issue. (*Cf* Article 16(2)(b) of the CISG which is more specific.)

In Article 11, the CISG, unlike the ULF, does not appear to deal with certain other possibilities of revocation such as:

- (1) the death of the offeror; or
- (2) the loss of legal capacity by the offeror prior to acceptance (eg through insanity, etc).

This should perhaps be governed by the applicable national law (Article 7(2) of the CISG).

English law: termination of offer

There are five principal methods of termination of offer in English law:

- (1) Withdrawal before acceptance:
 - an offer can be withdrawn by the offeror at any time before it has been accepted;
 - the revocation must be brought to the attention of the offeree when the revocation letter actually reaches the offeree's business or when he actually reads it.
- (2) Rejection of the offeree: an offer can be terminated by a rejection by the offeree (*cf* Article 17 of the CISG).
- (3) Lapse of time:
 - when a time frame has been stipulated, the offer can be terminated after that time has lapsed;
 - when no time frame is stipulated, the offer is terminated after a reasonable time.
- (4) Contingent offer: an offer which is stated to come to an end if a certain event occurs cannot be accepted after the event has actually taken place.
- (5) Death of the offeror: an offer may be terminated by the death of the offeror although English law is not entirely clear on this point. What happens when the offeree accepts in ignorance of the death of the offeror and the contract is not one for the performance of personal services? Perhaps there is a contract as the acceptance may be valid in the circumstances. The generally-accepted view of the death of the offeree is that the offer comes to an end by operation of law.

Acceptance: requirements/mode

English law

As the offer is required to be clear and unequivocal, it must be matched by an equally clear and unequivocal acceptance. An acceptance thus is an unqualified expression of assent to the terms proposed by the offeror. This is the 'mirror image' rule of offer and acceptance adopted by the English courts. An acceptance may come in the form of words or conduct (*Carlill v Carbolic Smoke Ball Co* [1893] 1 QB 256).

CISG

Article 18(1) of the CISG provides that acceptance may be in the form of a statement made by, or by other conduct of, the offeree indicating assent to an offer.

ULF

Article 6(1) and (2) of the ULF provides that acceptance may be by any means whatsoever and by conduct but Article 6(1) does define an 'acceptance'.

Acceptance versus counter offer

English law

A purported acceptance which does not accept all the terms and conditions proposed by the offeror but which in fact introduces new terms is not an acceptance but a counter offer. A counter offer:

- is a new offer by the offeree, capable of acceptance or rejection by the offeror;
- 'kills off' the original offer so that it cannot subsequently be accepted by the offeree.

In the case of *Hyde v Wrench* (1840) 3 Bean 354, the plaintiff's offer of £950 against the defendant's offer of £1,000 for his piece of land was a counter offer which renders the original offer incapable of being accepted subsequently by the original offeree.

ULF Article 7(1) and CISG Article 19(1)

In the above Articles, the general rule is that:

- an offeree must accept the offer as it stands;
- if he attempts to *add* or subtract anything from it, he is not accepting it but is making a counter offer.

ULF Article 7(2) and CISG Article 19(2)

A reply to an offer which purports to be an acceptance but contains additional or different terms, and such terms do not *materially* alter the terms of the offer shall constitute (ULF)/constitutes (CISG) an acceptance, unless the offeror, promptly (ULF)/without undue delay (CISG) objects by any means to the discrepancy.

What is 'material alteration' in Article 7(2) of the ULF and Article 19(2) of the CISG? The ULF provides no answer to this vital question. The CISG in Article 19(3) is clear on this point. It counts certain matters which would amount to material alteration in the terms of the offer (as additional/different terms) relating to:

- the price;
- the payment;
- the quality and quantity of the goods;
- the place and time of delivery;
- the extent of one party's liability to the other;
- the settlement of disputes (eg arbitration/court).

Acceptance: communication

English law

The general rule is that an acceptance must be communicated to the offeror. The acceptance is generally only validly communicated when it is actually brought to the attention of the offeror

(per Denning LJ in *Entores v Miles Far East Corp* [1955] 2 QB 327; *Brinkibon Ltd v Stahel Stahl* [1993] 2 AC 34).

Communication of acceptance to the offeror is not an absolute one:

- (1) Communication of acceptance may be waived by the terms of the offer (*Carlill v Carbolic Smoke Ball Co* [1893] 1 QB 256).
- (2) Conduct of the offeror: the offeror may be prevented by his conduct from arguing that the acceptance was communicated to him (*Entores v Miles Far East Corp* [1955] 2 QB 327).
- (3) Acceptance by post: acceptance of the 'offer' takes place when the letter of acceptance is posted by the offeree (the common law 'mailbox rule').

Mailbox rule

Adam v Lindsell (1818) 1 B & Ald 681 is one of the earliest authorities for the common law mailbox rule.

The justifications for 'the mailbox rule' are as follows:

- (1) the Post Office is the agent of the offeror, so receipt of the letter by the agent is equivalent to receipt by the offeror;
- (2) conduct of the offeror: the offeror has chosen to start negotiations through the post and so the risk of delay or loss in the post should be imposed on him;
- (3) the offeree should not be prejudiced once he has dispatched his acceptance, and he should be able to rely on the efficacy of his acceptance.

The 'mailbox rule' is also subject to criticism.

CISG and ULF

Under Article 18(2) of the CISG, acceptance takes effect when it reaches the offeror. Under Article 8(1) of the ULF, acceptance shall have effect only if it is communicated to the offeror. The corresponding CISG provision is much clearer. CISG and ULF provisions discard the 'mailbox rule' and endorse the civil law position that acceptance must be communicated.

Under Article 8(1) of the ULF and Article 18(2) of the CISG:

- an acceptance will not be effective if it does not reach the offeror within the time he has set or;
- if no time limit is set, the acceptance must reach the offeror within a reasonable time;
- an oral offer must be accepted immediately;
- where acceptance takes the form of an act, the act must be performed within the same time limits (ULF).

Article 18(3) of the CISG is clearer, in that it states that such acts are effective even without notice to the offeror. The acceptance is effective at the moment the act is performed. This is an improvement on the corresponding provisions of Article 6(2) of the ULF, and it also removes any ambiguity which may be inherent in the ULF.

Acceptance by silence

English law

Mere silence on the part of the offeree does not amount to acceptance. An offeror cannot impose a contractual obligation on the offeree by stating that unless the latter expressly rejects the offer, he will be held to have accepted it (*Felthouse v Bindley* (1862) 11 CB (NS) 869). The exceptions to this rule are: waiver of communication and conduct of the parties.

ULF

According to Article 2(2) of the ULF, 'A term of the offer stipulating that silence shall amount to acceptance is invalid'.

CISG

According to Article 18(1), 'Silence or inactivity does not in *itself* amount to acceptance'. However, silence may amount to acceptance, if coupled with other factors, giving sufficient assurance of the offeree's intention (*cf* Article 18(3) of the CISG and Article 6(2) of the ULF).

Period of acceptance fixed by an offeror in a telegram or letter

ULF

According to Article 8(2) of the ULF, in the absence of an indication to the contrary, the period of acceptance runs:

- from the day the offeree's letter was dated; or
- from the hour of the day the telegram was handed in for dispatch.

CISG

The CISG is more explicit since it states, in Article 20(1), that the period of acceptance runs:

- from the date shown on the letter;
- if no such date shown, from the date shown on the envelope; or
- from the moment the telegram is handed in for dispatch.

In the case of an offer made by an instantaneous means of communication (eg telephone, telex, e-mail, etc), the period runs from the moment it reaches the offeree.

Article 20(2) states that if notice of acceptance cannot be delivered to the offeror because the last day of the period is an official holiday/non-business day, the period is extended to the first business day following.

Late acceptance: CISG and ULF

CISG Article 21(1) and ULF Article 9(1)

There are similar provisions in the above two Articles with regard to late acceptance. A late acceptance is effective (CISG)/as an acceptance if the offeror without delay (CISG)/promptly (ULF) so informs the offeree (CISG)/acceptor (ULF):

- (1) orally; or
- (2) by dispatch of a notice (ULF)/dispatches a notice to that effect (CISG).

CISG Article 21(2) and ULF Article 9(2)

The above two Articles contain similar provisions dealing with an acceptance which, although made in time, is received late because of a delay in transmission.

Such late acceptance is considered to be effective unless the offeror otherwise informs the offeree without delay.

Withdrawal of acceptance

CISG

Article 22 of the CISG states that an acceptance may be withdrawn if the withdrawal reaches the offeror *before or at the same time as* the acceptance would have become effective.

ULF

Article 10 of the ULF provides that an acceptance cannot be revoked except by revocation which is communicated to the offeror *before or at the same time as* the acceptance.

Meaning of communication

CISG

Article 24 of the CISG provides that a communication is:

- (1) an offer;

- (2) a declaration of acceptance; or
- (3) any other indication of intention that reaches the addressee:
 - (a) when it is made orally to him, or
 - (b) and delivered by any other means to him personally, to his place of business/ mailing address or if he does not have a place of business/ mailing address, to his home.

ULF

Article 12 provides that the expression 'to be communicated' means:

- to be delivered at the address of the person to whom the communication is directed;
- communications to be made by the means usual in the circumstances.

Civil and common law: does the CISG offer a compromise?

In the 'offer and acceptance rules' of the CISG, rather more weight seems to have been given to the common law rather than to the civil law foundations of contract in the following respects:

- The CISG largely adopts the formalistic offer and acceptance language of the common law.
- In the CISG, the common law presumption of revocation is endorsed (in case of even 'fixed time for acceptance' in an offer) rather than the civil law presumption that offers are taken to be irrevocable.
- The common law implication is incorporated into the CISG, namely that an offeror may not revoke an offer once an acceptance is dispatched (Article 16(1) of the CISG).

The English common law postal rule, ie the mailbox rule, that acceptance becomes effective on the dispatch of the letter of acceptance by post (ie the dispatch rule) is rejected.

The civil law position is endorsed in the CISG that acceptance is effective when it reaches the offeror (ie the receipt rule).

The CISG does not uphold, for the formation of contracts, the common law requirement of consideration or its civil law counterpart '*causa*' (eg as provided in the French Civil Code, Articles 1108, 1131 and 1133).

Concluding remarks

Although the English common law of contract, like any other branch of English law, was considered to be influential in many parts of the world, especially the commonwealth and common law jurisdictions, such complacency should no longer exist in light of

the recent move towards the globalisation and liberalisation of international trade. The United Kingdom has not yet ratified the CISG, perhaps because of pride in its longstanding common law legal imperialism or in its long-treasured feeling of the superiority of English law to anything else that could even challenge it. This is despite the fact that the major and influential trading nations, such as the north American states, including the United States, and most European states are parties to the CISG.

With the anticipated acceleration of globalisation and liberalisation movements in the near future, there will be a greater demand for the global harmonisation of commercial law. In such a situation, the insular attitude of the United Kingdom to the harmonisation phenomenon is, in fact, regrettable. The time has come to wake up and face reality, and deal with it effectively.

The world has so far been deprived of the reputable talent of British judges and lawyers in the matter of interpretation of the CISG which could have influenced the harmonisation process in judicial decisions in the same way as the common law has in many countries. The truth of the matter is, as one has to acknowledge, that the influence of the traditional common law of contract seems to be falling increasingly into decay with the recent trend of many common law countries to adopt international instruments such as the CISG replacing their old tradition of common law bias or discarding their age-old habit of following the UK legislation as a model. In the view of the rest of the common law world, what matters most in this modern day and age is global expectation in the context of international sales contracts which is reflected in the CISG.

The virtue of the CISG cannot be over-emphasised, at least on the matter of the formation of contracts. Many of the CISG rules and principles have now been incorporated into the UNIDROIT Principles of International Commercial Contracts and the Principles of European Contract Law -- two very important recent developments in the field of harmonisation of commercial law. ■

Notes

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1 I. D'Archy *et al* (eds), *Schmitthoff's Export Trade* (10th edn, 2000), pp 52-53.