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THE COMPARATIVE LEGAL STUDY BETWEEN THE CISG[3] AND THE TURKISH LAW[4] IN RESPECT OF THE "FORMATION OF THE CONTRACT"

L.LM Thesis

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[3] "CISG" refers to the 1980 United Nations Convention on Contracts for the International Sale of Goods. Since the diplomatic conference was taken in Vienna in 1980, CISG is often called *"Vienna Convention."*

[4] "Turkish Law" represents the law applying in Republic of Turkey.

List of Abbreviations

CISG	: 1980 United Nations Convention on Contracts for the International Sale of Goods
SCO	: Swiss Code of Obligations
TCO	: Turkish Code of Obligations
TCOA	: Turkish Court of Appellant
US	: United States
art.	: Article
pp.	: Page

Introduction

In this study, I will compare formation of the contract under the CISG, a "widely recognized"[5] international convention[6] governing the international sale of goods and Turkish law. The Republic of Turkey is not at the present time a contracting party to the CISG and there have not yet been any Turkish court decisions on the CISG. This is expected to change as the adoption of the CISG by Turkey is anticipated.

The articles in the CISG relating to the formation of the contract will be compared with their counterpart provisions in Turkish law in accordance with the order of the CISG.

II. The System of the CISG

a. General

The CISG is a self-executing treaty that can apply directly within Contracting States without the need for domestic implementing legislation[7]. The major goal of the CISG is to promote uniformity in the treatment of contracts in the light of international commercial usage and practice.[8]

Unlike the domestic application of Turkish Law in Turkey, the CISG only applies to international sales contracts[9]. However, the CISG has relation to several domestic laws. Article 92 of the CISG gives Contracting States the opportunity to exclude some parts of the Convention by a specific declaration.[10] A Contracting State, for example, may exclude

[5] As of 2 December 2006, the United Nations reports that 70 States have adopted the CISG, *available at* http://cisgw3.law.pace.edu/cisg/countries/cntries.html
[6] See the table of Contracting States, *available at* http://cisgw3.law.pace.edu/cisg/countries/cntries.html
[7] DANIEL C.K. CHOW & THOMAS J. SCHOENBAUM, *International Business Transactions*, pp. 192, (2005).
[8] *Id.*
[9] See article 1(1) of the CISG: *"This Convention applies to contracts of sale of goods…" available at* http://www.cisg.law.pace.edu/cisg/text/e-text-01.html
[10] CHOW & SCHOENBAUM, pp. 193.

Part II (Formation of the contract) of the CISG by relying on this declaration.[11] In a recent case, the U.S. District Court of New Jersey held that the CISG did not govern the effect of the choice of law provision contained in plaintiff's written confirmation, since Finland, defendant's country in the case, had submitted a declaration excluding the Part II (Formation of the contract) provisions of the CISG.[12]

b. The articles of the CISG concerning the formation of the contract

Basically, the second part of the Convention contains the rules relating to the formation of the contract. After the first part governing "the sphere of application" and "general provisions", Article 14 of the Convention is the first of the sections dealing with the formation of the contract. The Convention continues presenting articles on formation through Article 24. There are eleven articles directly governing the formation of the contract:

- Articles (14-17) deal with the offer;
- The subsequent five articles (18-22) with the acceptance;
- The last two articles (23-24) with the time when a contract is concluded and when a communication reaches the addressee.

The CISG does not have official "subject headings." The following subject headings are used in this presentation:[13]

Part II of the Convention, formation of the contracts"

- *Article 14*: Criteria for an offer

[11] *Id.*
[12] *Valero Marketing & Supply Co. v. Greeni Oy*, 242 Fed. Appx. 840 C.A.3 (N.J), 2007, *available at* http://cisgw3.law.pace.edu/cases/050615u1.html
[13] The subject headings used in this presentation are derived from the descriptors list of the CISG, *available at* http://www.cisg.law.pace.edu/cisg/text/cisg-toc.html

- *Article 15*: When offer becomes effective; prior withdrawal
- *Article 16*: Revocability of offer
- *Article 17*: Rejection of offer followed by acceptance
- *Article 18*: Acceptance: time and manner for indicating assent
- *Article 19*: "Acceptance" with modifications
- *Article 20*: Interpretation of offeror's time limits for acceptance
- *Article 21*: Late acceptances: response by offeror
- *Article 22*: Withdrawal of acceptance
- *Article 23*: Effect of acceptance: time of conclusion of contract
- *Article 24*: When communication "reaches" addressee.

There are also other provisions of the CISG that can be relevant to aspects of formation but that are outside of Part II of the Convention, such as:

- Part I articles 6 through 9 which deal, respectively, with autonomy of the parties, interpretation of the Convention, intent and usages and practices and articles 11 and 12 which deal with writing requirements; and
- Article 29 (in Part III) which deals with the modification of a contract.

III. The Legal System of the Republic of Turkey

a. General

As a civil law country, the Republic of Turkey constituted some of its own fundamental codes by following several foreign countries' codes at the time of its establishment in 1923 such as the Swiss Civil Code and the Swiss Code of Obligations, the

Italian Penal Code, the German Code of Criminal Procedure and the German Commercial Code. For this reason, Turkish Law has some similarities with approaches has followed elsewhere in the continent of Europe.

b. Turkish Law governing the formation of the contract

In the comparison part of this study, since the formation of contracts provisions in Turkish Law are stated in the Turkish Code of Obligations (TCO), I will be dealing with it in order to compare the CISG and the Turkish Law in respect of the formation of contracts.

Unlike the American jurisdiction, there is a two-stage jurisdiction, in Turkish Law. When a party does not satisfy from the decision of the "Court of First Instance," he can bring it to the "Court of Appeals".[14] As a last resort in Turkey, the Turkish Court of Appeals is in the capital city of Ankara. I will also point out some Turkish Court of Appeals opinions concerning the relevant discussions.

Furthermore, since the TCO was constituted by following the Swiss Code of Obligations at the time, it has similarities with the Swiss approaches.[15] Therefore, sometimes, I will point out some Swiss Federal Court decisions.

The current TCO was enacted in April 22, 1926 and published one week later on the Official Gazette[16]. However, the current government of Turkey is planning to revise the TCO, in accordance with the new developments both in Turkey and in world.[17]

[14] Turkish Court of Appeals: "YARGITAY" (Original Turkish name of the Court).
[15] OGUZMAN, M. Kemal &OZ, Turgut *[Law of Obligations General Provisions]*, (2003), pp. 24.
[16] The translation of the Official Turkish Journal ("T.C. Resmi Gazetesi").
[17] The official press statement of the Turkish Minister of Justice, February 20, 2008, *available at* the official web site of Turkish Grand General Assembly ("Türkiye Büyük Millet Meclisi" (TBMM), http://www.tbmm.gov.tr/develop/owa/haber_portal.aciklama?p1=48588

IV. Pre-Contractual Liability (doctrine of *culpa in contrahendo*)

Before going through on comparison of the CISG and Turkish Law articles, I would like to discuss Pre-Contractual Liability Doctrine (Culpa in Contrahendo) in accordance with the CISG and Turkish Law approaches.

Generally speaking, prevailing view is that the CISG does not have Pre-Contractual Liability Doctrine. In other words, the CISG does not accept "Culpa in Contrahendo".
On the other hand, Turkish Law accepts the "Pre-Contractual Liability Doctrine." However, still, there are some points are controversial.

More specifically, parties have some responsibilities stemming from the *"integrity rule"* which I will also mention it in the acceptance part. According to the Turkish Civil Code art 2, *"Everyone must abide the "integrity rule," while they satisfy their obligations and use their rights.* (TCC art. 2/1). Additionally, *"if someone expressly strains his right, the law does not protect it."* For example, the following activities during the negotiations for the contract will be considered as contrary to "integrity rule": *"Inaccurate information," "not providing the required information," "careless approach," "entering into a contract with knowing the impossibility*[18]*."* Under Turkish law, a person who acts contrary to the "integrity rule" shall be liable due to his unlawful conduct.[19]

Basically, in Turkish Law, the debate on pre-contractual liability focuses on its "characteristics."[20] As mentioned above, Turkish Law accepts this type of liability; however, there is a discussion whether the liability is considered as *"tortious liability"* or

[18] OGUZMAN, M. Kemal &OZ, Turgut *[Law of Obligations General Provisions]*, (2000), pp. 311.
[19] *Id.*
[20] *Id.*

as *"obligator's liability*[21]*."* The three different approaches regarding pre-contractual liability are:[22]

1) Tortious liability,

2) Obligator's liability, and

3) Mixed approach.

Prof Oguzman and Prof Oz consider Pre-Contractual Liability as *"contradiction to obligator's liability"* in accordance with the TCO art. 96[23].

V. Comparison of Articles of the CISG Governing the Formation of the Contract with Turkish Law

a. Introduction

Under the rules in Part II of the Convention, a contract is concluded when an acceptance of an offer becomes effective as in the traditional model.[24] In other words, a contract is formed when offer is accepted. Like the CISG and the traditional model, Turkish Law adopts the same approach, seeking an acceptance after an offer to form the contract. (TCO art. 1/1).

b. Offer (CISG articles 14-17)

i) Elements of the offer:

Article 14 (1) of the CISG provides that:

[21] *Id.*
[22] *Id.*
[23] *Id.* at 312.
[24] PETER HUBER & ALASTAIR MULLIS, *The CISG*, 2007, at 69.

- *A proposal for concluding a contract addressed to one or more specific persons constitutes an offer if it is sufficiently definite and indicates the intention of the offeror to 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 and the price.*

Article 14 lays down two requirements to accept the proposal as an offer: first, the proposal must be "sufficiently definite", second the proposal must indicate "the intention of the offeror to be bound in case of acceptance[25]. Additionally, to satisfy the "sufficiently definite" requirement, the proposal must include a) the goods, b) ("expressly or implicitly fix[es] or make[s] provision for determining) the quantity, and c) the price. However; sometimes a proposal neither states the price nor provides a method for its determination,[26] In that case, if the contract is validly concluded, we can go to the Article 55 of the Convention to fix the price.[27]

In a CISG case between an American buyer and a Canadian seller, the U.S. Federal Court accepted the proposal as a sufficiently definite offer by relying on "industry custom" and as an intention to be bound by stating that, in this case, the party desiring to purchase the goods (clathrate) in the case need only send in a purchase order.[28] In another case, an oral offer by a German seller was held sufficiently definite under Article 14(1), in that the

[25] E. ALLAN FARNSWORTH, *Formation of Contract*, in Galston & Smit ed., International Sales: The United Nations Convention on Contracts for the International Sale of Goods, Matthew Bender (1984), Ch. 3, pages 3-1 to 3-18, *available at* http://www.cisg.law.pace.edu/cisg/biblio/farnsworth1.html

[26] *Id.*

[27] Art 55 of the CISG fixes the price by stating "*the price generally charged at the time of the conclusion of the contract for such goods sold under comparable circumstances in the trade concerned."* In other words, the price shall be the usual price for such goods, *available at* http://www.cisg.law.pace.edu/cisg/text/e-text-55.html

[28] *Geneva Pharmaceuticals v. Barr Laboratories, United States 10 May 2002 Federal District Court [New York], available at* http://cisgw3.law.pace.edu/cases/020510u1.html

quality, quantity and price of the goods were impliedly fixed by the parties' prior course of dealing in accordance with Article 9(2): the seller repeatedly had delivered goods ordered by the buyer, who had regularly and without objection paid the price after delivery[29]. On the other hand, a German court held that the plaintiff's fax to the buyer cannot be considered as an effective offer because it did not satisfy the requirements of Art. 14 of the CISG, failing to sufficiently define the goods, the quantity and the price.[30]

Besides the two requirements stated in the article 14, article 15(1) adds a third requirement for an offer by stating that: *"An offer becomes effective when it reaches the offeree*[31]*."*

In Turkish Law, there are also three requirements for a proposal to be accepted as an offer:[32]:

(1) The offer must be directed to the other party;

(2) The offer must include all the essential elements of the contract;

(3) The proposal must indicate the intention of the offeror to be bound (TCO art. 7).

It seems clear to me that the first requirement of the Turkish Law refers to the requirement in art. 15(1) of the CISG and, the third requirement refers to the second requirement in

[29] JOSEPH LOOKOFSKY, *Article 14 The Offer: Minimum Requirements* in International Encyclopaedia of Laws - Contracts, Suppl. 29 (December 2000) 1-192, *available at* http://cisgw3.law.pace.edu/cisg/biblio/loo14.html, See, e.g., the decision of the Court of Budapest of 24 March 1992, *available at* http://cisgw3.law.pace.edu/cases/920324h1.html

[30] Germany 30 August 2000 Appellate Court Frankfurt (Yarn case), *available at* http://cisgw3.law.pace.edu/cases/000830g1.html

[31] See the CISG art. 15 full text, *available at* http://www.cisg.law.pace.edu/cisg/text/e-text-15.html

[32] REISOGLU, Safa: Borclar Hukuku Genel Hukumler *[Law of Obligations General Provisions]*, (2002), pp. 53; KARAHASAN, Mustafa Resit: Turk Borclar Hukuku Genel Hukumler, Ogreti, Yargitay Kararlari, Ilgili Mevzuat, *[Turkish Law of Obligations General Provisions, with Doctrine, Court of Appeal Decisions, Concerning Legislation]* Vol.1, (2003), pp.122-123.

article 14 of the CISG. On the other hand, I think, the discussion focuses on the difference between the second requirement (essential elements) of the Turkish Law and the first element (sufficiently definite) of the CISG. Even though the CISG expressly designates which kinds of offers reach the "sufficiently definite" level by stating that the offer has to indicate "the goods," "the quantity" and "the price," generally speaking, there is no express article in the TCO stating which elements are essential, which are not[33]. (See "footnote 32" for exceptions). In other words, article 2 of the TCO only distinguishes the essential and the secondary elements; however, it does not say what they are. According to the article:

"When the parties provide a consensus on essential elements, even they skip the secondary elements by being silence, the contract is accepted as concluded." (TCO art. 2/1).

Moreover, it adds that:

"When there is no consensus between the parties on secondary elements, judge determines them by looking over the essence of the deal." (TCO art. 2/2).

Therefore, in Turkish law, when an offer indicates the essential elements of the contract, since the TCO does not require including secondary elements, it shall be accepted as a valid offer[34].

[33] However, in some instances, TCO indicates which are the essential elements, for example, *"sales contracts/the price"* (TCO art. 182), *"contract of employment/salary"* (TCO art. 323), *"independent contractor agreement/cost"* (TCO art. 366), and *"power of attorney/wage"* (TCO art. 386).
[34] REISOGLU, Safa, pp. 56; OGUZMAN, M. Kemal & OZ, Turgut, pp. 66.

Because article 2 of the TCO does not mention what the essential elements of the contract are, some Turkish scholars have determined them. According to Prof. Eren, for instance, in a contract for the sale of goods, the goods and the price must be indicated by the oferror in his proposal.[35] Similarly, Prof. Oguzman and Prof. Oz also emphasize that the goods and the price are the essentials elements of the sales contract.[36] However, they additionally add that when the parties do not agree upon the price, but they agree upon the market price at the time that they perform, it shall be accepted that the contract satisfies this essential element requirement.[37] In addition to that, in a previous case in 1929, the Swiss Federal Court emphasized that "the leasehold", "the price" and "the lease period" are the essential elements of a lease agreement in accordance with the article 2 of Swiss Code of Obligations (SCO).[38]

ii) Invitation to make offers:

Article 14 (2) of the CISG provides that:

- *A proposal other than one addressed to one or more specific persons is to be considered merely as an "invitation to make offers", unless the contrary is clearly indicated by the person making the proposal.*

[35] EREN, Fikret: Borclar Hukuku Genel Hukumler *[Law of Obligations General Provisions]*, (2003), pp. 220.
[36] OGUZMAN, M. Kemal & OZ, Turgut, pp. 66.
[37] *Id.*
[38] Julius Bär and Cie c. Burstein RO 54 II 300 (all.), JdT 1929 66, in OFTINGER, Karl, Borclar Kanununun Genel Kismina Iliskin Isvicre Federal Mahkeme Ictihatlari, Ceviren Av. Dr. Kemal DAYINDARLI *[Swiss Federal Courts Decisions Concerning the Law of Obligations' General Provisions, Translation to Turkish by Kemal DAYINDARLI]*, (1990), pp.26-28.

By this article, the CISG distinguishes between an offer, which binds the offeror, and an invitation that others make offers, which does not.[39] For example, supposing that an American buyer wants to do business with a Chinese seller and sends him a "letter of inquiry" including only "item numbers" and the "quantity of the items" in order to seek the best price from the seller. The seller responds with a "pro forma invoice" including the price, an identification of the goods and the quantity. Finally, buyer ends the dealing by a "purchase order" confirming the transaction. In this case, "the letter of inquiry" is only an "invitation to make an offer" since there is no price indicated by the buyer and the letter of inquiry only seeks the best price; the pro forma invoice is an offer because it includes the price, and an identification of the goods and the quantity besides the other requirements of an offer. However, CISG art. 14(2) provides that public offers may qualify as an offer when clearly intended to be an offer.[40] This means that a proposal clearly indicating that the party considers himself to be an offeror is sufficient to qualifying the proposal as an offer to conclude a contract.[41] In other words, a proposal clearly evidencing an intention to be bound should be treated as a true offer.[42]

Generally speaking, it comes to me clear that, public offers such as "offers published in newspapers", "professional journals" or those addressed to a random group of entities such as trade fairs are not effective as offers; they are only invitations to make offers. However, if the invitation to make an offer is addressed to a specific person and indicates that the person extending the invitation wants to be bound it would be considered as an offer.

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[39] LOOKOFSKY, *available at* http://cisgw3.law.pace.edu/cisg/biblio/loo14.html.
[40] GYULA EORSI, *article 14* in in Bianca-Bonell Commentary on the International Sales Law, Giuffrè: Milan (1987) 132-144. *available at* http://cisgw3.law.pace.edu/cisg/biblio/eorsi-bb14.html.
[41] *Id.*
[42] LOOKOFSKY, *available at* http://cisgw3.law.pace.edu/cisg/biblio/loo14.html

In a CISG case, a German court held that the invoice which the plaintiff sent to the buyer twice is also not an offer under Art. 14 CISG, since it did not contain all the essentials required under Art. 14 CISG nor did the facts indicate that the plaintiff intended it to be an offer for the sale of goods.[43]

Turkish Law also distinguishes between an offer which binds the offeror and an invitation to others to make offers, which does not. The relevant article of the TCO, it states that: *"If the offeror explicitly declares that he keeps on his right to be not bound, or his intention to be not bound is emerged due to the circumstances or the special characteristic of the deal, the offeror shall not be bound by his offer.* (TCO art. 7(1)). Therefore, if the proposal does not include the elements of the offer as indicated in the offer discussion below, and the circumstances as mentioned in the article 7 of the TCO, it would be an invitation to make an offer in accordance with the Turkish Law.[44] Thus, a proposal, which does not include the essential elements of the offer, will be considered as an invitation to make an offer.[45] Similarly, if the offeror explicitly declares that he will not be bound by his intention or the intention not to be bound is understood from the circumstances, there would be an invitation to make an offer and this person is not bound by it.[46] For example, if a person makes an offer published in a newspaper saying that *"I sell my racing horse, you may come and see it in ten days*; however, if he adds that *"I am free to sell it or not to sell it"*, it would be regarded as an invitation to make an offer[47]. In one of the previous TCOA

[43] Germany 30 August 2000 Appellate Court Frankfurt (Yarn case) *available at* http://cisgw3.law.pace.edu/cases/000830g1.html
[44] REISOGLU, Safa, pp. 56
[45] *Id.*
[46] *Id.*
[47] *Id.*

decisions, Turkish Higher Court considers "an offer by a letter" in order to attend a "sealed-bid tender" as an invitation to make an offer[48].

Both the CISG and the Turkish Law distinguish the offer and the invitation to make offer in a very similar way; however the TCO additionally indicates some special situations. According to the TCO, *"sending a price list is not an offer"* (TCO art 7/2). On the other hand, *"a public offer is considered as an offer[49];* and, as a rule, *exhibiting of commodities with a labeled price is considered as an offer"* (TCO art. 7/3). Unlike the CISG, the TCO explicitly states that public offers are accepted as offers. Therefore, for example, a t-shirt that is exhibited in a shop window with a "labeled price" is an offer, as a rule. However, if there is a "sold" or a "sample" sign on the t-shirt, it is not regarded as an offer[50]. On the other hand, the CISG does not accept this kind of exhibition as an offer, unless the contrary is clearly indicated by the person making the proposal (CISG art. 14 (2).

iii) Withdrawal of an offer

Article 15 (2) of the CISG provides that;

- *"An offer even it is irrevocable, may be withdrawn if the withdrawal reaches the offeree before or at the same as the offer."*

Thus, the CISG explicitly states the deadline for the withdrawal of an offer even it is irrevocable.[51]

[48] TCOA's decision: (*4. HD 2/3/1970 T. 11803 E. 1666 K.; 20/3/1970 T. 1081 E. 2346 K.)* in KARAHASAN, Mustafa Resit, pp.125.
[49] EREN, Fikret, pp. 223.
[50] *Id.*
[51] Irrevocability or revocability of an offer will be dealt with in art. 16 of the CISG, see the upcoming discussion in subsection *"iv".*

First of all, it should be emphasized that Article 15(2) applies only to an offer which, because it has not even "reached" the offeree (the recipient), cannot be described as having "become effective"; such an offer can be withdrawn.[52] On the other hand, the right to "revoke", dealt with in CISG Article 16, concerns the right of the offeror to call back an offer which has reached the offeree and which has therefore become effective.[53]

The reason supporting Article 15 is that the enforcement of contracts is designed to protect expectations; none arose in this case before the offeror withdrew the offer.[54] Therefore, the CISG gives the offeror two opportunities to withdraw his offer "even if the offer is irrevocable"; (1) withdrawal must reach the offeree before the offer, or (2) withdrawal must reach the offeree at the same time as the offer. The meaning of "at the same time" is not defined and could be of importance if the two communications are only separated by minutes and the offer purports to be irrevocable.[55] Presumably a tribunal will be guided by the underlying rationale of 15(2) and (quaere) by whether or not the two communications might be expected to come to the attention of a responsible officer of the offeree at the same time.[56]

The TCO similarly states two opportunities, but adds another one in order to be able to withdraw the offer. According to the TCO:

"If the declaration of withdrawal of the offer reaches the offeree before or at the same as the offer, or even if it reaches after the offer but before the offeree hears of the offer, the offer is considered as unaccomplished" (TCO art. 9/1).

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[52] LOOKOFSKY, *available at* http://cisgw3.law.pace.edu/cisg/biblio/loo15.html
[53] *Id.*
[54] JOHN O. HONNOLD, *Article 15 When Offer Becomes Effective; Prior Withdrawal* in Uniform Law for International Sales under the 1980 United Nations Convention, 3rd ed. (1999), page 158, *available at* http://cisgw3.law.pace.edu/cisg/biblio/ho15.html
[55] JACOB ZIEGEL, *Report to the Uniform Law Conference of Canada on Convention on Contracts for the International Sale of Goods, available at* http://cisgw3.law.pace.edu/cisg/text/ziegel15.html
[56] *Id.*

Therefore, the offeror may withdraw his offer: (1) before the offer reaches the offeree, or (2) at the same time as the offer, or (3) even it reaches after the offer but before the offeree hears of the offer. The first two opportunities are the same as under the CISG; however, the last one gives the offeror a chance to withdraw it even it reaches the offeree. If the offeree hears of the offer after it reaches to him, the offer can not be withdrawn by the offeror.[57]

iv) Revocability of offer

Article 16 of the CISG states that:

- *(1) Until a contract is concluded an offer may be revoked if the revocation reaches the offeree before he has dispatched an acceptance. (2) However, an offer cannot be revoked: (a) if it indicates, whether by stating a fixed time for acceptance or otherwise, that it is irrevocable; or (b) if it was reasonable for the offeree to rely on the offer as being irrevocable and the offeree has acted in reliance on the offer.*

The CISG states few restrictions on the right to "withdraw" the offeror as mentioned in the previous section; however, the right to "revoke" the offer is limited in several ways by article 16 of the CISG.[58]

During the drafting of the CISG, revocability of an offer, in other words, the "effective offer" issue led to a huge debate between common law country and civil law delegates because of the differences between the systems.[59] In the traditional common law systems, prior to acceptance an offer can generally be revoked, even if it says that it is firm

[57] REISOGLU, Safa , pp. 58
[58] HUBER & MULLIS, pp. 80.
[59] FARNSWORTH, *available at* http://www.cisg.law.pace.edu/cisg/biblio/farnsworth1.html

or irrevocable.[60] In other systems, an offer can be revocable unless the offer states that it is irrevocable.[61] On the other hand, in still other systems, the German and related systems, an offer is irrevocable unless the offeror states that it is revocable[62]. At the 1964 Hague Conference and at the Vienna Conference the debate was centered on the common law and the German system.[63]

From the three solutions, the drafters ultimately chose a solution closest to the second.[64] Article 16 lays down the general rule that offers are revocable (if the revocation reaches the offeree before he has dispatched an acceptance), subject to an exception that "*an offer cannot be revoked ... if it indicates, whether by stating a fixed time for acceptance or otherwise, that it is irrevocable*".[65] (CISG art. 16(2)(a). Article 16 also provides that, even if an offer does not indicate that it is irrevocable, it becomes irrevocable "*if it was reasonable for the offeree to rely on the offer as being irrevocable and the offeree has acted in reliance on the offer*."[66] (CISG art. 16(2)(b). Therefore, as a rule, [1] revocation is acceptable under art. 16(1), and [2] revocation is not be permitted if the offer includes a fixed time for acceptance or [3] the offeror indicates that the offer is irrevocable. Lastly, [4] revocation will not be permitted if it was reasonable situation for the offeree to have relied on the offer as being irrevocable, and [5] the offeree has acted in reliance on the offer.

[60] *Id.*
[61] *Id.*
[62] *Id.*
[63] EORSI, *available at* http://cisgw3.law.pace.edu/cisg/biblio/eorsi-bb16.html
[64] FARNSWORTH, *available at* http://www.cisg.law.pace.edu/cisg/biblio/farnsworth1.html
[65] *Id.*
[66] *Id.*

Additionally I need to point out that there were a lot of comments made during the course of the Conference debates[67] concerning CISG art.16(2)(a) as Prof. Kritzer from Pace Law stated[68].

The debates focused on "ambiguity" under the CISG. The issue here is "interpretation of offers containing a fixed period for acceptance."[69] For example,[70] the following provisions in a contract may be problematic:

(1) This offer shall remain open until 15 September 2006;

(2) This offer shall lapse on 15 September 2006.

Under the CISG, a civil law person would interpret *"an offer with a fixed term as irrevocable during that term,"* whereas a common law person would generally regard *"such an offer as revocable"* prior to acceptance. As I will discuss in the following section on Turkish Law, it is clear that the TCO falls in the civil camp. (TCO art.3/1).

The controversy surrounding art.16(2)(a) and even the uncertainty introduced by it, has seemingly not provided any great problems in practice.[71] It is suggested that the better view under the CISG, and the one most consistent with the history of the provision, is that the fixing of time for acceptance is not conclusive but merely one factor indicating an intention to be bound.[72] What art. 16(2)(a) CISG does, however, make clear is that an offer cannot be revoked where it indicates that it is irrevocable.[73] Briefly, whichever jurisdiction

[67] ALBERT KRITZER, *International Contract Manual*, 2007, p.86-33
[68] *Id.*
[69] *Id.*
[70] *Id.*
[71] *Id.* at 86-61
[72] HUBER & MULLIS, pp. 83.
[73] *Id.*

the parties stem from, the simple solution is for business people *"to spell out what effect they intend the fixing of a time for acceptance to have."*[74]

In Turkish Law, the TCO distinguishes "dated offer" and "undated offer" in order to underline when the offer can be revoked:[75]

a) "dated offer" (fixed time for acceptance): *"If the offer includes a fixed time for acceptance, the offeror cannot invoke his offer until the time expires."* (TCO art. 3/1). This provision is a very similar to the one stated in art 16(2)(a) of the CISG. The TCO also states that *"If the acceptance does not reach the offeror until it expires, the offeror is not be bound by his offer."* (TCO art. 3/2). Therefore, an acceptance coming right after the offer expires shall be regarded as a "new offer", not an acceptance.[76]

b) "undated offer" (no fixed time for acceptance): If the offer does not include any time for acceptance, the "revocation period" depends on whether the offer was made face-to-face or not.

- face-to-face: *"In a face-to-face conversation, if the offer does not include any time for acceptance and the offeree does not accept the offer immediately, offeror shall not be bound by his offer."* (TCO art. 4/1). Additionally, "*Contracts made between the offeror and the offeree or between their attorneys on the phone shall be regarded as a contract concluded in a face-to-face conversation.* (TCO art. 4/2). Needless to say, this principle is not limited to phone conversations. It shall also apply to computers, or with any other similar communication vehicles.[77]

[74] *Id.*
[75] KARAHASAN, Mustafa Resit, pp.125-129; REISOGLU, Safa, pp. 56-58; EREN, Fikret, pp. 224-228; OGUZMAN, M. Kemal & OZ, Turgut, pp. 53-60.
[76] REISOGLU, Safa, pp. 57
[77] *Id.*

- when there is a distance between the parties: *"When there is a distance between the parties, if the offer does not include any time for acceptance, the offeror is binding until a reasonable time in accordance with a proper and on time answer."* (TCO art. 5/1). For example, A lives in Ankara[78], B lives in Istanbul[79]. Supposing that A writes a letter including an offer which does not fix any time for acceptance. In this case, A might wait until a reasonable time including the arriving of the offer letter to the offeree, thinking of the offeree and the period of arrival of the acceptance by mail[80]. In other words, A is bound by his offer until this reasonable period ends. (TCO. Art. 5/1).

Generally speaking, both Turkish Law and the CISG may permit the offeror to revoke his offer in some cases. (CISG art. 16(1), TCO art. 7/1). It is also possible to make the proposal irrevocable and to state a fixed time in the offer both in Turkish law and the CISG. Therefore, the offer cannot be revoked. (CISG art. 16(2), TCO art. 3/1). Even though both CISG article 16(2)(b), *"...reasonable for the offeree to rely on the offer as being irrevocable and the offeree has acted in reliance on the offer"*, and TOC article 5, "*When there is a distance between the parties, if the offer does not include any time for acceptance, the offeror is bound until a reasonable time in accordance with a proper and on time answer"*, do not meet quite the same point; I have to emphasize that both articles give the offeree a chance to rely on the offer and do not permit the offeror to get out of his offer.

[78] Ankara is the capital city of Turkey.
[79] Istanbul is the most populated city of Turkey.
[80] This is also a Swiss Federal Court Decision in 1973. (JT. 1973, I, 366), see in REISOGLU, Safa, pp. 58.

v) Rejection of offer

CISG art. 17 states that *"An offer, even it is irrevocable, is terminated when a rejection reaches the offeror."* This provision contains two elements: (1) an offer is terminated when a rejection reaches the offeror and, (2) this applies also if the offer is irrevocable.[81] The main purpose of the provision is to assure that the offeror is free to contract with someone else without fear that the offeree will change his mind and attempt to accept the offer which he had previously rejected.[82]

Even though there is no particular and explicit article in the TCO stating the rejection (except TCO article 5/3, "late acceptance," which will be discussed below), it is obviously indicated by Turkish scholars that an offer is terminated when a rejection reaches the offeror.[83]

Like the CISG, in Turkish Law a declaration of the rejection of an offer must reach the offeror. This declaration may be express or implicit.[84] It is not possible to accept the offer after rejecting it.[85] An "acceptance" after rejection is a "new offer", not an acceptance.[86]

c. Acceptance (CISG articles 18-22)

i) Acceptance: time and manner for indicating

Article 18 starts dealing with the acceptance by stating that:

[81] EORSI, *available at* http://cisgw3.law.pace.edu/cisg/biblio/eorsi-bb17.html
[82] *Id.*
[83] OGUZMAN, M. Kemal & OZ, Turgut, pp. 56; KARAHASAN, Mustafa Resit, pp.129; EREN, Fikret, pp. 228.
[84] *Id.*
[85] *Id.*
[86] *Id.*

(1) A statement made by or other conduct of the offeree indicating assent to an offer is an acceptance. Silence or inactivity does not in itself amount to acceptance.

(2) An acceptance of an offer becomes effective at the moment the indication of assent reaches the offeror. 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, due account being taken of the circumstances of the transaction, including the rapidity of the means of communication employed by the offeror. An oral offer must be accepted immediately unless the circumstances indicate otherwise.

(3) However, if, by virtue of the offer or as a result of practices which the parties have established between themselves or of usage, the offeree may indicate assent by performing an act, such as one relating to the dispatch of the goods or payment of the price, without notice to the offeror, the acceptance is effective at the moment the act is performed, provided that the act is performed within the period of time laid down in the preceding paragraph.

This article is the first one dealing with the acceptance. As mentioned above, articles 18 to 23 deal with acceptance. Article 18 regulates the basic rules for a valid acceptance in a variety of circumstances and taking due cognize of a practices established between the parties[87]. It also takes into account that very often acceptance will not be made explicit but will be clear form some conduct establishing implicit acceptance[88]. Schlechtriem distinguishes three different forms of acceptance[89]:

I) An expressly made acceptance which must reach the offeror.

[87] ALBERT KRITZER, pp.86-89.
[88] *Id.*
[89] *Id.*

II) An implied acceptance by conduct, which must come to the attention of the offeror and,

III) An implied acceptance through conduct which becomes effective at the time the relevant acts are performed.

According to the sentence 1 of the article 18 (1), the acceptance of an offer can be communicated verbally or by conduct indicating assent[90].

The declaration of the offeree must exactly cover acceptance of the offer with the necessary intent to be bound, although art. 19(2) will allow non-material modifications which are not rejected by the offeror. In a previous German CISG case, Appellate Court of Frankfurt held that *"It must be clear that the offeree intended to be bound by the acceptance[91]".*

Moreover, sentence 2 of the art.18(1), *"silence or inactivity"* as a reaction to the offer does not indicate acceptance[92]. This rule is intended to prevent the offeree from being taken by surprise (such as when a shipment of unordered goods is sent with an offer stating that by not returning the goods the offeree accepts the offer)[93]. The wording "in itself" makes it clear, however, that silence in connection with other circumstances can be considered as acceptance, particularly on the basis of Article 8(3)[94]. In addition, silence can, as an exception to the rule, have the effect of acceptance on the basis of usages which are legally relevant under Article 9[95]. In an Austrian CISG case[96], the court confirmed the

[90] PETER SCHLECHTRIEM, *Uniform Sales Law - The UN-Convention on Contracts for the International Sale of Goods*, *available at* http://www.cisg.law.pace.edu/cisg/biblio/schlechtriem-18.html
[91] Germany 30 August 2000 Appellate Court Frankfurt (Yarn case), *available at* http://cisgw3.law.pace.edu/cases/000830g1.html
[92] SCHLECHTRIEM, *available at* http://www.cisg.law.pace.edu/cisg/biblio/schlechtriem-18.html
[93] *Id.*
[94] *Id.*
[95] *Id.*

first grade decision and applied articles 14 and 8(3); finally, it held that *"the contract had not been validly concluded, since the declaration of acceptance conditional to the acceptance by the credit insurance diverged from the original proposal, thus constituting a counter offer."* The court added that "*the alleged silence or inactivity of the buyer could not be relevant for the conclusion of the contract under articles 18 and 19, and even more so since, after receiving the counter-offer, the buyer was requested to perform additional actions, i.e. to contact the credit insurance and to provide the identification number."* Finally, the Court of Appeal stated that "*from the oral negotiations between the parties it was clear for the buyer that the defendant would have entered into a contract only under condition that the buyer would be accepted by the seller's credit insurance."*

According to the sentence 1 of the art.18(2), an acceptance of an offer becomes "effective" when the indication of assent reaches the offeror. Therefore, "the acceptance" (1) must be right after the offer, (2) must include assent in accordance with the offer, (3) becomes effective when this assent reaches the offeror.

On the other hand, according to the sentence 2 of the art.18(2), the acceptance must be made within the "time provided" for in the offer, or in the absence of such a requirement within a "reasonable time" after receipt of the offer[97]. The reasonableness of the period of time will depend very much on the circumstances[98]. Art.18(2) specifically mentions the rapidity of the means of communication as one such circumstances[99]. The means of

[96] Austria 7 March 2002 Appellate Court Graz (Pork case), *available at* http://cisgw3.law.pace.edu/cases/020307a3.html
[97] ALBERT KRITZER, pp.86-103
[98] *Id*
[99] *Id*

communication therefore may play an important role[100]. The time for acceptance would be much longer than where the offeror employed ordinary post rather than fax or e-mail[101].

Last sentence of the art.18(2) states that an oral offer must be accepted immediately unless the circumstances indicate otherwise. This is an important exception in respect of oral offers[102]. In a previous Swiss CISG case[103], the court held that *"...the notion of an oral offer, before being in principle accepted immediately, includes conversations face-to-face, by telephone or any other technical or electronic means of communication allowing immediate oral contact, but not statements captured in a material medium such as, notably a fax."* The Court adds that *"unless there are particular contrary circumstances, the CISG provides that the offer does not survive a telephone conversation."* Therefore, an oral offer in a face-to-face, or in a telephone conversation or in other technical or electronic communications would be accepted as an oral offer within the context of the CISG.

Lastly, art.18(3) makes provision for circumstances where the parties have established a practice between themselves, or usage dictates or the offer itself indicates that the offeror has dispensed with the need to be informed of the acceptance and that the performance of an act such as dispatching the goods, will be sufficient to establish the formation of the contract[104].

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[100] *Id.*
[101] *Id.*
[102] *Id.*
[103] Switzerland 13 September 2002 Appellate Court Genève (Grain case), *available at* http://cisgw3.law.pace.edu/cases/020913s1.html
[104] ALBERT KRITZER, pp.86-97

Like the CISG, the acceptance must reach the offeror[105]. The declaration for acceptance also can be "expressly" or "implied"; however, it must cover acceptance and necessary intend to be bound[106].

On the other hand, unlike "usages provision" of the CISG under article 9, TCO does not state directly that "silence or inactivity" is not an acceptance. Contrarily, according to the TCO's "implied acceptance" rule, *"When the offeror is not obligated to expect an expressly acceptance and the offer is not rejected in a reasonable time; in respect of the special circumstances or as circumstances require, contract will be accepted as concluded"* (TCO art.6). This "implied acceptance" rule is also considered as "silence"[107].

Actually, there is a big debate on the issue that whether the silence has an effect as the same as an "express acceptance" or an "implied acceptance" in Turkish Law. As a rule, "silence" does not have an effect as the same as "implied acceptance[108]." However, sometimes, we need to consider the silence as an "express acceptance" by relying on "integrity rule[109]" in article 2 of the Turkish Civil Code. Turkish Court of Appeals (TCOA) considers *"silence as an express acceptance"* in one of the decisions[110]. Another TCOA decision also emphasizes the same point of view by adding that silence has a legal value[111].

On the other hand, there some exceptions to the TCOA's this view in TCO[112]. For example, TCO art.263: *"automatically renewing the loan contract one more year when the parties are silent,"* TCO art.387: *"if the agent/attorney does not immediately decline the*

[105] REISOGLU, Safa, pp. 59; OGUZMAN, M. Kemal & OZ, Turgut, pp. 60; KARAHASAN, Mustafa Resit, pp.132; EREN, Fikret, pp. 229.

[106] *Id.*
[107] EREN, Fikret, pp. 229.
[108] KARAHASAN, Mustafa Resit, pp.108.
[109] This is the English translation of "Dürüstlük Kuralı."
[110] TCOA's decision: *(4.HD. 7/7/1977 T. 11110 E. 7895 K.)* in KARAHASAN, Mustafa Resit, pp.109.
[111] *Id. (IBK. 30.11.1955, 14/20).*
[112] *Id.*

agency/power of attorney (in other words being silence), it would be considered as an acceptance."

Furthermore, in Turkish Law, the acceptance of an offer can also be communicated "verbally" or by "conduct" similar to the CISG[113]. If the offeree shows a "trustworthy conduct" in respect of an acceptance, it will also be accepted as a valid acceptance[114]. TCO has an express article giving an example of this situation. Truly, according to the TCO art.174/3, "*When a person transfers his debt to another one by an agreement, if the creditor accepts a "payment" or makes a "transaction" in the name of debtor without any reservation, "payment" or this "transaction" will be accepted as a valid acceptance."*

Turkish Law also indicates when the acceptance becomes effective. The effectiveness depends on where the parties are. In other words, it changes according to whether the parties are together (face-to-face) or there is a distance between the parties. Since the TCO states offer and acceptance together under the same main heading between the articles 3 to 11, rather than repeating all the expression that I made in "revocability of an offer" section, I will only emphasize what TCO states again: *"In a face to face conversation, if the offer does not include any time for acceptance and the offeree does not accept the offer immediately, offeror shall not be bound by his offer."* (TCO art. 4/1).
Therefore, acceptance must be indicated in a face-to-face conversation if there is no time is fixed. A declaration right after face-to-face conversation will not be accepted as an acceptance. Moreover, "*Contracts made between the offeror and the offeree or between their attorneys on the phone shall be accepted as the contract concluded in a face to face conversation.* (TCO art. 4/2). Hence, "acceptance" must be immediately indicated in phone

[113] OGUZMAN, M. Kemal & OZ, Turgut, pp. 61.
[114] *Id.*

conversations. Besides, *"When there is a distance between the parties, if the offer does not include any time for acceptance, the offeror is binding until a reasonable time in accordance with a proper and on time answer.*[115]*"* (TCO art. 5/1).

TCO also states when an acceptance becomes effective when the parties are in different places. According to TCO, *"When there is a distance between the parties entering into a contract, acceptance is effective at the time of sending".* (TCO. art. 10/1). It also adds that *"If there is no need an expressly acceptance, the acceptance is effective when the offer reaches the offeree"* (TCO art. 10/2). Therefore, TCO does not expressly solve the "concluded contract" issue when the parties are not together[116]. However, in accordance with the generally accepted approach (TCO articles 3, 5, and 9), contract will be concluded when the acceptance reaches the offeror[117]. But, the offeror must hear the acceptance, because acceptance can also be withdrawn by a same way as offer[118]. (TCO art.9). As it mentioned by the article 10 at the beginning of this paragraph, TCO has a different solution about the effectiveness of the contract. Therefore, on the one hand, when the parties are not together, the contract is concluded when the acceptance reaches the offeror; however, on the other hand, the acceptance will be effective at the time of sending[119].

ii) Acceptance with modifications

According to art 19 of the CISG;

(1) A reply to an offer which purports to be an acceptance but contains additions, limitations or other modifications is a rejection of the offer and constitutes a counter-offer.

[115] See the example in previous *"revocability of an offer"* section, concerning TCO art.5/1.
[116] REISOGLU, Safa, pp. 60.
[117] *Id.*
[118] *Id.*
[119] *Id.*

(2) However, a reply to an offer which purports to be an acceptance but contains 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. If he does not so object, the terms of the contract are the terms of the offer with the modifications contained in the acceptance.

(3) Additional or different terms relating, among other things, to the price, payment, quality and quantity of the goods, place and time of delivery, extent of one party's liability to the other or the settlement of disputes are considered to alter the terms of the offer materially.

Article 19(1) reflects traditional theory that contractual obligations arise out of expressions of mutual agreements and accordingly, an acceptance must comply exactly with the offer[120]. On the other hand, article 19(2) contains rules dealing with the situation where a reply to an offer is expressed and intended as an acceptance but contains additional or different terms which do not materially alter the terms of the offer[121]. Finally, article 19(3) provides that certain terms are normally to be considered as material[122].

Generally speaking, the purpose of the article 19 is that "the acceptance must be unconditional or mirror the offer[123]." It deals with the situations where the acceptance does not comply with this mirror image rule but contains modifications, additions or changes[124]. The general rule in Article 19(1) is that such an acceptance is an implied rejection and the making of a "counter-offer"; however, the further provisions recognize that there may be minor adjustments which should not be allowed to derail the contracting process. Lastly,

[120] ALBERT KRITZER, pp. 86-112
[121] *Id at* pp. 86-113
[122] *Id.*
[123] *Id. at* pp. 86-114
[124] *Id.*

the provision provides examples of what constitutes material alterations or modifications[125].

In a previous CISG case[126] in the USA, the court held that: *"Magellan, an American buyer and the plaintiff, alleged that it sent purchase orders to Salzgitter, a German seller and the defendant, on February 15 that contained the material terms upon which the parties had agreed. Those terms included identification of the goods, quantity and price. Certainly an offer could be found consistently with those facts; but, the article 19(1) reflects the common law's "mirror image" rule that the UCC[127] has rejected. And the defendant's February 17 response to the purchase orders did propose price changes. Hence that response can be seen as a counter-offer that justified plaintiff's belief that its acceptance of those new prices would form a contract."*

According to the general rule (acceptance with nonmaterial modifications) in article 19(1) of the CISG, it provides that where a party accepts an offer but qualified with non-material alterations, the acceptance is valid and the modifications effective, unless the offeror forthwith objects to the alterations[128]. This provision was applied in the German CISG case[129]: *"An acceptance that contains alterations is generally regarded as a counter-offer that constitutes a rejection of the offer (art.19(1) CISG). However, the reply by the seller giving a different time of delivery date did not materially alter the terms of the offer, especially since it did not regard the goods sold."* In this case, the buyer set a time of

[125] *Id.*
[126] *United States Magellan Intern. Corp v. Salzgitter Handel GmbH*, 76 F.Supp. 2d 919, 927, 53 Fed. R. Evid. Serv. 563, 40 U.C.C. Rep. Serv. 2d 321 (N.D. III. 1999), ALBERT KRITZER, pp. 86-118, *available at* http://cisgw3.law.pace.edu/cisg/wais/db/cases2/991207u1.html
[127] UCC (the Uniform Commercial Code) is one of a number of uniform acts that have been promulgated in conjunction with efforts to harmonize the law of sales and other commercial transactions in all 50 states within the USA.
[128] ALBERT KRITZER, pp 86-117-118
[129]Germany 27 April 1999 Appellate Court Naumburg (Automobile case), ALBERT KRITZER, 86-118, *available at* http://cisgw3.law.pace.edu/cases/990427g1.html

delivery date "no later than 15 March 1997" in his written document issuing the offer; however, the seller gave a different delivery date, later than 15 March 1997. Therefore, the same Court held in the case at the hand that: *"While the buyer's request for delivery no later than 15 March 1997 did not become part of the contract, it has to be considered in determining the reasonable time for performance under the art.33 of the CISG. Because, the place within this time frame, 29 January 1997(acceptance date by the seller)-15 March 1997(buyer's deadline requirement for delivery), the seller would have had to deliver by that date in order to have delivered within a reasonable time."*

"Battle of forms" problem: The use of documents such as "contracts", "purchase orders", "acceptances" and "confirmations" carries with it attendance problems, one of which has become known as the *"battle of forms*[130]*."* A "battle of forms" arises where both parties to the negotiations seek to introduce and rely on their own set of standard forms[131]. For example, the buyer sends his printed purchase order form in response to a seller's "catalogue" or "price list" and the seller responds by sending his "printed acceptance[132]. The back of each form commonly contains a list of printed terms designed to protect each party's interest and not infrequently these sets of terms conflict[133]. At this point, we will have two questions arise out when there is a 'fall in market price" of the goods or "some defect" in the performance tendered[134]:

1) Whether a contract has in fact been concluded, and
2) If so, whether it is on the seller's or buyer's terms.

[130] HUBER & MULLIS,pp. 91.
[131] *Id.*
[132] *Id.* at 92
[133] *Id.*
[134] *Id.*

The CISG does not contain any special rules on the battle of forms[135]. Additionally, no single solution has emerged and a number of different approaches can be identified in the case law and academic commentary; however, there are two solutions[136] regarding the battle of forms problem:

First solution; *"Last shot rule"*: Let's assume that the offeree's reply contains terms that are materially different from the offer and if we approach this problem via "last shot rule", the resulting contract will include only those terms on which the writings of the parties agree, excluding conflicting terms[137]. This theory has been rightly criticized as casuistic and unfair[138].

Second solution; *"Knock out rule"*: Actually, this is an alternative approach to the first solution. According to that solution, where it can be established that the parties have agreed the essential terms of the contract and actually want the contract despite the conflict between their respective standard terms, it is suggested that it can be presumed that the parties have agreed to waive the application of their standard terms in so far as they are in conflict with each other[139].

Generally speaking, like the CISG, in Turkish Law, if the offeree stipulates new conditions different than the offer, it will be accepted as a "rejection" of the offer and a "counter-offer" as well[140]. As a rule, the acceptance must be compatible with the offer (TCO art.1/1).

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[135] *Id.*
[136] *Id.* at 93-94.
[137] ALBERT KRITZER, pp. 86-125
[138] HONNOLD, *available at* http://cisgw3.law.pace.edu/cisg/biblio/ho19.html
[139] HUBER & MULLIS, pp. 94.
[140] OGUZMAN, M. Kemal & OZ, Turgut , pp. 60; REISOGLU, Safa, pp.59.

As mentioned above, Turkish law distinguishes the essential elements and the secondary elements (TCO art. 2). "*When the parties provide a consensus on essential elements, even they skip the secondary elements by being silence; the contract is accepted as concluded."* (TCO art. 2/1). Moreover, it adds that *"When there is no consensus between the parties on secondary elements, judge determines them by looking over the essence of the deal."* (TCO art. 2/2). Therefore, the judge has a very vital role when there is a conflict between the parties regarding the secondary elements.

More specifically, if the acceptance modifies the "essential elements" by expanding or shrinking, even though it will be accepted as a "rejection" and a "counter-offer" like the CISG; it is different when the offeree modifies the "secondary elements" of the offer. According to Prof Eren, if the secondary elements in the acceptance declaration are different than the secondary elements in the offer, this declaration will not be accepted as a rejection or a counter-offer[141]. In such a case, he recommends to apply article 2/1 of TCO by way of "analogy[142]." Since it is mandatory in Turkish Law to provide consensus on the essential elements -even there is no consensus on the secondary elements- (TCO art. 2/1); when the acceptance modifies the "secondary elements", "unlike the essential elements", it will not be accepted as a rejection and a counter-offer[143]. To sum up, if the acceptance's essential elements are incompatible with the offer's essential elements, it will be a rejection and a counter-offer; however, if the acceptance's secondary elements are compatible with

[141] EREN, Fikret, pp. 229.
[142] *Analogy* is a method when there is no solution in the law regarding the issue at the hand. In this method, judges find out the most related article and apply it in order to satisfy the accordance of law. Turkish Civil Code assigns the judges to find out the way when they encounter with a situation including no solution in the law; therefore, 1) judges are responsible to apply "existing law" to the related issues, 2) If they can not find anything to apply to the situation from existing law, they apply "legal custom", 3) If they do not find anything in the legal custom to apply, they will apply what they would apply if they would be the lawmaker. (Turkish Civil Code art. 1).
[143] *Id.*

the offer's secondary elements, it will not be accepted as a rejection and a counter-offer because of the TCO art.2 assigns the judges when there is no consensus on the secondary elements even though the contract concluded.

As mentioned above, the offeree must immediately accept the offer in a face-to-face conversation (TCO art.4/1). If he does not accept it and tries to accept the first conversation's offer in a new second conversation, TCOA does not accept it as a valid or a modified acceptance[144].

Briefly, on the one hand, firstly the CISG gives the general rule (art 19(1). Secondly, it provides some exceptions by emphasizing "materially alteration." According to the art.19(3) CISG, it particularly states that when the acceptance modifies, 1) the price, 2) payment, 3) quality of the goods, 4) quantity of the goods, 5) place and time of delivery, 6) extent of one party's liability to the other or 7) the settlement of disputes, it is considered as altering the terms of the offer materially. However, on the other hand, as mentioned many times above, even though Turkish Law distinguishes the essential elements and the secondary elements, there is no express article in Turkish Law enumerating them. CISG expressly enumerates them (articles 14(1) and 19(3) CISG).

iii) Interpretation of offer's time limits for acceptance

Article 20 states that:

(1) A period of time for acceptance fixed by the offeror in a telegram or a letter begins to run from the moment the telegram is handed in for dispatch or from the date shown on the letter or, if no such date is shown, from the date shown on the envelope. A period of time for acceptance fixed by the offeror by telephone, telex or other means of instantaneous communication begins to run from the moment that the offer reaches the offeree.

[144] TCOA's decision: *(6.HD. 12/10/1989 T. 12916 E. 14889 K.)* in KARAHASAN, Mustafa Resit, pp.127.

(2) Official holidays or non-business days occurring during the period for acceptance are included in calculating the period. However, if a notice of acceptance cannot be delivered at the address of the offeror on the last day of the period because that day falls on an official holiday or a non-business day at the place of business of the offeror, the period is extended until the first business day which follows.

Article 20 is aimed at providing certainty on time periods mentioned in an offer which maybe ambiguous or uncertain as to when exactly these periods start and it will only operate in circumstances where the offer contains no provision is insufficiently clear[145]. It makes provision two types of situations: 1) where non-instantaneous of communication such as a letter or a telegram is used, 2) where instantaneous methods of communication is used such as telephone, telex or any other method[146].

Article 20(2) is aimed at providing certainty on the effect of official holidays and nonbusiness days on these time periods[147]. Essentially these days only come into reckoning when the acceptance cannot be delivered on the last day of the period because of such day in which the next business day at the place of the offeror is deemed the last day[148].

On the other hand, the CISG Advisory Council has issued the following opinion on electronic communications in regard to Article 20(1): (OPINION[149]) A period of time for acceptance fixed by the offeror in "electronic real time communication" begins to run from *"the moment the offer enters the offeree's server."* A period of time for acceptance fixed by the offeror in "e-mail communication" begins to run from "*the time of dispatch of the e-mail communication."* Means of instantaneous communications includes electronic real

[145] ALBERT KRITZER, pp. 86-151
[146] *Id.*
[147] *Id.*
[148] *Id.*
[149] *Id.* at 86-153

time communication. The term "reaches" is to be interpreted to correspond to the point in time when *"an electronic communication has entered the offeree's server."*

According to Prof. Kritzer, from Pace University School of Law, *"For "telegrams," the period starts from the time it is handed in for dispatch. If it is sent in a letter, from the date shown on the letter, or if no such date is shown, from the date on the envelope. For "telephone", "telex" or "other means of instantaneous communication" the period begins to run from the moment that the offer reaches the offeree. Furthermore, "e-mail" is not instantaneous communication and, with respect to dating, it is not wholly equivalent to letters sent in envelopes. CISG does not provide any interpretative help with respect to e-mails and uncertain situations must be solved by ordinary means of interpretation taking into account that the party being unilaterally bound (the offeror) normally deserves more protection. A period of time for acceptance fixed by the offeror in "e-mail communication" begins to run from "the time of dispatch of the e-mail communication." This is so because this time can be easily ascertained and e-mails can be seen as functional equivalents of letters. Moreover, parties may communicate over the internet by "real-time communication" (this is more common for chat-programs). The technique is such that if the sender writes an "a" the letter "a" immediately appears on the addressee's screen. The parties are both present at the time and they may talk orally or write to each other just as if they were present in the same room or were talking over the phone. This type of communication qualifies as " instantaneous." CISG Art. 20(1) applies also to electronic communication in real time. If the sender sends an offer and stipulates that it is binding for two hours, the period starts to run from the point in time when the message reaches the addressee, i.e. immediately. For real time communication it is*

assumed that the addressee has indicated his willingness to receive electronic message of the relevant type."

As mentioned above, TCO distinguishes the situations 1) "offer fixing a specific time" and 2) "offer not fixing any specific time." When the offer includes a specific date for acceptance, if the declaration of acceptance does not reach the offeror before the fixed time expires, offeror is not bound by this offer (TCO art. 3). Therefore, if the acceptance comes after fixed time, there will be no concluded contract.

Unlike the CISG, there is no express article in TCO explaining when the time starts for acceptance. According to Prof. Oguzman, offeror may include a provision which fixes time indicating "when the time of acceptance starts[150]." If there is no time for acceptance in his declaration regarding when the time of acceptance starts, this issue will be solved by "interpretation of his declaration[151]." For instance, if the offeror declares that "he is bound 10 days", the time for acceptance starts "on the day of sending;" however, if the offeror declares that "respond in 10 days", the time for acceptance starts "when the offer reaches the offeree[152]."

On the other hand, if there is fixed time for acceptance in offer, TCO again distinguishes two different situations: 1) face-to-face, 2) when there is a distance between the parties. According to Turkish Law, a telephone conversation is considered as face-to-face conversations[153]. Additionally, art.4/1 TCO states that *"In a face to face conversation, if the offer does not include any time for acceptance and the offeree does not accept the offer immediately, offeror shall not be bound by his offer."* (TCO art. 4/1). Therefore, a

[150] OGUZMAN, M. Kemal & OZ, Turgut pp. 60.
[151] *Id.*
[152] *Id.*
[153] *Id.* at 57

period of time for acceptance on the telephone conversation starts when the offer is indicated by the offeror and, the period finishes until the conversation ends. However, letter, telegram, fax or electronic communications like computer are considered as the conversation which the parties are not together, in other words, not face-to-face conversations[154]. Since the TCO art.5/1 states that *"When there is a distance between the parties, if the offer does not include any time for acceptance, the offeror is binding until a reasonable time in accordance with a proper and on time answer",* offeror must wait until a reasonable time. Additionally art.10 TCO states that *"When there is a distance between the parties entering into a contract, acceptance is effective at the time of sending".* (TCO. art. 10/1). It also adds that *"If there is no need an expressly acceptance, the acceptance is effective when the offer reaches the offeree"* (TCO art. 10/2). Therefore, the reasonable time mentioned in the article 5/1 will start when the acceptance becomes effective. In other words, it will start at the time of sending or when it reaches the offeree (depends on the situation whether there is a an expressly acceptance need or not).

As far as I see, CISG and TCO have different approaches. On the one hand, CISG predicts some specific starting time of acceptance for particular conversation types (CISG art.20(1); however, on the other hand, TCO firstly distinguishes the "offer fixing a specific time" and "offer not fixing any specific time" (TCO art.4/1 and 5/1) and it does not mention when the time for acceptance starts. When there is an offer fixing a specific time for acceptance, (or there is a reasonable time need for unstated time) this period starts at the time on sending or when it reaches the offeree (depending on the interpretation of the declaration).

[154] *Id.*

iv) Late acceptances

Article 21 states that:

1) A late acceptance is nevertheless effective as an acceptance if without delay the offeror orally so informs the offeree or dispatches a notice to that effect.

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

Article 21 is aimed at providing clarity on the issue of acceptance that are either made late or which through no fault of the offeree, for instance postal strikes or power outs, reaches the offeree late[155]. In keeping with the general principles of the Convention, the provisions provide for validity despite the acceptance being late; however, it requires a response from the offeror to the offeree indicating that late acceptance will nevertheless be effective[156]. In cases where there are delays which prevent timeous delivery of the acceptance, the offeror can reject such a late acceptance by immediately informing the offeree that the acceptance was not effective[157].

If we take a look at the Turkish Law, we see that the TCO article 5 provides that *"When there is a distance between the parties, if the offer does not include any time for acceptance, the offeror is binding until a reasonable time in accordance with a proper and on time answer."* (TCO art. 5/1). And, *"Offeror has a right to assume that his offer reaches on time."* (TCO art. 5/2). Similar to CISG, TCO provides a chance for offeror to reject his

[155] ALBERT KRITZER, pp. 86-158
[156] *Id.*
[157] *Id.*

offer by stating that *"If the acceptance is sent on time but arrives the offeror late and the offeror prefers to not to be bound by his offer, he has to inform the offeree immediately about this situation."* (TCO art. 5/3). Therefore, acceptance must reach the offeror "on time" to assume that the contract is concluded[158]. Here, "on time" depends on two different situations: (1) When there is no time fixed by offeror for acceptance, on time means in the reasonable time (TCO art. 5/1) (2) When there is a specific time fixed by offeror for acceptance, on time means until this period expires (TCO art. 5/3).

As the TCO provides, when the acceptance is sent on time but does not reach the offeree in required time, the article 5/3 applies. In such a case, if the offeror does not want to go with the contract anymore, offeror must inform him about this situation; otherwise, this "late acceptance" causes a concluded contract[159].

v) Withdrawal of acceptance

CISG Article 22 sets the withdrawal of acceptance by stating 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.*

Article 22 allows an offeree to withdraw his acceptance if the withdrawal reaches the offeree no later than the time when the acceptance becomes effective[160]. It is a corollary of Article 23, which provides that a contract is concluded at the moment when the acceptance "becomes effective[161]." The time when the acceptance becomes effective is determined under Article 18(2) (3), and is generally "the moment the indication of assent

[158] KARAHASAN, Mustafa Resit, pp.132; REISOGLU, Safa, pp.59
[159] OGUZMAN, M. Kemal & OZ, Turgut, pp. 63.
[160] FARNSWORTH, *available at* http://www.cisg.law.pace.edu/cisg/biblio/farnsworth-bb22.html
[161] *Id.*

reaches the offeror[162]." Article 22 thus allows the offeree to withdraw his acceptance if the withdrawal reaches the offeror no later than the acceptance reaches him[163]. It is therefore parallel to Article 15(2), under which "an offer, even if it is irrevocable, may be withdrawn if the withdrawal reaches the offeree before or at the same time as the offer[164]."

Eventually, it is clear that there are two opportunities for the offeror to withdraw his offer: (1) he may withdraw it "before" the acceptance would have become effective, (2) he may also withdraw it "at the same time as" the acceptance would have become effective.

Article 9 of TCO sets the withdrawal of offer and acceptance together in article 9 under the same heading. Even though the first paragraph states some possibilities indicating only offer, second paragraph sets the same rule for acceptance by invoking the first paragraph. According to the article 9, *"If the declaration of withdrawal of the offer reaches the offeree before or at the same as the offer, or even it reaches after the offer but before offeree hears the offer, the offer is considered as unaccomplished"* (TCO art. 9/1). Additionally, it states that *"This rule* (the rule in the first paragraph stating the withdrawal of offer) *also applies for withdrawal of acceptance"* (TCO art. 9/2). Therefore, the same rule (TCO art. 9/1) is valid for withdrawal of acceptance too[165]. Briefly, the offeree may withdraw his acceptance: (1) before the acceptance reaches the offeror, or (2) at the same time as the acceptance, or (3) even it reaches after the acceptance but before offeror hears the acceptance. As mentioned in the withdrawal of offer section above, first two opportunities are the same as the CISG; however, the last one gives the offeree a chance to

[162] *Id.*
[163] *Id.*
[164] *Id.*
[165] KARAHASAN, Mustafa Resit, pp.133

withdraw it even it reaches the offeror. If the offeror hears the acceptance after it reaches to him, the acceptance cannot be withdrawn by the offeree.

d. Conclusion of the Contract (CISG articles 23-24)

i) Effect of the acceptance: time of the conclusion of the contract

First article of the last two articles concerning the conclusion of contract of CISG states that: *"A contract is concluded at the moment when an acceptance of an offer becomes effective in accordance with the provisions of this Convention."* (CISG art. 23).

Article 23 determines the time when a contract is concluded. In providing that, this is the moment when the acceptance "becomes effective"[166]. Article 23 incorporates the provisions of Article 18(2)[167]. According to the main rule in Article 18(2), an acceptance becomes effective at the moment the indication of assent reaches the offeror[168]. Therefore, it will be considered that the contract is concluded when the acceptance reaches the offeror. According to Prof. Ziegel, from University of Toronto, "the common law rule is the same as the rule stated in art. 23[169]."

Before going through the approach in TCO regarding the "time of the conclusion of the contract," it is better to discuss some different approaches. There are four theories[170] explaining the time of the conclusion of the contract:

(1) Declaratory Theory: According to this theory, the contract is concluded when the offeree declares his acceptance. There is no need to send his acceptance to the offeror. For example, when the offeree writes down a letter stating his declaration of acceptance, it

[166] FARNSWORTH, *available at* http://www.cisg.law.pace.edu/cisg/biblio/farnsworth-bb23.html
[167] *Id.*
[168] LOOKOFSKY, *available at* http://www.cisg.law.pace.edu/cisg/biblio/loo23.html
[169] ZIEGEL, *available at* http://www.cisg.law.pace.edu/cisg/text/ziegel23.html
[170] EREN, Fikret, pp. 234-235; KARAHASAN, Mustafa Resit, pp.134-135.

will be considered that the contract is concluded. It is not required to send the letter to the offeror according to this theory.

(2) Dispatching (Sending) Theory: According to this theory, the contract will be considered as concluded at the time of sending the acceptance. For example, the contract is considered as concluded at the time of sending the letter.

(3) Attaining (Arriving) Theory: According to that, the contract is considered as concluded when the acceptance arrives at the "legal destination" of offeror. For example, it will be accepted that the contract is concluded when the letter including an acceptance is dropped into the offeror's mail box.

(4) Learning (Hearing) Theory: This time, the contract is considered as concluded when the offeror hears the acceptance. For example, offeror will be heard when he opens and reads the letter.

The approach of the TCO depends on whether the conversation is a "face-to-face" (when parties are together) or there is a distance between the parties[171] (when parties are not together):

-Face-to-face conversation: Since TCO requires an "immediate response" to the offer in face-to-face conversations including the phone conversations, the contract is considered as concluded when the offeree declares the acceptance. For instance, in a phone conversation, when the offeree declares that "I accepted your offer", or a declaration like that, the contract is considered as concluded. If the parties are together, but they prefer to make a written contract, the contract is accepted as concluded when the offeree gives the contract to the offeror after signing it. In my opinion, since the TCO requires an immediate response to the offer in such a case, TCO's approach bears more than one theories

[171] *Id.*

mentioned above. When the offeree declares the acceptance on the phone, it is a declaratory approach. At the same time, it also bears dispatching, attaining and hearing theories. At the time of declaring his acceptance on the phone, the offeror will be receiving, taking and learning or hearing the declaration.

-Different places: When there is a distance between the parties TCO accepts "attaining (arriving) theory" in respect of the conclusion of the contract. In such a case, the contract will be considered as concluded when the acceptance arrives at the legal destination of offeror such as mail box.

ii) When communications reach the addressee

Seven rules[172] in Part II of the Convention provide that a communication becomes effective when it "reaches" the addressee and Article 24 fixes the time when a communication "reaches" the addressee for the purpose of these rules[173] by stating that: *"For the purposes of this Part of the Convention, an offer, declaration of acceptance or any other indication of intention "reaches" the addressee when it is made orally to him or delivered by any other means to him personally, to his place of business or mailing address or, if he does not have a place of business or mailing address, to his habitual residence."*

Article 24 implements the "receipt" rule, which is used generally in Part II of the Convention. Since a communication such as an offer or an acceptance becomes effective when it "reaches" the addressee, it is important to indicate with precision when that event

[172] See articles: *15(1) "offer", 15(2) "withdrawal of offer", 16(1) "revocation of offer", 17 "rejection", 18(2) "acceptance", 20(1) "instantaneous communication fixing period for acceptance", 22 "withdrawal of acceptance."*
[173] FARNSWORTH, *available at* http://www.cisg.law.pace.edu/cisg/biblio/farnsworth-bb24.html

takes place. Article 24 does this, subject to the power of the parties to provide otherwise under Article 6[174].

If the communication is made orally, it must be made to the addressee[175]. It may, of course, be made to an agent who is authorized by the addressee to receive it, and in that case questions as to the requisite authority would be resolved by the applicable national law[176].

If the communication is not made orally, it may be delivered either to the addressee personally or to his place of business or his mailing address[177]. Only if he does not have a place of business or mailing address may it be delivered to his habitual residence[178]. Again, it may be delivered to an agent who is authorized by the addressee to receive it, and in that case questions as to the requisite authority would be resolved by the applicable national law[179].

There are two views on when a communication has «reached» a party, one taking the time when it is delivered at the recipient's address and the other the time when it actually comes to his attention[180]. Although the latter has appeal in the context of consensual transactions, the former is more practical in application because of the greater ease of proof[181]. The Convention adopts the former view[182]. In order for a communication to "reach" the addressee, it need not come to his personal attention[183]. It is enough that it be placed in the mailbox or other place set aside for delivery of communication so that it is

[174] *Id.*
[175] *Id.*
[176] *Id.*
[177] *Id.*
[178] *Id.*
[179] *Id.*
[180] *Id.*
[181] *Id.*
[182] *Id.*
[183] *Id.*

handed to an employee authorized to take delivery[184]. It would not, however, be enough if the communication was left on the addressee's doorstep or in some other unattended place or if it were given to an unauthorized person[185]. In that event, it would not reach the addressee unless, for example, it subsequently came to his personal attention[186].

VI. Final Remarks & Conclusion

Comparing the CISG and the Turkish Law was a good opportunity for me to get more familiar with their similarities and differences. I have intentionally picked the "formation of the contract" part; because it is very beginning of a contract and most of the issues regarding contracts always start with its formation. In other words, if there is no properly formed contract, there would be no further discussions.

While I was reading and researching for my thesis, I have found specific differences and the similarities. The following part includes these specific points:

1) Turkey is a civil law country, the CISG, on the other hand, is including both civil law countries' and common law countries' aspects together. In other words, the CISG is one of the international tools holding two major law systems together.

2) TCO is one of the codes of Turkey. Since Turkish Law applies only domestic issues, TCO's "formation of the contract" section also applies for the related legal issues in the territory of Turkey. However, parties would have a chance to pick Turkish Law for their contract, in their choose of Law article, such as in an arbitration clause; therefore, it can be applied outside of the Turkish territory. The CISG, on the other hand is one of the multinational Conventions. It has relation to

[184] *Id.*
[185] *Id.*
[186] *Id.*

several laws and countries. It also can be choosen as an arbitration clause; however, it is more than a single country's domestic law.

3) In the Convention, there are 11 direct articles regarding the "formation of the contract". And it also has some articles such as Articles 6-9, Articles 11-12 and Article 29, are not directly relating to the formatin of the contract, but they have an indirect relation. In TCO, the first 10 articles are related to the formation of the contract. There still some other articles, such as Article 263, and Article 387, are related to the formation of the contract but it does not count as general design of the formation of the contract. Each of the Article 263 and Article 387 are one of the exceptions of being silence as I said above.

4) Specifically, even though Turkish Law accepts Pre-Contractual Liability Doctrine, CISG does not accept it. This is one of the big differences.

5) Both TCO and CISG recognize same approach regarding a formation of the contract which they both seek an acceptance after an offer to form the contract. But they have requirement differencies. For instance, the CISG seek for "sufficiently definite" level which includes "the goods", "the quantity" and "the price", TCO does not expressly state what they are. In other words, even though TCO distinguishes the essential elements and the secondary elements, there is no clear article in TCO ordering them. CISG clearly orders them in the Articles, 14(1) and 19(3).

6) Both CISG and TCO distinguish the offer and the invitation to make offer in a similar way; but TCO states some special situations such as Article 7/2 and 7/3 of TCO.

7) The CISG gives the offeror two opportunuties to withdraw his offer even if the offer is irrevocable. TCO states the same two. However, additionally, TCO state one more opportunity in the Article 9/1.

8) Both TCO and CISG allow the offeror to revoke his offer in some cases. (TCO art. 7/1, CISG art. 16(1)).

9) Even though CISG has a particular article, such as 17, states the rejection, TCO has no particular article about it except Article 5/3 of TCO. However, Turkish Scholars largely accept that offer is terminated when a rejection reaches the offeror.

10) Unlike "usage provision" of the CISG under article 9, TCO does not state directly that "silence or inactivity" is not an acceptance.

11) In the Article 20, CISG predicts some starting time of acceptance for particular types of conversation; however, TCO has no explanation about it. So, CISG and TCO have different approaches regarding the time of the acceptance.

These findings of mine show me that there are several differences and similarities between the CISG and the Turkish Law. However, if the CISG is applied in Turkey, I do believe that law practitioners in Turkey would not have long hard time to understand and apply the CISG. Becasue besides the differences, there are still sepecific similarities between the systems. However, practitioners would have to study for the differences in order to understand the persepective of the CISG.

As I stated above, at the time of my thesis, Turkey is not a contracting party of CISG. I firmly believe that Turkey is going to be a contracting party of CISG upcoming years, because of its growing international business deals. Therefore, I strongly hope this thesis

may help people starting to study CISG. I highly believe that the differences and the similarities I have put forward would be helping them at first sight very well.

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