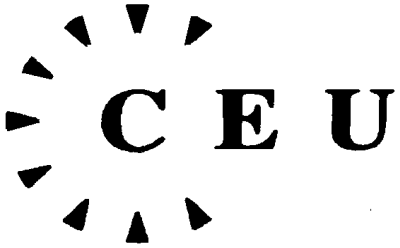

FORMATION OF CONTRACT FOR THE INTERNATIONAL SALE OF GOODS – COMPARATIVE STUDY OF THE CISG AND LEGISLATION OF THE KYRGYZ REPUBLIC

by Esenkulova Begaiym

LL.M. SHORT THESIS
COURSE: Drafting and Negotiating International Contracts
PROFESSOR: Prof. Dr. Stefan Messmann
Central European University
1051 Budapest, Nador utca 9.
Hungary

TABLE OF CONTENTS

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ABSTRACT

The thesis focuses upon a comparative study of the formation of contracts for the international sale of goods under the United Nations Convention on Contracts for the International Sale of Goods (CISG) and Kyrgyz legislation. Its purpose is to analyze the legal regulation of the formation of international sale of goods contracts in accordance with the CISG and Kyrgyz legislation, identify its problematic aspects and advance proposals on their solution. The research employs the comparative law method. It is based on the content analysis of the CISG, legislative acts of the Kyrgyz Republic, leading court decisions, arbitral awards and doctrinal works of prominent experts on the issue of the formation of contracts for the international sale of goods.

The results of the research demonstrate that although the rules of the CISG and Kyrgyz legislation regulating the contract offer, acceptance and form are generally analogous, there are a number of major discrepancies between the two acts concerning issues related to the sufficient definiteness of an offer, qualified acceptance and the form of contracts for the international sale of goods. Consequently, the study advances concrete proposals on the harmonization of the relevant provisions of the Kyrgyz legislation with those of the CISG. The principal among such recommendations are the proposals on the Kyrgyz Republic's declarations on the inapplicability of a set of conflicting parts of the CISG to parties, whose places of business are in the Kyrgyz Republic and on introducing amendments to the national legislation of Kyrgyzstan.

INTRODUCTION

The study of the legal regulation of the formation of contract for the international sale of goods and of its problematic aspects is the subject of continuous interest and discussion. At present, over two thirds of the world trade is done on the basis of the international sale of goods contract.[1] This serves as compelling evidence of the contract's significance in international commercial transactions. The same is true of the contract's role in the Kyrgyz Republic. The promotion of foreign trade and the improvement of the legislative regulation of foreign trade have been continuously emphasized among the primary priorities of Kyrgyzstan. [2] The Kyrgyz Republic's trade volume with foreign states, physical persons, and legal entities is constantly on the rise. The foreign trade turnover of Kyrgyzstan constituted 2512,3 million US dollars in the year of 2007 and rose to 3551,2 million US dollars in 2008. [3] It is estimated that it will further increase to 5316 million US dollars in the year of 2010.[4] Hence, a steadily rising level of international sales and unceasing promotion of foreign trade in the Kyrgyz Republic reveal the

[1] Martin Koehler and Guo Yujun, "The Acceptance of the Unified Sales Law (CISG) in Different Legal Systems," *Pace International Law Review* 20-45 (Spring 2008): 46; Michael Bonell, "The CISG, European Contract Law and the Development of a World Contract Law," *American Journal of Comparative Law* 56 (Winter 2008): 2.

[2] The Decree of the Kyrgyz Republic President "On the development of the state policy in the sphere of foreign trade and improvements of export-import procedures" (Ukaz o razvitii gosudarstvennoj politiki v sfere vneshnej torgovli i merah po sovershenstvovaniyu eksportno-importnuh procedur) of October 2007 N 464; The Regulation of the Kyrgyz Republic Government "On the creation of the National council of the Kyrgyz Republic on the assistance in the sphere of trade and transportation" (Postanovlenie o sozdanii Nacional'nogo komiteta po sodejstviyu v sfere torgovli i transporta) of January 29, 2008 #29; The Decree of the Kyrgyz Republic President "On the establishment of the Strategy of country development during the years of 2007-2010" (Ukaz o vnedrenii Strategii razvitiya stranu na 2007-2010 gody) of May 16, 2007 #249; Regulation of the Government of the Kyrgyz Republic "On the Establishment of a Program of the Development of Export and Import Substitution for the Period of 2007-2010" (Postanovlenie o sozdanii programu razvitiya eksporta i importozamesheniya na 2007-2010 gody) of February 9, 2007 # 43.

[3] The National Statistical Committee of the Kyrgyz Republic, *Kyrgyzstan in numbers* (Bishkek: The National Statistical Committee Press, 2008), 236.

[4] Ibid.

importance of international sale of goods contracts and necessitate the undertaking of an in-depth study of the legal regulation of the formation of these contracts.

The thesis paper's focus on the United Nations Convention on Contracts for the International Sale of Goods (CISG) and Kyrgyz legislation in the study of the legal regulation of the formation of contracts for the international sale of goods is significant in view of Kyrgyzstan's ratification of the CISG. The CISG, as importantly emphasized by Professor Stefan Messmann, Joseph Lookofsky, Ingeborg Schwenzer and a number of other distinguished scholars, is the most successful convention unifying rules in the sphere of international sale of goods adopted to help remove the legal barriers to international trade and advance its fruitful development. [5] The Kyrgyz Republic's ratification of this Convention makes it essential to study the correlation between the relevant provisions of the Kyrgyz legislation with those of the CISG in the field of contract formation.

The importance of the study of the international sale of goods contracts is also directly linked to the existence of a number of significant inconsistencies in the Kyrgyz Republic's legislative acts with those of the CISG in the sphere of contract formation. Despite the CISG's entry into force in the year of 2000, the Kyrgyz Republic has not taken steps to harmonize the discrepancies between the provisions of its civil legislation with those of the present Convention. The current imperfection of Kyrgyzstan's legislation proves to be a significant barrier to effective cross-border trade transactions by creating legal uncertainty. Needless to say, in spite of

[5] Stefan Messmann, *Lecture on Contracts for Sale of Goods,* Class on Drafting and Negotiating International Contracts, Central European University, Budapest, Hungary (16 January, 2009); John Felemegas, *The United Nations Convention on Contracts for the International Sale of Goods: Article 7 and Uniform Interpretation* (NY: Kluwer Law International, 2000), 6; Joseph Lookofsky, "Loose Ends and Contorts in International Sales: Problems in the Harmonization of Private Law Rules," *American Journal of Comparative Law* 39 (1991): 403; Ingeborg Schwenzer, "National Preconceptions that Endanger Uniformity, " *Pace International Law Review* 19 (Spring 2007), 104.

the increasing importance of the role of contracts for the international sale of goods and the existence of problematic aspects related to their legal regulation, there is a virtual absence of doctrinal sources that would analyze the nature of these contracts and their regulation in Kyrgyzstan. Hence, all of the above-stated factors necessitate a thorough and systematic research of the legal regulation of the formation of contracts for the international sale of goods under the CISG and Kyrgyz legislation, of its problematic aspects and their effective practical resolution.

LITERATURE REVIEW. The issue of the legal regulation of the formation of contracts for the international sale of goods and of its problematic aspects under the CISG and Kyrgyz legislation has not been subject to extensive and systematic research. Although there have been attempts of studying the present topic as evidenced by the writings of N. Gallyamova and Zh. Kozhobekova, none of them has proven to be full scale and comprehensive. Given the virtual absence of scholarly works on the legal regulation of the formation of international sale of goods contracts in the Kyrgyz Republic, the work has been concentrated upon the analysis of national and international legislation, including the Civil Code of the Kyrgyz Republic, the Law of the Kyrgyz Republic on the export control, the Law of the Kyrgyz Republic on the state regulation of the foreign trade activity, the United Nations Convention on contracts for the international sale of goods and a number of other sources.

Special emphasis has been placed upon the study of court and arbitration tribunal practice of the Kyrgyz Republic with respect to contracts for the international sale of goods. Despite the fact that issues related to international sale of goods contracts have not yet surfaced in a meaningful way in litigation, the thesis contains a thorough analysis of one court decision of the Court of Arbitration of Osh Oblast of Kyrgyzstan and three arbitral awards of the International

Court of Arbitration in affiliation with the Chamber of Commerce and Industry of the Kyrgyz Republic.

The major pool of scholarship is concentrated in the works of foreign specialists which are not specific to the Kyrgyz Republic. These scholars focus on the legal regulation of the formation of contracts for the international sale of goods under the CISG. In view of the abundance of literature on the issue of the formation of international sale contracts under the CISG, the present thesis has been based on the analysis of more than one hundred doctrinal sources and works of the prominent and leading world experts on the issue of the international sale, including but not limited to P. Schlechtriem, P. Huber, I. Schwenzer, J. Honnold, S. Judge, F. Enderlein, D. Maskow, D. Lauzon, R. Brand, H. Flechtner, M. Boguslavskiy, M. Eisenberg, D. Jacobson, M. Braginskiy, V. Vitryanskiy, O. Ioffe, S. Symeonides, M. Bonell, A. Farnsworth, F. Ferrari, and numerous other scholars.

Major emphasis has been placed upon the study of the world court and arbitration tribunal practice in disputes related to the issue of the formation of contracts for the international sale of goods. More than twenty arbitral awards and not fewer than seventy court cases from all continents of the planet have been scrupulously analyzed with the view of providing the most up-to-date and prevalent court and arbitration tribunal interpretation of the CISG. Hence, unlike existing studies, the present thesis has integrated the national and international statutory and doctrinal sources as well as court and arbitration tribunal practice. The research work is also distinctive in its concentration on the Kyrgyz Republic, in filling of the gaps of earlier studies of leading world scholars, and in its comprehensive and systematic analysis of the latest developments in the legal regulation of the formation of contracts for the international sale of goods under the CISG and Kyrgyz legislation.

RESEARCH PURPOSE AND TASKS. The purpose of the thesis paper is to analyze the legal regulation of the formation of contracts for the international sale of goods under the CISG and Kyrgyz Republic legislation, identify its problematic aspects and advance proposals on their solution. The study seeks to achieve this objective by accomplishing the following key tasks:

1. examining the conceptual framework of contracts for the international sale of goods;
2. undertaking a comparative study of the legal regulation of contract offer, acceptance and form of contracts for the international sale of goods under the CISG and Kyrgyz legislation;
3. analyzing the major problematic aspects of the legal regulation of the international sale of goods contract's formation under the CISG and Kyrgyzstan legislation;
4. advancing concrete proposals on the solution of the identified problematic aspects of the legal regulation of the formation of contracts for the international sale of goods.

RESEARCH OBJECT AND DELIMITATION. The thesis is concentrated upon the study of the formation of commercial contracts for the international sale of goods, as provided in the legislation of the Kyrgyz Republic and CISG. It does not address the sale of goods bought for personal, family or household use and sale of stocks, investment securities, negotiable instruments, immovable property, ships, vessels, hovercraft or aircraft, and electricity, since these issues are not regulated by the CISG.[6] Neither does it concentrate on the study of incapacity, fraud, duress, illegality, mistake and unconscionability in the contract formation,

[6] CISG, Article 2; Bruno Zeller, *CISG and Unification of International Trade Law* (New York: Routledge-Cavendish, 2007), 14.

since the exclusion of these subjects from the scope of the CISG [7] renders the comparison of these elements with the Kyrgyz law impossible. Last but not least, the thesis does not analyze the contract consideration, which is an essential element in the contract formation in the common law countries, as neither the CISG nor Kyrgyz legislation require this element to be present for the contract to be formed. [8]

RESEARCH METHODS. The research work is a qualitative study. It employs the comparative law method. It is based on the content analysis of the relevant provisions of the CISG, legislative acts of the Kyrgyz Republic, leading court decisions, arbitral awards as well as doctrinal works of prominent experts on the issue of the formation of contracts for the international sale of goods. The thesis is also based on interviews with the representatives of law firms, courts, and arbitral tribunals of the Kyrgyz Republic.

THESIS OUTLINE. The thesis is composed of an introduction, two chapters and a conclusion. The first chapter is focused on the legal regulation of the formation of contracts for the international sale of goods under the CISG and Kyrgyz legislation. It is divided into two subchapters. The first subchapter introduces the conceptual framework of contracts for the

[7] CISG, Article 4; Michael Bridge, "A Law for International Sales," *Hong Kong Law Journal* 3-7 (2007): 24; Camilla Andersen, "The Uniform International Sales Law and the Global Jurisconsultorium," *Journal of Law and Commerce* 24 (2005): 164; Fritz Enderlein and Dietrich Maskow, *International Sales Law: United Nations Convention on Contracts for the International Sale of Goods, Convention on the Limitation Period in the International Sale of Goods (Commentary)* (New York: Oceana Publications, 1992), 6; Lisa Spagnolo, "Opening Pandora's Box: Good Faith and Precontractual Liability in the CISG," *Temple International and Comparative Law Journal* 21 (Fall 2007): 262

[8] Henning Lutz, "The CISG and Common Law Courts: Is There Really a Problem?" *Victoria University of Wellington Law Review 28* (2004):36; Monica Kilian, "CISG and the Problem with Common Law Jurisdictions," *Journal of Transnational Law & Policy* 10 (Spring 2001): 231; John Murray, "An Essay on the Formation of Contracts and Related Matters under the United Nations Convention on Contracts for the International Sale of Goods," *Journal of Law and Commerce* 8 (1988): 169; Cholponkul Arabaev, *Civil Law of the Kyrgyz Republic (Grazhdanskoe pravo Kyrgyzskoj Respubliki)* (Bishkek: Science and Education Printing House, 2004): 267.

international sale of goods. The second subchapter provides a comparative analysis of the legal regulation of the contract offer, acceptance and form under the CISG and Kyrgyz legislation.

The second chapter is devoted to the problematic aspects of the legal regulation of the formation of contracts for the international sale of goods under the CISG and Kyrgyz Republic legislation. It is divided into three subchapters that focus upon the problematic aspects of the international sale of goods contract's legal regulation related to the contract offer, acceptance and form. Each subchapter contains concrete proposals on the harmonization of the existing legislation of the Kyrgyz Republic with the CISG provisions on contract formation. The principal among such recommendations are the proposals on the Kyrgyz Republic's declarations on the inapplicability of a set of conflicting parts of the CISG to parties, whose places of business are in the Kyrgyz Republic and on introducing amendments to the national legislation of Kyrgyzstan.

THEORETICAL AND PRACTICAL SIGNIFICANCE. The research of the legal regulation of the formation of contract on the international sale of goods under the CISG and Kyrgyz Republic legislation is significant, since it possesses both theoretical and practical value. The research has theoretical significance, since it is the first work of its kind in the history of the Central European University and Kyrgyz Republic. No scholar has produced works that would specifically provide for a systematic and comprehensive research on the issue of the legal regulation of the formation of contracts for the international sale of goods and of its problematic aspects under the CISG and Kyrgyz legislation. The concentration of the work on the Kyrgyz Republic is, thus, a refreshing perspective that sets this study apart from previous studies of foreign scholars on the general issues, pertaining to the formation of contracts for the international sales of goods under the CISG. Therefore, this research makes a unique

contribution into the study of the legal regulation of the formation of international sales of goods contracts and lays the groundwork for future research on similar subjects in CEU and Kyrgyz Republic.

This research is also significant because it systematizes the enormous pool of scholarship on general issues that are related to the legal regulation of formation of international sale of goods contracts under CISG. In addition, it fills in the gaps of earlier studies of leading scholars on the issue. Given the tempo of the present times, it is important to underline that the research study aims to be up-to-date, employing the most recent material from leading and authoritative legal journals, law reviews, books and monographs. This means that the present work, unlike many of the previous studies, encompasses the most recent legislative provisions and court/arbitration tribunal practice, the latest scholarship, and the updated statistics. The present thesis paper, thus, keeps abreast of the most updated information related to the formation of international sales of goods contract under the CISG and Kyrgyz legislation and seeks to contribute to the greater understanding of the issue.

The research possesses practical value, since it provides not only an extensive review and analysis of the existing legislative gaps and inconsistencies, but also advances concrete proposals on the improvement of the present legislation of the Kyrgyz Republic. The results of the research study may be used in the process of the conclusion of the international sale of goods contracts as well as in the scientific and pedagogical work related to the study of the legal regulation of the formation of international sale of goods contracts.

CHAPTER I. THE LEGAL REGULATION OF THE FORMATION OF CONTRACT FOR THE INTERNATIONAL SALE OF GOODS UNDER CISG AND KYRGYZ LEGISLATION

The understanding of the essence of the formation of international sale of goods contracts under the CISG and legislation of the Kyrgyz Republic requires comprehension of its conceptual framework and key elements of its formation. The first chapter of the thesis will, therefore, be focused upon the comparative study of the concept of international sale of goods contracts in accordance with the CISG and Kyrgyz legislation as well as the analysis of the legal regulation of the contract offer, acceptance and form as key constitutive elements of the contract formation process.

§ 1. Conceptual framework of contracts for the international sale of goods

Considering the international character of the contract for the international sale of goods, it is important to state that the precise legislative definition of the contract depends on the law that governs parties' contractual relations. Given the fact that over two thirds of the world trade is done of the basis of this type of contract, it becomes evident that laws which may govern the international sale of goods contract are imposed by different governments with distinct legal systems.[9] Hence, there can be no one single uniform answer as to what constitutes the international sale of goods contract in view of such legislative diversity. In explaining the concept of the contract the present thesis is, therefore, focused only on the contract's conceptual

[9] Troy Keily, "Harmonization and the United Nations Convention on Contracts for the International Sale of Goods," *Nordic Journal of Commercial Law* 1 (2003): 1; Sonja Kruisinga, *Conformity in the 1980 UN Convention on Contracts for the International Sale of Goods* (Oxford: Hart Publishing, 2004), 11; Philip Hackney, "Is the United Nations Convention on the International Sale of Goods Achieving Uniformity?" *Louisiana Law Review* 61 (2001): 473; Gilles Cuniberti, "Is the CISG Benefiting Anybody?" *Vanderbilt Journal of Transnational Law* 39 (November, 2006): 1511

framework under the Kyrgyz legislation and the United Nations Convention on Contracts for the International Sale of Goods.

1.1. Kyrgyz legislation

First, it is essential to discuss the conceptual framework of the contract under the Kyrgyz legislation. The Civil Code of the Kyrgyz Republic is the primary law governing the legal regulation of contracts for the international sale of goods. [10] In compliance with Article 415 of the Code, the sale of goods contract is a "contract, under which one party (the seller) undertakes to transfer goods into the ownership of the other party (the buyer), and the buyer undertakes to accept goods and pay a specified amount of money (the price) for them". According to Chapter 23 of the Kyrgyz Civil Code, there are four types of sales contracts: contracts for the (1) retail sale (*Articles 455-468*), (2) commercial sale of goods (*Articles 469-486*), (3) supply of electricity (*Articles 487-496*) and (4) sale of enterprise (*Articles 497-504*).

As has been stated in the thesis introduction, the present research is focused exclusively upon the commercial sale of goods contract. The nature of this type of contract is defined in Article 469 of the Kyrgyz Civil Code, under which "the seller involved in the entrepreneurial activity shall within the specified period or periods of time undertake to transfer to the buyer goods manufactured or purchased by him which must be used in business activity or for other purposes not related to personal, family, household or similar use". This definition provides for two major criteria that must be present for a contract to be recognized as a commercial sale of goods contract. First, the seller must be a physical person or legal entity, involved in the entrepreneurial activity in the field of manufacturing or purchasing of such goods. The legal

[10] The Civil Code of the Kyrgyz Republic (Grazhdanskij kodeks Kyrgyzskoj Respubliki). Part 1 of 8 May, 1996 # 15 (with latest amendments of 23 January 2009 #23); The Civil Code of the Kyrgyz Republic (Grazhdanskij kodeks Kyrgyzskoj Respubliki). Part 2 of 5 January, 1998 # 1 (with latest amendments of 17 October, 2008 #215) [*hereinafter* "Civil Code of the Kyrgyz Republic"]

entities, as a general rule, should be commercial entities. [11] However, non-commercial legal entities may also be sellers, if they are involved in business activities to the extent necessary for achieving the goals, specified in their respective charters. [12] Thus, the seller under the contract must be involved in the entrepreneurial activity, specifically related to the manufacturing or purchasing of goods. Secondly, the restriction with respect to the intended use of goods must be observed. The goods under the contract must be transferred to the buyer with the intention to be used in commercial purposes.

This legislative definition explains the nature of a commercial sale of goods contract that may be concluded on the territory of the Kyrgyz Republic (domestic contract of sale). However, it fails to specify the meaning of the international sale of goods contract. The content analysis of other relevant laws of Kyrgyzstan reveals that while there is a legislative description given for such concepts, as foreign trade activity, no such characterization is given for the international sale of goods contract.[13] Hence, while the Kyrgyz Civil Code provides a definition of the concept of domestic commercial sale of goods contract, there is no specific law in the Kyrgyz Republic

[11] The Law of the Kyrgyz Republic "On Business Partnerships and Companies" (Zakon Kyrgyzskoj Respubliki o hozyajstvennuh tovarishestvah i obshestvah) of November 15 1996 # 60; The Law of the Kyrgyz Republic "On Joint Stock Companies" (Zakon Kyrgyzkoj Respubliki ob akcionernuh obshestvah) of March 27, 2003 #64; The Law of the Kyrgyz Republic "On Cooperation (Cooperatives)" (Zakon Kyrgyzkoj Respubliki o cooperativah) of June 11 2004 # 70; The Regulation on the Order of the Registration of Physical Persons, involved in Individual Entrepreneurial Activity on the Territory of the Kyrgyz Republic (Postanovlenie o poryadke registracii phyzicheskih lic, zanimayushihsya predprinimetl'skoj deyatel'nostyu na territorii Kyrgyzskoj Respubliki) of July 2, 1998 #404; Mihail Braginskiy and Viacheslav Vitryanskiy, *Contract Law: Contracts on Property Transfer* (Moscow: Statut, 2006), 20; Elena Solovyeva et al., ed., *The Commentary to the Civil Code of the Kyrgyz Republic* 1 (Bishkek: Academia, 2005), 31.

[12] Civil Code of the Kyrgyz Republic, Article 85; The Law of the Kyrgyz Republic "On Non-Commercial Organizations" (Zakon Kyrgyzskoj Respubliki o nekommercheskih organizaciyah) of October 15, 1999 # 111, Article 12.

[13] Civil Code of the Kyrgyz Republic; Law of the Kyrgyz Republic "On the state regulation of foreign trade activity in the Kyrgyz Republic" (Zakon Kyrgyzskoj Respubliki o gosudarstvennom regulirovanii vneshnetorgovoj deyatel'nosti v Kyrgyzskoj Respublike) of July 2, 1997 # 41; Law of the Kyrgyz Republic "On the export control" (Zakon Kyrgyzskoj Respubliki ob eksportnom kontrole) of January 23, 2003 # 30; Customs Code of the Kyrgyz Republic (Tamozhennuj kodeks Kyrgyzskoj Respubliki) of July 12, 2004 # 87

that would explicitly define the nature of an international sale of goods contract. This necessitates the analysis of the conceptual framework of contracts for the international sale of goods under the United Nations Convention on Contracts for the International Sale of Goods.

1.2. CISG

The analysis of the contract's conceptual framework under the CISG first necessitates a brief overview of the Convention itself and its place in the legislative system of the Kyrgyz Republic. The CISG was prepared by the United Nations Commission on International Trade Law (UNCITRAL) and adopted in Vienna in 1980. [14] It has been widely recognized as the "uniform international commercial code," acting as a bridge between the world's different social, economic and legal systems that helps people around the world to successfully pursue their business activities in various countries.[15] As many scholars and practitioners note, numerous contracts could not be concluded before the Convention's entry into force due to parties' disagreements as to which law would govern their relations. [16] This means that the CISG helps to

[14] *The United Nations Convention on Contracts for the International Sale of Goods*, United Nations Conference for the International Sale of Goods, at 178, U.N. Doc. A/CONF.97/18, Annex I (1981); Muna Ndulo, "The Vienna Sales Convention 1980 and the Hague Uniform Laws on International Sale of Goods 1964: A Comparative Analysis," *The International and Comparative Law Quarterly* 38- 1 (1989): 2; Ronald Brand and Harry Flechtner, "Arbitration and Contract Formation in International Trade: First Interpretations of the U.N. Sales Convention," *J.L. & COM*. 12-239 (1993): 237; Mihail Rozenberg, "The Problematic Aspects of the Legal Regulation of the Contract for the International Sale of Goods among Organizations of the Member States of the Council for Mutual Economic Assistance" (Doctoral dissertation, Moscow, 05840001243, 1983), 28.

[15] Albert Kritzer, "The Convention on Contracts for the International Sale of Goods: Scope, Interpretation and Resources," *Cornell Review of the Convention on Contracts for the International Sale of Goods* 187 (1995): 148; Peter Schlechtriem, "Requirements of Application and Sphere of Applicability of the CISG," *Victoria University of Wellington Law Review* 36 (2005): 781; Peter Schlechtriem, "Basic Structures and General Concepts of the CISG as Models for a Harmonisation of the Law of Obligations," *Juridica International* 10 (2005): 27-34; Fryderyk Zoll, "The Impact of the Vienna Convention on the International Sale of Goods on Polish Law, With Some References to Other Central and Eastern European Countries," *Rabels Zeitschrift für ausländisches und internationales Privatrecht* 71 (January 2007): 81-98

[16] Johan Steyn, "The Vienna Convention on the Sale of Goods: A Kind of Esperanto?" in *The Frontiers of Liability*, ed. Peter Birks (Oxford University Press, 1994), 11, 17; Franco Ferrari, "Uniform Interpretation of the 1980 Uniform Sales Law," *Georgia Journal of International and Comparative Law* 24 (1994-95): 186; Allan Farnsworth, "The Vienna Convention: History and Scope," *International Law Journal* 18-19 (1984):18; Blair Crawford,

overcome the uncertainty on the interpretation and application of domestic laws, faced by people who run business on an international scale.

The Kyrgyz Republic acceded to the CISG in 1995. The Convention came into force in Kyrgyzstan on June 1, 2000. [17] Upon its entry into force, the text of the CISG has become a part of the Kyrgyz Republic domestic law, governing the formation and substantive regulation of international sale of goods contracts. In accordance with Article 12 of the Kyrgyz Constitution, international treaties and agreements, to which the Kyrgyz Republic is a party, are a "constituent part of the legal system of Kyrgyzstan".[18] At the same time, it is important to note that, according to Article 6 of the Kyrgyz Civil Code, if an international agreement, ratified by the Kyrgyz Republic Parliament establishes rules other than those set under the Kyrgyz civil legislation, the rules of the international agreement shall be applied. This means that the CISG is an integral part of the legal system of Kyrgyzstan and has priority over its civil legislation.

Having discussed the nature of the Convention and its place in the system of legislative acts of Kyrgyzstan, it is essential to analyze the concept of the contract for the international sale of goods under the Convention. Although the CISG does not contain a clear cut definition of contracts for the international sale of goods as is the case in the Kyrgyz legislation with regard to domestic contracts of sale, it contains three major rules that regulate the conceptual framework

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"Drafting Considerations Under the 1980 U.N. Convention on Contracts for the International Sale of Goods," *J.L. & COM*. 8-196 (1988): 191; Michael Bridge, "A Law for International Sales," *Hong Kong Law Journal* 3 7 (2007): 24; Camilla Andersen, "The Uniform International Sales Law and the Global Jurisconsultorium," *Journal of Law and Commerce* 24 (2005): 164.

[17] Enactment of the People's Congress of the Jogorku Kenesh of the Kyrgyz Republic on the Accession of the Kyrgyz Republic to the United Nations Convention on Contracts for the International Sale of Goods (Postanovlenie o prisoedinenii Kyrgyzskoj Respubliki k Konvencii OON o dogovorah mezhdunarodnoj kupli-prodazhi tovarov) of May 31, 1995 #63-1; Enactment of the Legislative Assembly of the Jogorku Kenesh of the Kyrgyz Republic on the Accession of the Kyrgyz Republic to the United Nations Convention on Contracts for the International Sale of Goods (Postanovlenie o prisoedinenii Kyrgyzskoj Respubliki k Konvencii OON o dogovorah mezhdunarodnoj kupli-prodazhi tovarov) of May 17, 1995 #80-1.

[18] Constitution of the Kyrgyz Republic (Constituciya Kyrgzskoj Respubliki) (*in* Law of the Kyrgyz Republic "On the new edition of the Constitution of the Kyrgyz Republic" of October 23, 2007 № 157).

of the contract. First, in accordance with Article 1 of the CISG, contracts of international sale of goods are understood to be "contracts between parties, whose places of business are in different States, *(a)* when the states are contracting states or *(b)* when the rules of private international law lead to the application of the law of a Contracting State". The Convention, hence, contains a significant criterion to be used in determining the internationality of a sales contract, which is tied to the parties' place of business and its situation on the territory of different states.[19] As is evident from the analysis of the conceptual framework of contracts for the international sale of goods in the Kyrgyz Republic, Kyrgyz laws do not specifically define the internationality of the sales contract. Nevertheless, since Kyrgyzstan ratified the CISG, the Convention's provisions may serve as a gap-filler, effectively supplementing the Kyrgyz legislation by providing a clear definition of the internationality of contracts for the sale of goods.

Secondly, CISG imposes a limitation with respect to the type of goods under the contract. In compliance with Article 3 (1) of the CISG, "contracts for the supply of goods to be manufactured or produced are to be considered sales, unless the party who orders the goods undertakes to supply a substantial part of the materials necessary for such manufacture or production". This means that the buyer must not supply the seller with the majority of materials necessary for the manufacture or production of goods.[20] Such limitation is not expressly provided in the Kyrgyz legislation. However, since the CISG has priority over the Kyrgyz national

[19] Franco Ferrari, "The CISG's Uniform Interpretation by Courts," *Vindobona Journal of International Commercial Law & Arbitration* 9 (2005): 237

[20] CISG Advisory Council Opinion No. 4, "Contracts for the Sale of Goods to Be Manufactured or Produced and Mixed Contracts: Article 3 CISG," Rapporteur: Professor Pilar Perales Viscasillas, Universidad Carlos III de Madrid (24 October 2004); Arbitral Award #VB/94131, Arbitration Court of the Chamber of Commerce and Industry of Budapest, Hungary (5 December, 1995) (available at Neue juristische Wochenschrift - Rechtsprechungsreport (NJW-RR), 1996, 1145-1146)

legislation, the additional restriction, placed by the Convention, must be taken into account, when establishing that the transaction amounts to a contract for the international sale of goods.

Having discussed the conceptual framework of contracts for the international sale of goods both under the Kyrgyz legislation and CISG, one may arrive at the following definition of the international sale of goods contract. It is the contract under which the seller undertakes to transfer the property in goods manufactured or purchased by him within the specified period or periods to the buyer and the buyer agrees to accept such goods for a monetary consideration, called the price, provided that the parties to the contract have their places of business in different states. The goods under the contract are transferred to the buyer with the intention to be used in the business activity or for other purposes not related to personal, family, household or other similar use. This definition comprehensively combines the requirements set for commercial contracts for international sale of goods both under the CISG and Kyrgyz legislation. Consequently, the comparative analysis of the formation of international sale of goods contracts will be made in light of the present conceptual framework.

§ 2. Constitutive elements of the contract formation process under CISG and Kyrgyz legislation

Having discussed the conceptual framework of contracts for international sale of goods, it is important to proceed with the legal analysis of the formation of international sale of goods contracts under the CISG and Kyrgyz legislation. Both the Convention and Kyrgyzstan Civil Code provide that a contract is concluded at the moment the indication of assent reaches the offeror. [21] The method of the contract formation is, thus, similar under the UN Sales Convention and Kyrgyz legislation. However, differences emerge with respect to the determination of what

[21] Civil Code of the Kyrgyz Republic, Articles 393, 394; CISG, Articles 15, 18, 23.

constitutes an offer and acceptance as well as of what contract form is permissible. Therefore, it is essential to undertake a scrupulous comparative study of the contract offer, acceptance and form as constitutive elements of the contract formation process under the CISG and Kyrgyz Republic legislation.

2.1. Contract offer

The determination of what constitutes an offer under the contract for the international sale of goods requires analysis of the relevant provisions of the CISG and Kyrgyz legislation.

2.1.1. CISG

First, it is important to discuss the requirements set for the contract offer in the CISG. According to Article 14 (1) of the Convention, a "proposal for concluding a contract that is 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". [22] The article establishes a number of criteria set for a proposal to amount to an offer. Some scholars, such as J. Honnold state that the primary criterion to be guided by in interpreting Article 14 of the CISG is the offeror's intention to be bound. [23] Such interpretation of the wording of the Convention is not completely well-founded, as the offeror's intention to be legally bound is not the only essential criterion for a valid offer. As may be evident from the wording of Article 14 of the CISG, the Convention equally requires the proposal itself to be sufficiently definite and to be addressed to concrete persons.

[22] CISG, Article 14

[23] John Honnold, *Uniform Law for International Sales under the 1980 United Nations Convention,* 3rd edition (The Hague: Kluwer Law International, 1999), 147.

Other scholars have recognized that the CISG imposes three major criteria for a proposal to be treated as an offer, namely that it (1) must be addressed to specific persons, (2) must indicate the offeror's intention to be bound and (3) be sufficiently definite. [24] One cannot but agree with these scholars' position, as the very language of Article 14 of the CISG warrants such an interpretation of the criteria necessary for a proposal to amount to an offer.

The first criterion is aimed to differentiate between a proposal which is an offer and a mere invitation to make an offer. As stipulated in Article 14 (2) of the CISG, a "proposal other than the 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". As noted by A. Farnsworth, one of the leading experts on the formation of contracts under the CISG, Article 14 (2) ensures that such documents as price lists or catalogues destined for the public at large are not treated as offers under the Convention. [25] This means that an offer is a proposal that is addressed to concrete persons rather than public at large, if the person does not expressly state otherwise.

The second criterion set for a proposal to be treated as an offer relates to an offeror's intention to be legally bound by acceptance. As widely recognized by scholars, such as A. Mullis, R. Rendell, J. Pierre and other authorities in the field of contract formation, the language employed in the offer plays a key role in establishing the offeror's intent. [26] One cannot but agree

[24] Joseph Lookofsky, "The 1980 United Nations Convention on Contracts for the International Sale of Goods," in *International Encyclopaedia of Laws - Contracts, Suppl. 29*, ed. J. Herbots (The Hague: Kluwer Law International, 2000), 62; Joseph Mattera, "The United Nations Convention on Contracts for the International Sale of Goods and Geneva Pharmaceuticals Technology Corp. V. Barr Laboratories, Inc.: The U.S. District Court for the Southern District of New York's Application and Interpretation of the Scope of the CISG," *Pace International Law Review* 16 (Spring 2004):175

[25] Allan Farnsworth, "Formation of Contract," in ed. Galston & Smit, *International Sales: The United Nations Convention on Contracts for the International Sale of Goods* (1984): Ch. 3, 3-5

[26] Peter Huber and Alastair Mullis, *The CISG: A New Textbook for students and practitioners* (Munchen: European Law Publishers, 2007), 71; Robert Rendell, "The New U.N. Convention on International Sales Contracts: An Overview," *Brooklyn Journal of International Law* 15 (1989):28; Vivica Pierre and John Pierre, "A Comparison of

with these scholars that the language of the offer plays a significant role in determining the intention to be bound. This position has been reinforced by caselaw. For example, the Swiss court found the words "order", "we order", "immediate delivery" enough to constitute a valid offer, since they evidenced the offeror's intention to be bound even though the offeror subsequently denied the conclusion of the contract. [27] Hence, the words used by the one making an offer will prove essential in establishing the intent to be bound.

Nevertheless, the language of the proposal per se cannot be viewed as the only factor that needs to be taken into account. Many scholars emphasize that the offeror's intention should be drawn in accordance with Article 8 of the CISG, which contains general rules of interpretation set in the Convention. [28] This means that that the offeror's intent may be deduced from "all relevant circumstances of the case including the negotiations, any practices which the parties have established between themselves, usages and any subsequent conduct of the parties". [29] Determining the intent of the offeror by looking at all the relevant factors is important, since the intention of the offeror may be hard to deduce from only one factor, such as the language used.

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the Rules on Formation of Sales Contracts under the Louisiana Civil Code and the United Nations Convention on Contracts for the International Sale of Goods: What Buyers and Sellers Should Know," *Southern University Law Review* 20 (Fall 1993):189

[27] HG 45/1994, Handelsgericht St. Gallen (05.12.1995) (available at Schweizerische Zeitschrift für Internationales und Europäisches Recht (SZIER), 1/1996, 53-54)

[28] Franco Ferrari, "Interpretation of Statements: Article 8," in *The Draft UNCITRAL Digest and Beyond: Cases, Analysis and Unresolved issues in the U.N. Sales Convention*, eds. F. Ferrari, H. Flechtner, R. Brand (2004): 175; Martin Schmidt-Kessel, "Commentary on Articles 8 and 9 of CISG," in *Commentary on the UN Convention on the International Sale of Goods* (CISG), eds. P. Schlechtriem, I. Schwenzer (Oxford University Press, 2005): 112; Franco Ferrari, "Brief Remarks on Electronic Contracting and the United Nations Convention on Contracts for the International Sale of Goods (CISG)," *Vindobona Journal of International Commercial Law & Arbitration* 6 (2002): 302; Burt Leete, "Contract Formation under the United Nations Convention on Contracts for the International Sale of Goods and the Uniform Commercial Code: Pitfalls for the Unwary," *Temple International and Comparative Law Journal* 6 (1992): 197; Orkun Akseli, "Commentary on whether and the Extent to Which the Principles of European Contract Law (PECL) May Be Used to Help Interpret Article 16 of the CISG," *Vindobona Journal of International Commercial Law & Arbitration* 7 (2003):158

[29] Article 8 (3) CISG

As far as the third criterion is concerned, a proposal is considered to be sufficiently definite, "if it indicates the goods and expressly or implicitly fixes or makes provision for determining the quantity and the price".[30] This means that a contract may not be concluded, if the nature, quantity and price of goods cannot be determined from the contract offer. It is important to emphasize that the CISG Article 14 (2) provides not only for the possibility of an express determination, but also allows an implicit indication of the quantity and price of goods. Such interpretation of the Convention is reinforced in view of the caselaw. For example, the Metropolitan Court of Budapest held that the criterion of sufficient definiteness was satisfied in the case, when although the price and quantity were not fixed explicitly, they could be implicitly determinable from the contract offer, specifically from the general business practice established by the parties. [31] Similar decisions were reached by the courts in Germany, France, and a number of other countries. [32] Hence, a proposal must indicate the nature of goods, their quantity and price in order to amount to an offer within the meaning of the CISG.

The present provision of the CISG on the necessity of fixing of the price in the contract offer comes into a direct collision with Article 55 of the CISG, according to which: "where a contract has been validly concluded but does not expressly or implicitly fix or make provision for determining the price, the parties are considered, in the absence of any indication to the

[30] Article 14 (2) CISG

[31] Metropolitan Court of Budapest, #AZ 12.G.41.471/1991 (24.03.1992) (available at http://www.globalsaleslaw.org/index.cfm?pageID=29&action=search)

[32] Oberster Gerichtsh of Austria, # 2Ob547/93 (10-Nov-1994) (available at http://www.globalsaleslaw.com/content/api/cisg/urteile/117.pdf); Oberlandesgericht Hamburg, Germany, #1 U 143/95 and 410 O 21/95 (04.07.1997) (available at http://www.unilex.info/case.cfm?pid=1&do=case&id=438&step=FullText); Oberster Gerichtshof of Austria, #10 Ob 518/95 (06.02.1996) (available at http://www.unilex.info/case.cfm?pid=1&do=case&id=202&step=FullText); *Sté Fauba France FDIS GC Electronique v. Sté Fujitsu Mikroelectronik GmbH*, Cour d'Appel de Paris, 15ème chambre, section A, France (22.04.1992) (available at http://www.unilex.info/case.cfm?pid=1&do=case&id=142&step=FullText); Tribunal of Int'l Commercial Arbitration at the Russian Federation Chamber of Commerce, Russian Federation, #309/1993 (03.03.1995) (available at http://www.unilex.info/case.cfm?pid=1&do=case&id=213&step=Abstract)

contrary, to have impliedly made reference to the price generally charged at the time of the conclusion of the contract for such goods sold under comparable circumstances in the trade concerned". Article 55 of the CISG stipulates that even if parties fail to specify the price or to make a provision for determining the price, the price may be determined on the basis of the prices generally charged for the same goods in the relevant industry. The two provisions of the CISG, hence, clearly contradict each other. This divergence has triggered much academic debate. [33] The view adopted in this thesis is that Article 14 of CISG takes precedence over CISG Article 55, since there must be a valid offer that needs to be formed under Article 14 of CISG before one can invoke Article 55 of the Convention. [34] Therefore, a proposal must indicate the nature of goods, their quantity and price in order to amount to an offer within the meaning of the CISG.

Having analyzed the criteria set for a proposal to constitute an offer, it is important to discuss the moment of its effectiveness. According to Article 15 (1) of the CISG, it "becomes effective when it reaches the offeree". It is essential to note that the CISG allows the withdrawal of an offer so long as it "reaches the offeree before or at the same time as the offer". [35] This provision of the CISG must be read in conjunction with Article 24 of the Convention. As stipulated in Article 24 of the CISG, an offer reaches the offeree, 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,

[33] Wolfgang Hahnkamper, "Acceptance of an Offer in Light of Electronic Communications," *Journal of Law and Commerce* 25 (Fall 2005):149; Paul Amato, "UN Convention on Contracts for the International Sale of Goods- The Open Price Term and Uniform Application," *Journal of Law and Commerce* 13 (1993): 8; Steven Walt, "Novelty and the Risks of Uniform Sales Law," *Virginia Journal of International Law* 39 (Spring 1999): 680; Predrag Cvetkovic, "The Characteristics of an Offer in CISG and PECL," *Pace International Law Review* 14 (Spring 2002): 126

[34] Please, see §2.1 of the thesis for the detailed analysis of Articles 14 and 55 of CISG

[35] CISG, Article 15 (2)

if he does not have a place of business or mailing address, to his habitual residence." The CISG, hence, contains specific rules that allow determining the moment an offer becomes effective.

An offer may be revoked in compliance with Article 16 (1) of the CISG, if it reaches the offeree before the dispatching of an acceptance takes place. Nevertheless, there are two exceptions to this general rule, as an offer may not be subject to revocation:

> "(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."[36]

As evidenced in the scholarly writings and legislative history of the CISG, the provisions on the revocation of an offer have been reached as a result of the compromise between common law and civil law countries with the general rule being characteristic of common law countries, while the two exceptions being distinctive of civil law countries. [37] The same cannot be said of the offer termination. In accordance with Article 17, "an offer, even if it is irrevocable, is terminated when a rejection reaches the offeror". The provision on the termination of offer is generally valid for both civil and common law countries. [38] Hence, while some CISG provisions have been drafted as a result of the uneasy compromise between the common and civil law

[36] CISG, Article 16 (2)

[37] *Report of the United Nations Commission on International Trade Law on the Work of its Eleventh Session,* [1978] UNCITRAL Y.B. 41, U.N. Doc. A/CN 9/SER.A/1978; Burt Leete, "Contract Formation under the United Nations Convention on Contracts for the International Sale of Goods and the Uniform Commercial Code: Pitfalls for the Unwary, *Temple International and Comparative Law Journal*6 (1992): 195; Alejandro Garro, "Reconciliation of Legal Traditions in the U.N. Convention on Contracts for the International Sale of Goods," *Int'l Law Review* 28 (1989): 457; John Honnold, ed., *Documentary History of the Uniform Law for International Sales* (Deventer: Kluwer, 1989): 280f, 307, 374f, 499ff.

[38] John Honnold, *Uniform Law for International Sales under the 1980 United Nations Convention*, 2d ed. (NY: Kluwer Law International, 1991), 216; Maria del Pilar Perales Viscasillas, "The Formation of Contracts and the Principles of European Contract Law," *Pace International Law Review* 13 (Fall 2001): 382.

jurisdictions, others have been prepared easily owing to similarities in the legal regulation of the contract formation in the two major legal systems.

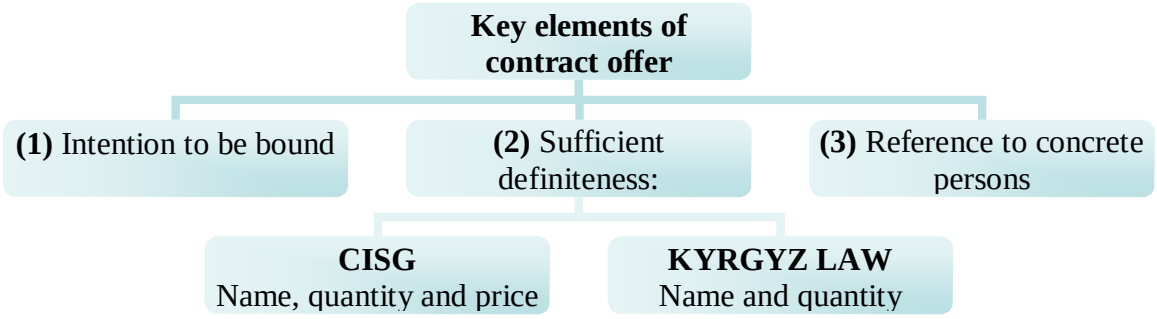
Concluding the analysis of contract offer under the CISG, it is important to reiterate that the Convention sets three major criteria for a proposal to be valid as an offer, namely its being sufficiently definite, evidencing an offeror's intention to be bound and containing a reference to concrete persons. As is evident from the analysis of the CISG Articles 14-17, the Convention establishes special rules on the effectiveness of the offer, its withdrawal, revocation and termination all of which must be observed in order to enable the successful conclusion of a contract for the international sale of goods.

2.1.2. Kyrgyz legislation

Having discussed the legal regulation of the contract offer under the CISG, it is important to proceed with the legal analysis of offer in compliance with the Kyrgyz legislation. The rules on contract formation, including on contract offer, are codified in one single act – the Civil Code of the Kyrgyz Republic. In compliance with Article 396 (1) of the Civil Code, an offer is a "proposal addressed to one or several concrete persons, which is sufficiently definite and which expresses the intention of the offeror to be bound in case of acceptance". This definition of the contract offer is generally analogous to that given in the CISG. Under both the Kyrgyz Republic legislation and CISG a contract offer must be addressed to concrete persons, must contain an offeror's intention to be bound and must be sufficiently definite. [39] This can be demonstrated in the table below:

[39] Cholponkul Arabaev, *Civil Law of the Kyrgyz Republic (Grazhdanskoe pravo Kyrgyzskoj Respubliki)* (Bishkek: Science and Education Printing House, 2004): 267.

Table 1. Comparative analysis of key elements of contract offer under CISG and Kyrgyz legislation



Although the general criteria of what constitutes an offer are the same under the CISG and Kyrgyz legislation, there is one major difference between the two as is shown in the above table. This divergence lies in the determination of what is understood as being sufficiently definite. While under the CISG sufficient definiteness means the indication of the nature of goods, their quantity and price, the Kyrgyz legislation limits sufficient definiteness only to the determination of the description and quantity of goods. This conclusion follows from the analysis of the Kyrgyz Civil Code rules on contract offer and contracts for the sale of goods.

According to Article 396 (1) of the Civil Code, a proposal is sufficiently definite, if it contains all fundamental terms of the contract. Fundamental terms of the contract are "terms on the subject matter of the contract, terms, defined as essential or indispensable for the given kind of contract in the law and all terms which are stipulated as fundamental in parties' agreement". [40] Consequently, it is essential to analyze the legal requirements set for a concrete type of contract in order to be able to determine which contractual terms are fundamental. This requires turning to Article 417 of the Kyrgyz Civil Code which regulates contracts for sale of goods. Under Article 417 (3) of the Civil Code, the contract of sale of goods has two essential terms without

[40] Civil Code of the Kyrgyz Republic, Article 393 (1); *Commentary to Part 1 of the Civil Code of the Kyrgyz Republic* (Kommentarij k Grazhdanskomu kodeksu Kyrgyzskoj Respubliki chasti pervoj), V. 2, Ch. 10-22 (Bishkek: Academy Publishing House, 2005), 448.

which the contract cannot be concluded. These are the terms on the description and quantity of goods. The civil legislation of Kyrgyzstan, hence, makes it mandatory for the offeror to list provisions on the contract subject matter (description of goods) as well as its quantity.

Unlike the CISG, the civil legislation of the Kyrgyz Republic does not contain an imperative norm on that the price of goods must be indicated in the offer, as the price is not treated as an essential term of the contract.[41] If a contract fails to specify the price and the price cannot be determined on the basis of contract terms, it may be established in accordance with point 3 of Article 390 of the Kyrgyz Civil Code. Article 390 (3) clearly stipulates that in the event the "price is not specified in a contract and may not be determined on the basis of contractual conditions, settlements between the parties shall be carried out according to the price usually charged under comparable conditions for similar goods, works and services". [42] Thus, as it may be seen, the Kyrgyz law does not require the indication of price in the contract, as the price is not an essential term of contracts of sale

Having discussed the concept of offer under the Kyrgyz legislation, it is important to proceed with the legal analysis of the offer's effectiveness, revocation, and termination. Similarly to CISG, an offer binds the offeror from the time it reaches the offeree in compliance with Article 396 (2) of the Kyrgyz Civil Code. Likewise, as a general rule, an offer under the Kyrgyz law may be revoked if a notice on revocation is "received prior to or at the same time as the offer itself". [43] The law prescribes two exceptions to this rule which are the same as the ones set in the CISG Article 16 (2), namely that the offer must indicate that it is irrevocable via the

[41] Civil Code of the Kyrgyz Republic, Article 417 (3), 448; *Commentary to Part 2 of the Civil Code of the Kyrgyz Republic* (Kommentarij k Grazhdanskomu kodeksu Kyrgyzskoj Respubliki chasti vtoroj), V. 1, Ch. 23-29, (Bishkek: Academy Publishing House, 2005), 146.

[42] Civil Code of the Kyrgyz Republic, Article 390 (3)

[43] Civil Code of the Kyrgyz Republic, Article 396 (2)

specification of a fixed time or otherwise or it must be reasonable for the offeree to rely on the offer as being irrevocable under the circumstances of the case. [44] As in the CISG, the offer is terminated once a rejection reaches an offeror. [45] Hence, the rules on the offer's effectiveness, revocation and termination are the same under the CISG and Kyrgyz civil legislation.

Concluding paragraph 2.1.of the first chapter of the thesis on contract offer, it is important to reiterate that the rules on the offer of contracts for the international sale of goods are generally analogous both under the CISG and Kyrgyz legislation. The analysis of an offer's effectiveness, revocation and termination shows that the requirements set under the Kyrgyz Civil Code are the same as the ones contained in Articles 14, 15, 16, and 17 of the CISG. However, there is one major inconsistency between the respective provisions of the UN sales Convention and Kyrgyz legislation. This divergence lies in the determination of when an offer is recognized as being sufficiently definite. While Article 14 of the CISG requires that an offer contain the description of goods, their quantity and price to be sufficiently definite, the Kyrgyz legislation limits sufficient definiteness only to the determination of the description and quantity of goods with no obligation of indicating the price in the offer. Hence, a comparative analysis of the provisions on contract offer under the Kyrgyz legislation and CISG demonstrates that there are both similarities and differences in its legal regulation.

2.2. Contract acceptance

Having discussed the legal regulation of contract offer, it is important to undertake a comparative analysis of contract acceptance under the CISG and Kyrgyz legislation.

[44] CISG, Article 16 (2); Civil Code of the Kyrgyz Republic, Article 397

[45] Civil Code of the Kyrgyz Republic, Article 402

2.2.1. CISG

First, it is important to discuss the legal rules set forth for contract acceptance in the CISG. The Convention contains four major rules concerning the contract acceptance: requirements on what constitutes an acceptance, when it becomes effective, when it may be withdrawn and if it may alter the terms of the offer made.

It is essential to begin the analysis of contract acceptance by reviewing the concept of acceptance under the CISG. In accordance with Article 18 (1) of the CISG, an acceptance is a "statement made by or other conduct of the offeree indicating assent to an offer". As further clarified in Article 18 (1) of the Convention, "silence or inactivity does not in itself amount to acceptance". The prevailing view of scholars is that the key element in this concept of acceptance is that there must be assent which may take the form of statements or some forms of performance, such as the dispatch of goods. [46] One cannot but agree with this view as it is reinforced by caselaw. For example, the Commercial Court of Argentina found that the payment of price amounts to acceptance within the meaning of Article 18 of the CISG. [47] Similar decisions in which conduct has been found to amount to acceptance under the Convention have been reached by courts worldwide. [48]

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[46] Allan Farnsworth, "Formation of Contract: Acceptance,"in *Commentary on the International Sales Law*, eds. C. Bianca, M. Bonell (Milan: Giuffrè, 1987), 166; Michael Esser," Commercial Letters of Confirmation in International Trade: Austrian, French, German and Swiss Law and Uniform Law Under the 1980 Sales Convention," *Georgia Journal of International and Comparative Law* 18 (1988): 442; Tom McNamara, "UN Sale of Goods Convention Finally Coming of Age?" *Colorado Lawyer* 32 (February 2003): 18

[47] Inta S.A. v. MCS Officina Meccanica S.p.A., Cámara Nacional en lo Comercial, Sala E, Case #45626, Argentina (14.10.1993) [available at http://www.unilex.info/case.cfm?pid=1&do=case&id=45&step=Sources].

[48] *M. v N.V. M*, Rechtbank van Koophandel, Hasselt, Belgium (02.12.1998) [available at http://www.unilex.info/case.cfm?pid=1&id=809&do=case]; *Sté Calzados Magnanni v. Sarl Shoes General International - S.G.I.*, Cour d'Appel de Grenoble, France, case #96J/00101 (21.10.1999) [available at http://www.unilex.info/case.cfm?pid=1&do=case&id=415&step=FullText]; *Hughes Electronic v. Société Technocontact*, Cour de Cassation, France, case #180 P (27.01.1998) [available at http://www.unilex.info/case.cfm?pid=1&do=case&id=279&step=FullText]; *Parties Unknown*, Landgericht

Likewise, it is predominantly accepted that silence or inactivity may only be interpreted as acceptance, if such a conclusion may be inferred from the practice established between parties. [49] Hence, although silence per se is not sufficient to be deemed as acceptance, the business or trade practices established by parties may be enough to conclude that an offeree accepted the proposal made.

Having discussed the concept of acceptance, it is important to proceed with the analysis of when it becomes effective. As noted by a number of distinguished scholars, such as J. Murray, I. Schwenzer and other authorities, the CISG has adopted a civil law receipt rule and rejected the common law "mailbox rule," according to which acceptance is effective upon dispatch. [50] Consequently, as affirmed by W. Dodge, "CISG places the risk of a lost communication on the offeree". [51] One cannot but agree with this view as the very wording of the Convention warrants such interpretation. According to Article 18 (2) of the CISG, an acceptance of an offer "becomes

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Frankfurt am Main, Germany case #2/1 O 7/94 (06.07.1994) [available at http://www.unilex.info/case.cfm?pid=1&do=case&id=189&step=FullText]; Case #5 U 209/94, Oberlandesgericht Frankfurt am Main, Germany (23.05.1995) [available at http://www.unilex.info/case.cfm?pid=1&do=case&id=188&step=FullText].

[49] Case #146453 / HA ZA 06-1789, Rechtbank Arnhem, Netherlands (17.01.2007) [available at the Dutch Courts' website, http://www.rechtspraak.nl]; Case # HG 940513, Handelsgericht des Kantons Zürich, Switzerland (10.07.1996) [available at http://www.unilex.info/case.cfm?pid=1&do=case&id=381&step=FullText]; Case #4C.103/2003, Bundesgericht court, Switzerland (04.08.2003) [available at http://www.unilex.info/case.cfm?pid=1&do=case&id=954&step=FullText]; *Filanto S.p.A. v. Chilewich International Corp.*, Case #91 Civ. 3253 (CLB), U.S. District Court, S.D., New York, USA (14.04.1992) [available at 789 Federal Supplement (1992), 1229].

[50] John Murray," An Essay on the Formation of Contracts and Related Matters under the United Nations Convention on Contracts for the International Sale of Goods," *Journal of Law and Commerce* 8 (1988): 22; Rob Schultz, "Rolling Contract Formation Under the UN Convention on Contracts for the International Sale of Goods," *Cornell International Law Journal* 35 (November 2001 / February 2002): 273; Ingeborg Schwenzer, Florian Mohs, "Old Habits Die Hard: Traditional Contract Formation in a Modern World," *Internationales Handelsrecht* (Sellier, Eruopean Law Publishers, 6/2006): 243; Peter Winship, "Formation of International Sales Contracts under the 1980 Vienna Convention," *International Lawyer* 17 (1983): 14

[51] William Dodge, "Teaching the CISG in Contracts," *Journal of Legal Education* 50 (March 2000): 81.

effective at the moment the indication of assent reaches the offeror." [52] It is important to note that acceptance must reach the offeror "within the time he has fixed or, if no time is fixed, within a reasonable time". [53] Hence, an offeror is afforded adequate protection against any lost communication. If acceptance is late, it is in the discretion of the offeror to treat it as effective. This is established in Article 21 of the CISG: "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". Consequently, the effectiveness of late acceptance is subject to the offeror's agreement to that effect.

It is essential to note that the Convention focuses not only upon the effectiveness of acceptance in the form of communication, but also that in the form of conduct without notice to the offeror. In compliance with Article 18 (3) of the CISG, if assent may be indicated by performing an act, then "the acceptance is effective at the moment the act is performed" without notice to the offeror under the condition that the act is performed within the time fixed in the offer or if not fixed within a reasonable time. As far as the issue of the withdrawal of contract acceptance is concerned, it is regulated in the same way as contract offer under the CISG. It may be withdrawn "if the withdrawal reaches the offeror before or at the same time as the acceptance would have become effective". [54] Thus, the key pre-requisite for the withdrawal of acceptance is the time factor.

[52] CISG, Article 18 (2)

[53] CISG, Article 18 (2)

[54] CISG, Article 22; Kazuaki Sono, "Formation of International Contracts under the Vienna Convention: A Shift above the Comparative Law," in *International Sale of Goods: Dubrovnik Lectures,* eds. P. Sarcevic and P. Volken, (Oceana, 1986):115; Allan Farnsworth, "Formation of Contract: Acceptance," in *Commentary on the International Sales Law,* eds. C. Bianca, M. Bonell (Milan: Giuffrè, 1987), 168.

Having analyzed the concept of acceptance, the moment it becomes effective and its withdrawal, it is important to proceed with the review of the issue of qualified acceptance, i.e. acceptance that alters the terms of the offer. As a general rule, if a reply to an offer contains additions or modifications, it is recognized as a counteroffer. [55] However, in compliance with Article 19 (2) of the CISG, 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". The CISG, hence, permits the conclusion of the contract even if acceptance contains terms different or additional from those contained in the offer as long as two criteria are satisfied. [56]

First, such terms should not be material. The Convention provides a clear guideline on what terms must be viewed as material. According to Article 19 (2) of the CISG, additional or different terms alter the terms of the offer materially, if they relate "among other things, to the price, payment, quality, quantity of goods, place and time of delivery, extent of one party's liability to the other or the settlement of disputes".[57] As this list of terms which are to be treated

[55] CISG, Article 19 (1); Peter Schlechtriem, "Battle of the Forms in International Contract Law: Evaluation of approaches in German law, UNIDROIT Principles, European Principles, CISG; UCC approaches under consideration," in ed. K. Thume, *Festschrift für Rolf Herber zum* 70 (Geburtstag, Newied: Luchterhand, 1999), 38; Maria del Pilar Perales Viscasillas, ""Battle of the Forms" Under the 1980 United Nations Convention on Contracts for the International Sale of Goods: A Comparison with Section 2-207 UCC and the UNIDROIT Principles, " *Pace International Law Review* 10 (1998): 101; Francois Vergne, "The "Battle of the Forms" under the 1980 United Nations Convention on Contracts for the International Sale of Goods," *American Journal of Comparative Law* (1985): 235.

[56] Larry DiMatteo, et al., "The Interpretive Turn in International Sales Law: An Analysis of Fifteen Years of CISG Jurisprudence," *Northwestern Journal of International Law and Business* 34 (Winter 2004): 350; Peter Schlechtriem, "Formation of the Contract," in eds. P. Schlechtriem, I. Schwenzer, *Commentary on the UN Convention on the International Sale of Goods* (CISG) (Oxford University Press, 2005): Art. 19 para. 8; John Murray, "The Definitive "Battle of the Forms": Chaos Revisited," *Journal of Law and Commerce* 20 (Fall 2000): 42; Jan Hellner, "The Vienna Convention and Standard Form Contracts," in *International Sale of Goods: Dubrovnik Lectures*, eds. P. Sarcevic and P. Volken (Oceana, 1986): 342.

[57] CISG, Article 19 (3).

as material is not exhaustive, the interpretation of what is material and what is not is, consequently, left to courts to decide. [58] This opens the door to some extent of subjectivity due to the absence of clear guidelines on what may be treated as an immaterial modification of terms of an offer.

Secondly, the offeror must not object to such modifications. In the absence of the offeror's objections "the terms of the contract are the terms of the offer with the modifications contained in the acceptance".[59] Thus, despite the general rule on the non-allowance of additions, limitations, modifications in the acceptance, the CISG allows such additions, if they do not materially modify the terms of the international sale of goods contract and if the offeror does not raise objections to that effect.

Concluding the analysis of the contract acceptance under the CISG, it is important to reiterate that the Convention contains four major rules concerning acceptance: requirements on what constitutes an acceptance, when it becomes effective, when it may be withdrawn and if it may alter the terms of the offer made. All of these rules must be strictly followed in order to enable the successful conclusion of a contract for the international sale of goods.

2.2.2. Kyrgyz legislation

Having discussed the legal regulation of the contract acceptance under the CISG, it is important to proceed with the legal analysis of acceptance in compliance with the Kyrgyz

[58] Case #2 Ob 58/97m, Oberster Gerichtshof, Austria (20.03.1997) [available at http://www.unilex.info/case.cfm?pid=1&do=case&id=254&step=FullText] (deciding that alterations of the offer which are favorable to an offeror are to be regarded as immaterial); Case #4 O 113/90, Landgericht Baden-Baden, Germany (14.08.1991) [available at http://www.unilex.info/case.cfm?pid=1&do=case&id=13&step=FullText] (deciding that the seller's term stipulating that any notice of defect or non-conformity must be given within 30 days from the moment of receiving of an invoice constitutes an immaterial modification).

[59] CISG, Article 19 (2)

legislation.

First, it is essential to review the concept of acceptance under the Kyrgyz law. In compliance with Article 399 of the Civil Code of Kyrgyzstan, acceptance is an "affirmative response received from a person to whom an offer is addressed". Unlike in CISG in which the indication of assent may take the form of a statement or other conduct, Kyrgyz law allows acceptance by conduct only if the offeror does not indicate otherwise. [60] Similarly to the Convention, the Kyrgyz Civil Code provides that silence per se shall not be treated as acceptance. However, the Kyrgyz legislation, contrary to the CISG, expressly stipulates that silence may amount to acceptance, if it follows from commercial practices or customs or from previous business relationships between the parties. [61] Hence, there are both similarities and minor differences in the concept of acceptance under the CISG and Kyrgyz law.

Having examined the concept of acceptance, it is important to proceed with the analysis of when it becomes effective and when it may be withdrawn. As in the CISG, acceptance under the Kyrgyz Civil Code becomes effective, when it reaches the offeror. [62] It is important to note that acceptance must reach the offeror within the time period set in the offer or, if no time is fixed, within a reasonable time. [63] Similarly to Article 21 of the CISG, if acceptance is late, it is in the discretion of the offeror to treat it as effective. Article 403 of the KR Civil Code states that a late acceptance is effective, if the offeror informs the offeree about its willingness to conclude the contract "immediately after receiving a delayed notice of acceptance". Likewise, the regulation

[60] CISG, Article 18 (1); Civil Code of the Kyrgyz Republic, Article 399 (3)

[61] Civil Code of the Kyrgyz Republic, Article 399 (2); *Commentary to Part 1 of the Civil Code of the Kyrgyz Republic* (Kommentarij k Grazhdanskomu kodeksu Kyrgyzskoj Respubliki chasti pervoj), V. 2, Ch. 10-22 (Bishkek: Academy Publishing House, 2005), 470.

[62] Civil Code of the Kyrgyz Republic, Article 394 (1)

[63] Civil Code of the Kyrgyz Republic, Articles 401, 402

of the withdrawal of acceptance under the Kyrgyz law is analogous to that in the CISG. An acceptance may be withdrawn, if a notice of withdrawal is "received prior to, or at the same time as the acceptance itself" [64] Thus, the key pre-requisite for the withdrawal of acceptance is the time factor.

Having analyzed the concept of acceptance, the moment it becomes effective and its withdrawal, it is important to proceed with the review of the issue of acceptance on conditions other than the ones stipulated in the offer. In accordance with Article 399 of the Kyrgyz Civil Code, acceptance must be full and unconditional. As further stipulated in Article 404 of the Code:

> "The response of an offeree, indicating the consent to conclude a contract on terms other than those proposed in an offer, shall not be regarded as an acceptance. Such response shall be recognized as a denial of the original offer and at the same time as a counteroffer." [65]

As is evident from the wording of Article 404, any modification, be it material or immaterial, of the original offer is treated as the new offer. Consequently, one may conclude that the Kyrgyz law is based on the so-called "mirror-image rule," according to which acceptance must be complete and unconditional.

At the same time it is important to note that the Kyrgyz law places an additional obligation on an offeror with respect to commercial contracts for sale of goods. If the offeror receives acceptance containing conditions other than those proposed in the offer, he must take measures "either to negotiate the respective terms of the contract or notify the other party in writing about the refusal to enter into the contract within thirty days of the receipt of the proposal unless

[64] Civil Code of the Kyrgyz Republic, Articles 400

[65] Civil Code of the Kyrgyz Republic, Article 404

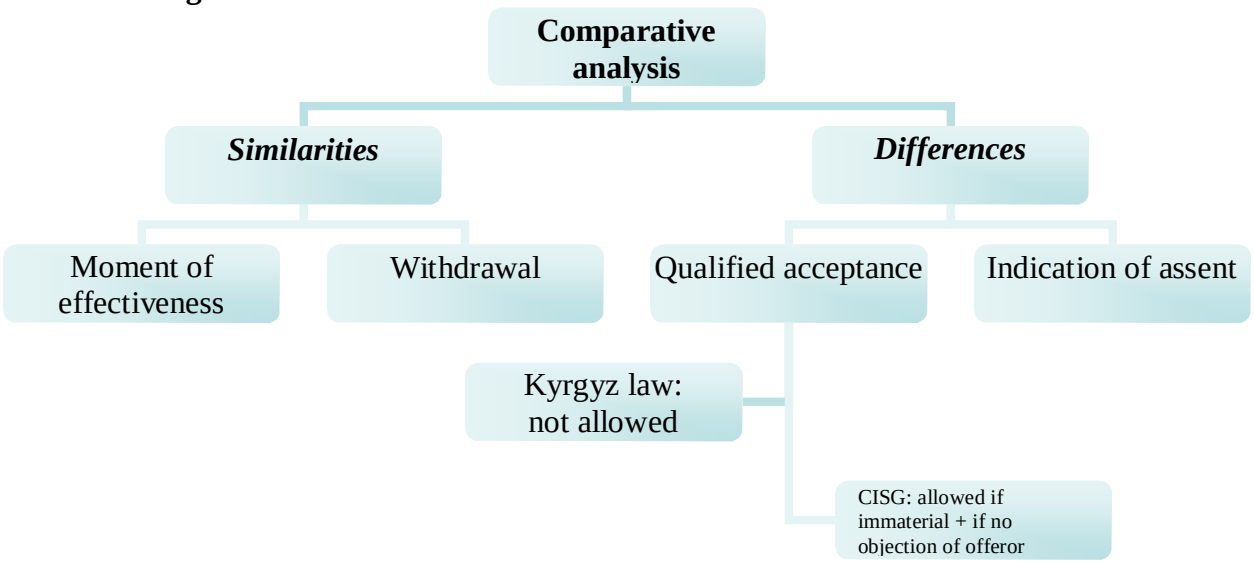
another period is stipulated by law or agreed upon between the parties" [66] The present provision of the Civil Code, hence, makes it obligatory for the offeror to actively react to acceptance containing alterations or modifications. It requires the offeror either to notify the offeree of its rejection of acceptance or to continue negotiating the terms of the contract. This provision has been recognized as according protection for the offeree, since it provides for a 30-day period during which the offeror must inform the offeree about its intentions with respect to contract conclusion. [67] Although the offeror's failure to take active measures will not result in finding the contract to be concluded on modified terms stipulated in acceptance, it will give the offeree the right to sue the offeror for damages for "evading from the settlement of terms and conditions of the contract" in compliance with Article 471 (3) of the Kyrgyz Civil Code.

As it could be seen from the analysis of contract acceptance, the provisions on acceptance under the CISG and the Kyrgyz Republic share both similarities and differences that may be summarized in the table below:

[66] Civil Code of the Kyrgyz Republic, Article 471

[67] *Commentary to Part 2 of the Civil Code of the Kyrgyz Republic* (Kommentarij k Grazhdanskomu kodeksu Kyrgyzskoj Respubliki chasti vtoroj), V. 1, Ch. 23-29 (Bishkek: Academy Publishing House, 2005), 229.

Table 2. Comparative analysis of contract acceptance under the CISG and Kyrgyz legislation



As is evident from the above table, both the CISG and Kyrgyz law have similar rules on the effectiveness of acceptance and its withdrawal. However, there are two differences with respect to the legal regulation of an indication of assent and qualified acceptance. While the first difference regarding the form of assent is a minor one, the second difference concerning acceptance with modifications or/and additions is significant, with the Kyrgyz law providing rules that contradict those contained in the CISG. Concluding paragraph 2.2.of the first chapter of the thesis on contract acceptance, it is important to reiterate that the comparative analysis of the provisions on contract acceptance under the Kyrgyz legislation and CISG demonstrates that there are both similarities and differences in its legal regulation.

2.3. Contract form

Having discussed the legal regulation of the contract offer and acceptance, it is important to undertake a comparative analysis of the requirements set for the form of contracts for the international sale of goods under the CISG and Kyrgyz civil legislation.

2.3.1. CISG

The Convention contains four major articles (Articles 11, 12, 13, 96) that govern the issue of the form of contracts for the international sale of goods. While Articles 11, 12, and 96 are focused upon the form requirements for the international sale of goods contracts, Article 13 defines what may be understood as a written form under the CISG.

First, it is essential to analyze the form requirements in general. In accordance with Article 11 of the CISG, a "contract of sale need not be concluded in or evidenced by writing and is not subject to any other requirement as to form…[and]…may be proved by any means, including witnesses". In other words, in compliance with the CISG, an international contract of sale may be concluded in an oral form. [68] This provision of the CISG gave rise to fierce debates among the representatives of various countries as evidenced by the legislative history of the CISG. [69] Consequently, a compromise was reached in the form of CISG Article 12.

At present although the Convention does not impose any requirements as to the form of contracts for the international sale of goods, it, nevertheless, allows parties to the CISG to derogate from Article 11 by making reservations as to its inapplicability. The CISG Article 12 establishes that "any provision of articles 11, 29, Part II of the Convention that allows a contract of sale […] or any offer, acceptance or other indication of intention to be made in any form other

[68] Jerzi Rajski, "Form of Contract," in *Commentary on the International Sales Law*, eds. C. Bianca, M. Bonell (Milan: Giuffrè, 1987), 121; Alejandro Garro, "Reconciliation of Legal Traditions in the U.N. Convention on Contracts for the International Sale of Goods," *International Lawyer* 23 (1989): 461; Explanatory Note by the UNCITRAL Secretariat on the United Nations Convention on Contracts for the International Sale of Goods, *U.N. Doc. V.89-53886 (1989)* (available at http://www.cisg.law.pace.edu/cisg/text/p23.html).

[69] 2 UNCITRAL Yearbook 48 no. 83 (1971); 68. 6 UNCITRAL Yearbook 72 no. 6 (1975): 8 *id.* 112 (1977); 1 UNCITRAL Yearbook 170 no. 91, (1968-1970); A/Conf. 97/C.1/L.71, 76 (= O.R. 91); A/Conf. 97/C.1/SR.8 at 4 *et seq.* (= O.R. 271 *et seq.*); A/Conf.97/C.1/L.35 (= O.R. 91); A/Conf. 97/C.1/SR.8 at 5 *et seq.* (= O.R. 272 *et seq.*); Gyula Eörsi, "General Provisions," in *International Sales: The United Nations Convention on Contracts for the International Sale of Goods*, eds. N. Galston and H. Smit (1984), 2-31.

than in writing does not apply, where any party has his place of business in a contracting state which has made a declaration under Article 96 of the Convention". This article makes a reference to Article 96 of the CISG which expressly permits parties to make reservations on the inapplicability of the form requirements set under the CISG Article 11. Article 96 of the Convention provides for the following:

> "A Contracting State whose legislation requires contracts of sale to be concluded in or evidenced by writing may at any time make a declaration in accordance with article 12 that any provision of article 11, article 29, or Part II of this Convention, that allows a contract of sale or its modification or termination by agreement or any offer, acceptance, or other indication of intention to be made in any form other than in writing, does not apply where any party has his place of business in that State." [70]

States that are parties to the CISG are, hence, entitled to make a reservation on the inapplicability of Article 11 of the CISG at any time by following the procedure, established for making such declarations under Article 97 of the CISG. Such reservations must be made "in writing and be formally notified to the depositary" as stipulated in Article 97 of the Convention.

Having discussed the form requirements set for contracts for the international sale of goods in general, it is important to proceed with the analysis of what is treated as the written form under the CISG. Article 13 of the Convention provides that "for the purposes of this Convention "writing" includes telegram and telex". Should this provision be interpreted as providing an exhaustive list of what means of communication can be considered as amounting to the written form? The prevailing view is that this provision is not an exhaustive enumeration of what may constitute the written form under the CISG. [71] Specifically, as professors J. Ziegel and

[70] CISG, Article 96

[71] Peter Schlechtriem, *Uniform Sales Law - The UN-Convention on Contracts for the International Sale of Goods* (Vienna: Manz, 1986): 46; John Honnold, *Uniform Law for International Sales under the 1980 United Nations Convention,* 3d. ed. (The Hague: Kluwer Law International, 1999): 141; Charles Martin, "The Electronic Contracts Convention, the CISG, and New Sources of E-Commerce Law," *Tulane Journal of International & Comparative*

C. Samson put it, telegram and telex were added as examples to **"**ensure that "writing" was interpreted liberally conformably to modern means of communication". [72] Furthermore, as stated in the International Sales Convention Advisory Council (CISG-AC) Opinion no 1 on Electronic Communications under CISG, "writing" within the meaning of the Convention "includes any electronic communication retrievable in perceivable form". [73] One cannot but agree with this interpretation of Article 13, as it is warranted by its drafting history. According to the legislative history of Article 13, the wording of the Article was proposed by the Federal Republic of Germany to facilitate the conclusion of contracts in a speedier manner.[74] Thus, considering the predominant view among scholars and the legislative history of Article 13 of the CISG, it is reasonable to conclude that the use of modern means of communication satisfies the written form requirement under the Convention.

Summarizing the analysis of the requirements on the form set for contracts for the international sale of goods under the CISG, one may arrive at two conclusions. First, although the Convention does not impose any written form requirements for contract conclusion, member states to the CISG may derogate from the rules of the Convention by making reservations as to its inapplicability with respect to the rules on contract form. Secondly, despite the absence of an

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Law 16-2 (Spring 2008): 474; Jennifer Hill, "The Future of Electronic Contracts in International Sales: Gaps and Natural Remedies Under the United Nations Convention on Contracts for the International Sales of Goods," *Northwestern Journal of Technology and Intellectual property* 2 (2003): 4; Siegfried Eiselen, "Electronic Commerce and the U.N. Convention on Contracts for the Sale of Goods (CISG)," *EDI Law Review* 6 (1999): 36.

[72] Jacob Ziegel and Claude Samson, "Report to the Uniform Law Conference of Canada on Convention on Contracts for the International Sale of Goods, 1981, Commentary on Article 13 CISG" (available at *http://www.cisg.law.pace.edu/cisg/wais/db/articles/english2.html*)

[73] *The International Sales Convention Advisory Council (CISG-AC) Opinion no 1, Electronic Communications under CISG*, 15 August 2003. Rapporteur: Professor Christina Ramberg, Gothenburg, Sweden (available at http://www.cisg.law.pace.edu/cisg/CISG-AC-op1.html#1).

[74] A/Conf. 97/C.1/L.17; A/Conf. 97/C.1/SR.7 at 10 § 73.

express regulation of electronic communications in the CISG, the intent behind Article 13 of the Convention makes it possible to conclude that the use of perceivable and retrievable electronic means of communication satisfies the written form requirement.

2.3.2. Kyrgyz legislation

Having discussed the legal regulation of the contract form under the CISG, it is first and foremost important to proceed with the legal analysis of the requirements set forth for the form of contracts for the international sale of goods under the Kyrgyz legislation. As a general rule, contracts "need not be concluded in writing or be subject to any form requirements, unless otherwise stipulated in the law." [75] Domestic contracts of sale may be concluded in an oral form, provided that they do not exceed ten times the amount of the monthly calculation index set by the Kyrgyz Government and are not concluded between legal entities or between a legal entity and an individual. [76] Hence, the rules on the form of domestic contracts of sale are rather flexible, as they generally do not mandate the observance of the written form.

However, contracts for the international sale of goods are subject to the strict written form requirements. Article 1190 of the Kyrgyz Civil Codes provides that "a foreign economic transaction at least one of the participants of which is the legal entity or individual of the Kyrgyz Republic shall be formalized in writing regardless of the place of transaction". As specified in Article 178 of Kyrgyzstan Civil Code, the failure to comply with the requirement of the written form entails the invalidity of the transaction. The contract on the international sale of goods is a

[75] Civil Code of the Kyrgyz Republic, Article 395 (1)

[76] Civil Code of the Kyrgyz Republic, Articles 175, 177; Law of the Kyrgyz Republic on the "Calculation Index" #3 of January 27, 2006 (Zakon Kyrgyzskoj Respubliki o raschetnom pokazatele), Article 2; Decree of the Parliament of the Kyrgyz Republic #1115-III "On the approval of the amount of the monthly calculation index set by the Kyrgyz Republic Government" of June 15, 2006 (Postanovlenie Jogorku Kenesha Kyrgyzskoj Respubliki ob utverzhdenii razmera raschetnogo pokazatelya) [establishing the amount of the monthly calculation index at a rate of 100 soms which as of March 23, 2009 amounts to 2 euro]

foreign economic transaction. [77] Therefore, in compliance with the Kyrgyz Republic legislation, such contract must be concluded in the written form. This means that the provision of the CISG on the contract form grossly contradicts the requirements stipulated in the Kyrgyz Republic legislation. The present legislative discrepancy may be demonstrated in the table below:

Table 3. Comparative analysis of the form of contracts for the international sale of goods under the CISG and Kyrgyz legislation

As is clear from the above table, the form requirements under the CISG and Kyrgyz legislation clearly contradict each other. This is further aggravated by the fact that Kyrgyzstan has failed to make a reservation on the inapplicability of Article 11 of the CISG in cases, when any party to the international sale of goods contract has his place of business in the Kyrgyz Republic.

Having discussed the form requirements set for contracts for the international sale of goods in general, it is important to proceed with the analysis of what is recognized as satisfying the written form under the Kyrgyz legislation. In addition to the traditional means of concluding the contract by signing one document, the contract is recognized as being concluded in the written form, if it is done via the exchange of documents by "mail, telegraph, teletype, telephone, by the electronic, fax or any other type of the means of communication, which makes it possible to authentically establish that the document comes from the contracting party".[78] Although the

[77] *Commentary to Part 2 of the Civil Code of the Kyrgyz Republic* (Kommentarij k Grazhdanskomu kodeksu Kyrgyzskoj Respubliki chasti vtoroj), V. 4, Ch. 48-65 (Bishkek: Academy Publishing House, 2005), 590.

[78] Civil Code of the Kyrgyz Republic, Article 395 (2).

Kyrgyz Republic has not yet ratified the United Nations Convention on use of Electronic Communalizations in International Contracts which, unlike the CISG, expressly gives electronic signatures and records the same validity and enforceability as manual signatures and paper-based transactions, the Kyrgyz law adopts the same approach in its legislation. It allows the conclusion of the contract via electronic means as it is evident from the language of the Civil Code as well as the key laws on the Kyrgyz Republic on this issue. [79] Therefore, the Kyrgyz law fully conforms to the provisions of Article 13 of the CISG, which is recognized as authorizing the conclusion of contract via any electronic communication that may be retrieved in the form that is perceivable.

Concluding paragraph 2.3.of the first chapter of the thesis on contract form, it is essential to reiterate that both the CISG and Kyrgyz legislation have similar rules on what is recognized as satisfying the written form requirement. However, as is evident from the analysis of the legal regulation of the contract form, there is one significant difference with respect to the requirement of the form in itself. While the CISG allows contracts for the international sale of goods to be concluded in an oral form, the Kyrgyz legislation strictly prescribes the written form for such contracts. Hence, the comparative analysis of the provisions on the contract form under the Kyrgyz legislation and CISG demonstrates that there are both similarities and differences in its legal regulation.

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Summarizing the first chapter of the thesis, it is important to state that as the comparative analysis of the formation of contracts for the international sale of goods under the CISG and

[79] Law of the Kyrgyz Republic "On the Electronic Digital Signature" #92 of 17 July 2004 (Zakon Kyrgyzskoj Respubliki ob elektronnoj cifrovoj podpisi); Law of the Kyrgyz Republic on the Electronic trade, #32 of June 14, 2007 (Zakon Kyrgyzskoj Respubliki ob elektronnoj torgovle)

Kyrgyz legislation shows, the rules regulating the contract offer, acceptance and form are generally analogous. Under both the UN sales convention and Kyrgyz civil legislation such issues as the effectiveness, revocation and termination of offer, effectiveness and withdrawal of acceptance as well as the criteria set for satisfying the written form requirement are the same.

However, there are a number of major discrepancies between the provisions of the Convention and Kyrgyz legislation. These concern issues related to the sufficient definiteness of an offer, qualified acceptance and form of contracts for the international sale of goods. Consequently, as a comprehensive study of the CISG, Kyrgyz legislation, relevant court/arbitration tribunal practice and doctrinal sources demonstrates, there are both similarities and differences in the legal regulation of the formation of contracts for the international sales of goods under the Convention and Kyrgyz legislation.

CHAPTER 2.THE PROBLEMATIC ASPECTS OF THE LEGAL REGULATION OF THE FORMATION OF CONTRACT FOR THE INTERNATIONAL SALE OF GOODS UNDER CISG AND KYRGYZ LEGISLATION

The thorough understanding of the formation of international sale of goods contracts under the CISG and Kyrgyz legislation requires not only the comprehension of its conceptual framework and key elements of its formation, but also of its problematic aspects. These problematic aspects concern a number of significant inconsistencies in the Kyrgyz Republic's legislative acts with those of the CISG that are related to the contract offer, acceptance, and form. Despite the CISG's entry into force in the year of 2000, the Kyrgyz Republic has not yet taken steps to harmonize the discrepancies between the respective provisions of its civil legislation with those of the present Convention. The current imperfection of Kyrgyzstan's legislation proves to be a significant barrier to effective cross-border trade transactions by creating legal uncertainty. Such a situation impedes the development of the rule of law, which most importantly means the existence of a "body of laws that is transparent, reasonably predictable, validly derived, and fairly and equitably applied".[80] The second chapter of the thesis will, therefore, be focused not only upon the analysis of the key problematic aspects of the legal regulation of the formation of contracts for the international sale of goods under the CISG and Kyrgyz legislation, but also on the examination of their possible solutions.

§ 1. The problematic aspects of contract offer

First, it is necessary to analyze the problematic aspects related to the contract offer. As is evident from the analysis of contract offer in chapter 1 of the thesis, the general criteria of what constitutes an offer are the same under the CISG and Kyrgyz legislation. Under both the

[80] Stefan Messmann, "Enforcement of Contracts in Central and Eastern Europe – A General Survey," in *Enforcing Contracts in Transition Economies,* eds. Andenes Mads and Sanders Gerar (London 2005), 22.

Convention and Kyrgyz Republic Civil Code a proposal is recognized to be an offer, if it is (1) addressed to specific persons, (2) indicates the offeror's intention to be bound and (3) is sufficiently definite. [81] However, there is one major inconsistency between the two acts. This divergence lies in the determination of what is understood as being sufficiently definite. While under Article 14 of the CISG sufficient definiteness means the indication of the description of goods, their quantity and price, the Kyrgyz legislation limits sufficient definiteness only to the determination of the description and quantity of goods with no requirement on the indication of price in the offer.

Before proceeding with the in-depth analysis of this divergence between the CISG and Kyrgyz legislation, it is first important to establish whether CISG Article 14 requirements on the necessity of fixing of the price in the contract offer are overridden by Article 55 of the CISG or not. Article 55 stipulates: "Where a contract has been validly concluded but does not expressly or implicitly fix or make provision for determining the price, the parties are considered, in the absence of any indication to the contrary, to have impliedly made reference to the price generally charged at the time of the conclusion of the contract for such goods sold under comparable circumstances in the trade concerned." Articles 14 and 55 of the CISG clearly contradict each other.

The issue of whether these two articles of the Convention may be reconciled has been subject to fierce controversy as evidenced by the different positions taken up by various scholars, courts and arbitration tribunals. Some scholars, such as professors Bonell, Honnold, Tallon and others maintain that there needs to be no agreement on price in the contract offer, if such offer is

[81] Civil Code of the Kyrgyz Republic, Articles 393, 396; CISG, Article 14

accepted by the parties to the contract. [82] In this way they argue that the price may be established on the basis of prices generally charged for the same goods in the relevant industry in accordance with Article 55 of CISG. This position has been adopted by some courts which found an offer to be valid even when it did not indicate the price [83] However, in none of these decisions have the judges legally justified their stance.

The position adopted by these scholars and several courts is legally groundless. The way of price determination set by Article 55 of the CISG can only be invoked after a contract has been concluded under the rules established by CISG Article 14, which clearly mandates the fixing of the price in the offer. One cannot but agree with Professor Kelso, who stated that arguing that there needs to be no indication of price in the contract offer "misinterprets the purpose of article 55 and does harm to the plain meaning of article 14". [84] This is reinforced by the language of Article 55 of CISG itself, which indicates that it applies "where a contract has been validly concluded".

Other scholars, such as A. Farnsworth, P. Winship, L. Ryan and others maintain that Article 14 of the CISG takes precedence over the CISG Article 55, since there must be a valid offer that needs to be formed under Article 14 of the CISG before one can invoke Article 55 of

[82] Michael Bonell, "The Convention on Contracts for the International Sale of Goods," *DPCI* (1981/3): 24; Kazuaki Sono, "Formation of International Contracts Under the Vienna Convention: A Shift Above the Comparative Law," in *International Sale of Goods: Dubrovnik Lectures 1, 2*, eds. P. Sarcevic and P. Volken (Oceana Pubns, 1986), 111; John Honnold, *Uniform Law for International Sales under the 1980 United Nations Convention*, 2nd ed. (Kluwer Law and Taxation Publishers, 1991), 164; Denis Tallon, *The determination of price in the contract for the international sale of goods* (Paris, 1989), 31; Ilya Eliseev, *The Civil Regulation of the International Sale of Goods* (St. Petersburg: Juridical Center Press, 2002), 160; Nina Galston and Hans Smit, "The International Sales: The United Nations Convention on Contracts for the International Sale of Goods" (paper presented at the Conference held by the Parker School of Foreign and Comparative Law, Columbia University, New York 1984).

[83] *C v. W*, District Court St. Gallen, Switzerland, case # 3PZ 97/18 (3 July 1997)[available at http://cisgw3.law.pace.edu/cases/970703s1.html]; Oberlandesgericht Rostock, Germany, case #6 U 126/00 (10.10. 2001) [available at http://www.CISG-online.ch/CISG/urteile/671.htm].

[84] Clark Kelso, "The United Nations Convention on Contracts for the International Sale of Goods: Contract Formation and the Battle of the Forms," *Colum. J. Trans. L.* 21 (1983): 537.

the Convention. [85] This view has been well-stated by Professor Rowe, who wrote: "If there is no reference to price, the proposal is not sufficiently definite to be considered an offer. If there is no offer, how can there be a contract?". [86] The position of these authors is in line with the wording of the Convention. It is impossible to conclude a contract without specifically setting out provisions for the price, since a contract may only be concluded, if the offer is sufficiently definite.

The analysis of the court/arbitration tribunal practice around the world reinforces this view. One of such examples may be a 2007 court decision, issued by the state district court of the United States. In accordance with this case, a U.S. company involved in the construction of a multi-purpose center situated in Colorado ordered reinforcing mesh from a Canadian seller. [87] The court, when reviewing the contract formation and requirements for offer, stated that an order must indicate the goods and contain their quantity and price in order to amount to an offer under the CISG. A similar decision was reached by the Higher Regional Court of Münich. According to the case, a German seller and a Singaporean buyer entered into an international sale of goods contract on the purchase of luxury vehicles. [88] Apart from a number of other issues, the court, in particular, held that no contract of sale concerning 26 Porsche Cayenne had been concluded,

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[85] Allan Farnsworth, "Formation of Contract," in *International Sales: The United Nations Convention on Contracts for the International Sale of Goods*, eds. N. Galston and H. Smit (New York, 1984): Ch. 3, 3-5; Peter Winship, "Formation of International Sales Contracts under the 1980 Vienna Convention," *Intl. Lawyer* 17-1 (1983): 5-6; Lisa Ryan, "The Convention on Contracts for the International Sale of Goods: Divergent Interpretations," *Tulane Journal of International and Comparative Law* 4 (Winter 1995):109; Jacqueline Mowbray, "The Application of the United Nations Convention on Contracts for the International Sale of Goods to E-Commerce Transactions: The Implications for Asia," *Vindobona Journal of International Commercial Law & Arbitration* 7 (2003):137.

[86] Michael Rowe, "UN Convention on International Sales Law," *Int'l. Fin. L. Rev*. 20 (July 1983): 21.

[87] *The Travelers Property Casualty Company of America and Hellmuth Obata & Kassabaum, Inc. v. Saint-Gobain Technical Fabrics Canada Ltd*, case # Civ. 04-4386 ADM/AJB.S., U.S. District Court, Minnesota, USA (2007) [available at http://www.unilex.info/case.cfm?pid=1&do=case&id=1166&step=FullText]

[88] Higher Regional Court of Münich (Oberlandesgericht München), Germany, case # 23 U 2421/05 (2006).

since the buyer's ordering letter failed to contain the price for each such vehicle. The Court, therefore, could not find such proposal to be an offer, since as the Court noted, pursuant to Art. 14 of the CISG an acceptable offer requires the determination of price. [89]

Analogous decisions, in which courts have applied the CISG and found the criterion of sufficient definiteness to mean the indication of goods, their quantity and price, were issued by courts in a number of countries, such as Russian Federation, Switzerland, Germany, Italy and others. [90] Similar decisions were also issued by the courts of the United States, Canada, Austria and other countries. [91] Therefore, the conclusion that follows in light of the language of the CISG Articles 14 and 55, legally substantiated position of scholars and prevalent court/arbitral practice is that a proposal must indicate the description of goods, their quantity and price in order to amount to an offer within the meaning of the CISG.

Having discussed the requirement of sufficient definiteness under the CISG, it is important to analyze how it contradicts the requirements set for the sufficient definiteness of the contract offer under the Kyrgyz law. While under Article 14 of CISG sufficient definiteness means the indication of the description of goods (subject matter of the contract), their quantity and price, the Kyrgyz legislation limits sufficient definiteness only to the determination of the

[89] Ibid.

[90] Tribunal of Int'l Commercial Arbitration at the Russian Federation Chamber of Commerce, Russian Federation, case #309/1993, (1995); Bundesgericht, Switzerland, case #4C.474/2004 (2005); *MALEV Hungarian Airlines v. United Technologies International Inc. Pratt & Whitney Commercial Engine Business*, Supreme Court of the Republic of Hungary, Hungary, case # Gf.I.31 349/1992/9 (1992); Landgericht Neubrandeburg, Germany, case #10 O 74/04 (2005); *Takap B.V. v. Europlay S.r.l.*, Tribunale di Rovereto, Italy, case #914/06 (2007); OR.960-0013, Handelsgericht Aargau, Switzerland (1997); Landgericht München, Germany, case # 8 HKO 24667/93 (1995); Handelsgericht St. Gallen, Switzerland, case # HG 45/1994 (1994).

[91] *Easom Automation Systems, Inc. v. Thyssenkrupp Fabco, Corp.*, .S. District Court, Eastern District of Michigan, USA, case #06-14553, 2007 WL 2875256 (2007); *Cherry Stix Ltd. v. President of the Canada Borders Services Agency*, Canadian International Trade Tribunal, Canada, case # AP-2004-009 (2005); *Chateau Des Charmes Wines Ltd. v. Sabate, USA, Inc., Canada*, case #03-CV-261424CM 3 (2005); HG 04 0374/U/ei, Handelsgericht Zürich, Switzerland (2005); 2002/02304, Cour d'Appel de Paris, France (2003); 1 U 143/95 and 410 O 21/95, Oberlandesgericht Hamburg, Germany (1997); *M. v. K.*, the Supreme Court of Austria (Oberster Gerichtshof), Austria, case#2 Ob 547/93 (1995); Obergericht des Kantons Thurgau, Switzerland, case # ZB 95.22 (1995).

description and quantity of goods with no requirement on the indication of price in the offer. Specifically, according to Article 396 (1) of the Kyrgyz Civil Code, a proposal is sufficiently definite, if it contains all fundamental terms of the contract. The fundamental terms of the contract for the sale of goods are the description and quantity of goods under Article 417 (3) of the Civil Code of the Kyrgyz Republic. If the contract fails to specify the price and the price cannot be determined on the basis of contract terms, it may be established in accordance with point 3 of Article 390 of the Kyrgyz Republic Civil Code. Article 390 (3) clearly stipulates that in the event the "price is not specified in a contract and may not be determined on the basis of contractual conditions, settlements between the parties shall be carried out according to the price usually charged under comparable conditions for similar goods, works and services". [92] The offer in a contract of sale of goods under the Kyrgyz law, consequently, must contain provisions concerning only the description and quantity of goods to be recognized as sufficiently definite under Article 396 (1) of the Kyrgyz Civil Code.

Unlike the CISG, the civil legislation of the Kyrgyz Republic, hence, does not contain an imperative norm on that the price of goods must be indicated in the offer, as the price is not treated as an essential term of the contract. The provisions of the CISG on the contract offer, consequently, come in direct collision with those of the civil legislation of the Kyrgyz Republic. Such collision entails significant consequences in practice. Specifically, in several arbitral awards rendered by the tribunal constituted by the International Court of Arbitration in affiliation with the Chamber of Commerce and Industry of the Kyrgyz Republic, it was held that the contract for the international sale of goods was not concluded, since parties to the contract failed

[92] Civil Code of the Kyrgyz Republic, Article 390 (3)

to indicate the price in the contract offer.[93] The tribunal specifically referred to the CISG in establishing the criteria for the sufficient definiteness of the contract offer, since the rules of an international agreement ratified by the Kyrgyz Republic Parliament have priority over the Kyrgyz civil legislation in accordance with Article 6 of the Kyrgyz Civil Code. Since the CISG is an international agreement ratified by the Parliament, its provisions were applied.

As the analysis of the arbitral awards rendered in the Kyrgyz Republic demonstrates, the divergence between the requirements set for the sufficient definiteness of the contract under the CISG and Kyrgyz legislation creates legal ambiguity. Although one may rely on Article 6 of the Kyrgyz Civil Code which establishes the priority of CISG over the national Kyrgyz legislation, this in itself will not solve the essence of the problem, but will only impede the fruitful development of international trade in the Kyrgyz Republic. Hence, it is necessary to harmonize the provisions of the Convention with those of the Kyrgyz national legislation in order to ensure the effective application of the principle of legal certainty for merchants involved in the business of sale of goods.

There may be two **practical solutions** to the present problem. The first solution lies in introducing an amendment to Article 417 (3) of the Civil Code of Kyrgyzstan. The proposed text of amendment would read as follows: "The terms of the contract of sale on goods are considered to be agreed upon, if the contract makes it possible to determine the name, quantity, and price of goods." Making the term on price fundamental in contracts of commercial sale of goods will

[93] Arbitral Award #1-2-006-030305 of the International Court of Arbitration in affiliation with the Chamber of Commerce and Industry of the Kyrgyz Republic (28 April 2005); Arbitral Award # 1-1-001-170204 of the International Court of Arbitration in affiliation with the Chamber of Commerce and Industry of the Kyrgyz Republic (30 June 2004); The interview with the Chair of the International Court of Arbitration in affiliation with the Chamber of Commerce and Industry of the Kyrgyz Republic, Shamaral Maichiev (February 4, 2009); The Arbitration Rules of the International Court of Arbitration in Affiliation with the Chamber of Commerce and Industry of the Kyrgyz Republic of February 8, 2007 (approved by the resolution of the Supervisory Board of the International Court of Arbitration in affiliation with the Chamber of Commerce and Industry of the Kyrgyz Republic)

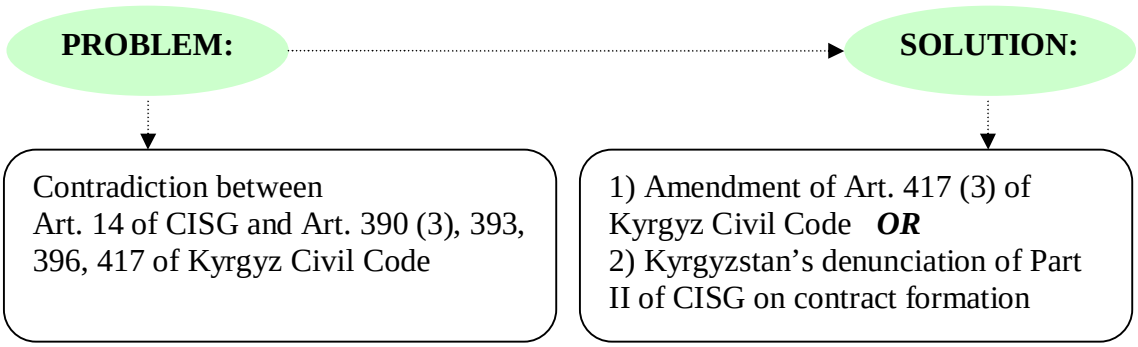
result in the necessity of fixing the price in the contract offer for these types of contracts under the Kyrgyz legislation. The proposed amendment will make it possible to harmonize the provisions of Kyrgyz law on contract offer with those of the CISG. Consequently, an offer would be treated as sufficiently definite, if it indicates the nature of goods (subject matter of the contract), their quantity and price under both the Kyrgyz law and the Convention.

The second alternative solution lies in circumventing the contradictions, contained in Articles 14 of the CISG and Articles 390 (3), 393, 396, 417 of the Kyrgyzstan Civil Code by following a partial denunciation procedure under Article 101 of the CISG. In accordance with Article 101 of CISG, the Kyrgyz Republic may denounce Part II of CISG by "a formal notification in writing addressed to the depositary." The present solution will help to eliminate contradictions, found in the UN Convention and Kyrgyz legislation with respect to the sufficient definiteness of the contract offer. This approach is supported by scholars, such as professors Fritz Enderlein, Dietrich Maskow and others who suggest that states, whose national legislation allows the conclusion of contracts of sale without indicating price in the offer, should make appropriate declarations under CISG to be bound by Part I (sphere of application and general provisions) and Part III (sale of goods) of the CISG, but not Part II (formation of the contract) of the Convention. [94]

The above two solutions recommended for the harmonization of the Kyrgyz Republic legislation with those of the CISG may be summarized in the table below:

[94] Fritz Enderlein and Dietrich Maskow, *International Sales Law: United Nations Convention on Contracts for the International Sale of Goods, Convention on the Limitation Period in the International Sale of Goods (Commentary)* (New York: Oceana Publications, 1992), 208; Tatyana Lazareva, "Price as the Term of the Contract for the International Sale of Goods," in ed. Natalya Marysheva, *The Problems of the Private International Law* (Moscow: 2000), 101-2; Stephanie Greene, et al., "The Interpretive Turn in International Sales Law: An Analysis of Fifteen Years of CISG Jurisprudence," *Northwestern Journal of International Law and Business* 34 (Winter 2004): 340; Glenn Feltham, "The United Nations Convention on Contracts for the International Sale of Goods," *Journal of Business Law* (1981): 346, 351.

Table 4. The problematic aspect of contract offer under the CISG and Kyrgyz legislation and recommended solutions



It is necessary for the Kyrgyz Republic to adopt one of the above-stated solutions in order to harmonize its legislation with those of the CISG by eliminating the contradictory provisions on the contract offer. Although both of these solutions will help to eliminate the present legislative inconsistencies, it is, nevertheless, advisable to follow the first solution by introducing the relevant amendment to the Kyrgyz law. This will have the effect of harmonizing the provisions on contract offer under both the Kyrgyz legislation and the Convention without the necessity of denouncing the provisions of Part 2 of the CISG. Concluding the first paragraph of the second chapter, it is important to reiterate that the first problematic aspect of the legal regulation of the formation of contract for the international sale of goods is connected with the contract offer. The proposed solutions to this problem may aid in its effective resolution in practice.

§ 2. The problematic issues of contract acceptance

Having discussed the problematic aspects related to the contract offer, it is important to analyze problems, connected with the contract acceptance. As is evident from the analysis of contract acceptance in chapter 1 of the thesis, both the CISG and Kyrgyz law have similar rules on the effectiveness of acceptance and its withdrawal. However, there is one major

inconsistency between the two acts. This divergence lies in the regulation of qualified acceptance. While the CISG allows the conclusion of the contract based on acceptance that "contains additional or different terms which do not materially alter the terms of the offer" in the absence of offeror's objections, the Kyrgyz law does not allow qualified acceptance at all. [95]

In accordance with Article 19 (2) of the CISG, 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". The CISG, hence, permits the conclusion of the contract even if acceptance contains terms different or additional from those contained in the offer as long as two criteria are satisfied. [96] First, such terms should not be material. The Convention provides a clear guideline on what can be viewed as material terms. According to Article 19 (2) of the CISG, additional or different terms alter the terms of the offer materially, if they relate "among other things, to the price, payment, quality, quantity of goods, place and time of delivery, extent of one party's liability to the other or the settlement of disputes".[97] Secondly, the offeror must not object to such modifications, in which case "the terms of the contract are the terms of the offer with the modifications contained in the acceptance".[98] Thus, despite the general rule on the non-allowance of additions, limitations, modifications in the acceptance, the CISG allows such additions, if they do not materially modify the terms of the international sale of goods contract and if the offeror does not object in that regard.

[95] CISG, Article 18; Civil Code of the Kyrgyz Republic, Articles 399, 404.

[96] Allison Butler, "The International Contract: Knowing when, Why, and How to "Opt Out" of the United Nations Convention on Contracts for the International Sale of Goods," *Florida Bar Journal* 76 (May 2002): 29.

[97] CISG, Article 19 (3).

[98] CISG, Article 19 (2)

The analysis of the court/arbitration practice around the world reveals that courts and arbitration tribunals have applied the norms of the CISG on acceptance in such a way as to find a reply with the non-material alteration of the terms of the offer to be an acceptance. One of such examples may be a 2002 arbitral award, issued by the China International Economic and Trade Arbitration Commission (CIETAC), a permanent arbitration institution in China. [99] In accordance with the case, a buyer changed a seller's offer by removing a clause that required the shipping vessel to be no older than 20 years. [100] Although the seller refused to recognize the contract's conclusion, the arbitral tribunal found the contract to have been validly concluded as the buyer's alteration of the seller's offer did not change the latter's offer materially under the CISG Article 19. [101] Thus, the arbitration tribunal found the buyer's reply to constitute acceptance despite modifications in the buyer's letter of acceptance.

A similar decision was reached by the Metropolitan Court of Budapest. According to the case, a Hungarian buyer modified the offer made by a US seller on the purchase of components of aircraft engine by adding to the offer the requirement of the confidential treatment of the letter of acceptance. [102] The seller argued that the contract was not concluded due to the buyer's alteration of the terms of the offer. The court, however, concluded that since the buyer's alteration of the contract was not material, it constituted a valid acceptance in accordance with

[99] *Parties unknown*, arbitral award, CIETAC China International Economic and Trade Arbitration Commission. China (10.06.2002) [available at. http://www.unilex.info/case.cfm?pid=1&do=case&id=1114&step=Abstract]

[100] *Ibid.*

[101] *Ibid.*

[102] *MALEV Hungarian Airlines v. United Technologies International Inc. Pratt & Whitney Commercial Engine Business*, Metropolitan Court of Budapest, Hungary case #3.G.50.289/1991/32 (1992) in *Journal of Law and Commerce* 13 (1993): 49-77

Article 19(2) CISG. [103] Analogous decisions, in which courts have applied the CISG and found the buyer's reply with non-material modifications to be an acceptance, were issued by courts in a number of countries, such as France, Germany, Spain, and Austria.[104] Equivalent decisions were issued by courts of Belgium, Netherlands, Mexico, and United States. [105] Hence, the CISG allows qualified acceptance as long as the alteration of the offer is not material and the offeror does not object to it.

The provisions on acceptance stipulated in the civil legislation of the Kyrgyz Republic are different from those contained in the CISG. In accordance with Article 399 of the Kyrgyz Civil Code, acceptance must be "full and unconditional". As further stipulated in Article 404 of the Code:

> "The response of an offeree, indicating the consent to conclude a contract on terms other than those proposed in an offer, shall not be regarded as an acceptance. Such response shall be recognized as a denial of the original offer and at the same time as a counteroffer."[106]

The Kyrgyz law is based on the so-called "mirror-image rule" on that an acceptance must be complete and unconditional. As is evident from the wording of Article 404, any modification, be it material or immaterial, of the original offer is treated as the new offer.

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[103] Ibid.

[104] *Sté Fauba France FIDIS GC Electronique v. Sté Fujitsu Mikroelectronik GmbH*, Cour de Cassation, France (1995); *Sociedad Cooperativa Epis-Centre vs. La Palentina, S.A*, Tribunal Supremo, Spain (1998); 9 U 146/98, Oberlandesgericht Naumburg, Germany (1999); Landgericht Baden-Baden, Germany, case #4 O 113/90 (1991); Oberster Gerichtshof, Austria, case # 6 Ob 311/99z, (2000); Bundesgerichtshof, Germany, case # VIII ZR 304/00 (2002).

[105] *S.A. Gantry v. Research Consulting Marketing*, # R.G. 1707/93, Tribunal Commercial de Nivelles, Belgium (1995); *Handelskwekerij G. Aartsen BV v. G. Suykens*, Arrondissementsrechtbank Zutphen, Netherlands, case # 1242 HAZA 95-934 (1997); *Kolmar Petrochemicals Americas, Inc. v. Idesa Petroquimica Sociedad Anonima de Capital Variable*, Primer Tribunal Colegiado en Materia Civil del Primer Circuito, Mexico, case #127/2005 (2005); 2 Ob 58/97m, Oberster Gerichtshof, Austria (1997). 2001/AR/1982, Hof van Beroep Gent, Belgium (2004); Arbitral Award # 8908, ICC Court of Arbitration - Milan (1998); 10 U 80/93, Oberlandesgericht Frankfurt am Main, Germany (1994); *Chateau des Charmes Wines Ltd. v. Sabate USA Inc., Sabate S.A.*, U.S. Circuit Court of Appeal (9th Circuit), USA, case # # 02-15727 (2003).

[106] Civil Code of the Kyrgyz Republic, Article 404

The analysis of the CISG provisions and those of the Kyrgyzstan civil legislation reveals the existence of a considerable contradiction in the concept of acceptance and the consequences of acceptance on different terms for contract conclusion process. While the civil legislation of the Kyrgyz Republic does not allow acceptance to contain modifications of the offer, the CISG allows such additions as long as they do not materially alter the terms of the offer in the absence of the offeror's objection.

The present collision between the norms of the CISG and Kyrgyz legislation may entail significant consequences in practice. The parties to the international sale of goods contract may use the conflicting provisions of the CISG and the civil legislation of the Kyrgyz Republic to prove the contract conclusion or the failure to reach contract conclusion. It is true that if an international agreement, ratified by the Kyrgyz Republic Parliament establishes rules other than those stipulated by the Kyrgyz civil legislation, the international agreement rules will be applied.[107] Yet, the application of the international convention (CISG in this case) will not solve the essence of the problem, but will only contribute to legal ambiguity. This demonstrates the need for harmonizing the provisions of the Convention and Kyrgyz national legislation in order to ensure the effective application of the principle of legal certainty.

There may be two **practical solutions** to the present problem. The first solution lies in circumventing the contradictions, contained in Articles 19 of the CISG and Articles 399 and 404 of the Kyrgyzstan Civil Code by following a partial denunciation procedure under Article 101 of CISG. In accordance with Article 101 of CISG, the Kyrgyz Republic may denounce Part II of CISG by "a formal notification in writing addressed to the depositary." The present solution will help to eliminate contradictions, found in the UN Convention and the legislation of the Kyrgyz Republic with respect to contract acceptance and the consequences of acceptance on

[107] Civil Code of the Kyrgyz Republic, Article 6

different/modified terms for the contract conclusion process. Consequently, parties to the international sale of goods contract will be governed by the provisions of Articles 399 and 404 of the Civil Code of the Kyrgyz Republic.

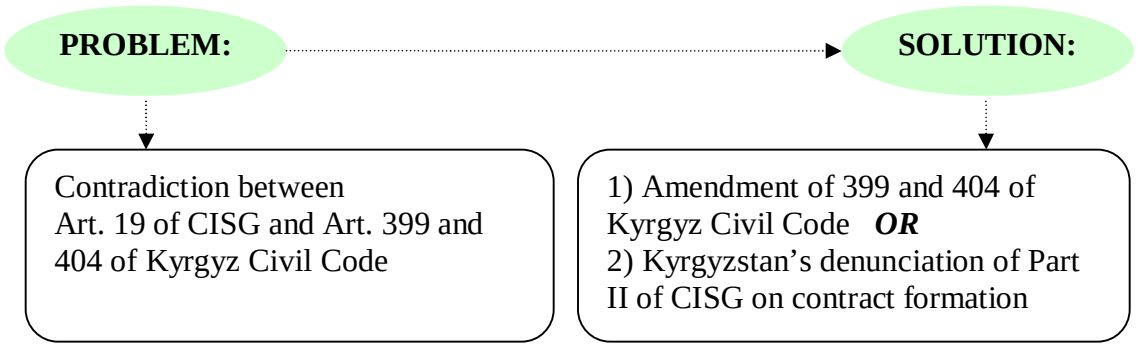
The second solution lies in introducing an amendment to Articles 399 and 404 of the Civil Code of Kyrgyzstan by changing the Kyrgyz legislation's strict stance on the issue of qualified acceptance. The proposed text of amendment would read as follows: "Acceptance is an affirmative response received from a person to whom an offer is addressed. 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 counteroffer. 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." [108] Furthermore, a proposed amendment may also contain a definition of what constitutes a material alteration of the terms of the contract. The proposed definition would read as follows: "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". [109] This amendment to Kyrgyzstan civil legislation on contract acceptance would make it possible to harmonize the provisions of the CISG with those contained in the Kyrgyzstan Civil Code.

The above two solutions recommended for the harmonization of the Kyrgyz Republic legislation with those of the CISG may be summarized in the table below:

[108] The proposed amendment is based on the synthesis of the present Kyrgyz legislation and Article 19 of CISG

[109] The proposed amendment is based on the synthesis of the present Kyrgyz legislation and Article 19 of CISG

Table 5. The problematic aspect of contract acceptance under the CISG and Kyrgyz legislation and recommended solutions



It is necessary for the Kyrgyz Republic to adopt one of the above-stated solutions in order to harmonize its legislation with those of the CISG by eliminating the contradictory provisions on the contract acceptance. Although both of these solutions will have the effect of eliminating the present legislative inconsistencies, it is, nevertheless, advisable to follow the second solution by introducing the relevant amendment to the Kyrgyz law. This will allow harmonizing the provisions on contract acceptance under both the Kyrgyz legislation and the Convention without the necessity of denouncing the provisions of Part 2 of the CISG. Concluding the second paragraph of the second chapter, it is important to reiterate that the second problematic aspect of the legal regulation of the formation of contract for the international sale of goods is connected with the contract acceptance. The proposed solutions to this problem may aid in its efficient resolution in practice, thereby promoting the fruitful development of international sales of goods.

§ 3. The problematic points of contract form

Having discussed the problematic aspects related to the contract offer and acceptance, it is important to analyze problems, connected with the contract form. As is evident from the analysis of the contract form in chapter 1 of the thesis, there is a significant divergence in the

requirement on the form of contracts for the international sale of goods under the CISG and Kyrgyz legislation.

In accordance with Article 11 of the CISG, a "contract of sale need not be concluded in or evidenced by writing and is not subject to any other requirement as to form…[and]…may be proved by any means, including witnesses". In other words, in compliance with the CISG, an international contract of sale may be concluded in an oral form. This provision of the CISG grossly contradicts the requirements on the contract form, stipulated in the Kyrgyz Republic legislation. Specifically, in accordance with Article 1190 of the Kyrgyz Republic Civil Code, "foreign economic transaction at least one of the participants of which is the legal entity or individual of the Kyrgyz Republic shall be formalized in writing regardless of the place of transaction". As specified in Article 178 of Kyrgyzstan Civil Code, the failure to comply with the requirement of the written form entails the invalidity of the transaction. The contract on the international sale of goods is a foreign economic transaction. [110] Therefore, in compliance with the Kyrgyz Republic legislation, such contract must be concluded in the written form. Thus, there is a clear inconsistency between the norms of CISG and those established by the Kyrgyz Republic civil legislation.

The issue of the collision of norms on the contract form has a significant practical implication in Kyrgyzstan. For instance, in several court decisions and arbitral awards issued in the Kyrgyz Republic the respective judges and arbitrators found a contract for the international sale of goods concluded in an oral form to be void as not fulfilling the requirements set under the

[110] *Commentary to Part 2 of the Civil Code of the Kyrgyz Republic* (Kommentarij k Grazhdanskomu kodeksu Kyrgyzskoj Respubliki chasti vtoroj), V. 4, Ch. 48-65 (Bishkek: Academy Publishing House, 2005), 590.

Kyrgyz law despite the CISG's applicability in those cases. [111] This result may be due to the general non-awareness of local judges and arbitrators of the possibility of application of CISG or simply due to their unwillingness to apply it by comfortably adhering to the application of Kyrgyz law in which they have expertise. Consequently, the problem of the contract form remains to be one of the most pressing to date in the Kyrgyz Republic. As the issue of the form of contracts for the international sale of goods has not yet surfaced in a meaningful way in litigation and arbitration in Kyrgyzstan, one can not exclude the likelihood that a contract for the international sale of goods concluded in an oral form in compliance with CISG may, nevertheless, be found void by the courts or arbitration tribunals in the Kyrgyz Republic.

The present inconsistency on contract form requirements may theoretically be solved by the application of the CISG norms on contract form due to the priority of the CISG over the national legislation of the Kyrgyz Republic. [112] For example, such position was affirmed by a 2006 Italian court decision, in which the court declared that the written form of the international sale of goods contract is not necessary, if the contract is governed by the CISG regardless of the different requirements set under the respective domestic law.[113] In compliance with the court decision, this applies only in cases, when the concerned parties have not made any declarations as to the inapplicability of Article 11 of CISG.

Although the proposed solution of applying the CISG norms on the contract form is effective *de jure*, it is not practical *de facto*, since there has not been any court practice in

[111] Decision # O-05-293/00-C2 of the Court of Arbitration of Osh Oblast, Kyrgyz Republic (2000). Case # 2-2-008-140605 of the International Court of Arbitration in affiliation with the Chamber of Commerce and Industry of the Kyrgyz Republic (7 July 2005).

[112] Civil Code of the Kyrgyz Republic, Article 6.

[113] *Amministrazione delle Finanze dello Stato v. Ford Italia S.p.A.*, Corte di Cassazione, Italy, case #22023 (2006) [available at http://www.unilex.info/case.cfm?pid=1&do=case&id=1157&step=FullText].

Kyrgyzstan, in accordance with which the CISG provisions on the contract form prevailed over those of the Kyrgyz legislation. [114] Moreover, the application of the international convention in this case will not solve the essence of the problem, but will only contribute to legal ambiguity. This demonstrates the need for harmonizing the provisions of the Convention and those of the Kyrgyz national legislation in order to ensure the effective application of the principle of legal certainty.

The key **practical solution** to the present problem lies in having the Kyrgyz Republic make a reservation on the inapplicability of Article 11 of the CISG in cases, when any party to the international sale of goods contract has his place of business in Kyrgyzstan. This is permitted by the provisions of the CISG itself. In compliance with Article 6 of the CISG, the parties "may exclude the application of the Convention or, subject to article 12, derogate from or vary the effect of any of its provisions". The CISG Article 12 establishes the following:

> "Any provision of article 11, article 29 or Part II of this Convention that allows a contract of sale or its modification or termination by agreement or any offer, acceptance or other indication of intention to be made in any form other than in writing does not apply where any party has his place of business in a Contracting State which has made a declaration under article 96 of this Convention. The parties may not derogate from or vary the effect or this article."[115]

Article 12 of CISG, hence, allows excluding the applicability of Article 11 of CISG on the requirement of form. This is furthermore reinforced by Article 96 of the CISG, which stipulates that "a contracting state whose legislation requires contracts of sale to be concluded in

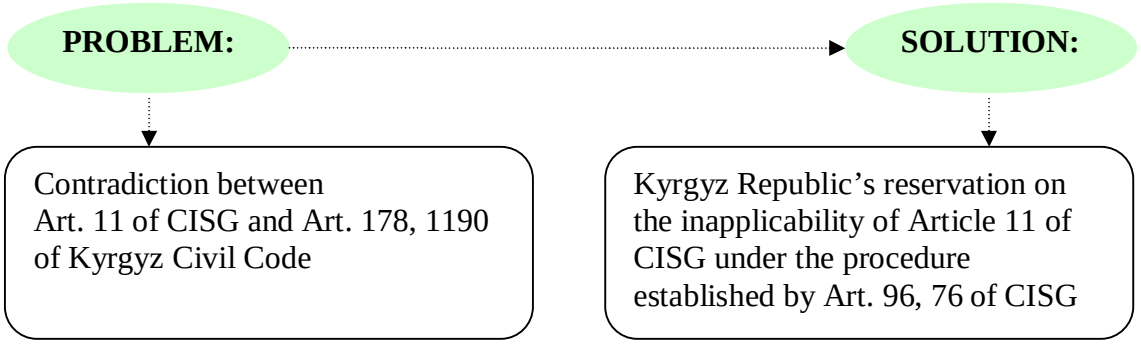
[114] The analysis is based on a comprehensive review of court practice, provided in the legal databases "Toktom," "Legal Court Acts of the Kyrgyz Republic," www.bdsa.toktom.kg; Natalya Gallyamova, "The Vienna Convention on Contracts for the International Sale of Goods as a Constituent Part of the Legal System of the Kyrgyz Republic," *The Journal of Law and Business* 1 (March 2006): 47-72; J. Kozhobekova, "The Courts' Application of Norms of Private International Law," *The Practice of Law Application of Courts of the Kyrgyz Republic* (Compilation of Lectures), V. 1 (Bishkek: Premier LTD, 2006), 60; Rolf Knieper, "Celebration Success by Accession to CISG," *Journal of Law and Commerce* 25 (2005-06): 478.

[115] CISG, Article 12

or evidenced by writing may at any time make a declaration in accordance with article 12 that any provision of article 11, article 29, or Part II of this Convention […] does not apply where any party has his place of business in that State". Thus, the Kyrgyz Republic is entitled to make a reservation on the inapplicability of Article 11 of the CISG at any time by following the procedure, established for making such declarations under Article 97 of the CISG.

The solution recommended for the harmonization of the Kyrgyz Republic legislation on contract form with those of the CISG may be summarized in the table below:

Table 6. The problematic aspect of contract form under the CISG and Kyrgyz legislation and recommended solution



The proposed solution will help to eliminate inconsistencies on the contract form requirement in the CISG and Kyrgyz legislation by promoting the principle of legal certainty. It is important to emphasize that a number of countries, such as Armenia, Argentina, Belarus, Chile, Estonia, Hungary, Latvia, Lithuania, Paraguay, Russian Federation, and Ukraine have already made the reservations on the inapplicability of CISG norms, governing the contract form. [116] For instance, the Russian Federation has specifically declared that in accordance with Articles 12 and 96 of the Convention "any provision of Article 11, Article 29 or Part II of the Convention

[116] Harry Flechtner, "The Several Texts of the CISG in a Decentralized System: Observations on Translations, Reservations and other Challenges to the Uniformity Principle in Article 7(1)," *Journal of Law and Commerce* 17 (1998): 195; Henry Mather, "Choice of Law for International Sales Issues Not Resolved by the CISG," *Journal of Law and Commerce* 20 (Spring 2001): 167.

that allows a contract of sale or its modification or termination by agreement or any offer, acceptance or other indication of intention to be made in any form other than in writing does not apply, where any party has his place of business in the Russian Federation". [117]

As it could be seen from a number of court cases that have been decided in these countries, courts have specifically excluded Article 11 of the CISG and applied the domestic law of respective countries or other relevant law due to the reservations made as to the inapplicability of this part of the Convention. [118] This demonstrates that when parties located in these countries are involved in a sale within the scope of the CISG, the requirements on the form of contracts for the international sale of goods will depend on the law applicable under the rules of private international law. Thus, the Kyrgyz Republic should follow the practice of above-stated countries and declare a reservation as to the oral form of contract, prescribed by the Convention.

Concluding the third paragraph of the second chapter, it is important to reiterate that the third problematic aspect of the legal regulation of the formation of contract for the international sale of goods is connected with the contract form. The proposed solution to this problem may aid in eliminating the inconsistencies on the contract form requirement in the CISG and Kyrgyz legislation, thereby promoting the principle of legal certainty.

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Summarizing the second chapter of the thesis, it is important to state that as the

[117] "CISG declarations," http://www.uncitral.org/pdf/english/texts/sales/cisg/CISG.pdf; "United Nations Convention on Contracts for the International Sale of Goods Status and Declarations/Reservations," http://untreaty.un.org/ENGLISH/bible/englishinternetbible/partI/chapterX/treaty20.asp

[118] *Conservas la Costena S.A. de C.V. v. Lanis San Luis S.A. & Agro- industrial Santa Adela S.A*, COMPROMEX, Comisión para la Protección del Comercio Exterior de Mexico, Mexico, case #M/21/95 (1996); High Court of Arbitration of the Russian Federation, Russian Federation, case #29 (1998); *J.T. Schuermans v. Boomsma Distilleerderij / Wijnkoperij BV*, Hoge Raad, Netherlands, case #16.436 (1997); *Vital Berry Marketing NV v. Dira-Frost NV*, Rechtbank van Koophandel, Hasselt, Belgium, case #AR 1849/94 (1995).

comparative analysis of the formation of contracts for the international sale of goods under the CISG and Kyrgyz legislation shows, there are a number of problematic aspects connected with its legal regulation. These problematic issues concern the sufficient definiteness of the offer, qualified acceptance and the form of international sale of goods contracts. The essence of these problematic points lies in the existence of inconsistencies between the respective provisions of the Kyrgyz legislation and CISG.

The scrupulous comparative analysis of all of the problematic aspects of the legal regulation of the formation of contracts for the international sale of goods demonstrates the increasing need for their solution. Therefore, concrete recommendations on the harmonization of the provisions of the Kyrgyz national legislation with those of the CISG have been advanced. The principal among such solutions have been the proposals on the Kyrgyz Republic's declarations on the inapplicability of a set of conflicting parts of the CISG to parties, whose places of business are in the Kyrgyz Republic and on introducing amendments to the Kyrgyz legislation. The recommendations on the solution of the analyzed problematic issues have been suggested with the view of ensuring the effective promotion of the principle of legal certainty and aiding in the elimination of the existing legal discrepancies that impede the successful conclusion of contracts for the international sale of goods.

CONCLUSION

The issue of the legal regulation of the formation of contracts for the international sale of goods under the CISG and Kyrgyz civil legislation is a topic of continuous significance in view of the constantly increasing trade volume and unceasing promotion of foreign trade in Kyrgyzstan. The present research study has sought to contribute to the greater understanding of this issue by pursuing the objective of analyzing the legal regulation of the formation of contracts for the international sale of goods under the CISG and Kyrgyz legislation, identifying its problematic aspects and advancing concrete proposals on their solution.

The research objective has been fully achieved via a thorough and systematic study of the conceptual framework of the contract for the international sale of goods; comparative analysis of the legal regulation of the key constitutive elements of its formation, namely offer, acceptance and form; examination of the major problematic aspects of the legal regulation of formation of international sale of goods contracts as well as advancement of concrete proposals on their solution.

As an in-depth comparative analysis of the formation of contracts for the international sale of goods under the CISG and legislation of the Kyrgyz Republic shows, the rules regulating the contract offer, acceptance, and form are generally analogous. Under both the UN sales convention and Kyrgyz civil legislation such issues, as the effectiveness, revocation and termination of offer, effectiveness and withdrawal of acceptance as well as the criteria set for satisfying the written form requirement are the same.

Despite the existence of a number of similarities in the legal regulation of the formation of contracts for the international sale of goods under the CISG and Kyrgyz legislation, the

research has identified and provided a scrupulous analysis of a number of problematic aspects related to the contract offer, acceptance and form. As a comprehensive analysis of over twenty national and international legislative acts, not fewer than eighty court/arbitral decisions and more than one hundred doctrinal sources of leading scholars has revealed, these problematic issues specifically concern the sufficient definiteness of the offer, qualified acceptance and the form of contracts for the international sale of goods. The research study has made it evident that the essence of these problematic points lies in the existence of significant inconsistencies between the respective provisions of the Kyrgyz civil legislation and those of the CISG.

The critical overview and thorough examination of all of these problematic aspects of the legal regulation of the formation of contracts for the international sale of goods have demonstrated the increasing need for their solution. Therefore, concrete proposals on the harmonization of the provisions of the Kyrgyz Republic national legislation with those of the CISG have been advanced. The principal among such solutions have been the proposals on the Kyrgyz Republic's declarations on the inapplicability of a set of conflicting parts of the CISG to parties, whose places of business are in the Kyrgyz Republic and on introducing amendments to the Kyrgyz legislation. The stated recommendations on the solution of the analyzed problematic issues have been suggested with the view of ensuring the effective promotion of the principle of legal certainty and contributing to the elimination of the present legislative discrepancies, collisions, and gaps that stand as barriers to effective cross-border sale of goods transactions.

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