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The conclusion of international sale contract under the CISG**

1. Introduction

The relevance of the United Nations Convention on the Contracts for the International Sale of Goods (CISG) is unquestionable in the current world economy, with its ever-increasing drive towards globalization. International sales are becoming more and more widespread for a variety of reasons. Corporations, driven by shareholders constantly looking for growth and increasing returns, are compelled to angle themselves towards increasing their revenues (and thus, profits) at all costs. These monetary gains cannot be realized within the market of any single country, expansion has become a necessity, going international is a crucial aspect of satisfying one's shareholders and ensuring competitiveness with one's business rivals. Furthermore, consumerism has become a monolithic institution: consumers constantly need more products, and their needs and wants can no longer be satisfied by merely domestic products. Thus, there was a definite need for businesses to begin selling their products internationally, sending their goods to foreign markets. These tendencies in international trade are followed by international organizations which try to create a legal framework for these international transactions. One of the more successful of these frameworks is the Convention on Contracts for the International Sale of Goods (hereinafter: Convention).

The issue of an international framework for international sales law was raised as early as the 1920s. In 1930, the International Institute for the Unification of Private Law in Rome (UNIDROIT) established a drafting Committee for European legal experts to create a uniform law for international sales. By 1939, the Committee managed to create a first draft, revising it based on the comments and advices of governments. Although interrupted by the Second World War, the Committee continued its work, and in 1951, the Netherlands arranged for a twenty-one-nation conference in the Hague, which approved the revised draft, and established a special Commission to further refine it. This new

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Commission wrote a revised draft in 1956, and then received further comments from different governments. Parallel to these efforts, a somewhat different type of harmonization of the law of sales was undertaken in the 1950s, by the United Nations Economic Commission for Europe (ECE). These efforts resulted in the General Conditions of Sale and Standard Forms of Contract. These were mainly intended to serve as a tool in assisting trade between the West and the Eastern bloc. The Netherlands organized a conference once again in the Hague in 1964, which resulted in the creation and approval of two uniform laws: the Uniform Law on the International Sale of Goods (ULIS), and the Uniform Law on the Formation of Contracts for the International Sale of Goods (ULFC).[1] However, these uniform laws did not receive widespread ratification, due to their pervasive scope. ULIS was notably adopted by the Federal Republic of Germany, Italy, Netherlands and Israel among others. The United Kingdom also adopted ULIS, but with a significant reservation. The United States also chose to abstain from the application of the uniform laws, presumably due to the lack of significant involvement in the drafting process (which was dominated by European scholars and governments) by American legal and political interests. However, the United States did attempt to recommend several amendments to the uniform laws, but as these were offered very late in the drafting and approval process, there was no time to make substantial changes to the uniform laws. The next important step towards the creation of the CISG was in 1966, when on Hungary's initiative, the United Nations Commission on International Trade Law (UNCITRAL) has been established. One of the first priorities of this new organization was the development of international sales, which was a subject of discourse on its very first session in 1968. In 1969, the UNCITRAL created a fourteen-person working group to refashion and revise ULIS, especially having regard to non-Western European countries and their legal systems. In nearly a decade, this led to a (revised) draft of the Convention that was approved by UNCITRAL in 1977.[2] This draft was later expanded with additional provisions in 1978. The text itself was finalized and adopted in 1980, and has entered into force in 1988.

Regarding its scope, material scope reflects that it is about sale of goods, which are movable goods[3], with some exceptions enumerated in Article 2, including goods bought for personal use. Personal scope means that the contract is about international sale of goods between parties whose place of business are in different states, and the parties should know about this when concluding the contract. And finally, territorial scope means that the Convention applies only to sales contracts of goods that are between parties whose

[1] JOHN HONNOLD: *The Uniform Law for the International Sale of Goods: The Hague Convention of 1964*. https://scholarship.law.duke.edu/cgi/viewcontent.cgi?article=3058&context=lcp (2020.04.17.) GYULA EÖRSI: Problems of Unifying Law on the Formation of Contracts, for the International Sale of Goods. American Journal of Comparative Law 1979. 27, 311-12. pp. UNCITRAL: *Thirty-five Years of Uniform Sales Law: Trends and Perspectives*. https://www.uncitral.org/pdf/english/texts/sales/cisg/35_Years_of_ Uniform_Sales_ Law-E.pdf (2020.02.21.) See also: LAJOS VÉKÁS, TAMÁS SÁNDOR: *Nemzetközi adásvétel*. HVG-Orac Kft., 2005.

[2] Here another important UNCITRAL convention should be also mentioned, the Convention on the Limitation Period in the International Sale of Goods. https://www.uncitral.org/pdf/english/texts/sales/limit/limit_conv_E_Ebook.pdf (2020.02.21.)

[3] According to the technical literature, softwares also fall under the material scope of the Convention. See: HERBERT BERNSTEIN, JOSEPH M. LOOKOFSKY: *Understanding the CISG in Europe: a compact guide to the 1980 United Nations Convention on Contracts for the International Sale of Good*, Kluwer Law International, 1997, 14-15 pp.

places of business are in different states. Hence, to international sales contracts. Obviously, these states have to be contracting states of the Convention, or the rules of private international law must lead to the application of the law of a contracting state for the Convention to be applicable.

Regarding the general structure of the Convention, it is divided into four parts: Sphere of Application and General Provisions, Formation of the Contract, Sale of Goods and Final Provisions. The Formation of the Contract is the most relevant part for this study, as this is where the conclusion of the sales contract and related provisions are to be found, ranging from the offer to the acceptance. This part is not divided into chapters, as it is relatively brief, despite its crucial importance, both for the study and international sales in general.

The Convention deals only with two issues, the formation of the international sale contract and the rights and obligations of the parties to the contract. This work focuses on the issue of the conclusion of international sales contracts, more precisely on Article 23 and the related case law. The conclusion of a contract is a question of great importance, determining whether there was a contract in the first place or not. This issue is regulated in the Convention in Article 23. However, it is questionable whether the current provision is sufficient enough for a mostly uniform interpretation, or whether its interpretation by national courts varies too much. After all, the Convention's goal, like with other international legal frameworks, is to provide a uniform system. In practice, however, we may find this objective frustrated by differing interpretations from national courts. As such, it is extremely important for these frameworks to be as clear as possible in their wording. This naturally applies to Article 23 as well. Furthermore, in order to properly understand the Convention's provision on the international sales contract's conclusion and to identify the issues noted above, other adjacent subjects must also be examined.

In the next part, Article 23 of the Convention is analyzed, highlighting the particularities of concluding an international sales contract under the Convention's provisions. The final substantive part of the essay focuses on Article 23-related case law, with particular importance placed on more recent cases. As noted beforehand, the Convention's interpretation varies by nation, so observing how the conclusion of the international sales contract is interpreted or applied by national courts helps us develop a reasoned conclusion.

2. The conclusion of the international sales contract

The conclusion of the international sales contract is explicitly addressed by only one provision of the Convention: Article 23. Article 23 can be considered a novum, as it was not found in the Uniform Law on the Formation of Contracts for the International Sale of Goods, nor was there any similar provision. Its origins seemingly lie in a proposal by the UNCITRAL Secretariat to include a sub-paragraph of similar content in Article 6 of the ULFC, in 1977. The Working Group on the International Sale of Goods later in the same year adopted this same provision as Article 23. Even though the content of this article could be inferred from other provisions, the Working Group decided that, since a number of other provisions referred to the time of conclusion of the international sales contract, there was reason to include a provision that explicitly states the time of conclusion.

To begin with the examination, Article 23 is a short and seemingly simple provision, of only one sentence: "A contract is concluded at the moment when an acceptance of an offer becomes effective in accordance with the provisions of this Convention.". Related to the article, it is evident that it fixes the time of conclusion of the sales contract, and this is the moment when the acceptance of the offer becomes effective. Compared to earlier similar frameworks, this increases the importance of acceptance in contract formation. The next issue is to determine the moment when the acceptance becomes effective. For this, we should investigate Article 18 (2), which says: "(2) An acceptance of an offer becomes effective at the moment the indication of assent reaches the offeror. An acceptance is not effective if the indication of assent does not reach the offeror within the time he has fixed or, if no time is fixed, within a reasonable time, due account being taken of the circumstances of the transaction, including the rapidity of the means of communication employed by the offeror. An oral offer must be accepted immediately unless the circumstances indicate otherwise.".

This article shows that the Convention adopts the theory of reception, or receipt theory (that is to say, an acceptance of an offer becomes effective when it reaches the original offeror), as opposed to the postal or dispatch or post-box theory (that is to say, an acceptance of an offer becomes effective when it is dispatched), which was a competing theory during the drafting of the Convention. Receipt theory is most common in civil law systems, while the postal theory is in common law. Thus, the use of receipt theory naturally means that the sender of the acceptance, will bear the risk of transmission (the dispatched acceptance may never arrive due to various circumstances such as postal confusion or similar issues), as opposed to the other theory, where the acceptance would become effective as soon as it was dispatched. Hence, any legal consequences associated with the contract would only be brought about if the message of acceptance reaches the original offeror. However, this distinction is of lesser importance nowadays. In the age of fax and e-mail, it is far less likely for such a communication error to occur, thus the impact of picking between these theories is somewhat lessened. Of course, given that different legal systems may apply different theories of acceptance for this matter, the specification from the Convention is still reasonable, so as to promote a more uniform interpretation and use by various national courts. Also, from our perspective, this also means that a contract will be concluded at the moment the notice or message of acceptance reaches the offeror.

The second and third sentences of Article 18(2) in turn further refine this general rule. The second sentence makes it clear that if the notice of acceptance arrives 'late' (after the offer has expired (as fixed by the offeror) or lost relevance), then it is not effective (and thus no contract will be concluded). If no time has been set by the offeror, then reasonable time must be considered. According to the Convention, this will depend on the circumstances of the transaction, and in particular, the rapidity of the means of communication employed by the offeror. When it comes to oral communication, the acceptance must come immediately for it to become effective (unless circumstances dictate otherwise). In general, these provisions are the same as those found in the ULFC. Furthermore, this also raises the question of instantaneous, but non-personal communication, such as telephone and other technical methods that allow for oral messages to be immediately receivable and be replied to directly without delay. These are most commonly interpreted to fall under the rules of oral communication. However, non-instantaneous electronic means of communication (such as sending a pre-recorded message through mail) are not considered oral offers and thus their

acceptance also falls under the rules of the second sentence. All these naturally affect the conclusion of the contract as well.

Besides Article 18(2), another article that must be briefly analyzed in connection with Article 23 is Article 22, which states that: "An acceptance may be withdrawn if the withdrawal reaches the offeror before or at the same time as the acceptance would have become effective." This is rather relevant from our perspective, as this indicates that the conclusion of the contract can be evaded, if the withdrawal of acceptance reaches the offeror before or at the same time as the acceptance. This type of legal construct is commonly termed and overtaking withdrawal. On a side note, it does notably raise a potential issue when it comes to the balance of power between the parties: as per Article 16, it may lead to a situation where the offeror is bound but the offeree is not, thus allowing the latter perform market speculations. Namely, by sending an acceptance, the offeree can obligate the offeror, who is unable to revoke his offer under Article 16, while the offeree can of course still revoke his own acceptance through an overtaking withdrawal.

Returning to Article 23 proper, it might be asked whether the contract must come to conclusion at the moment when the acceptance of the offer becomes effective, or whether the parties can agree to a later formation of the contract, through a condition precedent or other methods. This seems to be the case according to certain interpretations of the Convention, based on similar readings of the ULFC (which does not explicitly fix the time when the contract concludes).[4] Furthermore, according to the same reading, in cases where a contract's formation is legally relevant to the dispute (typically when it concerns other articles that refer to the conclusion of the contract), the conclusion must be determined based on the evaluation of the respective provision and its intended goal, what the parties intended by the condition precedent, and the factors that resulted in the postponement of the formation.

In other cases, consider situations in which parties make their contract dependent on the fulfillment of a certain condition, or the perfection of a contract depends on the consent that is to be given by some third party. If such a situation occurs, these reservations must be interpreted in order to determine whether consent is to take effect retroactively or only when given. According to Professor Schlechtriem, for those provisions which make the determination of the moment of the contract's perfection legally relevant, the choice between the time set forth in Article 23 or a later time must be made by evaluating the "respective provision and its legal purpose, the meaning of a condition precedent, and the circumstances of the postponement".[5] However, when such consent is a legal requirement of applicable domestic law, the governing domestic law must in each case provide the time when the consent becomes effective.

It has been suggested by some that the time of conclusion of the international sales contract will rarely be a matter of legal relevance, except perhaps in relation to Article 68, as it provides that risk of loss of goods sold during transit passes onto the buyer when the

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[4] PETER SCHLECHTRIEM: *Uniform Sales Law - The UN-Convention on Contracts for the International Sale of Goods.* Manz. Vienna, 1986. 49. p.

[5] PETER SCHLECHTRIEM: *Uniform Sales Law - The UN-Convention on Contracts for the International Sale of Goods.* Manz. Vienna, 1986. 49. p.

conclusion of the contract occurs.[6] Honnold suggests that the time might be also relevant when it comes to the application of domestic fiscal or regulatory laws.[7] Furthermore, the content of the Article could be easily inferred from Article 18(2).[8] However, as the Working Group believed, it was indeed reasonable given the number of articles that refer to the conclusion of contracts. These include the afore-mentioned Article 68, and Articles 42(1), 55, 74, 79(1) and 100(2). Legal clarity was likely of paramount importance, in order to ensure a sufficiently uniform reading of these provisions' contract conclusion-related aspects.

It has also been raised that Article 23 does not deal with situations where the precise time of acceptance cannot be readily established, such as situations where the parties engaged in a diverse variety of communications and acts between each other, and the court cannot easily pinpoint any single one of those as acceptance, even though it is otherwise obvious that a contract has been concluded (at some point).

The final issue of note is the fact that all throughout this section, we have only been discussing the time of the conclusion of the contract, and not the place of the conclusion of the contract. This is because this aspect was entirely omitted from Article 23, and the Convention as a whole. Such a proposal was even explicitly rejected by the Working Group, though for different rationales: it was argued that the place automatically follows the time, while others posited that the latter would be unwelcome, place and time must not automatically become linked, while yet others believed that this should not be addressed at all, since the Convention never refers to the place of conclusion, only to the time of conclusion. Notwithstanding, based on Article 18(2) we can assume that the contract is concluded at the place where the indication of assent reaches the offeror, or if the contract is concluded by conduct implying the intent to accept an offer under the Article 18(3) of the Convention, then place of performance of this act would probably be decisive.

3. Case law

Article 23 has appeared in several documented national cases related to the application of the Convention. Here, we examine some of the more recent ones. It should be noted that many of these cases involved other articles of the Convention as well, however our particular focus is on the issue of conclusion of the international sales contract, given the subject of this study.

The first case is Company M.C.S. v. Stock Corporation H.D (of 27 May 2008) heard by the Court of Appeal (Cour d'appel) Rennes, France.[9] This particular case was a dispute between a French (Buyer) and an Italian (Seller) company, centered around the international sale of bra linings, which the French company utilized to manufacture

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[6] JOHN O. HONNOLD: *Uniform Law for International Sales under the 1980 United Nations Convention*. Kluwer Law International. The Hague, 1999. 200. p.

[7] JOHN O. HONNOLD: *Uniform Law for International Sales under the 1980 United Nations Convention*. Kluwer Law International. The Hague, 1999. 200. p.

[8] JOSEPH LOOKOFSKY: *The 1980 United Nations Convention on Contracts for the International Sale of Goods.* In: J. Herbots (ed.), R. Blanpain (gen. Ed.): International Encyclopaedia of Laws - Contracts, Suppl. Kluwer Law International. The Hague, 2000, 77. p.

[9] Available at Pace Law School – Institute of International Commercial Law – CISG Database: http://cisgw3.law.pace.edu/cases/080527f1.html (2020.04.10.)

swimsuits. The companies were in a business relationship since 2001, however, the dispute specifically concerned three orders placed in 2003. Over time, it became clear that the bra cups ordered in the first two instances were unsatisfactory and resulted in poor quality swimsuits. The Seller took back the bra cups for the second order, but demanded an advance payment of 30%, as it had to buy special foam for the Buyer's order. This was acquiesced by the Buyer, though it reduced the order's amount and placed another order (the third one). The Seller notified the Buyer days later that only a later delivery period is viable, and that the price of the bra cups would be increased. The Buyer found this unacceptable as it could not wait for that long, especially given the conditions put forth by the Seller. Subsequently, the parties could not come to an agreement and the Buyer cancelled all of the above orders in December 2003, and had to purchase replacement goods from another company (at an inflated cost). The case went to court, where the court of first instance declared that avoidance of the contracts occurred, and ordered the Seller to reimburse the Buyer. This led to the Seller appealing the judgment. From our perspective, the Court of Appeal's rulings on the conclusion of the contract are the most relevant. The Court of Appeal found that neither parties contested that the Convention is applicable to their dispute, given the international sales contracts involved in the dispute. Thus, the court had to determine whether the three purported contracts were actually concluded under the Convention. For the first order, the court ruled that a contract of international sale was concluded by the Buyer's offer (order) and the Seller's acceptance (delivering the goods within the prescribed period), with neither party objecting to the conditions regarding price and payment or to the quality and quantity of the goods. Hence, the court ruled that this contract was concluded as per the provisions of Article 18, Article 19, Article 20, Article 21, Article 22 and Article 23 of the Convention. However, it found that the contract was not duly performed by the Seller, and that it could be thus avoided according to Article 49[10] of the Convention. For the second order, the court found that a contract was concluded as well, based on the same provisions as in the first case. However, it once more found that the Seller did not perform the contract in conformity with the initially agreed on conditions, and that the Buyer could thus avoid the contract in accordance with Article 49. However, it ruled that no contract was concluded for the third order, since the Seller did not accept the Buyer's offer made according to the conditions established in the previous contracts. The Seller, by altering the price of the ordered bra

[10] CISG Article 49: „(1) The buyer may declare the contract avoided:
(a) if the failure by the seller to perform any of his obligations under the contract or this Convention amounts to a fundamental breach of contract; or
(b) in case of non-delivery, if the seller does not deliver the goods within the additional period of time fixed by the buyer in accordance with paragraph (1) of article 47 or declares that he will not deliver within the period so fixed.
(2) However, in cases where the seller has delivered the goods, the buyer loses the right to declare the contract avoided unless he does so:
(a) in respect of late delivery, within a reasonable time after he has become aware that delivery has been made;
(b) in respect of any breach other than late delivery, within a reasonable time:
(i) after he knew or ought to have known of the breach;
(ii) after the expiration of any additional period of time fixed by the buyer in accordance with paragraph (1) of article 47, or after the seller has declared that he will not perform his obligations within such an additional period; or
(iii) after the expiration of any additional period of time indicated by the seller in accordance with paragraph (2) of article 48, or after the buyer has declared that he will not accept performance.".

cups, effectively made a counter-offer to the Buyer in accordance with Article 19 of the CISG. As this was not accepted in turn by the Buyer, no contract was concluded. As for the other aspects of the case, the Court of Appeal dismissed part of the Buyer's claim for damages. The court ruled that the Buyer was not entitled to the difference between the price of the contract and the price of the replacement goods the Buyer had to purchase to make up for the deficiencies of the Seller, citing the unreasonable difference between prices. It also ruled that the Buyer failed to minimize damage as per Article 77[11] of the CISG, as it took three days to stop the production of swimsuits once the bra cups' deficiency came to light.

The second notable case is the "Tomato and lemons case", Decision 16319/2007 of the First Instance Court of Thessaloniki, Greece.[12] In this particular case, the Seller agreed to sell to the Buyer several tons of tomatoes and lemons, which the Buyer intended to resell to Greek merchants at a profit. These goods were of Italian origin. The parties also agreed upon the price, and designated Thessaloniki (Greece) as the place where the goods would be delivered to. The Buyer paid the agreed upon price and the delivery occurred. However, the Buyer soon discovered that these were defective goods and returned them to the Seller. As a result, the Buyer was not able to resell the goods as originally intended. Hence, the Buyer turned to the Thessaloniki Court to recover the purchase price and also the *lucrum cessans* that occurred due to its inability to resell. The Thessaloniki court examined jurisdictional issues, as well as the Convention's provisions on the place of performance pursuant to Article 31[13] of the Convention. Besides, the Thessaloniki Court investigated when and where was the contract concluded. The Thessaloniki Court accepted the theory of receipt based on Articles 18 and 23, that is to say, a contract is concluded when the acceptance of an offer becomes effective under the Convention. However, the court noted that the CISG does not provide any provision as to where the conclusion of the contract takes place, and as such, the domestic law of the forum must be applied to determine this. As such, the Thessaloniki Court referred to the Greek Civil Code, which provides that the place of conclusion of the contract is the place where the offeror receives acceptance of its offer. Ultimately, the Court found that it had no jurisdiction over the case, based on a joint interpretation of Regulation 44/2001 of the European Council, the Greek Code of Civil Procedure, and the CISG. According to this,

[11] CISG Article 77: „A party who relies on a breach of contract must take such measures as are reasonable in the circumstances to mitigate the loss, including loss of profit, resulting from the breach. If he fails to take such measures, the party in breach may claim a reduction in the damages in the amount by which the loss should have been mitigated.".

[12] Available at Pace Law School – Institute of International Commercial Law – CISG Database: https://www.cisg.law.pace.edu/cisg/wais/db/cases2/080001gr.html (2020.03.23.)

[13] CISG Article 31:
If the seller is not bound to deliver the goods at any other particular place, his obligation to deliver consists:
(a) if the contract of sale involves carriage of the goods - in handing the goods over to the first carrier for transmission to the buyer;
(b) if, in cases not within the preceding subparagraph, the contract relates to specific goods, or unidentified goods to be drawn from a specific stock or to be manufactured or produced, and at the time of the conclusion of the contract the parties knew that the goods were at, or were to be manufactured or produced at, a particular place - in placing the goods at the buyer's disposal at that place;
(c) in other cases - in placing the goods at the buyer's disposal at the place where the seller had his place of business at the time of the conclusion of the contract.

the place of performance in sales contracts will be the place of delivery, and the Thessaloniki court found this to be the city of Vitoria in Italy.

Another case where Article 23 of the Convention was relevant, is Scafom International BV v. Lorraine Tubes S.A.S. (of 19 June 2009) heard by the Court of Cassation [Supreme Court], Belgium.[14] This dispute concerned a Dutch Buyer and French Seller. The parties concluded several contracts of sale concerning steel tubes. However, after these contracts were formed, but before the steel tubes were delivered, the price of steel increased by 70%, unexpectantly for both parties. Furthermore, there was no clause for price adaptation in these contracts. The Seller attempted to renegotiate with the Buyer unsuccessfully, who insisted upon the original price and the delivery of the goods. The case went through three stages, starting with the Commercial Court of Tongeren, which was followed by the Court of Appeal in Antwerpen, and finally ending with the Court of Cassation of Belgium. The dispute centered around the theory of *imprévision* (if after the conclusion of the contract, an unexpected event severely alters the balance of the contract between the parties and thus renders performance on one party's side exceptionally detrimental to that party, there is ground for revision), specifically because the Convention does not cover this issue. Thus, there was a question of whether French domestic law or the general principles of international trade should be applied. The Court of Appeal took the former stance, while the Court of Cassation preferred the latter. In the end, the Court of Cassation decided to reject the appeal, and uphold the Court of Appeal's decision that the Buyer must renegotiate the contract (on slightly different grounds). From the perspective of the present study it is important, that the Court of Appeal also addressed the issue of conclusion of the contract under the Convention (and this was not disputed by the Court of Cassation). In particular, it was noted that the courts recognize that the drafters of the Convention wanted to create a uniform system for the conclusion of international sales contracts, and thus interpretations that further uniformity should be implicitly preferred. This could be seen as a genuine intent by a national court to not mold the Convention's Article 23 (and related) to a domestic legal frame, but to attempt an interpretation that is as uniform as possible.

The next case to be discussed is a case between a Spanish Seller and a Dubai Buyer (of 9 July 2013) heard by the Appellate Court Cantabria, Spain.[15] The two parties concluded a CIF sales contract, concerning steel cable for Dubai. They were disagreeing regarding the execution of the contract. In particular, the Buyer issued two purchase orders in January 2008, both were received by the Seller and signed by its representative. The form of payment was credit telegraphic transfer (TT) 90 days from the issue of the bill of lading (B/L) date or letter of credit (L/C) at 90 days from the issue of the bill of lading. However, after the purchase orders were received, the Seller sent *pro forma* invoices, in apparent contravention of the previous agreement. This has led to the dispute between the parties. In the court of first instance, it was determined that the contract could not be amended (as it was already put into effect by the purchase orders), and the invoices thus had no contractual effectiveness, they could not alter what was agreed upon when the offer was

[14] Available at Pace Law School – Institute of International Commercial Law – CISG Database: https://www.cisg.law.pace.edu/cisg/wais/db/cases2/090619b1.html (2020.03.12.)

[15] Available at Pace Law School – Institute of International Commercial Law – CISG Database: http://cisgw3.law.pace.edu/cases/130709s4.html (2020.03.17.)

accepted. This was disputed by the appellate court, which ruled that a certain letter sent by the Seller's representative to the Buyer constituted a form of novation, as the conditions of the documentary credit had been changed. The appellate court noted that the Buyer acted in accordance with this letter, securing an irrevocable and unconditional guarantee from a Swiss bank in favor of the Seller, in a manner consistent with the novation introduced by the Seller (though only covering half the necessary amount). The court also used Article 29[16] of the Convention in conjunction with this line of thought. At the end, it determined that as the Buyer did not guarantee the full price, there was a fundamental breach of contract by it, and thus it could not refer to any breach of the Seller's obligations, in accordance with Article 80[17] of the Convention. Article 23 of the Convention appeared in relation to whether the signing of the purchase orders by the Seller's representative constituted acceptance, and thus conclusion of the international sales contract under the Convention. This was an important facet, as the time of the contract's conclusion was relied upon by the court of first instance for determining the contractual effectiveness of the later invoices, and was also briefly addressed by the appellate court. In this regard, both held that these signatures of the purchase orders constituted an acceptance and thus the conclusion of the contract under Article 23 of the Convention.

The final case to be discussed here is one between a Belgian Buyer and a French Seller (of 27 May 2014) heard by the French Supreme Court, Commercial Chamber.[18] The objects of the sales contract were granite cobblestones. The Seller delivered and invoiced more cobblestone than what was agreed upon. The Belgian Buyer refused to pay the difference, arguing, based on Article 19 (1) of the Convention, that such an addition must be considered not as an acceptance of the offer but as a counter-offer, which naturally has to be accepted by the offeror for the sales contract to conclude. The French Supreme Court rejected this, arguing that this interpretation disregards the other two paragraphs of Article 19. Meaning, a reply to an offer which purports to be an acceptance but which contains additional terms or different terms which do not materially alter the terms of the offer shall constitute an acceptance unless the offeror, without undue delay, objects to the discrepancy verbally or in writing. Thus, the French Supreme Court came to the conclusion that the sale contract has been validly concluded based on this Article, as the buyer did not object to the discrepancy between the offer and the counter-offer. However, it did note that this alteration must not be material: in this particular case, the only change was from 761 square meters to 800 square meters of cobblestone, and a corresponding minor price change. In the court's opinion, this did not constitute a material addition or modification, and thus given the lack of objection by the Buyer at the time, it validly concluded the contract.

[16] CISG Article 29:
(1) A contract may be modified or terminated by the mere agreement of the parties.
(2) A contract in writing which contains a provision requiring any modification or termination by agreement to be in writing may not be otherwise modified or terminated by agreement. *However, a party may be precluded by his conduct from asserting such a provision to the extent that the other party has relied on that conduct.* (emphasis by author)

[17] CISG Article 80: A party may not rely on a failure of the other party to perform, to the extent that such failure was caused by the first party's act or omission.

[18] LAMY LEXEL: *The conclusion of the contract for the international sale of goods.* https://www.lamy-lexel.com/en/news/detail/the-conclusion-of-the-contract-for-the-international-sale-of-goods (2020.03.26.)

4. Conclusions

In the conclusion, we attempt to make a few observations regarding the status of Article 23 in the Convention, as well as suggestions to improve it. These are drawn from the theoretical analysis and the case law as well. The first issue that has to be mentioned is determining when is the contract concluded exactly. Although, Article 23 states that a contract is concluded at the moment when an acceptance of an offer becomes effective in accordance with the provisions of the Convention, as noted earlier in the study, this can be a matter of difficulty for courts when it comes down to the facts and the general business practices of merchants. In such situations, the courts have to either painstakingly parse through the facts of the case, or determine arbitrarily a single point of time as being the moment of conclusion.

Another issue that seems to be a common theme is that the Convention does not regulate the place of conclusion at all. While it is true that the Convention itself does not refer to the place of conclusion, this could be highly relevant from the perspective of domestic or other law, which are being used adjacently to the Convention. Furthermore, it might be problematic to assume that place automatically follows time when it comes to the conclusion of the contract, given the diversity of facts and situation that can potentially arise, and that different national courts might have radically different logic. As such, in the interests of absolute legal clarity, it would likely be worthwhile to also include a sub-paragraph regarding the place of conclusion in Article 23. One suggestion could be to specify the place where the offeror receives the acceptance. The place from where the acceptance was sent could also be a candidate. Alternatively, in a more radical move, it could be tied to the place of performance, given its importance in a sales contract. Ultimately, it is not the exact specifics that are truly the crux of the issue, but the general problem that the Convention does not regulate the matter at all.

Despite its apparent simplicity at first glance, Article 23 has proven to be a relatively interesting article of the Convention, with different interpretative issues emerging, showcasing a general lack of consensus about how the conclusion of the international sales contract should be handled. Here, we attempted to show a few possible answers to those issues, based on available case law. As noted in the introduction, with the rise of a globalized economy, international sales will not only continue with their prominence, but will in fact become ever more important. It is imperative that the legal community adapts to this challenge and ensures that the process began during the 20th Century continues unabated.

VÍG ZOLTÁN

A NEMZETKÖZI ADÁSVÉTELI SZERZŐDÉS LÉTREJÖTTE A BÉCSI VÉTELI EGYEZMÉNY ALAPJÁN

(Összefoglalás)

Az Egyesült Nemzeteknek az áruk nemzetközi adásvételi szerződéseiről szóló Egyezményének (Bécsi Vételi Egyezmény) jelentősége vitathatatlan egy nemzetközi áru-cserén alapuló világgazdaságban. Ugyanakkor, általános vélemény, hogy az Egyezmény jelenlegi szövege reformra szorul, valamint a nemzetközi adásvételi szerződéssel kap-csolatban több kérdést kéne lefednie. Azonban, a rengeteg aláíró miatt ez szinte kivite-lezhetetlen.

A tanulmány, egy általános bevezetőt követően, a nemzetközi adásvételi szerződés létrejöttével foglalkozik, különös tekintettel az Bécsi Vételi Egyezmény 23. cikkére. Ezt követően pedig megvizsgálja az ezzel a kérdéssel kapcsolatos joggyakorlatot az utóbbi évekből, így francia, görög, belga és spanyol bíróságok ítéleteit. Végül pedig felhívja a figyelmet a 23. cikkel kapcsolatos problémás kérdésekre.