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Contractual offer under the Vienna Convention: the latest developments in the case-law**

1. Introduction

The United Nations Convention on Contracts for the International Sale of Goods (hereinafter: the Vienna Convention) represents an enduring element of international sales contracts and related dispute resolution. Owing to its popularity, it has been a defining instrument of international sales contract law for decades. As a consequence, the Vienna Convention built up a large collection of theoretical, dogmatic examinations and analyses, as well as an impressive body of case law and jurisprudence.

However, interpreting the Vienna Convention can still cause issues to civil courts overseeing dispute resolution concerning international sales contracts. Though the drafters of the Vienna Convention aimed for a clear and coherent system and general legal framework, they could not accomplish this due to the different legal solutions in various national legal systems. Therefore, many provisions and aspects of the Convention still construe significant, fertile grounds for scholarly debate. This debate is continuous, always shaped by the evolving international business scene, the current jurisprudence of various courts, and new theoretical approaches to viewing the Vienna Convention.

In this article, we examine one such element of debate, more specifically, the validity of offer and related latest case law. This concept seems simple enough at first, but the question of what constitutes an offer or offers in the parties' dealings with each other is a recurring question in dispute resolution concerning international sales contracts. The issue is further muddled by how differently various national laws might view the concept of an offer, and even if the courts have to interpret it based on the Convention, their domestic legal training will still surely color their perceptions.

As such, this article aims to examine in-depth the question of offers within the context of the Vienna Convention, and how such offers may be construed as valid or invalid. To

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do so, we utilize a two-fold approach: theoretical and practical. First, we briefly discuss the general structure, subject and scope of the Convention (alongside a brief mention of the Convention's creation), so as to acquaint the reader with the matter at hand, before moving onto an overview and analysis of the validity of offer in particular. This is followed by a review of various cases originating from national courts, through which we will be able to demonstrate how the abstract principles of the Vienna Convention, with regards to the validity of the offer, are treated in actual practice by practicing judges, arbitrators, and other participants of a dispute.

Finally, based on the above theoretical and practical deliberations, we can establish a conclusion on the subject matter, reflecting on the current legal trends with regards to the validity of offers in the Convention-context, as well as some *de lege ferenda* suggestions.

2. General Overview of the Vienna Convention

In this section, we provide a short overview of the Vienna Convention's history and structure. The Vienna Convention is approximately four decades old, its text having been finalized in 1980, but its origins lie a bit earlier. The primary organization responsible was the UNCITRAL (United Nations Commission on International Trade Law), which created a fourteen-person working group in 1969 to rework an earlier international instrument of sales contracts (the ULIS, or Uniform Law on the International Sale of Goods).[1] The fruits of their labour was a draft of the Convention on the International Sale of Goods, which was approved by the UNCITRAL in 1977, and was later amended with further provisions in 1978. This was ultimately the draft that got finalized and approved.[2]

After this brief historical overview, we continue with the general structure of the Vienna Convention. In general, there are four different main sections of the Conventions, which are further divided into various chapters. These four main sections are titled the Sphere of Application and General Provisions; Formation of the Contract; Sale of Goods; and ultimately, the Final Provisions.

First of these sections is the Sphere of Application and General Provisions. It is divided into two sub-chapters, one on the Sphere of Application and another on the General Provisions. This section provides provisions on basic questions related to the Convention, including the subject and scope of the Convention. The second main section is called the Formation of the Contract. Compared to the other main sections, this one is not divided into sub-chapters. As the name implies, this is where the Convention discusses the circumstances, conditions and various other factors related to an international sales contract's formation. This is naturally also where our main subject, the regulation of the validity of offer, can be found, but it also deals with other related subjects, like the conclusion of the sales contract, etc. The next main section is titled the Sale of Goods. It

[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.)

[2] E. ALLAN FARNSWORTH: *The Vienna Convention: History and Scope.* 1983. 18. p.

comprises of five sub-chapters: general provisions, obligations of the seller, obligations of the buyer, the passing of risk, and the provisions common to the obligations of the seller and the buyer. As these sub-chapter titles indicate, this main section is chiefly about how the international sales contract is executed by the parties, and what obligations each of those parties must adhere to. The fourth, and last main section is called the Final Provisions, which is also not divided into sub-chapters like the second main section. This section mostly relates to various administrative and technical concerns about the Convention's acceptance, signing and implementation.

3. The Validity of Offer

The central subject of our current study lies in Article 14 of the Convention, which defines what constitutes an offer under the Convention: "(1) A proposal for concluding a contract addressed to one or more specific persons constitutes an offer if it is sufficiently definite and indicates the intention of the offeror to be bound in case of acceptance. A proposal is sufficiently definite if it indicates the goods and expressly or implicitly fixes or makes provision for determining the quantity and the price. (2) A proposal other than one addressed to one or more specific persons is to be considered merely as an invitation to make offers, unless the contrary is clearly indicated by the person making the proposal."[3]

First of all, there should exist the intention by the offeror to be bound in case of acceptance. As each transaction is specific for itself, this intention should be investigated in each of them based on the facts of the transaction. If there is uncertainty, article 8 of the Convention can help, as it says that in determining the intent of a party practices which the parties have established between themselves, usages and any subsequent conduct of the parties should be taken into account.[4] Once the intention to be bound is established, the next issue is the addressee: one or more specific persons. The Convention in article 14 (2) follows the principle found in most national legislations that public offers are not considered offer, only invitation to make offer. So, the offeree should be specifically named.

The next element of a valid offer is that it should be sufficiently definite. In the second sentence of article 14 (1) the Convention specifies this. The Convention, in effect, reflects on various national contract laws, which roughly categorize the terms of a contract into three main groupings (based on their necessity towards forming the contract): *essentialia negotii* (terms which are fundamental to the contract, and without which the contract would cease having a purpose or meaning), *naturalia negotii* (contractual elements that determine the parties' obligations, by logically originating from the contract itself) and finally, *accidentalia negotii* (uncommon terms for the given contractual type, but which nevertheless could be part of its provisions).[5] In our particular case, the Vienna Convention defines the *essential negotii* as the basic elements that must be present in an

[3] CISG Article 14.

[4] JOHN O. HONNOLD: *Uniform Law for International Sales under the 1980 United Nations Convention.* Kluwer Law International. The Hague, 1999. 148. p.

[5] Predrag Cvetkovic, *The Characteristics of an Offer in CISG and PECL*, Pace International Law Review Vol. 14, Issue 1, 2002. 123. p.

offer to be considered "sufficiently definite." These are usually the nature, quantity, quality and price of the goods, but in the Convention's case, it only describes the nature of goods as having to be clearly indicated, with two other fundamental elements being treated in broad terms (the offer only needs to either implicitly or expressly address the determination of the quantity and the price). Regarding the nature of goods, the goods themselves should be identified by the parties, however, their specification can be done later. Article 65 states that if the buyer is to specify the form, measurement or other features of the goods and he fails to make such specification, the seller may make the specification in accordance with the requirements of the buyer that may be known to him. However, when discussing the quality of goods, article 35 (2) should be also taken into account, where the Convention determines what does not constitute of appropriate quality of goods (provided the parties haven't agreed otherwise): "(2) Except where the parties have agreed otherwise, the goods do not conform with the contract unless they: (a) are fit for the purposes for which goods of the same description would ordinarily be used; (b) are fit for any particular purpose expressly or impliedly made known to the seller at the time of the conclusion of the contract, except where the circumstances show that the buyer did not rely, or that it was unreasonable for him to rely, on the seller's skill and judgement; (c) possess the qualities of goods which the seller has held out to the buyer as a sample or model; (d) are contained or packaged in the manner usual for such goods or, where there is no such manner, in a manner adequate to preserve and protect the goods."[6] Regarding the next element, quantity of the goods, under the Vienna Convention it is enough to fix it implicitly. Honnold mentions long term contracts, where the parties often are not able to estimate in advance their needs or outputs.[7] The final element required is the price of the goods. This is usually specified by the parties, however, it might happen that the parties do not specify it explicitly (e.g. long term contracts, listed prices subject to changed, etc.). Here, article 55 can help, stating that if there is a valid contract without determining the price, the parties are considered 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. However, article 14 does not refer to article 55. Therefore, in such cases the buyer might refer to article 14 (1) and plead that there was no valid contract as one of the required elements, the price, was not present (especially, if the parties did not intended to leave open the price term). And if there was no valid contract, the court may rule that there is no resort to the application of article 55. Another option is that the court may look at article 55 as gap filler in case there is no price fixing in the offer (even if no price term is provided).[8] This latter might be reasonable, if the parties perform as if there was a contract.[9]

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[6] CISG Article 35(2).

[7] JOHN O. HONNOLD: *Uniform Law for International Sales under the 1980 United Nations Convention.* Kluwer Law International. The Hague, 1999. 149. p.

[8] LARRY A. DIMATTEO: *Critical Issues in the Formation of Contracts Under the CISG*. Belgrade Law Review, Year LIX/3 (2011). 72. p.

[9] Some authors suggest that for the resolution of this problem, we should look into legislative history of article 55, according to which the scope of the article is restricted to agreements that were valid under the applicable law, that is to say, domestic law applicable under rules of private international law. See: JOHN O. HONNOLD: Uniform Law for International Sales under the 1980 United Nations Convention. Kluwer Law International.

Despite the critical importance of clarifying what is a valid offer, the Vienna Convention uses a somewhat lax and broad language, only specifying that the kind of goods should be included in the proposal expressly. However, national regulations typically have a more cohesive, fixed concept of an offer, usually including price, quantity and even quality as fundamental aspects of a valid offer in a sales contract. After all, it logically follows that one cannot accept an offer which does not have all the contract's fundamental parts in place. This could lead to confusion and unclear intent between the parties, since they would need to specify these important, unavoidable details immediately. Of course, the Convention's refusal to be more explicit is understandable on some level, as indicated by the tumultuous history of trying to regulate international sales contracts taking into consideration expectations of several nations, but on the other hand, it could lead to issues. If the price and quantity is only involved in an implicit manner in the offer, how could the other party make a reasonable acceptance of the offer? It implies a mutual, unstated understanding, which might not be present, or it might just not be synchronous between the parties. Hence, the next step is to analyze some of the most recent cases on article 14.

4. Case law

In this section, we examine a number of recent cases from different jurisdictions. These have been selected based on three factors: their availability to researchers, their recentness in time, and their connection to Article 14 of the Vienna Convention, and especially the validity of offer within the meaning of the Convention. This is by no means an exhaustive analysis, but it easily serves the purpose of displaying the current trends regarding Article 14. We move through these cases in a chronological order, starting from the oldest to the most recent.

We begin with a Dutch case, *C/10/493214 / HA ZA 16-76.*[10] This case concerned a Dutch seller (the defendant), and a Norwegian buyer (the plaintiff). The case was presided over by the District Court (Rechtbank) of Rotterdam, which reached a decision on April 19, 2017. The goods that served as the object of the international sales contract were food supplements. In particular, the parties were involved in the manufacture and trade of protein products. The Norwegian buyer originally contacted the Dutch seller to acquire 10-15 tons of protein to fill out a gap in production. This led to a series of e-mail exchanges between the two parties, with the buyer changing the requested amount to five tons due to local Norwegian production speeding up considerably. The buyer paid for these five tons, but it was not delivered to him. However, at this point, the seller already ordered 15 tons of protein. In addition, what caused consternation between the parties was that the buyer lost interest even in the 5 tons of protein due to changing market circumstances. The buyer devised the solution: have the seller buy back the already bought protein instead of buying a new batch. The proposal also included an element that the payment would be due when supplies would be partially used or when a deadline passed. However, afterwards,

The Hague, 1999. 355. p. PETER SCHLECHTRIEM: *Uniform Sales Law - The UN-Convention on Contracts for the International Sale of Goods.* Manz. Vienna, 1986. 51. p

[10] Case available at: https://www.iicl.law.pace.edu/cisg/case/netherlands-april-19-2017-rechtbank-district-court.

communication broke down between parties for months, and the seller didn't transfer the money as in the offer's deadline and also used the protein supply in question. This led the buyer trying to extract the payment from the seller, which in turn led to court case. From our perspective a central aspect of the dispute was the formation of the contract, specifically whether the buy-back proposal made by the buyer constitutes a valid offer under the Vienna Convention. The cruciality of the matter arose from the seller attempting to allege that no such contract came into existence. Thus, the District Court had to examine two elements: whether the offer was sufficiently definite and made with the intention of the offeror being bound by it; and whether the offer was accepted with regards to the Convention's rules. The District Court noted that proposal was addressed to one or more specific persons, it was sufficiently definite, and it shows the will of the Norwegian buyer to be bound by the offer should it be accepted. The District Court explained that it was sufficiently definite, as it specified the goods, with the quantity and price explicitly determined. Furthermore, it also stipulated sufficiently clearly that the purchase price must be paid when part of the supply is used, and in any case, before the end of 2012 (the offer being sent in early November 2012). As for acceptance of the offer, the message sent by the seller's employee seven days later indicated a clear assent to the offer in the District Court's view, since it included phrases such as "we'll take the protein for that price, it is a good deal indeed". Furthermore, due to previous contact and business relationship, the buyer was entitled to believe this to be a communication with a reasonable person of equal capacity (based on Article 8 of the Convention), and thus considering the offer accepted. With both elements (offer and acceptance) being present according to the Convention's rules, the District Court determined the contract to exist. Besides the formation of the contract element, the District Court also had to address matters related to issues excluded from the scope of the Convention (as the buyer attempted execution on the seller at a later stage of their pre-judicial dispute, among other issues), matters related to the time for payment (Article 58 of the Convention) and payment due without request (Article 59 of the Convention).

Our second case is an Austrian one (*8 Ob 104/16.*),[11] which concerned an Italian seller (the defendant) and an Austrian buyer (the plaintiff). The case was presided over by Handelsgericht of Vienna in the first instance, and the Oberlandesgericht of Vienna in the second instance, with the final judgement being delivered by the Supreme Court of Austria (Oberster Gerichtshof) on June 29, 2017. The goods that served as the object of the sales contract were knitwear. In particular, the Italian seller was a knitwear manufacturer that has been supplying the Austrian seller, who operates clothing stores in Austria, with knitwear since 2008. Their dispute centered around how the buyer's general terms and conditions contained provisions for deductions for late deliveries (which was undisputed by the seller), quality defects (these were disputed by the seller), which the buyer tried to extract from the seller, leading to the case going to court. The court of first instance acknowledged the deductions based on the general terms and conditions, while the court of second instance only did so partially. From our perspective, the important aspect of the dispute is the question of whether the general terms and conditions became part of the contract or not. In the present case, the general terms and conditions were

[11] Case available at: https://www.iicl.law.pace.edu/cisg/case/austria-june-29-2017-oberster-gerichtshof-supreme-court.

mentioned as part of the offer, but they were not discussed in detail, nor submitted to the seller in writing. The Austrian Supreme Court relied on a twofold reasoning to answer this: first, it invoked earlier German jurisprudence on the subject, by noting that it has been generally recognized that terms and conditions are only included in the contract if the text has been sent to the other party or had been made otherwise accessible or "making available." The Supreme Court also stressed the importance of acknowledging the legal practice of other contracting state courts, in order to advance the Convention's harmonious interpretation. Afterwards, the Supreme Court focused on examining whether given the circumstances of the parties' legal relationship, was the buyer's general terms and conditions made available to the seller as part of the contract. It noted that if one party of the contract wants to contract with the other only under conditions that differ in considerable parts from disposable rules, then it is also up to said party to name these conditions specifically and in a way that enables the other party to immediately know their content. The Supreme Court argued that only making such passing references is contrary to the good faith principle of Article 7 of the CISG, since it leaves the other party in an unknown area, and forces them to make specific requests in order to clarify the actual terms and conditions of the contract. It also noted that empty references to general terms and conditions are inutile, because these are not standardized and thus do not innately convey any substantive information to the other party. Not only that, since general terms and conditions can be changed at any time, the other party would have to frequently inquire about the current status of the general terms and conditions during the business relationship, just in order to discover these "hidden provisions" of the contract. The Supreme Court determined that this is contrary to the requirement of sufficient disclosure originating from Article 19 (1) and (3) of the Convention. The Supreme Court also argued that in this particular case, a counter-offer bearing an inclusion of the general terms and conditions carries such implications regarding the contract wholesale, that an "empty reference" is simply not sufficient. Besides these critical issues related to contract formation, offers and counter-offers, as well as general terms and conditions, the Supreme Court also discussed the cost for the extra-judicial pursuit of Convention claims and the costs for debt collection agency as part of the claim for damages under Article 74 of the Convention.

The next case at hand, with a somewhat similar legal issue, is a German case, numbered *419 HKO 57/15*.[12] It concerned a dispute between a United States seller (the defendant) and a German buyer (the plaintiff). It was presided over by the Hamburg Regional Court (Landgericht), which reached a decision on July 17, 2017. The goods serving as the object of the sales contract were rotary compound liners. The German buyer was a mechanical engineering company that manufactures systems with which cans and parts for them are produced. The United States seller produced rotary compound liners, an essential element in the production lines for manufacturing cans. The buyer purchased in 2013 two such rotary compound liners from the seller. The circumstances are as follows: the seller made an initial offer which was not accepted within the mandated sixty days, and instead, the buyer made a counter-offer that differed from the seller's offer in delivery location, certification and payment terms. It also included a (internet homepage) reference to the general terms and conditions of the buyer. This was accepted by the seller.

[12] Case available at: https://www.iicl.law.pace.edu/cisg/case/germany-july-17-2017-landgericht-regional-court.

However, after the rotary compound liners were found to be allegedly defective by the buyer, the case went to court. The main issue of the case was whether the parties agreed on a choice of forum clause in favor of the Hamburg court, as the aforementioned general terms and conditions of the buyer contained one such clause. This was problematic mostly because it was questionable that the buyer made his standard terms available to the seller in a sufficient manner (since they only referred to a webpage in the offer). The Regional Court had to interpret the Convention rules on contract formation to answer this dilemma. Using Articles 8, 14 and 18 of the Convention, as well as case law, the Regional Court held that a reference of such small magnitude to the buyer's homepage in the offer could not constitute a sufficiently strong element of the contract, especially since the declaration that included the reference to the webpage was made by letter, not even via internet. The Regional Court noted that it is the responsibility of the general terms and conditions' owner to provide its contents to the other party, and it is not the other party's obligation to seek it out on their own. As a result, the Regional Court denied jurisdiction to the court designated by the buyer's general terms and conditions, and also dismissed the notion that the general terms and conditions constituted an element of the offer.

And now we can turn our attention to our next case, *Meduri Farms, Inc. v. DutchTecSource B.V.*[13] This United States case involved a Dutch seller (the defendant), and a United States buyer (the plaintiff). The dispute was overseen by the District Court of Oregon, which ruled on it on December 5, 2017. The goods that were the object of the contract were a customized system for processing blueberries. Over the course of mainly e-mail based negotiations between the parties, DutchTecSource (the seller) sold one blueberry processing system to Meduri Farms (the buyer). However, the parties had dispute regarding the price, as well as the quality of the goods. After having paid 90% of the system's price, Meduri Farms requested that DutchTecSource remove it, pay back the purchase price and also pay for further damages, as they claimed the system never worked as advertised in the first place. This led to the dispute going before court, as DutchTecSource simultaneously attempted to initiate arbitration against Meduri Farms. Besides other issues, the District Court had to determine the applicable law regarding contract formation, specifically regarding if one of the documents involved in the business dealings of the parties could be considered the offer and acceptance of the offer. There was some disagreement between the parties, with DutchTecSource arguing for Oregon state law, while Meduri Farms believed that the Convention was applicable to the dispute in this regard. However, the District Court observed that as both parties are merchants, and the dispute concerns the international sale of goods, both under the Convention and the Oregon Uniform Commercial Code, the offer (and the contract by extension) need only possess a few essential terms. Thus, this distinction was ruled ephemeral by the District Court. Nevertheless, in further discussion regarding contract formation, the District Court referred to both the Oregon Uniform Commercial Code and the Convention for its reasoning in a parallel system. The validity of offer subject came up because Meduri Farms claimed to have considered and accepted a specific document during the parties' negotiations as the offer. DutchTecSource disputed this, arguing that the acceptance of the offer must have

[13] Case available at: https://www.iicl.law.pace.edu/cisg/case/united-states-december-5-2017-district-court-meduri-farms-inc-v-dutchtecsource-bv.

necessarily incorporated related documents and messages between the parties, as said document alone was not sufficient in its view to stand as an offer on its own. The District Court disagreed with this assertion, referring to Article 14 (1) of the Convention (and also parallel Oregon Uniform Commercial Code provisions). It determined that the document (the one that Meduri Farms claimed as the offer in its entirety) meets all the criteria of the article, as it "indicates the goods being sold (listing them all in a manner that the parties understood, as merchants in the industry who had been negotiating this deal for months), the quantity and the price." It also noted that as per Article 18 (1) of the Convention, accepting an offer only requires a statement made or other conduct indicating assent. Thus, the District Court ruled the specific document is the basis of a valid contract between the parties. DutchTecSource attempted to argue that Meduir Farms were unable to understand the goods in question without also incorporating another document into the theoretical offer, but this was rejected by the District Court, noting that while such documents don't have to be part of the final agreement between the parties, they could still be considered as communication tools for the parties before the agreement is reached. But that does not mean they are incorporated into the final offer. After addressing several supplementary questions, the District Court enjoined DutchTecSource from proceeding with arbitration against Meduri Farms, and kept further proceedings at the court.

The next case chronologically is *New Organics Inc. v. Kremer Zaden B.V. and Grupo Lunamax S.L.*[14] This Dutch case involved a United States seller (the plaintiff), and Spanish and Dutch buyers (defendants). The dispute was presided over by the Noord-Nederland District Court (Rechtbank), which decided on the case on March 13, 2019. The subject of the international sales contract were chia seeds. These (high quality organic) chia seeds were originally produced in Latin America and were to be sold on the United States market. However, demand turned out to be lower than expected, so New Organics (the United States seller and plaintiff in the dispute) eventually decided to export the goods to the European Union. As part of this effort, the corporation contacted a Colombian corporation first, and through them, engaged in an increasingly complicated effort to bring the chia seeds to Europe (and repackage them) through a series of e-mails between different parties. This culminated into a dispute over the ownership of the chia seeds, with Lunamax (one of the primary corporations involved on the European side) attempting to order Kremer Zaden (the Dutch corporation responsible for mixing and repackaging the chia seeds) to hold the seeds in storage, contrary to New Organics who wanted Kremer Zaden to release them. In this context, the parties strongly disputed about whether Lunamax bought the seeds from New Organics, or whether they are just facilitating its import and hold it in consignment through Kremer Zaden. The District Court first ruled that the Vienna Convention is applicable to the case and its principles are thus necessary to determine whether a sales contract existed between the parties. Then it relied on Article 14 (1)'s definition of a sales offer (sufficiently definite and demonstrates offeror's intention to be bound) for determining this. It examined the various e-mails and invoices exchanged between Lunamax and New Organics, and found that in none of those can an offer be found that is sufficiently definite or demonstrates offeror's intention to be bound, and even more so, the New Organics' e-mails and invoices

[14] Case available at: https://www.iicl.law.pace.edu/cisg/case/netherlands-march-13-2019-rechtbank-district-court-new-organics-inc-v-kremer-zaden-bv-and.

explicitly support the consignment contract reading, while Lunamax failed to supply appropriate proof of its claims of a sales contract. As a consequence, the District Court ordered Lunamax to cease pretending to be the chia seeds' owner, while Kremer Zaden was instructed to release the chia seeds owned by New Organics.

The penultimate case to be examined is *Hellenic Petroleum LLC v. Elbow River Marketing Ltd.*[15] This case was judged by the United States District Court Eastern District of California, with a decision reached on November 18, 2019. The parties involved in the case were a U.S. corporation, whose principal place of business was in Florida (the aforementioned Hellenic Petroleum LLC), and a Canadian corporation based out of Alberta (Elbow River Marketing LTD). These two parties agreed on a sales contract (with the goods in question being propane) orally in October 2018. Hellenic Petroleum was the buyer, while Elbow River Marketing acted as the seller. Over the course of the contract's execution, the seller delivered propane 2.2 million USD in value, which was allegedly contrary to the oral agreement between the parties, which specified (as claimed by the plaintiff, Hellenic Petroleum) propane no more than one million USD in value. This final oral agreement followed several written correspondence and agreements between the parties. The greater quantity of propane led to litigation between the parties. After resolving some initial dispute over jurisdiction (Elbow River Marketing attempted to argue that an Albertan court had exclusive jurisdiction over the case), the District Court determined that the Vienna Convention is applicable to the present case, based on the fact that the dispute concerned a sales contract of goods that was also international in character (being conducted between two corporations from different Contracting States). Hence, due to the specific issue at hand (an oral contract), the Court had to examine the contract's formation within the context of the Convention, and thus also dealt with the question of offer. In this particular context, the question of whether the value of goods (no more than one million USD) consisted an *essentialia negotii* of the offer became relevant, with the plaintiff trying to argue that it was the case (thus by extension, the fundamental breach of contract by the defendant would become unavoidable). By contrast, the defendant alleged that there was no oral contract, it was an amendment of the earlier written agreements between the parties. The District Court opted to interpret the relevant Convention article (Article 14), quoting the following passage: "a proposal for concluding a contract addressed to one or more specific persons constitutes an offer if it is sufficiently definite and indicates the intention of the offeror to be bound in case of acceptance."[16] The District Court determined that the plaintiff failed to prove that its offer was sufficiently definite, and thus by extension, the plaintiff could not prove that the clause that the propane should be valued at no more than one million USD was an essential element of the contract. Besides Article 14, the District Court also addressed supplementary questions regarding the offer by quoting Article 15(1) and Article 18(1)-(2). To wit, "an offer becomes effective when it reaches the offeree"[17], "a statement made by or other conduct of the offeree indicating assent to an offer is an acceptance. Silence or inactivity does not in itself

[15] Case available at: https://www.iicl.law.pace.edu/cisg/case/united-states-november-18-2019-district-court-hellenic-petroleum-llc-v-elbow-river.
[16] CISG Article 14(1).
[17] CISG Article 15(1).

amount to acceptance"[18], and "an acceptance of an offer becomes effective at the moment the indication of assent reaches the offeror."[19] Based on these, the District Court decided that not only the supposedly new offer itself was insufficiently definitive, it did not seem like the oral discussion between the parties actually led to the formation of a new contract, instead deeming it an amendment of the original written agreements, thus excluding the propane clause from the essential elements of the contract. Interestingly, the District Court also raised the notion of consideration to determine that the contract did not properly form. This is a common law principle, by which the existence of a contract between the parties is proved by the parties performing a mutual exchange of value (to simplify the concept).[20] However, this is naturally excluded as concept from the Convention, which the District Court also acknowledged. Nevertheless, the District Court referenced an earlier case[21] by quoting the following: "[b]ecause caselaw interpreting the CISG is relatively sparse, [courts are generally] authorized to interpret it in accordance with its general principles, 'with a view towards the need to promote uniformity in its application and the observance of good faith in international trade.'"[22] This led to the District Court deciding that on the grounds of general principles, that is viable to apply the relevant provisions of the Uniform Commercial Code with regards to examining consideration. Here too, the plaintiff failed to show proper consideration for the limitation on the propane delivery.

One of the newest cases related to the subject of offers within the Convention's meaning, is the *SK Energy Europe Ltd v. Trefoil Trading B.V.* case[23]. This case concerned a sales contract of bunker oil, between a British seller (the plaintiff) and a Dutch buyer (the defendant). The dispute was overseen by the District Court (Rechtbank) of Rotterdam, and was decided on December 11, 2019. This case presented an interesting dilemma: it became a question whether the "General Conditions of the Dutch Association of Independent Bunker Suppliers" (NOVE) of the seller was part of the offer and thus the contract formation. However, said NOVE general terms and conditions explicitly excluded the application of the Vienna Convention. To resolve this dilemma, the District Court went back to earlier Dutch case law, and stated that although the Convention did not apply to the dispute due to the exclusion by the NOVE general terms and conditions, the matter on whether to include said general terms and conditions in were to be evaluated based on the relevant principles and provisions of the Convention (contract formation, and specifically offer and acceptance). This led to the District Court using Article 14, for example, to determine whether the general terms and conditions themselves were included within the offer as per the Convention's meaning, even though the Convention itself did not apply to the dispute due to the existence of said clause in the general terms and conditions.

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[18] CISG Article 18(1).
[19] CISG Article 18(2).
[20] See: MCKENDRICK E.: *Consideration and Form.* In: Contract Law. Macmillan Law Masters. Palgrave, London, (1997), 68. p.
[21] Hanwha Corp. v. Cedar Petrochemicals, Inc., 760 F. Supp. 2d 426, 430 (S.D.N.Y. 2011).
[22] Id.
[23] Available at: https://www.iicl.law.pace.edu/cisg/case/netherlands-december-11-2019-rechtbank-district-court-sk-energy-europe-ltd-v-trefoil.

5. Conclusion

Based on the research related to the writing of this study, we can say that the issue of the validity of contract is not the most litigated. However, some observations can still be made based on the case law processed. First of all, as we discussed earlier, and as shown by a few cases, the Vienna Convention is relatively flexible when it comes to the obligatory elements for a valid offer. The Convention only demands that the offeror specify what kind of goods the offer concerns, issues like quantity and price can be included either expressively, or implicitly. It is ultimately the latter element that causes difficulties, as it potentially makes the "sufficiently definitive" concept just a touch too broad, and perhaps disproportionally increases the propensity for autonomous judicial interpretation, which in turn could lead to uncertainty. Here should be mentioned the strange relationship between article 14 and 55, in the sense that the former does not refer to the latter. Requirement of a written contract would definitely help legal uncertainty. There are provisions in the Convention that counteract this uncertainty, such as the stated intent for the Convention's articles to be uniformly applied and interpreted by various courts, which as we can see from the case law, is occasionally referenced by a court. Another is article 8 which requires court to give due consideration to practices which the parties have established between themselves, or applicable usages. Another issue, as we already touched upon earlier, is that quality is not included as an essential element of the offer, however, the Convention has an article that otherwise deals with the quality of goods.

Issues might also arise from general terms and conditions. As we have seen several times in the presented case law, the placement of general terms and conditions within the offer is often met with confusion by the parties. Due to their extreme prevalence, and ubiquitous nature, they have become common elements of sales contracts between merchants, yet their application within the meaning of the Convention is poorly understood. Time and time again, courts have to make a ruling on general terms and conditions within offers, either relying on a textual reading of the Convention, or case law. Of course, this could be argued to be a self-correcting problem in the end, but the opportunity cost of judges spending time deciding on these matters, and parties arguing over them in the judicial process, does lead to a certain degree of inefficiency. In general, it would be likely advisable to somehow amend the Convention with an explicit ruling on how general terms and conditions should be handled.[24]

Of course, there are reasons for this broadness. From a negotiating perspective, making the Convention looser in certain ways could have helped with getting more states to sign it. An international instrument with too much specificity risks not only becoming too detached and different from national laws, it also risks becoming unappealing in the eyes of the governments who decide over signing the instrument or rejecting it. There is also a practical aspect to this from a legal perspective, making it easier to fit the Convention to national law.

And on the matter of practicality from a different perspective, when it comes to merchant activities, sale of goods often requires a looser framework than traditional civil law, due to the "different level" these sophisticated actors supposedly operate on. Especially with

[24] The CISG Advisory Council has dealt with the issue of general terms in its opinion no 13, http://www.cisgac.com/cisgac-opinion-no13/ (2020.06.12.).

regards to United States case law, we could observe this in play, with certain domestic regulations, such as the Oregon Uniform Commercial Code, being virtually identical to the Convention when it comes to the criteria of a valid offer in the context of international sale between merchants. In the context of international sales activities, it is perhaps not absolutely necessary for the parties to agree upon every detail with great exactness, and given the hectic nature of the world economy, perhaps it is often not even advantageous or efficient to expend a great deal of time on crafting an offer with overly concrete details. After all, as we have seen in the protein-related case, for example, market circumstances can change very quickly. Mandating that each fundamental aspect of the contract is to be fixed in the offer, could cost a great deal of flexibility for these merchants.

On the other hand, such flexibility has its cost. As we have seen from these newer cases, disputes over the formation of the contract, and specifically what constitutes an offer, is a never-ending staple of Convention-related case law. Due to the very broadness of the Convention, especially with regards to "sufficiently definite", this seems unavoidable. Therefore, it might be advisable to reconsider our stance on the matter, in the interests of litigation efficiency. As already noted, being too concrete itself might have downsides. Thus, the key could be perhaps to find a balanced approach. Introduce quality as a necessary element, for example. By only a small change like that, we could bring some perhaps needed clarity to the concept, without compromising the positive aspects of its flexibility. However, removing the implicit option is more problematic. It would be tempting to solve the issue by only allowing offers that explicitly define their price, quantity (and with the other suggestion, quality), but it would not reflect well on real business practices, where especially between long-term business partners, a degree of implicit understanding is usually inherent. Thus, the best option is possibly to keep this phrase inside the Convention, even if it causes issues from time-to-time in disputes.

In conclusion, despite its long history, we can see how the Convention still sparks debate and uncertainty, as clearly displayed by its case law. The validity of offers in itself is certainly a topic that elicits and will continue to elicit some jurisprudence.

VÍG ZOLTÁN

SZERZŐDÉSES AJÁNLAT A BÉCSI VÉTELI EGYEZMÉNYBEN: AZ ESETJOG LEGÚJABB FEJLEMÉNYEI

(Összefoglalás)

A Bécsi Egyezmény megalkotóinak eredetileg egy logikus és egységes jogi keret megalkotása volt a célja, azonban ezt politikai okok miatt nem sikerült minden tekintetben megvalósítani. Az egyes rendelkezéseknél nagyon nehéz volt megtalálni azt a közös nevezőt a különböző jogi megoldások között, amely minden tagország számára elfogadható. Ennek köszönhetően, a mai napig nagyon sok vita van az egyes rendelkezések értelmezésével kapcsolatban.

A tanulmányban egy ilyen kérdést vizsgálunk meg a legújabb esetjog tükrében, azaz az ajánlat érvényességét. Habár első ránézésre egyszerűnek tűnik, mégis a nemzetközi adásvétel kapcsán újra és újra felmerülő viták tárgya. Ebben az is közrejátszik, hogy az egyes nemzeti bíróságok sokszor különbözőképpen értelmezik a Bécsi Egyezmény rendelkezéseit, attól függően, hogy a bírák milyen jogrendszerben szocializálódtak.