

# ***FORMATION OF THE CONTRACT ACCORDING TO CISG AND TURKISH LAW COMPARED***

## ***1 – GENERAL***

The United Nations Convention on Contracts for the International Sale of Goods (CISG) was signed in Vienna on 11<sup>th</sup> April 1980 by the United Nations and entered into force on 1<sup>st</sup> January 1988. Today, 70 countries have adopted the CISG,<sup>1</sup> among them most of the great trading countries of the world. Such as USA, Russia, China and most of the European Union member states. Thousands of cases have been decided by state courts or arbitral tribunals and are reported upon via electronic databases or in legal journals, voluminous commentaries in several languages.<sup>2</sup> Its success comes to direct application to the cross border sales and an effect on another international and national regulation.<sup>3</sup> For instance, it is used as a model law for many countries' law of obligations.

Turkey has not yet ratified the CISG, but it has been accepted by most of Turkey's major trading partners. Such as Germany, Holland, France, Switzerland and USA. Therefore, Turkish Lawyers or Traders come into contract with CISG in connection with contracts in which at least one of the parties has his place of business in a Contracting State.<sup>4</sup>

Moreover, the convention aims to unify the rules, which shall be applied to international sale of goods. In order to unify the rules of International Sale of Goods, drafters of the convention considered differences between Civil Law and Common Law as well as differences between developed and developing countries.<sup>5</sup> Therefore, the CISG is quite new and has some differences from domestic laws.

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<sup>1</sup> See <http://www.cisg.law.pace.edu/cisg/countries/cntries.html> accessed 16/01/07

<sup>2</sup> Schlechtriem P "Basic Structures and General Concepts of the CISG as Models for a Harmonisation of the Law of Obligation" *Juridica International* X/2005 page 27

<[http://www.juridica.ee/get\\_doc.php?id=880](http://www.juridica.ee/get_doc.php?id=880)> accessed 16/01/07

<sup>3</sup> Schlechtriem P "Basic Structures and General Concepts of the CISG as Models for a Harmonisation of the Law of Obligation" *Juridica International* X/2005 page 27

<[http://www.juridica.ee/get\\_doc.php?id=880](http://www.juridica.ee/get_doc.php?id=880)> accessed 16/01/07

<sup>4</sup> Article 1(1) (b) of CISG

<sup>5</sup> Ozsunay E, "1980 tarihli uluslararası mal satım sözleşmeleri hakkında viyana antlaşması ve türk teşebbüslerinin taraf olduğu uluslararası mal satımı sözleşmeleri üzerindeki yansımaları(the cisg and its effects on international sale contracts of Turkish enterprises)" *Istanbul barsosu dergisi(law review of the Istanbul bar association)* Vol. 78 (2004) pp 906-959

Consequently, being member states of CISG has gained an importance especially in the eyes of Turkish Traders. Therefore, a Draft Code concerning the participation of Turkey to CISG has been submitted to Turkish Parliament on 01.08.2006. This is expected to be enacted in the forthcoming parliamentary session. In the event that CISG enters into force, the various provisions of the Turkish Code of Obligations (TCO) and the Turkish Commercial Code regarding sales contract will not be applicable for these international sales, to which CISG applies.

The main purpose of this study is to introduce the novelties which will be brought by CISG and explain its essential differences as well as similarities to the Turkish legal system in connection with formation of the contract.

## ***2- FORMATION OF THE CONTRACT***

### ***I-Meeting the Minds of the Parties***

A contract is an exchange of assents between two or more persons that creates an enforceable legal obligation. If the exchange of assents of the parties is not consistent with each other or they interpreted their intentions differently, it will not create a binding contract. In order to create a binding contract, the exchange of intentions of the parties must be necessary and real.<sup>6</sup> Where an exchange of assent of the parties is inconsistent, it must be interpreted according to the rules of good faith.<sup>7</sup>

According to article 1 of TCO states, “a contract requires the mutual agreement of the parties”. It is obvious that the main requirement to create a binding contract is the mutual consent of the parties. In addition, according to paragraph 2 of this article states “this agreement may be either express or implied”. Thereby, the parties’ exchange of assents can be either express or implied. Such as making a payment or performing an act.

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<sup>6</sup> Oguzman K, Oz M, (1998), “*Borclar Hukuku Genel Hukumler (Turkish Law of Obligation General Part)*”, 2<sup>nd</sup> Edition, Filiz Kitap Evi, Page 40

<sup>7</sup> Tekinay S, Akman S, Burcuoglu H, Altop A.,(1988) “*Tekinay Borclar Hukuku(Tekinay Obligation Law)*”, 6<sup>th</sup> Edition, Istanbul, Page 73

It is necessary to examine that whether a silence is an implied acceptance or not. As a rule, silence is not same as the implied acceptance and no body needs to answer an offer. However, under special circumstances of the transaction, silence is to be accepted as an implied acceptance.<sup>8</sup>

Moreover, in order to create a binding contract the parties must have agreed on all the objective essential terms of the contract.<sup>9</sup> These terms must be either determined or objectively determinable at the time of the formation of the contract. Where the terms of the contract have been left open for a future date, it may be determined according to objectives criteria or by impartial third person.<sup>10</sup> For instance, under the contract of sale, the objective essential terms of the contract must be the price and the quantity of goods. The parties can sometimes agree on the unessential terms of the contract to be essential terms. Such as the place where goods will be delivered.<sup>11</sup> These terms can be called as a subjective essential terms of the contract.<sup>12</sup>

In addition, where unessential terms of the contract have been left open, the contract is also presumed to be binding.<sup>13</sup> If no agreement can be reached about the unessential terms of the contract, the court will decide them according to the nature of the transaction.<sup>14</sup> On the other hand, according to article 2(3) of TCO states, the form of the contract shall remain unaffected. The general rule is the freedom of form of the contract. Where the law requires a special form of contract, it will not be valid without that specified form.<sup>15</sup>

As far as the CISG is concerned, it does not formulate the basic conditions of formation of the contract.<sup>16</sup> The CISG adopted the ‘traditional theory’ using ‘offer’ and acceptance’ as the

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<sup>8</sup> Article 6 of TCO

<sup>9</sup> Article 2(1) of TCO

<sup>10</sup> Eren F, (2003), “*Borclar Hukuku Genel Hukumle(Turkish Code of Obligation General Part)*” Istanbul, page 208

<sup>11</sup> Yilmaz I, (2002)“*Uluslararası Menkul Satisi Sozlesmelerine Dair Viyana Konvansiyonu ve Turk Hukukuna Gore Sozlesmenin Kurulusu(CISG and Formation of the Contract in Turkish Law)* ” Kemal Oguzman Armagani, Istanbul page 577

<sup>12</sup> Feyzioglu N F., (1978) “*Borclar Hukuku-Akdin Muhtelif Nevileri (Law of Obligation- Various Kind of Contract)*” Istanbul page 65

<sup>13</sup> Article 2 (1) of TCO

<sup>14</sup> TCO Art. 2 (2) of TCO - Tekinay S, Akman S, Burcuoglu H, Altop A, op.cit, Page 100

<sup>15</sup> Article 11 of TCO

<sup>16</sup> Yilmaz I, op.cit, page 579

elements that are necessary for formation of the contracts.<sup>17</sup> In fact, offer and acceptance that are milestones of the contract have been adopted both by the TCO and by the CISG. However, in contradiction to Turkish law, the CISG does not mention to the mutual consent of the parties. It only mentions the indication of assent of the parties.

Moreover, article 2 of TCO makes differentiation between the essential and the unessential terms of the contract. As I mentioned before, in order to create a contract, the parties must agree on all the essential terms of the contract. According to the CISG, article 14(1) introduces a similar provision, which is that “the offer must be sufficiently definite.”<sup>18</sup> Therefore, if the unessential terms of the contract have been left open, the contract is presumed to be binding under the CISG.<sup>19</sup> As it can be seen that there is a similarity between the TCO and the CISG.

In addition, the indication of assent of the parties may be either express or implied under the CISG<sup>20</sup> just as under the TCO. Silence also does not in itself amount an acceptance. However, under some circumstances, it may count as an acceptance. Such as, according to article 19(2) of CISG, where an offeror does not reject an acceptance without undue delay, which contains an immaterial terms, it constitutes an acceptance.

Finally, it can be said that the TCO and the CISG have large similarities regarding the basic conditions of formation of the contract.

## ***II- Offer***

An offer is a declaration of the intent of the offeror to another party in order to enter into contract.<sup>21</sup> As I mentioned before, the contract requires an exchange of assent. The first indication of assent is to be called as an offer. In order to make an effective offer, it has to be communicated to the offeree.<sup>22</sup>

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<sup>17</sup> Erdem H. E., (1992) “*Milletlerarası Mal Satış Sözleşmeleri Hakkında Birleşmiş Milletler Sözleşmesi (Viyana Satım Sözleşmesi)(the Cist –in Turkish*”)16 Banka ve Ticaret Hukuku Dergisi, (Banking and Commercial Law Journal), Ankara, ,page 61

<sup>18</sup> The offer is sufficiently definite if it indicates the goods and expressly or implicitly fixes or makes provision for determining the quantity and the price.

<sup>19</sup> Yılmaz I, op.cit, page 580

<sup>20</sup> Article 18 (3) of CISG, “the offeree may indicate assent by performing an act.”

<sup>21</sup> Oguzman K, Oz M, op.cit, Page 47

<sup>22</sup> Article 15(1) of CISG

## 1) Criteria for Offer

The basic criteria for an offer are set out under the article 14 of CISG. According to article 14, “a proposal for concluding a contract addressed to one or more specific persons constitutes an offer, if it is sufficiently definite and indicates of the intention of the offeror to be bound in the case of acceptance.” In contrast with it, there is no counterpart in the TCO, but the criteria for an offer can be ascertain regarding to the relevant articles of the TCO.<sup>23</sup>

*a) Addressed to one or more specific persons:* According to article 14 of CISG, the offer should be addressed to one or more specific persons in order to be definite.<sup>24</sup> Otherwise, it will be treated as an invitation to make an offer.<sup>25</sup> Therefore, offers to the public should not be considered as offers. Such as price list, circulars, newspapers advertisements.<sup>26</sup>

According to the TCO, an offer must be communicated to the offeree or general public. The offer can be made to a general public by displaying goods with prices<sup>27</sup>, or by making a public offer of a reward.<sup>28</sup> Therefore, under Turkish law, there is no need to address an offer to specific persons in order to create a binding offer. According to article 7(3) of TCO, “the display of goods with price quotation is considered to be an offer.”

In this point, the TCO and the CISG have a different approach. Under the CISG, a proposal can be acceptable as an offer, if it addressed to one or more specific persons even though it does not specify the price. According to article 14(2) of CISG, public offers are not considered as an offer, as it does not address to one or more specific persons, unless the contrary is clearly indicated by the person making the proposal. For instance, a mail order catalogue may be sent specific persons; it will be addressed to those persons who may see the catalogue.<sup>29</sup> In contrast, under the TCO, the despatch of tariffs, price lists or similar items

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<sup>23</sup> Yilmaz I, op.cit, page 581

<sup>24</sup> The court (Oberster Gerichtshof- 3 Ob 512/96) decided on 18-06-1997, “An offer can be validly accepted only by the offeree, that is by the person to whom the offer was addressed.” <http://cisgw3.law.pace.edu/cases/970618a3.html>> accessed 17.01.2007

<sup>25</sup> “However, there is no common law requirement that the proposal must be addressed to one or more “specific” persons; it can be addressed to the world at large if that is the offeror's intention.” Ziegel, J S “Report to the Uniform Law Conference of Canada on Convention on Contracts for the International Sale of Goods”(1981)Art. 14 < <http://www.cisg.law.pace.edu/cisg/text/ziegel14.html>> accessed 17/01/07

<sup>26</sup> Valioti Z, *The Rules on Contract Formation under the Vienna Convention on Contracts for the International Sale of Goods (1980)*, (2003), [http://www.cisg.law.pace.edu/cisg/biblio/valioti.html#\\*](http://www.cisg.law.pace.edu/cisg/biblio/valioti.html#*) accessed 26/12/2006

<sup>27</sup> Article 7(3) of TCO

<sup>28</sup> Article 8(1) of TCO

<sup>29</sup> Nicholas B, (1989) “The Vienna Convention on International Sales Law” 105 *Law Quarterly Review* page 214 <http://www.cisg.law.pace.edu/cisg/biblio/nicholas2.html#ptii> accessed 17/01/07

does not constitute an offer,<sup>30</sup> even if it is addressed to specific persons. The most important thing here is the content of the offer, not to have a determinable addressee. As it can be seen in the article 7(3) of TCO, “the display of goods with price quotation is considered as an offer.” It is an offer according to the TCO, but it is not an offer according to the CISG as it is not addressed to one or more specific persons.

As a result of this, a proposal may be an offer under the CISG, if it is addressed to one or more specific persons; nevertheless, under the TCO, the most essential requirement is the content of the offer so as to determine whether it is offer or not.

**b) Sufficiently Definite:** According to article 14(1) of CISG, “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.” Therefore, an offer must include all the essential elements in order to be definite.<sup>31</sup> In this point, it has similarities with the TCO. As article 2(1) of TCO states, “where the parties have agreed on all the essential terms of the contract, it is presumed to be binding.” In contrast to CISG, the TCO does not identify the essential terms of the contract.<sup>32</sup> It may be determined regarding to the nature of the transaction or general practices and usages which parties have established between themselves. As a rule, under the contract of sale, the price and the quantity of the goods must be accepted as an essential terms of the contract.<sup>33</sup>

The TCO does not require being included the unessential terms of the contract in order to create a binding contract.<sup>34</sup> In addition, article 14 also does not require that the proposal

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<sup>30</sup> Article 7(2) of TCO

<sup>31</sup> The Court (Obergericht des Kantons Thurgau- ZB 95.22) pointed out that “*under Art. 14 (1) CISG a proposal constitutes an offer, if it is definite and if it indicates the intention of the person who makes the proposal to be bound in case of acceptance. As to the requirement of definiteness of terms, the Court observed that the proposal was valid because it expressly indicated the goods, the quantity, the price and the offeree.*” 19/12/1995 <<http://cisgw3.law.pace.edu/cases/951219s1.html>> accessed 17/01/07

<sup>32</sup> Uygur T, (2003), “*Aciklamali-Ictihatli Borclar Kanunu Sorumluluk ve Tazminat Hukuku Cilt1*” 2<sup>nd</sup> Edition, Seckin, page 452

<sup>33</sup> Eren F, op.cit, page 220

<sup>34</sup> Article 2(1) of TCO

include all the terms of the proposed contract.<sup>35</sup> If, for example, the parties have not agreed on the place of delivery or the mode of transportation the Convention may fill the gap.<sup>36</sup>

Furthermore, the indication of price is the essential terms of the contract. However, it may present certain problems in the case of open-price contracts. According to the wording of the article 14, the contract is not to be concluded without specifying the price. However, *Switzerland Handelsgericht [Commercial Court]* decided that the contract is concluded even if the failures to specify the price as the parties have established general practices between themselves.<sup>37</sup>

In addition, article 55 of CISG provides a formula for this problem. The price supplied by article 55 is "the price generally charged at the time of the conclusion of the contract for such goods sold under comparable circumstances in the trade concerned."<sup>38</sup> According to this article, a contract can be validly concluded without making any reference to the price.

On the other hand, under the TCO, where the parties do not fix a price, it will be determined according to Article 209 of TCO. It states, "where the contract is concluded without fixing a price, it is charged on the current price for such goods at the time of the conclusion of the contract."

In order to apply these provisions, the goods must have a market price. According to *Malev Hungarian Airlines case*, "the offer was not sufficiently definite: there were "no market prices" for aircraft engines."<sup>39</sup>

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<sup>35</sup> *Landgericht* [District Court] München 8 February 1995 "In the Court's opinion a contract had been concluded between the parties as they had both signed the purchase order and had come to an agreement on the minimum contract requirements (identification of the goods and price determination; Arts. 14, 18 and 23 CISG)." < <http://cisgw3.law.pace.edu/cases/950208g4.html> > accessed 17/01/07

<sup>36</sup> The UNCITRAL Digest of case law on the United Nations Convention on the International Sale of Goods, A/CN.9/SER.C/DIGEST/CISG/14 [8 June 2004] < <http://www.cisg.law.pace.edu/cisg/text/digest-art-14.html#address> > accessed 17/01/07

<sup>37</sup> *Handelsgericht* [Commercial Court], 5.12.1995 "The Court further noted that under Art. 14 CISG a proposal constitutes an offer when it indicates the intention of the offeror to be bound in case of acceptance: in the case at hand such an intention was to be derived from the terms 'order', 'we order' and 'immediate delivery' contained in the fax. As to the requirement of definiteness of terms, the Court observed, without any further specification, that the offer was valid although the fax did not indicate the price of the goods." < <http://cisgw3.law.pace.edu/cases/951205s1.html> > accessed 17/01/07

and also see the case of *Entreprise Alain VEYRON v. Société E. AMBROSIO* available at <http://www.cisg.law.pace.edu/cisg/wais/db/cases2/950426f1.html> accessed 17/01/07

<sup>38</sup> The UNCITRAL Digest of case law on the United Nations Convention on the International Sale of Goods, A/CN.9/SER.C/DIGEST/CISG/14 [8 June 2004] < <http://www.cisg.law.pace.edu/cisg/text/digest-art-14.html#address> > accessed 17/01/07

<sup>39</sup> *MALEV Hungarian Airlines v. United Technologies International Inc. Pratt & Whitney Commercial Engine Business*, The court held that although CISG does not apply to the sale of aircraft (Art. 2(e) CISG) it does apply

As a consequence of these facts, where the price is not fixed, it will be determined according to article 209 of TCO and the contract is to be concluded without doubt under the Turkish law. However, the situation is not yet clear under the CISG. There are different interpretations of the relationship between these two articles (Articles 14 and 55) regarding to the price. According to *Honnold*, “these two Articles should be read in conjunction”, in contrast to this, *Farnsworth* states, “article 14 should be read alone”. As far as I am concerned, I also agree with Honnold that articles 14 and 55 should be read in conjunction. As article 55 provides a gap-filling reference to the price.<sup>40</sup> It also falls in line with the aims of the CISG, which intend to unify the rules and provide quickest and safest trade for international sale of goods. Therefore, adoption of the CISG may introduce some uncertainty into the Turkish Law relative to this particular subject.

**c) Indication of Intent to be bound:** An offer must be made with real intention of the offeror to be bound in the case of acceptance. The offeror should be completely aware that his proposal constitutes an offer and must be ready to fulfil his obligations in the case of acceptance.<sup>41</sup>

Where the offeror is not serious about his offer, such as making a joke, or his intention is not clear to create a binding obligation, it would not be construed as an offer and it would be as an invitation to make offer.

As I mentioned previously, it is related with state of mind of the offeror and of a subjective nature. Therefore, it often cannot be fully ascertained.<sup>42</sup> It can only be determined regarding to the interpretation of the parties’ intention.<sup>43</sup>

Both the Turkish and the CISG have similar provision regarding to this subject. Under the Turkish law, the offer must be made with real intention of the offeror.<sup>44</sup> Therefore, the parties’ intention to be bound is to be determined regarding to the rules of good faith.<sup>45</sup>

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to the sale of single components of aircraft. However, as the offer did not specify the price, it was not sufficiently definite for mere acceptance on the part of the buyer to conclude the contract (Art. 14(1) CISG). Available at < <http://www.cisg.law.pace.edu/cisg/wais/db/cases2/920925h1.html>> 17/01/07

<sup>40</sup> Ruangvichathorn J, “*Commentary on Whether the UNIDROIT Principles of International Commercial Contracts May Be Used to Interpret or Supplement Article 55 of the CISG*” (2004) <http://cisgw3.law.pace.edu/cisg/principles/uni55.html> accessed 17/01/07

<sup>41</sup> Valiotti Z, *The Rules on Contract Formation under the Vienna Convention on Contracts for the International Sale of Goods* (1980), (2003), < <http://www.cisg.law.pace.edu/cisg/biblio/valiotti.html#1>> accessed 21/01/07

<sup>42</sup> Eorsi G, in Bianca-Bonell “*Commentary on the International Sales Law*” Giuffrè: Milan (1987) Art 14, 2.2.3. < <http://www.cisg.law.pace.edu/cisg/biblio/eorsi-bb14.html>> accessed 21/01/07

<sup>43</sup> Article 8 of CISG



## 2) Invitation to Make Offers

It is obvious that where two parties enter into negotiations, the question whether a particular statement by one of them is an offer or merely an invitation to treat must always be one of fact.<sup>46</sup> Article 14 (2) of CISG deals with proposals to an indeterminate number of persons. Such as advertisements, catalogues, displays of goods in a store windows. All these are proposals to sell or buy directed to the public at large, that is, public offers.<sup>47</sup> Public offers are of two types, those in which the display of goods in a store window, vending machine or making a public offers of a reward. The CISG takes a middle position regarding to public offer.<sup>48</sup> Therefore, public offers are considered merely as an invitation to make offers, unless the contrary is clearly indicated by the person making the proposal.<sup>49</sup>

According to TCO, a public offer can be made by displaying goods with prices<sup>50</sup>, or by making a public offer of a reward.<sup>51</sup> Therefore, public offers are considered an offer. However, where the offeror does not specify one of the essential terms of the contract, it can be accepted as an invitation to make an offer.<sup>52</sup> Moreover, according to article 7 (1) of TCO, where the nature of the transaction shows that the offeror's intention is not clear to create a binding obligation or he adds to the offer a declaration declining liability, this statement is to be considered just an invitation to make an offer. Such as, sending brochures and price list or similar items does not constitute an offer.<sup>53</sup>

In general, it can be said that where the Turkish law sees a "public offer", the CISG sees only an invitation to make an offer.<sup>54</sup> It is clear that the display of goods with a price quotation in a

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<sup>44</sup> Saymen F H, Elbir H K, (1958), "*Türk Borçlar Hukuku, I, Umumi Hukuklar (Turkish Code of Obligation, I, General Part)*" Istanbul, page 97

<sup>45</sup> Article 2 –3 of Turkish Civil Code - Oguzman K, Oz M, op.cit, Page 64

<sup>46</sup> Nicholas B, (2005), "*The French Law of Contract*" Clarendon Press Oxford, 2<sup>nd</sup> Edition, page 63

<sup>47</sup> Eorsi G, in Bianca-Bonell "*Commentary on the International Sales Law*" Giuffrè: Milan (1987) Art 14, 2.2.5. < <http://www.cisg.law.pace.edu/cisg/biblio/eorsi-bb14.html>> accessed 22/01/07

<sup>48</sup> Secretariat Commentary (closest counterpart to an Official Commentary), "GUIDE TO CISG ARTICLE 14" < <http://www.cisg.law.pace.edu/cisg/text/secomm/secomm-14.html>> accessed 22/01/07

<sup>49</sup> Article 14(2) of CISG

<sup>50</sup> Article 7(3) of TCO

<sup>51</sup> Article 8 of TCO

<sup>52</sup> Yilmaz I, op.cit, page 584

<sup>53</sup> Article 7(2) of TCO

<sup>54</sup> According to English law, advertisements, catalogues or displays of goods in shop windows are considered as mere invitations to make an offer. Also see *Pharmaceutical Society of Great Britain V Boots Cash Chemists (Southern) Ltd* [1953] 1QB 401.

shop window constitutes an offer under the Turkish law.<sup>55</sup> The situation can be best analysed under the leading French case of Lemonade Bottle.<sup>56</sup> According to this case, when a bottle of lemonade exploded at the cash-desk, but before it had been checked out, the Paris Court of Appeal, in a decision which was upheld by the Cour de Cassation, rules that in a self-service shop “the sale is complete when the customer, having chosen from the shelf an article offered for sale at a posted price which he accepts, places it in the basket which is provided and which he is bound to use until the goods are checked out at the cash-desk”.<sup>57</sup> According to facts of the case, the contract would not have been concluded under the CISG. It may be regarded as mere invitations to treat. Because a proposal is not addressed to one or more specific persons<sup>58</sup> and even if it is addressed to one or more specific persons, formation may only occur when an acceptance reaches the offeror (Article 18(1) of CISG). Therefore, an offeree may withdraw his acceptance, until he makes a payment (Article 22 of CISG).<sup>59</sup> In contrast to this, the contract is concluded under the Turkish law. As the tag on the bottle constitutes an offer<sup>60</sup> and taking the bottle constitutes an acceptance.<sup>61</sup> Therefore, there is a formation of the contract.

Finally, having regard to the invitation to make an offer, the main difference between the CISG and the TCO comes to the light in the case of public offer. In fact, under the TCO, the display of goods with price quotation is considered as an offer; nevertheless, under the CISG, it is considered merely as an invitation to make offers, as it is not addressed to one or more specific persons. It can be said that other than public offers, the CISG and the TCO have a same provision.

### **3) Withdrawal of Offer**

According to article 15 (1) of CISG, an offer becomes effective when it 'reaches' the offeree. Therefore, until that moment even though the offeree may have learned of the dispatch of the offer by some means, he cannot accept it.<sup>62</sup> Article 15(2) lays down the condition for

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<sup>55</sup> According to French law, “displays of goods in shop windows and on supermarket shelves constitute offers, provided that the price is displayed.”

<sup>56</sup> Paris 14.12.1961

<sup>57</sup> Nicholas B, op.cit, page 64

<sup>58</sup> Article 14(2) of CISG

<sup>59</sup> According to English law, it is not a contract as well.

<sup>60</sup> Article 7(3) of TCO, “the display of goods with price quotation is considered as an offer.”

<sup>61</sup> French law has also taken the same view.

<sup>62</sup> Secretariat Commentary (closest counterpart to an Official Commentary),” GUIDE TO CISG ARTICLE 15”<  
<http://www.cisg.law.pace.edu/cisg/text/e-text-15.html> > accessed 23/01/07

withdrawal of an offer. Withdrawal is only possible if the notification reaches the addressee before or at the same time as the offer. The importance of article 15(2) is that the offer may be withdrawn even if it is irrevocable. As it has not yet qualified as an effective offer.

Moreover, article 16 of CISG formulates the revocation of the offer. According to article 16(1), an offer may be revoked, after it becomes effective.<sup>63</sup> In fact, the convention follows the common law rule in here.<sup>64</sup> The common law applies, the mailbox theory, which means that revocation is not effective if the offeree dispatches an acceptance before the revocation has reached him.<sup>65</sup> Moreover, article 16(2) constitutes the exception to the rule of revocability of the offer.<sup>66</sup>

Consequently, CISG uses a “withdrawal” in its article 15(2) and a “revocation” in its article 16 and gives them a different meaning. The first is of Anglo-Saxon origin and the second of Latin origin.<sup>67</sup> It might be thought that there is a contradiction between these two Articles. Whereas, there is not any contradiction. Because article 15(2) states, the withdrawal is possible until an offer becomes effective, conversely, article 16 states, the revocation is possible after effectiveness of the offer.

In contrast, they are synonymous under the TCO.<sup>68</sup> Withdrawal of an offer is set out in article 9 of TCO. According to this article, an offer can be effectively withdrawn, if the withdrawal reaches to the offeree before or at the same time with the offer; although the withdrawal arrived after the arrival of the offer, the offer may be withdrawn if the offeree reads the withdrawal before he reads the offer itself. Article 9 of TCO has a same provision with article 15(2) of CISG regarding to the withdrawal of an offer. However, other than the wording of article 15(2), the TCO provides under article 9, “where the withdrawal arrived after the offer, the offer may be withdrawn if the offeree is informed about withdrawal before he learns the

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<sup>63</sup> Article 16(1) states, “Until a contract is concluded an offer may be revoked if the revocation reaches the offeree before he has dispatched an acceptance.”- also under the English law, “an offer can be revoked at any time unless the offeror gives consideration”.

<sup>64</sup> Erdem H. E., op.cit, page 62

<sup>65</sup> Eorsi G, in Bianca-Bonell “Commentary on the International Sales Law” Giuffrè: Milan (1987) Art 16,2.1.2 <<http://www.cisg.law.pace.edu/cisg/biblio/eorsi-bb16.html>> Accessed 22/01/07

<sup>66</sup> Article 16(2) states, “However, an offer cannot be revoked:

(a) if it indicates, whether by stating a fixed time for acceptance or otherwise, that it is irrevocable; or

(b) if it was reasonable for the offeree to rely on the offer as being irrevocable and the offeree has acted in reliance on the offer.”

<sup>67</sup> Eorsi G, in Bianca-Bonell “Commentary on the International Sales Law” Giuffrè: Milan (1987) Art 15,2.1.1. <<http://www.cisg.law.pace.edu/cisg/biblio/eorsi-bb15.html>> Accessed 22/01/07

<sup>68</sup> Yilmaz I, op.cit, page 585

offer itself". Therefore, the withdrawal is possible even if it reaches the offeree after the offer reaches under the TCO.

Moreover, according to article 7(1) of the TCO, an offeror may withdraw his offer, if he adds to the offer a declaration declining his liability, or such a reservation results from the nature of the transaction.

Finally, there is no counterpart of article 16 of the CISG in the TCO.

#### **4) Termination**

According to TCO, an offer may be terminated by withdrawal (Article 9), counteroffer or under articles 3-5 of TCO, where an acceptance does not reach the offeror within the time limit or by rejection.<sup>69</sup>

Same principles also take effect under the CISG. Although, according to article 17 of CISG, "an offer, even if it is irrevocable, is terminated when a rejection reaches the offeror." The main purpose of the provision is to assure that the offeror is free to contract with someone else without fear that the offeree will change his mind and attempt to accept the offer, which he had previously rejected.<sup>70</sup>

Furthermore, an offer may also be terminated by lapse of time, death or disability of either party, or subsequent illegality. However, the CISG does not contain any rules about these provisions. In such situations, domestic law continues to govern the effects of such events on an existing offer (Article 7(2)).<sup>71</sup>

### ***III- Acceptance***

#### **1) Criteria for Acceptance**

Acceptance can be defined as an approval of the offeree to the terms of the offer without stipulating any condition. The basic criteria for an acceptance are set out under article 18 of

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<sup>69</sup> Yilmaz I, op.cit page 590

<sup>70</sup> Eorsi G, in Bianca-Bonell Commentary on the International Sales Law, Giuffrè: Milan (1987) "Article 17" 2.2.1.< <http://www.cisg.law.pace.edu/cisg/biblio/eorsi-bb16.html#ijj>> accessed 23/01/07

<sup>71</sup> Schlechtriem P, Schwenger I, (1998), *Commentary On The UN Convention On The International Sale Of Goods (CISG)*, 2<sup>nd</sup> Edition, Oxford University Press, page 216

CISG.<sup>72</sup> In order to create an effective acceptance, it must be communicated to the offeror within a time limit or, if no time limit is fixed, within a reasonable time.<sup>73</sup> Therefore, an acceptance becomes effective at the moment it reaches the offeror.

Consequently, the TCO has similar rules regarding to terms of the acceptance. As it also requires that acceptance has to be communicated to the offeror.<sup>74</sup> As I explained it before, in order to create an effective acceptance, the indication of assent of the offeree must reach the offeror.

Moreover, article 18(1) of CISG states, silence or inactivity does not in itself amount to acceptance.<sup>75</sup> However, acceptance can be made either express or implied. As it can be seen that article 18(3) states, an acceptance made by conduct becomes effective when the act performed within the time limit indicated in article 18(2), without notice being reached to the offeror.<sup>76</sup> The implied acceptance occurs because of practices, which parties have established between themselves or of usage. Such as, dispatch of the goods or payment of the price.

According to TCO, an acceptance can also be made either express or implied. In the case of implied acceptance<sup>77</sup>, the most important element needs to be discussed is whether mere silence is an acceptance or not. In general, mere silence does not amount to acceptance. However, article 6 states, due to the special nature of the transaction, if the offeree does not answer after having received the offer, thus the contract is deemed to be concluded, unless the offer is refused within a reasonable period. The special nature of the transaction can be either the dispatch of the goods or payment of the price as it is also stated under article 18(3) of CISG. This article is only applicable where the offer is made to persons absent.<sup>78</sup>

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<sup>72</sup> According to Article 18(1), “a statement made by or other conducts of the offeree indicating assent to an offer is an acceptance.”

<sup>73</sup> Article 18(2) of CISG

<sup>74</sup> *According to English law, an acceptance must be communicated to the offeror to be effective. Only exception is postal acceptance. It is effective when it has been sent out the offeror. If the address is correct and stamped, it is irrelevant whether the acceptance reached to the offeror or not.* Also see *Adams v Lindsell* (1813) 1B & Ald 681

<sup>75</sup> According to English Law, *silence is not an acceptance unless otherwise stipulated.* see *Felthouse v Bindley* (1862) 11 CBNS 869.

<sup>76</sup> Valioti Z, *The Rules on Contract Formation under the Vienna Convention on Contracts for the International Sale of Goods* (1980), (2003), [http://www.cisg.law.pace.edu/cisg/biblio/valioti.html#\\*](http://www.cisg.law.pace.edu/cisg/biblio/valioti.html#*) accessed 23/01/07

<sup>77</sup> Article 6 of TCO (Implied Acceptance)

<sup>78</sup> Yilmaz I, *op.cit*, page 591

Finally, it can be said that the CISG and the TCO has similar rules regarding to the implied acceptance. According to *Yilmaz*, “there is only one difference, which is that the CISG has formulated the implied acceptance in a positive manner but the TCO is not.”<sup>79</sup>

## 2) Counter-Offer

Where an offeree adds to his reply additions, limitations or other modifications that is considered as a rejection of the original offer and constitutes a counter-offer. The situation is dealt article 19 of CISG. This provision reflects traditional “mirror image” rule that an acceptance must comply exactly with the offer.<sup>80</sup>

However, article 19(2) of CISG has departed from the traditional theory and followed to the modern trend found in both common law and civil law systems.<sup>81</sup> According to the paragraph (2), where a reply to an offer contains different terms which do not materially change the terms of the offer constitutes an acceptance, unless the offeror objects to that difference and informs the offeree without undue delay.

Consequently, the importance has to be given whether modifications in the acceptance is material or not or the question is that what the material modifications are. Article 19 (3) gives an answer to this question. It provides a list of modifications, which is considered material.<sup>82</sup>

In contrast, under the Turkish Law, there is no regulation about counter-offer. Therefore, the subject was introduced under doctrines and current practices of Turkish law.<sup>83</sup> According to doctrines, where a reply to an offer contains additions, modifications or limitations that is considered as a rejection of the offer and it constitutes a counter-offer.<sup>84</sup> In fact, it may be presumed that the TCO adopts the traditional “mirror image” rule.

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<sup>79</sup> *Yilmaz I*, *ibid*, page 591

<sup>80</sup> Article 19(1) of CISG - Secretariat Commentary (closest counterpart to an Official Commentary),” GUIDE TO CISG ARTICLE 19” < <http://www.cisg.law.pace.edu/cisg/text/secomm/secomm-19.html> > accessed 23/01/07

<sup>81</sup> *Vergne F*, “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)233-258.

<http://www.cisg.law.pace.edu/cisg/biblio/vergne.html> accessed 23/01/07

<sup>82</sup> 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.

<sup>83</sup> *Yilmaz I*, *op.ci*, Page 593

<sup>84</sup> *Esener T*, “*Akitlerin Kurulusu (Formation of the Contract)*”, Ankara, page 55

Moreover, if the modifications are only related with unessential terms of the contract, the contract is presumed to be binding.<sup>85</sup> However, there are two different situations regarding to this matter.<sup>86</sup>

In addition, Turkish law does not have any regulation to determine the essential terms of the contract. It may be determined regarding to the nature of the transaction or general practices and usages which parties have established between themselves. In general, goods and their price can be accepted as an essential terms of the contract of sale.<sup>87</sup> In contrast, other than goods and their price, the CISG adopted other elements in order to determine the essential terms of the contract.<sup>88</sup>

Finally, the CISG has adopted extensive provision regarding to the counter-offer. As, it aims to create internationally established rules. Therefore, the rules governing to the counter-offer should be applicable into Turkish law without objection.

### **3) Time Allowed for Acceptance**

In order to understand the matter, it is necessary to explain periods for binding offer. According to TCO, a binding offer cannot be revoked.<sup>89</sup> Even if it were revoked, it would not affect the formation of the contract. According to article 3 of TCO, where the offeror fixes a time limit for an acceptance, he is bound until the expiration of the time limit. In contrast, According to article 16(1) of CISG, “until a contract concluded an offer may be revoked if the revocation reaches the offeree before he has dispatched an acceptance”. Therefore, an offer can be revoked, after it becomes effective (binding).<sup>90</sup> However, paragraph 2(a) of article 16 has adopted the similar provision as TCO, which is the fixed time or indication that the offer is irrevocable. In addition, paragraph 2(b) of article 16 has also introduced another alternative way to restrict the power of the offeror, which is not dealt under the TCO. Where the offeree has acted in reliance on the offer.

Besides, an offer can be made without time limit being arranged. According to article 4 of TCO, if the offer is made to persons present, the answer must be given immediately.

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<sup>85</sup> Article 2(1) of TCO

<sup>86</sup> See Counter-Offer in Chapter III- part 3,II.

<sup>87</sup> Erdem H. E., op.cit, page 64

<sup>88</sup> Article 19(3) of CISG

<sup>89</sup> Yilmaz I, op.cit, Page 587

<sup>90</sup> Article 15(1) of CISG, “An offer becomes effective when it reaches the offeree.”

Sometimes negotiations may take time. During that time, the offeror is still bound by his offer, unless it was rejected by the offeree.<sup>91</sup> Where the subject matter has been changed during negotiations without being agreed on the first matter, the problem may arise. As I explained it previously, if the parties decided to reserve the first subject, the offeror will still be bound with his first offer. Otherwise, the offeror is not bound with it.<sup>92</sup> In contrast, according to article 18(2) of CISG, “an offer made to persons present must be accepted immediately unless the circumstances indicate otherwise”. Therefore, face-to-face offer must be accepted immediately in order to be effective. In fact, the CISG and the TCO has adopted similar provision regarding to this matter.

Moreover, according to article 5(1) of TCO, where an offer is made to persons absent without time limit being arranged, the offeror is bound until the time when he should receive the acceptance if it is dispatched in due course and time.<sup>93</sup> In contrast, according to article 18 (2) of CISG, where the offeror fixed a time limit for an acceptance, the acceptance will only be effective, if it reaches the offeror within a time limit. If there is no time fixed, it must reach within a reasonable time. The reasonable time must be determined in the light of the circumstances under which the transaction was made or even by the nature of the means used by the offeror.<sup>94</sup> Therefore, the offeror will be bound with his offer within the time limit fixed or there is no time limit fixed, within a reasonable time. If an acceptance does not reach in a prescribed time or it reaches unreasonable late, the offeror will be released from his offer. It can be seen that the CISG and the TCO has also adopted similar provisions regarding to this matter.

Having explained periods for binding offer, it would necessary to determine when those periods begin to run in accordance with different situations. Article 20 of CISG gives an accurate rule, which depends on the means of communication in order to determine the beginning of the period.<sup>95</sup> Paragraph 1 of article 20 states, where the offeror has already fixed the time for acceptance, it starts to run from the moment the telegram is dispatched and from

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<sup>91</sup> Eren F, op.cit, page 226

<sup>92</sup> See Chapter III, “Binding Offer”

<sup>93</sup> In order to determine this reasonable period of time, the offeror may consider three different period of time; *a*) the time for the offer to reach the offeree, *b*) the time for offeree to consider the offer and *c*) the time to dispatch the answer in due course and time.

<sup>94</sup> Valiotti Z, *The Rules on Contract Formation under the Vienna Convention on Contracts for the International Sale of Goods (1980)*, (2003), [http://www.cisg.law.pace.edu/cisg/biblio/valiotti.html#\\*](http://www.cisg.law.pace.edu/cisg/biblio/valiotti.html#*) accessed 23/01/07

<sup>95</sup> Schlechtriem P, “*Uniform Sales Law - The UN-Convention on Contracts for the International Sale of Goods*” Vienna (1986)p 54 <http://www.cisg.law.pace.edu/cisg/biblio/slechtriem-20.html> accessed 24/01/07



the date shown on the letter. If there is no date shown on the letter, the time starts to run from the date shown on the envelope. Moreover, if the offeror has fixed the period by telephone, telex or other means of communication, it begins to run from the moment that the offer reaches the offeree.

In general, article 20(1) of CISG has chosen the dispatch theory to determine the beginning of the period for the letter and telegram. However, it has chosen the receipt theory for telephone, telex and other means of communication.<sup>96</sup>

In addition, the matter remains unclear with regard to the e-mail. The time may start when e-mail is sent or can be read or is read. The most logical opinion would be at the time it can be read.<sup>97</sup>

Article 20(2) deals with the effect of official holidays or non-business days in determining the period for acceptance. These days are included in calculating the period. However, if a notice of acceptance cannot be delivered to the offeror on the last day of the period because that last day is an official holiday or a non-business day, the period is extended to the next business day. The TCO has also adopted the same principle in its article 77.

In contrast, according to Turkish law, the time allowed for acceptance is a matter of interpretation of the relative articles under the TCO. Where the offeror has fixed a time limit in his offer, the beginning of the time limit may also be fixed by the offeror. However, if it is not fixed, there is no specific article in the TCO regarding to the beginning of the time limit for acceptance. In such cases, there are two different views. According to *Yargitay*, it starts running from the time the offer is dispatched.<sup>98</sup> In here, *Yargitay* has accepted the dispatch theory, which was already adopted by CISG in Article 20(1) in order to determine the beginning of the period for letter and telegram.

Another view was asserted by *Reisoglu*.<sup>99</sup> According to him, the beginning of the time for acceptance starts to run from the moment when the offer reaches the offeree. In here, the receipt theory has been chosen to determine the beginning of the time limit. As I mentioned before, I also agree with *Reisoglu*, as withdrawal of an offer is only possible if the notification

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<sup>96</sup> Yilmaz I, op.cit. Page 594

<sup>97</sup> Brown I, (2006) International Commercial Contract's Lectures 4-5, Holborn College, University of Wales.

<sup>98</sup> *Yargitay* Tic. D, 22/10/1953, E.4865, K.5413

<sup>99</sup> *Reisoglu S*, (2006), "*Borclar Hukuku Genel Hukimler (Turkish Law of Obligation General Part)*", Istanbul, Page 59

reaches the offeree before or at the same time as the offer.<sup>100</sup> Therefore, the beginning of the time limit for acceptance may start to run from the time the offer reaches the offeree.

The receipt theory is also accepted by CISG in Article 20(1) in order to determine the beginning of the period for telephone, telex and other means of instantaneous communication. In such cases, where an offer was made by means of instantaneous communications (such as telephone or telex), it may be presumed that there would be no differences between the dispatch and the receipt of the offer.

#### **4) Late Acceptance**

There are two different situations under the CISG regarding to late acceptance. It is set out in article 21 of CISG. Article 21(1) deals with the late dispatch of an acceptance. As a rule, late dispatch of an acceptance is not effective. In this case, if the offeror informs the offeree immediately, the late acceptance will be effective.

On the other hand, according to paragraph (2) of article 21, the reason of the late acceptance is the delay in transmission. In this situation, late acceptance becomes effective on arrival, unless the offeror object it without undue delay.

Accordingly, if the lateness caused by offeree, the offeror may inform him that he considers his late acceptance as effective<sup>101</sup>, while the lateness resulted in its transmission the contract is to be concluded if the offeror remains in silent.<sup>102</sup>

Conversely, the TCO has no provision about the late dispatch of an acceptance (Article 21(1) of CISG). According to *Yargitay*, if the acceptance has been dispatched late, it will be considered as a new offer.<sup>103</sup> Regarding to this matter, the CISG has adopted more extensive rule than the TCO. Besides, the same provision of paragraph 2 of article 21 has been formulated under article 5(3) of TCO. According to article 5(3) states, where an acceptance reaches the offeror unreasonable late, although it was dispatched in due time, the offeror must give notice to the other party immediately about the late acceptance; otherwise the offeror is bound by the contract.

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<sup>100</sup> Article 9(1) of TCO

<sup>101</sup> Article 21(1) of CISG

<sup>102</sup> Article 21(2) of CISG

<sup>103</sup> *Yargitay* TD. 26.03.1964-1015/771

## **5- Withdrawal of Acceptance**

Withdrawal of acceptance is only possible between to persons absent. In order to apply to this provision, it must be some time for acceptance to reach the offeror.<sup>104</sup> It is not possible to withdraw an offer or an acceptance that is made to persons present. As it has to be accepted immediately, otherwise the parties will be free from any obligation.

Withdrawal of acceptance is formulated under article 22 of CISG. According to this article, the withdrawal of an acceptance is effective, if it reaches the offeror before or at the same time, as the acceptance would have become effective. The time when acceptance becomes effective, as provided in article 18 (2) is the moment the indication of assent reaches the offeror. Therefore, an offeree may withdraw his acceptance until the time when his intention reaches the offeror.

In contrast, according to article 9(2) of TCO, the rule of the withdrawal of an offer is applicable for the withdrawal of an acceptance. Therefore, withdrawal is effective, if it reaches the offeror before or at the same time as the acceptance reaches. In wording of the article demonstrates that the receipt theory is adopted. In fact, the CISG and the TCO has a similar provision in relation to this matter.

However, there is a possibility to withdraw an acceptance under the TCO, even if the withdrawal reaches the offeror after the acceptance reaches. The wording of article 9 indicates that where the withdrawal arrived after the acceptance, the acceptance may be withdrawn if the offeror is informed about withdrawal before he learns of the acceptance. In such cases, the acceptance can be validly withdrawn according to article 9, despite the fact that the contract has been concluded.<sup>105</sup> At this time, “the learning theory” is adopted. However, the CISG has no provision about this matter. As I said before, according to CISG, acceptance cannot be withdrawn after it becomes effective.

## **6) Death or Disability of Either Party**

Under the Turkish Law, there is no regulation about how death or loss of legal capacity will affect the validity of contract. The matter was introduced and improved under the doctrines. If

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<sup>104</sup> Schlechtriem P, Schwenger I, op.cit, page 260

<sup>105</sup> Kocayusufpasaoglu, Hatemi, Serozan, Arpaci, op.cit, page 188

the either party is personally connected to the contract, it cannot be concluded validly, as the personality of parties becomes important in order to performance the contract. Otherwise, the inheritors take the place of the original offeror or offeree.<sup>106</sup>

The CISG does also have no rule about this matter. However, the matter may be dealt according to the provision of Article 7(2) of CISG.<sup>107</sup>

#### ***IV) TIME OF CONCLUSION OF CONTRACT***

The matter is set out under article 23 of CISG. According to this article, the contract is concluded at the time when an acceptance becomes effective. Therefore, this refers to article 18(2); “acceptance becomes effective when the indication of assent reaches the offeror”. However, this article fails to determine the precise time of acceptance. Therefore, article 24 of CISG defines the point of time at which any indication of intention "reaches" the addressee for the purposes of Part II of this Convention.<sup>108</sup> The wording of article 24 points that the CISG has adopted the receipt theory in order to conclude a contract. Because of this fact, the contract is to be effective and concluded at the time when the offeror receives the indication of assent of the offeree.

Consequently, either the time limit is fixed for an acceptance or not the contract is to be concluded when an acceptance reaches the offeror within the fixed time limit or if it is not fixed within a reasonable time.<sup>109</sup> In addition, in the case of implied acceptance, the contract is to be concluded and effective at the moment the act is performed because there is no need to notify the other party.<sup>110</sup>

In contrast, according to TCO, the time of conclusion of contract and the time of its effectiveness occur in a different time. Where the offer is made to persons present, it is

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<sup>106</sup> Reisoglu S, op.cit, Page 61

<sup>107</sup> According to Article 7(2) of CISG, “Questions concerning matters governed by this Convention which are not expressly settled in it are to be settled in conformity with the general principles on which it is based or, in the absence of such principles, in conformity with the law applicable by virtue of the rules of private international law.”

<sup>108</sup> Article 24 of CISG, “For the purposes of this Part of the Convention, an offer, declaration of acceptance or any other indication of intention "reaches" the addressee when it is made orally to him or delivered by any other means to him personally, to his place of business or mailing address or, if he does not have a place of business or mailing address, to his habitual residence.”- Secretariat Commentary (closest counterpart to an Official Commentary),” GUIDE TO CISG ARTICLE 24”< <http://www.cisg.law.pace.edu/cisg/text/secomm/secomm-24.html>> accessed 24/01/07

<sup>109</sup> Article 18(2) of CISG

<sup>110</sup> Article 18(3) of CISG

deemed to be concluded at the time when the offeree expresses his intention.<sup>111</sup> On the other hand, where the offer is made persons absent, the contract is deemed to be concluded when the acceptance reaches the offeror.<sup>112</sup> The reason is that articles 3, 5, 9 of TCO adopted the receipt theory.<sup>113</sup> Therefore, the contract is to be concluded at the moment the acceptance reaches the offeror.<sup>114</sup> In addition, in the case of implied acceptance, the contract is to be concluded at the moment the offer reaches to the offeree provided that the offer is not rejected by the offeree.<sup>115</sup>

However, it can be said that, the CISG and the TCO have adopted different provisions regarding this matter.<sup>116</sup> The reason is that even if the contract is concluded according to the receipt theory under the TCO, it will not be effective at the time of the conclusion of the contract. In contrast, the contract will be effective at the time of the conclusion of the contract under the CISG. Therefore, According to article 10(1) of TCO, where the contract entered into by absent persons, it takes effect at the time of dispatch of the acceptance. Furthermore, according to article 10(2) of TCO, where there is no express acceptance necessary such as in the case of silence acceptance (Article 6 of TCO), the contract takes effect when an offer is received.

Finally, neither the CISG nor the TCO have rules to determine the place where a contract is concluded. According to CISG, the matter may not be important, because no provision in this Convention depends at the place, where the contract is concluded.<sup>117</sup> In addition, as I mentioned in Chapter II that *Schlechtriem* states, “this is not a gap in the Convention to be filled, by virtue of article 7(2) on the basis of the CISG’s general principles.”<sup>118</sup>

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<sup>111</sup> Article 4 of TCO

<sup>112</sup> Article 5 of TCO

<sup>113</sup> Velidedeoglu H V, Ozdemis S.,(1987) “*Turk Borclar Kanunu SerhiGenel-Ozel*” Ankara, page 26-27

<sup>114</sup> Yilmaz I, op.cit. Page 597

<sup>115</sup> Article 6 of TCO

<sup>116</sup> According to English law, the contract is made at the time the acceptance reached the offeror. Exceptionally for postal acceptance, the contract is made at the time when it has been sent out to the offeror if the address is correct and it is stamped.

<sup>117</sup> Secretariat Commentary (closest counterpart to an Official Commentary),” GUIDE TO CISG ARTICLE 23”< <http://www.cisg.law.pace.edu/cisg/text/secomm/secomm-23.html>> accessed 25/01/07

<sup>118</sup> Schlechtriem P, Schwenger I, op.cit, page 265

In contrast, it can be presumed that article 10 of TCO might be applicable in order to cure the problem by way of analogy under the Turkish law. Therefore, the place where the contract becomes effective will be the place of formation of the contract.<sup>119</sup>

### ***3- FINAL REMARKS***

The main aim of the CISG is to unify and harmonise the rules governing the international trade transactions and desired to be ratified by as many countries as possible. In order to achieve this aim, drafters of the convention mainly considered differences between Civil Law and Common Law. As a principle, an international trade does not have any border; therefore, the international trade law must have no border. For this reason, its success comes to direct application to the cross border sales.

In general, the CISG and the TCO have many similarities regarding to formation of the contract. Because, Turkey is a Civil Law country like many European countries. Therefore, TCO has similarities with many European countries' codes of obligations.<sup>120</sup> Besides, it is a domestic law and has been regulated for the requirements of the Turkish domestic traders.

Conversely, the CISG is an international law and aims to keep the contracts afloat in order to achieve uniformity in the field of International Trade.

Finally, being member states of CISG has gained an importance especially in the eyes of Turkish Traders. As Turkey has a very big trade potential and trades with many different countries around the world. In order to be an active in the field of International Trade, Turkey should ratify the Convention.

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<sup>119</sup> Can M, "Contract in the Turkish Law" Page 6,  
<<http://hukukcu.com/modules/smartsection/item.php?itemid=44&keywords=contract+turkish>> accessed  
25/01/07

<sup>120</sup> The TCO have been influenced mainly by Swiss and German Code of Obligations.