

# ACCEPTANCE OF AN OFFER IN LIGHT OF ELECTRONIC COMMUNICATIONS<sup>1</sup>

*Wolfgang Hahnkamper*

## 1. INTRODUCTION

The CISG deals with contracts that generally result from the exchange of concurrent declarations of intention by two or more persons. The process of contract formation is a process of communication. A simple definition in social sciences is that “communication is the effective transmission of a message.”

At first glance, “effective” seems redundant—isn’t a message only a message if it has been effected, i.e. transmitted? However, the fact that the CISG itself contains ten articles only dealing with contract formation, indicates that the effective transmission of a message was not the easiest subject to cast into a set of rules, even at the time of the drafting of the Convention in 1980. Now, however, twenty-five years later, in times of global business and economy, communication has increased in complexity and almost gained the speed of light.

Today, the delivery of signed documents in an envelope by “snail mail” co-exists with the electronic transmission of electronic files containing not only typed letters, but also what is generally referred to as “multimedia messages.” The law, including the CISG, has to adapt to this situation, and, in fact, it is able to do so. In Article 20, the Convention already contained a differentiation between instantaneous and non-instantaneous means of communication, with phone and telex being the means that make the message available on the addressee’s side immediately, explicitly mentioned as instantaneous forms of communication. With e-mail and telefax<sup>2</sup> not counted among oral communication and matching telex in speed, this gives a first

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1. A revised version of a paper presented at the VIAC—UNCITRAL Conference “Celebrating Success: 25 Years United Nations Convention on Contracts for the International Sale of Goods (CISG).”

2. See CLOUT Case No. 395 [Tribunal Supremo, Spain, 28 Jan. 2000], published in REPORTORIO ARANZADI, 454/2000 (one of the decisions where two concurrent declarations via fax constituted offer and acceptance).

indication as to how electronic communication can fit into the system of the CISG.

Opinion No. 1 on Electronic Communications under the CISG,<sup>3</sup> brought together by the International Sales Advisory Council (CISG-AC) composed of prominent experts, shows how the Convention's provisions on communication are valid for electronic communications as well as traditional communications. It should be noted that, in the near future, the United Nations Convention on the Use of Electronic Communications in International Contracts can be expected to be approved by the General Assembly of the United Nations and will supplement the CISG (and other conventions) with regard to electronic communications. However, until such time as that Convention enters into force, the CISG-AC's Opinion No. 1 is the applicable interpretation of the CISG with regard to electronic communications and is, therefore, the subject of this paper.

## 2. THE OFFER

The basic concept of effective communication in contract formation is the concept of offer and acceptance. The CISG describes an offer as a sufficiently definite proposal to specified addressees, at least implicitly specifying the goods and the contract price.<sup>4</sup> With regard to an acceptance, this means that an offer can only be accepted by someone who it was specifically addressed to.<sup>5</sup>

As to the specific terms of an offer, Article 14 of the CISG calls for at least the goods and the price to be contracted for to be specified. In addition, most contracts contain many more terms and side obligations. Strictly speaking, in many cases the absence of any additional terms may constitute sufficient grounds for the addressee to have to doubt the actual will of the promissory to be bound by the proposal.<sup>6</sup>

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3. CISG-AC Opinion no 1, Electronic Communications under CISG, 15 August 2003. Rapporteur: Professor Christina Ramberg, Gothenburg, Sweden.

4. CISG art. 14(1).

5. According to Article 14(2) CISG, a general proposal not aimed at specific persons can only be considered an offer, if this is clearly indicated by the person making the proposal.

6. Commentary on the Draft Convention on Contracts for the International Sale of Goods prepared by the Secretariat, Official Records, at 20, U.N. Doc. A/CONF.97/5 (1979) [hereinafter Secretariat Commentary].

### 3. THE ACCEPTANCE OF THE OFFER

Following the receipt of an offer, for a contract to be concluded, is the acceptance of the offer. Under the CISG, an offer can be accepted explicitly by statement, implicitly by conduct<sup>7</sup> or even by silence,<sup>8</sup> although not by itself,<sup>9</sup> and must comply exactly with the offer.<sup>10</sup> The ideal case is a clearly worded offer which is unambiguously accepted in its entirety. However, the acceptance of an offer can be accompanied by more or less obvious additional terms or can be motivated by a different understanding of offered terms. This can lead to conflicting declarations in which case the legal consequences have to be determined.

The CISG itself contains the necessary provisions for solving such conflicts. Article 19(1) of the CISG stipulates that, generally, a declaration of acceptance containing terms in conflict with the offer is to be understood as a rejection of the offer and, at the same time, as a new offer in its own right. However, Article 19(2) of the CISG limits the general provision of Article 19(1) by stipulating that non-material changes or additions do not prevent the declaration's classification as an acceptance. To prevent such changes from becoming part of the contract, the initial offeror has to immediately object to those alterations either orally or by "dispatching a notice." According to the CISG-AC Opinion No. 1, the term "oral" includes electronically transmitted sound and the term "notice" includes electronic communications in general.

Article 19(3) of the CISG then gives a non-exhaustive list of terms which, in any case, have to be seen as material alterations. Those include, for example, price, payment, quality and quantity of the goods. Such changes lead to the acceptance constituting a new offer.

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7. Geneva Pharmaceuticals Tech. Corp. v. Barr Laboratories, Inc., 789 F. Supp. 1229 (S.D.N.Y. 2002).

8. Filanto S.p.A. v. Chilewich Int'l Corp., 201 F. Supp. 2d 236 (S.D.N.Y. 1992), CLOUT Case No. 23 [14 Apr. 1992]; *see also* Rb Rotterdam, Netherlands, 12 July 2001, *published in* No. 278 NEDERLANDS INTERNATIONAAL PRIVAATRECHT (NIPR) 458-60 (2001).

9. CLOUT Case No. 193 [Handelsgericht Zürich, Switzerland, 10 July 1996], *published in* SCHWEIZERISCHE ZEITSCHRIFT FÜR INTERNATIONALES UND EUROPÄISCHES RECHT (SZIER)/REVUE SUISSE DE DROIT INTERNATIONAL ET DE DROIT EUROPÉEN 131-32 (1997).

10. Secretariat Commentary, *supra* note 6, at 24.

#### 4. THE CONCEPT OF A MESSAGE TO “REACH” A PERSON

Under Article 15 of the CISG, an offer becomes effective when it “reaches” the offeree and can be withdrawn only if the withdrawal “reaches” the offeree before or simultaneously with the offer. Without further explanation, determining the meaning of “reaching” a person can be a difficult undertaking. However, for the classic forms of communications, the CISG contains a provision addressing exactly this problem. Article 24 of the CISG defines a message to have “reached” the addressee if it has been made orally to him or delivered by any other means to him personally to his place of business or to his mailing address. As today’s means of electronic communications did not exist at the time of the drafting of the CISG, the CISG does not contain a definition for the “reaching” requirement of e-mails and other electronic communications. The CISG-AC Opinion No. 1 clearly states that the “place” of an e-mail has to be understood in a functional rather than a physical way. Therefore, the message could be on any server in the world and still have reached the addressee’s place of business as long as he would have been able to retrieve it. Consequently, for an e-mail to “reach” the addressee, it is enough for the e-mail to enter the addressee’s server. It is not important if the addressee has actually read it, or maybe even could not read it due to technical problems, as it is within the addressee’s “sphere of influence” to provide for adequate means to ensure that his internal communication functions satisfactorily.<sup>11</sup>

However, according to the CISG-AC’s opinion, the addressee of an electronic message has to have somehow consented to receiving such communications and, more specifically, to receiving them in that format and to that address. Explicit consent is not necessary and contract interpretation,<sup>12</sup> as well as practices and usages,<sup>13</sup> may help in determining the existence of such consent.

#### 5. THE NOTION OF “WRITING”

Generally, the CISG, in Article 11, grants complete freedom of forms. For the conclusion of a contract, i.e. offer and acceptance, it contains no

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11. CISG-AC Opinion No. 1, *supra* note 3, § 15.3.

12. CISG art. 8.

13. CISG art. 9.

formal requirements. However, several countries have declared reservations to this provision and the CISG mentions the concept several times.<sup>14</sup> Therefore, it is necessary to understand the concept, especially in regard to electronic communications.

The Convention provides in Article 13 that “[f]or the purpose of this convention “writing” includes telegram and telex.” At the time of its drafting, the Convention’s notion of written communication was extended to cover the fastest means of document transmission then available: telegram and telex. No telefax was mentioned, and, of course, no e-mail. As has been briefly mentioned,<sup>15</sup> e-mail and telefax, being means of instantaneous communication, could be compared to telex in this regard.

Opinion No. 1 now extends the notion of “writing” as follows: “The term “writing” also includes any electronic communication retrievable in perceivable form.” In its comment to Article 13, the Advisory Council says that the prerequisite of “writing” is fulfilled as long as the electronic communication is able to fulfill the same function as a paper message, i.e., that it can be saved (retrieved) and understood (perceived).

## 6. CONCLUSION

In summary, it can be seen that the CISG, while twenty-five years old and, of course, not directly dealing with modern means of communication, has not become outdated by the massive changes that have shaped the landscape of today’s means of communication. The CISG itself provides a flexible framework of provisions for the conclusion of contracts by any form of communication and can be interpreted, without resorting to farfetched explanations, to include classic forms of communication as well as electronic media. It can therefore be assumed that the CISG will be able to adapt to future changes just as well. In addition, the upcoming United Nations Convention on the Use of Electronic Communications in International Contracts will hopefully provide for a set of supplementary rules, establishing mandatory provisions with regard to new means of communication and further increasing the CISG’s adaptability for future changes in business reality.

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14. CISG arts. 11, 12, 13, 21, 29, 96.

15. See *supra* Part 1 (Introduction).