



The European Legal Forum

Forum iuris communis Europae

5-2000/01

pp. 301 - 376

1st Year May/June 2001

INTERNATIONAL AND EUROPEAN COMMERCIAL AND COMPANY LAW

Brief Remarks on the Conclusion of Contracts on the Internet and the United Nations Convention on Contracts for the International Sale of Goods (CISG)

Prof. Dr Franco Ferrari, LL.M.^{}*

This short paper focuses on the issue of whether the United Nations Convention on Contracts for the International Sale of Goods,¹ hereinafter: CISG, can be applied and is suited to apply to contracts concluded electronically.

I. International and Personal Sphere of Application

1. Internationality

It is common knowledge that the CISG is per se applicable only to contracts that are concluded between parties having their place of business in different countries (Article 1(1)).² According to the CISG, this “internationality” is “to be disregarded whenever [it] does not appear either from the contract or from any dealings between, or from information disclosed by, the parties at any time before or at the conclusion of the contract”.³ Since, however, electronic commerce tends to blur the distinction between domestic and international transactions, a closer look at the aforementioned CISG provisions becomes necessary.

Where the parties to a contract concluded electronically clearly indicate where their relevant place of business is located, that place of business is to be taken into consideration in determining the internationality of the sales transaction, not unlike in cases where the contract is concluded by more “traditional” means. This is true even in those instances where a party has more than one place of business, an issue dealt with by Article 10 CISG. Indeed, according to a number of legal writers, an indication by a party as to which of several places

of business is the relevant one in relation to a specific transaction is an important criterion, if not the most important one, in determining the internationality of a contract under the CISG.⁴ A clear indication of the relevant place of business also avoids any problems with respect to the recognisability of the internationality required by Article 1(2).

If the relevant place of business has not been clearly indicated by the parties before or at the conclusion of the contract, one has to wonder whether there are circumstances from which one is able to infer the location of the place of business. In this respect, it may be appropriate to consider taking into account the address from which the electronic messages are sent. Where a party uses an address linked to a domain name connected to a specific country (such as the addresses ending in “.at”, “.fr”, “.it”, etc.), one could argue that the place of business should be located in that country. Thus, a sales contract concluded between a party using an address ending in “.at” and one using an address ending in “.fr” would have to be considered international. This solution would have the advantage of necessarily making the parties aware that the contract may not be a domestic one. Consequently, the CISG could not be inapplicable on the grounds that the parties were unaware of the internationality of their transaction (Article 1(2)).

The aforementioned solution, in other words, locates one party’s place of business (where it has not otherwise been indicated or where it is otherwise not possible to determine it) in the country resulting from the address. What about the situation, however, where the address does not allow for a similar solution because it does not evidence any link to one particular country, as in those cases where an address is a top level domain such as “.com”, “.net”, etc.? One could argue that the contract is always international; this could be justified

^{*} Full Professor of Comparative Law at Bologna University (I); Legal Officer, United Nations Office of Legal Affairs, International Trade Law Branch; the views expressed in this paper are the personal views of the author and do not necessarily reflect those of the United Nations.

¹ See United Nations Convention on contracts for the International Sale of Goods, 11 April 1980, S. Treaty Doc. No. 98-9 (1983), 19. I.L.M. 1980, at 668.

² For a detailed discussion of the CISG’s international sphere of application, see *Siebr*, Der internationale Anwendungsbereich des UN-Kaufrechts, *RabelsZ* 1988, at 587 et seq.

³ Article 1(2) CISG.

⁴ Several legal writers have pointed out that the parties’ indication as to which of several places of business is to be considered the relevant one has to be taken into consideration; see, e.g., *Ferrari*, in: *Schlechtriem*, Kommentar zum Einheitlichen UN-Kaufrecht, 3rd ed., Munich (D), 2000, Article 10, at 155; *Kritzer*, Guide to Practical Applications of the United Nations Conventions on Contracts for the International Sale of Goods, Deventer (NL), 1989, at 75.

by the fact that the use of an address which is not linked to any particular country is presumably due to the fact that the party does not want to be located in any specific country or may want to be accessible universally. As far as Article 1(2) CISG is concerned, this approach would not cause any problems, since one could argue that anybody contracting electronically with a party having such an address could not be unaware of the fact that it is contracting “internationally”.

Another approach to deal with the issue of determining the internationality under the CISG of an electronically concluded sales transaction would be that of defining the “place of business” for those cases where the contract is concluded electronically. In elaborating such a definition, one would of course have to avoid creating a definition which differs from that generally accepted under the CISG,⁵ while taking into account the need to easily determine one party’s place of business. One should, in other words, avoid that one and the same party should be considered as having its place of business in one country when contracting electronically and in another one when contracting by more traditional means.

This approach would have the advantage of making applicable to electronically concluded sales transactions all the rules (on internationality, on multiple places of business as well as on recognisability of the internationality) applicable to sales transactions concluded by more traditional means.

2. Parties

Although the internationality and, thus, the applicability of the CISG depend on where the “parties” have their place of business, the concept of “party” is not defined in the CISG. One must therefore wonder who is party to a contract. This, however, is not a problem unique to electronic contracting; it is an issue even where the contract is concluded by more traditional means, for instance where a seller avails itself of the collaboration of an intermediary.

As the CISG does not deal with the issue of agency,⁶ one will have to apply the applicable domestic law when determining who is to be considered “party” to a contract.⁷ Thus, it will be up to the applicable domestic law to decide, for instance, whether the principal or its agent is party to a specific contract.⁸ The same solution – applicability of domestic law to the issue of agency – will have to be applied to electronic agents as well.

When examining whether the aforementioned solution is appropriate, one should take into consideration that the issue

of the electronic agent has been discussed by the UNCITRAL Working Group on Electronic Commerce, where it was generally felt that a computer should not become the subject of any right or obligation.⁹ The person (whether a natural or legal one) on whose behalf a computer is programmed, for example to issue purchase orders, should ultimately be responsible for any message generated by the machine. It was also felt that the parties should, however, subject to the aforementioned principle, have the possibility to freely organise any automated communication scheme. In this respect it may be worth noting that this would not conflict with the CISG which expressly allows the parties to create their own rules (Article 6).

3. The Criteria of Applicability

In order for the CISG to be applicable to an international sales contract, the fact that the contract be an international one, is insufficient.¹⁰ Indeed, the parties do not only have to have their place of business in different countries, but these countries must also be Contracting States to the CISG at a given time (Article 100 CISG) or, where this criterion of applicability set forth in Article 1(1), lit. a is not met, the rules of private international law of the forum must lead to the law of a Contracting State (1(1), lit. b).

As far as the first of these criteria of applicability is concerned, it makes no difference whether the contract is concluded electronically or by any other means, since the required feature is that the countries in which the parties have their place of business are Contracting States. Indeed, once the location of the place of business has been determined, it should be easy to establish whether the country in which the place of business is located was, at the time of the conclusion of the contract, a Contracting State.

As far as the second criterion of applicability is concerned,¹¹ the use of electronic means – as opposed to more traditional means – when concluding international sales contracts only becomes relevant where the rules of private international law of the forum refer, as a connecting factor, to the place of conclusion of the contract. In this case, the determination of the place of conclusion of the contract may cause difficulties, among others due to the lack of specific rules on this issue. Where, however, the rules of private international law of the forum do refer to connecting factors different from the place of conclusion of the contract, as do for instance the 1994 Inter-American Convention on the Law Applicable to Contractual Obligations¹² and the 1980 Rome Convention on the Law Applicable to Contractual Obligations,¹³ the use of elec-

⁵ For a discussion of the concept of “place of business” under the CISG, see, e.g., *Bell*, *The Sphere of Application of the Vienna Sales Convention on Contracts for the International Sale of Goods*, *Pace Int’l L. Rev.* 1996, at 245; *Rosett*, *Critical Reflections on the United Nations Convention on Contracts for the International Sale of Goods*, *Ohio State Law Journal* 1984, at 279.

⁶ See, e.g., OGH (A) 20 March 1997, ÖJZ 1997, at 829 = CLOUT case No. 189; AG Tessin (CH) 12 February 1996, SZIER 1996, at 135; AG Alsfeld (D) 12 May 1995, NJW-RR 1996, at 120; KG Berlin (D) 24 January 1994, RIW 1994, at 683 = CLOUT case No. 80; LG Hamburg (D) 26 September 1990, IPRax 1991, at 400 = CLOUT case No. 5.

⁷ For this, see also *Ferrari* (*supra* note 4), Article 1, at 61.

⁸ *Siehr*, in: *Honsell*, *Kommentar zum UN-Kaufrecht*, Berlin/Heidelberg/New York (D/USA), 1997, Article 1, at 48.

⁹ In this respect, see *Sorieul*, *The United Nations Convention on Contracts for the International Sale of Goods (CISG) as set of uniform rules for electronic commerce*, *Business Law International* 2000, at 383.

¹⁰ For a similar affirmation in recent case law, see Trib. Vigevano (I) 12 July 2000, EuLF 2000/01 (E), at 93.

¹¹ For a discussion of the CISG’s applicability by virtue of Article 1(1), lit. b, see *Pünder*, *Das Einheitliche UN-Kaufrecht – Anwendung kraft kollisionsrechtlicher Verweisung nach Article 1 Abs. 1 lit. b. UNN-Kaufrecht*, RIW 1990, at 869 et seq.

¹² See Inter-American Convention on the Law Applicable to International Contracts, 33 I.L.M. 1994, at 732.

¹³ See Convention on the Law Applicable to Contractual Obligations, 19

tronic means should not lead to problems that are any different from those arising out of the use of more traditional means. Therefore, it does not appear that a treatment of electronically-concluded contracts that is different from that reserved for any other means of conclusion of the contract is warranted.

II. The Substantive Sphere of Application

1. Goods

It is common knowledge that the CISG is solely applicable to contracts for the international sale of "goods". Unfortunately, the CISG does not include a definition of what has to be considered a "good".¹⁴ However, this does not mean that one should resort to domestic concepts of "goods". As with most CISG concepts, the concept of "goods" has to be defined "autonomously", i.e. not in the light of any particular domestic legal system, in order to ensure uniformity.

The CISG seems to embody a rather conservative concept of "goods", as it is considered both in scholarly writing¹⁵ and case-law to apply basically to moveable tangible goods.¹⁶ Thus, according to most commentators intangible rights, such as patent rights, trademarks, copyrights, a quota of a limited liability company,¹⁷ as well as know-how, are not to be considered "goods". The same is true for immovable property.

It is obvious that the aforementioned definition of "goods" is valid irrespective of whether the sales contract is concluded electronically or otherwise. In other words, there is no need to somehow modify the concept of "goods" to fit specific needs of electronic contracting. However, this raises the question of whether the CISG does and, if not, whether it should cover what could be defined as "virtual goods". In this respect it may be helpful to consider how software is dealt with under the CISG both by commentators and courts. According to many legal writers,¹⁸ the sale of software may fall under the Convention's substantive scope of application, although software is not a tangible good and as long as it is not custom-made or, even where it is standard software, as long as it is not extensively modified to fit the buyer's particular needs. This view has been justified on the grounds that in this line of cases (not unlike in cases where books or discs are sold) the intellectual activity is incorporated in tangible goods. Ultimately,

this view would, however, exclude the sale of software from the Convention's substantive scope of application whenever it is not incorporated in a tangible good, as in those cases where the software is sent electronically.

The view that the sale of software can be covered by the CISG was recently upheld by several courts as well. In an obiter dictum, a German appeal court expressly stated that the sale of standard software can be considered a sale of goods, at least where the software is not custom-made.¹⁹ A German court had reached the same result on a previous occasion.²⁰

From what has been said thus far, it is apparent that a clarification of whether the software should be considered a "good" in the sense of the CISG would be useful in order to ensure uniformity. If one were to extend the CISG's sphere of application to include software, one would have to consider the scope of such an extension. One would have to decide whether it would be appropriate to have the CISG cover the sale of software only where the software is incorporated in a tangible goods or whether it would be better to have it govern regardless of the manner in which it is delivered. Even if one were to hold the view that software is a "good" in the sense of the CISG, one would have to exclude that the "sale of custom-made software" would fall under the Convention's scope of application, since according to Article 3(2) the CISG "does not apply to contracts in which the preponderant part of the obligations of the party who furnishes the goods consists in the supply of labour or other services."

2. Sales Contract

The issue whether "virtual goods" should be included in the notion of "goods" under the CISG is not the only relevant one when one has to decide whether the CISG should cover transactions concerning "virtual goods". Another concept which is paramount is that of "sales contract".

Although the CISG does not expressly define the sales contract,²¹ a concept of what is to be considered a "sales contract" falling within the CISG's sphere of application can be inferred from the different rights and obligations of the parties. Thus, the "sales contract" can be (and has been) defined as a contract by virtue of which the seller must deliver the goods, hand over any documents relating to them and transfer the property in the goods sold, whereas the buyer is bound to pay the price for the goods and take delivery of them.²²

Given the aforementioned definition of "sales contract", one has to wonder whether transactions in "virtual goods" would actually fall under that definition. According to some commentators, transactions in these goods do not fall under this definition, since they are in the form of licenses, not sales.²³ The differences in these approaches are considerable.

I.L.M. 1980, at 1492.

¹⁴ See Botschaft des Schweizerischen Bundesrats betreffend das Wiener Übereinkommen über Verträge über den internationalen Warenkauf vom 11. 1. 1989, Bern (CH), at 759.

¹⁵ See *Czerwenka*, Rechtsanwendungsprobleme im internationalen Kaufrecht, Berlin (D), 1988, at 147; *Calvo Caravaca*, in: *Diez-Picazo*, La compraventa internacional de mercaderías, Madrid (E), 1998, Article 1, at 48.

¹⁶ See Trib. Pavia (I) 29 December 1999, *Corriere giuridico* 2000, at 932; OLG Cologne (D) 26 August 1994, NJW-RR 1995, at 246 = CLOUT case No. 122.

¹⁷ See Arbitration Court attached to the Hungarian Chamber of Commerce and Industry, 20 December 1993, CLOUT case No. 161.

¹⁸ See *Cox*, Chaos versus uniformity: the divergent views of software in the International Community, *Business Law International* 2000, at 361; *Diedrich*, Anwendbarkeit des Wiener Kaufrechts auf Softwareüberlassungsverträge, RIW 1993, at 452; *Hoeren*, Der Softwareüberlassungsvertrag als Sachkauf, CR 1988, at 916.

¹⁹ OLG Cologne (D) 26 August 1994, NJW-RR 1995, at 246 = CLOUT case No. 122.

²⁰ See also OLG Koblenz (D) 17 September 1993, RIW 1993, at 934 = CLOUT case No. 281.

²¹ See KG Waadt (CH) 11 March 1996, unpublished; OGH (A), 10 November 1994, JBl 1995, at 253 = CLOUT case No. 106.

²² See KG Waadt (CH), *ibid.*

²³ For this statement, see *Dodd*, Time and Assent in the Formation of

While a sales contract, for instance, frees buyers (i.e. “users”) from restrictions as to the use of the product bought and, thus, clearly demarcates the boundaries of control that a patent or copyright owner may have over the use of the product that incorporates the patented or copyrighted work, a license agreement allows the producer or developer of the “virtual good” to exercise control over the product down through the licensing chain (where sales, as mentioned, would free users from those controls).²⁴

From what has just been said, it becomes apparent that it is not just sufficient to decide whether one wants the CISG to extend to the “sale” of “virtual goods”, an issue one could solve by integrating the CISG. If one were to qualify transactions in “virtual goods” as “contracts for the sale of goods”, one would have to look into whether the substantive rules laid down by the CISG conform to the requirements of those kinds of transactions.

3. Consumer Purpose of the Sale

In order for the CISG to be applicable, it is not sufficient, from a substantive point of view, that the contract be one for the “sale” of “goods”. According to Article 2(a), the CISG does not apply to sales “of goods bought for personal, family or household use, unless the seller, at any time before or at the conclusion of the contract, neither knew nor ought to have known that the goods were bought for any such use.” In respect of this exclusion, the issue of whether one is contracting electronically as opposed to contracting by more traditional means does not appear to make any difference. Like in instances where the contract is concluded by more traditional means, the buyer is the only one to know about the purpose of the transaction. Where the buyer informs the seller about its purpose, and this purpose is exclusively a personal, household or domestic one, the CISG will not be applicable. Where the buyer does not inform the seller of such a purpose, the CISG’s applicability will depend on the seller’s possibility of recognising that purpose. In order to determine whether this possibility exists, one will have to take into account, just as in cases where the contract is not formed electronically, elements such as the number of items bought, their nature, etc.

4. a) Form: General Issues

Although the CISG does not generally deal with issues of validity,²⁵ it expressly deals with the formal validity of contracts for the international sale of goods. Indeed, Article 11 CISG establishes that “a contract for the international sale of goods need not be concluded in or evidenced by writing and is

not subject to any other requirement as to form. It may be proved by any means, including witnesses.” Thus, Article 11 CISG establishes the principle that the formation and the evidence of a contract subject to the Convention is free of any form requirement,²⁶ and therefore can be concluded orally, in writing²⁷ or in any other way. As a result, exchange of e-mail messages should suffice to form a contract under the CISG, an opinion to which very many legal writers have subscribed for some time now.²⁸

What has just been said, is subject to the effects of the reservation which the States with domestic law requirements as to the form of contracts for the sale are allowed to declare according to Article 96 CISG. According to this provision, “a Contracting State whose legislation requires contracts of sale to be concluded in or evidenced by writing may at any time make a declaration in accordance with Article 12 that any provision of Article 11, Article 29, or Part II of this Convention, that allows a contract of sale or its modification or termination by agreement or any offer, acceptance, or other indication of intention to be made in any form other than in writing, does not apply where any party has his place of business in that State.”

Some legal writers interpret this provision to mean that whenever one party has its place of business in a State that has made an Article 96 declaration, the interpreters are not allowed to disregard form requirements. However, according to these writers, interpreters should take into account the domestic form requirements of the State that made the reservation.²⁹ Thus, if this view is accepted, this would mean that it would depend on the domestic law of the State that made the reservation whether contracts could be concluded and/or evidenced by electronic means.

According to other legal writers,³⁰ the effects of the Article 96 reservation are somehow different, i.e., the reservation would not automatically lead to the application of the domestic law form requirements of the State that made the reservation. Rather, it should be up to the rules of private international law of the forum to determine which law is to be applied to the form issue.³¹ Thus, if the rules of private international law were to lead to the law of a Contracting State of the CISG which did not make a reservation, the principle of informality set forth in Article 11 would be applicable despite the fact that one party has its place of business in a State that declared an Article 96 reservation. If the conflict-of-laws rules were to lead to the law of a State that declared a reservation, this State’s rules on form requirements would apply.

From what has just been said, it becomes evident that even

Information Contracts: The Mischief of Applying Article 2 to Information Contracts, 36 *Houston Law Review* 1999, at 211.

²⁴ *Ibid.*

²⁵ For papers dealing with this issue, see, e.g., *Hartnell*, Rousing the Sleeping Dog: The Validity Exception to the Convention on Contracts for the International Sale of Goods, 18 *Yale Journal of International Law* 1993, at 1 et seq.; *Heiz*, Validity of Contracts Under the United Nations Convention on contracts for the International Sale of Goods, 11 *April* 1980, and *Swiss Contract Law*, 20 *Vanderbilt J Transnatl L* 1987, at 639 et seq.; *Schluchter*, Die Gültigkeit von Kaufverträgen unter dem UN-Kaufrecht, Baden-Baden (D), 1996.

²⁶ See OGH (A) 6 February 1996, ZRV 1996, at 248 = CLOUT case No. 176

²⁷ For this statement, see, e.g., OLG Munich (D) 8 March 1995, CLOUT case No. 134.

²⁸ See, e.g., *Schlechtriem* (*supra* note 4), Article 11, at 157.

²⁹ This view is held, for instance, by *Stoffel*, Formation du contrat, in: *Lausanner Kolloquium zum UN-Kaufrecht 1984 vom Schweizerisches Institut für Rechtsvergleichung*, Zurich (CH), 1985, at 60.

³⁰ See, for instance, *Herber/Czerwenka*, Internationales Kaufrecht, Munich (D), 1991, at 399.

³¹ See also *Ferrari* (*supra* note 4), Article 96, at 862.

if one were to compare electronic forms of communication to other, more traditional forms of communication under the CISG, there are instances where, despite the CISG's applicability, the utilisation of electronic forms of communication would still not have any effects. The most effective way to solve this problem would be the withdrawal of the various Article 96 reservations, since by doing so one would extend the principal of informality to all contracts for the international sale of goods to which the CISG applies.

4. b) Form: The Definition of "Writing" under Article 13

Whereas Article 11 deals with the issue of form requirements both in respect of how a contract is formed as well as the form in which a contract for the international sale of goods is to be evidenced, Article 13 is a provision which is relevant for the interpretation of the term "writing". Indeed, "for the purposes of this Convention 'writing' includes telegram and telex." Thus, if the parties do not provide otherwise, both telex and telegram will satisfy the writing requirement. According to many authors,³² Article 13 should be applied – by analogy – to fax communications as well, basically on the grounds that it merely constitutes a technical development of telex. Some of the authors who favour this view, argue that messages transferred via computer do not satisfy the writing requirement,³³ fundamentally on the grounds that no hard copy is received. This view is opposed by other authors who state that electronic forms of communication should also be considered as meeting the criterion of "writing" under the CISG.³⁴ These authors base their view on the fact that this issue is not expressly settled in the CISG, even though it is governed by it, and that it must therefore be settled in conformity with its general principles, namely that of informality which allows for an extensive interpretation of Article 13.

Even if one were to agree with the latter view, this would not necessarily lead to a uniform response to the question whether, whenever the CISG is applicable, electronic forms of communication always satisfy the "writing" requirements. There are divergent views regarding the effects of Article 13 in cases where a State that is involved has declared an Article 11 reservation. Some commentators hold the view that since no reservation may be made to it, Article 13 ensures that, even where the law of a State that has made a reservation is applicable, this State's form requirements are satisfied by telex and telegram, as well as by electronic forms of communication, at least if one were to hold that Article 13 also covers these kind of communications.³⁵

According to a different view, Article 13 has more limited

³² See, e.g., *Audit*, La vente internationale de marchandises, Paris (F), 1990, at 73; *Enderlein/Maskow/Strobbach*, Internationales Kaufrecht, Berlin (D), 1991, at 78; *Herber/Czerwenka* (*supra* note 30), at 71.

³³ See *Witz*, in: *Witz/Salger/Lorenz*, International Einheitliches Kaufrecht, Heidelberg (D), 2000, Article 13, at 124.

³⁴ See *Enderlein/Maskow/Strobbach* (*supra* note 32), at 77; *Homhold*, Uniform Law for International Sales, 3rd ed., The Hague (NL), 1999, at 141.

³⁵ See *Jametti-Greimer*, Der Vertragsabschluss, in: *Hoyer/Posch*, Das Einheitliche Wiener Kaufrecht: Neues Recht für den internationalen Warenkauf, Vienna (A), 1992, at 47; *Magnus*, Wiener UN-Kaufrecht (CISG), Berlin (D), 1999, at 190.

effects, i.e., it only applies to those instances where the CISG itself refers to a "writing" requirement.³⁶ If one were to adopt this view, one could not be sure that electronic forms of communication would always satisfy the "writing" requirement; if, for instance, the domestic law of a State with an Article 96 reservation were applicable, this would depend on whether, under that domestic law, electronic forms of communication were considered to satisfy the requirements of the concept "writing".

III. Substantive Issues

The issue whether the CISG applies to contracts for the international sale of goods concluded electronically must be distinguished from that of whether the rules set forth in the CISG are appropriate for electronic contracting. Indeed, the CISG's applicability does not necessarily mean that its rules are appropriate in the context of electronic contracting. In the following paragraphs some of the rules of the CISG will be examined in the light of their appropriateness in the said context.

1. a) Formation of Contract: In General

The rules on the formation of contracts are provided for in Articles 14 through 24. Their advantage consists in their having demonstrated their workable character in an international environment. This is evidenced, among other things, by the fact that they have been used as models for UNIDROIT's unification efforts which led to the "Principles of International Commercial Contracts".³⁷ But despite the success of the CISG's rules on offer and acceptance, which is due to their transcending the traditional differences in the approaches taken by civil and common law, one has to wonder whether they are exhaustively dealing with all the issues relating to contract formation and, consequently, whether they are appropriate for an electronic contracting environment.

The CISG's rules do without any doubt work in those cases where a contract is formed through offer and acceptance. The fact that this traditional approach does not cover all the ways by which an agreement can be reached becomes evident if one considers the possible complexity of negotiations which may include a great deal of communication between the parties and which does not necessarily fit within the traditional analysis of offer and acceptance. According to one view, agreements reached without an offer and an acceptance being clearly discernible do not fall within the CISG's scope and should therefore be dealt with by resorting to the applicable domestic law.³⁸ According to a different view, the CISG covers even the agreements reached without resorting to the traditional "offer-acceptance" scheme;³⁹ the fact that the CISG does not ex-

³⁶ See *Audit* (*supra* note 32), at 73.

³⁷ Compare articles 2.1 et seq. of the UNIDROIT Principles of International Commercial Contracts.

³⁸ For this view, see *Huber*, Der UNCITRAL-Entwurf eines Übereinkommens über internationale Warenkaufverträge, *RabelsZ* 1979, at 447.

³⁹ See *Bonell*, Vertragsverhandlungen und culpa in contrahendo nach dem Wiener Kaufrechtsübereinkommen, *RIW* 1990, at 695 et seq.; *Karollus*, UN-Kaufrecht, Vienna/New York (A/USA), 1991, at 54 et seq.

pressly refer to them is not due to their being excluded from the Convention's scope, but rather to the fact that the drafters encountered great difficulties in finding appropriate wording. Thus, not unlike any other matter which is governed by – albeit not expressly settled in – the CISG, the issue of whether there is an agreement even without clear offer and acceptance, has “to be settled in conformity with the general principles on which it is based” (Article 7 (1)), such as the principle of consensus as well as that according to which it must be possible to discern the minimum content required for the conclusion of the contract (as defined by the requirements set forth in Article 14).

Irrespective of the view one takes, it is apparent that the CISG is not complete and, thus, may cause problems where parties are trying to conclude a contract electronically and do not resort to the traditional means of offer and acceptance.⁴⁰

1. b) Formation of Contract: Offer and Acceptance

Article 14 of the CISG lays down the substantive criteria a declaration has to meet in order to be considered an offer: it has to be addressed to one or more specific persons, it has to be sufficiently definite (in the sense that it must indicate the goods and somehow fix or make provision for determining the quantity and the price) and it must indicate the intention of the offeror to be bound in case of acceptance.⁴¹

As far as the element of specificity is concerned, it appears to make no difference what form of communication one uses. In respect of this substantive feature of the offer, there are, in other words, no problems intrinsic to electronic forms of communication as there are no problems intrinsic to other forms of communication.

This is basically also true in respect of the required intention to be bound which distinguishes an offer from an invitation to make an offer. Generally advertisements in newspapers, radio and television, catalogues, brochures, price lists, etc., are considered *invitationes ad offerendum*, according to some authors even in those cases where they are directed to a specific group of customers, since in these cases the intention to be bound is considered to be lacking. The same should be true as far as web-sites are concerned through which one can buy goods: where a company advertises its goods on the Internet, it should be considered as merely inviting one to make offers.

In order to be considered an offer, a declaration has also to be addressed to one or more specific persons. Thus, price circulars sent to an indefinite group of people are considered not to constitute offers, even where the addressees are individually named. This should be true even as far as electronic messages are concerned: via electronic means it will be even less problematic to address messages to a very large number of specific persons.

What has just been said in respect to the offer and its substantive requirements is *mutatis mutandis* true as well in respect of the acceptance.

According to the CISG, both the offer and the acceptance (at least in most cases) become effective upon their “receipt” which is defined in Article 24 according to which “for the purposes of this Part of the Convention, an offer, declaration of acceptance [...] ‘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”.

In respect of the traditional forms of communication, such as oral or paper-based communications, the aforementioned provision does not seem to cause any problems. But what about electronic forms of communications: can Article 24 apply to those as well without raising problems? This question has to be answered affirmatively. The issue is only one of defining the “receipt” of the electronic message, i.e. of determining when an electronic message is to be considered received. Thus, it can be stated that the CISG, in particular Article 24, contains a rule which can also work in an electronic environment; the rule just has to be specified in a particular way in order to be specific enough to be useful in practice.

The same is true, of course, in respect of the “dispatch rule” which – as far as the formation of contracts is concerned – is relevant for instance under Article 16(1), which provides that “an offer may be revoked if the revocation reaches the offeree before he has dispatched an acceptance”. The rule may be appropriate even for an electronic context, but unfortunately, it is not specific enough. Whereas it appears obvious when a paper-based statement is dispatched, there are doubts when an electronic message must be considered as having been sent.

There appears to be, however, one instance where it may cause problems if one were to compare electronic messages to more traditional ones, such as telegrams, letters, telexes, as the CISG contains one provision which makes a distinction between these forms of communications. Indeed, according to Article 20(1) “a period of time for acceptance fixed by the offeror in a telegram or a letter begins to run from the moment the telegram is handed in for dispatch or from the date shown on the letter or, if no such date is shown, from the date shown on the envelope. A period of time for acceptance fixed by the offeror by telephone, telex or other means of instantaneous communication, begins to run from the moment that the offer reaches the offeree.” Thus, for the purpose of deciding when the time for acceptance begins to run, one has to decide whether to compare an electronic message to a means of instantaneous communication rather than to a letter or telegram.

2. Effectiveness of Communications Made According to Part III CISG

Whereas Part II CISG is based upon the principle that communications are effective upon receipt,⁴² Part III is based upon a different principle. By providing in Part III that “a delay or error in the transmission of the communication or its

⁴⁰ See *Eiselen*, Electronic Commerce and the UN Convention on Contracts for the International Sale of Goods (CISG), EDI Law Review 1999, at 23-24, highlighting that it is not always to force “communications into either the offer and acceptance mould”.

⁴¹ See OGH (A) 10 November 1994, JBl 1995, at 253 = CLOUT case No. 106.

⁴² For exceptions, see Articles 19(2) and 21(1).

failure to arrive does not deprive that party of the right to rely on the communication”,⁴³ the drafters of the CISG favoured, at least according to most commentators,⁴⁴ the “dispatch theory”, since, where the parties did not agree otherwise or where the CISG itself does not provide differently,⁴⁵ the addressee bears the risk of loss, delay or alteration.

The problem, not unlike in respect of the “receipt theory”, is one of defining “dispatch” for the purposes of electronic contracting; it is not one of appropriateness of the rule in an electronic context. The CISG rule is still appropriate, it just has to be narrowed down so as to be useful for practical purposes.

IV. Conclusion

It appears that the CISG is applicable not only to contracts concluded via traditional means, but also to contract concluded electronically. The rules set forth in the CISG do appear workable in that context as well. Some of the rules, such as those relating to the effectiveness of communications, may need to be adapted to an electronic context; but it does not seem that this would cause any major problems, since some texts which could serve as models already exist, such as the UNCITRAL Model Law on Electronic Commerce.

Furthermore, from what has been said it also results that the applicability of the CISG to electronically concluded contracts must be distinguished from the issue of whether the CISG also covers the sale of “virtual goods”. As mentioned earlier, the transactions in these kind of goods appear not to be sale, but rather license agreements. Whether the rules of the CISG can apply to these transactions must be doubted.

⁴³ Article 27.

⁴⁴ See Herber/Czerwenka (*supra* note 30), at 135.

⁴⁵ See, for instance, Articles 47(2), 48(2) and (3).

ECJ 5 April 2001 – C-123/00 – Christina Bellamy v English Shop Wholesale SA

Articles 28 and 30 EC – Prohibition of marketing of foodstuffs lawfully manufactured and marketed in another Member State, inadmissibility –

Council Directive 79/112/EEC¹ – Prohibition of giving the impression that the branded product possesses particular qualities when in fact all similar foodstuffs display the same qualities – admissibility

A rule of a Member State prohibiting the marketing of bread and other bakery products whose salt content by ref-

erence to the dry matter exceeds the maximum permitted level of 2 %, when applied to products which have been lawfully manufactured and marketed in another Member State, constitutes a measure having equivalent effect to a quantitative restriction within the meaning of Article 28 EC. Such a rule is likely to hinder trade between Member States and cannot be regarded as justified under Article 30 EC on the ground of protecting public health.

Article 28 EC does not preclude a national rule which prohibits giving the impression that the branded product possesses particular qualities when in fact all similar foodstuffs display the same qualities.

Facts: Article 1 of the Royal Decree of 2 September 1985 on bread and other bakery products (Moniteur belge of 7 November 1985, “the 1985 Decree”) defines bread and bakery products falling within its scope. Article 3 of the decree provides:

“The foodstuffs to which this decree applies must comply with the following requirements as to composition: (...)”

2. As regards the foodstuffs referred to in Article 1(1) to (3), the cooking salt content expressed in terms of sodium chloride and calculated on the basis of the dry matter may not exceed 2.00 %; (...)”

Article 8 of the 1985 Decree provides:

“Any contravention of this decree shall be investigated, prosecuted and punished in accordance with the Law of 24 January 1977 on the protection of consumers’ health in relation to foodstuffs and other products, as regards Articles 2, 3 and 5(...)”

Article 4 of the Royal Decree of 17 April 1980 concerning advertising of foodstuffs (Moniteur belge of 6 May 1980: “the 1980 Decree”) provides:

“In any advertising of foodstuffs, the following are prohibited: (...)”

2. giving the impression that the branded product possesses particular qualities when in fact all similar foodstuffs display the same qualities; (...)”

Article 5 of the 1980 Decree provides:

“All advertising relating to foodstuffs must use in a clearly visible manner such description of a foodstuff as may be provided by law or regulation, where the omission of that description might mislead consumers as to the nature of the foodstuff.”

English Shop Wholesale SA (“ESW”), established in Anderlecht, Belgium, imports foodstuffs from Great Britain for retail sale in Belgium where its clientele consists of European civil servants. A judgment in default was delivered by the Tribunal de première instance de Bruxelles on 9 December 1998 against Mrs Bellamy, the director of ESW, in particular, for having, in contravention of the 1980 and 1985 Decrees:

- sold bread with a salt content of 2.88 %;

- given the impression that the branded product possessed particular qualities when in fact all similar foodstuffs display the same qualities, having in the present case stated that the milk contained no additives or preservatives;

- failed, in the advertising for the product, to use in a clearly visible manner a description of the foodstuff thereby misleading consumers as to the nature of the foodstuff, having in the present

¹ Council Directive 79/112/EEC of 18 December 1978 on the approximation of the laws of the Member States relating to the labelling, presentation and advertising of foodstuffs for sale to the ultimate consumer, OJ 1979 L 33, at 1.