

## The CISG and Electronic Issues

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### I. Introduction

Since the adoption of the Vienna Convention on Contracts for the International Sale of Goods, 1980 (CISG) use of electronic means of communication such as e-mail, SMS and the internet in the last decade has outstripped or replaced other more traditional forms of communications such as post, telex and telegram. The only other form of communication which has been able to hold its own is fax, which in any event is of fairly recent origin and is increasingly becoming integrated into the other forms of electronic communications. The convergence of technologies is also increasingly diffusing the boundaries between these various forms of electronic communications. Most cell phones, for instance have become a small computer enabling the user to use either voice, SMS, e-mail and even fax from the same instrument, as well as accessing the internet.

The Internet has had the added effect that all forms of communications (including voice) have become much faster, cheaper and, importantly, international. Distance in the digital world has virtually no meaning and has almost erased the importance of national boundaries in communications.<sup>①</sup> These developments have also changed the face of communications in international trade. The ease and reliability of communications have facilitated the development of international trade as traders can advertise and sell their wares independent of where buyer and seller may find themselves in the world.<sup>②</sup> This is

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① Chris Reed and John Angel (eds.), *Computer Law—The Law and Regulation of Information Technology*, 6th ed., Oxford University Press, 2007, pp. lxii-lxiii, 197.

② H. R. Cheeseman, *Essentials of Business and Online Commerce Law*, Upper Saddle River Pearson, 2006 pp. 299-300; Chris Reed and John Angel (eds.), *Computer Law—The Law and Regulation of Information Technology*, 6th ed., Oxford University Press, 2007, pp. lxii-lxiii.

also important for developing nations as it opens up international markets to smaller traders from developing nations to an unprecedented extent.

It is a common perception that the law, and more particularly the law of contract, has been lagging behind in the development of solutions for the use of electronic communications in commerce, leading to legal uncertainty which in turn creates obstacles to trade. ① This perception exists not only in respect of international law, but also in respect of most domestic legal systems. ② Some of the questions usually raised include: the legal value and validity of electronic communications; compliance with formalities; whether electronic signatures are possible and valid; determining the time and place of the conclusion of the contract; the validity of automated transactions; the applicable legal system; the evidential value of electronic records; and similar issues. ③

The fact that many of these issues could already be adequately accommodated in terms of existing flexible rules, ④ has not removed these perceptions about legal uncertainty. It provided the ground for UNCITRAL to develop a Model Law on Electronic Commerce (1996) ⑤ and a Model Law on Electronic Signatures (2001) ⑥ and finally the United Nations Convention on the Use of Electronic Communications in International Contracts, 2005 (UNECIC). The two model laws were aimed at standardising and facilitating the response of *domestic legal systems* to the challenges of electronic commerce

① Working Group Report 5-9 May 2003 A/CN. 9/528 (19 May 2003); UNCITRAL *Model Law* par 2 and 3 [http://www.uncitral.org/uncitral/en/uncitral\\_texts/electronic\\_commerce/1996Model.html](http://www.uncitral.org/uncitral/en/uncitral_texts/electronic_commerce/1996Model.html), last visited September 8, 2007. See also the South African Department of Communications, *Greenpaper on E-Commerce*, 2000.

② UNCITRAL Model Law and 3 [http://www.uncitral.org/uncitral/en/uncitral\\_texts/electronic\\_commerce/1996Model.html](http://www.uncitral.org/uncitral/en/uncitral_texts/electronic_commerce/1996Model.html), last visited September 12, 2007 para. 2.

③ See UNCITRAL, *Legal Barriers to the Development of Electronic Commerce in International Instruments Relating to International Trade* Compilation of Comments by Governments and International Organizations, A/CN. 9/WG. IV/WP.94 (14 February 2002); South African Department of Communications, *Greenpaper on E-Commerce*, 2000.

④ Paras 30 and 31 Working Group Report 5-9 May 2003 A/CN. 9/528 (19 May 2003).

⑤ Adopted by UNCITRAL on 12 June 1996. See G. A. Res. 51/162, adopted on 16 December 1996, UN Doc. A/RES/51/162 (30 January 1997) [http://www.uncitral.org/uncitral/en/uncitral\\_texts/electronic\\_commerce/1996Model.html](http://www.uncitral.org/uncitral/en/uncitral_texts/electronic_commerce/1996Model.html), last visited 12 September 2007. The Model Law provided the basis for Chapter 3 of the South African Electronic Communications and Transactions law 25 of 2005.

⑥ Adopted by UNCITRAL on 5 July 2001. See G. A. Res56/80 adopted on 12 December 2001, UN Doc. A/RES/56/80 (24 June 2002).

and have subsequently been used in the drafting of the domestic legislation of a fairly large number of countries. ① The UNECIC, in turn, aims at establishing legal certainty in *international trade* by providing solutions and harmonizing rules on electronic communications for *international transactions*. ② In Article 20 specific reference is made to the applicability of the UNECIC to the CISG.

Article 13 of the CISG which defines "writing" today seems curiously outdated with its reference to telegram and telex. ③ Other forms of electronic communications were not considered at the time of the drafting of the Convention. ④ Although most commentators agree that Article 13 should be interpreted to include other more modern forms of communications such as e-mail and internet data messages, the continued development and convergence of technologies still create some uncertainties. ⑤ For instance, if a natural person interacts with an automatic agent over the internet using voice (with Voice over Internet Protocol— "VoIP") could the voice message if recorded, constitute writing?

① Legislation implementing provisions of the Model Law has been adopted in: Australia (1999), China (2004), Colombia (1999), Dominican Republic (2002), Ecuador (2002), France (2000), India (2000), Ireland (2000), Jordan (2001), Mauritius (2000), Mexico (2000), New Zealand (2002), Pakistan (2002), Panama (2001), Philippines (2000), Republic of Korea (1999), Singapore (1998), Slovenia (2000), South Africa (2002), Sri Lanka (2006), Thailand (2002), Venezuela (2001) and Viet Nam (2005). Uniform legislation influenced by the Model Law and the principles on which it is based has been prepared in: the United States (Uniform Electronic Transactions Act, adopted in 1999 by the National Conference of Commissioners on Uniform State Law) and enacted in 49 of its states; Canada (Uniform Electronic Commerce Act, adopted in 1999 by the Uniform Law Conference of Canada) and enacted in 11 of its provinces and territories.

② See the UNECIC Preamble.

③ Western Union announced the discontinuation of all of its telegram services effective from the 31 January 2006. Only 20, 000 telegrams were sent in 2005, compared with 20 million in 1929. According to Western Union, which still offers money transfer services, its last telegram was sent Friday, 27 January 2006. The company stated that this was, "... the final transition from a communications company to a financial services company", available at <http://www.wired.com/news/technology/0,70147-0.html>.

④ CISG-AC Opinion no 1, Electronic Communications under CISG, 15 August 2003. Rapporteur:

Professor Christina Ramberg, Gothenburg, Sweden.

⑤ John O Honnold, *Uniform Law for International Sales*, 3rd ed., Kluwer, 1999, p. 189; Peter Schlechtriem, *Uniform Sales Law—The Experience with Uniform Sales Laws in the Federal Republic of Germany*, *Juridisk Tidskrift*, 1991-1992, p. 18; Julius von Staudingers and Ulrich Magnus, *Kommentar zum Bürgerlichen Gesetzbuch mit Einführungsgesetz und Nebengesetzen Wiener UN Kaufrecht*, Berlin Sellier, 2005, p. 213.

Other questions that may arise in respect to electronic communications deal with:

—the legal validity of data messages and contracts concluded by electronic data

messages;

—compliance with formalities;

—the time and place of communications and contracting; and

—the validity of prescribed notices sent by electronic means.

In this paper the responses to these issues from the CISG Advisory Council and the UNECIC will be compared and evaluated. For ease of reference the text of the UNECIC, the CISG and the CISG Advisory Council Opinion will be quoted in a table at the beginning of each section.

## II. Legal Recognition and Formalities

The point of departure in the CISG is that of freedom of form, ie that international sales contracts need not be reduced to writing or any other kind of form and that the contents of the contract can be proved by any means, including oral testimony. It is also generally recognised that Article 11 excludes the application of the parol evidence rule of Anglo-American law. ①

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① CISG-AC Opinion no 3, Parol Evidence Rule, Plain Meaning Rule, Contractual Merger Clause and the CISG, 23 October 2004 Rapporteur: Professor Richard Hyland, Rutgers Law School, Camden, NJ, USA para. 2, available at <http://www.cisg.law.pace.edu/cisg/CISG-AC-op3.html>, last visited August 15, 2007. See also Kessel Schmidt in Peter Schlechtriem and Ingeborg Schwenzer (eds.), *Commentary on the UN Convention on the International Sale of Goods (CISG)*, 2nd English ed., Oxford University Press, 2005, Art. 1, para. 7, 14-24, and Art. 8 paras. 32-34; Julius von Staudingers and Ulrich Magnus, *Kommentar zum Bürgerlichen Gesetzbuch mit Einführungsgesetz und Nebengesetzen Wiener UN Kaufrecht*, Berlin Sellier, 2005, Art. 1, paras. 1-4, 13-28, and Art. 11, para. 16; Harry Flechtner, *The U. N. Sales Convention (CISG) and MCC-Marble Ceramic Center, Inc. v. Ceramica Nuova D'Agostino, S. p. A.: The Eleventh Circuit Weighs in on Interpretation, Subjective Intent, Procedural Limits to the Convention's Scope, and the Parol Evidence Rule*, *Journal of Law and Commerce*, Vol. 18, 1999, pp. 270-271; *United States MCC-Marble Ceramic Center, Inc., v. Ceramica Nuova d'Agostino, S. p. A.*, 144 F. 3d 1384, 1388-1389 (11th Cir. 1998), available at <http://www.cisg.law.pace.edu/cisg/wais/db/cases2/980629u1.html>, last visited August 15, 2007. See also *United States TeeVee Toons, Inc. v. Gerhard Schubert GmbH*, 2006 WL 2463537 (S. D. N. Y. 2006), available at <http://www.cisg.law.pace.edu/cisg/wais/db/cases2/060823u1.html>, last visited August 15, 2007.

UNECIC	CISG	CISG AC Opinion 1
<p><b>Article 8—Legal recognition of electronic communications</b></p> <p>1. A communication or a contract shall not be denied validity or enforceability on the sole ground that it is in the form of an electronic communication.</p> <p>Nothing in this Convention requires a party to use or accept electronic communications, but a party's agreement to do so may be inferred from the party's conduct.</p> <p><b>Article 9 Form requirements</b></p> <p>2. Where the law requires that a communication or a contract should be in writing, or provides consequences for the absence of a writing, that requirement is met by an electronic communication if the information contained therein is accessible so as to be usable for subsequent reference.</p> <p>3. Where the law requires that a communication or a contract should be signed by a party, or provides consequences for the absence of a signature, that requirement is met in relation to an electronic communication if:</p> <p>(a) A method is used to identify the party and to indicate that party's intention in respect of the information contained in the electronic communication; and</p> <p>(b) The method used is either:</p> <p>(i) As reliable as appropriate for the purpose for which the electronic communication was generated or communicated, in the light of all the circumstances, including any relevant agreement; or</p> <p>(ii) Proven in fact to have fulfilled the functions described in subparagraph (a) above, by itself or together with further evidence.</p> <p>4. Where the law requires that a communication or a contract should be made available or retained in its original form, or provides consequences for the absence of an original, that requirement is met in relation to an electronic communication if:</p> <p>(a) There exists a reliable assurance as to the integrity of the information it contains from the time when it was first generated in its final form, as an electronic communication or otherwise; and</p> <p>(b) Where it is required that the information it contains be made available, that information is capable of being displayed to the person to whom it is to be made available.</p>	<p><b>Article 11</b></p> <p>A contract of sale 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.</p> <p><b>Article 13</b></p> <p>For the purposes of this Convention "writing" includes telegram and telex.</p>	<p><b>Opinion</b></p> <p>A contract may be concluded or evidenced by electronic communications.</p> <p><b>Opinion</b></p> <p>The term "writing" in CISG also includes any electronic communication retrievable in perceivable form.</p> <p><b>Opinion</b></p> <p>The term "notice" includes electronic communications, provided that the addressee expressly or impliedly has consented to receiving electronic messages of that type, in that format, and to that address.</p>

The UNECIC supports this position by ensuring that there is proper legal recognition for the use of electronic communications in this process.

A few states have made use of the right to make a declaration under CISC Article 96 requiring contracts for the sale of goods to be in writing.<sup>①</sup> That is the only statutory formality requirement allowed as an exception to the general principle of freedom of contract. In terms of the party autonomy principle of CISC Article 6, it is open to the parties to require more strict formalities, including signature for the validity of the contract or its amendment. UNECIC Article 9 makes provision for all of these situations, supporting the *favor contra ctus* principle underlying the CISC. In terms of this provision electronic communications will be regarded as "in writing", provided that it is produced in a manner that enables it to be accessible for subsequent use. Similarly, the provision in respect of signature is very flexible allowing for the development of new technologies and methods as well as party autonomy in so far as allowed by the law.

CISC Article 13 seemingly has become somewhat redundant in that it refers to technologies that are being used less and less or have become obsolete. Until such time as there is wide acceptance of the UNECIC by CISC countries, Article 13 remains important as an interpretative aid. It refers to at least one form of communication that is electronic, namely telex, determining that it is to be regarded as writing for purposes of formalities requirements. With the development of more modern communications technologies, there is now clearly a gap in the convention which needs to be filled with the techniques discussed above. There is general consensus that most forms of electronic communications should be recognised as writing in filling this gap in CISC Article 13 as indicated by the CISC AC Opinion 1.<sup>②</sup> The application of UNECIC Article 9 puts that issue beyond doubt.

The advantage of UNECIC Article 9 is that it provides a more certain, precise and comprehensive solution to the gap in CISC Article 13 than will be achieved relying on case law alone. There is a clear description of what minimum requirements need to be met to qualify an electronic message as writing. Furthermore it also provides solutions in respect of electronic signatures, for instance where required by the agreement between the parties

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<sup>①</sup> The following countries have made an Art. 96 declaration: Argentina, Belarus, Chile, China, Hungary, Latvia, Lithuania, Paraguay, Russia, and the Ukraine.

<sup>②</sup> See CISC-AC Opinion no 1, available at <http://www.cisg.law.pace.edu/cisg/CISC-AC-op1.html>, last visited August 15, 2007, which deals extensively with the gap created by the newer technologies.

or some other law. It also makes provision for the proof of such communications where the applicable law, such as the law of evidence requires that the original document must be provided.

### III. Time and Place of Contracting

UNECIC	CISG	CISG AC Opinion 1
<p><b>Article 10 Time and place of dispatch and receipt of electronic communications</b></p> <p>1. The time of dispatch of an electronic communication is the time when it leaves an information system under the control of the originator or of the party who sent it on behalf of the originator or, if the electronic communication has not left an information system under the control of the originator or of the party who sent it on behalf of the originator, the time when the electronic communication is received.</p> <p>2. The time of receipt of an electronic communication is the time when it becomes capable of being retrieved by the addressee at an electronic address designated by the addressee. The time of receipt of an electronic communication at another electronic address of the addressee is the time when it</p>	<p><b>Article 24</b></p> <p>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.</p> <p><b>Article 15</b></p> <p>(1) An offer becomes effective when it reaches the offeree.</p> <p>(2) An offer, even if it is irrevocable, may be withdrawn if the withdrawal reaches the offeree before or at the same time as the offer.</p> <p><b>Article 16</b></p> <p>(1) Until a contract is concluded an offer may be revoked if the revocation reaches the offeree before he has dispatched an acceptance.</p> <p>(2) However, an offer cannot be revoked:</p> <p>(a) if it indicates, whether by stating a fixed time for acceptance or otherwise, that it is irrevocable; or</p>	<p><b>Opinion (i)ro Art. 15)</b></p> <p>The term "reaches" corresponds to the point in time when an electronic communication has entered the offeree's server.</p> <p><b>Opinion (i)ro 18 (2))</b></p> <p>An acceptance becomes effective when an electronic indication of assent has entered the offeror's server, provided that the offeror has consented, expressly or impliedly, to receiving electronic communications of that type, in that format, and to that address. The term "oral" includes electronically transmitted sound in real time and electronic communications in real time. An offer that is transmitted electronically in real time communication must be accepted immediately unless the circumstances indicate otherwise provided that the addressee consented expressly or impliedly to receiving communications of that type, in that format, and to that address.</p>

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UNECIC	CISG	CISG AC Opinion I
<p>becomes capable of being retrieved by the addressee at that address and the addressee becomes aware that the electronic communication has been sent to that address. An electronic communication is presumed to be capable of being retrieved by the addressee when it reaches the addressee's electronic address.</p> <p>3. An electronic communication is deemed to be dispatched at the place where the originator has its place of business and is deemed to be received at the place where the addressee has its place of business, as determined in accordance with article 6.</p> <p>4. Paragraph 2 of this article applies notwithstanding that the place where the information system supporting an electronic address is located may be different from the place where the electronic communication is deemed to be received under paragraph 3 of this article.</p>	<p>(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.</p> <p><b>Article 18</b></p> <p>(1) A statement made by or other conduct of the offeree indicating assent to an offer is an acceptance. Silence or inactivity does not in itself amount to acceptance.</p> <p>(2) An acceptance of an offer becomes effective at the moment the indication of assent reaches the offeror. An acceptance is not effective if the indication of assent does not reach the offeror within the time he has fixed or, if no time is fixed, within a reasonable time, due account being taken of the circumstances of the transaction, including the rapidity of the means of communication employed by the offeror. An oral offer must be accepted immediately unless the circumstances indicate otherwise.</p> <p>(3) However, if, by virtue of the offer or as a result of practices which the parties have established between themselves or of usage, the offeree may indicate assent by performing an act, such as one relating to the dispatch of the goods or payment of the price, without notice to the offeror, the acceptance is effective at the moment the act is performed, provided that the act is performed within the period of time laid down in the preceding paragraph.</p> <p><b>Article 20</b></p> <p>(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.</p> <p><b>Article 23</b></p> <p>A contract is concluded at the moment when an acceptance of an offer becomes effective in accordance with the provisions of this Convention.</p>	<p><del>Opinion (i) (Art 22)</del></p> <p>The term "reaches" corresponds to the point in time when an electronic communication has entered the offeror's server, provided that the offeror expressly or impliedly has consented to receiving electronic messages of that type, in that format, and to that address.</p> <p><b>Opinion (i) (Art 24)</b></p> <p>The term "reaches" corresponds to the point in time when an electronic communication has entered the addressee's server, provided that the addressee expressly or impliedly has consented to receiving electronic communications of that type, in that format, and to that address.</p>



The determination of time and place where messages are sent from or received and the time and place of the conclusion of the contract may be important for a number of issues, including the following:

- Establishing the place where a tort (delict) has been committed (*the lex loci delicti*) in the case of pre-contractual misstatements for purposes of establishing the applicable legal system and jurisdiction. However, the CISG does not deal with this aspect which therefore falls within the scope of the applicable domestic law.

- Establishing when an offer becomes effective or when the period within which the offer must be accepted commences;

- Establishing when an offer may be lawfully retracted without further consequences;

- Establishing the place where the contract was concluded (*lex loci contractus*) for purposes of formalities compliance, the proper law of the contract or jurisdiction.

There are a number of different opinions and solutions to the question on where and when a contract has come into existence in situations where the parties are not negotiating face to face, ie *inter absentes* or where indirect forms of communications are used. There isn't even consensus on what forms of communications should be regarded as direct or indirect forms of communications. In the English *Entores Ltd case*<sup>①</sup> Parker LJ remarked that parties who communicate by telephone, telex or telefacsimile transmission are to all intents and purposes in each others presence. Most commentators would disagree—telex and fax are certainly not direct forms of communication, ie as if the parties were in one another's presence. There is no indication, as would be the case with a telephone conversation whether the other party is physically present at the fax machine, or that it has taken cognisance of the communication or that it has received the message at all. The same holds true for other electronic communications such as SMS, e-mail and transactions taking place via the internet. There is a need for legal certainty to the approach of these forms of communications when used for contract formation.

Three different approaches may be used in determining the place and time of the conclusion of the contract:<sup>②</sup>

<sup>①</sup> England *Entores Ltd v. Miles Far East Corporation* [1955] 2 QB 327 (CA) ([1955] 2 All ER 493) at 337. See also South Africa *Jamieson v Sabingo* 2002 (4) SA 49 (SCA) para. 5.

<sup>②</sup> UNCITRAL Secretariat Explanatory Note, para. 287, available at <http://www.cisg.law.pace.edu/cisg/conf-erence.html>, last visited August 15, 2007, paras. 173-174 (*Secretariat Explanatory Note* hereinafter).

• **The information theory.** In terms of this approach the contract comes into existence at the time and place where the offeror takes subjective notice of the acceptance by the offeree. This approach is generally used for direct forms of communications, ie where the parties are in one another's presence or for telephonic negotiations.

• **The reception theory.** In terms of this approach the contract comes into existence at the time and place that the offeror receives the acceptance. This approach is generally recognised as the most suitable approach for indirect forms of communications such as post, e-mail, fax and telex. This is also the approach adopted in the CISG. ①

• **The despatch or postal theory.** In terms of this approach the contract comes into existence at the time and place where the offeree puts the acceptance in the post. This approach is used mostly in Common Law countries. ②

It is fairly widely recognised that the English postal rule as a solution to the problem of indirect communications is either not acceptable at all, or is at least outdated as far as modern communications techniques are concerned. ③ The UNECIC brings the needed clarification as far as the questions of where and when electronic communications take place are concerned. That will indirectly also be determinative of where and when the contract comes into existence. The UNECIC follows an approach which is consonant with the solution adopted in the CISG.

The point of departure in the CISG is that indirect communications become effective when they *reach* the addressee. ④ In terms of Article 24 a message is deemed to reach the addressee when it is delivered to the addressee in person or at its place of business or at its mailing address. These provisions cause problems when they are applied to electronic communications as they do not take account of the difficulties caused by electronic messages. This has been recognised and the CISG Advisory Council in its first opinion dealt with

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① See CISG Art. 18 (2).

② See *England Henthorn v Fraser* [1892] 2 Ch 27 33; *South Africa Cape Explosives Works (Pty) Ltd v SA Oil and Fat Industries Ltd* 1921 CPD p. 244; *South Africa Kergeulen Sealing and Whaling Co Ltd v CIR* 1939 AD p. 487. See Reed and Angel, *Computer Law*, pp. 201-202. They indicate that the rule is also applied in Spanish law in commercial transactions.

③ Chris Reed and John Angel (eds.), *Computer Law—The Law and Regulation of Information Technology*, 6th ed., Oxford University Press, 2007, pp. 202-203. See also the solutions adopted in American law with s 15 of the US Uniform Electronic Transactions Act 1999 and s 14 of the Australian Electronic Communications Act 1999.

④ See CISG Arts. 15 and 18.

these problems in order to interpretative guidance in these situations. ① In respect of Article 15 and 16 the Opinion states that the term “reaches” corresponds to the point in time when an electronic communication has entered the offeree’s server. In the case of electronic communications the term “reaches” corresponds to the point in time when an electronic communication has entered the offeree’s server. A prerequisite is that the offeree has consented, expressly or impliedly, to receiving electronic communications of that type, in that format, and to that address.

This suggested solution generally corresponds with UNECIC Article 10 (2). UNECIC Article 10 (2), however is more precise in that it differentiates between situations where the addressee has designated an electronic address and situations where the message is sent to an undesignated address. In the latter instance the addressee must be subjectively aware of the fact that the messages have been received. It also makes it clear that the messages need only be capable of being retrieved. Article 10 (2) also uses the term “reach” for purposes of creating a presumption that the messages are retrievable.

In terms of CISG Article 18 (2) read with Article 23 the contract comes into existence at the time that the acceptance reaches the offeror. The CISG does not determine the place of contracting, which needs to be determined by the applicable domestic law. ② The CISG AC opinion on Article 18 states that an acceptance will become effective when “an electronic indication of assent has entered the offeror’s server, provided that the offeror has consented, expressly or impliedly, to receiving electronic communications of that type, in that format, and to that address.” As far as the place of contracting is concerned, the UNECIC makes it clear that the usual physical places of business of the parties will be decisive, and not the place where the server or other communications apparatus may be situated, which very often may be in another part of the world which has no other connection with the transaction. ③ The principle that parties are linked to their physical place of business rather than their virtual place of communication, is one of the underlying principles of the UNECIC. The Secretariat *Explanatory Note* states:

*The principal reason for including these rules is to address a characteristic of electronic commerce that may not be treated adequately under existing law, namely, that very often the*

① See para. 15. 2 CISG-AC Opinion No. 1.

② Julius von Staudingers and Ulrich Magnus, *Kommentar zum Bürgerlichen Gesetzbuch mit Einführungsgesetz und Nebengesetzen Wiener UN Kaufrecht*, Berlin Sellier, 2005, Art. 23, para. 8.

③ See UNECIC Article 10 (4); Secretariat *Explanatory Note*, para. 194.

*information system of the addressee where the electronic communication is received, or from which the electronic communication is retrieved, is located in a jurisdiction other than that in which the addressee itself is located. Thus, the rationale behind the provision is to ensure that the location of an information system is not the determinant element, and that there is some reasonable connection between the addressee and what is deemed to be the place of receipt and that this place can be readily ascertained by the originator.*

The UNECIC does not contain any provision dealing directly with the time and place of contract formation, rather relying on the applicable law to fulfil that function.<sup>①</sup> If the CISG is the applicable law the provisions of UNECIC Article 10 determines that the contract will come into existence either when the electronic message reaches the offeror at the designated electronic address, or if it is sent to another address when the offeror becomes aware that the message has been sent to that address. If the message is not retrievable the onus is on the offeror to prove that fact. Where the message is not retrievable it will not be effective, even though it may have reached the offeror.

In many cases offers will contain a period of time within which the acceptance must take place, but often these time periods are ambiguous as they do not indicate exactly when such time period commences, ie on the date of despatch or the date of receipt. CISG Article 20 distinguishes between indirect forms of communication like letters and telegrams and direct forms of communications such as telephone and telex. In respect of indirect forms of communication the period commences upon despatch of the message, whereas with direct forms of communication it commences when the message reaches the addressee. The distinction between instantaneous and non-instantaneous forms or direct and indirect forms of communications is not really helpful for the determination of the underlying policy on when time periods should commence.

It is much more helpful to distinguish between real time communications where the human parties are in instant contact with one another and any break in communications becomes immediately apparent. Telephone conversations, whether on land line, by cell-phone or over the internet with VoIP, and communications on chat lines should be regarded as real time communications. All other forms of electronic communications such as SMS, e-mail, EDI, telex and interactive transactions with an automated agent should be regarded as not being in real time. In respect of real time communications the time period should commence when the offer reaches the offerree. In respect of all other communica-

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① Secretariat Explanatory Note, para. 175.

tions the period should commence when the offer is sent. ① In this regard UNECIC Art 10 (1) determines that it is deemed sent when it leaves the information system under the control of the originator.

#### IV. Use of Automated Message Systems

UNECIC	CISG	CISG AC Opinion 1
<p><b>Article 12 Use of automated message systems for contract formation</b>                      A contract formed by the interaction of an automated message system and a natural person, or by the interaction of automated message systems, shall not be denied validity or enforceability on the sole ground that no natural person reviewed or intervened in each of the individual actions carried out by the automated message systems or the resulting contract.</p> <p><b>Article 14 Error in electronic communications</b>                      1. Where a natural person makes an input error in an electronic communication exchanged with the automated message system of another party and the automated message system does not provide the person with an opportunity to correct the error, that person, or the party on whose behalf that person was acting, has the right to withdraw the portion of the electronic communication in which the input error was made if:                      (a) The person, or the party on whose behalf that person was acting, notifies the other party of the error as soon as possible after having learned of the error and indicates that he or she made an error in the electronic communication; and                      (b) The person, or the party on whose behalf that person was acting, has not used or received any material benefit or value from the goods or services, if any, received from the other party.                      2. Nothing in this article affects the application of any rule of law that may govern the consequences of any error other than as provided for in paragraph 1.</p>	<p><b>Article 8 [ Interpretation of statements and conduct ]</b>                      (1) For the purposes of this Convention statements made by and other conduct of a party are to be interpreted according to his intent where the other party knew or could not have been unaware what that intent was.                      (2) If the preceding paragraph is not applicable, statements made by and other conduct of a party are to be interpreted according to the understanding that a reasonable person of the same kind as the other party would have had in the same circumstances.                      (3) In determining the intent of a party or the understanding a reasonable person would have had, due consideration is to be given to all relevant circumstances of the case including the negotiations, any practices which the parties have established between themselves, usages and any subsequent conduct of the parties.</p>	<p>The CISG Advisory Council Opinion contains no provision on this issue as it fell outside the scope of the Opinion.</p>

① This solution is in accord with the CISG-AC Opinion No 1 on Art. 20 (1). However, the Opinion does not offer any solution for so-called passive websites, ie where the contract is concluded by an electronic agent.

The use of automated message systems for contract formation, for instance in the case of EDI transactions where both parties may be using automated agents, or in the case of interactive websites, where one of the parties is using an automated agent, creates doctrinal problems in respect of consensus as at least one of the communications is not made directly by a human party who can express a subjective intention. How can there be a "meeting of the minds" if there is no mind involved? Contract formation in these situations can be explained as follows in terms of traditional doctrine:

(a) If the offeror makes use of an electronic agent, receipt by the electronic agent of an acceptance will be sufficient to establish consensus. This is so because of the offeror has implicitly abandoned its right to take subjective notice of the acceptance in the way it has set up its website or EDI system. ① A party can also rely on CISG Article 8 namely that there is a reasonable reliance on the conduct of the offeror or a course of dealing established between the parties, ② or Article 9 which deals with international usages. ③

(b) Where one party makes use of an electronic agent, as will be the case in most websites, either the receipt of the acceptance by the human party may constitute formation of the contract, or the sending of an acknowledgement by the website or receipt of the acknowledgement by the client may conclude the formation. If the website does not stipulate clearly when the agreement will be concluded, it will depend on the facts of the particular case which construction should apply. In all of these cases the subjective declaration of the party using the electronic agent is substituted by the electronic response

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① R. H. Christie, *The Law of Contract*, 4th ed., 2004, Durban Butterworths, p. 77; *South Africa R v. Nel* 1921 AD p. 339.

② For a general discussion of Art. 8 see Peter Schlechtriem and Ingeborg Schwenzer (eds.), *Commentary on the UN Convention on the International Sale of Goods (CISG)*, 2nd English ed., Oxford University Press, 2005, Art. 8, paras. 19-20, 44-46; Julius von Staudingers and Ulrich Magnus, *Kommentar zum Bürgerlichen Gesetzbuch mit Einführungsgesetz und Nebengesetzen Wiener UN Kaufrecht*, Berlin Sellier, 2005, Art. 8 paras. 8-10, 17-18, 23-26.

③ See generally Julius von Staudingers and Ulrich Magnus, *Kommentar zum Bürgerlichen Gesetzbuch mit Einführungsgesetz und Nebengesetzen Wiener UN Kaufrecht*, Berlin Sellier, 2005, Art. 9, paras. 16-17.

which is ascribed to that party. If you program a computer to reply on your behalf, you will be held responsible for that reply as if you have made it personally. The other party may reasonably rely on that fact. This can be deducted from CISG Art. 8 which deals with the interpretation of statements and conduct of a party and reasonable reliance.

(c) In the case of EDI it will often happen that both parties will make use of electronic agents. As goods are sold, the electronic inventory may initiate an order automatically without any human interference. The order will also be received electronically with the actual dispatch of the goods requiring the first human intervention or interaction in the transaction. In these cases the interchange agreement between the parties should deal with issues of contract formation and mistake. In any event, the data messages generated by the electronic agents will be ascribed to the parties responsible as if it had been there subjective declarations of will. ①

UNECIC Article 12 does not solve the underlying doctrinal difficulties with automated transactions, but offers a practical solution to the problems created by them. ② It simply stipulates that such transactions will be valid in principle although there may be other factors which could invalidate the transaction such as *force majeure* for instance.

Whether a party can rely on a mistake made in an automated transaction is not dealt with by the CISG. Under prevailing opinion the issue of mistake is not governed by the CISG, but by the applicable domestic law. ③ The UNECIC in Article 14 resolves the problem only of *input* mistakes made. ④ Any other mistake will still be governed by the applicable domestic law.

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① Once again relying on CISG Art. 8.

② See generally Secretariat Explanatory Note, paras. 208-210.

③ Peter Schlechtriem and Ingeborg Schwenzer (eds.), *Commentary on the UN Convention on the International Sale of Goods (CISG)*, 2nd English ed., Oxford University Press, 2005, Art. 8, paras. 6 and 7; Staudinger/Magnus, *Kommentar*, Art. 8 para. 21.

④ Secretariat Explanatory Note, paras. 225-226.

V. Post Contract Formation Communications

UNECIC	CISG	CISG AC Opinion 1
<p><b>Article 8 Legal recognition of electronic communications</b></p> <p>2. Nothing in this Convention requires a party to use or accept electronic communications, but a party's agreement to do so may be inferred from the party's conduct.</p>	<p><b>Article 27</b></p> <p>Unless otherwise expressly provided in this Part of the Convention, if any notice, request or other communication is given or made by a party in accordance with this Part and by means appropriate in the circumstances, a delay or error in the transmission of the communication or its failure to arrive does not deprive that party of the right to rely on the communication.</p>	<p><b>Opinion ( iro Art. 26)</b></p> <p>The term "notice" includes Electronic communications, provided that the addressee expressly or impliedly has consented to receiving electronic messages of that type, in that format, and to that address.</p>
<p><b>Article 10 Time and place of dispatch and receipt of electronic communications</b></p>	<p><b>Article 26</b></p> <p>A declaration of avoidance of the contract is effective only if made by notice to the other party.</p>	<p><b>Opinion ( iro Art. 39)</b></p> <p>The term "notice" includes electronic communications provided that the seller expressly or impliedly has consented to receiving electronic messages of that type, in that format, and to that address.</p>
<p>1. The time of dispatch of an electronic communication is the time when it leaves an information system under the control of the originator or of the party who sent it on behalf of the originator or, if the electronic communication has not left an information system under the control of the originator or of the party who sent it on behalf of the originator, the time when the electronic communication is received.</p>	<p><b>Article 39</b></p> <p>(1) The buyer loses the right to rely on a lack of conformity of the goods if he does not give notice to the seller specifying the nature of the lack of conformity within a reasonable time after he has discovered it or ought to have discovered it.</p>	<p><b>Opinion ( iro Art. 71)</b></p> <p>The term "notice" includes electronic communications, provided that the addressee expressly or impliedly has consented to receiving electronic communications of that type, in that format, and to that address.</p>
	<p><b>Article 71</b></p> <p>(3) A party suspending performance, whether before or after dispatch of the goods, must immediately give notice of the suspension to the other party and must continue with performance if the other party provides adequate assurance of his performance.</p>	
	<p><b>Opinion ( iro Art. 27)</b></p> <p>A notice, request or other communication may be given or made electronically whenever the addressee expressly or impliedly has consented to receiving electronic messages of this type, in that format, and to that address.</p>	



The CISG is not only concerned with the sending of messages in respect of *contract formation*, but there are also a number of instances where a party is required to notify the other party of certain facts or events which takes place *after contract formation*.<sup>①</sup> In terms of CISG Article 27 the risk of the communication generally is on the addressee, except where the convention provides otherwise,<sup>②</sup> with the result that the notification requirement is met where the notice is sent even though it does not reach the other party and it is not the fault of the sender.<sup>③</sup> In these cases UNEDIC Article 10 (1) becomes relevant to determine whether a notice was effectively sent. In terms of this provision the originating party need only prove that the message was sent and that it had left the information system under its control.

The CISG Advisory Council Opinion on Article 26 which deals with notice of termination of the agreement and article 27 which deals with the validity of notices states that the term "notice" includes electronic communications, provided that the addressee had expressly or impliedly consented to receiving electronic messages of that type, in that format, and to that address.

It is submitted that this opinion is consistent with the provisions of UNEDIC Article 8 (2) which states that a party is not obliged to receive electronic notices unless it has agreed to do so. Such agreement may be inferred from the party's conduct. Where a party is using electronic communications, e-mail for instance, that would be an indication of that party's willingness to accept electronic communications. Article 10 (1) will provide clarity as to when the notices is deemed to be sent, ie when it has left the information system of the originator.

## VI. Conclusion

The CISG was drafted at a time when the electronic communications available today were either not in existence or in their infancy. This has left certain obvious gaps in the

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① See Arts. 26, 32, 39, 43, 47, 48, 63, 71, 72, 79 and 88.

② See for instance Art. 47(2), 48(2)-(4), 63(2), 65(1)-(2) and 79(4).

③ Peter Schlechtriem and Ingeborg Schwenzer (eds.), *Commentary on the UN Convention on the International Sale of Goods (CISG)*, 2nd English ed., Oxford University Press, 2005, Art. 27, paras. 1-3; Julius von Staudingers and Ulrich Magnus, *Kommentar zum Bürgerlichen Gesetzbuch mit Einführungsgesetz und Nebengesetzen Wiener UN Kaufrecht*, Berlin Sellier, 2005, Art. 27, paras. 1-3.

convention which needs to be filled either by an amendment of the convention, which would be a nigh on impossible task considering the number of parties that have adopted it, or by creative interpretation as called for under CISG Article 7 (2) or by the introduction of an ancillary convention that will fill the gaps. The CISG Advisory Council has published an opinion aiming at filling most of the gaps which have appeared, but the opinion lacks direct applicability, however authoritative or persuasive it may be.

The UNECIC is a timely instrument which provides pertinent solutions to most of the gaps found in the CISG due to the use of modern electronic communications. From the above analysis it appears that there could be a useful interaction and synergy if the UNECIC should be adopted by the CISG countries. There does not appear to be any major stumbling block in the way of widespread adoption of the UNECIC. Although the convention allows a lot of flexibility in the manner and extent to which countries may adopt the convention, it is to be hoped that few if any countries will make use of the exclusionary declarations allowed.