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WORKING GROUP FOR THE PREPARATION OF
PRINCIPLES OF INTERNATIONAL COMMERCIAL CONTRACTS

UNIDROIT PRINCIPLES AND ELECTRONIC COMMERCE

(Questionnaire prepared by Professors M.J. Bonell and E.A. Farnsworth and
replies of Professors A.H. Boss, J. Ginsburg and C. Ramberg)

Rome, May 2002

On the occasion of the 1st session of the new Working Group for the preparation of Part II of the Principles of International Commercial Contracts held in Rome in 1998, it was decided to consider whether, and if so, to what extent the present version of the Principles required additions or amendments to the black letter rules and/or to the Comments in the light of the practice of electronic contracting (cf. Summary Records of the Meeting held in Rome from 16 to 19 March 1998, UNIDROIT 1998 Study L – Misc. 20, paras. 362-367). At the Group's request, Professor T. Uchida prepared a position paper (UNIDROIT 1999 Study L – Doc. 60) in which he compared some basic provisions of the Principles and the corresponding provisions of the 1996 UNICTRAL Model Law on Electronic Commerce and made several suggestions for possible changes in the Principles.

On the occasion of its 5th session held in Rome in 2001, the Group agreed that it would be advisable to collect additional information and comments on e-commerce and the UNIDROIT Principles and invited all members to contact to this effect experts in their respective countries (cf. Summary Records of the Meeting held in Rome from 4 to 7 June 2001, UNIDROIT 2001 Study L – Misc. 23, para. 650).

Taking advantage of his stay at Columbia Law School Professor M.J. Bonell prepared, together with Professor E.A. Farnsworth, a questionnaire which was then submitted to a number of experts in the field of electronic contracting. The present paper contains, together with the questionnaire, the written replies received from Professors A.H. Boss (Temple University School of Law; American Law Institute Council), J. Ginsburg (Columbia Law School) and C. Ramberg (University of Stockholm).

QUESTIONNAIRE ON UNIDROIT PRINCIPLES AND E-COMMERCE^{*}

1. - *Article 1.2: “Nothing in these Principles requires a contract to be concluded in or evidenced by writing. It may be proved by any means, including witnesses”.*

Question: Should there be a provision expressly stating that a contract may be validly concluded and/or proved by way of electronic data messages¹ or would language to this effect in the comments be sufficient?

A.B. This does not go far enough. It simply says a contract need not be concluded in or evidenced by writing, but may proven by any means. It *does not* say that a contract should not be denied enforceability solely because it was entered into electronically. The latter formulation in the Model Law is more extensive -- and removes such questions as whether the requisite intent to contract can be found through electronically programmed exchanges.

J.G. To begin with, a general remark. I do not think that e-commerce-specific amendments to the “black letter” are necessary or desirable. In most cases, the black letter is stated in terms sufficiently general to accommodate electronic communications. (The one possible exception is art. 2.8, which specifies the means of communication in terms that may be antiquated for digital communications, but I will address that article specifically.) I would be concerned that introducing e-commerce-specific language into the black letter will risk making those rules too technology-specific, and therefore too subject to obsolescence. The black letter is, I believe, set out at a happy level of generality; it should be the role of the commentary to illustrate how these broad rules adapt to e-commerce.

With respect to the specific question, if a writing is not required in the first place, I would think that *a fortiori* electronic exchanges can serve as a means of proof, as much as anything else. I do not think that a statement along the lines of UNCITRAL art. 5 (quoted below) is apposite here. If the commentary already lists examples of “any means,” then digital communications can be added to that list.

* Q = Question;

A.B. = reply of A.H. Boss; J. G. = reply of Jane Ginsburg; C.R. = reply of Christina Ramberg.

¹ See e.g. Art. 5 of the 1996 UNCITRAL Model Law on Electronic Commerce stating that “[i]nformation shall not be denied legal effect, validity or enforceability solely on the grounds that it is in the form of a data message”. (“Data message” is defined in Art. 2 as “information generated, sent, received or stored by electronic, optical or similar means including, but not limited to, electronic data interchange (EDI), electronic mail, telegram, telex or telecopy”).

C.R. To my opinion the Article does not need to be supplemented. It is sufficient to deal with the matter in the comments.

2. - *Article 1.9: “(1) Where notice is required it may be given by any means appropriate to the circumstances.”*

Question: Should there be a provision expressly stating that notice may be given by way of electronic data message or would language to this effect in the comments be sufficient?

A.B. It would be helpful here to give illustrations of when electronic notice is and when it is not appropriate. For example, if the entire contract is in writing, and there has been no prior communications electronically, would electronic notice be appropriate? It may not serve the necessary purpose in some instances - as the recipient may have not reason to know to expect such a communication.

J.G. Again, I think commentary suffices. The issue would be whether electronic communications are “appropriate to the circumstances.” That would depend on the particular parties, e.g., do they both regularly use email? If only one party enjoyed regular email access, email might not be appropriate in those circumstances.

C.R. To my opinion the Article does not need to be supplemented. In the comments it should be emphasized that for an electronic message to be “appropriate in the circumstances”, the addressee must somehow have communicated its willingness to receive electronic communication in the way it was sent by the sender (see for inspiration the US UETA).

3. - *Article 1.9: “(2) A notice is effective when it reaches the person to whom it is given.*

(3) For the purpose of paragraph (2) a notice “reaches” a person when given to that person orally or delivered at that person’s place of business or mailing address.”

Question: As to the definition of “reaches” in the context of electronic forms of communications do you think that there is a need of a special provision, e.g. of the kind of Article 15(2) of the UNCITRAL Model Law², or would a reference to it in the comments be sufficient? For this latter approach see e.g. with respect to

² “Unless otherwise agreed between the originator and the addressee, the time of receipt of a data message is determined as follows:

- (a) if the addressee has designated an information system for the purpose of receiving data messages, receipt occurs:
 - (i) at the time when the data message enters the designated information system; or
 - (ii) if the data message is sent to an information system of the addressee that is not the designated information system, at the time when the data message is retrieved by the addressee;
- (b) if the addressee has not designated an information system, receipt occurs when the data message enters an information system of the addressee.”

question when a funds transfer becomes effective, Art. 6.1.8(2) UNIDROIT Principles and Comment 2 to it.

A.B. Given that these are principles, not a statute, references in the comments is an acceptable way of referencing another work without having to repeat it verbatim. [Query: would a reference such as that be sufficient to preclude use of contrary domestic principles.] The difficulty I have, however, is that the formulation you use here is the notice "reaches" a person rather than notice is "received by" a person. This might introduce some questions about whether the two are identical. A second (substantive) issue: is the receipt rule for notice always appropriate?

J.G. While I think it is important to elaborate on the meaning of "reaches," I also think this can (and should) be done in commentary. I read the next black letter paragraph in 1.9 ("For the purpose of . . .") as only a partial definition of "reaches." As a result, the commentary can elaborate further. Moreover, I think that "mailing address" can include email address. Similarly, "delivered at that person's place of business" can mean both a physical office, and a computer whose files are designated for that business (even though the computer is physically located somewhere else). The commentary could elaborate further, perhaps in the manner indicated in UNCITRAL art. 15(1).

In general, I think "reaches" may be a difficult concept, but its difficulty is not necessarily limited to electronic communications. E.g., a letter may "reach" its intended reader when the letter arrives at the office, but it may not in fact be *read* till some considerable time thereafter. This may not only because of the reader's absence from the office, but because of some misstep in the mail room, that resulted in losing the letter or delaying its actual delivery to the reader. In light of this sort of problem with traditional mail, I do not know that the problems with electronic mail (e.g. virus in central office computer that initially receives the communication) are qualitatively different.

Note that e-mail might make realization of the concept of "reaches" easier and more certain: if the sender programs the communication to "request receipt," the sender will receive a notification when the recipient opens the email.

C.R. This is not an easy question to answer. I am generally very much against making any changes in UPICC unless it is absolutely necessary. Practitioners do not like changes. This Article is quite controversial to my opinion and it has – at least in Sweden - been criticized. In case the fundamental Article 1.9(1) is to be changed it could be advisable to also in 9.1(2) clarify the precise meaning of "reaches" in the electronic setting. If the fundamental rule is not to be changed, I suggest that the "reaches" clarification is better dealt with in the comments.

4. - *Article 2.1: "A contract may be concluded either by the acceptance of an offer or by conduct of the parties that is sufficient to show agreement."*

Question: Given the practice of purely automated contracting in the context of electronic contracting do you think there is a need of amending the text of this provision, e.g. along the lines of Art. 202(a) of the U.S. Uniform Computer Information Transaction Act,³ or would it be sufficient to mention in the comments the possibility of automated contracting ?

A.B. I would think a reference in the comments to automated contracting should be sufficient. I would be *extremely* wary of any reference to UCITA - it has not been well received in the US.

J.G. The term "conduct of the parties" is sufficiently broad, I believe, to cover electronic communications, or, for that matter, automatic procedures upon which the parties have agreed. The commentary could adopt a formulation similar to UCITA's (bearing in mind, however, that UCITA is a very controversial document, albeit not on this specific point). In general, I think the concept of "conduct" can extend to mutual consent to set in motion a series of self-executing electronic actions. Perhaps it would be desirable for the commentary to specify that the parties should understand what the automated contracting does and means.

C.R. I would definitely not change the article to expressly encompass automated contracting. The very beauty of this Article is that it is general in nature. The Article would be destroyed if UNIDROIT started to make specifications. I am sceptical as to whether it is necessary even to comment on automated transactions. If UNIDROIT decides to make a comment, please do not make it longer than one sentence!

5. - *Article 2.4: "(1) Until a contract is concluded an offer may be revoked if the revocation reaches the offeree before it has dispatched an acceptance."*

Question: As to the definition of "dispatched" in the context of electronic forms of communications do you think that there is a need of a special provision, e.g. of the kind of Article 15(1) of the 1996 UNCITRAL Model Law on Electronic Commerce⁴, or would a reference to it in the comments be sufficient?

A.B. A reference should suffice.

³ "A contract may be formed in any manner sufficient to show agreement, including offer and acceptance or conduct of both parties *or operation of electronic agents* which recognize the existence of a contract." (emphasis added)

⁴ "Unless otherwise agreed between the originator and the addressee, the dispatch of a data message occurs when it enters an information system outside the control of the originator or of the person who sent the data message on behalf of the originator."

J.G. “Dispatched” is a very broad term that, it seems to me, covers all modes of communication (including by Pony Express). Therefore, commentary should suffice. Whatever “dispatched” means in the electronic context (I don’t know how helpful the UNCITRAL suggestion here is), it would need to be a means that assigns a reliable date and time to the sending of the communication. Otherwise it will not be possible to know whether the revocation was sent before the acceptance “reached” its destination.

C.R. : I do not think that it is necessary to clarify the meaning of “dispatched” in the black letter text. A short comment suffices.

6. - *Article 1.10: “In these Principles*

[...]

- “writing” means any mode of communication that preserves a record of the information contained therein and is capable of being reproduced in tangible form.”

Question: Should this provision be redrafted along the lines of Article 6(1) of the UNCITRAL Model Law⁵?

A.B. I would prefer wording which more closely parallels the Model Law. The question is not merely whether the message can be reproduced in tangible form - as long as it can be *produced* in a manner which allows *use* of the message. The language you use could mean that you satisfy the rule by (1) printing it out or (2) storing on a tangible medium even though it cannot be deciphered, read, or used. Moreover, the question is not *reproducing* but *producing* the information.

J.G. This is a broad enough definition that it already covers digital communications. I do not think the UNCITRAL Model Law adds anything in this instance. It might be helpful for the commentary to explain *why* a digital communication meets the definition’s standard. (Any communication received in a computer’s temporary memory is *capable* of being reproduced in tangible form, even if it is subsequently erased. “Preserves a record” may be more elusive; the communication *creates* a record, but I’m not sure about whether it “preserves” it. On the other hand, “preserves” can’t mean *permanent* preservation, as someone can throw away tangible paper, too.

C.R. No. The Article is fine as it is. It captures the important two elements of writing (information and reproduceable) and corresponds in substance to the Model Law.

⁵ “Where the law requires information to be in writing, that requirement is met by a data message if the information contained therein is accessible so as to be usable for subsequent reference”.

7. - *Article 2.6: “(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.
 (2) An acceptance of an offer becomes effective when the indication of assent reaches the offeror.
 (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 without notice to the offeror, the acceptance is effective when the act is performed.”*

Question: Do you think that language should be added either to the text of this Article or to the comments, addressing the case where in the context of electronic contracting consent is expressed through “clicking”, and if so, of what tenor (always bearing in mind that the UNIDROIT Principles do not apply to consumer transactions)?

A.B. Whether or not a click operates as an acceptance is a question of fact - was there the necessary indication of intent to assent. I would be wary of adding to the black letter here.

J.G. For reasons earlier stated, “other conduct” and “reaches” are sufficiently broad to cover electronic communications.

C.R. No, I do not think that the Article should be changed. The comments may say something about it, but it does not seem terribly important to spell this out in the comments – but I guess it would cause no harm to do so (apart from making the comments longer, which in itself is a very bad thing).

8. - *Article 2.8: “(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 means of instantaneous communication begins to run from the moment that offer reaches the offeree.”*

Question: Are electronic messages always to be considered “means of instantaneous communication” irrespective of whether or not some time passes between their “dispatch” by the originator and their “receipt” by the addressee?

A.B. The problem with using a "time of dispatch" rule here is that there is often no way of demonstrating when something was dispatched. There is often a lag between sending and receipt with electronic messages - but it is a

matter of hours, not days. I would favor treating this as an instantaneous communication.

J.G. This is the one provision stated at a level of specificity that may not adapt well to digital communications, given the references to “telegram” and “envelope.” But that may not require amending the black letter text. The general principle is stated in the last sentence: this is technology-neutral. One can read the first sentence as exceptions to the general instantaneous communication rule. If the offeror wants in effect to give more time, the offeror can select a slower means of communication. Read that way, there is no need to adapt the first sentence to email, because email is by definition “instantaneous.”

You raise the problem whether email really is instantaneous, given the possible delay in communication (e.g., email grouped in batches may take hours, rather than seconds, to deliver). The commentary could treat the email as a “letter,” and refer to the sending date and time logged on the email (I think this happens automatically, but I wouldn’t want to tie myself to a particular technology).

C.R. Electronic messages may and may not be “instantaneous”. Communication over the web in real time is instantaneous. E-mail is not instantaneous. This Article is very media specific, it is not technologically neutral. Instead of making an amendment, I would consider perhaps to abolish the Article altogether. If the Article is to be kept, an option is to simply not cover e-mail and other electronic communication. There is a great risk that what we right now perceive as the standard way of electronic communication will soon be “Stone-age”. It is better to abstain from making a particular regulation in this respect and instead let the issue be decided by interpretative law in the individual case.

9. - *Article 2.18: “A contract in writing which contains a clause requiring any modification or termination by agreement to be in writing may not be otherwise modified or terminated. However, a party may be precluded by its conduct from asserting such a clause to the extent that the other party has acted in reliance on that conduct.”*

Question: Should this rule also apply where the contract has been concluded by electronic forms of communications and it provides that it may be modified (or terminated by agreement) only by the same electronic forms of communications?

A.B. Are you using the term “writing” here to refer to only paper, or electronic as well. The definition in 1.10 seems to imply the latter. If so, then I have a problem: this does NOT say that the parties can insist on paper. It then says that if they insist on a “writing” electronic

communications may suffice. The parties should have the ability to insist on paper.

J.G. Yes. I don't think it's necessary to specify this in the black letter.

C.R. This Article does not need to be changed, since electronic documents constitute "writing". It is recommendable that the question is dealt with in the comments. The comments should direct attention to what extent the addressee has indicated that he is willing to accept electronic communication (see for inspiration the US UETA).

- 10 . - *Article 2.19: "(1) Where one party or both parties use standard terms in concluding a contract, the general rules of formation apply, subject to Articles 2.20 - 2.22.
(2) Standard terms are provisions which are prepared in advance for general and repeated use by one party and which are actually used without negotiation with the other party."*

Question: In view of the fact that electronic commerce heavily relies on the mechanism of incorporation of standard terms by reference, the UNCITRAL Model contains a special provision establishing also in this respect the principle of non-discrimination, i.e. that the ordinary rules applicable to incorporation by reference in a paper-based environment are equally applicable to incorporation by reference for the purpose of electronic commerce⁶. Do you think that a similar provision should be adopted also in the UNIDROIT Principles or would the addition to language to this effect in Comment 3 to this Article be sufficient?

A.B. There is an overriding policy issue about the extent to which incorporation by reference should be recognized - questions are raised about how accessible the reference must be. For that reason, I would not put this in the black letter but only in comments.

J.G. For reasons earlier stated, I think it's sufficient to add it to the Comment.

C.R. I would like to emphasize that the origin of the unfortunate Article 5 bis in the Model Law is the following: It was one (1) single person from ICC representing the electronic signature industry that kept the Working Group constantly involved in endless discussions about incorporation by reference. He failed to make any success in the Model Law but came back to the issue incessantly in the next project on electronic signatures. The chairman made a quite controversial attempt to get rid of this useless and

⁶ Cf. Art. 5 bis (as introduced in 1998) stating that "[i]nformation shall not be denied legal effect, validity or enforceability solely on the grounds that it is not contained in the data message purporting to give rise to such legal effect, but is merely referred to in that data message".

endless discussion by all of a sudden right before a coffee break state that the group had agreed to the 5 bis. The delegates were quite surprised since there was no sign in the room of such agreement. But they were also happy and relieved to not having to talk about the topic once again and too tired to make a fuss. I would strongly like to urge UNIDROIT not to be inspired by this article in the Model Law. UPICC need no special regulation of how to electronically incorporate standard terms.

11. - *Article 2.20: “(1) No term contained in standard terms which is of such a character that the other party could not reasonably have expected it, is effective unless it has been expressly accepted by that party.
(2) In determining whether a term is of such a character regard is to be had to its content, language and presentation”.*

Question: Do you think that language should be added either to the text of para.2 or to the comments to it, addressing the special situations which might arise in this respect in the context of electronic contracting, and if so, of what tenor (always bearing in mind that the UNIDROIT Principles do not apply to consumer transactions)?

A.B. I am not sure what kind of a comment you envision. The issue is not whether the contract was entered into electronically or the old fashioned way; the issue is the terms included in that contract. So - I can't see any "special situations" involving electronic contracts. The big issues in the US on surprising terms involve generic terms (like choice of law or forum) and specific licensing terms (restrictions on use, etc).

J.G. It might be useful to supply examples in the commentary. E.g., “presentation” might include terms contained in a different document, which the party can access by click-linking. It is possible that terms incorporated by reference can be rendered *more* accessible to the parties by linking between electronic documents than by reference to some prior paper document.

C.R. I think that was it now stated in UPICC is easy to apply also to electronic incorporation of standard terms. UPICC need not be amended.