Study L - Doc. 8
Droit des obligations
UNIDROIT 1975

U n i d r o i t

INTERNATIONAL INSTITUTE FOR THE UNIFICATION OF PRIVATE LAW

PROGRESSIVE CODIFICATION OF INTERNATIONAL TRADE LAW

QUESTIONNAIRE ON THE DRAFT UNIFORM LAW ON THE FORMATION OF CONTRACTS IN GENERAL

PREPARED BY UNIDROIT

Rome, September 1975

PRELIMINARY REMARKS

1. In accordance with the instructions he received from the Governing Council at its 52nd session, the President of UNIDROIT set up a small steering Committee to orientate future work in the preparation of a uniform international trade code.

At its first meeting held in Rome at the head-quarters of UNIDROIT on 8 and 9 February 1974, the Committee (1) decided:

- for the present, to limit the plan of codification to the general part of the law of contract and not to touch on the problem of specific contracts until later, especially as a number of these are already governed by specific international conventions and uniform laws (e.g. the contract of sale and many types of transport contracts);

- to precede the part of the future code covering the general aspects of contracts with an introduction setting out the general aims of the planned codification, its sphere of application, as well as some definitions and basic concepts, for example, good faith and public order, etc.;

- not to make any distinction between civil and commercial contracts but to limit in all cases the field of application of the future code to international contracts, the exact definition of which will be prepared at a later date and included in the introduction referred to above;

- to deal with the following subjects and problems in the general part of the future code, in the order set out below:

(a) formation of contracts;

(b) interpretation of contracts, with special reference to adhesion contracts and contracts concluded on the basis of general conditions and standard forms;

(c) terms of the contract, with special reference to the problems associated with the fixing, in whole or in part of the contents of the contract by a third party, and revision of the initial terms of the contract;

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(1) The members of this Committee are Messrs. René David (University of Aix-Marseilles), Tudor Popescu (University of Bucharest) and Clive Schmitthoff (University of Kent); the Secretary to the Committee is Mr Michael Joachim Bonell (UNIDROIT)

(d) performance of contracts, with reference to those cases where the contract is terminated otherwise than by satisfaction of the duties undertaken thereunder, as, for example, by novation, time-limitation, etc.;

(e) non-performance of contracts;

(f) damages awarded for non-performance;

(g) unjust enrichment and restitution;

(h) proof;

- to start preparatory work on the chapter relating to the formation of contracts immediately, asking the Secretariat of UNIDROIT to prepare a document containing the text of the draft drawn up by Prof. Popescu on the basis of the 1964 Uniform Law on the Formation of Contracts for the International Sale of Goods, as well as a questionnaire. This document would then be sent to a certain number of people and bodies, well known in the field of comparative private law studies, with a request for their assistance in this first stage of the work by the sending of their observations, suggestions and points of view on the problems set out in the questionnaire.

2. By way of introduction to this document the UNIDROIT Secretariat would draw the reader's attention to the following points:

(a) the draft uniform rules on the formation of contracts in general which are proposed as the basis for discussion were drawn up by Prof. Popescu, a member of the UNIDROIT Governing Council. That they are based on the 1964 Hague Uniform Law on the Formation of Contracts for the International Sale of Goods is quite evident. The reason why rules drawn up for the contract of sale alone are felt to be equally valid as the basis for preparing rules to apply to all contracts in general is to be found in the fact that, with rare exceptions (such as contracts of association), all the other typical international trade contracts are bilateral contracts, of which sale is obviously the best example. There will still be some aspects or problems touching on the formation of contracts which, for the purposes of a general set of rules for contracts, will require more detailed, or even different treatment from what is at present laid down in the aforementioned Hague Uniform Law, restricted to sale contracts. Whilst expressing its opinion in this regard, the Secretariat nevertheless intends to take all suggestions and proposals on the subject into consideration, as its present initiative aims only at providing a starting point for discussion on the envisaged Uniform Law on the formation of contracts in general and not at canvassing modifications to or the revision of the Uniform Law on the formation of contracts of sale, which was approved at the International Conference of The Hague in 1964 and has since been successfully introduced into the national law of a number of States.

(b) In deciding to send this document to individuals and private organisations but not to governmental organisations, UNIDROIT has been motivated by the nature of the work it is about to undertake. It is self-evident that the preparation of an international code on the law of contracts in general demands first and foremost the participation of States as such, in addition to individuals and organisations with a special knowledge in the field; on the other hand, it is quite clear that discussion should be restricted, at least at this early stage of the study and the work, to individual persons and private organisations which, precisely because they are free of any public functions or responsibilities, are in a better position to put forward freer and more objective opinions and proposals.

(c) In drawing up the questionnaire which accompanies the present draft uniform rules on the formation of contracts in general, the Secretariat, in accordance with the instructions it had received from the steering Committee, found it useful to refer to the provisions on the subject contained in Czechoslovak law no. 101 of 18 December 1963 concerning legal relationships in international trade dealings, the U.S. Uniform Commercial Code of 1962, the CMEA General Conditions, and also the General Conditions prepared under the auspices of the United Nations Economic Commission for Europe. This choice is explained by the fact that those rules were drawn up on the basis of the special needs of international trade. However, this does not preclude account being taken of the statute law, "doctrine" and case-law of all States in the discussion on the contents of the envisaged uniform rules on the formation of contracts in general; this is, however, simply a view held by the Secretariat, which considers that as the draft uniform international commercial code sets out to provide a satisfactory set of rules for those trade relationships that come about, by definition, across the national frontiers of each separate State, whereas national law is essentially based on the requirements of normal internal relationships, the code should not attempt chiefly to reconcile the two, but rather to lay down principles and solutions which seem the best adapted to the special requirements of international trade.

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ARTICLE 1

"An offer or an acceptance need not be evidenced by writing and shall not be subject to any other requirement as to form."

This Article aims to lay down the rule that there shall be no requirements as to form for either offer or acceptance, while not of course preventing the parties, in certain cases, from stipulating the contrary. This is the rule laid down in the 1964 Uniform Laws on sale (Article 3 of the Uniform Law on Formation; Article 15 of ULIS) and in the internal law of most of the civil law countries, as also in many of the general conditions of the UN/ECE. On the contrary, a written form is required "ad substantiam" in the CMEA General Conditions and in the national law of many socialist countries (e.g. Articles 14 and 125 of the Soviet law on the basic principles of civil legislation), while the written form "ad probationem" is required for contracts for the sale of goods worth more than 500 dollars in the American Uniform Commercial Code (section 2 - 201).

As, for the moment, one is only concerned with the substantive legal side of the problem - the procedural aspect will be dealt with later in the chapter on general rules relating to proof - the question to be answered here is whether Article 1:

"an offer or an acceptance need not be evidenced by writing and shall not be subject to any other requirement as to form"

raises any objections, (a) as regards its contents, or (b) as regards its wording.

ARTICLE 2

"1. The communication which one person addresses to one or more specific persons with the object of concluding a contract shall constitute an offer if it is sufficiently definite to permit the conclusion of the contract by acceptance and if it indicates the intention of the offeror to be bound.

2. This communication may be interpreted by reference to and supplemented by the preliminary negotiations, invitations to make offers, any practices which the parties have established between themselves, usage and any applicable legal rules for the contract in question."

In an effort to define the notion of an offer, this Article lays down three essential requirements: the communication must:

(a) be addressed to one or more specific persons;

(b) be sufficiently definite to permit the conclusion of the contract by mere acceptance;

(c) indicate the intention of the offeror to be bound by his acceptance.

The requirement whereby, in order to be an offer, the communication "must be addressed to one or more specific persons" raises the problem of offers "to the public" i.e. declarations which (although satisfying the other requirements laid down in the same article) are addressed to an indeterminate number of persons (e.g. people visiting a department store, the readers of a newspaper, those who frequent a public place or a stock exchange). It is a known fact that the internal law of different countries often contain different solutions on this subject, whereas neither the U.S. Uniform Commercial Code, nor the CMEA General Conditions, nor the Czechoslovak law no. 101/1963 deal specifically with this question. This is probably mainly due to the fact that such cases arise less frequently in international trade practice.

In connection with the requirement set out in (b) which provides that "the communication must be sufficiently definite to permit the conclusion of the contract by mere acceptance", it is understood that, in establishing whether a specific offer can be considered sufficiently definite or not, reference must be made now and then to the factors expressly mentioned in the second paragraph of this article, i.e. "the preliminary negotiations, any practices which the parties have established between themselves, usage and any applicable legal rules for the contract in question". This should facilitate a practical solution to the divergencies on this subject between the different national legal systems: one only has to think of the fairly strict rules provided, for example, in the Czechoslovak law (Article 108, paragraph 1) and, on the other hand, of the very flexible rules, laid down exclusively for sale contracts in the U.S. Uniform Commercial Code (section 2-204 (3)).

Lastly, the requirement laid down in (c) whereby, in order to be an offer, the communication "must indicate the intention of the offeror to be bound by its acceptance", serves to differentiate between a genuine offer and a mere "invitation to treat". It is self-evident that, in making a precise distinction between these two notions, account must also be taken of the various factors set out in paragraph 2 of the present article.

In the light of the foregoing, do you feel that the criteria laid down in the present article for defining the offer are:

2.1 satisfactory (from the point of view of substance and form)
2.2 unsatisfactory (which ? why ?)
2.3 capable of being combined with other criteria, and if so, which ?

ARTICLE 3

"1. The offer shall not bind the offeror until it has been communicated to the offeree; it shall lapse if its withdrawal is communicated to the offeree before or at the same time as the offer.

2. After an offer has been communicated to the offeree it can be revoked unless the revocation is not made in good faith or in conformity with fair dealing or unless the offer states a fixed time for acceptance or otherwise indicates that it is firm or irrevocable.

3. An indication that the offer is firm or irrevocable may be express or implied from the circumstances, the preliminary negotiations, invitations to make offers, any practices which the parties have established between themselves or usage.

4. A revocation of an offer shall only have effect if it has been communicated to the offeree before he has despatched his acceptance or has done any act treated as acceptance in accordance with the provisions of the contract in question.

The problem of the revocability or irrevocability of the offer is one of the most widely discussed questions regarding the formation of contracts: indeed, whereas in many civil law countries (the only significant exceptions being France, Italy and the Netherlands) an offer usually binds the offeror for a length of time established by himself or for the time an offeree would normally require to accept it (see Austrian ABGB, paragraph 862; German BGB, paragraph 145; Swiss "Code des obligations", Article 3, as well as the Scandinavian countries), the Common law countries recognise the opposite rule on account of their well-known conceptual difficulty in acknowledging the existence of any legal relationship without a corresponding consideration (see David, "Les contrats en droit anglais", Paris 1973, pages 92 et seq.). It should however be noted that recently the binding character of the offer has not only been recognised by the Czechoslovak law no. 101/1973, Article 108, § 2 and the CMEA General Conditions, Article 1, § 3 but also, even if in a restricted way, in the relationships between merchants and, subject to specific objective, formal requirements, by the U.S. Uniform Commercial Code itself (§ 2-205).

Given that, in actual fact, even in a system which lays down that offers shall be revocable, there is always the possibility of stipulating an irrevocable offer, just as there is the possibility of stipulating a revocable offer under a system which lays down that offers shall be irrevocable, the present Article, in accordance with Article 5 of the Uniform Law on the formation of international contracts of sale and in order to satisfy the requirements of international trade, aims at a compromise, half-way between the two contrasting viewpoints: on the one hand, it lays down the rule that the offer shall be revocable until such time as the offeree has sent his acceptance to the offeror or has at least completed some act which could be considered as equivalent to acceptance; on the other hand, it admits a certain number of exceptions to this rule, either in the case in which the offer indicates a time limit for acceptance or if the offer is expressly declared to be a "firm" offer, and also, in a more general way, in all cases in which revocation appears in practice to be contrary to the rules of good faith or professional conduct. The fact that an offer is a "firm" offer may also be inferred, failing any indication to the contrary by the offeror himself, from "the circumstances, the preliminary negotiations, any practices which the parties have established between themselves or usage" (§3).

In the light of the foregoing:

1. is it preferable to adopt the rule that the offer is revocable until such time as the offeree has sent his acceptance to the offeror or has at least completed some act which could be considered as equivalent to acceptance; and consequently, admit as exceptions:

(a) the situation in which the offer indicates a time limit for the other party's acceptance;

(b) the situation in which the offer is expressly declared to be a "firm" offer;

(c) the situation in which revocation of the offer would appear to be contrary to the rules of good faith and fair commercial practice ?

2. Or would it be better to adopt the rule that the offer is irrevocable and consequently admit the revocability of the offer in certain circumstances which would have to be specified ?

ARTICLE 4

"1. Acceptance of an offer consists of a declaration communicated by any means whatsoever to the offeror.

2. Acceptance may also consist of an act which may be considered to be equivalent to the declaration referred to in paragraph 1 of this Article either by virtue of the offer or as a result of practices which the parties have established between themselves or usage.

3. The offer may lay down a special mode for its acceptance. However, a term of the offer stipulating that silence shall amount to acceptance is invalid."

This article aims at finding a solution to two sets of problems: on the one hand, the method or methods by which the offer may be accepted; on the other hand, the moment from which acceptance is effective.

A. The solutions open in respect of the first of these points are as follows:

(a) express acceptance i.e. expressed by a special oral or written declaration addressed or sent by the offeree to the offeror;

(b) tacit acceptance (presumed or implied) resulting from any act which "by virtue of the offer or as a result of practices which the parties have established between themselves or usage" shows beyond any doubt the offeree's intention to accept the offer (for example, a typical act of performance) and which can therefore be considered as being equivalent to an express acceptance;

(c) acceptance by the method specially prescribed in the offer, but without the offeror being able to stipulate in his offer (i.e. unilaterally) that the offeree's silence will be regarded as acceptance.

It is not specified whether and to what extent mere silence on the part of the offeree could possibly be regarded as tacit acceptance. Silence may, however, be regarded as acceptance "by virtue of the practices which the parties have established between themselves or usage".

B. As regards the time from which acceptance has effect, it is to be noted that the so-called theory of "receipt" has been opted for in the case of express acceptance (acceptance is a declaration which is communicated to the offeror) but that the acceptor is not, on the other hand, required to inform the offeror of the act he has performed (equivalent to acceptance) in the case of tacit acceptance.

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A comparison of the law currently in force in the different countries reveals a general acceptance, from certain aspects, for the solutions proposed in Article 4 above; this is the case with regard to express acceptance defined as a declaration which is communicated to the offeror as also for tacit or implied acceptance, which consists of an act which expresses the intention of the offeree to accept, as for example, by part performance ("commencement d'exécution"), by the despatching of the goods or by the payment of the price, or by a promise to despatch the goods or to pay the price

(see for example: § 151 of the German BGB; Article 1327 of the Italian Civil Code; § 844 of the Austrian ABGB; Article 114 of the Czechoslovak law n° 101/1963 and, although limited to sales only, § 2-206 (1b) of the American Uniform Commercial Code). Such a solution certainly meets the needs of international trade, at least where it is necessary that performance of the contract should begin as soon as possible.

The solution based on the receipt theory is not, however, generally accepted for the time from which acceptance has effect. As we know, the Common Law countries recognise the opposite rule, that is the "mail box rule", while still other countries, such as Italy, Egypt and Roumania, adopt an intermediary solution (see Articles 1326, § 1 and 1335 of the Italian Civil Code).

Lastly, as regards tacit acceptance, which the acceptor is not required to notify to the offeror, it should be pointed out that only the Uniform Commercial Code requires that notice be specifically given to the offeror in order for tacit acceptance to take effect (2-206 (2)). For other legal systems, as for example Italian law, failure to give such notice merely entails that the offeree is required to compensate any damage (Art. 1327, § 2 of the Italian Civil Code).

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In the light of the foregoing:

1. is the rule providing that "acceptance of an offer consists of a declaration communicated by any means whatsoever to the offeror" satisfactory ?

2. Is the rule laying down that "acceptance may also consist of an act which may be considered to be equivalent to the declaration referred to in the preceding paragraph by virtue of the offer or as a result of practices which the parties have established between themselves or usage" satisfactory ?

3. Is it necessary to include some provision on the role of silence in the formation of the contract and, if so, in which way ?

4. Should the rule providing that "the offer may lay down a special mode for its acceptance" be maintained ?

5. Should the rule providing that "a term of the offer stipulating that silence shall amount to acceptance is invalid" be maintained ?

6. In the case of tacit acceptance is it necessary to require the offeree to inform the offeror of his performance of some act equivalent to an express acceptance ?

ARTICLE 5

"1. An acceptance containing additions, limitations or other modifications shall be a rejection of the offer and shall constitute a counter-offer.

2. However, a reply to an offer which purports to be an acceptance but which contains additional or different terms which do not materially alter the terms of the offer shall constitute an acceptance unless the offeror promptly objects to the discrepancy; if he does not so object, the terms of the contract shall be the terms of the offer with the modifications contained in the acceptance."

The rule set forth in the first paragraph should not cause any great difficulty as it is generally accepted nowadays, especially in the rules governing international trade (see e.g. the CMEA General Conditions, § 1, par. 1 (b); the Czechoslovak law n° 101/1963, art. 112; see also § 150-2 of the German BGB; Article 1336, § 5 of the Italian Civil Code; for English law, see TREITEL, The Law of Contract, London 1970, p. 18).

The provision contained in the second paragraph, on the other hand, is much more open to discussion: there are in fact only a few legal systems which recognise in the case of an acceptance containing modifications or additions which do not, however, bring about any substantial alteration in the original terms of the offer, and failing some quick reaction by the offeror, that such modifications or additions must be considered as having been tacitly accepted by the latter and as such become part of the final agreement (see on these lines, § 6-2 of the Scandinavian law on the general part of the law of contract and, although limited to the relationship between merchants ("commerçants"), § 2 - 207 (2) of the American UCC). In many other legal systems, on the other hand, such as the Common law and Socialist systems, an acceptance of this kind is considered in reality to be nothing other than a counter-offer, in acknowledgement of the general rule set out in the first paragraph.

There is however another practice which is not provided for in the present article but which is to be encountered fairly often. This is the case where the contract has already been made and one of the parties sends his co-contractant a document confirming what he had earlier agreed over the telephone or by telegram (Bestaetigungsschreiben; letter of confirmation) or even a simple invoice which for the first time mentions contractual terms or conditions which modify even substantially the terms of the original agreement: what is the effect of such terms and conditions if the other party does not comply with them or even expressly objects to them once he has received notice thereof? The stands taken by the different legal systems on this subject vary considerably: in fact, as regards Bestaetigungsschreiben, only German law and perhaps a part of the Austrian and Swiss "doctrine" and

case-law seem to accept that the silence of the addressee amounts to a tacit, albeit late acceptance by him (see RABEL, Das Recht des Warenkaufs, Berlin-Tübingen 1957, vol. 1, page 97; SONNENBERGER, Verkehrssitten im Schuldvertrag, München, 1970, pages 216 et seq.), whilst a similar rule would seem to be admitted for invoices, particularly in France and Belgium (see BERLIOZ, Le contrat d'adhésion, Paris, 1973, pages 64 et seq.).

In the light of the foregoing:

1. should the general rule providing that "an acceptance containing additions, limitations or other modifications shall be a rejection of the offer and shall constitute a counter-offer" be accepted ?

2. Should the rule contained in the second paragraph be maintained ?

3. Is it advisable or necessary, in the interests of international trade, to provide rules for the case where the contract has already been concluded and one of the parties sends either a letter or an invoice to his co-contractant containing terms which are being mentioned for the first time and the effect of which is to modify, even substantially, the terms of the original contract ?

ARTICLE 6

"1. A declaration of acceptance of an offer shall have effect only if it is communicated to the offeror within the time he has fixed or, if no such 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, and usage. In the case of an oral offer, the acceptance shall be immediate if the circumstances do not show that the offeree shall have time for reflection.

2. If a time for acceptance is fixed by an offeror in a letter or in a telegram, it shall be presumed to begin to run from the day the letter was dated or the hour of the day the telegram was handed in for despatch.

3. If an acceptance consists of an act equivalent to the declaration provided by Article 4, paragraph 2, the act shall have effect only if it is done within the period laid down in paragraph 1 of the present Article."

The purpose of this article is to specify the time during which acceptance must be made in order to be effective. Right at the start one should mention the two typical cases which have to be distinguished: first, where the offer has been made inter praesentes or by telephone (except,

however, when the person speaking on the telephone is not himself a party to the offer and is only acting as a messenger, merely passing on the messages he has received) and, secondly, undoubtedly much more common in international contracts, the case where the offer reaches the offeree in writing (by letter or by telegram, by telex or even a message given via the telephone). In the first of these cases, it is provided that acceptance shall be "immediate", unless the circumstances of the case do not indicate that there shall be some time for reflection. In the second case, on the other hand, one has to distinguish according to whether or not the offeror has set a time-limit on acceptance: on the one hand, acceptance is clearly ineffective if it fails to reach the offeror in the time laid down - this time runs from the date on which the letter or telegram containing the offer was sent. On the other hand, acceptance must be made "within a reasonable time, due account being taken of the circumstnnces of the transaction, including rapidity of the means of communication employed by the offeror, and usage". Lastly, it should be noted that these rules apply not only to cases where there is an cxpress acceptance but also where there is a tacit or presumed acceptance, i.e. where the offeree signifies his acceptance by performing one of the acts which, under Art. 4, § 2, indicate his intention to accept.

Remembering that the provisions contained in this article are to be found in almost all national legal systems, are there any comments you would like to raise in their regard ?

ARTICLE 7

"1. If the acceptance is late, the offeror may nevertheless consider it to have arrived in due time on condition that he promptly so informs the acceptor.

2. If however the acceptance is communicated late, it shall be considered to have been communicated in due time, if the letter or document which contains the acceptance shows that it has been sent in such circumstances that if its transmission had been normal it would have been communicated in due time; this provision shall not however apply if the offeror has promptly informed the acceptor that he considers his offer as having lapsed."

This Article deals with the various cases where acceptance is late and to this end makes a distinction between two situations: first, the case in which the acceptance is made late, i.e. when the offeree notifies the offeror of his acceptance, or performs some act equivalent to acceptance outside the time-limit fixed in Article 6 for a normal acceptance; secondly,

the case in which acceptance is transmitted late. This occurs when the offeree himself declares his acceptance in time but it is nevertheless late in reaching the offeror (owing to a delay or to some other irregularity in its transmission by third parties, e.g. the postal services).

In the first case, acceptance is generally regarded as having no effect unless the offeror immediately notifies the other party of his intention to disregard the delay and to consider the acceptance as valid (see Article 1326, § 3 of the Italian Civil Code and Article 35 of the Roumanian Civil Code; a different solution is to be found in § 150 (1) of the German BGB and in § 4 of the Scandinavian law on the general part of the law of contract. These define late acceptance as a new offer, which means that the original offeror has more time in which to let the other party know whether or not he intends to accept).

However, in the second case it is the reverse rule which is laid down. Thus, provided that the offeror be shown that the offeree was not the cause of the delay, a declaration of acceptance which is late in arriving should as a rule be considered fully valid. In these circumstances the only way to prevent the contract from being concluded is for the offeror to notify the offeree at once that his offer no longer stands (see for example, § 149 of the German BGB; Article 5, § 3, of the Swiss "Code des obligations"; Article 111 of the Czechoslovak Code for International Trade; Article 862 of the Austrian ABGB; Article 1, para. 2 of the 1968 CMEA General Conditions of Delivery of Goods, whereby, even if the notification of acceptance arrives late, provided it was sent off within the time laid down, it is considered as being late only if the offeror immediately so informs the other party).

In the light of this, do you consider the solutions offered in these articles to be satisfactory, and if not, which solution would you put forward ?

ARTICLE 8

"An acceptance cannot be revoked except by a revocation which is communicated to the offeror before or at the same time as the acceptance."

Seeing that, under Article 4, § 1, "acceptance of an offer consists of a declaration communicated to the offeror", it is logical that, under the present article, dealing with the problem of whether or not acceptance is revocable, revocation is admitted provided that it is brought to the notice of the offeror either before or at the same time as acceptance. Moreover, this type of provision can be found in all those legal systems which, like the present draft, follow the so-called "receipt" theory, for example,

§ 130 (1) of the German BGB; Article 9 of the Swiss "Code des obligations"; § 7 of the Scandinavian law on the general part of the law of contract; Article 1328, § 2 of the Italian Civil Code; Article 37 of the Roumanian Commercial Code; Article 109, § 1 of the Czechoslovak law n° 101/1963). The situation is more complicated in the Common law countries. Here it is the "mail box rule" which is followed: on the one hand, acceptance (and with it the conclusion of the contract) is considered to take effect from the time when the offeree sends the offeror his declaration of acceptance; logically, it should not be possible to revoke this acceptance subsequently. However, on the other hand, even these legal systems tend towards admitting that an acceptance may be revoked in certain practical cases, although always provided that the revocation reaches the offeror either before or at the same time as his acceptance (such would be the case when the acceptance has been sent by letter, but this will only reach the offeror on a certain day X and the sender subsequently decides to revoke his acceptance by a telegram or telex message which he knows will reach its destination before day X) (see LAGERGREN, Formation of Contract, in "Unification of Law Governing International Sales of Goods, cit. pages 66 - 67).

In the light of the foregoing and with the needs of international trade in mind:

1. is the present article felt to be satisfactory or

2. would you prefer some other solutions, and if so, which ?

ARTICLE 9

"The formation of the contract is not affected by the death of one of the parties or by his becoming incapable of contracting before acceptance unless the contrary results from the intention of the parties, usage or the nature of the transaction."

The effect of the offeror's or offeree's death or supervening incapacity on the offer generally depends on whether or not the particular offer is binding on the offeror. In fact, the occurrence of the above-mentioned events in the case of such a binding offer would not usually hinder the conclusion of the contract, unless of course the intention of the parties or the nature of the transaction call for a contrary solution in the specific case (see, expressly on these lines, §§ 152 and 130 (2) of the German BGB; § 862 of the Austrian ABGB; Article 109, §2 of the Czechoslovak law n° 101/1963, and, for the death or incapacity of the offeror only, Article 1329, § 2 of the Italian Civil Code); vice-versa, in the case of a revocable offer the death or incapacity of one of the two parties results almost always in the termination of the offer (for the Common law systems, see TREITEL, op. cit. pages 44 - 47), and only the Italian Civil Code lays down that the offer remains open even in these circumstances, provided it was made by a businessman in the exercise of his business (cf. art. 1330).

The present article lays down, as a general rule, that the death or incapacity of one of the parties prior to the conclusion of the contract does not prevent the said contract from being formed subsequently. In so doing it reflects the fact that, in international trade, offers and acceptances are frequently made by and to businesses, and not by and to individuals. Moreover, the reverse solution is expressly admitted when this corresponds to the intention of the parties, or if it results from usage or the nature of the transaction (for instance, in the case of a contract intuitu personae).

When the draft speaks of the supervening incapacity of one of the parties, this does not cover the case where a person has his legal capacity restricted or reduced as a result of the opening of bankruptcy proceedings or some similar procedure: these cases are covered under national law by special rules which, at least in part, are of an administrative or procedural law character, and in regard to which a uniform international solution would be inappropriate.

In the light of the foregoing:

1. is the rule laying down that "the death or incapacity of one of the parties prior to the conclusion of the contract does not prevent the said contract from being formed subsequently" felt to meet the needs of international trade ?

2. Should the reverse solution, i.e. "the formation of the contract is not affected by the death of one of the parties or by his becoming incapable of contracting before acceptance unless the contrary results from the intention of the parties, usage or the nature of the transaction" be adopted ?

3. Should cases where a person has his legal capacity restricted or reduced as a result of the opening of bankruptcy proceedings (or some similar procedure) be excluded ?

ARTICLE 10

"For the purposes of the present chapter the expression "to be communicated" means to be delivered at the address of the person to whom the communication is directed."

In determining the moment from which the offer or declaration of acceptance or else revocation of the offer or acceptance takes effect, the present draft follows the "receipt" rule, i.e. it provides that they take effect as soon as they reach the person to whom they are addressed, but not before (see Articles 3; 4, § 1; 6, § 1; 8). The term "to be communicated" raises a series of problems of interpretation. First, one has to decide whether in

order "to be communicated" to the person to whom the declaration is addressed, it is sufficient that it has been delivered at his address, or whether the declaration must necessarily have come to his knowledge. If one opted for the first solution, one would still have to decide whether the declaration could be handed over equally at the private address or at the business address of the person to whom it is addressed, and moreover, in this last case, one would have to decide whether the handing over of a declaration outside office hours can be considered to take effect immediately or only as from the time at which offices re-open.

The present article sets out to clarify this point in favour of the solution whereby a declaration is to be considered to have reached the person to whom it is addressed not by merely being handed over at his address (see, along these lines, a decision of the E.C.S.C. Court of Justice, 10/II/57, vol. III, page 200 and also Article 1335 of the Italian Civil Code), however without making any specific provision for the other cases which must accordingly be decided by the judge's interpretation of the individual case.

In the light of the above comments:

1. should the solution provided in Article 10 be adopted ?

2. Is it or is it not necessary to include some provision on the other items mentioned and, if so, which solution would you propose in their regard ?