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UNIDROIT
draft uniform law on the formation of contracts in general: analysis of the replies to the Questionnaire prepared by the Secretariat

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A. INTRODUCTION

1. In the framework of its work on the elaboration of an international trade Code, UNIDROIT, assisted by a steering Committee composed of Professors David, Popescu and Schmitthoff, has so far prepared a preliminary draft set of rules on the formation of international contracts in general which, together with a Questionnaire, has been submitted to a large number of academics, specialised Institutes and other Organisations dealing with international trade.

Almost all those to whom the Questionnaire was addressed have now replied. Among these, mention should particularly be made of the lengthy observations of the United Nations Economic and Social Commission for Asia and the Pacific, the Comparative Law Institute of Belgrade University, the Max-Planck-Institut für ausländisches und internationales Privatrecht in Hamburg, Professor Enderlein of the Institut für ausländisches Recht und Rechtsvergleichung in Potsdam, Professors Smith and Black of the Scottish Law Commission, Professor Gordon, Dean of the Law Faculty of Glasgow University, Professor Tallon of the Service de Recherches Juridiques Comparatives in Paris, Professor Tunc of the Centre d'Etudes Juridiques Comparatives in Paris, Professor Rodière of the Institut de Droit Comparé in Paris and Professor Sacco of the University of Turin. The I.C.C. and the Commission of the European Economic Community have also announced that they will be sending observations. The draft uniform law was also discussed at a Round Table held at the Scuola di Perfezionamento di Diritto Civile of the University of Camerino, with Professor Sacco in the chair. Many professors of civil law and of comparative law from the Italian faculties were present: the proceedings of this Round Table will shortly be published.

2. Before proceeding to a comparative analysis of the various replies, it is perhaps useful to recall the highly significant trends which have recently been visible at UNCITRAL in connection with the idea of drawing up uniform rules to be applied to international commercial contracts in general. Indeed, at its 7th session, held in Geneva from 5 to 16 January 1976, the Working Group on the International Sale of Goods decided that at its next session it should begin work on uniform rules governing the formation of contracts and that in this connection an attempt should be made to formulate such rules, if necessary integrated

with rules on the conditions of the validity of contracts, on a broader basis than the international sale of goods. The representative of UNIDROIT at that session naturally informed the Working Group of the work on this subject already undertaken by UNIDROIT and of its future plans. The Group was of the unanimous view that the Secretariat of UNCITRAL should ask UNIDROIT to submit at its next session to be held in New York in January 1977 a report on the results of the studies so far undertaken in this field by UNIDROIT.

It is evident from the foregoing that the draft uniform law on the formation of contracts in general could serve as a basis for discussion for the future work of the UNCITRAL Working Group; but even if this were not to be the case, UNIDROIT's enquires at a world-wide level, intended to establish whether or not such rules would be acceptable, are in any event of capital importance if it is considered that the material thus gathered together will permit UNCITRAL to begin its own work with fuller knowledge of the present situation.

B. GENERAL OBSERVATIONS

The replies so far received by the Secretariat bear witness to the wide interest aroused by UNIDROIT's initiative, not only among legal theorists, but above all among the different organisations dealing directly with the regulation of international trade. There was a wide measure of agreement with the decision to begin the general part of the projected international trade code with a chapter on the fundamental problem of the formation of contracts.

As to the choice, as a basis for the present draft uniform rules on the formation of contracts in general, of the 1964 Hague Uniform Law on the Formation of Contracts for the International Sale of Goods, only the Max-Planck Institute cast doubt upon it, in particular on the grounds that the "European" character of that instrument was too marked to serve as a model for rules which should on the contrary, at least according to the intention of its authors, be of universal application.

There were however those who, with regard to the rules contained in the draft, were of the opinion that no definitive judgement could be made until such time as its scope of application had been better defined (in particular the Max-Planck Institute).

It should be added in this connection that some persons have already proposed, as of now, limiting the application of the uniform rules to contracts of a commercial nature, taking as an example the laws recently adopted in a number of Socialist countries which are intended to be applicable only to international trade relations (Professor Enderlein).

Others, in view of the fact that the draft contemplates a model contract concluded by an offer followed by an acceptance, wondered what would be the position in the event of the offeror making a declaration to the other party to the effect that he undertakes to give him something or to do something if the offeree does, or gives him, something (a problem known in the common law systems as an "offer calling for an act") or in the case in which someone, while having no intention to make a gratuitous offer, states that he will assume an obligation to the other party without requesting the latter to make any undertaking or to carry out any act (the problem of the so-called "contract binding the offeror only" - cf., for example, article 1333 of the Italian Civil Code (Professor Sacco): are such contracts to be deemed to be concluded simply because the offer has not been rejected, or does the uniform law apply with the result that, contrary to the solutions provided by national law, acceptance by the offeree is required even in these cases ?

C. OBSERVATIONS ON THE DIFFERENT PROVISIONS OF THE DRAFT

Article 1

The principle contained in this article that there should be no requirements as to form was in general favourably received: at the most it was suggested to insert a provision to the effect that the parties may, in all cases, manifest a contrary intention.

Some replies indicated that it would be useful to define more clearly the scope of application of the principle contained in this article with the result that it would not apply, for example, to gifts or to the possible effects which a given contract might have on third parties (Professors Sacco and Criscuoli). It was therefore suggested that two further paragraphs be added stating respectively that the first paragraph "shall not apply to any agreement the sole purpose of which is to enrich one of the parties or a third party, to the detriment of another party" and "shall only affect relations between the parties. It shall in no way govern consequences affecting third parties, in particular the transfer of title and the constitution of a security over property."

As to the purely formal drafting of the article the question was raised as to whether it would not be preferable to avoid speaking of "offer" and "acceptance" (Professors Blagojević, T.B. Smith and R. Black, and Tallon): in fact cases not infrequently arise in practice in which the contract is only concluded after protracted negotiations, perhaps after the intervention of an intermediary, so that it becomes extremely difficult to determine which acts are to be deemed as constituting "offer" and "acceptance". Hence the proposal to reformulate the article as follows: "Neither declarations of intention leading to the conclusion of a contract nor the contract itself need be evidenced by writing or subject to any other requirement as to form" or more simply "The conclusion of the contract need not be evidenced by writing and shall not be subject to any other requirement as to form."

Article 2

With regard to article 2, more than one person criticised the fact that it does not cover offers to the public (Professors Blagojević, Criscuoli, Smith and Black, Tunc and Zweigert): such cases are far from exceptional in international commercial practice and the uniform regulation of them would be all the more desirable inasmuch as the various national positive systems provide widely differing solutions to the pro-

blem. As to the content of the rule to be adopted in the case of offers to the public, two proposals have been made: on the one hand it was suggested that "offers whereby the offeror does not intend to be bound and offers to the public are to be considered, in case of doubt, as merely invitations to make offers" (Professor Blagojević) while on the other it was proposed that the nature and validity of genuine offers should be accorded to offers to the public (Professors Smith and Black).

In connection with the requirement that the offer "indicates" the intention of the person making it to be bound, a proposal was made to replace the term "if it indicates" by "if it reveals" so as to avoid giving the impression that there must be an express manifestation of the intention of the offeror (Professors Tallon and Criscuoli). Moreover, some of the replies criticised the very substance of the provision, arguing that every offer should be considered as being in principle binding, unless the offeror expressly excludes this interpretation or has inserted the "freistubend" clause (without engagement", "free", "libre") (Professors Enderlein, Smith and Black).

As to the second paragraph, the deletion of the reference to "invitations to make offers" was suggested as they would already be included in the wider concept of "preliminary negotiations" or in "the practices which the parties have established between themselves" (Professors Criscuoli and Zweigert). With regard to the reference to "usage" queries were raised as to what types of "usage" it was intended to refer to (international usage, national usage, usage known in the two countries etc...) and it was suggested that the importance of usage be treated elsewhere in the draft (Professors Sacco and Zweigert). It was also wondered what was the precise meaning of the concept of "applicable legal rules for the contract in question" and a proposal was made for the deletion of the reference to them (Professor Enderlein).

Article 3

Only half of the replies were in favour of the principle of the revocability of the offer contained in this article. The other half firmly stated that they favoured the opposite principle of the irrevocability of the offer (Professors Enderlein, Blagojević, Smith and Black, and Tunc).

It should be stressed in this connection that, within the framework of the typical transactions of international trade, whoever receives an offer to conclude a given contract must usually, before accepting, contact other persons (for example his suppliers) and incur certain expenses, and it is for this reason that it does not seem to be

desirable to permit the offeror to withdraw his original proposal during this period. The rule should therefore be that every offer is irrevocable for a certain length of time, unless the parties have agreed otherwise.

The present text of Article 3 should therefore be reformulated and in this connection two proposals have been made: the first is to replace the second paragraph by the provision that "the offer shall contain an indication of a time-limit for acceptance. In the absence of such an indication, any offer reaching the offeree may not be revoked before the expiry of the customary time-limit" (Professor Tunc); the second is to replace not only the second but also the third paragraph by the provision that "after the offer has reached the offeree, it shall become irrevocable, unless it contains a clause to the effect that it is revocable" and that "the indication that the offer is revocable may be express or implied by the circumstances, by any practices which the parties have established between themselves or by usage" (Professor Blagojević).

Even among those who favour maintaining the principle of revocability there are some however who suggest amending the present text.

A first proposal (Professor Sacco) consists in adding to the second paragraph the provision that "if the offer has been made in a particular form, its withdrawal or revocation shall have no effect unless made in the same form": that is to say in order to avoid that the offeror, after making his offer in writing and having received a written acceptance from the offeree, may seek to invoke an oral revocation which preceded the written acceptance.

Other replies suggest that the present text of paragraph 4 is very obscure, in particular the concept of "any act treated as acceptance in accordance with the provisions of the contract in question", and a return is therefore proposed to the original wording in Article 5, paragraph 4 of the 1964 Uniform Law (Professor Zweigert).

Article 4

As to the time from which the acceptance takes effect, there is general agreement on the principle of reception as contained in the draft; in the case of tacit or presumed acceptance, some were of the opinion that the acceptor must in all cases give notice to the offeror that he has performed an act equivalent to acceptance (Professor Enderlein) while others have suggested the adoption of the rule contained in Article 1327, second paragraph, of the Italian Civil Code according to which the fact that the acceptor has not given notice to the offeror renders him liable for the prejudice which may have been suffered by the latter (Professors Criscuoli and Tunc).

In connection with the very concept of tacit or presumed acceptance as established by the second paragraph of the article under examination, it was felt that it was too restrictive when compared with the original formulation of Article 6, paragraph 2 of the Hague Uniform Law and it was suggested therefore to add the following phrase:" acceptance may also consist in any act carried out for the performance of the contract in question or any other act which...." (Professor Zweigert).

Finally several replies called for the insertion of a provision under the terms of which the silence of the offeree could amount to an acceptance, to the extent that this is in conformity with practices which the parties have established between them or usage (Professors Tunc, Tallon, Blagojević, Smith and Gordon). In this connection it was proposed that the following words of the second paragraph "acceptance may also consist of an act which may be considered..." be replaced by the formula "It may also be implied by circumstances which may be considered..." (Professor Tallon); or to reformulate entirely paragraphs 3 and 4 by providing that "Silence of the offeree does not amount to acceptance of the offer. Any provision in the offer stipulating that the silence of the offeree shall amount to acceptance shall have no effect" and "However, when that is implied by preceding negotiations, by practices which the parties have established between themselves or by usage, the offeree must, if he does not wish to conclude that contract, give notice to the offeror, within the time-limit provided for the acceptance of the offer, that he does not wish to accept the offer; otherwise he will be considered to have accepted it." (Professor Blagojević).

Article 5

The provisions contained in the first and second paragraphs of this article were in general deemed to be satisfactory.

Even so, the view has been advanced that the formula " a reply .... which does not materially alter the terms of the offer...." contained in paragraph 2 is too vague and that it could therefore, in practice, create considerable uncertainty and numerous disputes between the parties (Professors Smith and Black, and Criscuoli); in this connection it has been proposed to delete the present paragraph 2 and to add to the first paragraph a provision whereby "additions to or modifications of the acceptance which are purely oral or which change the content of the offer to an insignificant degree shall not be considered to be modifications of the terms of the offer." (Professor Blagojević).

The question remains open however of the necessity, or at least the desirability, of expressly regulating those cases where a so-called confirmation letter or invoice is sent by one of the parties to the other after the conclusion of the contract, and which contains clauses or conditions completing or modifying the terms of the original oral agreement. More precisely, while this is admittedly an extremely frequent situation in commercial practice and the draft should deal with it in one way or another, there was discussion as to the type of solution to be adopted.

Thus, while the majority was in favour of a solution similar to that to be found in German caselaw under the name of "Schweigen auf Bestätigungsschreiben bedeutet Annahme" ("silence in response to a confirmation letter amounts to acceptance") (Professors Zweigert, Tunc, Rodière, Gordon, Blagojević), others fear that the party who dictates the general conditions and who is normally in a position of evident economic superiority, will be clearly favoured by this solution (Professor Tallon, U.N. Economic and Social Commission for Asia and the Pacific).

Similarly, in connection with the problem of the "battle of forms" (that is to say the case in which each party avails himself, on the occasion of an offer or of an acceptance or even merely on the occasion of a written confirmation of the preceding oral agreement, of his own general conditions and maintains that these are effective against the other contracting party merely because there has been no express opposition to them), the question has been argued as to whether this is a question relating to the formation of the contract and thus one to be treated here or whether it should rather be dealt with in the chapter on interpretation. Among the supporters of the former view are those who suggest the adoption of a solution identical to that provided for in Article 33 of the recent law on international commercial contracts of the German Democratic Republic ((2) "If each partner refers to general conditions or clauses, those which were the last to be sent and which have not been rejected shall be effective. (3) Moreover, if the other partner rejects the general conditions and clauses which were the last to be sent or if each partner rejects the general conditions and clauses of the other, the contract shall be deemed to be concluded without such general conditions or clauses. Article 42 shall be applicable for completing the terms of the contract. The contract shall however not be deemed to have been concluded when the partner who has received the declaration from which it is apparent that there is no agreement on the general conditions or clauses or on the differing conditions of the other, immediately opposes the conclusion of the contract") (Professor Enderlein).

Article 6

Apart from the fact, already noted, that it would be preferable for the time-limit for acceptance to run from the date on which the letter or the telegram is delivered to the address of the offeree, rather than from that of its dispatch, the substance of this article has not met with criticism. As to its actual wording, those who in connection with Article 4, paragraph 2 have already proposed a wider definition of the concept of declaration, that is to say a tacit one, have naturally likewise proposed the same amendment to paragraph 3 of Article 6.

Article 7

With regard to paragraph 1, there are some replies which indicate a preference for the contrary solution, that is to say the rule according to which "if the acceptance is late it shall constitute a counter-offer." (U.N. Economic and Social Commission for Asia and the Pacific); others however consider that late acceptance should in all cases bind the acceptor and propose therefore the deletion of the obligation on the offeror to give prompt and express notice to the acceptor that he considers his offer as having lapsed (Professors Smith and Black).

As to the case of the late communication of the acceptance (paragraph 2), a suggestion has been made to deny its validity, as in the case of express rejection by the offeror, also in cases where the latter has begun, subsequently to the expiry of the time-limit, negotiations with a third party and is therefore no longer in a position to maintain his original offer (Professor Tallon): the end of paragraph 2 should therefore be completed by the words "if the offeror has dealt with a third party after the expiry of the time-limit for acceptance and is in consequence for this reason unable to maintain his offer."

Article 8

No criticism has been levelled at this article except for the opinion of those (Professor Tallon) who propose its deletion on the grounds that it merely lays down the self-evident principle of the irrevocability of the acceptance after the conclusion of the contract.

Article 9

This article was generally accepted. Some replies however openly argued in favour of the adoption of the opposite principle for the reason that international relations are not confined to large firms (Professor Tallon). Others would like more time to consider how the implications of the death or incapacity of one of the parties prior to the conclusion of the contract could affect international trade, especially if regard is had to the requirements of the developing and least developed countries (U.N. Economic and Social Commission for Asia and the Pacific).

Finally some persons wished that the article should cover cases of the opening of bankruptcy or other similar proceedings against the offeror or the offeree (Professor Blagojević): as a solution most conducive to the requirement of certainty in international trade relations, it has been proposed that with the opening of bankruptcy proceedings against either the offeror or the offeree, offers should not be binding if they have not been accepted before the opening of the proceedings.

Article 10

There was general agreement on this provision, even though in order to reduce uncertainty as far as possible, it has been proposed that delivery must be effected "in the normal manner and in accordance with the practice of business relations" (Professor Tallon), "to the business address of the person to whom the communication is directed" (Professor Gordon), and "at the time at which he might reasonably be expected to be present there" (Professors Smith and Black).