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INTERNATIONAL INSTITUTE FOR THE UNIFICATION OF PRIVATE LAW

PROGRESSIVE CODIFICATION OF INTERNATIONAL TRADE LAW

Draft Uniform Law on the Formation of Contracts in general revised by the Steering Committee on the Progressive Codification of International Trade Law

and

Explanatory Report

(prepared by the Secretariat)

Rome, April 1977

DRAFT UNIFORM LAW ON THE FORMATION OF CONTRACTS IN GENERAL

Article 1

The conclusion of a contract shall not be subject to any requirement as to form, unless the law or the parties otherwise provide.

Article 2

1. The communication which a person addresses to another shall constitute an offer if it admits the inference that the offeror intends to be bound and if it is sufficiently definite to permit an acceptance.

2. This communication may be interpreted by reference to, and supplemented by, the preliminary negotiations any course of dealing which the parties have established between themselves and usage.

3. Offers to the public are to be considered, unless the contrary is clearly indicated by the person making the statement, merely as invitations to make offers.

Article 3

A contract a term of which is left by the parties to be agreed upon in further negotiations is not binding unless the parties have provided in what manner it shall be rendered definite in the event of their failure to reach agreement.

Article 4

1. The parties may expressly provide that one or more terms of their contract, specifically indicated by them, shall be determined by a third person, designated by them or in accordance with the procedure agreed by them.

2. If the third party, thus designated, cannot or will not fulfil his task, there is no contract.

3. The provisions of the two preceding paragraphs shall also apply when the parties provide for a possible revision of their contract.

Article 5

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 may be revoked 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 or any course of dealing which the parties have established between themselves.

Article 6

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 the present article by virtue of the offer or as a result of a course of dealing which the parties have established between themselves.

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

Article 7

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

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

Article 8

1. Where, after the conclusion of a contract, one party sends the other a document which is intended to be a written confirmation of what has been agreed upon orally, but which contains terms that add to or vary those of the original agreement, silence on the part of the recipient does not amount to an acceptance of these terms, unless they are in accordance with a course of dealing which the parties have established between themselves.

2. Paragraph 1 of this article applies also where the additional or varying terms are contained in an invoice sent after the conclusion of the contract by one party or the other.

Article 9

1. An 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.

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 or other written communication was handed in for despatch.

Article 10

1. If the acceptance is late, the offeror may nevertheless treat it as having arrived in due time provided that he promptly so informs the acceptor.

2. If, however, the acceptance is communicated late, it shall be treated as having been communicated in due time if the letter or other communication 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.

Article 11

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

Article 12

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

Article 13

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.

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EXPLANATORY REPORT

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 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 Bärmann of the Institut für das internationale Recht des Spar-und Kreditwesens in Mainz, 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 International Chamber of Commerce and the Commission of the European Communities have also announced that they will be sending observations. The draft uniform law was in addition 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 comparative law from Italian universities were present: the proceedings of this Round Table have been published under the title "La formazione dei contratti commerciali: A proposito di un progetto di legge uniforme" (Naples 1976).

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.

There were however some 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 while others 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.

With regard to these reserves the Steering Committee expressed the view that, while it is understood that the proposed Code will apply only to international contracts of a commercial nature, the exact definitions of what is meant by "international" and "commercial" should be made at a later date and included in an introductory section of the Code intended to set out not only the sphere of application, but also the general aims of the codification, as well as the definition of some other basic concepts, such as good faith, public policy, etc.

Only one reply objected 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 (ULFIS).

In this respect the Steering Committee pointed out that the reason why rules drawn up for the contract of sale alone have been felt to be equally valid as a basis for preparing rules to apply to 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 certainly are some aspects or problems touching on the formation of contracts which, for the purposes of a set of rules for contracts in general, require more detailed, or even different, treatment from what is at present laid down in the aforementioned Hague Uniform Law, restricted to sales contracts. It was, indeed, precisely with a view to collecting suggestions and proposals of this type that the Questionnaire on the original draft was sent out, and the present revised draft shows that a considerable number of those remarks have been taken into account.

Article 1

This article lays down the rule that there shall be no requirements as to form for the conclusion of contracts, except, of course, those cases in which the law itself or the parties provide otherwise. This is the rule laid down in the internal law of most of the civil law countries, as also in many of the general conditions of the United Nations Economic Commission for Europe. On the contrary, a written form is required "ad substantiam" in the national law of many Socialist countries (e.g. arts. 14 and 125 of the Soviet law on the basic principles of civil legislation) and in the CMEA General Conditions (but see the opposite rule adopted by art. 24 of the Czechoslovak International Trade Code and by § 35 of the GDR Law on International Economic Contracts) while the written form "ad probationem" is required for contracts for the sale of goods worth more than 500 dollars in the American U.C.C. (section 2-201).

In laying down the principle that there should as a rule be no requirements as to the form of the contract, this article avoids speaking of "offer" and "acceptance" (cf. the wording of art. 3 of ULFIS), on the ground that in practice cases not infrequently arise in which contracts are 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 to constitute "offer" and "acceptance".

Article 2

In an effort to define the notion of an offer, this article lays down two essential requirements. The communication must:

(a) admit the inference that the offeror intends to be bound;

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

The first requirement serves to differentiate between a genuine offer and a mere "invitation to make offers". It is self-evidente 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.

On the other hand, as to the second requirement, 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 course of dealing which the parties have established between themselves and usage". 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 Code (art. 108, para. 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)).

Paragraph 3 of this article deals with the problem of so-called "offers to the public", i.e. declarations which 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, etc.). Neither the 1964 Hague Uniform Law on the Formation of Contracts for the International Sale of Goods, nor the U.C.C., nor yet again the Czechoslovak Code or the Law of the German Democratic Republic on International Economic Contracts contain any provision on this particular question, and it has been argued that this is due to the fact that such cases arise less frequently in international trade practice (cf. Mertens - Rehbinder, Internationales Kaufrecht, 1975, p. 321 et seq.) Many replies to the UNIDROIT Questionnaire expressed a different view however and held that a specific regulation of "offers to the public" by the future International Code would be all the more desirable inasmuch as the various national laws provide widely differing solutions to the problem. Indeed, while certain legal systems consider offers to the public to be, at least in principle, merely invitations to make offers (see, as far as the Common Law is concerned, Cheshire and Fifoot's Law of Contract, 8th edn. 1972, p. 26 et seq.), according to others they have the nature and validity of authentic offers (e.g. art. 1336 of the Italian Civil Code). The provision contained in paragraph 3 of this article is clearly intended to achieve a compromise solution, but it must be understood that in order to amount to a genuine offer an "offer to the public" must not only show an express indication in this sense by the person making the statement, but also fulfil the other requirement provided by paragraph 1, i.e. to be sufficiently definite as to permit the conclusion of the contract by more acceptance.

Articles 3 and 4

According to paragraph 1 of Article 2 an offer, apart from revealing the intention of the offeror to be bound, must also be sufficiently definite to permit the conclusion of the contract by acceptance. This means that if an offer does not meet the required degree of definiteness in its terms, it will be considered to be a mere invitation to treat and therefore cannot provide the basis for a valid contract. In practice, however, it quite frequently occurs that the parties, when concluding their contract, leave one or more of its terms open, but nevertheless intend to enter into a binding agreement and in fact refer for the determination of the outstanding terms to an agreement to be made by them at a later stage or to a third person.

In these cases the problem arises whether, notwithstanding such omissions, the contract may be considered to be valid and enforceable and, if so, what are the criteria on the basis of which the missing terms are to be determined.

The articles under consideration distinguish between the two hypotheses and with respect to the first adopt the solution that so-called agreements to agree are to be considered not binding, unless the parties have made provision for the manner in which the term left open is to be made definite in the event of failure to reach agreement (Article 3) (see, for analogous solutions provided for by the various national laws, among others, Section 2-204 (3) U.C.C.; Articles 113 and 123 of the Czechoslovak Code; Treitel, The Law of Contract, 3rd ed. 1970, p. 52 et seq.; Staudinger's Kommentar BGB, 11th ed. 1957, Vorb. 17 on § 145; Sacco, Il Contratto, Turin 1975, p. 561 et seq.).

Such a possibility is expressly admitted, on the other hand, as far as the reference to a third person is concerned, provided that a) the parties directly designate the person entrusted with this task or at least agree on the procedure to be followed for his designation, and b) such a third person is called upon not to determine the whole content of the contract but only one or more specific terms expressly indicated by the parties (Article 4, para. 1). The first requirement is in line with the results achieved by the I.C.C. Working Party on "Specialized Types of Arbitration" (see Draft standard clause and rules on the regulation of contractual relations: Appendices II and III of Doc. No. 420/205 of February 2, 1977), while the second requirement aims at avoiding the use of the so-called blank signature ("biancosegno") apparently admitted, for instance, by Article 1349 of the Italian Codice Civile.

According to paragraph 2 of Article 4, the determination of the missing terms by the third person is considered to be an essential condition for the validity of the contract: in other words, if the third person designated by the parties cannot or will not fulfil his task, for any reason whatsoever, the contract will have no binding force.

Finally, as particularly in connection with long-term contracts it often occurs in practice that the parties refer to the determination of a third person with a view to making it possible to adapt their contract to changing circumstances which could upset the equilibrium of their original agreement (see e.g. the so-called hardship clause), paragraph 3 of Article 4 expressly also extends the provisions of the two preceding paragraphs to such cases of revision of the contract.

Article 5

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, § 862; German BGB, § 145; Swiss "Code des obligations", art. 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, p. 92 et seq.). It should however be noted that recently the binding character of the offer has not only been recognized by the Czechoslovak Code (art. 108 para. 2), the CMEA General Conditions (art. 1 para. 3) and the GDR Law on International Economic Contracts (§ 29), but also, albeit to a limited extent, in the relationships between merchants and, subject to specific objective formal requirements, by the U.S. Uniform Commercial Code itself (section 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,

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 art. 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 an exception to this rule, precisely in those cases in which the offer indicates a time limit for acceptance or in those where the offer is expressly declared to be a "firm" offer. 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 or any course of dealing which the parties have established between themselves." (para. 3).

Article 6

This article, which closely follows art. 6 of ULFIS, 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.

The solutions adopted 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 a course of dealing which the parties have established between themselves" 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 may possibly be regarded as tacit acceptance. Silence may, however, be regarded as acceptance by virtue of a course of dealing which the parties have established between themselves (see Mertens - Rehbinder, op. cit., p. 333; Dölle, Kommentar zum Einheitlichen Kaufrecht, 1976, p. 717).

As regards the time from which acceptance takes effect, it should be noted that the so-called receipt theory has been adopted in the case of express acceptance ("Acceptance ... consists of a declaration communicated by any means whatsoever to the offeror"), but 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.

A comparison of the law currently in force in different countries reveals a general acceptance, as regards certain aspects, of the solutions proposed in the present article 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; art. 1327 of the Italian Civil Code; § 844 of the Austrian ABGB; art. 114 of the Czechoslavak Code; § 30 (4) of the GDR Law on International Economic Contracts and, although limited to sales only, section 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 generally adopt the opposite rule, that is the "mail box rule", while still other countries, such as Italy, Egypt and Rumania, provide for an intermediate solution (see arts. 1326, para. 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 U.C.C. (Section 2-206(2)) and the GDR Law on International Economic Contracts (§ 30 (4)) require that notice be specifically given to the offeror in order for tacit acceptance to take effect while in other legal systems, as for example Italian law, failure to give such notice merely entails the offeree's being required to compensate any damage (art. 1327 para. 2 of the Italian Civil Code).

Article 7

This article, which corresponds to art. 7 of ULFIS, was in general deemed to be satisfactory by those who replied to the UNIDROIT Questionnaire.

As a matter of fact, the rule set forth in the first paragraph is nowadays universally accepted (see, e.g. § 150 (2) of the German BGB; art.1336 para. 5 of the Italian Civil Code; for English law, cf. Treitel, op.cit., p. 18; see also art. 112 of the Czechoslovak Code; § 31 of the GDR Law on International Economic Contracts; § 1 para. 1 (b) of the CMEA General Conditions).

More open to discussion is perhaps the provision contained in the second paragraph: there are in fact certain legal systems, such as the Common Law and the Socialist systems, where an acceptance of the kind envisaged by the provision under consideration is considered in reality to be nothing more than a counter-offer, in acknowledgement of the general rule set out in the first paragraph. It should nevertheless be noted that other systems expressly 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"), section 2-207 (2) of the American UCC).

Article 8

This article deals with two situations which are encountered fairly often in international trade practice. The one is where a contract has already been made either orally or by informal correspondence and one party sends to the other a document ("letter of confirmation"), the purpose of which is simply to confirm what has already been agreed upon, but which may sometimes also contain terms or conditions as yet not discussed between the parties; the other situation is one in which one party, after the conclusion of a contract, sends to the other an invoice or other document which relates to performance, but also contains terms that add to or vary those of the original contract. In both cases the question arises whether or not such additional or varying terms unilaterally proposed by one party after the conclusion of the contract are binding on the other party if he does not expressly object to them once he has been given notice thereof.

The stands taken by the different legal systems on this subject vary considerably: in fact, as regards the so-called letter of confirmation, only the German and, to a certain extent, the Austrian and Swiss "doctrine" and case-law seem to accept that the silence of the addressee amounts to a tacit acceptance by him ("Schweigen auf Bestätigungsschreiben bedeutet Annahme") (see Rabel, Das Recht des Warenkaufs, Berlin-Tübingen 1957, I, p. 97 et seq., Sonnenberger, Verkehrssitten im Schuldvertrag, München 1970, p. 216 et seq.), whilst for invoices a similar rule would seem to be admitted only in France and Belgium ("facture acceptée") (see Berlioz, Le contrat d'adhésion, Paris, 1973, p. 64 et seq.). In all the other systems silence on the part of the addressee may be considered as acceptance of the terms or conditions at issue only in exceptional circumstances, e.g. if they have been inserted in prior contracts or are commonly used in similar transactions and consequently correspond to a course of dealing between the parties or to a veritable usage of the particular sector of trade concerned (see Schlesinger, op. cit., p. 135 et seq.; European Court of Justice, 14 December 1976, No. 25/76).

This is precisely the solution envisaged by the article under consideration. After all, even according to German law, no acceptance will be inferred from silence if the sender of the letter of confirmation fraudulently introduces terms different from those which were previously negotiated, i.e. the additional or varying terms are of such an unusual nature that he could not reasonably have expected them to be accepted by the addressee (cf. BGH 20 March 1974, in DRechtspr. 1974, 1059).

Article 9

The purpose of this article is to specify the time during which acceptance must be made in order to be effective. From the outset 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 understood 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 circumstances of the transaction, including the rapidity of the means of communication employed by the offeror". Lastly, it should be noted that these rules apply not only to cases where there is an express 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. 6, paragraph 2, indicate his intention to accept.

Article 10

This article which corresponds to art. 9 of ULFIS 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 8 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 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 e.g. art. 1326 para. 3 of the Italian Civil Code; art. 35 of the Rumanian Civil Code). Although various legal systems adopt the converse solution and consider late acceptance as a new offer (which means in practice that the original offeror has more time in which to let the other party know whether or not he intends to accept: see, e.g., § 150 (1) of the German BGB or § 4 of the Scandinavian Law on Contracts), only one of the replies received by UNIDROIT indicated a preference for this latter rule.

In the second case it is precisely the reverse principle 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, and 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, in the same sense, for example, § 149 of the German BGB; art. 5 para. 3 of the Swiss Code of Obligations; art. 111 of the Czechoslovak Code; § 30 (3) of the GDR Law on International Economic Contracts; § 1 para. 2 of the CMEA General Conditions). The substance of this provision has not met with criticism.

Article 11

Seeing that under Article 6 paragraph 1, "acceptance of an offer consists of a declaration communicated by any means whatsoever 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; art. 9 of the Swiss Code of Obligations; § 7 of the Scandinavian Law of Contract; Article 1328, para. 2 of the Italian Civil Code; art. 37 of the Rumanian Commercial Code; Article 109, para. 1 of the Czechoslovak Code. 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 in practice be revoked in certain cases, always provided however that the revocation reaches the offeror either before or at the same time as his acceptance (as 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, ed. by Honnold, Paris 1966, p. 66 et seq.).

Article 12

The effect on the offer of the offeror's or offeree's death or supervening incapacity 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 calls for a converse 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, para. 2 of the Czechoslovak Code and, for the death or incapacity of the offeror only, art. 1329, para. 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 almost always results in the termination of the offer (for the Common law systems, see Treitel, op.cit. pages 44 - 47), and only the Italian Civil Code stipulates that the offer remains open even in these circumstances, provided it was made by a business-man 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 firms 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).

It should be noted that when the draft speaks of the supervening incapacity of one of the parties, this does not cover the case of a person whose legal capacity is restricted or reduced as a result of the opening of bankruptcy proceedings or some similar procedure: these cases are covered in national law by special rules which, at least in part, are of an administrative or procedural law character and although some of the replies received by UNIDROIT to its Questionnaire were of a different opinion, it was thought that in regard to these rules a uniform international solution would be inappropriate, if not impossible, to achieve in practice.

Article 13

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 5; 6, para. 1; 9, para. 1; 11).

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 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.

There was general agreement on this provision among those who replied to UNIDROIT's Questionnaire, 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", "to the business address of the person to whom the communication is directed" and "at the time at which he might reasonably be expected to be present there".