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UNIDROIT

International Institute for the Unification of Private Law
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WORKING GROUP FOR THE PREPARATION OF
PRINCIPLES OF INTERNATIONAL COMMERCIAL CONTRACTS

CONSOLIDATED EDITION OF PART I AND PART II OF THE PRINCIPLES OF INTERNATIONAL
COMMERCIAL CONTRACTS: DECIDED AMENDMENTS & OPEN QUESTIONS

(Memorandum prepared by the Secretariat)

Rome, April 2003

I. DECIDED AMENDMENTS TO PART I

A. Black letter rules

- **Model Clause**

UNIDROIT 1999 - C.D. (78) 23: *The Governing Council [...] approved the addition of the following text as a footnote to Paragraph 2 of the Preamble of the Principles:*

Parties wishing to provide that their agreement be governed by the Principles might use the following words, adding any desired exceptions or modifications:

“This contract shall be governed by the UNIDROIT Principles (1994) [except as to Articles ...]”

Parties wishing to provide in addition for the application of the law of a particular jurisdiction might use the following words:

“This contract shall be governed by the UNIDROIT Principles (1994) [except as to Articles ...], supplemented when necessary by the law of [jurisdiction X]”.

NOTE: The dates will have to be changed in the new edition.

- **Article 1.2**

(Excerpt from the Report on the 2002 session of the Working Group, para. 347):

The new text of Art. 1.2 as adopted by the Group reads as follows:

“Nothing in these Principles requires a contract to be concluded in or evidenced by a particular form. It may be proved by any means, including witnesses.”

- **Article 2.18**

(Excerpt from the Report on the 2002 session of the Working Group, para. 360):

The Group ultimately agreed on the following new title and text of Art. 2.18:

(Modification in particular form)

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

B. Comments

- **E-commerce**

Excerpt from “UNIDROIT Principles and Electronic Commerce. Questionnaire prepared by Professors M.J. Bonell and E.A. Farnsworth and replies of Professors A.H. Boss, M.A. Eisenberg, J. Ginsburg and C. Ramberg” (UNIDROIT 2001 - Doc. 77 rev.):

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

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

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

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

C.R. To my opinion the Article does not need to be supplemented. In the comments it should be emphasized that for an electronic message to be “appropriate in the circumstances”, the addressee must somehow have communicated its willingness to receive electronic communication in the way it was sent by the sender (see for inspiration the US Uniform Electronic Transactions Act of 1999).

Article 1.9: “[...] (2) *A notice is effective when it reaches the person to whom it is given. (3) For the purpose of paragraph (2) a notice “reaches” a person when given to that person orally or delivered at that person’s place of business or mailing address.*”

Question: As to the definition of “reaches” in the context of electronic forms of communications do you think that there is a need of a special provision, e.g. of the kind of Article 15(2) of the 1996 UNCITRAL Model Law on Electronic Commerce¹, or would a reference to it in the comments be sufficient? For this

¹ “Unless otherwise agreed between the originator and the addressee, the time of receipt of a data message is determined as follows:

(a) if the addressee has designated an information system for the purpose of receiving data messages, receipt occurs:
 (i) at the time when the data message enters the designated information system; or

latter approach see e.g. with respect to question when a funds transfer becomes effective, Art. 6.1.8(2) UNIDROIT Principles and Comment 2 to it.

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

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

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

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

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

(ii) if the data message is sent to an information system of the addressee that is not the designated information system, at the time when the data message is retrieved by the addressee;
 (b) if the addressee has not designated an information system, receipt occurs when the data message enters an information system of the addressee."

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

Question: Given the practice of purely automated contracting in the context of electronic contracting do you think there is a need of amending the text of this provision, e.g. along the lines of Art. 202(a) of the U.S. Uniform Computer Information Transaction Act,² or would it be sufficient to mention in the comments the possibility of automated contracting ?

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

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

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

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

Question: As to the definition of “dispatched” in the context of electronic forms of communications do you think that there is a need of a special provision, e.g. of the kind of Article 15(1) of the UNCITRAL Model Law³, or would a reference to it in the comments be sufficient?

A.B. A reference should suffice.

M.E. Here clarifications are required, in the text or comment, concerning when an electronic communication “reaches” a recipient. I assume it is when the message first shows up on the recipient’s screen, in the case of a

² “A contract may be formed in any manner sufficient to show agreement, including offer and acceptance or conduct of both parties *or operation of electronic agents* which recognize the existence of a contract.” (emphasis added)

³ “Unless otherwise agreed between the originator and the addressee, the dispatch of a data message occurs when it enters an information system outside the control of the originator or of the person who sent the data message on behalf of the originator.”

person or an organization, or first enters a receiving electronic agent's processing apparatus, in the case of an electronic agent.

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

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

II. OPEN QUESTIONS IN PART I & PART II

A. Black letter rules

- **Preamble**

The present text of the Preamble reads as follows:

Preamble
(Purpose of the Principles)

These Principles set forth general rules for international commercial contracts.

They shall be applied when the parties have agreed that their contract be governed by them.

They may be applied when the parties have agreed that their contract be governed by general principles of law, the *lex mercatoria* or the like.

They may provide a solution to an issue raised when it proves impossible to establish the relevant rule of the applicable law.

They may be used to interpret or supplement international uniform law instruments.

They may serve as a model for national and international legislators.

1. The present text makes no reference to the possible use of the Principles

- as a guideline in contract negotiation,
- as a means of interpreting and supplementing the applicable domestic law, notwithstanding the fact that in practice the Principles are widely used for these two purposes

Question: Would the Group consider making an express reference in the Preamble to such purposes? The two new paragraphs could read as follows:

“They may be used to interpret or supplement domestic law.”

“They may serve as a model in drafting contracts.”

2. The corresponding provision in the European Principles (Art. 1:101) states:

“These Principles may be applied when the parties [...] have not chosen any system or rules of law to govern their contract”.

A provision of this kind appeared in the preliminary drafts of the Principles and was deleted at the very last moment by the Governing Council by a 10 to 8 majority with one abstention. To be precise, the provision on which the Council took the vote was a combination of a provision similar to the one contained in the European Principles and the present paragraph 4 of the Preamble and read as follows: “[The Principles] may also provide a solution to an issue raised when the parties have not chosen any law to govern their contract, or when it proves impossible to establish the relevant rule of the applicable law.” The Council decided to delete the first part of that provision (UNIDROIT 1993 – C.D. (72) 19, p. 22).

Question: Would the Group consider adding to the Preamble a provision similar to the one contained in the European Principles, also in view of the fact that there is a growing body of international case law where arbitrators applied the Principles as the *lex contractus* in the case of a so-called negative choice of law by the parties or by *voie directe* (e.g. according to Article 17 of the ICC Rules of Arbitration)? The new paragraph could read as follows:

“They may be applied when the parties have not chosen any law to govern their contract”.

Another possibility might be to envisage a combination of such a provision and the present paragraph 4 of the Preamble. The new paragraph could read as follows:

“They may provide a solution to an issue raised when the parties have not chosen any law to govern their contract, or when it proves impossible to establish the relevant rule of the applicable law.”

- **Article 2.8**

The present text reads as follows:

Article 2.8
(Acceptance within a fixed period of time)

(1) A period of time for acceptance fixed by the offeror in a telegram or a letter begins to run from the moment the telegram is handed in for dispatch or from the date shown on the letter or, if no such date is shown, from the date shown on the envelope. A period of time for acceptance fixed by the offeror by means of instantaneous communication begins to run from the moment that the offer reaches the offeree.

(2) Official holidays or non-business days occurring during the period for acceptance are included in calculating the period. However, if a notice of acceptance cannot be delivered at the address of the offeror on the last day of the period because that day falls on an official holiday or a non-business day at the place of business of the offeror, the period is extended until the first business day which follows.

(Excerpt from the Report on the 2002 session of the Working Group):

“361. Bonell asked for comments on Art. 2.8 (1).

362. Uchida explained the two new alternative texts he had prepared: “[1] A period of time for acceptance fixed by the offeror begins to run from the moment of dispatch or from the moment shown in the offer. [2] A period of time for acceptance fixed by the offeror begins to run from the moment that offer reaches the offeree or from the moment shown in the offer.” Both versions had the merit of avoiding any reference to specific modes of communication, some of which (e.g. telegrams) are clearly outdated.

363. Bonell drew attention to the comments made by the experts consulted focusing on the question as to whether electronic messages could always be considered “means of instantaneous communication”, and coming to different conclusions.

364. Schlechtriem felt that a distinction should be made between electronic messages which are clearly instantaneous such as those exchanged in a chat room context and others which might well not be instantaneous at all.

365. Farnsworth recalled that Professor Boss had suggested treating all electronic messages as an instantaneous communication.

366. Furmston objected that for instance messages sent by fax are not instantaneous at all as confirmed by the House of Lords which stated that it made a difference whether or not one sends a fax to somebody during ordinary working hours and whether or not on the recipient’s side there is a central fax collection office which keeps the fax messages until they are picked up by the addressees.

367. El Kohly was against the deletion of telegrams which were still being used in many parts of the world.

368. Lando pointed out that PECL took a more agnostic approach. In other words, PECL does not contain a special provision, similar to Art. 2.8 of the UNIDROIT Principles, on the questions as to when a fixed period starts to run and the effect of holidays during that period. PECL has only a general rule that an offer must be accepted within the time the offeror has fixed or, if no time is fixed, within a reasonable time.⁴

369. Bonell recalled that also the UNIDROIT Principles contain a similar rule in Art. 2.7 which however provides a special rule on oral offers and therefore might

⁴ *Article 2:206): Time Limit for Acceptance*

(1) In order to be effective, acceptance of an offer must reach the offeror within the time fixed by it.

(2) If no time has been fixed by the offeror acceptance must reach it within a reasonable time.

(3) In the case of an acceptance by an act of performance under art. 2:205 (3), that act must be performed within the time for acceptance fixed by the offeror or, if no such time is fixed, within a reasonable time.

pose additional problems with respect to “instantaneous” electronic communications.

370. Schlechtriem thought that it had been decided to leave the second sentence of Art. 2.8 as it stood because of the difficulty in determining what is instantaneous in cyberspace. As to the first sentence he thought one could take up Uchida’s proposal to replace the “dispatch of a telegram by handing it in” by “dispatch”. The Comments could explain that in the case of a telegram this means handing it in at the post office or from wherever it is sent, and in the case of an electronic messages it is the dispatching by the server of the sender. As to the date shown on the letter, it should be the date shown on the acceptance or on the communication and if no such date is shown, the date shown on the envelope. It would then be necessary to deal with the date in the case of e-messages: if it is not in the text of the e-message itself it is indicated in the heading of the e-message.

371. Finn proposed the following amendment: “A period of time for acceptance fixed by the offeror in a communication in writing runs from the date specified in the communication or, if no such date is specified, then from the date of the communication”.

372. Date Bah proposed to focus on non-instantaneous modes of electronic communication and to leave the text as it stood.

373. Farnsworth expressed support for Finn’s proposal but felt that it should be refined so as to make it clear how to deal with the case of a letter dated the 10th and postmarked on the 12th or of a system of electronic communications in which there is one time of dispatch and another time of receipt on the communication. One ought also to specify which date is the date of the communication.

374. Furmston expressed some misgivings as to the development of the discussion. Arts. 2.7 and 2.8 had a long history going back to the ULFC and CISG and he wondered whether at this late hour the Group really wanted to introduce substantial amendments to the black letter rule.

375. In summing up the discussion Bonell saw the emergence of basically three different approaches with respect to Art. 2.8: to leave the text of paragraph 1 as it stood with a possible additional reference to non-instantaneous electronic communications; to replace it with a much shorter and media-neutral wording such as the one suggested by Uchida and Finn; to delete the entire article altogether. He invited all members of the Group to give some further thought to the question so as to be in a position to take a final view at the next session.”

Question: Would the Group be prepared to consider the adoption of a shorter and media-neutral wording of paragraph 1 of Article 2.8 to read as follows:

“Article 2.8

(Acceptance within a fixed period of time)

A period of time for acceptance fixed by the offeror begins to run from the time that the offer is dispatched. A time indicated in the offer is deemed to be the time of dispatch.”

NOTE: The present paragraph 2 of Article 2.8 addresses an issue which is not limited to the time fixed for acceptance but actually arises in all cases where the parties have fixed a certain period within which an act has to be done. The Group might consider deleting paragraph 2 of Article 2.8 and transferring its content, with appropriate modifications, into article on its own to be placed at the end of Chapter 1 (General Provisions). The suggested new article would read as follows:

*“Article 1.11
(Computation of time set by parties)*

(1) Official holidays or non-business days occurring during a period set by parties for an act to be done are included in calculating the period.

(2) However, if the last day of the period is an official holiday or a non-business day at the place of business of the party to do the act, the period is extended until the first business day which follows, unless the circumstances indicate otherwise.

(3) The relevant time zone is that of the place of business of the party setting the time, unless the circumstances indicate otherwise.”

- **Article 2.9**

The present text reads as follows:

Article 2.9
(Late acceptance. Delay in transmission)

(1) A late acceptance is nevertheless effective as an acceptance if without undue delay the offeror so informs the offeree or gives notice to that effect.

(2) If a letter or other writing containing a late acceptance shows that it has been sent in such circumstances that if its transmission had been normal it would have reached the offeror in due time, the late acceptance is effective as an acceptance unless, without undue delay, the offeror informs the offeree that it considers the offer as having lapsed.

Question: The Group might consider replacing the opening words of paragraph 2 “If a letter or other writing ...” by media-neutral language such as “If a communication ...” (emphasis added).

- **General provision stating that all references in the Principles to contracts would include unilateral acts**

(Excerpt from the Report on the 1999 session of the Working Group):

“Authority of Agents: Article 1

(1) This chapter governs the authority of a person, the agent, to affect the legal relations of another person, the principal, by or with respect to a contract with a third party, whether the agent acts in its own name or in that of the principal.

258. With respect to paragraph 1 El Kholy suggested adding the words “or a unilateral undertaking” after “contract”. This would prevent the provision from applying to contracts only. Bonell replied that a reference to a unilateral undertaking would not be necessary in the black letter text as it would be mentioned in the Comments. Also, in the context of the revision of the present edition of the Principles, the inclusion of a general provision stating that all references in the Principles to contracts would include unilateral acts would be advisable.

Authority of Agents: Article 9

(8) Ratification is subject to no requirement as to form. It may be express or may be inferred from the conduct of the principal.

241. With respect to paragraph 8 Farnsworth suggested that when the topic of ‘no requirement as to form’ was discussed in the general revision of the present edition of the Principles, there should be a reference that this would also apply in relation to ratification. It was so agreed and the deletion of paragraph 8 was decided.”

Question: Article 1.2 (*No form required*) presently states: “Nothing in these Principles requires a contract to be concluded in or evidenced by a particular form ...” (emphasis added). The Group might consider amending the wording of the provision so as to read as follows:

“Article 1.2
(*No form required*)

Nothing in these Principles requires a contract, [statement of intention] or any other act to be concluded in, made or evidenced by a particular form. It may be proved by any means, including witnesses.”

NOTE: The European Principles contain a provision (Article 1:107 - Application of the Principles by Way of Analogy) stating “These Principles apply with appropriate modifications to agreements to modify or end a contract, to unilateral promises and other statements and conduct indicating intention.”

- **“Reliance” only or “reasonable reliance”?**

(Excerpt from the Report on the 2002 session of the Working Group):

“Chapter [...] on Third Party Rights

Article 5 (*Revocation*)

The contracting parties may modify or revoke the rights conferred by the contract on the beneficiary until the beneficiary has accepted them or relied on them.

32. Bonell drew attention to Art. 2.4(2)(b) where it is expressly required that “... it was reasonable for the offeree to rely on the offer as being irrevocable and the offeree has acted in reliance on the offer”.

33. Finn suggested that at least in the Comments when reference is made to reliance it should be made clear that the reliance should be reasonable in the circumstances. He thought that also in the context of Art. 5 there should be some limitation imposed on the third party beneficiary, either in the article itself or at least in the Comments to indicate that the third party beneficiary must act reasonably.

35. Furmston ... One could deal with what he would regard as relatively unusual cases of unreasonable reliance by including the word “reasonable”.

36. Crépeau pointed out that this was not the first time where the Principles refer to reliance yet not always was “reasonableness” added in relation to reliance. He wondered whether Art. 5 was a special case of “reasonable” reliance or whether “reasonable” should be included in all cases of reliance.

37. Finn agreed that this was a serious question.

38. Bonell recalled that indeed for instance in Art. 3.10 there is no mention of reasonableness which was at most hinted at in the Comments. He asked the Group to express its views on the issue.

39. According to Furmston it was premature to take a definite view on whether to have throughout the Principles additional language to the effect that the reliance must be reasonable under the circumstances. He proposed coming back to the issue once the new enlarged edition of the Principles was ready.

41. For Huang it made no difference whether “reasonable” was included in the black letter rule or in the Comments.

42. Lando warned that not everybody interested in the Principles necessarily read the Comments. Therefore he thought it a good idea to put “reasonableness” in the black letter rule.

43. Date Bah objected that an indication of preference on this issue was not yet possible. If a black letter rule on reliance of a more general character was introduced, this might well influence the decision on how to draft the specific applications of that rule.

44. In summing up Bonell concluded that there seemed to be substantial support in favour of having a reference to the reliance doctrine in the context of Art. 5. It had been agreed to change the present wording to “acting in reliance on them”. The Group also had requested the Rapporteur to be as explicit and elaborate as possible on this point in the Comments, hopefully with illustrations. As to the further qualification of reasonableness, he suggested postponing a decision until a

later stage when a provision of a more general character might be adopted. It was so agreed.”

NOTE: Throughout the Principles there are a number of articles containing a reference to “reliance”, most of which with no further qualification (see in Part I: Articles 2.18, 3.5 (1) (b), 3.10 (3), 3.11 (2), 3.13 (1); in Part II; Article 5 of the draft Chapter on Third Party Rights), while a few refer to “reliance” further qualifying it with “reasonable” (see in Part I: Article 2.4 (2) (b); in Part II Article 5 (2) of the draft Chapter on Authority of Agents).

Question: The Group may wish to consider whether such further qualification of reasonableness might be appropriate in all articles containing a reference to reliance or whether it should be deleted throughout, also in view of the fact that there will be a general provision on inconsistent behaviour.

B. Comments

- **Agreement to negotiate in good faith enforceable?**

(Report on the 1998 session of the Working Group):

6. Farnsworth [...] He was personally involved as an expert witness in an ICC arbitration where the arbitrators thought that the Principles were relevant even though the contract in question had been entered into long before the Principles had been published. One of the questions that had been put to him was whether, if there was an agreement to negotiate in good faith, specific performance was an appropriate remedy. He explained that there was a section in the Principles stating that specific performance was an appropriate remedy while another section provided that if parties negotiated in bad faith the remedy was essentially recovery of the reliance interest and that the question was how the two provisions could be reconciled. He suggested that when the existing Principles were revised, a comment could be inserted addressing the issue but he did not consider it a defect in the present edition.

Question: The Group might wish to add in the Comments a sentence indicating that in practice the duty to negotiate in good faith may be the subject of an express agreement between the parties, in which case remedies for breach of contract might be available.

- **Article 6.2.2 Comment 2**

Comment 2 in its present form reads as follows:

“Since the general principle is that a change in circumstances does not affect the obligation to perform (see Art. 6.2.1), it follows that hardship may not be invoked unless the alteration of the equilibrium of the contract is fundamental. Whether an alteration is “fundamental” in a given case will of course depend upon the circumstances. If, however, the performances are capable of precise measurement in monetary terms, an alteration amounting to 50% or more of the cost or the value of the performance is likely to amount to a fundamental alteration.”

Question: The Group might consider deleting the third sentence in view of the fact that the figures “50% or more” have been criticised in legal writings as being too low and in any event rather arbitrary.