E-commerce

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I. UNIDROIT's approach to electronic commerce

UNIDROIT and ICC seem to take the same approach to electronic communication: they both welcome it and see it as an important tool for facilitating international transactions and at the same time are averse to regulating it.

This is an approach I strongly support and upon which I would like to insist. It would be highly detrimental if a special regime were to be created for electronic transactions, distinct from 'ordinary' transactions. The principal problems encountered in commerce have been known for over two thousand years and are independent of the means of communication used. The focus at both national and international levels should be on solving these fundamental problems. Besides, electronic commerce and ordinary commerce have now become indistinguishable. Consequently, special rules for e-commerce would merely give rise to bureaucratic and formalistic legal discussions on how to qualify a transaction, which would be prejudicial to commerce and undermine society's general respect for lawyers and legal rules.

It is most unfortunate that UNCITRAL has taken a different approach in its newly approved Draft Convention on the use of electronic communications in the formation and performance of international contracts and the 2001 Model Law on Electronic Signatures. UNIDROIT and ICC are to be congratulated on not having taken such a media-specific and dualistic approach. In their different ways, these two organizations show how e-commerce problems can be solved without regulations specific to electronic transactions.

Although the 2004 UNIDROIT Principles do not therefore contain any provisions specifically regulating e-commerce, some changes have been introduced to take account of e-commerce. These will be examined below.

II. Changes in the black letter text

1. Article 1.2: No form required

In the 1994 version of the UNIDROIT Principles, this article made it clear that a contract need not be concluded in writing. The term writing does not appear in the 2004 version and the article now states instead that there is no requirement for a contract to be 'evidenced by a particular form'. This is a very intelligent expression since it is media-neutral and clearly indicates that the form is irrelevant.

The comment explicitly mentions that e-mail and web communication may be used to form a contract.

2. Article 2.1.8 (formerly 2.8(1)): Acceptance within a fixed period of time

The 1994 article was media-specific, insofar as it referred to 'telegram', 'letter', 'envelope' and 'instantaneous communication' when giving guidance on how to calculate a vaguely stipulated period of time during which an offer is binding. It was inspired by Article 20 of the Vienna Convention on Contracts for the International Sale of Goods (CISG). Application of such a media-specific provision to new means of communication would clearly be problematic: Does an e-mail correspond to a telegram or to a letter? What is the envelope when communicating over a website? Is chat communication on the Internet the same thing as 'instantaneous communication"?

The 2004 article is completely media-neutral and makes no reference to different types of messages. Now, it is presumed that the period for accepting an offer starts to run at the time of dispatch, yet this may be uncertain or subject to contradiction. The drawback with the 2004 version is that the provision does not provide as much guidance as its predecessor. Despite the lack of specific guidance, the only way of solving this problem would appear to be to refer it to the court in each individual case. Let us hope that parties in the future will become better at clarifying when a stipulated time period for acceptance is to start and end.

The comments to Article 2.1.8 provide more guidance than the black letter text. Here we learn that the time of dispatch for a letter is the date shown on the letter, for an e-mail the time indicated as the sending time by the sender's server, and for a fax the date printed by the fax machine. The comments point out, however, that in individual cases it might be possible to interpret the offeror's message otherwise.

3. Article 2.1.18 (formerly 2.18): Written modification clause

This is an interesting change relating to the parties' agreement to be bound only by changes in a contract that are made in a particular form. The 2004 provision still speaks of a modification clause '*in writing*', but says of the changes themselves that they may be required to be in 'a particular form'. It thus acknowledges that parties may agree that modifications be restricted to forms other than 'writing', such as electronic communication or through a webpage. This is useful.

If the parties have agreed that modifications should be made in writing and a modification is later made by e-mail, the question arises as to whether the e-mail qualifies as 'writing'? According to Article 1.11, anything that preserves a record of the information and is capable of being reproduced in tangible form constitutes writing. Consequently, a modification made by e-mail satisfies the requirement that modifications be in writing.

The example chosen to illustrate the 2004 provision on modification clauses is, in my mind, unfortunate and misleading. It concerns a construction agreement where the parties have agreed that any modification to the work schedule must be in writing and the document must be signed by both parties. In the course of

construction, A sends B an e-mail asking B to agree to the extension of a particular deadline. B accepts by return of e-mail. According to the example, B's acceptance is ineffective 'since there is no single document bearing both parties' signature'. I would argue otherwise: first, the fact that each party has signed a mutual declaration of will in two separate e-mails should be regarded as satisfying the requirement in the written modification clause and thus be considered as effective; second, with reference to the second sentence of Article 2.1.18, B's e-mail is conduct precluding him 'from asserting such a clause' since A 'has reasonably acted in reliance on that conduct'.

III. Changes and amendments in comments and illustrations

1. Comments 1 & 4 and illustrations to Article 1.10 (formerly 1.9) on notice

As was already the case in the 1994 Principles, notice can be given by any means as long as the method of communication is 'appropriate'. Comment 1 clarifies that although notice can be given by electronic means, the addressee 'must expressly or impliedly have consented to receive electronic communication in the way in which the notice was sent by the sender, i.e. of that type, in that format and to that address'. This is an important clarification—sadly lacking in the UNCITRAL Model Law on Electronic Commerce—since it would be inappropriate and unreasonable to make someone suffer the legal consequences of notices sent to him that he is unlikely to read. It originates from the US Uniform Act on Electronic Transactions and the Canadian Uniform Act on Electronic Commerce and is also repeatedly referred to in the CISG Advisory Council's Report on Electronic Commerce.

Subparagraphs (2) and (3) refer to when a notice 'reaches' the addressee. What constitutes 'reach' in an electronic setting has been analyzed for many years. In keeping with the UNCITRAL Model Law on Electronic Commerce, comment 4 clarifies that a notice can be sent to an addressee's electronic mailing address and thus reaches the addressee at the moment it enters the addressee's server. In my opinion, it is a sound and correct rule and the clarification given in comment 4 is likely to be of help to a judge who may need to determine the appropriate meaning of 'reach' in an electronic setting.

2. Comment 3 and illustration to Article 2.1.1 (formerly 2.1) on manner of formation

As regards the formation of contracts, the UNIDROIT Principles take an informal approach that allows contracts to be formed 'automatically' by electronic means. This is expressly clarified in comment 3 and the following Illustration relating to orders submitted and accepted by EDI-systems.

In my opinion, it is good that this has been clarified as the last ten years have seen meaningless discussions over electronic agents caused by the apparent wish of computer specialists to introduce legal rules implying that computers are capable of entering into contracts and other legal transactions. It is very difficult to explain to these experts that the contract is not made by the computer but by the legal or

natural person behind it acting as party to the contract or agent. It may be that the computer software program is technically called an agent, but the computer and the software program cannot be agents from a legal point of view since they are not legal or natural persons (it is not possible to let a computer or software program have rights and obligations and to be sued in court). Let us hope that the clarification in comment 3 is sufficient to end this confusing discussion and that judges and lawmakers will be convinced by this explanation and not misled by the confused arguments put forward by some computer specialists.

3. Comment and illustration to Article 2.1.7 (formerly 2.7) on time of acceptance

The comment and illustration give guidance on how to determine 'reasonable time having regard to the circumstances' in a situation where an offer is given in an e-mail in which the person to whom the offer is addressed is asked to reply as soon as possible and the acceptance is given in a letter sent by post. According to the comment and the illustration, a letter sent by post in these circumstances does not meet the requirement to reply 'as soon as possible'. In my view, this goes without saying and the clarification would therefore seem somewhat superfluous—but it is correct and does no harm.

IV. Areas where no special consideration has been given to e-commerce

1. Mistake

There are many articles of the 1994 Principles that have not been changed in the 2004 version. Most important of these are the provisions on mistake. The UNCITRAL Model Law on Electronic Commerce addresses this issue in Article 13, as does the US Uniform Electronic Transaction Act in section 10 and the European Union E-Commerce Directive in Article 11(2) on input errors.

The problem is that mistakes are easily made in electronic transactions, either because a party is in too much of a hurry or due to a misleading or obscure web site design by the other party. I imagine that most of us have at some point sent an e-mail to the wrong person or clicked on the send button too early, or been fooled, or at least unwary, when trying to buy or check something on the Internet. The instruments mentioned above are aimed at protecting parties in the event of mistakes in electronic communications. This matter is addressed neither in the black letter text nor in the comments or illustrations of the 2004 UNIDROIT Principles.

I think it would have been valuable to include a clarification in the comment to Article 3.5(1)(a) that the misleading design of a web site may be a case in which 'the other party . . . caused the mistake . . . and it was contrary to reasonable commercial standards of fair dealing to leave the mistaken party in error'. I also think it would have been useful to clarify in the comments that a person who makes a mistake when interacting with a web site or when sending an e-mail can avoid the consequences by immediately informing the other party of the mistake and thereby preventing the other party from reasonably acting in reliance on the contract.

Of course, a wise judge would come to the same conclusion by simply applying the present general provision about mistake in Article 3.5, but express guidance on this matter in the comments would have helped to spare the judge unnecessary doubts.

2. 'Writing', 'dispatched' and 'oral'

The definition of 'writing' given in the 1994 version of the UNIDROIT Principles has survived the revision. It is a good enough definition, although somewhat circular. It refers to 'any mode of communication that preserves a record . . .', but since it is highly uncertain what a 'record' is, the answer remains unclear. However, given the small number of occasions on which the term 'writing' is used in the 2004 version, this is more of an academic than a practical problem.

The 2004 version of the UNIDROIT Principles does not define the terms 'dispatched' and 'oral' in an electronic setting, despite the use of these terms in the text and the fact that they have caused some uncertainty over the past fifteen years. On reflection, it was wise not to do so. As far as the term 'dispatched' is concerned, there would now appear to be a common understanding that the definition given in the UNCITRAL Model Law on Electronic Commerce is correct: a message is 'dispatched' when it leaves the sender's server. It may be that the term 'oral' is more controversial, but the only instance in which it is used—Article 1.10(3)—is hardly likely to cause problems related to the exact definition of the term.

V. End remark

The drafters of the UNIDROIT Principles are to be congratulated for the success of their achievement and the importance the Principles have already acquired after ten years. They must also be congratulated for their useful and modern approach to e-commerce—minimalist and truly media neutral.

Tribute should also be paid to the close relationship between UNIDROIT and ICC. Not only do the two organizations share a common approach to e-commerce, but ICC's references to the UNIDROIT Principles in their Model Contracts are likely to be of benefit to international business and contribute on a wider scale, alongside legislation and conventions, to the harmonization of contract law and practice worldwide.