

ELECTRONIC COMMUNICATION IN INTERNATIONAL SALE AND UN CONVENTION ON CONTRACTS FOR THE INTERNATIONAL SALE OF GOODS (CISG) 1980

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Abstract

Most of the International Sale contracts are formed by electronic means of communication in today's international business and trade. Sharp development of modern electronic communication technologies provides a challenge to the traditional rules of contract law. Formation of contract in international sale is similar to the rules of traditional contract formation rules. Application of the provisions of the UN Convention for the International Sale of Goods 1980 (CISG) are analysed in this article in relation to the usage of these methods of electronic communications technologies. The different approaches to the time and place of contracting as well as the formalities required are discussed and applied in this context. The research has discovered that the CISG forms a coherent body of uniform contract law in international sale world-wide, well suited to deal adequately with the modern electronic communications technologies.

Keywords: CISG, international sale, electronic communication, formation of contract, Dispatch Theory.

1. Introduction

The United Nations Convention on Contract for International Sale of Goods (CISG) 1980⁶⁷ was adopted quarter of century ago while advanced electronic communication technologies were not available. Since the text of the CISG was adopted the method of business communications has changed drastically by the introduction of newer communication technologies such as email and electronic data interchange (EDI).⁶⁸ By introducing electronic means of communication businesses enjoy major benefits such as reduced cost, increased processing speed, reduced errors and improved relationships with business partners. At present in most international sale contract the common documents exchanged via EDI are purchase orders, invoices and Advance Ship Notices. The most

⁶⁷ United Nations Convention on Contracts for the International Sale of Goods, Apr. 11, 1980, U.N. Doc. A/CONF.97/18, Annex I, reprinted in 19 I.L.M.668.

⁶⁸ Assaduzzaman, doi:10.1016/j.clsr.2016.07.012., Legal Issues in the Application of CISG in Online Sale (e-commerce) Contracts, Computer Law & Security Review: The International Journal of Technology Law and Practice (2016), doi:10.1016/j.clsr.2016.07.012.

common documents exchanged via EDI are purchase orders, invoices and Advance Ship Notices. It is clear from the wording of article 13 that these applications were not available at the time as it only refers to telegram and telex.⁶⁹

The use of technological means raises not only issues related to the applicability of the CISG, but also in respect to its material provisions. Indeed, the parties may negotiate an agreement electronically: one of them might make, withdraw or revoke an offer by means of an electronic message, and the other party might make or revoke an acceptance using the same means. In those cases, the issue is whether the CISG allows the parties to use electronic communications in the process of formation of the sale contract. After the contract is formed, the parties might still use electronic communications to interact with each other. Then, the issue is whether the effects attributed by the CISG to certain communications made after the conclusion of the sales contract will also be given to electronic communications. The analysis of these issues requires a prior review of the general rules of the CISG in respect to communications between the parties in light of the technological developments.

CISG as a uniform piece of legislation for international sale contracts, one of the most important concern is that it is impossible to be amended as needed. The challenges posed by these new communication technologies in international sale contracts offer an excellent opportunity to analyse whether that prediction was accurate or not. The article will analyse the contract formation issues covered by the CISG in the context of the use of these newer communication technologies and their applications to establish whether any specific problems arise that need to be addressed by parties who use these applications in international sale contracts. This will also address the issue of sphere of application and the requirements stipulated for communications to be valid and effective under the CISG. Further it will examine the form requirements in international sale contracts such as writing and signature.

2. Electronic communications in International Sale Contracts

Most of the international sale contracts are communicated through electronic means of communication technology in today's business world. Function of electronic communication technology in international sale contracts is rather faster compared to traditional postal communication. Business corporations mostly use email and other forms of online forms uploaded in their website to communicate each other for international sale. In such dealings most often there is no face-to-face communication or negotiation between the parties. However, there are some new applications which are more direct than others such as online video calls provided by skype, google hangout, facebook, viber, Whatsapp,

⁶⁹ Schlechtriem P(ed) Commentary on the UN Convention on the International Sale of Goods (1998 Oxford) p. 13.

etc.⁷⁰ This types of communication technologies are considered to be next to the face to face negotiations as the communication takes place directly in time between the parties without any real time pause. Any uncertainties, ambiguities or even breaks in communication can be clarified immediately by the parties.⁷¹ This is not the case where there is a break in place and time between the communications of the different parties. In electronic communications there is this gap in time and space, but the gap in time is much smaller than it used to be with traditional postal communication. In electronic communication the participation of third parties such as service providers is much less apparent than is the case with either post or telegram.

The analysis of offer and acceptance which forms part of the structure of the CISG⁷² is often difficult to make in complicated negotiations where there is a great deal of communication between the parties as it is often the case in international trade.⁷³ This is further complicated by the introduction of methods of communication such as electronic means of communication which requires a more flexible approach than the strict offer-acceptance dichotomy. It seems however that with the provisions contained in the Convention, there is enough flexibility to evade the constraints of forcing communications into either the offer or acceptance sculpture.⁷⁴ The question as to when communications will become valid and binding in the case of parties who are not in touch directly, has been solved in a number of different ways. Each of these approaches in essence determines which of the parties carries the risk of a communication being lost, destroyed or damaged in the transition process. Unless determined by agreement between the parties themselves⁷⁵ there are following four main theories which may be applied.⁷⁶

⁷⁰ This types of online communication system works as VOIP system. One can call any user just by entering their user/account name to call to any account or phone, anywhere in the world, using the ordinary telephone network (PSTN).

⁷¹ *Wright B* The Law of Electronic Commerce (Looseleaf Updated July 1996 Boston) ss.2.1-2.8, 5.1-5.6; *Soergel/Wolf* s.130 Rn 3; *Williston* s.6.34; *Restatement (Second) of Contract* ss.64-65; *Entores Ltd v Miles Far East Corp* [1955] 2 All ER 327.

⁷² *J Honnold, Uniform Law for international sales under the CISG*, (3rd ed.1999), Kluwer Law International, The Hague,p. 148.

⁷³ *Honnold, JO Uniform Law for the International Sales under the 1980 United Nations Convention* (2nd ed, 1991 Deventer) p. 132.

⁷⁴ *Honnold, 2nd edn.* p.132.

⁷⁵ In the case of an offer the offeror may of course one-sidedly determine what form of communications must or may be used to effect an acceptance. Any agreement between the parties will of course take precedence over these principles. See *vCaemmerer/Schlechtriem/Schlechtriem* Art 18 p. 5.

⁷⁶ *Corbin* ss.3.23-3.24; *Christie Contract* 75-77; *Staudinger/Magnus* Art 24 p. 1; *vCaemmerer/Schlechtriem/Leser* Art 26 p. 11; *Cape Explosives Works Ltd v SA Oil & Fat Industries Ltd (1)* [1921] CPD 244; *Amcoal Collieries Ltd v Truter* [1990] 1 SA 1(A) 4; *Münchner Kommentar/Förschler* s.130 (1) p. 3-4.

First, the parties must receive the content of the information directly from the other parties. This is known as the information theory which determines that a communication only becomes effective once the recipient takes notice of the content of the communication.⁷⁷ This theory is usually applied to direct forms of communication such as VOIP communication or telecommunication, video conference calling system and may often also be the default position in cases of uncertainty.⁷⁸ Under direct forms of communication parties has the opportunity to clarify any ambiguity or information gap.

Second, the reception theory which determines that a communication only becomes effective once the recipient has actually physically received the communication or it has at least been made available to it, even though it has not yet taken notice of the content. In terms of this so-called “Zugangstheorie”,⁷⁹ the deciding moment is dependent upon the communication being available to the recipient in the sense that it has been placed at its disposal in a place in which it would expect to receive communications in the normal course of business and in a manner which is comprehensible to it. It is usually used in regard to indirect forms of communication such as Fax, telegram, telex and in modern age email and has its origin in civil law systems.⁸⁰

Third, the postal rule or dispatch theory in terms of which the communication is effective once it has been posted or sent by the sender. This is usually applied to cases of indirect communications and has its origins in the Common Law where it was introduced to handle the issue of revocability of offers. This theory is applicable both in English and American law subject to the condition that the post or similar medium of communication was prescribed or authorised specifically or impliedly by the offeror and that acceptance was properly dispatched. In some instances the emphasis has moved from the authorisation of the form of communication to the question of reasonableness.⁸¹ At present when an email is send by the sender it falls under dispatch theory and the communication is considered effective.

Forth, the formulation theory in terms of which the communication becomes effective the moment that the responder begins to formulate its communication. This theory is usually only used in conjunction with the postal theory to prevent a party from retracting an offer or communication once the other party has started

⁷⁷ Siegfried Eiselen, ‘Electronic Commerce and UN Convention on Contracts for the International Sale of Goods (CISG) 1980 (1999) EDI Law Review’ p.21.

⁷⁸ *Van der Merwe S* (ed) *Contract - General Principles* (1993 Cape Town) p.43; *Amcoal Collieries Ltd v Truter* 1990 1 SA 1(A) 4.

⁷⁹ Del Pilar Perales Viscasillas, ‘Recent Development Relating To Cisg: Contract Conclusion Under Cisg’ (1997) 16 J.L. & Com. P. 315. (The Receipt Theory is known as *Zugangstheorie* or *Empfangstheorie* in the German Legal system).

⁸⁰ *Restatement (Second) of Contract* s.68; *EntoresLtd v Miles Far East Corp* [1955] 2 All ER 327.

⁸¹ *Cape Explosives Works Ltd v SA Oil & Fat Industries Ltd (1)* [1921] CPD 244; Honnold, *Uniform Law 2nd edn.* p. 162;

to respond to that communication.⁸² In current electronic communication system formulation theory works when an email is received and replied to the sender.

Although these theories or principles were developed first and foremost to deal with the risks of communications in the contract negotiations phase, they are generally applied today to all forms of communications between contractual parties including international sale contracts. This theory applies to the electronic communication in international sale similarly as postal rule depending on which forms of electronic communication parties to the contract resorted to.

In application of electronic communication in international sale contracts, a strong case can be made out for the use of one of the variants of the reception theory rather than the information or dispatch theory in the absence of any provision by the parties. There are conflicting approaches to this issue in the English and American law. In English law this view is accepted and used whereas in the United States the mailbox rule is also used in regard to electronic message transfers such as telex, fax and even telephone.⁸³ If electronic communication technology for instance, is being applied, it is quite easy to determine when a party had access to a message, or when it had received it.⁸⁴ On the other hand it may be very difficult to determine when it actually became informed of the existence or content of the message in a subjective sense. Very often an electronic order will be acknowledged by the seller's system and executed by its plant without any person with executive powers actually taking notice of the communication. In these circumstances it is unrealistic to apply the information theory. This theory also provides opportunities for the recipient to deceive its opponent and it encumbers the sender with an almost impossible burden of proof.

In most circumstances it is fairer to both parties to apply an objective test, namely the reception theory rather than the subjective information theory when dealing with indirect forms of communication. Whether electronic communication technology, fax, telex or e-mail, it is fairly easy to determine objectively when a party actually received a message or had access to it.⁸⁵ The choice between strict reception, where actual reception is required, and the "Zugangstheorie", which only requires access, will vary from situation to situation. As a general rule it may be argued that the "Zugangstheorie" is probably the fairer solution for most situations if it is made subject to the condition that the message must be readable or processable by the recipient. It

⁸² *Cape Explosives Works Ltd v SA Oil & Fat Industries Ltd (1)* [1921] CPD 244; See also Christie *Contract* p.76.

⁸³ See *Entores Ltd v Miles Far East Corp* [1955] 2 All ER 493; see also *United States v Bushwick Mills Inc* (1947 CA2 NY) 165 F2d 198; *Metropolitan Air Service v Penberthy Aircraft & Leasing Co* (1986 SD NY) 648 F Supp 1153.

⁸⁴ Assaduzzaman, doi:10.1016/j.clsr.2016.07.012.

⁸⁵ *Wright B* The Law of Electronic Commerce (Looseleaf Updated July 1996 Boston) s.5.5 and s.6.4.

has the advantage of being objective and it provides the least opportunity for either party to unfairly manipulate the time of the dispatch or reception of the message.

In the case of an email, fax or telex, the offer, acceptance, order or notice will be legally effective once it has been received by the recipient's a fax machine in a processable form; in the case of direct electronic communication, the offer, acceptance, order or notice will be legally effective once it has been received by the third party network operator and placed in the recipient's electronic mailbox, when store and retrieve communication is used, or where it has been received by the recipient's computer system; and in the case of an e-mail, the offer, acceptance, order or notice will be legally effective once it has been deposited in the recipient's electronic post box or usually known as sent mail.

In situations where communications are made between parties *inter absentes*, the receipt and postal theories are competing theories with different justifications for the use of the one or the other. The main consideration in the application of these theories is the distribution of the risk of the communication being delayed, destroyed lost or changed during the transmission process. Whereas the usual point of departure in the law of contract is the information theory, the point of departure in communications *inter absentes* is handled differently in common law and civil law countries. In common law countries the dispatch or mailbox rule is used to account for difficulties in regard to the revocation of the offer. In civil law countries the receipt principle is normally used as offers are normally not revocable. However, when judging the consistency of the solutions followed by the CISG, different considerations need to be applied. The use of either principle should be based on the principle of fairness between the parties considering the risks involved in the transmission of the communication. In this regard the following factors may play a role.

First consideration that needs to be taken into account is whether the message is an initiating communication or a responsive communication. An initiating communication is a message that is sent by one party to another where there have been no preceding dealings between them, or even if there had been prior dealings, where a new relationship is to be formed. There is therefore no reason for the other party to expect a communication. Responsive communications on the other hand are either messages sent in response to a prior message by the other party as in the case of an acceptance or where a communication is sent in response to an act by the other party such as sending a notice of default where the other party is in *mora* or has performed inadequately. If there is a concurrent relationship in terms of which the message is sent the message can either be initiating, for instance an order within a just-in-time arrangement or responsive in the case of notice of default.

In the case of initiating communications it is only fair that the party that commences the communication bear the risk of the chosen method of

communication.⁸⁶ Therefore if the parties have had no dealings and a party wants to send an offer or notice to the other party, the reception theory should apply. It is in the hands of the initiating party to ensure that an effective channel of communication is used. When the message is of a responsive nature fairness still dictates that the communication only become valid and binding once it has been received by the recipient unless there are other factors which militate against this. For instance, where a message is sent to establish certain rights after breach of contract, the risk of the communication should be transferred to the culpable party rather than the innocent party and therefore the dispatch rather than the reception theory should apply.

Second, it must be asked whether there has been a course of dealing between the parties from which a usage or practice between the parties may be implied if they have not regulated the matter in an Interchange Agreement.⁸⁷ If such a course of dealing can be established from which the relevant deductions may be made, then it should take precedence over any of the theories. Similarly if an Interchange Agreement specifically prescribes the methods of communications and when they will become valid, that should be observed.⁸⁸

Third, it must be asked whether either party is at fault, resulting in the need for the Communication by the innocent party. In such cases it may be fair to displace the risk of the communication to the culpable party. If the culpable party was at fault is dispatching the communication it would be unfair to hold the innocent party responsible for it.

Fourth, are there particular risks involved in the transmission of the communication? If the means of communication is particularly hazardous, then principle of equity requires that the reasonableness of the use of that method of communication be weighed according to the advantages and disadvantages of using it. The fact that one of the parties stipulated the manner of acceptance as peremptory may then play a decisive role. The consequences for either party in the event of a failed transmission must be considered. It may be fairer that the party who bears the least risk, bear the risk of the method of communication.

A further important factor is the level of control that a party has over its communication and its success or failure. If the party is in a position to monitor the success of a communication with relative ease and little cost, then the principle of equity may dictate that this party should bear the risk. Lastly, generally accepted practices in the specific trade should also be considered in determining the approach that best serves the interests of the parties and fairness in general.

⁸⁶ See *Williston* s. 6.35 for the reasons usually advanced for the application of the mailbox rule.

⁸⁷ Siegfried Eiselen, *Electronic commerce and the UN Convention on Contracts for the International Sale of Goods (CISG) 1980*, (1999) 6 EDI L. REV, p. 21, 36.

⁸⁸ See For Example, Sections 2 and 3 of the South African Model Interchange Agreement (published as by the South African Bureau of Standards).

Who should bear the risk of failed communications in international sale contracts should therefore be decided after the relative position of each of the parties in regard to the communication has been considered. In the usage of modern communications technologies the success rate of communications is very high and receipt of the messages moves ever closer to the time of dispatch so that the exact time when a message becomes effective has become less and less relevant in regard to the start of time periods. Although it is quite certain that messages will be duly and properly delivered with these applications, now and again there are glitches which may have serious effects for the parties.

Given the above one must conclude that in accordance with the position in most legal systems, the point of departure in regard to the determination of the time and place that a communication will become effective in international sale contracts, that the receipt or "*Zugangstheorie*" offers the fairest and most realistic point of departure in the absence of any special circumstances. It should be used also in those circumstances where the mailbox rule has traditionally been used as the reason for that rule all but falls away with modern communications technologies. However, where there are special circumstances then departures from the general rule should be allowed. In terms of the considerations listed above, it seems that there are only two instances where a deviation from the general rule should apply, namely where the parties have specifically agreed to that deviation or where the receiver of a communication is the culpable party necessitating the communication.

3. Formation of the Contract in e-commerce under CISG

Draft history suggests that Articles 11 and 13 of the CISG were inserted in the "General Provisions" chapter of the first part of the Convention, suggesting that they are intended to play a role on the interpretation of the provisions related to formation of the contract, obligations of the parties and other matters contained in the second and third parts of the CISG.⁸⁹ Indeed, they are the basis of the principle of informality, which governs the interactions between the parties, either before or after a contract is concluded. Article 13 states it expressly by presenting an explanation of a term "writing" that appears in other parts of the CISG; Article 11, although phrased in a manner that limits its applicability to formation of the contract, has an important role in other matters such as evidence of writing and witness statement to prove writing requirement.

Once it was established that a contract can be formed by electronic means under Article 11 of the CISG, certain issues that arise in connection of the use of more modern communications methods for the conclusion of a contract should be examined.

⁸⁹ Assaduzzaman, doi:10.1016/j.clsr.2016.07.012.

Initially, it should be noted that the provisions of the CISG relating to formation of contract rely on a rigid offer acceptance structure, which causes some difficulties in “complicated negotiations where there is a great deal of communication between the parties” and when they use electronic means of communication technologies which requires a more flexible approach than the strict offer acceptance dichotomy”.⁹⁰ Nevertheless, it seems that the CISG provisions provide “enough flexibility to evade the constraints of forcing communications into either the offer or acceptance model”;⁹¹ one example of a rule that provides flexibility is Article 18(1), which provides that “a statement made by or other conduct of the offeree indicating assent to an offer is an acceptance”.

Having said that, the issues relating to electronic formation of contracts under the CISG may be

Explored: first, is there an offer when a seller uses some technologies to market her products? Second, when does an electronic communication relating to the formation of contract produce effects, *i.e.*, what is the exact moment in which a data message “reaches” the addressee under Article 24 of the CISG? Third, how to fit the more modern methods of communication technologies in Article 20(1), which sets the moment when the period of time fixed by the offeror to accept an offer begins to run?

3.1. Form Requirements in International Sale Contracts

In international sale contracts, there are usually three different types of formalities that may be required namely writing, signature and some kind of third party authentication or involvement such as notarial execution endorsement by the commissioner of oaths. In the context of international sales contracts for movables only the first two requirements are relevant.⁹² These formalities are required for two purposes, namely legal certainty and authentication and may be required either by statute or by the parties themselves. Many written contracts contain a standard clause which states that no amendments to the contract will be valid or binding unless reduced to writing and signed by both parties,⁹³ which makes the use of those formalities mandatory. It may also cause grave difficulties in regard to the use of especially e-mail and other forms of electronic

⁹⁰ Siegfried Eiselen, *Electronic commerce and the UN Convention on Contracts for the International Sale of Goods (CISG) 1980*, (1999) 6 EDI L. REV, p. 21, 36.

⁹¹ Siegfried Eiselen, p. 2324.

See also John O. Honnold, ss. 132.1, 145 (stating that “the Convention accommodates both the simple exchange of two communications and also the development of a contract when it is impossible to isolate an ‘offer’ and ‘acceptance’”).

⁹² *Dicey & Morris, Conflict of Laws*, (15th edn. Sweet & Maxwell 2012) p. 1255; Wright *Electronic Commerce* ss.16.1.

⁹³ Van der Merwe *Contract* 117-119.

communications because it may be difficult or impossible to comply with the signature requirement.⁹⁴

Whether e-mail, fax and other forms of electronic communications messages which are not printed out constitute writing especially in the context of statutory formality requirements is differently handled in different jurisdictions.⁹⁵ In many jurisdictions an electronic message in whatever form is also regarded as writing, provided that it is readable in some form for a human being, even if it is only on the screen. In the United States this progressive and realistic attitude seems to prevail.⁹⁶ In some other jurisdictions however, there is doubt about this issue.⁹⁷ In South African law for instance, a statutory requirement of writing is not fulfilled if the “document” is only in electronic form.⁹⁸ A fax must be printed out before it can constitute writing. Once it has been printed out it is regarded as a document, usually a copy of the original that was faxed. If it is required that both parties must sign the document, it is sufficient if the sender signs the original, faxes it and the recipient then signs the copy printed out. The two documents together then form the original contract.⁹⁹

In relation to article 13 of the CISG telegrams and telexes are included under the term “writing”.¹⁰⁰ In both of these forms of communications one deals with applications where the recipient receives a print-out of the message. It is therefore available in a physical format and not purely electronic format. As electronic communications such as e-mail and other forms of electronic communications were unknown at the time, it must be established whether they can be included in the expanded definition of article 13. It is submitted that article 13 contains a gap, i.e. fails to address a situation which is clearly covered by the Convention and that gap-filling interpretation is necessary in this case.¹⁰¹

Although telex and telegram has become a totally outdated concept in modern business life where fax, e-mail and other forms of electronic communications provide much more effective means of communication. When interpreting this article, the principle of freedom of formalities and freedom of contract suggests that an inclusive interpretation is in order. This means that article 13 of the CISG must be read to include all electronic forms of communication as well.¹⁰² Thus, a fax, an e-mail or a message from other forms of electronic communications

⁹⁴ See Wright *Electronic Commerce* ss.16.3.2; Fritzemeyer & Heun 1992 *CR* 131; Eiselen 1995 *SA Merc LJ* 10-11; Heinrich 1994 *CR* 120; .

⁹⁵ Honnold *Uniform Law Rn* 189-190.

⁹⁶ Baum & Perrit *Electronic Contracting* 337-341.

⁹⁷ See Wright *Electronic Commerce* ss. 16.3.2; Fritzemeyer & Heun 1992 *CR* 131; Eiselen 1995 *SA Merc LJ* 10-11; Heinrich 1994 *CR* 120.

⁹⁸ Eiselen 1992 *THRHR* 214-217.

⁹⁹ Christie *Contract* 125; Van der Merwe *Contract* 119; *Craib v Crisp* [1984] 3 *SA* 594 (T); *Johnston v Leal* 1980 3 *SA* 927 (A).

¹⁰⁰ Assaduzzaman, doi:10.1016/j.clsr.2016.07.012.; Honnold *Uniform Law Rn* 180.

¹⁰¹ *Bernstein & Lookofsky* 24.

¹⁰² Assaduzzaman, doi:10.1016/j.clsr.2016.07.012.

should be regarded as writing where writing is required.¹⁰³ However, because the CISG in relation to Articles 12 and 96 allows countries to exclude Article 11 which stipulates freedom of form, and to substitute their national law in regard to writing, whether electronic communications will be valid as writing depends on the law of the country in question and not on the interpretation of the CISG.¹⁰⁴

Authentication by signature is a bigger problem not just in relation to the CISG but also other international Conventions as well.¹⁰⁵ In most jurisdictions it seems that the requirement of signature is only met if a physical signature is affixed to a paper document.¹⁰⁶ So called electronic signatures do not suffice unless specific provision for electronic authentication has been made. The fact that there are applications available today which make electronic signatures more secure for purposes of authentication than hand written signatures have not yet found favour with most legislators where formalities are concerned. The CISG does not require signature in any case and no country is entitled to make an exception as articles 12 and 96 only apply to the formality of writing. Therefore, in international sale contracts the requirement of an electronic signature will only be relevant where the parties themselves have required authentication by signature. As this requirement often appears in standard terms and conditions it may prove problematic in such circumstances.

The point of departure of the CISG in regard to formalities is that no formalities are required.¹⁰⁷ International sales contracts can therefore be concluded in any manner seen fit by the parties, including any of the newer communications applications.¹⁰⁸ However, where parties are using other forms of communication, they must be cautious of their own standard terms which often contain clauses subjecting them to these formalities.¹⁰⁹ In these cases it must either be agreed between the parties that electronic means of communications will be regarded as writing and that the alternative prescribed authentication procedures will be recognised as “signatures”. This can easily be done in the standard contracts or in the Interchange Agreement between the parties.

4. Electronic Communication under CISG

The CISG contains a number of provisions which deal with the validity and timing of communications. Part II of the Convention deals with the formation of the contract, in other words, with offer and acceptance and the communications

¹⁰³ Honnold *Uniform Law* Rn 130; *Bernstein & Lookofsky* 24.

¹⁰⁴ Schlechtriem *UN-Kaufrecht* p. 68.

¹⁰⁵ Article 2 of the *Convention on the Recognition and Enforcement of Foreign Arbitral Awards* 1958.

¹⁰⁶ See Wright *Electronic Commerce* ss.16.4-ss.16.5.

¹⁰⁷ *Bernstein & Lookofsky* 30-31; *Stern Erklärungen* Rn 143; Schlechtriem *UN-Kaufrecht* Rn 64.

¹⁰⁸ Assaduzzaman, doi:10.1016/j.clsr.2016.07.012.

¹⁰⁹ Honnold *Uniform Law* Rn 184-185; Schlechtriem *UN-Kaufrecht* Rn 66.

exchanged in that context that is pre-contractual communications. Part III deals with the situation where the contract is already in existence and there is a contractual relationship that is post-contractual communications. Communications during this period pertain to the rights and duties of the parties, performance, and breach of contract and the exercise of contractual remedies.

It is important to determine when and sometimes also where communications become effective. The point in time when they become valid and effective may determine other time periods which may commence. For instance, an offer may stipulate that performance must be made within fourteen days of the conclusion of the contract, or in terms notice of article 39 of the CISG, notice of lack of conformity of goods must be given within a reasonable time of the discovery of such a lack of conformity.¹¹⁰ Sometimes a few days may not be important in the calculation of periods, in other instances a few hours may be decisive. It is therefore important to be able to determine exactly when a communication takes effect.¹¹¹ It may also be important therefore to determine where the communication becomes effective as it may be decisive in terms of determining the applicable legal system, for instance in regard to formalities.

The Convention uses the terms *reach* and *received* in regard to the sender and *send, give, made* and *dispatch* in regard to the sender for the acts involved in exchanging communications between the parties to international sale contracts. The term *reach* is defined in Article 24 of the CISG for the purposes of Part II, but *received, send* and *dispatch* are not defined and must be interpreted according to the usual rules of interpretation used for the Convention. Most commentators professed the same meaning as to *reach* and *receive* namely the meaning defined in article 24 of the CISG. It seems that nothing must be read into the difference in terminology used here in the Convention.¹¹²

4.1. Time and Place of Communication

When a communication becomes effective and valid usually depends on the approach or theory used by the courts or legal system concerned. Thus, if the expedition theory is used, the communication will become valid, and any time periods will commence when the communication is sent, posted or dispatched.¹¹³ If the “*Zugangstheorie*” is applicable the relevant moment will be when the

¹¹⁰ Honnold *Uniform Law* p. 255-260.

¹¹¹ Schlechtriem *UN-Kaufrecht* p. 154.

¹¹² Honnold *Uniform Law* p. 179.

¹¹³ *Uniform Commercial Code* ss.1-201; *Restatement (Second) of Contract* ss. 64-65; *Adams v Lindsell* [KB 1818] 106 ER 250; *United States v Bushwick Mills Inc* (1947 CA2 NY) 165 F2d 198; *Metropolitan Air Service v Penberthy Aircraft & Leasing Co* (1986 SD NY) 648 F Supp 1153; *Lipschutz v Gordon Jewelry Corp* (1974 SD Tex) 373 F Supp 375; *Ward Manufacturing Co v Miley* (1955 2nd Dist) 131 Cal 2d 603.

communication becomes available to the recipient.¹¹⁴ In the case of e-mail that will be as soon as the message is deposited in the recipient's mailbox and he is able to retrieve it; or in the case of other forms of electronic communications as soon as the Value Added Network has either passed the message on or deposited it in the recipient's mailbox for retrieval whichever is earlier.

Article 20 of the CISG is the relevant provision in the Convention¹¹⁵ in relation to determining the time. It determines that "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 telephone, telex or other means of instantaneous communication, begins to run from the moment that the offer reaches the offeree".¹¹⁶

In article 20 telegram is coupled with letters as non-instantaneous means of communication, whereas telex is coupled with telephone and other possible methods of instantaneous means of communication. That the latter term does not refer to e-mail, other forms of electronic communication technologies or fax is clear from the fact that these applications were not in existence or were not yet widely used at the time that the CISG text was drafted. These applications can however easily be equated with telex or video conference call as virtually instantaneous methods of communication. Thus a time period fixed in an offer made by e-mail, other forms of electronic communication technologies or fax ought to begin to run as soon as the communication becomes available to the recipient according to Article 20 of the CISG.

4.2. Contractual Communication

The Convention does not directly make provision for electronic communications and it will depend on the rules of interpretation whether this gap can be filled.¹¹⁷ Where there is a gap in the Convention, it must be decided whether the situation falls inside the expected field covered by the Convention, in case there is a gap which must be filled through interpretational methods, or if it falls outside that field in which case there is no gap.¹¹⁸ In such a case the situation is resolved by reference to the applicable legal system according to the private international

¹¹⁴ John 'Grundsätzliches zum Wirksamwerden empfangsbedürftiger Willenserklärungen 1984 pp. 385-412.

¹¹⁵ Murray J 'An essay on the formation of contracts and related matters under the United Nations Convention on Contracts for the International Sale of Goods' 1988 J of L & Comm, p.20-23; Bernstein & Lookofsky 45-46.

¹¹⁶ Article 20(1) of the CISG.

¹¹⁷ Article 24 of the CISG.

¹¹⁸ Staudinger/Magnus Art 7 Rn 9, 38; vCaemmerer/Schlechtriem/Herber Art 7 pp. 8-9, 27-42.

law rules.¹¹⁹ In the case of a gap, article 7 provides guidelines for the interpretation of the Convention.¹²⁰

Article 7(1) of the CISG stipulates that in the interpretation of the Convention its international character must be observed as well as the observance of good faith in international trade. Where an issue is not directly dealt with, but falls within the sphere of application of the Convention, then such a gap must be filled according to the general principles underlying the Convention.¹²¹ Only if these general principles provide no solution, must the issue be referred to the legal system applicable according to the rules of private international law.¹²² In the case of interpretational techniques it is generally recognised that analogical interpretation is allowed to fill gaps in the Convention.¹²³

It is clear that in the case of electronic communications there is only reference to telex and none of the other forms of communication with the result that the existence of a gap can be assumed. The content matter not dealt with clearly falls within the scope of the Convention because it deals with other forms of communication and there is no indication that the Convention intended to exclude any specific kind of communication. This assumption is further supported by the fact that the methods of communication under discussion were largely non-existent at the time of the acceptance of the Convention.¹²⁴

Once the contract is formed, the parties may continue to interact with each other by electronic means. Many of the substantive provisions dealing with obligations of the parties and other matters require that one party communicates a given fact to the other one; for instance, to rely on the lack of conformity of the goods, the buyer must give the seller notice of the non-conformity.¹²⁵ Since the principle of informality is also extended to these provisions of the CISG, it is clear that all those interactions can be made through electronic means. The issue in respect to matters of formation of the international sales contract, is to determine which party bears the risk in case the communication fails. Also, there is another kind of contractual communication not related to the performance of the obligations by

¹¹⁹ Art 7(2) of the CISG; See Honnold *Uniform Law Rn* 96-98; *Staudinger/Magnus Art 7 pp.* 1-2, 38-39;

¹²⁰ Honnold *Uniform Law Rn* 96; *Bernstein & Lookofsky* 23-27; *vCaemmerer/Schlechtriem/Herber Art 7 p.* 27.

¹²¹ Article 7(2) of the CISG; Magnus U 'General Principles of UN-Sales Law' 1997 *Intl Trade & Bus L Annual* 33-56; Diedrich F 'Lückenfüllung im Internationalem Einheitsrecht' 1995 pp. 353-364;

Ferrari F 'General Principles and International Uniform Commercial Law Conventions: A Study of the 1980 Vienna Sales Convention and the 1988 Unidroit Conventions' 1997 *Uniform pp.* 451-473;

¹²² *Bernstein & Lookofsky* 15-16; *vCaemmerer/Schlechtriem/Herber Art 7 Rn* 31; Honnold *Uniform Law Rn* 102.

¹²³ Honnold *Uniform Law pp.* 60.4, 245.1; *Bernstein & Lookofsky* 25.

¹²⁴ Honnold *Uniform Law pp.* 132.1.

¹²⁵ Article 39 of the CISG; Article 67(2)), 32(3).

the parties, but rather the eventual modification or termination of the agreement.¹²⁶

5. Dispatch Theory under Article 27

Article 27 states the general rule on allocation of risks of delays or errors in contractual Communications. It provides that unless otherwise expressly provided in this Part of the Convention, if any notice, request or other communication is given or made by a party in accordance with this Part and by means appropriate in the circumstances, a delay or error in the transmission of the communication or its failure to arrive does not deprive that party of the right to rely on the communication. This was upheld by the Provincial Court of Appeal, *Naumburg*, Germany stating that “the sender may rely on the original content of his communication as long as he sent the notice by means appropriate in the circumstances, even if it reaches the addressee too late, altered or not at all”; the court found, based on the testimony of a witness, that an effective notice declaring a contract avoided was sent.¹²⁷ By providing that a party might still rely on the communication even if there is delay or error in the transmission or if it fails, Article 27 adopts the dispatch theory as a general rule.¹²⁸

The idea that underlies Article 27 is that the party who should bear the risk of transmitting the message is the “one who, as a result of his deviation from normal performance, caused the statement to be sent”.¹²⁹ For example, if the reception theory were adopted, an error in transmitting the buyer’s notice that the goods are non-conforming would deprive the innocent party (buyer) of the right of relying on the nonconformity.¹³⁰ However, there are a few exceptions to this rule, as it can be inferred from the wording of Article 27.

5.1. Exceptions to the dispatch rule

The first clause in Article 27 states: “[u]nless otherwise provided”. Indeed, in the third part of the CISG there are several provisions that condition the effectiveness of a notice, request or communication to the *receipt* by the addressee. Those provisions are Articles 47(2) which states that notice by the seller that she will not perform within the period set by the buyer; 48(4) states that the request by the seller to remedy the failure to perform her obligations; 63(2) states that the notice by the buyer that she will not perform within the period set by the seller; 65(1) provides that the request by the seller to the buyer

¹²⁶ Article 29(1) of the CISG.

¹²⁷ Case Number 9 U 146/98, available at <<http://cisgw3.law.pace.edu/cases/990427g1.html>> (last visited August 21, 2016).

¹²⁸ Siegfried Eiselen, *Electronic commerce and the UN Convention on Contracts for the International Sale of Goods (CISG) 1980*, 6 EDI L. pp.V. 21, 36 (1999) p.32.

¹²⁹ Peter Schlechtriem, *UNIFORM SALES LAW: The Unconvention on Contracts for The International Sale Of Goods* (Vienna, Manz, 1986) p. 62.

¹³⁰ Article 39 of the CISG; John O. Honnold, *Uniform Law For International Sales Under The 1980 United Nations Convention* ss. 4 3 , 3 2 3 4 (Kluwer L a w, T h e Hague, 3 d ed. 1 9 9 9) p.189.

to specify the form, measurement and other features of the goods; 65(2) provides the communication of the specification of the goods made by the seller; and 79(4) provides notice of an impediment to the performance of the contract. The issue here is how to define *receipt*, since the applicability of the definition of “reaches” contained in Article 24 is limited by the text of this provision to issues of formation; however, it is contended that the Article 24 definition is also applicable to these exceptions. Stating that “the analogy between the time when a communication ‘reaches’ an addressee under Part II and the time when there is ‘receipt’ of a communication under Part III is striking” , which justify extension of the principle of Article 24 to Part III”¹³¹.

The other exception lies on the “appropriateness of the means” test. Under Article 27, in case of delay, error or failure, the party sending the notice, request or communication may only rely on it if she has used the “means appropriate in the circumstances”. This was upheld by District Court of *Stendal*, Germany stating that “[a]s soon as *one party* has made the decision to suspend her performance, she is bound to inform the other party without delay, which regularly requires an appropriate sending of the notice as stipulated by Art. 27 CISG”.¹³² The availability of electronic means of communication is a potential source of complications in determining the appropriateness of the means selected; however, in the absence of agreement or practices between the parties, it is very difficult to set *a priori* some guidelines to determine what will be appropriate in a real case. For instance, it is not clear that the mere availability of a faster means of communication would render inappropriate the choice of a slower one.

5.2. Dispatch of electronic communications

The CISG does not define dispatch, not even for more traditional means of communications, such as letters, telegrams and telexes. But since Article 27 of the CISG uses the expression “transmission”, it is possible to infer that a message can be deemed to be sent when it leaves the sphere of control of the seller. The solution of problem of determining “whether there has been in fact a ‘dispatch’ is not within the domain of the CISG, but instead must be resolved by the slow emergence of international uniform standards for electronic commerce on such questions as what constitutes ‘receipt’”.¹³³ This definition has the advantage of being symmetrical to the definition of “reaches” for non-instantaneous and instantaneous *inter absentes* communications, if a message is received when it

¹³¹ E. Allan Farnsworth, *Article 24*, in Biancabonell Commentary on the International Sales Law, p. 201; See also John O. Honnold, p. 179, 202.

¹³² See *Landgericht [District Court] Stendal*, Germany, 12 October 2000, Case Number 22 S 234/94, available at <<http://cisgw3.law.pace.edu/cases/001012g1.html>> (last visited August 21, 2016).

¹³³ Henry Deeb Gabriel, *General provisions, obligations of the seller, and remedies for breach of contract by the seller*, in *Draft Uncitral Digest and beyond: cases, analysis and unresolved issues in the U.N. Sales convention*, p.336.

enters the sphere of control of the recipient, it is logical to assume that it is sent when it leaves the sphere of control of the sender.

Therefore, a letter is dispatched when it is given to the postal service. Similarly, if the sender uses an information system to send it, an electronic message is deemed to be dispatched when it leaves that information system and enters a network over which she has no control. United Nations Convention on the Use of Electronic Communications in International Contracts provides that “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”.¹³⁴ Article 10(1) of the *UNCITRAL Draft Convention on Electronic Communications* provides that “the time of dispatch of an electronic communication is the time when it leaves an information system under the control of the originator or of the party who sent it on behalf of the originator or, if the electronic communication has not left an information system under the control of the originator or of the party who sent it on behalf of the originator, the time when the electronic communication is received.”¹³⁵

Of course, in order to be effective, the message should be able to reach the addressee; for instance, if the sender types the wrong email address of the recipient, the former will not be able to rely on that message. However, unlike the receipt theory, if the message is not comprehensible or unable of being processed by another information system due to a failure in the transmission process, the sender will nevertheless be able to rely on it. The dispatch theory allocates the risk of the failure in transmission. There are situations when a data message will be properly transmitted, but still will not be readable, a risk that is not allocated to the recipient under the dispatch theory. Thus, if the sender chooses a means of communication that issues messages that the recipient is not able to read because of the latter does not have a required computer application, the risk is still on the sender by virtue of the exception of Article 27; the reason is that the choice of a means that results in a message unreadable to the recipient is not “appropriate”. However, a good faith recipient will always communicate/advise the sender that the message could not be read because of certain technical difficulties, if, of course, the recipient can identify the sender.¹³⁶

6. Conclusion

The analysis exposed in this article demonstrated that the substantive provisions of the CISG can also be applicable to electronic communications. Based on the principle of informality, a contract might be formed, modified or terminated by

¹³⁴ Article 15(1) of United Nations Convention on the Use of Electronic Communications in International Contracts (New York, 2005).

¹³⁵ Specifically in respect to fax messages, see Ericson P. Kimbel, *Nachfrist Notice and Avoidance under the CISG*, (1999)18 J.L.&COM. pp. 301, 314.

¹³⁶ Article 27 of the CISG.

electronic means. Furthermore, a definition of “writing” can be derived from Article 13 of the CISG, which clearly encompasses the more modern means of communication mentioned in this paper. This definition might override a conflicting one contained in the domestic law applicable due to the Article 96 of the CISG which provides the option of reservation, giving the parties certainty that, even if one of them is from a reserving State and that State’s law would be applicable by virtue of conflict of laws rules, they can rely on the definition of writing implicit in the CISG.

Moreover, the provisions of the CISG dealing with formation of contracts can also be applied to ecommerce. The definition of offer contained in Article 14 of the CISG addresses relevant issues arising from electronically generated proposals. Article 24 of the CISG, which defines the moment in which a pre-contractual communication produces its effects, can also be applied to electronic communications, once the technologies are properly categorized and technological equivalents for the concepts of “cognisance” and “receipt” are derived from the text of the Convention. The same happens with Article 20(1) of the CISG, which defines the moment in which time limit to issue an acceptance begins to run. Finally, Article 27 of the CISG, which deals with the risk of errors in the transmission of a contractual communications, can also be applicable to ecommerce environment once a technological equivalent of “dispatch” is developed.

Therefore, it is possible to say that the CISG can be applicable to ecommerce transactions and the CISG provisions dealing with formation of the contract and contractual communications are perfectly suitable for the ecommerce environment. Consequently, it is clear that the CISG provides a workable framework for international ecommerce transactions involving sale of goods; the difficulties that may arise are not sufficient to set aside the conclusion that the Convention is able to deal with emerging issues in ecommerce. This is the only Convention which unifies the world’s international sale contracts and its provisions are unique to accommodate technological development in modern communication system.