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Legal aspects of electronic commerce

Electronic contracting: background information

Note by the Secretariat*

Addendum

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* Submission of the present document by the secretariat of the United Nations Commission on International Trade Law was delayed by a few days owing to shortage of staff.

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III. Issues related to the use of data messages in international contracts

B. Time of receipt and dispatch of data messages and contract formation

1. In its present version, the preliminary draft convention is not limited to the formation of contracts by electronic means and deals more broadly with the use of data messages "in connection with an existing or contemplated contract" or "in the context of the formation or performance of contracts" (see A/CN.9/WG.IV/WP.103, annex, art. 1, para. 1). Accordingly, the rules on time of dispatch and receipt of data messages in article 10 of the preliminary draft convention are intended to apply to messages exchanged before or after the conclusion of a contract or even where no contract is eventually concluded.

2. When the parties deal through more traditional means, the effectiveness of the communications they exchange depends on various factors, including the time of their receipt or dispatch, as appropriate. Although some legal systems have general rules on the effectiveness of communications in a contractual context, in many legal systems general rules are derived from the specific rules that govern the effectiveness of offer and acceptance for purposes of contract formation. The essential question before the Working Group is how to formulate rules on time of receipt and dispatch of data messages that adequately transpose to the context of the preliminary draft convention the existing rules for other means of communication.

1. Rules on contract formation

3. Rules on contract formation often distinguish between "instantaneous" and "non-instantaneous" communications of offer and acceptance or between communications exchanged between parties present at the same place at the same time (*inter praesentes*) or communications exchanged at a distance (*inter absentes*). Typically, unless the parties engage in "instantaneous" communication or are negotiating face-to-face, a contract will be formed when an "offer" to conclude the contract has been expressly or tacitly "accepted" by the party or parties to whom it was addressed.

4. Leaving aside the possibility of contract formation through performance or other actions implying acceptance,[1] which usually involves a finding of facts, the controlling factor for contract formation where the communications are not "instantaneous" is the time when an acceptance of an offer becomes effective. There are currently four main theories for determining when an acceptance becomes effective under general contract law, although they are rarely applied in pure form or for all situations.[2]

5. Pursuant to the "declaration" theory,[3] a contract is formed when the offeree produces some external manifestation of its intent to accept the offer, even though this may not yet be known to the offeror. According to the "mailbox rule", which is traditionally applied in most common law jurisdictions,[4] but also in some countries belonging to the civil law tradition,[5] acceptance of an offer is effective upon dispatch by the offeree (for example, by placing a letter in a mailbox). In turn, under the "reception" theory, which has been adopted in several civil law jurisdictions,[6]

the acceptance becomes effective when it reaches the offeror. Lastly, the "information" theory requires knowledge of the acceptance for a contract to be formed.[7] Of all these theories, the "mailbox rule" and the reception theory are the most commonly applied for business transactions.

6. In some legal systems, both theories may be invoked, according to the context.[8] The notion of "receipt" is sometimes understood not only as a question of *time* but also as a question of *form* or maybe even *content* of the communication of acceptance. Thus, for example, the rules of the German Civil Code[9] on the legal effectiveness of legally relevant communications or "declarations of will" upon their receipt have been understood by German doctrine and case law to the effect that a communication has not only to reach the addressee's sphere of control but it also has to be in such a form as to ensure the possibility for the addressee to become aware of it.[10] The latter element has been further subdivided into various substantive requirements, such as, for example, accessibility of the language of the communication[11] or delivery within normal working hours.[12]

7. The United Nations Convention on Contracts for the International Sale of Goods ("the United Nations Sales Convention")[13] adopted the "reception" theory as a general rule.[14] Under the Sales Convention, a contract is concluded "at the moment when an acceptance of an offer becomes effective",[15] which happens when "the indication of assent reaches the offeror".[16] For the purposes of the Convention's provisions on contract formation, an offer, declaration of acceptance or any other indication of intent "reaches" the addressee "when it is made orally to him or delivered by any other means to him personally, to his place of business or mailing address or, if he does not have a place of business or mailing address, to his habitual residence".[17]

8. The notion of "receipt" has been understood by commentators to mean the time when the communication enters the "sphere of control" of the addressee. Up to that time, the originator of the communication (in case of acceptance, the offeree) must ensure that the communication reaches the addressee and that it arrives within the required time. Where the notion of "dispatch" is relevant, the crucial moment is when the communication leaves the sphere of control of the originator. From that moment on, the originator would be relieved of the risk of loss or delay in the communication, with which instead the addressee would be concerned.

9. Commentators of the United Nations Sales Convention have observed that the notion of "reach" in article 24 of the Convention was made dependent upon "external, easily provable facts" and was meant to relieve the originator of the "risk of defective communications of a declaration within the recipient's organizational sphere"; circumstances that indicated that the provisions of article 24—contrary to the strict rules followed in some domestic laws—should be interpreted to the effect that "they generally do not require an opportunity for the recipient to gain awareness of the declaration".[18] Other ways of applying the article, for example, by attempting to take "national public holidays and customary working hours" into consideration were said to "lead to problems and to legal uncertainty in a law governing international situations".[19]

2. Timing of dispatch and receipt of data messages

10. The above considerations are equally important for the formation of contracts through electronic communications. Indeed, despite some early suggestions that contract negotiation through electronic means, in particular in an electronic data interchange (EDI) environment, replicates the pattern of "face-to-face" or "instantaneous" communications,[20] the exchange of electronic messages, at least when electronic mail (e-mail) techniques are used, seems to be more analogous to exchange of postal correspondence.[21]

11. In any event, default rules on time and place of dispatch and receipt of data messages should supplement national rules on dispatch and receipt by transposing them to an electronic environment. Such provisions should be sufficiently flexible to cover both cases where electronic communication appears to be instantaneous and those where electronic messaging mirrors traditional mail. The following paragraphs analyse the way this has been done by the UNCITRAL Model Law on Electronic Commerce and in domestic legislation. They also summarize the debate that has taken place in the Working Group and offer elements that the Working Group may wish to consider in its deliberations on article 10 of the preliminary draft convention.

(a) The rule in article 15 of the UNCITRAL Model Law on Electronic Commerce

12. Article 15, paragraph 1, of the Model Law defines the time of *dispatch* of a data message as the time when the data message enters an "information system"[22] placed "outside the control of the originator",[23] which may be the information system of an intermediary or an information system of the addressee. Under that provision, a data message should not be considered to have been dispatched if it merely reached the information system of the addressee but failed to enter it.[24]

13. For the time of *receipt*, paragraph 2 of the same article distinguishes between a few factual situations: (a) where the addressee designates a specific information system, which may or may not be his own, for the receipt of a message, the data message is deemed to have been received when it *enters the designated system*;[25] (b) if the data message is sent to an information system of the addressee that is not the designated system, "receipt" occurs when the data message is *retrieved by the addressee*; and (c) if the addressee has not designated an information system, receipt occurs when the data message *enters an information system of the addressee*.

14. The distinction between "designated" and "non-designated" information systems is intended to establish an appropriate allocation of risks and responsibilities between originator and addressee. The person who designates a specific information system for the receipt of data messages, even if it is a system operated by a third party, should be expected to bear the risk of loss or delay of messages that effectively entered that system. However, if the originator chooses to ignore the addressee's instructions and sends the message to an information system other than the designated system, it would not be reasonable to consider the message delivered to the addressee until the addressee has actually retrieved it. The rule in the event that no particular system was designated assumes that for the addressee it was a matter of indifference to which information system the messages would be sent, in which case it would be reasonable to presume that it would accept messages through any of its information systems.

15. For both the definition of dispatch and that of receipt, a data message *enters* an information system at the time when it becomes available for processing within that information system. It is not necessary for the recipient to know that the message has been received and there is no additional requirement that the recipient actually read or even access the message. If it reaches the recipient's "mailbox", receipt has occurred.

16. Whether the data message is intelligible or usable by the addressee is intentionally outside the purview of the Model Law, which does not set out to overrule provisions of national law under which receipt of a message may occur at the time when the message enters the sphere of the addressee, irrespective of whether the message is intelligible or usable by the addressee.[26]

(b) Electronic communications in domestic enactments of the Model Law

17. At the domestic level, there seems to be little disagreement on the proposition that, from a purely factual point of view, the time when a message enters an information system within the addressee's control or enters an information system outside the sender's control represent the evident electronic equivalents of the "sphere of control" tests used to define "receipt" and "dispatch" under both the "reception" and the "mailbox" rules.

18. Except for France,[27] the more than 20 countries and non-sovereign jurisdictions that have thus far adopted the Model Law have included provisions on time and place of dispatch and receipt of data messages. Without exception, all enactments of the Model Law have adopted the distinction between designated and non-designated systems.[28] This is also the case in those countries in which uniform law has been prepared on the basis of the Model Law, such as Canada[29] and the United States of America.[30] That distinction, however, is not explicit in the United States Uniform Electronic Transactions Act (UETA), which contemplates, in addition to a "designated" information system, an information system that the recipient "uses for the purpose of receiving electronic records or information of the type sent and from which the recipient is able to retrieve the electronic record".[31] Notwithstanding that the language used in UETA differs from article 15 of the Model Law, both instruments distinguish between a system that was positively chosen by a party for the receipt of a particular message or type of message and other (non-designated) information systems merely used by the recipient. The latter category, in much the same way as the non-designated system under article 15 of the UNCITRAL Model Law, was included in UETA out of a concern to "[allow] the recipient of electronic records to retain control over where they would be sent and received".[32]

19. Domestic enactments of the Model Law are also remarkably uniform in defining the time of receipt of data messages sent to a designated system. Nearly all enactments reproduce the rule of paragraph 2 (a) (i) of article 15 of the Model Law, namely, that a message sent to a designated system is received when it enters that system.

20. Minor domestic variations exist with regard to cases in which either the addressee has not designated a particular information system or the originator sends the message to a system other than the designated system. Most domestic enactments of the Model Law make that distinction.[33] In those countries, the

consequences are generally the same as in article 15 of the Model Law, that is, a message sent to an information system other than the designated one is only deemed to be received upon retrieval by the addressee,[34] whereas a message sent in the absence of a designated system is deemed to be received upon entry into an information system of the addressee. However, in two countries in that group[35] the law explicitly requires retrieval in both situations.

21. The laws of other countries contemplate only cases where an addressee has not designated an information system.[36] In those countries, receipt normally occurs once the message is "retrieved" or "comes to the attention" of the addressee, but in one country[37] receipt occurs upon entry in a system "regularly used by the addressee". Two countries contemplate only the hypothesis of a message being sent to an information system other than the designated system, in which case receipt occurs upon retrieval.[38] It is not clear, for that group of countries, whether a message sent to one particular system despite an express designation of another system would follow the same rule. Arguably, both situations would be treated in the same manner, as is suggested by the law of one country,[39] which expressly provides that for all cases other than designated systems, the message is received when it comes to the addressee's attention.

22. The only apparently significant deviations from article 15 of the Model Law are found in UETA and the Uniform Electronic Commerce Act (UECA) of Canada. Both texts require that the data message be capable of being retrieved and processed by the addressee in addition to entering the addressee's system.[40] It has been pointed out, in that connection, that the emphasis in the Model Law is on timing.[41] Under the Model Law, the message enters a system when it is available for processing, "whether or not it can in fact be processed". For UETA and UECA, on the other hand, proper receipt requires that the recipient should be able to retrieve the record from the system and that the message be sent in a form that the addressee's system can process. Nonetheless, "there is arguably no inconsistency between the UETA and the Model Law", as it may be understood that the Model Law "defers to national law on the 'processability' issue".[42] Legal analysis and comparison of UETA and the Model Law has indicated, however, that, despite the different formulation, both instruments achieve the same result, as shown in the following example:[43]

> "Consider the situation where, because of a power failure or system failure, the system becomes inaccessible, precluding the recipient from ever retrieving the record. The question would be (under both products): when did the failure occur? If it occurred before the electronic record entered the system, then no receipt has yet occurred under either formulation. If the message enters the system, the question initially under the UETA is whether the recipient is able to retrieve it. If the recipient is able to retrieve it, albeit for an instant, receipt has occurred. Subsequent failure of the system should not 'undo' what has already occurred. The mere inability of the recipient to retrieve the electronic record at a later point in time is irrelevant once receipt has occurred."

23. Another situation where both UETA and UECA seem at first sight to differ from the Model Law is when the recipient has designated an information system, but the sender sends the electronic record to another information system. Unlike the Model Law, UETA and UECA do not have specific rules for such a case, which

would have to be solved in the light of their more general provisions. The result would probably not be substantially different from the result under the Model Law. If the information system, although not the designated system, was one used by the recipient for electronic records of this type, the record would be deemed received (whether or not it was "actually" retrieved or received). If the system was not generally used for messages of this type, the presumption established by UETA would not apply. Arguably, that presumption would not be needed if the record was actually retrieved by the recipient, which would mean that in practice the result under the Model Law and UETA would be the same. If, however, the record entered an information system of the recipient that was neither the one designated by the recipient, nor the one used by the recipient for such messages, and the record was never retrieved by the recipient, it is claimed that the two laws would again produce the same result: "there would be no receipt under the Model Law (because there was no retrieval), and none under the UETA (because it was not sent to the correct address)".[44]

(c) Electronic communications in other domestic laws

24. The situation in countries that have not adopted the Model Law is not easily ascertainable in view of the scarcity of legal authorities. For the purposes of the present analysis, those countries may be placed in two broad groups: member States of the European Union (EU) and non-member States of the Union.

25. Very few countries outside EU other than enacting States of the UNCITRAL Model Law have specific legislation on the types of issue related to electronic commerce that have been dealt with by UNCITRAL. Typically, where written laws exist, they deal only with digital signatures (sometimes also other forms of electronic signatures) and certification services[45] and rarely with issues of electronic contracting.[46] The survey done by the Secretariat has not identified legislative provisions on time of dispatch and receipt of data messages in those countries.

26. The situation is different within EU. EU member States are bound to implement the principles set forth in the various EU directives relevant for electronic commerce, in particular Directive 2000/31/EC of the European Parliament and of the Council of 8 June 2000 on certain legal aspects of information society services, in particular electronic commerce, in the internal market.[47] Article 11 of the EU Directive provides that EU member States shall ensure, "except when otherwise agreed by parties who are not consumers", that a customer's order and the acknowledgement of receipt of the order by the merchant "are deemed to be received when the parties to whom they are addressed are able to access them". Under the EU legislative system, member States are left with the choice of the means to achieve the result envisaged by the EU Directive.

27. When, however, are the parties "able to access" data messages and which kind of "ability" is meant by the EU Directive? Is it sufficient that the parties have the abstract possibility of gaining access to the data message, or is it necessary for the addressee to be actually in a position to retrieve the message? The preamble to the EU Directive does not explain the precise meaning of the words "able to access". While a number of language versions favour a more general formulation,[48] some of them seem to imply that the addressee must be actually able to retrieve the message.[49]

28. Arguably, the linguistic nuances in the various language versions of the EU Directive are not substantive. The main difficulty in fact seems to be that the formulation in article 11 of the EU Directive does not provide a presumption or indication of the time from which a party should be deemed to have been "able to access" a message. To date, a number of EU member States have enacted specific legislation to implement the EU Directive. Austria,[50] Denmark,[51] Germany,[52] Ireland,[53] Italy,[54] Spain[55] and the United Kingdom of Great Britain and Northern Ireland[56] have reproduced the formulation used in article 11 of the EU Directive with only slight changes.[57]

29. It is not entirely clear which rule applies in countries such as Ireland[58] and Italy[59] that already had statutory provisions on time of dispatch and receipt of data messages before the adoption of the EU Directive. The Irish law contains essentially the same rule as article 15 of the Model Law. The new law implementing the EU Directive provides that the specific rule on receipt of an "order" applies "notwithstanding" the earlier law. The rule in Italy is that an electronic document is deemed to have been dispatched by the originator and received by the addressee if it is "transmitted to the electronic address" indicated by the addressee.[60] Although different in formulation, this rule would arguably lead in most cases to the same result as that of article 15 of the Model Law.

30. Most of the countries that have implemented the EU Directive, however, did not have statutory rules on time of dispatch and receipt of data messages, although case law in some of them already provided criteria for the transposition to an electronic environment of traditional rules on dispatch and receipt. The result is typically consistent with article 15 of the UNCITRAL Model Law. This is true even in countries such as Germany, which have not enacted the Model Law, where the courts have regarded the delivery of a message to a party's e-mail address, for instance, as the equivalent of "receipt", regardless of whether or not the party had actually accessed the message.[61] Incomplete delivery of the text of a data message, owing, for instance to technical malfunctioning of the receiving equipment, does not exclude "receipt", if there is evidence that the message was transmitted entirely in electronic form.[62] While proof of proper dispatch of a data message may be regarded as prima facie evidence of its effective receipt by the other party,[63] the courts have also stressed that the originator of a data message is not entitled to rely on mere dispatch of the message, which creates no presumption that the message was actually received.[64]

31. The fact, however, that the EU Directive introduced the "accessibility" criterion to determine the time of receipt of data messages has caused some concern, as it was felt that the rule in the EU Directive should not be carried so far as to require actual retrieval of messages, a result that would conflict with existing case law. Indeed, it appears from the consultation process preceding the implementation of the EU Directive in some countries that some of the changes introduced in domestic legislation were intended to avoid the impression that receipt of a message required actual retrieval by the addressee. The final rule, it was said, should instead make it clear that only the "technical possibility" of retrieval was relevant, and not the addressee's "availability" for retrieving the message.[65]

(d) The debate within the Working Group

32. The preliminary draft convention has followed closely the structure and formulation of article 15 of the UNCITRAL Model Law on Electronic Commerce. This was a natural choice in view of the wide acceptance of that provision of the Model Law. It also had the additional advantage of its compatibility with article 24 of the United Nations Sales Convention.[66] This provision, however, has caused extensive debate within the Working Group (see A/CN.9/509, paras. 93-98; and A/CN.9/528, paras. 141-151).

33. One criticism has been that the provision is overly complex and that there may be no practical need for distinguishing between designated and non-designated information systems. That criticism was formulated in the following terms in a statement by the German Bar Association on the preliminary draft convention:[67]

> "A point requiring clarification seems to be the distinction in article 11, paragraph 2 [*draft art. 10, para. 2 in document A/CN.9/WG.IV/WP.103*], between an information system designated by the addressee for the receipt of data messages and a system other than the designated system. This distinction is more relevant for Electronic Data Interchange (EDI), but not for e-mail communications. The consequence is that, in the context of e-mail communications, the decisive factor should be the actual entry of the data message in the recipient's computer station. This does not flow from article 11 (2) with the clarity required for legal harmonization.
>
> "On the basis of the definition in article 5 (f) […], an 'information system' means 'a system for generating, sending, receiving, storing or otherwise processing data messages'. This wide definition encompasses not only a provider's web server, but also the computer stations of the provider's clients, from which they retrieve their messages or through which they forward their messages to the provider for transmission to the addressees. It is important in this connection to clarify whether the entry in the provider's server is sufficient to establish the receipt of the message, or whether the data message needs to be actually retrieved by the addressee at its computer station.
>
> "This distinction depends on whether the addressee has designated a particular information system for the receipt of the data message and which is the designated system. Normally, the user does not make use of system-specification (*Systembenennung*) as a "receipt-address" (*Zustelladresse*), but rather uses an e-mail address, from which no specified system is recognizable. A specification should not in fact be necessary, since, in protocol-based Internet data communication, messages are transmitted without empty signs through special computers that use appropriate destination tables.
>
> "On this technical basis, article 11, paragraph 2 [*draft art. 10, para. 2, in document A/CN.9/WG.IV/WP.103*], would become idle, because the originator is not provided with a specific system of destination, and only requires an e-mail address, which is independent from a computer station. The transmission of the message to *another*, non-designated system (article 11, paragraph 2, first sentence, second phrase) does not occur, since to that end there should have been a designated system in the first place."

34. The problems identified in this analysis may in fact be significant if the notion of "information system" is understood to refer to the telecommunication channels and infrastructure used to transport messages to their final destination, rather than to the "electronic address" designated by a party for the purpose of receiving messages. As understood thus far, however, the notion of "information system" is intended to cover "the entire range of technical means used for transmitting, receiving and storing information", which, depending on the factual situation, may be "a communications network, and in other instances could include an electronic mailbox or even a telecopier".[68] The same broad interpretation should be given in the context of the preliminary draft convention. Nevertheless, the Working Group may wish to consider whether it might be useful to formulate an appropriate clarification in the definition of "information system" in draft article 5, subparagraph (e). The Working Group may further wish to consider whether some explanation should be given as to what actions should be regarded as a "designation" of an information system by the addressee.[69] Moreover, the Working Group may wish to consider the relationship between an e-mail address as a designated "information system" and the system used to deliver messages to mailboxes carrying a particular extension (e.g. "@XYZ.com").

35. Another criticism has been that the rule of article 15 of the Model Law might be excessively rigid because the entry of a message in the addressee's system or another system designated by the addressee does not always allow the conclusion that the addressee is capable of accessing the message. It has been proposed that the notion of "entry" should be rendered more flexible by adding the notion of "accessibility" of the data message, which would be given when the message is capable of being "processed and retrieved by the addressee" (A/CN.9/509, paras. 94 and 96). One proposal would link the receipt to "the time when the retrieval of that data message by the addressee" could "normally be expected" (A/CN.9/528, para. 148). However, there were also objections to that proposal, as the reference to the time when the addressee could "normally be expected" to "retrieve" might deviate from the accepted notion of "availability" of the message for processing within an information system, as an objective test, towards a more subjective approach (A/CN.9/528, para. 149).

36. There seems to be no disagreement with the general objective of developing default rules on dispatch and receipt of messages that aim at establishing a fair allocation of risks and responsibilities between the originator and the addressee (A/CN.9/528, para. 145). In principle, it should not be difficult to reach international consensus on the principle that a person who manages an information system, or designates a specific information system for the receipt of data messages, even if it is a system operated by a third party, should bear the risk of loss or delay of messages that have effectively entered that system. This point, however, highlights the importance of a clear understanding of the meaning of "information system", in particular where the parties communicate through e-mail.

37. Where no specific system has been designated, the rule should be such that it would allow a judge or arbitrator called to decide upon a dispute on the time of receipt of a data message to apply a test of reasonableness to the choice of an information system by the originator in the absence of a clear designation by the addressee.

38. The Working Group may wish to consider possible ways of bridging the gap between the opposing views on this aspect of draft article 10. One possibility, which has been proposed even in connection with systems that follow the "information theory" for the purposes of contract formation, might be to attach a presumption of knowledge (in the sense of "accessibility" or "possibility of knowledge") of a message to the effective delivery of a message to the addressee's information system. It would thus be for the addressee to adduce evidence that, through no fault of its own or of any intermediary of its choosing, it could not access the message.[70]

Notes

[1] See the commentary to article 2.6 of the *UNIDROIT Principles of International Commercial Contracts* (Unidroit, Rome, 1994).

[2] See the overview of the existing common law and civil law rules on contract formation in María del Pilar Perales Viscasillas, *La formación del contrato de compraventa internacional de mercaderías* (Valencia, 1996), pp. 178 ff.

[3] Which seems to be the general rule for contract formation in Switzerland, where the formation of a contract occurs "*lorsque les parties ont, réciproquement et d'une manière concordante, manifesté leur volonté*" (*Code des Obligations,* art. 1).

[4] The mailbox rule was first adopted by the King's Bench in 1818 in order to avoid the need for successive confirmations of receipt as that might continue "ad infinitum" (see *Adams v. Lindsell*, England Law Reports, vol. 160, p. 250 (K.B. 1818)). Despite some criticism, the mailbox rule has been nearly unanimously adopted in common law jurisdictions (see the references in Paul Fasciano, "Internet electronic mail: a last bastion for the mailbox rule", *Hofstra Law Review,* vol. 25, No. 3 (spring 1997), pp. 971-1003, footnote 20).

[5] For instance, Argentina (*Código Civil*, art. 1154) and Brazil (*Código Civil*, art. 434).

[6] Such as in Austria (*Allgemeines Bürgerliches Gesetzbuch (ABGB),* art. 862) and Germany (*Bürgerliches Gesetzbuch* (*BGB*)*,* sect. 130).

[7] For instance, Spain (*Código Civil*, art. 1262) and Venezuela (*Código de Comercio*, art. 120, para. 1). The "information" theory is the general rule for contract formation in Italy, where the contract is concluded when the offeror "has knowledge" of the acceptance by the offeree (*Codice Civile*, art. 1326). However, knowledge is presumed when the acceptance is received at the offeror's address (*Codice Civile*, art. 1335), which in practice brings the Italian system closer to the "reception" theory.

[8] This seems to be the case in France, where the Commercial Chamber of the Cour de cassation, in a judgement of 7 January 1981, affirmed the dispatch theory, but commentators continue to maintain the validity of the receipt theory (*Revue trimestrielle de droit civil*, 1981, pp. 849-850, note by François Chabas).

[9] *BGB*, sect. 130 (1).

[10] Otto Palandt, *Bürgerliches Gesetzbuch*, 60th ed. (München, Beck, 2001), p. 103, No. 3 (commentary on sect. 130 by H. Heinrichs); and *Münchener Kommentar zum Bürgerlichen Gesetzbuch*, vol. 1, 3rd ed. (München, Beck'sche Verlagsbuchhandlung, 1993), p. 1055, No. 10 (commentary on sect. 130 by H. Förschler).

[11] Transposed to the context of the United Nations Sales Convention, this requirement has led to the conclusion, for example, that standard contract conditions could not be relied upon if they have been sent in a language different from the one used during the negotiations (Amtsgericht Kehl, 6 October 1995, available at http://cisgw3.law.pace.edu/cases/951006g1.html).

[12] See the authorities cited elsewhere (Palandt, op. cit.; and *Münchener Kommentar* ..., No. 12).

[13] United Nations, *Treaty Series*, vol. 1489, No. 25567, but also the *UNIDROIT Principles of International Commercial Contracts*, as follows from the combined reading of articles 2.1 and 2.6, paragraph 2.

[14] However, "dispatch" is also relevant for the operation of a number of provisions of the Convention, such as articles 19, paragraph 2 (notice of objection to additional terms proposed by offeree); 20 (period of time for acceptance); and 21 (conditions for effectiveness of late acceptance).

[15] United Nations Sales Convention, art. 23.

[16] United Nations, Sales Convention, art. 18, para. 2.

[17] United Nations, Sales Convention, art. 24.

[18] Peter Schlechtriem, *Commentary on the UN Convention on the International Sale of Goods* (CISG) (Oxford, Clarendon Press, 1998), art. 24, Nos. 13-14, pp. 167-168; see also Ernst von Caemmerer and Peter Schlechtriem, *Kommentar zum einheitlichen UN-Kaufrecht*, 2nd ed. (München, 1995), art. 24, Nos. 13-14, pp. 202-203.

[19] Ibid.

[20] For example, Michael S. Baum and Henry H. Perritt, Jr., *Electronic Contracting, Publishing and EDI Law* (New York, Wiley Law Publications, 1991), p. 323, No. 6.8. The authors, however, recognize various factual circumstances that might lead to a different conclusion, such as "a certain non-instantaneous characteristic of computerized offers and acceptances, regardless of whether mailboxes or store-and-forward techniques are used in the transmission".

[21] "Despite common belief, [the transmission of Internet electronic mail] does not take place in a substantially instantaneous manner. Rather, it will typically take minutes, hours or in some cases days" (Fasciano, loc. cit., pp. 1000-1001).

[22] "Information system" is a defined term under article 2, subparagraph (f), of the Model Law and means "a system for generating, sending, receiving, storing or otherwise processing data messages". Depending on the factual situation, this may indicate "a communications network, and in other instances could include an electronic mailbox or even a telecopier" (*Guide to Enactment of the UNCITRAL Model Law on Electronic Commerce* (United Nations publication, Sales No. E.99.V.4), para. 40).

[23] The notion of "control" over an information system should not be understood as requiring the information system to be located on the premises of the addressee, since "location of information systems is not an operative criterion under the Model Law" (*Guide to Enactment* ...).

[24] It should be noted that the Model Law, as pointed out in its *Guide to Enactment* (para. 104): "does not expressly address the question of possible malfunctioning of information systems as a basis for liability. In particular, where the information system of the addressee does not function at all or functions improperly or, while functioning properly, cannot be entered into by the data message (e.g. in the case of a fax that is constantly occupied), dispatch under the Model Law does not occur. It was felt during the preparation of the Model Law that the addressee should not be placed under the burdensome obligation to maintain its information system functioning at all times by way of a general provision."

[25] By "designated information system" the Model Law means a system that has been specifically chosen by a party, for instance in the case where an offer expressly specifies the address to which acceptance should be sent. Paragraph 102 of the *Guide to Enactment* clarifies that a "mere indication of an electronic mail or telecopy address on a letterhead or other document should not be regarded as express designation of one or more information systems".

[26] The *Guide to Enactment* (para. 103) adds that the Model Law is also not intended "to run counter to trade usage, under which certain encoded messages are deemed to be received even before they are usable by, or intelligible for, the addressee. It was felt that the Model Law should not create a more stringent requirement than currently exists in a paper-based environment, where a message can be considered to be received even if it is not intelligible for the addressee or not intended to be intelligible to the addressee (e.g. where encrypted data is transmitted to a depository for the sole purpose of retention in the context of intellectual property rights protection)".

[27] The French enactment of the Model Law (*Loi n° 2000-230 du 13 mars 2000 portant adaptation du droit de la preuve aux technologies de l'information et relative à la signature électronique*) deals essentially with recognition and evidentiary legal value of electronic records, but does not deal with their communication.

[28] Australia (Electronic Transactions Act 1999, sect. 14, subsects. (3) and (4)); Colombia (*Ley Número 527 de 1999: Ley de comercio electrónico*, art. 24, subparas. (a) and (b)); Ecuador (*Ley de comercio electrónico, firmas electrónicas y mensajes de datos* of 2002, art. 11, subparas. (a) and (b)); India (Information Technology Act 2000, sect. 13); Ireland (Electronic Commerce Act, 2000, sect. 21, paras. (2) and (3)); Jordan (Electronic Transactions Law (No. 85) of 2001, art. 17); Mauritius (Electronic Transactions Act 2000, sect. 14 (2)); Mexico *(Decreto por el que se reforman y adicionan diversas disposiciones del Código Civil para el Distrito Federal* of 26 April 2000, art. 91); New Zealand (Electronic Transactions Act 2002, sect. 11, paras. (a) and (b)); Pakistan (Electronic Transactions Ordinance 2002, sect. 15, para. (2)); Philippines (Electronic Commerce Act 2000, sect. 22, paras. (a) and (b)); Republic of Korea (Framework Law on Electronic Commerce, 1999, art. 6, para. (2)); Singapore (Electronic Transactions Act 1998, sect. 15, subpara. (2) (a)); Slovenia (Electronic Commerce and Electronic Signature Act, 2000, art. 10, para. 2); Thailand (Electronic Transactions Act 2002, sect. 23); and Venezuela (*Decreto nº 1024 de 10 de febrero de 2001— Ley sobre mensajes de datos y firmas electrónicas*, art. 11). The same rules are also contained in the laws of the Bailiwick of Jersey (Electronic Communications (Jersey) Law 2000, art. 6), and the Isle of Man (Electronic Transactions Act 2000, sect. 2), both Dependencies of the British Crown; in the British overseas territories of Bermuda (Electronic Transactions Act 1999, sect. 18, para. 2) and Turks and Caicos (Electronic Transactions Ordinance 2000, sect. 16 (2) and (3)); and in the Hong Kong Special Administrative Region of China (Electronic Commerce Ordinance 2000), sect. 19 (2)).

[29] Uniform Electronic Commerce Act (UECA), sect. 23 (2).

[30] Uniform Electronic Transactions Act (UETA), sect. 15 (b).

[31] This formulation is also used in section 23 (b) of the Electronic Communications and Transactions Act 2002 of South Africa.

[32] The drafters of UETA recognized the fact that "many people have multiple e-mail addresses for different purposes. [Subsection 15 (b) of UETA] assures that recipients can designate the e-mail address or system to be used in a particular transaction. For example, the recipient retains the ability to designate a home e-mail for personal matters, work e-mail for official business, or a separate organizational e-mail solely for the business purposes of that organization. If A sends B a notice at his home which relates to business, it may not be deemed received if B designated his business address as the sole address for business purposes. Whether actual knowledge upon seeing it at home would qualify as receipt is determined under the otherwise applicable substantive law" (Amelia H. Boss, "The Uniform Electronic Transactions Act in a global environment", *Idaho Law Review*, vol. 37, 2001, p. 329).

[33] E.g. Bermuda, Colombia, Ecuador, India, Jordan, Mauritius, Mexico, Pakistan, the Philippines and the Republic of Korea.

[34] Some enactments, as in Bermuda, require, instead of "retrieval", that the message "come to the attention of the addressee". This does not, in practice, alter the substance of the rule.

[35] Mauritius and Mexico.

[36] E.g. Australia, Canada, Ireland and Venezuela.

[37] Venezuela.

[38] E.g. Slovenia and Thailand.

[39] New Zealand.

[40] UETA, sect. 15 (b) (1) and (2); UECA, sect. 23 (2) (a).

[41] Boss, loc. cit., p. 328.

[42] Boss, loc. cit.

[43] Boss, loc. cit., pp. 330-331.

[44] Boss, loc. cit.

[45] This is the case, for example, of the laws of Argentina (*Ley No. 25.506—"Ley de Firma Digital"* and *Decreto No. 2628/2002 (Firma Digital), Reglamentación de la Ley No. 25.506*); Estonia (Digital Signatures Act, 2000); Israel (Electronic Signatures Act, 2000); Japan (Law concerning Electronic Signatures and Certification Services, 2001); Lithuania (Law on Electronic Signatures, 2000); Malaysia (Digital Signatures Act, 1997); Poland (Electronic Signatures Act, 2001); and Russian Federation (Law on Electronic Digital Signature (Federal Act No. 1-FZ) of 10 January 2002).

[46] One example is Tunisia, which has enacted legislation on electronic commerce (*Loi relative aux échanges et au commerce électroniques* of 9 August 2000) that contains provisions on electronic contracting inspired by Directive 97/7/EC of the European Parliament and of the Council of 20 May 1997 on the protection of consumers in respect of distance contracts (*Official Journal of the European Communities*, No. L 144, 4 June 1997, pp. 19-27).

[47] *Official Journal of the European Communities*, No. L 17, 17 July 2000.

[48] This seems to be the case for the French (*"lorsque les parties* [...] *peuvent y avoir accès"*), Italian (*"quando le parte* [...] *hanno la possibilità di acerdervi"*), Portuguese (*"quando as partes* [...] *têm possibilidade de aceder a estes"*) and Spanish (*"cuando las partes* [...] *puedan tener acceso a los mismos"*) texts.

[49] For instance, the German text (*"wenn die Parteien, für die sie bestimmt sind, sie abrufen können"*).

[50] See "*Bundesgesetz mit dem bestimmte rechtliche Aspekte des elektronischen Geschäfts- und Rechtsverkehrs geregelt (E-Commerce-Gesetz—ECG) und Änderung des Signaturgesetzes sowie der Zivilprozessordnung*" (*Bundesgesetzblatt für die Republik Österreich*, 21 December 2001, p. 1977), sect. 12.

[51] See *Lov om tjenester i informationssamfundet, herunder visse aspekter af elektronisk handel*, sect. 12 (2).

[52] Article 11 of the EU Directive has been incorporated in the new section 312e(1) of the German Civil Code (BGR).

[53] See European Communities (Directive 2000/31/EC) Regulations 2003, sect. 14 (1) (b).

[54] See *Decreto legislativo 9 aprile 2003, n. 70*, art. 13, para. 3.

[55] See *Ley 34/2002, de 11 de julio, de servicios de la sociedad de la información y de comercio electrónico,* art. 28, para. 2.

[56] See Electronic Commerce (EC Directive) Regulations 2002 (Statutory Instrument 2002 No. 2013), sect. 11 (2).

[57] Section 312e(1) of the German Civil Code provides that an order and the acknowledgement of its receipt are deemed to have been received when the parties to whom they are addressed are

able to retrieve them "under normal circumstances" ("*unter gewöhnlichen Umständen*"). The same formulation is used in the Austrian law. The Spanish law refers to the addressee's ability to become aware ("*tener constancia*") of the message, rather than "access" ("*tener acceso*") the message

[58] Electronic Commerce Act 2000, sect. 13, paras. (2) (a) and (b)).

[59] *Decreto del Presidente della Repubblica 10 novembre 1997, n. 513*, art. 12, para. 1.

[60] "*Il documento informatico trasmesso per via telematica si intende inviato e pervenuto al destinatario se trasmesso all'indirizzo elettronico da questi dichiarato*" (*Decreto del Presidente della Repubblica 10 novembre 1997, n. 513*).

[61] See, for example, Landgericht Nürnberg-Fürth, Case No. 2 HK O 9431/01, 7 May 2002, *JurPC—Internet Zeitschrift für Rechtsinformatik*, JurPC WebDok 158/2003 (available at www.jurpc.de/rechtspr/20030158.htm, accessed on 8 September 2003). In this case, the claimant's contract was terminated by the defendant through registered mail, which was later confirmed by an electronic message sent to the claimant's e-mail address. The claimant challenged the effectiveness of the e-mail message, arguing that he had not been able to retrieve it, since the message was sent during his holiday and his e-mail account was not accessible through ordinary web browsers. The court held that the claimant had effectively received the message, as it had been delivered to his e-mail address. From that time on, the claimant bore the risk of loss of the message or delay in retrieving the message, for instance due to difficulties in accessing his e-mail account, as such a risk occurred within the claimant's sphere of control.

[62] See Bundesgerichtshof, Case No. XII ZR 51/99, 14 March 2001, *JurPC—Internet Zeitschrift für Rechtsinformatik*, JurPC WebDok 167/2001 (available at www.jurpc.de/rechtspr/20010167.htm, accessed on 9 September 2003). In this case, a court of appeals had rejected an appeal because the facsimile received did not contain counsel's signature, which would have been contained in the fourth page of the statement of appeal, which the court did not receive. The Federal Court disagreed with the position taken by the court of appeals that only the pages received by it could be taken into account in determining whether the statement of appeal had been delivered within the deadline for its submission. The Federal Court held that when a document was completely ("*vollständig*") transmitted as a data message ("*durch elektrische Signale*") from the appellant's facsimile to the court's machine, but did not get printed completely and without errors, possibly as a result of technical malfunctioning at the destination, the document was deemed to have been received at the time of its transmission as a facsimile, as long as the entire content of the document could be established through other means.

[63] In particular in the case of highly reliable transmission methods, in view of the current stage of technological development, such as facsimile transmissions (see Oberlandesgericht München, Case No. 15 W 2631/98, 8 October 1998, *JurPC—Internet Zeitschrift für Rechtsinformatik*, JurPC WebDok 153/1999, available at www.jurpc.de/rechtspr/19990153.htm, accessed on 9 September 2003).

[64] See Oberlandesgericht Düsseldorf, Case No. 23 U 92/02, 4 October 2002, *JurPC—Internet Zeitschrift für Rechtsinformatik*, JurPC WebDok 167/2003 (available at www.jurpc.de/rechtspr/20030158.htm, accessed on 9 September 2003), in a case involving e-mail messages.

[65] This point was made expressly in the explanatory note to the draft bill introduced to implement the EU Directive in Austria. The Austrian Bar Association, in its comments on the draft bill, proposed that the law clearly provide that the only controlling factor was the technical "retrievability" (*Abrufbarkeit*) and that neither technical malfunctioning on the addressee's part nor the addressee's absence nor any other obstacle within the addressee's sphere of control should hinder the effective receipt of the message (Rechtsanwaltskammer Wien, *Stellungnahme zum Bundesgesetz mit dem bestimmte rechtliche Aspekte des elektronischen Geschäfts- und Rechtsverkehrs geregelt werden (E-Commerce-Gesetz—ECG*), 31 August 2001, available at www.rakwien.at/import/documents/stellungnahme_ecommerce_fuer_homepage.pdf, accessed on 8 September 2003).

[66] Sieg Eiselen, "E-Commerce and the CISG: formation, formalities and validity", *Vindobona Journal of International Commercial Law and Arbitration*, vol. 6, No. 2 (2002), pp. 310-311.

[67] *Stellungnahme der Bundesrechtsanwaltskammer: UNCITRAL-Übereinkommensentwurf über internationale Verträge, die mit elektronischen Mitteln geschlossen oder nachgewiesen werden*, submitted in March 2002 by the Committee on Private International Law and International Procedural Law (Ausschuss Internationales Privat- und Prozessrecht) (available at www.brak.de/seiten/pdf/EndfUNCITRAL-Uebereinkentwurf.pdf, accessed on 8 September 2003).

[68] *Guide to Enactment* ..., para. 40.

[69] The remarks by the German Bar Association seem indeed to be based on the perception that, for the purposes of the Model Law, an e-mail address could not be a "designated information system" in view of the statement, in paragraph 102 of the *Guide to Enactment*, that "the mere indication of an electronic mail or telecopy address on a letterhead or other document should not be regarded as express designation of one or more information systems".

[70] Giovanni Comandé and Salvatore Sica, *Il commercio elettronico* (Turin, G. Giappichelli, 2001), p. 57. The authors propose this approach as a combined interpretation of articles 1136 (which requires the offeror's "knowledge" of the acceptance for contract formation) and 1135 (which provides that the party's knowledge is presumed when the acceptance was communicated to an appropriate address), both of the Italian Civil Code, and article 12, subparagraph (l), of Decree No. 513/1997 (which provides that an electronic document is deemed to have been received by the addressee when it has been "transmitted" to the electronic address indicated by it). The authors point out that such an interpretation would also be in line with the notion of "accessibility" of a data message for the purposes of the EU Directive.