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## CISG-AC Publishes First Opinion

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# OPINION

## CISG-AC PUBLISHES FIRST OPINION†

I. Introduction to the CISG Opinion .....	454
II. First CISG Advisory Opinion: Communication.....	456
A. CSIG Art. 11 .....	456
B. CISG Art. 13 .....	457
C. CISG Art. 15 .....	458
D. CISG Art. 16(1).....	461
E. CISG Art. 17 .....	461
F. CISG Art. 18(2).....	462
G. CISG Art. 19(2).....	464
H. CISG Art. 20(1).....	465
I. CISG Art. 21(1).....	467
J. CISG Art. 21(2).....	467
K. CISG Art. 22 .....	469
L. CISG Art. 24 .....	470
M. CISG Art. 26 .....	471
N. CISG Art. 27 .....	472
O. CISG Art. 32(1).....	472
P. CISG Art. 39 .....	473
Q. CISG Art. 43 .....	473
R. CISG Art. 47 .....	474
S. CISG Art. 63 .....	475
T. CISG Art. 65 .....	475
U. CISG Art. 67 .....	476
V. CISG Art. 71 .....	477
W. CISG Art. 72 .....	478
X. CISG Art. 79 .....	479
Y. CISG Art. 88(1) and (2).....	480

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† The following Introductory Note and Opinion were provided by Professor Albert Kritzer, Executive Secretary of the Institute of International Commercial Law, Pace University School of Law. His assistance in securing this material as well as his unbounded guidance and support of the Pace International Law Review and the Pace International Law program cannot be fully thanked in a mere footnote.

## I. INTRODUCTION TO THE CISG OPINION

**Dr. Loukas Mistelis\***

In a world of countless legal abbreviations, one more is being added in our jargon. CISG-AC stands for Advisory Council of the United Nations Conventions on Contracts for the International Sale of Goods (CISG). This is an unusual Convention and this is an unusual Council.

Knowingly the CISG is one of the most successful international instruments which produce uniform substantive rules for international trade. It is often pointed out that, world-wide two thirds of international sale transactions are conducted between parties based in a CISG country. In addition more than 1,000 judicial and arbitral decisions have been identified and are now featured in the relevant databases, such as <http://www.cisg.law.pace.edu>. In this sense, CISG is a successful and mature text of protean nature, which has been supported and enhanced by legal practice over the last 15 years. Most recently, UNCITRAL, the CISG formulating agency, has completed a digest which provides a comprehensive presentation of case law on the CISG and aims at assisting courts in the application of the Convention.

The CISG-AC has been established in 2001 as a private initiative to respond to the emerging need to address some controversial, unresolved issues relating to the CISG which would merit interpretative guidance. Professor Albert Kritzer, Executive Secretary of the Institute of International Commercial Law, Pace University School of Law, has been the *spiritus rector* of the idea of an interpretative council, an idea which has been mooted reluctantly in meetings of international organizations before. In a meeting in Paris in June 2001 some of the most eminent scholars in CISG gathered to explore the possibility of creating a CISG interpretative council.

The idea received warm support and the founding members of the CISG-AC are *Professor Dr. Eric E. Bergsten*, Emeritus of

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Pace University, formerly Secretary General of UNCITRAL, *Professor Dr. Michael Joachim Bonell*, University of Rome La Sapienza, formerly Secretary General of UNIDROIT, *Professor E. Allan Farnsworth*, Columbia University, New York, *Professor Dr. Alejandro Garro*, Columbia University, *Professor Sir Roy Goode*, University of Oxford, *Professor Dr. Sergei N. Lebedev*, Moscow Institute of International Relations, *Professor Dr. Jan Ramberg*, Emeritus, Stockholm University, *Professor Dr. Dr. h.c. Peter Schlechtriem*, Emeritus, University of Freiburg, *Professor Hiroo Sono*, Kyushu University and *Professor Dr. Claude Witz*, Universität des Saarlandes and Université Robert Schuman, Strasbourg. The meeting was also attended by *Albert Kritzer*, Pace, and *Dr. Loukas Mistelis*, Clive M. Schmitthoff Senior Lecturer in International Commercial Law, Centre for Commercial Law Studies, Queen Mary, University of London who represented the two sponsoring institutions. *Professor Schlechtriem* was elected as the first Chair, and *Dr. Mistelis* as the Secretary of CISG-AC. Two more members were invited to join the Council in June 2003, *Professor Dr. M<sup>a</sup> del Pilar Perales Viscasillas*, Universidad Carlos III, Madrid, and *Professor Dr. Ingeborg Schwenzer*, University of Basel.

The CISG-AC is a private initiative which aims at *promoting a uniform interpretation* of the CISG. It is a private initiative in the sense that its members do not represent countries or legal cultures, but they are scholars who look beyond the cooking pot for ideas and for a more profound understanding of issues relating to CISG. Accordingly the group is afforded the luxury of being critical of judicial or arbitral decision and of addressing issues not dealt with previously by adjudicating bodies. The Council is guided by the mandate of Article 7 of the Convention as far its interpretation and application are concerned: the paramount regard to international character of the Convention and the need to promote uniformity.

In practical terms, the primary purpose of the CISG-AC is to issue opinions relating to the interpretation and application of the Convention on request or on its own initiative. Requests may be submitted to the CISG-AC, in particular, by international organizations, professional associations and adjudication bodies. This first opinion is a response to an informal request by the International Chamber of Commerce for the Council to

reflect on issue of electronic communications and the ability of the CISG to respond to such challenges. The CISG-AC invited *Professor Dr. Christina Ramberg*, University of Göteborg, to submit a report to the Council's consideration. The opinion has been discussed in three sessions. The CISG-AC is of the opinion that the Convention can accommodate electronic communications as well as it does traditional communications and the published opinion suggests interpretation of all CISG provisions which pertain to communications.

Three more opinions will be completed in the next months. One opinion is a response to a request by the Association of the Bar of the City of New York Committee on Foreign and Comparative Law to address the question of the parol evidence rule. The other two opinions address the issue of reasonable notice for lack of conformity, a highly controversial issue in judicial practice, and the question of exemption from liability for economic hardship.

The CISG-AC wishes to publicize all its opinions widely through printed and electronic media and wishes to receive any comments the readership may have. The preferred citation style is: CISG-AC, Opinion no 1: Electronic Communications under CISG, 15 August 2003; Rapporteur: Professor Christina Ramberg, followed by a reference to the place of publication.

## II. FIRST CISG ADVISORY OPINION: ELECTRONIC COMMUNICATIONS UNDER CISG

### A. CISG Art. 11

*A contract of sale need not be concluded in or evidenced by writing and is not subject to any other requirement as to form. It may be proved by any means, including witnesses.*

#### OPINION:

**A contract may be concluded or evidenced by electronic communications.**

#### COMMENT:

11.1. The purpose of CISG Art. 11 is to ensure that there are no form requirements of writing connected to the formation of contracts. The issue of electronic communications beyond telegram

and telex was not considered during the drafting of the CISG in the 1970s. By not prescribing any form in this article, CISG enables the parties to conclude contracts electronically.

See also UNCITRAL Model Law on Electronic Commerce Art. 5.

## **B. CISG Art. 13**

*For the purpose of this Convention 'writing' includes telegram and telex.*

### **OPINION:**

**The term “writing” in CISG also includes any electronic communication retrievable in perceivable form.**

### **COMMENT:**

13.1. CISG Arts. 11, 12, 13, 21, 29 and 96 contain the term “writing”. In the traditional paper world this term was uncomplicated and referred to documents written on paper [or other durable medium] by pencil, pen, etc. The problem is now whether electronic documents other than telegram and telex may also constitute “writing”. The prerequisite of “writing” is fulfilled as long as the electronic communication is able to fulfill the same functions as a paper message. These functions are the possibility to save (retrieve) the message and to understand (perceive) it.

13.2. The parties may agree on what type of written form they intend to use (CISG Art. 6). They may, for instance, agree that they only accept paper letters sent by a particular courier service. Unless the parties have limited the notion of writing, there should be a presumption that electronic communications are included in the term “writing”. This presumption could be strengthened or weakened in accordance to the parties' prior conduct or common usages (CISG Art. 9(1) and (2)).

13.3. This Opinion does not deal with reservations made by States in accordance with CISG Art. 96 nor does it impose any restrictions on States that have made such a reservation.

See also UNCITRAL Model Law on Electronic Commerce Art. 6.

### C. CISG Art. 15

- (1) *An offer becomes effective when it reaches the offeree.*
- (2) *An offer, even if it is irrevocable, may be withdrawn if the withdrawal reaches the offeree before or at the same time as the offer.*

### OPINION

**The term “reaches” corresponds to the point in time when an electronic communication has entered the offeree’s server.**

**An offer, even if it is irrevocable, can be withdrawn if the withdrawal enters the offeree’s server before or at the same time as the offer reaches the offeree. A prerequisite for withdrawal by electronic communication is that the offeree has consented, expressly or impliedly, to receive electronic communications of that type, in that format and to that address.**

### COMMENT

15.1. An offer is not effective until it reaches the offeree (CISG Art. 15(1)) and may be withdrawn if the withdrawal reaches the offeree before or at the same time as the offer (CISG Art. 15(2)). In traditional means of communication this rule enables the offeror to withdraw his offer by a faster means of communication. He may, for instance, send an offer by letter through ordinary mail (snail mail) and then later withdraw it by sending a fax that reaches the offeree before the letter. The problem in relation to electronic means of communication is that there are rarely any practical means of faster communication than electronic messages sent by e-mail or communicated over websites or other EDI-arrangements. Thus a question of practical importance arises when the offer is sent by a traditional letter written on a paper and sent by traditional mail while the withdrawal is sent electronically.

15.2. The difficulty from a conceptual point of view is that the addressee of an electronic withdrawal does not have to be physically present at the place where the message arrives. The *place* of the message is a functional concept rather than a physical

one. The message could be located on any server in the world, including the sender's – the important question is whether the addressee can retrieve it. The following are the most important situations that are likely to be considered in relation to the term "reaches" in the context of electronic communications:

15.3. *Situation "A"*. From a pragmatic point of view it is clear that the addressee of an electronic withdrawal may read it as soon as it is located on his server. He may have problems reaching his server due to internal problems in his network system. This is normally within his "sphere of influence". Irrespective of how harsh it may be for the offeree that messages have arrived to his server but cannot be read by him due to internal problems, it is not appropriate to put the risk on the offeror for the offeree's technical problems. The offeree may reduce the risk by choosing appropriate internet service providers or designing an adequate technical infrastructure to make sure that the internal communication functions satisfactorily. The sender of an electronic communication ought not to assume this risk.

15.4. *Situation "B"*. It is not sufficient that a withdrawal has entered the offeree's server. The offeree must also have expressed somehow that he is willing to receive electronic communications. The offeree's willingness to accept electronic communications must be taken into account in determining whether an electronic withdrawal has "reached" the offeror. The consent of the offeree may be evident under CISG Art. 8, governing the interpretation of the conduct of the parties. CISG Art. 9(1) may also be relevant if the parties have established a practice in their business. CISG Art. 9(2) may apply in connections to trade usages which the parties knew or ought to have known and which in international trade are widely known to, and regularly observed by, parties to contracts of the type involved in the particular trade concerned.

15.5. *Situation "C"*. A related problem is when the e-mail address is not correctly stated in the message containing a withdrawal. Such messages may enter the addressee's server – but never reach the addressee personally, so that it cannot be accessed by the addressee. An example is when the correct email address is "Thomas@companyx.com" but the sender writes "To-



mas@companyx.com.” This wrongly spelled e-mail may sometimes enter Thomas’ server, but gets stuck in the server, since the server cannot find Tomas without the ‘h’. For such situations the risk is on the sender, since Thomas has not indicated his willingness to receive electronic messages incorrectly addressed. Sometimes an electronic communication with an incorrect address is forwarded by the postmaster to the correct address. If the forwarded communication reaches the addressee’s server in time, the withdrawal is effective. The addressee has in such a situation informed the postmaster that e-mails incorrectly addressed in a certain way should be forwarded to him, and by doing so he has expressed his general willingness to receive also electronic messages incorrectly addressed.

15.6. *Situation “D”*. Another problem in relation to “reaches” is whether the offeree is able to process and understand the electronic communication. Due to incompatible computer programs, the text appearing at the offeree’s computer may be incomprehensible. The situation is rather close to the problem of a message being written in a language that the offeree is unable to understand. The question at issue here is whether an electronic withdrawal that cannot be accurately processed by the offeree has “reached” the offeree when it has entered his server. The crucial issue is to what extent the offeree has indicated that he is willing to receive that type of electronic communications. It is not sufficient that the offeree has agreed to generally receive electronic communications. He must have consented to receiving electronic messages of that type, in that format, and to that address. Here again, CISG Art. 8 will be relevant for the interpretation of the conduct of parties, CISG Art. 9(1) will be relevant for any practices established between the parties, while CISG 9(2) may indicate, as a matter of trade usage, whether the offeror has impliedly or expressly agreed to receive electronic messages of a certain type.

See also UNCITRAL Model Law on Electronic Commerce Art. 15

#### **D. CISG Art. 16(1)**

*(1) Until a contract is concluded an offer may be revoked if the revocation reaches the offeree before he has dispatched an acceptance.*

#### **OPINION**

**In case of electronic communications the term “reaches” corresponds to the point in time when an electronic communication has entered the offeree’s server. An offer may be revoked if the revocation enters the offeree’s server before the offeree has dispatched an acceptance. A prerequisite is that the offeree has consented, expressly or impliedly, to receiving electronic communications of that type, in that format, and to that address.**

**In electronic communications the term “dispatch” corresponds to the point in time when the acceptance has left the offeree’s server. The offeror may revoke the offer by sending a revocation that enters the offeree’s server before the offeree’s acceptance leaves the offeree’s server. A prerequisite is that the offeror has consented, expressly or impliedly, to receiving electronic communications of that type, in that format and to that address.**

#### **COMMENT**

16.1. This provision enables the offeror to revoke an offer until the offeree has dispatched his acceptance. The revocation must have entered the offeree’s server before the offeree has dispatched his acceptance.

16.2. For restrictions on the effectiveness of “reaches”, see comments in Article 15. For the concept of “dispatch” see the comment 21.3

See also UNCITRAL Model Law on Electronic Commerce Art. 15

#### **E. CISG Art. 17**

*An offer, even if it is irrevocable, is terminated when a rejection reaches the offeror.*

## OPINION

**The term “reaches” corresponds to the point in time when an electronic message has entered the offeror’s server. An offer is terminated when a rejection enters the offeror’s server. A prerequisite is that the offeror has consented expressly or impliedly to receiving electronic communications of that type, in that format, and to that address.**

## COMMENT

17.1. An offer is terminated when rejection reaches the offeror. In electronic environments the exact time of “reaches the offeror” can be determined. The offeree can no longer create a contract by dispatching an indication of assent. If the offeree changes his mind after having dispatched a rejection of the offer and wishes to conclude a contract, the indication of assent must enter the offeror’s server before the rejection enters the offeror’s server

17.2. For restrictions on the effectiveness of “reaches” see comments in Article 15.

See also UNCITRAL Model Law on Electronic Commerce Art. 15

## F. CISG Art. 18(2)

*(2) An acceptance of an offer becomes effective at the moment the indication of assent reaches the offeror. An acceptance is not effective if the indication of assent does not reach the offeror within the time he has fixed, or, if no time is fixed, within a reasonable time, due to account being taken of the circumstances of the transaction, including the rapidity of the means of communication employed by the offeror. An oral offer must be accepted immediately unless the circumstances indicate otherwise.*

## OPINION

**An acceptance becomes effective when an electronic indication of assent has entered the offeror’s server, provided that the offeror has consented, expressly or**

**impliedly, to receiving electronic communications of that type, in that format, and to that address.**

**The term “oral” includes electronically transmitted sound in real time and electronic communications in real time. An offer that is transmitted electronically in real time communication must be accepted immediately unless the circumstances indicate otherwise provided that the addressee consented expressly or impliedly to receiving communications of that type, in that format, and to that address.**

## **COMMENT**

18.1. The underlying purpose of this article is to ensure that the offeror has an opportunity to read the indication of assent if he so chooses. It is not required that the offeror actually have read the indication of assent, but rather that such indication of assent become accessible for reading (the distinction between “reach the mind” and “reach the desk” or “reach the legal entity”). Accordingly, when an indication of assent has entered the offeror’s sphere of control, it must be assumed to have reached the offeror.

18.2. The proposition that an indication of assent only needs to be accessible and not actually read is designed to facilitate evidence. It is possible (more or less easily, but at least conceptually) to prove when a message becomes accessible; it is very difficult to prove when someone actually addressed his mind to it.

18.3. For restrictions on the effectiveness of “reaches” see comments in Article 15.

18.4. The requirement that an oral offer must be accepted immediately indicates that oral offers are only binding during the immediate negotiations. When negotiations are carried out in real time, whether by sound or by typed letters, the situation is similar to oral negotiations and the presumption is that the offers must be accepted on the spot, in immediate connection to the negotiations and in real time. The relevant factor is that the other party is aware of the offer and has a possibility to respond immediately. An offer that is communicated electroni-

cally in real time not by sound but in writing by typed letters must also be accepted immediately unless the circumstances indicate otherwise. Offers in chat rooms and other types of real time communication must be accepted immediately.

See also UNCITRAL Model Law on Electronic Commerce Art. 15.

### G. CISG Art 19(2)

*(2) However, a reply to an offer which purports to be an acceptance but contains additional or different terms which do not materially alter the terms of the offer constitutes an acceptance, unless the offeror, without undue delay, objects orally to the discrepancy or dispatches a notice to that effect. If he does not so object, the terms of the contract are the terms of the offer with the modifications contained in the acceptance.*

### OPINION

**The term “oral” includes electronically transmitted sound provided that the addressee expressly or impliedly has consented to receiving electronic communication of that type, in that format, and to that address.**

**The term “notice” includes electronic communications provided that the addressee expressly or impliedly has consented to receiving electronic messages of that type, in that format, and to that address.**

### COMMENT

19.1. The purpose of this article is to make a message that does not constitute an acceptance effective as an acceptance unless the offeror provides a quick notice that the purported acceptance is not an acceptance. Such information by the offeror could be conveyed by electronic sound or by other electronic messages.

19.2. For restrictions on the effectiveness of “reaches” see comments in Article 15.

See also UNCITRAL Model Law on Electronic Commerce Art. 5.

## H. CISG Art. 20(1)

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

## OPINION

**A period of time for acceptance fixed by the offeror in electronic real time communication begins to run from the moment the offer enters the offeree's server.**

**A period of time for acceptance fixed by the offeror in e-mail communication begins to run from the time of dispatch of the e-mail communication.**

**"Means of instantaneous communications" includes electronic real time communication.**

**The term "reaches" is to be interpreted to correspond to the point in time when an electronic communication has entered the offeree's server.**

## COMMENT

20.1. CISG Art. 20(1) provides a help to the interpreter of ambiguously stated periods for acceptance. When a period of, for instance, four days is stated in an offer without any indication from when this four-day period starts to run, CISG Art. 20(1) provides a different starting point depending on the medium the offer was sent. For telegrams the period starts from the time it is handed in for dispatch. If it is sent in a letter, from the date shown on the letter, or if no such date is shown, from the date on the envelope. For telephone, telex or other means of instantaneous communication the period begins to run from the moment that the offer reaches the offeree.

20.2. The problem now in consideration is how to determine when the period starts to run in case the offer is made by electronic means. We can envisage three main types of electronic

messages, (1) offers in e-mail, (2) offers at passive web sites, and (3) offers at chat sites where communication occurs in real time.

### *E-mail*

20.3. E-mail is not instantaneous communication and, with respect to dating, it is not wholly equivalent to letters sent in envelopes. CISG does not provide any interpretative help with respect to e-mails and uncertain situations must be solved by ordinary means of interpretation taking into account that the party being unilaterally bound (the offeror) normally deserves more protection. E-mails normally produce information about when they were sent and when they were received. CISG provides no direct guidance as to whether the time span starts to run from the time of sending or receiving. A period of time for acceptance fixed by the offeror in e-mail communication begins to run from the time of dispatch of the e-mail communication. This is so because this time can be easily ascertained and e-mails can be seen as functional equivalents of letters.

### *Passive Web Sites*

20.4. When offers are contained in web sites it is often uncertain whether they constitute offers in the legal sense. However, the web site holder may explicitly state that his offer is binding during a certain period of time. No guidance can be found in CISG where the web site holder has provided a time limit of three days without specifying from when the time limit starts to run. Uncertain situations must be solved by ordinary means of interpretation taking into account that the party being unilaterally bound (the offeror) normally deserves more protection. This opinion does not cover non-real time communication over passive websites.

### *Chatting in Real Time*

20.5. Parties may communicate over the Internet by real-time communication (this is common for chat-programs). The technique is such that if the sender writes an "a" the letter "a" immediately appears on the addressee's screen. The parties are both present at the same time and they may talk orally or write to each other just as if they were present in the same room or were talking over the phone. This type of communication qualifies as "instantaneous". CISG Art. 20(1) applies also to elec-

tronic communication in real time. If the sender sends an offer and stipulates that it is binding for two hours, the period starts to run from the point in time when the message reaches the addressee, i.e. immediately. For real-time communication it is assumed that the addressee has indicated his willingness to receive electronic messages of the relevant type.

See also UNCITRAL Model Law on Electronic Commerce Art. 5.

## **I. CISG Art. 21(1)**

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

## **OPINION**

**The term “oral” includes electronically transmitted sound provided that the offeree expressly or impliedly has consented to receiving electronic communication of that type, in that format, and to that address.**

**The term “notice” includes electronic communications provided that the offeree expressly or impliedly has consented to receiving electronic messages of that type, in that format, and to that address.**

## **COMMENT**

21.1. Information to the offeree about the late acceptance can be given in an electronic message. The important factor is that the information be conveyed to the offeree, not in what form it was conveyed.

21.2. For the effectiveness of electronic communication see comments in Art. 15

See also UNCITRAL Model Law on Electronic Commerce Art. 5.

## **J. CISG Art. 21(2)**

*(2) If a letter or other writing containing a late acceptance shows that it has been sent in such circumstances that if its transmission had been normal it would have reached the offeror in due time, the late acceptance is effective as an acceptance unless, without delay, the offeror orally informs the offeree that he con-*



*siders his offer as having lapsed or dispatches a notice to that effect.*

## OPINION

**The term “writing” covers any type of electronic communication that is retrievable in perceivable form. A late acceptance in electronic form may thus be effective according to this article.**

**The term “oral” includes electronically transmitted sound and communications in real time provided that the offeree expressly or impliedly has consented to receiving electronic communication of that type, in that format, and to that address.**

**The term “notice” includes electronic communications provided that the offeree expressly or impliedly has consented to receiving electronic messages of that type, in that format, and to that address.**

**The term “dispatch” corresponds to the point in time when the notice has left the offeree’s server. A prerequisite is that the offeree has consented expressly or impliedly to receiving electronic messages of that type, in that format, and to that address.**

## COMMENT

21.3. The purpose of this Article is to make a delayed acceptance effective when the offeror does not inform the other party that the acceptance has been delayed and the acceptance has reached the offeror too late. A typical situation is when an electronic acceptance is delayed and does not reach the offeror within the normal time-span. The article is only applicable if the acceptance is sent in a letter or other writing. The article applies also when the acceptance is sent by an electronic message as long as this electronic message fulfils the two functions of writing, i.e. that it can be understood and saved.

21.4. When the offeror provides a quick notice that the acceptance has arrived too late, the acceptance is not effective. Information to the offeree about the late acceptance can be given in an electronic message. The important factor is that the

information be conveyed to the offeree, not in what form it is conveyed. According to this Article such notice shall be communicated orally or by a [written] notice. The offeror may provide the information by electronically conveyed sound or by an electronic message under the precondition that the sender of the late acceptance has indicated that he is willing to receive such electronic messages.

21.5. It is enough that the notice has been dispatched; it does not have to reach the addressee. However, it must have been dispatched correctly. This means that the address must be correctly stated and that the sender uses a computer program that the addressee has indicated he is willing to accept.

21.6. The offeror should inform the offeree about a late acceptance by dispatching a notice. Dispatch occurs when the notice leaves the offeror's server. If, however, the offeree does not use the kind of electronic communication that the notice is sent in, the offeror is not considered to have dispatched the notice. The offeree must have indicated that he is willing to receive electronic acceptances of the type and format used by the offeror. CISG Arts. 8 and 9 may be of assistance in determining whether the offeree has impliedly indicated his willingness to receive such messages.

See also UNCITRAL Model Law on Electronic Commerce Arts. 5 and 6.

## K. CISG Art. 22

*An acceptance may be withdrawn if the withdrawal reaches the offeror before or at the same time as the acceptance would have become effective.*

## OPINION

**The term “reaches” corresponds to the point in time when an electronic communication has entered the offeror's server, provided that the offeror expressly or impliedly has consented to receiving electronic messages of that type, in that format, and to that address.**

## COMMENT

22.1. This article intends to provide a last time for withdrawal of an acceptance. In traditional means of communication this rule enables the sender of an acceptance to withdraw his acceptance by a faster means of communication. He may, for instance, send an acceptance by ordinary mail (snail mail) and later withdraw it by sending a fax that reaches the offeror before the mail. The problem in relation to electronic means of communication is that there are rarely any practical means of faster communication than electronic messages sent by e-mail or communicated over websites or other EDI-arrangements. However, the question becomes of practical importance in situations where the acceptance is sent by traditional paper mail and the withdrawal is sent electronically.

22.2. The underlying purpose of this article is to ensure that the offeror has an opportunity to read the withdrawal if he so chooses. It is not required that the offeror actually read the withdrawal, but rather that the withdrawal becomes accessible for reading (the distinction between 'reach the mind' and "reach the desk" or "reach the legal entity"). Therefore, when a withdrawal of assent has entered the offeror's sphere of control, it must be assumed to have reached the offeror.

22.3. The proposition that a withdrawal only needs to be accessible and not actually read is designed to facilitate evidence. It is possible (more or less easily, but at least conceptually) to prove when a message becomes accessible; it is very difficult to prove when someone actually addressed his mind to it.

See also UNCITRAL Model Law on Electronic Commerce Art. 15

## L. CISG Art. 24

*For the purposes of this Part of the Convention, an offer, declaration of acceptance or any other indication of intention "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.*

## OPINION

**The term “reaches” corresponds to the point in time when an electronic communication has entered the addressee’s server, provided that the addressee expressly or impliedly has consented to receiving electronic communications of that type, in that format, and to that address.**

**The term “orally” includes electronically transmitted sound and other communications in real time provided that the addressee expressly or impliedly has consented to receive electronic communications of that type, in that format, and to that address.**

## COMMENT

No comment since the issues are covered under the relevant articles concerning “reaches” in articles 15, 16(1), 17, 18(2), 20(1), 21(2), 22 and “oral” in articles 18(2) and 2(2)

## M. CISG Art. 26

*A declaration of avoidance of the contract is effective only if made by notice to the other party.*

## OPINION

**The term “notice” includes electronic communications, provided that the addressee expressly or impliedly has consented to receiving electronic messages of that type, in that format, and to that address.**

## COMMENT

26.1. Information to the other party that the contract is avoided can be given in an electronic message. The important factor is that the information be conveyed to the offeree, not in what form it is conveyed.

26.2. For the effectiveness of electronic notices see comments in Article 15.

See also UNCITRAL Model Law on Electronic Commerce Art. 5

## N. CISG Art. 27

*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.*

### OPINION

**A notice, request or other communication may be given or made electronically whenever the addressee expressly or impliedly has consented to receiving electronic messages of this type, in that format, and to that address.**

### COMMENT

27.1. Notices, requests or other communication to a party can be given in an electronic message. The important factor is that the information be conveyed to the other party, not in what form it is conveyed.

27.2. For the effectiveness of electronic notices, requests or other communication see comments in Article 15.

See also UNCITRAL Model Law on Electronic Commerce Art. 5.

## O. CISG Art. 32(1)

*(1) If the seller, in accordance with the contract or this Convention, hands the goods over to a carrier and if the goods are not clearly identified to the contract by markings on the goods, by shipping documents or otherwise, the seller must give the buyer notice of the consignment specifying the goods.*

### OPINION

**The term “notice” includes electronic communications, provided that the buyer expressly or impliedly has consented to receiving electronic messages of that type, in that format, and to that address.**

**COMMENT**

32.1. Information to the buyer about consignment of the goods can be given in an electronic message. The important factor is that the information be conveyed to the buyer, not in what form it is conveyed.

32.2. For the effectiveness of information to the buyer see comments in Articles 15 and 27.

See also UNCITRAL Model Law on Electronic Commerce Art. 5

**P. CISG Art. 39**

*(1) The buyer loses the right to rely on a lack of conformity of the goods if he does not give notice to the seller specifying the nature of the lack of conformity within a reasonable time after he has discovered it or ought to have discovered it.*

**OPINION**

**The term “notice” includes electronic communications provided that the seller expressly or impliedly has consented to receiving electronic messages of that type, in that format, and to that address.**

**COMMENT**

39.1. Information to the seller about lack of conformity of the goods can be given in an electronic message. The important factor is that the information be conveyed to the seller, not in what form it is conveyed.

39.2. For the effectiveness of notice to the seller see comments in Articles 15 and 27.

See also UNCITRAL Model Law on Electronic Commerce Art. 5

**Q. CISG Art. 43**

*(1) The buyer loses the right to rely on the provisions of article 41 or article 42 if he does not give notice to the seller specifying the nature of the right or claim of the third party within a reasonable time after he has become aware or ought to have become aware of the right or claim.*

*(2) The seller is not entitled to rely on the provisions of the preceding paragraph if he knew of the right or claim of the third party and the nature of it.*

## OPINION

**The term “notice” includes electronic communications provided that the seller expressly or impliedly has consented to receiving electronic messages of that type, in that format, and to that address.**

## COMMENT

43.1. Information to the seller about the nature of a right or claim of a third party can be given in an electronic message. The important factor is that the information be conveyed to the seller, not in what form it is conveyed.

43.2. Even when the seller has not indicated his willingness to receive electronic messages of the relevant type, it may be nevertheless established that he was aware of the claim in accordance with CISG Art. 43(2).

43.3. For the effectiveness of notice to the seller see comments in Articles 15 and 27.

See also UNCITRAL Model Law on Electronic Commerce Art. 5.

## R. CISG Art. 47

*(1) The buyer may fix an additional period of time of reasonable length for performance by the seller of his obligations.*

*(2) Unless the buyer has received notice from the seller that he will not perform within the period so fixed, the buyer may not, during that period, resort to any remedy for breach of contract. However, the buyer is not deprived thereby of any right he may have to claim damages for delay in performance.*

## OPINION

**The term “notice” includes electronic communications.**

**COMMENT**

47.1. Information to the buyer from the seller that the seller will not perform within the fixed period can be conveyed by an electronic message. When the buyer has received such electronic notice, he may choose to resort to a remedy for breach of contract.

**S. CISG Art. 63**

*(1) The seller may fix an additional period of time of reasonable length for performance by the buyer of his obligations.*

*(2) Unless the seller has received notice from the buyer that he will not perform within the period so fixed, the seller may not, during that period, resort to any remedy for breach of contract. However, the seller is not deprived thereby of any right he may have to claim damages for delay in performance.*

**OPINION**

**The term “notice” includes electronic communications.**

**COMMENT**

63.1. Information to the seller from the buyer that the buyer will not perform within the fixed period can be conveyed by an electronic message. When the seller has received such electronic notice, he may resort to any relevant remedy for the breach of contract.

**T. CISG Art. 65**

*(1) If under the contract the buyer is to specify the form, measurement or other features of the goods and he fails to make such specification either on the date agreed upon or within a reasonable time after receipt of a request from the seller, the seller may, without prejudice to any other rights he may have, make the specification himself in accordance with the requirements of the buyer that may be known to him.*

*(2) If the seller makes the specification himself, he must inform the buyer of the details thereof and must fix a reasonable time within which the buyer may make a different specification. If, after receipt of such a communication, the buyer fails*



*to do so within the time so fixed, the specification made by the seller is binding.*

## OPINION

**Specifications and communications may be electronic provided that the addressee expressly or impliedly consented to receiving such communications.**

## COMMENT

65.1. Information to the other party about specifications or communications about specifications can be given in an electronic message. The important factor is that the information be conveyed to the other party, not in what form it is conveyed.

65.2. For the effectiveness of specifications and communications to the other party see comments in Articles 15 and 27.

See also UNCITRAL Model Law on Electronic Commerce Art. 5.

## U. CISG Art. 67

*(1) If the contract of sale involves carriage of the goods and the seller is not bound to hand them over at a particular place, the risk passes to the buyer when the goods are handed over to the first carrier for transmission to the buyer in accordance with the contract of sale. If the seller is bound to hand the goods over to a carrier at a particular place, the risk does not pass to the buyer until the goods are handed over to the carrier at that place. The fact that the seller is authorized to retain documents controlling the disposition of the goods does not affect the passage of the risk.*

*(2) Nevertheless, the risk does not pass to the buyer until the goods are clearly identified to the contract, whether by markings on the goods, by shipping documents, by notice given to the buyer or otherwise.*

## OPINION

**The term “notice” includes electronic communications provided that the buyer expressly or impliedly has consented to receiving electronic communications of that type, in that format and to that address.**

## COMMENT

67.1. Information to the buyer about the goods being clearly identified to the contract can be given in an electronic message. The important factor is that the information be conveyed to the buyer, not in what form it is conveyed.

67.2 The buyer need not have consented to electronic communication in order to make an electronic notice under article 67(2) effective. The reason is that the buyer's consent is not needed for other modes of identification such as markings of the goods.

67.3. For the effectiveness of communications to the buyer about identification see comments in Articles 15 and 27.

See also UNCITRAL Model Law on Electronic Commerce Art. 5.

## V. CISG Art. 71

*(1) A party may suspend the performance of his obligations if, after the conclusion of the contract, it becomes apparent that the other party will not perform a substantial part of his obligations as a result of:*

*(a) a serious deficiency in his ability to perform or in his creditworthiness; or*

*(b) his conduct in preparing to perform or in performing the contract.*

*(2) If the seller has already dispatched the goods before the grounds described in the preceding paragraph become evident, he may prevent the handing over of the goods to the buyer even though the buyer holds a document which entitles him to obtain them. The present paragraph relates only to the rights in the goods as between the buyer and the seller.*

*(3) A party suspending performance, whether before or after dispatch of the goods, must immediately give notice of the suspension to the other party and must continue with performance if the other party provides adequate assurance of his performance.*

## OPINION

**The term “notice” includes electronic communications, provided that the addressee expressly or impliedly has consented to receiving electronic communications of that type, in that format, and to that address.**

## COMMENT

71.1. Information to the other party about suspending performance can be given in an electronic message. The important factor is that the information be conveyed to the addressee, not in what form it is conveyed.

71.2. For the effectiveness of communications to the other party about suspending performance see comments in Articles 15 and 27.

See also UNCITRAL Model Law on Electronic Commerce Art. 5.

## W. CISG Art. 72

*(1) If prior to the date for performance of the contract it is clear that one of the parties will commit a fundamental breach of contract, the other party may declare the contract avoided.*

*(2) If time allows, the party intending to declare the contract avoided must give reasonable notice to the other party in order to permit him to provide adequate assurance of his performance.*

*(3) The requirements of the preceding paragraph do not apply if the other party has declared that he will not perform his obligations.*

## OPINION

**The term “notice” includes electronic communications, provided that the addressee expressly or impliedly has consented to receive electronic communications of that type, in that format, and to that address.**

## COMMENT

72.1. Information to the other party about an intention to declare a contract avoided can be given in an electronic message. The important factor is that the information was conveyed to the addressee, not in what form it was conveyed.

72.2. For the effectiveness of communications to the other party about an intention to declare a contract avoided see comments in Articles 15 and 27.

See also UNCITRAL Model Law on Electronic Commerce Art. 5

## **X. CISG Art. 79**

*(1) A party is not liable for a failure to perform any of his obligations if he proves that the failure was due to an impediment beyond his control and that he could not reasonably be expected to have taken the impediment into account at the time of the conclusion of the contract or to have avoided or overcome it or its consequences.*

*(2) If the party's failure is due to the failure by a third person whom he has engaged to perform the whole or a part of the contract, that party is exempt from liability only if:*

*(a) he is exempt under the preceding paragraph; and*

*(b) the person whom he has so engaged would be so exempt if the provisions of that paragraph were applied to him.*

*(3) The exemption provided by this article has effect for the period during which the impediment exists.*

*(4) The party who fails to perform must give notice to the other party of the impediment and its effect on his ability to perform. If the notice is not received by the other party within a reasonable time after the party who fails to perform knew or ought to have known of the impediment, he is liable for damages resulting from such non-receipt.*

*(5) Nothing in this article prevents either party from exercising any right other than to claim damages under this Convention.*

## **OPINION**

**The term “notice” includes electronic communications, provided that the addressee expressly or impliedly has consented to receiving electronic communications of that type, in that format, and to that address.**

## **COMMENT**

79.1. Information to the other party about an impediment can be given in an electronic message. The important factor is that the information be conveyed to the addressee, not in what form it is conveyed.

79.2. For the effectiveness of information to the other party about an impediment see comments in Articles 15 and 27.

See also UNCITRAL Model Law on Electronic Commerce Art.5

## Y. CISG Art. 88(1) and (2)

*(1) A party who is bound to preserve the goods in accordance with article 85 or 86 may sell them by any appropriate means if there has been an unreasonable delay by the other party in taking possession of the goods or in taking them back or in paying the price or the cost of preservation, provided that reasonable notice of the intention to sell has been given to the other party.*

*(2) If the goods are subject to rapid deterioration or their preservation would involve unreasonable expense, a party who is bound to preserve the goods in accordance with article 85 or 86 must take reasonable measures to sell them. To the extent possible he must give notice to the other party of his intention to sell.*

## OPINION

**The term “notice” includes electronic communications, provided that the addressee expressly or impliedly has consented that he is willing to receive electronic communications of that type, in that format, and to address.**

## COMMENT

88.1. Information to the other party about an intention to sell the goods can be given in an electronic message. The important factor is that the information be conveyed to the addressee, not in what form it is conveyed.

88.2. For the effectiveness of communications to the other party about an intention to sell the goods see comments in Articles 15 and 27.

See also UNCITRAL Model Law on Electronic Commerce Art. 5