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Legal aspects of electronic commerce

Electronic contracting: background information

Note by the Secretariat*

Addendum

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* Submission of this 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

1. The present chapter deals with two sets of general issues on contract formation through electronic means. Section A below discusses how traditional notions of offer and acceptance may be applied to contract negotiation through electronic means. Section B, which appears in a further addendum (A/CN.9/WG.IV/WP.104/Add.2), considers questions related to timing of communications, including receipt and dispatch of offer and acceptance.

A. Qualification of parties' intent: offers and invitations to make offers

2. Article 14, paragraph 1, of the United Nations Convention on Contracts for the International Sale of Goods ("the United Nations Sales Convention")[1] provides that a proposal for concluding a contract that is addressed to one or more specific persons constitutes an offer if it is sufficiently definite and indicates the intention of the offeror to be bound in case of acceptance. Paragraph 2 of that article provides, however, that a proposal other than one that is addressed to one or more specific persons is to be considered merely as an invitation to make offers, unless the contrary is clearly indicated by the person making the proposal.

3. In a paper-based environment, advertisements in newspapers, on the radio and television and in catalogues, brochures and price lists are generally regarded as invitations to submit offers (according to some legal writers, even in cases where they are directed to a specific group of customers), since in those cases the intention to be bound is considered to be lacking.[2]

1. "Offers" and "advertisements" in electronic commerce

4. If the United Nations Sales Convention's notion of "offer" is transposed to an electronic environment, a company that advertises its goods or services on the Internet or through other open networks should be considered to be merely inviting those who access the site to make offers. Thus, an offer of goods or services through the Internet would not prima facie constitute a binding offer.[3]

5. The difficulty that may arise in this context is how to strike a balance between a trader's possible intention (or lack thereof) of being bound by an offer, on the one hand, and the protection of relying parties acting in good faith, on the other. The Internet makes it possible to address specific information to a virtually unlimited number of persons and current technology permits contracts to be concluded nearly instantaneously, or at least creates the impression that a contract has been so concluded.

6. In legal literature, it has been suggested that the "invitation-to-treat" paradigm may not be suitable for uncritical transposition to an Internet environment. One possible criterion for distinguishing between a binding offer and an invitation to treat may be based on the nature of the applications used by the parties. Legal writings on electronic contracting have proposed a distinction between web sites offering goods or services through interactive applications and those which use non-interactive applications. If a web site only offers information about a company and

its products and any contact with potential customers lies outside the electronic medium, there would be little difference from a conventional advertisement. However, an Internet web site that uses interactive applications may enable negotiation and immediate conclusion of a contract (in the case of virtual goods even immediate performance). Legal writings on electronic commerce have proposed that such interactive applications might be regarded as an offer "open for acceptance while stocks last", as opposed to an "invitation to treat".[4]

7. This proposition is at least at first sight consistent with legal thinking for traditional transactions. Indeed, the notion of offers to the public that are binding upon the offeror "while stocks last" is recognized also for international sales transactions.[5] However, the potentially unlimited reach of the Internet and the risk of errors in electronic communications, including in posting price and other product information on a web site, compounded by the use of automatic reply functions that do not provide an opportunity for review and correction of errors, seem to call for caution.[6]

2. The debate within the Working Group

8. Ultimately, this is a question of risk allocation: should the seller be bound by its "offer" because it created the impression of a binding offer and did not indicate otherwise? Alternatively, should the buyer bear the risk of possibly forfeiting other business opportunities as a result of its reliance on what appeared to be a binding offer?

9. Arguments in favour of attaching a default presumption of binding intention to the use of interactive applications have invoked the aim of enhancing legal certainty in international transactions. It has been said that parties acting upon offers of goods or services made through interactive contract applications might be led to assume that offers made through such systems were firm offers and that by placing an order they might be validly concluding a binding contract at that point in time. Those parties, it has been said, should be able to rely on such a reasonable assumption in view of the potentially significant economic consequences of contract frustration, in particular in connection with purchase orders for securities, commodities or other items with highly fluctuating prices. A default rule might help enhance transparency in trading practices by encouraging business entities to state clearly whether or not they accepted to be bound by acceptance of offers of goods or services or whether they were only extending invitations to make offers (A/CN.9/509, para. 81).

10. The countervailing view is that attaching a presumption of binding intention to the use of interactive contracting applications would be detrimental for sellers holding a limited stock of certain goods, if the seller were to be liable to fulfil all purchase orders received from a potentially unlimited number of buyers. Also, it has been argued that this kind of rule could run counter to business practice, as companies offering goods or services on the Internet typically indicate on their web sites that they are not bound by those advertisements (A/CN.9/509, para. 82; see also A/CN.9/528, paras. 116 and 117).

3. Court decisions on particular cases

11. With a view of facilitating its consideration of the implications of a decision in one way or the other, the Working Group may wish to take note of principles that

have been developed by national courts on this matter. Generally, recent court decisions in cases involving Internet offers of tangible goods seem to confirm this understanding.[7] However, other cases seem to indicate that certain types of business activity conducted via the Internet may need specific rules, as discussed below.

(a) "Click-wrap" agreements

12. One such line of jurisprudence comprises cases dealing with so-called "click-wrap" agreements in the United States of America. Most—if not all—of those cases have involved contracts with Internet service providers or online purchases of software or other digitalized information through web sites that allowed online download of software or immediate connection to a provider of Internet access services.[8] Users were typically presented with messages on their computer screens requiring that they manifest their assent to the terms of the licence agreement by clicking on an icon. The products could not be obtained or used unless and until the icon was clicked. The main issue in such cases has been the enforceability of contract terms purported to have been incorporated by reference and the conditions under which a consumer may be validly bound by such terms. While the cases have not directly dealt with the nature of the seller's offer (i.e. whether it was a true offer or merely an invitation to treat), the reasoning used by the courts to deal with such cases implies a certain understanding of the nature of the communications from which a qualification of the "offers" may be inferred.

13. Firstly, the courts that have thus far dealt with "click-wrap" cases, even those which have denied their enforceability—as a whole or only of some of their terms—against consumers,[9] have not questioned the seller's intention to be bound by its Internet offer of a software or similar product. Furthermore, while some courts have questioned the effectiveness of clicking on an icon or "I agree" button for the purpose of indicating assent to the terms of the vendor's software licence agreements, the courts have not required a subsequent act of the vendor as a condition for a contract to be concluded. Nor have the courts denied the existence of a contract on the ground that the consumer's action represented a contract offer that needed to be accepted by the buyer. It is in fact implicit in the reasoning of the courts that—at least in theory—a valid contract could be formed once the consumer had validly indicated its intention to purchase the software. The courts have not regarded the customer as the actual offeror and have, albeit not expressly, clearly treated the web site offerings as a binding commitment on the vendor and not a mere invitation to treat.

14. It may be argued that the fact that the products or services being offered allowed for immediate delivery by the vendor or immediate enjoyment by the customer was a decisive factor for the court's affirmation of contract formation through customer action without requiring subsequent "acceptance" by the vendor, even though no such mention is made by the courts in those cases. Nevertheless, the Working Group may wish to consider the extent to which other situations might be treated in an analogous manner.

(b) Internet auctions

15. The second group of case law deals with Internet auctions and involves both business-to-consumer and business-to-business auctions. In an early case, a district court in Germany found that a person offering goods through an Internet auction

platform had not made a binding offer, but had merely invited offers in respect of the goods during a set period of time.[10] That decision was later reversed by the court of appeal, which found that the display of goods for auction purposes through an Internet auction platform constituted more than an invitation to treat and should be regarded as a binding contractual offer.[11] Such an offer did not represent an open-ended commitment to accept an unlimited number of offers, as it was limited to the acceptance of the highest bid remaining at the end of the auction period. The electronic auction process allowed for sufficient determination of the price, so that all essential elements of a binding offer to conclude a sales contract were present.

16. That understanding has been followed by other German courts[12] and was also affirmed by the Federal Court (*Bundesgerichtshof*), which expressly affirmed the principle that an offer of goods for auction purposes through an Internet auction platform with the indication that the seller was committed to accepting the highest effective bid constituted a valid anticipatory acceptance of the highest bid and not only an invitation to treat.[13] A court of appeals in the United States reached essentially the same conclusion in a case involving the auction of a domain name though the Internet. The court held that a party's ex post facto characterization of the contents of its web site as a "mere advertisement" did not by itself exclude the binding nature of a commitment to sell a certain item to the person offering the highest bid within a set period.[14]

17. It is not suggested that such jurisprudence would entirely reverse the rule currently reflected in article 12, variant B, of the preliminary draft convention (A/CN/9/WG.IV/WP.103). Nevertheless, the Working Group may wish to consider whether variant B of draft article 12, if retained by the Working Group, might require additional clarification, so as not to disrupt the principles that have been developed by domestic courts.

Notes

[1] United Nations, *Treaty Series*, vol. 1489, No. 25567, p. 3 (also available at www.uncitral.org/english/texts/sales/CISG.htm).

[2] John Honnold, *Uniform Law for International Sales under the 1980 United Nations Convention*, 2nd ed. (Kluwer, Deventer, 1991), pp. 195-196; Ernst von Caemmerer and Peter Schlechtriem, *Kommentar zum einheitlichen UN-Kaufrecht*, 2nd ed. (München, 1995), art. 14, Nos. 13-15, pp. 144-146; Peter Schlechtriem, *Commentary on the UN Convention on the International Sale of Goods* (CISG) (Clarendon Press, Oxford, 1998), art. 14, Nos. 13-15, pp. 111-112; Heinrich Honsell, ed., *Kommentar zum UN-Kaufrecht*, (Springer, Berlin/Heidelberg/New York, 1997), art. 14, Nos. 17-19, p. 121; Fritz Enderlein and Dietrich Maskow, *International Sales Law* (Oceana, New York/London/Rome, 1992), p. 83; Maria del Pilar Perales Viscasillas, *La formación del contrato de compraventa internacional de mercaderías* (Valencia, 1996), p. 289. A few commentators argue, however, that catalogue mailings addressed to named recipients might be regarded as binding offers, since such mailings could not be regarded as being to "non-specified persons" (Vicent Heuzé, *La vente internationale de marchandises* (L.G.D.J., Paris, 2000), No. 175, p. 156; see also Bernard Audit, *La vente internationale de marchandises* (L.G.D.J., Paris, 1990), No. 62, p. 58, and Jean Thieffry and Chantal Granier, *La vente internationale*, 2nd ed. (Centre français du commerce exterieur, Paris, 1992), p. 89).

[3] Jens Werner, "E-Commerce.CO.UK: local rules in a global net: online business transactions and the applicability of traditional English contract law rules", *International Journal of Communications Law and Policy*, No. 6, winter 2000/2001, p. 5.

[4] Christoph Glatt, "Comparative issues in the formation of electronic contracts", *International Journal of Law and Information Technology*, vol. 6, spring 1998, p. 50.

[5] Von Caemmerer and Peter Schlechtriem, op. cit., p. 144; del Pilar Perales Viscasillas, op. cit., p. 295 and the example of Spanish legislation given in footnote 41.

[6] Werner (op. cit., p. 5) highlights the practical importance of the distinction between invitations to treat and offers with the following example: "E-tailer Argos offered by mistake a Sony TV for £3.00 instead of £299.99. People who spotted the bargain placed numerous orders for TVs which would constitute an acceptance (and thus conclude a contract) if the webvertisement of Argos could be regarded as a genuine offer."

[7] Amtsgericht Butzbach, Case No. 51 C 25/02 (71), 14 June 2002, *JurPC-Internet Zeitschrift für Rechtsinformatik*, JurPC WebDok 348/2002 (www.jurpc.de/rechtspr/20020348.htm); Oberlandesgericht Frankfurt, 20 November 2002, *JurPC-Internet Zeitschrift für Rechtsinformatik*, JurPC WebDok 91/2003 (www.jurpc.de/rechtspr/20030091.htm); Amtsgericht Westerburg, Case No. 21 C 26/03, 14 March 2003, *JurPC-Internet Zeitschrift für Rechtsinformatik*, JurPC WebDok 184/2003 (www.jurpc.de/rechtspr/20030184.htm); and Landgericht Köln, Case No. 9 S 289/02, 16 April 2003, *JurPC-Internet Zeitschrift für Rechtsinformatik*, JurPC WebDok 138/2003 (www.jurpc.de/rechtspr/20030138.htm) (all pages accessed on 9 September 2003).

[8] See *Lawrence Groff v. America Online, Inc.*, Superior Court of Rhode Island, 27 May 1998, LEXIS 46 (R.I. Super., 1998) (legal.web.aol.com/decisions/dlother/groff.html, accessed on 3 September 2003); *Hotmail Corp. v. Van$ Money Pie*, United States District Court for the Northern District of California, 16 April 1998, U.S. Dist. LEXIS 10729 (U.S. Dist., 1998); *Steven J. Caspi, et al. v. The Microsoft Network, L.L.C., et al*, Superior Court of New Jersey, Appellate Division, 2 July 1999 (New Jersey Superior Court Reports, vol. 323, p. 118); and *I. Lan Systems, Inc. v. Netscout Service Level Corp.*, United States District Court, District of Massachusetts, 2 January 2002 (Federal Supplement, 2nd series, vol. 183, p. 328).

[9] For instance, *Specht v. Netscape Communications Corp.*, Federal Supplement, 2nd series, vol. 150, p. 585, affirmed in *Specht v. Netscape Communications Corporation and America Online, Inc.*, United States Court of Appeals for the Second Circuit, 1 October 2002, Federal Reporter, 3rd series, vol. 306, p. 17.

[10] Landgericht Münster, Case No. 4 O 424/99, 21 January 2000, *JurPC-Internet Zeitschrift für Rechtsinformatik*, JurPC WebDok 60/2000 (www.jurpc.de/rechtspr/20000060.htm, accessed on 1 September 2003).

[11] Oberlandesgericht Hamm, Case No. 2 U 58/00, 14 December 2000, *JurPC-Internet Zeitschrift für Rechtsinformatik*, JurPC WebDok 255/2000 (www.jurpc.de/rechtspr/20000255.htm, accessed on 1 September 2003).

[12] Amtsgericht Hanover, Case No. 501 C 1510/01, 7 September 2002, *JurPC-Internet Zeitschrift für Rechtsinformatik*, JurPC WebDok 299/2002 (www.jurpc.de/rechtspr/20020299.htm, accessed on 1 September 2003).

[13] Bundesgerichtshof, Case No. VIII ZR 13/01, 7 November 2001, *JurPC-Internet Zeitschrift für Rechtsinformatik*, JurPC WebDok 255/2001 (www.jurpc.de/rechtspr/20010255.htm, accessed on 1 September 2003).

[14] *Je Ho Lim v. The TV Corporation International*, (State) Court of Appeal of California, 24 June 2002, 99 Cal. App. 4th 684.

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