



## **When does an electronically transmitted offer become effective: Perspectives of the CISG and Turkish Law**

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### **Can the CISG cope with the modern means of communication?**

Before examining the effectiveness of an electronically transmitted offer, one should first answer the question “Can the CISG cope with the modern means of communication?”

Advisory Council Opinion No.1 (hereinafter “Advisory Opinion”)<sup>1</sup>, which was prepared by the CISG Advisory Council<sup>2</sup> upon the request of International Chamber of Commerce<sup>3</sup>

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<sup>1</sup> CISG-AC Opinion No 1, Electronic Communications under CISG, 15 August 2003. Rapporteur: Professor Christina Ramberg, Gothenburg, Sweden.

<sup>2</sup> “*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.*”

Retrieved on 27 September, 2015 from: <http://www.cisgac.com/>

<sup>3</sup> LOOKOFISKY, J., Convention on Contracts for the International Sale of Goods (CISG), Alphen aan den Rijn, The Netherlands, Kluwer Law International, 2012.

(hereinafter the “ICC”), is an important contribution for the interpretation of cases involving electronic communications under the CISG. According to which the term “writing” under the Article 13 of the Convention is inclusive of any electronic communication which is *retrievable* (possible to save) and in *perceivable* form. Together with this, it is always worth mentioning the flexibility provided under the Article 6 of the CISG which may allow parties to agree on the kind of communication they intend to use. Again, Article 9 of the Convention is of significance in determining the method which the parties intended to communicate with. Advisory Opinion, upon a detailed study and comprehensive explanations, came into the conclusion that the CISG enables the parties to conclude contracts electronically.

In light of the aforementioned provisions of the Convention which allow incorporating electronic communication into the CISG; as well as supplementary elucidations delivered by the Advisory Council; and due to the absence of any other rule under the Convention which may hinder such supposition, it is possible to conclude that the Convention and its underlying principles are adequately well-fit and flexible to cope with modern ways of communication.

Furthermore, it should be noted that there are certain other international instruments that deal with the issue of electronic communications, the most well-known one being the United Nations convention on the Use of Electronic Communications in International Contracts (hereinafter the “CUECIC”), as of today<sup>4</sup>, signed by 18 and ratified by 7 States, respectively.<sup>5</sup> If gained sufficient recognition, it is a candidate to supplement the CISG with

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<sup>4</sup> “*Signing the convention only indicates an intention to consider its ratification rather than consent to be bound by it. Nations including China, Russia, Singapore, and the Republic of Korea had signed CUECIC.*” Excerpt from:

MARTIN, C., *The Electronic Contracts Convention, the CISG, and New Sources of E-Commerce Law*, 2008. Retrieved on 26 September 2015 from:

[http://papers.ssrn.com/sol3/papers.cfm?abstract\\_id=1120333](http://papers.ssrn.com/sol3/papers.cfm?abstract_id=1120333)

<sup>5</sup> Retrieved from UNCITRAL webpage on September 26, 2015 from:

[http://www.uncitral.org/uncitral/en/uncitral\\_texts/electronic\\_commerce/2005Convention\\_status.html](http://www.uncitral.org/uncitral/en/uncitral_texts/electronic_commerce/2005Convention_status.html)

regards to the questions relating to the electronic communications. Some suggest<sup>6</sup> that supplementing CISG in the area of e-commerce may be of assistance by way of increasing the legal “certainty” with respect to the subject matter. Also, the CUECIC bears great deal of significance given that it has a fairly broader scope of application than the CISG as the latter is only applicable to contracts concerning the sale of goods<sup>7</sup>; whereas the CUECIC is applicable to electronic communications in connection with the formation or performance of a contract between parties whose places of business are located in different States<sup>8</sup> which renders the CUECIC potentially suitable for contracts in relation to services, auctions as well as sales of goods or various other types of transactions; indeed proposing a larger palette.

### **When does an electronically transmitted offer become effective under the CISG?**

Having seen that the CISG is capable of integrating electronic communications into its structure, the focus shall be brought back to the status of “offers” conveyed via electronic means. First of all, it should be noted that, the Convention, in its Article 15(1), stipulates

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<sup>6</sup> *“Indeed, ‘electronic contracts’ are not fundamentally different from paper-based contracts. **And while there may be a need to supplement CISG Part II rules to achieve greater ‘certainty’ in electronic contracting**, the ‘areas where the approach or solution followed in the CISG has been shown to be problematic stem not from the use of more modern forms of communication, but rather are structural or conceptual deficiencies that existed from the outset and are applicable to all forms of communication...”* (emphasis added) Excerpt from:

LOOKOFISKY, J., *Convention on Contracts for the International Sale of Goods (CISG)*, Alphen aan den Rijn, The Netherlands, Kluwer Law International, 2012, p.65.

*“Overall, the **UNCITRAL Model Law is perhaps the comprehensive answer to omitted parts of the CISG**, such as Article 13, because it directly addresses writing issues to resolve contracting concerns, including offer, acceptance, consideration and modification”.* (emphasis added) Excerpt from:

HILL, J., “The Future of Electronic Contracts in International Sales: Gaps and Natural Remedies under the United Nations Convention on Contracts for the International Sale of Goods”, In 2 Nw. J. Tech. & Intell. Prop. 1, 2003, p. 28. Retrieved on 28 September 2015 from: <http://scholarlycommons.law.northwestern.edu/njtip/vol2/iss1/1>

<sup>7</sup> Please see Articles 1 and 2 of the Convention.

<sup>8</sup> Please see Article 1 of the CUECIC.

that an offer becomes effective when it reaches the offeree.<sup>9</sup> However, Article 15 does not specify when an offer is deemed to have “reached” the addressee.

In order to decide when the “reaching” of an offer takes place, one shall refer to Article 24<sup>10</sup> of the Convention where it sets a rule on determining when an offer, declaration of acceptance or any other indication of intention is deemed to have reached its addressee. Article 24 of the Convention distinguishes offers made “*verbally*” and an offers “*delivered by any other means*”; for former stipulating that it should be made orally to the addressee, itself; whereas for the latter, setting forth that it is to be delivered by any other means to the addressee personally, to its place of business or mailing address or, in the absence of those, to its habitual residence.

In principle, offers conveyed through electronic communications are classified under the category of “*offers delivered by any other means*”, except those which allow its users to be engaged in instantaneous communication. Offers delivered by any other means are considered to have reached the addressee when they enter addressee’s “sphere of control”, meaning the delivery should be made to an “appropriate” place; such as the mailbox of the respective place or delivered directly to an authorized employee.

The Advisory Council<sup>11</sup> is of the opinion that in cases where the addressee has expressed somehow that it is willing to receive electronic communications; then the message is deemed to be “reached” when it enters the information system of the addressee. If the addressee has not expressed such intention, then, additionally, the offeree has to become

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<sup>9</sup> Article 15(1) of the Convention: “*An offer becomes effective when it reaches the offeree.*”

<sup>10</sup> Article 24 of the Convention: “*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.*”

<sup>11</sup> CISG-AC Opinion No 1, Electronic Communications under CISG, 15 August 2003. Rapporteur: Professor Christina Ramberg, Gothenburg, Sweden.

aware of the message<sup>12</sup>. In both cases, however, the following additional criteria must be met: the electronic message at hand must be retrievable and understandable. This is because in some cases, due to the format that is used, certain programs may be incompatible in certain electronic systems which may result in texts that appear in a way that is impossible to comprehend in the addressee's computer. So it is not only sufficient that the addressee has shown willingness to be communicated by electronic means but it must have also accepted to receive electronic messages of such type, in that format, and to that particular address. The question, whether the addressee has consented to these shall be determined under the light of Articles 8 and 9.

### **Under Turkish Law**

Similarly, in order for an electronic communication to take effect as an offer under Turkish law, first of all, the addressee should have indicated, explicitly or implicitly, its intention to receive communication of such type. Secondly, such communication should reach addressee's "sphere of control", meaning it should enter the information system of the addressee.<sup>13</sup> In this regard, it is the offeror who bears the risk of transmission of an offer until the offer enters the information system of the addressee; whereas the offeree bears the risk after the delivery takes place, such as loss, destruction or late knowledge of the offer.

### **Does the offeree have to acquire knowledge of an offer for it to become effective?**

It is controversial whether the offeree must become aware of the fact of delivery in order to accept that such offer has "reached" the offeree in the sense of Article 24.<sup>14</sup> We agree with the

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<sup>12</sup>SCHWENZER, I., & MOHS, F., "Old Habits Die Hard: Traditional Contract Formation in a Modern World", In *Internationales Handelsrecht* (6:2006) 239-246. Retrieved on 25 September 2015, from: <http://www.cisg.law.pace.edu/cisg/biblio/schwenzer-mohs.html>

<sup>13</sup> ŞAHİN, T., "Statements Of Intent Concerning Formation Of Electronic Contracts And Revocation Of These Statements", *TBB Dergisi* (95), 2011, p.345.

<sup>14</sup> SCHWENZER, I. (ed.) , Schlechtriem & Schwenzler, *Commentary on the UN Convention on the International Sale of Goods (CISG)*, 3rd ed., Oxford, Oxford University Press, 2010, p. 383.

scholars<sup>15</sup> who contemplate that the Convention does not place such an additional burden on the offeror. Hence, according to this view, it is not required that the addressee must personally read and process the content of the offer in order to give it an effect. Such that, it is sufficient that the offer is posted in the offeree's mailbox or received on its fax machine, or duly reached in some other way.

In a decision rendered by the German Appellate Court dated 10 November 2006<sup>16</sup>, the Court has reached the conclusion that a declaration of intent reaches the addressee if it has entered the addressee's sphere; in a way that the latter has a "possibility" under normal circumstances to become aware of the content of the declaration. So the Court explicitly takes the view that it is *not* a prerequisite for the addressee to become aware of the content of an offer in order for that respective offer to "reach" its addressee in the sense of the Convention. It is sufficient that the addressee has at least the "possibility" to become aware of such content without any need to resort to unusual endeavors. Furthermore, the decision defines the meaning of "sphere of the addressee" according to which *"Any facilities set up by the addressee for his receipt of declarations of intent form part of the addressee's sphere of control"*.

Thank you for your interest. Should you have any questions on the CISG or Turkish commercial law, please contact us at **info@guzeloglu.legal**.

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<sup>15</sup>Ibid., p. 384.

<sup>16</sup> GERMANY, 10 November 2006, Appellate Court Dresden (Meat case).