



COMPARISON OF CISG ARTICLE 27 AND COUNTERPART NOTICE
PROVISIONS OF THE UNIDROIT PRINCIPLES AND PECL

*Chengwei Liu**

Nordic Journal of Commercial Law

issue 2004 #1

For the purpose of this discussion, the “notices” discussed below cover the whole range of notices, declarations and other communications.¹

-FORM OF NOTICE

-CISG APPROACH

-RECEIPT PRINCIPLE AS GENERAL RULE

-THE DISPATCH PRINCIPLE FOR CASES OF DEFAULT

Form of notice

a. As for the form of the notice, the CISG is silent on whether the notice must be in writing or can be presented orally. Although one may submit that Art. 27 does not include a rule for oral declarations,² it seems more appropriate to conclude from the Convention’s “informality principle” as contemplated in Art. 11,³ that generally there are no formal requirements for the notice under the Convention and it can be oral or written. This “informality principle” regarding the notice is clearly adopted under each of the two sets of Principles: in Art. 1.9(1) of the UNIDROIT Principles of International Commercial Contracts. and PECL Art. 1:303(1), respectively. In other words, it is the principle that notices or any other kinds of communication of intention (declarations, demands, requests, etc.) required by individual provisions of the two sets of Principles are not subject to any particular requirement as to form, but may be given by any means appropriate in the circumstances.⁴ However, this informality principle does not apply if the contract, usages or practices provide otherwise.⁵

b. On the other hand, it would not be consistent with good faith and fair dealing for a party to rely on, for instance, a purely casual remark made to the other party. The comments to the PECL provide that: “For notices of major importance written form may be appropriate.”⁶ As an example, while notice by telephone may suffice, it can be harder to prove than written notice. Particular care will have to be taken when choosing the means for communication of such an important decision as avoidance. All three texts require that the notice be given by means *appropriate in/to the circumstances*. Which means are appropriate will depend on the actual circumstances of the case, in particular on the availability and the reliability of the various modes of communication, and the importance and/or urgency of the message to be delivered. Thus, if the postal service is unreliable, it might be more appropriate to use fax, telex or other forms of electronic communication for a communication which has to be made in writing, or the telephone if an oral communication is sufficient. In choosing the means of communication, the sender must as a rule take into account the situation which exists both in its own and in the addressee’s country.⁷

c. In short, notices may be made in any form – orally, in writing, by telex, by fax or by electronic mail, for example – provided that the form of notice used is appropriate to the circumstances.⁸ A communication is appropriate to the circumstances, if it is appropriate to the situation of the parties. However, a means of communication which is appropriate in one set of circumstances may not be appropriate in another set of circumstances.⁹ On the other hand, there may be more than one means of communication which is appropriate in the circumstances. In such a case, the sender may use the one which is the most convenient for him.¹⁰

CISG approach

d. A number of scholars interpret the rule in Art. 27 CISG as an acceptance of the dispatch theory. Without reference to the veracity of such a proposition, it can never be concluded that Art. 27 establishes the general dispatch principle for the whole CISG. This is *firstly* for the fact that Art. 27 only applies to Part III of the CISG. Unlike the declarations covered in Part III, Part II declarations are, for the most part, expressly regulated under the receipt theory.¹¹ *Secondly*, Part III of the Convention contains exceptions to this rule in cases where it was considered that communication ought to be received to be effective (Official Records [O.R.], 27).¹² As clarified by the Secretariat Commentary, the general rule in Art. 27 that the risk of delay, error or loss in respect of a communication is to be borne by the addressee arises out of the consideration that it is desirable to have, as far as possible, one rule governing the hazards of transmission.¹³ One advantage of the rule is that at least a clear and unequivocal solution has been found for the question which was generally left open by the Hague Sales and Formation Conventions, ULF and ULIS, the antecedents to the CISG.¹⁴

e. The theory of dispatch would be useful where a party fulfilled an obligation or required remedy for a loss; not, however, where it served to substantiate an obligation for the other party (O.R., 303). Thus, under the Convention, as with most Part II declarations on offer and acceptance, the legal effectiveness of Part III declarations regulated under Articles 47(2), 48(4), 63(2), 65(1), 65(2), and 79(4) is tied to the moment of receipt. One way to treat these declarations is to rule that the declaring party is bound from the moment that his declaration is received, but also to allow him to withdraw or change his declaration up until this moment.¹⁵ However, on the other hand, it was believed that acceptance of a generalized receipt theory would have required that the Convention contain supporting procedural rules to establish whether a notice had in fact been received by the addressee since legal systems which operate on the theory that notices are effective on dispatch often do not contain such supporting rules.¹⁶ As a result, it is not very clear whether a general dispatch or a general receipt has been established under the Convention.

Receipt principle as a general rule

f. By contrast with the CISG's ambiguity with regard to the general principle, both the UNIDROIT Principles and the PECL adopt the receipt principle as a general rule. UNIDROIT Principles Art. 1.9(2) stipulates that "[a] notice is effective when it reaches the person to whom it is given". Similarly, Art. 1:303(2) PECL states pertinently that "any notice becomes effective when it reaches the addressee." It is important in relation to the receipt principle to determine precisely when the communications in question "reach" the addressee. In this respect, both Art. 1.9(3) of the UNIDROIT Principles and PECL Art. 1:303(3) follow in substance the rule in CISG Art. 24.¹⁷ In an attempt to define the concept, UNIDROIT Principles Art. 1.9(3) draws a distinction between oral and other communications. The former "reach" the addressee if they are made personally to it or to another person authorized by it to receive them. The latter "reach" the addressee as soon as they are delivered either to the addressee personally or to its place of business or mailing address. The particular communication in question need not come into the hands of the addressee. It is sufficient that it be handed over to an employee of the addressee authorized to accept it, or that it be placed in the addressee's mailbox, or received by the addressee's fax, telex or computer.¹⁸ In other words, as confirmed by PECL Art. 1:303(3), it is not necessary that the notice should actually have come to the addressee's attention provided that it has been delivered to him in the normal way, e.g., a letter placed in his letter box or a message sent to his telex or fax machine.¹⁹

g. A plain understanding of the receipt principle is that a party cannot rely on a notice sent to the other party unless and until the notice reaches that party.²⁰ A most practical importance of this receipt concept is the ability of the declaring party to withdraw or change his declaration at any time prior to the time of receipt. Accordingly, PECL Art. 1:303(5) expressly sets out that "A notice has no

effect if a withdrawal of it reaches the addressee before or at the same time as the notice.” Without a similar counterpart, such a rule seems to be implied by the general receipt principle established in UNIDROIT Principles Art. 1.9(2). Similarly, the risk of errors in the notice is normally placed upon the sender. However, the principle of good faith and fair dealing means that a party cannot complain that it has not received a notice, or has not received it in time, if it has deliberately evaded receiving it.²¹ On the other hand, as the result of practices or usages, the dispatch rule can apply. Moreover, the parties are, of course, always free to expressly stipulate the application of the dispatch principle. This may be appropriate in particular with respect to the notice a party has to give in order to preserve its rights in cases of the other party’s actual or anticipated non-performance when it would not be fair to place the risk of loss, mistake or delay in the transmission of the message on the former. This is all the more true if the difficulties which may arise at international level in proving effective receipt of a notice are borne in mind.²²

The dispatch principle for cases of default

h. However, this rigid solution of UNIDROIT Principles Art. 1.9 might lead to some unreasonable situations. Particularly, many of the situations in which one party gives a notice to the other are situations in which the party to be notified is in default, or it appears that a default is likely. Here, it seems appropriate to put the risk of loss, mistake or delay in the transmission of the message on the defaulting party rather than on the aggrieved party.²³ It is to be mentioned that UNIDROIT Principles Art. 1.9 is optional and does not eliminate the application of party autonomy. The parties are therefore at liberty to set other requirements, such as dispatch for communications to be effective.²⁴ Nonetheless, such a solution is not sufficient particularly in consideration of the complexity of international contracts. In this respect, CISG Art. 27 demonstrates merit and is persuasive, for example, in the case of a notice of defects, since the seller is responsible for ensuring that the quality of goods conforms to the contract. Such a persuasive solution as adopted in CISG Art. 27 is also followed by PECL Art. 1:303(4).²⁵ As mentioned above, the PECL adopts the receipt principle as a general rule. At the same time, PECL Art. 1:303 links this general rule to two qualifications for the operative effect of communications, one of which is set out in PECL Art. 1:303(4).²⁶

i. A notice subject to the general “receipt” principle takes effect when it is received. A notice subject to the dispatch principle may be effective even though it never arrives or is delayed, but it is not effective the moment it is dispatched. It would not be fair that even a non-performing party should be affected by a notice as from a time at which it could not have known about it. Accordingly the notice takes effect only from the time at which it would normally have been received.²⁷ In other words, in the event of loss of the communication, effectiveness occurs at the hypothetical moment of receipt under normal circumstances.²⁸ Finally, it is to be noted that the dispatch principle will not apply if the means of notice was not appropriate in the circumstances. For instance, for the dispatch principle to apply, the means chosen must be fast enough. If great speed is needed, a letter sent by airmail may not be appropriate and the sender may not rely on the fact that it was dispatched. It will be able to rely on it only if and when it arrives.²⁹

FOOTNOTES

* LL.M. of Renmin University of China; Attorney-at-Law on Global Law Office; 37th Floor, Jing Guang Center, Hu Jia Lou, Chaoyang District; Beijing 100020 China; <Lexway@mail.com>.

1. The “notices” include under the Convention Part II declarations and *any notice, request or other communication* given or made by a party in accordance with Part III (CISG Art. 27); under the UNIDROIT Principles *a declaration, demand, request or any other communication of intention* (UPICC Art. 1.9(4)); under the PECL *the communication of a promise, statement, offer, acceptance, demand, request or other declaration* (PECL Art. 1:303(6)).

2. For instance, *Schlechtriem* states in this respect: “Unfortunately, Article 27 does not include a rule for oral declarations. The wording – ‘transmission of the communication’ and ‘failure to arrive’ – makes it clear, however, that the Article refers only to messages transmitted by means similar to correspondence. On the basis of Article 7, it can be assumed that an oral declaration must be intelligible to those present or on the telephone; a statement that is not intelligible or not perceptible to the addressee has not been communicated by appropriate means.” *Peter Schlechtriem, Uniform Sales Law – The UN-Convention on Contracts for the International Sale of Goods*, Manz: Vienna (1987) fn. 14, p. 62. Available online at <<http://cisgw3.law.pace.edu/cisg/biblio/schlechtriem-27.html>>.
3. CISG Art. 11 reads: “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.”
4. See Comment 1 on Art. 1.9 UNIDROIT Principles.
5. Furthermore, it is to be noted that eight States, including China, made declarations under CISG Art. 96 rejecting provisions of CISG that allowed effective notification in form other than in writing – e.g., Arts. 11, 12, 96. For online identification of declarations, see <<http://www.uncitral.org/english/status-e.htm>>. It is also to be noted that the “informality principle” has been clearly adopted by the new China Contract Law (e.g., Art. 10.) Nonetheless, even when Contracting States make use of the reservation in Art. 96, domestic requirements on form are only to be regarded as far as they relate to the formation of the contract, its modification or consensual termination. The precise formulation contained in Arts. 12, 29 and 96 “its modification or termination by agreement” makes it clear that a one-sided declaration to terminate a contract does not fall within the scope of the reservation and the corresponding domestic regulations on form. *Schlechtriem, supra*. fn. 5, p. 45.
6. See Comment and Notes to the PECL: Art. 1:303. Comment B. Available online at <<http://cisgw3.law.pace.edu/cisg/text/peclcomp27.html>>.
7. *Supra*. fn. 4.
8. *Supra*. fn. 6.
9. For example, even though a particular form of notice may normally be sent by airmail, in a given case the need for speed may make only electronic communication, telegram, telex, or telephone, a means appropriate “in the circumstances.” *Infra*. fn. 10, Comment 2. For guidance on Electronic Communications under CISG, see CISG-AC Opinion No. 1. Available online at <<http://cisgw3.law.pace.edu/cisg/CISG-AC-op1.html>>.
10. See Secretariat Commentary on Art. 25 of the 1978 Draft [counterpart of CISG Art. 27], Comment 3. Available online at <<http://cisgw3.law.pace.edu/cisg/text/secomm/secomm-27.html>>.
11. In Part II of the CISG, the legal effectiveness of an offer under Article 15(1) and the legal effectiveness of an acceptance under Article 18(2) are tied to the moment of receipt as defined in Article 24. The same rule applies to the withdrawal of an offer (Article 15(2)), the rejection of an offer (Article 17), a declaration fixing a period of time for acceptance of an offer (Article 20(1)), and the withdrawal of an acceptance (Article 22). *Infra*. fn. 15. Article 16(1) is an exception; it turns on the common law “mailbox rule”: an offeror may not revoke an offer once the offeree has dispatched his acceptance.
12. Such exceptions to Art. 27 in Part III are contained in Article 47, paragraph 2, and Article 63, paragraph 2, in which receipt of a notice is actually already a condition for the activities of the other party caused by it; Article 48, paragraph 2, Article 65, paragraphs 1 and 2, and Article 79, paragraph 4. See *Fritz Enderlein, Dietrich Maskow, International Sales Law: United Nations Convention on Contracts for the International Sale of Goods*, Oceana Publication (1992), p. 119. Available online at <<http://cisgw3.law.pace.edu/cisg/biblio/enderlein.html>>. *Schlechtriem* also states similarly but in more details as: “Part III of the CISG contains five articles which tie the legal effectiveness of a contract to the receipt of a buyer’s or seller’s notice. Under Article 47(2), a seller’s notice that he will not perform within the period fixed by the buyer becomes effective upon receipt of this notice. Similarly under Article 63(2), the legal effectiveness of a buyer’s notice that he will not perform within the period fixed by the seller also becomes effective upon such receipt. The same rule applies to (1) the seller’s request for clarification or notice that the buyer will perform within a specified time; (2) the seller’s request that the buyer supply missing specifications and the seller’s notice to the buyer that he will supply such specifications if buyer fails to do so; and (3) the notice of an impediment and its effect upon a party’s ability to perform.” *Infra*. fn. 15.
13. *Supra*. fn. 10, Comment 4.
14. *Schlechtriem, supra* fn. 5, p. 61.
15. See *Peter Schlechtriem* in “Effectiveness and Binding Nature of Declarations (Notices, Requests or Other Communications) under

Part II and Part III of the CISG”: *Cornell Review of the Convention on Contracts for the International Sale of Goods* (1995), pp. 95-114. Available online at <<http://cisgw3.law.pace.edu/cisg/biblio/schlecht.html>>.

- ¹⁶ *Supra*. fn. 13.
- ¹⁷ CISG Art. 24 reads: “*For the purpose of this Part [Part II] 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.*”
- ¹⁸ See Comment 4 on Art. 1.9 UNIDROIT Principles.
- ¹⁹ *Supra*. fn. 6, Comment C.
- ²⁰ *Ibid*.
- ²¹ *Supra*. fn. 19.
- ²² See Comment 3 on Art. 1.9 UNIDROIT Principles.
- ²³ *Supra*. fn. 6, Comment D.
- ²⁴ *Supra*. fn. 22.
- ²⁵ It is to be mentioned again, either CISG Art. 27 or PECL Art. 1:303(4) is optional; the parties are also at liberty to set other requirements, such as receipt for communications to be effective. Even absent explicit agreement, usages or practices established between the parties can modify the principle stated in CISG Art. 27 or PECL Art. 1:303(4).
- ²⁶ The dispatch principle thus applies to notices given under the following articles of the PECL: 7:109 Property not accepted; 7:110 Money not accepted; 8:105 Assurance of performance; 8:106 Notice fixing additional time for performance; 9:102(3) Non-monetary obligation (loss of right to specific performance); 9:301 Right to terminate the contract; 9:303 Notice of termination; 9:304 Anticipatory non-performance. The dispatch rule does not apply to a notice which is to be given by the defaulting party, e.g., under Article 8:108(3), or by a party which wishes to invoke hardship, see Article 6:111, or to an assurance of performance under 8:105(2). (*Supra*. fn. 23.)
- ²⁷ *Supra*. fn. 6, Comment F.
- ²⁸ In a CISG case in which *Schlechtriem* participated as an expert witness on uniform sales law, the buyer declared avoidance of the contract, claiming that the machines he purchased produced an unacceptable amount of waste because of a malfunctioning electronic control system. The seller denied any non-conformity and rejected the buyer’s declaration of avoidance (and his demand for repayment of the purchase price). More than three years of litigation followed. Taking into account the uncertainties of the lawsuit, the buyer mitigated his losses by repairing the machines himself. During the litigation, the court determined that the machines had not conformed to the contract when they were delivered, and that this non-conformity amounted to a fundamental breach. The court also realized that the seller was in serious financial straits and would not be able to refund the purchase price or pay the damages caused by the breach of contract. In order to avoid having to return the machines and account to the seller for the benefits the buyer had derived from them in the meantime, the buyer revoked his declaration of avoidances. The buyer instead declared a reduction of the purchase price under Article 50, claiming restitution of only a part of the purchase price and additional damages. He was well aware that even this reduced demand would not be satisfied by the seller, but cut his overall losses by keeping the machines which were now functioning more or less properly. The seller objected to the revocation of the declaration of avoidance. He agreed with a termination of the contract and asked for the machines to be returned to him. This case illustrates some of the practical reasons supporting a rule that permits the revocation of a declaration governed by Article 27 after the declaration has been dispatched. Although not relevant to this buyer, the theory that such declarations should at least remain ineffective prior to receipt makes sense. A declaration which avoids the contract or reduces the price should not occur before the other party has a chance to know the declaration and the change in the legal situation brought about thereby. Such a declaration is characterized as a “unilaterally shaping declaration” (*einseitige Gestaltungserklärung*). *Supra*. fn. 15.
- ²⁹ *Supra*. fn. 6, Comment E.