

The Impact of Electronic Communications on the Formation of International Sales Contracts: Successes and Limitations of CISG Advisory Council Opinion No. 1

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Abstract

In the context of a globalized economy, the United Nations Convention on Contracts for the International Sale of Goods (CISG) has been widely applied as the foundational legal framework for transnational sales contracts. However, with the rise of electronic communications, the applicability of the CISG in contract formation has faced several ambiguities. Advisory Council Opinion No. 1 seeks to address these ambiguities by providing clear guidance on the use of electronic communications in international sales contracts. This essay argues that while the Opinion has theoretically resolved many of these issues, certain limitations remain. The essay firstly reviews the CISG's ambiguities in contract formation, then assesses the successes of Advisory Council Opinion No. 1 in addressing these issues, and finally examines the remaining challenges and limitations that the Opinion does not fully resolve.

Keywords: CISG, international sales contracts, electronic communications, Advisory Council Opinion No. 1, contract formation ambiguities

1. Introduction

In a globalised economy, the legal framework of international sales contracts is crucial to ensure the smooth functioning of cross-border trade. The United Nations Convention on Contracts for the International Sale of Goods (CISG) has been the cornerstone since 1980. However, with the proliferation of electronic communications, the applicability of the CISG in dealing with the formation of contracts by electronic means has been challenged, creating more ambiguities in forming international sales contracts. The Advisory Council Opinion No. 1 aims to address

these ambiguities by providing clear guidance on applying electronic communications in international sales contracts. This essay argues that Opinion theoretically solves most problems in terms of ambiguity, but there are still unavoidable shortcomings and limitations. Therefore, this essay will first review CISG's ambiguities in international sales contract formation, then analyse the success of Advisory Council Opinion No. 1 in resolving this aspect of the issue, and finally explore the issues and limitations that the Opinion lacks to address.

2. CISG Ambiguity in Contract Formation

The United Nations Convention on Contracts for the International Sale of Goods (CISG) provides a widely accepted legal framework for contracts for the transnational sale of goods to facilitate the smooth conduct of international trade. However, there is ambiguity in the provisions of the CISG regarding the formation of international sales contracts. Since the CISG does not explicitly define “electronic communication” in the original text nor directly refer to modern means of communication such as email, instant messaging, etc., the “ambiguity” exists in particular in adapting to the fast-developing electronic communication technology.

Firstly, there is ambiguity in the CISG as to the clarity of the offer and the validity of a contract concluded by electronic means; the CISG recognises that a contract may not be formed in writing (Article 11) and that a contract may be formed informally by conduct or oral understanding.¹ In practice, however, parties to a contract often need tangible and retrievable evidence to prove the existence of the contract and its terms. Although the CISG provides for “writing”, stating that writing includes telegrams and telexes (Article 13), these provisions fail to specify the legal status of modern electronic communications such as email and instant messaging.

Secondly, the time of “arrival” of electronic communication is also ambiguous, as Article 18 of the CISG provides that an offer is compelling when it reaches the offeree and that the manner of acceptance of an offer includes the possibility of tacit acceptance.² However, the scope and boundaries of such tacit acceptance may sometimes need to be clarified. For example, it does not specify an electronic communication’s arrival time. Where electronic communications can be sent and received instantaneously, determining a specific “arrival” time becomes complicated, especially when communication involves different time zones or network delays.

Finally, the so-called ‘Battle of the Forms’ occurs when both parties attempt to incorporate their

standard terms into the contract but disagree on which party’s terms will apply before execution. The CISG does not specify how to resolve such conflicts, which in actual cases may lead to an interpretation of the contract’s content in dispute.³ Whilst Article 19 goes some way to attempting to resolve this issue, Steensgaard points out that given the purpose of the CISG and the interests of users, the best approach at this time is to arrive at a harmonised final offer rule, rather than introducing new legal positions through inconsistent interpretation.⁴

3. Solutions and Successes Provided by Advisory Council Opinion No. 1

The Advisory Council Opinion No. 1 (ACO 1) seeks to modernise the CISG, drafted before the widespread use of electronic communications. As such, it provides an article-by-article commentary on the clauses in the CISG that relate to electronic communications, offering explanations and opinions on how these clauses should be applied in an electronic communications environment. The Opinion contributed significantly to resolving ambiguities in the CISG’s treatment of electronic communications, including in the contract formation process.⁵

Firstly, the ACO 1 directly determines the applicability of electronic communications and makes it clear that electronic communications can be deemed to satisfy the CISG’s “written” form requirement and that the time of their sending and receipt can determine the point in time at which contractual terms come into force, (Article 13). By including electronic communications within the definition of “writing”, the Opinion provides a legal basis for the validity of modern means of communication, such as e-mail and instant messaging, within the legal framework of contracts, confirming that international sales contracts can be concluded through electronic communications.

Secondly, ACO 1 proposes a definition of the

¹ Gillette, Clayton P., and Steven D. Walt. 2016 (). *The UN Convention on Contracts for the International Sale of Goods: Theory and Practice*, trans. Anonymous, 2nd edn. New York: Cambridge University Press, p. 83.

² Schwenger, Ingeborg H., Christiana Fountoulakis, and Mariel Dimsey. (2019). *International Sales Law: A Guide to the CISG*, trans. Anonymous, 3rd edn. Oxford, UK: Hart Publishing, pp. 143-156.

³ Fogt, Morten M. (2014). Contract Formation under the CISG: The Need for a Reform. In DiMatteo, Larry A. (ed), *International Sales Law: A Global Challenge*. Cambridge University Press, pp. 179-202.

⁴ Steensgaard, Kasper. (2015). A Comparative View on ‘Battle of the Forms’ Under the CISG and in the German and US American Experiences. *Nordic Journal of Commercial Law*, (1).

⁵ Ramberg, Christina. (2004). Electronic Communications Under the United Nations Convention on Contracts for the International Sale of Goods, CISG. *Scandinavian Studies in Law*, 47.

time of “arrival” of an electronic communication, which specifies the point in time when the offer becomes effective, is accepted and withdrawn. An electronic communication is deemed to have “arrived” when it enters the addressee’s server (articles 15, 16 and 24). This definition resolves the ambiguity regarding the time of arrival of an electronic communication. It provides an explicit criterion for determining the critical point in time during contract formation.

In addition, ACO 1 clarifies key terminology by providing a clear definition of the terms “writing”, “arrival”, “oral”, and “notice” in the context of electronic communications. The ACO 1 integrates with other legal frameworks. It refers to the UNCITRAL Model Law on Electronic Commerce and provides a harmonised approach to electronic communications in international trade. While this integration does not directly answer the “Battle of the Forms” question, it objectively contributes to creating a coherent legal environment for electronic transactions. It somewhat reduces the ambiguity created by “Battle of the Forms”.

4. Objective Limitations on the Effectiveness of Opinions

Generally, ACO 1 is very objective in its success in clarifying CISG ambiguities relating to electronic communications. However, it inevitably has limitations in resolving all international sales contract formation ambiguities.

Firstly, ACO 1 is a developmental comment on the CISG provisions on electronic communications. However, the ambiguities of CISG about the formation of international sales contracts are not, in fact, limited to the issue of electronic communications, e.g., ‘Battle of the Forms’, which is a common feature of practice, is not merely a matter of the rules on electronic communications, but rather an objective disagreement. Instead, it is an objective disagreement. Secondly, ACO 1 is not a legally binding document. It is an interpretive tool designed to guide courts and parties, and its success depends on its adoption by national courts and parties. Finally, rapid advances in electronic communications technology mean that opinions can quickly become outdated. The CISG will also face new challenges in the future, such as the use of blockchain and smart

contracts. However, ACO 1’s difficulty in fully meeting and providing new forms of communication may require further guidance.

Therefore, while ACO 1 has made significant progress in clarifying that CISG applies to electronic communications, its success in resolving all ambiguities will depend on the extent to which it is adopted and the continued development and refinement of the legal framework in response to technological change. It serves as a valuable interpretative tool, but the ultimate resolution of ambiguities may require further development and refinement of CISG’s provisions in electronic commerce.

5. Conclusion

In conclusion, the Advisory Council Opinion No. 1 has already provided vital guidance to modern commercial practice in adapting CISG to electronic communications. In particular, it has clarified critical issues such as the role of electronic communications in forming contracts, the definition of the “writing” form and the time of “arrival” of electronic communications. These contributions are essential to ensure the effectiveness of the CISG in the digital age. Inevitably, however, the Opinion will not resolve all ambiguities in the formation of international sales contracts, as ambiguities will also be created outside of electronic communications, e.g., in ‘Battle of the Forms’ and cross-jurisdictional applicability, and emerging technologies will continue to create new challenges in the future. Thus, in general, the ACO 1 has successfully resolved ambiguities, but there is still a need for the CISG to be continuously updated and adapted in response to the diverse and rapidly changing global trade environment.

References

- Fogt, Morten M. (2014). Contract Formation under the CISG: The Need for a Reform. In DiMatteo, Larry A. (ed), *International Sales Law: A Global Challenge*. Cambridge University Press, pp. 179-202.
- Gillette, Clayton P., and Steven D. Walt. (2016). *The UN Convention on Contracts for the International Sale of Goods: Theory and Practice*, trans. Anonymous, 2nd edn. New York: Cambridge University Press, p. 83.
- Ramberg, Christina. (2004). Electronic Communications Under the United Nations Convention on Contracts for the

International Sale of Goods, CISG.
Scandinavian Studies in Law, 47.

Schwenzer, Ingeborg H., Christiana Fountoulakis, and Mariel Dimsey. (2019).
International Sales Law: A Guide to the CISG,
trans. Anonymous, 3rd edn. Oxford, UK:
Hart Publishing, pp. 143-156.

Steensgaard, Kasper. (2015). A Comparative
View on 'Battle of the Forms' Under the
CISG and in the German and US American
Experiences. *Nordic Journal of Commercial
Law*, (1).