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UNCITRAL Approaches to Regulate Electronic Contracting. Are They Still Applicable? Based on Ukrainian and Other CIS Countries' Experience

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Abstract:

Contract formation by electronic means nowadays is a widespread phenomenon. Although electronic contracting has been thoroughly analyzed by scholars, there still remain some issues which need to be addressed. In our view, the most essential question raised by electronic contracting is whether there is a need to amend substantial contract law provisions with regard to peculiarities of contracts formed by electronic means. Seeking the answer to this question the UNCITRAL developed several basic approaches which come down to the idea that there is no need to amend substantial contract law provisions and create a special regulation for electronic contracting. However, a lot of countries have deviated from this approach and amended some special rules.

In this article the latest amendments of contract law provisions in the CIS countries as well as the provisions on contract formation which remained untouched are critically analyzed. Based on this analysis the following conclusion is made: the principles of functional equivalence and technology neutrality are still applicable to practice of electronic contracting. However, the 'contract law neutrality' approach should be carefully rethought since in some cases there is a need to adapt current contract law provisions to the new realm and new practices of contract formation.

Keywords: domestic law; electronic contracts; functional equivalence; contract law neutrality; technology neutrality.

JEL Classification: K12; L24.

Introduction

Electronic contracting nowadays is a widespread phenomenon. It obviously reduces some costs, related to dispatch and delivery of letters, printing of contract terms, telephone and fax expanses etc. Even though electronic contracting is no more something unfamiliar, both in theory and in practice there are a lot of issues which still need

to be addressed. The most essential among them may be formulated in the following way: is there any difference between electronic and paper-based contracting which affects substantial provisions of contract law? In other words, is there a need to amend contract law provisions and develop a new legal framework for electronic contracting?

Attempting to address this issue a couple of decades ago UNCITRAL developed basic approaches to regulation in the field of electronic contracting. There are two principles: principle of functional equivalence and technological neutrality. The former presumes a need to adapt a domestic legislation to developments in communications technology applicable to trade law without necessitating the wholesale removal of the paper-based requirements themselves or disturbing the legal concepts and approaches underlying those requirements. In its turn, technological neutrality presumes that all technical means of storage and transmission of information have equal legal characteristics, and no discrimination should be made among the various techniques that may be used to communicate or store information electronically (Guide to Enactment 2001, United Nations Convention 2007).

All in all, both principles come down to the main conclusion, expressed in the Explanatory note of the UNCITRAL secretariat on the CUECIC: 'UNCITRAL was mindful of the need to avoid creating a duality of regimes for contract formation: a uniform regime for electronic contracts under the new Convention and a different, not harmonized regime, for contract formation by any other means' (Guide to Enactment 2001, United Nations Convention 2007). This may be called a laissez-faire or 'contract law neutrality' approach. However, continuous development of innovative technologies and wide practice of their use have proved that this conclusion is not so doubtless. Purporting initially to implement principles of functional equivalence and technological neutrality into domestic legislation, legislators in many countries deviated from this purpose in the end. All in all, it led to adoption of some provisions with respect to electronic contracts which amend substantial contract law provisions or even create new ones. Meanwhile, practicability and availability of these amendments still is questionable.

In this article we will critically analyze the latest amendments concerning formation of electronic contracts in Ukraine and other CIS countries. In particular, in Part I we will carefully analyze basic approaches developed by the UNCITRAL. In Part II we will explore whether these approaches have been consistently implemented into the legislation of Ukraine and other CIS countries. Here we will analyze provisions which were amended as well as provisions which remained untouched, and try to answer whether the amendments were justified and whether the untouched provisions need to be amended as well. In the conclusion we will sum up the results of the research and suggest possible answers to the questions raised in the introduction.

1. Basic Approaches Developed by the UNCITRAL

The most significant contribution into development of regulative framework for electronic contracts was made by the UNCITRAL. This UN organization prepared several model laws on electronic commerce and related issues (e.g. Model Law on Electronic Commerce 1996, UNCITRAL Model Law 1998, Model law on electronic signatures 2001, UNCITRAL Model Law 2001) and United Nations Convention on the Use of Electronic Communications in International Contracts for further mentioning - 'CUECIC' (United Nations Convention 2005). The mentioned documents elaborated by UNCITRAL are based on two major principles: functional equivalence and technological neutrality.

The principle of functional equivalence originates in a presumption that paper and electronic documents should be equally recognized by official bodies, and electronic documents should not be deprived their legal effect solely because of their electronic form. To make it possible there is a need to make electronic documents equivalent by their functions to paper ones. Thus, functional equivalence principle 'is based on an analysis of the purposes and functions of the traditional paper-based requirement with a view to determining how those purposes or functions could be fulfilled through electronic-commerce techniques and to providing criteria which enable such electronic communications to enjoy the same level of legal recognition as corresponding paper documents performing the same function' (United Nations Convention 2007).

Therefore, functional equivalence principle relates mainly to formal requirements provided by contract law (i.e., 'in writing' or 'a signature' requirement). However, it doesn't itself create any new formal requirements or amend the existing ones. Functional equivalence presumes a need to adapt a domestic legislation to developments in communications technology, but not to remove paper-based requirements themselves (Explanatory Note para 52) (United Nations Convention 2007, UNCITRAL Model Law 1996). That is why (and it is especially remarkable), the 'adoption of the functional-equivalent approach should not result in imposing on users of electronic commerce more stringent standards of security (and the costs associated with them) than in a paper-based environment' (Explanatory Note para 134) (United Nations Convention 2007). The principle of technological neutrality originates in a presumption that all technical means of storage and transmission of information have equal legal

characteristics, and no discrimination should be made among the various techniques that may be used to communicate or store information electronically (Explanatory Note para 47) (Guide to Enactment 2001, United Nations Convention 2007). This principle is a starting point for regulation of electronic contracting since it erases the boards between existing and future technologies. Just like the principle of functional equivalence, the principle of technological neutrality is not intended to alter traditional rules on paper-based communications or create separate substantive rules for electronic communications.

This principle is mainly associated with requirements to a signature used in electronic contracting. In this respect the UNCITRAL mentions that 'no method of electronic signature should be discriminated against'. Thus, 'there should be no disparity of treatment between various types of electronically signed messages, provided that they meet the basic requirements set forth in article 6, paragraph 1, of the Model Law [on electronic signatures] or any other requirement set forth in applicable law' (Guide to Enactment 2001). All in all, these two principles constitute the main UNCITRAL's approach to elaborate a legal framework for contracting: UNCITRAL purports not to interfere with domestic contract law provisions of different countries. In this regard UNCITRAL confirms that it does not 'deal with substantive law issues related to the formation of contracts or with the rights and obligations of the parties to a contract concluded by electronic means' (Explanatory Note para 53) (United Nations Convention 2007). Moreover, the UNCITRAL stresses the need to 'avoid creating a duality of regimes for contract formation: a uniform regime for electronic contracts and a different, not harmonized regime, for contract formation by any other means' (Explanatory Note para 53) (United Nations Convention 2007). In our view, this may be called a laissez-faire approach which means that basically there is no need to amend contract law provisions and create a special legal framework for formation of electronic contracts. This approach resembles a so-called 'contract law neutrality' approach (Winn and Haubold 2002) reflected in Directive 2000/31/EU.

2. Implementation of UNCITRAL Approaches into Contract Law of Ukraine and other CIS Countries

Contract law of Ukraine and other CIS countries during last years have been challenged by the wide use of electronic technologies in contract formation. In response provisions of civil codes of these countries were amended and new laws in the field were adopted. The courts facing the same challenges elaborated basic approaches to resolve disputes related to contract formation by electronic means. In this Part we will point out the main challenges in the field and analyze the main amendments caused by these challenges as well as the provisions which nevertheless remained untouched.

2.1. Electronic Form and its Legal Status

The legal nature of electronic form was one of the first issues challenging the practice of formation of electronic contracts. Traditionally, the legislation of CIS countries provides rather strict formal requirements to transactions and contracts. First, there are a lot of transactions that are to be made in writing: these are transactions formed between legal entities or natural persons and legal entities (Civil Code of Russian Federation 1994; Civil Code of Ukraine 2003) as well as between natural persons if the price of transaction exceeds a certain value (Civil Code of Republic of Kazakhstan 1999). However, generally breach of these requirements doesn't cause invalidity of the whole contract, but merely deprives its parties from the possibility to bring witnesses to the court (Civil Code of Ukraine, article 218, paragraph 1; Civil Code of Republic of Kazakhstan, article 153, paragraph 1; Civil Code of Ukraine 2003, 10). Second, there are a lot of transactions which are to be made in writing otherwise being void. For example, in Ukraine insurance contracts, credit agreements, bank deposit agreements, transactions on security of obligation fulfillment and agreements to dispose the intellectual property rights (e.g. license agreements) shall be done in writing, otherwise being considered absolutely void (Civil Code of Ukraine, article 547: paragraph 2, article 981: paragraph 2, article 1055: paragraph 2, article 1059: paragraph 2, article 1107: paragraph 2; Civil Code of Ukraine 2003).

Thus, it is extremely important to determine whether electronic form may qualify as written one. Attempting to address this issue, in Ukraine the Law on electronic commerce was adopted, which not only provided totally new rules and principles in the field, but also amended some articles of the Civil Code of Ukraine (The Law on Electronic Commerce 2015). In particular, it provided a principle of equivalent legal effect of electronic transactions and transactions effected in other forms (article 5 of the Law). It also implemented the term 'electronic form' into article 205 of the Civil Code of Ukraine, apparently, considering it as a type of the written form.

Since written form according to Ukrainian legislation is considered to be complied with if: (a) the content of a transaction is stored in a document; and (b) the document is signed by the parties to the transaction, it is correct to presume that electronic form may qualify as written one if it meets both requirements (i.e. the requirement of documentation and signature). However, this conclusion nowadays is not so apparent, since the Law on e-

commerce also amended other provisions of the Civil Code of Ukraine, which led to certain ambiguities. In particular, the Law amended article 639 of the Civil Code of Ukraine, which now provides that if parties agreed to enter a contract by virtue of informational-telecommunication systems, the contract is formed in writing. Thus, according to the latter provision, no matter which kind of electronic document was used (was it 'html' or 'pdf') and no matter whether it was signed, the contract nevertheless is in writing.

Apparently, amending provisions on formal requirements purporting to remove obstacles in the sphere of e-contracting, the Ukrainian legislator didn't implement the principle of functional equivalence, but in fact ignored it. Instead of providing criteria to determine which kinds of electronic documents may be considered functionally equivalent to paper ones, the legislator equated any kind of electronic document to a paper one. Of course, inconsistency of regulation in the field has multiplied ambiguities in practice. Businesses, including banks, started simplify their workflow as much as possible, avoiding paper documents and giving preference to electronic ones while concluding contracts with their clients. In particular, the major Ukrainian bank, AT 'KB Privatbank', offered to enter credit contracts in a simplified manner: the clients didn't have to sign the entire contract, but they merely signed an application which contained a provision saying that they adhere to the terms of the credit contract located on the bank's web-site.

However, this practice led to numerous disputes: when the term of a credit contract expired, the bank asked a borrower to give the loan back, including interests and penalties, but the borrowers refused to pay interests and penalties since they didn't sign any document containing them. In courts borrowers said that the only document they had got acquainted with was the paper application they had signed while entering a contract which nevertheless didn't contain anything except the loan body and reference to the website. Interest rate, penalty rate and other conditions were only available through the website which, however, could be modified unilaterally by the bank at any time. The bank, in its turn, explained that its practice was lawful since electronic form equates to paper one. Resolving these disputes, Grand Chamber of the Supreme Court (the highest court in Ukraine) supported the borrowers' position. It stressed that terms of the credit contract printed out from the bank's website may not be taken into account since they may have been unilaterally modified by the bank. Thus, these terms were inadmissible evidences. The Grand Chamber went on to say that as credit contracts must be concluded in writing otherwise being void, the terms and conditions containing the information on interests and penalty rates placed on the website did not satisfy the requirement of written form. Therefore, these terms may not be invoked against the borrower (Resolution of the Grand Chamber 2019).

Apparently, in the absence of relevant rules in the legislation Grand Chamber of the Supreme Court developed a deliberate and consistent legal position based on careful analysis of the peculiarities of electronic documents in contrast to paper ones. In the European Union the same position has been implemented at the legislative level long ago and came down to the concept of a 'durable medium' as a major formal requirement in the sphere of B2C contracts (Directive 2008/48/EC of the European Parliament 2008; Directive 2002/92/EC of the European 2002; Directive 2002/65/EC of the European 2002; Directive 2011/83/EU of the European 2011). For instance, according to article 10 (paragraph 1) of Directive 2008/48/EC credit agreements shall be drawn up on paper or on another durable medium. Article 11 (paragraph 1) of this Directive provides that where applicable, the consumer shall be informed of any change in the borrowing rate, on paper or another durable medium, before the change enters into force (Directive 2008/48/EC of the European Parliament 2008).

However, the requirement for contracts and other transactions to be drawn up on a durable medium is more than merely a result of implementation of the principle of functional equivalence. First, nowadays this requirement constitutes a new and a separate formal requirement for B2C contracts which in fact has partly superseded a classical 'in writing' requirement: this follows both from the provisions of EU Directives on consumer protection and domestic legislation of European countries. For example, German Civil Code nowadays mentions two new types of form of transaction, electronic and textual form, being separated from the classic written form. According to article 126b of the German Civil Code text form presumes that a readable declaration, in which the person making the declaration is named, must be made on a durable medium. In its turn, a durable medium is any medium that enables the recipient to retain or store a declaration included on the medium that is addressed to him personally such that it is accessible to him for a period of time adequate to its purpose, and that allows the unchanged reproduction of such declaration. What if not an amendment to substantial contract law provisions can it be considered? Second, the term 'durable' medium is often defined with technical terms. For example, Directive 2002/92/EU of 9 December 2002 on insurance mediation provides that durable medium, in particular, covers floppy disks, CD-ROMs, DVDs and hard drives of personal computers on which electronic mail is stored, but it excludes Internet sites, unless such sites meet the criteria specified in the first paragraph (Directive 2002/92/EC of the European 2002). Apparently,

this kind of definition is not technologically neutral and is not based on merely functional characteristics of different formats of electronic documents.

The mentioned examples show that principle of functional equivalence should be implemented into the legislation very carefully to avoid automatic equation of electronic and paper documents. Meanwhile, implementation of this principle nowadays leads to alteration of substantial contract law provisions, although this is what the contract law neutrality approach warns against. However paradoxical this situation is, it shows that full implementation of functional equivalence principle in its classical appreciation with regard to formal requirements is almost impossible. Thus, the appropriate amendment of substantial contract law provisions on formal requirements is justifiable, but it should be based on a careful analysis of functional characteristics of different formats of electronic documents.

2.2. Electronic Signature and its Legal Status

In contract law signature traditionally relates to formal requirements. However, in different jurisdictions a place of this requirement among other formal requirements is determined differently: some jurisdictions regard a signature as an element of written form (German Civil Code 2013), while in other jurisdictions a signature is regarded as a separate formal requirement (Uniform Commercial Code 2012). In CIS countries signature traditionally is considered an element of written form (Civil Code of Russian Federation 1994, Civil Code of Republic of Belarus 1998): if there is no signature on a document, it is not a written document, which in certain cases my lead to the invalidity of a contract. When electronic communication started to be widely used in practice of contract formation, CIS countries as many other countries in the world faced the need to adapt the concept of signature to the new realm. Mainly, these countries followed the approach reflected in UNCITRAL Model Law on electronic signatures (2001) and Directive 1999/93/EC (recently repealed by the Regulation (EU) No 910/2014): electronic signature has been defined broadly and has been generally recognized at the legislative level, however, only digital electronic signature has been considered a full equivalent of the handwritten one (The Law on Electronic Document 2005; The Law on Electronic Document 2003). The provisions concerning electronic signatures were placed both in new laws and in civil codes of these countries. However, these amendments generally didn't alter contract law provisions substantially: the new laws and provisions in the field followed the principle of technological neutrality, leaving the technical characteristics of electronic signatures aside and focusing on their functional characteristics.

Meanwhile, there are some examples when the principle of technological neutrality has been deviated from. In particular, Ukrainian Law on electronic commerce adopted in 2015 among possible types of electronic signatures mentioned a so-called 'signature by a disposable identifier'. By essence, this signature is a kind of PIN which helps to identify a person when a contract is formed by electronic means. The Law on e-commerce gave a large and complicated definition of this type of signature saying that it is a combination of letters and numbers which is received by a person who authorizes in an informational system of a trader and afterwards must be entered by the person into an appropriate place on a web-page where an offer of goods, works or services is located.

However, the special emphasize on this kind of electronic signature in the Law on e-commerce and its definition are obviously unreasonable. It is enough to provide that any electronic signature should give an opportunity to identify a signatory, but it is not necessary at all to provide particular examples of methods which can help in this regard. Therefore, the Supreme Court in its relevant decision came to the conclusion that it had been possible to use the signature by a disposable identifier even before the Law on e-commerce was adopted since in fact this type of signature is a kind of electronic signature (Resolution of the Supreme Court 2019).

Moreover, attempts to provide special regulation of various methods to identify contracting parties may lead to some obstacles in practice. For example, according to Ukrainian Law on e-commerce, signature by a disposable identifier is defined as a combination of letters and numbers. But what if this signature contains only numbers or only letters? Will it still be considered an electronic signature? To avoid these ambiguities in practice generally the principle of technological neutrality should be followed.

However, implementation of this principle sometimes requires amendment of contract law provisions, although it contradicts the basic UNCITRAL's approach of non-interference with substantial rules. For example, in 2018 in Republic of Belarus attempts to implement the principle of technological neutrality led to the amendments of rules on formation of contract law provisions. Previously the Civil code of this country provided that a contract is in writing if it is signed by its parties. However, after amendments this rule says: a contract in writing may be formed by way of drafting of a single text document (including electronic document) or by way of exchange of text or electronic documents which are signed by the parties with their handwritten signatures or by virtue of communicative and technical means, computer programs, informational systems or informational nets, if this way to sign a document makes it possible to establish for certain that the document comes from the party to the contract

(article 404, paragraph 2) (Civil Code of Republic of Belarus 1998).In our view, if such amendments help to remove some obstacles in practice of contract formation and facilitate the use of electronic communication, they are justifiable, even though they contradict the laissez-faire approach suggested by the UNCITRAL. However, these amendments should not create excessive and unreasonable regulation in the field.

2.3. Acceptance of an Offer by Electronic Means

Acceptance is a stage of contract formation which responds to the offer. There are various ways to express acceptance. Civil legislation of Post-Soviet countries provides the following ways:

- oral or written consent to all terms and conditions expressed in the offer. This way to express acceptance is not provided by the civil legislation of these countries expressly, but it follows from the rule that a contract is formed, if the parties have reached a consensus on all its essential provisions in a due form (Civil Code of Republic of Belarus, article 402, paragraph 1:
  - Civil Code of Ukraine, article 638, paragraph 1;
  - Civil Code of the Russian Federation, article 432, paragraph 1;
  - Civil Code of Republic of Kazakhstan, article 393, paragraph 1, Civil Code of Russian Federation 1994; Civil Code of Ukraine 2003; Civil Code of Republic of Kazakhstan 1999; Civil Code of Republic of Belarus 1998;
- conduct purporting to perform contract obligations mentioned in offer (shipping of products, provision of services, transfer of money etc., Civil Code of Republic of Belarus, article 408, paragraph 3;
  - Civil Code of Ukraine, article 642, paragraph 2;
  - Civil Code of the Russian Federation, article 438, paragraph 3;
  - Civil Code of Republic of Kazakhstan, article 396, paragraph 3, Civil Code of Russian Federation 1994; Civil Code of Ukraine 2003; Civil Code of Republic of Kazakhstan 1999; Civil Code of Republic of Belarus 1998);
- silence, though it may express the acceptance only in certain cases (Civil Code of Republic of Belarus, article 408, paragraph 2):
  - Civil Code of Ukraine, article 205, paragraph 3;
  - Civil Code of the Russian Federation, article 438 paragraph 3;
  - Civil Code of Republic of Kazakhstan, article 396, paragraph 2;
  - Civil Code of Russian Federation. 1994;
  - Civil Code of Ukraine 2003;
  - Civil Code of Republic of Kazakhstan, 1999;
  - Civil Code of Republic of Belarus, 1998.

However, wide use of electronic means in practice of contract formation has challenged traditional rules on acceptance and ways of its expression. Electronic contracts usually are formed through so-called 'Online shops', i.e. through various informational systems providing an opportunity to enter a contract automatically or almost automatically by mere 'click', scrolling, authorizing, registering on a website of a trader or service provider, browsing a webpage etc. Case law of common law countries has divided all electronic contracts due to the way the acceptance is expressed into several groups: 'installwrap', 'sign-in-wrap', 'scrollwrap', 'tapwrap' and 'hybridwrap' contracts. Apparently, it is easy to guess which way of expression of consent gave the name to each type of electronic contracts (Russ 2016). However, the dichotomic classification is classical in this regard. It divides all the contracts into two types, 'click-wrap' and 'browse-wrap' (Mootz 2008; Moringiello and Reynolds 2010; Kim 2015; Gautrais 2003; Moringiello 2005). Concluding click-wrap contract the adhering party expresses her consent by clicking an appropriate interactive icon on a webpage and gets an access to a contract terms before she enters the contract. Browse-wrap contracts are formed without an expressed consent: the adhering party is considered to have given consent if she browses a webpage, repeatedly accesses a website or merely doesn't leave a webpage.

Regarding click-wrap contracts the following questions arise: what is 'click' and can it constitute the acceptance? These questions become rather important since there are a lot of electronic contracts formed by mere click: for example, nowadays we give our consent to processing of our personal data when visiting some websites, which all in all constitutes an agreement with the person asking for our consent. Apparently, an icon we click is not an oral or written expression of our acceptance since it is merely 'click'. Neither can it be considered a silent consent since silence presumes saying and doing nothing, whereas 'click' is an act, even though it is very short and simple. Thus, the only possible option is to consider a 'click' as the offeree's conduct attesting her will to enter a contract. However, literally this option is not appropriate as well: according to the mentioned provisions of the civil codes of the CIS countries, acceptance may be expressed not by any conduct, but only by the action aimed at contract

performance, mentioned in the offer. Clicking an icon apparently is not an action, aimed at contract performance, but an action, aimed at contract formation.

This situation shows that click as a widespread way to express acceptance does not fall within the scope of current regulation in the CIS countries. However, modern sources of lexmercantoria and other international instruments of contract law take a very broad approach on ways to express acceptance. For example, according to article 2.1.6. of UNIDROIT Principles of commercial contracts (PICC) acceptance may be expressed in a statement or other conduct of the offeree indicating assent. Official commentary of this provision underlines that the mentioned article does not specify the form such conduct should assume, however, most often it will consist in acts of performance (UNIDROIT Principles of commercial contracts 2016). The same approach has been taken by the authors of Draft Common Frame of References (DCFR): according to article II. – 4: 204 any form of statement or conduct by the offeree is an acceptance if it indicates assent to the offer (von Bar and Clive 2009).

Browse-wrap contracts challenge rules on contract formation as well. Although currently they are less widespread than in the beginning of the new millennium, sometimes they still are formed in the Internet. However, the way the consent of the adhering party is usually expressed to form these contracts doesn't fall within the current regulation in most of CIS countries. Usually the adhering party is not required to do anything to enter the browse-wrap contract: it is enough to visit the website, to scroll the page etc. Thus, in fact, the acceptance is expressed tacitly. According to the civil codes of many CIS countries silence may not constitute the acceptance, unless other is provided by the law or by the agreement (Civil Code of Republic of Belarus, article 408: paragraph 2; Civil Code of Ukraine, article 205: paragraph 3; Civil Code of Ukraine 2003; Civil Code of Republic of Belarus 1998).

Therefore, to make the way the browse-wrap contracts are usually formed admissible from contract law perspective, the provisions of domestic legislation on tacitoconsensu should be more flexible. In our opinion, the list of cases when the silence may constitute acceptance should be broadened: the law should provide that silence may constitute acceptance not only when it is provided for by the law or an agreement, but when it follows from customs and previous relationships between the contracting parties.

Thus, in both cases we face a controversial situation: on the one hand, there is a need to amend contract law provisions to adapt them to modern practices of contract formation. On the other hand, amending the domestic legislation will contradict the laissez-faire approach taken by the UNCITRAL. In our opinion, it is more important to make contract law provisions flexible enough to encompass new practices of contract formation, than to observe the neutral approach chosen by the UNCITRAL, especially since it doesn't create parallel regimes for paper and electronic contracts. Therefore, in this regard deviation from laissez-faire approach is justified and suggested.

Generally, a contract is formed when the offer has been duly accepted. However, there are different theories to identify the moment when it happens:

- the declaration theory considering a contract being formed when the acceptance has been expressed;
- the dispatch theory which considers a contract to be formed once the acceptance comes to the actual knowledge of the offeror;
- the postal rule saying that the contract is formed at the moment when the offeree sends acceptance to the offeror;
- and the theory of reception which states that a contract is concluded once the acceptance is received by the offeror (Sasso 2016).

Here we won't go into details of each of the mentioned approaches since the only issue which matters for the purposes of this research is whether the approach to identify the moment of contract formation already chosen in a certain jurisdiction should be altered considering electronic contracting. Some scholars have already supported this idea. Particularly, Rawls (2009) came to the conclusion that a 'postal rule' being the main rule determining the moment of contract formation in common law countries, may not be applied to cases where acceptances were delivered by email or other electronic messengers. Moreover, this opinion was supported in case law in the UK (Nolan 2010).

The CIS countries traditionally support the theory of receipt to identify the moment of contract formation (Civil Code of Republic of Belarus, article 403: paragraph 1; Civil Code of Ukraine, article 640: paragraph 1; Civil Code of the Russian Federation, article 433: paragraph 1; Civil Code of Republic of Moldova, article 699: paragraph 1; Civil Code of Republic of Armenia, article 449: paragraph 1; Civil Code of Russian Federation 1994; Civil Code of Ukraine 2003; Civil Code of Republic of Belarus 1998; Civil Code of Republic of Moldova 2018; Civil Code of Republic of Armenia 1998). However, the practice of contract formation by electronic means has led to some deviations from this approach in some jurisdictions. For example, the Law on Electronic Document and Digital Signature of Republic of Kazakhstan provides that the receipt of an electronic document shall be acknowledged. If the acknowledgement of the receipt is not received by the sender of the electronic document, the document is

deemed not to be received by the addressee (article 7, paragraph 4 of the Law) (Law of Republic of Kazakhstan on Electronic 2003). Thus, if the acceptance in form of an electronic document is sent and received, but there is no acknowledgement of the receipt, the acceptance will not be considered received by the offeror. Much the same approach has been supported in Republic of Moldova. Initially it was reflected in the Law on electronic commerce providing that the offer or acceptance shall be received at the time of dispatch of acknowledgement of their receipt by the addressee unless other is agreed by the contracting parties (article 22, paragraph 2) (Law of Republic of Moldova 2004). However, in 2018 this provision was repealed. Now mutatis mutandis the same approach is reflected in the Civil Code of Republic of Moldova. According to article 678-12 of the Code the business offering to conclude a contract by electronic means shall acknowledge with electronic means the receipt of the offer made by the other party or the acceptance made by the other party. If the other party doesn't receive the acknowledgement in due time, she may terminate the offer it made or terminate the entire contract (Civil Code of Republic of Moldova 2018).

These examples show that in fact, the mentioned countries have supported informational theory for the purposes of determination of the time when an electronic contract is formed. However, whether deviation from the basic approach (receipt theory) was justified and necessary is rather questionable. In our view, this deviation obviously will create parallel regimes for paper and electronic contracts. Moreover, it may cause some ambiguities in practice: if a contract is deemed to be formed once the acknowledgement is received, it puts excessive burden on the offeror who bears the risk of failure to receive the acknowledgement by the offeree. Apparently, it also delays the moment of contract formation.

Therefore, in our opinion, in this case deviation from the receipt theory as well as from the laissez-faire approach is not justified. There are no reasons to interfere with the existing substantial provisions which regulate this issue. The only thing which should be reflected in the legislation is not the new rule to determine the time of contract formation, but the rule to determine the moment of dispatch and receipt of electronic communications. In this regard article 10 of CUECIC may be used by legislators as a pattern since it provides the most deliberate and consistent approach to regulate this issue.

Conclusions

Model laws and conventions in the field of electronic commerce elaborated by the UNCITRAL are based on three main approaches: functional equivalence, technology neutrality and contract law neutrality meaning that substantial contract law provisions shall not be amended because of new technologies, and creation of parallel regimes for electronic and paper contracts shall be avoided.

Although these approaches were developed long ago, the practice of contract formation by electronic means shows that they still are applicable. The analysis of legislation of Ukraine and some other CIS countries has shown that mostly the main UNCITRAL's approaches were observed while adopting new laws on e-commerce and electronic signatures. However, sometimes the parliaments of these countries deviated from these approaches, which led to ambiguities in practice (in particular, with regard to status of electronic form and electronic signatures). On the other hand, the emergence of electronic contracting has revealed that not all the contract law provisions are flexible enough to encompass new ways of contract formation (for example, ways to express acceptance).

In our opinion, basic approaches developed by the UNCITRAL should still be considered when adopting new provisions concerning formation of electronic contracts. In particular, the principles of functional equivalence and technology neutrality should be strictly observed. However, the 'contract law neutrality' approach should be carefully rethought. It should not be overestimated and perceived in a way that nothing in contract law may ever be changed because of new practices of contract formation. Contrariwise, if the consistent implementation of functional equivalence or technology neutrality requires making some amendments, they should be made. Likewise, if the new practice shows that contract law provisions unjustifiably hinder new practices of contract formation, these provisions shall be amended.

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