LA FORMACION DEL CONTRATO

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CONCLUSIONES

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1. En el primer y segundo capítulo se repasa gran parte de la doctrina tradicional en materia de formación del contrato y se contrasta con la jurisprudencia. De este análisis se pueden destacar las siguientes conclusiones:

1.a. En la actualidad, la doctrina y la jurisprudencia se muestran mayoritariamente a favor del reconocimiento de una plazo implícito en toda oferta.

1.b. Este plazo se distingue de la revocabilidad en el carácter implícito y explícito de cada uno de ellos: a diferencia del primero, la irrevocabilidad de una oferta debe manifestarse de manera expresa.

1.c. La mayoría de la doctrina y la escasa jurisprudencia al respecto defienden el carácter intransmisible mortis causae de la oferta.

1.d. Como regla general, el silencio no equivale a aceptación, pues los agentes sociales no pueden imponer sobre sus interlocutores la carga de contestar sus ofertas. Sin embargo, del análisis jurisprudencial se llega a la conclusión contraria cuando concurren circunstancias adicionales que conducen al oferente a inferir de manera razonable la aceptación.

2. En el capítulo tercero se rompe con la doctrina tradicional y se sostiene que en la contratación actual por medio de condicionados generales no es necesaria una perfecta identidad entre la oferta y la aceptación, pues la mayoría de cláusulas no han sido negociadas ni conocidas por las partes:

2.a. En el derecho comparado, los Estados Unidos de América y Alemania han superado las posiciones tradicionales.

2.b. En nuestro ordenamiento, la doctrina se muestra partidaria de la postura tradicional, la jurisprudencia ha aplicado criterios más pragmáticos, y el Convenio de Viena de 1980 sobre compraventas internacionales de mercaderías introduce una innovación sumamente moderada en esta cuestión.

2.c. El Convenio de Viena regula esta cuestión en su artículo 19, y aunque da la impresión que el parágrafo (2) introduce una modificación importante a la regla tradicional establecida en el (1), al considerar perfeccionados contratos en los que no coinciden la oferta y la aceptación, el parágrafo (3) malogra dicha posibilidad al vaciar de contenido al anterior, quedando reducido a modificaciones insustanciales, errores tipográficos, etc.

2.d. La propuesta parte de la afirmación que el acuerdo contractual debe versar sobre lo realmente negociado; respecto de lo restante, las cláusulas de la oferta y aceptación distintas entre si no formarán parte del contrato (nulidad parcial), pasando a ser regulada esa materia por el derecho dispositivo.

3. En el capítulo cuarto se trata la cuestión del momento y lugar de formación del contrato: tras exponer las distintas soluciones existentes en el derecho comparado y en nuestro ordenamiento, y la aplicación correctora de la jurisprudencia, se propone un criterio unitario:

3.a. Mientras la doctrina civil coincide con la jurisprudencia en la interpretación correctora del artículo 1262.2 Cc, aplicando la regla de

la recepción, no ocurre lo mismo con la mayor parte de la mercantil, la cual aplica literalmente la regla de la emisión, a diferencia de la jurisprudencia, que interpreta el artículo 54 Cco adoptando la regla de la expedición.

3.b. Partiendo de la necesidad de unificar la regulación civil y mercantil en materia de obligaciones y contratos, el criterio propuesto es el formulado en el Convenio de Viena: teoría de la recepción, concediéndole al oferente la posibilidad de revocar siempre que ésta llegue al aceptante antes que sea expedida la aceptación. Solución avalada por razones económicas, de justicia, de asunción de riesgos, de unificación de criterios, de derecho comparado, y de la naturaleza de la aceptación.

4. El último capítulo trata de algunas cuestiones concernientes al proceso de formación del contrato de seguro:

4.a. Se defiende la naturaleza consensual más forma ad probationem del contrato de seguro, en la línea de nuestra jurisprudencia y de la mayoría de ordenamientos afines, a pesar de la división existente al respecto en la doctrina.

4.b. Se reconoce al solicitante del seguro la cualidad de oferente.

4.c. Los tribunales no conceden validez a las cláusulas exoneratorias o limitativas de responsabilidad si hay un tercero perjudicado que prevén no será resarcido, siempre que no tenga un lazo de unión de tipo familiar, afectivo, o similar con el causante. Los argumentos empleados son: a) la falta de aceptación expresa de dicha cláusula; b) la ausencia de una efectiva relación de causalidad entre la excepción y el evento dañoso.

5. El Convenio de Viena de 1980 sobre compraventa internacional de mercaderías ha quedado algo anticuado, pues, entre otras razones, desde entonces han aparecido nuevas formas de contratación, como son el fax y el correo electrónico, que están llamadas a sustituir algunos de los procedimientos tradicionales. Buena prueba de ello son los proyectos de regulación internacional en curso: los Principios aplicables a los contratos internacionales (Principles for International Commercial Contracts), y los Principios del derecho europeo de contratos (Principles of European Contract Law).

ANEXOS

ANEXO I. MODELO DE ACUERDO ENTRE LAS PARTES INTERVINIENTES EN LA CONTRATACION POR CORREO ELECTRONICO[579].

MODEL ELECTRONIC DATA INTERCHANGE TRADING PARTNER AGREEMENT

THIS ELECTRONIC DATA INTERCHANGE TRADING PARTNER AGREEMENT (the "Agreement") is made as of _____, 19__, by and between _____ ("ABC"), a _____ corporation, with offices at _____ and _____ ("XYZ"), a _____ corporation, with offices at _____.

RECITALS

ABC and XYZ desire to facilitate purchase and sale transactions ("Transactions") by electronically transmitting and receiving data in agreed formats in substitution for conventional paper-based documents and to assure that such Transactions are not legally invalid or unenforceable as a resut of the use of available electronic technologies for the mutual benefit of the parties.

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[579]Tomado de BAUM/BOSS/McCARTHY/OTERO/RITTER. The Commercial Use of Electronic Data Interchange -A Report and Model Trading Partner Agreement. pp. 1717 y ss.

NOW THEREFORE, the parties, intending to be legally bound, agree as follows:

Section 1. Prerequisites

1.1. Documents; Standards. Each party may electronically transmit to or receive from the other party any of the transaction sets listed in the Appendix, [transaction sets which the parties regularly transmit] and transaction sets which the parties by written agreement add to the Appendix (collectively "Documents"). Any transmission of data which is not a Document shall have no force or effect between the parties unless justifiably relied upon by the receiving party. All Documents shall be transmitted in accordance with the standards [and the published industry guidelines] set forth in the Appendix.

1.2. Third Party Sevice Providers.

1.2.1. Documents will be transmitted electronically to each party either, as specified in the Appendix, directly or through any third party service provider ("Provider") with which either party may contract. Either party may modify its election to use, not use or change a Provider upon 30 days prior written notice.

1.2.2. Each party shall be responsible for the costs of any Provider with which it contracts, unless otherwise set forth in the Appendix.

[**1.2.3.** Each party shall be liable for the acts or omissions of its Provider while transmitting, receiving, storing or handling Documents, or perfoming related activities, for such party; provided, that if both the parties use the same Provider to effect the transmission and

receipt of a Document, the originating party shall be liable for the acts or omissions of such Provider as to such Document.]

1.3. Sistem Operations. "Each party, at its own expense, shall provide and maintain the equipment, software, services and testing necessary to effectively and reliably transmit and receive Documents.

1.4 Security Procedures. Each party shall properly use those security procedures, including those specified in the Appendix, if any, which are reasonably sufficient to ensure that all transmissions of Documents are authorized and to protect its business records and data from improper access.

1.5. Signatures. Each party shall adopt as its signature an electronic identification consisting of symbol(s) or code(s) which are to be affixed to or contained in each Document transmitted by such party ("Signatures"). Each party agrees that any Signature of such party affixed to or contained in any transmitted Document shall be sufficient to verify such party originated such Document. Neither party shall disclose to any unauthorized person the Signatures of the other party.

Section 2. Transmissions.

2.1. Proper Receipt. Documents shall not be deemed to have been properly received, and no Document shall give rise to any obligation, until accessible to the receiving party at such party's Receipt Computer designated in the Appendix.

2.2. Verification. Upon proper receipt of any Document, the receiving party shall promptly and properly transmit a functional

acknowledgement in return, unless otherwise specified in the Appendix. A functional acknowledgement shall constitute conclusive evidence a Document has been properly received.

2.3. Acceptance. If acceptance of a Document is required by the Appendix, any such Document which has been properly received shall not give rise to any obligation unless and until the party initially transmitting such Document has properly received in return an Acceptance Document (as specified in the Appendix).

2.4. Garbled Transmissions. If any transmitted Document is received in and unintelligible or garbled from, the receiving party shall promptly notify the originating party (if identifiable from the received Document) in a reasonable manner. In the absence of such a notice, the originating party's records of the contents of such Document shall control.

Section 3. Transactions Terms.

3.1. Terms and Conditions. This Agreement is to be considered part of any other written agreement referencing it or referenced in the Appendix. In the absence of any other written agreement applicable to any Transaction made pursuant to this Agreement, such Transaction (and any related communication) also shall be subject to [CHOOSE ONE]:

[A] those terms and conditions, including any terms for payment, included in the Appendix.

[B] the terms and conditions included on each party's standard printed applicable forms attached to or identified in the Appendix [as the same may be amended from time to time by either party upon written notice to the other]. The parties acknowledge that the terms and conditions set forth and such forms may be inconsistent, or in conflict, but agree that any conflict or dispute that arises between the parties in connection with any such Transaction will be resolved as if such Transaction had been effected through the use of such forms.

[C] such additional terms and conditions as may be determined in accordance with applicable law.

The terms of this Agreement shall prevail in the event of any conflict with any other terms and conditions applicable to any Transaction.

3.2. **Confidentiality.** No information contained in any Document or otherwise exchange between the parties shall be considered confidential, except to the extent provided in Section 1.5. by written agreement between the parties, or by applicable law.

3.3. **Validity; Enforceability.**

3.3.1. This Agreement has been executed by the parties to evidence their mutual intent to create binding purchase and sale obligations pursuant to the electronic transmission and receipt of Documents specifying certain of the applicable terms.

3.3.2. Any Document properly transmitted pursuant to this Agreement shall be considered, in conection with any Transaction, any other written agreement described in Section 3.1, or this Agreement, to be a "writting" or "in writting"; and any such Document when containing, or to which there is affixed, a Signature ("Signed Documents") shall be deemed for all purposes (a) to have been "signed and (b) to constitute an "original" when printed from electronic files or records established and maintained in the normal course of business.

3.3.3. The conduct of the parties pursuant to this Agreement, including the use of Signed Documents properly transmitted pursuant to this Agreement, shall, for all legal purposes, evidence a course of dealing and a course of perfomance accepted by the parties in furtherance of this Agreement, any Transaction and any other written agreement described in Section 3.1.

3.4. The parties agree not to contest the validity or enforceability of Signed Documents under the provisions of any applicable law relating to whether certain agreements are to be in writting or signed by the party to be bound thereby. Signed Documents, if introduced as evidence on paper in any judicial, arbitration, mediation or administrative proceedings, will be admissible as between the parties to the same extent and under the same conditions as other business records originated and maintained in documentary form. Neither party shall contest the admissibility of copies of Signed Documents under either the business records exception to the hearsay rule or the best evidence rule on the basis that the Signed Documents were not originated or maintained in documentary form.

Section 4. Miscellaneous.

4.1 Termination. This Agreement shall remain in effect until terminated by either party with not less than 30 days prior written notice, which notice shall specify the effective date of termination; provided, however, that any termination shall not affect the respective obligations or rights of the parties arising under any Documents or otherwise under this Agrement prior to the effective date of termination.

4.2. Severavility. Any provision of this Agreement which is determined to be invalid or unenforceable will be ineffective to the extent of such determination without invalidating the remainig provisions of this Agreement or affecting the validity or enforceability of such remaining provisions.

4.3. Entire Agreement. This Agreement and the Appendix constitute the complete agreement of the parties relating to the matters specified in this Agreement and supersede all prior representations or agreements, whether oral or written, with respect to such matters. No oral modification or waiver of any of the provisions of this Agreement shall be binding on either party. No obligation to enter into any Transaction is to be implied from the execution or delivery of this Agreement. This Agreement is for the benefit of, and shall be binding upon, the parties and their respective successors and assigns.

4.4. Governig Law. This Agreement shall be governed by and interpreted in accordance with the laws of the State of _____.

4.5. **Force Majeure.** No party shall be liable for any failure to perform its obligations in connection with any Transaction or any Document, where such failure results from any act of God or other case beyond such party's reasonable control (including, without limitation, any mechanical, electronic or communications failure) which prevents such party from transmitting or receiving any Documents.

4.6. **Limitation of Damages.** Neither party shall be liable to the other for any special, incidental, exemplary or consequential damages arising from or as result of any delay, omission or error in the electronic transmission or receipt of any Documents pursuant to this Agreement, even if either party has been advised of the possibility of such damages.

4.7. **Arbitration.** Any controversy or claim arising out of or relating to this Agreement, or the breach thereof, shall be settled accordance with the Comercial Arbitration Rules of the American Arbitration Association, and judgment on the award rendered by the arbitrator(s) may be entered in any court having jurisdiction thereof.

Each party has caused this Agreement to be properly executed on its behalf as of the date first above written.

ABC XYZ

By
Name
Title

ANEXO II. BORRADORES PARCIALES DE LOS PRINCIPIOS APLICABLES A LOS CONTRATOS INTERNACIONALES (PRINCIPLES FOR INTERNATIONAL COMMERCIAL CONTRACTS) Y LOS PRINCIPIOS DEL DERECHO EUROPEO DE CONTRATOS (PRINCIPLES OF EUROPEAN CONTRACT LAW), JUNTO CON UN BREVE COMENTARIO.

PRINCIPLES FOR INTERNATIONAL COMMERCIAL CONTRACTS

CHAPTER 1

GENERAL PROVISIONS

Article 1. 1

(Purpose of the Principles)

These Principles set forth general rules for international commercial contracts.

Article 1.2

(Application of the Principles)

(1) The Principles shall be applied when the parties have agreed that their contract be governed by them.

(2) The Principles may be applied

(a) when the parties have agreed that their contract be governed by "general principles of law", the "lex mercatoria" or the like; or

(b) when the parties have not chosen any law to govern their contract.

(3) The Principles may provide a solution to the issue raised when it proves impossible to establish the relevant rule of the applicable law.

(4) The Principles may be used to interpret or supplement instruments of international uniform law.

Article 1.3

(Freedom of contract)

The parties are free to enter into a contract and to determine its content.

Article 1.4

(Sinding character of the agreement)

A contract validly entered into is binding upon the parties. It can only be modified or terminated in accordance with its terms or by agreement or as otherwise provided under these Principles.

Article 1.5

(Mandatory rules)

Nothing in these Principles shall restrict the application of mandatory rules, whether of national, international or supranational origin, which are applicable in accordance with the relevant rules of private international law.

Article 1.6

(Exclusion or modification by the parties)

The parties may exclude the application of these Principles or derogate from or vary the effect of any of its provisions, except as otherwise provided in the Principles.

Article 1.7

(Interpretation and supplementation of the Principles)

(l) In the interpretation of these Principies, regard is to be had to their international character and to their purposes including the need to promote uniformity in their application.

(2) Issues within the scope of these Principles but not expressly settled by them are so far as possible to be settled in accordance with the ideas underlylng the Principles.

Artlcle 1.8

(Good faith and fair dealing)

(l) Each party must act in accordance with good faith and fair dealing in international trade.

(2) The parties may not exclude or limit this duty.

Article 1.9

(Courses of dealing and usages)

(1) The parties are bound by any usage to which they have agreed and by any practices which they have established between themselves.

(2) The parties are bound by a usage that is widely known to and regularly observed in international trade by parties in the particular trade concerned except where the application of such a usage would be unreasonable.

Article 1.10

(Notice)

(1) Where notice is required it may be given by any means appropriate to the circumstances.

(2) A notice is effective when it reaches the person to whom it is given.

(3) For the purpose of paragraph (2) a notice "reaches" a person when given to the person orally or delivered to that person's place of business or mailing address.

(4) For the purpose of this article "notice" includes a declaration, demand, request or any other communication of intention.

Artlcle 1.11

(Definitions)

In these Principles

- "court" includes arbitration tribunal;
- where a party has more than one place of business the relevant "place of business" is that which has the closest relationship to the contract and its performance, having regard to the circumstances known to or contemplated by the parties at any time before or at the conclusion of the contract.

CHAPTER 2

FORMATION

Article 2. 1

(Definition of offer)

A proposal for concluding a contract constitutes an offer if it is sufficiently definite and indicates the intention of the offeror to be bound in case of acceptance.

Article 2.2

(Withdrawl of offer)

(l) An offer becomes effective when it reaches the offeree.

(2) An offer, even if it is irrevocable, may be withdrawn if the withdrawal reaches the offeree before or at the same time as the offer.

Article 2.3

(Revocation of offer)

(1) Until a contract is concluded an offer may be revoked if the revocation reaches the offeree before he has dispatched an acceptance.

(2) However, an offer cannot be revoked:

(a) if it indicates, whether by stating a fixed time for acceptance or otherwise, that it is irrevocable; or

(b) if it was reasonable for the offeree to rely on the offer as being irrevocable and the offeree has acted in reliance on the offer.

Article 2.4

(Rejection of offer)

An offer is terminated when a rejection reaches the offeror.

Article 2.5

(Mode of acceptance)

(1) A statement made by or other conduct of the offeree indicating assent to an offer is an acceptance. Silence or inactivity does not in itself amount to acceptance.

(2) An acceptance of an offer becomes effective at the moment the indication of assent reaches the offeror.

(3) However if, by virtue of the offer or as a result of practices which the parties have established between themselves or of usage, the offeree may indicate assent by performing an act without notice to the offeror, the acceptance is effective at the moment the act is performed.

Article 2.6

(Time of acceptance)

An offer must be accepted within the time the offeror has fixed or, if no time is fixed, within a reasonable time, due account being taken of the circumstances of the transaction, including the rapidity of the means of communication employed by the offeror. An oral offer must be accepted immediately unless the circumstances indicate otherwise.

Article 2.7

(Acceptance within a fixed period of time)

(1) A period of time for acceptance fixed by the offeror in a telegram or a letter begins to run from the moment the telegram is handed in for dispatch or from the date shown on the letter or, if no such date is shown, from the date shown on the envelope. A period of time for acceptance fixed by the offeror by means of instantaneous communication begins to run from the moment that the offer reaches the offeree.

(2) Official holidays or non-business days occurring during the period for acceptance are included in calculating the period. However, if a notice of acceptance cannot be delivered at the address of the offeror on the last day of the period because that day falls on an official holiday or a nonbusiness day at the place of business of the offeror, the period is extended until the first business day which follows.

Article 2.8

(Late acceptance. Delay in transmission)

(1) A late acceptance is nevertheless effective as an acceptance if without delay the offeror orally so informs the offeree or gives a notice to that effect.

(2) If a letter or other writing containing a late acceptance shows that it has been sent in such circumstances that if its transmission had been normal it would have reached the offeror in due time, the late acceptance is effective as an acceptance unless, without

delay, the offeror orally informs the offeree that he considers his offer as having lapsed or gives a notice to that effect.

Article 2.9

(Withdrawal of acceptance)

An acceptance may be withdrawn if the withdrawal reaches the offeror before or at the same time as the acceptance would have become effeetive.

Article 2. 10

(Modified acceptance)

(l) A reply to an offer which purports to be an acceptance but contains additions, limitations or other modifications is a rejection of the offer and constitutes a counter-offer.

(2) However, a reply to an offer which purports to be an acceptance but contains additional or different terms which do not materially alter the terms of the offer constitutes an acceptance, unless the offeror, without undue delay, objects orally to the discrepancy or gives a notice to that effect. If he does not is object, the terms of the contract are the terms of the offer with the modifications contained in the acceptance.

Article 2.11

(Writing in confirmation)

If a writing which is sent within a reasonable time after the conclusion of the contract and which purports to be a confirmation of the contract contains additional or different terms, such terms will become part of the contract, unless they materially alter the contract or the recipient, without undue delay, orally objects to the discrepancy or dispatches a notice to that effect.

Article 2. 12

(Conclusion of contract dependent on agreement on specific matters or in a specific form)

Where one of the parties in the course of negotiations insists that a contract not be concluded until there is agreement on specific matters or in a specific form, the contract is not concluded before there is agreement on these matters or in that form.

Article 2.13

(Contract with terms deliberately left open)

(1) If the parties intended to conclude a contract, the fact that they have intentionally left a term to be agreed upon in further negotiations or to be determined by a third person does not prevent a contract from coming into existence.

(2) The existence of the contract is not affected by the fact that subsequently

(a) the parties reach no agreement on the term, or

(b) the third person does not determine the term, provided that there is an alternative means of rendering the term definite that is reasonable in all of the circumstances, including any intention of the parties.

Article 2.14

(Negotiations in bad faith)

(1) A party is free to negotiate and is not liable for failure to reach an agreement.

(2) However, a party who has negotiated or broken off negotiations in bad faith is liable for the losses caused to the other party.

(3) It is bad faith, in particular, for a party to enter into or continue negotiations intending not to make an agreement with the other party.

Article 2.15

(Duty of confidentiality)

If information is given as confidential by one party in the course of negotiations, the other party is under a duty not to disclose that information or use it improperly for his own purposes whether or not a contract is subsequently concluded. If appropriate, the remedy for breach may include compensation based on the benefit received by the other party.

Article 2.16

(Contracting under standard terms)

(1) Where one party or both parties use standard terms in concluding a contract, the general rules on formation apply, subject to Articles 2.17 - 2.19.

(2) Standard terms are provisions which are prepared in advance for general and repeated use by one party and which are actually used without negotiation with the other party.

Article 2.17

(Battle of forms)

If both parties use standard terms and they reach an agreement except on those terms, a contract is concluded on the basis of the agreed terms and any standard terms which are common in substance unless one party clearly indicates in advance or later, without undue delay, informs the other that he does not intend to be bound by such a contract.

Article 2.18

(Surprising provisions)

No provision contained in standard terms which by virtue of its content, language or presentation is of such a character that the other party could not reasonably have expected it, shall be effective, unless it has been expressly accepted by that party.

Article 2.19

(Conflict between standard terms and individual provisions)

If there is a conflict between a standard term and another term [which is not a standard term] the other term prevails.

PRINCIPLES OF EUROPEAN CONTRACT LAW

Chapter V
Conclusion of Contracts

Index

Section 1

General Provisions

Article 5.101 Conditions for the Conclusion of a Contract

The conclusion of a contract requires from the parties:

a) the intention to be legally bound; and

b) a sufficient agreement on the terms of the contract.

Article 5.102 Intention

A party's intention to be legally bound by contract and as to its terms is to be determined from the party's statements and\or conduct as they reasonably appear to the other party.

Article 5.103 Sufficient Aqreement

There is sufficient agreement on the terms of the contract, if the essential terms either have been agreed by the parties or can be determined under the provisions of chapter 2 (or by other means).

Article 5.104 Silence and Inactivity

Except as otherwise provided in these Principles silence or inactivity will not in itself create obligations for a party.

Article 5.105 Written Statements

Written statements or statements on writing include communications made by telegram, telex, telefax and electronic means of communications.

Article 5.106 Writing and Other Formalities

(1) Except as otherwise provided these Principles do not require a contract to be concluded or evidenced in writing or to be subject to any other requirement as to form. The contract may be proved by any means, including witnesses.

(2) A clause in a written contract indicating that the writing completely embodies the terms agreed upon only establishes a presumption that the parties intended that their prior statements or agreements not contained in the writing should not form part of the contract. Such statements or agreements may be used to interpret the writing.

(3) A clause in a written contract requiring any modification or termination by agreement to be made in writing establishes only a presumption that no agreement to modify or to terminate the contract should be effective unless it is in writing.

(4) A party may by his conduct be precluded from asserting a clause referred to in paragraph (2) or (3) to the

extent that the other party has reasonably relied on that conduct.

Article 5.107 Time when a Statement Takes Effect

(1) [Unless otherwise provided in this chapter a statement becomes effective when it reaches the party to whom it is addressed).

(2) A statement is withdrawn if the withdrawal reaches the addressee before or at the same time as the statement.

Alternative general rule on the "receipt principle"

(1) For the purpose of these Principles any offer, acceptance, notice, demand, request or other indication of intention becomes effective when it reaches the addressee.

(2) An 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, if he does not have a place of business or mailing address, to his habitual residence.

Article 5.108 Unilateral Promises

(1) A unilateral promise is an undertaking which is not made conditional either upon acceptance or upon the performances of any act by the promisee.

(2) A unilateral promise which is intended to be legally binding is to be treated as a contract under these principles once it has been communicated.

Section 2

Offer and Acceptance

Article 5.201 Definiteness and Intention

[(1) (OL version):

An offer is a proposal which:

(a) shows an intention to be legally bound if the other party accepts it

and

(b) which is sufficiently definite to meet the requirements of Article 5.103]

[(1) (UD version):

An offer is a proposal for concluding a contract which would satisfy the requirements of articles 5.102 to 5.103 provided it is accepted]

(2) A proposal which is not addressed to one or more specific persons is only an invitation to make an offer unless the terms of the proposal or the circumstances [clearly] show that it is an offer].

Article 5.202 Revocation of an Offer

(1) An offer may be revoked if the revocation reaches the offeree before he has accepted.

(2) However, a revocation of an offer is ineffective: a) if the offer indicates that it is irrevocable; or b) if it states a fixed time for its acceptance; or c) if it was reasonable for the offeree to rely on the offer as being irrevocable and the offeree has acted in reliance on the offer.

Article 5.203 Lapse of an offer

An offer lapses when a rejection reaches the offeror.

Article 5.204 Acceptance

An acceptance is a statement of the offeree or other conduct which indicates assent to an offer.

Article 5.205 (1) Effective Acceptance

(1) Once a statement of acceptance has been dispatched the offer may no longer be revoked; the acceptance becomes binding on the offeree and the contract is concluded once the statement reaches the offeror. [In other circumstances] [In cases of acceptance by conduct] the acceptance is effective to bind the parties when the offeror learns of it.

(2) If by virtue of the offer, or as result of practices which the parties have established between themselves, or of a usage, the offeree may accept the offer by performing an act

without notice to the offeror, the acceptance is effective at the moment that performance of the act begins.

Article 5.206 Time for Acceptance

(1) In order to be effective indication of acceptance of an offer must reach the offeror within the time fixed by him.

(2) If no time has been fixed by the offeror indication of acceptance must reach him within a reasonable time.

[(3) An oral offer must be accepted immediately unless the circumstances indicate otherwise.]

Article 5.207 Calculating time of acceptance

(1) A period of time for acceptance fixed by the offeror in a telegramme or a letter begins to run from the moment the telegramme is handed in for dispatch or from the date shown on the letter or, if no such date is shown, from the date shown on the envelope. A period of time for acceptance fixed by the offeror by means of instantaneous communication begins to run from the moment that the offer reaches the offeree.

(2) Official holidays or non-business days occurring during the period for acceptance are included in calculating the period. However, if a notice of acceptance cannot be delivered at the address of the offeror on the last day of the

period, because that day falls on an official holiday or a non-business day at the place of business of the offeror, the period is extended until the first business day which follows.

[Article 2.508 Late acceptance

(1) A late acceptance is nevertheless effective as an acceptance if without delay the offeror orally so informs the offeree or dispatches a notice to that effect.

(2) If a letter or other writing containing a late acceptance shows that it has been sent in such circumstances that if~its transmission had been normal it would have reached the offeror in due time, the late acceptance is effective as an acceptance unless, without delay, the offeror orally informs the offeree that he considers his offer as having lapsed or dispatches a notice to that effect.

Article 5.209 Modified acceptance

(1) Except as provided in paragraph 2, a reply which gives a definite and express assent to an offer operates as acceptance even if it states terms additional to or different from the terms offered, provided the additional or different terms do not materially alter the terms of the offer.

(2) However, a reply will be treated as a rejection of the offer if:

a) the offer expressly limits acceptance to the terms of the offer; or

b) the offeror objects to the additional or different terms without delay; or

c) the offeree makes acceptance conditional upon the offeror's assent to the additional or different terms, and the offeror does not give his assent within a reasonable time.

(3) A reply which states additional or different terms which would materially alter the terms of the offer is a rejection and a counter-offer.

OL's proposal to the Drafting group (JulY 1992)

Article 5.209 Modified acceptance

(1) Except as provided in paragraph 2, a definite and express assent to the offer operates as acceptance even if it states terms additional to or different from the terms offered. The additional or different terms become part of the contract is they do not materially alter the contract. If they do, the contract is concluded with the terms on which the parties have agreed.

(2) However, a reply will be treated as a rejection of the offer if:

a) the offer expressly limits acceptance to the terms of the offer; or

b) the offeror objects to the additional or different terms without delay; or

c) the offeree makes acceptance conditional upon the offeror's assent to the additional or different terms, and the offeror does not give his assent within a reasonable time.

Article 5.210 Contract by Conduct

Conduct of the parties will establish a contract although the offer, the reply or other writing of the parties have not established a contract. In such cases the contract is concluded with the terms which the parties have agreed upon.

Article 5.210 Merchant's written confirmation

First alternative: DG

(1) A merchant's written confirmation is a writing, sent by a merchant to another merchant shortly after oral or telegraphic negotiations which led to the conclusion of a contract.

(2) If the written confirmation contains terms additional to or different from the parties' prior agreement, such terms become part of the contract, unless without undue delay the recipient objects to the additional or different terms or the different or additional terms materially alter the terms of the prior agreement.

Second alternative UNIDROIT 2.11

If a writing which is sent within a reasonable time after the conclusion of the contract and which purports to be a confirmation of the contract contains additional or different terms, such terms will become part of the contract, unless they materially alter the contract or the recipient, without undue delay, orally objects to the discrepancy or dispatches a notice to that effect.

Article 5.210 Merchant's written confirmation

Third alternative: OL

(1) A merchant's written confirmation is a writing, sent by a merchant to another merchant shortly after oral or telegraphic negotiations which the sender had reason to believe led to the conclusion of a contract.

(2) The contract is considered to have been concluded unless the recipient, without undue delay after the confirmation has reached him, orally objects to the contract or dispatches a note to that effect.

(3) If the written confirmation contains terms additional to or different from the parties' prior agreement, such terms become the contract, unless without undue delay the recipient objects to the additional or different terms or the different or additional terms materially alter the terms of the prior agreement.

Article 5.211 Conflicting General Conditions

(Supplied by Ewoud Hondius)

Section 3

Liability for negotiations

Article 5.301 Negotiation in bad faith

(1) A party is free to negotiate and is not liable for failure to reach an agreement.

(2) However, a party who has negotiated or broken off negotiations in bad faith is liable for the losses caused to the other party.

(3) It is bad faith, in particular, for a party to enter into or continue negotiations intending not to make an agreement with the other party.

Article 5.302 Breach of confidentiality

If information is given as confidential by one party in the course of negotiations, the other party is under a duty not to disclose that information or use it for his own purposes whether or not a contract is subsequently concluded. If appropriate, the remedy for breach may include compensation based on the benefit received by the other party.

COMENTARIO

A continuación se estudiarán, de manera sucinta, las soluciones propuestas por ambos borradores a las dos cuestiones tratadas con mayor profundidada lo largo del trabajo, a saber, la posible validez de la aceptación que se separa de la oferta y el momento de perfección del contrato.

Antes que nada, sin embargo, puede ser conveniente dejar constancia esquemáticamente de las diferencias básicas entre ambos borradores:

a) mientras el primero se aplica a los contratos entre empresarios, el segundo trata de abarcar todo tipo de contratos, tanto civiles como mercantiles;

b) mientras el primero tiene carácter internacional, el segundo se reduce, en principio, a los países miembros de la CEE;

c) mientras el primero se encuentra fuertemente influenciado por el Convenio de Viena, el segundo, aun partiendo de él, ha tomado derroteros muy diferentes.

1. Aceptación modificadora de la oferta.

a. Principios aplicables a los contratos internacionales.

Sus redactores establecen una distinción entre aceptación modificativa en general y aceptación modificativa en el seno de una relación contractual mediante condiciones generales.

En el primer caso, remiten a los artículos 2.10 y 2.11 del borrador. El primero está tomado literalmente del artículo 19 del Convenio de Viena, pero omite el criticado apartado (3). El segundo recobra una propuesta introducida y rechazada en la elaboración del Convenio de Viena, según la cual los términos de la confirmación de un contrato que no lo modifiquen sustancialmente pasarían a formar parte del mismo, a menos que su destinatario objetase dicha alteración. Los Principios recogen esa propuesta y la convierten en el actual artículo 2.11. Sobre lo que se tenga que entender por modificación sustantiva, vale la exposición realizada en sede de Convenio de Viena. Nótese, con todo, que en este caso se produce una quiebra en la teoría de la recepción, pues la objeción a tal modificación es efectiva desde el momento en que se envía, no cuando llega.

El segundo supuesto está regulado en los artículos 2.16 a 2.19, que tratan de las cláusulas impresas, las cuales son definidas como estipulaciones preparadas de antemano por una de las partes para su uso general y reiterado, utilizadas, en la práctica, sin que haya mediado negociación con la otra parte [cfr. artículo 2.16(2)]. Estos artículos

presumen la falta de negociación real de las partes, y, por tanto, el desconocimiento del contenido del contrato, mereciendo esta situación la protección del ordenamiento (por ejemplo, el artículo 2.18, que establece la ineficacia de las cláusulas sorprendentes). En este orden de cosas, el conflicto entre cláusulas puede ser de dos tipos:

a) el primero, cuando las dos cláusulas en pugna sean impresas. En este caso, el artículo 2.17 prevé que el contrato sea regido por las coincidentes y cualquier otra razonable, a menos que una de las partes indique de manera clara antes o después, sin retraso, su negativa a aceptar ese contrato. El antes se refiere al supuesto que esa parte, de antemano (normalmente también por medio de una cláusula impresa), deje clara su negativa. El después se sitúa una vez la oferta y la aceptación se han encontrado. Respecto a la expresión "sin retraso indebido" (without undue delay), no parece referirse al momento en que se recibe el clausulado de la otra parte, sino desde que tiene conocimiento de dicha contradicción;

b) el segundo, cuando una cláusula impresa se opone a una normal. El artículo 2.19 resuelve la contienda en favor de ésta última.

b. Principios del derecho europeo de contratos.

También sus redactores establecen una distinción entre aceptación modificativa en general y aceptación modificativa en el seno de una relación contractual mediante condiciones generales. En el primer caso, cuando se produce un conflicto entre cláusulas impresas, el

borrador se remite al artículo 5.211. En el segundo supuesto, cuando al menos una de las partes no hace referencia ni utiliza cláusulas impresas o condiciones generales, lo hace al artículo 5.209.

a) Artículo 5.211. En el borrador utilizado no consta la solución adoptada para el artículo 5.211, pues todavía no ha sido decidida.

b) Artículo 5.209. El borrador recoge dos versiones, una, la inicial, y otra, propuesta por el profesor Ole LANDO.

b.1) Propuesta inicial. Dice así:

> (1) Except as provided in paragraph 2, a replay which gives a definite and express assent to an offer operates as acceptance even if it states terms additional to or different from the terms offered, provided the additional or different terms do not materially alter the terms of the offer.
>
> (2) However, a reply will be treated as a rejection of the offer if:
>
> a) the offer expressly limits acceptance to the terms of the offer; or
> b) the offeror objects to the additional or different terms without delay; or
> c) the offeree makes acceptance conditional upon the offeror's assent to the additional or different terms, andthe offeror does not give his assent within a reasonabletime.
>
> (3) A reply which states additional or different terms which would materially alter the terms of the offer is a rejection and a counter-offer.

En primer lugar, rompe con la regla del espejo al considerar formado el contrato aunque la aceptación contenga términos adicionales o diferentes, siempre que no modifiquen sustancialmente la oferta (en este caso, la respuesta tendría consideración de rechazo y contraoferta), y no se den los supuestos del apartado 2º (en este caso, la respuesta equivaldrá a rechazo).

En segundo lugar, esta versión se mantiene, a pesar de todo, en la línea de la adoptada por Convenio de Viena, sin llegar a las pretensiones del § 2-207 UCC, pues no acepta que una respuesta que modifique sustancialmente la oferta valga como aceptación.

En tercer lugar, los redactores no han querido describir en abstracto el concepto de modificación sustancial, por lo que lo hacen depender de las circunstancias del caso y, en gran parte, de las relaciones entre las partes, de la naturaleza y propósito del contrato, y de los usos y costumbres.

b.2) Propuesta del profesor LANDO. Esta propuesta es más ambiciosa y cercana a la postura del UCC, y, por tanto, necesitada de mayor exactitud y minuciosidad en su redacción:

> (1) Except as provided in paragraph 2, a definite and express assent to the offer operates as acceptance even if it states terms additional to or different from the terms offered. The additional or different terms become part of the contract if they do not materially alter the contract. If they do, the contract is concluded with the terms on which the parties have agreed.

(2) However, a reply will be treated as a rejection of the offer if:

a) the offer expressly limits acceptance to the terms of the offer; or

b) the offeror objects to the additional or different termswithout delay; or

c) the offeree makes acceptance conditional upon the offeror's assent to the additional or different terms, and the offeror does not give his assent within a reasonable time.

Article 2.210.

Conduct of the parties will establish a contracts although the offer, the reply or other writing of the parties have not established a contract. In such cases the contract is concluded with the terms which the parties have agreed upon.

Coincide con la versión oficial en dos aspectos: la ruptura con la regla del espejo y la admisión de la regla según la cual los términos adicionales o diferentes que no modifiquen sustancialmente la oferta pasan a formar parte del contrato. A partír de aquí, diverge en lo demás: (a) los términos adicionales o diferentes que modifican sustancialmente la oferta no enervan la formación del contrato, siempre que no se den los supuestos del apartado (2), aunque tampoco pasarán a formar parte del mismo, sino tan sólo aquellos términos coincidentes entre las partes; (b) contrato de hecho: el contrato se forma con los términos que las partes hayan acordado.

LANDO justifica esta postura en la demostración empírica del dudoso efecto pedagógico benigno de la regla del espejo sobre la partes (según el cual, las consecuencias de esa regla motiva a quien recibe la oferta o aceptación a leerlas con mayor detenimiento, y a quien las envía a presentarlas de manera más atractiva): en los países donde se ha adoptado esta regla, la práctica ha demostrado que los resultados a los que se ha llegado han sido injustos e inesperados.

Respecto de los términos en conflicto, frente a la solución norteamericana, que hace prevalecer los términos de la oferta (al considerar al oferente, en la mayoría de los casos, como la parte débil), y la solución del Convenio de Viena, que interpreta la conducta del oferente como una aceptación de los términos adicionales o diferentes del aceptante, la propuesta de LANDO opta por incluir como términos del contrato sólo aquellos acerca de los cuales las partes hayan consentido (en la línea propuesta para el Uniform Commercial Code por MURRAY y el Permanent Editorial Board Study Group). Los restantes aspectos serán regulados por los términos supletorios de estos Principios, y, en último término, por los de la ley aplicable. En última instancia, siempre cabrá aplicar un término razonable.

c. Conclusión.

La solución propuesta por el profesor LANDO no impide la formación del contrato en estos casos, lo cual es importante para la fluidez del tráfico económico, y, por otra parte, tampoco concede preferencia a ninguno de los términos en conflicto, con lo que se evitan

resultados injustos o abusos inmotivados. Además, permite a ambas partes bloquear la aplicación de esta regulación [cfr. artículo 5.209 (2)]. Por su parte, tanto la versión inical de los Principios del derecho europeo de contratos como la solución de los Principios de UNIDROIT se quedan algo más cortas, al impedir la perfección del contrato ante cualquier modificación sustancial, y no contemplar el contrato de hecho.

2. Momento de perfección del contrato.

a. Principios aplicables a los contratos internacionales.

El borrador sigue la solución adoptada por el Convenio de Viena, pues el contrato se perfecciona cuando la aceptación llega a su destinatario, equivaliendo el concepto "llegar" a su comunicación oral o entrega en el domicilio o establecimiento del oferente [arts. 1.10 y 2.5 (2)]. A la vez, se limita la posibilidad de revocar la oferta hasta el momento de expedición de la aceptación [art. 2.3 (1)], de tal manera que debe llegar a su destinatario antes que éste haya enviado la aceptación. En resumidas cuentas, adopta una posición dualista, utilizando las teorías de la expedición -para limitar la revocabilidad de la oferta- y de la recepción -para determinar el momento de llegada de una declaración, y, por tanto, de perfección del contrato-.

b. Principios del derecho europeo de contratos.

También siguen esta posición dualista, tal como ha sido descrito más arriba: ver arts. 1.110 (2) y (3), 5.107 y 5.202.

Article 1.110

> (2) Except as otherwise provided, any communication (notice) becomes effective when it reaches the adressee.
>
> (3) A communication (notice) reaches the adressee when it is delivered to him or 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.

Con todo, en el momento de redactar estas líneas esta es una cuestión que se encuentra todavía en periodo de elaboración.

APENDICE A

JURISPRUDENCIA CITADA EN EL TEXTO

I. ESPAÑA*

* Las referencias se hacen a las notas a pie de página.

1. TRIBUNAL SUPREMO. SALA 1ª

2. TRIBUNAL SUPREMO. SALA 2ª

3. TRIBUNAL SUPREMO. SALA 3ª

II. OTROS ORDENAMIENTOS*

* Las referencias se hacen a las notas a pie de página.

1. ALEMANIA

2. ESTADOS UNIDOS DE AMERICA

3. FRANCIA

4. GRAN BRETAÑA

5. ITALIA

APENDICE B

BIBLIOGRAFIA CITADA EN EL TEXTO

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